SELECTED LEGAL ASPECTS OF LIABILITY INSURANCE

by

WENETTE JACOBS

submitted in accordance with the requirements for
the degree of

DOCTOR OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROF B KUSCHKE

CO-SUPERVISOR: PROF CJ VISSER

(January 2020)

DECLARATION

Name: **Wenette Jacobs**

Student number: **33475334**

Degree: **Doctor of Laws**

Exact wording of the title of the thesis as appearing on the electronic copy submitted for examination:

SELECTED LEGAL ASPECTS OF LIABILITY INSURANCE

I declare that the above thesis is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the thesis to originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

(The thesis will not be examined unless this statement has been submitted.)

SIGNATURE

29|2|2020

DATE

TURNITIN SUBMISSION RECEIPT

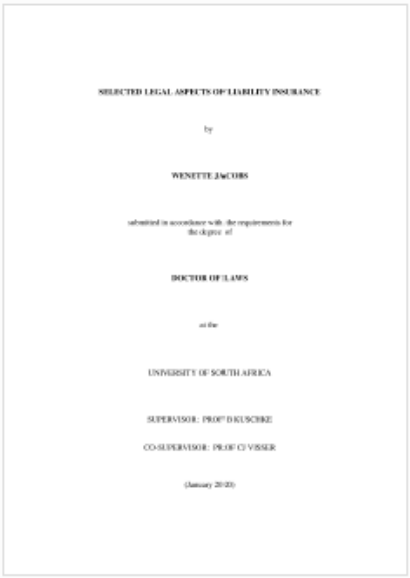
turnitin

Digital Receipt

This receipt acknowledges that Turnitin received your paper. Below you will find the receipt information regarding your submission.

The first page of your submissions is displayed below.

Submission author:	Wenette Jacobs
Assignment title:	Complete dissertation/thesis for exa…
Submission title:	Final Dissertation
File name:	LLD_W_Jacobs_Turnitin_Feb_2020…
File size:	667.02K
Page count:	350
Word count:	85,409
Character count:	458,789
Submission date:	29-Feb-2020 01:19PM (UTC+0200)
Submission ID:	1266494636



SELECTED LEGAL ASPECTS OF LIABILITY INSURANCE

by

WENETTE JACOBS

submitted in accordance with the requirements for the degree of

DOCTOR OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROF D KUSCHKE

CO-SUPERVISOR: PROF CJ VISSER

(January 2020)

CONFIRMATION BY EDITOR

PROFESSOR NEVILLE BOTHA
B Iuris, LLB (Pret) LLD (Unisa)

Professor Emeritus , School of Law University of South Africa
Advocate of the High Court
South African Representative Permanent Court of Arbitration
Editor: Annual Survey of South African Law - 2018
South African Mercantile Law Journal
Comparative & International Law Journal for Southern Africa
South African Yearbook of International Law

Cell: 082 820 1414
Tel: 012 362 0376
e-mail: Neville.Botha7@gmail.com

---

9 February 2020

TO WHOM IT MAY CONCERN

I hereby confirm that the candidate, Wenette Jacobs, submitted her LLD thesis entitled:

SELECTED LEGAL ASPECTS OF LIABILITY INSURANCE

to me for editing. The documents submitted have been edited to the standard required by the university and returned to the candidate for finalization.

Prof Neville Botha

ACKNOWLEDGEMENTS

I acknowledge the expert guidance by Professor JP van Niekerk, who supervised my thesis until his retirement. In true insurance law terminology: he 'triggered' my interest in the law of liability insurance. Professor van Niekerk's vast knowledge of insurance law and the law in general never ceases to amaze me. I am grateful for everything that I could learn under his guidance.

Next, I would also like to thank Professor Birgit Kuschke and Professor Coenraad Visser that continued the supervision of my thesis after the retirement of Professor van Niekerk. I am thankful for their specialised knowledge that they shared with me. Their novel perspectives challenged me to shape my manuscript in many ways. I appreciate their generous time devoted to my supervision.

It is with gratitude that I acknowledge Unisa and the College of Law that funded my doctoral study and foreign doctoral research.

I would also like to thank Professor H Cousy, Doctor Yves Thiery and Professor Caroline van Schoubroeck, formerly and/or currently from the Department of Mercantile Law at the *Katholieke Universiteit Leuven*. They hosted me at their Department when I was conducting research there and went out of their way to assist me. I am extremely grateful to Professor van Schoubroeck in particular who availed her expertise to me over an extended period of time.

I acknowledge Professor Neville Botha as professional editor of the manuscript and Mrs Thea de Villiers for her assistance with the formatting hereof.

Further, I would like to thank the Unisa College of Law Management and the Chairs of the Department of Mercantile Law for their support during my period of study. Thank you also to my colleagues from the Unisa Department of Mercantile Law and from the wider university community for their collegiality during the course of my research. I would like to recognise Mrs Elena Swanepoel, Mrs Elmarie Meyer, Mrs Erica Flinspach-Van der Walt, Mrs Zelda Groenewald and Professor Philip Stoop in particular. The following colleagues of the Unisa library also deserve a special mention: Ms Karen Breckon, Mrs Runette Bischoff and Ms Yegis Naidu.

Thank you to Allie Leonard, Sunelle Geyer and Anthea Wagener, for their friendship and encouragement.

As fellow insurance law lecturer and mentor, I would like to thank Professor Birgit Kuschke for her guidance as I 'drilled down' trough the intricacies of our

shared neglected field of study. I am also truly thankful for Prof Kuschke's motivation on my research path.

Thank you to my grown-up son, Piet Matipa, and my aunt and uncle, Vera & Flip Oelofse, for your moral support. My heartfelt thanks to Lily Jacobs, Niva Venter and Katriena Norkee for assisting me in various ways that freed up my time to complete my research.

I salute my late grandparents, Pietie and Wiets Botes, and my late father, Pieter Jacobs, who always believed in my ability to succeed.

On a more personal note, I would not have been able to complete my doctoral thesis without the prolonged devotion, dedication, love and prayers from my closest family members: my parents Zettie and Neels Campher, my husband Hannes Snyman and my son Wehann. A special word of thanks to my mom Zettie, whose steadfast motivation and assistance in all possible ways gave me the courage to persist. Hannes, thank you for your loving patience while I continued my research and for all your practical assistance. Wehann, your insight and support for what you termed 'the biggest assessment ever' warmed my heart. I will always cherish your love and understanding for the project that occupied me in my study for so long.

I dedicate this thesis to my family: may it inspire you to complete the tasks that you start, even though it may be daunting and seem impossible at times.

Soli Deo Gloria.

SUMMARY

Liability insurance concerns an insured's insurance of its legal liability towards a third party for the latter's loss. This specialised type of insurance is rather neglected in South African insurance law. There is a lack of understanding of the intricacies of liability insurance and its unique challenges. This flows primarily from its complex nature as third-party insurance, which involves legal obligations between multiple parties, and a lack of statutory regulation of the distinctive contractual aspects of liability insurance. Furthermore, limited authority exists on contentious legal aspects as a result of the relatively small number of judicial decisions in this field of law.

It is also evident that liability insurance constantly evolves as new grounds of liability emerge and new insurance products develop in response to the changing demands of society. The rise of consumerism and the increase in third-party claims amplify the economic significance of the law of liability insurance in South Africa. A substantial knowledge gap remains in our jurisprudence, irrespective of the recent introduction of new statutory instruments aimed at regulating insurance practice in general. These reforms have not as yet been applied critically to liability insurance, and no specialised legislation in South Africa regulates aspects of this branch of insurance as is the case with microinsurance.

The focus in this thesis is on two main issues: the insurer's duty effectively to indemnify the insured, and the insurer's defence and settlement of third-party claims brought against the insured. As a subsidiary theme, this thesis analyses legal uncertainties that may persist during pre-contractual negotiations, the liability insurance contract lifecycle, and even after the expiry of the contract. Legal challenges can be addressed by novel and creative application of the national law. Potential solutions can be gleaned from the other progressive jurisdictions reviewed – English and Belgian law. It is evident that this research may prompt Parliament to develop specific rules and regulations for liability insurance contract law. This thesis includes a check list of some of the most important disclosure duties for procuring liability insurance cover, its operation, and claims processes.

KEY TERMS

Claims-made policy; Duration of liability cover; Disclosure; Duty to indemnify; Hybrid Policy; Indemnity insurance; Insured defendant; Legal liability; Liability insurance; Liability insurance contract; Liability insured; Liability insurer; Right or duty to defend or settle; Third-party insurance; Third-party plaintiff; Third-party claim; Occurrence-based policy

LIST OF ABBREVIATIONS

(Abbreviations for legislation and case law are created in the body of the thesis.)

ALI	American Law Institute
CGL	Commercial General Liability Policy
EC	European Community
EU	European Union
FSCA	Financial Sector Conduct Authority
ICOBS	Insurance Conduct of Business Sourcebook
IVAs	Voluntary arrangements entered into by insured individuals with creditors
CVAs	Voluntary arrangements entered into by insured companies with creditors
LR	Law Review
P&I clubs	Protection and Indemnity Clubs
PA	Prudential Authority
PER	Potchefstroom Electronic Review
SA	South Africa
SA Merc LJ	South African Mercantile Law Journal
SALJ	South African Law Journal
TCF	Treating Customers Fairly (Principles)
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
UK	United Kingdom
US	United States
USA	United States of America

TABLE OF CONTENTS

CHAPTER 3:

SOUTH AFRICAN LAW

CHAPTER 4:

ENGLISH LAW

CHAPTER 5:

BELGIAN LAW

CHAPTER 6:

BIBLIOGRAPHY

CHAPTER 1:

INTRODUCTION AND OVERVIEW OF THE STUDY

CHAPTER 1:

INTRODUCTION AND OVERVIEW OF THE STUDY

1.1 BACKGROUND TO THE STUDY[1]

Risk is the possibility (uncertainty) of unforeseen harm as part of everyday life.[2] A person exposed to risk may protect itself by transferring the risk of loss to another party, an insurer, in exchange for an undertaking to pay a premium.[3] This is the essence of an insurance contract – to protect an insured against the financial consequences of the realisation of the risk insured.

There are several classifications of insurance; the most common is the distinction between indemnity and non-indemnity insurance. With indemnity insurance, the insurer indemnifies the insured for loss or damage suffered as a result of the happening of the uncertain event insured against.[4] First-party insurance and third-party insurance are examples of indemnity insurance. The distinction between these two types of insurance centre on the nature of the object of the risk and the object of insurance.[5] First-party insurance (such as property insurance) concerns assets in the insured's estate. Third-party insurance (such as liability insurance)[6] concerns the liabilities of the insured's estate.[7]

---

[1] Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 1.1-1.59 and 25.24-25.45.

[2] Ibid para 5.20 summarise the essence of an insurance contract as 'a transfer of a risk of loss from the insured to the insurer' and they opine that it is unclear whether there should be an additional duty on the insurer to spread the risk over a community of exposed persons under South African law. See para 2.2 below for further detail on the possible essential elements of an insurance contract under South African law.

[3] In the event of insurance for gain.

[4] This is referred to as the 'indemnity principle'. The indemnity principle does not apply to non-indemnity insurance where the insurer undertakes to pay a specified sum of money to the insured on the occurrence of an insured event. Further differences between indemnity and non-indemnity insurance may lie in the nature of the object of the risk and the object of insurance, but further discussion of non-indemnity insurance falls beyond the scope of this study as liability insurance is a form of indemnity insurance. See para 2.2.2.1 below for further detail on the classification of liability insurance as indemnity insurance.

[5] The object of insurance is the insured's insurable interest.

[6] See para 1.2 below for further detail on the reason for liability insurance and an example applied to the study.

[7] See para 2.2.1 below for further information on the terminology used in the thesis; and paras 2.2.2 and 2.2.3 below for further detail on parties involved in liability insurance.

1.2 WHY IS THERE LIABILITY INSURANCE?

One of the founding legal principles is that loss lies where it falls: *res perit domino*:[8] 'The first principle of the law of delict, which is so easily forgotten and hardly ever appears in any local text on the subject, is … that everyone has to bear the loss he or she suffers.'[9] The law recognises instances in which the loss is transferred from one party to another (such as by statute, or at common law (mainly by contract or delict)).[10]

As explained above,[11] a person exposed to potential harm may, as an insured, protect itself against the adverse consequences of such harm by the transfer of the risk to an insurer in terms of an insurance contract.[12] Here, we are concerned only with liability insurance.[13]

As mentioned earlier,[14] liability insurance is third-party insurance. It concerns an insured's insurance of its potential legal liability towards a third party for the latter's injury, damage, or loss.

To illustrate the reason for liability insurance: Say that a motor-vehicle collision occurs between two parties, the third-party plaintiff and an insured defendant. Assume that the insured defendant is legally liable in delict to the third-party plaintiff for all of the latter's damage to its vehicle (the accident that was caused solely by the insured defendant's negligent driving). Although loss lies where it falls, the third-party plaintiff may successfully claim its loss from the insured defendant.

If the insured defendant has insurance that covers its liability towards the third-party plaintiff, the insured defendant may also claim its loss[15] from the liability insurer. Depending on the liability insurance contract and the facts of the case, the liability insurer may conduct the insured defendant's defence or settlement (if any) against the third-party plaintiff in the name of the liability insured.

---

[8] Neethling & Potgieter *Law of Delict* 3-7.
[9] *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) 468.
[10] See paras 3.2.2.1(a), 4.2.2.1(a) and 5.2.2.1(a) below for further detail on these causes of action under South African, English and Belgian law.
[11] See para 1.1 above.
[12] Hartlief & Tjittes *Verzekering & aansprakelijkheid* paras 1.2.1 and 1.2.5.
[13] See para 2.2.2 below on classifying liability insurance for further detail.
[14] See para 1.1 above.
[15] Again: the insured's legal liability for the third-party plaintiff's loss, is the insured's loss for the purposes of liability insurance. See para 2.2 below for further detail.

Note that the insured defendant's liability towards the third-party plaintiff is in principle independent of any insurance. The insured's liability arises irrespective of whether the defendant is insured or its liability to the third party is covered.[16] Even though the defendant may not have any insurance, or may not be covered under its liability insurance contract against the risk of liability it incurred towards the third-party plaintiff, the defendant may still be liable for the loss incurred by the third-party plaintiff.

1.3 THE RESEARCH IN CONTEXT

Liability insurance was, generally, not recognised in Roman-Dutch law.[17] This type of insurance first emerged in England in the second half of the nineteenth century. Shortly afterwards it spread to the United States of America.[18] Liability insurance was introduced to South Africa only in 1942.[19]

Historically, insurance against the consequences of an insured's conduct, both intentionally and negligently, in the context of first- and third-party insurance was regarded to be against public policy. Such insurance was seen to create excessive moral hazard[20] – insurance may cause an insured to be less careful.

Abraham convincingly argues that it is more difficult to combat moral hazard in liability insurance.[21] As an insured may, in principle, incur unlimited legal liability to third parties, an insurer cannot efficiently minimise moral hazard merely by placing a limit on the amount of cover it provides (the sum insured).

Traditionally, public policy was against liability insurance as a way to 'avoid responsibility'.[22] Public policy changed gradually[23] in favour of the recognition of the validity of liability insurance, and acknowledged its social and economic benefits.[24]

Liability insurance serves an important social function in that it is socially responsible to have such cover.[25] A successful claim by the liability insured against

---

[16] See generally, Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 25.34-25.40 on the quantification of the insured's loss with reference to the quantification of the liability it incurred.
[17] Van Niekerk *Insurance in the Netherlands* 408-409.
[18] ('US/USA'). Abraham *Liability Century* 28; Abraham (2005) 64 *Maryland LR* 573; and Abraham (2001) 87 *Virginia LR* 86-87.
[19] Van Niekerk (2010) 22 *SA Merc LJ* 453-463.
[20] Abraham *Liability Century* 14 and 17; and Abraham (2001) 87 *Virginia LR* 86.
[21] Abraham *Liability Century* 16-17.
[22] Ibid 15.
[23] Ibid 21; Abraham (2001) 87 *Virginia LR* 576 and 578; and Scales (2008) 94 *Virginia LR* 1261.
[24] Paragraph 2.3 below on the historical development of liability insurance explores these aspects and provides further detail on the role and function of liability insurance.

the insurer indemnifies the insured against its legal liability towards the third-party plaintiff. It ensures that a wrongdoer, or insured defendant, is able to compensate the innocent victim, as third-party plaintiff (the 'deep-pocket' principle).[26] From the perspective of the insured defendant, a liability insurer's assistance in defending, or settling the third-party claim, also provides the liability insured with access to justice. Honouring a liability claim bolsters the concept 'social justice'.

Liability insurance plays an economic role in the allocation of risk. There is a nexus between the imposition of civil liability and liability insurance.[27] Currently, less emphasis appears to be placed on the 'punishment' of the wrongdoer, the insured defendant in the context of liability insurance, than was the case historically.[28] More emphasis is placed on the protection of the victim, as third-party plaintiff, in developed societies with technological developments, industrialisation, and advanced commercial activities that increase the risk of third-party damage.[29]

The first forms of liability insurance were aimed at indemnifying the liability insured against third-party claims.[30] Third parties, generally, did not have a direct claim against liability insurers. However, third-party rights under liability insurance became increasingly important. There has been a growing emphasis on the interests of third-party plaintiffs to ensure that they obtain the benefits of the insured defendant's liability cover.[31] Some of the legal systems canvassed in my thesis provide extensive statutory rights and protection to the third-party plaintiff as against the liability insured.[32]

As such, liability insurance protects not only the insured as consumer, but also the third-party as a participant in the social and economic life of a society.

---

[25] See para 2.3.1.1 below for further detail.

[26] As explained in para 1.2 above, there may be a shortfall between the indemnity that the insured defendant receives from the liability insurer and the compensation that it must pay to the third-party plaintiff – eg, if the sum insured under the liability insurance contract is less than the amount that the insured defendant is legally liable to pay towards the third-party plaintiff.

[27] Clarke *Policies and Perceptions* 308-316; Meurs & Thiery 'Aansprakelijkheidsverzekering' 73 para 1; Fontaine *Verzekeringsrecht* (2 ed) paras 666-669; and Abraham (2001) 87 *Virginia LR* 86-87.

[28] Abraham contends that liability in tort still has a deterrent function. See Abraham ibid 86. However, Birds argues 'that deterrence and punishment should have no place in the civil law'. See Birds *Birds' Modern Insurance Law* 279 para 14.4. See again para 2.3.1.1 below for further detail on the position from an historical perspective.

[29] Hartlief & Tjittes *Verzekering & aansprakelijkheid* paras 1.2.1, 1.2.3 and 1.3.

[30] Welford *Accident Insurance* 428 as to liability insurance under English law at the beginning of the 20th century.

[31] See, eg, the review hereof in paras 3.2.3, 4.2.3 and 5.2.3 below dealing with South African, English and Belgian law respectively.

[32] See in particular para 5.2.3 below on Belgian law.

1.4 WHY DOES THE LAW CONCERN ITSELF WITH LIABILITY INSURANCE?

In the first instance, the economic relevance of the liability sector is undeniable. Baker & Siegelman[33] surveyed theoretical and empirical literature on the law and the economics of liability insurance. Their findings may be summarised as follows: *(a)* there is some *ex ante* 'moral hazard' (reduction in care by insured defendants) as a result of liability insurance which has negative effects on an insured's precautionary measures to avoid or limit loss, but the advantage of liability insurance as a risk-spreading tool likely outweighs the former adversities;[34] *(b)* liability insurance has mechanisms to reduce *ex ante* 'moral hazard'. They include underwriting practices and screening a potential insured, experience rating based on claims history, and non-renewal, cover design that relates to exclusions, limits on cover, and excess payable, loss control and loss prevention advice, *ex post* auditing to enforce the former techniques, and insurance regulation and legal rules;[35] and *(c)* the effects of liability insurance on *ex post* 'moral hazard' (the increased tendency of the third-party plaintiff as victim to sue the wrongdoer (insured defendant) because it has insurance), and the consequence of any probable increase in litigation is inconclusive.[36]

Secondly, liability insurance depends not on only one basic legal obligation between an insurer and an insured, which is the case in ordinary property or life insurance.[37] There are at least two distinct legal obligations that underlie third-party or liability insurance: the obligation between the insured defendant and the third-party plaintiff leading to the legal liability for which insurance cover is obtained, on the one hand; and the insurance obligation between the insured defendant and the third-party plaintiff providing cover for such legal liability, on the other. As explained earlier,[38] third-party rights under liability insurance, and even a direct claim or right against the

[33]See Baker & Siegelman https://pdfs.semanticscholar.org/0dab/46f804b159b2755b336a91fc560292a6f3b0.pdf?ga=2.228972063.245882686.1574204988-1286220863.1574204988 (accessed on 20 Nov 2019).
[34] Ibid 35.
[35] Ibid 36.
[36] Ibid 37.
[37] See paras 2.2.2 and 2.2.3 below on liability insurance and the reference to different jurisdictions.
[38] See para 1.3 above on the research in context.

liability insurer, have become increasingly important. Each of these obligations is governed by its own rules of law.

The liability insurance contract is a particular type of contract. It follows, therefore, that liability insurance contracts are subject to the general law of contract. Then they are subject to some special legal rules pertaining to general insurance, and more specifically to liability insurance.[39]

The common law and judicial decisions form the bulk of liability insurance contract law in South Africa.[40] Although legislation is of increasing importance, it has had limited effect on the contractual aspects of liability insurance. Rather, it is more concerned with prudential and regulatory matters.[41]

Insurance contracts have been exempted from the Consumer Protection Act.[42] Consumer protection measures for the insurance industry are in the main introduced by the Replacement of the Policyholder Protection Rules[43] which focus on the conduct of the insurer, its treatment of the insured, regulation of communications, and the format of policies, such as the duty to use plain language, transparency, and disclosure. These rules apply generally to all types of insurance contract.[44]

1.5 RESEARCH STATEMENT AND OBJECTIVE

The purpose of the study is to analyse selected legal aspects of liability insurance, with particular focus on the liability insurer's duty to indemnify its insured, and on the liability insurer's conduct of the defence and settlement of claims by third-party plaintiff's against the insured defendant. The legal relationships between the different parties in liability insurance are evaluated to determine the ambit of their respective rights and duties towards each other. Legal uncertainty is rife as regards these two main aspects of liability insurance.

---

[39] This is the focus of the study and not general aspects of the law of contract or insurance. See para 1.9 below on the limitations and delineation of the study.
[40] See para 3.1 below for further detail on the sources of liability insurance law in South Africa.
[41] Insurance regulatory and supervision regimes fall beyond the ambit of this thesis. See para 1.9 below on the limitations and delineation of the study. But insurance regulation exists and is referred to briefly in the discussion of sources.
[42] Act 68 of 2008 ('CPA').
[43] In terms of the Short-term Insurance Act of 53 of 1998 ('SIA') as amended by the Insurance Act 18 of 2017, promulgated as GN 1433 in *GG* 41329 of 15 December 2017 and operational from 1 January 2018, unless provided otherwise ('PPRs'). A few amendments were made to the PPRs. The amendments were promulgated as GN 996 in *GG* 41928 of 28 September 2018 and came into effect on 1 October 2018. Previous versions of the PPRs fall beyond the ambit of this study.
[44] Except for more detailed rules in respect of microinsurance.

In the first instance, as to the liability insurer's duty to indemnify its insured, legal uncertainty may exist as to the scope of the insured defendant's liability covered. The insured's legal liability to the third party is the insured's loss in terms of the liability insurance contract. My thesis considers, the types of legal liability that may be covered by a liability policy; when, and how, an insured may become legally liable to a third-party plaintiff; and how prescription[45] operates in liability insurance.

A highly technical aspect of liability insurance, that gives rise to many legal disputes, is that the duration of liability cover may extend beyond the currency of a particular liability insurance contract. I review the different types of insured events that may bring a matter within the scope of a particular liability insurance contract (generally the insured's negligent conduct; the occurrence of the third-party loss; or the third-party claim). I then analyse the duration of liability cover under different types of liability policies: act-committed, loss-occurrence, and claims-made policies, and also what are known as hybrid policies.

I also explore limitations on, exceptions to, and exclusions that are particular to liability cover. I review the consequences of the conduct of the insured defendant on liability insurance.

I specifically emphasise the exceptional direct claim, or more extensive (and direct) rights that a third-party plaintiff may have against the liability insurer by way of legislation.

Secondly, the liability insurer may conduct the defence and settlement of the third party's claim against the insured defendant in the name of the insured. The liability insurer, generally, has a contractual right to defend and settle such claims. I explore the scope and extent of this right.[46] Some legal systems extend to the liability insurer a statutory right and a duty to conduct the defence of third-party claims on behalf of the insured.[47] I investigate the viability of legal reform in this area.

I also analyse defence costs, conflict of interest, and waiver or the defence of estoppel as an integral part of an insurer's conduct of the defence. I distinguish the

[45] The prescription of the third-party plaintiff's claim against the insured defendant and of the insured defendant's liability claim against the liability insurer are at the core, but many further legal scenarios that may arise are considered.
[46] This is the position in South African law. See Chapter 3 below for further detail.
[47] For example, Belgian law in particular. See para 5.3.1.1 below for further detail.

conduct of the defence of third-party claims by liability insurers in terms of liability insurance contracts from subrogation.

1.6 THE SIGNIFICANCE OF THE STUDY

I acknowledge that although the area of the law of liability insurance has received substantial attention in academic circles internationally, liability insurance has been somewhat neglected in South African law.[48] In South African law there appears to be a lack of appreciation of the intricacies of liability insurance, limited authority on the topic, and a relatively small number of reported legal decisions on liability insurance contracts.

Liability insurance has been addressed only broadly in a handful of local textbooks or reference works on insurance law generally.[49] A small body of academic and popular writing addresses random selected legal aspects of liability insurance.

There is a substantial knowledge gap.

In the first instance, the former publications are limited in scope and deal with fragmented areas of the law of liability insurance. Some aspects of the law of liability insurance have been researched; others not.

Secondly, recent statutory reform has impacted on liability insurance contract law and the former publications generally predate these reforms.

I am to address this knowledge gap in my thesis.

Apart from my thesis, there is no other comprehensive[50] and current South African commentary on the law of liability insurance at present which critically analyses the liability insurer's duty to indemnify the insured and the liability

[48] Note, eg, the following critical commentaries devoted to the law of liability insurance in a number of other jurisdictions: Hilliker *Liability Insurance in Canada* for Canada; Derrington & Ashton *Law of Liability Insurance* on the law of liability insurance in Australia; and Maniloff & Stempel *General Liability Insurance* on insurance coverage issues in the different states of the US. Liability insurance has also received substantial academic attention in English and Belgian law which have been chosen for the comparative study in this thesis. See Chapters 4 and 5 below.

[49] See, eg, Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 25.24-25.83; and Millard *Modern Insurance Law* 30, 42 and 45.

[50] Selected legal aspects of liability insurance implies that only a limited number of the most relevant and carefully selected sub-topics on the former can be reviewed due to the potential unlimited extent of the topic. See para 1.9 below on limitations and delineation of the study.

insurer's conduct of the defence and settlement, and that also includes substantial legal comparison.[51] This distinguishes my thesis from existing research.

This research is further relevant and necessary for the following reasons:

In the first instance, liability insurance is a complex branch of the law of insurance. The complexity results from the multiple legal relationships involved,[52] and in the sometimes complicated or lengthy chain of events that may occur when liability insurance comes into play.[53]

Secondly, it is also evident that liability insurance is constantly developing as new grounds of liability are imposed and new forms of liability insurance are developed in response to the growing demands of society.[54] Since the introduction of statutory consumer protection measures in the age of consumerism, the importance of the law of liability insurance in South Africa has increased.[55]

Thirdly, although liability insurance is a specialised branch of insurance, no specialised legislation is in force in South Africa to regulate the contractual aspects of this form of insurance and there is room for research that may prompt Parliament to develop specific rules.

Fourthly, I hope that my conclusions and recommendations will contribute towards the future development of the law of liability insurance under South African law, with particular focus on the liability insurer's duty to indemnify the insured, and its defence and settlement of third-party claims brought against the insured.[56]

---

[51] See Chapters 4-6 below.

[52] There are at least three parties involved in liability insurance: the third-party plaintiff, the insured defendant, and the latter's liability insurer, but many other parties may be involved, for example, the third-party plaintiff's insurers, co-defendants and their insurers. See, eg, para 2.2.2 below on the classification of liability insurance.

[53] There may be a considerable time lapse between the negligent conduct of the insured defendant, the occurrence of third-party loss, and the institution by the third-party of a claim on the liability insured.

[54] Chapter 2 below considers the development of liability insurance.

[55] The CPA, which came into operation on 31 March 2011, eg, introduced strict product liability, that in turn underlines the growing importance of product liability insurance. It is again important to note for the international reader in particular, that insurance does not fall within the general consumer legislation in South Africa. For further detail on the discussion of the sources of South African liability insurance law, see para 3.1 below.

[56] Chapter 6 below.

1.7 THESIS STATEMENT

My thesis statement is: South African insurance law should be amended and developed to fill the voids, meet the unique challenges, and iron out the impracticalities relating to liability insurance.

I consider this statement with reference to: *(a)* essentially, issues that arise in respect of the liability insurer's duty to indemnify its insured, and in relation to the liability insurer's conduct of the defence and settlement of third-party claims brought against the insured defendant; and *(b)* as subsidiary theme, the legal uncertainty that may precede the liability insurance contract (including contract negotiation), endure for the entire subsistence of the contract (including claims management), and continue after the expiry of the contract.[57]

1.8 METHODOLOGY AND APPROACH

1.8.1 Literature review

The research method is a desktop, in-depth literature study of the South African and other jurisdictions dealing with selected legal aspects of liability insurance.[58] My study includes a review of primary and secondary sources of law.

Primary sources[59] consulted are, in the main, the common law,[60] judicial decisions, and legislation and legislative instruments.[61] The relative importance of these sources depends on the legal system under review.

In addition to the primary sources, I also review secondary sources[62] such as commentaries, treatises, reference works, textbooks, articles, case discussions, reports and electronic material drawn from various internet sites.

---

[57] My focus is only on the law relating to liability insurance contracts. For example, as 'claims management' is a very wide concept, this study is limited to how a claim should ideally be managed under the provisions of the specific liability insurance contract. See para 1.9 below on the limitations and delineation of the study.

[58] Liability insurance from an overall jurisdiction-neutral perspective (para 2.2); the historical development of liability insurance from an Anglo-American perspective, with some references to European legal systems (para 2.3); South African law of liability insurance (Ch 3); English law of liability insurance (Ch 4); and Belgian law of liability insurance (Ch 5).

[59] Custom and trade usage are primary sources of South African and English insurance law, but they no longer appear to be of great relevance.

[60] As opposed to 'civil law'.

[61] For example, the PPRs.

[62] The most recent secondary sources that could be accessed via the Unisa library and via other reasonable means, were consulted. If older editions had to be used, attempts were made to update the content with reference to other sources. At times content required that previous editions had to be

1.8.2 Legal Comparison[63]

I have selected English and Belgian law for purposes of legal comparison.

English law is a natural choice for historical reasons. South African insurance practice, and the South African insurance industry, has strong ties to its British counterpart as their *fons et origo*. It follows that South African insurance law would follow suit and seek guidance, to put it mildly, from English insurance law. Although the then Appellate Division issued a declaration of independence, of sorts, in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality*,[64] English law remains strongly relevant for purposes of comparative analysis and continues to still influence the development of South African insurance law.[65]

Importantly, the English common law, like the South African, is uncodified and consists of subsidiary rules.[66]

Moreover, England fairly recently adopted legislation to reform its law relating to insurance. The most important (and relatively recent) pieces of legislation under English law that regulate the contractual aspects of insurance law generally, include the following: the Consumer Insurance (Disclosure and Representations) Act 2012[67] that reforms aspects of the English law of consumer insurance relating to pre-contractual disclosure and misrepresentation; the Insurance Act 2015[68] that reforms the duty of disclosure in non-consumer contracts;[69] and the Consumer Rights Act 2015[70] that controls unfair terms where the insured is a 'consumer' in a contract.[71] Also, the Third Parties (Rights Against Insurers) Act 2010[72] applies to liability insurance only, as it provides the third-party plaintiff with a direct claim against the insolvent estate of an insured defendant with liability cover.

---

referred to, eg, on the nature, history, and sources of insurance law and in respect to some general principles of the law of liability insurance.

[63] See Van Zyl (1972) 35 *THRHR* 17-43; and Venter et al *Regsnavorsing* 206-244 for further detail on comparative legal research.

[64] 1985 (1) SA 419 (A).

[65] Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 2.15-2.30.

[66] See paras 1.1 and 1.8.1 above.

[67] Chapter 6; the '2012 Act' or also known as 'CIDRA'. The 2012 Act came in force on 6 April 2013 and only applies to contracts entered into or renewed after that date. It has been said to 'represent the first real reform of insurance contract law since the principles were first developed, especially by Lord Mansfield in the eighteenth century'. See Birds, Lynch & Milnes *MacGillivray on Insurance (Centenary Ed)* ix Preface.

[68] Chapter 4; the '2015 Act'. The 2015 Act came into force on 12 August 2016.

[69] Part 2 of the 2015 Act.

[70] Chapter 15; the 'Consumer Rights Act'. From 1 October 2015, the Act replaced the previous regulations on unfair terms in consumer contracts.

[71] The ambit of the Act is wider than insurance consumer contracts.

[72] Chapter 10; the '2010 Act'.

Unlike South African and English law, Belgian law is codified. On 4 April 2014, Belgium enacted the Insurance Act.[73] It contains a separate part on the law of liability insurance. In particular, Chapter III of Title II of the former Land Insurance Contract Act of 25 June of 1992[74] on liability insurance contracts, was repealed and re-enacted almost unchanged as Chapter 3[75] of Title III of Part 4 of the 2014 Act.

Although traditional comparative connecting factors may suggest other civil-law legal systems for comparison, I have chosen Belgium as it has, fairly recently, adopted innovative and progressive legislation relevant to my study.[76] For example, the legislation amplifies the third party's statutory right to claim directly from the insurer. This right is not limited to the insolvency or sequestration of the liability insured, as is the case in South Africa, and offers greater protection to the third-party plaintiff.[77] Also, in Belgian law a liability insurer has a statutory duty to defend its insured against a third-party claim, and not merely a contractual right to conduct the defence as is the case in South Africa.[78]

Note that judicial decisions in Belgium, generally, bind only the parties to the particular dispute; put differently, unlike in England and South Africa, there is generally no doctrine of *stare decisis* (save in a few instances, such as when the Belgian Supreme Court annuls the decision of a lower court, the court that has to review that case is bound by the decision of the Belgian Supreme Court).[79] As a result of this absence of a doctrine of judicial precedent, I shall focus less on Belgian judicial decisions than I shall on English and South African case law.

1.9 LIMITATIONS AND DELINEATION OF THE STUDY

In the first instance, my thesis concerns selected legal aspects of liability insurance, with particular focus on the liability insurer's duty to indemnify its

[73] 'Wet betreffende de verzekeringen van 4 april 2014' (briefly 'Wet Verzekeringen'; or 'WVerz'), *Belgian State Gazette* of 30 April; hereafter referred to as the 'Insurance Act of 2014'.
[74] 'Wet van 25 juni 1992 op de landverzekeringsovereenkomst' or 'WLVO', *Belgian State Gazette* of 20 August 1992; hereafter the 'LIC Act', read with Royal Decree ('Koninklijk besluit') of 24 December 1992; hereafter 'Royal Decree of Dec 1992.'
[75] Chapter 3 of the Insurance Act of 2014 is entitled 'Aansprakelijkheidsverzekeringen' and it comprises of ss 141-153.
[76] Insurance legislation in the Netherlands, eg, dates from 2006. See Wansink *Algemene aansprakelijkheidsverzekering* (3 ed) at 3 on the statutory position in Dutch law.
[77] See para 5.2.3.1 below on the third-party plaintiff's direct right against the liability insurer.
[78] See para 5.3.1.1 below on Belgian law and the extensive protection that Belgian insurance legislation provides to both the liability insurer and the insured.
[79] The decisions by the Belgian Supreme Court are still relevant for the interpretation of legal provisions. My study refers to those decisions where relevant.

insured, and the insurer's conduct of the defence and settlement of claims by third-party plaintiffs against the insured. As liability insurers in South Africa merely have a contractual right[80] (as opposed to a duty) to conduct the defence and settlement, the analysis of the defence and settlement in my thesis is of more limited scope than that of the insurer's duty to indemnify.

Secondly, my focus is only on the law relating to liability insurance contracts. I leave aside the general aspects of the law relating to insurance, reinsurance contracts, contract, delict, enrichment, agency, civil procedure, microinsurance, consumer insurance, insurance intermediaries, and insurance regulation and supervision.[81]

Thirdly, my thesis focuses on liability insurance contracts, generally. I exclude from consideration a detailed analysis of the *species* of this *genus*, for example: employers' liability insurance, product liability insurance, directors' and officers' liability insurance, and marine liability insurance. In some instances, however, I draw examples from specific forms of liability insurance contracts.

Fourthly, my thesis is limited to private liability insurance contracts as distinct from social 'insurance' schemes such as third-party compensation schemes, pension funds, medical and health insurance, and unemployment insurance.

Fifthly, save for some brief references to marine insurance in my discussion of the sources of insurance law, marine insurance law is entirely excluded from my study.

Sixthly, jurisdiction, conflict of laws, and the enforcement of judgments fall outside the scope of my study.

Seventhly, a detailed discussion of the laws of the European Union falls outside the scope of my thesis.

Eighthly, although I refer to the Conduct of Financial Institutions Bill[82] in passing, I do not discuss it extensively as wide-ranging change is expected before its enactment and its focus is on regulatory matters that fall outside the scope of my thesis.

Finally, this thesis states the law up to August 2019.

---

[80] Which is generally part of an express term in the insurance contract.
[81] Insurance regulatory and supervision regimes fall beyond the ambit of this thesis, but the thesis makes recommendations on the regulation of selected aspects relevant to liability insurance contract law.
[82] Published on 11 December 2018 and comments invited by 1 April 2019 ('COFI Bill').

1.10 STRUCTURE OF THE THESIS

Chapter 1 contains the introduction to the thesis.

Chapter 2 consists of two parts. The first part investigates the nature of liability insurance from a general perspective. This part of my thesis provides a theoretical background and identifies generic legal rules and principles applying to liability insurance. The second part of chapter contains a concise summary of the historical development of liability insurance from mainly an Anglo-American perspective, with some references to European legal systems.

Chapter 3 consists of a synopsis on the relevant aspects of the South African law of liability insurance. It identifies some of the legal uncertainties and unresolved problems in respect of the liability insurer's duty to indemnify the insured, and its conduct of the defence and settlement. It marks the issues for comparative study in the next two chapters.

Chapters 4 (on English law) and Chapter 5 (on Belgian law) follow. The insurer's duty to indemnify the insured, and the insurer's conduct of the defence and settlement, are analysed with reference to the legal relationships between the parties in the liability insurance context.

Chapter 6 contains my conclusions and recommendations. It includes a checklist of some of the most important duties of disclosure for liability insurance contracts, their operation, and claims processes.

CHAPTER 2:

THE NATURE AND HISTORICAL DEVELOPMENT OF LIABILITY INSURANCE

CHAPTER 2:

THE NATURE AND HISTORICAL DEVELOPMENT OF LIABILITY INSURANCE

2.1 INTRODUCTION

Chapter 2 is in two parts and comprises a study of the nature and historical development of liability insurance. The first part investigates the nature of liability insurance and is considered supra-nationally – ie, from a jurisdiction-neutral perspective – for the reasons advanced below.[1] Liability insurance can be clearly defined, classified, and distinguished from other forms of contract[2] such as a contract in favour of a third party (*stipulatio alteri*). Liability insurance can further be distinguished from other types of insurance, such as first-party insurance or reinsurance. This part of the chapter also provides a theoretical background and identifies legal rules and principles generic to liability insurance irrespective of the applicable legal system or jurisdiction.[3] The section concludes by setting out the different forms of liability insurance contract.

The second part of the chapter provides a concise summary of the historical development of liability insurance from an Anglo-American perspective with some references to European legal systems. These sources form the basis of our national insurance law and introduced liability insurance to the realm of insurance. From the sources consulted, liability insurance originated in England during the second half of the nineteenth century and shortly afterwards spread to the United States of America ('US/USA') and other jurisdictions.[4] However, the origin and development of liability insurance cannot be attributed to a single country or jurisdiction as the continuous development in liability laws such as delict or tort affect the insurance risks and products which provided the impetus for the introduction of this type of insurance to the market. The primary role of the historical overview is to provide a

[1] Paragraph 2.2 below.

[2] It is pertinent to explore the nature of liability insurance before discussing the history of liability insurance in para 2.3 below. The nature of liability insurance assists scholars to identify the origin and analyse the development of liability insurance.

[3] Chapter 3 (on South African law), Chapter 4 (on English law) and Chapter 5 (on Belgian law) below provide further detail on liability insurance under those systems. See paras 3.1, 4.1 and 5.1 below.

[4] Abraham *Liability Century* 28. Liability insurance was in general not possible or recognised in Roman-Dutch law. See Van Niekerk *Insurance in the Netherlands* 408-409.

context for the research study on our national position and to facilitate a comparative review.[5]

The history, origin, and development of liability insurance have a role to play in, for instance, answering questions as to what 'legal liability' means, and how the conduct of the insured (eg, as regards the elements of fault or wrongfulness) impacts on its liability cover.

2.2 THE NATURE OF LIABILITY INSURANCE

It appears that there is no common, supra-national, working definition of 'insurance'.[6] This is because the essential elements that qualify contracts as contracts of insurance may differ from jurisdiction to jurisdiction. An analysis of all possible definitions of insurance[7] falls beyond the scope and focus of this thesis which is limited to liability insurance.[8]

As an introduction to a definition of liability insurance, it suffices briefly to state the possible[9] essential elements of an insurance contract under South African law.[10]

An insurance contract must:

- provide for the payment of a premium by one party, the insured;
- require the payment of a sum of money, or its equivalent, by the insurer in exchange for the premium;

---

[5] Venter et al *Regsnavorsing* 162. This historical overview cannot and does not purport to cover all the phases of development of liability insurance in South Africa. See Venter et al ibid 161-205 for further detail on the historical method of legal research in South Africa.

[6] Clarke *Law of Liability Insurance* para 1.2.1 states that '[c]onvincing definitions of insurance do not exist', and therefore concludes that in England '[a]n insurance contract is usually not defined but described'. He is of the view that the position is the same in Germany. Cf, Birds *Birds' Modern Insurance Law* para 1.6 at 8-9, who ventures a definition of an insurance contract under English law for regulatory purposes. In the past, the definition of an insurance contract was primarily important for fiscal and regulatory purposes of insurance business. See, eg, Birds, Lynch & Paul *MacGillivray on Insurance* para 1.001 on the English law of insurance.

[7] In the South African case, *Lake v Reinsurance Corporation Ltd* 1967 (3) SA 124 (W) 127, the court ventured a definition of an insurance contract, but it is criticised for being incomplete. See Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 5.14. Some jurisdictions provide statutory definitions of insurance, eg, under Belgian law. See para 5.1 below.

[8] As pertinently stated by Derrington & Ashton *Law of Liability Insurance* in para 1.1, concerning liability insurance, that '[i]t is inappropriate in a text on a specialised branch of insurance to enter upon a discussion of more general topics of insurance law other than in a general way'.

[9] There is even some uncertainty as to the essentials of an insurance contract under individual legal systems.

[10] See Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 5.1-5.113 on the essentials of a contract of insurance under South African law.

- the insurer's performance must depend on the outcome of an uncertain event; and
- the insured must have an interest in the outcome of the event.[11]

The element of uncertainty or risk, and the transfer of that risk of loss from the insured to the insurer are central to the definition of an insurance contract[12] under the South African and most other legal systems.[13] The terms 'insurance policy' and 'insurance contract' are used interchangeably in the study due to common usage in insurance practice and literature to that effect and the terms are assumed to bear the same meaning, except if the context provides the contrary.[14]

2.2.1 Defining Liability Insurance

The lack of a common supra-national working definition of 'insurance'suggests that the formulation of an all-encompassing, jurisdiction-neutral definition (or description) of liability insurance may be challenging.[15]

Without attention to all possible detail or variation, the following may provide an apt generic basis for defining a liability insurance contract:

> Deze is een overeenkomst, waarbij de verzekeraar zich tegen het genot van premie tegenover de verzekerde verbindt om laasgenoemde schadeloos te stellen wegens

[11] See, eg, the criticism of insurable interest as essential element under South African law: Reinecke, van Niekerk & Nienaber ibid paras 5.22-5.48. However, insurable interest is an essential feature of valid insurance under English law: Clarke *Law of Liability Insurance* para 1.2.1. On 20 June 2018, the English Law Commission and Scottish Law Commission published an updated Insurable Interest Draft Bill that focuses on life and other insurance relating to human life, such as accident and health cover. See https://www.lawcom.gov.uk/updating-the-law-of-insurable-interest/(accessed on 4 Nov 2019). There was no demand for reform in the area of indemnity and non-life insurance and further detail falls beyond the scope of this thesis.

[12] Insurance contracts should be distinguished from other risk-bearing transactions, like contracts of suretyship or guarantees relating to products or workmanship. See Reinecke, van Niekerk & Nienaber ibid paras 1.11 and 1.17-1.21.

[13] Reinecke, van Niekerk & Nienaber ibid para 5.20 summarise the essence of an insurance contract as 'a transfer of a risk of loss from the insured to the insurer'. They opine that it is unclear whether under South African law there must also be a duty on the insurer to spread the risk over a group of exposed persons. Under English law, the transfer of the risk of loss is also an essential feature of insurance. See Clarke *Law of Liability Insurance* para 1.2.1. However, in the USA, both the transfer of the risk of loss and its distribution across a group of persons having similar risks, are primary elements of an insurance contract. See Jerry & Richmond *Understanding Insurance Law* para 10[d].

[14] Theoretically, there is a difference between an insurance contract and an insurance policy: an insurance contract is the intangible agreement while the policy is the reduction of that agreement to a tangible form.

[15] See para 3.1 below on South African law; para 4.1 below on English law; and para 5.1 below on Belgian law for further detail on the relevant definitions or descriptions of liability insurance under those systems.

> een … schade …, die deze door een onzeker voorval zou kunnen lijden. Immers verzekerd is de schade, die de verzekerde in zijn vermogen lijd als gevolg van het ontstaan van een schuld tegenover een derde door een onzeker voorval.[16]

Loosely translated it states that the insurer ('liability insurer') undertakes to indemnify the insured ('insured defendant') in return for the undertaking to pay a premium by the insured. The transfer of risk of loss from the insured defendant to the liability insurer is implicit herein. The insurer's performance depends on the outcome of an uncertain event – the insured's risk of incurring legal liability towards third parties ('third-party plaintiffs').[17]

Section 11(7) of the Australian Insurance Contracts Act, 1984, may also be a suitable starting point in defining liability insurance.[18] A contract of liability insurance under that Act is defined as, 'a contract … that provides insurance cover in respect of the insured's liability for loss or damage caused to a person who is not the insured'.

From the definitions above, this form of insurance may be classed as indemnity insurance;[19] and as so-called 'third-party insurance'.[20] At its core, liability insurance is insurance against the insured defendant's legal liability, as opposed to general liability, towards third parties.[21] This aspect forms an integral part of the nature of liability insurance. [22]

---

[16] Wansink *Algemene aansprakelijkheidsverzekering* (2 ed) 8 commenting on general liability insurance under Dutch law) and Wansink *Algemene aansprakelijkheidsverzekering* (3 ed) 3 on the new statutory position under Dutch insurance law.

[17] This thesis used the following terminology: 'insured defendant', 'liability insurer', and 'third-party plaintiffs'. The insured may not always be a defendant, and the third-party may not always be a plaintiff (eg, due to possible different factual scenarios, or if there are no formal legal proceedings involved). See paras 2.2.2.1 and 2.2.3 below for further detail on parties involved in liability insurance.

[18] Derrington & Ashton *Law of Liability Insurance* para 2.16 commenting on liability insurance under Australian law and Clarke *Law of Liability Insurance* para 1.2.2.

[19] See para 2.2.2.1 below.

[20] See para 2.2.2.2 below.

[21] Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 25.27. Derrington & Ashton *Law of Liability Insurance* para 1.10, point out that 'liability insurance cannot easily be classified other than as relating to the legal liability of the insured to another party'. In the US, eg, the Commercial General Liability ('CGL') Policy's insuring clause contains the phrase 'legally obligated to pay as damages'. See Jerry & Richmond *Understanding Insurance Law* para 65[c][2]. In Canada, the insuring clause in commercial liability policies refers to 'liability imposed by the law on the insured to pay damages', or alternatively to 'damages which the insured is legally obligated to pay'. See Hilliker *Liability Insurance in Canada* 168.

[22] The enquiry concerns whether there is 'legal liability' covered under the scope of risk in the policy. The thesis explores the concept 'legal liability' (and its variations) in further detail. See, eg, para 3.2.2.1 on South African law; para 4.2.2.1 on English law; and para 5.2.2.1 on Belgian law below, on the types of legal liability that may be covered, as well as when and how the insured defendant may become legally liable towards the third-party plaintiff.

2.2.2 Classifying Liability Insurance

As stated above,[23] the thesis addresses the general aspects of liability insurance contract law focusing specifically on: first, the liability insurer's duty to indemnify the insured; and second, the liability insurer's conduct of the defence and settlement of claims by third-party plaintiffs against the insured defendant. Liability insurance, both as indemnity insurance and as third-party insurance, is analysed throughout the thesis. A few brief notes on these classifications suffice to describe the nature of liability insurance grom a jurisdiction-neutral perspective.

2.2.2.1 Liability Insurance as Indemnity Insurance

In indemnity insurance the insurer indemnifies the insured for loss or damage suffered as a result of the risk insured against.[24] Liability insurance is generally accepted as a form of indemnity insurance[25] (as opposed to non-indemnity insurance

[23] Paragraphs 1.2-1.4 above.

[24] Clarke *Law of Liability Insurance* para 8.1. There may be different ways to categorise and scrutinise the following distinction, but the study describes it as follows: The insured's legal liability towards the third-party plaintiff is the *insured's loss* in terms of the liability policy and should be distinguished from the '*insured event*' that brings the matter within the temporal scope of a particular period of cover designated in the liability insurance contract. Such an event may be the incidence of the loss itself, ie, the insured's legal liability towards the third party, or it may be an earlier occurrence that merely lead to the insured's legal liability, such as an act of negligence on the insured's part, or another occurrence which marks a significant stage in the process leading to the insured's legal liability. The insured event in the insuring clause determines the type of liability policy. It further depends on the type of insurance cover in question, whether occurrences that take place, or whether claims that are made, before, during or after the duration of the contract are covered. Acts-committed, occurrence-based, claims-made and hybrid liability insurance contracts may be distinguished in this regard. This relates to whether an insurance claim can be brought under a particular policy, or put differently: which policy is 'triggered'? If cover under a policy is triggered, the insurer may be on risk, but it still does not guarantee a 'successful claim': the latter depends on many other requirements such as timely notice and disclosure by the insured. This is an extremely complex aspect of liability insurance that gives rise to many insurance cover disputes and is analysed in detail in paras 3.2.2.2, 4.2.2.2, and 5.2.2.2 below. It should be noted that the terminology of the respective legal systems under review should not simply be equated.

[25] Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 1.39 and 25.34; Derrington & Ashton *Law of Liability Insurance* para 1.4; Jerry & Richmond *Understanding Insurance Law* para [13][e]; and Wansink *Algemene aansprakelijkheidsverzekering* (3 ed) 199. Liability insurance should be distinguished from other contractual arrangements where a party undertakes to indemnify another party, eg, an undertaking of indemnification by a lessee towards a lessor. See Reinecke, van Niekerk & Nienaber ibid para 25.28 n 58. The presence of the undertaking to pay a premium and in addition the undertaking to indemnify against liability as the primary, and not merely as a subsidiary element of the parties' agreement, may point to the existence of liability insurance. See also Derrington & Ashton ibid paras 1.12 and 1.22 for distinctions between liability insurance and other forms of indemnity insurance.

such as life insurance)[26] in that the liability insurer undertakes to indemnify the insured defendant against the latter's legal liability in damages to third parties.[27] The 'indemnity principle' applies to liability insurance in that the amount recoverable is determined by the insured's financial loss[28] and the insured defendant may not be enriched.[29]

As liability insurance is indemnity insurance, subrogation applies, although it is exceptional.[30] Subrogation involves the insurer enforcing the insured's claims against third parties.[31] The liability insurer may, for example, be subrogated to the insured defendant's claim for a contribution against others, for example, the insured's co-liable joint wrongdoers.[32]

Liability insurance contracts invariably deal with the defence and settlement of the third party's claim against the insured defendant in the name of the insured. The liability insurer generally has a contractual right to defend and settle such claims.[33] The right to conduct the defence and settlement involves the insurer's right to take charge of the insured's defence to a claim brought by the third-party plaintiff. However, some legal systems are more advanced in that the liability insurer has a right and a duty to conduct the defence of third-party claims on behalf of the insured.[34] Due to the differing positions across different legal systems, this aspect is

---

[26] In non-indemnity insurance the insurer undertakes to pay a specified sum of money to the insured on the happening of an insured event. See Reinecke, van Niekerk & Nienaber ibid para 1.40; and Hilliker *Liability Insurance in Canada* 4-5.

[27] See, eg, para 3.2 on South African law; para 4.2 on English law; and para 5.2 on Belgian law below for further detail on the liability insurer's duty to indemnify its liability insured.

[28] Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 25.36 explain that the insured's loss is usually quantified with reference to the quantification of the liability incurred by the insured, which may again involve a quantification of the third-party plaintiff's loss or damage.

[29] Reinecke, van Niekerk & Nienaber ibid para 25. 34; and Derrington & Ashton *Law of Liability Insurance* para 1.22.

[30] Reinecke, van Niekerk & Nienaber ibid para 25.40; and Derrington & Ashton ibid. See Van Niekerk *Subrogasie* passim on an insurer's right to subrogation.

[31] Other than the third-party plaintiff, and therefore referred to 'fourth parties'.

[32] See paras 3.2.4, 4.2.4 and 5.2.3.2 below for further detail on subrogation in liability insurance.

[33] Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 25.57-25.67 and 18.139; and Derrington & Ashton *Law of Liability Insurance* para 1.7. See, also, para 3.3 on South African law and para 4.3 on English law below, for further detail on the insurer's right to conduct the defence and settlement. Derrington & Ashton ibid para 1.8 point out that this right is primarily aimed at the protection of the insurer due to its duty to indemnify the insured.

[34] See, eg, para 5.3 below on Belgian law where the insurer has in fact both a duty and a right to conduct the defence. When the liability insurer has a duty towards the insured to conduct the defence, it is one of the rights of a liability insured against its insurer. See Maniloff & Stempel *General Liability Insurance* 1-3 for commentary on general liability insurance cover in the US on a state-by-state basis. They explain that the CGL Policy is the dominant general liability policy in the US and that it includes a duty to defend by the insurer. American state law can differ on the policy interpretation of cover. The authors opine at 111 that '[i]f coverage issues were stocks, the duty to defend would be Blue Chip'. See Maniloff & Stempel ibid 111-156 for further detail on the duty to defend on a state-by-state basis.

considered further in the survey of South African law and the other jurisdictions below.

2.2.2.2 Liability Insurance as Third-Party Insurance

Liability insurance is often referred to as third-party insurance.[35] Third-party insurance addresses an insured's insurance of its potential legal liability towards a third party for injury, damage, or loss suffered by that third party. The insured's liability for the third party's injury, damage, or loss is the insured's loss or damage for the purposes its liability insurance. In third-party insurance, the insured is the 'first' party, the liability insurer the 'second' party, and the party towards whom the insured is liable, the 'third' party.

Under property or first-party insurance an insured insures against its own injury, damage, or loss. While property insurance involves the positive elements of an insured's estate,[36] liability insurance involves the negative elements – the liabilities that an insured may incur toward third parties.[37] In liability insurance, the object of insurance[38] is the insured's interest in *not* incurring liability towards third parties. The object of the risk[39] in liability insurance (as opposed to property insurance) is not embodied in a particular object but may be the insured's estate generally. Where liability insurance does involve a specific object of risk, it is merely a way in which the insurer limits its liability by circumscribing the risk, for example, where the insurer undertakes to indemnify the insured if it becomes liable towards third parties as a result of using a particular object (such as driving a specific motor vehicle).[40]

---

[35] Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 1.46 n 54; Derrington & Ashton *Law of Liability Insurance* para 1.4; and Jerry & Richmond *Understanding Insurance Law* para 13A[e].

[36] For example, assets.

[37] Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 1.47-1.48.

[38] The object of insurance refers to the interest that the insured wishes to protect and is an intangible interest, not a physical object. See Reinecke, van Niekerk & Nienaber ibid para 3.6.

[39] Ibid. If the insurance, eg, property insurance, is concluded with reference to a physical object, the latter will be the object of the risk.

[40] Liability insurance may be regarded as insurance without a specific object of risk, even if the object of risk may be instrumental in causing the loss, eg, where the insured incurs a liability by driving a particular motor vehicle: Reinecke, van Niekerk & Nienaber ibid para 13.31, and Wansink *Algemene aansprakelijkheidsverzekering* (3 ed) 199.

As a rule, there is no immediate contractual relationship between the third-party plaintiff and the insured defendant's liability insured, unless created specifically by statute or agreement.[41]

2.2.3 Liability Insurance Contracts and Contracts in Favour of Third Parties

Although liability insurance is third-party insurance, it must be distinguished from contracts or stipulations in favour of third parties (third-party contracts).[42]

In terms of a third-party contract,[43] one party (the stipulator)[44] agrees with another party (the promisor),[45] that the promisor will render a performance to a beneficiary.[46] The parties must intend to provide the third party with a benefit – eg, a claim or insurance cover – and the benefit must (as a rule) be accepted by the third party.[47]

Liability insurance is generally not a contract in favour of a third party as there is no intention between the insured defendant and its liability insured to the confer a benefit (such as insurance cover or an insurance claim) on the third-party plaintiff.[48] Liability insurance is aimed at covering liability against a third party, not the liability of a third party.[49]

However, in exceptional circumstances liability insurance may contain a specific clause in the form of a *stipulatio alteri* that a benefit falls directly to the third

---

[41] Under South African and English law, the third-party plaintiff generally does not have a direct claim against the liability insurer, save for statutory exceptions: see paras 3.2.3 and 4.2.3 below. However, some legal systems provide the third-party plaintiff with a direct right to claim an indemnity from the insured defendant's liability insured: see para 5.2.3.1 below on Belgian law.

[42] Reinecke, van Niekerk & Nienaber *South African Insurance Law* in paras 25.77-25.80. The authors in para 19.3 opine that contracts in favour of third parties are known and enforced in most legal systems.

[43] Reinecke, van Niekerk & Nienaber ibid para 19.6.

[44] The first party.

[45] The second party.

[46] The third party, who is not a party to the conclusion of the contract.

[47] See Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 19.1-19.117 on third-party contracts under South African law generally. Further detail falls beyond the scope of the present discussion.

[48] Reinecke, van Niekerk & Nienaber ibid paras 25.77-25.78. Despite the introduction of the Contracts (Rights of Third Parties) Act 1999, the third-party plaintiff cannot claim directly from the insured defendant's liability insurer as there is no intention to confer a benefit on the third party under English law. See Clarke *Law of Liability Insurance* para 12.7, and para 4.3.2.1 below in the chapter on English law.

[49] A third-party plaintiff can only be regarded as a beneficiary of a liability insurance contract in an indirect and abstract sense, namely that the liability cover may assist the insured defendant to be better suited to meet its liability toward the third party. See Reinecke, van Niekerk & Nienaber ibid para 25.80.

party – eg, when the liability of a third party is also insured by way of an authorised-driver clause in a comprehensive motor-vehicle insurance contract. In terms of such a clause, the insurance contract provides liability cover to a specified insured[50] and another party who drives the insured's vehicle with its permission ('authorised drivers').[51] Generally, the insured defendant will claim from the liability insurer on behalf of the authorised driver.

2.2.4 Liability Insurance Contracts and Reinsurance Contracts[52]

A reinsurance contract is an insurance contract[53] in terms of which an insurer transfers the risk (either in whole, or in part) it has taken over under one or more insurance contracts to other insurers.[54] The reinsurer receives a premium in exchange for assuming the risk from the primary insurer ('reinsured').[55]

As to the nature of reinsurance, a specific contract of reinsurance may take the form of first-party indemnity insurance, third-party indemnity, or liability insurance.

If reinsurance takes the form of first-party indemnity insurance, it takes on the nature of the primary insurance. The reinsurance is then a fresh contract covering the same object of the risk covered by the direct insurance.[56] If reinsurance is a third-party indemnity or liability insurance, reinsurance is a distinct form of insurance covering the primary insurer's liability.

---

[50] The insured defendant.

[51] The authorised driver is a third-party (unnamed) insured and those to whom the latter incurs liability, are third-party plaintiffs (or fourth parties). See: Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 25.79 n 134. For further detail on extension clauses in motor-vehicle policies, see Reinecke, van Niekerk & Nienaber ibid paras 19.118-19.140.

[52] See generally Reinecke, van Niekerk & Nienaber ibid paras 23.67-23.79; Merkin, Summer & Hodgson *Colinvaux's Law of Insurance* ch 18; Birds, Lynch & Paul *MacGillivray on Insurance* ch 35; and Jerry & Richmond *Understanding Insurance Law* para 150.

[53] Merkin, Summer & Hodgson ibid para 18.007 opine that reinsurance is by the common law a contract of insurance under English law, but refers to difficulty to classify reinsurance in some jurisdictions where legislation does not make mention of reinsurance. In South Africa, the class reinsurance is included under the Insurance Act 18 of 2017 ('Insurance Act of 2017') Schedule 2 of tables 1 & 2.

[54] Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 23.67. Birds, Lynch & Paul ibid para 35.004 refer to the following as a useful definition of reinsurance as a contract 'whereby for a consideration one agrees to indemnify another wholly or partially against loss or liability by reason of a risk the latter has assumed under a separate and distinct contract as the insurer of a third person'.

[55] There are two main categories of reinsurance, namely facultative reinsurance and treaty reinsurance. Both these are main categories and may be written on a proportional or non-proportional basis. These distinctions are irrelevant for purposes of the present discussion, on the distinction between liability insurance and reinsurance.

[56] This appears to be the preferred view for purposes of regulation: see Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 23.75.

2.2.5 Different Types of Liability Insurance[57]

Liability insurance may be provided in a separate insurance policy (eg, if an insured requires liability cover only). Alternatively, liability insurance and property insurance may be combined under separate sections in a comprehensive policy (eg, motor-vehicle insurance). Liability cover may also be provided as part of 'insurance against all risks',[58] in which case the risk taken over by the insurer is not qualified by reference to an event or peril insured against (eg, in householders' insurance where the insured house is covered against all risks).

2.2.5.1 Private or Social Insurance and Voluntary or Mandatory Insurance[59]

Liability insurance may be classified as either private or social, and may be effected on either a voluntary basis or on the basis of a statutory obligation.

Private insurance covers the individual interests of the insured and is based on an insurance contract. It may either be contracted on a voluntary basis or be required by statute. For example, legislation may impose a duty on certain persons – eg, certain categories of professional, notably in the medical fields – to insure themselves against liability they may incur in certain capacities, especially when they perform potentially dangerous activities. The aim of compulsory statutory liability insurance is to ensure that the liability insured is able to meet third-party claims.[60]

In contrast to private insurance, social insurance schemes serve the general interests of society and are required to be implemented by statute. The South African Compensation for Occupational Injuries and Diseases Act[61] is an example of a social insurance (compensation) scheme that uses liability insurance.[62]

---

[57] Reinecke, van Niekerk en Nienaber ibid 25.26; Wansink *Algemene aansprakelijkheidsverzekering* (3 ed) 199; Derrington & Ashton *Law of Liability Insurance* para 1.24; and Jerry & Richmond *Understanding Insurance Law* para 13A[e].

[58] Reinecke, van Niekerk & Nienaber ibid paras 13.54-13.63. All-risks insurance is not entirely unlimited. See Reinecke, van Niekerk & Nienaber ibid para 13.56; and Clarke *Law of Insurance Contracts* in para 17.3A1.

[59] Reinecke, van Niekerk & Nienaber ibid paras 1.57-1.59; 25.30-25.31; Derrington & Ashton *Law of Liability Insurance* para 1.25; and Merkin, Summer & Hodgson *Colinvaux's Law of Insurance* paras 21.001-21.005.

[60] See also paras 3-5 below for further detail and examples.

[61] 130 of 1993 ('COIDA').

[62] The scope of this thesis is limited to private liability insurance contracts and further detail falls beyond the ambit of this discussion.

2.2.5.2 Profit or Non-profit Insurance[63]

Most modern liability policies qualify as insurance for profit. For-profit insurers are, in the main, owned by shareholders who do not necessarily have to be policyholders. In the case of profit insurance the contract is concluded between the insurer and the individual insured. The purpose of such insurance is to generate a profit for the insurer through the premiums paid, and to distribute that profit between the insurer's shareholders.

Non-profit insurance is, in the main, a vehicle for mutual insurers which are owned by their policyholders. However, mutual insurance is not aimed at making a profit for the insurer. If the premiums collected exceed the amount required to cover the losses, the balance must be returned to the insured. When there is a shortfall in premiums, a 'call' may be made to the insured to contribute towards the shortfall. Mutual marine insurance against liability for oil pollution is an example of this type of insurance.[64]

2.2.5.3 Examples of Liability Insurance

In this second part of the chapter we consider how the economic circumstances, social conditions, moral norms, and legal principles have changed and how this has enabled liability insurance to evolve and develop.[65] Interesting examples of earlier forms of liability insurance include liability insurance in respect of horse-drawn vehicles towards the end of the nineteenth century, and liability insurance against poison.[66]

---

[63] Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 1.31-1.36; and Jerry & Richmond *Understanding Insurance Law* para 13B[a].
[64] Reinecke et al *General Principles of Insurance Law* para 576. The scope of this thesis is limited to for profit-insurance and further detail falls beyond the ambit of this discussion.
[65] Paragraph 2.3 below.
[66] This insurance was aimed to cover pie makers against liability towards third parties for rash caused by cockroach poison. See Derrington & Ashton *Law of Liability Insurance* para 1.2.

Liability insurance may take different forms.[67] For example, as the insured may incur liability in different capacities and/or for different activities,[68] the type of third-party loss or damage in respect of the liability cover may differ, and the insured may be covered against liability to different categories of third parties. This may restrict the scope of liability cover.[69]

The following sub-classes of liability insurance are set out in the South African Insurance Act of 2017:[70] directors and officers;[71] employers;[72] product liability;[73] professional indemnity;[74] public liability; aviation; engineering; marine;[75] motor;[76] rail; transport;[77] personal; and others.[78] Note that the list also provides for other forms of liability insurance not listed in the Act.[79]

---

[67] Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 25.32; Wansink *Algemene aansprakelijkheidsverzekering* (3 ed) 11; and Atkins *Are You Covered?* 105-106. Hilliker *Liability Insurance in Canada* 4 opines that 'liability insurance contracts are generally written according to the nature of the business, professional or personal risks undertaken by the insured' and then provides examples under each category. See Reinecke, van Niekerk & Nienaber ibid para 1.37 for further detail on the distinction between commercial (or business) insurance and consumer (or individual/personal) insurance generally. The latter distinction became very important under English law in view of recent consumer legislation that also applies to (liability) insurance contracts. See para 4.1.2 below for more detail.

[68] See, eg, Merkin, Summer & Hodgson *Colinvaux's Law of Insurance* paras 21.035-21.039; and Merkin, Summer & Hodgson *Colinvaux Supplement* 120-121 ad paras 21.36, 21.28 ad 21.39 for more detail on cover under liability insurance based on the insured's activities.

[69] Maniloff & Stempel *General Liability Insurance* 1-3 explain that the CGL Policy is the dominant general liability policy in the USA and that it was developed in response to fragmented insurance policies and cover.

[70] See Schedule 2 of Table 2 on the classes and sub-classes of non-life insurance. Number 10 concerns the class 'liability insurance' and its sub-classes.

[71] See, eg, Merkin, Summer & Hodgson *Colinvaux's Law of Insurance* paras 21.139-21.158; and Merkin, Summer & Hodgson *Colinvaux Supplement* 126-127 ad paras 21.149 and 21.152 on directors' and officers' liability cover under English law.

[72] See, eg, see Birds, Lynch & Paul *MacGillivray on Insurance* in paras 30.110-30.117; Merkin, Summer & Hodgson *Colinvaux's Law of Insurance* paras 21.116-21.131 and Merkin, Summer & Hodgson *Colinvaux Supplement* 126 ad paras 21.122 and 21.126 on employers' liability insurance law under English law.

[73] See, eg, Merkin, Summer & Hodgson *Colinvaux's Law of Insurance* paras 21.132-21.138 and Merkin, Summer & Hodgson *Colinvaux Supplement* 126 ad paras 21.133, 21.134, and 21.135 on product liability policies under English law.

[74] See, eg, Van Schoubroeck *Professionele aansprakelijkheidsverzekering* passim. See also Birds, Lynch & Paul *MacGillivray on Insurance* paras 30.083-30.109; and Enright & Jess *Professional Indemnity* on professional indemnity insurance law under English law.

[75] On 'zeeverzekering' (that has its own ambit and cannot merely be equated to 'marine insurance' in other jurisdictions) and the law of liability insurance under Belgian law, see para 5.1.1 below.

[76] See, eg, Birds, Lynch & Paul *MacGillivray on Insurance* ch 31; Merkin, Summer & Hodgson *Colinvaux's Law of Insurance* ch 23; Merkin, Summer & Hodgson *Colinvaux Supplement* 151-202 ad ch 23 on the law of motor vehicle insurance under English law. A 12th edition of *Colinvaux's Law of Insurance* is set to analyse major changes as to the law of motor-vehicle insurance.

[77] The law relating to liability insurance contracts pertaining to transport is a thorny issue under Belgian law. See para 5.1.2 below.

[78] As the scope of the study focuses on liability insurance generally, further detail falls beyond the

New forms of liability insurance continue to develop in response to changes in law and liability, new technology, and growing societal demand. [80] More novel forms include liability insurance for private drone operators, medical clinical trials, autonomous driverless vehicles, social media, and cyber activities.

2.3 THE HISTORICAL DEVELOPMENT OF LIABILITY INSURANCE

The historical development of liability insurance is divided into three stages. First, possible reasons for the delay in the development of liability insurance; [81] second, mutual marine liability insurance in England, including mutual hull clubs and protection and indemnity clubs[82] as possible precursors to liability insurance;[83] and third, the legal recognition of liability insurance in the main in the form of employers' liability insurance.[84]

2.3.1 The Delay in the Introduction of Liability Insurance

From the sources consulted, and from an Anglo-American perspective in particular, liability insurance first emerged in England ('UK') during the second half of the nineteenth century and shortly thereafter spread to the United States of America.[85] Until then marine and fire insurance were the main forms of insurance,[86]

---

ambit of this discussion. As to liability insurance in general, it may be noted that the American Law Institute ('ALI') recently adopted a *Restatement on the Law of Liability Insurance*. The purpose of a Restatement may be explained as follows: 'Restatements are primarily addressed to courts. They aim at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might appropriately be stated by a court' (see ALI *Restatement on the Law of Liability Insurance* Proposed Final Draft No 2 of April 2018 at x). This is particularly relevant in America, where insurance law is regulated on a state-by-state basis. An entire Restatement may be accepted as the law of a state in that subject matter. The reason why this was not included in this study is because it was to date of this thesis not adopted by states. The final *Restatement on the Law of Liability Insurance* was published in 2019 and covers the law of contracts in the liability insurance context, liability insurance cover, and the management of insured liabilities. See https://www.ali.org/publications/show/liability-insurance/ (accessed on 4 Nov 2019).

[79] See, eg, Kuschke *Insurance against Damage Caused by Pollution* passim on environmental damage against pollution, as far as it concerns liability insurance.

[80] See also Merkin, Summer & Hodgson *Colinvaux's Law of Insurance* para 1.007.

[81] Paragraph 2.3.1 below.

[82] Known as 'P&I clubs'.

[83] Paragraph 2.3.2 below.

[84] Paragraph 2.3.3 below.

[85] Abraham *Liability Century* 28; Abraham (2005) 64 *Maryland LR* 573; and Abraham (2001) 87 *Virginia LR* 86-87.

[86] Abraham *Liability Century* 15-16. For an historical overview of these insurances in England, see Cockerell & Green *British Insurance Business* 3-60; and Merkin, Summer & Hodgson *Colinvaux's Law of Insurance* paras 1.001-1.004.

followed by life and accident insurance. In Europe, liability insurance also emerged in industry late in the nineteenth century.[87] There are at least three reasons why liability insurance took longer to develop than other forms of insurance.[88]

First, at common law insurance against the consequences of an insured's negligent conduct (for loss or damage of own property – first-party insurance – or for liability to another – third-party insurance) was regarded as contrary to public policy.[89] Second, the imposition of civil liability was limited which reduced the demand for cover.[90] Third, society was not organised to create a viable demand for liability insurance.[91]

This section describes how the economic circumstances, social conditions, moral norms, and legal principles changed so enabling liability insurance to develop.

2.3.1.1 From 'Moral Hazard' to Responsible Behaviour[92]

Insurers, both in first- and in third-party insurance, must guard against 'moral hazard', which is the possibility that, because it is insured, the party insured may exercise less care to avoid the occurrence or consequences of loss.[93]

---

[87] Fontaine *Verzekeringsrecht* (2 ed) para 11. Fontaine, in his commentary on Belgian insurance law, eg, mentions an historic *Parisian* decision that confirmed the need for, and validity of, liability insurance in 1845. See Fotntaine *Verzekeringsrecht* (2 ed) para 666; and Cour Royale de Paris 1 Jul 1845 Journal du Palais, Jurisprudence française II 1845, 793-794 (Automédon).

[88] See this para 2.3.1 below on the three reasons for the delay in the introduction in liability insurance. Abraham *Liability Century* 14. Abraham argues at 19 that '[t]he answers [as to why it took liability insurance so long to develop] lie both in economic history and in legal doctrines that prohibited insuring against tort liability'.

[89] Paragraphs 2.3.1.1(a)-2.3.1.1(c) below.

[90] Paragraph 2.3.1.2(a) below.

[91] Paragraph 2.3.1.2(b) below.

[92] See generally Abraham *Liability Century* 14-27; Scales (2008) 94 *Virginia LR* 1260-1262; Abraham (2001) 87 *Virginia LR* 86-87; Abraham (2005) 64 *Maryland LR* 575-580; Enright & Jess *Professional Indemnity* paras 1.170-1.182; Jerry & Richmond *Understanding Insurance Law* para 10[b]; and Clarke *Policies and Perceptions* 252 on moral hazard and insurance.

[93] See Enright & Jess ibid para 1.182 for an explanation of what they refer to as the two elements of moral hazard, namely 'that the availability of insurance will relax or dissipate the usual human and institutional energies which ought to be directed towards reducing the likelihood that the insured event will occur'; and 'the effect that the personality of the insured has on the risk: is the insured naturally careful or careless, righteous or criminal?' The last element is less often emphasised by other authors on this topic.

For a discussion on the origin of the doctrine of moral hazard in insurance, see Baker (1996-1997) 75 *Texas LR* 244-267. Briefly, the word hazard (danger, chance of danger) was used in fire insurance to refer to physical hazards long before it was paired with the adjective 'moral'. (For further detail on the increase in hazard in fire insurance policies, see Insurance Society of New York *Fire Insurance Contract* 117-136.) Baker suggests that the first references to 'moral hazard' appear to be in an American fire-insurance guide that was published in 1862. From the middle of the 19th century insurers began to use the term 'moral hazard'. However, the concerns encompassed within the term already existed at the beginning of the 19th century. Both moral and physical hazard are still terms in

During the eighteenth and nineteenth centuries, insurance was approached with great caution.[94] Initially, there was no possibility of insuring against the consequences of an insured's own fault in both first- and third-party insurance.[95] During the nineteenth century there was an insufficient distinction not only between the degrees of an insured's fault,[96] but also between the elements of fault and wrongfulness. All conduct with fault by the insured (whether negligent or intentional) was regarded as wrongful and for that reason not insurable.[97] There was also no distinction between the reasons for excluding an insurer's liability due to its own conduct.[98]

Although insurance was a lawful transaction with social benefits, it was seen to create a moral hazard. At common law, insurance against the consequences of an insured's conduct with fault (including negligent conduct) was regarded as contrary to public policy in that was seen to create an excessive moral hazard.[99] There were public-policy concerns that insurance against the consequences of all forms of fault would encourage wrongful behaviour by the insured and negate the impact of the imposition of liability in tort.[100]

To counteract the possibility of moral hazard in first- and third-party insurance, from early on insurance did not (and generally still does not) cover an insured against the consequences of its intentional and wrongful conduct.[101] This reduces the risk of moral hazard to some extent.

---

use and factors considered by insurers. See para 1.4 above for a discussion on the economics of liability insurance and moral hazard from a current perspective.

[94] See Abraham *Liability Centuary* 20 who points out that insurance seemed like gambling which was frowned upon.

[95] Roman-Dutch, French and English law, eg, excluded insurance cover for all forms of fault on the part of the insured in the 18th century. See Van Niekerk *Insurance in the Netherlands* 403-409.

[96] Namely, between intent and negligence. In time, the distinction between intentional and non-intentional conduct by the insured was established and insurance became possible against the latter but (generally) not against the former.

[97] See Welford *Accident Insurance* 433-436 on the public-policy objections that existed under early English law to contracts of indemnity against the consequences of negligent, intentional or wrongful acts by the insured. Eventually non-intentional conduct by the insured became insurable as a rule, but not (generally) if the conduct is wrongful.

[98] The lines were initially blurred between principles that have since been clarified, namely, that there is an implied term in insurance contracts against insurance of the intentional conduct of the insured, and it is against public policy to insure the consequences of an insured's wrongful conduct.

[99] Abraham *Liability Centuary* at 14 and 17; and Abraham (2001) 87 *Virginia LR* 86.

[100] Abraham contends that liability in tort still has a deterrence function today. See Abraham (2001) 87 *Virginia LR* 86. However, Birds *Birds' Modern Insurance Law* 279 para 14.4 argues 'that deterrence and punishment should have no place in the civil law'. Clarke *Policies and Perceptions* 257-258 is also not convinced that the exclusion of liability cover for unlawful intentional conduct deters criminals.

[101] This was not because insurance contracts expressly so provided, but because they were so interpreted. See Abraham *Liability Centuary* 16. See also Welford *Accident Insurance* 433-436 on the public-policy objections that existed under early English law to contracts of indemnity against the consequences of negligent, intentional or wrongful acts by the insured.

Throughout the nineteenth century courts grappled with whether insurance against the consequences of an insured's own negligence was valid: first in the realm of first-party insurance;[102] then in relation to mechanisms that resembled liability insurance (eg, the exclusion or limitation-of-liability clauses[103] or 'benefit-of-insurance' clauses);[104] and lastly in connection with liability insurance itself.[105] The possibility of insurance against the consequences of one's own conduct in liability insurance was initially regarded as wrongful – irrespective of the degree of fault.

Abraham argues convincingly that it is particularly difficult to combat moral hazard in liability insurance.[106] As an insured may in principle incur unlimited legal liability towards third parties, an insurer cannot minimise moral hazard effectively merely by placing a limit on the amount of cover it provides.

This section analyses how public policy gradually changed in favour of insurance against the consequences of an insured's own negligence. Abraham observes that he could find no American cases in which the validity of liability insurance was directly addressed prior to its introduction late in the nineteenth century.[107] However, he observes that 'the idea of insuring against civil liability was highly suspect; [that] liability insurance was considered almost immoral'[108] and was criticised as a 'method of avoiding moral responsibility'.[109]

2.3.1.1(a) The Validity of Insurance against Loss or Damage Caused by an Insured's (or its Employees') Negligent Conduct in First-Party Insurance

Until the nineteenth century, insurance against losses caused by an insured's own negligent conduct was generally considered contrary to public policy in first-party insurance in both UK and US law.[110] An insured could not validly insure against

[102] Paragraph 2.3.1.1(a) below.
[103] Paragraph 2.3.1.1(b) below.
[104] Paragraph 2.3.1.1(c) below.
[105] Abraham *Liability Century* at 21; Abraham (2001) 87 *Virginia LR* 576 and 578; and Scales (2008) 94 *Virginia LR* at 1261. See para 2.3.3 below as to the legal recognition of liability insurance itself.
[106] Abraham *Liability Century* 16-17.
[107] Abraham (2001) 87 *Virginia LR* 86-87 n 6.
[108] Abraham (2005) 64 *Maryland LR* 575.
[109] Abraham *Liability Century* 15.
[110] Welford *Accident Insurance* 433-436; Van Niekerk *Insurance in the Netherlands* 407 n 140; Abraham ibid 21.

the consequences of its own or its employees' (eg, its master and crew or mariners) conduct. This included, but was not limited to, negligent conduct.[111]

Busk v Royal Assurance Exchange Company[112] in 1818 appears to be the first English decision to hold a person entitled to insure against losses caused by the negligent conduct of its employees which resulted in damage to a ship;[113] while in 1837 in *Shaw v Robberds*[114] the courts in England extended this to allow an insured to insure against losses caused by its own negligent conduct (as opposed to that of its employees). Like *Busk*, *Shaw* made no express mention of a shift in public policy.

American law lagged behind its English counterpart. But from the 1830s, American courts too started to acknowledge that marine insurance policies could cover an insured for the consequences of the negligent conduct of its employees[115] in first-party insurance; and by the beginning of the twentieth century it was clear that these policies also covered loss due to the insured's own negligence.[116]

There appears not to have been a clear shift in public policy which allowed for cover against losses resulting from the insured or its agents' negligence in first-party insurance. Instead, marine and fire insurance policies which did not expressly exclude such cover, were interpreted to cover what they undertook to insure – loss of ships and cargo, and destruction of property by fire – even if the losses were directly or indirectly caused by such negligence.[117]

By the middle of the nineteenth century it appears that both UK and US law allowed insurance against the consequences of an insured's (or at least its employees') negligence in first-party insurance. This set the scene for the introduction of liability

[111] This discussion will focus on negligent conduct as intentional conduct was – and still is – generally excluded from insurance cover as explained in para 2.3.1.1 above.
[112] *Busk v Royal Exchange Assurance Company* (1818) 2 B & Ald 73, 106 Eng Rep 296. See De Hart & Simey *Arnould's Marine Insurance* (8 ed) 964-967 for a discussion of other English cases that affirm the *Busk* decision.
[113] *Busk v Royal Exchange Assurance Company* 296.
[114] *Shaw v Robberds* (1837) 6 Ad & E 82, 112 Eng Rep 29. This decision concerned a fire insurance policy.
[115] See *Patapsco Insurance Company v John Coulter* (1830) 28 US 222; *Columbia Insurance Company of Alexandria v Joseph W Lawrence Who Survived Thomas Poindexter* (1836) 35 US 507; and *William Waters v The Merchants' Louisville Insurance Company* (1837) 36 US 213.
[116] McNeely (1941) 41 *Columbia LR* 32. She provides a neat summary of some of the first English and American cases that acknowledged that insurance policies may cover loss due to the negligent conduct by the insured and its employees. Also see Porter *Laws of Insurance* (2 ed) 116 for further references to English and American cases on the same topic. See also para 2.3.1.1(c) below.
[117] Abraham *Liability Century* 21-22.

insurance which is, after all, also insurance against the consequence of an insured's negligence.[118]

The recognition of insurance cover against the consequences of an insured's own negligence first arose in first-party insurance. When it was realised that an insured could (or should) be permitted to claim against a first-party insurer for loss caused by its own negligent conduct, the way was paved for the recognition of insurance cover for an insured's loss caused by its liability towards third parties resulting from its own negligent conduct – liability insurance was with us. But the validity of mechanisms that resembled liability insurance (eg, exclusion or limitation-of-liability or so-called 'benefit-of-insurance' clauses) discussed in the following paragraphs, was considered before the legal recognition of liability insurance.

2.3.1.1(b) The Enforceability of Exclusion/Limitation-of-Liability Clauses

During the nineteenth century, public policy regarding the enforceability of the exclusion or limitation-of-liability [119] clauses is important in the historical development of liability insurance. Certain authors suggest that these clauses resemble liability insurance[120] in that they may both create moral hazard.[121] Clauses to exclude or limit legal liability do so by shifting the burden of liability from the tortfeasor to the third-party victim.[122] As liability insurance covers legal liability to third parties, it transfers the risk of such liability from the insured tortfeasor to the insurer. A person insured against liability therefore, like a tortfeasor, avoids or shifts its liability using exclusion or limitation-of-liability clauses. The reasoning was that once courts recognise the legitimacy of such clauses,[123] they might be more inclined to accept the validity of liability insurance.

---

[118] Ibid 22.

[119] These types of clauses are referred to as 'liability waivers' in America. For the purpose of this discussion, their meaning and effect are the same.

[120] See Abraham *Liability Century* at 22-24.

[121] Abraham (2005) 64 *Maryland LR* 578.

[122] Exclusion of liability clauses exclude or eliminate liability in its entirety – the tortfeasor has no liability at all. Limitation-of-liability clauses could limit liability in different ways. For example, a limitation clause may limit liability for the tortfeasor in excess of a certain amount; or it may limit the instances where liability could be incurred, eg, by providing that there will be no liability for the tortfeasor except in case of fraud or a particular form of fault. And further, total limitation of liability again amounts to exclusion of liability.

[123] Further distinction between these types of clauses generally falls beyond this discussion that focus on the recognition of (both) types of clauses as a step towards the later approval of liability insurance.

Before expanding on this possibility, it is necessary to provide some background on the carriage of goods and passengers where exclusion or limitation-of-liability clauses first featured prominently.[124] For present purposes the main focus is on public policy and the enforceability of exclusion or limitation-of-liability clauses in two categories: the carriage of goods; and the carriage of passengers.

As to the first category, initially public carriers of goods (so-called 'common carriers')[125] were, under UK law,[126] strictly liable to shippers of goods for the loss of or damage to such goods, irrespective of whether the carrier or its employees was negligent in causing the loss or damage.

On the one hand, strict liability was regarded as necessary because of the public nature of the carrier trade.[127] Strict liability was also perceived to make common carriers more careful in general[128] and to encourage commerce.[129] Given the crucial role common carriers played in the transportation of goods, the public's interest had to be protected against fraudulent common carriers.[130] On the other hand, public policy regarded it as unfair to hold a common carrier strictly liable for undeclared valuables, and it followed that common carriers had to be protected against potential fraud by shippers of these undisclosed goods.[131] English judges therefore attempted to accommodate the conflicting interests of common carriers and the shippers of

[124] See Baker (1996-1997) 75 *Texas LR* 359-360. This study only warrants a brief summary of the very extensive topic of exclusion or limitation-of-liability clauses. For a comprehensive survey of the topic, with references to English and American case law, see Kaczorowski (1990) 51 *Ohio State LJ* 1129-1257 and Pagan (1981-1982) 23 *William & Mary LR* 799-814 in regard to the carriage of goods. See also Kaczorowski ibid 1157-1169 for the carriage of passengers. Further, see Kostal *English Railway Capitalism* 284-285 for a concise summary of the English position in the pre-steam age. Also see Beven *Negligence in Law* 892-897 on notice of limitation of liability by common carriers.

[125] Beven ibid 845 defines common carriers as 'persons [who] hold themselves out as exercising the public employment of carrying goods for people generally, and as ready to engage in the carrying of goods for hire, and not as a mere casual occupation'. He provides further definitions 869-870, and at 870 provides the following examples of common carriers: 'waggoners and teamsters; coach-masters or proprietors of stage coaches…; railway companies, for goods which they profess to carry or actually carry; carmen and porters'.

[126] Pagan (1981-1982) 23 *William & Mary LR* 799 explains the relationship between the carrier of goods and the shipper as a 'species of bailment for hire'.

[127] Kaczorowski (1990) 51 *Ohio State LJ* 1135.

[128] See *Proprietors of Trent Navigation v Ward* (1785) 3 Esp 126, 170 Eng Rep 562 at 563-564 where it was held that '[i]f this sort of negligence were to excuse the carrier, when he finds that an accident has happened to goods from the misconduct of a third person, he would give himself no further trouble about the recovery'.

[129] Kaczorowski (1990) 51 *Ohio State LJ* 1136.

[130] Ibid 1141.

[131] Ibid 1143. See, eg, *Gibbon v Paynton* (1769) 4 Burr 2298, 98 Eng Rep 199 for an example of fraud by a shipper. See also Pagan (1981-1982) 23 *William & Mary LR* 814-816; and Kaczorowksi ibid 1140-1441 for a discussion of the *Gibbon* case.

goods.[132] On the basis of justice and fairness, the courts permitted common carriers to limit their liability for undisclosed valuable goods in excess of a certain amount[133] subject, however, to specific conditions.[134] For example, the common carrier had to prove that it had informed the shipper of its disclaimer of liability and of the terms of the contract.[135] However, courts soon permitted common carriers to limit the grounds for incurring liability in negligence by the issue of exclusion or limitation-of-liability clauses by public notice displayed prominently or by special acceptances *inter partes*.[136] Shortly thereafter, it was held in *Maving v Todd and Others*[137] that 'they may exclude it [liability] altogether'.[138]

In 1830 the English legislature enacted the Carriers' Act.[139] Certain sources suggest that the Act confirmed, and in some instances even increased, rather than restricted the common carriers' right to exclude or limit their strict liability at common law.[140] By the middle of the nineteenth century common carriers were increasingly contracting-out of their liability for all degrees of negligence towards shippers and these agreements were now recognised by the principal courts in

[132] Kaczorowski ibid 1143.
[133] It is insightful that 'the same principles of fair dealing, public safety, and minimizing loss based on moral principles of honesty, fairness and justice that explain the judicial creation of common carrier strict liability' led to the judicial recognition of a carrier's right limit its liability to, see Kaczorowski ibid 1143.
[134] Ibid 1148. American courts also eventually recognised this right in all jurisdictions.
[135] See, eg, *Clark v Gray* (1802) 4 Esp 177, 170 Eng Rep 682 at 683 where it was held that '[c]arriers are subjected to losses by the general law of the realm; I therefore think, that every man must discharge himself by notice given by himself; and that it was incumbent on him to prove that such notice was given in this case. The position was the same in the USA, see Kaczorowski ibid 1148.
[136] See *Nicholson & Another v Willan & Another* (1804) 5 East 507, 102 Eng Rep 1165 at 1167 where it was held that '[i]n the absence therefore of any evidence to support … a supposed tortious conversion of the goods in question, … we cannot help giving effect to those terms in the notice'.
[137] (1815) 1 Stark 59, 171 Eng Rep 405. Also see Kaczorowski (1990) 51 *Ohio State LJ* 1143 for a discussion of the *Maving* case.
[138] At 405. Also see *Leeson v Holt & Others* (1816) 1 Stark 186, 171 Eng Rep 441 at 442 where it was held that 'the common law imposed upon carriers a liability of ruinous extent, and in consequence, qualifications and limitations of that liability have been introduced from time to time, till, as in the present case, they seem to have excluded all responsibility whatsoever, so that under the terms of the present notice if a servant of carrier's had in the most wilful and wanton manner destroyed the furniture entrusted to them, the principals would not have been liable. If the parties in the present case have so contracted, the plaintiff must abide by the agreement.' Also see Kaczorowski ibid 1144 for a discussion of this case.
[139] 'An Act for the more effectual Protection of Mail Contractors, Stage Coach Proprietors, and other Common Carriers for hire, against the Loss of or injury to Parcels or Packages delivered to them for Conveyance or Custody, the Value and Contents of which shall not be Declared to them by the owners thereof' 1830, 11 Geo 4 c 68. See Baker (1996-1997) 75 *Texas LR* 360 for a brief discussion of the Act.
[140] See Pagan (1981-1982) 23 *William & Mary LR* 822-825; and Kaczorowski (1990) 51 *Ohio State LJ* 1144-1145 for a discussion of the effect of the Carriers' Act.

England.[141] This was largely due to the boom in the railway industry and because it was deemed 'reasonable that carriers should be allowed to make agreements for … protecting themselves against the new risks', even gross negligence.[142] The railways, in particular, exploited the situation and forced shippers to agree to prejudicial terms.[143] Public-policy concerns prompted the Legislature to enact the Railway and Canal Traffic Carriers' Act, 1854.[144]

Although this Act left the Carriers' Act, 1830, and the common-law right of carriers to contract out of strict liability largely in place,[145] it restricted exclusion or limitation of liability in the case of negligence[146] by carriers to some extent.

In brief as to the public policy and enforceability of exclusion or limitation-of-liability clauses for common carriers in English law shortly before the introduction of liability insurance during the second half of the nineteenth century: common carriers could still exclude strict common-law liability and could even contract-out of liability for negligence, provided certain conditions were met.

American courts[147] came to rely on the same public-policy concerns as their English counterparts and adopted strict liability for carriers of goods at common law.[148] They were more determined to uphold public-policy concerns and to preserve the common carrier's strict liability than the English courts. For the first half of the

---

[141] See, for example, *Shaw v The York and North Midland Railway Company* (1849) 13 QB 347, 116 Eng Rep 1295 at 1298 where Denman L held that 'the declaration that the defendants [common carrier] received the horses to be safely and securely carried by them, which would throw the risks of conveyance upon the defendants, is disproved by the memorandum at the foot of the ticket'. Pagan ibid 825 n 152 comments that the distinction between gross and ordinary negligence was blurred by that time.

[142] *Carr v Lancashire & Yorkshire Railway* (1852) 7 Ex 707, 155 Eng Rep 1133 at 1136. The court, eg, held as follows: 'The jury have found that the defendants have been guilty of gross negligence … [T]he owner [of the horse] has taken upon himself all risk of conveyance …. The contract appears to me to amount to this. The Company [railway as common carrier] say they will not be responsible for any injury or damage, however caused, occurring to live stock of any description travelling upon their railway. … [T]here is nothing unreasonable in the arrangement. … I am of opinion that the defendants [the common carrier] is not liable'.

[143] See Pagan (1981-1982) 23 *William & Mary LR* 824-825 and Kaczorowski (1990) 51 *Ohio State LJ* 1144-1145 for a discussion of the effect of the Carriers' Act of 1830.

[144] 'An Act for the better Regulation of the Traffic on the Railways and Canals', 1854, 17 & 18 Vict c 31. See Baker (1996-1997) 75 *Texas LR* 360 for a brief discussion of the Act.

[145] See Pagan (1981-1982) 23 *William & Mary LR* 826-827; and Kaczorowski (1990) 51 *Ohio State LJ* 1145 for a discussion of the effect of the Railway and Canal Traffic Carriers' Act of 1854.

[146] Also referred to as 'disclaimers of liability in case of negligence' or 'negligence-disclaimers'.

[147] See generally for what follows Kaczorowski (1990) 51 *Ohio State LJ* 1145-1157 for a detailed survey with ample references to American case law.

[148] Ibid 1148. See, eg, *Cole v Goodwin & Story* (1838) 19 Wend 251 at 281.

nineteenth century, several state courts still refused to recognise that common carriers could contract-out of strict liability, even by express agreement.[149]

However, in 1848 the United States Supreme Court ruled in *New Jersey Steam Navigation Company v The Merchants' Bank of Boston*[150] that common carriers could limit their strict liability by express agreement.[151] The court also relied on policy considerations to substantiate its decision, and held that it was 'unable to perceive any well-founded objection to the restriction'.[152] Almost all states eventually accepted this decision and recognised a common carrier's right to exempt itself from strict liability. By the middle of the nineteenth century judges no longer considered it necessary to protect the public from potentially dishonest common carriers.[153] Gradually American courts came to allow carriers to exempt themselves from liability in negligence and even from gross negligence.[154]

Then, in 1873 in *Railroad Company v Lockwood,*[155] the United States Supreme Court refused to permit common carriers to exclude all liability as it was not 'just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for negligence of himself or his servants'.[156] Again values of public policy underlay the decision.

In brief as to the public policy and enforceability of liability waivers[157] in the United States of America shortly before the introduction of liability insurance in the second half of the nineteenth century: in recognition of a decision of the United States Supreme Court,[158] most states permitted a common carrier to limit its strict liability by express contractual agreement, but a subsequent United States Supreme Court[159] ruled against the total exclusion of their liability for negligence.[160]

---

[149] See Kaczorowski ibid 1149-1150 for examples of states that refused to do so.
[150] (1848) 47 US 344.
[151] At 384. See Kaczorowski (1990) 51 *Ohio State LJ* 1151-1152 for a discussion of the case.
[152] *New Jersey Steam Navigation Company v The Merchants' Bank of Boston* above at 382.
[153] Kaczorowski (1990) 51 *Ohio State LJ* 1152-1153.
[154] Ibid 1154 for examples of the states that allowed this and the reasons therefor.
[155] (1873) 84 US 357. See Kaczorowski ibid 1156-1157; and Abraham (2005) 64 *Maryland LR* 578-579 for a discussion of the case. The decision itself provides a useful overview of both the English and American law pertaining to the exclusions of liability by common carriers.
[156] *Railroad Company v Lockwood* above at 384.
[157] Again, the American term 'liability waivers' may be equated with exclusion (or limitation) of liability clauses under English law. For the purpose of this discussion, their meaning and effect may be regarded as similar.
[158] *New Jersey Steam Navigation Company v The Merchants' Bank of Boston* above at 382.
[159] *Railroad Company v Lockwood* above at 384.
[160] In this regard, one may note the distinction made between exclusion and limitation of liability.

As to the second category where exclusion or limitation-of-liability clauses featured, carriers of passengers were under English law distinguished at common law from the carriers of goods.[161] Whereas goods were objects over which the shipper totally lost control, passengers could take care of themselves and even cause their own injuries.[162] Unlike the strict liability of the carriers of goods, carriers of passengers were liable in damages to injured passengers only when the injury arose due to the fault of the carrier or its employees.[163]

The 1869 decision in *Readhead v Midland Railway*[164] removed any doubt as to whether a carrier of passengers could be held strictly liable towards its passengers and confirmed negligence as the requirement for carrier liability.[165] However, between 1850 and 1875, English courts refrained from introducing 'liberal contractarian ideas'[166] to the law of passenger accidents. They resisted attempts by the carriers of passengers – eg, railway companies – to include express exculpatory clauses, such as exclusion-of-liability clauses, to absolve themselves from liability in negligence to passengers for loss or injury in the name freedom of contract. As a result these passenger carriers soon abandoned the practice of attempting to exclude liability in negligence without its legality ever having been tested in the English High Courts. Public policy dictated that the protection of passengers be ranked higher than the passenger carriers' rights to freedom of contract.

As is clear from United States Supreme Court decision in *Stokes v Saltonstall*,[167] the position regarding the principles of liability for carriers of passengers in America was the same as that in English law.[168] Liability waivers excluded strict liability only, as negligence at least was required to hold a carrier of passengers liable for loss or injury the passenger suffered. In *Railroad Company v Lockwood*[169] the United States

---

[161] Kostal *English Railway Capitalism* 285.
[162] Kaczorowski (1990) 51 *Ohio State LJ* 1157-1158.
[163] Kostal *English Railway Capitalism* 285. Cf some sources suggest that carriers of passengers had a high duty of care towards their passengers and that the common law did not require too much fault to hold them liable. See Abraham *Liability Century* 22-24. Abraham at 23 refers to the 'high duty of care' of carriers against their 'customers' and describes it as 'something approaching, though not quite as exacting as, strict liability'. However, Abraham's section on liability waivers should be read with care as he does not seem to distinguish between carriers of goods (common carriers) and carriers of passengers. See also Kaczorowski ibid 1158.
[164] (1869) LR 4 QB 379. See Kostal ibid 302-303 for comments on the decision.
[165] *Readhead v Midland Railway* above 393.
[166] Kostal *English Railway Capitalism* 319.
[167] (1839) 38 US 181 at 191-192. See Kaczorowski (1990) 51 *Ohio State LJ* 1158 for a reference to the decision.
[168] See Abraham (2005) 64 *Maryland LR* 578 for the position in the USA.
[169] *Railroad Company v Lockwood* above at 384.

Supreme Court refused to allow a carrier of passengers to contract-out of liability for negligence because it was 'with special force'[170] to that category of carriers not just and reasonable in the eye of the law. Special circumstances applied to that category in particular.

In conclusion, until shortly before the introduction of liability insurance, there was still considerable apprehension as regards the use of exclusion clauses (and to some extent limitation-of-liability clauses) under English law, and liability waivers under American law, by common carriers and carriers of passengers. There were public-policy concerns that these mechanisms could create a moral hazard by common carriers as tortfeasors.[171] While liability insurance was regarded as a way of avoiding or shifting moral responsibility, it was seen to resemble exclusion (or limitation) of liability clauses[172] and, therefore, was viewed with similar disapproval. But once courts recognised the legitimacy of exclusion or limitation-of-liability clauses, they might have been more inclined to accept the validity of liability insurance.

2.3.1.1(c) The Legality of 'Benefit-of-Insurance' Clauses

'Benefit-of-insurance' clauses are another mechanism that resembles liability insurance. Under a so-called 'benefit-of-insurance' clause the insured under first-party insurance[173] insures against its own loss or damage, but then provides the party responsible for that loss[174] with the benefit of its insurance. This may be regarded as an alternative and reverse method of excluding or limiting the liability of the third party responsible for the loss suffered by the insured under first-party insurance.[175]

---

[170] Ibid.
[171] Abraham *Liability Century* at 24.
[172] And liability waivers under American law.
[173] The injured party or party that suffered loss or damage or the third-party plaintiff in the context of liability insurance.
[174] The tortfeasor or the insured defendant in the context of liability insurance.
[175] An exclusion (or limitation of) liability clause provides that the tortfeasor is excluded from liability towards the third party, or that its liability is limited. A benefit of insurance clause provides the tortfeasor with the benefit of the insurance of the insured third-party plaintiff's first-party insurance cover: the tortfeasor is released from liability (in total or to a certain extent) as the insured has the benefit of its own insurance to cover its own loss. Under a benefit of insurance clause, the tortfeasor's liability towards the insured third-party plaintiff is excluded or limited because the latter has first-party insurance cover. Some sources suggest that a benefit of insurance clause may be regarded as 'indirect insurance against damage to the policyholder's property'. See Abraham *Liability Century* 24-26; and Abraham (2005) 64 *Maryland LR* 581-582. However, a benefit-of-insurance clause does not amount to any insurance (for or on behalf of the tortfeaser).

Liability insurance is a form of third-party insurance where the insured defendant (the party responsible for the loss to third parties) insures against its legal liability for loss, damage, or injury to third parties. We have already discussed the moral hazard posed by liability insurance.[176]A party responsible for the loss may also create moral hazard through a benefit-of-insurance clause. By giving the party responsible for the loss the benefit of the insured's insurance, the former has less incentive to protect the insured's property or goods than would be the case without the benefit of the insurance. It is, therefore, necessary to discuss the validity of benefit-of-insurance clauses as part of the historical development of liability insurance. Once public policy accepted the validity of benefit-of-insurance clauses, liability insurance, too, would be acceptable.

The legal recognition of benefit-of-insurance clauses is best described using the facts in *Phoenix Insurance Company v Erie & Western Transportation Company*.[177] This important case illustrates the positive attitude of the United States Supreme Court to the possibility of liability insurance a few months before the first liability insurance company was established in the US.[178]

A common carrier[179] contracted out of part of its liability to three shippers[180] by way of its bills of lading. The bills of lading further provided that if carrier incurred any legal liability or responsibility for the loss of the goods in its custody, it would enjoy the 'full benefit of any insurance' on the goods effected by the shippers.[181] The three shippers took out first-party insurance on the shipment of corn against loss or damage from the perils of the seas and some other perils. The common carrier stranded due to the negligence of the crew and all the grain was soaked.[182] The

[176] Paragraph 2.3.1.1 above.
[177] (1885) 117 US 312. The judgment includes at 313-317 a 'statement of facts' from the court a quo but it lacks some details. Further, see Abraham *Liability Century* 24-26; and Abraham (2005) 64 *Maryland LR* 581-582 for comments on the decision.
[178] For a discussion on benefit-of-insurance clauses under English law, and in particular their impact on an insurer's right to subrogation, see Van Niekerk *Subrogasie* 147 n 50, 344-348.
[179] That was the party that became responsible for the loss.
[180] These were the insured parties under first-party insurance that suffered loss or damage to their own goods.
[181] The practical implication of giving the carrier the benefit of the shippers' insurance was not clearly explained in the bills of lading. See Abraham *Liability Century* at 25 who proposes that the common carrier did not have to pay for the loss of goods in its custody or, if the common carrier had paid for the loss, it could recover it from the shippers' insurers.
[182] Some of the grain was thrown overboard to get it off the vessel and the remainder was sold in a perishable condition, see *Phoenix Insurance v Erie* above 315. The common carrier retained the proceeds of that sale. There is no reference in the facts of *Phoenix Insurance* that either the shippers or the insurer claimed the proceeds from that sale of the perishables. The insurer also did not dispute that fact that there was a total loss.

shippers' first-party insurer claimed to be subrogated to all the shippers' rights to sue the common carrier for its negligent loss of the goods. The insurer appears to have contended, inter alia, that providing the carrier with the benefit of the shippers' insurance was against public policy and invalid in that it amounted to the common carrier insuring against liability for the consequences of its own (or its employees') negligent conduct.[183] The common carrier's defence was that the bills of lading gave it the benefit of the shippers' insurance and therefore the insurer did not have a right of subrogation.[184]

The next part of the *Phoenix Insurance* judgment is particularly relevant to the present discussion as it illustrates the court's approach to different types of insurance against the consequences of an insured's (or its employees') negligent conduct. The court reaffirmed the validity of first-party insurance against loss caused by the negligence of a common carrier's employees.[185] It then held that anyone who is responsible for the safety of goods has a sufficient insurable interest in the goods. It cited the example of a contract of reinsurance in terms of which a reinsured aims to indemnify itself against its own responsibility, and pointed out that such contracts were valid.[186] The court further held that a common carrier could insure goods in its custody to protect itself against its strict liability or liability in negligence towards third parties.[187] It concluded that no rule of law or public policy is violated by permitting a common carrier to secure insurance against loss arising from the usual

[183] See *Phoenix Insurance* above 318-319 for the arguments by the insurer's counsel which were again very briefly stated but were supplemented by extensive case law. It is important to note that if the carrier was not legally entitled to enjoy the benefit of the shippers' insurance, that clause in the bills of lading would have been invalid, the insured shippers would have been able to sue the common carrier, and that the insurer would have been able to bring a subrogated recovery action against the common carrier. This appears to correspond to what the court eventually decided in *Phoenix Insurance* 325-326.
[184] A reason for the common carrier's defence was that the bills of lading gave the carrier the benefit of the shippers' insurance and that the insured shippers, therefore, did not have claims against the carrier (at least not up to the insured amount) and therefore the insurer equally did not have any claim against the carrier; an insurer can only enforce the rights that the insured have against third parties and no more. This is also the aspect which the court reiterated in its judgement. See *Phoenix Insurance* 321-322. Further detail on subrogation falls beyond the scope of this discussion.
[185] Ibid 323. The court referred to *William Waters v The Merchants' Louisville Insurance Company* (1837) 36 US 213 as authority.
[186] Ibid. The court cited *Sun Mutual Insurance Company v Ocean Insurance Company* (1882) 102 US 485 as authority for the validity of contracts of reinsurance. It also noted that reinsurance was statutorily prohibited in England for a time, but that it was valid at common law and had always been valid in the USA.
[187] *Phoenix Insurance* above 323-324. The court cited, eg, *Home Insurance Company v Baltimore Warehouse Co* (1876) 93 US 527 as authority.

perils, even though that loss may have arisen from the negligence of its own employees.[188]

Then, in a memorable phrase that indicates the court's approval of such insurance, the judge held that, '[b]y obtaining insurance, he [the common carrier] does not diminish his own responsibility to the owners of the goods, but rather increases his means of meeting that responsibility'.[189] This statement has been referred to as the '*Phoenix* doctrine'[190] and was subsequently applied in judgments dealing specifically with liability insurance.[191] Sources suggest that insurance against the consequences of an insured or its employee's negligence was from that point on regarded as a form of responsible behaviour, despite its potential for moral hazard, because the insurance could assist in compensating the prejudiced party.[192]

The court concluded that counsel for the insurer had failed to provide it with any precedent where a ship owner (who obtained insurance on its ship *and* the goods it carried) could, in case of loss of the ship and the goods through the negligence of the master and crew, recover only for the loss of the ship and not for the goods.[193] The court reasoned that if a ship owner could recover for the loss of the ship under such circumstances but not for goods it carried,[194] there had to be some trace of this distinction in the literature.[195] As authority that no such distinction existed, the court referred to *Walker v Maitland*,[196] one of the earliest English cases to affirm the validity of insurance against loss occasioned by the negligence of the insured's employees.[197]

---

[188] *Phoenix Insurance* above 323-324.
[189] Ibid para 324.
[190] Abraham *Liability Century* 24-25.
[191] See, eg, *Boston & AR Co v Mercantile Trust & Deposit* Co (1896) 34 A 778 at 786-787 and *Trenton Passenger RR v Guarantors' Liability Indemnity Co* (1897) 37 A 609 at 611. See the discussion of these decisions in paras 2.3.3.1(b) and 2.3.3.2(b) below.
[192] Abraham *Liability Century* 24-26; and Abraham (2005) 64 *Maryland LR* 581-582.
[193] *Phoenix Insurance* above 324.
[194] The insured goods that the court referred to here by implication belong to someone other than the ship owner, eg, to the shipper. Similarly, the insured goods in *Phoenix Insurance* belonged to the shippers, but the common carrier had the benefit of their insurance (although it did not amount to insurance on the goods).
[195] *Phoenix Insurance* above 324. As authority that no such distinction existed, the court referred to *Walker v Maitland*, one of the earliest English cases to affirm the validity of insurance against loss occasioned by the negligence of the insured's employees.
[196] (1821) 5 B & Ald 171, 106 Eng Rep 1155. See *Phoenix Insurance* above 324-325 for the court's extensive reference to the facts and decision in *Walker v Maitland* above.
[197] What the court in *Phoenix Insurance* wanted to illustrate by its extensive reference to *Walker v Maitland*, was that the *Walker* case did not exclude insurance cover for the sugar (goods that were carried by the ship but that belonged to the colony and not the ship owner) from the insurance cover, although the loss of the sugar was caused by the negligence of the ship owner's employees.

The court in *Phoenix Insurance* then found that because a carrier could lawfully obtain insurance against the loss of carried goods resulting from the usual perils – even if the loss resulted from the negligence of the carrier's employees – a carrier may likewise contract with the owner of the goods to provide that it will enjoy the benefit of insurance voluntarily effected by the owner.[198] The court held that such an agreement did not prevent the owner from recovering the full value of the goods,[199] but it did bar the owner itself or its insurer (who could only sue in the insured's right) from instituting any action contrary to the agreement between the carrier and the owner of the goods.[200]

The insurance contracts against the consequences of loss due negligent conduct – eg, in the *Walker* decision – to which the court referred in *Phoenix Insurance* with approval to justify the validity of benefit-of-insurance clauses, actually concerned the insurance of *goods* rather than liability insurance in the sense of insurance against legal liability to third parties for loss, damage, or injury. Even giving the common carrier the benefit of a shipper's insurance (as in *Phoenix Insurance*), did not amount to insurance, or liability insurance.[201] The judiciary had yet to affirm the validity of liability insurance. However, the court's approval of benefit-of-insurance clauses indicates that courts in the US were ready to enforce liability insurance which was due to be introduced within months of the *Phoenix Insurance* judgment.

In conclusion,[202] it appears that public policy did not merely shift from condemning insurance against the consequences of an insured's negligence as a moral hazard, to accepting it as a form of responsible behaviour. The change in public policy came about gradually with the expansion of civil liability and the changes in society which created a rising demand for liability insurance and which, in turn, put pressure on public policy to change.[203]

---

[198] *Phoenix Insurance* above 325.

[199] Ibid. If the owner was, eg, under-insured, it could claim the difference between the insured amount and the full value of the goods from the carrier.

[200] Ibid. As explained earlier, the owners of the goods did not have a right to sue the carrier (at least not to the full extent of the insured sum) and therefore the insurer's rights under subrogation were likewise limited.

[201] As explained in the introduction of para 2.3.1.1(c) above.

[202] For a discussion of the reasons for the delay in the introduction of liability insurance see paras 2.3.1.1 and 2.3.1.2 above.

[203] Abraham *Liability Century* 14. Fontaine *Verzekeringsrecht* (2 ed) para 666 describes the same change in public policy towards liability insurance under Belgian law. He summarises it as follows: 'De filosofie van het aansprakelijkheidsrecht heeft inderdaad sinds her begin van de XIXe eeuw een evolutie doorgemaakt. De voornaamste bekommernis bestaat er niet langer in de aansprakelijken te straffen maar wel de slachtoffers te vergoeden'. This confirms that the development of liability

Abrahams summarises how public policy developed in favour of liability insurance: 'Previously criticised on the ground that it was a method of avoiding moral responsibility, liability insurance was now recognised as socially desirable because it helped to assure that accident victims would be compensated for their injuries'.[204] Even though a third party did not have a direct claim against the liability insurer, liability insurance assisted the tortfeasor to satisfy claims against it. Whereas public policy used to be hostile to insuring against the consequences of an insured's own negligence, public policy turned in favour of liability insurance that could assist to compensate the third party, even indirectly.

2.3.1.2 The Rising Demand for Liability Insurance

As mentioned previously,[205] liability insurance took far longer than other forms of insurance to develop, because, amongst other reasons, the scope of civil liability was limited and society was not organised to create a demand for liability insurance.[206]

The following paragraphs examine the expansion of civil liability and the changes in society which created a rising demand for liability insurance before it was introduced and legally recognised. They aim to explain how the scope of civil liability expanded and industrialisation changed society and created a demand for liability insurance.

2.3.1.2(a) The Expansion of Civil Liability

Civil liability existed long before liability insurance was introduced in the UK or the US in the latter part of the nineteenth century.[207] For example, in England, 'trespass'[208] – the nearest medieval equivalent[209] to today's tort – already existed by

---

insurance in Belgium was also delayed pending a change in public policy: liability insurance was first regarded as an excessive moral hazard for insurers, but in time was valued as responsible behaviour by an (insured) tortfeasor. See also Simoens (1980-1981) 44 *Rechtskundig Weekblad* 1962.

[204] Abrahams *Liability Century* 15.

[205] See para 2.3.1 above on the three reasons for the delay in the introduction in liability insurance.

[206] These are the second and third reasons for the delay in the introduction of liability insurance. See paras 2.3.1.2(a) and 2.3.1.2(b) below. These reasons are linked and discussed under one main heading in para 2.3.1.2.

[207] Abraham *Liability Century* 14; and Scales (2008) 94 *Virginia LR* 1260. See also Baker *English Legal History* 400-421 for further detail on the history of actions on negligence in England.

[208] See Baker ibid 60-61 where he explains trespass and trespass on the case as types of original writ in England. Also see the explanatory diagram in this regard at 70.

the fifteenth century. Until the middle of the nineteenth century there was no general-purpose action based on negligence in English common law.[210] In *Mitchell v Allestry*,[211] the court finally held that one was 'answerable for all mischief proceeding from his neglect or actions, unless they were of unavoidable necessity'.[212] This judgment marked the start of the development of an independent action for damages caused by negligent conduct.[213] By the middle of the nineteenth century almost all accident litigation was based on this broad action.[214]

Until the late nineteenth century liability insurance was in any event largely superfluous as the scope of tortious liability was, in general, limited.[215] Few instances of liability were recognised, relatively few claims were made, and there were stringent requirements for incurring liability. According to Abraham, '[a] variety of doctrines based on proximate cause, the absence of duty, the status of the parties and the plaintiff's own conduct placed obstacles in the path of anyone seeking to recover damages in tort'.[216]

The first factor Abraham identifies and which limited the scope of tortious liability, is the doctrine of proximate cause.[217] The decision by the New York Court of Appeals in 1866, *Ryan v New York Central Railroad,*[218] illustrates some of the problems surrounding causation which limited the scope of tortious liability.[219] Due to careless management, sparks from a passing locomotive set fire to the railroad's own woodshed. The fire from the woodshed spread to Ryan's house and completely destroyed it, yet the court denied the action for damages against the railroad. The railroad's negligent conduct was not found to be the proximate cause of Ryan's loss and it was therefore not liable.

---

[209] Baker ibid 400.
[210] Abraham *Liability Century* 20.
[211] (1676) B & M 572. See Baker *English Legal History* 411 for a case discussion.
[212] *Mitchell v Allestry* above 575.
[213] See Baker *English Legal History* 411 where he also explains why the development of this action took place gradually. Further, see Baker ibid 413-416 for further detail on the development of the independent action on negligence.
[214] Ibid 413. As to European law, Simoens (1980-1981) 44 *Rechtskundig Weekblad* 1962 also explains that civil liability with fault originated there at the beginning of the 19th century.
[215] Scales (2008) 94 *Virginia LR* 1261.
[216] Abraham *Liability Century* 17.
[217] In England too, causation was a problem in the development of the action on negligence, see Baker *English Legal History* 416-417.
[218] (1866) 35 NY 210.
[219] See Hall, Wieck & Finkelman *American Legal History* 184-186; and Abraham *Liability Century* 17-18 for case discussions of *Ryan v New York Central Railroad.*

The court suggested that protection against loss and damages lay in first-party insurance, not in litigation or in the as yet unknown liability insurance.[220] *Ryan* was decided more than twenty years before *Phoenix Insurance,*[221] and it is clear from *Ryan* that public policy in the US at the time of the decision had not yet turned in favour of liability insurance.[222] The court held:

> To hold that the owner must not only meet his own loss by fire, but that he must guarantee the security of his neighbors on both sides … would be to *create a liability which would be the destruction of all civilized society*. … [and it] would be to *award a punishment quite beyond the offense committed* (my emphasis).[223]

As evidenced by the decision in *Phoenix* some twenty years later, after *Ryan* public policy tipped gradually in favour of insurance that resembled liability insurance.[224]

The next factors which, according to Abraham, limited the scope of liability in tort, are the absence of duty and the status of the parties. These limiting factors may be illustrated with reference to an employer's vicarious liability to fellow employees for the negligent acts of its employees. An employer was responsible for the negligent acts of its employees within the scope of their employment on the basis of the maxim *respondeat superior*.[225] During the eighteenth and nineteenth centuries, the scope of the employer's vicarious liability for the negligent actions of its employees was not yet settled[226] – in fact, before the industrial era, the question was seldom adjudicated.

From the 1840s, injured passengers and employees increasingly began to institute actions for damages against railway companies based on the negligence of their employees.[227] During the period 1840 to 1875, and mainly in the context of railway accidents, English judges when called upon to interpret the vicarious liability of railway companies as employers distinguished between third-party 'strangers' to the workplace (which included passengers), and employees as personal injury

---

[220] Hall, Wieck & Finkelman *American Legal History* 184.
[221] See para 2.3.1.1(c) above for a discussion of the *Phoenix Insurance* case.
[222] Abraham *Liability Century* 19 points out that the court in *Ryan v New York Central Railroad* found it 'significant that the railroad could not have bought insurance on neighboring property, in effect insuring itself against liability for damaging that property'. He ponders whether the availability of liability insurance would have changed the outcome in the *Ryan* case.
[223] *Ryan v New York Central Railroad* above 217.
[224] Again, see para 2.3.1.1(c) above for a discussion of the *Phoenix Insurance* case.
[225] See Beven *Negligence in Law* 572-573 and Anon (1983-1984) 132 *University of Pennsylvania LR* 584-585 for some of the different interpretations of *respondeat superior* in English and American law.
[226] Kostal *English Railway Capitalism* 256.
[227] Ibid 255.

litigants.[228] In cases involving the former category, judges continued to apply the broad vicarious liability of the pre-industrial era by enforcing the maxim *respondeat superior*.[229] As explained earlier,[230] common law carriers had a stringent duty of care towards passengers (and common carriers were strictly liable to owners of goods). However, when injured railway workers claimed that their employers were vicariously liable for their injuries caused by a fellow employee, the maxim *respondeat superior* was not applied. Injured employees were subjected to a very narrow theory of the employer's vicarious liability.[231]

This doctrine of common employment (or 'fellow-servant rule') entailed that an employee who had been injured by a fellow employee in the course of employment, could not bring an action against its employer, save if its employer was statutorily liable or had been personally negligent.[232] This was first affirmed in the English case of *Priestley v Fowler*.[233]

The next principle noted by the court in the *Priestley* case, was that of implied consent (*volenti non fit injuria*)[234] – the employee willingly accepted risks incidental to its employment (such as being injured by fellow employees) in terms of its contract of service.[235]

The English High Courts adopted the most expansive interpretation of the doctrine of common employment as a defence in the common-law world between 1850 and 1860.[236] The status of a party as an employee, and the absence of an

---

[228] For a comprehensive overview of personal injury litigation in England by both railway workers and passengers between 1825 and 1875, see Kostal ibid 254-372. The distinction between an employer's vicarious liability towards strangers and injured employees was not limited to the railways, but passenger claims due to railway accidents dominated the tort claims until the 1870s and that incorrectly creates the impression that the distinction was limited to the railways only. See Kostal ibid 308-309; Abraham *Liability Century* 34-35.

[229] Kostal ibid 256.

[230] See para 2.3.1.1(b) above on the rights of shippers of goods against common carriers and of passengers against carriers.

[231] Kostal *English Railway Capitalism* 256. He further opined at 320 that judges wanted to deter employees from unsafe labour practices by their narrow theory of vicarious liability that applied to injured employees.

[232] Raynes *History of British Insurance* at 290; Jenks *History of English Law* 325. Also see Welford *Accident Insurance* 559-560; and Merkin, Summer & Hodgson *Colinvaux's Law of Insurance* paras 1.006-1.007 on the doctrine of common employment.

[233] (1837) 3 M & W 1, 150 Eng Rep 1030. For critical discussions of the case, see Kostal *English Railway Capitalism* 259-267; Jenks ibid 325-326; and Anon (1983-1984) 132 *University of Pennsylvania LR* 586-590.

[234] It means 'he who voluntarily risks dangers cannot complain': see Willis at 2-3.

[235] Baker *English Legal History* 416. Also see Welford *Accident Insurance* at 554-559 and Beven *Negligence in Law* 631-641on the maxim *volenti non fit injuria*.

[236] Kostal *English Railway Capitalism* at 271. By 1880 the fellow servant rule was firmly entrenched in almost every American jurisdiction. See Anon (1983-1984) 132 *University of Pennsylvania LR* 579.

employer's duty (due to the doctrine of common employment and the *maxim volenti non fit injuria*), limited the employer's liability in tort towards its employees. The doctrine of common employment, the maxim *volenti non fit injuria*, and the doctrine of contributory negligence were all defences [237] to an employer's common-law liability for injuries sustained by its employees in the scope of their employment, and were referred to as the 'unholy trinity'.[238]

The final factor which, according to Abraham, limited the scope of liability in tort, was the conduct of the plaintiff – so-called 'contributory negligence'.[239] A negligent defendant could escape liability if the injured party's negligence contributed to the accident.[240] Carriers could even raise the defence of contributory negligence against injured railway passengers.[241]

There was remarkably little accident litigation by modern standards until the middle of the nineteenth century. One of the reasons was that serious accidents were often fatal, and until 1846 death debarred an action for damages by the dependants of the deceased[242] as 'the right of action died with the injured person'.[243] In 1846 the UK legislature enacted the Fatal Accidents Act, 1846 ('Lord Campbell's Act of 1846').[244] The Act gave certain of the deceased's relatives[245] a right of action against a negligent defendant.[246] It directed juries in fatal accident cases to award 'such Damages as they may think proportioned to the Injury resulting from such Death'.[247] This allowed judges a wider discretion in interpreting the phrase to juries.[248] The Fatal Accidents Act, 1846, extended the scope of civil liability in tort and aided in securing

---

However, some American courts developed exceptions to the fellow servant rule and narrowed its scope of application. Ibid 600-604.

[237] Willis *Workmen's Compensation Act, 1897* 2-3.

[238] Abraham *Liability Century* 42. Also see Abraham ibid 42 for an example of how these defences created under-compensation in tort for injured employees.

[239] See Baker *English Legal History* 416-417 where he mentions contributory negligence as a problem in the development of the independent action on negligence. Also see Beven *Negligence in Law* 633-634 on contributory negligence.

[240] This was also the position in English law. See Baker ibid 416-417; and Cockerell & Green *British Insurance Business* 53.

[241] Kaczaorowski (1990) 51 *Ohio State LJ* 1158. If a railway passenger was, eg, injured by stumbling over something in a poorly lit station, the passenger would likely have been regarded as the 'author of his own misfortune'. See Baker *English Legal History* 427.

[242] Baker ibid 411-412.

[243] Raynes *History of British Insurance* 290.

[244] 'An Act for compensating the Families of Persons killed by Accidents' 1846, 9 & 10 Vict c 93.

[245] Section 2.

[246] Section 1.

[247] Section 2 of the Fatal Accidents Act, 1846.

[248] Kostal *English Railway Capitalism* 292 and, on the damages that English courts awarded in fatal accident cases 291-298.

compensation for fatal accidents.[249] However, relatives of deceased employees generally had no action under the Act due to the doctrine of common employment.[250]

Labourers campaigned for radical legislative reform of accident compensation law.[251] In 1880 the English legislature passed the Employers' Liability Act, 1880.[252] This Act removed some of the harsh restrictions on employers' liability under the common law,[253] expanded the scope of employers' liability in tort, and triggered the introduction of liability insurance which had until then been negligible.[254] Although that Act greatly increased an employer's liability towards its employees, a large number of accidents did not fall within its provisions.[255] The common-law defences, such as *volenti non fit injuria* and contributory negligence, remained available to the employer.

The legislature sought to remedy the position, and in 1897 enacted the Workmen's Compensation Act, 1897.[256] The Act extended the rights of workmen against their employees under the common law or the Employers' Liability Act, 1880.[257] The Workman's Compensation Act, 1897, provided that an employer had to compensate its employees for accidental personal injuries arising from and in the course of their employment,[258] irrespective of the cause of the accident or the negligence of the employer.[259] Employers could no longer raise the defence of contributory negligence to escape liability, unless the injury could be attributed to the

[249] Baker *English Legal History* 417-418.
[250] Raynes *History of British Insurance* 290.
[251] Kostal *English Railway Capitalism* 277.
[252] 'An Act to extend and regulate the Liability of Employers to Make Compensation for Personal Injuries suffered by Workmen in their service' 1880, 43 & 44 Vict c 42.
[253] See Raynes *History of British Insurance* at 291 who also points out that the Employers' Liability Act of 1880 was not in the form of typical social legislation. See para 2.2.51 above on private and social liability insurance generally.
[254] Cockerell & Green *British Insurance Business* 53.
[255] Willis *Workmen's Compensation Act, 1897* 4.
[256] 'An Act to amend the Law with respect to Compensation to Workmen for accidental Injuries suffered in the course of their Employment' 1897, 60 & 61 Vict c 37. See Willis ibid 7-86 for notes on the Act.
[257] See Willis ibid 2-4 for a summary of a workman's rights against its employer under English law at the time of the enactment of the Workmen's Compensation Act of 1897.
[258] The Act applied to the more hazardous occupations only but was much wider than the Employers' Liability Act of 1880: ss 1 and 7. See also Willis ibid 5, 61-62; and Clayton *British Insurance* 129. The Workmen's Compensation Act, 1900, 'An Act to extend the benefits of the Workmen's Compensation Act, 1897, to Workmen in Agriculture', 1900, 63 & 64 Vict c 22 extended these benefits to workmen in agriculture as well. See s 1(1) of that Act and Raynes *History of British Insurance* 292. The Workmen's Compensation Act, 1906, 'An Act to consolidate and Amend the Law with Respect to Compensation to Workmen for Injuries suffered in the course of their Employment', 1906, 6 Edw 7 c 58 extended the benefit to workmen (employees) generally. See s 13 sv 'workman' of that Act and Raynes ibid 294.
[259] Section 1 of the Workmen's Compensation Act, 1897.

workman's 'serious and wilful misconduct'.[260] Similarly, the principle of *volenti non fit injuria* was diluted by the Act in that injured employees were no longer expected to accept their fate.[261] The Employers' Liability Act, 1880, and the Workmen's Compensation Act, 1897, assisted in the recovery of compensation for accidents.[262] When the 1880 Employers' Liability Act extended an employer's liability for accidents to its employees, most employers desperately needed insurance cover against those risks. Employers' liability insurance[263] was introduced shortly after the commencement of the Act.[264]

Civil liability has thus expanded considerably, for example, because of a change in the factors limiting its scope. The expansion of civil liability created a demand for liability insurance in the latter part of the nineteenth century. Colinvaux notes the significance of the development of liability insurance 'as a response to the expanding risk of third party claims covered by the courts and statute'.[265]

2.3.1.2(b) Changes in Society: Industrialisation

Apart from the expansion of civil liability, industrialisation contributed in creating a rising demand for liability insurance.

In the farming communities that existed before the industrialisation of the nineteenth century, there were very few viable liability claims against third parties

---

[260] Section 1(2)*(c)* of the Workman's Compensation Act, 1897. Also see Willis *Workmen's Compensation Act, 1897* 4, 16-77 for an explanation of the scope of the Act.

[261] Baker *English Legal History* 416-417.

[262] Ibid 417-418. Also see Raynes *History of British Insurance* 291-307 on the workmen's compensation legislation that succeeded the Workmen's Compensation Act, 1897. He notes at 295 that '[t]he Worksmen's Compensation Act of 1897 may be regarded as the first of a series of steps, ranging over a period of fifty years, in creating our modern system of social security…. During those fifty years employers gained protection by insurance against their liability'. In the USA, an employers' liability act that expanded the scope of employers' liability was, eg, enacted in Massachusetts, namely Act of 14 May 1887 ch 270, 1887 Mass Acts 889. See Abraham *Liability Century* 28 who indicates that some 24 states eventually adopted employers' liability Acts. The Acts were the product of the labour movement that campaigned for legislative reform of employer liability law ibid 27-28. These employers' liability Acts relaxed some of the common-law restrictions on employers' tort liability towards employees, but did not completely eliminate all limitations. Ibid 39. However, 43 states adopted workers' compensation between 1910 and 1920. Ibid 55. As opposed to the English Workmen's Compensation Act, 1897, these Acts created immunity from liability in tort for the employer and only imposed employer liability, namely, liability towards the employer for injury or death arising out of or in the course of employment. See Abraham *Liability Century* 55-56, 61. Employers would insure themselves against this liability through liability insurance. Ibid 61 and 39-67 for an overview of workers' compensation in the USA.

[263] This insurance covers the insured employer against its liability towards its workmen for accidental injury. See Welford *Accident Insurance* at 428.

[264] Raynes *History of British Insurance* 292.

[265] Merkin, Summer & Hodgson *Colinvaux's Law of Insurance* para 1.006.

and therefore no significant demand for liability insurance,[266] as the majority of personal injuries occurred on family farms.[267] Potential defendants were either likely to be a family member who the victim had no interest in suing, or workmen (eg, drivers) who were not worth suing as they were unlikely to be able to pay the claim.[268] By the end of the eighteenth century, a high proportion of collision cases involved ship owners as ships were valuable and their owners were perceived to be rich and worth suing.[269] However, the recovery of damages in those cases was no simple matter and courts battled with the same issues that confronted them in the next century's flood of railway cases.[270] Until the first half of nineteenth century, typical tortious claims for accidental injury or damage were those of a rural society and, for example, involved farm or residential fires and horses and the carriages they pulled.[271]

Industrialisation led to urbanisation and population growth which, together with machine-based manufacturing and mechanised transportation, provided greater opportunity for accidents.[272] Lloyds's statistical committee, for example, found that the number of collisions at sea suddenly increased from the 1820s after the installation of steam engines and the replacement of sail power with steam from the 1850s.[273] Accidental deaths and injuries in railroad disasters increased[274] alarmingly after the derailing of the first railway passenger train in England in 1829.[275] From the 1840s injured passengers and employees began instituting actions for damages against railway companies.[276] Victims of accidents were no longer willing to accept their injuries or damage caused by others as fate or bad luck, and began increasingly to seek redress against the individuals and corporations responsible for the accidents.[277]

The establishment of vicarious liability made it possible, for example, to sue the railway company rather than the negligent employee who had caused the accident.[278]

---

[266] Abraham *Liability Century* 14, 19. See also para 2.3.1.2(a) above on the limited scope of civil liability.
[267] Abraham *Liability Century* 20.
[268] Baker *English Legal History* 412.
[269] See para 2.3.2 below on mutual marine liability insurance.
[270] Ibid.
[271] Abraham *Liability Century* 22.
[272] Ibid 27, 34-35.
[273] Cockerell & Green *British Insurance Business* 14.
[274] Kostal *English Railway Capitalism* 255. For statistics of injuries and fatalities of employees and passengers, see ibid 258-259 and 276-277 (as to employees) and 280-281 (as to passengers).
[275] Cawton *Job Accidents* i.
[276] Kostal *English Railway Capitalism* 255.
[277] Baker *English Legal History* 412 and 416; Abraham *Liability Century* 26-27.
[278] Ibid.

Railway companies were seen to have deep pockets and were worth suing.[279] However, injured passengers generally won their cases, while injured employees generally lost theirs.[280] Although railway employees were killed and injured more frequently than railway passengers, they rarely sued their employers after the 1850s due to their limited chances of success. On the other hand, railway passengers or their surviving relatives, increasingly sued railway companies and this led to a 'swell of personal injury litigation'.[281]

The passenger litigation and huge awards in damages were very costly for the railway companies[282] and the demand for liability insurance escalated. From the 1860s railway companies litigated only those cases where the plaintiffs sought excessive damages or instituted fraudulent claims; other claims they tended to settle at the lowest possible amounts.[283]

Industrialisation changed society's perception of and reliance on litigation and in so doing created a demand for liability insurance. Colinvaux aptly points out that 'the history of risk, injury and liability is paralleled by the history of the growth of insurance' – and the same holds true for liability insurance.[284]

2.3.2 Mutual Marine Liability Insurance: Possible Precursor of Liability Insurance

Having considered the delay in the introduction of liability insurance,[285] we now turn to examine mutual marine liability insurance as the possible precursor of liability insurance.

Mutual hull clubs and Protection & Indemnity (P&I) clubs are both forms of mutual[286] marine insurance. They were created, at least in English law, to provide cover against risks that ordinary marine insurers and Lloyds were either not prepared to cover or to cover at reasonable cost.[287] These risks included, but were not limited to, liability risks not covered by the traditional marine insurance contract.

---

[279] Ibid.
[280] Kostal *English Railway Capitalism* 256. See again para 2.3.1.1(b) above.
[281] Kostal ibid 279.
[282] Ibid 294-298.
[283] Ibid 298.
[284] Merkin, Summer & Hodgson *Colinvaux's Law of Insurance* para 1.004.
[285] Paragraph 2.3.1 above.
[286] See para 2.2.5.2 above for further detail on mutual insurance generally.
[287] Merkin, Summer & Hodgson *Colinvaux's Law of Insurance* paras 1.006, 1.012 and 1.017.

Some marine insurance contracts added a 'running-down clause' for collision liability which provided cover to the ship owner for legal liability towards third parties for damage to another ship or its cargo resulting from a collision with, and caused by, the insured vessel. [288]

In the English case of *Delanoy v Robson*[289] the court found, obiter, on the validity of insurance against damage that a ship owner may be liable to pay for running down another ship, that '[i]t would be an illegal insurance to insure against what might be the consequences of the wrongful acts of the insured'.[290] However, the court created an exception where the insured also commonly functioned as an insurer and was therefore 'as much interested to extend the principle of loss as to restrain it'.[291] This collision liability was offered from as early as 1814, although its legality was still in dispute at that time.[292]

In *De Vaux v Salvador,*[293] for example, it was decided that collision liabilities did not always constitute 'perils of the seas' covered under the regular marine insurance contract. Marine insurers were only prepared to cover three quarters of collision liability and the balance had to be insured by P&I clubs. In addition to collision liability, ship- owner liability was later extended to include additional liability to third parties.[294] Early in the nineteenth century at least twenty mutual clubs operated and covered additional risks, including ship-owner liability.

Cases involving running-down clauses were rarely adjudicated by the courts before 1862.[295] The English Parliament addressed insurance by ship owners against liability to third parties in the Merchant Shipping Act Amendment Act, 1862.[296] This Act was repealed and re-enacted as the Merchant Shipping Act, 1894.[297] Welford suggests that insurance by ship owners against liability that fell outside the parameters of the 1894 Act was invalid.[298]

---

[288] So-called 'running-down' clause or 'collision liability'.
[289] (1814) 5 Taunt 605, 128 Eng Rep 827.
[290] *Delanoy v Robson* above 827.
[291] Ibid.
[292] Van Niekerk *Insurance in the Netherlands* 407 n 140, 409 n 147.
[293] (1836) 4 A & E 420
[294] For example, liability imposed on ship owners for the dependants of a deceased person; liability for damage caused to harbours, docks, and piers; and liability for the full value of lost cargo. See Merkin, Summer & Hodgson *Colinvaux's Law of Insurance* para 1.006.
[295] Welford *Accident Insurance* 433.
[296] 'An Act to amend "The Merchant Shipping Act, 1854", "The Merchant Shipping Act Amendment Act, 1855," and "The Customs Consolidation Act, 1853,"' 1862, 25 & 26 Vict c 63.
[297] 'An Act to consolidate Enactments relating to Merchant Shipping' 1894, 57 & 58 Vict c 60.
[298] Welford *Accident Insurance* 433.

Certain authorities argue that running-down clauses in marine insurance policies were the first form of (public) liability insurance.[299] For example, insurance by a ship owner against liability to third parties arising from collisions at sea was regarded as the first form of liability insurance, and motor accident insurance (as a form of public liability insurance) developed from it – at least insofar as it relates to insurance against liability arising from collisions on land.[300]

Colinvaux concludes that the earliest forms of liability cover indeed appear to have originated in the marine insurance market.[301] At the very least, mutual marine liability insurance was the precursor of liability insurance. However, mutual marine liability insurance itself may even have been the first form of liability insurance, although it was not offered independently but as additional cover to other or first-party insurance. As discussed earlier,[302] even modern liability insurance may be offered on its own or may be combined under different sections in a comprehensive policy.

2.3.3 The Legal Recognition of Liability Insurance

The last part of this overview of the development of liability insurance addresses the pioneering insurance companies in liability insurance and focuses on how courts and legislation validated employers' liability insurance[303] and public liability insurance.[304] This thesis deals with liability insurance in general rather than any specific form of liability cover. It is therefore unnecessary to explore the history of all forms of liability insurance, but rather concentrates on the legal recognition of liability insurance as a concept and illustrates the mainstream development of liability

[299] Ibid 428, 432 with reference to those authorities. Public liability insurance covered liability to the public for accidental injury or damage and consisted of public liability insurance generally and driving-accident insurance. Public liability insurance generally covered all other liabilities to the general public, save for those that were included under driving-accident insurance. Driving-accident insurance covered liabilities that arose out of the use of vehicles on the road. See para 2.3.3.2 below.
[300] Other authorities, such as McNeely (1941) 41 *Columbia LR* 27-28, do not agree that running-down clauses were the 'direct root of modern liability insurance' but they draw an analogy between collision liability as in *Delanoy v Robson* above, and liability insurance. However, McNeely does concede that running-down clauses (in collaboration with other types of indemnities that existed against liability towards third parties) 'pointed the way for the modern forms of liability insurance'. Abraham *Liability Century* 245 n 1 further opines that such collision liability in first-party insurance policies was 'something resembling liability insurance'.
[301] Merkin, Summer & Hodgson *Colinvaux's Law of Insurance* para 1.006.
[302] See again para 2.2.5 above.
[303] Paragraphs 2.3.3.1(a)-2.3.3.1(b) below.
[304] Paragraphs 2.3.3.2(a)-2.3.3.2(b) below

insurance by way of examples. This section also outlines the development of the liability insurer's duty to indemnify its insured, and explores the origin of the liability insurer's defence and the settlement of third-party claims. [305]

Although it is widely accepted that liability insurance first emerged in the form of employers' liability insurance in the UK after the adoption of the Employers' Liability Act, 1880,[306] some accident insurance companies offered liability insurance earlier on a selective basis.[307] Liability insurance was seen as a new field of accident insurance[308] and accident liability insurance was offered from the mid-nineteenth century. [309] However, liability insurance developed randomly and remained unimportant until the enactment of the Employer's Liability Act, 1880. [310] The introduction of motor vehicles in the UK in 1894 was followed by comprehensive insurance cover for first- and third-party claims.[311]

2.3.3.1 Employers' Liability Insurance

2.3.3.1(a) The Pioneering Insurance Companies

England's Employers' Liability Assurance Corporation Limited was the pioneer in the field of liability insurance.[312] It was formed in 1880 to provide indemnity to employers.[313] The company's prospectus stated that its primary objective of was 'to

[305] Paragraph 2.3.3.3 below.
[306] Abraham *Liability Century* 22; and McNeely (1941) 41 *Columbia LR* 28.
[307] Cockerell & Green *British Insurance Business* 53.
[308] Raynes *History of British Insurance* 292. Accident insurance generally covered all types of commercial risks other than those covered by marine, fire and life insurance and liability insurance: see Cockerell & Green ibid 47.
[309] Cockerell & Green ibid 53.
[310] Ibid. Liability insurance developed haphazardly: ibid. In 1855, the Railway Passengers Assurance Co, eg, insured a railway company against liability for accidents to passengers. After 1870, engineering insurance (originally known as steam-boiler insurance) policies indemnified the insured against liability towards third parties for damage to their property arising from explosion (later these policies also provided cover against liability for injury or death of third parties). The London and Provincial Carriage Co started offering third-party insurance for horse carriage accidents in 1875.
[311] Merkin, Summer & Hodgson *Colinvaux's Law of Insurance* para 1.005.
[312] Ibid. By 1886 the Employers' Liability Assurance Corporation Ltd also started to sell employers' liability insurance in Boston in the USA in view of the looming employers' liability legislation in Massachusetts. See Abraham *Liability Century* 28; Abraham (2001) 87 *Virginia LR* 87. Also see para 2.3.1.2(a) above on the employers' liability legislation in Massachusetts. Shortly afterwards, American textile manufacturers and community leaders formed the American Mutual Liability Insurance Co. See Abraham *Liability Century* 28, 32-33. These companies only provided insurance cover against employers' liability. After employers' liability legislation was enacted in Massachusetts in 1887 (and thereafter in other states), the demand for employers' liability insurance further increased and within a few years, many insurance companies were selling employers' liability insurance in Massachusetts and in other states.
[313] Ibid.

enable employers to protect themselves against the liability imposed upon them by the Employers' Liability Act, 1880'.314 Among the objects listed in its memorandum was,

> to grant insurances to protect principals and employers, and otherwise to indemnify them from liability by any reason of injury, damage, or loss occurring to or caused by agents, servants, and workmen or other employees in their employ or acting on their behalf.[315]

And also,

> to grant … insurances to protect principals and employers and otherwise indemnify them from injury, damage, or loss by reason of fraud or other misconduct of persons in their employ or acting on their behalf.[316]

Other accident insurance companies, such as the Railway Assurance Company, entered the market for employers' liability insurance shortly afterwards.[317] When the Workmen's Compensation Act, 1897, introduced the principle of automatic compensation for all accidents to workmen in hazardous occupations, and the Workmen's Compensation Acts of 1900 and 1906, extended the principle to all workers generally, almost every employer was at risk and in need of liability insurance.[318] In 1923 Welford aptly contended that employers' liability 'has been greatly extended by modern legislation, and insurance against it has become in practice a necessity'.[319]

2.3.3.1(b) The Validity of Employers' Liability Insurance

As early as 1887, the Employers' Liability Assurance Corporation Limited appeared as defendant before the courts.[320] It does not appear that the validity of employers' liability insurance was questioned, only the insurers' liability in certain instances. Employers' liability insurance was recognised in, amongst others, the Workmen's Compensation Act, 1906.[321] It was accepted that that statutory

314 Clayton *British Insurance* 128-129.
315 Raynes *History of British Insurance* 292.
316 Ibid.
317 Cockerell & Green *British Insurance Business* 53 and Raynes ibid 292.
318 Cockerell & Green ibid.
319 Welford *Accident Insurance* 551.
320 See, in general, the English treatises by Porter *Laws of Insurance* (2 ed) 188, 461; and Porter *Laws of Insurance* (3 ed) 47, 285, 476; and the American treatises by Beach *Law of Insurance* 66, 188-189; Woodruff *Cases on the Law of Insurance* 15-16; Vance *Law of Insurance* 584.
321 Welford *Accident Insurance* 432. See ss 5 and 8(7) of the Workmen's Compensation Act of 1906.

recognition made it unnecessary further to challenge the legality of employers' liability insurance.[322]

By 1920, the advantages of employers' liability insurance for both employers and employees were clear. Jenks summarises these benefits as follows:

> [T]he adoption of the system of insurance against liability has practically deprived the measures [the Employers' Liability Act of 1880 and the Workmen's Compensation Acts of 1900 and 1906] of all terrors for ordinarily prudent employers; while the same system has guaranteed compensation to thousands of deserving workmen who would otherwise have been dependant on charity.[323]

2.3.3.2 Public Liability Insurance[324]

2.3.3.2(a) The Pioneering Insurance Companies

Insurance of an insured's liability to the public at large (as opposed to a closed category of third parties) developed more slowly than employers' liability insurance.[325] The Employers' Liability Assurance Corporation Limited's objectives were wide enough to include public liability insurance for employers.[326] In 1880 the company started indemnifying employers in the UK against liability to persons other than their employees, so also covering the so-called 'outside risk'.[327] This cover was regarded as complimentary and additional to employers' liability insurance and was

[322] Ibid. Ten years after liability insurance was first introduced in Boston in the USA, the Court of Maryland rejected an attack on its validity in *Boston & AR v Mercantile Trust & Deposit Co* (1896) A 778, 786-787. It cited *Phoenix Insurance* above as authority for its decision that insurance against losses that resulted from an insured's own negligence was valid. See Abraham *Liability Century* 29-30; Abraham (2005) 64 *Maryland LR* 582 and Vance *Law of Insurance* 605 for a discussion of the *Boston* decision. The following year the Supreme Court of New Jersey confirmed the validity of liability insurance on similar grounds and with reference to the same authority. See *Trenton Passenger RR Co v Guarantors' Liability Indemnity Co* (1897) 37 A 609, 611. Also see Abraham *Liability Century* 29-30 and Abraham (2005) 64 *Maryland LR* 582 for a discussion of this decision.

[323] Jenks *History of English Law* 339.

[324] Again, this included public liability insurance generally and driving-accident insurance: Welford *Accident Insurance* 428.

[325] Cockerell & Green *British Insurance Business* 53.

[326] Raynes *History of British Insurance* 292.

[327] Cockerell & Green *British Insurance Business* 53. Before the dawn of 20th century liability insurers in the USA also started to provide cover to employers for their liability to the public. See Abraham *Liability Century* 32-33 on the insurance companies that started to write public liability policies in the beginning of the 20th century. Also see and Abraham (2001) 87 *Virginia LR* 582 and Vance *Law of Insurance* 604-605, where he explains that employers' liability insurance should rather be referred to as 'liability insurances' because it did not merely cover an insured against liability towards its employees, but also against liability towards others such as passengers in the case of an insured common carrier.

initially added as an endorsement to the employers' liability policies.[328] Thereafter, public liability insurance grew sporadically.[329]

2.3.3.2(b) The Validity of Public Liability Insurance

Public liability insurance was first defended by analogy with, for example, running-down clauses,[330] but this proved questionable.[331] As discussed earlier, [332] the legality of running-down clauses was initially questioned by the courts[333] and was in any event limited in scope. Welford contends that it was, therefore, not a valid argument to defend the validity of public liability insurance by analogy with running-down clauses.[334]

After public-liability policies were introduced, they were by 'common consent'[335] regarded as valid and effective, but their legal validity still had to be tested in court. The legality of motor accident insurance (as seen as a form of public liability insurance) was first directly addressed by the English courts only in 1921 in *Tinline v White Cross Insurance Association Limited*.[336]

Briefly, the insurance contract covered the insured against sums it was legally liable to pay to third parties as compensation for 'accidental personal injury'.[337] While driving his car at an excessive speed, the insured killed a pedestrian and injured others. He was convicted of manslaughter in a criminal case. The injured persons and the representative of the dead victim instituted action against the insured for damages. He attempted to claim from his insurance company, but the company refused his claim and contended that it was against public policy to indemnify him against the

---

[328] Ibid.
[329] See the development of different types of public liability insurance in Enright & Jess *Professional Indemnity* para 1.184 and Cockerell & Green *British Insurance Business* 53.
[330] Welford *Accident Insurance* 432. See, eg, *British Cash & Parcel Conveyors Ltd v Lamson Store Service* Co Ltd [1908] 1 KB 1006. The case dealt with the validity of a contract of indemnity, but the court found it to be valid and referred to insurance against claims made by third parties such as employers' liability insurance, running-down clauses and reinsurance in support of its argument at 1014-1016.
[331] Welford *Accident Insurance* 432-433.
[332] Paragraph 2.3.2 above.
[333] Welford *Accident Insurance* 433 n l.
[334] Ibid 433.
[335] *Tinline v White Cross Insurance Association Limited* [1921] 3 KB 327 at 331. As to the legality of public liability insurance in the USA, see *Trenton Passenger RR Co v Guarantors' Liability Indemnity Co* (1897) 37 A 609 at 611. Abraham *Liability Century* 30 notes that the doctrine of validating liability insurance (as in the *Trenton* case) was accepted almost without objection from the 1880s onwards.
[336] See Welford *Accident Insurance* 431-436 for his comments on the decision and for a general discussion on public policy and the legality of liability insurance.
[337] See *Tinline v White Cross Insurance Association Limited* above 327-328 for the facts of the case.

civil consequences of his criminal act. The court held that it was against public policy to indemnify an insured where the liability arose from his intentional criminal act.[338] However, it found that the accident had been caused by the insured's negligence[339] and held that the policy covered him despite his criminal act in exceeding the speed limit.[340]

Third-party insurance against motor-vehicle accidents had become compulsory in the UK by 1930, but by that time many motorists had already voluntarily insured themselves against liability.[341]

2.3.3.3 Early Liability Policies and Some General Principles of Liability Insurance

By 1923 some time had elapsed since the introduction of liability insurance, and two forms of liability insurance could be identified in English law: employers' liability insurance; and public liability insurance.[342] As explained earlier,[343] public liability insurance included both public liability insurance in general, and motor accident insurance.[344] As far as employers' liability insurance was concerned, an employer could insure against liability at common law,[345] liability under the Fatal Accidents Act, 1846, the Employers' Liability Act, 1880, and the Workmen's

---

[338] Ibid 330-331.
[339] Ibid 332. The court did not draw a distinction between the different grades of negligence. It found that the liability policy even covered the insured's apparent gross negligence.
[340] Ibid. For an opposite view, see *O'Hearn v Yorkshire Insurance Co* (1921) 64 DLR 437, 439 (OntSC) where the Ontario Supreme Court acknowledged the legality of liability insurance, but rejected the insured's claim because of its (negligent) criminal conduct. See Welford *Accident Insurance* at 436 note r for a discussion of this decision. See McNeely (1941) 41 *Columbia LR* 26-60 for a comprehensive overview of the role of illegality in the context of liability insurance.
[341] See again para 2.2.5.1 above on private and social liability insurance.
[342] Welford *Accident Insurance* 428. In 1905, Cooley distinguished between three types of liability insurance in the USA, namely insurance against liability for injury to employees, against liability for persons other than employees (eg, passengers) and against all classes of persons (eg, the general public or strangers): see Cooley *Law of Insurance* 241-242. There were at least 32 forms of liability insurance in the USA by 1941. See McNeely (1941) 41 *Columbia LR* 26.
[343] Paragraph 2.3.3 above.
[344] Welford *Accident Insurance* 428, and 480-510 for a comprehensive overview of public liability insurance by 1923 under English law. For details on liability insurance against accidents by vehicles, see Beach *Law of Insurance* 189-190 where he refers to English and American case law. Also see Richards *Law of Insurance* 678-679 on carriers' liability policies in the USA that covered carriers against liability to third parties.
[345] See para 2.3.1.2(a) above.

Compensation Act, 1906.[346] However, for an insured to by covered, each liability had to be specifically insured against.[347]

Employers' liability insurance and public liability insurance could be separate or combined in a single policy. Liability insurance could also be coupled with property insurance and personal accident insurance.[348]

In general, third parties had no direct claim against liability insurers as the 'insurers [were] under no obligation to the persons injured by the assured's act'.[349]

Liability policies in UK as a rule contained a clause allowing the liability insurer to conduct the defence of the action brought against the insured and to control any proceedings against the insured.[350]

2.4 SUMMARY AND CONCLUDING REMARKS

The first part of this chapter[351] dealt with the nature of liability insurance from a jurisdiction-neutral perspective. Constituting supra-national working definitions of 'insurance' and of 'liability insurance' are challenging. At its core, liability insurance is insurance against the insured defendant's *legal liability*, as opposed to *any* liability, to third parties. It may be broadly classified as indemnity insurance and as so-called 'third-party insurance'.

Liability insurance has to be distinguished from other forms of contract such as contracts in favour of third parties, although liability insurance may in exceptional

---

[346] Welford ibid 552.

[347] For a comprehensive overview of employers' liability insurance by 1923 under English law, see Welford *Accident Insurance* 552-624 who classified liability insurance as a form of accident insurance rather than as a separate branch of insurance. It is clear that employers' liability insurance was the dominant form of liability insurance in the USA by the beginning of the 20th century. See Beach *Law of Insurance* 188-189; Elliott *Law of Insurance* 451-458; Elliott *Law of Insurance* (*rev ed*) 451-458; Bacon *Benefit Societies* (2 ed) 1047-1049; Bacon *Benefit Societies* (3 ed) 1320-1322; Richards *Law of Insurance* 664-668; and Cooley *Law of Insurance* 3313-3319. Whereas Bacon discusses employers' liability insurance under accident insurance in both of these treatises, Vance and Richards deal with it in separate chapters. Also see Cady *Outlines of Insurance* 353-360 for a copy of a workmen's compensation and employer's liability policy during the 1920s.

[348] Welford *Accident Insurance* 428.

[349] Ibid 431 and for more general principles of liability insurance by 1923 under English law 428-479. For some general principles of liability insurance by 1911 under American law, see Richards *Law of Insurance* 668-678. Also see Cady *Outlines of Insurance* 349-352 for a copy of a liability policy from the 1920s.

[350] See Welford *Accident Insurance* 477-479 for further detail as regards the conduct of the defence and the recovery of the costs thereof. In the USA, liability policies from early on obliged the insurer to defend actions against its insured and to bear the costs thereof. It also gave the insurer the right to settle claims. However, the insured had to give immediate notice of any potential claims and had to assist the insurer in its defence. See Abraham *Liability Century* 35-37; Abrahams (2001) 87 *Virginia LR* 87; Richards *Law of Insurance* 677-778; and Vance *Law of Insurance* 607-608.

[351] Paragraph 2.2 above.

cases take the form of a contract in favour of the third party. This will for example be the case when the liability of a third party is also insured by way of an 'authorised-driver clause' in a comprehensive motor-vehicle insurance contract. Liability insurance can also be distinguished from other types of insurance such as first-party insurance and reinsurance. Some reinsurance contracts may, however, follow the nature of third-party indemnity or liability insurance contracts depending on the nature of the primary insurance.[352]

This chapter also reviewed different types of liability policies. Liability insurance cover may be provided in a separate policy, it may be combined under different sections in a comprehensive policy, or it may also be provided as part of 'insurance against all risks'. Liability insurance may be classified as either private or social insurance and may either be effected on a voluntary or be mandatory as required by statute. Although liability insurance may be offered by non-profit insurers, most modern liability policies are insurance for profit.[353]

The first part of this chapter on the supra-national nature of liability insurance provided a theoretical background for the rest of the thesis.

Having identified the general characteristics of liability insurance, the second part of the chapter[354] described the historical development of liability insurance spanning almost a century, from an Anglo-American perspective. Traces of liability insurance could already be identified even when first-party insurance against losses caused by an insured's own negligence were still regarded as against public policy. As civil liability expanded and society changed through industrialisation, public policy gradually swung in favour of liability insurance. Liability insurance was eventually regarded not only as beneficial, but even as necessary for both the insured defendant and the third-party plaintiff.

At the very least, mutual marine liability insurance was the possible precursor to liability insurance. It is widely accepted that liability insurance as we know it first emerged in the form of employers' liability insurance in England after the passing of the Employers' Liability Act of 1880. It then shortly thereafter spread to the United States of America and on into other jurisdictions. Insurance of an insured's liability to

[352] The focus of this study is on liability insurance contracts, to the exclusion of particular types. See para 1.9 above on the limitations and delineation of the study.
[353] This study is limited to private liability insurance contracts as opposed to social 'insurance' schemes. See para 1.9 above on the limitations and delineation of the study.
[354] Paragraph 2.3 above.

the public at large (as opposed to a closed category of third parties) developed slower than employers' liability insurance (to provide cover for its employees). In Europe liability insurance also emerged in industry late in the nineteenth century.

The eventual availability of liability insurance added to an increase in tortious claims which, in turn, raised the demand for liability insurance. Abrahams summarises the interaction between the law of tort and liability insurance as follows:

> Often the sequence has begun with tort law expanding the scope of liability or permitting ever-larger recoveries. Liability insurance then responds by providing insurance against the new liabilities and greater amounts of coverage. … In other settings the sequence of interaction takes place in reverse. Here liability insurance comes into existence first, and tort law then seeks it out by creating new forms of liability, at least partly in response to the availability of this insurance as a source of compensation.[355]

New forms of liability insurance continue to develop in response to changes in the law and liability, new technology, and a growing demand from society.

The history, origin, and development of liability insurance play a role in, for example, what 'legal liability' means, and how the conduct of the insured (eg, as regards the elements of fault or wrongfulness) impacts on its liability cover.

The development of liability insurance law in South African law should take account of the universal nature of liability insurance, and the purpose of providing liability cover. The first forms of liability insurance were aimed at indemnifying the liability insured against third-party claims. Initially third parties generally did not have a direct claim against liability insurers, but third-party rights under liability insurance became increasingly important over time. There has been a growing emphasis on the interests of third-party plaintiffs in some jurisdictions, to ensure that third parties obtain the benefits from the insured defendant's liability cover.

Liability policies in England usually contained a clause that allowed the liability insurer to take over the defence of the action brought against the insured and to control any proceedings against the insured. In the United States of America, liability policies from early on obliged the insurer to defend actions against its insured and to bear the costs thereof. Under some systems the liability insurer now has a duty to

[355] Abraham *Liability Century* 4 and for further detail on the interaction between liability insurance and the law of tort, 171-197. The term 'delict' is used in the South African chapter (ch 3) and context, whereas the equivalent term 'tort' is used in respect of the foreign systems reviewed.

defend, and in others even a right to decide to conduct the defence, depending on statutory provisions.

These issues are explored further in Chapters 3, 4 and 5 respectively.[356]

The next chapter, Chapter 3, analyses the relevant legal principles pertaining to liability insurance contracts under South African law, an uncodified or common-law system.

[356] Chapters 3, 4 and 5 below.

CHAPTER 3:

SOUTH AFRICAN LAW

CHAPTER 3:

SOUTH AFRICAN LAW

3.1 INTRODUCTION[1]

The nature and general principles of liability insurance from a jurisdiction-neutral view, as well as the initial introduction and historical development from an Anglo-American perspective of liability insurance, were discussed in Chapter 2.[2] Liability insurance, however, when compared to the Anglo-American countries, was only introduced in South Africa as late as in 1942. This was by the introduction of a statutory form of motor-vehicle accident compensation,[3] as liability insurance could not be recognised within the constraints of the Roman-Dutch law which applied to insurance.[4] Other forms of liability insurance, such as cover for the conduct by directors and officers of companies, professional liability cover for medical practitioners and attorneys, and general liability insurance cover, developed from there on over time, keeping track with international developments and to serve the interests of society and business. This thesis focuses on the prevailing law relating to contracts for general liability insurance.

In addition to the initial examination of the sources of liability insurance law,[5] this chapter identifies and analyses some of the lacunae, unique challenges, and impracticalities in the South African insurance law specifically as regards liability insurance contract law. The focus is on the following problematic areas:

[1] The following sources have been consulted and are relied on generally in this chapter. Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 25.24-25.83; Jacobs (2009) 21 *SA Merc LJ* 202-227; and the Replacement of the Policyholder Protection Rules in terms of the Short-term Insurance Act 53 of 1998 ('SIA'), promulgated as GN 1433 in *GG* 41329 of 15 December 2017 and in effect from 1 January 2018, unless provided otherwise (the 'PPRs'). A few amendments were made to the PPRs. The amendments were promulgated as GN 996 in *GG* 41928 of 28 September 2018 and came into effect from 1 October 2018. Previous versions of the PPRs fall outside of the ambit of this study. See also Millard *Modern Insurance Law* 30, 42 and 45; and Kuschke *Insurance Against Damage Caused by Pollution* passim on environmental damage against pollution, as far as it concerns liability insurance.

[2] Chapter 2 above.

[3] Van Niekerk (2010) 22 *SA Merc LJ* 453-463.

[4] Van Niekerk *Insurance in the Netherlands* 408-409.

[5] See paras 3.1.1-3.1.5 below.

- essentially, issues that arise in respect of the liability insurer's duty to indemnify its insured and in relation to the liability insurer's conduct of the defence and settlement of third-party claims brought against the insured defendant; and
- as subsidiary theme, the legal uncertainties that may precede the liability insurance contract (including contract negotiation), that may endure for the entire subsistence of the contract (including claims management),[6] and that may continue after the expiry of the contract.

Some of these legal challenges can be addressed by novel and creative applications of our national law not yet pursued and this chapter sets out to do so.[7] As to the remainder, this chapter identifies areas in which South African law lacks answers and where the other jurisdictions under review in this thesis can fruitfully be examined to find potential solutions.[8]

The choice of English and Belgian law for the legal comparative study has already been explained.[9] It may be re-stated that the other national chapters as far as possible follow the same structure[10] to enable optimal vertical comparison of the research questions identified earlier and to facilitate the application of the foreign comparative materials to South African law if and where relevant. The main sources of all insurance contract law under South African law are common law and judicial

[6] As 'claims management' is a very wide concept, this study is limited to how a claim should ideally be managed under the provisions of the specific liability insurance contract. The insured's duty of notification of third-party claims serves as an example. Notification depends on the type of liability insurance contract involved. See para 3.2.2.2 below.

[7] For example, as to disclosure in the PPRs. Most countries have some form of regulation on fair treatment of the insured or policyholder in general – some by statute, others in subordinate legislation or only via principles such as Treating Customers Fairly ('TCF'). This thesis does not delve into all of these provisions on general fairness for purpose of the comparative study as it provides answers for liability insurance contract law issues only.

[8] South African law may, eg, find valuable guidance on how English courts have dealt with the interpretation of the term 'legal liability'. And so far as the duration of liability cover is concerned, guidance may further be found in the English law on the interpretation of terminology under the different types of policy and their triggers. See Chapter 4 below. Belgian law again is progressive as far as the liability insurer's statutory right, and duty, to defend the insured defendant against third-party claims, and as regards the extensive third-party rights that protect the victim against the liability insurer itself. See Chapter 5 below.

[9] See para 1.8.2 above on the legal comparative method in this study.

[10] There may be some change in emphasis due to the unique characteristics of the respective jurisdictions. Greater focus falls on the improvement and expansion of the PPRs under South Africa law. Under English law, the interpretation of a liability insured's 'legal liability' towards the third-party plaintiff is more complex and expansive than under South African and Belgian law (cf paras 3.2.2.1, 4.2.2.1 and 5.2.2.1 below). The Belgian system governing the conduct of the defence and settlement of third-party claims by the liability insurer is again more advanced and detailed than the equivalent analysis under South African and English law (cf paras 3.3, 4.3 and 5.3 below).

decisions, legislation such as the LIA,[11] the SIA, the Insurance Act of 2017[12] and their respective regulations, and the relevant PPRs, and finally, trade usage, customary insurance law and the Constitution of the Republic of South Africa, 1996.[13]

Although liability insurance is a specialised branch of insurance, no specialised dedicated legislation is in force to regulate this form of insurance,[14] and thus the law of liability insurance is found in these same sources to a greater or lesser degree. The sources of liability insurance (contract) law are discussed below.[15]

3.1.1 Common law and Judicial Decisions

As mentioned above, South African commercial law is based on Roman-Dutch law,[16] including insurance law as confirmed in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality*.[17]

True to a common-law legal system, the principles of the South African law of insurance developed over time based on judicial precedent arising from case law.[18] The definition of an insurance contract in general, and a liability insurance contract specifically under common law, were discussed in the preceding chapter.[19] These general descriptions are amplified in the statutory instruments that follow.

3.1.2 Legislation and Policyholder Protection Rules

Liability insurance contracts in South Africa are regulated, in particular, by the SIA, the PPRs, and the new Insurance Act of 2017.[20] These are general insurance law statutes and legislative instruments.

---

[11] Act 52 of 1998.
[12] Act 18 of 2017 ('Insurance Act of 2017').
[13] 'The 'Constitution'.
[14] Section 156 of the Insolvency Act of 1936 ('Insolvency Act') provides for a statutory exception which applies in the event of sequestration of the insured defendant under liability insurance. See para 3.2.3.2 below.
[15] On the sources of South African insurance law generally, see Reinecke, van Niekerk & Nienaber *South African Insurance Law* ch 2; and Schulze *Insurance Premium* para 8.1.
[16] Liability insurance was in general neither possible nor recognised in Roman-Dutch law. See Van Niekerk *Insurance in the Netherlands* 408-409 and para 2.3 above.
[17] [1985] 1 All SA 324 (A).
[18] See, eg, *Lake v Reinsurance Corporation Ltd* 1967 (3) SA 124 (W) 127, where the court ventured a definition of an insurance contract. However, it is has been criticised for being incomplete. See Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 5.14.
[19] See paras 2.2 and 2.2.1 above.
[20] Other insurance legislation addresses regulatory aspects in particular. See the Financial Advisory and Intermediary Services Act 37 of 2002 ('FAIS Act') and the Financial Sector Regulation Act 9 of 2017

The SIA defined a 'liability policy'[21] as:

> [A] contract in terms of which a person, in return for a premium, undertakes to provide policy benefits if an event, contemplated in the contract as a risk relating to a liability, otherwise than as part of a policy relating to a risk more specifically contemplated in another policy relating to another definition in this section occurs; and includes a reinsurance policy in respect of such a policy.[22]

The SIA was in force until June 2018 after which some of its provisions (including definitions) were revoked and replaced by the new Insurance Act of 2017. The Insurance Act of 2017 however, only provides for classes and sub-classes of insurance business, but contains no distinct definition of a liability policy. It is therefore submitted that the spirit of the definition of a liability policy under the SIA – parts of which are still in force – remains applicable in that it was not expressly replaced.

The Insurance Act of 2017 distinguishes between life insurance (previously long-term insurance)[23] and non-life insurance (previously short-term insurance), as well as classes and sub-classes of insurance business.[24]

Liability insurance as a form of non-life insurance is included in Schedule 2 table 2 of the Insurance Act of 2017 which provides for the following classes and sub-classes of non-life insurance: directors and officers; employer liability; product

---

('FSRA'). The Conduct of Financial Institutions Bill ('COFI') was published on 11 December 2018 and invited comments by 1 April 2019. This Bill is designed as the next step in the introduction of the 'Twin Peaks system' in South Africa and is set to replace the market conduct provisions of the majority of the financial sector laws. Under a Twin Peaks system two regulators are established. One is responsible for market conduct and consumer protection, while the other is charged with maintaining the stability of the financial system (called prudential regulation). In South Africa, the Financial Sector Conduct Authority ('FSCA') is to oversee market conduct and the Prudential Authority ('PA') will be responsible for prudential regulation. See generally, Hattingh & Millard *FAIS Act Explained* passim; Millard (2018) 21 *Juta's Insurance Law Bulletin* 'FSRA' 1-2; Millard (2018) 21 *Juta's Insurance Law Bulletin* 'COFI Bill' 81-89, and Millard 'Fair Play?' 129-145. This study focuses on the law of liability insurance contracts. Insurance regulatory and supervision regimes fall beyond this ambit, but the thesis makes recommendations on the regulation of selected aspects relevant to liability insurance contract law. See para 1.9 above. Note that the majority of sources referred in this chapter, pre-date new insurance legislation and the PPRs. See, eg, Reinecke, van Niekerk & Nienaber *South African Insurance Law* and Jacobs (2009) 21 *SA Merc LJ* 202-227.

[21] Section 1(1)*(xix)* sv 'liability policy'.

[22] Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 25.27. For purposes of this study, no distinction is made between the terms 'insurance contract' in the sense of the agreement between the parties, and 'insurance policy' as referring to the reduction of the agreement to tangible form. The terms are used interchangeably.

[23] Long-term insurance or life insurance falls beyond the scope of this study and no reference is made to legislation and PPRs dealing with this form of insurance.

[24] These divisions are for administrative purposes. The PPRs still refer to the term short-term insurance, and not to non-life insurance as under the Insurance Act of 2017. Under the statutory definition, a liability policy is a short-term policy providing liability cover only. See Van Niekerk (1999) 2 *Juta's Insurance Law Bulletin* 'Legislation' 116.

liability; professional indemnity; public liability; aviation; engineering; marine; motor; rail; transport; personal; and others.[25] Some of these classes are thus specific forms of liability insurance.

The TCF Principles and their consumer protection measures were included in the PPRs and are now part of these legislative instruments.[26] The PPRs were enacted under section 55 of the SIA, as amended by the Insurance Act of 2017, and are recognised as formal statutory enactments. These PPRs apply to short-term policies[27] where the policyholder is a natural person, or a juristic person whose annual asset value is less than the threshold value as determined by the Minister of the Department of Trade and Industry in terms of section 6(1) of the Consumer Protection Act, 2008.[28]

It must be emphasised that South Africa insurance does not resort under general consumer protection legislation and has been exempted from the general consumer protection provisions in the CPA.[29] At present, therefore, there is no exclusive set of legislative rules that applies specifically to liability insurance as a distinct class of insurance, save for section 156 of the Insolvency Act which provides for a statutory exception in the event of the sequestration of the insured defendant.[30]

3.1.3 Trade Usage and Customary Insurance Law

A trade usage may develop into a rule of law that will be enforced by courts.[31]

---

[25] The Insurance Act of 2017 also introduces a legal framework for microinsurance. See the definition of 'microinsurance business' in s 1 of the Act, read with Schedule 2 tables 1 & 2. Microinsurance is not limited to only one kind of insurance product. The PPRs contain more detailed rules specifically on microinsurance. See rule 2A. See also para 2.2 above on the general nature of liability insurance from an overall jurisdiction-neutral perspective and para 2.2.5 above on the different types of liability policy in general. This study concerns the general aspects of the law of liability insurance to the exclusion of particular types.

[26] See generally Millard (2017) 20 *Juta's Insurance Law Bulletin* 'Infusion with Fairness' 1-19; Millard (2018) 21 *Juta's Insurance Law Bulletin* 'Replacement of the PPRs' 2-5; and Millard (2018) 21 *Juta's Insurance Law Bulletin* 'Legislative reforms' 35-78.

[27] Rule 2 sv 'policy'. Some of the rules apply to a 'claimant' and 'potential policyholder'. See the definitions under rule 2. This study does not distinguish between the terms claimant, policyholder, potential policyholder, or insured and refers to all of these as 'insured' or 'insured defendant'. If the term 'claimant' were to be used, it could be confused with the third-party plaintiff in the context of liability insurance.

[28] Act 68 of 2008 ('CPA'). See generally Jacobs, Stoop & Van Niekerk (2010) 13 *PER* 302-406.

[29] The FSRA provides that the CPA does not apply to any financial sector law (like insurance) regulated by the FSCA. See Nagel et al *Commercial Law* paras 152-153. Cf, Vessio 'Twin Peaks' 113-127 on Twin Peaks and the impact of the CPA on financial products and services.

[30] See para 3.2.3.2 below.

[31] Nagel et al ibid para 2.06. See the distinction between trade usage and custom. On the role of custom in Roman-Dutch law, see Van Niekerk *Insurance in the Netherlands* 245-268. Both trade usage and

This appears to be the case with some issues relating to insurance practice that are not covered by legislative instruments such as the specific Acts, regulations, PPRs and other codes of conduct. The relevance of trade usage or implied agreement to, for example, the passing of risk between contracting parties has been recognised in case law.[32] The importance of trade usage as a source of insurance law has decreased considerably.

Customary insurance law is a constitutionally recognised source of law and applies parallel to the common law as source of law, although not always equally important.[33] There is considerable scope for further research in this area.

Customary law, for example, regards 'stokvels' as informal risk-spreading mechanisms. The well-known local 'stokvel' can be described as a form of a savings club, where members contribute on a regular basis and are then allowed to draw money from the communal pool in accordance with a pre-determined roster.[34] One of the benefits of a stokvel is that members have access to this savings pool in case of adverse events. In the context of liability (insurance), it may be argued that such savings may be used if a third-party claims an indemnity from an 'insured' or wrongdoer based on the latter's legal liability towards it. A stokvel is not *per se* insurance or liability insurance, but it serves the same function as insurance. It also provides access to savings similar to having those savings in a banking account.[35]

3.1.4 The General Law of Contract, Insurance Law and the Law of Liability Insurance

The liability insurance contract is first and foremost a contract. It follows, therefore, that liability insurance contracts as insurance contracts are subject to the general law of contract.[36] Although they are further subject to certain

---

custom are less important in modern insurance law due to the proliferation of legislation. But see Hutchison (2017) 17 *SA Merc LJ* 17-42.

[32] See, eg, *Barloworld Capital (Pty) Ltd t/a Barloworld Equipment Finance v Napier* 2005 (1) SA 57 (W).

[33] Hutchison (2017) 17 *SA Merc LJ* 17-20.

[34] Ibid 23 and 26. See also Schulze *Insurance Premium* para 9.1 on stokvels as informal financial structures as part of research on the legal aspects of an insurance premium.

[35] Further detail falls beyond the scope of this thesis on general liability insurance (contract) law.

[36] See generally Bradfield *Christie's Law of Contract* as to the law of contract. On the validity requirements of contracts in general, see Reinecke, van Niekerk & Nienaber *South African Insurance Law* ch 7.

specific legal rules applicable to general insurance[37] and more specifically to liability insurance.[38]

3.1.5 The Constitution of the Republic of South Africa, 1996

The Constitution is the supreme law, with indirect horizontal application to civil obligations created by contract.[39] It contains no provision specifically applicable to insurance, but its values enjoy application via other legislative instruments – eg, the Promotion of Equality and Prevention of Unfairness Act of 2000[40] which gives effect to the right to equality as enshrined in section 9 of the Constitution. In accordance with the Constitution, the Equality Act prohibits unfair discrimination.[41] In particular, the Equality Act provides a list of illustrative unfair practices in the insurance industry.[42] Many of these practices arise during risk profiling, premium calculation, and to determine the extent and limits of insurance cover provided. It depends on the circumstances of each case whether or not these practices involve unfair discrimination and so contravene the Equality Act, or whether they are merely differentiation that is permitted.

Summative critical comment

First, the primary sources of South African liability insurance contract law raise concern. Despite the increasing importance of legislation, the statutory provisions are fragmented and so general as to be insufficiently comprehensive. This means that the common law and judicial decisions remain the principal sources of liability insurance contract law in South Africa. It is regrettable that the new Insurance Act of 2017 did not address some of the main concerns relating to liability insurance contract law.[43] This may be explained by the fact that insurance legislation in South African law

[37] See Reinecke, van Niekerk & Nienaber ibid ch 5 on the essentials of an insurance contract; and para 2.2 above. See also, eg, *Lorcom Thirteen (Pty) Ltd v Zurich Insurance Company South Africa Ltd* [2013] 4 All SA 71 (W) on insurable interest in the context of liability insurance.
[38] See in particular Reinecke, van Niekerk & Nienaber ibid paras 25.24-25.83; and Jacobs (2009) 21 *SA Merc LJ* 202-227 on liability insurance. This is the focus of the study and not general aspects of the law of contract or insurance: see again para 1.9 above.
[39] See Hutchison & Pretorius *Law of Contract* para 1.10 for further detail on the effect of the Constitution on contracts in general.
[40] Act 4 of 2000 ('Equality Act').
[41] Section 6.
[42] Item 5 in the Schedule of the Act refers to three practices in connection with insurance services that are possibly unfair and in need of attention. See Van Niekerk (2000) 3 *Juta's Insurance Law Bulletin* 'Promotion of Equality' 26-37.
[43] See Chapter 3 passim.

generally focuses on prudential, supervision and regulatory matters, and not on aspects of insurance contract law which lie at the heart of this study.[44]

As explained earlier,[45] it is particularly important for the international reader to note that insurance does not fall within South African general consumer protection legislation. The aim of the legislator in excluding insurance from general consumer protection legislation was to allow the insurance industry to introduce and enforce its own consumer protection measures tailored specifically to insurance contracts.[46] Consumer protection measures for the insurance industry are, in the main, introduced via the PPRs of 2018 which focus on the conduct of the insurer, its treatment of the insured, regulation of communications, and the format of policies – eg, the duty to use plain language,[47] transparency, and disclosure.[48] For liability insurance (consumer) contracts, the PPRs have to be applied and enforced as the primary consumer protection instruments. That may be challenging and onerous for insurers. This chapter identifies core areas that may benefit from the application of the PPRs in the context of liability insurance, and further recommends how the PPRs may be expanded and improved to give optimal effect to consumer protection and the introduction of fairness in that sphere.[49]

From the sources surveyed, the application of the constitutional values to liability insurance in South Africa has not reached its full potential. Examples are provided throughout this chapter, for example regarding equality, and access to justice.[50]

---

[44] The final COFI legislation may change this position.

[45] See para 3.1.2 above.

[46] The implementation of mandatory rules is to a large extent dependent on the self-regulation by the insurers. The enforcement of and sanctions fall within the powers of the FSCA, the ombuds, and the courts.

[47] Rule 2 of the PPRs defines 'plain language' as a 'communication that is clear and easy to understand; avoids uncertainty and confusion; and is adequate and appropriate in the circumstances, taking into account the factually established or reasonably assumed level of knowledge of the person or average persons at whom the communication is targeted'.

[48] Note again that the PPRs are recognised as formal legislative instruments.

[49] Clause 33 in the COFI Bill on unfair contract terms may also in future further advance fairness for 'financial retail consumers'. The final COFI legislation is awaited to determine the extent of the provisions and how they will be implemented in the insurance industry. As to the concept of 'fairness' in the regulation of contracts under the CPA, see Stoop *Concept 'Fairness'* passim (but note that the CPA does not apply to insurance contracts). The PPRs incorporate the TCF principles.

[50] See, eg, para 3.2.3.2 below for the third-party plaintiff's exceptional claim against the liability insurer under s 156 of the Insolvency Act, and para 3.3 below for the conduct of the defence and settlement by the liability insurer.

This chapter underlines voids, challenges, and impracticalities in the South African law of liability insurance.[51] These may be addressed by novel and creative application of our national law not yet pursued by the legislator or courts, and by implementing potential solutions found in the other jurisdictions under review.

Second, as to foreign law, comparative legal research of the English and Belgian laws governing liability insurance in subsequent chapters, may assist in the development of South African law where solutions for the challenges posed by liability insurance contracts are lacking. They must, however, recognise the differences[52] between our national system and foreign legal systems.[53]

Third, this chapter contains summative critical comments throughout which will be collated only in the summary of the final conclusions and recommendations for the development of the law of liability insurance in South Africa in the final chapter.[54] Conclusions and recommendations are based on the thesis that is developed during the course of this study. As explained earlier, the aim of this study is to promote legal certainty as to the selected aspects which are most challenging in liability insurance practice – the nature and extent of the liability insurer's duty to indemnify its insured, and the conduct of the defence and settlement by the liability insurer of third-party claims against the liability insured.[55]

3.2 THE LIABILITY INSURER'S DUTY TO INDEMNIFY THE INSURED

Liability insurance depends not on only one simple legal obligation between an insurer and an insured as in ordinary property or life insurance. There are at least two distinct legal obligations that underlie third party or liability insurance – the obligation leading to the legal liability for which insurance cover is obtained; and the insurance obligation providing cover for that legal liability – each governed by its own rules of

[51] See in particular the summative critical comments in the course of this chapter, and the summary and concluding remarks in para 3.4 below.
[52] For example, differences in terminology or legal principles, and practicality of implementation as part of the general legal framework that governs the law of liability insurance contracts under South African law.
[53] The chapters on English and Belgian law are Chapters 4 and 5 below. See in particular paras 4.4 and 5.5 for summaries and concluding remarks on the survey conducted on selected aspects of the law of liability insurance under these foreign systems.
[54] See Chapter 6 below for the summary of the final conclusions and recommendations reached.
[55] See para 1.5 above for the research statement and objective, and para 1.9 above for limitations and delineation of the study.

law. Furthermore, third-party rights under liability insurance, and even a direct right to claim against the liability insurer, has become increasingly important.[56]

The eventual enforcement of the insurance obligation depends, first, on the existence of the preceding liability obligation which is dealt with in detail below.[57] Liability claims that are insurable can arise, *inter alia*, from delict, contract, unjustified enrichment, administration, and statute. Simply put, where the insured defendant is legally liable towards the third-party plaintiff, this liability may be the risk for which liability insurance cover was procured by the insured defendant.

The nature and content of the legal obligation between the third-party plaintiff and the insured defendant depends on the establishment of liability in law, whether delictual or otherwise. The obligation between the insured and the liability insurer depends strictly on the agreement between the parties as shaped by other mandatory legal principles.

As the insured is generally ignorant of how the law establishes civil liability, and also how the contractual liability insurance obligation functions, it is of the utmost importance that the insurer complies with its duties of disclosure in both respects. This means that in compliance with its transparency duties, the insurer must disclose all relevant information of both relationships to the insured. This includes, on the one hand, information as to the insured defendant's potential liabilities towards third-party plaintiffs that the policy covers, and the conduct expected of the insured defendant as soon as potential liability and a potential insurance claim becomes apparent. This means that more extensive information must be provided as to what a 'legal liability' that is covered may entail.[58] On the other hand, the insurer must also provide information on the nature of the cover it provides under the policy, the triggers of claims,[59] the exclusions,[60] and all other aspects that might impact on the insured's right to be indemnified by its insurer.[61]

---

[56] See para 3.2.3.2 below on the legal relationship between the liability insurer and the third-party plaintiff.

[57] This aspect is therefore discussed in para 3.2.2.1 below as part of the wider analysis of the legal relationship between the liability insurer and the insured defendant.

[58] For a detailed discussion of 'legal liability' and its role in liability insurance, see para 3.2.2.1 below.

[59] For a detailed discussion see para 3.2.2.2(a) below on the insured event, and for the duration of liability cover, see para 3.2.2.2(b) below.

[60] See para 3.2.2.3 for further detail on exceptions to, exclusions from, and limitations on liability cover.

[61] See this para 3.2 here passim on the liability insurer's duty to indemnify its insured. See also para 3.3 below on the conduct of the defence and settlement by the liability insurer.

The common-law requirement of making proper pre-contractual disclosures in principle requires the disclosure of material information (in general) that could affect the agreement between the parties.[62] This makes the duty of disclosure very broad and leads to uncertainty on the part of the insurer, as to exactly what it must disclose, and uncertainty on the insured's side as to what it is entitled to ask for. The latter does not have sufficient knowledge to request specific information or an explanation from the insurer of the more intricate facts relating to the nature of the cover provided, unless a more specific list of facts is available. It is one of the aims of this study to highlight those specified aspects which the insurer must disclose, the identification of which will assist both the insurer and the prospective insured.

A brief discussion of an insurer's statutory disclosure duties under the PPRs follows,[63] after which the aspects that should in view of this study require mandatory disclosure are identified and analysed.[64]

Rule 11.4 of the PPRs provides for disclosure by the insurer before the policy is entered into and requires that an insurer should provide the insured with prescribed information, including 'the type of policy and a reasonable and appropriate general explanation of the relevant policy'.[65] Rule 11.4.2 also requires an insurer to disclose 'the nature and extent of policy benefits, including, where applicable, when the insurance cover begins and ends and a description of the risk insured by the policy'.[66] This information only addresses broad aspects as it is intended to cover most forms of

---

[62] As explained in the context of insurance law by Millard & Kuschke (2014) 17 *PER* 2412-2418. For purposes of this thesis it is important to note that the common-law duty is general and contains no specific aspects that qualify as 'material' with regard to liability insurance disclosures.

[63] Insurers operate by way of representatives or insurance intermediaries. The PPRs clearly provide that an insurer remains responsible to comply with the requirements set out in the rules, irrespective of whether it outsourced a function to another person; or relied on a representative to facilitate compliance. See rule 1.3 of the PPRs. This responsibility by the insurer is confirmed in rule 11.3.6 in the context of disclosure. Further detail on agency and insurance intermediaries falls beyond the ambit of this thesis. See para 1.9 above on limitations and delineation of the study.

[64] Disclosure duties are discussed as they arise in the course of this chapter as they are relevant to different aspects of liability insurance contracts. The rules on disclosure may be accessed in the PPRs and are not restated in every scenario: more important is the examples of when disclosure by the insurer is required, as applied to liability insurance contracts, which are highlighted in this chapter.

The General Code of Conduct for Authorised Financial Service Providers and Representatives ('GCC') under the FAIS Act, BN 80 of 2003, as amended, also prescribes mandatory disclosure by financial services providers, like insurers, and their representatives. See in particular rules 3 and 7 of the GCC. The thesis does not analyse these rules of general application in further detail. However, specific aspects regarding liability insurance should be described as mandatory disclosures in the GCC rules, in the same way that the PPRs should be expanded and applied to liability insurance contracts. See Hattingh & Millard *FAIS Act Explained* 10 and 37-38 on the GCC.

[65] Rule 11.4.2*(b)*.

[66] Rule 11.4.2*(c)*.

insurance. Not all important aspects of liability insurance are specifically described which results in legal uncertainty, ignorance, and disputes between the parties.

It remains a challenge to explain liability insurance contracts and their intricacies to potential insureds. The average person (insured) does not easily comprehend the intricacies of civil liability regimes, or their effect on the insurance relationship where liability insurance cover comes into play. The extent of the general duty of disclosure for purposes of transparency is not delineated comprehensively enough in existing legislative instruments on specific terms that apply to exclusively liability insurance.

It is one of the general disclosure requirements under Rule 11.3 that any communication by an insurer to an insured, or potential insured,[67] must be 'in plain language'[68] and 'not misleading'.[69] This duty on the insurer is in line with the common-law requirement that a party to a contract, or to a prospective contract, may not make a material misrepresentation to the other party as this will affect the consensus between the parties. At issue here is not the insured's pre-contractual duty of disclosure of information that may likely have materially affected the assessment of the risk under the policy at the time of its issue, renewal, or variation.[70] Yet both the insurer's statutory and common-law duties lack specificity on exactly what must be disclosed, to the extent that in practice very little is disclosed about the underlying legal aspects relating to liability insurance of which insureds are generally ignorant. In the discussion below, any reference to disclosure is a reference to the duty to disclose which rests on the insurer under the PPRs, unless indicated to the contrary.[71]

A further general legislative requirement is that communication should take place 'by using an appropriate medium, taking into account the complexity of the information being provided'.[72] Rule 11.3.4 broadly prescribes that 'information provided must enable [the insured] to understand the features of the policy and help [the insured] understand whether it meets [the insured's] requirements'.

To determine 'the level of information to be disclosed, the insurer must consider'[73] a number of factors, including the 'factually established or reasonably

[67] Rule 11 also applies to potential insured – see rule 11.2.
[68] Rule 11.3.1*(a)*.
[69] Rule 11.3.1*(b)*.
[70] See para 3.2.2.4 below for further detail on the insured's pre-contractual duty of disclosure of material facts.
[71] See Chapter 3 passim.
[72] Rule 11.3.1*(c)*. See also rules 11.3.1*(d)*-11.3.1*(e)* as to the format of the communication required, eg, 'clear and readable print size', as well as rules on how monetary amounts should be stated.
[73] Ibid.

assumed knowledge and experience of the [insured] or average targeted [insured] at whom the communication is targeted';[74] 'the policy terms and conditions, including its main benefits, exclusions, limitations, conditions and its duration';[75] and 'the policy's overall complexity, including whether it is entered into together with other goods or services'.[76] Rule 11.3.5 is especially relevant as it provides that

> [a]n insurer must take particular care to provide adequate information in respect of more complex or bundled features which are likely to be difficult for [an insured] to understand, particularly regarding the costs and risks involved,[77] including defining or explaining terms that could not reasonably be expected to be understood.[78]

This requires the insurer to provide extensive explanations to the insured on both relationships in the liability insurance structure as discussed earlier in this section.

The complex nature and structure of liability insurance has been highlighted and will be further developed in the course of this chapter. The liability insurer therefore has an onerous obligation in regard to its duty of disclosure to the liability insured. The PPRs apply to all forms of insurance contracts, and although they may appear to be detailed, there are scope for further expansion and application to liability insurance in particular. A (partial) solution in meeting the requirements of fairness set by the PPRs, would be to provide for specialised and more detailed PPRs applicable exclusively to liability insurance contracts, and further to provide the insurance consumer with detailed explanatory notes, tables, and examples in plain language.[79]

---

[74] Rule 11.3.4*(a)*.
[75] Rule 11.3.4*(b)*. As to the duration of liability insurance contracts, see para 3.2.2.2 below. As to limitations on, exceptions to, and exclusions from liability cover, see para 3.2.2.3 below.
[76] Rule 11.3.4*(c)*. Liability cover may be stand-alone or part of a comprehensive policy. See para 2.2.5 above on the different types of liability insurance.
[77] See, eg, para 3.2.1.1 on the loss covered under liability insurance.
[78] For example, 'legal liability' to third parties (para 3.2.2.1 below); 'occurrence-based' or 'claims-made' policies (para 3.2.2.2 below); and 'subrogation' in the context of liability insurance (para 3.2.4 below).
[79] See examples of these recommendations in the critical summative comments throughout this chapter, in the summary and concluding remarks in para 3.4 below, and in the final conclusions and recommendations in Chapter 6 below.

3.2.1 The Legal Relationship between the Third-Party Plaintiff and the Insured Defendant[80]

As liability insurance is classified as third-party insurance,[81] the insured's legal liability (both in fact and in scope) to the third party in principle determines the subsequent liability of the liability insurer to the insured.[82]

An insured's liability to the third-party plaintiff is in principle independent of any insurance; it is incurred irrespective of whether the defendant is insured or its liability to the third party covered.[83] Even though the defendant may not have insurance at all, or may not be covered under its liability insurance contract against the risk of loss for liability it incurred towards the third party, the defendant may still be liable towards the third party for the latter's loss. For example: where the liability insurer is only liable to pay part of the third party's damage and only pays that part of the damages claimed by the third party from the insured because of, for instance, under-insurance, the insured is not relieved of its liability towards the third party for the balance of the third-party claim.[84] Or, for example, where a defendant has intentionally caused loss to the third party, it may not be covered under its liability insurance (which as a rule covers only the consequence of innocent or negligent

[80] Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 25.25; Davis *Gordon & Getz* 482; and Van Niekerk (2006) 9 *Juta's Insurance Law Bulletin 'Truck and General Insurance'* 202.

[81] See para 2.2.2.2 above for further detail on liability insurance as third-party insurance. Liability insurance as third-party insurance is one of the general characteristics of liability insurance as viewed overall. The feature is the same under all of the legal systems reviewed. See also paras 4.2.1 and 5.2.1 below. On the distinction between liability (third-party) insurance and first-party insurance, see *Spar Group v Webber* Unreported, FB, 27 Jan 2011, case no 4193/2010, as discussed by Van Niekerk (2011) 14 *Juta's Insurance Law Bulletin 'Spar Group'* 84-86. See also *Russell NO and Loveday NO v Collins Submarine Pipelines Africa (Pty) Ltd* [1975] 1 All SA 344 (A); 1975 (1) SA 110 (A) on a claim that falls within the realm of liability insurance, as opposed to property insurance, and the meaning of 'damages'.

[82] See para 3.2.2.1 below for further analysis of the concept 'legal liability'. For further detail on the legal relationship between the third-party plaintiff and the insured defendant in the context of the conduct of the defence and settlement of claims by the third-party plaintiff against the insured defendant, see generally para 3.3 below. Liability policies, eg, usually contain a clause prohibiting the insured from settling any claim by a third party, or from making any admission of liability without the insurer's written consent. See para 3.3.1.2 below. There are differences in the legal obligations and relationships between the liability insurer, the insured defendant, and the third-party plaintiff under our law and the foreign systems considered. See Chapters 4 and 5 below.

[83] See generally, Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 25.34-25.40 on the quantification of the insured's loss with reference to the quantification of the liability it incurred. See also para 3.2.2.1 below on the scope of the insured defendant's liability covered.

[84] See *Masunga v Mutema & Another* 2007 JDR 1029 (ZH) and the discussion of this case by Van Niekerk (2008) 11 *Juta's Insurance Law Bulletin 'Masunga'* 17-19. Also see the relevance of the *Masunga* decision in para 3.3.1.1(b) below in the context of the defence by the liability insurer of third-party claims.

conduct), but may still be held legally liable towards the third party for the latter's loss.[85]

However, some commentators have recognised the potential influence of the existence of liability insurance cover on the imposition of civil liability on the insured defendant.[86] A defendant may settle a claim by acknowledging liability towards the third party irrespective of merit, on the assumption that the loss will be covered by the defendant's liability insurance policy.[87] The existence of liability cover may also cause a defendant to reduce the degree of care exercised and encourage negligent conduct based simply on the assumption that negative consequences will always be covered by its liability insurance.[88]

Summative critical comment

It has been explained earlier,[89] and is highlighted during the course of this study, that the multiple legal relationships involved in liability insurance add to its confusing and complex nature and structure, both in regard to the duty to indemnify, and in conducting the defence and settlement by the liability insurer. That liability insurance is third-party insurance, is central in this regard.

Conclusions and recommendations during the course of this chapter follow on how to simplify and clarify the legal obligations and relationships between the three main players in liability insurance – the liability insurer, the insured defendant, and the third-party plaintiff.[90] Proposals for reform address both liability insurance practice in general, and communications by the insurer to the insured.

---

[85] See para 3.2.2.3(b)(ii) below on the conduct of the insured.

[86] Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 25.24. See also Van Niekerk (2006) 18 *SA Merc LJ* 383.

[87] See para 3.3.1.2 below on the settlement of claims and on clauses that prohibit an insured to admit liability to the third party without the insurer's prior written consent. See also para 3.3.1.1(c) below on conflict of interest and the conduct of the defence.

[88] See para 1.4 above on 'moral hazard' from an economic perspective, and para 2.3 above on 'moral hazard' and liability insurance from an historical Anglo-American perspective.

[89] See para 1.6 above on the significance of the study and the knowledge gap.

[90] This paragraph deals with the legal relationship between the third-party plaintiff and the insured defendant in the context of the liability insurer's duty to indemnify the insured. See also para 3.3.1 below on the legal relationship between the third-party plaintiff and the insured defendant in the context of the liability insurer's defence and settlement. See further paras 3.2.2 and 3.3.1 below on the legal relationship between the liability insured and the insured defendant; and paras 3.2.3 and 3.3.2 below on the legal relationship between the liability insurer and the third-party plaintiff. On other legal relationships in the context of liability insurance, see paras 3.2.4 and 3.3.3 below.

3.2.2 The Legal Relationship between the Liability Insurer and the Insured Defendant

3.2.2.1 The Scope of the Insured Defendant's Liability Cover

As we have seen,[91] liability insurance covers only legal liability on the part of the insured defendant towards third parties.[92] The fact that the third party suffers a loss or damage is not sufficient; the insured must be liable in law to the third party for that loss or damage. The third party must be entitled to recover compensation for it from the insured before the latter's liability insurer will incur any liability in terms of the liability policy.

As liability insurance is indemnity insurance, the insured does not have a right to be indemnified, and the insurer is not obliged to indemnify the insured until the insured has suffered a 'loss'. For purposes of liability insurance, a 'loss' is suffered when the insured becomes 'legally liable' towards a third party for causing the latter's loss.[93] This was confirmed by the Supreme Court of Appeal in *Truck and General Insurance Co Ltd v Verulam Fuel Distributors CC & Another.*[94]

The terms of the insurance contract primarily determine and describe what the loss to the insured entails, that is, its legal liability towards a third party for the latter's loss, which may then trigger the liability of the insurer towards the insured under the liability insurance policy.[95] The 'loss' that is covered is thus the liability incurred towards a third party.

---

[91] See para 2.2.2.1 above on the classification of liability insurance as indemnity insurance. Liability insurance as indemnity insurance is one of the general characteristics of liability insurance as viewed from an overall perspective: the feature is the same under the South African and the foreign systems reviewed. See also paras 4.2.2 and 5.2.2 below. On the interpretation, and constitutionality of a clause that indemnifies a party against the liability it incurs similar to the effect of liability insurance, see *Mercedez-Benz South Africa (Pty) Ltd v Buffalo City Municipality* 2012 JDR 1770 (ECG) and the discussion of this case by Van Niekerk (2013) 16 *Juta's Insurance Law Bulletin* 5-9. The clause in question was held not to be an indemnity clause, but an exemption clause excluding the party's liability.

[92] Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 25.27, 25.29 and 25.50. The aim of liability insurance is to protect an insured against (legal) liability towards third-party claims. See *Watson NO & Another v Shaw & Others* 2008 (1) SA 350 (C) and the discussion of this case by Van Niekerk (2008) 11 *Juta's Insurance Law Bulletin 'Watson'* 4-14.

[93] This is not the only requirement for a successful claim under a liability insurance contract. See para 3.2.2.2 below on the insured event and the duration of liability. See also para 2.2.2.1 above.

[94] 2007 (2) SA 26 (SCA) para 10. Also see the case discussion by Van Niekerk (2006) 9 *Juta's Insurance Law Bulletin 'Truck and General Insurance'* 194-203.

[95] See paras 3.2.2.1(b)-3.2.2.1(c) below for further detail on the time when and ways in which the insured becomes legally liable towards third-party plaintiffs. The *Truck and General Insurance v Verulam Fuel Distributors* case is again relevant in this regard. Also see para 3.2.2.1(a) below for further detail on the scope of legal liability of the insured towards the third party covered under liability insurance.

The meaning of the phrase 'legal liability', also referred to as 'liability at law' or 'liability to pay', is one of the contentious issues concerning liability insurance internationally and in South African law and warrants detailed analysis.[96]

3.2.2.1(a) The Extent of the Liabilities Covered

The insured may be indemnified against amounts that it may be liable to pay to third parties in delict,[97] for contractual performance, for a breach of contract, or statutorily.[98] Indemnity against certain forms of liability cover may be excluded expressly or implicitly in the policy itself.

The term 'contractual liability' is often used in judicial decisions, insurance contracts, and by commentators without further explanation as to what it entails. It is a matter of interpretation in every instance whether a reference to contractual liability is to liability for damages imposed by law for breach of a contract, and if it also refers to liability imposed by agreement in the contract – ie, contractual liability for performance of a contract voluntarily assumed by the insured.[99] The duty not to breach a binding agreement or contract, which forms the basis for the remedy for breach of contract, is a contractual obligation that is legally imposed. Liability imposed by the contract for performance of a contract refers to liability that the insured defendant has incurred directly, or merely by reason of a contract voluntarily concluded between itself and the plaintiff, and not by breach.

The different bases of liability may be briefly distinguished. The requirements for delictual liability are conduct (by commission or omission), wrongfulness, fault,[100] causation, and damages (both patrimonial and non-patrimonial),[101] whereas the requirements for breach of contract are that a contract must exist, performance must

---

[96] See para 3.2.2.1(a) below for further detail. However, English law is far more complex but also rich in judicial precedent in this regard and in relation to the scope of the insured's liability covered in general. See para 4.2.2.1 below. In contrast to the position under both South African and English law, the position under Belgian legislation is more concise and clear, in particular as regards to the time and the ways in which the insured defendant may become legally liable towards the third-party plaintiff. See para 5.2.2.1 below, with the focus on paras 5.2.2.1(b) and 5.2.2.1(c) below.

[97] The term 'delict' is used in the South African chapter and context, whereas the equivalent term 'tort' is used in respect of the foreign systems reviewed.

[98] Or otherwise, eg, by way of unjustified enrichment.

[99] On occasion also referred to as 'liability by agreement'. An example is where performance to a third party is covered. See the public liability section in Multimark III which is a generic policy wording adopted widely by industry, but many variations and other wordings exist.

[100] Delictual liability without fault is also possible in some instances. See Neethling & Potgieter *Law of Delict* 379-399.

[101] Ibid 6-7 and chs 2-7 in general. See also Bradfield *Christie's Law of Contract* 587-589, and chs 13-14 in general for further detail.

be due, breach of contract must occur, and damages (patrimonial) must be suffered. [102] In the instance of contractual liability for performance of a contract voluntarily assumed, there is a contract and performance is due for which the insurance covers the delivery of satisfactory contractual performance, not for the damages due to breach. Despite a number of distinctions, there is nevertheless a substantial overlap between delictual and contractual liability and there may even be instances of concurrent liability, provided that the requirements for each of the separate obligations are met.[103]

Statutory liability refers to liability incurred under statute (legislation). There may, therefore, also be an overlap between statutory and delictual liability.[104]

The meaning of the term 'legal liability', the different bases of liability, and the questions that arise due to the distinctions and overlap between theses bases, may now be discussed briefly. From the sources consulted, there is very little judicial authority and commentary on this issue in South African law.[105]

The liability insured against and that is covered as a risk must be described in the insurance contract.[106] It is a matter of interpretation in every instance to determine which type of 'legal liability' is covered.

The relevant part of the insuring clause of the public liability section of an insurance contract for business risks for this part of the discussion, typically provides cover for '[d]amages which the insured shall become legally liable to pay consequent

---

[102] See *Russell NO and Loveday NO v Collins Submarine Pipelines Africa (Ptd) Ltd* above on a claim that falls within the realm of liability insurance, as opposed to property insurance, and the meaning of damages.

[103] Concurrent liability refers to the situation where delictual and contractual liability may both arise on the same set of facts, and where the third-party plaintiff may have a choice between these two alternate causes of action.

[104] See Neethling & Potgieter *Law of Delict* 398, 399-402. The distinction between a statutory debt and a liability for damages is not recognised under South African law. See para 4.2.2.1(a)(iv) below for the contrary position under English law.

[105] However, English law is far more complex but rich in judicial precedent in this regard and in relation to the scope of the insured's liability covered in general. See para 4.2.2.1 below. As to the extent of 'legal liability' of an insured defendant that is covered as regards third-party plaintiffs under English law, see in particular para 4.2.2.1(a)(i) below on whether 'legal liability' covers liability in tort to the exclusion of contractual liability; para 4.2.2.1(a)(ii) below on 'legal liability' for contractual liability; para 4.2.2.1(a)(iii) below on 'legal liability', liability voluntarily assumed, and settlements; and para 4.2.2.1(a)(iv) below on 'legal liability' under statute.

In contrast to the position under English law, the position under Belgian legislation is prescribed more concisely and clearly, in particular as regards to the time and the ways in which the insured defendant may become legally liable to the third-party plaintiff. See para 5.2.2.1 below, and in particular, paras 5.2.2.1(b) and 5.2.2.1(c). There does not appear to be the same number of judicial decisions, legal doctrine, or legal uncertainty under Belgian law as to the scope of the insured's liability covered as in South African or English law.

[106] *Liberty Group Limited v Jordaan* [2016] JOL 35513 (FB). See also *Hirsch Appliance Specialists v Shield Security Natal (Pty) Ltd* [1992] 1 All SA 84 (D) on the insurability of vicarious losses.

upon accidental death of or bodily injury to or illness of any person, or accidental loss of or physical damage to tangible property which occurred in the course of or in connection with the business'.[107]

It is submitted that phrase 'legal liability' in the insuring clause in the example above is wide enough to include delictual liability, contractual liability[108] (at least in the sense of liability imposed by law for damages for breach of contract),[109] and statutory liability,[110] except if expressly excluded.[111]

As a rule, liability insurance contracts expressly exclude contractual liability for performance of a contract voluntarily assumed by providing, for example, that 'the insurer will not indemnify the insured for liability accepted by agreement which would not have attached in the absence of the agreement'. The reason for the exclusion of this type of contractual liability is that proper performance under the contract is seen to be in the hands of the insured, and there may be an absence of fortuity to hold to the contrary (eg, if an insured intentionally renders performance of

[107] For example, see the public liability section in the *pro forma* Multimark III policy used in industry. Many different policy wordings exist.

[108] In the instance of contractual liability for performance of a contract voluntarily assumed, the remedy claimed is delivery of satisfactory contractual performance, not damages due to breach. The insuring clause in this example refers to 'damages'. However, it is conceivable that contractual liability for performance of a contract voluntarily assumed may be covered under a different type of insuring clause, or by way of an extension clause.

[109] See *David Trust & Others v Aegis Insurance Co Ltd & Another* 2000 (3) SA 289 (SCA) on the scope of cover under a professional indemnity insurance contract. Liability insurance cover was provided against claims made on the insured for breach of contract that amounted to breach of duty in the practice of its profession by the insured. The nature of the insured's contractual relationship with the third party, and whether the services that the insured rendered were in the conduct of its profession as accountants was the issue. See also the case discussion by Van Niekerk (2000) 3 *Juta's Insurance Law Bulletin 'David Trust'* 57-63. See also the *David Trust* case on the discussion of claims-made policies in para 3.2.2.2(b)(ii) below.

[110] *Verulam Fuel Distributors CC v Truck and General Insurance Co Ltd* 2005 (1) SA 70 (W). As to the scope of liability cope of cover, a liability insurer indemnified an insured in respect of liability to the third-party plaintiff. The insurance contract provided cover against 'all sums including the claimant's costs and expenses which the insured ... shall become legally liable to pay in respect of ... damage to property other than property belonging to the insured'. Upon interpretation of the insurance contract, the court held that there was as no restriction as to the type of cost, expense, or liability covered, and that the insurer's liability could not be restricted to instances where the insured's liability was based on negligence or where the third-party plaintiff had sought to hold it liable: see para 13. The contract did not exclude the instance where the insured's liability arose from statute without any claim from the third-party plaintiff. See also the case discussion by Van Niekerk (2004) 7 *Juta's Insurance Law Bulletin 'Verulam'* at 197-204.

[111] See also *Verulam Fuel Distributors v Truck and General Insurance* above paras 9-10 for an interpretation of 'liability at law' with reference to leading English cases; and the case discussion by Van Niekerk ibid. The decision by the court *a quo* was confirmed by the SCA in *Truck and General Insurance v Verulam Fuel Distributors* above. See para 3.2.2.1 above. Legal liability due to other forms of liability, such as undue enrichment may even be covered, unless expressly excluded. See also Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 25.25.

the contract impossible).[112] Liability insurance is not primarily intended to indemnify an insured against contractual liability for performance assumed by the latter. Cover for contractual liability under a general liability policy is, thus, the exception rather than the rule.

Further, liability insurance does not cover liability accepted voluntarily or *ex gratia* the insured – eg, payments made on the basis of a moral obligation or to preserve the insured's reputation or maintain a good business relationship with a third party.[113]

Summative critical comment[114]

As to the extent of the insured defendant's legal liabilities towards a third-party plaintiff covered under a liability insurance contract, there is far less judicial authority on the issue than in English law.[115] South African law may find guidance in how English courts have dealt with the interpretation of the term 'legal liability' to inform and develop our national liability insurance law. That was also the approach taken by the court *a quo* in *Verulam Fuel Distributors v Truck and General Insurance* above.[116] The position in English law on this point is discussed in the chapter that follows.

As a general rule one may accept the following: where the insurance contract contains no limitation as to the type of liability for which the insurer will be liable to the insured, the insured will be indemnified against amounts that the insured may delictually, contractually (for breach of contract in particular), statutorily, or otherwise (eg, by way of unjustified enrichment) be liable to pay to third parties. Contractual liability for performance of a contract voluntarily assumed is generally expressly excluded from liability cover. However, it depends on the interpretation of the insurance contract in every instance how wide the liability under the cover provided is. This depends on agreement between the insured and the insurer, and the

[112] See para 3.2.2.3(b)(ii) below on the conduct of the insured for further detail on limitations on, exclusions to and exceptions from liability cover.
[113] See again the case discussion by Van Niekerk (2004) 7 *Juta's Insurance Law Bulletin 'Verulam'* 202-204 for more comments and examples as regards liability incurred extra-legally or voluntarily.
[114] Regarding para 3.2.2.1(a).
[115] See para 4.2.2.1(a) below on English law, including paras 4.2.2.1(a)(i)-4.2.2.1(a)(iv) below.
[116] The decision was confirmed by the SCA in *Truck and General Insurance v Verulam Fuel Distributors* above. See para 3.2.2.1 above.

type of product procured. In each event a risk assessment will also impact on the liability the insurer is willing and able to assume.

As explained earlier,[117] rule 11.3 of the PPRs provides for general disclosure requirements by the insurer and rule 11.4.2 regulates disclosure by an insurer before the policy is entered into. Rule 11.4.2*(b)* requires that the insurer must provide the insured with prescribed information, including 'the type of policy and a reasonable and appropriate general explanation of the relevant policy'. Rule 11.4.2*(c)*, provides that the insurer must disclose to the insured 'the nature and extent of policy benefits, including, where applicable, when the insurance cover begins and ends, and a description of the risk insured by the policy'.

To clarify the extent of the insured defendant's legal liabilities towards the third-party plaintiff covered under the liability insurance contract, it is recommended that the insurance contract should provide, in clear terms, what type of legal liability is covered, and what excluded. Public liability policies,[118] for example, provide cover for 'damages that the insured will become legally liable to pay consequent to accidental death, bodily injury or illness to the third party, or accidental loss of or physical damage to tangible property which occurred in the course of or in connection with the business'.[119] It is recommended that the insuring clause should rather specify the legal liability covered clearly on the inception of the policy – eg, that the policy covers legal liability incurred towards third parties against the consequences of the insured's delict, breach of contract, and statutory liability. This should also be disclosed to the insured as required under the PPRs.

Under rule 11.3.4 of the PPRs the policy's provisions, including its 'main benefits, exclusions, limitations, conditions and its duration,' as well as the 'policy's overall complexity,' determine the level of information that the insurer must disclose to the insured. The complex nature and structure of liability insurance, that places an onerous duty of disclosure on the liability insurer, has already been highlighted. 'Legal liability' is one of the complicated features of liability insurance.

---

[117] See para 3.2 above.

[118] See again, as an example, the public policy section in the *pro forma* Multimark III policy used in industry. But many variations exist.

[119] Liability assumed under agreement that would not have attached in the absence of the agreement is then specifically excepted from the risk under specific exceptions, but cover may be extended to some instances of liability assumed by agreement that does not fall within the exceptions by way of specific extension. This is complex and potentially confusing for an insured.

Rule 11.4.2*(g)* also requires disclosure by the insurer of 'concise details of any significant exclusions or limitations[120] as contemplated in rule 10.15'.[121] Rule 11.5 deals with disclosure by the insurer after the inception of the policy.[122] The rule provides that the insurer should disclose to the insured at the 'earliest reasonable opportunity' after the inception of the policy, but within 31 days, written information in a format that is clearly distinguishable from the policy. This should include comprehensive details of all exclusions and limitations, including prominent disclosure of any significant exclusions or limitations as contemplated in rule 10.15. Contractual liability for performance of a contract voluntarily assumed, which is generally expressly excluded from liability cover, should be disclosed to the liability insured as required by the PPRs.[123]

3.2.2.1(b) The Time at Which the Insured Defendant Becomes 'Legally Liable' to Third-Party Plaintiffs[124]

As mentioned there are at least three main possibilities as to exactly when an insured may become 'legally liable' towards a third party:

- when the insured has actually compensated the third party;[125]
- when the third party has acquired a *prima facie* cause of action against the insured;[126]
- when the insured's liability against the third party has actually been established by a court judgment, an arbitral award, or by agreement.[127]

Each of these three possibilities in time is discussed in greater detail below. It remains a possibility that the insurer and insured could by agreement determine even more onerous requirements, such as meeting additional requirements, as set by the insurer.

---

[120] Rule 11.1 on the definitions for rule 11 on disclosure defines 'significant exclusion or limitation' as 'an exclusion or limitation in a policy that may affect the decision of the average targeted policyholder [insured] to enter into the policy and includes … any limit on the amount or amounts of cover; any limit on the period for which the benefits will be paid…'. The definition uses the word 'includes' and the instances mentioned are examples, rather than a closed category.
[121] Rule 10.15 prescribes rules on prominence of certain communications to the insured.
[122] See rule 11.5.1. See also rule 11.4.
[123] The same applies to any exceptions to, exclusions from and limitations on liability cover. See para 3.2.2.3 below.
[124] See Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 25.50-25.56.
[125] See para 3.2.2.1(b)(i) below.
[126] See para 3.2.2.1(b)(ii) below.
[127] See para 3.2.2.1(b)(iii) below.

3.2.2.1(b)(i) Actual Payment

The first option as to when an insured becomes legally liable towards a third-party plaintiff embodies the narrowest view, in that the insured actually has to compensate the third party to trigger its liability cover.[128]

If the liability insurer has, for example, inserted a so-called 'pay-to-be-paid clause' in its insurance contract, the insured is not entitled to be paid by the liability insurer until the insured has first actually paid the compensation due to the third-party plaintiff.[129]

3.2.2.1(b)(ii) Potential Liability

The second option is the widest approach. An insured must provide *prima facie* proof of liability towards the third-party plaintiff, and need not actually have finally established liability in law or have discharged its liability before being able to claim from its liability insurer. In *Truck and General Insurance v Verulam Fuel Distributors*,[130] the Supreme Court of Appeal found that the cause of action can exist even though liability has not yet formally been established or proved.

This appears to be the most common position under our law, unless the insurance policy specifically provides otherwise.[131] Consequently, legal liability arises when the third party has a *prima facie* cause of action against the insured – ie, when all the events have occurred which render the insured liable towards the third party, even though the amount of its liability has not yet been quantified or paid.

This option favours the insured. An insured may, for example, be in a position much earlier to compel the insurer to decide as regards and consent to a

[128] This is generally regarded as the original common-law rule under English law. See para 4.2.2.1(b)(i) below. But the position under English law has since changed. See para 4.2.2.1(b)(iii) below.
[129] See, eg, *Botha v Iveco South Africa (Pty) Ltd* 2012 JDR 0863 (SCA), where the indemnity clause required actual payment of the third party by the person to be indemnified, before any payment could be 'recovered' from the indemnifier. Also see the case discussion by Van Niekerk (2012) 15 *Juta's Insurance Law Bulletin 'Botha'* 106-108.
[130] Above; paras 16-18 of the judgment. See again the case discussion by Van Niekerk (2006) 9 *Juta's Insurance Law Bulletin 'Truck and General Insurance'* 194-203. See also paras 3.2.1 and 3.2.2.1 above for the further relevance of the decision on 'legal liability' and its scope covered under liability insurance.
[131] Van Niekerk ibid 200-202.

defence against or settlement with the third party.[132] Further, an insured's potential liability may trigger insurance cover and the insured may claim payment from the insurer without first having to pay the third-party claimant itself or to take any formal steps towards (formally) establishing liability. It has been emphasised by commentators that the aim of liability insurance is to 'protect the insured from being required to make a payment to a third party or having to borrow money to be able to do so, and not merely to indemnify [the insured] after [it] had already done so'.[133]

3.2.2.1(b)(iii) Established Liability

The third option adopts the golden mean between the former two views.[134] The insurer becomes liable to the insured only when the latter' liability to the third-party plaintiff has been established either by a court, by arbitral award, or by agreement between the insured and the third party. The liability insurance contract may require that liability be established in this way[135]

Summative critical comment

It may be accepted that the default position in South African law is indeed that potential liability suffices. Legal liability therefore arises when the third party has a *prima facie* cause of action against the insured – ie, when all the events have occurred which render the insured liable towards the third party, even though the amount of its liability has not yet been quantified or paid. As explained, this position favours the insured which offers a benefit some other jurisdictions do not.[136] Further, an insured's potential liability may trigger insurance cover, and the insured may claim payment from the insurer without itself first having to pay the third-party claimant or itself taking any formal steps to (formally) establish liability.

[132] See also para 3.3.1 below for further detail on the defence and settlement by the liability insurer.
[133] Reinecke, van Niekerk & Nienaber *South African Insurance Law* in para 25.51. This is therefore regarded as a specific form of indemnity insurance.
[134] This position applies in English law unless the insurance policy specifically provides to the contrary. See para 4.2.2.1(b)(iii) below. This position also applies in Belgian law. See para 5.2.2.1(b) below.
[135] For example, *Burley Appliances Ltd v Grobbelaar NO & Others* [2003] 3 All SA 505 (C).
[136] For example, an insured may much earlier be in a position to compel the insurer to decide as regards and consent to defence against, or settlement with, the third party. See para 3.3.1 below on the defence and settlement by the liability insurer.

However, as seen above, this position may be amended by the terms of the insurance contract which might, for example, stipulate 'pay-to-be-paid' or require established liability.

3.2.2.1(c) The Ways in Which the Insured Defendant Becomes 'Legally Liable' to Third-Party Plaintiffs

The liability policy may determine what 'legally liable' means for purposes of the scope of risk in the policy. The ways in which the insured defendant may establish legal liability to third parties depend on the time at which (ie, how) such a stipulated 'legal liability' is established in accordance with its description in the liability policy.

If an insurance contract requires actual payment of the amount to the third-party plaintiff for purposes of the moment of the existence of 'legal liability', that will be required as a way of establishing an insurance claim covering such a legal liability.

Where the insurance contract merely requires 'potential liability', legal liability arises when the third party has a *prima facie* cause of action against the insured – ie, when all the events have occurred which render the insured liable to the third party.

If the insurance contract requires 'established legal liability', the insurer becomes liable to the insured only when the latters' liability to the third-party plaintiff has been established by way of either by a court, by arbitral award,[137] or by agreement.[138]

Summative critical comment

As explained earlier,[139] the general position under South African law is that potential liability suffices, but it may be difficult for an insured to establish the exact time or the way in which legal liability arises. It is not always clear to the insured when the third party has a *prima facie* cause of action against it – ie, when all the events have occurred which render the insured liable to the third party. As explained earlier,[140] the PPRs require disclosure by the insurer to the insured. It is

[137] See *National Ports Authority, a Division of Transnet (Soc) Ltd v The Owners & Underwriters of the MV "Smart"* 2017 JDR 1240 (KDZ) on arbitration and settlement.
[138] English law again has a rich supply of judicial decisions on how an insured becomes legally liable towards the third-party plaintiff by way of a court judgment, arbitral award, or agreement between the parties. See paras 4.2.2.1(c)(i)-4.2.2.1(c)(iii) below.
[139] See paras 3.2.2.1(b)(ii) and 3.2.2.1(c) above.
[140] See para 3.2.2.1(a) above.

recommended that the insurer disclose and explain to the insured, when exactly a *prima facie* cause of action will exist by way of a number examples to guide the insured as to when and how its legal liability is established for purposes of the scope of the risk in the policy.

If the insurance contract requires actual payment or established liability for the insured defendant to become legally liable to the third-party plaintiff, it may prejudice the insured as explained above.[141] However, these ways mark a more definitive time when and way in which, the insured defendant may become legally liability to the third-party plaintiff and may provide greater legal certainty for the insured in the long run. From the literature consulted, there is insufficient judicial precedent on established legal liability by way of court judgment, arbitral award, or agreement between the parties[142] under South African law, and it may be necessary to look to the English law to develop our law where insurance contracts provide for such a position.

3.2.2.1(d) Prescription of Claims in Liability Insurance

The third-party plaintiff's claim against the insured defendant generally prescribes within three years after the debt becomes due under the Prescription Act of 1969,[143] unless stipulated otherwise in the Act (ie, shorter or longer limitation periods for statutory liability).[144] The liability insured's claim against its liability insurer also prescribes, as a rule, three years after the debt becomes due,[145] unless reduced by agreement[146] or if the claim has been extinguished or becomes unenforceable by a time-limitation provision.[147]

---

[141] See para 3.2.2.1(b) above.

[142] This is understandable as it does not appear to be the general position under South African law. See paras 3.2.2.1(b)(ii) and 3.2.2.1(c) above.

[143] Prescription Act 68 of 1969, see s 12(1) on extinctive prescription. However, note ss 12(2) and 12(3) on the interruption of prescription periods.

[144] Ibid s 11.

[145] Act 68 of 1969 s 12(1). Again, note ss 12(2) and 12(3) on the interruption of prescription periods.

[146] Under Belgian law, contractual clauses which shorten or extend the prescription periods, or provide for a different completion period, are void. See para 5.2.2.1(d) below.

[147] A defence based on time-limitation provisions must be distinguished from prescription. See *Pereira v Marine and Trade Insurance Co Ltd* 1975 (4) SA 745 (A) as to contractual time limits. See also Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 17.34. A 'time-bar' clause or 'time-limitation' provision is an auxiliary contractual provision which limits the insured's time within which to institute action against the insurer; it does not deny the insured the right to institute legal action. See *Barkhuizen v Napier* 2007 (5) SA 323 (CC); and the discussion by Van Niekerk (2007) 10 *Juta's Insurance Law Bulletin 'Barkhuizen'* 199-216.

The *Napier* decision led to the introduction of new rules governing decisions relating to claims and time-limitation provisions in a previous set of PPRs. The position under rule 17.6 of the current PPRs is relevant. It is very detailed, but for present purposes the following should be emphasised: any time-limitation provision should not include the 90-day period within which the insured may make

Summative critical comment

A debt is due, for purposes of the commencement of the prescription period, once the third party's *prima facie* cause of action against the insured has arisen.[148] It is submitted that the test used to determine when and how an insured's indemnification falls due, can be used to determine when the third party's legal liability against the insured,[149] and so also the insured's claim against the insurer, have prescribed. It follows that where the third party's claim against the insured has prescribed, the insured's claim against the insurer for actual loss fails due to the extinction of legal liability.

Difficult questions as regards legal liability and prescription may be raised in the context of liability insurance, and it is to be expected that more litigation will follow in this regard.[150] This is particularly so because the prescription of the liability insured's claim against its insurer is linked to the cause of action of the third party against the liability insured. Further, the liability insured cannot institute its claim against the insurer before the event which brings the case within the scope of the

---

representations to the insurer after receipt of notice that the insurer repudiates or disputes the claim (or amount thereof), and any time-limitation provision should provide for a minimum period of 6 months after the expiry of the 90-day period (rule 17.6.8, read with 17.6.3*(b)*). An insured may request condonation from the court for non-compliance with a time-limitation provision 'if good cause exists for the failure to institute legal proceedings and that the clause is unfair' to the insured (rule 17.6.9). For purposes of prescription, the debt will only be due after expiry of the 90-day period after the date of receipt of the insurer's notice of repudiation (rule 17.6.10). It has been argued that these rules are perhaps the best example of fairness in insurance. See Millard (2017) 20 *Juta's Insurance Law Bulletin* 'Infusion with Fairness' 11-12. To ensure transparency in the claims process, the insurer should also disclose time limits for submitting claims to the insured See rule 17.8.3*(c)*.

[148] Reinecke, van Niekerk & Nienaber *South African Insurance Law* in paras 25.54-25.55; and the case discussion by Van Niekerk (2006) 9 *Juta's Insurance Law Bulletin 'Truck and General Insurance'* 200-201. It is also the position under Belgian law that the insured's claim against its insurer begins to run from the date that gives rise to the claim, but their insurance legislation contains detailed provisions as to prescription. See para 5.2.2.1(d) below. Cf, *Shraga v Chalk* 1994 (3) SA 145 (N) and *Cape Town Municipality & Another v Allianz Insurance Co* 1990 (1) SA 311 (C). These decisions, held that an insured's indemnification falls due, and that prescription of the insured's claim against its insurer starts running, only after the insured has actually paid the third party's claim, or at least after the amount of the insured's liability has been judicially or consensually determined. This is the position under English law: see para 4.2.2.1(d) below and judicial authority. See also the case discussion by Van Niekerk (1998) 1 *Juta's Insurance Law Bulletin* 40. See also *Burley Appliances v Grobbelaar* above as referred to in para 3.2.2.1(b)(ii) above.

[149] But the position may be different for prescription of the third-party plaintiff's claim against the liability insurer in the context of s 156 of the Insolvency Act. See Reinecke, van Niekerk & Nienaber ibid 25.56 and para 3.2.3.2 below.

[150] See paras 4.2.2.1(d) and 5.2.2.1(d) below on English and Belgian law, and for further detail on the intricacies of prescription in the context of liability insurance. See also paras 4.2.2.2(b)(iv) and 5.2.2.2(b)(iv) below on prescription as applied to the different types of insurance contract under English and Belgian law respectively.

contract and triggers liability cover, has taken place.[151] The materialisation of the risk in liability insurance may be a gradual process spanning a considerable period and it may be difficult to determine when the insured's cause of action has arisen and so the actual commencement date of prescription.

Detailed provisions under Belgian law[152] provide legal certainty for the most part, and prescription in the context of liability insurance in South Africa should ideally be detailed in legislation, or in the PPRs, to provide for the start of a prescription period, and minimum periods, regulated in the same way as time-limitation provisions.[153] As to disclosure by the insurer, it is recommended that the application of prescription and time-bar clauses are again instances that have to be disclosed expressly and in simple terms to an insured under the PPRs. This is seldom the case, which leaves the insured oblivious to the dangers prescription holds for a successful insurance claim.

3.2.2.2 The Insured Event and the Duration of Liability Cover[154]

The above enquiry concerned whether legal liability was covered under the scope of risk under the policy. The insured may recover from its liability insurer only the loss which has been caused by an event covered by the insurance contract. The insured's legal liability towards the third-party plaintiff is the insured's loss[155] in terms of the liability policy and should be distinguished from the 'insured event' or trigger of insurance cover that brings the matter within the scope of a particular duration or period of cover designated in the liability insurance contract.[156] This relates to whether an insurance claim can be brought under a particular policy, and still does not guarantee a 'successful claim'.[157] This can be extremely confusing for the average insured to grasp.

---

[151] For example, the 'loss' under an occurrence-based policy and the 'claim' by the third party under a claims-made policy. See para 3.2.2.2 below.
[152] See para 5.2.2.1(d) below.
[153] Note again the distinction between prescription and time-bars; both apply to all types of insurance contract, but their application is particularly complex due to the nature of liability insurance.
[154] Reinecke, van Niekerk & Nienaber *South African Insurance Law* in para 25.46-25.48; and Van Niekerk (2006) 18 *SA Merc LJ* 382-393.
[155] As discussed in para 3.2.2.1 above.
[156] There may be different ways to categorise and scrutinise this distinction, but the core focus of this analysis is to distinguish the exposition of 'legal liability' from the 'trigger' that brings the matter within the temporal scope of a particular policy. See also para 2.2.2.1 above.
[157] The success of a claim also depends on many other circumstances – eg, timely notice, disclosure by the insured. See para 3.2.2.4 below.

The 'insured event' may be the incidence of the loss itself, that is, the insured's legal liability towards the third party, or it may be an earlier occurrence that merely led to the insured's legal liability, such as an act of negligence on the insured's part,[158] or another occurrence which marks a significant stage in the process leading to the insured's legal liability. For example, the occurrence of the third party's loss may be the 'insured event' (ie, the position in so-called 'occurrence-based' insurance), or the event may be a claim by a third party against the insured (ie, in cases of 'claims-made' insurance). This distinction is of great importance both nationally and internationally as it affects the insurer's duties and the insured's rights to claim.

One should even distinguish further between the duration of the liability insurance contract as provided for by the period of insurance, and the duration of liability cover.[159] The period of insurance in a liability policy may, for instance, be one year. In South African law, most liability policies have a currency of one year but are renewable. However, it depends on the type of insurance cover whether occurrences that take place or claims that are made, before, during, or after the duration of the contract are covered. These are all possibilities in liability insurance practice. Liability insurance policies grant cover for a limited time. As far as the duration of the liability cover is concerned, there are two broad types in South Africa – 'occurrence-based' and 'claims-made'[160] liability policies. Some 'hybrid' liability policies that are variations of 'occurrence-based' and 'claims-made' liability policies are also available in the market.[161]

A short practical example illustrates the difference between legal liability, the insured event, the duration of liability cover, and the different types of liability cover. Assume that an insured committed a delict against the third-party plaintiff (eg,

---

[158] In so-called 'act-committed' insurance, which is more prevalent in continental legal systems, the insured's breach of contract or delict brings the case within the scope of the policy. See paras 5.2.2.2(a)(i) and 5.2.2.2(b)(i) below in the comparative chapter on Belgian law.

[159] Again, the latter is at issue here (in para 3.2.2.2).

[160] Or a variation, 'claims-made and notified': see para 3.2.2.2(b)(ii) below. It is interesting to note that claims-made policies are illegal in France. See Clarke *Law of Insurance Contracts* paras 17.4B and 17.4D on claims-made cover.

[161] There is scant judicial authority in South African law on this aspect, as opposed to English law. See para 4.2.2.2 below. This section relies on some of the principles of English law that could be applied *mutatis mutandis* in our law. Occurrence-based and claims-made policies are the main types of liability insurance contracts in both South African and English law. It remains a question of interpretation of the terms of the insurance contract in every instance. The position is described in detail in Belgian insurance legislation, but is very complex – see para 5.2.2.2 below. Loss-occurrence policies and hybrid claims-made policies are permitted under Belgian law, but care should be taken that terminology as to the duration of liability cover under Belgian law, is not merely equated to similar terms under Anglo-American systems.

conduct that may have caused a progressive disease like asbestosis) between 2010 and 2017 by exposing the third party long-term to asbestos. Assume further that the third party's disease only manifested in 2018, that the insured was legally liable to the third party, and that the latter claimed damages from the insured in 2019. The insured had successive liability insurance policies in place between 2010 and 2019. A period of insurance of one year was agreed on in each of the insured's liability policies. The question here is which liability policy will be triggered? For an occurrence-based policy to be triggered, the period of insurance must be 2018 when the third party's loss occurred. However, for a claims-made policy to be triggered, the period of insurance must be 2019, when the third-party claim was instituted against the insured.

The distinctions between 'occurrence-based'[162] and 'claims-made'[163] liability policies, as far as the event and duration of the liability cover are concerned, will now be discussed in detail. Although not so prevalent, 'hybrid' policies may exist and develop under South African law[164] mainly because prescribed forms of minimum liability cover and their trigger events are not formalised in our legislation.[165]

3.2.2.2(a) The Insured Event

3.2.2.2(a)(i) Occurrence-based Policies

An occurrence-based liability policy, for example, would provide as follows:

> Defined events
> Damages which the insured shall become legally liable to pay consequent upon accidental death of or bodily injury to or illness of any person (hereinafter termed injury), or accidental loss of or physical damage to tangible property (hereinafter termed damage) *occurring* within the territorial limits *during the period of insurance.*[166]

An occurrence-based policy contains an undertaking by the liability insurer to indemnify the insured for loss arising from an insured event, occurrence, circumstance, or accident and must occur within the period of insurance of a particular insurance policy. The insured event in the case of occurrence-based policies

[162] For further detail see paras 3.2.2.2(a)(i) and 3.2.2.2(b)(i) below on 'occurrence-based' policies.
[163] For further detail see paras 3.2.2.2(a)(ii) and 3.2.2.2(b)(ii) below on 'claims-made' policies.
[164] For further detail see para 3.2.2.2(b)(iii) below on 'hybrid' policies.
[165] For further detail see the Belgian law for an example of a legal system with prescribed forms of liability cover in para 5.2.2.2 below, and the summative table in para 5.2.2.2(b)(iv) which also explains what parts are mandatorily prescribed and which not.
[166] Emphasis added.

is the time of the third party's loss: the time of its death, or when it suffers the illness, injury, loss, or damage. Under this type of liability insurance, it is irrelevant when the act causing the occurrence (eg, the insured's delict or breach of contract) took place or became known, when the third party actually claimed against the insured, or when the insured became liable towards the third party.[167]

3.2.2.2(a)(ii) Claims-made Policies

A claims-made liability, for example, would provide as follows:

> Defined events
>
> Damages which the insured shall become legally liable to pay consequent upon accidental death of or bodily injury to or illness of any person (hereinafter termed injury), or accidental loss of or physical damage to tangible property (hereinafter termed damage) which occurred within the territorial limits and on or after the retroactive date shown in the schedule, and which results in *a claim or claims first being made against the insured in writing during the period of insurance*.[168]

In claims-made policies, the liability insurer undertakes to indemnify the insured defendant for a claim that is first made by the third party against the insured within the period of insurance under that particular insurance policy.[169]

As regards the use of the word 'claim', one must distinguish carefully between the claim by the third party against the insured, and the insured's claim under its insurance policy. Whereas the third party may claim damages from the insured and may be referred to as the claimant in its action against the insured, the insured may claim from the liability insurer in respect of its legal liability towards a third party. Again, the meaning and nature of the word 'claim', referring here to the third party's claim against the insured,[170] is subject to an interpretation of the insurance contract and may be affected by the context. Although the inquiry starts with the insuring clause in the policy, there may be a separate definition in the contract. A 'claim' will bear its usual

---

[167] See, in particular, Van Niekerk (2006) 18 *SA Merc LJ* 391-392. See also para 3.2.2.2(b)(i) below for further detail on 'occurrence-based' policies, in particular the different possibilities on whether a third-party loss occurred during the period of insurance.

[168] Emphasis added.

[169] The insurance policy may, eg, contain a time limit for making a claim by the insured against the insurer.

[170] In *Caltrade CC v Santam Ltd* [1997] JOL 365 (C) is was held that the phrase 'any event which may result in a claim under this Policy', as applied to liability insurance in respect of claims by third persons, refers to a claim, duly quantified and substantiated, made by the third person against the insured. The case concerned a claims-made policy.

meaning, but it may, for example, be defined expressly to include a simple letter of demand or a more formal issue of summons.

Claims-made liability policies provide cover against third-party liability if the insured's conduct (such as delict or breach of contract) which causes the third party's loss or damage is discovered, and a third-party claim is made against the insured during the period of insurance.[171] It is not relevant when that injurious conduct took place or the loss manifested.[172] The event in the case of claims-made policies refers to the time when the claim is made against the insured by the third party.[173]

3.2.2.2(b) The Duration of Liability Cover

3.2.2.2(b)(i) Occurrence-based Policies

Occurrence-based policies *do not provide retrospective cover, but they do provide potentially unlimited prospective cover* which is limited in practice only by statutory or contractual prescription periods.[174]

Occurrence-based policies are the preferred type of insurance cover from an insured's point of view. Under these policies, the liability insurer bears the risk of uncertain future claims. The biggest disadvantage for liability insurers contracting on an occurrence-basis is that they are exposed to the aforementioned 'long-tail' liability in that claims may be made by third parties against insured and hence by the insured against the insurers, long after the occurrence of the insured's conduct that caused the death, injury, loss, or damage.[175]

The differences between occurrence-based and claims-made policies are particularly relevant in the case of professional liability, or progressive diseases where a significant period may elapse between the insured's conduct (ie, the professional's

[171] On potential claims, see paras 3.2.2.2(b)(ii)-3.2.2.2(b)(iii) below.
[172] The example of the claims-made policy above includes a 'retroactive date' to limit retrospective cover. Even though the third-party claim against the insured must be made within the period of the policy to bring the case within the scope of the policy, the event, circumstance, or occurrence from which the claim arises must then further also occur after the retroactive date.
[173] See, in particular, Van Niekerk (2006) 18 *SA Merc LJ* 391-392. See also para 3.2.2.2(b)(ii) below for further detail on 'claims-made' policies, in particular the different possibilities as to whether a claim has been made against the insured during the period of insurance.
[174] See para 3.2.2.1(d) above. Also note the effect of 'time-bar' clauses or 'time-limitation' provisions.
[175] See, in particular, Van Niekerk ibid.

act of negligence or breach of contract, or the disease-causing conduct) and the loss or damage to the third party and the latter's claim against the insured.[176]

Investigations and predictions by the insurer of 'long-tail' claims under occurrence-based policies are difficult to manage. Furthermore, inflation and interest have the potential to increase the size of such claims against liability insurers, and they are further, for unacceptably long periods, unable to close their books per underwriting year of account.

Although public liability policies specifically, may be written on a claims-made basis, they are commonly occurrence-based policies. However, the disadvantages of occurrence-based liability policies for liability insurers have encouraged the development and increased use of claims-made policies in the market. Professional liability insurers are, for example, disinclined to offer occurrence-based policies and prefer to write claims-made policies.

The time of the occurrence determines whether it falls within the period of cover. If the event took place at a specific time, such as loss caused by an identifiable accident, it is generally easy to determine which policy applies. In long-tail insurance, however, the question arises as to whether a particular insurer (if there is a single policy), or which insurer (in the case of consecutive policies), bears the loss when the occurrence involves damage, disease, or injury that may have been latent for a long period, such as pollution, asbestosis or cancer.[177] There are four possible times of occurrence that may qualify as the 'insured event' in determining whether or which policy, applies: (1) exposure, namely, when the third party is exposed to the activity or circumstance that gives rise to the action against the insured; (2) loss in fact (so-called 'injury in fact'), although it may also refer to the position when the third-party injury or damage actually occurs; (3) manifestation, namely, loss does not occur until it becomes manifest (or known); and (4) liability on any insurer whose policy was in force at the time of initial exposure, or at the time of manifestation. It is submitted that it appears to be widely accepted in industry that the time of occurrence under South African law is the time of the manifestation of damage, unless the insurance contract provides to the contrary.[178]

---

[176] Ibid.

[177] See para 4.2.2.2(b)(i) on the English law for further detail and judicial authority.

[178] That is also the position under English and Belgian law. See paras 4.2.2.2(b)(i) and 5.2.2.2(b)(ii) below.

When the occurrence concerns conduct, the time of the occurrence is again a matter of interpretation of the policy 'accident', 'event', 'loss', 'occurrence', and circumstance'[179]

Occurrence-based liability policies often require the insured to give the insurer notice of any occurrence or third-party loss as soon as the insured becomes aware of it. The insured cannot postpone notification to the insurer until a third-party claim has been made.[180]

3.2.2.2(b)(ii) Claims-Made Policies

Professional indemnity policies and directors' and officers' policies are usually written on a claims-made basis. Claims-made liability policies *provide potentially unlimited retrospective cover,*[181] *but no prospective cover beyond the period of insurance.* There may have been conduct by the insured within the duration of the policy that gives rise to claims many years later, and thus an insured will need to maintain a claims-made policy or successive claims-made policies for a lengthy period – eg, in the case of professional liability insurance, even after the cessation of the insured's relevant professional activities.[182]

---

[179] Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 25.37. See, eg, *St Paul Insurance Co SA Ltd v Eagle Ink System (Cape) (Pty) Ltd* 2010 (3) SA 647 (SCA) on the scope of cover under a product liability policy that contained an exclusion of the insurer's liability for a third-party claim against the insured 'arising out of ... liability directly or indirectly caused by seepage pollution or contamination'. See also the discussion of this case by Van Niekerk (2009) 12 *Juta's Insurance Law Bulletin* 150-153. See further English judicial decisions in para 4.2.2.2(b)(i) below. English courts have also construed the meanings of aggregation clauses (or so-called 'aggregations') such as 'loss/and or occurrence arising out of one event', 'claims resulting from a single event', 'losses arising out of' and 'occurrence or occurrences of a series consequent on or attributable to one original source'.

[180] The duty of notification here is not dependent on a third-party claim arising from the occurrence being made against the insured. See *Thompson v Federated Timbers & Another* [2010] JOL 26571 (KZD); *Thompson v Federated Timbers & Another (Zurich) Insurance Co (SA) Ltd (as third party)* [2011] JOL 26625 (KZD). Also see the discussion by Van Niekerk (2011) 14 *Juta's Insurance Law Bulletin 'Thompson'* 7-17.

[181] The example of the claims-made policy in para 3.2.2.2(a)(ii) above includes a 'retroactive date' to limit retrospective cover. Even though the third-party claim against the insured must be made within the period of the policy to bring the case within the scope of the policy, the event, circumstance, or occurrence from which the claim arises must then further also occur after the retroactive date. See para 3.2.2.2(b)(iii) below for further detail on hybrid policies. See also para 3.2.2.1(d) above on prescription and time-limitation provisions.

[182] See, in particular, Van Niekerk (2006) 18 *SA Merc LJ* 391-392. See also *David Trust v Aegis Insurance Co Ltd & Another* above on the scope of cover under a professional indemnity insurance contract. Liability insurance cover was provided against claims made on the insured for breach of contract that amounted to breach of duty in the practice of its profession by the insured. The nature of the insured's contractual relationship with the third party, and whether the services that the insured rendered were in the conduct of its profession as accountants, were at issue. See also the case

In claims-made policies, the insured itself bears much of the risk of uncertain future claims because it has an extensive duty to disclose potential claims before entering into or renewing any such liability insurance contract. Because of the extended retroactive liability in claims-made policies, insurers under such policies require meticulous disclosure by the insured of potential liability-inducing conduct in the past. Occurrences before the inception of the insurance contract may result in third-party claims being made against the insured during the currency of the policy.[183] Liability insurers contracting on a claims-made basis are able to calculate premiums with greater accuracy than those underwriting occurrence-based policies, given the more defined nature of the risk due to the disclosure by the insured. Where the insured has disclosed a potential claim, the liability insurer may choose to charge higher premiums, or refuse to grant or renew the liability insurance policy, or may exclude cover from the policy for the disclosed potential liability claim.

Insurance contracts generally impose a duty on the insured to give notice to the insurer about an impending or actual loss to be claimed under the policy. The type of policy – ie, whether it is an 'occurrence-based' or a 'claims-made' liability policy – may influence the interpretation of clauses requiring notification, for example, as regards when notice should be given. A claims-made policy usually requires notice of any actual third-party claim made against the insured in respect of which the insurer may incur liability. A claims-made policy may in addition require an insured to give notice of any potential claim (eg, any occurrence that may possibly give rise to a claim) by a third party against the insured. [184]

---

discussion by Van Niekerk (2000) 3 *Juta's Insurance Law Bulletin 'David Trust'* 57-63 and para 3.2.2.1(a) above.

[183] Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 25.33.

[184] *Van Immerzeel & Another v Santam Ltd* 2006 (3) SA 349 (SCA). This decision dealt with the scope of cover under a professional liability insurance policy for a 'claim first made' during the period of insurance, irrespective of when liability arose. There were two successive overlapping claims-made policies. Both required notification of actual and potential claims. The insured notified the insurers of a potential claim under the 1991 policy, and of an actual claim under the 1993 policy and was subsequently covered. It had a choice to claim under either of the policies and could choose to claim under the policy with the best of cover. See the discussion of the *Van Immerzeel* case by Van Niekerk (2006) 18 *SA Merc LJ* 382-392. Under English law it is typical for claims-made policies, such as professional indemnity policies, to require three phases of notification by the insured to the insurer: (1) the standard notification term that requires the insured in indemnity insurance contracts to give written notice of any occurrence, eg, 'of any accident, claim or proceedings'; (2) potential claims: notice of occurrences 'likely to give rise to a claim', or alternatively, that 'may give rise to a claim'; (3) actual claims: any claim made by the third party against the insured itself. See para 4.2.2.2(b)(ii) below for further detail.

Notification need not be within the period of insurance. But if the policy requires this, it is referred to as a 'claims-made and notified' policy.[185]

3.2.2.2(b)(iii) Hybrid Policies[186]

Liability insurers, naturally, attempt to limit their exposure to prospective liability in the case of occurrence-based policies, or to retrospective liability in the case of claims-made policies by adding contractual exceptions.[187] Such refinements to both types of policy tend to result in hybrid policies that create gaps in the cover provided by, for example, different successive policies.

The significant period that may elapse between the occurrence of the event and the third party's claim against the insured has primarily led to the introduction of hybrid policies. Those insureds under claims-made policies may protect themselves against claims made after the period of insurance by types of insurance such as so-called 'prior acts coverage' or 'long-tail coverage'.

Under prior-acts cover, under the new or renewed insurance policy the insurer charges an additional premium to cover the insured for incidents that may have occurred before the inception date of the new or renewed policy.

Claims-made policies generally include an extension clause in the form of an extended period of discovery which provides that 'if the notification is made within the duration of a policy, any claim arising out of the matters of the subject of the notification will be treated as a claim under the policy, even though the claim itself is made outside the duration of the policy'. Under such long-tail cover, the previous insurer covers future claims to be made for events that occurred during the currency of its claims-made policy at an additional premium.

These types of cover in effect combine claims-made and occurrence-based cover in a single policy. The terms of a particular liability policy may therefore amend

[185] Reinecke, van Niekerk & Nienaber *South African Insurance Law* in para 25.48; and Van Niekerk (2006) 18 *SA Merc LJ* 391-392.

[186] The position appears to be similar to that under English law, although not so prevalent. Cf Belgian law which provides for a hybrid type of claims-made policy. See paras 5.2.2.2(a)(iii) and 5.2.2.2(b)(iii) below.

[187] The insurance policy may, eg, provide that it does not cover any loss or any legal liability 'arising from any event or occurrence, which has been notified under any insurance in force prior to the inception of this [the] policy'. This clause prevents overlapping insurance (and double insurance) where an insured may be covered under more than one liability policy. See Van *Immerzeel v Santam* above for an example of overlapping cover under claims-made policies and Van Niekerk (2006) 18 *SA Merc LJ* 383-394. Alternatively, a retroactive date may be inserted in a claims-made policy to limit retroactive liability.

the broad features of occurrence-based or claims-made policies, and may even result in the policy no longer being classifiable as the one or the other, but rather as a hybrid form of liability policy.

Summative critical analysis

This is one of the most contentious and complex areas of liability insurance. There appear to be two main types of liability insurance contract – occurrence-based and claims-made policies under South African law, although hybrid forms may occur. As to when 'loss' occurs and what qualifies as the institution of a 'claim' under the different types of insurance contract is a question of interpretation. These terms may best be defined clearly in the insurance contract. Guidance may be found in the English law on the standard interpretation of these terms.[188]

Several PPRs require disclosure of the duration of liability cover.[189] It is recommended that the insurance contract explain the insured event and specifically the triggers and the duration of liability insurance cover in plain language, with the aid of tables and examples, as per the basic framework below. The information disclosed must be tailor-made for the type of liability policy involved. Prescription as applied to the different liability policies is also very complex and should be explained to an ignorant insured in detail. The insured should also be informed exactly when notice is required to prevent it from losing the right to claim through ignorance or tardiness. As disclosure by the insured is particularly relevant under claims-made policies, when issuing the policy the insurer should inform the insured of the importance thereof with clear and specific reference to the effect of failure to comply on the insurance claims.[190]

[188] See para 4.2.2.2 below on English law.

[189] See, eg, rule 11.3.5 which prescribes disclosure by the insurer of complex features that may be difficult for the insured to understand. See also rule 11.4.2*(c)* which requires disclosure of 'when the insurance cover begins and ends'.

[190] Rule 11.4.2*(k)*. The insurer should further disclose the representations that the insured made to the insurer which was regarded as material to its assessments of risk: rule 11.5: see Millard (2018) 21 *Juta's Insurance Law Bulletin* 'Legislative Reforms' at 41-42.

Summative table on the event and duration of liability cover under South African law

Type of Policy	Insured Event	Duration of Liability Cover
Occurrence-based policy	Third-party loss should occur within period of insurance. Define loss as the occurrence or manifestation of damage.	a) No retroactive cover b) Unlimited prospective cover
Claims-made policy	Third-party claim should be instituted against the insured within period of insurance, or the insured should notify the insurer of circumstances that may lead to a third-party claim. Define 'claim'. Claims may include actual or potential claims by third parties.	a) Retrospective cover b) No prospective cover If potential claims are covered, or the policy provides for a retroactive date, the policy may become a hybrid form and that may influence the duration of liability cover.
Claims-made and notified	Third-party claim should be instituted against the insured within period of insurance and the insured should have notified the insurer thereof within the period of insurance.	Same as claims-made above.
Hybrid	Variations of occurrence-based and claims-made policies.	It depends from case to case.

Prescribed minimum liability cover, as in Belgian law, is to the advantage of the insured and may also resolve some of the legal uncertainties.[191]

3.2.2.3 Exceptions to, Exclusions from, and Limitations on Liability Cover[192]

Some important exceptions to, exclusions from, and limitations on liability cover that may be found in insurance policies are now considered. The discussion is not aimed at providing an exhaustive summary of all the exceptions to, exclusions from, and the limitations on liability cover, as freedom of contract enables insurers and their prospective policyholders, by agreement, to design a structure to meet the specific needs of the insured that are acceptable to the insurer.

[191] It is not recommended that the types of policies under Belgian law should be implemented under South African law *mutatis mutandis*, as the 'hybrid claims-made' policy has been tailor-made for that system, and is also extremely complex and detailed.
[192] Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 25.37-25.38.

3.2.2.3(a) The Sum Insured, Aggregations, and Event Limits

The sum insured may limit the insurer's liability against the insured. For example, the standard limitation clause provides as follows:

> Limits of indemnity
> 1. The amount payable by the company [the insurer] will not exceed the amount stated in the schedule.
> 2. The limit of indemnity will include costs and expenses
> *(a)* recoverable by any [third-party plaintiff] from the insured;
> *(b)* incurred with the written consent of the company [the insurer]...

An insured's damage relates to two aspects – its liability towards the third party for the latter's damage; and liability for its own damage. The limit of indemnity in a liability policy may apply both in respect of the amounts that an insured is liable to pay to a third party (eg, damages, costs, and expenses); and in respect of the insured's own costs and expenses (eg, the insured's costs incurred with the approval of its insurer).

In *Coetzee v Attorneys' Insurance Indemnity Fund*[193] the policy provided that 'the liability of the insurer in respect of *all claims and the claimant's costs and expenses and approved costs* shall not exceed the limit of indemnity specified in Schedule A'.[194] The court held that the third party's costs were part of the insured's legal liability and that such costs were covered by the indemnity provided by the insurance policy, even though they had not yet been incurred or quantified.[195]

The court in *Coetzee v Attorneys' Insurance Indemnity Fund* further held that the insured was *not* the claimant, and that the words 'the claimant' in the clause from the insurance policy, in fact referred to the third party.[196] The use of the words 'claim' and 'claimant' in *Coetzee v Attorneys' Insurance Indemnity Fund* exemplifies the possibly confusing nature of both the use of terminology in liability insurance and the tripartite relationship between the insurer, the insured, and the third party in liability insurance as discussed extensively above. Whereas the insured may claim from the liability insurer in respect of its legal liability towards a third party and may as such be seen as a claimant under the insurance policy, the third party may claim

[193] 2003 (1) SA 1 (SCA).
[194] Emphasis added.
[195] *Coetzee v Attorneys' Insurance Indemnity Fund* above 5G/H-I/J.
[196] Ibid 5J. See also Van Niekerk (2002) 5 *Juta's Insurance Law Bulletin* 22.

damages from the insured and may again be referred to as the claimant in its action against the insured.[197]

On renewal of a policy, it is especially relevant for an insured to confirm the types of loss (termed the 'heads of loss') to which the limit of indemnity applies, because the third party and the insured's own legal costs and expenses may be a large components of the indemnity that an insured requires from its insurer. For example, in *Van Immerzeel v Sanlam Ltd*[198] the insured was potentially covered by two policies. Under the first policy ('the 1991 policy') the limit of indemnity applied in respect of both the heads of loss together (ie, the amounts that the insured was liable to pay to the third party (eg, damages, costs and expenses; 'the first head of loss') *and* in respect of the insured's own costs and expenses (eg, the insured's approved costs; 'the second head of loss'). In the second policy ('the 1993 policy'), the limit of indemnity applied only to the first head of loss and the insurers undertook to pay an additional proportion in respect of the second head of loss.[199]

Further, as regards the sum insured and the limits of indemnity in an insurance contract, there may be a limitation on the liability cover per 'claim', per 'occurrence', per 'event', or per 'accident'. Problems of interpretation may arise if the insured is required to bear an excess for every claim, or for claims arising from a single occurrence, or if the insurer's maximum liability is limited per claim or for all claims arising from a single occurrence.[200] The policy may also have a total limit: the maximum amount recoverable during the currency of the policy for all claims.[201]

3.2.2.3(b) Exclusions or Exceptions to Liability Cover for an Insured Defendant's Legal Liability to Third-Party Plaintiffs

3.2.2.3(b)(i) Contractual Liability

Liability policies often contain express exclusions or exceptions as to the types of legal liability towards third parties that are covered. A few of these are listed below by way of examples.

---

[197] See para 3.2.2.2(a)(ii) above.
[198] Above.
[199] See the case discussion of *Van Immerzeel* in Van Niekerk (2006) 18 *SA Merc LJ* 382-392; and para 3.2.2.2(b)(ii) above on claims-made policies. See also the conduct of the insured's defence in the insured's name and the costs relating thereto in para 3.3.1.1(d) below.
[200] See para 4.2.2.3(a) below for English case law on these aggregations and event limits.
[201] See, generally, *Bosch Munitech (Pty) Ltd v Govan Mbeki Municipality* [2015] 4 All SA 674 (GP) as to the limit of liability for indemnity insurance.

As explained before, liability insurance policies often expressly exclude contractual liability assumed by the insured for performance.[202]

Liability insurers also further limit their liability by circumscribing the risk, for instance, where the insurer undertakes to indemnify the insured if it becomes liable to a third party as a result of the driving of a specific motor vehicle or by the driving of a designated motor vehicle only in the course of the insured's business.

3.2.2.3(b)(ii) The Conduct of the Insured Defendant[203]

Further, as already observed,[204] an insured may not be able to recover from the insurer for liability incurred by the insured as a result of its intentional (including reckless), conduct. If an insured's negligent conduct is also criminal, public-policy considerations will determine whether the insured should be prohibited from benefiting from its own criminal conduct, or whether the third-party plaintiff should indirectly obtain the benefit of the insurance.

Summative critical comment

It again remains a question of interpretation to determine what exactly has been excluded from or limited by the insurance contract, and therefore parties should aim to use clear terminology. As recommended previously,[205] contractual liability for performance of a contract voluntarily assumed, which is generally expressly excluded from general liability cover, should be expressly disclosed to the liability insured as required by the PPRs. The same applies to limitations on liability cover, such as those pertaining to the sum insured (including aggregations and event limits) and exclusions or limitations applicable to the conduct of the insured. Care should be taken that 'significant exclusions and limitations'[206] are prominently disclosed.[207] It is recommended that all of the examples dealt with in this chapter qualify as significant

[202] See para 3.2.2.1(a) above. As to tenants' liability cover that usually includes contractual liability, see Atkins *Are You Covered?* 112.
[203] See Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 25.42 and paras 13.143-13.144.
[204] See para 3.2.2.1(a) above.
[205] See para 3.2.2.1(a) above for summative critical comment in the context of the extent of covered liabilities.
[206] See the definition of 'significant exclusion or limitation' in rule 11.1 as noted in para 3.2.2.1(a) above.
[207] See rule 10.15 for the rules on prominence of certain communications to the insured. See also para 3.2.2.1(a) above.

exclusions or limitations and should be disclosed explicitly in plain and simple language.

3.2.2.4 The Insured Defendant's Duties to the Liability Insurer

Insurance contracts generally impose a duty on the insured to notify the insurer of specific facts.[208] The type of policy – ie, whether it is an 'occurrence-based' or a 'claims-made' liability policy – may influence the interpretation of clauses requiring notification (eg, as regards *when* notice should be given, as well as *what* the insurer should be notified of).[209] The purpose of the notice to the insurer is to prepare it for the possibility of a third-party claim against the insured, and in turn the latter's claim against the insurer, so that the insurer may take steps to mitigate the insured's loss and to assist the insured as soon as possible.[210]

It has also been explained that an insured has a pre-contractual duty of disclosure and why this is particularly important in the case of claims-made policies.[211] The duty to notify during the existence of the contract is a separate duty which exists once the insurance contract has been concluded and remains a continuous contractual duty as agreed upon by the parties.

A typical clause that requires the insured to take reasonable precautions or care to avoid loss may read as follows: 'The insured shall take all reasonable steps and precautions to prevent accidents or losses'. This type of clause is common in liability insurance policies, but again is not confined to liability insurance and is also included in first-party policies such as those covering property losses.[212] In some cases an all-risks policy covers property insurance as well as providing general

---

[208] See *Furman & Another v Batha* Unreported, GSJ, 23 Sept 2010, case no 10044/2007 on the requirements of proper notice (and proper defence of the action) in the context of an indemnity contract. There may be an analogy with obligations under liability insurance. See also the case discussion by Van Niekerk (2011) 14 *Juta's Insurance Law Bulletin 'Furman'* 31-35.

[209] Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 25.46-25.49. See, too, the discussion on the duty to notify under occurrence-based, claims-made policies and hybrid policies in paras 3.2.2.2(b)(i)-3.2.2.2(b)(iii) above.

[210] See also para 3.3 below on the liability insurer's conduct of the defence and settlement.

[211] See again para 3.2.2.2(b)(ii) above. Section 53 of the SIA on misrepresentation and failure to disclose was set to be repealed by the Insurance Act of 2017, but the repeal of s 53 of the SIA appears to have been deferred. Section 53 of the SIA still governs misrepresentation and failure to disclose in short-term insurance (non-life insurance). See Donnelly (2018) 4 *SALJ* 593-612. On breach of the duty of disclosure and fraud in the context of liability insurance, see also *Commercial Union Insurance Co of SA Ltd v Wallace No; Santam Insurance Ltd v Africa Addressing (Pty) Ltd* 2004 (1) SA 326 (SCA).

[212] Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 13.114-13.116 and 25.43-25.45.

liability cover. It often happens that these two aspects are not explained separately to the insured who might be under misconceptions as to which losses require notification and which not. The use of terminology such as 'all risks' is often misleading as insured's believe it is *ipso facto* comprehensively covered for all losses it suffers.[213]

One of the primary purposes of liability insurance is to insure the insured against liability for its negligent conduct. Negligence is a failure to take reasonable care when a reasonable person would have taken reasonable steps to avert or minimise the loss or damage caused to another. By imposing a contractual obligation on the insured to take reasonable care, the insurer may attempt to exclude its liability against the insured for liability in negligence. If construed literally, such a clause may prevent an insured from successfully claiming an indemnity against liability for negligence.

Our courts have adopted a common-sense interpretation of clauses requiring reasonable precautions. Reasonable care refers to reasonable care as seen from the perspective of the relationship between liability insurer and insured (and not as between the insured and the third party – including the latter's point of view). Due regard must be had to the purpose of the insurance contract, which includes indemnity against the insured's own negligence. Only gross negligence, recklessness, or intent on the part of the insured (as opposed to mere negligence) will as, a general rule, amount to breach of the clause to take reasonable precautions – eg, if the insured refrains from taking precautions to avoid the loss that it ought to have taken merely because it is covered against loss in the policy.

A clause that compels the insured to take reasonable steps to minimise and prevent loss, confirms the common-law principle that the insured may not be covered under the insurance contract for its intentional or reckless acts that caused damage or loss to the third-party plaintiff.

Summative critical analysis

As to the insured's duty of notice: Some notice clauses, or 'claims-made-and-notified' policies, might in time be found to be unfair under South African law,

[213] As explained in para 2.2.5 above, all-risks insurance is not entirely unlimited. See Reinecke, van Niekerk & Nienaber ibid para 13.56.

whether under statute or common law, specifically on the basis of public policy.[214] Where an insured is truly not informed that it must take certain action within specific time limits, denying the insured an insurance claim might be contrary to public policy. Society still views insurance as an unequal relationship, where the insurer as a big business company is knowledgeable and manipulates the situation for profit, whereas the insured is less experienced an although paying premiums diligently, does not enjoy cover.

As to the pre-contractual duty of disclosure by the insured: the insurer should inform the insured of these aspects that might influence a successful claim for indemnification under the insurance policy.[215]

3.2.3 The Legal Relationship between the Liability Insurer and the Third-Party Plaintiff[216]

3.2.3.1 Common Law

As a rule, there is, on the basis of privity of contract, no contractual relationship between the third-party plaintiff and the insured defendant's liability insurer. Furthermore, the insurance contract between the liability insurer and the insured cannot be construed as a contract in favour of a third party (the third-party plaintiff in the liability claim). Consequently, the third party cannot claim directly from the liability insurer at common law. A statutory exception, however, applies in the event of the sequestration of the insured defendant, as discussed below.

3.2.3.2 Statutory Position

Section 156 of the Insolvency Act provides:

> Whenever any person (hereinafter called the insurer) is obliged to indemnify another person (hereinafter called the insured) in respect of any liability incurred by the insured towards a third party, the latter shall, on sequestration of the estate of the insured, be entitled to recover from the insurer the amount of the insured's

[214] Some authors on English law suggest that conditions that impose unreasonable time limits on the insured, may in future be regarded as unfair under the Consumer Rights Act of 2015 ('Consumer Rights Act'). See paras 4.1.2 and 4.2.2.4 below.

[215] Rule 11.4.2*(k)*. The insurer should further disclose the representations that the insured made to the insurer which were regarded as material to its assessments of risk. See rule 11.5 and Millard (2018) 21 *Juta's Insurance Law Bulletin* 'Legislative Reforms' 41-42.

[216] In writing this section, the following works were consulted: Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 25.74- 25.83; Van Niekerk (1999) 11 *SA Merc LJ* 59-77; Van Niekerk (2010) 22 *SA Merc LJ* 453-463; and Jacobs (2010) 22 *SA Merc LJ* 608-616.

liability towards the third party but no exceeding maximum amount for which the insurer has bound himself to indemnify the insured.

Whereas at common law the third-party plaintiff cannot claim directly from the insured defendant's liability insurer, section 156 creates an exception in that it provides the third-party plaintiff with a direct claim against the liability insurer if the estate of the insured defendant is sequestrated.[217] Further, as a general rule the effect of the sequestration of an insolvent debtor's estate (the insured in this case) is that the insolvent is divested of its estate which vests in the trustee, curator or liquidator of that estate. Again, section 156 provides an exception in that the proceeds of a liability insurance contract do not fall into the insured defendant's insolvent estate. The third party may claim directly from the insured's liability insurer and is not merely an ordinary creditor with a concurrent claim against the insured defendant's insolvent estate.

In short, section 156 applies only to liability insurance (as third-party insurance), not to property insurance (as first-party insurance).[218] The third party's rights against the insured's liability insurer are unique and original rights statutorily conferred on the third party by section 156. The insured's estate must have been sequestrated (or liquidated, in the case of legal persons) before section 156 can apply; mere insolvency of the insured is insufficient.

Before the third party can rely successfully on section 156, it carries a heavy burden of proof. It must first prove the liability of the insured to itself.[219] The third party must further prove the existence of a valid and enforceable insurance contract between the insured defendant and its liability insurer, and also the liability insurer's liability towards the insured to indemnify it (the insured) against liability to the third-party plaintiff.[220] This duty is a deviation from 'legal liability' as discussed above. In this

[217] For an example of the complexity and likelihood of confusion under s 156, see the case discussion by Van Niekerk (2012) 15 *Juta's Insurance Law Bulletin 'Hollard'* 62-69.
[218] See *Venfin Investments (Pty) Ltd v KZN Resins (Pty) Ltd t/a KZN Resins* [2011] 4 All SA 369 (SCA) on the scope of application of s 156; and the case discussion by Van Niekerk (2011) 14 *Juta's Insurance Law Bulletin 'Venfin Investments'* 156-161. See also, in particular, Van Niekerk (2010) 22 *SA Merc LJ* 453-463.
[219] See Reinecke, van Niekerk & Nienaber *South African Insurance Law* in para 25.56 where the authors opine that the insured's legal liability towards a third-party may have to be established by court judgment or an admission of liability for purposes of s 156. This differs from the general position on when and how a liability insured's becomes 'legally liable' towards a third party: see again paras 3.2.2.1(b)-3.2.2.1(c) above.
[220] As regards the requirements for the third party's claim under s 156, see *Hotels Inns & Resorts SA (Pty) Ltd v Underwriters at Lloyds & Others* 1998 (4) SA 466 (C); and the case discussion by Van

event the third party must prove actual liability, as it is clear from the wording of the Insolvency Act that mere *prima facie* proof is not sufficient. On the other hand, actual payment by the insolvent insured to the third party plaintiff is also not required.

The third party has no greater rights against the insured's liability insurer than the insured has against the insurer in terms of the insurance contract. The third party can recover only the amount of the insured's liability towards it (the third party) from the insured's liability insurer. [221] The third party's claim is, therefore, limited to the maximum amount of the liability of the insured' liability insurer towards the insured.[222]

For the present purposes, it is important to recognise that section 156 affects the position of the third party, the insured's liability insurer, and the insured's insolvent estate. In particular, the position under section 156 illustrates how the relationship between the insured and its liability insurer affects the position of the third party. As already observed, the third party has no greater rights against the insured's liability insurer than the insured has in terms of the insurance contract. All exclusions and limitations also apply to the third party's direct claim against the insurer.

Section 156 is already onerous, and prescription of the third party's claim against the liability insurer complicates matters still further.[223] The position on prescription of the third-party plaintiff's claim against the liability insurer in the context of section 156 appears to differ from prescription of the insured defendant's claim against the liability

---

Niekerk (1998) 1 *Juta's Insurance Law Bulletin 'Hotel Inns'* 79-81. See also *David Trust v Aegis Insurance* above and the case discussion by Van Niekerk (2000) 3 *Juta's Insurance Law Bulletin 'David Trust'* 57-63. Further see *Transnet Ltd v Mutual & Federal Insurance* Unreported, TPD, 12 Nov 1996, case nr 13664/95; and the discussion by Van Niekerk (1998) 1 *Juta's Insurance Law Bulletin* 40-42.

[221] On the joining of the insured defendant's liability insurer as co-defendant on the insured being wound up, see *African Products (Pty) Ltd v Venter NO & Others* [2007] 3 All SA 605 (C) and see also the case discussion by Van Niekerk (2007) 10 *Juta's Insurance Law Bulletin 'African Products'* 216-217.

[222] As to the extent of the third party's claim, see *Coetzee v Attorneys' Insurance Indemnity Fund* above; and the case discussion by Van Niekerk (2002) 5 *Juta's Insurance Law Bulletin* 133-140. See also *Le Roux v Standard General Versekeringsmaatskappy Bpk* 2000 (4) SA 1035 (SCA) and the case discussion by Van Niekerk (2000) 3 *Juta's Insurance Law Bulletin* '*Le Roux*' 135-138.

[223] See van *Van Reenen v Santam Ltd* 2013 (5) SA 595 (SCA). The court confirmed that s 156 is not a form of statutory cession of insured's right against insurer to a third party, but that it creates a new and distinct cause of action for the third party to recover what the insurer owes the insured under the insurance contract on sequestration of the insured. The third party's claim arose, and the debt became due for purposes of s 12(1) of Prescription Act, when the insured company was would up. Then the third party's cause of action against the insurer had fully accrued. See also the case discussion by Van Niekerk (2013) 16 *Juta's Insurance Law Bulletin* 121-127. On prescription under liability insurance in general, see para 3.2.2.1(d) above.

insurer.[224] Prescription of the third-party plaintiff's claim against the liability insurer will likely only start to run when the insured is actually liable towards it.[225]

Summative critical analysis

It is uncertain whether section 156 will withstand a constitutional challenge based on equality under section 9 of the Constitution, as it appears that third-party rights enjoy preference above the rights of other creditors under section 156. This type of discrimination does not appear to be regarded as unfair in current legislation.[226] Lessons may be learnt from the expanded provisions in English law.[227]

The most beneficial position for the third party is under Belgian law, where it has a direct right to a claim which is not limited to the insured's insolvency or sequestration.[228] But, as under section 156 of our Insolvency Act, questions of constitutionality may arise. Taking into consideration the principle of *concursus creditorum*, such provisions deviate from the normal rules of privity of contract and equal claims against the insolvent estate.

3.2.4 The Legal Relationship between the Liability Insurer and Other Parties: the Liability Insurer Exercising its Rights of Subrogation for a Contribution against Joint Wrongdoers of the Insured Defendant

Subrogation[229] (where the insurer has a right against its insured to enforce the insured's claim against joint wrongdoers of the insured defendant) is a *naturalia* of indemnity insurance and as such applies to liability insurance. But subrogation is exceptional in liability insurance.[230] There are at least two instances in which subrogation in the sense of claim enforcement may apply in liability insurance.

---

[224] See para 3.2.2.1(d) above on prescription of the insured defendant's claim against the liability insurer.
[225] See Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 25.56.
[226] See item 5 in the Schedule to the Equality Act which refers to three practices in connection with insurance services that are possibly unfair and in need of attention. Section 156 or its consequences are not covered under those three practices.
[227] The English Third Parties (Rights Against Insurers) Act of 2010 (the '2010 Act'). For example, the Act gives the third-party plaintiff detailed rights of disclosure against the insured, the insurer, and other parties about insurance. It also contains detailed provisions as to limitation in this context, although some issues have not been resolved. See Jacobs (2010) 22 *SA Merc LJ* 608-616 and para 4.2.3.3 below.
[228] See para 5.2.3.1 below on the third-party plaintiff's direct right against the liability insurer.
[229] On subrogation in insurance generally, see Van Niekerk (2007) 19 *SA Merc LJ* 502-517 and Van Niekerk *Subrogasie* passim. See also para 3.3.1.1 below on the distinction between the liability insurer's right to subrogation and the conduct of the defence of the third-party claim by the insurer.
[230] Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 25.40 and 25.58.

In the first place, where the insured defendant has a counterclaim against the third-party plaintiff to which the liability insurer may be subrogated, the counterclaim may be brought by the liability insurer in the exercise of its right to subrogation because liability insurance is a form of indemnity insurance.

Second, where there is a joint wrongdoer, other than the third-party plaintiff, the liability insurer, is entitled to enforce the insured defendant's claim for a contribution against such wrongdoer in the exercise of its right to subrogation.[231]

Summative critical comment

Referring to the extent and scope of disclosure, the insured should be made aware of the insurer's right to subrogation, what this entails, and ensure that it does not prejudice the insurer's rights. Even if it not expressly required under the PPRs, this should be brought expressly and prominently to the attention of the insured.

3.3 THE CONDUCT OF THE DEFENCE AND SETTLEMENT OF CLAIMS BY THIRD-PARTY PLAINTIFFS AGAINST THE INSURED DEFENDANT

As liability insurers in South Africa merely have a contractual right[232] (as opposed to a duty) to conduct the defence and settlement, the analysis of the defence and settlement in the study is more limited in scope than that of the insurer's duty to indemnify.

3.3.1 The Legal Relationship between the Liability Insurer and the Insured Defendant

3.3.1.1 Conduct of the Defence

A clause such as the following invariably appears in liability policies: 'We [the insurer] may take over and conduct the defence and settlement of any claim and have the right to use your name for this purpose'.

[231] See '*Walkerson v Matterson* 1936 NPD 495'; and the case discussion by Van Niekerk (2006) 9 *Juta's Insurance Law Bulletin 'Walkerson'* 230-236 for further explanation of the instances in which subrogation may apply in liability insurance. See also *Samancor Ltd v Mutual & Federal Insurance Co Ltd & Others* 2005 (4) SA 40 (SCA) on co-insurers, subrogation and contribution.
[232] Which is usually part of an express term in the insurance contract.

An insurer's right to defend and settle claims is sometimes incorrectly confused with an insurer's right to subrogation because often in the case of comprehensive policies these rights are dealt with in a single clause. The right to conduct the defence and settlement is concerned with an insurer's contractual right to take charge of the insured's defence to a claim brought by the third-party plaintiff. Subrogation, on the contrary, refers to an insurer's common-law right to enforce the insured's claim against a third-party defendant.[233] Both subrogation, as well as the defence and settlement of the claim, are conducted by the insurer but in the name of the insured.[234]

Under South African law, the liability insurer does not include an automatic or implied duty to defend the insured against third-party claims. The liability insurer only has a duty to defend if the insurance contract specifically so provides.[235] It is common practice, however, that the liability insurer has an express contractual right to defend the action and to settle the claim against its insured.[236] There is no basis on which to compel the liability insurer to take over the insured's defence if it elects not to do so. The liability insurer will generally exercise this right to defend to protect itself (the insurer) against the insured defendant's claim for an indemnity where it appears on merit as a judgment call, to be the best decision.

However, an insurer which exercises its right to defend the insured against liability claims does incur a number of additional duties against its insured during this process. These duties are discussed briefly.

The duty to act in good faith during the execution of the contract is mutual, and the insured should act accordance with its duty cooperate with the liability insurer in the conduct of the defence and settlement. Furthermore, the insured should not prejudice the insurer's right to recover from the third party in the name of the

---

[233] An insurer's common-law right to subrogation may be confirmed and extended in the insurance policy. See para 3.2.4 above on subrogation.

[234] See *Cupido v Kings Lodge Hotel* 1999 (4) SA 257 (E) and the discussion by Van Niekerk (1999) 2 *Juta's Insurance Law Bulletin 'Cupido'* 94 for a practical example of how the liability insurer conducts a defence in the name of an insured. See also *South African Veterinary Council & Another v Veterinary Defence Association* 2003 (4) SA 546 (SCA) and Van Niekerk (2003) 6 *Juta's Insurance Law Bulletin* 85-89 for a discussion of the *locus standi* of a defence association of which a veterinarian is a member and some comments on the position of the liability insurer which conducts the insured's defence.

[235] Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 25.61. This is also the position under English law. See para 4.3.1.1 below. In contrast, the liability insurer has a statutory duty and right to conduct the defence under Belgian law. See para 5.3.1.1 below.

[236] See para 3.3.1.2 below on the settlement of third-party claims.

insured.[237] For example, an insured should not collude with the third party to protect the third party against the insurer's claim brought against the third party in the insured's name.

One may ask what the benefits are for the insured if the liability insurer has a duty to defend, rather than a mere right to defend. One possible advantage is that the defence by the liability insurer may afford the insured valuable protection from the expense of litigation.[238] Then again, an insured may choose to appoint its own legal representative, because this will provide the insured with the opportunity to influence the defence attorney and its strategies to the benefit of the insurer.

3.3.1.1(a) When the Right or Duty to Defend Arises

The wording of any clause dealing with defence will generally indicate when a contractual duty to defend, as opposed to a mere right to choose to defend, will arise.[239] In the absence of wording indicating the contrary, the right or duty will arise when the insured is notified of facts giving rise to a potential liability.[240] However, the right or duty will not arise if the liability cover has not been triggered (ie, in respect of claims not falling within the scope of cover).[241] Part of disclosure to the insured should detail when the insurer will have a right or duty to defend, and of the scope of the duty. The insurer is required to inform the insured of the nature and extent of the insurance benefits and its potential limitations.[242]

3.3.1.1(b) The Scope and Extent of the Right or Duty

The defence must be conducted properly,[243] whether the liability insurer

---

[237] See *McClain v H Mohamed & Associates* [2003] 3 All SA 707 (C) and the discussion by Van Niekerk (2004) 7 *Juta's Insurance Law Bulletin 'McClain'* 88-97.

[238] See *Mondi South Africa Ltd v Martens & Another* 2012 (2) SA 469 (KZP) on the insurer's defence of a third-party claim against the insured and the insurer instructing attorneys to the defend action. See also the discussion by Van Niekerk (2012) 15 *Juta's Insurance Law Bulletin 'Mondi'* 1-2.

[239] Note again that there is generally not a duty to defend on the liability insurer under South African law.

[240] This is at the same time as when the insurer's duty to indemnify its insured generally arises under South African law. See, eg, *Botha v Iveco South Africa (Pty) Ltd* 2012 JDR 0863 (SCA), where the indemnity contract contained an indemnity clause and the person to be indemnified was not requested in time by the indemnifier to oppose the third-party claim. The full amount of the third-party claim and the costs incurred could be recovered from the indemnifier. Also see the discussion by Van Niekerk (2012) 15 *Juta's Insurance Law Bulletin 'Botha'* 106-108.

[241] See para 3.2.2.2 above on the insured event and the duration of liability cover.

[242] PPRs: see rules 11.4.2*(c)* and 11.4.2*(g)*. Also see paras 3.2 and 3.2.2.1(a) above.

[243] See *Furman & Another v Batha* above on the requirements of (proper notice and) proper defence of the action in the context of an indemnity contract. There may be an analogy with obligations under

defends the insured by choice or by duty. If the liability insurer fails to conduct a proper defence,[244] it may be liable to the insured for damages arising from its omission.[245]

Concessions that the insurer makes towards the third party in defending the third-party claim – eg, acceptance of liability – bind the insured directly.[246] This applies even if the insurer has not been authorised by the insured to make such a concession or waiver.[247] This aspect must also be disclosed expressly and prominently by the insurer to the insured. The latter must be able to understand the risks when it agrees to a defence clause.

3.3.1.1(c) Conflict of Interest

A conflict of interest between the liability insurer and the insured may arise, for example, in the following instances.[248]

- Where there is a possibility of legal liability (eg, a judgment) in excess of the policy limits: the insured may prefer settlement, while the liability insurer has nothing to lose if the matter is litigated to its conclusion.
- Where it is uncertain whether there is liability cover at all: for example, when the liability insurer questions whether liability falls within the scope of the policy (potential conflict), or when the insurer in fact disputes that the insured's liability is covered by the insurance policy (actual conflict).
- Legal expenses insurance cover[249] may also give rise to possible conflict of interest in the context of liability insurance: where the

---

liability insurance. See also the discussion by Van Niekerk (2011) 14 *Juta's Insurance Law Bulletin* '*Furman'* 31-35.

[244] See again *McClain v H Mohamed & Associates* above; and the discussion by Van Niekerk (2004) 7 *Juta's Insurance Law Bulletin 'McClain'* 88-97.

[245] Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 25.65.

[246] See *Masunga v Mutema* above and Van Niekerk (2008) 11 *Juta's Insurance Law Bulletin 'Masunga'* 17-19: a liability insurer's acceptance of liability towards a third party on authority of insured binds the latter.

[247] Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 25.66.

[248] This section is based on the position in English law as there is limited authority in South African law. See para 4.3.1.1(d) below. See also para 5.3.1.1(c) below on Belgian law.

[249] This type of insurance is aimed at legal expenses that may be incurred in legal proceedings that the insured may become involved in as plaintiff or defendant; it is also known as legal costs insurance. Under South African law, it may be provided under a separate insurance contract or in combination with other insurance. Liability insurance to some extent already includes an element of legal expenses

insured's liability insurer is also its legal protection insurer, whether in a comprehensive policy or under two different policies, a conflict of interest may arise between the insured and the insurer. On the one hand, the lawyer employed by the insurer or the insurer's panel may attempt to protect the insurer's interests by, for example, minimising its fees by suggesting a less expensive solution such as settlement, to retain the goodwill of the insurer. On the other hand, settlement may not be in the best interests of the insured and it may have a valid interest in maintaining costly litigation. It is undesirable that the same liability insurer which, for example, refuses to conduct the insured's defence, must nonetheless foot the bill for the insured's legal defence.[250]

– Under rule 11.4.2*(j)* of the PPRs an insurer is required to disclose to the insured 'any circumstance that could give rise to an actual or potential conflict of interest in dealing with the [insured]' before the policy is entered into. It is submitted that the insured may insist on its own legal representative if a conflict of interest exists between it and its liability insurer. This aspect should be highlighted and explained to the insured before litigation commences and decisions are taken on which the insured was ill informed. This is another aspect for which the specified duties of disclosure require attention.

Some insurance contracts may contain a so-called 'SC' or senior counsel clause to avoid a conflict of interest between the insurer and the insured in the context of the conduct of the defence of third-party claims.[251] In terms of such a clause the insurer undertakes to be liable and to pay claims under the policy without dispute or defence, unless a senior advocate advises that the claim may be successfully contested on a

---

insurance in that liability insurance may cover the insured's costs and the insurer may conduct the defence on behalf of the liability insured. See Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 25.71, and Jacobs (2011) 23 *SA Merc LJ* 464-475. See also Reinecke, van Niekerk & Nienaber ibid para 25.73 on the different types of legal expenses insurance.

[250] Such conflict of interest may be avoided by *regulating* the combination of liability insurance and legal protection insurance by a single insurer by statute. See, eg, the position under English law in para 4.3.1.1(d)(i) below, and Belgian law para 5.3.1.1(c) below. See also Reinecke, van Niekerk & Nienaber ibid paras 25.71-25.73; Jacobs ibid; and para 3.3.1.1(d) below.

[251] Reinecke, van Niekerk & Nienaber ibid para 25.66.

balance of probabilities.[252] Such a clause requires some clarification for the uninformed insured who is unfamiliar with legal practice and the remedies available for such a contestation.

3.3.1.1(d) Defence Costs

Liability policies generally provide that the insurer will pay the costs of the legal proceedings to defend the third-party claim against the insured, or the costs of settling the claim.[253] Insurers either actually conduct the defence, or if not, they fund it or indemnify the insured against those costs. However, this applies only when the third-party claim falls within the scope of the liability cover.[254]

Defence costs should ideally be incurred only with the insurer's prior consent and should at all times be reasonable. This aspect should be prominent in the disclosures, and the term 'reasonable' must be explained to the insured to allow it to grasp what it means in a practical sense. Apart from defence costs, other related expenses such as those for investigating the claim and the third-party costs awarded against the insured, will generally also be included.

Whether the defence costs will be included in the overall sum insured,[255] or in the limited sum insured per claim or occurrence, depends on the wording of the policy. In the alternative, defence costs may be treated separately and may have their own limit in addition to the basic indemnity cover. The insurer is required to inform the insured of the nature and extent of the insurance benefits and its potential limitations.[256] This aspect, too, requires mandatory clear disclosure to prevent disputes in the sphere of liability insurance claims which benefit none of the parties involved. Prevention of potential misconceptions and errors offers a greater benefit than attempting to resolve disputes at an advanced stage of dispute resolution or litigation.

---

[252] See the operation of the 'QC' clause as an alternative agreed way to establish the insured defendant's legal liability towards the third-party plaintiff under English law in para 4.2.2.1(c)(iv).
[253] Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 25.68-25.70; and Jacobs (2011) 23 *SA Merc LJ* 464-475.
[254] See para 3.2.2.2 above on the insured event and the duration of liability cover.
[255] See *Coetzee v Attorneys' Insurance Indemnity Fund* above where the costs and expenses incurred by the insured were expressly included in the contractual limit of indemnity and Van Niekerk (2002) 5 *Juta's Insurance Law Bulletin* 22. See also para 3.2.2.3(a) above.
[256] PPRs: see rules 11.4.2*(c)* and 11.4.2*(g)*. Also see paras 3.2 and 3.2.2.1(a) above.

3.3.1.1(e) Waiver and Estoppel

An insurer that starts to conduct the defence on behalf of the insured in knowledge that there are reasons which entitle it to deny liability on the policy, may be estopped from subsequently denying liability to the insured.[257]

Estoppel by representation[258] is where one party, the liability insured in this instance, has a reasonable belief in a misrepresentation by another party, the liability insurer (eg, that it will not deny liability on the policy). If the insured relied on this misrepresentation to its disadvantage, it may then hold the liability insurer to the misrepresentation and can prevent the liability insurer from relying on the true state of affairs by raising the defence of estoppel.[259]

But merely taking over the insured's defence is not inevitably an undisputable representation by the insurer to the insured that the insurer accepts liability under the policy.[260] To avoid uncertainty and disputes, an insurer that conducts the defence of a third-party claim should rather do so under an express reservation of rights. Many insureds are not aware of these complications. By determining by statute which disclosures must be made regarding the problematic aspects identified here, will benefit both the insurer and the insured.

An insurer may also waive its rights, for example, to deny liability on a policy.[261] According to one view, waiver is a contractual agreement to abandon rights. A different view, however, is that waiver is a one-sided juristic act – a choice not to deny liability on the policy.[262] Again, if the insurer reserves its rights in terms of the

---

[257] Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 22.116, 22.117 and 25.59.

[258] This doctrine was introduced into our law from English law. See Hutchison & Pretorius *Law of Contract* in para 3.5.1

[259] See *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) where the plea of estoppel was upheld against a liability insurer. See further *Van Reenen v Santam Ltd* above on whether a liability insurer's engaging of attorneys to conduct defence or settlement of third-party claims in name of insured against the insured, and the insurer's payment of fees and disbursements to such attorneys, amount to an acknowledgment of liability by the insurer to its insured. See also the case discussion by Van Niekerk (2013) 16 *Juta's Insurance Law Bulletin* 121-127. On the extent of the burden of proof on the insured of alleged waiver by the insurer of its right to repudiate, see *Regent Insurance Co Ltd v Maseko* 2000 (3) SA 983 (W) and the case discussion by Van Niekerk (2000) 3 *Juta's Insurance Law Bulletin 'Regent'* 63-66.

[260] The absence of representation by, or on behalf of, an insurer is no basis on which an insured can rely on estoppel. See *Everton v Compass Insurance Co Ltd* [2003] JOL 11268 (T); and the case discussion by Van Niekerk (2007) 10 *Juta's Insurance Law Bulletin 'Everton'*111-113.

[261] See Reinecke, van Niekerk & Nienaber *South African Insurance Law* paras 22.92-22.105 on waiver in insurance generally.

[262] On the test for the intention to waive tacitly, see *Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA). Also see the case discussion by Van Niekerk (2000) 3 *Juta's Insurance Law Bulletin* '*RAF v Mothupi'* 102-104.

policy, it may proceed to conduct the defence and cannot be seen to waive its right to deny liability on the policy afterwards. Again, this possibility of a reservation of rights should be highlighted as a mandatory duty in communications between the parties to provide legal certainty as to the positions the parties find themselves in and to protect their interests.

3.3.1.2 Settlement of Claims: No Admissions of Liability

As part of a clause in the insurance contract which entitles the liability insurer to take over the defence of any third-party claim that may be brought against the insured, the insurer is generally also entitled to settle the claim on the insured's behalf.[263] As explained previously,[264] concessions made by the insurer to the third party – eg, a settlement on the amount of the claim – bind the insured,[265] even if the insurer has not been authorised to do so by the insured.

Another important clause in liability insurance policies prohibits the insured from settling the claim by a third party or from making any admission of liability without the insurer's prior written consent. For example, the standard clause in a liability policy provides: 'No admission, statement, offer, promise, payment or indemnity may be made or accepted by you [the insured] without our [the insurer's] written consent'.[266]

This type of clause (a 'no-admissions clause'), although not exclusive to liability insurance policies, is essential from a liability insurer's perspective to protect its interests and to strengthen the insurer's right to take control of the proceedings instituted by the third party against the insured.

The no-admissions clause appears very wide and may even entitle insurers to avoid liability if the insured's admission (such as a mere informal 'sorry, it's my mistake') or settlement without their consent did not in fact prejudice them.[267] For instance, the insurer could argue that it might have persuaded the third party to accept a lower settlement.

---

[263] Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 25.57.
[264] See para 3.3.1.1(b) above.
[265] See *Masunga v Mutema* above and the case discussion by Van Niekerk (2008) 11 *Juta's Insurance Law Bulletin 'Masunga'*17-19: a liability insurer's acceptance of liability towards a third party on authority of insured binds the latter.
[266] This section is based on English law as authority in South African law is limited. See para 4.3.1.2 above. See also para 5.3.1.2 above on Belgian law.
[267] However, there is difference in opinion on this question in English law. See para 4.3.1.2 below.

One may ask whether the insurer is still entitled to rely on a no-admission clause if it elects not to conduct the insured's defence against the third-party plaintiff. If the insurer further refuses to consent to a settlement between the insured and the third party, the matter would have to be litigated. Could the insured argue that by refusing to conduct its defence, the insurer has forfeited its right to rely on the no-admission clause which prohibits settlement without its consent? The matter appears not yet to have been considered by our courts.[268] What is clear, however, is that these challenging aspects should be explained to the potential insured and that the insurer should be guided by a mandatory statutory list of items it must disclose for proper disclosure. It should be re-emphasised that the liability insurer must at all times exercise its rights under the policy with due regard to the interests of the insured.[269] The insurer has no power arbitrarily to refuse consent to a settlement between the insured and the third party. The insurer must make a reasonable estimate of the potential of the success of the third party's claim. If the third party has a very good chance of succeeding in its claim, the insurer should consent to a settlement within the policy limits. By contrast, if it appears unlikely that the third party's claim will succeed, the insurer may refuse to consent to settlement.

It is submitted that in some cases the liability insurer may refuse to consent to a settlement between the insured and the third party even though it has refused to conduct the insured's defence. This may arise particularly where the insurer's right to conduct the insured's defence or settlement, and the prohibition on admissions and settlements by the insured without the insurer's consent, are addressed in separate clauses of the insurance policy and the rights thus exist independently of each other. The duty of transparency by way of detailed disclosure is an important part of consumer protection measures for which the insurance industry must take responsibility as insurance is excluded from the general consumer protection measures under, for example, the CPA.

Summative critical comments[270]

Under South African law, an insurer generally has a contractual right to defend its insured, unless the insurance contract provides for a duty to do so. The right to

[268] English courts have also not yet ruled on this. See para 4.3.1.2 below.
[269] Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 25.67.
[270] As to the entire para 3.3 above.

defend the insured arises, as a rule, simultaneously with an insurer's duty to indemnify. Under English law, too, there is only a contractual right[271] as opposed to Belgian law where a liability insurer has a statutory right and duty to defend its insured.[272]

Growing consumerism and rising litigation, coupled with the right of access to justice, are among the reasons for advocating for an insurer's duty to defend, as opposed a mere right to defend. It is submitted that what is needed is minimum cover to be prescribed in the PPRs.

However, quantitative research studies are necessary to distinguish between the costs of underwriting an insurance contract where the insurer has a right to defend and where it has a duty to defend. Such studies are recommended and their outcomes factored in to the decision on whether the industry wishes to (or should) prescribe a mandatory duty to defend in the liability insurance claims process.

Legal expenses insurance is a further option to cover defence costs, as opposed to the conduct of the defence by a liability insurer, but defence by a liability insurer that is a specialist in the field may be preferred by the insured. There are also advantages to having a single rather than multiple policies.

Part of disclosure to the insured should detail when the insurer has a right or duty to defend and of the scope of the duty. The insurer is required to inform the insured of the nature and extent of the insurance benefits and its potential limitations.[273] Concessions by the insurer to the third party in defending the third-party claim – such as acceptance of liability – bind the insured directly and it should be warned of this possibility. No-admissions clauses should be disclosed prominently to the insured.[274]

If a liability insurer conducts the insured's defence, it should do so under reservation of rights to avoid uncertainty should it later opt to deny liability to the insured.[275] This possibility should be disclosed and the process clearly understood as it has consequences for the rights of both insurer and insured.

---

[271] There is more judicial authority in English law which may be consulted to develop our law. See para 4.3.1.1 below.

[272] See para 5.3.1.1 below on Belgian law and the extensive protection that Belgian insurance legislation provides to both the liability insurer and the insured.

[273] PPRs: see rules 11.4.2*(c)* and 11.4.2*(g)*. Also see paras 3.2 and 3.2.2.1(a) above.

[274] Some authors opine that clauses like no-admissions clauses which allow the insured absolute control over the conduct of its actions may in future be found unfair under the (English) Consumer Rights Act. See paras 4.1.2 and 4.3.1.2 below.

[275] See para 3.3.1.1(e) above.

Under the PPRs an insurer should disclose to an insured any actual or potential conflict of interest[276] between them.[277] An insured should be informed when it has a right to insist on its own legal representative and on how defence costs operate.

An insurer's right or duty to defend is not absolute, and one may here be guided by advances in English and Belgian law on how to deal with conflict of interest in the conduct of defence and settlements.[278]

To ensure transparency in the claims processes, and when an insurer makes a final payment, an offer, or a settlement to the insured, it should expressly disclose the full details and explain the reason for making payment or settlement to the insured.[279]

3.3.2 The Legal Relationship between the Liability Insurer and the Third-Party Plaintiff

As explained earlier,[280] privity of contract means that there is no contractual relationship between the liability insurer and the third-party plaintiff. The latter may only claim from the insurer under the exceptional circumstances in section 156 of the Insolvency Act. The liability insurer may defend the matter against the third-party plaintiff.

The possible multiple relationships in liability insurance and their interdependency in the context of liability insurance must be re-emphasised. In view of the many issues identified above, a direct claim by the third party against the insurer, that is not limited to the insured's insolvency or sequestration, may need to be reconsidered at some point in the future. This is already the position under Belgian law as discussed in Chapter 5.

3.3.3 The Legal Relationship between the Liability Insurer and the Third-Party Plaintiff's Insurers: Litigating against each other in the Names of their Insured

It may happen that the insured's liability insurer and the third party's property insurer litigate against each other in the names of their respective insured – the property insurer by enforcing the third party's claim in the exercise of its right of

[276] Rule 11.4.2*(j).*
[277] See para 3.3.1.1(c) above.
[278] See paras 4.3.1.1(d) and 5.3.1.1(c) below.
[279] PPRs: rule 17.8.8.
[280] See para 3.2.3 above.

subrogation; and the liability insurer by defending the third party's claim.[281] However, no contract or legal relationship exists between the respective insurers as, on the principle of privity of contract, each acts on behalf of its own insured. This is, once again, an intricacy that should be disclosed and explained to the insured.

3.4 CONCLUSIONS AND RECOMMENDATIONS

In the first instance, the main sources of South African (liability) insurance law are common law, judicial decisions, legislation such as the SIA, the Insurance Act of 2017, the relevant PPRs, and the Constitution of the Republic of South Africa, 1996. As explained, the law of liability insurance is found in these same sources to a greater or lesser degree.

Secondly, this chapter has identified and analysed some of the voids, unique challenges, and impracticalities in the South African insurance law, specifically as regards liability insurance contract law. These are: *(a)* in respect of the liability insurer's duty to indemnify its insured and; *(b)* in relation to the liability insurer's conduct of the defence and settlement of third-party claims brought against the insured defendant. Some of these are identified below.

Thirdly, the legal uncertainties that may precede the liability insurance contract (including contract negotiation), that may endure for the entire subsistence of the contract (including claims management), and that may continue after the expiry of the contract, have been explored in the chapter.

Fourthly, it was established in this chapter that certain of these legal challenges can be addressed by introducing novel and creative applications of our national law not yet pursued by the legislator or the courts.

In particular, the PPRs are aimed at insurance in general, yet due to the unique complexities and intricacies of liability insurance cover, separate rules in the existing PPRs applicable only to liability insurance,[282] or alternatively a complete separate set of PPRs exclusively for liability insurance, are recommended.[283] These will help in

[281] For an example, see *Momentum Group Ltd v Fire Control Systems (Cape) CC* 2007 JDR 0618 (C) and the case discussion by Van Niekerk (2007) 10 *Juta's Insurance Law Bulletin 'Momentum'* 230-237; Reinecke, van Niekerk & Nienaber *South African Insurance Law* para 25.40 and Van Niekerk (2006) 18 *SA Merc LJ* 382-393.

[282] For example, like the separate rules specifically for microinsurance products.

[283] The same applies to the GCC under the FAIS Act, in that more specific aspects regarding liability insurance should be described as mandatory disclosures. See para 3.2 above.

ensuring greater consumer protection for the insured and greater clarity for both insured and insurer as regards their respective rights and duties.

The research in Chapter 3, and the summative critical comments, lay the foundation for the proposals for improvements to South African liability insurance law. These include specifically, the innovative check list developed in Chapter 6 covering the most important disclosure duties for liability insurance contracts, their operation, and the eventual claims processes.

Fifthly, this chapter has identified areas in which liability insurance contract law lacks answers, and where the other jurisdictions under review in this thesis can provide potential solutions.

As to the liability insurer's duty to indemnify its insured, the problematic areas include:

- the interpretation of the term 'legal liability';
- as to the insured event and the duration of liability cover, guidance under the different types of policies of their triggers of cover;
- the fairness and clarity of notice clauses; and
- the constitutionality and ambit of the third-party plaintiff's rights against the liability insurer, as well as aspects relating to the protection of the third-party plaintiff.

As to the liability insurer's defence and settlement of third-party claims brought against the insured defendant:

- Growing consumerism and the right of access to justice are of the reasons advocating for a mandatory statutory duty to defend on the liability insurer, as opposed to a mere contractual right to choose to defend.
- Quantitative research is recommended to establish the need for and the viability and cost-effectiveness of imposing a statutory duty to defend on the liability insurer.
- The principles governing the settlement of third-party claims have not yet developed to their full potential in South African law and cognisance should be taken of other legal systems.

The nature of liability insurance as third-party insurance should be kept in mind when our law is considered and developed. Generally, the interests of the liability-insurance consumer (the insured or policyholder), the third-party plaintiff, and the insurer that offers liability cover should be balanced.

It is recommended that the above-mentioned is the minimum of aspects to be addressed in detail in mandatory cover to be prescribed in PPRs applicable specifically to liability insurance.

Lastly, as the subsequent chapters highlight potential solutions to the problems identified in this chapter, only summative critical comments have been included in this chapter. Proposals for improvements and the development of a clearer and more specific law of liability insurance contract law in South Africa will only be collated in the final summary of conclusions and recommendations in Chapter 6.

This chapter has analysed the relevant principles of the law of liability insurance contract law only under the national law of South Africa – an uncodified or common-law system. As part of the legal comparative review, the following chapter, Chapter 4, focuses on the law of liability insurance under English law – also a common-law system. Chapter 5 analyses liability insurance under Belgian law – a codified or civil-law system.

CHAPTER 4:

ENGLISH LAW

CHAPTER 4:
ENGLISH LAW

4.1 INTRODUCTION[1]

English law is an uncodified system consisting of subsidiary common-law rules. The main sources of English insurance (contract) law[2] are common law, legislation, equity, and trade usages. Liability insurance is a specialised branch of insurance law and the law of liability insurance is found in these same sources. The law of the European Union also has some impact on English insurance law.

4.1.1 Common Law, Judicial Decisions, and Principles of Equity

The term 'common law'[3] refers to the body of law that developed after the Norman Conquest, when the royal courts went on circuit and applied new rules which were incorporated into the local laws and customs and which gradually came to replace the local customary law in local courts.[4] As the decisions of the royal courts were progressively recorded and published, it became practice to cite prior decisions as persuasive and binding authority in argument before courts. Like other fields of

[1] In writing this section, the following general works on English law were consulted: Keenan *Smith & Keenan's Text & Cases* (15 ed) 3-17; Bailey, Ching & Taylor *Modern English Legal System* paras 1.002-1.007; Gubby *Legal Concepts in Language* 15-25 and 34-42; and Baker *English Legal History* 195-215. On English insurance law, see also Clarke *Insurance Contracts* para 1.1; Birds *Birds' Modern Insurance Law* 1-3 para 1.1 and 14-22 para 1.8; Merkin, Summer & Hodgson *Colinvaux's Law of Insurance* paras 1.019-1.054 (hereafter '*Colinvaux's Law of Insurance*' in the chapter); Merkin, Summer & Hodgson *Colinvaux Supplement* 1-2 ad para 1.029 (hereafter '*Colinvaux Supplement*' in this chapter); and Birds, Lynch & Paul *MacGillivray on Insurance* paras 1.001-1.012, 2.001-2.037 (hereafter '*MacGillivray on Insurance*' in this chapter).

[2] The study primary concerns insurance contract law, as opposed to the regulation of insurance business. For further detail on the regulation of the conduct of insurance business, see *MacGillivray on Insurance* chs 36-38; *Colinvaux's Law of Insurance* ch 14 and *Colinvaux Supplement* 79-86 ad ch 114; Clarke ibid para 1.1(a); and Birds *Birds' Modern Insurance Law* 8-19 paras 1.6-1.9, 25-39 paras 2.3-2.7 and ch 5. The regulation of insurance business has become more important for the United Kingdom ('UK') in recent years given the need to comply with the harmonisation requirements of the European Union ('EU') single market for insurance (but the impact of Brexit is still uncertain at present). *MacGillivray on Insurance* (14 ed) *Supplement*, due to be published, is said to contain updates on the proposed impact of Brexit on the regulation of UK insurers.

[3] As opposed to 'civil law'.

[4] It is therefore argued that 'the identity between custom and common law is not historically true, since much of the common law in early times was created by the judges who justified their rulings by asserting they were derived from "the general custom of the Realm"'. See Keenan *Smith & Keenan's Text & Cases* (15 ed) 7.

law, the English law of insurance is based on judicial precedent[5] arising from case law.[6]

True to a common-law legal tradition,[7] decisions of the superior courts are a substantive source of law.[8]

It is relevant for a discussion of the sources of insurance law, that this branch of the law may be divided into the broad categories of marine and non-marine insurance law,[9] and to observe that instances of liability insurance are to be found in both categories.[10]

Initially, the common law did not play a significant role in the resolution of insurance-law disputes as merchants spread the risks between themselves and a Chamber of Assurance outside of the regular court system resolved their disputes. The law merchant (mercantile law) is based on mercantile customs and initially developed independently of the common law. Further, the limited number of reported cases limited the development of insurance law in general. When Lord Mansfield was appointed Chief Justice in 1756, he embarked on instructing the juries of common-law courts in full on the rules of insurance law in each case, by drawing principles

[5] The doctrine of binding precedent (ie, *stare decisis*) implies that judges must follow decisions of higher courts in prior cases involving similar facts in the same area of law. Gubby *Legal Concepts in Language* 15-17, 23 and 38-39.

[6] As explained by Baker *English Legal History* 196, '[t]here was probably never a time when the common law was not in some sense "case law", the result of solutions found in real cases'. Case law, in essence, refers to the judicial decisions judges make by applying legal principles from legislation and binding precedents. See Gubby *Legal Concepts in Language* 16.

[7] The basic characteristics of English law have become established in various Commonwealth countries and in most states of the United States of America ('US/USA'). The term 'common law' bears different meanings. Broadly, the term 'common-law legal system' is used to distinguish such systems from 'continental or civil-law systems'. The latter systems were originally founded on Roman law and now primarily consist of codes established in the nineteenth and twentieth centuries (see, eg, Belgian law in para 5.1 below). In its narrower meaning, the term 'common law' refers to rules derived from the decisions of superior courts, as opposed to those derived from statute. In its narrowest sense, the term 'common law' refers to a limited number of judge-made rules, to the exclusion of the principles of equity. (Under Belgian law the term 'gemeen recht' bears a distinctive meaning, and cannot be equated to any of the above meanings of the term 'common law' under English law. See the chapter on Belgian law in para 5.1.1 below.)

[8] And even though there is no (encompassing) code of insurance law in English law, legislation, too, is an increasingly important source. See para 4.1.2 below.

[9] See *Colinvaux's Law of Insurance* para 1.032 for a summary of the differences between marine and non-marine insurance law in English law. This distinction has from very early on been drawn in English law between marine and non-marine insurance. However, there are many other possible classifications of insurance law. See, eg, *MacGillivray on Insurance* para 1.040; Birds *Birds' Modern Insurance Law* para 1.2 at 3-5; and Clarke *Law of Insurance* para 1.1(d) for further detail.

[10] This study primarily concerns the general principles of the law of liability insurance. See para 1.9 above.

from the law merchant and more traditional common law.[11] Mansfield's judgments, primarily in the field of marine insurance law, subsequently formed the foundation of English insurance law.

Due to the rigidity of the common law, the King's Court of Chancery developed as a court of equity. It gradually established its own principles of natural justice and fairness. It also granted its own remedies where none existed at common law.[12] 'Equity' therefore developed alongside the common law.[13] Today English courts may apply rules derived from the common law and the principles of equity.[14] The current position may be summarised as follows:

> 'Equity never says the common law is wrong but merely provides alternative solutions to legal problems. … Equity is not, therefore, a complete system of the law. It complements the rules of the common law.'[15]

As England was one of the leading maritime powers for many centuries, English commerce at sea was more important than her territorial commerce, and consequently her marine insurance law developed more rapidly than non-marine insurance law. The Marine Insurance Act, 1906,[16] codified the principles of marine insurance that originated, in the main, from judicial decisions and treatises of legal writers.[17] Despite

---

[11] Prior to this date, a mere 60 insurance law cases had been reported. In addition, cases were left to the decision of a jury of merchants without any statement of the relevant insurance legal principles from the Bench. See *Colinvaux's Law of Insurance* para 1.032.

[12] See Gubby *Legal Concepts in Language* 18 and 36-37.

[13] For a discussion of the conflict which existed between the common law and equity in the development of English law, see Keenan *Smith & Keenan's Text & Cases* (15 ed) 8, 11-12.

[14] For example, see the 'equitable rule on ascertainment' para 4.2.2.1(b)(iii) below to establish an insured's legal liability towards the third-party plaintiff.

[15] Keenan *Smith & Keenan's Text & Cases* (15 ed) 11-12.

[16] 6 Edw 7 c 41, the '1906 Act'. Section 1 provides that, '[a] contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured … against marine losses, that is to say, the losses incident to marine adventure'. As to liability insurance in marine insurance, there is a 'marine adventure' where '[a]ny liability to a third party may be incurred by the owner of … insurable property, by reason of maritime perils' (s 3(2)(*c*)). '"Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea …'(s 3(2)). Gilman et al *Arnould's Marine Insurance and Average* (18 ed) para 1.04 explain that the term 'marine adventure' governs the scope of what may be insured under a marine policy, while the term 'marine perils' determines the risks which may be insured against under a marine policy. For further detail on these concepts, also see Hardy Ivamy *Chalmers' Marine Insurance Act 1906* 108 ss 1-3. Section 74 of the Marine Insurance Act, 1906 also provides that '[w]here the assured has effected an insurance in express terms against any liability to a third party, the measure of indemnity, subject to any express provision in the policy, is the amount paid or payable by him to such third party in respect of such liability'. Examples of marine liability insurance include where a marine carrier insures its liability to a cargo owner should the cargo be damaged by the carrier's negligence; or where a ship owner insures against liability for damage caused to another vessel by the negligent navigation of its insured vessel. See ibid 123 s 74.

[17] Gilman et al ibid para 1.01. Legal treatises may be considered another source of insurance law. See Keenan *Smith & Keenan's Text & Cases* (15 ed) 16-17. English jurists have published legal treatises

the expanding role of legislation[18] in common-law jurisdictions generally, case law remains extremely important in the development of the English law of insurance.

4.1.2 Legislation

There has traditionally been more extensive statutory involvement in the field of liability insurance than in other area of substantive insurance law.[19] The Third Parties (Rights Against Insurers) Act, 1930,[20] for example, recognised the existence of liability insurance – whether mandatory or non-mandatory. It overturned the common-law rule[21] that the proceeds of a liability policy formed part of the insured's insolvent estate.[22] The 1930 Act has been replaced[23] by the Third Parties (Rights Against Insurers) Act, 2010, which has a wider sphere of application.[24]

A number of statutes also provide for compulsory insurance against liability for the performance of specific forms of activity.[25] However, these statutes primarily identify the risks against which liability insurance must be taken out, and do not generally prescribe the principles of liability insurance or the terms upon which the required liability insurance is to be effected.[26]

---

through the course of time which have helped shape the law. Older treatises, as well as modern works, are regularly referred to when new points of law are argued in the courts.

[18] Legislation (statutes or Acts) refers to written laws passed by the legislative body in England, that is, the Parliament. See Gubby *Legal Concepts in Language* 20. An English court may override national legislation where it is in conflict with the law of the EU. Ibid 35. As to the impact of anti-discrimination legislation on insurance law generally, see Birds *Birds' Modern Insurance Law* 146-147 para 7.8.5 and *Colinvaux's Law of Insurance* paras 7.122-7.124.

[19] Merkin & Hjalmarsson *Compendium of Insurance Law* 811-812.

[20] 20 & 21 Geo 5 c 25; the '1930 Act'.

[21] See para 4.2.3 below for further detail.

[22] It has been observed that 'very little has been written about liability insurance, except concerning the 1930 Act': Birds & Hird 'Report' 185. This may have well changed as the statement was made in excess of 20 years ago. See, eg, Clarke *Law of Liability Insurance* which has seen two subsequent editions. Commentaries by Colinvaux and MacGillivray also contain detailed analysis of the latest developments in the law of liability insurance.

[23] The 1930 Act still applies in some instances. See para 4.2.3.2 below for further detail.

[24] Chapter 10; the '2010 Act'. The 2010 Act came into operation on 1 August 2016. See para 4.2.3.3 below for further detail.

[25] *Colinvaux's Law of Insurance* para 1.037; and Merkin & Hjalmarsson *Compendium of Insurance Law* 811-2 and 850-857. For example, the Employers' Liability (Compulsory Insurance Act) of 1969 (c 57) which requires employers to insure against their liability for personal injury to their employees (s 1(1)); and the Solicitors Act of 1974 (c 47) which provides for compulsory professional indemnity insurance for solicitors (s 37). For further detail on employers' liability policies and professional indemnity policies, see *MacGillivray on Insurance* paras 30.083-30.109 and 30.110-30.117; *Colinvaux's Law of Insurance* paras 21.001-21.005 and 21.116-21.131 and *Colinvaux Supplement* 126 ad paras 21.122 and 21.126.

[26] The Road Traffic Act of 1988 (c 52), which provides for compulsory insurance against liability arising from the use or permitting the use of a motor vehicle in respect of personal injury or property damage, is an exception to this rule. It intervenes in the contractual arrangements between the

Three relatively recent statutes have reformed[27] major parts of the substantive law of insurance contract.[28] These statutes distinguish between 'consumer insurance'[29] and 'non-consumer insurance',[30] and as a result, a distinction[31] between these categories of insurance has become very important in the English law of insurance.[32] Again, instances of liability insurance are to be found in both categories.[33] A few brief notes on these Acts suffice in the context of legislation as a

---

contracting parties (the insured as users of motor vehicle and their insurers) by depriving insurers of the right to plead defences that would otherwise have been available to them (s 148). Also see Merkin & Hjalmarsson *Compendium of Insurance Law* at 850 and 942-944; *MacGillivray on Insurance* ch 31; *Colinvaux's Law of Insurance* ch 23 and *Colinvaux Supplement* 151-202 ad ch 23 for further detail. A future publication, *Colinvaux's Law of Insurance* (12 ed), is set to analyse major changes as to the law of motor-vehicle insurance.

[27] A detailed study of these statutes falls beyond the scope of this study, but the statutes will be referred to in passing where relevant. Sources that pre-date these Acts should be considered with caution.

[28] There is still no (encompassing) code of insurance law in English law. The English system of financial regulation of insurance business is based on EU requirements that have been consolidated in Directive 2009/138EEC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance ('Solvency II'). Solvency II has been included in English law by the enactment of the Financial Services and Markets, Act 2000, as amended (the '2000 Act, as amended'). General liability insurance is one of the classes of 'general business' defined in Part 1 of Schedule 1 to the 2000 Act. Further detail is beyond the scope of this thesis. See para 1.9 above.

The protection of policyholders is provided for by Part XV of the 2000 Act, as amended. Insurance business is regulated by the Insurance Conduct of Business Sourcebook ('ICOBS') issued under the 2000 Act, as amended. ICOBS is amended from time to time. The rules in ICOBS impose statutory duties on insurers and intermediaries. ICOBS 6 contains the rules on the disclosure of product information by insurers to ensure that the insured has the necessary information to make an informed choice on the product and the cover it requires. Some commentators argue that ICOBS has impacted on insurance contract law to some extent. There are general disclosure requirements for all forms of indemnity insurance. They also apply to liability insurance contracts, but are not tailored for liability insurance and will not be discussed in further detail for purposes of this thesis. See Birds *Birds' Modern Insurance Law* 15 para 1.9-1.91, chs 2 and 5. See also *MacGillivray on Insurance* paras 36.010-36.012 and 38.076-38.077.

[29] A 'consumer' under these Acts refers to an individual contracting 'wholly or mainly outside that individual's trade, business, craft or profession': Birds *Birds' Modern Insurance Law* 8 para 1.5 and 126 para 7.4.

[30] Also referred to as 'business' or 'commercial insurance'.

[31] For further detail on the distinction between consumer and non-consumer insurance law, see Birds ibid 15-16 para 1.9 and 110-111 para 6.1; *MacGillivray on Insurance* paras 10.001, 19.017 and 20.023 and *Colinvaux's Law of Insurance* paras 7.007 and 7.030.

[32] A 'contract of insurance' is not defined under these Acts. Before this, the definition of an insurance contract was primarily important for fiscal and regulatory purposes of insurance business under the English law of insurance. See *MacGillivray on Insurance* para 1.001. Birds *Birds' Modern Insurance Law* 8-9 para 1.6 proposes that, for regulatory purposes, a contract of insurance 'is any contract having as its principal object one party (the insurer) assuming the risk of an uncertain event, which is not within its control, happening at a future time, in which event the other party (the insured) has an interest, and under which contract the insurer is bound to pay money or provide its equivalent if the uncertain event occurs'.

[33] An example of a consumer liability insurance contract is where liability insurance forms part of a comprehensive policy, like a householder's policy. See Clarke *Law of Liability Insurance* para 5.11. Directors' and officers' liability policies are examples of non-consumer insurance.

source of insurance law.[34]

First, the Consumer Insurance (Disclosure and Representations) Act, 2012,[35] reforms aspects of the English consumer insurance law relating to pre-contractual disclosure and misrepresentation.[36] In essence, the 2012 Act abolishes a consumer's duty of disclosure of a 'material circumstance' or a 'material fact'.[37] A consumer now merely has a duty to take reasonable care[38] *not* to make a misrepresentation.[39] The insurer's questions to the consumer, for example, in the proposal form, determine the scope of the consumer's duty to take reasonable care. The remedies for breach of the duty have been modified. A remedy for breach of the duty to take reasonable care is available only if the misrepresentation was a 'qualifying misrepresentation'.[40]

Second, the Insurance Act, 2015,[41] has amended the duty of disclosure in non-consumer contracts.[42] The duty of disclosure is retained in non-consumer law. Both a failure to disclose and misrepresentation now resort under the 'duty of fair representation of the risk'.[43] Breach of this duty does not necessarily entitle the other contracting party to avoid the insurance contract.[44]

Both the 2012 Act and the 2015 Act modify the duty to act with utmost good faith in both consumer and non-consumer insurance contracts.[45] For example,

---

[34] During the course of Chapter 4, a few brief references will also be made to instances where these Acts may affect the general principles of the law of liability insurance.

[35] Chapter 6; the '2012 Act' or also known as 'CIDRA'. The 2012 Act came in force on 6 April 2013 and only applies to contracts entered into or renewed after that date. It has been said to 'represent the first real reform of insurance contract law since the principles were first developed, especially by Lord Mansfield in the eighteenth century': Birds, Lynch & Milnes *MacGillivray on Insurance (Centenary Ed)* in preface at ix. See Birds *Birds' Modern Insurance Law* 117-118 para 7.0 and 126-128 para 7.04; Clarke *Law of Liability Insurance* in paras 5.11 and 7.3; *MacGillivray on Insurance* paras 19.003-19.006; *Colinvaux's Law of Insurance* paras 7.005-7.029 for summaries and analysis of the reforms by the 2012 Act.

[36] Traditionally an insurer had the right to avoid the contract of insurance in its entirety if the insured was guilty of non-disclosure or misrepresentation.

[37] Section 2.

[38] Section 3 provides for an objective test to determine reasonable care.

[39] For example, by misstatements on a proposal form, or in answers to questions posed telephonically or electronically.

[40] Remedies for breach are set out in ss 4, 5, and Schedule 1 to the Act. See Birds *Birds' Modern Insurance Law* 128 para 7.4.2.

[41] Chapter 4; the '2015 Act'. The 2015 Act came into force on 12 August 2016.

[42] Part 2 of the 2015 Act. See Birds *Birds' Modern Insurance Law;* 130-146 paras 7.5-7.8; *Colinvaux's Law of Insurance* paras 7.006 and 7.029ff and *Colinvaux Supplement* 28-29 ad para 7.030ff; and *MacGillivray on Insurance* paras 20.001-20.007 in particular, and ch 20 generally.

[43] Section 3.

[44] Section 8 and Schedule 1 to the 2015 Act deal with remedies for the breach of this duty; see Birds *Birds' Modern Insurance Law* 147-151 para 7.9.

[45] Ibid 117-118 para 7.0; and *Colinvaux's Law of Insurance* paras 6.002-6.006.

avoidance of the contract as an automatic remedy for breach of the duty of utmost good faith has been abolished.[46]

The 2015 Act also impacts on the law on warranties and conditions[47] in both consumer and non-consumer contracts.[48] Before the 2015 Act, breach of warranty by the insured automatically discharged the insurer from liability, unless the insurer waived the breach. Under the 2015 Act, breach of warranty by the insured merely suspends the liability of the insurer for the duration of the breach.

Subject to requirements being met, insurers in non-consumer contracts may contract out[49] of Parts 2 and 3 of the 2015 Act.[50] The 2012 Act[51] and the 2015 Act[52] prohibit the use of a so-called 'basis-of-the-contract clause' to convert a pre-contractual representation into a warranty.[53]

Of relevance to liability insurance in particular, is that the 2015 Act also amended some parts of the 2010 Act.[54]

Thirdly, the Consumer Rights Act, 2015,[55] is relevant in so far as it impacts on the substantive law of insurance.[56] The Consumer Rights Act controls unfair terms

[46] See Birds *Birds' Modern Insurance Law* 117-158 para 7 for further detail on reforms to the duty of utmost good faith on the part of the insured, and 159-166 para 8 on reforms of the duty of utmost good faith on the part of the insurer. For further detail on the insured's pre-contractual duty of utmost good faith under common law and the statutory reforms, see *Colinvaux's Law of Insurance* para 6.022-6.025 and *Colinvaux Supplement* 25 ad para 6.022; and as to the post-contractual duty, see *Colinvaux's Law of Insurance* paras 6.032-6.040. See also *MacGillivray on Insurance* ch 17 generally as to the duty of good faith, and chs 19 and 20 as to the statutory reforms.

[47] See Birds ibid chs 6 and 9 for the distinction between the different types of contractual term and the effect of the reforms on them. Further detail falls beyond the scope of this thesis. Examples of conditions imposing rights on a liability insurer include conditions governing subrogation rights and control of the proceedings by or against the insured: Birds ibid 184 para 9.9. See paras 4.2.4 and 4.3 below for further detail.

[48] Part 3 of the 2015 Act. See Birds ibid 114 para 6.4 and 117 para 9.7; *MacGillivray on Insurance* paras 10.122-10.127; Clarke *Law of Liability Insurance* para 11.5; *Colinvaux's Law of Insurance* ch 8 generally and *Colinvaux Supplement* 31-32 ad para 8.018ff.

[49] Birds ibid 151 para 7.10 and 9.7.2 at 183. Part 3 of the 2015 Act may not be contracted out of in consumer contracts.

[50] For example, excluded contracts may provide for automatic discharge by the insurer in case of breach of warranty by the insured; or for a right to avoid the contract without having to show inducement when the duty to fair representation has been breached.

[51] Section 6.

[52] Section 9.

[53] Birds *Birds' Modern Insurance Law* 168-169 para 9.2.1 and 174-175 para 9.6; and *Colinvaux's Law of Insurance* paras 6.012, 8.003, and 8.124-8.125.

[54] Part 6 of the 2015 Act. See *MacGillivray on Insurance* paras 20.007 and 30.024-30.038. See para 4.2.3.3 below for further detail.

[55] Chapter 15; the 'Consumer Rights Act'. From 1 October 2015, the Act replaced the previous regulations on unfair terms in consumer contracts.

[56] The ambit of the Act is wider than insurance consumer contracts.

where the insured is a 'consumer' in a contract.[57] The Act distinguishes between two categories of terms: 'core terms' and 'non-core terms'.[58] All written terms in consumer insurance contracts should be transparent.[59] Provided that 'core terms' are transparent and prominent,[60] they are not assessed for unfairness.[61] Non-core terms are assessed for fairness and are unenforceable if they are found to be unfair.[62] It is at present uncertain which types of term in insurance contracts may be declared unfair.[63] As far as liability insurance is concerned, it is has been opined that conditions which enforce unreasonable time limits on the insured,[64] and terms which give the insurer absolute control over the conduct of the insured's actions,[65] may be found to be unfair.[66]

4.1.3 Trade Usage

Trade usage[67] may as be regarded as a source of insurance law. First, trade usage relating to the meaning of terms, for example, plays a role in the interpretation

[57] Part 2. See Birds *Birds' Modern Insurance Law* 16 para 1.6 and 110-111 para 6.1; *MacGillivray on Insurance* paras 3.25-3.31 and 10.016-10.021; *Colinvaux's Law of Insurance* paras 6.001 and 8.013 and *Colinvaux Supplement* 24 ad para 6.001. (As to the implied terms applicable to insurance consumer contracts under the Consumer Rights Act, see *Colinvaux's Law of Insurance* paras 6.066-6.067.)

[58] 'Core terms' specify the subject matter of a contract; or the appropriateness of the price payable under the contract in comparison with the goods or services supplied under it. Examples of core terms may include: clauses which define the scope of the cover and the measure of indemnity, including exception clauses, suspensive conditions, limitations on liability, and warranties that define the risk run by the insurer. 'Non-core terms' will include the following: procedural clauses stipulating time limits and procedures for making claims and resolving disputes arising from the policy, clauses requiring notification of events during the currency of the policy, and forfeiture clauses. See, eg, the decision by the European Court of Justice, *Van Hove v CNP Assurances SA* (C 96-14) concerning unfair terms.

[59] Section 68. 'Transparent' means that a term must be expressed in plain and intelligible language, and be legible.

[60] Sections 64(3)-64(5). 'Prominence' means that a term is brought to a consumer's attention in a way that an average consumer would be aware of it.

[61] Section 64(2).

[62] Section 62: 'A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer': s 62(4). See s 64(5) on the assessment of fairness.

[63] *MacGillivray on Insurance* para 10.021.

[64] For example, to give notice of loss or claims. See para 4.2.2.4 below.

[65] For example, clauses against admissions of liability by the insured and clauses relating to the control of the proceedings by the insurer. See paras 4.3.1.1 and 4.3.1.2 below.

[66] Birds *Birds' Modern Insurance Law* 110-111 para 6.1.

[67] English law distinguishes between trade usage and custom. A custom is a rule which has existed either actually or presumptively from time immemorial and has obtained the force of law in a particular location. Trade usage, on the other hand, lacks three of the distinguishing characteristics of custom: first, it need not have existed from time immemorial; secondly, it does not necessarily have to be confined to a limited location; and thirdly, where a trade usage is contrary to the positive law the courts will not recognise or enforce it.

of insurance policies.[68] If terms have acquired a meaning in a particular trade or business, it must be presumed that the contracting parties intended those words to bear that meaning. In the context of marine insurance, for example, the term 'average' has a technical meaning. Secondly, implied terms in marine insurance law may also be varied by trade usage. Section 87(1) of the Marine Insurance Act, 1906, for example, provides that '[w]here any right, duty, or liability would arise under a contract of marine insurance by implication of law, it may be negatived or varied by express agreement, or by usage, if the usage be such as to bind both parties to the contract'.[69]

Although custom was applied by the judges and turned into the common law of England in the past, it is of little relevance as a current source of law.[70]

4.1.4 The General Law of Contract, Insurance Law and the Law of Liability Insurance

The liability insurance contract is a type of insurance contract which is, in turn, simply a specific type of contract. It follows, therefore, that liability insurance contracts as insurance contracts are subject to the general law of contract,[71] although they are further subject to some special legal rules of insurance[72] and liability insurance.[73] Some authorities, Clarke for example, are of view that the concept of 'the law of insurance' is a misnomer as there is no distinct body of law of insurance contracts which determines the majority of issues in insurance law.[74] Others acknowledge the existence of a symbiotic relationship between the law of insurance

[68] See *MacGillivray on Insurance* para 11.016; and Clarke *Law of Insurance Contracts* para 28.8A. For further detail, see Hardy Ivamy *Chalmers' Marine Insurance Act 1906* 42-143 regarding s 87; and Gilman et al *Arnould's Marine Insurance and Average* (18 ed) paras 3.10-3.16.

[69] For further detail on how trade usage may vary implied terms of marine insurance law, see Hardy Ivamy ibid 142-143 ad s 87; and Gilman et al ibid paras 3.10-3.16.

[70] Keenan *Smith & Keenan's Texts and Cases* (15 ed) 14-15.

[71] For instance, the general principles relating to the formation and termination of the liability insurance contract are similar to those applicable to other types of contract. See Clarke *Policies and Perceptions* 353-354. Again see the impact of the Consumer Rights Act on insurance law and liability insurance contracts, as discussed in para 4.1.2 above.

[72] The duty of utmost good faith and the peculiar rules relating to conditions and warranties in the context of insurance contracts, eg, seem to be applicable to insurance contracts only and not other contracts. See Clarke *Law of Insurance Contracts* para 1.3; and Clarke *Policies and Perceptions* 354-355. However, account must be taken of the latest statutory reforms in this regard. See para 4.1.2 above. The common law has denounced a superseding duty of good faith in contracts generally, but the Consumer Rights Act (introduced due to the impact of EU legislation on English law), supports the notion of wider recognition of the duty of good faith than merely in insurance contract. See *Colinvaux's Law of Insurance* para 6.001. This matter is still under debate.

[73] Rules relating to the conduct of the defence by the liability insurer and the costs involved seem to be applicable to liability insurance only to the exclusion of other types of insurance. See below para 4.3.1.1 for further detail.

[74] See Clarke *Law of Insurance Contracts* para 1.3.

contracts and the general law of contracts.[75] It is argued that the former cannot exist without the latter, although the extent of the influence of insurance law on the general law of contract is questioned. However, the influence of judicial decisions on insurance law in the development of English contract law has been recognised. The symbiotic relationship, if any, between tort liability and liability insurance has further been widely debated.[76]

4.1.5 The Law of the European Union

English insurance law has further increasingly been influenced by the law of the EU.[77] The Restatement of European Insurance Contract Law Project Group[78] aims to harmonise substantive insurance contract law in EU Member States to some degree. The Project Group published the *Principles of European Insurance Contract Law*[79] in 2009. The *PEICL* was envisaged to become an optional instrument of European insurance contract law. Its application will depend on the agreement thereto by parties to the insurance contract. The *PEICL* will not replace the national insurance contract law of EU Member States,[80] but will provide the parties to the insurance contract with the choice of an alternative consensual set of rules to govern their insurance contract.[81]

The *PEICL* consists of rules that state the common understanding of the general provisions of insurance contract law throughout the EU.[82] The rules cover all types of

[75] For further detail, see Clarke ibid and Clarke *Policies and Perceptions* 354-358.
[76] Clarke *Policies and Perceptions* 308-316.
[77] As explained in para 4.1.1 above, the influence by the law of the EU generally concerns the regulation of the conduct of the business of insurance, as opposed to insurance contract law; and the impact of the law of the EU on English insurance law may change due to Brexit. However, EU regulations also impacted on English unfair terms in consumer contracts, as well as case law by the EU Court of Justice. See para 4.1.2 above. For the influence of EU law on regulating conflict of interest regarding legal expenses insurance in the context of liability insurance under English law, see para 4.3.1.1(d)(iii) below.
[78] The 'Project Group'.
[79] Basedow et al *PEICL*; the '*PEICL*'. See *PEICL* at xlix-lxviii; and Birds *Birds' Modern Insurance Law* 21-22 para 1.10.2 for further detail.
[80] As such, the *PEICL* is not a source of English insurance law, but it may influence the terms of insurance contracts in England (and other EU Member States – see para 5.1.4 below on Belgian law).
[81] For the *PEICL* to apply to an insurance contract, the parties will either have to contract into (or out of) the *PEICL*.
[82] The *PEICL* includes 'absolutely mandatory' and 'semi-mandatory' rules. If the *PEICL* are adopted by the parties to an insurance contract, some rules may not be derogated from at all and are thus 'absolutely' mandatory. Other *PEICL* rules are 'semi-mandatory' as the parties to the insurance contract that opted for the *PEICL*, may derogate from them provided that such derogation does not prejudice the policyholder, the insured, or the beneficiary.

insurance other than reinsurance.[83] An expanded and slightly updated version of the *PEICL* was published by the Project Group in 2015.[84] The Project Group has also started drafting special rules for individual branches of insurance law, and the updated version includes provisions on liability insurance.[85]

Although the overall draft of the *PEICL* is ready for consideration by the political institutions of the EU with a view to eventual legislation, some commentators are sceptical about the prospect of legislation at the European level.[86] In this chapter, however, the focus remains on the English national insurance contract law.

4.2 THE LIABILITY INSURER'S DUTY TO INDEMNIFY THE INSURED

4.2.1 The Legal Relationship between the Third-Party Plaintiff and the Insured Defendant

As liability insurance is third-party insurance,[87] the insured's legal liability (both in fact and in extent) to the third party in principle determines the liability of the liability insurer to the insured.[88] However, an insured's liability to the third-party plaintiff is in principle independent of any insurance or liability insurer and the insured's liability is incurred irrespective of whether the insured defendant is insured or covered.[89] Even though the defendant may not be an 'insured' in that it that does not have insurance at all, or may not be covered under its liability insurance contract

[83] The rules themselves are followed by comments that explain the reasons behind each rule, together with examples of how the rules should be applied. In addition to comments, notes to the rules confirm the *status quo* of insurance contract law in each EU Member State as well as the common viewpoints on each relevant legal point.
[84] Basedow et al *PEICL* (2 ed); the '*PEICL* (2 ed)'. See *PEICL* (2 ed) 'Preface' v.
[85] *PEICL* paras 1.1-1.10; and *PEICL* (2 ed) Part 4 at 51-56 and 286-311.
[86] Birds *Birds'Modern Insurance Law* 21-22 para 1.10.2.
[87] Ibid 3-4 para 1.2.1. A third party is someone other than the insured, eg, a claim by a subsidiary of an insured against the insured is a third-party claim: *Colinvaux's Law of Insurance* para 20.014 and *Colinvaux Supplement* 116-117 ad para 21.014. Also see para 2.2.2.2 above for further detail on liability insurance as third-party insurance.
[88] See para 4.2.2.1 below for further analysis of the concept 'legal liability'. For further detail on the legal relationship between the third-party plaintiff and the insured defendant in the context of the conduct of the defence and settlement of claims by the third-party plaintiff against the insured defendant, see generally para 4.3 below. Liability policies, eg, usually contain a clause that prohibits the insured from settling any claim by a third party, or from making any admission of liability, without the insurer's written consent. See para 4.3.1.2 below.
[89] Cooke *Law of Tort* confirms (at 8) that 'the fact that a party is insured is, strictly speaking, disregarded by the court when the liability and quantum of damages are assessed'. See Clarke *Policies and Perceptions* 308-316 for a critical discussion of the symbiotic relationship, if any, between tort liability and liability insurance.

against the liability it incurred towards the third party, the defendant may still be liable to the third party for the latter's loss. So, for example, a defendant that has intentionally caused loss to the third party may not be covered under its liability insurance contract, but may still be held legally liable towards the third party for the latter's loss.

However, some commentators have recognised the influence that the existence of liability insurance may have on the imposition of civil liability on the insured defendant.[90]

4.2.2 The Legal Relationship between the Liability Insurer and the Insured Defendant

4.2.2.1 The Scope of the Insured Defendant's Liability Cover

As indicated previously,[91] liability insurance covers only legal liability on the part of the insured defendant towards third parties. As liability insurance is indemnity insurance, the insured does not have a right to be indemnified, and the insurer is not obliged to indemnify the insured until the insured has suffered a 'loss'.[92] For purposes of liability insurance, a 'loss' is suffered when the insured becomes legally liable towards a third party for the latter's loss.[93] The terms of the insurance contract primarily determine the loss to the insured – ie, its legal liability towards a third party

[90] It has been opined that 'the tort system would be unable to operate without the underpinning of insurance and the presence of insurance may have shaped some liability rules'. See Cooke *Law of Tort* 8. Cooke then explains that, in the absence of third-party insurance, many claimants may be uncompensated or receive only partial compensation due to defendants' inability to meet compensation awards. He further describes two possible ways in which insurance may impact tort law. First, Parliament will consider the impact of any legislative change of tort law on insurance. Secondly, as liability insurers conduct the defence on behalf of their insured, they determine which claims are settled or disputed and insurance therefore plays a role in the actual operation of the tort system. Ibid 7-9. It has been suggested that the fact that insurance may be taken out against liability for legal costs towards third parties, has contributed to the so-called 'compensation culture', which may be defined as a 'propensity to respond to injury by legal redress'. Ibid 16. It should also be noted that liability in tort is not static and the development of the law of tort may have an impact on insurance. Ibid 17. The challenges relating to the expansion of the law of tort in negligence, and the interplay with insurance, eg, are discussed ibid at 31ff.

[91] See para 2.2.2.1 above on the classification of liability insurance as indemnity insurance.

[92] Clarke *Law of Insurance Contracts* para 17.4A. Clarke *Law of Liability Insurance* in para 8.6 explains that 'the amount of the loss covered and recoverable is the amount of damages that, as the consequence of the liability imposed in law, the insured is obligated to pay to third parties'. The ordinary meaning is ascribed to the word 'damages': ibid. However, the insured will not always receive a 'perfect indemnity': *Colinvaux's Law of Insurance* paras 1.028 and 1.029 and *Colinvaux Supplement* at 1-2 ad para 1.029.

[93] Clarke *Law of Liability Insurance* para 8.1.

for the latter's loss – which may then trigger the liability of the insurer towards the insured under the liability insurance policy.[94]

The meaning of the phrase 'legal liability', also referred to as 'liability at law' or 'liability to pay', is one of the contentious issues around liability insurance in English law and warrants detailed analysis.[95]

4.2.2.1(a) The Extent of 'Legal Liability'[96]

The insured may be indemnified against amounts that it may be liable to pay to third parties in tort, contractually for performance, for breach of contract, and/or by statute, although indemnity against certain forms of liability cover may be excluded expressly or by implication in the policy itself.

The different bases of liability may briefly be distinguished as follows:

- Tortious liability: Academic authorities have conceded that it is difficult to provide a satisfactory definition of this term. According to Winsfield, 'tortious liability arises from a duty primarily fixed by law: this duty is towards persons generally and its breach is redressible by an action for unliquidated damages'.[97] Winsfield's definition has been accepted in various English decisions.[98] Some of the recent authorities on the law of tort acknowledge Winfield's definition for its role in distinguishing tort from other branches of the law, such as contract,[99]

[94] The insured's legal liability towards the third-party plaintiff is the insured's loss in terms of the liability policy (see this para 4.2.2.1 below) and should be distinguished from the 'insured event' that brings the matter within the scope of a particular period of cover designated in the liability insurance contract (see para 4.2.2.2 below). See paras 4.2.2.1(b)-4.2.2.1(c) below for further detail on the time when, and the ways in which, the insured becomes legally liable towards third-party plaintiffs. Also see para 4.2.2.1(c) below for further detail on the effect of the established legal liability of the insured towards the third party on the liability of the insurer towards the insured.

[95] See para 4.2.2.1(a) below for further detail.

[96] Or 'liability at law', 'liability to pay', or other similar terminology. In writing this section, the following general works on English insurance law were consulted: Clarke *Law of Insurance Contracts* para 17.4A1; Clarke *Law of Liability Insurance* paras 8.6, 10.3 and 10.4.4; *MacGillivray on Insurance* paras 30.001-30.007; *Colinvaux's Law of Insurance* in paras 21.014-20.023 and *Colinvaux Supplement* 117-118 ad paras 21.014 and 21.017; and Birds *Birds' Modern Insurance Law* paras 20.0 and 20.11 at 385-386 and 388.

[97] Smith & Keenan *English Law* (6 ed) at 296 and Keenan *Smith & Keenan's Text & Cases* (15 ed) 491.

[98] Keenan *Smith & Keenan's Text & Cases* (15 ed) at 491.

[99] The distinctive characteristics that are referred to in Winfield's definition of 'tortious liability' may assist in providing clarification for statements made on tortious liability in the context of liability insurance in judicial decisions and commentaries. In the first instance, from the definition it is evident

and for its brevity, but do not accept the definition as entirely accurate.[100] Therefore, they regard the different aims of the heads of liability as a more satisfactory basis on which to distinguish between contract and tort – '[t]he "core" of contract is the enforcing of promises, whereas tort aims principally at the prevention or compensation of harms'.[101] These authors then again qualify this basis of distinction.[102] Despite a number of distinctions, there is nevertheless

---

that tortious liability arises from law, as opposed to from contract. That may explain why tortious liability (and seemingly not also contractual liability) is sometimes referred to as liability that arises at common law. See *M/S Aswan Engineering Establishment Co Ltd v Iron Trades Manual Insurance Co Ltd* [1989] 1 Lloyd's Rep IR 289 (QBD (Comm)) 292-293 discussed in further detail in para 4.2.2.1(a)(i) below. Secondly, the fact that tortious liability creates a duty towards persons generally, explains why public liability or product liability policies (that usually provide cover against the public at large) generally seek to cover tortious liability, but not contractual liability voluntarily assumed. See, *Tesco Stores Ltd v David Constable & Others* [2008] Lloyd's Rep IR 636 (CA (Civ Div)) para 14 discussed in further detail in para 4.2.2.1(a)(i) below. Thirdly, it is also clear from the definition of tortious liability that damages in tort are not liquidated but rather 'unliquidated' damages. The plaintiff in tort must produce evidence of the loss it suffered and it is then left to the discretion of the court to determine the amount of damages payable. See Smith & Keenan *English Law* (6 ed) 273 and Keenan *Smith & Keenan's Text & Cases* (15 ed) 518-524. See para 4.2.2.1(a)(i) below for further detail on whether 'legal liability' covers liability in tort to the exclusion of contractual liability.

[100] See, eg, Rogers *Winfield & Jolowicz Tort* paras 1.1-1.10; and Cooke *Law of Tort* 17-21, for a discussion of Winfield's definition on 'tortious liability', and his proposed distinction between tortious and contractual liability critically. They criticise these distinctions as 'generalisations' and as 'apt to mislead'. In the first instance, Winfield's view that tortious duties are legally imposed (fixed by the law itself) and do not depend on agreement or consent of the persons subjected to them, whereas contractual obligations are assumed voluntarily (fixed by the parties themselves), is challenged on a number of grounds. For example, on the one hand, there are instances of tortious liability where prior consent by the defendant is required (eg, the liability of the occupier of premises to its visitor is based on a breach of duty of care that is owed by the occupier to persons whom it has *permitted* to enter its premises). On the other hand, in many instances the content of contracts is legally imposed and not voluntarily inserted by the contracting parties (eg, terms implied in contracts by the operation of law, eg statutory obligations for the sale or hire-purchase of goods, which cannot be excluded by the parties to the contract), or the duty not to break a promise (or contract), which forms the basis for the remedy for breach of contract. Secondly, other proposed distinctions between tort and contract (eg, that tortious liability is fault-based and contractual liability is strict) are qualified. For example, some authors challenge the distinction by contending that the word 'fault' has different meanings and that high standards are imposed for tortious liability especially in the case of compulsory liability insurance. See Cooke *Law of Tort* 19.

[101] Rogers *Winfield & Jolowicz Tort* para 1.6 and Cooke ibid. The common law traditionally takes account of the diverging interests between contract and tort when a remedy is granted. Therefore, an award for contractual damages is aimed at placing the claimant in the position which it would have occupied had the defendant's undertaking been fulfilled; whereas an award for tort damages is designed to return the claimant to the position it was in before the defendant's wrong was committed. See Cooke ibid 19-20; and Keenan *Smith & Keenan's Texts & Cases* (15 ed) 518. Traditionally, the law of tort has been seen to protect victims against damage to their person or property and it was regarded as the role of contract to protect economic interests. See Cooke ibid 81. Tort law is said to provide limited protection for economic interests where the defendant has acted unlawfully and has caused economic loss to the claimant (so-called 'economic torts'). This may be explained by a distinction between lawful and unlawful business practice. Cook ibid 6.

[102] Rogers *Winfield & Jolowicz Tort* paras 1.6-1.7; and Cooke ibid 19-20. The extent of liability for negligently caused economic loss is controversial and is seen as one of the areas where tort and contract overlap. See Cooke ibid 6. A distinction is drawn between consequential economic loss

a substantial overlap between tortious and contractual liability[103] and there may even be instances of concurrent liability.[104]

– Contractual liability: The term is used often in judicial decisions and by commentators without further explanation of what it entails.[105] It is a matter of interpretation in every instance whether the reference to contractual liability refers to liability for damages imposed by law for breach of a contract, or if it also applies to liability imposed by contract – ie, contractual liability for performance of a contract voluntarily assumed by the insured. The duty not to break a promise (or contract), which forms the basis for the remedy for breach of contract,[106] is a contractual obligation imposed by law.[107] Liability imposed by contract for performance of a contract refers to liability that the insured defendant has incurred directly or merely by reason of a contract

---

(economic loss which is consequential on physical damage to the person or property) and pure economic loss (economic loss where there are no personal injuries or loss to property – ie, damage to the pocket). Consequential economic loss may be recovered by the tort of negligence; but pure economic loss not. For further detail, see Cooke ibid 32-34 and 104. However, subsequent cases have held that liability should rather be established by the relationship between the claimant and the form of wealth in question, than by the type of economic loss (consequential economic loss as opposed to pure economic loss). Cooke ibid 104. For an extensive summary of the extent of liability for negligently caused loss, including the historical development and different tests, see Cooke ibid 81-117. Liability insurance cover for pure economic loss is discussed in more detail in paras 4.2.2.1(a)(i) and 4.2.2.1(a)(ii) below.

[103] Cooke ibid 17.

[104] Concurrent (or co-extensive) liability refers to the situation where both tortious and contractual liability may arise from the same set of facts and where the claimant may have a choice between these alternative causes of action. See Rogers *Winfield & Jolowicz Tort* paras 1.5-1.7 and Cooke ibid 20, 34-35. A difference in the respective applicable limitation periods is one of the technical distinctions between tort and contract.

[105] Birds *Birds' Modern Insurance Law* 385 para 20.0

[106] The usual remedy for breach of contract is a so-called 'right of action for damages at common law': Smith & Keenan *English Law* (6 ed) 267. As opposed to damages in tort that are generally not liquidated, damages in contract may, depending on the circumstances, either be liquidated or unliquidated. See Keenan *Smith & Keenan's Texts & Cases* (15 ed) 522. Liquidated damages are damages that have been agreed upon by the contracting parties in advance. Where this is the case, only breach of contact has to be proved; it is not necessary for the claimant to prove loss. An agreement for liquidated damages will not be valid if it constitutes a penalty; it should constitute a true pre-estimate of loss. See Keenan *Smith & Keenan's Text & Cases* (15 ed) 405-406. It may be mentioned briefly that exemplary (or so-called 'punitive damages') are aimed at punishing rather than compensating the defendant, and may in principle be covered by liability insurance, but that many liability policies exclude any liability therefor. See *MacGillivray on Insurance* para 30.009 n 36; and *Colinvaux's Law of Insurance* para 21.023. For further detail on the different types of damages, and on the other types of remedy for breach of contract, see 6 ed ibid 267-278 and Keenan *Smith & Keenan's Text & Cases* (15 ed) 405-413.

[107] So-called 'contractual liability for damages imposed by law for breach of contract'. This type of liability is sometimes also referred to as pure contractual liability with a tortious counterpart. For further detail, see Rogers *Winfield & Jolowicz Tort* paras 1.5; and Cooke *Law of Tort* 17-18.

voluntarily concluded between itself and the plaintiff.[108]

- Statutory liability. This term refers to liability imposed by statute (legislation). Where a statute imposes a duty on a person, breach of such a duty may be classified as a tortious breach of a statutory duty, which may give rise to an action in damages by a person injured as a result.[109] There may, therefore, be an overlap between statutory and tortious liability.

The meaning of the term 'legal liability', the different bases of liability, and the questions that arise from the distinctions or overlap between theses bases, is now briefly considered with reference to judicial decisions.

4.2.2.1(a)(i) Whether 'Legal Liability' Covers Liability in Tort to the Exclusion of Contractual Liability [110]

Although 'legal liability' in the insuring clause of a (public or product) liability policy usually refers to liability in tort,[111] the phrase is wide enough to include contractual liability. However, the general rules of the interpretation of contracts which aim at establishing the intention of the parties, should be applied to establish the content of the phrase 'legal liability' when it is inserted in a liability insurance policy, and the resulting scope of the liability cover in each specific case.[112]

In *M/S Aswan Engineering Establishment Co Ltd v Iron Trades Manual Insurance,*[113] the court interpreted 'liable at law' in the phrase that an insurer shall be liable for 'all sums which the Insured shall become liable at law to pay as

---

[108] Liability policies often exclude cover therefor *MacGillivray on Insurance* in para 30.006 in n 27. However, cover for liability imposed by contract may, albeit subject to restriction, be present in contractors' liability policies or in the public liability section of a contractor's all risk policy, eg, to cover contractual liability incurred by the contractor arising from its presence or activities on the contract site. For further detail on contractual liability for damages imposed by law for breach of contract, contractual liability imposed by contract for performance assumed by the insured, and related matters, see pars 4.2.2.1(a)(i)-4.2.2.1(a)(iii) below.

[109] Cooke *Law of Tort* 265-277. However, not all breaches of statutory duty will give rise to such an action for damages. It will depend whether the statute gives rise to the right to sue for damages, which will again depend on the intention of Parliament. For further detail on statutory liability, see paras 4.2.2.1(a)(iv) below.

[110] For further detail on legal liability of the insured for contractual liability towards third party, and the distinction between contractual liability for damages imposed by law for breach of contract and for contractual liability imposed by contract for performance voluntarily assumed by the insured, see paras 4.2.2.1(a)(ii)-4.2.2.1(a)(iii) below.

[111] Clarke *Law of Liability Insurance* para 1.1.

[112] Ibid in para 10.3.

[113] *M/S Aswan Engineering Establishment* 292.

damages'.[114] In accordance with the general rules of interpretation of contracts, it held that in 'its ordinary meaning [it] simply means "legal liability"'.[115] It found that the tautologous phrase 'liable at law' was not limited to liability in tort but also covered contractual liability.[116] The court specifically observed that it had not been referred to any English judicial decision to the contrary, and it distinguished the Canadian decisions to which it had been referred, on their facts.[117] The parties to the liability insurance contract had to exclude cover for contractual liability expressly if they wished it to be excluded.[118]

Therefore, the phrase 'liable at law to pay as damages' includes both liability in tort and contractual liability (for liability imposed by law to pay damages for breach of contract),[119] and in itself does not exclude contractual liability.[120] Some commentators[121] caution that the policy in *M/S Aswan* – entitled 'third-party (legal and contractual liability) insurance' – should be distinguished from other liability policies.[122] The reference to contractual liability in the title of the policy therefore played a role in the court's decision and this was brought to the attention of the parties in support of its decision.[123] It is further notable that the policy was held *not* to have been a public liability policy.[124]

---

[114] Ibid 292-294. It had to be determined whether the liability policy covered the insured's liability towards the plaintiff in damages for loss of spilt waterproofing compound.
[115] Ibid 292-293.
[116] Ibid 293. The defendants argued that the phrase 'liable at law' meant that the liability of the insured had to arise at common law, and not under contract, but the Court of Appeal disagreed at 292-293. According to Winfield's definition of tortious liability, it arises from law, as opposed to from contract, and in consequence tortious liability (and seemingly not also contractual liability) would sometimes be referred to as 'liability that arose at common law'; but then Winfield's definition has been criticised. See para 4.2.2.1(a) above for further detail.
[117] *M/S Aswan Engineering Establishment* 293.
[118] Ibid.
[119] See para 4.2.2.1(a)(ii) below for further comments on *M/S Aswan Engineering Establishment*.
[120] Birds *Birds' Modern Insurance Law* 385-386 para 20.00 n 3 and Clarke *Law of Liability Insurance* para 10.3. See paras 4.2.2.1(a)(ii), 4.2.2.1(a)(iii) and para 4.2.2.3(b)(i) below for further comments on the exclusion of contractual liability from liability cover.
[121] Clarke *Law of Insurance Contracts* ibid para 17.4A1 n 7.
[122] *M/S Aswan Engineering Establishment* 293. According to Winfield's definition, tortious liability arises from law, as opposed to from contract and 'legal liability' would, on that interpretation, refer to tortious liability (and seemingly not also to contractual liability).
[123] *M/S Aswan Engineering Establishment* 293.
[124] Ibid. Winfield's definition of tortious liability under English law implies that the duty that gives to it is a duty towards persons generally. This explains why public liability or product liability policies, usually provide cover against the public at large, generally seek to cover tortious liability, but not contractual liability for liability voluntarily assumed. See para 4.2.2.1(a) above for further detail. It is therefore relevant that the policy in *M/S Aswan Engineering Establishment* was *not* a public liability policy. The inference could therefore not be drawn, as in the case of a public liability policy, that the policy would generally seek to cover tortious liability to the exclusion of contractual liability. Also see para 4.2.2.1(a)(ii) below for further comments on *M/S Aswan Engineering Establishment*.

In *Tesco Stores Ltd v Constable*,[125] the Court of Appeal held that the phrase 'liable at law for damages' in the insuring clause of a public liability policy were wide enough to include not only liability in tort,[126] but also contractual liability (ie, for liability imposed by law to pay damages for breach of contract).[127] However, the words that followed the phrase in this particular case, made it clear that the cover was limited to liability in tort.[128] The contractual liability extension clause provided cover for liability assumed by the insured under contract. The liability covered under the extension clause was subject to the same limitation as the insuring clause: the contractual liability had to be 'in respect of' liabilities defined by the law of tort.[129] The Court of Appeal dismissed the insured's contractual claim for pure economic loss under its public liability policy and reasoned as follows as to why the claim fell outside the scope of cover of the policy:

> [The insured's] liability was not in respect of material damage to property, but in respect of its contractual obligations under the deed of covenant … . It was not liable to [the third party] for any inference with [its] property rights, nor was it liable in contract in respect of liabilities defined by the law of tort. It was only liable to [the third party] under the deed of covenant for obligations under the deed of covenant. [The third party's] claim against [the insured] was not typical of a public liability policy. It was a straightforward contractual claim for economic loss. [The insured] had not damaged [the third party's] property or property rights and could not found its liability to [the third party] on the ground that it had damaged [another party's] property or property interests.[130]

The Court of Appeal in *Tesco Stores Ltd v Constable* explained the relevance of the type of policy – eg, a public liability policy – in distinguishing between cover for tortious and the different types of contractual liability.[131] It explained that public

---

[125] *Tesco Stores Ltd v Constable* paras 9, 10, 30 and 31. It had to be determined whether the policy provided cover against contractual liability for pure economic loss (loss of future business) that arose from a deed of covenant and was independent of any tortious liability.
[126] Ibid para 15.
[127] Ibid para 18. Also see para 4.2.2.1(a)(ii) below for more comments on contractual liability in *Tesco Stores.*
[128] The Court of Appeal further held that 'the wording could be construed to cover contractual liability co-extensive with liability in tort … to give effect to the intention of the parties'. See ibid para 20. As far as the insuring clause was concerned, it did not cover '"private liability" assumed under contract' which would not have attached in the absence of such an agreement. See *Colinvaux's Law of Insurance* para 21.015.
[129] *Tesco Stores* paras 24, 25 and 29. The function of the particular contractual extension clause may be explained 'to permit the parties to a construction contract to transfer tortious liabilities between themselves without impairing the assured's public liability cover'. See *Colinvaux's Law of Insurance* para 21.015.
[130] *Tesco Stores* paras 29-30.
[131] Ibid para 14.

liability policies provide cover against liability to the public at large, that public liability arises in tort, and that it cannot arise in contract only.[132] Public liability policies would therefore generally cover liability in tort and/or liability in contract for damages for breach of contract (so-called 'liability in contract with a tortious counterpart'), but they would not cover liability assumed by the contract which would not have attached in the absence of the contract (so-called 'pure contractual liability'), unless they clearly provided therefor.[133] The Court of Appeal contrasted public liability with private liability which arises from contracts entered into by individuals.[134] Private liability policies would generally cover contractual liability (both private liability assumed under the contract and liability for damages for breach of contract), but they may also extend to tortious liability (eg, to cover an insured as tortfeasor that is also liable towards a third party in tort).

In *Tesco Stores Ltd v Constable*[135] it was held that although the public liability policy in question did not cover liability in contract for pure economic loss,[136] the '[policy] wording may extend cover to third party claims in contract even for pure economic loss although one would expect it to say so clearly and for instance to be described as contract liability, financial or consequential loss cover'.[137]

A public liability policy is also unlikely to cover liability for restitution, as restitution is primarily concerned with the reversal of an unjust gain, as opposed to indemnify an insured against loss.[138]

The difference in English law between tortious and contractual liability has been summarised as follows: whereas liability in tort is 'concerned primarily with

---

[132] Ibid.
[133] *Colinvaux's Law of Insurance* para 21.015.
[134] *Tesco Stores* para 14.
[135] Ibid.
[136] The Court of Appeal referred with approval to a number of decisions that concerned public liability policies covering liability in respect of damage to property, where the insureds' contractual claims against the insurer for economic loss by the third party consequential upon, but not directly the result of the physical damage to the property, were rejected. See para 23. These decisions seem to have been referred to, to describe the limiting effect of the words 'in respect of' in the insuring clause in *Tesco Stores*, rather than to distinguish between so-called consequential and pure economic loss. See para 4.2.2.1(a) above for a distinction between these terms. See also *Axa Insurance UK Plc v Thermonex Limited (in liquidation)* [2013] Lloyd's Rep IR 323 (QBD (Merc)), 2012 WL 7870263 paras 60-65 where it was held that public liability insurance does not generally provide cover against liability for pure economic loss. See also *Colinvaux's Law of Insurance* para 21.136 and *MacGillivray on Insurance* para 30.006.
[137] *Tesco Stores* para 14. Some authorities are of view that liability for consequential economic loss may be recovered by the tort of negligence, but pure economic loss not. See para 4.2.2.1(a) above for a brief discussion, and criticism, of the position.
[138] *Axa Insurance v Thermonex* para 66.

compensating physical loss', [contractual liability] 'compensates for loss of expectation or profit'.[139] The difference between the aims of these types of liability may also be explained with reference to the public liability section of a contractor's all-risks policy which covers defective workmanship that would require rectification if it resulted in 'physical damage to the personal property of a third party or interference with a third party's property rights, as opposed to their purely economic interests'.[140] The policy therefore covers liability in tort and consequential economic loss, but not pure economic loss.[141]

If there is concurrent liability in contract and in tort,[142] the cover for tort liability will take priority and any exclusion of contractual liability will thus not affect the cover for liability in tort.[143]

If a claim against the insured is based on negligence (in tort) which is covered by the policy, and also on breach of contract, which has neither expressly been

---

[139] *Colinvaux's Law of Insurance* para 21.014 and *Colinvaux Supplement* 116-117 ad para 21.014. The reference to contractual liability may include liability damages imposed by law for breach of contract and for contractual liability imposed by contract for performance voluntarily assumed by the insured (pure contractual liability). The distinction between liability for damages in tort and for damages in contract for breach of contract may also be explained by the so-called 'doctrine of consideration'. Cooke *Law of Tort* 81 summarises it as follows: 'Where a person had entered a bargain promise and provided consideration, this would justify the court protecting their expectation interest in a breach of contract action. Damages for breach of contract are to put the claimant in the position they would have been in if the contract had been performed. Contrast this with the tortious objective of damages, to put the claimant in the position they would have been in if the tort had not been committed. This protects the status quo interest.' However, see para 4.2.2.1(a) above for criticism on this type of distinction in the context of economic loss, which is increasingly regarded as an area where the law of tort and of contract overlap.

[140] *James Longley & Co v Forest Giles Ltd* [2002] Lloyd's Rep IR 421 (CA (Civ Div)), 2001 WL 825585 para 17. The policy here contained an express exception that it would not cover contractual liability assumed under an agreement, unless such liability would have attached in the absence of the agreement. Ibid para 12. Notwithstanding the exception, the policy contained an extension in respect of contractual liability for physical damage to property. Liability in respect of liquidated damages was expressly excluded from this extension. Ibid para 13. An action for breach of contract for liquidated damages, was therefore also excluded.

[141] It has already been explained that economic loss is an area where the law of tort and contract overlap, and that pure economic loss is not generally recoverable in tort. See para 4.2.2.1(a) above.

[142] Concurrent causes of action may be distinguished from successive causes of action. In the case of concurrent causes of action, two or more causes of action exist co-extensively. The concurrent causes may either be interdependent or independent. Successive causes of action refer to consecutive causes, eg, where an event occurred and ended before another competing cause commenced. Clarke *Law of Insurance Contracts* para 25.9A is of view that '[i]n many cases, both views of the facts are possible and the court has room to manoeuvre and outflank the peril or the exception, as desired'. For further detail on concurrent and successive causes of action, see Clarke ibid paras 25.5-25.7 and 25.9A.

[143] *Jan de Nul (UK) Ltd v Axa Royale Belge SA (Formally NV Royale Belge)* [2002] Lloyd's Rep IR 589 (CA (Civ)), 2002 WL 45493 para 18 where the Court of Appeal held: 'What are excluded are damages which could only be recovered in contract.' The exclusion clause here excluded claims for damages which were solely recoverable in contract. The claim made against the insured could have been founded in tort, or alternatively in contract. The claim in tort was held not to be affected by the exclusion clause.

covered nor excluded by the policy, the claim will be covered.[144] It follows that if 'a claim against the insured may be classified in a number of ways, there is coverage if any one of those classifications is insured'.[145]

As to the classification of an insured's liability, problems may arise if the claim made by the third party against the insured is framed in terms that fall outside the scope of the policy, but the actual substance of the claim is insured. The court may then consider the true nature of the claim against the insured: the substance of the action will be determined, rather than how it has been framed.[146]

4.2.2.1(a)(ii) 'Legal Liability' for Contractual Liability

Some commentators are of the view that a liability policy covers contractual liabilities if they have a tortious counterpart (for example, liability imposed by law for damages for breach of contract), but that a liability policy does not cover pure contractual liability (for liability imposed by contract for performance voluntarily assumed), except if expressly so provided.[147] Most liability policies exclude contractual claims with no tortious counterpart (that is, pure contractual liability) indirectly by excluding liability voluntarily incurred.[148]

It is again a matter of interpretation whether the reference to, or the exclusion of, 'contractual liability' merely refers to liability for damages imposed by law for

---

[144] Clarke *Law of Insurance Contracts* para 17.4A1. In *Capel-Cure Myers Management Ltd v McCarthy* [1995] LRLR 498 (QBD) the court held at 503: '[I]t is the position that the Courts have long recognised that loss may be proximately caused by more than one peril, ie a combination of causes. In that event the loss may be properly attributed to each such cause, and assuming that one of those causes falls within the terms of the indemnity provided, the assured may recover. … [T]he case before me is one of liability insurance, in which the single act or omission giving rise to the claim is capable of being characterised as a breach of more than one duty owed to [the third party] while the insuring clause relied on relates only to one class of liability. However, it seems to me that similar principles apply. … Accordingly it seems to me that, …, an action by [the third party] lies against the [insured] which is properly framed in a form in which it would be a necessary averment that the [insured] are by virtue of their status/or activities under various statutory duties … which on the facts they have breached, and if an action could successfully be brought against them in that form, it is irrelevant that a different cause of action (such as breach of contract or fiduciary duty) could also be successfully alleged against them on the same facts.' For further detail on causation in liability insurance, see Clarke ibid paras 25.2 and 25.4(d).

[145] *Colinvaux's Law of Insurance* para 21.033 and *Colinvaux Supplement* 118-119 ad para 21.033.

[146] Ibid for English decisions on the classification of the insured's liability.

[147] Ibid para 21.014 and *Colinvaux Supplement* 116-117 ad para 21.014.

[148] See, eg, *Omega Proteins Ltd v Aspen Insurance UK Ltd* [2010] 2 CLC 370 (QBD (Comm)) para 19 where the liability policy excluded liability 'under any contract or agreement unless such liability would have attached in the absence of such contract or agreement'. See also para 4.2.2.3(b)(i) below for further detail on the exclusion from cover of contractual liability in liability policies.

breach of contract or if it also includes liability imposed by contract in the sense of contractual liability for performance assumed by the insured.

In *Peninsular and Oriental Steam Navigation Co & Others v Youell & Others*,[149] the insuring clause in the policies covered 'any sum or sums which the Assured shall become legally liable to pay whether contractually or otherwise howsoever to pay damages to third parties arising and occasioned through any of the Assured's activities anywhere in the World'.[150] The Court of Appeal held that the insured had to show only a liability in damages to the relevant third parties for its cancellation of the contracts between them.[151] It found that the insured was indeed under a legal liability in damages in respect of their claims, and that the policies therefore covered breach of contract.[152]

In *Enterprise Oil Ltd v Strand Insurance Co Ltd*,[153] there was express cover for 'liability imposed … by law or assumed under contract or agreement'.[154] Liability in tort, liability imposed by contract for breach of contract, and contractual liability for performance assumed by the insured were therefore included.

The decision in *M/S Aswan Engineering Establishment v Iron Trades Manual Insurance*, again, merely referred to 'contractual liability' without further explanation as to what that included.[155] The insuring clause referred to 'liable at law to pay as damages'.[156] The phrase suggests that the court's references to 'contractual liability' were limited to liability for damages for breach of contract and did not include contractual liability for performance assumed by the insured.[157]

In *Tesco Stores v Constable*, the Court of Appeal not only considered liability in tort, but also liability for damages for breach of contract and pure contractual liability for performance assumed by the insured. Referring to the insuring clause of the specific public liability policy, the Court of Appeal held:

---

[149] [1997] 2 Lloyd's Rep 136 (CA).
[150] Ibid 139.
[151] Ibid 141.
[152] See also *Lumberman's Mutual Casualty Co v Bovis Lend Lease Ltd* [2005] 1 Lloyd's Rep 494 (QBD (Comm)) paras 69-70 where the court considered whether the liability policy covered breach of contract. For an in-depth discussion of the decision, see paras 4.2.2.1(a)(v), 4.2.2.1(c)(ii) and 4.2.2.2(a)(ii) below.
[153] [2006] 1 Lloyd's Rep 500 (QBD (Comm)).
[154] Ibid 508. Also see para 4.2.2.1(a)(iii) below for further comments on this case.
[155] *M/S Aswan Engineering* 293.
[156] Ibid 292.
[157] See para 4.2.2.1(a)(i) for further comments on this decision on whether 'legal liability' covers liability in tort to the exclusion of contractual liability.

> A tort gives rise to a "liability at law" for damages. Although a breach of contract gives rise to a liability at law for damages the critical question is what the liability must be for.[158]

The court subsequently concluded that the damages had to be 'in respect of' the classes of liability set out in the policy and that each of those classes of liability was one that arose in tort. The contractual extension clause that applied to liability assumed under contract was subject to the same limitation as the insuring clause – the liabilities had to be defined in tort.[159] The insured's contractual claim for pure economic loss was accordingly not covered under the public liability policy.[160]

4.2.2.1(a)(iii) 'Legal Liability', Liability Voluntarily Assumed and Settlements

Both public liability and product liability policies generally seek to exclude contractual liability voluntarily assumed because their primary objective is to indemnify the insured against liability in tort.[161] Most of these liability policies, therefore, specifically exclude liability for contractual claims without a tortious parallel, and they do so by excluding cover for liability voluntarily assumed by the insured.[162]

Liability insurance generally does not cover liability assumed voluntarily or *ex gratia* by the insured, payments made by the insured on the basis of a perceived moral obligation, or made to preserve the insured's reputation or good business relationship with a third party in cases where there is no legal liability.[163] However, provided that the insured is in fact legally liable to the third party, amounts paid under an *ex gratia* settlement in satisfaction of (non-admitted) legal liability are covered.[164] The following judicial statements explain the position.

---

[158] *Tesco Stores* para 18.
[159] Ibid paras 24, and 30-31. The contractual liability assumed had to be in respect of the physical impact on a third-party claimant's person, property or property rights for the contractual extension to be applicable. See para 24.
[160] See para 4.2.2.1(a)(i) above for further comments on the decision regarding the relevance of the type of policy, such as a public liability policy, in distinguishing between cover for tortious and the different types of contractual liability.
[161] Birds *Birds' Modern Insurance Law* 385-386 para 20.0. See also the discussions in paras 4.2.2.1(a)(i)-4.2.2.1(a)(ii) above.
[162] *Colinvaux's Law of Insurance* para 21.014 and *Colinvaux Supplement* 116-117 ad para 21.014.
[163] *Colinvaux's Law of Insurance* para 21.047 and *Colinvaux Supplement* 123 ad para 21.047.
[164] See the discussion on the establishment of legal liability by way of agreement in para 4.2.2.1(c)(i) below.

In *Peninsular and Oriental Steam Navigation v Youell*, the insured compensated third parties in full and final settlement (in respect of luxury cruises that had to be cancelled) and no subsequent claims were made against the insured. The Court of Appeal affirmed that the insured was covered under its liability insurance policies and held:

> [A]ll that it was necessary for [the insured] to demonstrate was a liability in damages to the [third parties] compensated. If such liability existed, the form and nature of the compromise designed to avoid and/or satisfy claims in respect of such liability should not be determinative of the question whether or not there was a claim under the policy. … [I]t seems clear that [the insured was] under a legal liability in damages in respect of [the third parties'] claims in this case.[165]

In *Enterprise Oil v Strand Insurance*, the court held that 'all sums which [the insured] may be obligated to pay by reason of liability assumed under contract or by agreement … on account of personal injury'[166] referred to liability undertaken by contract, for example, that the insured would indemnify another for personal injuries to third parties. However, the insuring clause did not extend to a settlement agreement between the insured and a third party in respect of alleged tortious liability. The court defined a settlement agreement as 'a compromise of the fact whether there was in fact any liability on account of personal injury'.[167] It therefore held that the parties to the insurance contract did not intend to transform an alleged or arguable tortious liability (which could not be imposed by law) into an actual (legal) liability in contract by way of a compromise in a settlement agreement.[168]

4.2.2.1(a)(iv) 'Legal Liability' under Statute

'Legal liability' has been held to refer to and include statutory liability.[169] In *Bedfordshire Police Authority v Constable (Sued on His behalf & on behalf of All Other Members of Syndicate 386 at Lloyd's)*[170] the insuring clause provided cover for sums which the insured, a police authority, was 'legally liable to pay as damages for

[165] *Peninsular* above 141.
[166] *Enterprise Oil* above para 66.
[167] Ibid.
[168] Ibid.
[169] However, the term 'liability at law by way of damages' and similar wording have been held not to cover compensation payable under a statutory obligation which imposed liability irrespective of the fault of the insured. See *Colinvaux's Law of Insurance* para 21.017 *Colinvaux Supplement* 117-118 ad para 21.017.
[170] [2009] Lloyd's Rep IR 607 (CA (Civ)), 2009 WL 289348.

accidental damage to property arising out of the business' of the insured.[171] The insured was entitled to be indemnified by its insurer from liability to pay 'compensation' under statute to the owners of property damaged in a riot.[172] Although this type of liability will not generally give rise to a claim in damages, the Court of Appeal referred with approval to the meaning ascribed to the term 'damages' in the dissenting judgment of an earlier decision:[173] 'sums which fall to be paid by reason of some breach of duty or obligation, whether that duty or obligation is imposed by contract, by the general law, or legislation'.[174]

However, *Bedfordshire Police Authority v Constable* should be distinguished from the earlier decision in *Bartoline Ltd v Royal & Sun Alliance Insurance Plc*.[175] In that decision 'legal liability for damages in respect of ... accidental loss of or damage to property' was construed to provide 'an indemnity in respect of certain types of tortious liability',[176] but not for environmental clean-up costs which the insured was by statute obliged to pay. The latter was regarded as a statutory debt,[177] rather than as a liability for damages.

---

[171] Ibid para 1.
[172] Ibid para 26.
[173] *Hall Brothers Steamship Co Ltd v Young* [1939] 1 KB 748 (CA) 756-757.
[174] *Bedfordshire Police Authority v Constable* para 23, where the CA referred to *Hall Brothers Steamship v Young* ibid 756-757.
[175] [2007] Lloyd's Rep IR 423 (QBD (MDR)). As explained by *Colinvaux's Law of Insurance* para 21.017 and *Colinvaux Supplement* 117-118 ad para 21.017: '*Bartoline* and the earlier cases were regarded by the Court of Appeal in *Bedfordshire* as illustrations of liability being imposed on the assured in the absence of any duty owed to third parties by the assured'. The liability in *Bartoline* therefore did not concern the tort of breach of statutory duty which may give rise to an action in damages. The elements of such a tort are: that the statutory duty in question gives rise to an action in damages; that the duty was owed to the claimant (third party); that the duty was breached; and that damage was caused by the breach of duty. See Cooke *Law of Tort* 265-266. The statute may impose a strict or a fault-based standard, it is a question of interpretation in every instance. Ibid 273.
[176] In para 110. The court observed in para 45 that the statute 'and the law of torts seek to protect very different interests' and ordered the insured to pay clean-up costs.
[177] See para 61ff for the distinction in English law between a statutory debt and a liability for damages. As to the statutory debt, the 'court was satisfied that liability under [that particular statute] was not dependent upon proof of negligence and the cause of action was not breach of statutory duty in tort [that would give rise to an action for damages] but rather one imposed directly by the legislation'. See *Colinvaux's Law of Insurance* para 21.017 and *Colinvaux Supplement* 117-118 ad para 21.017. As explained above in para 4.2.2.1(a), not every breach of statutory duty will classify as a breach of the tort of statutory duty which will give rise to an action for damages. That will depend whether the statute gives rise to the right to sue for damages, which will again depend on the intention of Parliament.

4.2.2.1(a)(v) More Clauses aimed at Limiting 'Legal Liability'

Insurers have developed standard wordings to provide basic cover and basic exclusions in their liability insurance policies.[178]

The main aim of a liability policy is to provide cover for liability in tort.[179] The insured's negligent conduct[180] is generally *included* in the risk by way of cover for liability in tort. However, an insured's intentional or reckless conduct is, as a rule, *excluded* from the risk[181] in the absence of agreement to the contrary. Many liability policies attempt to limit the insurer's obligation to the insured to certain types of liability in tort, for example, by providing cover for the insured's liability arising from 'neglect, error or omission'.[182]

In *Lumberman's Mutual Casualty v Bovis Lend Lease*, after considering the relevant case law, the court held that the insuring clauses which provided cover for legal liability 'as a result of any neglect, error or omission or breach of warranty of authority in the conduct of the insured',[183] did not require the insured to establish liability in negligence to trigger cover under the policies.[184] A breach of warranty may be negligent or non-negligent on the part of the person giving the warranty, and the court found no reason why the cover had to be limited to negligent breach of warranty. It further reasoned that if the policies covered non-negligent breach of warranty, any errors and omissions would also not need to be negligent to trigger cover under the policy. However, by the very nature of insurance, deliberate breaches of warranty, deliberate errors, or deliberate omissions are not covered as they fall in the category of self-realisation of the risk, unless these risks are covered expressly by

---

[178] Birds *Birds' Modern Insurance Law* 385 para 20.0.
[179] *Colinvaux's Law of Insurance* para 21.042. See also *MacGillivray on Insurance* para 30.092.
[180] For further information on the exception excluding common-law negligence, eg, by way of a condition that the insured shall take reasonable precautions to prevent accidents and disease. See Clarke *Law of Insurance Contracts* para 19.2A, *Colinvaux's Law of Insurance* para 21.042, and the discussions in paras 4.2.2.3(b)(ii) and 4.2.2.4 below.
[181] Due to at least an implied term in insurance contracts that intentional loss is excluded from the risk, but often by way of a so-called 'intentional act exclusion'. See *Colinvaux's Law of Insurance* par 21.016 and Clarke *Law of Liability Insurance* para 10.7. On the exclusion of fraud, see also Clarke ibid para 10.4.7. See also para 4.2.2.3(b) below for further detail on exclusions on liability cover for the conduct of the insured.
[182] Birds *Birds' Modern Insurance Law* 385-386 para 20.0 n 4 observes that professional liability policies often provide cover against 'negligent act, error or omission', but that the word 'negligent' does not qualify the words 'act' or 'omission'. Thus, not only negligence is covered. See also *Colinvaux's Law of Insurance* para 21.016; and *MacGillivray on Insurance* para 30.085 for further detail on the coverage for 'non-negligent acts' in liability policies.
[183] *Lumberman's Mutual Casualty* above para 13, see issue 3.
[184] Ibid paras 62, 69 and 70.

appropriate wording.[185]

4.2.2.1(b) The Time at Which the Insured Defendant Becomes 'Legally Liable' to Third-Party Plaintiffs[186]

There are at least three possibilities as to exactly when an insured may become legally liable to a third party:

- when the insured has actually compensated the third party;[187]
- when the third party has a *prima facie* cause of action against the insured;[188]
- when the insured's liability against the third party has actually been established by a court judgment, an arbitral award, or by agreement.[189]

Each of these three possibilities in time is now discussed in greater detail.

4.2.2.1(b)(i) Actual Payment

The first option as to when an insured becomes legally liable to a third party is the narrowest in that the insured must actually compensate the third party to trigger its liability cover. This is generally regarded as the original common-law rule by reference to *Collinge v Heywood*,[190] where the court held that 'no action arose till [the insured] was damnified, and that he was not damnified till he had paid the bill'.[191]

Some commentators[192] question *Collinge v Heywood* as authority for the view that an insured's cause of action against the insurer only arises on the insured's actual

[185] It is further generally against public policy for an insured to benefit from its unlawful or criminal conduct. See para 4.2.2.3(b)(ii) below for further detail on exclusions on liability cover for the conduct of the insured.
[186] In writing this section, the following general works on the English insurance law were consulted: Clarke *Law of Insurance Contracts* paras 17.4A2 and 17.4A3; Birds *Birds' Modern Insurance Law* 388-391 para 20.1.1; *Colinvaux's Law of Insurance* paras 21.047-21.052 and *Colinvaux Supplement* 122-123 ad paras 21.047, 21.051, 21.052; and *MacGillivray on Insurance* paras 30.002-30.003. See also Enright & Jess *Professional Indemnity* paras 1.083-1.115 on professional indemnity insurance law.
[187] See para 4.2.2.1(b)(i) below for further detail on actual payment as a possible way to establish when an insured becomes legally liable towards a third party.
[188] See para 4.2.2.1(b)(ii) below for further detail on potential liability as a possible way to determine when an insured may become legally liable towards a third party.
[189] See para 4.2.2.1(b)(iii) below for further detail on established liability as a possible way to ascertain when an insured may become legally liable towards a third party.
[190] (1839) 9 Ad & E 633 (QBD), 112 ER 1352.
[191] Ibid 641, 1354.
[192] Enright & Jess *Professional Indemnity* paras 1.087-1.093. The writers agree with the decision in *Firma C-Trade SA v Newcastle Protection & Indemnity Association; Socony Mobil Oil Inc & Others v West of England Shipowners Mutual Insurance Association (London) Ltd (No2)* [1991] 2 AC 1 (HL)

payment of the third party. However, if the liability insurer has inserted a so-called 'pay- to-be-paid clause'[193] in its insurance contract, the insured is not entitled payment by the insurer until the insured has first actually paid compensation to the third party. An advantage of this option for the insured is that the limitation period against the insurer commences relatively late.[194] A negative aspect is that the insured may not have sufficient funds readily available to pay the third party.[195] It follows that the view that the insured defendant must actually compensate the third party to trigger its liability cover may defeat the very purpose of liability insurance, which is to provide the insured with the ability to claim from its liability insurer rather than first having to pay the third party from its own pocket. An insurer may favour this narrow approach because its liability under the insurance contract is triggered rather late. Also, the likelihood of being involved in litigation as liability insurer (eg, conducting the defence of the insured in the name of the insured) and of being named in litigation (which may create adverse publicity) becomes less likely when the third parties' claims have already been paid.[196]

4.2.2.1(b)(ii) Potential Liability

The second option is the widest view. An insured need not actually have discharged its liability before claiming from its liability insurer. Some sources suggest that the cause of action can exist even though liability has not yet been formally established or proved.[197]

40, where the court opined that: '*Collinge v Heywood* was a procedural decision and it laid down no rule as to common law rights of parties under a contract of indemnity'. Enright & Jess ibid para 1.091. See also *Total Liban SA v Vitol Energy SA* [2001] QB 643 (QBD) 650 which rejected the argument in *Collinge v Heywood* that, 'there is a general common law rule in English law that liability without actual payment [of that liability] does not constitute a recoverable loss'. Enright & Jess ibid para 1.090 contend that the insured's right to an indemnity arises on the occurrence of the insured event and the insured then has a cause of action for a declaration to that effect, but that it does not mature into a right for the insured to be paid directly by the insurer until the insured has actually paid the third party. *Colinvaux's Law of Insurance* para 21.051 and *Colinvaux Supplement* 123 ad para 21.051, also opines that, '[t]here is no need for the assured to show that he has actually made payment to the third party' to establish its legal liability towards the third party.

[193] See *Colinvaux's Law of Insurance* 21.051; and Colinvaux *Supplement* 123 ad par 21.051 for further detail in regard to 'pay-to-be-paid clauses' in Protection and Indemnity ('P&I') Clubs and in reinsurance.

[194] Clarke *Law of Insurance Contracts* para 17.4A1. As to the limitation of actions in liability insurance, see para 4.2.2.1(d) below for further detail.

[195] Clarke ibid para 17.4A1.

[196] Ibid.

[197] See, eg, *Central Electricity Board v Halifax Corporation* [1963] AC 785 (HL) 801 where the court held that 'a cause of action can exist although one of the facts essential to the cause of action … has not yet been proved when action is brought'. Enright & Jess *Professional Indemnity* para 1.104 appear to

Under this interpretation 'legal liability' can refer to potential legal obligations to a third party. Legal liability may, therefore, arise when the third party has a *prima facie* cause of action against the insured – ie, when all the events which render the insured liable towards the third party have occurred – even though the amount of its liability has not yet been quantified, paid, or formally established.

This possibility favours the insured.[198] An insured may much earlier be in a position to obtain the insurer's involvement in and consent to a settlement with the third party. Further, not only an insured's actual established liability, but also its potential liability can trigger insurance cover. The insured may claim payment[199] from the insurer without first having to pay the third-party plaintiff out of its own pocket or having to take any formal steps to establish actual liability.

4.2.2.1(b)(iii) Established Liability[200]

The third takes is a golden mean between the two previous views. It applies in English law, unless the insurance policy specifically provides to the contrary.[201] Under equity, a loss has been suffered when the liability of the party seeking to enforce an indemnity has been established.[202]

The existence of this equitable rule was confirmed by the Court of Appeal in *Post Office v Norwich Union Fire Insurance Society Ltd*:[203]

> The insured only acquires a right to sue [the insurer] for the money when his liability to the injured person has been established so as to give rise to a right of

---

support the view that '"liability" means actually or potentially subject to an obligation'. However, Clarke ibid para 17.4A2 ascribes their view to the fact that Enright practices in Australia where the law appears to be different from England. Compare para 4.2.2.1(b)(iii) below on 'established liabilty' as a third possible way in which an insured may become legal liability towards a third party

[198] Clarke ibid para 17.4A2.

[199] And if not payment, then at least involvement.

[200] Also referred to as 'ascertainment' (ascertained liability). See Enright & Jess *Professional Liability* para 1.105.

[201] Clarke *Law of Insurance Contracts* paras 17.4A2 and 17.4A3.

[202] Also known as the 'equitable rule'. In *Re Richardson Ex parte Governors of St Thomas's Hospital* [1911] 2 KB 707 (CA) 709 the Court of Appeal distinguished between the common-law rule and equitable rule and held: 'Equity has always taken a wider and more liberal view of these rights of indemnity than the old Common Law Courts did. … The common law view was first pay and then come to the Court under your agreement to indemnify. In equity that view was not taken. … [I]n the view of the Court of Equity it was not necessary for the person entitled to the indemnity to be ruined by having to pay the full amount in the first instance.' Clarke ibid para 17.4A2 refers to some of the critics' 'forceful attack on this "equitable rule" of ascertainment'. See, eg, Enright & Jess *Professional Liability* paras 1.094-1.102 for criticism in this regard.

[203] [1967] 2 QB 362 (CA).

> indemnity. His liability to the injured person must be ascertained and determined to exist either by judgment of the court or by an award in arbitration or by agreement.[204]

The insurer becomes liable to the insured only when the latter's liability to the third-party plaintiff has been established either by a court, by arbitration, or by agreement between the insured and the third party.

This '*Post Office* rule', has been criticised in that the 1930 Act[205] on which the case turned, did not require liability to be established.[206]

However, the House of Lords confirmed the *Post Office* rule in *Bradley v Eagle Star Insurance Co Ltd*,[207] by holding that the insured 'cannot sue for an indemnity from the insurers unless and until the existence and amount of his liability to a third party has been established by action, arbitration or agreement'.[208]

The disadvantage for the insured of this approach is that the insurer is not obliged to accept or reject the insured's claim until its liability has been established. In the interim, the insured may find it difficult to make an informed decision as to whether or not to settle the claim.[209] Knowledge by the insured of the insurer's decision to accept or reject a claim, may impact on an insured's decision to settle the claim. For example, if an insured has been informed that its insurer will accept a claim, it may be more inclined to settle the matter, and *vice versa*.

---

[204] Ibid 373-374.
[205] Concerning third parties' rights against insurers.
[206] Clarke *Law of Insurance Contracts* para 17.4A3. See also Enright & Jess *Professional Indemnity* paras 1.106-1.116 for further criticism.
[207] [1989] AC 957 (HL).
[208] Ibid 966. For further critical discussion of the decisions in *Post Office v Norwich Union Fire Insurance* and *Bradley v Eagle Star Insurance*, see Clarke *Law of Insurance Contracts* para 5.8C; and the Enright & Jess *Professional Indemnity* paras 1.109-1.115, 1.121 and 1.124-1.128. Despite reservations about the correctness of the *Post Office* rule in previous editions, *MacGillivray on Insurance* para 30.003 now regards it as authoritative as confirmed in *Bradley v Eagle Star Insurance*. The principle in *Post Office* and *Bradley* was also applied as an established legal principle in *Teal Assurance Company Limited v W R Berkley Insurance (Europe) Limited & Another* [2011] Lloyd's Rep IR 285, 2011 WL 197339 (QB (Comm)) para 30 and in [2012] Lloyd's Rep 315 (CA (Civ)), 2011 WL 5903305 para 20. The Supreme Court in *Teal* [2013] 2 CLC 390 SC paras 13-15 also subsequently confirmed the position of the courts a quo by quoting from *Cox v Bankside Members Agency Ltd* [1995] 2 Lloyd's LR 437 (CA (Civ)) 457-458. (At issue in *Cox* was the position after the statutory assignment to a third-party claimant under the 1930 Act of the potential right to recover under the insurance policy claims as yet unascertained against the insolvent insured.) See also *Colinvaux's Law of Insurance* para 21.052 and *Colinvaux Supplement* 123 ad para 21.051 on interim awards and the establishment of liability.
[209] Clarke *Law of Insurance Contracts* para 17.4A2. English professional liability policies sometimes contain a so-called 'Queen's Counsel clause' ('QC clause') that may curb this negative effect. Ibid para 17.4.A3(d). For further details on the QC clause as an alternative, agreed method to establish liability between the insured and the third-party plaintiff, see para 4.2.2.1(c)(iv) below.

4.2.2.1(b)(iv) Conclusion

In the absence of agreement to the contrary, to trigger its liability cover English case law provides that the insured's legal liability (which falls within the scope of the policy) to the third party must be established and quantified by agreement, court judgment, or arbitral award.[210]

4.2.2.1(c) The Ways in Which the Insured Defendant Establishes 'Legal Liability' to Third-Party Plaintiffs[211]

The ways in which (ie, how) the insured defendant can establish legal liability towards third parties – agreement, judgment, or arbitral award – warrant further analysis. Further explanation is also required as to whether, and if so to what extent, established liability of the insured to the third party is automatically binding on the insurer for the latter's liability towards the insured under the insurance policy to be established.[212]

A few brief observations will also be made regarding express wording in liability insurance policies that may offer alternative, agreed methods [213] of establishing liability between the insured and third-party plaintiffs,[214] and the effect that liability may have on the insurer's liability to the insured under the insurance policy.

4.2.2.1(c)(i) By Agreement

The term 'agreements' generally refers to less formal events [215] occurring between the insured and the third party, such as a settlement, compromise, or

[210] See *Post Office* as discussed in para 4.2.2.1(b)(iii) above.
[211] In writing this section, the following general works on the English insurance law were consulted: Clarke *Law of Insurance Contracts* para 17.4A3; Clarke *Law of Liability Insurance* paras 12.5ff; Birds *Birds' Modern Insurance Law* 388-389 para 20.1.1; *Colinvaux's Law of Insurance* paras 21.020, 21.047-21.053,, and 21.107-21.112 and *Colinvaux Supplement* 122-123 and 125 ad paras 21.047, 21.051-21.053 and 21.107; and *MacGillivray on Insurance* paras 30.006, 30.008, and 30.091.
[212] See paras 4.2.2.1(c)(i)-4.2.2.1(c)(iii) below on the ways in which liability between the insured and the third party may be established, and the effect of liability so established on the liability between the insurer and the insured.
[213] Other than liability of the insured towards the third party established by agreement, judgment or arbitral award.
[214] See para 4.2.2.1(c)(iv) below for further detail on alternative agreed ways to establish the liability of the insured towards the third-party plaintiff.
[215] It appears to include an admission of bankruptcy. In *Law Society of England and Wales & Others v Shah & Others; In Re Aziz, Granziani and Barda Law Society of England and Wales v Earp & Another*

mediation. Insurance policies generally provide that insurers have the right to take over negotiations between the insured and the third party, and also prohibit an insured from making admissions of liability to third parties in settlements without the insurer's prior written approval.[216] However, in the absence of such terms, the insured may enter into a settlement agreement with the third party without any prior approval from the insurer.

Three different aspects that may prove relevant in this context are considered. First, in terms of the *Post Office* rule, to determine liability by way of a settlement agreement, the agreement must *establish* liability as such.[217] It is not sufficient for an insured merely to settle to avoid liability by, for example, making payments, or to settle legal proceedings based on nuisance, for example, in order to continue with its operations.[218] The settlement must take the form of a binding (not merely provisional) agreement between the insured and the third party, irrespective of whether or not it is embodied in a formal document.[219] Any amount paid by the insured under the third-party settlement must be reasonable. Second, a settlement may establish the liability of the insured towards the third party. However an insurer is not bound by it to establish the insurer's liability towards the insured.[220] The insurer is bound by a settlement agreement only if it accepts the agreement, or, in case of estoppel, when

---

[2008] Lloyd's Rep IR 442 (Ch) paras 21-22, 34, 44 and 49, the court held that the admission of a claim in bankruptcy was adequate to establish a claim against the insured; that the formal discharge of the bankrupt from the remedy of payment did not extinguish the cause of action on which the obligation to pay was founded; and that there remained a possibility of a claim against the insurers. For further detail on the operation of the 1930 and the 2010 Acts on third parties' rights against insurers, see paras 4.2.3.2 and 4.2.3.3 below.

[216] *Colinvaux's Law of Insurance* paras 21.107, 21.108 and 21.112 and *Colinvaux Supplement* at 125 ad para 21.107.

[217] See para 4.2.2.1(a)(i) above for further detail on 'legal liability', liability voluntarily assumed and settlements. For a critical discussion of the position and relevant judicial decisions, also see Enright & Jess *Professional Liability* paras 1.116-1.120.

[218] In *Corbin v Payne, The Times*, 11 Oct 1990 (CA) the Court of Appeal held that '[t]o read a policy as entitling the plaintiff to purchase at the insurers' expense the liberty to go on using a noisy and possibly dangerous machine which he had chosen to bring on to his land and to install near his neighbour's residence was far removed from the tenor and obvious intent of the policy'.

[219] See *Colinvaux's Law of Insurance* para 21.107 and 21.108 and *Colinvaux Supplement* 125 ad para 21.107. See also *MacGillivray on Insurance* para 30.006 for further detail on settlements.

[220] *Colinvaux's Law of Insurance* para 21.047 states that, '[s]ettlements raise distinct issues, in that they may be subject to terms under which insurers may be subject to control their making and in that a settlement cannot be more than *prima facie* evidence of liability'. See also *Colinvaux Supplement* 122-123 ad para 21.047. The position differs from the establishment of liability by judgment (and arbitral award). See paras 4.2.2.1(c)(ii)-4.2.2.1(c)(iii) below. Also see *MacGillivray on Insurance* ibid; *Colinvaux's Law of Insurance* paras 21.047, 21.107 and 21.108 and *Colinvaux Supplement* 122-123 and 125 ad paras 21.047 and 21.107 for further detail. For a critical discussion of the position and relevant judicial decisions, also see Enright & Jess *Professional Indemnity* paras 1.116-1.120.

the insurer is estopped from denying that it accepted the settlement agreement.[221] Third, the position regarding single settlements covering different claims and counterclaims is explored. These aspects are addressed in the following judicial statements.

As to the first aspect, the Court of Appeal in *MDIS (formerly McDonnell Information Systems Limited) v Swinbank London & Edinburgh Insurance Company Limited, Aegon Insurance Company (UK) Limited*,[222] agreed with the findings of the court a quo[223] and held:

> [T]he obligation to indemnify arises only when the legal liability of the assured is established. Legal liability cannot arise from the making of an allegation or the formulation or service of a claim.[224]

The settlement agreement should, therefore, establish the insured's liability. It is not the mere fact of a compromise that is relevant, but rather whether the compromise was justified based on a proper analysis, and whether it has, objectively, established the insured's liability towards the third party.

In dismissing the insured's argument that its liability could be established subjectively, the Court of Appeal in *MDIS v Swinbank* held:

> If the argument for [the insured] were correct, the practical realities of their claim for indemnity would be obscured. [According to this argument], [t]he liability for the underwriters would depend not on an objective analysis of the true cause of the loss for which the assured as responsible, but rather on the way in which the claim against them by a third party was formulated and pursued, and if improper conduct

---

[221] For more detail on estoppel under English law as one of the forms of waiver, see para 4.3.1.1(e) below on waiver by the insurer's conduct of the defence. Most reinsurance agreements contain so-called 'follow the settlements' clauses that require reinsurers to provide indemnity to their reinsured, as long as the settlement was reached in a 'bona fide and business like fashion'. For further detail, see *Colinvaux's Law of Insurance* paras 18.044-18.046.

[222] [1999] Lloyds' Rep IR 516 (CA (Civ)), 1999 WL 982480.

[223] See *MDIS v Swinbank* where the (majority judgment) of the Court of Appeal quoted the court a quo's findings with approval in para 24: '[A]s between insured and insurers, *it is established liability which this insurance pays*, and it is upon the nature and causation of any liability established that I consider the insured's right to indemnification must depend. … In a case compromised short of judgment, it is necessary and appropriate to ascertain the real basis on which the case was compromised. That depends not on what the third party may have alleged, although it is an important consideration when seeking to understand the overall position. It involves taking an overall view of the nature and causation of the liability recognised by the compromise. A defendant who, confident on the allegations made, nonetheless settles before discovery knowing that, if he continues, documents will reach the other side which will enable different allegations to be made to which he will or may have no answer, cannot on this basis ground his claim against the insurers solely and artificially on the allegations which happen to be made against him. He must address the real basis of such liability as is established by the compromise which he makes.' (My emphasis.)

[224] Ibid para 27.

> within the meaning [of an exemption clause in the policy] were not alleged, the underwriters' exemption from liability would have no application.[225]

MDIS v Swinbank was applied in *Enterprise Oil v Strand Insurance*, where the court held that 'in the absence of express wording to the contrary, an insured under a liability policy could only recover against his insurer if it was actually under a liability to a third party, upon a proper analysis of the law and the facts'.[226] The court found that the insured had to 'demonstrate that it was or would have been actually liable to [the third party] in the [foreign legal] proceedings in respect of the alleged tortious interference'.[227] It further found that such a conclusion 'does not prevent [the insured from] recovering because it had entered into the Settlement Agreement in respect of an actual liability'.[228] Only *actual* (legal) liability on the part of the insured to the third party that may be imposed by law, as opposed to *alleged* or *arguable* liability, will establish an insurer's liability towards its insured by way of agreement. However, the court found that the insuring clause of the liability policy did not extend to a settlement agreement between the insured and a third party in respect of *alleged* tortious liability; and that the insured did not 'assume liability' in tort in the settlement agreement.[229]

In *Astrazeneca Insurance Company Ltd v XL Insurance (Bermuda) Ltd, ACE Bermuda Insurance Ltd*,[230] the Court of Appeal[231] referred with approval to previous authority, including *MDIS v Swinbank*, and held that 'insuring clauses in liability insurance contracts are to be construed as providing cover against actual liability (as opposed to alleged liability), unless there is clear wording in the contract showing that this principle is intended to be excluded'.[232] However, the majority of settlements do

---

[225] Ibid. The Court of Appeal further explained why it rejected the insured's argument: 'In other words, the contractual entitlement of the underwriters to seek exemption from the liability would depend on decisions, possibly ill-formed, possibly motivated by tactical considerations, by others to which they were not parties, and which, as between underwriters and the assured, might very well be entirely fortuitous. This outcome would be contrary to the contractual intentions of the parties, who expressly agreed [on an exception from liability for loss caused by dishonesty].'

[226] Ibid para 66.

[227] Ibid para 72.

[228] Ibid para 73.

[229] Ibid paras 64-66.

[230] [2013] EWCA Civ 1660. See also *Colinvaux's Law of Insurance* para 21.050 for further detail.

[231] Ibid para 22.

[232] The Court of Appeal para 63 generally observed that 'had a draftsman, cognizant of English law, intended the position to be as [the insured] contends it to be, it is difficult to accept that he would have left his intention to be discerned by the sort of analysis upon which [the insured] relies'. See, eg, *Ace European Group & Ors v Standard Life Assurance Ltd* [2012] EWCA Civ 1713, [2013] CLC 255 for an example of a liability insurance policy that amended the general principles on how an insured may

not contain an admission of liability and most are made with an express no-admission, or a denial of liability. It is difficult to envisage a settlement which in its terms did not admit liability that could be regarded as establishing that liability existed.

As to the second aspect – that a settlement agreement may establish the liability of the insured towards the third party but that an insurer is generally not bound to it automatically in that it establishes the insurer's liability towards the insured – the court of Appeal in *MDIS v Swinbank* held that 'while, by reason of the compromise, [the insured] has proved a loss… [i]t is open to the underwriters to assert … [that the insured] would not be able to recover under the policy'.[233] In *MDIS v Swinbank*, the loss was not proximately caused by the insured's neglect, but by dishonesty that was expressly excluded from cover under the policy.

MDIS v Swinbank was again applied in *Enterprise Oil v Strand Insurance*, where the court held that,

> if the insured negotiated a settlement which identifies certain heads of claim as being referable to certain causes of action that are within the perils insured under the insured's liability policy, then that will be evidence that the insured has suffered a loss that is covered by the policy, [b]ut … that can be challenged by underwriters … on evidence that is extrinsic to the settlement agreement itself.[234]

The court in *Enterprise Oil v Strand Insurance* confirmed that an insurer had a right to challenge whether the insured's right to an indemnity under the policy has so been established, except if it (the insurer) was specifically involved as a party in the (judgment, award, or)[235] settlement.[236] The court further observed that an insurer may challenge whether the insured was in fact and in law liable to the third party, as well

---

establish its liability towards the third party by way of clear wording in the contract. 'Mitigation Costs' were defined in this policy as 'any payment of loss, costs or expenses reasonable and necessary incurred by the Assured in taking action to avoid a third-party claim or to reduce a third-party claim which would have been covered under this Policy'. See ibid para 2. The Court of Appeal held that the cash injection and other remedial payments that the insured made to third-party investors to reverse a shortfall in third parties' investments, were recoverable mitigation costs, although not all of the investors that received payment would have had a claim against the insured. The definition ascribed to 'mitigation costs' in the policy resulted in the court finding 'that relevant "payment" does not have to be made to discharge a particular liability of a particular third party claimant'. Ibid para 246.

[233] Above; para 25.

[234] Ibid para 170.

[235] The case is discussed here, rather than under judgments or arbitral awards, as it dealt with legal liability in the context of settlements.

[236] Ibid para 167. The court's remark as to judgments or awards is obiter as the case concerned a settlement agreement.

as the quantum of the loss, and also whether the insured's liability to the third party is a loss that falls within the scope of the liability policy.[237]

As to the third aspect, namely a single settlement covering different claims and counterclaims, the controversial decision in *Lumberman's Mutual Casualty v Bovis Lend Lease* created some obstacles.[238] In that decision the court held that to establish liability, the following were required:

> Firstly, there has to have occurred an eventuality which has rendered the insured liable to a third party. Secondly, the eventuality and the consequent liability has to be within the scope of cover as provided by the policy. Thirdly, it must be established that such liability has caused loss to the insured of an amount within the scope of the contractual indemnity.[239]

The court then referred to two different facets of the establishment of liability, namely, that 'the [judgment, arbitration or][240] settlement agreement … constitute[d] the assured's loss on the policy caused by the assured's liability';[241] and 'that it is a source of evidence'.[242] According to the court, a judgment and an arbitral award are conclusive evidence as to both the insured's liability and to the quantum of its liability.[243] However, it held that a settlement of a third-party claim only:

> [E]vidences the amount which the assured has agreed to pay to discharge the claim in respect of the assured's liability but that it [is] not conclusive evidence as between assured and insurer as to whether there was in truth [objectively] liability or, if so, what the true amount of that liability was'.[244]

An insured who relies on a settlement agreement as a way of establishing legal liability for purposes of liability insurance, therefore must prove by extrinsic evidence that it is indeed 'under a liability insured by the policy' and that the settlement amount it paid is 'reasonable having regard to the amount of damages that it would have to pay if the matter had gone to trial'.[245] The court therefore concluded that an overall

---

[237] Ibid. However, the court did concede (again obiter) that 'in the case of judgments and awards … the merits as to liability and quantum is unlikely to be upset in an action on the liability policy'.
[238] See, eg, *Colinvaux's Law of Insurance* para 21.111 for a critical discussion of the decision.
[239] *Lumberman's Mutual Casualty* para 31.
[240] Remember, the case concerned a settlement agreement and the court's remarks as to judgments and awards are therefore obiter.
[241] *Lumberman's Mutual Casualty* para 39.
[242] Ibid para 43.
[243] There is authority contrary to this obiter view. See para 4.2.2.1(c)(ii)-4.2.2.1(c)(iii) below for further detail.
[244] *Lumberman's Mutual Casualty* para 44.
[245] Ibid para 44.

settlement amount such as the one before it, did not establish individual liability under the liability insurance policies, and did not impose 'any identifiable loss in respect of any identifiable eventuality'[246] on the insured. It merely 'identifie[d] the overall price paid by the assured as consideration for a contract which conferred on the insured certain benefits'.[247]

The judgment in *Lumbermans* has been criticised on various grounds.[248] To itemise and allocate a sum to each claim and counterclaim may hinder settlement negotiations, even though the overall figure might be acceptable to both parties. Further, in some instances, such an agreement may constitute an admission of liability by the insured contrary to the terms of the policy. It is also objectionable that so much trouble and expense should be incurred by using the court's suggested method of establishing liability without even being certain that the liability insurer will cover the claim.

The *Lumbermans* decision was not followed in *Enterprise Oil v Strand Insurance* where the court, again obiter, held that an insured did not have to show that the 'amount of its loss to be claimed under an insured peril covered by the liability policy has been "specifically ascertained" in the wording of judgment, award or settlement'.[249] The court justified its decision on the basis that the policy wording did not require that; that an insurer has a right to challenge whether the insured is liable to the third party; and that the loss as 'ascertained' between an insured and a third party in a judgment, arbitral award, or settlement is irrelevant as between the insured and insurer.[250] It further criticised the view of the court in the *Lumbermans* case in as much as it could lead to commercial inconvenience and to artificial statements in judgments, arbitral awards, or settlements.[251] According to the court in *Enterprise Oil v Strand Insurance*, the insured could provide evidence extrinsic to the settlement agreement to show that it was liable for a particular amount under an overall settlement.[252] This approach appears to be preferred from an insured's perspective over that in *Lumbermans*, although it may still be challenging for an insured to

[246] Ibid para 55.
[247] Ibid.
[248] *Colinvaux's Law of Insurance* para 21.111; *MacGillivray on Insurance* para 30.008; Clarke *Law of Insurance Contracts* para 17.4A3(a) and para 17.4A(3) n 1-2; and Enright & Jess *Professional Liability* paras 1.116-1.120.
[249] *Enterprise Oil* para 166. Note again that this case concerned a settlement agreement.
[250] Ibid paras 167-170.
[251] Ibid para 172.
[252] Ibid paras 170-171.

provide evidence of the relevant liability where an overall nor lump-sum settlement has been reached.

4.2.2.1(c)(ii) By Judgment

As to the establishment of an insured's legal liability towards a third party by judgment, the Court in *Cheltenham & Gloucester plc v Royal & Sun Alliance Insurance Co plc*[253] held that a decree obtained by third-party plaintiff against an insured will establish an insurer's liability even though there is no record explaining the basis of the decree.[254] Although the insured's liability towards the third party may have been established in this way, an insurer may still escape liability under the terms of the policy,[255] – eg, if the insured's liability that has been established to the third party falls outside the scope of cover of the insurance policy.

A default judgment is sufficient to establish liability, although it may be rescinded at a later stage.[256] If an insured disputes liability to the third-party claimant, for example by way of litigation, it follows in principle that liability has not yet been established. However, the Court of Appeal held in *Brice & Others v JH Wackerbarth (Australasia) Pty Ltd, Flack, Dominium Insurance Co Ltd & Alliance Assurance Co, Third Parties*[257] that, 'the Judge will give his decision in the main action before he decides in the third party proceedings. So the liability of the insured will have been ascertained.' Nothing prevents the third-party proceedings (in the claim by the insured against its insurer) from continuing.[258] The Court of Appeal further observed that the insured can also apply for a declaration that it will be entitled to an indemnity from the insurer if it (the insured) is found liable as against the third-party plaintiff.[259]

However, an insurer does not have *locus standi* in litigation between the third-party plaintiff and the insured to seek a declaration that its insured is not liable to the third party.[260]

---

[253] 2001 SLT 347 (OK), a decision on Scottish law.
[254] Ibid 350E-F. This may occur, eg, where an insured has not defended the action or has allowed the decree to pass.
[255] Ibid.
[256] See, eg, *Pioneer Concrete (UK) Ltd v National Employers Mutual General Insurance Association Ltd* [1985] 1 Lloyd's Rep 274 (QBD (Comm)) 277.
[257] [1974] 2 Lloyd's Rep 274 (CA) 275-276.
[258] Ibid 276.
[259] Ibid.
[260] *Meadows Indemnity Co Ltd v The Insurance Corporation of Ireland Plc & International Commercial Bank Plc* [1989] 2 Lloyd's Rep 298 (CA) 304-6 and 309.

The *Post Office* rule must therefore be applied with commercial sense and with a consideration of the particular circumstances of each case. Where necessary, a flexible view must be taken on the establishment of liability. For example, it has been held that the determinations of the Pensions Ombudsman are 'findings of legal liability'.[261]

Two specific issues require further comment.

The first deals with whether the judgment between the third party and the insured may be binding on the insurers, that is, whether that judgment could automatically establish the liability of the insurer towards the insured under the policy. It has formerly been considered that judgments as to insureds' liability towards third parties are automatically binding on insurers, as there is an implied obligation on insurers in insurance contracts to recognise these judgments.[262] However, the current position appears to be that judgments (both of English courts and of foreign courts in so far as they are recognised and enforced in England) are not automatically binding on insurers, at least not if the insurers were not parties to those judgments.[263] In the absence of an agreement to the contrary, an insurer will not be bound by a judgment between the third-party plaintiff and the insured determining whether or not the insured was under a liability, or what the basis of that liability was.[264]

The second issue is whether a judgment against the insured in favour of the third party is to be recognised, for purposes of a claim by the insured against the insurer, as opposed to merely establishing the insured's liability towards the third party.[265] Here a distinction is drawn between English judgments and foreign

---

[261] *London Borough of Redbridge v Municipal Mutual Insurance Ltd* [2001] Lloyd's Rep IR 545 (QBD (Comm)) para 7. The court held further that the insured had a statutory liability to pay compensation in respect of maladministration. Compare the earlier case of *Smit Tak Offshore Services & Others v Youell and General Accident Fire & Life Assurance Corporation Plc* [1992] 1 Lloyd's Rep 154 (CA) 159 where the court held that a letter from the Department of Ports and Customs did not establish the legal liability of the insured because the Department did not have the authority to order the removal of the wreck and that the insured was not legally liable for the costs of removing the wreck. Although the Department of could withdraw the insured's license to operate in Dubai, such a loss would not have been covered by the policy.

[262] *Colinvaux's Law of Insurance* para 21.047 and *Colinvaux Supplement* 122-123 ad para 21.047.

[263] *Colinvaux's Law of Insurance* para 21.047 para 21.048; *MacGillivray on Insurance* para 30.005. The insured may have to bring proceedings against an insurer for a declaratory order, or the liability insurers may have to be joined in third-party proceedings of the third-party against the insured.

[264] On this aspect the position coincides with that of the establishment of liability by way of settlement agreements. See *MacGillivray on Insurance* para 30.006.

[265] A judgment of a third party against the insured, or an agreed settlement between them, may establish the insured's legal liability to the insured and be indicative that the insured has suffered a loss,

judgments. English judgments against the insured are generally recognised as claims by the insured against its liability insurer. However, the position regarding foreign judgments is uncertain and more complex. There are two possibilities. On the one hand, there is judicial authority (obiter)[266] to the effect that a foreign judgment will be automatically binding on the insurer for purposes of a claim by the insured against the insurer. This applies unless the foreign court lacked jurisdiction over the dispute; or the arbitration was brought in breach of an arbitration or a jurisdiction clause; or the insured did not defend the proceedings properly; or the judgment was 'ultimately perverse'. On the other hand, some judicial authority (again obiter)[267] supports the view that a foreign judgment against the insured may establish the insured's loss, but it may not necessarily conclusively establish the legal liability of the insured towards the third party. It is argued that the test as to whether a foreign judgment constitutes a claim which triggers liability cover, does not depend on whether it is 'manifestly perverse', but rather on whether it was, 'on the balance of probabilities, wrong'.[268]

4.2.2.1(c)(iii) By Arbitral Award

Legal liability as required by the *Post Office* rule may also be established by way of an arbitral award.[269] In determining whether an arbitral award regarding the insured's liability against the third party is binding on the insurer, the same considerations arise as in the case of judgments.[270]

4.2.2.1(c)(iv) Alternative Agreed Ways to Establish the Liability of the Insured to Third-Party Plaintiffs

Express wording in liability insurance policies may provide alternative, agreed methods[271] to establish liability between the insured and the third-party plaintiff.

English professional liability policies sometimes contain a so-called 'QC' clause which is mainly for the benefit of the insured.[272] A typical QC clause reads:

---

but it does not automatically qualify as an insured event which triggers liability cover. See paras 4.2.2.1(c)(v) and 4.2.2.2 below.

[266] The decision concerned settlement.

[267] The decision concerned settlement in the reinsurance context.

[268] *Colinvaux's Law of Insurance* para 21.049.

[269] On the role of QC clauses and their (possible) function as 'arbitration clauses', see para 4.2.2.1(c)(iv) below.

[270] *Colinvaux's Law of Insurance* para 21.048. See also the discussion in para 4.2.2.1(c)(ii) above and Jacobs, Masters & Stanley *International Arbitration* for further detail in that regard.

[271] Other than liability of the insured to the third party established by agreement, judgment, or arbitral award.

> [The insurer will pay] any such claim or claims which may arise without requiring the assured to dispute any claim, unless a Queen's Counsel (to be mutually agreed upon by the underwriters and assured) advise that the same could be successfully contested by the assured and the assured consents to such a claim being contested, but such consent not to be unreasonably withheld.[273]

Colinvaux opines that the QC clause imposes three possible obligations on insurers.[274] They must namely pay:

- the costs of any claim;
- the claim itself – unless Queen's Counsel advises that it may probably be contested successfully; and
- claims that can probably be contested successfully (on the advice of Queen's Counsel), if the insured reasonably objects to contesting them.

Some commentators are of the view that the QC clause offers cover for the insured under its liability policy before its liability to the third party has been established.[275] Others submit that the QC clause restricts the circumstances in which insurers can deny that liability by the insured against the third party was established by way of the insured and the third party's settlement.[276]

Or, one may regard the procedure under the QC clause as an alternative, agreed method by which liability may be established between the insured and the third party as required by the *Post Office* rule.[277] The argument goes that the Queen's Counsel fulfils the role of an arbitrator. In usual arbitral proceedings, an arbitrator is appointed by the insured and the third-party plaintiff to establish the former's legal liability to the latter. Under the QC clause, a Queen's Counsel is appointed 'as arbitrator' by the insured and the insurer in the insurance policy, to determine the insured's legal liability towards the third-party plaintiff (for purposes of the insurance policy, not as an actual arbitrator between the insured and the third party).

---

[272] As discussed in para 4.2.2.1(b) below, the insurer is not obliged to accept or reject the insured's claim until the insured's liability towards a third-party plaintiff has been established and in the meantime an insured may find it difficult to make an informed decision as to whether to settle the claim or not. QC clauses may reduce this negative effect to some extent.
[273] Clarke *Law of Insurance Contracts* para 17.4A3(d). See also Clarke 'Report' 189; Clarke *Law of Liability Insurance* para 12.5.2; *MacGillivray on Insurance* para 30.103; and Enright & Jess *Professional Indemnity* para 1.151 for further detail on QC clauses and their different variations.
[274] *Colinvaux's Law of Insurance* para 21.082 and *Colinvaux Supplement* 124 ad para 21.082.
[275] Clarke *Law of Insurance Contracts* 17.4A3(d).
[276] *MacGillivray on Insurance* para 30.103.
[277] Clarke *Law of Insurance Contracts* 17.4A3(d).

It appears that although a QC clause establishes the liability of the insured towards the third party, it does not follow that the insured will be covered under the insurance policy. As to the effect of a QC clause on the *insurer's liability towards the insured*, Colinvaux submits that:

> The question whether the policy corresponds to any claim which may be made against the insured is not usually within the terms of the [QC] clause, and it is open to the [insurers] to see[k] a judicial determination of coverage on assumed facts, as if there is coverage the QC clause can then be applied to the question of whether the [in]sured was or was not liable [towards the third party].[278]

4.2.2.1(c)(v) Conclusion

Omega Proteins v Aspen Insurance[279] contains a neat summary of the principles relating to the establishment of liability by the insured towards the third-party plaintiff (and its impact on the liability of the insurer towards the insured):

- the insured must establish that it has suffered a loss which is covered by one of the perils insured against;
- the insured's loss may be established by a judgment or award against the insured or by an agreement to pay;
- the loss must fall within the scope of cover of the policy;
- as a matter of practicality, the judgment, arbitral award, or settlement may settle the question as to whether the loss is covered by the policy as the insurers may accept it;
- if the insurer is not a party to the judgment, arbitral award, or settlement and there is no agreement by the insurer to be bound, neither the judgment award nor the agreement is conclusive as to whether or not the insured's loss is covered by the policy;
- it is open to the insurers to contest whether the insured was in fact liable towards the third party; whether it was liable on the basis set out in the judgment; or to prove that the true basis of the insured's liability fell within an exception under the policy;

[278] *Colinvaux's Law of Insurance* in para 21.082 and *Colinvaux Supplement* 124 ad para 21.082.
[279] *Omega Proteins* above para 49.

- when an insured against whom a claim for negligence is the subject of a judgment against it, its insurer may seek to prove that the claim was for fraud; or for something not covered or excluded by the policy; and
- likewise, an insured who is held liable for fraud (which the policy does not cover) may dispute the alleged fraud with its insurers, and may be able to establish in court that the insured's conduct was not in fact fraudulent, but only negligent and that it was entitled to cover on the policy in issue.[280]

4.2.2.1(d) Limitation of Actions in Liability Insurance[281]

Section 5 of the Limitation Act, 1980,[282] provides that an action on a contract must be brought within six years from the date of accrual or vesting of the cause of action.[283] The application of this rule to liability insurance contracts implies that the limitation period in a liability policy may generally commence as soon as the insured's liability towards the third party has been established by way of a judgment, arbitral award, or binding settlement, provided that the event that brings the case within the scope of the policy has taken place.[284] The judgment or arbitral award against the insured in favour of the third party, or a binding settlement between them, establishes that the insured's cause of action has accrued for purposes of the limitation of its action on the insurance contract. The limitation period is therefore not antedated to the date on which the event that brings the case within the scope of the policy took

[280] See *MacGillivray on Insurance* paras 30.006 and 30.091 for discussions of *Omega Proteins*. Compare also *London Borough of Redbridge v Municipal Mutual Insurance* above para 12 where it was held that, 'it is neither permissible nor possible to look beyond or outside the four corners of the determination itself for the basis of the liability to which the insured has become subject'. *Omega Proteins* cast doubt on the decision in *London Borough of Redbridge Municipal Mutual Insurance.* See paras 50-58 and 78-79. The approach by the court in *Omega Proteins* was treated as correct by the court in *Astrazeneca Insurance Company v XL Insurance, ACE Bermuda Insurance* above. See paras 60-65 and 90-96. See also *Colinvaux's Law of Insurance* paras 21.033 and 21.034 and *Colinvaux Supplement* 118-119 ad para 21.033 for further detail on classifying the insured's liability.

[281] In writing this section, the following general works on the English insurance law were consulted: Clarke *Law of Insurance Contracts* paras 9.8A and 26.5B; Clarke *Law of Liability Insurance* para 12.14; *Colinvaux's Law of Insurance* paras 10.076-10.084 and *Colinvaux Supplement* 37 ad paras 10.078, 10.080 and 10.081; and *MacGillivray on Insurance* paras 30.004 and 30.077. For further detail, see also Enright & Jess *Professional Liability* paras 1.094-1.102 and McGee *Limitation Periods* paras 10.039-10.041.

[282] Chapter 58; the 'Limitation Act'.

[283] As to limitation periods where the cause of action is in tort, see Clarke 'Report' 194-195 for further detail.

[284] For further detail in this regard, see para 4.2.2.2(b)(iv) below on the limitation of actions applied to 'occurrence-based' and 'claims-made' liability policies.

place, nor to the date when the third parties' cause of action against the insured arose or on which the insured actually paid the third party.[285]

This interpretation of the accrual rule in liability insurance may result in a considerable delay between the date on which the insured first notifies the insurer of an occurrence or the possibility of a claim against it, and the eventual date on which the insured's liability against the third party is established by way of judgment, arbitral award,or settlement. During that period, the insurers might deny liability or attempt to repudiate the policy, for example, for breach by the insured of its duty of utmost good faith.[286] Limitation problems may arise if the insured does not take action against the insurers at the time of repudiation of the insured's claim and the insured's liability towards the third party is established more than six years after the insurer's repudiation.

It was held in *Lefevre v White*[287] that, although the insured acquired a cause of action on the date of the repudiation of its claim by the insurer, the insured acquired a further cause of action on the date on which its liability towards the third party was established. The insured did not have to institute action against the insurer within six years of the repudiation provided that it did not accept the repudiation. Acceptance of the repudiation by the insured would have brought the policy to an end and extinguished any possible and further causes of action against the insurer. In the absence of a cause of action, the limitation of action would therefore no longer be an issue for the insured.

---

[285] See *Virk v Gan Life Holdings Plc* [2000] Lloyd's Rep IR 159 (CA (Civ)) 162, where the accrual of the cause of action in liability insurance was distinguished from that in other types of insurance contract such as property insurance. The Court of Appeal referred with approval to *Bradley v Eagle Star Insurance* above and held at 162 that, '[t]he cause of action does not accrue under a liability policy until the liability of the insured is established by judgment, arbitration or binding settlement', whereas in other types of insurance policy … 'the limitation period begins to run as soon as the insured event occurs'. For the position under other contracts of insurance, see Clarke *Law of Liability Insurance* para 12.14.3.

As to possible law reform of insurance law generally, the Law Commissions of England and Scotland recommended in December 2011 that the limitation period should not start on the date of the occurrence of the insured peril but only after the insurers have had a reasonable time to investigate and assess the claim or, alternatively, when the claim is rejected. However, the proposal was not implemented. *Colinvaux's Law of Insurance* para 10.084 explains that the 2015 Act introduced a right to damages for late payment which led to the addition of s 5A to the Limitation Act. Under the latter provision a claim by an insured for damages for late payment must be brought within one year of the date on which the insured's loss is paid by the insurers.

[286] However, see the statutory reforms discussed in para 4.1.2 above.

[287] [1990] 1 Lloyd's Rep 569 (QBD) 576 and 578-579. See *Colinvaux's Law of Insurance* para 22.017 and *Colinvaux Supplement* 137-138 ad paras 22.017-22.020 for a discussion of the decision in the context of limitation and the 1930 Act. See also Clarke *Law of Insurance Contracts* paras 5.8D-5.8E and para 4.2.3.2 and 4.2.3.3 below for further detail as to limitation and prescription under the 1930 and the 2010 Acts.

It is permissible for the parties to an insurance contract to vary the statutory limitation period and to agree to a shorter or even a longer[288] period. Some liability policies contain 'pay-to-be-paid clauses',[289] which provide that an insured cannot recover from its insurer until the insured has actually paid the third-party plaintiff. Commentators suggest that a 'pay-to-be-paid clause' would probably not influence the accrual of the insured's cause of action and that it would still accrue on the date on which the insured's liability towards the third party was established by judgment, award, or settlement.[290]

Some policies contain a clause providing that 'if insurers disclaim liability for a claim and if, within 12 months of such a disclaimer, legal proceedings have not been instituted, the claim shall be deemed abandoned and shall not thereafter be recoverable.'[291] The insured may notify its insurer of a claim against it, but if the third party delays instituting proceedings against the insured, the insured may in the meantime neglect to institute proceedings against its insurers. Such clauses have therefore been regarded as 'a trap for the unwary' insured in liability policies.[292] The Court of Appeal agreed with this view in *William McIlroy (Swindon) Ltd, Mackays Stores Ltd, Cathedral Works Organisation (Chichester) Ltd, Rannoch Investments Limited v Quinn Insurance Ltd*.[293] It held that 'it makes no sense to think that an insured may have become time barred in a claim under [a public liability] policy before, possibly years before, he has any cause of action to bring it'.[294]

In view of the *William McIlroy* decision, where a liability policy provides for a time bar to run from the making of a 'claim' by the insured against the insurer, or the existence of a 'dispute' between the insured and the insurer, the limitation period of the insured's cause of action against the insurer would probably not begin to run before the third party's cause of action against the insured has been established by way of judgment, arbitral award, or settlement.[295]

---

[288] For example, by the conduct of the insurer, but the usual rules for waiver and estoppel apply. See Clarke *Law of Liability Insurance* paras 12.14.1, 12.14.2 and 4.3.1.1(e) below for further detail.
[289] See the discussion on 'pay-to-be-paid clauses' para 4.2.2.1(b)(i) above as to when the insured becomes legally liable.
[290] *Colinvaux's Law of Insurance* para 10.081.
[291] *MacGillivray on Insurance* para 30.077, referring to 'deemed abandonment of proceedings'.
[292] Ibid.
[293] [2011] EWCA Civ 825 para 46. The Court of Appeal referred to Legh-Jones, Birds & Owen *MacGillivray on Insurance* (11 ed) para 28.064 with approval.
[294] *William McIlroy v Quinn Insurance* para 46.
[295] See *MacGillivray on Insurance* para 30.077 and *Colinvaux's Law of Insurance* para 3.024 for further comment on the case. Again note the statutory reform as to unfair terms brought abought by the

4.2.2.2 The Insured Event and the Duration of Liability Cover[296]

The insured may recover only that loss which has been caused by an event covered by the insurance contract from its liability insurer. The insured's legal liability towards the third-party plaintiff is the insured's loss[297] in terms of the liability policy and should be distinguished from the 'insured event' that brings the matter within the scope of a particular period of cover designated in the liability insurance contract.[298] Such an event may be the occurrence of the loss itself – ie, the insured's legal liability towards the third party[299] – or it may be an earlier occurrence that merely leads to the insured's legal liability, such as an act of negligence on the insured's part,[300] or another occurrence which marks a significant stage in the process leading to the insured's legal liability. For example, the occurrence of the third party's loss may be the 'insured event' (as in so-called 'occurrence-based' insurance), or the event may be a claim by a third party against the insured (as in 'claims-made' insurance).

One should distinguish further between the duration of the liability insurance contract as provided for by the period of insurance, and the duration of liability cover.[301] The period of insurance in a liability policy may, for instance, be one year. In English law, most liability policies endure for one year but are renewable.[302] However, it depends on the type of insurance cover in question whether occurrences that take place or claims that are made, before, during, or after the duration of the

---

Consumer Rights Act. See *MacGillivray on Insurance* ibid para 30.078 and *Colinvaux's Law of Insurance* paras 3.024-3.025ff. See also para 4.1.2 above.

[296] In writing this section, the following general works on the English insurance law were consulted: Clarke *Law of Insurance Contracts* paras 17.4B-17.4D; Clarke *Law of Liability Insurance* paras 8.1, 8.2, 8.4-8.8; *Colinvaux's Law of Insurance* paras 21.006-21.011; *MacGillivray on Insurance* paras 30.63-30.67; Birds & Hird 'Report' 179-85; Clarke 'Report' 187-202; and Enright & Jess *Professional Liability* paras 1.132-1.162, 7.012-7.018, 14.009-14.011 and 10.119-10.164.

[297] As discussed in para 4.2.2.1 above.

[298] The latter is at issue here (para 4.2.2.2). Clarke *Law of Insurance Contracts* para 17.4B comments that '[t]he incidence of loss, both as to its nature and timing, should be distinguished from the event that brings the case within the scope of a particular period of cover: that event, the insured event, is the one specified in the contract'.

[299] Clarke ibid.

[300] In a so-called 'act-committed' insurance, which is more prevalent in continental legal systems, the insured's breach of contract or tort brings the case within the scope of the policy.

[301] Again, the latter is at issue here (para 4.2.2.2).

[302] Birds & Hird 'Report' 180. They observe that it is possible to have a liability policy with a shorter or longer fixed duration, as is usually the case when the liability policy is linked to another contract, eg, in a construction project.

contract, are covered. Liability insurance policies grant cover for a limited time. As far as the duration of the liability cover is concerned, there are two broad types in England, namely 'occurrence-based' and 'claims-made' liability policies. In addition, some 'hybrid' liability policies, which are variations on 'occurrence-based' and 'claims-made' policies, have developed.

The distinctions between 'occurrence-based'[303] and 'claims-made'[304] liability policies, as far as the event and duration of the liability cover are concerned, are discussed in what follows. Some hybrid forms of liability policies that have developed are also explored.[305]

4.2.2.2(a) The Insured Event

4.2.2.2(a)(i) Occurrence-based Policies

An occurrence-based liability policy would, for example, provide that an insurer will indemnify the insured 'against all sums which the insured shall become liable at law to pay as damages … in respect of or in consequence of … *accidental loss of or damage to property from whatsoever cause during the period of insurance*'.[306]

An occurrence-based liability policy contains an undertaking by the liability insurer to indemnify the insured for loss arising out of an event, occurrence, circumstance, or accident which occurred within the period of insurance of a particular insurance policy.[307] In the case of occurrence-based policies the event is the point when the third party's loss occurred, be it the time of a death, illness, injury, loss or damage.[308] As to the nature of the occurrence, the damage may be damage to property or injury to person. The occurrence or the event that triggers liability cover varies from one insurance contract to the other and is, therefore, a question of

[303] For further detail, see paras 4.2.2.2(a)(i) and 4.2.2.2(b)(i) below on 'occurrence-based' policies.
[304] For further detail, see paras 4.2.2.2(a)(ii) and 4.2.2.2(b)(ii) below on 'claims-made' policies.
[305] For further detail, see para 4.2.2.2(b)(iii) below on 'hybrid' policies.
[306] This is an extract, with added emphasis, from the insuring clause in the liability policy in *M/S Aswan Engineering* above 292.
[307] See Birds *Birds' Modern Insurance Law* 251 para 13.6.3 and 256-260 para 13.7; *Colinvaux's Law of Insurance* paras 11.161-11.180 and *Colinvaux Supplement* 49 ad paras 11.161, 11.162, 11.164, 11.165, 11.167, 11.176, and 11.177; and Enright & Jess *Professional Liability* paras 10.125-10.10.137 for the meaning of 'accident', 'loss' and 'occurrence', 'event' or 'circumstance'. Also see para 4.2.2.3(a) below for further detail on 'event limits' and 'aggregations'.
[308] For further detail on how to determine the time of the third party's loss, see para 4.2.2.2(b)(i) below. The third party's loss which is at issue here, must be distinguished from the insured defendant's loss, as discussed in para 4.2.2.1 above.

interpretation in each case. In *Post Office v Norwich Union Fire Insurance*, the court held that 'liability arises at the time of the accident, when negligence and damage coincide'.[309] But that it will not necessarily always be the case.[310]

Under this type of liability insurance, however, it is generally irrelevant when the act causing the occurrence – such as the insured's tort or breach of contract – either took place or became known, when the third party actually claimed against the insured, or when the insured became liable to the third party.[311]

4.2.2.2(a)(ii) Claims-made Policies

A claims-made liability policy would, for example, provide that the liability insurer will indemnify the insured 'for any sum which the insured may become legally liable to pay arising from *any claim or claims first made against the insured*'.[312]

In claims-made policies, the liability insurer undertakes to indemnify the insured defendant for a claim that is first made by the third party against the insured within the period of insurance of that particular insurance policy.[313]

As regards the use of the word 'claim', one has to distinguish carefully between the claim by the third party against the insured, and the insured's claim under its insurance policy. Whereas the third party may claim damages from the insured and may be referred to as the claimant in its action against the insured, the insured may claim from the liability insurer in respect of its legal liability towards a third party.[314] Again, the meaning and nature of the word 'claim', referring here to the third party's

---

[309] *Post Office* above 373. However, Clarke *Law of Insurance Contracts* paras 17.4B and 17.4C1 also considers 'negligence' as an occurrence under occurrence-based insurance. Clarke 'Report' 189 observes that '[i]n the past, that earlier event was usually the occurrence giving rise to the insured's liability, such as an act of negligence on his part'. Compare Clarke *Law of Liability Insurance*, a more recent work, para 8.1 that opines as follows: 'The event that brings a case within the scope of a particular policy and period of cover is the event that is specified in the insuring clause. … [T]his may be the occurrence out of which that loss (liability to the other person) arose, such as negligence. However, liability for negligence arises not at the time of the negligence, but "at the time of the accident, when negligence and damage coincide".'

[310] See para 4.2.2.1(b)(ii) below on the different possibilities as to the time of the loss.

[311] The event that brings the case within the scope of the policy is an issue of interpretation in every case. See para 4.2.2.1(c)(ii) below for further detail in this regard.

[312] This is an extract, with added emphasis, from the insuring clause of the liability policy in *Lumberman's Mutual Casualty v Bovis Lend Lease* above para 17.

[313] The insurance policy may contain a time limit on the submission of the claim by the insured against the insurer.

[314] For further detail, see Enright & Jess *Professional Liability* paras 14.004ff and 10.147-10.151; *MacGillivray on Insurance* para 30.067; and Clarke *Law of Liability Insurance* paras 8.5.1 and 8.8.

claim against the insured, is subject to the interpretation of the insurance contract and may be affected by the context.[315] The inquiry starts with the insuring clause in the policy.[316] An English court is likely to define a 'claim' as 'a demand for something as due; an assertion of a right to something'.[317]

Claims-made liability policies provide cover against third-party liability if the insured's conduct (such as tort or breach of contract) which causes the third party's loss or damage is discovered and a third-party claim is made against the insured during the period of insurance. It is irrelevant when that conduct took place. The event in the case of claims-made policies refers to the time at which the claim is made against the insured by the third party.[318]

4.2.2.2(b) The Duration of Liability Cover

4.2.2.2(b)(i) Occurrence-based Policies

Occurrence-based policies *do not provide retrospective cover, but they do provide potentially unlimited prospective cover* that is limited only by statutory or contractual prescription periods.

Occurrence-based policies are the preferred type of insurance cover from an insured's point of view. Under these policies, the liability insurer bears the risk of uncertain future claims. The biggest disadvantage for liability insurers contracting on an occurrence basis is that they are exposed to 'long-tail' liability in that claims may be made by third parties on the insured, and hence by the insured on the insurer, long after the occurrence of the insured's conduct that caused the death, injury, loss, or damage, or long after the third party's loss itself occurred.[319] The differences between occurrence-based and claims-made policies are particularly relevant in the case of

[315] See, eg, *West Wake Price & Co v Ching* [1957] 1 WLR 45 (QBD) 55, 57 where the court considered the policy, and especially the QC clause, and held that the term 'claim' refers to a claim for money rather than to the cause of action itself. See further *Thornman & Others v New Hampshire Insurance Co (UK) Ltd & Home Assurance Co* [1988] 1 Lloyd's Rep 7 (CA (Civ)) 15 where the court held that the 'application of the definition may vary according to the circumstances it falls to be construed'.
[316] Clarke ibid para 8.5.1.
[317] See *Thornman v New Hampshire Insurance* 15 where the court accepted the meaning that the *Oxford English Dictionary* ascribed to the term 'claim' and also referred to the decision (that the term 'claim' refers to a claim for money) in *West Wake Price v Ching* above with approval. See *MacGillivray on Insurance* para 30.103 for further comments on *West Wake Price v Ching*.
[318] See also para 4.2.2.2(b)(ii) below for further detail on 'claims-made' policies, in particular the different possibilities as to whether a claim has been made against the insured during the period of insurance.
[319] For more information on long-tail insurance in general, see also Clarke *Law of Insurance Contracts* para 18.1A and Clarke *Law of Liability Insurance* paras 8.2, 8.4, and 12.7.1.

professional liability or when dealing with progressive diseases, where a significant period may elapse between the insured's conduct (that is, the professional's act of negligence or breach of contract, or the disease-causing conduct) and the loss or damage to the third party and the latter's claim against the insured.

Investigations by the insurer of 'long-tail' claims under occurrence-based policies are difficult. Furthermore, inflation and interest have increased the size of such claims against liability insurers, and they are further for unacceptably long periods unable to close their books per underwriting year of account.

Although public liability policies may be written on a claims-made basis, they are more commonly occurrence-based policies. However, the disadvantages of occurrence-based liability policies for liability insurers have encouraged the development and use of claims-made policies. Professional liability insurers are, for example, disinclined to offer occurrence-based policies and prefer to write claims-made policies.[320]

The time of the occurrence determines whether it falls within the period of cover. If the event took place at a specific time, such as loss caused by an identifiable accident, it is generally not difficult to determine which policy applies. In long-tail insurance, however, the question arises as to whether a particular insurer (if there is only one policy), or which insurer (in the case of consecutive policies), bears the loss when the occurrence involves damage, disease, or injury that may have been latent for a considerable time – eg, pollution, asbestosis, or cancer.

There are four possible times of occurrence that may qualify as the 'insured event' in determining whether or which policy applies:

- exposure: when the third party is exposed to the activity or circumstance that gives rise to the action against the insured;[321]

[320] Clarke *Law of Liability Insurance* para 8.4 notes that occurrence-based cover is less frequent at nowadays.

[321] See *Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd & Another* [2006] 1 WLR 1492 (CA (Civ Div)) para 15 where the court rejected this possibility and held that, '[i]t cannot be right that, at the stage of initial exposure or initial bodily reaction to such exposure, there could be a liability on the part of [the insured] in respect of which they could require to be indemnified under any public liability insurance policy'. Cf *Durham v BAI (Run-Off) Ltd (in scheme of arrangement) & Other Cases; Re Employers' Liability Policy 'Trigger' Litigation* [2008] EWHC 2962 in respect of an employers' liability policy; but the decision of the court a quo was reversed in part on appeal in *Durham v BAI* [2010] 1 Lloyd's Rep IR 295 ('*Durham v BAI* (CA)'). In *Employers' Liability Insurance*

- loss in fact (so-called 'injury in fact'): although it may refer to the position when the third-party injury or damage actually occurs;[322]
- manifestation: loss does not occur until it becomes manifest (or known);[323] and
- liability: of any insurer whose policy was in force at the time of initial exposure, during continued exposure, or at the time of manifestation.[324]

A distinction is sometimes drawn between 'losses-occurring' and 'events-occurring' policies.[325] A losses-occurring policy provides cover in respect of liability for injury suffered by the third party during the currency of the policy, even though the insured's liability for those injuries is not established until later. An 'events-occurring' policy provides indemnity for events that occur within the currency of the policy, even though they do not give rise to injury until a later date, and the insured's liability for those injuries is not established until an even later date. The distinction between these two forms of policy is particularly relevant in so-called 'exposure' cases – eg, exposure to asbestos where the third party is exposed to the harmful substance during the currency of the policy, but where that exposure does not result in physical injury to the third party until some time later.

In *Bolton Metropolitan Borough Council v Municipal Mutual Insurance*[326] the insuring clause in a public liability policy[327] provided for indemnity 'in respect of all sums which [the insured] shall become legally liable to pay as compensation arising

---

Trigger Litigation, BAI (Run Off) Ltd v Durham [2012] UKSC 14, the Supreme Court again reinstated the judgment of the court a quo. See the discussions in this para 4.2.2.2(b)(i) below.

[322] This was the earliest time that the injury could arise according to the Court of Appeal in *Bolton Metropolitan Borough Council v Municipal Mutual Insurance* above paras 18-19. See the discussion of *Bolton* in this para 4.2.2.2(b)(i) below.

[323] *Bolton* above para 18, where the Court of Appeal held that the injury had occurred on a later date than exposure 'when a malignant tumour [was] first created [injury in fact] or when identifiable symptoms first occurred [manifestation of the loss]'. It was not necessary to distinguish between the date of injury in fact or the date manifestation of the loss in that case, as the insured had been covered by the same policy at both times.

[324] The so-called 'tripple trigger' theory or 'multiple trigger' theory was also rejected by the Court of Appeal in *Bolton* para 24, when it held that 'as far as the public liability policies used in the present cases, I see no need for the English courts to adopt the multiple trigger theory. It has been adopted in the US avowedly for policy reasons in relation to the vastly greater number of asbestos-disease sufferers in that country. I see no reason to adopt it in this particular case where the same policy considerations are not present.'

[325] See *Colinvaux's Law of Insurance* paras 21.009-21.011 and *MacGillivray on Insurance* paras 30.082 and 30.110 for further detail.

[326] *Bolton* above.

[327] The judgment is confined to such policies, eg, *Bolton* paras 15 and 24. It is explained in *Colinvaux's Law of Insurance* para 21.009 that, '[i]f the reasoning in *Bolton* is extended [to the context of employers' liability insurance] the insurance [would be] seriously undermined in cases where exposure and the injury occur in different years'.

out of … accidental bodily injury or illness … to any person … which occurs during the currency of the policy'. The Court of Appeal found that the policy provided losses-occurring cover, and not events-occurring on exposure.[328] It held that 'actionable injury does not occur on exposure or on initial bodily changes happening at that time but at a much later date; whether it is when a malignant tumour is first created or when identifiable symptoms first occur does not matter for purposes of this case'.[329] The court further held that the phrase 'accidental bodily injury' did not require the accident – the initial exposure – and the injury to occur within the currency of the policy.[330] It was sufficient if the injury occurred within the currency of any one of the policies that may be applicable in determining the time of the occurrence as the time of the damage, or its manifestation.[331] The Court of Appeal therefore preferred to determine the time of the occurrence as the time of the damage or of its manifestation.[332]

Employers' liability insurance policies that covered employers for 'disease contracted' and 'injury sustained' by their employees during the course of employment, were considered in *Durham v BAI*,[333] a decision involving a group of test cases on the employers' liability wording.[334] The case related to mesothelioma compensation claims. The court a quo held that the phrases 'injury was sustained' and 'disease was contracted' referred to when the injury or disease was caused, namely at the date of inhalation [exposure], and it distinguished the case from *Bolton*.[335]

The Court of Appeal in *Durham v BAI* reversed the court a quo's decision in part.[336] It held, in respect of the 'disease contracted' wording, that the insurer's liability to indemnify the employers was triggered on the date of exposure – ie, on inhalation of the asbestos dust which caused the disease. However, where the policy contained the phrase 'injury sustained', the insurer's liability was triggered only if the

[328] *Bolton* paras 13-19, 22, 26, 44-46.
[329] Ibid para 18.
[330] Ibid para 19.
[331] Ibid.
[332] See Clarke *Law of Insurance Contracts* para 7.4C2; *Colinvaux's Law of Insurance* paras 21.009-21.011; and *MacGillivray on Insurance* para 30.082 for further comment on *Bolton*.
[333] *Durham v BAI* above.
[334] The case should be read in the context of compulsory employers' liability insurance in English law. For further detail see *MacGillivray on Insurance* para 30.110; and *Colinvaux's Law of Insurance* paras 21.009-21.011.
[335] *Durham v BAI* above in paras 226-227, 239, 240 and 243.
[336] *Durham v BAI* (CA) above.

policy was in force on the date of the injury – ie, when the tumour developed.[337] The Court of Appeal in passing considered itself bound by its earlier decision in *Bolton*. Due to the significant time lapse between the exposure to asbestos during the course of employment, and the onset of the disease, the negligent employer may be without cover for liability to its former employee if it was no longer covered by liability insurance at the time of the injury.[338]

On appeal, in *Employers' Liability Insurance Trigger Litigation, BAI v Durham*, the Supreme Court again reinstated the judgment of the court a quo in *Durham*. It held that 'injury sustained' and 'disease contracted' both referred to exposure rather than to injury.[339]

In the absence of any terms in the policy to the contrary, the phrase 'injury sustained' means exposure (causation) in an employers' liability policy, and 'injury' in a public liability policy.[340]

When the occurrence involves conduct, the time of the occurrence is, in English law, again a matter of interpretation of the policy. Numerous cases have interpreted terms such as 'accident', 'event', 'loss', 'occurrence', and 'circumstance'.[341] The courts have also construed the meaning of aggregation clauses (or so-called 'aggregations') such as 'loss/and or occurrence arising out of one event', 'claims resulting from a single event', 'losses arising out of' and 'occurrence or occurrences of a series consequent on or attributable to one original source'.

Occurrence-based liability policies also require the insured to give notice of any third-party loss to the insurer as soon as the insured becomes aware of it.[342]

---

[337] Ibid paras 230-231, 233, 235, 237 and 244-245 above.
[338] *MacGillivray on Insurance* paras 30.110 and 30.112.
[339] See *Colinvaux's Law of Insurance* paras 21.007-21.011 and 21.123-21.124; and *MacGillivray on Insurance* para 30.110 for further comment on the case.
[340] See *Equitas Insurance Limited v Municipal Mutual Insurance Limited* [2019] EWCA Civ 718 (CA (Civ)) on employment liability insurers' claims against their reinsurers for mesothelioma liabilities arising from multiple years of negligent exposure.
[341] See, Birds *Birds' Modern Insurance Law* 251 para 13.6.3 and 256-260 para 13.7; *Colinvaux's Law of Insurance* paras 11.161-11.180 and *Colinvaux Supplement* 49-53 ad paras 11.161, 11.162, 11.164, 11.165, 11.167, 11.176, and 11.177; and Enright & Jess *Professional Liability* paras 10.125-10.10.137 for English judicial decisions on the meaning of these terms. See also Clarke *Law of Insurance Contracts* para 17.4C3; Birds ibid 401-402 para 20.3; *Colinvaux's Law of Insurance* para 21.040; *MacGillivray on Insurance* paras 30.060-29.067; and Clarke 'Report' 199-200.
[342] For further detail on notice to insurers, see *MacGillivray on Insurance* paras 21.036-21.049 and 30.040-30.041; and *Colinvaux's Law of Insurance* para 21.054.

4.2.2.2(b)(ii) Claims-made Policies

Professional indemnity policies and directors' and officers' policies are generally written on a claims-made basis. Claims-made liability policies *provide potentially unlimited retrospective cover, but no prospective cover beyond the period of insurance*. There may have been conduct by the insured within the currency of the policy that gives rise to claims many years later, and thus an insured will need to maintain a claims-made policy, or successive claims-made policies, for a lengthy period – eg, in the case of professional liability insurance, even after the cessation of the insured's relevant professional activities. [343]

In claims-made policies, also referred to as 'discovery-policies', the insured itself bears much of the risk of uncertain future claims as it has an extensive duty to disclose potential claims before entering into or renewing any such liability insurance contract. Because of the extended retroactive liability in claims-made policies, insurers require meticulous disclosure by the insured of potential liability-inducing conduct in the past. Liability insurers contracting on a claims-made basis are able to calculate premiums with greater accuracy than those underwriting occurrence-based policies, given the better defined nature of the risk resulting from the insured's disclosures. Where the insured has disclosed a potential claim, the liability insurer may choose to charge higher premiums, refuse to grant or renew the liability insurance policy, or may exclude cover for the disclosed potential liability claim.[344]

Insurance contracts generally impose a duty on the insured to give the insurer notice when a loss or of any event which may result in a claim by the insured under the policy, takes place.[345] The type of policy – ie, whether it is 'occurrence-based' or 'claims-made' – may influence the interpretation of clauses requiring notification, for example, when notice must be given.[346] Notification under claims-made policies is complex.[347]

---

[343] Clarke *Law of Liability Insurance* para 8.6.1.

[344] Enright & Jess *Professional Liability* para 14.047.

[345] This is a contractual duty and the extent of the duty depends on the wording of the policy. Although there may be some overlap, it differs from an insured's common-law duty of pre-contractual disclosure. Note that the latter has now been amended by statute to a duty not to misrepresent in consumer insurance contracts and as a duty of fair representation of the risk in non-consumer insurance contracts. See para 4.1.2 on these statutory reforms.

[346] Enright & Jess *Professional Liability* para 14.029. See also Clarke *Law of Liability Insurance* paras 8.5, 8.7 and 8.8. Prompt notification, eg, was discussed by the Court of Appeal in *HLB Kidsons v Lloyd's Underwriters* [2008] EWCA Civ 1206, 2008 WL 472172 and in *Maccaferri Ltd v Zurich*

It is typical of claims-made policies, such as professional indemnity policies, to require three phases of notification by the insured to the insurer.

In the first instance, claims-made policies generally contain the standard notification term which requires the insured to give written notice of any occurrence, for example, 'of any accident, claim or proceedings'. The aim of this clause is to enable the insurer to investigate any accident or claim as soon as possible.

Secondly, claims-made policies may require the insured to give notice of occurrences 'likely to give rise to a claim', or that 'may give rise to a claim'.

Thirdly, the insured must notify the insurer of any claim made by a third party against the insured itself.

Insurance Plc [2016] EWCA Civ 1302, 2017 WL 11798 (CA (Civ)) on the interpretation of *Euro Pools Plc (In Administration) v Royal Sun and Sun Alliance Insurance Plc* [2019] EWCA Civ 808, 2019WL 02077848 regarding notification under successive claims-made policies.

[347] For further detail see *Colinvaux's Law of Insurance* paras 21.054-21.073 and *Colinvaux Supplement* 124 ad paras 21.058 and 21.059 and discussions of various judicial decisions. See also *MacGillivray on Insurance* paras 21.036-21.049 and 30.040-30.041 and Clarke *Law of Liability Insurance* paras 8.5 and 8.7.

As to whether a claim by a third party against the insured arose during the insurance period (the time of the claim), the possibilities include:[348]

- potential claims as to:
  - an occurrence of a state of affairs which may later give rise to third-party injury and liability by the insured towards the third party;
  - an occurrence of a state of affairs which may give rise to a claim by the third party against the insured;
  - an occurrence of a state of affairs which is likely to give rise to a claim by the third party against the insured;
- assertion of claims, consisting of:
  - notification of the occurrence of a state of affairs to the insured that may give rise to a claim, thus, a mere allegation;
  - notification of the occurrence or a state of affairs to the insured which is likely to give rise to a claim;
- institution of proceedings by the third party against the insured.[349]

Once it has been established that a claim has been made by the third party against the insured within the insurance period, and the insured institutes a claim against its insurer, the courts proceed to determine whether relevant matters are covered by the claim.[350]

4.2.2.2(b)(iii) Hybrid Policies

Liability insurers will, of course, attempt to limit their exposure to prospective liability in the case of occurrence-based policies, or to retrospective liability in the case of claims-made policies.[351] Such refinements to both types of policy tend to

[348] English courts divide the possibilities as to the time of the claim into three different groups. See, eg, Clarke *Law of Insurance Contracts* para 17.4D2 and Enright & Jess *Professional Liability* paras 14.036-14.044 in this regard.
[349] The courts treat the first three options as 'potential claims', the fourth and fifth as 'assertion of claims', and the last option – 'the institution of proceedings' – is treated separately.
[350] On the scope of the claim, see Clarke *Law of Insurance Contracts* para 17.4D3 and the examples from judicial decisions given there.
[351] The insurance policy may, eg, provide that it does not cover any loss or any legal liability 'arising from any event or occurrence, which has been notified under any insurance in force prior to the inception of this [the] policy'. Alternatively, a retroactive date may be inserted in a claims-made policy to limit retroactive liability. See para 4.2.2.2(b)(iv) below as to the latter.

result in hybrid policies that create gaps in the cover provided by, for example, different successive policies.

The significant period that may elapse between the occurrence of the event and the third party's claim against the insured has led to the development of hybrid policies. Those insured under claims-made policies may protect themselves against claims made after the period of insurance by using so-called 'prior-acts cover' or 'long-tail cover'.

Under prior-acts cover, the insurer under the new or renewed insurance policy charges an additional premium to cover the insured for incidents that may have occurred before the inception date of the new or renewed policy.

Claims-made policies generally include an extension clause in the form of an extended period of discovery which provides that 'if the notification is made within the duration of a policy, any claim arising out of the matters of the subject of the notification will be treated as a claim under the policy, even though the claim itself is made outside the duration of the policy'. Under such long-tail cover, the previous insurer covers future claims to be made for events that occurred during the currency of its claims-made policy at an additional premium.

These types of cover in effect combine claims-made and occurrence-based cover in a single policy. The terms of a specific liability policy may, therefore, amend the broad features of occurrence-based or claims-made policies, and may even result in the policy no longer qualifying as the one or the other, but rather as a hybrid form of liability policy.

4.2.2.2 (b)(iv) Limitation of Actions Applied to Occurrence-based and Claims-made Policies

It has been explained that the statutory limitation period of the insured's claim may start to run on the date when the insured's liability to the third party has been established by way of a judgment, arbitration award, or agreement, provided that the event which brings the matter within the scope of the policy has occurred.[352]

The same principle applies in determining when the limitation of an insured's claim against its liability insurer starts to run in both claims-made and occurrence-

[352] See para 4.2.2.1(d) above on limitation of actions in liability insurance in general.

based policies, but the practical consequences may vary, depending on the type of liability policy. This statement requires further explanation.

Insurers have 'long-tail liability' under occurrence-based policies. That entails potentially unlimited prospective coverage subject only to statutory or contractual prescription periods. A significant period may elapse between the date on which the policy was written; the occurrence of the event – ie, the third party's loss; and the latter's claim against the insured which may subsequently lead to the formal determination of the insured's legal liability by judgment, arbitral award, or agreement. The limitation period of the insured's claim against its insurer may thus equally start running only many years after the policy was written.

Claims-made liability policies provide potentially unlimited retrospective cover, but no prospective cover beyond the period of insurance. Claims-made policies, therefore, generally include a 'retroactive date' to limit retrospective cover.[353] Even though the third-party claim against the insured must be made within the period of the policy to bring the case within the scope of the policy, the event, circumstance, or occurrence giving rise to the claim must also occur after the retroactive date. Claims-made policies will also generally exclude or restrict cover for 'pre-existing occurrences' not disclosed by the insured.[354] Less time will thus elapse between the date on which the policy was written and the third party's claim against the insured which may subsequently lead to the formal establishment of the insured's legal liability by way of judgment, arbitral award, or agreement. The delay between the date on which the policy was written and the date on which the limitation of the insured's claim against its insurer begins to run, will be shorter in claims-made policies than in occurrence-based policies. However, there may still be a significant elapse of time.

4.2.2.3 Exceptions to, Exclusions from, and Limitations on Liability Cover[355]

Some of the more important exceptions to, exclusions from, and limitations on the liability cover that may be found in liability insurance policies will be explored next. However, the discussion does not intend to provide an exhaustive summary of all possibilities.

---

[353] Enright & Jess *Professional Liability* in para 7.015.
[354] Ibid para 7.017.
[355] For further detail on exceptions in insurance contracts is general, see Clarke *Law of Insurance Contracts* para 19.2.

4.2.2.3(a) The Sum Insured, Aggregations, and Event Limits

As regards the sum insured and the limits of indemnity, the liability insurance policy may have a maximum limit applying to a particular period of insurance, regardless of the number of claims made, or there may be an event limit, that is, a limit that applies to each accident or each occurrence or each claim by the insured, with no overall maximum limit.[356]

The use of aggregations (such as 'loss/and or occurrence arising out of one event', 'loss and/or occurrence', 'claims resulting from a single event', 'losses arising out of' and 'occurrence or occurrences of a series consequent on or attributable to one original source') is a way to limit the extent of the insurer's liability.[357]

4.2.2.3(b) Exclusions or Exceptions to Liability Cover for an Insured Defendant's Legal Liability towards Third-Party Plaintiffs

4.2.2.3(b)(i) Contractual Liability[358]

In *M/S Aswan Engineering Establishment v Iron Trades Manual Insurance*,[359] the court held that the parties to the insurance contract had to exclude cover for contractual liability expressly if they wished it not to be included.

The insurance industry has developed standard phrases to describe basic cover and basic exclusions. A public liability or products liability policy, for example, will provide cover against tortious liability, but will generally seek to exclude contractual liability. These policies provide an 'indemnity against sums that the insured is legally liable to pay' (which is in principle wide enough to cover contractual liability), but they generally then expressly exclude pure contractual liability from the indemnity by excluding 'liability assumed under contract' or providing that 'the insurer will not

[356] See Birds *Birds' Modern Insurance Law* 251 para 13.6.3, 258-260 para 13.7, and 401-402 para 20.3 for interesting English judicial decisions on the meaning of limits 'per accident', 'per occurrence' and 'per claim' respectively. See *Spire Healthcare Ltd v Royal & Sun Alliance Insurance Plc* [2018] EWCA Civ 317, [2018] CLC 327 (CA (Civ)) on aggregations and the limits of cover.

[357] See para 4.2.2.2(b)(i) above on the duration of liability cover in occurrence-based policies, as well as the sources referred to with regard to the functions of aggregations and event limits, as well as to their interpretation.

[358] In writing this section, the following general works on the English insurance law were consulted: Clarke *Law of Insurance Contracts* paras 17.4A1*; MacGillivray on Insurance* paras 30.006-30.007 and paras 34.017-34.018; *Colinvaux's Law of Insurance* paras 21.014-21.023 and *Colinvaux Supplement* 116-118 ad paras 21.014, 21.017 and 21.021; Birds *Birds' Modern Insurance Law* para 20.00 at 35; and Clarke *Law of Liability Insurance* paras 10.3 and 10.4.4.

[359] *M/S Aswan Engineering* above para 293. See the discussions of the extent of 'legal liability' in paras 4.2.2.1(a)(i)-4.2.2.1(a)(iii) above and the decisions discussed there on whether legal liability covers contractual liability, and if so, to what extent.

indemnify the insured for liability accepted by agreement which would not have attached in the absence of the agreement'. [360]

Cover for liability in contract alone is less likely in the case of public liability or product liability policies. The philosophy behind the exclusion of contractual liability is that proper performance under the contract is seen to be in the hands of the insured, and that there may be an absence of fortuity to provide for insurance cover. For example, should the insured intentionally render performance in terms of the contract impossible, it is self-realisation of the risk and generally uninsurable.[361] In short, liability insurance is not (primarily) intended to indemnify an insured against contractual liability for performance it undertakes.

It has been explained earlier that it is a matter of interpretation whether the exclusion of 'contractual liability' merely refers to liability imposed by contract (contractual liability for performance assumed by the insured) or whether it also includes liability for damages imposed by law for breach of contract.[362]

[360] In *Omega Proteins* above paras 21-23 the court interpreted the meaning in a public liability policy of an exclusion clause that excluded liability arising 'under any contract or agreement unless such liability would have attached in the absence of such contract or agreement'. It held that, '[t]he fact that liability arises under a contract does not, however, mean that cover is automatically excluded. The insurance is against "all sums which the Insured becomes legally liable to pay for damages" in connection with accidental loss of or damage to property. Whether or not there is cover depends on whether "such liability would have attached in the absence of such contract or agreement' (para 21). The court (para 22) quoted Legh-Jones, Birds & Owen *MacGillivray on Insurance* (11 ed) para 32.017 with approval: 'A refinement in relation to liability of this nature is a clause which excludes any liability arising out of contract unless such liability would in any event have arisen in tort. The wording of such a clause does not always make it clear whether the test is liability in tort as if no contract between the assured and the claimant had existed or liability in tort assuming the existence of a contract. A contractor may be liable in tort as well as in contract, and the existence of a contract could be a factor in establishing the necessary proximity between the parties to found the tortious duty of care. It is submitted that the former test is correct. The purpose of the exception must surely be to relieve the insurer of liability which the assured has incurred directly or by reason of the conclusion of a contract between himself and the claimant.' The court then summarised the way in which to interpret such exclusion clause such as in the present policy, as follows: 'It invites consideration as to what liability would an attached in the absence of a contract; not as to what liability in tort would have arisen in the presence of one; nor as to whether there was liability in tort as well as in contract. The court has to consider what liability there would have been if there had been no contract between [the insured] and [the third party]' (para 23). See the discussions on contractual liability in paras 4.2.2.1(a)(i)-4.2.2.1(a)(iii) above.

[361] On the contrary, there will be fortuity due to an insured's negligently or innocent non-performance of the contract by way of breach of contract.

[362] See the discussions in paras 4.2.2.1(a)(ii)-4.2.2.1(a)(iii) above in this regard and the decisions discussed there.

4.2.2.3(b)(ii) The Conduct of the Insured Defendant[363]

An insured may not be able to recover from the insurer when it incurs liability as a result of its intentional (including reckless), wrongful or criminal conduct.[364] It is against public policy for an insured to benefit from its unlawful or criminal conduct under an insurance policy and cover is therefore denied. This applies equally to all insurance contracts.[365]

However, claims may well be allowed where the loss or damage resulting from the insured's unlawful or criminal conduct affects third parties.[366] Then the public policy considerations in favour of third parties indirectly obtaining the benefit of the insured's insurance cover may outweigh the considerations against the insured benefitting directly from its own unlawful or criminal conduct. However, there is also a narrower approach in terms of which compensation will only be ordered to a third-party claimant (victim) who has an independent cause of action – eg, section 151 of the Road Traffic Act, 1988,[367] where liability insurance is compulsory.

Liability insurance contracts also frequently contain a so-called 'intentional-act exclusion' by providing cover, for example, for liability for death or bodily injury 'neither intended or [sic] expected' by the insured.[368] There are few decisions on this point in English law, but it is suggested that the exclusion should be 'read as an amplification in negative terms of the common law definition of accident, as generally understood'.[369]

---

[363] In writing this section, the following general works on the English insurance law were consulted: *Colinvaux's Law of Insurance* paras 21.033, 21.042-21.045 and *Colinvaux Supplement* 118-119 ad para 21.033 and 121-122 ad para 20.043; Birds *Birds' Modern Insurance Law* 235-237 para 13.2.2 and 400-401 para 20.2.6; *MacGillivray on Insurance* paras 30.070-30.72, and 30.92; and Clarke *Law* of *Liability Insurance* paras 3.3, 10.2.1, 10.4.7, and 10.7.

[364] English courts have generally confined the exclusion to the consequences of deliberate criminal misconduct. See *Colinvaux's Law of Insurance* para 21.043.

[365] See Clarke *Law of Insurance Contracts* para 19.2E1 for a discussion of three possible grounds for the exclusion of intentional and reckless acts, of which the rule of public policy seems to be the preferred view. However, Clarke observes that 'to inflict loss intentionally is only unlawful in certain situations' (ibid). On the courts' approach to the rule on public policy see ibid para 19.2E2.

[366] For further detail on the exclusion (or not) of criminal acts in liability policies, see Clarke ibid paras 19.2E3-19.2E7 and 24.B and *Colinvaux's Law of Insurance* para 21.043.

[367] Chapter 52.

[368] Intentional-act exclusions are also found in other types of insurance policy. For further detail on the 'intentional-act exclusion' in liability policies, see Clarke *Law of Insurance Contracts* paras 19.2E3-19.2E7. See para 4.2.2.1(a)(v) above on clauses aimed at limiting 'legal liability'.

[369] Clarke ibid para 19.2E3. There is at least an implied term in insurance contracts that intentional conduct is to be excluded from the risk.

A typical clause that places an obligation on the insured to take reasonable precautions, reads: '[t]he insured shall take all reasonable steps and precautions to prevent accidents or losses'. Such clauses are common in, but not confined to, liability insurance policies.

One of the primary purposes of liability insurance is to insure the insured against liability for its own negligence. Negligence on the part of the insured is a failure to take reasonable care when a reasonable person would have taken steps to avert or minimise loss or damage. By imposing a contractual obligation on the insured to take reasonable care, the insurer may attempt to exclude its liability in negligence against the insured for the latter's liability to the party.[370] If construed literally, such a clause may prevent an insured from successfully claiming an indemnity against liability for negligence. In accordance with the general rules of interpretation of insurance contracts, and in particular the *contra proferentem* rule, an exclusion of negligence is construed restrictively. Some commentators contend that 'if an exception to negligence is clearly worded to exclude negligence, it will not exclude common-law negligence unless there is still some insured loss without negligence and the insurance against loss without negligence is sufficient to achieve the purpose of the insurance contract'.[371]

In *Fraser v BN Furman (Productions) Ltd, Miller Smith & Partners (A Firm), Third Party*,[372] the Court of Appeal held, in the context of liability cover for injury to third persons, that 'one does not construe a condition as repugnant to a commercial purpose of the contract'.[373] It found that 'to take precautions to prevent accidents' meant that the insured (as opposed to its employees)[374] had to 'avert dangers which were likely to cause bodily injuries to employees'. It held that reasonable care referred to reasonable care as between liability insurer and insured, and not as between the insured and the third party. To test whether the insured had taken reasonable steps to prevent the accident, the insured's actions could not be tested against those of the hypothetical reasonable employer as that would defeat the commercial purpose of the

[370] For instance, if the policy provides that there will be insurance cover, save for liability from negligence on the part of the insured, or positively, that there will be no cover for negligence.
[371] Clarke *Law of Insurance Contracts* para 19.2A1.
[372] [1967] 1 WLR 898 (CA (Civ Div)).
[373] Ibid 905D.
[374] The court applied the decision of the Court of Appeal in *Woolfall & Rimmer, Limited v Moyle & Another* [1942] 1 KB 66 (CA).

contract – ie, to indemnify the insured against liability for its negligence.[375] The court held that 'an insured's omission or act must at least be reckless, that is to say made with actual recognition by the insured that a danger exists and not caring whether or not it is averted'.[376]

English courts have therefore adopted a common sense interpretation of clauses that require reasonable precautions to be taken by insured. The approach in *Fraser*, which dealt with liability for injury to persons, has also been followed in England with regard to the insured's liability in negligence for damage to property.[377] Due regard must had to the purpose of the insurance contract, which includes indemnification against the insured's own negligence. Only recklessness or intent on the part of the insured, and not mere negligence, will amount to breach of the clause to take reasonable precautions. Such recklessness may be present if the insured, merely because it is covered against loss by the policy, refrains from taking the precautions to avoid the loss that it ought to have taken.

4.2.2.4 The Insured Defendant's Duties towards the Liability Insurer

Under a liability insurance policy the insured has duties towards the liability insurer similar to those of insured under other types of insurance contract. For example, the insured has an obligation to adhere strictly to the duties of utmost good faith[378] and disclosure.[379] As mentioned earlier,[380] insurers require meticulous disclosure by the insured of previous potentially liability-inducing conduct under claims-made policies because of the extended retroactive liability inherent in such policies. Such policies are even referred to as 'disclosure policies'. The insured's notification obligations under a liability insurance contract have been canvassed earlier.[381]

The insured also has a duty to avoid or prevent loss, that is, not to cause loss intentionally or recklessly. The duty on the liability insured to take reasonable

[375] *Fraser v Furman* para 905F-H.
[376] Ibid 906C-D.
[377] See, eg, *W & J Lane v Spratt* [1970] 2 QB 480 (QBD (Comm)).
[378] Note the statutory reform of this duty as discussed in para 4.1.2 above.
[379] *Colinvaux's Law of Insurance* para 21.031. Also note that these duties have now been reformed by statute to a duty not to misrepresent in consumer insurance contracts and a duty of fair representation of the risk in non-consumer insurance contracts. See para 4.1.2 above.
[380] See para 4.2.2.2(b)(ii) on disclosure in claims-made policies above.
[381] It has been opined that some of these terms may be regarded as unfair in view of the Consumer Rights Act. See para 4.1.2 above. Also see paras 4.2.2.2(b)(i) and 4.2.2.2(b)(ii) on notification in occurrence-based and claims-made policies.

precautions to prevent the loss has been discussed earlier.[382] The insured further has a duty to mitigate loss that has already occurred. A clause compelling the insured to take reasonable steps to minimise and prevent loss confirms the common-law principle that the insured may not be covered under the insurance contract for its intentional or reckless act or omission that causes damage or loss to the third-party plaintiff. Insurance policies in general prohibit the insured from settling the claim by a third party or from making any admission of liability without the insurer's written consent. These 'no-admission' clauses are of particular importance in liability insurance and are discussed below.[383]

4.2.3 The Legal Relationship between the Liability Insurer and the Third-Party Plaintiff[384]

4.2.3.1 Common Law[385]

Under English common law, the rule of privity of contract applies. In terms of that rule no one may enforce a contract to which it is not a party. Generally there is no contractual relationship between the third-party plaintiff and the insured defendant's liability insurer. Consequently, the third party cannot claim from the liability insurer at common law. Although the common law was modified by the Contract (Rights of Third Parties) Act, 1999,[386] the amendment did not make it possible for third-party plaintiffs to claim from the insured defendant's liability insurer. Even when the insured defendant goes bankrupt, the third party is compelled to prove in the

[382] See para 4.2.2.3(b)(ii) above on the conduct of the insured and its obligation to take reasonable precautions below.
[383] It has also been opined that some of these terms may be regarded as unfair in view of the Consumer Rights Act. See para 4.1.2 above. See also para 4.3.1.2 below, where as part of the broader discussion of the conduct by the insurer of the defence and the settlement of claims by third-party plaintiffs against the insured, the further duties of the insured towards the liability insurer are discussed.
[384] *Colinvaux's Law of Insurance* ch 22 deals with third-party risks under liability policies. The entire chapter has been replaced by *Colinvaux Supplement* ch 22 and the latter is referenced in para 4.2.3 generally without mention to the former.
[385] Clarke *Law of Insurance Contracts* paras 5.1 and 5.1A; *Colinvaux Supplement* 128 ad para 22.001; and Clarke *Law of Liability Insurance* paras 12.3 and 12.7.
[386] Chapter 31, the '1999 Act'. *MacGillivray on Insurance* para 30.039 explains that, '[t]his Act allows a third party to bring an action on a contract if the contract so confers benefits on the third party and does not restrict a direct action. However, this is unlikely to be a route by which a [third party] claimant can generally recover from liability insurers. The [third party] claimant will not normally be specifically identifiable as an intended beneficiary of the insurance, nor to be intended to benefit from the liability insurance in the manner contemplated by the Act.' Liability insurance provides cover to an insured for its legal liability towards third parties and is not insurance for the benefit of third parties due to the absence of an intention in liability insurance to confer a benefit to a third party. The 1999 Act may apply to the insurance for the benefit of third parties but will, therefore, not generally apply to third-party claimants in the context of liability insurance.

bankruptcy with the other creditors.[387] If an insured which is indemnified under a contract of insurance against liability to third parties, goes bankrupt, the question arises whether the third party may claim from the liability insurer directly.[388] This was not possible under common law.

4.2.3.2 The Third Parties (Rights Against Insurers) Act, 1930[389]

The 1930 Act was adopted to remedy the perceived unjust position of the third-party plaintiff on the bankruptcy of the insured in that enjoyed no preferential status over general creditors. The gist of the Act is that if an insured who is indemnified against liability to third parties under a contract of insurance becomes bankrupt (or, subject to exceptions, is wound up in the case of a company) or enters into a composition or arrangement with creditors, the insured's rights against the insurer in regard to the liability it has incurred to a third party are 'transferred and vested in the third party to whom the liability was incurred'.[390] The provisions of the Act have given rise to a considerable litigation in English courts.[391]

The 1930 Act has been criticised, with the English and Scottish Law Commissions identifying a number of problems.[392] A few of these are mentioned briefly.[393]

First, the effect of section 1(1) of the 1930 Act is that the third-party plaintiff is required to establish the existence and extent of the insured's liability before it can institute action against the insurer. This is not only time consuming, but also involves

---

[387] See, eg, *Re Harrington Motor Co Ltd* [1928] Ch 105 (CA).

[388] This section is based on a previously published work. See Jacobs (2010) 22 *SA Merc LJ* 608-616.

[389] The 1930 Act, as abbreviated in para 4.1.2 above. See Clarke *Law of Insurance Contracts* para 5.8; Birds *Birds' Modern Insurance Law* 386-396 para 20.1; and *Colinvaux Supplement* at 128-129 ad para 22.002.

[390] Section 1(1) of the 1930 Act.

[391] See, eg Birds *Birds' Modern Insurance Law* 386-396 para 20.1; Clarke *Law of Insurance Contracts* para 5.8B; and *MacGillivray on Insurance* paras 30.013-30.023 for detailed discussion of the1930 Act and some of the litigation that arose from it. *Colinvaux Supplement* comments on the 1930 Act as part of the reform by the 2010 Act: see 129-150 ad paras 22.003-22.042. Selected paras of *Colinvaux's Law of Insurance* that contain detail on the 1930 Act are still referenced here in para 4.2.3.2.

[392] See The Law Commission and The Scottish Law Commission *Third Parties – Rights Against Insurers* (Law Com No 272) (Scot Law Com No 184) Cm 5217 on 31 July 2001, available at https://www.la wcom.gov.uk/project/third-parties-rights-against-insurers/ (accessed on 30 Jul 2019)). See also Law Commission 'Overview of the Third Parties (Rights Against Insurers) Act 2010', available at *https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage11jsxou24uy7q/uploads/2015/06/Third_Parties_Rights_against_Insurers_Act_2010_Overview*.pdf (accessed on 30 Jul 2019).

[393] Although the 1930 Act has been replaced, it remains applicable in some instances (and is discussed in the present tense). See para 4.2.3.3 below on the new 2010 Act and the instances in which the 1930 Act still applies.

additional expense for the third party as it must proceed against both the insured and the insurer. This is unnecessary and may lead to unfair results – eg, in cases where the insured no longer exists.[394]

Second, the 1930 Act has not kept pace with developments in company and insolvency law. For example, it does not expressly extend to partnerships other than limited partnerships,[395] or apply to voluntary arrangements[396] entered into by an individual insured with its creditors. It does, however, apply to voluntary arrangements[397] entered into by insured companies with their creditors.[398]

Third, the third-party plaintiff's rights to disclosure of information regarding the insurance[399] may be seen as inadequate.[400]

Fourth, rights transferred to the third-party plaintiff are subject to any defences that the insurer could have raised against the insured. An insurer may therefore use technical defences to escape the claim by the third party – eg, that the insured failed to notify the insurer, even where the third party itself has complied with the notification obligations of the insured under the policy.

Fifth, the 1930 Act does not apply to certain types of voluntarily incurred liability, such as legal expenses, and as legal-expenses insurance plays an important role in funding litigation, the Commissions objected to this exclusion.

---

[394] See, eg, *Bradley v Eagle Star Insurance* above. If the insured company has been dissolved, it must be restored to the Register of Companies so that the third party can use it to establish liability. This result amounts to artificial and additional proceedings. See Birds *Birds' Modern Insurance Law* 389 para 20.1.1 on how the legislature attempted to solve the problem before the 2010 Act.

[395] Although an insolvency order against an individual partner in a general partnership may trigger the operation of the Act on the principle of joint and several liability, s 3A was later inserted in the 1930 Act to extend its scope of application to limited partnerships.

[396] 'IVAs'

[397] 'CVAs'.

[398] See *Colinvaux's Law of Insurance* para 22.013 on how English courts, albeit by a cumbersome and expensive procedure, attempted to assist a third party who was potentially unfairly prejudiced by a moratorium on legal proceedings brought about by an IVA.

[399] Section 2 of the 1930 Act.

[400] Until recently, the right to information only arose when the liability of the insured had been established. This implied that a third party had to conduct litigation against the insured (to establish the insured's liability towards itself for the purposes of s 1(1)) without knowing whether there was an insurer against whom the third party may be able to proceed. In *Re OT Computers Ltd (In Administration)* [2004] Ch 317 (CA) 331 para 38 the Court of Appeal overruled the previous authorities and remedied the position: the duty to inform under s 2 of the 1930 Act now arises on occurrence of the insolvency events covered by s 1(1) and no longer depends on the insured's liability being established. However, the actual method of obtaining information has remained unclear. The third party may exercise the right to information against a limited number of parties and not against others, such as insurance brokers who might have relevant information. Apart from requiring the disclosure of information that may be reasonably required by the third party for the purpose of enforcing its rights under the Act, it is not exactly clear which information should be provided under the Act.

Sixth, it is uncertain whether the 1930 Act applies to claims with a foreign element.[401]

Lastly, the 1930 Act also does not provide how the Limitation Act applies to third-party claims.[402]

As pointed out, the 1930 Act could not address the evolving needs of liability insurance which differ considerable from those existing in 1930. Accordingly, this English statute was replaced by the 2010 Act.

4.2.3.3 The Third Parties (Rights Against Insurers) Act, 2010[403]

More than a decade after the Law Commissions began their reviews of the 1930 Act, the 2010 Act was finally enacted. Although the entry into force of the 2010 Act was delayed on numerous occasions, it eventually came into operation on 1 August 2016. However, it contains detailed transitional arrangements,[404] and the 1930 Act will continue to apply in certain instances – eg, where the insured's insolvency and its liability to a third party predates the commencement of the 2010 Act.[405] The key changes included in the 2010 Act are summarised briefly.[406]

First, section 1(1) of the 1930 Act was completely redrafted. Although section 1(2) of the 2010 Act provides that 'the rights of the relevant person under the contract against the insurer in respect of the liability are transferred to and vest in the person to whom the liability is or was incurred ("the third party")', section 1(3) expressly

---

[401] It may also be uncertain whether a court in Great Britain has jurisdiction to hear the parties in such a claim. This is an increasingly serious lacuna in view of the growing number of transnational insurance cases.

[402] *Colinvaux's Law of Insurance* paras 22.017 and 22.030. In *Lefevre v White* above, the third party obtained judgment against the insured and the insured instituted proceedings against its insurers. However, the insured became insolvent during the course of the proceedings, but more than six years after the judgment in favour of the third party. The court held that the third party had its own cause of action against the insurers under the 1930 Act, but that it accrued at the same time as that of the insured against the insurers, ie when the insured's liability towards the third party was established by judgment. The third party was time-barred from instituting a fresh action. Ibid 578-579. As the 1930 Act has been replaced by the 2010 Act, further discussion of the position under the 1930 Act falls beyond the scope of this thesis.

[403] The 2010 Act para 4.1.2 above. See Birds *Birds' Modern Insurance Law* 386-396 para 20.1.5; *MacGillivray on Insurance* paras 30.024-30.038; and *Colinvaux Supplement* 129-150 ad paras 22.003-22.042 with particular focus on para 22.005 as to the general features of the 2010 Act.

[404] See Schedule 3 to the 2010 Act, for the transitional arrangements.

[405] Clarke *Law of Liability Insurance* para 12.3 n 17.

[406] See The (English) Law Commission and The Scottish Law Commission *Third Parties – Rights Against Insurers* (Law Com No 272) (Scot Law Com No 184) Cm 5217 on 31 July 2001, available at https://www.lawcom.gov.uk/project/third-parties-rights-against-insurers/ (accessed on 30 Jul 2019)). See also (English) Law Commission 'Overview of the Third Parties (Rights Against Insurers) Act 2010' available at *https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads /2015/06/ Third_Parties _Rights_against_Insurers_Act_2010_Overview*.pdf (accessed on 30 Jul 2019).

excludes the need for a third-party plaintiff to issue proceedings against both the insolvent insured (to establish the insured's liability against the third party) and against the latter's insurer (to establish the insurer's liability against the insured). That will remain a possibility, but alternatively the third party will be able to sue the insurer for a declaration of the insured's liability (or potential liability) to itself as third party. The 2010 Act, therefore, removes the need for the third party to apply, for example, to have a dissolved insured company restored to the register. Section 1(3) is one of the most significant sections in the Act. However, the third-party plaintiff will still not be able to enforce its rights against the insurer without having established the insured's liability against it.[407]

Second, the 2010 Act refers to a 'relevant person' instead of to 'an insured'. It provides detailed definitions of who or what will qualify as a 'relevant person'.[408] The Act now also expressly covers instances in which the insured is an unincorporated body. The 2010 Act reflects changes in insolvency law by broadening its scope of application to IVAs. The 2015 Act also amended some parts of the 2010 Act, for example, to accommodate new insolvency procedures through which an insured may qualify as a 'relevant person'. [409]

Third, the 2010 Act gives the third-party plaintiff detailed rights against the insured, the insurer, and other parties, to information and disclosure regarding the insurance.[410]

Fourth, the 2010 Act still allows the insurer to raise defences such as non-disclosure, misrepresentation, or breach of warranty by the insured; to set off the amount of any liability of the insured to it against the third-party plaintiff; and to apply any excess to the third party's claim.[411] Section 9(2) of Act provides that anything done by the third party that, if done by the insured, would have amounted or contributed to fulfilling a condition to which the transferred rights are subject, is to be treated as if done by the insured. This will allow the third-party plaintiff, among other

[407] Section 1(3).
[408] Sections 4-7.
[409] Part 6 of the 2015 Act. See *MacGillivray on Insurance* paras 20.007 and 30.0013. See also (English) Law Commission 'Third Parties (Rights Against Insurers) 2010 Act: Background to the Provisions in the Insurance Bill' available at *https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q /uploads /2015/06/ Third_ Parties_and_Insurance_Bill_2014.pdf* (accessed on 30 Jul 2019).
[410] Section 11 and Schedule 1. However, see *Colinvaux Supplement* 147 in paras 22.037 for details on potential weaknesses of the third party's rights to information under the 2010 Act.
[411] Sections 9-10. See *Colinvaux Supplement* 141-142 ad para 22.028 for detailed explanations hereof in the context of different types of liability policy.

things, to give notice and particulars of a claim to an insurer. In addition, transferred rights no longer require the insured to provide information (other than giving notice of a claim) or assistance to the insurer if the insured cannot do so, for example, if the insured is a body corporate which has been dissolved or an individual who has died.[412]

Next, as to limitation under the 2010 Act, three different limitation periods are relevant: for a claim by the third party against the insured; for a claim by the insured against its insurers; and for a claim by the third party against the insurers. [413]

First, as to the third party's claim against the insured, the imitation period under the Limitation Act is six years for breach of contract, and either three or six years for a tort. However, the 2010 Act protects the third party provided that a claim form has been issued against the insured within the limitation period.[414] If the claim has not been resolved, but the limitation period expires during the course of the proceedings, the insurers are prevented from relying on the expiry of the limitation period when a third party seeks a declaration as to the insured's liability to it (the third party) in declaration proceedings against the insurers.

Second, as explained earlier,[415] subject to the contract, the limitation period of the insured's claim against its insurers is six years from the date on which the insured's liability against the third party has been established by judgment, arbitral award, or binding settlement.

Third, as to the third party's claim against the insurers, the 2010 Act is not clear exactly how the Limitation Act should operate.[416] It has been submitted that it depends on how the third party's right under the 2010 Act is classified. If the third party has an independent right against the insurer, it accrues on the date on which the insured becomes insolvent for purposes of the 2010 Act. If the third party's right is derivative, it accrues on the date on which the insured's liability towards it (the third party) has been established and quantified, but the third party cannot sue the insurer in its own name before insolvency. If the third party's right is derivative, and the

[412] Section 9(4).
[413] *Colinvaux Supplement* 137-138 paras 22.017-22.021. See also para 4.2.2.1(d) above on limitation of actions in liability insurance generally.
[414] Section 12.
[415] See also para 4.2.2.1(d) above on limitation of actions in liability insurance generally.
[416] In this sense, the position under the 1930 Act is still unchanged.

insured's insolvency occurs after the expiry of the limitation period for the third party's action against the insurers, there is a potential problem.[417]

4.2.4 The Liability Insurer Exercising its Rights of Subrogation for a Contribution against Joint Wrongdoers of the Insured Defendant[418]

As liability insurance is indemnity insurance, subrogation[419] applies.[420] The insurer must have paid to the insured all sums due under the contact of insurance to acquire a right of subrogation.[421] Under common law, the insured must assist the insurer to exercise its rights in subrogation against 'any other person responsible for the loss insured'.[422]

Liability insurance contracts under English law are silent, in the main, on subrogation.[423] The insured's liability to third parties is at core of liability insurance and the insured event under liability insurance is unlikely to give subrogation rights to the insurer in general.

Subrogation is exceptional in liability insurance,[424] but the liability insurer may be subrogated to the insured defendant's claim for a contribution against wrongdoers who acted jointly with the insured defendant. However, the rights of the insurer are no greater than those of the insured and may be limited by contributory negligence on the part of the insured.[425] Some examples of how subrogation may arise in liability insurance include:

---

[417] For a proposed solution hereto under English Civil Procedural Rules, see *Colinvaux Supplement* 138 para 22.021. Further detail falls beyond the ambit of this study.

[418] On subrogation in English law, see generally Clarke *Law of Insurance Contracts* para 31; Birds *Birds' Modern Insurance Law* ch 17; and Clarke *Law of Liability Insurance* para 11.4.2.3.

[419] Clarke *Law of Liability Insurance* para 11.4.2.3.1 describes subrogation under English law as follows: 'When insurer A conferred a benefit (insurance money or reinstatement) on B (the insured), B is obliged by law to transfer to A rights, notably rights of action against any person liable to B for loss insured'.

[420] Subrogation preserves the principle of indemnity.

[421] Liability insurers cannot make use of their ordinary rights of subrogation to contest the insured's liability as against a third party, unless they first pay the insured the full amount of its estimated loss. See *Colinvaux's Law of Insurance* para 21.074. That is one of the reasons why liability insurance contracts usually specifically reserve the insurer's right to defend any proceedings that may be brought by the third-party plaintiff against the insured, to conduct all settlement negotiations, and to approve any settlement. See also para 4.3 below for further detail on the conduct of the defence and settlement by the insurer.

[422] Clarke *Law of Liability Insurance* para 11.4.2.3.

[423] Ibid para 11.4.2.3.2.

[424] Ibid para 11.4.2.3 confirms that the insured's obligation to assist the insurer to exercise rights in subrogation is 'not very important in the case of liability insurance'.

[425] Clarke *Law of Insurance Contracts* para 31.4C.

The liability insurer may be subrogated to a counterclaim by the insured defendant against the third-party plaintiff, for example, where the insured also has rights in tort against a third party who has negligently caused damage or injury to the insured. Or, the liability insurer may be subrogated to the insured's right of action against other, 'fourth parties',[426] for example, the insured defendant's joint wrongdoers,[427] or for a claim for an indemnity from the insured's co-insurers.

4.3 THE CONDUCT OF THE DEFENCE AND SETTLEMENT OF CLAIMS BY THIRD-PARTY PLAINTIFFS AGAINST THE INSURED DEFENDANT

4.3.1 The Legal Relationship between the Liability Insurer and the Insured Defendant

4.3.1.1 Conduct of the Defence:[428] The Insurer's Right to Defend[429]

In English law, liability insurance contracts generally provide that the third-party claim may (and will) be defended by the insured.[430] However, the liability insurer does not have a duty to defend the insured against third-party claims unless the insurance contract specifically so provides.[431] In *Brice v Wackerbarth*[432] the court explained that 'usually [the insurers] are entitled to wait, to watch and see'[433] and then

[426] That is, parties other than the insured or the third-party plaintiff.
[427] Joint wrongdoers may or may not be co-insured of the insured defendant. However, In England there has been some reluctance to allow subrogation against a co-insured in an effort to avoid circuity, but an exception may be made if the co-insured is guilty of fraud. In every instance, the interpretation of the insurance contract will be paramount. See Clarke *Law of Insurance Contracts* para 31.5D and Clarke *Law of Liability Insurance* para 11.4.2.3.3 for further detail on subrogation against a co-insured. Where an insured as employer has a right of action against its own employees, English courts are also reluctant to enforce an employer's rights against its employees. Insurance contracts may contain a so-called 'waiver of subrogation' clause. Under such a clause the insurer waives its right of subrogation to proceed against employees of the insured, unless the claim against the insured 'was brought about or contributed to by the dishonest, fraudulent, or criminal act or omission' of the employee. See Clarke *Law of Liability Insurance* para 11.4.2.3.2.
[428] In writing this section, the following general works on the English insurance law were consulted: Clarke *Law of Insurance Contracts* para 17.4E; Birds *Birds' Modern Insurance Law* para 20.2.2 at 396-401; and Clarke *Law of Liability Insurance* ch 9. For further detail, also see *Colinvaux's Law of Insurance* paras 21.44-21.83 and *Colinvaux Supplement* 122-124 ad paras 21.046A, 21.047, 21.051-21.053, 21.058, 21.069, and 21.082; and *MacGillivray on Insurance* paras 30.042, 30.043 and 30.05-30.059.
[429] This part of the comparative analysis of English law (para 4.3.1 here) is more limited in extent than its Belgian equivalent (para 5.3.1 below), as the Belgian system is more advanced. Under Belgian law, the liability insurer has a right and a duty to conduct the defence of third-party claims against the insured.
[430] Clarke *Law of Liability Insurance* paras 9.1.1 and 9.2.
[431] Liability insurers may, therefore, in case of express policy wording to that effect, have a contractual duty to defend.
[432] *Brice v Wackerbarth* 276.
[433] Ibid 277.

decide on the way forward. The court further held that the insurer 'is perfectly entitled not to take over the conduct of the defence of the claim but to leave the assured to themselves to fight the [third-party] plaintiff's case'.[434] The liability insurer, therefore, does not have a legal duty to conduct the defence, but it may have a contractual duty – although that seems unlikely.[435]

It is common practice, however, for the liability insurer to have a contractual right to defend the action and to settle the claim against its insured, but it does not appear that this right exists without a contractual provision specifically providing for it.[436]

A clause that 'the insurer may take over and conduct the defence and settlement of any claim and have the right to use [the insured's] name for this purpose' almost invariably appears in English liability insurance policies.[437] Such a clause does not give the insured a right to be defended, and neither does it place any duty on the insurer to defend the insured. In short, the clause does not provide a basis on which to compel the liability insurer to take over the insured's defence if it chooses not to do so.[438] However, the liability insurer will generally exercise this right to assist the insured in its defence against the third-party claim and to protect itself (the insurer) against the insured defendant's claim for indemnity.[439]

In *Brice v Wackerbarth*,[440] the court stated that '[i]t is everyday practice in third party proceedings for the third party [in casu, the insurer] to support the defendant in his defence, but to protect himself against the defendant's claim for indemnity'. The conduct of the defence by the insurer is done in the name of the insured. [441]

It should be noted that some English textbooks discuss an insurer's *right* to defend the action against the insured defendant under headings such as 'duty to

---

[434] Ibid.

[435] *Colinvaux's Law of Insurance* para 21.074 confirms that the 'insurer's rights and duties in respect of defending the assured depend entirely upon the wording of the policy', and then mentions the possibility that insurers may be under a duty to defend, or alternatively have a discretion to defend.

[436] See para 4.3.1.2 below on settlements by the insurer. See also *John Wyeth & Brothers Ltd v Cigna Insurance Co of Europe SA-NV & ORS* [2001] Lloyd's Rep IR 420 (CA (Civ Div)), 2001 WL 239739 paras 32ff on the possible contractual position.

[437] Clarke *Law of Liability Insurance* para 9.2. It is usually combined with a 'no-admissions' clause, as to which, see para 4.3.1.2 below.

[438] See para 4.3.1.1(e) on waiver below.

[439] As explained in para 4.2.4 above, liability insurers cannot make use of their ordinary rights of subrogation to contest the insured's liability as against a third party, unless they first pay the insured the full amount of its estimated loss. They therefore reserve a contractual right to conduct the defence and settlement.

[440] At 276.

[441] *Colinvaux's Law of Insurance* para 21.074.

defend'[442] or 'control of proceedings – duty to defend'.[443] These headings may be misleading as the liability insurer's contractual right to defend the action, and the clause providing for it, do not as a rule impose a duty to defend on the insurer or give the insured a right to be defended by the liability insurer.

However, an insurer which exercises either its contractual right to defend the insured, or has a contractual duty to defend the insured against liability claims, incurs a number of consequential duties against its insured. These duties are discussed briefly below.[444]

4.3.1.1(a) When the Right Arises[445]

The triggers for indemnity cover under a liability policy[446] and for the contractual duty to defend the insured, if any, generally overlap in practice and require a notice of some kind to the insurer to activate the triggers. It is often disputed whether the insured has notified the insurer of the occurrence or of the third party's claim against it. In the end it depends largely on the interpretation of the terms in the policy as to what exactly the insured had to notify the insurers of and when this had to happen.[447]

Unless the contract provides otherwise, a contractual duty to defend is not limited to the amount of liability cover. Again, an insurer's duty to indemnify is limited to the lesser amount of either its legal liability towards the third party, or of the sum insured.

It has not been determined finally whether English law requires a real possibility of liability to trigger the contractual duty to defend. However, commentators contend that the courts will look behind the form and face of the claim by the third-party plaintiff against the insured and undertake a limited inquiry as to its substance.[448] If the insurer is in breach of a duty to defend, it is liable for any loss suffered by the insured as a result of that breach.[449]

---

[442] Clarke *Law of Insurance Contracts* para 17.4E (my emphasis).
[443] Birds *Birds' Modern Insurance Law* 386-397 para 20.2.2 (my emphasis).
[444] See para 4.3.1.1ff below.
[445] Clarke *Law of Insurance Contracts* para 17.4E.
[446] For example, an occurrence in an occurrence-based policy or a claim in a claims-made policy. See the discussion in para 4.2.2.2 above; and see also Clarke ibid 17.4C-17.4D.
[447] See, eg, *Kidsons v Lloyd's Underwriters* above.
[448] Clarke *Law of Insurance Contracts* para 17.4E.
[449] Ibid para 17.4E6.

4.3.1.1(b) The Scope and Extent of the Right[450]

The defence must be conducted properly whether the liability insurer defends the insured by choice or by duty. If the insurer does not conduct the defence properly, it may be liable to the insured for breach of contract for improper settlement negotiations and/or defence. As it is the insurer that appoints legal representative(s) to conduct the defence, the insured's ability to influence the defence counsel and its strategies are greatly reduced.

One of the duties incurred by a liability insurer which conducts the insured's defence is that it must ensure that its defence tactics take into account not only its own interests, but also those of the insured. In *Groom v Crocker*,[451] the Court of Appeal confirmed that the insurers could decide what tactics to pursue provided that 'they do so in what they bona fide consider to be the common interest of themselves and the insured'.[452] The insured may insist on a solicitor of its own choice should it face criminal prosecution in addition to civil liability,[453] or if there is a conflict of interest between the insured and the insurer.[454]

4.3.1.1(c) Defence Costs[455]

As a rule, liability insurance covers the costs of the insured's defence of the claim. The extent of that cover is a matter of interpretation of the contract.[456] A common clause on defence costs in liability policies provides indemnity for 'all costs and expenses of litigation recovered by any claimant from the insured'; and for 'all costs and expenses of litigation incurred with the written consent of the insurer'.[457]

---

[450] Ibid paras 17.4E1 and 17.4F and Clarke *Law of Liability Insurance* para 9.2.1. For further detail, see also *Colinvaux's Law of Insurance* para 21.079-21.081 and *MacGillivray on Insurance* paras 30.042, 30.043 and 30.050.
[451] [1939] 1 KB 194 at 203 (CA).
[452] See also the duties of the solicitor to the insured para 4.3.1.2 below.
[453] *Barratt Bros (Taxis) Ltd v Davies* [1966] 2 Lloyd's Rep 1 (CA (Civ Div)), [1996] 1 WLR 1334, 1340.
[454] See also para 4.3.1.1(d) below on conflict of interest between the insured and the insurer.
[455] See Clarke *Law of Liability Insurance* paras 9.1.1 and 9.2.1.
[456] For examples on how English courts interpreted defence costs and surrounding issues in liability policies, see Clarke *Law of Insurance Contracts* para 17.4E3; *Colinvaux's Law of Insurance* paras 21.084-21.092 and *Colinvaux Supplement* 124 ad para 21.091; and *MacGillivray on Insurance* paras 30.051-30.059.
[457] Alternatively, the insurer may conduct the insured's defence.

The limit on costs may be very complex or it may be layered and shared vertically between different insurers.[458] In the absence of an express clause on costs, an insured's costs reasonably incurred in defending the claim will be included in the indemnity, subject to the other terms in the policy and the rules governing mitigation.

As to the costs of a third party, there is judicial authority that an insurer may be liable to pay the third parties' costs in excess of the policy limit.[459] A costs order may even be made directly against the liability insurers of an unsuccessful insured defendant under section 51(1) of the Senior Courts Act, 1981.[460] The liability insurers may then be ordered to pay the third-party plaintiff's costs, irrespective of the terms of the insurance contract or any limits thereunder.[461] Commentaries suggest that although a costs order is exceptional, judicial decisions appear to suggest that 'it is easier to justify a costs order against liability insurers than in other contexts'.[462]

4.3.1.1(d) Conflict of Interest [463]

As we have seen, an insured may insist on its own legal representative if a conflict of interest exists between it and its liability insurer. A conflict of interest may arise, for example, where there is a possibility of a judgment in excess of the policy limits, or where it is uncertain whether there is liability cover at all.

4.3.1.1(d)(i) Possible Judgment in Excess of Policy Limits[464]

The insured may prefer a settlement with the third party where there is a possibility of a judgment against it in excess of the policy limits, while the liability insurer has nothing to lose if the matter is litigated to its conclusion and liability is imposed in the excess of the policy limits. A liability insurer, therefore, has a duty to consider third-party settlement offers in good faith. In English law there is a perceived duty to settle. This duty developed due to the pressure that the rules of civil procedure placed on parties to settle before a matter goes to court. Cooperation between parties

[458] See Clarke *Law of Liability Insurance* para 9.1.1 for examples and more detail.
[459] Ibid.
[460] Chapter 54. The Act was previously known as the 'Supreme Courts Act'.
[461] *MacGillivray on Insurance* para 30.056.
[462] See *Colinvaux's Law of Insurance* para 21.105 and *Colinvaux Supplement* 125 ad para 21.105 for further detail.
[463] Clarke *Law of Insurance Contracts* para 17.4E4 and Birds *Birds' Modern Insurance Law* 396-398 para 20.2.2. For further detail, see *Colinvaux's Law of Insurance* paras 21.079-21.081 and Clarke *Law of Liability Insurance* para 9.2.1.
[464] Ibid.

is encouraged, for example, by low-cost awards against claimants, and penalties on parties who litigate when a compromise could have been achieved.

Insurance policies often authorise the liability insurer to settle third-party claims without obtaining the insured's permission. However, even then the insurer should take the interests of the insured into account when settling such claims.[465] For example, insurers should not unjustifiably admit liability, settle beyond the policy limits, or refuse a settlement offer by the third party within those limits. There is as yet no English authority on the position should a liability insurer refuse a settlement offer by the third party within the policy limits, and the third party then recovers more than the sum insured against the insured in subsequent litigation. The insurer may be liable for the entire judgment obtained against the insured and thus also for the portion of the amount in excess of the sum insured.[466]

There is a mutual duty of utmost good faith between the insured and the insurer.[467] For its part the insured should, for example, cooperate with the liability insurer in the conduct of the defence and settlement. Further, it should not prejudice the insurer's rights against the third party – eg, its right to subrogation – by colluding with the third party.

4.3.1.1(d)(ii) Cover is Uncertain[468]

It is uncertain whether a conflict arises between the insured and the insurer when the liability insurer questions whether liability of the insured towards the third party is within the scope of the policy (so that there is a potential conflict), or when the insurer in fact disputes that the insured's liability is covered by the insurance policy (so that there is actual conflict). In English law the liability insurer's legal representative must inform both the insurer and the insured as soon as evidence emerges that may provide the insurer with a ground for denying liability on the policy. This enables the insured to appoint its own legal representative to defend the third-party claim on its behalf should it wish to do so.

---

[465] See also para 4.3.1.2 below on the settlement of claims.
[466] Birds *Birds' Modern Insurance Law* 396-398 para 20.2.2.
[467] Clarke *Law of Insurance Contracts* para 17.4E4. Note again the statutory reform of this duty as discussed in para 4.1.2 above.
[468] Clarke *Law of Insurance Contracts* para 17.4E4 and Clarke *Law of Liability Insurance* para 9.2.1.

4.3.1.1(d)(iii) Legal Expenses Insurance[469]

Legal expense insurance may give rise to conflict of interest in the context of liability insurance.[470] Where an insured's liability insurer is also its legal protection insurer, whether in a comprehensive policy or under two different policies, a conflict of interests may arise between the insured and the insurer. On the one hand, the lawyer employed by the insurer or the lawyer on the insurer's panel may attempt to protect the insurer's interest by, for example, minimising its fees by suggesting a cheaper solution such as settlement to retain the goodwill of the insurer. On the other hand, settlement may not be in the best interest of the insured and it may have a valid interest in maintaining costly litigation.

It is undesirable that the liability insurer which, for example, refuses to conduct the insured's defence, must also pay for the insured's legal defence. Further, where the liability insurer of an insured (the defendant, party X) is also the legal protection insurer of the other party (the plaintiff, party Y) to the same dispute, it may be in the interest of the insurer to frustrate party Y's action against party X.

Such conflict of interest can be avoided by regulating the combination of liability insurance and legal protection insurance by a single insurer, by statute.[471]

The Legal Expenses Insurance Directive has been implemented in English law by the Insurance Companies (Legal Expenses Insurance) Regulations, 1990.[472] The Regulations came into force on 1 July 1990 and apply to 'legal expenses insurance business' as defined in the Financial Services and Markets Act, 2000 (Consequential Amendments and Repeals) Order, 2001,[473] as the 'effecting and carrying out of contracts of insurance … which insure a risk arising from legal expense'.[474] Legal expenses insurance appears to include legal expenses ancillary to other classes of

[469] See Clarke *Law of Insurance Contracts* paras 17.4E4-17.4E5 and Clarke *Law of Liability Insurance* para 9.2.2. This section is based in part on an earlier publication. See Jacobs (2011) 23 *SA Merc LJ* 464-475.
[470] See paras 4.3.1.1(d)(i)-4.3.1.1(d)(iii) above for further detail on such conflict of interest.
[471] The European Community ('EC') adopted Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative proceedings relating to legal expenses insurance (the 'Legal Expenses Insurance Directive'). It was replaced by the so-called 'Solvency II' Directive 2009/138EEC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance. (See para 4.1.2 above). The contents of these directives are substantially the same when it comes to legal expenses insurance.
[472] SI 1990/1159; the 'Legal Expenses Insurance Regulations'.
[473] SI 2001/3649.
[474] Ibid s 408(1)(4).

insurance (eg, the conduct of a defence by a liability insurer in a liability policy and legal expenses cover that may be offered in liability policies), but subject to certain express exceptions.[475]

The Legal Expenses Insurance Regulations include the following stipulations:

- legal expenses insurance cover must be contained in a separate policy, or in a separate section of, for example a liability policy, relating to legal expenses insurance only, and in the latter case, the policy must specify the nature of the cover provided;[476]
- a legal expenses insurer must adopt one of three internal arrangements to avoid conflict of interest, one of which is that the policy must afford the insured the right to entrust the defence of its interests to a lawyer of its choice from the moment it has a claim from the insurer under the policy;[477]
- irrespective of the arrangements above, '[w]here … recourse is had to a lawyer … to defend, represent or serve the interests of the insured in any inquiry or proceedings, the insured shall be free to choose that lawyer'; and the insured shall also have a right to choose its own lawyer 'whenever a conflict of interest arises';[478] and
- the insurer must notify the insured of its right to independent legal advice where a conflict of interest arises or where there is a disagreement over the settlement of a dispute between the insurer and the insured.[479]

It is important to note that regulation 6(1) gives the insured a right to independent legal representation where recourse is had to a lawyer under a legal

[475] See reg 3 of the Legal Expenses Insurance Regulations.
[476] Ibid reg 4.
[477] Ibid reg 5; see in particular reg 5(4).
[478] Ibid reg 6. However, reg 7 limits the field of application of reg 6 and it will not apply, eg, where neither the legal expenses insurer 'nor the assistance insurer carries on any class of liability insurance business' (reg 7 (*b*)), or where there are arrangements for securing that parties to a dispute that are insured by the same legal expenses insurer obtain legal advice and representation from completely independent lawyers (reg 7(*c*)).
[479] Ibid reg 9(1)(*a*).

expenses insurance contract, and that this right is not limited to situations of conflict of interest.[480]

4.3.1.1(e) Waiver by the Insurer's Conduct of the Defence[481]

The broad term 'waiver' may be defined as

> [T]he abandonment or relinquishment of a right or a defence which may occur as the result either of an election by the insurer or of the creation of an estoppel preluding it from relying upon [its] contractual right against the [insured].[482]

English law recognises two main forms of waiver: waiver by election;[483] and waiver by promissory estoppel.[484]

On the one hand, waiver by election entails a choice by the insurer to honour the policy rather than to deny liability.[485] If the insurer is aware of facts which create a legal right or of its legal right to a defence, and it acts in a way which evidences its decision to abandon the right, the insurer will be held to have elected not to exercise the right.[486]

On the other hand, waiver by promissory estoppel concerns an insurer's promise as to its future behaviour.[487] It entails that the insurer makes an unequivocal representation to the insured that it does not intend to rely on a right or defence, and

---

[480] Some regard the meaning of this regulation as unclear. The judgment of the EC Court of Justice in *Eschig v UNIQA Sachversicherung AG* [2010] 1 CMLR 5 ECJ 130-214 on, *inter alia*, the interpretation of arts 3(2)(*c*) and 4(1) of the Legal Expenses Insurance Directive and the relationship between them, is of specific relevance. The EC Court of Justice in *Eschig v UNIQA* found that art 4(1) of the Legal Expenses Insurance Directive must be interpreted as not permitting a legal expenses insurer to reserve the right to select the legal representative of all the insured where a large number of insured suffer loss as a result of a single event (162). It further observed that art 4(1) of the Legal Expenses Insurance Directive recognises the freedom of an insured to choose its own legal representation (159). The court also found that the right that is granted in art 4(1)(*a*) is not limited to situations of conflict, but is restricted to 'any inquiry or proceedings' (160). The judgment in *Eschig v UNIQA* was applied in *Brown-Quinn v Equity Syndicate Management* [2012] EWCA Civ 1633, [2013] Lloyd's Rep IR 371 on reg 6 of the (English) Legal Expenses Insurance Regulations regarding the insured's choice of solicitors and their remuneration. See Clarke *Law of Liability Insurance* para 9.2.2 for further detail.

[481] In writing this section, the following general works on the English insurance law were consulted: Birds *Birds' Modern Insurance Law* 398-399 para 20.2.3; Clarke *Law of Liability Insurance* paras 9.3-9.4, Clarke *Law of Insurance Contracts* paras 17.4E4 and 17.4F; *Colinvaux's Law of Insurance* para 21.077; and *MacGillivray on Insurance* paras 30.044-30.049.

[482] *MacGillivray on Insurance* ibid para 10.099 (in the context of waiver by the insurer on breach of warranty or other terms by the insured). The term 'waiver' has been criticised as 'vague'. See ibid.

[483] Also known as 'waiver by affirmation'. See *Colinvaux's Law of Insurance* paras 8.034-8.035.

[484] Also known as 'waiver by equitable estoppel'. See *MacGillivray on Insurance* para 10.100.

[485] *Colinvaux's Law of Insurance* para 10.022.

[486] *MacGillivray on Insurance* para 10.099.

[487] *Colinvaux's Law of Insurance* para 7.238. There are also other forms of estoppel, namely 'estoppel in convention' and 'issue estoppel'. See ibid for further detail.

the insured relies on the representation to its detriment.[488] The insurer, as representor, will then be estopped from enforcing its legal right.[489]

Both of these forms of waiver require an unequivocal representation on the part of the insurer as waiving party. There are, however, differences between the two types of waiver.[490] Waiver by estoppel operates in equity, whereas waiver by election is not based on equitable principles and does not require any detrimental reliance by the insured. Waiver by election requires knowledge of a right that is exercisable by the insurer before it can make an election; whereas knowledge by the insurer is not required for estoppel. Once an election is made, it is irrevocable, whereas estoppel may in certain instances merely suspend the exercise of a right temporarily.[491] In *Kosmar Villa Hilidays plc v Trustees of Syndiacte 1243,*[492] the Court of Appeal considered the distinction between these two types of waiver.

Generally, a liability insurer's conduct in defending the insured defendant would not constitute a waiver of a right or defence on the policy. For example, if a liability insurer takes control of the proceedings, it is not prevented from denying liability to indemnify the insured, for example, if misrepresentation, breach of warranty, or breach of condition by the insured is discovered only at a later stage.[493] However, if the insurer knows of a right to avoid liability, or of a defence on the policy, and nevertheless continues the defence of the claim in judgment or in settlement, the insurer may be deemed to have waived its right to avoid liability or raise the defence.[494]

The stronger the potential defence of an insurer, the stronger the implication that the insurer has waived the defence by defending the insured.[495] Commentators[496] suggest that a distinction must to be drawn between two situations. The one is where an insurer continues the conduct of the proceedings where it has a right to avoid the policy or terminate it based on breach of warranty or breach of condition. The other is

[488] Ibid para 10.022. *MacGillivray on Insurance* para 30.048 summarises the three requirements for estoppel as: '(i) a clear representation by word or conduct of a present fact; (ii) made to someone who is expected to act on it; (iii) and who does so, to its detriment'.
[489] *MacGillivray on Insurance* para 10.100.
[490] *Colinvaux's Law of Insurance* para 7.238.
[491] *MacGillivray on Insurance* para 10.100.
[492] [2008] Lloyd's Rep IR 489 (CA (Civ Div)), 2008 WL 546411.
[493] Birds *Birds' Modern Insurance Law* 399 para 20.2.3. Statutory reform of the duty of disclosure and breach of warranty and condition may impact on the insurer's remedies. See para 4.1.2 above.
[494]*MacGillivray on Insurance* para 30.044.
[495] Clarke *Law of Liability Insurance* para 9.3.
[496] *Colinvaux's Law of Insurance* para 21.077 and *MacGillivray on Insurance* para 30.044.

where it has the defence that there is doubt whether the claim by the third party against the insured is covered by the policy regardless of any breach by the insured. In the former instance, the insurer may be deemed to have waived its right and may, therefore be liable to indemnify the insured.[497] In the latter instance of a coverage defence, the insurer is not necessarily prevented from relying on its defence.[498]

If a liability insurer is uncertain whether it is liable to indemnify an insured, it is advised to protect itself from the argument that, by conducting the defence, it has waived its right or defence. The insurer may do so by continuing to defend the claim by the insured under an express reservation of rights.[499] This it does by reserving its rights either informally or formally – eg, by way of non-waiver agreements[500] which provide that the liability insurer will defend the action while reserving its right to deny liability to the insured under the insurance contract at a later stage. Alternatively, the insurer may refuse to participate in the defence or settlement process at all and direct the insured to act as a 'prudent uninsured'.[501]

[497] *MacGillivray on Insurance* ibid. See also, eg, *Barrett Bros v Davies* above 5 for an example of a successful plea of waiver to (promissory) estoppel to a breach of a condition precedent.

[498] In *Soole v Royal Insurance Company Ltd* [1971] 2 Lloyd's Rep 332 (QB), the court found against the insurers on a different ground, but it held (obiter 339-340) that the insurers were not estopped by their conduct of the defence from relying on a cover defence. The court reasoned as follows: '[T]he assumption of control of the proceedings is equivocal. It does not necessarily imply a representation by the insurers that they regard the claim … as one which *must* give rise to a liability to indemnify the insured. It indicates no more than that it appears that it *may* give rise to such liability. Hence the insurers would not be estopped from asserting that a particular claim was, in the event, never within the ambit of the policy. [The insurers'] conduct would not, in those circumstances, be unequivocal, definite, clear and cogent so as to indicate that they regarded themselves as inevitably liable under the policy …' (ibid). The reasoning in *Soole* was approved by the Court of Appeal in *Kosmar Villa Holidays plc v Trustees of Syndicate 1243* above, where, in para 69, it pointed out that waiver by estoppel rather than election applies in cases relating to cover. The court opined that this view is, 'consistent moreover with the analysis in [*Soole*], which is to the effect that the exercise by an insurer of a right to conduct a claim made against his insured under a liability policy is not an election, and certainly not an unequivocal election, to accept liability under the policy' (ibid). It has also been argued that an insured cannot be said to suffer detriment by not having the opportunity to conduct its own defence. See *Colinvaux's Law of Insurance* para 21.077.

[499] *Colinvaux's Law of Insurance* para 21.077, *MacGillivray on Insurance* para 30.049; Clarke *Law of Insurance Contracts* para 17.4F and Clarke *Law of Liability Insurance* para 12.4.

[500] See Clarke *Law of Liability Insurance* para 9.4.

[501] *Colinvaux's Law of Insurance* para 21.077 suggests that there does not appear to be authority on the meaning of the term 'prudent uninsured' in English law and that guidance may be sought from Australian law.

4.3.1.2 Settlement of Claims: No Admissions of Liability[502]

Liability policies generally provide that the insurer is entitled to defend and settle claims against the insured. The standard clause in a liability policy provides:

> No admission of liability or offer or promise of payment, whether expressed or implied, shall be made [by you, the insured] without the written consent of the insurer, which shall at its own discretion take over and conduct in the name of the insured the defence[503] or settlement of any claim.[504]

In addition to establishing a liability insurer's contractual right to defend and settle, liability insurance contracts generally provide for 'no-admissions' by the insured in their standard conditions. A 'no-admissions' clause,[505] prohibits the insured from settling the claim by a third party, or from making any admission of liability to the latter, without the insurer's written consent.[506]Although not exclusive to liability insurance policies, from a liability insurer's perspective a no-admissions clause is essential to protect its interests and to strengthen its right to take control of the proceedings instituted by the third party against its insured.[507]

The no-admissions clause appears to be very wide and may even entitle the insurer to avoid liability if the insured's admission (such as a mere informal 'sorry, it's my mistake') or settlement without its consent, did not in fact prejudice it. For example, the insurer could argue that it might have persuaded the third party to accept a lower settlement.[508]

---

[502] In writing this section, the following general works on the English insurance law were consulted: Birds *Birds' Modern Insurance Law* 396 para 20.2.4 and 399 para 20.2.4; Clarke *Law of Insurance Contracts* paras 17.4E1 and 17.4E4; and Clarke *Law of Liability Insurance* para 11.4.2.2. See also *Colinvaux Supplement* 122 ad para 21.046A. See further para 4.2.2.1(c)(i) above on settlement as a way to establish the insured's legal liability to the third party, and the examples of the English judicial decisions discussed there.

[503] See para 4.3.1.1 above on the conduct of the defence by the insurer.

[504] Birds *Birds' Modern Insurance Law* 396 para 20.2.1.

[505] Or this part of the standard condition in a liability insurance contract.

[506] Another example of a no-admissions clause that was enforced in an English judicial decision, reads as follows: '[The] Insured shall not, except at his own cost, take any steps to compromise or settle any claim or admit liability without specific instructions in writing from the Insurer nor give any information or assistance to any person claiming against him, but the Insurer shall … [have] the absolute conduct and control of all proceedings'. See Clarke *Law of Liability Insurance* para 11.4.2.2.1.

[507] As discussed in paras 4.2.2.2(b)(i), 4.2.2.2(b)(ii) and 4.2.2.4 above, liability policies also require the insured to notify the insurer of any occurrence and claims. An insured should also furnish the insurer with any relevant documentation. The liability insured should further adhere to these duties in the context of the defence and settlement of the third-party claim against it.

[508] Birds *Birds' Modern Insurance Law* 399 para 20.2.4. The position may well have changed after the introduction of the Consumer Rights Act. See below in this paragraph.

However, the importance of the need for a definition of 'admission' has been emphasised repeatedly. Some commentators are of view that 'an admission must concern "the truth of the whole or any part of another person's case", and generally an apology, an expression of regret and (probably) an admission of fault are not admissions of liability'.[509] Whereas some sources do not doubt the validity of a no-admissions clause,[510] others contend that courts may construe a no-admission clause as *contra proferentem*.[511]

In the interim, it is uncertain whether the insurer is still entitled to rely on a no-admissions clause if it elects not to conduct the insured's defence against the third-party plaintiff. If the insurer further refuses to consent to a settlement between the insured and the third party, the matter between the insured and the third party would have to be litigated if the insured hopes to recover from its liability policy. The question is whether the insured could argue that by refusing to conduct its defence, the insurer forfeits its right to rely on the no-admissions clause which prohibits settlement without its consent. These issues have not yet been considered by the English courts.[512]

It should again be emphasised that the liability insurer must exercise its rights under the policy with due regard to the interests of the insured. The insurer does not have arbitrary power to withhold its consent to a settlement between the insured and the third party.[513] The insurer must make a reasonable estimate of the potential of success of the third party's claim. If the third party has a very good chance of succeeding in its claim, the insurer should agree to a settlement within the policy limits.[514] By contrast, if it seems unlikely that the third party's claim will succeed, the insurer is justified in refusing a settlement.

---

[509] Clarke *Law of Liability Insurance* para 11.4.2.2.
[510] Birds *Birds' Modern Insurance Law* 399 para 20.2.4.
[511] For example, if the admission was made in the heat of the moment concerning an accident.
[512] Birds *Birds' Modern Insurance Law* 399-400 para 20.2.5. However, the author supports judicial decisions under Australian law.
[513] See para 4.3.1.1(d)(i) above on conflict of interest in the face of a possible judgment in excess of policy limits, where the liability insurer's perceived duty to settle third-party claims against the liability insured has already been discussed.
[514] The question is whether a liability insurer that refuses a settlement falling within the policy limits between the insured and the third party, is liable to the insured for the whole amount if the third party recovers more than the sum insured from the insured in litigation. The matter does not yet appear to have been considered by the English courts. See Birds *Birds' Modern Insurance Law* 399 para 20.2.2.

Some authors also opine that a clause like the 'no-admissions' clause that gives the liability insurer absolute control over the conduct of the insured's actions, may in future be found unfair under the Consumer Rights Act of 2015.[515]

4.3.2 The Legal Relationship between the Liability Insurer and the Third-Party Plaintiff[516]

Apart from the possibility created by the Third Parties (Rights Against Insurers) Acts, 1930 and 2010,[517] there may be two exceptional instances in which a legal relationship between the third party and the insured's liability insurer may arise.

First, some authors suggest that there is a possibility that a fiduciary relationship may arise between the third party and the insured's liability insurer. However, the position is not clear. In practice, the liability insurer generally negotiates directly with the third party on behalf of the insured defendant. Liability insurers attempt to limit their liability as far as possible in such settlement negotiations. The insurer may, for instance, pressure the third party, to the latter's detriment, to accept a settlement far below the amount to which it is legally entitled. It is argued that a settlement between the insurer as agent for the insured and the third party[518] in such circumstances, may be voidable on the grounds of undue influence or misrepresentation, unless the insurer has informed the third party to seek independent legal advice or has made a realistic offer in respect of the third party's loss. [519]

In *Horry v Tate & Kyle Refineries Ltd*,[520] the court held that the relationship of confidence between the insurer and the third-party plaintiff imposed a duty of fiduciary care on the insurer.[521] The insurer breached that duty by making a misrepresentation which induced the third-party plaintiff to enter into a settlement and the insurer was not permitted to rely on the settlement.[522] An inequality in bargaining

[515] Birds ibid 396 para 20.2.1 n 57. See para 4.1.2 above and Birds ibid 110-111 para 6.1 on the Consumer Rights Act.
[516] In writing this section, the following general works on the English insurance law were consulted Clarke *Law of Insurance Contracts* para 17.4E; Birds *Birds' Modern Insurance Law* 403 para 20.4; *Colinvaux's Law of Insurance* para 21.102-21.106 and *Colinvaux Supplement* 125 ad para 21.105; *MacGillivray on Insurance* paras 30.056-30.057; and Clarke *Law of Liability Insurance* para 9.1.1.
[517] See the discussion of these Acts in paras 4.2.3.2 and 4.2.3.3 above.
[518] The settlement itself is between the third-party plaintiff and the insured.
[519] Birds *Birds' Modern Insurance Law* 403 para 20.4.
[520] [1982] 2 Lloyd's Rep 416 (QBD).
[521] Ibid 421.
[522] Ibid 422-423.

power existed between the insurer, acting on behalf of the insured, and the third-party plaintiff.[523]

The possible tactics that may be used by the third party should not be disregarded in this instance. For example, a third party, aware that it will not recover damages from the insured unless the liability insurer pays the latter's liability claim, may tailor its claim to fit the terms of the liability cover (eg, cover for negligence), and may omit any references to excluded conduct on the part of the insured (eg, intentional and/or criminal acts).

Second, under section 51 of the Senior Courts Act, 1981, a third party's costs may in exceptional circumstances and in the absolute discretion of the court, be awarded against the insurer, even if it is not a party to the proceedings.[524] Although the insurer conducts the defence on behalf of the insured, it is conducted in the insured's name.

In *TGC Chapman Ltd v Christopher*,[525] the Court of Appeal held that all of the following five conditions had to be satisfied for a costs order to be made against the insurer: the insurer must have decided to defend the claim; it must have funded the defence of the claim; it must have conducted the litigation or controlled it; it must have defended the claim exclusively to protect its owns interests; and the defence must have failed in its entirety. A sixth requirement – that the claim would not have been defended but for the intervention of the insurers – appears also to be required by English courts. The conditions for a cost order will not be satisfied lightly and such an order against insurers is exceptional. However, it appears that it is easier to justify a cost order against liability insurers than in other cases.[526]

[523] This view as to the effect of the insurer's conduct on the validity of the settlement may be questionable, as the settlement is between the third party and the insured (not the insurer).
[524] See para 4.3.1.1(c) above.
[525] [1998] 1 WLR 12 (CA (Civ Div)).
[526] Ibid.

4.3.3 The Legal Relationship between the Insured Defendant and the Liability Insurer's Legal Representatives

4.3.3.1 Conduct of the Defence and Settlement[527]

The insurer's solicitor owes a duty of care to the insured. In *Groom v Crocker*[528] the court held that the solicitor was not entitled to admit negligence on the part of the insured when the insured itself denied it. The court held:

> The duty of the solicitor so nominated [by the insurer] to the insured for whom he is to act cannot of course be the same as that which arises in the ordinary case of a solicitor and client, where the client is entitled to require the solicitor to act according to his own instructions. The whole object and usefulness of these provisions would be defeated if the insured were to be entitled to interfere with the conduct of the proceedings in that way. The insured in my opinion is not entitled to complain of anything done by the solicitors upon the instructions, express or implied, of the insurers, provided that it falls within the class of things which the insurers are … entitled to do under the terms of the policy.

4.3.3.2 The Legal Representative of the Insured Defendant's Duty to furnish the Liability Insured with Information[529]

The solicitor appointed by the insurer must also keep the insured informed as is reasonably necessary.[530] For example, it must inform the insured of any possible conflict of interest[531] between the insured and the insurer.[532] On request, the solicitor must also give the insured all the documents relating to the action in its possession, either during or after the action by the third-party plaintiff.[533]

4.3.4 The Legal Relationship between the Liability Insurer and the Third-Party Plaintiff's Insurers: Litigating against each other in the Names of their Insured

It may happen that the insured's liability insurer and the third party's property insurer litigate against each other in the names of their respective insured: the property insurer by enforcing the third party's claim in the exercise of its right of

---

[527] Clarke *Law of Insurance* Contracts para 17.4E1.
[528] At 202-203.
[529] See Clarke *Law of Insurance Contracts* para 17.4E2 and *Colinvaux's Law of Insurance* paras 21.074-21.075 and 21.081; *MacGillivray on Insurance* paras 30.042, 30.043 and 30.050; and Clarke *Law of Liability Insurance* para 9.2.
[530] *Groom v Crocker* above 222.
[531] Ibid 227.
[532] As to conflict of interest between the insured and the insurer, see para 4.3.1.1(d) above.
[533] *Re Crocker* & *In Re Taxation of Costs* [1936] Ch 696, 702. Cf, the decision by the Court of Appeal in *Alistair Graham John Brown v Guardian Royal Assurance Plc* [1994] 2 Lloyd's Rep 325 (CA (Civ)), 1994 WL 1062352 in regard to privilege of documents.

subrogation,[534] and the liability insurer by defending the third party's claim.[535] However, no contract or legal relationship exists between the respective insurers.

4.4 SUMMARY AND CONCLUDING REMARKS[536]

In the first instance, the sources of English insurance law are the common law, judicial decisions, legislation, equity, and trade usages. Liability insurance is a specialised branch of insurance law and the law of liability insurance is found in these same sources. Recent statutory reforms – eg, by way of the 2012 Act, the 2015 Act, and the Consumer Rights Act of 2015 – must be taken into account insofar as they relate to liability insurance contracts. Despite the increasing importance of legislation, like South African law, English law is an uncodified system that consists of subsidiary common-law rules.

Secondly, as to the liability insurer's duty to indemnify the insured, English insurance law is complex but rich in precedent on the extent of an insured's legal liability to the third-party and to establish legal liability. Legal liability so established, is the insured's loss under the policy. The liability insurer becomes liable to the insured only when the latter's liability towards the third-party plaintiff has been established (by way of judgment, arbitral award, or settlement). The time at which the liability insurer becomes liable to indemnify the insured is rather late in the judicial process. There are also a number of judicial decisions and legal doctrine on how the insured defendant's liability towards third-party plaintiffs should be proved under English law.

However, as to the duration of liability cover, the event that brings the case within the scope of a specific liability policy depends on the type of liability policy involved. In English law, professional liability policies are usually written on a claims-made basis, whereas public liability policies in general are written as occurrence-based policies. The latter type of policy is found less frequently

[534] In contrast, see para 4.2.4 above on the liability insurer's right to subrogation in exceptional circumstances. Different scenarios may arise but further detail falls beyond the scope of this study.

[535] See para 4.3.1 above on the conduct of the defence by the liability insurer. See, eg, *RSA Insurance Plc v Assicurazione Generali SpA* [2018] EWHC 1237 (QB) where it was held that insurers have two years (not six) to bring contribution claims against other insurers in mesothelioma cases.

[536] This para 4.4 is a concise summative conclusion of the survey conducted on selected aspects of the law of liability insurance under English law. English law may assist in the development of the law of liability insurance in South African law, but the conclusions and recommendations reached in Chapter 6 go beyond those of para 4.4. Some parts of the law were reviewed to provide a complete overview of the law of liability insurance under English law, but it may not provide an appropriate solution for South African law in all instances.

nowadays. A number of English decisions have interpreted insuring aggregations and event limits in these policies. The duration of cover in a liability policy generally depends on the interpretation of the contract and on the context. Hybrid forms of policy have developed to address gaps in liability cover. The limitation of the action of an insured against its liability insurer may start to run from the date of establishment of the insured's legal liability towards the third party, provided that the event has occurred to bring the case within the scope of the policy.

Although an insured under a liability policy is subject to some of the same exclusions and limitations as an insured under other types of policy, the exclusion of contractual liability for performance voluntarily assumed by the insured, and for misconduct by the insured is particularly relevant in liability insurance. Under a liability policy, the insured also shares many of the usual duties of an insured towards an insurer. However, the insured's notification obligations and its duty of disclosure have been emphasised in the case of liability policies – particularly in claims-made policies. Some authors suggest that conditions which impose unreasonable time limits on the insured may in future be regarded as unfair under the Consumer Rights Act.

Liability insurance gives rise to a multitude of legal relationships, but a third party does not generally have a right to claim directly against the liability insurer under common law. The 1930 Act introduced a direct right to claim for the third party against the liability insurer in the event of the insolvency of the insured. The complexity and shortcomings of the 1930 Act have been widely criticised, and the Act has been replaced by the 2010 Act. The 2010 Act also contains detailed provisions on the limitation of the third-party claim against the insured, but not all the limitation issues that arose under the 1930 Act have been resolved – eg, the limitation period for the third-party plaintiff's cause of action against the liability insured remains uncertain.

Thirdly, liability policies generally provide that the liability insurer has the right to defend and settle claims by third parties against the insured. The insurer and its legal representatives, should have due regard for the insured's interests in the exercise of these rights. The duty of utmost good faith is mutual and the insured should cooperate with the insurer in its defence and settlement of the claim. However, this duty has been tailored by recent statutory reform. The liability insurer's conduct in defending or settling would not generally prevent it from denying liability to

indemnify the insured defendant, but to protect itself, it should defend under an express reservation of its rights.

Liability insurance policies usually contain 'no-admissions' clauses. A moot issue that have not been addressed by English courts, is whether the insured may argue that by refusing to conduct its defence, the insurer has forfeited its right to rely on a no-admissions clause. Some authors also opine that a clause such as the no-admissions clause which allows the liability insurer absolute control over the conduct of the insured's actions, may in future be found to be unfair under the Consumer Rights Act.

Liability insurance generally covers an insured's defence costs, or alternatively, the insurer will conduct the defence on its behalf at its own expense. However, conflict of interest often arise and the Legal Expenses Insurance Directive was implemented in English law by the Insurance Companies (Legal Expenses Insurance) Regulations, 1990, to address such conflict. Although the Legal Expenses Insurance Directive was replaced by the 'Solvency II' Directive, the contents of these directives is substantially unchanged when it comes to legal expenses insurance.

There may be exceptional instances of a legal relationship between a liability insurer and the third party. A costs order for the third party's costs against the liability insurer under section 51 of the Senior Courts Act, 1981 serves as an example.

Lastly, English law enjoys strong persuasive authority in South African courts on matters pertaining to insurance contracts and insurance law.[537] Both are common-law legal systems. South African insurance practice largely follows the English insurance law practice, which is more advanced in the area of liability insurance than ours (eg, policy wording). Because of its more dedicated statutory law, such as the 2010 Act, English law is more advanced than South African law in the area of liability insurance. The impact of the Consumer Rights Act on the law of liability insurance contracts may be significant. However, an uncritical adaption of English law in respect of South African liability insurance law may not only be incorrect, but also prove detrimental to the development of South African law.[538]

[537] See Chapter 6 for further detail.
[538] For further detail, see Chapter 6 on the South African law of liability insurance and the conclusions and recommendations there.

This chapter has analysed the relevant principles of the law liability insurance under English law, an uncodified or common-law system. In the following chapter, Chapter 5, the focus shifts to liability insurance under Belgian law, a codified or civil-law system.

CHAPTER 5:

BELGIAN LAW

CHAPTER 5:

BELGIAN LAW

5.1 INTRODUCTION[1]

Belgian law is a codified or civil-law legal system.[2] Legislation in the form of codes primarily regulates Belgian insurance law. Although the main source of Belgian insurance contract law is legislation, judicial decisions are another important source.[3] Liability insurance is a specialised branch of insurance law and the law of liability insurance is found in these same sources. The law of the European Union[4] has some impact on Belgian insurance law.

5.1.1 The General Law of Contract, Insurance Law, and the Law of Liability Insurance

Liability insurance ('aansprakelijkheidsverzekering') contracts are subject to the general principles of the Belgian law of contract ('verbintenissenrecht'),[5] save in so

[1] In writing this section, the following works on Belgian insurance law were consulted: Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 340-364; 693; Fontaine *Verzekeringsrecht* (2 ed) paras 74-77; 80-82; 85-133 and 665-671; Van Schoubroeck 'Aansprakelijkheidsverzekering' para 1.1.2 at 8-9; Meurs & Thiery 'Aansprakelijkheidsverzekering' para 1 at 73-74; and Jocqué (2014-2015) 13 *Rechtskundig Weekblad* 483-496. Also see Bouckaert & Van Hoeke *Inleiding tot het recht* 451-51; and Ballon et al *Economisch Recht* 21-39 as to the sources of Belgian law generally.

[2] In Belgium, there are no subsidiary 'common-law' rules like those in uncodified systems such as South African and English law. See paras 3.1 and 4.1 above on the subsidiary common law as source of insurance law in those legal systems.

[3] A few comments are necessary on customary law ('gewoonterecht'); general legal principles ('algemene rechtsbeginselen'); and legal doctrine ('rechtsleer') as sources of Belgian law in general. First, customary law refers to the established customs that a society considers as binding legal rules based on tradition. See Bouckaert & Van Hoeke *Inleiding tot het recht* 50 and Ballon et al *Economisch Recht* 22. Although these customs are not contained in legislation, they are regarded as having the same force as legislation. Belgian commercial law still relies on some customs, but today the practical relevance of customary law in Belgian law is limited. Customary law is not directly relevant as a source of the general principles of Belgian liability insurance law and a further discussion is not required in this thesis. Second, general legal principles, such as the principle of good faith and the non-retrospective nature of legislation, may also be regarded as a source of Belgian law. See Bouckaert & Van Hoeke ibid 51 and Ballon et al *Economisch Recht* 22. Judicial decisions have accepted their existence in recent decades and have formulated and applied them to supplement legislation. Although the principle of good faith is, eg, indeed *the basis for many substantive provisions of insurance contract law*, general legal principles as a rule concern the contemporary legal order and are primarily important in the domain of administrative law. See para 5.3.1.1(e) below for the principle of good faith in the context of the conduct of the defence by a liability insurer. Further detail falls outside the scope of this thesis. Third, legal doctrine includes articles, books and commentaries by legal writers. Although not a binding source of law, legal doctrine may influence judicial decisions or result in legislation (legislative change) and it may therefore be a recognised (but indirect) source of law.

[4] The 'EU'.

[5] Fontaine *Verzekeringsrecht* (2 ed) para 115 explains this as follows: 'De verzekeringsovereenkomst is, zoals elk contract, onderworpen aan de algemene beginselen van het *verbintenissenrecht*, waarop

far as liability insurance contract law provides for a specific principle.[6] Belgian private law is codified in the Belgian Civil Code.[7] The Code contains general provisions applicable to all contracts ('gemeen recht'),[8] including liability insurance contracts.[9]

5.1.2 Legislation

It is important to provide some background to the legislative landscape[10] of Belgian insurance contract law with emphasis on the general principles of liability insurance. The following discussion distinguishes between three periods and addresses 'landver-zekeringen'[11] and 'zeeverzekeringen'[12] in each instance.[13]

---

voortdurend beroept word gedaan: vorming van het contract, wilsgebreken, verbintenissen van de partijen, sancties in geval van wanuitvoering, mechanisme van het beding ten gunste van een derde, overdracht der verbintenissen, enz'.

[6] Insurance law does provide original solutions that deviate from the general principles of the law of contract in some instances. Fontaine ibid therefore cautions as follows: 'Nochtans dient de aandacht gevestigd te worden op de originele oplossingen die het verzekeringsrecht op tal van punten levert'.

[7] 'Burgerlijk Wetboek' (hereafter the 'Civil Code'). The Civil Code came into effect in 1804. Vandeputte 'Inleiding tot het verzekeringsrecht' 45 explains as follows: 'Globaal blijft nochtans het verzekeringscontract onderworpen aan de fundamentele beginselen van het contractenrecht van het Burgerlijk Wetboek'. Article 1964 of the Civil Code, eg, refers to insurance as an aleatory contract. See Fontaine *Verzekeringsrecht* (2 ed) para 113.

[8] The term 'gemeen recht' bears a distinctive meaning in Belgian law which cannot be equated to the term 'common law' in common-law legal systems. In the present context, 'gemeen recht' generally refers to the basic principles of Belgian private law that are common to (insurance) contracts and are contained in the Civil Code, as opposed to principles enunciated in other specific legislation. See Fontaine paras 174-199 and Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 47 for further detail on the 'gemeen recht' of Belgian contract law with particular focus on insurance contract law.

[9] See also para 5.1.2.4 below. Relevant terminology from Belgian law are translated and/or explained in the course of this chapter. As to translation in general: the term 'overeenkomst' means a 'contract'; and the term 'overeenkomsten' refers to 'contracts'. Further, the term 'verzekeringen' means 'insurance'; and the term 'aansprakelijkheidsverzekeringen' refers to 'liability insurance'.

[10] See the summative table on the legislative landscape in para 5.1.2.4 below.

[11] Generally: 'non-marine insurance' in layman's terms. However, the term 'landverzekeringen' bears a distinct meaning in Belgian law and cannot be equated to the term 'non-marine insurance' in other legal systems. For legal certainty, the Dutch term is used in this chapter. See paras 5.1.2.1-5.1.2.4 below for further detail.

[12] Generally: 'marine insurance' in layman's terms. However, the term 'zeeverzekeringen' bears a distinct meaning in Belgian law and cannot be equated to the term 'marine insurance' in other legal systems. For legal certainty, the Dutch term is used is issued in this chapter. See paras 5.1.2.1-5.1.2.4 below for further detail.

[13] Apart from the distinction between 'landverzekeringen' and 'zeeverzekeringen', some of the other relevant classifications of insurance in Belgian law are discussed in this chapter. See Fontaine *Verzekeringsrecht* (2 ed) paras 71-84 and Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) in paras 41-52 for further detail on the most important classifications of insurance ('voornaamste indelingen van de verzekeringen').

5.1.2.1 Late Nineteenth Century

By the late nineteenth century, Belgian insurance contract law was codified[14] in the Insurance Act of 11 June 1874[15] which dealt with insurance contract law in general,[16] including 'landverzekeringen' and 'zeeverzekering', as well as certain specific classes of 'landverzekeringen'.[17] The Insurance Act of 1874 was regarded as impressive at the time of its enactment, as it was among the first pieces of legislation to codify some of the general principles of insurance contract law.[18] Liability insurance had not yet fully evolved and the Act did not address it directly,[19] save for the liability insurance cover of a tenant.[20]

As far as 'zeeverzekering'[21] was concerned, the Act of 21 August 1879 on Marine and Inland Waterways,[22] replaced the original text of the Commercial Code of 1810 which had previously regulated the position. The Act of 1879 was extended[23] to

---

[14] Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 341.

[15] 'Wet van 11 juni 1874 betreffende de verzekeringen', or, briefly, 'De Verzekeringswet', *Belgian State Gazette* ('*Belgisch Staatsblad*') of 14 Jun 1874. This Act was included in the Commercial Code as Titles X and XI in Book I of the Commercial Code (hereafter the 'Insurance Act of 1874').

[16] Insurance Act of 1874, 'Titel X. Verzekering in het algemeen' (hereafter 'Title X of the Insurance Act of 1874'). It comprises ss 1-32.

[17] Insurance Act of 1874, 'Titel XI. Enige [land]verzekeringen in het bijzonder' (hereafter 'Title XI of the Insurance Act of 1874'). The part on specific classes of 'landverzekeringen' was dealt with in arts 33-43.

[18] Fontaine *Verzekeringsrecht* para 87. Under Belgian law there were no codified (legislated) general principles of insurance contract law prior to the Insurance Act of 1874.

[19] Fontaine ibid para 665 explains this and provides that, 'de oude wet [the Insurance Act of 1874] slechts vage toespelingen op de aansprakelijkheidsverzekering bevatte' and that '[d]eze verzekeringen … nog zeer weinig ontwikkeld waren op het einde van de XIXe eeuw'. Vandeputte 'Inleiding tot het verzekeringsrecht' 134 explains further: 'De aansprakelijkheidsverzekering is, zoals de zakenverzekering, een schadeverzekering. … Verschillende regelingen die gelden voor de zakenverzekering zijn ook toepasselijk op die aansprakelijkheidsverzekering … . De *wet van 11 Juni 1874* [The Insurance Act of 1874] *handelt niet uitdrukkelijk* over de verbintenis van de verzekeraar in de aansprakelijkheidsverzekering. Deze leemte wordt in 'n zekere mate goedgemaakt door het feit dat voor de aansprakelijkheidsverzekering menigmaal in aanmerking komt wat de wet voor de zakenverzekering heeft bepaald.'

[20] Title XI of the Insurance Act of 1874. The part on the liability insurance of a tenant was dealt with in ss 37-38. See also see, Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 341.

[21] Fontaine *Verzekeringsrecht* (2 ed) para 74 explains that, 'zeeverzekeringen' pertain to 'de dekking van de risico's die eigen zijn aan zeevaart (schipbreuk, storm, stranding, aanvaring …), in de mate waarin deze de schepen treffen … of de goederen …of sommige ander materiële belangen; het recht van de zeeverzekering is niet toepasselijk op de schadegevallen die personen treffen (lichamelijke ongevallen, overlijden).'

[22] 'Wet van 21 augustus van 1879 op de zee-en binnenvaart', *Belgian State Gazette* of 4 Sept 1879. This Act was included in the Commercial Code as 'Titel VI Zeeverzekering' (Marine insurance) in Book II of the Commercial Code (hereafter the 'Act of 1879'). Title VI comprises arts 191-250. The Act of 1879 still exists and is still applied.

[23] By the Act of 10 February of 1908, *Belgian State Gazette* of 25 Sept 1908. This Act was inserted as 'Titel X Binnenschepen' (Inland waterways) in Book II of the Commercial Code. Title X comprises of articles 271, 276 and 277. Article 277 provides that the provisions of Title VI regarding 'zeeverzekering' apply equally to the insurance of inland waterways.

apply to 'binnenvaartverzekering'.[24] The provisions of Title X of the Insurance Act of 1874 addressing insurance law in general – also applied to 'zeeverzekeringen' and to insurance of transport by land, river, and inland waterway, save in so far as particular legislation provided otherwise.[25] The Act of 1879, as amended, supplemented Title X of the Insurance Act of 1874 with regard to 'zeeverzekering' and 'binnenvaart-verzekering'.

This position was maintained in Belgium for more than a century.[26] By the middle of the twentieth century, liability insurance had become an important branch of insurance law.[27] There were several lacunae in the Insurance Act of 1874 and its provisions were, in the main, not mandatory.[28] The Act did not reflect legal developments and offered the insured inadequate protection.[29] The main objective of the Insurance Act of 1874 was to protect the weaker party, which at the time was considered to be the insurer. But insurers had excessive autonomy and started dictating policy terms,[30] which resulted in the use of standardised policies.[31] Commentators called for legislative reform to protect the insureds.[32]

[24] That may be translated as 'inland waterways'.
[25] Section 3 of the Insurance Act of 1874.
[26] See Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 346 for further detail on the minor changes to the Insurance Act of 1874 during this period.
[27] Fontaine *Verzekeringsrecht* (2 ed) para 87.
[28] 'Aanvullend recht'. Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 341 explain the non-mandatory character of the Insurance Act of 1874 as follows: 'De 43 artikelen van de wet waren hoofdzakelijk suppletief en de invulling van de contractuele bepalingen werd in zeer ruime mate aan de wil van de partijen overgelaten'. The same criticism was levelled against the Act of 1879. See Fontaine *Verzekeringsrecht* (2 ed) para 103.
[29] Fontaine *ibid* paras 87 and 118.
[30] Ibid. Vandeputte 'Inleiding tot het verzekeringsrecht' 134 argues: '*De polissen* leggen derhalve … vast … de schuld die de verzekeraar moet uitvoeren wanneer het in aanmerking genomen schadegeval … in vervulling treedt. Ook voor het toepassingsgebied van de aansprakelijkheidsverzekering doen de verzekeraars een niet geringe inspanning om in de polissen, precies te omschrijven wat ze dekken. Zulks is niet gemakkelijk en betwistingen doen zich voor in de rechtspraak.'
[31] Fontaine *Verzekeringsrecht* (2 ed) para 87. Although not an actual source of law, these standard policies influenced some branches of insurance contract law. Fontaine para 118 suggests: 'De ontleding van deze gestandaardiseerde polissen openbaarde, veel meer dan deze van de wet [the Insurance Act of 1874], het effectief en wijd verbreid toegepaste recht'. But see Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 346 who reason that: 'De beperkte omvang van de wet van 1874 [the Insurance Act of 1874] heeft zijn maatschappelijke bruikbaarheid niet verhinderd. Dit was ongetwijfeld te danken aan de interpretatie en de verfijningen die de rechtspraak en vooral het Hof van Cassatie [Belgian Supreme Court] aanbrachten'.
[32] Vandeputte 'Inleiding tot het verzekeringsrecht' 44 states: 'Die toestand is onaanvaardbaar. Aan de praktijk van de verzekeraars en aan de rechtspraak wordt, wegens deze leemte van de wetgeving, een al te ruime plaats toebedeeld'.

5.1.2.2 Since the Introduction of the Land Insurance Contract Act of 1992

The Land Insurance Contract Act of 25 June 1992 ('LIC Act'),[33] brought long-awaited legislative intervention in 'landverzekeringsovereenkomsten'.[34] It made fundamental changes by repealing and replacing the 1874 Act in part.[35] Important for our purposes, is that Title X of the 1874 Act no longer applied to insurance contracts governed by the LIC Act,[36] and Part XI (on 'landverzekeringen') of the Insurance Act of 1874 was repealed.[37]

The LIC Act applied to all 'landverzekeringsovereenkomsten' in so far as specific legislation did not expressly provide otherwise.[38] It did not apply to reinsurance or to transport insurance of goods, save for luggage insurance and removal insurance.[39] The LIC Act devoted an entire chapter to liability insurance contracts.[40] The Act was commended[41] for its systematic structure,[42] its substantial content,[43] its more balanced protection of the insurer and the insured, and because the

---

[33] 'Wet van 25 juni 1992 op de landverzekeringsovereenkomst' or 'WLVO', *Belgian State Gazette* of 20 Aug 1992 (hereafter the 'LIC Act'), read with Royal Decree ('Koninklijk besluit') of 24 Dec 1992 (hereafter 'Royal Decree of Dec 1992'). It came into effect on 1 Jan 1993: see Royal Decree of 24 Aug 1992 and Fontaine *Verzekeringsrecht* (2 ed) para 101. The official version of the Insurance Act of 1992 is available in French and Dutch, which are the official languages in Belgium. An unofficial English version of the initial LIC Act (of 1992) is contained in [1994] 1 *Commercial Laws of Europe* 55-105, but it does not reflect subsequent amendments to the Act. Direct quotations from Dutch legislation have been freely translated into English by the author to make them more accessible.

[34] Note again: this term bears a distinct meaning in Belgian law and cannot be equated to the term 'non-marine insurance contract law' in other legal systems. For legal certainty, the Dutch term is used in this chapter. See this para 5.1.2 below for further detail. See Fontaine ibid paras 85-91 and Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 342-346 for further detail on the lengthy history behind the drafting of the LIC Act.

[35] Schuermans & Van Schoubroeck ibid para 342.

[36] Section 142 of the LIC Act and amended s 3 of Title X of the Insurance Act of 1874 accordingly.

[37] Section 147 of the LIC Act.

[38] Section 2(1) of the LIC Act, as amended, provided as follows on the scope of the Act: 'Deze wet is van toepassing op alle landverzekeringen voor zover er niet wordt van afgeweken door bijzondere wetten'. Van Schoubroeck et al (2016) 2 & 3 *Tijdschrift voor Privaatrecht* para 7.3 explain that '[e]r wordt aangenomen dat de wetgever met de term "landverzekering", de zeevaart- en binnenvaartverzekeringen van het toepassingsgebied van de WLVO [the LIC Act] heeft willen uitsluiten'… as '[d]eze verzekeringen worden beheerst door de Verzekeringswet 11 juni 1874 [Title X of the Insurance Act of 1874], in de mate dat er niet van afgeweken wordt door bijzondere wetten'.

[39] Section 2(1) of the LIC Act, as amended, further provided as follows on the scope of the Act: 'Zij is niet van toepassing op de herverzekering noch op de verzekeringen van goederenvervoer, met uitzondering van de baggage- en verhuisverzekeringen'. The term 'removal insurance' used in practice refers to the insurance of goods procured by a removal company or owner of goods for damage caused during, for example, the move of a household from one building to another.

[40] Chapter III, Title II. It comprised ss 77-89.

[41] Fontaine *Verzekeringsrecht* (2 ed) paras 92-100.

[42] For a useful diagram on the structure of the LIC Act, see Fontaine ibid para 173.

[43] More so, when compared to the Insurance Act of 1874.

majority of its provisions were mandatory.[44] Insurance policies under the LIC Act had to comply with the statutory position, or alternatively had to contain terms more favourable to the party protected by its provisions.[45] Although several provisions in the LIC Act had to be revised,[46] it was regarded as exemplary legislation.[47]

As regards 'zeeverzekering' and transport insurance, the position remained largely unchanged after the introduction of the LIC Act.[48] Title X of the Insurance Act of 1874 and the Act of 1879 continued to regulate 'zeeverzekering' as well as insurance of transport by land, river, and inland waterway.

The exact demarcation between the LIC Act and the Insurance Act of 1874 remained uncertain.[49] The LIC Act governed all liability insurance contracts falling within its ambit, but did not apply to 'zeeverzekeringen', or to insurance of transport by land, river, and inland waterway.[50] Liability insurance relating to transport – by sea, inland waterway, and land – continued to be governed by Title X of the Insurance

[44] 'Dwingende aard'. Section 3 of the LIC Act provided that its provisions were mandatory, except where the option to derogate from the provisions by particular (contractual) arrangement was clear from a provision's actual wording.

[45] However, it is not always easy to determine which party is protected by a specific provision. See Fontaine *Verzekeringsrecht* (2 ed) paras 96 and 119. See paras 5.2.2.1(a), 5.2.2.2 and 5.2.2.3(b)(ii) below for further discussion of issues regarding the mandatory nature (or not) of ss 8 and 78 of the LIC Act respectively.

[46] See Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 347-349 for a summary of the most important amendments. The following amended sections are relevant for purposes of this chapter and are discussed below: s 2(1) (on the non-applicability of the LIC Act to reinsurance and transport insurance of goods: para 5.1.2.3 below; s 35 (on the suspension and interruption of the prescription period: para 5.2.2.1(d) below); s 77 (on the scope of liability insurance: paras 5.2.2.1 and 5.3.1.1 below); s 78 (on the liability insurer's obligations after the expiry of the contract: para 5.2.2.2 below); s 82 (on the payment by the insurer of the principal sum, interest and costs: paras 5.2.2.3(a) and 5.3.1.1(d) below); s 86 (on the third party plaintiff's own/direct right against the insurer: para 5.2.3.1 below); and s 87 (on defences, procedural objections and forfeiture: para 5.2.3.1 below).

[47] Schuermans & Van Schoubroeck ibid para 348 state it to, 'behoorde tot de koplopers op wetgevend gebied'.

[48] Generally: the LIC Act only applied to non-marine insurance contracts. See s 2(1), as amended. See also para 5.1.2.1 above for the discussion of the legislative landscape of marine insurance and this para 5.1.2.2 below. Again note: for legal certainty, the Dutch terms are used in this chapter.

[49] Van Schoubroeck 'Aansprakelijkheidsverzekering' 8 para 1.1.2.1; Fontaine *Verzekeringsrecht* (2 ed) paras 74, 103-105; Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 362; and Van Schoubroeck et al (2016) 2 & 3 *Tijdschrift voor Privaatrecht* para 7.3. The Belgian Supreme Court ('Hof of Cassatie'), Cass, dated 16 Sept 2011 and 1 Mar 2013, eg, decided that the insurance of river cruises fell within the abmit of the LIC Act. See the discussion of these decisions by Schuermans & Van Schoubroeck ibid para 362; and in Van Schoubroeck et al ibid para 7.3. The majority of judicial decisions and commentators regarded insurance of transport by air ('luchtvaartverzekeringen') to be excluded from the ambit of the LIC Act. However, the Belgian Supreme Court, Cass, dated 18 Dec 2015, decided that the insurance of air transport indeed fell within the abmit of the LIC Act, save for the transport of goods. See the discussion of the decision by Van Schoubroeck et al ibid para 7.3. Further analysis hereof falls outside the scope of this study, which focuses on the general principles relating to liability insurance.

[50] Section 2(1), as amended.

Act of 1874 (insurance law in general), save in so far as specific legislation provided otherwise.[51] The Insurance Act of 1897 is an example of this specific legislation.[52]

5.1.2.3 Since the Introduction of the Insurance Act of 2014[53]

On 4 April 2014 Belgium adopted a new Insurance Act[54] which codified some important aspects of Belgian insurance law.[55]

As regards 'landverzekeringsovereenkomsten', the Insurance Act of 2014 repealed the majority of the provisions of the LIC Act.[56] The Act of 2014 re-enacted the vast majority of those provisions in its Part 4.[57] In particular, Chapter III of Title II

---

[51] Van Schoubroeck 'Aansprakelijkheidsverzekering' 8 para 1.1.2.1. Fontaine *Verzekeringsrecht* (2 ed) para 74 comments that 'in de praktijk wordt het zeeverzekeringsrecht in ruime mate *mutatis mutandi* toegepas op de *land-vervoerverzekeringen*'.

[52] Note that the Act of 1879 still exists and is still applied.

[53] See generally regarding liability insurance, Colle *Algemene beginselen* (7 ed) 193-242; and Fontaine Verzekeringsrecht (3 ed) 568-636.

[54] 'Wet betreffende de verzekeringen van 4 april 2014' ('Wet Verzekeringen' or 'WVerz'), *Belgian State Gazette* of 30 Apr (hereafter the 'Insurance Act of 2014)'. The official version of the Act is only available in the official languages of Belgium, namely Dutch and French. As far as could be established, no official or unofficial English version of the Insurance Act of 2014 exists at present.

[55] Jocqué (2014-2015) 13 *Rechtskundig Weekblad* 483 para 1. The Insurance Act of 2014 to some extent combines part of the regulation of the insurance industry (as far as it concerns the competence of the Financial Services and Markets Authority ('FSMA'), insurance distribution and insurance intermediaries) as well as insurance contract law. Further detail on insurance regulatory and supervision regimes falls outside the scope of this thesis. (For additional information on the regulation of the insurance sector prior to the coming into force of the Insurance Act of 2014, see Fontaine *Verzekeringsrecht* (2 ed) paras 34-59 and 111. For a useful summary of insurance regulation under the Insurance Act of 2014, see Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 351-356.)

European Community ('EC') Directives that deal with disclosure by insurers to their policyholders (or insureds) have been incorporated in Belgian law by the enactment of sections 32-37 and 281-285 of the Insurance Act of 2014 (and some provisions that were part of the statute before 2014, namely the LIC Act). The EC provisions are of general application to all forms of insurance. The provisions under Belgian law, therefore, follow suit and deal with disclosures in general: they are not tailored to liability insurance contracts in particular and will not be discussed in detail in this thesis. The majority of the provisions of the Insurance Act of 2014, including the part on liability insurance, are mandatory and introduce measures that aim to provide protection to the insured, the insurer and third parties. The part on liability insurance in the Insurance Act of 2014 is detailed and a comprehensive analysis of that part is sufficient for purposes of this thesis.

[56] Section 347(3) of the Insurance Act of 2014. For present purposes, it may be mentioned that a few sections of the LIC Act, namely, s 1 (containing definitions), s 2 (on its scope of application), s 3 (on its mandatory character), and ss 127-128 (regarding life insurance), remain in force as sections of that Act. See Schuermans & Van Schoubroeck ibid para 358.

[57] This part is entitled 'De landverzekeringsovereenkomst'. Part 4 generally applies to all 'landverzekeringsovereenkomsten' that are subject to Belgian law in so far as specific legislation does not provide to the contrary. See s 54(1) of the Insurance Act of 2014. The scope of application of Part 4 of the Insurance Act of 2014 is, therefore, the same as that of the former LIC Act, but the lattter Act did not contain the provision that 'landverzekeringsovereenkomsten' had to be subject to Belgian law. See s 2(1) of the LIC Act. As under the LIC Act, Part 4 of the Insurance Act of 2014 does not apply to reinsurance, or to transport insurance of goods, save for luggage insurance and removal insurance. See s 2(1) of the LIC Act and s 54(2) of the Insurance Act of 2014 respectively. Also see Van Schoubroeck et al (2016) 2 & 3 *Tijdschrift voor Privaatrecht* para 7.1.

of the LIC Act dealing with liability insurance contracts was repealed and re-enacted virtually unchanged as Chapter 3[58] of Title III of Part 4 of the 2014 Insurance Act.[59]

Schuermans and Van Schoubroeck explain as follows:

> Door zijn codificatie blijft het *acquis* van die WLVO [LIC Act] doorwerken in de WVerz [2014 Insurance Act].[60]

As explained by the commentators above, the principles of liability insurance contract law established under the LIC Act therefore continue to apply under the new dispensation.[61] Judicial decisions and legal doctrine on the LIC Act remain relevant, save in so far as the Insurance Act of 2014 has changed the previous position.[62] This chapter, therefore, refers to both the previous sections of the LIC Act and the corresponding section in the Insurance Act of 2014.[63]

The Insurance Act of 2014 entered into force on 1 November 2014.[64] Part 4 of the Act applies to 'landverzekeringsovereenkomsten' entered into on or after 1 November 2014, as well as to such agreements entered into before this date and still in force at that time.[65] Insurers were allowed until 1 June 2015 to implement any

---

[58] Chapter 3 of the Insurance Act of 2014 is entitled 'Aansprakelijkheidsverzekeringen' and it comprises ss 141-153.

[59] Jocqué (2014-2015) 13 *Rechtskundig Weekblad* 490-491 para 28. As far as liability insurance contract law is concerned, s 152 of the Insurance Act 2014 on the insurer's right of recourse against the policyholder has slightly amended the previous s 88 of the LIC Act. See Meurs & Thiery 'Aansprakelijkheids-verzekering' 74 para 2 n 2. For further detail, see para 5.3.1.1(d) below.

[60] Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 360.

[61] This thesis contains reference to some publications that pre-date the implementation of the Insurance Act of 2014 (see, eg, Van Schoubroeck 'Aansprakelijkheidsverzekering'; and 'Fontaine *Verzekeringsrecht* (2 ed 2011). An updated third edition of Fontaine *Verzekeringsrecht* has since been published, but only limited pages were available to the author. Save for changes to section numbers in the Insurance Act of 2014, there is limited amendment to content in the sections relating to liability insurance contracts. The thesis refers to several sources published since the Insurance Act of 2014, eg, Van Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed); 4 Jocqué (2014-2015) 13 *Rechtskundig Weekblad* 83-496 paras 1-51; Meurs & Thiery 'Aansprakelijkheidsverzekering' 73-109 paras 1-47; and several other sources. The thesis has, as far as possible, been updated since the implementation of the Insurance Act of 2014 with reference to these publications.

[62] For an insightful analysis of the amendments to insurance contract law under the Insurance Act of 2014, see Jocqué (2014-2015) 13 *Rechtskundig Weekblad* 483-496 paras 1-51. Meurs & Thiery ibid provide critical comment as to thorny issues as regards liability insurance and the Insurance Act of 2014 with due reference to judicial decisions and legal doctrine. Also see Schuermans & Van Schoubroeck ibid passim, where the Insurance Act of 2014 has been integrated into the commentary on Belgian insurance law. Further see Van Schoubroeck et al (2016) 2 & 3 *Tijdschrift voor Privaatrecht* paras 7.1, 7.3, 65.1-65.2 for discussion of judicial decisions relating to liability insurance contracts.

[63] This is also in accordance to the methodology adapted by Belgian commentators. See Schuermans & Van Schoubroeck ibid xxxvii. For an accurate account, this chapter contains quotations in Dutch from the relevant legislative provisions concerning liability insurance. Direct quotations from Dutch legislation have been freely translated into English to make them more accessible.

[64] Namely, six months from 1 May 2014. See s 352 of the Insurance Act of 2014.

[65] Section 311(3) of the Insurance Act of 2014. Sections 311-319 of the Insurance Act of 2014 provide the transitional arrangements for the Act. Sections 311(3)-311(4) provide special transitional

formal amendments to their insurance contracts arising from the entery into force of the Act of 2014.[66]

As regards 'zeeverzekering' and transport insurance, Title X of Insurance Act of 1874 was repealed in its entirety[67] and re-enacted as Part 5 of the Insurance Act of 2014.[68] As reflected by its title,[69] Part 5 of the Act of 2014 relates to insurance contracts other than 'landverzekeringsovereenkomsten' as contemplated in Part 4 of that Act. Part 5 of the Act of 2014, therefore, has the same scope of application as the repealed Title X of the Insurance Act of 1874.[70] Part 5 also applies to 'zeever-zekering', as well as to insurance of transport by land, river, and inland waterway, save in so far as specific legislation provides otherwise. The Act of 1879 has not been repealed and still governs 'zeeverzekering' and 'binnenvaartverzekering', but now in conjunction with Part 5 of the Insurance Act of 2014.[71]

The same questions that arose regarding the demarcation between the LIC Act and the Insurance Act of 1874 in transport insurance, remain under the new legislative dispensation as the scope of application of Parts 4 and 5 of the Insurance Act of 2014 are the same as their predecessors. Likewise, judicial decisions as to the scope of application of the two Acts in, for example, the domain of transport insurance still apply post the Insurance Act of 2014, save in as far as new decisions have changed the legal position.

The Insurance Act of 2014 has been criticised for codifying insurance contract law without addressing all of the thorny issues that gave rise to in judicial disputes under the LIC Act. It has further been suggested that the re-numbering of sections will throw the legal profession into confusion for the next few years.[72]

---

arrangements as regards s 88 of the LIC Act on prescription. See para 5.2.2.1(d) below for further detail on prescription of claims in liability insurance.

[66] Namely, on the first day of the thirteenth month following the publication of the Insurance Act of 2014. See s 311(6)(1) of the Insurance Act of 2014. Pending the amendment of insurance contracts and other insurance documentation, references in them to sections in previous legislation – eg, the LIC Act and the Insurance Act of 1874 – are assumed to refer to the corresponding sections in the Insurance Act of 2014. See s 311(6)(2) of the Insurance Act of 2014.

[67] Section 347(4) of the Insurance Act 2014.

[68] It consists of ss 225-227.

[69] 'De verzekeringsovereenkomst, andere dan de landverzekeringsovereenkomst zoals bedoeld in deel 4'.

[70] Section 225 of the Insurance Act of 2014.

[71] Section 347 of the Insurance Act of 2014 addresses repealed legislation. See Jocqué (2014-2015) 13 *Rechtskundig Weekblad* 494 para 39.

[72] Ibid 496 para 51.

5.1.2.4 Summary

Summative table of the legislative landscape of insurance contract law applicable in Belgium with particular focus on general liability insurance contracts: historical and current

Time Period/ Era	**'Landverzekeringsovereenkomsten'**	**'Zeeverzekering'**
Late 19th century	Titles X and XI of the Insurance Act of 1874: Liability insurance was not addressed directly, save for the liability insurance cover of a tenant.	Title X of the Insurance Act of 1874, and the Act of 1879: Liability insurance has not yet fully evolved.
Since the introduction of the LIC Act	Chapter III, Title II of the LIC Act, 1992 (ss 77-89) concerned liability insurance contracts.	Title X of the Insurance Act of 1874 and the Act of 1879: Liability insurance contracts pertaining to most types of transport were governed by these Acts.
Since the introduction of the Insurance Act of 2014	Chapter 3, Title III, Part 4 of the Insurance Act of 2014 (ss 141-153) governs liability insurance contracts.	Part 5 of the Insurance Act of 2014 and the Act of 1879: Liability insurance contracts pertaining to most types of transport are governed by these Acts.

There appears to be a difference of opinion as to whether the Insurance Act of 2014 (or the LIC Act) defines liability insurance (contracts), or whether it merely describes their scope of application.[73]

The following statutory definitions[74] are relevant for purposes of this chapter:[75]

– 'verzekeringsovereenkomst';[76]

[73] See Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 693; Fontaine *Verzekeringsrecht* (2 ed) para 672; and para 5.2.2.1(a) below for further detail.

[74] Part 1 of the Insurance Act of 2014 contains a number of definitions, while Part 4 sets out further definitions that relate to 'landverzekeringovereenkomsten'. The relevant statutory definitions (previously contained in s 1 of the LIC Act), are now divided between ss 5 and 54 of the Insurance Act of 2014. See Jocqué (2014-2015) 13 *Rechtskundig Weekblad* 485-486 paras 8-11 for further comment.

[75] Given their specific meaning in Belgian law, these definitions require some explanation in the following footnotes.

[76] 'Insurance contract'. Section 1A of the LIC Act defined 'verzekeringsovereenkomst' as follows: 'Een overeenkomst, waarbij een partij, de verzekeraar, zich er tegen betaling van een vaste of veranderlijke premie tegenover een andere partij, de verzekeringnemer, toe verbindt een in de overeenkomst bepaalde prestatie te leveren in het geval zich een onzekere gebeurtenis voordoet waarbij, naargelang van het geval, de verzekerde of de begunstigde belang heeft dat zich niet voordoet'. An 'insurance contract', therefore, refers to a contract in which the insurer, in exchange for the payment of a premium, undertakes towards the policyholder to provide it with benefits, as stipulated in the contract, on the occurrence of an uncertain event. The non-occurrence of the event

– ‘schadeverzekering’ and ‘verzekering tot vergoeding van schade’,[77]
– ‘verzekerde bij schadeverzekering’[78] and
– ‘benadeelde in een aansprakelijkheidsverzekering’.[79]

---

must be in the interest of the insured or the beneficiary. The definition of an insurance contract has been included in s 5(14) of the Insurance Act of 2014. (Further detail on the definition of an insurance contract falls beyond the scope of this thesis.) The term ‘insurer’ (‘verzekeraar’) was not defined in the LIC Act but has now been defined in s 5(14) the Insurance Act of 2014. For the definition of the term ‘insured’ (‘verzekerde’), see s 1B of the LIC Act and s 5(17) of the Insurance Act of 2014 (the latter Act has amended the definition slightly, but further detail is not relevant for purpose of this chapter as the amendment concerns personal insurance). The definition of the term ‘beneficiary’ (‘begunstigde’) was previously contained in s 1C of the LIC Act and has now been included in s 5(18) of the Insurance Act of 2014. For the definition of ‘insurance benefit’ (‘verzekeringsprestatie’), see s 1F of the LIC Act and s 55(2) of the Insurance Act of 2014.

[77] For ease of reference, both of these terms will be referred to as ‘indemnity insurance’ in the remainder of this chapter, save where the content dictates further distinction. However, some Belgian law distinguishes between the terms ‘schadeverzekering’ and ‘verzekering tot vergoeding van schade’. Section 1G of the LIC Act defined ‘schadeverzekering’ as ‘verzekering waarbij de verzekeringsprestatie afhankelijk is van een onzeker voorval dat schade veroorzaakt aan iemands vermogen’ and the same definition has been taken up in s 5(15) of the Insurance Act of 2014. The insured event in ‘schadeverzekering’ is loss to a person’s estate or patrimony, and the term may be translated as ‘insurance of loss or damage’. ‘Schadeverzekering’ is to be contrasted with personal insurance (‘persoonsverzekering’), where the insured event is loss involving a person’s life, physical integrity, or family life. See s 1H of the LIC Act and s 5(16) of the Insurance Act of 2014 for the definition of the latter term. Section 1I of the LIC Act defined the term ‘verzekering tot vergoeding van schade’ as ‘verzekering waarbij de verzekeraar zich ertoe verbindt de prestatie te leveren die nodig is om de schade die de verzekerde geleden heeft of waarvoor hij aansprakelijk is, geheel of gedeeltelijk te vergoeden’; and an identical definition has been included in s 55(3) of the Insurance Act of 2014. The essence of ‘verzekering tot vergoeding van schade’ is that it is aimed at indemnifying no more than the actual loss that the insured has suffered, or for which the insured is liable. It concerns the ‘indemnity principle’, namely indemnification for actual loss suffered (‘indemnity insurance’). ‘Verzekering tot vergoeding van schade’ is contrasted to ‘verzekering tot uitkering van een vast bedrag’ (‘insurance providing fixed-sum payments’, ‘contingency insurance’ or ‘fixed-sum insurance’), that concerns the ‘forfairtaire’ character of insurance, namely where the insurance benefit is not linked to the amount of loss or damage. See s 1J of the LIC Act and s 55(4) of the Insurance Act of 2014 for the definition of the latter term. All ‘schadeverzekering’ is ‘verzekering tot vergoeding van schade’, but not the other way around. ‘Verzekering tot vergoeding van schade’ may include ‘schadeverzekering’ and personal insurance. For purpose of this chapter, the distinction between these terms is relevant in so far as there are different sections in the LIC Act and in the Insurance Act of 2014 which apply to them. According to Fontaine *Verzekeringsrecht* (2 ed) para 670, liability insurance qualifies as both ‘schadeverzekering’ and as ‘verzekering tot vergoeding van schade’. For further detail, see Fontaine ibid paras 80, 81, 162-164, 620-621, and 790-794. (Note that the unofficial English version of the LIA, available in [1994] 1 *Commercial Laws of Europe* 55-105, incorrectly translates ‘schadeverzekering’ as ‘property insurance’ (‘zaakverzekering’) – a narrower term – in s 1G, instead of the wider term ‘indemnity insurance’ (‘schadeverzekering’). It subsequently, again incorrectly, refers in s 1G to ‘injury to a person’s property’, instead of to ‘patrimonial loss’. See Fontaine ibid paras 82 and 670 on the distinction between property insurance and indemnity insurance, and on liability insurance as a form of the latter.)

[78] Hereafter referred to as the ‘insured (defendant)’. Section 5(17)(a) of the Insurance Act of 2014 provides that an insured in indemnity insurance (‘verzekerde bij schadeverzekering’) refers to ‘degene door de verzekering is gedekt tegen vermogenschade’; it denotes a person that is covered against patrimonial loss by insurance. This definition corresponds to that in the LIC Act s 1B(a).

[79] Although the unofficial English version of the LIC Act translates it as the ‘injured party’, it will here be referred to as the ‘third-party plaintiff’. In the context of liability insurance, the term refers to the third party for whose loss or injury the insured is responsible. Section 1D of the LIC Act defined the term as ‘degene aan wie schade is toegebracht waarvoor de verzekerde aansprakelijk is’ and the same definition has been included in s 55(1) the Insurance Act of 2014.

Liability insurance contracts[80] must comply with the provisions relating to insurance contracts ('verzekeringsovereenkomsten') in general,[81] the general provisions regarding indemnity insurance ('schadeverzekering'),[82] the provisions specific to indemnity insurance ('verzekering tot vergoeding van schade' in particular),[83] and with the provisions peculiar to liability insurance in the Insurance Act of 2014.[84]

5.1.2.5 Unfair Contract Terms[85]

The EC Directive 93/13 of 5 April 1993 on Unfair Contract Terms in Consumer Contracts has been incorporated into Belgian law in sections VI.82-I.87 of the Code of Economic Law 2010 ('Wetboek Economisch recht 2010'). Furthermore, even before the enactment of the EC Directive, Belgian insurance law had rules on unfair contract terms for all insurance contracts, not only for insurance contracts concluded with consumers. The current, unamended, rules are contained in section 23 of the Insurance Act of 2014 and provide as follows:

> De algemene, bijzondere en speciale voorwaarden, de verzekeringsovereenkomsten in hun geheel, evenals alle clausules afzonderlijk, moeten in duidelijke en nauwkeurige bewoordingen worden opgesteld. Ze mogen geen enkele clausule bevatten die een inbreuk uitmaakt op de gelijkwaardigheid tussen de

[80] Fontaine *Verzekeringsrecht* (2 ed) para 670.
[81] 'Bepalingen betreffende alle verzekeringsovereenkomsten' in ss 58-90 of the Insurance Act of 2014 (previously ss 4-36 of the LIC Act). See Fontaine ibid paras 173-528 for comments on and the interpretation of these sections in the LIC Act. For purposes of this chapter, the most important change to these sections in the Insurance Act of 2014 concerns s 89(1) on the prescription period against minors and other persons with disabilities under Belgian law (the position was formerly governed by s 35(1) of the LIC Act). See Meurs & Thiery 'Aansprakelijkheidsverzekering' 103-104 para 40. See also para 5.2.2.1(d) below for further detail.
[82] 'Schadeverzekeringen' in ss 105-106 of the Insurance Act of 2014 (previously ss 51-52 of the LIC Act). These sections refer to provisions relating to 'schadeverzekeringen', translated as 'indemnity insurance', as explained above. See Fontaine ibid paras 619-622 for comments on and the interpretation of these sections under the LIC Act.
[83] 'Bepalingen eigen aan de verzekeringen tot vergoeding van schade' in ss 91-101 of the Insurance Act of 2014 (previously ss 37-47 of the LIC Act). These sections refer to provisions relating to 'de vergoeding tot verzekeringingen van schade', translated as 'indemnity insurance', as explained above. See Fontaine *Verzekeringsrecht* (2 ed) paras 529-601 for comments on and the interpretation of these sections under the LIC Act.
[84] 'Aansprakelijkheidsverzekeringen' in ss 141-153 of the Insurance Act of 2014 (previously ss 77-89 of the LIC Act). These sections form the focus of this chapter. See Fontaine ibid paras 672-767; and Van Schoubroeck 'Aanspreeklijkheidsverzekering' paras 1.1-1.4 at 7-29 for comments on and the interpretation of these sections under the LIC Act. For comments on these sections under the Insurance Act of 2014, see Jocqué (2014-2015) 13 *Rechtskundig Weekblad* 483-496 paras 1-51; Meurs & Thiery 'Aansprakelijkheidsverzekering' 73-109; and Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 700-751.
[85] See Van Schoubroeck 'Onrechtmatige bedingen' 7-8.

verbintenissen van de verzekeraar en die van de verzekeringnemer.[86]

In geval van twijfel over de betekenis van een beding, prevaleert in alle gevallen de voor de verzekeringnemer meest gunstige interpretatie. Indien de verzekeringnemer en de verzekerde niet één en dezelfde persoon zijn, prevaleert de voor de verzekerde meest gunstige interpretatie.[87]

In summary, insurance contracts demand clear and precise wording. No clause should discriminate between the status and importance of the parties. If there is uncertainty as to the interpretation of a clause, the interpretation that favours the insured prevails at all times.

5.1.3 Judicial Decisions

Despite the dominant role of codes and statutes,[88] the decisions[89] of the Belgian Supreme Court[90] remain an important source of the law in that the relevant legislation

[86] This provision does not generally apply to 'grotere risico's' (large risks), but further details fall beyond the scope of this thesis.

[87] Freely translated: 'The general, specific, and special conditions, the insurance contracts as a whole, as well as all clauses individually, must be drafted accurately in clear language. They may not contain any clause that infringes upon the equality of the obligations of the insurer and those of the policyholder. In the event of uncertainty as to the meaning of a provision, the interpretation most beneficial to the policyholder shall prevail in all instances. Should the policyholder and the insured not be one and the same person, the interpretation that benefits the insured shall prevail.' (My translation.)

[88] Fontaine *Verzekeringsrecht* (2 ed) para 113 refers to several other legislative provisions relevant to insurance contract law. In para 75 he distinguishes between non-compulsory insurance ('facultatieve' or 'niet-verplichte verzekeringen') such as 'familiale burgerrechtelijke aansprakelijkheidsverzekering', and compulsory insurance ('verplichte verzekeringen'). An example of compulsory insurance with minimum conditions of insurance cover, may be found in compulsory motor-vehicle liability insurance ('verplichte verzekering B.A motorrijtuigen'), as per Act of 21 November 1989 on Motor-Vehicle Liability Insurance, *Belgian State Gazette* of 8 Dec 1989; (hereafter 'Act of 1989 on Motor-Vehicle Liability Insurance') See Van Schoubroeck 'Aansprakelijkheidsverzekering' 32-46 para 2.1 for an exposition and comments in this regard. For particular liability insurance risks, specific legislation prescribes minimum cover that should be provided in the insurance policy – eg, in personal liability insurance 'verzekering B.A privéleven' (a form of non-compulsory insurance), as per Royal Decree of 12 Jan 1984, *Belgian State Gazette* of 31 Jan 1984 (hereafter 'Royal Decree of Jan 1984'), on the minimum conditions regarding personal liability insurance ('tot vaststelling van de minimumgarantievoorwaarden van de verzekeringsovereenkomsten tot dekking van de burgerrechtelijke aansprakelijkheid buiten overeenkomst met betrekking tot het privéleven'). Further, several federal laws and community decrees or decisions ('gemeenschaps- of gewestdecreet of besluit') prescribe compulsory insurance and insurance terms, depending on the nature of the insured's business or undertaking: see Van Schoubroeck ibid 9 para 1.1.2.2 and 52 para 5; Cousy & Van Schoubroeck *Wetgeving Verzekeringen* 1154-1162; and Bouckaert & Van Hoeke *Inleiding tot het recht* 48-49 for further detail. The relevance of the distinction between compulsory and non-compulsory liability insurance will be discussed further with reference to s 151 of the Insurance Act of 2014 (previously s 87 of the LIC Act). It concerns the reliance of defences by the liability insurer against the third-party plaintiff that it could have raised against the insured ('inzake de tegenstelbaarheid van verweermiddelen aan de benadeelde'). See Fontaine ibid para 76 and para 5.2.3.1 below for further detail.

is considered and interpreted by Belgian courts on a continuing basis. Constitutional law impacts on insurance law in Belgium by way of decisions by the Belgian Constitutional Court ('Grondwettelijk Hof')[91] and the European Court of Human Rights ('Europees Hof voor de Rechten van de Mens').[92]

5.1.4 The Law of the European Union

Belgian insurance law is increasingly influenced by the law of the EU.[93] As explained earlier,[94] the Restatement of European Insurance Contract Law Project

---

[89] Judicial decisions in Belgium primarily interpret legislation and clarify vague legal principles, except in the rare case of an interpretative law when courts may not interpret legislation: see s 84 of the Belgian Constitution ('Grondwet') Coordinated Law of 17 February 1994.

Judicial decisions generally only bind the parties to the particular dispute in Belgium, and there is generally no doctrine of *stare decisis* (save in a few instances, eg, when the Belgian Supreme Court annuls the decision of a lower court, the court that has to review that case is bound by the decision of the Belgian Supreme Court). Due to the absence of the doctrine of *stare decisis*, less focus will therefore be on judicial decisions in this chapter than in other chapters of this thesis. However, judicial decisions remain an important source of law. Ballon et al *Economisch Recht* 22 explain the position as follows: 'Rechterlijke beslissingen binden in principe slechts de partijen die bij het geschil waren betrokken. Niettemin is ook de rechtspraak een belangrijke bron van recht.' Bouckaert & Van Hoeke *Inleiding tot het recht* 50 also confirm that and state as follows: 'Herhaalde beslissingen in dezelfde zin, uitgesproken door diverse rechtscolleges, vormen na verloop van tijd *een vaste rechtspraak*, waarvan niet snel sal worden afgeweken door andere rechters, zelfs niet door het hof van cassatie. Juridisch bindend is deze vaste rechtspraak evenwel niet.' See Fontaine ibid para 102, eg, where he refers to a flurry of case law concerning the third-party plaintiff's direct claim against the liability insurer (ibid paras 746-758); and also a liability insurer's right of recourse against the insured (ibid paras 759-766).

[90] See Ballon et al ibid 41-47 for further detail on the judicial structure in Belgium, and for a useful diagram see ibid 42. They explain at 45 as follows: 'Hoewel er geen wettelijke verplichting bestaat om de uitspraak van het Hof van Cassatie te volgen, zal dit in de praktijk meestal het geval zijn. Indien het rechtscollege waarna werd verwezen de wet bijvoorbeeld opnieuw op dezelfde manier gaat interpreteren zal een nieuwe voorziening in cassatie kunnen worden ingesteld. Wanneer het tweede cassatiearrest het arrest of vonnis vernietigt om dezelfde redenen, zal de feitenrechter waarna de zaak dan wordt verwezen wel verplicht zijn de belissing van het Hof van Cassatie te volgen … .'

[91] Ballon et al *Economisch Recht* 46. Constitutional law and the principle of non-discrimination are, eg, relevant in liability insurance concerning the defences by the liability insurer against the third-party plaintiff that it could or could not have raised against the insured in compulsory or non-compulsory insurance and differences thereto ('onderscheid tussen verplichte en niet verplichte verzekeringen inzake de tegenstelbaarheid van verweermiddelen aan de benadeelde'). See Fontaine *Verzekeringsrecht* (2 ed) paras 114 and 749. See also para 5.2.3.1 below for further detail.

[92] Ballon et al ibid 41-42. Meurs & Thiery 'Aansprakelijkheidsverzekering' 103-104 para 40 (in particular 104 n 123) provide an example of a decision by the European Court of Human Rights that resulted in the amendment to the regulation of the period of prescription against minors and other persons with disabilities under Belgian law. See s 89(1) of the Insurance Act of 2014 (formerly s 35(1) of the LIC Act) and para 5.2.2.1(d) below for further detail.

[93] As far as insurance supervisory law is concerned, EC legislation had established a system of single licensing and the conflict of laws had been unified and harmonised in part through Conventions and Directives. See Basedow et al *PEICL* (2 ed) para I1 for further detail (hereafter the '*PEICL* (2 ed)'). The influence of the laws of the EU generally concerns the regulation of the conduct of the business of insurance, as opposed to insurance contract law. However, EC Directives on disclosure by the insurers to insured have been incorporated in Belgian law as noted above in para 5.1.2.3. These Directives also impacted on Belgian unfair contract terms that apply to all consumer contracts including insurance contracts. See para 5.1.2.5 above. For the influence of EU law regarding the regulation of a potential conflict of interest specifically in disputes relating to legal expenses insurance, which has, due to its

Group,[95] published the *Principles of European Insurance Contract Law*[96] in 2009. An expanded and partially updated version of the *PEICL* was published by the Project Group in 2015.[97] The Project Group has also started drafting special rules for individual branches of law, and the updated version of the *PEICL* includes provisions on liability insurance.[98]

As mentioned earlier, although the overall draft of the *PEICL* is ready for consideration by the political institutions of the EU with a view to eventual legislation, certain commentators are sceptical of the prospect of legislation at the European level.[99] The focus in this chapter is, consequently, on Belgian national insurance contract law.

5.2 THE LIABILITY INSURER'S DUTY TO INDEMNIFY THE INSURED

5.2.1 The Legal Relationship between the Third-Party Plaintiff and the Insured Defendant

From the statutory definitions set out above,[100] the following is clear. As liability insurance is a form of indemnity insurance, the performance of the insurance benefit is subject to the occurrence of an uncertain event which causes loss to the insured defendant's estate.[101] The insured defendant in indemnity insurance is the person covered by the insurance against patrimonial loss to its estate,[102] whereas the

---

challenges, been regulated in particular, see the discussion of relevant aspects in the context of liability insurance under Belgian law in para 5.3.1.1(c) below. Also see further, eg, paras 5.3.1.1(c) and 5.3.1.1(d) below on the influence of EU law on legal expense insurance and motor-vehicle liability insurance.

[94] See para 4.1.5 above on the sources of English insurance law.

[95] The 'Project Group'.

[96] See Basedow et al *PEICL* (hereafter *'PEICL').* See *PEICL* xlix-lxviii for further detail.

[97] *PEICL* (2 ed) 'Preface' v.

[98] See Fontaine *Verzekeringsrecht* (2 ed) para 30; *PEICL* paras 1.1-1.10; and *PEICL* (2 ed) Part 4 51-56 and 286-311. Again, the *PEICL* will not replace the national insurance contract law of EU Member States, but the aim of the drafters is that it will provide parties to the insurance contract with the choice of an alternative consensual set of rules to govern their insurance contract. As such, the *PEICL* it not a source of Belgian law but may in future influence the terms of insurance contracts in Belgium (and other EU Member States – see para 4.1.5 above on English law).

[99] Birds *Birds' Modern Insurance Law* 21-22 para 1.10.2 on insurance law developments on an European level.

[100] See the definitions of the terms 'schadeverzekering'; 'verzekerde bij schadeverzekering'; 'benadeelde'; and 'verzekering tot vergoeding van schade' discussed para 5.1.2.4 and accompanying footnotes above.

[101] Section 5(15) of the Insurance Act of 2014 (previously s 1G of the LIC Act).

[102] Section 5(17)(a) of the Insurance Act of 2014 (previously s 1B(a) of the LIC Act).

third-party plaintiff is the person who suffers loss for which the insured is responsible.[103]

Liability insurance is aimed at protecting the insured's estate against possible claims by third-party plaintiffs.[104] It has as its purpose to indemnify, within the limits of the insurance contract, the insured defendant against the loss for which it is liable to third parties.[105]

As liability insurance is third-party insurance,[106] in principle the insured's legal liability, in both fact and extent, to the third party determines the liability of the insurer to the insured. This complex tripartite relationship in liability insurance has been referred to as a 'beruchte driehoeksverhouding' or 'notorious triangle'.[107]

However, the insured's liability to the third-party plaintiff is, in principle, independent of the existence of any insurance or liability insurance, and is incurred irrespective of whether the insured defendant is insured or covered.[108] The existence

---

[103] Section 55(1) of the Insurance Act of 2014 (previously s 1C of the LIC Act).

[104] Van Schoubroeck 'Aansprakelijkheidsverzekering' 9 para 1.1.1.2.

[105] Section 55(3) of the Insurance Act of 2014 (previously s 1I of the LIC Act). Although the third-party plaintiff is not a party to the insurance contract between the insured defendant and the liability insurer, the third party may benefit indirectly from the insurance, eg, in the event that the insured becomes insolvent. See Van Schoubroeck ibid 9 para 1.1.1.2. The third-party plaintiff has the prospect of being compensated in as far as the insured would have been indemnified by its liability insurance. Meurs & Thiery 'Aansprakelijkheidsverzekering' 73 para 1 explain as follows: 'Voor het slachtoffer [the third-party plaintiff] heeft het bestaan van een aansprakelijkheidsverzekering tot gevolg dat hij een grotere kans heeft om effectief vergoed te worden voor de geleden schade'. See para 5.2.3.1 below for further detail on the third party's direct claim against the liability insurer.

[106] See Chapter 2 above for further detail on liability insurance as third-party insurance.

[107] Cousy 'Pikante details' passim. Kruithof 'De leiding van het geschil' 5-6 para 8 provides the following explanation of the so-called 'parties involved' ('belanghebbenden') and the complex multitude of legal relationships in the context of liability insurance: 'Het verzekerde risico bestaat uit de kans dat de verzekerde een schuld krijgt uit aansprakelijkheid. De waarborg houdt in dat de verzekeraar het vermogen van de verzekerde – diens belang – vrijwaart van dergelijke schuld. Dit wordt gerealiseerd enerzijds doordat de polis de verzekerde een vordering geeft tot terugbetaling van wat hij ingevolge de aansprakeljikheid aan de benadeelde heeft moeten betalen, en anderzijds doordat artikel 152 Verzekeringswet 2014 [2014 Insurance Act] (art 86 WLVO [LIC Act]) de benadeelde een eigen recht geeft op schadevergoeding. In het eerste geval speelt het aansprakelijkheidsgeschil zich formeel af tussen de benadeelde en de verzekerde; in het tweede geval situeert dit geschil zich tussen de benadeelde en de verzekeraar. In beide gevallen wordt de verzekeraar echter belanghebbende bij de uitkomst van dit geschil. Zijn belang, *ie* zijn vermogen, wordt geraakt door te uitkomst van het aansprakelijkheidsgeschil doordat hij gehouden is tot dekking indien het verzekerde risico zich realiseert, en dat is het geval indien de verzekerde aansprakeljik wordt bevonden.' The thesis explains these parties and relationships involved, and the intricacies, in liability insurance contracts. See para 5.2 and 5.3 passim.

[108] The distinction between an insured defendant's limited and unlimited liability towards the third-party plaintiff, and its effect on the cover provided in the insurance contract, are discussed below in para 5.2.2.1(a). For further detail on the legal relationship between the third-party plaintiff and the insured defendant in the context of the conduct of the defence and settlement, see generally para 5.3 below. Liability policies usually contain a clause that prohibits the insured from settling any claim by a third party, or from making any admission of liability, without the insurer's written consent. Section 149(1) of the Insurance Act of 2014 (previously s 85(1) of the LIC Act) provides as follows:

of liability insurance is not necessary for the insured to incur liability. Even though the defendant may not be an 'insured' in that it does not have insurance at all, or may not be covered under its liability insurance contract against the specific liability it incurs to the third party, the defendant may still be liable to the third party for the latter's loss. So, for example, a defendant that has intentionally caused loss to the third party may not be covered under its liability insurance contract,[109] but may still be held legally liable to the third party for the latter's loss.[110]

This notwithstanding, some commentators have recognised that there is a close connection between the development of liability insurance[111] and the law of delict.[112] Fontaine, for example, refers to the inclination by the judiciary to award larger sums in compensation (delictual damages) to third-party plaintiffs who have become insured since the rise of liability insurance. He further notes that there has been an increase in the different types of damages that may be claimed under the law of delict.[113]

5.2.2 The Legal Relationship between the Liability Insurer and the Insured Defendant

5.2.2.1 The Scope the Insured Defendant's Liability Cover

Section 141 of the Insurance Act of 2014 (s 77 of the LIC Act) provides as follows:

'Compensation, or a promise of it, to the third-party plaintiff by the insured defendant without the liability insurer's consent shall not bind the latter'. See para 5.3.1.1(b) below.

[109] Section 62 of the Insurance Act of 2014 (previously s 8 of the LIC Act) provides as follows: 'Niettegenstaande enig andersluidend beding, kan de verzekeraar niet verplicht worden dekking te geven aan hem die het schadegeval opzettelijk heeft veroorzaakt'.

[110] See para 5.2.2.3 (b)(ii) below for comments on the exclusion of cover for loss caused by the intentional conduct of the insured.

[111] Meurs & Thiery 'Aansprakelijkheidsverzekering' 73 para 1 opine that the development liability insurance is connected to economic and business life. They provide that '[d]e toegenomen complexiteit van het economische leven zorgt ervoor dat ook de aangeboden aansprakelijkheidsverzekeringen specialistischer en complexer worden, zeker voor wat betreft de verzekeringen afgesloten door ondernemingen'.

[112] The law of delict has evolved to focus on the compensation of victims (third parties), rather than on the punishment of wrongdoers (insured defendants). Liability insurance has similarly developed to provide improved protection to third parties (such as a third party-plaintiff having a direct claim against the liability insurer). Fontaine *Verzekeringsrecht* (2 ed) para 668 explains as follows: 'De ontwikkeling van de aansprakelijkheidsverzekeringen is door een wederzijdse wisselwerking, nauw verbonden met de ontwikkeling van het aansprakelilijkheidsrecht self'. See para 5.2.3.1 below for further detail.

[113] Fontaine ibid paras 666-669.

> Dit hoofdstuk[114] is van toepassing op de verzekeringsovereenkomsten die ertoe strekken de verzekerde dekking te geven tegen alle vorderingen tot vergoeding wegens het voorvallen van de schade die in de overeenkomst is beschreven, en zijn vermogen binnen de grenzen van de dekking te vrijwaren tegen alle schulden uit een vaststaande aansprakelijkheid.[115]

Liability insurance contracts aim to defend the insured ('leiding van het geschil')[116] against third-party claims for compensation based on the occurrence of loss[117] as provided for in the contract, and also indemnify the insured's estate,[118] within the limits of cover, for a debt arising from proven liability.

As indicated earlier,[119] liability insurance is indemnity insurance. The insured does not have the right to be indemnified, and the insurer is not obliged to indemnify the insured until the insured has suffered a 'loss' ('schadegeval').[120] For purposes of liability insurance, a 'loss' is suffered when the insured's liability towards a third

---

[114] This refers to the chapter on liability insurance ('aansprakelijkheidsverzekeringen') that applies to liability insurance contract law in particular, namely Chapter 3, Title III, Part 4 of the Insurance Act of 2014 (previously Chapter III, Title III of the LIC Act).

[115] Freely translated: 'This chapter applies to contracts of insurance which aim to defend the insured against any claim for compensation based on the occurrence of loss as provided for in the contract and to keep its estate indemnified, within the limits of cover, for any debt arising from proven liability'. (My translation.) As stated in para 5.1.2.4 above, there appears to be a difference in opinion as to whether the Insurance Act of 2014 (or the LIC Act) defines liability insurance, or whether it merely decribes the scope of application of liability insurance. According to Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 693, s 141 of the Insurance Act of 2014 (previously s 77 of the LIC Act) contains a definition of liability insurance, while Fontaine holds a contrary view. See Fontaine ibid para 672 where he interprets the section to refer merely to the scope of application of the legislative provisions on liability insurance. Some commentators are of the opinion that s 141 of the Insurance Act of 2014 (previously s 77 of the LIC Act) provides a *description of the scope of application* of ss 141-152 of the Insurance Act of 2014 (previously ss 78-89 of the LIC Act) to liability insurance contracts, and that undue emphasis should not be placed on s 141 of the Insurance Act of 2014 (previously s 77 of the LIC Act) as a way of determining either the *scope of the undertaking to provide insurance, or the time when the performance by the liability insurer is due.* See Van Schoubroeck & Schoorens (1995) *Tijdschrift voor Belgisch Handelsrecht* 644. They propose that a more neutral way of formulating the scope of application of ss 141-152 of the Insurance Act of 2014 (previously ss 78-89 of the LIC Act) may be to provide that 'verzekeringsovereenkomsten waarbij de verzekeraar zich ertoe verbindt om zich achter de verzekerde te stellen wanneer de aansprakelijkheid van de verzekerde zoals omschreven in de overeenkomst in het gedrang komt en het vermogen binne die grenzen van de dekking te vrijwaren tegen alle schulden uit een vaststaande aansprakelijkheid'.

[116] For further detail on the liability insurer's defence, see para 5.3 below.

[117] For further detail on the meaning of the term 'occurrence of loss', see para 5.2.2.2 below and Fontaine *Verzekeringsrecht* (2 ed) paras 679-699.

[118] Fontaine ibid para 673 explains that 'aansprakelijkheidsverzekeringen dekken het vermogen van de verzekerde tegen de aantastingen die het bedreigen'. The insurable interest in liability insurance, as a type of indemnity insurance ('verzekeringen tot vergoeding van schade'), is a financial interest in the preservation of the integrity of the estate 'in geld waardeerbaar belang … bij de gaafheid van het vermogen'. See s 91 of the Insurance Act of 2014 (previously s 37 of the LIC Act). The unofficial English version of the LIC Act in [1994] 1 *Commercial Laws of Europe* 55-105, incorrectly translates the term 'vermogen' as 'property' instead of 'estate'. By referring to the liability insurer's duty as regards the insured's estate, s 141 of the Insurance Act of 2014 (previously s 77 of the LIC Act) is in line with s 91 (previously s 37 of the LIC Act). See Fontaine ibid para 678.

[119] See Chapter 2 above on the classification of liability insurance as indemnity insurance.

[120] For further detail, see para 5.2.2.1(b) below.

party for the latter's loss has been established. The terms of the insurance contract primarily determine the loss to the insured − ie, its proven liability[121] towards a third party for the latter's loss − which may then trigger the liability of the insurer to the insured under the insurance contract.[122] Fontaine emphasises, with reference to liability insurance as a type of indemnity insurance, that,

> bij deze verzekeringen is de vergoede schade in dit geval deze die door de verzekerde wordt geleden, nl. de aantasting van zijn vermogen ingevolge de aansprakelijkheidsschuld die hij oploopt, zelfs indien deze schade overeenstemt met deze die het slachtoffer [third-party plaintiff] geleden heeft.[123]

5.2.2.1(a) The Extent of the Liabilities Covered[124]

Section 141 of the Insurance Act of 2014 (s 77 of the LIC Act)[125] refers to the liability insurer's two main duties to its liability insured:[126]

- to conduct the insured's defence against the third-party plaintiff;[127] and
- to indemnify the insured against proven liability to the third party, within the limits of the insurance policy.[128]

As to the types of liability which may be covered under liability insurance ('gedekte aansprakelijkheden'), the insured may be indemnified against amounts that it may be liable to pay to third-party plaintiffs in delict ('extracontractuele

---

[121] Section 141 of the Insurance Act of 2014 (previously s 77 of the LIC Act) refers to 'vaststaande aansprakelijkheid'. The unofficial English version ibid, translates the term 'vaststaande aansprakelijkheid' as 'proven liability', but it may equally be termed 'established liability' or 'legal liability'. The term 'proven liability' appears to be preferred in Belgian law and will therefore be used in this chapter.

[122] See paras 5.2.2.1(b)-5.2.2.1(c) below for further detail on when and how the insured's liability to third-party plaintiffs becomes proven. See para 5.2.2.1(c) below for further detail on the effect of the insured's proven liability to the third party on the liability of the insurer to the insured.

[123] Fontaine *Verzekeringsrecht* (2 ed) para 163 n 415.

[124] In writing this section, the following works on Belgian insurance law were consulted: Fontaine *Verzekeringsrecht* paras 672-682; Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 693; and Van Schoubroeck 'Aansprakelijkheidsverzekering' 10 para 1.2.1.

[125] See para 5.2.2.1 above for further detail.

[126] The insured defendant has corresponding rights against the liability insurer to be defended against third-party claims and to be indemnified. Other rights of the insured against the liability insurer include: to choose its insurer in case of double insurance; and rights as regards its intervention in legal proceedings ('tussenkomst in de rechtspleging'; see para 5.3.1 below in regard to the latter). See Van Schoubroeck 'Aansprakelijkheidsverzekering' 18-19 paras 1.3.2.1-1.3.2.4 for further detail. Also see para 5.2.2.4 below for further detail on the insured's duties towards the liability insurer.

[127] For further detail on the liability insurer's duty of defence, see para 5.3 below.

[128] The emphasis here (in para 5.2.2.1(a) ff) falls on this duty as para 5.2 deals with the liability insurer's duty to indemnify the insured.

aansprakelijk-heid' or 'vorderingen uit een onregmatige daad'),[129] contractually ('contractuele aansprakelijkheid'),[130] for breach of contract,[131] or in terms of a statute ('wettelijk').[132] Clearly, indemnity against certain forms of liability may be excluded in the insurance contract itself.[133] As only private-law (civil) ('privaat' or 'burger-rechtelijk') liabilities can be covered under a liability insurance contract, criminal, moral, and disciplinary liabilities are excluded.[134]

5.2.2.1(b) The Time When the Insured Defendant Becomes 'Legally Liable' to Third-Party Plaintiffs[135]

In liability insurance the materialisation of risk ('verwezenlijking van het risico')[136] may be a gradual process which unfolds over an extended period.[137] The materialisation of the risk may have a number of legal consequences in liability

[129] For example, liability under art 1382ff of the Civil Code or under art 544 of the Civil Code on nuisance by neighbours ('burenhinder'). See Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 779-782 for further detail. On liability in delict generally, see Cousy & Droshout 'Fault under Belgian Law' 27-51; Cousy & Vanderspikken 'Causation under Belgian Law' 23-37; and Cousy & Vanderspikken 'Damages under Belgian Law' 27-51.

[130] Fontaine *Verzekeringsrecht* (2 ed) para 674. The term is often used without an explanation as to what it entails. It is a matter of interpretation in every instance whether the reference to contractual liability refers to contractual liability for damages imposed by law for breach of the contract, and if it (also) pertains to liability imposed by the contract itself for performance voluntarily assumed by the insured. Both forms of contractual liability may in principle be covered.

[131] An example of contractual liability that may be covered under a liability insurance contract is the tenant's liability to the lessor in case of fire ('contractuele aansprakelijkheid van de huurder jegens de verhuurder ingeval van brand'). See Schuermans & Van Schoubroeck 3 *Belgische Verzekeringsrecht* paras 755-769 for further detail.

[132] For example, product liability under the Act of 25 Feb of 1991. There may be some overlap between statutory liability and the other forms of liability (as the majority of instances of delictual and contractual liability under Belgian law are prescribed by statute).

[133] See para 5.2.2.3(b)(i) below for the exclusions to, and exceptions from, liability cover for an insured defendant's legal liability towards third-party plaintiffs.

[134] The distinction between an insured defendant's limited and unlimited liability towards the third-party plaintiff, and its effect on the cover provided for in the insurance contract, are discussed in para 5.2.2.3(a) below. The influence of the insured defendant's fault on the cover in the insurance contract is discussed in para 5.2.2.3(b)(ii) below.

[135] In writing this section, the following works on Belgian insurance law were consulted: Fontaine *Verzekeringsrecht* (2 ed) paras 681, 683, 684 and 687; Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 693; and Van Schoubroeck 'Aansprakelijkheidsverzekering' 25 para 1.3.4.2. For further detail, see Van Schoubroeck & Schoorens (1995) *Tijdschrift voor Belgisch Handelsrecht* 644-645.

[136] The term 'schadegeval' may generally be translated as the 'insured event'. Fontaine ibid para 683 explains that '[h]et schadegeval werd gedefinieerd als de verwezenliking van het risico'. For further detail on the 'insured event' in liability insurance, see para 5.2.2.2 below.

[137] Fontaine ibid para 168 provides as follows: 'In sommige verzekeringstakken doet het schadegeval zich niet op een ogenblikkelijke wijze voor, maar verwezenlijkt zich geleidelijkt in de loop van een min of meer langer periode; dit kan met name het geval zijn in de aansprakelijkheidsverzekeringen…'.

insurance,[138] but is relevant here to determine when a liability insurer should indemnify its insured.[139]

In liability insurance, the insured suffers a loss when its liability to a third party for the latter's loss has been proved.[140] Section 141 of the Insurance Act of 2014 (s 77 of the LIC Act) provides that the liability insurer's duty to indemnify the insured defendant applies to 'all debt arising from proven liability' ('alle schulden uit een vaststaande aansprakelijkheid').[141] The liability insurer is liable to the insured only once the latter's liability to the third-party plaintiff has been established or proved.[142] In most cases, the terms of the insurance contract determine when a 'loss' for purposes of the insurer's liability occurs.[143]

---

[138] Fontaine *Verzekeringsrecht* (2 ed) para 683 explains that 'talrijke rechtsgevolgen vloeien voort uit het schadegeval' and provides examples. However, he cautions that '[d]eze rechtsgevolgen zijn niet alle gehecht aan dezelfde fase van het proces waarin het schadegeval geleidelijk vorm krijgt'. See Fontaine ibid paras 683-689 for further detail. In para 684 he comments that '[d]e veelvoudige gevolgen die het verzekeringsrecht aan het begrip schadegeval hecht vergen veel meer geschak[k]eerde beschouwingen'. The meaning of the term 'schadegeval' may therefore be fluid and depends on the context. See, eg, Van Schoubroeck (2015) 10 *Tijdschrift voor Belgisch Handelsrecht* 987 where the author describes the uncertainty of the meaning of the term 'schadegeval' and the debate in that regard as follows: 'Over de juiste interpretatie en draagwijdte van het begrip "schadegeval" (veelal vertaald in Frans als "sinistre") in the aansprakelijkheidsverzekering en of aan dit begrip één dan wel meerdere betekenissen toekomen naar gelang de concrete rechtsvraag die zich stelt, blijft in de rechtsleer discussie bestaan'.

[139] Fontaine ibid para 168. Van Schoubroeck & Schoorens (1995) *Tijdschrift voor Belgisch Handelsrecht* 644 opine that undue emphasis should not be placed on s 141 of the Insurance Act of 2014 (previously s 77 of the LIC Act) in determining the time when the performance by the liability insurer is due.

[140] Section 141 of the Insurance Act of 2014 (previously s 77 of the LIC Act).

[141] Where the insured pays the third-party plaintiff for debt that arose from proven liability, it can claim that amount (to the maximum of the insured amount) from its liability insurer. However, a liability insurer's duty of indemnification of its insured will be not be due from the date of the insured's negligent act ('vanaf de dag dat de schadeverwekkende gebeurtenis zich heeft voorgedaan') against the third-party plaintiff but arises only from the date on which the insured paid the third-party plaintiff. See the decision by the Belgian Supreme Court, Cass, dated 29 Sept 2011, as referred to by Schuermans and Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 693 n 412.

From the literature consulted there are more English judicial decisions and legal doctrine, yet greater legal uncertainty, on established liability as the time when the insured defendant's legal liability toward a third-party plaintiff is proven, than in Belgian law. In Belgium, all debt arising from proven liability ('alle schulden uit een vaststaande aansprakelijkheid') in s 141 of the Insurance Act of 2014 (previously s 77 of the LIC Act) should be proven: see 4.2.2.1(b) above on English law.

[142] Fontaine *Verzekeringsrecht* (2 ed) para 683. See para 5.2.2.1(c) below as to the ways in which the insured defendant's liability towards third-party plaintiffs may be proved.

[143] Ibid paras 674 and 682.

5.2.2.1(c) The Ways in Which the Insured Defendant's Liability to Third-Party Plaintiffs may be Proven[144]

The insured's liability to the third party may be proved by way of agreement,[145] judgment,[146] or arbitration.[147]

Fontaine describes the lengthy process by which an insured's 'proven liability' to the third-party plaintiff (in the context of delictual liability established by a court judgment) may arise.[148] For example, in determining when delictual liability has been proved a number of phases may be distinguished: the insured's delict against the third party, the loss suffered by the third party, the third party's initial claim, the institution of legal proceedings by the third party against the insured, and the judgment in favour of the third party against the insured. Proven liability in Belgian law exists when all the elements of liability have been proved beyond all reasonable doubt. It may take several years from the third-party plaintiff's institution of a claim or legal proceedings for compensation against the insured,[149] before a final judgment as to the insured defendant's proven liability to the third-party plaintiff is delivered and before the insured may claim indemnification from its liability insurer for debt arising from that proven liability.

5.2.2.1(d) Prescription in Liability Insurance[150]

Prescription in insurance law is complex.[151] In liability insurance – being third-party insurance – prescription is particularly complicated because prescription of

---

[144] From the literature there are more English judicial decisions, legal doctrine, yet greater legal uncertainty on the ways in which the insured defendant's legal liability toward a third-party plaintiff is proven, than in Belgian law: see para 4.2.2.1(c) above on English law.

[145] Van Schoubroeck 'Aansprakelijkheidsverzekering' 14 para 1.2.5.2 comments that '[d]eze eis kan zowel mondeling … als schriftelijk geformuleerd worden en minnelijk of gerechteljik worden behandeld'. See para 5.3 below for further detail on the conduct of the defence and settlement by the liability insurer.

[146] Fontaine *Verzekeringsrecht* (2 ed) paras 683 and 687.

[147] For further detail on arbitration under Belgian insurance law, see Fontaine ibid 524-528 and Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 1227-1231.

[148] Fontaine ibid para 684.

[149] Again, the third-party claim and legal proceedings will follow the insured's delict or breach of contract against the third party and (at least some of) the loss suffered by the latter.

[150] In writing this section, the following works on Belgian insurance law were consulted: Fontaine *Verzekeringsrecht* (2 ed) paras 486-496, 759; Van Schoubroeck 'Aansprakelijkheidsverzekering' 29 paras 1.1 and 1.4.1; Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 1119-1121, 1123-1124, 1127; and Jocqué (2006) 354 *Tijdschrift voor Verzekeringen* 6-9, 14-17.

the insured's claim against its insurer is linked to the prescription of the third-party plaintiff's claim against the insured defendant.[152]

Section 88 of the Insurance Act of 2014 (s 34 of the LIC Act) governs prescription in liability insurance. The provision deals with extinctive prescription ('bevrijdende verjaring')[153] and is mandatory.[154] Contractual clauses which reduce or extend the prescription period, or which change the starting or completion date of the period, are void.[155]

Section 88(1) of the Act of 2014 (s 34(1) of the LIC Act) provides as follows:

> De verjaringstermijn voor elke rechtsvordering, voortvloeiend uit een verzekeringsovereenkomst, bedraagt drie jaar. [156] …
> De termijn begint te lopen vanaf de dag van het voorval dat het vorderingsrecht doet ontstaan. Wanneer degene aan wie de rechtsvordering toekomt, bewijst dat hij pas op een later tijdstip van het voorval kennis heeft gekregen, begint de termijn te lopen vanaf dat tijdstip, maar hij verstrijkt in elk geval vijf jaar na de voorval, behoudens bedrog.[157] …
> In de aansprakelijkheidsverzekering begint de termijn, wat de regresvordering van de verzekerde tegen de verzekeraar betreft, te lopen vanaf het instellen van de rechtsvordering door de benadeelde, onverschillig of het gaat om een

---

[151] See van Schuermans & Van Schoubroeck ibid para 1119 for an explanation of this complexity. It must be noted that in some jurisdictions the term 'limitation period' is preferred to the term 'prescription'.

[152] All claims based on contractual obligations prescribe after ten years; while claims for compensation of loss based on delict prescribe five years from the day on which the third-party plaintiff ('benadeelde') became aware of the loss and of the identity of the liable party (the 'liability insured'): art 2262*bis* Civil Code. For further detail, see Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 1166-1183.

[153] Jocqué (2006) 354 *Tijdschrift voor Verzekeringen* 6 explains that '[d]e bepalingen … voorzien in een bevrijdende verjaring waardoor de bedoelde rechtsvorderingen door het verstrijking van de vasgestelde termijn teniet gaan. De verjaring … heeft de verdwijning van de eisbaarheid van deze schuldvorderingen tot gevolg.'

[154] Section 56 of the Insurance Act of 2014 (previously s 3 of the LIC Act).

[155] Van Schoubroeck 'Aansprakelijkheidsverzekering' 29 para 1.4; Fontaine *Verzekeringsrecht* (2 ed) paras 487 and 505; Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 1121; and Jocqué (2006) 354 *Tijdschrift voor Verzekeringen* 6-9. Fontaine ibid explains that the relatively short prescription period of three years is aimed at preventing the disappearance of evidence and that longer prescription periods would make it challenging for insurers to exercise control over the claims against them.

[156] Freely translated: 'The prescription period for each legal claim ensuing from an insurance agreement is three years'. (My translation.) Section 88(1)(i) of the Insurance Act of 2014 (previously s 34(1)(i) of the LIC Act). This chapter employs Roman numbers to refer to specific parts of the legislative provisions that the Dutch commentators identify as 'lid' or 'alinea'. To further underline particular detail, sentences or bullets are referred to in some instances.

[157] Freely translated: 'The prescription period starts to run from the date of the event that gives rise to the claim. If a party proves that it had knowledge of the event that gave rise to the claim only at a date later than the date that gave rise to the claim, the prescription period shall begin to run only at such later date. Such a period shall expire five years from the date of event, except in the case of fraud.' (My translation) Section 88(1)(ii) of the Insurance Act of 2014 (previously s 34(1)(ii) of the LIC Act). Note sentences one and two.

> oorspronkelijke eis tot schadeloosstelling dan wel om een latere eis naar aanleiding van een verzwaring van de schade of van het ontstaan van een nieuwe schade.[158]

The general principle regarding an insured's claim against its insurer arising from an insurance contract ('voor elke rechtsvordering, voortvloeiend uit een verzekerings-overeenkomst')[159] is that the prescription period of three years begins to run from the date of the event that gave rise to the claim ('[v]anaf de dag van het voorval dat het vorderingsrecht doet ontstaan').[160] As the materialisation of the risk ('schadegeval')[161] in liability insurance may be a gradual process over a long period,[162] it is particularly difficult to determine the date of the event which gave rise to the claim and the date of commencement of prescription. The Legislature has addressed this challenge in section 88(1)(iii) of the Act of 2014 (s 34(1)(iii) of the LIC Act) by providing a specific commencement date for the prescription of a liability insured's claim against its liability insurer. The liability insured must institute any claim arising under a liability insurance contract against its liability insurer[163]

---

[158] Freely translated: 'In liability insurance, the period starts to run for the insured's claim against the insurer within three years from the date on which the third party issued summons against the insured, irrespective of whether the original claim for indemnity is supplemented by a later claim for an increase in the loss suffered or the occurrence of another related loss'. (My translation.) Section 88(1)(iii) of the Insurance Act of 2014 (previously s 34(1)(iii) of the LIC Act). The focus of this paragraph 5.2.2.1(d) is on the prescription of the liability insured's claim against its liability insurer.

[159] Section 88(1)(i) of the Insurance Act of 2014 (previously s 34(1)(i) of the LIC Act). The phrase 'voor elke rechtsvordering, voortvloeiend uit een verzekeringsovereenkomst' is vague. See Jocqué (2006) 354 *Tijdschrift voor Verzekeringen* 8 for further detail. However, the insured's claim against the insurer for the payment of indemnification; the insurer's claim against the insured for, eg, payment of its premium; as well as the liability insurer's claim for recourse against its insured (which prescription is provided for specifically in s 88(3) of the Insurance Act of 2014 previously s 34(3) of the LIC Act), are subject to a presciption period of three years. See Fontaine *Verzekeringsrecht* (2 ed) paras 488-491.

[160] Section 88(1)(ii) of the Insurance Act of 2014 (previously s 34(1)(ii) of the LIC Act). This refers to the time of materialisation of the risk ('vanaf het ogenblik waarop het risico zich heeft gerealiseerd'). See Jocqué ibid 15; and Meurs & Thiery 'Aansprakelijkheidsverzekering' 100-101 paras 37-38 for further detail.

[161] Prescription in liability insurance is also complicated by the different meanings that may be ascribed to the term 'schadegeval'. Fontaine *Verzekeringsrecht* (2 ed) para 689 explains in the context of prescription that, '[o]ok hier stelt men vast hoezeer elke regel met betrekking tot het schadegeval vasgeknoopt is aan een specifiek ogenblik van het verloop'. The other periods of prescription concerned in liability insurance, namely the prescription of the liability insurer's claim of recourse against its insured (under s 88(3) of the Insurance Act of 2014; previously s 34(3) of the LIC Act) and the prescription of the direct claim of the third-party plaintiff ('benadeelde') against the insured's liability insurer (under s 88(2) of the Insurance Act of 2014; previously s 34(2) of the LIC Act), are discussed below in paras 5.3.1.1(c) and 5.2.3.1.

[162] See para 5.2.2.2(b) above for further detail.

[163] Fontaine *Verzekeringsrecht* (2 ed) para 496 explains that '[h]et gaat om de bepaling van het vertrekpunt van de verjaring van de "regres" vordering van de verzekerde tegen de verzekeraar, dit wil zeggen van de vordering waarin de verzekerde zijn aansprakelijkheidsverzekeraar oproept om hem dekking te verlenen'.

within three years of the issue of summons[164] by the third-party plaintiff against the insured,[165] irrespective of whether the claim relates to the original claim for indemnity, a later claim as a result of an increase in the loss, or the occurrence of further loss.[166]

The provisions governing prescription are comprehensive.[167] The detailed provisions of section 88(1)(ii) of the Insurance Act of 2014 (s 34(1)(ii) of the LIC Act) provide that if a party proves that it had knowledge of the event that gave rise to the claim only after the date which gave rise to the claim, prescription begins to run only at that later date. In this situation, this period will, however, lapse five years from the date of the event, except in the case of fraud. Although it may not often arise in practice, Fontaine is of view that this section may also affect the commencement date of the prescription period of an insured's claim against its liability insurer where the insured was unaware of the third-party plaintiff's summons.[168]

Section 89 of the Insurance Act of 2014 (s 35 of the LIC Act) contains detailed provisions for the suspension and interruption of prescription periods.[169]

---

[164] A payment demand should be distinguished from the issue of the summons. See Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 1127 n 21 who observe that '[e]en betalingsverzoek en een rechtsvordering zijn onderscheidende begrippen'.

[165] '[B]innen de drie jaar; ingaande vanaf het ogenblik dat de benadeelde voor de rechter een vordering tegen de verzekerde heeft ingesteld'. See Van Schoubroeck 'Aansprakelijkheidsverzekering' 29 para 1.4.1. The issue of the summons by the third-party plaintiff against the insured defendant is the event that gives rise to the claim of the insured against its liability insurer for purposes of s 88(1)(iii) of the Insurance Act of 2014 (previously s 34(1)(iii) of the LIC Act). See the decision by the Belgian Supreme Court, Cass, dated 28 Nov of 2008, as referred to by Schuermans & Van Schoubroeck ibid para 1127 n 22.

[166] Where the insured has compensated the third-party insured voluntarily (for debt arising from proven liability), the insured's payment to the third-party plaintiff will be regarded as the event that gives rise to the claim ('het voorval dat zijn vorderingsrecht doet ontstaan') and the latter date will be the commencement date of prescription of the insured's claim against the liability insurer. In this scenario, the prescription of the insured's claim against the liability insurer does not commence on the date of the initial event that gives rise to the third-party plaintiff's loss ('het ogenblik van het initiële schadegeval'; the 'schadeverwekkende gebeurtenis'). See the decision by the Belgian Supreme Court, Cass, dated 28 Nov of 2008, as referred to by Schuermans & Van Schoubroeck ibid para 1127 n 22.

[167] Fontaine *Verzekeringsrecht* (2 ed) para 486 describes them as 'omstandige bepalingen'.

[168] Ibid 496 n 1252 opines that one may interpret s 88(1)(iii)of the Insurance Act of 2014 (previously s 34(1)(iii) of the LIC Act) on the prescription of the insured's claim against the liability insurer in liability insurance, to explain the meaning of 'the date of the event which give rise to the claim' ('voorval dat het vorderingsrecht doet ontstaan') in s 88(1)(ii) thereof; and that the second sentence of s 88(1)(ii) as to the extended commencement date of prescription in case of lack of knowledge also applies to the instances covered under s 88(1)(iii).

[169] Section 35(1) of the LIC Act provided that the prescription period ran against minors, lunatics, and other persons with disability, except in case of the direct claim of the third-party plaintiff against the liability insurer. Section 89(1) of the Insurance Act of 2014 has amended the position in line with a decision by the European Court of Human Rights and now provides that prescription periods do not run against minors, lunatics, and other persons with disability until their date of majority or the suspension of their disability. See Meurs & Thiery 'Aansprakelijkheidsverzekering' 103-109 paras 40-46 for further detail as regards the suspension and interruption of prescription periods. Also see Schuermans

5.2.2.2 The Insured Event and the Duration of Liability Cover[170]

The insured may recover only that loss caused by an event covered by the liability insurance contract from an insurer. The insured's proven liability towards the third party is the insured's loss[171] in the liability insurance contract, and should be distinguished from the 'insured event'[172] which brings the matter within the scope of a particular period of cover designated in the liability insurance contract. Such an event may be the incidence of the loss itself – ie, the insured's proven liability towards the third party – or it may be an earlier event that merely leads to the incidence of loss, such as an act of negligence on the insured's part,[173] or some other occurrence which marks a significant stage in the process leading to the insured's legal liability.

Belgian law has adopted the so-called 'Anglo-American legal terminology' in an attempt to resolve legal questions in the context of the insured event and the duration of liability cover.[174] For example, the insured's breach of contract or delict may be the insured event (under 'act-committed' insurance); the occurrence of the third party's loss may be the insured event (under 'loss-occurrence' insurance);[175] or

---

& Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 1134-1139; Van Schoubroeck 'Aansprakelijkheidsverzekering' para 1.4.4 at 30-31; Jocqué (2006) 354 *Tijdschrift voor Verzekeringen* 25-33; and Fontaine *Verzekeringsrecht* (2 ed) paras 498-504.

[170] In writing this section, the following works on the Belgian insurance law were consulted: Meurs & Thiery 'Aansprakelijkheidsverzekering' 96-100 paras 33-35; Van Schoubroeck & Meurs (2012-2013) 35 *Rechtskundig Weekblad* 1382-1389; Van Schoubroeck (2015) 10 *Tijdschrift voor Belgisch Handelsrecht* 985-988; Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 694-699; Van Schoubroeck 'Aansprakelijkheidsverzekering' 13-15 para 1.2.5; and Fontaine *Verzekeringsrecht* (2 ed) paras 680-681 and 690-702. For further detail, see Cousy 'Over het "verzekerbaar risico"' 147-165; Van Schoubroeck & Schoorens (1995) *Tijdschrift voor Belgisch Handelsrecht* 645-664; and CRIS *Aansprakelijkheidsverzekering: dekking in de tijd* passim.

[171] 'Schadegeval' para 5.2.2.1 above, is the materialisation of the risk, and it may occur gradually over a long period in liability insurance, and may also have a number of legal consequences. The meaning of the term 'schadegeval' may therefore change, depending on the context.

[172] 'Schadegeval' may generally also be translated as 'insured event'. See Fontaine *Verzekeringsrecht* (2 ed) paras 168 and 683-689 for further detail.

[173] The insured event (in that instance the 'schadeverwekkende gebeurtenis') has been referred to as the 'aanknopingsfactor om te bepalen of de verzekeraar al dan niet dekking moest verlenen' and it therefore determines whether an insurer has provided cover or not. See Van Schoubroeck & Meurs (2012-2013) 35 *Rechtskundig Weekblad* 1384.

[174] Also referred to as the 'temporal scope of cover' or 'dekking in de tijd'. Schuermans & Van Schoubroek *Belgische Verzekeringsrecht* (3 ed) para 694 observe that, '[a]ansprakelijkheden kunnen ontstaan vooraleer de polis werd afgesloten, maar ook nadat de verzekeringsovereenkomst reeds is afgelopen'. They formulate the challenge as to the duration of liability cover as whether 'de verzekeringsdekking effect sorteert wanneer het tijdsverloop tussen fout en schadeverzekering zich niet volledig binnen de duur van de contractuele verzekeringstermijn voltrekt'. See para 5.2.2.2(b) below for further detail.

[175] Also known as 'occurrence-based' insurance. The term 'loss-occurrence' seems to be more prevalent in the majority of Belgian sources consulted and is used in the remainder of this chapter. See, eg, Van Schoubroeck & Meurs (2012-2013) 35 *Rechtskundig Weekblad* 1385; Schuermans & Van

the insured event may be a claim by a third party against the insured (under 'claims-made' insurance). Although the general characteristics of the different types of liability policy are similar in various legal systems, an insured must determine the exact meaning of these different policies under Belgian law and with reference to the liability insurance contract involved.

Section 141 of the Insurance Contract Act of 2014 (s 77 of the LIC Act)[176] provides, as regards the scope of liability insurance contracts, that these types of contract aim to cover the insured against third-party claims for compensation 'based on the occurrence of loss as provided for in the contract'.[177] The insurance contract may, however, still limit cover to accidental loss only[178] but the majority of policies

Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 694; and Van Schoubroeck & Schoorens (1995) *Tijdschrift voor Belgisch Handelsreg* 646-647. Cf Fontaine *Verzekeringsrecht* (2 ed) para 692 who refers to 'polissen op occurrence basis'.

[176] In the past liability insurers attempted to limit liability cover to an insured's liability towards a third party for an accident ('het voorvallen van een *ongeval*, dit wil zeggen een "plotse en onvrijwillige" gebeurtenis'). See Fontaine ibid para 680. Gradually this limited cover was somewhat extended in practice by liability policies that covered liability for a 'harmful event' ('schadeverwekkende gebeurtenis') ibid. The initial version of s 77 of the LIC Act applied to insurance cover against any claim for compensation 'based on a harmful event provided for in the contract' ('de in de overeenkomst beschreven schade-verwekkende gebeurtenis') (hereafter the 'initial version of s 77 of the LIC Act') The wording of the initial version of s 77 of the LIC Act was amended to 'the occurrence of loss as provided for in the contract' ('het voorvallen van de schade die in de overeenkomst is beschreven') (hereafter 's 77 of the LIC Act, as amended'). See s 8 of the Act of March 1994, *Belgian State Gazette* of 4 May 1994. This was done due to possible ambiguity in the initial version of s 77 of the LIC Act, in conjunction with the former initial wording of s 78 of the LIC Act (hereafter referred to as the 'initial version of s 78 of the LIC Act'). It was uncertain whether the initial versions of ss 77 and 78 referred to the occurrence of loss itself ('het voorvallen zelf van de schade'), or whether they referred to the act or neglect that may have resulted in the loss ('de fout die de schade dreigt te veroorzaken'). See Fontaine ibid para 681 and Van Schoubroeck & Schoorens ibid 644-645. Section 77, as amended, of the LIC Act (now s 141 of the Insurance Act of 2014) no longer contained the ambiguity, although other criticism remains. See Fontaine *Verzekeringsrecht* (2 ed) para 681. The initial version of s 78 of the LIC Act was also changed in line with the amendment of s 77 of that Act. See Fontaine *Verzekeringsrecht* (2 ed) para 699; and Van Schoubroeck & Meurs (2012-2013) 35 *Rechtskundig Weekblad* 1384. The amended s 78 of the LIC Act (hereafter 's 78 of the LIC Act, as amended') is now contained in s 142 of the Insurance Act of 2014. See Fontaine ibid paras 679-699 and see paras 5.2.2.2(a) and 5.2.2.2(b) below for further detail on the application of ss 141-142 of the Insurance Act of 2014 (previously ss 77-78 of the LIC Act, as amended).

[177] As discussed in para 5.2.2.1 above, some commentators are of the opinion that s 141 of the Insurance Act of 2014 (previously s 77 of the LIC Act, as amended) merely provides a description of the scope of application of ss 141-152 of the Insurance Act of 2014 (previously ss 78-89 of the LIC Act) to liability insurance contracts and that undue emphasis should not be placed on s 141 of the Insurance Act of 2014 (previously s 77 of the LIC Act, as amended) as a way of determining the scope of the undertaking to provide insurance, nor of the time when the performance by the liability insurer is due. See Van Schoubroeck & Schoorens (1995) *Tijdschrift voor Belgisch Handelsrecht* 644.

[178] For example, the cover against environmental loss in public liability policies is limited to accidental environmental loss ('milieuschade die in de meeste polissen BA-exploitatie beperkt is tot de accidentele milieuschade'). See Van Schoubroeck 'Aansprakelijkheidsverzekering' 10 para 1.2.1.

also provide cover for gradual loss that is not caused by a sudden or accidental event or occurrence.[179]

One should further distinguish between the duration of the liability insurance contract as provided for by the period of insurance, and the duration of liability cover in terms of that contract.[180] As far as the duration of the contract is concerned, the period of insurance in a liability policy may, for instance, be one year, while the duration of liability cover may commence before the commencement of the liability policy and may even extend beyond the period of insurance.

Section 85(1) of the Insurance Act of 2014 (s 30(1) of the LIC Act) provides as follows as to the duration and termination of insurance contracts in general:

> 'De duur van de verzekeringsovereenkomst mag niet langer zijn dan één jaar'.[181]

In Belgian law, liability policies are issued for one year, but in any event are renewable.

As far as the duration or scope of the liability cover is concerned, there are three broad forms of liability policy in Belgium: 'act-committed'; 'loss-occurrence'; and 'claims-made'. In addition, some 'hybrid' liability policies – in the main, variations and combinations of 'occurrence-based' and 'claims-made' policies – have developed. It depends on the type of insurance cover whether acts or occurrences which take place, or whether claims that are made before, during, or after the currency of the contract (period of insurance) are covered. Many scenarios may arise.

The distinctions between the different types of policy, as far as the insured event and the duration of cover are concerned, are discussed further below.[182] Section

---

[179] An example of a sudden event or occurrence is a car accident or an explosion. An example of gradual loss that is not sudden is long-term seepage of oil into groundwater resources. The impact of gradual loss on insurance cover is explained by Van Schoubroeck 10 para 1.2.1 as 'schadegevallen of schadever-wekkende gebeurtenissen, waarmee worden bedoeld de niet-verwachte gebeurtenissen zonder de voorwaarde dat deze plots of abnomaal hoeven te zijn'.

[180] For further detail, see Van Schoubroeck 'Aansprakelijkheidsverzekering' 12-13 para 1.2.4 on the duration of liability contracts and 13-15 para 1.2.5.1 on the duration of liability cover. Also see Van Schoubroeck & Schoorens (1995) *Tijdschrift voor Belgisch Handelsrecht* 645-664 and Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 694-699.

[181] Freely translated: 'The duration of the liability insurance contract may not exceed one year'. (My translation.) See s 85(2) of the Insurance Act of 2014 (previously s 30(2) of the LIC Act), as discussed by Van Schoubroeck ibid 12-13 para 1.2.4 for exceptions to the general rule in s 85(1) of the Insurance Act of 2014 (previously s 30(1) of the LIC Act).

[182] For further detail and examples see paras 5.2.2.2(a)(i) and 5.2.2.2(b)(i) below on 'act-committed' policies; paras 5.2.2.2(a)(ii) and 5.2.2.2(b)(ii) below on 'loss-occurrence' policies; and paras 5.2.2.2(c)(i) and 5.2.2.2(c)(ii) below on 'claims-made' policies and hybrid policies.

142 of the Insurance Act of 2014 (s 78 of the LIC Act, as amended)[183] deals with the liability insurer's obligations and the termination of the contract; and is also explored further below.[184]

5.2.2.2(a) The Insured Event[185]

5.2.2.2(a)(i) Act-committed Policies

An act-committed liability policy, like all liability policies, contains an undertaking by the liability insurer to indemnify the insured against loss arising from a 'harmful event' ('schadeverwekkende gebeurtenis'). In the case of act-committed liability policies, however, the insured and relevant event is the occurrence of a harmful event, such as the insured's delict or breach of contract, within the period of the particular insurance contract. Under this type of liability insurance, it is generally irrelevant when the loss arising from the event occurred or became known; when the third party actually claimed against the insured;[186] or when the insured became liable to the third party.

The original version of section 78 of the LIC Act of 1992 provided as follows:[187]

> De verplichting van de verzekeraar strekt zich uit tot de vorderingen die na het einde van de overeenkomst worden ingediend, [188] *wanneer de schadeverwekkende gebeurtenis zich in de loop van de overeenkomst heeft voorgedaan*.[189]

---

[183] Apart from the heading 'Verplichtingen van de verzekeraar en het einde van de overeenkomst' added to s 142 of the Insurance Act of 2014, the content of the previous s 78 of the LIC Act, as amended, was not amended further in the 2014 Insurance Act.

[184] See the summative table on the insured event and the duration of liability cover in para 5.2.2.2(b)(iv) below.

[185] The different types of policy should not simply be equated to those with similar names under other legal systems, eg, in paras 3.2.2.2(a) and 4.2.2.2(a) above and para 6.2.2.2(a) below. Although the broad characteristics of these policies are the same in all legal systems, the content of the policies under Belgian law is influenced by s 142 of the Insurance Act of 2014 (previously s 78 of the LIC Act, as amended). The different types of policy are discussed in a slightly different order in this chapter than in Chapters 3, 4 and 6, owing to the structure of Belgian law.

[186] Fontaine *Verzekeringsrecht* (2 ed) para 691 states that, '[d]e meest beperkende oplossing bestond erin om slechts de tenlasteneming te aanvaarden van de schadegevallen waarvan de meest kenmerkende fasen, het "verwekkende feit" en de "eis" van de benadeelde, zich allebei gedurende de dekkingsperiode hadden voorgedaan …[m]aar soms werden uitbreidingen voorzien'. For further detail, see the extention of liability cover after the termination of the insurance agreement in para 5.2.2.2(b)(i) below.

[187] See Fontaine ibid 699.

[188] This refers to the insurer's liability to its insured after the termination of the insurance contract. See para 5.2.2.2(b)(i) below on the duration of liability cover for a discussion on the insurer's liability towards its insured beyond the period of insurance.

[189] Emphasis added. Freely translated: 'The obligation of the insurer extends to claims that are brought after the expiry of the liability insurance contract *if the harmful event occurred during the currency of the insurance contract*'. (My translation.) The phrase 'de in de overeenkomst beschreven

Initially the 'occurrence of a harmful event during the currency of an insurance contract' was the trigger to bring the matter within the scope of a particular period of cover designated in the liability insurance contract.[190] Before 1994, the LIC Act therefore provided for 'act-committed' liability policies in Belgium.[191]

5.2.2.2(a)(ii) Loss-occurrence Policies

A loss-occurrence liability policy contains an undertaking by the liability insurer to indemnify the insured against loss that occurs during the currency of the insurance contract. Under these policies, the insured and relevant event is the occurrence of the third party's loss during the period of a particular insurance contract. Under this type of liability insurance, too, it is generally irrelevant when the harmful event occurred; when the third party actually claimed against the insured; or when the insured became liable to the third party.

Section 78(1) of the LIC Act, as amended,[192] provided as follows:

> De verzekeringswaarborg slaat op de *schade voorgevallen tijdens de duur van de overeenkomst* en strekt zich uit tot vorderingen die na het einde van deze overeenkomst worden ingediend.[193]

This section has since been repealed and re-enacted as section 142(1) of the Insurance Act of 2014 without any amendment to its content.

The general rule under Belgian law at present is that liability insurance cover applies to loss that has occurred to the third party during the currency of the insurance

---

schadeverwekkende gebeurtenis' in the initial version of s 78 of the LIC Act originated from usage in policies. It was linked to the phrase 'de in de overeenkomst beschreven schadeverwekkende gebeurtenis' in the initial version of s 77 of the LIC Act, as regards the scope of liability insurance contracts,that aimed to indemnify the insured against harmful events provided for in the contract. See paras 5.2.2.1, 5.2.2.1(a)(i) and 5.2.2.2 above and Fontaine *Verzekeringsrecht* (2 ed) paras 681 and 699 for further detail. The insurer's liability to its insured after the end of the insurance contract is discussed under the duration of liability cover in para 5.2.2.2(b)(i) below.

[190] See para 5.2.2.2 above for the criticism, that they were contradictory raised, against the initial versions of ss 77 and 78 of the LIC Act.

[191] The initial version of s 78 of the LIC Act did not allow for any policy forms other than act-committed policies. Fontaine *Verzekeringsrecht* (2 ed) paras 696 and 697. The initial version of s 78 of the LIC Act was amended by s 9 of the Act of March 1994, *Belgian State Gazette* of 4 May 1994. See Fontaine ibid para 697 and para 5.2.2.2(a)(ii)ff below for further detail on the position in Belgian law after 1994.

[192] Also in line with s 77 of the LIC Act, as amended, s 78 of the LIC Act, as amended, no longer contained the contradiction for which it had previously been critised. See Fontaine ibid paras 681 and 699.

[193] Emphasis added. Freely translated: 'The insurance cover applies to *loss occurring during the term of the contract* and extends to claims brought after the expiry of the contract'. (My translation.) The insurer's liability to its insured after the end of the insurance contract is discussed under the duration of liability cover in para 5.2.2.2(b)(ii) below.

contract.[194] Section 142(1) of the Insurance Act of 2014 (s 78(1) of the LIC Act, as amended) no longer considers the occurrence of a harmful event during the period of an insurance contract as the trigger for determining whether a liability insurer must provide insurance cover, but now prescribes the occurrence of the third-party's loss within the insurance period as the trigger for insurance cover. The term 'voorvallen van de schade'[195] is not defined in section 141 of the Insurance Act of 2014 (s 78 of the LIC Act). [196] Most commentators on Belgian law accept the so-called 'manifestation-therory' ('manifestatietheorie'). [197] The term 'schadevoorval' is therefore considered to refer to the moment when the (third-party) loss has manifested[198] – ie, when the third-party became aware of its loss.[199]

Section 142(1) of the Insurance Act of 2014 (s 78(1) of the LIC Act, as amended) now provides for a loss-occurrence system which coincides with section 141 of the Insurance Act of 2014 (s 77 of the LIC Act, as amended).

5.2.2.2(a)(iii) Claims-made Policies and Hybrid Policies

In 'pure' claims-made policies, the liability insurer undertakes to indemnify the insured defendant for a third-party claim ('schadeloosstellingseis door benadeelde') that has been made to either the insured defendant or the latter's liability

[194] Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 696; Fontaine *Verzekeringsrecht* (2 ed) paras 698-699; and Meurs & Thiery 'Aansprakelijkheidsverzekering' 97-98 para 34. Section 142(2) of the Insurance Act of 2014 (previously s 78(2) of the LIC Act, as amended) contains exceptions where claims-made policies are possible under certain conditions. See Schuermans & Van Schoubroeck ibid para 697; Fontaine ibid paras 699-700; and Meurs & Thiery 'Aansprakelijkheids-verzekering' 98-100 para 35. See para 5.2.2.2(a)(iii) below on 'claims-made' policies and 'hybrid' policies.

[195] Or 'schadevoorval' in short; 'the occurrence of loss or damage'.

[196] Van Schoubroeck & Meurs (2012-2013) 35 *Rechtskundig Weekblad* 1388; Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 696; and Meurs & Thiery 'Aansprakelijk-heidsverzekering' 97 para 34.

[197] In keeping with American case law and legal doctrine, four possible theories or criteria to determine the time of (and content of the term) loss may be identified: Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) ibid. Apart of the 'manifestation-theory', the 'exposure-theory' ('blootstellingstheorie'); the 'injury-in-fact theory' ('criterium van het feitelijke schade'); and the 'multiple or continuous trigger theory' ('criterium van de meervoudige schade') exist. English law also recognises these theories. For further detail see para 4.2.2.2(b)(i) above.

[198] '[H]et zich manifesteren van de schade'. See Meurs & Thiery 'Aansprakelijkheidsverzekering' 97 para 34. Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 696 explain that, 'er is pas een schadevoorval wanneer de schade zich openbaart of manifesteert. Concreet is dit het moment waarop de benadeelde kennis heeft of kennis krijgt van de schade.'

[199] Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 696 and Meurs & Thiery 'Aansprakelijkheidsverzekering' 97-98 para 34. The manifestation theory has been accepted by judicial decisions, eg, Antwerpen, Court of Appeal ('CA') ['Hof van Beroep'], decision of 17 Oct 2012, as referred to by Meurs & Thiery ibid para 34 n 102.

insurer within the period of insurance.[200] In case of 'pure' claims-made policies, the insured and relevant event is the third party's claim during the currency of a particular insurance contract. Under this type of liability insurance, it is generally irrelevant when the harmful event occurred; when the loss occurred or became known; or when the insured became liable to the third party. After the amendment of the initial version of section 78 of the LIC Act in 1994,[201] section 78(2)(i) provided as follows:

> Voor de takken die deel uitmaken van de algemene burgerrechtelijke aansprakelijkheid, andere dan de burgerrechtelijke aansprakelijkheid inzake motorrijtuigen, die door de Koning worden bepaald, kunnen de partijen overeenkomen dat de verzekerings-waarborg alleen slaat op de *vorderingen die schriftelijk worden ingesteld tegen de verzekerde of de verzekeraar tijdens de duur van de overeenkomst voor schade voorgevallen tijdens diezelfde duur*.[202]

Section 78(2)(i) of the LIC Act, as amended, has since been repealed and re-enacted as section 142(2) of the Insurance Act of 2014 without further changes to its content.[203] This section may be regarded as an exception to the loss-occurrence system prescribed by section 142(1) of the Insurance Act of 2014 (s 78(1) of the LIC Act, as amended).[204] Subject to specified conditions, section 142(2) of the Insurance Act of 2014 (s 78(2) of the LIC Act, as amended) provides for a 'hybrid' type of claims-made policy[205] against general liability in private law. When liability insurance contracts are enlisted in the Royal Decree of December 1992, as amended,[206] parties

---

[200] Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 694.

[201] See para 5.2.2.2(a)(i) above for further detail.

[202] Emphasis added. Freely translated as: 'For classes of general civil liability, other than motor-vehicle liability, as determined by the King, the parties may agree that the insurance cover applies only to the *claims brought in writing against the insured or the insurer during the term of the contract for loss that occurred during the same period*'. (My translation.) The insurer's liability to its insured after the end of the insurance contract is discussed under the duration of liability cover in para 5.2.2.2(b)(iii) below.

[203] Section 142(2)(ii) of the Insurance Act of 2014 (previously s 78(2)(ii) of the LIC Act, as amended) is discussed in para 5.2.2.2(b)(iii) below.

[204] Fontaine *Verzekeringsrecht* (2 ed) para 699 discusses s 142(2) of the Insurance Act of 2014 (previously s 78(2) of the LIC Act) under 'Uitzonderingen'; Meurs & Thiery 'Aansprakelijk-heidsverzekering' 98 para 35 describe it under the heading 'Uitzonderingsregeling…'; and Van Schoubroeck & Meurs (2012-2013) 35 *Rechtskundig Weekblad* 1385 refer to that position as a 'uitzonderingsregime'.

[205] Due to the combination of elements from claims-made policies and loss-occurrence policies (and even the possibility of act-committed policies). See further explanation para 5.2.2.2(b)(iii). Also see paras 5.2.2.2(b) and 5.2.2.2(b)(iv) for futher detail on whether the provisions of s 142 of the Insurance Act of 2014 (previously s 78 of the LIC Act, as amended) are mandatory, or if the parties to the contract may agree on variations thereof by entering into other type of hybrid policies.

[206] Section 6*bis* of Royal Decree of 24 Dec 1992, 'tot uitvoering van de wet van 25 juni 1992 op de landverzekeringsovereenkomst', *Belgian State Gazette* of 31 Dec 1992, as amended by Royal Decree of 29 Dec 1994, *Belgian State Gazette* of 27 Jan 1995 (hereafter 'Royal Decree of Dec 1992, as amended'). The Legislature also determined that personal liability insurance ('BA privéleven') and personal liability insurance against fire ('BA brand') may not be offered under this exception. See Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 698.

to such liability insurance contracts, other than motor-vehicle liability insurance,[207] may agree to apply the system under section 142(2)(i) of the Insurance Act of 2014 (s 78(2)(i) of the LIC Act, as amended). However it is provided that third-party claims under section 142(2)(i) of the Insurance Act of 2014 (s 78(2)(i) of the LIC Act, as amended) should be brought in writing against the insured or the latter's liability insurer during the currency of the contract for loss suffered during the same period.

As explained above, in a pure claims-made policy the third-party claim should be made within the period of insurance. Under the 'hybrid' form of claims-made policies provided for under section 142(2)(i) of the Insurance Act of 2014 (s 78(2)(i) of the LIC Act, as amended), it is provided that the third-party claim should be made in writing within the period of insurance[208] and, in addition, that the third-party loss should have occurred within the period of insurance. In the case of this 'hybrid' form of claims-made policy, the insured (and relevant) events are a written third-party claim and occurrence of the loss, both of which events should take place within the period of insurance.[209] It is irrelevant when the harmful event occurred[210] or when the insured became liable to the third party.

5.2.2.2(b) The Duration of Liability Cover[211]

As explained earlier,[212] the materialisation of the risk[213] in liability insurance may start before the commencement of the insurance contract and continue beyond

---

[207] 'BA motorrijtuigen'.

[208] Save in as far as s 142(2)(ii) of the Insurance Act of 2014 (previously s 78(2)(ii) of the LIC Act, as amended) concerns the duration of liability cover and provides for the third-party claim to be instituted within an extended period of time after the expiry of the insurance contract. See para 5.2.2.2(b)(iii) below for further detail.

[209] Under s 142(2)(i) of the Insurance Act of 2014 (previously s 78(2)(i) of the LIC Act, as amended).

[210] However, see the reference to harmful events that may give rise to the occurrence of loss within the period of insurance, in s 142(2)(ii) bullet 2 of the Insurance Act of 2014 (previously s 78(2)(ii) bullet 2 of the LIC Act, as amended). See para 5.2.2.2(b)(iii) below for further detail.

[211] This topic is as important in Belgian law as in the other systems considered (in chapters 3 and 4) due to the legal challenges that it present: it therefore requires detailed analysis. Fontaine *Verzekeringsrecht* (2 ed) in para 689-690 comments that '[d]eze vraag [dekking in de tijd] maakt het voorwerp uit van een afzonderlijke afdeling omwille van haar heel bijzonder belang'. See paras 3.2.2.2(b) and 4.2.2.2(b) above for further detail on the duration of liability cover in the other chapters on South African and English law. Some repetition may occur in paras 5.2.2.2(a) and 5.2.2.2(b) for purpose of clarity in this rather technical discussion.

[212] See para 5.2..1(b) above.

[213] Cousy 'Over het "verzekerbaar risico"' 158 describes it as a composite risk and defines the term 'composiet risico' as 'een risico waarvan de realisatie het plaatsgrijpen veronderstelt van verschillende, niet in de tijd samevallende gebeurtenissen'. He explains the process in which the 'schadegeval' may evolve in liability insurance as folows: 'waar het schadegeval niet uit een enkele gebeurtenis, maar uit een opeenvolging van gebeurtenissen, uit een proces van opeenvolgende feiten (schadeverwekkende

the period of insurance. The gradual materialisation of the risk in liability insurance not only creates uncertainty in determining the precise moment of the materialisation of the insured event,[214] but also creates legal challenges regarding the extended duration of liability cover[215] beyond the period of insurance ('uitgebreidheid [uitgestrektheid] van de dekking in de tijd').

Van Schoubroeck illustrates the uncertainty that may arise as to the duration of liability cover with reference to the following example. Say that there is a liability policy in place with insurer X when a vehicle leaves the factory after manufacture. Z purchases the vehicle and takes out liability cover with a different insurer, Y. Z has an accident and a manufacturing default with the brakes is discovered by an expert. Is X or Y liable?[216]

The type of liability policy(ies) involved determines both which policy applies and the duration of liability cover. The terms 'anterioriteitsrisico'[217] and 'posterioriteitsrisico'[218] are used for the discussion on the duration of liability cover.[219] 'Anterioriteitsrisico' refers to an insured's retrospective risk of liability for loss arising from events that occurred prior to the inception of the insurance contract.[220] 'Posterioriteitsrisico' refers to an insured's prospective risk if the third-party claim is instituted against it after the period of the insurance agreement for a

---

gebeurtenis, voorvallen van de schade, instellen van de vordering) bestaat, derwijze dat het risico erin bestaat dat deze verschillende niet in de samevallende feite, zich allemaal voordoen'. Ibid.

[214] See para 5.2.2.2 above.

[215] Cousy 'Over het "verzekerbaar risico"' 158 outlines some of the legal challenges resulting from composite risk specifically in the context of the loss-causing event and the duration of the policy and observes that the 'composiet karakter van het risico maakt het kern uit van heel wat delicate problemen zoals het (juiste tijdstip van het) plaatsgrijpen van het schadegeval, … en wellicht en vooral uitgestrektheid van de dekking in de tijd in de aansprakelijkheidsverzekering.' Fontaine *Verzekeringsrecht* (2 ed) paras 689-690 also emphasises the need to extend liability cover beyond the period of insurance to take account of the gradual materialisation of the insured event in liability insurance.

[216] Van Schoubroeck 'Aansprakelijkheidsverzekering' 13 para 1.2.5.1. For other (more complex) examples, see Van Schoubroeck & Meurs (2012-2013) 35 *Rechtskundig Weekblad* 1388-1389 and Van Schoubroeck & Schoorens (1995) *Tijdschrift voor Belgisch Handelsrecht* 650-652.

[217] Also known as 'inlooprisico'.

[218] Also known as 'uitlooprisico'.

[219] These terms should not simply be equated to similar terminology (or their translations) as used in other legal systems, eg, in paras 3.2.2.2(b) and 4.2.2.2(b) above. The Dutch terms are used here for legal certainty. The content of these terms under Belgian law is influenced by the different types of policy as provided for by s 142 of the Insurance Act of 2014 (previously s 78 of the LIC Act, as amended).

[220] Meurs & Thiery 'Aansprakelijkheidsverzekering' 96 para 33. Fontaine *Verzekeringsrecht* (2 ed) para 690 explains that the term 'anterioriteitsrisico' refers to the case where 'het verloop [van het schadegeval] reeds een aanvang heeft genomen op het ogenblik waarop het contract uitwerking krijgt, met name zo het "verwekkend feit" vooraf plaats gehad heeft'.

harmful event or loss that occurred during the currency of the insurance contract.[221] Questions arise as to whether an insured's liability insurer, or which of its liability insurers in the instance of successive liability policies, should provide liability cover for an insured's 'anterioriteits'- or 'posterioriteitsrisico'.

The duration of liability cover[222] under the different types of policy may now be explained on the basis of the 'anterioriteits-' or 'posterioriteitsrisico' created or covered by the respective policies.

5.2.2.2(b)(i) Act-committed Policies

As discussed earlier,[223] liability cover will be provided under act-committed policies if the harmful event ('schadeverwekkende gebeurtenis') occurred during the period of insurance.

Act-committed liability policies *do not provide retrospective cover against 'anterioriteitsrisico' for harmful events* (such as the insured's delict or breach of contract against the third party) which occurred *prior to the inception of a specific insurance policy* (and subsequent third-party loss that arises from such anterior harmful events).[224] However, these policies *provide prospective cover against 'posterioriteitsrisico' for claims instituted* by third parties against the insured (or for loss that manifests) *after the expiry of a specific insurance contract, provided that the harmful event on which the claim or loss is based occurred during the currency of the insurance contract*.

The initial version of section 78 of the LIC Act provided as follows:[225]

> *De verplichting van de verzekeraar strekt zich uit tot de vorderingen die na het einde van de overeenkomst worden ingediend,*[226] wanneer de schadeverwekkende gebeurtenis zich in de loop van de overeenkomst heeft voorgedaan.[227]

---

[221] Meurs & Thiery ibid. Fontaine ibid para 690 explains that the term 'posterioriteitsrisico' refers to the case where 'de "eis" van de benadeelde wordt gesteld na het einde van de overeenkomst'.
[222] See the distinction between the duration of cover and the duration of the liability insurance contract para 5.2.2.2 above.
[223] See para 5.2.2.2(a)(i) above.
[224] In the context of act-committed policies, Van Schoubroeck & Meurs (2012-2013) 35 *Rechtskundig Weekblad* 1385 describe 'anterioriteitsrisico' to refer to 'aansprakelijkheid voor schade die voortvloeit uit of veroorzaakt word door feiten die zich voordeden vóór het begin van de verzekerings-overeenkomst'. In act-committed policies there is not retrospective cover for such 'anteritioriteitsrisico's' – the first element of risk, being the harmful event, should occur during the period of insurance.
[225] Fontaine *Verzekeringsrecht* (2 ed) para 699.
[226] Emphasis added. This refers to the insurer's liability to its insured after the end of the insurance contract and is the focus of this discussion.
[227] Freely translated as: '*The obligation of the insurer extends to claims that are brought after the expiry of the liability insurance contract* if the harmful event occurred during the currency of the

Under the initial version of section 78 of the LIC Act, a harmful event that occurred within the period of the insurance contract brought the matter within the scope of a particular period of cover designated in the liability insurance contract. Further, the insurer's obligations extended beyond the expiry of the insurance contract, to the expiry of prescription periods (of claims by the third party against the insured on the one hand; and of claims by the insured or third party against the liability insurer on the other).[228] Insurers were exposed to this so-called 'long-tail liability' in that claims may have been made by third parties on the insured and hence by the insured (or third parties directly) on the insurer, long after the expiry of the insurance contract and the occurrence of the harmful event.[229] Legal commentators regarded the initial version of section 78(1) of the LIC Act as *mandatory in so far as it related to the insurer's obligation to prospective cover against 'posterioriteits-risico'*.[230]

The scope of the initial version of section 78 of the LIC Act was considered too wide due to the insurer's potential long-tail liability. Professional liability, in particular, threatened to become uninsurable. As discussed earlier,[231] the initial version of section 78 of the LIC Act was fundamentally reviewed and replaced by a dual system.[232]

---

insurance contract'. (My translation.) See para 5.2.2.2(a)(i) above as regards the insured event in act-committed policies.

[228] For further detail on prescription, see para 5.2.2.1(d)(i) above and para 5.2.2.2(b)(iv) below.

[229] In the context of act-committed policies, Van Schoubroeck & Meurs (2012-2013) 35 *Rechtskundig Weekblad* 1384 describe 'posterioriteitsrisico' as follows: 'De aansprakelijkheidsverzekeraar kon bijgevolg gehouden zijn, binnen de regels van de verjaring, tot een zeer lange termijn van dekking voor eisen ingesteld na het einde van de verzekeringsovereenkomst, voor zover het schadeverwekkend feit zich in de duurtijd van deze overeenkomst had voorgedaan'.

[230] Van Schoubroeck & Meurs ibid 1385. Fontaine *Verzekeringsrecht* (2 ed) para 696 explains, as regards the mandatory cover of 'posterioriteitsrisico' in act-committed policies, that 'in zijn oorspronkelijke vorm sloot het artikel 78 bijgevolg elke afwijking uit'.

[231] See paras 5.2.2.2(a)(ii) and 5.2.2.2(a)(iii) above for further detail on the insured event in loss-occurrence policies and claims-made and hybrid policies.

[232] Namely, loss-occurrence policies as a general rule, and hybrid claims-made policies as the exception to it, under certain conditions. See paras 5.2.2.2(b)(ii) and 5.2.2.2(b)(iii) below on the duration of liability cover under loss-occurrence policies and hybrid claims-made policies respectively as prescribed by the s 78 of the LIC Act, as amended (now s 142 of the Insurance Act of 2014).

5.2.2.2(b)(ii) Loss-occurrence Policies

Liability cover will be triggered under loss-occurrence policies if the third-party loss occurred during the period of insurance. Loss-occurrence liability policies *generally offer retrospective cover against 'anterioriteitsrisico' as far as they may relate to harmful events that occurred before the inception of a particular insurance policy*.[233] These policies also *provide prospective cover against 'posterioriteitsrisico' for claims instituted by third parties against the insured after the expiry of a particular insurance contract*.[234] It is irrelevant whether the harmful event occurred before the inception insurance contract,[235] or whether the claim by the third party against the insured was instituted after the period of the insurance contract.

Section 78(1) of the LIC Act as amended, provided as follows:[236]

> De verzekeringswaarborg slaat op de schade voorgevallen tijdens de duur van de overeenkomst[237] en *strekt zich uit tot vorderingen die na het einde van deze overeenkomst worden ingediend*.[238]

Section 78(1) of the LIC Act, as amended, has since been repealed and re-enacted as section 142(1) of the Insurance Act of 2014 without further amendment to its content. Liability insurers must provide insurance cover under section 142(1) of the Insurance Act of 2014 (s 78(1) of the LIC Act, as amended) provided that the third-party loss occurred (ie, manifested)[239] within the period of the insurance contract.

Uncertainty existed as to whether the Legislature provided for retrospective cover for 'anterioriteitsrisico' under section 142(1) of the Insurance Act of 2014 (s

---

[233] Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 694.

[234] Fontaine *Verzekeringsrecht* (2 ed) para 692 explains that '[m]et betrekking tot het posterioriteitsrisico, spreekt men … van polissen op *occurrence basis* wanneer de dekking zich uitstrekt tot nadien ingestelde vorderingen, voor zover [de schade] ('the third-paraty loss') zich heeft voorgedaan in de loop van de overeenkomst'.

[235] As to retrospective cover for anterioriteitscover in loss-occurrence policies, Van Schoubroeck & Meurs (2012-2013) 35 *Rechtskundig Weekblad* 1387 contend that '[u]it de zuivere toepassing van dit system volgt dat de aansprakelijkheid is gedekt wanneer de schade voorvalt tijdens de duurtijd van de overeenkomst, met inbegrip van de schade die het gevolg is van feiten of handelingen die zich voor de inwerkingtreding van de overeenkomst hebben voorgedaan'.

[236] The initial version of s 78 of the LIC Act was replaced by a new version in 1994. See para 5.2.2.2 above.

[237] See para 5.2.2.2(a)(ii) above for further detail on the insured event in loss-occurrence policies.

[238] Emphasis added. Freely translated as: 'The insurance cover applies to loss occurring during the term of the contract and *extends to claims brought after the expiry of the contract*'. (My translation.) This refers to the insurer's liability towards its insured after the termination of the insurance contract and is the focus of the present discussion.

[239] On the manifestion of the loss, see para 5.2.2.2(a)(ii) above.

78(1) of the LIC Act) if the third-party loss occurred during the period of insurance, but the harmful event occurred before the inception of the insurance contract.[240] The Belgian Supreme Court has since decided that the Legislature *did not intend to prescribe retrospective cover for 'anteriterioriteitsrisico' mandatorily*.[241] For example, it is within the contractual freedom of the insured and the insurer to agree on whether or not liability for loss that arises due to harmful events that occurred prior to the inception of the insurance contract is covered under a particular insurance policy.[242]

Section 142(1) of the Insurance Act of 2014 (s 78(1) of the LIC Act, as amended) *provides for prospective liability cover for 'posterioriteitsrisico'*. The insurer's obligations *extend beyond the expiry of the insurance contract, until the end of prescription periods* of claims by the third party against the insured on the one hand; and of claims by the insured or third party against the liability insurer on the other hand.[243] Liability insurers are exposed to this so-called 'long-tail liability' in that claims may have been made by third parties against the insured, and hence by the insured (or by third parties directly) on the insurer, long after the expiry of the insurance contract and the occurrence of the third-party loss or harmful event.[244]

Loss-occurrence policies are the preferred type of liability insurance cover from the insured's point of view,[245] whereas claims-made policies[246] are preferred by insurers.[247]

---

[240] Fontaine *Verzekeringsrecht* (2 ed) para 699 and n 1606; Meurs & Thiery 'Aansprakelijkheids-verzekering' 97-98 para 34; Schuermans & Van Schouboeck *Belgische Verzekeringsrecht* (3 ed) para 695; and Van Schoubroeck & Meurs (2012-2013) 35 *Rechtskundig Weekblad* at 1385.

[241] See the decision by the Belgian Supreme Court, Cass, dated 28 Jun 2012, as discussed by Van Schoubroeck & Meurs (2012-2013) 35 *Rechtskundig Weekblad* at 1382-1384 and at 1386-1389; Schuermans & Van Schoubroeck ibid para 695; and Meurs & Thiery 'Aansprakelijkheidsverzekering' 98 para 34 n 103.

[242] Meurs & Thiery ibid. Van Schoubroeck & Meurs ibid 1388 caution that contractual limitation of retrospective cover for 'anterioriteitsrisico' may create gaps in the insurance cover. They provide that in successive policies, 'door het samenspel van een contractuele inperking van het inlooprisico en de toepasselijke regeling van het uitlooprisico er echter dreigt een verzekerde alsnog tussen wal en schip te belanden'. Meurs & Thiery 'Aansprakelijkheidsverzekering' 98 para 34 confirm that the insured may then be unable to claim cover under any of its insurance agreements. For an example see Van Schoubroeck & Meurs ibid.

[243] For further detail on prescription see para 5.2.2.1(d) above and para 5.2.2.2(b)(iv) below.

[244] Van Schoubroeck & Meurs (2012-2013) 35 *Rechtskundig Weekblad* 1385 and Fontaine *Verzekeringsrecht* (2 ed) para 694.

[245] Provided that under successive loss-occurrence policies each insurer provides cover for third-party loss that occurred while its contract was in force, irrespective the date of the third-party claim. See Fontaine *Verzekeringsrecht* (2 ed) para 695 who also refers to the disadvange of loss-occurrence policies to the insured, namely that where a third-party institutes a claim against an insured and the insured claims against an insurer for loss that occurred under a very old policy, the latter policy's limits

Legal doctrine holds that section 142(1) of the Insurance Act of 2014 (s 78(1) of the LIC Act, as amended) *covers prospective liability for 'posterioriteitsrisico' mandatorily*.[248] Parties to an insurance contract may deviate from mandatory provisions only in so far as the deviation is to the advantage of the party protected by the legislative provision.[249] The Belgian Supreme Court did not rule on which party was protected under the mandatory provisions of section 142 of the Insurance Act of 2014 (s 78 of the LIC Act, as amended), but the majority of commentators consider the provision to be to the benefit of the insured.[250] The prospective cover for 'posterioriteitsrisico' which the Legislature prescribes under section 142(1) of the Insurance Act of 2014 (s 78(1) of the LIC Act, as amended) is therefore to be regarded as the minimum cover that an insured may enjoy under a loss-occurrence policy.[251] Parties to the insurance agreement may derogate from the latter section to the extent that it benefits the insured or under the exception provided for in section 142(2) of the Insurance Act of 2014 (s 78(2) of the LIC Act).

5.2.2.2(b)(iii) Claims-made Policies and Hybrid Policies

As explained earlier,[252] in a 'pure' claims-made policy the third-party claim should be made within the period of insurance. There is, in principle, *unlimited retrospective cover for 'anterioriteitsrisico'* as it is irrelevant when the harmful event or third-party loss occurred.[253]

---

of cover will apply and may, due to inflation, not be sufficient to cover a claim at the present value of the third-party claim.

[246] See para 5.2.2.2(b)(iii) below for further detail on the duration of liability cover under claims-made liability policies.

[247] Fontaine *Verzekeringsrecht* (2ed) para 694 explains the problems that insurers encounter with 'posterioriteitsrisico' under loss-occurrence policies by referring to examples of claims for liability against environmental loss or damage, medical negligence, and product liability that may be instituted long after the occurrence of the harmful event that gave rise to the loss. It is challenging for insurers to provide prospective cover for 'posterioriteitsrisico' long after the expiry of their insurance conctracts. Fontaine ibid underlines the gravity of 'posterioriteitsrisico' by referring to reinsurers declining to cover risks where 'posterioriteitsrisico' has not been excluded.

[248] Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 699; Van Schoubroeck & Meurs (2012-2013) 35 *Rechtskundig Weekblad* 1386 and the decision by the Belgian Supreme Court, Cass, dated of 28 Jun 2012.

[249] Van Schoubroeck & Meurs ibid.

[250] Ibid.

[251] Ibid. The following deviations from the posterioriteit ('uitloopdekking') for prospective cover are accepted as valid, as they are regarded as favouring the insured: an act-committed policy with prospective cover until the claims have prescribed; or prospective cover beyond 3 years. See para 5.2.2.2(b)(iii) below for further detail.

[252] See para 5.2.2.2(a)(iii) above on the insured event in claims-made policies.

[253] Fontaine *Verzekeringsrecht* (2 ed) para 693 refers to the insured's extensive duty of disclosure to the liability insurer as one of the challenges of 'anterioriteitsrisico' and explains the duty as follows, 'de omstandigheden me[e] te delen die hij kent en die van aard zijn om tot het verwezenlijking van het

These policies usually *do not provide prospective cover against 'posterioriteitsrisico' for claims instituted by third parties against the insured after the expiry of a particular insurance contract*. Claims-made policies are therefore the preferred option from the insurer's point of view.[254]

Section 142(2)(i) of the Insurance Act of 2014 (s 78(2)(i) of the LIC Act, as amended) provides for 'hybrid claims-made policies' under certain circumstances, provided that the third-party claim is made in writing within the period of insurance. It is further required that the third-party loss occurred (manifested) within the period of insurance.[255] There is, in principle, *unlimited retrospective cover for 'anterioriteits-risico'* as it is irrelevant when the harmful event occurred.

A further deviation from 'pure' claims-made policies, may be found in section 142(2)(ii) of the Insurance Act of 2014 (s 78(2)(ii) of the LIC Act, as amended).[256] The so-called '*sunset clause' prescribes limited prospective cover for 'posterioriteits-risico'* ('beperkte nadekking')[257] for the 'hybrid' claims-made policies under section 142(2)(ii) of the Insurance Act of 2014 (s 78(2)(ii) of the LIC Act, as amended).

---

risico te leiden'. He further cautions that retrospective cover against 'anterioriteitsrisico' is not permitted if the risk has materialised in full, but is possible in liability insurance due to the evolving nature of the occurrence of loss, eg, the harmful event has taken place but the loss ('schadegeval') has not yet maifested.

[254] Fontaine *Verzekeringsrecht* (2 ed) para 694 and Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 694.

[255] Section 142(2)(ii) of the Insurance Act of 2014 (previously s 78(2)(ii) of the LIC Act, as amended) concerns the duration of liability cover and provides for the third-party claim to be instituted within an extended period after the termination of the insurance contract. See this para 5.2.2.2(b)(iii) below for further detail.

[256] Under 'pure' claims-made policies there is usually no prospective cover for 'posterioriteitsrisico'.

[257] Meurs & Thiery'Aansprakelijkheidsverzekering' 99 para 35 n 106 explain as follows: 'De mogelijkheid van de toepassing van het "claims-made"-systeem werd ingelast om tegemoet te komen aan bezorgdheden van verzekeraars inzake langtermijnaansprakelijkheid [under, eg, loss-occurrence policies], maar tevens is getracht om de verzekerde (en indirect ook benadeelden) te beschermen door het voorzien van een beperkte posterioriteitsdekking indien aan bepaalde voorwaarden voldaan is'. The incorporation of the possibility of hybrid claims-made policies under certain conditions may, therefore, be described as a compromise solution, taking into account the interests of the liability insurer and the insured defendant (and to a certain extent also those of the third-party plaintiff).

The 'sunset clause' provides:

> In dat geval worden ook in aanmerking genomen, op voorwaarde dat ze schriftelijk worden ingesteld tegen de verzekerde of de verzekeraar binnen zesendertig maanden te rekenen van het einde van de overeenkomst, de *vorderingen* tot vergoeding die betrekking hebben op:
>
> - *schade* die zich tijdens de duur van deze overeenkomst heeft voorgedaan indien bij het einde van deze overeenkomst het risico niet door een andere verzekeraar is gedekt;[258]
> - *daden of feiten die aanleiding kunnen geven tot schade*, die tijdens de duur van deze overeenkomst zijn voorgevallen en aan de verzekeraar zijn aangeven.[259]

Therefore, third-party claims brought against the insured or the insurer under 'hybrid' claims-made policies, in writing, and within 36 months of the expiry of the insurance contract, are also covered under the 'sunset clause' in the following instances:

- where the claims for compensation relate to third-party loss that has occurred during the currency of the contract, provided that on termination of the contract the risk is not covered by another insurer;[260] or
- where the claims for compensation relate to acts or facts (harmful events) that may give rise to third-party loss, where the acts or facts

[258] Section 142(2)(ii) bullet 1 of the Insurance Act of 2014 (previously s 78(2)(ii) bullet 1 of the LIC Act, as amended). Emphasis added.

[259] Section 142(2)(ii) bullet 2 of the Insurance Act of 2014 (previously s 78(2)(ii) bullet 2 of the LIC Act, as amended). Emphasis added. Section 142(2)(ii) may be as: 'Third-party *claims* brought against the insured or the insurer in writing, and within 36 months after expiry of the contract, are also covered subject to the following conditions: where the claims for compensation relate to third-party *loss* that has occurred during the contract provided that, upon termination of the contract, the risk is not covered by another insurer; or where the claims for compensation relate to *acts or facts that may give rise to third-party loss*, which acts or facts occurred during the currency of the contract and were reported to the insurer within that period'.

[260] There was uncertainty as to the exact interpretation of this clause (ie, s 142(2)(ii) bullet 1 of the Insurance Act of 2014 previously s 78(2)(ii) bullet 1 of the LIC Act, as amended). See Meurs & Thiery 'Aansprakelijkheidsverzekering' 99-100 para 35; and Van Schoubroeck (2015) 10 *Tijdschrift voor Belgisch Handelsrecht* para 2. The decision by the Belgian Supreme Court, Cass, dated 16 Jan 2015, discussed by Meurs & Thiery 'Aansprakelijkheidsverzekering' 100 para 35 n 110 and Van Schoubroeck 'Risico & schadegeval' passim, interpreted this sub-section. The court held that, 'de verplichte dekking gedurende de termijn van 36 maanden na het einde van de verzekeringsovereenkomst geldt, tenzij een andere verzekeraar het schadegeval dekt'. In the case of two successive insurance policies that may provide cover under s 142(2)(ii) bullet 1 of the Insurance Act of 2014 (previously s 78(2)(ii) bullet 1 of the LIC Act, as amended), the first insurer will be relieved of liability only when the successive insurer in fact provides cover. Meurs & Thiery 'Aansprakelijkheidsverzekering' 100 para 35 explain that, '[h]ieruit kan worden afgeleid dat … de eerste verzekeraar maar zal zijn vrijgesteld van dekking, wanneer de tweede verzekeraar effectief dekking verleent voor het *schadegeval* (d.w.z hij verleent dekking *in concreto* voor het risico)' and '[h]et volstaat niet dat de tweede verzekeraar het risico *in abstracto* dekt'.

occurred during the currency of the contract and have been reported to the insurer within that period.[261]

The Belgian Supreme Court has decided that the Legislature *did not intend to prescribe mandatory retrospective cover for 'anterioriteitsrisico'*.[262] As far as section 142(2) of the Insurance Act of 2014 (s 78(2) of the LIC Act, as amended) is concerned, parties to an insurance contract may exclude retrospective cover for 'anterioriteitsrisico' by providing that the insurer will not cover claims for third-party loss that occurred during the period of insurance, if the harmful events that caused the loss occurred prior to the inception of the insurance contract.[263] The *prospective cover for 'posterioriteitsrisico'* which the Legislature provides for under section 142(2)(ii) of the Insurance Act of 2014 (s 78(2)(ii) of the LIC Act, as amended) *is mandatory*. Parties to the insurance agreement may derogate from the latter section only in so far as it is to the benefit of the insured – eg, prospective cover for 'posterioriteitsrisico' beyond three years.[264]

[261] Section 142(2)(ii) bullet 2 of the Insurance Act of 2014 (previously s 78(2)(ii) bullet 2 of the LIC Act, as amended).

[262] The decision by the Belgian Supreme Court, Cass, dated 28 Jun of 2012, as discussed by Van Schoubroeck (2015) 10 *Tijdschrift voor Belgisch Handelsrecht* para 1. However, it is an inherent feature of claims-made policies (and also of hybrid forms) that the retrospective risk for 'anterioriteitsrisico' is covered.

[263] Van Schoubroeck ibid para 2. This may amount to an indirect restriction on the application of the 'sunset clause'.

[264] Van Schoubroeck & Meurs (2012-2013) 35 *Rechtskundig Weekblad* 1386. Some commentators are of the view that the prospective cover of 'posterioriteitsrisico' for 36 months after the end of the insurance agreement under the 'sunset clause' may be too short due to different meanings ascribed to term 'loss' ('schadegeval'). See Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 699.

5.2.2.2(b)(iv) Prescription of Claims Applied to Section 142 of the Insurance Act of 2014[265]

Summative table on the insured event and duration of liability cover under Belgian law[266]

Type of Policy	**Insured Event**	**Duration of Liability Cover**	**Mandatory or Not?**
Loss-occurrence policy (s 142(1) of the Insurance Act of 2014; previously s 78(1) of the LIC Act, as amended)	Third-party loss should occur (manifest) within period of insurance	a) Retrospective cover against 'anterioriteitsrisico' exists b) Prospective cover against 'posterioriteitsrisico' exists	a) No mandatory cover; may be derogated from by the contracting parties b)Yes, mandatorily covered. But may be derogated from by the parties only if to the benefit of the insured
Hybrid claims-made policy (s 142(2) of the Insurance Act of 2014; previously s 78(2) of the LIC Act, as amended)	Third-party loss should occur (manifest) within period of insurance and a written third-party claim should be instituted against the insured or its liability insurer within the period of insurance	a) Retrospective cover against 'anterioriteitsrisico' exists b) Limited prospective cover against 'posterioriteitsrisico' exists under 'sunset clause'	a) No mandatory cover; may be derogated from by the contracting parties b) Yes, mandatorily covered. But may be derogated from by the parties if to the benefit of the insured.

Commentators are of view that the prospective cover of 'posterioriteitsrisico' under section 142 of the Insurance Act of 2014 (s 78 of the LIC Act, as amended) has not affected (or nullified) the prescription of claims in liability insurance. Despite some similarities, the duration of liability cover and the prescription of claims are different distinct phenomena.[267]

[265] Previously s 78 of the LIC Act. See Schuermans & Van Schoubroeck ibid para 1165 and Jocqué (2006) 354 *Tijdschrift voor Verzekeringen* paras 75-76.

[266] Despite the profound changes to ss 77-78 of the LIC Act, as amended (now ss 141-142 of the Insurance Act of 2014), the sections are still subject to criticism, as explained in para 5.2.2.2 above and Schuermans & Van Schoubroeck ibid para 699.

[267] Jocqué (2006) 354 *Tijdschrift voor Verzekeringen* para 76 explains that, 'de duur van de waarborg en de verjaring zijn twee verschillende fenomenen die beide verband houden met de tijdsdimensie van

While the duration of liability cover involves whether the insured event brings the claim, occurrence, or harmful event within the scope of a particular liability insurance contract,[268] prescription of claims involves whether a potential claim, for example, by the insured or the third-party plaintiff against the liability insurer, has prescribed and can no longer be instituted.[269]

5.2.2.3 Exceptions to, Exclusions from, and Limitations on Liability Cover

Some of the more important exceptions to, exclusions from, and limitations on the liability cover in liability insurance policies are now explored. However, the discussion does not aim to provide an exhaustive analysis of all possibilities.

5.2.2.3(a) The Sum Insured, Aggregations, and Event Limits[270]

The sum insured may generally be agreed upon between the parties to the liability insurance contract. However, the indemnity principle applies and the indemnity by the liability insurer to the insured defendant may not exceed the loss the latter has suffered, even where the sum insured is greater.[271]

It is important to distinguish between the insured defendant's limited and unlimited liability ('onbeperkte en beperkte aansprakelijkheid') towards the third-party plaintiff, and the possible effect it may have on the extent of cover under the liability insurance contract.

An insured defendant's liability towards a third-party plaintiff may, in principle, be unlimited as may the cover under the liability policy.[272] There is no capped insured sum in such an instance and the insurer should indemnify the insured up to the full amount of the third-party loss. Motor-vehicle liability insurance for bodily harm or

---

de waarborg van de aansprakelijkheidsverzekeraar'. Schuermans & Van Schoubroeck ibid para 1165 opine that: 'De duur van de verzekeringswaarborg en de verjaring van vorderingen zijn fenomenen die zich op eenzelfde tijdsas kunnen aftekenen en uiteraard kunnen overlappen. Het zijn echter twee verschillende fenomenen. De duur van de verzekeringswaarborg heeft te maken met de omvang van de dekking in de tijd en de verjaring heeft te maken met het instellen van vorderingen en aanspraken'.

[268] See paras 5.2.2.2 and 5.2.2.2(b)(i)-5.2.2.2(b)(iii) above. The question here is whether there is liability under a specific insurance policy although the insured event may fall outside the period of insurance.

[269] See para 5.2.2.1(d) above. The question here is whether a claim under a policy has become extinguished due to time lapse under statutory periods of prescription.

[270] In writing this section, the following works on the Belgian insurance law were consulted: Fontaine *Verzekeringsrecht* (2 ed) paras 675-677; Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 700-710; and Van Schoubroeck 'Aansprakelijkheidsverzekering' 11-12 para 1.2.3.

[271] Sections 91 and 105 of the Insurance Act of 2014 (previously ss 37 and 51 of the LIC Act) on indemnity insurance. Also see Van Schoubroeck 'Aansprakelijkheidsverzekering' 18 para 1.3.1.

[272] See, eg, the liability under articles 1382-1386 of the Civil Code.

physical injuries ('verzekering BA motorrijtuigen voor lichamelijke letsels') is the only mandatory unlimited cover under Belgian law.[273]

However, the majority of liability policies limit the cover to be provided by the liability insurer by way of the sum insured.[274] As regards the sum insured and the limits of indemnity, there may be an event limit, that is, a limit which applies to each accident, each occurrence or each claim by the insured, with no maximum. Alternatively, the liability policy may have a maximum limit applicable to a specific period of insurance, regardless of the number of claims made against the liability insurer. The use of aggregations – eg, sum insured per period of insurance ('verzekerd bedrag per verzekeringsjaar'), or per harmful event ('per schadeverwekkend feit'), or combinations of the two – is a further way of limiting the extent of the insurer's liability under its liability policies.[275] As discussed earlier,[276] 'schadegeval' is the materialisation of the risk that may occur gradually over an extended period in liability insurance. However, successive identical or similar losses which arise from the same cause/insured event, may occur within the same period of insurance. Liability insurers use aggregation clauses of successive losses (clauses of serial loss or cumulative clauses; 'globalisatieclausules') in policies to treat successive losses as a single loss so as to limit the insurer's liability.[277]

An insured defendant's liability to a third-party plaintiff is in some instances limited by statute. For example, the liability of a hotelkeeper to a guest is limited by statute to one hundred times the price of an overnight stay.[278] Where the insured defendant's liability has been limited in this way, the sum insured under the liability policy cannot exceed the statutory limitation[279] – even if the policy provides for further limitation as discussed above.

---

[273] Section 3(2) of Act of 1989 on Motor-Vehicle Liability Insurance; Fontaine *Verzekeringsrecht* (2 ed) para 676; and Van Schoubroeck ibid 11-12 para 1.2.3.
[274] Fontaine ibid para 676.
[275] See para 5.2.2.2(b) above on the duration of liability cover in liability policies.
[276] See para 5.2.2.1 above.
[277] Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 701 explain that aggregation of successive losses has a contractual basis; ambiguity may be settled by judicial interpretation; and aggregation of successive losses and are often used in conjunction with other aggregations.
[278] Article 1952 of the Civil Code and Fontaine *Verzekeringsrecht* (2 ed) para 675.
[279] This is an application of the indemnity principle.

Many liability policies purport to distinguish between the sum insured for material loss and the sum insured for death or physical injury. There are different insured sums for these categories.

Two mandatory statutory rules are also important in the limitation of the sum insured to protect the insured's estate against liability claims.

First, the sum insured must be at least equivalent to the minimum amount prescribed for (compulsory) insurance against particular liability risks in specific legislation. For example, the sums insured for physical injury and material loss are determined for private liability insurance on a building that is insured under a fire insurance policy against so-called 'simple risks' ('verzekering burgerrechtelijke aansprakelijkheid gebouw die wordt verzekerd in een brandpolis eenvoudige risico's').[280]

Secondly, the sum insured as set out in the liability policy is no longer the absolute limit of the amount of the insurer's liability. Section 146 of the Insurance Act of 2014 (s 82 of the LIC Act) deals with the payment of the principal sum, interest, and costs by the liability insurer:[281]

> De verzekeraar betaalt de hoofdsom verschuldigde schadevergoeding ten belope van de dekking.
> De verzekeraar betaalt, zelfs boven de dekkingsgrenzen, de interest op de in hoofdsom verschuldigde schadevergoeding. …[282]
> Voor de aansprakelijkheidsverzekeringen, andere dan die bedoeld in de wet van 21 november 1989 betreffende de verplichte aansprakelijkheidsverzekering inzake motorrijtuigen, kan de Koning de intresten [en kosten ...] van dit artikel beperken.[283]

[280] Van Schoubroeck 'Aansprakeljkheidsverzekering' 10 para 1.2.3.

[281] In writing this section, the following general works on the Belgian insurance law were consulted: Fontaine *Verzekeringsrecht* (2 ed) paras 723-727; Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 708-710; and Van Schoubroeck 'Aansprakelijkheidsverzekering' 11-12 para 1.2.3 and 25 para 1.3.4.2. For further detail, see Cousy 'De waarborg in de (professionele) aansprakelijk-heidsverzekering' 64-67.

[282] See ss 146(3) and 146(4) of the Insurance Act of 2014 (previously ss 82(3) and 82(4) of the LIC Act) and para 5.3.1.1(d) below as to the payment of the defence costs by the liability insurer.

[283] Freely translated: 'The insurer shall pay the principal sum due, up to the sum insured. The insurer shall pay any interest due on the principal sum even where this exceeds the sum insured. … With regard to liability insurance other than motor-vehicle liability insurance regulated by the Act of 1989 on Motor-Vehicle Liability Insurance, the interest [and costs] referred to in the previous two paragraphs can be limited by Royal Decree.' (My translation.) Section 82(4) of the LIC Act was inserted in s 82 by s 10 of the Act of 16 March 1994, *Belgian State Gazette* of 4 May 1994, and provides for limitation of the payment of interest (and costs) by the liability insurer. It has since been repealed and re-enacted as s 146(4) of the Insurance Act of 2014.

Previously, the liability insurer was only liable to pay interest on the principal sum in so far as that amount plus interest did not exceed the limit of the cover (the sum insured) under the liability policy. Since the coming into force of the LIC Act, and now also under the 2014 Insurance Act, a liability insurer is liable to pay the damages due by the insured to the third-party plaintiff as follows: the principal sum up to the sum insured; and, in addition, interest due on the principal sum, even if this exceeds the sum insured in the liability policy.[284] This amendment was adopted to protect both the insured defendant and the third-party plaintiff, as a liability dispute may take an inordinate time to be resolved and as the defence of the liability insured is generally largely in the hands of its liability insurer.

However, the liability insurer's obligation to pay the interest (and costs)[285] due on the principal amount, even in excess of the sum insured in the liability policy, is not unlimited:

- The liability insurer is liable to pay the interest in the same proportion that it is liable to pay the principal sum due. [286]
- Further, with regard to liability insurance, other than motor-vehicle liability insurance regulated by the Act of 1989 on Motor-Vehicle Liability Insurance, the Royal Decree of Dec 1992, as amended, provides for the contractual limitation of the interest and costs referred to in section 146(4) of the Insurance Act of 2014 (s 82(4) of the LIC Act).[287]

---

[284] Sections 146-148 of the Insurance Act of 2014 (previously ss 82-84 of the LIC Act) deal with payment to the third-party plaintiff by the liability insurer, whereas s 149 of the Insurance Act of 2014 (previously s 85 of the LIC Act) deals with payment to the third-party plaintiff by the insured defendant. See paras 5.3.1.1, 5.3.1.2, and 5.3.2 below.

[285] See para 5.3.1.1(d) below on the payment of the defence costs by the liability insurer.

[286] For example, say that the insured defendant's liability to pay the third-party plaintiff is €2 million as principal sum and € 800 000 towards interest, and the limit of cover under the liability policy is €1 million, then the liabililty insurer will be liable for payment of €1 million towards the principal sum and €400 000 towards the interest. See Fontaine *Verzekeringsrecht* (2 ed) para 726.

[287] Section 6*ter* provides: 'De in artikel 82 van de wet bedoelde intresten en kosten worden integraal door de verzekeraar gedragen, voor zover het geheel van de schadeloosstelling en de intresten en kosten per verzekeringsnemer en per schadegeval het verzekerde totaalbedrag niet overschrijdt'. Freely translated: 'The interest and costs referred to in s 82 of the Act [now s 146 of the Insurance Act of 2014] are paid by the insurer in principle, in so far as the total amout of indemnity does not exceed the total sum insured'. (My translation.) In principle, the liability insurer therefore pays the interest (and costs) if it is within the total sum insured per insured event. The Royal Decree of Dec 1992, as amended, further provides for the contractual limitation of payment of the interest (and costs) by the liability insurer if those amounts exceed the total sum insured, in accordance with the statutory formula. See Fontaine *Verzekeringsrecht* (2 ed) para 730; Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 710; and Van Schoubroeck 12 para 1.2.3 and 25-26 para 1.3.4.2 for

5.2.2.3(b) Exclusions or Exceptions to Liability Cover for an Insured Defendant's Legal Liability towards Third-Party Plaintiffs

5.2.2.3(b)(i) Contractual Liability[288]

As discussed earlier,[289] the insured may be indemnified against amounts that it may be liable to pay to third parties in delict, contractually, for breach of contract, or statutorily, although indemnity against certain types of liability may be excluded expressly or by implication in the policy itself. Many liability policies cover only liability in delict and expressly exclude contractual liability. The parties to the contract may, in principle, negotiate freely whether delictual, contractual, particular statutory liabilities, or a combination of these, will be covered, at least while they have contractual freedom in the matter,[290] and where it is possible to exclude liability contractually.[291]

5.2.2.3(b)(ii) The Conduct of the Insured Defendant[292]

It has already been explained that only civil liabilities may be covered by a liability policy, and that no cover is permitted for criminal, moral, and disciplinary liabilities.[293]

Section 62 of the Insurance Act of 2014 (s 8 of the LIC Act) provides as follows as regards 'Fraud and fault' ('Bedrog en schuld'):[294]

> Niettegenstaande enig andersluidend beding, kan de verzekeraar niet verplicht worden dekking te geven aan hem die het schadegeval opzettelijk heeft veroorzaakt. De verzekeraar dekt de schade veroorzaakt door de schuld, zelfs de grove schuld,[295] van de verzekeringsnemer, van de verzekerde of van de begunstigde. De

---

further detail on the limitation of payment of interest (and costs) by the liability insurer. See also generally Colle *Algemene beginselen* (7 ed) 204-211 and Fontaine *Verzekeringsrecht* (3 ed) 600-611.

[288] In writing this section, the following general works on Belgian insurance law were consulted: Fontaine *Verzekeringsrecht* (2 ed) para 674; Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 693; and Van Schoubroeck 'Aansprakelijkheidsverzekering' 10 para 1.2.1.

[289] See para 5.2.2.1(a) above on the extent of covered liabilities.

[290] That is, where liability insurance is not compulsory by law.

[291] For example, delictual and contractual liability towards a passenger is compulsory under motor-vehicle liability insurance ('verzekering BA motorrijtuigen').

[292] In writing this section, the following general works on Belgian insurance law were consulted: Fontaine *Verzekeringsrecht* (2 ed) paras 97 and 363-380; Meurs & Thiery 'Aansprakelijkheids-verzekering' 74-79 paras 2-9; and Van Schoubroeck 'Aansprakelijkheidsverzekering' 10 para 1.2.1.

[293] See para 5.2.2.1(a) above on the extent of covered liabilities.

[294] For further detail on liability in delict generally, see Cousy & Droshout 'Fault under Belgian Law' 27-51; Cousy & Vanderspikken 'Causation under Belgian Law' 23-37; and Cousy & Vanderspikken 'Damages under Belgian Law' 27-51.

> verzekeraar kan zich echter van zijn verplichtingen bevrijden voor de gevallen van grove schuld [zware fout] die op uitdrukkelijke en beperkende wijze in de overeenkomst zijn bepaald.
> De Koning kan een beperkende lijst opstellen van feiten die niet als grove schuld aangemerkt mogen worden.[296]

The insurer is not entitled to provide cover to an insured defendant against its intentional causing of the loss. Neither the LIC Act, nor the Insurance Act of 2014, defines the meaning of a loss that has been caused 'intentionally'. However, a court has ruled that under section 8 of the LIC Act (s 62 of the Insurance Act of 2014) loss is caused intentionally if the insured defendant has caused the loss voluntarily and consciously; although the insured need not have intended to cause loss of the nature and to the extent which occurred.[297]

An agreement to cover intentional loss is void.[298] This, too, has been confirmed by a court which held that the burden of proof rests on the insurer to establish both that loss was caused intentionally, and that there is a causal link between the intention of the insured and the loss caused.[299]

---

[295] Also known as 'zware fout' and hereafter referred to as 'zware fout': see this para 5.2.2.3(b)(ii) below for further detail. Also see Fontaine *Verzekeringsrecht* (2 ed) paras 371-380.

[296] Freely translated as: 'Notwithstanding any agreement to the contrary, the insurer shall not be required to provide a benefit to any person who intentionally caused the insured event. The insurer may cover loss caused by other forms of fault, including serious misconduct ['zware fout'] by the policyholder, the insured, or the beneficiary. However, the insurer may be exempted from its obligations in cases of serious misconduct ['zware fout'] which have been expressly exempted and listed in detail in the liability insurance contract. The King may draw up an exhaustive list of acts which cannot be classified as serious misconduct ['zware fout']'. (My translation.)

[297] It has been decided that "'[e]en schadegeval is opzettelijk veroorzaakt, … wanneer de verzekerde vrijwillig en bewust schade heeft toegebracht; … is niet vereist dat de verzekerde de bedoeling had de schade te veroorzaken zoals zij zich heeft voorgedaan'". See decision by the Belgian Supreme Court, Cass, dated 24 Apr 2009, referred to by Fontaine *Verzekeringsrecht* (2 ed) para 366 and the decision by the Belgian Supreme Court, Cass, dated 26 Oct 2011, as referred to by Jocqué (2013) 286 *Nieuw Juridisch Weekblad* para I.A.4.5.

[298] See Fontaine ibid para 97 where he confirms, as regards s 8 of the LIC Act, that, 'het artikel 8 alinea 1 [s 8(i)], zijn van openbare orde, en niet louter van dwingende aard'. He further explains in para 369: 'De regel van artikel 8 alinea 1 [s 8(i)], is niet alleen van gebiedend recht, hij wordt ook beschouwd als zijnd[e] van openbare orde. Het is in deze zin dat de aanhef van de regel "niettegenstaande enig andersluidende beding" dient uitgelegd te worden … . Met andere woorden, de dekking van een opzettelijk schadegeval zou getroffen worden door de volstrekte nietigheid. Opzettelijke schadegevallen vallen trouwens in het algemeen onder de strafwet.' Fontaine's comments will also apply mutatis mutandi to s 62 of the Insurance Act of 2014. Also see for further detail, Fontaine *Verzekeringsrecht* (2 ed) paras 363-370; Van Schoubroeck 'Aansprakelijkheidsverzekering' 21 para 1.3.3.2; Jocqué (2013) 280 *Nieuw Juridisch Weekblad* 309-310; and Jocqué ibid 5-8; and Guiliams (2010-2011) 12 *Rechtskundig Weekblad* 474-485.See Weyts 'Opzettelijkke fout' 363-376 for an historical perspective.

[299] Decision by the Belgian Supreme Court, Cass, dated 7 Jun 2001, as referred to by Meurs & Thiery 'Aansprakelijkheidsverzekering' 77 para 6 n 14, where it was confirmed that article 1315(ii) of the Civil Code applies. The latter section provides that, "'hij die beweert bevrijd te zijn, het bewijs [moet] leveren van […] het feit dat het tenietgaan van zijn verbintenis heeft teweeggebracht'". Prior to this decision there was a difference in opinion as to whether loss caused intentionally by an insured was an

Loss caused by other forms of fault on the part of the insured defendant (including 'zware fout')[300] may be covered, save in so far as 'zware fout'[301] has been expressly exempted, and listed exhaustively (in detail) in the liability insurance contract. 'Zware fout' is defined in neither the LIC Act nor the 2014 Insurance Act.[302] The mere fact that 'zware fout' on the part of the insured caused the loss, is no longer an automatic prohibition on liability cover.[303] The insurer must, however, exempt the specific 'zware fout' expressly in the liability insurance policy,[304] and such an exemption is interpreted narrowly.[305] The Legislature may compile a list of acts which cannot be classified as 'zware fout', and that can, therefore, not be exempted.

---

exclusion ('uitsluiting') of liability or a forfeiture ('verval') of cover, with a different burden of proof. As a result of the decision, this distinction is no longer relevant in determining the burden of proof as regards intent. The Belgian Supreme Court, Cass, dated 14 May 2012, as referred to by Meurs & Thiery ibid 78 para 7 also confirmed that loss caused intentionally by the insured qualifies as 'een verval van dekking' under s 87(2) of the LIC Act (now s 151(2) of the 2014 Insurance Act). See paras 5.2.2.4 (on forfeiture of insurance cover) and 5.2.3.1 below (on the liability insurer's right to the defences that the liability insurer may raise or not raise against the third-party plaintiff) for further detail.

[300] The Dutch term 'zware fout' is used for clarity. From the Belgian literature reviewed it is not clear whether the term 'zware fout' should be translated as recklessness, gross negligence, or should bear a different meaning. Dutch 'zware fout' involves an objective and a subjective element. Jocqué '*De verzekerde en de benadeelde*' 407-408 refers to judicial decisions and legal doctrine and explains that, 'de grove fout [zware fout] enerzijds bestaat uit een objectief element, met name de risicoverzwaring buiten de normale vooruitzichten van de verzekeraar, en anderzijds uit een subjectief element, het bewustzijn van de verzekerde of het zich moeten bewust zijn van deze risicoverzwaring'. He proceeds (ibid 408) to explain the objective element as follows: 'Het objectieve element houdt verband met het evenwicht tussen de prestaties van de contractpartijen, en meer bepaald met de toename van de kans dat het risico zich voordoet door het gedrag van de verzekerde en dit buiten de voorzieningen van de verzekeraar'. He then describes the subjective element as follows: 'Het subjectieve element houdt in dat de verzekerde de gevolgen van zijn daad weliswaar niet heeft gewild maar dat zijn onachtzaamheid van die aard is dat hij wist of had moeten weten dat hierdoor een risicoverzwaring ontstond buiten de normale vooruitzichten van de verzekeraar'.

[301] Commentators appear to differ on whether other forms of fault on the part of the insured, eg 'lichte fout', may also be exempted by the liability insurer. Fontaine *Verzekeringsrecht* (2 ed) para 379.

[302] For further detail on the meaning of the term and its objective and subjective elements required under previous legislation, see Fredericq & Fredericq 382-383; Fredericq, Cousy & Rogge (1981) 18 *Tijdschrift voor Privaatrecht* paras 27-31 (note that these sources predate the LIC Act).

[303] Prior to the coming into force of the LIC Act, loss caused by the 'zware fout' of the insured was also excluded from insurance cover in the same way as loss caused intentionally by the insured and that there was no need for the loss to be expressly exempted and to be listed exhaustively.

[304] The majority of commentators appear to agree that the previous definition of 'zware fout' (consisting of of an objective and a subjective element) is no longer relevant. Meurs & Thiery 'Aansprakelijkheids-verzekering' 76 para 4 argue that 'het volstaat dat wordt nagegaan of het feit waarop de verzekeraar zich beroept, overeenstemt met een geval dat is opgenomen in de polisvoorwaarden'. It is merely necessary to confirm whether the particular 'zware fout' has been exempted in the insurance policy expressly.

[305]General exclusions such as the following are not acceptable for purposes of exempting the insurer's liability for 'zware fout': serious breaches of safety regulations ('ernstige inbreuken op de veiligheidsvoorschriften'; gross shortcomings in relation to the rules of the art or trade ('grove tekortkomingen t.a.v de regels van de kunst'); taking unreasonable risks to speed up tasks or to save operating costs ('het nemen van onredelijke risico's om de werken te bespoedigen of om werkingskosten uit te sparen'); and neglecting the basic precautionary measures to prevent normally expected loss or its repetition ('veronachtzamen van de elementaire voorzorgsmaatregelen om normaal

The burden of proof again rests on the insurer to prove that the 'zware fout' was exempted as alleged and that there is a causal link between the insured's 'zware fout' and the loss caused.[306]

It is said that intent and 'zware fout' have a personal character: an insurer's liability can only be excluded as regards the person (eg, an insured, a policyholder, or a beneficiary) who actually caused the loss intentionally or by way of 'zware fout'.[307] For example, where the parents of a minor are vicariously liable to third parties for loss that the minor caused intentionally or by 'zware fout', the insurer may be liable towards the parents for their vicarious liability, even though the insurer's liability may, in principle, be excluded as regards the minor wrongdoer.

5.2.2.4 The Insured Defendant's Duties towards the Liability Insurer[308]

Under a liability insurance contract, the insured has similar duties towards the liability insurer as those under other types of insurance contract.

---

te verwachten schade of herhaling ervan te voorkomen'). See Meurs & Thiey 'Aansprakelijkheidsverzekering' 80 para 11 n 30. To be exempted from cover, 'zware fout' must be listed expressly and exhaustively (in specific detail), eg, that 'zware fout will be covered except in case of an accident that occurred while the insured was under the influence of drugs'.

[306] Decision by the Belgian Supreme Court, Cass, dated 12 Oct 2007, as referred to by Meurs & Thiey ibid 78 para 6 n 17. Section 65 of the Insurance Act of 2014 (previously s 11 of the LIC Act) deals with forfeiture or partial forfeiture of an insured's right to performance by the insurer due to the non-fulfilment of a contractual obligation by the insured itself ('geheel of gedeelteljik verval van het recht op verzekeringsprestasie'). The burden of proof is on the insurer to establish a causal link between the non-fulfilment of the contractual obligation in the forfeiture clause and the occurrence of the loss. An example of such a forfeiture clause in a liability insurance policy is that the insurer will not be liable in the event that an insured fails to comply with preventative measures expressly stipulated in the liability insurance policy (eg, provision of a fire extinguisher). See Meurs & Thiery ibid 81-83 paras 12-14 for further detail.

[307] Decisions by the Belgian Supreme Court, Cass, dated 25 Mar 2003 and 4 Jun 2012, as referred to by Jocqué (2013) 286 *Nieuw Juridisch Weekblad* para I.A.4.5. For further detail, see Meurs & Thiery ibid 79-80 para 8-9; Fontaine *Verzekeringsrecht* (2 ed) paras 367 and 370; and Van Schoubroeck 'Aansprakelijk-heidsverzekering' 21 para 1.3.3.2.

[308] In writing this section, the following general works on Belgian insurance law were consulted: Van Schoubroeck ibid 15-18 para 1.3.1. For further detail, see Fontaine ibid paras 683 and 686; para 5.2.2.1(a) above; and Van Schoubroeck ibid 18-19 para 1.3.2 for further detail on the rights of the insured defendant against the liability insurer, see again para 5.2.2.1(a) above; and Van Schoubroeck in para 1.3.2 at 18-19. The liability insurer's rights include: the conduct of the defence (see para 5.3 below); the right of subrogation against a responsible third party (see para 5.2.3.2 below); and the right of recourse against the policyholder or the insured (see para 5.3.1.1(c) below). Also see Van Schoubroeck ibid 26-29 para 1.3.5.

For example, the insured has an obligation to:

- give notice of the insured event ('melding [aangifte] van het schadegeval');[309] and
- take all reasonable measures to prevent and mitigate the consequences of the loss ('redelijke maatregelen nemen om de gevolgen van het schadegeval te voorkomen en te beperken').[310]

If the insured defendant fails to meet these obligations and its failure leads to any loss for the liability insurer, the latter has a right to claim a reduction in the insurance payment (performance by the insurer) equivalent to the loss suffered.[311] The liability insurer may refuse to honour the policy if the insured acted with fraudulent intent in the non-fulfilment of these obligations.[312]

The chapter on liability insurance in the Insurance Act of 2014 (previously the LIC Act) sets out a number of duties peculiar to liability insurance which the insured must fulfil in dealings with the liability insurer.

The insured defendant:[313]

- must submit documents to the insurer as soon as it is notified, enters an appearance, or submits to an investigation ordered by court ('mededeling en overdracht stukken en verschijning voor de rechtbank'); [314]
- may not compensate, or promise to compensate, the third-party plaintiff without the consent of the liability insurer ('verbod de benadeelde te vergoeden of vergoeding toe te zeggen');[315] but may

[309] See s 74 of the Insurance Act of 2014 (previously s 19 of the LIC Act). The insured may, eg, have to give notice of the third-party claim or the third-party loss.
[310] See s 75 of the Insurance Act of 2014 (previously s 20 of the LIC Act) under the heading 'Verplichtingen van de verzekerde bij schadegeval', translated as 'Obligations at the time of the materialisation of the risk, or at the time of occurrence of the insured event' (my translation). As to the term 'schadegeval', see the explanation in para 5.2.2.1(b) above.
[311] Section 65 of the Insurance Act of 2014 (previously s 11 of the LIC Act) on the full or partial forfeiture of the right to an insurance benefit (performance by the insurer) may also be applicable.
[312] See s 76 of the Insurance Act of 2014 (previously s 21 of the LIC Act) under the heading 'Sancties' meaning 'Sanctions'.
[313] See para 5.3.1.1(d) below as part of the broader discussion of the conduct of the defence and settlement of claims by third-party plaintiffs against the insured by the insurer.
[314] See ss 145-146 of the Insurance Act of 2014 (previously ss 80-81 of the LIC Act) under the respective headings 'Overdracht van de stukken' and 'Niet-verschijning', translated as 'Transmission of documents' and 'Failure to enter appearance' (my translations).
[315] See s 149(1) of the Insurance Act of 2014 (previously s 85(1) of the LIC Act) under the heading 'Schadeloosstelling door de verzekerde' translated as 'Compensation by the insured' (my translation). The terminology 'compensation' (and not indemnification) by the insured defendant will be used. Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) par 716 explains that when an

admit the truth of a fact (even if in dispute)[316] and provide immediate financial assistance and medical care to the third-party plaintiff ('erkenning van feiten en verstrekking van eerste medische of geldelijke hulp'); [317] and

- may not admit liability ('geen erkenning van aansprakeljikheid') to the third-party plaintiff without the insurer's consent.[318]

These duties are of particular importance in liability insurance and are discussed below.[319]

5.2.3 The Legal Relationship between the Liability Insurer and the Third-Party Plaintiff[320]

The LIC Act, and now also the Insurance Act of 2014, have broadened the scope of protection for the third-party plaintiff.[321]

---

insured defendant compensates the third-party plaintiff, the liability insurer is not necessarily liable to the insured defendant to reimburse the payment. The insured defendant should prove that the liability cover is due and that the indemnity it paid towards the third party is in accordance with the loss (that the insured defendant) suffered.

[316] For example, the insured driver of a vehicle may acknowledge that it crossed the traffic light after it had turned red.

[317] See s 149(2) of the Insurance Act of 2014 (previously s 85(2) of the LIC Act).

[318] Van Schoubroeck ibid 17 para 1.3.1.5. The insured driver of a vehicle may, however, not acknowledge that it is liable for the accident after it crossed the traffic lightonce it has turned red. There is a fine distinction between the admission of a fact and the admission of liability. Although both traffic lights cannot be red simultaneously, the hypothesis that both vehicles in principle crossed the traffic light after it had turned red, should be open for investigation. Van Schoubroeck explains the position as follows: 'Zelfs wanneer de verzekerde de aansprakelijkheid zou erkend hebben, kan de verzekeraar dit niet tegen de benadeelde inroepen en op basis hiervan weigeren de benadeelde te vergoeden die tegen hem een rechtstreekse vordering instelde'. See para 5.2.3.1 below on the third-party plaintiff's right against the liability insurer and the defences that the liability insurer may (or may not) raise against the third-party plaintiff.

[319] See para 5.3.1.2 below for more detail on these duties in the context of the conduct of the defence and settlement of the claim.

[320] In writing this section, the following works on Belgian insurance law were consulted: Van Schoubroeck 'Aansprakelijkheidsverzekering' 11 para 1.2.2, 20-23 para 1.3.3.3, and 29-30 para 1.4.2; Schuermans & Van Schoubroeck paras 717-728; and Meurs & Thiery 'Aansprakelijkheidsverzekering' 87-96 paras 20-32. For further detail, see Fontaine *Verzekeringsrecht* (2 ed) paras 507-514, 688-689, 740-766; Cousy 'Pikante details' passim; and Jocqué '*De verzekerde en de benadeelde'* passim.

[321] For an historical background to the third parties' direct right against the liability insurer, see Fontaine ibid paras 740-745 and Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 718-722.

5.2.3.1 The Third-Party Plaintiff's Direct Right against the Liability Insurer to be Indemnified for its Loss and Related Matters[322]

Section 150 of the Insurance Act of 2014 (s 86 of the LIC Act) provides as follows in regard to a third-party plaintiff's direct right (or claim) to be indemnified for its loss against the liability insurer ('eigen recht van de benadeelde' or 'rechtstreekse vordering van de benadeelde'):

> De verzekering geeft de benadeelde een eigen recht tegen de verzekeraar.
> De door de verzekeraar verschuldigde schadevergoeding komt toe aan de benadeelde, met uitsluiting van de overige schuldeisers van de verzekerde.
> Indien er meer dan één benadeelde is en het totaal bedrag van de verschuldigde schadeloosstellingen de verzekerde som overschrijdt, worden de rechten van de benadeelden tegen de verzekeraar naar evenredigdheid verminderd ten belope van deze som. Niettemin blijft de verzekeraar die, onbekend met het bestaan van vorderingen van ander benadeelden, te goeder trouw aan een benadeelde een groter bedrag dan het aan deze toekomende deel heeft uitgekeerd, jegens die anderen slechts gehouden tot het beloop van het overblijvende gedeelte van de verzekerde som.[323]

Although the third-party plaintiff is not a party to the liability insurance contract between the insured defendant and the liability insurer, it may well have a direct right against the liability insurer. The third-party plaintiff has its own statutory right against the liability insurer,[324] but that right is limited to liability insurance subject to Part 4 of the Insurance Act of 2014 (previously the LIC Act).[325]

---

[322] Van Schoubroeck 'Aansprakelijkheidsverzekering' para 1.3.3.3 at 20-23 summarises the third-party plaintiff's rights against the liability insurer as follows: its direct right against the liability insurer to be indemnified for its loss; free disposal of damages paid by the liability insurer; to receive receipts of payment by the liability insurer; and rights and duties in regard to intervention of legal proceedings (see para 5.3.2 below in regard to the latter). The liability insurer's rights and duties towards the third-party plaintiff are discussed in conjunction with the former. Also see para 5.3.1 below.

[323] Freely translated: 'The insurance shall confer upon the the third-party plaintiff as victim, its own right or claim against the insurer. The indemnity payable by the insurer shall be appropriated to the third party, to the exclusion of other creditors of the insured. If there is more than one third party or victim and the total amount of indemnification payable exceeds the sum insured, the rights of the third parties against the insurer shall be reduced proportionately to the extent of this sum. Nevertheless, an insurer who is ignorant of the existence of claims by other third-party victims and who in good faith pays to one of the third parties a greater amount than its due share to one of the third parties, shall towards the other third parties, only be liable, to the other third parties for the remaining portion of the sum insured.' (My translation.)

[324] Fontaine *Verzekeringsrecht* (2 ed) explains as follows in para 744: 'De voor de benadeelde meest voordelige regeling bestaat inderdaad in *een rechtstreekse vordering* tegen de verzekeraar van de aansprakelijke. Het gaat dus er nu niet meer om hem een voorkeurrecht toe te kennen op die schadeloosstelling waarop de aansprakelijke kan aanspraak maken, maar aan het slachtoffer zelf een eigen recht tegen de verzekeraar toe te kennen.'

[325] See Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 727-728 for further details and a discussion of judicial decisions on the commencement of the third-party plaintiff's direct right against the liability insurer under s 86 of the LIC Act. Section 150 of the Insurance Act of 2014 has since replaced s 86 of the LIC Act. However, s 20(9) of the Act of 16 December of 1851,

Any third party who has suffered loss for which the insured is (allegedly) liable, has its own direct right against the insured's liability insurer, without prejudice to its claim against the insured defendant.[326] However, the indemnity principle applies and the indemnity by the liability insurer to the third-party plaintiff may not exceed the loss the latter has suffered.[327]

The third-party plaintiff's direct right against the liability insurer protects it against the insured defendant's inability to pay, but is not limited solely to the insolvency or sequestration of the insured.[328] The indemnity payable by the liability insurer to the third-party plaintiff will be paid as a preferential claim to the exclusion of other creditors of the insured.[329]

In the event that there is more than one third-party plaintiff and the total amount of indemnification due to them exceeds the sum insured, the rights of the third parties against the liability insurer are reduced proportionately to the extent of the insured sum. However, a liability insurer who is unaware of other third-party claims and which in good faith pays an amount greater than its due share of the sum insured to one of the third parties, is only liable to the other third parties for the remaining portion of the sum insured.[330]

The third-party plaintiff's direct right to claim against the (insured defendant's) liability insurer is subject to two limitations.[331]

'Hypotheekwet', *Belgian State Gazette* of 22 Dec of 1851, previously deleted, and then amended by s 13 of the Act of 16 Mar of 1994, *Belgian State Gazette* of 4 May 1994, applies to liability insurance under Part 5 of the Insurance Act of 2014 (ie, liability insurance that was not governed the LIC Act). It provides as follows: 'Voor de verzekeringsovereenkomsten waarop de wet van 25 juni 1992 op de landverzekerings-overeenkomst niet van toepassing is, zijn de uit een ongeval ontstane schuldvorderingen ten bate van door dat ongeval benadeelde derde of diens rechthebbenden, bevoorrecht op de vergoeding die de verzekeraar van de burgerrechtelijke aansprakelijkheid verschuldig is op grond van de verzekeringsovereenkomst. Geen betaling aan de verzekerde zal bevrijdend zijn, zolang de bevoorrechte schuldeisers niet schadeloos zijn gesteld.' See Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 723 for further detail.

[326] Van Schoubroeck 'Aansprakelijkheidsverzekering' 20 para 1.3.3.2.

[327] Sections 91 and 105 of the Insurance Act of 2014 (previously ss 37 and 51 of the LIC Act) concerning indemnity insurance. Also see Van Schoubroeck ibid para 1.3.3.1.

[328] Unlike in some of the other legal systems examined in this thesis. See paras 3.2.3 and 4.2.3 for the South African and the English legal positions.

[329] Van Schoubroeck 'Aansprakelijkheidsverzekering' 20 para 1.3.3.2 explains that the third-party plaintiff's direct claim is, 'zonder omweg via het vermogen van de verzekerde waarop ook andere schuldeisers aanspraak kunnen maken'. The third-party plaintiff's claim is, therefore, not subject to any rule of concurrence of creditors.

[330] See Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 728 for further detail.

[331] Van Schoubroeck *Recht voor de onderneming* 20-21 para 1.3.3.2.

First, the third-party plaintiff must institute its direct claim against the liability insurer before the claim prescribes. Section 88(2) of the Insurance Act of 2014 (s 34(2) of the LIC Act) provides a specific prescription period[332] within which the third-party plaintiff must institute its direct claim against the liability insurer:[333]

> Onder voorbehoud van bijzondere wettelijke bepalingen, verjaart de vordering die voortvloeit uit het eigen recht dat de benadeelde tegen de verzekeraar heeft krachtens artikel 150 [334] door verloop van vijf jaar, te rekenen vanaf het schadeverwekkend[335] feit of, indien er misdrijf is, vanaf de dag waarop dit is gepleegd.
> Indien de benadeelde evenwel bewijst dat hij pas op een later tijdstip kennis heeft gekregen van zijn recht tegen de verzekeraar, begint de termijn pas te lopen vanaf dat tijdstip, maar hij verstrijkt in elk geval na verloop van tien jaar, te rekenen vanaf het schadeverwekkend feit of, indien er misdrijft is, vanaf de dag waarop dit is gepleegd.[336]

Subject to special statutory provisions, a claim arising from the right of the third-party plaintiff against the liability insurer under section 150 of the Insurance Act of 2014[337] prescribes five years[338] after the event giving rise to the loss[339] or, where

---

[332] This prescription period is independent of the prescripton period of the third-party plaintiff's claim against the insured defendant itself. See Jocqué (2006) 354 *Tijdschrift voor Verzekeringen* 18. He explains the position as follows: 'De benadeelde [third-party plaintiff] bekomt door het eigen recht een vordering tegen de schuldenaar (verzekeraar) [the insured defendant's liability insurer] van zijn schuldenaar (aansprakelijke/verzekerde) [insured defendant] en bij gebreke aan een bijzondere wettelijke regeling zou hij zijn vordering tegen de onderschuldenaar [the insured defendant's liability insurer] niet meer kunnen uitoefenen wanneer zijn vordering tegen de schuldenaar [the insured defendant] verjaard is. De verjaring van de rechtstreekse vordering van de benadeelde lastens de aansprakelijkheidsverzekeraar [the insured defendant's liability insurer] is aldus onderworpen aan een ander regime dan de vordering van de benadeelde [third-party plaintiff] ten overstaan van de aansprakelijke verzekerde zelf [the insured defendant]. De eigen verjaringstermijn voor de rechtstreekse vordering vermijdt elke betwisting omtrent de toepassing van de verjaring van artikel 34(1) Wet Landverzekeringsovereenkomst [previously s 34(1) of the LIC Act; now s 88(1) of the 2014 Insurance Act] op deze vordering.' See para 5.2.2.1(d) above on prescription in liability insurance.

[333] See Meurs & Thiery 'Aansprakelijkheidsverzekering' 100-103 paras 36-39. For further detail see Van Schoubroeck *Recht voor de onderneming* 29-30 para 1.4.2 and Fontaine *Verzekeringsrecht* (2 ed) paras 507-514 and 758.

[334] Previously s 86 of the LIC Act.

[335] Section 150 of the Insurance Act of 2014 (previously s 86 of the LIC Act) still refers to 'schadeverwekkend feit', despite the changes that have been made to ss 141-142 of the Insurance Act of 2014 (previously ss 77-78 of the LIC Act). See paras 5.2.2.1(a) and 5.2.2.2(a) above.

[336] Freely translated: 'Subject to specific statutory provisions, a claim arising from the own or direct right of the third party as victim against the insurer under s 150 [of the Insurance Act of 2014], prescribes five years after the event that gave rise to the loss, or where there was a criminal offence, from the date that the criminal offence was committed. However, where the third-party as victim proves that it became aware of its rights against the insurer only at a later date, the prescription period starts to run only at such later date. But, the claim in any event prescribes ten years from the occurrence of the event that gave rise to the loss, or, where a criminal offence is involved, from the date on which the offence was committed.' (My translation.)

[337] Previously s 86 of the LIC Act.

[338] The prescription period of five years differs from the usual presciption period of three years for claims arising from insurance contracts as set out in s 88(1) of the Insurance Act of 2014 (previously s

there is a criminal offence, from the date on which the offence was committed. However, where the third-party plaintiff proves that it became aware of its rights against the liability insurer only at a later date,[340] the prescription period starts to run only at such later date.[341] The claim prescribes ten years from the occurrence of the event that gave rise to the loss or, where a criminal offence is involved, from the date on which the offence was committed.

Section 89(4) of the Insurance Act of 2014 (s 35(4) of the LIC Act), as well as a newly inserted section 89(5) of the Insurance Act of 2014 contain detailed provisions on the suspension and interruption of prescription periods of third-party plaintiffs' direct claims against a liability insurer.[342]

Second, the third-party plaintiff's claim might be subject to certain of the defences[343] available to the liability insurer against the insured defendant ('tegenwerp-

---

34(1) of the LIC Act). For the position on the prescription period for a recourse claim by an insured defendant against its liability insurer, see para 5.2.2.1(d) above.

[339] The date that prescription starts to run for a third-party plaintiff's claim against the insured's liability insurer, namely from the occurrence of the event giving rise to the loss ('vanaf het schadeverwekkend feit'), also differs from the date that prescription starts to run for claims by the insured against an insurer, which is the date of issue of summons by the third party ('vanaf het instellen van de rechtsvordering door de benadeelde'). See s 88(1)(iii) of the Insurance Act of 2014 (previously s 34(1)(iii) of the LIC Act). For further detail on when prescription starts to run in a recourse claim by an insured defendant against its liability insurer, see para 5.2.2.1(d) above; and for the prescription of the claim of recourse of the liability insurer against its insured (under s 88(3) of the Insurance Act of 2014; previously s 34(3) of the LIC Act), see para 5.3.1.1(c) below. Meurs & Thiery 'Aansprakelijkheids-verzekering' 101 para 37 explain that the date on which prescription starts to run in a claim arising out of the right of the third-party plaintiff against the liability insurer – from the occurrence of the event giving rise to the loss ('vanaf het schadeverwekkend feit') – does not necessarily coincide with the time of the occurrence of loss ('voorvallen van de schade') as referred to in ss 141-142 of the Insurance Act of 2014 (previously ss 77-78 of the LIC Act). The authors refer to judicial decisions and commentaries and clarify the terminology as follows: 'Zoals … reeds werd toegelicht, wordt volgens vigerende rechtspraak en rechtsleer het tijdstip van "het voorvallen van schade" meestal gelijkgesteld met het ogenblik dat de schade zich manifesteert. Voor wat betreft de verjaringstermijn van de rechtstreekse vordering is het vertrekpunt wel degelijk het ogenblik van het feit of de handeling die aanleiding heeft gegeven tot de schade, hetgeen zich meestal zal voordoen op een moment voorafgaand aan (of in sommige gevallen (bijna) gelijktijdig met) het zich manifesteren van de schade.'

[340] To meet the burden of proof in this regard, the third-party plaintiff should be aware that the defendant is insured and of the identity of the liability insurer. See the decision by the Belgian Supreme Court, Cass, dated 16 Feb 2007, as referred to by Meurs & Thiery 'Aansprakelijkheidsverzekering' 102 para 38. The majority of commentators agree that the third-party plaintiff has a duty to establish whether there is liability insurance and who the insurer is. The third-party may not simply sit back and remain passive.

[341] Section 88(2)(ii) of the Insurance Act of 2014 (previously s 34(2)(ii) of the LIC Act) contains an exception to the rule that prescription of the third-party plaintiff's direct claim against the liability insurer starts to run from the occurrence of the event that gave rise to the loss ('vanaf het schadeverwekkend feit').

[342] See Meurs & Thiery 'Aansprakelijkheidsverzekering' 104-106 paras 42-43 for further detail.

[343] The defences that the liability insurer may raise against the third-party plaintiff, are discussed here as part of the discussion on the third-party's direct right against the liability insurer. However, these defences are also relevant in para 5.3.1.1(c) below on the conflict of interest between the insured

baarheid van verweermiddelen aan de benadeelde').[344] Section 151 of the Insurance Act of 2014 (s 87 of the LIC Act)[345] contains detailed provisions in regard to these defences,[346] excesses, nullity,[347] and forfeiture.[348]

In the instances where the liability insurer may raise defences against the third-party plaintiff, it is not liable to indemnify the third-party plaintiff and the latter must

---

defendant and the liability insurer; and in regard to the legal relationship between the liability insurer and the third-party plaintiff in the conduct of the defence by the liability insurer.

[344] Meurs & Thiery 'Aansprakelijkheidsverzekering' 87 para 20. Section 151 of the Insurance Act of 2014 (previously s 87 of the LIC Act) provides as follows under the heading 'Tegenstelbaarheid van de excepties, [vrijstellingen,] nietigheid en verval van recht':

> '§ 1. Bij de verplichte burgerrechtelijke aansprakelijkheidsverzekeringen kunnen de excepties, vrijstellingen, de nietigheid en het verval van recht voortvloeiend uit de wet of de overeenkomst en die hun oorzaak vinden in een feit dat zich voor of na het schadegeval heeft voorgedaan, aan de benadeelde niet worden tegenworpen.
>
> Indien de nietigverklaring, de opzegging, de beëindiging of de schorsing van de overeenkomst geschied is voordat het schadegeval zich heeft voorgedaan, kan zich echter aan de benadeelde worden tegengeworpen.
>
> § 2. Voor de andere soorten burgerrechtelijke aansprakelijkheidsverzekeringen kan de verzekeraar slechts de excepties, de nietigheid en de verval van recht voortvloeiend uit de wet of de overeenkomst tegenwerpen aan de benadeelde persoon voor zover deze hun oorzaak vinden in een feit dat het schadegeval voorafgaat.
>
> De Koning kan het toepassingsgebied van § 1 echter uitbreiden tot de soorten van niet verplichte burgerrechtelijke aansprakelijkheidsverzekeringen die Hij bepaalt.'

Freely translated: 'In mandatory civil liability insurance, defences, excesses, nullity (voidness) and forfeiture which derive from statute or contract and have their origin in an act committed prior to the loss, cannot be raised against the third party as victim. Nonetheless, the anullment (nullification), cancellation, or expiry of the contract before the occurrence of the insured event can be raised against the third party as victim. In other types of civil liability insurance, the insurer may rely, as against the third party as victim, only upon the defences of nullity (voidnesss) and forfeiture which derive from statute or contract and which have their origin in an act prior to the loss. The King may extend the scope of ss 1 (on compulsory civil liability insurance) to any type of non-compulsory civil liability insurance as prescribed by Him.' (My translation.)

[345] For further detail, see Meurs & Thiery 'Aansprakelijkheidsverzekering' 87-96 paras 20-32; Van Schoubroeck 'Aansprakelijkheidsverzekering' para 1.3.3.2 at 20-22; Fontaine *Verzekeringsrecht* (2 ed) paras 688, 748-757; and Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 729-737.

[346] The general term 'defences' is used here to refer to 'excepties'. Schuermans & Van Schoubroeck ibid para 729 explain that '[h]et begrip "exceptie" is een generieke term die elk verweermiddel omvat dat ertoe strekt te ontstnappen aan de uitvoering van een verbintenis wanneer deze uitvoering in rechte gevorderd wordt. Een exceptie kan betrekking hebben op het bestaan, de afdwingbaarheid, de nietigheid, het verval of de schorsing van de verbintenis.' The general term 'defences' is used here to refer to 'excepties'.

[347] Schuermans & Van Schoubroeck ibid para 729 clarify that, '[d]e nietigheid verwijst naar een sanctie op het niet-naleven door rechtssubjecten van de geldigheidsvoorwaarden bij de totstandkoming van een rechtshandeling. De nietigheidssanctie heeft tot gevolg dat de betrokken rechtshandeling ophoudt te bestaan, hetzij voor de toekomst, hetzij zowel voor het verleden als de toekomst'.

[348] Schuermans & Van Schoubroeck ibid explain that,'[h]et verval kan worden omschreven als een wettelijke of conventionele sanctie voor een bepaald gedrag zonder dat dit gedrag noodzakelijk onverenigbaar hoeft te zijn met het vervallen subjectief recht. Artikel 11 [of the LIC Act] (tans art 65 WVerz.)[now s 65 of the 2014 Insurance Act] laat het bedingen van een verval alleen maar toe wanneer dit verval de niet-nakoming van een bepaalde, in de overeenkomst opgelegde verplichting sanctioneert en er een oorzakelijk verband bestaat tussen de tekortkoming en het schadegeval'. See paras 5.2.2.3(b)(ii) and 5.2.2.4 above for further detail as regards s 65 of the Insurance Act of 2014 (previously s 11 of the LIC Act).

claim its loss from the insured defendant.[349] When the liability insurer cannot raise defences against the third-party plaintiff, it is liable to the third-party plaintiff.

To determine what defences the liability insurer may raise against the third-party plaintiff, it is important to distinguish between compulsory and non-compulsory private- law (or civil) liability insurance ('verplichte en niet-verplichte burger-rechtelijke aansprakelijkheidsverzekeringen').[350]

The third-party plaintiff is protected to a greater extent in the case of compulsory insurance[351] than in the case of non-compulsory insurance, as there are fewer defences which the liability insurer may raise against the third-party plaintiff in the former instance than in the latter.

In compulsory civil liability insurance,[352] defences which derive from statute or contract *and* have their origin in an act prior to the loss cannot be raised against the third-party plaintiff. In instances of non-compulsory civil liability insurance[353] the liability insurer may, as against the third-party plaintiff, rely only on defences which derive from statute or contract *and* have their origin in an act prior to the loss.[354]

---

[349] Meurs & Thiery 'Aansprakelijkheidsverzekering' 87 para 20 give the following exaplantion: 'Kan de verzekeraar de betreffende verweermiddelen wel tegenwerpen aan de benadeelde, is hij tegenover deze benadeelde niet tot betaling gehouden en kan de benadeelde zich enkel richten tot de verzekerde'.

[350] Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 729.

[351] Compulsory insurance is mandatory and non-compulsory insurance is voluntary. A list of compulsory insurance is published by the Financial Services and Markets Authority at https://www.fsma.be/nl/lijst-van-de-verplichte-verzekeringen (accessed on 30 Jul 2019). Further see Meurs & Thiery 'Aansprakelijk-heidsverzekering' 87-88 para 21 for examples of compulsory insurance.

[352] See Meurs & Thiery ibid 88-92 paras 22-27 for a discussion and examples of defences that the liability insurer may (and may not) raise against the third-party plaintiff in compulsory insurance. Also see Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 730-733 for further detail.

[353] See Meurs & Thiery ibid 92-93 paras 28-32 for a discussion and examples of defences that the liability insurer may raise against the third-party plaintiff in non-compulsory insurance. Also see Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 734-737 for further detail.

[354] This is the essence of the difference in the defences that may be raised in compulsory and non-compulsory civil liability insurance. Van Schoubroeck 'Aansprakelijkheidsvezekering' 21 para 1.3.2.4 summarises the distinction as follows: 'Gaat het om een van de verplichte aansprakelijkheids-verzekeringen … , kan de verzekeraar geen enkele exceptie … voortvloeiende uit de wet of uit overeenkomst aan de benadeelde tegenwerpen. Het is daarbij zonder belang of deze een oorzaak vinden in een feit dat zich voor of na het schadegeval heeft voorgedaan. … Voor alle niet-verplichte aansprakeljikheidsverzekeringen kan de verzekeraar enkel de excepties … voortvloeiende uit de wet of de overeenkomst tegenwerpen aan de benadelde, voor zover deze hun oorzaak vinden in een feit dat het schadegeval voorafgaat.' This is confirmed by Meurs & Thiery ibid 88-89 para 22. Due to the procedural nature of the defences, further detail falls outside the scope of this thesis.

If the liability insurer cannot raise a defence against the third-party plaintiff's claim, it will attempt to exercise its right of recourse under section 152 of the Insurance Act of 2014 (s 88 of the LIC Act) against the insured defendant.[355]

A few matters related to the third-party plaintiff's direct right to claim against the insured's liability insurer, warrant discussion.

The liability insurer generally indemnifies the third-party plaintiff directly,[356] but section 149(1) of the Insurance Act of 2014 (s 85(1) the LIC Act) also provides for payment by the insured defendant.[357] It provides as follows in regard to compensation[358] by the insured defendant:

> Wanneer de verzekerde de benadeelde heeft vergoed of hem een vergoeding heeft toegezegd, zonder de toestemming van de verzekeraar, kan zulks tegen deze laatste niet worden ingeroepen.[359]

The third party may claim damages from the insured defendant or the liability insurer separately or jointly.[360] Compensation, or a promise of it, to the third-party plaintiff by the insured defendant without the liability insurer's consent does not bind the insurer. Section 85(1) of the LIC Act (s 149(1) of the Insurance Act of 2014) was enacted to counteract possible collusion between the third-party plaintiff and the insured defendant.[361]

---

[355] Meurs & Thiery ibid 87 para 20 explain as follows: 'De verzekeraar zal zijn verhaalsrecht tegenover de verzekerde willen uitoefen wanneer hij de benadeelde heeft vergoed en wanneer hij tegenover deze laaste niet de verweermiddellen kon doen gelden die hij wel had tegen over de verzekerde'. See paras 5.3.1.1(c) and 5.3.2 below for further detail.

[356] Under s 86 of the Insurance Act of 1992. See Fontaine *Verzekeringsrecht* (2 ed) para 723 and para 5.2.3.1 below.

[357] For further detail, see Fontaine ibid paras 737-739; Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 716; and Van Schoubroeck 'Aansprakelijkheidsverzekering' 16 para 1.3.1.3.

[358] Section 149(1) of the Insurance Act of 2014 (previously s 85(1) the LIC Act) bears the heading: 'Schadeloosstelling door de verzekerde'. (Again, the terminology 'compensation' (and not indemnification) by the insured defendant will be used.)

[359] Freely translated: 'When the insured has compensated the third party or promised to compensate the third party without consent of the insurer, it shall not bind the insurer'. (My translation.)

[360] Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 725 explain that, '[i]n dit laatste geval zijn de verzekerde en de verzekeraar bij een vastgestelde aansprakelijkheid *in solidum* ertoe gehouden de benadeelde te vergoeden'.

[361] The insured defendant's duty not to prejudice the liability insurer correlates with a similar duty of the liability insurer towards its liability insured in s 143(3) of the Insurance Act of 2014 (previously s 79(3) of the LIC Act). It provides that interventions by the liability insurer will not imply an acknowledgement of debt (towards the third-party plaintiff) by the insured defendant, and will not prejudice the insured defendant. See para 5.3.1.1(c) below.

Section 147 of the Insurance Act of 2014 (s 83 of the LIC Act) governs the third-party plaintiff's free disposal of damages ('vrije beschikking over de schade-vergoeding')[362] paid by the insurer by providing as follows:

> De benadeelde beschikt vrij over de door de verzekeraar verschuldigde schadevergoeding. Het bedrag van de schadevergoeding mag niet verschillen naargelang van het gebruik dat de benadeelde ervan zal maken.[363]

The amount of damages may not vary in accordance with the use to be made of it by the third-party plaintiff – the third party may freely dispose of any damages paid by the liability insurer.

Section 148 of the Insurance Act of 2014 (s 84 of the LIC Act)[364] provides as follows regarding 'receipts' ('kwitantie ter afrekening' or 'kwijtschrift'):

> Elke kwitantie voor een gedeeltelijke afrekening of ter finale afrekening, betekent voor de benadeelde niet dat hij van zijn rechten afziet.
> Een kwitantie ter finale afrekening moet de elementen van de schade vermelden waarop die afrekening slaat.

A partial or final receipt signed by the third party to acknowledge compensation received, does not imply that the third-party plaintiff waives its rights. A final receipt must state the heads of loss to which the account relates.

---

[362] Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 714 explain it as follows: 'Dit betekent dat de aansprakelijkheidsverzekeraar de [som van] eventuele btw als schadebestanddeel binnen de limieten van de verzekerde som ten laste moet nemen, ook als de schade niet wordt hersteld of het vernielde goed niet wordt vervangen. Hiermee is een einde gekomen aan het systeem van de dubbele schatting, naargelang de schade al dan niet wordt hersteld.' Also see Van Schoubroeck 'Aansprakelijk-heidsverzekering' 22 para 1.3.3.4 and Fontaine *Verzekeringsrecht* (2 ed) paras 731-732 for further detail.

[363] Freely translated: 'The third party may freely dispose of any damages paid by the liability insurer. The amount of damages may not vary in accordance with the use to be made of it by the third-party plaintiff.' (My translation.)

[364] For further detail, see Fontaine *Verzekeringsrecht* (2 ed) paras 733-736; Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 715; and Van Schoubroeck 'Aansprakelijkheids-verzekering' 23 para 1.3.3.5.

5.2.3.2 The Liability Insurer Subrogated to Rights and Legal Claims of the Insured Defendant Against Third Parties Responsible for the Loss[365]

Sections 95(1)-95(3) of the Insurance Act of 2014 (ss 41(1)-41(3) of the LIC Act)[366] provide as follows in regard to the right of subrogation against a liable third party ('subrogatierecht tegen de aansprakelijke derde'):[367]

> De verzekeraar die de schadevergoeding betaald heeft, treedt ten belope van het bedrag van die vergoeding in de rechten en rechtsvorderingen van de verzekerde of de begunstigde tegen de aansprakelijke derden.
> Indien, door toedoen van de verzekerde of de begunstigde, de indeplaatsstelling geen gevolg kan hebben ten voordele van de verzekeraar, kan deze van hem de terugbetaling vorderen van de betaalde schadevergoeding in de mate van het geleden nadeel.
> De indeplaatstelling mag de verzekerde of de begunstigde, die slechts gedeeltelijk vergoed is, niet benadelen. In dat geval kan hij zijn rechten uitoefenen voor hetgeen hem nog verschuldigd is, bij voorrang boven de verzekeraar.[368]

Subrogation under this section is only possible against 'third parties responsible for the loss' ('aansprakelijke derden').[369] Commentators give examples of the limited instances of subrogation in liability insurance.[370] In the context of liability insurance, 'third parties responsible for the loss', refers to where the loss is caused by joint wrongdoers. These joint wrongdoers are so-called 'fourth parties' in the context of liability insurance (the insured defendant and the liability insurer as the first and second parties, the third-party plaintiff as the third party, and the 'third party

---

[365] In writing this section, the following works on Belgian insurance law were consulted: Meurs & Thiery 'Aansprakelijkheidsverzekering' 83-85 paras 15-16; Colle *De nieuwe wet* (6 ed) paras 181-186; and Van Schoubroeck ibid 27-28 para 1.3.5.1.

[366] This is an example of 'persoonlijke subrogatie', as defined in art 1249 of the Civil Code. For further detail, and on the distinction between 'persoonlijke subrogatie' and 'zakelijke subrogatie of zaakvervanging' under Belgian law, see Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 1044-1059.

[367] Also known as 'indeplaatsstelling van de verzekeraar' or 'verhaal van de verzekeraar tegen de aansprakelijke derde'. This should be distinguished from the liability insurer's right of recourse against the insured defendant under s 152 of the Insurance Act of 2014 (previously s 88 of the LIC Act) discussed in para 5.3.1.1(c) below.

[368] Freely translated: 'The insurer that has paid the damages shall be subrogated *pro tanto* to the rights and legal claims of the insured or the beneficiary against the party responsible for the loss. If subrogation cannot take place successfully in favour of the insurer due to the conduct of theinsured or the beneficiary, the insurer may claim restitution from the the insured or the beneficiary for the damages paid equal to the amount of the loss suffered by the insurer. Subrogation shall not prejudice an insured or a beneficiary who has only been partially indemnified. In that case the insured or the beneficiary may exercise its rights against the third party to claim what is still due to it, in preference to the insurer.' (My translation.)

[369] Note the disctinction between 'third parties responsible for the loss' and the 'third-party plaintiff'.

[370] Colle *De nieuwe wet* (6 ed) para 181; Van Schoubroeck 'Aansprakelijkheidsverzekering' 27-28 para 1.3.5.3; Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 1048; Fontaine *Verzekeringsrecht* (2 ed) paras 709-710; and Guiliams (2010-2011) 12 *Rechtskundig Weekblad* 474-480.

responsible for the loss' as the fourth party). However, one may assume that if the insured defendant has a counterclaim against the third-party plaintiff to which the liability insurer may be subrogated, that the counterclaim may be brought against the third-party plaintiff by the liability insurer in the exercise of its right to subrogation.

The liability insurer (which has indemnified the insured by payment of the third-party plaintiff) may be subrogated to the rights and legal claims of the insured defendant against third parties co-responsible for the loss for which the insured is responsible – ie, joint wrongdoers.[371] The liability insurer may, for example, be subrogated to the insured defendant's rights in delict against a third party who was negligently co-responsible for the loss for which the insured is responsible.[372]

Subrogation is not possible against the insured defendant under liability insurance.[373] Subrogatory recourse against the insured defendant would undermine the object of the insurance contract which is to transfer the financial risk associated with a third-party claim to the liability insurer on payment of a premium.[374]

If subrogation cannot take place due to the conduct of the insured defendant,[375] the liability insurer may claim restitution from the latter of the indemnification paid to the third-party plaintiff equal to the amount of the loss suffered by the liability insurer.[376] The subrogation rights of the liability insurer are no greater than the rights of the insured defendant and may be limited by any intent or contributory negligence on the part of the insured.[377]

---

[371] Section 95(1) of the Insurance Act of 2014 (previously s 41(1) of the LIC Act) is in line of the indemnity principle, to avoid the third-party plaintiff being compensated twice; once by the liability insurer and again by the third party co-responsible for the loss. See Colle ibid para 180. Subrogation under this section takes place by law ('van rechtswege') and may not be excluded contractually. See Schuermans & Van Schoubroeck ibid para 1045.

[372] Colle ibid para 183 explains that '[h]et quasi-delictuele of contractuele karakter van de aansprakelijkheid is daarentegen zonder belang'.

[373] In the context of liability insurance, Colle ibid explains in para 185 as follows: 'De aansprakelijke persoon is daar de verzekerde [the insured defendant]. De aansprakelijke [the insured defendant] is geen derde zoals de wet vereist opdat de indeplaasstelling zou kunnen plaasvinden. Bovendien, indien het de verzekeraar toegelaten zou zijn zich tegen de verzekerde te keren, zou de verzekeringsovereenkomst geen voorwerp of oorzaak meer hebben. … Subrogatie betekent in de rechten en rechtsvorderingen treden van de oorspronklijke rechtshebbende (*de subrogant*). Welnu, die aansprakelijke verzekerde [insured defendant], wiens rechten en rechtsvorderingen de verzekeraar treedt, kan niet aansprakelijk zijn tegen zichzelf of een recht tegen zichzelf laten gelden'.

[374] Meurs & Thiery 'Aansprakelijkheidsverzekering' 83 para 15.

[375] For example, where an insured has absolved a joint wrongdoer from liability without the insurer's consent.

[376] Section 95(2) of the Insurance Act of 2014 (previously s 41(2) of the LIC Act).

[377] Restitution by the insurer may be in full, or only for a proportional part that is no longer recoverable due to the conduct of the insured. On 'de verdeling van de schadelast bij sameloop van een opzettelijke en een onopzettelijke fout', see Guiliams (2010-2011) 12 *Rechtskundig Weekblad* 474-485.

Sections 95(4) and 95(5) of the Insurance Act of 2014 (ss 41(4) and 41(5) of the LIC Act)[378] prohibit subrogation by the liability insurer's against certain of the insured defendant's family members, save in case of intent ('kwaad opzet') on the part of those relatives,[379] or in so far as the relatives' liability has actually been covered by a different insurance contract. The same applies to a number of other close relations to the insured, like guests and members of its domestic staff, as set out in the former provisions.

Subrogation is only possible to the extent that the liability insurer has indemnified the insured by the payment of the third-party plaintiff.[380] An insured defendant who has only been partly indemnified by the liability insurer, may not be prejudiced by subrogation: the insured may exercise its rights against any third parties liable to claim what is still due to it, in preference to the insurer.

[378] These sections provide: 'De verzekeraar heeft geen verhaal op de bloedverwanten in de rechte opgaande of nederdalende lijn, de echtgenoot en de aanverwanten in de rechte lijn van de verzekerde, noch op bij hem inwonende personen, zijn gasten en zijn huispersoneel, behoudens kwaad opzet. In geval van kwaad opzet door minderjarigen kan de Koning het recht van verhaal beperken van de verzekeraar die de burgerrechtelijke aansprakelijkheid buiten overeenkomst met betrekking tot privéleven dekt. De verzekeraar kan evenwel verhaal uitoefenen op de in het vorige lid genoemde personen, voor zover hun aansprakelijkheid daadwerkelijk door een verzekeringsovereenkomst is gedekt.' Freely translated: 'Save in the case of intent ['kwaad opzet'] the insurer shall have no recourse against the relatives in the descending or ascending line, the spouse, and direct relatives by marriage of the insured, or against persons living in its household, its guests, and members of its domestic staff. In the case of intent of a minor, the King can limit the right to subrogation by an insurer of personal liability insurance. However, the insurer may exercise its right to subrogation against the aforementioned persons in as far as their liability is actually covered by an insurance contract.' (My translation.)

[379] The Legislature has limited the extent of the right to subrogation by an insurer of personal liability insurance ('verzekeraar BA-privéleven') against minors. See s 7(2) of the Royal Decree of Jan 1984, as amended, on the minimum conditions regarding personal liability insurance ('tot vaststelling van de minimumvoorwaarden BA-privéleven'). For further detail on loss caused intentionally by a minor to a third-party plaintiff, and whether the liability insurer may be subrogated to the parents' rights as insured, see Van Schoubroeck 'Aansprakelijkheidsverzekering' 27-28 para 1.3.5.3 and Meurs & Thiery 'Aansprakelijkheidsverzekering' 83-85 paras 15-16.

[380] Section 95(3) of the Insurance Act of 2014 (previously s 41(3) of the LIC Act).

5.3 THE CONDUCT OF THE DEFENCE AND SETTLEMENT OF CLAIMS BY THIRD-PARTY PLAINTIFFS AGAINST THE INSURED DEFENDANT[381]

5.3.1 The Legal Relationship between the Liability Insurer and the Insured Defendant

5.3.1.1 Conduct of the Defence ('Leiding van het geschil'):[382] The Insurer's Duty[383] and Right to Defend[384]

As mentioned previously,[385] the primary obligation of a liability insurer under Belgian law is to protect the insured's patrimony. Fontaine explains the liability insurer's dual obligation to the insured: The liability insurer conducts the insured's defence against third-party claims,[386] and then indemnifies the insured defendant's estate against proven liability for third-party loss.[387]

---

[381] As noted previously, the Belgian chapter contains more detail than the British and South African chapters as regards the conduct of the defence and settlement, due to the liability insurer's statutory duty to defend, as opposed to a mere contractual right of the insurer to choose to defend. In writing this section, the following works on Belgian insurance law were consulted: Van Schoubroeck 'Aansprakelijkheids-verzekering' 11-12 para 1.2.3, 18-19 para 1.3.2, 23-25 para 1.3.4.1, 25-26 para 1.3.4.2, and 28-29 para 1.3.5.4; Fontaine *Verzekeringsrecht* (2 ed) paras 673, 713-722, 728-730, and 767; and Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 705-707, and 708-711. For further detail, see Kruithof 'De leiding van het geschil' 1-95; Van De Sype 'Leiden en lijden van de verzekeraar' 33-51; and Cousy 'De waarborg in de (professionele) aansprakelijkheids-verzekering' 64-67.

[382] Or, 'zich achter de verzekerde te stellen ... hem te verdedigen tegen de aanspraken van de derde'. The conduct of the defence of the dispute that is referred to here, is the dispute between the insured defendant and the third-party plaintiff. See Van Schoubroeck et al (2016) 2 & 3 *Tijdschrift voor Privaatrecht* para 65.1. The insurer conducts the defence in the insured's name.

[383] 'Verplichting van de verzekeraar om zich achter de verzekerde te stellen'.

[384] 'Recht van de verzekeraar om het geschil te leiden'.

[385] See para 5.2.2.1 above.

[386] The conduct of the defence is the focus of this discussion. The conduct of the defence on behalf of the insured originated from trade usage. Before the conduct of the defence became a statutory obligation on and right for the insurer, liability insurers merely had a contractual right to conduct the defence. See Fontaine *Verzekeringsrecht* (2 ed) pars 673 and 714. For an historical perspective on the insurer's duty and right to defend, see Vandeputte 'Inleiding tot het verzekeringsrecht' 134-138; Fredericq (1969) *Tijdschrift voor Privaatrecht* para 66; and Fredericq, Cousy & Rogge (1981) 18 *Tijdschrift voor Privaatrecht* para 84 (note that these texts predate the LIC Act). Also see Kruithof 'De leiding van het geschil' 10-13 paras 13-17.

[387] Fontaine ibid explains as follows in para 673: 'De aansprakelijkheidsverzekeringen dekken het vermogen van de verzekerde tegen de aantastingen die het bedreigen ingevolge de aansprakelijkheden die hij zou kunnen oplopen. Het betref dus een schadeverzekering … op *de ongeschondenheid van het vermogen* in zijn geheel. Dit *is het wesenlijke*. Het andere luik van de bewoordingen van artikel 77 [now s 141 of the Insurance Act of 2014], met betrekking tot de *dekking tegen de vorderingen tot schadevergoeding, is een bijzaak van de hoofdzakelijke functie van de aansprakelijkheidsverzekeringen, die in het verleden door het praktijk zelf werd ingevoerd en op heden een verplichting voor de verzekeraar is geworden* … De aanspreeklijkheidsverzekeraar biedt dus een verdediging in rechte aan, die gevolgd wordt door een eventuele dekking van de aansprakelijkheidsschuld.' (Emphasis added.)

In Belgian law, there is also a dual system as to the conduct of the defence. The liability insurer has both a duty[388] and a right[389] to conduct the defence of third-party claims against the insured defendant.[390]

Sections 141 and 143 of the Insurance Act of 2014 (ss 77 and 79 of the LIC Act) are relevant here and correlate with one another.

Section 141 of the Insurance Act of 2014 (s 77 of the LIC Act) provides as follows with regard to the conduct of the defence:

> Dit hoofdstuk is van toepassing op de verzekeringsovereenkomsten die ertoe strekken de verzekerde dekking te geven tegen alle vorderingen tot vergoeding wegens het voorvallen van de schade die in die overeenkomst is beschreven, en zijn vermogen binnen de grenzen van de dekking te vrijwaren tegen alle schulden uit een vaststaande aansprakelijkheid.[391]

Liability insurance contracts defend the insured against third-party claims for compensation based on the occurrence of loss provided for in the contract,[392] and also

---

[388] Van Schoubroeck 'Aansprakelijkheidsverzekering' 26-29 para 1.3.5 summarises the liability insurer's duties as follows: to intervene in the third-party claim in support of the insured defendant (as discussed in para 5.3.1.1 below); and to indemnify the insured against the loss, interest and costs (as discussed in paras 5.2.2.3(a) above and 5.3.1.1(d) below).

[389] Van Schoubroeck ibid 26-29 para 1.3.5 summarises the liability insurer's rights as follows: the conduct of the defence (as discussed in para 5.3.1.1 below); intervention in proceedings in several instances (see para 5.2.3.1 above and para 5.3.1.1(b) below); subrogation to the rights and legal claims of the insured defendant against third parties responsible for the loss (see paras 5.2.3.2 and 5.2.4 above); and the right of recourse against the insured defendant (see para 5.3.1.1(c) below).

[390] See Van Schoubroeck ibid 23-25 para 1.3.4 and 26 para 1.3.5.1 for an explanation. Fontaine *Verzekeringsrecht* (2 ed) para 714 underlines that the *origin of the conduct of the defence by the insurer was aimed at the protection of the insurers' interests*. He explains as follows: 'Een verzekeraar die er zich toe zou beperken om de schadevergoeding te betalen eens de aansprakelijkheid van de verzekerde bewezen is, zou het gevaar lopen om vaak en op gulle wijze te moeten tussenkomen: de aansprakelijke [insured defendant] die weet dat hij verzekerd is, is geneigd om zich zonder te veel strijdlust te verdedigen, ja zelfs om al te gemakkelijk zijn schuld jegens het slachtoffer [the third-party plaintiff] te erkennen. De aansprakelijkheidsverzekeraar verkiest de zaken zelf in handen te nemen, temeer daar zijn ervaring in dit soort van geschillen hem een zeker voordeel verschaft.' He also describes the *benefits of the conduct of the defence by the liability insurer to the insured* as follows: 'Hoewel uitgedacht in het belang van de verzekeraar, vertoont de leiding van het geschil vanzelf sprekend (sic) ook voordelen voor de verzekerde. Zij ontlast hem van een deel van de bekommernissen die verbonden zijn aan het door het slachtoffer tegen hem gevoerde rechtsgeding. Er bestaan ook gevallen waarin de verzekerde zich verheugt om verdedigd te worden door zijn verzekeraar, bijvoorbeeld zo hij zelf schade heeft geleden waarvan hij de schadeloosstelling tenminste gedeeltelijk nastreeft.' But Kruithof 'De leiding van het geschil' 12 para 17 opines that the right to conduct the defence is aimed at the protection of the insurer's interests (and not those of the insured).

[391] Freely translated: 'This chapter applies to contracts of insurance which aim to defend the insured against any claim for compensation based on the occurrence of loss as provided for in the contract and to keep its estate indemnified, within the limits of cover, for any debt arising from proven liability.' (My translation.)

[392] The conduct of the defence is the focus of this discussion.

hold the insured's estate indemnified[393] within the limits of cover, for a debt arising from proven liability.

Regarding the conduct of the defence, section 143 of the Insurance Act of 2014 (s 79 of the LIC Act) further provides:[394]

> Vanaf het ogenblik dat de verzekeraar tot het geven van dekking is gehouden en voor zover deze wordt ingeroepen, is hij verplicht zich achter de verzekerde te stellen binnen de grenzen van de dekking.[395]
>
> Ten aanzien van de burgerrechtelijke belangen en in zover de belangen van de verzekeraar en van de verzekerde samenvallen, heeft de verzekeraar het recht om, in de plaats van de verzekerde, de vordering te bestrijden. Hij kan deze laatste vergoeden indien daartoe grond bestaat. [396]
>
> De tussenkomsten van de verzekeraar houden geen enkele erkenning in van aansprakelijkheid vanwege de verzekerde en zij mogen hem ook geen nadeel berokkenen.[397]

The paragraphs below explain the legislation governing the liability insurer's right and duty to conduct the defence.[398] There are different prerequisites and provisions as to the existence of the duty and right to conduct the defence, the point at which they arise, and their scope. If the liability insurer has a duty to the insured to conduct the defence – which is one of the rights a liability insured has against its insurer – the insurer has no option but to conduct the defence.[399] When the liability insurer has a right towards the insured to conduct the defence, the insured has a duty to allow the defence: the insurer has a choice whether or not to conduct the defence, but the right entitles the insurer to conduct the defence even, for example, when the

---

[393] See para 5.2 above.

[394] 'Kruithof Leiding van het geschil'. See generally Colle *Algemene beginselen* (7 ed) 204-211 and Fontaine *Verzekeringsrecht* (3 ed) 600-611.

[395] Freely translatated: 'The insurer has a duty to intervene in the third-party claim in support of the insured from the date on which the insurer is on risk, within the limits of cover, and provided that it is called upon to do so'. (My translation.) See s 143(1) of the Insurance Act of 2014 (previously s 79(1) of the LIC Act).

[396] Freely translated: 'The insurer has a right to conduct the defence to resist the third-party claims on behalf of the insured with regard to private-law or civil interests and in so far as the interests of the insurer and the insured coincide. The insurer may pay the third party if there is merit in doing so.' (My translation.) See s 43(2) of the Insurance Act of 2014 (previously s 79(2) of the LIC Act).

[397] Freely translated: 'The interventions by the insurer shall not constitute any form of acknowledgement of liability by the insured (to the third party) and may not prejudice the insured'. (My translation.) See s 143(3) of the Insurance Act of 2014 (previously s 79(3) of the LIC Act).

[398] See paras 5.3.1.1(a)-5.3.1.1(c) below.

[399] Van Schoubroeck 'Aansprakelijkheidsverzekering' 18 para 1.3.2.1 explains that the liability insured has a statutory right to the conduct of the defence by the liability insurer. She mentions that '[i]n aansprakelijk-heidsverzekering houdt deze prestatie wettelijk in dat de verzekeraar de verzekerde moet verdedigen… .'

insured attempts to deny the insurer that right.[400] In certain instances both the duty and the right to conduct the defence may exist simultaneously.

5.3.1.1(a) When the Duty and Right Arises

Section 143(1) of the Insurance Act of 2014 (s 79(1) of the LIC Act)[401] provides that the insurer has a duty to intervene in the third-party claim in support of the insured ('zich achter de verzekerde te stellen')[402] from the date when the insurer is on risk,[403] within the limits of cover,[404] and provided that it is called upon to do so.[405]

Therefore, the liability insurer has a duty to intervene and conduct the defence when: [406]

- the occurrence of an insured event[407] within the limits of cover, has been reported to the liability insurer that is on risk, and
- the insured defendant has called upon the liability insurer to intervene in the defence.[408] The liability insurer must intervene in the third-party claim in support of the insured defendant from the date on which it is called upon to do so by the insured defendant.

---

[400] Fontaine *Verzekeringsrecht* (2 ed) para 717 comments as to the purpose of the liability insurer's right to conduct the defence: 'De erkenning van dit recht laat de verzekeraar dus toe om de leiding van het geschil op zich te nemen in de gevallen waarin de verzekerde hem dit willen ontzeggen'.

[401] See para 5.3.1.1 above.

[402] Namely, to protect the insured defendant against claims by the third-party plaintiff. See Fontaine *Verzekeringsrecht* (2 ed) para 715.

[403] Fontaine ibid para 687 explains that 'zonder twijfel moet men hieronder verstaan dat de verzekeraar de verdediging moet opnemen in de gevallen waarin zijn waarborg waarschijnlijk verschuldigd is indien de aansprakelijkheid van de verzekerde zou komen vast te staan'. That would be the time when the liability insurer is on risk under the insurance contract.

[404] The dispute should relate to covered liabilities, namely that 'het geschil betrekking heeft op een gedekte aansprakelijkheid'. See Fontaine ibid para 716.

[405] Fontaine ibid para 687 states: 'Niettegenstaande de formulering van de tekst hoort de tijdsfactor ['vanaf het ogenblik'] niet bij het eerste lid ['dat de verzekeraar tot het geven van dekking is gehouden'], maar wel bij het tweede: 'de verplichting om het op te nemen voor de verzekerde neemt een aanvang van zodra ze wordt ingeroepen'. Also see Fontaine ibid para 716 and at para 687 where he cautions that the first part of the section ('dat de verzekeraar tot het geven van dekking is gehouden') should not be interpreted literally to mean that the insurer's performance will only be due at the close of the dispute in which it should conduct the defence.

[406] When the insurer's duty to intervene in the claim in support of the insured arises has been summarised by Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 706 as follows: 'De verzekeraar is slechts tot leiding van het geschil verplicht, wanneer hij dekking moet bieden tegen een aansprakelijkheidsvordering en voor zover de verzekerde zich op deze dekking beroept'.

[407] As discussed in para 5.2.2.4 above in connection with the insured defendant's duties towards the liability insurer.

[408] Fontaine *Verzekeringsrecht* (2 ed) para 616 explains as follows: 'Geen enkel verwijt zal a *posteriori* kunnen worden gemaakt aan een verzekeraar die passief blijft wanneer het schadegeval hem niet was aangegeven geworden. Maar de verplichting om zich achter de verzekerde te stellen speelt van zodra beroep gedaan wordt op de verzekeraar.'

If the insured has not notified the insurer or called upon it to intervene in the conduct of the defence, the insurer does not have a duty to conduct the defence (but it may well still have a right to do so).

Section 143(2) of the Insurance Act of 2014 (s 79(2) of the LIC Act)[409] provides that the insurer has a right[410] to conduct the defence and to resist the third-party plaintiff's claim ('om, in de plaats van de verzekerde, de vordering [van die benadeelde] te bestrijden') with regard to private-law or civil interests ('ten aanzien van de burgerrechtelijke belangen'),[411] and in so far as the interests of the liability insurer and the insured defendant coincide ('in zover de belangen van de verzekeraar en van de verzekerde samenvallen').[412]

The liability insurer has a right to conduct the defence when:

- the third-party plaintiff's claim concerns private-law (or civil) interests; and
- in so far as the liability insurer and the insured defendant's interests coincide.[413]

When the interests of the parties no longer coincide, there is conflict of interest[414] and the liability insurer loses both its right[415] and duty to conduct the defence.

[409] See para 5.3.1.1 above.
[410] As explained earlier, the acknowledgement of the liability insurer's right to conduct the defence is to provide for instances where the insured defendant does not wish to allow the insurer's involvement in the conduct of the defence. See Fontaine *Verzekeringsrecht* (2 ed) para 717. The liability insurer has an interest in resisting third-party claims to prove that there is no liability on part of the insured defendant towards the third-party plaintiff, or to prove that the loss suffered was less than the amount claimed by the third-party plaintiff; and to avoid instances where the insured defendant would be too lenient towards the third-party plaintiff, eg, in the case of settlement. See Van Schoubroeck 'Aansprakelijk-heidsverzekering' 23-24 para 1.3.4.1.
[411] This was also confirmed by Bergen, CA, decision of 29 Jun 2012, as referred to in Van Schoubroeck et al (2016) 2 & 3 *Tijdschrift voor Privaatrecht* para 65.1. The liability insurer does not have a right to conduct the defence of the insured in criminal proceedings.
[412] The point at which the insurer's right to conduct the defence arises is summarised by Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 706: 'De leiding van het geschil komt aan de verzekeraar slechts toe op voorwaarde dat de belangen van de verzekeraar en de verzekerde samenvallen. Alleen dan heeft de verzekeraar ten aanzien van de burgerrechtelijke belangen het recht om, in de plaats van de verzekerde, de vordering van de benadeelde te bestrijden.'
[413] Fontaine *Verzekeringsrecht* (2 ed) paras 718, 759-766 and s 152 of the Insurance Act of 2014 (an amended version of the previous s 88 of the LIC Act).
[414] See para 5.3.1.1(c) below.
[415] Antwerpen, CA, decision of 23 Jan 2008, as discussed in Van Schoubroeck et al (2016) 2 & 3 *Tijdschrift voor Privaatrecht* para 65.1. When the interests of the liability insurer and the insured defendant no longer coincide, the liability insurer loses its right to conduct the defence.

The duty and the right to conduct the defence may exist simultaneously. This arises when the cumulative prerequisites of both the duty to conduct the defence[416] and the right to conduct the defence[417] have been met.

5.3.1.1(b) The Scope and Extent of the Duty and Right[418]

The liability insurer's duty to support the insured defendant in a claim by the third-party plaintiff is wider than mere intervention in support of the insured in litigation brought by the third-party plaintiff. The duty includes guiding the insured defendant in the prevention and reduction of loss,[419] assisting it in attempts to settle between the third-party plaintiff and the insured,[420] and conducting the defence in court on behalf of the insured defendant.[421]

The liability insurer's right to conduct the defence of the liability dispute provides the insurer with the opportunity to oversee the defence in terms of its own insights and enables it to conduct its insurance business effectively.[422] The liability insurer also has the right to indemnify the third-party plaintiff if it is justified ('hij kan deze laatste vergoeden indien daartoe grond bestaat') under section 143(2) of the Insurance Act of 2014 (s 79(2) of the LIC Act).[423]

Provided that there it would not prejudice the insured defendant,[424] the liability insurer must conduct the defence as follows:[425]

---

[416] Section 143(1) of the Insurance Act of 2014 (previously s 79(1) of the LIC Act) discussed in para 5.3.1.1(a) above.
[417] Section 143(2) of the Insurance Act of 2014 (previously s 79(1) of the LIC Act) discussed in para 5.3.1.1(a) above.
[418] The scope and extent of the duty and the right to defend may also be explained by the legislative provisions referred to above in para 5.3.1.1(a).
[419] For example, Van Schoubroeck et al (2016) 2 & 3 *Tijdschrift voor Privaatrecht* para 65.2 provides: 'Deze verplichting houdt in dat de verzekeraar de nodige maatregelen moet nemen of bijkomende inlichtingen moet inwinnen indien, in geval van een verkeersongeval, uit het gemeenschappelijk aanrijdingsformulier blijkt dat de verzekerde zijn aansprakeljikheid betwist en het deskundigenverslag bovendien tegenstrijdigheden bevat. De verzekeraar die deze verplichting niet nakomt begaat een fout en moet de schade die deze fout veroorzaakt aan de verzekerde vergoeden.'
[420] See para 5.3.1.2 below.
[421] Van Schoubroeck 'Aansprakelijkheidsverzekering' 23-24 para 1.3.4.1.
[422] See para 5.3.1.1(a) on the benefits of the conduct of the defence by the liability insurer for both the insurer and the insured respectively.
[423] The liability insurer's right to indemnify the third-party plaintiff in the context of the conduct of the defence, is additional to the liability insurer's duty to indemnify the insured or the third-party plaintiff directly. See paras 5.2.2 and 5.2.3.1 above.
[424] See the discussion of s 143(3) of the Insurance Act of 2014 (previously s 79(3) of the LIC Act) in para 5.3.1.1(c) below on conclict of interest.
[425] Kruithof 'De leiding van het geschil' 94 para 144. This applies to both the insurer's right and duty to conduct the defence. Many other examples may arise.

- If the claim by the third-party plaintiff against the insured defendant falls entirely within the cover provided by the liability insurance contract, the insurer may conduct the defence focusing solely on its own interests as it alone will bear the outcome and consequences of the resolution of the dispute.
- When the claim by the third-party plaintiff against the insured defendant falls entirely outside the cover provided by the liability the insured defendant may conduct the defence focusing solely on its own interests as it alone will bear the outcome and consequences of the resolution of the dispute.
- If the claim by the third-party plaintiff against the insured defendant falls partly within the cover provided by the liability insurance contract and partly outside of the cover, or in so far as the insurer and insured both have interests in their own disputes, the insured must conduct its own defence and claim indemnification for its defence costs from the liability insurer under section 146 of the Insurance Act of 2014(s 82 of the LIC Act).[426]

Section 153 of the Insurance Act of 2014 (s 89 of the LIC Act) contains detailed provisions as to the liability insurer's[427] intervention in legal proceedings ('tussenkomst in de rechtspleging'). The liability insurer and the insured defendant may respectively intervene voluntarily in litigation instituted by the third-party plaintiff against the other;[428] either can join the other party in the dispute which the third-party plaintiff has instituted against it.[429] Further analysis hereof falls beyond the scope of this thesis due to its procedural nature.

[426] See para 5.3.1.1(d) on defence costs.
[427] There are also provisions relating to the insured defendant, the policyholder, and the third-party plaintiff's intervention in the legal proceedings. Also see Fontaine *Verzekeringsrecht* (2 ed) para 767; Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 747-751; and Van Schoubroeck 'Aansprakelijkheidsverzekering' 19 para 1.2.3, 21 para 1.3.3, and 26 para 1.3.5.2.
[428] Section 153(2) of the Insurance Act of 2014 (previously s 89(2) of the LIC Act).
[429] Section 153(3) of the Insurance Act of 2014 (previously s 89(2) of the LIC Act).

Section 143(3) of the Insurance Act of 2014 (s 79(3) of the LIC Act) provides:

> De tussenkomsten van de verzekeraar houden geen enkele erkenning in van aansprakelijkheid vanwege de verzekerde en zij mogen hem ook geen nadeel berokkenen.[430]

Interventions by the liability insurer in the conduct of the defence do not imply an acknowledgement of liability of any kind on the part of the insured defendant (to the third-party plaintiff) while the insurer may not prejudice the insured defendant.

The duties of the insured defendant towards the liability insurer have already been discussed.[431] These include the prohibition of compensation of the third-party plaintiff by the insured defendant without the liability insurer's consent,[432] and the insured defendant's obligation to take reasonable measures to prevent and mitigate the loss, failure of which may result in a reduction in the performance due by the liability insurer.[433] The insured defendant's statutory duties towards the liability insurer – to transmit documents to the insurer as soon as it is notified of a third-party claim[434] and to enter an appearance, or submit to an investigation ordered by court[435] – are underlined in the context of the conduct of the defence.[436] Failure to comply with these duties may result in a claim for damages against the insured defendant for the loss suffered by the liability insurer – eg, if the insured's failure impacts negatively on the insurer's conduct of the defence resulting in a judgment in favour of the third-party plaintiff and proven liability of the insured towards the third party which the liability insurer must indemnify.

---

[430] Freely translated: 'The interventions by the insurer shall not constitute any form of acknowledgement of liability by the insured (to the third party) and may not prejudice the insured'. (My translation.)
[431] See para 5.2.2.4 above.
[432] See s 149(1) of the Insurance Act of 2014 (previously s 85(1) of the LIC Act).
[433] See ss 75-76 of the Insurance Act of 2014 (previously ss 20-21 of the LIC Act).
[434] Or as soon as a document relating to the third-party claim has been delivered to, or served on, the insured defendant. Section 144 of the Insurance Act of 2014 (previously s 80 of the LIC Act).
[435] Section 145 of the Insurance Act of 2014 (previously s 81 of the LIC Act).
[436] These are coherent duties for the insured ('samenhangende verplichtingen ten laste van de verzekerde') in respect of the liability insurer's duty and right to conduct the defence. See Fontaine *Verzekeringsrecht* (2 ed) paras 714 and 721-722.

5.3.1.1(c) Conflict of Interest[437]

In practice, liability insurers may have interests which conflict with those of the insured defendant so that it is not always advisable or possible for the insurer to conduct the defence against the third-party plaintiff rather than the insured.[438] Conflict of interest between the liability insurer and the insured defendant are also relevant where the liability (or not) for the payment of defence costs by the liability insurer arises.[439]

The following examples of conflicting interests,[440] and instances when the insurer does not have the right or duty to conduct the defence of the third-party plaintiff's against the insured, may be mentioned:[441]

- when the sum insured is insufficient to cover the damages claimed by the third-party plaintiff and the insured defendant is liable to pay a portion of the damages itself; [442]
- if the insured is summoned by the third-party plaintiff on the basis of a covered liability under the insurance contract or a potential non-covered liability;[443]
- when the insured defendant and the third-party plaintiff have contracted with the same insurer;[444]

---

[437] Conflict of interest between the liability insurer and the insured defendant in the conduct of the defence are discussed here in a somewhat different sequence than in the chapter dealing with English law (Chapter 3) owing to the content of the Belgian law and for the sake of clarity.

[438] Van Schoubroeck 'Aansprakelijkheidsverzekering' 24 para 1.3.4.1.

[439] See para 5.3.1.1(d) below.

[440] There is a distinction between conflict that arise from the actions of the insured and those that do not. The distinction is relevant to the allocation of defence costs. See para 5.3.1.1(d) below.

[441] Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 706 and Van Schoubroeck 'Aansprakelijkheidsverzekering' 24-25 para 1.3.4.1.

[442] This is so-called 'under-insurance' and an example of a conflict that is not due to the insured defendant, save in so far as the insured under-insured intentionally. See Fontaine *Verzekeringsrecht* (2 ed) para 729. But see Schuermans & Van Schoubroeck ibid. The coincidence of the interests of the liability insurer and the insured defendant does not necessarily imply a complete congruence of these interests – eg, when an insured is under-insured, its uninsured interest may be greater than the financial interest of its insurer under the insurance policy. The interests of the insurer and the insured are indeed distinct, but do not invariably conflict as, eg, the defence of the third-party plaintiff's claim by the insurer also benefits the insured who is under-insured as regards the uninsured part of the claim.

[443] It has been decided that, 'deze belangen niet samenvallen wanneer de benadeelde [third-party plaintiff], zelfs in ondergeschikte orde, de verzekerde aanspreekt op grond van een aansprakelijkheid die niet gedekt is'. See the decision by the Belgian Supreme Court, Cass, dated 7 Jun 2013, as referred to by by Jocqué (2013) 286 *Nieuw Juridisch Weekblad* para I.C.3.23.

[444] Although in different capacities. For example, where the insured defendant's insurer in its capacity as liability insurer, acts as first-party insurer for the third-party plaintiff we see a conflict that is not due to the insured defendant. See, eg, further detail on legal expense insurance para 5.3.1.1(c) below.

- when there is a difference of opinion between the liability insurer and the insured defendant on whether the matter should be resolved by settlement with the third-party plaintiff, or by litigation;[445]
- when the liability insurer has a right of recourse against its insured under section 152 of the Insurance Act of 2014 (s 88 of the LIC Act in a slightly amended form);[446] or
- when the liability insurer may raise a defence based on the insurance contract.

The following two matters require further discussion: legal expenses insurance; and the liability insurer's right of recourse against the insured defendant.

First, legal expenses insurance may give rise to a possible conflict of interest in liability insurance. It is undesirable that the same liability insurer which, for example, refuses to conduct the insured's defence, must foot the bill for the expense incurred in the insured's legal defence due to conflicting interests. Further, where an insured's liability insurer (the defendant, party X) is also the legal expenses insurer of the third party (the plaintiff, party Y) in the same dispute, it may also be in the interests of the insurer to frustrate party Y's claim against party X, or X's defence against Y.

Belgian law deals with legal expenses insurance ('rechtsbijstands-verzekering')[447] in sections 154-157 of the Insurance Act of 2014 (ss 90-93 of the LIC Act). Section 154 of the Insurance Act of 2014 (s 90 of the LIC Act) expressly states that the provisions regarding legal expenses insurance[448] do not apply to the defence of the insured undertaken by the liability insurer.[449] Legal expenses insurance is generally not relevant in the conduct of the defence in liability insurance, save where

[445] This is an example of a conflict that is not due to the insured defendant.
[446] For example, when the event is caused by the insured's 'zware fout' (as stated in para 5.2.2.3(b)(ii) the Dutch term is used for clarity). This is an example of a conflict due to the insured. In the event that the liability insurer exercises its right of recourse without merit, the conflict is not due to the insured. See Fontaine *Verzekeringsrecht* (2 ed) para 729 and for further detail, see para 5.3.1.1(c) below.
[447] It may be defined as, 'een verzekeringsovereenkomst waarbij de verzekeraar zich verbindt diensten en kosten op zich te nemen om de verzekerde in staat te stellen zijh rechten te doen gelden, als eiser of als verweerder, hetzij in een gerechtelijke, administratieve of andere procedure, hetzij los van enige procedure.' See Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 662. For further detail on the distinction between liability insurance and legal expenses insurance under Belgian law, see Fontaine ibid paras 82 and 768-770.
[448] Sections 155-157 of the Insurance Act of 2014 (previously ss 91-93 of the LIC Act).
[449] Under ss 143 and 146 of the Insurance Act of 2014 (previously ss 79 and 82 of the LIC Act).

there is a conflict of interest between the parties and the insured conducts its own defence.[450]

Conflict of interest between the liability insurer and the insured defendant may be avoided by a statutory measure that expressly regulates the relationship, where both liability and legal expenses insurance are provided by a single insurer to the same insured.[451] The EC, for example, adopted the Legal Expenses Insurance Directive in 1987 for this purpose,[452] that was in part replaced by the so-called 'Solvency II' Directive.[453] The contents of these directives are substantially similar when it comes to legal expenses insurance.[454]

Second, the conflict of interest which arises when the liability insurer has a right of recourse against its insured ('recht van verhaal van de verzekeraar op de verzekerings-nemer en de verzekerde') under section 152 of the 2014 Insurance Act[455] (s 88 of the LIC Act in a slightly amended form) requires further explanation. Section 152 of the Insurance Act of 2014 now provides as follows:

> De verzekeraar kan zich, voor zover hij volgens de wet of de verzekeringsovereenkomst de prestaties had kunnen weigeren of verminderen, een recht van verhaal voorbehouden tegen de verzekeringsnemer en, indien daartoe grond bestaat, tegen de verzekerde die niet de verzekeringsnemer is, ten belope van het persoonlijk aandeel in de aansprakelijkheid van de verzekerde.

---

[450] Also see para 5.3.1.1(d) below on defence costs.

[451] For further detail see Fontaine *Verzekeringsrecht* (2 ed) paras 768-784 and Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) paras 662-676. See also para 4.3.1.1(d)(iii) above on English law.

[452] EC Directive 87/344EEC of 22 June 1987 on the coordination of laws, regulations and administrative proceedings relating to legal expenses insurance.

[453] EC Directive 2009/138EEC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance.

[454] European case law on the topic revolves around when an insured's right to appoint its own legal council commences in legal expenses insurance (see, eg, *Erhard Eschig v UNIQA Sachversicherung AG* [2010] 1 CMLR 5 (ECJ) 130-214). Due to the procedural issues involved, further detail falls beyond the scope of this thesis.

[455] This is also known as the liability insurer's 'regresrecht' or 'regresvordering'. See Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 738 n 537. However, the liability insurer's right of recourse against the insured defendant should not be confused with the its claim against its liability insurer (and the prescription of that claim as dealt with under s 88(1)(iii) of the Insurance Act of 2014, previously s 34(1)(iii) of the LIC Act as discussed in para 5.2.2.1(d) above). It should also not be confused with the liability insurer's right to subrogation (under s 95 of the Insurance Act of 2014previously s 41 of the LIC Act; see para 5.2.3.2 above). This right of recourse allows the liability insurer to recover the indemnification paid to the third-party plaintiff from the insured defendant and differs from the insurer's subrogation right which allows it to recover expenses incurred from liable third parties. See Meurs & Thiery 'Aansprakelijkheidsverzekering' 85-86 para 17. In Belgian law the liability insurer's right of recourse differs from subrogation as the former has a contractual basis. Van Schoubroeck 28 para 1.3.5.4 explains that, '[d]e grondslag voor het verhaal is zuiver contractueel en vloeit niet rechtstreeks voort uit de wet'. For further detail see Fontaine *Verzekeringsrecht* (2 ed) paras 759-766; Schuermans & Van Schoubroeck ibid paras 738-740; and Van Schoubroeck 'Aansprakelijkheidsverzekering' 28-29 para 1.3.5.4.

> De verzekeraar is, op straffe van verval van zijn recht van verhaal, verplicht de verzekeringsnemer of, in voorkomend geval, de verzekerde die niet verzekeringsnemer is, kennis te geven van zijn voornemen om verhaal in te stellen zodra hij op de hoogte is van de feiten waarop dat besluit gegrond is.
> De Koning kan het recht van verhaal beperken in de gevallen en in de mate die Hij bepaalt.[456]

As discussed earlier,[457] section 151 of the Insurance Act of 2014 (s 87 of the LIC Act) provides detailed provisions in regard to the defences which the liability insurer may or may not raise against the third-party plaintiff. To summarise again: in the instances where the liability insurer cannot raise the defences that it has against its insured against the third-party plaintiff, it will be liable to indemnify the third-party plaintiff. The liability insurer will then attempt to exercise its right of recourse against the insured under section 152 of the Insurance Act of 2014 (s 88 of the LIC Act).[458]

The liability insurer's right of recourse has been limited to the insured's personal liability to the third-party plaintiff. There are two further conditions for the liability insurer's right of recourse:[459] it must have reserved its right of recourse and the grounds therefor against the insured in the insurance contract; and the insurer must notify[460] the insured of its intention to seek recourse as soon as it is informed of the facts justifying such a decision. The Legislature may limit the insurer's right to recourse. As regards the prescription of a claim for the liability insurer's recourse against the insured, section 88(3) of the Insurance Act of 2014 (s 34(3) of the LIC Act) provides:

> De regresvordering van de verzekeraar tegen de verzekerde verjaart door verloop

[456] Freely translated: 'The insurer may reserve a right of recourse against the policyholder and, if appropriate, against the insured other than the policyholder, to the extent that it could have denied or reduced the benefit pursuant to statute or under the insurance contract. The liability insurer's right of recourse is limited to the insured's personal liability to the third party. On pain of losing its right of recourse, the insurer shall notify the policyholder or, as the case may be, the insured other than the policyholder, of its intention to seek recourse as soon as it is informed of the facts justifying such a decision. The King may limit recourse in such cases and to an extent he may determine.' (My translation.)
[457] See para 5.2.3.1 above.
[458] Van Schoubroeck 'Aansprakelijkheidsverzekering' 28 para 1.3.5.4; Meurs & Thiery 'Aansprakelijkheidsverzekering' 85-86 para 17; and Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 738.
[459] Strict compliance with these conditions is required. Failure to comply results in the extinction of the right of recourse so that it is no longer possible for the liability insurer to exercise its right of recourse.
[460] See the decision of the Belgian Supreme Court, Cass, dated 4 Oct 2013, as discussed by Meurs & Thiery 'Aansprakelijkheidsverzekering' 87 para 19.

> van drie jaar, te rekenen vanaf de dag van de betaling door de verzekeraar, behoudens bedrog.[461]

This recourse by the liability insurer prescribes three years after the date on which the insurer pays the third-party plaintiff directly, save in cases of fraud.

5.3.1.1(d) Defence Costs[462]

Sections 146(3) and 146(4) of the Insurance Act of 2014 (ss 82(3) and 82(4) of the LIC Act) provide as follows in regard to defence costs:[463]

> De verzekeraar betaalt, zelfs boven de dekkingsgrenzen, de kosten betreffende burgerlijke rechtsvorderingen, alsook de honoraria en de kosten van de advocaten en de deskundigen, maar alleen in zover die kosten door hem of met zijn toestemming gemaakt, of in geval van belangenconflict dat niet te wijten is aan de verzekerde, voor zover die kosten niet onredelijk zijn gemaakt.
> Voor de aansprakelijkheidsverzekeringen, andere dan die bedoeld in de wet van 21 november 1989 betreffende de verplichte aansprakelijkheidsverzekering inzake motorrijtuigen, kan de Koning [de intresten en] kosten ... van dit artikel beperken.[464]

As previously noted,[465] the liability insurer will generally conduct the defence in claims against the insured and it will bear the defence costs it incurs in doing so. The insurer must pay, even in excess of the sum insured, the costs in connection with civil proceedings as well as the fees and costs of lawyers and experts ('the defence costs') to the extent that such costs are either incurred by the insurer or with its consent. The liability insurer loses its right and duty to conduct the defence under section 143 of

---

[461] Freely translated: 'The right to recourse by the insurer against the insured prescribes three years after the date on which the insurer pays (the third party), save in cases of fraud'. (My translation.)

[462] Note that s 154 of the Insurance Act of 2014 (previously s 90 of the LIC Act) expressly states that the provisions regarding legal expenses insurance in ss 155-157 of the Insurance Act of 2014 (previously ss 91-93 of the LIC Act) do not apply to the defence of the insured undertaken by the liability insurer under ss 143 and 146 of the Insurance Act of 2014 (previously ss 79 and 82 of the LIC Act). For further detail on the distinction between liability insurance and legal expenses insurance under Belgian law, see Fontaine *Verzekeringsrecht* (2 ed) paras 82 and 768-770.

[463] The heading of s 146 of the Insurance Act of 2014 (previously s 82 of the LIC Act) reads: 'Betaling door de verzekeraar van de hoofdsom, de interest en de kosten' freely translated as: 'Payment by the insurer of the principal sum, the interest, and the costs'. (My translation.) The focus falls on defence costs in this paragraph. See ss 146(1), 146(2), and 146(4) of the Insurance Act of 2014 (previously ss 82(1), 82(2), and 82(4) of the LIC Act) and para 5.2.2.3(a) above for further detail on the payment of third-party damages and interest by the liability insurer.

[464] Freely translated: 'The insurers shall pay, even in excess of the sum insured, the costs in connection with civil proceedings as well as the fees and costs of lawyers and experts, but only to the extent that such costs are incurred by the insurer or with its consent or, where there is a conflict of interest which is not attributable to the insured, provided that such costs are not incurred unreasonably. With regard to liability insurance other than motor-vehicle liability insurance regulated by the Act of 1989 on Motor-Vehicle Liability Insurance, the [interest and] costs referred to in … of this section can be limited by Royal Decree.' (My translation.)

[465] See paras 5.3.1.1, 5.3.1.1(a), and 5.3.1.1(b) above.

the Insurance Act of 2014 (s 79 of the LIC Act) if there is a conflict of interest between the parties.[466]

Where there is a conflict of interest[467] between the liability insurer and the insured defendant, the defence costs will generally be incurred by the insured. The insured may then claim these costs from the liability insurer if the conflict of interest is not due to the actions of the insured,[468] and if the costs have not been incurred unreasonably. As discussed earlier,[469] the liability insurer's obligation to pay the interest and costs due on the principal amount, even in excess of the sum insured in the liability policy, is not unlimited. Section 6*ter* of Royal Decree of December 1992, as amended, provides for the contractual limitation of the interest on third-party damages and the defence costs with regard to liability insurance, other than motor-vehicle liability insurance regulated by the Act of 1989 on Motor-Vehicle Liability Insurance.[470]

Neither the LIC Act, nor Part 4 of Insurance Act of 2014 provides when the liability insurer should pay the defence costs. A demand must first be made by the insured before interest accrues on the insurer's debts (such as the defence costs).[471]

5.3.1.1(e) Waiver by Conduct ('Gewekte Schijn')[472]

In view of the statutory requirements discussed earlier,[473] the liability insurer that has a right to conduct the defence on behalf of the insured, has a choice whether

---

[466] See para 5.3.1.1(c) above.

[467] An example of unreasonable expenditure is where the insured appoints senior counsel in an uncomplicated matter. See Fontaine *Verzekeringsrecht* (2 ed) para 729.

[468] See para 5.3.1.1(c) above for examples of conflict due to the insured and for examples of conflict not due to the insured.

[469] See para 5.2.2.3(a) above; Fontaine ibid para 730; and Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 711.

[470] For example, a conflict of interest between the liability insurer and the insured defendant may arise if the damages claimed by the third-party plaintiff exceed the sum insured under the insurance policy. Such a conflict is not due to the insured and the insurer will be obliged to pay the defence costs, even in excess of the sum insured, provided that the costs have not been incurred unreasonably and are within the limits as laid down in s 6*ter* of Royal Decree of Dec 1992, as amended.

[471] Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 712. Also see art 1146 of the Civil Code.

[472] From the sources consulted on Belgian law, 'estoppel' (as referred to in paras 3.3.1.1(e) and 4.3.1.1(e) above) does not appear to be known under Belgian law. Belgian legal sources appear to suggest that 'gewekte schijn' by the liability insurer may be regarded as waiver by a liability insurer of its rights, eg, waiver of its right to decline to indemnify the insured ('afstand van het recht om dekking te weigeren'). The phrase 'gewekte schijn' may be translated into English as 'a created impression' or 'impression by conduct'. For legal certainty, the Dutch phrase 'gewekte schijn' is used in conjunction with the English phrase 'waiver by conduct'. See, eg, Van Schoubroeck et al (2016) 2 & 3 *Tijdschrift voor Privaatrecht* para 65.1 and Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 706.

or not to conduct the defence. On the one hand, the insurer may exercise its choice and conduct the defence in accordance with its own insights and interests, but then it may be held accountable to indemnify the insured.[474] On the other hand, the insurer may prefer to have an option to decline to indemnify the insured or to be able to exercise its right to recourse against the insured.[475] In the latter instance the liability insurer must:

- abstain from conducting the defence in the claim by the third-party plaintiff against the insured defendant;
- fully inform the insured defendant of its position, pointing to the possibility[476] that the insured may ultimately bear a part of the third-party claim itself; and
- advise the insured defendant to conduct its own defence against the claim of the third-party plaintiff and to obtain legal advice in doing so.

It has already been mentioned[477] that intervention by the liability insurer in the conduct of the defence does not imply an acknowledgement of liability of any kind on the part of the insured defendant (towards the third-party plaintiff) and the insurer may not prejudice the insured defendant.[478]

Commentators agree that the liability insurer should take a stance as to the conduct of the defence, or not, as soon as it becomes aware that there may be a conflict of interest between itself and the insured defendant.[479] If the insurer does not do so, it may be taken to have created the impression ('dan kan de schijn gewekt worden')[480] that it will, for example, not rely on any contractual exclusion. Should the liability insurer then indeed attempt to rely on a contractual exclusion, that may be

[473] See para 5.3.1.1 above. In summary: When the liability insurer has a right to conduct the defence, the insured has a duty to allow the defence. This is in contrast to when the liability insurer has a duty towards the insured to conduct the defence; the liability insured then has a right against its insurer and the insurer has no choice whether but to comply with its obligation to conduct the defence.
[474] See para 5.3.1.1(e) below on waiver by 'schijn gewekt'.
[475] For example, in instances where the liability insurer considers indemnifying the third-party plaintiff or would like to enter into settlement negotiations with the latter, but it foresees that it may be able to exercise its right of recourse against the insured defendant. See para 5.3.1.1(c) above for further detail on the liability insurer's right of recourse against the insured defendant.
[476] Again, note that Kruithof 'De leiding van het geschil' 95 para 145 n 451 is of opinion that it is the possibility, not the certainty, that the insured may have to bear a portion of the third-party claim on its own, that is relevant here. See para 5.3.1.1(a) above.
[477] See para 5.3.1.1(b) above.
[478] Section 143(3) of the Insurance Act of 2014 (previously s 79(3) of the LIC Act).
[479] Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed) para 706.
[480] Ibid.

regarded as an abuse of its contractual rights and that it acted against the principle of good faith – the insurer waived its rights by conduct ('gewekte schijn') and then attempted to undo the waiver.[481] In such an instance, the remedy in favour of the insured will be to deny the liability insurer its right to rely on the exclusion to deny liability to the insured.[482]

When the liability insurer takes charge of the conduct of the defence, this does not conclusively mean that the insurer will be held liable to indemnify the insured in respect of the insured event.[483] For example, the fact that the liability insurer initially assumed the conduct of the defence does not prevent it from relying on the allegedly 'zware fout'[484] of the insured to deny liability after having been informed of the findings of an expert investigator.

In practice, the theory of waiver by conduct ('gewekte schijn') is often used by the insured in an attempt to hold the liability insurer liable to indemnify the insured defendant. For example, in one instance the insured alleged that the liability insurer had conducted the defence 'without reservation of its rights' ('voorbehoudloos').[485] The insured further alleged that the liability insurer had created the impression that it would indemnify the insured, and that it had waived its right to rely on a contractual exclusion ('hiermee schijn heeft gewekt dekking te zullen verlenen, zodat de verzekeraar moet worden geacht afstand te hebben gedaan van het recht zich te beroepen op een contractuele uitsluiting').[486] The court found[487] that the liability insurer was entitled to await the outcome of the findings of the expert investigator[488] before making its decision on whether or not to conduct the defence.

---

[481] Ibid: 'Misbruik maken van zijn contractuele rechten en in strijd met de goede trouw handelen'.

[482] Ibid para 706 explain it as follows: 'Een abusievelijke rechtsoefening kan in dat geval enkel op passende wijze worden hersteld door aan de verzekeraar het recht te ontzeggen zich op de uitsluiting te beroepen.'

[483] See Van Schoubroeck et al (2016) 2 & 3 *Tijdschrift voor Privaatrecht* para 65.1 on the judicial decisions and opinions of commentators in this regard.

[484] As stated in para 5.2.2.3(b)(ii) above, the Dutch term 'zware fout' is used for clarity.

[485] See Ghent, CA, decision of 9 Dec 2009, as discussed in Van Schoubroeck et al (2016) 2 & 3 *Tijdschrift voor Privaatrecht* para 65.1.

[486] Ibid.

[487] Ibid: 'Vanaf het ogenblik echter dat de verzekeraar kennis nam van het rapport van de gerechtsdeskundige, waaruit bleek dat zijn belangen en die van de verzekerde niet meer gelijklopend waren, had de verzekeraar aan de verzekerde moeten melden dat hij geen dekking zou verlenen … en dat hij niet langer de verdediging van diens belangen op zich zou nemen'.

[488] For further detail in regard to waiver by the insurer's conduct of defence, eg, where an insurer participates in 'l'assureur a l'expertise' (expert investigation, which is a part of the defence), see De Rode & Dubuission 'L'expertise et l'assurance' paras 28 and 45.

5.3.1.2 Settlement of Claims and Related Matters

The liability insurer's duty to support the insured defendant in a claim by the third-party plaintiff may include that the insurer assist the insured to negotiate a settlement between the third-party plaintiff and the insured.[489]

The Insurance Act of 2014(and previously the LIC Act) sets out a number of duties peculiar to liability insurance which the insured must fulfil as regards the liability insurer, and *vice versa*.

The liability insurer and its insured's duties towards each other have already been discussed in the context of the conduct of the defence.[490] The most important principle is that their behaviour in conducting the defence or negotiating a settlement should not prejudice one another.

For example, section 149 of the Insurance Act of 2014 (s 85 of the LIC Act) also provides that compensation, or a promise of it, to the third-party plaintiff by the insured without the insurer's consent does not bind the insurer.[491] Under a liability insurance contract an insured may also not admit liability towards the third-party plaintiff without the insurer's consent.[492] Section 143(3) of the Insurance Act of 2014 (s 79(3) of the LIC Act) contains a corresponding duty on the liability insurer to its insured, namely that interventions by the liability insurer in the conduct of the defence do not imply an acknowledgement of liability of any kind by the insured defendant (towards the third-party plaintiff) while the insurer may not prejudice the insured defendant.

5.3.2 The Legal Relationship between the Liability Insurer and the Third-Party Plaintiff

This relationship has already been discussed.[493] Section 151 of the Insurance Act of 2014 (s 87 of the LIC Act) provides for detailed provisions in regard to the defences that the liability insurer may or may not raise against the third-party plaintiff.

---

[489] Van Schoubroeck 'Aansprakelijkheidsverzekering' 24 para 1.3.4.1. Also see s 143(2) of the Insurance Act of 2014 (s 79 of the LIC Act).
[490] See para 5.3.1.1(b).
[491] See Fontaine *Verzekeringsrecht* (2 ed) paras 737-739 and Van Schoubroeck 'Aansprakelijkheids-verzekering' 16 para 1.3.1.3 for further detail on compensation by the insured defendant.
[492] See para 5.2.2.2.4 for further detail on the insured defendant's duties towards the liability insurer.
[493] See 5.2.3.1 above on the third-party plaintiffs' direct right against the liability insurer, and the liability insurer and the third-parties' rights and obligations towards each other. The third parties' rights against the liability insurer, eg, as to the free disposal of damages paid by the insurer and as to receipts, may again be relevant here.

This may be particularly important in the context of the defence of the third-party claim by the liability insurer. To summarise again: where the liability insurer cannot raise the defences that it has against its insured, against the third-party plaintiff, the liability insurer will be liable to the third-party plaintiff. The liability insurer will then attempt to exercise its right of recourse against the insured.[494]

The liability insurer's right of subrogation against a responsible third party has also already been discussed.[495] Such a claim for subrogation may be instituted as part of the conduct of the defence by the liability insurer.

5.3.3 The Legal Relationship between the Insured Defendant and the Liability Insurer's Legal Representatives

The liability insurer's legal representatives must take particular care that their conduct of the defence does not prejudice the insured defendant.[496]

5.3.4 The Legal Relationship between the Liability Insurer and the Third-Party Plaintiff's Insurers: Litigating against Each Other in the Names of Their Insured

The insured's liability insurer and the third party's first-party insurer may litigate against each other in the names of their respective insured: the first-party insurer by enforcing the third party's claim by exercising its right of subrogation; and the liability insurer by defending the third party's claim. No contract or legal relationship exists between the respective insurers. [497]

We have already seen[498] that the third-party plaintiff must institute its direct claim against the liability insurer (where applicable) before the claim prescribes, and further that section 88(2) of the Insurance Act of 2014 (s 34(2) of the LIC Act) governs the prescription period within which the third-party plaintiff may institute its claim. However, should the third-party plaintiff's first-party insurer be subrogated to

[494] Under s 152 of the Insurance Act of 2014 (previously s 88 of the LIC Act). See para 5.3.1.1(c) above on this conflict of interest between the liability insurer and the insured defendant.
[495] See para 5.2.3.2 above.
[496] Section 143(3) of the Insurance Act of 2014 (previously s 79(3) of the LIC Act). Also see para 5.3.1.1(b) above on the liability insurer and the insured's duties towards each other in the context of the conduct of the defence, as well as para 5.3.1.2 above on settlement.
[497] It is a consequence of s 95 of the Insurance Act of 2014 (previously s 41 of the LIC Act) on subrogation in indemnity insurance See ss 141 and 143 of the Insurance Act of 2014 (ss 77 and 79 of the LIC Act) on the liability insurer's duty and/or right to defend its insured against third-party claims.
[498] See para 5.2.3.1 above.

the third-party plaintiff's rights against the liability insurer, such a party's rights be will be no greater than those of the third-party plaintiff. [499]

5.4 SUMMARY AND CONCLUDING REMARKS[500]

In the first instance, the main source of Belgian liability insurance contract law is legislation as Belgium follows a codified or civil-law system. The Insurance Act of 2014 is a relatively recent piece of legislation (although the majority of its provisions on liability insurance from the LIC Act have been repealed and re-enacted without amendment in the Insurance Act of 2014).

Belgian insurance legislation creates a useful structure and division: liability insurance is dealt with separately in Part 4, Title III, Chapter 3 of the Insurance Act of 2014 (Title II, Chapter III of the LIC Act). Section 141 of the Insurance Act of 2014 (s 77 of the LIC Act) further describes the scope of application of liability insurance contracts. Some of the other provisions relating to indemnity insurance (in other parts or chapters) also apply to liability insurance. Belgian insurance legislation provides an example of workable legislation which incorporates rules pertaining specifically to liability insurance contract law.

Legal terminology in Belgian law is not always clear to a South African audience (eg, the term 'zware fout' in s 62 of the Insurance Act of 2014; s 8 of the LIC Act) and caution should be exercised in translating terminology.

The EC Directive 93/13 on Unfair Contract Terms in Consumer Contracts has been incorporated into Belgian law. But it is especially relevant that Belgian insurance law also provides for rules on unfair contract terms for all insurance contracts – not only insurance contracts concluded with consumers.

---

[499] Van Schoubroeck 'Aansprakelijkheidsverzekering' 30 para 1.4.2 explains the position as follows: 'Wordt een derde [the third-party plaintiff's first-party insurer] gesubrogeerd in de rechten van de benadeelde [the third-party plaintiff], … , oefent de indeplaatsgestelde derde [the first-party insurer], de vordering van de benadeelde [the third-party plaintiff] uit met al haar kenmerken en toebehoren. Daaruit volgt dat de verjaringstermijn van de rechtstreekse vordering van de indeplaatsgestelde [the first-party insurer] tegen de aansprakelijkheidsverzekeraar aanvangt op het ogenblik waarop de verjaringstermijn van de vordering van de benadeelde [third-party plaintiff] begint te lopen.' For further detail, see Meurs & Thiery 'Aansprakelijkheidsverzekering' 108-109 para 46.

[500] This para 5.4 is a concise summative conclusion of the survey conducted on selected aspects of the law of liability insurance under Belgian law. Belgian law may assist in the development of the law of liability insurance in South African law, but the conclusions and recommendations reached in Chapter 6 go beyond those of para 5.4. Some parts of the law were reviewed to provide a complete overview of the law of liability insurance under Belgian law, but they may not offer an appropriate solution for South African law in all instances.

Secondly, as regards the liability insurer's duty to indemnify the insured, and the scope of cover of the insured defendant's liability, Belgian insurance legislation is concise but clear. Section 141 of the Insurance Act of 2014 (s 77 of the LIC Act) provides that the liability insurer must indemnify the insured's estate within the limits of the cover agreed upon, for a debt arising from proven liability (ie, the insured's proven liability to the third party for the latter's loss). The liability insurer becomes liable to the insured only once the latter's liability to the third-party plaintiff has been established (by way of judgment, arbitral award, or settlement). The time at which the liability insurer becomes liable to indemnify the insured is rather late in the judicial process.

As to the ways in which the insured defendant's liability towards third-party plaintiffs should be proven, there appear to be fewer judicial decisions, and less legal doctrine or uncertainties, in Belgian law than in other systems researched in the thesis for the purposes of a comparative study. This may be ascribed to the clear legislative provisions relating to the liability insurer's duty to indemnify the insured under the more advanced Belgian insurance contract law.

Section 142 of the Insurance Act of 2014 (s 78 of the LIC Act, as amended) provides at least a partial solution to the uncertainty surrounding the duration of liability cover. This involves the event which brings the matter within the scope of a particular liability policy. The duration of liability cover is provided for by a dual system in section 142 of the Insurance Act of 2014 (s 78 of the LIC Act, as amended). Apart from occurrence-based liability cover as the general rule, under certain circumstances the section allows for hybrid claims-made policies which provide protection to the insured and insurer in different ways. Prescribed minimum cover by way of legislation benefits the insured, but excessive contractual freedom in adapting the insurance cover may create gaps and uncertainty in cover which is to the disadvantage of the insured. Legislative amendments to the LIC Act, and a recent decision by the Belgian Supreme Court have resolved some of the challenges as to the duration of liability cover. Care should be taken that terminology as to the duration of liability cover under Belgian law is not simply equated with similar terms in Anglo-American legal systems.

As to the sum insured, under section 146 of the Insurance Act of 2014 (s 82 of the LIC Act) the liability insurer may be liable to pay costs and interest on the

damages claimed by the third-party plaintiff which may even exceed the sum insured. This benefits the insured.

The Insurance Act of 2014 (and previously the LIC Act) has clarified many legal uncertainties. Section 88 of the Insurance Act of 2014 (a slightly amended version of s 34 of the LIC Act), for example, contains detailed provisions as regards prescription periods (for the insured's recourse claim against its insurer, the third-party's direct right to claim from the liability insurer, and for the liability insurer's recourse claim against its insured). Contractual clauses which reduce or extend the prescription period, or provide for a different starting or completion date for the period, are void. But there are still some interpretation issues as to prescription – eg, in the case of fraud and fault involving minors.

Liability insurance gives rise to a multitude of legal relationships. Extensive protection is provided to the respective parties involved in liability insurance – eg, by way of the direct right of the third-party plaintiff to claim against the liability insurer in section 150 of the Insurance Act of 2014 (s 86 of the LIC Act) which is not limited to instances of insolvency or sequestration. The liability insurer's rights are protected by detailed procedural provisions – eg, the defences which the liability insurer has against the insured defendant and which it may or may not raise against the third-party plaintiff are addressed in section 151 of the Insurance Act of 2014 (s 87 of the LIC Act); and the recourse claim that the liability insurer has against the insured if it is unable to institute defences against the third-party plaintiff as provided for in section 152 of the Insurance Act of 2014 (s 88 of the LIC Act, in a slightly amended form). There are also detailed provisions as to intervention in legal proceedings by the liability insured, the insured, and the third-party plaintiff in section 153 of the Insurance Act of 2014 (s 89 of the LIC Act) that prove to be valuable. The third parties' direct right against the liability insurer may be in the interest of third parties which suffered loss attributable to the insured. Some of the procedural aspects relating to the liability insurer's defences and its recourse claim against the insured, as well as the provisions relating to intervention in legal proceedings, fall beyond the scope of this thesis.

Thirdly, the Belgian insurance legislation provides extensive protection to both the liability insurer and the insured by providing for a liability insurer's statutory duty and right to conduct the defence under certain specified conditions (see ss 141 and 143 of the 2014 Insurance Act; ss 77 and 79 of the LIC Act, as amended). Belgian

insurance legislation provides that the liability insurer has a duty to conduct the defence when it has been notified of the occurrence of the insured event (within the limits of cover) that is on risk, and the insured defendant has called upon the insurer to intervene in the defence. The liability insurer must intervene in the third-party claim in support of the insured defendant from the date on which the insured defendant calls upon it to do so. The liability insurer has a right to conduct the defence when the third-party plaintiff's claim concerns private-law or civil interests; and in so far as its interests and those of the insured defendant coincide. There are also detailed provisions as to the scope and extent of the duty and/or right to conduct the defence, as well as to conflict of interest between the liability insurer and the insured.

Section 146 of the Insurance Act of 2014 (s 82 of the LIC Act) also obliges liability insurers to pay the insured's defence costs, even when these exceed the sum insured under certain circumstances. This benefits the insured that may be unable to pay high defence costs. Some conflict of interest between the liability insurer and the insured defendant may be avoided by regulating the provision of liability insurance and legal expenses insurance to an insured by a single insurer by statute. The EC, for example, adopted the Legal Expenses Insurance Directive in 1987 which was subsequently replaced by the so-called 'Solvency II' Directive.

The majority of rights and duties of the parties involved in liability insurance – the liability insurer, the insured, and the third-party plaintiff – are clearly specified under the Insurance Act of 2014 (previously the LIC Act). The most important duty as far as the liability insurer and the insured are concerned, is that their behaviour in the conduct of the defence or settlement, should not prejudice either party. For example, section 149 of the Insurance Act of 2014 (s 85 of the LIC Act) provides that compensation or a promise of it, to the third-party plaintiff by the insured without the insurer's consent will not bind the latter. Section 143(3) of the Insurance Act of 2014 (s 79(3) of the LIC Act) contains a correlating duty on the liability insurer to its insured that its interventions in the conduct of the defence will not imply an acknowledgement of liability of any kind in respect of the insured defendant (towards the third-party plaintiff), and will not prejudice the insured defendant. To provide for the parties' duties by statute may avoid disputes between the parties and create legal certainty.

Lastly, although Belgian law is foreign law and may only be used for comparative purposes in our law, South African insurance law could learn from and adopt some of the provisions on liability insurance contract law in Belgium's Insurance Act of 2014 (previously the LIC Act) and its interpretation in court judgments and law doctrine.[501]

This chapter has analysed the relevant principles of the law of liability insurance under Belgian law, a codified or civil-law system. The next and final chapter, Chapter 6, contains the conclusions and recommendations on how the South African liability insurance contract law can develop in future and benefit from the current position in both the United Kingdom and Belgium. Taking cognisance of the laws of other jurisdictions could provide the South African legislator and the Financial Services Conduct Authority with some guidance when consideration is given to codify principles relating to liability insurance.

[501] For further detail, see Chapter 6 on the South African law of liability insurance and the conclusions and recommendations there.

CHAPTER 6:

SUMMARY OF FINAL CONCLUSIONS AND RECOMMENDATIONS

This thesis argues that there are gaps, impracticalities, and unique challenges facing South African insurance law specifically when it comes to liability insurance. Issues arise in respect of the liability insurer's duty to indemnify its insured and in relation to the liability insurer's conduct of the defence and settlement of third-party claims against the insured defendant.[1] Legal uncertainty may span the entire lifetime of the contract, including the pre-contractual process, the actual negotiation, and the nature of the cover procured, and claims management both before and after the expiry of the contract.[2] Some of these legal challenges can be addressed by novel and creative applications of the national law not yet pursued,[3] and by implementing potential solutions from the other jurisdictions reviewed in this thesis.[4]

The thesis presents critical summative comments, conclusions, and recommendations throughout[5] which address how to promote the law of liability insurance and advance legal certainty on specific aspects analysed in the preceding chapters.[6] This final chapter is a concise summary of the final conclusions and recommendations for purposes of the development of the law of liability insurance in South Africa.

The principal sources of liability insurance contract law are the common law, and a limited number of judicial decisions, as well as general insurance law statutes and legislative instruments to a lesser degree.[7] These sources to some extent provide broadly for fairness, transparency, and consumer protection under the general principles of the law of contract and general insurance law. But I argue that the

[1] This is the thesis. See para 1.7 above.
[2] See para 3.2.2.2(b) above on the duration of liability cover and Chapter 3 passim.
[3] See Chapter 3 on South African law above.
[4] See again Chapter 4 on English law and Chapter 5 on Belgian law above.
[5] See, eg, the summative critical comments and the conclusions and recommendations on South African law in Chapter 3 above. See also the summaries and concluding remarks in Chapters 4 and 5 above on the survey conducted on selected aspects of the law of liability insurance under these foreign systems. These provide a basis for the final conclusions and recommendations in this chapter.
[6] See again the research statement and objective in para 1.5 above.
[7] See para 3.1 above on the sources of liability insurance contract law. Although legislation is of increasing importance, it has had limited effect on the contractual aspects of liability insurance. See para 3.1.2 above. See also para 3.1.5 above on the application of the Constitution of the Republic of South Africa, 1996 (the 'Constitution') to civil obligations and liability insurance contracts.

primary development of the law of liability insurance should be by way of the enactment of specific legislation. Development by way of judicial activism is less certain, and will probably be fragmented and take a considerable period before it enjoys general application.

There is no specific statute on insurance contract law in force in South Africa at present,[8] or any statute specifically regulating liability insurance contract law.[9] The Consumer Protection Act 68 of 2008 does not apply to insurance contracts, and the proposed Conduct of Financial Institutions Bill,[10] which may potentially address the inclusion of unfair contract terms, has not yet been finalised. The approach of South African law to introduce more statutory regulation, such as the COFI Bill, appears to indicate a shift from rule-based to principle-based (but mandatory) regulation.

The Replacement of the Policyholder Protection Rules [11] emphasise the importance of fair treatment of the insured and regulate the use of plain language, transparency, and disclosure to an extent, but only in principle and only in general terms. The PPRs apply to all forms of insurance contracts, and although they may appear to be detailed, there is scope for their further expansion and application to liability insurance in particular.[12] It has been questioned whether the new, generic disclosure duties placed on insurers under the current PPRs will result in a fairer dispensation for the insured. Specifically as regards the unique nature and challenges posed by the character and structure of liability insurance, it is concluded that it will be far more prudent for the legislator to develop specific rules for liability insurers, and potential insured,[13] to ensure compliance with tailor-made rules and processes.[14] To promote legal certainty, consumer protection, and industry standards, these rules

[8] Section 156 of the Insolvency Act 24 of 1936 (the 'Insolvency Act') provides for a statutory exception which applies in the event of sequestration of the insured defendant under liability insurance. See para 3.2.3.2 above.
[9] See para 3.1 above.
[10] The 'COFI Bill'. The Bill was published on 11 December 2018 and invited comments by 1 April 2019.
[11] The 'PPRs'; in terms of the Short-term Insurance Act 53 of 1998 (the 'SIA') promulgated as GN 1433 in *GG* 41329 of 15 December 2017 and in force from 1 January 2018, unless provided otherwise. A few amendments were made to the PPRs. The amendments were promulgated as GN 996 in *GG* 41928 of 28 September 2018 and came into effect from 1 October 2018. Previous versions of the PPRs fall beyond the ambit of this study.
[12] The same applies to the General Code of Conduct for Authorised Financial Service Providers and Representatives (the 'GCC') under the Financial Advisory and Intermediary Services Act 37 of 2002 (the 'FAIS Act'), BN 80 of 2003 as amended, in that more specific aspects regarding liability insurance should be described as mandatory disclosures. See rules 3 and 7 of the GCC. See also para 3.2 above.
[13] Again, the term 'insured' is used consistently in preference to 'policyholder'.
[14] As is the case with microinsurance. See below for further detail.

should include greater specificity on mandatory disclosures to be made by both parties.

Most importantly, this study has attempted to drill down through the various layers of general principles and requirements for all forms of insurance, with the specific aim of identifying only those current issues in insurance contract law and insurance practice relevant to liability insurance cover and related claims management.

A. The thesis has identified and developed *a check list of some of the most important disclosure duties for liability insurance contracts, their operation, and the eventual claims processes*.[15] The thesis recommends that the Financial Service Conduct Authority[16] enact specific statutory provisions that require liability insurers and their insured to disclose, as a minimum, the following specific issues expressly to one another before and during their relationship.[17]

- A clearer and simpler explanation of the nature and purpose of the liability insurance contract,[18] its complex features specifically during the existence of the product lifecycle and claims processes,[19] and explanations of its challenging terminology.[20] These disclosures should be illustrated by the incorporation of simple tables and descriptive examples.

[15] The purpose of this list is to indicate the most important information that must disclosed by an insurer to an insured in liability insurance. This is not intended as a closed list as the study has focused only on selected legal aspects of liability insurance. Some information will have to be disclosed repeatedly as there are different times and instances of disclosure by the insurer required under the PPRs. That detail may be found in Chapter 3 above and in the PPRs 11, 17.6 and 17.8.3*(c)*.

[16] The 'FSCA', as established under the Financial Sector Regulation Act 9 of 2017 (the 'FSRA').

[17] Chapter 3 contains a synopsis of the current disclosure duties under the PPRs, including when and by whom disclosure is required.

[18] The insurer's duty to indemnify the insured (para 3.2 above), and the conduct of the defence and settlement by the liability insurer of third-party claims brought against the insured should also be explained (see para 3.3 above).

[19] Complex features that should be explained include: liability insurance as third-party insurance (para 3.2.1 above); 'loss' under liability insurance (para 3.2.2.1 above); prescription in the context of liability insurance (para 3.2.2.1(d) above); and the duration of liability cover (para 3.2.2.2 above).

[20] For example, as to the 'loss' under liability insurance: 'legal liability' towards third parties, its scope and the time and the way in which the insured defendant becomes legally liable towards the third party (para 3.2.2.1 above). As to the 'insured event' and the duration of liability cover: 'occurrence-based' or 'claims-made' policies, or variations thereof ('hybrid' policies), whichever are relevant (para 3.2.2.2 above).

- An insuring or cover clause that clearly defines the types of legal liability covered,[21] including details on the time when and way in which the insured defendant becomes legally liable to the third-party plaintiff.[22]
- The duration of the liability cover,[23] amplified by specific reference to the trigger for cover, namely whether the liability insurance contract is occurrence-based, claims-made, or a hybrid form of liability insurance. The insurance contract should clearly describe the insured event, identify the specific trigger and duration of liability insurance cover for that specific product in plain language, and attempt to illustrate the challenges and complexities surrounding these issues with the aid of tables and examples as mentioned earlier.[24] Information disclosed must be tailor-made according to each individual type of liability policy.[25] As the rules of prescription as applied to the different liability policies are also very complex, the insured must be informed in detail and in advance of the termination of its rights.
- An insured should further be fully informed of the scope of its disclosure duties towards the liability insurer.[26] Legislative measures should contain a list of mandatory facts that must be disclosed in addition to those required under general insurance law. These facts should be explained in detail by the insurer to the insured. As specific disclosures by the insured are particularly relevant for claims brought under claims-made policies, the insurer should, for example, inform the insured of these and describe the rationale for the insurer to gain access to the specific information.
- Exceptions to, exclusions from, and limitations on liability cover should be disclosed by the insurer in simple language to the liability

[21] See para 3.2.2.1(a) above.
[22] Potential legal liability by the insured defendant to the third-party plaintiff is the default position under South African law and is recommended, but the effect should be explained clearly (paras 3.2.2.1(b)(ii) and 3.2.2.1(c) above).
[23] See para 3.2.2.2 above.
[24] Ibid.
[25] For example, to occurrence-based, claims-made or hybrid forms of liability insurance, as well as to general liability cover and specialised forms of liability cover.
[26] See paras 3.2.2.2(b) and 3.2.2.4 above.

insured.[27] These include: *(a*) exclusions such as contractual liability for performance; *(b)* limitations on the sum insured (including aggregations and event limits); and *(c)* exclusions or limitations applicable to the conduct of the insured. Significant exclusions or limitations for an individual policy should be prominently disclosed,[28] clearly and in full. It is recommended that all of the former examples of prescribed or recommended disclosures are significant (or should be considered as such) and they should be prominently disclosed in any event.

- The application of prescription and time-limit provisions have to be explained and disclosed to the insured.[29] Again tables and examples can be incorporated to explain their effect under different types of liability policy.[30]
- The insured should be informed of the insurer's rights to subrogation, defence,[31] and settlement. These should be explained in detail to the insured with specific emphasis on the conduct required by the insured to avoid prejudice to the insurer's rights thereto or in connection therewith.[32]
- An insurer should advise an insured of any circumstance that could give rise to actual (or potential) conflict of interest between the insurer and the insured.[33] An insured should be informed when it is entitled to insist on its own legal representative and on how defence costs operate.[34]

[27] See paras 3.2.2.1(a) and 3.2.2.3 above.
[28] Rule 10.15 prescribes rules on prominence of certain communications to the insured. See para 3.2.2.1(a) above.
[29] See para 3.2.2.1(d) above. These should also be regarded as significant exclusions or limitations that require prominence in communication, or should be treated similarly.
[30] See paras 4.2.2(b)(iv) and 5.2.2(b)(iv) above for the application of prescription to the different types of policies under English and Belgian law.
[31] The possibility of a reservation of rights by the insurer when it conducts the defence should be highlighted as a mandatory duty in communications between the parties to advance the interests of the insurer and provide legal certainty as to the positions the parties. See para 3.3.1.1(e) above.
[32] For example, the insured defendant should not admit liability towards the third-party plaintiff without the prior consent by the insurer. See paras 3.2.4 and 3.3 above. The insurer should equally not prejudice the rights of the insured in its communication and contact with third-party plaintiffs.
[33] For example, when there is legal liability towards the third party in excess of the policy limits, where liability cover is uncertain, or where the liability insurer is also the legal expenses insurer. See paras 3.1.1.1(c), 4.1.1.1(d) and 5.1.1.1(c) above on possible conflict of interest.
[34] See para 3.3.1.1(d) above on defence costs.

– To ensure transparency in the insurance claims processes, and when an insurer makes a final payment or offer of settlement to the insured, the insurer should disclose and explain the payment and settlement processes and their effect on the insurance relationship to the insured.[35] In liability insurance the same applies when the liability insurer makes a final payment or settlement offer to the third-party plaintiff on behalf of the insured defendant.

There are concerns that insureds generally do not read (insurance) documents; and that some insured are not financially literate enough to understand their contents. However, the extensive insurance consumer education being developed by the new FSCA may gradually assist in addressing these concerns.

The study proposes that the development of the law of liability insurance may best be accommodated by amendment of the existing PPRs, which are also part of the suite of legislative instruments that regulate the insurance industry.[36] Although the PPRs are aimed at insurance contracts in general,[37] they contain separate rules specifically for microinsurance products.[38] The latter was necessary to protect the insured under microinsurance cover due to the increased vulnerability of that category of insured. For this reason, it appears to be possible to tailor some PPRs for a specific type of insurance cover. From this study it is clear that a liability insured suffers from vulnerability in the liability insurance relationship due to the special and composite nature of liability insurance, as compared to other forms of insurance cover. This thesis proposes the incorporation of liability insurance PPRs specifically for purposes of regulating liability insurance contracts and liability insurance practice.[39]

Given the complexities and unique intricacies of liability insurance cover, either a complete separate set of rules in the existing PPRs that apply to liability insurance, or alternatively even a completely separate set of PPRs enacted exclusively for

[35] See para 3.3.1.2 above.
[36] The PPRs were enacted under s 55 of the SIA, as amended by the (South African) Insurance Act 18 of 2017 (the 'Insurance Act of 2017'). Insurance regulatory and supervision regimes fall beyond the ambit of this thesis. The regulation that is at issue here concerns aspects relevant to liability insurance contract law.
[37] Namely 'short-term insurance' contracts and 'long-term insurance' contracts respectively, which are now known as 'non-life insurance contracts' and life insurance contracts' in the (South African) Insurance Act of 2017. See para 3.1.2 above.
[38] Rule 2A.
[39] If liability insurance is part of a comprehensive policy, these will apply to the liability section of the policy.

liability insurance, are recommended. These will ensure greater consumer protection and improved legal clarity in the negotiation, conclusion, and execution of liability insurance contracts. Although the PPRs at present prescribe some measures to improve fairness, these are so generic that they are, in the main, insufficiently specific to address what is required for specific types of insurance. Bearing in mind the unique challenges posed by liability insurance, the most efficient vehicle to introduce such rules would be for the incorporation of a set of tailor-made PPRs. It is recommended that these specialised PPRs should prescribe the minimum disclosure duties as denoted above[40] for liability insurance contracts, their operation, and the eventual claims processes. The specialised PPRs should further address the specific issues as recommended below for future enactments.[41]

At present the PPRs only apply to limited categories of insured.[42] It is recommended that the development of these separate rules applicable to liability insurance cover should not be limited to specific categories of insurance consumer. The insured – eg, corporations in the commercial sector – which also face catastrophic events liability insurance challenges (like those that arose from the US 9/11 catastrophe, or in environmental liability claims such a liability claims for asbestosis and silicosis) equally require protection and remedies for the legal challenges posed by liability insurance cover.

The solution proposed will benefit not only the insured, liability insurers too can only benefit as improved legal certainty will limit the number of claims, and the time, expense, and reputational damage that comes with the pursuit of insurance disputes at the Ombuds or in courts alike. The protection of the insurance consumer as well as the economic stability of the insurer are at issue.

[40] See again the check list (para A).
[41] See paras B and C below. If the PPRs are repealed or amended by the COFI legislation, the minimum standards may be incorporated in that legislation to apply to liability insurance contracts.
[42] Note again that they only apply to a limited category of insured – natural persons and some juristic persons – s 1 of the PPRs sv 'policy'. Some of the rules also apply to potential policyholders, albeit insured.

The main legal challenges in regard to liability insurance that would be addressed by future extended statutory regulation, and the recommendations proposed in this regard, are briefly summarised below.

B. *Recommendations as to the liability insurer's duty to indemnify its insured*:

1. In South Africa, far less judicial authority exists on the extent of the insured defendant's legal liabilities towards a third-party plaintiff covered under the liability insurance contract, when compared to authority available in English law, which has strong persuasive authority in our law. South African law may find valuable guidance, for example, from how English courts have dealt with the interpretation of the term 'legal liability'.[43] To clarify the extent of the insured defendant's legal liabilities towards the third-party plaintiff that is covered under the liability insurance contract, it is recommended that the insurance contract should in clear terms provide exactly which type of legal liability is covered, and what is excluded.[44]

2. In essence the time that the legal liability of the insured defendant to the third-party plaintiff arises under South African law is when the third party has a *prima facie* cause of action against the insured, which is when all the events have occurred which render the insured liable to the third party, even though the amount of its liability has not yet been quantified or paid. As explained, this position favours the insured which offers a benefit other jurisdictions do not.[45]

3. As to the insured event and the duration of liability cover,[46] guidance may be found in the English law on the interpretation of terminology under the different types of policy and their triggers.[47]

Prescribed minimum liability cover, as is found in Belgian law, is clearly to the advantage of the insured and may also resolve some of the legal uncertainties through

[43] See para 4.2.2.1(a) above.
[44] See the example developed in the summative critical comment of para 3.2.2.1(a) above.
[45] See paras 3.2.2.1(b)-3.2.2.1(c) above.
[46] See para 3.2.2.2 above.
[47] See para 4.2.2.2 above.

detailed statutory provisions which eliminate the need for judicial interpretation of uncertainties.[48]

4. As to duty of notice by the insured of the occurrence, claim, potential claim, or related matters, some authors under English law suggest that conditions that impose unreasonable time limits on the insured may in future be regarded as unfair.[49] Similarly, some notice clauses, or 'claims-made and notified' policies might in time be found to be unfair under South African law, whether under statute or common law, and specifically regarding public policy.[50] It is recommended that the issue be pre-empted by following the introduction of a rule on reasonable time periods as foreseen in English law.

5. Belgian legislation prescribes detailed mandatory provisions relating to the prescription and limitation of claims for liability insurance contracts.[51] It provides legal certainty for the most part, and prescription in the context of liability insurance in South Africa should ideally be detailed in legislation, or in the PPRs, to provide for the start of a prescription period and minimum periods, regulated in the same way as time-limit provisions.[52]

6. As to the legal relationship between the liability insurer and the third-party plaintiff: The third-party plaintiff may claim directly from a liability insurer under the exceptional circumstances of section 156 of our Insolvency Act.[53] It is uncertain whether section 156 will withstand a constitutional challenge based on equality in section 9 of the Constitution as it appears that third-party rights enjoy preference over the rights of other creditors under section 156. It does not appear that this type of discrimination is directly held to be unfair in current legislation. It is also unsure whether and when section 156 will be amended when the proposed update of South African insolvency legislation gets under way. In order not to delay the introduction

[48] See para 5.2.2.2 above. It is not recommended that the same types of policies under Belgian law should be implemented in South Africa *mutatis mutandis*, eg, the 'hybrid claims-made' policy and the 'sunset clause' in particular are tailor-made for the Belgian system and extremely complex and detailed.
[49] Under the (English) Consumer Rights Act of 2015. See paras 4.1.2 and 4.2.2.4 above.
[50] See para 3.2.2.4 above.
[51] See para 5.2.2.1(d) above.
[52] Note again the distinction between prescription and time-bars.
[53] See para 3.2.3 above.

of such an amended provision, the matter should be addressed in the unique PPRs or rules for liability insurance claims as proposed, rather than in general insolvency law legislation. Lessons may be learnt from the expanded provisions on the direct claim of the third-party plaintiff against the liability insurer under current English law.[54]

However, the most comprehensive and beneficial position for the third party can be found in Belgian law, where the third-party plaintiff has a statutory right to a direct claim against the liability insurer which is not limited to the insolvency or sequestration of the liability insured.[55] Yet, the constitutionality of such an approach may be open to question, as in the case of section 156 under the South African Insolvency Act. It is doubted whether a third-party plaintiff under liability insurance will be awarded a direct claim against the liability insurer which goes beyond the sequestration of the liability insured. Our law has not yet evolved to the stage where it readily recognises such extended rights of the third party under liability insurance. These third-party rights under Belgian law go beyond the third-party rights currently provided under section 156 which are already under fire for being unequal, and may discriminate unfairly between a third-party plaintiff and other of the liability insured's creditors.

C. *Recommendations as to the liability insurer's defence and settlement of third-party claims brought against the liability insured:*

1. Under South African law,[56] unless the insurance contract provides for the insurer's duty to defend the insured,[57] an insurer can generally secure a contractual right which allows it to choose to defend its insured against the third party's claim. The right to decide to defend the insured generally arises simultaneously with the insurer's duty to indemnify. Under English law, too, the insurer only has such a right if it has been agreed upon contractually.[58] In Belgian law, however, a liability insurer has a statutory right, and even a statutory duty, to defend its insured.[59]

[54] See the English Third Parties (Rights Against Insurers) Act of 2010 that was enacted and came into operation long after its predecessor of 1930. See also para 4.2.3.3 above.
[55] See para 5.2.3.1 above on the third-party plaintiff's direct right against the liability insurer.
[56] See para 3.3.1.1 above.
[57] A contractual duty to defend is not practice in South African law.
[58] There is more judicial authority in English law that may be consulted to develop our law. See para 4.3.1.1 above.
[59] See para 5.3.1.1 above on Belgian law and the extensive protection that Belgian insurance legislation provides to both the liability insurer and the insured.

Growing consumerism and rising litigation, and right of access to justice are some of the reasons for calling for an insurer's statutory duty to defend, as opposed to merely a contractual right to choose to defend. Minimum cover may be prescribed in the PPRs.

2. In addition to the inclusion of rules on the issues mentioned above in separate PPRs or separate rules in the existing PPRs, it is recommended that the regulators pursue a project on quantitative research. The purpose of the project should be to establish the need for and the viability and cost-effectiveness of providing liability cover that includes the increases in the cost of honouring a statutory duty by the liability insurer to defend, as opposed to the contractual right of defence that is prevalent in liability insurance cover in South Africa. Belgian insurance legislation provides an example of how the costs and processes for the defence and settlement of a claim by the liability insurer may be developed under South African law. [60]

In this regard legal expenses insurance could serve as an alternative to cover defence costs, as opposed to the liability insurer conducting the defence, although defence by a liability insurer that is a specialist in the field may be preferred by the insured. There are also advantages to having only a single policy rather that a number of separate policies – one for the liability itself and another for related legal costs.

3. Some conflict of interest between the liability insurer and the insured defendant may be avoided by regulating the provision of liability insurance and legal expenses insurance to an insured by a single insurer by statute, as in both English and Belgian law.[61]

4. Furthermore, if a liability insurer conducts the insured's defence, it should conduct the defence expressly under reservation of rights to avoid uncertainty if it later denies liability to the insured which then leaves the latter without rights of redress.[62]

[60] See para 5.3.1.1 above.
[61] See paras 4.3.1.1(d)(iii) and 5.3.1.1(c) above.
[62] See para 3.3.1.1(e) above.

5. In the development of the South African liability insurance law, the legislator may take cognisance of the English law on principles for the settlement of third-party claims by the liability insurer which are as yet undeveloped in South African law.[63]

6. Any development of the law of liability insurance in South African law, should take account of the transboundary or supra-national nature of liability insurance, and the universal aims of liability cover.[64] The first forms of liability insurance were aimed at indemnifying (and in some legal systems like the Belgian, also defending) the liability insured against third-party claims. There is a growing emphasis on protecting the interests of the third-party plaintiff in jurisdictions such as Belgium, to ensure that these plaintiffs benefit from the insured defendant's liability cover and that damage does not simply rest where it falls.[65] In view of our national aim of increased consumer protection, the interests of the liability insurance consumer (the insured or policyholder), the third-party plaintiff, and the insurer who offers a liability insurance cover product, must be considered and can be effectively regulated by product-specific rules. Such rules will provide increased protection for all three parties, increase financial stability and solvency, and ensure a developed liability insurance regime that will be attractive to foreign investors and consumers alike.

[63] See paras 3.3.1.2 and 4.3.1.2 above.
[64] See Chapter 2 above. It has further been observed that liability cover aims to indemnify the liability insured before it is required to pay the third-party claim.
[65] For example, the direct claim of the third party against the liability insurer in para 5.2.3.1 above. See also para 1.2 above for further detail on the reasons for liability insurance.

BIBLIOGRAPHY

(Both a full and an abbreviated reference are provided in this bibliography. The abbreviated reference is used in the footnotes.)

LITERATURE

A

Abraham (2005) 64 Maryland LR

Abraham KS 'Liability Insurance and Accident Prevention: The Evolution of an Era' (2005) 64 Maryland LR 573-612

Abraham *Liability Century*

Abraham KS *The Liability Century: Insurance and Tort Reform from the Progressive Era to 9/11* (Harvard University Press, London 2008)

Abraham (2001) 87 *Virginia LR*

Abraham KS 'The Rise and Fall of Commercial Liability Insurance' (2001) 87 *Virginia LR* 85-109

ALI *Restatement on the Law of Liability Insurance*

American Law Institute *Restatement on the Law of Liability Insurance* Proposed Final Draft No 2 of April 2018

Anon (1983-1984) 132 *University of Pennsylvania LR*

Anon 'The Creation of a Common Law Rule: The Fellow Servant Rule, 1837-1850' (1983-1984) 132 *University of Pennsylvania LR* 579-620

Atkins *Are You Covered?*

Atkins N *Are You Covered? A South African Guide to Short-term Insurance* (Divaris Stein Publishers, Johannesburg 1984)

B

Bacon *Benefit Societies* (2 ed)

Bacon FH *A Treatise on the Law of Benefit Societies and Life Insurance: Voluntary Associations, Regular Life, Beneficiary and Accident Insurance* 2 vols 2 ed (FH Thomas Book Co, St Louis 1894)

Bacon *Benefit Societies* (3 ed)

Bacon FH *A Treatise on the Law of Benefit Societies and Life Insurance: Voluntary Associations, Regular Life, Beneficiary and Accident Insurance* 2 vols 3 ed (FH Thomas Book Co, St Louis 1904)

Bailey, Ching & Taylor *Modern English Legal System*

Bailey SH, Ching JPL & Taylor NW (eds) *Smith, Bailey & Gunn on the Modern English Legal System* 5 ed (Sweet & Maxwell, London 2007)

Baker *English Legal History*

Baker JH *An Introduction to English Legal History* 4 ed (Butterworths LexisNexis, London 2002)

Baker (1996-1997) 75 *Texas LR*

Baker T 'On the Genealogy of Moral Hazard' (1996-1997) 75 *Texas LR* 237-267

Ballon et al *Economisch Recht*

Ballon GL, Geens K, Stuyck J & Terryn E (eds) *Inleiding tot het Economisch Recht* (Kluwer, Mechelen 2010)

Basedow et al *PEICL*

Principles of European Insurance Contract Law (PEICL) prepared by the Project Group Restatement of European Insurance Contract Law (est by Fritz Reichert-Facilides, chairman Heiss H), edited by the Drafting Committee: Basedow J et al, in cooperation with Loacker LD (eds) (Sweet & Maxwell, Munich 2009)

Basedow et al *PEICL* (2 ed)

Principles of European Insurance Contract Law (PEICL) prepared by the Project Group Restatement of European Insurance Contract Law (chairman Heiss H), edited by, Basedow J et al (eds) 2nd Expanded ed (Ottoschmidt, Köln 2016)

Beach *Law of Insurance*

Beach CH Jr *Commentaries on the Law of Insurance including Life, Fire, Marine, Accident and Casualty, and Guaranty Insurance in Every Form as Determined by the Courts and Statutes of England and the United States* 2 vols (Riverside Press, Cambridge 1895)

Beven *Negligence in Law*

Beven T *Negligence in Law* (originally issued as *Principles of the Law of Negligence*) 2 vols 3 ed (Stevens and Haynes Law Publishers, London 1908)

Birds *Birds' Modern Insurance Law*

Birds J *Birds' Modern Insurance Law* 10 ed (Sweet & Maxwell, London 2016)

Birds & Hird 'Report'

Birds J & Hird N 'Report of the United Kingdom concerning the Duration of Cover in Liability Insurance?' in Cousy H & Claassens H (eds) *Aansprakelijkheidsverzekering: Dekking in de tijd* 179-185 (Centrum Verzekeringswetenschap Katholieke Universiteit Leuven, MAKLU Uitgevers Antwerpen, and Academia Bruylant Louvain-la-Neuve 1997)

Birds, Lynch & Milnes *MacGillivray on Insurance (Centenary Ed)*

Birds J, Lynch B & Milnes S *MacGillivray on Insurance Law relating to all other Risks than Marine: Centenary Edition* 12 ed (Sweet & Maxwell, London 2012)

Birds, Lynch & Paul *MacGillivray on Insurance*

Birds J, Lynch B & Paul S *MacGillivray on Insurance Law relating to all other Risks than Marine* 14 ed (Sweet & Maxwell, London 2018)

Bouckaert & Van Hoeke *Inleiding tot het recht*

Bouckaert B & Van Hoecke M *Inleiding tot het recht* 19 ed (Acco, Leuven 2005)

Bradfield *Christie's Law of Contract*

Bradfield GB *Christie's Law of Contract in South Africa* 7 ed (LexisNexis, Durban 2016)

C

Cady *Outlines of Insurance*

Cady EW *Outlines of Insurance* 2 ed (The Lawyers Co-Operative Publishing Company, New York 1925

Cawton *Job Accidents*

Cawton EA *Job Accidents and the Law in England's Early Railway Age: Origins of Employer Liability and Workmen's Compensation* (Edwin Mellen Press, Lewiston 1997)

Clarke *Insurance Contracts*

Clarke MA, assisted by Burling JM & Purves RL *The Law of Insurance Contracts* 6 ed (Informa, London 2009)

Clarke *Law of Liability Insurance*

Clarke MA *The Law of Liability Insurance* 2 ed (Routledge, Oxon 2017)

Clarke *Policies and Perceptions*
Clarke MA *Policies and Perceptions of Insurance Law in the Twenty-First Century* (Oxford University Press, Oxford 2005)

Clarke 'Report'
Clarke MA 'Report of the United Kingdom concerning the Duration of Cover in Liability Insurance?' in Cousy H & Claassens H (eds) *Aansprakelijkheidsverzekering: Dekking in de tijd* 187-202 (Centrum Verzekeringswetenschap Katholieke Universiteit Leuven, MAKLU Uitgevers Antwerpen, and Academia Bruylant Louvain-la-Neuve 1997)

Clayton *British Insurance*
Clayton G *British Insurance* (Elek Books Ltd, London 1971)

Cockerell & Green *British Insurance Business*
Cockerell HAL & Green E *The British Insurance Business* (Heinemann Educational Books, London 1976)

Colle *De nieuwe wet* (6 ed)
Colle P *De nieuwe wet van 4 April 2014 betreffende de verzekeringen*: *Algemene beginselen van het Belgische Verzekeringsrecht* 6 ed (Intersentia, Antwerpen 2015)

Colle *Algemene beginselen* (7 ed)
Colle P *Algemene beginselen van het Belgische Verzekeringsrecht* 7 ed (Intersentia, Antwerpen 2019)

Cooley *Law of Insurance*
Cooley RW *Briefs on the Law of Insurance* 5 vols (West Publishing, St Paul 1905)

Cooke *Law of Tort*
Cooke J *Law of Tort* 8 ed (Pearson Education Ltd, Essex 2007)

Cousy 'De waarborg in de (professionele) aansprakelijkheidsverzekering'
Cousy H 'Omvang en duur van de waarborg in de (professionele) aansprakelijkheidsverzekering' 57-86 in Vlaams Pleitgenootschap bij de Balie Brussel (eds) *Verzekeringen en gerechtelijke procedures* by (Biblo, Kalmthout 1996)

Cousy ‘Over het “verzekerbaar risico”’
Cousy H ‘Over het “verzekerbaar risico” in het licht van een evolutionaire visie op de ontwikkeling van het verzekeringsrecht’ 158-166 in Van Tiggele-van der Velde N, Kamphuisen JGC & Lauwerier BKM (eds) *De Wansink-bundel Van draden en daden* (Kluwer, Deventer 2006)

Cousy ‘Pikante details’
Cousy H ‘Pikante details over een beruchte driehoeksverhouding: de rechtstreekse vordering in de aansprakelijkheidsverzekering’ 417-455 in XXXIIIe Postuniversitaire Cyclus Willy Delva 2006-2007 *Aansprakelijkheid, aansprakelijkheidsverzekering en andere vergoedings-systemen* (Claudine Weyn, Kluwer, Mechelen 2007)

Cousy & Droshout ‘Fault under Belgian Law’
Cousy H & Droshout D ‘Fault under Belgian Law’ 27-51 in Widmer P (ed) *Unification of Tort Law: Fault* (Kluwer Law International, The Hague 2005)

Cousy & Vanderspikken ‘Causation under Belgian Law’
Cousy H & Vanderspikken A ‘Causation under Belgian Law’ 27-51 in Spier J (ed) *Unification of Tort Law: Causation* by Principles (Kluwer Law International, The Hague 2000)

Cousy & Vanderspikken ‘Damages under Belgian Law’
Cousy H & Vanderspikken A ‘Damages under Belgian Law’ 23-37 in Magnus U (ed) *Unification of Tort Law: Causation* by Principles (Kluwer Law International, The Hague 2001)

Cousy & Van Schoubroeck ‘*Wetgeving Verzekeringen’*
Cousy H & Van Schoubroeck C ‘Wetgeving Verzekeringen 2009 Europees en Belgisch recht’ (Kluwer, Mechelen 2008)

CRIS *Aansprakelijkheidsverzekering: dekking in de tijd*
Centrum Verzekeringswetenschap Katholieke Universiteit Leuven *Aansprakelijkheidsverzekering: dekking in de tijd* passim in Cousy & Claassens (eds) (Centrum Verzekeringswetenschap Katholieke Universiteit Leuven, MAKLU Uitgevers, Antwerpen & Academia Bruylant Louvain-la-Neuve 1997)

D

Davis *Gordon & Getz*
Davis DM *Gordon & Getz on the South African Law of Insurance* 4 ed (Juta & Co Ltd, Cape Town 2008)

De Hart & Simey *Arnould's Marine Insurance* (8 ed)
De Hart EL & Simey RI (eds) *Arnould's Law of Marine Insurance and Average* 2 vols 8 ed (Stevens & Sons, London 1909)

De Rode & Dubuission 'L'expertise et l'assurance'
De Rode H & Dubuisson B 'L'expertise et l'assurance' 59-101 in Van Compernolle J & Dubuisson B (eds) L'expertise (Bruylant, Bruxelles 2002)

Derrington & Ashton *Law of Liability Insurance*
Derrington D & Ashton RS *The Law of Liability Insurance* 2 ed (LexisNexis, Chatswood 2005)

Donnelly (2018) 4 *SALJ*
Donnelly D 'Do You Always Get Something Out? The Impact of the Insurance Act 18 of 2017 and Revised Policyholder Protection Rules on Material Misrepresentation and Disclosure' (2018) 4 *SALJ* 593-612

E

Elliott *Law of Insurance*
Elliott CB *The Law of Insurance*: *A Treatise on the Law of Insurance including Fire, Life, Accident, Casualty, Title, Credit and Guarantee Insurance in every Form* (Bowen-Merril Company, Indianapolis 1902)

Elliott *Law of Insurance (rev ed)*
Elliott CB *The Law of Insurance*: *A Treatise on the Law of Insurance including Fire, Life, Accident, Casualty, Title, Credit and Guarantee Insurance in every Form* rev ed (Bowen-Merril Company, Indianapolis 1907)

Enright & Jess *Professional Indemnity*
Enright WIB & Jess DC *Professional Indemnity Insurance Law* 2 ed (Sweet & Maxwell, London 2007)

F

Fontaine *Verzekeringsrecht* (2 ed)
Fontaine M *Verzekeringsrecht* 2 ed (Larcier, Brussel 2011)

Fontaine *Verzekeringsrecht* (3 ed)
M Fontaine *Verzekeringsrecht* 3 ed (Larcier, Brussel 2017)

Fredericq (1969) *Tijdschrift voor Privaatrecht*
Fredericq S 'Overzicht van Rechtspraak (1965-1968) Verzekeringen' (1969) *Tijdschrift voor Privaatrecht* 257-324

Fredericq, Cousy & Rogge (1981) 18 *Tijdschrift voor Privaatrecht*
Fredericq S, Cousy H & Rogge J 'Overzicht van Rechtspraak (1969-1978) Verzekeringen' (1981) 18 *Tijdschrift voor Privaatrecht* 409-452

Fredericq & Fredericq *Belgisch Handelsrecht*
Fredericq L & Fredericq S *Handboek van Belgisch Handelsrecht II* (Établissements Emile Bruylant, Brussel 1978)

G

Gilman et al *Arnould's Marine Insurance and Average* (18 ed)
Gilman et al (eds) *Arnould's Law of Marine Insurance and Average* 18 ed (Sweet & Maxwell, London 2013)

Gubby *Legal Concepts in Language*
Gubby H *English Legal Terminology: Legal Concepts in Language* 2 ed (Boom Juridische Uitgevers, Den Haag 2007)

Guiliams (2010-2011) 12 *Rechtskundig Weekblad*
Guiliams S 'De verdeling van de schadelast bij sameloop van een opzettelijk en een onopzetteljik fout' (2010-2011) 12 *Rechtskundig Weekblad* 474-485

H

Hall, Wieck & Finkelman *American Legal History*
Hall KL, Wieck WM & Finkelman P *American Legal History: Cases and Materials* 4 ed (Oxford University Press, New York 1996)

Hardy Ivamy *Chalmers' Marine Insurance Act 1906*
Hardy Ivamy ER *Chalmers' Marine Insurance Act 1906* 10 ed (Butterworths, London 1993)

Hattingh & Millard *FAIS Act Explained*
Hattingh W & Millard D *The FAIS Act Explained: A guide to understanding the Financial and Intermediaries Act 37 of 2002* (LexisNexis, Durban 2010)

Hartlief & Tjittes *Verzekering & aansprakelijkheid*
Hartlief T & Tjittes RPJL *Verzekering & aansprakelijkheid* (Kluwer, Deventer 1994)

Hilliker *Liability Insurance in Canada*
Hilliker G *Liability Insurance in Canada* 4 ed (LexisNexis, Ontario 2006)

Hutchison (2017) 17 *SA Merc LJ*
Hutchison A 'A Customary Insurance law' (2017) 17 *SA Merc LJ* 17-42

Hutchison & Pretorius *Law of Contract*
Hutchison D & Pretorius CJ (eds) *The Law of Contract in South Africa* 3 ed (Oxford University Press, Cape Town 2017)

I

Insurance Society of New York *Fire Insurance Contract*
Insurance Society of New York *The Fire Insurance Contract; Its History and Interpretation* (Rough Notes Co, Indianapolis 1922)

J

Jacobs (2009) 21 *SA Merc LJ*
Jacobs W 'Liability Insurance in a Nutshell: Simplified Complexities or Complex Simplicities?' (2009) 21 *SA Merc LJ* 202-227

Jacobs (2010) 22 *SA Merc LJ*
Jacobs W 'The Third-Party Plaintiff's Exceptional Direct Claim against the Insured Defendant's Liability Insurer: Some Lessons to be Learnt from the Third Parties (Rights Against Insurers) Act 2010 in English Law' (2010) 22 *SA Merc LJ* 608-616.

Jacobs (2011) 23 *SA Merc LJ*
Jacobs W 'Legal Protection Insurance in the Context of Liability Insurance: Possible Solutions in English Law? (2011) 23 *SA Merc LJ* 464-475

Jacobs, Masters & Stanley *International Arbitration*
Jacobs R, Masters L & Stanley P *Liability Insurance in International Arbitration* (Hart Publishing, Oxford 2011)

Jacobs, Stoop & Van Niekerk (2010) 13 *PER*
Jacobs W, Stoop PN & Van Niekerk R 'Fundamental Consumer Rights under the Consumer Protection Act 68 of 2008: A Critical Overview and Analysis' (2010) 13 *PER* 302-406

Jenks *History of English Law*
Jenks E *A Short History of English Law: From the Earliest Times to the End of the Year 1919* 2 ed (Methuen & Co, London 1920)

Jerry & Richmond *Understanding Insurance Law*

Jerry RH II & Richmond DR *Understanding Insurance Law* 6 ed (Carolina Academic Press, Durham 2018)

Jocqué '*De verzekerde en de benadeelde'*

Jocqué G *De verzekerde en de benadeelde in de aansprakeljikheids-verzekering* (Intersentia, Antwerpen – Cambridge 2016)

Jocqué (2006) 354 *Tijdschrift voor Verzekeringen*

Jocqué G 'Verjaring en verzekering' (2006) 354 *Tijdschrift voor Verzekeringen* 6-36

Jocqué (2013) 280 *Nieuw Juridisch Weekblad*

Jocqué G 'Verzekeraar kan niet verplicht worden dekking te geven aan hem die het schadegeval opzettelijk heeft veroorzaakt' (2013) 280 *Nieuw Juridisch Weekblad* 309-310

Jocqué (2013) 286 *Nieuw Juridisch Weekblad*

Jocqué G 'Verzekeringsrecht kroniek 2011-2013' (2013) 286 *Nieuw Juridisch Weekblad* 574-587

Jocqué (2014-2015) 13 *Rechtskundig Weekblad*

Jocqué G 'De Wet Landverzekeringsovereenkomst en de Verzekeringswet 1874 in de nieuwe Wet Verzekeringen' (2014-2015) 13 *Rechtskundig Weekblad* 483-496.

K

Kaczorowski (1990) 51 *Ohio State LJ*

Kaczorowksi RJ 'The Common-Law Background of Nineteenth-Century Tort Law' (1990) 51 *Ohio State LJ* 1127-99

Keenan *Smith & Keenan's Text & Cases* (15 ed)

Keenan DJ *Smith & Keenan's English Law Text & Cases* 15 ed (Pearson, Essex 2007)

Kostal *English Railway Capitalism*

Kostal RW *Law and English Railway Capitalism 1825-1875* (Clarendon Press, Oxford 1994)

Kruithof ‘De leiding van het geschil’

Kruithof M ‘De leiding van het geschil door de aansprakelijkheidsverzekaar: een analyse van de artikel 143, tweede en derde lid en 152, tweede lid Verzekeringswet 2014 (art 79, tweede en derde lid en 88, tweede lid WLVO)’ 1-95 in Vansweevelt T & Weyts B (eds) *De aansprakelijk-heidsverzekering in ontwikkeling* (Intersentia, Antwerpen 2016)

Kuschke *Insurance Against Damage Caused by Pollution*

Kuschke M *Insurance Against Damage Caused by Pollution* (unpublished LLD thesis University of South Africa Feb 2009)

L

Legh-Jones, Birds & Owen *MacGillivray on Insurance* (11 ed)

Legh-Jones N, Birds J, & Owen D *MacGillivray on Insurance Law relating to all other Risks than Marine* 11 ed (Sweet & Maxwell, London 2008)

M

Maniloff & Stempel *General Liability Insurance*

Maniloff R & Stempel J *General Liability Insurance Coverage: Key Issues in Every State* 3 ed (LexisNexis, Middletown 2015)

McGee *Limitation Periods*

McGee A *Limitation Periods* 7 ed (Sweet & Maxwell, London 2014)

McNeely (1941) 41 *Columbia LR*

McNeely MC ‘Illegality as A Factor in Insurance’ (1941) 41 *Columbia LR* 26-60

Merkin, Summer & Hodgson *Colinvaux’s Law of Insurance*

Merkin R (ed), Summer JP & Hodgson L (contributing eds) *Colinvaux’s Law of Insurance* 11 ed (Sweet & Maxwell, London 2016)

Merkin, Summer & Hodgson *Colinvaux Supplement*

Merkin R (ed), Summer JP & Hodgson L (contributing eds) *Colinvaux’s Law of Insurance: First Supplement to the Eleventh Edition* (Sweet & Maxwell, London 2017)

Merkin & Hjalmarsson *Compendium of Insurance Law*

Merkin R & Hjalmarsson J (eds) *Compendium of Insurance Law* (Informa, London 2007)

Meurs & Thiery 'Aansprakelijkheidsverzekering'
Meurs T & Thiery Y 'Aansprakelijkheidsverzekering: risicovolle onderneming?' 73-109 in Van Schoubroeck C & Samoy I (eds) *Aansprakelijkheids- en verzekeringsrecht* Themis (2014-2015) 93 (die Keure, Brugge 2015)

Millard *Modern Insurance Law*
Millard D *Modern Insurance Law* (Juta, Cape Town 2013)

Millard 'Fair Play?'
Millard D 'Fair Play? The Conduct of Financial Institutions Bill and the New Face of the Financial Services Industry'129-145 in Du Toit S & Hugo C (eds) *Annual Banking Law Update 2019* (Juta, Claremont 2019)

Millard (2017) 20 *Juta's Insurance Law Bulletin* 'Infusion with Fairness'
Millard D 'The Infusion of Insurance with Fairness: Incorporation of TCF into the draft Policyholder Protection Rules' (2017) 20 *Juta's Insurance Law Bulletin* 1-19

Millard (2018) 21 *Juta's Insurance Law Bulletin* 'COFI Bill'
D Millard 'Conduct of the Financial Institutions Bill (COFI Bill)'(2018) 21 *Juta's Insurance Law Bulletin* 81-89

Millard (2018) 21 *Juta's Insurance Law Bulletin* 'FSRA'
Millard D 'Financial Sector Regulation Act in force from 1 April 2018' (2018) 21 *Juta's Insurance Law Bulletin* 1-2

Millard (2018) 21 *Juta's Insurance Law Bulletin* 'Legislative reforms'
Millard D '2018 Legislative reforms' (2018) 21 *Juta's Insurance Law Bulletin* 35-78

Millard (2018) 21 *Juta's Insurance Law Bulletin* 'Replacement of the PPRs'
Millard D 'Replacement of the Policyholder Protection Rules in terms of the Long-term Insurance Act 52 of 1998 and the Short-term Insurance Act 53 of 1998' (2018) 21 *Juta's Insurance Law Bulletin* 2-5

Millard & Kuschke (2014) 17 *PER*
Millard D & Kuschke B 'Transparency, Trust and Security: An Evaluation of the Insurer's Pre-contractual Duties' (2014) 17 *PER* 2412-2450

N

Nagel et al *Commercial Law*
Nagel CJ et al *Commercial Law* 5 ed (LexisNexis, Durban 2015)

Neethling & Potgieter *Law of Delict*
Neethling J & Potgieter JM *Neethling-Potgieter-Visser Law of Delict* (LexisNexis, Durban 2015)

P

Pagan (1981-1982) 23 *William & Mary LR*
Pagan JR 'English Carriers' Common-Law Right to Reject Undeclared Cargo: The Myth of the Closed-Container Conundrum' (1981-1982) 23 *William & Mary LR* 791-833

Porter *Laws of Insurance* (2 ed)
Porter JB, assisted by Craies WF *The Laws of Insurance: Fire, Life, Accident and Guarantee; Embodying Cases in the English, Scotch, Irish, American, and Canadian Courts* 2 ed (Stevens & Haynes Law Publisher, London 1887)

Porter *Laws of Insurance* (3 ed)
Porter JB, assisted by WF Craies *The Laws of Insurance: Fire, Life, Accident and Guarantee; Embodying Cases in the English, Scotch, Irish, American, and Canadian Courts* 3 ed (Stevens & Haynes Law Publisher, London 1898)

R

Raynes *History of British Insurance*
Raynes HE *A History of British Insurance* 2 ed (Sir Isaac Pitman & Sons Ltd, London 1964)

Reinecke et al *General Principles of Insurance Law*
Reinecke MFB et al *General Principles of Insurance Law* (LexisNexis Butterworths, Durban 2002)

Reinecke, van Niekerk & Nienaber *South African Insurance Law*
Reinecke MFB, van Niekerk JP & Nienaber PM *South African Insurance Law* (LexisNexis, Durban 2013)

Richards *Law of Insurance*
Richards G *A Treatise on the Law of Insurance in All its Branches, especially Fire, Life, Accident, Marine, Title, Fidelity, Credit, and Employers' Liability with an Appendix of Statutes Affecting the Insurance Contract and a Collection of Forms* 3 ed enlarged and rewritten (Banks Law Publishing Co, New York 1911)

Rogers *Winfield & Jolowicz Tort*
Rogers WVH *Winfield & Jolowicz Tort* 18 ed (Sweet & Maxwell, London 2010)

S

Scales (2008) 94 *Virginia LR*
Scales AF 'The Chicken and the Egg: Kenneth S Abraham's "The Liability Century"' (2008) 94 *Virginia LR* 1259-1279

Schulze *Insurance Premium*
Schulze WG *Legal Aspects of the Insurance Premium* (unpublished LLD thesis University of South Africa Jul 1997)

Schuermans & Van Schoubroeck *Belgische Verzekeringsrecht* (3 ed)
Schuermans L & Van Schoubroeck C *Grondslagen van het Belgische Verzekeringsrecht* 3 ed (Antwerpen – Cambridge 2015)

Simoens (1980-1981) 44 *Rechtskundig Weekblad*
Simoens D 'Hoofdlijnen in de evolutie van het aansprakelijkheidsrecht' (1980-1981) 44 *Rechtskundig Weekblad* 1962-1990

Smith & Keenan *English Law* (6 ed)
Smith K & Keenan DJ *English Law* 6 ed (Pitman, London 1979).

Stoop *Concept 'Fairness'*
Stoop PN *The Concept 'Fairness' in the regulation of Contracts under the Consumer Protection Act 68 of 2008* (unpublished LLD thesis University of South Africa Jun 2012)

V

Vance *Law of Insurance*
Vance WR *Handbook of the Law of Insurance* (West Publishing Co, St Paul, 1904)

Vandeputte 'Inleiding tot het verzekeringsrecht'
Vandeputte R 'Inleiding tot het verzekeringsrecht' 1-143 in Dillemans R & Van Gerven W (eds) *Beginselen van Belgisch XIV Privaatrecht* 2 ed (Standaard Wetenschappelijke Uitgeverij, Antwerpen – Weesp 1983)

Van De Sype 'Leiden en lijden van de verzekeraar'

Van De Sype P 'Over het leiden en lijden van de verzekeraar' 33-55 in Vlaams Pleitgenootschap bij de Balie Brussel (eds) *Verzekeringen en gerechtelijke procedures* (Biblo, Kalmthout 1996)

Van Niekerk *Insurance in the Netherlands*

Van Niekerk JP *The Development of the Principles of Insurance Law in the Netherlands from 1500 to 1800* 3 vols (unpublished LLD thesis University of South Africa Jul 1997)

Van Niekerk (1998) 1 *Juta's Insurance Law Bulletin 'Hotel Inns'*

Van Niekerk JP '*Hotels Inns & Resorts SA (Pty) Ltd v Underwriters at Lloyds & Others* 1998 (4) SA 466 (C)' (1998) 1 *Juta's Insurance Law Bulletin* 79-81

Van Niekerk (1998) 1 *Juta's Insurance Law Bulletin 'Transnet'*

Van Niekerk JP '*Transnet Ltd v Mutual & Federal Insurance Co Ltd* Unreported, TPD, 12 November 1996, case no 13664/95' (1998) 1 *Juta's Insurance Law Bulletin* 40-42

Van Niekerk (1999) 2 *Juta's Insurance Law Bulletin 'Cupido'*

Van Niekerk JP '*Cupido v Kings Lodge Hotel* 1999 (4) SA 257 (EC)'(1999) 2 *Juta's Insurance Law Bulletin* 94

Van Niekerk (1999) 2 *Juta's Insurance Law Bulletin* 'Legislation'

Van Niekerk JP 'Legislation' (1999) 2 *Juta's Insurance Law Bulletin* 106-117

Van Niekerk (1999) 11 *SA Merc LJ*

Van Niekerk JP 'The Liability Insurer, the Insolvent Insured, and Section 156 of the Insolvency Act' (1999) 11 *SA Merc LJ* 59-77

Van Niekerk (2000) 3 *Juta's Insurance Law Bulletin 'David Trust'*

Van Niekerk JP *'David Trust & Others v Aegis Insurance Co Ltd & Another* 2000 (3) SA 289 (SCA)' (2000) 3 *Juta's Insurance Law Bulletin* 57-63

Van Niekerk (2000) 3 *Juta's Insurance Law Bulletin 'Le Roux'*

Van Niekerk JP '*Le Roux v Standard General Versekeringsmaatskappy Bpk* 2000 (4) SA 1035 (SCA)' (2000) 3 *Juta's Insurance Law Bulletin* 135-138

Van Niekerk (2000) 3 *Juta's Insurance Law Bulletin* 'Promotion of Equality'

Van Niekerk JP 'Promotion of Equality and Prevention of Unfairness Act 4 of 2000' (2000) 3 *Juta's Insurance Law Bulletin* 26-37

Van Niekerk (2000) 3 *Juta's Insurance Law Bulletin 'RAF v Mothupi'*

Van Niekerk JP '*Road Accident Fund v Mothupi* 2000 (4) SA 38 (SCA)' (2000) 3 *Juta's Insurance Law Bulletin* 102-104

Van Niekerk (2000) 3 *Juta's Insurance Law Bulletin 'Regent Insurance'*

Van Niekerk JP '*Regent Insurance Co Ltd v Maseko* 2000 (3) SA 983 (W)' (2000) 3 *Juta's Insurance Law Bulletin* 63-66

Van Niekerk (2002) 5 *Juta's Insurance Law Bulletin*

Van Niekerk JP '*Coetzee v Attorneys' Insurance Indemnity Fund*' *Coetzee v Attorneys' Insurance Indemnity Fund* 2003 (1) SA 1 (SCA)' (2002) 5 *Juta's Insurance Law Bulletin* 133-140

Van Niekerk (2003) 6 *Juta's Insurance Law Bulletin*

Van Niekerk JP '*SA Veterinary Council & Another v Veterinary Defence Association* 2003 (4) SA 546 (SCA)' (2003) 6 *Juta's Insurance Law Bulletin* 85-89

Van Niekerk (2004) 7 *Juta's Insurance Law Bulletin 'McClain'*

Van Niekerk JP '*McClain v H Mohamed & Associates* [2003] 3 All SA 707 (C)' (2004) 7 *Juta's Insurance Law Bulletin* 88-97

Van Niekerk (2004) 7 *Juta's Insurance Law Bulletin 'Verulam'*

Van Niekerk JP '*Verulam Fuel Distributors CC v Truck and General Insurance* (W)' (2004) 7 *Juta's Insurance Law Bulletin* 197-205

Van Niekerk (2006) 9 *Juta's Insurance Law Bulletin 'Truck and General Insurance'*

Van Niekerk JP '*Truck and General Insurance v Verulam Fuel Distributors* 2007 (2) SA 26 (SCA)' (2006) 9 *Juta's Insurance Law Bulletin* 194-203

Van Niekerk (2006) 9 *Juta's Insurance Law Bulletin 'Walkerson'*

Van Niekerk JP '*Walkerson v Matterson* 1936 NPD 495' (2006) 9 *Juta's Insurance Law Bulletin* 230-236

Van Niekerk (2006) 18 *SA Merc LJ*

Van Niekerk JP 'Liability Insurance: Successive but Overlapping 'claims-made' Policies and a Question of Quantum' (2006) 18 *SA Merc LJ* 382-393

Van Niekerk (2007) 10 *Juta's Insurance Law Bulletin 'African Products'*

Van Niekerk JP '*African Products (Pty) Ltd v Venter NO & Others* [2007] 3 All SA 605 (C)' (2007) 10 *Jut's Insurance Law Bulletin* 216-217

Van Niekerk (2007) 10 *Juta's Insurance Law Bulletin 'Barkhuizen'*

Van Niekerk JP '*Barkhuizen v Napier NO* 2007 (5) SA 535 (CC)' (2007) 10 *Juta's Insurance Law Bulletin* 199-216

Van Niekerk (2007) 10 *Juta's Insurance Law Bulletin 'Everton'*

Van Niekerk JP '*Everton v Compass Insurance Co Ltd* [2003] JOL 11268 (T)' (2007) 10 *Juta's Insurance Law Bulletin* 111-113

Van Niekerk (2007) 10 *Juta's Insurance Law Bulletin 'Momentum'*

Van Niekerk JP '*Momentum Group Ltd v Fire Control Systems (Cape) CC* 2007 JDR 0618 (C)' (2007) 10 *Juta's Insurance Law Bulletin* 230-237

Van Niekerk (2007) 19 *SA Merc LJ*

Van Niekerk JP 'Insurance Subrogation, Implied or Expressed: In the Name of the Insured, Always' (2007) 19 *SA Merc LJ* 502-517

Van Niekerk (2008) 11 *Juta's Insurance Law Bulletin 'Masunga'*

Van Niekerk JP '*Masunga v Mutema & Another* 2007 JDR 1029 (ZH)' (2008) 11 *Juta's Insurance Law Bulletin* 17-19

Van Niekerk (2008) 11 *Juta's Insurance Law Bulletin 'Watson'*

Van Niekerk JP '*Watson NO & Another v Shaw NO & Others* 2008 (1) SA 350 (C)' (2008) 11 *Juta's Insurance Law Bulletin* 4-14

Van Niekerk (2009) 12 *Juta's Insurance Law Bulletin*

Van Niekerk JP '*St Paul Insurance Co SA Ltd v Eagle Ink System (Cape) (Pty) Ltd* 2010 (3) SA 647 (SCA)' (2009) 12 *Juta's Insurance Law Bulletin* 150-153

Van Niekerk (2010) 22 *SA Merc LJ*

Van Niekerk JP 'The Scope of Application of Section 156 of the Insolvency Act: Within or beyond the Realm of Indemnity (Liability) Insurance Contracts: *Venfin (Pty) Ltd v KZN Resins (Pty) Ltd t/a KZN Resins*' (2010) 22 *SA Merc LJ* 453-463

Van Niekerk (2011) 14 *Juta's Insurance Law Bulletin 'Furman'*

Van Niekerk JP '*Furman & Another v Batha* Unreported, GSJ, 23 September 2010, case no 10044/2007' (2011) 14 *Juta's Insurance Law Bulletin* 31-35

Van Niekerk (2011) 14 *Juta's Insurance Law Bulletin 'Spar Group'*

Van Niekerk JP '*Spar Group v Webber* Unreported, FB, 27 January 2011, case no 4193/2010' (2011) 14 *Juta's Insurance Law Bulletin* 84-86

Van Niekerk (2011) 14 *Juta's Insurance Law Bulletin 'Thompson'*

Van Niekerk JP '*Thompson v Federated Timbers & Others* [2011] JOL 26625 (KZD)' (2011) 14 *Juta's Insurance Law Bulletin* 7-17

Van Niekerk (2011) 14 *Juta's Insurance Law Bulletin 'Venfin Investments'*
Van Niekerk JP '*Venfin Investments (Pty) Ltd v KZN Resins (Pty) Ltd t/a KZN Resins* [2011] 4 All SA 369 (SCA)' (2011) 14 *Juta's Insurance Law Bulletin* 156-161

Van Niekerk (2012) 15 *Juta's Insurance Law Bulletin 'Botha'*
Van Niekerk JP '*Botha v Iveco SA (Pty) Ltd* 2012 JDR 0863 (SCA)' (2012) 15 *Juta's Insurance Law Bulletin* 106-108

Van Niekerk (2012) 15 *Juta's Insurance Law Bulletin 'Hollard'*
Van Niekerk JP '*Hollard Insurance Co Ltd v Unitrans Fuel and Chemicals (Pty) Ltd & Another* GSJ, Unreported, May 2012, case no A5052/2010' (2012) 15 *Juta's Insurance Law Bulletin* 62-69

Van Niekerk (2012) 15 *Juta's Insurance Law Bulletin 'Mondi'*
Van Niekerk JP *'Mondi South Africa Ltd v Martens & Another* 2012 (2) SA 469 (KZP)' (2012) 15 *Juta's Insurance Law Bulletin* 1-2

Van Niekerk (2012) 24 *SA Merc LJ*
Van Niekerk JP 'A Confusion of Third Parties in Insurance Law: *Hollard Insurance Co Ltd v Unitrans Fuel and Chemicals (Pty) Ltd and Another*' (2012) 24 *SA Merc LJ* 449-455

Van Niekerk (2013) 16 *Juta's Insurance Law Bulletin*
Van Niekerk JP '*Mercedez-Benz SA (Pty) Ltd v Buffalo City Municipality* 2012 JDR 1770 (ECG)' (2013) 16 *Juta's Insurance Law Bulletin* 5-9

Van Niekerk *Subrogasie*
Van Niekerk JP *Subrogasie in die Versekeringsreg* (unpublished LLM thesis University of South Africa Aug 1997)

Van Schoubroeck 'Aansprakelijkheidsverzekering'
Van Schoubroeck C 'Aansprakelijkheidsverzekering' 7-31 in Suijkerbuijk H (ed) *Recht voor de onderneming* 2 ed (Wolters Kluwer Belgium, Mechelen 2013)

Van Schoubroeck 'Onrechtmatige bedingen'
Van Schoubroeck C 'Onrechtmatige bedingen en transparantievoorschriften in deel 3 van de Verzekeringswet' 1-25 in Vansweevelt T & Weyts T (eds) *De Verzekeringswet 2014* (Intersentia, Antwerpen – Cambridge 2015)

Van Schoubroeck *Professionele aansprakelijkheidsverzekering*
Van Schoubroeck C *Professionele aansprakelijkheidsverzekering en de Europese Interne Markt* (Maklu, Antwerpen 1994)

Van Schoubroeck (2015) 10 *Tijdschrift voor Belgisch Handelsrecht*
Van Schoubroeck C 'Risico en schadegeval in de posterioriteitsregeling van de aansprakelijkheidsverzekering' (2015) 10 *Tijdschrift voor Belgisch Handelsrecht* 985-988

Van Schoubroeck et al (2016) 2 & 3 *Tijdschrift voor Privaatrecht*
Van Schoubroeck C et al 'Overzicht van Rechtspraak: Wet op de Landverzekeringsovereenkomst 2004-2015' (2016) 2 & 3 *Tijdschrift voor Privaatrecht* 673-1117

Van Schoubroeck & Meurs (2012-2013) 35 *Rechtskundig Weekblad*
Van Schoubroeck C & Meurs T 'Art 78 Wet Landverzekeringsovereenkomst regelt dwingend het uitlooprisico en niet het inlooprisico' note under Cass 28 Jun 2012 (2012-2013) 35 *Rechtskundig Weekblad* 1382-1389

Van Schoubroeck & Schoorens (1995) *Tijdschrift voor Belgisch Handelsrecht*
Van Schoubroeck C & Schoorens G 'De aansprakelijkheidsverzekering: a never ending story' (1995) *Tijdschrift voor Belgisch Handelsrecht* 636-663

Van Zyl (1972) 35 *THRHR*
Van Zyl DH 'Die Regshistoriese Metode' (1972) 35 *THRHR* 19-37

Venter et al *Regsnavorsing*
Venter F et al *Regsnavorsing: Metode en Publikasie* (Juta, Kenwyn 1990)

Vessio 'Twin Peaks'
Vessio ML 'Twin Peaks and the Impact of the Consumer Protection Act on Financial Products and Services' 113-127 in Du Toit S & Hugo C (eds) *Annual Banking Law Update 2019* (Juta, Claremont 2019)

W

Wansink *Algemene aansprakelijkheidsverzekering* (2 ed)
Wansink JH *De algemene aansprakelijkheidsverzekering: Een hernieuwde verzekeringsrechtelijke en verzekeringstechnische beschouwing* 2 ed (1994) (WEJ Tjeenk Willink, Zwolle 1994)

Wansink *Algemene aansprakelijkheidsverzekering* (3 ed)
Wansink JH *De algemene aansprakelijkheidsverzekering: Een hernieuwde beschouing in het licht van titel 7.17 BW* 3 ed (Kluwer, Amsterdam 2006)

Welford *Accident Insurance*

Welford AW *The Law relating to Accident Insurance including Insurance Against Personal Accidents, Accidents to Property and Liability for Accidents* (Butterworth, London 1923)

Weyts 'Opzettelijkke fout'

Weyts B 'De ene opzettelijkke fout is de andere niet. Over opzet in het aansprakeljikheids-en verzekeringsrecht' 363-376 in Rogge J, Regout M & Longfils F (eds) *Liber amicorum Jean-Luc Fagnart* (Athemis, Louvan-la-Neuve 2008)

Willis *Workmen's Compensation Act, 1897*

Willis WA *The Workmen's Compensation Act, 1897, with Notes. And an Appendix Containing the Rules and Regulations under the Act, The Employers' Liability Act, 1880. Analysis of a Scheme under the Act, etc* 5 ed (Butterworth & Co, Shaw & Sons Law Publishers, London 1898)

Woodruff *Cases on the Law of Insurance*

Woodruff EH *A Selection of Cases on the Law of Insurance* (Baker, Voorhis & Co, New York, 1900)

TABLE OF CASES

South Africa

African Products (Pty) Ltd v Venter NO & Others [2007] 3 All SA 605 (C)

Barkhuizen v Napier 2007 (5) SA 323 (CC)
Barloworld Capital (Pty) Ltd t/a Barloworld Equipment Finance v Napier 2005 (1) SA 57 (W)
Bosch Munitech (Pty) Ltd v Govan Mbeki Municipality [2015] 4 All SA 674 (GP)
Botha v Iveco South Africa (Pty) Ltd 2012 JDR 0863 (SCA)
Burley Appliances Ltd v Grobbelaar NO & Others [2003] 3 All SA 505 (C)

Caltrade CC v Santam Ltd [1997] JOL 365 (C)
Cape Town Municipality & Another v Allianz Insurance Co 1990 (1) SA 311 (C)
Coetzee v Attorneys' Insurance Indemnity Fund 2003 (1) SA 1 (SCA)
Commercial Union Insurance Co of SA Ltd v Wallace NO; Santam Insurance Ltd v Africa Addressing (Pty) Ltd 2004 (1) SA 326 (SCA)
Cupido v Kings Lodge Hotel 1999 (4) SA 257 (E)

David Trust & Others v Aegis Insurance Co Ltd & Another 2000 (3) SA 289 (SCA)

Everton v Compass Insurance Co Ltd [2003] JOL 11268 (T)

Furman & Another v Batha Unreported, GSJ, 23 September 2010, case no 10044/2007

Hirsch Appliance Specialists v Shield Security Natal (Pty)Ltd [1992] 1 All SA 84 (D)
Hotels Inns & Resorts SA (Pty) Ltd v Underwriters at Lloyds & Others 1998 (4) SA 466 (C)

Lake v Reinsurance Corporation Ltd 1967 (3) SA 124 (W)
Le Roux v Standard General Versekeringsmaatskappy Bpk 2000 (4) SA 1035 (SCA)
Liberty Group Limited v Jordaan [2016] JOL 35513 (FB)
Lorcom Thirteen (Pty) Ltd v Zurich Insurance Company South Africa Ltd [2013] 4 All SA 71 (W)

Masunga v Mutema & Another 2007 JDR 1029 (ZH)
McClain v H Mohamed & Associates [2003] 3 All SA 707 (C)
Mercedez-Benz South Africa (Pty) Ltd v Buffalo City Municipality 2012 JDR 1770 (ECG)
Momentum Group Ltd v Fire Control Systems (Cape) CC 2007 JDR 0618 (C)
Mondi South Africa Ltd v Martens & Another 2012 (2) SA 469 (KZP)
Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality [1985] 1 All SA 324 (A)

National Ports Authority, a Division of Transnet (Soc) Ltd v The Owners & Underwriters of the MV "Smart" 2017 JDR 1240 (KDZ)

Pereira v Marine and Trade Insurance Co Ltd 1975 (4) SA 745 (A)

Regent Insurance Co Ltd v Maseko 2000 (3) SA 983 (W)
Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd 1963 (1) SA 632 (A)
Road Accident Fund v Mothupi 2000 (4) SA 38 (SCA)
Russell NO and Loveday NO v Collins Submarine Pipelines Africa (Pty) Ltd [1975] 1 All SA 344 (A); 1975 (1) SA 110 (A)

Samancor Ltd v Mutual & Federal Insurance Co Ltd & Others 2005 (4) SA 40 (SCA)
Shraga v Chalk 1994 (3) SA 145 (N)
South African Veterinary Council & Another v Veterinary Defence Association 2003 (4) SA 546 (SCA)
Spar Group v Webber Unreported, FB, 27 January 2011, case no 4193/2010
St Paul Insurance Co SA Ltd v Eagle Ink System (Cape) (Pty) Ltd 2010 (3) SA 647 (SCA)

Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA 461 (SCA)
Thompson v Federated Timbers & Another [2010] JOL 26571 (KZD)
Thompson v Federated Timbers & Another (Zurich) Insurance Co (SA) Ltd (as third party) [2011] JOL 26625 (KZD)
Transnet Ltd v Mutual & Federal Insurance Unreported, TPD, 12 November 1996, case no 13664/95
Truck and General Insurance Co Ltd v Verulam Fuel Distributors CC & Another 2007 (2) SA 26 (SCA)

Van Immerzeel & Another v Santam Ltd 2006 (3) SA 349 (SCA)
Van Reenen v Santam Ltd 2013 (5) SA 595 (SCA)
Venfin Investments (Pty) Ltd v KZN Resins (Pty) Ltd t/a KZN Resins [2011] 4 All SA 369 (SCA)
Verulam Fuel Distributors CC v Truck and General Insurance 2005 (1) SA 70 (W)

Walkerson v Matterson 1936 NPD 495
Watson NO & Another v Shaw & Others 2008 (1) SA 350 (C)

Belgium

Antwerpen, Court of Appeal, decision of 23 January 2008
Antwerpen, Court of Appeal, decision of 17 October 2012

Belgian Supreme Court, Cass, dated 7 June 2001
Belgian Supreme Court, Cass, dated 25 March 2003
Belgian Supreme Court, Cass, dated 16 February 2007
Belgian Supreme Court, Cass, dated 12 October 2007
Belgian Supreme Court, Cass, dated 28 November of 2008
Belgian Supreme Court, Cass, dated 24 April 2009
Belgian Supreme Court, Cass, dated 16 September 2011
Belgian Supreme Court, Cass, dated 29 September 2011
Belgian Supreme Court, Cass, dated 26 October 2011
Belgian Supreme Court, Cass, dated 14 May 2012
Belgian Supreme Court, Cass, dated 4 June 2012
Belgian Supreme Court, Cass, dated 28 June 2012
Belgian Supreme Court, Cass, dated 1 March 2013
Belgian Supreme Court, Cass, dated 7 June 2013
Belgian Supreme Court, Cass, dated 4 October 2013
Belgian Supreme Court, Cass, dated 16 January 2015
Belgian Supreme Court, Cass, dated 18 December 2015

Bergen, Court of Appeal, decision of 29 June 2012

Ghent, Court of Appeal, decision of 9 December 2009

Canada

O'Hearn v Yorkshire Insurance Co (1921) 64 DLR 437 (OntSC)

England/United Kingdom

Ace European Group & Ors v Standard Life Assurance Ltd [2012] EWCA Civ 1713, [2013] CLC 255

Alistair Graham John Brown v Guardian Royal Assurance Plc [1994] 2 Lloyd's Rep 325 (CA (Civ)), 1994 WL 1062352

Astrazeneca Insurance Company Ltd v XL Insurance (Bermuda) Ltd, ACE Bermuda Insurance Ltd [2013] EWCA Civ 1660

Axa Insurance UK Plc v Thermonex Limited (in liquidation) [2013] Lloyd's Rep IR 323 (QBD (Merc)), 2012 WL 7870263

Barratt Bros (Taxis) Ltd v Davies [1966] 2 Lloyd's Rep 1 (CA (Civ Div)), [1966] 1 WLR 1334

Bartoline Ltd v Royal & Sun Alliance Insurance Plc [2007] Lloyd's Rep IR 423 (QBD (MDR))

Bradley v Eagle Star Ins Co Ltd [1989] AC 957 (HL)

Bedfordshire Police Authority v Constable (Sued on His behalf & on behalf of All Other Members of Syndicate 386 at Lloyd's) [2009] Lloyd's Rep IR 607 (CA (Civ)), 2009 WL 289348

Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd & Another [2006] 1 WLR 1492 (CA (Civ Div))

Brice & Others v JH Wackerbarth (Australasia) Pty Ltd, Flack, Dominium Insurance Co Ltd & Alliance Assurance Co, Third Parties [1974] 2 Lloyd's Rep 274 (CA)

British Cash & Parcel Conveyors Ltd v Lamson Store Service Co Ltd [1908] 1 KB 1006

Brown-Quinn v Equity Syndicate Management [2012] EWCA Civ1633, [2013] Lloyd's Rep IR 371

Busk v Royal Exchange Assurance Co (1818) 2 B & Ald 73, 106 ER 296

Capel-Cure Myers Management Ltd v McCarthy [1995] LRLR 498 (QBD)

Carr v Lancashire & Yorkshire Railway (1852) 7 Ex 707, 155 ER 1133

*Central Electricity Board v Halifax C*orp [1963] AC 785 (HL)

Cheltenham & Gloucester plc v Royal & Sun Alliance Insurance Co plc 2001 SLT 347 (OK)
Clark v Gray (1802) 4 Esp 177, 170 ER 682
Collinge v Heywood (1839) 9 Ad & E 633 (QBD), 112 ER 1352
Corbin v Payne, The Times, 11 Oct 1990 (CA)
Cox v Bankside Members Agency Ltd [1995] 2 Lloyd's LR 437 (CA (Civ))

Delanoy v Robson (1814) 5 Taunt 605, 128 ER 827
De Vaux v Salvador (1836) 4 A & E 420
Durham v BAI (Run-Off) Ltd (in scheme of arrangement) & Other Cases; Re Employers' Liability Policy 'Trigger' Litigation [2008] EWHC 2962
Durham v BAI [2010] 1 Lloyd's Rep IR 295 (CA)

Employers' Liability Insurance Trigger Litigation, BAI (Run Off) Ltd v Durham [2012] UKSC 14
Enterprise Oil Ltd v Strand Insurance Co Ltd [2006] 1 Lloyd's Rep 500 (QBD (Comm))
Equitas Insurance Limited v Municipal Mutual Insurance Limited [2019] EWCA Civ 718 (CA (Civ))
Euro Pools Plc (In Administration) v Royal Sun and Sun Alliance Insurance Plc [2019] EWCA Civ 808, 2019WL 02077848 (CA(Civ))

Firma C-Trade SA v Newcastle Protection & Indemnity Association; Socony Mobil Oil Inc & Others v West of England Shipowners Mutual Insurance Association (London) Ltd (No2) [1991] 2 AC 1 (HL)
Fraser v BN Furman (Productions) Ltd, Miller Smith & Partners (A Firm), Third Party [1967] 1 WLR 898 (CA (Civ Div))

Gibbon v Paynton & Another (1769) 4 Burr 2298, 98 ER 199
Groom v Crocker [1939] 1 KB 194 (CA)

Hall Brothers Steamship Co Ltd v Young [1939] 1 KB 748 (CA)
Horry v Tate & Kyle Refineries Ltd [1982] 2 Lloyd's Rep 416 (QBD)
HLB Kidsons v Lloyd's Underwriters [2008] EWCA Civ 1206, 2008 WL 472172

James Longley & Co v Forest Giles Ltd [2002] Lloyd's Rep IR 421 (CA (Civ Div)), 2001 WL 825585
Jan de Nul (UK) Ltd v Axa Royale Belge SA (Formally NV Royale Belge) [2002] Lloyd's Rep IR 589 (CA (Civ)), 2002 WL 45493
John Wyeth & Brothers Ltd v Cigna Insurance Co of Europe SA-NV & ORS [2001] Lloyd's Rep IR 420 (CA (Civ Div)), 2001 WL 239739

Kosmar Villa Holidays plc v Trustees of Syndicate 1243 [2008] Lloyd's Rep IR 489 (CA (Civ Div))

Law Society of England and Wales & Others v Shah & Others; In Re Aziz, Granziani and Barda Law Society of England and Wales v Earp & Another [2008] Lloyd's Rep IR 442 (Ch)
Leeson v Holt & Others (1816) 1 Stark 186, 171 ER 441
Lefevre v White [1990] 1 Lloyd's Rep 569 (QBD)
London Borough of Redbridge v Municipal Mutual Insurance Ltd [2001] Lloyd's Rep IR 545 (QBD (Comm))
Lumberman's Mutual Casualty Co v Bovis Lend Lease Ltd [2005] 1 Lloyd's Rep 494 (QBD (Comm))

Maccaferri Ltd v Zurich Insurance Plc [2016] EWCA Civ 1302, 2017 WL 11798 (CA (Civ))
Maving v Todd & Others (1815) 1 Stark 59, 171 ER 405
MDIS (formerly McDonnell Information Systems Limited) v Swinbank London & Edinburgh Insurance Company Limited, Aegon Insurance Company (UK) Limited [1999] Lloyds' Rep IR 516 (CA (Civ)), 1999 WL 982480
Meadows Indemnity Co Ltd v The Insurance Corporation of Ireland Plc & International Commercial Bank Plc [1989] 2 Lloyd's Rep 298 (CA)
Mitchell v Allestry (1676) B & M 572
M/S Aswan Engineering Establishment Co Ltd v Iron Trades Manual Insurance Co Ltd [1989] 1 Lloyd's Rep IR 289 (QBD (Comm))

Nicholson & Another v Willan & Another (1804) 5 East 507, 102 ER 1165

Omega Proteins Ltd v Aspen Insurance UK Ltd [2010] 2 CLC 370 (QBD (Comm))

Peninsular and Oriental Steam Navigation Co & Others v Youell & Others [1997] 2 Lloyd's Rep 136 (CA)
Pioneer Concrete (UK) Ltd v National Employers Mutual General Insurance Association Ltd [1985] 1 Lloyd's Rep 274 (QBD (Comm))
Post Office v Norwich Union Fire Ins Sy Ltd [1967] 2 QB 362 (CA)
Priestley v Fowler (1837) 3 M & W 1, 150 ER 1030
Proprietors of Trent Navigation v Ward (1785) 3 Esp 126, 170 Eng Rep 562

Readhead v Midland Railway (1869) LR 4 QB 379-93
Re Crocker & In Re Taxation of Costs [1936] Ch 696
Re Harrington Motor Co Ltd [1928] Ch 105 (CA)
Re OT Computers Ltd (In Administration) [2004] Ch 317 CA
Re Richardson Ex parte Governors of St Thomas's Hospital [1911] 2 KB 707 (CA)
RSA Insurance Plc v Assicurazione Generali SpA [2018] EWHC 1237 (QB)

Shaw v Robberds (1837) 6 Ad & E 82, 112 ER 29
Shaw v The York & North Midland Railway Co (1849) 13 QB 347, 116 ER 1295

Smit Tak Offshore Services & Others v Youell And General Accident Fire & Life Assurance Corporation Plc [1992] 1 Lloyd's Rep 154 (CA)
Spire Healthcare Ltd v Royal & Sun Alliance Insurance Plc [2018] EWCA Civ 317; [2018] CLC 327 (CA (Civ))
Soole v Royal Insurance Company Ltd [1971] 2 Lloyd's Rep 332 (QB)

Teal Assurance Company Limited v W R Berkley Insurance (Europe) Limited & Another [2011] Lloyd's Rep IR 285, 2011 WL 197339 (QB (Comm)); [2012] Lloyd's Rep 315 CA (Civ), 2011 WL 5903305; [2013] 2 CLC 390 (SC)
Tesco Stores Ltd v David Constable & Others [2008] Lloyd's Rep IR 636 (CA (Civ Div))
TGC Chapman Ltd v Christopher [1998] 1 WLR 12 (CA (Civ Div))
Thornman & Others v New Hampshire Insurance Co (UK) Ltd & Home Assurance Co [1988] 1 Lloyd's Rep 7 (CA (Civ))
Tinline v White Cross Insurance Association Ltd [1921] 3 KB 327
Total Liban SA v Vitol Energy SA [2001] QB 64 (QBD)

Virk v Gan Life Holdings Plc [2000] Lloyd's Rep IR 159 (CA (Civ))

Walker v Maitland (1821) 5 B & Ald 171, 106 ER 1155
West Wake Price & Co v Ching [1957] 1 WLR 45 (QBD)
William McIlroy (Swindon) Ltd, Mackays Stores Ltd, Cathedral Works Organisation (Chichester) Ltd, Rannoch Investments Limited v Quinn Insurance Ltd [2011] EWCA Civ 825
W & J Lane v Spratt [1970] 2 QB 480 (QBD (Comm))
Woolfall & Rimmer, Limited v Moyle & Another [1942] 1 KB 66 (CA)

European Union

Erhard Eschig v UNIQA Sachversicherung AG [2010] 1 CMLR 5 (ECJ)

Van Hove v CNP Assurances SA (C 96-14) (ECJ)

France

Cour Royale de Paris 1 Jul 1845 Journal du Palais, Jurisprudence française II 1845, 793-794 (Automédon)

United States of America

Boston & AR Co v Mercantile Trust & Deposit Co (1896) 34 A 778

Cole v Goodwin & Story (1838) 19 Wend 251
Columbia Insurance Company of Alexandria v Joseph W Lawrence Who Survived Thomas Poindexter (1836) 35 US 517

Home Insurance Company v Baltimore Warehouse Co (1876) 93 US 527

New Jersey Steam Navigation Company v The Merchants' Bank of Boston (1848) 47 US 344

Patapsco Insurance Company v John Coulter (1830) 28 US 222
Phoenix Insurance Company v Erie & Western Transportation Company (1885) 117 US 312

Railroad Company v Lockwood (1873) 84 US 357
Ryan v New York Central Railroad (1866) 35 NY 210

Stokes v Saltonstall (1839) 38 US 181
Sun Mutual Insurance Company v Ocean Insurance Company (1882) 102 US 485

Trenton Passenger RR v Guarantors' Liability Indemnity Co (1897) 37 A 609

William Waters v The Merchants' Louisville Insurance Company (1837) 36 US 213

TABLE OF STATUTES AND LEGISLATIVE INSTRUMENTS

South Africa

Conduct of Financial Institutions Bill published on 11 Dec 2018 and invited comments by 1 April 2019 (COFI Bill)
Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA)
Constitution of the Republic of South Africa, 1996 (Constitution)
Consumer Protection Act 68 of 2008 (CPA)

Financial Advisory and Intermediary Services Act 37 of 2002 (FAIS Act)
Financial Sector Regulation Act 9 of 2017 (FSRA)

General Code of Conduct for Authorised Financial Service Providers and Representatives under the Financial Advisory and Intermediary Services Act 37 of 2002, BN 80 of 2003, as amended (GCC)

Insolvency Act 24 of 1936 (Insolvency Act)
Insurance Act 18 of 2017 (Insurance Act of 2017)

Long-term Insurance Act 52 of 1998 (LIA)

Prescription Act 68 of 1969 (Prescription Act)
Promotion of Equality and Prevention of Unfairness Act 4 of 2000 (Equality Act)

Replacement of the Policyholder Protection Rules in terms of the Short-term Insurance Act of 53 of 1998, GN 1433 in *GG* 41329 of 15 December 2017 (PPRs)

Short-term Insurance Act 53 of 1998 (SIA)

Australia

Australian Insurance Contracts Act, 1984

Belgium

Act of 21 August 1879 on Marine and Inland Waterways ('Wet van 21 augustus van 1879 op de zee-en binnenvaart') (Act of 1879)
Act of 10 February 1908 on Inland Waterways ('Titel X Binnenschepen')
Act of 25 February 1991
Act of 16 March 1994
Act of 21 November 1989 on Motor-Vehicle Liability Insurance (Act of 1989 on Motor-Vehicle Liability Insurance)

Belgian Civil Code ('Burgerlijk Wetboek')(Civil Code)
Belgian Constitution ('Grondwet') Coordinated Law of 17 February 1994

Code of Economic law 2010 ('Wetboek Economisch recht 2010')
Commercial Code of 1810 ('Wetboek van Koophandel')(Commercial Code)

Insurance Act of 11 June 1874 ('Wet van 11 juni 1874 betreffende de verzekeringen') (Insurance Act of 1874)
Insurance Act of 4 April 2014 ('Wet betreffende de verzekeringen van 4 april 2014') (Insurance Act of 2014)

Land Insurance Contract Act of 1992 ('Wet van 25 juni 1992 op de landverzekerings-overeenkomst') (LIC Act)

Royal Decree of 12 January 1984 (Royal Decree of Jan 1984)
Royal Decree of 24 August 1992 (Royal Decree of 24 Aug 1992)
Royal Decree of 24 December 1992, as amended by Royal Decree of 29 December 1994 (Royal Decree of Dec 1992, as amended)

England/United Kingdom

Carriers' Act, 1830
Contracts (Rights of Third Parties) Act, 1999 (1999 Act)
Consumer Insurance (Disclosure and Representations – CIDRA) Act, 2012 (2012 Act)
Consumer Rights Act, 2015 (Consumer Rights Act)

Employers' Liability Act, 1880
Employers' Liability (Compulsory Insurance Act), 1969

Financial Services and Markets Act, 2000, as amended (2000 Act, amended)
Financial Services and Markets Act, 2000, (Consequential Amendments and Repeals) Order, 2001, SI 2001/3649
Fatal Accidents Act, 1846

Insurance Act, 2015 (2015 Act)
Insurance Companies (Legal Expenses Insurance) Regulations, 1990, SI 1990/1159 (Legal Expenses Insurance Regulations)

Marine Insurance Act, 1906 (1906 Act)
Merchant Shipping Act Amendment Act, 1862
Merchant Shipping Act, 1894

Railway and Canal Traffic Carriers' Act, 1854
Road Traffic Act, 1988

Senior Courts Act, 1981
Solicitors Act, 1974

Third Parties (Rights Against Insurers) Act, 1930 (1930 Act)
Third Parties (Rights Against Insurers) Act, 2010 (2010 Act)

Workmen's Compensation Act, 1897
Workmen's Compensation Act, 1900
Workmen's Compensation Act, 1906

European Union

Directive 87/344/EEC of 22 June 1987 on the coordination of laws, regulations and administrative proceedings relating to legal expenses insurance (Legal Expenses Insurance Directive)

Directive 93/13 EEC of 5 April 1993 on Unfair Terms in Consumer Contracts

Directive 2009/138/EEC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of insurance and reinsurance (Solvency II)

United States of America

Employers' Liability Act of 14 May 1887 ch 270, 1887 Mass Acts 889

INTERNET RESOURCES

American Law Institute *Final Restatement on the Law of Liability Insurance* https://www.ali.org/publications/show/liability-insurance/ (accessed on 4 November 2019)

Baker T & Siegelman P 'Law and Economics of Liability Insurance' https://pdfs.semanticscholar.org/0dab/ 46f804b159b2755b336a 91fc560292a 6f3b0.pdf?ga=2.228972063.245882686.1574204988-1286220863.1574 204988 (accessed on 20 November 2019)

English Law Commission 'Overview of the Third Parties (Rights Against Insurers) Act 2010' https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads /2015/06/Third_Parties_Rights_against_Insurers__Act_2010_Overview.pdf (accessed on 30 July 2019)

English Law Commission 'Third Parties (Rights Against Insurers) 2010 Act: Background to the Provisions in the Insurance Bill' https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q /uploads/2015/06/Third_Parties_and_Insurance_Bill_2014.pdf (accessed on 30 July 2019)

English Law Commission and The Scottish Law Commission *Third Parties – Rights Against Insurers* (Law Com No 272) (Scot Law Com No 184) Cm 5217 on 31 July 2001
https://www.lawcom.gov.uk/project/third-parties-rights-against-insurers/ (accessed on 30 July 2019)

English Law Commission and Scottish Law Commission 'Updated Insurable Interest Draft Bill'
https://www.lawcom.gov.uk/updating-the-law-of-insurable-interest (accessed on 4 November 2019)

Financial Services and Markets Authority 'Lijst van de verplichte verzekeringen'
https://www.fsma.be/nl/lijst-van-de-verplichte-verzekeringen (accessed on 30 July 2019)