AN APPRAISAL OF INDEMNITY AS A KEY PRINCIPLE IN THE PRACTICE OF INSURANCE –UGANDA AS A CASE STUDY

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DECLARATION

I **BAYO FOLAYAN** do hereby declare that **"AN APPRAISAL OF INDEMNITY AS A KEY PRINCIPLE IN THE PRACTICE OF INSURANCE –UGANDA AS A CASE STUDY"** 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.

Signature .... **Date** 24/5/2018

APPROVAL

This is to certify that this research has been conducted under my supervision and is now ready for submission to the School of Law at Kampala International University.

Dr. Chima Magnus

Supervisor

Signature.................................... Date 24-5-2018

DEDICATION

I dedicate this research to my wife, daughter and son: Victoria, Ibidunninuoluwa, and Erioluwa. Thank you for your understanding and support

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LIST OF CASES

Dalby-v-India and London Life Assurance Co. (1854) 15 C.R 365

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National Insurance Corporation Ltd-v- Kakugu Sylvan Civil Appeal No. 040 of 2015

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LIST OF STATUTES

1. Insurance Act, 2017
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5. The National Social Security Fund Act Cap 222
6. The Contracts Act, 2010

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CHAPTER ONE

1.0 Introduction

Indemnity is the controlling principle of contracts of insurance which is the system for wide distribution of accidental losses and an arrangement for transferring and distributing risk.[1]Insurance is essentially a contract of indemnity, and from this cardinal principle arise many of its distinctive characteristics.[2]The purpose of insurance is indemnity and indemnity only and whenever it is applied to any other, such use is a perversion of the true principle.[3]

In understanding the importance of Insurance to the economy, one must acknowledge its role as a mechanism of financially mitigating risk and providing for loss recovery in such a manner that the loss sufferer is put back in the exact financial position he or she was before the loss, this underlies the Principle of Indemnity which is the focus of this paper.

As a nation under-going rapid development, Insurance has begun to receive a lot of focus in Uganda. This has necessitated increased government interest in ensuring that the business of insurance is not only run well but that it meets its obligations to the insuring public. Thus the country has witnessed within the past ten years amendments and enactments in the legal regime within which the industry and the business must operate.[4]

1.1 Background

Although the indemnity principle is well accepted, its customary meaning has not kept up with insurance practice. It is not out of place that in the complex field of risk management, insurance has become universally recognised and accepted as the most efficient response to address risk related issues. As a result the position today is that no modern economy can survive or prosper without the active support of a disciplined and viable insurance industry.[5]

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[1] Robert E Keeton, "Insurance Law basic Text" at 88

[2] Jeffrey E. Thomas and Brad M. Wilson, "The indemnity Principle: From a Financial to a Functional Paradigm at 30

[3] Vance William R, "Handbook of the Law of Insurance, 1st Edition 1904

[4]Insurance (Amendment) Act 2011, Insurance Act 2017 and various Insurance Regulations.

[5] Mr Fola Daniels, Commissioner for Insurance, Nigeria National Insurance Commission "Insurance Regulation in the African Environment"

1.2 Problem statement

While insurance has developed as a vital tool facilitating commerce, trade and economic development it has also become more evident that no modern economy can survive or prosper without an effective, disciplined and viable insurance industry. The insurance sector in Uganda is not as developed as one would have expected and the formal insurance legislations and regulations in Uganda have recently been amended and enacted thus their implementation not fully tested

There is lack of understanding of the practice of Insurance in most African countries and most especially in Uganda. This belies the misunderstanding that insurance is fraudulent. Thus there is lack of understanding of the Principles of Insurance and most especially, the Principle of Indemnity. Apart from that there develops distrust where the insurer, in accordance with the Principle of Indemnity, does not fully pay what the insured believe they have lost.

The courts in Uganda have demonstrated lack of understanding of the business of insurance and the fundamental principles of insurance.

1.3 Purpose of the Study

1. The purpose of the study is to examine the role of insurance in the economic development of Uganda.
2. To investigate why the insurance industry is not developed in Uganda.
3. To examine how the existing legal framework affects the development of insurance in Uganda.
4. To examine the cases on indemnity in Uganda and what Courts have held in such cases.

1.4 Objectives of the Study

1. There is need to examine the legal framework of insurance in Uganda
2. To examine the role of indemnity insurance
3. To examine the role of different stakeholders in the development of insurance industry in Uganda
4. To make viable recommendations for the effective application of indemnity in insurance

5. To examine the extent to which insurance contracts are contracts of indemnity
6. To examine the insurance regulatory system in Uganda

1.5 Research Questions

1. What is insurance and what role does it play
2. How is insurance perceived by the general public?
3. How important is indemnity in contracts of insurance
4. Why is insurance industry in Uganda Underdeveloped?
5. How has the principle of indemnity been perceived?
6. How is the existing framework affecting the development of insurance in Uganda?
7. Whether the insurance regulatory and supervisory institution have effective and enforcement mechanisms

1.6 Hypothesis

While no modern economy can survive or prosper without the active support of a disciplined and viable insurance industry, Uganda's insurance industry is under developed. The insurance industry in Uganda is not developed partly because the public do not have trust in the insurance industry and the current insurance legal framework has not been tested. The public does not understand the role of insurance and in particular indemnity as a key principle in insurance. The insurance companies have also contributed to mistrust the public has against insurance industry as some of them have refused without legal justification to fulfil their obligations under insurance contracts and forcefully fulfilled their obligations under insurance contracts. Some insured have also in some instances, fraudulently claimed to have suffered losses in order to be indemnified.

1.7 Scope of the Study

The study deals with the concept of indemnity and its application in Uganda. The study also analyses the existing legal framework and for comparative purposes, reference will be made to the concept and application of indemnity in other jurisdictions.

1.8 Significance of the Study

1. The study will analyse the challenges that have hindered the development of insurance in Uganda.
2. The study will ascertain the role of insurance in the development of the economy and educate the population on the need to have trust in the insurance industry in Uganda
3. The study is important because it examines the role of indemnity in insurance.

1.9 Methodology

The research basically applied qualitative methodology in the data collection process. This entailed analysing secondary sources of information which include academic writings on indemnity such as text books, law journals, articles and precedents both in Uganda and other jurisdictions.

The researcher will study and review literature on insurance and in particular on indemnity sourced from law libraries and the internet to help develop understanding of indemnity and the role it plays in insurance.

1.10 Literature Review

The topic of indemnity the general concept of insurance is not new in insurance in Uganda. It should however be noted that there has been no comprehensive study on the role of indemnity in insurance in Uganda thus making it inescapable to review literature of foreign jurisdictions.

Indemnity being a cardinal principle of insurance and the purpose of insurance being indemnity,[6] it is almost impossible to understand indemnity without first understanding insurance and thus apposite to first define insurance. An insurance contract is an agreement between two or more parties in which one party, the insured pays a specific sum to the other, the insurer, in exchange for the latter's indemnification for losses incurred as a result of certain risks, contingencies or

[6] Richards, George, "A Treatise on the Law of insurance 3rd edition 1909 at 27-28

occurrences specified under the contract[7] and for such an agreement to be enforceable, the insured must have an insurable interest in the property insured.[8]

In order to understand the meaning and role of indemnity in insurance, it may be worthwhile referring to some legal definitions. Black's Law Dictionary[9] defines indemnity as a duty to make good any loss, damage or liability incurred by another. The right of an injured party to claim reimbursement for its loss, damage or liability from a person who has such a duty. Black's Law Dictionary meaning appears to have adopted what was stated in the case of ***Dalby-v-India and London Assurance Co.***[10] wherein it was stated that an indemnity contract is a contract of insurance where the insured pays a premium on the understanding that in the event of loss, he will be indemnified for the actual loss sustained.

To Robert E. Keeton, the principle of indemnity means one aspect of a system of insurance where there is transfer of loss from an insured to an insurer by means of an obligation upon the insurer to confer an offsetting benefit. He continues to state that to speak of 'transferring loss, or providing an offsetting benefit' is to imply that the value of the benefit shall not exceed the loss. The principle that insurance contracts shall be interpreted and enforced consistently with its objective of conferring a benefit no greater in value than the loss suffered will be referred to as the principle of indemnity. This principle does not imply, in converse, that the benefit must be no less than the loss. That is partial reimbursement of a loss is not offensive to the principle of indemnity.[11] As asserted by him, the researcher agrees that any opportunity for net gain to an insured through the receipt of insurance is inconsistent with the principle of indemnity.

According to Susan Hodges,[12] the rights and liabilities of the parties are governed by this basic concept of indemnity, and the amount recoverable by the assured, which is measured by the extent of his pecuniary loss, is also governed by it. He further asserts this should not come as a surprise, for the very purpose of effecting a policy

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[7]Emeric Fischer, 'The Rule of Insurable Interest and the Principle of Indemnity: Are they measures of Damages in Property Insurance? (1981) Faculty Publication paper 484 Vol. 56:445

[8] Ibid at 446

[9] 8th edition at 784

[10][1854]15 CB 361

[11] Robert E. Keeton, "Basic Text on Insurance Law, 1971 at 88

[12] Susan Hodges, "Law of Marine Insurance, 1996 at 1

of insurance, marine or non-marine, is indemnity for loss and it is on this latter assertion that the researcher holds a different view. The researcher opines that not all contracts of insurance are indemnity contracts. This is because certain insurance contracts such as life insurance cannot be indemnified.

The most incisive comment on the subject of indemnity can be found in Lord Wright's judgement of the House of Lords in **Rickards-v-Forestal Land, Timber and Railway Co.**[13] where he said: *"the contract of insurance contained in a marine or fire policy is a contract of indemnity, which is the basic principle of insurance, and to apply in the diverse complications of fact and law in respect of which it has to operate. In this way, the law merchant has solved, or sought to solve the manifold problems which have been presented by insurance of maritime adventure."*

In Castellain-v-Preston (1883)11QBD 380 at 386, Mr Justice, Brett remarked, *"the contract of insurance contained in a marine or fire policy is a contract of indemnity, and indemnity only, and this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified but shall never be more than fully indemnified.*

The incidents and legal consequences of the contract all stem from this great principle per Lord Ellenborough in **Brotherston-v- Barber**[14] *"the great principle of the law of insurance is that it is a contract of indemnity. The underwriter does not stipulate, under any circumstances to become the purchaser of the subject matter insured, it is not supposed to be in his contemplation: he is to indemnify only"*

Susan Hodges rightly asserts that many of the main legal principles, for example the rules relating to insurable interest, gaming and wagering policies, excessive rules of over-valuation, double insurance, contribution and return of premium, abandonment and right of subrogation and the merger of losses, all spring from this concept of indemnity[15]

Unlike other Writers, Susan Hodges rightly states that a contract of marine insurance is not a perfect contract of indemnity[16]

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[13] (1941)3 ALL ER 62 at 76
[14] (1816), 5 M & S 418 at 425
[15] Susan Hodges, Supra at 1
[16] Ibid at 2

Citing the case of **Castellain-v-Preston** in which Lord Justice Bowen was confident that the principle of indemnity will solve all problems. His words were "in all these difficult problems, I go back with confidence to the broad principle of indemnity. Apply that and an answer to the difficulty will be found... but can it be any exception to the infallible rule that a man can only be indemnified to the extent of his loss? The writer admitted that most of the problems can be resolved by applying the principle but hastened to add that this, is a somewhat optimistic point of view. A contract of marine Insurance, though a contract of indemnity, is by no means a perfect contract of indemnity. As in all walks of life, there is always a margin of error: in some instances, the theory may more than indemnify the assured for his loss, and in others, he may be under-indemnified. That the principle is not infallible was noted by Lord Sumner in **British and Foreign Insurance Co Ltd-v- Wilson Shipping Co Ltd**[17] where he said, "*the practice contracts of insurance by no means always result in a complete indemnity, but indemnity is always the basis of the contract"*

In similar terms, Mr Justice Patteson in **Irving-v-Manning**[18] who, also resigned to the fact that perfection may be difficult, if not impossible, to achieve, openly declared that 'a policy of assurance is not a perfect contract of indemnity." He acknowledged the fact that it has to be taken with qualifications, one of which is the effects of a valued policy, the problem he was asked to resolve. It was also noted that in a valued policy, the agreed total value is conclusive; the parties have conclusively admitted that this fixed sum shall be that which the assured is entitled to receive in event of a loss

Ideally, an assured should be compensated only to the extent of his loss. In practice, however, this is not always easy to attain. But having said that, the principle is always at hand and may be invoked whenever judges feel that justice may be better served by its application rather than by a strict and literal adherence to rules. It is fair to say that judges have in the past employed the principle of indemnity as a fall-

[17] (1921)1 AC 188 at 214
[18] (1847)1HLC 287 at 307

back whenever the main ground of their decision needed further support or reinforcement.[19]

The author of Marine insurance[20] Law further stated that the very essence of a contract of marine insurance is that of indemnity and this necessarily means that an assured who has no insurable interest in the subject matter insured, would not be able to show that he has suffered a loss since he is not 'prejudiced' by its loss or by damage thereto, or by the detention thereof'. Such a contract, where the assured has not an insurable interest is deemed to be a gaming or wagering contract and therefore void.

Susan Hodges assertion that before a person can be indemnified must demonstrate that he has an insurable interest in the subject matter insured is supported by Ray Hodgin[21] who wrote that Insurance is intended to provide the insured with an indemnity against loss although life assurance does not fit easily with the description and the researcher finds no reason to disagree with the learned authors.

Braden Galea[22] asserts that *Indemnity means that the insured must be placed in the same financial position as he was just before he suffered a loss. The principles of subrogation and contribution are ancillary to indemnity.* Bladen states that he principle of indemnity means that the insured must be placed in the same financial position as he was just before the loss occurred and cited the case of Leppardvs Excess Insurance Company Ltd (1979), which illustrated the principle of indemnity. In this case, the subject matter was a cottage. As a result of a conflict with the farmer owning all the surrounding land, Mr Leppard could not sell the cottage as no one could access the cottage. He had to drop the price of the cottage excluding land from £8694 to £3000. A loss occurred just then, and the indemnity amount paid to Leppard was £3000 which was the value just before the fire, not the £8694 cost of rebuilding. In the case of a total loss of property, its financial value at the time and place of loss must be paid. Deductions are made for wear and tear and betterment.

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[19] Susan Hodges, Supra at 2

[20] Ibid at 3

[21] Insurance Law, Text and Material, 2nd Edition at 100

[22] Insurance Principles Indemnity, Subrogation and Contribution available at https://insurance1.knoji.com/insurance-principles-indemnity-subrogation-and-contribution

The indemnity principle may be adjusted in three ways; Valued policies for subject matters which do not have a measurable value, allowing more than indemnity, for example in cases of new-for-old where no deduction for depreciation is made, or in cases of property insurance covering architects' and surveyors' fees after fire damage to ensure that rebuilding complies with local legislation and allowing less than indemnity, for example in cases of underinsurance where the insured is deemed to be his own insurer for the proportion of the underinsured loss, or excess which is the first part of a claim paid by the insured.

Braden Galea went ahead and defined subrogation as the insurance principle which allows insurers to stand in the place of the insured and avail themselves of all rights and remedies of the insured and rightly stated that subrogation only applies to contracts of indemnity not to benefit policies such as life assurance. He stated rightly, that the principle of subrogation enforces indemnity and cited the leading case of **Castellain-vs- Preston** where the insurers, were given the right to stand in the place of insured and recover the amount paid in the claim to insured.

CHAPTER TWO

MEANING, TYPES AND HISTORY OF INSURANCE IN UGANDA

2.1 Meaning of Insurance

Despite the long and influential history of insurance, the basic questions of what an insurance contract is still pose a difficult problem. Since the purposes for which definitions of insurance are invoked differ, no single definition will serve always, even in a single jurisdiction. A way of approaching this problem of varied meanings of insurance is to state some characteristics always found in any transaction identified as insurance, without trying at the same time to make the catalogue of characteristics complete.[23] While a satisfactory definition of 'contract of insurance' is elusive, the use of the phrase to define the ambit of fiscal and regulatory legislation has made the task of attempting it inescapable.[24] The complex system of supervision created by the Insurance Act 2017 applies to specified regulated activities which include effecting and carrying out, as a principal, a contract of insurance. While there is no general statutory definition of a contract of insurance,[25] the business of effecting and carrying out contracts of insurance is regulated by statute, and for this purpose, 'insurance business' and 'contract of insurance' have statutory definitions. The insurance Act defines insurance business as the business of undertaking liability as an insurer or reinsurer under an insurance contract. While insurance contract is defined to mean a contract under which one party, known as the insurer, in exchange for a premium, agrees with another party known as the policy holder to make a payment or provide a benefit to the policy holder or another person on the occurrence of a specified, uncertain event, which, if it occurs, will be adverse to the interests of the policy holder or to the interests of the policy holder or to the interests of the person who will receive the payment or benefit.[26]

The common law authorities defining essential characteristics of insurance therefore remain relevant. A useful working definition is that given by Channel J in **Prudential**

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[23] Robert Keeton, Supra at 2

[24] McGillivray on Insurance Law, Centenary Edition at 3

[25] Halsbury's Laws of England, 4th Ed Vol. 25

[26] Section 2 of the Insurance Act 2017

Insurance Co.-v-Inland Revenue Commissioners[27]where he stated that *"a contract of insurance then must be a contract for payment of a sum of money or for some corresponding benefit such as the rebuilding of a house or the repairing of a shape to become due on the happening of an event, which event must have some amount of uncertainty about it and must be of a character more or less adverse to the interest of the person effecting the insurance."* The judge further observed that, *"it must be a contract whereby for some consideration usually but not necessarily for periodical payments called premiums, you secure yourself some benefit usually but not necessarily the payment of a sum of money upon the happening of some event"*
In the words of Ivamy[28], *a contract of insurance in the widest sense of the term may be defined as a contract whereby one person called the insurer undertakes in return for the agreed consideration called the premium, to pay to the other person called the assured, a sum of money or its equivalent on the happening of a specified event"*
In the words of John Birds,[29] *Insurance it is suggested that a contract of insurance is any contract whereby one party assures the risk of an uncertain event which is not within his control happening at a future time. In which event the other party has an interest and under which contract the first party is bound to pay money or provide its equivalent if the uncertain event occurs."*
Lord Clerk in Scottish Amicable Heritage Securities Association Ltd-v- Northern Assurance Co[30] *stated that insurance contract is a contract belong to a very ordinary class by which the insurer undertakes in consideration of the payment of an estimated equivalent beforehand to make up to the assured any loss he may sustain by the assurance of an uncertain contingency.*
The essential features of an insurance contract are: that a sum of money will be paid by the insurers on the happening of a specified event, there must be uncertainty as to the happening of the event, either as to whether it will happen or not, or if it is bound to happen, like death of a human being, as to the time at which it will

[27] [1904]2KB 658 at 663
[28] ER. Ivamy, General Principles of Insurance Law, 6th Edition, Butterworth's
[29] Modern Insurance Law at 13
[30] *(1883)11 ER 287*

happen.[31]There must also be an insurable interest in the insured, which is normally that the event is one which is primafacie adverse to his interest.

2.2 Types of Insurance

In the law of insurance, as elsewhere, categories are used and sometimes misused in developing and communicating ideas. There is always risk that a system of classification wisely designed for one purpose will be thoughtlessly extended to use in an unfitting context. Classification is part of the process of seeking organising principles. It is a useful-perhaps even inevitable-way of signifying similarities that warrant like treatment or differences that warrant contrasting treatment. Thus the role of classification is closely related to the balance between generalisation and particularisation in a body of law.[32]

Since different purposes of inquiry call for classification by different criteria, the systems of classification are numerous.[33] The insurance Act[34] classifies insurance business as life insurance and nonlife insurance business. The researcher will in this work, classify insurance by nature of risk. Halsbury's Laws of England[35] states that for convenience, the different types of insurance may be classified as Marine Insurance, Long term insurance, Personal accident insurance, Property insurance, Liability insurance, Motor vehicle Insurance, Pecuniary loss insurance and Industrial insurance

2.2.1 Marine Insurance

A contract of Marine insurance is defined by the Marine Insurance Act to mean a contract by which the insurer undertakes to indemnify the assured, in a manner and to an extent agreed under the contract, against the losses incidental to marine adventure. A contract of Marine Insurance may by its express terms or usage of

[31]Prudential Insurance Co V IRC [1904]2 KB 658 at 663 per Channel J.
[32] Robert E. Keeton, supra at 1
[33] Ibid at 2
[34] Section 6 of Insurance Act, 2017
[35] 4th edition 2003 Reissue at Para 9

trade be extended so as to protect the assured against losses on inland waters, or on any land or a risk which may be incidental to any sea voyage.[36]

The operative word in the above definition is indemnity. A contract of marine insurance is essentially a contract of indemnity upon which the whole contract is founded, and from which the rules relating to the right of claim under a policy emanates.[37]

Regarding the subject matter of insurance, the most usual insurances are on a ship or goods, freight or profit, but every lawful marine adventure may be the subject of insurance.[38] In particular, there is Marine adventure where any insurable property is exposed to maritime perils, the earning or acquisition of any freight, passage money, commission, profit or other pecuniary benefit, or the security for any advances, loan, disbursements, is endangered by the exposure of insurable property to maritime perils, or any liability to a third party may be incurred by the owner of or the other person interested in or responsible for insurable property, by reason of maritime perils.[39]

2.2.2 Long term insurance.

Farwell CJ[40] stated that for the purposes of insurance business, contracts of insurance on human life are contracts of long term insurance. In this case, Life insurance was defined as the contract in which one party agrees to a pay given sum upon the happening of a stipulated event contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum or certain equivalent periodical payments by another.

A contract of life insurance, in its strict form may be defined as a contract under which the insurers undertake, in consideration of specified premiums being continuously paid throughout the life of a particular person, to pay a specified sum of money upon the death of that person.[41]

[36] Section 3, Marine Insurance Act, 2002
[37] Susan Hodges, supra at 1
[38] Halsbury's Laws of England, 4th edition 2003 at Para 217
[39] Section 4, Marine Insurance Act 2002
[40] Joseph-v-Law Integrity Co. Ltd (1912)2 Ch. 581
[41] Dalby-v-Indian and London Life Assurance Co (1854)15 C.B at 387

The particular person whose life forms the subject matter of the insurance need not be the person who pays the premium; it may be a third party.[42]Under a policy of life insurance in the strict sense, the event which gives right to payment is death during the currency of the policy.[43] Generally, the cause of the death, whether due to natural or accidental causes, fall within the policy, even death caused by the wilful act of a third party is covered. The insurer's liability to pay the policy money cannot be affected by the fact that the insured was killed by a third party.[44]

However, as a matter of public policy, a person may not benefit from his own criminal act. Thus a person who murders the insured will not benefit under a policy of life insurance on the deceased's life. The same applies in the case of manslaughter or unlawful aiding, abetting, counselling or procuring the death of the insured.[45]

Like any other insurance contract, in life insurance, there must be an insurable interest a policy of insurance cannot be issued to any person on the life of any person where that person has no insurable interest in the life or event.[46] Under the Insurance Act, 2017,[47] an insurable interest shall be deemed to be had by; a parent of a minor or the guardian of a minor on the life of a minor, a husband on the life of the wife and vice versa, any person on the life of another upon whom he or she is wholly or in part dependent for support or education, a company or other person, on the life of an officer or employee of the company or that other person, in the life of that person to the extent only of that pecuniary interest at the outset.

2.2.3 Accident insurance

Halsbury's Laws of England[48] states that accident insurance developed out of life insurance, but it must now be regarded as a different kind of insurance, and it is in practice generally so regarded.

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[42]Halsbury's Laws of England, supra at Para. 525
[43] Ibid at Para. 529
[44]Cleaver-v- Mutual Reserve Fund Association (1892)1 QB 147
[45]Halsbury's Laws of England, supra at para. 530
[46] Section 133, Insurance Act, 2017
[47]Section 133(2)
[48] Supra at para. 568

The object of accident insurance is to make provision for payment of a sum of money in the event of the insured sustaining accidental injury. It resembles life insurance and differs from other types of insurance in that it is not a contract of indemnity, it is merely a contract to pay a sum of money on the happening of a specified event, namely the sustaining by the insured of personal injury by such accidental means.[49] The event may involve the death of the insured, but the insurance is not for that reason a contract of life insurance.[50]

As in life insurance, an insurable interest is required in accident insurance, the interest normally being the potential pecuniary loss of the insured as a result of disablement, either of himself or of the third party if a third party is insured.[51]

2.2.4 Health Insurance

There are several kinds of health insurance. One kind provides for reimbursement of medical, hospital or surgical expenses when an insured person is sick or injured. Another kind provides for replacement of lost income when an insured person is unable to work due to disability.[52]

In Uganda, a Health Membership Organisation licence authorises the holder to provide health benefit plans to persons resident in Uganda only.[53] A health membership organisation or "HMO" is an organisation engaged in the business of undertaking liability in respect of funding health care by way of membership.[54]

The law applicable to sickness insurance is basically the same as that applicable to accident insurance. The insured normally required to give information in the proposal form as to his previous medical history and to sign a declaration as to his being in good health and not having suffered from any serious illness over a specified period. He may also have to submit a medical examination by a doctor nominated by the insurers.[55]

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[49]Halsbury's Laws of England, supra at para. At 567

[50]General Accident Assurance Corporation-v- IRC (1906)8 F. Ct. of Sess

[51]Halsbury's Laws of England Supra at 568

[52]Muriel L. CrawfordLaw and the Life Insurance Contract, at 474

[53]Section (35 (1) (c)

[54] Section 2, Insurance Act 2017

[55]Halsbury's Laws of England, supra at para 590

2.2.5 Property insurance

In his book, Hodgin[56] states that property insurance is a contract of indemnity and the interest must exist at the time of loss and not when the contract is made. Fire Insurance is one of property insurances. A policy of fire insurance is intended to protect the insured against loss caused by fire. In practice, the protection normally extends to losses caused by events which are frequently the cause of fire but may occur without fire resulting, such as lightning and certain kinds of explosion.[57]

Also under property insurance, the property may be insured against theft and burglary. Theft in an insurance policy must be construed in accordance with the technical meaning and the same must apply to policies that cover burglary.[58]

2.2.6 Liability insurance

In liability insurance, the event insured affects the insured financially by reason of his becoming liable to pay to third party either damages for breach of contract or tort or some other form of compensation, restitution or reimbursement.[59] The event upon which the obligation of the insurers to indemnify the insured depends is the happening of the liability insured against[60] and the liability must be the liability described in the policy.

Forms of liability insurance in Uganda include:

(a) Motor vehicle insurance(Third Party Risks)

In Uganda, it is unlawful for any person to use, to cause or to permit any other person to use a vehicle on a road if there is no policy of insurance in respect of third party risks that is in force in relation to the use of the vehicle by that person or that other person as the case may be.[61]

(b) Insurance by emplo;yers

Every employer is required to insure and keep himself or herself insured in respect of any liabilities that he or she might incur to any worker employed by him or her. This insurance enables the employer to compensate the workers for injuries suffered

[56] Ray Hodgin Insurance Law, Text and Materials, 2nd Edition at 60
[57] Halsbury's Laws of England, supra atPara. 591
[58] McGillivray on Insurance Law, Centenary Edition, 2012 at 949
[59] Halsbury's Laws of England, supra at Para. 660
[60] Lancashire Insurance Co-v- IRC [1899] 1 QB 353 at 359 per Bruce J
[61] section 2(1) of the Motor vehicle Insurance (Third Party Risk) Act cap 214

and scheduled diseases incurred in the course of employment to which the employer is liable and an employer is prohibited from making any false statement or wilfully doing any act in consequence of which the policy is liable to be voided or payment under the policy refused.[62]

2.2.7 Social insurance

As matter of national policy, the state undertakes the responsibility of providing on an insurance basis benefits for unemployment, incapacity, maternity, widow and widowers, retirement, death, industrial injuries and diseases.[63]

Social insurance is compulsorily imposed upon the assured by statute to protect the society from a hazard which no single individual can cushion it. The individual must guard against such risks as well as the activities giving rise to the risk as it is beneficial to the society. Social insurance is said to be a device of pooling risks by their transfer to an organisation under an obligation to provide pecuniary benefits or services to or on behalf of the insured on the occurrence of the event. In Uganda, an example of social insurance organisation is the National Social Security Fund. Any employee of or above the age of 16 and below the age of 55 years except an employee who is excepted and declared by the Minister to be exempted employee is deemed to be an eligible employee for the purposes of registration.[64] Eligible employees and employers are compulsorily registered as members and contributing employers respectively of the National Social Security Fund.[65] The contributing employer may deduct from the monthly wage payment of his or her employees share of a standard contribution of 5 percent calculated on the total wages during that month to that employee.[66] The benefits to which members of the Fund are entitled are age benefit, withdrawal benefit, invalidity benefit, emigration grant and survivor's benefit.[67]

Contracts of insurance may further be subdivided into two categories as indemnity insurance and contingency insurance. Indemnity insurance is where the insured pays

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62 Section 2(3), Workers Compensation Act cap 225

63 Halsbury's Laws of England, supra at. Para. 10

64 Section 6 of NSSF Act Cap. 222

65 Ibid section 7

66 Ibid section 12

67 Section 19 NSSF Act cap 222

a premium on the understanding that in the event of loss, he will be indemnified for the actual loss sustained. He must be restored to the position he was before the loss.

Contingency insurance, where the promise is to pay a specified sum on the happening of a named event for example personal injury policy or life policy. In the latter case, the insurer contracts to pay a predetermined sum when the person whose life is assured dies, and the sum is payable irrespective of the value of life that is lost.

2.3 History of Insurance

The concept of insurance arose out of the mercantile adventure of transporting goods across the sea, the adventure consisting in early times of the enormous fortune to be made if the project turned out to be successful, as contrasted with disastrous loss, even ruin, which resulted if the project foundered amid the perils of the sea. It is not surprising therefore that the common law of insurance developed in the first instance through decisions of maritime insurance. Non-marine insurance first made its appearance in the form of life and fire insurance, but until the middle of the nineteenth century, these three types of insurance comprised, in practice, substantially the whole range of insurance. Therefore, there are historically fewer court decisions bearing directly on non-marine questions than there are relating to marine insurance, and recourse must frequently be made to the basic principles as formulated in marine cases.[68]

The researches have proved that the earliest variety of this contract was the contract of marine insurance, that is a separate and independent contract it dates back to the early years of 14^{th} century, and that it evolved, like so many other modern mercantile institutions, in the commercial cities of Italy. This contract was not devised by a legislator. It was the last term in the evolution of various legal devices invented to provide against the risks of the sea, and though there is no evidence of the existence of an independent contract of insurance before the

[68]Halsbury's Laws of England, supra at Para. 1

beginning of the 14th century, we can see in these various devices the germs from which this contract evolved.[69]

More immediately connected with the development of the contract of insurance were the stipulations as to risk introduced into the ordinary commercial contracts of the 13th century. In the 13th century, some of these contracts for example contracts of sale or loan, were never intended to be sales or loans but insurances.[70]

In 1347, we have, in the archives of Genoa, perhaps the oldest contract of insurance, and the archives of Florence show that, in the first 20 years of this century it was an ordinary commercial transaction in the principal commercial towns of Italy.[71] The contracts in which the market value of the element of risk had been chiefly contracts of maritime loan, and all were concerned with risks incurred in transport-generally by sea. It is not surprising, therefore to find that when the contract of insurance first appears as independent contract, it is modelled on the maritime loan.

During the 14th century, the business of insurance grew and flourished. In the first half of the 14th century, Florence and Genoese merchants treated the cost of insurance as a regular part of the cost of transport. Genoa seems to have been the centre of the insurance business. In these early days, there were no rules as to the form in which the contract must be drawn up. There is reason indeed to think that, in the earlier part of the 14th century, contracts of insurance were sometimes made verbally.[72]

This growth of the practice of insurance, caused in the first place, the ascertainment and elaboration of the rules of law governing the contract and, in the second place, its regulation by statutes which were passed, either in the interest of the state, or in the interest of the parties to the contract and the earliest legislation on the subject of insurance comes from Genoa and Florence. The earliest enactment is a Genoese statute which comes from the last quarter of the 14th century.[73]

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69 Holdsworth, W, The Early history of Contract of Insurance (1917)17 Col LR 85
70 Ray Hodgin Insurance Law, Text and Materials, 2nd Edition at 20
71 Ibid
72 Ray Hodgin Insurance Law, Text and Materials, 2nd Edition at 21
73 Ray Hodgin Insurance Law, Text and Materials, 2nd Edition at 21

To John Birds,[74] the origins of modern insurance contracts are to be found in the practices adapted by the Italian merchants from the 14th century though the concept of insuring is an ancient one.

Early methods of transferring or distributing risk were practiced by Chinese and Babylonian traders as long ago as the third and second millennia BC, respectively.[75]

Some forms of insurance had developed in London by the early decades of the 17th century. For example the will of the English colonist Robert Hayman mentions two policies of insurance taken out with the diocesan chancellor of London, Arthur Duck. Of the value of £100 each, one relates to safe arrival of Hayman's ship in Guyana and the other is in regard to £100 assured by the said Doctor Arthur Duck on my life'. Hayman's will was signed and sealed on 17 November 1628 but not proved until 1633.

In the late 1680s, Edward Lloyd opened a coffee house that became a popular haunt of ship owners, merchants and ships' captain, and thereby a reliable source of the latest shipping news. It became the meeting point of parties wishing to insure cargoes and ships and those willing to underwrite such ventures. Today, Lloyds of London remains the leading insurance market for marine and other specialist types of insurance, but it operates rather differently than the more familiar kinds of insurance.

Insurance was first introduced in Uganda during the colonial era by the British traders who came in the wake of British administrators during the 19th century, transacting both life and non-life insurance with their offices based abroad. The first insurance company was the East African Insurance Company, which was incorporated in 1949.[76]This was followed by the National Insurance Corporation being established by an Act of Parliament in 1964 which commenced work a year later in 1965.[77]Prior to that, there were only agencies and branch offices of foreign insurance companies mainly from United Kingdom, India, and America that numbered about 95 by independence time in 1962.

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74 Bird's Modern Insurance Law 6th Edition

75 Vaughan, E.J (1997) Risk Management. New York: Willy

76 Uganda insurance commission Annual insurance Market Report, 2000 at 1

77 Ibid

In April 1996, the insurance Statute was enacted. The Statute among others established the Uganda Insurance Commission now, the Insurance Regulatory Authority as an independent body mandated with ensuring effective administration, supervision, regulation and control of the insurance business in Uganda.[78]

[78]Insurance Institute of Uganda, Htm"Overview of the Insurance Industry." Retrieved 07-03-2012

CHAPTER THREE

THE LEGAL AND REGULATORY FRAMEWORK OF INSURANCE IN UGANDA

3.1 The Legal Frame Work

When people speak of a law, they usually mean a Statute enacted by a legislature. However, law is a great deal more than a collection of statutes. The structure of the law is highly complex. In its broad sense, law can be defined as system of rules and principles governing human conduct and enforceable by a controlling authority. Included in the concept of law are many general principles of custom and public policy dating back so far that no one can say accurately when they began. The laws of a society are shaped by and tailored to the needs of that society. Some laws are very old and others very new. The age of a law does not govern its validity. A Court decision handed down two centuries ago may still regulate the actions of the people today. Nevertheless, as society changes, some laws lose public acceptance[79]and social changes also necessitate new laws which explains why the insurance laws in Uganda have followed a logical pattern characterised by enacting, amending and repealing in order to meet the changes and needs of the society.

It has been conceded by Insurance Law Scholars that harmonisation of insurance contract law has been the great failure.[80] Instead complicated choices of law rules have been introduced. Insurers presumably will prefer to follow their own national rules. The history of their own national development in this area over many decades must surely be reflected in their products and in their approach to the insured risk.[81]

Insurance contracts are governed by the general law of contract subject to additional special principles such as the duty of good faith.[82]It has been observed by Roskill LJ that *it is desirable that the same legal principles should apply to the law of contract as a whole and those different legal principles should not apply to different branches of that law.*[83] Equally, there is no doubt that over the years, it attracted many principles of its own to such an extent that it is perfectly proper to speak of

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[79]Law and the Life Insurance contract, Muriel L. Crawford 7th Edition at 2

[80] Ray Hodgin Insurance Law, Text and Materials, 2nd Edition at 12

[81] Ibid

[82]Halsbury's Laws of England, supra at para. 2

[83]Cehave NV-V-Bremen Handelsgellschaft Mb H, The HansaMord(1975) 3 ALL ER 739 at 756,

the law of insurance and in the words of Collinvaux: 'insurance contracts also exhibit certain features which as a matter of common law apply only to them'[84].

Brett L.J stated that the basic principles applicable to matters of insurance flow from the nature of an insurance contract as conceived by the law merchant and taken over by the common law and are therefore, common to both marine and non-marine contracts.[85]

The insurance industry in Uganda is currently governed by the following laws.

3.1.1 The Marine Insurance Act, 2002

The Act codifies, the common law relating to marine insurance. It expressly states under section 93 that the rules of the common law, including the law merchant, shall continue to apply to contracts of marine insurance, so far as those rules are for the time being in force and are not inconsistent with the Act, and the rules of construction of a policy set out in the second schedule to this Act shall apply.

3.1.2 The Motor vehicle Insurance (Third Party Risk) Act cap 214

This law regulates the Motor vehicle third party insurance in Uganda.

Under this law, it is not allowed for any person to use or to cause or to permit any other person to use a vehicle on a road unless there is a policy of insurance in respect of third party risks in force in relation to the use of the vehicle by that person or that other person.[86] Any person who contravenes this provision commits an offence.[87]

3.1.3 Workers compensation Act Cap 225

This is an Act that provides for compensation to workers for injuries suffered and scheduled diseases incurred in the course of their employment. Every employer is required to insure and keep himself or herself insured in respect of any liabilities he or she may incur to any worker employed by him or her.[88]

[84]Collinvaux Law of Insurance at 2, Sweet and Maxwell, 7th Edition

[85]Castellain-v-Preston (1883) 11 QBD 330 at 386

[86]section 2(1), Motor Vehicle Insurance(Third Party Risk)Act cap 214

[87] Ibid section 2(3)

[88] Section 18

The law protects the workers in that the insurers empowered to offer insurance for the purpose of compensating the employee for injuries and schedule diseases are specified in a list kept by the Minister responsible for finance and published in the official gazette.[89] For the purposes of obtaining a policy of insurance the employer is prohibited from making any false statement or wilfully doing any act in consequence of which the policy is liable to be voided or payment under the policy refused.

3.2 Regulation of Insurance in Uganda

3.2.1 Historical background of insurance regulation

A gradual global change took place in the twentieth Century. Governments, guided by the pressures created following two world wars and the emergence of socialist ideas, found it necessary on grounds of public policy to get involved with the administration of insurance companies. The intervention of individual states in controlling insurance Companies was extensive and governments were very active in legislating powers for themselves to regulate insurance companies operating within their jurisdiction.

The business of insurance, although primarily a matter of private contract, is nevertheless of such concern to the public as a whole that it is subject to governmental regulation to protect the public's interest.[90]

One would wonder what are the reasons for government intervention in what might be called market economies? It is the researcher's view that Insurance was a business conducted on a large scale and involved a number of policyholders paying a considerable amount of money in premiums. The funds accumulated were inevitably a source of temptation to some dishonest businessmen who at different periods in the development of insurance devised and perpetrated various fraudulent schemes under the guise of insurance. Over the years, some insurers failed to meet their obligations, mainly because of financial failure. Whatever the reason for the collapse

[89] Section 18 (2)

[90] Mayhall, Van 111, Insurance Regulatory Law: Defined, Insurance Regulatory Law. Retrieved, 12th July 2012)

of an insurer, the consequences for existing policyholders and their dependants relying on the stability of a life fund to provide for them in their old age or on the event of a life tragedy were even worse. Like any other person, the researcher concludes that it was the function of government to intervene and take appropriate action to ensure that the insurance companies operating within their territories were financially stable and conducted their affairs in a reasonable manner.

The desire to protect the insured by mean of statutory intervention outweighed the hostile opposition of many companies, who at most wanted to arrange non-statutory protection.[91]

Insurance regulatory law is the body of statutory law, administrative regulations and jurisprudence that governs and regulates the insurance industry and those engaged in the business of insurance. Insurance Regulatory law is primarily enforced through regulations, rules and directives by the state insurance departments as authorised and directed by the Statutory enacted by the State legislature. However, court decisions and administrative adjudications also play an important role.[92]

The fundamental purpose of insurance regulatory law is to protect the public as insurance consumers and policyholders. Functionally, this involves; licensing and regulating insurance companies and others involved in the insurance industry, monitoring and preserving the financial solvency of insolvency companies, regulating and standardizing insurance policies and products, controlling market conduct and preventing unfair trade practices and regulating other aspects of the insurance industry.[93]

The researcher will thus analyse the body of the law that regulates, governs and monitors insurance in Uganda.

As early as 1961, Uganda has had several laws providing for the regulation of insurance, the Insurance Ordinance, 1961. It was repealed by the Insurance Companies Act of 1964 Cap. 92 which was in turn repealed in 1978 by the Insurance Decree of the same year, the Statute of 1996 and the Insurance Act 213 of 2000

[91] Ray Hodgin Insurance Law, Text and Materials, 2nd Edition at 15

[92]Mayhall, Van 111, Insurance Regulatory Law: Defined, Insurance Regulatory Law. Retrieved, 12th July 2012

[93]Klein, Robert W. (2008) An Overview of the Insurance Industry and its Regulation, Centre for Risk Management and Insurance Regulation, Georgia State University.

both of which were eventually amended by the Insurance Amendment Act, 13 of 2011.[94] The Insurance Act Cap.213 as amended was eventually repealed by the Insurance Act 2017[95] but saved Statutory Instruments made under the repealed Act which were in force immediately before the commencement of the Insurance Act.[96]

The enactment of Uganda's regulatory laws followed a logical pattern. It had as its aim, regulation of insurance companies by compelling compliance with several conditions before commencing trading operations and following up a company being wound up or ceasing from any other cause.

The supervision of the insurance industry in Uganda has developed to its present level over a period of years through the Insurance Regulatory Authority formally known as the Insurance Commission established as a body corporate under the repealed Act Cap 213 and continued in existence by the Insurance Act, 2017[97] with the object of ensuring effective administration, supervision, regulation and control of Insurance business in Uganda.

The general functions of the Regulatory Authority are;[98] to regulate, supervise, monitor and control the insurance sector, to establish standards for the conduct of business in the insurance sector and to issue such guidance as it considers appropriate, to control entry into and exit from the insurance sector through the issuance, variation or revocation of licences, to take appropriate action against persons carrying on unauthorised business, to supervise licensees on an individual basis and where appropriate, on a group wide and cross border basis, to monitor compliance with, or investigate conduct that constitutes or may constitute a contravention to the Act, to take action in relation to licensees that are insolvent or likely to become insolvent, to monitor the operation of insurance sector and to conduct inquiries and investigations into any matter relating to the insurance sector, to keep under review the effectiveness of the Act and Regulations and, where appropriate, initiate and make proposals to the Minister concerning the Act and other legislation relevant to the insurance sector, to receive and resolve insurance

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[94] ttps://www.ira.go.ug/a%20presentation%20on%20regulations%20of%20insurance%20at%20ldc.pdf

[95] Section 153(1)

[96] Section 153(2)

[97] Section 10(1)

[98] Section 12

related complaints, to receive complaints from the members of the public on the conduct of the person licensed and arbitrate and to advise government on adequate insurance protection and security for national assets and national properties and to promote awareness of and undertake public education concerning the insurance sector.

The Authority is obliged in performing its general functions to have regard to the need to implement international standards and best practices in relation to the regulation and supervision of the insurance sector and effective risk management by insurers and other licensees.[99]

In discharging its general functions, the authority must so far as is reasonably possible, act in a way which is compatible with its regulatory objectives[100] which are to promote and facilitate the maintenance of a sound, efficient, fair, transparent and stable insurance sector, promote and uphold public confidence in the insurance sector, protect the interests of persons who are or who may become policyholders of insurers or customers of other licensees, regulate and supervise licensees on a risk-sensitive basis and to promote effective competition in the insurance sector in the interests of consumers, the growth and development of the insurance sector and the development of an inclusive insurance sector.

3.2.2 Effect of the Regulatory Law on the Insurance Industry

The repealed Insurance Act Cap 213 established the Insurance Regulatory Authority formerly known as the Insurance Commission as a body corporate responsible for the regulation and control of insurance business in Uganda.

The basic act of the control of the Authority is the license. In order to obtain a licence to commence business, an insurance company has to comply with several conditions. The license is evidence of the Authority's approval that the prospective insurance player has fulfilled all conditions prescribed by the law and deemed necessary for the protection of the policyholders, beneficiaries and the economy of the country. The overall effect of the Insurance legal framework developed to its

[99] Section 12(2)
[100] Section 11(11)

present level over a period of years is that the insurance industry in Uganda was from 1996 to be supervised in the following manner:

3.2.3 Preliminaries

All insurers or Health Membership Organisation are to be bodies corporate. The acceptable forms of incorporation are; are a company incorporated under the companies Act, an Insurance society registered under the Cooperative Societies Act or a Mutual insurer.[101] An insurance broker is also required to be incorporated under the Companies Act.

3.2.4 Financial requirements

(i) **Minimum paid-up capital**

It is important to regulate the financial status of insurance companies in order to ensure financial stability and solvency. The basic aim of the Authority has been to ensure that insurance entities remain solvent and always able to meet their financial commitments. The Insurance Regulations provides that the minimum paid-up capital is Four billion shillings for nonlife insurance and three billion shillings for life insurance. Brokerage firm's minimum paid up capital is seventy five million and ten billion shillings for reinsurance. Regulation of the financial status of insurance company is relevant in order to ensure and maintain financial stability and solvency and the regulatory law has been effective.

(ii) Security deposit

The insurers are required to make a security deposit of at least ten percent of the prescribed paid up capital of the company to a commercial bank approved by the Authority.[102] The security deposit is used to pay insurance claims, satisfy the costs of, or associated with any remedial measures or enforcement of powers exercised by the Authority in relation to the insurer, in the event that the insurer is liquidated, to pay to the liquidator of the insurer for the purposes of winding up.[103]

101 Section 7 Insurance Act 2017
102 Section 38(1), Insurance Act, 2017
103 Ibid, Section 39

(iii) Professional indemnity

One of the licensing requirements for intermediaries is that the professional indemnity policy taken out is satisfactory. Thus every insurance broker or reinsurance broker shall not carry on the business of insurance broking unless it maintains at all times while carrying on that business a paid up capital as stipulated in the Regulations and shall furnish the Authority with proof of registration of the Authority's lien on the deposit.[104] Every intermediary except an insurance agent, shall not carry on the business unless the insurance intermediary maintains at all times while carrying on that business a professional indemnity policy of not less than the equivalent of one hundred million shillings.[105]

3.2.5 Licensing

Once a player has complied with the above requirements, and the Authority is satisfied, it is granted a licence to commence transacting insurance business and an insurance license issued remains in force until suspended, varied or revoked.[106]No person is allowed to carry on or purport to carry on insurance business, reinsurance business or the business of HMO in Uganda without a valid license issued by the Authority.[107]In addition, brokers, agents and risk managers are to be licensed. Thus a person shall not carry on or purport to carry on the business as an insurance intermediary unless the person holds a valid insurance intermediary license issued by the Authority.[108]

Not only does the Authority ensure that the unsuitable players are not licensed, but also that those licensed continue to conform to the licensing requirements, carry on business in a lawful manner, remain solvent and in a position to meet all the financial liabilities incurred.

[104] Ibid, section 89
[105] Ibid, Section89(6)
[106] Section 44
[107]Section 34 Insurance Act 2017
[108] Section 82 Insurance Act 2017

3.2.6 Requirement to appoint an actuary

Regarding long term insurances, the regulatory enjoins the insurer and HMO to appoint an actuary to the business of insurance company within one month or other longer period not exceeding six months of beginning to carry on long term business.[109] A licensed insurer or **HMO** is obliged to ensure that its appointed actuary undertakes an actuarial review, in respect of each financial year and also ensure that the appointed actuary has access to all documents and records and that he carries out an actuarial investigation and prepare a report to submit to the Authority.[110] The requirement of appointment of an actuary by every insurer or **HMO** engaging in long term insurance effectively builds public confidence in life insurance.

3.2.7 Accounting requirements

In order for the Regulatory Authority to satisfy itself regarding the existence and adequacy of the financial requirements demanded under the law, the Authority relies on annual reports containing all particulars relating to all financial transactions undertaken by it during that year which should be submitted by Insurers within three months from the end of each financial year.[111] The law requires every licensee shall keep at its principal office in Uganda records sufficient to show and explain its transactions, to enable its financial position to be determined with reasonable accuracy at any time and to enable the insured to prepare financial statements and make returns as it may be required to prepare and make under the law.[112]

3.2.8 Market conduct

As an adjunct to regulation of the financial security of the insurance players, the Insurance Act has provisions governing the conduct of certain aspects of insurance business, thereby ensuring that in addition to financial integrity, insurers conduct their business affairs in an ethical manner.

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[109] section 113, Insurance Act 2017
[110] section 114, Insurance Act 2017
[111] Section 110, Insurance Act, 2017
[112] section 106, Insurance Act 2017

(i) **Prohibition of misleading advertisement**

It is an offence for any person knowingly to advertise, state, promise or make false forecasts, dishonestly conceals facts or make reckless advertisements to conclude or offer to enter into a contract, transaction, or arrangement with an insurer or any other person relating to insurance business and is liable to a fine not exceeding five hundred currency points.[113]

(ii) **Premiums and other moneys to be paid to insurers and HMOs directly.**

An insurance broker or insurance agent is not allowed to accept a cheque or other payable order from a policy holder or prospective policyholder in respect of premiums or other monies paid for or on account of an insurer or **HMO** in connection with an insurance contract or proposed insurance contract unless the cheque or payable order is made payable to the insurer or **HMO**[114]

Loss adjusters and loss assessors are not allowed to accept the receipt of and handle any monies representing premiums or any other money payable to an insurer or to a policy holder under an insurance contract or prospective insurance contract.[115]

(iii) **Restrictions on insurance intermediaries**

The law disqualifies public officers or employees of local government, administrators, managers, auditors or employees of insurers or reinsurers or insurance brokers, or reinsurance brokers, risk advisors or loss assessors and persons who are not fit. An insurance agent is not allowed to act for two or more insurers transacting the same class of insurance business without the written approval of the Authority.[116]

3.2.9 Offences

To ensure that the activities of insurers and other players in the insurance business comply with the law, the Act defines offences that result from noncompliance with the Act which carry penal consequences and include the following:

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113 Section 142, Insurance Act, 2017

114 Section 90, Insurance Act, 2017

115 Section 94, Insurance Act 2017

116 Section 87, Insurance Act 2017

(a) Acting as an intermediary without a license is prohibited?[117]

(b) A licensee failing to keep financial records sufficient to show and explain its transactions and enable its financial position to be determined.[118]

(c) Carrying on, or purporting to carry on insurance business, reinsurance business or business as a HMO without a license.

3.2.10 Risk management

The insurance regulatory law also requires that every insurer or HMO establishes and maintains a clearly defined strategy and policies for the effective management of all significant risks to which the insurer or HMO is or may be exposed, and procedures and controls that are sufficient to ensure that the risk management strategy and polices are effectively implemented.[119]

[117]Ibid section 82(6)
[118] Section 106(4) Insurance Act 2017
[119]Section 62, Insurance Act 2017

CHAPTER 4

THE PRINCIPLE OF INDEMNITY, RATIONALE OF INDEMNITY AND OTHER FUNDAMENTAL PRINCIPLES OF INSURANCE

4.1 The Principle of Indemnity

The word "indemnity" has several interlinked meanings in the insurance context. It may describe a type of policy, a measure of loss, or the so-called principle of indemnity.[120] This research seeks to more accurately assess the scope of the third meaning. Courts may use the term indemnity without clearly distinguishing which meaning is intended, leading to some confusion. For clarity, the researcher will briefly explain the first two meanings before discussion of the principle itself.

First, indemnity provides a distinction between contracts of indemnity, which provide cover for loss suffered, and contracts based on contingencies. "Loss suffered" in itself indicates the premise upon which the indemnity principle is based: loss is an essential element of indemnity insurance.[121]

In comparison, Buckley L.J[122] held that contingency contracts provide for a specified amount of money to be paid when an insured event occurs irrespective of loss suffered, for example, life insurance.

The difference lies principally in the fact that one cannot put a price on certain things, like loss of life, so the insurance received cannot be based on pecuniary loss. The indemnity principle, unsurprisingly, operates only in the context of indemnity policies.

Secondly, in the case of an insured event occurring under an indemnity contract, policies may offer different options for measuring the insurer's liability to cover the insured's loss. Indemnity value is one method. It involves measuring the loss caused by assessing the difference between the insured's position immediately before and after the event. This can be contrasted with replacement cover, where the amount required to indemnify the insured is calculated based on the cost of replacing or

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120 Kasia Ginders, Insurance Law and the Principle of Indemnity in light of Ridgecrest NZ Ltd v Iag New Zealand ltd

121 Robert Merkin and Chris Nicoll (eds) Colinvaux's Law of Insurance in New Zealand (Thomson Reuters, Wellington, 2014) at 1.1.2(9).

122 Gould v Curtis [1913] 3 KB 84 (CA) at 95

reinstating the thing insured, without making deductions for depreciation in value or the increased cost of meeting new building standards in respect of property insurance.[123]

Robert Keeton wrote that insurance is a system for wide distribution of accidental losses. One aspect of this system is the transfer of loss from an insured to an insurer by means of an obligation upon the insurer to confer an offsetting benefits (insurance proceeds). To speak of 'transferring loss' or providing an 'offsetting benefit' is to imply that the values of the benefit shall not exceed the loss. Thus insurance is aimed at reimbursement, but not more. The author referred to the principle that insurance contracts shall be interpreted and enforced consistently with this objective of conferring a benefit no greater in value than the loss suffered as the principle of indemnity. This principle does not imply, in converse, that the benefit must be no less than the loss thus partial reimbursement of a loss is not offensive to the principle of indemnity.[124]

Although the indemnity principle is well accepted, its customary meaning has not kept up with insurance practice. Exploring the evolution of the indemnity principle in the context of property insurance, Jeffrey E. Thomas and Brad M. Wilson state that 'when property insurance was standardised in the 19th Century, indemnity had a strict, financial meaning. An insured was only entitled to receive actual cash value for a loss, less depreciation. This ensured that insured received a financial recovery equal to the value of their property prior to the loss. This approach to indemnify was developed in the context of concerns about the morality of insurance, its association with gambling and the risk of moral hazard.[125]

The rights and liabilities of the parties are governed by this basic concept of indemnity and the amount recoverable by the assured, which is measured by the extent of his pecuniary loss, is also governed by it[126]. This should not come as a surprise, for the very purpose of affecting a policy of insurance, marine or non-marine, is indemnity for loss.

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123 Kasia Ginders, Insurance Law and the Principle of Indemnity in light of Ridgecrest NZ Ltd v Iag New Zealand ltd at 75

124 Robert E. Keeton, "Basic Text on Insurance Law, 1971 at 88

125 Jeffrey E. Thomas & Brad M. Wilson, The Indemnity Principle: From a Financial to a Functional Paradigm at 30

126 Susan Hodges, "Law of Marine Insurance, 1996 at 1

In the Words of Lord Ellenborough, '*the incidents and legal consequences of the contract of insurance all stem from this 'great principle. The great principle of the law of insurance is that it is a contract for indemnity. The underwriter does not stipulate, under any circumstances, to become the purchaser of the subject-matter insured; it is not supposed to be in his contemplation: he is to indemnify only.*'[127]

Hodges, an insurance scholar appears to have found no reason not to agree with Lord Ellenborough when he wrote that "many of the main legal principles, for example, the rules relating to insurable interest; gaming and wagering policies; excessive over-valuation; double insurance, contribution, and return of premium; abandonment and right of subrogation; and the merger of losses, all spring from this concept".[128]

The principle of indemnity in insurance law holds that an insured is entitled to receive a full indemnity for his or her loss, no more and no less.[129] However, *Ridgecrest NZ Ltd v IAG New Zealand Ltd (Ridgecrest)*[130], a 2014 case in the New Zealand Supreme Court, has brought the nature of the principle into question. When an insured building owned by Ridgecrest NZ Ltd (Ridgecrest) sustained damage in successive Canterbury earthquakes, the Supreme Court held that Ridgecrest could claim up to the full amount of the sum insured per happening, despite being underinsured and not having repaired the damage from the earlier quakes when the insured building became a total loss.[131] Ridgecrest could therefore obtain more than the amount they had insured for, a result that appears to be somewhat at odds with the indemnity principle.

The learned authors[132] of MacGillvray on Insurance Law[133]stated that not all contracts of insurance are contracts of indemnity. Where the contract provides that on the occurrence of an event insured against, the insurer will pay a fixed sum or a sum calculated by the application of a set formula or scale, regardless of whether

[127]Brotherston v Barber (1816), 5 M & S 418 at p 425

[128] Susan Hodges, "Law of Marine Insurance, 1996 at 1

[129]Kasia Ginders in his article "Insurance Law and the Principle of Indemnity in Light of Ridgecrest Nz Ltd V Iag New Zealand Ltd" Submitted as part of the LLB(Hons) programme at Victoria University of Wellington

[130]Ridgecrest NZ Ltd v IAG New Zealand Ltd [2014] NZSC 117, [2015] 1 NZLR 40 [Ridgecrest].

[131]Ibid

[132]Prof. John Birds, Ben Lynch and Simon Milnes

[133]Centenary edition; Sweet & Maxwell at 10

the assured has suffered a loss and irrespective of the amount of any loss in fact suffered, then it is not an indemnity insurance but what is commonly described as a contingency insurance. Life and accident insurances are usually drafted in this form. Although Ellenborough L.J in the case of Godsall-v-Boldero[134] held life insurance to be a contract of indemnity, Dalby-v-India and London Life Assurance Co., in overruling Goldsall-v- Boldero left no room for doubt that contracts of life insurance as normally written are not contracts of indemnity. This follows from the fact that the loss of one's life is not capable of translation into pecuniary loss.[135] The contract on the part of the insurer is to pay a predetermined sum on the happening of death regardless of whether the payee be a personal representative of the deceased or some other person whose pecuniary loss is completely immaterial and relevant. The essential qualities of a contract of life insurance dictate that it be a contract other than one of indemnity. In fact it would seem to be impossible so to draft such a contract that it be one of indemnity. The same may be said of a contract providing for payment of a fixed weekly or monthly payment during incapacity arising from a personal accident. But all other forms of insurance contracts are capable of being so drafted that they may be contracts of indemnity or otherwise according to the intention of the parties entering into the contract.[136]

4.2 Rationales of the Principle of Indemnity

The rationales of the indemnity principle are the key starting point. Understanding the rationales and their current relevance is necessary to assess the weight of the policies on which a principle that is more akin to a legal test or presumption might be based.

Three reasons are commonly given as justification for the principle of indemnity:

(a) Avoiding windfall

Inherent in the notion that an insurance contract should provide no more and no less than a full indemnity is the goal of preventing windfalls to either party.[137] Brett

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134(Eng; 1807)
135Crawford Baer, Cases on the Canadian Law of Insurance, 1971 at page 5
136 Ibid
137 Ibid at 77

LJ emphasised this aspect when he declared that: "*the very foundation ... of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it ... that proposition must certainly be wrong.*"[138]

To Malcolm Clarke[139] the object of indemnity is simply to put the insured in the position they would have been in had the loss not occurred.

The reason for this limitation was elaborated on by Lord Shaw when he warned against extending the indemnity principle in that it would lead to a situation "not in the region of indemnity against loss, but in the region of profit-earning".[140]

It is also not unreasonable for one can argue that the indemnity principle is not necessary to prevent unfair profit from an insurance contract. In most insurance contracts, an interpretation which allowed an insured to profit from a loss would be obviously outside the contemplation of the contracting parties, and thus a court would not permit such an outcome regardless of the principle. While other contracts may take account of the possibility of profit, and have appropriate premiums that reflect this. For example, replacement policies, where premiums are calculated based on the possibility of more than an indemnity being received.[141]

Interpretation using ordinary contract principles that look to the intent of the parties can equally achieve the purpose of avoiding unfair profit. Under this approach, the principle becomes a kind of self-fulfilling prophecy; it applies mostly because the parties expect it to apply, and structure their contract accordingly.[142]

138Castellain v Preston (1883) 11 QBD 380 (CA) at 386

139Malcome Clarke, Policies and Perceptions of Insurance Law in the Twenty-First Century (Oxford University Press, Oxford, 200) at 220

140 British & Foreign Insurance Co Ltd v Wilson Shipping Co Ltd [1921] 1 AC 188 (HL), at 207.

141 John Lowry and Philip Rawlings Insurance Law: Doctrines and Principles (3rd ed, Hart Publishing, Oxford, 2011) at 265.

142 Kasia Ginders, Supra at 78

(b) Prevention of fraud

Fraud prevention is a more persuasive reason for not allowing an insured to profit. JP Van Niekerk opines that if the insured stands to profit following a loss, the incentive to cause loss increases, and the motivation to take precautions to avoid loss or damage is diminished. The latter is more insidious as it is not in itself fraudulent. If claims increase (or insurers perceive that they have increased), eventually so will premiums, distorting the process of spreading risk through insurance, as honest people end up paying for those who are dishonest or deliberately careless.[143] In 1758, Lord Mansfield CJ had noted that "the rule was calculated to prevent fraud; lest the temptation of gain should occasion unfair and wilful losses".[144]

(c) Wagering contracts

While an insurance contract usually only protects a pre-existing interest, a potential for profit would create a new interest in the outcome, encouraging entrance into the contract because of the chance for profit – a kind of wager. Both courts and commentators have raised concerns about this. In British Traders Insurance Co Ltd v Monson, the High Court of Australia declared that underlying the indemnity principle is "the law's policy not to allow gambling in the form of insurance"[145]and Bowen LJ warned against insurance contracts becoming mere "speculation for gain" in Castellain v Preston.[146]

Robert Keeton seems to hold the same view when he wrote that an adverse judgement of wagering has been a major influence in development of the principle of indemnity and associated doctrines. A number of harmful social consequences such as idleness, vice and socially parasitic way of life, with a resulting increase of impoverishment, misery, crime have been thought to be caused by wagering. The principle of indemnity is aimed chiefly at guarding against inducement to wagering and to destruction of lives or property.[147]

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143 JP Van Niekerk "Fraudulent Insurance Claims" (2000) 12 SA Merc LJ 69 at 71

144 Godin v London Assurance Co (1758) 1 Burr 489, 97 ER 419 (KB) at 421

145 British Traders Insurance Co Ltd v Monson (1964) 111 CLR 86 (HCA) at 94.

146Castellain v Preston supra at 399 and 401

147 Robert E. Keeton, "Basic Text on Insurance Law, 1971 at 92

4.3 Indemnity in Relation to other Fundamental Principles of Insurance

While it is tempting and permitted not to discuss the whole of insurance law in this research paper given the scope and limitations of the research, the omission of some parts of the law of insurance such as subrogation, insurable interest, double insurance, contribution and return of premium are so striking that it would be the height of irresponsibility not to point them out and discuss since all these legal principles emanate from indemnity. Crawford[148], in part two of his book, generally refers to insurable interest, valuation, subrogation, contribution as basic principles of indemnity insurance.

It was made clear in *Castellain v Preston (1883)11 QB.D 380,* and is noted by John Lowry and Phillip Rawlings, that "the overriding requirement of indemnity can be seen to underlie the rules which operate in the event of an insured loss."[149]These rules are evidence of how the indemnity principle applies in a more practical sense....for example the doctrine of subrogation.

4.3. 1 Subrogation

There is no doubt that the right of subrogation is a 'necessary incident of a contract of indemnity'.[150] In the words of Lord Justice Brett[151] subrogation is '... a corollary of the great principle law of indemnity', and it is from this principle that an assured is not permitted to recover more than his actual loss. In Uganda, the law relating to subrogation is contained in section 79[152] which provides for the right of subrogation. It provides that where the insurer pays for a total loss, either of the whole, or in the case of goods of any apportionable part, of the subject-matter insured, the insurer thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and the insurer is by that surrogated to all the rights and remedies of the assured in and in respect of that subject-matter as from the time of the casualty causing the loss. The Learned Justice of the Supreme

148Crawford Baer, Cases on the Canadian Law of Insurance, 1971

149 John Lowry and Philip Rawlings Insurance Law: Doctrines and Principles (3rd edition, Hart Publishing, Oxford, 2011) at 264.

150 Chalmers' Marine Insurance Act (1906, 10th edn), p 131

151Castellain v Preston(1883)11 QB.D 380

152 Marine Insurance Act, 2002

Court of Uganda, Oder JSC observed that *the whole basis of the subrogation doctrine is founded on a binding and operative contract of indemnity. It derives its life from the original contract of indemnity. In my view the essence of the matter is that subrogation springs not from payment only but from actual payment conjointly with the fact that it is made pursuant to the basic and original contract of indemnity.*[153]

Where the insurer pays for a partial loss, the insurer acquires no title to the subject-matter insured, or such part of it as may remain, but the insurer is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this Act, by that payment for the loss.[154]

According to Lord Blackburn[155] "subrogation' the doctrine of subrogation is a rule of law and of equity: 'The general rule of law (and it is obvious justice) is that where there is a contract of indemnity ... and a loss happens, anything which reduces or diminishes that loss, reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back".

While in the earlier case of Simpson v Thomson,[156] Lord Cairns described the principle in the following terms: 'I know of no foundation for the right of underwriters, except the well-known principle of law, that where one person has agreed to indemnify another he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss.'

On settlement of a loss, the indemnifier, the insurer, is, by the rule of subrogation, entitled to step into the shoes of the assured.[157] Having paid the assured for the loss, he is 'subrogated to all the rights and remedies of the assured in and in respect

153Suffish International Food Processors (U) Ltd & Another-v-Egypt Air Uganda SCCA No. 15 of 2001
154 Marine Insurance Act, 2002, 79(2)(1)
155Burnand v Rodocanachi (1882) 7 App Cas 333 at p 339
156 (1877) 3 App Cas 279 at p 284, HL
157 Susan Hodges, "Law of Marine Insurance, 1996 at 7

of that subject-matter as from the time of the casualty causing the losses. The objective of this process is to prevent the assured from taking with both hands: once indemnified, he would not be allowed to be compensated twice over for the same loss.

When a loss occurs, it is open to the legal system to adopt one of three alternatives: (i) to allow the insured party to keep both the insurance proceeds and to allow full recovery against the tortfeasor (or other party against whom the insured could enforce contractual rights); (ii) to allow the insured party to recover his/her own loss while the insurer is denied the right to proceed against the tortfeasor or contract breaker; or (iii) to allow the insured to recover from his/her own insurer but also to allow the insurer to use the insured's name to recover such pay-out from the tortfeasor or contract breaker. It is the third option that the legal system has chosen to deal with most insured losses and which is called subrogation. This doctrine operates throughout the field of property and liability insurance – to all so called contracts of indemnity. However, this principle does not hold sway throughout the law of insurance. In the field of personal injury because life insurance and accident insurance are (strangely) not thought to be contracts of indemnity, the insured person is allowed to accumulate recoveries.[158]

4.3.2 Insurable Interest

An assured has to have an insurable interest in the subject-matter insured before he would be allowed to claim under a policy. Aside from having provisions regarding insurable interest, the Marine Insurance Act and the Insurance Act, 2017 does not define and explain its relevance to the scheme of things. Section 5[159] defines insurable interest in general terms, and then proceeds to amplify its nature in more specific terms. It states: "Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure". Subsection 5(2) then goes on to elaborate that: "In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk in it, in consequence of which he or she may benefit by the safety or due arrival of the insurable property, or may be prejudiced by its loss, or

[158] Hasson, R, 'Subrogation in insurance law – a critical evaluation' (1985) 5 OJLS 416
[159] Marine Insurance Act, 2002

by damage to it, or by the detention of it, or may incur liability in respect of it". Thus, for a proper understanding of the subject, it is necessary to refer to the basis or foundation of the notion; and only by referring to case law definition does the meaning and rationale of insurable interest become clearer. In order to understand the meaning and rationale of insurable interest, it is inescapable to write an extract of the judgment of **Lucena v Craufurd (1806) 2 Bos& PNR 269, HL**

Lord Eldon: *The questions now are, first, whether upon the matters disclosed on the first count the commissioners had an insurable interest in any of the ships and cargoes upon which they have recovered? Secondly, if they had an insurable interest in any, whether there are not some on which they had no such right? Whether your Lordships shall come to the conclusion that they have no right to recover upon any of these ships and cargoes, or to a more limited conclusion, and take such steps as may be in your power to collect the true result of the proceedings which have been had, it seems to me due to the importance of the subject to enter into some of the topics which have been discussed at the bar; and to determine the real character of the plaintiffs which led to the existence of their commission ... ... Since the 19 Geo 2 (Marine Insurances Act 1745–1746), it is clear that the insured must have an interest, whatever we understand by that term. In order to distinguish that intermediate thing between a strict right, or a right derived under a contract, and a mere expectation or hope, which has been termed an insurable interest, it has been said in many cases to be that which amounts to a moral certainty. I have in vain endeavoured, however, to find a fit definition of that which is between a certainty and an expectation; nor am I able to point out what is an interest unless it be a right in the property, or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party ... If moral certainty be a ground of insurable interest, there are hundreds, perhaps thousands, who would be entitled to insure. First, the dock company, then the dock master, then the warehouse keeper, then the porter, then every other person who to a moral certainty would have anything to do with the property, and of course get something by it. Suppose A to be possessed of a ship limited to B in case A dies without issue; that A has 20 children, the eldest of whom is 20 years of age; and B, 90 years of age; it is a moral certainty that B will never* *come into possession, yet this is a clear interest. On the other hand, suppose the case of the heir at law of a man who has an estate worth £20,000 a year, who is 90 years of age; upon his deathbed intestate, and incapable from incurable lunacy of making a will, there is no man who will deny that such an heir at law has a moral certainty of succeeding to the estate; yet the law will not allow that he has any interest, or anything more than a mere expectation.*

The requirement of insurable interest emanates from the cardinal principle of insurance law that a contract of insurance is a contract of indemnity: Section 3 defines a contract of marine insurance as a contract by which the insurer undertakes to indemnify the assured, in a manner and to an extent agreed under the contract, against the losses incidental to marine adventure.[160]

Insurance is intended to provide the insured with an indemnity against loss although life assurance does not fit easily with the description[161]

Thus, before an assured can seek for indemnity under any policy, it has first to be shown that he has in fact suffered a loss. To prove this, he has to show that he is 'interested in a marine adventure.[162] Without going into a detailed study at this stage as to what constitutes 'insurable interest', it is sufficient to say, in simple terms, it signifies the relationship, if any, which the assured has with the subject matter insured against. If the assured has no interest whatsoever in the marine adventure, the contract which he has entered into will be deemed to be by way of gaming or wagering. Where the assured has not an insurable interest as defined by this Act, and the contract is entered into with no expectation of acquiring such an interest, it would appear from the above that the assured, in not having an insurable interest in the subject-matter insured at the time of loss, would be caught not only by the fundamental principle of marine insurance, that of indemnity, but also that every contract of marine insurance by way of gaming or wagering is void. Thus, his claim is not indemnifiable on both of these grounds.[163]

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160 Marine Insurance Act, 2002

161 Ray Hodgin, Insurance Law, Text and Material, 2nd Edition at 55

162 Susan Hodges, "Law of Marine Insurance, 1996 at 15

163 ibid

4.3.3 Double Insurance/Contribution

Over-insurance by double insurance occurs when 'two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums insured exceed the indemnity allowed by allowed by law. While explaining double insurance, Hodges stated that the same assured is insuring the same subject-matter, for the same adventure, for the same interest, and for the same perils.[164]Thus there is no double insurance where one or more of these subjects are different, or where one of the policies is, for whatever reason, unenforceable.[165]

The possibility of double insurance was recognised as early as the 18th century and rules were created to deal with its possible encroachment on the principle of indemnity.

In the early case of **Newby v Reed**,[166] the insured took out a policy with company A to cover a voyage of his ship from Newfoundland to Barbados. He later insured the same ship on the same voyage but from Newfoundland to Dominica, with company B. He made his claim against the second company only and the court (Lord Mansfield) allowed that company's claim for some reimbursement from the first company.[167]

The common law definition provided by Lord Justice Mellish,[168]*albeit a fire policy, clearly explains the basis of the rule. He said: "The rule is perfectly established in the case of a marine policy that contribution only applies where it is an insurance by the same person having the same rights, and does not apply where different persons insure in respect of different rights".*

Under the Marine Act, 2002, where two or more contracts of marine insurance are effected by or on behalf of the assured on the same adventure and interest or any part of it, and the sums insured exceed the indemnity allowed by this Act, the assured is said to be over-insured by double insurance.[169]

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164 Ibid at 5
165 Ibid
166(1763) 1 WmBl 416
167 Ray Hodgin, Insurance Law, Text and Material, 2nd Edition at 450
168North British and Mercantile Insurance Co v London, Liverpool and Globe Insurance Co. (1877) 5 Ch D 569 at p 583
169 Section 32(1)

As two or more policies with different insurers are in operation, the assured is permitted to claim payment from the insurers in such order as he or she thinks fit, but he or she is not entitled to receive any sum in excess of the indemnity allowed by this Act.[170]

The foundation principle of insurance is that of indemnity and, therefore, an insured must not be allowed to receive more than the financial loss which he has suffered. Subrogation seeks to put that principle into operation.[171]

Should he receive more than full indemnity under either policy, valued or unvalued, he must give credit for the sum in excess of the indemnity and is deemed to hold such sum in trust for the insurers, according to their right of contribution among themselves.[172]

In Uganda,where the policy under which the assured claim, is a valued policy, the assured must give credit as against the valuation for any sum received by him or her under any other policy without regard to the actual value of the subject-matter insured.[173]

Where the policy under which the assured claims is an unvalued policy he or she must give credit, as against the full insurable value, for any sum received by him or her under any other policy.[174]

Where the assured receives any sum in excess of the indemnity allowed by this Act, he or she holds that sum in trust for the insurer, according to their right of contribution among themselves.[175]

4.3.4 Contribution and apportionment

Assuming that the legal rules leading to double insurance are met, then the practical rules of contribution need to be explained.[176]In the event of over-insurance by double insurance, fairness has also to be observed amongst the insurers. Each insurer should not have to contribute more than his proportion of the loss. Section

170 Section 32(2)(a)
171 Ray Hodgin, Insurance Law, Text and Material, 2nd Edition at 499
172 Susan Hodges, "Law of Marine Insurance, 1996 at 5
173 Marine insurance Act, 2002, section 32(2) (b)
174 Ibid, section 32(2)(c)
175 Ibid section 32(2) (d)
176 Ray Hodgin, Insurance Law, Text and Material, 2nd Edition at 655

80 spells out the rules as to how the matter is to be resolved amongst the insurers inter se. The fundamental rule is that he should not incur more than 'the amount which he is liable under his contract.[177]

The position of the law in Uganda is that where the assured is over-insured by double insurance, each insurer is bound, as between that insurer and the other insurers, to contribute rateably to the loss in proportion to the amount for which he or she is liable under his or her contract.[178]

The insurer who pays more than his or her proportion of the loss is entitled to maintain an action for contribution against the other insurer, and is entitled to the same remedies as a surety who has paid more than his or her proportion of the debt[179]

4.3.5 Return of premium

Lord Hardwicke LC held that Premiums, like any moneys paid in return for a promise of a service or benefit, are recoverable when paid for a consideration which has failed.[180] The principle was expounded in typically clear language by the progenitor of modern insurance law, Lord Mansfield in the early marine insurance case of **Tyrie-v- Fletcher**[181] when he observed *"I take it, there are two general rules established, applicable to this question: the first is, that where the risk has not been run, whether its not having been due to the fault pleasure or will of the insured, or to any other cause, the premium shall be returned: because a policy of insurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the insured, and whatever cause it be owing to, if he does not run the risk, the consideration for which the premium or money is put into his hands, fails and therefore he ought to return it. Another rule is, that if the risk of that contract of indemnity has once commenced, there shall be no apportionment or return of premium afterwards. For though the premium is estimated, and the risk depends upon the nature and length of the voyage, yet, if it has commenced, though it be*

177 Susan Hodges, "Law of Marine Insurance, 1996 at 6

178 Marine Insurance Act, 2002, section 80(1)

179 Ibid

180 Henkle-v- Royal Exchange Assurance Co. (1749) 1 Ven. Sen. 317 at 319

181 (1777)2 Cowp.666 at 668

only for twenty four hours or less, the risk is run, the contract is for the whole entire risk, and no part of the consideration shall be returned."

An insurer is not liable for more than his share of the risk. The corollary of this is that an assured who has over-insured by double insurance would be able to recover a proportionate part of the several premiums which he has paid to the various insurers.[182]

Regarding Marine Insurance, enforcement of return of premium is regulated by Marine Insurance Act, 2002.[183] Where the premium or a proportionate part of it is, declared by this Act to be returnable, if already paid, it may be recovered by the assured from the insurer; and if unpaid, it may be retained by the assured or his or her agent. The Act enumerates different instances when premium may be returned and these include:

4.3.6 Return by agreement

Where the policy contains a stipulation for the return of the premium, or a proportionate part of it, on the happening of a certain event, and that event happens, the premium, or, as the case may be, the proportionate part of it, is thereupon returnable to the assured.

4.3.7 Return for failure of consideration

Where the consideration for the payment of the premium totally fails, and there has been no fraud or illegality on the part of the assured or his or her agents, the premium is thereupon returnable to the assured.[184] Where the consideration for the payment of the premium is apportionable and there is a total failure of any apportionable part of the consideration, a proportionate part of the premium is, equally returnable to the assured.

The right to demand a return of premium in such a case is, however, subject to the proviso in Section 84(3) of the Marine insurance Act. Thus where the policy is void, or is avoided by the insurer as from the commencement of the risk, the premium is returnable, if there has been no fraud or illegality on the part of the assured; but if

182 Susan Hodges, "Law of Marine Insurance, 1996 at 6

183 Section 82

184 Section 84(1)

the risk is not apportionable, and has once attached, the premium is not returnable. Where the subject-matter insured, or part of it, has never been imperilled, the premium or, as the case may be, a proportionate part of it is returnable except that where the subject-matter has been insured lost or not lost and has arrived in safety at the time when the contract is concluded, the premium is not returnable, unless, at that time, the insurer knew of the safe arrival.

Where the assured has no insurable interest throughout the currency of the risk, the premium is returnable, though not in the case of a policy effected by way of gaming or wagering.

Regarding instances where the assured has over-insured under an unvalued policy, a proportionate part of the premium is returnable.

Where the assured has over insured by double insurance, a proportionate part of the several premiums is returnable.

Premium is not returnable if the assured has a defeasible interest which is terminated during the currency of the risk, the premium is not returnable.

If the policies are effected at different times, and any earlier policy has at any time borne the entire risk, or if a claim has been paid on the policy in respect of the full sum insured by the policy, no premium is returnable in respect of that policy; and when the double insurance is effected knowingly by the assured, no premium is returnable.

CHAPTER 5

RECOMMENDATIONS AND CONCLUSION

5.1 Recommendations

Having had a keen interest in the role of indemnity in insurance in Uganda and having carried out research on the principle of indemnity and insurance law as a whole, not only in Uganda but also in other jurisdiction, the researcher has come out with and found it imperative to give the following recommendations which he strongly hopes will lead to the development of the insurance business in Uganda.

There is need for government of Uganda to be actively involved in development and regulation of insurance industry in Uganda. As a stakeholder, the government should sensitize the entire citizenry on the role that insurance plays in a modern economy. This is because the public has a poor attitude towards insurance and have no confidence in the insurance business.

The laws regulating insurance business should be strictly implemented. For instance the financial requirements should be strictly enforced and all stakeholders such as intermediaries in the insurance business should be strictly regulated.

There should be a database established by the Insurance Regulatory Authority which must contain updates about the insurance business, it's underwriters as well as such relevant information regulating to insurance business in Uganda. This will reduce on the people who carry out the business of insurance without complying with the requirements set by law.

The insurance regulatory authority ought to make public awareness of the ombudsman established under ***Section 135 of the Insurance Act*** 2017 who arbitrates complaints and dispute concerning licenses and the several public.

The insurance regulatory authority should teach the public about the importance of insurance as indemnity and make the people aware of the policy holders' compensation fund established under ***section 138 of the Insurance Act***, 2017 which will instil trust in the insurance business.

The relevant stakeholders in the insurance industry should be trained so as to acquire insurance knowledge. This can be achieved by utilizing the Insurance

Training College established under section 140 of the Insurance Act, 2017 to train the people with insurance knowledge. This is because there is a challenge of lack of well-trained personnel which has hindered the growth of the insurance industry in Uganda.[185]

All the insurance companies and other relevant stakeholders in the insurance industry should be prevailed upon to implement the legal requirements and those who fail to comply with the provisions of the law be brought to book and severe penalties meted against them.

5.2 Conclusion

Although the insurance industry has developed as a vital tool facilitating commerce, trade and economic development to the extent that no economy can survive or prosper without an effective, disciplined and viable insurance industry, in Uganda, the insurance industry is undeveloped. The regulatory framework in Uganda is still young.

However, with the logical pattern that Uganda's Insurance regulatory laws have followed and with the amendment of the Insurance Act in 2017, it is hoped that the insurance industry in Uganda will develop.

The Insurance Act of 2017 had as its aim, the regulation of insurance companies by compelling compliance with the several conditions and requirements set by the law before trading, during training and following up a company being wound up. The supervision of insurance industry has developed to its present level over a period of years through the insurance regulatory authority.

There is a shortage of professionally qualified manpower for more effective, innovative and modernized management of the insurance industry.

From the research , it can be stated with confidence that the role of insurance as a mechanism of financially mitigating risk and providing for loss recovery aims at putting back in the exact financial position the insured was in before which underlies the principle of insurance, which is the focus this paper. The available literature have showed, and the researcher agrees that no modern economy can survive without an

185 The Insurance Institute of Uganda: Overview of the Insurance Industry 2012.

effective and developed insurance industry thus the need for Uganda to put more emphasis on the development of its insurance industry.

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