UNIVERSITY OF THE
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JOHANNESBURG

General Principles of Insurance

VOLUME 1

The legal system, legal principles and insurance products

Vivian, R. and Mushai, A (2020)
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Foreword

The global short-term insurance market is highly complex and fiercely competitive, the local market is no different. The risks covered by short-term insurance are pervasive, touching every aspect of human activity and these risks and the management thereof are technically complicated. Climate change and COVID-19 have added further complications to this market. It is therefore abundantly clear that those who operate in this market must be equipped with the requisite technical skills and relevant knowledge to ensure that the short-term insurance sector operates effectively and efficiently. Hence, skills training is an imperative.

Those who work in short-term insurance are specialists, bringing technical expertise from a range of disciplines into the sector. However, the pace of technological changes and its impact on every aspect of life has necessitated the need for continuous training and development. Therefore, it is a challenge to keep employees abreast of developments in short-term insurance. A further challenge is to develop a system that allows articulation from the industry to university qualifications and vice-a-versa, or one that explicitly progresses university graduates into professionals.

To support ongoing development of the sector, the Insurance Sector Education and Training Authority (INSETA) has partnered with the University of Witwatersrand to address the skills gaps of employees and new entrants in short-term insurance. This current initiative is aimed at developing a body of knowledge for the short-term insurance industry. It provides foundational learning that can be used at various institutional types from education institutions to the workplace. It is part of a process of standardising learning outcomes and establishing a common frame of reference.

Two volumes of this body of knowledge are now complete. The intention is to provide this material as a common good, and as Open Source material to be used in the industry. The material was developed by Prof Vivian and Dr Mushai with the sponsorship of the INSETA. In addition, INSETA and The South African Insurance Association (SAIA) set-up a consultative committee from which a sub-committee of industry experts was drawn to review specific sections of the material in greater detail. It is intended that this process should be an ongoing process and the material should be further developed and refined as necessary.

Ideally, this is not the end of the process but the beginning. The current pandemic has highlighted the need for ongoing research into insurance matters which can translate into research and learning at universities and within the industry itself.

INSETA is pleased to be part of a process of empowering this industry and working collaboratively with key-roleplayers and we look forward to further enhancing this body of knowledge with support from the broader sector.

Nadia Starr
25 November 2020
INSETA Chief Executive Officer

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AND

JUDICIAL SYSTEM

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1 LAW AND INSURANCE

There is a close relationship between law and insurance. Insurance is arranged by means of an insurance contract. The rights and duties of the insured and insurer are governed largely by the law of contract as applied to the insurance contract.[1] One of the most important risks dealt with by the insurance contract is that of the legal liability claim.[2] Liability claims are governed mainly by the law of delict hence a study of the law of delict is also important to understand liability insurance.

1.1 Contract and insurance

In South Africa, each year billions of rands are paid by the public for short-term insurance and approximately an equal amount is expended on claims paid by short-term insurers. These amounts are all transferred in terms of contracts and in particular insurance contracts. The law of contract, particularly as it applies to an insurance contract is of paramount importance to the study of insurance.

1.2 Law of delict (torts)

The law of delict is the cornerstone of legal liability claims. The law of delict has undergone considerable change, most rapidly during the last forty-five years. These changes have had dramatic effect on the insurance market and the study of the law of delict is essential to the study of insurance.[3]

1.3 Criminal law

Criminal law is of lesser importance to insurance practice than say, the law of contract or delict. Generally criminal liability results in imprisonment or the imposition of a fine. Insurance matters involving criminal law are usually concerned with issues such as are the payment of fines insurable and if so under what circumstances, insuring legal defence and representation costs arising out of criminal actions.

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1 The insurance contract is not only the product of the common law but is also governed to an extent by legislation.

2 In the United States of America approximately eighty percent of the cost of risk is devoted to legal liability type of claims.

3 The financial difficulties which beset Lloyd's is ascribed largely to the asbestos crisis and liability for pollution; both of which are legal liability actions in nature.

2 CUSTOM AS LAW

The study of law is important since it plays a fundamental role to the practice of insurance. What is not clear is: what is meant by law. The answer to this question, has eluded mankind for as long as this question has been posed. The answer to the question must be sought in the history of civilisation in general and the history of law in particular.

It is more difficult today to answer the question what is law, than in the past. The modern notion that laws include 'laws' passed by a parliament. Law has existed for as long as society has existed. This is long before legislative institutions evolved and long before the idea that law exists as written commands. Society in the past has always condemned bringing about certain specified consequences as unlawful and judged man for any conduct which brought about these consequences. So for example, if one man murdered another, society understood the act of bringing about the murder to be evil and condemned the man for his deed of murdering another. It was not necessary to reduce this law to writing, to make it law, since it was understood by all that to commit murder is unlawful. These long existing laws can be regarded as laws accepted by long established custom. Custom is by nature causal, lacking in theory; it is factual. With the passing of time, these customs were largely codified. The function of the codification was not to create law but to codify the existing customary law. This is true of all the known old codes. So for example it is true of the Hittite legal code which is incomplete, in the sense that it does not deal will all issues within society because 'the Hittites did not consider it necessary to legislate on all matters, presumably because they did not normally give rise to dispute, being regulated by the customary law of the people' (Gurney, 1990). This is also true of the Ten Commandments.[4] The crime of murder was not created by the Ten Commandments. Murder existed long before the Ten Commandments. It was the first crime mentioned in the Old Testament (Genesis 4). Marriage was protected by custom long before the crime of adultery was codified in the Ten Commandments (Genesis 4). The Ten Commandments did not thus create the law but were rather the codification of some of the customary laws of the time. The same can be said of the laws of the early Roman kings. The "so called Law of the Kings was no more, in all probability than declarations of religious practice" (Kolbert, 1979, p. 12). The Romans codified their law a number of times, the earliest being the Twelve Tables which consisted mainly of ancient custom. Roman law did not recognise a doctrine of precedent, since it was the law and not the precedent which was binding ('Digest', no date, chap. D.1.3.38; Hahlo and Kahn, 1968). The Roman jurists did not seek to develop law via case law but sought to apply the law. English law also owes it origin to customary law (Hogue, 1966). Once law has been codified it is easy to forget the connection between custom and the code. The code, its interpretation and revision then becomes

[4] It is not suggested that the Ten Commandments should be considered to be law. The view of FC Fensham is probably correct, "I do not think that the pronouncements of the Ten Commandments must be regarded as law, but as the policy of God ... are prohibitives and are without any penalty-clauses in contrast to the general approach of legal material in the Ancient Near East. It is, thus, quite likely that the prohibitives ... were not meant to be used by judges." (Fensham, 1978, p. 285)

the central issue and the customary nature of law is forgotten.[5] Historically the source of law was custom.[6]

Where courts apply and develop historical precedents this may in many instances be regarded as the development of customary law. In this sense customary law could continue today as judicial precedent. Unfortunately judges, like parliament, have often engaged in judicial activism and social engineering and have substituted their opinions for the law. This then is not custom but a form of judicial 'legislation'. Case 'law' today cannot be regarded as customary law but rather as modern case 'law' as explained below.

The original activity of parliaments was not to make law but to codify the law. This has long passed and parliaments today are considered to be law making institutions. Parliamentary law is also referred to as positive law. Of course not all possible 'laws' passed by a parliament can be regarded as valid laws as was quickly realised by Leslie Stevens. If all laws were valid because parliament passed it, then a law requiring all blue-eyed babies to be put to death, would this be valid law? It is clear that not all parliamentary law can be valid.

3 SOURCES OF LAW

3.1 Roman law

Roman history can be divided into a number of periods:

Monarchy
Early Republic (-367BC)
Late Republic (367BC - 27BC)
The Principate (or Empire) (27BC - 284)
The Dominate (284 - 565)

The point of departure in the study of Roman law is the Roman codification known as the Twelve Tables. This was followed by a number of other important codifications or part-codifications such as the *Lex Aquilia* which is important in the field of delict and is discussed below. It is generally regarded that the civil law of Rome, in its developed form, as it has come down to us, is one of the greatest achievements of civilization (Kolbert, 1979). It is interesting to note that despite the importance of Roman law, scarcely any of the original histories of Rome make more than a passing reference to Roman law. The Roman law did not appear to be particularly important to the Romans themselves.[7]

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5 It is very seldom that the courts nowadays rely on custom to create a new rule. *Van Breda v Jacobs* 1921 AD 330; *Catering Equipment Centre v Friesland Hotel* 1967 4 SA 336 O (*Van Breda v Jacobs*, 1921; *Catering Equipment Centre v Friesland Hotel*, 1967). In insurance matters the courts do occasionally look at business practice to come to a decision as in the case of *Marine and Trade Insurance Co Limited v J Gerber (Pty) Limited* 1981 4 SA 958 A (*Marine and Trade Insurance Co Limited v J Gerber (Pty) Limited*, 1981).

6 For a discussion on the role of custom in the development of law, consult D Lloyd (Lloyd, 1964).

7 If Procopius is to be believed Justinian had no regard for the law (Procopius, no date).

The Twelve Tables was the product of the struggle between patricians and plebs.[8] Before its promulgation the law had been the preserve of the patricians and its administration was regarded as a semi-holy mystery, known only to the patricians. Tradition had it that ten men, the Decemvirs, were appointed to draw up the code and they may have travelled to Greece in 451BC to study the laws of Solon.[9] Once completed the code was set up in the market place on ten inscribed bronze tables. Two were added a year later and the twelve were approved as a lex by the *comitia centuriata* in 450BC. The Gauls are said to have destroyed the original bronze tables when sacking Rome in 390BC. During most of this period of Roman history statute law or lex played a minor part. From 450BC until 27BC we know of only thirty or so statutes affecting public law. One of the statutes which is of importance to the law of delict is the Lex Aquilia which took away the force of all earlier laws which dealt with unlawful damage - the Twelve Tables and others alike. The *Lex Aquilia* is a plebiscite, an enactment procured for the plebs by their tribune Aquilius.[10]

The final and most famous codification of Roman law is the Justinian code. Tradition has it that most of the work was done under the supervision of Tribonian. Procopus (560-565) portrayed Tribonian as an extremely avaricious person assisted by a commission of sixteen experts (Procopius, no date). The code consists of a number of works. The Digest is the largest and best known work, being a selection and collection of the views of famous jurists on points of law. Thirty-nine jurists in all are quoted. The earliest jurist was Mucius Scaevola (-82BC). The most widely quoted jurists were:

Ulpian (-223AD)	quoted 2 464 times
Paul	quoted 2 081 times
Papmion	quoted 601 times
Pomponios (-138AD)	quoted 578 times
Gaius	quoted 535 times
Others	quoted 2 883 times

Work on the Digest commenced in 530 AD and it was published in 533 AD. The commission reviewed some 2 000 existing books. It should be noted that most of the works reviewed by the commission were over three hundred years old, at the time. Ulpian was murdered in 223 AD and the code was completed in 533 AD.[11] On the completion of the Digest, Emperor Justinian asked Tribonian and two of his professional colleagues, Theophilus of Constantinople and Dorotheus of Beirut to prepare an elementary textbook for students. Taking the Institutes of Gaius as their model they produced the Institutes of Justinian in December 533 AD. These works have survived and were influential in the development of the law.

Roman law is of very little assistance when it comes to insurance which never had a theory of contracts and the insurance contract did not exist in Roman times. Life insurance would probably have been

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8 The position which prevailed at the time is recounted by Livy The Early History of Rome.

9 There is however much controversy concerning this point.

10 D.9.2.1

11 Initially Judges had difficulties in applying the Dutch law because of the unavailability of the sources and language problems. The tendency particularly in insurance was to rely on English law.

illegal in Roman law. Commentators attempting to find an analogy in Roman law usually start with an examination of the law of gambling, treating insurance as a form of gambling. If Roman-Dutch law is to be of assistance to insurance, the assistance must come from the Dutch contribution discussed elsewhere.

3.2 South African Roman-Dutch law

It is often said that the South African common law is the Roman-Dutch law.[12] Strictly speaking South Africa does not have a common law, but an uncodified law. It has a codified law since the Roman law was codified and it is this code which applies to South Africa. Where law is based on custom, it does not exist as a definitive code. It is to be found in court judgments and textbooks and the writings of the jurists. It also develops within a specific geographical area. The word common law, correctly used refers in the first instance to the English Common law, meaning the law common to whole realm. The Old English had a hatred for the Roman Law since it represented the law imposed upon the English by the conquering Normans[13] and accorded unfettered rights to the Prince or Sovereign, a fact more suited to dictatorships.[14] On this point the Roman Law stands in stark contrast to English law which accepted that the sovereign was bound by laws such as those contained in the Magna Carta. The English Common law had almost completely disappeared and was saved by the establishment of the Inns of Court and Chancery, which taught the English Common law while prohibiting the study of Roman Civil law.

From 1652 to 1795 the Cape was under the control of the Dutch and the Roman-Dutch law, accordingly applied in the Cape (Lee, 1946). As the name implies, the Dutch adopted the Roman law and over a period of time it underwent slight changes as it was applied and commented upon by Dutch writers, and thus became the Roman-Dutch law. Hence the basic South African law became the Roman-Dutch law. It is a fundamental rule of international law that when one country invades another, the legal system remains unchanged, until changed by the invading power. The fact that the English invaded the Cape in 1795 did not make South African law, English law. The Roman-Dutch law is largely Roman law, and for that reason, Roman law is now considered.

3.2.1 Roman-Dutch law

Present status of Roman-Dutch law

Over the years, the application of original Roman-Dutch in practice has been altered by parliament and the courts. The changes have been so far reaching that it is suggested that it is no longer correct to accept that the 'law', in essence, as applied by the South African courts is still Roman or Roman-Dutch.

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12 The phrase *Roman-Dutch Law* was invented by Simon van Leeuwen in 1652, the same year that Jan van Riebeeck established the first settlement at the Cape. The Roman Law is a codified system of law and as such is a form of statutory law. South African thus as two codified systems. The United Kingdom and America on the other hand do not recognise the codified Roman system and hence refer to the uncodified law as the common law. This term is more appropriate to the United Kingdom and America than to South Africa.

13 Chitty (1893:xvi);

14 Sir William Jones quoted by Chitty (1893:xvi). A similar reason for the dislike is given by Lord Mackenzie.

The time may well be upon us to abandon any pretension that the essence of the current South African uncodified law is still Roman-Dutch in nature.[15]

3.2.2 Influence of English law on South African insurance law

The relationship between the insurer and insured is governed largely by the general principles of contract. The law of contact is well established in Roman and Roman-Dutch law. However, the contract of insurance has its own peculiarities and in these matters neither Roman nor Roman-Dutch law is thought to be of much assistance. Roman law did not have a general theory of contract, dealing rather with specific contracts. The specific contract of insurance was unknown to Roman law. The Roman-Dutch authorities confined themselves mainly to marine insurance and life insurance may even have been illegal.

Under these circumstances even prior to 11 September 1879, it is not surprising that the South African courts turned to the law and judgments of other countries for guidance in insurance matters. The courts referred to Scottish cases,[16] American cases [17] and English judgements but it was English law which by far held predominance, which, thanks to great insurance judges such as Lord Mansfield is rich in insurance law. English law is thus of particular importance to the study of insurance law.

s2 of General Law Amendment Act 8 of 1879

There is another reason why English law of insurance is especially important. It was incorporated into the law of the Cape in terms of, s2 of General Law Amendment Act 8 of 1879 (Cape) which provided that:

> "... in every suit, action and cause having reference to fire, life and marine assurance, stoppage in transitu and bills of lading, which shall henceforth be brought in the Supreme Court, or any other competent Court in this Colony, the law administered in the High Court of Justice in England, for the time being, so far as the same shall not be repugnant to, or in conflict with, any Ordinance, Act of Parliament or other statute having force of law in this Colony, shall be the law to be administered by the said Supreme Court or other competent Court"

Hence the laws of England, including statute law passed before 1879, as applied to insurance became applicable in the Cape. With the discovery of diamonds in the Orange Free State, economically South Africa started to develop quite quickly giving rise to the need for a workable legal system, including a well-defined commercial law. It was thus not surprising that the General Law Amendment Ordinance 5 of 1902 (O) incorporated the law as administered by the Supreme Court of the Cape of Good Hope was adopted as the law of the Orange Free State. The consequence of this legislation was to incorporate the Cape ordinance as part of the law of the province of the Orange Free State. Thus, in these two colonies English law of insurance became part of South African law. These old statutes were not

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15 (Beinart, 1981)

16 *Nafte v Atlas Assurance Co Ltd* 1924 WLD 239 (*Nafte v Atlas Assurance Co*, 1924); *Hollet v Nisbet & Dickson* 1829 1 Menz 391 (*Hollet v Nisbet & Dickson*, 1829); *Lange & Co v South African Fire & Life Assurance Co* 1867 5 Searle 358 (*Lange & Co v South African Fire & Life Assurance Co*, 1867); (Vivian, 1996).

17 *De Pass v Commercial Marine Assurance Co* 1857 3 Searle 46 (*De Pass v Commercial Marine Assurance Co*, 1857)

adopted in either Natal or Transvaal, nevertheless precedent established in the Cape and Orange Free State were followed in all parts of the country producing uniformity throughout South Africa.

Pre-Union Statute Law Revision Act 43 of 1977

These two statutes were however eventually repealed by the Pre-Union Statute Law Revision Act 43 of 1977, theoretically repealing the application of English law of insurance. However, by this time South African precedent was so well established that in reality the repeal has not made much difference; the courts have not been inclined to abandon precedent simply because the origins are to be found in English law. On the other hand, courts are now not compelled to follow old English law, and indeed have on occasions declined to do so.

Status of English insurance doctrines - insurable interest

Judges found little assistance in the Roman-Dutch law in insurance matters and relied on insurance law of other countries.[18] Through this process South African case law adopted, applied and developed typically English doctrines such as those of utmost good faith and insurable interest to South African cases. These doctrines were accepted, not only in South Africa but also in many parts of the world. In recent years some of these have been found, in many parts of the world, in need of revision. The question, therefore arises, whether or not the South African courts are bound to slavishly follow their own precedents based on English law until the South African parliament makes suitable amendments or whether the courts should make the changes of its own accord. It is clear that the South African courts are not going to wait for parliament and will revise the previous doctrines. Attempts have been made to find Roman-Dutch insurance sources but this is not likely to be a fruitful exercise.[19] It is after all hardly possible for the courts now to ignore 160 years of legal precedent and to begin applying different principles, which are not well-known or even known to exist.

Insurable interest and the doctrine of utmost good faith are two of the English insurance law doctrines adopted by the South African courts. One of the contentious issues is the need for insurable interest in South Africa. One of the reasons put forward for this doctrine is to distinguish between insurance and wagers. However South Africa's Roman-Dutch common-law deals with wagers[20] and is capable of distinguishing between insurance and wagers without resorting to English legislation and case law. In addition to the common-law, specific South African legislation was introduced to deal with wagers[21] and hence an even lesser need exits to rely on English law. Nevertheless, as explained early Cape decisions imported the doctrine of insurable interest into South Africa case law and it was accepted that insurable interest forms part of the South African law of insurance. This acceptance was brought into

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18 *Little john v Norwich Union Fire Insurance Society* 1905 TH 374; *Spencer v London & Lancashire Insurance Co* 1884 5 NLR 37 (*Little john v Norwich Union Fire Insurance Society*, 1905) (*Spencer v London & Lancashire Insurance Co*, 1884)

19 (Van Niekerk, 1988)

20 *Estate Wege v Strauss* 1932 AD 76; *Dodd v Hadley* 1905 TS; *Gibson v Van der Walt* 1952 1 SA 262 A; *Nichol v Burger* 1990 1 SA 231 C; *Rosen v Wassermann* 1984 1 SA 808 W; *Fensham v Jacobson* 1951 2 SA 136 T (*Estate Wege v Strauss*, 1932) (*Dodd v Hadley*, 1905) (*Gibson v Van der Walt*, 1952) (*Nichol v Burger*, 1990) (*Rosen v Wassermann*, 1984) (*Fensham v Jacobson*, 1951)

21 Act 36 of 1902 (Cape); Gaming Act 8 & 9 Vic 1845

question by academic writers[22] and thereafter in some cases.[23] In the early Cape case of *Malcher & Malcomess v Kingwilliamstown Fire & Marine Insurance & Trust Co* 1883 3 EDC 271 the court treated the English Gaming Act 1774 as express legislation on the question of insurable interest.[24] It is now argued that it was not necessary to introduce insurable interest, at all, into South Africa.

A further departure from the English position is evident in the case of *Lorcom Thirteen (Pty) Ltd v Zurich Insurance Company South Africa* 2013 Western Cape High Court.

Status of English insurance doctrines - duty to act in good faith - disclosure
The doctrine of utmost good faith and position of the English law of insurance in general was considered by the courts in the case of the *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 A at 430 DG. Joubert JA summarised the position of Roman-Dutch law with respect to English insurance law succinctly as follows:

> "The General Law Amendment Act 8 of 1879 (Cape) introduced the English law (as it then existed) concerning fire, life and marine insurance into the Cape of Good Hope Colony. The General Law Amendment Ordinance 5 of 1902 (Orange Free State) incorporated 'the law administered by the Supreme Court of the Cape of Good Hope'. This in effect introduced the English law (as it existed in 1879) concerning fire, life, and marine insurance into the Orange Free State Colony. Both Act 8 of 1879 (C) and Ordinance 5 of 1902 (O) were repealed by s1 of the Pre-Union Statue Revision Act 43 of 1977 with the result that English law (as it existed in 1879) concerning fire, life, and marine insurance is no longer binding authority in the Cape Province or in the Orange Free State Province. ... Hence, the South African law of insurance is governed mainly by Roman-Dutch as our common law."

3.3 Modern case 'law'

The most recent innovation has been the rise of judicial 'law'. It was often said that the function of the judge is to declare (*jus dicere)* the law and not to make it (*jus facere*). In fact, as far as modern society finds itself, nothing can be further from the truth. This has come about by the phenomenon of judicial activism, that is by judges substituting their opinions for the law. Where a judge makes a decision based on the custom or precedent and even in those circumstances where he extends an existing precedent by analogy to a new situation the judge is fulfilling the historical role of establishing custom. Where however the judge makes a break with history and substitutes his opinion for the law, where he does this to achieve his perceived social objectives, he is creating 'law' and like Parliament is engaging in social engineering.

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22 Reinecke, MFB (1971) 'Versekering sonder Versekerbare belang?' CILSA 1971,193, 324; Reinecke, MFB (1977) 'Die Rol van die Life Insurance Assurance Act van 1774 in die Suid-Afrikaanse Versekeringsreg' 1977 TSAR 159; Life Insurance Assurance Act of 1774

23 *Steyn v AA Mutual Insurance Association Limited* 1985 4 SA 7; *T Phillips v General Accident Insurance Company SA Limited* 1983 4 SA 652; *W Price v IGI* 1980 3 SA 683 W. (*Steyn v AA Mutual Insurance Association Limited*, 1985) (*Phillips v General Accident Insurance Company SA Limited*, 1983) (*W Price v IGI*, 1980)

24 Gambling Act of 1774 Davis, D (1993) Gordon and Getz: The South African Law of Insurance 3ed Juta 1993

It is necessary in the study of insurance to be very familiar with judicial pronouncements on insurance law, since this is the main source of insurance law which arises in practice. The judgments are discussed in the various law journals and these too should be read. The journals include *SALJ* - The South African Law Journal, which is the world's oldest law journal.

3.4 Parliamentary or statute law

Comparatively speaking, parliamentary law, or positive law, is a more recent innovation. To the extent that parliamentary law codifies customary law, it fulfils its historical role.[25] Where, however, parliament makes a complete break with history creating new laws particularly when it does so with a view to undertaking social engineering this is a relatively new innovation. With the rise of unfettered parliamentary law, complex questions of jurisprudence must arise. For example, it is argued that parliament is sovereign, that is to say it can make or repeal any law. If this view is accepted, the questions of the limit of its sovereignty must arise. This gives rise to tricky questions such as those raised by the jurist John Austin: if Parliament is sovereign, has it the lawful authority to declare that all blue-eyed babies be put to death? This type of issue only arises where parliament sees itself freed from customary law. In customary law to put anyone to death other than in terms of the existing customary law is unlawful. There could be no question of putting blue eyed babies to death. In recent years, the idea of parliamentary sovereignty has been challenged or limited, by the notion of constitutional sovereignty, an American concept, derived in part, in concept, at least from Roman constitutional law.

Parliament has not deemed it necessary to intervene extensively in the field of insurance law. Nevertheless there are a number of statutes which are important to the practice of insurance.[26] The bulk of insurance law, proper, comes from judicial decisions and the role of judicial 'law' must be considered.

3.4.1 South African legislation impacting on insurance law and practice

Legislation is playing an increasingly important role in South African insurance practice. The details of the legislation is not going to be dealt with in this section, since the volume involved, would require a separate volume. The following are the most important items of legislation:

Insurance Act 18 of 2017

From 1943 to 1998 there was one Act the Insurance Act of 1943. This was replaced by two Acts the Long-term Act 52 of 1998 and the Short-term Act 53 of 1998. Conceptually insurance should be regulated by a single Act in 2017 the two 1998 Act were repealed and replaced by the Insurance Act 18 of 2017.

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[25] Even in modern society, legislation often fulfils its historical role of codification of custom. So for example, a local authority deals with millions of applications for motor licences. Since these transactions are repeated so often the local authority will develop an efficient manner in which to deal with this type of transaction. The procedures are then codified in road traffic ordinances or statutes.

[26] Examples of legislation involving insurance include the Short-term Insurance Act, the Long-term Insurance Act, The Road Accident Fund Act and so on.

Long term Insurance Act 52 of 1998

This Act defines the business of Long-term insurance and then prohibits anyone from carrying on Long-term Insurance business unless registered in terms of the Act and licenced to transact certain specific classes of insurance business. This Act was largely repealed by the Insurance Act 18 of 2017. As the new Act is phased in so this Act will be phased out.

Short term Insurance Act 53 of 1998

This Act defines the business of Short-term insurance and then prohibits anyone from carrying on Short-term insurance business unless registered in terms of the Act and licenced to transact certain specific classes of insurance business. This Act was largely repealed by the Insurance Act 18 of 2017. As the new Act is phased in so this Act will be phased out

Medical Schemes Act 131 of 1998

This Act defines the business of medical schemes and then prohibits anyone from carrying on medical schemes business unless registered in terms of the Act. Conceptually there is considerable overlap between medical schemes and medical insurance but the Registrar of Medical Schemes attempts to prevent insurance from competing with medical schemes.

Pension Funds Act 24 of 1956

This Act defines the business of Pension Funds and then prohibits anyone from carrying on Pension Fund business unless registered in terms of the Act and licenced to transact certain specific classes of insurance business.

Financial Advisory Act and Intermediary Services Act 37 of 2002

This Act purports to regulate intermediary services and the furnishing of advice. There is thus considerable overlap between this and other Acts.

Financial Sector Regulation Act 9 of 2017

It was decided to introduce the Twin Peaks regulatory system. The Financial Sector Regulation Act 9 of 2017 is the main legislative instrument which achieves this. This Act creates two regulators the market conduct regulator and the prudential regulator. Before this the financial markets were regulated essentially by the Financial Services Board.

Financial Services Board Act 97 of 1990

This is the founding legislation of the Financial Services Board which has been repealed as its defining role is now the Financial Sector Regulation Act 9 of 2017.

4 SOUTH AFRICAN JUDICIAL SYSTEM

The most important courts in the South African judicial system are the following.

4.1 Small Claims Court

The Small Claims Court was introduced in terms of the Small Claims Act 61 of 1984 (as amended) to deal with a limited number of specified matters[27] but generally limited to amounts not exceeding R7 000.[28] Only a natural person may institute an action in a court and a juristic person may become a party to an action in a court only as a defendant.[29] When the juristic person defendant appears it 'shall be represented by a duly nominated director or other officer.'[30] In an insurance context this means that insureds can bring a case against an insurance company in the Small Claims Court, but insurance companies may not do so. The decisions of the small claims court are not published nor binding on other courts.

4.2 Labour Courts

The labour court was introduced to deal with labour matters. It is a court of equity and not a court of law. It attempts to do justice between two parties without the legalism which arises from the strict application of the law. It is doubtful whether a system of equity law can co-exist indefinitely. Courts of equity were well known in English history, and ultimately had to and were brought under control by the courts of law.

4.3 Magistrates' Courts

The Magistrates' Courts can hear criminal and civil matters. Until recently the Regional Court only heard criminal matters but civil jurisdiction has been added.[31] The jurisdiction of the Magistrates' Courts is limited by the amount in dispute, and the decisions of the Magistrates' Courts are not binding on other courts. An appeal from the Magistrates Court is to a division of the High Court.[32] Decisions of the Magistrates' Court are not binding on any other court and are not published.

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27 Chapter III of the Small Claims Court's Act 61 of 1984

28 The jurisdiction in respect of various causes of action of the Small Claims Court is set out in s15 of Act 61 of 1984. The limit with respect to quantum is promulgated from time to time. In terms of GNR1402 in Government Gazette 16661 of 15th September 1995 it was R3 000 and GN 313 GG 26113 of 12 March 2004, R7 000.

29 S7(1) of Act 61 of 1984.

30 S7(4) of Act 61 of 1984.

31 Kim Hawkey 'New act means increased efficiency for civil matters', *Star* August 18, 2010. Civil jurisdiction is conferred in terms of the Regional Courts Amendment Act.

32 The name of the Supreme Court was changed to High Court.

4.4 High Courts

There are a number of divisions of the High Court. There are local divisions such as the Witwatersrand Local Division, Provincial Divisions, and the Supreme Court of Appeal which is the final court of appeal, and being a court of appeal does not usually hear matters of the first instance.[33]

4.5 Supreme Court of Appeal

Until 1994 the highest court was the Appellate Division of the Supreme Court, the AD. Once South African adopted a constitution it was decided to introduce a further court the Constitutional Court. The AD was renamed to the Supreme Court of Appeal (SCA). Initially it was not argued that the highest court of the land was the Constitutional Court since it was going to be a specialist court dealing with constitutional matters. Gradually the idea took root that the Constitutional Court was the highest court of the land.

4.6 Constitutional Court

The South Africa Constitutional Court is the most recent court to be added to the South African legal system. The South African Courts can now declare laws to be contrary to the constitution and hence invalid. The Constitutional Court has considered several insurance matters as indicted briefly below. But first a review of some of the more well-known foreign constitutional cases involving insurance.

4.7 Foreign constitutional cases

4.7.1 Canada

In the Canadian case of *Zurich Insurance Company v Ontario (Human Rights Commission)* 1992 93 DLR 4th 346 SC CanDalby (*Zurich Insurance Company v Ontario (Human Rights Commission)*, 1992), BG 'Adverse Selection and Statistical Discrimination' - a single twenty year-old male complained that he was discriminated against because he had to pay insurance rates which exceeded the rates paid by women. He alleged he was discriminated against on the basis of age, gender and marital status. The Court by a majority of five judges to two ruled in favour or the insurance company.

4.7.2 United States of America

In *Hartford Accident & Indemnity Company v Insurance Commissioner of the Commonwealth of Pennsylvania* 482 A 2d 542 Pa 1984 (*Hartford Accident & Indemnity Company v Insurance Commissioner of the Commonwealth of Pennsylvania*, 1984) a twenty-six year-old unmarried male with an unblemished driving record successfully protested against gender based insurance rating and the

[33] In this regard it differs from the United States Supreme Court which in very special circumstances can act as a Court of the first instance. The Appellate Division unlike the United States Supreme Court, hears all matters presented to it. The United States Supreme Court on the other hand decides which cases it will hear. This is understandable since in the United States has a population of two hundred and fifty million people. The United States Supreme Court can never deal with the caseload, if it heard all the cases referred to it.

Insurance Commissioner[34] held that gender based rating was invalid. Hartford made an application to overturn the commissioner's decision but was unsuccessful in *Pennsylvania National Organisation for Women v Commissioner of Pennsylvania Insurance Department* 551 A2d 1162 Pa Cmwlth 1988 (*Pennsylvania National Organisation for Women v Commissioner of Pennsylvania Insurance Department*, 1988). NOW, a women's organisation appealed against the decision of the Insurance Commissioner that it was permissible for insurers to charge men and women a uniform rate. The court refused to overturn the commissioner's decision. *City of Los Angeles, Department of Water & Power v Monhart* 435 US 702, 98 Sct 1370 1978 (*City of Los Angeles, Department of Water & Power v Monhart*, 1978) an employer noted that women outlive men and this required women to make a larger contribution to the pension fund than male employees. The women took the matter to court. The Supreme Court of the United States held 5 to 3 that this pension plan violated the American Civil Rights Act.

In Arizona *Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v Norris* 462 US 1073, 103 Sct 3492 1983 (*Governing Committee for Tax Deferred Annuity & Deferred Compensation Plans v Norris*, 1983) an employer offered the option to its employees of receiving retirement benefits from one of several companies selected by it. All companies used gender-based mortality tables. For the same contribution the men would recover .... (men die earlier). The court ruled that this practice was discriminatory.

4.7.3 Europe

The South African courts usually follow the UK on insurance matters and then the US. No doubt there are cases in Europe of interest but these are not included at this stage.

4.7.4 South African insurance constitutional cases

Road Accident Fund
The Constitutional Court has considered several matters involving the Road Accident Fund.

In *Tsotetsi v Mutual & Federal Insurance Co Ltd* 1997 1 SA 585 CC (*Tsotetsi v Mutual & Federal Insurance Co Ltd*, 1997) the issue was the constitutionality of the limitation of liability clause in the Agreement establishing the Motor Vehicle Accidents Fund but the court found it unnecessary to decide whether these provisions are unconstitutional or not since the accident took place before the constitution came into force.
Other cases include *Van der Merwe v The Road Accident Fund et al* 2006 CCT 48 05 (*Van der Merwe v The Road Accident Fund et al*, 2006), *Engelbrecht v Road Accident Fund* 2007 001 ZACC (*Engelbrecht v Road Accident Fund*, 2007), *Road Accident Fund v Mdeyide et al* 2007 007 ZACC (*Road Accident Fund v Mdeyide et al*, 2007).

Interpretation of policy terms

[34] The American insurance industry is regulated in a complex manner. For details of this system consult Joskow 'Cartels competition and regulation in the property-liability insurance industry' *Bell Journal of Economics* Paul L Joskow (1973) (Joskow, 1973)

In *Barkhuizen v Napier NO* 2007 005 CC (*Barkhuizen v Napier*, 2007) the court had to interpret a term in the insurance policy which specified that the insured had to institute an action against an insurer within a specified period laid down in the policy.

Interpretation of provisions of the Insurance Act

In *Brink v Kitshoff NO* 1996 4 SA 197 CC[35] (*Brink v Kitshoff*, 1996) the issue was the constitutional validity of ss44(1) and 44(2) of the Insurance Act 27 of 1943. These sections provided that where a man's estate was declared insolvent, then under certain circumstances, the proceeds of a life policy had to be paid to the estate and not the wife as beneficiary. In the Brink case, in terms of ss44 the proceeds would not be paid to the wife but to the estate and hence to the benefit of the creditors. The wife argued to that since the sections applied only to husbands, the section discriminates against women. The court agreed and declared the section to be invalid.

Reverse onus of proof

It is not only the insurance matters per se which come before the Constitutional Court which may also have an impact on insurance practice. There are a host of other interim matters such as the payment of legal liability claims which come before the court. Thus, in *Prinsloo v Van der Linde and Another* 1997 3 SA 1012 CC (*Prinsloo v Van der Linde and Another*, 1997) the so-called reverse onus of proof contained in s84 of the Forest Act 122 of 1984 was declared to be not unconstitutional. This issue often arises in claims involving fires.

Worker's compensation

In *Susana Elizabeth Magdalena Jooste v Score Supermarket Trading (Pty) Limited* (The Minister of Labour intervening) 1999 2 SA 1 CC (*Susana Elizabeth Magdalena Jooste v Score Supermarket Trading (Pty) Limited*, 1999) the court was asked to approve the High Court's decision that s35 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 was unconstitutional but declined to do so. The Court pointed out that similar provisions in the United States of America, Canada and Germany were not unconstitutional. In *Barkhuizen v Napier* NO 2006 CC the insured vehicle was damaged beyond economic repair. After a claim was submitted, the insurer (a Lloyd's syndicate) repudiated the claim on the basis that the vehicle had been used for business purposes, contrary to the undertaking to use it for private purposes only (§2). Two years after the repudiation the insured issued summons against the insurer. The insurer raised a special plea based on a term in the insurance contract which read, '... if we reject liability for any claim under this Policy we will be released from liability unless summons is served ... within 90 days of repudiation.' In replication the insured alleged inter alia that the term in the policy is contrary to s34 of the Constitution, the right of access to the court provision. When the matter was heard in the High Court, the court found that the contractual term was contrary to s34 of the Constitution (§9), relying on an earlier decision where a provision which imposed a time

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[35] For comments on this case consult Havenga, P (1997) 'The Comfortable Estate of Widowhood: Insurance Law and the Constitution' *THRHR* 1997 60 164 (Havenga, 1997b); Schlemmer, E (1996) 'On the *Brink* of Equality: The Constitution and Insurance' *Juta's Business Law* 1996 4 128 (Schlemmer, 1996); Van Niekerk, JP (1997) 'Brink v Kitshoff NO' *International Journal of Insurance Law* 1997 190 (Van Niekerk, 1997); Havenga, Peter (1997a) 'Equality in Insurance Law - The Impact of the Bill of Rights' *South African Mercantile Law Journal* 1997 3 275-290 (Havenga, 1997a)

limit was held to be unconstitutional.[36] A main pillar of the insured's argument was that the term was per se unconstitutional, in that it deprived the insured of the constitutional right of access to the courts. This being so, little information was provided as to why the insured did not issue summons within the period stipulated in the contract. This case raised the thorny issue of whether or not the Constitution applies to contractual relationships, the so-called horizontal application of the Constitution. On appeal the Supreme Court of Appeal accepted that contractual terms are subject to the Constitution (§5). The Supreme Court of Appeal upheld the insurer's special plea and the matter was taken to the Constitutional Court. The Constitutional Court took the approach to the challenge that a contractual term is unconstitutional is to determine if the term so-challenged is contrary to public policy as evidenced by constitutional values (§30). The court concluded that on the facts provided that it could not conclude, in the circumstances, the term was contrary to public policy.

5 TRIBUNALS AND OTHER INSTITUTIONS

In addition to the courts, there are an increasing number of tribunals and other institutions for resolving disputers including the CCMA, Pension Fund Adjudicator, Ombudsman and so on. It is fair to say that increasingly statutory tribunals and voluntary Ombudsmen are increasingly used with a corresponding decrease in the use of courts.

6 ALTERNATIVE DISPUTE RESOLUTION

Other alternative dispute resolutions options exist including arbitration.

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LIABILITY RISKS

1 LIABILITY OF ROBBERS AND BYSTANDERS IN CUSTOM

The Rule-of-Law as noted by jurists was a matter of law and facts.[1] Further as Mr Justice OW Holmes Jnr (1841-1935), one of America's greatest jurists and judges, noted the life of the law has not been logic; it has been experience.[2] He is correct.

These two aspects can be demonstrated by the following example which is a type of practical problem which society and the courts often deal with. A man dressed up as a robber enters a bank, aims his gun at the bank teller. Also in the bank is an armed bystander who may or may not attempt to shoot the robber. In our example the 'robber' proceeds to shoot and kills the teller and the bystander does not intervene. The question of law is, is the ‘robber’ guilty of the murder of the teller, or is the bystander or are both? If the one is guilty of murder and not the other, what is it which distinguishes the guilt of the one from that of the other? One needs no knowledge of law to answer these questions. Everyday experience is all that is needed.

1.1 Law

The main distinguishing feature is the law. The common-law is so ingrained into the fabric of society that there is a tendency to forget that it exists.[3] It is a fact that there is a law prohibiting murder.[4]

First consider the position of the ‘robber’. It is the robber whose actions caused the death of the teller and in so doing he has at least *prima facie* committed the crime of murder.

Secondly consider the position of the bystander. In the common-law there is no law which says one must prevent a murder by killing someone else failing which the person who fails to prevent the murder is guilty of the murder one did not prevent. It is the robber whose conduct caused the death of the teller not that of the bystander. The robber as a point of fact thus contravenes the existing common-law; the bystander does not.

Why does a law exist which prohibits murder? We do not know. The law against murder has existed for so long that we have no way of knowing why the law was introduced.[5] Centuries of experience has taught us that the law against murder is sound. It would be a matter of opinion whether or not a law is required to hold the bystander liable for not killing others to prevent murders. Experience has not produced such a law. It is doubted if such a law will ever stand the test of time, since in essence the bystander would be held liable for the acts of the 'robber'. To hold the bystander so liable, is a disguised form of vicarious liability. Very strong feelings exist against vicarious liability in general and criminal vicarious liability in particular.

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1 PJ Fitzgerald (1966,65) *Salmond on Jurisprudence* 12ed Sweet and Maxwell 1966 (Fitzgerald & Salmond, 1966)

2 Holmes, OW (1881) *The Common Law* Boston 1881 at 1 (Holmes, 1881)

3 In numerous workshops where this example has been used and participants asked to decide why either is guilty, virtually no-one mentions the law.

4 Exodus 20 v 13.

5 One could speculate as to the reason for the law, but would make the error Holmes (1881,5) (Holmes, 1881) realised when he wrote: 'In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reasons which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for.' The ingenious minds then substitute their imagination for the reason.

1.2 Conduct

Most people see the central distinguishing feature between the ‘robber’ and the bystander to be that it was the conduct of the 'robber' which caused the teller’s death. It is a point of that it was he who pulled the trigger. The teller died because he was hit by the bullet. The bystander, on the other hand did not do anything. He did not kill the teller. That men should only be judged by their positive conduct has been the fundamental feature of the Rule of Law for as long as there has been both society and law.

To hold the bystander liable is to fail to distinguish good from evil. According to this view there is no difference between the person who kills another and one who does not. Should society impose a duty on the bystander to shoot the ‘robber’? Should he be guilty of killing the teller by not preventing his death? If the answer is yes then why restrict the liability to the bystander? Why not the bank’s security guard? Why not say his conduct caused the death of the teller, even if he was not there. After all if he was there and did kill the ‘robber’, the teller would not have died. Why not an unarmed bystander. If he shouted, he would have distracted the attention of the ‘robber’. Why not the parents of either the ‘robber’ or the bystander who gave birth to these two. If they had not given birth to either the robber or the bystander the whole episode would not have taken place. Experience, distilled into the common-law holds that it is only conduct which caused the death which is actionable. It is the conduct of the ‘robber’ which caused the death of the teller. It is this conduct which brands him to be the murderer.

1.3 Cause

Another feature which distinguishes the ‘robber’ from the bystander is that the causal link is between the action of the ‘robber’ and the death of the teller. His conduct caused the death of the teller and this identifies him to be the murderer. It is a fact that a causal connection exists between the conduct of the robber and the death of the teller.

Causation is the element which links the conduct to the unlawful consequence. If the robber pulled the trigger but missed, he could not be guilty of murder because his conduct did not cause the death of the teller. There is no factual causal connection between the conduct of the bystander and the death of the teller. Not shooting cannot kill; it is the shooting which kills. (To say the bystander caused the death of the teller by not shooting the robber is a perversion of the everyday notion of cause).

If the bystander attempted to shoot the ‘robber’ would he have succeeded? That is matter of opinion. In any event if the bystander did attempt to shoot the ‘robber’ he may have missed. To suggest that the bystander would have succeeded in shooting the ‘robber’ is speculation.

1.4 Harm

For a person to be liable conduct must bring about the unlawful consequence in this case the death of the teller. It is a fact that harm is present since the teller died. There is physical manifestation that harm exists; it is a fact. Only specific forms of harm are prohibited by law. So for example in the case of murder the form of harm is the death of the person. If the teller did not die, then the robber cannot be guilty of the crime of murder but may be guilty of some other crime. If the robber missed he could be found guilty of attempted murder, but not murder, because the teller did not suffer prohibited harm. If the teller was only injured the 'robber' could be found guilty of assault. The form or type of injury is important since it establishes the type of crime involved.

1.5 Fault

If liability were to be based only on the act and the consequence caused by the act, then the scope of liability would be too broad. There are many instances where a person by his act kills another and experience indicates that he is not guilty of murder. Thus for example one may kill in self-defence. In addition to the act one must intend to unlawfully cause the consequence. One must intend to murder, intending to kill is not enough. The defence of not intending to commit murder could be raised in cases where a person's conduct causes the death. It has always been a requirement that the person who by his wrongful act causes harm or injury to another is only guilty if he is also at fault.[6] Fault is present if the perpetrator, has what is known as, a guilty mind. If he intended by his act to bring about the unlawful consequences, he has a guilty mind. In certain crimes negligence and not intention would suffice. He could be liable in some cases if he could foresee that his conduct would bring about the unlawful consequences. In our case the 'robber' intended to murder the teller when he pulled the trigger. The bystander on the other hand is not relevant, since the issue of fault was only a defence which could only arise if the bystander had committed the unlawful act.

1.6 Conclusion

The position regarding the robber and bystander is summarised in the tables below:

Element	Fact or opinion	Historical Roman-Dutch Law
Conduct	Fact	Mr X shot the teller
Causes	Fact	Mr X's shot killed the teller
Harm	Fact	The teller died
Contrary to Law	Fact	There is a law prohibiting murder
At Fault	Fact	Mr X intended to murder the teller

6 From time to time writers have tried to argue the fault is a more recent innovation.

Position regarding the ‘robber’. The ‘robber’ is as a matter of fact and law guilty of murder and the bystander is as a matter of fact and law not guilty. If the bystander is to be held responsible for the death of the teller the rule of law would be transgressed. Firstly there is no law which requires him to shoot the ‘robber’ or be guilty of murdering the teller.

What we now need to do is examine how the five simple practical elements have changed over the last 20 years or so. It should be noted that the above five elements are not independent but are interrelated. To cause is to cause harm. Cause thus involves harm. The act causes the harm. This act and cause are interrelated. One is liable for acting unlawfully. Conduct and unlawfulness is related and so forth. The interrelationship could be quite complex.

Position regarding the bystander

Elements	Fact or opinion	Historical Roman-Dutch Law
Conduct	Opinion	The bystander did not act
Causes	Opinion	No action factually killed the teller
Harm	Fact	The teller died
Contrary to law	Opinion	There is no law requiring the bystander to kill the ‘robber’
At fault	No relevant	Not relevant

2 ANCIENT LAW

Ancient law consisted of a number of specific commands. As an example commands from the decalogue can be considered:

- You shall do no murder.[7]
- You shall not steal.[8]
- You shall not bear false testimony against you neighbour.[9]

2.1 Murder and culpable homicide

7 Exodus 20v13

8 Exodus 20v15

9 Exodus 8v16

These laws, as expressed in these commands are much more generalised than appears at first sight. It embodies the idea of intention. The law also does not say 'Thou shalt not kill' but 'murder'. The person must have a guilty mind; he must intend to murder. The law does not define what is meant by murder. People know what murder is; it requires no definition. The law against murder does not mention any specific type of conduct but prohibits bringing about the consequence of death. This notion implies any positive conduct.

From this specific case law would develop as the mere application of the law and not the creation of law. Initially case law was not recorded being simply the application of law. Examples of case law regarding murder, in ancient law are:

> Anyone who strikes a man and kills him shall surely be put to death. However, if he does not do so intentionally, but God lets it happen, he is to flee to a place I will designate. But if a man schemes and kills another man deliberately, take him away from my alter and put him to death.[10]

Here the different forms of positive conduct can be seen.

> If a man strikes someone with an iron object so that he dies, he is a murderer; the murderer shall be put to death. Or if anyone has a stone in his hand that could kill, and he strikes someone so that he dies, he is a murderer, the murderer shall be put to death. Or if anyone has a wooden object in his hand that could kill and he hits someone so that he dies, he is a murderer; the murderer shall be put to death.

Here the different forms of positive conduct can be seen.

> If anyone with malice and aforethought shoves another or throws something at him intentionally so that he dies or if in hostility he hits him with his fist so that he dies, that person shall be put to death; he is a murderer. But if without hostility someone suddenly shoves another or throws something at him unintentionally or, without seeing him, drops a stone on him that he could kill him, and he dies, then since he was not his enemy and he did not intend to harm him, the assembly must judge between him and the avenger according to these regulations.[11]

Here again the requirement of fault can be seen. In these cases, the elements which constitute the crime are quite clear. The law is that against murder. The act is one of striking, striking with an iron object, striking with a stone, hitting with a wooden object or shoving. All of these are some form of positive conduct of such a nature that the act can cause harm. In many cases the positive act itself may cause the death of the person. So if a man strikes another with his fist so that that person dies then it is this blow which causes the death of the other person. This act is a body to body (*corpore corpori*) type of act. However if a man shoves another so that the man falls off a mountain then it is the fall and not the shove which kills the man. It is not required that the act itself killed the person but only that it is the cause of the death of the person. The act must set into motion the sequence of events which results in the death of the person. The act must be the proximate cause of the death.

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10 Exodus 21v12

11 Numbers 35v10-24

Causation is the connection between the act and the death, it is the person whose blow caused the death who is guilty of the crime of murder. It is the person whose shove caused the death of the person who is guilty of murder. Fault is to intend to murder (to have a guilty mind or *mens rea*).

Once liability for murder is recognised, the possibility of than an act may be committed which kills but the act was committed without the intention to murder, must be considered. If the intention to murder is absent the person who stuck the blow could still be condemned but for a lesser offence, that of culpable homicide. Ancient law judged a man by his conduct. If by his conduct he killed a man he had to flee to city of refuge pending his trial before the judges. This procedure for example is set out as follows:

> ... 'When you cross the Jordan into Canaan, select some towns to be your cities of refuge, to which a person who has killed someone accidentally may flee. They will be places of refuge from the avenger, so that a person accused of murder may not die before he stands trial before the assembly'.[12]

2.2 Personal Injuries

The possibility of the act injury and not killing must also be examined. The position regarding the crime of murder was examined, the same applied to personal injuries:

> If men quarrel and one hits the other with a stone or with his fist and he does not die but is confined to bed, the one who stuck the blow will not be held responsible if the other gets up and walks around outside with his staff; however, he must pay the injured man for the loss of his time and see he is completely healed.[13]

In this case it is the intentional causing of injury which is considered. Fault in the form of intention is present. The liability of the person who struck the other is to pay medical expenses and loss of earnings.

Again in this example it is the man who struck the other is liable. Liability is for positive conduct.

It can be seen thus that in ancient law (1) specific laws existed. A general theory of law did not exist. (2) The perpetrator who committed positive conduct was liable (3) fault was a requirement. (4) The conduct had to cause harm, causation and harm were present.

3 HISTORICAL ROMAN-DUTCH LAW FOUNDATION OF DELICT

Because of the changes which have taken place in the last two decades or so in the law of delict, it is necessary to go back to the Roman-Dutch origins in order to establish what originally constituted a delict or civil wrong.

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12 Numbers 35v10-12. See also Deut 19v1-13; Joshua 20v1-9; Joshua 21v13,21,27,32,38)

13 Exodus 21v18

The recent changes which have taken place need to be examined and understood in the light of the historical law and the historical development of the changes understood.

3.1 Lex Aquilia

In Roman law, as in ancient law, no general definition of what constituted a delict or crime existed. There were a number of separate and distinct civil wrongs, each with its own rules and appropriate remedy. The most important were the delicts of *furtum, rapina, damnum injuria datum* and *injuria*, and the praetorian delicts of *metus, dolus* and *fraus creditorum.*

Modern law is influenced most by the delicts of *damnum injuria datum* and *injuria*. The scope of these two originally limited delicts have been extended to cover virtually the whole field of delictual liability.

3.1.1 Damnum injuria datum

The delict known as *damnum injuria datum* was created by the *Lex Aquilia*, a plebiscite attributed to the year 287 BC.[14] The *Lex* contained three chapters. The first chapter gave a remedy for the wrongful killing of a slave or beast belonging to the class of *pecus*. The second chapter does not concern us since it became obsolete early-on in the Roman Empire. The third chapter gave the remedy for the wrongful wounding of a slave or a beast belonging to the class of *pecus*, and for the wrongful damage of a corporeal thing. It is the wrongful damage of the corporeal thing which remains of importance to us today. It is not altogether clear what these three words mean. *Injuria* seemed to mean to act in a manner contrary to the law.

This *Lex* was first very narrowly construed in that the remedy was available only (1) to the owner where there had been (2) physical damage or lesion (3) caused by (4) the direct application of force.

Initially the liability was not based on fault but the law developed to the point where it became a requirement that damage must have been wrongfully caused. *Injuria datum* was so interpreted that it excluded liability where damage was not the defendant's fault. Thus the action came to be allowed for every kind of damage to corporeal property, movable or immovable, which could be attributed to the *culpa* or fault of the defendant. The remedy, too, was no longer confined to the owner as in the earlier law but was available to any person who had real rights in the property.

By the time of Justinian, if not earlier, the action based on the *Lex Aquilia* had become a general remedy for damage wrongfully done to a corporeal thing and for physical injuries wrongfully caused to the body of a freeman, whereby compensation could be recovered not only for immediate but also for consequential loss. The action was still, however, related to damage to the corporeal thing.

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[14] For a more detailed discussion on the origin of the *Lex Aquilia* see (Beinhart, 1956); WM Gordon (1976) 'Dating the Lex Aqulia' *Acta Juridica* Volume I 315-321 .

Despite the apparent broadening of the basis of liability, it remained limited in that it still had to be related at least to fault and physical damage with a connection between the two. The remedy was also not available for any loss suffered by a person, but only those which related to ownership or where there was at least a real right in the damaged property.

3.1.2 Injuria

In the preceding section it was noted that the *damnum injuria datum* was used to recover damages for corporeal property damaged caused by positive conduct. There is another form of damage, however, where the rights of people to their person are violated. This arises in cases of assault, insult and defamation. The violation of such rights to the human body and integrity are referred to as personality rights and when these are violated in such a way as to give rise to damages, it is known as the violation of personality rights. The delictual action is that of the *injuria*. The delict of *injuria* has a very long history. Certain wrongs against the person, probably all of them species of assault, were treated as *injuria*. For each of these wrongs a fixed monetary penalty was prescribed, which the victim of the *injuria* was entitled to recover from the wrongdoer. This crude system was superseded in the second century BC by a series a praetorian edicts. The first of these new remedies was the *actio injuriarum aestimatoria*, substituted in place of the old civil action which had a fixed monetary penalty. In terms of the new *actio aestimatoria* the penalty would be assessed by the *judex* [judge] and levied according to the gravity of the offence. It is this second *actio*, the *actio injuriarum* which has come down to us as the remedy available for recovering damages from somebody who violates the personality rights of others.

Before the time of Justinian the *actio injuriarum* had come to be regarded as a general remedy for any wrongful aggression upon a person (*corpus*), his dignity (*dignatas*) or reputation (*fama*). In this case one would use on the *actio injuriarum* to recover damages, (as in cases of defamation) for aggression upon a person himself (such as assault or imprisonment), his dignity (as in cases of insult) or his reputation.

An important difference between the action based on the *actio injuriarum* and the *Lex Aquilia* is the requirement of fault. In a case of physical damage to property, negligence was sufficient to succeed in a claim for damages but in the case of an action based on the *actio injuriarum* negligence was not sufficient; intention was required.

The subjective element of intention involved in the concept of an *injuria* is usually referred to as the *animus injuriandi* (or the intention to injure). The expression is used by the Roman and Roman-Dutch writers in a strictly literal sense, namely the intention of committing an injuria; the intention of subjecting another to *injuria*. *Animus injuriandi* is therefore merely a species of *dolus* or wrongful intent.

The courts have difficulty in proving *animus injuriandi* and judged a man's intentions by his conduct. All that the plaintiff needed in order to establish *animus injuriandi*, is that the act complained of constituted an aggression upon his person, his dignity or his reputation, and that the act was intentional. Solomon J expressed this as follows in the case of *Whittaker v Roos*:

> It is not necessary in order to find that there was *animus injuriandi* to prove any ill-will or spite on the part of the defendants towards the plaintiffs; and it is quite immaterial what the motive was or that the object which the defendants had in view was a laudable one. Is sufficient that the injuries suffered by

> the plaintiffs were inflicted by the defendants, not accidentally or negligently, but with deliberate intention.

Or as Innes J pointed out in the same case:

> When an unlawful aggression ... has been proved, the law presumes that the aggressor had in view the necessary consequence of his conduct; that he had the intention to injure, the *animus injuriandi*. The requirement of *animus injuriandi* as applied in the Roman law can be illustrated by the following example: If A intentionally strikes B he clearly commits an assault. Because he intentionally assaulted B, it is said he had the necessary *animus injuriandi*, which is a prerequisite for the delict of injuries. If on the other hand A believed that B was his slave - and according to the Roman law he was quite entitled to strike his slave - he could not be sued because he believed he had the legal right to strike B and therefore did not have the *animus injuriandi*.

In modern law, it is considered to be unjust for a man to escape liability in cases where he injures another simply because he does not have the prerequisite *animus injuriandi*, and this requirement has been watered down considerably in recent years.

3.2 Strict liability

In addition to the two main areas of liability which has been discussed, that is, claims based on damage to property and claims based on the violation of a person's personality rights, various other miscellaneous actions existed. Some of these restricted actions required neither negligence nor intention and are thus classified as strict liability. These include -

- *pauperies*, which is an action for damage caused by domestic animals acting from inward excitement or vice;
- the so-called quasi-delicts, for which the remedy is the *actio de effusis vel dejectis* or the *actio positi vel suspensi*;
- the disturbance of lateral support, which is well known in insurance policies; this risk is normally an exception to general liability policies.
- interference with the natural flow of water; and
- nuisance (except where the defendant did not create the nuisance or actively continue it).

In recent years strict liability has been imposed by statute in a number of instances as in the case of the Aviation and Nuclear Energy Acts.

3.3 Conclusion regarding the Roman-Dutch law of delict

It can thus be seen that at the turn of the century the Roman-Dutch law of delict recognised two main areas in which actions could be brought. One was for physical damage to corporeal property and the other for aggression against the personality of a person. In neither case did a general action for recovery exist, in the

sense that anybody who suffered any form of loss could sue someone else for the recovery. In America a drug manufacturer was successfully sued even though it could not be proven that he manufactured the drug. Even though these two actions tended to become somewhat generalised, specific requirements still existed. In the case of damage, the requirement included aspects such as who could bring the action and the action was only for physical damage, requiring a cause and consequence. The cause and consequence also had to be linked by the direct action of the party at fault. In the case of violation of personality rights, the requirement was that there had to be intention to injure; negligence was not enough.

Apart from these two actions there were a number of miscellaneous and special actions which did not require fault, but were based on strict liability. Liability could be avoided even for strict liability if the damage was what is referred to as an act of God. In addition to these examples of strict liability, legislation introduced forms of no-fault liability as in the case of the *Aviation Act*, *Nuclear Energy Act* and so on. The statutory actions, however, fall outside of the scope of the common law since they were created by statute.

4 MODERN CASE LAW

In recent years the common-law doctrines of the law of delict has changed, in the words of Richard K Willard[15] 'beyond recognition' with the majority of changes taking place in the last twenty-five years or so. Looking backwards however incremental changes have been taking place for the last hundred years. The quantum leap is more recent. The philosophy behind the changes started can be traced to the beginning of the previous century, when the economic philosophy was directed towards the creation of the welfare state.

4.1 Conduct

4.1.1 Positive conduct only

In Roman law only positive conduct of such a nature that it could cause physical damage was actionable. The act was the heart and soul of the Roman law of delict. Without the act there was no liability. Strange as it may appear at a first glance the common law does not prohibit any specific form of conduct but rather prohibits the bringing about of specific consequences. Take for example the simple command "You shall do no murder". This command or law does not specify what you must not do in order not to commit the crime of murder. The reason for this is obvious. For the law to specify both the prohibited consequence and the conduct is for the law to repeat itself.[16] So for example if the command was, "Thou shalt not murder by striking" a further law would be required if the murder was brought about by poison and not striking. If the law was to specify the conduct as well as the prohibited consequence an infinite number of laws would be required. The law therefore

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15 Richard W Willard was appointed to investigate the Reagan administration to investigate the causes of the liability crisis which occurred in the mid 1980s.

16 This point was clearly articulated by JS Mill (1825) 'Law of Libel and Liberty of the Press' *Westminster Review*, reproduced in GL Williams (1976) *On Politics and Society Fontana* 1976 at 145 (Mill, 1825).

simply prohibits the consequence and accepts that one can only be liable for positive conduct which bring about the prohibited consequence. It was accepted that only positive conduct can have the causal effect of bringing about the prohibited consequence. Historically this was accepted as being the correct position in the historical common law[17]. Changes have been brought about by modern case law as *infra*.

4.1.2 Prior conduct

The first case to be considered is *Halliwell v Johannesburg City Council* 1912 AD 659 (*Halliwell v Johannesburg City Council*, 1912). The Johannesburg City Council had installed experimental cobbled paving but with the efflux of time the paving had worn smooth and Mr Halliwell's horse slipped, injuring Mr Halliwell. Mr Halliwell sued the City Council. The question to be resolved was what was the act of the City Council which caused Mr Halliwell's injury? The appeal court controversially decided that the act was the prior conduct of installing the paving (at 673 and at 694). The paving having been installed would eventually wear smooth. The act of installing the paving set into motion the sequence of events which caused his injury. Should the City Council wish to avoid liability it would have to argue that it was not at fault or blameworthy or negligent. Since it had not maintained the road it was negligent and was hence blameworthy. The court, to emphasise the point, went to great pains to point out that the City Council could never be liable without the prior positive conduct of installing the paving. The mere failure to maintain the road would not be adequate to establish liability. The crucial element of positive conduct would be missing.

Although this case appeared to keep the Roman-Dutch Law intact, it in fact changed the law considerably. The nature of the act had changed. Prior to this case the act would have had to be of such a nature that it could set into motion the sequence of events which caused the harm. It had to be the proximate cause of the harm.[18] Thus the type of act required before this case was acts such as striking, breaking, burning and poisoning. If generalised the act is any positive act of such a nature that it could cause physical injury. In essence the act must be able to cause the prohibited consequence. The mere installation of the cobbles could not of itself cause injury. The court, nevertheless, ruled that the installation imposed a duty on the City Council to maintain the road. It did not and hence it was negligent. According to the court all five elements of delict were thus present.[19]

The next case was *Cape Town Municipality v Paine* 1923 AD 207 (*Cape Town Municipality v Paine*, 1923). The plaintiff in this case was injured when he sat on the grandstand which collapsed. The grandstand had not been maintained and he sued the Cape Town Municipality. A central issue in this case was whether the Municipality had committed an unlawful act. The court came to the conclusion that the act of erecting the grandstand imposed a duty upon the Municipality to ensure that it was maintained. The municipality having

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17 See Valsamkis, Vivian and du Toit (1992); see PH Winfield (1926) 'The Myth of Absolute Liability' *LQR* for the position in English law. See Holmes (1881), for the position in American Law and the *Halliwell Case* for the position of the Roman and Roman-Dutch law.

18 Examples referred in the Halliwell case include; the act of a surgeon who makes a proper incision then fails to attend to the patient. Clearly the incision, itself will cause the death of the patient, if not attended. The man who lights a fire and then falls asleep while watching it. An unattended fire will cause damage. A person who lops off a branch but does not warn a passer-by. The branch falls on the passer-by. The injury is not caused by the failure to warn the passer-by but by the falling branch. In all these cases it is the act itself that causes the injury. Should the defendant wish to avoid liability, he would have to show that he was not blameworthy, despite his act. The laying of the cobbles could not cause injury.

19 The case received widespread comment Van den Heever *Aquilian Damages*, B Beinart (1949) *THRHR* 141; Tom Price (1950) 13 THRHR 1 at 14.

erected this structure for the purpose of enabling the public to witness the sports ... the duty devolved upon the municipality to keep the same in a reasonable state of repair, therefore kept intact the notion that for liability to exist a positive act which ultimately could result in injury was necessary. The erection of a grandstand was such an act. Ultimately the grandstand, if not maintained would fall into a state of disrepair and cause injury of persons utilising the grandstand. If the Municipality wish to avoid liability from erecting the grandstand it could only do so if it took reasonable steps such as maintaining the grandstand. It failed to do so it was therefore liable. Once again the court recognised the need for prior positive conduct to establish liability. Again the nature of the act however was different to that required by the *Lex Aquila*.

A break with the history came in the case of *Joffe & Company Ltd v Hoskins* 1941 AD 341 (*Joffe & Company Ltd v Hoskins*, 1941).[20] In this case engineers contracted to design reinforcing steel for a cantilever. They duly did this. The construction of the cantilever was undertaken by a contractor. During construction the employees of the contractor by walking on the steel pushed the steel to the bottom surface of the cantilever. In this position the steel did not serve any purpose and the cantilever collapsed killing Mr Hoskins. Now clearly if anybody was liable it would be the contractor because the contractor's employees caused the steel to move to the lower surface of the concrete rendering it quite useless. Unfortunately the court of the first instance found the engineers were liable and not the contractor. The engineers were of course upset and appealed against the decision. Mrs Hoskins the widow of the deceased did not counter appeal against the decision concerning the contractor. The appeal court was thus left with an unfortunate choice that if it ruled in favour of the engineers the widow would lose her compensation. The court ruled that the engineers were liable. The court reasoned that the supply of the steel imposed a duty on the engineers to ensure that the steel remained in the correct position. This clearly was a break with the common law since the supply of the steel could not result in any injury to anyone.

4.1.3 Liability for mere omissions

Increasingly cases began to be heard where the prior conduct was difficult to see; increasingly the question arose can a defendant be liable for a mere omission. At first the courts tried to argue that prior conduct did in fact exist, but the link became tenuous.

In *Blore v Standard General Insurance Co Ltd en 'n ander* 1972 2 SA 89 O (*Blore v Standard General Insurance Co Ltd en 'n ander*, 1972) the plaintiff was injured in a collision between two vehicles. Shortly before the accident the vehicle went in for repairs at a garage to fit new king-pins and bushes. The plaintiff alleged that the accident was caused by a defective steering mechanism and the fact that the garage had omitted to examine the steering box and if it had it would have detected the defect. In this event the steering mechanism would have been repaired and the accident would not have taken place. The plaintiff sued the statutory insurer and the garage. The garage excepted to the case on the basis that it showed no cause of action. The court dismissed the exception holding that garage had a duty to act based upon its prior conduct. The case attracted considerable comment.[21]

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20 The unfortunate engineers in this case also lost their claim of tax deductibility *Joffe and Co (Pty) Ltd v CIR* 1946 AD 157 (*Joffe and Co (Pty) Ltd v CIR*, 1946)

21 Paul Boberg (1972) SALJ 207; 1972 *Annual Survey* 137; PM Bekker (1972) *Scintilla Juris* 34; PEJ Brooks 1972 13 *Codicillus* 46; DJ McQuoid-Mason (1973) 1 *Natal University Law Review* 77, 1974 *Acta Juridica* 53

4.1.4 Omissions and the legal convictions of society

Persons were increasingly held liable for mere omissions, unknown in the Roman-Dutch law. A person was no longer liable because of what he did, but because he did not do what a judge thought he should do. The judge would only think about what he should have done, years after the event. In the cases which followed the requirement of conduct increasingly became a façade as courts attempted to rationalise their conclusions that the act which was not committed was in fact the cause of the injury. The façade had to come to an end which came in the case of *Minister of Police v Ewels* 1975 3 SA 590 A (*Minister of Police v Ewels*, 1975). In this case an off-duty policeman, Sergeant Barnard assaulted Mr Ewels. Mr Ewels wished to claim compensation but since policemen are notoriously underpaid there was no point in suing Sergeant Barnard. The obvious alternative was to sue the minister of police who is perceived to have a 'deep pocket'. Since Sergeant Barnard was off-duty the minister could not at that stage be vicariously liable. Mr Ewels then had to find an on-duty policeman. The policemen on duty in the police station would do. These police did not commit any act at all which gave rise to the injury suffered by Mr Ewels. Nevertheless the court found the minister of police was liable. There was no positive act on the part of the on-duty policemen which caused Mr Ewels harm. The minister of police was held liable for a mere omission. The court had to create a 'law' which would grant to them the authority to find people liable without any act and then to find that the on-duty policemen broke the law that they had just created. The court broke with history and invented a new concept which would in future enable courts to hold anyone liable under any circumstance that the particular court chose. The court invented the concept of wrongfulness, and thereby abandoned the law. The court ruled:

> Our law has developed to the stage where an omission can be regarded as wrongful also where the circumstances of the case are such that the omission not only evokes moral indignation, but also the legal convictions of the community require the omission be regarded as wrongful and that the loss suffered be compensated by the person who failed to act positively.

From that day onwards whenever the court wished to hold someone liable it did not have to worry about an act or law. It could hold someone liable if they should have done whatever the court imagined that they should have done and because the defendant did not do what the court imagined he should have done they acted and wrongfully so.

Although all academics[22] applauded the Ewels decision there was a dissenting voice. Mr Justice Coleman said:

> It must be accepted ... each judge will when dealing with a claim for damages flowing from an omission have to apply his own personal view on the question whether that particular omission ought to support a claim or not ... with all respect due to the distinguished judges who decided the Ewels case, it is submitted that that sort of approach is unsatisfactory ... legislative wisdom is not one of the gifts for which judges are chosen, and their judicial oath require them to apply the law, not to dispense rough justice.[23]

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22 PQR Boberg (1975) 'The Wrongfulness of an Omission' *SALJ* 1975 2 361 (Boberg, 1975)

23 *Amicus Curtae* (Justice Coleman) (1976) 'The Actionable Omission - Another view of the Ewels's case' 1976 93 SALJ 85 (Coleman, 1976)

The Ewels case demonstrates another point. Why was the Minister of Police sued and not Sargent Barnard. The answer is obvious. The Minister has money, Sargent Barnard would probably not have money. This is important not only to Mr Ewels but also to the lawyers representing Mr Ewels. The lawyers want their fees to be paid. The legal costs could quite easily exceed the damages. So in the end the choice of the defendant is based on the ability pay, or the deep pocket syndrome.

When the Court in the Ewels case, said that a person can be liable in accordance with the legal convictions of society, it never answered the question of how to determine these convictions. The answer was given by Professor Boberg. He said:

> How does the court determine what the community would feel? The court determines it, if I may speak directly, by its judicial gut reaction. The judge feels the answer and he then rationalises it. He says, the defendant is liable, and it is because the community would brand his conduct as wrongful. But as we cannot ask the community, we cannot bring the oldest man or the wisest or whomever may represent the community - heaven forbid that anyone should claim to do that - because of that, we must let the judge decide. So it is a formula for expressing a conclusion arrived at by other, intuitive means.[24]

4.1.5 The 'act' in modern case 'law'

In modern case law the historical act as a distinctive limiting feature as known in the Roman and Roman-Dutch law has all but disappeared. In the historical sense one could only be liable if he committed an act of such a nature that it was the proximate cause of the physical harm. The 'act' in the modern sense has extended well beyond the historical position and is declared to be the act at the discretion of the judge. The act is more often than not the proximate cause of the harm. The judge in exercising his discretion may be influenced by other considerations. He may simply ask himself whether under the particular circumstances he should award compensation or not and if so work backwards, the so called back letter law, and rationalize an act, any act, to justify his conclusion. This can be illustrated by a number of cases. In *Burger v Santam Versekeringsmaatskappy Bpk* 1981 2 SA 703 A (*Burger v Santam Versekeringsmaatskappy Bpk*, 1981) the driver was held to have "acted" negligently by not blowing his hooter to warn a car on the wrong side of the road. The argument was if he had done so, the other driver would have heard the hooter and returned to the correct side of the road. This in any event is a doubtful proposition. In another case *Santam Versekeringsmaatskappy Bpk v Letlojone* 1982 3 SA 318 A (*Santam Versekeringsmaatskappy Bpk v Letlojone*, 1982) a cyclist without stopping went through a controlled intersection into the path of an oncoming bus and the bus driver was held to have "acted" negligently by not blowing his hooter to warn that he was going straight. These cases involved payment by the Road Accident Fund (or its predecessors). Not surprisingly the fund has long since become hopelessly insolvent.

4.1.6 Negligent misstatement [causing a pure economic loss]

Cases in delict usually involve physical injury and the conduct is of such a nature as can cause physical harm. Once courts began to recognise liability for pure financial losses, infra, this involved a different form of

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[24] PQR Boberg (1985) 'From Pecus to Pecuniary Loss *Aquilian* Liability in the Twentieth Century' *Lesotho Law Journal* 1985 1 331 at 358 (Boberg, 1985)

conduct, usually negligent misstatements. Thus in *Perlman v Zoutendyk* a property valuer issued a valuation which was used to lend a sum of money. When the borrower could not repay the loan and the money lender tried to recover based on the value of the property it was discovered the valuation was below the market price. The valuer was then sued in which event the act of the valuer was a negligent misstatement. This matter is discussed in greater detail infra while dealing with liability for pure economic losses. Negligent misstatements (including omitted negligent misstatements) can of course also cause physical injury. The omission to blow a hooter, as discussed above, is in reality a negligent misstatement. Blowing a hooter cannot cause physical injury, it is not the proximate cause of the physical injury.

5 Law (wrongfulness or unlawfulness)

5.1 Damage to property or injury to people

The common-law only judges men for their positive deeds which cause harm to others. As we have seen the specific law which is applicable where people are injured or property damaged is the *damnum injuria datum*. A person is liable if by his positive act he wrongfully causes damage to someone else's property or injures or kills someone. There is no law which holds someone liable for not preventing loss to some else.

5.2 Violation of personality rights

5.3 Harm or damage

5.3.1 Damage of a physical nature

As seen harm in Roman-Dutch law damage meant damage to property. This damage was initially of such a nature that it could be caused by some external act.[25] Our courts have expanded liability to include other forms of 'damage'.

5.3.2 Consequential losses

When property is damaged consequential losses may follow from the damage. Thus if a factory is destroyed by fire, the owners may lose production from the fire and thus suffer consequential losses. Consequential losses are distinguished from pure financial losses as discussed below. In the case of pure financial losses, the losses are not associated with damage to property at all. An example of consequential losses which often arises in insurance is where an insured causes damages to the motor vehicle of a third party, as a result of which the third party has to hire a replacement vehicle while his vehicle is being repaired. The questions the arises is the

[25] Killing of a slave, or four-footed beast of the class of cattle.

insured liable for these car hire costs in addition to the repair costs of the motor vehicle. This issue is discussed in the motor policy section.

5.3.3 Bodily injuries

5.3.3.1 Introduction

In ancient law an injured person was entitled to claim medical expenses and support from the person who wrongfully and negligently caused his injuries. This position is clearly seen in the Old Testament:

> If men quarrel and one hits the other with a stone or with his fist and he does not die but is confined to bed, the one who struck the blow will not be held responsible if the other gets up and walks around outside with his staff; however, he must pay the injured man for the loss of his time and see that he is completely healed.[26]

Thus the injured party could claim pecuniary losses under two heads:

(a) Medical expenses - '... he must see that he is healed'
(b) Loss of earnings - ' ... he must pay the injured man for the loss of his time'.

At about the turn of the century the courts introduced claims for non-pecuniary losses. Initially this was for pain and suffering, suffered by the person who was injured but has been expanded to general damages. General damages includes pain and suffering, loss of amenities and so forth. Thus today three heads of damages exist:

Pecuniary losses

(a) Medical and other expenses
(b) Loss of earnings
(c) Loss of support

Non-pecuniary losses

(d) General damages including; pain, suffering, bodily disfigurement, loss of life expectancy.

The reason for awarding and the nature of non-pecuniary losses is not always clear.

5.3.3.2 Action for loss of earnings

The tortfeasor has an obligation to pay for the loss of earnings suffered by the person he has injured.

5.3.3.3 Action for pain and suffering

An action for the negligent causing of pain, suffering, bodily disfigurement, loss of life expectancy was unknown in the Roman common law for two reasons. Firstly, the Aquilian action compensates for actual losses

[26] Exodus 21v18-19

that is loss of income and medical expenses. Actions for this class of loss fell outside of the scope of the Aquilian action. Secondly generally claims against persons fell to the scope of the *actio iniuiarum*.

Person's in a permanent vegetative state

A particular problem which arises is claims for pain and suffering from persons who cannot feel pain and suffering; person's in a permanent vegetative state. An injured person may be in a coma or brain damaged to the extent that that person cannot feel pain and suffering or understand that they have lost the amenities of life. What under these circumstances is the appropriate award that should be made? This question has arisen in England[27] on a number of occasions in Australia.[28]

In South Africa such a circumstance arose in *Collins v Administrator, Cape* 1995 4 SA 73 C (*Collins v Administrator, Cape*, 1995) where the court found that the brain damage suffered by a sixteen-week baby Lee-Ann, was caused by the negligence of the hospital staff. The father had claimed R200 000, in their representative capacity from the hospital for pain and suffering. The court concluded the following about her state (84E-G)

> It follows that it is of no consequence to Lee-Ann what amount, if any, is awarded to her in respect of non-pecuniary damages. Not only will she never know of the award, she will receive no benefit from it whether knowingly or unknowingly. ... Indeed there is something unreal in attempting to compensate her.

Subjectively a person who is in a permanent vegetative state cannot suffer pain and suffering and therefore is not entitled to any damages under this head. However, an argument has been made that objectively, the person has in fact suffered and should be awarded damages under this heading. The court in the Collins case declined to make any award for pain and suffering for a person in a permanent vegetative state, pointing out that if such an award was made the true beneficiaries would be the parents of Lee-Ann. They were in law not entitled to damages for the grief which they felt and the court could not indirectly make such an award to them.

5.3.3.4 Psychiatric injury

The Roman and Roman-Dutch law did not recognise liability for mere psychiatric injury[29] or any of the other similar notions such as, emotional distress, emotional shock or nervous shock.[30] A number of early attempts were made to claim damages under this heading. In *Waring & Gillow Ltd v Sherborne* 1904 TS 340 (*Waring & Gillow Ltd v Sherborne*, 1904), Sherborne worked for Waring & Gillow Ltd on the construction of the old Carlton Hotel in Johannesburg. He was killed as a result of a building accident and his employer was found to be negligent. Sherborne's wife suffered emotional shock on receiving news of her husband's death and suffered a miscarriage and had to undergo an operation. She sued her husband's employer for damages and was awarded

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27 *Wise v Kaye and another* 1962 1 All ER 257 CA; *H West & Son Ltd and another v Shepard* 1963 2 All ER 625 HL; *Lin Poh Choo v Camden and Islington Area Health Authority* 1979 2 All ER 910 HL. (*Wise v Kaye and another*, 1962) (*H West & Son Ltd and another v Shepard*, 1963) (*Lin Poh Choo v Camden and Islington Area Health Authority*, 1979)

28 *Skelton v Collins* 1966 115 CLR 94 HC (*Skelton v Collins*, 1966)

29 For a discussion on the subject see PJ Visser 'Aanspreeklikheid vir Senuskok na Ontvangs van 'n Nuusberig' 1977 10 *De Jure* 37 (Visser, 1977); Deval, T *Skadevergoedig aan Afhanklikes* (Deval, n.d.); Koch, Robert *Damages for Lost Income* (R. Koch, 1984); Boberg (1984, 174 et seq)

30 *Waring & Gillow Ltd v Sherborne* 1904 TS 340 at 348 (*Waring & Gillow Ltd v Sherborne*, 1904)

£3 500 by the trial judge which included an amount of £700 for nervous shock. The employer appealed. The court reversed this part of the judgement. Innes CJ said:

> There is no authority for holding that the Roman-Dutch law allowed damages to be awarded for mental suffering unaccompanied by physical injury or illness in an action founded on negligence. It would be different under certain circumstances, in an *actio injuriarum* based upon the wilful attack upon or violation of the feelings of another. In such a case it may be possible to award compensation for the outrage to the feelings or the insult to the honour; but no solatium could be given for mere mental suffering caused by negligence.

Of course, Mrs Sherborne did indeed also suffer physical injury - she had a miscarriage and needed an operation. So it was conceivable that she would get damages. Her claim was not for mere emotional distress. The learned judge recognised this and continued:

> The question whether physical suffering or injury, resulting from mental or nervous shock can form the basis of damages in an action framed like the present, is not equally simple. ... The nervous shock, which is here claimed to have been the cause of the physical suffering, was not due to the imminence of danger to the plaintiff herself. It was not even caused by the sight of the accident; it was the result of the communication of the intelligence to her some time after the accident had happened. Neither the English law nor under our own could the effects of the shock so produced give ground for the action; the damages would be altogether too remote.

Thus the requirement that the person who claims damages for emotional shock had to face danger as well, in order to get compensation was born.

With the passing of time, so additional actions were launched. In *Sueltz v Bolttler* 1914 EDL 176 (EDL, 1914) the wife was denied recovery for shock caused by witnessing her husband being run over because she did not fear for her own safety. In *Hauman v Malmesbury Divisional Council* 1916 CPD 216 (*Hauman v Malmesbury Divisional Council*, 1916) a motorist whose health was impaired by shock of narrowly escaping injury from blasting activities was awarded damages. In *Mulder v South British Insurance Co Ltd* 1957 2 SA 444 W (*Mulder v South British Insurance Co Ltd*, 1957) a mother who saw her child killed by a bus was denied recovery because she did not fear for her own safety. In *Muzik v Canzone del Mare* 1980 3 SA 470 C (*Muzik v Canzone del Mare*, 1980) the plaintiff was denied recovery for anxiety resulting from food poisoning.

Matters came to a head in *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 A (*Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*, 1973). In this case while two brothers Deon (aged 11) and Werner (aged 6) were crossing a road when an accident occurred in which Werner was killed. Deon who was slightly ahead of his brother and suffered severe shock resulting in a medical condition which required medical treatment. The statutory insurer was sued for the cost of this medical treatment. This claim was dismissed by the court *a quo* on the ground that Deon did not suffer any physical injury. The appeal court reversed the decision reasoning that the nervous system was as much part of the body as any other part of the body and if this was injured compensation could follow.

Matters took a turn in *Clinton-Parker v Administrator, Transvaal*; *Dawkins v Administrator, Transvaal* 1996 2 SA 37 W (*Clinton-Parker v Administrator, Transvaal; Dawkins v Administrator, Transvaal*, 1996) a case

which arose out of the hospital negligently mixing up two babies shortly after birth. When this was discovered a couple of years later, the two mothers sued the hospital for damages. Clearly in this case, unlike previous cases, an accident was not involved, it is not clear that the mothers suffered any form of nervous shock or that they suffered a medical condition, and no-one was ever in any physical danger. The court nevertheless awarded the mothers damages. At the same time in *Collins v Administrator, Cape* 1995 4 SA 73 C (*Collins v Administrator, Cape*, 1995) parents whose child was severely injured in a hospital sued for the medical expenses and the emotional distress they suffered as a result of the injury to their child. The court found in favour of the parents with respect to the medical expenses but did not recognise the claim for their emotional distress. These two cases produced conflicting outcomes.[31]

In view of this development, producing conflicting decisions, it was clear that further actions would arise[32] and once again the matter was considered by the Supreme Court of Appeal in the case of *Barnard v Santam Bpk* 1999 1 SA 202 SCA (*Barnard v Santam Bpk*, 1999). In this case Mrs Barnard was telephonically advised of the death of her son as the consequence of a motor accident. She was not present at the scene of the accident and thus her life was not in danger. For these reasons the court *a quo* dismissed the claim. This was overturned on appeal. The court held that is was not necessary for the person to be present at the scene of the accident or that the plaintiff be in danger. The court also held that the term nervous shock was an outmoded and misleading term that lacked psychiatric content and that the only relevant question was whether the claimant had sustained a detectable psychiatric injury. Mere grief would not be adequate to found an action for compensation. The most commonly recognised form of psychiatric injury is Post Traumatic Stress Disorder (PTSD) and as a consequence of the Barnard case, PTSD became a common feature in the South African legal landscape. In *Road Accident Fund v Sauls* 2002 SA 55 SCA (*Road Accident Fund v Sauls*, 2002) Sauls watched her fiancé being knocked over by a truck. Her fiancé was not seriously injured, at all, but initially she thought he had been killed. She was at no time in any danger of injury herself but nevertheless claimed that as a result of this incident that she suffered from Post Traumatic Stress Disorder and consequently would never recover or accordingly work again. The court found in her favour.[33]

5.3.3.5 Dependant's action for loss of support

For ease of reference the person who caused the death of the breadwinner is called the tortfeasor and the person who is claiming is called the dependant and the deceased or injured party is the breadwinner. As pointed out above the person who injured another had to pay the loss of income and medical expenses. Now of course the injured person, while earning an income, had to pay a number of other persons, e.g. the receiver of revenue; the bank mortgage bond; stores' where food was purchased; children's education and so on. Do the persons who would have received an income from the breadwinner have a claim for the loss of income they suffer as a result of the injury or death of the breadwinner? Do all of these have a right of support. In the historical law, the answer is of course not. There is not even the slightest hint, in the historical law, that these other persons can now free-ride on the person who caused the injury. If the person who caused the injury paid the loss of income to the injured person then they all continue to receive amounts out of the income. Through the

31 Vivian (1996) 'Divided opinions - liability for psychological damage' Cover 8 (9) 13 (Vivian, 1996)

32 Barnard v Santam Bank Bpk (sic) 1997 4 SA 1032 T (*Barnard v Santam Bank Bpk (sic)*, 1997)

33 Vivian (2003) 'More about liability for psychiatric injury' Cover 15 (3) 30-31 (Vivian, 2003)

evolutionary judicial process the right of law was introduced and continues to expand. The question has attracted considerable comment and analysis.

What happens, however, if the injured person dies. Historically the position was exactly the same as if the person dies for any other reason. When a person dies, he no longer earns an income and his dependants must fend for themselves. That is why life insurance was invented. Since the dead breadwinner can no longer earn an income, the person who killed him has no further obligation to support him or his family. An exception developed for dependants of the breadwinner.[34] Thus although in our historical Roman law no-such thing as a dependant's action for loss of support existed and indeed no logical case can be made for such an action, today it is well established. Recognising a dependant's right does however create a legion of conceptual anomalies. To mention but a few.

Firstly, it is only the dependant who has a claim against the tortfeasor for the death of the breadwinner. The breadwinner while alive has many obligations, not only to his dependants. Other persons such as the receiver of revenue, the bank for outstanding mortgage payments and others do not have a claim, yet.[35] If logically one has a claim why not others? A second anomaly is that the dependant has a direct action against the tortfeasor. Now this is extraordinary because the tortfeasor did not injure the dependant - he injured (in fact killed) the deceased. So at most, it should be the estate suing tortfeasor and not the dependant. The dependant has at most suffered a pure economic or financial loss (discussed below) which did not form part of the Roman-Dutch common law and was only recently introduced into our modern case 'law'. A third anomaly is if the wife has a right of support why can she not protect that right? So for example if her husband, as part of his mid-life crisis decides to take up a dangerous sport such as mountaineering, why can she not obtain an interdict to restrain him on the basis that he is endangering her right to support. The truth of the matter is of course he has an obligation to support her - she has no independent right of support. A fourth anomaly is that the tortfeasor acquires a greater obligation than the breadwinner. So for example the breadwinner my in terms of the common-law disinherit his wife.[36] He dies she is left penniless. Since she cannot get any support from the breadwinner's estate she can sue the tortfeasor. He then becomes liable to support the wife the breadwinner decided not to support! A fifth anomaly is that it transfers the guilt of the guilty onto the innocent. Take the following example. A breadwinner gets paralytically drunk. He drives his car at high speed on the wrong side of the road and collides with the tortfeasor. The court concludes that the drunk breadwinner is 99% negligent and as such responsible for the accident and the tortfeasor is 1% negligent - the courts can always find the 1%. The wife of the drunk breadwinner sues the tortfeasor and the court says that the tortfeasor cannot apportion the claim against the wife's claim since with regard to the tortfeasor she is totally innocent. The tortfeasor then becomes liable for a hundred percent of the claim.

Origins of the doctrine of dependant's action for loss of support

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34 For a discussion of the dependants action for loss of support see Klopper (2007) 'The widow's portion' THRHR 70(3) 440 (Klopper, 2007)

35 *De Vos v SA Eagle Versekeringsmpy* 1985 3 SA 447 A (*De Vos v SA Eagle Versekeringsmpy*, 1985). For a rather remote claim (one which would become common) see De Koch, Robert J 'Life or life cover' Newsletter 64, December 2006, where the loss of benefits to a life policy was claimed arguing that death prevented payment of the premium (R. J. De Koch, 2006).

36 The common-law position was of course changed with the promulgation of the Maintenance of Surviving Spouse Act 27 of 1990.

There is no doubt in England where the dependant's action for loss of support came from. It was introduced into law by legislation, the Fatal Accidents Act of 1846.[37] This legislation was followed in other parts of the world.[38] Clearly after a century or so a body of a case law builds up and the courts of other countries, including South Africa accept the right to be part of the 'common law', these courts when faced with a case of a dependant claiming a right to loss of support arrive at the same conclusion as the United Kingdom courts - dependants have a right to compensation. The statutory origins are forgotten. This process is well-known. Insurable interest was introduced into insurance law by the Life Assurance Act of 1774. It is applied in case after case around the world. When last has even a United Kingdom court, when dealing with insurable interest specifically referred to the legislation? The statutory origins of the right explains the anomalous nature of the right; that dependants and no-one else have the right. It was only conferred on dependants. If the dependant's action did not derive from the Roman common-law where did it come from? The doctrine in South Africa has its origins in court decisions.[39] Some writers have suggested that it has the origins in the Dutch law[40] but reading any of the earlier cases will show that the real life of the dependant's action came from the courts[41] (and not the Dutch law).

Dependant's action for loss of support where the breadwinner is injured but not killed

It can thus be accepted that where the breadwinner is killed dependants have a right of action. What however is the position where the breadwinner is only injured and not killed? The current position is that the dependant has no right to compensation but there is a view developing that indeed the dependants should have a right to compensation even if the breadwinner is not killed but only injured.[42] One genesis for conclusion that the dependant has a direct claim against the tortfeasor was arrived at by what must surely be the most extraordinary piece of gobbledegook being passed as logic in the history of jurisprudence. It goes like this. The deceased has on obligation to support the dependant, therefore the dependant has a right of support. By killing the breadwinner the tortfeasor has interfered with this right of support. Therefore the tortfeasor is liable because he interfered with the right of support not because he killed the breadwinner! This piece of logic is similar to: a cat has fur; a dog has fur, therefore a cat is a dog. Watch what happens when we apply the same logic to the receiver of revenue. The breadwinner has an obligation to pay his taxes. The receiver of revenue has the right to collect the taxes. Therefore when the tortfeasor kills the breadwinner he interferes with the receiver of revenue's right to collect taxes. Therefore the receiver of revenue has a direct right to claim his loss of taxes

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37 Lord Campbell's Act

38 Australia, New Zealand, Canada and America

39 *Jameson's Minors v CSAR* 1908 TS 575 (*Jameson's Minors v CSAR*, 1908); *Union Government v Lee* 1927 AD 202 (*Union Government v Lee*, 1927); *Santam v Fondo* 1960 2 SA 467 A (*Santam v Fondo*, 1960); *Legal Insurance Co Ltd v Boets* 1963 1 SA 608 A (*Legal Insurance Co Ltd v Boets*, 1963); *Munarin v Peri-Urban Areas Health Board* 1965 1 SA 545 W (*Munarin v Peri-Urban Areas Health Board*, 1965); *Evins v Shield Insurance Co Ltd* 1980 2 SA 814 A (*Evins v Shield Insurance Co Ltd*, 1980); *Santam Insurance Co Ltd v Fourie* 1997 1 SA 611 A (*Santam Insurance Co Ltd v Fourie*, 1997); *Victor v Constantia Insurance Co Ltd* 1985 1 SA 118 C (*Victor v Constantia Insurance Co Ltd*, 1985); *Minister of Police, Transkei v Xatula* 1994 2 SA 680 (*Minister of Police, Transkei v Xatula*, 1994).

40 Voet 9.2, 11; Grotius 3,32,2; See *Jamison's Minors v Central South African Railways* 1908 TS 575 at 583-4 (*Jamison's Minors v Central South African Railways*, 1908)

41 This point was made by the *Appellate Division in Legal Insurance Co Ltd v Botes* 1963 1 SA 608 A at 614D (*Appellate Division in Legal Insurance Co Ltd v Botes*, 1963) '[t]his remedy has continued its evolution in South Africa - particularly during this century - through judicial pronouncements, including judgments of this court, and it has kept abreast of the times in regard to such matters as benefits from insurance policies, as regards to maintenance as they would have been if the deceased had not been killed ...'

42 *Abbott v Bergman* 1922 AD 53 (*Abbott v Bergman*, 1922); *De Vaal NO v Messing* 1938 TPD 34 (*De Vaal NO v Messing*, 1938)

form the tortfeasor. It is the same logic which leads to the same nonsense conclusion. One cannot create additional or different rights by simply restating an obligation as a right. The dependant's right to support can only exist as long as the breadwinner has an obligation to support. Thus when the receiver comes for his missing taxes the answer is 'sorry the taxpayer is dead there are two certainties - taxes and death and thankfully after death there are no taxes.'

Recent cases

With this background the recent cases are examined in chronological order.

In *Ongevallekommissaris v Santam Bpk* 1991 1 SA 251 W (*Ongevallekommissaris v Santam Bpk*, 1991) the breadwinner was killed but the surviving spouse remarried. Now traditionally if the widow remarries she loses her right of support. In this case it was argued that the man she remarried may not be as wealthy as the man who died and thus she is entitled to the difference. The court agreed. One wonders if the court will now apply this rule to divorces. If a woman divorces and remarries. Will the first husband now have to pay the difference and if she divorces the second husband do both husbands continue to support her and if the one dies does the other one pick up the full burden? Interesting case.

In *Van Wyk v Santam Bpk* 1998 4 SA 731 C (*Van Wyk v Santam Bpk*, 1998) the plaintiff was injured in a motor accident but was already in receipt of a state disability pension.[43] When she sued the Road Accident fund (via Santam), Santam sought to subtract the state pension from the amounts due to her from the motor accident fund. The court concluded that since both payments came from the state she could not receive double compensation and the state pension had to be subtracted.

In *Santam v Gerdes* 1999 1 SA 693 SCA (*Santam v Gerdes*, 1999) the breadwinner was domiciled in Germany but was killed in a motor accident working in South Africa. His wife was entitled to compensation in Germany, something akin to our worker's compensation. Nevertheless she sued the Road Accident Fund (via Santam) for her loss of support. Santam wished to subtract the income she will receive from the German worker's compensation fund. The court disallowed the reduction - the widow is thus compensated from two sources - South Africa and Germany.

In *Santam Bkp v Henery* 1999 3 SA 421 SCA (*Santam Bkp v Henery*, 1999) the breadwinner was divorced but paying maintenance to his former wife. She sued for the loss of maintenance she would suffer because of the death of her former husband. As indicated, traditionally, it is only the wife who as a claim for loss of support. The court of appeal made legal history when it ruled that from now on divorced women have a right to claim the maintenance they would have been able to claim had their ex-husband not been killed.

In *Lambrakis v Santam Ltd* 2000 3 SA 1098 W (*Lambrakis v Santam Ltd*, 2000) the breadwinner was killed in a motor accident on the 27 February 1987. The case came to court 17th March 1999 - 12 years later. It also took ten years and ten months to wind up his estate. He had three children by his former wife who upon his death sued the third party insurer for R1 076 404 in respect of the one and R1 379 222 in respect of the other.[44] He was living with another woman at the time of his death and had a fourth child by her. The breadwinner

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43 Granted in terms of the Social Assistance Act 59 of 1992

44 The one child was born shortly before his death and after the divorce.

died intestate and accordingly his two children inherited his entire estate. There were adequate assets in the estate to support the two children and indeed over the ten years that it took before the matter came to court they had been supported. The court concluded that they had not discharged the onus of proving that they were entitled to recover any damages from the statutory third party insurer.

5.3.4 Pure financial or economic losses

As seen above in order for liability arise it is required that the defendant commit an act which causes harm. When a plaintiff suffers a pure financial loss, that is a loss not as a consequence of physical harm, almost always the act is a negligent misstatement. Cases which are based on other grounds should be read carefully and critically.

5.3.4.1 History of liability for financial losses - United Kingdom

Under the influence of the activist judge Lord Denning liability for an economic loss was recognised. It was subsequently confirmed by the House of Lords in the case of *Anns v Merton London Borough Council* 1978 AC 728 HL (*Anns v Merton London Borough Council*, 1978). The missing requirement for the rule of law was in England as in South Africa, the law itself. As a point of law, under what circumstances could a person be liable for the economic loss someone else suffered. After 184 cases the House of Lords was no closer to answering this question than when it introduced liability for economic losses in 1978. In the case of *Murphy v Brentwood District Council* 1990 2 All ER 908 HL (*Murphy v Brentwood District Council*, 1990) the judge said the House of Lords cannot permit the law of England to remain in the mess that it had become.[45] It then denied any general doctrine which would recognise liability for economic loss. The South African court had not, as yet, followed the wisdom of the English judges.

5.3.4.2 History of liability for financial losses - South Africa

A more recent development of liability for pure economic loss; a claim where there is no physical damage to property or injury to people. The only losses are those which are purely financial in nature or as it used to be said to be a mere pecuniary loss?[46] Liability for this form of damage was unknown in the Roman and Roman-Dutch common law.[47] The history of the introduction of this type of loss, in South Africa, is now traced.

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45 Vivian (1992) 'The House of Lords crys halt - at last' Cover (Vivian, 1992)

46 For a discussion of this matter see D Marshall 'Liability for pure economic loss negligently caused: French and English law compared', *International and Comparative Law Quarterly* 24 (4) 748-790 (Marshall, 1975); JA Smillie 'Negligence and economic loss', *University of Toronto Law Journal* 1982 32 (2) 231-280 (Smillie, 1982); C Gosnell 'English Courts: Restoration of a Common Law of Pure Economic Loss' *University of Toronto Law Journal* 50 (2) 135-171 (Gosnell, 2000).

47 There are some writers who argue that liability for pure economic losses may have existed, particularly in the Dutch law. The debate is now only of academic interest, since when introduced by the courts it was done so by what the court called caesarean section. The court accepted that in the law as it then stood, there was no basis in law for the action. Nor since that date despite hundreds of decisions has a workable basis in law been found on which to base liability for pure economic loss, either in historical law or the subsequent judgments. If it existed in history, history has not delivered up the principle on which the law rests. For a discussion on the subject consult Hutchison, D (1996) 'Aquilian Liability II (Twentieth Century)' *Southern Cross Civil Law and the Common Law of South Africa* Juta & Co 1996 at 595-637 (Hutchison, 1996)

The first case where the damage was purely of an economic nature was that of *Cape of Good Hope Bank v Fischer* 1886 4 SC 368 (*Cape of Good Hope Bank v Fischer*, 1886). In this case the Old Mutual lent money to a Mr Hudson. The Old Mutual protected itself against the insolvency of the debtor by registering a mortgage bond against the property. After a while Mr Hudson sold the property to another Mr Hudson. The mortgage bond was not cancelled and Mr Hudson was provided with a copy of the title deed to the property. This copy did not indicate the existence of a mortgage bond. The second Mr Hudson then borrowed money and became indebted to the Cape of Good Hope Bank. The Cape of Good Hope Bank registered a mortgage bond and on the strength of the blank title deed, believed it had a first mortgage bond. Since the Old Mutual already had a mortgage bond registered against the property the Cape of Good Hope Bank had only a second mortgage bond. The second Mr Hudson defaulted, and the Cape of Good Hope Bank foreclosed. To its great surprise it could not recover since the bulk of the amount went to the Old Mutual. It decided to institute an action against Mr Fischer, the registrar. The action failed because the Cape of Good Hope Bank could not prove Mr Fischer had caused the loss. Nevertheless this case created the impression that the *Lex Aquilia* as extended was broad enough to cover claims for pure economic losses, particularly in the comment by De Villiers CJ that the *Aquilian* law:

> had received an extension by analogy to an extent never permitted under the Roman law. The action *in factum* was no longer confined to cases of damage done to corporeal property, but was extended to every kind of loss sustained by a person tin consequence of the wrongful acts of another.

This statement is however incorrect. The Aquilian law had never been extended to cover pure economic losses. The court was in fact busy attempting to extend the law by pretending that it was making a decision in terms of the existing law.[48] Van Aswegen (1996,566)[49] comes to the following conclusion regarding the above statement by the court:

> Although the ... statement expressed a general truth about the [subsequent] development of the *actio legis Aquiliae* in South African law, the sentiments articulated in the first case [*Cape of Good Hope Bank v Fischer*] did not accurately reflect the development of South African law at that stage. While it is true that the area of application of the *actio legis Aquiliae* has been extended significantly through the years, especially in regard to liability for omissions, negligent misrepresentations, and pure economic loss, this development came at a much later stage. The statement in the Fischer case can thus be regarded at best as a somewhat optimistic prediction of the future development of the action in South African law.

Nothing much more happened in South Africa[50] until the case of *Perlman v Zoutendyk 1934* CPD 151 (*Perlman v Zoutendyk*, 1934). In this case money was one again lent against security of a fixed property. The valuation on the fixed property was determined by the defendant, Zoutendyk a sworn appraiser. Perlaman

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48 In the subsequent South African case of *Liquidator of Cape Central Railways v Nöthling* 1890 8 SC 25 (*Liquidator of Cape Central Railways v Nöthling*, 1890) the same judge expressed the matter more clearly when he said, 'The provisions of the *Aquilian* law have, by judicial interpretation, been extended to causes not falling strictly within the terms of the law.' Liability for economic losses are not covered by the strict Roman-Dutch law but have been introduced because of judicial policy. Decades later this process would be called judicial activism.

49 Van Aswegen, A (1996) 'Aquilian Liability I (Nineteenth Century)' *Southern Cross Civil Law and the Common Law in South Africa* Juta & Co Ltd 1996 at 559-993 (Van Aswegen, 1996).

50 South African developments were influenced by the English cases of *Derry v Peek* 1889 14 App Cas 337 HL (*Derry v Peek*, 1889) and *Le Lievre and Dennes v Gould* 1893 1 QB 491 CA (*Le Lievre and Dennes v Gould*, 1893).

advanced a considerable sum of money to the owner of the property based on the valuation certificate. The borrower defaulted, and Perlman tried to recover his loss but then discovered that the property had been grossly overvalued and the security proved to be worthless. An action was instituted by Perlman against Zoutendy who excepted on the basis that the action was bad in law as the *Lex Aquilia* only recognised liability for material damage not for a mere economic loss. Mr Justice Watermeyer[51] (Sutton J concurring) ruled that *Lex Aquilia* as extended does indeed cover liability for economic losses. He said:

> Roman Dutch Law approaches a new problem in the continental rather than the English way, because in general all damaged caused unjustifiably (*injuria*) is actionable, whether caused intentionally (*dolo*) or by negligence (*culpa*).

At this point in history Professor Robin McKerron made his appearance.[52] He pointed out that our Roman-Dutch law does nothing of the sort. Because of the strenuous objection raised by Professor McKerron, only one[53] further serious attempt was made during his lifetime to recognise liability for pure economic loss.[54] Professor McKerron never changed his mind that the general doctrine of delict did extend to cover pure economic losses. Shortly before his death he commented as follows:

> It is probably no exaggeration to say that the leading heresy in the law of delict is the view expressed by Watermeyer J in *Perlman v Zoutendyk*[55]SA (*Perlman v Zoutendyk*, 1934); *Bantoetrust v Ross en Jacobz* 1977 3 SA 184 T (*Bantoetrust v Ross en Jacobz*, 1977); *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 3 SA 824 A (*Administrateur, Natal v Trust Bank van Afrika Bpk*, 1979) hopefully with the passing of time the Court would be able to work out what the law should be. What he did do however, was promise that the Court would keep this form of liability under strict control. He kept his promise as long as he was Chief Justice.

It can thus be accepted that in the modern case 'law', liability is no longer confined to physical damage and that liability for economic loss does, indeed exist, but we are no closer to knowing under what circumstances liability should be imposed than we were thirty years ago when the Court recognised this form of liability by Caesarean section. If in the opinion of the Court liability should exist, then such liability does exist. This aspect is thus no longer a point of law, or fact, but a point of opinion.

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51 This decision should not have come as a surprise since Mr Justice Watermeyer had been heading towards the direction of the generalised statement of the *Lex Aquilia* in previous cases of *Bredell v Pienaar* 1924 CPD 203 at 213 (*Bredell v Pienaar*, 1924) and *Van Zyl v African Theatres Ltd* 1931 CPD 61 at 64 et seq (*Van Zyl v African Theatres Ltd*, 1931).

52 Professor Robin McKerron, Vinerian scholar was the first full-time professor of law at the University of the Witwatersrand. The first edition of his book on delict McKerron, RG (1933) Law of Delicts in South Africa (Robin McKerron, 1933) appeared in 1933. This book became the leading textbook in delict until his death by which time it had run to its 7th edition.

53 *Herschel v Mrupe* 1954 3 SA 464 (*Herschel v Mrupe*, 1954). Other cases were taken to court such as *Combrinck Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd* 1972 4 SA 185 T (*Combrinck Chiropraktiese Kliniek (Edms) Bpk v Datsun Motor Vehicle Distributors (Pty) Ltd*, 1972) where Myburgh J (Human J concurring) expressly rejected the idea that *Aquilian* liability extended to pure economic losses.

54 In *Herschel v Mrupe* 1954 3 SA 464 A (*Herschel v Mrupe*, 1954) five judges of appeal delivered independent judgments and it has not been possible to reconcile these judgments. It is generally conceded that this case did not take the matter any further. Hutchison (1996: 617) for example says of this case 'An opportunity to dispel the uncertainty ... was unfortunately squandered: each of the five judges ... expressed a different view on the matter, making it all but impossible to extract a ratio decidendi from the case'

55 McKerron, RG (1973) 'Liability for mere pecuniary loss is an action under the *Lex Acquilia*' *South African Law Journal* 1973 90 1-4 (RG McKerron, 1973)

5.3.4.3 Prospective 'losses'

If it is now possible to claim compensation for a financial loss, then why not also for future profits not made? It was not long before the courts began to recognise claims from persons who alleged that they could have made substantial profits but for the acts or omissions of others and those others are liable for the profits thus not made. Thus in *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* (*Transnet Ltd v Sechaba Photoscan (Pty) Ltd*, 2004), Transnet was successfully sued for R60m on the allegation that if the correct tender proceedings were followed, the plaintiff would have made R60m. Since the procedures were not followed, the court awarded the R60m.[56]

5.4 Fault

5.4.1 Fault in Roman-law a defence

The changes which have taken place with regard to the concept of fault or blameworthiness is more complex than with the other elements. The role of fault in the Roman and Roman-Dutch Law must first be understood then the position in modern case law becomes easier to understand. Take the following example from Roman law.[57] Where a man cuts off a branch of a tree and this branch fell on somebody passing by, the person who cut the branch off could be liable. He was liable because he cut the branch which fell and caused in injury if he could foresee that somebody would be injured at the point of time that he cut the branch. To avoid liability, he would have to cry out a warning to passers-by.

> If a pruner threw down a branch from a tree and killed a slave passing underneath (the same applies to a man working on a scaffold), he is liable only if it falls down in a public place and he failed to shout a warning so that the accident could be avoided. But Mucius says that even if the accident occurred in a private place an action can be brought if his conduct is blameworthy - and he thinks there is fault when what could have been foreseen by a diligent man was not foreseen, ...

From this example one can see that two acts are involved, one the act of cutting the branch and two, the act of shouting a warning. Now no obligation to perform the second act, shouting the warning, could arise, unless the first act, that of cutting the branch, arose. It is the first act that causes the injury and the second act which prevents the injury. No question of liability for the prevention can arise without the act which could cause the injury. If the man cuts the branch and does not give a warning then he is at fault. So one can conclude that in the Roman Law fault was a defence which limited liability for positive conduct. If by his positive conduct he caused injury to someone, he could still avoid liability if a reasonable man in his position would not have foreseen the harm and if he did, he would not have taken steps to prevent the harm.

5.4.2 Test for fault

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56 Vivian (2008) 'Liability for prospective losses' *Cover* 20(10) 33-34 (Vivian, 2008).

57 Digest 9.2.31

The most well known general test for fault was laid down by Holmes JA in *Kruger v Coetzee* 1966 2 SA 428 A 430 (*Kruger v Coetzee*, 1966) where he said:

(a) a *diligens paterfamilias* in the position of the defendant -
    (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
    (ii) would take reasonable steps to guard against such occurrence; and
(b) the defendant failed to take such steps.

This test is modified for example where a professional person is involved. Instead of the reasonable person, it is the reasonable person in the position of the professional concerned.

5.4.3 Fault in modern case - law

What modern case 'law' has done is introduce liability for the second act only. The nature of fault is dramatically changed in a subtle manner from a defence to a cause of action. The same word, fault is used, but its meaning is completely different. A person can therefore be liable purely for not taking steps to prevent injuries even if the person did not in any way whatsoever cause the injury. A few cases will illustrate the point.

In *Langley Fox Building Partnership (Pty) Ltd v De Valence* 1991 1 SA 1 A (*Langley Fox Building Partnership (Pty) Ltd v De Valence*, 1991) a subcontractor had erected a scaffold plank across a public walkway. Mrs De Valence claimed to have walked into the scaffold plank and suffered permanent brain damage. It took her two years to notify the contractor. As a consequence of her injuries, she claimed R2 million as damages. Clearly the person who committed the wrongful act (if any) was the subcontractor who erected the scaffolding. The main contractor was Langley Fox and it is known that it had R2 million public liability insurance. Langley Fox did not commit any act, the Court nevertheless ruled that Langley Fox was liable for not taking steps to prevent the accident. Now what steps should Langley Fox take? Any steps the Court believes it should take. So for example, the lawyers appearing for Mrs De Valence suggested they should have put up warning signs. The court, however, disagreed and suggested they should have put up barriers. It should be clear that with this approach an infinite variety of acts can be suggested. It then becomes a matter of opinion not fact as to what the person should have done and as to whether this caused the damage or not. In the meanwhile, the person who actually causes the damage escapes liability.

In the case of *Butters v Cape Town Municipality* 1993 3 SA 521 C (*Butters v Cape Town Municipality*, 1993) a man who was dining at a restaurant went to his car to fetch some alcoholic beverages. Having retrieved his alcohol he decided to return to the restaurant doing a tight rope walk act on the ledge of a deep concrete lined sloot. He fell in. He sued the City Council on the basis they should have put a fence around the sloot to stop him from falling in. He won his case.

It is clear with the modern approach to blameworthiness, the Court can come to any opinion that any action is required and if performed would have avoided the accident. The law in this regard is no longer a matter of fact and law.

5.5 Cause

Causation features in many facets of law not only the law of delict. Historically causation meant the act had to be the proximate cause of the harm. There could be no liability for remote causes or as is said cause of causes. The position was expressed as follows by Lord Bacon[58]:

> It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it [the law] contenteth itself with the immediate cause, and judgeth of act by that, without looking to the any further degree.[59]

Or, to the cause of causes there is no end, the law thus contends itself exclusively with the proximate cause. The legal maxim is *in jure non remota causa sed proxima spectatur*, loosely translated, in law it is not the remote cause but the cause observed by the spectator; the proximate cause.[60]

In Roman Law cause meant that the immediate positive act of the plaintiff had to cause tangible harm to property or injury. Or as stated above the act had to cause the prohibited consequence. In the example above, the act of shooting on the part of the robber caused the death of the teller. The notion that the bystander by not shooting the robber caused the death of the teller, and he should thus be accountable, would be thoroughly laughable to the Roman lawyers. It is not the cause of the harm, it is but a remote cause of causes. Yet this is exactly what modern case law has done. In one case, the police escorted a man into the township. The police came under fire, retreated, the man was killed and the court concluded that the police had "caused" the man's death by retreating. In the Burger case, the court concluded that the driver had "caused" the accident by not blowing his hooter to warn a car on the wrong side of the road to return to its correct side.

The American products liability crisis indicates the problem of causation. Dow Corning was successfully sued for billions of dollars by women who had silicone gel breast implants. Did these implants however cause them any harm? It is commonly believed that the causal connection has not been proven and that the so-called connection is simply 'junk science'.[61] Causation has, at best become a matter of judicial opinion but more realistically a matter of imagination, far removed from the original requirement.

6 SPECIFIC LIABILITY DOCTRINES

There are a number of legal doctrines which are important besides the five elements.

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58 Francis Bacon (1597) *The Elements of the Common Law of England aka Maxims of the Law* (Bacon, 1597)

59 Quoted with approval in *The Cape of Good Hope Bank v Fischer* SC 1886 at 380 (*The Cape of Good Hope Bank v Fischer*, 1886).

60 This translation is in line with one of the more famous works of Francis Bacon (1620), the *Novum Organum I* (Bacon, 1620) in which he argued truth is the exclude product of observation, to logic. This work ushered in the scientific age.

61 *Daubert v Marion Merrell Dow* (*Daubert v Marion Merrell Dow*, 1993).

6.1 Vicarious liability

6.1.1 Prohibited in the common law

Vicarious liability exists when one person is held liable for the acts of another. Historically, vicarious liability was virtually unknown in common law. It was strictly prohibited in ancient societies.[62]

> The soul who sins is the soul who will die. The son will not die for the father's sin; he will surely live. Yet you may ask, 'Why does the son not share the guilt of the father?' Since the son has done what is just and right and has been careful to keep my decrees, he will surely live. The soul who sins is the one who will die. The son will not share the guilt of the father, nor will the father share the guilt of the son. The righteousness of the righteous man will be credited to him, and the wickedness of the wicked will be charged against him.

No satisfactory reason has ever been given as to why one person should be held liable for the wrongful acts of another. A recent development to the law of delict is the dramatic extension of vicarious liability. The common-law position is supposed to be maintained in criminal law and where criminal vicarious liability exists it is supposed to be imposed by statute, but a movement by the courts to impose vicarious criminal liability can be detected.

6.1.2 Requirements for vicarious liability

Initially vicarious liability was only imposed on an employer for the delicts of his servant or employee. The law may define the circumstances where liability is imposed. One of the first circumstances for which vicarious liability was imposed is in the case of master for the delicts of his servant or as it is succinctly usually stated, 'The standard test for vicarious liability is, of course, whether the delict in question was committed by an employee while acting in the course and scope of his employment. The inquiry is frequently said to be whether at the time of the employee was about the affairs or business or doing the work of the employer.'[63]

From this it can be seen that for vicarious liability to attach to the master the following must be present:

- an employee-employer relationship;
- the servant must be delictually liable;
- the servant must be about his master's business or the act committed by the servant must be done in the course of his employment.

When an employee causes harm for which his employer becomes vicariously liable a number of questions can arise. These include can the employer recover the damages from the employee and closely related to this can the insurer exercising subrogated rights recover from the employee? In *Richard Ellis South Africa (Pty) Ltd v Miller* 1990 1 SA 453 T (*Richard Ellis South Africa (Pty) Ltd v Miller*, 1990) the court ruled that where the

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62 Ezekiel 18 v 20

63 *Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport* 2000 4 SA 21 SCA (*Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport*, 2000)

employer was insured in terms of a professional liability policy which waived subrogation rights against employees and was indemnified by the insurer that an implied term existed in the contract of employment that the employer would not recover from the employee. Since the employer did not have any rights against the employee, neither could the insurer have any rights in terms of subrogation.

6.1.3 Cases

A number of cases illustrate the development of vicarious liability.

Colonial Mutual v MacDonald: Principal-Agent

In *Colonial Mutual v MacDonald* (*Colonial Mutual v MacDonald*, 1931), Dr MacDonald was a passenger in a motor car driven by Mr WE Brittain who was injured through the negligent driving of Brittain who was not an employee of Colonial Mutual but an independent agent. Dr MacDonald sued Colonial Mutual for the injuries sustained. The action could only succeed if Colonial Mutual was vicariously liable for the delicts of Brittain. Colonial Mutual defended the action denying they are not vicariously liable for the act or the acts of Brittain, an independent agent (contractor).

The appeal court dismissed the claim emphasising that the principal is not liable for the acts of the contractor, sub-contractor or the servant of the contractor or sub-contractor. In this case the court found that no employee-employer relationship existed, needed to establish vicarious liability. In the Colonial Mutual case the action had to fail because there was no employer - employee, relationship between Mr Brittain and Colonial Mutual.

Feldman v Mall - employer and employee

The next case was that of *Feldman v Mall* 1945 AD 733(*Feldman v Mall*, 1945). In the Feldman case an employee-driver deviated from his route and went on a drinking-spree. After drinking for a number of hours he decided to return to his place of employment. On the way back he was involved in an accident. The employer was sued as a result of the accident.

The issue is: was the employee about his master's business?

It is clear that to drive to a place of drinking is not to be about the master's business, nor is drinking in the course of business of the master. If the accident happened on the way to the drinking session, there is little doubt that the employer would not be liable as the law stood at that time. However, the court has broadened the test for vicarious liability. Two of the judges made it clear that since the claim involved a motor accident and this type of liability was insured, no undue hardship would be created if vicarious liability was extended. The hardship which would have existed, had the extended form of vicarious liability been imposed at a previous age - in the days before insurance had developed - no longer existed. The master was held vicariously liable for the accident and the law was extended.

More modern developments - risk as the basis vicarious liability

The courts have been anxious to extend vicarious liability beyond the traditional limits. A foray into this was the attempted introduction and then abandonment of risk liability. To understand the attempted introduction the facts of the famous *Minister of Police v Ewels* (*Minister of Police v Ewels*, 1975) should be recalled; Mr

Ewels was assaulted by the off-duty police sergeant Barnard and eventually the court managed to hold the employer, the minister of police, liable by finding some on-duty police who should have prevented the assault. But in practice it is not always possible to find some on-duty employee around as the basis of holding the employer liable. This problem can be illustrated by the case of *Minister of Police v Rabie* 1986 1 SA 117 A. (*Minister of Police v Rabie*, 1986)[64]

In this case Van der Westhuizen, a motor mechanic, was employed by the SA Police. In order to gain access to a party from which he had been barred, he beat up and arrested an innocent person. He had hoped that his actions would impress the people at the party. He did not succeed in being re-admitted. He was clearly not about his master's business.

Clearly in this case the wrongful act of the off-duty motor mechanic had nothing to do with his employer. The facts of the case fall completely outside the grounds for vicarious liability, as agreed by all the judges of appeal. To quote Jansen JA, who delivered the majority judgement:

> However, it is contended by the appellant that Van der Westhuizen at no stage acted in terms of the Police Act, that his conduct was unrelated to his employment and that in reality he was engaged upon a private and personal action that had nothing to do with police work, but flowed from malice and the furthering of his own interests. In view of the analysis by van Heerden JA, I am prepared to accept in favour of the appellant, that on the stated case and the evidence of the respondent the probabilities are that Van der Westhuizen, in committing the delict in question, was totally self-serving and *mala fide*, and that he knew from the very beginning that the respondent was innocent and that there were no grounds for using his powers as a policeman.

One would have thought that that would have disposed of the case. Van der Westhuizen was not acting in the course of his employment. The function of the police is to prevent crime. Thus it is inconceivable that when Van der Westhuizen was doing the very opposite, it could be construed that he was about his master's business. The case should have been dismissed in accordance with the decision made by the dissenting judge.

The court however, created a new test for vicarious liability called a risk test. According to this new test, the Minister of Police (and hence the taxpayer) was liable. Many commentators pointed out that it is not at all clear what the ambit of the risk test is. It is not surprisingly that the court itself later rejected risk liability.

More recent cases

In *Minister of Safety & Security v Jordaan t/a Andre Jordaan Transport* 2000 4 SA 21 SCA (*Minister of Safety and Security v Jordaan t/a Andre Jordaan Transport*, 2000) Detective Sergeant Madden was killed in a motor accident owned by the government causing loss to Jordaan. The government denied that it was vicariously liable for the acts of Sergeant Madden on the basis that he was not about its business at the time of the accident and the court found on the facts that Madden was indeed about police business.

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64 This case attracted considerable comment. (Vivian & Thompson, 1987) concluded the doctrine was unworkable. Van der Walt (1988: 4) supported the judgment. Martin (1989: 273) concluded that the decision to base liability of the State on the creation of risk was unfortunate because no indication of the limitation of liability was given by the court. Further discussion can be found in Stranex (1986: 190); Dendy (1987: 82); Dendy (1986); Otto (1986: 177).

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INSURANCE LAW

Contents

1 INDEMNITY

1.1 Moral hazard and indemnity

Insurance creates a moral hazard problem, i.e. when someone purchases insurance that may alter that person's behaviour in a negative manner, so as to increase the likelihood of the insured event occurring and thus the cost. Thus for example an insured person may become careless in looking after or protecting the insured property taking the view that if the insured loss occurred, the insurer will pay the loss. Even worse the insured person may deliberately bring about the insured event to obtain the insurance moneys. Many of insurance law principles mitigate against moral hazard i.e. it reduces the moral hazard risk. Indemnity is such a principle which ensures the insured can never be put in a better position than he was before the loss, without insurance. Thus if the insured can only receive the value of the loss or even less there is no incentive for the insured to bring about the loss. The insured is not supposed to benefit from the loss.

1.2 Indemnity - fundamental principle of insurance law

The principle of indemnity is one of the most, probably the most fundamental principle of insurance law as stated in at *Casetllian v Preston* QBD 1883 11 CA 388:[1] (*Castellain v Preston*, 1883)

> The very foundation, in my opinion, of every rule which has ever been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy (and that equally applies to accident policies) is a contract of indemnity only, and that this contract means that the assured, in a case of loss against which the policy has been made, shall be fully indemnified, but shall never be more than indemnified. That is the fundamental principle of insurance and if ever a proposition is brought forward which is at variance with it, that is to say, which will give the assured more than a full indemnity, that proposition must certainly be wrong.

In contracts of indemnity insurance the insured is entitled to recover the actual commercial value of what he has lost through the occurrence of the event insured against and no more.[2] Many of the other legal doctrines operate to reinforce the principle of indemnity including subrogation, contribution, average, betterment, salvage and is the basis used in the determination of the value of the loss. Subrogation for example prevents the insured from being doubly indemnified; the insured cannot be indemnified by the third party and the insurer. Average ensures that the insured receives only the extent of his own loss and if underinsured carries the uninsured portion. Salvage ensures that if the insured is indemnified, he cannot retain the salvage that goes to the insurer who has indemnified the insured. Contribution prevents the insured from being doubly insured and thus an insurer who has paid the claim can claim against the other insurer, instead of the insured having two claims.

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1 Earlier cases include V*ance v Foster* 1841 Ir Cir Rep.

2 Davis (1993, 247), *Nafte v Atlas Assurance Co* 1924 WLD 239.

Examples of indemnity insurance are insurance against damage (including the consequences of damage) to property and insurance against legal liability claims. These include insurance policies such as the fire and natural perils policy, motor policies, plate glass, marine insurance, public liability, etc.

1.3 Indemnity and policy wordings

Insurance contracts can be divided into indemnity and non-indemnity contracts. Generally the operative clause of the property and liability policies indicates that the policy is one of indemnity. For example the opening preamble to the Multi-Mark III multi-peril policy reads:

> In consideration of the payment of the premium by or on behalf of the insured, the company ... agrees to *indemnify* or compensate the insured ...

(Emphasis added)

1.4 Non-indemnity insurance

It seems a bit odd to say that the fundamental principle of insurance is indemnity and then to state non-indemnity policies also exist. With non-indemnity policies, it is usually not possible to express the loss in monetary terms. A person, thus may insure his own life for any amount. It is not really possible for a person to place a monetary value on his own life. With non-indemnity insurance the amount due to the insured in terms of the contract need not bear any relationship to the actual loss suffered by the insured. For example, a person can insure his life for R1 m. This amount need not equal the calculated pecuniary loss suffered as a result of his death.[3] Non-indemnity policies include life, personal accident and sickness insurance. In the case of non-indemnity insurance, the need to distinguish insurance from certain types of wager is more acute because of the absence of the limitation on the claim which indemnity imposes. Historically the distinguishing feature has been the requirement of insurable interest which becomes more important where non-indemnity insurance is involved. The time when insurable interest must exist may differ between indemnity and non-indemnity insurance.

The object of indemnity is to place the insured, after the loss, in the same position he occupied immediately before the loss. He is not to be placed in a better position as a result of being insured. Indemnity requires an insurer to compensate the insured for loss or damage proximately caused by the event insured against. Once the event insured against occurs, the insured acquires a claim for indemnification. If the insured wishes to pursue such a claim, he must observe the terms and conditions which regulate the enforcement of claims, such as the term which requires the insured to notify the insurer of the occurrence of the loss.

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[3] It could be argued that there must, implicitly be some relationship since the amount that the insured can afford as a premium is related to the amount that he earns. Indirectly thus in most cases a relationship exists between the earning capacity of the insured and the sum insured. There is however no requirement for this relationship to exist.

The insurer's liability is limited to the 'real and actual' value of the loss suffered through the occurrence of the event insured against. It cannot exceed either the amount insured or the amount of the insurable interest; and if it exceeds either or both of these items, it must be reduced to correspond with the smaller of the two. The insured cannot make a profit out of his loss or as is sometimes said, is not entitled to double indemnity.

Indemnity does not imply that the insured will be indemnified to the full extent of his loss. Thus for example an insured who stands to be indemnified in terms of a fire policy is not entitled to be indemnified for loss of profits or against any liability claims that may arise as a consequence of the fire even although it can be argued that these constitute part of the loss from the event. Indemnification is with respect to the insured loss. Loss of profits can be insured in terms of a separate policy as can legal liability claims. The principles of indemnification can be illustrated by examples from case law.

1.5 Measures of indemnity

The insurer can discharge his obligation to indemnify the insured in a number of ways.[4] Although the principle of indemnity may be clear, it has been pointed out[5] the proper measure of indemnity is fraught with theoretical and practical difficulties. In terms of the common law the obligation is to indemnify the insured by the payment of cash.[6] Insurance contracts usually provides other measures of indemnity; cash, replacement, reinstatement or repair. Insurance policies usually give the insurer the discretion to choose the form of indemnity. To a certain extent the parties can avoid the theoretical difficulties by concluding a valued policy. Nevertheless, the broad aim to be achieved by compensation is clear, namely to restore the insured financially to a position similar to that which he occupied regarding the insured interest before the event insured against took place, subject to the limitations contained in the policy.

1.5.1 Cash

The insured can be indemnified by the payment of a cash sum equal to the amount required to achieve indemnity. As a general rule, the insurer has an obligation to settle the claim in money.[7] With liability claims cash is usually the only practicable method available.

1.5.2 Reinstatement or repair

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4 See p, measures of indemnity.

5 Reinecke & vd Merwe (1989, par202)

6 Birds, John and Hinds, Norma (2001) *Bird's Modern Insurance Law* 5ed London: Sweet & Maxwell Van Niekerk (1983:165) (John Birds & Hinds, 2001); per Brett LJ *Rayner v Preston* 1881 18 ChD CA 1 at 9-10 (Brett, 1881).

7 Birds, John and Hinds, Norma (2001) *Bird's Modern Insurance Law* 5ed London: Sweet & Maxwell Van Niekerk (1983:165) (John Birds & Hinds, 2001); per Brett LJ *Rayner v Preston* 1881 18 ChD CA 1 at 9-10 (Brett, 1881).

Policy terms may allow for the reinstatement[8] of the damaged premises or equipment usually at the discretion of the insurer. It may not be possible to reinstate the property particularly if an old building is to be replaced by a new building. Aspects such as upgraded fire regulations may apply, which may result in additional costs. Reinstatement is discussed in greater detail elsewhere. Reinstatement and or repair is the common method of achieving indemnity with motor insurance.

A problem which arises in practice with reinstatement or repair is to match the surrounding area. Assume for example a tile has to be replaced but a matching tile can no longer be secured. In order to achieve indemnification does the insurer then need to re-tile the entire bathroom? In America, in 1990 the National Association of Insurance Commissioners (NAIC) promulgated a model regulation requiring insurers to 'replace all such items in the area so as to conform to a reasonably uniform appearance'. This regulation has been adopted by a number of states, creates problems of interpretation and application,[9] and resulted in some litigation.[10]

1.5.3 Replacement

Indemnity can be achieved by replacement rather than the payment of cash.

1.6 Practices which appear to violate the principle of indemnity

There are a number of insurance practices which conceptually appear to violate the principle of indemnity.

1.6.1 New for old

Often an insured would prefer to be indemnified for an amount in excess of indemnification in the strict sense of the concept. Thus an insured would prefer that his old asset be replaced with a new asset. If for example a television set is stolen the insured would rather have a new television set than to receive an old one as a replacement. Strictly speaking, when this happens, the insured is placed in a better position than he was before the loss occurred. New for old is not necessarily a violation of the principle of indemnity since, as already noted, there is no general principle that the loss must be determined in terms of the market value of the asset. Technically the insured is covered on a replacement value or basis rather than new for old. New for old can however raise issues of betterment.

1.6.2 Reinstatement or repair

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8 Van Niekerk, JP (1983) 'Reinstatement by insurers under insurance contracts', *MBL* 1983 165 (Van Niekerk, 1983); Davis (1993:253-257).

9 William W Palmer (1996) 'Proposed unfair claims regulations', *Santa Clara Law Review* (Palmer, 1996).

10 For an overview of the litigation see the briefing note by Paul Dwyer and Benjamin Davis (2014) 'Proliferation of property insurance matching regulations increases litigation risks', *Edward Wildman*

A similar problem arises where a damaged property is reinstated or repaired. Usually the property will be improved in relation to its pre-damaged condition and it may be argued this violates the principle of indemnity. When an insurer elects to reinstate the contract is then a reinstatement contract and the insurer cannot apply average (*Kaffrarian Colonial Bank v Grahamstown Fire Insurance Co*, 1985)

1.6.3 Valued policies

It is not always possible to assign a value for indemnity purposes to every asset, especially when arranging insurance (as opposed to the claim stage). In some instances such as the insurance of cargo in marine insurance, insurance of jewellery, works of art, where it is difficult to determine a value for insurance purposes, even at the loss stage, it usual to insure on valued basis in the case of a total loss. In this case the parties agree beforehand as to the measure of indemnity. Should it turn of that the agreed value is in excess of the actual loss then it can be argued that the principle of indemnity has been violated. In valued policies the parties have legitimately agreed as to the measure of the loss. Lord Mansfield lent authority to the legality of valued policies in *Lewis v Ruker* 1761 2 Burr 1167 (*Lewis v Ruker*, 1761) when he wrote:

> A valued policy is not to be considered as a wager policy ... The only effect of the valuation is fixing the amount of the prime cost; just as if the parties admitted it at the trial; but in every agreement, and for every other purpose, it must be taken that the value was fixed in such a manner so that the assured meant only to have an indemnity.[11]

In the event of a total loss the sum insured will be paid out.[12] Since indemnity is a public policy requirement, it can be argued if the value assigned to the asset is excessive the principle of indemnity is violated and thus a valued policy is contrary to public policy. The valued policy is not however *per se* contrary to public policy.[13] In English law if over insured the insured is nevertheless paid the stated value *Quorum A S v Schramm* [2001] EWHC 494 (Comm) (07 August 2001) (*Quorum A S v Schramm*, 2001).

1.7 Examples of indemnity

The case of *Leppard v Excess Insurance Company Limited* 1979 2 Lloyd's Law Reports 91 CA (*Leppard v Excess Insurance Company Limited*, 1979) illustrates the principle of indemnity.[14] Mr Leppard owned a country cottage surrounded by open fields and farms. It was insured for a sum of £14 000 and the

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11 See also Canner, Kenneth (1985) *Essential Cases in Insurance Law* Cambridge: Woodhead-Faulkner Ltd (Canner, 1985)

12 *Elcock v Thompson* 1949 2 All ER 381 (*Elcock v Thompson*, 1949); *Parham v Royal Exchange Assurance* 1943 SR 49 (*Parham v Royal Exchange Assurance*, 1943).

13 Citibank NA, *South Africa Branch v Paul NO and another* 2003 4 SA 180 T (*South Africa Branch v Paul NO and another*, 2003).

14 For a discussion on this case see Birds, John (1980) 'The measure of indemnity in property insurance' *Modern Law Review* 1980 43(4) 456-459 (John Birds, 1980); Reinecke, MFB and SWJ Van der Merwe (1989, par203 n8) *General Principles of Insurance* Durban: Butterworths (Reinecke, MFB & vd Merwe, 1989).

insured paid the premium accordingly. The insured had purchased the property from his in-laws and never intended to live in the cottage and wanted to sell it. When a local farmer heard about the sale, he decided to oppose it because of the nuisance he imagined the new occupiers would cause. The farmer owned all the land surrounding the cottage and was in a position to deny access to it. Not surprisingly, nobody wanted to buy the house to which they did not have access! Mr Leppard thus had to drop the asking price till it stood at £4 500 which included £1 500 for the value of the land. Thus the net market value of the house itself was thus £3 000. The cottage was destroyed by fire and instead of the £8 694 that originally was estimated as the cost of rebuilding the property, the insurers only paid out £3 000. In his judgement, Lord Laine explained the principle of indemnity as follows:

> ... this is an indemnity policy: it entitles [Mr Leppard] to the amount of his loss and no more. Accordingly, it seems to me the amount that he is entitled in respect of this fire is the £3 000 which is the agreed value of the cottage as it was immediately before the fire. That is all that he is entitled to recover.

Mr Leppard was only entitled to the value of his loss. This is the market value less the value of the ground, rather than the cost of repairs because there was substantial evidence that he had no intention of rebuilding the cottage. If Mr Leppard had demonstrated that he wanted to live in the cottage, however, it would have been unfair to give him less than the cost of the repairs. This case illustrates that the correct measure of indemnity could depend upon the intentions and circumstances of the insured.[15] This case may be a textbook example of the principle of indemnity, but does little to reassure the public about the value of insurance.

The case of *Reynolds and Anderson v Phoenix Assurance Company and Others*[16] 1978 2 440 Lloyd's Law Rep (*Reynolds and Anderson v Phoenix Assurance Company and Others*, 1978) illustrates the point that the insured can receive amounts in excess of the market value if that is indeed the true measure of indemnity. In this case the plaintiffs owned a massively constructed old malting which they used for storing grain. The building was largely destroyed by fire. Rebuilding a new modern structure would cost £30 000. The pre-fire market value of the building was £55 000. However to reinstate the building to its original condition would cost over £300 000. The insurers contended that no commercially minded person would reinstate the building, at a cost of ten times the cost of replacing the building with a new structure. The court ruled that Reynolds and Anderson had demonstrated a genuine need to reinstate and that was their measure of indemnity.

1.8 Reception into South African law

The principle of Indemnity has been recognised in South Africa in a number of cases based on the English precedents. Thus in the case of *Malcher and Malcomess v King Williamstown Fire & Marine*

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15 For a discussion on this case see Birds (1980)

16 Discussed by Reinecke & vd Merwe (1989, par203 n33).

Insurance & Trust Company 1883 3 EDC 271 (*Malcher and Malcomess v King Williamstown Fire & Marine Insurance & Trust Company*, 1883) where Barry JP said:[17]

> The very essence of the contract of insurance is, that it is a contract of indemnity; its sole and exclusive object is to procure for the assured indemnity, in the strictest sense of the word, for the losses he may sustain, through the agency of risk against the effect of which the underwriter, by the terms of his policy stands pledged to protect him.

In the case of *Nafte v Atlas Assurance Company Limited* 1924 WLD 239 (*Nafte v Atlas Assurance Co Ltd*, 1924), Krause J said:

> The amount recoverable under a policy of insurance in the event of fire, must not exceed the sum necessary to indemnify the insured fully against any loss which he may have actually sustained in the consequence of the fire. He is not entitled to recover the amount specified in the policy unless it represents his actual loss. The main purpose of the policy is to fix the total amount of the premium and to mark the limit beyond which the liability of the insurers is not to extend. The insured is, therefore, entitled to a full indemnity within the limits of his policy, for the loss which he has sustained in respect of the subject-matter of the insurance.[18]

2 REINSTATEMENT OR REPAIR

2.1 Indemnification by the payment of money, not reinstatement

In the absence of any other agreement, the obligation of the insurer is to indemnify the insured through the payment of a sum of money. There is a very strong presumption in law that the contract of insurance is one for indemnification through the payment of money. Any other form of indemnification can only be achieved if allowed in terms of a term in the policy itself. This is explained by Birds & Hird (2001:278) as follows.[19]

> In certain circumstances an insurer may be entitled ... to reinstate insured property that has been damaged or destroyed, rather than pay a sum of money to the insured. In so far as insurers may have a right to reinstate rather than pay money, this may arise under the terms of the policy ... . Reinstatement by contract will be permitted only if the policy expressly refers to it, if it does not the insurers must pay money.

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17 Davis, DM (1993:83) *Gordon & Getz: The South African Law of Insurance* 4ed Cape Town: Juta & Co (Davis, 1993a); Grotius *De Jure Belli* 2.12.3.5.

18 Davis (1993:247). The court relied on the following English cases *Westminster Fire Office v Glasgow Provident Investment Society* 1888 13 AC 699 (*Westminster Fire Office v Glasgow Provident Investment Society*, 1888), *Chapman v Pole* 1870 22 LT 306 (*Chapman v Pole*, 1870), *Castellain v Preston* 1883 11 QBD 380 CA (*Castellain v Preston*, 1883).

19 *Rayner v Preston* 1881 18 ChD 1 CA (Brett, 1881); JP van Niekerk (1983)

Once money is paid as indemnification, the insured can do as it likes with the money. The insured is not obliged to reinstate the damaged property.

2.2 Policy term

Usually policies contain a term allowing the insurer to elect to reinstate or repair. Typically the term reads as follows:

> "indemnify or compensate the insured by payment or, ***at the option of the company***, by replacement, reinstatement or repair in respect of the defined events occurring during the period of insurance"[20]

It should be noted that it is the insurer which elects to make the reinstatement. The insured cannot make or insist on reinstatement. The election by the insurer is unilateral. It is not a new contract between the insurer and insured. The insurer is exercising a right in terms of the existing insurance contract. Agreement between the insurer and insured is not a requirement for the insurer to exercise the option to reinstate or repair. If the policy does not contain a reinstatement clause, the insurer and insured can come to an agreement at the claim stage that the insurer will reinstate or repair the damaged property. It is possible that the insurer agrees that the insured reinstate or repair the damaged property.[21] Failure to elect to reinstate means the insurer has to indemnify through the payment of money.

Once the insurer elects to reinstate, the insured is duty bound to offer all assistance to allow the reinstatement to be carried out. 'Where an insured prevents or makes impossible reinstatement, his conduct may amount to breach of contract (Van Niekerk 1983:173)'. If the insured frustrates the reinstatement the insured is in breach of contract.

The policy itself, may in terms of the *reinstatement value conditions clause* contained in the policy, as in the case of a fire policy, indicate how the reinstatement value is to be determined. Reinstatement requires that the insurer having elected reinstatement physically reinstate the damaged plant, as opposed to making a payment of money. Once an insurer elects to reinstate, the contract between the insurer and insured is often compared to a construction contract.[22] The question then arises has the insurance contract been replaced by a construction contract. If this is the case a number of consequences would follow. There is some authority for this view, but it has been suggested that this is not legally correct other than being a useful and practical way of understanding reinstatement.

Case law

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20 Preamble to the general terms and conditions to the Multimark series of policies. An examination of old court cases indicates that the reinstatement term has been in use for several centuries. (Van Niekerk 1983:165n10).

21 *Nejasmic v Royal Insurance* 1981 120 DLR ed 65 Alb QB (*Nejasmic v Royal Insurance*, 1981); Van Niekerk 1983: 166n17.

22 As Van Niekerk puts it, 'The generally accepted view is that an election to reinstate discharges the insurance contract and the contract becomes one to reinstate; a new contract to reinstate which replaces the insurance contract is deemed to have been entered into.'

Court cases involving the question of reinstatement *per se* are rare in South Africa. Reinstatement is the common method elected to provide indemnification in the case of the motor policy.

3 SUBROGATION

3.1 The meaning of subrogation

Subrogation[23] means 'to stand in the shoes of the assured'.[24] It is the right of one person to stand, at law, in the place of another,[25] and to avail him of all the rights and remedies of that other person. The origin and scope of the doctrine of subrogation is controversial. Some claim subrogation can be traced to Roman law. Others trace subrogation to equity[26] in which event this form of subrogation can be referred to as equitable subrogation. The different forms of subrogation may well have different principles. Although commonly associated with insurance, it is routinely pointed out that subrogation is not confined to insurance.[27] It can be argued that a basis of subrogation in insurance stems from the insurance contract, itself.[28] Subrogation is most commonly encountered in practice in insurance usually when an insurer has indemnified an insured and then seeks to recover from the third party who caused the insured to suffer the loss. A more conceptually sound basis for subrogation, in insurance, is that it is a consequence of the application of indemnity.[29] Where the loss suffered by the insured is caused by a third party, if the insured recovers from the insurer and the third party, the insured would be doubly indemnified; profiting from insurance which would create a moral hazard problem. Subrogation prevents the insured from profiting from his loss or as is often said from achieving double indemnity. Subrogation ensures the principle of indemnity is not violated.

3.2 English insurance law: origins of subrogation

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23 For a discussion on subrogation consult Davis (1993:257). Reinecke & van der Merwe (1989: par224 et seq), Birds, John (1988) *Modern Insurance Law* 2ed London: Sweet & Maxwell Birds (1988:236-258) (J Birds, 1988), Derham (1985) Subrogation in Insurance Law *Law Book Company* (Derham, 1985)*;* Maxwell (1994) *The law of subrogation* Oxford (Maxwell, 1994); Van Niekerk, JP (1973) *Subrogasie in versekeringsreg*. Unisa: unpublished LLM dissertation (Van Niekerk, 1973). Cannar, Ken (1990) 'Paying your debt' Post Magazine 1990 151 7 39 (Cannar, 1990). Cannar, Ken (1993) 'Passing the bucks' Post Magazine 1993 154 (12) 24-25 (Cannar, 1993).

24 Lord Mansfield in *Mason v Sainsbury* supra. It has been contended that the word subrogation is a misnomer and the term valuable recourse is better, see *Tate & Son v Hyslop* 1885 15 QBD 368 at 375 (*Tate & Son v Hyslop*, 1885).

25 *Samancor v Mutual and Federal Insurance Company* 2005 4 SA 40 SCA at 45E-F (*Samancor v Mutual and Federal Insurance Company*, 2005).

26 Birds et al (2001:287). In *Morris v Ford Motor Company* 1973 1 QB 792 at 800-801 (*Morris v Ford Motor Company*, 1973) Lord Denning resorted to equity to deny the application of subrogation in those instances in which he thought the outcome would be unjust.

27 In *South Africa Ackerman v Loubser* 1918 OPD 31 at 34 (*South Africa Ackerman v Loubser*, 1918).

28 As was the case in *Ackerman v Loubser* 1918 OPD 31.

29 *Castellain v Preston* 1883 11 QBD 330 CA (*Castellain v Preston*, 1883).

There are a number of early English cases dealing with subrogation.[30] In *Mason v Sainsbury* 1782 3 Doug KB 61,[31] (*Mason v Sainsbury*, 1782) rioters had wrecked an insured house. The insurers paid the claim. The insured also had a claim against the local administrative district authority in terms of the Riot Act of 1714 which the insurers having paid the claim wish exercise. The insurers were held to be entitled to recover in the name of the insured. The two aspects of subrogation can be seen from this case. Firstly, the insured has two possible claims available to him, firstly from the insurer in terms of the insurance contract and secondly from the local authority in terms of the legislation. Because of the principle of indemnity the insured may not be placed in a better position than if the loss did not occur. He cannot thus expect to recover from both parties and if he does recover from both, to both amounts. In short, the insured cannot make a profit from his loss or as often expressed he is not entitled to double indemnity. Secondly, the insurer having paid the claim secures the right to enforce the rights of the insured against the third party; in short the insurer acquires the right to take action against the third party.

An action in subrogation is usually brought by an insurance company for its own benefit, but in the name of the insured.[32] The case of *Darrell v Tibbitts* 1880 5 QBD 560 CA (*Darrell v Tibbitts*, 1880) illustrates the rule that the insured cannot make a profit from the indemnity. In terms of a lease the tenant was obliged to repair any damage to the leased building. The building was damaged by a gas explosion and the Corporation of Brighton, whose negligence caused the explosion, compensated the tenant whereupon the tenant restored the building.[33] The landlord had also taken out insurance covering the peril which had occurred. The insurer paid the value of the loss to the landlord, ignorant of the terms of the lease. Learning afterwards of the tenant's obligation to repair the building and that this had been done, the insurer sued the landlord to recover a sum equal to the insurance money paid by it. The court held that the insurer would have been subrogated to the landlord's right under the lease to require compliance with tenant's obligation to repair, and, since the tenant had fully compensated the landlord, the amount of insurance money it had paid to the insured had to be restored to the insurer in order to prevent the landlord from receiving double indemnity.[34] The insurer may be subrogated to the

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30 There were cases before 1782. The following two older cases involved a claim by the insurer for recovery having indemnified the insured. In *Randal v Cockran* 1748 1 Ves Sen 98 (*Randal v Cockran*, 1748) (marine insurance) the insurer settled a claim for the loss of a vessel captured by the Spaniards. The ship's owner became entitled to share in prize money from the sale of Spanish vessels that had been taken by the British. The insurers thought that they should recoup what they had paid but the commission that was responsible for the distribution of the prize fund did not agree. The insurer successfully sued. Lord Hardwicke declared, ' ... the plaintiffs [the insurers] had the plainest equity that could be. The person originally sustaining the loss was the owner; but after satisfaction be made to him, ... The assured stands as trustee for the insurer, in proportion to what he paid'. *Blaauwpot v Da Costa* 1758 1 Eden 130 (*Blaauwpot v Da Costa*, 1758) (marine insurance).

31 per Lord Mansfield.

32 In South Africa the insurer can bring the action in its own name supra.

33 A more recent approach involving a tenant and landlord is to understand that in commercial leases the insurance premium paid by the landlord is derived from the rental paid by the tenant and the insurance is for the benefit of both parties. As a matter of equity it would appear that the cost of repairs should be borne by the insurer, for the benefit of both the landlord and tenant without any right of subrogation against the tenant. In any event the landlord may not benefit from double indemnity.

34 Davis (1993:258).

insured's contractual rights against the third party as we have seen in the case of *Burnard v Rodocanachi*[35] [36] case. In

Castellain [37] [38] [39] [40] [41] [42] [43] [44] [45] [46] [47] *v Preston* 1883 11 QBD 380 CA (*Castellain v Preston*, 1883) the insured, Preston, contracted to sell immovable property. After the conclusion of the sale but before transfer took place a fire occurred and the insured property was damaged. The insured submitted a claim. The insurer was unaware of the contract of sale and paid the insured a sum of money in settlement of the insurance claim. The purchasers also paid the insured (as sellers) the purchase price which was the price for the undamaged property. The damaged property was transferred to the new owners, Rayner who thought he was entitled to the insurance payout but the insured refused to reinstate the property or hand over the insurance proceeds to the Rayner. The purchasers unsuccessfully sued the seller for the insurance proceeds. Had Rayner sued for the reinstatement of the property or compensation for damage to the property, matters may have turned out differently. The two Court of Appeal judges who ruled against Rayner expressed the obiter view that the insured would not be entitled to retain the insurance payout. Practically thus it looked as if the insured would be able to retain the insurance payout and not repair the damage. The insured would be doubly indemnified. The insurance company, the London, Liverpool and Globe then demanded repayment of the amount it had paid as indemnity. The insured refused to return the payment and the insurer, suing in the name of its chairman, Castellain, sought to recover the amount they paid from the insured. The claim was unsuccessful in the court *a quo*. The matter was then taken on appeal. The Brett LJ, who was one of the judges in the previous case who had expressed the view that the insured would not be able to retain the payout, explained the principle of subrogation, being necessary to prevent over indemnification, as follows:

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35 As pointed out in *Castellain v Preston* (*Castellain v Preston*, 1883) subrogation in marine may differ from when applied to insurance of buildings annexed to the soil. In the case of a total loss the doctrine of abandonment holds that the insured property is considered to be abandoned in favour of the insurers. This is clearly not applicable to buildings attached to land.

36 The reference to equity in these early cases should be noted. This endorses the idea that in some cases subrogation has its roots in equity.

37 *Rayner v Preston* 5 Ch D 569 (Brett, 1881)

38 In the days before companies existed as separate legal entities court cases were brought in the name of the chairman.

39 *Castellain v Preston* 1883 08 QBD 613 before Mr Justice Chitty. Mr Chitty QC represented the insured in *Rayner v Preston* supra. If the judge is the same Mr Chitty, that would be irregular.

40 *Castellain v Preston* 1883 11 QBD 380 CA (*Castellain v Preston*, 1883).

41 See also Davis (1993:258).

42 In the Castellian case it was clear that the insured was not indebted to the purchaser of the property. If the insured is indebted to the purchaser for the repair the damaged property, the outcome may well be different.

43 *Napier and Ettrick and another v Hunter and others* 1993 1 All ER; 1993 2 WLR 42 (*Napier and Ettrick and another v Hunter and others*, 1993)

44 Davis (1993:257-8).

45 *Page v Scottish Insurance Corporation* 1929 98 LJKB 308 (*Page v Scottish Insurance Corporation*, 1929); *Scottish Union and National Insurance Co v Davis* 1970 1 Lloyd's Law Reports 1 CA (*Scottish Union and National Insurance Co v Davis*, 1970).

46 For a discussion of the relationship between specific contractual terms found in South African insurance policies and subrogation see Hart, Michael (1996) 'Insurance recoveries - who gets first bite' Deneys Reitz Insurance Report 2 (Hart, 1996).

47 For a discussion of this case see Hart (1996), Birds (2001:292-294).

> ... the doctrine of subrogation is to be applied merely for the purpose of preventing the assured from obtaining more than a full indemnity, the question is whether that doctrine as applied to insurance law can in any way be limited. ... In order to apply the doctrine of subrogation, it seems to me that the full and absolute meaning of the word must be used, that is to say the insurer must be placed in the position of the assured. ... As between the underwriter and the assured the underwriter is entitled to every right of the assured, whether such right consists in contract fulfilled or unfilled, or in remedy for tort capable of being insisted on, or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has been exercised or has accrued, and whether such rights could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been, diminished.

The insurer was successful on appeal and ordered to repay the insurer.

Subrogation is now well established in insurance law. Subrogation expresses the insurer's right to be placed in the insured's position so as to be entitled to the advantage of all the insured's rights and remedies against third parties. Subrogation rests clearly on the principle that no one should profit out of any loss. Subrogation applies to all contracts of indemnity insurance such as fire insurance, whether the loss is total or partial. It does not apply to non-indemnity insurance such as life or personal accident insurance.

The insurer cannot be subrogated to the insured's right of action until it has paid the insured and made good the loss. This creates a problem since most policies contain an excess, i.e. the insured bears some of the loss. Accordingly the insured is never fully indemnified. To overcome this problem most policies contain a term which enables the insurer to take over the action in the name of the insured before indemnification.

A common situation where subrogation arises involves a claim in delict when the loss to the insured's property is attributable to a third party's negligence. Thus the insurer under a motor policy may be subrogated to the insured's remedy against the third party whose negligence caused damage to the insured vehicle.

The fact that the insured bears the cost of the excess presents a number of conceptual problems. Firstly, since the insurer can only exercise subrogated rights after indemnification implies that the insurer cannot exercise these rights since the insured has not been indemnified. *Napier and Ettrick and another v Hunter and others* 1993 1 All ER (*Napier and Ettrick and another v Hunter and others*, 1993) concerned the issue of an excess and inadequate cover. A number of Lloyd's names had suffered a loss of £160 000. They were insured against this loss to the extent of £125 000 less an excess of £25 000, resulting in a recovery of £100 000. The underwriting manager was sued based on negligence causing the loss and an amount of £130 000 was recovered and held in trust by a solicitor. The question which arose for determination was how much should the insurer receive of the £130 000? Lord Templeton reasoned that the actual loss suffered by the Names was the actual loss less the recovery from the negligent party i.e. £30 000. Since the Names had elected to carry an excess of £25 000, this is the amount which they should bear of the £30 000, leaving a balance of £5 000. Since the insurers had paid £100 000 they were entitled to a refund of £95 000.

3.3 Insured must not prejudice subrogation rights of the insurer

An important insurance point relating to subrogation is that the insured may not prejudice the insurer's right of subrogation.[48] This has a number of implications. If an insured sues the wrongdoer he must sue for the whole amount and not only for the uninsured amount. An insured cannot therefore sue merely for the excess. By the same token, when the insurer sues, it too must be for the whole amount.

The insured may not renounce or compromise any right of action he has against the third party if by doing so he could diminish his claim against the third party. If he does he will render himself liable to the insurer. This can be illustrated by the case of *Phoenix Assurance Company v Spooner* 1905 2 KB 753 CA (*Phoenix Assurance Company v Spooner*, 1905). In this case Mrs Spooner insured a house and shops against fire. The Plymouth Corporation decided to expropriate the property and served on her the notice of expropriation. Before anything more was done the building was destroyed by fire and the insurer paid her £925, the agreed amount of her loss. After the fire she agreed to reduce her claim for compensation against the corporation by the sum of £925. She probably did this on the basis that having received the money due in terms of the insurance claim, she need not claim the same amount from the local authority. It was held that the insurer could recover the amount it had paid her, from her. The judge said:[49]

> The contract being one of mere indemnity, the plaintiff's re-assurers upon payment of the loss became entitled to all the rights that then vested in Mrs Spooner in respect of the destroyed property. Those rights in my opinion included the right to be paid by the corporation the value of the property as of the date of the notice to treat - that is to say, the value before the fire; and it was not legally possible for her to deprive the plaintiff's (the insurance company) of the benefits of this right by any agreement with the corporation. The arrangement made by her with the corporation was, no doubt, made at the instance of the corporation, and was entered into for the purpose of securing to the corporation the benefit of the insurance contract. But the risk of the fire was the corporation's risk from the time of the notice to treat, and they must be satisfied to bear it.

A question which often arises in practice, is, can the insurer's right of subrogation be interfered with before the event occurs or even before insurance is entered into?[50] Since the right of subrogation only arises after the insurer has settled the claim, it is problematic to suggest the right can be interfered with before it in fact arises. This would appear to be an issue of non-disclosure or misrepresentation rather than subrogation.

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48 Davis (1993:263).

49 At 757.

50 An insured may for example enter into a contract with a security company to guard its premises and agree to hold the company harmless in the case one of its employees cause damage to the guarded property. If the property is destroyed by fire due to negligence of a guard, the insured has no right of recourse against the security company because of the hold harmless term in the contract. Can the insurer then repudiate the claim on the basis that the insured has interfered with its right of subrogation?

3.4 Insurer may not profit from the loss

Just as the insured may not make a profit from indemnity insurance or as is often said may not be have double indemnity so the insurer may not make a profit from the subrogation rights. The leading case is *Yorkshire Insurance Company v Nesbitt Shipping Company*.[51] (*Yorkshire Insurance Company v Nesbitt Shipping Company*, 1961) In this case a ship was insured for £72 000. In 1945 it collided with a Canadian government vessel, becoming a total loss. The insured, having been paid £72 000 by the insurer, sued, with the permission of the insurer, the Canadian government for damages and in 1955 was awarded the equivalent of £75 000 in Canadian dollars by the Canadian courts. During the case, in 1949, the English pound was devalued resulting in the insured making a substantial profit, receiving £126 000. The insurer contended that having indemnified the insured it was entitled to the full amount while the insured contended it was only entitled to the amount it had been paid by the insurer. The court ruled the insured could keep the profit as it was only obliged to repay the amount it had actually received. This judgment is not beyond criticism.[52]

3.5 Subrogation and salvage

Finally, the subrogation gives the insurer the right to salvage. If an insurer agrees to pay or reinstate as in the case of a total loss, the insurer is entitled to such remnant as remains by way of salvage.

3.6 Subrogation in South African law

3.6.1 Reception

The doctrine of subrogation is part of South African insurance law.[53] The case of *Ackerman v Loubser* 1918 OPD 31 is usually regarded as the first case in South Africa involving subrogation.[54] In fact the case involved delict, not subrogation, although it is dealt with in the judgement. In this case Loubser's car was damaged by Ackerman's dog, whereupon Loubser successfully sued Ackerman in the magistrate's court for the damages. Ackerman on appeal contended that Loubser was not entitled to

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51 1961 2 All ER 487 QB & 1962 2 QB 330; Davis (1993:264).

52 See Megaw LJ in *Lucas v Export Credit Guarantee Department* 1973 1 WLR 914 at 924 (*Lucas v Export Credit Guarantee Department*, 1973).

53 *Gowie v Provident Insurance Company* 1885 4 SC 118 (*Gowie v Provident Insurance Company*, 1885); *Mendelsohn v Estate Morom* 1912 CPD 660 (*Mendelsohn v Estate Morom*, 1912); *Chi v Lodi* 1949 (2) SA 507 T (*Chi v Lodi*, 1949); *Teper v McGees Motors (Pty) Ltd* 1956 1 SA 738 C (*Teper v McGees Motors (Pty) Ltd*, 1956); *Schoonwinkel v Galatides* 1974 4 SA 388 T (*Schoonwinkel v Galatides*, 1974); *Aviation Insurance Company v Bates and Lloyd Aviation (Pty) Limited* 1982 4 SA 838 T (*Aviation Insurance Company v Bates and Lloyd Aviation (Pty) Limited*, 1982); *Rand Mutual v Road Accident Fund* 2008 (*Rand Mutual v Road Accident Fund*, 2008).

54 There is an earlier case *Weber and others v The Africander Gold Mining Company* 5 OR

damages because he was insured and having been indemnified by the insurer,[55] so the argument went he suffered no loss. Accordingly the insured having been compensated by the insurer, it was contended, cannot claim further damages from the Ackerman. The court accepted the fact that the plaintiff was insured is *res inter alios acta* and thus the "insured" was not prohibited from suing the third party. The action was, in fact, brought at the insistence of the insurer, acting in terms of a term in the policy. The basis of the action was thus a term in the policy. The head-note to the case summaries the position. When paid, the insured becomes a trustee for any compensation paid him by the wrongdoer and is bound to hand compensation over to the insurer he receives from the wrongdoer over and above the actual loss he sustained. This prevents the insured from being doubly indemnified. Ward J explained:

> There is another consideration ... An accident policy is a contract of indemnity and from that it follows that the insurers who have indemnified the insured are entitled upon the principle of subrogation to the advantage of every right vested in the latter ... .

3.6.2 Limitation to subrogation

The above quotation made it clear that an insurer can be subrogated only to actions which the insured could have brought himself and subrogation cannot be evoked where the other party had no rights. Ward J quoting from an author, Addison on the law of Torts the court said (at 37):

> But the right of the insurer is merely to make such claim for damages as an insured could have made; and, when the latter cannot assert a claim for damages against the wrongdoer, neither can the insurer do so.

So for example where a wife intentionally damaged the insured property by setting it on fire it was held that the insurer could not recover from the wife since the husband had no such claim against the wife.[56] This is of course especially the case where they are married in community of property.

3.6.3 May not prejudice insurer's rights - insured claiming for the deductible

In *Visser v Incorporated General Insurance Ltd* 1994 1 SA 472 T (*Visser v Incorporated General Insurance Ltd*, 1994) the insurer paid the insured an amount of R18 000 with respect to damages suffered with respect to damage to his car. Thereafter the insured sued the third party for loss of use of his vehicle and the excess he paid. The third party settled the claim for an amount of R3 000 and when the insurer discovered this it claimed the R18 000 back on the basis that the insured had prejudiced the rights he acquired against the third party by virtue of subrogation. The insurer was granted summary judgement. The insured appealed to have the summary judgement set aside which was granted.[57]

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55 The insurer was African Guarantee and Indemnity Company.

56 *Midland Insurance Company v Smith* 1881 6 QBD 561 (*Midland Insurance Company v Smith*, 1881) discussed in Davis (1993:260). See also *Commercial Union Assurance v Golden Era Printers & Stationers* 1998 2 SA 718 BPD (*Commercial Union Assurance v Golden Era Printers & Stationers*, 1998) discussed infra involving an insurer attempting to sue a tenant where the landlord indicated it preferred not do so, in any event not in its own name.

57 The case raises the issue of splitting a claim *Avex Air (Pty) Ltd v Borough of Vryheid* 1973 1 SA 671 A (*Avex Air (Pty) Ltd v Borough of Vryheid*, 1973).

3.6.4 Sue in the name of the insurer?

It was accepted that where an insurer exercises subrogation rights it has to do so in the name of the insured. The insurer cannot sue in its own name. However in *Rand Mutual v Road Accident Fund* 2008 6 SA 511 SCA[58] (*Rand Mutual v Road Accident Fund*, 2008) took the stance that South Africa is not bound by the English law of subrogation and departed from the well-known position that the insurer must sue in the name of the insured concluding that insurers may sue in their own name. Insurers may therefore sue in their own names as well as in the name of the insured. The court recognised that both options were still available for the action to proceed in the name of the insured or the insurer.

3.6.5 Disclosure of the involvement of the insurer?

The issue of suing in different names raises the question when suing a third party must the identity of the person actually suing be disclosed to the third party. Van Niekerk (1998:72) correctly summaries the position as follows:[59]

> Also, it is not generally possible for a person to litigate in another's name without disclosing this fact and the legal basis for doing so. Unless pertinently disclosed and justified, such conduct would undermine the integrity of the administration of justice. Litigation in the name of another without disclosure of this fact not only raises the spectre of champerty, but also questions as to who authorised the legal representative acting in the case. It also has an enormous potential to prejudice the other party to the litigation. For example, many decisions in litigation, such as whether to proceed or settle, are taken against the background of the identity of the opposing party, his ability to perform, and the nature of the existing and future commercial and other relationships between them. And the same objections to a cessionary litigating in the name of the cedent, the court thought, also applied in the case of arbitral proceedings. The integrity of these proceedings would equally be compromised were parties to be allowed to lend their names to others.

This statement of the general position clearly suggests that where an insurer is involved in the litigation this should be revealed. Insurers acting in terms of subrogation rights is a well-known exception to the general rule. It can be argued that exception is not justified should be abolished. This is especially true since insurers are now permitted to sue in their own names. It is suggested that the involvement of the insurer should now be disclosed.

3.6.6 Examples of subrogation

3.6.6.1 Lessor - lessee

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58 Discussed by JP van Niekerk (2009) 'Rand Mutual Assurance Co Ltd v Road Accident Fund', *Juta's Insurance Bulletin* 12 1 1-23 (van Niekerk, 2009).

59 JP Van Niekerk (1998) 'Subrogation and cession in insurance law: a basic distinction confounded' *South African Mercantile Law Journal* 10 58-77 (Van Niekerk, 1998).

A lessee is in possession of property, often immovable property which can be damaged and can give rise to a claim against the lessee (tenant) by the lessor. The property is usually also insured the premiums ultimately being paid by the tenant. The loss could give rise to a claim by the insurer against the tenant based on subrogation. It is somewhat odd for the tenant to pay the premiums for insurance cover and then be sued by the insurance company when the loss occurs. Conceptually at least the insurance is for the benefit for both the lessor and tenant. Subrogated claims against tenants were rare because of a market agreement, or market accord, between South African insurers known as the Tenant's Liability Agreement, where insurers agreed not to pursue subrogated claims against tenants. An exception is the case of *Commercial Union Assurance v Golden Era Printers & Stationers* 1998 2 SA 718 BPD (*Commercial Union Assurance v Golden Era Printers & Stationers*, 1998), where it was alleged that the lessee (Golden Era) negligently caused the fire which damaged the leased property. Commercial Union having settled the claim sought to recover from the tenant, alleging negligence. Commercial Union also took cession of the lessor's claim against the lessee. The action was probably brought because the events were not in South Africa and the market accord accordingly did not apply. In any event the agreement, even in South Africa, appears to have been forgotten.[60] The insurer took cession and sued in its own name because the landlord did not want to be seen to be suing its own tenants when tenants were hard to come by. For a number of reasons the claim by the insurer was dismissed. A point of importance is that when the lessee pays the rental, part of this is to cover the insurance premiums. In this sense it is the lessee who is paying for the insurance and accordingly the insurance should be for the benefit of the lessee and lessor and the insurer should not have subrogation rights. The court noted:

> '... this factor [cost of insurance being borne by the lessee] constitutes a strong pointer to the merit of the submission that the insuring of the premises was intended by the parties to insure to the benefit not only of the lessor but also of the lessee.'

Under this circumstance an insurer should not succeed. It did not succeed in the Golden Era case.[61]

3.6.6.2 Carriage contractor

In *Dresselhaus Transport CC v Government of the Republic of Namibia* 2005 (*Dresselhaus Transport CC v Government of the Republic of Namibia*, 2005) unreported[62] a truck conveying beer overturned and the beer was looted in the presence of the police. The insurer indemnified the loss and in subrogation successfully sued the government of Namibia for the inactivity of the police.

3.7 Appraisal of the doctrine of subrogation

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60 An attempt to secure a copy of the agreement from the South African Insurance Association drew a blank

61 Similar cases also did not succeed in other jurisdictions *Ross, Southward Tire Limited v Pyrotech Products Limited* 1975 57 DLR 3d 248 (*Ross, Southward Tire Limited v Pyrotech Products Limited*, 1975); *T Eaton Co Limited v Smith* 1977 82 DLR 3d 425 (*T Eaton Co Limited v Smith*, 1977); *Mark Rowlands Ltd v Berni Inns Ltd* 1986 QB 211, 1985 3 All ER 473 CA (*Mark Rowlands Ltd v Berni Inns Ltd*, 1985).

62 Discussed, Van Niekerk (2007:180-181). Van Niekerk, JP (2007) Juta's Insurance Law Bulletin 2007 10 (3)

Subrogation has been the subject of extensive research and comment in South Africa[63] and most parts of the world for over a century.[64] A number of points of criticism have been raised against the doctrine. Firstly being a doctrine based in equity, it should not be evoked in inequitable situations.[65] Indeed the industry has recognised this and industry agreements exist indicting certain circumstances where insurers will not attempt to recover in subrogation. Thus for example a landlord would not like an insurer to recover from his tenant, this is especially true since the rental paid by the tenant almost certainly includes the cost of insurance premiums, in the first place. Thus there exists (or existed) the market accord, the Tenant's Liability Agreement, endorsing the general legal position.[66] Secondly, it has been argued that when an insurer exercises its right of subrogation it is usually, even if only indirectly against another insurer.[67] Thus on the one hand the claims expenses of an insurer is reduced when it can recover via subrogation but on the other its expenditure is increased when the insurer pay by other insurers exercising their rights of subrogation. Insurers win and lose because of subrogation. It has been argued that this whole process is wasteful and suggested that the rights of subrogation should be limited as is the Scandinavian practice.

4 AVERAGE

4.1 Average in the Marine Insurance Act

4.1.1 General average (Marine)

Marine law recognises what is known as General Average. This should not be confused with average found in most insurance policies. In marine law if, for example, cargo has to be sacrificed to save the marine adventure then those who benefit from the sacrifice are obliged to make a contribution to the cargo owners whose property was sacrificed. Owners are obliged to make the contribution because of General Average. Thus for example if a ship is in danger of sinking and the captain decides to jettison some of the cargo to save the ship, then those who benefitted must contribute to the cost of the jettisoned cargo. From this it can be seen that those who do not suffer a loss must contribute to those who suffered the loss. Unlike most insurance claims the person who is asked to make the contribution did not suffer a loss. Obligations arising from marine average (General Average) can be insured in terms of a marine policy which makes provision for marine average claims. Marine General Average is an obligation imposed by marine law not an insurance contract.

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63 Van Niekerk (1973).

64 Dixon on the Law of Subrogation Philadelphia 1862.

65 For examples see Vivian (2006) 'Knock-for-knock agreements, champerty and subrogation' *Cover* 18(10) (Vivian, 2006).

66 For a discussion of the Tenant's Liability Agreement the Golden Era case.

67 Birds (1988:257)

4.1.2 Marine Insurance Act 1906

The operation of average as found in insurance is described in terms of s81 of the UK Marine Insurance Act 1906 (UK Marine Insurance Act, 1906) which reads:

> Where the assured is insured for an amount less than the insurable value or, in the case of a valued policy, for an amount less that the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance.

Thus if property has a value of R6 000 000 but is insured for only R5 000 000, then the insured is deemed to be his own insurer for the balance, the difference of R1 000 000. If the property is damaged to the extent of R3 000 000, the insurer is only liable for R2 500 000.[68] Thus if the insured under-insures, he cannot recover the full value of the loss.

4.2 Average and the common law

Average is widely discussed[69] in the literature. In terms of the common law,[70] the rule is that a person who under insures his property is entitled to the full amount of his loss, whether total or partial, subject to the maximum limit of the policy.[71] Average is not assumed in the common law. Thus if a house worth R1 000 000 is insured for only R800 000 and is damaged by fire to the extent of R500 000, in the common law, the insured will be entitled to be indemnified to the extent of his loss R500 000. In terms of the common law, thus, a person can under-insure his property and still receive the full amount of the loss, providing the loss does not exceed the limit of the insurance. For partial losses,[72] this is obviously unfair to the insurer since the insurer calculates the premium on R800 000 but the exposure is greater at R1 000 000. Most indemnity policies contain, and need to contain an average term to deal with this problem.[73]

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68 The insurer's liability is R5 000 000 / R6 000 000 × R3000 000 = R2 500 000 and the insured's 'liability' being his own insurer is R1 000 000 / R6 000 000 × R3 000 000 = R500 000.

69 Davis (1993;286). Birds (1988;227). Van Niekerk, JP (1981) 'Under insurance and average' *BML* 1981 125. Atkins, NG (1979) 'The sum insured-I' *BML* 1979 (8) 219 (Atkins, 1979a); Atkins, NG (1979a) 'The sum insured-II' *BML* 1979 (9) 23 (Atkins, 1979b); Atkins, NG (1979c) 'The sum insured-III' *BML* 1979 (9) 37 (Atkins, 1979c); Reinecke & vd Merwe (1989 par262) and Davis (1993,279).

70 Davis (1993;291) and Reinecke & vd Merwe (1989), hold the view that apart from marine insurance the insured can claim up to the limit of the sum insured. If this is the case the common law does not imply average. Birds (1988,227) dealing with English laws relying on *Carrers Ltd v Cunard Steamship Co* 1918 1 KB 118 (*Carrers Ltd v Cunard Steamship Co*, 1918) is of the opinion that average is implied in commercial policies on goods. There does not seem to be any reason, in law, why an average term should be implied in a contract. The normal rules for implied terms can be invoked to determine if average is an implied term. On the other hand, the average term is so well known that it is probably not necessary to insert a particular term. The policy can simply declare to be subject to average.

71 Subject naturally to the insurer not avoiding the policy as discussed below.

72 If a total loss occurs, the insured is only entitled to the limit of the sum insured, R800 000 in the example quoted. In this event the insurer is not prejudiced by the under insurance.

73 In this case asset includes consequential loss policies. Average clauses are common in commercial fire, theft and marine insurances but are rare in liability insurances (Diacon et al 1988;61).

4.3 Average and policy terms

It has been suggested that under-insurance is grounds on which the insurer may avoid the policy. This could be because of failure to disclosure a material fact or breach of warranty.[74] It is however more common for the insurer to insert and invoke the so-called average clause. Because of the possibility of the person under-insuring himself, it is normal for property-based indemnity insurance policies to deal with the problem of underinsurance by inserting an average term in the policy.[75] In order to prevent under-insurance and enable the insurer to levy the correct premium based on the declared insured value, property policies such as fire policies commonly contain a term which provides that, if at the time of the loss the sum insured is less than the value of the property, the insured is to be considered his own insurer for the difference, and must accordingly bear a rateable portion of the loss. The insurer's liability is normally calculated in terms of the following formula.[76]

$$\frac{Value\ Insured}{Value\ at\ risk} \times Loss\ sustained$$

Various types of average clauses are found in practice.[77] Average has not been the subject of much judicial pronouncement however the effect of average on reinstatement has been considered by the South African courts where the court ruled average does not apply.[78]

In any event most policies require the insured to bear part of the loss. As a rule insurers do not offer total cover. The insured must bear some part of the loss. A clause often found, requires the insured to bear a portion of the loss. This is referred to as the excess clause. This clause may require that the insured bear a fixed amount of the loss. In the case of a motor policy this could be an amount of R2 000 for each loss and every. It is common in motor policies to have a clause whereby the insured carries a percentage of the loss.

4.4 Non-indemnity insurance

Average is not applicable to non-indemnity insurance such as life and personal accident insurance.[79] There is reference to an 'under-average' life in life insurance but this is a different concept. In this case these words have their normal English meaning of 'average', in the sense that the health or some feature

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74 Birds (1988;226)

75 Different terms are used, such as the pro-rata, special condition and the two-condition average.

76 This formula can be criticised since it implies the loss is linear. It is unlikely that it is linear.

77 Older policies contained what was known as the two-thirds rule which made the insured his own insurer to an extent of two thirds of the value of his loss. This is not common in modern policies.

78 *Kaffrarian Colonial Bank v Grahamstown Fire Insurance Co* 1885 5 EDC 61 (*Kaffrarian Colonial Bank v Grahamstown Fire Insurance Co*, 1985).

79 Reinecke & vd Merwe (1989,par 269).

relating of the person under consideration was in some particular way sub-normal. In this case special underwriting considerations would arise.[80]

5 BETTERMENT

Betterment[81] is another doctrine linked to indemnity. Almost inevitably the insured will be in a better position after indemnification than before, especially were the insurer elects reinstatement. Take for example where an insured's house is destroyed by fire and the insurer elects reinstatement, i.e. to rebuild the house. The insured, now the owner of a new house, is better off after indemnification than before. Raising Betterment as a defence, enables the insurer to subtract from the amount due to the insured, an amount representing the insured's betterment, to arrive at a more appropriate indemnification figure.

In *Reynolds and Another v Phoenix Assurance Company supra* (*Reynolds and Anderson v Phoenix Assurance Company and Others*, 1978) the reinstatement cost ten times the market value of the property, the court discussed making an adjustment for betterment and hence the judgement contains a useful exposition of the principles of betterment. The onus of proving betterment rests with the insurer. Once again in *Harbutt's Plasticine v Wayne Truck Company* 1970 1 All ER 225 (*Harbutt's Plasticine v Wayne Truck Company*, 1970), the plaintiff contended for reinstatement and the defendant wanted to subtract an amount for betterment. Lord Denning ruled in favour of the plaintiff since, under the circumstance of the case reinstatement was the only practical option and accordingly the plaintiff was not in a better position after reinstatement. In *Pleasurama Limited v Sun Alliance and London Insurance Limited* 1979 1 Lloyd's Law Reports 389 (*Pleasurama Limited v Sun Alliance and London Insurance Limited*, 1979), on the other hand, the insured's building was a total loss and the insured decided to build a new building elsewhere. Since reinstatement did not take place the court agreed that betterment had to be taken into consideration.

There is a definition in some policies, such as the fire policy which assists with this problem. Replacement is defined as equal to but not superior to the insured property's value when new.

6 SALVAGE

In the case of a total loss if the insured is fully indemnified what is left of the damaged or lost property is called the salvage. If the insured is fully indemnified and also retains the salvage, the insured would be over indemnified.[82] To avoid over-indemnification the insured is obliged to hand over the salvage.[83]

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80 Hansell (1988,250).

81 Very little is written about betterment. An exception is Isaacs, Rohan (1998) 'Betterment' *Deneys Reitz Insurance Report* 07 (Isaacs, 1998).

82 For a discussion on salvage consult Ivamy 473; Reinecke *et al* (2002:par403-405); *Oldfield v Price* 1860 2 F&F 80 (*Oldfield v Price*, 1860).

83 *Walker v Santam and others* 2009 ZASCA 056 par 16 (*Walker v Santam and others*, 2009)

The insurer becomes entitled to the salvage from the date of the total loss.[84] Some policies contain terms which are relevant to question of salvage:

> **Claims**
> If, after the payment of a claim in terms of this policy in respect of lost or stolen property, the property (the subject matter of the claim) or any part thereof is located, the insured shall render all assistance in the identification and physical recovery of such property if called on to do so by the company, provided that the insured's reasonable expenses in rendering such assistance shall be reimbursed by the company. Should the insured fail to render assistance in terms of this condition when called upon to do so, the insured shall immediately become liable to repay to the company all amounts paid in respect of the claim.[85]

And:

> **Company's rights after an event**
> (a) On the happening of any event in respect of which a claim is or may be made under this policy, the company and every person authorised by them may without thereby incurring any liability and without diminishing the right of the company to rely upon any conditions of this policy,
>
> (i) take, enter or keep possession of any damaged property and deal with it in any reasonable manner. This condition shall be evidence of the leave and licence of the insured to the company to do so. The insured shall not be entitled to abandon any property to the company whether taken possession of by the company or not.

An issue which often arises is, did the insured, indeed, suffer a loss. This can happen for example when a motor vehicle is stolen. Since the possibility exists that the vehicle can be recovered and thus it can be argued the insured cannot show he has suffered a loss, under what circumstances, then, can it be said that the insured has suffered a loss. In *M Zahn Investments (Pty) Ltd v General Accident Insurance of South Africa Ltd* 1981 4 SA 143 SE (*M Zahn Investments (Pty) Ltd v General Accident Insurance of South Africa Ltd*, 1981) an employee had without authorisation 'borrowed' a company vehicle and left it in a parking garage in Johannesburg where it subsequently was stolen by persons unknown.[86] The vehicle appeared to have been taken to Zambia where it was resold. The possibility of recovering the vehicle, two years after the theft, could not be excluded. However, the Zambian authorities refused to assist the South African Police with the recovery. It was argued that an employee of the insured company may indeed have succeeded if he went to Zambia and attempted to recover the vehicle. In these circumstances, did the insured in fact suffer a [total] loss? The court concluded that the insured had suffered a loss, making the following remark defining when it can be said the insured had suffered a loss:

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84 *Walker v Santam and others* ZASCA 056 par 16 (*Walker v Santam and others*, 2009)

85 Clause 6 of the General Terms and Conditions

86 This case is also of importance to deal with the question; when an employee borrows a vehicle without the permission of the employer, does this fall within the employees exclusion in the motor policy.

> "Modern business insurance demands that an insured, after having taken reasonable steps to trace his missing property, and a reasonable time having elapsed to allege a 'loss' for purposes of a claim under his policy."

For a loss to materialise in the context of an insurance policy, the 'loss' need not be a loss in the literal sense of the word. This leads to the next question. What would happen if the 'lost' property is subsequently recovered? The court continued, obiter:

> 'The subsequent finding of such property does not defeat such a claim, the insurer however becoming entitled to the recovered property.'

It would seem therefore that the insured cannot demand the undoing of the claim and retain the recovered property. If the property is recovered the insurer becomes entitled to the salvage.

In D*e Wet v Santam Bpk* 1996 2 SA 629 A (*De Wet v Santam Bpk*, 1996) the motor vehicle was stolen by false pretences and the insurer submitted a claim.[87] The police subsequently found the vehicle but the police retained possession pending the finalisation of the criminal case. Nevertheless the insured persisted with his claim against the insurer for indemnification. The court decided that the insured's loss was only temporary and accordingly not a 'loss' in terms of the policy.

Salvage raises interesting questions of ownership. Insurers, generally, do not wish to automatically become owners of the salvage since this often is accompanied by other onerous responsibilities.[88]

In *Mutual & Federal Insurance & another [the insured] v Minister of Safety and Security* 2010 NGP (*Mutual & Federal Insurance & another [the insured] v Minister of Safety and Security*, 2010) (unreported)[89] the insurer had indemnified against the loss of a vehicle which was stolen and then recovered, identified and taken into possession by the police. When the agent of the insurer went to collect the vehicle it was discovered that the vehicle had been handed over to someone else, it had been re-stolen. The insurer and insured then sued the Minister who raised the defence that the bank and neither the insurer or insured. The court rejected this argument holding that the insurer became the owner when the agreement of loss was signed.

7 CONTRIBUTION

7.1 Principle of contribution

87 This case is also of importance to deal with the question; when property is stolen by false presences, is the loss of the property or a pure financial loss. The court held it was the loss of property.

88 This issue is specifically dealt with in policies; 'The insured shall not be entitled to abandon any property to the company whether taken possession of by the company or not.'

89 Discussed by Van Niekerk (2010:102)

A person who has taken out double insurance, that is, has insured the same risk with two or more different insurers, can look to either or any of the insurers for indemnification.[90] The insured has a valid contract with the other insurers and can claim in terms of these contracts. However, those insurers which have indemnified the insured claim, in their own names, from the other co-insurers to bear their share of the loss.[91] This principle is the principle of contribution which is well established, being stated by Lord Mansfield in the leading case of *Godin v London Insurance Company* 1758 1 Burr 489 (*Godin v London Insurance Company*, 1978):[92]

> Natural justice says that several insurers shall all of them contribute pro rata to satisfy the loss against which they are all insured.

The principle of indemnity ensures that a person who is insured cannot recover more than the extent of his loss. A person may take out insurance with more than one insurer. He can for example insure his assets in terms of an assets policy and then also in terms of a construction policy.[93] After the loss, the position of the two insurers is governed by the principles of contribution. Obviously, the principle of indemnity, ensures that the insured person cannot recover more than his loss. The consequence is that if both insurers paid the claim, the insured cannot retain the full amount from both insurers since this will violate the principle of indemnity. An insurer who wishes to deal with the possibility of double insurance can insert an appropriate term in the contract of insurance.

The insured may seek indemnity from any of the insurers. The insurer which pays the claim then has via natural justice (equity) a right to claim from the co-insurers, in a pro rata portion of the amount. This ensures that each insurer contributes to the indemnification. This process on one insurer paying and then claiming a *pro rata* contribution would result in a circuitous process whereby the insured first claims in full from one insurer leaving the insurer subsequently to claim a rateable contribution from others. To avoid this circuitous procedure, policies commonly contain a contribution term. This term provides that if at the time of the loss, there is any other insurance covering the loss or part of it, the insurer shall not be liable for more than its rateable portion. The nett effect of this clause is that the insured person can only claim up to the rateable proportion of his loss from each insurer.

7.2 Examples of contribution

The case of *North British & Mercantile Insurance Co v London Liverpool & Globe Insurance Company* 1877 5 ChD 569 CA[94] (*North British & Mercantile Insurance Co v London Liverpool & Globe*

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90 *Samancor v Mutual & Federal Insurance Co Ltd and others* 2005 4 SA 40 SCA at 48-9 (*Samancor v Mutual and Federal Insurance Company*, 2005).

91 Davis (1993:289)

92 *Scottish Amicable Heritable Securities Association Ltd v Northern Assurance Co* 1883 11 R(Ct of Sess) 287 (*Scottish Amicable Heritable Securities Association Ltd v Northern Assurance Co*, 1883)

93 *Samancor v Mutual & Federal Insurance Co Ltd and others* 2005 4 SA 40 SCA (*Samancor v Mutual and Federal Insurance Company*, 2005)

94 The citation of the case given by the authors differs slightly from the above used citation. The case is also cited as an example of subrogation in Reinecke & vd Merwe (1989 par226n10). The case is discussed under contribution by

Insurance Company, 1877) demonstrates the principle of contribution. In this case the owner-operator of a grain storage facility, Barnett & Co took out fire insurance covering the loss or damage to grain stored in the facility. It was accepted that if the grain was damaged by fire that Barnett & Co had an obligation to the actual owners of the grain, the so-called bailee's liability. One of the owners Rodocanachi also took out fire insurance. The grain was destroyed by fire and it was accepted that Barnett & Co would indemnify Rodocanachi. Barnett & Co's insurance companies, North British and Mercantile Insurance Company and the Royal Insurance Company paid the claim discovered that the Rodocanachi was also insured, by the London, Liverpool, and Globe (LLG) and claim contribution from the LLG. The LLG denied liability and the matter when to court. The court *a quo* dismissed the insurer's claim pointing out that contribution arises when the same person insures himself with two different insurers for the same risk. In this case there were two different insurers who had insured themselves with different insurers. The case was then taken on appeal and the appeal dismissed upholding the court a quo's decision. It could be argued that in terms of principles of equity, set out by Lord Mansfield above, contribution could be applied and this case demonstrated the difference between equity and law. It is interesting to note that the appeal court pointed out that contribution was derived from marine insurance and that this was the first case where contribution was applied to fire insurance. The appeal court also recognised that one insurer could sue another in subrogation.

The fundamental contribution rule was laid down in the case *American Surety Company of New York v Wrightson* 1910 103 LT 663[95] (*American Surety Company of New York v Wrightson*, 1910) as follows:

> ... same interests, same assureds, same adventure, same risk, different amounts.

7.3 Reception of contribution into South African law

Contribution cases are rare in South Africa, but the principle has been recognised. There was *Lange and Company v The SA Fire and Life Assurance Company* 1867 5 Searle 358 at 369[96] (*Lange and Company v The SA Fire and Life Assurance Company*, 1867) and 140 years later *Samancor v Mutual & Federal Insurance Co Ltd and others* 2005 4 SA 40 SCA.[97] (*Samancor v Mutual and Federal Insurance Company*, 2005) In the latter case Samancor was insured in terms of two policies. The Westchester Insurance Company had issued an assets policy and Mutual & Federal a Principal Controlled Construction policy. Traditionally a construction policy covers the risk during the construction phase, to the exclusion of other policies. If this tradition was followed the loss should have been paid by Mutual & Federal and not Westchester. However, having paid the claim Westchester, sought to recover this payment from Mutual & Federal. Since Westchester had paid the claim, *prima facie*, the appropriate legal doctrine would be contribution; a direct action by Westchester against Mutual & Federal. Westchester however decided to resort to subrogation. As indicated above an

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Birds (1988,260)

95 Davis (1993:287)

96 Another earlier case is *Nathanson v Commercial Insurance Company* 1886 4 SC 461 (*Nathanson v Commercial Insurance Company*, 1886)

97 For a discussion of this case see, Van Niekerk, JP (2005) *Juta's Insurance Law Bulletin* 8 1 28-47.

insurer having indemnified the insured acquires the subrogated right to sue the third party in the name of the insured. Westchester thus sued Mutual & Federal in the name of Samancor for the amount it had paid. Mutual & Federal raised the defence that Samancor, having been indemnified by Westchester has no further claim for indemnification and thus no claim against it. If it was to be sued, so the argument goes, it had to be in terms of contribution and not subrogation. The court agreed, holding (at 50F-G), 'Westchester should have brought a claim for contribution and not a subrogated claim.' Thus contribution was successfully used as a defence, not a cause of action.

7.4 Contribution and standard terms of contract

Because of the desire of the insurer to avoid the situation of having to sue a co-insurer, in terms of the common law for contribution, the position of contribution is often dealt with in terms of the insurance policy.[98] This is discussed above.

8 INSURABLE INTEREST

8.1 Requirement of insurable interest for a valid insurance contract?

It is often stated that insurable interest is a requirement for all insurance contracts. The argument goes that a person should only be paid by an insurer if that person has suffered a loss. This statement is becoming controversial as increasingly arguments are advanced against there being such a requirement. Some reasons for the existence of insurable interest can be advanced.

8.1.1 Moral hazard and insurable interest

Moral hazard and insurable interest creates a moral hazard problem. People can be enriched by bringing about the insured event and the requirement of insurable interest is important to limit the risk that someone will take out insurance on an event in which that person has no interest and then bringing about the event. Without the requirement of insurable interest the public will be exposed to considerable increase in risk. Allegations in South Africa of people committing crimes, especially but not only murder, in order to cash in on insurance policies are well-known.[99] If the requirement of insurable

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98 *North British & Mercantile Insurance Company v Liverpool & Globe Insurance Co & London* 1877 5 ChD 569 (*North British & Mercantile Insurance Co v London Liverpool & Globe Insurance Company*, 1877)

99 Examples are legion: In 1992 two former insurance agents were charged with murder, attempted murder and fraud but acquitted arising. This arose out of an incident in which their minibus containing thirteen newly employed and insured employees were driving. The salesmen were the beneficiaries to the policies. Five employees died when the minibus plummeted down a ravine and burst into flames. It is not clear whether or not the insurer paid the claims (Star June 25, 1993). Dr Omar Sabadia was found guilty of murdering his wife Dr Zahida Sabadia. Shortly before her death he had insured her life for R3 m. Mr Ben du Toit was charged with the murder of his wife. He stood to gain R7 m from life insurance policies taken out on her life. Mrs Janet Kobrin was charged with the murder of her husband. She stood to gain R7 m from insurance policies. Dr Casper Greeff was found guilty of murdering his wife a charge he consistently

interest in life insurance was not a requirement, it can be anticipated that a considerable increase in murders and other insurance related crimes committed for insurance gains would occur.

8.1.2 Public policy

It is argued that it is against public policy for anyone to receive an insurance benefit in cases where that person has no interest in the loss not occurring. Thus it is argued, if the insured does not suffer a financial loss, that person should not gain from insurance. However from a public policy point of view this is too narrow. It is argued more broadly that a person should not gain from insurance when he or she cannot show a rational reason, apart from the insurance contract itself, why he should gain. To gain where there is no rational reason, it can be argued, would be against public policy. Such a gain is akin to a wagering contract. Insurers do not favour entering into insurance contracts where the beneficiary has no interest. Insurers were concerned about the lack of insurable interest long before it became a legal requirement that insurance contracts required insurable interest. Before this insurers spent a great deal of time attempting to avoid contracts with no insurable interest.

8.2 English law

It is generally accepted that insurable interest is a requirement as a matter of public policy, for all contracts of insurance. The absence of insurable interest could render the insurance contract illegal, void or simply unenforceable.[100] Insurable interest was introduced into South African insurance law via English statutory law and thus English law is the point of departure in the discussion of insurable interest.[101]

8.2.1 English Legislation

The relationship between the insurance and the wagering (or gaming) contracts has a long history. Wagers and insurance contracts were both enforceable in English law.[102] These two contracts could thus be confused. Before the promulgation of the English Life Assurance Act[103] 1774 (also called the Gambling Act) many distasteful wagering transactions were conducted as 'insurance'. This was particularly so where the insurance of a life was concerned. The British Parliament decided that

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denied. It was alleged that insurance policies taken out on her life would solve his financial problems. It should be noted that in most cases the husband-wife relationship is involved, in which relationship, insurance is permissible. This is often a reason advanced why insurable interest can be abolished.

100 Birds (1988:24)

101 The position at English law is succinctly set out in Birds (1988:24-52); See also

102 For an overview to the English law of betting consult Rowsell, HW & Moran, CG *A Guide to the Law of Betting- Civil and Criminal* Butterworth 1911 (Rowsell & Moran, 1911). As to enforceability of wagers in the English common-law, *Moulis v Owen* 1907 1 KB 757 (*Moulis v Owen*, 1907); Gaming contracts had been enforced in *Good v Elliott* 1790 3 TR 693 (*Good v Elliott*, 1790).

103 14 Geo 3 c 48.

insurance should be limited to those instances where the insured had an interest and thereby distinguishing between the two types of contract.[104] The Life Assurance Act was passed because:

> it had been found by experience that the making insurances on lives or other events wherein the assured shall have no interest hath introduced a mischievous kind of gaming:[105]

(My emphasis)

It was not intended to prohibit wagering as such but only wagering under the cloak of an agreement which purported to be a contract of insurance. Despite the reference to life assurance in the title of the Act, the Act applies to insurances other than life insurance.[106] This Act is still in force in England. Unfortunately the Act did not define insurable interest and over the years considerable difficulty was experienced trying to define what this concept was to supposed to mean. Insurable interest is also specifically required in marine insurance in terms of s4 of the Marine Insurance Act 1906. There is probably no statutory requirement for insurable interest in goods.[107] The Life Assurance Act of 1774 was followed by the Gaming Act of 1845.[108] This Act for the first time declared all contracts made by way of gaming or wagering were void irrespective of their form or subject matter. From that time onwards, contracts of gaming became unenforceable but insurance contracts were enforceable. In addition to the above two English Acts various other Acts apply in England dealing with insurable interest.[109]

8.2.2 United Kingdom case law

In the years since 1774, the requirement of insurable interest was extensively developed by English case law.[110] As a consequence of case law, complex rules developed for various classes of insurance defining, in particular, what is meant by insurable interest and the time when insurable interest should exist.

In *Castellian v Preston* 1883 11 QBD 380 CA (*Castellain v Preston*, 1883), Preston was in the course of selling his house to one Rayner when it was destroyed by fire. He claimed from and recovered from his insurer the Liverpool & London & Globe.[111] He also received the full purchase price from Rayner.

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104 The possibility, for example, of murdering the insured life exists.

105 Quoted from the preamble to the Act. A copy of this act is to be found in Davis (1993,521).

106 In terms of s4 of the Act, the Act does not extend to insurances on ships, goods or merchandises. Other insurances are not exempted in terms of s4.1

107 See however the Marine Insurance Act (1788) which was repealed, in so far as it related to marine insurance by the Marine Insurance Act (1906).

108 8 & 9 Vict C 109.

109 The Marine Insurance Act 1788; Marine Insurance Act 1906.

110 Le Cras v Hughes 1782 3 Doug KB 81 (*Le Cras v Hughes*, 1782); *Lucena v Craufurd* 1806 2 Bos & PNR 269 HL (*Lucena v Craufurd*, 1806); *Dalby v India and London Life Assurance Company* 1854 15 CB 365 (*Dalby v India and London Life Assurance Company*, 1854); *Castellain v Preston* 1883 11 QBD 380 CA (*Castellain v Preston*, 1883); *Macaura v Northern Assurance Company* 1925 AC 619 (*Macaura v Northern Assurance Company*, 1925).

111 This company operated in South Africa until the early 1970s and known commonly as the Globe. It merged with the Royal in the early 1900s but continued to operate in South Africa. In the 1960s separate South African companies

He was thus doubly indemnified. The insurer sued in the name of their chairman,[112] Castellian, and were successful in recovering their outlay. The court stated that only those who have an insurable interest can recover and only to the extent to which that insurable interest is damaged by the loss.
Some cases illustrate how hash the doctrine can be, if strictly applied, and the strict application of the doctrine is a matter of concern and has been subjected to increasing criticism.

8.3 South African law

The insurance contract was unknown in Roman law and thus the concept of insurance interest is not part of the Roman law. It was however not unknown in Roman-Dutch insurance law.[113] It is generally conceded that the requirement of insurable interest forms part of South African insurance law. Since English law of insurance was adopted by statute, in the Cape and Orange Free State at least, it is not surprising to note the English law of insurable interest being applied in South Africa. The leading South African case on what constitutes insurable interest is *Little john v Norwich Union Fire Insurance Society* 1905 TH 374 (*Little john v Norwich Union Fire Insurance Society*, 1905). In this case a husband insured, in his own name, business goods belonging to his wife. The spouses were married out of community of property. He was the sole manager of the business and was in control of the business. He bought and sold the goods at his sole discretion. The profits from the business were used to support the spouses. The goods were destroyed by fire and the insured submitted a claim which was rejected on the basis that he had no insurable interest in the goods - he, after all, did not own the goods.

In this case Wessels J laid down the following principle applicable to insurable interest:[114]

> The principle to be deduced from these cases appear to be thus, if the insured can show that he stands to lose something of an appreciable commercial value by the destruction of the thing insured, then even though he has neither a jus in re nor a jus ad rem to the thing insured his interest will be an insurable one. As a general principle the insurable interest should exist at the time when the policy is entered into and certainly at the time when the loss is incurred.

The court concluded that the husband's control of the goods and the fact that the husband and wife jointly had an interest in the business was sufficient to constitute insurable interest. From this case it is clear that the South African courts interpret the concept of insurable interest to be much broader than ownership to the property or contractual rights or obligations. This broad notion of insurable interest has been criticised.

Malcher and Malcomess v Kingwilliamstown Fire and Marine & Trust Company 1883 3 EDC 271 m(*Malcher and Malcomess v King Williamstown Fire & Marine Insurance & Trust Company*, 1883)

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were listed on the Johannesburg Stock Exchange. The Royal-Globe group in turn merged with the Old Mutual's short-term company the SA Mutual Fire and General to form the Mutual & Federal Insurance Company.

112 The modern company form started in 1844. Before this time 'companies' were formed in terms of a Deed of Co-partnership and when prosecuting a case through the courts it was the custom to sue in the name of the chairman.

113 Van Niekerk (1998: 149).

114 Discussed in Davis (1993: 96).

the court held that a mere creditor does not have an insurable interest in the property of his creditor. Credit agreements usually require proof of insurance and that the interest of the credit provider be noted by the insurer.

In *Commercial Assurance Company v Kern* NO 1944 EDL 215[115] (*Commercial Assurance Company v Kern*, 1944) a man insured his Willy's motor car. By means of a personal accident endorsement the insurer also undertook to pay the legal representative of his son R1 000 should he die by accident 'in connection with the car described'. The insured then donated the Willy's car to his son who subsequently sold it and in its place acquired a different car, a Morris. He was subsequently killed in an accident. The father then attempted to claim R1 000, due in terms of the personal action section of the policy from the insurer. It was held that since the insured's ownership in the Willy's car constituted his insurable interest, once he divested himself of such ownership, as he had done by donating and delivering it to his son, he also divested himself of his insurable interest. At the time of the accident in the Morris the policy and the endorsement ceased to have any effect, as Pittman JP stated:

> The fundamental principle is that once the assured is deprived of his insurable interest in the insured car, the policy ceases to have any validity.

In *Green v Heyman* 1963 3 SA 390 T (*Green v Heyman*, 1963) the court held that a contractual obligation to repair plate glass windows established insurable interest. In *T Phillips v General Accident Insurance Co SA Ltd* 1983 4 SA 651 W (*Phillips v General Accident Insurance Company SA Limited*, 1983), with the repeal of the pre-Union legislation,[116] some academics took the view that insurable interest was no longer necessary; according to this view insurance with out insurable interest is possible.[117] In the Phillips case the issue to be considered is does a husband have an insurable interest in his wife=s property - in this case her engagement ring. Unlike the Littlejohn case, the husband did not have control over the ring and the property did not produce an income on which they lived. The court came to the conclusion that a husband does indeed have an insurable interest in her property since a husband has a moral obligation to replace the ring and it was possible for the wife to sell the ring should they need money. The court went out of its way to find insurable interest in this case which was in line with the view that insurable interest is not necessary for a valid insurance contract.

In *Steyn v AA Onderlinge Assurance Assosiasie Bpk* 1985 4 SA 7 T (*Steyn v AA Mutual Insurance Association Limited*, 1985) The insured had taken out two policies indemnifying against loss or damage due to fire. One policy covered his furniture and the other the house itself. The house belonged to the Provincial Administration which intended to demolish it when it got round to building a road. Until that time the insured had the right to occupy the house. The insurer repudiated the claim on the basis that the insured had no insurable interest in the house and that the insured was an unrehabilitated insolvent. The court, De Villiers J, approached the matter by accepting that the purpose of insurable interest was to distinguish between wages and contracts and it was clear that the specific transaction was not a wager. The repudiation on grounds of no insurable interest thus failed.

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115 Davis (1993, 94).

116 Repealed in terms of the Pre-Union Statute Law Revision Act 43 of 1977

117 MFB Reinecke (1971) 'Versekering sonder versekerbare belang?' *CILSA* 4 (Reinecke, 1971)

In *Manderson t/a Hillcrest Electrical v Standard General Insurance Co* 1996 3 SA 434 D (*Manderson t/a Hillcrest Electrical v Standard General Insurance Co*, 1996) Manderson had insured a vehicle belonging to one of his subcontractors together with his vehicles.[118] When a loss occurred Manderson submitted a claim which was repudiated by the insurer on the basis that the insured did not have an insurable interest in the vehicle which belonged to his subcontractor. The court upheld the repudiation and specifically declined to follow the broader approach of Phillips and Steyn.[119]

The facts of *Brightside Enterprises (Pvt) Ltd v Zimnat Insurance Co Ltd* 2003 1 SA 318 (*Brightside Enterprises (Pvt) Ltd v Zimnat Insurance Co Ltd*, 2003) are similar to those of the Brian Hilton Manderson case. Brightside Enterprises, a company, had insured the motor vehicle belonging to one of its employees, Michael Durham a director and shareholder of the insured company. It was agreed that Durham would use his vehicle on company business and in return the company would insure, repair or replace the vehicle. The insurer was fully aware of this arrangement, issued a certificate to this effect (321GH). While in South Africa, the vehicle was damaged by a garage and while being driven by a garage employee was car-jacked and thus stolen. The insured, the company, submitted a claim which was repudiated by the insurer on a number of grounds including the lack of insurable interest, because the company was not the owner of the insured vehicle. It did not stand to make an insured loss if the vehicle had been stolen. The insured instituted an action to compel the insurer to payout in terms of the policy. In a criticised judgement the court found in favour of the insured company.

Insurable interest was criticised in *Lorcom Thirteen (Pty) Ltd v Zurich Insurance Company South Africa Ltd* (*Lorcom Thirteen (Pty) Ltd v Zurich Insurance Company South Africa Ltd*, 2013) discussed in greater detail below.

8.4 Examples of insurable interest

Ownership is adequate to establish insurable interest. A person has an insurable interest in the property that he owns. A joint owner is entitled to insure to the extent of his interest in the property. Possession of property coupled with the claim of title also gives an insurable interest which continues until the title has been declared invalid. Thus a person hiring property from another has an insurable interest in it. A lien over the property of another carries with it an insurable interest and thus a contractor has an insurable interest in work done on another's premises. A person who holds himself responsible for the safety of goods has sufficient interest to enable him to obtain insurance on articles in his custody and therefore a bailee of goods has an insurable interest.

The position of the parties under a contract of sale deserve special consideration. Under such a contract ownership in the property may pass from seller to the purchaser without the risk also passing. On the other hand, the risk may pass without ownership passing.

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118 In so doing the contractor would enjoy a lower rate (fleet rate) than had he insured the vehicle himself.

119 For a discussion of the Manderson case consult Van Niekerk 'Insurable interest 1, Legal certainty 0' 1995 *SAMLJ* (Van Niekerk, 1995)

8.5 Insurable interest and life insurance

Insurable interest is required in contracts for life insurance. In the case of insurance on one's own life, insurance on the life of a wife or by a wife on the life of the husband, an insurable interest is presumed[120] and need not be proved. There is no limit on the amount of life insurance that may be contracted for. The limit is not a function of the extent of the insurable interest. Insurable interest is simply required to distinguish insurance from a wager.

Life insurance also illustrates the importance of the time when the insurable interest must exist. For example, a man may take out life insurance on the life of his wife. They then divorce and five years after the divorce his, now ex-wife dies. Will the policy still be enforceable? The general principle is that it is sufficient if the insurable interest existed at the time when the life policy was taken out, and consequently the contract will be enforceable even though there is no insurable interest at the time of the claim as long as, insurable interest was in existence at the beginning of the contract.[121]

As a general rule one may have an insurable interest and therefore one can insure the life of a relative. This arises from the South African position which recognises a very wide legal duty to support relatives. Such legal duties confer an insurable interest. This position differs from that in the English law and American law.

A creditor has an insurable interest in the life of his debtor, at least to the extent of the debt.[122] A person has an insurable interest in the life of their partner. A company has an insurable interest in the life of its manager or managing director, where its prosperity depends on his services and skill and where his death would cause it financial loss. A servant who has a contract of service for a number of years at an annual salary has an insurable interest in the life of his employer to the extent of the value of the future salary. There is authority for the proposition that a woman who has a right to expect pecuniary advantage from the continuance of the life of her fiancée,[123] has sufficient interest in his life to confer on her an insurable interest in his life. And in a suitable case this would apply for a man in regard to his fiancée as well.

8.6 Insuring the lives of children

There are instances where the lives of children were insured who were subsequently murdered in order to claim the insurance benefits.[124] To avoid the possibility of receiving meaningful insurance benefits

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120 *Griffiths v Fleming* 1909 1 KB 805 CA (*Griffiths v Fleming*, 1909). Reinecke & vd Merwe (1989;38, 39).

121 Davis (1993:107).

122 *Godsall v Boldero* (1807) 9 East 72 (*Godsall v Boldero*, 1807); *Henson v Blackwell* (1845) 4 Hare 435 (*Henson v Blackwell*, 1845); Birds (1988,27)

123 Davis (1993,108), quoting MacGillivray par. 83.

124 The well-known American example is *Liberty National Life Co v Weldon* 1957, discussed by J Donald Cairns (1958) "Life insurer liable for death caused by beneficiary without insurable interest in decedent", *Ohio State Insurance Law*

on the lives of children, legislation restricts the insurance benefits on the lives of children. In South Africa this is done through s55 of the Long-Term Insurance Act[125] which prohibits insurers from insuring lives of a certain minors. A long-term insurer may not insure the life of a minor under 14 years of age for any sum which (or which when added to any other amount payable on the minor's death by any other insurer or friendly society) exceeds:

(a) R10 000 if the minor is under six years or age; or
(b) R30 000 if the minor is six years or older but under fourteen years of age.

A policy may, however, be issued providing for the payment on the death of a minor of a sum not exceeding the total of all premiums paid on the policy together with the interest of premiums at a rate prescribed by the Minister. This is a statutory limitation and should not be confused with the common law doctrine of insurable interest. The statutory limitation does not apply to disability insurance.

8.7 Presumption in interpretation

As a general principle the courts will lean towards upholding the existence of an insurable interest.[126] As Brett MR said in the case of *Stock v Ingles*:[127]

> After the underwriters have received a premium, the objection that there was no insurable interest is often, as nearly as possible, a technical objection, and one which has no merit, certainly not as between the assured and the assurer. Of course we must not assume facts which do not exist nor stretch the law beyond its proper limits, but we ought I think, to consider the question with our mind, if the facts and the laws allow it, to find in favour of the insurable interest.

8.8 Criticism of the requirement of insurable interest

Insurable interest has received judicial attention[128] and has been criticised in a number of Transvaal judgments. Insurable interest has also been commented on in a number of articles.[129] It has been questioned why a contract of insurance should not be enforceable in the absence of the English concept of insurable interest when, it is quite clear that the transaction is neither a wager nor contrary to public

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Journal 19 532 (Cairns, 1958); Gary I Salzman (1965) "Insurable interest in life insurance", *Insurance Law Journal* 512 (Salzman, 1965)

125 s55 of Act 52 of 1998.

126 *Brian Hilton Manderson v Standard General Insurance Co* (*Manderson t/a Hillcrest Electrical v Standard General Insurance Co*, 1996)

127 (1884) 12 QBD 564 at 571; Davis (1993 17 of 1943 - 550)

128 See the following cases *Phillips v General Insurance Company SA* 1983 SA 4 652 W (*Phillips v General Accident Insurance Company SA Limited*, 1983); *Steyn v AA Onderlinge Assuransie Assosiasie Beperk* 1985 4 SA 7 T (*Steyn v AA Mutual Insurance Association Limited*, 1985); *Gutman, NO v Standard General Insurance Company* 1981 4 SA 114 C (*Gutman, NO v Standard General Insurance Company*, 1981).

129 Lindsay Tee R 'Insurable interest-recent judgments' 1985 *SAILJ* 49 (Lindsay, 1985); Hyman 1980 *SAILJ* B-17.

policy. It has been argued that to permit an insurer to evade liability under these circumstances is to permit the insurer to evade liability on a mere technicality. In more recent times some confusing statements have appeared in South African judgements regarding insurable interest.[130]

9 DUTY TO ACT IN GOOD FAITH - DUTY TO DISCLOSE MATERIAL CIRCUMSTANCES

The parties to the insurance contract are under a duty to act towards each other in good faith. An important manifestation of this is the duty to disclose every material circumstance. This is the most common, but by no means the only, consequence of the duty. The duty to disclose every material circumstance before entering into the insurance contract, is by nature, related to other legal doctrines. First it can be argued that the intentional, fraudulent or negligent mis-statement inducing a person to enter into a contract is actionable. Therefore even if no specific insurance doctrine existed the general would in any event be applied to the insurance contract. Second to avoid any misunderstanding about the importance of the representations made by the insured when seeking insurance, the insurance contract contains terms which it could be argued could be breached if the material facts are not disclosed leading to issues of contractual interpretation[131] and thirdly to correctness, to remove any doubt as to the importance of the pre-contractual representations these could be affirmatively warranted leading to a breach of warranty. The contractual aspects are discussed in greater detail herein.

When dealing with a problem of non-disclosure, these different aspects should be borne in mind and dealt with in a systematic fashion or confusion can arise. It is suggested that *Jerrier v Outsurance Insurance Company Ltd* 2013 (*Jerrier v Outsurance Insurance Company Ltd*, 2013) is an example of this confusion.

9.1 English law

It is generally accepted that the doctrine of the duty of good faith, or utmost good faith as referred to in English law, originated from that country and thus the English law is first examined.

9.1.1 *Carter v Boehm* 1766

130 *Lorcom Thirteen (Pty) (Ltd) v Zurich Insurance Company South Africa Ltd* 2013 (*Lorcom Thirteen (Pty) Ltd v Zurich Insurance Company South Africa Ltd*, 2013) WCHC. See in particular Van Niekerk's discussion on the indemnity aspects of the case (Van Niekerk, JP (2013) Juta's Insurance Law Bulletin 16(2) 73-103 at 97 et seq.)

131 *Bruwer v Nova Risk Partners Ltd* 2011 (1) SA 234 GSJ (*Bruwer v Nova Risk Partners Ltd*, 2011) discussed in greater detail elsewhere.

In the United Kingdom insurance contracts are regarded as contracts of utmost good faith (*uberrima fides*)[132] which is traced back to the case of *Carter v Boehm* 1766 3 Burr 1905; 1766 97 ER 1162[133] (*Carter v Boehm*, 1766). Insurance was provided in favour of the Governor George Carter by a London underwriter Charles Boehm, covering a fort which was likely to be attacked and subsequently was. It fell into the hands of the French. The facts, *inter alios* it was likely to be attacked and not really designed or properly equipped for defence were not disclosed when insurance was sought. The underwriter complained that the insured should have disclosed these material facts when insurance was sort. Lord Mansfield, the famous English judge, made the following ruling, launching the duty to disclose material facts:

> Insurance is a contract upon speculation.
> The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation, and proceeds upon the confidence that he does not keep back any circumstances in his knowledge, to mislead the underwriter into a belief that the circumstances do not exist, and to induce him to estimate the risk as if it does not exist. The keeping back of such circumstances is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriters deceived, and the policy is void, because this risque [risk] run is really different from the risque [risk] understood and intended to be run, at the time of the agreement. The policy would equally be void against the insurer if he concealed [it].

The requirement of utmost good faith transcends all insurance policies as noted, clearly, by Lord Blackburn in the case of *Brownlie v Campbell* 1880 5 AC 925 HL at 954[134] (*Brownlie v Campbell*, 1880):

> In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is of *uberrima fides*, that, if you know of any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he should take it or what premium he will charge if he does take it, you will state what you know. There is an obligation there to disclose what you know; and the concealment of a material circumstance known to you, whether you have thought it material or not, avoids the policy.

9.1.2 Marine Insurance Act (1906) - s17 & s18

The doctrine of disclosure, in marine insurance was codified by the English Marine Insurance Act (Marine Insurance Act, 1906) which reads:[135]

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132 As indicated below in South Africa, in the Oudshoorn case the Appellate Division in 1985 rejected the expression *uberrima fides*. This expression is thus, after that case, seldom used in South Africa.

133 Davis (1993: 112).

134 Davis (1993: 112).

135 It is well-known that this Act represents to codification of English marine insurance law and as such much of insurance law in general.

s17 A contract of marine insurance is a contract based upon utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.

18(1) Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such a disclosure the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judg[e]ment of a prudent insurer in fixing the premium or determine whether he will take the risk.

(3) In the absence of inquiry the following circumstances need not be disclosed, namely

(a) any circumstance which diminishes the risk;

(b) any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;

(c) any circumstance as to which information is waived by the insurer.

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

(5) The term circumstance includes any communication made to, or information received by, the assured.

Although the basic principle of utmost good faith and the subsequent doctrine of duty to disclose all material facts appears to be straightforward in principle, in practice it is a source of considerable consternation mainly because in order to determine the materiality of facts for purposes of disclosure, English law adopts the so called prudent or reasonable insurer test.[136]

9.1.3 Material alteration of the risk

Closely allied to the question of disclosing material facts is the question of a material alteration of the risk during the contract period. As a general rule an insurer is bound by the contract entered into and minor changes in risk does not change this fact. As was stated by Sir Frederick Pollock in *Baxendale v Harvey* 1859 (*Baxendale v Harvey*, 1859):

> "The insurer, when it has had notice of the risk, is not entitled to any notice by reason of the increase in danger. A person who insures may light as many candles as he pleases, though each additional candle increases the danger of setting the house on fire."

To cater for material alterations in the risk some policies contain specific provisions requiring the insured to notify the insurer of a material change in the risk. This is a contractual matter and is discussed below. However, an insurer faced with significantly changed circumstances which materially alters the insured risk during the course of the contract is entitled to treat the insurance contract as automatically

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136 *Elton v Larkins* 5 Car & P 385 discussed in *Mutual and Federal Insurance Company Ltd v Oudtshoorn Municipality* 1985 SA 1 419 A at 434 (*Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality*, 1985).

discharged.[137] So in *Swiss Reinsurance Co v United India Insurance Co Ltd* 2005 (*Swiss Reinsurance Co v United India Insurance Co Ltd*, 2005), where Swiss Re was the reinsurer of a Construction All Risks Policy (CAR) which had been issued by United India Insurance Co Ltd (UII) for a power station in India. The project was undertaken as a joint venture and a dispute developed between the two parties resulting in a complete cessation of work on the almost finished project. Swiss Re advised UII that because of the material alteration of circumstances it regarded the contract as terminated. The court was called upon to decide if Swiss Re was indeed entitled to regard the contract as at an end and decided that the changed circumstances justified the termination of the policy. The CAR was construction insurance while the now deserted site was no longer a construction site.

9.1.4 Need for reform

Aspects of the duty to disclose has been criticised in most parts of the world. In South Africa it has been commented on by leading insurance writers[138] as is the case in other parts of the world.[139] It has been criticised by a number of commissions in the United Kingdom.[140] The Law Reform Committee's 5th report 1957 'Conditions and exceptions in insurance policies' (David, Jenkins, & Committee, 1957) criticised the doctrine as being unduly harsh to innocent policy holders. The Law Commission's 1980 report Insurance law - non disclosure and breach of warranty Report of 1980,[141] suggested that the definition of materiality be changed to what a reasonable insurer would disclose rather than what he would consider material. The EEC Directive on Insurance Law of 1979 also criticised the existing position. The United Kingdom insurance industry responded to the criticism by publishing a code of practice.

Unfair contract terms legislation

The need to make specific reforms for insurance contracts have to an extent been lessened by the introduction of consumer legislation dealing with unfair contractual terms in general. This general legislation applies to terms found in insurance contracts as well. In countries such as the United Kingdom special legislation has been enacted to ensure fair play between the parties.[142] Legislation includes the Sale of Goods Act (1979), the Misrepresentation Act (1967), the Supply of Goods (Implied Terms) Act (1973), the Unfair Contract Terms Act (1977) and the Consumer Credit Act (1974).

9.2 South Africa

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137 *Kausar v Eagle Star* 2000 (*Kausar v Eagle Star*, 2000); *Swiss Reinsurance Co v United India Insurance Co Ltd* 2005 (*Swiss Reinsurance Co v United India Insurance Co Ltd*, 2005); Hanson, John and Sephton, Emma (2006) '*Material alteration of the insured risk'* Barlow Lyde & Gilbert (Hanson & Sephton, 2006)

138 Oelofse, AN Die Uberrima fides-leerstuk in die versekeringsreg (Unpublished doctoral thesis) 1983 (Oelofse, 1983). Spiro 'Uberrima fides' 1961 *THRHR* 196-202 (Spiro, 1961); Trakman 1983 7 SAILJ 95 quoted in Pillay supra.

139 Hasson, RA 'The doctrine of uberrima fides in insurance law - a critical review' 1969 32 *Modern Law Review* 615-637 (Hasson, 1969).

140 Diacon et al (1988,52).

141 Report number 104

142 Diacon et al (1988: 48)

9.2.1 Rejection of the expression *uberrima fides*

In the Oudshoorn case the court specifically rejected the expression *Uberrima Fides*. It was the expression and not the doctrine which was rejected.

About the expression the court said, "It is an alien, vague, useless expression without any particular meaning in law. As I have indicated, it cannot be used in our law for the purpose of explaining the juristic basis of the duty to disclose a material fact before the conclusion of a contract of insurance. Our law of insurance has no need for this [expression] and the time has come to jettison it"

9.2.2 Duty to disclose as part of South African insurance law

The duty of good faith in the context of the insurance contract has been considered in a number of South African cases.[143] A consequence of this duty is the duty to disclose material facts. This duty forms part of South African insurance law despite the absence of the expression *uberrima fides* in Roman or Roman-Dutch law. The duty to disclose is imposed *ex lege* and is not based on an implied term of the contract of insurance.[144]

9.2.3 Duty to disclose

When an insurance company accepts a risk, the insurer relies on the information given to him by the person making application for the insurance. The law places a positive duty on the applicant to disclose all circumstances material to the risk. The person seeking insurance cover likewise is placing his faith in the insurer and the insurer must disclose material facts to the person seeking insurance. The law thus

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143 The duty was accepted to exist in a number of cases before the Oudshoorn case and subject to detailed security in the Oudshoorn Municipality 1985 1 SA 419 A case. See *Fine v The General Accident Fire and Life Assurance Corporation Ltd* 1915 AD 213 at 218 (*Fine v The General Accident Fire and Life Assurance Corporation Ltd*, 1915); *Colonial Industries Ltd v Provincial Insurance Co Ltd* 1922 AD 33 at 40 (*Colonial Industries Ltd v Provincial Insurance Co Ltd*, 1922); *Bodemer NO v American Insurance Co* 1961 2 SA 662 A at 668 (*Bodemer NO v American Insurance Co*, 1961); *Pereira v Marine & Trade Insurance Co* 1975 4 SA 745 A at 755F (*Pereira v Marine & Trade Insurance Co*, 1975); *Rabinowitz and another NNO v Ned-Equity Insurance Company Ltd and another* 1980 1 SA 403 W (*Rabinowitz and another NNO v Ned-Equity Insurance Company Ltd and another*, 1980); *Kelly v Pickering* (1) 1980 SA 2 753 R (*Kelly v Pickering (1)*, 1980); *Kelly v Pickering (2)* 1980 SA 2 758 R (*Kelly v Pickering (2)*, 1980); *Nel v Santam Insurance Company* 1981 SA 2 230 T (*Nel v Santam Insurance Company*, 1981); *Pienaar v Southern Life Insurance Association Limited* 1983 1 SA 917 C (*Pienaar v Southern Life Insurance Association Limited*, 1983); *Mutual and Federal Insurance Company Ltd v Oudtshoorn Municipality* 1985 SA 1 419 A (*Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality*, 1985); *Anderson Shipping (Pty) Limited v Guardian National Insurance Company* 1987 SA 3 506 A (*Anderson Shipping (Pty) Limited v Guardian National Insurance Company*, 1987); *Trust Bank van Afrika Beperk v President Versekeringsmaatskappy Beperk* 1988 1 SA 546 W (*Trust Bank van Afrika Beperk v President Versekeringsmaatskappy Beperk*, 1988); *President Versekeringsmaatskappy Beperk v Trust Bank van Afrika Beperk* 1989 1 SA 208 A (*President Versekeringsmaatskappy Beperk v Trust Bank van Afrika Beperk*, 1989); *Cronje v AA Lewens* 1989 4 SA 818 W (*Cronje v AA Lewens*, 1989); *Pillay v South African National Life Assurance Co Ltd* 1991 1 SA 363 D (*Pillay v South African National Life Assurance Co Ltd*, 1991) (this case was actually a breach of warranty case see van Niekerk JP (1991).

144 1985 1 SA 419 A at 433AB.

requires that the parties to an insurance contract must deal with each other in good faith. A consequence of the requirement of good faith is the duty to disclose.

Miller JA,[145] expressed the duty as follows:

> It is part of the law that a person making a proposal for insurance is under a duty to disclose to the insurer material facts of which he has knowledge - material, that is, to the question of 'estimating the risk', which is turn would involve the question of acceptance or refusal of the proposed insurance and, in the case of acceptance, the question of the premium to be charged.

Joubert JA[146] expressed this duty in a similar manner:

> There is a duty on both insured and insurer to disclose to each other prior to conclusion of the contract of insurance every fact relative and material to the risk ... or the assessment of the premium. This duty of disclosure relates to material facts of which the parties had actual knowledge or constructive knowledge prior to conclusion of the contract of insurance.

The requirement for disclosure accepted by the court is in line with that set-out in the UK's Marine Insurance Act.[147] The extent of the duty is not the same for all contracts. As a general rule in most commercial contracts, there is no duty to disclose information not requested. The idea is that people should make the best bargain while not actually misleading each other. The legal principle governing such contracts is the *caveat emptor* (let the buyer beware). This principle encourages each man to get the best deal for himself, but such a principle permits one party not to fully inform the other party.

9.2.4 Test for failure to disclose

It is very important to know when an insurer (or insured) may repudiate a claim because the duty to disclose has not been met. The test should be broken into two stages: (1) was the fact which was not disclosed a material fact and if so (2) should be failure give rise to repudiation?

Test of materiality

The first issue to determine is, is the fact which was not disclosed, material. The test for materiality is as set out in s18(2) of the Marine Insurance Act. A fact is material if it would influence the judgment of the prudent insurer in accepting the risk or in fixing the premium.[148] Premiums, especially life premiums are set by insurance companies on the advice of actuaries. The question which arose in *Qilingele v South African Mutual Life Assurance Society Ltd* 1991 2 SA 399 W[149] (*Qilingele v South African Mutual Life Assurance Society Ltd*, 1991) is an expert witness, such as an actuary necessary to

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145 1985 1 SA 419 A at 442 G.

146 1985 1 SA 419 A at 432 EG.

147 van Niekerk (1991,119-120), for reasons which are not clear, defines materiality somewhat broader than the courts. His definition does not stop at the determination of the premium but continues to include considerations of contract terms.

148 s18 of The Marine Insurance 1906.

149 Reported on appeal as 1993 1 SA 69 A.

determine if a fact is material in order to set the premium? The answer to this question is discussed in relation to the reasonable man test discussed below.

Should the insured have disclosed the fact

The fact that a material fact has not been disclosed cannot in itself be grounds for repudiation by an insurer. Mr X for example may be dying of cancer but is unaware of this fact. The fact exists and is material but the failure to disclose it is not ground for repudiation since the insured cannot disclose that which did not know. The insured breaches the duty to disclose if a reasonable man would have realised the fact is material and would have disclosed the fact, and the insured did not so disclose the fact.

9.2.5 Test adopted by the courts; reasonable insurer or reasonable man?

In the case of *President Versekeringsmaatskappy Beperk v Trust Bank van Afrika Beperk* 1989 1 SA 208 A (*President Versekeringsmaatskappy Beperk v Trust Bank van Afrika Beperk*, 1989) it was held that the test of whether information should be disclosed was whether the reasonable man (not the reasonable insurer or insured) would consider that the disputed fact should be conveyed to the prospective insurer so that it could reach a decision as to whether to accept the risk or charge a higher premium than normal. The movement to the reasonable man test, instead of the reasonable insurer test, is as pointed out above in accordance with the considered opinion in most parts of the developed world. In *Qilingele v South African Mutual Life Assurance Society Ltd* 1991 2 SA 399 W and 1993 1 SA 69 A on appeal, the insurer presented evidence from a number of actuaries who argued that the facts which were not disclosed were material. This evidence may well have been material when seen through the eyes of an actuary but the test is as seen through the eyes of the reasonable man. The question then to be resolved is, is the evidence of an actuary admissible? Both courts agreed that the evidence of actuaries was admissible but the approach adopted in the case has been criticised and it is not clear if this case remains good authority.

9.2.6 Facts which need not be disclosed

Not all facts are material, and sometimes even if material need not be disclosed in the absence of enquiry. The following circumstances need not be disclosed, unless called for in the proposal form:[150]

- Any circumstance which diminishes the risk[151].
- Any circumstance which is known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of business, as such, ought to know.
- Any circumstance which is superfluous to disclose by reason of any express or implied warranty.

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150 Davis (1993:126). s18(3) of Marine Insurance Act (1906)

151 Failure to disclose a fact which decreased the risk could still have resulted in a breach of a contract term, where the correctness of the information is warranted. The harshness of this doctrine is ameliorated by virtue of s53 of the Short-term Insurance Act 53 of 1998, previously s63(3) of the repealed Insurance Act. This aspect is discussed in greater detail when discussing warranties.

- The existence of other insurance.

The view that the existence of other insurance need not be disclosed can no longer be accepted in South Africa without qualification. In *Qilingele v South African Mutual Life Assurance Society Ltd* 1991 2 SA 399 W (*Qilingele v South African Mutual Life Assurance Society Ltd*, 1991) the insured answered in the negative to a question in the proposal form 'Is any other application for insurance on your life pending or contemplated?' In fact the insured had made an application to two other insurers at the same time and had done so on the advice of a broker in order to spread the risk. Had he applied for the total insurance with one insurer that insurer would not have accepted the proposal without further investigation. The court held that the failure to disclose the applications to other insurers was material and upheld the insurer's decision to repudiate the insurance claim.

9.2.7 Duration of duty to disclose

The duty of disclosure continues throughout the negotiations and terminates when the contract is concluded.[152] Material facts which come into the proposer's possession before the contract is completed, or facts which were previously immaterial and become material due to changed circumstances, must be disclosed. Once the contract has been concluded, however, the proposer is not obliged to disclose any further material facts.[153] In *Pereira v Marine and Trade Insurance Co Ltd* 1975 4 SA 745 A at 755 (*Pereira v Marine & Trade Insurance Co*, 1975) the court said:

> It was contended by respondent's counsel that this duty, or a similar duty, of disclosure persisted after the conclusion of the contract of insurance and affected the insured in all his dealings with the insurer, including the making of a claim under the policy. I know of no authority which fully bears out this proposition. In fact, there are statements in certain textbooks which tend to the contrary ... and certainly the purpose and rationale of the pre-contract duty of disclosure could hardly apply after the conclusion of the contract

In indemnity insurance the duty to disclose attaches at the renewal of the contract to the same extent as it does to the making of the original contract, for the renewal is a new contract for a defined period, which entirely replaces the contract which has expired by the passing of time.

In an ordinary life policy the position is different. The life insurance contract is a continuing contract which the insured has a right to keep in existence by paying premiums when they fall due. As the renewal is not a 'new contract', no fresh duty to disclose arises. That there cannot be a duty to disclose in the case of the anniversary of a life policy is self-evident because the anniversary is not a new contract. If a new contract arose this would mean that if a person contracted some form of terminal disease, the insurance company could refuse to renew the policy. In this event life policies would be useless.

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152 The contract of insurance, itself, may however contain a term requiring the insured to make disclosures during the existence of the contract; *Bruwer v Nova Risk Partners*

153 Davis (1993:127).

9.2.8 Disclosure and the proposal form

Cases often originate from incorrect answers provided to questions in proposal forms.[154] The duty of disclosure may be limited by the questions and structure of the proposal form.[155]

9.2.9 Consequences of failing to disclose material facts

Failure by the insured to disclose material facts entitles the insurer to avoid the contract of insurance.[156] The insurer must however elect to do so and if the insurer fails to do so it can waive its right to do so. *Gordon v AA Mutual Insurance Association Ltd* 1988 1 SA 398 W (*Gordon v AA Mutual Insurance Association Ltd*, 1988) involved a burglary claim submitted against the householders section of a multi-peril policy. The insured failed to disclose the material fact the house was of wooden construction (at 406G-H). The insurer repudiated the burglary claim but continued to accept the premiums. Under the circumstances the court concluded that the insurer had not elected to avoid the contract and hence the insured had a valid claim, despite the failure to disclose the material fact.

9.2.10 s53 of the Short-term Insurance Act 53 of 1998

The position regarding material disclosures is largely regulated by s53 of the STIA which reads as follows:[157]

> **Misrepresentation and failure to disclose material information**
>
> (1)(a) Notwithstanding anything to the contrary contained in a short-term policy, whether entered into before or after the commencement of this Act, but subject to subsection (2)
>
> (i) the policy shall not be invalidated;
>
> (ii) the obligation of the short term insurer thereunder shall not be excluded or limited; and
>
> (iii) the obligations of the policyholder shall not be increased, on account of any representation made to the insurer which is not true or failure to disclose information, whether or not the representation or disclosure has been warranted to be true and correct, unless that representation or non-disclosure is such as to have materially affected the assessment of the risk under the policy concerned at the time of its issue or at the time of any renewal or variation thereof.
>
> (b) The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which not disclosed, as the case may be, should have been correctly disclosed to the short term insurer so that the insurer could form its own view as to the effect of such information on the assessment relevant risk.

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154 *Qilingele v South African Mutual Life Assurance Society Ltd* 1991 2 SA 399 W (*Qilingele v South African Mutual Life Assurance Society Ltd*, 1991), confirmed on appeal 1993 1 SA 69 A

155 *Cronje v AA Lewens* 1989 4 SA 818 W (*Cronje v AA Lewens*, 1989).

156 *Pereira v Marine and Trade Insurance Co Ltd* 1975 4 SA 745 A at 755F-H (*Pereira v Marine & Trade Insurance Co*, 1975).

157 The corresponding section in the long-term Act is s59 of the Long-term Insurance Act 52 of 1998. Previously s63(3) of the Insurance Act 27 of 1943.

(2) If the age of an insured under an accident and health policy has been incorrectly stated to the short term insurer, the policy benefits shall, notwithstanding subsection (1), be those which should have been provided under that policy in return for the premium payable had the age been correctly stated: Provided that nature of that accident and health policy is such as to render such arrangement inequitable, the Registrar may direct the short term insurer to apply such different method of adjustment to the policy benefits of that accident and health policy as the Registrar considers equitable in relation to the misstatement of age.

9.2.11 Examples of non-disclosure

The fact that a policy has been cancelled or that a proposal for insurance has been declined or that the renewal of previous policies had been refused are facts which should be disclosed. The character of the insured ought to be disclosed, thus the fact that a proposer for fire insurance has had previous fires suggesting carelessness or increased moral hazard on the part of himself or his servants, has made an unfair or excessive claim or is fond of litigation, are all material facts which should be disclosed. It can be material for the insurer to know whether the insured has been declared insolvent or not. But in *Cronje v AA Lewens* 1989 4 SA 818 W (*Cronje v AA Lewens*, 1989) the insured failed to disclose declared insolvency when filling in a proposal for life insurance and the structure of the proposal form was such that it only asked personal circumstances questions.[158] The court concluded the failure to disclose insolvency was not material. The claims experience of the proposer can be material. Thus, a case occurred in which two partners had recently formed a partnership and were asked if they had experienced any fires. They answered no. It turned out that although the partnership had never had a fire, one of the partners did, shortly before entering into the partnership. The chief justice held that the proposal referred to transactions of the firm only and not to a private transactions of the partners. The insurer could thus not repudiate the claim. Some authors have suggested that the fire which had not been disclosed was indeed a material fact.

In *Pillay v South African National Life Assurance Co Ltd* 1991 1 SA 363 D (*Pillay v South African National Life Assurance Co Ltd*, 1991) the court decided that hypertension can be material to the life insurer. In this case Didcott J (as he then was) expressed the view that the law of non-disclosure operated harshly with respect to the insured who has no claim in the event of a non-disclosure and forward the novel French idea that if the insured should receive a pro-rata payment. This suggestion has been applied by some life insurers in South Africa and has received a measure of statutory support.[159]

9.2.12 Criticism of the duty to disclose

The need for similar general legislation in South Africa has been considered for a long time.[160] There is however little dissatisfaction with the contract wordings used by the South African insurance

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158 The decision was confirmed on appeal in *AA Mutual Life Assurance Association Ltd v Cronje* 1990 3 SA 966 T (*AA Mutual Life Assurance Association Ltd v Cronje*, 1990)

159 s53(2) of the Short-term Insurance Act 53 of 1998.

160 The SA Law Commission has however investigated the need for such legislation. The general legislation in the form

industry.[161] The courts may in any event ameliorate the operation of harsh terms when dealing with specific cases, but there is no consistency on this point.

The application of the duty to disclose can be harsh on the insured, depending largely on what test is adopted to decide if the insured has failed to disclose a material fact. The insured paid his premium. He has placed his faith in the insurance company and the insurance contract to protect him against ruin. Since he is not an expert in insurance matters he can never be sure that he has indeed secured protection because once the loss occurs, the insurer can allege that he (the insured) had not disclosed all material facts. Indeed, the insurer need never even examine the factual issues until the claim arises. Historically the test adopted is that of a reasonable insurer. This test in particular has been criticised. Another test which has been suggested is that of the reasonable insured.

10 CAUSE OF LOSS

As a general rule[162] insurance contracts require that the loss or damage be caused by the peril insured against and not by an excluded peril.[163]

10.1 Iure non remota causa sed [proxima] spectatur

The issue of causation is common to most branches of law including criminal, delict and contract. It was recognised centuries ago that conceptually the chain of the causal link can be infinite and hence the law must contend itself with the proximate (or immediate) cause and not some remote cause. This was expressed as a maxim of law by Sir Francis Bacon (1638):[164]

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of the Consumer Protection Act has been introduced.

161 Note for example the comments of South Africa's first short-term ombudsman, Advocate William (Bill) Schreiner (1990), 'One thing I've noticed, I am very surprised at the simple way in which policies are written these days. It's a big improvement on 30 years ago when I was a junior at the bar.' *Insurance Times* April 5, 1990. Some problematic terms do however exist as evidenced by the case of *Lourens NO v Colonial Mutual Life Assurance Society* 1984 2 SA 80 C (*Lourens NO v Colonial Mutual Life Assurance Society*, 1984) and the comments on this case; Dyke (1986) 'An inequitable exclusion' 1986 June *Protection* 3.

162 Contracts of insurance usually require a connection between the peril and the loss. These are usually called specified perils policies. In some policies the peril is not specified. In life, marine, motor and so on perils are not specified. A life policy may insure against death from any cause whatsoever, unless excluded. Another example is the so-called 'assets all risks policy'. The policies which do not specify the perils is not really an exception to the rule, since these are all perils policies, which is not the same thing as a no-perils policy. See Reinecke & vd Merwe (1989: par182 n3). This is not unique to insurance. For example take the prohibition, 'Thou shalt do no murder'. It does not list specific acts nor prohibit specific acts which can bring about the murder. The prohibition includes all positive acts which can bring about the murder.

163 Davis (1993:181)

164 The elements of the Common-laws of England quoted in South Africa with approval in *The Cape of Good Hope Bank v Fischer* 1886 SC 368 at 380 (*The Cape of Good Hope Bank v Fischer*, 1886).

> It were infinite for the law to judge the causes of causes, and their impulsions one of another therefore it contenteth itself with the immediate cause, and judgeth acts by that, without looking to any, further degree.

The requirement to establish the legal connection between cause and consequence is a problem faced in many fields of study[165] including several branches of law. It is an extremely difficult legal problem to decide what legally caused which outcomes. For example, take the case of a man running to catch a train. On the way he is stopped by someone who asks him if he has a match to light a cigarette. As a result of this small delay the man arrives late and decides to jump on board the moving train. He slips and falls under the wheels of the train and is severely injured. Can he now sue the man who delayed him on the basis that this caused him to be late and hence caused the accident? If the answer to that question is yes, can the man then sue the parents of the man who stopped him since they gave birth to him? Logically, if they had not given birth to him he would not have been able to be there to delay the man from boarding his train. These are well-known arguments of causality which pervade the whole field of law. A detailed discussion of the doctrine of causation falls outside the scope of this study.

10.2 The insured peril and the loss or exception

The point of departure when dealing with an insurance claim is to prove the loss falls within the operative clause. This requires the peril caused the loss or in the case of the exception the peril did not cause the loss. Thus the causal issue usually involves determining if a specified peril has caused a loss thereby bringing the event within the operative clause and if it has not it falls outside of the operative clause. The question can also be if the loss was caused by an excepted peril. This is expressed as follows by s55(1) of the English Marine Insurance Act 1906:

> Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately cause by a peril insured against.

This section evokes the concept of proximate cause. An insurance claim does not succeed unless the loss or damage is proximately caused by the peril insured against.[166] The idea of proximate cause is found in Sir Francis Bacon's abovementioned *maxim iure non remota causa sed proxima spectatur*, which means that an insurer will only be liable if the 'fact' for which a claim is brought about is the result of a proximate cause.[167] In the field of insurance, the notion of proximate cause finds application.[168] The following are examples of proximate cause.

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165 Examples of different fields of study include causation in history and economics.

166 For a discussion of proximate case consult Malcolm Clarke (1981) 'Insurance: the proximate cause in English Law' *Cambridge Law Journal* 40 (2) 284-306 (M. Clarke, 1981).

167 Reinecke & vd Merwe (1989: 181). See also Clarke (1981:284),

168 Other branches of law no longer rely on the concept of proximate cause, found in insurance law, to resolve the issues of causation but evoke a concept of legal causation.

10.3 United Kingdom cases dealing with proximate cause

The issue of proximate cause has featured in a large number of cases, in addition to those discussed here.[169] It has been argued that insurance cases involving causation before 1918 should be treated with cautions since after that date the law took a new turn.[170] Nevertheless these earlier cases are included for illustrative purposes.

Pre 1918 cases

In *Johnston v West of Scotland Insurance Company* 1828[171] (*Johnston v West of Scotland Insurance Company*, 1828), water discharged from a fireman's hose, while fighting the fire damaged the property, which on the face of it, is water damage. The question then was, was this damage covered by a fire policy. The proximate cause of the loss was the fire, not the water and the damage is thus covered by a fire policy.

In *Everett v London Assurance Company* 1865 19 CBNS 126 (*Everett v London Assurance Company*, 1865) a fire caused an explosion which in turn damaged property half a mile away. The proximate cause of the damage was important. If the damage was proximately caused by fire, the claim would have been covered by the fire policy of the insured (not the company where the incident occurred). If, however, the damage was caused by explosion, the policy will not respond. The explosion was held to be the proximate cause of the damage to the property. Wiles J said:[172]

> We are bound to look at the immediate cause of the loss or damage, and not to some remote or speculative cause. Speaking of the injury [suffered by the insured] no person would say that it was caused by fire. It was occasioned by a concussion or disturbance of the air caused by fire elsewhere. It would be going to the cause of causes to say that this was an injury caused by property fire to the insured.

The court in this case was clearly influenced by the nature of the damage suffered by the insured, which was clearly damage by explosion, not fire. However subsequent cases established that the nature of the damage is not conclusive. In this case the fire was remote from the damage suffered by the insured. The insured did not suffer fire and explosion damage but only explosion damage.

Insurers have attempted to avoid a claim on the basis of steps taken to deal with the loss was not the cause of the loss. This often arises because the nature of the damage caused will taking preventative measures is not the same as the damage caused by the peril. For example to stop the spread of a fire the firefighting authorities may decide to destroy a row of houses to make a fire break. Can the owners

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169 Another early, important case is *Reischer v Borwick* 1894 2 QB 548 (*Reischer v Borwick*, 1894).

170 Clarke (1981:85). The date of 1918 refers to the advent of the case of *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* 1918 AC 350 (*Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd*, 1918).

171 Diacon *et al* but neither Birds, Davis, Ivamy, nor Reinecke & vd Merwe (1989) refer to this case and Diacon *et al* do not give the full reference.

172 Ivamy (1986:380)

of the destroyed houses claim indemnification for the destruction of their house? In *Stanley v Western Insurance Co* 1868 LR 3 Exch 71 (*Stanley v Western Insurance Co*, 1868) Kelly CB concluded that:

> Any loss resulting from an apparently necessary and *bona fide* effort to put out a fire, whether in be by spoiling the goods by water, or throwing articles of fire out of window, or even the destroying of a neighbouring house by explosion for the purpose of checking the progress of the flames, in a word, every loss that clearly and proximately results, whether directly or indirectly from the fire, is within the policy.

In *Winspear v Accident Insurance Association* 1880 6 QBD 42 (*Winspear v Accident Insurance Association*, 1880) a man experienced a fit while he crossing a stream and fell into the water and drowned. Death was in fact by drowning. If the proximate cause of the death was the fit, then the man died of natural causes. In this event it is not an accident but a natural cause and the claim would not fall within the operative clause of the personal accident policy. The policy would thus not respond. However in the actual case the court held the cause of death was drowning. Drowning was the proximate cause of his death, which was accidental, and not the fit or the fall. This was because the court considered there was break in the chain of causation between the fit and the drowning. The man could for example have had a fit and fallen to the ground, in which event he would not have died. So the actual cause of death was accidental drowning.

In *Lawrence v Accidental Insurance Co Ltd* 1881 7 QBD 216 (*Lawrence v Accidental Insurance Co Ltd*, 1881) a man was standing on platform on a crowded the train station of Waterloo and suffered a fit and was killed when he fell under a train. The policy excluded "injury from fits" and so the question arose was he killed as a result of an accident or from fits? The court ruled it was an accident and not the fit.

Post 1918 cases

The Post 1918 cases were led by *Reischer v Borwick* 1894 2 QB 584 (*Reischer v Borwick*, 1894) where the insured ship was covered for collision damage but not for the "perils of the sea". While on the Danube she struck a floating snag and if she sank at that stage the loss would have been covered since the cause was collision damage. She did not however sink. The captain managed to keep her afloat and plug the gap. A tug arrived and started to tow her to the yard and while under tow the plugs were dislodged, the ship took water and the vessel was lost. The sinking cannot have been said to have been the inevitable consequence of the collision. Clearly the insurers would have been liable for the costs of repairs had the ship not sank and the court concluded that the loss was covered by the policy.

Pawsey & Co v Scottish Union and National Union Insurance Co 1908 Times Law Reports PC (*Pawsey & Co v Scottish Union and National Union Insurance Co*, 1908) the court specified the proximate cause to:

> Proximate cause means the active, efficient cause that sets in motion a train of events that brings about the result, without the intervention of any force started and working actively from a new and independent source.

It is the "dominant or effective or operative cause". In the case of *Re: Etherington v Lancashire and Yorkshire Accidental Insurance Co* 1909 1 KB 591 (*Etherington v Lancashire and Yorkshire Accidental Insurance Co*, 1909); [1908-10] All ER Rep 581, a man fell from his horse and sustained injuries which prevented him from moving. As a result of lying on wet ground he contracted pneumonia and died. The proximate cause of his death was the fall and not pneumonia. If his death was as a result of the fall then he died by accidental means which falls within the cover provided by the insurance. If he died from pneumonia he would then have died from natural causes which is not covered by the insurance. If for example he fell off his horse into a stream and drowned it would be accepted he died from accidental means. The result should be the same if he fell off his horse and contracted pneumonia; the proximate cause is still the fall or accidental means.

Leyland Shipping 1918

A break in the concept of causation took place in *Leyland Shipping Company v Norwich Union Fire Insurance Society* 1918 AC 350; 1918-19 All ER Rep 433 (*Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd*, 1918) during World War I the ship was torpedoed by an enemy submarine, in the English Channel off Le Have. The ship managed to reach port, where she was moored to a quay in the outer harbour, being too damaged to be taken into the safer inner harbour or dry dock. The port authorities fearful that she would sink and block the quay which was needed for Red Cross embarkment ordered the ship out of the harbour. She was taken to the breakwater where buffered by the heavy seas she soon sank. The question which arose was did she sink as a result of the storm (normal marine claim, a peril of the sea) or as a result of the torpedoing (a war damage claim) which was excluded from the normal marine policy? Now clearly the last 'cause' in the chain of events was the heavy seas. So if causation is taken to be the last cause in the line of causation the loss would have been covered as peril of the sea. The House of Lords rejected that argument holding that the proximate cause of the loss was the torpedoing rather than the storm, because in the opinion of the court the chain of causation was unbroken, and the proximate cause of the loss was still operating when the storm blew up. The significance of this judgment is the rejection of the idea that the proximate cause is the last cause, or the closest cause to the loss, in point of time. The court held that 'The cause which is truly proximate is that which is proximate in efficiency.'[173] The last cause in the time sequence was the storm but that did not make the storm the proximate cause.[174] The storm was not the efficient or dominant cause. This judgement however opened the door to the cause bring the cause of causes.

In *Symington v Union Insurance Society of Canton* 1928 97 LJKB 546 (*Symington v Union Insurance Society of Canton*, 1928) a cargo of cork standing on the jetty at Algeciras caught fire and was damaged by the fire and water used to extinguish the fire. The question arose was the cork damaged by water covered by the fire policy. The court held that any action necessary to prevent further fire damage which resulted in further damage then fire was the proximate cause of the further damage and thus the water damage was covered because the proximate cause of the damage was the fire. It should be clear that the actual damage, in nature, need not be caused by the peril insured against. The damage need not

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173 Lord Shaw at p 369.

174 Cases before the Leyland case should be treated with caution on this point.

be fire damage to be covered by a fire policy. The issue is, was the damage proximately caused by the insured peril.

It is often argued that the damage was caused by negligence of various parties and this is a new intervening cause. The courts have always been reluctant to see negligence as a defence to an insurance claim. Indemnification of damage attributable to the negligence of the insured or the servants of the insured is one of the accepted objects of insurance.[175] Thus attempts to argue that the cause of a loss was the negligence of the insured or the insured's employees and thus not an insured peril have not been successful. Negligence is unlikely to be seen as a separate cause of a loss.

In *Midland Mainline Ltd and others v Eagle Star Insurance Company* 2004 EWCA 1024 Comm (*Midland Mainline Ltd and others v Eagle Star Insurance Company*, 2004) a railway accident occurred. It was discovered that some tracks showed signs of cracking, a form of rolling contact fatigue (RCF). As a consequence the owner and operator Railtrack PLC the owner of the UK mainland railway network imposed a series of emergency speed restrictions (ESR). The plaintiffs who used the network attempted to recover in terms of their business interruption policies as a result of the myriad of ESRs which had been issued. The policy excluded claims which arose out of wear and tear. It was argued that RCF was simply wear and tear. So in short the question was, was the proximate cause of the interruption loss the RCFs or ESRs? The court *a quo* concluded the loss was caused by the issue of the ESRs and not the RCFs which were Ano more than the underlying state of affairs providing occasion for the loss. The court of appeal approached the matter differently. The appeal court concluded that there were two causes of the loss the RCFs which resulted in the ESRs being issued and that the RCF was the proximate cause and hence the claim fell with in wear and tear exception (par 13). This being so the appeal was in favour of the insurer.

Other recent cases include:

Global Process Systems Inc and another v Syarikat Takaful Malaysia Berhad 2011 UKSC 5 (*Global Process Systems Inc and another v Syarikat Takaful Malaysia Berhad*, 2001)

Astrazeneca Insurance Company Ltd v XL Insurance (BERMUDA) and another 2013 EWHC 349 (Comm) (*Astrazeneca Insurance Company Ltd v XL Insurance (BERMUDA) and another*, 2013)

Versoot Dreging BV and another v HDI Gerling and others 2013 EWHC 1666 (Comm) (*Versoot Dreging BV and another v HDI Gerling and others*, 2013)

10.4 South African cases dealing with proximate cause

[175] As per Lord Denman in *Shaw v Robberds* 1831 6 Ad & El 95 (*Shaw v Robberds*, 1831); Clarke (1981:290); Marine Insurance Act 1906 s55(2)(a).

Proximate cause, in insurance law, has been in issue in a number of South African court cases.[176] The South African courts have relied heavily on English insurance law in deciding these individual cases.[177] Causation appears to be particularly in personal accident cases as discussed in greater detail below. Some of the more recent cases are discussed.

Rabinowitz NO v Ned-Equity Insurance Company Ltd 1980 1 SA 403 W (*Rabinowitz and another NNO v Ned-Equity Insurance Company Ltd and another*, 1980) the deceased was an expert glider pilot. He took his new glider for a flight and suddenly, it was seen by a number of witness from the ground, to plunge to the ground. There was no clear explanation as to why the accident occurred. The question then arose did the deceased die by natural causes (heart attack), or as a result of aviation accident or did he commit suicide? If he died by natural causes (heart attack) his life policy would payout. If he died in an aviation accident, the aviation policy would payout but the aviation exclusion in his life policy would excuse the life insurer from paying out. If he committed suicide the suicide exclusion could be relevant. Since the suicide exclusion is an exclusion the onus on the insurer to prove suicide and since this could not be proven, the insurer could not avoid the claim on the suicide exclusion.

Mutual and Federal Insurance Co Ltd v Ingram NO and others 2009 6 SA 53 E (*Mutual and Federal Insurance Co Ltd v Ingram NO and others*, 2009)

Mutual & Federal Insurance Co Ltd v SMD Telecommunications CC 2011 1 SA 04 SCA (*Mutual & Federal Insurance Co Ltd v SMD Telecommunications CC*, 2011)

10.5 Causal connection between policy terms and the loss

An argument is often encountered that an insurer cannot repudiate a claim based on a policy term unless a causal connection exists between the term and the loss. Thus for example in *SA Eagle v Norman Welthagen* 1993 SCA (*SA Eagle v Norman Welthagen*, 1993) the policy contained a warranty that the insured would keep the motor vehicle keys in a locked safe. A vehicle was stolen but the keys were not locked away. There was no connection between the theft and unlocked vehicle. The lack of the connection did not invalidate the repudiation.

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176 *Law Union and Rock Insurance Co Ltd v De Wet* 1918 AD 663 (*Law Union and Rock Insurance Co Ltd v De Wet*, 1918); *Rootenberg v Guardian Insurance Co and another* 1935 OPD 174 (*Rootenberg v Guardian Insurance Co and another*, 1935); *Nell v Incorporated General Insurance Ltd* 1976 3 SA 776 W (*Nell v Incorporated General Insurance Ltd*, 1976); *Cape Shires Properties (Pty) Ltd and another v National Employers General Insurance Co Ltd* 1976 4 SA 747 C (*Cape Shires Properties (Pty) Ltd and another v National Employers General Insurance Co Ltd*, 1976)

177 For a discussion of proximate cause, especially when liability is excluded because of an excepted peril see 'Excepted perils - dominant proximate cause' *South African Insurance Law Journal* 1997 B1-B8 ("Excepted perils - dominant proximate cause," 1997).

11 PREMIUMS

11.1 Agreement an essential element of the contract of insurance

Agreement on the premium is an essential element in terms of the general requirements of contract as applied to the contract of insurance. There cannot be an insurance contract unless the premium is agreed upon.[178] The actual payment of, or the receipt of the premium by the insurer is not necessary for the conclusion of the contract.[179] The leading South African case with regard to the requirements of premium is *Lake and Others NNO v Reinsurance Corporation Limited* 1967 3 SA 124 W (*Lake & Others v Reinsurance Corporation Ltd & Others*, 1967) where it was stated at 127 that:[180]

> A provision that the policy is not to attach until payment of the premium ... will not be implied.

In the case of *Wooding v Monmouthshire & South Wales Mutual Indemnity Society Limited* 1939 4 All ER 570 HL (*Wooding v Monmouthshire & South Wales Mutual Indemnity Society Limited*, 1939) it was said there is:

> [There is] no principle of law that there must be implied in a contract of insurance a provision that the right to indemnity by the assured is conditional on his previous payment of the premiums. As a matter of commercial good sense, it is a great deal to be said of the terse phrase 'no premium, no cover'. It is doubtless for that reason that insurance companies usually require that the consideration for which they undertake to indemnify the assured must be paid before the risk attaches. There is, however, no doubt that a contract of insurance may involve merely a promise by the assured or his broker to pay the premium.

Although it is not a requirement of the common law that the premium be paid before the insurance cover is operative, it may be required by a term of the insurance policy.[181] Where this is a requirement this may cause practical problems.[182]

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178 In *Zava Trading (Prop) Ltd v Santam Insurance Ltd* (unreported case no 4108/89 D) (*Zava Trading (Prop) Ltd v Santam Insurance Ltd*, 1989) it seemed to suggest that a premium is not necessary for a contract of insurance to come into existence. This view is so radical that before the traditional position is departed from further authority is required. For the purposes of this section it will be accepted that a premium is required.

179 *Peterson v Incorporated General Insurances Ltd* 1982 3 SA 1 C (*Peterson v Incorporated General Insurances Ltd*, 1982).

180 Davis (1993: 193)

181 *National Employers' Mutual General Insurance Association Ltd v Myerson* 1939 TPD II (*National Employers' Mutual General Insurance Association Ltd v Myerson*, 1939)

182 It was a requirement of SASRIA (South African Special Risks Insurance Association) that there be no cover until the premium was paid, which was a source of considerable practical problems and this as a requirement was subsequently changed to bring SASRIA practice in line with the market practice. An example of the type of practical problem would be where an insured requires insurance urgently, say for example the insured is to leave on a journey outside of South Africa, to a territory excluded in his normal policy. He contacts his broker to arrange the additional cover which is duly done. In all probability he will forget to pay the premium before leaving.

In practice it is usually the insurer which tries to recover the premium which has not been paid.[183] In *Parsons Transport (Pty) Ltd v Global Insurance Co Ltd* 2006 1 SA 488 SCA (*Parsons Transport (Pty) Ltd v Global Insurance Co Ltd*, 2006) the insurer had insured a motor fleet in terms of the MulitMark III policy for an amount of R4.514 m. The insured failed to pay the premium whereupon the insurer issued summons for the recovery of the premium. The MultiMark III wording read as follows:

> 'Subject to the terms, exceptions and conditions (precedent or otherwise) and in consideration of, and conditional upon, the prior payment of the premium by or on behalf of the insured and receipt thereof by or on behalf of the company, the company . . . agrees to indemnify or compensate the insured by payment or . . . repair in respect of the defined events occurring during the period of insurance. . . .'

The 'insured' argued that the wording was clear. For the contract to come into being it required 'the prior payment of the premium' and 'receipt thereof by ... the company'. Accordingly so the argument went there was no contract until the premium had been paid and received by the insurer, in short the above term constituted a suspensive condition. This case was watched with great interest by the insurance market since legal advisers had taken the view that despite what appears to be very clear wording, the MultiMark III wording did not in fact contain a suspensive condition. The opinion was that the wording did not change the common law position and that a contract of insurance came into being despite the apparently clear wording. The court however came to the opposite conclusion, that despite the wording the term did not constitute a suspensive condition, "In my view, counsel's reliance on the 'warranties' in support of the contention that the obligation flowing from the contract was suspended pending payment of the premium is misplaced." (at page 494). The appeal by the insured was accordingly dismissed.

It may not always necessary for the premium to be separately identified and specified.[184]

11.2 Short-term Insurance Act

The payment insurance premiums is today largely regulated in terms of the Insurance Act. Premiums form part of the assets of the insurer needed to pay claims. It can thus be argued that the insurer is the trustee of public funds. It is therefore in the interest that the premiums be paid to the insurer as soon as possible after the insurer becomes entitled to these. The purpose of the legislation is to achieve this goal. In most cases the broker, acting as the agent of the insurer collects the premium from the insured and pays the premium to the insurer. The previous section was s20bis which was considered by the courts.[185]

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183 *British Oak Insurance Co., Ltd v Atmore* 1939 TPD 9 (*British Oak Insurance Company Limited v Atmore*, 1939)

184 *Sydmore Engineering Works (Pty) Ltd v Fidelity Guards (Pty) Ltd* 1972 1 SA 478 W (*Sydmore Engineering Works (Pty) Ltd v Fidelity Guards (Pty) Ltd*, 1972) the court appeared to accept that a premium may form part of a comprehensive monthly payment for services rendered.

185 *Premier Milling Company (Pty) Limited v van der Merwe and others NNO* 1989 2 SA 1 A (*Premier Milling Company (Pty) Limited v van der Merwe and others NNO*, 1989); and Connolly & Others NNO (Joint Liquidators of AA Mutual short term) v National Aviation Insurance Brokers (1938) (Pty) Ltd 1990 1 SA 904 W (*Connolly & Others NNO (Joint*

11.3 Long-term insurance Act

The Long-term Insurance Act governs the position of late payment on renewal of life policies, industrial policies, and home policies which is a domestic policy. If any premium under a policy which is one of the above has not been paid on its due date, the insurer who is liable under the policy shall, notwithstanding any agreement to the contrary, maintain the policy in force for the full sum insured for a period of one month, and if the premium is paid within the period shall renew the policy. In the case of domestic life policies where premiums are paid in monthly intervals the period is fifteen days. If the premium is not paid the contract lapses and the section requires that the insurer then issue a paid up policy or apply the non-forfeiture value to maintain the policy in force.

11.4 Return of premium

The general rule applicable to a claim by the insured for the return of premiums is that insurer must return the premium if for some reason the risk did not attach. Lord Mansfield CJ, in the case of *Stevenson v Snow* 1761 3 Burr 1237[186], (*Stevenson v Snow*, 1761) (marine insurance) stated this as follows:

"The insurer shall not receive the price of running a risqué (sic) [risk] if he runs none."

The position in UK marine insurance is governed by ss 82, 83, 84 of the Marine Insurance Act 1906 (Marine Insurance Act, 1906). Thus for example if the contract is vitiated by fundamental mistake, or the insured has no insurable interest the insurer must repay the premium it received for the risk which it never ran. Where an insurance contract was induced by the insured's innocent misrepresentation or by non-disclosure it is voidable at the insurer's instance. In this case the insurer can at its option declare the contract to be void, but then must return the premium. Where there is a breach of warranty to the extent that the contract never came into being, then, since there never was a risk, any premium received must be returned. Where the misrepresentation or non-disclosure is as a result of fraud, the insurer is not bound to return the premium.

12 FRAUD

12.1 English law - fraud - common law

Liquidators of AA Mutual short term) v National Aviation Insurance Brokers (1938) (Pty) Ltd, 1990); *S v Schraader* 1995 1 SA 194 N (*S v Schraader*, 1995). This case arose out of the liquidation of the AA Mutual and concerned the ownership of the premiums held by intermediaries.

186 Davis (1993, 199); Ivamy (1986,194).

Fraud is a possibility common to all contracts but the insurance contract is particularly susceptible to fraud. The fraud may take place at various places in the insurance transaction and take on a large variety of forms. It may take place when the contract is entered into but it more commonly occurs when a claim is instituted.

Historically as noted in English law, the contract of insurance is regarded as a contract of utmost good faith therefore requiring the insured to disclose all material facts when entering into an insurance contract.[187] It was suggested for some time by academic writers that the doctrine of utmost good faith extends to the submission of claims and hence if a fraudulent claim is submitted it is a breach of the duty to act in utmost good faith. English law is somewhat anomalous, in that this doctrine was extended to the dealing with claims. There was however no direct support in law for this proposition but by a gradual process, this view was recently, comparatively speaking, accepted as being the position in law.[188]

The general principles of the law of contract also deal with the situations where persons have been induced to contract as a consequence of fraud or a positive misrepresentation and failure to disclose any material facts. It is because the general principles of contract deal with these issues that it is questionable whether a need exists for a specific doctrine of utmost good faith. Issues such as fraud can be dealt with in terms of the rules which govern the law of contract, without any need to develop a specific doctrines relating to insurance contracts.

What constitutes fraud was laid down by Lord Herschell in *Derry v Peek* 1889 14 AC (*Derry v Peek*, 1889):

> Fraud is proved when it is shown that a false representation has been made: one knowingly, or two without belief in its truth, or three recklessly, careless whether it be true or false. The third is but an instance of the second.

12.2 South Africa - Fraud

12.2.1 Roman-Dutch law

187 The position of the doctrine in South Africa is discussed elsewhere in this text..

188 Galyer, C and E Mellors (1996) 'Curbing the flow' *Post Magazine* 157(13) 31 (Galyer & Mellors, 1996); *Black King Shipping Corporation and Wayang (Panama) SA v Massie (Litsion Pride')* 1985 1 Lloyd's Rep 437'Litsion Pride' '…with regard to marine insurance' per Hirst J 'the duty not to make fraudulent claims and not to make a claim in breach of the duty of utmost good faith is an implied term in the policy.'; *OkapoOkapo v Barclays Insurance Services* 1995 LRLR 443 (*OkapoOkapo v Barclays Insurance Services*, 1995), this decision does however contain a powerful dissenting judgment.

In recent years the question of fraud in general and as manifested in insurance has been considered by the courts on a number of occasions[189], and received considerable academic comments[190] and attention from others. Fraudulent insurance claims usually take on two forms, firstly the insured may make representations of facts which are simply not true and secondly the facts can be exaggerated.

It will be recalled that in *Pereira v Marine and Trade Insurance Co Ltd* 1975 4 SA 745 A at 755 (*Pereira v Marine & Trade Insurance Co*, 1975) the court refused to find that the duty to disclose extended beyond the conclusion of the contract. The court said:

> It was contended by respondent's counsel that this duty, or a similar duty, of disclosure persisted after the conclusion of the contract of insurance and affected the insured in all his dealings with the insurer, including the making of a claim under the policy. I know of no authority which fully bears out this proposition. In fact, there are statements in certain textbooks which tend to the contrary ... and certainly the purpose and rationale of the pre-contract duty of disclosure could hardly apply after the conclusion of the contract ...

Under these circumstances then it is difficult to see how the duty of good faith can, without further authority, extend to the making of claims.

In *Lehmbecker' Earthmoving and Excavators (Pty) Ltd v Incorporated General Insurances Ltd* 1984 (3) SA 513 A (*Lehmbecker' Earthmoving and Excavators (Pty) Ltd v Incorporated General Insurances Ltd*, 1984) the policy contained an express term dealing with fraud. It read *inter alia*:

> 'if any claim be in any respect fraudulent or intentionally exaggerated or if any fraudulent means for devices be used by the insured ... all benefits under the policy shall be forfeited.'

The insured made two claims, the first was a proper claim untainted by fraud the second was tainted. The court a quo ruled that both claims were fell within the purview of the term. On appeal the court refused to apply the term to the untainted claim.[191]

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189 *Maritime and General Insurance Co v Sky Unit Engineering* 1989 1 SA 867 T (*Maritime and General Insurance Company v Sky Unit Engineering*, 1989); *Videtsky v Liberty Life Insurance Association of Africa Ltd* 1990 1 SA 386 W (*Videtsky v Liberty Life Insurance Association of Africa Ltd*, 1990); *Strydom v Certain Underwriting Members* 2002 2 SA 482 W (*Strydom v Certain Underwriting Members*, 2002); *Schoeman v Constantia Insurance Co Ltd* 2003 6 SA 313 SCA (*Schoeman v Constantia Insurance Co Ltd*, 2003); *SA Eagle Insurance Co Ltd v KRS Investments* 2005 2 SA 502 SCA (*SA Eagle Insurance Co Ltd v KRS Investments*, 2005).

190 Schulze, WG (1990) "'Bedrieglike Eise' in die Versekeringsreg - 'n Caveat an Versekeraars" *South African Journal of Mercantile Law* (2) 349; Visser, Coenraad (1991) 'Fraudulent Insurance Claims: Implied Term or Duty of Good Faith?' *South African Law Journal* 108 385; Van Niekerk, JP (2000) 'Fraudulent insurance claims' *South African Journal of Mercantile Law* 2000 12 69JP; Van Niekerk, JP (2002) 'Continued confusion about fraudulent insurance claims' *South African Journal of Mercantile Law* 2002 14 575; Clarke, Malcolm A (2002) 'Good Faith and Bad Blood in Insurance Claims' *South African Mercantile Law* 2002 14 64 (M. A. Clarke, 2002); Van Niekerk, JP (2003) 'Some clarity about fraudulent insurance claims' *South African Journal of Mercantile Law* 2003 15 285 (Van Niekerk, 2003); Jacobs, Wenette (2006) 'Two Recent Supreme Court of Appeal decisions on the common-law and contractual consequences of fraudulent insurance claims' *South African Mercantile Law Journal* 2006 18 524 (Jacobs, 2006) Van Niekerk, JP (2007) 'Fraudulent insurance claims: immateriality of materiality' South African Journal of Mercantile Law 2007 19(2) 217-234 (Van Niekerk, 2007).

191 See *Schoeman v Constantia Insurance Co Ltd* 2003 6 SA 313 SCA at 321D-G (*Schoeman v Constantia Insurance Co*

In *Maritime and General Insurance Co v Sky Unit Engineering* 1989 1 SA 867 T (*Maritime and General Insurance Company v Sky Unit Engineering*, 1989) the insurer paid a fire claim which had been lodged in terms of the policy. A few months later it received a second malicious damage claim and on investigation formed the impression that the second claim was fraudulent, the loss being self-inflicted and refused to pay the second claim and claimed a refund on the first claim. The insured was, also, at all times in financial difficulties. The insured successfully sued the insurer for payment of the second claim, the insurer failing to discharge the onus of proof required to prove fraud. On appeal to the full bench, the court found on the balance of probabilities that the insured had caused its own losses and ordered the insured to repay the amounts the insurer had paid with respect to the first claim and dismissed the second claim made by the insured. This case is important with regard to what is required to meet the onus and standard of proof.[192]

Videtsky v Liberty Life Insurance Association of Africa Ltd 1990 1 SA 3806 W (*Videtsky v Liberty Life Insurance Association of Africa Ltd*, 1990) involved a personal accident policy. An insured had an otherwise valid claim, however to bolster this claim a letter was forwarded to the insurer, on behalf of the insured purported to have been written by a physiotherapist indicating that the insured Arlene Videtsky had received treatment for a period of six months and that further treatment was unlikely to improve her situation. It turned out that the letter was a forgery (387G-H). The response of the insurer was to attempt to avoid the entire claim, because of the forgery. The important issue was, on what legal basis could it do so. It was argued on behalf of the insurer that it was entitled to do so in terms of an implied term in a contract of insurance. The court could find no basis in law for supporting the existence of an implied term of this nature and the insured's exception to the insurer's special plea was upheld. In this regard South African law differs from English law.

Strydom v Certain Underwriting Members 2000 2 SA 482 W (*Strydom v Certain Underwriting Members*, 2002) the insured made a number of false statements to hide his own negligence. The policy in any event covered negligence on the part of the insured and truth or otherwise of the insured's statements did not affect the liability of the insurer to indemnify the insured. Nevertheless the insurer attempted to repudiate the claim. The magistrate upheld the insurer's contention but on appeal it was held that the false statements made by the insured were immaterial.

In *Schoeman v Constantia Insurance Co Ltd* 2002 3 SA 417 (*Schoeman v Constantia Insurance Co Ltd*, 2002) the insured deliberately inflated her claim by 10 percent, submitting a claim in the sum of R149 595. The insured was required to undergo a polygraph or lie detector test. As a result the insurer repudiated the claim. The insurer did not rely on a term in the contract but maintained that even in the absence of a specific forfeiture term, the insured forfeits the benefits under the policy if the claim is tainted by fraud. The court upheld the forfeiture of the entire claim, declining to follow the Videtsky judgment, influenced in no small part by the developments which have taken place in English law since the Videtsky judgment. On appeal *Schoeman v Constantia Insurance Co Ltd* 2003 6 SA 313 SCA

Ltd, 2003).

192 See section _____ for a discussion on the problem of onus and the difference between English and South African law with regard to onus.

(*Schoeman v Constantia Insurance Co Ltd*, 2003) it was noted that the estimate of the claim made by a professional loss adjustor was far higher than the plaintiff had made (326G-H). The court examined the position of forfeiture of benefits in the absence of a specific provision in the insurance contract. Since the Roman-Dutch law is anti-penal, no authority could be found for the proposition that the benefits could be forfeited in the absence of a specific provision in the policy. As a point of fact, the court majority, expressed considerable doubts if the insured in any event had been involved in fraud of any nature. It should be clear that after this case, the emphasis would move to cases where the insurance contract did indeed, include a forfeiture term.

In *SA Eagle Insurance Co Ltd v KRS Investments* 2005 2 SA 502 SCA (*SA Eagle Insurance Co Ltd v KRS Investments*, 2005) the insured provided false information as to who the driver of the vehicle was to avoid the insurer evoking an exception to the policy. After submitting the claim (including false information) the insured's restaurant (and contents) were destroyed by fire and the insured submitted a second claim. The insurer attempted to terminate from the date of the fraudulent misrepresentation which would automatically have the effect that the second claim would not be covered by the policy. This stratagem would allow the insurer to avoid paying the both claims. The court decided that insurer cannot avoid liability for a valid claim which arose before the termination of the policy.

12.2.2 Contractual terms in policies

In *Papagapiou v Santam Ltd* 2006 5 SA 29 SCA (*Papagapiou v Santam Ltd*, 2006) the insured twice attempted to bribe the assessor to inflate the claim. The assessor refused but notified the insurer which then repudiated the claim relying on the now oft-quoted fraud clause:

> If any claim under this policy be in any respect fraudulent, or if any fraudulent means or devices be used by the insured or anyone acting on his behalf or with his knowledge or consent to obtain any benefit under this policy, or if any event be occasioned by the wilful act or with the connivance of the insured, the benefit afforded under this policy in respect of such claim shall be forfeited.

The court agreed that the term had been breached and the insurer had validly repudiated the claim.

In *Duze v Auto & General Insurance Co Ltd* 2006 JOL 16471 (*Duze v Auto & General Insurance Co Ltd*, 2006) the insured was injured and her vehicle damaged in an accident which occurred whilst she was on her way home from a social engagement.[193] She reported the accident to the insurer and later submitted a claim. The insurer repudiated the claim firstly by virtue of the fraud clause in the policy and secondly that she had failed to disclose that the vehicle had been used for business purposes which would have materially affected the assessment of the risk and thirdly by claiming when the vehicle was being used for business purposes this too was fraudulent falling foul of the fraud clause. The court per Tshabalala JP dismissed the insurers defences ruling in favour of the insured. With regard to the first point raised by the insurer, the insurer alleged that since the time of the accident given by the insured differed by that given by the police by three hours, the claim fell foul of the wording of the so-called

193 Discussed, Van Niekerk (2007)

fraud clause. The court disagreed. With regard to the second point, the court held that the insurer had failed to prove that when the policy was entered into the insured had intended to use the vehicle for business purposes. The insurer also failed to prove that while on the way home the vehicle was being used for business purposes.

In *Ivanov v Santam Ltd* 2006 JDR 0714 W (*Ivanov v Santam Ltd*, 2006) the insured vehicle, insured for a limit of indemnity of R170 000 was hijacked. The same vehicle, insured by the same insurer had previously been the subject of an insurance claim, by another unrelated insured. In the previous claim the vehicle had been declared as uneconomic to repair and written off as a total loss, the salvage being sold to a dealer. The dealer had reconstructed the vehicle and sold it to the new insured. The insurer repudiated the claim relying on the fraud clause (which by now had become for more extensive) alleging that the insured had inflated to cost of repairing the vehicle. The court by evoking s53 of the Short-term Insurance Act ruled in favour of the insured. It is however quite clear that s53 is inappropriate to this type of claim, as discussed below.

12.3 Misrepresentation

An insurer can avoid an insurance contract if it was induced to enter into the contract by a misrepresentation of fact made by a proposer and which was false in a material particular, whether a proposer acted negligently or innocently.[194] This right differs little from that determined by the doctrine of non-disclosure. Historically, misrepresentation in the contractual sense has not been of particular importance. This is partly because of the extreme width of the duty to disclose material facts, which has already been discussed. Cases have frequently failed to distinguish between the two defences of failure to disclose in insurance law and misrepresentation as a contractual requirement. Indeed it appears to be standard practice for an insurer, where possible, to plead both defences. While this may be conceptually unsatisfactory, it is well established, the rationalisation being that it is said to be part of the insured's duty of good faith to answer correctly questions on the proposal form. Misrepresentation in the field of contract has received considerable attention in South Africa in recent years.

13 THIRD-PARTY RIGHTS, DUTIES AND BENEFITS

13.1 Extensive application

When a person enters into an insurance contract he acquires valuable rights. It is often desirable to transfer these rights to third parties or for the third party to claim in terms of a policy entered into by someone else.[195] If for example a person wishes to borrow money from a bank, the bank may be

194 Birds (1988)

195 An example of this is where Mr X borrows the car of Mr Y and is involved in an accident. As a consequence, Mr X

concerned that the person may die before the loan is repaid. The bank may then suggest or even require that the person take out a life insurance policy on his life, the proceeds of which will serve to repay the outstanding balance of the loan. The borrower may even have an existing policy and instead of taking out an additional policy may transfer rights in existing policies to a third party, such as the bank. A friend may borrow your motor car and be involved in an accident in which he incurs extensive legal liabilities. Your friend would also like to be assured that he has some protection against these legal liability claims. It is for these reasons that third parties, that is to say, parties not originally involved in the contract between the insurer and insured, in many instances have some right or benefit[196] in the insurance contract.

The manner in which rights can be transferred is dealt with by many legal doctrines in the field of contract such as cession, novation, allegation, assignment and the application of *stipulatio alteri*. It is not intended to deal with the various legal doctrines in detail as each form a separate and in-depth field of study in the contract law. A number of examples, however, of the problems which can arise because of the lack of understanding of the problems of transferability in insurance will be examined.

13.2 Examples of insurance problems and the transferability of rights

13.2.1 Beneficiaries of a life policy

Probably the most common example of a third party obtaining a benefit from an insurance policy is the nominated beneficiary of a life policy. Mr X takes out insurance on his life with insurance company ABC and nominates his wife Mrs X as the beneficiary. Mrs X is not party to this contact but enjoys a benefit from the contact of insurance. Matters involving beneficiaries to life policies have often come before the courts. In *Theron v AA Life Assurance Association Ltd* 1993 1 SA 736 C (*Theron v AA Life Assurance Association Ltd*, 1993) Theron was a nominated beneficiary but could show no relationship with the deceased. Normally this would raise issues of insurable interest. Questions were raised about the legal capacity of the insured to understand the sophisticated nature of the insurance contract. The court *a quo* ruled against Theron but the decision was overturned on appeal.[197] This case is discussed in greater detail when dealing with legal capacity, below.

In some cases persons who have not been nominated have also claimed to benefit from the policy. In *Mooi v SA Mutual Life Assurance Society & Others* 1998 JOL 314 Tk[198] (*Mooi v SA Mutual Life Assurance Society & Others*, 1998) a husband insured his own life and nominated his brother and sister as beneficiaries. The wife tried to claim half of the proceeds in terms of ss 41-44 of the now repealed Insurance Act 27 of 1943. The court found against the wife in this regard. The wife also raised the constitutionality of not nominating a wife. The court concluded, also dismissing this argument, 'the nomination by a man married in community of property of a beneficiary under a life policy of a person

is sued. Mr X would like if he can claim protection in terms of Mr Y's insurance policy.

196 It is not always rights which are conferred on third parties.

197 *Theron v AA Life Assurance Association Ltd* 1995 4 SA 361 A (*Theron v AA Life Assurance Association Ltd*, 1995).

198 Discussed by Van Niekerk in JILB 10(2) 102-106 and JILB 10(4) 189-192.

other than his wife is not unconstitutional'. Professor Van Niekerk (2008:189 *et seq*) in expressing addition views on the case, is of the opinion that s15 of the Matrimonial Property Act may have assisted the wife.[199] In *Hees NO v Southern Life Association Ltd* 2000 1 SA 943 WLD (*Hees NO v Southern Life Association Ltd*, 2000) Mr Hees (five years before he married) took out a life insurance policy nominating his brother as the beneficiary. After his marriage in community of property he and his newly wed wife entered into a joint Will. Two months later he died as a result of suicide. His wife sued Southern Life for the benefits of the policy alleging that the marriage in community property and the joint Will was sufficient to make her the beneficiary of the proceeds of the insurance. The court concluded that the marriage and Will did not constitute a revocation of the nomination and hence the proceeds did not fall into the joint estate (958F-G).

In *Ries v Boland Bank PKS Ltd and Another* 2000 4 SA 955 C[200] (*Ries v Boland Bank PKS Ltd and Another*, 2000) Mr Ries indicated to his broker, Mr Groenewald that he wished to change the beneficiary under is insurance policy to his soon to be wife. Groenewald indicated that he did not have the necessary forms with him but would return that afternoon with the forms. He did so but Ries did not keep the appointment. He left a message with the soon to be wife that Ries should contact him so that the forms could be completed. He never did and accordingly beneficiaries were not changed. When he died the new Mrs Ries successfully sued the broker and his employer for the loss suffered, in delict, as a result of the forms not being filled in. The decision was overturned on appeal.[201] This matter is discussed in greater detail under delict and when dealing with the professional liability of brokers.

In *Pieterse v Shrosbree NO and others; Shrosbree NO v Love and others* 2005 1 SA 309 SCA[202] a husband nominated his wife as the beneficiary and subsequently died through suicide. The question arose does the policy benefits go to the executor of the husband's insolvent estate or the wife. The SCA decided in favour of the wife as the nominated beneficiary. A case can be made that at least some portion should go to the estate but legislation is needed to achieve this.

13.2.2 Motor policies

The owner of a motor vehicle will often let others drive his or her motor vehicle and that driver could be involved in an accident resulting in the driver becoming legally liable to pay damages to the injured party, usually property damage. The insurer undertakes to indemnify the third party driving with the permission of the insured. This matter is discussed below when dealing with the motor policy.

13.2.3 Cession in *securitatem debiti*

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199 For a discussion of beneficiaries to a life policy note H Henckert 'The life insurance policy, beneficiary clauses and marriage: a few aspects' *Tydskrif vir die Suid-Afrikaanse Reg* 1994 513-525 (Henckert, 1994).

200 For a discussion of this case note Vivian Cover 2001 14(1) and after the judgment had been overturned Cover 2002 14(12).

201 *BoE Bank Ltd v Ries* 2002 2 SA 39 SCA (*BoE Bank Ltd v Ries*, 2002).

202 For a discussion of this case note Vivian Cover 2003 16(1) and 2004 17 (7).

In the case of *Colyvas v Standard Bank* 1926 AD 56 (*Colyvas v Standard Bank*, 1926) Colyvas passed a bond in favour of the bank for security 'for a sum of money due to me or to become due by me'. In terms of the bond he undertook to insure the buildings against fire, to keep them insured, and to cede the policy to the bank as collateral security. This was done. A fire occurred and neither the insured (cedent) nor the bank (cessionary) notified the insurer as required by the conditions of the insurance contract. The insurer took advantage of this breach and repudiated the claim. The insured sued the bank for failing to give notice of the fire. The court ruled that the cession transferred the right of suing for any loss under the policy to the bank. The cession was different from the transfer of an obligation. The obligation remained with the insured (cedent). The obligation was not transferred by the operation of the cession itself.

13.2.4 Contract of purchase and sale

The case of *Van Deventer v Erasmus* 1960 4 SA 100 T (*Van Deventer v Erasmus*, 1960) demonstrates the tragedy of misunderstanding the law of insurance. In this case a purchaser bought property from a seller and paid the purchase price to the seller. The property was still insured by the seller. Probably because the purchaser thought that the insurance would attach to the property and did not realise that it was a personal contract between the insurer and the insured, he did not have the property insured himself. The property burnt down. Thus the purchaser had paid the purchase price and now had a house, ruined by fire. The insurance company paid out to the seller and the purchaser tried to sue the seller for the insurance proceeds. The insured argued that the insurance proceeds were fruits or benefits derived from the property. The court, however, dismissed the action because the insurance proceeds was particular to the seller and did not attach to the property.[203] By application of the doctrine of indemnity, it would be possible for the insurance company to recover its payments from the seller.[204] This example illustrates the danger of not understanding how insurance rights are transferred.

13.3 s156 of the Insolvency Act 24 of 1936

s156 gives a third party the right to claim directly from the insurer under certain circumstances. The section reads:

> Whenever any person (hereinafter called the insurer) is obliged to indemnify another person (hereinafter called the insured) in respect of any liability incurred by the insured towards a third party, the latter shall, on the sequestration of the insured, be entitled to recover from the insurer the amount of the insured's liability towards the third party but not exceeding the maximum amount for which the insurer has bound himself to indemnify the insured.

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203 Davis (1993, 276).

204 *Mendelshon v Estate Morom* 1912 CPD 690 (*Mendelsohn v Estate Morom*, 1912). *Rayner v Preston* 1881 18 ChD 1 (Brett, 1881).

This section has been considered by the South African courts on a significant number of occasions[205] and discussed by various writers.[206] Similar legislation exists in England[207] and other parts of the world.

The operation of this section can be illustrated from case law. In *Przybylak v Santam Insurance Ltd* 1992 1 SA 588 C (*Przybylak v Santam Insurance Ltd*, 1992), Mr Przybylak went to a braai at the home of some friends. While playing at the pool side his three friends threw him into the pool and as a consequence he broke his neck and was paralysed. He instituted an action against the three friends, Santam defended the delictual action using its contractual right to do so in the name of the insured before it has settled the claim (this right must not be confused with subrogation). Mr Przybylak won that case. Santam however refused to pay the claim. In order to bring an action against Santam, Mr Przybylak had to have recourse to s156 of the Insolvency Act. The friends were unable to pay the R3m damages and as a consequence were placed into insolvency. Mr Przybylak was then able to bring an action directly against Santam relying on a tacit understanding that since it had been shown that the insureds were legally liable to pay and Santam's obligation was to indemnity the insureds, that Santam was thus now liable to pay the third party be virtue of s156. Santam argued that that was not the case. The third party would have to prove that it had a contractual obligation to do so. Santam successfully defended the action arguing that it had no contractual obligation to indemnify the insureds. Mr Przybylak never received his compensation. Quite a sad story, but does illustrate the operation of s156 of the Insolvency Act. The important point is that it is insufficient to show that the insured has an obligation to the third party, the third party must also show that the insurer also had an obligation to indemnify the insured. (See also Le Roux, Coetzee and Unitrans cases supra).

Van Reenen v Santam Ltd 2012 SA 074 SCA (*Van Reenen v Santam Ltd*, 2012) involved the question of whether or not a claim in terms of s156 had prescribed; the case involved the intersection between insolvency and prescription.

14 PROPER LAW

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205 *Woodley v Guardian Assurance Co of SA Ltd* 1976 1 SA 758 W (*Woodley v Guardian Assurance Co of SA Ltd*, 1976); *Supermarket Haasenback (Pty) Ltd v Santam Insurance Ltd* 1989 2 SA 790 W (*Supermarket Haasenback (Pty) Ltd v Santam Insurance Ltd*, 1989); *Supermarket Leaseback (Elsburg) (Pty) Ltd v Santam Insurance Ltd* 1991 1 SA 410 A (*Supermarket Leaseback (Elsburg) (Pty) Ltd v Santam Insurance Ltd*, 1991); *Gypsum Industries Ltd v Standard General Insurance Co Ltd* 1991 1 SA 718 W (*Gypsum Industries Ltd v Standard General Insurance Co Ltd*, 1991); *Przybylak v Santam Insurance Ltd* 1992 1 SA 588 C (*Przybylak v Santam Insurance Ltd*, 1992); *Le Roux v Standard General Versekeringsmaatskappy Bpk* 2000 4 SA 1035 SCA (*Le Roux v Standard General Versekeringsmaatskappy Bpk*, 2000); *Coetzee v Attorney's Indemnity Fund* 2003 1 SA 1 SCA (*Coetzee v Attorney's Indemnity Fund*, 2003); *Unitrans Freight (Pty) Ltd v Santam Ltd* 2004 ZASCA 25 (*Unitrans Freight (Pty) Ltd v Santam Ltd*, 2004).

206 Pike, A 'The rights of indemnity insurers- third party plaintiffs should beware' 1993 1 1 JBL 24.

207 *Third Party (Rights against Insurers) Act, 1930 and Post Office v Norwich Union Fire Insurance Society Ltd* 1967 1 All ER 577 CA (*Third Party (Rights against Insurers) Act, 1930 and Post Office v Norwich Union Fire Insurance Society Ltd*, 1967); *Farrell v Federated Employers Insurance Association Ltd* 1970 3 All ER 632 CA (*Farrell v Federated Employers Insurance Association Ltd*, 1970).

Many insurance programmes, particularly those involving major companies involve an international insurer. Many personal lines policies in South Africa are underwritten by Lloyd's with the headquarters of Lloyd's being situation in London. Some policies may be underwritten in other countries but entered into and apply in South Africa. Specific statutory provisions, for example, exists to place risks in the Lloyd's market. Three important questions can arise where contracts are of an international nature, firstly the question of service and secondly which country's laws are applicable to the contract and finally which country's courts have jurisdiction to adjudicate on any dispute? Since insurance involves a contract between to persons, these issues fall to be resolved in terms of private international law. The last two questions are resolved by what is known as the doctrine of proper law.

Imagine the situation where a major South African company enters into an insurance contract which is insured by numerous insurance companies. Some of these companies may be resident overseas and some of the policies may be reinsured by overseas reinsurers. It is also probable that Lloyd's will bear some financial responsibility for a major loss. Under these circumstances a number of different countries could be involved, involving different interpretations of insurance law by courts in different countries.

The matter, in South Africa, had been resolved in terms of s63(1) of Insurance Act 27 of 1943 which provided that:

> ... the owner of a domestic policy issued after the first day of January, 1924, shall notwithstanding any contrary provision in the policy or in any agreement relating thereto, be entitled to enforce his rights under the policy against the insurer concerned in any court of competent jurisdiction in the Republic, and any question of law arising from a domestic policy be decided according to the law of the Republic. Provided that such a policy may validly provide that the amount of any liability under the policy shall be determined by arbitration in the Republic, if the insurer demands that the said amount be so determined.

The practical outcome of the above section was that insurance questions would be resolved in terms of the South African courts applying South African legislation. For reasons which are not clear, when the new insurance Acts were promulgated this section was not re-enacted in either of the Acts.

In the absence of a statutory provision the proper law must be determined by the application of the general principles of private international law which could well result in some cases that foreign courts will have jurisdiction applying foreign law. This is clearly not satisfactory and the above section should be re-enacted into the current legislation.

Lloyd's

In South Africa the question of the provision of domestic insurance by foreign insurers initially focussed around Lloyd's, resulting in separate legislative provisions governing Lloyd's operation in South Africa.[208] Lloyd's is still governed by its own legislative provisions and is considered separately. The

208 Further since Lloyd's is a market and not a company this produced unique problems of legal service and security, necessitating separate legislation.

relevant section of the Short-term Insurance Act (Short-term Insurance Act, 1998), of s59, reads as follows:

> "(1) Any claim against any Lloyd's underwriter under a South African short term insurance policy shall be cognisable by any competent court in the Republic.
> (2) In any action - instituted under subsection (1), the Lloyd's representative may be cited, in the name of his or her office, as nominated defendant or respondent and the summons or application commencing the proceedings may be served on him or her."

The Act grants jurisdiction to SA Courts but is silent on the law to be applied. The parties are thus free to apply the law of their choice. The matter was considered in the case of *Representative of Lloyd's v Classic Sailing Adventures* 2010 4 SA 90 SCA[209] (*Representative of Lloyd's v Classic Sailing Adventures*, 2010) where it was accepted the South African court had jurisdiction. The question which arose was, which law applied? In terms of Private International Law the parties were free to specify for themselves which law to apply and thus the law could have been UK law. However the question involved the duty of disclosure on which the South African courts has often pronounced and the matter is now also dealt with by statute. Under the circumstances the court accepted that South African law applied.

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[209] The case *a quo* was discussed by JP van Niekerk (2010) *TSAR* 590-608 and the appeal court case discussed by JP Van Niekerk (2011) 'Choice of foreign law in a South African marine insurance policy: an unjustified limitation of party autonomy', *TSAR* 166 (Van Niekerk, 2011); and Jason Mitchell (2013) 'To override, and when? A comparative evaluation of the doctrine of mandatory rules in South African Private International Law' *South African Law Journal* 130 (4) 757-777 (Mitchell, 2013)

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Yorkshire Insurance Company v Nesbitt Shipping Company. , 1 Lloyds 479 (1961).

Zava Trading (Prop) Ltd v Santam Insurance Ltd. , (1989).

INSURANCE CONTRACT

Contents

LAW OF CONTRACT AND THE INSURANCE CONTRACT

1.1 Law of contract as the law of the insurance contract

The relationship between the insurer and the insured, is governed largely by the insurance contract. This relationship, in turn, is governed, generally by the law of contract,[1] and more specifically as it applies to the contract of insurance.

1.2 English law - from status to contract (and now return to status)

Sir Henry Sumner Maine (1861) famously noted that the law of contract came from the movement of status to contract.[2] In earlier centuries, English law, as with Roman law did not have a general doctrine of contract, that is a person was bound by his agreement. A person's status determined his rights and obligations. Thus if someone was a tenant his relationship determined by the law of landlord and tenant, or in employment by the law of Master and Servant, or in sale by the law of Purchase and Sale and so on. Contracts involved exchange between parties. The status of each party determined their rights and obligations. There was no need for him to agree to anything. The law defined the rights and obligations of both parties. If a person was an employee his rights were determined as the servant by the law of master and servant and so on. Under the influence of the church, closely allied to obligations from exchange are obligations which come from taking an oath. In this case a person is bound by his oath. As time progressed the idea became entrenched that a person should be bound by his word and so

[1] It is not intended to deal in any detail with the law of contract in this work and text books on the subject can be consulted in this regard. Some of these are: Joubert, DJ (1987) *General Principles of the Law of Contract* Juta & Co Ltd (Joubert, 1987); Hosten *et al* (1980) *Introduction to South African Law and Legal Theory* Butterworth Group (Hosten, 1980); Gibson, JTR (1983) *SA Mercantile and Company Law* 5ed Juta (Gibson, 1983); Kerr, AJ (1989) *The principles of the law of contract* 2ed Butterworths (Kerr, 1989); Gibson, JTR (1970) *Wille's Principles of South African Law* 6ed Juta 1970 (Gibson, 1970); Sharrock, R (1992) *Business Transactions Law* 3ed Cape Town Juta & Co (Sharrock, 1992). For the position in England consult Furmston, W (1986) *Cheshire, Fifoot & Furmston's Law of Contract* 11ed London Butterworths (Furmston, 1986).

[2] For a discussion on Maine's statement consult MR Cohen (1933) 'The basis of contract', *Harvard Law Review* 46 (4) 553-592 (M. Cohen, 1933); RH Graveson (1941) 'Movement from status to contract', *Modern Law Review* 4 (4) 261-272 (Graveson, 1941); L Wilson (1987) 'Ben Jonson and the law of contract', *Cardozo Studies in Law and Literature* 5 (2) 281-306 (Wilson, 1987); A Soifer (1987) 'Status, contract and promises unkept' *Yale Law Journal* 96 (8) 1916-1959 (Soifer, 1987).

contracts became obligations by mere agreement. In English law is it still understood that contracts are generally agreements involving exchange and thus some *quid pro quo* must exist and thus require *due consideration* to be a valid contract.

Reading modern South African judgements the question arises whether or not courts are unknowingly returning to status as the basis of contract, especially where insurance brokers are concerned.[3]

1.3 Roman Law of contracts

South Africa's law of contract derives from the Roman-Dutch law of obligations. Roman Law recognised that there could be agreement between two parties without that agreement being legally enforceable.[4] Where the parties have an agreement but no obligations this is a bare agreement [*nudum pactum*][5]. A mere agreement between the parties was not sufficient to create a binding contract. Something more, the *causa* was needed.[6] Even after a binding agreement existed, the Roman law did not recognise a general doctrine of contract but recognised specific types of contract.[7] These were four nominate (i.e. named) contracts and a number of innominate, or unnamed contracts. The four nominate contracts were verbal contracts, literal contracts, real contracts and consensual contracts.

Verbal contracts, the earliest contracts, were entered into by the parties coming to an agreement and then using words of a certain kind. The most important verbal contract was the *stipultio*. The one party would stipulate to the other 'Do you solemnly promise such-and-such?' and the other replied, 'I solemnly promise'. The stipulation which was made and accepted indicated the points of consensus.

Literal contracts required agreement and then made use of writing of a certain kind. These contracts were created by an entry in a creditor's ledger or account book that the creditor had paid to the debtor and the debtor had received a certain sum of money. The entry was made with the assent of the debtor.

Real contracts involved things or property and became operative and binding on the transfer or delivery of the thing [res] concerned. Four types of contracts were known (a) *mutuum* which involved a gratuitous loan of consumable things which are borrowed or lent. An example would be the loan of money or grain. (b) *commodatum* which involved a gratuitous loan for use of a thing that is to be returned in its identical form. An example would be a horse or a picture; (c) *depositum* [bailment] is the delivery by one person to another of an article for custody, to be returned on demand, with compensation;[8] (d) *pignus* is a pledge, pawn, mortgage is the delivery of an article, moveable or

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3 RW Vivian (2005) 'Broker's liability - from status to contract - my goodness back to status', *Cover* 18 (08) (Vivian, 2005a); RW Vivian (2009) 'Insurers are insurers - not intermediaries', *Cover* 2009, January (Vivian, 2009).

4 Although the *nudum pactum* was not enforceable it gave rise to natural obligations and hence an exception.

5 *Ulpian Digest* D.2.14.7.4D.2.14.7.2 & 4. 'If there is no additional ground [*causa*], in that case it is certain that no obligation can be created, on the mere agreement; so that a bare agreement [*nudum pactum*] does not produce an obligation ...' and Ulpian D.13.5.1.6

6 Ledlie, JC (1926:215-371) *Sohm's Institutes of Roman Law* 3ed, Oxford (Ledlie, 1926).

7 Thomas, JAC (1976) *Textbook of Roman Law* North Holland (1976:215) (Thomas, 1976).

8 The contract of bailment [*depositum*] for reward is important and gives rise to insurance problems. This contract has

immovable to a creditor as a security for a debt, conditionally on the creditor returning it when the debt is paid, the creditor having the power of sale in default of payment. In all of these cases agreement was insufficient to create an obligation. Only upon delivery did the agreement become binding.

Consensual contracts are important because they are the forerunner of the modern contract which becomes binding once the parties reach agreement on the essentialia of the contract. Four consensual contracts were recognised (a) *emptio et venditio*, or purchase and sale; (b) *locatio et conductio*, or lease and hire of things, services or work; (c) *societas* or partnership and; (d) *mandatum* or mandate or agency in the broad sense. The contract of insurance was unknown to Roman law.[9] Dutch law dealt with indemnity insurance but not with non-indemnity contracts. In Roman-Dutch law the contract of insurance is a contract nominate consensual.

1.4 Requirements for a valid contract

An insurance contract is a mutual or bilateral contract. It is a contract between two parties each of whom incur reciprocal obligations. In order that a valid contract come into existence, at least the following requirements must exist:[10]

- the parties must reach consensus on the possible performance of the essentials of the particular contract;
- the parties must have legal capacity;
- the contract must relate to an object which is lawful, in accordance with public policy [not *contra boni mores*];
- the prescribed formalities, must be complied with.

These requirements are not particular to the contract of insurance but are the general requirements for any bilateral contract. Since an insurance contract is simply a contract these requirements are applicable to the insurance contract. It is not intended to discuss the application of these requirements to the insurance contract in detail[11] since this would make this work too unwieldy.

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often been considered by the courts. *Weinberg v Oliver* 1943 AD 181 (*Weinberg v Oliver*, 1943); *Rosenthal v Marks* 1944 TPD 172 (*Rosenthal v Marks*, 1944); *Essa v Divaris* 1947 1 SA 753 A (*Essa v Divaris*, 1947); and Government of the Republic of SA - *Department of Industries v Fibre Spinners and Weavers (Pty) Ltd* 1977 2 SA 324 D (*Government of the Republic of SA (Department of Industries) v Fibre Spinners and Weavers (Pty) Ltd*, 1977).

9 *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 A at 426I (*Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality*, 1985).

10 The requirements for a valid contract are expressed slightly differently by various authors on contract or in some cases not expressed at all. Some writers simply deal with the various requirements without listing all of the individual requirements needed to constitute a valid contract.

11 For the application of the general principles to the insurance contract consult: Reinecke, MFB & vd Merwe, SWJ (1989:52) *General Principles of Insurance* Butterworths 1989 (Reinecke, MFB & vd Merwe, 1989); Hansell, DS (1988:130) *The Elements of Insurance* 4ed Pitman (Hansell, 1988); Birds, J (1988:53) *Modern Insurance Law* 2ed Sweet and Maxwell (J Birds, 1988). The various general principles are dealt with at diverse places in the work of Davis, DM (1993) *Gordon & Getz: The South African Law of Insurance* 4ed Juta, Cape Town (Davis, 1993a); Kahn (ed) (1985) Ellison Kahn, D Zeffertt, JP Pretorius & C Visser *Contract & Mercantile Law Through the Cases* 2ed Juta

1.4.1 Consensus

When the contract is entered into, the parties must reach consensus on the essentials of the contract. Consensus may be lacking as in the case of mistake [*error*], fraud [*dolus*] or duress [*metus*]; impossibility;[12] modalities.

1.4.1.1 The essentialia of the contract of insurance

The parties to a contract must reach consensus on specific points or objects or essentialia of the contract. The specific *essentialia* determine the classification of the specific contract. Thus, if the contract is a contract of purchase and sale [*emptio venditio*] then the parties must reach consensus on the thing to be sold [*merx* or *res*] the price to be paid [*pretium*] and the exchange of one for the other. Since the insurance contract was unknown in Roman law, Roman law does not determine the essentialia of the insurance contract. The *essentialia* must be determined from case law. The case usually quoted to establish the *essentialia* is that of *British Oak Insurance Company Limited v Atmore* 1939 TPD 9 (*British Oak Insurance Company Limited v Atmore*, 1939).[13] In this case the insured and insurer entered into an agreement whereby the insurer insured the insured's Workmen's Compensation Liability. After the period of insurance had passed, the insured still had not paid the premium. The insured also did not submit any claims during the period of insurance. The insured then argued that the payment of the premium was an essential element of the contract and since the period of insurance had passed and the premium had not been paid he could not be liable for this premium. In order to determine whether the insured was liable for the premium the judge had to establish what are the *essentialia* of the insurance contract. The judge concluded:

> I think that it is not without importance to consider the nature of the simplest kind of contract relating to insurance, in which the bare minimum is stated, namely, the nature of the indemnity, the period of insurance and the amount of the premium. If such an agreement were made at one time there seems to me to be no reason to doubt that a contract binding on both parties would be in existence that even in the absence of an express promise by the Insured to pay the premium it could be recovered from him. ... [I]t is necessary, I think, to bear in mind that when the essentials had been agreed upon an obligation to pay the premium and the obligation to indemnify have come into existence and this it appears, either expressly or impliedly, from the whole of the documents constituting the agreement, that such obligations had been suspended. This appears to me to be the correct view on principle; it is not inconsistent with any other authority cited and desired support, though not as clear as one might have wished or expected from some of them.

1991 (Ellison Kahn, Zeffertt, Pretorius, & Visser, 1991).

12 D.50.171.185 *Impossibilim nulla obligatio est*. [There is no obligation for the impossible]. If a contract was initially impossible then this showed no real intent to contract and the contract did not come into being for lack of consensus. Thomas (1976:232).

13 See also *Lake & Others v Reinsurance Corporation Ltd & Others* 1967 3 SA 124 W (*Lake & Others v Reinsurance Corporation Ltd & Others*, 1967) and Reinecke, MBF (1968) '*Lake and Others NNO v Reinsurance Corporation Ltd and Others 1967 3 SA W'* 1968 31 THRHR 75 (*Lake and Others NNO v Reinsurance Corporation Ltd and Others 196 3 SA W'*, 1968).

From the judgment it is clear that consensus must be reached on the following to constitute an enforceable contract of insurance the:

- nature of the indemnity[14];
- period of insurance;
- amount of the premium[15].

It should be noted that consensus on each of the above points of consensus is essential failing which there can be no consensus, and without such consensus a contract of insurance cannot exist.[16] *Zava Trading (Prop) Ltd v Santam Insurance Ltd* 1989 D[17] (*Zava Trading (Prop) Ltd v Santam Insurance Ltd*, 1989) dealt with what appeared to be a common open marine through put policy. Most large companies are not able to determine beforehand all the shipments for which insurance is required. Blanket cover is provided for all shipments and these are declared during the year of insurance as and when they arise. The declaration is often in arrears. In the Zava Trading case the cover was provided 'at rates to be agreed'. The contract made no provision for the determination of the premium. Without certainty and hence consensus on an essential point of the contract, the court concluded that no contract of insurance came into existence.[18] The decision of the court has been criticised[19] that the premium could be determined in accordance with marine custom that when the premium is not specified, the premium is a reasonable premium and what is reasonable is question of fact.

Sometimes it is clear that the parties had reached consensus, indeed had even performed on that consensus but what is not clear is that they had reached consensus on a contract of insurance. The question then arises is it necessary to know if a particular contract is one of insurance. The answer must surely be no. It is generally no longer important to label contracts. It is only in exceptional circumstances that it is important to know if a contract is one of insurance, as for example where a regulatory issue is involved.

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14 The nature of indemnity includes the fact that the indemnity does not become payable until an uncertain event takes place.

15 Insurance is a bilateral agreement, one party promises to indemnify and the other to pay the premium. In English law the payment is known as due or valuable consideration and is an essential element of a contract. For a discussion on consideration see Chloros, AG (1968) 'The doctrine of consideration and the reform of the law of contract' *International and Comparative Law Quarterly* 17 (1) 137-166 (Chloros, 1968); Hamson (1938) 'The reform of consideration' *Law Quarterly Review* 54 233 (Hamson, 1938); AG Chloros (1968) 'The doctrine of consideration and the reform of the law of contract' *International and Comparative Law Quarterly* 17 (1) 137-166 (Chloros, 1968); Twyford, JW (2002) The doctrine of consideration Sydney: University of Technology (Twyford, 2002). In *Aegis Insurance Company v Smith* (*Aegis Insurance Co Ltd v Smith & 'n Ander*, 1993) the judge seemed to conclude that agreement to pay the premium was not necessary for a contract of insurance.

16 In Roman law, since only specific contracts existed, if consensus was not reached on all specific *essentialia*, no contract would come into existence. In modern law although a contract of insurance did not come into

17 Discussed by Van Niekerk, JP (1994) 'Certainty of Premium and Insurance Cover at a Premium to be arranged' *THRHR* 57 (4) 661-671

18 In England the position is governed by s31(1), s31(2) and s88 of the Marine Insurance Act of 1906.

19 Van Niekerk (1994).

1.5 Definition of an insurance contract

The definition proposed in this text is the following:

> The insurance contract is a bilateral contract whereby the insured consents to pay a consideration to an insurer and the insurer consents to be bound to indemnify the insured should the insured contingency arise during the period of insurance.

The definition proposed above stresses the bilateral nature of the contract and is broad enough to include non-indemnity insurance, if it is accepted the insured amount in non-indemnity insurance is the agreed indemnification. The good faith requirement of the insurance is not stressed in the definition since, as is correctly pointed out by the courts, good faith is to some degree or other, required in all contracts.

1.6 The *essentialia* of the contract of suretyship

Closely allied to the contract of insurance is the contract of suretyship. These two contracts are so closely related that it is possible for them to be confused[20] and a need exists to establish the distinguishing features.[21]

In *Aegis Insurance Co Ltd v Smith & 'n Ander* 1993 C (*Aegis Insurance Co Ltd v Smith & 'n Ander*, 1993),[22] Aegis issued a performance guarantee in favour of a third party and Smith entered into a deed of suretyship to indemnify Aegis if it was called to pay on the guarantee. Aegis was called to pay and looked to recover from Smith in terms of the indemnity. Smith denied liability on the basis that the guarantee policy did not require the payment of a premium and hence was not a valid contract. The court seemed to indicate that an agreement for the payment of a premium was not necessary for a valid contract of insurance, which is contrary to the prevailing authorities and has been criticised.

1.7 Capacity to contract

A person cannot consent beyond his capacity. Thus where a person purports to 'contract' beyond the limits of his contractual capacity, the general rule is that the 'contract' is void. Because of the sophisticated nature of insurance, it is seldom that the issue of capacity to contract[23] arises in the context of entering into an insurance policy. The issue however arose in *Theron v AA Life Assurance Association Ltd* 1993 1 SA 736 C (*Theron v AA Life Assurance Association Ltd*, 1993). The 'insured'

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20 *Trans-Africa Credit and Savings Bank Ltd v Union Guarantee and Insurance Co Ltd* 1963 2 SA 92 C at 98 (*Trans-Africa Credit and Savings Bank Ltd v Union Guarantee and Insurance Co Ltd*, 1963).

21 Forsyth, CF (1982) *Caney's: The Law of Suretyship* 3ed, Juta, 1982 (Forsyth, 1982).

22 Discussed by Schultz, WA (1995) 'Is an insurance policy without a premium possible?' *SA MERC LJ* 71 1 103-109 (Schultz, 1995).

23 Capacity to litigate is another issue which can arise *Jonathan v General Accident Insurance Company of South Africa* 1992 4 SA 618 C (*Jonathan v General Accident Insurance Company of South Africa*, 1992).

Robert Fortuin was retarded. He entered into a contract on the 26 February 1985 and died on the 21 July 1985. The beneficiary was one Vincent Theron who did not have an insurable interest in the life of Fortuin. There was no clear reason why Fortuin should nominate Theron as his beneficiary. The court came to the conclusion that the 'insured' could not understand and appreciate the transaction into which he was entering. The contract was declared null and void and without any legal effect. The decision was overturned on appeal in *Theron v AA Life Assurance Association Ltd* 1995 4 SA 361 A (*Theron v AA Life Assurance Association Ltd*, 1995).

1.8 Lawfulness

Courts will not give effect to agreements made contrary to the law or contrary to public policy. The object of the contract of insurance must be lawful. The general rule is that all agreements are lawful unless prohibited by statute or common law. Contracts are prohibited by common law if they are against public policy or are contrary to good morals (*contra bonos mores*.)[24]

Richards v Guardian Assurance Co 1907 TH 24 (*Richards v Guardian Assurance Co*, 1907) At common law the object of the contract must not be illegal or contrary to public morals or policy. In the above case an insurer was held not liable in terms of a fire policy where an insured property which had been described as a dwelling house had been used as a brothel. This case may well be a bit extreme, since it is the building that was insured and not the business. A stronger case can be made to repudiate a claim, on moral grounds, against loss of profits of a brothel. The question of public policy was raised in *Ivory Kraal (Pvt) Ltd v Unity Insurance Co Ltd* 1985 4 SA 453 ZH (*Ivory Kraal (Pvt) Ltd v Unity Insurance Co Ltd*, 1985) as discussed below in the context of the all risks policy.

1.8.1 Insurance, wagering agreements and insurable interest

It is generally accepted that insurable interest is required as a matter of public policy. That the agreement must be lawful is of particular importance to the law of insurance because of the similarity between the insurance contract and the contract of wager. At common law, wagering contracts are not illegal[25] as such but are unenforceable.[26] It is thus necessary to be able to distinguish between wagering agreements and insurance contracts. This is usually achieved by resorting to the concept of insurable interest. In terms of case law, contracts of insurance require insurable interest as a matter of public policy.[27]

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24 Gibson (1983:10)

25 Since a wagering contract is not illegal it could be argued that it is misleading to discuss wagering and insurance as part of lawfulness of contracts. In this regard the approach adopted by *Reinecke & vd Merwe* (1989,54) (*Reinecke & vd Merwe*, 1959) is followed.

26 For a discussion on certain aspects of enforcing wagers consult Midgley, JR (1990) 'Wagers, natural obligations and set-off' 1990 107 *SALJ* 381 (Midgley, 1990), commenting on Nichol v Burger 1990 1 SA 231 C (*Nichol v Burger*, 1990).

27 It should not be accepted that the only reason for insurable interest is a matter of public policy. Economists would argue that insurable interest is required to deal with the problem of moral hazard.

Burger v SA Mutual Life Assurance Society 20 SC 538 (*Burger v SA Mutual Life Assurance Society*, 1984). In this case the insured was killed while fighting for rebel forces in an unlawful rebellion. Nevertheless the claim against his life insurer succeeded. On the question of public policy, the judge Kotze J said, "The doctrine of public policy aught not to be stretched beyond what is necessary for protection of the public".

1.8.2 Intentionally bringing about the insured risk and public policy

It is against public policy for persons to deliberately or intentionally bring about the risk insured against,[28] especially but not only when it is a crime to do so. Generally, the intentional act of employees will not be treated as acts of the policyholder.[29] In *Government of the Republic of SA (Department of Industries) v Fibre Spinners and Weavers (Pty) Ltd* 1977 2 SA (*Government of the Republic of SA (Department of Industries) v Fibre Spinners and Weavers (Pty) Ltd*, 1977)

> "Subject to one limitation, a person may effectively insure against the consequences of his own conduct, even if culpable. The limitation ... applies to a wilful or deliberate act bringing about the risk especially but not only when it is a crime. An insured who perpetrates such an act is not entitled to indemnification against its consequences. In some cases a necessary implication to that effect has been invoked. More often public policy has been invoked."

The judge decided that Fibre Spinners was indeed entirely exempt from the liability towards the government. This decision was confirmed in the appeal case of *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 2 SA 794 A (*Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd*, 1978).

Shooter t/a Shooter's Fisheries v Incorporated General Insurances Ltd 1984 4 SA 269 D (*Shooter t/a Shooter's Fisheries v Incorporated General Insurances Ltd*, 1984), this court case was a sequel to the confiscation by the authorities of the People's Republic of Mozambique of the fishing trawler Morning Star. The owner was insured in terms of a Hull policy and a war risks policy. During the case the issue arose of whether or not an insured may succeed in a claim under a policy where the risk is brought about by a deliberate act of the insured or by his wilful or intentional conduct. The court noted that a claim will fail where the event is brought about by a deliberate act of the insured or by his wilful conduct. The second issue was, was it contrary to public policy to recognise a claim which has resulted from the commission of a crime? The court concluded that it may be against public policy to permit a claim where the accused has been guilty of either illegal or unlawful activities. Judgment was given in the first instance in favour of the insured, however, judgment was reversed on appeal in the case of *Incorporated General Insurances Ltd v Shooter t\a Shooters* 1987 1 SA 842 A (*Shooter t/a Shooter's Fisheries v Incorporated General Insurances Ltd*, 1984).

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28 *Bereford v Royal Insurance Co Ltd* 1938 AC 595 598-9 S86 HL (*Bereford v Royal Insurance Co Ltd*, 1938); *Nathan NO v Ocean Accident and Guarantee Corporation Ltd* 1959 1 SA 65 N 72A-E (*Nathan NO v Ocean Accident and Guarantee Corporation Ltd*, 1959)

29 *John Dwyer Holdings Ltd v Phoenix Assurance Co Ltd* 1974 4 SA 231W at 239E-F; 338G-H (*John Dwyer Holdings Ltd v Phoenix Assurance Co Ltd*, 1974).

Suicide appears to be an exception to the rule that a person cannot recover if the loss is deliberately caused.

1.8.3 Insurance Acts

Until Insurance Act 27 of 1941 was repealed the industry was regulated by this single Act, thereafter two Acts were promulgated, one for the Long-term industry[30] and another for the Short-term industry.[31] The Insurance Acts are important, with regard to lawfulness for two reasons. Firstly, the Act contains a number of prohibitions, discussed below. Secondly as insurance contracts are in some instances an exception to the normal rule that contracts which are unlawful will not be upheld by the courts. Unlawful insurance contracts may indeed be upheld by the courts.[32]

The following are some of the important prohibitions:

Only registered persons may carry on insurance business if registered to carry out that class of business.[33] There is a limitation on the insurance which may be effected on the life of a child under the age of fourteen for amounts in excess of that specified in the Act.[34] It is a criminal offence to render services as an intermediary to persons not registered as an insurer.[35] Prohibition of offering inducements to enter into a contract of insurance.[36]

1.9 Formalities

1.9.1 Roman law requirement of *causa* and the English law requirement of valuable (or due) consideration

There is a tendency by modern writers to treat *causa* as a separate requirement. It is, however, suggested that this approach is not in keeping with the original Roman law concept of a contract. *Causa* was the formality of the Roman law of contract. *Causa* was that formal positive act by the parties without which Roman law would not recognise an enforceable contract had come into existence. Roman law required a variety of formalities, dependent on the type of contract to bring a contact into existence. Roman law judged people in terms of visible acts - mere consensus would be too abstract a concept for the Romans. Insurance, wagering agreements and insurable interest.

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30 Long-term Insurance Act 52 of 1998 (Long-term Insurance Act, 1998).

31 Short-term Insurance Act 53 of 1998 (Short-term Insurance Act, 1998)

32 The effect of contravening the law was dealt with in terms of s68 of the now repealed Insurance Act 27 of 1941 which read, 'A policy issued by any person, whether before or after the commencement of this Act, shall not be invalid merely because that person contravened or failed to comply with any law in connection with that policy.' The matter is now dealt with in terms of s54 of the Short-term Insurance Act 53 of 1998 - s54 Short-term Insurance Act 53 of 1998 and s60 of Act 52 of 1998.

33 S7 of Act 52 of 1998 and s7 of Act 53 of 1998.

34 S55 of Act 52 of 1998.

35 s8(2) of the Short-term Insurance Act 53 of 1998 - s8(2) Short-term Insurance Act 53 of 1998 Act 52 of 1998.

36 s44 of the Short-term Insurance Short-term Insurance Act 53 of 1998 - s44Act 53 of 1998 and s45 of Act 52 of 1998.

1.9.1.1 Other formalities

In the modern law of contract, as a rule no special form or external formalities are required for a contract to come into existence. Insurance follows this rule.[37] The contract of insurance as with other contracts comes into existence as soon as the parties have agreed to its essentials of the contract. It follows therefore, at common law, that neither the issuance of a policy nor the payment of the premium is essential for the conclusion of the contract. Although a written document is not required, in practice a policy document is normally issued or is available.

1.10 Formation of a contract

A person who wishes to enter into a contract must convey this intention to the other party. The one person must offer[38] to contract and the other must accept[39] this offer. Once the offer has been extended and accepted, consensus has been reached. Once the offer is made and accepted the law adds the obligations.

1.10.1 Offer and acceptance: the proposal form

The insurance contract is simply a contract and therefore the rules of establishing agreement by offer and acceptance applies. The proposal form[40] plays an important part in this regard. When an insurer issues a proposal form, the insurer invites the public to make an application to be insured, while it is the insured, by completing and submitting the proposal form who offers to be insured. Invariably insurers contract on their own fixed terms and the applicant proposes that the insurer issue a policy in its usual form.

Kahn v African Life Assurance Company 1932 WLD 160.[41] (*Kahn v African Life Assurance Company*, 1932) In 1916 one Abt took out a Child's Deferred Assurance policy on behalf of Kahn. It was intended that Khan should be entitled to the sum of £203 on attaining the age of 21 years. The insurer incorrectly entered the amount of £590 in its policy document. Kahn on attaining the age of 21 claimed the amount of £590. The insurer paid £203 into Court. The Court noted that a proposal form is an application to the insurer to issue a policy on its usual terms and according to its usual conditions. The policy, the contract document as is usually the case, was merely a memorandum setting forth the terms agreed upon

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37 Davis (1993: 132)

38 *Pollicitatio vero offerentis solius promissium*, or the offer made by one party before it is accepted by the other Harvey (1879,5) *A Brief Digest of the Roman Law of Contracts* James Thornton 1879 (Harvey, 1878).

39 *Conventio sive pactum* - the acceptance by the other party. Harvey (1819:5).

40 With the advent of arranging insurance cover via a telephone, the formal written proposal form is falling away. However the telephonic conversation is usually recorded and the recording fulfills the role of the proposal form. Proposal forms are seldom, if ever used in placing the cover of large commercial and industrial risks. However detailed survey reports are compiled for most large risks. Specialised classes of risks still require proposal forms.

41 Davis (1993:134)

by the two contracting parties, in writing. Since the policy, the contract document did not correctly reflect the agreement of the minds, it could be rectified to indicate the correct figure of £203.

Therefore where an insurance company issues a proposal form which is duly completed by the insured and submitted to the insurer, the usual rule is that the proposal form is not an offer by that company to the insured, but rather an invitation to do business. The content of the proposal form is largely dependent upon the class of insurance cover being arranged. In the case of a life policy, for example questions concerning a person's age and health are asked. In the case of a fire policy, questions on a person's solvency may well be asked.

Generally the proposal form covers items such as the status of the person and details of the risk which the insurers are being asked to insure. Thus in the case of insuring a building, the proposal form would probably require information regarding the construction and occupation of the premises; in a life policy the insurer would probably wish to know something about the habits of the person - whether he drinks or smokes and so forth. In a motor policy the insurer will probably want information on the person's driving history and criminal actions and civil and insurance claims arising out of driving and related matters. An important question contained in most proposal forms is the claims experience of the proposer.

It is essential to disclose all material facts to the insurer, since it is on the basis of the information disclosed in the proposal form that the insurer can make a decision as to whether he accepts the risk and, if so, at what premium. The requirements of disclosure is discussed in greater detail below. Many proposal forms conclude with a declaration that the proposer warrants that the information given in the form is the truth and that the information forms the basis of the contract.[42] The proposal is then incorporated by reference into the contract.[43]

The proposal form has however more than one purpose. The following are the six main functions of a proposal form:[44]

- **To advertise:**
  Proposal forms may also advertise the other products available from the insurer.

- **To elicit information:**
  The main use of proposal forms is to provide underwriters with the information they need to decide whether to accept the proposal and, if so, at what price and on what terms.

- **To elicit a quotation:**

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42 The legal implications of this declaration is discussed under *warrantees infra*.

43 As has been indicated, the proposal form constitutes the offer to be insured and once accepted the insurance normally follows. The mere submission of the completed proposal form does not result in the contract of insurance coming into existence. Sometimes insurance is required as a matter of urgency, before the insurer has received or has had the opportunity to study the proposal form and make a decision. Under these circumstances it is possible to arrange temporary insurance.

44 Diacon et al (1992, 154) Diacon SR & Carter RL *Success in insurance* 3ed John Murry 1992 (Diacon & Carter, 1992).

Sometimes a proposal form is filled in as a request to the insurers for a quotation on price and terms. The insurer's quotation is then the legal offer.

- **To describe the cover available:**
  Many forms of prospectuses summarise the cover obtainable under the insurance contract.

- **To make a legal offer:**
  As has been noted, a valid offer must be made before a contract can be concluded. The completion of a proposal form often constitutes the legal offer by the proposer to the insurance company, although offers can also be made orally.

- **To establish a warranty:**
  The wording and declaration in a proposal form often warrant the truth of the answers there on.

1.11 General duties arising out of contract and insurance

The law of contract establishes some general rights and duties which were appropriate apply to the contract of insurance. For example in the case of a breach, a duty exists on the person who suffers a loss to minimise that loss. The person who suffered the loss cannot sit back and simply pass all the losses onto the other party. That duty exists with respect to the contract of insurance.[45]

2 COMPONENTS OF AN INSURANCE POLICY - SHORT TERM

2.1 Standard and model contracts

Insurance works because like risks are pooled. It stands to reason insurance should be provided in terms of standard or model contracts covering like risks. This has been the case since the inception of the modern insurance market. In England, following the South Sea Bubble of 1720 the formation of companies were prohibited until 1844. It was thus only after this date that an insurance market in the modern sense began to develop. In 1868 fire insurance companies got together in tariff committees, the Fire Offices Committee (FOC) and inter alia standardised policy wordings emerged which were compulsory for tariff companies. Membership of the tariff was voluntary and some companies decided not to be party to the tariff. Usually new entrants were not tariff members. Generally non-tariff companies still used or based their policy wording on the tariff wording. In that sense then these standardised wordings were regarded as model wordings. In the UK the Monopolies Commission in 1972 voiced concern about the existence of tariff committees and the industry decided to disband these committees.

[45] *Walker v Santam and others* 2009 ZASCA 56 par 16 (*Walker v Santam and others*, 2009).

South Africa followed the UK in many regards, including the formation of tariff committees in the late 1800s. Because of the size of the country more than one committee was formed. The initial tariff was a mere few pages. When the UK decided to disband tariff committees, the South African industry followed. When the committees were disbanded the tariff comprised well in excess of 100 pages. The standard policy wording continued to be used and could thus be regarded as model contracts. The disbanding of the tariff committees created several problems for the industry.[46]

As pointed out insurance is the pooling of like risks, suggesting that similar or identical policies for specific classes of risk is not only desirable but inevitable. The achievement of this became conceptually difficult after the demise of tariff committees. The need for model wording came to the fore in Europe with the formation of a unified Common Market. It became clear that for companies to compete on an equal footing across Europe common wording for common risks was desirable and insurers the prohibition against standard wording was lifted for insurers. As indicated in the next section after the demise of the tariff insurers and brokers formed a committee to standardise on policy wordings leading to the MultiMark series of policies. This was transferred to the SAIA and abandoned when it became clear that a risk of falling foul of the competition legislation existed. The possibility of getting an exemption similar to Europe was raised with the short-term statutory Advisory Committee and National Treasury but nothing came of this initiative. The legislative establishing Advisory Committees was subsequently repealed. The new s55 of the Short-term Act now authorises the regulator to promulgate standard wordings.

2.2 Modern practice, multi-peril policies

Most persons, companies and institutions require more than one class of insurance to meet their various needs. A person may have a motor car and thus require motor insurance. Houseowners' insurance is required for dwellings and householders' insurance for the contents of the dwelling. All-risks insurance is required for specified usually valuable assets which are likely to be taken out of the house and are exposed to a wide range of perils. Public liability insurance is required to protect against ruinous liability, usually delictual, claims. Similarly, companies and other institutions require an even wider range of insurance protection. In addition to those mentioned above for the individual, insurance such as marine, aviation, contractors' all risk and consequential loss cover is usually required by profit seeking companies. It is possible to issue separate policies for each risk but this is not the modern practice. It is customary, in the short-term industry personal lines to package these into one document referred to is a multi-peril policy. It is not sure which insurance company was the first to do so but Santam has claimed pole place with this innovation with its Multiplex policy. This approach is logical

[46] Without the tariff, especially agreed premiums, the market faced unfamiliar competition. In the late 1970s and 1980s many company's solvency ratios became a matter of concern. The then Registrar of insurance called a meeting of the CEO's of insurance companies to find a solution. They agreed to what was known as the market accord. Insurers would not quote on rival business unless they could offer more than a 10 per cent reduction in premiums. The accord was endorsed by the Registrar. With the collapse of the AA Mutual, premium rates increased dramatically and stability was resorted long enough for insurers to learn how to cope in a competitive market. Similar problems were faced in the USA but US insurers decided to surrender to regulation where essentially the regulator replaced or if you like, became the tariff committee. For details of the American Market, Jaskow 1973 can be consulted.

since all these policies are renewed on an annual basis and it makes sense to use one multi-policy document.

A similar practice exists in the commercial market. It is tempting to believe the commercial market practice was the mere continuation of the model policies of the tariff era or/and extension of the multiplex system to commercial lines but its history derives from a different source. A consequence of the demise of the tariff was that individual wordings could evolve. The brokers took advantage of this and began to develop their own wordings. These of course had to be accepted by insurance companies and senior executives found increasingly their time was taken-up with discussions with brokers on policy wordings. Having concluded negotiations with one insurer, brokers would have to start off afresh with the next insurance company and similarly having concluded negotiations with one broker, the next would arrive and insurers would have to start all over again. To overcome this problem it was decided for form a committee of brokers and insurers and agree on model wording. The outcome of this process was the MultiMark series of policy wordings. Each series of wordings took years to finalise and thus MultiMark I, II and III saw the light of day. The process was time consuming, and probably an expensive exercise. The responsibility for the MultiMark series shifted from the joint committee to the South African Insurance Association (SAIA). Eventually concern was expressed about model wordings, in the light of developments in competition law and an opinion was sought on the matter. The opinion concluded that there was a strong probability that the model wording fell foul of competition law and the system was abandoned. Conceptually for the first time since 1868 the industry now operates without model contracts although it is anticipated that the existing wordings will remain influential for some time to come. The MultiMark policy has often been considered by the courts and was beginning to develop a solid base of case law of assistance in interpreting the wordings.

2.3 Components

The multi-peril policy contains an opening section setting out the general terms (or conditions) and provisions (including general exceptions) of the policy. These general terms cover all the other sections in the multi-policy document. Thereafter there are separate sections covering each specific risk such as motor, householders, public liability, employers' liability. If each of these individual sections are examined it will be seen they each contain an operative clause defining the risk covered and specific exceptions and specific extensions. The operative clause together with the exceptions and extensions are largely used to define the risk covered by the policy. Each individual section may also contain specific terms applicable to that section. The average person purchases a number of policies during his life time. The structure of contract follows the same structure viz general terms, operative clause, extensions and exceptions.

When dealing with a large number of insurance policies covering different risks in different circumstances, it is convenient to work to some basic structure. The structure which is proposed, is that the policy be considered in terms of the following components:

- general terms, conditions and warranties

- insuring or operative clause
- exceptions
- extensions.

2.4 Terms, conditions and warranties

Before the general or typical components found in policies are considered the meanings, at law, of terms, conditions and warranties are considered.

2.4.1 Terms or conditions?

Most insurance policies contain a heading Conditions of Contract which is taken from English law. This is unfortunate since the word condition has a specific meaning in Roman and Roman-Law and hence in South African common-law.[47] It is preferable to use terms of contract so as not to confuse the terminology. Conditions should be reserved for those instances where conditions in the proper sense is meant.

2.4.2 Essential and non-essential terms

The rights and obligations that flow from insurance arises from the contract between the insured and insurer. In a society that adheres to the principle of freedom of contract, a large measure of freedom exists as to what terms can be contained in a contract. The possibility exists that one or more of the terms will be breached. The implications of the breach must be determined. In some cases, to breach a term in a contract is more serious than in other cases. In those cases, these terms are referred to as essential terms. Tests have developed to determine if a term in a contract is essential or non-essential.

The difference between the two types of terms can be illustrated by way of an example. If on your way to work, you take your R1 000 suit to a drycleaner and you and the drycleaner agrees that you can collect the suit on the same day, on your way from work. This is then a stipulation in terms of the contract. You may make it clear that there is no particular reason why you want to collect it on the same day. If later, when you return the drycleaner tells you that your suit is not ready, this is a breach of a term of your contract but it is not a serious breach. It is unlikely that you would sue the drycleaner, despite the breach of the term. In any event you have not suffered any damages. A mere breach is not enough, to give rise to significant legal consequences. If on the other hand, when you collect the cleaning, you find your R1 000 suit completely ruined, the position is different. This is a serious breach of an essential, usually implied term. In this case damages can be claimed. Thus it is possible for some non-essential terms in a contact to be violated with very little consequences, while the breach of other essential terms can have very serious consequences indeed. The same principles apply to the insurance

[47] A condition is an uncertain future event on the occurrence of which the parties agree to make the effect of the transaction dependent. A condition is suspensive when the commencement, and resolutive when the termination, of the operation is made to depend on its occurrence. Ledlie (1926:213) (Ledlie, 1926).

contract. A distinction must be made between essential and non-essential terms in a contract. How does one know which term in a contract is essential and which is not? As with the dry-cleaning example each circumstance must be examined but case law has determined fairly clear guidelines to determine which terms are essential for contracts including insurance contracts.[48]

2.4.3 Express, implied and tacit terms

It is possible that not every term to an agreement is to be found in the written expression of the contract. Some terms may be implied. However a term will not be implied in the contract by a court of law, unless there are very good reasons and circumstances which compel its implication. As a general rule therefore courts are reluctant to add to the contract. Many aspects dealt with by specific contractual terms in the insurance contract are also covered in the common law. These aspects include insurable interest, good faith, subrogation, contribution. According to Davis (Davis, 1993) some aspects of these are implied terms. In other cases they exist *ex lege*.

2.4.4 Warranties

One way of removing doubt as to the importance of a term in a contract is to declare that term is an essential term. This can be done by declaring the term to be a 'warranty' or a 'condition precedent'. In terms of the common law[49], in this event even if on the face of it the term is a non-essential term, if it is breached serious consequences, usually for the insured, attaches. If a warranty is breached, in terms of the common law, the insurer could repudiate liability under the policy, even if the warranty reduces the risk to the insurer. If an insurer has declared that a term is a warranty and it is breached the insurer may elect to repudiate a claim even if there is no connection between the loss and the warranty.[50] The existence of warranties in an insurance contract may be very hash to the insured.[51] The harshness of warranties was demonstrated by the *Jordan v New Zealand Insurance Co* 1968 2 SA 288 E (*Jordan v New Zealand Insurance Co*, 1968) where an insurer repudiated the claim because the insured has incorrectly stated his age in the proposal form. This risk to the insurer was in fact reduced. Had the insurer known the truth if anything a lower premium would have been charged. The now repealed and replaced Insurance Act 27 of 1943 was amended in 1969[52] to by the insertion of s63(3) to give an insured a greater measure of protection. The relevant portion of repealed s 63(3) read:

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48 These are set out in Davis (1993:204)

49 The common law position was altered, in so far as insurance contracts are concerned in terms of s 63(3) of the Insurance Act.

50 Examples of insurers repudiating claims based on incorrect information supplied and no connection between the incorrect information and the circumstances of the claim are legion. In *Qilingele v South African Mutual Life Assurance Association Ltd* 1993 1 SA 69 A (*Qilingele v South African Mutual Life Assurance Association Ltd*, 1993) the insured had incorrectly replied in the proposal form that he was not contemplating any other insurance when in fact he had made application for insurance from three other insurers. Shortly afterwards he was murdered which resulted in the claim.

51 PQR Boberg (1966:220) 'Insurance warranties are trumps', *South African Law Journal* 83 220 (Boberg, 1966).

52 Insurance Amendment Act 39 of 1969 (Insurance Amendment Act, 1969).

> Notwithstanding anything to the contrary contained in any domestic policy or document relating to such policy, any such policy ... shall not be invalidated ... and the obligation of an insurer thereunder shall not be excluded or limited ... on account of any representation made to the insurer which is not true, ... unless the incorrectness of such representation is of such a nature as to be likely to have materially affected the assessment of the risk ...

The 'representation made to the insurer which is not true' is usually contained in the proposal form the contents of which are usually warranted to be correct. This amendment is discussed fully in the literature.[53] It is unlikely that the protection goes far enough. Warranties can be divided into two classes, affirmative and promissory warranties.[54] Affirmative warranties are those where the insured affirms an actual fact. Thus in a life policy the insured may warrant that he is of a specified age. In a promissory warranty the insured undertakes to maintain a certain performance during the existence of the contract. Thus the insured may warrant not to leave insured goods in an unlocked vehicle. S63(3) was replaced by s53 of the Short-term Insurance Act which reads as follows:

> **S53 Misrepresentation and failure to disclose material information**
>
> (1) (a) Notwithstanding anything to the contrary contained in a short-term policy, whether entered into before or after the commencement of this Act, but subject to subsection (2) -
>
> (i) the policy shall not be invalidated;
>
> (ii) the obligation of the short-term insurer thereunder shall not be excluded or limited; and
>
> (iii) the obligations of the policyholder shall not be increased,
>
> on account of any representation made to the insurer which is or failure to disclose information, whether or not the representation or disclosure has been warranted to be true and correct unless that representation or non-disclosure is such as to be likely to have materially affected the assessment of the risk under the policy concerned at the time e of its issue or at the time of any renewal or variation thereof.
>
> (b) The representation or non-disclosure shall be regarded as material if a reasonable, prudent person would consider that the particular information constituting the representation or which was not disclosed, as the case may be, should have been correctly disclosed to the short-term insurer so that the insurer could form its own view as to the effect of such information on the assessment of the relevant risk.
>
> (2) If the age of an insured under an accident and health policy has been incorrectly stated to the short-term insurer, the policy benefits shall, notwithstanding subsection (1), be those which would have been provided under that policy in return for the premium payable had the age been correctly stated: Provided that if the nature of that accident and health policy is such as to render such arrangement inequitable, the Registrar may direct the short-term insurer to apply such different method of adjustment to the policy benefits of that accident

[53] Davis (1993:213) (Davis, 1993)

[54] Davis (1993:213) (Davis, 1993)

> and health policy as the Registrar considers equitable in relation to the misstatement of age.

3 TYPICAL TERMS OF A SHORT-TERM POLICY

As noted, the modern multi-policy document contains a number of general terms usually inaccurately referred to as conditions of contract.[55] Terms are also be found in the individual sections of the policy document. Insurance policies generally have a section called the *general conditions [or terms] of contract*. These terms contained therein generally also form part of the insurance common or case law and thus these contractual terms should be interpreted in the light of the insurance law. Despite effort by the insurance industry to standardise and simplify insurance wordings, different wordings exist and in practice the actual wording must be consulted. As a rule it is believed that, wordings drawn up by insurers are more restrictive that those drawn up by intermediaries such as insurance brokers. The following are some of the terms generally found in policies:

3.1 Misrepresentation, misdescription and non-disclosure

Typically this type of term reads as follows:[56]

> Misrepresentation, misdirection or non-disclosure in any material particular shall render voidable the particular Section of the policy, as the case may be, affected by such misrepresentation, misdescription or non-disclosure;

In terms of this clause any misrepresentation, misdirection or non-disclosure of any material fact renders voidable a particular item or section of the policy, as the case may be. From this type of clause it is evident that if the insured misleads the insurer, grounds exist for the claim to be avoided. Because of the duty on the insured to disclose all material facts to the underwriter, in practice little reliance has been placed on this contractual term but the practice is to rely rather on the legal duty to disclose.[57]

3.2 Other insurance and rateable portion

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55 The word *condition* has a number of different meanings. Further our courts have drawn attention to the fact that the meaning in South African law differs from English law. Some times the word condition appears in inverted commas to warn the reader that no attempt is made to assign it a formal legal meaning.

56 Taken from PFV *personal insurance group scheme policy* document, p5.

57 Birds (1988:79) 'Historically, misrepresentation in the strict sense has not been of particular importance in the insurance context'. The term has however featured in South African litigation; *Bruwer v Nova Risk Partners Ltd* 2011 1 234 GSJ (*Bruwer v Nova Risk Partners Ltd*, 2011).

It could happen that more than one policy covers the same insured against the same risk. The general terms often include a clause dealing with this eventuality. The courts have upheld this type of clause, which typically reads as follows:

> If, at the time of any event giving rise to a claim under this policy, an insurance exists with any other insurers covering the insured against the defined events the company shall be liable to make good only the rateable proportion of the amount payable by or to the insured in respect of such event. If any such other insurances shall be subject to any condition of average, this policy, if not already subject to any Condition of Average, shall be subject to Average in like manner;[58]

Thus if more than one policy covers the same event, the insurer need not pay the full amount of any loss but only that portion of the amount referred to as the rateable proportion. This aspect is discussed further below under contribution.

3.3 Cancellation

Short-term policies normally[59] have a thirty-day cancellation clause which enables the insured or insurer to cancel the policy on proper notice.[60]

Typically the clause reads as follows:

> This policy or any optional section hereof may be cancelled at any time by either the Insured named in the proposal or Company giving thirty days notice thereof in writing to the last known address. Where the Insured ceases to be an employee of the Employer, all cover afforded by this policy shall cease from such date.[61]

This type of term can leave an insured exposed. For example products liability claims usually arise as a series of claims over a period of time. Once these begin to arise, the insurer acting in terms of the above term can cancel the contract. The insured is then exposed for any further claims occurring after the cancellation, unless it can be shown that the cause of the claims arose before cancellation. In cancelling policies in terms of this term, the correct procedure must be followed. Firstly, the cancellation must be in writing. Secondly the correct person must be notified.[62] In particular the question arises is notifying the insured's broker sufficient or should the insured be notified directly? In *Truck & General Insurance Co Ltd & another v Riasal Tours CC* NPD AR356/2003[63] (*Truck & General Insurance Co Ltd & another v Riasal Tours CC*, 2003) on the 24th May 2000, the insurer notified the broker who in turn, on the next day the 25th May 2000 by fax, notified the insured that the contract

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58 *PFV personal insurance group scheme policy* 'General exceptions, conditions and provisions' *Multisure Policy*

59 There are exceptions, SASRIA policies cannot be cancelled.

60 Atkins, NG (1981, 19) 'Insurance terms and conditions-III: cancellation, reinstatement and jurisdiction conditions' (1981) 11 *BML* 19 (Atkins, 1981b); Van Niekerk (2006) 'The right person to notify in insurance' *JBL* 14 2 46-49 (Niekerk, 2006).

61 *PFV personal insurance group scheme policy*, p. 7.

62 Van Niekerk *ibid*

63 Discussed by Van Niekerk (2005) *Juta's Insurance Law Bulletin* 8(2) 97-102 s (Niekerk, 2005)

would terminate on midnight 23rd June 2000. The insured's bus was destroyed by fire on the 25th June 2000. Since the insured was thus notified on the 25th May 2000 and it could be argued that the policy lapsed at mid-night 25th June 2000, in which case the contract was still in force when the loss occurred. So, the question became, did the thirty days start to run on the 24th May when the broker was advised or 25th when the broker advised the insured? The court *a quo* ruled in favour of the insured but this was reversed on appeal.

Cancellation clauses usually deal with premium refunds in the event of a cancellation.

3.4 Continuation of cover (where premium is payable by bank debit order)

As noted, actual payment of the premium is not an essential element of the insurance contract. A contract of insurance can be enforced despite the non-payment of the premium. However, some policies make the payment of the premium a condition of cover. In the case of such a contractual condition there is no cover until the premium has been paid. In modern society premiums are often paid by means of a bank or debit order. A danger exists that a bank may for a variety of reasons not make such a payment. In the absence of a clause dealing with this situation, it could be argued that the failure to receive the premium is adequate grounds for the policy to have been terminated. The insured, through no fault of his own, could be left uninsured. Many modern policies therefore have a specific clause which states that if the premium is not received as a result of the error on the part of the bank or paying agent, this will not invalidate the insurance. Typically such a clause reads:

> The premium is due in advance, and if not received by the company by the thirtieth day following due date, then this insurance shall be deemed to have been cancelled ... unless the insured can show that failure to make payment was an error on the part of the bank or other paying agent.[64]

3.5 Prevention of loss

Policies often contain a clause to the effect that the insured shall take reasonable steps and precautions to prevent accidents and losses. This type of clause has been the subject of substantial litigation[65] and comment.[66]

The following is the wording of a typical clause, in a multi-policy document, of this nature:

> The Insured and/or any person enjoying cover under any Section of this policy shall exercise all reasonable precautions for the maintenance or safety of the property and to prevent loss, damage and accidents.

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64 PFV multidek policy, p. 2.

65 *Sofi v Prudential Assurance Company Ltd* 6 Mar 1990 AC(*Sofi v Prudential Assurance Company Ltd*, 1990).

66 Thomkinson, D (1991) 'Erosion of the duty of care' 5 2 *Journal of the Society of Fellows* 42 (Thomkinson, 1991).

This type of clause raises interesting debates on negligence and insurance.[67] Insurance generally covers the insured against the insured's own negligence. The above clause places an obligation on the insured to act reasonably. Taken to its logical conclusion if the insured is negligent the operative clause protects the insured but the insurer not liable because of the above clause. This is a problem of interpretation.

3.5.1 United Kingdom court cases

The prevention of loss clause was raised in the case of *City Tailors Ltd v Evans* 1921 9 LLR 46 CA (*City Tailors Ltd v Evans*, 1921), a case which involved a claim in terms of a consequential loss policy.[68] The insured was able to reduce its consequential losses by trading from a different premises. The insurer wish to reduce the insured loss by the amount saved by trading elsewhere. The insured argued that the policy was a valued policy and the savings was not relevant to the policy. The insured countered by arguing that in terms of the prevention of loss clause the insured was obliged to take such steps as necessary to reduce the loss and trading elsewhere is such a step. The court did not agree. The consequential loss policy was amended after this case to take income from other premises into consideration when determining the indemnity payable to the insured.

Woolfall and Rimmer Limited v Moyle and Another 1941 3 All ER 304 CA at 311 (*Woolfall and Rimmer Limited v Moyle and Another*, 1941) is the leading case on the matter where the court explained the contradiction which this clause creates as follows:

> ... it would follow that the underwriters were saying, 'I will insure you against your liability for negligence on condition that you are not negligent'...

This leading case has often been quoted with approval by the South African courts.[69] Despite the apparent contradiction the term is often relied on by insurers to repudiate claims. In *Hayward v Norwich Union*[70] (*Hayward v Norwich Union*, 2001) the insured owned a new Porsche motor vehicle valued at £65 000. He filled up with petrol and left the keys in the car when he walked across the forecourt to pay for the petrol. While away from the car a thief jumped in and sped away with his Porsche. He submitted a claim and the insurers repudiated the claim inter alia that the[71] insured breached the policy term that 'at all times [the insured shall] take all reasonable steps to safeguard [the] car from loss or damage' - the usual loss or prevention of damage clause. The court *a quo* per Tugendhat DJ ruled that this requirement amounted to no more than a duty on the insured not to act recklessly. The judge concluded that the insured had not acted recklessly and hence the term in the policy had not been breached. The court also found that an exception had not been breached. Insurers appealed on both

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67 Atkins NG (1981a) 'Insurance policies: terms and conditions-II' *BML* 10 (2) 18 (Atkins, 1981a).

68 This case is discussed further below in the consequential loss section.

69 *Isando Foods (Pty) Ltd v Fedgen Insurance Co Ltd* 2001 3 SA 1278 SCA at 1284 G-J (*Isando Foods (Pty) Ltd v Fedgen Insurance Co Ltd*, 2001)

70 Discussed by Miller, J and Narburgh, G (2001) 'Key to defeating claim' 2001 May 17 *Insurance Times* 18 (Miller & Narburgh, 2001)

71 The policy also contained an exclusion which excluded 'loss or damage arising from theft while the ignition keys ... have been left in the car or on the car ...'

points. The Court of Appeal found that the insurers were entitled to rely on the exception and hence it was not necessary to reconsider the finding with regard to the reasonable precaution clause.

3.5.2 South African court cases

Waksal Investments (Pty) Ltd v Fulton 1985 2 SA 877 W (*Waksal Investments (Pty) Ltd v Fulton*, 1985)

Theodoris v AA Mutual Assurance Association 1986 3 SA 906 O (*Theodoris v AA Mutual Assurance Association*, 1986)

Paterson v Aegis Insurance Company Limited 1989 3 SA 478 C (*Paterson v Aegis Insurance Company Limited*, 1989)
A similar clause and was considered in *Paterson v Aegis Insurance Company Limited* 1989 3 SA 478 C[72]; where the court noted that to act reasonably usually means not to act negligently. However, it doubted if this is the correct interpretation of the words act reasonably in this type of clause and the court even hinted that this type of clause may be disregarded by the court, in future, if it cannot be reconciled to the indemnity given by the policy.

Santam Ltd v CC Designing CC 1999 4 SA 199 C (*Santam Ltd v CC Designing CC*, 1999)
This case was an appeal to a full bench of the Cape court. In this case the insured decided to sell an insured vehicle and advertised the sale in the newspaper. The insured was contacted by one Solly with whom the sale was telephonically negotiated. The sale price was to be deposited into the insured's account and proof of payment faxed to the insured which duly happened. The insured sent an employee to the bank who confirmed the amount had been deposited into the account but was unable to confirm that the deposit was cash. Solly confirmed the deposit consisted of cash. The vehicle was handed over to a person representing Solly. It subsequently turned out the deposit was a false cheque and the bank reversed the transaction. The matter was reported to the insurer and the police. The vehicle was never recovered. The insurer repudiated the claim on the basis the reasonable precautions term in the policy. The court concluded the insured was not in breach of the reasonable precautions term.

3.6 Claims

When a loss occurs the insured has a duty to take reasonable steps to minimise his loss.[73] Besides this, most policies contain provisions pertaining to claims, claims handling and claims procedures. Some of these will now be considered.

3.6.1 Claims notification clause

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72 See also *Woolfall and Rimmer Limited v Moyle and Another* 1941 3 All ER 3041(A) at 311 (*Woolfall and Rimmer Limited v Moyle and Another*, 1941).

73 *Maja v South African Eagle Insurance Co Ltd* 1990 2 SA 701 W (*Maja v South African Eagle Insurance Co Ltd*, 1990); *Walker v Santam Ltd and others* 2009 224 SCA (*Walker v Santam and others*, 2009).

The insured is required to notify the insurer of a number of aspects concerning claims. Typically the first section of term reads as follows:[74]

> (a) On the happening of any event which may result in a claim under this policy the insured shall, at their own expense:
>
> (i) give notice thereof to the [insurance] company as soon as reasonably possible and provide particulars of any other insurance covering such events as are hereby insured.
>
> (ii) As soon as practicable after the event inform the police of any claim involving theft or (if required by the [insurance] company loss of property and take all practicable steps to discover the guilty party and to recover the stolen or lost property.
>
> (iii) as soon as practicable after the event submit to the [insurance] company full details in writing of any claim
>
> (iv) give the [insurance] company such proof, information and sworn declarations as the company may require and forward to the company immediately any notice of claim or any communication, writ, summons or legal process issued to commenced against the insured in connection with the event giving rise to the claim.

3.6.2 Obligation to notify the insurer of a claim

The first requirement in the term is that the insured must 'at his own expense ... as soon as possible notify the company [insurer] in writing of any claim ...'. In practice claims are usually, in the first instance, notified by telephone whereupon, the insurer or broker sends a claim form to the insured to fill in, which accordingly, results in the claim being reduced to writing. Clearly if the insured wishes the claim to be paid, the insured has to notify the insurer of the claim. Notifying the insurer is a natural consequence of insurance. English writers hold that the duty to notify insurers of the claim exists irrespective of the contractual term to do so,[75] however it is conceded that even if the common-law obligation to notify the insurer exists, it is of academic interest only since this requirement is in any event, always regulated by a claims notification term in the insurance contract. An example of this term is indicated above.

The notification requirement has been subject to comment[76] and litigation in particular the phrases as soon possible notify. In *Hean v General Accident, Fire & Life Assurance Corporation Ltd* 1931 NPD 215 (*Hean v General Accident, Fire & Life Assurance Corporation Ltd*, 1931) term required the insured to give immediate written notice.

3.6.3 Time barring and prescription

The claims notification clauses exposes the insured to a risk that he notifies the insurer outside of the time limit laid down in the clause. Generally there are three time periods involved; notification of the claim after the event has occurred; commencement of an action against the insurer after the insurer has

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74 The term is taken from the Multimark policy.

75 Ivamy (1986:395); Birds and Hurd (200: 224)

76 Davis (1993: 299) (Davis, 1993)

repudiated the claim and lastly the prescription period laid down in terms of statute. As a general rule, by statute, any claim in terms of the policy against an insurer would prescribe after three years.[77]

3.6.3.1 Notification of the claim

An example of the first type of wording is as indicated above:

> (a) On the happening of any event which may result in a claim under this policy the insured shall, at their own expense

There is some justification for insisting that the insured notify the insurer as soon as reasonable after the event. It is fair that the insurer be given the opportunity to investigate the circumstances of the claim. It would be unfair for example, if the first time the insurer hears about the claim is just before the expiry of the three year statutory period.

These time barring clauses have been the subject of litigation. It is possible for the insured, who is out of time, to argue that the insurer has waived its rights to rely on the clause or to raise estoppel. The case of *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Company* 1963 1 SA 632 A 233 (*Resisto Dairy (Pty) Ltd v Auto Protection Insurance Company*, 1963) involved a late notification. In this case, on the 17th October 1959, the oil fuel tank of a truck belonging to Resisto Dairy, the insured, partly broke loose and was dragged along a public road with the result that oil leaked onto the road. The vehicle was being driven by a servant of the insured. The oil which spilled on the road caused another motor car to skid[78] and collide with a Land Rover belonging to the Cape Sea Industries (Pty) Limited. Cape Sea claimed damages from the insured. The insured received a letter of demand from Cape Sea on the 28 December 1959. The insured notified the insurer about the occurrence on 6th January 1960. The notification was thus given about three months after the incident. At first the insurer dealt with the claim but much later repudiated the claim on the grounds of late notification. The notification clause read, inter alia:

> Notice shall be given in writing to the company as soon as possible after the occurrence of any accident or loss or damage and in the event of any claim.

The insured resisted the repudiation on the grounds of late notification and the court had to decide on the point. The court noted the facts as follows:[79]

> The accident in the present case occurred on the 17th October, 1959, and the next morning Shapiro, the managing director of the appellant, telephoned to the police and was informed that the appellant's truck was not involved in the collision. Shapiro, however, knew that the accident had been caused by the oil which had leaked from the fallen fuel tank of the appellant's truck, and I agree with the finding of the trial court that he must have realised the possibility that the claimant would hold the appellant responsible for the damage done to his Land Rover. It was

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77 Prescription Act 68 of 1969 (Prescription Act, 1969).

78 Oil spills causing accidents are a common occurrence and often result in court cases. See also Ancill

79 At 638 H - 639 A.

> therefore the duty of the appellant to have notified the respondent of the occurrence as soon as possible and in writing. It failed to do so, because it was only on the 6th January, 1960, that it actually gave written notice of the accident to the respondent.

This term imposes a contractual duty on the insured to notify the insurer but is silent on the duty of the insurer to notify the insured of its decision. The court continued to recognise a duty on the insured but decided that if the insurer is going to rely on the clause it has a duty to inform the insured accordingly:[80]

> In my opinion there was a duty on the respondent, (the insurer) if it had made up its mind to repudiate liability on the policy, to inform the appellant of its decision within a reasonable time.

It had not done so, and could not now do so at the last moment.

> (i) give notice thereof to the [insurance] company as soon as reasonably possible and provide particulars of any other insurance covering such events as are hereby insured.

3.6.3.2 Commencement of litigation

An example of the second kind of wording reads as follows:

> (b) No claim under this policy shall be payable:
> for any loss or damage after the expiry of twelve months from the happening of such loss or damage unless the claim is the subject of pending legal action or is a claim under any Section of the policy which indemnifies the Insured against sums which the Insured may become legally liable to pay as compensation in respect of bodily injury and/or loss or damage to property.[81]

A different wording is found in the Santam policy:

> In the event of Santam disclaiming liability in respect of any claim and an action or suit be not commenced within three months after such disclaimer all benefits under this policy shall be forfeited.

The case of *Regent Insurance Co Ltd v Maseko* 2000 3 SA 983 W (*Regent Insurance Co Ltd v Maseko*, 2000) involved a case where the insured did not institute an action within the time allocated in the clause, in this case 90 days.

This type of term was considered by the Constitutional Court in the Barkhuizen case.[82]

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80 At 640 C-D.

81 PFV policy, p5. This type of term has been the subject of litigation, *Noah v Union National South British Insurance Co Ltd* 1979 1 SA 330 T (*Noah v Union National South British Insurance Co Ltd*, 1979); *Union National South British Insurance Co Ltd v Padayachee and Another* 1985 1 SA 551 A (*Union National South British Insurance Co Ltd v Padayachee and Another*, 1985); *Ledingham v Commercial Union Insurance Co of SA Ltd* 1993 2 SA 760 C (*Ledingham v Commercial Union Insurance Co of SA Ltd*, 1993); *IGI Insurance Co Ltd v Madasa* 1995 1 SA 144 TK AD (*IGI Insurance Co Ltd v Madasa*, 1995).

82 'Row over contract time clause' Star May 4, 2006 ("Row over contract time clause," 2006)

3.6.4 Notification to the police in the case of theft

In the event of a theft the condition is that the claimant shall notify the police of any claim involving theft and also take such steps as are practical to discover the guilty party and to recover the stolen property. Typically, the clause reads-

> (ii) as soon as possible inform the police of any claim involving theft or loss of property and take all practicable steps to discover the guilty party and recover the stolen or lost property.

This is an important clause where large companies are involved. Often a company, having discovered the thief is one of its own employees, may prefer not to take such action.

3.7 Company's right after an event

The rights of an insurance company after a claim has taken place are normally defined, too:

> (a) on the happening of any event in respect of which a claim is or may be made under this policy, the Company and every person authorised by the Company may without thereby incurring any liability and without diminishing the right of the Company to rely upon any condition of this Policy:
>
> > (i) take possession of any damaged property hereby insured and deal with it in any reasonable manner. This Condition shall be evidence of the leave and licence of the Insured to the Company to do so. The Insured shall not be entitled to abandon any property to the Company whether taken possession of by the Company, or not
>
> (b) In respect of any Section of this policy under which an indemnity is provided for liability to third parties the Company may in the case of any occurrence pay to the Insured the limit of indemnity provided in respect of such occurrence or any lesser sum for which the claim or claims arising from such occurrence can be settled and the Company shall thereafter not be under further liability in respect of such occurrence except for the payment of costs and expenses for which provision is made in such Section and which relates to matters prior to the date of payment.

3.8 Right to take over the defence

The insurer has a contractual right[83] under certain circumstances to institute an action in the name of the insured. This contractual right is sometimes incorrectly referred to as subrogation rights.[84] Typically the clause reads, the insurer may -

> ...take over and conduct in the name of the Insured the defence or settlement of any claim and pursue in the name of the Insured for its own benefit any claim for indemnity or damage or otherwise and shall have full discretion in the settlement of any claim.

No admission, statement, offer, promise, payment or indemnity shall be made by the insured without the written consent of the company.

The operation of this term may be illustrated by the *Przybylak v Santam Insurance Ltd* 1992 1 SA 588 C (*Przybylak v Santam Insurance Ltd*, 1992) case, where Mr Przybylak was injured when he was thrown into a swimming pool. He then sued the persons, the insureds, who caused his injury. The defence against the insureds was taken over by Santam without admitting any liability to the insureds as a consequence of the insurance contract. Santam not acting in terms of subrogation rights. The insureds (Santam) lost this case and the insureds were held liable in delict. This did not however mean that Santam was liable to indemnify the insureds. In the subsequent case Santam then went on to successfully argue that it was not liable to the insureds.

4 OPERATIVE OR INSURING CLAUSE OR THE PROMISE

4.1 Basic cover of the operative clause

The operative or insuring clause of an insurance policy is probably the single most important clause in any policy. This clause defines what is covered by the policy. Thus in the case of a fire policy a person trying to recover from the insurer would have to prove that the event which took place fell within the promise as contained in the operative clause.

Typically, the operative clause of a fire policy would read as follows:

> In consideration of the payment of or agreement to pay the premium[85] the company agrees to indemnify the insured against damage to the whole or part of the property described in the Schedule, owned by the Insured or for which they are responsible by fire, lightning or thunder bolt, explosion, such additional perils as are stated in the schedule to be included.

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83 *Ackerman v Loubser* 1918 OPD 31 (*Ackerman v Loubser*, 1918), is usually referred to as the case which introduced subrogation into South African law, in fact, it was based on the contractual term in the policy and technically speaking reference to subrogation in the case is obiter.

84 In terms of this term the insurer may take over any defence, i.e, before the obligation to the insured is settled. The right to stand subrogated to the rights of the insured arise only after the insured has been indemnified.

85 For an interpretation of the words 'in consideration of payment of the premium' consult *British Oak Insurance Company v Atmore* 1939 TPD 9 at 15 (*British Oak Insurance Company Limited v Atmore*, 1939).

To illustrate this example, take the case of a person who insures jewellery in terms of a fire policy. The person then goes on holiday and fearing the loss of the jewellery by way of a burglary, hides the jewellery in the fireplace.[86] While the person is away and unbeknown to the insured, the insured's son comes home and makes a fire in the fireplace. As a result of this fire the jewellery is damaged. Under these circumstances does the person have a claim?

It is clear that the general conditions would have to be complied with and therefore due, proper and timeous notice must be given to the insurance company. He must also ensure that the loss did not take place as a result of one of the exceptions, as for example nuclear damage or war. These in our present case are obviously not of any significance.

What the insured must now do is prove that the event took place and that it falls within the insuring clause. Therefore the insured must first show that there was damage to property described in the schedule. There is little difficulty in proving that the damage took place and so that portion of the operative clause is satisfied. Secondly, the insured will have to prove that the damage that took place to the jewellery was by one of the perils mentioned, that is to say, either by fire, lightning, thunderbolt explosion or some other special peril named in the policy. In this case it is quite clear that the jewellery was damaged as a result of fire and therefore the event which took place does indeed fall within the operative clause.

In the case of *Harris v Poland*,[87] [88] (*Harris v Poland,* 1941) the insurer tried to avoid the claim on the basis that the fire was a friendly fire and not a hostile fire. While the distinction is recognised in American literature, the court rejected this argument.

Another example, using the public, may help to illustrate the point. In this case the operative clause dealing with the risk of a legal liability claim reads as follows:

> The damage which the insured shall be legally liable to pay consequent upon accidental death of or bodily injury to or illness of any person or accidental loss or damage to property occurring within the territorial limits during the period of insurance in connection with the business.

A minister of religion stands up one day to preach a sermon on adultery. In the congregation is a person who is living with someone of the opposite sex, without being married. That person feels aggrieved by the particular sermon and decides to sue the minister for defamation or *injuria*. Now in terms of the operative clause, is the church covered by that policy?

Examine the opening words of the operative clause,

> ... damage which the insured shall be legally liable to pay.

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86 Harris v Poland 1941 1 All ER 204 (*Harris v Poland,* 1941); Getz et al (1983:406).

87 (1941) 1 All ER 204.

88 Davis (1993).

If the minister and the church are being sued then the question which needs to be resolved is whether they are 'legally liable to pay'. The answer to that question can only be determined by a court of law and therefore if a court of law determines, under the circumstances, that the person has been defamed and makes a judgement against the church, they will have to pay. The first portion then of the operative clause 'damages which the insured shall be legally liable to pay' is indeed fulfilled and the claim, to that extent, falls within the operative clause.

The operative clause, however, continues -

> ... consequent upon accidental death or bodily injury to or illness of any person.

We now have to ask ourselves whether a defamation action meets that criteria, that is to say, does defamation constitute bodily injury or illness of any person. The answer to that is clearly no and therefore that part of the operative clause is not met. Under these circumstances it is thus clear that a claim for defamation is not recoverable in terms of the operative clause of the general liability policy. If it is to be covered it must be done in terms of another policy or in terms of an extension to the public liability policy.

4.2 Extending the operative clause

Generally the operative clause is framed as widely as possible. Despite this the wording is not on the whole wide enough to cover every conceivable event and the insurer may offer covers which are wider than those mentioned in the operative clause. This is then done by way of an extension. If the church for example wishes protection against defamation claims, it could arrange an extension to its policy.

5 EXCEPTIONS

Policies contain exceptions indicating the risks that are not covered. Two types are of exceptions are important. General exceptions which cover all the individual sections in the multi-policy document and specific exceptions limiting the specific risk in each section.

5.1 Specific exclusions

Logically the role of specific exclusions is easier to under after the operative clause had been dealt with. Each individual section of multi-policy document can contain is own exception specific to that risk. Thus for example a public liability policy may have an exclusion excluding claims arising from employees.

In terms of the general structure of a policy, the next aspect that needs to be discussed is the specific exclusions and, having determined that a claim does fall within the ambit of the operative clause, our

attention must therefore be focussed on the exclusions. Again every type of policy has its own set of exclusions and to illustrate this, we have to look at a specific policy.

The use of specific exceptions can be illustrated again with reference to the fire policy. Take the example of a manufacturer that makes use of arc furnaces or other types of furnaces. These furnaces are lined with ceramic material and the ceramic material can be and is damaged by the fire. The cost of replacing this material is enormous as is the costs associated with the loss of output while the furnace is being rebuilt. Can a company recover these costs from an insurance company in terms of a normal fire policy? If one applies the facts to the operative clause one could argue that the ceramic has been damaged by fire and therefore falls within the meaning of the operative clause.

However, it was never the intention of the insurance company to insure the normal day-to-day operating expenses of a company and that type of loss was never catered for. The American market has catered for this type of loss by interpreting fire to be hostile or friendly. A friendly fire is a fire in its normal place and so a fire in an arc furnace is a friendly fire and any damage caused by this friendly fire would not be recovered. Such an analysis and interpretation is not supported by the words of the policy and would not be accepted in South African insurance practice. Therefore the insurance company that wishes to avoid liability for the repairs of an arc furnace would make use of an exception clause and make it clear that is not the type of loss it intends covering.

Other policies such as the liability policies have standard types of exceptions. Thus, for example, the liability policy will not normally cover claims arising for goods in care, custody and control. Therefore if a neighbour spends a weekend with you and while he is in your house his goods are stolen, the liability section of your policy will probably not respond to that type of claim because there is an exception for goods in care, custody and control.

5.2 General exceptions

The general exceptions to a short-term policy include those risks which an insurer and indeed generally the short term market, will not as a general rule accept. These include damage due to politically motivated persons (including war damage) and nuclear risks.

5.2.1 War damage exclusion

Typically the war damage exclusion reads:

> This company shall not be liable for:
>
> 1. Loss, Damage or Liability directly or indirectly occasioned by, happening through or in consequence of war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or

confiscation or nationalisation or requisition or destruction of or damage to property by or under the order of any government or public or local authority.

Provision exists to deal with war damage in terms of the War Damage Insurance and Compensation Act 85 of 1976 (War Damage Insurance and Compensation Act, 1976). It is generally accepted that, widespread damage resulting from war falls outside the scope of the private insurance market. Provision does exist to fund war damages in terms of the War Damage Insurance and Compensation Act 85 of 1976[89]. This Act repealed the previous Act dealing with war damage.

In terms of s2 the Minister may establish a fund to be known as the War Damage Fund.

In terms of s3 and 4 specified persons may obtain insurance from the Fund against the risk of war damage, may be compensated by the Fund for war damage and enjoy other forms of assistance against war damage.

In terms of s5 the Minister may limit the liability of the Fund and may apply to Parliament for money to be appropriated to the Fund. The Reserve Bank shall be the member for the Fund.

5.2.1.1 The politically motivated acts exclusion

In South Africa damage and losses from political motivated acts are excluded from most normal policies and are covered by what is known as the SASRIA (South African Special Risks Insurance Association) coupon.[90] This is a special form of insurance introduced to deal with damage caused by persons who are politically motivated and came into being as a result of the 1976 riots. These risks are excluded in terms of the SASRIA regulations but can be insured in terms of the SASRIA scheme. The SASRIA scheme, however, will not cover all politically motivated acts and acts of war and so on are excluded in totality.

The South African Insurance Association (SAIA) exclusion reads as follows:

(i) civil commotion, labour disturbances, riot, strike or lock-out;
(ii) war, invasion, act of foreign enemy, hostilities or warlike operations (whether war be declared or not) or civil war;
(iii) (a) mutiny, military rising, military or usurped power, martial law or state of siege, or any other event or cause which determines the proclamation or maintenance of martial law or state of siege;
(b) insurrection, rebellion or revolution;
(iv) any act (whether on behalf of any organisation, body or person, or group of persons) calculated or directed to overthrow or influence any State or Government or any provincial, local or tribal authority with force, or by means of fear, terrorism or violence;

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89 Section B.

90 For details of the SASRIA contract, see 'Riot insurance by SASRIA' (1979) *The South African Insurance Law Journal - SAILJ* ("Riot insurance by SASRIA," 1979); Atkins, NG (1979) 'Political riot insurance' BML 1979 (8) 199 (Atkins, 1979).

(v) any act which is calculated or directed to bring about loss or damage in order to further any political aim, objective or cause, or to bring about any social or economic change or in protest against any State or Government, or any provincial, local or tribal authority, or for the purpose of inspiring fear in the public or any section thereof;

(vi) any attempt to perform any act referred to in clauses (iv) or (v) above;

(vii) the act of any lawfully established authority in controlling, preventing, suppressing or in any other way dealing with any occurrence referred in Clauses (i), (ii), (iii), (iv), (v) or (vi) above.

Having excluded these risks from the underlying policy, some of the risks are then covered by a coupon issued against the underlying policy. The SASRIA coupon thus requires an underlying policy.

The SASRIA scheme did not originally cover up damage caused by normal non-political riot and strike. This was covered by riot strike and malicious damage extension.

The consequence of the SASRIA scheme is discussed elsewhere.

5.2.2 The nuclear exclusion

Nuclear energy which held such great potential for mankind also holds the potential for destruction on an unprecedented scale. The insurance industry when first faced with this risk decided it was too great a risk to insure and excluded it from most policies[91]. The reservation of the industry was well founded as demonstrated by the Three Mile Island[92] and Chernobyl disasters[93]. There are other nuclear incidents on record, without any loss of life.[94]

A number of nuclear incidents occurred in South Africa. Terrorists planted bombs at Koeberg Power Station during the project's construction stage. A contractor's worker, Mr Jacob Mahlangu, working at Kendal Power Station picked up a radio-active isotope and placed it in his pocket. As a consequence his severely radiation damaged right leg and three fingers had to be amputated.[95] A radiation scare occurred at Sasol One when a Cobalt 60 Isotope was accidentally left on site and an employee picked

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91 An exception to the rule that nuclear risks are excluded applies to personal accident, marine and aviation policies. Atkins, NG (1976b) 'Nuclear energy and insurance' 1976 6 *BML* 72 (Atkins, 1976b); Atkins (1976a,73) 'More about Nuclear energy and insurance' 1976 6 *BML* 72.

92 The Three Mile Island nuclear incident took place on the 28 March 1979 when the uranium core of one of the plant's pressurized water reactors overheated. There was no loss of life.

93 The Chernobyl disaster occurred on 26 April 1986 causing the death of at least 31 persons and the evacuation of 135 000 people. Six senior officials faced criminal prosecution. 'Radiation checks as Chernobyl starts trial' *Star* 8 July 1987 ("Radiation checks as Chernobyl starts trial," 1987); 'Trial of six top Chernobyl officials begins' *Star*, 9 July 1987 ("Trial of six top Chernobyl officials begins," 1987); The nuclear fall out is expected to last for decades, 'Chernobyl fall-out lingers' *Star* 9 January 1990 ("Chernobyl fall-out lingers," 1990).

94 On October 8, 1957, a fire engulfed Britain's Windscale (later renamed Sellafield) nuclear plant.

95 The incident resulted in criminal charges being brought against the engineering company International Combustion Africa Limited 'Firm faces Nuclear Act charges' *Star* 20 July 1990 ("Firm faces Nuclear Act charges," 1990); 'Director in court' *Star* 9 October 1990 ("Director in court," 1990).

up the isotope and put it in his tool cabinet.[96] In another incident a stainless steel capsule containing radio active material was stolen from a Boksburg Construction firm[97]. There was a general radiation scare when it was discovered that the radiation level of scrap steel was high[98].

As a general rule most short term policies will not cover loss or damage or any legal liability claims arising directly or indirectly from radiation, contamination or radio-activity from any nuclear fuel or from nuclear waste from the combustion of nuclear fuel.[99] This exception reads as follows:

> The Company shall not be liable in respect of:
>
> (a) Loss or destruction of or damage to any property whatsoever or any loss or expense whatsoever resulting or arising therefrom or any consequential loss.
>
> (b) Legal liability of whatsoever nature directly or indirectly caused by or contributed to by or arising from nuclear weapons material or by ionising radiations or contamination by radio-activity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel.
>
> For the purpose of this exception only, combustion shall include any self-sustaining process of nuclear fission.

Nuclear damage can be regarded as a fundamental risk not dealt with by the normal insurance policies but by legislation developed out of international treaties.

In most countries[100] liability for nuclear damage is regulated by statute as a consequence of international treaties[101]. In South Africa the position is governed by the Nuclear Energy Act 131 of 1993[102] (Nuclear Energy Act, 1993) which regulates compensation for persons who suffer nuclear damage.[103]

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96 'Radiation scare at Sasol' *Star* 20 August 1990 ("Radiation scare at Sasol," 1990); 'Isotope hero [Robert Burrow] is waiting' Sunday *Star* 2 September 1990 ("Isotope hero is waiting," 1990); 'Two contaminated at Sasol' Business Day ("Two contaminated at Sasol," n.d.).

97 'Radiation threat' *Star* 11 June 1991 ("Radiation threat," 1991).

98 'Radioactivity test results awaited confidence after uranium scare' *Star* 23 September 1993 ("Radioactivity test results awaited confidence after uranium scare," 1993); 'Probe into radioactive waste sites' *Star* 27 September 1993 ("Probe into radioactive waste sites," 1993); 'South Africa finds itself radio active' *Star* 20 October 1993 ("South Africa finds itself radio active," 1993).

99 Atkins, NG (1976) 'Nuclear energy and insurance' 6 *BML* 57 (Atkins, 1976b); Atkins (1976,57) 'A review of the international approach to nuclear energy and insurance' 6 BML 57; and Atkins, NG (1976) 'More about the international approach to nuclear energy and insurance' *BML* 72 (Atkins, 1976a).

100 For the position in America see Anderson, DR (1987) 'The dangers of nuclear limits.' *Best's Review* (Anderson, 1987); Kurland, OM 'Risk mitigation in the Atomic Age' 1993 *Risk Management* 34-45 (Kurland, 1993). Nuclear liability is regulated by the Price-Anderson Act of 1957which amended the Atomic Energy Act of 1954.

101 Nuclear Non-Proliferation Treaty was acceded to by the Republic on July 10, 1991.

102 Nuclear activities have been regulated by a number of statutes in South Africa; Nuclear Installations (Licensing and Security) Act 43 of 1963 (Nuclear Installations (Licensing and Security) Act, 1963); Nuclear Energy Act 92 of 1982 as amended by the Nuclear Energy Amendment 1985; Nuclear Energy Amendment Act 45 of 1987; 56 of 1988 and Nuclear Energy Amendment Act 70 of 1991.

103 Act 45 of 1987; 56 of 1988 and Nuclear Energy Amendment Act 70 of 1991. Nuclear damage is defined in the Act to mean any injury to or the death or any sickness or disease of a person, or other damage, including to property which

In terms of legislation, no person may without a nuclear licence construct or use a nuclear installation or use, possess, produce, store, enrich, process, convey, dispose of or carry out any other activity involving radio-active material.[104] Before granting the licence the Minister may require the applicant to make provision for security for his obligation to provide compensation.[105] Having obtained security the Minister may request additional security.[106] If a nuclear accident occurs and the Minister is satisfied that the security is inadequate the Minister may require the licensee to lodge additional security.[107]

The grounds for which the licensee is liable to pay compensation is set out in Section 61. The requirements are as follows:

S61. Liability of certain licensees in respect of nuclear damage-

(I) Any licensee shall, subject to the provisions of this Act, be liable for any nuclear damage caused during his period of responsibility -

(a) in the case of a nuclear license relating to any nuclear installation, by anything being present or which is being done at or in the nuclear installation in question, or by any radioactive material which has been discharged or released (in whatever form) from such nuclear installation;

(b) in the case of a nuclear license other than a nuclear licence relating to any particular nuclear installation, by -

(i) any radioactive material, or as a result of the performance or carrying out of any act or activity in connection with any radioactive material, in the possession or under the control of the licensee; or

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results from nuclear energy.

104 S51 of the Nuclear Energy Act, a separate section s52 deals with the licensing of nuclear vessels.

105 s59(1) The CNS (Council for Nuclear Safety) shall not grant a nuclear licence to any person unless such person has, if so required by the Minister, given security to the satisfaction of the Minister to fulfil any obligations which he may incur towards any person in terms of section 61 if such a nuclear licence is granted to him.

(2) The Minister shall, with the concurrence of the Minister of Finance, determine the time when, the manner in which and the amount for which security required by him in terms of subsection (1) shall be given.

106 s59 (3) The Minister may, with the concurrence of the Minister of Finance, from time to time, whether during or after the expiry of the period of responsibility of a licensee, (a) require such licensee -

(a) although he has provided security in terms of subsection (1), to give additional security or to give security in another manner; or

(b) to give security, although security was not previously required in terms of subsection (1)

and the Minister may with the concurrence of the Minister of Finance -

(i) reduce the amount of security given;

(ii) refund to the licensee the amount given as security; or

(iii) discharge the licensee from security given in any other manner.

107 s59 (4) If a nuclear accident occurs and compensation is claimed in respect thereof from the licensee in question, or the Minister is satisfied that such compensation will be so claimed, the Minister may require the licensee who has provided security to give additional security with respect to such accident or with respect to nuclear accidents which may occur subsequent to the giving of such additional security and cause damage for which he is liable in terms of this Act, to the extent to which, in the opinion of the Minister, the existing security given by the licensee has been or may be diminished, or rendered inadequate, as a result of any claim for compensation which has been or may be so made.

(ii) any radioactive waste which has been discharged or released (in whatever form) from such site; or

(iii) the accumulation of a radiation dose arising from the performance of any activity contemplated in section 51 (1)(b)(i);

(c) by any radioactive material in whatever form) while in the possession or under the control of the licensee, in the course of the conveyance thereof -

(i) from or to any nuclear installation or site or any other place in the Republic; or

(ii) in the territorial waters of the Republic from or to any place in the Republic to or from any place outside the Republic.

(2) For the purposes of subsection (1) radioactive material which is being conveyed on behalf of, or in terms of a contract with, a licensee shall be deemed to be under the control of such licensee while being so conveyed.

(3) Subject to the provisions of subsection (4), no person other than the licensee in question shall be liable for any nuclear damage caused as contemplated in subsection (1), and not withstanding anything contained in the Apportionment of Damages Act, 1956 (Act No. 34 of 1956), or any other law or any other legal rule, no fault of any person shall be a defence to any claim for compensation on account of such damage, or affect the amount of compensation which the licensee is liable to pay by virtue of the provisions of subsection (1).

(4) Notwithstanding the provisions of subsections (1) and (3) -

(a) a licensee shall not be liable to any person for any nuclear damage -

(i) to the extent to which such nuclear damage is attributable to the presence of such person or any property of such person at or in the nuclear installation, or on the site or near the radioactive material, in respect of which the nuclear licence in question has been granted, without the permission of the licensee or of any person acting on behalf of the licensee; or

(ii) if such person deliberately caused or deliberately contributed to the cause of such damage;

(b) such licensee shall, for the purposes of recourse against or contribution by any person who deliberately caused or deliberately contributed to the cause of the damage for which the licensee is liable in terms of subsection (1), be deemed to be liable in delict therefor; and

(c) the licensee shall retain any right of recourse or contribution which he may in terms of any contract have against any person in respect of any damage for which he is liable in terms of subsection (1).

It is possible, indeed estimates indicate, that almost certainly in a major nuclear disaster, the claims will exceed the security. The Act makes provision for this eventuality[108].

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108 63. Claims for compensation in excess of security -

(1) If the aggregate amount of any claims for compensation against a licensee referred to in section 61 by virtue of the provisions of the said section, or if the amount of any such claims which has already been paid by the licensee together with the estimated amount still likely to be required to be paid, exceeds, or is likely to exceed,

The effects of nuclear radiation may not be known until many years have passed after the nuclear accident took place and accordingly rules regarding prescription are required. These rules are set out in s64 of the Act.

The first rule is no action for compensation can be instituted after thirty years from the date of nuclear occurrence. Where the nuclear occurrence takes place over a period of time, the period is thirty years from the last event of the nuclear occurrence.

The second rule is, if the person claiming knew the identity of the licensee and the facts upon which he has a claim, he must do so within two years.

In practice two years is not a very long time and the running of prescription can be interrupted once by negotiations to settle the claim for a maximum period of five years[109]

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the amount for which he has given security in terms of section 59 in respect of the nuclear accident in question, he shall forthwith notify the Minister thereof in writing, giving particulars of the aggregate number and amount of all such claims received and paid, together with an estimate of the number and amount of any other such claims which may have to be satisfied.

(2) If, upon receipt of a notice in terms of subsection (1) or any other information, (a) the Minister is satisfied that the aggregate amount of claims for compensation against a licensee by virtue of the provisions in section 61 that are unpaid and of such claims as are likely to be made thereafter, will exceed the amount of the security given by such licensee in terms of section 59 in respect of the nuclear accident in question and available in respect of such claims, and (b) that the licensee is unable to settle such claims the Minister shall

(i) table in Parliament a report on the nuclear accident in question in such form as he may consider appropriate, and in which is recommended that Parliament appropriate money for rendering financial assistance in respect of the amount by which such claims exceed or are likely to exceed the security so available: Provided that the liability of the licensee as contemplated in section 61 shall in no respect be affected by any such appropriation; and

(ii) by notice in the Gazette suspend the obligation to pay such claims in respect of the nuclear accident in question until Parliament has decided about the recommendation.

(3) If Parliament has by resolution decided that money in an amount specified in such resolution, be so appropriated, no payment of any such claim for compensation arising out of the said nuclear accident shall be made after the passing of such resolution, without the approval of the Minister or an order of court.

(4) The giving of additional security by a licensee in terms of section 59 (4) shall not affect the application of the provisions of this section.

[109] 64. Prescription of actions -

Notwithstanding anything to the contrary in any other law contained-

(a) no action for compensation by virtue of the provisions of section 61 may be commenced after the expiration of thirty years from -

(i) the date of the occurrence which gave rise to the right to claim such compensation; or

(ii) in a case where a continuing occurrence or a succession of occurrences all attributable to a particular event or the carrying out of a particular operation gave rise to such right, the date of the last event in the course of that occurrence or succession of occurrences;

unless the claimant concerned during that period became aware, or by exercising reasonable care could have become aware, of the identity of the licensee concerned and of the facts from which the right to claim compensation arose, in which case no such action shall be commenced after the expiration of a period of two years from the date on which he so became aware or could have become aware, or after the expiration of such period of 30 years; whichever occurs first; and

(b) the running of the said period of prescription of two years shall be suspended during any period in which negotiations in connection with a settlement are being conducted by or on behalf of the claimant and the licensee concerned, which period shall commence on the date on which such negotiations commenced in

6 INTERPRETATION

6.1 Part of law of interpretation of contracts

The insurance contract is simply a contract, the terms of which are usually reduced to writing and set-out in a policy document. Because written documents are often not clear, it is necessary to interpret these documents. The rules of interpretation, applied to interpret insurance contracts become important. These rules follow the normal rules of interpretation of contracts and there are no special rules of interpretation needed for insurance purposes. This point was confirmed in the case of *Quick v Goldwasser* 1956 2 SA 525 SR.[110] (*Quick v Goldwasser*, 1956)

> The general principle unquestionably is that there are no special rules of construction particular to the interpretation of policies.

Although there may not be any specific rules of interpretation applicable to insurance contracts, it does not mean that in interpreting the words of a policy the court does not take into consideration the established practice in the insurance industry, particularly since some policies wordings have been in use for centuries.[111] A court, faced with interpreting a contract will regard as persuasive authority the decisions made in other countries on similar issues. One need only read a few court judgments on insurance to note the extent that the court is influenced by judgments from other countries and in particular the judgments of English courts.

The rules of interpreting insurance contracts were expressed more fully in *Fedgen Insurance Ltd v Leyds* 1995 (3) SA 33 A at 38(A-E) (*Fedgen Insurance Ltd v Leyds*, 1995) where Smalberger JA said:

> The ordinary rules relating to the interpretation of contracts must be applied in construing a policy of insurance. A court must therefore endeavour to ascertain the intention of the parties. Such intention is, in the first instance, to be gathered from the language used which, if clear, must be given effect to. This involves giving the words used their plain, ordinary and popular meaning unless the context indicates otherwise (*Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd* 1934 AD 458 at 464–5 (*Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd*, 1934)). Any provision which purports to place a limitation upon a clearly expressed obligation to indemnify must be restrictively interpreted (*Auto Protection Insurance Co Ltd v Hanmer-Strudwick* 1964 (1) SA 349 (A) at 354C–D (*Auto Protection Insurance Co Ltd v Hanmer-Strudwick*, 1964)); for it is the insurer's duty to make clear what particular risks it wishes to exclude (*French Hairdressing Saloons Ltd*

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writing, and shall end on the date on which any of the parties concerned notifies the other that he is not proceeding with the negotiations: Provided that, subject to the provisions of paragraph (a), the said suspension shall not be longer than five years: Provided further that a claimant may only once claim such suspension during such period of prescription of two years.

110 Davis (1993,225). Reinecke & vd Merwe (1989, par70) make the same point but rely on different cases.

111 Atkins, NG (1978) 'Form and content - the insurance policy' 1978 BML 47 (Atkins, 1978).

> *v National Employers Mutual General Insurance Association Ltd* 1931 AD 60 at 65 (*French Hairdressing Saloons Ltd v National Employers Mutual General Insurance Association Ltd*, 1931); *Auto Protection Insurance Co Ltd v Hanmer-Strudwick* (supra at 354D–E)). A policy normally evidences the contract and an insured's obligation, and the extent to which an insurer's liability is limited, must be plainly spelt out. In the event of a real ambiguity the contra proferentem rule, which requires a written document to be construed against the person who drew it up, would operate against Fedgen as drafter of the policy (*Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd* 1961 (1) SA 103 (A) at 108C (*Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd*, 1961)).

6.2 Rules of interpretation

The purpose of applying the rules of interpretation is to determine the intention of the parties to the contract. These rules of interpretation can be divided into primary and secondary rules and some of the more important rules are summarised as follows:

- purpose is to seek the intention of the parties
- words should receive their ordinary grammatical meaning
- technical words and expressions must be given such meaning
- words should be read in context
- where applicable the *contra proferentum* rule is applied
- the contract should rather be upheld than declared nugatory
- where appropriate the ejusdem generis rule is applied
- the existence of a general rule favouring the insured must be considered.

6.3 Intention of the parties

To determine the intention of the parties to the contract is often referred to as the golden rule of interpretation. The importance of the intention of the parties to a contract was set out as follows in *Joubert v Enslin* 1910 AD 6[112] (*Joubert v Enslin*, 1910):

> The golden rule applicable to the interpretation of all contracts is to ascertain and to follow the intention of the parties; and, if the contracts itself ... affords a definite indication of the meaning of the contracting parties, then it seems to me that a court should always give affect to that meaning.

In interpreting an insurance contract, the court must ascertain the intention of the parties. This must be gathered from the language of the contract itself. If the language is clear, the court must give effect to what the parties themselves have said; it must presume that they know the meaning of the words used. In practice the vast majority of insurance contracts are standard form contracts. These are not negotiated contracts and in some instances many of the clauses, words or phrases found in the policy document

[112] For a discussion see Kerr (1989:300)

have been in existence for several centuries. Quite often the meanings of these clauses are not clear to anyone, and in particular the parties to the contract. It is thus something of a fiction, in many instances, to assume that the parties who use these contracts actually know what they mean.

6.4 Parole evidence rule

6.5 Ordinary meaning of words

A primary rule is that the words which appear in the document must be given their ordinary grammatical meaning, unless it appears clearly from the context that both parties intend the contract to mean something different. *Mutual and Federal Insurance Limited v Manuelle Gouveia* 2003 ZASCA 16 (*Mutual and Federal Insurance Limited v Manuelle Gouveia*, 2003) involved the interpretation of the unlicensed driver exclusion found in motor policies which read:

> The company shall not be liable in respect of any ... loss ... caused, sustained or incurred whilst any vehicle insured under the policy is being ... driven by the insured or with his general knowledge or consent, by any person ... unless he is licensed to drive such vehicle in accordance with the legislation of the territory in which it is being used...

The vehicle was hijacked [stolen] while being driven by an unlicensed driver. Relying on the above exception the insurer repudiated the claim. The insured argued that the exception did not apply to hijacking events arguing that the licence was irrelevant because it was not the cause of the loss. The SCA by assigning the ordinary meaning of words in interpreting the contract concluded that this proposition could not be sustained. In terms of the ordinary meaning of the words the loss was incurred whilst the vehicle was being driven by an unlicensed driver and hence the exception was indeed applicable.

6.6 Technical words and expressions

Although there are no special rules of interpretation applicable to insurance contracts, this does not mean that practice and in particular insurance practice does not influence the rules of interpretation. Words may, by trade, craft, disciple or usage, have acquired a particular sense distinct from the popular sense; or the content may indicate that they must, in a particular instance, be understood in some special and particular sense. The words must then be interpreted in this sense. Therefore words which are used in trade or in the insurance industry to mean something in particular can limit the general meaning of

the word by its normal application in industry.[113] The document must also be interpreted against the background of insurance practice.

6.7 Words in context

The words in the policy must be interpreted in context. It is self-evident that when one considers the words of a contract one must have regard to the nature and purpose of the contract as a whole. The words cannot be cut out, pasted on a clean sheet of paper, and then considered with a view to determining the meaning.[114]

6.8 *Contra proferentum* rule

If the intention of the parties is clear then expression must be given to that intention. Only when this is not the case do the secondary rules of interpretation come into play.

One of the secondary rules is the *contra proferentum*. The *contra proferentum*[115] rule is a secondary rule because it can only be invoked if the contract is itself uncertain and not as a primary source of interpretation. This rule essentially states that if there is uncertainty about the policy, the policy must be construed against the person who drew it up, on the grounds that it was his responsibility to make his meaning clear in plain terms. The rationale of the *contra proferentum* rule was expressed as follows in the case of *British American Assurance Company v Cash Wholesale* 1932 AD 70[116] (*British American Assurance Company v Cash Wholesale*, 1932):

> Now questions are framed by insurance company and it is its duty to make them clear and unambiguous especially when it attaches so much importance to truth and such dire consequences to untruth, of the answers. If then, the question is capable of two reasonable meanings, that which is the most favourable to the insured will be accepted by a court of law when the truth of its answer is assailed.[117]

An example where the court did not apply the *contra proferentum* rule is *British Oak Insurance Co Ltd v Atmore* 1939 TPD 9 (*British Oak Insurance Company Limited v Atmore*, 1939).

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113 Davis (1993,244).

114 Kerr (1989,302) relying on *Swart en 'n ander v Cape Fabrix (Pty) Ltd* 1979 3 SA 106 A (*Swart en 'n ander v Cape Fabrix (Pty) Ltd*, 1979) and *Marine and Trade Insurance Co Ltd v J Gerber Finance (Pty) Ltd* 1981 4 SA 958 A (*Marine and Trade Insurance Co Limited v J Gerber (Pty) Limited*, 1981).

115 For a discussion on the *contra proferentum* rule to insurance contracts see Atkins (1978,48).

116 Davis (1993).

117 supra at 74.

6.9 The contract should rather be upheld than declared nugatory

6.10 *Ejusdem generis* rule

The *ejusdem generis* rule is a fundamental rule applied to the interpretation of documents. According to this rule, where words which have a limited or particular meaning are followed by a phrase of general application, the meaning of the set phrases is restricted to the generic meaning of the preceding words.[118] The following example will illustrate the ejusdem generis rule. If a policy contained the phrase following -

> Damage caused by storm, wind, water, hail or snow ...

Storm, wind, hail and snow are all examples of perils of nature. Is water in this phrase limited to water related to water arising out of natural perils e.g. floodwaters? It can be argued that water must be restricted in meaning to the same class as the other words i.e. water arising from natural perils. Thus in an insurance policy which excludes riot, war, commotion, civil unrest or any other peril, the 'other peril' will only refer to perils of a similar nature as the preceding list. The other perils will therefore not refer to events such as earthquakes, lightning, floods and so on.

6.11 *Expressio unius est exclusio alterius* rule

Bruwer v Nova Risk Partners Ltd 2011 1 SA 234 GSJ (*Bruwer v Nova Risk Partners Ltd*, 2011)

6.12 The rule to uphold the contract favouring the insured

There is another rule secondary rule which states that:

> ... the court should lean towards upholding the policy against producing a forfeiture.[119]

In terms of this rule where a provision, particularly an exception, to the policy is ambiguous, these provisos or exceptions should be strictly construed against the insurers because they have the object of limitation of the scope and purpose of the contract. In other words, exceptions must be interpreted against the insurer. There is no general rule stating that an insurance policy must be interpreted in the

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118 Du Plessis LM (1986) The interpretation of statutes Butterworths (Du Plessis, 1986).

119 *Kliptown Clothing Industries (Pty) Limited v Marine and Trade Insurance Company of South Africa* 1961 1 SA 103 A (*Kliptown Clothing Industries (Pty) Ltd v Marine and Trade Insurance Co of SA Ltd*, 1961). Davis (1993).

favour of the insured[120]. According to *Scottish Union and National Insurance Company v Native Recruiting Corporation Limited* 1934 AD 458[121] at 472 (*Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd*, 1934).

> I am not aware that by our law the courts must lean in favour of the insured in construing insurance contracts, in cases where the words are unambiguous and can bear only one meaning ...

6.13 Implied terms

Courts do not readily read implied terms into a contract, for to do so is for the courts to write the contract for the parties. On the other hand, unanticipated changes may take place and it is not clear then what the intention of the parties to the contract is. To find an implied term the court evokes a fiction of the officious bystander test. The court will the imply a term which is obvious to both parties that if they anticipated the changed circumstance they would have agreed to the term.

6.14 Rectification

Court can order the rectification of contract terms.

7 ONUS

7.1 General rule

The law dealing with the question of onus forms part of the law of evidence and procedure. The fundamental principle governing the question of onus, '...is that he who asserts must prove'.[122] This rule is an ancient rule and is common-sense. This rule is applied to the operative clause, exceptions and terms and conditions, requirements of law, and so on, in the paragraph below.

7.2 Operative clause - the promise

At the outset of a claim it is the insured who wishes to receive indemnification or an amount from the insurer and thus the onus is on the insured to assert and prove that the insurer has an obligation to him. This obligation arises because of the contract between the insured and the insurer. The insured, to start

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120 Reinecke and vd Merwe (1989: par88) seems to indicate that a secondary rule favouring the insured does exist. Reading some judgments I am inclined to agree.

121 Davis (1993).

122 *Van Wyk v Lewis* 1924 AD 438 at 444 (*Van Wyk v Lewis*, 1924)

off must thus assert that his claim falls within the promise made by the insurer. This promise is contained in the operative clause. The general position regarding the onus and the operative clause was put by the Appellate Division as follows. The insured must "bring his claim within the four corners of the promise made to him".

In this regard South African law of insurance follows British law, and this position has existed in the British law for nearly a century.[123] The position regarding onus of is thus fairly straightforward. It is the duty of the insured, as the person who is claiming from the insurance company, to prove that the event which took place and resulted in the loss falls within the terms of the operative clause of the policy. The onus is often decisive and by careful drafting of policy wording or pleadings one party may try to shift the incidence of the onus. If the insured cannot succeed in bring the claim within the four corners of the insurer's promise the insurer has no obligation.

The question of onus and the operative clause can be illustrated by any number of cases. *In Isando Foods (Pty) Ltd v Fedgen Insurance Co Ltd* 2001 3 SA 1285 SCA at 1285 B-D (*Isando Foods (Pty) Ltd v Fedgen Insurance Co Ltd*, 2001) the court noted that 'It was for the appellant to bring its claim within the four corners of the policy'. The insured failed to do so and hence the insurer was not liable to indemnify the insured.

In *Cold Storage Co Ltd v Eagle Insurance Co Ltd* 2002 ZWHHC 219[124] (*Cold Storage Co Ltd v Eagle Insurance Co Ltd*, 2002). Several tons of meat had deteriorated because the temperature in the cold-storage rooms had increase to above the appropriate level. The insured claim against its policy and the insurer repudiated the claim. The court unfortunately conflated to aspects, firstly proof that the claim falls within the operative clause and the secondly that the insured failed to meet its contractual obligation to take reasonable precautions to prevent the loss. The second issue only arises if the first is proven. The court summarised the cover as follows:

> The contract of insurance covered loss, destruction or damage to refrigerated stocks resulting from change of temperature due to the total or partial loss, destruction or disablement of refrigeration plant by electric power failure or due to failure or defect in, or accident to, the refrigeration plant howsoever arising. It was a condition of the policy that the CSC must at all times observe all reasonable precautions to ensure the safety of the property insured.

The records showed that the temperature has risen for extended periods well above what it should have for extended periods of times. There had been no knowledge or record of any problem with the refrigeration machinery. Had the machinery broken down steps would have been taken to prevent the loss. The first step in the enquiry should have been for the insured to show that there had been 'total or partial loss ... of refrigeration plant ...'. Since there was no evidence presented of any 'destruction or disablement of refrigeration plant' it is not clear that the claim fell within the operative clause. Since this was not litigated it is not even clear what was the correct position. Instead the case went directly to the question of inadequate maintenance and the court ruled in favour of the insurer holding, 'As soon

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123 Ivamy ER (1986,417) *General Principles of Insurance Law* 5ed Butterworths Insurance Library (Ivamy, 1986) quoting a 1908 case for authority.

124 Discussed, Van Niekerk (2002:181-184).

as it became evident that the two freezers were not maintaining the required temperature remedial measures should have been taken. They were not. Clearly, the damage was due to the negligence on the part of some of the employees of CSC [the insured]. Therefore, there was no liability on Eagle to pay the insurance claim." The problem with this outcome, is of course, negligence is insured and not the basis of repudiating a claim. It would have been far better had the case been approached in the more conventional manner of first showing the claim fell within the operative clause and then shifting to the question of an exception or a contractual term.

The importance of understanding the requirements of onus is illustrated *Aegis Insurance Company Ltd v Consani NO* 1996 4 SA 1 A (*Aegis Insurance Company Ltd v Consani NO*, 1996). In this case the fact strongly suggested that the insured had committed suicide. If the insurer repudiated the claim based on suicide the insurer would face the onus of proving suicide. On the other hand, the onus was on the plaintiff to show that the insured died by accidental means. If the plaintiff could not do this the plaintiff would fail to prove the claim fell within the provisions of the operative clause.

7.3 Exclusions or exceptions

Once the insured has shown that the loss falls within the operative clause, if the insurer wishes to avoid liability relying on an exception in the contract the onus is on the insurer to show that the exception excuses him from liability.[125] In *RM Insurance Co (Pty) Ltd v GCM (Pvt) Ltd* 1995 1 SA 698 ZSC (*RM Insurance Co (Pty) Ltd v GCM (Pvt) Ltd*, 1995), the insurer repudiated a claim on a personal accident policy relying on an exception that it was:

> 'not liable to pay compensation in respect of bodily injury resulting from an accident sustained directly or indirectly by an insured person by any breach on the part of the insured person of any Air Navigation Act, Order or Regulation ...'

Inter alia, the deceased pilot did not have a valid pilot's licence and the insurer repudiated the claim. The court explained the onus which rested on the insurer as follows:

> 'Exception C3, having been inserted in the policy for the purpose of exempting the defendant from liability for a loss which, but for its provision, would have been covered, was to be construed against the defendant with the utmost strictness; for it was the duty of the defendant, in framing the policy, to exempt its liability in clear and unambiguous terms. Plainly the onus of proving the applicability of the exclusion clause to the claim addressed rested with the defendant.'

(Emphasis added)

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125 *Eagle Star Insurance Co Ltd v Willey* 1956 1 SA 330 A (*Eagle Star Insurance Co Ltd v Willey*, 1956); *Aswanestaal CC v South African Eagle Insurance Co Ltd* 1992 1 SA 662 C at 664E-F (*Aswanestaal CC v South African Eagle Insurance Co Ltd*, 1992); *RM Insurance Co (Pty) Ltd v GCM (Pvt) Ltd* 1995 1 SA 698 ZSC (*RM Insurance Co (Pty) Ltd v GCM (Pvt) Ltd*, 1995).

Had the exclusion simply said, 'injury sustained by reason of any breach' it would have been accepted that the insurer would have to prove that the breach (e.g. not having a valid licence) caused the injury i.e. a causal link existed between the injury and the breach but the term said directly or indirectly in which case a causal link would not need to be established. So the issue went about interpreting the phrase, directly or indirectly.[126] The question then was, did this phrase absolve the insurer from proving the causal link? The court decided that this phrase did not absolve the insurer from proving that a casual link existed and the insurer had to plea a causal connection existed in some material respect to the accident and since the insurer did not aver this in its plea the insurer's exception was dismissed.

In *Mutual & Federal Insurance Co v Da Costa* 2007 JDR 0450 SCA[127] (*Mutual & Federal Insurance Co v Da Costa*, 2007) the insured failed to provide a number of details to the insurer regarding the submitted claim. The details supplied however were sufficient to bring the claim within the operative clause. The insurer repudiated the claim on the basis that it may require the additional details since these may indeed be relevant to exceptions in terms of the policy. The SCA rejected this approach. The insurer cannot ask the insured to present a defence until the insurer had at least raised the exception,

> '... that until the insurer pleaded that the circumstances giving rise t the claim where covered by one or the other of the [exclusions] set out in the [policy] it was not incumbent on the insured to prove they did not exist ... the policy exclusion must first be raised as a defence by the insurer in its plea before it becomes incumbent on the insured to prove that on the facts of the particular case it does not apply.'

7.4 General contract terms

Once the insurer acknowledges that the insured has suffered a loss that falls within the four corners of the promise but nevertheless the insurer denies liability because of a breach of a contractual term. The courts have often held that if an insurer wishes to avoid liability for breach of a term in an insurance contract, the onus rests on the insurer to prove the breach. This was expressed as follows by *Hoexter JA in Resisto Dairy v Auto Protection Insurance Company* 1963 1 SA 223 A at 645 A.[128] (*Hoexter JA in Resisto Dairy v Auto Protection Insurance Company*, 1963)

> There are many cases in our reports in which it has been held or assumed that, if an insurer denies liability in a policy on the ground of a breach by the insured of one of the terms of the policy, the onus is on the insurer to plead and prove such breach.

7.5 Requirements of law of contract or insurance

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126 The phrase directly or indirectly was considered for the first time in the case of *Coxe v Employer's Liability Assurance Corporation* 1916 3 KB 629 (*Coxe v Employer's Liability Assurance Corporation*, 1916).

127 Discussed, Van Niekerk (2007:142-148)

128 *Norwich Union Fire Insurance Society Limited v SA Toilet Requisites Company Limited* 1924 AD 212 (*Norwich Union Fire Insurance Society Limited v SA Toilet Requisites Company Limited*, 1924).

If an insurer wishes to avoid liability because of the absence of a general requirement of the law of contact, the onus is on the insurer. This in *Theron v AA Life Assurance Association Ltd* 1995 4 SA 361 A (*Theron v AA Life Assurance Association Ltd*, 1995) the insurer raised the defence that the insured lacked contractual capacity. Regarding the question of onus, the court noted:

> It is common cause that the *onus* of proving that the insured lacked the required contractual capacity at the relevant time vested throughout on the respondent [the insurer], so that it was for the respondent [insurer] to prove that at the time of contracting, the insured's intellect had not improved from that described by his school teachers

Where an insurer wishes to avoid liability because a mutual fact has not been disclosed, the onus is on the insurer to show both aspects.[129]

7.6 Reverse onus of proof

Some policies contain a term which purports to reverse the onus of proof. The SASRIA policy is an example of such a policy.

7.7 Fraudulent claims

If the insurer wishes to avoid a claim because the insurer is of the view that the insured committed fraud, then the onus is on the insurer to prove the fraud. The normal standard of proof in civil matters is proof on the balance of probabilities but in England it appears that a higher standard of proof is required where an insurer alleges fraud.[130] This is not surprising since a person is not lightly to be presumed to have committed fraud or to be labelled a fraudster. In South Africa the court rejected the notion that variable degrees of proof exist for insurance claims.[131]

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129 In *Gordon v AA Mutual Insurance Association Ltd* 1988 1 SA 398 W at 400F-G (*Gordon v AA Mutual Insurance Association Ltd*, 1988) the matter of onus is not clearly set out. The text reads 'Counsel are *ad idem* that the plaintiff (insured) was saddled with the onus as regards the issues ... and Mr Wessels (for the insurer) assumed the task '.....' It is clear at 404D-F that the insurer had discharged the onus of showing fraud and had established a case for the plaintiff (insured) to answer. *Fransbaervoer (Edms) Bpk v Incorporated General Insurances* 1976 4 SA 970 W at 977B-D (*Fransbaervoer (Edms) Bpk v Incorporated General Insurances*, 1976).

130 Galyer and Mellows (1996)

131 *Maritime and General Insurance Company v Sky Unit Engineering* 1989 1 SA 867 T (*Maritime and General Insurance Company v Sky Unit Engineering*, 1989).

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SPECIFIC INSURANCE POLICIES

Contents

1 INSURANCE AND THE RISK MANAGER

Insurance remains the single most important method of financing the consequences of pure risk and the risk manager needs to have a firm grasp of a number of insurance issues. In particular he needs to understand the law of contracts and how this law applies to the insurance contract, the law of insurance,[1] specific insurance contracts, insurance practice, insurance regulation,[2] cover provided by the various statutory funds,[3] various insurance markets.[4]

It is not intended to deal with all of these at this point but only to review the more common types of insurance policies available.

1.1 The marine & aviation market

1.1.1 Marine[5]

1 The leading South African textbooks on the law of contract are Getz, LAWSA.

2 Regulation includes the Insurance Act, Medical Schemes Act, Co-operatives Act.

3 Workmen's Compensation, Third Party motor insurance, Insolvency legislation.

4 The South African market, the UK market, to a lesser extent the American market and Lloyd's.

5 Many insurers product easy to read publications on the various classes of insurance. See for example WM Mellert (1989) 'Marine Insurance' *Swiss Re* (Mellert, 1989).

The oldest class of insurance is marine insurance. Persons involved in a marine adventure are exposed to the what is referred to as the *perils of the sea*[6], *perils on the sea* and extraneous risk. These perils operate to cause loss or damage. Ships are lost at sea, cargo is lost at sea, the cost of transporting the cargo (freight), is paid but since the cargo is lost, the expenditure is lost. Lives are lost at sea. Liability claims can be instituted as a consequence of a marine adventure.

The marine policy is in the first instance assets policy.

The most famous form of marine policy was the so-called Lloyd's SG policy[7] which started to be phased out in 1982 with the introduction of the *Lloyd's Marine Policy* (the MAR Form) and the *Companies Marine Policy of the Institute of London Underwriters*. It is however the Institute Clauses which are important. The first of these, the '1888 Time Clauses were accepted by the Institute of London Underwriters' in 1888, and issued annually thereafter. Each complete set of Institute Clauses for use with the Lloyd's policy constitutes a self-contained insurance cover.

English Marine Insurance law was codified at the turn of the century in terms of the *Marine Insurance Act* (1906) (Marine Insurance Act, 1906). This Act is very important since it essentially is a codification of not only marine insurance law, but insurance law in general.

An unusual risk to which the person who uses marine transport is exposed to is the risk of General Average being declared. Sometimes it may be necessary to sacrifice or incur expenditure in time of peril to preserve property imperilled in a common adventure. It may be necessary, for example, to jettison some cargo during a storm to save the vessel and remainder of the cargo. In this event the cargo owners, despite the fact that they did not lose cargo may be called upon to contribute towards the cost of the jettisoned cargo.

Persons engaged in a marine adventure are exposed legal liability claims. The usual marine cover provided by the *Institute Time Clauses (Hulls)* (1/10/83) does not however provide full protection against liability claims but only limited cover in terms of the so-called *3/4 ths Collision Liability Clause*.[8] The liability of the insurer is limited to $^3/_4$ of the amount paid by the assured as a consequence of liability claims. The obligation of the insurer is limited to $^3/_4{}^{ths}$ of the insured value of the insured vessel and the clause does not cover to costs of the insured for the removal of wrecks, loss of life, personal injury, pollution.

It is clear that very limited marine liability cover is provided.

- Protection & Indemnity Clubs (P&I Clubs)

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6 The term *perils of the sea*, lacks precise definition but has been in use for several centuries.

7 A copy of the policy, referred to in terms of s30 of the *Marine Insurance Act* (1906), is annexed to the Act as the First Schedule. This same form of policy was affixed to the *Stamp Act (1795)*. The wording is far from easy to understand and already in 1791 it was referred to as 'an absurd and incoherent document', nevertheless the document was in use for 200 years.

8 Some writers refer to this as the *Running Down Clause* (RDC).

Since the marine policy only provides limited liability cover a need exists to provide a more comprehensive protection. In the marine market this need is filled by the P&I Clubs.[9]

1.1.2 Aviation insurance

Aviation insurance is a modern addition to the insurance industry, however since marine and aviation are forms of transportation, in modern theory is usual to deal with aviation when dealing with marine; the tendency is deal with marine and aviation. Aviation gives rise to a number of risks; loss or damage to the aircraft (hull), loss or damage to cargo; cost of search for missing aircraft; extensive liabilities attach to people on the ground; liability to crew and passengers. Some forms of aviation liability are governed legislation and international treaties.

1.2 Fire insurance

The next great short-term insurance market to develop was the fire market. This policy provides indemnification against loss or damage of assets from a specific peril, namely fire. A fire can be caused from a number of sources. Thus an earthquake can arise and preceding, (sometimes by a mere few seconds) or following the earthquake fires can develop. Other perils such as explosions, preceding the fire or as a consequence of the fire.

In these cases, confusion arises as to the cause of or the proximate cause of the loss; fire, explosion or earthquake. The development was either to exclude fire as a result of the other natural perils or the extension of the fire policy to provide indemnification against from a variety of natural perils.
The fire-fighting process could entail a variety of expenses; the fire department may raise a cost for their services. After the fire, indirect costs such as the employment of accountants to quantify the cost of the loss. In order to rebuild the damaged asset, the service of architects may be required. When the factory is to be rebuilt it may be found that the municipal regulations have changed and increased costs arise to meet the higher standards. It may be desirable not to replace the building in exactly the same manner it was before the fire but to make use of the opportunity of the rebuilding the factory to carry out capital improvements. It may also take some time before the building can be rebuilt by which time inflation has reduced the value of money. It may be necessary to make provision for infraction in the policy.

After centuries of experience, the modern fire policy is a very sophisticated policy designed to cater for a wide range of costs associated with fire and natural perils.

1.3 Accident market

[9] For a discussion of the P&I Clubs consult Dillon,C & van Niekerk, JP (1983) *South African Maritime Law and Marine Insurance Selected Topics* Butterworth 1983 (Dillon & van Niekerk, 1983).

Fire was a specific peril. The introduction of rail-transport and factories gave rise to the desire to be compensated as a result of an accident. This gave rise to a number of accident policies; railway accidents, employers liability (which was not actually liability based by accident based and gave rise to the Workmen's compensation movement, employee benefits); personal accident policies. It was customary for large insurance companies to have accident departments as indicated in the history of the *Liverpool & London & Globe* in 1936: It is clear from the list appears in earlier books on insurance companies that the modern motor, liability, consequential loss departments developed from the accident departments that sprang up at the turn of the century.

1.4 Consequential loss market

It has always been realised that when people are injured or assets are damaged, consequential losses, of a financial nature arise. Thus an injured person, unable to work loses his income. A building destroyed by fire cannot produce the rent income to the landlord. These losses, without a specific extension are not covered by an asset policy such as the fire policy. Consequential loss policies developed this century to cater for the losses which arise as a consequence of loss producing events.

1.5 Liability policies

Liability developed as part of the accident market but is today, is generally regarded as a separate form of insurance. In addition to the general liability a number of specific forms of liability cover exists. As noted the marine hull cover, provides a measure of liability cover. Section B of the motor policy provides liability cover, the aviation policy provides liability cover.

The purpose of the liability policy is to indemnify the insured against amounts that he becomes legally liable to pay, usually (except in professional liability policies) arising out of accidental loss or damage or injury to person. The cover is essentially in line with the original *actio damnum datum*. Liability for pure financial loss is not covered nor *actio iniurium* is not covered without special extensions.

2 MOTOR INSURANCE

2.1 Introduction

The motor vehicle creates a number of risks, some of which are covered by the motor policy. Firstly, there can be loss or damage to the vehicle itself. This is often referred to as own damage. Secondly, there can be legal liability claims, from a third party[10] as a result of damage caused to the third party's

[10] The first and second parties refer to the parties to the insurance contract; namely the insured and the insurer. The third

vehicle or property or injury. Thirdly, medical costs may arise from injuries to the people in the insured vehicle itself, and in particular the driver. These three[11] areas are normally catered for in terms of the motor policy. The three types of losses usually occur in one event or accident, and policies generally have three separate operative clauses, one for the own damage, one for the liability to third parties and one for medical expenses. Variations in policies exist for personal use, business use or fleets.

2.2 General terms of the policy

The general terms to the policy apply to the motor section. The reasonable precautions term has been examined by the courts; see *Hayward v Norwich Union Insurance Ltd* 2001 LLR 410 CA[12] (*Hayward v Norwich Union Insurance Ltd*, 2001) discussed page 26 above. It will be recalled that the keys were left in the unattended car (a Porsche) and a thief jumped into the car and drove away with it. The insurer repudiated the claim on two grounds, firstly the insured breached the policy term requiring reasonable precautions to be taken and secondly a specific term in the policy making it clear that the policy excluding liability by theft 'whilst the keys ... have been left in or on the car'. This is a case of the unattended car.[13] The court upheld the repudiation on the second grounds but not the first. The case is important as it demonstrates the application of the principles of interpretation applied to insurance contracts.

2.3 Section A: Loss or damage

2.3.1 Operative Clause

The operative clause referred to as section A of the motor policy covers own damage and typically reads as follows in the case of the Multimark III wording:

> Loss or damage to any motor vehicle to any vehicle described in the schedule and its accessories and spare parts whilst thereon.

Sometimes vehicles have trailers attached to them which create interesting insurance problems.[14] It can be seen that the motor policy is an indemnity policy. The principles of indemnity are applicable. The

party is anyone who is not party to the insurance contract - it is usually the injured party.

11 Other types of losses also occur. These include loss of income and profit because the damaged vehicle is not available to be used in the business. Pure financial losses as such will not be discussed.

12 For a discussion of this case see Ombudsman News 37 May-June 2004

13 The leading case of unattended property *Starfire Diamond Rings Ltd v Angel* 1962 2 LLR 217 CA (*Starfire Diamond Rings Ltd v Angel*, 1962).

14 Insurance problems can arise where the trailer is separated from the 'motor' component. *Seaton v London General Insurance Co Ltd* (1932) 42 LLRep 398 (*Seaton v London General Insurance Co Ltd*, 1932); *H Davies & Son v National Motor & B Adams (Insurance) Ltd* (Chester County Court June 16 1992) (*H Davies & Son v National Motor & B Adams (Insurance) Ltd*, 1992). This last case illustrates a trend; where the insurer escapes liability, often the insurance broker is held liable; (1992) 153 34 Post 16. Trailers can also give rise to liability problems.

indemnity is against damage or loss thus includes events such as theft. It also covers costs of repairs incurred as a result of an accident.

- *The insured*
  A further point is that, given this type of operative clause, the vehicle could be owned by the insured, his spouse or any relative financially dependent upon the insured, providing the details of the stated vehicle is in the proposal form. Therefore a single group policy taken out by an individual containing an operative clause as above, will serve to cover all vehicles owned by the insured and his wife and children, provided that they are financially dependent upon the insured and that the specific vehicles are declared in the proposal form. Thus this type of policy provides cover for all vehicles used by the whole family.

  This arrangement introduces a number of legal problems. The insurable interest of the insured in the vehicles of the spouse and dependent family members needs to be considered. Other problems are the rights of the spouse and family members in terms of the policy. This second problem is in some cases regulated by the contract conditions.

2.3.2 Specific exceptions to section A

The following are some of common exceptions to part A of the policy:

The company shall not be liable for:

(a) Consequential loss from any cause whatsoever, depreciation in value whether arising from repairs following a defined event or otherwise, wear and tear, mechanical or electrical breakdowns, failures or breakages.
(b) Damage to tyres by application of brakes or by road punctures, cuts or bursts.
(c) Damage to springs, shock absorbers due to any inequalities of the road or other surface or to impact with such inequalities
(d) confiscation or requisition by customs or other officials or authorities.

- *Consequential loss exclusion*
  Section A is the property damage section and in common with property damage in general only covers damage to the property itself and not consequential loss or liability cover. Thus even without the exclusion consequential losses are not covered. Nevertheless it is common for policies to have a term excluding consequential losses. A number of common problems arise concerning consequential losses. One example is the hire of a replacement vehicle. When the insured vehicle is damaged or stolen and the insured may hire another vehicle until his stolen vehicle is replaced. The costs of hiring the vehicle is a consequential loss and thus not covered unless the policy has a specific extension dealing with this problem.

  Normal wear and tear is excluded since it is not an insurable risk. Damage to tyres is insurable as it could result from sudden and accidental event. It thus falls within the

operative clause and it could be argued that the insurer is liable to compensate for damage to tyres. However, because insurers regard this as a high risk, this class of damage is usually specifically excluded.

- *Towing costs*

As noted, consequential losses are excluded from the policy. In terms of the common law, consequential losses are in any case excluded, unless specific provision has been made for it. Two consequential loss costs which are generally included in motor policies are the towing expenses and the cost of transporting a repaired vehicle back to the insured. For example, if your vehicle is involved in an accident while you were on holiday in Cape Town and you are resident in Johannesburg the costs involved in transporting the repaired vehicle back to Johannesburg could be considerable. Most insurance policies cater for this and are prepared to cover these costs. Typically the clause reads as follows:

> If such motor car, caravan or motor cycle becomes disabled by reason of loss or damage insured under this sub-section the [insurance] company will bear the reasonable cost of protection and removal to the nearest repairers. The company will also pay the reasonable cost of delivery to the insured after repair of such loss and damage not exceeding the reasonable cost of transport to the address of the insured in the Republic of South Africa, South West Africa, Lesotho, Botswana, Swaziland or Malawi.

Thus provision is made for the insurer to pay for the towing costs. It is for this reason that there is always fierce competition amongst the towing fraternity as to who has the right to tow a vehicle which is involved in an accident - they know the costs will ultimately be recovered from the insurer.

- *Hire purchase agreements*

Generally most vehicles are subject to a hire-purchase or some similar other financing agreement and motor insurance policies make provision for this. Typically, the hire-purchase clause reads as follows:

> If to the knowledge of the [insurance] company the motor car, caravan or motor cycle is subject to a hire purchase or similar agreement, payment shall be made to the owner described therein whose receipt shall be full and final discharge to the company in respect of such loss and damage.

In terms of the hire-purchase agreement, the owner of the vehicle legally is normally the company that granted the hire purchase finance (usually a bank) and payment will in the first instance thus be made to the bank and not to the insured, as is clear from this clause. This is common practice. In *Marine and Trade Insurance Co Ltd v J Gerber Finance (Pty) Ltd* 1981 (4) SA 958 (A) (*Marine and Trade Insurance Co Limited v J Gerber (Pty) Limited*, 1981) the insured was paid instead of the finance company. The insured then became insolvent and the insurance company was sued for a second payment. The insurance company was obliged to pay the finance company the full amount, despite the

fact it had already paid the insured. The practice, therefore, is that if anyone has a hire-purchase agreement the insurance company first pays out the owner of the vehicle and only thereafter the insured. Subsequently the court distinguished the Marine and Trade case in *Barloworld Capital (Pty) Ltd v Napier NO* 2005 (1) SA 57 (W) (*Barloworld Capital (Pty) Ltd v Napier NO*, 2005) where the insured and not the financier was paid. Neither the Marine and Trade nor the Barloworld cases involved motor insurance and neither had the above term in their contract of insurance.

In the UK, initially the courts held that the bank (financier) is the owner and that when the insured had incorrectly stated that he was the insured in the proposal form, this was sufficient grounds for the insurer to repudiate the claim.[15] Today it is accepted that the insured is correctly described as the owner even where the vehicle is subject to a hire-purchase agreement and can insure the vehicle for his or her own interest.

- *Limitation of liability*
  When a person is entitled to indemnification in terms of the common law of insurance, that person is entitled to full indemnification. This indemnification could of course exceed the insured amount and therefore a clause is usually included to limit the liability of the insurer to the insured amount. Typically this type of clause reads:

  > The limit of the liability of the company shall be limited to the amount stated plus an additional amount stated in a proposal which shall be the maximum amount payable by the company in respect of such loss or damage but shall not exceed the reasonable market value of such motor vehicle, caravan or motor cycle and accessories and spare parts at the time of loss of damage.

  This is an important clause since it determines the basis of settlement. which is generally the market value.[16]

2.4 Section B: Liability to third parties

2.4.1 Introduction

In some policies the next part or section to the motor policy, part B, is referred to as the liability to third parties section. It provides indemnity against liability claims or civil actions.

2.4.2 Operative clause

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15 *Banton v Home and Colonial Insurance Co* (1921) Times April 27 (*Banton v Home and Colonial Insurance Co*, 1921). This was however reversed on appeal. See also *Arlet v Lancashire and General Insurance Co* 1927 LLR 454; Welford (1932) (*Arlet v Lancashire and General Insurance Co*, 1927)

16 For details on how the market value is determined, see Atkins, NG 'Are You Covered' p.30,31 (Atkins, n.d.).

Typically, the operative clause of the liability to third parties reads as follows:

> In the event of an accident caused by or through or in connection with any motor car or any caravan or any motor cycle stated in the proposal or any caravan attached[17] to such car stated in the proposal or any disabled vehicle being towed other than for reward by such car stated in the proposal, the company will indemnify the insured against all sums including the claimants costs and expenses which the insured shall become legally liable to pay in respect of-
>
> (i) Death or bodily injury to any person excluding
> (a) a member of the same household as the insured
> (b) any person being conveyed in or on a caravan or in the open portion of a light vehicle, and
> (c) any employee of the insured in the event arising out of and in the course of his employment.[18]
>
> (ii) Damage to property other than property belonging to the insured or held in trust by or in the custody or control of the insured or being conveyed in any caravan.[19]

Again, the operative clause makes it clear that while the motor policy is an indemnity policy, it is not a general indemnity. The insured is indemnified against claims against him, plus expenses, which arises out of death or bodily injury to persons or damage to property. What, in detail, the insured is liable for is usually determined by the law of delict (discussed in the delict section). It includes the indemnification for damage caused to the third parties property, in motor insurance more often than not damage to another motor vehicle. A problem which arises is where the insured has caused damage to another vehicle and the third parties hires a replacement vehicle is the insured liable for those replacement costs. Sometimes the insured's insurer offers to lend a vehicle to the third-party.[20]

It will also be noted that claims arising from members of the same household are excluded as are claims from persons being conveyed in or on a caravan or in the open portion of any light delivery vehicle or bakkie. Presumably the risk is regarded as being too high.

Claims from employees injured in the course of employment are also excluded with the view that this form of liability should be covered by the employer's liability policy. The latter is discussed below.

- *Limitation of liability*

  The magnitude of legal liability claims can be very large indeed. Imagine the consequences of a collision in an underground parking garage where a vehicle ignites and explodes. The losses could run into hundreds of millions of rand. In the case of liability

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17 Liability problems can arise where the caravan or trailer is unattached; for example it is parked on a public road and constitutes a danger to the public. See fn.

18 This type of exclusion can cause problems with respect to domestic servants. For a discussion on this problem consult Atkins, NG 'Liability to domestic servants' 1991 20 *BML* 131 (Atkins, 1991). For a more detailed discussion of the problems of transporting employees see Rowe, G 'Transport for employees' 1991 20 *BML* 123 (Rowe, 1991).

19 PFV Personal insurance group scheme policy.

20 *Bee v Jenson* 2006 EWHC 3359 Comm and on appeal 2007 EWCA Civ 923 (*Bee v Jenson*, 2006); *Copley v Lawn* 2009 EWCA Civ 580 (*Copley v Lawn*, 2009); *Sayce v TNT (UK) Ltd* 2011 EWCA Civ 1583 (*Sayce v TNT (UK) Ltd*, 2011).

claims arising from personal injuries caused by motor vehicles, claims in the region of R24 million have been instituted. Insurance companies can no longer take the risk of open ended liability.

The insurance company will limit its liability which can arise in terms of this section B. Typically this limiting clause reads:

> Provided always that the liability of the company under this sub-section in respect of death, injury and/or damage directly or indirectly due to or in consequence of fire or fire and explosion in the case of any other vehicle will be limited to R500 000 in respect of one accident or series of accidents due to or arising from one event or occurrence[21]

From this it can be seen that the liability in this type of clause is unlimited other than in the case of fire and fire and explosion.

It is, however, anticipated that with the escalating awards for liability claims, the unlimited liability exclusion will disappear and be replaced by a total cap on the exposure of the company. This is the practice with other policies.

- *Legal representation*

  The liability of a person or company is determined by a court of law. In cases of death there maybe preliminary inquiries for example, an inquest may be held, the outcome of which may influence the finding of a court of law in either a criminal or civil action. Motor policies often have an extension enabling the insurance company to provide legal representation at inquiries and inquests.

  Typically the clause will read as follows:

  > The company shall be entitled at its discretion to arrange for representation at any inquest or fatal enquiry in respect of any death which may be subject to indemnity under this sub-section or for defending in any magistrates court any criminal proceedings in respect of any act arising or relating to any event which may be the subject of indemnity under the sub-section[22].

2.4.3 Extensions to the liability section

From the operative clause the impression could be gained that the cover is very wide. However, various situations are not covered in terms of the operative clause and a number of extensions are usually found to the liability section.

- *Indemnity to drivers driving with permission*

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21 The PFV personal insurance group scheme policy, p. 22.

22 The PFV Policy, p. 22.

In terms of the operative clause, it is the insured who can claim indemnity. A person other than the insured may cause an accident, especially if that person is the driver of the vehicle and it is desirable to extend the cover to persons who drive the vehicle, other than the insured. Policies are often extended to provide liability cover for such persons.[23] Typically the driving with permission extension reads as follows: The company will:

> ... indemnify any person who is driving or using such vehicle the insured's order or with the insured's permission provided that ...

The cover is extended to indemnify persons driving with the permission of the insured. Thieves and the like accordingly are not covered. The term can result in more than one insurer covering the same contingency and problems of contribution can arise.[24] Since the person driving with the permission of the insured, is not the insured, problems of privity of contract and insurable interest also arise. Firstly, the person seeking indemnification has no contract with the insurer and hence in law it is difficult to see the basis of the claim against the insurer. In law it is only the two parties who are privity to the contract who have rights which arise from the contract. This is the doctrine of privity of contract, which is more particularly and English law doctrine and is regard by some as problematic.[25] And secondly, it can be argued that the insured has no insurable interest in the loss suffered by the person seeking indemnification has. These issues have been subject to debate[26] and litigation[27]. The privity of contract problem is catered for by a stipulation in the policy that:

> The extension of the company's [insurer's] liability to any person, other than the insured shall give no right of claim to such person, the intention being that the insured shall in all cases claim for and on behalf of such person.[28]

A problem which can arise is where the insured decides not to claim for and on behalf the person who caused the accident and is being sued.

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23 *Refrigerated Trucking v Zive NO (Aegis Insurance, Third Party)* 1996 2 SA 361 T (*Refrigerated Trucking v Zive NO (Aegis Insurance, Third Party)*, 1996).

24 *Vandepitte v Preferred Accident Insurance Corporation of New York* 1933 AC 70 PC (*Vandepitte v Preferred Accident Insurance Corporation of New York*, 1933) discussed in Refrigerated Trucking case supra.

25 Dowrick, EF 'A Jus Quaesitum Tertio by Way of Contract in English Law', *Modern Law Review*, 19 (4) 1956, 374-393 (Dowrick, 1956); Weeramantry, CG (1967) *The Law of Contracts*, Colombo, H. W. Cave & Co. Ltd (Weeramantry, 1967); JN Beyleveld, D and R Brownsword (1991) 'Privity, Transitivity and Rationality', *Modern Law Review*, 54, (1), pp 48-71 (Beyleveld & Brownsword, 1991); Adams and R Brownword (1993) 'Privity of contract; that pestilential nuisance' *Modern Law Review* 56 (5) 722-732 (Adams & Brownword, 1993); Convery, J (1999) 'Standard Form Building Contracts and Duty of Care', *Modern Law Review*, 62 (5), pp 766-776 (Convery, 1999).

26 For a discussion of the problems associated with this type of term consult Kahn, E (1952) 'Extension Clauses in Insurance Contracts' *South African Law Journal* 1952 69 (Kahn, 1952); *Croce v Croce* 1940 TPD 251 (*Croce v Croce*, 1940); Chaskalson, A (1963) Annual Survey of SA Law 382-3 (Chaskalson, 1963); Reineke (1971) Comparative and International Law SA 4 193 at 218-20 (Reineke, 1971); Kahn (1985:745 et seq)

27 *Croce v Croce* 1940 TPD 251 (*Croce v Croce*, 1940); *Coertzen v Gerard NO and another* 1997 (2) SA 838 O (*Coertzen v Gerard NO and another*, 1997)

28 Refrigerated Trucking supra

In the Unitrans case supra the insured was a firm known as JG Olieverspreiders. With the permission of the firm the vehicle was being driven by a certain Mr Shai who was employed by a close corporation known as De Kroon Brandstofverspreiders CC when Shai was involved in a collision and negligently caused Unitran's loss. De Kroon was in the meanwhile placed into liquidation and acting on s156 of the Insolvency Act 24 of 1936 Unitrans brought an action directly against Santam. Santam raised and exception which was in any event, in terms of the circumstance of the case, badly drafted and the SCA had no difficulty in dismissing the exception. The court emphasised in this case that clearly Santam had the intention of indemnifying the third party an intention clearly express in terms of the extension clause. It is not a contract for the benefit of a third party, since the policy made it clear that it is the insured who has the right to enforce the third party's indemnification.

- *Driving other vehicles extension*

  The indemnity of the motor policy relates to the motor vehicle stated in the policy. This being so, if the insured is driving another vehicle he is not covered in terms of the operative clause. This could present a problem to a person who is insured and drives a car other than the insured car. The cover while driving other cars is usually provided by means of an extension[29]. Typically the extension will read as follows:

  > The company will also indemnify the insured[30] while personally driving a motor car or motor cycle not belonging to him and not hired to him under a hire purchase agreement.[31]

- *Motor cycle: passenger liability*

  Normally the liability of the company for passengers on a motor cycle is limited.

- *Contingent liability*

  It is a common feature that private vehicles are used for company purposes. For tax reasons it is a popular arrangement that individual employees purchase their own vehicles, used for employment purposes, and for this they receive an allowance from their employer. In terms of the law of vicarious liability the employer can become liable for the acts of his employees. Thus while an employee is using his motor vehicle on company business, the company faces an exposure. This is normally catered for in terms of what is known as the contingent liability clause. Typically the clause reads as follows:

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29 For a discussion on problems associated with the DOC clause see Parsons, C (1993) 'Road to ruin' 154 19 *Post* 18 (Parsons, 1993). The clause has been considered in a number of cases *Williams v Baltic Insurance Association of London* 1924 2 KB 282 (*Williams v Baltic Insurance Association of London*, 1924); *Rogerson v Scottish Automobile and General Insurance Co Ltd* 1931 All ER 606 (*Rogerson v Scottish Automobile and General Insurance Co Ltd*, 1931); *Tattersall v Drysdale* 1935 2 KB 174; *Boss v Kingston* 1962 2 LlRep 431 DC (*Tattersall v Drysdale*, 1935).

30 It should be noted that the indemnity is only extended to the insured. Therefore if the insured's children are driving another vehicle the policy does not provide any cover. If additional cover is needed to cover the insured's children, this should be negotiated with the insurer.

31 PFV policy p22.

> The company undertakes to indemnify the insureds' employer with whom the insured is in permanent employment in respect of any accident occurring -
>
> (i) while the motor vehicle or motor car described in the proposal is being used by the insured or any other person
> (ii) while any other motor car or motor cycle referred to in the extension of section B is being driven by the insured.
>
> In the employment of the employer upon the business of the employer.

The contingent liability extension has its own limitations which need not be discussed for purposes of this study.

2.5 Section C: Medical expenses

The motor policy usually makes provision for payment of limited medical expenses in terms of section C of the policy. Typically the operative clause reads as follows:

> If an occupant anywhere inside the vehicle[32] in direct connection with such vehicle sustains bodily injury by violent, accidental, external and visible means, the company will pay to the insured the medical expenses incurred as a result of such injury up to the sum of R1 000 per injured occupant but not exceeding R20 000 in total for all occupants injured as a result of an occurrence or series of occurrences arising out of one event.[33]

The word occupant is broad enough to include the driver. If the word passenger is used there could be some doubt if the driver is included. The wording is similar to the wording of the personal accident policy, which includes cover for medical expenses. Payment is to the insured not the injured persons which is in line with the view that the contractual relationship is between the insurer and the insured. The insurer has a strong preference to deal exclusively with the insured, the other party to the contract, and not with third parties. The payment is not based on fault. The driver, even if at fault will still be entitled to the payment. Generally passengers are not at fault in a motor accident. The payment in above wording is for medical expense incurred up to R1 000, which makes it clear the payment is not a lump sum, payable as a consequence of injury, but for actual expenses incurred. This is indicative of indemnity insurance. A similar debate surrounds personal accident insurance; it is argued that it is non-indemnity insurance but the payment of medical expenses is indemnity insurance.

2.6 Deductibles

[32] The wording pertains to a private type motor car or motorised caravan.

[33] Multisure (Motor) 01/2007 pg 2 of 7.

Motor policies have numerous deductibles, that is, amounts deducted from any claim. These may vary from a deduction for age, to for the years of experience as a driver, and will not be discussed here.

2.7 Description of use

A motor vehicle can be used for a number of purposes, some of which are extremely hazardous, as in the case of motor car racing. The policy normally limits the use to which the vehicle can be put while under the protection of the insurance policy. The policy thus has a description of use clause and this is normally extended to include those times when the vehicle is in the care, custody and control of the motor trade for purposes of overall upkeep or repair. Where a private vehicle is used for company purposes, this should be declared. One of the most common reasons insurers repudiate claims is because the insured used the vehicle contrary to the declared description of use. Typically the term reads as follows:

> The insurer shall not be liable for any accident, loss, damage or liability whilst the vehicle is being used with the general knowledge and consent of the insured otherwise than in accordance with the description of use clause.

The limitation of use term was used by the insurer to repudiate the claim in *Samuelson v National Insurance and Guarantee Corp Ltd* 1986 3 All ER 417 CA (*Samuelson v National Insurance and Guarantee Corp Ltd*, 1986).

The matter arose in *Fedgen Insurance v Leyds* 1995 (3) SA 33 (*Fedgen Insurance Ltd v Leyds*, 1995) where the insured Leyds had lent is car to a 'friend' Steven Mohlala to use to go to a funeral in Harare. Leyds asked Mohlala to collect some samples for him from a friend while in Harare. His 'friend' did not return and in fact never went to Harare at all. He went to Swaziland and Maputo. Leyds reported the car as stolen and submitted a claim to the insurer Fedgen which repudiated the claim contending that at the time it was stolen it was being used for business purposes contrary to the provisions of the policy (at 37H-I). The policy was structured is such a manner that it was not clear that the description of use term applied to the accidents or all perils including theft. An interpretation of the policy in terms of the rules of interpretation led to the conclusion that it applied only to the peril of an accident and other perils such as theft. The court accordingly found in favour of the insured.

2.8 Specific exceptions

In addition to having specific exceptions to each of the sections of the policy, there are general exceptions which cover the whole policy.

2.8.1 Road Accident Fund (RAF) exclusion

The motor policy contains an RAF exclusion which excludes any liability that the RAF covers. The RAF scheme, is a scheme established by specific legislation and is funded from a levy imposed on fuel. Even if the motor policy does not specifically exclude such liability, in terms of the relevant RAF legislation the insured is not legally liable in those instances where the RAF is liable. This being so the insurer will not be liable to indemnify the insured in terms of the motor policy. The RAF is only liable arising out of personal injuries and for historical reasons a distinction between persons outside and those inside of the insured vehicle used to be of importance.

2.8.1.1 Persons outside of the insured vehicle

As a general rule, persons outside of the insured vehicle, who are injured by the negligence of the driver, owner or servant of the owner of the insured vehicle can claim compensation for their injuries from the RAF. The extent to the compensation provided by the RAF was until recently is not limited but is now limited. As matter now stand it is believed that if the liability of the insured exceeds that provided by the RAF, the injured party does not have a claim against the insured motorist.

2.8.1.2 Persons being conveyed in the insured vehicle

Historically motor policies did not cover liability claims from persons conveyed within the vehicle, especially family members. Presumably this exclusion existed because insurers regarded the moral hazard from these persons as being too great. When liability for third parties was transferred to the statutory scheme, now the RAF, this limitation was taken over and included into the RAF[34]. This then left the motorist exposed to an uninsured liability risk. Motor insurers responded by providing cover for persons being conveyed or on the insured vehicle. The need for this specific cover declined with the exclusion in the RAF was removed.

2.8.2 Territorial limitations

A motor vehicle is obviously mobile, and permits travel anywhere in the world. This may give rise to claims from any legal jurisdiction. However, most policies contain an exception which limits liability to the Republic of South Africa, Lesotho, Botswana, South West Africa, Malawi and Swaziland. If anyone wishes to move outside the Republic of South Africa, he would be wise to check his insurance cover carefully.

2.8.3 Miscellaneous

[34] As a general rule the claim by a person being conveyed in or on the insured vehicle against the RAF was limited to a maximum R25 000, a limit which did not change for decades. The claim was based on the fault of the driver, owner or servant of the owners of the insured vehicle. The motor policy could provide indemnification for any claim in excess of the amount. This limitation was subject to criticism and unsuccessful constitutional challenge. The exclusion however no longer exists.

The policy normally excludes claims for a number of miscellaneous reasons. It excludes claims if a motor vehicle is not being used in accordance with the description of use, hence the importance of a proper declaration. Claims which arise where the driver is not fully licensed to drive the vehicle in terms of the legislation applying to such territory within the territorial limits to which the policy applies are excluded. There is also no cover if the person is driving under the influence of intoxicating liquor or drugs.

Specific exceptions

The insurer shall not be liable for any accident, loss, damage or liability

whilst the vehicle is being used with the general knowledge and consent of the insured otherwise than in accordance with the description of use clause.

....

incurred while any vehicle is being driven by:

the insured while under the influence of intoxicating liquor or drugs (unless administered by or prescribed by and taken in accordance with the instructions of a member of the medical profession (other than himself) or while not licensed to drive such vehicle.

This term has been considered by the courts on a number of occasions. Generally problems arise with this term is applied to companies with the courts ending-up with an interpretation not supported by the words of the exception. Since a company, which the insured, does in fact not exist as a person it clearly cannot drive a motor vehicle. Taken literally the exception cannot apply to a company. In *Leicester Bros (Coal) Ltd v Avon Insurance Company Ltd* 1942 LLR 109 (*Leicester Bros (Coal) Ltd v Avon Insurance Company Ltd*, 1942) the court interpreted the phrase in a way not supported by the words themselves. The court decided that "driven by the insured" means "driven by or on behalf of the insured ... and I think it means being driven by or on behalf of the insured for purposes of their business ..." In other words if the vehicle is driven by an employee under the influence of alcohol or drugs the exception applies. In *Micro Mouldings (Pty) Ltd v American International Insurance Co Ltd* 1979 4 SA 771 C (*Micro Mouldings (Pty) Ltd v American International Insurance Co Ltd*, 1979) the insured was a company. The vehicle was being driven by the company's managing director who was under the influence of alcohol. In this state he was involved in the accident. The court however refused to accept this argument and held that "being driven by the insured" in the context of a company means "driven on behalf of a company".

In *Mutual and Federal Insurance Limited v Manuelle Gouveia* 2003 ZASCA 16 (*Mutual and Federal Insurance Limited v Manuelle Gouveia*, 2003) the vehicle was being driven by an unlicenced driver when it was hijacked. The insured, the plaintiff, lodged a claim with the insurer which repudiated the claim by virtue of the fact that the vehicle was being driven by an unlicenced driver when it was hijacked. The plaintiff argued that the insurer could only rely on the unlicenced driver exclusion if the loss was causally related [connected] to the loss. The court *a quo* ruled that because the hijacking had nothing to do with the lack of a valid driver's licence on the part of the driver, the exception clause was

inapplicable. The insurer took the decision on appeal which was overturned. The SCA applied the usual rule of interpretation that words must be given their ordinary meaning and if this is done it is not possible to read causation into the exception. The loss occurred whilst the vehicle was being driven by an unlicenced driver and hence the exception applied.

2.9 Endorsements

2.9.1 Balance of third party, fire and theft

The cover described above is referred to as comprehensive cover and provides cover against damage to the vehicle from most perils as well as against liability and medical expenses. It is possible to limit the extent of cover essentially to the perils of fire and theft, and to dispense with the medical cover. When this is done the policy is known as a balance of third party, fire and theft policy. This can be done by issuing a limited policy or simply by using a comprehensive policy and endorsing the policy to exclude some of the risks which are covered in terms of the comprehensive policy.

2.9.2 Miscellaneous endorsements

It is also possible to amend the scope of the cover by means of various other endorsements such as the loss or damage to contents of vehicles, trailers, caravans and so on. The wording of the specific endorsements must be studied if the full impact of the endorsement is to be understood.

2.10 Specific terms

Motor policies can also contain specific stipulations particularly stipulations which require the insured to advise the insurer of any criminal offenses pending against him relating to negligence, reckless or improper driving. These stipulations should be noted.

3 ALL RISKS

3.1 Introduction

Initially insurance companies insured defined property against defined perils. For example, a house was insured against fire. Both the asset and the peril were clearly defined. A more recent development is the introduction of a much broader form of policy known as the all risks policy and then the even broader assets all risks policy. This cover is considerably broader than the conventional specified perils policy, since it is intended to cover a wider spectrum of assets against as broad as possible a spectrum

of perils. This form of cover is extensively used in policies for individual persons, families[35] and businesses, especially covering high value assets which are not confined to one place. This includes items such as cameras and jewellery. Most of the major corporations arrange insurance in terms of an assets all risks package. Most major corporation would be unable to list all their assets so a conventional specified assets policy is impractical. When the insurance market hardens, there is a tendency to limit this form of cover (or as it is said to 'unbundle' the cover). All risks policies have been the subject of litigation in South Africa.[36]

3.2 General requirements of a contract

In *Ivory Kraal (Pvt) Ltd v Unity Insurance Co Ltd* 1985 4 SA 453 ZH (*Ivory Kraal (Pvt) Ltd v Unity Insurance Co Ltd*, 1985) the issue that a contract may not be against public policy was raised. The insured property which was stolen was in the possession of a salesman who was an illegal alien and in employing the salesman the insured also violated the taxation legislation. The court decided that the insurance contract was not illegal but was tainted with illegality and as such was unenforceable being an infringement of public policy.

3.3 Insurance law

The court also decided in *Ivory Kraal (Pvt) Ltd v Unity Insurance Co Ltd* 1985 4 SA 453 ZH the fact that the salesman was an illegal immigrant was a material fact which should have been disclosed.

3.4 General terms and conditions

The failure to take reasonable precautions (or similar) term has been considered on a number of occasions with respect to the All Risks Policy. In *Turdeich v National Employers' General Insurance Co Ltd* 1982 2 SA 219 C (*Turdeich v National Employers' General Insurance Co Ltd*, 1982) the insured took off her diamond rings while washing her hands and forgot them at the washbasin. When she realised this and returned a few moments later to retrieve them, they had disappeared resulting in the insurance claim. The insurer attempted to repudiate the claim on the basis did not take all reasonable steps to ensure the maintenance and safety of the insured property. The court concluded that the clause was not clear enough to exclude negligence and forgetfulness. In *Paterson v Aegis Insurance Co Ltd* 1989 3 SA 478 as previously noted the insurer tried unsuccessfully to avoid a claim by evoking the reasonable precautions term.

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35 NG Atkins Are you covered? p. 92.

36 *Turdeich v National Employers' General Insurance Co Ltd* 1982 2 SA 219 C (*Turdeich v National Employers' General Insurance Co Ltd*, 1982); *Paterson v Aegis Insurance Co. Ltd* 1989 3 SA 478 (*Paterson v Aegis Insurance Company Limited*, 1989); *Aris Enterprises (Finance)(Pty) v Protea Assurance Com Ltd* 1981 3 SA 274 A (*Aris Enterprises (Finance)(Pty) v Protea Assurance Com Ltd*, 1981); *Ivory Kraal (Pvt) Ltd v Unity Insurance Co Ltd* 1985 4 SA 453 ZH (*Ivory Kraal (Pvt) Ltd v Unity Insurance Co Ltd*, 1985).

In *Ivory Kraal (Pvt) Ltd v Unity Insurance Co Ltd* 1985 4 SA 453 ZH (*Ivory Kraal (Pvt) Ltd v Unity Insurance Co Ltd*, 1985) insurers raised a number of defences. The insured had left jewellery packed in suitcases on the backseat of an unlocked car, whereupon it was stolen. The insurer refused to pay alleging that the insured was grossly negligent and had breached the specific locked car term in the policy. The court agreed with the insurer and the insured's claim was dismissed.

3.5 The operative clause

Typically the operative clause of the business all risk policy reads as follows:

> Loss of or damage to the whole or part of the property described in the schedule while anywhere in the world by any accident or misfortune not otherwise excluded.[37]

From the operative clause it is clear that the cover is exceptionally broad, extending to any place in the world, *by any accident or misfortune not otherwise excluded*. The words in italics are innovative in that specific perils are not mentioned. And so the policy does not cover specified property from specified perils, while perils not included must be specifically mentioned. When an individual purchases an all risk policy the classes of assets to be protected are fairly well defined. These normally include items such as personal effects (which include wearing apparel, jewellery, pocket-sized calculator, electric razors, portable radios, tape recorders and so on). Other property which can be included in the All Risks section would be property not insured in terms of personal effects and should the value of the property exceed a specified amount, usually R2 000, documentary description would be required of the asset including a certificate of value. Car radios, contact lenses, automatic swimming pool cleaners and pedal cycles are normally included in this cover.

An all risks policy does not mean a no risks policy. This was explained as follows in *British and Foreign Marine Insurance Co Ltd v Gaunt* 1921 2 AC 46 HL at 57 (*British and Foreign Marine Insurance Co Ltd v Gaunt*, 1921):

> There are, of course, limits as to 'all risks'. There are risks and risks insured against. Accordingly, the expression does not cover inherent vice or mere wear and tear ... It covers a risk, not a certainty; it is something which happens to the subject-matter from without, not the normal behaviour of the subject-matter, being what it is in the circumstances in which it is carried. Nor is it a loss which the insured brings about by his own act, for then he has not merely exposed the goods to the chance of injury, he has injured them himself.

An example of that which is not covered by the notion of all risks is inherent vice. This notion was considered in *Blackshaws (Pty) Ltd v Constantia Insurance Co Ltd* 1983 1 SA 120 A (*Blackshaws (Pty) Ltd v Constantia Insurance Co Ltd*, 1983). This case involved a marine policy. Machinery was damaged on the marine voyage. It turned out that the machinery was not adequately packed for the

[37] MultiMark III wording.

voyage and due to the normal movement of the ship the machinery was damaged. The court concluded that the damage was caused by the inadequate packing and as such this constituted an 'inherent vice'.

The broad scope of the all risks operative clause can be limited by the contract itself. In *Aris Enterprises (Finance)(Pty) v Protea Assurance Company Ltd* 1981 3 SA 274 A (*Aris Enterprises (Finance)(Pty) v Protea Assurance Com Ltd*, 1981), a finance house provided finance for catering equipment which was leased out to various restaurants. The insurer issued an endorsement which excluded theft i.e. 'abscondment by lessees and or their employees.' On a claim for theft the court ruled that the endorsement was sufficiently clear to exclude theft.

3.6 Exceptions

Generally the exceptions to an all risk policy include the following:

> Company shall not be liable for:
> (1) Loss or damage resulting from or caused by
> (a) theft from any unattended vehicle in the custody or control of the insured unless the property is contained in a completely closed and securely locked vehicle or the vehicle itself is housed in a securely locked building and entry to or exit from such locked building is accompanied by forcible and violent entry or exit;[38]
> (b) its undergoing a process of cleaning, repair, dyeing, bleaching, alteration or restoration;
> (c) inherent vice or defect, vermin, insects, damp, mildew or rust;
> (d) the dishonesty of any principal, partner, director or any employee of the insured whether acting alone or in collusion with others;
> (e) detention, confiscation or requisition by customs or other officials or authorities;
> (2) wear and tear or gradual deterioration (including the gradual action of light or climatic or atmospheric conditions) unless following an accident or misfortune not otherwise excluded;
> (3) mechanical, electronic or electrical breakdown, failure, breakage or derangement unless caused by an accident or misfortune not otherwise excluded;
> (4) loss of or damage to cash, bank and currency notes, coins, bonds, coupons, stamps, negotiable instruments, title deeds, manuscripts, or securities of any kind;
> (5) loss or damage to goods consigned under a bill of lading[39].

4 FIRE AND NATURAL PERILS POLICY

[38] For a discussion and application of this kind of term in the exception clause see *Ivory Kraal (Pvt) Ltd v Unity Insurance Co Ltd* 1985 4 SA 453 ZH (*Ivory Kraal (Pvt) Ltd v Unity Insurance Co Ltd*, 1985).

[39] MultiMark III wording.

4.1 Introduction

Probably the single largest peril threatening assets is the peril of fire. Although it could be argued that earthquake constitutes a greater risk, the frequency of earthquakes in South Africa is very low, while that of fire, is high. Protection against fire and specified perils is defined in terms of the fire policy. A study of the fire policy will reveal the difference between the assets all risk and the fire policy. Generally, the fire policy insures against specified perils, whereas an asset all risks policy does not specify the perils concerned.

4.2 The operative clause

4.2.1 Typical wording

Typically the operative clause of a fire policy reads:

> Damage to the whole or part of the property described in the schedule owned by the insured or for which they are responsible by -
>
> (1) Fire whether resulting from an explosion or otherwise
> (2) lightning or thunderbolt
> (3) explosion of gas used for domestic purposes or for heating or lighting any building
> (4) such additional perils as are stated in the schedule to be included.[40]

From this it will be seen that the property insured is normally defined in a schedule and is not confined to property owned by the insured but could also be property for which the insured is responsible. Thus in the case of a company that has goods on consignment, these can be covered against fire perils in terms of this type of policy.

4.2.2 The meaning of fire

In order to know what is covered, one should have a clear understanding of the meaning of fire which appears in the operative clause. There is no fire within the meaning of a fire policy unless there is ignition either of the property insured or of the premises where it is situated. Damage caused by heat or fermentation unaccompanied by ignition is not covered.[41] The cause of the fire is generally irrelevant. The fact that the insured's negligence caused the fire would not exempt the insurer from liability. Similarly, the insured may recover in terms of the policy where the fire is caused by the wilful act of a third party without the insured's knowledge or consent. However, the insured will not be able to recover where the loss is caused by his own wilful act or that of someone acting with his knowledge or consent. Nor will he be able to recover where the fire is caused by an excepted peril. Where an

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40 PFV multidek policy.

41 Getz *et al* (1983,406), notes that American law distinguishes between friendly and hostile fires, but is unlikely that this distinction will be recognised in South Africa.

insurance company which has insured a house against fire avers that the insured deliberately set the house on fire, the onus is on the insurer to prove that the insured committed the arson.

It is not necessary that the insured property actually be burnt by fire, although fire must have been the proximate cause of the damage. Therefore damage caused by water which was used to extinguish the fire or to prevent it from spreading will be covered and so will damage by explosion caused by a fire. Impact damage caused by roofs and heavy beams or girders which fall either as a result of a fire or efforts made to extinguish it will also be covered.[42] Loss due to theft which occurs during a fire as well as expenses incurred in the reasonable removable of the insured property in order to save it from the fire will be covered.

In *Stanley v Western Insurance Company* (1868) LR 3 EXCH 71 (*Stanley v Western Insurance Company*, 1868). Kelly CB said:

> Any loss resulting from an apparently necessary and *bona fide* effort to put out a fire whether it be by spoiling the goods by water, or throwing the articles or furniture out of the window or even the destroying of a neighbouring house by explosion for the purpose of checking the progress of the flames, in a word every loss that clearly and proximately results, whether directly or indirectly from the fire, is within the policy.[43]

However, consequential losses such as loss of profits due to the destruction of the assets are, not covered by the fire policy, as it is essentially an assets policy. These consequential losses can be covered in terms of the consequential loss or business interruption policy.

4.3 Specific exceptions

It will be seen that the perils described in the operative clause are very narrow indeed. being fire whether that fire be caused by an explosion or not lightning and so on. The cover is restrictive and the exceptions limit it even further. The earthquakes and volcanic eruptions are excluded as is damage by explosion or damage to property undergoing any heating or drying process.

4.4 Specific extensions - additional perils

It is possible to extend the fire policy to cover what is known as the additional perils by means of extensions. By using the extensions the policy takes on the form of a general assets policy.

The following perils can be insured or included in the insurance cover by way of extensions:

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42 Getz *et al* (1983,407).

43 P. 74; Getz *et al*., p. 408.

- **Damage caused by explosion:** from the operative clause it can be seen that if a fire results as a consequence of an explosion, damage caused by the fire is covered but not damage simply resulting from an explosion by itself. It is possible to extend the policy to cover explosion damage.

- **Earthquake and earth tremor extension:** earthquake damage clearly does not fall within the operative clause. Policies normally contain an earthquake and earth tremor extension which reads:

  > Damage caused by earthquake excluding, damage arising directly or indirectly from any mining operations but including the act of any lawfully established authority in minimising damage by earthquake or in any other way dealing with the earthquake.

- **Special perils extension:** the special perils extension include perils such as storm, wind, water, hail or snow. Damage caused by aircraft, other aerial devices or articles dropped from an aircraft can also be covered but damage caused by sonic shock waves is excluded.

Impact damage can be covered. Any damage caused by impact by animals or vehicles excluding damage to such vehicles or property in or on such vehicles, can be covered by the impact extension. Thus if an owner accidentally crashes his car into the wall of his house damage to the wall is covered but not damage to the car. Damage to the car is covered by the motor policy.

- **Sprinkler extension:** closely allied to damage by fire, is damage caused by water as a consequence of a leaking sprinkler system. Sprinkler systems are installed with a view to preventing damage resulting from fire but quite often they tend to go off, resulting in water damage, without cause. It is possible to insure against such water damage by means of the sprinkler leakage extension.

- **Subsidence and landslip extension:** damage caused by subsidence and landslip can be covered by way of an extension.

4.5 Miscellaneous clauses

Fire policies normally contain a number of miscellaneous clauses such as the rent clause and architects' and other professional fees clause. The architects' clause covers additional costs which may be incurred by way of professional fees necessary for the reinstatement or replacement of the insured property following damage.

If a building is burnt down it may not be desirable to reinstate it exactly as it was before it was damaged, but rather to make improvements to the building. A capital additions clause, normally limited to 15% of the sum insured, is often included in insurance policies.

Costs of demolition and clearing and erection and hoarding clause: Obviously if a building has burnt down substantial costs could be incurred in demolition and clearing of the building and erecting hoardings around the premises while a new building is being built. Provision exists for this by way of the hoarding clause.

- **Fire brigade charges clause:** if a fire occurs the fire department will be summoned to fight the fire. The fire department will charge for services rendered and accordingly provision exists in terms of one of the miscellaneous clauses to cover these costs.

- **Municipal plans and scrutiny fee clause:** a new building may require that additional municipal plans be drawn up and passed before the building can be reinstated. Provision exists for covering these costs.

- **Public authorities requirements clause:** buildings erected many years ago no longer comply with the new building or municipal regulations and requirements. Since new laws have no retroactive application, owners of the buildings are not required to upgrade the buildings while these building are intact. If such a building burns down and has to be rebuilt, however, the local authority may insist that the additional requirements be implemented.

For example, in terms of the new national building regulations, sprinkler protection may be required for any new building. Whereas with the old building, authorities could not enforce such a requirement, they can do so when the building is being rebuilt and may insist on sprinkler protection being installed. The costs involved could easily be in the region of R250 000.

Special provision is made in terms of one of the miscellaneous clauses in a fire policy to recover some costs which may be incurred to meet the local authority requirements.

5 MACHINERY BREAKDOWN

5.1 Introduction

Should a machine break down the repair cost could be substantial and insurance, in the form of machinery breakdown insurance can be arranged to cover this eventuality.[44]

The creation of profits are often dependent upon machinery and should the machine break down and production cease, loss of profits may result. In order to arrange business interruption cover, it is

[44] Generally the insurance industry regards machinery breakdown and other engineering risks as good risks; Post 3 (Aug. 89) p. 21.

necessary to have the underlying machinery breakdown policy. The machinery breakdown policy is thus important to anyone involved with industrial or manufacturing plants.

Traditionally, separate policies were issued for different types of plant but the more recent tendency is towards a single policy covering all categories of plant.[45] The traditional policy had three sections:

I Damage in one form or another to the insured plant itself.
II Damage to the insured's surrounding property.
III Third party liability.

Sections II and III cover risks which can normally be catered for in terms of a general assets policy and public and employer's liability policies. These sections need not be considered any further.

5.2 The operative clause

Typically an operative clause of a damage section will read:

> This insurance is in respect of unforeseen and sudden physical damage to the insured property from any cause.

The important words in this clause are unforeseen and sudden physical damage. Despite the length of time that this policy has been in operation, worldwide, there are very few reported court cases to assist in interpreting the policy. For a long time, the industry has been guided by legal opinions, the most important of which was written by George W Cooke (1967). The opinion dealt with the question of whether or not cracks which were discovered in the spokes of a large gear-wheel fell within the ambit of the policy. Since the cracks had been discovered before any breakdown took place Cooke concluded, 'Applying the above considerations, the development of the cracks ... does not constitute an accident as defined.' What happened if the cracks were not detected and then the wheel collapsed? Cooke continued, 'If, of course, the crack had been undetected, and had developed so far that the gear-wheel broke apart, the actual breaking apart would in our opinion have constituted and internal accident, the crack having been undetected, the breaking apart would have been an unforeseen contingency.'

The issue of 'unforeseen and sudden' was considered in *African Products (Pty) Ltd v AIG South Africa Ltd* 2009 (3) SA 473 SCA (*African Products (Pty) Ltd v AIG South Africa Ltd*, 2009) where production at a maize mill was interrupted due to electrical failure. The mill was commissioned in 1998. At 04:50 on the 11 September 2002 there was a power outage when a circuit breaker tripped. It was discovered that the cables which had been buried, as is normally the case, and thus not at all visible, were too close to each other and the heat generated by the cables could not be sufficiently dissipated. An inspection of the cables revealed that the PVC insulation had deteriorated because of the heat and were unusable and had to be decommissioned, resulting in an interruption of the plant. The plant was out of

[45] Insurance Handbook, pp. 6.3-05.

commission from the 19th September to 15th October 2002 while the cables were replaced. The insured claimed for business interruption arising out of the machinery breakdown.

The insurer would be liable if it could be shown that there was 'unforeseen and sudden physical damage' to machinery. The first issue was, is electrical cables machinery? The insurer argued that cables do not constitute machinery. The court decided otherwise, 'I am prepared to accept, without deciding, that the electrical cables fall under all plant and machinery.' The next question then was, was the requirement of unforeseen and sudden physical damage met? The court ruled:

> As I have attempted to demonstrate above, there is no ambiguity when 'sudden' is given a meaning with a temporal element such as 'abrupt' or 'taking place all at once'. Nor do I agree that physical damage must have been sudden from the perspective of only the insured. An objective perspective seems to me to be in accordance with sound commercial principles and good business sense. I say this because if the unforeseen physical damage occurs suddenly, viewed objectively, the insurer will become liable. If, on the other hand, it is not sudden from an objective perspective no liability will attach. It would otherwise be difficult, if not impossible, to dislodge an assertion by a claimant that, viewed subjectively, physical damage was sudden even though such damage may be shown to have been gradual and to have occurred over a long period. In my view, this could never have been the intention of the parties.

It is not clear that this view is altogether correct. And ruled the damage was not sudden and accidental.

The machinery breakdown policy was considered in Australia in *Vee H Aviation Pty Ltd v Australian Aviation Underwriting Pool Proprietary Limited* 1996 ACTSC 123[46] (*Vee H Aviation Pty Ltd v Australian Aviation Underwriting Pool Proprietary Limited*, 1996). An aircraft turbine engine was taken out of service for routine service at which point damage to various parts of the engine was discovered. The insured submitted a claim against its machinery breakdown insurer which was repudiated. Looking at all the facts, the court concluded that "I am unable to see that in any meaningful sense of the word it can be called 'sudden'".

5.3 Exceptions

The machinery breakdown policy contains a number of exceptions.

5.3.1 Fire and natural perils

Normally the perils at the insured's premises insured in terms of a fire policy are excluded from the machinery breakdown policy. Thus if a fire occurs at the insured's factory damaging the machinery which is insured in terms of a machinery breakdown policy, the fire damage should be recovered from terms of the fire policy[47] and not the machinery breakdown policy.

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46 See another Australian case, *Sun Alliance & London Insurance Group and others v North West Iron Co Ltd* 1974 2 NSWLR 625 (*Sun Alliance & London Insurance Group and others v North West Iron Co Ltd*, 1974).

47 Insurance handbook, pp. 6.3-13.

5.3.2 Deliberate overloading

Any damage which is caused by the deliberate overloading, the imposition of abnormal conditions or hydraulic testing is normally excluded.

5.3.3 Wear and tear

Damage arising out of wear and tear and gradual deterioration of machinery is not covered. This is regarded as a normal maintenance cost.

5.3.4 Expendable parts

The costs of replacing expendable parts, exchangeable or detachable tools such as blades, dyes, patterns, rollers, slings, chains, belts, ropes, conveyor bands, etc., are also not normally covered by the machinery policy. These are not regarded as insurable costs.

5.3.5 Consequential losses

Consequential losses, such as the loss of profits, are not generally covered in terms of an asset policy but can be covered in terms of an extension to the machinery breakdown policy or by a separate business interruption policy.

6 CONSEQUENTIAL LOSS INSURANCE

6.1 Property policies do not include consequential losses

Whilst consequential loss insurance, also known as Loss of Profits Insurance and lately Business Interruption Insurance is a relatively recent development in the insurance industry, it established itself as practically indispensable in most insurance portfolios.

The economy developed into a capital-intensive tool and the investor whether in the manufacturing industry or satisfying consumer demands in a retail store requires a return on his investment. Such investment is always exposed to detrimental risks such as fire, whilst the return (yield) needs to be protected by means of a consequential loss insurance policy.

Consequential loss insurance has been available, including in South Africa, for well over a century.[48] It is essential since there is, quite correctly, a presumption that insurance of property *prima facie* covers that property in respect of the loss attributable only to its own value. In other words, consequential losses are not recoverable unless separately insured.[49] Similarly property insurance is presumed not to cover legal liability claims. This too must be separately insured. While the normal property policy may not cover consequential loss, the need for such cover was realised years ago. In the previous century a number of attempts were made to claim consequential losses under the ordinary property policy, but these did not succeed.

Thus in In re Wright and Pole (1834) 1 Ad & El 621[50] (*In re Wright and Pole*, 1834) an insured's inn was destroyed by fire. The insured tried to recover 'loss of custom' (loss of income) in terms of a fire policy as well as cost rental of other premises, which he was forced to incur as a result of the damage to his inn. He did not succeed. The court held the 'fabric of the building' was covered but the policy did not include loss resulting from patrons going elsewhere or the increased cost of renting other premises while rebuilding was in progress.

In a Scottish case, *Menzies v North British and Mercantile Insurance Co Ltd* (1847) 9 Dunl 694[51] (*Menzies v North British and Mercantile Insurance Co Ltd*, 1847), Menzies, a manufacturer, claimed under his fire policy for wages he had to pay during the interruption period as well as the loss of profits he suffered because of his inability to use the buildings after fire damage. The insured's claim failed.

In an American case, *Niblo v North American Fire Insurance Co* 1848 1 Sandf NY 551[52] (*Niblo v North American Fire Insurance Co*, 1848), a similar conclusion was reached as the judge followed the United Kingdom precedents. In *Theobald v Railway Passengers' Assurance Company* (1854) 10 Exch 45 (*Theobald v Railway Passengers' Assurance Company*, 1854) it was held that loss of business profits are not recoverable under an accident policy.

In all these early cases attempts were made to recover consequential losses or liability costs under an ordinary property policy. In each case the claim failed. There is however a need for consequential loss and liability insurance. Consequential losses are insured by means of a variety of separate consequential loss insurance policies as are legal liability claims.

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48 H (1925) *February African Insurance Record* 14; EB Ferguson (1928) *African Insurance Record* 331-337. For a comprehensive analysis of this type of cover see WB Honour & GJR Hickmott (1970) *Principles and Practice of Interruption Insurance* 4ed London; Butterworths (Honour & Hickmott, 1970); David Cloughton (1985) Riley on Business Interruption and Consequential Loss Insurance and Claims 6ed Sweet & Maxwell; DS Stewart (1980) *Introduction to Profits Insurance* Hollandia (Stewart, 1980); E Gamlen & J Phillips (1992) *Business Interruption Insurance: Theory and Principles* London; Buckley Press Ltd (Gamlen & Phillips, 1992).

49 Birds (1988:182).

50 Honour and Hickmott (1970: 4)

51 Houour and Hickmott (1970:4); Ivamy (1986: 26&351).

52 Honour and Hickmott (1970:4)

6.2 Liability claims not covered by property policies

Further where a shipowner was held liable to pay damages it was held that the marine policy[53] did not cover legal liabilities as a peril of the sea[54] and accordingly a separate policy, the liability policy, or liability section in the property policy was required to cover liability risks.

6.3 Early attempts to provide consequential loss insurance

When any property which is used for production purposes is damaged, production is interrupted and the possibility of a loss of profits arises. As noted however, while ordinary asset or property insurance policies such as the fire and machinery breakdown policies may cover the costs required to indemnify the insured against the damage of the assets, these policies do not cover the consequential losses such as loss of profits. A separate policy is required to cover these consequential losses.

The first attempt, in England, to insure loss of profits caused by fire was made in 1797 by a company called Minerva Universal[55]. In 1821 the Beacon Fire Insurance offered to pay tradesmen a weekly allowance during the period they were deprived by fire of the means of pursuing their vocation.[56] In 1853 the General Indemnity Insurance Company, in 1871 the Trade Profit and in 1875 the Crown Fire all offered various forms of consequential loss insurance. None of these were successful. The first workable scheme in the United Kingdom was due to the efforts of a London broker, Mr Ludovic MacLellan Mann (1869-1955) in 1899[57] when he designed a workable set of principles to be applied to for this class of insurance. The fundamental principles remain unchanged to this day.

Consequential loss insurance has been available in South Africa for some time. The consequential loss policy is known by various other names[58], including, business interruption policy (BI), a loss of profits policy, advanced profits policy in the case of construction insurance, and so forth. These all have the same purpose, namely to indemnify against the consequential losses arising out of damage to property from an insured peril. This is an important point, since the cover provided by the usual consequential loss policy does not extend to cover all possible form of business interruption[59]. If the distinction is not borne in mind, the insured may be lulled into a false sense of security.

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53 A limited liability cover is provided in terms of the 'Running Down Clause'.

54 *De Vaux v Salvador* 1836 4 Ad & El 420 (*De Vaux v Salvador*, 1836). In order to provide this cover, a liability policy is required. The P & I clubs provide this cover.

55 Macken (1952,2)

56 Macken (1952,2)

57 Surveyor 'The formula for measuring Loss of profits Insurance' *South African Insurance Magazine* 14 (Surveyor, n.d.)

58 NG Atkins (1981) 'Determining the correct sum to be insured - Loss of profits insurance' 1981 11 BML 69 (Atkins, 1981) and NG Atkins (1982) 'How to establish the correct premium - Loss of profits insurance II' 1982 11 BML 116 (Atkins, 1982).

59 For example interruption losses could arise from labour disputes but since in this event property is not damaged, the interruption or consequential losses will not be covered.

The scope of cover of this type of policy is stated by Atkins as:[60]

> "By whatever name it is known (and for the present purpose it will be called 'profit insurance'), its basic function is to pay for the financial loss that may be sustained by a business undertaking should its operations be interrupted or interfered with as a result of 'insured damage' to the physical assets of the
> undertaking occurring. Usually, the insured damage is that which would be covered by a 'fire and allied perils' policy, but there are other forms of policy such as 'engineering' and 'marine' policies, to which profits insurance, in one form of another may be related."

It should be noted:

- The consequential loss insurance is known by a variety of names.
- Consequential loss insurance generally requires a related underlying asset policy such as a fire or engineering policy.
- The consequential loss insurance should preferably be placed with the underlying asset insurer.
- Consequential loss insurance is a sophisticated and complex form of insurance.
- In order to determine the loss, a detailed knowledge of accounting principles and practices is required. It is for this reason that many find this policy difficult to understand.
- Unlike the exposure faced from damage to assets, the consequential loss exposure cannot be determined from a mere physical inspection of a business operation. These losses are time and profit related and hence are abstract in nature.
- The consequential loss insurance policy is the only policy wording which stipulate exactly how your claim will be settled.

6.4 Different forms of consequential loss policies

There is no single policy which can cover all forms of consequential loss as a variety of losses can arise covering different circumstances. For example, if the insured is a professional person such as a dentist, consequential losses could arise if he were injured or became ill and was accordingly unable to see clients. In this case, the consequential losses would attach to the risk of an injury to the dentist. On the other hand, if the insured is a large industrial company and an explosion occurs, consequential losses may arise and the underlying policy is the fire and explosion policy. The cause of the consequential loss need not be a loss of income, but could be an increase in the cost of working. Because policy wordings differ, when dealing with a claim, it is important that the actual policy itself be examined.

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[60] NG Atkins (1981) 'Determining the correct sum to be insured - Loss of profits insurance' 1981 11 BML 69 (Atkins, 1981) and Atkins, NG (1982) 'How to establish the correct premium - Loss of profits insurance II' 1982 11 BML 116 (Atkins, 1982).

Notwithstanding this limitation, the operative clause found in some of the more common types[61] of policies will be examined.

The wording has been adapted to cater for:

Loss of Gross Profit
Loss of Gross revenue
Loss of gross rental.

Many a development require large capital investments and lenders moneys. To protect future proceeds the developers will most likely arrange Advanced loss of Profits insurance following the underlying Contract Works Policy.

6.5 Basic principles

6.5.1 Basic equations

All the implied insurance conditions and basic principles of insurance of which ”indemnity” is most probably the most important, also applies to consequential loss insurance.

The business of the insured is the subject matter of the insurance, and a clear appreciation of the elements of business is, therefore essential to the study of loss of profits insurance.

The doctrine of proximate cause. It is important to realise that the doctrine applies to loss of profits insurance in a similar way it applies to the material damage policy. The policy contains a material damage proviso which normally reads as follows:

“provided that at the time of the happening of the damage there shall be in force an insurance covering the interest of the insured in the property at the premises against such damage and that payment shall have been made or liability admitted therefor under such insurance.”

This condition is fundamental to the whole contract.

Consequential losses can be understood in terms of the fundamental equation which governs the financial representation of the activities of entities, represented by the so-called breakeven graph shown in Figure 1:

Turnover = (Standing charges (SC) + Profit before tax (PbT)) + Variable charges (VC) ... (E1)

If Profit before tax + standing charges is defined to be Gross Profit then:

[61] In October 1989, the Association of British Insurers (AIB) published the recommended Business Interruption wordings. A further amendment was published in March 1991.

i.e. Gross Profit (GP) = Profit before tax (PbT) + Standing charges (SC) .... (E2)

This is known as the additions method used to arrive at the insured Gross Profit.

Turnover (T) = Gross Profit (GP) + Variable charges (VC) .... (E3)

from which:
GP = T - VC .... (E4)

This is known as the differences method used to arrive at the insured gross profit.

If damage to income producing assets occurs the variable charges, which by definition are related to the turnover will not be incurred or decline in line with the reduction in turnover. Since there is no production the profit before tax would be zero or decline in line with the reduction in turn over. If the insurance company paid an amount equal to the gross profit the insured or an amount in line with this, the insured would be indemnified.

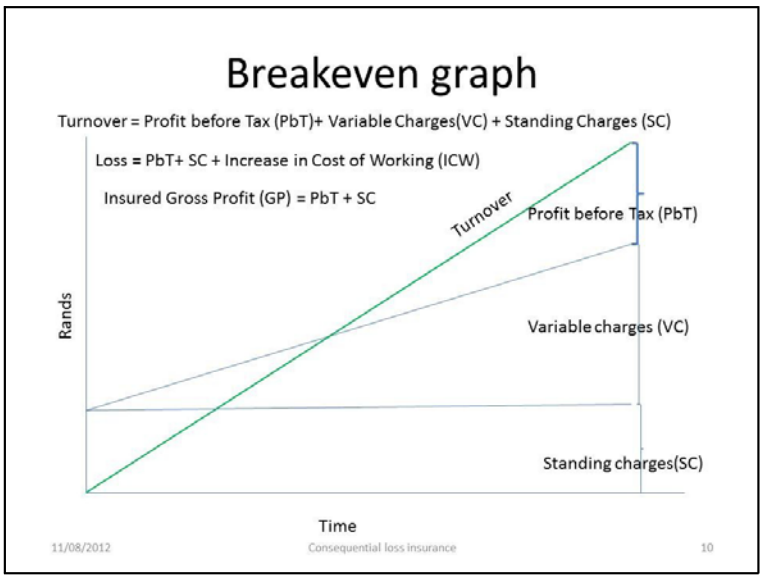

Figure 1: Breakeven graph

6.5.2 Increase in cost of working

A reduction in profits can occur even if there is no reduction in turnover. This occurs where there is an increase in expenses as a result of the damage to assets. For example, the output from a factory which is damaged by fire could be reduced. The insured may however be able to maintain sales levels (and hence turnover) by working overtime at other production facilities in the company and transport the finished goods to the distribution centres. This would result in an increase in the cost of working. In this case increased costs are incurred. Loss of profits can result from increases in various items of

expenditure event if turnover is not reduced. Another insured item is thus increase in cost of working to maintain turnover.

The limitation applicable to increase in cost of working can be expressed as the cost not to exceed the limit of what would have been payable as gross profit from the reduction in turnover if such increased cost had not been incurred. (You can only spend up to R1 to save R1).

6.5.3 Fixed or standing charges and variable charges

Thus to apply the above equations all expenditure can be divided into two categories, standing or variable charges. In the event of a loss, there is a saving in the form of variable charges. This saving has to be taken into account. Generally profits are decreased due to a combination of a decrease in turnover and an increase in expenditure. It is thus common practice to insure the reduction in turnover as well as an increase in of working costs.

6.5.4 What is insured?

In order to be indemnified, that is placed in the same position had the loss not occurred, the insured must receive income from the insurer to place it in the same position had the loss not occurred. The items which are at risk are those usually paid out of turnover.

- Gross profit
    - The profit before tax plus
    - The standing charges
- Increase in cost of working

Variable charges are not insured since these are reduced in proportion to the reduction of turnover. It is clear that Gross profit can be determined in two different ways. Since Gross profit = standing charges + profit before tax, it can be determined by identifying all the standing charges and adding these together. This is known as the additions method. This was the initial manner in which Gross profit was determine from 1899 to 1939. Gross profit also equals Turnover - variable charges, or subtract from turnover the uninsured costs and one is obviously left with the insured amounts. This is the difference method, adopted in 1939. Both forms of wordings are still used in South Africa.

6.6 Early policies

From the 1860s onwards to the early 1980s the United Kingdom insurance was influenced by industry committees, in particular the Fire Office Committee (FOC) which managed the tariff. These committees adopted policy wordings which became mandatory for insurance companies which were parties to the tariff and were usually copied by non-tariff companies. The committee controlled the wording of consequential loss policies. As a result, policy wordings are fairly standard. In 1985 after the end of the tariff system the British Insurance Association (BIA) produced recommended wording and so the degree of standardisation continues to the present.

6.7 Current market policy - Multimark working

6.7.1 Operative clause

The policy wording of a consequential loss policy is complex.[62] Typically[63] the cover which the policy provides is stated as follows:

> This insurance is limited to loss of [insured] gross profit due to -
>
> (a) reduction in turnover
> (b) increase in cost of working
>
> and the amount payable as indemnity[64] thereunder shall be -
>
> (a) in respect of reduction in turnover the sum produced by applying the rate of gross profit to the amount by which the turnover during the indemnity period shall in consequence of the damage fall short of the standard turnover;
> (b) in respect to the increase in cost of working the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in turnover which, but for the expenditure would have taken place during the indemnity period in consequence of the damage but not exceeding the sum produced by applying the rate of gross profit to the amount of reduction thereby avoided
>
> less any sum saved during the indemnity period in respect of such charges[65] and expenses as may cease or be reduced in consequence of the damage provided that if the amount payable[66] be less

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62 Most other types of policy do not define the manner in which the loss is to be determined by rely on the concept of indemnity (Riley (1967) Consequential loss insurance claims 3ed Sweet & Maxwell).

63 In South Africa the typical wording is used in the Multimark multi-peril policy.

64 The policy indicates that it is an indemnity policy however the issue is more complex than that of assuming a claim can be settled merely by applying the principles of indemnity. See for example *City Tailors Ltd v Montague Evans* LLR 7 195-6 KBD (*City Tailors Ltd v Montague Evans*, 1921) and on appeal LLR 9 (1921) 394-99 CA, 1921 All ER 339 CA; Re: *Henry Booth & Sons and Commercial Union* LLR 14 (1923) discussed infra.

65 Referred to as standing charges in some policies.

66 Referred to as the sum insured in some policies.

> that the sum produced by applying the rate of gross profit to the annual turnover where the maximum indemnity period is 12 months or less or the appropriate multiple of the annual turnover where the maximum indemnity period exceeds 12 months.

Much of the consequential loss wording is devoted to defining the various terms found in the operative clause but the indemnity is determined by multiplying the rate of gross profit to the so- called shortage of income plus the increase in the cost of working.

6.7.2 Damage covered by the underlying policy

As was pointed out earlier, generally a consequential loss policy responds if there is an asset loss covered by another asset policy. This could be a fire policy, machinery breakdown policy etc. So loss must follow an interruption or interference with the business in consequence of damage occurring during the period of insurance at the premises in respect of which payment has been made or admitted under some other policy such as a fire or office contents or general assets all risks policy.

6.7.3 [Insured] Gross profit

It is the loss of gross profit which is insured. Gross profit as defined in the policy but does not have the same meaning as used by accountants. Gross profit is normally defined in the insurance policy in one of two ways chosen according to the type of policy that best suits the insured's needs:

- The addition basis[67]
- The difference basis

Whichever of these two methods is used, the resultant figure will be the same. The difference basis is the more recently introduced method and more widely used because it is simpler to apply. It does however not meet the requirements of every insured's business and accordingly the addition basis is still in use.[68]

Gross profit is defined on the addition basis:

> The sum produced by adding to the net profit [profit before tax] the amount of standing charges or if there be no net profit the amount of all the standing charges less any trading loss.

and on a difference basis as follow:

> (i) the amount by which the sum of turnover and the closing stock shall exceed the sum of the opening stock and the uninsured costs.

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67 The addition basis was the standard basis from 1939 when it was introduced until 1960 when the difference basis was introduced. Riley (1967; par28)

68 Atkins (1981: 69).

6.7.4 Net Profit [profit before tax]

Gross profit includes profit before tax or net profit as defined in the policy as follows:

> The net trading profit (exclusive of all capital receipts accretions and all outlay properly chargeable to capital) resulting from the business of the insured at the premises after due provision has been made for all standing and other charges including depreciation but before the deduction of any taxation chargeable on profits.

6.7.5 Turnover

It will be seen from the operative clause that which is insured is the loss of gross profit, inter alia due to reduction of turnover and hence turnover is also defined, usually as follows:

> The money paid or payable to the insured for goods sold and delivered and for services rendered in the course of business at the premises.

Turnover is thus the amount paid during a specific period, namely the indemnity period, and thus indemnity period is also be defined.

6.7.6 Indemnity period

The indemnity period is defined as follows:

> The period beginning with the commencement of the Damage and ending not later than the number of months thereafter stated in the schedule during which the results of the business shall be affected in consequence of the Damage.

The indemnity period does not cease when the material damage has been reinstated, but only when the insured obtained his pre-loss turnover or the end of his indemnity period, whichever comes first. It is very important to ensure that the indemnity period is sufficient not only to cater for the reconstruction of the facilities, but also to obtain its standard turnover.

There have been a number of American cases involving the period of interruption.[69] Firstly, often after an event, the insured decides not to rebuild the property. The insured has on the other hand paid for the cover, and the policy is a value policy. In *Beautytuft Inc v Factory Insurance Association* 431 F.2d 1122 (6th Circuit) (1970) (*Beautytuft Inc v Factory Insurance Association*, 1970) the court ruled if the building is not rebuilt the insured is still entitled to payment based on the theoretical BI period. In *Anchor Toy Corporation v American Eagle Insurance Company* 155 NYS 2d 600 NY Supreme Court 1956 (*Anchor Toy Corporation v American Eagle Insurance Company*, 1956), the court ruled the theoretical BI period included estimates of delays in re-building.[70] In *BA Properties Inc v Aetna*

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69 These are discussed by Gary Thompson (2006) Adjusting Today

70 See also *Dileo v US Fiduciary & Guarantee Co* 248 NE 2d 669 (1969) (*Dileo v US Fiduciary & Guarantee Co*, 1969).

Casualty 273 F.Supp.2d 673 2003 (*BA Properties Inc v Aetna Casualty*, 2003), the court held that even if the property is sold before being rebuilt, the insured is entitled to payment. Either the insured or the insurer could cause delays in rebuilding the damaged property. The American courts have repeatedly held that if the insurer causes the delay, the BI period can be extended.[71]

Rate of gross profit The rate of gross profit earned on the turnover during the financial year immediately before the date of the incident. Annual turnover The turnover during the twelve months immediately before the date of the incident. Standard turnover The turnover during the period in the twelve months immediately before the date of the incident which corresponds with indemnity period.	to which such adjustments shall be made as may be necessary to provide for the trend of the business and for variations in or other circumstances affecting the business either before or after the incident which would have affected the business had the incident not occurred, so that the figures thus adjusted shall represent as nearly as may be reasonably practicable the results which but for the incident would have been obtained during the relative period after the incident.

The rate of gross profit, annual turnover and standard turnover must be adjusted to provide for any trends in the business.

6.7.7 Suppliers Premises.

With the automation of factories, the out-sourcing of the manufacturing to specialist components suppliers and satellite plant, often in other countries, a mishap at another premises may have an influence on the insured's turnover and ultimately gross profit. For instance, the Japanese tsunami disaster brought a large sector of the RSA motor industry to a standstill due to the lack of imported components. The local insurance industry contributed millions due to local loss of turnover.
Key and critical components in the manufacturing process and sole suppliers are underwriting considerations which the underwriter must establish before providing this cover.

6.7.8 Customers premises.

Dependence on sole or few customers may have the same effect as Suppliers premise and the same remarks as above will apply

[71] *SR International Business Insurance Company v World Trade Center Properties et al* 2005 US District Lexis 13001 (*SR International Business Insurance Company v World Trade Center Properties et al*, 2005).

6.8 Conclusion

- The prime purpose of this type of interruption policy is to protect the insured against the loss of gross profit. Although the concept is simple, the determination of the gross profit is not and a whole series of secondary definitions are necessary to define gross profit. In practice persons trained in accounting are required to determine the loss of gross profits.

6.9 Worked example

Item	Without the fire		After the fire	With insurance payments	
	Amount	Rate	Amount		
Turnover	R50 000 000	1.00	R20 000 000		R20 000 000
Which is distributed as follows:					
(a) Variable charges	R35 000 000	0.70	R14 000 000		R14 000 000
(b) Gross profit	R15 000 000	0.30	R6 000 000		
(i) Insurance payment					R9 000 000
(ii) Standing charges	R10 000 000	0.20	R10 000 000		R10 000 000
(iii) Profit before tax	R5 000 000	0.10	(R4 000 000)	Restored profit	R5 000 000
				Loss insurance	(R4 000 000)
				Payment	R4 000 000

In this example the financial statements of the company are examined and all expenditure divided into two categories variable charges and standing charges. The previous year's Profit before Tax is also determine or a prediction of the Profit before Tax is made. The Standing Charges and Profit before Tax are added to arrive at the Gross Profit. Once this is done the rate of gross profit and the rate of variable charges are determined. In the above example these are 0.3 and 0.7 respectively. In other words, for every Rand of Turnover earned, 70 cents pays for the variable costs and the other 30 cents goes towards the gross profit.

Assume now that a fire occurs and as a result the turnover is reduced to R20 m. In other words, the company still produces R20 m of goods. The cost of the variable charges is R14 m (R20 × 0.7) and the Gross Profit is R6 m (R20 × 0.3). From this R20 m the standing charges of R10 m must still be paid. This will result in a loss of R4m instead of a profit of R5 m. The reduction or loss of turnover (or as referred to in the insurance industry as the shortage in turnover) is R30 m (R50 - R20). The rate of gross profit is applied to the shortage of turnover i.e. R30 m × 0.3 = R9 m. The insurance company will

pay an amount of R9 m to indemnify the insured for the loss. If the R9 m is taken into account then it will be noted that the insured is indeed placed in the same position he would have been had the loss not occurred. R4 m covers the loss and R5 m is the profit which the insured would have made had the loss not occurred.

7 MACHINERY BREAKDOWN

7.1 Introduction

Should a machine break down the repair cost could be substantial and insurance, in the form of machinery breakdown insurance can be arranged to cover this eventuality.[72]

The creation of profits are often dependent upon machinery and should the machine break down and production cease, loss of profits may result. In order to arrange business interruption cover, it is necessary to have the underlying machinery breakdown policy. The machinery breakdown policy is thus important to anyone involved with industrial or manufacturing plants.

Traditionally, separate policies were issued for different types of plant but the more recent tendency is towards a single policy covering all categories of plant.[73] The traditional policy had three sections:

I Damage in one form or another to the insured plant itself.
II Damage to the insured's surrounding property.
III Third party liability.

Sections II and III cover risks which can normally be catered for in terms of a general assets policy and public and employer's liability policies. These sections need not be considered any further.

7.2 The operative clause

Typically an operative clause of a damage section will read:

> This insurance is in respect of unforeseen and sudden physical damage to the insured property from any cause.

The important words in this clause are unforeseen and sudden physical damage. Despite the length of time that this policy has been in operation, worldwide, there are very few reported court cases to assist in interpreting the policy. For a long time, the industry has been guided by legal opinions, the most important of which was written by George W Cooke (1967). The opinion dealt with the question of

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72 Generally the insurance industry regards machinery breakdown and other engineering risks as good risks; Post 3 (Aug. 89) p. 21.

73 Insurance Handbook, pp. 6.3-05.

whether or not cracks which were discovered in the spokes of a large gear-wheel fell within the ambit of the policy. Since the cracks had been discovered before any breakdown took place Cooke concluded, 'Applying the above considerations, the development of the cracks ... does not constitute an accident as defined.' What happened if the cracks were not detected and then the wheel collapsed? Cooke continued, 'If, of course, the crack had been undetected, and had developed so far that the gear-wheel broke apart, the actual breaking apart would in our opinion have constituted and internal accident, the crack having been undetected, the breaking apart would have been an unforeseen contingency.'

The issue of 'unforeseen and sudden' was considered in *African Products (Pty) Ltd v AIG South Africa Ltd* 2009 (3) SA 473 SCA (*African Products (Pty) Ltd v AIG South Africa Ltd*, 2009) where production at a maize mill was interrupted due to electrical failure. The mill was commissioned in 1998. At 04:50 on the 11 September 2002 there was a power outage when a circuit breaker tripped. It was discovered that the cables which had been buried, as is normally the case, and thus not at all visible, were too close to each other and the heat generated by the cables could not be sufficiently dissipated. An inspection of the cables revealed that the PVC insulation had deteriorated because of the heat and were unusable and had to be decommissioned, resulting in an interruption of the plant. The plant was out of commission from the 19th September to 15th October 2002 while the cables were replaced. The insured claimed for business interruption arising out of the machinery breakdown.

The insurer would be liable if it could be shown that there was 'unforeseen and sudden physical damage' to machinery. The first issue was, is electrical cables machinery? The insurer argued that cables do not constitute machinery. The court decided otherwise, 'I am prepared to accept, without deciding, that the electrical cables fall under all plant and machinery.' The next question then was, was the requirement of unforeseen and sudden physical damage met? The court ruled:

> As I have attempted to demonstrate above, there is no ambiguity when 'sudden' is given a meaning with a temporal element such as 'abrupt' or 'taking place all at once'. Nor do I agree that physical damage must have been sudden from the perspective of only the insured. An objective perspective seems to me to be in accordance with sound commercial principles and good business sense. I say this because if the unforeseen physical damage occurs suddenly, viewed objectively, the insurer will become liable. If, on the other hand, it is not sudden from an objective perspective no liability will attach. It would otherwise be difficult, if not impossible, to dislodge an assertion by a claimant that, viewed subjectively, physical damage was sudden even though such damage may be shown to have been gradual and to have occurred over a long period. In my view, this could never have been the intention of the parties.

It is not clear that this view is altogether correct. And ruled the damage was not sudden and accidental.

The machinery breakdown policy was considered in Australia in *Vee H Aviation Pty Ltd v Australian Aviation Underwriting Pool Proprietary Limited* 1996 ACTSC 123[74] (*Vee H Aviation Pty Ltd v Australian Aviation Underwriting Pool Proprietary Limited*, 1996). An aircraft turbine engine was taken out of service for routine service at which point damage to various parts of the engine was

[74] See another Australian case, *Sun Alliance & London Insurance Group and others v North West Iron Co Ltd* 1974 2 NSWLR 625 (*Sun Alliance & London Insurance Group and others v North West Iron Co Ltd*, 1974).

discovered. The insured submitted a claim against its machinery breakdown insurer which was repudiated. Looking at all the facts, the court concluded that "I am unable to see that in any meaningful sense of the word it can be called 'sudden'".

7.3 Exceptions

The machinery breakdown policy contains a number of exceptions.

7.3.1 Fire and natural perils

Normally the perils at the insured's premises insured in terms of a fire policy are excluded from the machinery breakdown policy. Thus if a fire occurs at the insured's factory damaging the machinery which is insured in terms of a machinery breakdown policy, the fire damage should be recovered from terms of the fire policy[75] and not the machinery breakdown policy.

7.3.2 Deliberate overloading

Any damage which is caused by the deliberate overloading, the imposition of abnormal conditions or hydraulic testing is normally excluded.

7.3.3 Wear and tear

Damage arising out of wear and tear and gradual deterioration of machinery is not covered. This is regarded as a normal maintenance cost.

7.3.4 Expendable parts

The costs of replacing expendable parts, exchangeable or detachable tools such as blades, dyes, patterns, rollers, slings, chains, belts, ropes, conveyor bands, etc., are also not normally covered by the machinery policy. These are not regarded as insurable costs.

7.3.5 Consequential losses

Consequential losses, such as the loss of profits, are not generally covered in terms of an asset policy but can be covered in terms of an extension to the machinery breakdown policy or by a separate business interruption policy.

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[75] Insurance handbook, pp. 6.3-13.

8 MARINE INSURANCE

8.1 History of marine insurance

8.1.1 Early insurance-like practices

The earliest type of insurance is marine insurance[76]. Indeed, the origin of modern commercial insurance can be traced to this type of insurance. A number of insurance-like practices existed before the modern commercial practice developed. These practices can be traced back to the Greeks, Romans and Phoenicians. One of the first insurance like practices was the *bottomry bond* which concerned a loan to made in order to finance a venture. The vessel was pledged as security for the loan. If the vessel did not survive the venture the money was retained and could be used to replace the vessel. If the vessel survived the money plus a premium was repaid. The *respondentia* bond is similar to the bottomry bond except the cargo and not the vessel was pledged.

A further early practice of risk sharing which is traced to the Greek Island of Rhodes[77] is General Average. In terms of General Average the loss suffered or expense incurred to save a marine adventure by one party was shared equally by all parties to the venture. Thus if the captain of a ship deemed it necessary to jettison some cargo to save the ship or balance of the cargo, then the owners of the cargo which was saved would contribute towards the loss of the owners whose cargo was jettisoned. General Average, in the UK is dealt with in terms of s66 of the Marine Insurance Act 1906 (Marine Insurance Act, 1906) the relevant portion of which reads:

> "(1) A general average loss is a loss caused by or directly in consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.
>
> (2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperilled in the common adventure."

It is emphasised that General Average is consequence of Marine Law and is distinct from marine insurance. Because General Average, a risk sharing mechanism, the party to the marine adventure could find himself incurring a substantial liability. The obligations which arise out of General Average is insurable.

8.1.2 Development of the marine market

Marine insurance was first introduced to the United Kingdom by the Lombards some 600 years ago to cover the international trade. In those early days marine insurance was not undertaken by specialist insurers but by merchants as part of the everyday trading along the lines of a mutual aid insurance

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[76] For a discussion on marine insurance consult Dillon et al (1983). Hansell (1988,19). Diacon *et al* (1988,11). A highly readable publication is that of Mellert WM *Marine Insurance* Swiss Re 1989 (Mellert, 1989).

[77] Mellert (1989,7).

system. Merchants met at convenient places to discuss the sharing of risks and one of the earliest meeting places was the coffee house of one Edward T Lloyd in Tower Street in London. This subsequently became Lloyd's of London - perhaps the most famous name in insurance throughout the world. Details of the proposed marine adventure would be drawn up in a document which would later would be referred to as a policy. The consenting merchants would write their names underneath the writing indicating the proportion of the risk that they were prepared to cover and the premium to be charged thereon. In time, such signatories became known as the underwriters, being the persons who accepted the risk. The term "underwriter" is still widely used today.

The modern UK insurance market began to develop in the later 1500s. In 1575 a Chamber of Assurances was established in the Royal Exchange in London in order to register marine insurance policies and to settle disputes between policy holders and underwriters (Ibbetson, 2008; Van Niekerk, 2011). The Chamber of Assurances lacked any legal powers and dissatisfaction grew because its decisions were unenforceable in law. In 1601 a Court of Arbitration was therefore established to deal with disputes. The Chamber was disbanded in the middle of the 18th century.

More than a century later, most marine insurance was still being provided by individuals although these were often full-time professionals.

8.2 UK Marine Insurance Act - 1906

Further developments in marine insurance case law continued until the law was codified[78] by the Marine Insurance Act of 1906[79]. This Act a codification of the common law, still forms the basis of much modern insurance law.[80]

8.3 Modern insurance practice

Transportation by sea exposes the venture to risks of loss or damage to assets, consequential losses and liabilities from a number of perils, famously referred to as "perils of the sea". The modern marine insurance deals with four main areas:

- Hull
- Cargo
- Freight
- Marine liability.

8.3.1 Hull

78 Mellert (1989,7).

79 6 Edw 7 C41.

80 Diacon e*t al* (1988,12)

Hull losses relate to damage or loss of the vessel and associated machinery. Basically anything that can float and move, even if only occasionally can be classified as Hull. Marine hull policies are available to cover not only completed vessels but also those under construction or navigation. Specialised cover can be obtained covering damage to off-shore oil and gas installations. Clearly few people would regard an off-shore oil rig to be a ship in the conventional sense. But the marine market refers to Hull cover. The term hull is used for historical reasons. Initially the insurance did not cover all the fittings but only the hull. The fitting is property and conceptually insurable and today the term Hull and Machinery (H+M) is used to make it clear that both the hull and propulsion equipment is covered.

The Marine Hull market covers two further areas; disbursements and collision liability.[81] Disbursements includes ships stores, bunker fuel up to a maximum of 25% of the total value insured for Hull and Machinery. Collision liability is covered in terms of the so called Running Down Collision (RDC) or three quarters clause. This provides cover for ¾ of liability arising out of the running down of other ships. The liability of the hull insurer is limited to ¾ of the value insured for the hull and machinery (H + M), or ¾ of the claim. Cover can be arranged in various ways such as time policies or voyage policies. Liability cover in excess of what is covered by the marine policy can be sought in the P&I Club market.

8.3.2 Cargo

The purpose of marine transportation is to transport various items of cargo. The loss or damaged of such cargo can be insured. Cargo is, of course, property and thus cargo cover is a form of property or asset cover. Cargo insurance covers goods that have been sold and are being shipped to a buyer. There are various arrangements by which cargo is transported, such as FOB (Free on Board), CIF (Cost Insurance and Freight), etc.

8.3.3 Freight

Freight is the cost of transporting cargo. This can include the hire of a ship where necessary. Amounts paid for Freight may be lost if the cargo cannot be delivered for any reason. If, for example, freight is payable in advance and the cargo is lost, the cargo owner must bear this loss. It is then normally added to the agreed value of the cargo. Other than adding the cost of freight to the cost of goods lost or damaged and recovering the cost of freight that way, the ship owner or carrier can insure for the loss of freight on an annual basis.

8.3.4 Marine Liability

A distinction needs to be made between the liability cover provided in terms of the marine policy and cover not provided there which may be obtained via the P&I Clubs.

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81 Mellert (1989,13).

8.3.4.1 Marine policy

Legal liability claims arising from damage or injury to third parties may result from various causes. The marine market covers marine liability to a very limited extent. The cover is provided in terms of the Running Down Clause (or the three-fourths clause) which covers liability up to three quarters of the extent of the liability arising from collisions with other vessels to a maximum of three quarters of the value of the insured vessel. The RDC, attached as clause 1 of the Institute Time Clauses (Hulls) to the Lloyd's policy form, provides, in part, that

> "... if the Vessel hereby insured shall come into collision with any other vessel and the Assured shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision for ... loss of or damage to any other vessel or property on any other vessel ..., the Underwriters will pay the Assured ... three-fourths of such sum or sums so paid ... provided always that their liability in respect of any one such collision shall not exceed ... three-fourths of the value of the Vessel hereby insured ..."

The marine market also covers pollution caused by oil seepage.

8.3.4.2 P&I Clubs

The balance of the marine liabilities can be covered by associations of ship owners known as Protection and Indemnity Associations or P & I Clubs, organised to provide mutual aid and financed by members' contributions.

8.4 Insured perils

The perils insured against the standard form of Lloyd's policy enumerates the perils insured against and includes the following:

> Touching the adventures and perils which we assurers are contended to bear we take upon us in this voyage; there are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter mart, reprisals, taking at sea, risks, restraints and determinants and detainments of all kings, princes and people, of what nation, condition or quality so ever, barratry of the master and mariners, and of all other perils, losses and misfortunes, that have or shall come to the hurt, detriment, or damage of the said goods and merchandises and ships, etc. or any part thereof[82]

Note the archaic form of language which was, until recently in use. Essentially, the assets are covered against specified perils.[83] In analysing the perils, it is usual to talk about perils on the sea, perils of the sea and extraneous risks. It is stressed that despite the broad nature of perils covered the loss producing event must be fortuitous. Thus, for example damage due to rust would not be covered by a marine policy.

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82 Getz et al., p. 378.

83 For a detailed analysis of the marine policy consult Dillon, C and Van Niekerk, JP, SA marine law and marine insurance selected topics (Dillon & Van Niekerk, 1983); Getz *et al*., LAWSA (vol. 12).

8.4.1 Perils of the sea[84]

These perils include stranding, sinking, collision, extraordinary heavy weather.

8.4.2 Perils on the sea

These perils include fire, thieves, jettison, barratry.

The modern Institute Clauses wording is essentially an all perils (or all risks) wording.

8.5 Policy wordings: Institute Clauses

Until 1982 most marine and cargo insurance forms were based on traditional wording traced back to 1601. For example, the Lloyd's so-called S & G form for marine insurance was adopted in 1779 and survived with only minor changes for over 200 years. The wording was brought up to date in 1982 by the introduction of revised standard printed clauses terms institute clauses. A number of these exist as indicated in Table 1.

Clause	**Date of issue**
(For use only with the new marine policy form) Institute Cargo Clauses (A) Institute Cargo Clauses (C) 01/01/82 Institute War Clauses (Cargo) 01/01/82 Institute Strikes Clauses (Cargo) 01/01/82 Institute Time Clauses (Hulls) 01/10/83 Institute War and Strike Clauses (Hulls-Time) Clauses	01/01/82

9 AVIATION

9.1 Development of the aviation market

[84] Mellert (1989,24).

9.2 Various aviation risks

Aviation activities give rise to a number of exposures and various forms of aviation insurance cover is available to provide security against these exposures. These include hull, cargo, freight and liability.

Aviation insurance is available to aircraft owners, operators and manufacturers as well as airport operators.

9.2.1 Asset Damage: Hull, Freight and Cargo

9.2.2 Liability Risks: passengers, consignors and third parties

Special problems arise with aviation liability because of the large values at risk, as well as the international nature of many flights. The extent of legal liabilities is often laid down by internationally agreed conventions. Aviation insurance can be obtained to cover certain specified liabilities.

9.2.2.1 Liability to passengers

In any aviation accident passengers are exposed to injury. Liability to passengers is governed in terms of conventions, such as the Warsaw Convention of 1929. According to this Convention, operators are liable for injury to passengers and damage to their property without claimants having to prove negligence on the part of the operator. The Warsaw Convention also states a maximum limit of liability to passengers. The limit of liability was altered by the Haig Protocol of 1955 and the Montreal Agreement of 1966. These conventions deal mainly with international air travel.[85]

9.2.2.2 Liability to non-passenger third parties

It is evident from disasters, such as the Lockerbie disaster in Scotland, that persons usually on the ground, are also exposed to damage from the operation of aircraft.

9.2.2.3 Liability of aircraft manufacturers

It should be evident that if an aircraft crashes and it is shown that the accident was the result of a defect in manufacture, the manufacturers of the aircraft can be liable. Therefore liability cover is available for aircraft manufacturers.

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85 Diacon *et al* (1988,11); *Barclays Bank of Zimbabwe Ltd v Air Zimbabwe Corporation* 1994 1 SA 639 ZH (*Barclays Bank of Zimbabwe Ltd v Air Zimbabwe Corporation*, 1994).

9.2.2.4 Airport Operators' Liability

Owners and operators of aerodromes are also exposed to liability claims. Indeed in South Africa there are a number of cases where aircraft and airport operators have been involved in litigation.[86]

9.2.2.5 Problems caused by a sonic boom

9.2.2.6 Strict liability: Aviation Act

Strict liability is imposed for certain types of liability in terms of S11(2), (3), (4), (5) & (6) Aviation Act 74 of 1962 which reads:

> (2) Where material damage or loss is caused by an aircraft in flight, taking off or landing, or by any person in any such aircraft, or by any article falling from any such aircraft, to any person or property on land or water, damages may be recovered from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action as though such damage or loss had been caused by his wilful act, neglect or default.
>
> (3) The provisions of sub-section (2) shall not apply where the damage or loss was caused by or contributed to by the negligence or wilful act of the person by whom it was suffered.
>
> (4) Where any damages recovered from or paid by the owner of an aircraft under this section arose from damage or loss caused solely by the wrongful or negligent action or omission of any person other than the owner or some person in his employment, the owner shall, subject to the provisions of paragraph (b) of sub-section (5), be entitled to recover from that person the amount of such damages.
>
> (5) (a) In any proceedings against the owner for the recovery of damages in terms of sub-section (2), such owner may, on making such application to the court and on giving such security as to costs as may be prescribed by rules of court, join any person referred to in sub-section (4) as a defendant.
>
> (b) If such person is not so joined he shall not in any subsequent proceedings taken against him by the owner be precluded from disputing the reasonableness of any damages recovered from or paid by the owner.
>
> (6) Where any aircraft has been bona fide leased or hired out for a period exceeding fourteen days to any other person by the owner thereof, and no pilot, commander, navigator, or operative member of the crew of the aircraft is in the employment of the owner, this section shall have effect as though for references to the owner, there were substituted references to the person to whom the aircraft has been so leased or hired out.

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86 *Noakes v Outdtshoorn Municipality* 1980 1 SA 636 C (*Noakes v Outdtshoorn Municipality*, 1980); *Sasverbijl Beleggings v Van Rhynsdorp Town Council* 1980 1 SA 621 W (*Sasverbijl Beleggings v Van Rhynsdorp Town Council*, 1980); *Fourie v Munisipaliteit van Malmesbury* 1983 2 SA 748 C (*Fourie v Munisipaliteit van Malmesbury*, 1983); *Bennetto v Vryburg Municipality* 1980 2 SA 84 NC (*Bennetto v Vryburg Municipality*, 1980).

9.3 The aviation policy - operator's policy

9.3.1 Introduction

The aviation policy can take on many forms. For the purposes of this study an operator's policy will be discussed. This policy normally has three sections. Section one deals with the loss or damage to the aircraft, section two deals with legal liability to third parties other than passengers and section three deals with legal liability to passengers. Each of these sections have an operative clause, own conditions and special exceptions.

9.3.2 Section one: Loss or damage to aircraft

This section deals with the loss or damage to the aircraft which is an asset risk. The operative clause typically reads as follows:

> Coverage -
> (a) The company will at its option pay for, replace or repair accidental loss or damage to the aircraft described in the schedule arising from the risks covered, including disappearance, if the aircraft is unreported for sixty days after the commencement of flight, not exceeding the amount insured as shown therein and subject to the amounts deducted below.
> (b) If the aircraft is insured hereby for the risks of flight, the company will in addition pay reasonable emergency expenses necessarily incurred by the insured for the immediate safety of the aircraft consequent upon damage or forced landing up to 10% of the insured value specified in the schedule.

It will be seen from this operative clause that it is only aircraft specified in the schedule that are insured and that provision is also made to pay for aircraft which have disappeared. In other words, it is recognised that it is not always possible to locate the aircraft or its wreck. If the aircraft has disappeared for more than 60 days it will be presumed that it has disappeared and payment will be made.

The section contains specific exceptions or exclusions, such as normal exclusions dealing with the avoidance of liability for wear and tear and engineering breakdown, etc.

9.3.3 Section two: Legal liability to third parties other than passengers

The operative clause of section two typically reads as follows:

> The company will indemnify the insured for all sums which the insured shall become legally liable to pay and shall pay as compensatory damages (including costs awarded against the insured) in respect of accidental bodily injury (fatal or otherwise) and accidental damage to property caused by the insured aircraft or by persons or objects falling therefrom.

It will be seen that the liability of the insurance company is for amounts which the insured is legally liable to pay. This operative clause, as with other liability operative clauses, does not define the actual basis of the liability of the insured. The basis could be negligence or contract or otherwise, but the legal

liable to pay. Thus if an accident occurs and an operative clause simply requires the insured to be held liable in terms of a statute such as the Aviation Act, this basis of liability is not excluded by the operative clause.

Section two has its own specific exclusions. Generally the insurance company is not liable for claims arising from injury to employees, directors or partners, etc. The intention is clearly that these forms of liability should be picked up in terms of the employer's liability policy. This section also excludes claims arising from the flight or cabin crew. This distinction is to cater for cases where the crew are not members or employees of the company. Another exception is that liability does not attach for passengers or goods in care, custody and control of the company.

An unusual source of liability peculiar to the operating of an aeroplane is claims arising from noise and pollution, such as the breaking of the sound barrier which can cause sonic booms. This form of liability is generally excluded under section two. The company will, however, be liable for damage caused by an explosion if the plane crashes and the explosive boom damages property. In this case the proximate cause is the accident and not the noise.

9.3.4 Section three: Liability to passengers

Typically the policy reads as follows:

> The company will indemnify the insured in respect of all sums which the insured shall become legally liable to pay, and shall pay as compensatory damage (including costs awarded against the insured) in respect of -
> (a) bodily injury (fatal or otherwise) to passengers while entering, on board or alighting from the aircraft, and
> (b) loss or damage to baggage and personal articles of passengers arising out of the accident to the aircraft.

Again it is worth noting that this clause indemnifies against amounts which the insured shall become legally liable to pay. The clause does not, however, define the grounds of liability. Therefore if the liability is for example limited by the Warsaw Convention read together with subsequent protocols, the insurance company will pay that amount. It does not specify the grounds of liability, so again, negligence is not specifically required for the policy to be triggered.

Section Three has its own exceptions. Generally the company shall not be liable for injury or loss sustained by employees and others and the operational crew and so the operational crew and employees have to be covered in terms of another policy.

9.3.5 Limits of liability

It is customary in liability policies of this nature to limit the liability exposure of the insurer. Generally the limit is in the region of R200 million.

9.3.6 Miscellaneous provisions

Aviation policies are specialised policies that are dealt with by specialised sectors of the insurance market and they have a number of their own peculiarities. Cover is normally only for aircraft as specified in the schedule and on a named pilot basis. It is therefore customary that the list of pilots who fly the plane be nominated. It has been held that to violate this list is a material fact which is grounds to avoid the policy.[87]

It is also generally a requirement that the insured comply with all air navigation and air worthiness orders and regulations issued by a competent authority affecting the safe operation of the aircraft. This is generally not a good clause and as a result it has featured in litigation.[88] It is not always possible to comply with all the air navigation regulations, but the failure to do so can invalidate the policy.

Although the pilots are named in the policy, it does happen that an aircraft is sent in for maintenance and under these circumstances the aeroplane may be flown by pilots who are not named in the schedule. It is not practical to name all the pilots who may park the aircraft and so provision exists in terms of the policy for non-named pilots to park the plane.

Liability policies normally exclude any liability assumed by contract. This exception for contractually assumed liability also applies to aviation policies, other than the liability which is accepted for the baggage. Normally an aircraft is registered for a specific number of passengers and if this number is exceeded then the insurer may avoid liability.

10 GENERAL LIABILITY POLICY

10.1 Liability relationships

An insured purchases liability insurance because he is exposed to the risk of legal liability claims being made against him by third parties. Various liability policies exist to protect the insured from this risk.[89] One of these policies is the general or public liability policy.

In dealing with a liability policy it should be remembered that two relationships exist.

- the relationship between the third party and the insured, which is the basis of the claim. This relationship is governed by the law of obligations, generally the law of delict; and

87 *Nel v Santam Insurance Company* 1981 2 SA 230 T (*Nel v Santam Insurance Company*, 1981).

88 *Bates and Lloyd Aviation (Pty) Limited v Aviation Insurance Company* 1985 3 SA 916 A (*Bates and Lloyd Aviation (Pty) Limited v Aviation Insurance Company*, 1985).

89 Section B of the motor policy employers' liability policies, professional liability policies, aviation policies.

- the relationship between the insured and the insurer. This is generally governed by the law of insurance which is mainly the law of contract.

10.2 Relationship between third party and insured

The first relationship establishes the liability of the insured to the third party and is normally dealt with as part of the law of delict. The basis of liability is not necessarily confined to the law of delict. It is not intended to discuss this relationship in any depth in this section. It is pointed out however that a phenomenon of the modern society has been the widening of the basis of this liability. Courts are much more willing to find liability on grounds previously unknown and to award ever increasing *quanta*[90]. The existence of liability insurance has played an important role in the widening of the basis of liability. The rationale of this expansion is that if the insured is liable and the insurance policy responds to the claim, then in fact, it is not the insured person who bears the cost but the insurer. The insured thus does not incur the cost but the cost is spread to the community at large, through the insurance mechanism.[91] The courts[92] see the very function of the law of delict to spread the costs. With this approach the escalation of liability and hence the liability crisis becomes inevitable. The bulk of the Cost-of-Risk premium is spent on liability and related risks.

10.3 Insurance relationship

The second relationship is the insurance relationship and is the focus of this study. In practice these two relationships are so interrelated that it is difficult to discuss the one without the other and most texts on liability insurance deal with both aspects. An insured is concerned with both relationships; the question of whether or not he is liable and if so whether or not the insurer will indemnify him against his liability.

10.4 The operative clause

Typically the operative clause of a public liability policy for a business reads as follows:

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90 RW Vivian 'SA is poised for a liability crisis' *SA Annual Insurance Review* 1984 (Vivian, 1984); RW Vivian 'The insurance crisis and positive natural law' *SA Annual Insurance Review* 1986 (Vivian, 1986), Valsamakis, Vivian & du Toit (1992,193-239).

91 See for example Boberg (1977;312) *The Law of Persons and The Family* Juta 1977 (Boberg, 1977) view that the law should expand with regard to dependant's action for loss of support. The cost to the person being sued is of no consequence because '... the defendant's financial resources play no part in fixing his liability. And if he did, the fact that the defendant is an insurance company in most cases should favour the plaintiff's case'

92 See for example the comments of the former Chief Justice in the *Pakendorf v De Flamingh* 1982 3 SA 146 A (*Pakendorf v De Flamingh*, 1982).

> the insurer will indemnify the insured against damages which the insured shall become legally liable to pay consequent upon accidental death of or bodily injury to or illness of any person (hereinafter termed injury) or accidental loss of or physical damage to tangible property (herein termed damage) occurring within the territorial limits during the period of insurance in the course of or connection with the business.[93]

Some of the phrases which appear in the operative clause are discussed.

(a) ... indemnify ...

The public liability policy is an indemnity policy. The principles of indemnity thus apply to this policy. In practice the indemnity aspect is often not understood by the insured. For example a member of the public may slip on the premises of the insured through no fault of the insured. It may however be in the insured's interest to compensate the injured party. The failure to compensate the injured party may for example have an adverse effect on the insured business. If the insured is not liable the policy will not respond because although there is a moral obligation no legal obligation exists. Also there is nothing to indemnify. If the insurer decides to pay compensation, in such an instance, then this decision is a business decision.

(b) ... legally liable to pay ...

The operative clause contains the phrase become legally liable to pay. The policy does not define the meaning of the phrase. The requirements of this phrase are met when it is clear that at law, a competent court does or will rule that the insured will be liable to compensate the third party. The policy does not define the basis of liability.[94] Liability does not depend, in terms of this wording, on any limited basis such as negligence, statutory liability or contractually assumed liability.[95] What is required to meet the requirement 'legally liable to pay' is that the person must be regarded[96] by the courts as being legally liable to pay. This phrase would result in exceptionally wide cover[97] which is however limited by the other phrases in the operative clause. One would expect that the legally liable to pay meant legally liable to pay a third party. *Verulam Fuel Distributors CC v Truck and General Insurance Co Ltd* 2005 1 SA 70 W (*Verulam Fuel Distributors CC v Truck and General Insurance Co Ltd*, 2005) seemed not to understand this point.[98]

(c) ... consequent upon accidental death or bodily injury ...

A limiting phrase in the operative clause is the phrase consequent upon accidental death or bodily injury or illness to any person (here-in after termed injury).

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93 See the Multimark II policy.

94 Getz *et al* (1983,466) limits the indemnity to actions 'arising in contract or delict or under statute', the wording of liability policies do not however limit the liability to any specific grounds of liability.

95 In *Aswan Engineering Establishment Co Ltd v Iron Trades Mutual Insurance Co Limited* 1989 1 Lloyd's Rep 289 QBD (*Aswan Engineering Establishment Co Ltd v Iron Trades Mutual Insurance Co Limited*, 1989) the contention that 'liable at law' meant liable at common law and not under contract was rejected.

96 Usually a decision must be taken without a court judgment.

97 For example if one party breaks off an engagement to be married that party may be legally liable to pay something to another. The general liability policy does not cover this type of liability.

98 RW Vivian (2005) 'Pollution and the liability section of a motor policy', Cover 2005, April (Vivian, 2005).

The general liability policy with this limitation, is limited to claims arising from bodily injury and not other forms of personal injury. The words bodily injury, in another type of policy, have been interpreted to include a heart attack[99], it is however highly unlikely that the insurance industry ever intended this phrase to include heart attacks. Some American courts have interpreted the comprehensive (or commercial) general liability (CGL) phrase ... bodily injury, sickness and disease ... to include claims for emotional distress.[100] In *Preferred National Insurance Co v Dousearch Inc* the court concluded that an assault and battery exclusion is not broad enough to exclude and action for invasion of privacy.[101]

(d) ... accidental loss or damage to property ...

A similar and continuing limitation is the phrase 'accidental loss or damage[102] to property'. The indemnification provided by the general liability policy is, in this instance, limited to physical injury or damage to tangible property. Therefore neither a pure financial loss which arises in delict nor contractually assumed liabilities which have as a consequence only a financial loss are included in the insurer's promise.

The limitation of accidental bodily injury or damage to property essentially limits the indemnification provided by the policy to the traditional areas covered by the *Lex Aquilia*. The extended areas of the *Lex Aquilia* such as that for pure financial (economic loss) are not covered.

(e) ... occurring ...

One of the problems demonstrated by the liability crisis is that insurers can be held liable on policies issued decades before the claim is made. The problem is acute where claims involve events which occur over a period of time such as diseases and gradually developing pollution. Occupational diseases could be a serious problem to liability insurers but it is generally not a problem for the public liability insurer because of the employees liability exclusion. This problem would then be a matter of concern for the employers' liability policy and almost invariably these policies are on a claims made basis and not an occurrence basis.

A person may contract a disease as a consequence of working with a hazardous substance. The disease may only manifest itself thirty years after. In this type of case when does the event occur? Was it when the person worked with the substance, or when the person discovered that he had contracted the disease or when the employee instituted the claim. If it is accepted that the injury occurred when the employee first came in contact with the substance, thirty years previously, it is this event which 'triggers' the policy. In this case it is a policy which was issued thirty years

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99 *Oelofsen NO v Cigna Insurance Co of SA Ltd* 1991 1 SA 74 T (*Oelofsen NO v Cigna Insurance Co of SA Ltd*, 1991).

100 Gordon, S 'NY upholds CGL cover for emotional distress' *BI* June 15, 1992 (Gordon, 1992b). Suzanne Lavanant et al v General Accident Insurance Company of America New York State Court of Appeals (*Suzanne Lavanant et al v General Accident Insurance Company of America New York State*, 1992).

101 'Invasion of privacy claim exempted from exclusion' *Business Insurance* March 8, 2004 ("Invasion of privacy claim exempted from exclusion," 2004)

102 An issue which arises is whether or not pollution causes damage as used in general liability insurance policy, see fn 396

previously. If this happens the insurer cannot know when a policy can be closed. American courts introduced to the notion of a multiple trigger (or continuous), which accepts that policies may be triggered by more than one event.[103] The policy could be triggered by the initial contact with the hazardous substance during the years of exposure, or when symptoms of the disease become manifest. This gives rise to longtail problems. In addition to disease claims a similar problem arises where claims involving pollution are concerned.[104]

To overcome the problem incurring indeterminate liability on 'old' policies (which used the occurrence wording), in mid-1986 (adopted in South Africa in June 1987) insurers introduced the 'claims made' wording, instead of the 'occurrence' wording, for some liability policies.[105] In terms of this wording the insurer would only be liable for claims first made during the period of insurance. The introduction was resisted by insurance brokers and both wordings are currently freely available for the general liability policy. Claims made wording is always used for professional liability, products liability and now employer's liability policies.

(f) ... territorial limits ...

The operative clause is further limited by the phrase 'occurring within the territorial limits during a period of insurance'. This is an important limitation, since liability, as in the case of products liability, can arise anywhere in the world. Although the insured may be liable, liability coverage in terms of this operative clause is limited to claims which occur within the territorial limits defined in the policy.

(g) Onus

The usual rules governing onus apply to the general liability policy. The onus is on the insured to prove his claim falls within the promise made by the insurer. The above limitations form part of the operative clause of the policy. The onus is in each instance on the insured to prove that his claim falls within the promise contained in the operative clause.

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103 *Keene v Insurance Company of North America* 667 F 2d 1034 (DC Cir 1981) (*Keene v Insurance Company of North America*, 1981).

104 The California appellate court ruled that the policy-holder can tap all of its general liability policies from the time the pollution first began until the liability is known. Gordon (1991) 'Court broadens pollution cover trigger' (1992) June, 1 *BI* 1 (Gordon, 1992a) commenting on *Stonewall Insurance Co v City of Palos Verdes Estates*. See also *Montrose Chemical Co v Admiral Insurance Co* (Feb,27) BI March 9, 1991 (*Montrose Chemical Co v Admiral Insurance Co*, 1991).

105 NG Atkins (1987) 'Liability insurance II -The claims made basis', *BML* 16 99 (Atkins, 1987a); NG Atkins (1987) 'Liability Insurance III - Changing to the claims made basis' *BML* 1987 16 139 (Atkins, 1987b); TT Saul (1987) "Liability Insurance - the 'claims made' debate", *SA Annual Insurance Review* 41-42 (Saul, 1987); John Murray (1987) 'A fair hearing for claims made', *Post Magazine* May 14, 43 (Murray, 1987); 'The complications of claims made', *Post Magazine* May 14, 1987 48-49 ("The complications of claims made," 1987); Doris Fenske (1986) " 'Claims Made' in the marketplace: Anything Goes", *Best's Review* October143 (Fenske, 1986). The French courts declared the 'claims-made' wording was deemed to be null and void resulting in a protracted dispute between the industry and judiciary. Eventually legislation was passed overturning the courts' position. Helene Cohen (2004) 'How the French Market rebellion decided the claims-made stand-off', ID October 20 (Cohen, 2004).

10.5 Limits of indemnity

Delictual claims are open ended. The common law does not impose a limit of liability. For example, a R24 million personal injury claim has been instituted in South Africa and a R16m award actually made.[106] The aggregate of claims from a single event can run into hundreds of millions of rands. In the case of the Bhopal disaster the claims were settled for an amount of $490 million. The insurance industry cannot accept responsibility for open ended claims and it is common for the general liability policy to have a limit of indemnity. A clause is inserted which limits the liability of the insurer to a predetermined amount, usually in the region of R0.5 million to R5 million. Larger companies could, however, have much higher limits, in the order of R250m. The limits of liability term may or may not include legal costs.[107] Legal costs, in South Africa, in one case have amounted to R10 million.[108] The tendency today is for the limit of liability to include legal costs.

10.6 Specific exceptions

General liability policies contain a number of specific exceptions. Exceptions are introduced for a number of reasons. It could be that the excluded risk is covered by another policy.[109] An exclusion can also be introduced because it is not regarded as an insurable risk.[110]

It is again emphasised that when dealing with a claim, the wording of the specific policy involved must be studied, since variations in cover may exist. However, the general liability policy usually excludes the following:

(a) Liability to persons employed by the insured

General liability policies exclude liability for claims arising from persons employed by the insured. The reason for this exception is that this liability can be covered by other more specific policies such as the employers' liability policy, or by statutory compensation scheme provided by the Compensation of Occupational Injuries and Act 130 of 1993 (Compensation of Occupational Injuries and Act, 1993). In certain parts of the world, claims from employees have been crippling.[111]

In the case of a policy available to the individual as opposed to a company, this exclusion could pose a serious risk, since the individual may employ a domestic servant, who does not fall under the latter Act.[112] This problem is increasingly being understood by the insurance market since the modern tendency is not to excluded liability for claims from domestic servants in the policies

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106 Kidd, J (1992) 'Trends affecting the MMF' 4 9 *Cover* 17 (Kidd, 1992).

107 In 1992 it was estimated that the costs to the Lloyds market of pollution cases alone was £350 million (Fields (1993,22)).

108 'Colgate gets R7,5m costs' Star 89/12/1 (Star, 1989).

109 It is for this reason that motor and employers liability are excluded.

110 It is for this reason that wear & tear should not form part of the promise made by the insurer and is excluded.

111 Over 200 000 asbestos related claims have been made, many of these from employees. The cost of these $20 bn.

112 N Atkins (1991) 'Liability to domestic servants' 20 5 BML 131 (Atkins, 1991).

sold to individuals.[113] This is however not universal, and the actual policy wording should be inspected. Worker's compensation policies for domestic servants are also available.[114]

(b) Goods in care, custody and control

Another exception is for liability for goods in care, custody and control. Thus if the insured borrows equipment, stores assets or has goods on consignment, this exclusion could well be a source for concern. The reason for this exclusion is that these assets may be insured under an assets policy rather than to rely on the liability policy. Loss or damage to this class of goods due to specified perils, can be covered in terms of an assets policy.

(c) Professional advice

Liability arising out of advice of a professional nature is normally excluded, the intention being that this form of liability should rather be covered in terms of a professional liability policy. A typical general liability policy will not cover the different types of professional liability losses in any event, since generally professional liability risks result in pure financial losses.

(d) Mechanically propelled vehicles

Liability which arises out of any mechanically propelled vehicle is excluded from the general liability policy since this form of liability should be covered by a motor policy or statutory provisions. Claims arising from mechanically propelled vehicles used as a tool of trade could be dealt with by the general liability policy.

If someone is thus injured by a forklift truck which is used to convey materials on a factory site, it could be argued that the mechanically propelled vehicle is being used as a tool of trade and not as a motor vehicle. The claim would thus not be excluded from the general liability policy.

(e) Products liability

Product liability claims are generally excluded from the general liability policy but can be re-included by way of an extension. This method has been described by the British courts as 'patching' but it is still the standard method of insuring against products liability. It is, however, also possible to have a separate products liability policy.

(f) Lateral support

One of the oldest forms of strict liability is liability for loss of lateral support. Every owner of a property has the right to the support from the adjoining property. If the ground which provides support to a building is interfered with, the person responsible for interfering with the land is held liable because he interfered with the lateral support of the building. Claims arising from this source are excluded.

(h) Liability assumed by contract

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113 This is of course not the end of the issue, employer's liability is excluded by many other liability sections such as the in the motor policy.

114 'Workers' Compensation private scheme for domestics' *Insurance Times* June 1996 ("Workers' Compensation private scheme for domestics," 1996).

As a general rule liability assumed by contract is excluded unless such liability would have attached to the insured notwithstanding that agreement.

(i) Pollution

A more recent exclusion[115] of the general liability policy, excludes claims from gradually developing pollution. Damage caused by pollution is excluded unless it is '... sudden and accidental...'[116] Separate, EIL, cover can be arranged for this exposure.[117] The pollution exclusion has given rise to problems of interpretation, especially in America with regard to the issue of whether the policy covers clean-up costs[118] or not.

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115 The exclusion was incorporated in the American comprehensive general liability policy (CGL) in January 1973 (BI Sept 12, 1988). The exclusion generally reads, "This policy does not apply ... to bodily injury or property damage arising out of the discharge, disposal, release, or escape of smoke, vapours, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste material or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any watercourse or body of water; but this exclusion shall not apply if such discharge, dispersal, release or escape is sudden and accidental. One method adopted to finance cleanup costs in particular was the passing of the Comprehensive Environmental Response, Comprehensive Liability Act of 1980 (CERCLA), 42 USC §9600. Insurance cover for liability from gradual pollution can be obtained in terms of an Environmental Impairment Liability (EIL) policy. For a discussion of EIL insurance see Jernberg *et al* (1987)

116 Despite the wording the American courts have by '... clever lawyering and judicial straining' (Jernberg *et at* (1987,44)) ruled in many instances that gradual pollution is not excluded; *Allstate Insurance Company v Klock Oil Company* 426 NYS 2d 603, 73 App Div 2d 486 (1980) (*Allstate Insurance Company v Klock Oil Company*, 1980). In terms of the policy definition an event or occurrence is accidental if it is neither expected not intended from the point of view of the insured. See *Jackson Township Municipal Utilities Authority v Harford Accident Indemnity Co* 186 NJ Super 1982 (*Jackson Township Municipal Utilities Authority v Harford Accident Indemnity Co*, 1982); *Mraz v American Ins Co* 616 F DC Md (1985) (*Mraz v American Ins Co*, 1985); *Buckeye Union Insurance v Liberty Solvents & Chemicals* 47 Ohio (1984) (*Buckeye Union Insurance v Liberty Solvents & Chemicals*, 1984); *Reliance Insurance Co of Illinios v Martin* 126 Ill (1984) (*Reliance Insurance Co of Illinios v Martin*, 1984); *Travellers Indemnity Co v Dingwell* 414 Maine (1980) (*Travellers Indemnity Co v Dingwell*, 1980); *Lansco Inc v Department of Environmental Protection* 183 NJ Super (1975) (*Lansco Inc v Department of Environmental Protection*, 1975); *contra American States Co v Maryland Causality* 587 Mich 1984 (*Contra American States Co v Maryland Causality*, 1984); *Waste Management v Peerless Insurance Co* 315 NC (1986) (*Waste Management v Peerless Insurance Co*, 1986). One of the most prominent cases involves Shell and the Rocky Mountain Arsenal site. In 1988 a jury ruled the gradual pollution was not covered by the CGL policy (BI Dec 26, 1988), on appeal a retrial was ordered (BI Jan 25, 1993). In *Outboard Marine Corporation v Liberty Mutual Insurance* (4/12/1993) (*Outboard Marine Corporation v Liberty Mutual Insurance*, 1993) the Illions rejected the defence that claims for cleanup costs of contamination caused by gradual pollution was excluded.

117 EIL cover is difficult to obtain and as an insurance cover has not been very successful. In 1983 the estimated premium income was $35 million and claims $90 million; Jernberg *et al* (1987).

118 The 4th (BI July 27, 1987; April 6, 1992), 6th (BI Sept 12, 1988) and 8th (BI Dec 23, 1991) US Circuit Courts of Appeals held that 'damage' does not include clean up costs, ruling in favour of insurers. The District of Columbia (BI Sept 23 & 16 1991), 2nd (BI Oct 23, 1989), 3rd (BI May 6, 1991) & 9th (BI Nov 25) US Circuit Courts of Appeals held that 'damage' does include clean-up costs, ruling in favour of the policyholder. The Massachusetts Supreme Judicial Court, which falls within the 1st Circuit ruled, in the case of *CPC International Inc v Northbrook Excess & Surplus Insurance Co* 91-1580, 91-1734, in favour of policyholders. (BI April 6,1992). See also *Broadwell Realty Services Inc v Fidelity & Casualty Co of New York.* The West Virginia high court adopted a pro-policy holder view Gordon, S (1992) 'Pollution coverage ruling' *BI* June 15, 1992 (Gordon, 1992c). The Supreme Court of Illonis, in the case of *Outboard Marine Corporation v Liberty Mutual Insurance* (4 Dec 1992) decided that contamination was damage; Fields, R 'Market Meltdown' (1993) 154 7 Post 21 (Fields, 1993).

10.7 Specific extensions

The general liability policy can contain a number of specific extensions.

(a) Additional insured

A liability claim usually arises because of the actions of people. The fact that the company has taken out insurance to protect itself, does not mean that the persons who caused the claim to arise in the first place, are also insured. To also cover the persons involved, the liability policy has a term which extends the policy to cover the persons as additional insured persons.

Persons included as the additional insured

The following persons are normally insured as additional insured: any personal representative, partner, director or employee of the insured if the insured so requests but only against any claim for which the insured is entitled to indemnity under the insurance.

In many cases large companies have social clubs, first-aid stations or fire or ambulance services. For example in isolated areas, the fire service of a large company may often be called to render assistance to deal with fires. The policy can be extended in respect of activities at any social or sports club or welfare organisation, first-aid, fire, ambulance service or canteen including any officer or member thereof or any visiting sports team or member thereof.

This extension is obviously subject to a number of limitations. If additional persons are insured, then in terms of the law of subrogation the insurance company may have a right of subrogation against the latter insured since they caused the claim. For the purposes of the extension the rights of subrogation are usually waived.

(b) Liability assumed by agreement

One of the exceptions is the exception for liability assured by agreements. In industry there are a number of well-known agreements, such as agreements entered into with Transnet for the use of a private siding. There is normally an extension to the policy to cover claims arising notwithstanding such agreements.

(c) Products liability

The general liability policy can be extended to cover products liability claims.

Repetitive Strain Injury (RSI) Litigation - (USA)

The RSI litigation is an example of injured employees resorting to claims against manufacturers instead of their employers.[119] Examples include the case in 1993 where a plaintiff unsuccessfully sued NCR alleging his condition was caused by a grocery scanner. In November 1994 a case involving a check encoding system against NCR was dismissed. In 1994 there was a further unsuccessful claim in Texas against the Compaq Computer Corporation. In 1995 there were a series of cases in the US. In Michigan a case brought by John Spears against Unisys Corporation

[119] A Stokes, 'Repeat Performance' 1996 157 (14) PostMagazine 22 (Stokes, 1996)

was dismissed. In Minnesota, Nancy Urbanski, brought a case against Apple Computer and IBS for RSI. The case against IBM was dismissed but Apple settled out of court. Maryland Bush brought a case in New York against IBM. Her case was also dismissed. Carolyn Brust a graphic artist brought a case against Apple Computer in the San Francisco Court. This time Apple Computer defended and the case was dismissed. By 1996 over 2 400 cases were pending in the USA, three hundred of which are against IBM.

In South Africa repetitive strain injuries are now covered by workers' compensation and accordingly the possibly of claims being brought against employers or anyone else has decreased.

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