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 **NORTON ROSE FULBRIGHT**

## **Insurable Interest Marine Forum**

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# Dangers of gambling

## *Amory v Gilman*, 1806

Per Serjeant Marshall:

"Many are the contrivances which men have fallen upon for the gratification of their propensity to gaming; and the uncertain events of maritime adventure afford an obvious and extensive field for the calculation of chances and the decision of fortune. The practice of gaming, by nourishing a constant hope of gain, excites in the mind an interest which engrosses the attention and withdraws the exertions of men from useful pursuits. By pointing out a speedy though hazardous mode of accumulating wealth, it produces a contempt for the moderate but certain profits of sober industry. It perverts the activities of the mind, taints the heart, and depraves the affections. By frequent and great reverses of fortune, it becomes not only the source of great private misery, but suggests constant temptations to fraud, and the perpetration of atrocious crimes."

# Insurable Interest – just a technical defence?

## Dunt:

- ❖ “The courts do not look favourably on technical insurable interest defences where the assured has suffered a loss and will be quick to find that an insurable interest existed even if the evidence is weak.”
- ❖ “A broad view is now taken as to what constitutes an insurable interest.”

## *Inglis v Stock* 1884:

“...it is the duty of the Court always to lean in the favour of insurable interest”.

# Insurable Interest – just a technical defence? (Cont.)

## *Unitran v Santam Limited*, 2004

“Indeed, it would be surprising if an insurer who has given an earnest undertaking to indemnify a person in what is clearly a policy of insurance and not a gambling contract (having regard to the fact that the requirement of insurable interest is designed to ensure that insurance policies are not used as a basis of gambling) were to repudiate its obligations on those grounds”.

# Origins of Marine Insurance and Insurable Interest

- **Eldridge:**

- “The invention of marine insurance was due to the desirability of making good to the merchant and shipowner any loss arising from the destruction of property by tempest or other sea peril”

- **Grotius:**

- “The cardinal principle of insurance is the principle of indemnity”.

- **Eldridge:**

- “... in early times insurances were always effected on the understanding that the person assuring was possessed of the property which was about to be subjected to the dangers of a sea voyage”

- **Emerigon:**

- “An insurance without an object at risk can never be a true insurance”

# Setting the scene

## Which law applies?

- English law and practice - Institute Cargo Clauses (clause 11.1 and 19) and Hull Time and Voyage Clauses (preamble)
- South African Roman-Dutch law (common law and s 6 of the AJRA)
- Unscrambling the egg (both systems)
- The “MILP seduction” as a solution

# The issue – what is the status of insurable interest

- **English law and practice** - Institute Cargo Clauses – assured **must** have an insurable interest in the subject matter insured at the time of the loss
- **South African Roman-Dutch law** : Question asked : Is it true to say that for a contract of insurance to be valid the assured must have an insurable interest in the subject matter?
- In *Lorcom v Zurich*, the court stated:
  - whilst the traditional view is that it is the purpose of indemnity insurance indemnify the insured's actual loss – and
  - there can be no loss without an interest.....
  - ❖ it does not follow that Roman-Dutch law requires a separate requirement of insurable interest; and
  - ❖ One must interpret each insurance policy to determine what it means.

## Lorcom v Zurich (Cont.)

The court held, obiter it is suggested:

❖ The difference between an insurance contract and a wager must be sought in the **existence of an interest** – the reason why the happening of the event matters to the insured party.

❖ The assured's interest is that the event should not happen, so that, unlike the person who places a bet, the assured does not conclude the contract **with the wish that the event will occur** so that he can receive a payment from the insurer.

## Back to basics: Insurable interest v the object of risk (subject matter)

- The definition in *Castellain v Preston*:
  - An insured's insurable interest is the object of the insurance and only those who have an insurable interest can recover on the insurance contract
  - An insured can only recover to the extent to which his or her insurable interest has been impaired by the insured peril and no more

### Note:

- The object of the insurance is the **INTEREST** which the insured wishes to protect against potential peril – it is **NOT** the **GOODS** (ie the object of the **RISK**) that are being insured.



## Decisions

### **English** decision 1806 - *Lucena v Crauford*:

*“[An interest is] a right in the property, or a right derivable out of some contract about the property...”*

### **South African** decision 1905 – *Littlejohn v Norwich Union*:

*“If the [insured] can show that he stands to lose something of an appreciable commercial value by the destruction of the thing insured, then even though he has neither a jus in re or a jus ad rem to the thing insured his interest will be an insurable one.”*

### **South Africa** commentators – too narrow – Reineke et al:

*“...insurable interest...[is]...an interest in the non-occurrence of an event rather than an interest in a particular object of risk.”*

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## THE CARBOLIC SMOKE BALL,

### TESTIMONIALS.

The Duke of Devonshire writes: "I am much obliged for the Carbolic Smoke Ball which you have sent me, and which I find most efficacious."

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AND MANY OTHERS BY  
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- The Duke of Richmond, K.G.
- The Duke of Wellington, K.G.
- The Marquis of Ripon, K.G.
- The Earl of Derby, K.G.
- Earl Spencer, K.G.
- The Lord Chamberlain.
- The Lord Chief Justice.
- Lord Treasurer.

### TESTIMONIALS.

The Baron de Lytton writes: "The Carbolic Smoke Ball has benefited me greatly."

The Viscountess de Lytton writes: "The Carbolic Smoke Ball has benefited me greatly."

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# The twin concerns

Insurable interest as a requirement stemmed from two concerns:

- Moral hazard
- A prejudice against wagering
  
- Moral Hazard** – not an issue in marine insurance as the assured must always show that it suffered a loss:
  - Fortuitously and/or
  - From a peril insured against.
  
- As for **Wagering** – see below

# Gaming and Wagering (defined in 1906 Marine Insurance Act)

## Prohibition on wagering by statute

- 1745 Marine Insurance Act – prohibited policies that bore the indicia of wagering (see below)
  - Confined to British ships and goods laden on them.
- Backed by the 1845 Gaming Act

# 1906 Marine Insurance Act (Part 1)

- **Section 4** (Gaming and wagering) states that:
  - any contract of marine insurance by way of gaming or wagering is **void**.
- Deems an insurance contract to be one of **gaming or wagering** if:
  - The assured has no insurable interest (as defined in the Act) and the assured has no expectation of acquiring such an “interest”; or
- The policy is made:
  - “interest or no interest”;
  - “without further proof of interest that the policy itself”
  - “without benefit or salvage (abandonment) to the insurer”
- Honour policies and Ex-works clauses

## 1906 Marine Insurance Act (Part 2)

- Section 5 (insurable interest) states:
  - Every person has an **insurable interest** who is interested in a **marine adventure**
  
- Such interest is evidenced where:
  - The insured stands in any legal or equitable relation to the **adventure** or to any **insurable property** at risk therein where the insured may:
    - ❖ Benefit by the safety or due arrival of the insured property;
    - ❖ be prejudiced by its loss or damage or detention;
    - ❖ Incur liability in respect thereof.

## 1906 Marine Insurance Act (Part 3)

- Chambers (commenting on the MIA 1906):
  - The definition of insurable interest has been constantly expanding, and dicta in some older cases, which would tend to narrow it, must be accepted with caution.
  - The essence of “interest” is:
    - ❖ that there should be a **physical object** exposed to sea perils; and
    - ❖ that the insured should **stand in some relationship**, recognised by law, to that object, in consequence of which he either benefits by its preservation, or is prejudiced by its loss or mishap to it.

## 1906 Marine Insurance Act (Part 4)

- Section 6 (when must interest attach) states:
  - Insured must have an interest in the subject-matter **at the time of the loss**;
  - Insured, if he has no interest at the time of the loss, cannot acquire an interest by any act or election **after he is aware of the loss**.

# Bailee insurance

- ❖ An example of a non-owner being able to insure goods for its full value.
- ❖ Under English law (and probably South African law), a bailee may insure goods in its custody for the full value of the goods even though he has no, or limited, liability to the owner.
- ❖ However, the bailee must account to the owner of the goods who has suffered the loss, for any amount received by way of indemnification.

# Insurable interest and patrimonial damage

Reineke at al state:

- In the context of indemnity insurance, insurable interest is usually portrayed as going hand-in-hand with patrimonial damage.
- Whenever an assured can prove that he has suffered damage as a result of the event insured against, he must have had an insurable interest in the event.
- Conversely, the absence of any loss points to the absence of an insurable interest.

## Strict v Liberal approach

English law has maintained the strict view that an insurable interest must be in the nature of a legal right or legal liability.

This is not followed in SA:

*Littlejohn:*

Insured husband had an insurable interest in goods belonging to his wife

*Phillips:*

Insured husband had insurable interest in his wife's jewellery as he felt that he had a moral obligation to replace it.

## *Refrigerated Trucking*

Policy contained an extension clause covering the liability of authorised vehicle users. Insured owner held to have an insurable interest in the contingent liability of the authorised driver even though the insured himself incurred no liability.

## *Lynco Plant Hire*

Member of a cc has an insurable interest in the property of his corporation

# Scottish and English Law Commission

Seeks to define insurable interest by way of statute.

The statute should state that an insured has an insurable interest if the insured has:

- ❖ a right in the property which is the subject matter of the insurance or a right arising out of a contract in respect of it;
- ❖ possession or custody of the insured subject matter; or
- ❖ a reasonable prospect (or similar) either of an economic benefit from the preservation of the insured subject matter, or of an economic loss on its damage or destruction, which would arise in the ordinary course of things.