RECENT TRENDS IN INSURANCE LAW

It is proposed to examine in this paper some recent decisions on insurance law,which may be of interest to practitioners in Sri Lanka.

There is no standard definition of insurance and it has been suggested that a contract of insurance may be defined as a contract whereby one party assumes the risk of an uncertain event which is not within his control, happening at a future time, in which event the other party is bound to pay money or its equivalent if the uncertain event occurs.[1]

SHOULD INSURANCE BE ONLY FOR MONEY COMPENSATION?

Question has arisen whether it is necessary that an Insurer should undertake to pay money on the occurrence of a particular event. Although, it may not be accurate to say that provision for services itself is not sufficient to make a contract a contract of insurance[2] if it can be shown that if there is provision for something other than money provided it is of monies worth then such a contract may be a contract of insurance. [3]

INSURABLE INTEREST

In England family relationships have created much controversy regarding the insurable interest. When a child is a minor, he would have an insurable interest in the lives of his parents if they were legally obliged to support the child, and it has been said that as a matter of English Common Law there is no such obligation[4]. Even where a parent insurers the life of his child, it has been suggested in Halford vs Kymer[5] that a parent would not usually have the necessary interest except possibly to cover the funeral expenses of a child. The position however may be different under Roman Dutch Law where it may be argued that there are reciprocal duties of support by parent and child. The question has also arisen both in England and in the Commonwealth whether an economic interest in property is sufficient to create an insurable interest.

In the leading english case of Macura vs Northern assurance[6] the claimant sold timber at his estate to a company in which all the shares were held by him or his nominee.

Most of the timber was destroyed by fire. The timber was insured not by the company, which owned it, but by the claimant. The House of Lords held that the Plaintiff did not have

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[1] John Birds Modern Law of England 4th Edition 1997 Page 13.

[2] Medical Defence Union vs Department of Trade 1979 2AER 421.

[3] Department of Trade and Industry vs St.Christopher Motorist Association Ltd., Securities Plc (1966) 1 WLR 316.

[4] Bazley vs Forder (1868) LR 3QB 55.

[5] (1830) 10 B&C 724.

[6](1925) AC 619.

an insurable interest. This case however does not appear to have been followed in Australia.[7]

In Canada although the rule in Macura was followed until 1987 in the case of Constitution Insurance Company vs Kosmopoulos[8] the Insured turned his business into a Company of which he was the sole shareholder and director but retained insurance in his name rather than in the name of the Company, the Court held that the Rule of Indemnity was better served by a notion of interest wider than the Rule in Macura and that the Rule was too restrictive of legitimate insurance. In United States also after 1898 the Courts have strictly followed the **Macura Principle**[9].

In view of the uncertainty in the law relating to insurable interest in Australia, the **Australian Insurance Contract Act 1984** in **Sections 18 and 19** have set out a list of relationships in respect of which it is permissible for one person to insure the life of another. It has also been suggested by the Australian Law Reform Commission in its discussion paper No. 7 and in their Report No.20 the possibility of abandoning the requirement of interest altogether and relying on the general prohibition on wagering and on public policy or imposing a requirement of consent by the life insured. As regard to general insurance the requirement of insurable interest was abolished by **Insurance Contract Act No.1984 (Cth).** With regard to the time at which the interest is required, it approved the decision in Dalby vs India and London Life Assurance Co.[10]

In New Zealand, reform has progressed even further and provided, that the insurance of the life of a person is not void or illegal by reason only of the fact that the insured under the contract did not have any interest in the life of that person.

In Quebec, Ontario, and in certain American States such as New York, Insurable Interest is no longer required if the life insured consents to the insurance of his life.

In view of the fact that the requirement of **1774 Life Assurance Act** in England does not provide clear answer to the problems relating of insurable interest, the statutory provision as in Australia and New Zealand should be considered in Sri Lanka as well.

UNDISCLOSED PRINCIPAL

In regard to the right of a third party to claim directly under a contract of insurance the Privy Council has recently had the occasion to consider this matter in relation to the

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[7] The Australian Law Commission Report No.20 at paragraph 118 have rejected this technical rule as one "which prevented the insured from recovering the loans actually suffered by him" (Clarke insurance contracts Page 64).

[8](1987) 1 SCR 2.

[9] Clarke opcit 65.

[10] (1854) 15CB 365.

doctrine of undisclosed principal in the case of Sin Yin Kwan vs Eastern Insurance Company Ltd., [11]where the Privy Council held that the doctrine of undisclosed principal was applicable to insurance contracts. In this case Ship Agents effected an insurance on behalf of the Shipowners. Some crewmembers were killed and when compensation was claimed from the hipowners it was found that the Shipowners were wound up and the representatives of the deceased sought to recover the amount from the Insurers. The Insurers resisted the claim on the basis that the agents have acted as undisclosed agents. For the owners it was argued that the doctrine of undisclosed principal was inapplicable to insurance contracts. The Privy Council did not agree with this contention.

PAN ATLANTIC CASE

A landmark case in the law relating to non disclosure is the case of Pan Atlantic Insurance Company vs Pine Top Insurance Company Ltd.,[12]. In this case the House of Lords considered the earlier decision of the Court of Appeal in container Transport International Inc. vs Oceanus Mutual Underwriting Association (Bermuda) Ltd.[13].

In this case it was held that for the purposes of **Section 18 of the Marine insurance Act 1906** the fact must be one which "would influence the judgement" of a prudent insurer and does not necessarily mean than an Insurer must have acted differently if he had known the particular fact but merely that the insurer would have wanted to know the fact when making the decision. In the Pan Atlantic Case a majority of 3 to 2 followed this judgment.

However, the House of Lords also introduced an additional requirement into the law of non-disclosure. Their Lordships took the view that in regard to a non-disclosed fact, it should be material in the opinion of the prudent Insurer and such fact must also have induced the actual insurer to enter into the contract.

In the Pan Atlantic Case the following matters were left open in determing material facts-

(a) Is the test of materiality dependant on a fact which would have been regarded by a prudent Insurer as increasing the risk (the "increased risk theory") or

(b) The fact was one, which would have been of interest to a prudent insurer ("CTI test").

These matters came up for interpretation in the subsequent case of St. Paul Fire & Marine insurance Company U.K.Ltd., vs McConnell Dowell contractors Ltd.[14]and the Court of Appeal reaffirmed the CTI decision given above. The Court of appeal in the St. Pauls Fire case rejected the "increased risk theory".

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[11] (1994) 1 AER 581.

[12] (1984) 1 Lloyds 467

[13] 1994 3 AER 581

[14] (1996) 1 AER 96.

With regard to the presumption of inducement which was also a matter in issue in the Pan Atlantic case, the Court concluded that the correct view is that expressed by Lord Mustill that the Insurer was entitled to rely upon the presumption of inducement, the test being satisfied where the Insurer could show that he was influenced in whole or in part by the assured's misleading presentation of the risk.

PRINCIPLE OF INDUCEMENTS

Another interesting question that has come up for consideration of the House of Lord recently is whether any policies which contains an "excess so that the insured bears the first part of the claim, can the insured keep the amount of this out of what he recovers from the third party". In Napier vs Huner[15] the House of Lords considered the matter with reference to a simple illustration. Assuming that the loss suffered by the insured was GBP 160,000/- and the limit of the liability of Insurer was GBP 125,000/- with an excess of GBP 25,000/- if the sum recovered from the third party was GBP 130,000/- and the insurers paid a sum of GBP 100,000/- the question was whether the insured was entitled to GBP 60,000/- of the sum recovered from the third party so that he would recover the whole of his loss and the insurer would recover GBP 70,000/- back or whether the insurer is entitled to a greater proportion of GBP 130,000/- so that the insured would be under compensated. The House of Lord took the view that the latter approach was the correct one.

The effect of this decision is that the insured must be deemed to be his own insurer for the excess viz GBP 25,000/- and bear any loss over GBP 125,000/- and the insured is entitled to GBP 35,000/- and the insurer GBP 95,000/-.

INSURANCE AGENTS

It is usual for insurance transaction to be negotiated through agents. If an answer to a question in the proposal form is incorrect due to the fault of the insured then the policy may be repudiated. If however the proposer tells the truth to the agent but the latter falsifies the answer and the proposer does not become aware of what has happened the question arises whether the proposer is bound by what the agent has done[16]. In Bawden vs London Edinburgh & Glasgow Assurance Co.[17]the proposal for Accident insurance was made by an illiterate person who had only one eye. This fact was known to the agent who completed the form for him. The form however warranted that he had no physical deformity. This was not obviously correct. The agents knowledge of the truth was imputed to the insurer. However this case was distinguished by the Court of Appeal in Newsholme Bros vs Road Transport & General insurance Co.[18]. In this case *Scrutton LJ* observed: -

"I have great difficulty in understanding how a man who has signed without reading it, document which he knows to be a proposal for insurance and which contains statements infact untrue, and a promise they are true and the basis of the contract, can

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[15] (1993) 2 WLR 42, Bird opcit p.290.

[16] Bird opcit at p.148

[17] (1892) 2 QB 3Y.

[18] (1929) 2 KB 356.

escape from the consequence of negligence by saying that a person he asked to fill it up for him is the agent of the person of whom the proposal is addressed".

It has been submitted that the decision in Newsholme Case is correct[19]. But the Law Reform Committee (17) (5th report 1957 Cmnd 62) recommended the reversal of this rule. They recommended that the agent at all time be regarded as the agent of the insurer. Need for reform was pointed out by the Government White Paper in"[20].

INSURANCE BROKERS

A question has also arisen whether insurance Brokers are authorized to act as agents of the insurance Companies when they solicit proposals. Some authorities suggest that in the absence of specific arrangements the payment to a Broker in respect of a non marine policy does not relieve the insured of liability to make another payment. High Court of Australia in Con-Stan Industries of Australia Pty. Ltd., vs Norwich Winter Hur insurance (Australia) Ltd.[21] held that a premium to an insurance Broker shall not amount to payment to the agent of the insurer. This decision does not appear to have found favour with the **Australian Law Commission**[22].

NOMINATION AND ASSIGNMENTS

There has been some uncertainty in several jurisdictions regarding the affect of nominating a person as beneficiary in the policy and subsequently assigning that policy. Only a few countries have addressed this issue by legislation. In England legislation appears to be silent on this matter and even in Australia the view has been taken that assignments do not automatically cancel a prior nomination.

In Sri Lanka **Section 28(1)** of the **Control of Insurance Act No.25 of 1962** provides as follows: -

> "The holder of a policy for a Life Assurance, may when affecting the policy or at any time before the policy matures for payment nominate a person or persons to whom the money secured by the policy shall be paid in the event of his death".

Section 28(2) provides for cancellation of the nomination. This Section reads as follows: -

> "Any such nomination may at any time before the policy matures for payment be cancelled or changed by another endorsement or a will of the policy holder as the case may be".

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[19] Bird ibid.

[20] insurance Intermediaries Cmd.6715 para 16.

[21] (1986) 160 CLR 226.

[22] Report No. 16 Recommendation P.XVIII.

There is a considerable doubt in Sri Lanka as to whether nominations apply only to "own life policies or applies to all forms of insurance". The effect of **Section 545** in **Civil Procedure Code (Amendment) Act No. 14 of 1993** on nomination is also a matter of considerable uncertainty.

SHIPOWNERS PROTECTING CLUBS

In the 19th Century Shipowners found themselves faced with increasing liabilities and the **Marine insurance Act of 1745** already prohibited Shipowners from insuring against liabilities for sums in excess of the value of their vessels.

In 1836 the English Courts held that the Shipowners could not recover from the Hull Underwriter damages done in a collision[23]. In response, the insurance market provided cover up to 3/4ths of the Shipowners liability and left the balance 1/4th to the Shipowner. Furthermore liabilities in respect of death, personal injury and damages have also to be covered and this resulted in the Old Hull Clubs which were converted into the Protecting Clubs providing so that 1/4th collision liability and liabilities in respect of loss of life and personal injury may be covered. Since then these clubs have grown and developed into large institutions and the International Group of Clubs today covers majority of the seagoing vessels in the world. They have also expanded into new areas and are even considering "launching into new satellite" mutual covers to cover risks regarding the European Rocket Arine and in United Kingdom moves were also made to provide cover for Accountants with the intention of the mutual insurance providing professional indemnity cover to small and medium sized Accounting Firms on lines similar to P & I insurance. The view has also been expressed by a leading writer on P & I Clubs that Banks, Building Societies, Dentists, Doctors, Estate Agents, Financial Advisors and many more would think this concept to be worthy of investigation to cover their risks[24].

CONCLUSION

When considering the proposals for reform when we are in the threshold of the 21st Century special provision may have to be made regarding iinsurance interest, relationship between insured, agents and brokers and other intermediaries, and the possible expansion of mutuality covers. These will all be areas in which considerable judicial activity and legislative initiative may occur, in the turn of the century.

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[23] De Baux vs Salvador (1836) 4E & A 420.

[24] Steven J Haselwood P & I Clubs Law & practice;Christopher Hill, Bill Robertson & Steven J. Hazelwood Introduction to P & I).