

Insurable interest as a requirement for insurance contracts: A comparative analysis

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SUMMARY AND KEY TERMS

This mini-dissertation has as its focus the application of the doctrine of an insurable interest in South Africa. The research question to be answered was to what extent, if any, an insurable interest should be considered to constitute a requirement for the validity of an insurance contract. The overall approach was to analyse and discuss the case law and academic literature with regard to the definition and application of the doctrine.

Due to the fact that the difficulties experienced with regard to the doctrine are not unique to South Africa, a comparative approach was adopted. The comparative approach entailed a detailed discussion regarding the definition and application of the doctrine in Great Britain and Australia.

The research will show that the doctrine has dubious historical origins and that the importation of the doctrine is questionable at best. Furthermore, the doctrine tends to be anti-consumer in that it provides an obscure technical defence whereby the insurer is able to avoid performing in terms of the contract of insurance. Due to the afore-mentioned reasons it is recommended that the doctrine be scrapped in favour of the indemnity principle that already satisfies the objectives sought to be achieved by the doctrine.

KEYWORDS: Insurance, insurable interest, indemnity principle, insurance contract, third party insurance, South Africa, Great Britain, Australia

TABLE OF CONTENTS

LIST OF ABBREVIATIONS	1
1 Chapter 1	2
1.1 Problem Statement	2
1.2 General and specific research questions	4
1.3 Primary and secondary research objectives	5
1.3.1 Outline.....	5
1.4 Factual scenario.....	6
2 Chapter 2	7
2.1 Introduction	7
2.2 The traditional/classical definition of an insurable interest.....	7
2.3 The indemnity-based definition	9
2.3.1 Introduction	9
2.3.2 Application by the courts.....	10
2.4 Liberalisation of the definition of an insurable interest	13
2.4.1 <i>Phillips v General Accident Insurance</i>	14
2.4.1.1 Discussion of the judgement.....	14
2.4.1.2 Criticism	15
2.4.2 <i>Refrigerated Trucking v Zive</i>	16
2.4.2.1 Discussion of the judgement.....	16
2.4.2.2 Criticism against the decision.....	18

2.4.2.3	Concluding remarks	19
2.5	<i>Insurable interest as a requirement for insurance contracts</i>	19
2.5.1	<i>Introduction</i>	19
2.5.2	<i>Importation of the concept</i>	20
2.5.3	<i>English adaptation</i>	20
2.5.4	<i>Criticism against adoption</i>	21
2.5.5	<i>The view South African courts</i>	22
2.5.5.1	Introduction	22
2.5.5.2	Lynco Plant Hire v Univem.....	23
2.5.5.2.1	Discussion of the case	23
2.5.5.3	Philips v General Accident Insurance	24
2.5.5.3.1	Discussion of the case.....	24
2.5.5.4	Steyn v AA Onderling Assuransie Assosiasie Bpk.....	25
2.5.5.4.1	Discussion of the case.....	25
2.5.5.5	Lorcom Thirteen v Zurich	27
2.5.5.5.1	Discussion of the case.....	27
2.5.5.6	Criticism against the decision.....	29
2.5.6	<i>Summary</i>	30
2.6	<i>Conclusion</i>	31
3.1	<i>Introduction</i>	33
3.2	<i>History of the concept</i>	33

3.2.1	<i>Legislative history</i>	33
3.2.2	<i>Defining an insurable interest</i>	35
3.2.3	<i>Application to factual scenario</i>	39
3.3	<i>The legal position after 2005</i>	40
3.3.1	<i>The Scottish and English Law Commission</i>	40
3.3.2	<i>The 2008-paper on the insurable interest doctrine</i>	41
3.3.2.1	Fears of reform	41
3.3.2.2	Insurable interest as a necessity for classifying a contract as one of insurance	42
3.3.2.3	Insurable interest as a necessity to prevent moral hazards	43
3.3.2.4	The indemnity principle	44
3.3.2.5	The indemnity principle as a substitute for the insurable interest doctrine	45
3.3.3	<i>Second Joint Consultation Paper 2011</i>	47
3.3.3.1	Aids in distinguishing between contracts of insurance and other contracts	48
3.3.3.2	Prevents moral hazards	50
3.3.3.3	Protects insurers from invalid claims.....	51
3.3.3.4	Global market used to define where insurance is located.....	53
3.3.4	<i>Issue Paper Number 10 of 2015</i>	53
3.3.5	<i>Continuing application of the doctrine</i>	54
3.4	<i>Relevance to South Africa</i>	55

3.4.1	<i>Historical origins</i>	55
3.4.2	<i>Difficulties regarding the strict definition</i>	55
3.4.3	<i>Continuing application of the doctrine</i>	56
3.5	Conclusion	57
3.5.1	<i>Historical application and purpose of the doctrine</i>	58
3.5.2	<i>Approach adopted by the British courts</i>	58
3.5.3	<i>Findings and recommendations of the SELC</i>	59
3.5.4	<i>Relevance to the current South African debate</i>	60
4	Australia	60
4.1	Introduction	60
4.2	Australian Law Reform Commission	61
4.2.1	<i>Abolishment of the doctrine</i>	62
4.2.2	<i>Indemnity principle</i>	63
4.2.3	<i>Anomalies with regard to the indemnity principle</i>	64
4.2.3.1	Nature of the interest required	64
4.2.3.2	Third-party insurance	66
4.2.3.3	Limited interest in property.....	66
4.3	Insurance Contracts Act	69
4.4	Conclusion	70
4.4.1	<i>Abandonment of the insurable interest doctrine</i>	70

4.4.2	<i>Legislative measures adopted in light of the ALRC's recommendations.....</i>	70
4.4.3	<i>ALRC's discussion regarding the indemnity principle.....</i>	71
4.4.4	<i>Relevance to South Africa</i>	72
4.4.4.1	Revocation of the insurable interest doctrine	72
4.4.4.2	The indemnity principle	72
5	Chapter 5	74
5.1	<i>Revisiting the research question.....</i>	74
5.2	<i>Responding to the research questions through research objectives</i>	75
5.2.1	<i>Application of the doctrine in South Africa</i>	75
5.2.1.1	Defining the doctrine	75
5.2.1.2	Essentiality of the doctrine	76
5.2.2	<i>Application of the doctrine in Great Britain.....</i>	77
5.2.3	<i>Application of the doctrine in Australia.....</i>	77
5.3	<i>Recommendations.....</i>	78
5.3.1	<i>Redefining the concept</i>	78
	BIBLIOGRAPHY.....	80

LIST OF ABBREVIATIONS

ALRC	Australian Law Reform Commission
CILSA	Comparative and International Law Journal of Southern Africa
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
SELC	Scottish and English Law Commission
TSAR	Tydskrif vir die Suid Afrikaanse Reg

1 Chapter 1

1.1 Problem Statement

In 1883 the Canadian Court of Appeal held in the classical decision of *Castellain v Preston*¹ "that only those who have an insurable interest can recover on the insurance contract".² The court added that an insured would only be able to claim to the extent that his insurable interest would allow.³

The approach taken in the above-mentioned case has had far-reaching effects on the manner in which South African courts approaches insurance contracts. The approach in *Castellain v Preston* has been endorsed by South African courts and can safely be accepted as forming a core part of the country's insurance law.⁴ It is remarkable that a concept that has been accepted as part of the South African law and that is seemingly so important to the validity of an insurance contract is still shrouded in controversy and has divided South African courts and academic opinion in the manner that it has.

The confusion stems mainly from the fact that neither the *Short Term Insurance Act*⁵ nor the *Long Term Insurance Act*⁶ contains a definition with regard to the concept of an insurable interest. As of yet the Supreme Court of Appeal has not had the opportunity to clarify the confusion. Therefore the definition, content and role of the concept are to be found in case law.

Case law dealing with the concept, however, is likely to cause more confusion than it tends to clarify. The courts are remarkably inconsistent with their pronouncements regarding the role and composition of the concept, as will become evident from the following paragraphs.

In the case of *Lynco Plant Hire & Sales BK v Univem Versekeringsmakelaars BK*⁷ the court held that an insurable interest is a requirement for the validity of an insurance

1 *Castellain v Preston* (1883) 11 QBD 380 (CA) (hereafter referred to as the *Castellain*-case.

2 *Castellain*-case at par [397].

3 *Castellain*-case at par [397].

4 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 26.

5 53 of 1998.

6 52 of 1998.

7 *Lynco Plant Hire & Sales BK v Univem Versekeringsmakelaars BK* 2002 5 SA 8 (T) (Hereafter referred to as the *Lynco-Plant* case).

contract.⁸ In the case of *Philips v General Accident Insurance CO (SA) Ltd*⁹ the court questioned the validity of the concept as a requirement and held that too much emphasis was placed on the requirement and that the real enquiry should rather be aimed at establishing whether the contract before the court amounted to a betting or wagering agreement.¹⁰ In *Lorcom Thirteen v Zurich Insurance Company South Africa Ltd*¹¹ the court rejected the concept altogether by holding that there was in fact very little justification for the incorporation of the concept.¹² The court went further to hold that the only real enquiry was whether the parties to the insurance contract had in fact intended for the insurer to indemnify the insured against the damages that he had suffered.¹³

Apart from conflicting judgements with regards to this elusive concept, academic opinion is also firmly divided regarding the definition, role and content of an insurable interest. Authors such as Gordon and Gets¹⁴ argue that an insurable interest is a fundamental requirement for the validity of an insurance contract and that risk will not attach to the insured unless such an interest is present. Opposed to this position are authors such as Reinecke and Van der Merwe¹⁵ who argue that one should not focus on an insurable interest in order to classify a contract as one of insurance but that the focus should rather be on the intention of the parties. According to their approach an insurer will be liable if the insured has suffered damages that the parties intended the insurer to indemnify.

Unfortunately, these controversies are not only of theoretical significance as the role and definition of an insurable interest can and does have severe practical consequences for the insured. Schulze¹⁶ states that:

8 *Lynco-Plant* case at par [9].

9 *Philips v General Accident Insurance CO (SA) Ltd* 1983 4 SA 652 (W) (hereafter referred to as the *Philips-case*).

10 *Philips-case* at 659E-G.

11 *Lorcom Thirteen v Zurich Insurance Company South Africa Ltd* 2013 5 SA 42 (WCC) (hereafter referred to as the *Lorcom Thirteen-case*).

12 *Lorcom Thirteen-case* at par [23].

13 *Lorcom Thirteen-case* at par [26].

14 Davis *Gordon and Gets The South African Law of Insurance* 94-95.

15 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 26.

16 Schulze 1997 *SA Merc LJ* 65.

Due to the fact that neither the role of the concept of an insurable interest nor its content is certain, it is a perfect peg for the insurer on which to hang repudiation.

In practice it often occurs that insurers raise the defence of a lack of an insurable interest when they want to escape liability. It is for this reason that it is vitally important that clarity be obtained on the definition, content and ultimately the role of the concept of an insurable interest in South African insurance law.

A comparative approach is advisable due to the fact that the concept of an insurable interest is not unique to the South African legal system. Both the Australian and British legal systems have experienced similar difficulties to those experienced by South Africa and have sought to solve them. It is therefore advisable to analyse the solutions applied by the above-mentioned nations

1.2 General and specific research questions

Given the situation described in the preceding paragraphs, the general question to be researched in this mini-dissertation can be formulated as follows:

To what extent, if any, should an insurable interest be considered to constitute a requirement for the validity of an insurance contract?

The following specific research questions have been formulated in order to answer the general research question comprehensively:

1. How is the doctrine of an insurable interest currently applied in South Africa?
2. How is the doctrine of an insurable interest currently applied in Great Britain?
3. How is the doctrine of an insurable interest currently applied in Australia?
4. What lessons is to be learned from the doctrines application in Australia and Great Britain?

Although the concept of an insurable interest has also caused major difficulties with regard to non-indemnity insurance contracts this mini-dissertation will focus solely on indemnity insurance contracts.¹⁷

1.3 Primary and secondary research objectives

The primary objective of this mini-dissertation is to determine to what extent an insurable interest should be considered to constitute a requirement for the validity of an insurance contract. In reaching the primary objective, the following secondary objectives can be identified:

1. To establish how the doctrine of an insurable interest is currently being applied in South Africa;
2. to determine how the doctrine of an insurable interest is currently being applied in Great Britain;
3. to determine how the doctrine of an insurable interest is currently being applied in Australia; and
4. to identify and discuss the lessons to be learned from the doctrines application in Australia and Great Britain.

The research-method employed will consist of an in-depth study of relevant case law, journal articles and academic texts. The different principles and academic opinions will then be applied to a factual scenario to better illustrate the different arguments and decisions with regard to an insurable interest.

1.3.1 Outline

Chapter 2 contains an in-depth discussion regarding the difficulties faced with regard to the insurable interest doctrine in the South African context. In essence the chapter focuses on the approach adopted by the courts with regard to the essentiality and definition of the requirement of an insurable interest. The approach adopted by the

17 For an in-depth discussion of the requirement of an insurable interest with regards to non-indemnity insurance see Havenga P "Liberalising the requirement of an insurable interest in (life) insurance" 2006 *SA Merc LJ* 259-273.

courts, as described in chapter 3, focuses on the application of the doctrine in Great Britain with specific emphasis on the recent reforms that have been implemented by the British legislature.

Chapter 4 focuses on the Australian experience with regard to the doctrine and its subsequent abolishment. Particular emphasis is placed on Australia's application of the indemnity principle. Chapter 5 contains concluding remarks and recommendations regarding the continuing application of the doctrine in South Africa.

1.4 Factual scenario

To aid in better illustrating the arguments of each of the above-mentioned sides and the practical effects of the respective approaches, an example will be used: John (aged 25) owns all the shares in a transporting company by the name of Albatross Transporters (henceforth referred to as AT Company). The company owns several trucks which it uses for transporting goods across the country. The company has been doing very well and John decides to buy a brand new Golf GTX.

John's sister has recently had some financial difficulties and John has agreed to have her live with him until such a time when she can get back on her own feet. John's sister has recently won a brand new Mercedes Benz, but due to her financial difficulties she cannot afford the insurance premiums.

John decides to insure both the Golf and the trucks owned by the company at YMC Insurance Company. He is a lay-person when it comes to insurance and decides to insure the trucks of the company in his own name. John feels empathy for his sister's financial position and decides to insure the Mercedes Benz as part of his insurance portfolio. YMC agrees to indemnify John against any loss or damages that may be sustained in respect of the vehicles.

Based on the abovementioned, it is important to firstly investigate how an insurable interest is defined. As will be discussed below, the courts are currently faced with two competing definitions, namely the traditional definition and the indemnity based definition.

2 Chapter 2

2.1 Introduction

The focus of Chapter 2 is the application of the insurable interest doctrine in the South African context. Reference has already been made to the fact that the doctrine's continuing application and its definition are marred in controversy.¹⁸ The continuing application and definition of the doctrine is of importance due to the fact that indemnity insurance has become a part of most households in South Africa. It will be demonstrated below that the insurable interest doctrine serves as a technical defence of which the client often has little or no knowledge, thus providing the insurer with an easy tool to relegate on a contract if he so chooses.

Considering preceding paragraphs, chapter two has the following objectives:

- To establish and discuss how the doctrine is currently defined; and
- to establish and discuss whether the doctrine is still considered to constitute an essentiality for the enforcement of an insurance contract;

Based on these objectives, the specific research question to be answered in this chapter is the following: How is the doctrine of an insurable interest currently defined and applied in South Africa?

2.2 The traditional/classical definition of an insurable interest

Reference has already been made to the fact that neither the Short Term Insurance Act nor the Long Term Insurance Act contains a definition with regards to the concept of an insurable interest, and that the Supreme Court of Appeal has not yet had the opportunity to clarify the confusion. Currently, two opposing definitions are put forward by academics, namely the traditional definition and an economic-based definition.

18 See paragraph 1.1 in this regard.

Gordon and Gets appear to be the most prominent authors in favour of the traditional or English approach to defining an insurable interest.¹⁹ They suggest that the definition given by McGillivray and Parkington²⁰ should be used which reads as follows:

where the assured is so situated that the happening of the event on which the insurance money is to become payable would, as a proximate cause, involve the assured in the loss or diminution of any right recognized by law or in any legal liability there is an insurable interest in the happening of that event to the extent of the loss or liability.

Gordon and Gets therefore argue that the insured must stand in a legal or equitable relationship with regard to the subject matter of the insurance contract. In short they argue that an insurable interest, as a point of departure, must have a legal basis.²¹

A prime example of the traditional definition can be found in the case of *Macuara v Northern Assurance*²² (an English decision) where the House of Lords held that a single shareholder could not have an insurable interest in the company's assets. Suffice it to say that this definition for an insurable interest has not found acceptance in all spheres of the South African legal system and is heavily criticised by authors such as Reinecke and Van der Merwe²³ who view this definition as too narrow.²⁴

If the traditional definition were to be applied to the factual scenario in chapter 1, the results would be the following: With regard to the Golf, no difficulties would be experienced as John clearly has a legal basis for his interest in the vehicle, namely ownership. A problem arises, however, with regard to the insurance of the Mercedes Benz and the trucks of AT. John has no legal right or legal liability with regard to the Mercedes that is owned by his sister. Therefore, according to the traditional approach,

19 The *locus classicus* with regard to the traditional definition is to be found in *Lucena v Craufurd* (1806) 2 Bos & Pul (NR) 260. It is interesting to note that throughout the extensive research conducted with regard to the application of the insurable interest in South Africa, Gordon and Gets are the only South African authors that are currently in support of the traditional definition. Common sense dictates that they surely cannot be the only South African authors that support the traditional definition. However, it would appear that they are by far the most prominent in that they appear to be the only authors in support of the traditional definition capable of publication.

20 Davis *Gordon and Gets The South African Law of Insurance* 92.

21 Davis *Gordon and Gets The South African Law of Insurance* 92.

22 *Macuara v Northern Assurance CO Ltd* [1925] AC 619.

23 Reinecke and Van der Merwe 1984 *SALJ* 609.

24 It will become apparent from the subsequent paragraphs that the vast majority of South African academics are against the traditional definition of an insurable interest. It was mentioned in footnote 19 that Gordon and Gets appear to be the only published academics that are still in favour of the doctrine.

John does not have an insurable interest with regard to the Mercedes and will not be able to claim under the insurance contract.

The same is also true with regard to the vehicles of AT. Seeing that a company has its own distinct legal personality, it cannot be said that a shareholder (even a majority shareholder) has a legal right or legal liability with regard to the assets of that company.²⁵ Therefore, John will also be unable to claim under the insurance contract in respect of the vehicles of AT Company. The traditional approach has not found acceptance with everyone in the academic sphere and, as an alternative, some have put forward the indemnity based definition.

2.3 The indemnity-based definition

2.3.1 Introduction

Authors such as Reinecke and Van der Merwe²⁶ do not endorse the traditional definition and they are of the opinion that it's too narrow. Instead, they advocate a definition in which the focus is not centred on a legal right or a liability but rather on the intention of the parties and whether it can be said that the insured has suffered damages.

When reference is made to the concept of damages in the context of insurance law, it is not meant that some specialised meaning should be attributed to the concept.²⁷ It is simply to be given the meaning that is generally accepted in law of damages with the exception being that the insurer and insured be given the freedom to broaden the concept with regard to their insurance contract.²⁸

In the law of damages the concept of damages is defined as follows:

Damage is the diminution, as a result of a damage-causing event, in the utility or quality of a patrimonial or personality interest in satisfying the legally recognised needs of the person involved.²⁹

25 In this regard see *Macaura v Northern Assurance CO Ltd* [1925] AC 619 where it was held that a shareholder (even if he is a majority shareholder) does not have an insurable interest in the property of the company due to the fact that it cannot be said that he stands in a legal or equitable relationship with regard to the property.

26 See par 1.1 above.

27 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 36.

28 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 36.

29 Floyd, Steynberg and Potgieter *Visser & Potgieter Law of Damages* 27.

The patrimony of a person is deemed to consist of all rights, obligations and expectancies.³⁰ It also concerns the monetary value of the above-mentioned components as a patrimonial loss must necessarily be expressed in money.³¹

Therefore, in terms of the indemnity-based definition, any interest that, when impaired, results in the diminution of a person's patrimony, would constitute an insurable interest with regard to insurance contracts. In short the interest in question must be "a loss with a realistic commercial value".³²

2.3.2 Application by the courts

Reinecke and Van der Merwe³³ use as their point of departure the definition provided in the case of *Littlejohn v Norwich*³⁴ which states the following:

[I]f 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* or a *jus ad rem* to the thing insured his interest will be an insurable one.

They are, however, quick to point out this definition is merely a starting point and will not be satisfactory in all situations.³⁵ One point of criticism raised by the authors is that the definition is only applicable to the physical destruction or loss of a corporeal thing and since South Africa's modern law has for a considerable time recognised incorporeal rights and expectations as forming part of a person's estate (the incorporeal right to one's intellectual property being but one example), the definition will not be useful in all instances.³⁶

However, the definition is important in the sense that it shows a willingness by South African courts to move away from the strict English definition of an insurable interest to the extent that it is not a requirement that one has to have a legal basis for such an

30 Floyd, Steynberg and Potgieter *Visser & Potgieter Law of Damages* 55.

31 Floyd, Steynberg and Potgieter *Visser & Potgieter Law of Damages* 55.

32 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 36.

33 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 27.

34 *Littlejohn v Norwich Union Fire Insurance Society* 1905 TH 374 380-381 (hereafter referred to as the *Little John*-case).

35 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 27-28.

36 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 27-28.

interest. Reinecke and Van der Merwe³⁷ argues that the way forward should be a more comprehensive definition built on that what was stated in the *Littlejohn*-case.³⁸

The indemnity-based definition has found favour in many South African courts. In the case of *Manderson v Standard General Insurance Company*³⁹ the court referred with approval to the definition given in the *Littlejohn*-case⁴⁰ and came to the conclusion that the real question needed to be one related to whether the insured had suffered damages that the insurer had intended to indemnify.⁴¹

In *Refrigerated Trucking v Zive*⁴² the court not only accepted the definition provided in the *Littlejohn*-case but accepted the definition as an unchallenged exposition of South African law on this point.⁴³ The court then proceeded to give its own definition:

It seems then that in our law of indemnity insurance an insurable interest is an *economic interest* which relates to the risk which a person runs in respect of a thing which, if damaged or destroyed, will cause him to suffer economic loss or, in respect of an event, which if it happens will likewise cause him to suffer an economic loss. It does not matter whether he personally has rights in respect of that article, or whether the event happens to him personally, or whether the rights are those of someone to whom he stands in such a relationship that, despite the fact that he has no personal rights in respect of the article, or that the event does not affect him personally, he will nevertheless be worse off if the object is damaged or destroyed, or the event happens.⁴⁴ (own emphasis added)

What is of particular interest with regard to the quotation is the court's reference to an "economic interest". Shortly summarised, an economic interest is quite simply any interest that, if impaired, would lead to the insured suffering damages.

37 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 27-28.

38 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 27-28.

39 *Brian Hilton Manderson v Standard General Insurance Company Limited* (D), 2 September 1993 (case 4898/92) unreported. (hereafter referred to as the *Brian Hilton*-case).

40 *Littlejohn*-case at 374.

41 *Brian Hilton Manderson v Standard General Insurance Company Limited* (D), 2 September 1993 (case 4898/92) unreported 9.

42 *Refrigerated Trucking (Pty) Ltd v Zive NO* 1996 2 SA 361 (T) (henceforth referred to as the *Zive* - case).

43 *Zive*-case at 371D-E.

44 *Zive*-case at 372F-H.

Another example of a case where an economic interest was deemed to be sufficient to constitute an insurable interest is *Pienaar v Guardian National Insurance*.⁴⁵ In the *Pienaar*-case it was held that the economic interest that a *bona fide* possessor has in a stolen car was sufficient to constitute an insurable interest for insurance purposes.⁴⁶ This is due to the fact that the *bona fide possessor* “stands to lose something of an appreciable commercial value” should the insured vehicle be stolen, notwithstanding the fact that he was not able to obtain “good title” with regard to the vehicle.⁴⁷ The loss that was to be suffered by the *bona fide possessor* in this instance is the “loss of continued useful possession of the article”.⁴⁸ This, the court held, was sufficient to establish an insurable interest.⁴⁹

If the indemnity based definition was to be applied to the factual scenario the results would be the following: John will naturally be able to claim for any loss suffered in respect of his Golf as he will be personally liable to repair any of the damages in respect of the vehicle. With regard to his sister’s Mercedes John will still not be able to claim as he does not stand to lose “something of an economic value” should anything happen to the Mercedes. He might be able to argue that he will in fact suffer financial loss due to the fact that he will in all likelihood now be his sister’s only mode of transportation but that would be a long-shot at best. With regard to the trucks of AT Company John will now be able to claim as his interest in the company does constitute an “economic interest” as defined above. If the trucks have to be replaced by the company his shares in the company will decrease in value, causing John to suffer damages.

In the preceding paragraphs both the traditional approach and the indemnity based definition was discussed. The question remains, however, which approach has found favour with South African courts and is currently being applied. Thus the subsequent paragraphs constitute an analysis of the approach that the South African courts have recently taken with regard to defining an insurable interest.

45 *Pienaar v Guardian National Insurance Co Ltd* 2002 3 SA 640 (C) (hereafter referred to as the *Pienaar*-case); also see *Foster v Mutual & Federal Insurance Co Ltd* (T) 5 2002 unreported, where the right of a *bona fide* occupier was held to be sufficient to constitute an insurable interest.

46 For an in depth discussion of *Pienaar v Guardian National Insurance* see Manamela T “Insurable interest in stolen property bought in terms of an instalment-sale agreement” 2003 *SA Merc LJ* 479-486.

47 *Pienaar*-case 640D-F.

48 *Pienaar*-case 647A-B.

49 *Pienaar*-case 647C.

2.4 Liberalisation of the definition of an insurable interest

As was stated previously, a lack of an insurable interest is often raised as a defence by those insurers who wish to escape liability. This may lead to situations that appear to be manifestly unfair. For example, John, having faithfully paid his premiums every month, will be unable to claim for any damage that is sustained to the Mercedes simply because he does not have an insurable interest in the vehicle, the same being true with regard to the trucks owned by AT Company.

John, having no legal training whatsoever, is unaware of the situation; while it would be very simple for the insurer (YMC) to obtain the necessary information and inform John of the above mentioned deficiency. This could be done by having a more thorough questionnaire completed before agreeing to the insurance contract.

It must also be mentioned that if the Mercedes (the same being true for the trucks) never sustains any damage, the question of an insurable interest will never be raised. YMC insurance company would in fact have received compensation (in the form of a premium) and not incurred any risk with regards to the Mercedes or trucks.

Unfortunately, no statutory duty is placed on the insurer either to ascertain or to inform John that he does or does not have an insurable interest in the vehicles in question.⁵⁰ Even if such a duty did exist it would be nearly impossible for an insured to prove that the insurance company did in fact have the required knowledge.

This situation has not gone unnoticed by the courts and they have at times gone to great lengths to assist the insured in finding an insurable interest. Two prime examples of this can be found in the *Phillips*-case and *Zive*-case. It will become evident from the judgements in these cases that the courts have embarked on a process of liberalising the requirement of an insurable interest.

50 Neither the *Short-Term Insurance Act 53* of 1998 nor the *Long-Term Insurance Act 52* of 1998 creates such a duty.

2.4.1 *Philips v General Accident Insurance*

2.4.1.1 Discussion of the judgement

The facts of the case are, in short, the following: Mr Philips (the plaintiff) had insured his wife's jewellery for R10 000 with General Accident Insurance CO (the defendant).⁵¹ The plaintiff and his wife had been married out of community of property hence no legal basis existed for the plaintiff's interest in the jewellery.⁵² The plaintiff's wife had been conned into giving the jewellery to a certain Luigi who had disappeared with the items shortly thereafter.⁵³ Therefore, in light of the above, the defendant raised the defence that the plaintiff had no insurable interest with regard to the jewellery in question and could not claim under the insurance contract.⁵⁴

Interestingly, the insurance contract between the plaintiff and the defendant had specifically stated that the plaintiff would be insuring his wife's jewellery.⁵⁵ However, due to the fact that the plaintiff did not base his argument on this prior knowledge the court did not base its decision there on.⁵⁶ The court held that:

If there is any doubt, the benefit should in my view be given to the insured, having regard to the fact that normally the company has throughout the period of insurance accepted the insurance premiums and that such a defence is really a technical one. I concede that one of the factors to be taken into consideration in deciding whether the agreement amounts to a wager or not is whether the husband has an insurable interest in the article insured.⁵⁷

51 *Philips*-case at 653A-B.

52 *Philips*-case at 653A-B. It should be noted that had the parties been married in community of property, the defence of the insurance interest would not have been feasible. This is due to the fact that the spouses would have shared a single estate that would have been owned equally in undivided shares by the spouses.

53 *Philips*-case at 656C-H.

54 *Philips*-case at 658E-F.

55 *Philips*-case at 658E-F.

56 *Philips*-case at 658E-F. Had Philips argued that the insurance company had been aware, upon conclusion of the contract, that he did not have an insurable interest in his wife's jewellery, he might have been able to raise the plea of estoppel in order to prevent the insurance company from raising the defence of a lack of an insurable interest. Due to the difficulty in proving prior knowledge of an insurance company, the plea of estoppel has yet to find general application in the law of insurance with regard to insurable interests. With regard to the requirements for a plea of estoppel see Sonnekus JC *The Law of Estoppel in South Africa* 3rd ed (LexisNexis Durban 2012).

57 *Philips*-case at 659F-H.

It is clear from what the court stated that it felt the necessity to expand the definition of an insurable interest.⁵⁸ The court was not prepared to abandon the concept altogether but held instead that the plaintiff did in fact have an insurable interest in the jewellery as he felt himself under a *moral obligation* to replace it.⁵⁹

Applying this decision to the factual scenario, John would now be able to claim for any damage suffered with regard to the Mercedes as a strong argument could be made that he would in fact feel morally obliged to repair or replace the vehicle for his sister. It should be clear that this decision has considerably relaxed the requirement of an insurable interest.

2.4.1.2 Criticism

This decision has been criticised by academics but for distinctly different reasons. Gordon and Gets⁶⁰ argue that the decision defines an insurable interest too widely as it flies in the face of an insurable interest requiring a legal basis. Reinecke and Van Niekerk⁶¹ accept the decision as a step in the right direction only with respect to it being a step away from the traditional definition. They state the following:

It is unacceptable to award compensation on the ground of a nebulous interest such as that the insured felt himself morally – but not legally – obliged to replace the insured property, and thus leaving him a choice whether or not to honour the “obligation”.⁶²

The main thrust of the arguments against the extension of the doctrine in this manner is based on the fact that it extends beyond the indemnity principle.⁶³ In the *Phillips*-case it could not be argued that the insured stood to suffer a financial loss due to the theft of the property. *Mothupi*⁶⁴ illustrates the argument by asking whether it would be acceptable for a person to insure the property of his neighbour due to him feeling morally obliged to do so.

58 *Phillips*-case at 659F-H.

59 *Phillips*-case at 660H.

60 Davis *Gordon and Gets The South African Law of Insurance* 99.

61 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 35.

62 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 35.

63 *Mothupi* 2003 *Codicillus XLIV* 105 and Reinecke and Van der Merwe *SA Insurance LJ* 610.

64 *Mothupi* 2003 *Codicillus XLIV* 105.

It is argued that an extension of the doctrine would lead to some unnecessary problems and uncertainties and therefore courts should consider themselves bound by the indemnity principle.⁶⁵ That being said, it is easy to empathise with the court in the *Philips*-case seeing that the insurer had undertaken to indemnify the insured, who had faithfully performed his obligations in terms of the contract of insurance. It is difficult to avoid the conclusion that the court was guided by a sense of justice, especially considering the fact that no legal authority could be produced for the notion that a "moral obligation" would be sufficient to constitute an insurable interest.

2.4.2 Refrigerated Trucking v Zive

2.4.2.1 Discussion of the judgement

In this case the plaintiff had been the owner of a truck (a mechanical horse and trailer) that had been involved in a collision with the vehicle of a Mr Zive.⁶⁶ Mr Zive had passed away due to the collision and it was the executor of his deceased estate that acted as the defendant in the present matter.⁶⁷

The deceased had taken out an insurance policy with Aegis Insurance (which joined the proceedings as a third party and will be referred to as A Insurance) in terms of which A Insurance covered the damages sustained during the accident.⁶⁸ The issue before the court concerned the extent of A Insurance's liability due to the fact that the damage caused by the deceased was also covered by Golden Mark Promotions (Pty) Ltd (G Insurance).

G Insurance covered the liability of the employer of the deceased for any damages sustained by the employees whilst driving the insured vehicle of the employer.⁶⁹ A Insurance argued that they were only liable for 50% of the damages caused by the

65 Reinecke and Van der Merwe *SA Insurance LJ* 610.

66 *Zive*-case at 362D.

67 *Zive*-case at 362D.

68 *Zive*-case at 362D-H.

69 *Zive*-case at 362H.

defendant due to the extension clause⁷⁰ in the insurance contract between G Insurance and the employer of the deceased.⁷¹

An interesting secondary issue before the court was whether the defendant did in fact have an insurable interest. Both G Insurance and A Insurance had extension clauses in their insurance contracts that extended cover to third parties lawfully driving the vehicle in question. The effect of an extension clause, such as the one in the present matter, is that the insurer is in fact indemnifying third parties against damages that the third party might sustain whilst driving the vehicle that has been insured. Extension clauses such as these have caused considerable problems for the courts due to the traditional definition according to which the insured does not have an insurable interest in the damages sustained by the third party driving his vehicle.

Obviously the insured does have an insurable interest in his vehicle, but not in the contingent liability sustained by the third party driving his vehicle. With regard to this issue the court held that in respect of indemnity insurance it seems that an economic interest would be sufficient for an insured to claim on a contract of insurance.

The court defined an economic interest as an interest that relates to either the destruction or damaging of an object or the happening of an event that would result in the insured suffering an economic loss.⁷² The court emphasised that it was not required for the insured to stand in a legal relationship with the object of the contract of insurance or that the event should happen to him personally.⁷³ All that was required for an insurable interest to exist was that the insured should suffer an economic loss.

Although it appears from the preceding paragraphs that the court favoured the indemnity-based definition, in the end the court based its judgement on *considerations of convenience*. It held that the matters which might arise would be so complex that it would simply be more convenient that an extension clause extending liability in the

70 An extension clause is a clause in an insurance contract that extends coverage to other persons driving the insured motor vehicle. An extension clause, for example, would stipulate that the vehicle would be covered for any damages resulting from the driving of the motor vehicle by the policy holder or any of his extended family.

71 *Zive*-case at 362H.

72 *Zive*-case at 372H.

73 *Zive*-case at 372G.

manner that it did in the present case, be deemed to provide the insured with an insurable interest.⁷⁴

In the factual scenario, this would mean that should John allow his best friend, Botha, to drive his vehicle with his permission, and Botha is then involved in an accident, YMC will be liable for any damages incurred by Botha (provided of course that the necessary extension clause exists) due it being convenient to do so.

2.4.2.2 Criticism against the decision

The court's decision in the *Zive*-case has been heavily criticised by academics such as Reinecke and Van Niekerk.⁷⁵ Reinecke and Van Niekerk⁷⁶ state that:

It is wholly unacceptable to base an insurable interest on the ground of convenience, for example to recognise an insurable interest simply on the ground that the insured may be liable to a third party.

Schulze⁷⁷ also criticises the reasoning behind the judgement, arguing that the court should rather have held that the extension clause amounted to a stipulation in favour of a third party.⁷⁸ In short, a *stipulatio alteri* (stipulation in favour of a third party) is a contractual term in which one of the parties contracts with the other party that the other party is to deliver performance to a third party.⁷⁹

It would appear that, similarly to the *Phillips*-case, the court has gone out of its way to bring the scenario within the scope of the concept of an insurable interest. In doing so the court might have caused more confusion, rather than clarity, as the decision begs the question of just how far this convenience theory can be extended and applied to other disputes concerning an insurable interest.

74 *Zive*-case at 372H-373D.

75 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 35.

76 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 35: The reasoning behind the criticism is similar to that raised against the *Phillips*-case in that the court appears to deviate from the indemnity principle. In this regard, see paragraph 2.3.1.2.

77 Schulze 1997 *SA Merc LJ* 72-73.

78 This line of argumentation illustrates the desperation displayed by certain authors in attempting to validate certain insurance anomalies. Extension clauses have become common place but cannot be justified in terms of either the insurable interest doctrine or the indemnity principle. Legislative intervention recognising the interest as valid would of course have been preferable. In the absence of such intervention, however, it has been left to the courts and academics to find "creative" solutions for some of the difficulties faced with regard to the insurable interest doctrine.

79 Schulze 1997 *SA Merc LJ* 72.

It should be noted that the debate with regards to the insurable interest of a person covered by an extension clause has been laid to rest. The Supreme Court of Appeal held in the case of *Unitrans Freight v Santam*⁸⁰ that an extension clause amounts to a stipulation in favour of a third party and is therefore enforceable against the insurer. It should be noted, however, that there are still many questions that remain unanswered with regard to the application of the Supreme Court of Appeal's judgement.⁸¹

2.4.2.3 Concluding remarks

In conclusion, it becomes evident that some South African courts have gone to great lengths in order to come to the aid of those that have been prejudiced by what some coin a *technical defence*. In attempting to extend the definition, however, some argue that the courts have gone too far in that certain interests are now included that cannot be considered to be viable with regard to insurance contracts.

This begs the important question whether the concept is still acceptable as an element of an insurance contract. A question, that logically follows the first, is if the concept of an insurable interest *should* still be considered to be an element of an insurance contract.

2.5 Insurable interest as a requirement for insurance contracts

2.5.1 Introduction

The aim of this paragraph is to ascertain whether South African courts still consider an insurable interest to be one of the requirements for the validity of an insurance contract. In fulfillment of this aim, the origin and importation of the concept of an insurable interest must firstly be discussed in order to give context to the discussion of the importance thereof.

Therefore, before embarking on a discussion of whether an insurable interest is still considered a requirement for the validity of an insurance contract it would perhaps be

80 *Unitrans Freight (Pty) Ltd v Santam Ltd v Santam Ltd* 2004 6 SA 21 (SCA). For an in-depth discussion of the case, see Van Niekerk JP "Extension clauses in motor-vehicle insurance contracts as stipulations in favour of a third party: Clarity at long last" 2004 16 *SA Merc LJ* 286-303 and Reinecke MFB "Extension clauses and indemnity insurance" 2012 2 *TSAR* 342-348.

81 In this regard, see Van Niekerk JP "Extension clauses in motor-vehicle insurance contracts as stipulations in favour of a third party: A slight hiccup" 2006 4 *TSAR* 819-826.

prudent to discuss how, and more importantly, why, the concept was accepted into the South African legal system.

2.5.2 *Importation of the concept*

The concept of an insurable interest was developed from the *lex mercatoria* of the Middle Ages and was eventually accepted into South African legal system through adoption of the English insurance law.⁸² Originally it served a descriptive purpose only as the object of insurance; as time progressed, however, the concept was seen not merely as the object of insurance, but as a characteristic feature of an insurance contract.⁸³ Eventually the concept was accepted as a fundamental requirement for the validity of an insurance contract.⁸⁴

2.5.3 *English adaptation*⁸⁵

The *Life Assurance Act*⁸⁶ introduced the concept of an insurable interest as a statutory requirement for any insurance contract to the English legal system.⁸⁷ This is applicable to all insurance contracts, both indemnity and non-indemnity contracts, and should an insurance contract not comply with the strict requirements set by the *Life Assurance Act*, the contract is illegal and void.⁸⁸ None of the parties are able to waive the requirement and the court may take notice *mero motu* of the fact that an insurable interest is not present.⁸⁹

The *Life Assurance Act* is still applicable in England. What is interesting to note is the purpose of the promulgation of the *Life Assurance Act*. The English common law does not prohibit wagering contracts to the same extent as the Roman Dutch law.⁹⁰ Wagering contracts, in terms of the English common law, is perfectly enforceable unless

82 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 25.

83 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 26.

84 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 26.

85 The discussion concerning the historic origins of the concept contained in this chapter is of an introductory nature only. Chapter 3 contains a full discussion of the historic origins of the concept, as well as a discussion regarding the continuing application of the doctrine.

86 14 Geo III c 48.

87 The historical origins pertaining to the creation of the insurable interest doctrine in England is comprehensively discussed in chapter 3.

88 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 125.

89 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 125.

90 Reinecke 1971 *CILSA* 196.

there is something particularly offensive with regards to the particular wager that offends either the public policy or the *boni mores* of the community.⁹¹

The preamble to the *Life Assurance Act* stipulates that concluding insurance contracts, indemnity and non-indemnity, in which the insured has no interest has introduced a “mischievous kind of gaming”. Section 1 of the *Life Assurance Act* stipulates the following:

From and after the passing of this Act no insurance shall be made by any person or persons, bodies politick or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering: and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purpose whatsoever.⁹²

Despite the fact that the common law and our legislature have never viewed an insurable interest as a requirement for the validity of an insurance contract, the courts seem to have accepted the concept.⁹³ A good example can be found in the *Lynco Plant Hire*-case,⁹⁴ where the court assumed that an insurable interest is in fact a requirement for the validity of an insurance contract.

2.5.4 Criticism against adoption

Reinecke⁹⁵ argues that, considering the unique position of the English common law, the preamble to the *Life Assurance Act* and the wording of the above-mentioned section, the intention of the English legislature was clearly the prohibition of certain wagering contracts that had until that point been accepted as valid by the English common law. He points to the fact that legitimate insurance contracts can hardly be described as “mischievous kind of gaming”.⁹⁶

91 Reinecke 1971 *CILSA* 196.

92 14 Geo III c 48 s4.

93 *Lynco Plant Hire & Sales BK v Univem Versekeringsmakelaars BK* 2002 5 SA 8 (T) par [12] (henceforth referred to as the *Lynco Plant Hire* case).

94 *Lynco Plant Hire*-case at par [12].

95 Reinecke 1971 *CILSA* 201. For further criticism of the incorporation of the concept see Mothupi S 2003 “The problems and criticisms relating to interest theory in South African insurance law and other legal systems: some suggestions for reform” *Codicillus XLIV* Nr/No 2 101-109 and Schulze WG “Extension clauses in insurance contracts – uncertainty rules, ok” 1997 9 *SA Merc LJ* 64-76.

96 Reinecke 1971 *CILSA* 201.

Reinecke⁹⁷ makes the argument that the wagering contracts that the *Life Assurance Act* was intended to put an end to have been regulated by South African common law well before 1774. He points to the fact that the concept of an insurable interest is foreign to both South African common law and legislature.⁹⁸ He concludes that the *Life Assurance Act* was never applicable to the South African legal system and that the importation of the concept was wholly unnecessary.⁹⁹

2.5.5 The view South African courts

2.5.5.1 Introduction

Considering what has been mentioned above with regard to the incorporation of the concept of an insurable interest and the criticism that has been raised against it, the next step will be to consider the approach of the courts. As will be illustrated in the subsequent paragraphs a relatively recent trend has been the questioning and the outright dismissal of the concept.

To illustrate the approach taken by the courts the cases of *Lynco Plant Hire v Univem*,¹⁰⁰ *Phillips v General Accident Insurance*,¹⁰¹ *Steyn v AA Onderling Assuransie Assosiasie Bpk*¹⁰² and *Lorcom Thirteen v Zurich*¹⁰³ will be discussed. Only the criticism against the *Zurich* decision will be discussed.¹⁰⁴

97 Reinecke 1971 *CILSA* 201.

98 Reinecke 1971 *CILSA* 202.

99 Reinecke 1971 *CILSA* 202.

100 2002 5 SA 85 (T).

101 *Phillips v General Accident Insurance CO (SA) Ltd* 1983 4 SA 652 (W) (henceforth referred to as the *Phillips-case*).

102 *Steyn v AA Onderling Assuransie Assosiasie Bpk* 1985 4 SA 7 (T) (henceforth referred to as the *Steyn-case*).

103 *Lorcom Thirteen (Pty) Ltd v Zurich Insurance Company South Africa Ltd* 2013 5 SA 42 (WCC) (henceforth referred to as the *Lorcom Thirteen case*).

104 The *Lynco Plant Hire*-case is included only to illustrate the general approach that has been taken by our courts. The *Phillips* and *Steyn*-decisions gradually culminated into the *Lorcom Thirteen*-case and therefore all the criticism directed at the *Lorcom Thirteen*-case will be equally relevant to the *Phillips* and *Steyn*-decisions in respect of abandoning the concept of an insurable interest.

2.5.5.2 Lynco Plant Hire v Univem

2.5.5.2.1 Discussion of the case

An interesting example of the application of the concept of an insurance contract can be found in the *Lynco Plant Hire*-case. The facts of the case, shortly summarised, are the following: The plaintiff had purchased two motor vehicles on a lease agreement and had, on the strength of the advice of one of its insurance brokers, insured the vehicles on the name of one of its members.¹⁰⁵ The plaintiff and the member had concluded an agreement that all monies obtained in terms of the insurance agreement would be payable to the plaintiff.

When the two vehicles were stolen the insurance company repudiated the claim on the basis that the insured had no insurable interest in the two vehicles.¹⁰⁶ The plaintiff sued the defendant, the broker, on the grounds that he had given incorrect advice. As part of the adjudication the court had to determine whether the member had an insurable interest in the property of the closed corporation.¹⁰⁷

What is of interest to the current discussion is the courts position on whether an insurable interest is in fact a requirement for the validity of an insurance contract. The court stated the following:

Wat vasstaan is dat 'n versekerbare belang wel 'n vereiste is vir 'n geldige versekeringskontrak, hetsy vanweë gemeenregtelike beginsels hetsy vanweë oor-geërfde Engelsregtelike invloed. Wat ookal die juridiese basis daarvoor mag wees, is dit myns insiens uit die gesag waarna verwys is in argument baie duidelik dat dit deel van ons huidige regssisteem is en is dit nie nodig om verder oor die beginselvraag uit te wy nie.¹⁰⁸

The court is that the court appears to have assumed that an insurable interest is a requirement for the validity of an insurance contract without an investigation into the historical origins of the concept.¹⁰⁹ The court seems to accept that the concept has been a part of the South African legal system for such a long time that it is unnecessary to even consider the validity of the concept.

¹⁰⁵ *Lynco Plant Hire*-case at par [86].

¹⁰⁶ *Lynco Plant Hire*-case at par [86].

¹⁰⁷ *Lynco Plant Hire*-case at par [86].

¹⁰⁸ *Lynco Plant Hire*-case at par [12].

¹⁰⁹ *Lynco Plant Hire*-case at par [12].

The *Lynco Plant Hire*-case, along with those discussed in paragraph 2.5.5, illustrates that the courts generally accept that an insurable interest is in fact a requirement for the validity of an insurance contract. Although the courts may disagree with regard to the definition and the validity of the requirement, they are weary of departing from it. That being said, several relatively recent decisions, as will be discussed below, are indicative of the fact that the courts are beginning to become more comfortable with the notion of abandoning the concept entirely.

2.5.5.3 Philips v General Accident Insurance

2.5.5.3.1 Discussion of the case

An illustration of the courts questioning the validity of the concept of an insurable interest can be found in the *Phillips*-case. This case has already been discussed in paragraph 2.3 with regard to the definition of an insurable interest but it is relevant again with regard to this discussion on the role of the concept of an insurable interest.¹¹⁰

Regarding the importance of the concept of an insurable interest the court held that too much emphasis was being placed on the requirement of an insurable interest.¹¹¹ The real enquiry was whether the contract in question amounted to a contract of wager. This indicates that the court was of the opinion that it should be guarded against attaching too much importance to the concept of an insurable interest. The court, continuing its line of argument, stated that an insurable interest could be taken into consideration as a factor to determine whether the contract amounted to one of wager, but that it was not the only factor to be considered.¹¹²

From this statement one may be tempted to assume that the court was implying that an insurable interest is not in fact a requirement for an insurance contract but that it is merely a yardstick to be used in determining whether the contract before it amounted to one of wager. This conclusion is dubious though considering the fact that the court went to great lengths to bring the contract in question in line with the concept, holding

110 See par 2.3.1.1 above.

111 *Phillips*-case at 659E.

112 *Phillips*-case at 659G-H.

that a moral obligation will suffice to constitute an insurable interest.¹¹³ The criticism against this case has already been discussed in paragraph 2.5.1.2.

2.5.5.4 Steyn v AA Onderling Assuransie Assosiasie Bpk

2.5.5.4.1 Discussion of the case

A case following shortly on the *Phillips*-decision and drawing heavily on it, is the *Steyn*-case. The facts of the case are the following: Mr Steyn (the plaintiff) had insured the residence he was living in and the furniture within the residence with AA Assuransie Assosiasie Bpk (the defendant).¹¹⁴ Subsequently, the house burned down.¹¹⁵ With regard to the residence, the defendant raised the defence that the plaintiff did not have an insurable interest in the said residence due to the fact that the residence in fact belongs to the Provincial Administrator.¹¹⁶

In terms of a settlement agreement, the plaintiff had acquired the right to live in the residence for as long as the Provincial Administrator did not need the residence.¹¹⁷ It must be noted that the Provincial Administrator could have at any time forced the plaintiff to vacate the residence to continue with its building programme and it was on this fact that the defendant relied for its defence.¹¹⁸

The court held that it was often forgotten that the purpose of an insurable interest was to aid in distinguishing between a contract of insurance and that of a wager.¹¹⁹ Therefore, according to the court, the primary question was not whether the insured had an insurable interest but whether or not the contract before it amounted to one of a wager.¹²⁰ The fact that the insured did not possess an insurable interest would constitute a factor to be considered by the court in determining whether the contract constituted one of wager.¹²¹ The lack of an insurable interest would not, however,

113 *Phillips*-case at 660H.

114 *Steyn*-case at 7F-G.

115 *Steyn*-case at 7F-G.

116 *Steyn*-case at 7G-H.

117 *Steyn*-case at 7G-H.

118 *Steyn*-case at 7G-H.

119 *Steyn*-case at 11E-F.

120 *Steyn*-case at 11G-I.

121 *Steyn*-case at 11G-J.

automatically result in the contract constituting a wager.¹²² The intention of the parties would also be an important consideration to be taken into account.

The court continued by stating that the intention of the parties could be determined by regarding the contract itself and the surrounding circumstances.¹²³ It should be noted that the court did not specifically stipulate that the concept of an insurable interest should be abandoned altogether; however, this wording indicates that the court was not of the opinion that too much emphasis, if any, should be placed on the concept. It should further be noted that the judgement of the court was not based on the presence of an insurable interest or the lack thereof. The court held that, due to the fact that the plaintiff had failed to inform the defendant that he was an un-rehabilitated insolvent, the claim had to fail.¹²⁴

If the judgement of the *Steyn*-case were to be applied to the factual scenario, the focus of the enquiry would be on whether the contract between John and the insurer amounted to one of wager and not on the concept of an insurable interest. This would be achieved by considering the contract (specifically the intention of the parties) in addition to the circumstances surrounding the conclusion of the contract.

If this approach is taken, it is unlikely that the court would come to the conclusion that the contract between John and the insurer amounts to one of wager. This is due to the distinction in the nature of a contract of wager and that of insurance.¹²⁵ Therefore, John would be able to claim for the damages with regards to his own vehicle, the trucks of AT Company and his sister's Mercedes.

122 *Steyn*-case at 11G-J.

123 *Steyn*-case at 11I-J.

124 *Steyn*-case at 14D-F. This is due to the fact that the court held that the fact that the plaintiff was an un-rehabilitated insolvent was a material fact that should have been disclosed and that this was sufficient to have the contract and therefore the claim, fail.

125 See par 3.2.2 above.

2.5.5.5 Lorcom Thirteen v Zurich

2.5.5.5.1 Discussion of the case

The facts of the *Lorcom Thirteen*-case are the following: Gansbaai Fishing Wholesalers had bought a fishing vessel called *The Buccaneer*.¹²⁶ Lorcom Thirteen owned 100% of the shares in Gansbaai Fishing; therefore, for all practical purposes the vessel had actually been bought by Lorcom Thirteen.¹²⁷

Lorcom Thirteen subsequently concluded an insurance agreement with Zurich in terms of which Zurich indemnified Lorcom Thirteen against all “loss, damage, liability or expense” with regard to the hull, machinery and equipment of the vessel for the amount of R3 million.¹²⁸ It should be noted at this stage that the proposal form never indicated that Lorcom Thirteen was the owner of the vessel nor did the proposal form contain any questions aimed at identifying the owner of the vessel.¹²⁹

What is more, various certificates and documents had been provided to Zurich indicating, or at the very least suggesting, that Gansbaai Fishing was in fact the owner of the vessel.¹³⁰ The vessel was eventually “lost” under what can only be coined “suspicious circumstances” and Lorcom Thirteen claimed from Zurich the amount agreed to in the policy.¹³¹ Zurich repudiated the claim on the ground, amongst others, that the insured did not have an insurable interest in the property so insured.¹³²

The primary question before the court was whether Lorcom Thirteen did in fact have an insurable interest in *The Buccaneer*. The court began its judgement with a general discussion with regards to the requirement of an insurable interest.¹³³

The court began this discussion by acknowledging that it is generally accepted that an insurable interest in the property so insured is a requirement for a valid insurance

126 *Lorcom Thirteen*-case at 44B.

127 *Lorcom Thirteen*-case at 44B-C.

128 *Lorcom Thirteen*-case at 45D-I.

129 *Lorcom Thirteen*-case at 45F.

130 *Lorcom Thirteen*-case at 45F-G.

131 *Lorcom Thirteen*-case at 42D.

132 *Lorcom Thirteen*-case at 42D-E.

133 *Lorcom Thirteen*-case at 47A-59.

contract.¹³⁴ The court then took a brief look at the origin of the concept, concluding that it is an English concept intended to put a stop to certain wagering contracts due to the fact that the English common law did not consider wagering contracts as illegal.¹³⁵ The court further pointed to the fact that South Africa has no statutory requirement with regard to an insurable interest and that the country's common law and statute make provision for the regulation of wagering contracts.¹³⁶

From the above-mentioned, the court concluded that there appears to be very little justification for the importation of the concept from English insurance law, which only applied in the Cape Province and Orange Free State and has not been applied there since 1977.¹³⁷ The court then tackled the question of how one is to distinguish between a game of chance and an insurance contract.

The court concluded that the difference lies in the fact that with regards to a wagering contract, the person making the wager hopes that the event will happen so that he may claim the money, whereas with an insurance contract, the insured has no interest in the happening of the event in that he actually hopes that the event will not occur.¹³⁸ The court made the following remark:

There seems no good reason why an enquiry into whether a person who has concluded a purported insurance contract has an interest in the event or contract apart from the insurance contract itself, should be an unduly technical matter. In the context of insurance contracts it may do no harm to call this distinguishing interest an 'insurable interest' provided one guards against equating this criterion with the English law of insurable interest.¹³⁹

The court specifically referred to the decision in the *Lynco Plant Hire*-case stipulating that approach was incorrect in that it did not consider the historical basis and purpose of the concept.¹⁴⁰ From the above-mentioned remarks it should be apparent that the court was not satisfied with a less strict interpretation of the concept but took the view that the concept should be done away with altogether. The court, however, went even further by stipulating that it is not necessarily a requirement that the insured suffer

134 *Lorcom Thirteen*-case at 47D-E.

135 *Lorcom Thirteen*-case at 47C-48E.

136 *Lorcom Thirteen*-case at 48F-G.

137 *Lorcom Thirteen*-case at 48G-H.

138 *Lorcom Thirteen*-case at 49G-H.

139 *Lorcom Thirteen*-case at 49H-50A.

140 *Lorcom Thirteen*-case at 50F-G.

patrimonial loss in order for him to claim under the insurance contract in question.¹⁴¹ If the contract requires that a patrimonial loss be proven, then it has to be proven; should the contract provide otherwise or be silent on a patrimonial loss, then it should not be required that the insured proves one.¹⁴²

In short, the court divorced insurance contracts from the indemnity principle and reduced the matter solely to the intention of the parties.¹⁴³ According to the court, an insurance contract would therefore be enforceable, regardless of patrimonial loss, provided that the contract did not amount to a wager.¹⁴⁴ In conclusion, the court found that *Lorcom Thirteen* did in fact have an insurable interest in *The Buccaneer*.

If this approach is applied to the factual scenario, the simple result will be that John will be able to enforce both the insurance policies against the insurance company. This is based on the assumption of course that the contract does not amount to a wager and that it was in fact the intention of both the parties.

2.5.5.6 Criticism against the decision

The judgement in the *Lorcom Thirteen*-case has not been accepted without criticism. Reinecke¹⁴⁵ welcomes the decision in all but one respect, namely the apparent discarding of the indemnity principle. He makes the argument that if not for the indemnity principle, it could be practically difficult to distinguish between a wager and an insurance contract:

Accepting an indemnity clause as the essence of a contract of property insurance enables one immediately to classify a contract of chance as either a contract of insurance or a contract of wager, irrespective of the existence or absence of an insurable interest.¹⁴⁶

141 *Lorcom Thirteen*-case at 52A-C.

142 *Lorcom Thirteen*-case at 52A-C.

143 *Lorcom Thirteen*-case at 52E-G.

144 *Lorcom Thirteen*-case at 52E-G.

145 Reinecke 2013 *TSAR* 820.

146 Reinecke 2013 *TSAR* 820.

Reinecke¹⁴⁷ concludes that there exists no support for divorcing indemnity insurance from the principle of indemnity as it would “fly in the face of ages of history, long standing precedents and international thinking”.

Reinecke and Van Niekerk do not suggest that the damages should necessarily be legally claimable but rather that no coherent argument can be made for divorcing insurance contracts from the indemnity principle.¹⁴⁸ If insurance contracts were to be divorced from the indemnity principle, they argue, this would lead to unlimited and unforeseen liability with regard to the insurers. The natural consequence will be that the insurers will have to noticeably raise their premiums.¹⁴⁹

In conclusion, it would appear that the courts have in fact become more willing to move away from the concept of an insurable interest. However, due to the fact that there has not been a definitive judgement from the Supreme Court of Appeal the question will remain open until a case does finally reach the above mentioned court or the legislature deems intervention necessary.

2.5.6 Summary

It is apparent that the incorporation of the concept of an insurable interest has created extensive legal uncertainty within the insurance sphere. Due to the rigid and formalistic nature of the traditional definition, the requirement of an insurable interest has repeatedly been used as a means whereby insurance companies attempted to repudiate liability with regard to insurance contracts.¹⁵⁰

Owing to the seemingly unfair results that often spring forth from the rigid application of the concept, the courts have attempted to come to the aid of the insured. However, in their endeavour to come to the rescue of the insured, some courts have stretched the definition to the extent that authority can be found for holding that a nebulous interest (such as the insured feeling himself morally obliged to replace the property in question) is sufficient to constitute an insurable interest.¹⁵¹ What complicates the issue

147 Reinecke 2013 *TSAR* 820.

148 Reinecke 2013 *TSAR* 820.

149 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 36.

150 See par 1.1 above.

151 See par 2.3.1.2 above.

further is that although it is generally accepted that the concept is a requirement for the validity of an insurance contract, some courts have recently demonstrated a willingness to move away from the concept altogether.¹⁵²

Considering the above, the future of the concept remains uncertain. The current trend would suggest that the courts are ready to abandon the concept altogether or to replace the traditional definition with a more suitable one. The ideal would of course be for the Supreme Court of Appeal to remedy the situation or for the legislature to intervene and craft an all-encompassing definition that would bring some clarity to an extremely murky situation.

2.6 Conclusion

The following objectives were identified for the Chapter 2:

- To establish and discuss how the doctrine is currently defined;
- to establish and discuss whether the doctrine is still considered to constitute an essentiality for the enforcement of an insurance contract; and

It was established in the preceding paragraphs that although the traditional/classical definition initially found application the courts have slowly but surely been in the process of *liberalising* the definition of an insurable interest. It is worth mentioning, however, that in an attempt to come to the aid of the insured some “questionable” interests have been recognised as constituting an insurable interest.

In the preceding paragraphs, it was illustrated that most courts still consider an insurable interest to constitute a requirement in order to claim on an insurance contract.¹⁵³ Some courts have criticised the doctrine and suggested that the actual enquiry should relate to whether the contract amounts to a wager but ultimately the courts have been reluctant to uphold an insurance contract without an insurable interest being found. A notable exception to this can be found in the *Lorcom Thirteen*-case¹⁵⁴ where the court held that an insurable interest was in fact not required to claim

152 See par 3.3 above.

153 See paragraph 3.3 in this regard.

154 See paragraph 3.3.5 for a discussion of the *Lorcom Thirteen*-case.

on a contract of insurance. It should be noted that the court, in reaching its decision, also discarded the indemnity principle by holding that the terms of the contract alone should be consulted to determine the insured's claim. It should be apparent that the different approaches adopted by the courts over the years have resulted in considerable uncertainty regarding both the definition and essentiality of an insurable interest.

Academic opinion on the matter appears to be firmly divided. Some argue abandonment of the doctrine whilst others argue that the application of the doctrine should be limited to a measuring stick in order to aid in determining the damages suffered by the insured.¹⁵⁵ Some authors have argued the continuing application of the doctrine in its traditional form although it should be noted that these are in the vast minority.

In summary, it becomes apparent that the definition and essentiality of the doctrine in the South African context remains unclear. This is largely due to the fact that the doctrine is not recognised nor defined by legislation, leaving it to the courts to attempt to deal with the difficulties that are created by the doctrine. The courts' attempt to come to the aid of the insured, whilst being incredibly reluctant to discard the doctrine, has resulted in wildly divergent definitions of the doctrine. Academic opinion also remains firmly divided regarding the definition and continuing application of the doctrine.

The difficulties faced with regards to the doctrine of an insurable interest are not, however, unique to the South Africa. Identical issues have been experienced in both Great Britain and Australia. Furthermore, each one of the afore-mentioned countries has had their own unique approach to solving the problems experienced with regards to the doctrine. The subsequent chapters therefore focus on the British and Australian experience with regards to the doctrine.

155 See paragraph 2.2 and 2.3 in this regard.

Chapter 3 (Great Britain)

3.1 Introduction

Chapter 3 has as its focus the application of the doctrine of an insurable interest within Great Britain. The British position with regard to the doctrine of an insurable interest is important for three reasons. Firstly, the doctrine is a British creation and knowledge about the historical application and original purpose of the doctrine is vital if one is to have a better understanding regarding the current debate in South Africa. Secondly, the British courts themselves have experienced identical issues to those currently being experienced by the South African courts. Thirdly, in 2008 the Scottish and English Law Commission embarked on an investigation into the continuing relevance of the doctrine.

In light of the preceding paragraph chapter 3 has the following objectives:

- A short investigation into the historical application and purpose of the doctrine of an insurable interest;
- an analysis of the approach adopted by the English courts with regards to the application and definition of the doctrine of an insurable interest; and
- an analysis of the findings and recommendations of the Scottish and English Law Commission regarding the continuing relevance of the doctrine.

The research question to be answered by this chapter is the following: What has been the British experience regarding the application of the insurable interest doctrine and what is its relevance to the current South African debate regarding the doctrine?

3.2 History of the concept

3.2.1 Legislative history

The doctrine of an insurable interest finds its origins in Great Britain. The necessity of the doctrine was largely due to the fact that the British common law does not prohibit wagering and therefore, under British common law, wagering contracts are fully

enforceable.¹⁵⁶ Due to the lack of any regulation with regard to wagering, certain “morally hazardous” agreements became common place. These agreements took the form of insurance contracts but were in fact nothing more than contracts of wager.¹⁵⁷

An industry that was especially hard hit by these agreements was the maritime industry wherein a large number of ships were lost in fraudulent or suspicious circumstances. In the mid-18th century the British parliament addressed the issue by passing the *Marine Insurance Act*.¹⁵⁸ The preamble of the ACT reads as follows:

by Experience, that the making Assurances, without further Proof of Interest than the Policy, hath been productive of many *pernicious* Practices, whereby great Numbers of Ships with their Cargoes, have been fraudulently lost and destroyed.¹⁵⁹

The *MIA* was therefore the first piece of legislation that introduced the doctrine of an insurable interest to the sphere of indemnity insurance in an attempt to curb contracts that encouraged the destruction or loss of marine cargo. It was not, however, only in the marine industry that simulated insurance contracts were encountered. Atmeh¹⁶⁰ describes the situation as follows:

Popular accounts of the period describe the practice of purchasing insurance on the lives of those being tried for capital crimes. These policies constituted naked wagers on whether the accused would ultimately be convicted and executed for the alleged offense. A related practice was the purchase of insurance on the lives of famous, elderly persons; the premium would be a function of what was known about the person's health, including any recent illnesses.

It was therefore not long after the promulgation of the *MIA* that the British Parliament extended the insurable interest doctrine to non-indemnity insurance by promulgating the *Life Assurance Act*¹⁶¹. The preamble of the *LAA* is nearly identical to that of the *MIA* in that it stipulates that it has been learned by experience that by allowing persons to conclude insurance contracts over persons or events that the person has no interest in leads to a “mischievous kind of gaming”.¹⁶²

156 Birds *Bird's Modern Insurance Law* 39. It should be noted that this is in direct contrast to the South African common law that does illegalise contracts of wager. See paragraph 3.2 in this regard.

157 Sutton *Insurance Law in Australia* 504 and Birds *Bird's Modern Insurance Law* 39.

158 1745, 19 Geo. 2, c. 37 (henceforth referred to as the *MIA*).

159 Preamble to the *MIA*.

160 Atmeh 2011 *Northwestern Journal of International Law & Business* 98-99.

161 1774, 14 Geo. 3, c. 48. (henceforth referred to as the *LAA*).

162 Preamble to the *LAA*.

It should therefore be clear that the primary purpose of the doctrine was the prohibition of certain insurance contracts that were deemed to be morally abhorrent. The common theme of these contracts was that they encouraged the loss of property or death of the person against whom the insurance was obtained. This is commonly referred to as a moral hazard.

In 1845 the *Gaming Act*¹⁶³ further extended the scope of the insurable interest doctrine to encompass all forms of indemnity insurance. Section 18 of the *Gaming Act* required that a person should have an insurable interest in the property so insured. If no such interest existed the contract would be deemed a wager and be null and void. Two other acts were promulgated to further strengthen the doctrine, in the marine insurance context, namely the *Marine Insurance Act* of 1906¹⁶⁴ and 1909¹⁶⁵.

The *Marine Insurance Act* of 1906 defined the concept as follows:

(1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure. (2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.¹⁶⁶

It should be apparent that this definition forms the basis of the traditional definition that is currently being advocated by authors such as Gordon and Gets.¹⁶⁷ To date, this has been the only attempt by the British legislature to define the concept. Since no other legislative definitions exist, the courts have made their own attempt to define the concept.

3.2.2 *Defining an insurable interest*

In the case of *Lucena v Craufurd*¹⁶⁸ Lord Elton of the House of Lords, speaking on behalf of the majority of the Lords, defined an insurable interest as follows:

163 1845, 8 and 9 Vict., c 109 (henceforth referred to as the *Gaming Act*).

164 1906, 6 Edw. 7, c. 41.

165 1909, 9 Edw. 7, c. 12.

166 1909, 9 Edw. 7, c. 12. S5.

167 See paragraph 2.1 in this regard.

168 *Lucena v Craufurd* 1806.

a right in the property, or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party.¹⁶⁹

This definition is generally referred to as the strict or traditional definition of an insurable interest.¹⁷⁰ The emphasis in this definition falls squarely on the insured having “a present right to a legal or equitable interest or a right under contract”.¹⁷¹ The minority of the Lords, however, opted for a more liberal definition that reads as follows:

To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction.¹⁷²

This definition is generally referred to as the economic relationship test and requires that the insured suffer some kind of economic loss¹⁷³ upon the destruction or injury of the property so insured. It is the traditional definition, however, that eventually carried the day and formed the basis of the definition contained in the *Marine Insurance Act* of 1906.

The second case that is of importance is *Macaura v Northern Assurance*.¹⁷⁴ In the *Macuara*-case the court defined an insurable interest as a legal or equitable interest.¹⁷⁵ Therefore a person would only have an insurable interest if he stood in a legal relationship with the object (such as ownership). The definition given in the *Macaura*-case still forms the basis of more modern definitions such as the one given by McGillivray and Parkington.¹⁷⁶

In short, the definition requires that an insurable interest, as a point of departure, must have a legal basis.¹⁷⁷ The above-mentioned definition formed the *locus classicus* for nearly a century with regard to the definition of an insurable interest. However, due to

169 *Lucena v Craufurd* 1806 650.

170 Atmeh 2011 *Northwestern Journal of International Law & Business* 100.

171 Atmeh 2011 *Northwestern Journal of International Law & Business* 36.

172 *Lucena v Craufurd* 1806 643.

173 It should be noted that the economic relationship test is essentially the same as the indemnity based definition that is currently advocated by authors such as Reinecke and Van der Merwe although the one advocated by the above-mentioned authors is more refined in that it includes the happening of an insured-against event.

174 *Macaura v Northern Assurance CO Ltd* [1925] AC 619 (hereafter referred to as the *Macuara*-case).

175 *Macuara*-case at 619.

176 In this regard see paragraph 2.1.

177 Davis *Gordon and Gets The South African Law of Insurance* 92 and Birds *Birds' Modern Insurance Law* 58 – 60.

the harsh results¹⁷⁸ that flows from the application of the strict definition some courts began to prefer a softer definition.¹⁷⁹

The harsh consequences of the strict definition and the seemingly unfair results thereof eventually culminated in the case of *Feasey v Sun Life Assurance*¹⁸⁰. In the *Feasey*-case Lord Waller, upon a thorough analysis of British case law, found that the interests that had been found to constitute insurable interests could be classified into four different groups.¹⁸¹ With regard to Group 1 Lord Waller held as follows:

Group 1 are those cases where the court has defined the subject matter as an item of property; where the insurance is to recover the value of that property.¹⁸²

In these instances the court held that a real or equitable interest in the property so insured was in fact required.¹⁸³ The court stated that both the cases of *Lucena v Craufurd* and *Macuara v Northern Assurance* fell into this category.

With regard to Group 3 the court held as follows:

There are then cases where even though the subject matter may appear to be a particular item of property, properly construed the policy extends beyond the item and embraces such insurable interest as the insured has.¹⁸⁴

Group 3 are those instances where it is not actually the property that is being insured but rather some other interest that the insured has in the property. In these instances the court held that this "other" interest does in fact constitute an insurable interest. To illustrate Group 3 the court referred to the case of *Wilson v Jones*.¹⁸⁵

178 The following example is given to illustrate the harsh results that may flow from the strict definition: If X and Y are married outside of community of property and X insures the jewellery of Y he will not be able to claim on the contract of insurance in the case of a loss. The reason for this is that it cannot be said that X has a legal right to the property or stands in a legal relationship towards the property. Notwithstanding the fact that X has diligently paid his premiums every month, he will be left without recourse against the insurance company and might not even be able to claim his premiums back due to the popular "forfeiture clauses" that most insurance contracts now contain.

179 English and Scottish Law Commission 2008 http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 37.

180 *Feasey v Sun Life Assurance Co of Canada* [2003] EWCA Civ 885 (hereafter referred to as the *Feasey*-case).

181 *Feasey*-case at 607 Note: Group 2 deals with non-indemnity insurance exclusively and will therefore not be discussed. Group 2 can be found on page 608.

182 *Feasey*-case at 607.

183 *Feasey*-case at 607.

184 *Feasey*-case at 607-608.

185 *Wilson v Jones* (1867) LR 2 Exch 139 (hereafter referred to as the *Wilson*-case).

In the *Wilson*-case the plaintiff had insured certain cables that had to be laid between Ireland and Newfoundland by the ship *Great Eastern*. The plaintiff took out the insurance in his capacity as a shareholder of Atlantic Telegraph Co. (the company that owned the cables). When the cable broke whilst being laid by the *Great Eastern*, the defendant refused to compensate the plaintiff on the grounds that he had no insurable interest in the above-mentioned cables.

As to the insurable interest the court stated that the departure point was to ask: What was the subject matter insured?¹⁸⁶ Here the court found that, upon proper reading of the contract of insurance, it was not in fact the cables that had been insured but rather the plaintiff's interest in a share of the profit that was to be made when the cables had been successfully laid down.¹⁸⁷ Therefore, it was in fact the "plaintiff's interest in the adventure" that had been insured.¹⁸⁸

The court held that the above-mentioned interest was in fact sufficient to constitute an insurable interest.¹⁸⁹ It should be noted that the definition applied by the court was the economic relationship test formulated in the *Lucena*-case and not the strict definition that requires that the insured stands in a legal or equitable relationship with the property so insured.¹⁹⁰ With regards to Group 3 it would appear that certain pecuniary interests, other than those generally perceived as legal or equitable, have been regarded as sufficient to constitute an insurable interest.

With regards to Group 4 the court held the following:

Group 4 are policies in which the court has recognised interests which are not even strictly pecuniary...but even in the case of property something less than a legal or equitable or even simply a pecuniary interest has been thought to be sufficient.¹⁹¹

Group 4 are those instances where the interest insured was not even strictly speaking a pecuniary one but rather an interest in a certain event not happening. An example of

186 *Wilson*-case at 145.

187 *Wilson*-case at 145.

188 *Wilson*-case at 145.

189 *Wilson*-case at 145.

190 *Wilson*-case at 150-151.

191 *Feasey*-case at 610.

this can be found in the case of *Deepak Fertilisers & Petrochemicals Ltd v Davy*¹⁹² where it was held that a sub-contractor had an insurable interest in an unfinished methanol plant in India due to the fact that he would potentially “lose the opportunity to do the work and to be remunerated for it” if the plant was not completed.¹⁹³

Although Lord Justice Waller was criticised for his analysis, the *Feasy*-case remains the leading authority on the definition of an insurable interest.¹⁹⁴ Therefore, considering the *Feasy*-judgement an insurable interest exists if:

(1) the assured has legal or equitable title to the subject matter; or (2) if the assured is in possession of the subject matter; or (3) if the assured is not in possession of the subject matter but may be either responsible for, or suffer loss in the event of, any damage to the subject matter.¹⁹⁵

The *Feasy*-judgement constitutes a noticeable deviation from the traditional definition in that it recognises both possession and economic loss as grounds upon which an insurable interest may be found. The question that remains unanswered is what the practical implications of the *Feasy*-case would be for John.

3.2.3 Application to factual scenario

The Golf GTX would not pose a problem seeing as ownership is recognised as a legal title. The situation with regard to his sister’s Mercedes Benz is more dubious considering the fact that John does not have a recognised legal title with regards to the Mercedes Benz, nor can it be said that he will directly suffer economic loss upon the destruction of the vehicle.

It could be argued that he will suffer an economic loss indirectly due to the fact that he will most likely be his sister’s sole mode of transportation. The afore-mentioned argument would, however, be a precarious one seeing as the damage is quite far removed from the actual loss of the asset and the fact that it will be very difficult to quantify. With regard to the trucks owned by the company John (as a majority

192 *Deepak Fertilisers & Petrochemicals Ltd v Davy McKee* (London) Ltd [1999] 1 All ER (Comm) 69 (hereafter referred to as the *Deep Fertilisers*-case)

193 *Deep Fertilisers*-case at 85-86.

194 Law Commission 38.

195 *Feasey*-case at 610.

shareholder) would be able to claim seeing as the loss of the trucks would cause him to suffer an economic loss in that the value of his shares would be diminished.

3.3 The legal position after 2005

In 2005 the British Parliament promulgated the *Gambling Act*.¹⁹⁶ Section 334 of the *Gambling Act* repealed section 18 of the *Gaming Act* thereby removing the legislative requirement of an insurable interest in the indemnity insurance context. Furthermore, section 335 of the *Gambling Act* provides that “the fact that a contract relates to gambling shall not prevent its enforcement”, thereby removing the primary “moral” purpose of the requirement.

Atmeh¹⁹⁷ described the introduction of section 334 and the repeal of section 18 as a “death knell” to the insurable interest doctrine as the “legislative basis” of the doctrine had been removed. Atmeh¹⁹⁸ argued, rather optimistically in hindsight, that the doctrine had been eliminated by accident.¹⁹⁹ It will be shown in the subsequent paragraphs that Atmeh’s analysis of the future of the doctrine was incorrect in that the repealing of section 18 was not the “death knell” that was hoped for.

3.3.1 *The Scottish and English Law Commission*

The Scottish and English Law Commissions were established by the *Law Commissions Act*²⁰⁰. The purpose of these law commissions is, broadly speaking, the reforming of law.²⁰¹ Section 3 of the *Law Commissions Act* defines the function of these commissions as the review of law with the ultimate aim of development and reform. Of particular importance is the elimination of anomalies, the annulment of obsolete and non-essential enactments and generally the “simplification and modernisation of law”. The proposals of these law commissions do not have the status of law. However, proposals

196 2005, c19.

197 Atmeh 2011 *Northwestern Journal of International Law & Business* 101.

198 Atmeh 2011 *Northwestern Journal of International Law & Business* 101.

199 It will be shown in the subsequent paragraphs that repeal of section 18 did not in fact result in the abandonment of the doctrine of an insurable interest.

200 C.22 of 1965.

201 C.22 of 1965 (section 1).

submitted by these law commissions do carry considerable weight in the reform and propagation of law.²⁰²

3.3.2 The 2008-paper on the insurable interest doctrine

In 2008 the Scottish and English Law Commissions²⁰³ jointly released a paper wherein the doctrine of insurable interest was fully discussed and analysed.²⁰⁴ The SELC acknowledged the fact that the legislative requirement of an insurable interest with regard to the indemnity insurance sphere had been accidentally repealed as neither the *White* and *Green Papers* nor parliamentary discussion preceding the *Gambling Act* addressed the doctrine.²⁰⁵

Therefore, the purpose of the 2008-paper is the clarification of whether the doctrine still finds application and more importantly, whether it should.²⁰⁶ After a thorough discussion of the history, purpose and definition of the doctrine of an insurable interest, the SELC turned its attention to whether the doctrine was still relevant in the modern context.²⁰⁷

3.3.2.1 Fears of reform

In their paper the SELC considered both the amendment and the abolition of the doctrine of an insurable interest.²⁰⁸ In doing so the SELC had to consider the two primary concerns with regard to the abolition of the doctrine.²⁰⁹ The first of these concerns was whether an insurable interest is considered necessary to distinguish

202 C.22 of 1965 (section 3).
 203 Hereafter referred to as the SELC.
 204 Scottish and English Law Commissions 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf.
 205 Scottish and English Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 45.
 206 (Note: this discussion pertaining to the 2008-paper is limited to the requirement of an insurable interest in the indemnity sphere. The 2008-paper, however, also addresses the requirement of an insurable interest in the non-indemnity sphere and should be consulted separately as manifestly different considerations were taken into account that leads to a different set of proposals being given with regard to the continuing application of the insurable interest doctrine in the indemnity and non-indemnity spheres respectively).
 207 Scottish and English Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 2-9.
 208 Scottish and English Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 47.
 209 Scottish and English Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 47.

insurance from other similar contracts.²¹⁰ The second concern was whether an insurable interest is still a requirement to prevent certain moral hazards or wagering contracts that take the guise of insurance contracts.²¹¹ The SELC’s analysis of the above-mentioned concerns will now be discussed separately.

3.3.2.2 Insurable interest as a necessity for classifying a contract as one of insurance

The first consideration discussed by the SELC was whether an insurable interest is required to classify a contract as one of insurance.²¹² An issue that naturally flows from the first consideration is whether courts would be able to distinguish between contracts of insurance and other similar contracts without the requirement of insurable interest.²¹³

In its discussion the SELC specifically referred to the fact that the Financial Services Authority²¹⁴ does not consider an insurable interest as a defining feature of an insurance contract.²¹⁵ It also took into consideration the British common law and came to the conclusion that support could not be found for the notion that an insurable interest is a requirement or a necessity for defining a contract as one of insurance.

210 Scottish and English Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 47.

211 Scottish and English Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 47.

212 Scottish and English Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 47.

213 Scottish and English Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 47.

214 Hereafter referred to as the FSA. The FSA was established in terms of the *Financial Services and Market Act* of 2000. The general functions of the FSA are given in section 4 of the above-mentioned act and entails the following: The Authority’s general functions are— (a) its function of making rules under this act (considered as a whole); (b) its function of preparing and issuing codes under this act (considered as a whole); (c) its functions in relation to the giving of general guidance (considered as a whole); (d) and its function of determining the general policy and principles by reference to which it performs particular functions. It should be noted that the FCA was replaced in 2013 with the Prudential Regulatory Authority (PRA) and Financial Conduct Authority (FCA).

215 FSA Policy Statement 04/19, July 2004, para 2.10: The guidelines given by the FSA describes a contract of insurance as follows: (1) the “assumption of risk” by the provider is an important descriptive feature of all contracts of insurance; (2) a contract is more likely to be regarded as insurance if (a) the amount payable by the recipient under the contract is calculated by reference to either or both of the probability of occurrence or likely severity of the uncertain event and (b) if the contract is described as insurance and contains terms that are consistent with its classification of a contract of insurance, for example, obligations of the utmost good faith; and (3) a contract is less likely to be regarded as insurance if it requires the provider to assume a specific risk (that is, a risk carrying the possibility of either profit or loss) rather than a pure risk (that is, a risk of loss only).

It is interesting that South African definitions regarding insurance contracts generally do not mention an insurable interest.²¹⁶ In the case of *Lake and Others v Reinsurance Corporation*²¹⁷, the *locus classicus* with regards to the definition of an insurance contract, the court defined an insurance contract as follows:

A contract between an insurer (or assurer) and an insured (or assured), whereby the insurer undertakes in return for the payment of a price or premium to render to the insured a sum of money, or its equivalent, on the happening of a special uncertain event in which the insured has some interest.²¹⁸

Although, Reinecke, Van Niekerk and Nienaber²¹⁹ acknowledge the definition given in the *Lake*-case as a good starting point they prefer the description given by Clarke.²²⁰ It should be noted that neither the definition expounded in the *Lake*-case nor the description given by Clark contains any mention of the requirement of an insurable interest. Considering the preceding paragraphs, it is difficult to see how the insurable interest doctrine aids in classifying a contract as one of insurance but this should be expected seeing as the original purpose of the doctrine was not aimed at the nature of insurance contracts but rather at the prevention of certain morally hazardous contracts.²²¹

3.3.2.3 Insurable interest as a necessity to prevent moral hazards

It should be remembered that the original purpose of the insurable interest doctrine was the prevention of contracts that were deemed to constitute moral hazards.²²² The SELC therefore had to determine whether the doctrine was still necessary to fulfil the above-mentioned purpose. In this respect the SELC referred to several factors that

216 Reference has already been made to the fact that neither the *Short-Term Insurance Act* nor *Long-term Insurance Act* contains any reference to the doctrine of insurance.

217 *Lake and Others, No v Reinsurance Corporation Ltd and Others* 1967 (3) SA 124 (W) (hereafter referred to as the *Lake*-case).

218 *Lake*-case at 127A.

219 Clark *et al The Law of Insurance Law*. Clarke describes a contract of insurance as "a contract whereby a person, usually but not always in business as such, agrees to pay money (or provide a corresponding benefit) on the occurrence of an uncertain and adverse event, in return for a money consideration, usually called a premium".

220 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 5.

221 In this regard See paragraph 3.2

222 See paragraph 1.2.1.

undermine the effectiveness of the doctrine in preventing the afore-mentioned contracts.²²³

Firstly, modern insurance practice makes it relatively simple to transfer and trade insurance policies, the effect being that complete strangers stand to benefit from the death of the insured. This, however, has not lead to a noticeable increase in the homicide rate. Secondly, the relationship where murder is statistically the most likely to take place, that of marriage, creates an automatic insurable interest. It should also be noted that insurance policies taken out on the life of a spouse do not automatically laps after a subsequent divorce.

Also of particular importance are the court's remarks that better mechanisms exist to prevent morally hazardous contracts, an example being the *Proceeds of Crime Act* of 2000.²²⁴ The general purpose of the *Proceeds of Crime Act* is the confiscation and recovery of all goods that are obtained in an unlawful manner, thereby supplying effective tools to prevent the fraudulent destruction of property.²²⁵

3.3.2.4 The indemnity principle

The indemnity principle is an implied or actual contractual term that is automatically incorporated into every contract of indemnity insurance in terms of British common law.²²⁶ The principle entails that in order for an insured to claim on a contract of insurance, he must be able to prove a loss.²²⁷ It further entails that an insured's claim will only be to the extent of the above-mentioned loss.²²⁸ It is therefore a requirement that the insured must show an interest in the subject matter so insured.

This interest must, however, be distinguished from an insurable interest. Firstly, the former is required in terms of British common law whereas the latter was required by

223 Scottish and English Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 55.

224 Scottish and English Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 56.

225 Preamble of the *Proceeds of Crime Act* of 2000.

226 Scottish and English Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 35.

227 Scottish and English Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 34.

228 Scottish and English Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 34.

the now repealed *Gaming Act*. Secondly, due to the strict definition of an insurable interest, the indemnity principle potentially lends itself to a more lenient application than the insurable interest doctrine due to the fact that a legal relationship with the subject matter is not required.²²⁹ Thirdly, the indemnity principle can be waived by the parties, as is the case in contracts of reinsurance,²³⁰ whereas the insurable interest doctrine cannot.²³¹ The indemnity principle remains unaltered by the *Gambling Act* and currently remains a requirement for all contracts of indemnity insurance.²³²

It should be noted that the indemnity principle is currently applicable in South Africa. The principle was introduced to South African insurance law through the country's Roman Dutch law heritage and remains applicable to all contracts of indemnity insurance.²³³ Due to the fact that the application of the principle is identical in Great Britain and South Africa, the SELC's recommendations with regard to the principle are of particular importance to the current debate regarding the insurable interest doctrine in South Africa.

3.3.2.5 The indemnity principle as a substitute for the insurable interest doctrine

The conclusion of the SELC regarding the continuing application of the doctrine of an insurable interest was the following:

In indemnity insurance it is difficult to see what a statutory requirement of insurable interest added to the common law indemnity principle, certainly if insurable interest was only demanded at the time of loss. The indemnity principle enables parties to define the risk and the extent of the policy in a more subtle way than the strict legal or equitable right demanded by the statutory requirement of insurable interest.²³⁴

The general thrust of the SELC's argument is that the statutory requirement of an insurable interest only creates legal uncertainty without adding anything of value to the

229 Scottish and English Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 35.

230 Reinsurance refers to the second-hand purchasing of insurance contracts. For example, X sells his car insurance contract to Y who will be able to claim on the contract notwithstanding the fact that he will not suffer a loss should the subject matter be destroyed or damaged.

231 Scottish and English Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 35.

232 Scottish and English Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 34.

233 Reinecke, Van Niekerk and Nienaber *South African Insurance Law* 59.

234 English and Scottish Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 56.

protection already offered by the indemnity principle.²³⁵ The commission added that the definition of the doctrine had been stretched to such an extent that no material difference exists between the doctrine and the indemnity principle.²³⁶ It concluded that it could find no reason for the continuing application of the doctrine in Great Britain.²³⁷ Therefore, the SELC recommended that the doctrine not be reinstated and that the indemnity principle should serve as a substitute.²³⁸

It should be noted that the argument put forward by the SELC in their first joint consultation paper appears to have been met with approval by the vast majority of academics writing on the subject. Merkin²³⁹ commented with approval of the SELC’s arguments regarding the doctrine of an insurable interest, calling it a “bold” approach. Birds²⁴⁰ argues that the continuing application of the doctrine is questionable because the indemnity principle ensures that the insured does not recover more on a policy than the damages that he sustains.

The SELC’s recommendations regarding the repeal of the insurable interest doctrine in favour of the indemnity principle is identical to the arguments made by Reinecke and Van der Merwe.²⁴¹ Similarly to Great Britain, South African courts have also extended the definition of the insurable doctrine to the point where no material difference can be identified between the doctrine and the indemnity principle.²⁴² In fact, due to the legal uncertainty that the doctrine creates, some courts have extended the definition of an insurable interest beyond the application of the indemnity principle.²⁴³ Although the

235 English and Scottish Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 57.

236 English and Scottish Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 57.

237 English and Scottish Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 57.

238 English and Scottish Law Commission 2008
http://lawcommission.justice.gov.uk/docs/ICL4_Insurable_Interest.pdf 57.

239 Merkin *Colinvaux’s Law of Insurance* 154-155.

240 Bird *Birds’ Modern Insurance Law* 64.

241 See paragraph 2.2.1 in this regard.

242 See paragraph 2.2.2 in this regard.

243 See paragraph 2.3 in this regard.

indemnity principle does have certain deficiencies²⁴⁴ it is difficult to argue against the motion that renders the insurable interest doctrine irrelevant.

3.3.3 Second Joint Consultation Paper 2011

From what was said by the SELC concerning the doctrine of an insurable interest one could not be faulted for concluding that the doctrine would probably face abolishment in the near future. This assumption would, however, be incorrect. In a second joint consultation paper, the SELC once again addressed the issue of an insurable interest.²⁴⁵ Surprisingly, unless a cynical approach is adopted, the SELC completely reversed its former recommendation by proposing that the doctrine be reinstated.²⁴⁶

The reason for the SELC's reversal is to be found in the fact that most of those who responded to the recommendations made in Issue Paper No 4 "argued strongly in favour of retaining the requirement".²⁴⁷ In this regard the SELC held that the requirement "was thought to fulfil four useful functions".²⁴⁸ The four functions identified by the SELC are the following:

It provides a dividing line between gambling and insurance; it guards against moral hazard; it protects the insurer from invalid claims and in an increasingly global market place it is used to define where insurance is located and therefore which regulatory or tax regime it falls within.²⁴⁹

What follows is a thorough analysis of the four functions identified by the SELC as well as criticism that has been levelled against them.

244 See paragraph 4.2.2.1 in this regard: An example of a deficiency of the doctrine can be found in car insurance. Extension clauses have become common place in most motor vehicle insurance contracts. Yet, it is impossible to reconcile extension clauses with the indemnity principle

245 English and Scottish Law Commission 2011
http://lawcommission.justice.gov.uk/docs/cp201_ICL_post_contract_duties.pdf.

246 English and Scottish Law Commission 2011
http://lawcommission.justice.gov.uk/docs/cp201_ICL_post_contract_duties.pdf 101.

247 English and Scottish Law Commission 2011
http://lawcommission.justice.gov.uk/docs/cp201_ICL_post_contract_duties.pdf 101.

248 It should be noted that a further three reasons were given with regard to indemnity insurance, namely it is the hallmark of insurance; it reinforces market discipline and it acts as a barrier against invalid claims. Meggit argues convincingly, however, that these reasons are essentially the same as the afore-mentioned four requirements. It will therefore not be discussed separately but will be incorporated into the discussion of the above-mentioned four requirements.

249 English and Scottish Law Commission 2011
http://lawcommission.justice.gov.uk/docs/cp201_ICL_post_contract_duties.pdf 101.

3.3.3.1 Aids in distinguishing between contracts of insurance and other contracts

The first function of the requirement identified by the SELC is that it aids in distinguishing between contracts of insurance and those of wager. In that regard the SELC held that the doctrine serves as a “dividing line between gambling and insurance”.²⁵⁰ It was argued that this “dividing line” was essential for both regulation and taxation purposes as well as for those communities where gambling was still illegal.

It was therefore argued that an insurable interest constitutes the hallmark of insurance in that it constitutes an essential part of the definition of insurance contracts.²⁵¹ Although the paper contains many specific arguments in this regard²⁵² what is being argued, in essence, is that an insurable interest constitutes a “dividing line” between contracts of insurance and other similar contracts for regulatory, tax, social and religious²⁵³ purposes.

With regard to an insurable interest serving a “crucial” regulatory role, Meggit²⁵⁴ points to the fact that Great Britain already has a regulatory framework, in the form of legislation and regulatory with regard to “regulated activities”.²⁵⁵ As mentioned in the preceding paragraphs, the FSA, the primary regulatory body with regards to contracts of insurance, does not consider an insurable interest as an essential requirement for the identification of a contract of insurance.²⁵⁶ Meggit²⁵⁷ therefore concludes that:

250 English and Scottish Law Commission 2011
http://lawcommission.justice.gov.uk/docs/cp201_ICL_post_contract_duties.pdf 102.

251 English and Scottish Law Commission 2011
http://lawcommission.justice.gov.uk/docs/cp201_ICL_post_contract_duties.pdf 124.

252 English and Scottish Law Commission 2011
http://lawcommission.justice.gov.uk/docs/cp201_ICL_post_contract_duties.pdf 124-125.

253 By “religious purposes” reference is made to the fact that gambling is still illegal in certain communities for largely religious reasons. It is therefore argued that the doctrine aids these communities in that it aids in distinguishing between contracts of insurance and those of wager.

254 Meggit 2014 *The Society of Legal Scholars* 9.

255 The definition of a ‘regulated activity’ as contained in section 2 of the *FSMA* includes: Dealing in investments; Buying, selling, subscribing for or underwriting investments of offering to do so, either as a principal or as an agent; In the case of an investment which is a contract of insurance, that includes carrying out the contract. Schedule 2 specifically includes the ‘rights under a contract of insurance’. The above-mentioned serves as an example. For a full discussion of all the regulatory frameworks in place with regard to insurance contracts see Meggit *The Society of Legal Scholars* 9-10

256 Neither the PRA nor FCA has expressed an opposite view in this regard.

257 Meggit 2014 *The Society of Legal Scholars* 9.

It is suggested, in light of the contents of both the governing legislation and regulatory bodies' own publications, that the argument that the doctrine is 'crucial' to the regulation of insurance is mistaken.²⁵⁸

With regard to the second aspect Meggit²⁵⁹ refers to the fact that the UK Revenue and Customs Authority²⁶⁰ consider an insurable interest to be one of many features of an insurance contract.²⁶¹ It should also be noted that the definition attributed to doctrine by the URCA, namely that the insured "must suffer a financial or other loss on the happening of the insured event" could easily be substituted for the indemnity principle.²⁶² Meggit²⁶³ concludes that due to the fact that UK Revenue Services do not make use of the doctrine in identifying insurance contracts "the centrality of the doctrine to the tax treatment of insurance" is open to question.

With regard to the social aspect of this "dividing" line, it has already been mentioned that contracts of wager are no longer unlawful in Great Britain and therefore the distinction between the two has become moot.²⁶⁴ With regard to those communities whose religious or cultural norms prohibit gambling in its entirety, Meggit²⁶⁵ uses the Islamic community as an example. Under Islamic (Shari'a) law, insurance contracts are operated in terms of the *takaful* system. Meggit²⁶⁶ argues that it is "commercially acceptable and a sign of cultural and religious plurality" for insurers to offer insurance contracts that are compliant with the *takaful* system. The removal of an "automatic requirement" of an insurable interest will not prohibit insurers from incorporating the requirement into their insurance contracts. Meggit²⁶⁷ therefore considers the "religious concerns" to be a non-issue.

Therefore, in conclusion, it would appear that the argument of an insurable interest being an essential "dividing line" between contracts of insurance and other similar contracts is empty. Neither the FCA nor URCA relies on the concept to identify a

258 Meggit 2014 *The Society of Legal Scholars* 10.

259 Meggit 2014 *The Society of Legal Scholars* 10.

260 The UK Revenue and Customs Authority (Henceforth referred to as the URCA) is the British equivalent of SARS.

261 UK Government 2014 <https://www.gov.uk/government/publications/notice-ipt-1-insurance-premium-tax>.

262 Meggit 2014 *The Society of Legal Scholars* 10.

263 Meggit 2014 *The Society of Legal Scholars* 11.

264 See paragraph 1.3.

265 Meggit 2014 *The Society of Legal Scholars* 11.

266 Meggit 2014 *The Society of Legal Scholars* 11.

267 Meggit 2014 *The Society of Legal Scholars* 11.

contract as one of insurance. As to the other concerns, the preceding paragraphs appear to indicate that these arguments are either weak or easily solvable.

3.3.3.2 Prevents moral hazards

The second function of the doctrine identified by the SELC is that an insurable interest, as a requirement of insurance, guards against moral hazards.²⁶⁸ In that regard the SELC stated that limiting insurers in the insurance contracts that they may enter into the doctrine protects these insurers from themselves.²⁶⁹ The doctrine therefore prevents insurers from entering into contracts that are “overly speculative or encourages wrongdoing”.

Again, reference must be made to the statements made by the SELC in *Issue Paper 4* especially with regard to the fact that better mechanisms exist to prevent moral hazards.²⁷⁰ The notion that the requirement of an insurable interest prevents fraud is also open to doubt. In this regard, Harnett and Thornton²⁷¹ wrote the following:

Assume that X, an individual of criminal mind, seeks to defraud an insurance company. Assume further that the requirement of insurable interest does not exist in his state. Can anyone reasonably suppose that X will insure Building A, in which he has no property interest, burn it down, and then seek to collect the insurance? [. . .] Typically, X, as a reasonably prudent criminal will burn down his own property which he has over insured. Since the property is his own, he can systematically plan the fraud and carry it out, undisturbed by prying eyes, and leaving the minimum of evidence – things he could only do with great difficulty were the property in the control of another.

The 2013 Annual Fraud Indicator published by the UK Government estimates a fraud loss of £2.1 billion with regard to insurance activities.²⁷² The largest identified cause of insurance fraud is that of organised “Cash for Crash”²⁷³ cases. According to the IFB's report the large majority of these instances involve the fraudster's own vehicle.²⁷⁴ From

268 Scottish and English Law Commission 2011
http://lawcommission.justice.gov.uk/docs/cp201_ICL_post_contract_duties.pdf 101

269 Scottish and English Law Commission 2011
http://lawcommission.justice.gov.uk/docs/cp201_ICL_post_contract_duties.pdf 101

270 See paragraph 1.3.1.3.

271 Harnett and Thornton 1948 *Colum L Rev* 1167.

272 UK Government 2013
www.gov.uk/government/uploads/system/uploads/attachment_data/file/206552/nfa_annual-fraud-indicator-2013.pdf 39.

273 The IFB defines 'cash for crash' cases as the act of “Staging or deliberately causing a road traffic collision solely for the purpose of financial gain”.

274 IFB date unknown <http://www.insurancefraudbureau.org/insurance-fraud/crash-for-cash>.

the statistics provided above it appears that the insurable interest doctrine is perhaps not the preventative tool it is argued to be.

With regard to the argument that the requirement "protects insurers from themselves" and enforces "market discipline", it is submitted that leaving the insurer with a technicality that enables him to repudiate the contract and thereby his obligations to honour its terms, is perhaps not the best method of cultivating market discipline. In this regard, Meggit²⁷⁵ points to the fact that the SELC was sceptical about the above-mentioned points. Meggit²⁷⁶ concludes that it could in fact be argued that the doctrine provides a mechanism whereby insurers escape the consequences of their own "inefficient" underwriting procedures.

3.3.3.3 Protects insurers from invalid claims

The third function identified by the SELC is that the requirement of an insurable interest offers protection to insurers against invalid claims. In that regard the SELC stated that although the validity of a claim should theoretically be determined by the wording of the insurance contract, in practice the contract would often only describe the subject matter without reference to who may claim on the policy.²⁷⁷ Those who may claim on the insurance policy is left to "customary understandings", as developed by the courts regarding who is deemed to have an insurable interest in the subject matter of the policy. The SELC referred to the fact that the insurance industry was concerned that an abolishment of the doctrine would "interfere" with the customary understandings that had been developed by the courts and that "claims could be made by a wider class of people", including persons that could not be said to have "a close link" to the property insured.²⁷⁸

At the outset it should be asked why an industry that is responsible for investments of £1.8 trillion and for 22% of total EU premium income requires protection in addition to

275 Meggit 2014 *The Society of Legal Scholars* 11.
276 Meggit 2014 *The Society of Legal Scholars* 11.
277 Scottish and English Law Commission
http://lawcommission.justice.gov.uk/docs/cp201_ICL_post_contract_duties.pdf 102.
278 Scottish and English Law Commission
http://lawcommission.justice.gov.uk/docs/cp201_ICL_post_contract_duties.pdf 102.

the legislation that is specifically aimed towards the combatting of fraud.²⁷⁹ The notion of two parties on equal footing, negotiating over the terms of a contract, does not find application in the insurance industry where the large majority of contracts incorporate the standard terms of the particular insurance company. The terms are, as a rule, non-negotiable with a great many terms being incorporated through reference to other documents. One would assume that it is the consumer who would require protection under these circumstances.²⁸⁰

Meggitt identifies two parts of the summary given by the SELC that is worthy of discussion. Firstly, that the “customary understanding” of the court, used when interpreting insurance contracts, is dependent on the retention of the doctrine. Secondly, the abolishment of the requirement would “open the floodgates” to a host of possible claimants.

With regard to the first part, Meggitt²⁸¹ argues that it cannot be forgotten that contracts of insurance “are just that – contracts”. Therefore, the general rules of “contractual construction” are applicable to them regardless of whether an insurable interest is a requirement or not. Meggitt²⁸² argues that it is highly unlikely that the courts would assume that insurers and policy holders would be happy for complete strangers to benefit from their insurance contracts. Even if the courts take a very liberal approach when interpreting insurance contracts, nothing precludes the insurance companies from compiling insurance contracts that are more precise and therefore “less open to interpretation”.

Without going into too much detail about the flood-gate-argument, it should be noted that the argument has been a point of contention in Great Britain.²⁸³ In this regard Meggitt²⁸⁴ argues that if it was found that to correct to abolish the requirement of an insurable interest due to the various flaws that have been identified in the preceding

279 Association of British Insurers <https://www.abi.org.uk/Insurance-and-savings/Industry-data/~media/DCB83D1E7CC845E28FF956358A880064.ashx>

280 In this regard see Bird *Birds' Modern Law of Insurance* 85-89.

281 For a full discussion of case law and interpretative tools used in this regard see Meggitt 2014 *The Society of Legal Scholars* 14-16.

282 For a full discussion of case law and interpretative tools used in this regard see Meggitt 2014 *The Society of Legal Scholars* 14-16.

283 Meggitt 2014 *The Society of Legal Scholars* 16.

284 Meggitt 2014 *The Society of Legal Scholars* 16.

paragraphs, the fact that it might lead to more people being able to legitimately claim on their insurance policies should not be seen as a negative, and it should therefore not be an obstacle to the abolishment of the doctrine.

It was previously mentioned that the terms of an insurance contract lies entirely at the discretion of the particular insurance company and it would therefore be entirely able to construct its policies in such a manner as to avoid an “opening of the floodgates”. It should also not be forgotten that the indemnity principle is applicable in this regard.

3.3.3.4 Global market used to define where insurance is located

The final reason given by the SELC was that “in an increasingly global market place” the doctrine served to define where the insurance is located and therefore which system of taxation and regulation applies.²⁸⁵ It is quite surprising that this point would be put forward seeing that the requirement of an insurable interest is not exclusive to British insurance law.²⁸⁶

It is therefore difficult to ascertain how exactly it is that the requirement distinguishes between British and other contracts of insurance. Furthermore, Meggit²⁸⁷ draws attention to the fact that it is standard policy to include a 'governing law or jurisdiction clause'²⁸⁸ in any contract of insurance that provides cover to those who are not situated in Great Britain.

3.3.4 Issue Paper Number 10 of 2015

The latest development regarding the insurable interest requirement is *Issue Paper Number 10*, published by the Joint Law Commission for comment in 2015. In this paper the Joint Law Commission published its final recommendations about the requirement of an insurable interest.

285 English and Scottish Law Commission 2011
http://lawcommission.justice.gov.uk/docs/cp201_ICL_post_contract_duties.pdf 102.

286 The doctrine also finds application in the USA, Canada, South Africa and Hong Kong to name but a few.

287 Meggit 2014 *The Society of Legal Scholars* 17.

288 Such a clause quite simply determines the country that will have jurisdiction regarding any disputes that might arise over the contract of insurance and therefore also the laws that will be applicable.

With regard to indemnity insurance, the SELC recommends the insurable interest doctrine to given a clear statutory basis.²⁸⁹ If an insurable interest is not present, the contract is to be declared void subject to a repayment of the premiums to the insured.²⁹⁰ With regard to what the definition of an insurable interest should be, the SELC recommends that a non-exhaustive list of interests that would be sufficient to constitute an insurable interest, should be included in the proposed legislation.²⁹¹

3.3.5 Continuing application of the doctrine

From the discussion in the preceding paragraphs it would therefore appear that the doctrine has yet to draw its final breath. On the contrary, the recommendations given by the SELC in *Issue Paper 10*, if given effect through legislation, would cement the application of the doctrine for the foreseeable future.

The cause of the SELC's recommendations, that are manifestly different from those expressed in *Issue Paper 4*, is quite simply the heavy push-back against the notion of abolishing the requirement by the insurance industry.²⁹² In this regard Meggit²⁹³ argues that despite very little evidence existing for the argument that the insurable interest doctrine achieves the purposes discussed in the preceding paragraphs,²⁹⁴ the majority of the insurance industry is undeniably in favour thereof. Meggit²⁹⁵ summarises the situation as follows:

A cynic would suggest that insurers defend the doctrine because it defends them from claims that they would prefer not to pay. Sadly, the respondents' submissions that the doctrine 'protects insurers from themselves' and allows them to rely on 'customary understandings' of policy wordings tend to support such a suggestion.

Despite strong criticism against the doctrine, including that levelled against it by the very law commission that is now recommending its reinstatement, it would appear that the doctrine is to remain a requirement of British insurance law.

289 Issue Paper 10 6.

290 Issue Paper 10 6.

291 Issue Paper 10 11.

292 http://lawcommission.justice.gov.uk/consultations/post_contract_duties.htm

293 Meggit 2014 *The Society of Legal Scholars* 21.

294 (1) maintains the distinction between insurance and gambling (2) guards against moral hazards and (3) prevents invalid claims.

295 Meggit 2014 *The Society of Legal Scholars* 21.

3.4 Relevance to South Africa

3.4.1 *Historical origins*

From the preceding paragraphs it should be evident that the doctrine was necessitated by the fact that British common law does not illegalise gambling and seeks to prevent certain morally hazardous insurance contracts. Authors such as Reinecke²⁹⁶ criticise the importation of the concept due to the fact that South African common law prohibits gambling and therefore adequately protects against wagering contracts disguised as contracts of insurance. It should also be noted that the indemnity principle is applicable to South African law of insurance and provides sufficient protection for insurers with regard to the malicious destruction of the subject matter insurance contract by the insured.

It has already been mentioned in the preceding paragraphs that the doctrine of an insurable interest does not have a legislative basis in South Africa but was rather imported “whole cloth” from the British.²⁹⁷ It is argued that the importation was unnecessary as the South African legal system offered solutions to the initial problems that the doctrine sought to solve.

3.4.2 *Difficulties regarding the strict definition*

It is interesting that the British and South African experience regarding the “strict definition” is nearly identical. It should be apparent from the preceding paragraphs that the British courts have started to move towards a more lenient definition due to the harsh and seemingly unfair results that may result from the strict definition.²⁹⁸ Unsurprisingly, South African courts also appear to be favouring a less strict definition.²⁹⁹

That being said, the latest issue paper released by the SELC seeks to create a list of interests³⁰⁰ that are to be recognised as satisfying the insurable interest doctrine. It

296 Reinecke 1971 *CILSA* 201.

297 See paragraph 3.2 in this regard.

298 In this regard, see Lowry et al *Insurance Law Doctrines and Principles* 191-205.

299 See paragraph 3.2. In this regard.

300 Issue Paper 10 11.

should be noted that the proposals put forward by the SELC has yet to be constructed into legislation.

It is argued that even if South Africa elects to retain the doctrine of an insurable interest, it should accept that the strict definition is not compatible with the modern insurance industry due it being inherently anti-consumer.³⁰¹ Regarding the proposal for a list of interests that are to be deemed sufficient to constitute an insurable interest, it is argued that this too might be anti-consumer. It is safe to assume that most persons require insurance whilst at the same time have very limited knowledge regarding the law of insurance. It is questionable whether consumers will have any knowledge concerning the list of interests and therefore one might be faced with the current dilemma, namely, insurers being able to escape liability through a technical defence. It is therefore argued that either the insurable interest must be abolished or that a lenient definition be adopted.

3.4.3 Continuing application of the doctrine

The First Joint Consultation Paper by the SELC is informative in the sense that the insurable interest doctrine was critically analysed and found to be redundant; instead the indemnity principle accomplishes the purposes that the doctrine seeks to achieve. Additionally, the indemnity principle does not stand to prejudice consumers to the same extent that the insurable interest doctrine does.³⁰² Those South African authors who argue for the abolishment of the doctrine should consult the First Joint Consultation Paper for arguments in favour of their motion.

The Second Joint Consultation Paper, however, raises difficult questions in that it directly contradicts the First Joint Consultation Paper. The arguments put forward in favour of the continuing application of the doctrine are unconvincing at best. Meggit argues by that these contradictions are the direct result of pressure from the insurance

301 It can safely be accepted that most persons have very limited knowledge concerning insurance law and therefore the strict definition grants the insurer a technical way to escape from its duty to perform in terms of a contract of insurance.

302 It should be noted that the indemnity principle is not a solution to every difficulty currently relating to the insurable interest doctrine. There are certain insurance contracts that fall outside its scope of application. In this regard see paragraph 6.2.2.1.

industry. It is argued that the primary reason for the continuing application of the doctrine can be found in the following quote:

By setting limits on the contracts that insurers may enter into, it protects insurers from themselves – from writing insurance which is overly speculative, or which encourages wrongdoing.³⁰³

Why insurers should be protected from themselves is baffling, since most insurance companies use standard term contracts and is therefore in complete control with regard to the content of those insurance contracts. Should the South African legislature conduct an investigation into the continuing application of the doctrine it is proposed that those who support such a notion must be extremely vocal in their arguments against the continuing application of the doctrine. It is almost a certainty that the insurance industry would oppose abolishment of the doctrine.

3.5 Conclusion

Chapter 3 have sought to achieve the following objectives namely:

- A thorough investigation into the historical application and purpose of the doctrine of an insurable interest,
- an analysis of the approach adopted by the British courts regarding the application and definition of the doctrine of an insurable interest; and
- an analysis of the findings and recommendations of the SELC regarding the continuing relevance of the doctrine.

Ultimately, the specific research question to be answered by this chapter was the following: What has been the British experience regarding the application of the insurable interest doctrine and what is its relevance to the current South African debate regarding the doctrine?

303 Scottish and English Law Commission
http://lawcommission.justice.gov.uk/docs/cp201_ICL_post_contract_duties.pdf 101

3.5.1 *Historical application and purpose of the doctrine*

It has been demonstrated that the insurable interest doctrine originated in Great Britain due to the fact that British common law does not prohibit gambling. In the absence of regulatory measures with regard to contracts of wager certain “morally abhorrent” gambling contracts, in the guise of insurance became common place. The British legislature intervened by requiring an insurable interest for all contracts of marine insurance.³⁰⁴ The application of the doctrine was subsequently extended to all contracts of indemnity insurance by the promulgation of the *Life Assurance Act*.³⁰⁵

It was mentioned in the previous paragraphs that the deficiency in the British common law pertaining to contracts of wager that facilitated the concluding of “morally abhorrent” contracts is not present in South African common law since the country’s own common law precludes contracts of wager. It is due to the unique historical position of English insurance law that authors, such as Reinecke, are lead to argue that the doctrine of an insurable interest should never have been incorporated into South African law. The concept is foreign to both South African common law and the South African legislature, yet the fact that the doctrine has been accepted by the country’s courts is undeniable. Therefore, it is concluded that from a historical perspective the doctrine should not have been incorporated into the South African law of insurance.

3.5.2 *Approach adopted by the British courts*

Similarly to the South African position, a “legislative definition” of the doctrine was not attempted, save for the definition contained in the Marine Insurance Act.³⁰⁶ The nature and content of the insurable interest doctrine was therefore left to the courts. The English courts’ approach to the doctrine is remarkably similar to that of South Africa. Initially the traditional or strict definition was preferred; however, due to the harsh consequences that could result from the application of the strict definition the courts began “softening” the definition by opting for the economic-based definition.

The definition given by the House of Lords in the *Feasy*-case is nearly identical to the indemnity-based definition advocated by authors such as Reinecke and Van der Merwe.

304 Section 1 of the *Marine Insurance Act* of 1906.

305 1774.

306 1906.

The only differences worth noting is that in terms of the *Feasy*-judgement, possession and certain “non-pecuniary interests” are sufficient to constitute and insurable interest whereas the indemnity-based definition requires that the insured suffer an economic loss upon the subject matter being damaged, destroyed or lost.

In light of both the South African and English experience with regard to defining an insurable interest, it is concluded that the strict definition simply does not comply with modern insurance needs or practices. It is argued that the indemnity/economic based definition, although it does contain certain deficiencies, is preferable to the strict definition due to the fact that it does not require that interests in the property be “legal or equitable”. It therefore enables a wider group of persons to insure their economic interest in property.

3.5.3 Findings and recommendations of the SELC

The disparities between the recommendations given by the SELC in the First and Second Joint Consultation Papers are remarkable. In the First Paper the SELC concluded that the indemnity principle does not only serve the same purpose than that of the insurable interest doctrine, but it also does it without the complications created by the insurable interest doctrine. The SELC therefore recommended the doctrine be abolished.

In the Second Joint Consultation Paper the SELC retracted the recommendations that it had made in the First Joint Consultation Paper by holding that the doctrine does perform certain useful functions. Considering the arguments that have been made by Meggit, it is difficult to escape the conclusion that the actual reason for the retention of the doctrine is that the insurance industry does not want to see it abandoned. It provides the insurer with a technical defence, the existence of which is often unbeknownst to the insured, which enables the insurer to escape his obligations in terms of the insurance contract.

South African academics who advocate the abandonment of the doctrine should familiarise themselves with the arguments that had been made in favour of the retention of the doctrine by the insurance industry and the criticism against the aforementioned arguments. If the South African legislature should decide to investigate the

validity of the doctrine it is very likely that the South African insurance industry will oppose abandonment. It is therefore very important that those in opposition to the doctrine prepare themselves to argue against its continuing application.

3.5.4 Relevance to the current South African debate

In summary, due to the English experience with regard to the application and definition of the doctrine, it is recommended that the doctrine must either be abandoned or that the indemnity based definition be adopted. A legislative definition would of course be preferable to a judicially crafted definition considering the fact that subject matter which has yet to be heard is unlikely to proceed to the Supreme Court of Appeal.

Chapter 4 Australia

4 Australia

4.1 Introduction

The Australian approach to the doctrine of an insurable interest was, until 1984, very similar to that of Great Britain. The reason for this was the automatic importation into Australia of all British legislation due to Australia being a British colony.³⁰⁷ Australia therefore had the insurable interest doctrine “imported” into the continent by the legislative measures discussed in the preceding chapter in much the same way that the concept was imported into South Africa.³⁰⁸

In 1982 the Australian Law Reform Commission³⁰⁹ released a paper titled “Insurance Contracts”.³¹⁰ In this paper the ALRC comprehensively discussed insurance reform, including the doctrine of an insurable interest. The proposals put forward by the ALRC

307 It should be noted that the legal position relating to the insurable interest doctrine was quite complicated in Australia due to the fact that Australia is divided into different states and territories each having its own system of courts and parliaments. It is only the Parliament of the Commonwealth that can pass legislation that is binding on all territories and states. The doctrine was therefore not uniformly applied in all territories.

308 See paragraph 5.2 above.

309 Henceforth referred to as the “ALRC”.

310 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20>.

led to the passing of the *Insurance Contracts Act*,³¹¹ thereby completely abolishing the requirement of an insurable interest with regard to indemnity insurance.³¹²

Of particular importance to the current debate on the insurable interest doctrine in South Africa, is the ALRC's discussion on the indemnity principle. Some South African authors³¹³ have argued that the insurable interest doctrine should be replaced in its entirety by the indemnity principle and therefore the ALRC's discussion is of particular importance especially with regard to the limitations of the doctrine in certain difficult instances such as where the insured has a limited interest in the subject matter of the insurance contract and third-party insurance.

Considering the preceding paragraphs, chapter 4 has the following objectives:

- A brief discussion on the abandonment of the insurable interest doctrine as discussed by the ALRC;
- a brief overview of the legislative measures adopted considering the recommendations given by the ALRC; and
- a thorough investigation and analysis of the ALRC's discussion regarding the indemnity principle.

The research question to be answered by this chapter is the following: What lead to the abandonment of the insurable interest doctrine in Australia and what is its relevance to the current South African debate regarding the doctrine?

4.2 Australian Law Reform Commission

The ALRC is a federal agency³¹⁴ responsible for reviewing Australian law and, if necessary, making proposals for reform. In that regard the ALRC performs the same functions as those performed by the SALC and the SELC.³¹⁵ As mentioned in the

311 80 of 1984.

312 The specific sections dealing with the requirement of an insurable interest will be discussed in more detail in the subsequent paragraphs.

313 See Chapter 2.2 in this regard.

314 In the context of South African law this would mean a national agency in other words an agency that is not tied to a specific territory or state.

315 Australian Law Reform Commission date unknown <http://www.alrc.gov.au/>

preceding paragraphs, the ALRC published a paper in 1982 wherein the doctrine of an insurable interest was discussed.

This paper is of importance to the South African debate regarding the doctrine of an insurable interest for two reasons. Firstly, it resulted in the abolishment of the doctrine of an insurable interest in the subsequently promulgated *Insurance Contracts Act*. It is important to understand the reasoning that resulted in the abolishment of the doctrine.

Secondly, it contains a full discussion on both the importance, nature and the application of the indemnity principle in insurance contracts. The indemnity principle is currently being applied in South Africa and since some South African authors have argued that it should replace the insurable interest doctrine, it is argued that there are lessons to be learned in that regard.

4.2.1 Abolishment of the doctrine

The ALRC commenced its discussion by acknowledging that an insurable interest is generally required to claim on a contract of insurance.³¹⁶ According to the ALRC, the requirement of an insurable was thought to serve a dual purpose. Firstly, it discouraged wagering and gaming.³¹⁷ Secondly, it discouraged the malicious destruction of the subject matter of the insurance contract by the insured.³¹⁸

After a brief discussion pertaining to the historical inception of the doctrine into Australian law the ALRC concluded that the doctrine should be abandoned in its entirety.³¹⁹ In coming to the above-mentioned conclusion, the ALRC made the following statement:

The legislative requirements relating to the interest which an insured must have in the subject matter of an insurance contract are the result of a combination of imprecise drafting and historical accident, rather than implementation of clear legislative policy. Had general gaming legislation been passed earlier than it was, there would have been no need for the Life Assurance Act 1774 (Imp.). Even in 1774, there was no reason

316 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20> 67.

317 It has been illustrated in the previous paragraphs that this has been accepted as the primary purpose of the doctrine by both the South African and British courts.

318 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20> 67.

319 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20> 68-71.

why that act should extend to contracts of indemnity, since the nature of such contracts prevents gaming and wagering in the form of insurance.³²⁰

With regard to the argument that the requirement is essential in lowering the risk that the insured would destroy the insured property, the ALRC argued that the indemnity principle provided sufficient protection since the insured would be limited to his actual loss and therefore no profit was to be made from the destruction of the insured property.³²¹ On the strength of the arguments the ALRC concluded that the requirement of an insurable interest should be abolished in its entirety.³²²

4.2.2 Indemnity principle

It should be evident from the preceding paragraphs that the ALRC's argument that an insurable interest should no longer be a requirement for recovery on an insurance contract, relies heavily on the premise that the indemnity principle would provide sufficient protection for insurers in that it would prevent insurance contracts from being used as vehicles for gambling and would discourage the destruction of the insured property by the insured. Due to the importance of the indemnity principle the ALRC felt it necessary to describe and define the type of interest that would be required in terms of the indemnity principle.³²³

This discussion on the indemnity principle was necessitated by certain "anomalies" that had arisen with regard to the indemnity principle. "Anomalies" in this context refer to certain difficult cases relating to insurance contracts, such as third-party insurance and limited interests in property. In this regard, it is interesting to note that some of the decisions that have been traditionally interpreted by the British courts to apply to the insurable interest doctrine have been interpreted by the ALRC to apply to the indemnity principle.³²⁴

320 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20> 71.

321 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20> 72.

322 It should be noted that this recommendation only applies to indemnity insurance. The ALRC recommended that the doctrine must be retained with regards to non-indemnity insurance.

323 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20> 72.

324 This assertion will be discussed in more depth in the subsequent paragraphs.

4.2.3 Anomalies with regard to the indemnity principle

4.2.3.1 Nature of the interest required

The first of those anomalies identified by the ALRC relates to the nature of the interest required by the indemnity principle.³²⁵ At the time when the ALRC convened, a “strict interest” was required in order for an insured to be able to claim on a contract of insurance.³²⁶

By “strict interest” it was meant that the insured have a “strict proprietary interest” in the subject matter of the insurance contract or that he have a “legal or equitable interest” in the aforementioned property.³²⁷ To illustrate the application of the “strict interest” the ALRC discussed the *Macaura*-case³²⁸ where the sole shareholder of a company was prohibited from claiming on an insurance policy. The insured had acquired the insurance policy in his own name in terms of which he insured the property of the company. In this instance the plaintiff could not claim on the contract of insurance due to the fact that he did not stand in a legal or equitable relation to the company's property despite the fact that he was the sole shareholder of the aforementioned company.

In the *Macaura* case the House of Lords held as follows:

where the assured is so situated that the happening of the event on which the insurance money is to become payable would, as a proximate cause, involve the assured in the loss or diminution of any right recognized by law or in any legal liability there is an insurable interest in the happening of that event to the extent of the loss or liability.³²⁹

The ALRC did not approve of the “strict requirement” due to the argument that it could “unduly inhibit recovery in certain types of insurance” and amounted to a “technical

325 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20> 72: It should be noted that certain portions of the ALRC's discussion regarding anomalies pertaining to the indemnity principle in Australia are irrelevant to the South African debate regarding the insurable interest doctrine. This discussion will therefore be limited to only those anomalies experienced by South Africa or those that could conceivably experience in the future should the indemnity principle replace the insurable interest doctrine.

326 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20> 72.

327 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20> 72.

328 *Macaura v Northern Assurance CO Ltd* [1925] AC

329 *Macaura v Northern Assurance CO Ltd* [1925] AC 619.

rule” that prevented an insured from recovering losses that had been suffered by him and which the insurer had agreed to indemnify.³³⁰

As an alternative the ALRC proposed that an “economic interest” should be required for an insured to be able to claim on an insurance policy. In that regard the ACLP quoted with approval the following statement made by Harnett and Thornton³³¹:

Procurement of a policy of insurance is an investment prompted by commercial foresight. This foresight involves recognition of a desirable economic relationship to a thing capable of destruction or damage. And the prudence of allocating certain monetary sums to ensure financial protection in the event of a catastrophic occurrence ... Based on economic analysis ... there is only one true concept of an insurable interest, and that is the factual expectation of damage. Restated, this conception is that insurable interest exists if the insured, independently of the policy of insurance, will gain economic advantage from the continued existence of the insured property or will suffer economic disadvantage on damage to the property. The property right conception is analytically not separate from the factual expectation of damage but...while the physical owner is the most probable lose, others may similarly suffer pecuniary setback upon the destruction of the insured property, and often to a greater extent than the nominal owner.

Therefore, in essence it is meant by “economic interest” it is meant that the insured should benefit financially from the property remaining in existence and be prejudiced financially by its destruction. There would be no need for the insured to stand in a “special” relationship to the property.

Considering of the preceding paragraphs, the ALRC recommended that the strict requirement must be done away with in favour of an economic interest. In that regard the ALRC proposed that legislation must be passed that allows an insured to claim on a contract of insurance were he had suffered economic damage upon the destruction of the subject matter so insured notwithstanding the fact that he did not stand in a legal or equitable relation to the afore-mentioned property.³³²

330 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20> 72.

331 Harnet and Thornton *COL LR* 1184-1185.

332 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20>.

4.2.3.2 Third-party insurance

Another issue that had arisen in Australian law relates to what is commonly referred to as third-party insurance.³³³ The question to be answered, in short, was whether the interest of third parties that stood to benefit in terms of a contract of insurance but was not a party to the aforementioned contract, was sufficient to satisfy the indemnity principle. Due to the fact that this issue was recently resolved in South Africa it is unnecessary to fully discuss it in this paper.³³⁴ What is of importance with regard to the South African debate is how the ALRC reconciled third-party insurance with the indemnity principle.

The ALRC found that third-party insurance could not be resolved in terms of the indemnity principle due to the fact that it cannot be said that the person who had taken out the insurance policy suffered any economic loss.³³⁵ Despite this, the ALRC recommended that third-party claims should be enforceable against insurers. In this regard the ALRC made the following statement:

At risk is the accepted practice of arranging insurance on behalf of all persons who might be exposed to liability in connection with the use of the insured's property. Every person who properly falls within a policy's description of the persons entitled to indemnity should be entitled to make a claim for loss covered by the policy.³³⁶

It is important to take cognisance of the fact that the ALRC did not feel restricted by the indemnity principle in recognising the claims of third parties with regard to insurance contracts. The ALRC, therefore, seemingly favoured freedom of contract over rigid adherence to a principle.

4.2.3.3 Limited interest in property

A third issue that had been experienced with regard to the indemnity principle in Australia relates to limited interests in property. Shortly summarised, the issue in

333 Third party insurance refers to those instances where the contract of insurance indemnifies the insured and certain nominated third parties. An example that commonly occurs in practise is where the insured takes out a policy of insurance on his vehicle that also provides cover for all damages incurred by any third parties through the driving of the aforementioned vehicle.

334 In this regard see Chapter 2 paragraph 2.3.

335 Australian Law Reform Commission 1982 [http://www.alrc.gov.au/report-20 75](http://www.alrc.gov.au/report-20%2075).

336 Australian Law Reform Commission 1982 [http://www.alrc.gov.au/report-20 75](http://www.alrc.gov.au/report-20%2075).

question deals with the situation where the contracting party insure an interest in the property above and beyond the interest held by the owner of the property.

In the case of *A Tomlinson (Hauliers) Ltd v Hepburn*³³⁷ carriers were tasked with the transportation of cigarettes owned by a third party. The carriers took out an insurance policy over the cigarettes for the duration of time that the cigarettes would be "in transportation". The cigarettes were stolen without any negligence on the part of the carriers.

The insurer refused the claim arguing that the insured had not suffered a loss.³³⁸ This was due to the fact that the insurer would only be liable to the third party if the cargo was lost during transit owing to the negligence of the insured. In this instance, the insurer was under no responsibility to indemnify the third party (owner). It should be noted that the insured and the third party had an agreement whereby the insured would insure the property against destruction for the duration that the property was in transit.

In this instance, the House of Lords held that the insurance contract in question covered the property in question and not the limited interest of the insured. The insured was therefore entitled to claim on the contract subject to the condition that the funds are kept in trust for the benefit of the third party. A limited interest would therefore not prohibit the insured from claiming the full amount agreed to in the insurance contract. It should be noted that under similar circumstances the House of Lords had denied a claim due to the insured only having a limited interest in the property insured.³³⁹

With regard to limited interests the ALRC recognised that the indemnity principle would not influence the outcome of such cases. In that regard the ALRC made the following statement:

The problem illustrated by Monson's case would not be solved by adopting the amendment to the indemnity principle suggested earlier. What is in issue, once again, is not the insured's personal loss, but the right of an insurer to renege on a clear promise to provide cover for the whole property.³⁴⁰

337 *A Tomlinson (Hauliers) Ltd v Hepburn* (1966) AC 451.

338 *A Tomlinson (Hauliers) Ltd v Hepburn* (1966) AC 451 454.

339 In this regard see *British Traders' Insurance Co Ltd v Monson* (1964) 111 CLR 86.

340 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20> 77.

In essence, therefore, the question to be answered was whether an insurer should be relieved from its obligation to perform in terms of a contract owing to a technical defence, namely that the interest insured was only a limited interest in the property. According to the ALRC such a state of affairs was untenable.³⁴¹

The ALRC pointed to the fact that insurers were able to limit their liability by clearly and expressly indicating in insurance contracts the nature of the interest that it was willing to indemnify. The ALRC therefore recommended that “in the absence of clear limitations which are specifically brought to the attention of the insured” an insured should not be prohibited from claiming for the full amount agreed to by the insured and the insurer.³⁴² With regard to those who held a limited interest in the insured property the ALRC argued that the insurer should be required to “pay any amount in excess of the insured’s own loss” within a time period that was to be incorporated into legislation.³⁴³

4.2.3.4 Valued policies

The last anomaly pertaining to the Australian law of insurance worth discussing relates to what is termed as “valued policies”. A “valued policy” is a contract of insurance in terms of which the subject matter of the contract is insured for a fixed amount in the event of a loss.³⁴⁴ The reason why valued policies were being scrutinised by the ALRC was due to the insurance industries’ suspicion of “large scale” fraud pertaining to motor vehicle insurance.³⁴⁵ The insurance industry claimed that motor vehicles were being grossly over-valued and over-insured. The vehicles would then be reported as either having been stolen or lost.

Valued policies are clearly in conflict with the indemnity principle in that they potentially purport to compensate the insured over and above losses actually sustained. Notwithstanding the above-mentioned conflict the ALRC held that such policies should be allowed due to economic necessity.³⁴⁶ The ALRC also argued that insurers are in a position where the market value of the subject matter of insurance contracts could

341 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20-77>.

342 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20-77>.

343 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20-77>.

344 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20-81>.

345 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20-81>.

346 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20-81>.

easily be obtained and therefore fears relating to fraud could easily be negated by the insurance companies themselves.³⁴⁷ Accordingly, statutory intervention relating to value policies was not required.

4.3 Insurance Contracts Act

The recommendations of the ALRC were given legislative force by the passing of the *Insurance Contracts Act* 80 of 1984. Section 16 stipulates that an insurable interest is not a requirement for an insurance contract and that such a contract is not void due to a lack thereof. Section 17 gives effect to the ALRC's recommendations concerning the type of interest required and reads as follows:

Where the insured under a contract of general insurance has suffered a pecuniary or economic loss by reason that property, the subject matter of the contract has been damaged or destroyed, the insurer is not relieved of liability under the contract by reason only that, at the time of the loss, the insured did not have an interest at law or equity in the property.

Section 17 implies that an economic interest would now be sufficient to satisfy the indemnity principle, although, the exact scope of the interest required has been left largely to the discretion of the courts. Section 20 stipulates that it is no longer required for those parties who stand to benefit from the provisions of the insurance contract to be named in the policy.

Section 49, shortly summarised, gives effect to the recommendations of the ALRC concerning limited interests in insured property. In essence, the section acknowledges limited interests in property to the extent that the insurer purports to insure the aforementioned interests. If the insurer does not intend to insure limited interests in the property above and beyond the interest of the owner, the insurer must bring this fact to the attention of the insured. Section 51 validates third-party insurance to the extent that the insurance contract purports to cover the insured for such damages. Should the insurer wish to limit his liability in this regard this intention must be brought to the attention of the insured.

347 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20> 81.

4.4 Conclusion

The following objectives were identified for Chapter 4:

- A brief discussion on the abandonment of the insurable interest doctrine as discussed by the ALRC;
- a brief overview of the legislative measures adopted considering the recommendations given by the ALRC; and
- a thorough investigation and analysis of the ALRC's discussion regarding the indemnity principle.

The research question to be answered by this chapter was the following: What lead to the abandonment of the insurable interest doctrine in Australia and what is its relevance to the current South African debate regarding the doctrine?

4.4.1 Abandonment of the insurable interest doctrine

It has been established that the doctrine of an insurable interest was abandoned due to the recommendations put forward by the ALRC. The ALRC established that the purposes thought to be achieved by the doctrine were (1) that it discourages wagering and gaming and (2) that it discourages the malicious destruction of the subject matter of the insurance contract by the insured.³⁴⁸ It was argued by the ALRC that no justification could be found for the extension of the doctrine to contracts of indemnity due to the fact that indemnity insurance, by its very nature, discourages the above-mentioned actions.³⁴⁹ Shortly summarised, the ALRC argued that the indemnity principle does not only achieve the purposes that the doctrine sought to achieve but does so in a clearer and more consumer-friendly manner.

4.4.2 Legislative measures adopted in light of the ALRC's recommendations

The *Insurance Contracts Act*³⁵⁰ gave effect to the recommendations put forward by the ALRC in that section 16 effectively abolished the requirement of an insurable interest.

348 See paragraph 4.2.1 in this regard.

349 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20> 71.

350 80 of 1984

Section 17 specifically stipulates that if the insured suffer a pecuniary or economic loss through the destruction or loss of the insured property the insurer will not be relieved of his obligation to perform in terms of the contract of insurance “by reason alone” that the insured does not have an “interest at law or equity in the insured property”.

4.4.3 ALRC's discussion regarding the indemnity principle

Two issues should be noted regarding the ALRC's discussion of the indemnity principle. Firstly, The ALRC concluded that an economic interest was preferable to a strict proprietary interest. This was due to the fact that a strict interest would “unduly inhibit recovery in certain types of insurance” and amounts to a “technical rule”.³⁵¹ Summarised, the strict requirement is inherently anti-consumer whereas the economic requirement is not.

Secondly, the ALRC's discussion illustrates that the indemnity principle should not be considered to constitute an all-embracing rule as it does not deal with certain insurance practices that have become common place. In this regard, third-party insurance serves as a perfect example.³⁵² Third-party insurance cannot be justified in terms of the indemnity principle since as the persons to whom cover is extended do not suffer an economic or pecuniary loss. The practice, however, has become common place to the extent that most contracts of motor vehicle insurance do contain a clause that extends cover to a certain class of persons.³⁵³ Despite the fact that third-party insurance cannot be justified in terms of the indemnity principle, the ALRC held that it should be recognised by legislation.

The approach of the ALRC is recommendable in that it shows an inherent flexibility; it does not consider itself limited by fixed rules. Rather, practical solutions were advised in order to solve problems that had been created through insurance practises and economic necessity. The only question that remains unanswered is: What is the relevance of the Australian position to the current debate in South Africa?

351 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20> 72.

352 In this regard see paragraph 4.2.3.2.

353 Usually the family of the insured or someone that drives with the permission of the insured.

4.4.4 *Relevance to South Africa*

4.4.4.1 Revocation of the insurable interest doctrine

The ALRC's discussion relating to the abandonment of the doctrine of an insurable interest does not contain the same amount of detail than the 2008-paper released by the SELC.³⁵⁴ The ALRC's assertion that the doctrine seeks to accomplish two purposes, namely the prevention of wagers being disguised in the form of contracts of insurance and the discouragement of the wilful destruction of insured property by the insured, was not challenged, thereby greatly simplifying the issue.³⁵⁵ Furthermore, the ALRC argues that the above-mentioned purposes were already satisfactorily accomplished by the indemnity principle rendering the insurable interest doctrine irrelevant and burdensome.³⁵⁶

What, then, distinguishes the Australian position from that of the British? What is the distinguishing factor that led to the ALRC's recommendations pertaining to the abandonment of the doctrine of an insurable interest were implemented whilst the recommendations of the SELC were severely criticised, leading them to retrace their original recommendations? The answer to these questions is quite simply that the insurance industry in Australia supported the recommendations of the ALRC, whereas the British insurance industry vehemently opposed those of the SELC.³⁵⁷

Arguments pertaining to the abandonment of the doctrine of an insurable interest have already been discussed thoroughly and therefore it is unnecessary to revisit the topic. Suffice it to say that the doctrine was abandoned in favour of the indemnity principle. What is of particular importance is the ALRC's discussion pertaining to the indemnity principle.

4.4.4.2 The indemnity principle

South African authors who advocate the abandonment of the insurable interest doctrine generally recommend that the indemnity principle either serve as a replacement or form

354 See Chapter 1.3.1.

355 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20> 81.

356 Australian Law Reform Commission 1982 <http://www.alrc.gov.au/report-20> 72.

357 ICA Submission. 9 August 1979, 6.

the basis of the definition of the insurable interest doctrine.³⁵⁸ The ALRC's discussion on the indemnity principle could therefore provide valuable guidance should South Africa decide to abandon the insurable interest doctrine or alternatively create a legislative definition in line with the indemnity principle.

The ALRC's discussion relating to "anomalies" that was experienced with regards to insurance contracts in Australia should also be consulted since South Africa is currently facing similar difficulties. A prime example of this is the discussion in the preceding paragraphs relating to extension clauses (referred to by the ALRC as third party insurance).³⁵⁹ A major distinction between the approach adopted by South Africa and that of Australia boils down to flexibility.

Local courts have been struggling for a long time to find a legal niche within which third party insurance could be justified until the Supreme Court of Appeal held in 2004 that a third party insurance contract amounts to a *stipulatio alteri*.³⁶⁰ It should be noted that the definition and principles relating to a *stipulatio alteri* had to be extended substantially in order to accommodate the concept of third party insurance.³⁶¹ The ALRC, faced with the exact same conundrum, did not consider itself bound by strict principle and simply held that such contracts were an economic necessity and that the insurer should not be able to avail himself of a technical defence after giving an unambiguous promise.

It should be evident from the preceding paragraphs that the approach adopted by the ALRC with regard to difficulties pertaining to the indemnity principle was both flexible and logical. The ALRC recognised from the outset that the indemnity principle would be insufficient to correct certain "anomalies" that had cropped up in the Australian law of insurance and that this could not be allowed to constitute an insurmountable problem.

358 In this regard see chapter 2.2.

359 In this regard see footnote number 67.

360 *Unitrans Freight (Pty) Ltd v Santam Ltd v Santam Ltd* 2004 6 SA 21 (SCA). For an in-depth discussion of the case see Van Niekerk JP "Extension clauses in motor-vehicle insurance contracts as stipulations in favour of a third party: Clarity at long last" 2004 16 *SA Merc LJ* 286-303 and Reinecke MFB "Extension clauses and indemnity insurance" 2012 2 *TSAR* 342-348.

361 Example: Ordinarily the third party in whose favour the contract of insurance is concluded would be required to accept the terms of the contract before being able to benefit in terms thereof. With regards to third party insurance, however, the insurer generally indemnifies a class of persons (ordinarily anybody driving with the permission of the insured) for any damages pertaining to the driving of the insured motor vehicle.

Instead of trying to force these problem cases within the ambit of the indemnity principle the ALRC sought case-specific solutions that could not necessarily be justified under a single fixed principle relating to the law of insurance.³⁶² At the heart of the ALRC's recommendations lies a sense of justice in that insurers are not to be allowed to escape honouring agreements due to technical defences.

South Africa could stand to learn some valuable lessons from the approach taken by the ALRC. The problems currently faced with regards to the insurable interest doctrine can largely be attributed to an inherent inflexibility within the South African judicial system. Despite the fact that the doctrine does not have a legislative or historic basis the courts have been incredibly reluctant to see the concept abandoned whilst at the same time feeling honour-bound to come to the aid of those who must face the potentially harsh consequences imposed by the doctrine. This should be evident from the bizarre definitions that have recently cropped up with regards to the requirement of an insurable interest.³⁶³ If South Africa's legislature had adopted the approach of the ALRC, the uncertainty currently surrounding the doctrine would have been resolved a long time ago.

5 Chapter 5

5.1 Revisiting the research question

The central focus of this mini-dissertation, as identified by the general research question, was to establish to what extent, if any, an insurable interest should be considered to constitute a requirement for the validity of an insurance contract. The need for the research stems mainly from the fact that both the definition and essentiality of the doctrine is currently unclear. The practical implication of the confusion surrounding the doctrine is that insurers have at their disposal a technical tool whereby they can, and often do, attempt to escape from performing in terms of the insurance contract.

In order to effectively answer the general research question a number of specific research questions were formulated.

362 Unless one was to consider "fairness" and "justice" to constitute fixed principles.

363 In this regard see chapter 2.3.

These specific research questions constituted the framework for the discussion in chapters 2 to 4. Chapter 2 identified and analysed academic arguments regarding the definition of insurable interest and the essentiality of the doctrine. Chapter 3 further investigated the historical evolution and purpose of the doctrine of an insurable interest; analyzed the approach adopted by the British courts regarding the application and definition of the doctrine of an insurable interest; and analyzed the findings and recommendations of the SELC regarding the continuing relevance of the doctrine. Chapter 4 briefly reflected on the abandonment of the insurable interest doctrine as discussed by the ALRC; briefly overviewed the legislative measures adopted considering the recommendations given by the ALRC; and thoroughly investigated and analysed the ALRC's discussion regarding the indemnity principle.

5.2 Responding to the research questions through research objectives

Considering the formulation of the general research question the primary objective of this mini-dissertation was to determine to what extent an insurable interest should be considered to constitute a requirement for the validity of an insurance contract. In achieving the primary objective, secondary research objectives were identified in paragraph 1.3. Each of the specific research questions had been sculpted to support the primary research question. What follows now is a brief reflection on the answers put forward to each of the specific research questions. Ultimately the general research question will be addressed and recommendations based on the answers given to each of the specific research questions will be advanced.

5.2.1 Application of the doctrine in South Africa

5.2.1.1 Defining the doctrine

It has been established that the doctrine of an insurable interest is defined, but authors differ on the content of the concept. Due to the fact that the doctrine lacks a legislative foundation, it has been left to the courts to craft a working definition for the doctrine. Initially the strict or traditional definition was preferred in terms of which an insured would only be able to claim if he stood in a certain legal or equitable relationship to the insured property. Recently, however, the courts have started to employ the economic-based definition, in terms of which the insured will be able to claim if he suffers

damages due to the loss or destruction of the insured object. This shift from the traditional definition to the more liberal economic test was necessitated by the harsh consequences that result from the application of the traditional definition.

It has also been argued that in an attempt to come to the aid of the insured, the courts have “liberalised” the definition of an insurable interest to include certain questionable interests, such as convenience and the insured feeling “morally obligated” to insure the property in question. Shortly summarised, the definition of an insurable interest remains unclear, although it can be said with a reasonable amount of certainty that the courts have started moving away from the traditional definition to a more consumer-friendly economic-based definition.

5.2.1.2 Essentiality of the doctrine

It was established in paragraph 2.5.5 that most South African courts still appear to consider an insurable interest to constitute a requirement for the enforcement of an insurance contract. The doctrine has been criticised by the courts with some going as far as suggesting that the real enquiry should be whether the contract amounts to one of wager. Despite the criticism levied against the doctrine it has been shown time and again that the courts are loath to abandon the doctrine.

A notable exception to what has been said above can be found in the *Lorcom Thirteen*-case. Here the court held that an insurable interest was in fact not an essentiality for the enforcement of an insurance contract. The court held that the insurance contract alone should determine the interest required, as well as the amount that could be claimed in terms thereof.

It should therefore be apparent that continuing application of the doctrine is uncertain. Although the courts have been willing to criticise the doctrine, the only example of a court actually being willing to discard was the one in the *Lorcom Thirteen*-case. Until the legislature deems it necessary to address the doctrine, or the matter reaches the Supreme Court of Appeal, the matter will remain uncertain.

5.2.2 Application of the doctrine in Great Britain

The doctrine of an insurable interest was created and developed in Great Britain to dissuade certain contracts that had been deemed to be “morally hazardous”. This was necessitated by the fact that British common law does not illegalise gambling. Following the accidental repealing of the legislative basis of the doctrine by section 334 of the *Gambling Act*, the SELC met to discuss the continuing application of the doctrine.

In their 2008-paper, after a thorough investigation into the historical origins and application of the doctrine, the SELC found that “it was difficult to see what the requirement added to the common law indemnity principle”. Furthermore, it was argued that the indemnity principle did not create the legal uncertainty or harsh results that were attributable to the insurable interest doctrine. The SELC also referred to the “stretching” of the definition of the doctrine by the British courts to the extent, that for all practical purposes, it was indistinguishable from the indemnity principle.

The SELC therefore recommended the doctrine to be abandoned with regard to indemnity insurance and that the indemnity principle should serve as a substitute. It should be noted that the recommendations published by the SELC in its 2008-paper were met with academic approval.

In 2011 the SELC published its Second Joint Consultation Paper addressing the insurable interest doctrine. Surprisingly, the SELC contradicted the recommendations given in the First Joint Consultation Paper by recommending that the doctrine should be retained. The SELC recommended that a list be published that would contain a number of interests that would satisfy the insurable interest doctrine. Although reasons had been put forward by the SELC as to why the doctrine should be retained it is difficult not to come to the conclusion that it was the pressure applied by the British insurance industry that had carried the day. Ultimately, it would appear that the doctrine is to be retained in Great Britain.

5.2.3 Application of the doctrine in Australia

In paragraph 4.2 it was established that on the strength of recommendations given by the ALRC, the *Insurance Contracts Act* abolished the requirement of an insurable interest in Australia. The argument put forward by the ALRC in favour of abolishment

was that no good reason existed for the extension of the doctrine to indemnity insurance. The indemnity principle, it was argued, already contained the mechanisms whereby the purposes that the doctrine sought to achieve could be reached.

The ALRC's discussion regarding the indemnity principle is especially informative. The ALRC illustrated that the indemnity principle could not be seen as a rule set in stone, due to the fact that certain insurance practices that had become common place could not be justified in terms thereof. The approach adopted by the ALRC is flexible in that certain interests were given legislative recognition despite the fact that it cannot be said that the insured suffers damages of a patrimonial nature. It is argued that the Australian experience with regard to the insurable interest should serve as the foundation for future discussions regarding the continuing application of the doctrine.

5.3 Recommendations

5.3.1 Redefining the concept

A very simple and efficient method of remedying the current situation would be either legislative intervention, or a clear and concise judgement from the Supreme Court of Appeal. It should be apparent that the traditional definition of an insurable interest is inherently anti-consumer and does not meet the modern economic needs of the insured. It is therefore argued that the approach advocated by Reinecke and Van der Merwe would be the most viable. The concept of an insurable interest should be redefined to consist of any economic interest that, if impaired, would result in the insured suffering damages that the insurer has undertaken to indemnify to the extent agreed upon by the parties. In essence, the concept would be kept in name only, with the focus shifting to damages coupled with the intention of the respective parties. The approach advocated by Reinecke and Van der Merwe and supported by Van Niekerk is intrinsically tied to the concept of damages.

An economic interest would be any interest that is deemed to form part of a person's patrimony, the loss of which would result in the insurer suffering damages as understood in the general law of damages. The advantages of this approach are numerous. It would create legal certainty were it is sorely lacking and it would relieve the perceived unfairness of the insurer being able to shield himself with an extremely technical defence of which the lay person will seldom possess any knowledge.

The incorporation of this definition would furthermore not lead to limitless liability on the part of the insurer, as he would be more than capable of limiting his liability by defining the nature and extent of the damages which he intends to carry the risk for. If the parties wish to broaden the definition of damages past those generally recognised in the law of damages, then they should be free to do so. Thereby greater contractual freedom will be available to those parties who wish to make use of it.

It should be noted, however, that merely replacing the insurable interest doctrine with the indemnity principle will not adequately address all the interests that are currently insured. Extension clauses serve as a prime example. It is therefore recommended that certain interests be given legislative recognition in order for the South African law of insurance to remain compatible with the economic and social needs of its citizens. What is required is a flexible approach that is willing to ignore some of the "rules" that have been developed by the courts.

In conclusion it is only by legislative intervention or an extended judgement by the Supreme Court of Appeal that legal certainty will be achieved with regard to the concept of an insurable interest. Currently, if John was to approach an attorney seeking clarity on his insurance portfolio, the discussion would be an extremely lengthy one indeed, with the final answer being one of speculation instead of concrete legal opinion.

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