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Principle of indemnity and related doctrines in Nigerian insurance law and practice: A comparative study with the counterparts in other jurisdictions

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PRINCIPLE OF INDEMNITY AND RELATED DOCTRINES IN NIGERIAN INSURANCE LAW AND PRACTICE: A COMPARATIVE STUDY WITH THE COUNTERPARTS IN OTHER JURISDICTIONS

A Thesis Submitted in Accordance with the Requirements for the Degree of Doctor of Philosophy

By

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DECLARATION

I, Omotolani Victoria Somoye, hereby declare that this thesis is the results of my own investigations, except where otherwise stated. All other sources are acknowledged by bibliographic references. This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree unless, as agreed by the University, for approved dual awards.

Yr wyf drwy hyn yn datgan mai canlyniad fy ymchwil fy hun yw'r thesis hwn, ac eithrio lle nodir yn wahanol. Caiff ffynonellau eraill eu cydnabod gan droednodiadau yn rhoi cyfeiriadau eglur. Nid yw sylwedd y gwaith hwn wedi cael ei dderbyn o'r blaen ar gyfer unrhyw radd, ac nid yw'n cael ei gyflwyno ar yr un pryd mewn ymgeisiaeth am unrhyw radd oni bai ei fod, fel y cytunwyd gan y Brifysgol, am gymwysterau deuol cymeradwy.

Signed:

Date:

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ABSTRACT

The principle of indemnity is the cornerstone of every indemnity insurance, which functions to ensure that in the event of losses, the insured party receive full compensation and nothing more. To support the goals of indemnity in insurance law, other related doctrines like insurable interest and subrogation have been established. The primary purpose of the thesis is to critically evaluate and reconcile the problems found in Nigerian insurance laws on insurable interest and subrogation that are inconsistent with the principle of indemnity with principal reference to the English laws, and Australian laws, but not exclusively. There is significant evidence in the literature that some rules of insurable interest and subrogation applied to insurance contracts cause problems in practice, and to some extent, contradict the aims of the principle of indemnity. These legal principles of insurance law have undergone legislative reforms in other common law countries, but to date, there have been no similar developments in Nigeria. However, limited research exists that directly questions why the principle of indemnity is undermined, particularly for the insured's interest. To achieve the objective of this study, the thesis examines the principle of indemnity and related doctrines in Nigerian insurance law and practice: A comparative study with the counterparts in other jurisdictions.

This study is a qualitative legal research and adopts a doctrinal and comparative legal research methodology to investigate the approaches of recent developments, particularly in common law countries. The research shows that the requirement of insurable interest under sec 7, MIA 1961(Nig.) is restrictive, with harsh consequences which not only defeats a legitimate commercial transaction but also deprives the insured unjustly of recovering economic losses. More seriously, the insurers often use the strict rule as a technical objection to avoid liability which leaves the insured in a lose all position and the insurer in a gain all position. The research also shows that sec 80, MIA 1961 (Nig.) has failed to address how subrogation recoveries ought to be distributed where there is a competing interest between the insured and the insurer. The research further reveals that these problems have not been addressed by the current Nigerian Insurance (Consolidated) Bill 2016. The thesis concludes with suggested reforms, including detailed draft legislative amendments on how the problematic rules of insurable interest and subrogation under Nigerian insurance laws, in line with global practices can be modified to conform with the nature of the principle of indemnity.

Keywords: Australia, England, Indemnity, Insurable Interest, Nigeria, Subrogation

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LIST OF LEGISLATIONS

LIST OF ABBREVIATIONS

ABI	Association of British Insurers
All E.R	All English Law Report
App. Cas.	Appeal Cases
ALRC	Australian Law Reform Commission
F.N.L.R	Federal Nigerian Law Report
FOS	Financial Ombudsman Service
HL Cas	House of Lords Cases
IA	Insurance Act
ICA	Insurance Contracts Act
IA	Insurance Act
J.B.L	Journal of Business Law
JMarLC	Journal of Maritime Law and Commerce
KB	King's Bench
L.L.C.R	Lagos High Court Report
L.M.C.L.Q	Lloyd's Maritime and Commercial Law Quarterly
Lloyd's Rep.	Lloyd's Reports
M.L.R	Modern Law Review
MIA	Marine Insurance Act
NIG.	Nigeria
NWLR	Nigerian Weekly Law Report
NAICOM	National Insurance Commission
N.I.A	Nigerian Insurers Association
NSWLR	New South Wales Law Review
QB	Queen's Bench
T & I.L.J	Tort & Insurance Law Journal
UK.	United Kingdom
UNCTAD	United Nations Commission on Trade & Development
WLR	Weekly Law Reports

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CHAPTER ONE: INTRODUCTION

The research provides, as the title suggests, a critical review of the application of fundamental principles of insurance law and related doctrines. It is well established that the principle of indemnity is a fundamental principle of insurance law.[1] This means that the principle of indemnity is the fountain of other rules of insurance law, and the aim is to place the insured in the position occupied preceding the loss. However, the application and interpretation of some rules of insurable interest and subrogation derived from indemnity are contrary to its goals by leaving the insured compensated for less than the actual losses or denying them compensation.

The research focuses on the principles of indemnity, insurable interest and subrogation under the Nigerian,[2] English[3] and Australian laws. The Nigerian Marine Insurance Act is the most comprehensive legislation that governs marine and non-life businesses, enacted in 1961[4] with provisions that relate to principles of indemnity,[5] insurable interest[6] and subrogation.[7] Each of

[1] In *Castellain v. Preston* (1883) 11 Q.B.D. 380, 387 Brett L.J. suggested: *'The fundamental rule of insurance law is that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and this contract means that the assured, in the case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified.*' The rule in *Castellain* has been followed and cited by various courts in several jurisdictions including in Nigerian courts by accepting the nature of the indemnity principle as the heart of its insurance law. *Alakija v. Mercury Assurance* [1975] 9 C.C.H.C.J. 1301; *Okpalaugo v. Commerce Assurance* [1976] N.C.L.R. 2731; *Babalola v Harmony Insurance* [1982] 1 O.Y.S.H.C. 1.

[2] In this thesis, the term 'Nigerian law' covers the whole jurisdiction in Nigeria because it operates a federal system of government and laws of insurance is a federal law that applies to all 36 States and the Federal Capital Territory.

[3] In this thesis, the term 'English law' will be used rather than 'English and Welsh law', for the following reasons. References to 'English law' are referred to the substantive law which typically govern contractual and non-contractual obligations within England and Wales. Although Welsh law does exist autonomously of English law (made up of legislation generated by the National Assembly for Wales, a devolved and elected authority), these laws essentially govern only local issues within Wales, rather than wider legal rules (such as the laws of contract). England and Wales share a unified legal system and the judiciary within Wales applies English law. By contrast Scotland and Northern Ireland are distinct legal jurisdictions applying autonomous regimes of substantive law; Philip Wood QC, Why English Law? (2019) Butterworths Journal of International Banking and Financial Law, https://primefinancedisputes.org/files/2019-03/why-english-law-philip-wood-cbe-qc-hon-.pdf?439c9efb7f Assessed 10 April, 2020.

[4] The Nigerian Marine Insurance Act is hereinafter referred to as the MIA 1961 (Nig.).

[5] Sec 3 MIA 1961 (Nig.) provides that: *'A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in a manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to a marine adventure'.*

[6] Sec 6 (1) & (2) MIA 1961 (Nig.) makes provision for the avoidance of wagering or gaming contracts: (*1) Every contract of marine insurance by way of gaming or wagering is void. (2) A contract of marine insurance is deemed to be a gaming or wagering contract— (a) 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;*

[7] Sec 80 (1) & (2) MIA 1961 (Nig.) provides for the Right of Subrogation: *(1) 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, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in and in respect of that*

these principles are very significant in preserving the goals of insurance contracts law with specific functions. However, they are interpreted and applied differently in many jurisdictions.

The principle of indemnity provides that the insurer is under an obligation to reimburse the insured from the actual loss from the covered risk and an insured is entitled to be restored, subject to the terms and conditions of the policy, to the financial position enjoyed immediately before the loss and nothing more.[8] To safeguard the goals of indemnity, the insurable interest principle ensures that the insured must be able to prove that a relationship exists with the subject matter of insurance, to be entitled to any recovery. Similarly, subrogation, on the other hand, prevents double recovery by an insured party from the insurer and the negligent third party. However, some rules of insurable interest and subrogation applied to marine and property insurance contracts in the Nigerian law, cause problems in practice, and to some extent are inconsistent with the nature of the principle of indemnity. This is as a result of technical barriers that exist in the current law.

For instance, under the Nigerian laws that relate to insurable interest, the insured must prove a legal and equitable relationship with the subject matter insured to be entitled to recovery.[9] As a result, the strict adherence to the harsh legal consequences of the requirement of insurable interest in section 7, MIA 1961 (Nig.), not only defeats a legitimate commercial transaction but the economic relationship between the insureds and the insured property is not recognised by law. Therefore, the insurance contract in most circumstances is declared void and the insureds' claim denied to the insurer's advantage. On this basis, the study criticises the current Nigerian law for being inconsistent with the fundamental aims of indemnity.[10]

In the same vein, sec 80 MIA 1961 (Nig.), govern the insurer's right of subrogation with distinct rights to recover that which has been paid out from the third-party wrongdoer. However, when subrogation monies are recouped from the negligent third-party, it is not clear

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subject-matter as from the time of the casualty causing the loss. (2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he 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 such payment for the loss.

[8] *Ibid (n 1).*

[9] Sec 7 MIA 1961 (Nig.) provides that: '*Subject to the provisions of this Act every person has an insurable interest who is interested in a marine adventure. In particular, a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or maybe prejudiced by its loss, or damage thereto, or by the detention thereof, or may incur liability in respect thereof*'.

[10] See chapter four of the thesis for discussions of the principle of insurable interest.

who has priority, especially where the policyholder has sustained both insured and uninsured losses. On the issue, the current Nigerian law has failed to address how subrogation recoveries ought to be distributed where there is a competing interest between the insured and the insurer. In resolving disputes, the Nigerian courts rely on the highly criticised English model laid down in *Napier v Hunter,*[11] by giving priority to the insurer. This position is inconsistent with the principle of indemnity because it deprives the insured a recovery of actual losses.[12]

Given the limitations associated with the principles of insurable interest and subrogation under the Nigerian laws, there is evidence that retaining inconsistent rules will result in the insured not recovering his full losses, which defeats the aim of insurance contracts. However, there is still a gap in the literature concerning the Nigerian context for an understanding of the purposes of indemnity and how its rules contribute to the experiences of insureds faced with the problem of recovery in insurance. This thesis aims to address this gap by examining the implication of existing statutory laws and recent court cases.

Similarly, over the years, other doctrines like double insurance,[13] the right to contribution,[14] and abandonment[15] are common law principles been developed in marine and other indemnity insurance to support the principle of indemnity. However, the thesis does not examine these other doctrines in detail because they are not commonly applied in Nigeria and its rules are not as problematic to indemnity as those of insurable interest and subrogation.[16]

Therefore, the purpose of the study is to critically examine the doctrines and rules of insurable interest and subrogation in relation to indemnity insurance[17] contracts under the Nigerian laws in comparison with the English and Australian laws for the following reasons: (i) they are corollaries of indemnity, (ii) the rules in insurable interest and subrogation cause problems and to some extent depart from the nature of the indemnity principle; (iii) the application of the rules of these doctrines have attracted a large proportion of disputes in the insurance arena and

[11] Following the court's decision in *Lord Napier and Ettrick v Hunter* [1993] AC 713 regarding the principle of subrogation, the top-down approach has been established as the English model.
[12] Chapter five of the thesis critiques the doctrine of subrogation.
[13] Sec 33 MIA, 1961 (Nig.).
[14] Sec 81 MIA, 1961 (Nig.).
[15] Sec 64 MIA, 1961 (Nig.).
[16] Because insurance is gradually penetrating the Nigerian market, companies or individuals rarely double insure their properties. It is only common for consumers or customers to employ the services of only one insurer.
[17] Indemnity insurance in this thesis covers mainly marine and property insurance contracts.

a major topic for debates in Nigeria, the United Kingdom and Australia,[18] and (iv) to suggest recommendations for amending and developing the laws by learning from the experiences of the English and Australian law reforms.[19]

The English insurance industry has a long history compared to the Nigerian industry experience with the business of insurance.[20] Since the sixteenth century, the English laws and style of insurance practices have been followed by many jurisdictions.[21] Similarly, the Nigerian Marine insurance Act 1961 was drafted and modelled along the broad lines of the English Marine Insurance Act 1906[22] , and the Nigerian courts apply the common laws made by the judges to disputes. The English law is admittedly the most developed, insurer-friendly and comprehensive with England having the world's leading insurance industry.[23] Currently, the UK had the largest insurance industry in Europe and the fourth largest in the world.[24]

[18] Law Commission of England and Wales and Scottish Law Commission Joint Consultation Paper on *Insurance Contract Law: Post Contract Duties and Other Issues* (Law Com CP No. 201/Scot Law Com No. 152, 2011) Chapter 3, Part 10. Paras 10.2 (2) *noted that 'the law was in a confused state by reason of the law is a bewildering mixture of common law and statute; the definition of insurable interest is uncertain; the doctrine differs depending on the type of insurance'.* Robert Merkin, Reforming Insurance Law: Is there a Case for Reverse Transportation? A Report for the English and Scottish Law Commissions on the Australian experience of insurance law reform (2007); ALRC recommendations in Part III of the (Australian) Insurance Contracts Act 1984. ALRC 20, at 108-120; Franziska Arnold-Dwyer, 'Insurance Law Reform by Degrees: Late Payment and Insurable Interest' [2017] 80 (3) MLR 489.

[19] Chapter six of the thesis for conclusions and recommendation.

[20] Chapter 2.2 for Historical overview of Insurance.

[21] The English statutes like MIA 1906 and common law has had substantial influence internationally and has been adopted in several Commonwealth Member States. See John Birds, *Birds' Modern Insurance Law*, (10th Edn, Sweet & Maxwell 2019) 1.

[22] The English Marine Insurance Act 1906 hereafter referred to as MIA 1906 (UK.).

[23] Philip Wood QC OBE, Why English Law? Butterworths Journal of International Banking and Financial Law, July/August 2019 https://primefinancedisputes.org/files/2019-03/why-english-law-philip-wood-cbe-qc-hon-.pdf?439c9efb7f Assessed 10th April, 2020; As indicated in ABI report, in Europe, the United Kingdom is leading and insurance businesses and output *is an essential part of the UK's economic strength, managing investments of over £1.8 trillion and paying nearly £12 billion in taxes to the Government. It employs around 300,000 individuals, of which around a third are employed directly by providers with the remainder in auxiliary services such as broking'.* Association of British Insurers UK Insurance and Long-Term Savings: The state of the market2019 <https://www.abi.org.uk/globalassets/files/publications/public/data/abi_bro6778_state_of_market_2019_web.pdf > Assessed 10 April, 2019.

[24] The Association of British Insurer's 2019 Report notes that, the United States ranks first in the world, next to China and Japan. However, China and Japan are not suitable for the study because they have a different legal system and pattern to Nigeria. Only some court cases and statutory laws of the United States are beneficial because the United States has a federal system of government, a written constitution, and a common law legal system, somewhat similar to Nigeria. More importantly, the United Kingdom's 4th position in the world still falls within the rank of been a world leader in the field of insurance. Therefore, the United Kingdom's law and practice is used as a model in this research because of its affinity with Nigeria and its legal system is similar with Nigeria's legal system. Association of British Insurers UK Insurance and Long-Term Savings: The state of the market2019 <https://www.abi.org.uk/globalassets/files/publications/public/data/abi_bro6778_state_of_market_2019_web.pdf > Assessed 10 April, 2019.

Also, there has been current consultations and reports by the English and Scottish Law Commission on issues relating to legal principles of insurance contract law with suggested practical solutions.[25] While the Australian regime, on the other hand, mitigates the common law for its harshness to consumers making it insured-friendly and is often regarded as a good model for insurance law reform.[26] Therefore, it is hoped that this doctrinal study will improve the legislative landscape for insurance law in Nigeria.

1.1. Background of Study

Nigeria is a developing nation with the largest population in Africa.[27] Hence the title 'the giant of Africa'. Over the years, the economy has grown steadily, and the insurance industry and market have become a vital part of the economy by huge premiums received by the insurers, the investment scale and, more fundamentally, the essential social and economic role it plays by providing financial security and protection for the assets of corporate bodies and individual citizens.[28] However, the insurance sector has contributed significantly low to the total economy, because the insurance penetration is very low.[29]

As of 2015, the Nigerian insurance market ranked 62nd in the world,[30] and 86th position behind nine other African countries in global insurance penetration and density figures, as a percentage of GDP.[31] The insurance industry is growing rapidly, with about 59 insurance companies, and there has been an increase in foreign investor's investments in the Nigerian insurance market.[32] Also, there has been recent restructuring ongoing with the insurance industry as at the 20th May

[25] Sec 4.7. on legislative reforms on Insurable Interest.
[26] Robert Merkin, Reforming Insurance Law: Is there a Case for Reverse Transportation? A Report for the English and Scottish Law Commissions on the Australian experience of insurance law reform (2007) para 1.1. '*The leading author of insurance concluded is that there is much to learn from Australia from a consumer perspective.'*
[27] Nigeria ranks 7th in the world with approximately 196 million people. Department of Economic and Social Affairs Population Dynamics, World's Population prospects List of African Countries by Population as at 15th October, 2015 http://statisticstimes.com/demographics/african-countries-by-population.php> Assessed on 20th January, 2020.
[28] Funmi Adeyemi, *Nigerian Insurance Law* (2nd Edn, Dalson Publications Limited, 2007) 463.
[29] Chapter 2.5. explains the Impact of Insurance on the Economy.
[30] PWC, Africa Insurance Trends, Strategic and Emerging Trends in Insurance Markets in Nigeria(October2015)4<file:///C:/Users/User/Documents/ARTICLES%20FOLDER/nigeria-insurance-survey.pdf> Assessed 10th April, 2020; See also R in Swiss Re Sigma Research World Insurance in 2009 (2012, Swiss Re Publication) 31, 33, 38-39.
[31] Swiss Re Sigma Research World Insurance in 2009 (2012, Swiss Re Publication) 38–39.
[32] These include Sanlam and Old Mutual from South Africa and AXA from France acquiring a $246 million stake in Mansard Insurance. Progressivity can be seen in the introduction of new insurance products in the growing mortgage and housing sector.

2019 which will have a significant impact on the economy with an increase of the minimum capital requirement for companies doing insurance business in Nigeria.[33]

Over the years, legislation has been enacted to govern insurance activities in Nigeria which includes the Marine Insurance Act, 1961 which governs marine businesses and other non-life businesses while the Insurance Act 2003, governs life insurance and sets out the regulations that govern the chief insurance regulator in Nigeria – NAICOM. However, many regulations that have been reviewed are focused on the reviving the industry and market but not on the laws. An attempt was made in 2016 when the Insurance Bill 2016 was proposed to consolidate all the laws that apply to insurance in one single legislation.[34]

The Insurance (Consolidated) Bill 2016 is still pending, but when it becomes law, it will be an outstanding achievement to have all the insurance legislations consolidated. However, the content is only the reinstatement of the old laws, and there is no new development on the legal principles of insurance law. Similarly, the Nigerian Law Reform Commission is the body vested with the improvement of the law, but the only consultation on insurance contract law principles that has been made was in 1986.[35] However, no recommendations were made regarding the doctrines of insurable interest and subrogation.[36] In other words, the changes only tidies up the law rather than reforming its content. Currently, no consultations or reports are calling for the reform of insurance contract law. Undoubtedly, the neglect of insurance law has many consequences like a case of insurance not responding as expected, more legal disputes between policyholders and insurers and uncertainty on the outcomes of insurance contracts. Furthermore, it risks undermining trust in Nigerian insurance in the local and international marketplace.[37] It is against this background that this thesis seeks to develop a robust legal

[33] Chapter 2.4.3. on Insurance Capital for companies in Nigeria.

[34] The Chairman of the Nigerian Insurers Association (NIA), GUS Wiggle, reiterated recently, *'that primary laws of Insurance in Nigeria was long overdue for review so that it will meet the challenges of the present day business environment, to initiate laws that are in tandem with current realities.'* Joshua Nse, Operators Laud Naming of Insurance Review Panel,
<https://guardian.ng/business-services/insurance/operators-laud-naming-of-insurance-bill-review-panel/>
Assessed 10th April, 2019.

[35] Sec 2.3.4 for Insurance Law Reform.

[36] The Law Reform Journal, Issue No. 5 July 1986, containing the deliberations and recommendations of the Nigerian Law Reform Commission on Insurance Law.

[37] Robert Merkin, Reforming Insurance Law: Is there a Case for Reverse Transportation? A Report for the English and Scottish Law Commissions on the Australian experience of insurance law reform (2007) para 1.3. Speaking about the English and Australian experience, *the leading author of insurance concluded that 'Doubtless any attempt to change the law in the UK will be met with protests from some quarters: the Australian experience shows that the market adapts very easily to new laws as long as they strike a fair balance between the interests of the parties. Many jurisdictions have revised their insurance laws, and the London market may find itself becoming less sought after if there are rival centres with a more benign legal environment.'*

framework of fundamental principles of insurance applicable to contracts of indemnity and analyse current rules enshrined in the Nigerian insurance laws that are archaic, harsh on the insured, weak, disproportionate and uncertain.

1.2. Objectives of the Study

The primary purpose of this research is to critically examine the application of the rules and doctrines of subrogation and insurable interest under Nigerian indemnity insurance[38] and identify the problems that are inconsistent with the principle of indemnity, for better solutions, by using the English, Australian and other countries' laws as a model.

To achieve this purpose, the research will first examine the scope, nature and aims of the principle of indemnity, which is the fundamental principle in insurance law for indemnity insurance.[39] Also, the thesis will discuss how the principle of indemnity is applied for recoveries in marine policies and property policies. The research will also present how other sub-principles of indemnity like insurable interest and subrogation provides support for the nature of the indemnity principle.

Secondly, the research aims to critically examine the extent to which the application of the current Nigerian rules on insurable interest prevent insureds to be fully compensated for their losses in comparison with English Laws and Australian laws.[40] To achieve this goal, the thesis will analyse the two controversial approaches of insurable interest, which are the legal interest test and the economic interest test. The research will examine whether there are specific limitations and barriers placed on the insured, which undermines the aims of indemnity as a result of the legal interest test adopted in the Nigerian laws[41] and English laws.[42] Furthermore, the research will critically examine through a comparative analysis, other countries' insurance laws[43] that have reformed their laws and adopted the economic interest approach to determine whether the approach is more reasonable and fair on the insured. The study also examines

[38] This thesis does not deal with the requirement of insurable interest in non-indemnity insurance. Property, marine and liability insurance are examples of indemnity insurance. Life insurance, personal accident are examples of non-indemnity insurance.
[39] Chapter three of the thesis examines the indemnity principle in detail.
[40] Chapter four of the thesis examines the principle of insurable interest in detail.
[41] Sec 7, MIA 1961 (Nig.); *Law Union and Rock Insurance Ltd v Livinus Onuoha* (1998) NWLR (pt. 555) 576.
[42] *Lucena v Craufurd* [1806] 2 Bos. & P.N.R. 269; *Macaura v Northern Assurance Co*. [1925] A.C. 619; Sec 5, MIA 1906 (UK.).
[43] Such as American laws, Australian laws, Canadian laws, New Zealand laws, and South Africa laws.

whether the current Nigerian Insurance (Consolidated) Bill 2016[44] and the English Insurable Interest Bill 2016[45] improves the problematic aspects of insurable interest that appears inconsistent with the principle of indemnity.

Thirdly, the thesis aims to examine the extent to which the application of the current Nigerian subrogation rules on indemnity insurance, allow the insured to be fully compensated for their losses arising from subrogation proceeds and actions.[46] To achieve this objective, the research will critically analyse the Nigerian,[47] English,[48] and other approaches[49] on how subrogation monies recovered from third parties are distributed, to determine whether they are consistent with the nature of indemnity. The research will examine whether the current Nigerian Insurance (Consolidated) Bill 2016[50] and the English judicial pronouncement improves the problematic aspects of subrogation that appears inconsistent with the principle of indemnity. Thus, the thesis will identify the weaknesses of subrogation under the Nigerian insurance law and suggest a suitable method for distributing subrogation recoveries in line with the principle of indemnity to improve Nigerian laws.

Lastly, the research will recommend reforms for the amendment of existing Nigerian laws relating to insurable interest and subrogation to be consistent with the nature of the principle of indemnity. To achieve the aim, the study refers to recent legal developments introduced by the English Law Commission (UK Law Commissions) and the Australian Law Commission to resolve similar problems. This is essential because in Nigeria, there is little research on the deficiencies and weaknesses of both principles, and there are no current proposals to amend the laws in this area. The work suggests solutions on how existing deficiencies can be better addressed that will help Nigerian laws adjoin with international best practices which impact positively on the economic and legal system.

[44] Sec 145 (1) & (2) Part XVII Insurance (Consolidated) Bill 2016 relates to insurable interest.
[45] Law Commission of England and Wales and Scottish Law Commission on Reforming Insurance Contract Law: Short Consultation on Draft Bill: Insurable Interest (2016): Clause 6.
[46] Chapter five of the thesis examines the doctrine of subrogation in details
[47] Sec 80 MIA 1961 (Nig.).
[48] Sec 79, MIA 1906 (UK.); *Napier v Hunter* [1993] AC 713.
[49] Such as Australian laws, and American laws.
[50] Sec 217 (1) & (2) Part XVII Insurance (Consolidated) Bill 2016 relates to subrogation.

1.3. Research Statement

The principle of indemnity is the cornerstone for indemnity insurance. The primary research statement is that the rules in the current Nigeran insurance laws with respect to insurable interest and subrogation in indemnity insurance do not fully reflect the nature of the fundamental principle of indemnity and prevents the insureds from receiving full compensation for their actual losses. Therefore, the rules of law in this area are in need of reform. The work suggests solutions to solve the inconsistencies of insurable interest and subrogation with the indemnity principle that undermines the nature of indemnity by referring critically to the approaches of English law and Australian law.

1.4. Literature Review[51]

The literature review in this thesis presents current discussions and debates in relation to the legal principles of insurance law. According to Greg, insurance is a risk transfer, loss-spreading arrangement.[52] Birds noted that what makes the law of insurance contract unique in comparison to other general contracts is because it has attracted many principles of its own.[53] They include the principle of indemnity, the rules against double-insurance, the requirements of insurable interest, subrogation, abandonment and the right of contribution. Ozlem emphasised that each of these principles were established to protect the nature of insurance contracts as a contract of indemnity.[54] For this reason, the most fundamental principle that reflects the nature of insurance contracts is the principle of indemnity. This thesis focuses only on the doctrines of indemnity, insurable interest and subrogation and are discussed as follows.

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[51] As indicated by renowned authors in legal research studies, 'a high level of conceptual thinking within and across theories, summative and formative evaluation of previous work on the problem and depth of discussion on important philosophical traditions and ways in which they relate to the problem' is expected at a doctoral level; Chris Hart, Doing a Literature Review: Releasing the Research Imagination (2nd edn, Sage 2018) 64; Mike McConville and Wing Hong Chui, *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 3; A.B. Ahmed, Techniques of Writing a Research Proposal in Law, in Ahmed A. B., (eds) *Issues in Research Methodology in Law* (Ahmadu Bello University Press, Zaria, 2010) 21; A. Taiwo, *Basic Concepts in Legal Research Methodology, A Practical Guide on Writing Excellent Master and Doctoral Thesis* (St. Paul's Publishing House Ibadan, 2011) 36; A Fink, *Conducting Research Literature Reviews: From the internet to Paper* (2nd edn, Thousand Oaks, CA: Sage) 3-5; Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart publishing 2014) 26.

[52] Greg Pynt, *Australian Insurance Law: A First Reference* (2nd edn, LexisNexis Butterworths Australia 2011) 4.

[53] John Birds, *Birds' Modern Insurance Law*, (10th Edn, Sweet & Maxwell 2019) 1. However, Merkin indicates that insurance contracts are subject to general law of contract. Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 13; *Friends Provident Life and Pensions Ltd v Sirius International Insurance Corp* [2006] Lloyd's Rep. I.R. 45.

[54] Ozlem Gurse, *Marine Insurance Law* (Routledge 2015) 50.

1.4.1. The Principle of Indemnity

The root of all contracts of insurance is 'indemnity' which, according to Jackson, 'will not be controverted by any intelligent lawyer'.[55] This view is correct because, if the purpose of insurance is to 'payback' or 'indemnify' policyholders for losses or damages sustained, or, to restore the insured to its pre-loss condition, then indemnity is the very essence. On this basis, there is a universal acceptance that the contract of insurance is a contract of indemnity.[56] Therefore, when the principle of indemnity is tampered with by legislatures or courts or even insurers, the very vitals of an insurance contract are in danger.[57] Therefore, at the heart of marine insurance and all other types of insurance, excluding life policies[58] is the principle of indemnity commonly referred to as the cornerstone of insurance law.[59]

Scholars have attempted to provide a universal meaning of the word 'indemnity', either conceptually or definitionally.[60] Fischer indicated that the lack of uniformity encourages the divergence of decisions in determining the quantum of damages when a property loss occurs.[61]

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[55] Henry Jackson, 'Indemnity the Essence of Insurance; Causes and Consequences of Legislation Qualifying this Principle' (1887) 10 Annual Report ABA 261.

[56] According to M. A Clarke, 'The principle of indemnity is a nucleus principle of the law of insurance'; M.A Clarke, The Law of Insurance Contracts, (6th edn, Infoma, 2009) 1056; The authors, Johnny Parker, 'Replacement Cost Coverage: A Legal Primer' (1999) 34 Wake Forest L. Rev 295, 296 observed that '*the purpose indemnity is to make the insured whole, but never to benefit him ... to indemnify means simply to put the insured back in the position she previously enjoyed prior to the loss.*' See also J.O Irukwu, *Fundamentals of Insurance Law*, (1st Edn, Witherbys Printing Ltd) 103; Ozlem Gurse, *Marine Insurance Law* (Routledge 2015) 50.

[57] Henry Jackson, 'Indemnity the Essence of Insurance; Causes and Consequences of Legislation Qualifying this Principle ' (1887) 10 Annual Report ABA 261; As far back as 1883, the rules of indemnity were clearly stated by Brett LJ in his judgement which reads: '*in case of a loss against which the marine or fire policy has been made, the insured shall be fully indemnified, but shall never be more than fully indemnified'; Castellain v Preston (1883) 11 QBD 380.*

[58] See Chapter three, section 3.3 on discussions why the indemnity principle is limited to only indemnity contracts.

[59] Charles Lewis, 'A Fundamental Principle of Insurance Law' [1979] LMCLQ 275; Olusegun Yerokun, *Insurance Law in Nigeria Insurance* (Princeton Publishing Company, 2013) 242; J.P. Van Niekerk, 'Maintaining the principle of indemnity: theory and practice', (1996) J. S. Afr. L. Journal of South Africa Law 572; N Campbell ' The Nature of an insurer's Obligation' [2000] LMCLQ 42; ALRC Discussion Paper 63, para. 7.3. However, Kasia Ginders, 'Insurance Law and the Principle of Indemnity in Light of *Ridgecrest NZ Ltd v IAG New Zealand ltd'* (2016) 47 Victoria U Wellington L Rev 73, 75 '*raises doubts as to whether the modern scope and application of indemnity supports its fundamental role in insurance law*'.

[60] Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016) 113; Vance in W. Vance, *Handbook on The Law of Insurance* (3rd Edn, B. Anderson 1951) 102 states that '*under the strict principle of indemnity, the actual value of the subject of insurance is always the limit of recovery*.'; Patterson seems to question the nature of the indemnity aspect of insurance in E Patterson, *Essentials of Insurance law* (2d ed. 1957) 109; stated: *'If, and to the extent that, any particular insurance contract is a contract to pay indemnity, the insurable interest of the insured will be the measure of the upper limit of his provable loss under the contract.*'; Clearly, each of the authors definition are different. Keeton thinks of indemnity in terms of financial loss because he refers to it as '*loss suffered*,' whereas Vance, by referring to the '*subject of insurance'*, treats the concept in terms of the physical value of the property. Patterson takes an intermediate approach, speaking in terms of '*provable loss'.*

[61] Emeric Fischer, 'The Rule of Insurable Interest and the Principle of Indemnity: Are they Measures of Damages in Property Insurance' (1980) 56 Ind LJ 445, 448.

Keeton's version is expressed in the following language: 'the insurance contract shall confer a benefit no greater in value than the loss suffered by an insured which could be interpreted that the principle does not imply that the benefit must not be less than the loss'.[62] By contrast, other writers define the requirement of indemnity to mean that the insured must not profit by a claim but, at least, be made whole again.[63] The author agrees with the latter view as the true balanced nature of the indemnity principle, which aligns with the nature of insurance contracts. The insurer is under an obligation to reimburse the insured for the actual loss from the covered risk, and an insured is entitled to be restored. [64] However, the word 'indemnity' in theory appears simple, but the practical application is complex and difficult to apply, yet it has attracted fewer criticisms. As observed by Sutton, indemnity is inherently 'ambiguous' and 'elusive'.[65]

Notwithstanding, there are two sides to indemnity.[66] One side prevents unjust enrichment of the insured, while the other aspect ensures that the insured is compensated to the full extent of the loss. While studies have examined the former aspect of indemnity,[67] very few researchers have taken into consideration the significance and implication of the latter in insurance law.[68] It must be noted that the two sides are essential.[69] It is argued that the aspect that is often appraised is the point that insured is not entitled to recover the amount specified in the policy unless it represents his actual loss.[70] However, the point that the insured is to recover fully for his losses is often overlooked and downplayed in practice. Therefore, the crucial question which the study investigates is the extent to which the insured can recover for his actual losses

[62] Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016) 113.
[63] Andrew Lindblad, 'How Relevant Is the Principle of Indemnity in Property Insurance?' (1976) The Insurance Law Journal, 271.
[64] As noted by William H Hope, 'Whither Indemnity' (1962) Ins. L. J. 633 '*The insurance companies should and must pay no matter what'.*
[65] W I B Enright, Robert Merkin, *Sutton on Insurance Law* (4th edn, Thomson Reuters 2015) Volume 2 85.
[66] The two -sides is premised on the decision of *Castellain v. Preston* (1883) 11 Q.B.D. 380, 387.
[67] Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016) 113; Tarr, 'The Measure of Indemnity under Property Insurance Policies' (1983) 2 Canterbury L.R. 107.
[68] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 327; ALRC Discussion Paper 63, para. 7.3; J.P. Van Niekerk, 'Maintaining the principle of indemnity: theory and practice', (1996) J. S. Afr. L. Journal of South Africa Law 572; J Birds, 'The Measure of Indemnity in Property Insurance' (1980) 43 MLR 456.
[69] As indicated by Brett LJ in *Castellain v. Preston* (1883) 11 Q.B.D. 380, 387'…*if ever a proposition is brought forward which is at variance with it, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must be certainly wrong'.*
[70] Charles Lewis, 'A Fundamental Principle of Insurance Law' [1979] LMCLQ 275, 276; As emphasised by Keeton, 'opportunities for a net gain to an insured through the receipt of insurance proceeds exceeding a loss are inimical to the public interest.'; Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016) 113.

without any technical barriers. This aspect of indemnity is significant because according to Keeton, recovery for actual losses is the reason why parties choose to contract in the event of a loss of goods, marine objects or property.[71] Irukwu, emphasised, that what an insured expects is the exact financial compensation.[72] To do otherwise, according to Lindbald, would either cheat the policyholder or increase the likelihood of intentional destruction of the insured property.[73] Other scholars suggest that the positive aspect of indemnity is that the insured should not be 'rewarded' or 'penalised' for their losses but should simply be placed in the exact position occupied preceding the loss.[74]

There is a view that the indemnity principle is imperfect and cannot be achieved based on the requirements of a valued policy or reinstatement clauses.[75] Scholars[76] have criticised such policies because it breaches the theory of indemnity and gives room for the insured to receive more than a compensation for his loss. On the contrary, Tarr[77] is of a different opinion that such arrangements allow freedom to parties where it might be difficult to calculate the value of the subject matter at the time of loss. The thesis agrees with this view that valued policies throws no doubt to the rules of indemnity but only relieves parties from arguing, especially when it is difficult to measure. On this basis, the thesis examines the operation of the exception of the indemnity principle in Nigeria in comparison to the English laws to justify the use of such policies.

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[71] Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016) 113.

[72] J.O. Irukwu, *Insurance Law in Africa: Cases, Statutes and Principle* (London Witherby & Co. Ltd 1987) 53; J.O Irukwu, *Fundamentals of Insurance Law*, (1st Edn, Witherbys Printing Ltd) 103.

[73] Andrew Lindblad, 'How Relevant Is the Principle of Indemnity in Property Insurance?' (1976) The Insurance Law Journal 271.

[74] Mohammed Reza and Rajabali Moradmahi, 'The Principle of Indemnity in Insurance Law' (2016) UCT Journal of Social Science and Humanities Research 3 suggests that the negative aspect *'is that no injured party should profit from the harmful act or the insured event and his situation improves more than past. The only thing that should be considered in the relations of insurer and policy holder is the positive dimension, unless the insurer improves its contrary';* As noted in *Hamilton v Mendes* (1761) 2 Burr 1198, 1214 Lord Mansfield stated '*the insurer .. . ought never to pay less upon a contract of indemnity, than the value of the loss, and the assured ought never to gain more.'*

[75] Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016) 238; Walter Williams, 'The Valued Policy and Value Determination' (1961) INS. L. J. 71,78; J.P. Van Niekerk, 'Maintaining the principle of indemnity: theory and practice', (1996) J. S. Afr. L. Journal of South Africa Law 572 where the indemnity principle was referred to as a *sterile cliché* because of its imperfect nature.

[76] Andrew Lindblad, 'How Relevant Is the Principle of Indemnity in Property Insurance?' (1976) The Insurance Law Journal 271; Kyriaki Noussia, *The Principle of Indemnity in Marine Insurance Contract: A Comparative Approach* (Springer Berlin Heidelberg, 2007) 29.

[77] A.A Tarr and J.A Kennedy, *Insurance Law in New Zealand* (2nd edn, The Law Book Company Limited 1992) 203.

Furthermore, as observed by Tarr, a large proportion of disputes in the insurance arena relate to the amounts recoverable under the policies of insurance.[78] The complex question of determining the appropriate measure of indemnity has generated a considerable volume of academic writing.[79] The thesis examines the legal principles on the assessment of an insured loss, and some particular area of difficulties. According to Lewis, the loss needs to be identified and quantified.[80]

Discussions on the indemnity principle is very limited in Nigerian literature, and there is little research carried out in Nigeria or by Nigerian academics to support discussions on the goals of this fundamental principle of indemnity. Based on the literature review, this study examines the purpose, nature and scope of indemnity as a foundation for discussions on other sub-principles. It is essential because a vast majority of policyholders are quite probably unaware of the intricacies of insurance and insurance law and the meaning of concepts like indemnity. In the context of the meaning of indemnity expressed in the works of literature mentioned above, the meaning, of indemnity under the Nigerian, English and Australian laws will be addressed in order to understand whether the word indemnity provided by the MIA 1961(Nig.), MIA 1906 (UK.) and MIA 1909(Aus.) respectively has the same meaning or whether it has a broader meaning. On this basis, it is imperative to examine the problems identified by commentators regarding insurable interest and subrogation, since some evidence suggests that there are deficient rules in this area that can lead to unfairness for the insured. This is not acceptable in insurance law and practice as noted by Vance, '*the purpose of insurance is indemnity, and indemnity only, and, whenever it is applied to any other purpose, such use is a pervasion of fraud and crime'.*[81]

[78] A.A Tarr and J.A Kennedy, *Insurance Law in New Zealand* (2nd edn, The Law Book Company Limited 1992) 11.
[79] Lakeman 'Measure of Indemnity (1980) 8 The Adjusters Journal 2; Robinson, 'The Measure of Indemnity' (1980) 8 The Adjusters Journal 15; Smith, 'Actual Cash Value (1980) 8 The Adjusters Journal 18; Olusegun Yerokun, *Insurance Law in Nigeria Insurance* (Princeton Publishing Company, 2013) 244; Charles Lewis, 'A Fundamental Principle of Insurance Law' [1979] LMCLQ 275; J Birds, 'The Measure of Indemnity in Property Insurance' (1980) 43 MLR 456.
[80] Charles Lewis, 'A Fundamental Principle of Insurance Law' [1979] LMCLQ 275.
[81] Vance, William R., *Handbook of the Law of Insurance* (1st edn, 1904) 21.

1.4.2. The Principle of Insurable Interest

The principle of insurable interest is derived from the fundamental principle of indemnity, and termed by Harnett as 'the very warp and woof of the enforceability of insurance contracts.'[82] As noted by Williams, to allow recovery when the policy owner has no interest in the property insured would be to sanction wagering, which the law will not do.[83]

From inception, the principle of insurable interest in indemnity insurance is an area full of much controversy which began to attract much attention from scholars dating back to the late 1940s.[84] Since then, a considerable amount of literature has been produced.[85] Although commentators have reached agreement on specific issues that have propelled law reform in many jurisdictions, it seems that some disagreements remain. A particular concern is its application to areas that often cause a problem with the implementation of the indemnity principle in indemnity insurance.

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[82] Bertram Harnett & John V. Thornton, 'Insurable Interest in Property: A Socio – Economic Revaluation of a Legal Concept' (1948) 48 Columbia Law Review 1162.

[83] William T. Vukowich, Insurable Interest: When It Must Exist in Property and Life Insurance, 7 (1971) Willametre L.J. 1, 12.

[84] The earliest commentary and criticisms on the requirement of insurable interest in property insurance was Bertram Harnett & John V. Thornton, 'Insurable Interest in Property: A Socio – Economic Revaluation of a Legal Concept' (1948) 48 Columbia Law Review 1162, 1164.

[85] The focus of the literature has been evolving based on old cases and archaic statues with the development of the English Law, in particular the common law court decisions. It seems that two stages could be roughly distinguished.

(1) Before 2000, the attention of the discussion was not on the connection of the principle of indemnity with the principle of insurable interest but on the economic analysis and measure of damages of the insurable interest. See for example Bertram Harnett & John V. Thornton, 'Insurable Interest in Property: A Socio – Economic Revaluation of a Legal Concept' (1948) 48 Columbia Law Review 1162, at 1184 - 1185 focus argument stated *that: 'Procurement of a policy of insurance is an investment prompted by commercial foresight. Based on economic analysis... there is only one true concept of insurable interest…'* Pinzur, 'Insurable Interest: A Search for Consistency' (1979) 46 Ins Counsel J 109; Gary I Salzman, 'The Law of Insurable Interest in Property Insurance' (1966) Ins LJ 394; Emeric Fischer, 'The Rule of Insurable Interest and the Principle of Indemnity: Are They Measures of Damages in Property Insurance' (1980) 56 Ind LJ 445.

(2) From 2000, the principle of insurable interest and the harsh consequences on the insured it has on the insured has begun to attract attention from commentators because the insurer began to raise technical objections to avoid liability and the inconsistencies of the legislation; Kyriaki Noussia, 'Insurable Interest in Marine Insurance Contracts: Modern Commercial Needs versus Tradition' (2008) 39 J Mar L & Com 81; J. Loshin, 'Insurance Law's Hapless Busybody: A Case Against Insurable Interest Requirement', (2007) 117 Yale L.J 474; Ahmed Tolu Olubajo, 'Pervasive Insurable Interest: A Reappraisal' Const. L.J. (2004) 20(2), 45-57; Sarah Derrington, 'Australia: Perspectives and Permutations on the Law of Marine Insurance' in *The Modern Law of Marine Insurance* edited by Prof D. Rhidian Thomas (LLP, Volume 2, 2002) Chapter 11, 371; Zhen Jing, 'Insurable Interest in Life Insurance: A Chinese Perspective' [2014] J.B.L. 337-360; Gary Meggitt, 'Insurable Interest – The doctrine that would not die' [2015] 35 (2) Legal Studies 280 – 301; Franziska Arnold-Dwyer, 'Insurance Law Reform by Degrees: Late Payment and Insurable Interest' [2017] 80(3) MLR 489, 505; John Dunt, *Insurable Interest and the Indemnity principle* (Marine Cargo Insurance 2nd Edn 2015) paras 4.1; Oyeniyi Ajigboye, 'A Review of the Doctrine of Insurable Interest Under the Marine Insurance Act In Nigeria' (2016) 7(3) The Gravitas Review of Business & Property Law; Meixian Song, 'Insurable Interest in the Law of Marine Insurance' [2011] 1 Southampton Student L Rev 75.

Controversy amongst scholars in this area is primarily caused by the lack of proper definition of insurable interest which will apply in all situations.[86] As Bockrath observed, insurable interest is 'difficult to define'.[87] While most statutory laws do not clearly define the concept, the court is also faced with a difficult task to define what amounts to an insurable interest.[88]

Similarly, old and current case law illustrates the inadequacy of the current definition of insurable interest in furthering the indemnity principle.[89] This is clear in leading cases like *Lucena,*[90] and *Macaura,*[91] which defined insurable interest in a way that limits the insured's recovery to legal and equitable ownership as against a factual expectation of loss. Despite the limitation, the legal and equitable approach is the law in Nigeria and the United Kingdom.[92] For this reason, there is a split of authority on which view best defines the nature of insurable interest.[93]

There is a view that criticises the legal and equitable theory approach as too 'narrow', 'strict' and 'restrictive'.[94] Several authors believe that the result derived by applying this test to certain

[86] For example, in 1891, Frederick H. Cooke on The Law of Life Insurance 58,90 called the doctrine of insurable interest, 'false, artificial and confusing; In 1918, another scholar lamented the great diversity of judicial opinion in Edwin W. Patterson, Insurable Interest in Life, 18 Colum. L. Rev. 381 -382 (1918); In 1948 another foremost critique Bertram, termed '*insurable interest is manifestly a misnomer'.* Bertram Harnett & John V. Thornton, 'Insurable Interest in Property: A Socio – Economic Revaluation of a Legal Concept' (1948) 48 Columbia Law Review 1162, 1164; By 1986, *the definition of insurable interest was still contradictory and vague* as noted by Franklin L. Best, Jr., Defining Insurable Interests in Lives, (1986) 22 Tort & Ins. L.J. 106; As observed by Loshin, the words that describe insurable interest are '*inconsistent', 'erratic', and 'ambiguous'*. J. Loshin, 'Insurance law's hapless busybody: A Case Against Insurable Interest Requirement', (2007) 117 Yale L.J 474, 486-488.

[87] Joseph Bockrath, 'Insurable Interest in Maritime Law' (1977) 8 J Mar L & Com 247; The authors Bertram Harnett & John v. Thornton, 'Insurable Interest in Property: A Socio – Economic Revaluation of a Legal Concept' (1948) 48 Columbia Law Review 1162, 1164 questions the terminology and suggested that the proper term is *'insurable relationships.*

[88] In Chalmers D, *Marine Insurance Act 1906* (10th edn, London Butterworths 1993) 11 Chalmers observed '*the definition of insurable interest has been continuously expanding, and dicta in some of the older cases, which would tend to narrow it, must be accepted with caution.'* Arnould J, Law of Marine Insurance and Average (16th edn, London Sweet & Maxwell 1981) Vol 1 para 362 expressed as follows '*The legal conception of insurable interest has been continuously expanding, and possibly the court may, on some future occasion, continue this procession of expansion…'*

[89] See chapter four, section 4.3. and 4.4. of the thesis for case law analysis.

[90] *Lucena v Craufurd* (1806) 2 Bos & Pul (NR) 269.

[91] *Macaura v Northern Assurance Company* [1925] AC 619; *Law Union and Rock Insurance Ltd v Livinus Onuoha* (1998) NWLR (pt. 555) 576.

[92] Sec 5 MIA 1906 (UK) and Sec 7 MIA 1961(Nig.).

[93] John F. Dobbyn, *Insurance Law in a Nutshell* (3rd Edn, Nutshell Series 1996) 82 observed that '*the debate between 'legal interest' and 'factual expectation' remains one of the most ancient yet continuing controversies engendered by the insurable interest doctrine;* As noted by Pinzur, '*both approaches have built strong housings, but neither has planted a firm and fixed hold over the world of insurable interest'*. R Pinzur, 'Insurable Interest a Search for Consistency' [1979] 46 Ins. Counsel J. 109,129.

[94] John Birds, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell 2019) 63; D. Rhidian Thomas, *'Insurable Interest: Accelerating the Liberal Spirit'* in Rhidian Thomas eds, Marine Insurance: The law in Transition (Informa, London 2006) 31; Kyriaki Noussia, 'Insurable Interest in Marine Insurance Contracts: Modern Commercial Needs versus Tradition' (2008) 39 J Mar L & Com 81. As Professor Robert Keeton *has*

situations leads to injustice and believe that the test is 'unfair' and 'unreasonable'.[95] By contrast, Vance supports the view that an insurable interest is only maintainable when the insured has some legally enforceable relationship to the property.[96]

Based on judicial concerns, the reason why a limit of ownership is used as a yardstick of who could insure is that a broader definition of insurable interest would lead to too much insurance.[97] However, it is argued by Thomas that there is every possibility that certain people may have many economic interests in a property they do not formally own.[98] For this reason, a legal interest test is suggested to be a poor yardstick for measuring a person's actual interest in a property.[99] As suggested by Keeton, the legal interest test 'traps the unwary person whose interest truly satisfies the principle of indemnity rather than to advance that principle'. [100] Similarly, the operation of the legal interest approach of insurable interest has been extensively criticised in the context of marine insurance as being inconsistent with the principle of indemnity.[101]

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pointed out: The conclusion seems inescapable that Lord Eldon's conception of insurable interest included a requirement of some kind of legally enforceable right. It also appears that, when finding such a legally enforceable right, he would have found an insurable interest even if the factual expectation was that the right would be economically worthless.' Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016) 149.

[95] Clarke, M, *Policies and Perceptions of Insurance: An Introduction to Insurance Law* (Oxford: Clarendon Press, 1997) 32; Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 204.

[96] William R. Vance, *Handbook of the Law of Insurance* (3rd Edn, St. Paul, West Publishing Company 1930) 156.

[97] According to Lord Eldon in *Lucena v Craufurd* (1806) 2 Bos & Pul (NR) 269, 651 – 652 opined that *'If moral certainty be a ground of insurable interest, there are hundreds, perhaps thousands, who would be entitled to insure'.*

[98] D Rhidian Thomas stated that: 'Although a shareholder does not have an insurable interest in the property of the company '*... a shareholder does have an insurable interest in the value of the share and in the commercial adventures of the company'*. See D. Rhidian Thomas*, 'Insurable Interest: Accelerating the Liberal Spirit'* in Rhidian Thomas eds, Marine Insurance: The law in Transition (Informa, London 2006) 31.

[99] Jacob Loshin, 'Insurance Law's Hapless busybody: A case against insurable interest requirement', (2007) 117 Yale L.J 474, 487; J Hjalmarsson, 'Legal or Equitable Relationship to Insured Subject-matter as a Determinant of Insurable Interest- The Approaches of English and Swedish law, (2008) L.M.C.L.Q 97.

[100] Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016) 149.

[101] Bockrath, submits that the '*insurable interest picture is somewhat less clear in the case of the cargo seller or owner'*;Joseph Bockrath, 'Insurable Interest in Maritime Law' (1977) 8 J Mar L & Com 247, 250; Derrington, '*there is a legal impediment in principle to the insurance of goods before loading aboard a ship which deprives a purchaser of goods of seeking cover for any loss of the value of the goods or any profit that it might earn from them with the risk attaching as soon as the goods are paid for'*; Sarah Derrington, 'Australia: Perspectives and Permutations on the Law of Marine Insurance' in *The Modern Law of Marine Insurance* edited by Prof D. Rhidian Thomas (LLP, Volume 2, 2002) Chapter 11, 372; According to M Taylor 'Is the Requirement of an Insurable Interest in the Marine Insurance Act Still Valid?' (2000) 11 Insurance Law Journal 147, 149-50 '*When a buyer purchases goods on FOB terms (which are desirable because of their flexibility), unless the insurer provides 'lost or not lost' or other pre-shipment cover, the buyer will be uninsured for the goods prior to loading. In these circumstances, unless the buyer can recover from the seller or carrier, its position may be hopeless'.*

On the contrary, there is massive support for a broader definition of insurable interest by applying the factual expectancy test.[102] Thomas suggested that if the 'insurance is commercially comprehendible, sensible and justified, there is little or no reason to justify the law interfering and frustrating the reasonable commercial expectations of the parties.[103]As indicated by Merkin, there are situations whereby an insured is reliant upon a particular subject-matter for specific purposes but without having any legal or equitable ownership of it or right to possess it.[104] Merkin, further reiterates that the legal interest approach shuts its eyes to economic realities, but believes that a broader test meets current commercial practices.[105] For this reason, is suggested the factual expectation test better reflects actual interests in property, mainly because it accommodates one's real-world expectation in a property over formal property rights.[106]

The crucial question is to what extent do any of the approaches support the rule of indemnity by not preventing an insured from recovering all his losses. While some scholars praise the legal interest test for being simple to apply,[107] others suggest 'it is an imperfect tool to further the public policy against wagering'.[108] Again, it is suggested that though the application of the legal interest rule leads to harsh justice, but it can be corrected.[109] Zhen opines that it is too

[102] Bertram Harnett & John v. Thornton, 'Insurable Interest in Property: A Socio – Economic Revaluation of a Legal Concept' (1948) 48 Columbia Law Review 1162, 1164 argues that '*Factual expectation of damage should be the exclusive test of an insurable relationship. To those who cling to strict property delineations in fear of the process of drawing the line between a genuine factual expectation of damage and a wager, it can be said not only that judicial wisdom is equal to the task, but that a just line drawn with difficulty exceeds in value a simple line which works disproportionate injustice.'* Theodore Greenberg, 'Factual Expectation of Loss as an Insurable Interest in Property' (1952) 7 Intramural L Rev NYU 185, 194 suggested that '*a clear business interest based on a factual expectation of loss should be held insurable'*

[103] D Rhidian Thomas, Insurable interest: Accelerating the liberal spirit' in D Rhidian Thomas (eds), Marine Insurance: The Law in Transition (Inform, London 2006)45; According to MacIntosh "Insurable Interest: The Supreme Court of Canada adopts the Factual Expectancy Test" (1987- 1988) 13 Can Bus LJ 226 '*the decision in Kosmopoulous is bold'.*

[104] Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 204. For example, a street vendor who pitches his stall outside a building housing a public attraction has no interest in the building as far as the legal interest is concerned but may be able to insure that building based on the factual expectation of loss.

[105] Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 204; Clarke observed that '*the law states a rule, which most people do not expect in the first place, and then confuses them further with special cases…. the requirement of insurable interest is too constricting and no longer meets the needs of the day and the rule has been stretched by the realities and requirement of practice.'*Clarke M, *Policies and Perceptions of Insurance: An Introduction to Insurance Law* (Oxford: Clarendon Press, 1997) 32.

[106] Jacob Loshin, 'Insurance Law's Hapless busybody: A case against insurable interest requirement', (2007) 117 Yale L.J 474, 487.

[107] Ibid p 486.

[108] Jacob S. Ziegel, 'Shareholder's Insurable Interest--Another Attempt to Scuttle the *Macaura* v. *Northern Assurance Co.* Doctrine: *Kosmopoulos* v. *Constitution Insurance Co.*' (1984), 62 *Can. Bar Rev.* 95,102-103. See section 4.4. for more analysis of scholar's opinion.

[109] *Constitution Insurance v Kosmopoulous* (1987) 34 DLR (4th) 208).

rigid.[110] Bockrath is of the view that the extension of the concept of insurable interest developed; to wit, to halt wagering, seem too extreme.[111]

On the contrary, some scholars reject the factual expectancy test as not 'too good enough' and 'vague' because it requires 'discerning a subjective expectation'. Hence it does not remain easy to apply.[112] There are possible difficulties like evaluating the exact expectation expected of the insured. Other scholars like Kyriaki,[113] argue that the legal interest approach does not suit the modern commercial need. The author agrees with the view that a better, fairer and reasonable approach is the factual expectancy test rather than legal interest test for the Nigerian jurisdiction because it allows the insured to recover actual losses. If legal interest is adopted for the abuse of excessive insurance, then there is a way out. As suggested by Thorton, insurance carriers have options to decline risks or insert protective clauses.[114] Alternatively, as indicated by Clarke, the insurers also have a duty to investigate a risk.[115] It is submitted that an insurer who accepts a risk, knowing fully well the conditions attached to it, must be willing to pay. This appears to be a significant problem with insurance in Nigeria because the potential is underdeveloped.[116]

Other arguments concern how insurers take advantage and use the lack of insurable interest as a defence to avoid liability. Loshin referred to this situation as 'exploitation'.[117] It often penalises only the insured without a remedy, which means that an insurer who received premium can walk away without any consequences or penalty even when there has been some negligence on their path. Unfortunately, the law does not hold them accountable for a duty of care. For this reason, the consequence of the lack of insurable interest is agreed by the author

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[110] Zhen Jing, *Chinese Insurance Contracts Law and Practice* (Informa law from Routledge 2017) 179 'The author in this book, compares the Chinese Law on insurable interest and the English law.

[111] Joseph Bockrath, 'Insurable Interest in Maritime Law' (1977) 8 J Mar L & Com 247, 250.

[112] Jacob Loshin, 'Insurance Law's Hapless busybody: A case against insurable interest requirement', (2007) 117 Yale L.J 474, 487 suggested that '*The modern factual expectation test usually requires that the economic expectation be 'substantial' and therein lies the rub. Determining what counts as a substantial factual expectation involves a necessarily subjective, fact-bound, case-by-case approach.'*

[113] Kyriaki Noussia, 'Insurable Interest in Marine Insurance Contracts: Modern Commercial Needs versus Tradition' (2008) 39 J Mar L & Com 81, 96.

[114] Bertram Harnett & John v. Thornton, 'Insurable Interest in Property: A Socio – Economic Revaluation of a Legal Concept' (1948) 48 Columbia Law Review 1162, 1175.

[115] Malcome Clarke, M, *Policies and Perceptions of Insurance: An Introduction to Insurance Law* (Oxford: Clarendon Press, 1997) 38.

[116] Agomo, *noted that insurance companies have a poor image and members of the public would avoid them like and the reason for the distrust is because of the readiness of insurers to accept premiums and their unwillingness to settle claims when the need arises'.* Agomo, 'Some thoughts on the Attitude of Insurers towards Insurance Claims' (1985) 15 The Lawyer 66; See chapter 2 for insurance challenges in Nigeria.

[117] Jacob Loshin, 'Insurance Law's Hapless busybody: A Case Against Insurable Interest Requirement',(2007) 117 Yale L.J 474, 494.

to be very imbalanced. Furthermore, while some scholars[118] view insurable interest as a necessity for indemnity insurance, others[119] argue that the doctrine should be discarded from the history of insurance law. The thesis examines both views and determines whether insurable interest plays a fundamental role in insurance law.

Interestingly, the debate on insurable interest has not ended.[120] The sensitivity has resulted in several reports and consultations of the Law Commission with proposals for an expansion of the principle of insurable interest.[121] However, scholars are so much divided whether the draft Insurable Interest Bill 2016 does improve the current state of the English law.[122] Similarly, scholars also support the modification to insurable interest proposed by the Australian Law Reform Commission.[123]

Based on the above literature review, if insureds have suffered an actual economic loss caused by an insured risk, but cannot prove legal ownership, he will be prevented from recovery. Meaning that insurable interest in a property is enjoyed by limited people in the eyes of the law, but many people with significant economic interest that invested time, money and effort in property are left out. By contrast, the principle of indemnity states that the insured must be fully compensated for his losses. However, there is a limitation on the current Nigerian insurance law that prevents recovery of actual economic losses which is inconsistent with the

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[118] Joseph Bockrath, 'Insurable Interest in Maritime Law' (1977) 8 J Mar L & Com 247, 249; Meixian Song, 'Insurable Interest in the Law of Marine Insurance' [2011] 1 Southampton Student L Rev 75,79

[119] Gary Meggitt, 'Insurable Interest – The doctrine that would not die' [2015] 35 (2) Legal Studies 280 mentioned that insurable interest ought to be '*consigned to the proverbial dustbin of history, because it undermines the very aim it purports to advance*'. Similarly, Loshin indicated that, '*the failure to resolve the problems of insurable interest suggests an inherent and irresolvable dilemma'*. Jacob Loshin, 'Insurance Law's Hapless Busybody: A case against insurable interest requirement', (2007) 117 Yale L.J 474, 477, 486; Oyeniyi Ajigboye, 'A Review of the Doctrine of Insurable Interest Under the Marine Insurance Act In Nigeria' [2016] 7(3) The Gravitas Review of Business & Property Law.

[120] M. Templeman, '*Insurable Interest: A Suitable case for treatment*? In Baris Soyer (eds), Reforming Marine and Commercial Insurance Law, (Informa, 2008) 208 mentioned that *'common and civil law jurisdictions of insurance law have been troubled by the complex nature of the insurable interest concept'.* Robert Merkin, 'Reforming Insurance Law: Is There A Case for Reverse Transportation? A Report for the English And Scottish Law Commissions on the Australian Experience of Insurance Law Reform' (2007) 79 '*the current English approach which is argued to be in a 'confused state' and in an 'illogical mess'*. Hjalmason suggests, *it has caused inefficiency in the financial market*'…J Hjalmarsson, 'Legal or equitable relationship to insured subject-matter as a determinant of insurable interest- the approaches of English and Swedish law', (2008) L.M.C.L.Q 97.

[121] Law Commission of England and Wales and Scottish Law Commission Joint Consultation Paper on *Insurance Contract Law: Post Contract Duties and Other Issues* (Law Com CP No. 201/Scot Law Com No. 152, 2011) Chapter 3, Part 10. Paras 10.2 (2) noted that '*the law was in a confused state by reason of the law is a bewildering mixture of common law and statute; the definition of insurable interest is uncertain*; the doctrine differs depending on the type of insurance; See section 4.7, chapter 4 of the thesis for more discussions.

[122] Franziska Arnold-Dwyer, 'Insurance Law Reform by Degrees: Late Payment and Insurable Interest' [2017] 80(3) MLR 489; Zhen Jing, *Chinese Insurance Contracts Law and Practice* (Informa law from Routledge 2017) 176.

[123] Law Reform Commission Report, No 20, Insurance Contracts para 118 '*all the law needs is what it has already got: A rule against voluntary destruction and the principle of indemnity'.*

nature of the indemnity principle. To get rid of these judicially created abnormalities, a reviewed legislation is needed and proposed by this research. Thus, the weaknesses and deficiencies of insurable interest under the Nigerian law will be critically analysed in order to see whether applying a broader approach such as the factual expectancy test could be a fairer or more reasonable test that reflects the principle of indemnity.

1.4.3. The Doctrine of Subrogation

The principle of subrogation is derived from the fundamental principle of indemnity, which, according to Couch,[124] ought only to carry out the aim of indemnity.' However, the principle of subrogation is rarely criticised, nor has it been considered for legal discussions for the past hundred years in the Nigerian and English courts and even among academic writers.[125] As indicated by Reuben, 'it is one of the areas in insurance law and any legal subject that received less attention over the years compared to other principles of insurance law.'[126] Nevertheless, Green noted substantial areas of subrogation that tends to be dealt with inadequately by subrogation clauses included in insurance policies.[127]

There is a view that the meaning of the law of subrogation has been misconceived, thereby leading to confusion. For example, Zhen[128] noted that subrogation is often confused with an assignment, while Eggers, noted that subrogation is an '*ill-defined'* or '*ill-understood'* word.[129]

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[124] George James Couch, Cyclopedia of Insurance Law (1997), 6590; Similarly, Joyce, states that '*marine and fire insurance is a contract of indemnity, and it is for the purpose of carrying out this principle that the doctrine of subrogation has been adopted…the insured might often recover more than a full indemnity, and to prevent such a result the courts have adopted the rule that the insured shall be entitled to only one full indemnity for the injury sustained…'* Joyce, Insurance (2d ed. 1917) 5880.

[125] Nigerian Law Reform Commission in 1986 did not review the principle of subrogation.

[126] Reuben Hasson, 'Subrogation in Insurance Law - A Critical Evaluation' (1985) 5 Oxford J Legal Stud 416: '*it is worth considering why the doctrine of subrogation has attracted so little critical attention from legal writers. In the first place, most writing in the law of insurance has been aimed at practitioners and there is a feeling (perhaps justified) that practitioners are not interested in policy debates. Second, the doctrine of subrogation is at least two centuries old that doctrine as being an indispensable'*. More recently in 2016, the IBA in its IBA Insurance Committee Substantive Project Report on 'Insurers' Rights of Recovery Subrogation /Recourse' (2016), produced a report on the law of subrogation in several countries and showed that subrogation rules differ from country to country.

[127] Andrew Green, 'Strengthening the Insurer's Subrogation Rights' (1995) International Insurance Law Review 348. According to Parker, '*subrogation occurs at the expense of the insured and benefits the insurer more which is likely one of the reasons why insurer have less concerns with problematic aspects of the law'*; Johnny C. Parker, The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation (2005) 70 Mo. L. Rev. 723.

[128] Zhen Jing, 'The Confusion between Subrogation and Assignment in the Insurance Law of the People's Republic of China 1995: A Critical Analysis on Article 44 of the Insurance Law' (2002) J.B.L. 608, 609.

[129] Peter MacDonalds Eggers QC, 'The Place of Subrogation in Insurance Law: The Deception Depths of a Difficult Doctrine' in *The Modern Law of Marine Insurance* edited by Prof D. Rhidian Thomas (Informa Law from Routledge, Volume 4, 2016) 195; C Mitchell, *The Law of Subrogation* (Oxford, Clarendon Press, 1994) 68-

Other scholars[130] question its usefulness in insurance law. Albeit the confusion, the goal of subrogation in insurance law appears simple, with several theories advanced in support, yet complicated in application.[131]

There is disagreement as to the legal basis of the rights of subrogation, with two conflicting views advanced.[132] They are whether subrogation theories are founded on equitable principles or contractual terms by operation of law.[133] Derhams' survey of the authorities concluded that the doctrine of subrogation should be regarded as an equitable doctrine and the same is with other scholars.[134] The thesis reviews in details recent court decisions and its significance to the law of subrogation under the Nigerian insurance law.

There are two limbs of subrogation universally agreed upon by scholars.[135] Merkin calls this the positive and the negative side.[136] The negative side is that the insured cannot make a profit and the aspect of the insurer's right against a third party is the positive side.[137] Both sides are crucial, but scholars have divided views on the second limb, which is the point at which insurers can exercise their subrogation rights.[138] As indicated by Ozlem, the English statutory provision of subrogation in sec 79 MIA 1906 is not a model of clarity.[139]

74; In addition, this confusion could be alluded to the fact that subrogation is not only fundamental to insurance law but of comprehensive and extensive application to restitution and sureties; See Goff and Jones, *The Law of Restitution* (6th edn, London: Sweet and Maxwell, 2002) 523; Festus Esiri, *The Law of Restitution in Nigeria* (Malthouse Press Nigeria 2012); In *Banque Financiere de la Cite v Parc (Battersea) Ltd* [1999] 1 AC 221,231 (Lord Hoffman); As Lord Hoffman remarked that '*the subject of subrogation is bedevilled by problems of terminology and classification which are calculated to cause confusion'*

[130] Reuben Hasson, 'Subrogation in Insurance Law--A Critical Evaluation' (1985) 5 Oxford Journal of Legal Studies 416-438.

[131] Ronald C. Horn, *Subrogation in Insurance Theory and Practice* (Homewood, Illinois, Richard D. Irwin, Inc. 1964) 371 observed that *'Subrogation has long been one of the mysteries of the insurance business. The law of subrogation has been inadequately stated and understood; statistical or even descriptive information about insurance company practices and recoveries has been very difficult to procure. Indeed, a curious thing about the insurance business-a business that necessarily deals statistically with great masses of information is the large amount of relevant and useful information that is not accessible.'*

[132] See Sec 5.2.0., chapter 5 of the thesis for further discussions.

[133] John Birds, *Birds' Modern Insurance Law*, (10th Edn, Sweet & Maxwell 2016) 328; John Birds, Ben Lynch and Simon Paul, *MacGillivary on Insurance Law* (1st Supp 14th edn, Sweet & Maxwell 2019) 726; Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2016) 724; James M. Mullen, The Equitable Doctrine of Subrogation, (1939) 3 Maryland Law Review 202.

[134] S. R. Derham, *Subrogation in Insurance Law*, (The Law Book Company Limited, 1985) 22; Powles, 'Subrogation in Equity, Implied Terms and Exclusions' (1974) 90 LQR 34, 38-39.

[135] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 383; Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2016) 623 para 11-002.

[136] Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 761.

[137] Omo -Eboh, 'The Doctrine of Subrogation in Nigerian insurance Law and Practice – An overview (1987) 2 Legal Practitioners' Review 43.

[138] Nicholas Pengally, 'When can an Insurer exercise its Right of Subrogation?' (2013) 24 Insurance Law Journal 89.

[139] Ozlem Gurses, *Marine Insurance Law* (Routledge, 2nd edn, 2017) 257.

Omo-eboh, who is a leading Nigerian author, also observed that there are some shortcomings associated with the application of the principle of subrogation which is not clearly expressed by sec 80 MIA, 1961.[140] Similarly, Pengally,[141] observed that the judgement of the court in *Castellain v Preston*[142] is difficult to interpret and inferred that the court intended that the ability to exercise the right should arise once payment had been made under the policy. Pengally opined that this view is fallacious, but many scholars have endorsed it over the century.

As a consequence, there is a controversial understanding of the meaning of 'full indemnity' from subrogation monies. While there is every possibility that achieving full indemnity might be complex in reality, Parker emphasised that the equitable principle was designed to achieve fairness between the parties to a subrogation dispute.[143] The problem is that various writers have wrongly asserted that the insurer does not acquire rights of subrogation until the insured has received a full indemnity against its total loss (that is, insured and uninsured), even though the insurer has met in full obligations under the insurance contract.[144] The lack of judicial pronouncement contributed to the controversy until recently when some clarity was established in case law.[145] The current law about this issue is examined in details in the body of the thesis. The Nigerian and English approach to the issue will be critically analysed to clarify the understanding of this area in the Nigerian insurance context.

Another major problem debated upon is the method by which the proceeds of subrogated recoveries should be allocated, where the policyholder has sustained both insured and uninsured losses.[146] On this issue, scholars point out that the court's case law has been divided

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[140] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 382; Omo -Eboh, 'The Doctrine of Subrogation in Nigerian insurance Law and Practice – An overview (1987) 2 Legal Practitioners' Review 43.

[141] Nicholas Pengally, 'When can an Insurer exercise its Right of Subrogation?' (2013) 24 Insurance Law Journal 89, 93-94.

[142] *Castellain v. Preston* (1883) 11 Q.B.D. 380, 387.

[143] Johnny C. Parker, The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation (2005) 70 Mo. L. Rev. 723.

[144] Andrew Green, 'Strengthening the Insurer's Subrogation Rights' (1995) International Insurance Law Review 348,349; Malcome A Clarke with Julian M Burling and Robert L Purves, *The Law of Insurance Contracts* (6th edn, Informa 2009) 1028 para. 31-3B1; Bunyon, *Bunyon's Law of Fire Insurance* (7th Edn, Charles & Edwin Layton 1913) 274; John Lowry, Philip Rawlings and Robert Merkin, *Insurance Law, Doctrines and Principles* (3rd edn Hart Publishing Oxford and Portland Oregon 2011) 353; Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 383, 388. John Birds, *Birds' Modern Insurance Law*, (11th Edn, Sweet & Maxwell 2019) 338.

[145] *Lord Napier and Ettrick v Hunter* [1993] AC 713; See section 5.4.1. chapter 5 for further discussions.

[146] Jeffrey A. Greenblatt, 'Insurance and Subrogation: When the Pie Isn't Big Enough, Who Eats Last? (1997) 64(4) Chicago Law Review 1337, 1339: *The question of priorities has generated considerable confusion in the courts. Some courts require the insured to be fully compensated before the insurer recovers its outlays; others*

on different methods of allocation.[147] As a result, there is strong support for giving priority to the insured based on the principle of indemnity,[148] and others give priority to the insurer which means the insurer is permitted to recover before the insured has been made whole.[149] Others scholars agree that the pro-rata approach (a middle road) is the best.[150] The author disagrees with the notion that the insurer should have priority because it deprives the insured of a full right of recovery of actual losses. The issue of distribution of subrogation recovery was addressed by the English court in *Napier v Hunter.*[151] Scholars welcomed the decision because it clarified how recoveries should be allocated. However, many English scholars have strongly criticised the English approach relating to underinsurance and excess clause situation because worsens the position of the insured, and it is in favour of insurers.[152]

The aspect of distribution has also been a topic of discussion amongst Australian scholars.[153] Before the review of the Australian law on the destination of subrogation recoveries, the old

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require the insurer to be compensated before the insured is paid (also called pro tanto); yet others require pro rata sharing. The only unanimity in the courts is a categorical rejection of insurer first as a default rule; J Birds, "Insurance: Subrogation in the House of Lords", (1993) J.B.L 294; A Tarr, "Subrogation and the Ash Wednesday bushfire disaster", (1987-1988) 11 Adel. L. Rev. 232; M.A Clarke, *The Law of Insurance Contracts* (6th edn, Infoma, 2009) 1029-1030; G Veal, "Subrogation: The duties and obligations of the insured and rights of the insurer revisited", (1992) 28 Tort & Ins. L.J 69, 74; M Hemsworth, 'Subrogation: The Problem of Competing Claims to Recovery Monies' (1998) J.B.L 111,114.

[147] S. R. Derham, *Subrogation in Insurance Law*, (The Law Book Company Limited, 1985) 133; As noted by the author in Jeffrey A. Greenblatt, 'Insurance and Subrogation: When the Pie Isn't Big Enough, Who Eats Last? (1997) 64(4) Chicago Law Review 1337, 1343 '*Most American courts have held that a clause providing that the insurer 'shall be subrogated . . . to the full extent of the value of ... its payments, explicitly gives first priority to the insurer. But at least one court has held that similar language was not sufficiently explicit. And at least one court has invoked the made-whole doctrine despite a clause expressly designed to circumvent subrogation and it made-whole limitations'.*

[148] Kyriaki Noussia, *The Principle of Indemnity in Marine Insurance Contract: A Comparative Approach* (Springer 2010) 242; Susan Hodges, *Cases and Materials on Marine Insurance Law* (Cavendish Publishing Limited, 1999) 610; Peter MacDonalds Eggers QC, 'The Place of Subrogation in Insurance Law: The Deception Depths of a Difficult Doctrine' in *The Modern Law of Marine Insurance* edited by Prof D. Rhidian Thomas (Informa Law from Routledge, Volume 4, 2016) 192; M Luey, 'Proprietary remedies in insurance subrogation' (1995) 25 Victoria. U. Wellington. L. Rev. 449, 457.

[149] A critical analysis is provided for in Sec 5.4.2., chapter 5 of the thesis.

[150] Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016) 203.

[151] In *Lord Napier and Ettrick v Hunter* [1993] AC 713 the court adopted the 'top down' approach.

[152] J Birds 'Insurance: subrogation in the House of Lords' (1993) J.B.L 294, 298 *'the doctrine of subrogation which was developed in order to prevent an insured from being overcompensated is now operating in effect to deprive him of an indemnity against his loss'.* Clarke also criticises the judgement in *Napier* as been too harsh on the insured .M.A Clarke, The Law of Insurance Contracts, (6th edn, Infoma, 2009) 1029; Zhen Jing, 'The Confusion between Subrogation and Assignment in the Insurance Law of the People's Republic of China 1995: A Critical Analysis on Article 44 of the Insurance Law' (2002) J.B.L. 608, 624.

[153] D Kelly and M Ball, *Principles of Insurance Law in Australia and New Zealand* (Butterworths Sydney 1991) 512; F Marks and A Balia, '*Guidebook to Insurance Law in Australia* (3rd ed CCH Sydney 1998) 524-525.

sec 67, ICA 1984 was not a model of clarity as noted by legal practitioners.[154] For this reason, the Australian Law Commission, through discussion papers, and reports drafted a Bill to simplify sec 67 ICA that seemed difficult to interpret. [155] After an analysis of the current law in Australia regarding subrogation recoveries, the study concludes that the current law in this jurisdiction is more robust.[156] Zhen,[157] and Hemsworth,[158] suggest that the Australian insurance law provides a suitable model in respect of the allocation of subrogation recoveries. This is because the insured's interest is seen as a priority. The thesis agrees with the view that the insured's priority should come first from subrogation recoveries because the principle of indemnity is bound up with the doctrine of subrogation and are indeed complementary to it. Thus, where double recovery is not in issue, the insurer should not take priority until the insured has been fully indemnified.

Based on the above literature, if insureds have suffered an actual loss not covered by the policy, and not given priority, he is deprived of full indemnity, leaving the burden of going uncompensated on the insured. By implication, the essence of subrogation could be abused by insurers seeking to recoup what has been paid out. However, under the Nigerian insurance rules, there is no specific rule to address this issue, which is problematic because it leaves the insured in a worse position of not been fully indemnified. Unfortunately, the English law often relied upon is not problem-free. The thesis argues that in the absence of any clear judicial rule or statutory provision, apportionment of subrogation monies is more difficult, especially, where there is a contention by the insured party not been fully compensated. This is a likely problem which the Nigeria insureds will encounter.

Furthermore, some academic writers criticise situations in which subrogation may give rise to difficulty in certain relationships. One instance is where a member of the insured's family

[154] Even legal practitioners found this scope as one which creates problem in practice. For example, More accurately described by the firm of Allens Arthur Robinson, 'as a difficult section to interpret and has been a subject of controversy'. Subrogation by M Skinner & J. Coss, 'Subrogation at online http://www.allens.con.au/pubs/pdf/insure/pap7jun assessed 10th Auguste, 2018.

[155] Insurance Contracts, Australian Law Reform Commission Report No 20; Review Panel Report on the Review of the Insurance Contracts Act 1984 Final Report on second stage: Provisions other than section 54 (Australian Treasury, 2004) paragraphs 11.14-11.30; W I B Enright, Robert Merkin, *Sutton on Insurance Law* (4th edn, Thomson Reuters 2015) Volume 2 334.

[156] Australian Law Reform Commission (ALRC) Review of the Marine Insurance Act 1909 (Report 91), April 2001 paras 12.11 - 12.12.

[157] Zhen Jing, 'The Confusion between Subrogation and Assignment in the Insurance Law of the People's Republic of China 1995: A Critical Analysis on Article 44 of the Insurance Law' (2002) J.B.L. 608, 625

[158] Hemsworth, 'Subrogation: The Problem of Competing Claims to Recovery Monies' (1998) J.B.L 111,114.

caused the loss.[159] There have been controversies as to whether granting immunity to these categories of persons would defeat the goals of subrogation.[160] The research makes findings into whether there are statutory rules under the Nigerian laws that restricts subrogation actions against such persons. If there are no such rules, then reforms are suggested.

1.5. Research Questions

As noted by McConville, research questions must be specific and answerable.[161] There are four research questions in this thesis that relates to indemnity insurance on the principles of indemnity, insurable interest, and subrogation. It is hypothesised that 'Nigerian insurance law deprives the insured of obtaining full compensation for actual economic losses suffered, which do not fully reflect the aims of the indemnity principle'. Thus, the questions of inquiry in the thesis are as follows:

1) What is the meaning, nature and purpose of the indemnity principle in insurance as enacted in the Nigerian laws, English laws and Australian laws?[162]
2) How can the current legal interest test of insurable interest in indemnity insurance under the Nigerian laws be redefined for fairness to reflect the nature of the principle of indemnity in comparison to the English laws and Australian laws?[163]
3) How should subrogated monies recovered from third parties be distributed between the insurers and insured to reflect the nature of the indemnity principle under the Nigerian laws, in comparison with the English laws and Australian laws?[164]
4) What reforms are essential to resolve the problems of insurable interest and subrogation, which undermines the nature of the indemnity principle under Nigerian laws?[165]

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[159] S. R. Derham, *Subrogation in Insurance Law*, (The Law Book Company Limited, 1985) 44; Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 404.
[160] Robert Merkin, 'Reforming Insurance Law: Is There A Case for Reverse Transportation? A Report for the English And Scottish Law Commissions on the Australian Experience of Insurance Law Reform' (2007) 85. ALRC 20, para 305.
[161] Mike McConville and Wing Hong Chui, *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 55; N. Blaikie, *Analyzing Quantitative Data* (London: Sage, 2003) 13; R.K. Yin, *Case study Research: Design and Methods* (London: Sage Publications 1989) 17; Asking the familiar questions of 'who, 'what', 'where', 'how' and 'why' may lead the student towards placing appropriate boundaries around the research problem; S.R. Cummings, W.S. Brownere and S.B Hulley, 'Conceiving the research question' in S.B. Hulley, S.R. Cummings. W.S. Browner, D. Grady and T.B. Newman (eds), *Designing Clinical Research* (4th edn Philadelphia, PA: Wolters Kluwer Health, 2013)14 -22.
[162] Chapter three of the thesis provides answers to this research question.
[163] Chapter four of the thesis provides answers to the research question.
[164] Chapter five of the thesis provides answers to the research question.
[165] Chapter six of the thesis provides answers to the research question.

1.6. Methodology

The goal of any legal scholarship is attained when it follows a unitary approach and the strategy utilised is replicable for subsequent researches in the area of inquiry. This study is a qualitative legal research [166] and adopts a doctrinal and comparative legal research methodology.[167] This type of methodology is adopted for this type of research because it is the most dominant method utilised for comparative law research in common law countries.[168] As indicated by Birds, insurance principles are best presented in a doctrinal way.[169]

First, the thesis is undertaken by a comparative approach. It is essential because the comparative study of laws between two or more legal systems is a better way to improve one's own country's law. The study, therefore, follows the commonly employed methodology in comparative law research to measure and compare whether the applications and interpretation of Nigerian insurance law principles meet up with international standards and for improving domestic law and legal doctrines.[170] To achieve this purpose, the research will compare the Nigerian laws with the English and Australian insurance laws and other country's laws (where

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[166] A Qualitative legal research is defined as simply non- numerical and the aim is to provide an in-depth and interpreted understanding of a subject matter by learning about other countries' perspectives and histories. This work adopts Epstein and King's assertion that a qualitative legal research is empirical in nature based on observations of the world, in other words, data, which is just a term for facts about the world. These facts may be historical or contemporary, or based on legislation or case law, data, economic and legal…'; See L Epstein and G. King, 'Empirical Research and the Goals of Legal Scholarship: The Rules of Inference' (2002) 69 University of Chicago Law Review 1; Mike McConville and Wing Hong Chui, *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 19; Jane Lewis, Carol McNaughton Nicholls, and others, *Qualitative Research Practice: A Guide for Social Science Students and Researchers* (4th edn Sage publishers 2014) 3.

[167] In Mike McConville and Wing Hong Chui, *Research Methods for Law* (2nd edn, Edinburgh University Press 2017) 24 the authors opine that:

> '*…Doctrinal research is not simply a case of finding the correct legislation and the relevant cases and then making a statement of law which is objectively verifiable. It is a process of selecting and weighing materials, taking into account hierarchy and authority as well as understanding social context and interpretation…'*

[168] Most common law countries have a similar pattern of law. In terms of proposing recommendations, these countries depend on relevant Law Commission's views on any matter especially relating to Insurance law for a major recommendation. For example, the United Kingdom in 2015, followed the Australian pattern to reform the Doctrine of Utmost good faith that produced the Insurance Act, 2015.

[169] John Birds, *Birds' Modern Insurance Law*, (11th Edn, Sweet & Maxwell 2019) 1.

[170] Comparative law is comparing the rules or (norms) in one system with rules in another. As Mathias summarised, the purpose of comparative law in legal research is achieved by having knowledge and understanding of foreign laws, examining the background of the domestic and foreign legal rules, identify whether a better legal rules can be applied to a domestic legal problem and find how the legislature can transplant these rules into its domestic laws to solve future problems. Siems Mathias, *Comparative Law* (2nd edn Cambridge University Press 2018)1; Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart publishing 2014) 12; H. Patrick Glenn, 'The Aims of Comparative Law', in J.M. Smits (eds.), *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar 2006) 57-65; E. Orucu,' Developing Comparative Law' in E Orucu & D. Nelken (eds.), *Comparative Law: A Handbook* (Oxford: Hart Publishing 2007) 62.

necessary) on the principles of indemnity, insurable interest and subrogation. As a result, the thesis examines, (a) the similarities and differences; (b) strengths and weaknesses of the law (c) evaluate whether the strengths can be adopted to improve the quality of Nigerian insurance law and industry and (d) make proposals on how the better legal rules (if transposed into Nigeria's domestic laws) by the legislature can solve future legal disputes between the insured and the insurer.

The second method which the research adopts is the 'doctrinal' or 'black letter law' methodology which focuses on the analysis of caselaw, statutes and other legal sources located in literature, judicial and academic opinions and practitioner's guide.[171] The leading research tools used in this thesis include legal encyclopaedias, case digests, legislations,[172] Law commission reports,[173] secondary sources, textbooks, legal treatise, working papers, and published scholarly articles in insurance law. This helps the thesis to detect ambiguities, weaknesses, criticisms, and solutions which exist under the existing laws on indemnity, insurable interest and subrogation in Nigeria, England and Australia. This is essential because the thesis cannot determine the problems associated with the sub-principles of indemnity that weakens the indemnity principle without the examinations of legislation and court cases. Also, fieldwork is embarked upon to survey the opinion of academics and insurance industry practitioners.

Finally, the thesis is built on the functional, and historical methods utilised in comparative literature.[174] The research harnesses first the functional method to transplant practical legal solution from the English and Australian jurisdiction to Nigeria. This is because the functional method is defined as the study of legal transplantation on how rules and concepts may work in a different socio-economic environment (apart from a different doctrinal environment).[175] This

[171] The word 'doctrine' is derived from the Latin noun '*doctrina'* which means instruction, knowledge or learning, which includes legal concepts and principles of all types - cases, statutes, and rules; Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17 Deakin Law Review 83, 84.

[172] The Nigerian Marine Insurance Act 1961 and Nigerian Insurance Act 2003. The Motor Vehicles (Third Party Insurance) Act 1950; Marine Insurance Act 1906 (UK), Insurance Act 2015, Life Insurance Act 1774, Fires Prevention (Metropolis) Act 1774; Marine Insurance 1909 MIA (Cth); Insurance Contracts Act 1984.

[173] Section 4.7, Chapter 4 on Law Commission Reports on Insurable interest and chapter 5 on Law Commission reports on subrogation.

[174] Geoffrey Samuel, *An Introduction to Comparative Law Theory and Method* (Hart publishing 2014) 81; Mark Van Hoeke, Methodology of Comparative Legal Research 8 <https://biblio.ugent.be/publication/7145504/file/7145530> Assessed 10th August 2016.

[175] Ralf Micheals, 'The Functional Method of Comparative Law', in: *Mathias Reimann and Reinhard Zimmermann* (eds.) *The Oxford Handbook of Comparative Law* (2006) Chapter 10 341 Available at: https://scholarship.law.duke.edu/faculty_scholarship/1249 Assessed 10 August 2016.

thesis argues that despite the divergences in economy and culture, all societies have some form of 'law' which helps to solve problems.

Historically, the English common law tradition inherited in Nigeria has a strong force in influencing the enforcement and successful transplantation of the law. Therefore, in this study, whenever it is proposed to adopt an English or Australian solution to a problem, it is considered whether the law is satisfactory and whether it will work in Nigeria. It is argued that legal transplantation[176] of statutory provisions, court decision and law reforms from the laws of England and Wales would stimulate Nigeria's economic development as well as its insurance law and market.[177] Using English law has many benefits which make it the ideal law for businesses across the globe, regardless of language or legal history. As indicated by Phillip, it is flexible, predictable, and stable.[178] It has formed the foundation of many legal systems across the world for hundreds of years.[179] While the Australian regime, on the other hand, mitigates the common law for its harshness to consumers making it insured-friendly and is often regarded as a good model for insurance law reform.[180] To achieve the objective of the research, better solutions will be adopted from English as well as Australian legal institutions and other countries' laws (where necessary).

1.7. Significance of the Research

The research findings of this study are significant in theoretical, legal and practical sense. At the theoretical level, the research attempts to provide a robust definition of three fundamental principles of insurance laws in the Nigerian, English and Australian jurisdictions on indemnity, insurable interest and subrogation. Currently, there is a dearth of academic scholarship that examines this aspect of the Nigerian insurance contract law compared to other developed jurisdictions. Thus, the research fills this gap and provides detailed discussions about the possible interpretation of these doctrines by referencing modern cases, literature, of other

[176] Hugh Collins, 'Methods and Aims of Comparative Contract Law' (1991) 11 OJLS 396; Kahn –Freund, 'Comparative Law as an Academic Subject' (1996) 82 LQR 40.
[177] According to Mathias, the concept of legal transplantation concerns a situation where the legislator of one's country enacts a new rule that largely follows the rule of another country; Siems Mathias, *Comparative Law* (2nd edn, Cambridge University Press 2018) 232.
[178] Philip Wood, Why English Law? Butterworths Journal of International Banking and Financial Law, July/August 2019 https://primefinancedisputes.org/files/2019-03/why-english-law-philip-wood-cbe-qc-hon-.pdf?439c9efb7f Assessed 10th April, 2020.
[179] Canada, Australia, New Zealand, Uganda, Hong Kong and Cyprus.
[180] Robert Merkin, Reforming Insurance Law: Is there a Case for Reverse Transportation? A Report for the English and Scottish Law Commissions on the Australian experience of insurance law reform (2007) para 1.1. '*The leading author of insurance concluded is that there is much to learn from Australia from a consumer perspective.'*

commonwealth jurisdictions such as England, Australia, Canada, and South Africa. The research further expands the knowledge of insurance laws by discussing fundamental principles of insurance law and practices in developed jurisdictions to better understand the application of law thereby improving the experiences and outcomes of insurance contracts on parties. It is hoped that the Nigerian literature on insurance law will be enriched with both legal and an up-to-date academic resource.

From a legal standpoint, the thesis proposes solutions for some grey areas in the Nigerian insurance law that is due for reform. Historically, the Nigerian law was modelled mainly on the English 1906 MIA, which has been reviewed with several reports and consultations by the English Law Commissions to amend its statutory and common laws rules. However, the MIA 1961 (Nig.) provisions on the principles of insurable interest and subrogation have remained static with ambiguous and harsh rules that impact the insured negatively. Therefore, the research makes significant contributions by identifying the rules that should be eliminated and introduces new statutory rules to fill up any existing gaps and weaknesses in the Nigerian laws. As a means of developing the law, the study contributes to injecting certainty and reforms into this area of Nigerian insurance law that has been devoid of specific authority.

Finally, the thesis also offers practical insights for aspects in insurance law that appears confusing. Unlike jurisdictions such as the United Kingdom and Australia, Nigerian courts have not engaged with these insurance principles, mainly because insurance cases are not accessible, and the insured sometimes do not know how to pursue a cause of action. In Nigeria, it appears the government, judiciary, populace and market operators are yet to fully grasp the significant socio-economic role which insurance performs for its potential developments. This research increases the awareness of insurance penetration in Nigeria, it clarifies the basic principles of insurance law, and it is a tool that can help the courts enforce compliance by curbing the menace of mistrust of insurance in Nigeria, significantly when insurers raise technical objections to refuse claims.

1.8. Scope of Research

The thesis limits its scope to discussions on the legal principles of indemnity, insurable interest and subrogation on indemnity insurance (such as marine and property) in Nigeria, the United Kingdom and Australia. Also, reference will be made to other countries with similar laws and practices where necessary.[181] The thesis does not examine in details contingency insurances like life, and accident except minor analysis that argues on the limitations of the application of indemnity and subrogation to life and other non-indemnity insurances. Neither does the thesis review in detail the other sub-principles of indemnity,[182] except in chapter three of the thesis that shows how they provide support for the principle of indemnity.

In addition, the core statutes that govern insurance activities in Nigeria include the Marine Insurance Act 1961 and the Insurance Act 2003, which provides adequately for insurance law principles. However, the primary focus is on the rules enacted in the MIA 1961 because it applies to marine and non-life insurance contract. The thesis does not examine in detail the provisions of the Insurance Act 2003 because it governs life insurance and makes provisions for governing bodies of insurance. However, reference is made to the Insurance Act 2003 in chapter two when discussing the development of insurance business and regulations in Nigeria.

1.9. Research Limitation

A research of this type in Nigeria, requires data, information and decided cases. In the process of writing the thesis, problems like the unavailability of current resources were encountered. Despite the high level of unawareness of insurance practices in Nigerian society, a few Nigerian authors have, however, helped in publishing some good literature on Insurance law, but they are not sufficient. A few numbers of textbooks on Nigerian insurance contract were referred to in the study but none specifically on the challenges and weaknesses of the statutory laws in Nigeria. Also, there is a dearth of academic writing, domestic case laws, novel court decisions and critical analysis of insurance legal principles in Nigeria. Nevertheless, the author commends the labour of those who have contributed to the knowledge of insurance and legal issues that have opened the way for further research into this particular and unique aspect of insurance law in Nigeria.

[181] This includes the United States, New Zealand, South Africa and Canada.
[182] Other sub-principles include the abandonment, double insurance and the right of contribution.

Consequently, the limitation will be in the area limited access to current journal articles by Nigerian authors, recent books whereby there have been current issues not addressed, and case laws not accessible online or in the court. In this manner, there may not be a lot of Nigerian case, articles and current textbooks to review. However, there are lots of literature in the English jurisdiction and other international texts which, indeed, shall enrich the research.

1.10. Outline of Chapters

This section provides a full context of the research. It also follows the scholarly rule that each chapter in a thesis should stand almost alone but must be closely linked for cohesiveness.[183] As a result, the logical assessment that has threaded throughout the research is outlined as follows:

Chapter one of the thesis sets out the background of the study, objective, and research statement. It further presents a detailed review of literature relevant to the study, the research questions, the methodology adopted, significance and scope of the research, limitations and an outline of chapters. It concludes with a conceptual diagram of the whole thesis.

Chapter two of the thesis provides an overview of the development of insurance law and its impacts on the economic system of Nigeria. It starts by presenting a brief account of the history and key dates on insurance penetration in Nigeria. After that, the chapter reviews the Nigerian legal system, legislative framework and recent law reforms in the insurance industry. Next, the scope of insurance business operation and its impact on the economy is presented to identify the gaps and the problems militating against insurance growth in Nigeria.

Chapter three responds to research question one. It presents the legal framework of the principle of indemnity as enacted under the Nigerian, English and Australian laws. This chapter of the thesis gives a robust definition of the scope and nature of the principle of indemnity. The chapter further discusses why the principle of indemnity does not apply to life insurance. Furthermore, it provides a detailed analysis of the application and appropriate measure of indemnity on property and marine insurance contract. Also, in a view to demonstrating the

[183] Each chapter should have an introductory section linking the chapter to the main idea of the previous chapter and outlining the aim and the organisation of the chapter. Chad Perry, 'A Structured Approach for Presenting Theses' (1998) 6 (1) Australian Marketing Journal (AMJ) 63-85 <https://doi.org/10.1016/S1441-3582(98)70240-X> assessed 18 August 2016.

imperfect nature of the indemnity principle, the exceptions are analysed. Finally, the chapter shows the relationship of indemnity with other related doctrines.

Chapter four[184] critically examines the principle of insurable interest in indemnity insurance under the Nigerian, English and Australian laws. The chapter starts by discussing the historical overview of insurable interest, the legislative framework in these jurisdictions and the aims of the doctrine of insurable interest in insurance law. In this chapter, the competing definition of the scope and meaning of insurable interest is presented. The chapter further *critiques* the two controversial approaches of insurable interest, namely: legal interest test and factual expectancy/economic interest test to determine the test that is more reasonable, fair on the insured and consistent with the nature of the principle of indemnity. The chapter examines the problems and barriers that exist with the adoption of the legal interest test under the Nigerian statutory provisions (Sec 7, MIA 1961) and court decisions which prevent the insured from recovering economic losses. By comparison, the chapter critically examines the different approaches in other jurisdiction like England, Australia, the United States, Canada and South Africa. After that, the chapter proposes a new approach to expand the test of insurable interest under Nigerian laws with reference to current legislative reforms in the United Kingdom and Australia. The chapter also explores the provisions of the new Nigerian Insurance (Consolidated) Bill, 2016 on whether it improves the rules of insurable interest. The chapter further provides justifications on the need to retain the principle of insurable interest in insurance law, because of the role played for the insurance market. Finally, the chapter concludes with reasons why sec 7 MIA 1961 (Nig.) should be amended with suggestions on how to redefine the test of insurable interest under the Nigerian laws in line with the principle of indemnity.

Chapter five[185] investigates whether the current Nigerian and English law relating to subrogation is consistent with the principle of indemnity in terms of the distribution of the recoveries from a third party and granting immunity to certain persons from subrogation action. The chapter begins by examining the historical origin of the principle of subrogation. It further analyses the juristic basis of subrogation by determining the recent legal decision on whether subrogation is an equitable or common law doctrine. After that, the meaning, nature and justification of the doctrine of subrogation and relevant statutory rules in Nigerian, English and Australian insurance laws relating to subrogation are examined. Next, the two limbs of

[184] Chapter four responds to research questions two of the thesis.
[185] Chapter five responds to research questions three of the thesis.

subrogation are analysed. After that, the chapter evaluates controversial and complex areas of subrogation which includes: the insurer's prerequisite for recovery: full indemnity or policy limit and the distribution of subrogation recoveries. The chapter critically analyses the approaches of the Nigerian laws, in comparison with the English and Australian laws on the controversial issues to determine whether they are consistent with the aims of indemnity. The chapter further examines whether the Nigerian Insurance (Consolidated) Bill, 2016 addresses the deficient areas of subrogation. The chapter explores whether the Nigerian laws restrict subrogation actions against the insured's family member and co-insured, in comparison to the English and Australian approaches. The chapter concludes by identifying key reasons why subrogation should be retained in the Nigerian laws and proposes equitable solutions and reforms on areas that are inconsistent with the principle of indemnity.

Finally, chapter six summarises and concludes on significant findings from chapters three, four, and five of the research. It discusses the impact, advantages and disadvantages of the influence of the English law on Nigeria's jurisprudence, and the problems encountered as a result of transplantation and possible solutions. Also, the possibilities of adopting and applying partly current English and Australia legal frameworks to Nigeria's insurance law is discussed to strengthen weak areas identified in the research. Furthermore, legal and institutional recommendations for reforms and amendments of Nigeria's insurance law for provisions relating to insurable interest and subrogation is suggested to enrich its legal frameworks, insurance penetration, and economic development. The chapter finally identifies areas for future research.

1.11. Conceptual Flow of the Research

The theoretical flow of the literature review and research structure is presented below:

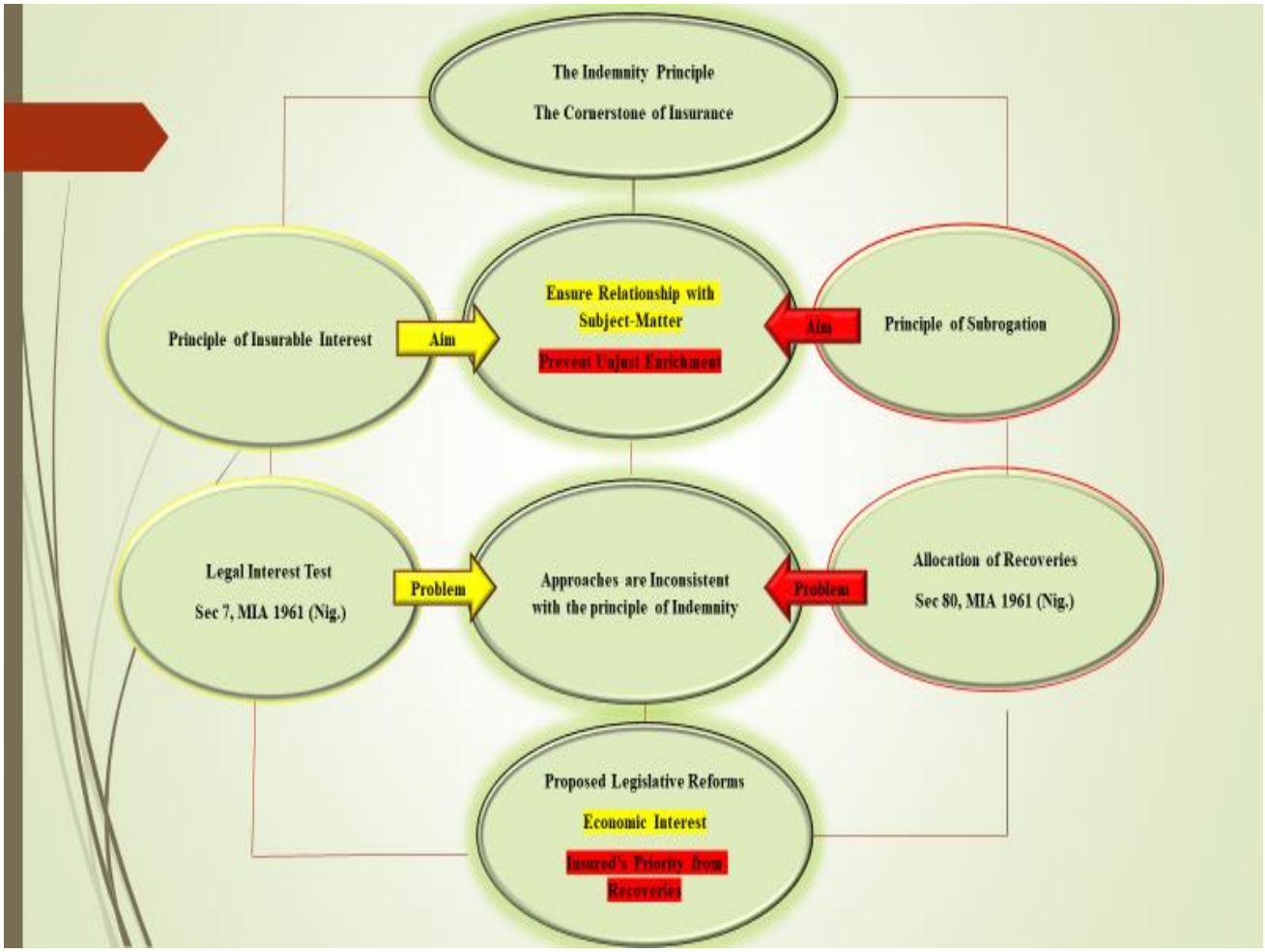

Figure 1: Conceptual Flow of the Research[186]

[186] The conceptual flow of the research depicts the general overview of the entire thesis. The yellow theme represents issues that relates to insurable interest; While the red theme represents issues that relates to the principle of subrogation. Source: The Author's creation.

CHAPTER TWO: THE DEVELOPMENT OF INSURANCE LAW AND ITS IMPACT ON ECONOMIC SYSTEM IN NIGERIA

2.1. Introduction

This chapter reviews the development of insurance law, the insurance industry and its impact on the economy in Nigeria. The chapter argues that global insurance is increasingly becoming popular in every continent and contributing to its economic growth, including some regions in Africa. Thus, the chapter examines the role which insurance business, and law plays in Nigeria. In Nigeria, colonial and trading association with Britain fostered the introduction of modern insurance about the early part of the 20th century. While much has been written about the origin of insurance and its subsequent growth in England,[187] it is essential to show how insurance penetrated the Nigerian system. Also, the chapter presents the legal framework that governs insurance contract law operations and major developments on insurance law reforms in Nigeria. The chapter further examines the challenges militating against the growth of insurance law in Nigeria.

Therefore, the discussions on the chapter are as follows: (i) historical overview of insurance and key events of insurance evolution in Nigeria; (ii) The Nigerian legal system and developments of insurance law in Nigeria (iii) insurance business operations and (iv) the impact of insurance on the economy.

2.2. Historical Overview of Insurance

The origins of the modern insurance contract are to be found in the practices adopted by Italian merchants from the fourteenth century onwards.[188] The earliest forms of policies were marine, life and fire insurances. Of all these classes, marine was first to emerge, although its precise origin remains disputed.[189] Maritime risks, the risk of losing ships and cargoes at sea, instigated the practice of medieval insurance and dominated insurance for many years.[190] The Lombards were probably responsible for introducing the idea of marine insurance into England in the thirteenth century, and policies were issued in Genoa in the fourteenth century.[191] The first legislation on marine insurance was made in Genoa, Northern Italy, in the last quarter of the

[187] J. A. Park, *A System of the Law of Marine Insurance*, edited by F. Hildyard, 8th edn (London: Butterworths, 1809); H.H. Lay, *History of Marine Insurance* (London: Post Magazine, 1925); C, Wright and C.E. Fayle, *A History of Lloyd's* (London: Macmillan, 1956); Holdworth, The Early History of the contract of insurance' (1917) 17 Col. L.R. 85; G. Clayton, *British Insurance* (London: Elek Books Ltd, 1970).
[188] John Birds, *Birds' Modern Insurance Law*, (11th Edn, Sweet & Maxwell 2019) 1.
[189] Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 1.
[190] John Birds, *Birds' Modern Insurance Law*, (11th Edn, Sweet & Maxwell 2019) 1.
[191] The first text on insurance, in Italian, written in 1488, was published in 1552 in *Pedro de Satanerna, on Insurance and Merchants' Bets* (1552).

14th century which laid down conditions for the validity of a marine insurance contract. [192] The development of marine insurance[193] was given a boost by the establishment of the Royal Exchange in Lombard Street in 1570, as a meeting place for merchants.[194] For life insurance, the first insurance policies was written around the beginning of the fifteenth century dated 18 June 1583.[195] Similarly, fire insurance developed in Hamburg, Germany in 1591 and the birth of fire insurance in England was stimulated by the Great Fire of London in 1666.[196]

2.2.1. A Brief Account of the Development of Insurance in Nigeria

Historically, a rudimentary form of insurance has been in existence long before the advent of English Common law in Nigeria which was occasioned by colonial conquest.[197] Age grade and tribal associations have been practising some form of mutual assistance resembling a life insurance contract.[198] The members of the group raise funds through levies and donations from which a handsome amount will be presented to the next of kin of a deceased member on the occasion of the demise of such a member.[199] Unfortunately, this system was not sufficient for other forms of losses. Also, there are faith-based insurance activities practised by Muslims called Takaful insurance.[200] This type of insurance involves the polling of resources amongst

[192] John Birds, *Birds' Modern Insurance Law*, (11th Edn, Sweet & Maxwell 2019) 1.
[193] The principles developed regarding marine insurance have by and large been applied to the other types of insurance that developed subsequently.
[194] The earliest policy found to date was written in 1547 in Italian but with subscribing London underwriters, and insured the vessel *Santa Maria Venetia.* The earliest English language policy thus far traced was issued in 1555 on the vessel Santa Cruz. The business of marine insurance expanded rapidly in the eighteenth century, in the hands of the two chartered insurers, Royal Exchange Assurance and London Assurance and also Lloyd's and mutual societies formed by shipowners for their own benefit; Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 2.
[195] Life insurance in England took the form of society arrangements for the provision of death and funeral benefits, although the device was also used by borrowers who insured their own lives by way of security for loans. Life insurance was by definition restricted to a small class of policyholders, although the practice became more widely recognised in the last decade of the seventeenth century and there was a large expansion despite the prohibition in the Life Assurance Act 1774 on life policies made without insurable interest. The first insurance policies were on the lives of the slaves used for marine voyages, although slaves were regarded as chattels rather than lives in the *Gregson v Gilbert* (1783) 3 Doug. 232 with a ruling that throwing slaves overboard to preserve drinking water on board the vessel was not a peril of the seas.
[196] Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 3; D.T. Jenkins, '*The Practice of Insurance Against Fire*, 1750 and historical research 'in O.M. Westall (ed.). The Historian and the Business of Insurance (Manchester: Manchester University Press, 1984).
[197] M. C Okany, *Nigerian Commercial Law* (Africana First Publishers Plc, 1992) 811.
[198] *Ibid*.
[199] O. Achike, *Commercial Law in Nigeria* (University Press, 1985) 316.
[200] Nigeria, which has the sixth-largest Christian population in the world (87 million), also has the world's fifth-largest Muslim population (90 million); Data retrieved from Pew Research Centre on The Future of World Religions: Population Growth Projection 2010 – 2050 <https://www.pewresearch.org/fact-tank/2019/04/01/the-countries-with-the-10-largest-christian-populations-and-the-10-largest-muslim-populations/ft_19-03-29_muslimchristianpopulations_muslim/> Assessed 10 September, 2020; There are currently two takaful insurance companies in Nigeria: Jaiz Takaful Insurance Plc and Noor Takaful Plc.

the members of Islamic faith, to assist in time of need, such that parties agree to provide financial support to a brethren who has experienced a loss to property.

Modern insurance, which was first introduced to Nigeria as a commercial arrangement, is the appropriate device for obtaining indemnity when loss or financial misfortune occurs to individuals. British merchants introduced modern insurance to Nigeria in the 20th century following their opening up of trading posts in West Africa. However, during the pre-independence era, British insurance companies dominated the local insurance market until 1968, while underwriting was done in the United Kingdom, and administrative functions were carried out locally.[201] For several years after the introduction to Nigeria, insurance activities covered mainly marine underwriting for produce exports, some personal insurance, insurance of bank mortgage security and motor.

This period was followed by the establishment of branch offices in Nigeria by British insurers. It is reported that the first company to have a branch office in Nigeria was the Royal Exchange Assurance in 1921.[202] It remained the only company till 1949 when three other companies established offices in Lagos, namely; the Norwich Union Fire Insurance Society, the Tobacco Insurance Company, and the Legal and General Assurance Company.[203] Before 1960, there were no indigenously owned insurance companies operating in Nigeria. With political independence in that year, several indigenous companies began operating. Participation in the insurance business by Nigerian citizens was given a boost in the 1970s as part of the government's drive during this period towards placing areas of the economy in the hands of Nigerians. Within this period, the Government (both Federal and State) acquired substantial shares in some wholly-owned foreign insurance companies, and wholly-owned government insurance companies were formed.[204]

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[201] The term 'underwriting' and 'underwriter' evolved from the practices at a coffee house in the City of London owned by a man called Lloyd. There merchant wishing insurance would pass round to the people willing to provide it, who were gathered there, a slip of paper on which he had written the details of the ship, voyage and cargo. Those willing to accept a proportion of the risk initialled the slip. When the total amount of insurance required was underwritten, the contract was complete. From this practice comes the term 'underwriter' which, is still in use today, and the name of the owner of the coffee house attached itself to the institution called Lloyds of London which is now a corporation with statutory authority. See John Birds, *Birds' Modern Insurance Law*, (11th Edn, Sweet & Maxwell 2019) 2.

[202] Omo-Eboh, Omogbai, 'Insurance law in Nigeria with particular reference to legislative intervention' (PhD thesis, London School of Economics and Political Science 1990) 15.

[203] Irukwu, 'The Development of Insurance in Nigeria from 1900-1975', (1975) I WAICA Journal 12.

[204] Omo-Eboh, Omogbai, 'Insurance law in Nigeria with particular reference to legislative intervention' (PhD thesis, London School of Economics and Political Science 1990)15; Ojukwu '*Insurance Law in Nigeria'* 102.

At present, the government, foreigners and individual citizens participate in the insurance business in Nigeria. It is, however, unsurprising that the consequence of the domination of the market by British companies is that the insurance practices and laws prevalent in Nigeria are patterned after the British. Nonetheless, the level of insurance awareness and participation is increasing because the Insurance Act 2003 and other sister regulations have made six classes of insurance compulsory.[205] It is submitted that making certain classes of insurance compulsory, has fostered a reawakening of insurance claims and the need for proper information is increasingly felt.

2.2.2. Key Dates in Nigerian Insurance History

Figure two below shows strategic dates of how insurance penetrated Nigeria and the various regimes that ruled the pre-independence period. From 1921–1960 was the insurance market establishment.[206] Subsequently, the year 1960–1980 showed the indigenisation period,[207] and the 1980–2003 was a period of privatisation and establishment of new regulator.[208] There was

[205] The 6 insurance products include:
a. Group life Insurance in line with the Pencom Act 2004.
b. Employers liability in line with the Workmen's Compensation Act 1987.
c. Buildings under construction-section 64 of the Insurance Act 2003 provides that 'No person shall cause to be constructed any building of more than two floors without insuring with a registered insurer his liability …'
d. Occupiers liability insurance –section 65 of the Insurance Act 2003 provides that 'Every public building shall be insured with a registered insurer against the hazards of collapse, fire, earthquake, storm and flood'.
e. Motor Third party Insurance –section 68 of the Insurance Act 2003 provides for Insurance of third party property damage (1) No person shall use or cause or permit any other person to use a motor vehicle on a road unless a liability which he may thereby incur in respect of damage to the property of third parties is insured with an insurer registered under this Act.
f. Health care Professional indemnity insurance under section 45 of the NHIS Act 1999.

[206] The London-based Royal Exchange Assurance Company established the first Nigerian insurance branch in 1921. In 1955, the first domestic insurer entered the market. There were 25 insurers by the time Nigeria gained independence from Britain in 1960. Of the 25 insurers, four were Nigerian-owned.

[207] The Insurance Companies Act of 1961 introduced the first insurance regulatory framework in Nigeria. It created the Nigerian Department of Insurance as part of the Federal Ministry of Trade. The private sector formalised by establishing the Nigerian Corporation of Insurance Brokers in 1962 and the Nigerian Insurers Association in 1971. In 1976, the ruling military junta instituted an indigenisation programme to curb fraud and increase the local retention of insurance premiums. Prior to indigenisation, 46 of the 70 insurers were locally owned. However, they only earned 17% of gross written premiums. The indigenisation resulted in the Yorkshire General Life Assurance Company being sold to the State to become the National Insurance Corporation of Nigeria (NICON). The State then compelled the remaining 14 foreign-owned companies each to sell a 49% share to NICON.

[208] The 1987 Privatisation & Commercialisation Decree reversed the Indigenisation policy. The result was the privatisation of NICON (finalised in 2005) and the sale of 51% of Nigeria in 2002, as well as a spate of market entry. The current insurance regulator, the National Insurance Commission (NAICOM), was established by the National Insurance Commission Act 1997. The Association of Registered Insurance Agents of Nigeria (ARIAN) was established in 2000, and the Nigerian Council of Registered Insurance Brokers replaced the Nigerian Corporation of Insurance Brokers in 2003. The Insurance Act of 2003 was enacted as a primary law for life insurance and insurance regulations.

a huge restructuring in 2003–2019. There has been further consolidation and growth from 2007–2019.

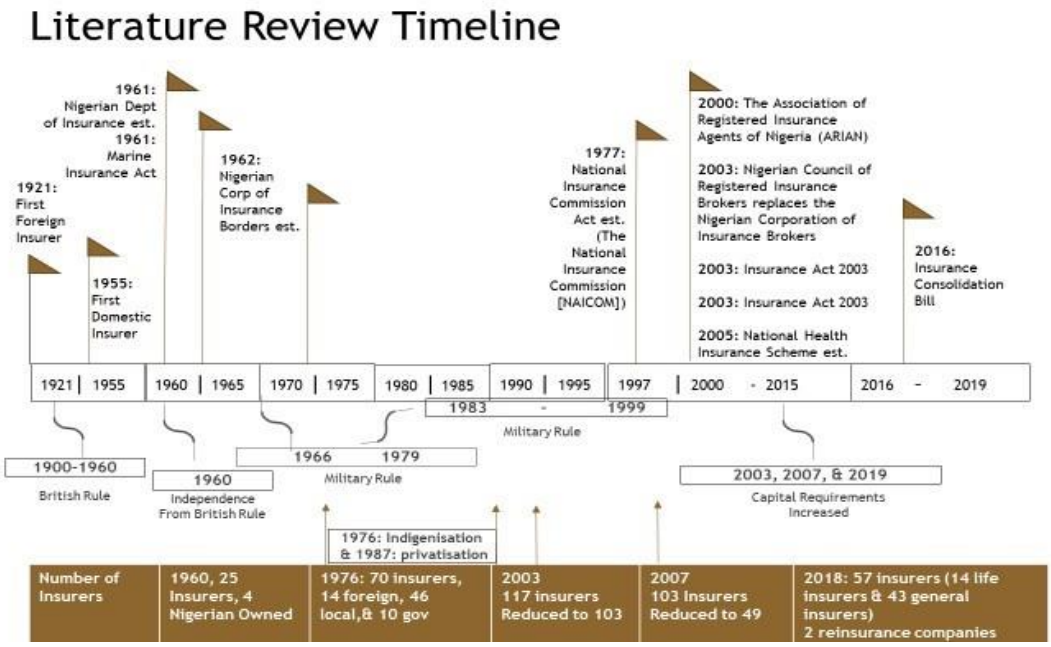

Figure 2: Key Historical Events of Nigerian Insurance

2.3. The Nigerian Legal System, Legislative Framework and Insurance Law Reforms

2.3.1. Sources of the Nigerian Law

The sources of Nigerian law are the Constitution, both federal and state legislation, English common law, customary law, Islamic law and judicial precedent. [209] The legal system is solely modelled after the English legal system, which was transplanted during colonisation. It is a common law system with an adversarial court process, meaning that the judge plays an active role during court proceedings and that laws are developed through case outcomes, also known as judicial precedent.

[209] All laws are subject to the Constitution, which will prevail in the event of an inconsistency. Each State has its own established legal system, but federal law will trump State law where the two laws oppose each other. Customary law in Nigeria consists of ethnic and Sharia law and is mainly restricted to family law matters. Customary law is enforced by the lowest courts in the country and is presided over by non-legally trained personnel. It is thus the formal legal system that applies to financial-sector matters. Ngozi Efobi, Rachel Ehima, Legal systems in Nigeria: overview (Uk Practical Law) I.O Okonkwo, *Introduction to Nigerian Law* (Sweet and Maxwell, London 1980).

From the onset, English common law has tremendously influenced the Nigerian legal system, and it forms a substantial part of Nigerian law. [210] This position is set out in Section 45 (1) of the Interpretation Act 1964. [211] Also, the courts, in most circumstances, apply equitable principles where common law rules are harsh and would create injustice.

By transplantation, common law became the largest source of Nigerian Insurance law. Thus, the principles of insurance law in the areas of formation of contract, indemnity, insurable interest, disclosures and representations, among others, are essentially based on common law decisions laid down by English judges and codified in statutes alongside some minimal portion of sharia law. Under the 1999 Nigerian constitution, insurance is listed as item number 32 in the exclusive list; therefore, only the federal legislative authority can make laws on the subject. Once such law is made, it applies throughout the country.[212]

2.3.2. Legal and Regulatory Framework on Insurance

Generally, the law that regulates the subject of insurance operates in two distinct ways. On the one hand, the principles in insurance contract law regulate the legal relationship between the insured and the insurer, while the other legal framework, focuses on the regulatory mechanisms that govern and control insurance market operators. These two aspects are well established under the Nigerian insurance regime.

The Motor Vehicles (Third Party Insurance) Act 1950, is the oldest insurance law in Nigeria.[213] The compulsory insurance of third-party liability for death or bodily injury arising from the use of a motor vehicle required by the Motor Vehicles (Third Party Insurance) Act 1950 is extended by section 68 of the Insurance Act of 2003 to third party property damage.

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[210] Festus Esiri and Ayuba Giwa, *Equity and Trust in Nigeria* (Malthouse Press Limited 2012) Chapter 1 for the history and development of equity in the Nigerian Legal System; I.O Okonkwo, *Introduction to Nigerian Law* (Sweet and Maxwell, London 1980) Chapter 1 for sources of Nigerian Laws.

[211] This statutory provision states that, '*the common law of England and the doctrines of equity and the statutes of general application which were in force in England on 1st January 1900 are applicable in Nigeria'* The Interpretation Act does not define a statute of general application and the courts have been burdened with the problem of deciding whether or not a statute sought to be applied in Nigeria is of general application. See I.O Okonkwo, *Introduction to Nigerian Law* (Sweet and Maxwell, London 1980) 5 on a critique of the provision of the Interpretation Act 1964.

[212] The importance of legislation lies in the fact that it is the most potent instrument of law reform. It can be used to modify common law or reverse case law.

[213] Motor Vehicle (Third Party Insurance) Act enacted in 1945 but came into force in April 1950. Sec 3 (1) & 6 of the Act makes motor vehicle insurance compulsory.

Similarly, the first most comprehensive laws relating to marine insurance contracts are contained in the Marine Insurance Act Cap. M2 LFN, 2004.[214] The Nigerian Marine insurance Act 1961 is a replica of the English Marine Insurance Act 1906. Currently, the Marine insurance Act 1961 applies not only to marine policies but non-life policies. Sec 3 and 5 of the MIA 1961 (Nig.) are specific on expectations over losses incidental to marine adventure and perils.

The Insurance Act of 2003 encompasses the primary laws covering insurance activity in the country. The Insurance Act 2003 also applies mostly to life policies, and it is broader in scope.[215] The Insurance Act 2003 divides the insurance business into two categories for registration.[216]

Next, is the NAICOM Act of 1997[217] that set up the chief insurance regulators in Nigeria, which is the National Insurance Commission, NAICOM.[218] The NAICOM Act 1997 makes provisions for the continued existence of the Commission.[219] Alongside the NAICOM Act 1997, other pieces of legislation have been passed. [220]

[214] The Act was passed on 1st April 1961.
[215] The Insurance Act 2003 was passed on 27th May 2003 and repealed the Insurance Decree of 1997 although it re-enacted a substantial amount of the latter's provisions; Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 9.
[216] Section 1, 2(1) & (2) and (3) of Insurance Act 2003 - They are life insurance and general insurance business. Life insurance is further subdivided into eight categories namely: individual life insurance business, group life insurance and pension business and health insurance business. The general insurance business is divided into eight categories namely: fire, general accident, motor vehicle, marine and aviation, oil and gas, engineering, bonds credit guarantee and suretyship, and miscellaneous insurance business not falling under any of the listed heads.
[217] Prior the enactment of the 1997 Act and the subsequent establishment of NAICOM, the NISB functioned as the insurance industry's supervisor. NAICOM, since its establishment, has performed this role and others as enshrined in the 1997 Act.
[218] Decree no 1 of 1997 replaced an earlier Decree no 62 of 1992 that established the National Insurance Supervisory Board, NISB; Section 7 of the Insurance Act 1997.
[219] In addition, section 86 of the Insurance Act 2003 states that: 'Subject to the provisions of this Act, the National Insurance Commission shall be responsible for the administration and enforcement of this Act and is at this moment authorised to carry out the provisions of this Act. In addition, section 95 of the same Insurance Act provides that 'The provisions of this Act shall be read in conformity with that of the National Insurance Commission Act, 1997 and if any provision of that Act is inconsistent with those of this Act, the provision of this Act shall prevail, and that other provision shall to the extent of its inconsistency be void'
[220] Nigeria Reinsurance Corporation Act, 2004; Code of Good Corporate Governance for the Insurance Industry, 2009; Guidelines for Oil and Gas Insurance Business, 2010; Takaful Operational Guidelines, 2013; Market Conduct and Business Practice Guidelines for Insurance Institutions, 2015; Prudential Guidelines for Insurers and Reinsurers, 2015; Bancassurance Guidelines, 2017 and Microinsurance Guidelines, 2018; Nigerian Council of Registered Insurance Brokers Act Cap N148 LFN 2004 (NCRIBA), National Insurance Commission Act Cap N53 LFN 2004 (NAICOMA), and Federal Road Safety Commission (Establishment) Act Cap F19 LFN 2004 (FRSCA).

2.3.3. Chief Insurance Regulators in Nigeria

The Nigerian insurance industry is divided into four groups.[221] Amongst them, the National Insurance Commission (NAICOM) is the chief regulator of the Nigerian insurance industry with a mandate to ensure the effective administration, supervision, regulation and control of insurance business in Nigeria and protection of insurance policyholders, beneficiaries and third parties to insurance contracts.[222] The National Insurance Commission (NAICOM) is the regulatory agency for the laws enacted in the Insurance Act 2003. NAICOM between 2003 and 2019 has in line with its statutory duty[223] increased the minimum paid-up share capital for various categories of insurance businesses in Nigeria.[224]

On 20th May 2019, NAICOM issued a circular to increase the minimum paid-up share capital for insurance and re-insurance companies doing insurance business in Nigeria.[225] The renewed minimum capital is captured in the table below: [226]

[221] (i) those regulated by the National Insurance Commission (NAICOM), forming the largest group; (ii) health insurance, which is regulated by the National Health Insurance Scheme (NHIS); (iii) agricultural insurance, provided almost exclusively by the Nigerian Agricultural Insurance Corporation (NAIC); and (iv) the cooperative sector, which offers insurance to their members.

[222] Website of the Chief Regulator of Insurance and affairs relating to insurance business can be found here <https://www.naicom.gov.ng/> Assessed 10th April, 2020; Section 7 of the Insurance Act 1997 spells out the functions of NAICOM.

[223] Section 6 of the NAICOM Act and section 6 (4) of the Insurance Act 2003.

[224] The number of insurers in Nigeria peaked at 117 in 2003, when increased capital requirements were announced. The increase in capital requirements resulted in 14 insurers being liquidated. In 2007, capital requirements increased again, resulting in further market consolidation through mergers to ensure compliance. As a result, the number of insurers reduced from 103 to 49.

[225] The New Minimum Capital Requirement, was communicated via a circular dated May 20, 2019, titled: Minimum Paid-up Share Capital Policy for Insurance and Reinsurance Companies in Nigeria and referenced: NAICOM/DPR/CIR/25/2019 ('the Circular'). The circular exempts Takaful operators and Micro-Insurance companies from the regulation which respectively cater for the insurance needs of Sharia-compliant and low-income segments of the market.

[226] Latest trend in the Nigerian Insurance Sector (2019) <https://thefirmaadvisory.com/new-blog/2019/6/7/latest-trends-in-the-nigerian-insurance-sector-42m8s> Assessed 10th April, 2020.

S/NO	CLASS OF INSURANCE BUSINESS	CURRENT MINIMUM PAID-UP SHARE CAPITAL (₦) (FROM FEBRUARY 2007)	REVIEWED MINIMUM PAID-UP SHARE CAPITAL (₦) (FROM MAY 2019)
1.	Life Insurance Business	2 Billion	8 Billion
2.	General Insurance Business	3 Billion	10 Billion
3.	Composite Business	5 Billion	18 Billion
4.	Reinsurance Business	10 Billion	20 Billion

Figure 3: Reviewed Minimum Capital

There is a unanimous agreement amongst insurance regulators and the industry practitioners that the recapitalisation is essential. According to Akah, 'this is a right direction in handling the challenges of the insurance sector'.[227] He argued that the sporadic increase in exchange rate does affect insurance companies, such that they are unable to pay claims.[228] He further identified that the effect of what happened in the stock market as a result of the global financial meltdown in 2008 when the investments of banks and insurance companies went down, encouraged recapitalisation for insurance companies.[229] This is because the government only assisted the Banking sector leaving out the insurance sector. As a result, some of the operators are still suffering from the impact of the financial crisis and struggling to pay claims to date. It is argued that with the current recapitalisations, there will be a mass reduction in capital flight, the industry, and consumers will benefit from it accordingly. Similarly, from, an industry

[227] Leonard Akah is the deputy director, Authorization and Policy, National Insurance Commission (NAICOM) and was a panelist at The Development of Insurance Law and Practice in Nigeria: Prospects and Challenges seminar, organised on the 8th Oct, 2020.

[228] As at 2007, the exchange rate was ₦120 to $1, as at year 2020 the exchange rate is ₦380 to $1. Data Retrived from The Central Bank of Nigeria website https://www.cbn.gov.ng/rates/exchratebycurrency.asp Assessed 10 Oct, 2020.

[229] Ayodele Thomas, Oke Margaret, 'Global Economic Melt –Down and the Nigerian Banking Industry-A Review' (2014) 3 (2) IOSR Journal of Economics and Finance 41, 43 identified that the global financial crises Weakened the financial market, Job losses and drop in business activities, General shrinking of global financial flows and foreign investment and General global credit crunch which push up interest rates on lines of credit for Nigerian banks. However, there was recapitalisation to boost the Banking sector with an increase in minimum paid up capital from N2 billion to N25 billion; Somoye, R. O. C. The Performances of Commercial Banks in Post-Consolidation Period in Nigeria: An Empirical Review (2008) 14 European Journal of Economics, Finance and Administrative Sciences, 62-72.

perspective, Mr Oshin,[230] submitted that this would encourage practitioners to take up affordable risks as the portfolio deems and reduces pressure on the industry.

Conclusively, the directive from NAICOM will help insurers to raise more capital towards facilitating the acquisition of modern digital and technology-driven infrastructure necessary to aid their efforts at deepening insurance penetration. It is hoped that the implementation of the regulation will assist in solidifying the financial base of the players in the sector while also assisting them to expand the full deployment of their services to multi-finance projects and risk sectors like the maritime and oil and gas sectors as well as position them for growth on the international landscape.[231]

2.3.4. Overview of Insurance Law Reforms[232]

In 1964, the Obande Commission of inquiry was set up by the Nigerian government to investigate insurance practices. Amongst other reasons, one primary task of the commission was to inquire whether the rights of the insured against the insurance companies in cases of accident, loss or damage to insured vehicles, are adequately protected and setting up government control for premiums on motor vehicles. The committee proposed setting up a motor vehicle insurance office by the government but was rejected. Other reforms carried out by the Law Commission is on the law of warranties and issues that affect proposal forms.[233]

The Nigerian Federal Government in March 2009, appointed a committee to review insurance law and regulations that relate to the insurance business in Nigeria for a robust and regulatory framework to improve the insurance industry in line with best international practices.[234] In 2010, the committee's report produced a draft revised Consolidated Insurance Bill which was not passed into law. Recently, the Insurance (Consolidated) Bill 2016 was proposed with a bid

[230] Mr Oluwole Oshin is the Group MD/CEO Custodian Investment Plc, was a panelist at The Development of Insurance Law and Practice in Nigeria: Prospects and Challenges seminar, organised on the 8th Oct, 2020.
[231] Latest trend in the Nigerian Insurance Sector (2019) <https://thefirmaadvisory.com/new-blog/2019/6/7/latest-trends-in-the-nigerian-insurance-sector-42m8s> Assessed 10 April, 2020.
[232] Section 1.1. on Background of the study.
[233] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 190.
[234] The goal was to ensure that the insurance sector contributes positively to the principal objective of the financial system strategy 2020 (FSS 2020) to make Nigeria Africa's financial hub and one of the 20 largest economies in the world by the year 2020. Joshua Nse, Operators Laud Naming of Insurance Review Panel, 18th Jan, 2016 <https://guardian.ng/business-services/insurance/operators-laud-naming-of-insurance-bill-review-panel/> Assessed 10th April, 2019.

to consolidate all the insurance laws into one piece.[235] However, the bill is yet to become law, but the outcome of the Bill introduces no new laws but a consolidation of previous laws into one piece.[236]

To improve Nigeria's insurance penetration, the National Health Insurance Act, 2003 (Repeal and Re-enactment) Bill 2019, was introduced to make it mandatory for every resident of the country to contribute a minimum amount to the health insurance pool.[237] This is also a welcome development to increase insurance penetration.

2.3.5. Does the Current Nigerian Insurance Law Reflect Modern Practices?

There are currently no discussions on insurance laws relating to insurable interest and subrogation, a core focus of this research. The focus of the government had been on the financial aspect of insurance only.[238] However, the provisions of the law on these legal principles as it has been since enactment in 1961, is the same till date. In comparison to other developed countries, some of the Nigerian laws are no longer fit for purpose and not in line with modern practices. Without doubt, insurance and its laws are working in more developed in countries like England, and the courts often challenge the strict legislations where it is inequitable. The strong insurance penetration evidences this in England.[239]

One area that needs revitalisation in the insurance sector is to have a functioning Law Commission in Nigeria that not only consistently review the Legislative frameworks, but

[235] The terms of reference of the review committee include a critical review of the draft insurance (consolidated) bill, with a view to making it a framework or principle-based legislation; a comparative review of the Bill to align it with the powers of other financial regulators in the country as well as a thorough examination of current market problems and recommendation of appropriate regulatory powers to allow the Insurance Regulator act appropriately. See Joshua Nse, Operators Laud Naming of Insurance Review Panel, 18th Jan, 2016 <https://guardian.ng/business-services/insurance/operators-laud-naming-of-insurance-bill-review-panel/> Assessed 10 April, 2019.

[236] The Insurance (Consolidated) Bill 2016 is 'A Bill for an act to repeal and consolidate the laws relating to and regulating insurance business and other related matters - this act repeals certain existing laws on insurance in Nigeria to provide for a comprehensive and consolidated legal and regulatory framework for all insurance businesses and activities in Nigeria and for other related matters'.

[237] Martins Ifijeh, Nigeria: New Bill Will Ensure Mandatory Health Insurance, 25th April, 2019 <https://allafrica.com/stories/201904250488.html> Assessed 10th January, 2020.

[238] See section 2.3. on regulatory reforms.

[239] According to Statista Research Report published , Sep 30, 2020, Among all European countries in 2018, the insurance sector in the United Kingdom (UK), has the highest penetration rate of 14.3 percent, followed by Denmark and Finland <https://www.statista.com/statistics/1060920/insurance-penetration-europe-by-country/#:~:text=Among%20all%20European%20countries%20in,penetration%20rate%20of%2014.3%20percent Assessed 10th October, 2020.

critically examines judicial reasoning on issues. The significant gap that has affected insurance growth in Nigeria is that the laws are not thoroughly reviewed with the Law Commission constituting of the appropriate experts. The seemingly poor procedure for law review is not transparent but political and to some extent influenced by religious divide. This thesis has compared how insurance legal principle works in foreign jurisdictions, examined the background of the domestic and foreign legal rules, identified whether better legal rules could be applied to a domestic legal problem and find how the legislature can transplant these rules into its domestic laws to solve future problems. Thus, insurance law problems and proffered solution in other jurisdictions identified in the thesis was derived from a transparent, rigorous process of discussions of Law Commissions and the engagement of the public and academic experts in the field of insurance. It is hoped that the Nigerian law commission can take a queue from the English and Australian law commissions on procedures of reviewing insurance laws. Conclusively, the research finds that the concept of legal transplantation is not utilised correctly in Nigeria. Many laws transplanted are without proper understanding and application. It is submitted that more legally based ideas will prompt insurance law developments in Nigeria.

2.3.6. Jurisdiction of Courts on Insurance Matters[240]

A thorny legal issue which often arises in connection with litigation over insurance contracts, especially as a result of the Nigerian federal system of government, is the court which has jurisdiction to adjudicate over such cases.[241] Thus, if the insured and the insurer are unable to reach a compromise over a dispute on an insurance claim, either party may seek redress in the law court. Therefore, where the dispute concerns the liability of the insurer under the policy or the amount of indemnity payable, legal action must be sort in a court with requisite jurisdiction.

Nigerian courts operate in a hierarchy, and over the years the jurisdiction of courts over non-marine insurance claims has a chequered history.[242] It is, therefore, clear that jurisdiction of the Court over non-marine insurance claims is vested in the State's High Court by Section 272 of the 1999 Constitution which stipulates *'the High Court of a state Shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power,*

[240] In *Triumph Assurance Co. Ltd. V. Fadlalla* (2000) NWLR (Pt. 640) 294 the court defined jurisdiction as the authority which a court has to decide or take cognizance of matters brought before it. In this thesis, the word jurisdiction is used to depict a 'country' and 'court' powers'.

[241] Funmi Adeyemi, *Nigerian Insurance Law* (2nd edn Dalson Publications Limited, 2007) 238.

[242] See Funmi Adeyemi, *Nigerian Insurance Law* (2nd edn Dalson Publications Limited, 2007) 238 for pre-historical discussion on insurance court jurisdiction; See also Olusegun Yerokun, *Insurance Law in Nigeria Insurance* (Princeton Publishing Company, 2013) 16.

duty, liability, privilege, interest, obligation or claim is in issue' Jurisdiction to adjudicate over marine insurance contracts is vested in the Federal High Court under the Admiralty Jurisdiction Act.[243]

One problem which the study proposes a solution for is an improved justice system. The thesis calls for increased protection for the insured's rights as there is a decline in legal actions. The Nigerian judiciary and court system have over the years been faced with challenges like corruption, slow and expensive court procedure.[244] Although the judges are of high calibre, those designated to deal with insurance cases are not well vast in the field of insurance, but maybe vast in handling other commercial disputes. The English judiciary and court system, on the other hand, are highly respected around the world. The judges designated to specific courts are allocated based on intellectual expertise in various fields with an international reputation for independence. They are particularly experienced in resolving commercial disputes, especially those and the judges are known and respected for their understanding of the complexities of the modern commercial world. It is recommended that the justice system in Nigeria can be improved by appointing qualified judges and proffering alternative dispute resolution for insurance matters because it is cheaper and quicker.

2.4. Insurance Business Operation in Nigeria[245]

In Nigeria, the principles governing the formation of insurance contracts are reasonably well settled and similar to the common law principles. The general requirements for the formation of a contract of insurance were stated in *Babalola v Harmony Insurance Co,*

> *'… like any other kind of contract, must be constituted by an offer and acceptance, and a consideration. The offer is normally contained in a proposal form duly filled and signed by the assured or the proposer and the acceptance is signified by a*

[243] Cap. A5 LFN 2004; *Savannah Bank Nigeria Limited v Pan Atlantic Shipping and Transport Agencies Limited* (1988) NWLR.1.

[244] For example, it takes about 447 days to enforce a commercial contract in Lagos: 40 days for service and filling; 265 days for trial and judgement, and 142 for enforcement of judgement. Source: World Bank Report 2017< https://www.worldbank.org/en/topic/governance/brief/justice-rights-and-public-safety>Assessed 10th Aug, 2018.

[245] The phrases 'contract of insurance', 'insurance business' and 'insurance' are commonly used to mean the same thing *Department of Trade and Industry v St Christopher Motorists' Association Ltd* [1974] 1 All E.R. 395; *Medical Defence Union v Department of Trade* [1979] 2 All E.R. 421, 429. Thus, would be used interchangeably in this thesis.

formal acceptance, or by the issue of a policy, or by the acceptance of the premium paid by the proposer or by conduct on the part of the insurers."[246]

The proposal form is the usual means by which the prospective insured makes his offer for insurance cover, and it is an essential document in the insurance transaction. Those that operate insurance business in the Nigerian industry are the insurers and reinsurers,[247] brokers,[248] agents[249] and loss adjusters.[250] The insurance and reinsurance companies underwrite risks while the insurance brokers and agents act as intermediaries between the underwriters and the policy holders in the sale of insurance products and the collection of premiums.

The bulk of private insurance in Nigeria is transacted through the medium of different categories of insurance intermediaries. The classification of insurance intermediaries in the Nigerian insurance industry falls into two broad categories, namely: insurance agents and insurance brokers. The agent is usually for the insurers while the brokers act for the insured. While there are different types of agent employed by the insurers,[251] the most common types are the full-time agents. The insurance companies employ this group of intermediaries to market the various products on offer. Brokers play a significant role in the local market and are currently estimated to handle approximately 60% of all insurance placed. The loss adjusters have the task to determine the appropriate valuation of the loss/damage incurred when a claim is presented.

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[246] *Babalola v Harmony Insurance Co* [1982] 1; Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 62; In addition, parties have a duty to observe utmost good faith and the requirement that the insured should possess an insurable interest in the subject matter of insurance.

[247] At present there are about 59 registered insurance companies. Comprising of 28 Non-Life Insurance Companies, 2 registered Reinsurance Companies, 14 Life Insurance Companies, 2 Takaful Insurance Companies and 13 Composite Insurers. List of all insurance companies can be found here https://naicom.gov.ng/index.php/insurance-industry/insurance-companies Assessed 10th April, 2019.

[248] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 232; There are currently 469 brokers with licence as at 30th June, 2020. The name and status of brokers can be found here <https://naicom.gov.ng/index.php/insurance-industry/brokers> Assessed 15th January, 2020.

[249] Insurance agents dominate the individual life insurance market and there are about 15,000 agents.<https://www.nigeriainsurers.org/page/nigerian-insurance-market> Assessed 15 January, 2020.

[250] Section 35 & 36 Insurance Act 2003; There are 34 loss adjusters with valid licence as at 31st January 2019. The list of loss adjusters can be found here <https://naicom.gov.ng/index.php/insurance-industry/loss-adjusters> Assessed 10th April, 2019.

[251] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 229.

2.5. The Impact of Insurance on the Economy[252]

Despite Nigeria's status in Africa with a vast population,[253] insurance penetration has a history of niggling endemic gap brought about by the prevalence of several factors and problems like a weak legal and regulatory framework, coupled with sharp practices, has also led to mistrust of insurers and image problems,[254] made worse by low levels of consumer awareness.[255] These circumstances impact negatively on sales in personal insurance lines, so most premiums are generated from corporate and government clients, leaving the potential available from Nigeria's large population untapped. [256]

The Nigerian insurance regime does have regulations than other financial sectors of the economy, such as the banking and financial services industry and the securities and capital markets.[257] However, it is essential to note the impact of the insurance market on inclusive and sustainable growth occurs via several different pathways. There is significant evidence in the theoretical literature which suggest a positive and significant relationship between the insurance industry and economic growth. Although insurance transactions are classified as non-financial institutions, they are part of the financial system and capital accumulation

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[252] Christine Hougaard, '*The Role of Insurance in Inclusive Growth: Nigeria Diagnostic'* (2018) <file:///C:/Users/User/Documents/ARTICLES%20FOLDER/The-role-of-insurance-in-inclusive-growth_-Nigeria-diagnostic.pdf> Assessed 10th April, 2020; J Akintunde "Burning issues in Nigerian insurance industry" (11 August 2010) Financial Nigeria, Assessed 10 August 2015; RO Ayorinde 'Insurance-fund investment regulation in Nigeria' (2001) 20 Journal of Insurance Regulation 195, 201.

[253] The median age is 19.2 years and the average life expectancy is around 54.5 years of age according to WHO data, with men living an average of 53.7 years and women living an average of 55.4 years. This very low number can be attributed to the fact that the country has a lot of health issues. <https://worldpopulationreview.com/countries/nigeria-population/> Assessed 10th April, 2020.

[254] Agomo, noted that insurance companies have a poor image and members of the public would avoid them like a plague and the reason for the distrust is because of the readiness of insurers to accept premiums and their unwillingness to settle claims when the need arises. Agomo, 'Some thoughts on the Attitude of Insurers towards Insurance Claims' The Lawyer (1985) Vol 15 pp 66; Irukwu, 'The Settlement of Insurance Claims in Nigeria' (1972) 1 IIN Conference Papers 56; Onwuguya, 'The Handling of Motor Insurance Claims in West – Africa: Problems and Possible Solution' (1978) IV WAICA Journal 110; Kiladejo, 'Settlement of Life Assurance Claims: Problems and Documentation' (1987) XI WAICA Journal 185; Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 327.

[255] CP Barros and EL Obijiaku 'Technical Efficiency of Nigerian insurance companies' (Technical University Lisbon working paper WP018/2007/DE/UECE) 5.

[256] For example, proof of an insurance cover should be made condition precedent for applicable construction approvals. For effective regulatory oversight, government officials should carry out unannounced visits/inspections of construction sites until completion and respective public buildings to ensure that insurance certificates obtained and presented are valid, current and from approved channels. Of course the monitoring system must be transparent, and designed to minimize corruption by such officials. Foundational to this is that there is an awareness gap – there should be continued massive public sensitization of these mandatory insurance schemes as a prelude to invigorated enforcement.

[257] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 1.

mechanism. Thus, the theory of financial intermediation has a direct link to the theory of insurance, as indicated in the modern theory of finance.[258] Another scholar opines that legal systems, political institutions, and innovation can certainly ―drive both financial intermediation and economic development.[259] Levin, asserts further that the ―weight of evidence from the literature and empirical studies suggests that financial systems like insurance are instrumental to the process of economic development which requires a great understanding of factors underlying economic growth.[260]

For Nigeria, a recent study showed the effect of insurance industry performance on economic growth in Nigeria and its impact on the recovery of financial loss using time series data for the period 1988-2014 revealed that non-life insurance penetration had a positive and substantial effect on the economic growth in Nigeria.[261] Also, the study of Ozuomba on the impact of Insurance on Economic Growth in Nigeria shows there is a significant and positive relationship between the insurance premium and economic growth and recommended that appropriate policy and enabling law for insurance business sustainability.[262]

The insurance business industry could further be expanded through an appropriate mechanism. For instance, insurance for growth transmission mechanism could be a linkage through which the insurance sector impacts economic growth in Nigeria. This is illustrated in figure 4 below.

[258] Robert C. Merton, A Functional Perspective of Financial Intermediation Financial Management, (1995) 24(2) 23; R.O.C Somoye, The Role of Financial Intermediation in Entrepreneurship Financing in Nigeria (PhD Thesis, University of West of Scotland 2011).
[259] In Ross Levine, Financial Development and Economic Growth: Views and Agenda (1997) 35 (2) Journal of Economic Literature 691, an empirical study was conducted which appears to be one of the first studies to explore the relationship between insurance and economic growth for OECD countries showed that the theory of 'demand or supply hypothesis showed positive and significant relationship between insurance and economic growth. The position is also the same for the United Kingdom as indicated by Maurice Kugler & Reza Ofoghi, 2005 'Does Insurance Promote Economic Growth? Evidence from the UK, Money Macro and Finance (MMF) Research Group Conference 2005 8, Money Macro and Finance Research Group.
[260] Ross Levine, Financial Development and Economic Growth: Views and Agenda (1997) 35 (2) Journal of Economic Literature 691.
[261] Iyodo, Babayaro & Samuel, Impact of Non-life Insurance Penetration on the Economic Growth of Nigeria (2020) 11(2) Research Journal of Finance and Accounting 40.
[262] Ozuomba in 2013 was between the periods of 1998-2007 and data collated from 71 insurance companies in Nigeria; Ozuomba,C. Impact of Insurance on Economic Growth in Nigeria (2013) 2(10) International Journal of Business and Management Invention 19-31.

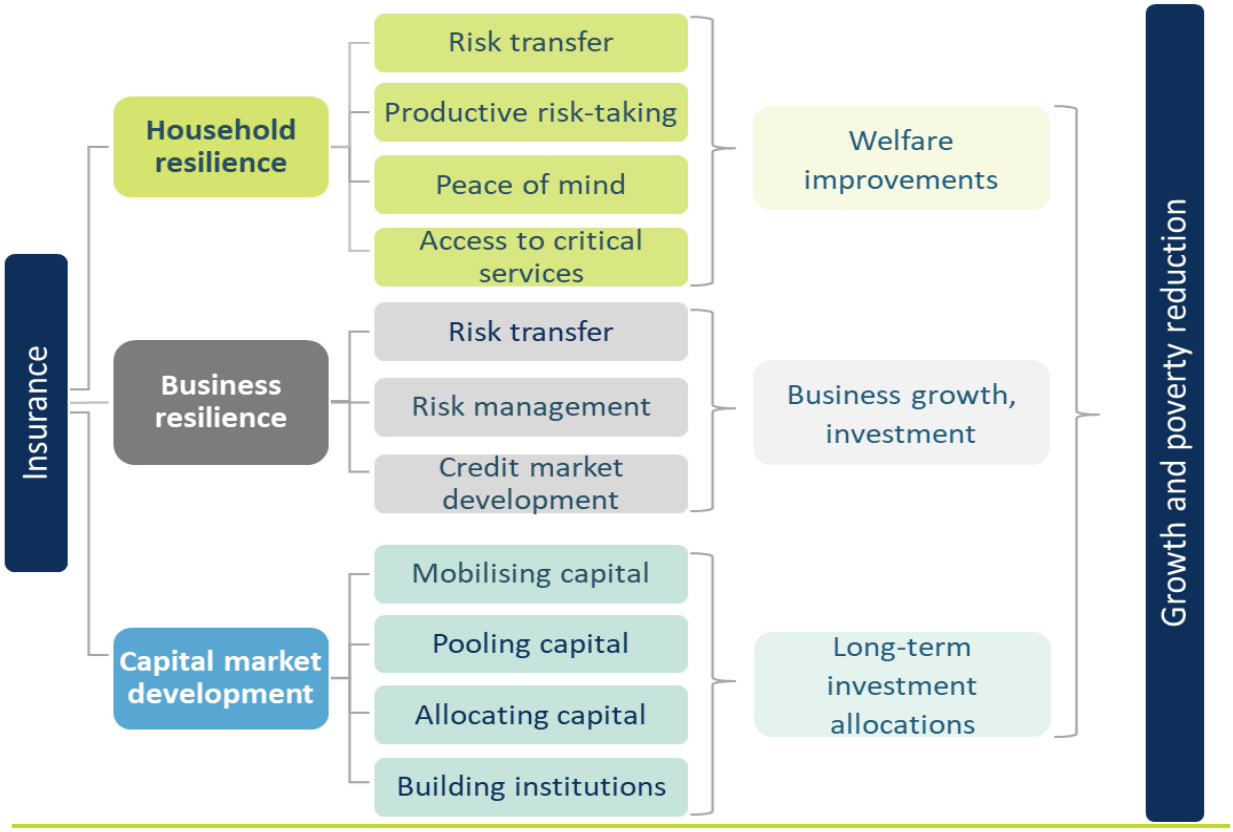

Figure 4: Linkages between Insurance and Economic Growth [263]

This figure shows that there are linkages between insurance and economic growth. However, the general public is not yet enlightened on the whole concept of insurance. Many properties, cars, and lives are still not insured, which makes it difficult for insurance penetration. It also makes insurance products affordable and quick payments of claims will boost insurance activities amongst the public and reduce poverty.

As of 2010, 60.9% of the population was living in poverty. At the time, the country's total population was 112.4 million translating to 68.4 million people living in poverty. Currently, with a population of 196 million, 82.9 million Nigerians are living in poverty.[264] The business of insurance and effective law can be a viable tool in reducing poverty. From the preceding discussion, it is therefore vital to review the empirical pieces of evidence on the performance of the insurance sector in the overall economy of Nigeria. In doing this, the research has also looked into this in a global context to have a clear picture of the performances of the insurance

[263] Source: Adapted from Christine Hougaard, '*The Role of Insurance in Inclusive Growth: Nigeria Diagnostic'* (2018) 25-26 <file:///C:/Users/User/Documents/ARTICLES%20FOLDER/The-role-of-insurance-in-inclusive-growth_-Nigeria-diagnostic.pdf> Assessed 10th April, 2020.
[264] Data Source: National Bureau of Statistics, 2019 Poverty and Inequality in Nigeria: Executive Summary.

industry and the economy of any nation. The empirical evidence of the insurance industry in Nigeria appears to be weak, as can be seen from table 1 Appendix 1 and figure 5 below.

Table 1 (Appendix 1)[265] and Figure 5 show that the insurance industry contribution from 1981-2018 (39 years) to the total economy is significantly low. The performance of Nigeria insurance industry from 1981 to 2018 gross income as % of GDP had the highest value in 1995 (0.50% less than a percentage point) and the lowest in 1986 (0.13%). The Marine insurance sub-sector also contributed significantly low, of less than 1% (0.06%) between 1981 and 2018.[266] Similarly, the life insurance sub-sector also did not perform as its average contribution between 1981 and 2018 was less than one per cent (0.07%). Also, when we combine both marine and non-life insurance (which are the focus of this research), they appear to contribute very little to the overall insurance premium as they recorded 0.13% of the total percentage income to Gross Domestic Products. This scenario shows that the government needs to evolve strong institutional and legal policies that will build confidence and penetration in the insurance sector of the economy.

[265] Table 1, Appendix 1 on page 263 of thesis.

[266] Nwokoro I. A. and Ndikom Obed B. C, An assessment of the contribution of marine insurance to the development of insurance markets in Nigeria' (2012) 5(8) Journal of Geography and Regional Planning 212, 220 shows that the motor, general accident and marine insurances contributed positively to the development of the insurance market in Nigeria, by their positive coefficients, while fire and life insurance businesses are negative contributors the insurance market development. This is because individuals rarely purchase insurance, it is mostly corporations for employees and governments purchasing insurance for civil and public servants as part of their employment package.

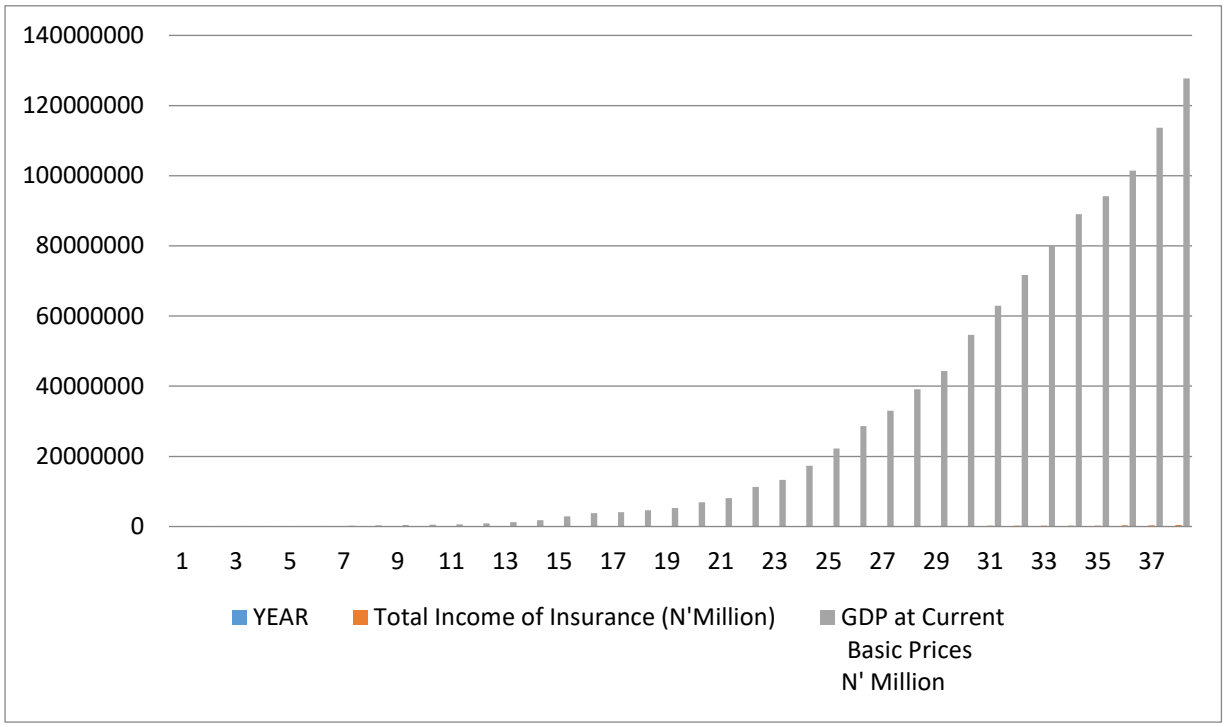

Figure 5: Insurance Income and Gross Domestic Products (1981-2018)

However, this poor performance of the insurance industry is a global phenomenon. A cursory look at some selected countries' insurance performances vis-à-vis the Gross Domestic Products shows a similar trend. This can be seen in Figure 6 below.

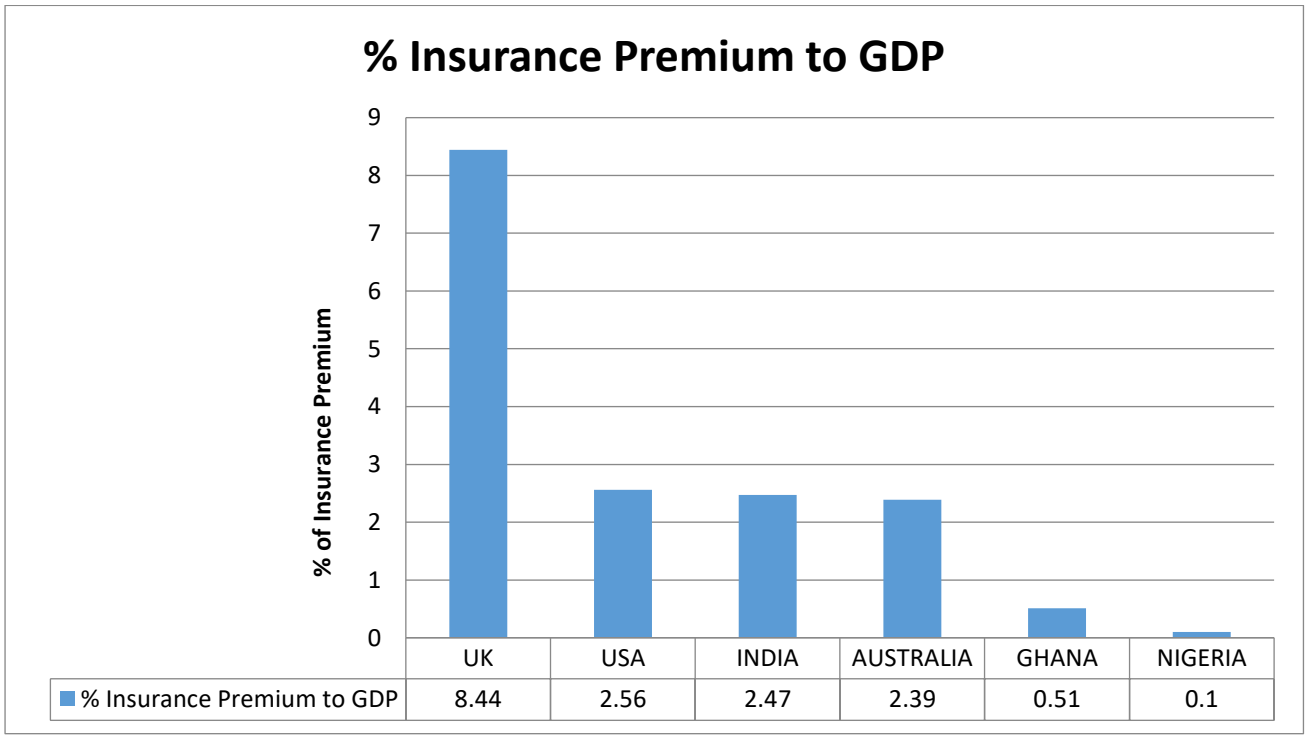

Figure 6: % of Insurance to GDP in Selected Countries as of 2017

Figure 6 shows that the contributions of the insurance sector to Gross Domestic Products (GDP) in the selected countries is higher than in Nigeria, where premiums are abysmally low. It is argued that there is a lack of market efficiency, proportionality, and the population lacks awareness of insurance products to purchase, this contrast with the result from other countries. For instance, in 2017, the United Kingdom (UK) posited the highest of 8.44%, while the States of America (USA) recorded 2.56% to the economy. On the other hand, the Republic of India contributed 2.47%, and Australia recorded 2.39% to the economies of these countries. Interestingly, Ghana contributed 0.51%, while Nigeria barely contributed 0.1% to Gross Domestic Products (GDP). This is a relatively poor performance when viewed from the perspective that this industrial sector could improve the economies of these countries if the right policies are in place.

However, to correct the low insurance penetration in the developing nations, the micro-insurance system was initiated to provide insurance inclusion mechanism. For example, India experienced 3.69% penetration in the insurance industry in 2018, which is higher than the value recorded for Nigeria, which is 0.31% in 2018.[267] Moreover, the aggregate insurance premiums in India from 2012 to 2018 grew at a compound annual growth rate (CAGR) of 11.6% compared with the low CAGR of 6.2% recorded for Nigeria during the same period which is discouraging. Approximately only 1.5% of all Nigerian adults are covered by insurance today.[268] The risk faced by Nigerians daily is huge, and citizens (both working-class and non-working class) seem not to worry about seeking financial protection by using insurance mechanisms. A report on the insurance market in Nigeria shows that low insurance penetration is a result of mistrust, lack of confidence in insurance companies and limited knowledge of how insurance works amongst the public.[269]

On micro-insurance infiltration to improve insurance sector performance, India recorded 12.03% insurance policies in 2017, while Ghana micro-insurance infiltration rate grew significantly from nothing in 2008 to 28.3% of the population in 2017. Disappointingly, the

[267] Nigeria Insurance Industry Report (2019). From the Lagoon to the Ocean. Coronation Merchant Bank.
[268]Christine Hougaard, '*The Role of Insurance in Inclusive Growth: Nigeria Diagnostic'* (2018) 3 <file:///C:/Users/User/Documents/ARTICLES%20FOLDER/The-role-of-insurance-in-inclusive-growth_-Nigeria-diagnostic.pdf> Assessed 10th April, 2020; Even for the target group that is the easiest to reach (salaried employees), insurance uptake is only 10.6%. The National Health Insurance Scheme, despite its aims for universal health coverage, serves only an estimated 1% of the population.
[269] Strategic and Emerging Trends in Insurance Markets in Nigeria October 2015 https://www.pwc.com/ng/en/assets/pdf/nigeria-insurance-survey.pdf> assessed 10 April 2020.

micro-insurance scheme in Nigeria took-up at the rate of 1.2% in 2017.[270] The total insurance Industry Gross Premium Income after adjusting for inflation between 2013-2017 increased by 6.9%, which is contrary to the negative Gross Premium Income after adjusting for inflation CAGR of 3.7%.

In a nutshell, there are lots of lessons to be learnt by Nigeria from India and Ghana in order to experience a positive turnaround in our insurance industry and level of financial inclusion. The insurance sector growth recorded in India and Ghana was similar and could be attributable to the support from the government towards micro-insurance and demanded cooperation from regulators and insurance companies to attain the pre-determined goals. This was done in conjunction with the central banks, insurance and telecommunication regulators. In order to make the objective see the light of the day, the government also carried out insurance education, mass-awareness and market penetration into the insurance industry.

The problems of marine and life insurance and general insurance products are many in developing nations. However, the level of awareness and patronage of marine and life insurance in Nigeria is very weak. The sector is also affected by a myriad of challenges.[271] In the basket of challenges are weak government legislation and policy, lack of human capital and expertise, and high level of ignorance.[272] Thus, the challenges of marine and non-life insurance sub-sector in legal perspectives are some of the focus areas on this research. It is the author's view that given the revenue-generating capacity and appropriate legal instruments, Nigeria, and developing nations, should be able to exploit the opportunities that exist in the insurance sector for sustainable developments.

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[270] EFInA, 2018; Microinsurance Guideline 2018 can be found here https://naicom.gov.ng/docs/guidelines/MicroInsurance%20Guidelines%202018(NAICOM).pdf> Assessed 10th April,2020.

[271] Major challenges include corruption, fraud, poverty and illiteracy.

[272] Sip and Ports (2018) The State of Marine Insurance In Nigeria, <https://shipsandports.com.ng/state-marine-insurance-nigeria/> Assessed 15 July, 2020; Yejide is of the view that *'effective institutional and legal reforms will create a strong independent and transparent supervisory body and regime while facilitating the easier detection of fraud and the effective enforcement of sanctions.'* Yejide Oyetayo 'Transparency and Accountability in the supervision of the Nigerian insurance industry: A Review of Statutory Provisions' (2012) VIII/2–3 Lagos State University Law Journal 57.

2.6. Conclusion

From the discussion of this chapter, the research has been able to establish that there are relevant laws and institutions on insurance and developments in Nigeria. The research has also been able to show that there are linkages between insurance and economic development. The empirical evidence, however, shows that Nigeria needs to improve on her insurance penetration for sustainable development. It is commendable that the regulators of insurance (NAICOM) has reviewed the paid-up share capital for insurance businesses. Given Nigeria's untapped vast potential in the global insurance marketplace, a well-capitalized industry with insurers who have deep pockets and excellent local capacity is desirable and will contribute to improving the Nigerian economy.

However, the thesis argues for the same measures to be accorded to reviewing the laws that govern insurance contracts. As the chapter has revealed, the Nigerian government has overtime concentrated more on rejuvenating policies on regulatory mechanisms to improve the insurance market, but the developments of legal principles have been deprioritised. Although regulations are imperative, they work hand in hand with existing legal structure for consumer protection, economic and political expediencies and influence the socio-economic role that insurance plays in a developing country like Nigeria.[273] As discussed, countries that share a common cultural affiliation to Nigeria by location like Ghana and by population like India appears to be a reawakened on how insurance is harnessed to improve the standard of living. It remains to see how Nigeria can catch up in years to come. Conclusively, many of the disputes that arise between the insurers and the insured relates to the amount recoverable in the event of a loss. Hence, the next chapter examines the principle of indemnity, which is a fundamental principle of insurance law.

[273] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 1.

CHAPTER THREE: THE PRINCIPLE OF INDEMNITY IN INSURANCE LAW

3.1. Introduction

This chapter presents a critical analysis of the interpretation of the fundamental principle of insurance contract law, namely, indemnity. In insurance law context, indemnity means that the party insured is entitled to be compensated for losses occasioned by the perils insured against and placed in the financial position enjoyed immediately before the loss subject to the terms and conditions of the policy.[274] The indemnity principle was developed in England, and the rules have formed the basis of insurance law in many countries, particularly in Nigeria,[275] and Australia.[276]

The principle of indemnity in insurance law has been subject to misinterpretation, misapplication and its purpose is often misconceived. For instance, the principle has been strictly applied to only prevent the insured from using insurance as a profit-making mechanism. For this reason, other concepts and rules have become established in insurance law to ensure that the insured does not receive a sum greater than his losses. The principles of subrogation, double insurance, contribution and abandonment provide support in this regard. Even more, the law places a barrier on the insured's recovery, such that without interest or relationship with the subject matter of insurance, the contract is illegal, void or simply unenforceable, or prevent a claim under it.[277]

However, there is another side of indemnity, which is often not emphasized in the insurance laws of some countries. It is to make the insured whole again. By interpretation, the insured should be fully compensated and not receive less than the actual loss sustained. In many instances, the interpretation and application of the sub-principles of indemnity (like the rules of insurable interest and subrogation) are inconsistent with this second aspect which the research argues defeats the very purpose of insurance contracts. The outcome of these

[274] The English decision in the leading case of *Castellain v. Preston* (1883) 11 Q.B.D. 380, 387 is the foundation of insurance law which has been adopted in many countries, including Nigeria.

[275] Sec.3 MIA 1961 (Nig.) defines *marine insurance contract as one whereby the insurer undertakes to indemnify the assured, in a manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to a marine adventure'*; Sec 1 MIA 1906 (UK.); Sec 68 (1) & 2 MIA 1961 (Nig.); *Alakija v. Mercury Assurance* [1975] 9 C.C.H.C.J. 1301; *Babalola v Harmony Insurance* [1982] 1 O.Y.S.H.C. 1; *AIICO v Ceekay Traders Ltd* [2001] FWLR [Pt 47] 1163,1186 S.C; *Esewe v Asiemo* (1975) N.C.L.R 433 (Nigeria).

[276] Section 73 (1) MIA 1909.

[277] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 41; John Birds, *Birds' Modern Insurance Law*, (11th Edn, Sweet & Maxwell 2019) 41.

inconsistencies works unjustly on the insured, which either results in denial of compensation or receiving less than the actual losses.

While the concept of indemnity in insurance law appears simple, in practice, the insured's legitimate interest for a full recovery of actual pecuniary loss under the Nigerian and English laws is often undermined. Also, insurers are quick to raise technical defences imposed by the law to avoid payment and liability, which severely affects the legal rights of the insured. Furthermore, many insurance disputes relate mainly to the measure of indemnity which an insured should recover under insurance policies. Similarly, based on literature, there is evidence that the principle of indemnity is imperfect.

Therefore, this chapter focuses on the meaning and purposes of the indemnity principle in indemnity insurance contracts as enacted in the Nigerian, English, and Australian laws. The objective is to clarify the understanding of the goals of indemnity in both jurisdictions. It discusses the reason why the indemnity principle is limited to only indemnity contracts and the complicated legal principles that relate to the measure of indemnity. The chapter also examines some exceptions that modify and affects the perfect nature of indemnity. Finally, it discusses the significance and relationship of other sub-principles that preserves the goals of indemnity.

3.2. The Scope and Nature of the Indemnity Principle

3.2.1. What is Nature of 'Indemnity' in Insurance Law?

The ordinary usage of the word 'indemnity' speaks of a claim which a person has contracted to receive against an unanticipated loss or damage.[278] Although different branches of law use the concept of indemnity for relationships, the interpretation and application in insurance are different from a broader scope.[279] Thus, to understand the root of indemnity and its meaning in insurance law, it might be helpful first to define insurance and its purpose.[280]

The contract of insurance is governed by the rules which form part of the general law of contract, but there is no doubt that over the years it has attracted many principles of its own to

[278] W I B Enright, Robert Merkin, *Sutton on Insurance Law* (4th edn, Thomson Reuters 2015) Volume 2 85; J P Van Nierkerk, *The Development of the principles of Insurance Law in the Netherlands from 1500 to 1800* (Volume 11, Juta & Co Ltd 1998) 1093.

[279] The scope of Indemnity in Insurance law and the law of torts seem to achieve the same purpose, but in terms of loss compensated and assessed for there are differences. In insurance law, loss is confined to direct losses except business interruption insurance while consequential loss is normally recoverable in torts; Malcome A Clarke with Julian M Burling and Robert L Purves, *The Law of Insurance Contracts* (6th edn, Informa 2009) 925.

[280] The word insurance (formally called assurance) is of Italian origin, and the word policy derives from *'polizza'*, as promise or undertaking. See Martin F, *History of Lloyd's and of Marine Insurance in Great Britain* (1876) 31.

such an extent that it is perfectly proper to speak, of a law of insurance.[281] Providing an exhaustive statutory definition for insurance contract has not been an easy task.[282] However, the courts have, over the years, filled the gap in this area.[283] As defined by Agbakoba J, a contract of insurance is one between two parties, one called the insured,[284] and another called the insurer whereby the insurer agrees for an agreed consideration called the premium to pay to the insured a sum of money or its equivalent on the happening of specified events.'[285] The primary objective of insurance is, therefore, to make the insured whole, but never to benefit him.[286] Another purpose is to protect the insured from the economic consequences of fortuitous events.[287] Thus, the interpretation of the terms of the insurance contract must be consistent with the goals of the indemnity principle, when a dispute arises between the parties, for their rights and obligation depend on it.[288]

Based on the requirement of an insurance contract, an underlying task that rests on the insurer's shoulder is a primary and secondary obligation in the event of a loss towards the insured.[289] In

[281] John Birds, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell 2019) 1.

[282] There is no statutory definition of insurance in the Nigerian Insurance Act 2003 which is the core regulatory framework of insurance businesses. The Act is unhelpful for the purposes of a definition of insurance and it is important to know who is an insurer or one carrying on insurance business for the purposes of licencing and regulation. Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 79; Even the situation is the same in the English jurisdiction. See John Birds, *Birds' Modern Insurance Law*, (11th Edn, Sweet & Maxwell 2019) 7; The English Law Commission and The Scottish Law Commission: Insurance Contract Law: A Joint Scoping Paper (2006) para 2.11.

[283] *Chime v. United Nigeria Insurance Co. Ltd* (1972) 2 E.N.L.R. 808, 811; In *Lucena v Craufurd* (1808) 127 E.R. 858 insurance was defined as *'…a contract by which one of the contracting parties charges himself with the risk of the fortuitous accidents to which something is exposed, and obliges himself to indemnify the others from the loss which those accidents may occasion in case of their happenings, in consideration of a sum of money which the other contracting party gives as a price with which he is charged';* More recently, *in Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd* [2010] EWHC 2661 (Comm) *Beatson J defined insurance as 'the provision of cover by an insurer to an assured in respect of an adverse event which is uncertain and the object of which is to provide against loss to the assured, whether as a result of liability to third parties or otherwise or to compensate for prejudice.'*

[284] The terminologies used must be clarified here because the words will be used interchangeably in the thesis: The terminology 'Assured' is peculiar to life assurance simply because death is assured of happening. However, the risk covered by other types of insurance are not. Often in practice, the person who actually contracts with an insurer is referred to as the policyholder but for the purposes of this study, the word 'insured' and 'policyholders' is adopted and used interchangeably.

[285] *Chime v. United Nigeria Insurance Co. Ltd* (1972) 2 E.N.L.R. 808, 811; In *Prudential Insurance Co v IRC* [1904] 2 KB 658 Per Channell J, set out the essential requirements of insurance as follows, the payment of premiums, by the insured, in return, the insurer '*undertakes to provide a benefit or pay a sum of money*', on the happening of a specified event which is uncertain.

[286] Johnny Parker, Replacement Cost Coverage: A Legal Primer, (1999) 34 Wake Forest L. Rev. 295, 296.

[287] A.A Tarr and J.A Kennedy, *Insurance Law in New Zealand* (2nd edn, The Law Book Company Limited 1992) 206.

[288] S Hodges, Law of Marine Insurance, (Cavendish Publishing Limited, London, 2005) 1.

[289] Neil Campbell, "The nature of an insurer's obligation" [2000] LMCLQ 42, at p. 48; Sutton described indemnity as first and foremost a right and obligation, a promise resulting in an obligation' W I B Enright, Robert Merkin, *Sutton on Insurance Law* (4th edn, Thomson Reuters 2015) Volume 2 85; That indemnity is a primary obligation was mentioned in *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827; [1980] 2 WLR 283; [1980] 1

primary obligation, the insurer, on the occurrence of loss or damage to the property insured, is obligated to '*indemnify'* the insured by providing compensation for such loss or damage. For instance, if it is a marine insurance contract, the insurer's obligation is to '*indemnify'* or *'restore'* or *'reimburse'* the assured against losses arising from a marine adventure like preventing a ship from sinking'. Similarly, in a fire policy, it is expected that any damages or loss to a property, like a house on fire or car theft the insurer should place the insured in the position occupied preceding the loss by either paying money, re-instate or repair and nothing more. By way of example using the Nigerian currency, if the value of the insured subject matter destroyed or lost is ₦ 500,000, the insurer must indemnify the insured for the sum of ₦ 500,000 only and nothing more.

The system of reimbursement in insurance is termed '*indemnifying'* and payments made by an insurer generally are limited to an amount that does not exceed what is required to restore the insured to a condition relatively equivalent to that which existed before the loss occurred.[290] It could therefore be inferred that 'indemnity' is a central point in marine or property insurance contracts. The leading case of *Castellain v. Preston*[291] laid down the governing rule of indemnity in insurance contract law and has been followed as precedence by many countries, including the Nigerian courts.[292] The nature, scope and rules of indemnity are discussed as follows.

All ER 556. The primary obligation is most relevant for this thesis. The secondary obligation is the failure by the insurer to perform its primary obligation is a breach of contract.

[290] United Nations (1982) UN Conference on Trade and Development: Legal and Documentary Aspects of Marine Insurance Contract, UN, NY, pp 1-2 <https://unctad.org/en/PublicationsLibrary/c4isl27rev1_en.pdf> assessed on the 5th February, 2016; Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016) 113; W I B Enright, Robert Merkin, *Sutton on Insurance Law* (4th edn, Thomson Reuters 2015) Volume 2 85 - Sutton defined indemnity as the measure of the amount one person must pay to another, in a variety of circumstances; J.O. Irukwu, *Insurance Law in Africa: Cases, Statutes and Principle* (London Witherby & Co. Ltd 1987) 53.

[291] *Castellain v. Preston* (1883) 11 Q.B.D. 380, 387; SR Derham, Subrogation in Insurance Law, (Law Book Company, Sydney, 1985) 133-134.

[292] In Nigeria, *Alakija v. Mercury Assurance* [1975] 9 C.C.H.C.J. 1301; *Okpalaugo v. Commerce Assurance* [1976] N.C.L.R. 2731; *Babalola v Harmony Insurance* [1982] 1 O.Y.S.H.C. 1; *AIICO v Ceekay Traders Ltd* [2001] FWLR [Pt 47] 1163, 1186 S.C; *Esewe v Asiemo* (1975) NCLR 433; *Omotosho v Gateway Insurance Co*., 2 L.R.N. 293; In *Pacific Fire Ins. Co v Pennsylvania Sugar* Co. 72 F 2nd 958 (United States).

3.2.2. The Concept of 'Full Indemnity' derived from the *Castellain* Rule[293]

The seminal case law of *Castellain v Preston*[294] presided over by Brett LJ has over the years remained a solid foundation and excellent application for interpreting the scope, purpose and nature of the indemnity principle. On the facts, a house was damaged by fire after a contract of sale had been signed but before the completion date. His insurers paid the vendor for the loss that occurred as a result of the fire. After that, the contract was completed, and the full price was paid to the vendor.

The issue of contention was whether the insurers could recoup the payment made out to the vendor who received the full price from the purchaser after been compensated by the insurer for the loss sustained? The court held that the insurers could recover their payment out of the sale proceeds of the house, thereby prohibiting the vendor from receiving with both hands. Brett LJ succinctly backed up his decision by providing a lucid statement on the purpose and nature of the indemnity principle in an insurance contract as follows:

> *'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 is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must be certainly wrong'.* [295]

The most crucial line with much impact on the nature of insurance contracts in the above dictum '*shall be fully indemnified but shall never be more than fully indemnified'* specifies the rights

[293] Olusegun Yerokun, *Insurance Law in Nigeria Insurance* (Princeton Publishing Company, 2013) 247; Henry Jackson, 'Indemnity the Essence of Insurance; Causes and Consequences of Legislation Qualifying this Principle ' (1887) 10 Annual Report ABA 261; Charles Lewis, 'A Fundamental Principle of Insurance Law' [1979] LMCLQ 275; See also Andrew Lindblad, 'How Relevant Is the Principle of Indemnity in Property Insurance?' (1976) the Insurance Law Journal, 640; Walter Williams, 'The Principle of Indemnity: A Critical Analysis' The Insurance Law Journal, (1960) 451; William R. Vance, *Handbook of the Law of Insurance* (2nd edn, St. Paul, West Publishing Company, 1930) 75.

[294] [1883] 11 QBD 380.

[295] Per Brett L.J. *Castellain v Preston* [1883] 11 QBD [380], [386]; *Meacock v Bryant and Company* [1942] 2 All E.R. [664]; *British & Foreign Marine Insurance Co. Ltd. v Wilson Shipping Co. Ltd* [1921] 1 AC 188 [814]; *Rickards v Forestal Land, Timber and Railways Co Ltd* [1941] 3 All ER 62 [76].

and obligations of parties in an insurance contract. The meaning of full indemnity when applying other rules of insurance law is explained as follows:

1) First, in the event of a loss, the amount that the insured will recover from his insurers will neither be more nor less than his actual financial loss. Thus, the insurer is under an obligation to indemnify the insured only against his actual loss from the accepted risk.[296] What the insured expects is to be placed in the same position, enjoyed preceding the loss less any excess which the insured has agreed to bear.[297] As noted by Afonja J., in *Ojo v. Nigeria Reliance Insurance Co,*[298] : '*where the insured has discharged his duty of establishing his claim and has shown that the loss or damage was caused by an insured peril, the insurer must then discharge his obligations under the contract by indemnifying the insured in full…'*

2) Second, the insured must have an interest in the subject matter of insurance, for, without such an interest, the insured cannot suffer a loss and hence can obtain no indemnity.[299] The nature of the interest which the insured must possess must not be too strict but one that will allow the recovery of all types of losses, including economic losses.[300]

3) Third, the principle of subrogation steps in to ensure that the insured must not take with both hands. Where there is a potential to receive double payments from the insurer and the negligent third party that caused the damage, the insured should account for this payment to the insurer, and he is bound to transfer to the insurers any rights against the negligent third party. Thus, if the insured is paid a sum greater than the actual loss and makes a profit, the indemnity principle

[296] The amount recoverable from the insurer must not exceed the loss suffered and that any other rules that is inconsistent with the indemnity doctrine must be disregarded; N Campbell 'The Nature of an insurer's Obligation' [2000] LMCLQ 42; ALRC Discussion Paper 63, para. 7.3. The author Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 80 noted the insurer's undertaking to pay is a legally binding one.

[297] In England, an insurer's promise to indemnify is regarded as a promise to prevent an insured from suffering an insured loss as a result of an insured event occurring has been established recently in *Venturouris v Trevor Rex Mountain (The Italia Express* (No 2) [1992] 2 Lloyd's Rep 281 (Hirst J).

[298] *Ojo v. Nigeria Reliance Insurance [1983] 2 F.N.R. 313 at 318.*

[299] Emeric Fischer, 'The Rule of Insurable Interest and the Principle of Indemnity: Are they Measures of Damages in Property Insurance' (1980) 56 Ind LJ 445, 448.

[300] Kyriaki Noussia, *The Principle of Indemnity in Marine Insurance Contract: A Comparative Approach* (Springer 2010) 28; Section 4.3 discusses approaches to economic and non-economic losses under the principle of insurable interest.

is violated.[301] Similarly, when the insured interest takes priority for all losses from subrogation monies recovered, then he has been fully indemnified.[302]

4) Fourth, in the case of double insurance, for instance, where the insured has taken out more than one insurance policy in respect of the same interest, he is precluded from obtaining more than one complete indemnity.[303] The insurer who has paid the claim is entitled to request that the other insurers contribute rateably in proportion to the amount for which the insurer in question is liable.[304]

5) Fifth, a full indemnity in abandonment means the insured gives up their interest and control in a property once they have been compensated for a total loss.[305]

6) Finally, the measure of indemnity in the event of a total loss under a valued policy, the amount of indemnity recoverable by the insured, is the agreed value, whether or not it is more or less than the insured's actual loss.[306] For buildings damaged or destroyed, the amount payable to the insured would be either the cost of repairing or reinstating the building to the same condition preceding the loss.[307]

3.1.3. Purposes and Justification of the Indemnity Rule

The purpose of insurance is indemnity, and indemnity is the yardstick that determines the amount of insurance benefits an insured is entitled to receive. Therefore, the justification and *rationale* behind the principle of indemnity in insurance law are in two folds: (i) to prevent

[301] In *Darrell v. Tibbitts* [1880] L. R. 5 Q. B. D. 560, the premises were held on a lease containing a covenant, under which the lessee was liable for damage caused by gas explosion. The lessor insured the premises with the plaintiff against fire. A gas explosion having damaged the premises, the tenant repaired them. The plaintiff, in ignorance, paid the insurance money. The court held that the plaintiff (insurer) is entitled to recover his money back and not liable because contract of fire insurance is a contract of indemnity, and the assured is not entitled to recover more than the amount of the loss he has suffered; See also John Lowry & Philip Rawlings, *Insurance Law: Cases and Materials* (Hart Publishing 2004) 641.

[302] Johnny C. Parker, The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation (2005) 70 Mo. L. Rev. 723.

[303] Sec 33 & 81 MIA, 1961 (Nig.); See section 3.9.1. on brief discussion on how the principle of double insurance and contribution plays a major role to provide support for the principle of indemnity.

[304] John Birds, Ben Lynch and Simon Paul, *MacGillivary on Insurance Law* (1st Supp 14th edn, Sweet & Maxwell 2019) paras 25-035 to 25-053; John Birds, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell 2019) 371.

[305] Sec 64 MIA, 1961 (Nig.); On several occasions, the courts, over time, have emphasized on the point that subrogation and abandonment are separate doctrines. Ostensibly both are based upon the same principle, that the insured should not be more than fully indemnified for losses. While abandonment is related to the transfer of proprietary rights in the subject matter abandoned, subrogation deals with personal rights and actions of the insured transferred to the insurer; *Goss v. Withers* (1758) 2 Burr.683; 97 E.R. 511.

[306] John Birds, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell 2019)321; J.O. Irukwu, *Insurance Law in Africa: Cases, Statutes and Principle* (London Witherby & Co. Ltd 1987) 54; J.O Irukwu, *Fundamentals of Insurance Law*, (1st Edn, Witherbys Printing Ltd) 106.

[307] See section 3.5. on discussions on the measure of indemnity in marine and property insurance.

unjust enrichment of the insured through wagering; and (ii) to fully restore the insured's losses. Both aspects must always be taken into consideration by the courts when applying the principle of indemnity.

(i) Preventing Unjust Enrichment

Inherent in the notion that an insurance contract should provide no more and no less than a full indemnity is a goal of preventing windfalls to either party.[308] The Nigerian court in *Esewe v Asiemo* [309] emphasised that a contract of insurance was meant to indemnify the assured and not to enrich him over and above that which was necessary to enable him to recoup his loss. Meaning that all the insured should receive must not exceed his losses, nor use insurance contracts to get rich. An example of a Nigerian case where the principle prevented unfair profit by the assured is in *Ejiofor v. Arrowhead Insurance Co. Ltd*.[310] that the insured account for any amount received that exceeded personal liability for the property insured.

Lord Shaw explained the reason for this limitation in *British & Foreign Insurance Co Ltd v Wilson Shipping Co Ltd*.[311] He warned against extending the indemnity principle in that it would lead to a situation 'not in the region of indemnity against loss, but the region of profit-earning.' If the insured stands to profit following a loss, the incentive to cause loss increases with the temptation to destroy, which could be injurious to public policy.[312] If the potential for profit justifies special measures to prevent wrongdoing, impliedly they are necessary to plug a gap generally filled by the indemnity principle.[313] Thus, where the insureds engage in fraud or gambling in the guise of insurance and attempts to make a profit, it is against the nature of insurance, and the principle of indemnity is sufficient to prevent this.[314] Other doctrines like

[308] Kasia Ginders, 'Insurance Law and the Principle of Indemnity in Light of *Ridgecrest NZ Ltd v IAG New Zealand ltd'* (2016) 47 Victoria U Wellington L Rev 73.
[309] (1975) NCLR 433; A leading South African case law *Nafte v. Atlas Assurance Co. Ltd*, 1924 W.L.D. 239 at p. 245 Krause, J emphasised that 'the amount recoverable under a policy of insurance in the event of a fire, must not exceed the sum necessary to indemnify the insured fully against any loss which he may have actually sustained in consequence of the fire'.
[310] (1992) 2 N.I.L.R. 57; Other New Zealand and Australian cases supports this position that the insured is not entitled to make a profit at the expense of the insurer; he is entitled to be fully indemnified, but not more. See for example, *Anderson v James* (1908) 28 NZLR 34, 42; *British Traders' Insurance Ltd v Monson* (1964) 111 CLR 86, 92-94.
[311] [1921] 1 AC 188 (HL), at 207.
[312] J.O. Irukwu, *Insurance Law in Africa: Cases, Statutes and Principle* (London Witherby & Co. Ltd 1987) 53; Kasia Ginders, 'Insurance Law and the Principle of Indemnity in Light of *Ridgecrest NZ Ltd v IAG New Zealand ltd'* (2016) 47 Victoria U Wellington L Rev 73.
[313] Kasia Ginders, 'Insurance Law and the Principle of Indemnity in Light of *Ridgecrest NZ Ltd v IAG New Zealand ltd'* (2016) 47 Victoria U Wellington L Rev 73,79.
[314] A wagering contract is founded upon chance, not upon the chance of an event; it creates its own risk, win all or lose all. An insurance contract is founded upon dispersion of a risk - the insured transfers a large risk for a small

the insurable interest provide support for the indemnity principle is targeted at preventing wagering.[315]

(ii) Fully Restore the insured to Pre-loss condition

Another purpose of indemnity is simply to put the insured in the position they would have been in had the loss not occurred.[316] To do otherwise would either cheat the policyholder or increase the likelihood of intentional destruction of the insured property.[317] Meaning that the insured must not receive less than that the amount lost. Where the insurer pays a sum lesser than amount loss, or not placed in the position occupied preceding the loss, then the very vitals of insurance has been destroyed.

In many countries, including Nigeria, there are legal boundaries that negate the rule that the insured must be fully compensated for losses. For instance, the application of some rules of other important principles occasionally produces for the insured an insurance payment lesser than the loss or outrightly depriving the insured any recoveries.[318] This approach contrasts with the essence of the indemnity principle. When an insurer transacts, they have agreed to compensate for losses, and that side of the bargain must be kept. Often, insurers use these rules as an opportunity to avoid payment. It is argued that this amounts to an exploitation of the insured. The fundamentals of insurance contracts are re-emphasised in the Nigerian case of *Tharwadas v. British India General Insurance.*[319] There Agoro J restated that '*the essence of the insurance contracts is that the insurer agrees, in return for the premium paid… to indemnify or compensate the insured in the event of a loss.*

In practice, it is not uncommon that the insureds engage in fraudulent activities to make a profit or the insurers collect premiums and refuse to pay. To combat such occurrences, the indemnity principle serves as a check on insurance contracts and introduces some amount of certainty to insurance agreement between the parties. In several cases, the court re-emphasises that indemnity is the basis and foundation of insurance coverage with the aim that the amount stated

cost. He is not seeking a gain; he wants to avoid a possible future loss; Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016) 10.

[315] Chapter 4: Detailed discussions on Insurable Interest.

[316] *Castellain v Preston* [1883] 11 QBD [380]; Malcolm Clarke, *Policies and Perceptions of Insurance Law in the Twenty-First Century* (Oxford University Press, Oxford, 2009) 220.

[317] Andrew Lindblad, 'How Relevant Is the Principle of Indemnity in Property Insurance?' (1976) The Insurance Law Journal 271.

[318] For example, the rules of insurable interest and subrogation.

[319] [1974] N.C.L.R. 304 at 309, per Agoro J.

in the policy will not be exceeded, to prevent the insured from reaping economic gains or incurring a loss if adequately insured by the policy.[320] Any rule that negates these goals must be rooted out. Conclusively, the objective of the indemnity rule is significant in the Nigerian insurance law and has an utmost universal acceptance by insurance writers.[321]

3.3. Why Life Insurance Policy is Excluded from the Indemnity Rule

The principle of indemnity only applies to contracts of indemnity like property, marine and fire policies. In *Ojo v Nigeria Reliance Insurance Co.*[322] Afonja J observed that 'it is a fundamental principle of insurance law that all insurance policies with the exclusion of life are contracts of indemnity'. One area of controversy with much debates concerns why the rules of indemnity should apply only to contracts of indemnity and not to life insurance policies.[323] In 1854, the Court of Exchequer Chamber laid the precedence that life insurance was a contingency, not indemnity.[324] Many reasons have been adduced for this proposition.

(a) In life insurance policies, an agreed sum of money is fixed by the terms of the policy recoverable on the death of the life insured. According to Birds, these types of policy can be with profits, in the form of bonus above the stated sum insured expected to be received.[325] While indemnity insurance pays compensation up to the amount of the actual measurable loss, contingency insurance pays a pre-determined sum payable on death.

(b) One other reason is that life insurance is adopted as a means of savings. For this reason, the principle of indemnity is not applicable based on different obligations placed on the insured

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[320] *Crisp v. Security Nat'l Ins. Co.*, 369 S.W.2d 326 (Tex. 1963) (US); *Parham v Royal Exchange Assurance* (1943) SR 49 52 (south Africa); The Australian court in *R v Cohen; Ex parte Motor Accidents Insurance Board* [1979] HCA 46; (1979) 141 CLR 577, said that 'the essence of insurance is 'the relationship of indemnity'.

[321] Kasia Ginders, 'Insurance Law and the Principle of Indemnity in Light of *Ridgecrest NZ Ltd v IAG New Zealand Ltd*' (2016) 47 Victoria U Wellington L Rev 73,77; MFB Reinecke, The basis of Insurance: The Indemnity Theory revisited 2001 J.S. Afr. L. 222, 226; Emeric Fischer, 'The Rule of Insurable Interest and the Principle of Indemnity: Are they Measures of Damages in Property Insurance' (1980) 56 Ind LJ 445, 448; Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016) 112-113; Reinecke et al General Principles of Insurance Law para 46; Van Niekerk 2001 South African Law Journal (SALJ) 302; William R. Vance, *Handbook of the Law of Insurance* (St. Paul, West Publishing Company, 2d Ed., 1930) 75; Zhen Jing, *Chinese Insurance Contracts Law and Practice* (Informa law from Routledge 2017) 738.

[322] [1983] 2 F.N.R. 313 at 318; *Ejiofor v. Arrowhead Insurance Co. Ltd.* [1992] 2 N.I.L.R. p 57.

[323] Not all insurance contracts are contracts of indemnity. A non-marine insurance is categorised into property insurance and personal insurance. See Zhen Jing, *Chinese Insurance Contracts Law and Practice* (Informa law from Routledge 2017) 580; Olusegun Yerokun, *Insurance Law in Nigeria* (1st edn, Princeton 2013) 256 for a detailed classification of types of personal insurance.

[324] The case of *Dalby v The India and London Life Assurance Company* (1854) 15 CB Reports 365; 139 ER Rep 465 is an authority that a life assurance contract is not a contract of indemnity.

[325] John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 373.

and insurer. In the words, of Prof Zhen, 'a person's life cannot be measured with money. Hence there is no question of compensation for loss resulting from death'.[326]

(c) Finally, a more convincing explanation is that various rules which are applied to life insurance arrangements – including the doctrines which define or determine (i) the requisite duration of an insurable interest; (ii) the possible rights of subrogation; and overvaluation – are inconsistent with the principle of indemnity.[327] Many common law jurisdictions, support that the rules of indemnity do not apply to life insurance policies.[328]

By contrast, a different school of thought is of the opinion that life insurance policies are contracts of indemnity because the insurance proceeds are usually provided to a beneficiary who has sustained a loss of some benefits as a consequence of death.[329] As a result, it is argued that life insurance policies partake of the nature of the foundation of insurance law- Indemnity. According to Prof Yerokun, life insurance is hibernating under the principle of indemnity to fulfil a specific purpose of an insurance claim. [330]

One other support for the applicability of indemnity rules on life insurance is because of its similarity to the arrangement of a valued policy.[331] Consequently, the amount payable for any loss or maturity on death by the insurer is fixed from the inception of the contract as opposed to an undertaking to pay a sum based which is calculated based on the loss incurred in the case of an indemnity contract. As a result, the premium paid by the assured to the insurer is to receive a fixed amount payable to him of his representatives in the event of death. At best could be referred to a valued contract.

Based on the contrasting views, it is the opinion of the writer that life insurance does not comply with the nature of the indemnity principle in comparison with other forms of insurance. First, it hibernates under the indemnity principle but not a strict indemnity contract. Second, the

[326] Zhen Jing, *Chinese Insurance Contracts Law and Practice* (Informa law from Routledge 2017) 635.
[327] Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016)119.
[328] In the United States for instance, the court in *Keckley v. Coshocton Glass Co.*, 99 N.E. 299, 300 (Ohio 1921) rejected the contention that life insurance policies based on an underlying business relationship may be characterized as indemnity insurance.
[329] Warren Reedman, *Richards on the Law of Insurance* (5th edn, Baker Voorhis & Co 1952) 370.
[330] In an interview conducted with Prof Yerokun on the 20th April 2017, he mentioned that life insurance is not subject to strict indemnity because life insurance is predicated on age of which the cost cannot be calculated monetarily.
[331] A valued policy specifies the agreed value of the subject-matter insured.

contractual arrangement is influenced by the indemnity principle though less pervasive like other contracts of indemnity, e.g. marine and property insurance.[332]

Conclusively, while life insurance policies merely secure payment of a sum of money in the event of a loss while the amount recoverable, in contracts of indemnity – marine insurance and property insurance - is measured by the extent of the insured's loss. Furthermore, life insurance, unlike its property counterpart, protects against an occurrence that is certain to occur.[333] Hence the justifiable reason why life policies are excluded from the rule of indemnity. In summary, life insurance is more of an investment contract, while property insurance is more of an indemnity contract. However, each type of insurance has characteristics of both indemnity and investment. These differences will be variably attenuated when different types of insurance are considered.[334]

3.4. Statutory Approach to Contracts of Indemnity

The common law doctrine of indemnity is expressed and codified in the English Marine Insurance Act 1906 and was first developed as a statutory requirement for English Insurance contracts between the 18th and 19th century.[335] Although the wordings of the statutory definition is marine in nature, it encompasses both marine and a portion of non-marine insurance – property insurance. The Nigerian law, according to sec. 3 MIA 1961 (Nig.) defines indemnity as:

> *'A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in a manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to a marine adventure'.*

The English statutory approach to the Indemnity principle is similar word-for-word in principle to the Nigerian Law.[336] For insurance on a property, like houses or buildings, s. 66 Insurance Act 2003 (Nig.) applies, and it states that the insurer has the liability to make good the loss[337]

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[332] Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016)119.
[333] Johnny C. Parker, Does Lack of an Insurable Interest Preclude an Insurance Agent From Taking an Absolute Assignment of His Client's Life Policy?, 31 U. Rich. L. Rev. 71 (1997) 74.
[334] William T. Vukowich, Insurable Interest: When It Must Exist in Property and Life Insurance, (1971) 7 Willametre L.J. 1,23.
[335] J P Van Nierkerk, *The Development of the principles of Insurance Law in the Netherlands from 1500 to 1800* (Volume 11, Juta &Co Ltd 1998) 1093.
[336] MIA 1906, Sec 1 (Uk.).
[337] Section 66 (1) Insurance Act 2003 specifies on how money insured on houses burnt are to be applied.

of the insured subject matter. The section also specifies how the insurance monies are to be applied and make a requirement to pay the insured for the loss suffered but not exceeding the insured sum.[338]

The statutory definition of marine insurance portrays indemnity insurance as a contract of indemnity and further underpins several fundamental issues for the indemnity principle. First, it is undoubtedly clear through the operative wordings '…*undertakes to indemnify'* that the rules of performance between parties, rights, liabilities and obligations of parties primarily emanates from and is founded upon an insurance contract.[339] Concerning rights and liabilities of parties, the insured is entitled to recoup the amount incidental to his loss which needs to be proved with exception to valued policies while the insurer's obligation is to pay a valid claim within a reasonable time.[340]

Second, the law allows and embraces the freedom of parties to agree on the terms and amount recoverable through the wordings '…*in the manner and to the extent thereby agreed*…' With this provision, parties are at liberty to contract via a valued policy as well as lifts the burden of proving the extent of loss of the insured, although a loss must have indeed occurred. According to Kyriaki, the English law is unclear as to the limit of the agreement, which poses many difficulties in the exact measure of the insured valued of the subject matter.[341] This uncertainty possibly gives rise to overvaluation or overcompensation. Concerning marine insurance, a statutory barrier is set stating that indemnity should not exceed the sum set out in the policy of insurance. [342] This serves as a measure of indemnity in a valued and unvalued policy.

Lastly, indemnification is made consequent upon the occurrence of a loss. To interpret this final point with respect to loss, various factors such as the nature of the policy, type of loss

[338] Section 66(3) Insurance Act 2003.
[339] W I B Enright, Robert Merkin, *Sutton on Insurance Law* (4th edn, Volume 2 Thomson Reuters 2015) 85.
[340] In the Enterprise Act 2016, part 5 late payment of insurance claims - The position changed in England to payment within a reasonable time with respect to the Enterprise Act 2015. In other words, the obligation on the insurer is to hold the insured harmless against a specified loss while the insured is allowed to recover no more than the actual value of his property at the time of loss. The insurer's obligation is to pay a valid claim 'within reasonable time'. See Enterprise Act 2016, part 5 late payment of insurance claims. See also Zhen Jing, The Insurer's Primary Obligation to Pay Valid Claims in a Timely Manner 2015 The Journal of Business Law, 37-67.
[341] Kyriaki Noussia, *The Principle of Indemnity in Marine Insurance Contract: A Comparative Approach* (Springer Berlin Heidelberg, 2007) 30.
[342] MIA 1906, Sec 67 (1) (UK); MIA 1961, Sec 68 (Nig) and MIA 1909, Sec 73 (1) (Aust.) defines the extent of liability for an insurer and measure of indemnity in a valued and unvalued policy.

whether partial or total is be assessed to determine the measure of indemnity or amount recoverable when a loss occurs in a marine or property insurance contract.

3.5. Application and Measure of the Principle of Indemnity in Property and Marine Insurance

In principle, indemnity is the sum that the assured is entitled to recover in respect of a specified loss (whether economic or pecuniary).[343] Where the insurer needs to fulfil his obligation under the principle of indemnity, there are various methods whereby the insured's loss is measured. The measurement of the insured's loss is the guide to restoring the insured to the position he occupied preceding the loss. The object of calculating the amount recoverable is to ascertain the pecuniary value of the loss since the obligation of the insurers is to indemnify through methods agreed upon.[344] The courts through techniques have adopted several approaches in determining the measure of indemnity wherein either a partial or total loss has occurred. This is because to effectuate indemnity every relevant fact and circumstances should be considered in arriving at a correct estimate of loss.[345] Additionally, the insured value of the subject matter and the amount of the loss are relevant for a claim under an insurance policy.[346]

Of utmost concern is the fact that because the measure of indemnity is strongly linked with the insured's loss suffered and not necessarily the value of the subject matter destroyed, there is bound to be difficulties in accessing the loss.[347] As a result, the starting point is to ask what has the insured lost, and how should the loss be calculated to arrive at an amount sufficient for indemnification? These problems are addressed under the following heading: (i) Measure of indemnity in property insurance contract (ii) Measure of Indemnity in a marine insurance contract.

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[343] See section 4.5. on insurable interest for economic loses.

[344] The compensation expected after a loss is the payment of money. However, other methods like reinstatement or repair could be agreed upon by parties. Where the insurer has elected to reinstate the insured, the insured cannot insist on the payment of money.

[345] Williams H. Hope, 'Whither Indemnity' (1962) Ins. L.J. 632, 635; See also *British Traders' Insurance Co Ltd v Monson* [1964] HCA 24; 111 CLR 86 where the court reiterated that 'the assured is not entitled to recover the amount specified in the policy unless it represents his actual loss'.

[346] The onus of establishing the insurable value amongst other factors lies on the claimant. See also F.D Rose, *Marine Insurance Law and Practice* (2nd edn, Informa, 2013) 532 for more analysis on the proof of loss.

[347] There is sufficient line of authority that indemnity is only attached to the loss suffered by the insured. In *Falcon Investments Corporation (NZ) Ltd v State Insurance General Manager* [1975] 1 N.Z.L.R 520,523 it was held that the policy in question was one of indemnity and the sum payable as a result was the loss to the insured and not the value of the house destroyed; See also *Leppard v Excess Insurance Company Ltd* [1979] 1 W.L.R 512.

3.5.0.1. Indemnity in Property Insurance Contract[348]

Property insurance is a prime example of a contract of indemnity. In practice, the measure of indemnity under property insurance policies is usually determined by the terms of the policy and calculated at the time the loss occurs. The measure of indemnity is the cost of reinstatement.[349] However, if the terms stated in the policy, exceeds the actual loss sustained, the insured is not entitled to recover more.[350] Furthermore, the insurer's liability to the insured is limited to the indemnification of the loss sustained, and indemnity insurance law strives to avoid the unjust enrichment of the insured through any recovery above the measure of indemnity provided by law.[351] For example, if the cost of reinstatement exceeds his actual loss, he is prohibited from recovering that cost where the market value offers a lesser indemnity.[352] The loss has to be identified to determine the proper measure of indemnity. Any recovery that exceeds the insured's interest is wagering.

However, a large proportion of contention arises as to the amount recoverable in the policy itself. This is because calculating and ascertaining the measure of indemnity and how this figure recoverable is to be arrived at the fundamental to putting the insured back to the position occupied preceding the loss amounts to recover actual losses. It is important to note that the insurer is not only obliged to calculate the loss but also obligated to use an appropriate measure that meets the policy requirement. [353] The task of the courts and legislature has been to develop clear standards of recovery that will enable property owners to estimate the amount of

[348] Tarr, 'The Measure of Indemnity under Property Insurance Policies' (1983) 2 Canterbury L.R. 107; J.P. Van Niekerk, 'Maintaining the principle of indemnity: theory and practice', (1996) J. S. Afr. L. Journal of South Africa Law 572; J Birds, 'The Measure of Indemnity in Property Insurance' (1980) 43 MLR 456.
[349] John Lowry & Philip Rawlings, *Insurance Law: Cases and Materials* (Hart Publishing 2004) 642.
[350] In *Chicago Title & Trust Co v United States Fidelity & Guaranty* Co 376 F Supp 767 (1973), per Will J, in John Lowry & Philip Rawlings, ibid, p. 642, where the insured claimed on his policy to seek indemnification from his insurer for destruction of the insured building that was empty, secured and boarded. It had been gutted by a previous fire and had not been used in any way. Will J ruled that, '...it would be ludicrous to allow the plaintiff [the insured] to recover a substantial amount of money representing the replacement cost less depreciation of a building that was for all practical purposes non-existent. It would be grossly inequitable for plaintiffs beneficiary to recover $43,000 for a building which less than one month prior to its destruction she had purchased for $4,000 in what appears to have been an arm's length transaction and in which building she had made absolutely no additional investment or improvement.'
[351] Howard Benneth, The Law of Marine Insurance (2nd Edn, Oxford University Press 2006) Para. 1.51, 22.
[352] Charles Lewis, 'A Fundamental Principle of Insurance' Lloyd's Maritime and Commercial Law Quarterly 277.
[353] Recently, the New Zealand courts in *Young v Tower Insurance Ltd* [2016] NZHC 2956 addressed the appropriate measure of indemnity in a building and arrived at a conclusion that the repair methodology did not meet the requirements of the policy, and on that basis the house was a rebuild rather than a repair. See also Robert Merkin (Editor) Insurance Law Monthly, January 2018, Volume 30, Issue 1.

insurance necessary for proper compensation of losses.[354] Traditionally, property insurance policies being indemnity policies provides compensation to the extent of the actual cash value done through reinstatement.[355] It could either be contractual or statutory.

3.5.0.2. Indemnity based on Contractual Re-instatement

Usually, insurers always have options to elect to reinstate and to repair the destroyed property. In *Western Trading Ltd v Great Lakes Reinsurance (UK)* [356] the court of appeal revisited the concept of reinstatement. It was defined to mean the insured to be placed 'in a condition or situation equal to but not greater or more extensive than its previous condition when new'. In the case of property insurance, the option of reinstatement often gives rise to difficulties and often litigation between the insured and the insurer where the property is in a poor state of repair or policyholder decides against reinstatement.[357]

Common motor vehicle policy provides that: *'At its own option the Company may pay in cash the amount of the damage or may repair, reinstate or replace the motor vehicle in part…'* It is submitted that whatever the options are taken as a method of compensation the insured must be fully indemnified and the courts must be consistent with the rule. The court held in *Abed Bros. Ltd. v. Niger Insurance Co.*[358] that the insured cannot withdraw from their options and are liable for the consequences of a failure to perform adequately.

In Nigeria, most disputes have arisen on the insurer's failure to repair or reinstate within a reasonable time or unsatisfactorily. For example, insurance companies might want to save cost by patronising roadside mechanics rather than patronise the motor dealers such as Toyota, Honda or Kia where a good job is guaranteed and secured.[359]

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[354] Valuation and Measure of Recovery under Fire Insurance Policies (1949) 49 Columbia Law Review 818,819. <https://www.jstor.org/stable/1119150?seq=1#page_scan_tab_contents> accessed 10 Jan 2018

[355] Actual cash value policies are pure indemnities agreements. Their purpose is to reimburse the insured; to restore him as nearly as possible to the position he was in before the loss.

[356] [2016] EWCA Civ 1003; [2016] P.L.S.C.S. 270. The issue before the court was to determine whether the amount payable be limited to the current value of the building or be based on the cost of reinstatement. The decision of the court considered the insured's intention to genuinely reinstate and held that the reinstatement cost was payable to cover for the actual loss; Property Law Bulletin, 'Case Comment, Insurance: Reinstatement Cost or Value?' (2017) 37(7) 52-53; See also John Birds, *Birds' Modern Insurance Law* (10th edn, Sweet & Maxwell 2016) 319 where author referred to 'reinstatement' as a conventional term that could be expanded to mean to rebuild, to replace or to repair.

[357] Austin J. Buckley, *Insurance Law* (3rd edn, Round Hall Thompson Reuters, 2012) 171.

[358] [1976] N.C.L.R. 458, 470.

[359] Motor repairs in Nigeria is not as structured as its UK Counterpart.

The court upheld the principle of indemnity in *Nicholas Bros. Ltd. v. Lion of Africa Insurance Co.*,[360] and held on the facts of the case that the insurer had not discharged its obligation when it failed to install a new roof as the roof of the car insured was damaged beyond repair.[361] The decision is a typical example of instances where the courts insist that in motor insurance cases, nothing short of compensating the insured in full by restoring the vehicle to its condition before the accident would suffice. Also, in *Kayode v. Royal Exchange Assurance*,[362] the insurer was held in breach of the obligation to repair satisfactorily when the vehicle failed a roadworthiness test undertaken after the purported repairs carried out by the insurer.

It is important to note that with policies offering 'new for old' or 'reinstatement as new' as compensation, must make a deduction for betterment for wear and tear before compensation to guard against a violation of the principle of indemnity. Furthermore, sums paid in respect old buildings that have been destroyed or lost or in a poor state of repair must not be greater so that it enriches the insured or lesser so that the insured is not impoverished.

According to Buckley, a policy written on reinstatement as a new basis is subject to the indemnity principle which limits the insured's recovery to only what has been lost. [363] If the reinstatement is not carried out timeously or becomes practically impossible to do so, the insurer is only liable to compensate the insured for the value of the property at the time of the loss in consonance with the principle of indemnity.[364] However, in the absence of how the word 'value' is to be interpreted or calculated, three possible approaches flowing from a line of authorities are used to actualize the real cash value of the insured property. They are (i) Re-instatement cost (ii) Market Value (iii) The cost of an equivalent modern replacement.

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[360] [1961] L.L.R. 86, 90.
[361] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 340.
[362] [1955-56] W.R.N.L.R. 154.
[363] Austin J. Buckley, *Insurance Law* (3rd edn, Round Hall Thompson Reuters, 2012) 171.
[364] Austin J. Buckley, *Insurance Law* (3rd edn, Round Hall Thompson Reuters, 2012) 172 mentioned that assessment of the value of the property could prove problematic sometimes hence in order to resolve the problems of assessing the value of the property at the time of loss, the courts are called upon to establish the monetary value of the property at the time of loss; Valuation and Measure of Recovery under Fire Insurance Policies (1949) 49 Columbia Law Review 818,832 <https://www.jstor.org/stable/1119150?seq=1#page_scan_tab_contents> accessed 10 Jan 2018; Ambrose B. Kelly, 'The Insurance of Profits, Reinstatement Value, Agreed Amount and the Principle of Indemnity' (1966) The Insurance Law Journal 517, 527.

3.5.0.3. Recoveries through Re-instatement Cost or Cash Payment

In property insurance contracts, particularly coverages of building, the amount payable as indemnity on policies that contain 'reinstatement as new' is the cost of rebuilding to a condition as it was previously, but not in a better or more expensive form when new.[365] The liability of the insurer is limited to the payment of the value of the property at the time of loss. However, reinstatement cost can be sort by the insured as the basis of valuation in arriving at a figure payable as indemnity. For a successful claim, the courts have established through lines of authorities of what the claimant must prove.[366] In *Reynolds and Anderson v Phoenix Assurance Co. Ltd* [367] the court highlighted conditions that must be met for reinstatement cost to apply.

An analysis of *Reynolds and Anderson v Phoenix Assurance Co. Ltd* [368] presents a clear foundation upon which a cost of reinstatement is used as the measure of indemnity on the insurance of old buildings. In this case, about 70 per cent of an old malting building was destroyed by fire. Of all the measures canvassed as the appropriate measure of indemnity, the cost of reinstatement was held to be the most appropriate and sufficient measure to reinstate the building substantially preceding the loss especially because the insured had a genuine intention to reinstate.[369]

However, where the insurer wishes to reinstate, he must give the insured unequivocal notice that he intends to exercise his options to reinstate. Thus, Agbeje, J. held in *E.O Kikiowo v. West Association Company Ltd*[370] that once an insurer has made an election to reinstate, he is bound by it and cannot thereafter change its mind.

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[365] Austin J. Buckley, *Insurance Law* (3rd edn, Round Hall Thompson Reuters, 2012) 172.

[366] In most cases, whether or not an insured is entitled to a cost of reinstatement is a question of fact as there are no laid down rules or principles dictating market value or cost of reinstatement. Hence all the facts and circumstances of the particular case must be examined in order to ascertain the actual value of the loss at the relevant date.

[367] [1978] 2 Lloyds Rep. 440.

[368] [1978] 2 Lloyds's Rep. 440.

[369] Using the Market value was inappropriate; A.A Tarr and J.A Kennedy, *Insurance Law in New Zealand* (2nd edn, The Law Book Company Limited 1992) 213. Furthermore, the English Court of Appeal recently in *Great Lakes Reinsurance (UK) SE v Western Trading Limited* [2016] EWCA Civ 1003 identified circumstances where the court may make a declaration that an insured under a property insurance policy is be compensated for the cost of reinstating property damaged by an insured peril, especially where the insured's intention is unclear. *Great Lakes's* case further provides clarity on the insured's right to be indemnified on a reinstatement basis with respect to a property insurance policy. For further guidance see Herbert Smith Freehills LLP, 'Court of Appeal confirms insured's entitlement to a declaration of indemnity for cost of reinstatement of property damaged by fire' (December 2016) <https://www.lexology.com/library/detail.aspx?g=27eaf5c4-99a8-4295-86b3-88ef57b49163> Assessed 07 March 2018.

[370] (1976) 3 O.Y.S. 390.

There is also judicial support for making payments for claims in cash.[371] This method is often common and preferable. In practice, a clause is inserted in the contract of insurance, giving an insurer the option to pay or reinstate. The option clause is a contractual understanding between the parties and gives the insurer a chance to compare the options before making elections.[372] Nonetheless, a deduction for betterment must be made from the amount recoverable by the insured. [373] This is as a result of the well-established principle of betterment in insurance although it may sometimes work a hardship on the insured. In principle, an allowance must be made because the insured is getting a new version for something old. [374] Although the 'new for old' policies was no doubt a significant inroad into the traditional principle of indemnity, insurers demand higher premiums for such cover.[375]

As for the quantum payable for a unique building destroyed by fire, the Supreme Court of South Australia in *Marek v C.G.A. Fire & Accident Insurance Co. Ltd*[376] adopted the cost of repair for reinstatement of the unique stating that the market value would not fully compensate the insured for his actual loss been lesser than the reinstatement cost. The case law as mentioned above on reinstatement, demonstrates conclusively that the loss suffered by the insured in a property or fire policy is the measure of indemnity.

3.5.0.4. Recoveries based on Market Value test

In insurances of property, the test adopted by the insurance industry or companies in determining the amount that would suffice to indemnify the insured is the 'market value' test.[377] The term market value refers to the value at the market of replacement rather than the actual cost value. In principle, the insured is fully indemnified if paid the market value of the lost or damaged property at the time and the place of loss. [378] The cost is recovered by the claimant in the market of replacement. As a result, the marketplace used is the one nearest the place of loss

[371] *Rayner v. Preston* (1881) 18 Ch. D. I (CA).
[372] Olusegun Yerokun, *Insurance Law in Nigeria Insurance* (Princeton Publishing Company, 2013) 256.
[373] *Harbutt's Plasticine Ltd v Wayne Tank & Pump Co Ltd* [1970] 1 Q.B. 447 at 473.
[374] A.A Tarr and J.A Kennedy, *Insurance Law in New Zealand* (2nd edn, The Law Book Company Limited 1992) 213; In *Pleasurama Ltd v. Sun Alliance and London Assurance Ltd* [1979] 1 Lloyd's Rep.389 the issue of determination was to access the insured's actual loss which was the cost of reinstatement less an allowance for betterment bearing in mind the nature of the building.
[375] John Birds, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell 2019) 315.
[376] (1985) 3 A.N.Z. Insurance cases 60-665.
[377] J.O. Irukwu, *Insurance Law in Africa: Cases, Statutes and Principle* (London Witherby & Co. Ltd 1987) 55.
[378] Malcome A Clarke with Julian M Burling and Robert L Purves, *The Law of Insurance Contracts* (6th edn, Informa 2009) 930; J.O. Irukwu, *Insurance Law in Africa: Cases, Statutes and Principle* (London Witherby & Co. Ltd 1987) 55.

or discovery of the loss, and for goods, in transit, it is often the place of the intended destination. [379] The cost is recovered by the claimant in the market of replacement been quantified to be the actual market value rather than the actual cost value. Hence, the test to be applied is what it would cost the insured to replace the lost goods. [380]

In respect of goods, market value at the time of loss is the obvious measure because the insured can go into market and purchase equivalent goods perhaps market value approach would not restore the insured to his original position because it might cost him more. [381] In the absence of a market value, the court takes into consideration the price which the item could have been sold for immediately preceding the loss.

Market value under property insurance is also used to determine indemnity depending on the intention of the insured at the time of loss which might be an appropriate measure for calculating the actual or real loss. [382] If before the loss, the insured intended for the property to be sold, the basis of assessment is the market value of the property. However, where the insured has no intention that the property is for sale immediately before loss but has an after though as a result of the loss, possibly because he needs immediate alternative accommodation, the cost of finding alternative property will be the basis of indemnity. If the reverse is the case – insured having no intention to sell before the loss or damage – the insured cannot be forced to accept the market value as the basis of indemnity.

In a situation where the insurer contends that market value is the measure of indemnity, the onus is on the insurer to prove there is a market for such a building and the level of the value in that market.[383] In *Pleasurama Ltd v Sun Alliance & London Insurance Ltd* [384] the court held that the cost of reinstatement was the only measure of indemnity available due to the insufficient evidence of market value for similar halls to enable any kind of reliable estimate of market value to be made. Furthermore, market value is also used as a measure of indemnity for unique items like arts and difficult to apply in some circumstances. [385]

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[379] *Rice v Baxendale* [1861] 7 H & N 96,100; See also Malcome A Clarke with Julian M Burling and Robert L Purves, *The Law of Insurance Contracts* (6th edn, Informa 2009) 930.
[380] *Rice v Baxendale* [1861] 7 H & N 96 at 100.
[381] John Birds, 'The Measure of Indemnity in Property Insurance' (1980) 43 The Modern Law review 456, 458.
[382] *Leoppard v Excess Insurance Co Ltd* [1979] 2 Lloyd's Rep 91, 96.
[383] Austin J. Buckley, *Insurance Law* (3rd edn, Round Hall Thompson Reuters, 2012) 175.
[384] [1979] 1 Lloyd's Rep. 389.
[385] *Quorum AS v Schramm* [2001] EWHC 494 (Comm); [2002] Lloyd's Rep. I.R. 292.1 Lloyd's Rep 249; See Austin J. Buckley, *Insurance Law* (3rd edn, Round Hall Thompson Reuters, 2012) 177 for more analysis for measure of indemnity for work of arts.

3.5.0.5. Recoveries based on the Cost of Equivalent Modern Replacement

The cost of equivalent modern equipment is an alternative method of arriving at a valuation of premises. Especially in difficult circumstances involving old buildings where no other suitable method of valuation is available.[386] The rationale behind this is so that an alternative building should be possibly erected once the purpose of the initial damaged building is established and agreed upon. The value of the building destroyed could, therefore, be said to be the cost of erecting the new building. [387]

3.4.0.6. Indemnity in Marine Insurance Contract[388]

The measure of indemnity in marine policies is quite different from property policies. The common types could either be valued or unvalued for both hull and cargo. [389] Thus, the measure of indemnity between these two identified policies differs and legal disputes often arise as to identifying a policy as being one or the other. There are lines of authorities that resolve this complexity.

Where it is a valued policy, the amount recoverable in the event of a loss is either agreed upon by parties or fixed by the policy. e.g. if it is cargo, the invoice value of the cargo in other for the loss of profit on resale to be covered.[390] According to sec 29 (1) MIA, 1961 (Nig.) 'a valued policy is a policy which specifies the agreed value of the subject-matter insured.[391] Therefore, the measure of indemnity is calculated by reference to the agreed value stated in the policy. The agreed valuation upon which the premium is calculated is conclusive on both the insured and the insurer.[392] In *Great Nigeria Insurance Company Ltd v Ladgroups Limited*, [393] the court defined a valued policy as 'one in which the value of the thing insured and also the amount

[386] Austin J. Buckley, *Insurance Law* (3rd edn, Round Hall Thompson Reuters, 2012) 174.
[387] The option for cost of equivalent modern replacement was considered in *Reynolds and Anderson v Phoenix Assurance Co. Ltd* [1978] 2 Lloyds's Rep. 440 but not sufficient to fully compensate the insured based on his genuine intention.
[388] Walter Williams, 'The Valued Policy and Value Determination' (1961) INS. L. J. 71,78; Charles Lewis, 'A Fundamental Principle of Insurance Law' [1979] LMCLQ 275; Lakeman 'Measure of Indemnity (1980) 8 The Adjusters Journal 2; Robinson, 'The Measure of Indemnity' (1980) 8 The Adjusters Journal 15; Smith, ' Actual Cash Value (1980) 8 The Adjusters Journal 18.
[389] Sec 68 (1) & (2) MIA 1961 (Nig.). clearly defines the meaning of the 'measure of indemnity'. See Appendix 2, of the thesis for an excerpt of this statutory provision; The equivalent English provision is Sec 67 (1) & (2), MIA 1906 (UK). Similarly, Sec 69 MIA 1961 (Nig.) specifies the measure of indemnity on a total loss for valued and unvalued policies. The equivalent English provision is Sec 68 (1) & (2), MIA 1906 (UK).
[390] *Clothing Management Technology Ltd v Beazley Solutions Ltd* [2012] EWHC 727 (QB); *Kuwait Airways Corp v Kuwait Insurance Co SAK* [2000] Lloyd's Rep. I.R. 439.
[391] MIA 1906, s 27 (UK.); See also Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 629 for a detailed analysis of the measure of indemnity under a valued policy under the English law.
[392] *British Traders' Insurance Co Ltd v Monson* [1964] HCA 24; 111 CLR 86; Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet &Maxwell 2016) Para. 11-016.
[393] *(Court of Appeal, Lagos Division) 3 PLR/1985/ 43 (CA).*

thereon in the event of a loss, is settled by arrangement between the parties and inserted in the policy'.

An unvalued policy has a contrasting approach to a valued policy according to section 30 of the Marine Insurance Act 1961(Nig):

> *'a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained...'*

Consequent upon this statutory definition, what distinguishes an unvalued policy from a valued policy is that there is no specificity as to the value of the subject matter, but compensation is subject to the maximum sum insured. The insurable value of the subject matter is left to be determined at the time of loss. [394] The sum specified in the policy as the amount of insurance, if any, indicates the limit of the insurer's liability. [395] The absence of no consensus between the insured and insurer as to the value of the insured subject matter at the time the contract is entered into, upon loss or damage, the actual value of the insured subject matter at the time of the occurrence of the insured event shall be the basis for calculating the amount of the indemnity payment. [396] Therefore, the assured must prove the actual value of the insured subject matter in the event of a loss.[397]

3.5.1. Most Effective Measure of Indemnity in Nigeria: Comparing Methods

The primary obligation of the insurer is to indemnify the insured under the policy through various means by either paying money, repairing the damaged property or reinstatement. In the event of the destruction of this kind of property, the measure of damage should be actual worth or value to the owner preceeding the loss excluding any sentimental considerations.[398]

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[394] Zhen Jing, *Chinese Insurance Contracts Law and Practice* (Informa law from Routledge 2017) 575; Art 55 (2) of the Insurance Law (China); Sec 30, MIA 1961 (Nig); The meaning of insurable value of goods in an unvalued policy is the prime cost of the goods, plus the expenses of and incidental to shipping and the charges of insurance upon the whole. For an unvalued policy the value of the insured goods has to be proved at a later date but not exceeding the maximum sum stated. Another practical differentiating factor in terms of the form is that in a valued policy the space corresponding to the sum at which the parties agree to fix the amount of the insurable interest is filled in, whereas in an unvalued policy it is left blank.

[395] E.R. Ivamy, *General Principles of Insurance Law* (6th edn, Butterworths 1993) 231.

[396] Zhen Jing, *Chinese Insurance Contracts Law and Practice* (Informa law from Routledge 2017) 575.

[397] This has to be proven by the production of invoices, vouchers, estimates and other evidence.

[398] Emeric Fischer, 'The Rule of Insurable Interest and the Principle of Indemnity: Are They Measures of Damages in Property Insurance' (1980) 56 Ind LJ 445, 448.

Where an insurer opts for either a reinstatement cost, market value, or the cost of equivalent modern replacement, the loss suffered by the insured must be the appropriate measure of indemnity. In other words, recovery is limited to the actual value of a loss.[399] However, the most practicable amongst the three approaches is difficult to pinpoint in the Nigerian setting. The high level of illiteracy, coupled with consumer apathy makes it very difficult for the average Nigerian to be interested in protecting his rights.[400]

In some cases, it might be found that the market price or the market value at the time and place of loss is not sufficient to indemnify the insured, in which case a more practical method of assessing a proper indemnity must be agreed between the insurers and the insured. Thus, the writer recommends that the reinstatement cost is most practicable, and quicker for an average insured in the loss of building or motor car. In determining indemnity, the insured must show that he has a genuine intention to re-instate the building or property taking depreciation into account; that the reinstatement is not eccentric in the circumstances; that the proposed mode of reinstatement is reasonable.

On the other hand, there are difficulties where the insurer elects to repair the damaged property, which would possibly lead to the insured paying more. These are: the insurers may not be able to limit their expenditure to the sum insured; and the insurers may be liable to damages for failure to repair the car substantially to its *status quo,* even if repair is more expensive. Based on this above mention, payment in cash is preferable.

In the case of goods or merchandise in a trader's shop for example, where such goods are insured under a fire or burglary policy, the insured will be fully indemnified if he is paid the value of the goods to himself, that is, the wholesale price he paid to obtain the goods and not the selling price which he has fixed for the goods.[401] This method of settlement is generally accepted as a full indemnity because, with the wholesale price of the goods paid to him, the insured could have them replaced at the wholesale price without any extra cost to himself. It is submitted that with the Nigerian situation, paying cash to the insured is less burdensome.

[399] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 334.
[400] This is one of the challenges of insurance identified in section 2.5, chapter 2.
[401] Many shops in Balogun market (Lagos) and Yaba market are not fully insured and could benefit from this from sustaining their businesses in the event of losses.

3.6. The Imperfect Nature of Indemnity[402]

In principle, the true essence of indemnity is to limit the insurer's liability to indemnify the insured only in respect of the actual pecuniary loss suffered, by placing the insured in the position occupied preceding the loss. Whether this principle can be applied and achieved in certain circumstances has been an area of much controversy.[403] This is because some types of policy arrangements in insurance portray the indemnity principle as a *sterile cliché* that violates its own rules.[404] In exceptional circumstances, parties are given the freedom to agree beforehand in estimating the value of the subject assured, to avoid disputes when there are difficulties in measuring the actual losses of the insureds when the insured peril occurs. Notwithstanding, indemnity must always the basis of any rules applied to insurance contracts by courts when any disputes arise.[405] There are many exceptions, but only valued policies and reinstatement clauses are discussed here.[406]

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[402] That the perfection of the indemnity principle may be difficult, if not impossible to achieve was also illustrated in *Irving v Manning* (1847) 1 HLC 287, 307; 9 ER 766 where Patterson J said… '*A policy of assurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured, by way of liquidated damages, as indeed they may in other contract to indemnify…'*

[403] In *British Traders' Insurance Co. Ltd v. Monson* (1964) 111 CLR 86, 93 *'The agreement in the case of a valued policy is as to the value of the subject matter, not the amount of the loss; and its effect upon the assessment of the amount payable to the insured is not that the process is to be directed to anything other than the indemnification of the insured, but only that the assessment of his loss must proceed on the basis of the agreed valuation of the property;* Andrew Lindblad, 'How Relevant Is the Principle of Indemnity in Property Insurance?' (1976) The Insurance Law Journal 271; Kyriaki Noussia, *The Principle of Indemnity in Marine Insurance Contract: A Comparative Approach* (Springer Berlin Heidelberg, 2007) 29.

[404] J.P. Van Niekerk, 'Maintaining the principle of indemnity: theory and practice', (1996) J. S. Afr. L. Journal of South Africa Law 572.

[405] S Hodges, *Law of Marine Insurance* (Cavendish Publishing Limited, London, 2005) 2; Lord Summer stated in *British and Foreign Ins. Co v Wilson Shipping Co* [1921] 1 AC 188 (HL) at 214: 'in practice contracts of insurance by no means always result in a complete indemnity, but indemnity is always the basis of the contract'.

[406] Andrew Lindblad, 'How Relevant Is the Principle of Indemnity in Property Insurance?' (1976) The Insurance Law Journal 271 where author critically analyses the no fault principle and business interruption as accepted exceptions to the principle of indemnity. Most recently, the English Supreme Court made a decision in the Covid-19 Business Interruption insurance test case of *The Financial Conduct Authority v Arch Insurance (UK) Ltd & others* [2021] UKSC 1 determining whether commercial insurance policies for business interruption cover claims due to the COVID-19 pandemic and consequent lockdowns. However, this is outside the scope of this thesis. See, Kyriaki Noussia, 'The Covid-19 Pandemic: Contract and Insurance Law Implications' (2020) Journal of International Banking Law and Regulation, 35

Valued Policies:[407] Valued policies is common with marine insurance, although it is not unusual for non-marine policies.[408] A valued policy specifies the agreed value of the subject-matter insured.[409] Thus, parties pre-determine the sum payable in the event of a loss irrespective of the actual cash value of the property at that time, and such agreement is conclusive.[410] In the words of Merkin, they have made an arrangement by which for better or for worse they are bound'.[411] This means that the value of the ship and cargo is fixed well in advance, usually at the time the insurance is effected. The intention of parties on a basis to insure on a fixed value is essential. [412] One of its advantages is that it simplifies loss adjustment and serves as a quick aid for calculating the loss caused by the insured peril. Often, parties opt for valued policies to avoid prolonged disputes where it is envisaged that there might be difficulties in assessing the actual amount of loss or value of the subject-matter insured. In the event of a total loss, the amount recoverable as full indemnity from the insurer, is the agreed value in the insurance policy, without considering the actual value of the property and the actual loss the insureds

[407] Walter Williams, 'The Valued Policy and Value Determination' (1961) INS. L. J. 71,78; J. Trayner, 'Valued Policies' (1894) 6 The Judicial Review 1,3; John Bird, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell London 2019) 321; Zhen Jing, *Chinese Insurance Contracts Law and Practice* (Informa law from Routledge 2017) 575 on the Chinese approach to valued and unvalued policies in property insurance; Howard Bennett, 'Valued Polices' in D.Rhidian Thomas (eds), *The Modern Law of Marine Insurance* (LLP 2002) 104; Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016) 235 -238 for an analysis of states that have adopted the Valued Policies statutes in the United States of America both in real property insurance and marine insurance. R Keeton also mentioned that the reason for the legislation embracing the use of valued policies is that insurers would be diligent enough to investigate the value of the subject-matter sort to be insured before underwriting. Once the claim is filed, the insurers would be denied the opportunity to contest the valuation.

[408] In non-marine insurance, they are sometimes used to cover an article of particular value, for example, a piece of jewellery, work of art, or an antique; John Birds, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell 2019) 321.

[409] Sec 29(1), MIA 1961 (Nig.); Sec 27 (2) MIA 1906 (UK); By contrast Sec 28, MIA 1906 (UK); Sec 30, MIA 1961 (Nig.); Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 334; J.O. Irukwu, *Insurance Law in Africa: Cases, Statutes and Principle* (London Witherby & Co. Ltd 1987) 56; In *Elcock v Thompson* [1949] 2 K.B. 755 at 761 the mansion insured under a fire policy was for an agreed value of £106,850, with an actual worth of £18,000. Afterwards, the mansion got damaged by fire and thereafter valued at £12,600, a 30 per cent reduction in value. The court's decision was that the assured was also entitled to 30 per cent of £106,850 (the agreed value) - £32,055. The rule in *Elcock* influenced subsequent decisions in other jurisdictions. For example, the US Supreme Court in *Compania Maritima Astra SA v Archdale* (The 'ARMAR') [1954] 2 Lloyd's Rep. 95; John Birds, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell 2019) 321.

[410] John Lowry and Philip Rawlings, *Insurance Law: Doctrines and Principles* (2nd edn Hart Publishing 2005) 643; Section 29 (3) MIA 1961 (Nig): Section 27 (3) MIA 1906(UK.).

[411] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2016) 601; WIB Enright and R M Merkin, *Sutton on Insurance Law* (4th edn, Thomson Reuters 2015) Volume 2, 115;

[412] According to Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 629 'a policy need not be described as a 'valued policy' or 'valued at', the intention of parties on a basis to insure on a fixed value is sufficient.

sustained.[413] Therefore, in compensating the insured, the insurers may give an amount greater than or less than the actual losses.[414]

The arrangements of valued policies illustrate a departure from a true indemnity, but it is not inconsistent with the purposes of the indemnity principle. It is submitted that for commercial convenience, the shortcomings of a valued policy is justified. The law is clear on instances where bad faith and dishonesty is expressed at any stage of negotiation.[415] The contract becomes voidable at the instance of the insured on the grounds of mistake,[416] misrepresentation,[417] and wagering.[418] Thus, granting freedom to parties to contract on their terms and conditions where difficulties in measuring the insured's loss are envisaged does not defeat the purpose of indemnity, and scholars and the judges should support such agreements (with indemnification for actual pecuniary loss).

Policies with Reinstatement Clauses:[419] Reinstatement clauses inserted in insurance policies is also a modification to the principle of indemnity. As a result, this method of compensation is applied by restoring the insured property to its original state or to rebuild a building which is damaged or destroyed by fire or any disaster or repair goods rather than pay a sum of money

[413] Andrew Lindblad, 'How Relevant Is the Principle of Indemnity in Property Insurance?' (1976) The Insurance Law Journal 271, 274.
[414] John Birds, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell 2019) 321.
[415] Section 29 (3) MIA 1961 (Nig): *'Subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial'.* Similar approach in England is provided for under Section 27 (3) MIA 1906.
[416] Where the value is stated on the basis of a mistake, the contract will be vitiated only if the mistake is fundamental. See *Elcock v Thomson* [1949] 2 KB 755,760.
[417] The legal implication for a statement of value will amount to misrepresentation if made in bad faith because the value of the property is material to the risk. According to section 3 (1), Insurance Act 2015(UK), before a contract of insurance is entered into, the insured must make to the insurer a fair presentation of the risk.' In effect a duty of fair presentation is what is expected of the insured. Furthermore, section 3(3)(c), Insurance Act 2015(UK) explains that a fair presentation of the risk is one 'in which every material representation as to a matter of fact is substantially correct, and every material representation as to a matter of expectation or belief is made in good faith. In *Ionides v Pender* [1874] LR 9 QB 531 at 538 the underwriters were held free from liability in respect of loss because of gross excessive valuation that was concealed by the insured. And because this concealment was a material fact vitiated the contract; *Economides v Commercial Union Assurance Co plc* [1997] 3 All ER 636 at 652-653.
[418] A wagering policy is void in law where the insured has no interest in the subject matter insured. If the effect of the over-valuation is that the claimant recovers significantly more than his actual loss, the rules of insurable interest against wagering may be infringed upon. *Lewis v Rucker* (1761) 2 Burr, 1167,1171.
[419] There are two types of reinstatement: (a) Contractual reinstatement *Abed Bros. Ltd. v. Niger Insurance Co.,* [1976] N.C.L.R. 458 at 470; *Alchorne v Favill* (1825) 4 L.J. (O.S.) Ch.47 (b) Statutory reinstatement (*Vural Ltd v Security Archives Ltd* (1990) 60 P & CR 258; *Lonsdale & Thompson Ltd v Black Arrow Group Plc and Another* [1993] Ch 361.

to the insured.[420] The insurer's right to reinstate is preserved based on the terms of the policy by inserting a reinstatement clause[421] or by statutes.[422] Reinstatement clause serves two purposes most popularly with fire,[423] burglary, steam boiler, construction, property and motor vehicle insurance. First, it enables the insurer to ease his liability, for a money indemnity if the economics of the situation so dictates[424] and serves to protect an insurer against fraudulent claims and excessive claims.[425] However, where the insurer has neither a statutory nor an express contractual right to reinstate he cannot, as against his assured, insist on doing so, but must pay a money indemnity.[426] On this premise, this thesis submits that inserting a reinstatement clause in an insurance policy is not a deviation from the principle of indemnity with the underlying goal that the insured be restored to the position he occupied preceding the loss.

3.7. Sub-Principles of the Indemnity Principle

3.7.1. Principle of Insurable Interest and Indemnity

The principle of insurable interest is derived from the fundamental principle of indemnity and the 'doorpost' for payment of indemnity. To confirm that the insured suffered a loss for any form of compensation, he/she must show that it had an insurable interest and relationship with the subject-matter insured.[427] The absence of the required relationship will render the contract

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[420] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 345; John Birds, *Birds' Modern Insurance Law*, (11th Edn, Sweet & Maxwell 2019) 325; John Birds, 'Insurable Interest and Reinstatement' (1994) Journal of Business Law 188.

[421] An example of a reinstatement clause goes thus:

> The company agrees to indemnify the insured in respect of any of the defined events happening during the period of insurance by payment, or at the option of the company, by reinstatement or repair

[422] Section 83 Fires Prevention (Metropolis) Act 1774 (UK); sections 66 (1) of the Insurance Act 2003 (Nig.); The Law Commissions and Scottish Law Commission(s), *Reforming Insurance Contract Law, Introductory Paper, Section 83 of the Fires Prevention (Metropolis) Act 1774: should it be reformed?* (March 2009); Ray Hodgin, *Insurance Law Text and Materials* (2nd edn, 2002) 591; E.R. Hardy Ivamy, General Principles of Insurance Law (6th edn, Butterworths) 1993) 488; John Lowry and Philip Rawlings, *Insurance Law: Doctrines and Principles* (2nd edn Hart Publishing 2005) 284.

[423] In *McLean Enterprises Ltd v Ecclesiastical Insurance Office plc* [1986] 2 Lloyd's Rep 416 (fire insurance) a clause in the policy was held to be a reinstatement clause. Either through the clause inserted in the contract, or where the property – house or building - is destroyed by fire, where the insurer elects to reinstate, the obligation of replacement must be carried out regardless of the cost, even if the cost may be greater than the value of the insured property.

[424] *Allwright v Queensland Insurance Co. Ltd* (1966) 84 W.N. (Pt 1) (N.S.W.) 378 at 390; E.R. Ivamy, *General Principles of Insurance Law* (6th edn, Butterworths 1993) 483.

[425] A.A Tarr and J.A Kennedy, *Insurance Law in New Zealand* (2nd edn, The Law Book Company Limited 1992) 231; John Birds, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell 2019) 325.

[426] *Rayner v Preston* [1881] 18 Ch. D 1 at 9-10; See also John Birds, Ben Lynch and Simon Milnes, *MacGillivary on Insurance Law* (12th edn, centenary edn, Sweet & Maxwell 2012) 673.

[427] Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 203; Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 41; Sarah Derrington,

illegal, void, or prevent a claim under it.[428] In a situation where the insured lacks the requisite interest, it is presumed by law that no loss has been suffered and the insured is not entitled to any payments to prevent violation of the indemnity principle. Hence, insurable interest is employed to (i) prevent wagering under the guise of insurance; (ii) implement the principle of indemnity; and (iii) prevent the temptation to destroy the insured property.[429]

The doctrine of insurable interest is interpreted differently in many countries.[430] The Nigerian laws,[431] English laws[432] and Australian laws[433] all make provision for insurable interest rules. The main problem with the Nigerian and common law[434] which the thesis challenges is that it imposes a strict limitation of 'legal or equitable relationship' on the insured, which often deprives an insured of recovery of economic losses. Other approaches have been adopted in other jurisdictions for its consistency with modern economic realities and the indemnity principle.[435] Chapter four of the thesis critically examines the principle of insurable interest in details and identifies the rules that are inconsistent with the principle of indemnity under the Nigerian and English laws.

3.7.2. Principle of Subrogation and Indemnity

The doctrine of subrogation is derived from the fundamental principle of indemnity and operates as a 'shield' against double recovery in insurance contracts. Subrogation, as a rule, provides that an insurer, having indemnified its insured policyholder under a policy in respect

'Australia: Perspectives and Permutations on the Law of Marine Insurance' in *The Modern Law of Marine Insurance* edited by Prof D. Rhidian Thomas (LLP, Volume 2, 2002) Chapter 11, 369; Olusegun Yerokun, *Insurance Law in Nigeria Insurance* (Princeton Publishing Company, 2013) 174.

[428] John Birds, *Birds' Modern Insurance Law*, (11th Edn, Sweet & Maxwell 2019) 41.

[429] Bertram Harnett & John V. Thornton, 'Insurable Interest in Property: A Socio – Economic Revaluation of a Legal Concept' (1948) 48 Columbia Law Review 1162, 1175, 1183; The authors illustrated the mechanism of the principle of indemnity as follows: *'The general statement that insurance is traditionally a contract of indemnity is significant in determining the measure of an insured's recovery, for the attempt is always to evaluate the insurable interest and the impairment of it through the occurrence of the insured event. Having then ascertained loss in terms of economic impairment, that impairment becomes the measure of recovery. Colloquially phrased, the amount of allowable recovery is theoretically the extent to which the insured is out of pocket, or alternately put, an insured can recover only to the extent of his interes.To the extent that a possible insurance recovery is in excess of the insured's interest, it is a wager, and limiting indemnity to the extent of the interest is simply the way in which an insurance contract is removed from the wager category. The traditionally distinct purpose of, they said, insurable interest as a limitation on indemnity is, then, merely the wagering policy accoutered in different verbal cloth.';* Section 6, MIA 1961 (Nig.); Marine Insurance (Gambling Policies) Act 1909 (UK.).

[430] See chapter 4, section 4.4 and 4.5 for different countries' interpretation of insurable interest.

[431] Sec 7 (1) & (2) MIA 1961 for marine and non-life insurance; Sec 56 (2) of the Insurance Act 2003 for life insurance.

[432] MIA s 5 1906 (UK).

[433] The Insurance Contracts Act 1984, section 16 -17; 10 -12 of the Marine Insurance Act 1909.

[434] *Lucena v Craufurd* [1806] 2 Bos. & P.N.R 269; *Macaura v Northern Assurance Company* [1925] AC 619.

[435] Chapter 4, Section 4.3. on discussions of approaches of insurable interest.

of a loss can step into the insured's shoes and exercise all his legal rights against responsible third parties to recovering the sums it has paid out.[436] For instance, if the loss or damage is to property, which can be evaluated, the insured would be profiting from a double recovery, and his enrichment would be unjust since he is entitled to compensation only, whether from tortfeasor or insurer. To avoid such enrichment, the insurer who pays the victim is subrogated to (i.e. is entitled to use) his rights against the tortfeasor.[437] The primary purpose is to prevent the unjust enrichment of the insured by preventing the insured from recovering twice for the same loss and several policy considerations justify the rule.

The Nigerian laws,[438] English laws[439] and Australian laws[440] all make provision for the doctrine of subrogation. In insurance subrogation, the mechanics are not as straightforward. Even defining the term 'made whole' for subrogation is difficult.[441] The major controversial issue with the application of subrogation rules is the distribution of subrogation recoveries. Often the question, which is less clear, is who bears the ultimate risk where the insured has not been fully compensated for losses? Who should have priority? The Nigerian law in that respect is vague; similarly, the English law[442] is criticised for favouring the insurer at the expense of the insured's losses while the Australian law appears to provide a fairer and more equitable model. Chapter five of the thesis examines in details controversial aspects of subrogation rules in the Nigerian, English and Australian insurance law that depart from the principle of indemnity and suggests a method that is consistent with the indemnity principle.

[436] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 383; Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 760; Olusegun Yerokun, *Insurance Law in Nigeria Insurance* (Princeton Publishing Company, 2013) 408; John Birds, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell 2019) 333; Z Jing, 'The Confusion between Subrogation and Assignment in the Insurance Law of the People's Republic of China 1995 A Critical Analysis on Article 44 of the Insurance Law, (2002) J.B.L. 608, 609.
[437] Tony Weir, Subrogation and Indemnity, 2012 (71) 1 The Cambridge Law Journal 1,2.
[438] Sec 80 MIA 1961 (Nig.).
[439] Sec 79 MIA 1906 (UK).
[440] Sec 85 MIA 1909 (Aus.).
[441] Jeffrey A. Greenblatt, 'Insurance and Subrogation: When the Pie Isn't Big Enough, Who Eats Last? (1997) 64(4) Chicago Law Review 1337, 1360.
[442] *Lord Napier and Ettrick v Hunter* [1993] AC 713.

3.7.3. Double Insurance, Right of Contribution and Indemnity

The principle of double insurance and right of contribution is outside the scope of this thesis and causes less problems to the indemnity principle. However, it is discussed here briefly to show its relationship and how it provides support for the indemnity principle. [443]

Double insurance allows for a person to effect multiple policies on the same property against identical risks.[444] As a result, the insured is at liberty to claim payment from whichever insurer he chooses.[445] The principle of indemnity is safeguarded such that irrespective of the numerous policies the insured may have effected, the insured party cannot recover more than a full indemnity.[446]

The objective of the rules on double insurance hinges on two legal principles. First, the insured cannot recover more than an indemnity but is free to choose which policy to claim on. Second, the insurers who pay out monies to the insured are entitled to a contribution from the other insurers so that the insured is not unjustly enriched.[447]

As a result, the position of co-insurers is governed by the equitable doctrine of contribution.[448] It works on the principle of 'equality is equity'.[449] The insurer who has paid the claim is entitled to request that the other insurers contribute rateably in proportion to the amount for which the insurer in question is liable. The doctrine of contribution is only applicable to indemnity insurance and in principle, prevents the insured from unjust enrichment. It is on this basis that the indemnity principle is strengthened.

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[443] For further analysis of this doctrine see Olusegun Yerokun, *Insurance Law in Nigeria Insurance* (Princeton Publishing Company, 2013) 433; Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 407; Zhen Jing, *Chinese Insurance Contracts Law and Practice* (Informa law from Routledge 2017) 361.

[444] John Lowry and Philip Rawlings, *Insurance Law: Doctrines and Principles* (2nd edn, Hart Publishing 2005) 270; Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 808.

[445] Sec 32 (1), MIA 1906 (UK); Sec 33 (1), MIA 1961 (Nig).

[446] E.R. Hardy Ivamy, General Principles of Insurance Law (6th edn, Butterworths) 1993) 517; John Birds, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell 2019) 371.

[447] Chioma Kanu Agomo, *Modern Nigerian Law of Insurance* (2nd edn, Concepts Publication Limited 2013)199; J C Ojukwu, *Modern Insurance Law and Practice in Nigeria* (Revised Edition, Cel-Bez Publishing Co Ltd 2011) 142. See also *Albion Insurance Co. v Government Insurance Office of New South Wales* (1969) 121 CLR 342; Section 32 (2), MIA 1906 (UK); Sec 33(2), MIA 1961 (Nig).

[448] *North British and Mercantile Insurance Company v Liverpool, London and Globe Insurance Co*. (1877) 5 Ch D 569, CA; *O'Kane v Jones* [2003] EWHC 2158 (Comm); [2004] 1 Llyod's Rep 389; Martin Davies, Subrogation, Contribution and Insurance Law: An Australian View, (2000) 8 Restitution Law Review 70, 74 -75.

[449] *Scottish Amicable Heritage Securities Association v Northern Assurance Co* (1883) 11 R (Ct of Sess) 287 (fire insurance) per Lord Moncrieff, at 303; *Godin v London Assurance Co* (1758) 1 Burr 489 (marine insurance) per Lord Mansfield CJ, at 492.

3.8. Conclusion

The indemnity principle remains the bedrock and cornerstone of indemnity insurance law, e.g. marine and property policies. The main objective of the chapter is to examine the nature and purpose of the indemnity principle under the Nigerian, English, and Australian laws. The comparative analysis in this chapter show that the nature of the principle of indemnity mean the same thing in the three jurisdictions. However, the way the principle has been defined and applied in judicial practice seems it operates only to suit the insurer's interest. Where this is the case in consideration of insurance law disputes, the goal of insurance is defeated. It has been discussed in this chapter that the indemnity principle has two important dimensions: One side prevents unjust enrichment of the insured, while the other aspect ensures that the insured is compensated to the full extent of the loss. The main argument in this chapter, is that both sides are important, and one purpose must not override the other, nor should the goal of the insured receiving a full compensation be ignored.

This chapter suggests that the second aspect of the indemnity principle should be upheld at all stages of the insurance contract for the following reasons: first, to promote a balance of interest and equality between parties. Once, the insured receives a sum not lesser than any pecuniary losses, then the legitimate interest of the insured is sufficiently protected in an insurance contract; and second, to prevent insurers from exploiting their consumers. On this issue, a vast majority of policyholders in Nigeria are quite unaware of the intricacies of insurance and insurance law and the meaning of concepts like indemnity. Hence, it is easy for insurers to be quick to refuse the payment of claims by using legal technicalities as a defence. It is submitted that the indemnity principle is not a word that exists in the history of insurance to favour only the insurer, it also seeks to ensure that the insurer performs his obligation which he has agreed to do. In this way, indemnity can be seen as achieving its a vital role in insurance law and in the judicial practice of many countries around the world, including Nigeria.

However, whilst indemnity is essential to the relationship between the insured and the insurer in an insurance contract, evidence suggests that in certain situations, the indemnity principle is not perfect. On this basis, to avoid disputes, parties are given the freedom to contract on terms as they wish by issuing valued policies or including reinstatement clauses in policies. Notwithstanding, in practice, indemnity for actual pecuniary loss remains the basis of such contracts and any measure of indemnity agreed upon by parties, and judges must always have this in mind.

Finally, the chapter has presented the relationship which indemnity has with other principles of insurance law like insurable interest, subrogation, double insurance and contribution. It is concluded that each of the sub-principles support the indemnity and must be consistent with the goals which the indemnity principle seeks to achieve in insurance law. In subsequent chapters, the thesis critically examines how the existence of specific rules weakens the nature of the indemnity principle under the Nigerian and English laws. In line with the proposition of Brett LJ, '*if ever a proposition is brought forward which is at variance with the indemnity principle, that is to say, which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must be certainly wrong'.*[450] The next chapter thus analyses specific strict rules derived from the doctrine of insurable interest, which places the insured in a worse position, either by receiving less than their actual losses or nothing at all.

[450] *Castellain v Preston* [1883] 11 QBD 380, 386.

CHAPTER FOUR: THE PRINCIPLE OF INSURABLE INTEREST

4.1. Introduction

The preceding chapter has established that the doctrine of indemnity aims to: (i) prevent the unjust enrichment of the insured; and (ii) fully make the insured whole again. This chapter critically examines the doctrine of insurable interest derived from the principle of indemnity, as another fundamental principle in indemnity insurance law. The basic concept of insurable interest means that the validity of a contract of insurance depends on the insured's relationship with the subject-matter. Thus, to confirm that the insured suffered a loss, a pre-requisite for recovery and performance of the insurer's obligation for payment of an indemnity is to show that an insurable interest exists in the subject-matter insured.[451]

Historically, theories, rules and principles of insurable interest developed in England, to avoid the evils of wagering and moral hazards.[452] For example, contracts lacking an insurable interest creates an incentive for the beneficiaries or policyholders to destroy insured property he does not own or murder the insured lives, in order to obtain the insurance money. For this reason, many countries, particularly Nigeria and Australia, adopted the concept of insurable interest, but the interpretation differs. Over the years, many complexities, uncertainties and problems have arisen as a result of the interpretation of some rules of insurable interest which undermines the principle of indemnity. The issue that often contributes to the uncertainties is the difficulty in defining what constitutes insurable interest to suit the aims of indemnity. Two theories though controversial, have been advanced as a guide: the legal interest test and the factual expectancy test.

Based on case law and statutory provisions in both Nigerian and English jurisdictions, the legal interest theory has wide support.[453] The chapter asks: How can the current legal interest test of insurable interest in indemnity insurance under the Nigerian laws be redefined for fairness to

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[451] Sec 8 (1) MIA 1961 (Nig.) states '…where the insured has no insurable interest at the time of loss, a valid claim cannot be made…' Sec 6 MIA 1906 (UK.); Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 63; John Birds, Ben Lynch and Simon Paul, *MacGillivary on Insurance Law* (1st Supp 14th edn, Sweet & Maxwell 2019) 9.

[452] This common law concept is reflective in the Nigerian law. Section 6 (1) & (2) MIA 1961 (Nig.).

[453] The Nigerian insurance legislation, Sec 7 MIA 1961 (Nig.). is illustrative that there must be present ***a legal or equitable interest or a right under the contract*** with a similar provision in England in Sec 5 MIA 1906 (UK.). The legal requirements were drafted and codified in the legislations in accordance to Lord Eldon's view of *legal interest test* in *Lucena v Craufurd*, (1806), 2 B. & P. (NR.) 269, 127 ER, 630 and the case of *Macaura v Northern Assurance Company* [1925] AC 619 approved the position.

reflect the nature of the principle of indemnity in comparison to the English laws and Australian laws? The chapter argues on how the Nigerian approach works adversely on an insured who has genuinely contracted to secure recovery of any financial losses that may occur but is refused compensation for lack of ownership title.[454] More seriously, the insurers who received premium often use the strict rule as a technical objection to avoid liability which leaves the insured in a lose all position and the insurer in a gain all position. The chapter argues that this 'technical', 'restrictive' and 'narrow' approach does not reflect the nature of the principle of indemnity under the Nigerian laws because it conflicts with the basis of an insurance contract. Even in judicial practice, the court is often confused in determining whether the legal test is sufficient.[455]

Recently, however, courts,[456] legislatures,[457] and legal writers[458] indicate a preference for a 'factual expectation' theory and an expansion of the concept of insurable interest. This theory connotes recovery on the premise that the policyholder, will gain *economic advantage* from the continued existence of the insured property, or will *suffer economic disadvantage* on damage to the property.[459] Based on the outcome of the court decisions that have applied this test, it appears to be broader in scope and does not in many ways cause problem or contradict the aim of indemnity principle, or the underlying policies of insurable interest but justifies a legitimate defence of insurers to avoid insurance payment.

Other problems associated with insurable interest is the harsh consequences for lack of insurable interest which only penalises the insured. For example, there is no form of liability or damages required by law where insurers act in bad faith. It, therefore, creates doctrinal

[454] As argued under section 4.4. of this chapter, there is a limitation imposed by the application of the legal interest test on shareholders, unsecured creditors, FOB purchasers, and innocent buyers of stolen goods to get insurance cover for their real economic losses.
[455] *Feasey v Sun Life Assurance Co of Canada* [2003] 2 All.E.R. [Comm] 587; *Constitution Insurance Co of Canada v Kosmopoulos* [1987] 34 D.L.R 208; *Law Union and Rock Insurance Ltd v Livinus Onuoha* (1998) NWLR (pt. 555) 576; *Lorcom Thirteen (Pty) Ltd v Zurich Insurance Co South Africa Ltd* (2013) 5 SA 42 (WCC); *British Indian General Ins. Co. Nig. Ltd. v Thawardas* (1987) 34 D.O.R. (4th) 208; 91987) 1 SCR 2.
[456] *Ibid.*
[457] The requirement on insurable interest in the sphere of the legal interest test is no longer acceptable in Australia by Insurance Contracts Act 1984, Part III Sec 16 & 17; In the USA (New York), Paragraph 3401.
[458] Theodore Greenberg, 'Factual Expectation of Loss as an Insurable Interest in Property' (1952) 7 Intramural L Rev NYU 185, 194; Robert Stuart Pinzur, 'Insurable Interest: A Search for Consistency' (1979) 46 Ins Counsel J 109, 111; Franziska Arnold-Dwyer, 'Insurance Law Reform by Degrees: Late Payment and Insurable Interest' [2017] 80(3) MLR 489, 505.
[459] Bertram Harnett & John v. Thornton, 'Insurable Interest in Property: A Socio – Economic Revaluation of a Legal Concept' (1948) 48 Columbia Law Review 1162, 1185, 1175, 1185 (Hereinafter referred to as Harnett and Thornton, 1948).

uncertainty and legal gap for insurers to hide under the cloak of acting in good faith, issuing policies not supported by an insurable interest.[460]

Based on the difficulties of a strict proprietary interest, some jurisdictions have abandoned the legal interest test in favour of one based on the more flexible concept of economic loss; others are in the process of abolishing, while some are seeking alternative means to expand the scope of insurable interest. The chapter examines in detail the position, particularly in Australia, and other jurisdictions[461] who have trodden their path along the factual expectancy line.

Most recently, the Nigerian Law commission made proposals to consolidate laws on insurance, including insurable interest. Thus, the chapter makes investigation whether the insurance Bill has in any way improved the current Nigerian law on insurable interest with the provision of the Insurance (Consolidated) Bill 2016.[462] Similarly, the English Law Commissions through several consultations and reports have proposed that the requirements of insurable interest be expanded.[463] Thus, the chapter makes inquiries whether the Insurable Interest Bill 2016 has improved the current state of English law, which has been criticized for being in an 'illogical mess'.

The main objective of this chapter is to critically analyze the problems and extent to which Nigerian laws and practice on insurable interest, contradicts the principle of indemnity by comparing the English, and Australian laws for plausible solutions. Thus, in consideration of the ultimate problems, a preliminary investigation is made into the origin, meaning, justification of insurable interest under the Nigerian, English and Australian legislative framework. The chapter then critiques the two competing approaches and the complications arising from the legal test and the factual expectancy test. Next, the chapter identifies which view better implements the principle of indemnity. Discussions in this chapter further suggest why redefining of insurable interest in the Nigerian laws is necessary for a developing insurance market, like Nigeria. The chapter concludes with a detailed analysis of the legislative reforms ongoing in the English and Australian jurisdiction and finally, make some suggestions and recommendations for the amendment of Nigerian insurance laws.

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[460] Jacob Loshin, 'Insurance Law's Hapless busybody: A Case against Insurable Interest Requirement', (2007) 117 Yale L.J 474, 477.
[461] Such as Canada, the United States and South Africa.
[462] Sec 145 (1) & (2) Part XVII of the Insurance (Consolidated) Bill 2016 relates Insurable interest.
[463] Law Commission of England and Wales and Scottish Law Commission on Reforming Insurance Contract Law: Short Consultation on Draft Bill: Insurable Interest (2016) Clause 6, paras 3.10. (Hereinafter referred to as 'The LCs').

4.2. The Origin, Current Laws and Aims of Insurable Interest

4.2.0. Historical Overview of Insurable Interest [464]

The development of rules in insurable interest is traceable to several English statutes passed to eliminate the elements of wagering from insurance contracts. While the doctrine is concerned with the insured's relationship with the subject-matter of insurance, there was no statutory regulation of the relationship between the prospective insured and the subject matter of the insurance before 1745. This led to concerns that British vessels and cargoes were harmed deliberately by policyholders otherwise unconnected to the voyage to enable recovery on the policy. On this basis, these 'insurance wagers' were prejudicial to British trade interests.[465] Insurable interest was first developed as a statutory requirement for English insurance contracts in the mid-eighteenth century.[466] Although, in the early eighteenth century, wagering contracts were legal at common law.[467] There were also concerns about gambling in the guise of insurance when insurance was taken out on the lives of public figures.[468] To prevent such occurrences, the English Parliaments introduced five pieces of legislation.

To begin with, the Marine Insurance Act 1745 was the first piece of legislation in the UK to create a requirement for insurable interest in insurance contracts whose objective was to outlaw wagering contracts on marine insurance.[469] After thirty years of the 1745 statute, the Parliament passed another Act known as the Life Assurance Act 1774 to extend the prohibition of gaming from marine insurance to life insurance. The main aim of the Act is to prevent insurance on lives being taken out without a valid interest and declared null and void any contracts of

[464] For Lengthy and in-depth discussions of historical development of the concept of insurable interest. Harnett and Thornton, (1948) 1162; Law Commission and Scottish Law Commission, *Insurance Contract Law Insurable Interest* (Issues Paper 4, 2008) part 2; Philip Rawlings, 'Bubbles, Taxes, and Interests: Another History of Insurance Law, 1720-1825' (2016) 36 (4) Oxford Journal of Legal Studies 799-827; Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (London: University of North Carolina Press, 1992) 452.

[465] In addition to harming marine trade, these gambling policies also harmed the reputation of the fledgling marine insurance market in London.

[466] Law Commission and Scottish Law Commission, *Insurance Contract Law Insurable Interest* (Issues Paper 4, 2008) paras 2.3. (Hereinafter referred to as 'The LCs').

[467] Halsbury's Laws of England (3rd edn, 1958) vol 22, para 195; *March v Piggot* (1771) 98 E. R. 471; *Good v Elliot* (1790) 3 T. R. 693; 100 E. R. 808; However there are evidences of judicial reluctance to enforce wagers, see *Da Costa v. Jones*, 2 Cowp. 729, 98 Eng. Rep. 331 (1778); *Henkin v Gerss* 170 ER 1199, (1810) 2 Camp 408.

[468] The LCs Issues Paper 4, 2008, paras 2.5; Geoffrey Clark, *Betting on Lives: The Culture of Life Insurance in England 1965-1775* (1st edn, Manchester University Press 1999) 49; Welford, *Insurance Guide and Handbook* (4th ed 1901) 27 and 28. These public figures included George II, Admiral Byng and Sir Robert Walpole.

[469] Preamble of the Marine Insurance Act 1745 is clear on this point.

insurance taken without interest. Thereafter, the Marine Insurance Act 1788[470] , which required the names of those interested in the insurance to be inserted into the policy was passed.[471]

The Gaming Act 1845 was another piece of legislation passed in the nineteenth century to reduce the hardened attitude towards gambling whereby a contract will be classed as a wager and unenforceable where the policyholder is unable to demonstrate an insurable interest in the subject matter. [472] The introduction of the Gaming Act 1845 put a stop to the enforceability of wagers that were enforceable at common law.

In the twentieth century, the MIA 1906 [473] and Marine Insurance (Gambling Policies) Act 1909[474] statutes were passed to strengthen marine insurance laws. Finally, after 1909, the legislation remained unchanged for nearly one hundred years until the Gambling Act 2005[475] came into force on 1 September 2007.

4.2.1. Legislative Framework in Nigeria

The doctrine of insurable interest remains well-entrenched in Nigerian statutory law, but its origins and evolution as shown above, although complicated are traceable to England. The requirement of insurable interest was inherited and enforced in Nigeria before 1988 as English statutes of general application. Judicially, court decisions made in the English courts are still applied by the Nigerian courts to date. Therefore, all English common law decisions are often cited and applied as precedence when there is an insurance law dispute. While the Life Assurance Act 1774 continues to apply in England today in virtually its original form without any change but has ceased to apply in Nigeria since the passing of the Insurance (Special

[470] This Act has been repealed for the purposes of marine insurance only.
[471] The Act was also intended to aid easy check that those interested people had valid insurable interests in the subject matter.
[472] Section 18 of the Gaming Act 1845; Law Commission and Scottish Law Commission, *Insurance Contract Law Insurable Interest* (Issues Paper 4, 2008) paras 2.11 – 2.12; Gary Meggitt, 'Insurable Interest – The doctrine that would not die' [2015] 35 (2) Legal Studies 280 – 301; James Davey, 'The Reform of Gambling and the Future of Insurance law' [2004] 24(2) The Journal of Society Legal Scholars 507,511; Eric A Posner and E Glen Weyl, 'An FDA for Financial Innovation: Applying the Insurable Interest Doctrine to Twenty-First-Century Financial Markets' (2013) 107 Nw U L Rev 1307.
[473] The MIA 1906 codified the laws on marine insurance and repealed the 1745 Act.
[474] The Act made it a criminal offence punishable by a fine or prison for up to six months against those who took out marine policies without insurable interest.
[475] The object of this Act was to strengthen and improve the existing laws on gambling to take account of the internet and new technologies that helped such transactions occur outside British Law. The English government wanted to provide rigorous and effective protection for the public by creating a regulatory regime for gambling.' The Gambling Act 2005 repealed Section 18 of the 1845 Gaming Act, and replaced it with the following language: '*The fact that a contract relates to gambling does not prevent its enforcement.'* Thus, by making gambling legal in an effort to regulate it in the United Kingdom.

Provisions) Decree of 1988 which, for the first time, codified the provisions of the Life Assurance Act 1774 in a modified form directly into the law of insurance in Nigeria.[476]

In Nigeria, the Marine Insurance Act is the first law to have attempted to give the scope of insurable interest. For marine and non-marine insurance, the provisions of the English Insurance Act of 1906 were adopted and codified word-for-word in Nigeria in sec 7 MIA 1961 which provides that there must be present right to a legal or equitable interest or a right under the contract.[477] For life insurance, the test has been given statutory force in sec 56(2) of the Insurance Act of 2003.[478] Although the rules of insurable interest apply to both marine, property and life insurances, the scope of this chapter excludes discussions on life insurance.

4.2.2. Defining the Concept of Insurable Interest: Two Options

The word interest, in insurance law context, is defined as a right or relationship to property insured.[479] However, defining the concept of insurable interest that applies to all situation is difficult. Nevertheless, this concept is very critical to the validity of a policy. The leading case on the definition of insurable interest, and one which has shaped judicial thinking throughout Anglo-Commonwealth jurisdictions and Nigeria, is *Lucena v Craufurd*.[480]

In *Lucena v Craufurd,*[481] two famous judges attempted to define insurable interest from different perspectives. For Lord Eldon, insurable interest means that there must be a legal relationship, ownership or propriety interest which a court of law or equity will recognize and enforce.[482] This means that where the insured genuinely lost something but cannot prove ownership, he has lost nothing in the eyes of the law and there is no longer an obligation on the

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[476] Under section 32(2) of the interpretation Act of 1964, pre-1900 English statutes apply only in Nigeria subject 'to any Federal law'. Those provisions are now found in section 56-59 of the Insurance Act 2003.
[477] Similar provision in England: Section 5 (1) & (2) MIA (UK.) 1906.
[478] *'A person shall be deemed to have an insurable interest in the life of any other person or in any other event where he stands in any legal relationship to that person or other event in consequence of which he may benefit by the safety of that person or event or be prejudiced by the death of that person or the loss from the occurrence of the event'.* For application of insurable principles to life insurance see, Zhen Jing, *Chinese Insurance Contracts Law and Practice* (Informa law from Routledge 2017) 194; Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 41.
[479] In *Castellain v Preston* [1883] 11 QBD [380], Brett L J. asked '*what is it that is insured in a fire policy? Not the bricks and materials used in building the house, but the interest of the insured in the subject matter of insurance*.
[480] (1806) 2 Bos & PNR 269.
[481] *Ibid.* Prior to the decision in *Lucena,* there was no precise definition of insurable interest. As noted by Lord Mansfield in *Le Cras* case, stated that '*...since the Statute of Geo.2, insurance is a contract of indemnity. An interest is necessary, but no particular kind of interest is required*.' (1782) 3 Doug, at 86, 99 ER, 549, at 552. While the law enforced the requirement of insurable interest in order to satisfy the court that the contract of insurance was not wagering, it did not identify the meaning of insurable interest. Thus, *Lucena* introduced some certainty of what type of interest was required.
[482] (1806) 2 Bos & PNR 269 at [321].

insurer to pay the promised amount. By contrast, Lawrence J subscribes to the factual expectations theory under which an insurable interest exists when a person profits by the continued existence of a thing and would suffer some loss by its destruction whether or not he has any legal interest in it.[483] Another definition offered by MacGillivray is:

> *'where the assured is so situated that the happening of the event on which the insurance money is to become payable would, as a proximate cause, involve the assured in the loss or diminution of any legal liability or any right recognised by law there is an insurable interest when the event happens to the extent of the possible liability or loss.*'[484]

However, common law history has preferred Lord Eldon's definition, and it is codified into sec 7 MIA 1961 (Nig.)[485] which forms the basis of the Nigerian insurance law governing insurable interest. The statutory approach connotes that the insurable interest must be one recognised by law. For this reason, some Nigerian courts, for example in *Law Union and Rock Insurance Ltd v Livinus Onuoha*,[486] and *Thawardas v British India General Insurance Co.Ltd.,* [487] accepted the view that only person who has a direct, legal or equitable interest' can be counted as having an insurable interest in the subject matter of insurance.

The main difficulty here is that the phrase of interest recognised by law is ambiguous, and it is in some instances challenging to determine what relationship between the insured and the subject matter may fall into the scope of a legally recognised interest. These limitations are discussed elsewhere in this chapter; however, based on these definitions, it is submitted that the nature of insurable interest still demonstrates the goal of indemnity. It ensures that for the validity of a contract, the person taking out the insurance must stand to gain a benefit from the preservation of the subject matter of the insurance or to suffer a disadvantage should it be lost or damaged.[488]

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[483] *Lucena v Craufurd* (1806) 2 Bos & Pul (NR) 302-303.
[484] John Birds, Ben Lynch and Simon Paul, *MacGillivary on Insurance Law* (1st Supp 14th edn, Sweet & Maxwell 2019) 25.
[485] Sec 5(2), MIA 1906 (UK.).
[486] (1998) NWLR (pt. 555) 576, the court defined an insurable interest as the assured's pecuniary interest in the subject-matter of insurance and what qualifies such interest is mere possession. The event must either cast on the assured ***a legally binding liability***, or it must affect the ***right of the assured*** recognised by law and protected by the courts.'
[487] [1974] N.C.L.R. 304, the court mentioned that insurable interest means some proprietary or pecuniary interest in a thing but '***only person who has a direct, legal or equitable interest*'** can be counted as having insurable interest.
[488] The LCs Issues Paper 10, Insurable Interest: Updated proposals (2015) para 1.8.

4.2.3. Justification for Interest Requirement in Insurance Law

The purpose of insurance is indemnity and indemnity payments are only limited by law to persons with a relationship with the insured property.[489] As a consequence, the early statutory wordings reveal, the original purposes behind the insurable interest requirement.[490] Public policy is the main goal behind the strict necessity of insurable interest, and it is exemplified in three folds to: (i) prevent the risk of using wagering under the guise of insurance; (ii) prevent the temptation to destroy the insured property; and (iii) favouring limitation of indemnity.[491]

(i) Prohibits Wagering in the Guise of Insurance[492]

The primary purpose for the requirements of insurable interest was to prevent the use of insurance contracts to gamble or speculate on ships and lives.[493] The Nigerian law also condemns wagering agreements in the guise of insurance which was why insurable interest was enacted in their laws.[494] Also, some religious beliefs in Nigeria like Islam, condemn gambling

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[489] Early authorities on the need for an insurable interest includes *Goddard v Garrett* (1692) 2 Vern 269; A statement by Lord Chancellor Hardwicke, in *The Sadler's Company v Badcock* (1743) 26 Eng. Rep. 733, 2 Atk 554, 555 is said to have established the rule for property insurance that it is necessary for the insured to have an interest in the property at the time of insuring and at the time of the loss. He said, *'If the insured was not to have a property at the time of the insurance or loss, anyone might insure upon another's house'.*

[490] The preamble of the Life Assurance Act 1774:*'Whereas it hath been found by experience that the making of insurances on lives or other events wherein the assured shall have no interest hath introduced a mischievous kind of gaming'.* Preamble of the Marine Insurance Act 1745 is also clear on this point.

[491] Harnett & Thornton (1948) 1162, 1182; Clarke, M, *Policies and Perceptions of Insurance: An Introduction to Insurance Law* (Oxford: Clarendon Press, 1997) 36-37; Julian Long, 'The Concept of Insurable Interest and the Insurance Law Reform Act 1985' (1992) Auckland University Law Review 81.

[492] A wagering contract has been defined by Hawkins J in *Carlill v. The Carbolic Smoke Ball Company* [1892] 2 QB 484, at pp. 490-91, as a situation where, '…***neither of the contracting parties having any other interest*** in that contract than the sum or stake he will so win or lose, there being no other real consideration for the making of such contract by either of the parties. It is essential to a wagering contract that each party may under it either win or lose, whether he will win or lose being dependent on the issue of the event, and, therefore, remaining uncertain until that issue is known'; *Prudential Insurance Company v Comrs of Inland Revenue* [1904] 2 KB 658 (insurance). Thus, a distinguishing factor between insurance and wagering contracts is that while the former is not aimed at profits, the latter is not aimed at making profit but aims to reduce overall risk.

[493] At common law, wagering contracts were enforceable, and wagering contracts on marine cargo and individual lives were not abolished until 1745 and 1774, respectively. The practice of widespread public betting on the chances of the rich, famous and influential surviving their latest ailment undoubtedly hastened legislative reform. The Life Assurance Act of 1774 curbed the growing apprehension about the moral implications of the practice alarmed Parliament, particularly when it was noted that, in one gentleman's club, nearly 25% of all bets concerned the death of a third party as compared to only the 2.5% of bets placed on horse races; Timothy Alborn, 'A License to Bet: Life Insurance and The Gambling Act In The British Courts' [2008] 14 (1) Connecticut Insurance Law Journal 1, 2; Merkin 'Gambling by Insurance: A Study of the Life Assurance Act 1774' (1980) 9 Anglo-Am LR 330.

[494] Under the Nigerian insurance legislation, Section 6 (1) MIA 1961 is illustrative of the consequences of wagering or gaming in the disguise of marine insurance. *It provides that 'Every contract of marine insurance by way of gaming or wagering is void'*. Sect 6(2) states *'A contract of marine insurance shall be deemed to be a gaming or wagering contract- (a) 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; or (b) where the policy is made 'interest or no interest,' or 'without further proof of interest than the policy itself,' or 'without the benefit of salvage to the insurer,' or subject to any other like term.*' The same provision under the English and Australian Laws: Marine Insurance Act 1906, s 4 (UK); Sec 10, MIA 1909 (Aus).

in any form.[495] If a policy of insurance is issued to one who has no independent interest in the property involved, as affected by the event insured against, it is a wager and it is against public policy. For instance, if X insure his cargo worth £200,000 against total loss on a voyage to Ghana for a premium of £200, that would be seen as valid insurance made for encouragement to trade. However, if the cargo is not for X but another, the so-called insurance is a wager of a thousand to one on whether the cargo will get there, and it is void, for he is unconnected in trade, neither is he interested in the cargo but only wants to profit from it. The basis of an insurance contract is founded upon dispersion of risk, the insured transfers for a small cost. He is not seeking a gain; he wants to avoid a possible future loss.

Thus, the insurable interest requirement is the distinguishing element between a wagering contract and an insurance contract.[496] The case of *Newbury International Ltd v Reliance National Insurance Co*.,[497] is a modern example of a contract of insurance being found to be a wagering contract. Where an insurable interest is absent, it means no actual loss was suffered, and for public policy reasons, insurers making payments would constitute gains, or profit, and risk encouraging wrongdoing like pure gamble under the guise of insurance. Given the fact that insurance is based on a theory of indemnity, such a policy is sound.

(ii) Prevent deliberate destruction of property

Another justification for the requirement of insurable interest was to mitigate the concern for moral hazards.[498] In the same vein, Keeton identifies that insurable interest and the indemnity principle is intertwined, based on the concern that a person without meaningful interest in the

[495] Under Islamic (*Shari'a)* law, insurance is permitted and operates under the takaful system. Thus, it is expedient for insurers to offer takaful complaint insurance that does not encourage gambling. It opposes practices that encourage unlawful advantage by way of excess; *Maysir*, gambling; *Gharar,* uncertainty, risk, speculation and unjustifiable gain of people's money. Quran provides that, ([29] *O you who believe! Eat not up your property among yourselves in unjustly except it be a trade amongst you by mutual consent...)*; Yusuf Abdul Azeez, Abdullahi Saliu Ishola, 'Insurable Interest in Takaful: A Theoretical Contrivance for Islamic Insurers (2016) 6 International Journal of Economics and Financial Issues'109-115 <file:///C:/Users/User/Downloads/InsurableInterestinTakaful.pdf> assessed 10th August, 2020.

[496] *Kent v Birds* (1777) 2 Cowp 583; *Gedge v Royal Exchange Assurance Corp* [1990] 2 Q.B. 214..

[497] In *Newbury International Ltd v Reliance National Insurance Co (UK) Ltd* [1994] 1 Lloyd's Rep 83, the insured took out a policy to 'indemnify' the insured in respect of a contractual obligation to pay £425 000 in event of a particular racing car driver achieving a top three series position. It was a contractual condition precedent that the relevant sum should first have been received from the insurers before the plaintiffs could be sued for it. The judge found that the insured 'never in truth had any insurable interest' and the contract was merely a device to raise money by, in substance, placing a bet on the outcome of the motor racing. The judge stated that 'If polices of prize indemnity insurance are to be valid contracts of insurance there must be a true liability to another which is the subject matter of the insurance'.

[498] As Kyriaki comments: 'the existence of insurable interest lessens the danger of fraudulent and intentional destruction of the subject-matter insured, and it is in this was that the 'moral -hazard factor is introduced'. See Kyriaki Noussia, *The Principle of Indemnity in Marine Insurance Contract: A Comparative Approach* (Springer 2010) 32.

transaction may deliberately cause a loss, thus triggering the benefit pay-out mechanism of the transaction, to realise a profit.[499] For instance, an individual called 'X' with a criminal mind, who seeks to defraud an insurance company, can reasonably insure building A, in which he has no property interest, burn it down, and then seek to collect insurance monies. This is moral hazard, and in recognition of this danger, the law ensured that a policyholder with no interest could not be indemnified.[500] Allowing such contracts would be a temptation to fraud and undermines the scientific basis of insurance. In the context of insurance, the moral hazard could happen in two ways: (i) where the policyholder takes less care in safeguarding the insured property; and (ii) where the policyholder insures a property or person that belongs to another.[501] However, modern court decisions have questioned whether restricting the requirement of insurable interest reduces or increases moral hazard. [502]

(iii) Favours the Indemnity Principle

The measure of the insured's recovery for the loss under a policy of insurance on the property is governed by the basic principles of indemnity, that the contract is one designed to indemnify the insured against loss, or damages indicated in the contract.[503] This applies to both property and marine insurances that an insured is only entitled to no more or less than an actual loss.[504] Again, extending the above example of the individual X with a criminal mind. Where the property is burnt down to make a profit off the insurance company, insurance law frowns at any opportunity for net gains, and it is inconsistent with the indemnity principle. It is argued that where X will recover more than his actual loss, the feature of indemnification is absent,

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[499] Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016) 113.

[500] The preamble of the Marine Insurance Act 1745 provides:

> *'It hath been found by experience, that the making of insurances, interest or no interest, or without further proof of interest than the policy, hath been productive of many pernicious practices, whereby great numbers of ships, with their cargoes, have been fraudulently lost or destroyed.'*

[501] Moral hazard involves some elements. It is wrongful to commit destructive and evil acts. Innocent persons may be harmed, and the destruction of useful property is economically wasteful. Also, the principle that insurance covers only fortuitous losses is violated. Finally, the unnatural loss skews the premium rates, to the detriment of all other insureds.

[502] *Constitution Insurance Co. of Canada v. Kosmopoulos* (1987) 34 D.L.R. (4th) 208; [1987] 1 S.C.R. 2. More discussion in section 4.5. of this chapter.

[503] Bertram & Thornton (1948) 1183; Theodore Greenberg, 'Factual Expectation of Loss as an Insurable Interest in Property' (1952) 7 Intramural L Rev NYU 185, 186.

[504] G. Richards, *A Treatise on the Law of Insurance* (3rd edn. 1909) 27-28; Richards noted that *the doctrines of indemnity and of the necessity of an insurable interest are correlative and complementary in all branches of the law of insurance, no matter how large the amount of insurance, the recovery is restricted to the loss actually sustained'*.

and the policy reverts in the form of a wager. It is thus submitted that to limit indemnity is to make it less effective in doing its job of ensuring that the insured does not profit from insurance.

By law, the insured cannot recover on a contract of fire or marine insurance unless he shows that he has an insurable interest in the subject-matter of insurance. For if it can be proven that he has no insurable interest in a particular object, then he cannot be prejudiced by its destruction, nor is there anything to which the right of indemnity given by the contract can attach.[505] The main problem here is the degree of interest which an insured with genuine interest, who is not wagering can recover.

The Nigerian law is very restrictive in such situations.[506] Thus if an insured has no legally recognized interest in the subject matter, then he has suffered no loss. Coupled with this, is the principle that the measure of loss is governed by the extent of the interest which entitles one to indemnification. For this reason, the policy behind the insurable interest principle providing support for indemnity could be weakened in some circumstances discussed in the latter part of this chapter.

4.3. Competing Approaches of Insurable Interest in Indemnity Insurance

Most academic writers and legal authorities agree that an insurable interest in indemnity insurance is necessary.[507] However, there is a considerable conflict of opinion as to what relationship between the insured and the subject of insurance will produce an insurable interest.[508] However, there are two dimensions within the lens of the law that defines the type of interest which the insured should possess.

Since the early nineteenth century, two debatable approaches have emanated from the leading judgement of *Lucena v Craufurd,*[509] and has remained a subject of controversy till date. One

[505] E.R. Ivamy, *General Principles of Insurance Law* (6th edn, Butterworths 1993) 23; Bertram & Thornton (1948) 1175.
[506] See section 4.4 on application of legal interest test.
[507] See later section 4.9. on the discussions on retaining or abolishing insurable interest.
[508] Graham Douds, 'Insurable Interest in English Marine Insurance Law: Do We Still Need It' (2012) University of San Francisco Maritime Law Journal 323, 328; *Feasey v Sun Life Assurance Company of Canada* [2003] EWCA Civ 885; Lloyd's Rep IR 637 at [71] [Waller LJ]; Jacob Loshin, 'Insurance Law's Hapless Busybody: A Case Against the Insurable Interest Requirement' (2007) The Yale Law Journal 474, 486; Gary I Salzman, 'The Law of Insurable Interest in Property Insurance' (1966) Ins LJ 394; John Birds, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell 2019) 63.
[509] In *Lucena v Craufurd* (1806) 2 Bos & PNR 269, a number of enemy ships captured by British vessels were insured by the British Crown Commissioners while the captured ships were still on the high seas. The law giving them authority empowered them to take charge of the ships only when they reached British ports. Several ships were lost at sea, and the question was whether the Crown Commissioners has an insurable interest in the ships at the time of loss to enable them to claim on insurance.

view adopts a legal interest test, while the other approach is the factual expectancy test. A third view classed as a pragmatic commercial approach is directly linked with the factual expectancy, so they are treated as one. Thus, it is essential to critically examine each approach and the court's reasoning for adopting each test in specific cases that relate to the validity of a contract, for the payment of an indemnity.

4.4. A Critique on the Application of the Legal Interest Theory

According to the legal interest rule, the insurance beneficiary must have a property right in the insured property; and not merely a situation where the beneficiary only expects to derive actual economic gain from the property's continued existence. Thus, the insured's must possess proprietary interest which could either be legal, equitable or contractual in the subject matter of insurance.[510] Meaning that where the insured cannot prove *legal ownership or title* to the damaged property, then the insurer is not obliged to pay any form of compensation even in the face of the existence of a financial or economic loss.

For instance, 'X' (a sole shareholder and creditor) insures a private limited company's property in his name, and thereafter, the property was destroyed by fire, he would have no right to recover for losses on the property because he had no ownership right at the time of loss. The loss fell on the company, not on 'X' because the company is a separate legal entity in law. Fixing the situation in the words of Lord Eldon, insurable interest exists only if it is:

> *'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.'*[511]

By interpretation, the legal approach is illustrative of the requirement for a close legal relationship between the person insuring and the property insured. Even when the insured has suffered losses in monetary terms, the mere fact that he lacks a legal title disqualifies him from the recovery of insurance payments. The question, therefore, is that should a person who paid premium without ownership rights but with some economic investments and expectations at the time of loss be viewed as having no actual interest in the insured property? Would that person be wagering in the guise of insurance? Should that be sufficient ground for insurance companies to use this as a defence by refusing payment? It is argued that these are questionable

[510] John Birds, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell 2019) 62.
[511] *Lucena v Craufurd* (1806) 2 Bos & PNR 269 at 321.

consequences of the outcome of the narrow legalistic approach where having an economic interest in the subject matter of the insurance is insufficient to form the basis of a connection to that subject matter.

Unfortunately, for more than two hundred years now, the legal approach has been accepted under the English law and for more than fifty years under Nigerian law. According to sec 7 (1) MIA 1961(Nig.), the law imposes a legal or equitable relationship to the subject-matter of insurance as a test of insurable interest.[512] Similarly, under the English rules, a combination of sec 4, MIA 1906 (UK.) and sec 5 (1) &(2) MIA 1906 (UK.) only recognise a legal and equitable interest.

This approach has caused problems in practice both in marine and non-marine cases and is criticised for being too restrictive, strict and extreme by academics and judges.[513] There are many categories of persons who could have interests in an insurance transaction. However, it is impossible to deal with all cases in this chapter. The cases identified here are the ones that are more problematic and are inconsistent with the principle of indemnity.

4.4.1. Barrier for Recovery of Economic losses

There is evidence that the requirement of a legal and equitable interest serves as a barrier for many insureds and causes a great deal of financial hardship on shareholders, unsecured creditors, FOB & C&F purchasers, and innocent buyers to get insurance cover for their real economic losses. Under the legalist approach, merely having an economic interest in the subject matter of the insurance is insufficient to form the basis of a connection to the subject matter.[514] One must bear in mind that the aim of insurance coverage for an insured is protection against financial losses, and the purpose of indemnity is to place the insured in the financial position occupied preceding the loss. However, the application of the legal interest test does not correctly implement this purpose, and this approach has attracted many problems, and a means

[512] Sect 7(1) & (2) MIA 1961, 'Subject to the provisions of this Act every person has an insurable interest who is interested in a marine adventure. The subsequent section provides the type of relationship required. 'In particular, a person is interested in a marine adventure where he stands in any *legal or equitable* relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or maybe prejudiced by its loss, or damage thereto, or by the detention thereof, or may incur liability in respect thereof'.

[513] *Ibid* (n 94).

[514] Graham Douds, 'Insurable Interest in English Marine Insurance Law: Do We Still Need It' (2012) 25 (2) University of San Francisco Maritime Law Journal 323, 324, 328.

to reform the laws relating to insurable interest of similar common law countries. Since Nigerian insurance laws also adopt the legal right approach, the problems caused in Nigeria are similar to those of England. Thus, discussing the problems is necessary to recommend some better solutions to reform the Nigerian insurance laws in this area.

4.4.2. Shareholder and Unsecured Creditor's Interest

4.4.2.1. No Right of Recovery under the English *Macaura* Rule

Macaura v Northern Assurance Company[515] is a famous case which provides another example of a denial of insurable interest in the face of real economic interest with the application of the legal interest test. On the facts, the sole shareholder of a limited company, also doubled as a substantial creditor, of the same company, insured in his name, the timber product owned by the company. The House of Lord's decision was that Macaura had no insurable interest in the timber that had been destroyed by fire. As a shareholder, he had no right to the property owned by the company, the latter being a separate legal person, even though his shares would fall in the event of the destruction of the company's property.[516]

Macaura had suffered actual pecuniary loss, and he had a real relationship with the company's property but was not able to fully recover his economic losses based on the restrictive definition of insurable interest. This goes to show how the indemnity principle is undermined. The insured was punished unjustly for failure to take formal steps, while the insurer was free to escape liability even where they could have been diligent in eliciting useful information at the negotiation stage of the contract. More seriously, the wrong result reached in *Macaura* contradicts with the underlying purposes of the insurable interest requirement. The insured was not gambling; neither was he wagering. It was a pure and non-speculative risk whereby he suffered a detriment which was cut off by the fire incidence. In line with the recommendation of other countries' judges, *Macaura* should not be followed.[517]

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[515] [1925] AC 619*; Macaura* is known to be notorious for cementing Lord Eldon's view of insurable interest. Another recent court decision that followed the legal interest test is *Comlex Ltd (in liquidation) v Allianz Insurance Plc* [2016] CSOH 87; See Donna McKenzie Skene, (2016) 144 Insolvency Bus. L.B. 3.

[516] Lord Buckmaster at *Macaura* at p 626 said that *'no shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.'*; *A shareholder's relationship was to the company, not to the company's goods, and thus any damage to the goods was not to the shareholder, but merely to a company's assets.*

[517] See later the Canadian court's position in *Kosmopoulos* discussed in section 4.5.1, in this chapter.

Furthermore, the strictness of Lord's Eldon's legal approach can also be seen in *Glengate – KG Properties v Norwich Union.*[518] The issue concerned whether the insured party could recover for loss of architect's plans owned by architects although they might one day have been acquired by the insured. Auld LJ held that 'In the case of insurance against the cost of repair or reinstatement of damaged property, the insured's relationship to the property, to qualify as an insurable interest, must normally be of a proprietary or contractual nature'. It is essential to now examine the Nigerian situation for shareholder's insurable interest in the company's asset.

4.4.2.2. The *Abou Diwan's* Rule Under the Nigerian law

A critical reflection on the practice in the insurance industry in Nigeria tends to show that though the doctrine of insurable interest is justifiable, it has worked a great deal of hardship on shareholders with real interests.[519] Like many English precedent cases, *Macaura* found a Nigerian home. The insured is deprived of the same protection for which he had paid premiums under the insurance policy, and the insurance company is relieved of any obligation to pay for the loss which it had contracted and had been paid to bear.

Also, the concept of a separate legal entity, used as a defence in *Macaura*, is central to Nigeria's company and insurance law. Although there is limited reported case on this issue for limited companies in Nigeria, whether private or public, it is commendable that the court found insurable interest in a sole proprietorship business.

For example, the court in *Thawardas v British India General Insurance Co.Ltd*[520] applied the insurable interest rule fairly, and the insured (a sole proprietor) was not prevented from recovering his actual economic loss. The court held that Thawardas and Shamco are the same.

[518] [1996] 1 Lloyd's Rep 614 CA.

[519] Shamsi Ubale Jibril, Ishaq Abubakar Baba, and Abdulkarim Kabiru Maude, 'Critical Analysis of Fundamental Principles of Insurance Under the Nigerian Law' [2018] (4) 7 International Journal of Advanced Academic Research Arts, Humanities and Education 28, 35; Oyeniyi Ajigboye. 'A Review of the Doctrine of Insurable Interest Under the Marine Insurance Act in Nigeria' (2016) 7(3) The Gravitas Review of Business & Property Law 1.

[520] [1974] N.C.L.R. 304. In this case, the plaintiff, using his registered business name 'Shamco', insured a consignment of sardines with the defendant insurer under a contract of marine insurance. The goods were lost and plaintiff instituted proceedings to claim for the value of the goods following the insurer's refusal to pay. The insurer contended that the plaintiff had no insurable interest in the goods insured because the contract of insurance was made in the name of 'Shamco'; and secondly that since 'Shamco', which was the insured named in the policy, had no legal personality, the contract of insurance did not enure to the benefit of anybody, and was therefore a nullity. The court also cited the section 25 of the Marine Insurance Act 1961 (Nig.) is that the policy shall specify the name of the insured (or assured) or of some person who effects the insurance on his behalf. The obligation has been discharged.

Thus, the fact that Shamco being a business name is not invested with legal personality does not render an insurance policy a nullity if such a name is mentioned as an insured in the policy.

However, for limited companies, the application of insurable interest is different on the general principle of company law governing a company's property. Concerning the concept of separate legal personality of companies as enunciated in *Salomon v. Salomon,* the property of the company belongs to the company, and not to shareholders.[521] In addition, Sec 42, CAMA 2020 specifies the effect of the registration of a company that a shareholder and a company are different legal entities.[522]

In the famous Nigerian case of *Philips v Abou Diwan,* [523] it was held that the shareholders are not the individual owners of the company's property and have no powers as individuals to dispose of the company's property. This implies that the liability of individual shareholders is limited to the number of shares subscribed to and does not cover the unsubscribed assets of the shareholders since they are distinct from the company's assets. [524] By implication, the shareholder has no real right *(right in rem)* to the company's property within the context of Lord Eldon's definition of insurable interest.

It means the shareholder's properties, his responsibilities, and his liabilities are separate from those of the company. All that the shareholders have are personal rights (rights *in personam*) that are exercisable against the company.[525] Therefore, the shareholder cannot exercise rights

[521] The leading case of *Salomon v A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22 has remained the bedrock and foundation of company law in Nigeria. The principle provides that on incorporation, a company becomes a legal entity separate and distinct from its shareholders and it is not the agent of those shareholders, not even if it is a one-man company with one shareholder controlling all its activities. Other Nigerian cases include *Marina Nominees Ltd v Federal Board of Inland Revenue* (1986) 2 NWLR (PT 20) 61; *Habib Nig. Bank Ltd v Ochete* (2001) FWLR (PT 54) 384; *Government of Midwestern State v Mid Motors Nig. Co. Ltd* (1977) 10 S. C. 43; *Njemanze v Shell B.P. Port–Harcourt* (1966) 1 All NLR 8; See also a *critique* of the corporate personality principle in Nigeria in Olufemi Amao, Kenneth Amaeshi, 'Galvanising Shareholder Activism: A Prerequisite for Effective Corporate Governance and Accountability in Nigeria'(2008) Journal of Business Ethics 82 , 119–130. Brenda Hannigan, *Company Law* (4th edn, Oxford University Press 2016) 41; Orojo J. O., *Company Law and Practice in Nigeria* (3rd edn, Mbeyi & Associates, Lagos Nigeria 1992) 17.

[522] On the 7th August 2020 a new Companies and Allied Matters Act (CAMA 2020) was signed into law with new provisions. The new Act repeals the CAMA Cap C20, LFN 2004. However, the issue with effect of registration has not changed. Sec 42, CAMA 2020 provides *'As from the date of incorporation, the subscriber of the memorandum together with such other persons as may, from time to time, become members of the company, shall be a body corporate by the name contained in the memorandum, capable forthwith of* ***exercising all the powers and functions of an incorporated company including the power to hold land, and having perpetual succession*** *and a common seal, but with such liability on the part of the members to contribute to the assets of the company in the event of its being wound up as is mentioned in this Act.*

[523] (1976) 2 FRCR 24. The fact is not concerned with insurance law, however, the basis of the principle applies to dealing with the company's asset.

[524] Akinola Bukola, A Critical Appraisal of The Doctrine of Corporate Personality Under the Nigerian Company Law, (NLII Working Paper Series 002) 16 <https://www.nlii.org/files/NLIIWPS002.pdf> assessed 10th April, 2019.

[525] They include the right to vote at shareholders' meetings and the right to dividends.

that are peculiar to the incorporated company as listed in sec 42, CAMA 2020, having no insurable interest in the company's property to recover for any economic losses even if he solely as an investment. On what basis then should sole shareholders be entitled to insure?

4.4.2.3. Is a Shareholder's interest insurable?

The strictness of the insurable interest requirement has been forcefully criticised on many occasions by academic scholars.[526] In a situation where a sole shareholder is denied recovery for his actual economic loss of the company's property, it infringes on the principle of indemnity. This point can be justified because the shareholder's rights to corporate property are not tenuous, but rather are directly dependent on the continued existence of the property. The shareholder, being the only natural person with a substantial interest in the preservation of the property of the corporation, should be allowed to protect this interest through the medium of insurance.[527] The principle of insurable interest as established by *Macaura*, deprived a shareholder of recovering from losses suffered by the company, even though Macaura was the sole shareholder. In the United States, a case that has reached the same conclusion as that of *Macauras'*[528] is *Philips, Beckel & Co. v. Knox County Mut. Ins. Co*.,[529] but the reason given for the decision in the case differs essentially from that employed in the House of Lord's decision. The *Philips, Beckel* case held that when the certain property belongs to a corporation, the shareholders cannot insure it as their individual property.[530]

It is argued that commercial practices have changed from the time the decision of *Lucena* and *Macaura* was made. Modern realities can no longer accommodate the orthodox legal interest rule, which shuts its eyes to economic realities. One of the major judicial concerns of denying a shareholder recovery for damage caused to a company's asset is that it may lead to too much

[526] Harnett and Thornton, (1948) 1162; John Birds, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell 2019) 63; Chioma Kanu Agomo, *Modern Nigerian Law of Insurance* (2nd edn, Concepts Publication Limited 2013) 66; Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2016) 189 para 4-020; John Birds, Ben Lynch and Simon Paul, *MacGillivary on Insurance Law* (1st Supplement 14th edn, Sweet & Maxwell 2019) 59; John Lowry and Philip Rawlings, "Re-thinking Insurable Interest", Sarah Worthington, Commercial Law and Commercial Practice, (2003) 335, 361.

[527] Frank P Presta and George A Fisher, in 'Insurable Interest of a Shareholder in His Corporation's Property and Key Men ' (1961) 49 Geo L J 594, 602.

[528] *Macaura v Northern Assurance Company* [1925] AC 619.

[529] 20 Ohio 174 (1851).

[530] This decision, however, was based solely on the charter of the corporation which gave the corporation a lien on the property insured. The court held that since the shareholders did not possess such title to the property as would support a lien, they could not insure the corporate property.

insurance on the same subject-matter.[531] To counter this concern, the principle of double insurance will prevent such happening.[532] Another concern was on how to measure the exact value of the insured's interest,[533] which means that the insured can over-value the company's asset for a profit. Again, the principle and measure of indemnity have a role to play here.[534] The insured simply holds the excess in trust for the company or other shareholders. If the concern is also ascertaining what is due to such individual, the problem does not appear too severe since modern economics allows for shares to be calculated on the stock market. A third issue is a possibility of the shareholder gaining undue advantage from other creditors or minority shareholders of the company. Again, the legal provisions and remedies of company law are sufficient to prevent the shareholder from making a profit at the expense of other stakeholders.[535]

More draconian consequences are envisaged if a shareholder of a company is deprived recovery. In a private or public company, a shareholder has some rights connected with the corporation's property, such as the right to dividends and the right to share in the final distribution of the corporate property. These rights could be prejudiced by the destruction of or damage to the property of the company.

In practice, small companies are punished more if a shareholder is deprived of the benefit of taking out insurance on his company's property. Majorly, public or large companies might not be faced with such problems, because they would have their insurance. These problems are foreseeable in smaller companies in Nigeria, where a wealthy sole shareholder and creditor might not be as literate and does have a thorough knowledge of insurance law. There is every possibility that insurance will be purchased in their own name instead of the company's name.

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[531] Lord Eldon feared a flood of insurance resulting from an ill-defined concept of moral certainty: *Lucena v Craufurd* (1806) 2 Bos & PNR 269 at 324-325; 652.

[532] This limits the insurer's liability to the actual value of the insured property, and each insurer is only liable to pay for a proportion of the loss. See section 3.7. of this chapter on the discussion of the relationship between the principle of indemnity and double insurance and contribution.

[533] Lord Buckmaster in *Macaura v Northern Assurance Co*. [1925] A.C. 619, 627 submitted: '*If he [the shareholder] were at liberty to effect an insurance against loss by fire of any item of the company's property, the extent of his insurable interest could only be measured by determining the extent to which his share in the ultimate distribution would be diminished by the loss of the asset – a calculation almost impossible to make. There is no means by which such an interest can be definitely measured and no standard which can be fixed of the loss against which the contract of insurance could be regarded as an indemnity*.

[534] Section 3.5. on the application and measure of indemnity.

[535] J Birds, 'A Shareholder's Insurable Interest in His Company's Property (1987) J.B.L. 309, 311; For example, the corporate veil of incorporation will be lifted to protect the interests of third parties; New directions on exceptions to corporate personality principle - principles on governing Corporate personality principle – *Prest v Petrodel Resources Ltd* [2013] UKSC 34; *VTB Capital plc v Nutritek International Corp* [2013] 2 WLR 398; Particularly, with respect to sec 346, CAMA 2020, a shareholder can commence a derivative action; and relief will be granted on grounds of unfairly prejudicial conducts with respect to sec 353-354, CAMA 2020 (Nig.).

It is argued that when such a person is punished for not taking formal steps, the restrictive definition of insurable interest based on public policy is inconsistent with the intention behind seeking an insurance cover. By virtue of the two limbs of the principle of indemnity,[536] it is submitted that shareholders should be allowed to recover economic losses on the following reasons:

First, allowing a shareholder to recover brings greater social benefits to small companies, especially in Nigeria's economy in which most of the companies are small private companies.[537] Particularly with regard to the smaller corporations, the individual shareholder may be most desirous of protecting the investment he has made against those unforeseeable hazards to life and property which may greatly jeopardize the value of the interest he holds in his corporation. Insurance money paid in the event of a loss of the company's assets will be beneficial in keeping such a small company in operation, and even employees keep their jobs. If however, the insurance pay-out is denied, the company is faced with difficulties like struggling to stay in business or might entirely lose the business.[538] In Nigeria, litigation procedure is very slow, and most likely before a final judgement is given, even if in favour of the insured, it could turn a legal victory into personal jeopardy.

Secondly, the insurer ought to be held accountable to perform their duty of utmost good faith to identify who or what are covered in the policy. Thus, it is suggested that there should be a statutory penalty for failure to diligently perform their duty at the pre-contractual stage of negotiation. The disclosure of the relationship and connection of the insured to the subject-matter of insurance is a material fact that the insurer ought to elicit from the insured.[539]

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[536] See chapter three Section 3.1.3. on the limbs of indemnity.

[537] According to the Nigeria Bureau of Statistics, small and medium scale enterprises (SMEs) in Nigeria have contributed about 48% of the national GDP in the last five years. This segment of the economy also accounts for 96% of operational businesses and 84% of employment. With a total number of about 41.5 million enterprises, the SME segment accounts for nearly 90% of companies operating in the manufacturing sector and 50% of industrial jobs. The report is available here <https://nigerianstat.gov.ng/> assessed 10 august, 2020.

[538] For instance, Mr Kosmopoulous, a sole owner of his leather goods business in *Constitution Insurance Co of Canada v Kosmoopoulos* [1987] 34 D.L.R 208 shut down his company because of 10 year litigation, although he eventually won the case; The story is not a happy one. He managed to reopen the store without the benefit of insurance money. He borrowed. He eventually was forced to sell his home. In 1980 he was forced to close the store. Mr. Kosmopoulos, a former self-employed small businessman, turned to a factory job. Now this is in Canada where the legal system is much advanced than Nigeria's. See L Stuesser, 'Insurable Interest: The Supreme Court of Canada Adopts the Factual Expectancy Test' (1987) 13 Can Bus LJ 226, 238.

[539] Section 19 MIA, 1961 (Nig.), provides '…*A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith is not observed by either party, the contract may be avoided by the other party...*' *Akpata & Anor v African Alliance Insurance Co Ltd* Unreported suit No LD/340/67; *United Nigeria Insurance Co Ltd v Universal Commercial and Industrial Co.Ltd* (1999) 3 NWLR (pt 593); The New English Insurance Act introduced fairness to insurance contracts; Insurance Act 2015 (UK.); See for more discussion

In Nigeria, the insurers are the persons who have comprehensive knowledge of insurance laws and procedure. Also, the insurers are aware of the legal requirement of insurable interest that governs prospective eligibility of an insured to insure a risk. Thus, it is submitted that any information not requested or explained at the pre-contractual stage should be the insurer's fault and should not be made to avoid liability.

Finally, and yet another concern is that shareholders can use insurance contracts as a wager. Again, once the shareholder can prove the actual economic loss, the question of a wager is quashed. Furthermore, since the basis for the insurable interest requirement is a strong public policy against wagering, no good reason appears for denying the validity of a shareholder's insurance of his corporation's property.

The preceding analysis demonstrates the legitimate interest of a shareholder in the tangible assets of his corporation. As leading academics have argued,[540] with good reason, then, a shareholder may wish to secure his investment from impairment by unforeseeable destruction of the non-human, wealth-producing factors of his company.

It is concluded that the legal interest test as required under the Nigerian and English insurance cases and by the statutes is too narrow. For shareholders, it stands as a barrier for the recovery of actual losses suffered. In addition, modern commercial needs, convenience and economic security require the extension of insurable interest to suit the purposes of indemnity. It is suggested that parliaments in Nigeria and England should revisit the uncertainties created by the legal interest rule and aim towards a broader approach to the requirements of insurable interest in this context.

4.4.2.4. Is an Unsecured Creditor entitled to his debtor's property?

As discussed, the position of an unsecured creditor in the English and Nigerian law regime is another instance where an insured can be denied recovery for his actual economic losses where the legal test approach is applied. By contrast, for mortgage situations in Nigeria, mortgagor and mortgagee both have an insurable interest in the full value and interest due under the

Omotolani Victoria Somoye, The Reciprocal Duty of Utmost Good Faith on the insured and insurer in Insurance Law: A Comparative Analysis of English, Australian and Nigerian Approaches (LLM Dissertation, Bangor University 2015) 51.

[540] Frank P Presta and George A Fisher, in 'Insurable Interest of a Shareholder in His Corporation's Property and Key Men ' (1961) 49 Geo L J 594, 602; J Birds, 'A shareholder's Insurable Interest in His Company's Property (1987) J.B.L. 309; Ziegel, Jacob S. 'Shareholder's Insurable Interest-Another Attempt to Scuttle the *Macaura* v. *Northern Assurance Co.* Doctrine: *Kosmopoulos* v. *Constitution Insurance Co.*" (1984), 62 *Can. Bar Rev.* 95.

mortgage, respectively.[541] Under the Nigerian rules, an unsecured creditor cannot recover for lack of insurable interest and right of ownership in his debtor's property under sec 42 CAMA 2020, [542] and the decision in *Macaura* for both English and Nigerian jurisdiction.[543] Lord Buckmaster concluded that,

> *'… a simple creditor in a company has no insurable interest in a particular asset which the company holds… nor can his claim to insure be supported on the ground that he was a bailee…'* [544]

Judicial pronouncements make it clear that an unsecured creditor's interest is too remote and not morally certain; it is ***merely an expectation*** of repayment which cannot be quantified in monetary terms.[545] It is suggested that it is inequitable to the insured where he could not even rely on the policy to recover the amount equivalent to sums which he had spent on the maintenance of the property. An unsecured creditor should have an insurable interest in the property of the debtor because he has an expectation of benefit from the continued existence of the debtor's property.[546]

A plausible reason why an unsecured creditor should be allowed to recover from his insured debtor is that where the actual economic loss suffered can be proven, his entitlement and claims

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[541] Funmi Adeyemi, *Nigerian Insurance Law* (2nd edn Dalson Publications Limited, 2007) 22; *Royal Exchange Assurance Nigeria Plc. v. Anuminu* [2003] 6 NWLR Pt. 815.

[542] Sec 120 (2), CAMA 2020 provides that 'a person is deemed a substantial shareholder in a public company if he holds under his name or by his nominee, shares in the company which entitle him to exercise at least 5% of the unrestricted voting rights at any general meeting of the company'.

[543] While he was also a creditor of the company in respect of advances totalling £l9 000, a creditor, in the absence of a specific mortgage, charge or lien, has no insurable interest in the goods of his debtor, The probability that the debtor company would be less able to pay its debts were its assets destroyed was also held to be insufficient to constitute an insurable interest; John Birds, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell 2019) 63; WIB Enright and R M Merkin, *Sutton on Insurance Law* (4th edn, Thomson Reuters 2015) Volume 2, para 22.210.

[544] *Macaura* at 628; Lord Wrenbury put the matter succinctly at [633] by saying …. '*Neither the shareholder nor any creditor of the company had any property legal or equitable in the asset of the corporation'*… However, the decisions in other countries that followed Macaura is now obsolete. For instance, *Truran Earthmovers Pty Ltd v Norwich Union Fire Insurance Society Ltd* (1976) 17 SASR 1; In Canada *Aqua -Land Exploration Ltd. Guarantee Co. of North America* [1966] 54 D.L.R. See also, Hasson, Reuben A. "Reform of the Law Relating to Insurable Interest in Property-Some Thoughts on *Chadwick v. Gibraltar General Insurance.'*(1983) Canadian Business Law Journal 114-119; Greg Pynt, *Australian Insurance Law: A First Reference* (4th edn, LexisNexis Butterworths Australia 2018) 197; *Julian Long, 'The Concept of Insurable Interest and the Insurance Law Reform Act 1985' (1992) 7 Auckland University Law Review 80, 88*

[545] In *Macaura v Northern Assurance Company* [1925] AC 619, 626, 630 reasons why an unsecured creditor's interest failed was given as follows: Lord Buckmaster at 626, suggested, *if the creditor had an insurable interest 'it would follow that any person would be at liberty to insure the furniture of his debtor'*; Lord Summer at 630 emphasised *the debt was not exposed to fire nor were his shares*; Lastly, as observed by MacGillivary, *a creditor must have a right to have his debt satisfied directly from the proceeds of his debtor's property before he is in a position to insure it*.

[546] Pinzur, Insurable Interest: A search for consistency (1979) 46 Ins. Counsel J. 109, 119; C. Brown and J. Menezes, Insurance Law in Canada (Creswells, Toronto, 1982) 71.

under the insurance policy taken should be valid. Even though, the unsecured creditor's insurable interest is predicated on the destruction of the debtor's property, his right to the debt still survives.[547]

It is here argued that though the debtor's property is destroyed, he is still in debt as he is yet to be released from the duty to repay, which should not legally impair the creditor's right to be paid.[548] However, if the debtor's property were only a few pieces, the destruction of those properties may diminish the creditor's opportunity of collecting his debt and does impair the economic value of the creditors' chose in action.[549]

It is suggested that as an alternative, an unsecured creditor has three alternatives. Either to insure the debt itself, [550] take credit insurance,[551] or require as a condition of credit, that the debtor insures his property with a clause binding the insurer that loss should be payable to the creditor.[552] On the second alternative, in practice, the credit insurer may require the insured to bear some of the risks while the problem with on the third option, the debtor may let the cover lapse or break its warranties. Thus, if the insurer pays the debtor, the debtor may dispose of the money before the creditor can get it. These identified options are submitted does not provide a good solution, and the unsecured creditor may end up with nothing.

A more convincing analysis is to apply the creditor's situation to the policy behind the requirement of insurable interest. If wagering is a concern, the insurer alone can raise the defence of lack of insurable interest, no traffic policeman can raise it. Thus, a creditor cannot be said to be wagering where he has a valuable relationship to the property or where the insurance is not in excess of his interest. Again, if the debtor owed a good deal of money, the creditor's interest is directly prejudiced. Another policy, behind the requirement of an insurable interest, is said to be designed to minimize the incentive to destroy the insured property. It is submitted that insurance concepts cannot on their own prevent deliberate causing of loss. The primary burden for discouraging anti-social activity lies with the criminal justice system;

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[547] *Moran v Uzielli* [1905] 2 KB 555, 559 per Walton J; M.A. Clarke, *The Law of Insurance Contracts* (6th edn Informa 2009) 164.
[548] Edwin W. Patterson and Harry J. McIntyre, 'Unsecured Creditor's Insurance' (1931) 31(2) Columbia Law Review 212, 225.
[549] *Ibid*.
[550] In *National Filtereing Oil Co. v Citizens Insurance Co*. 13 NE 337 (NY, 1887 – FIRE) where the insured had a right to royalties on an invention which the debtor was to exploit in the debtor's factory. It was held that the insured could insure the royalties against fire at the factory.
[551] *Anglo-Californian Bank v London & Provincial Marine & General Ins Co* (1904) 10 Comm Cas 1; In practice credit insurance is limited to debtors with high credit rating.
[552] M.A Clarke, *The Law of Insurance Contracts* (6th edn, Informa 2009) 166.

neither can insurance principles eliminate murder or arson any more than banking legislation can eliminate armed robbery. It is submitted that denying creditors in Nigeria the right to claim is too expensive a price to pay where the creditor has no intentions to destroy the insured property to gain the insurance money where the property is lost due to the occurrence of an insured risk which infringes the principle of indemnity.

In summary, where unsecured creditors take out insurance for financial protection, and the insurer agrees, on no circumstance should they be deprived such right to recover their economic and pecuniary losses. This submission is made for three main reasons: the creditor has a beneficial right in the debtor's property, the creditor will suffer a pecuniary loss in relation to the damage of the debtor's property, and insurance pay-out are disbursed eventually towards the debtor's liability. On this ground, a creditor should have the capacity to insure against the debtor's failure to pay. Thus, an insured creditor should be capable of supporting a claim with an alternative ground for establishing an insurable interest.

4.4.3. Problems of FOB & C&F Purchasers in Marine Insurance Practice

In marine insurance law, there is a mandatory requirement of insurable interest, although its operation often causes disputes and has been extensively criticised.[553] At present, the principle of indemnity is undermined by the rule of insurable interest because the legal right approach and time of loss puts a legal obstacle in the way of the FOB or C&F buyers who tries to recover for the loss or damage of goods before shipment.

As far as marine insurance is concerned, a policy effected by way of wagering or gaming is void, and the principle of indemnity requires the assured to possess insurable interest at the date of the loss.[554] A contract is therefore deemed to be a gaming or wagering contract where the insured does not have an insurable interest as defined by the MIA 1961 and the contract is

[553] H Bennett, The Law of Marine Insurance (2nd Oxford University Press, 2006) 67; D Galbraith 'An Unmeritorious Defence — The Requirement of Insurable Interest in the Law of Marine Insurance and Related Matters' (1993) 5(3) Insurance Law Journal 177; M Taylor 'Is the Requirement of an Insurable Interest in the Marine Insurance Act Still Valid?' (2000) 11 Insurance Law Journal 147; Joseph Bockrath, 'Insurable Interest in Maritime Law' (1977) 8 J Mar L & Com 247, 251; Meixian Song, 'Insurable Interest in the Law of Marine Insurance' [2011] 1; Kyriaki Noussia, 'Insurable Interest in Marine Insurance Contracts: Modern Commercial Needs versus Tradition' (2008) 39 J Mar L & Com 81,93.

[554] Sec 6, MIA 1961 (Nig.); Sec 4, 1906 (UK.). Until the Marine Insurance Act 1745 (UK) and subsequent statutes there was no legal requirement that an insured have any connection to the insured adventure. For this reason, insurance policies were amenable to abuse as wagers on the continued safety of the insured property and, since the assured won the bet if the vessel sank, they provided a financial disincentive to the exercise of due care for the safety of the crew.

entered into with no expectation of acquiring such interest.[555] Thus, for enforceability and validity of a marine insurance contract, the insured must have a specific kind of relationship with the subject-matter of insurance.[556]

In a marine adventure, different persons have some contact or relationship with a given maritime enterprise, before, during and after the voyage from one point to another. In an international transaction, under either a FOB or CIF contract, the risk in goods passes to the buyer on shipment,[557] and the passing of risk vests an insurable interest in the buyer. Whether an insured possesses an insurable interest at the time of loss is an issue which arises most frequently in connection with cargo insurance. Resolving this question often requires careful examination of the terms of contracts for the sale of goods to ascertain precisely when property or risk in the insured cargo passed to or from the insured. Thus, the discussion here is limited to FOB & C&F purchasers. Let's look at how connection arises with different persons and how an insured may suffer a loss before obtaining an insurable interest in pre-shipped goods during transit.

4.4.3.1. The FOB and C&F Purchaser's Insurable Interest for Cargo in Transit under the Nigerian and English rules

In marine insurance, it is required that the insured must have an interest in the subject matter at the time of loss. The principle is well illustrated under the Nigerian and English rules.[558] Following from the principle of indemnity, as the foundation of marine insurance, a person who, at the date of loss, has parted with his interest, or, though in negotiation for, has not yet acquired an interest in the subject matter of insurance, cannot successfully enforce a claim under the policy because he does not stand in any legal or equitable relation with the property to benefit from its safety or prejudiced by its loss.[559] Thus, in a situation where the insured does

[555] Sec 6 (1) & (2), MIA 1961 (Nig.); See Excerpts Appendix 2 (page 266) for the provision of the law.
[556] The policies of insurance are made to protect from the loss the merchant who legitimately risks his ship or goods in a marine adventure. Sec 5 (1) & (2) & (3) MIA 1961(Nig.), defines what a marine adventure; classifies every lawful marine adventure that is a subject of a contract of marine insurance and defines what amounts to maritime perils. For instance, any ship goods exposed to maritime perils, such property, earning or acquisition of any freight, profit, or other pecuniary benefit. Maritime perils would involve perils incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seizures, e.t.c.
[557] In Nigeria, cargo owners and other parties to an international sale of goods contract usually incorporate Incoterms in their contract to govern their transaction. Under Incoterms for an FOB or CIF contract, the risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards. See ICC Incoterms 2020. New rules are available here: <https://iccwbo.org/publication/incoterms-2020-introduction/> assessed 10th August, 2020.
[558] Sec Section 8 (1), MIA 1961 (Nig.); This rule is similar to the English approach in the MIA 1906, s. 6(1).
[559] Section 3, MIA 1961 (Nig.), marine insurance is a contract of indemnity; See Section 3.4 for statutory provisions on indemnity; *AIICO v Ceekay Traders Ltd* [2001] FWLR [Pt 47] 1163,1186 S.C.

not have an insurable interest at the time of loss, he has lost nothing and cannot recover an indemnity. Also, insurable interest safeguards cargo underwriters from being exposed to the risk of a double payment.[560]

Under standard FOB contracts, the risk in respect of goods, whether or not loaded in a sealed container, does not pass to the buyer until the container is on board the vessel.[561] There is a potential problem where a buyer pays for the goods and arranges insurance cover over the goods but has not yet acquired an insurable interest in the goods under the sales contract at the time the goods are damaged or lost. For example, where there is a loaded container with goods, and some were stolen before loading them on board the ship, the insurers can deny payments on the premise for lack of insurable interest at the time of loss. It is also difficult to ascertain whether a combination of lost or no lost or warehouse to warehouse clause does improve the insured's position. Whether and when an insured possesses an insurable interest to recover economic losses remains a controversial and difficult problem in marine insurance practice. The Nigerian and English rule is ambiguous and strict to a buyer who suffers financial losses, while cargo is in transit before shipment will be unable to recover based on technical rules, while in Australia, there are recent developments. This means for private consumers of insurance will they lack the protection which the law is supposed to offer.

4.4.3.1.1. Insured Buyer Suffers at Time of Loss

Under the Nigerian and English law, on marine insurance, a buyer's claim would be rejected for lack of insurable interest at the time of loss because the risk of the loss had not passed when the damage or loss occurred (he is yet to acquire a legal title) before shipment as required by the statutory laws.[562] The Nigerian law provides that there must be a present right to a legal or equitable interest or a right under the contract.[563] In a situation, where the goods of a FOB purchaser is damaged or stolen prior to shipment, in the eyes of the law and by application of the legal right approach, the FOB buyer has lost nothing over which he should be indemnified.

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[560] John Dunt, *Insurable Interest and the Indemnity principle* (Marine Cargo Insurance 2nd Edition 2015) paras 4.1.

[561] Sarah Derrington, 'Australia: Perspectives and Permutations on the Law of Marine Insurance' in *The Modern Law of Marine Insurance* edited by Prof D. Rhidian Thomas (LLP, Volume 2, 2002) Chapter 11, 371.

[562] Sec 7 (1), MIA 1961 (Nig.).

[563] Sec 7 (1) MIA 1961 (Nig.). 'In particular, a person is interested in a marine adventure where he stands in any *legal or equitable* relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or maybe prejudiced by its loss, or damage thereto, or by the detention thereof, or may incur liability in respect thereof'. Clearly, a combination of Section 5 (1) MIA 1961 (Nig.) and Section 7 (1) & (2) MIA 1961 (Nig.) means that persons with a legally recognised interest in a ship, goods and other moveable at sea are assumed to have an insurable interest in them either as a carrier, buyer of cargo or owner; Similar provision in Sec 5 MIA, 1906 (UK).

In parallel with the MIA 1961 Act, the revised Institute Cargo Clauses (A), (B) and (C) also reiterates, in Clause 11, an express contractual requirement for an insurable interest at the time of loss.[564]

It must be noted that English law is similarly strict. The insured must at the time of loss have an insurable interest which must be one which confers right of ownership.[565] To prove this, the insertion of a warehouse to warehouse clause in an all-risk policy could not allow the insured (a C&F buyer) recover for substituted goods prior to shipment.[566] Since the insured could not prove that the cargo they agreed to buy had ever been shipped, the risk under the policy never attached and this fact was enough to dismiss the insured's claim.[567] Nevertheless, the insurance company which provided insurance cover with the 'warehouse to warehouse' clause, were able to retain the premiums and escape their contractual liability. This clearly shows how insurers have used technical rules to avoid payments in both jurisdictions.

Under the Nigerian and English rules, the buyer cannot insure goods allocated to his contract, however crucial they are to his business, in respect of loss or damage before shipment for lack of insurable interest. This is because a buyer does not have either a legal or equitable title to such unascertained goods as stipulated by statutory provisions.[568] Consequently, the FOB or CIF buyer has no insurable interest in goods contracted for until risk has passed (usually on shipment) or (part of) the price has been paid.[569] Similarly, under a standard FOB contract, the risk in respect of goods, whether or not loaded in a sealed container, does not pass to the buyer

[564] These clauses were issued by the Institute of London Underwriters and are revised from time to time to meet the needs of the marine insurance market. It provides '11.1. In order to recover under this insurance, the Assured must have an insurable interest in the subject-matter insured at the time of loss; Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 77; John Dunt, *Insurable Interest and the indemnity principle* (Marine Cargo Insurance 2nd Edition 2015) paras 4.2.

[565] Sec 5 & 6, MIA, 1961 (Nig.).

[566] In *Fuerst Day Lawson v Orion Ins,* [1980] 1 Lloyd's Rep 656, a cargo of scented oil purchased by the insured on C&F terms was substituted with water before shipment. Since the insured could not prove that the cargo they agreed to buy had ever been shipped, risk under the policy never attached and this fact was sufficient to dismiss the insured's claim

[567] *In Anderson v Morice* (1876) 1 App Cas 713 *a pre- authority caselaw, the House of Lords held that under the terms of the contract of sale, risk only passed to the buyer when a complete cargo had been shipped and, therefore, the buyer did not have an insurable interest in the goods. However, a buyer was allowed to recover for profit of earnings.; sec 6 (2) 1906 (UK) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss.*

[568] Sec 7, MIA 1961 (Nig.); Sec 5, MIA 1906 (UK). The court's decision in *Anderson v Morice (1876) 1 AppCas 713 and Fuerst Day Lawson v Orion Ins* [1980] 1 Lloyd's Rep 656 *emphasise the strict application of the insurable interest requirement in circumstances where the 'insured' claimants suffered economic or pecuniary loss.*

[569] Malcolm Clarke, Marine Insurance System In Common Law Countries - Status and Problems (Conference Paper 1998).

until the container has passed the ship's rail.[570] In these circumstances, unless the buyer can recover from the seller or carrier, its position may be hopeless.[571] Accordingly, the buyer's remedy against the seller under the F.O.B. contract may be worthless if the seller is insolvent or, in any event, difficult to pursue economically against the seller's jurisdiction.[572]

In the same vein, containerisation can make it more difficult to establish precisely when and where damage to, or loss of, goods took place and, whether the insured had an insurable interest at the time of loss. The problem is that the content of the container cannot be seen at the time the container crosses the ship's rail and loads onboard the vessel. Cargo theft as the United Nations has acknowledged is a global problem.[573] It is also a problem in Nigeria.[574] One reason why reform in this aspect of marine insurance is necessary is because of the operation of containerisation in Nigeria. In Nigeria, there appears to be a big container traffic and with insufficient facilities to control all containers in the ports.[575] This is also a global problem.[576]

In Nigeria, robbers often attack containers, and most cases are not often reported.[577] Even when they are reported, security measures are insufficient to prevent and deter thieves, and sometimes there are some internal tactics employed by logistic companies and their staff. Thus, should there be a cargo theft or as some call it 'pilfering', the purchaser himself cannot personally inspect the goods at the time of loading into his ship.[578] Also, cargo handling in the

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[570] Sarah Derrington, 'Australia: Perspectives and Permutations on the Law of Marine Insurance' in *The Modern Law of Marine Insurance* edited by Prof D. Rhidian Thomas (LLP, Volume 2, 2002) Chapter 11, 371.

[571] M Taylor 'Is the Requirement of an Insurable Interest in the Marine Insurance Act Still Valid?' (2000) 11 Insurance Law Journal 147, 149-50.

[572] John Dunt, *Marine Cargo Insurance* in 'Insurable Interest and the indemnity principle' (2nd Edn, Abingdon/New York: Informa 2015) paras 4.21.

[573] UNCTAD (2019c). Review of Maritime Transport 2019. This freight report also shows theft as a global threat. http://www.transportschaden.biz/html/documents/FreightWatch_Global_Threat_Assessment_2011.pdf> Assessed 10 August 2019.

[574] Reports from Protection Vessels International, show example of crimes committed at different ports. As reported on the 7th January 2019, around four to five robbers came alongside a product tanker anchored in the Lagos Secure Anchorage Area (SAA) and attached hooks and ropes onto the tanker. On another occasion, two robbers connected plastic hoses to the ullage ports of cargo tanks during ship to ship operations at Lagos anchorage and attempted to steal cargo. Reports for other countries can be found here: <https://www.pviltd.com/news-insight/news/article/weekly-maritime-security-report-16-january-2019.html> assessed on 10th August, 2020.

[575] Lagos (Apapa) and Port Harcourt Port are the busiest in Nigeria.

[576] In 2018, 793 million TEUs of containers were handled in ports worldwide. World container port throughput grew by 4.7 per cent between 2017 and 2018. Worldwide Container Traffic reports <https://stats.unctad.org/handbook/MaritimeTransport/Indicators.html> assessed 10 August 2020.

[577] Ibid (n 575) for reports of cargo theft in Lagos, Nigeria.

[578] Taylor states that unless 'foul play' is suspected, it would not be the usual practice to inspect goods between the time of delivery to the container park or wharf, and the time of loading onto the ship. In fact, it would be impractical to do so, as once the goods have been containerised, there is little or no opportunity for the buyer to inspect the goods prior to loading. Primary difficulties are that the goods are usually sealed into containers for shipment and the goods often pass through numerous transit entities prior to shipment: M Taylor 'Is the Requirement of an Insurable Interest in the Marine Insurance Act Still Valid?' (2000) 11 Insurance Law Journal 147, 159–160.

Nigerian ports involves unprofessional and no sufficient agencies or watchdog to monitor the loading activities.

With containerisation, there are now more individuals involved in the handling process after goods leave their supplier's hands for the last time prior to export, and there are probably greater time gaps between the time when goods leave their supplier's hands and when they pass the ship's rail.[579] Thus, the insured will suffer pre-shipment losses where goods were loaded in containers were stolen prior to shipment.

A ground whereby the insurers will deny the insured any payment is the lack of insurable interest at the time of loss. This is because the insured's right to recover financial losses, is not only dependent on the time of loss but the transfer of risk.[580] If there was a law that deems containers loaded with goods to be functionally part of the ship so that the containers should generally be considered as the point of delivery at which risk in the goods passes.

Whether the insured can rely on a 'lost or not lost' or 'warehouse to warehouse' clause is another issue of contention.[581] There appears to be inconsistency in this area of law first, based on whether an insured can rely on a lost or no lost and warehouse to warehouse clause or transit clauses unless the loss falls on it in line with the fundamental principle that a contract of insurance is a contract of indemnity.[582]

4.4.4. Lost or not Lost Policies: Different Meaning and Understanding

The concept of 'lost or not lost' originated from English law and has been adopted into the Nigerian statutory law.[583] It is a moot point whether the 'lost or not lost' provision can be of assistance to the problem that may confront a buyer of goods on FOB terms to recover for actual losses.[584] Except the insurer provides 'lost or not lost' clauses or other pre-shipment

[579] D Galbraith 'An Unmeritorious Defence — The Requirement of Insurable Interest in the Law of Marine Insurance and Related Matters' (1993) 5(3) Insurance Law Journal 177, 181.
[580] *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd* (1991) 25 NSWLR 699; *Wünsche Handelsgesellschaft International mbH v Tai Ping Insurance Co Ltd* [1998] 2 Lloyd's Rep 8.
[581] ALRC 91; John Dunt, *Insurable Interest and the indemnity principle* (Marine Cargo Insurance 2nd Edition 2015) paras 4.18; *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd* (1991) 25 NSWLR 699; *Sutherland v Pratt* (1843) 11 M & W 296; *Reinhs Co v Joshua Hoyle & Sons Ltd* [1961] 1 Lloyd's Rep 346.
[582] Sarah Derrington, 'Australia: Perspectives and Permutations on the Law of Marine Insurance' in *The Modern Law of Marine Insurance* edited by Prof D. Rhidian Thomas (LLP, Volume 2, 2002) Chapter 11,371.
[583] Sec 8(1) MIA 1961 (Nig.). provides: 'The assured must be interested in the subject matter insured at the time of the loss though he need not be interested when the insurance is effected: Provided that where the subject matter is insured "**lost or not lost**", the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not. Similar provisions in England – MIA 1906, s. 6(1.
[584] Sec 8 (1) & (2) MIA 1961 (Nig.); Sec 6 (1) & (2) MIA 1906 (UK.).

cover, the buyer will be uninsured and open to risk for the goods prior to loading. An authority, on the issues surrounding the usage of such clauses to find insurable interest, has been reviewed in Australia following the decision in *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd.*[585] The court held that the insured was entitled to an indemnity for the goods stolen before the risk attached and had an insurable interest in those goods because of a combination of a 'lost or not lost' and warehouse-to-warehouse clause. However, the outcome of the case has been a subject of criticism.[586] The major criticism is that a 'lost or not lost' clause was not designed to assist a buyer without an insurable interest recover for actual losses, but dealt with the specific problem that in the days of poor communications the assured might at the date of the policy be unaware of the condition or fate of goods purchased by him and located abroad.[587] This is supported by the definition of lost or not lost clauses in sec 8 (1) & (2) MIA 1961 (Nig.).[588] However, it is subject to the qualification that the insured must not have been aware of the loss of the subject matter (whether vessel or cargo) at the time of acquiring the insurable interest, but not regarding losses occurring before an insurable interest is acquired by the insured. Thus, without this exception, an insured who is acting in good faith without knowledge of any loss may well have been deprived of recovery merely upon the grounds of ignorance as to the situation.[589]

Notwithstanding the provisions relating to the lost or not lost, the insured must still prove that the risk had attached to the subject matter at the time of loss. This point is well illustrated in the case of *Andeann Pty Ltd v South British Insurance Co Ltd,*[590] where the Supreme Court of Tasmania held that because the plaintiff failed to prove that the risk had attached to the goods

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[585] *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd* (1990) 103 FLR 70.

[586] Australian Law Reform Commission, Review of the Marine Insurance Act 1909, Report No 91 (2001), 248 ('ALRC MIA Review'). ALRC 91, paras 11.36-11.40; Sarah Derrington, 'Australia: Perspectives and Permutations on the Law of Marine Insurance' in *The Modern Law of Marine Insurance* edited by Prof D. Rhidian Thomas (LLP, Volume 2, 2002) Chapter 11, 371; Robert Merkin, Reforming Insurance Law: Is there a Case for Reverse Transportation? A Report for the English and Scottish Law Commissions on the Australian experience of insurance law reform (2007) 78-79.

[587] ALRC 91, paras 11.36-11.40.

[588] Sec 8 (2), MIA 1961 (Nig.).provides that insurance may be taken out on a lost or not lost basis, in which case the assured may recover even though no interest was acquired until after the loss occurred, **unless the assured knew of the loss and the insurer did not** as at the time of conclusion of the contract; Similar provisions in England, Sec 6 (2), MIA 1906; In Australia, sec 12 of the MIA 1909 (Aus.).

[589] Kyriaki Noussia, *The Principle of Indemnity in Marine Insurance Contract: A Comparative Approach* (Springer 2010) 61.

[590] In *Andeann Pty Ltd v South British Insurance Co Ltd* (1987) 4 ANZ Insurance Cases, 75-029 in response to an advertisement to ship goods, persons purporting to represent a transport company collected the goods, whilst the owner insured them under a certificate of marine insurance as from the following day and the goods were apparently stolen by the collector.

before the loss occurred, there was no obligation to receive insurance payment (indemnity) under a lost or not lost clause.

There are difficulties faced by a C&F or FOB buyer where the goods are damaged before shipment. For instance, it is difficult for buyers on FOB terms to purchase 'warehouse to warehouse' cover, as many underwriters will not offer such terms to FOB buyers, on the basis that they will not attain an insurable interest until the cargo has passed the ship's rail.[591] Even if both types of clause are included in the contract, an insurer may still resist liability where cargo is lost or stolen prior to loading by arguing that under the contract of sale the insured never acquired an insurable interest in the cargo and therefore the `lost or not lost' cover does not operate. In addition, 'lost or not lost' clauses are not offered in most standard policies offered by marine underwriters. [592]

Also, the extent to which `lost or not lost' cover is commonly available from Nigerian insurers is unclear. The reasons for this are that, under the Nigeran insurance law, there is no clear explanation about the scope and meaning of the clause, and insurers do not often offer a policy with a 'lost or not lost' clause.

In commercial practice, Nigerian insurers' common understanding and usage of the clause is that the clause is applied in the situation that before the contract of insurance is concluded, the loss of the goods, which were unknown to both insurers and insureds, has occurred, and then the insureds would acquire an insurable interest in the goods after the loss. In addition, the clause is commonly applied when the goods, which have been lost during the voyage at sea, are resold from one buyer to another buyer, and the first buyer in the chain has acquired an insurable interest in the goods.[593]

The argument that Nigerian insurers might put forward is that it has never been insurers' intention that 'lost or not lost' clauses should cover cases where the loss occurs before an insurable interest has been acquired by an insured. This is the vulnerable situation that FOB or C&F buyers are placed.

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[591] ALRC 91, paras 11.36.

[592] M Taylor `Is the Requirement of an Insurable Interest in the Marine Insurance Act Still Valid?' (2000) 11 *Insurance Law Journal* 147, 155. In *NSW Leather*, an open policy had been issued several years before the theft so commencement of cover was not at issue: (1991) 25 NSWLR 699, 710.

[593] M Taylor 'Is the Requirement of an Insurable Interest in the Marine Insurance Act Still Valid?' (2000) 11 Insurance Law Journal 147.

Other arguments centre around where goods are lost prior to loading the 'lost or not lost' clause will not assist unless the buyer of goods on FOB or C&F terms also purchases 'warehouse-to-warehouse' cover because the risk will not attach until the goods are loaded onto the ship.[594] It is difficult for buyers on FOB terms to purchase 'warehouse to warehouse' cover, as many underwriters will not offer such terms to FOB buyers, on the basis that they will not attain an insurable interest until the cargo has passed the ship's rail.

While it is agreed that a combination of the lost or not lost clause and the 'warehouse to warehouse' clause can give the buyers a chance to recover for the loss, it creates confusion and technical difficulties for inexperienced insureds. It is suggested that those obstacles should be removed. The underlying purpose of an insurance bargain is that the insureds should be indemnified for their actual loss, and the insurer should keep his promise to pay when the loss occurs, it is unfair to the insureds if the insurer is allowed to use his technical defence to refuse to pay when the loss which has been specified in the policy occurs.

Another alternative open to the insured buyer could be the inclusion of FOB or C&F pre-shipment clauses' in policies which could provide insureds with adequate additional protection for pre-shipment loss.[595] The pre-shipment clause overcomes some of the problems that arise out of the combination of the 'warehouse to warehouse' and 'lost or not lost' clause.[596] However, the insurance market might have problems with using such clauses for such purposes.

For this reason, the FOB and C&F pre-shipment clauses cause problems in most insurance markets.[597] Nigerian insurance market, which is at the developing stage is likely to face the same problems. These problems are said to include ambiguity about when cover first attaches and the extent of the obligation on the insured to use all reasonable means to first recover from the exporter or supplier.[598] Most importantly, for present purposes, an insurer can argue that

[594] ALRC 20, p 244 paras 11.40.
[595] ALRC 20, p 245 paras 11.44; Such clauses are often in the following terms: '*Notwithstanding the provisions of the contract of sale, the insurance attaches from the beginning of the transit, or that loss or damage to the goods discovered at destination is deemed to have occurred during the transit insured*'.
[596] First, it does not depend on the terms of the contract of sale; thus, passing of risk or passing of property has no impact on application of the clause. Second, it attaches from the beginning of the transit, which is like the warehouse to warehouse clause. Therefore, there is no need to identify the time when the loss occurs, and the insurers are not able to refuse to make a payment on the ground that the loss occurs before shipment and the insureds have no insurable interest at that time. Third, it is not dependent upon whether or not the insured subsequently acquire an insurable interest after the loss of the goods occurs.
[597] As noted by the ALRC 20, p244, para 11.45 'The idea behind the development of such pre-shipment clauses was to give the insured the choice of making a claim against either the seller or their insurer when it is not clear at what point in time the loss has occurred'; M Taylor is the Requirement of an Insurable Interest in the Marine Insurance Act Still Valid?' (2000) 11 Insurance Law Journal 147, 155.
[598] ALRC 20, page 245 paras 11.46.

the cover provided by such clauses is not enforceable as they are in contravention of the insurable interest requirements of the MIA.[599] This is submitted that the clause is commercially convenient rather than legally enforceable against the insurers because it lacks a statutory basis like the lost or no lost clause. Thus, the court is open to declare such policies with a pre-shipment clause null and void. If an insurer declined indemnity to an assured on the basis that the cover was not legally enforceable, the issue of an insurer providing illusory cover to an assured would have to be reconciled. Nevertheless, it would be open for a court to find that the contract of insurance was void *ab initio* and that the remedy for the assured would be no more than the refund of the premium.[600] Where a cargo is lost before insurance is effected, the consequences is that the interest of the insured would have ceased and the buyer will not be able to recover anything.[601]

In the context of cargo insurance where the goods are lost or destroyed prior to loading, it is arguable that neither a warehouse-to-warehouse clause nor a 'lost or not lost' clause is, in isolation, sufficient to protect a purchaser on FOB or C&F terms. Even if the contract includes both such clauses, the purchaser will not be protected if the purchaser never subsequently acquires an interest in the cargo.[602] It is suggested that perhaps a far less contrived solution to the conflict is to keep apart the law of passing risks and property in a contract of sale from that of insurable interest in marine insurance.[603] The purchaser's relationship with the goods is not, by any stretch of imagination, speculative, or one of mere expectation, it is real and factual expectancy.[604]

4.4.4.1. Whether a purchaser Can Rely on CIF Terms

In the same vein, whether purchasers on CIF (cost, freight and insurance) terms are better placed than FOB and C&F buyers is another issue. What that means is that the seller is obliged

[599] M Taylor 'Is the Requirement of an Insurable Interest in the Marine Insurance Act Still Valid?' (2000) 11 Insurance Law Journal 147,157 observed that 'An FOB or C&F pre-shipment clause provides cover for an assured who does not have an insurable interest. Furthermore, it is not a 'lost or not lost' clause, as it is not dependent upon the assured subsequently attaining an insurable interest after the loss has occurred.
[600] *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd* (1991) 25 NSWLR 699.
[601] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 76.
[602] Rhidian Thomas, *The Modern Law of Marine Insurance Law* (Volume 4, Informa Law from Routledge 2016) 12; Baris Soyer In Insurance Law, 'Marine Insurance Law Insurable Interest in Insurance- Adopting A Commercial Solution' International Maritime and Commercial Law The Official Blog of the Institute of International Shipping and Trade Law (2018)
<https://iistl.blog/2018/12/10/insurable-interest-in-insurance-adopting-a-commercial-solution/> Assessed 10th Jan, 2020.
[603] Susan Hodges, *Cases and Materials on Marine Insurance Law* (Cavendish Publishing Limited, 1999) 81.
[604] *Ibid*.

to procure marine insurance against the buyer's risk of loss during the carriage.[605] As illustrated in a recent Canadian case, insurers tend to avoid paying insurance monies to CIF sellers, on strict technical rules.

Recently, the Canadian court was asked to decide whether a seller on CIF terms has an insurable interest in goods damaged during transit from Nigeria to China, in the case of *Broadgrain Commodities Inc v Continental Casualty Co.* [606] The insurers intended to avoid liability by relying on past cases with statements to the effect that, 'where goods are shipped on CIF terms and the goods are loaded onboard the ship, the seller no longer has an insurable interest and cannot claim under a policy of insurance'.[607] The court in giving a decision, considered the seller's security interest in the cargo granted by the buyer until all amounts had been paid. On this basis, the court held that even though the title and risk had passed upon shipment and payment, then the security interest retained would qualify as a real interest sufficient for payment of an indemnity.

For the buyers, major disadvantages of such CIF terms are that the purchaser will not be in control of the policy terms entered into with the seller's insurer, premium cost and claims handling.[608] Notwithstanding, where payment is made before shipment, the buyer is still exposed to the same potential economic loss as under a FOB contract. There are also economic reasons why it would be beneficial for Nigerian importers to contract on FOB and C&F terms rather than CIF terms because they will be more encouraged to patronise domestic insurers.[609] It is suggested for commercial realities that parties be given the freedom to contract to protect

[605] The seller contracts for insurance and pays the insurance premium. If the goods are lost before the buyer acquires an insurable interest, the seller's policy of insurance will provide indemnity, at least to the seller.

[606] In *Broadgrain Commodities Inc v Continental Casualty Co.* [2017] ONSC 4721, the plaintiff entered into a contract with a buyer for the sale and shipment of 26 containers of sesame seeds. The goods were insured by Canada-based defendant under a policy of marine insurance. Goods damaged in transit. Defendant refused coverage on the basis that Plaintiff did not have an insurable interest in the goods at the time of the loss and that Plaintiff did not sustain any loss because it was paid in full by the buyer for shipment in question.

[607] *Green Forest Lumber Ltd v. General Security Insurance Co of Canada* [1977] 2F.C. 351 (F.C.T.); aff'd [1978] 2 F.C. 773 (F.C.A), aff'd [1980] 1 S.C.R. 176 and *Union Carbide Corp v. Fednav Ltd* [1997] F.C.J.No. 665 (F.C.T); See also Baris Soyer In Insurance Law, 'Marine Insurance Law Insurable Interest in Insurance- Adopting A Commercial Solution' International Maritime and Commercial Law The Official Blog of the Institute of International Shipping and Trade Law (2018) <https://iistl.blog/2018/12/10/insurable-interest-in-insurance-adopting-a-commercial-solution/> Assessed 10th Jan, 2020; Insurance Law Monthly, (2019) Ins. L.M., 6-7.

[608] According to the Incoterms 2020, 'Under CIF the seller is required to obtain insurance only on minimum cover'.

[609] Where Nigerian importers purchase on FOB and C&F terms, they assist the Nigerian marine insurance industry because the insurance cover will be purchased in Nigeria. By contrast where insurance is purchased by overseas exporters as part of a CIF package it will be generally purchased overseas.

their interest so that they can decide at what point the risk of the goods passes possible earlier than at the ship's rail.

In conclusion, these issues are strong points to reform the law of insurable interest in marine insurance because the time at which the risk passes to the buyer, influences when the buyer obtains an insurable interest. In most marine insurance transactions, a contract of sale is read alongside the legal requirements of insurable interest. As highlighted above, a FOB and C&F purchaser face difficulties in recovering for pre-shipment losses, as a result of technical provisions of the law. Because the commercial risk is high, there is no reason why such buyers should be prevented from seeking insurance cover from insurance companies to prevent pre-shipment losses.

At present, the principle of indemnity is undermined by the rule of insurable interest because the legal right approach and time of loss puts a legal obstacle in the way of the FOB or C&F buyers trying to recover for the loss of goods prior to shipment.[610] If it is commercially desirable by parties in entering a contract of insurance, liberty must be given in such a way as to break the link between cover for pre-shipment loss and the passing of risk or property under the contract for sale.[611] In the same vein, parties to such contract (both insured and insurer) must think carefully about the implication of what has been agreed. Suggestions for reforming the Nigerian law are made in chapter six of the thesis that supports a purchaser of good's ability to protect his interest in a marine insurance transaction and permit purchasers of insured goods to obtain insurance to cover their exposure to loss if they pay for the goods before they acquire an insurable interest in them under the contract of sale.

4.4.5. Insurable interest of a *Bonafide* Purchaser of Stolen Goods

Another problem with the insurable interest principle concerns whether a *bonafide* purchaser should be denied an indemnity because a thief is not the sole or original owner of the property.[612] Given the high rate of crime and theft in Nigeria, it is essential to discuss how insurance companies will deal with such a situation. While no case has been reported on this issue in

[610] At present, sec 7 MIA 1961 (Nig.). constrains their ability to do so. Market forces will dictate the availability and cost of such cover.
[611] ALRC Report 91, para.11.39 page 244.
[612] Bertram Harnett & John V. Thornton, 'Insurable Interest in Property: A Socio – Economic Revaluation of a Legal Concept' (1948) 48 Columbia Law Review 1162, 1165; *Lucena v Craufurd* (1806) 2 Bos. & P.N.R. 269 at 323; *Dobson v Sotheby* (1827) Moo. & M. 90, 93; Funmi Adeyemi, *Nigerian Insurance Law* (2nd edn Dalson Publications Limited, 2007) 18; John Birds, Ben Lynch and Simon Paul, *MacGillivary on Insurance Law* (1st Supplement 14th edn, Sweet & Maxwell 2019) 60.

England, notable academics[613] agree that a possessor or purchaser of stolen goods bought in good faith, does have an insurable interest and possession is sufficient proof of ownership to establish an interest. There appears to be a large volume of case law in other jurisdictions like America, Canada and just a few South Africa.[614]

In the Nigerian case of *Law Union and Rock Insurance Co. Ltd v. Onuoha,*[615] the insured bought a stolen car from the mechanic village in Makurdi without knowledge of the defect in the title of the seller. He insured it with *Law Union & Rock Ltd* insurance company. Following the destruction of the vehicle by fire, he sought to claim on the policy. The insurer repudiated liability upon discovering that the car was stolen vehicle. The High Court gave judgement for the insured. Upon appeal, the Court of Appeal held that the mechanic village was a market overt and, having bought the vehicle in good faith without notice of any defect, the insured had an insurable interest in the property to entitle him to claim an indemnity under the property.

In America, a majority of case law favours the existence of insurable interest of the stolen property.[616] By contrast, a Canadian judgement on the same issue in *Chadwick v. Gibraltar General Insurance Co.*[617] was criticised based on being a bad law[618] because the insurer refused to indemnify the innocent purchaser of a stolen vehicle on the basis that the insured had no insurable interest in the car. The Court of Appeal of Ontario in *Assaad v. Economical Mutual Insurance Group,*[619] held that the factual expectation test does not apply to cases involving

[613] John Birds, Ben Lynch and Simon Paul, *MacGillivary on Insurance Law* (1st Supplement 14th edn, Sweet & Maxwell 2019) 61; J P van Niekerk, 'Insurable Interests in Stolen Property' (2003) 11 Juta's Bus L 15, 19.
[614] In South Africa, the existence of an insurable interest in stolen property has arisen in two cases: *Foster v Mutual & Federal Insurance Co Ltd* (TPD 10 November 1995 (case no 3239/1995) unreported), and *Pienaar v Guardian National Insurance Co Ltd 2002* (3) SA 640 (C).
[615] *Law Union and Rock Insurance Co. Ltd v. Onuoha* [1998] 6 NWLR Part 555 part 576 at page 590.
[616] *Scarola v Insurance Co. of North America* 292 N.E. 2d 776 (1972); *Reznich v Home Insurance Co.* 360 N.E. 2d 461 (1977). A different decision was reached in several cases denying relief to the insured possessor of an automobile purchased without knowledge that it was stolen in *Insurance Co of North America v Cliff Pettit Motors* Inc 513 S.W. 2d 785 (1974); *Giles v. Citizens' Ins. Co*., 32 Ga. App. 207, 122 S.E. 890 (1944); Jay M. Zitter, Annotation, Automobile Fire, Theft, and Collision Insurance: Insurable Interest in Stolen Motor Vehicle, 38 A.L.R. 4TH 538 (1985); Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016) 146.
[617] In *Chadwick v. Gibraltar General Insurance* (1981) 34 O.R. 2d 488 the plaintiff purchased a vehicle and took out an "all perils" policy with the defendant insurance company. The car was later discovered to have been stolen and was seized by the police. The insurer conceded that the plaintiff was an innocent purchaser for value without notice of the fact that the car was a stolen vehicle. Despite this the insurer refused to indemnify the plaintiff on the basis that the insured had no insurable interest in the car; *Thompson v Madill* (1986) 13 C.C.L.I. 242.
[618] The author in R A Hasson, 'Reform of the Law Relating to Insurable Interest in Property-Some Thoughts on *Chadwick v. Gibraltar General Insurance'* (1983) 8 Can Bus LJ 114 identified that 'the decision in *Chadwick v. Gibraltar General Insurance Co*.' deserves to be rescued from the comparative obscurity of the Ontario Reports.
[619] *Assaad v. Economical Mutual Insurance Group* 59 O.R. (3d) 641 [2002] O.J. No. 2356.

stolen goods and a thief, or one who knowingly purchases from a thief does not have an insurable interest in the stolen property.

It is submitted that under no circumstances should a *bonafide* purchaser be denied an indemnity for lack of insurable interest for three primary reasons: First, possession by an insured is a *prima facie* proof of ownership.[620] Second, because he has an economic expectation of continued use: such a purchaser stands to benefit from the continued existence of such a vehicle because of the continued availability of its use to him'.[621] Finally, it prevents the insured from recovering the economic loss that he suffered as a result of the insured event.[622] For jurisdictions which still apply the legal test approach,[623] perhaps it could be argued that a good faith purchaser has not only a factual expectancy but also possesses an interest that is legally enforceable against claims of persons other than the actual owner.[624]

4.4.6. The Technical Nature, Impact and Inconsistencies of the Legal Right Approach

In summary, the public policy limiting the insured to full indemnity for his loss is inconsistent with the restrictive definition of insurable interest set out by the application of the legal interest test. This is evident in the cases examined above, and the consequences are listed below. It is submitted that if the main purpose of the concept of insurable interest developed to wit, to halt wagering and if it performs any other function like depriving the insured of his economic losses then the application is too extreme. They include the following:

4.4.6.1. Technical Rule Inhibits Recovery

It is submitted that the requirement of legal or equitable interest is a technical rule that prevents the insured from recovering the financial loss suffered by him. Consequently, if a person possesses only an economic interest in the subject matter insured, but this interest is not recognised and protected by law, the relationship is presumed not sufficient to be insurable. For this reason, the technicality of insurable interest law has generated non-wager policies, to

[620] John Birds, Ben Lynch and Simon Paul, *MacGillivary on Insurance Law* (1st Supplement 14th edn, Sweet & Maxwell 2019) 61.
[621] J. D. W, *Castle Cars, Inc. v. United States Fire Insurance Co*.: The Bona Fide Purchaser's Insurable Interest in Stolen Property (1982) 68(3) Virginia Law Review, 651,659 https://www.jstor.org/stable/1072858 assessed 13 Jan, 2020.
[622] *Ibid*, p 662.
[623] Like England and Nigeria.
[624] Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016) 147.

be void because of a lack of insurable interest. This is evident in Nigerian and English cases discussed above, as it relates to shareholders and unsecured creditors.

4.4.6.2. A Technical Defence to avoid liability

The legal interest test of insurable interest is purely a technical defence for insurers against the insured's claim. Moreover, even where an insurable interest defence is unsuccessful, it still has to be contested, leading to expense and delay in settlement.[625] Past cases since 1884[626] and latest ones reveals the disadvantage of the strict legal requirement of insurable interest. In the same vein, learned academic writers have the same view that the legal right approach provides a technical defence to insurers because it allows insurers to escape liability, refusing to give an indemnity in the event of a loss.[627]

As shown in the Nigerian case of *British Indian General Ins. Co. Nig. Ltd. V Thawardas*,[628] where the insurers raised a defence of lack of insurable interest after collecting premium on behalf of a non-existent company. It is asserted that this technical defence is contrary to the social and economic expectation of insurance contracts. Insurers in Nigeria generally have apathy towards settling claims, and during the formation of the contract, insurers do not raise issues or explain clearly. Even when they do, the insured who is illiterate might not understand the implication and complexities of the requirement of insurable interest.

This is one of the key reasons why the legal interest test should be removed in circumstances where insurers are unable to demonstrate that the policyholder has committed fraud. If insurance fraud is a concern for insurance companies, then loss adjusters, claims investigators, and insurance fraud agencies can help out. The answer to risks that are difficult to assess or define is for insurers to either decline to underwrite them or to put more effort into drafting

[625] In each of these cases discussed under the legal interest test, lack of insurable interest was used by the insurers to avoid payment: *Feasey v Sun Life Assurance Corporation of Canada* [2003] Lloyd's Rep IR 637; *Law Union and Rock Insurance Co. Ltd v. Onuoha* [1998] 6 NWLR Part 555 part 576, 590; *British Indian General Ins. Co. Nig. Ltd. v Thawardas* (1987) 34 D.O.R. (4th) 208; (1987) 1 SCR 2; *Cepheus Shipping Corporation v Guardian Royal Exchange Assurance plc (The Capricorn)* [1995] 1 Lloyd's Rep 622 at 641 (Mance J).

[626] In *Stock v Inglis* [1884] 12 Q.B.D. 564, 571 Brett M.R. made a well -known statement '… *after underwriters have received the premium, the objection that there is no insurable interest is often, a technical objection, and one which has no real merit, certainly not as between the assured and the insurer'* .

[627] D Galbraith 'An Unmeritorious Defence — The Requirement of Insurable Interest in the Law of Marine Insurance and Related Matters' (1993) 5(3) Insurance Law Journal 177 observed '*pleading 'insurable interest' as the sole defence to avoid a claim is considered to be a mere technicality and an unmeritorious defence, particularly where the underwriters have accepted the premium from the claimant.*

[628] (1987) 34 D.O.R. (4th) 208; (1987) 1 SCR 2.

their policies. It is thus submitted that the failure of the insurers to perform their duty diligently should not be used to punish the insured from being fully indemnified.

In the same vein, the insurer's may be mindful that the loss would possibly occur between the seller's warehouse and the port of loading, and, at the time of entering the contract. It, therefore, means that they should have been aware that the FOB buyer has no interest in the goods before shipment. The narrow interpretation of insurable interest appears to be unfair to an inexperienced insured who is refused compensation for actual financial losses. It is submitted that placing FOB buyers in such situation is inconsistent with the principle of indemnity. On another note, insurers should be bound by their agreements in the insurance contract. They have a choice to increase premium where they feel the risk of loss before loading is high. However, once an agreement has been reached to provide financial cover, insurers must perform their duty and not escape their contractual obligation.

4.4.6.3. Limits the Recovery of actual economic losses

Only legal interests and ownership rights are recognisable by law which means the insured cannot recover where interest is purely economic.[629] This limitation is injurious with the Nigerian system and unfair to shareholders, unsecured creditors, people who have agreed to buy goods but have yet to acquire possession or ownership, in particular the distance buyer of goods in transit, even though the very future of the buyer's business may depend on their safe arrival. This may cause injustice for the insured where their interests are not legal interest.

Moreover, this approach prevents the insured from recovering their actual economic losses and it is inconsistent with the indemnity principle. For fairness, such departure must not exist in insurance law and practice. The requirement of insurable interest rules should run parallel with the fundamental economic nature of insurance contracts – to fully indemnify insured for their actual economic losses. Within the concept of insurable interest are two distinct, economically relevant ideas: the legitimate demand for insurance by an honest client, and the prudent limitation set by an insurer who remains sceptical that the client might wilfully destroy the proper.

In the modern world, economic conditions have changed, and proprietary interest has been expanded. For instance, a FOB buyer cannot recover ordinarily, but other clauses are applied reluctantly by the courts, which sometimes are not legally binding but only commercially

[629] See section 4.4.2 of the chapter for discussion on *Macaura*.

convenient to include in a policy. Also, it is commercially convenient for subcontractor's interest to be included in a policy, but the legal interest test, questions whether or not the potential liability of a sub-contractor for damage after the completion of a project is sufficient to amount to an insurable interest.[630]

4.4.6.4. Penalises only the insured

The application of the hard-line legal interest test is one-sided, unreasonably burdensome and only punishes the insured. The remedy for the breach of the requirement of insurable interest is a void policy which means that the policyholder will not have their premiums returned. Whereas, the insurer who suffers no loss even after issuing a wrong policy, collects premium and can refuse to pay claims on the grounds of lack of insurable interest. This situation is not only unfair but unbalanced and disproportionate because there is no penalty imposed on the insurers. It is suggested that the legal interest test be reviewed under the Nigerian laws to balance the interest of both parties. For instance, insurers may offer and conclude a policy knowing fully well that the insured does not have a legally recognised insurable interest. However, accept premium but reject the claims when it is time for payment. For this reason, the provisions governing insurable interest under the Nigerian laws produce unjust results on the insured and are inconsistent with the indemnity principle.

There is no commensurate situation in Nigeria which mitigates the insured's position like in England where the activities of the Financial Ombudsman Service, will not allow insurers to retain premium where a policy has been made without interest. However, even in England, the jurisdiction of the Ombudsman is limited.[631] These limitations help to explain why the requirement of legal or equitable relation which had been imported as part of the common law from England, was later dropped by similar common law countries and even other civil law countries for a broader approach.

[630] *Deepak Fertilisers & Petrochemicals Ltd v Davy McKee* [London] Ltd [1999] 1 All ER [Comm] 69.
[631] M. Templeman, '*Insurable Interest: A Suitable case for treatment*? In Baris Soyer (eds), Reforming Marine and Commercial Insurance Law, (Informa, 2008) 216; The Ombudsman does not extend beyond £100,000, does not admit of the reception of third party evidence and does not extend to business insurance where the turnover of the business exceeds £1,000,000.

4.5. Towards the Factual Expectancy Theory[632]

4.5.1. Pecuniary Interests Arising out of a Financial Loss

Modern realities and conditions are gradually expanding the scope of the test of insurable interest towards the insurability of factual expectation of pecuniary loss. According to the factual expectancy rule, insurable interest exists when 'a person profits by the continued existence of a thing and would suffer some loss by its destruction whether or not he has any legal interest in it'.[633] What this connotes is that the loss to be suffered can be quantifiable in monetary terms. The focus of this test is whether the insured had suffered a loss and not necessarily whether the insured's has property rights in what was damaged or lost.

To confine insurance, to the protection of the interest which arises out of property would be to add a restriction to the contract which does not arise out of its nature. This negates the concept of insurance which purports to protect the insured party from a potential loss.[634] For this reason, there appears to be a call for the expansion of the insurable interest principle arising from some troublesome cases which the courts find difficult to apply the legal interest rule.

Let us apply the same scenario given above on X's limitation to recover for losses caused to the company under legal interest rule.[635] Under the factual expectancy rule, 'X' can recover for losses because the success of X's investment is entirely dependent upon the continued existence of the company. It could be said that X has a pecuniary interest which is one that is capable of valuation.

Also, X would be said to have suffered a substantial financial loss by the destruction of the company's property, even though legal ownership is not vested in him. In line with the purposes of insurable interest, he is not wagering; he did not intentionally destroy the company's property. The insured party intended that the policy should cover a genuine factual expectation interest which will be reasonably valued and measured by any equitable scale. All the insured seeks is to recover what has been lost. The factual expectation of loss connotes the expectation of economic advantage, the property continues to exist, or, stated negatively, the expectation of economic disadvantage accruing upon damage to the insured.[636]

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[632] The factual expectancy test is used interchangeably here to mean the economic interest or pecuniary interest.
[633] *Lucena v Craufurd* (1806) 2 Bos & Pul (NR) 302-303.
[634] Section 3.2.1 explains the fundamentals of Insurance.
[635] Section 4.4 of this chapter.
[636] Harnett and Thornton (1948) 1162,1172; R. Pinzur, Insurable interest: A Search for Consistency', (1979) 46 Ins. Counsel J. 109.

The public policy restricting the insured to full indemnity for his loss appears to be consistent with a broader definition of insurable interest set out under the factual expectancy rule. Where the interest the insured did have was such that it was liable to be prejudicially affected by a range of events other than the insured peril, then it is sufficient.[637] This test is viewed to be a wider test that accommodates the insured's genuine losses and factual possibility of loss due to damage or destruction of the property.[638]

Where the factual expectancy test is applied, anyone with a 'moral certainty of benefit' from the continued existence of a thing could insure, irrespective of property considerations.[639] The dividing line between this theory with the legal relations theory is that more emphasis is that it also recognises the need to protect some pecuniary or economic interest.[640] It is broader and more inclusive.

The word 'pecuniary' in insurance context would mean no more than the insured may recover, that is the monetary value of the interest at the time of loss. Mainly factual expectations discussion illustrates the risk of loss. In fact, the insured's pure risk, and not speculative. It is significant to note that this alternative approach is not entirely settled, yet with convincing reasons, recent cases in England, Canada and the US are gradually leaning towards the insured's economic interest as a test of determining insurable interest.

4.5.1.1. *Feasey* in England

Lawrence J's view first formulated the broader test in the early case of *Lucena v Craufurd*.[641] The main aim of applying such test is to be 'able to protect men against uncertain events which may in any wise be of disadvantage to them.[642] However, his proposition was rejected in

[637] Law Commission of England and Wales and Scottish Law Commission Consultation Paper on Insurance Contract Law: Post Contract Duties and Other Issues (Law Com No. 201/Scottish Law Com. No. 152, 2011) at paragraph 11.51.
[638] Theodore Greenberg, 'Factual Expectation of Loss as an Insurable Interest in Property' (1952) 7 Intramural L Rev NYU 185, 190.
[639] On the facts, Lawrence J, although differing in the test, agreed on the result: 'I know not how to conceive an interest dependant on a thing, with which thing the persons supposed to be interested have nothing to do': *Lucena v Craufurd* (1806) 2 Bos & Pul (NR) 306; 644.
[640] Graham Douds, 'Insurable Interest in English Marine Insurance Law: Do We Still Need It' (2012) 25 (2) University of San Francisco Maritime Law Journal 323, 329.
[641] According to of Lawrence J, *'A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it; Interest does not necessarily imply a right to the whole or a part of the thing… Where a man is so circumstanced with respect to advantage or benefit but for those risks or dangers, he may be said to be interested in the safety of the thing. To be interested in the preservation of a thing is to be so circumstanced with respect to it as to have the benefit from its existence, prejudice from its destruction.'*
[642] *Lucena v Craufurd* (1806) 2 Bos & Pul (NR) 269, 301.

England and was never enacted into its legislation. Interestingly, over the years, the pecuniary approach has gradually blossomed in England based on court decisions in several cases.[643]

The leading case in England now where the factual expectancy test prevailed is *Feasey v Sun Life Assurance Corp of Canada.* [644] The issue was to determine whether a P & I club could recover reinsurance that did not meet a strict legal definition of insurable interest which is the current approach in England.[645] In reaching a conclusion, Waller J re-examined nineteenth-century cases to determine whether a pecuniary interest is suitable in a more modern context. Lord Waller categorised these cases into four groups, of which three concerned property and construction insurance cases.[646] After a critical analysis of case laws, Lord Waller thought it appropriate to broaden the scope of insurable interest and held that economic interests in light of commercial needs were enough to establish an insurable interest.[647]

In relation to property insurance, Waller J emphasised that insurable interest exists, in circumstances where there is a real probability that the insured will suffer a loss or incur liability on the occurrence of the insured peril. The observations of Waller LJ on the position

[643] Examples of cases where the pecuniary approach has been applied include the following: *Wilson v Jones (1865 - 66) LR 2 EX 139* concerned a shareholder who took out insurance on property owned by the company – a telegraph cable. The court found that the policy was not on the cable but on the shareholder's interest in the successful completion of the project to lay the cable. Mr Wilson had insured the right thing in the right capacity and was therefore entitled to claim. Similarly, in *Moran, Galloway & Co v Uzielli,* [1905] 2 KB 555 at p563 it was held that an unsecured creditor, who had no legal or equitable relation to the insured ship, but had the right to bring an action 'in rem',had an insurable interest in the ship. In another case, *The Moonacre [1992] 2 Lloyd's Rep 501 the court* looked for ways to find an insurable interest. O

[644] *Feasey v Sun Life Assurance Corp of Canada* [2003] EWCA Civ 885; [2003] Lloyd's Rep.I.R. 637 at 654 (Hereinafter called *Feasey); Law Commission of England and Wales and Scottish Law Commission Consultation Paper on Insurance Contract Law: Post Contract Duties and Other Issues (Law Com No. 201/Scottish Law Com. No. 152, 2011) at paragraph 11.87.*

[645] The case of *Feasey v Sun Life Assurance Corp of Canada* [2003] EWCA Civ 885; [2003] Lloyd's Rep.I.R. 637 at 654 concerned both life insurance and marine insurance. On the facts, a protection and indemnity insurance (P&I) club, Steamship Mutual, insured its members against liability claims brought by employees and others who were injured on board their members' vessels. Steamship Mutual approached a Lloyd's syndicate to reinsure the risk, but the syndicate suggested another form of policy, which was more favourably treated under the Lloyd's risk codes. The result was that Steamship Mutual took out a first party personal accident policy, whereby the syndicate agreed to pay a fixed sum to Steamship Mutual for each death or disablement aboard their members' vessels. This in turn was reinsured by Sun Life Assurance Co. Later, when a dispute arose, it was alleged that Steamship Mutual did not have an insurable interest in the lives it had insured.

[646] Group 1 is where the subject matter insured is an item of property, the insured must have an legal or equitable interest in the property as held in *Macaura v Northern Assurance Co*. [1925] A.C. 619 & *Lucena*; Group 2 is where the subject matter is property, but the policy extends beyond the property and covers such interest like an adventure as the insured might possess as it was in *Wilson v Jones* [1867] L.R. 2 Ex 139 and Group 3 was specific on property insurance and complex construction policies where something less than a legal or equitable or even a pecuniary interest has been thought to be sufficient as it was in *The Moonacre* [1992] 2 Lloyd's Rep 501 and other cases of pervasive interests examined in section 4.4.2 of this chapter.

[647] *Feasey v. Sun Life Assurance Co. of Canada* [2003] 12 All E.R. (Comm.) 292.

in property insurance serve to reinforce the view that an overly strict test of insurable interest is out of line with current commercial practices.

Feasey has not only established that economic interest is enough justification for insurable interest, but it has also pointed that the mere existence of an economic benefit underlying a contractual relationship is sufficient requirement, so long as the contractual parties have so expressed in formulating the contract involved each time. It could also be inferred that in case of non-existence of a gamble or wager at the inception of the contract, there is no longer the need to abide by the strict legal requirements of the past. This approach is remarkable, and broader in concept because it accommodates the insureds' actual economic losses and it is arguably, therefore, fairer on the insurer.

The trend towards the recognition of the inclusion of pecuniary is confirmed in other cases. For example, in *O'Kane v. Jones & Others*,[648] the courts asserted that ownership or possession (or the right to possession) of the property insured is not a necessary requirement of an insurable interest therein and that commercial convenience can be a relevant factor in determining the existence of an insurable interest.[649]

Another case is *Linelevel Ltd v. Powszechny Zaklad Ubezpieczen SA, (The Nore Challenger),*[650] where the court followed the approach that economic relationships which are conducive to commercial conveniences, such as the duty of repair and the loss of hire caused by the need of accomplishment of that duty, are enough to constitute evidence of the existence of an insurable interest, even in cases where a clear, direct legal or analogous relation does not exist.

In the context of marine case, there has been parallel developments and a 'push' for expansion of insurable interest'. For example, in *The Moonacre*[651] the issue of insurable interest arose in a hull insurance case where the insured was not the registered owner of the vessel which had been acquired for his benefit. The vessel was registered for tax purposes in the name of a Gibraltar company. The individual had powers of attorney from the company to sail and manage the vessel, and the vessel was insured in his name. A fire onboard the vessel resulted

[648] *O' Kane v Jones & Others* [2003] All ER (D) 510 (Jul).
[649] The Court concluded that ABC had an insurable interest in the vessel which satisfied the requirements of section 5(2) of the MIA 1906.
[650] *Linelevel Ltd v Powszechny Zaklad Ubezpieczen SA,* (The Nore Challenger) [2005] EWHC 421 (Comm).
[651] *Sharp and Roarer Investments Ltd v Sphere Drake Insurance plc, Minster Insurance Co Ltd and EC Parker and Co Ltd* (The Moonacre) [1992] 2 Lloyd's Rep 501. On the facts, the insured (Mr Sharp) took out insurance on a yacht owned by his company of which he was the sole shareholder. He was given full use of the yacht by two powers of attorney, granted to him by the company. The court found that the right to use the yacht was a valuable benefit, and the power of attorney founded a sufficient interest.

in a constructive total loss and the insured claimed under the policy. The judge found that the insured had an insurable interest in the yacht.[652]

The trend in England is in the direction of recognising extension to include an economic and pecuniary test. It is submitted that the factual expectancy test overrides that of the legal interest test, and it is more in line with the objective and purposes of indemnity insurance. Since the goal of indemnity is to put the insureds in the position in which they would have been if the loss had not occurred, broadening the definition of insurable interest to a factual expectation offers more flexibility and a possibility for recovery of other types of losses.

4.5.1.2. *National Filtering Oil Co.* - The United States (New York)

In the U.S. jurisdictions, a substantial and lawful economic interest requirement is sufficient.[653] One of the most notable American decisions supporting the view that a factual expectancy is an adequate insurable interest is an opinion by the New York Court of Appeals in 1887. In *National Filtering Oil Co. v. Citizens' Insurance Co*.,[654] the factual expectancy theory of insurable interest was approved. The court held that an interest, legal or equitable, in the property burned, is not necessary to support insurance upon it; that it is enough if the assured is so situated as to be liable to loss if it is destroyed by the peril insured against.[655]

In 1939, slightly more than a half-century after the *National Filtering* decision, New York enacted insurance legislation with a section on insurable interest. Paragraph 3401 of the New York Insurance Law states that insurable interest shall be deemed to include 'any *lawful* and *substantial economic* interest in the safety or preservation of property from the loss, destruction

[652] *Ibid*; The court at 501 suggested that 'the essential question to be investigated concerns to test the existence of an insurable interest, has been whether the relationship between the assured and the subject matter of the insurance was sufficiently close to justify his being paid in the event of its loss or damage, having regard to the fact that, if there were no or no sufficiently close relationship, the contract would be a wagering contract.'

[653] Robert Stuart Pinzur, 'Insurable Interest: A Search for Consistency' (1979) 46 Ins Counsel J 109, 118.

[654] *National Filtering Oil Co. v. Citizens' Insurance Co*., 13 N.E. 337 (N.Y. 1887) in that case, National Filtering owned a patent and had licensed Ellis & Co. to use the patented process in the Ellis oil reduction and filtering works. The license granted Ellis exclusive rights to use of the process if Ellis continued the normal operations of its works. On the terms of the contract, National Filtering was entitled to royalties guaranteed under the contract. Although National Filtering had no ownership interest in Ellis' plant, National Filtering procured insurance on the Ellis' plant as protection against diminution of royalties because of fire damage to the plant. Afterwards, a fire occurred at the Ellis plant and the insurer's refused the claim for lack of insurable interest.

[655] *National Filtering Oil Co. v. Citizens' Insurance Co*., 13 N.E. 337 at 339 (N.Y. 1887); See also Banks McDowell, 'Insurable Interest in Property Revisited' (1988) 17 Capital University Law Review 165; Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016) 144 - 145 for an analysis of other American decisions.

or pecuniary damage. The legislative provision appears to be consistent with judicial developments of the insurable interest doctrine with recognitions in recent decisions.[656]

In one case, an insured contracted with a farmer to raise the latter's crops. The title to the crops remained in the farmer as security for the contract until the insured fully performed his contractual obligations. The hay was destroyed by fire. Nevertheless, *Hudson v. Glens Falls Insurance Co.*,[657] held that the insured has a sufficient insurable interest in the hay because he could retain possession against all but the farmer. Again, the insured did not create a wager but had an expectation of benefit from the contract.

Regarding shareholder's interest in a company, unlike Nigeria and the UK, the weight of authority in the United States is that a shareholder in a private corporation has an insurable interest in the corporate property to the extent of the actual loss which he might sustain because of the injury or destruction of such property.[658] On the logic that the corporation is the owner of its assets and property, and the stockholder is an owner of the corporation. Nonetheless, the stockholder does not have legal title to the corporate property, not any equitable interest convertible into a legal title.

Based on a factual expectation, the case of *Riggs v Commercial Mut. Ins. Co.*,[659] explained that '*shareholders have equitable rights of a pecuniary nature, growing out of their situation as stockholders, which may be prejudiced by the destruction of the corporate property ... It is very plain that both these rights of stockholders-viz., the right to dividends and the right to share in the final distribution of the corporate property-may be prejudiced by its destruction.' [660]*

Of course, if the principle of indemnity is violated and the insured is allowed recovery in excess of the expected loss in dividends and appreciation, the stockholder is merely wagering that the corporation will suffer an insured loss. However, if the primary concern is about the protection

[656] *Azzato v. Allstate Ins. Co.*, 951 N.Y.S. 2d 726, 734 (App. Div. 2012); A New Jersey court's decision in *Balentine v New Jersey Insurance Underwriting Ass'n* represents the view that although the property right approach to the legal interest test met by the existence of legal or equitable title of virtually any nature and quality, a 'thin' property interest is more likely to substantiate the legal interest if it is accompanied by the insured's pecuniary stake in the property.
[657] 218 NY 133, 112 NE 728 (1916).
[658] *American Indem. Co. v. Southern Missionary College*, 195 Tenn. 513, 260 S.W.2d 269 (1953); *Pacific Fire Ins. Co. v. John E. Morris Co.*, 12 S.W.2d 971 (Tex. App. Comm'n 1929); *National Grocery Co. v. Kotzebue Fur & Trading Co.*, 3 Wash. 2d 288, 100 P.2d 408 (1940); See also Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016) 151; L I Reiser, Annotation, Insurable Interest of Stockholders in Corporation's Property, 39 A.L.R. 2d 723 (1955); John Birds, Ben Lynch and Simon Paul, *MacGillivary on Insurance Law* (1st Supp, 14th edn, Sweet & Maxwell 2019) 59.
[659] 25 N.E. 1058(N.Y. 1890).
[660] Robert Stuart Pinzur, 'Insurable Interest: A Search for Consistency' (1979) 46 Ins Counsel J 109, 112, 121.

of the corporation's creditors gaining access to the insurance proceeds paid on a loss to the corporate shareholder. There is every likelihood that shareholders could be tempted to insure, the company's property personally in order to deny the company's creditors the fruits of the insurance. Company law offers several remedial devices available to protect such creditors. The courts could imply a trust on the insurance proceeds where the shareholder intended to insure the corporation's interests. Alternatively, the courts could lift the corporate veil in the interest of the third parties.

4.5.1.3. *Kosmopoulos* in Canada

While Canada (both federally and at the provincial level) retains the doctrine of insurable interest, the legal interest rule has been displaced. For compelling reasons, the pecuniary approach has been employed in a non-maritime case by the Canadian Supreme Court.[661] In *Constitution Insurance Co. of Canada v. Kosmopoulos*,[662] the court was to determine 'whether a sole shareholder of a corporation has an insurable interest in the assets of that corporation'. This is a case that bears similarity with *Macaura.*[663] However, Wilson J, dispensed with the rule in *Macaura* and gave no support to the legal interest test. Instead, criticized the legal interest approach and favoured the more liberal factual expectation test, by asserting that an insurable interest exists for the shareholder (Kosmopoulous) who owned all the shares in a company and had insured the company's property in his name. The insured was able to recover under the policy on the basis that as a sole shareholder of the company he was 'so placed with respect to the assets of the business as to have benefited from their existence and prejudice from their destruction.

To reach this conclusion, the court consistent with developing academic arguments, adopted a broader and more inclusive conclusion as illustrated in academic comments[664] and critically

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[661] MacIntosh 'Insurable Interest: The Supreme Court of Canada adopts the Factual Expectancy Test" (1987-1988) 13 Can Bus LJ 226. Catzman "Reform of the Law Relating to Insurable Interest in Property - Some Thoughts on *Chadwick v Gibraltar General Insurance*" (1983-1984) 8 Can Bus LJ 114; Stuesser, 'Insurable Interest: The Supreme Court of Canada Adopts the Factual Expectancy Test' (1987) 13 Can Bus LJ 226.

[662] In *Kosmopoulo*s, (1987) 34 D.L.R. (4th) 208; [1987] 1 S.C.R. 2, Mr Kosmopoulos was the sole shareholder and director of a leather goods company. The company's offices were leased in his own name and the insurance policy on the office was also in his own name in order to protect his personal assets. The insurers were 'well aware' of these facts. A fire in a neighbouring property damaged the company's offices but the insurers declined the claim on the policy on the ground that the insured was lack of insurable interest in the company's assets.

[663] Wherein the legal right approach was used, see section 4.4.2.1. While the facts of both cases are similar, not only that the result produced was different, but the terms of the concluding process was significant.

[664] In order to support her criticism, Wilson J cited, at p. 218, from Brown and Menezes, that, '*After Macaura, it is no longer possible to claim merely that one would be adversely affected by the loss; the insured must assert that he owned an interest in the objects destroyed. This provides the illusion of great certainty. Property law is among the most technical and certain segments of the law. This certainty is totally illusory because the new*

evaluated the policies underlying the requirement of insurable interest.[665] Most significantly, on the policies behind insurable interest, like for wagering, it was suggested that restricting the definition of insurable interest is not an ideal tool to combat such practices.[666]

Second, the nature of property insurance is that it is a contract of indemnity. On indemnity, the court argued that the legal relation test was too narrow, and it is a means to deny the insured an indemnity, which was the case here. Mr Kosmopoulos suffered a genuine pecuniary loss but cannot obtain indemnification because of the restrictive definition.[667] Thirdly, Wilson J suggested that broadening of the definition of insurable interest will not increase the temptation of shareholders to destroy the corporate property instead it is the insured with a legal or equitable interest in the subject matter of the insurance that has intimate access to the property and is in a position to destroy it without detection.[668] The unequivocal statement by Wilson J, vindicates Lawrence J's view, which resulted in the Supreme Court of Canada declining to follow previous decisions.[669] Her conclusion was, '*the policies underlying the requirement of an insurable interest do not support the restrictive definition, but merely a technical objection if anything, they support a broader definition…*'[670]

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formulation makes no concessions either to the reasons for which insurable interest is a component of insurance law or for commonplace business transactions.... Assuming that an insurable interest in things must mean property, among the simple questions raised are matters such as how does one own a direct interest in property which is not in existence at the time of the contract? Can next season's crops or fluctuating inventory be insured? Are warehousing and other bailee policies subject to the law as set out in Macaura so as to limit the right to insure to the bailee's liability to the bailor? Brown, Craig and Julio Menezes. *Insurance Law in Canada* (Toronto: Carswells, 1982) 84; Jacob S. Ziegel, 'Shareholder's Insurable Interest--Another Attempt to Scuttle the *Macaura* v. *Northern Assurance Co.* Doctrine: *Kosmopoulos* v. *Constitution Insurance Co.*' (1984), 62 *Can. Bar Rev.* 95, at pp. 102-103. In addition, o*ther cases Wilson J reviewed are some authorities in favour of Lawrence J's view, like Patterson v. Harris* (1861), 1 B. & S. 336,121 E.R. 740, *and in Wilson v. Jones* (1867), L.R. 2 Ex. 139, *courts allowed two shareholders of a company established for the purpose of laying down a transatlantic submarine cable to recover on an insurance policy once the cable had been destroyed even although neither had a legally enforceable right in the cable. In Blascheck v. Bussell (1916), 33 T.L.R. 51 (Eng. K.B.), there was no challenge to the insurable interest of the plaintiff who had insured the health of an actor he had engaged for a performance. That interest was a purely pecuniary, non-legal one concerned with the consequences of the actor's non-performance on account of injury."*

[665] See section 4.2.3. for policies justifying the requirements of insurable interest.

[666] Wilson J reiterated at *Kosmopoulous* pp. 222, 223 'I think it is probably easy to overestimate the risk of insurance contracts being used in today's world to create a wagering transaction. There seem to be many more convenient devices available to the serious wagerer'.

[667] *Kosmopoulos*, (1987) 34 D.L.R. (4th) 208; [1987] 1 S.C.R. 2.

[668] *Ibid* (p 224).

[669] *Ibid (p* 227) 'I think Macaura should no longer be followed...' with clear statement that previous decisions in *Clark v. Scottish Imperial Insurance Co.*, (1879), 4 S.C.R. 192; *Guarantee Co. of North America v. Aqua-Land Exploration Ltd.*, (1965), 54 D.L.R. (2d) 229, [1966] S.C.R. 133; *Wandlyn Motels Ltd. v. Commerce General Insurance Co.*, (1970), 12 D.L.R. (3d) 605, [1970] S.C.R. 992 should not be followed because they are inconsistent with this definition of insurable interest.

[670] *Ibid*, *Kosmopoulous* p 227.

In *Commonwealth Construction Co Ltd v Imperial Oil Ltd*.,[671] the factual expectation approach was also applied. This case concerned a subcontractor's insurable interest. It was held that, in cases of composite policies, '*if the different interests are pervasive and if each relates to the entire property, albeit from different angles, … there is no question that the several insureds must be regarded as one.*'[672] Therefore, a subcontractor's insurable interest lies in the entirety of the insured properties involved in a construction project.[673]

A more recent decision in Canada is the case of *Broadgrain Commodities Inc v Continental Casualty Co.*[674] In this case, the court held that the insured CIF seller had an insurable interest by applying a wider approach because the CIF seller had a real interest in the marine adventure's security interest retained and holding otherwise will be detrimental to international trade.

4.5.1.4. ICA 1984 - Australia and New Zealand

The Australian legislature also has a more liberal approach in cases of general insurance. The ALRC in 1982 reviewed its laws to correct the anomaly created in *Truran Earthmovers Pty Ltd v Norwich Union Fire Insurance Society Ltd*,[675] a case illustrating the strict legal interest requirement of the common law. By this reason, the factual expectations doctrine was adopted because the legal interest test posed as a technical rule which prevented recovery of an insured's actual loss. Therefore, the Australian statutory law endorsed insurable interest along the broad

[671] [1977] 69 DLR (3d) 558, the case was about a composite policy which covered all-risks to a construction venture. Imperial entered into a contract for building a fertiliser plant with Wellman-Lord for the latter to carry out the construction. Part of the construction was sub-contracted to Commonwealth. Commonwealth started a fire in the process of performing its sub-contract, resulting in damage to the works. The insurer indemnified Imperial for its loss, and then brought a subrogated action against Commonwealth to recoup its payment. The question arose as to whether the insurer could bring a subrogated action against one of the co-insureds.

[672] *Commonwealth* p 561 per De Grandpré J.

[673] The two grounds for the court to give the judgment were: (i) the analogy between the position of contractors or sub-contractors and the position of bailees, and (ii) the common goal of all parties involved in the construction venture- joint efforts to complete the construction. In *State of the Netherlands v Youell* [1997] 2 Lloyd's Rep 440, p449 per Rix J.: 'by a pervasive interest is meant the right to claim an insurable interest in the whole property, analogous to the well-known right of a bailee to insure for the total value of the property bailed and not merely to the extent of his liability interest as bailee: if the property is lost or destroyed, the bailee can recover for the whole value of the property even though he may be under no liability to the owner, and he holds the proceeds of insurance in trust for the owner.'

[674] *Broadgrain Commodities Inc v Continental Casualty Co.* [2017] ONSC 4721; Interesting, the Canadian Marine Insurance Act 1993 is similar to the English MIA 1961; Yet a more liberal approach was followed.

[675] In *Truran Earthmovers Pty Ltd v Norwich Union Fire Insurance Society Ltd* (1976) 17 SASR 1 which involved the purchase of a bulldozer. The purchaser was held to have no insurable interest in the bulldozer even though he had lent the owner money which was to be deducted from the purchase price. Greg Pynt, *Australian Insurance Law: A First Reference* (4th edn, LexisNexis Butterworths Australia 2018).

lines of the factual expectancy test.[676] Similarly, New Zealand has adopted the same approach in the Insurance Law Reform Act 1985.[677]

4.5.1.5. The *Zive* case - South Africa

Amongst other African countries, South Africa has a different insurable interest regime in contrast with England, but in line with the Roman-Dutch Law. The English 1774 Act was never enacted or adopted in any way, and the South African judiciary adopted an economic interest test. In *Refrigerated Trucking (Pty) Ltd v Zive*[678] a Transvaal Court has provided a broad economic interest test, in line with earlier South African judicial authorities that are against the legal or equitable interest approach, by upholding a contract even though the claimant has neither *a jus in re* nor a *jus in rem* to the thing insured.[679] In *Zive* the Court held:

> *'an insurable interest is an economic interest which relates to the risk which a person runs in respect of a thing which, if damaged or destroyed will cause him to suffer an economic loss or, in respect of an event, which if it happens will likewise cause him to suffer an economic loss. It does not matter whether he personally has rights in respect of that article, or whether the event happens to him personally, or whether the rights are those of someone to whom he stands in such a relationship that, despite the fact that he has no personal right in respect of the article, or that the event does not affect him personally, he will nevertheless be worse off if the object is damaged or destroyed or the event happens'.*[680]

Recently, in *Lorcom Thirteen (Pty) Ltd v Zurich Insurance Co South Africa Ltd*,[681] the court found that the insured's 100% shareholding in Gansbaai Fishing Wholesalers (GWF), taken together with its right of use of the vessel and its expectancy of becoming owner, was sufficient

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[676] Sec 16 and 17 ICA 1984 that applies to non-marine general insurance; See other discussions about marine insurance in sections 4.4.

[677] Rhidian Thomas, *The Modern Law of Marine Insurance Law* (Volume 4, Informa Law from Routledge 2016) 14; Julian Long 'The Concept of Insurable Interest and the Insurance Law Reform Act 1985' (1992-1995) 7 Auckland University Law Review 80, 81; With respect to New Zealand, which was also referred to in the ACE report, ss 6 and 7 of its Insurance Law Reform Act 1985 abolished the doctrine of insurable interest for life policies and limited it for indemnity policies.

[678] 1996 2 SA 361(T). The insurable interest position in South African law according to Havenga, ―Liberalising the Requirement of an Insurable Interest in (Life) Insurance (2006) 18 SA Merc LJ. 259, the judges see the central issue as **whether the contract is a wager or not**. On moral hazard see Van Niekerk (2009) 21 SA Merc LJ 126.

[679] *Littlejohn v Norwich Union Fire Insurance Society* 1905 TH 374; See Reinecke and S Van der Merwe, (1984) 101 SALJ 608; Midgley, (1986) SALJ 18; M F B Reinecke, 'Insurable Interest' (2013) J S Afr L 816; Estian Botes and Henk Kloppers, 'Insurable Interest as A Requirement For Insurance Contracts: A Comparative Analysis' (2018) African Journal of International and Comparative Law 130-154.

[680] *Refrigerated Trucking (Pty) Ltd v Zive (*1996) 2 SA 361(T).

[681] *Lorcom Thirteen (Pty) Ltd v Zurich Insurance Co South Africa Ltd* (2013) 5 SA 42 (WCC).

interest to render enforceable an insurance contract providing for payment of the loss of the market value of the vessel.

4.5.1.6. Asian and European Statutory Provisions on Factual Expectancy [682]

It is interesting to note that many civil law jurisdictions, statutorily use the economic and factual expectancy interest test as a measure to finding insurable interest—for instance, Swiss Insurance law, [683] France,[684] Italy,[685] Germany,[686] and Estonia.[687] In Asian jurisdiction, Japan has adopted an economic insurable interest.[688] However, this does not represent the position in other jurisdictions. For instance, in China, the rigid proprietary and legally recognised test of insurable interest is the current law.[689]

4.5.2. Pervasive Interests in Construction Contracts

The high number of judicial decisions in England indicate that a broader and more liberal approach is being taken to answer the question of the existence of insurable interest especially in large offshore and construction projects where there are pervasive interests.[690] Such projects

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[682] See Kyriaki Noussia, *The Principle of Indemnity in Marine Insurance Contract: A Comparative Approach* (Springer 2010) 43-55; and Perception of Insurable Interest in European Insurance Law approaches <https://www.journaloftheuniversityoflatvialaw.lu.lv/fileadmin/user_upload/lu_portal/projekti/journaloftheuniversityoflatvialaw/No10/V.Mantrovs.pdf> Assessed on the 20th September, 2019, for other European approaches.

[683] Article 48 Swiss Insurance Contract Act provides a link between economic interest and insurable interest that *'the subject matter of property insurance can be any economic interest that someone has in the failure of a feared event'*; Article 49(1), 50–51 - Swiss Insurance Contract Act links the value of insured event with the moment when an insurance contract enters into force it is clear that this value may be revised if it does not correspond to the actual value of the insured object.

[684] According to Article L121-6(1) of the French Insurance Code, it provides that '*any person who has an interest in safeguarding a property may have it insured'* and this interest is defined broadly by stating that '*any direct or indirect interest in the non-occurrence of risk may be the subject of insurance*'

[685] Art. 1904 Italian Civil Code provides, *'a contract of insurance of property,…, an indemnity contract is void if, at the time when of the beginning of insurance, the insured has no interest in the property for which he/she may be compensated in case of damage'*; See also Cerini D, *Insurance Law in Italy* (AH Alphen aan den Rijn: Kluwer Law International, 2012) 80.

[686] Art. 94 German Insurance Contract Act; Art. 43(1) German Insurance Contract Act.

[687] Art. 478(1) Estonian Law of obligations provides that '*insurable interest is the interest of the policyholder in being insured against a certain insured risk'.*

[688] Commercial Code of Japan, sec 630; Similarly, in Macao a Portuguese colony and a highland off China, in its statute the Commercial Code of Macao, s. 995, adopts a factual expectancy test. See Kaun-Chun Chang, 'Commentaries on the Recent Amendment of the Insurance Law of the People's Republic of China Regarding Insurance Contracts from the Perspective of Comparative Law' (2011) 10 Wash. U. Global Stud. L. Rev. 749, 757 for more discussions for an analysis of the Chinese insurance law.

[689] Insurance Law, Art. 12(6); Zhen Jing, *Chinese Insurance Contracts Law and Practice* (Informa law from Routledge 2017) 179, 762.

[690] Mark Templeman defines pervasive interest as 'an insurable interest not merely to the extent of the contractor's own loss or liability in relation to the project works, but in respect of the entire project works, so that they may claim for all loss sustained, holding (and eventually distributing) the balance of any recover beyond their own loss for the benefit of their co-assured/subcontractors.' M. Templeman, '*Insurable Interest: A Suitable case for treatment*? In Baris Soyer (eds), Reforming Marine and Commercial Insurance Law, (Informa, 2008) 195, 207; John Birds, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell 2019) 73-75.

involve a multiplicity of co-contractors and sub-contractors, as well as a multiplicity of parties interested in the project itself.[691]

In Nigeria, there are many construction companies and co-contractors who engage in limited or whole part of a site whom they do not possess.[692] When a loss occurs in the course of work, the application of a legal interest test will deprive such persons of financial loss, and the joint insurance cover will not protect them. While there has been no case outlining the court's views, English courts have reached some beneficial conclusions.

In *Petrofina (UK) v Magnaload Ltd*,[693] the court analysed the issue where owners, subcontractors and contractors take out joint insurance on the construction site. The court held that each of the individual sub-contractors on a construction site had an insurable interest in the entire works despite the facts work was carried out on limited parts of the site, their interest not linked with possession or ownership, but on the basis that where negligence occurs, they will be liable for any part of the work destroyed or damaged. Although the sub-contractors had no property interest, works in progress, they had an insurable interest in the continued existence of those works. The judge was of the view that the sub-contractor's insurable interest lay in a 'pervasive interest' in the entire property.

The *Petrofina* principle has been followed in many cases,[694] but with limitations.[695] By contrast, the case of *Deepak Fertilisers and Petrochemicals Corporation v ICI Chemicals and Polymers Ltd*[696] rejected the submission that a contractor may continue to enjoy an insurable interest in the property comprising the contract works by reason of its potential liability for damage to them after completion and commissioning. In the court's view, the policyholder

[691] In complex construction sites, standard forms of contract usually require the site owners, contractors and sub-contractors to take out joint insurance on the whole site.
[692] One of the most popular construction companies is Julius Berger Nigeria Plc who rose to prominence after completing the Lagos Eko bridge in Lagos and they often construct major government projects with contractors and sub-contractors.
[693] [1983] 2 Lloyd's Rep 91; Even for bailees, Lloyd J's discussion in *Petrofina* at p 135 emphasised that '…it was commercially convenient for someone who holds other people's goods is responsible for them in a general sense. It makes commercial sense for them to be able to insure them for their full value, and pass on the proceeds to the owner...' The court followed the Canadian decision *Commonwealth Construction Co Ltd v Imperial Oil Ltd* (1977) 69 DLR (3d) 558 at 560.
[694] For instance, in *Stone Vickers Ltd v Appledore Ferguson Shipbuilders Ltd [1991] 2 Lloyd's Rep 288* where the suppliers of the propeller for a new ship claimed the protection of a policy effected by the principal contractor. Another case is *National Oilwell (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582 where an insurable interest was found to exist based on the insured's (sub-contractor's) proximate physical relationship to the property.
[695] As stressed in *Co-operative Retail Services Ltd v Taylor Young Partnership Ltd* [2002] UKHL 17, [2002] 1 All ER 918, as applied in *Tyco Fire and Integrated Solutions (UK) Ltd v RollsRoyce Motor Cars Ltd* [2008] EWCA Civ 286, [2008] 2 All ER 584, the outcome of the case must depend on the construction of the contract.
[696] [1999] 1 Lloyd's Rep. 387 at 399.

needs more than a potential liability for negligence, some element of a joint project, so that all the parties would benefit from the project's successful completion, was of necessity.[697] The court held that the only reason why held that only reason why the parties had an insurable interest in the construction work was because '*they might lose the opportunity to do the work and be remunerated for it if the property were damaged or destroyed'*.[698]

The latest pronouncement on the issue of subcontractors interest in a policy is *Feasey v Sun Life Assurance Co of Canada*[699] with the conclusion that the basis of their insurable interest was not their potential liability in the event of causing damage to the works. However, instead, their potential pecuniary loss should the works be damaged.[700] Waller J cast doubt on whether there needs to be an additional link between insured and subject matter, other than a potential liability.[701] Waller J concluded that insurable interest exists (i) based on the terms of the policy which ascertains the subject of the insurance; (ii) if the nature of an insurable interest relates to a liability to compensate for the loss, that insurable interest could only be covered by a liability policy rather than a policy insuring properties; (iii) based on the construction of the policy if it embraces the insurable interest intended; (iv) it is not a requirement of property insurance that the insured must have a 'legal or equitable' interest in the property. It is sufficient to have a contract that relates to the property and potential liability for damage to the property to have an insurable interest in the property.[702]

In summary, the court's application of the rules of insurable interest (using factual expectancy test) seems inconsistent. As noted by the Law Commission, the exact boundaries of the concept of 'pervasive interest' are far from fixed.[703] However, as it can be seen for commercial convenience, the courts are in support of the view that damage to property involved in a common project, with potential liability, although in the absence of a possessory or proprietary right is sufficient to create an insurable interest. It is most preferable to having separate policies on the same subject matter.

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[697] *Deepak Fertilisers and Petrochemical Corporation v ICI Chemicals & Polymers Ltd* [1999] 1 Lloyd's Rep 387 at p 399; For more critique see Olubajo, 'Pervasive Insurable interest: a reappraisal' (2004) 20 Const. LJ 45.
[698] Ibid *Deepak Fertilisers*.
[699] [2003] EWCA Civ 885.
[700] *Petrofina, Stone Vickers,* and *National Oil Wells* were also extensively, analysed and approved.
[701] [2003] EWCA Civ 885, [2003] 2 All ER 587, at [95]
[702] *Feasey v. Sun Life Assurance Co. of Canada* [2003] EWCA Civ 885; [2003] Lloyds' Rep. I.R. 637, 659-660; For life Insurance, Waller LJ observed that it will be difficult to establish a 'legal or equitable' relation without a pecuniary liability recognised by law arising on the death of that particular person - *Feasey* [2003] 2 All ER (Comm) 587; John Birds, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell 2019) 67,76.
[703] The LCs 2015, paras 11.66.

4.5.3. Broad Nature and the Limitations of the Factual Expectancy Test

Although the approach cannot be said to be problem-free, however, it is broader and fairer than the strict proprietary interest with huge support from academic scholars.[704] A major limitation of the factual expectancy test is because it requires discerning a subjective expectation, which might make it seem not easy to apply. How do you value the exact interest, and should it be measured by the value of the property? Many insurance policies now have an arbitration procedure built in to avoid the administrative difficulties of this determination.[705] Still, it is difficult as a practical matter to answer the question of what is the value of the destroyed property, and without such a reliable determination, it is hard to say whether the insured has suffered a loss or not and therefore whether he is likely to get a windfall.[706]

This is one of the reasons why 'factual expectation rule' has been criticised for being vague because the standard must provide a measure of insurable interest that can be both accurate and predictable.[707] The modern 'factual expectation' test usually requires that the economic expectation be 'substantial' and therein lies the potential problem in a country like Nigeria.[708] Determining what counts as a substantial factual expectation involves a necessarily subjective, fact-bound, case-by-case approach.[709] Of course, this question of valuation was one of the reasons why the definition of insurable interest was limited to a legal interest test. Nevertheless, the court in *Kosmopoulous* suggests it is not the duty of the court to decide valuation. [710]

Moreover, not only is an insurable interest essential, but the rule of indemnity in property insurance requires that the amount payable from the insurance proceeds must not exceed the value of the insurable property interest. Again, this might not be a big issue as there are different measures of indemnity both for marine and non-marine insurance. e.g. market value and valued

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[704] Bertram & Thornton (1948) 1162, 1175, 1183; Chris Nicoll, Insurable Interest: As intended? [2008] 5 JBL, 432, 447, 422.

[705] Arbitration in Nigeria is quite effective and quicker than litigation. There are multi-door court houses mediates on contractual disputes.

[706] Banks McDowell, 'Insurable Interest in Property Revisited' (1988) 17 Cap U L Rev 165, 177.

[707] Jacob Loshin, 'Insurance Law's Hapless busybody: A Case Against Insurable Interest Requirement', (2007) 117 Yale L.J 474, 487.

[708] Exact valuation is an issue in Nigeria, for lack of technology and access to data.

[709] Jacob Loshin, 'Insurance Law's Hapless busybody: A case against insurable interest requirement', (2007) 117 Yale L.J 474, 487.

[710] *Kosmopolous* (1987) p. 222, 223, Wilson J emphasised, 'but insurance companies have always faced the difficult task of calculating their total potential liability arising upon the occurrence of an insured event in order to judge whether to make a particular policy or class of policies and to calculate the appropriate premium to be charged. **It is not for this court to substitute its judgement for the sound business judgement and actuarial expertise of insurance companies** by holding that a certain class of policies should not be made because it will result in too much insurance...'

policies.[711] Now it is essential to compare which legal requirements better implement the aims of indemnity, by weighing the advantages and disadvantages of both approaches that have been discussed.

4.6. A Hybrid Approach for Expanding Insurable Interest in Nigeria

As discussed above, the court's interpretation and application of insurable interest doctrine have led to two theories. Embedded in these theories are distinct, economically relevant ideas. According to the legally enforceable right theory, it is required that the insured have some valid and recognizable property right in the subject matter as a pre-requisite for recovery. By contrast, the factual expectations view is based on the notion that the insured must suffer some actual loss or detriment from the damage, loss or destruction to the insured property, and maintain some gain, benefit or advantage from its continued existence.

The main problem that relates to this chapter is to determine which view better implements the purposes of indemnity under the Nigerian insurance law that relates to insurable interest. i.e. a restrictive approach or a broader economic test. It must be reiterated here that when the insured is not placed in the position occupied preceding the loss, it tampers with the very objective of insurance. On this basis, the insured's right to recover is dependent on whether an insurable interest exists, and if so, the extent, if any of its loss. It must be emphasised here that the cases that developed the strict rules came from a time when it was not as common to carry insurance as it is today, but the basis of insurance remains the same. Thus, to determine the better view of the threshold of insurable interest, an underlying factor must be (i) apply the reason behind procuring a policy of insurance; (ii) whether a contract constitutes a wager; (iii) Commercial convenience of persons who choose to insure a property, and finally (iv)the position of the insurer and insured must be balanced and equitable.

(i) Procurement of Policy of Insurance

The procurement of an insurance policy is an investment-driven by commercial foresight which involves several elements. For instance, a recognition of a desirable economic relationship not necessarily a legal relationship to a thing which can be damaged or destroyed, and the prudent allocation of monetary sums to ensure adequate financial protection, should a catastrophic event occur.[712] It could be argued that the property right conception is closely linked to the factual expectation of damage. However, it is the person whom physical owns the property that

[711] See sec 3.5. of chapter 3 on measure of indemnity.
[712] Harnett and Thornton (1848) 1162, 1184-1185.

is mostly at risk of losing, others may likely suffer a financial setback when the insured property is destroyed, and often to a greater extent than a legal owner. This makes the factual expectancy test/economic interest preferable in a country like Nigeria, where people do not have much capacity to own a legal title. It is the expectancy of loss which prompts the securing of insurance, and logically there is no basis for the courts to discriminate. If the policy is carefully drawn and caution is exercised to provide for indemnification to the person with potential financial losses, then the strict interpretation of the concept of insurable interest should not stand in the way.[713]

(ii) When the insured is not Wagering

If the underlying principle of the insurable interest requirement is the elimination of wagering policies and the avoidance of moral hazards, then the attention of the courts must be fixed on such purpose rather than trying to 'Pidgeon hole' a certain case.[714] Thus, if a policyholder is not wagering or gambling but can demonstrate pecuniary interest irrespective of whether it was based on strict proprietary interest, then the factual expectancy theory is better. It is submitted that the application of the factual expectancy approach resolves the matter with a limitation that the insured be denied recovery to the extent such interest was created as a means to profit by wager.[715]

Academic,[716]and judicial[717] arguments are increasing leaning towards the policy considerations that underpinned the formulation of the legal interest test as being 'no longer relevant'. It is only where 'the insured has no valuable relationship to the property or where the insurance is in excess of the insured's interest that the evils of wagering in part reappear'.[718] The thesis argues that the legal interest test is too restrictive and does not justify why the insured should be denied recovery. That someone is the owner of a property does not mean, he cannot systematically plan the fraud and carry it out, undisturbed by prying eyes, and leaving the

[713] Theodore Greenberg, 'Factual Expectation of Loss as an Insurable Interest in Property' (1952) 7(3) Intramural Law Review of New York University' 185, 192.
[714] Robert Stuart Pinzur, 'Insurable Interest: A Search for Consistency' (1979) 46 Ins Counsel J 109, 112, 129.
[715] Ibid.
[716] J Lowry and P Rawlings 'Rethinking insurable interest', in S Worthington (ed)Commercial Law and Commercial Practice (Oxford: Hart Publishing, 2003) 335, 347-350; Harnett and Thornton (1948) 1178-1183.
[717] Wilson J in *Kosmopoulous*, 244 observed '…the requirement of an insurable interest is said to be designed to minimize the incentive to destroy the insured property. But it is clear that the restrictive definition of insurable interest does not necessarily have this result... I agree that the restrictive definition of insurable interest set out in *Macaura* is not required for the implementation of the policy against wagering…'; See section 4.4.1.2. of this chapter for more discussion.
[718] Harnett and Thornton at p. 1181, '…*some form of valuable relationship to the occurrence is necessary to avoid the wagering aspect, the policy against wagering is satisfied by any valuable relationship which equals the pecuniary value of the insurance, regardless of the legal nature of that relationship*...'

minimum of evidence – things he could only do with great difficulty were the property in the control of another.[719]

Several strategies can be put in place by the insurers to detect whether or not an insured has a relationship with the subject matter. For instance, insureds will still have to disclose all material circumstances and declare the nature of their interests to the insurer in order to enable it to judge the risk to be taken. If it seems difficult for the insurer to estimate the likelihood of the damage or loss occurring, in a situation where the information is with a third party, there are several options. They can either refuse to write the policy, limit their liability or charge higher premiums.[720] Thus, limiting the requirement of insurable interest is too restrictive and burdensome on the insured because the insurers should carry out their duties diligently as well. On this premise, the shareholder's or creditor's position or FOB purchaser's interest can be improved with the application of factual expectancy test if the court is satisfied that there was no wagering involved.

(iii) Commercial Convenience and Modern Insurance Needs

Modern economics and convenience should give opportunities to insured to take out insurance on a subject-matter for certain purposes, which they have no legal or equitable relation. So, if a loss occurs, they can recover pecuniary losses and be placed in the position they occupied before the loss occurred.[721] Overall, it has been discussed how courts have tendencies to change their attitude towards the requirements for recognition of the existence of an insurable interest

[719] This view can be supported by the Canadian Supreme Court, as in *Constitution Insurance v Kosmopoulous* (1987) 34 DLR (4th) 208), the Court rejected the legal or equitable interest approach by the reasoning that having a legal or equitable interest in the insured property need not necessarily be a deterrent to someone planning to destroy it. In fact, a person who has a legal or equitable interest in a property is likely to have 'intimate access' to the insured property and will thus be better placed to destroy it without destruction; on the contrary, it will be more difficult for a person without such 'intimate access' to do so without arousing suspicion. There are several incidences of people setting their property like offices, shops and businesses on fire just to recover insurance monies. Recently, a man was found guilty in 2019 by the Liverpool crown court for blowing up his failing furniture shop and devastating a community so that he could claim on his insurance. A few days after the explosion, Blasio put an insurance claim in for £50,000 which, he said, was the value of the stock he had lost. Loss adjustors from the NFU insurance company became suspicious when Blasio seemed to be making no effort to find alternative premises for his business. Further checks revealed that the shop was in difficulties, which was the reason he destroyed the property. <https://www.cps.gov.uk/mersey-cheshire/news/update-man-sentenced-blowing-his-failing-furniture-shop-claim-insurance> assessed 10th Aug 2020;

[720] *Kosmopoulous 217, 218.*

[721] Thomas identifies another example of a situation in which the insurable interest doctrine could restrict otherwise-valid commercial practices is when an uninformed, but well-intentioned party takes out an insurance policy that is commercially beneficial and without a motive of moral hazard - such as a father taking a policy out on a boat he purchased for his adult son as a gift to that son. There is no moral hazard in this situation and the arrangement is commercially beneficial to both parties, yet the insurable interest doctrine would invalidate the contract because the father, as a non-owner, has no insurable interest in the son's vessel; D. Rhidian Thomas, Insurable Interest - Accelerating the Liberal Spirit, in Marine Insurance: The Law In Transition (D. Rhidian Thomas ed., 2006) 32.

in very complex construction situations. In such subcontractor who does not have the property possession but have potential liability, the result appears to be justifiable for convenience.

The main reason why the factual expectancy rule was applied as against strict proprietary interest was for commercial convenience to allow all the parties to insure the whole site. Otherwise, each sub-contractor with pervasive interests would be forced to obtain separate policies which might either mean extra paperwork or could at worst lead to overlapping claims and crossclaims.[722] Joint insurance of sites is commercially convenient and has become a common practice. In some cases, it is even an industry requirement.[723] In addition, a modern marine transaction would require a FOB purchaser to seek insurance cover for losses even when he is yet to acquire ownership or possession. Thus, a factual expectation of losses for pre-shipment losses does not undermine the indemnity principle.

(iv) Supports the Aim of the Indemnity Principle

Modern-day economics recognises the multiplicity of stakeholders. Thus, an expansion of insurable interest has expanded the categories of policyholders' interest in a property, such that they are not limited to a legal or equitable interest but can have other economic interests. For instance, an actual economic loss may be suffered by FOB or C&F purchasers, if advanced payments have been made for the goods, but the goods have been stolen, lost, or damaged in transit from the sellers' warehouse to the port of loading, of which the seller's insolvency may stand as a barrier for the buyers recovering their money from the seller. Again, if the legal right approach is applied, it means that they have no interest in the goods before shipment because the risk of loss of goods does not pass to them prior to shipment.[724] As discussed, a shareholder too suffers the same fate. The above-identified problems of the legal right approach contradict the economic nature of insurance contracts-to fully indemnify insureds for their actual economic losses, which means that the requirement of insurable interest in property and marine insurance does not run parallel with the fundamental principle of indemnity. It is submitted that this departure should not exist, and all the insureds' interest must be embraced, including those that are not legally recognised.

It therefore arguable that in every instance wherein the legal nature of an insured's interest is not the motivating factor behind the insured's desire for insurance protection. Rather, in all

[722] *Petrofina (UK) Ltd v Magnaload Ltd* [1984] Q.B. 127, 136.
[723] The JCT standard form of contract requires the employer to take out insurance in the name of the employer and contractor for certain risks because risks are inseparable from construction projects.
[724] This point is discussed in section 4.4.3. of this chapter.

cases, it is an expectancy that moves him to procure the policy. That expectancy is financial benefit from the perpetuation of the insured property or pecuniary loss due to its damage or destruction. Just as it is in factual expectation cases. It is submitted, then, that in every instance wherein recovery is had on a policy of property insurance, the courts do recognize an interest based on an expectancy. Green questions why the courts discriminate as to which expectancies they will allow protection. [725] Likewise, because it looks beyond formal property rights to one's real-world expectation in a piece of property, the factual expectation test better reflects actual interests in property.

(v) Potential Risk for Insurers

The main reasons why the factual expectancy rule was rejected was on the basis that insurers would be exposed to risk. Arguably, that insurers are not performing well should not be the basis of a strict interest rule. Whether or not a legal interest or factual expectancy rule is adopted, does not reduce or increase the risk which insurers face in the business. It is submitted that a strict proprietary interest exposes the insured to more financial risks. As shown based on other countries position who adopted the factual expectancy, do not seem to have problems and deleterious effect on the insurance industry to date. For instance, in Australia, OECD's figures, total gross premiums rose from $65.6million in 2008 to $69.9 million in 2018, which suggests that Australian insurers have penetrated the market.[726] Even in Canada, there is sustained growth of premiums during a given period.[727] While there is potential for insoluble problems of calculation, fear of wagering, difficulties in ascertaining insurable interests, possible over-insurance by the insured and wilful damage of property; it does not logically follow that the genuine holder of interest, should not be allowed to protect his financial losses for what it is worth as a matter of fact.

[725] Theodore Greenberg, 'Factual Expectation of Loss as an Insurable Interest in Property' (1952) 7 Intramural L Rev NYU 185, 194.

[726]Insurance Indicators 'OECD Statistics 2008 -2018' <https://stats.oecd.org/Index.aspx?DataSetCode=INSIND> assessed 11 July, 2020.

[727] The gross premiums of the Canadian insurance industry increased from CA$70.05 billion to CA$121.3 billion in the period from 1999 to 2008, which does not suggest that the industry suffered from the courts' relaxed approach to the doctrine. No problem of this approach has been recorded Australia for over 15 years of using the economic interest approach as noted by the ALRC, 20.

(vi) Creates Socially Beneficial Insurance

In line with the Canadian court's recommendation, the factual expectation test would provide better beneficial insurance and security to an individual and society.[728] In a country like Nigeria, parties should be allowed to contract freely, and insurers must be encouraged to meet their obligation under contracts which they freely entered and received premiums. Such contracts will not pose as a risk to insurers where there is due diligence. Other kinds of contracts that support freedom of contracts instance valued policies provided for under sec 29 (1) MIA 1961 (Nig.). One reason for its support is because it allows parties to negotiate freely on the value and extent of recovery provided fraud and other factors are involved and to prevent disputes. Such policies secure the insured's interest and promote diversity on how contracts are negotiated, with minimal risk to the insurer. Why then should the law ignore a rule that is economically and socially beneficial in a modern commercial setting for a rule that is technically restrictive?

In summary, the solution which follows from the preceding analysis is that an insured with an economic interest in the property should be entitled to recover from his insurer only to the extent he has suffered a loss. In determining that loss, the economic interest test provides considerable flexibility on the law on insurable interest and widens the possible range of legitimate insurance. Based on the insured's pecuniary interest, and the consequences of the risk of loss being valued in monetary terms, the nature of insurable interests is based on the factual expectancy test; by contrast, an insurable interest does not exist with the application of the legal right approach. There is widespread consensus amongst academic writers of the insurable interest doctrine, 'the factual expectation is the simplest expressed, yet most all-inclusive of insurable interest concept'.[729] The court should be concerned more with ascertaining real losses, and it is when the court is unsatisfied or desires to avoid some injustice, that the route of legal interest requirement of insurable interest be taken to prevent a wager or a moral hazard.[730]

[728] In John Lowry and Philip Rawlings, "Re-thinking Insurable Interest", Sarah Worthington, Commercial Law and Commercial Practice, (2003), p. 335, at 347-350, the authors pointed out that the court's analysis in Wilson J's analysis in *Kosmopoulous* reflects a shift in emphasis from Lord Eldon's concern, which led him to define insurable interest narrowly, to a view that recognizes the economic and social benefit of insurance and, therefore, a broader conception of insurable interest. In the modem commercial world, they said, property insurance is generally sought to secure indemnification, it is more socially beneficial to encourage widespread insurance than to restrict it.

[729] Harnett & Thornton (1948) 1162, 1171.

[730] R Pinzur, 'Insurable Interest a Search for Consistency' [1979] 46 Ins. Counsel J. 109,129.

4.7. Current Legislative Reforms on Insurable Interest (Nigeria, UK and Australia)

4.7.1. Post – Nigerian Act 1961: Any Improvement with Insurance (Consolidated) Bill 2016?

Since the enactment of the 1961 Marine Insurance Act in Nigeria, the rules governing insurable interest is yet to be reviewed by the Nigerian Law Commission. Although, there have been steps made to consolidate the laws of insurable interest together in one piece which has produced the Insurance (Consolidated) Bill 2016.[731] The objective clearly states to: (a) regulate the insurance industry in order to develop the insurance sector, to protect the interest of policyholders and prospective policyholders under insurance policies in ways that are consistent with the continued development of a viable, competitive and innovative insurance industry.[732] Nevertheless, the provision that relates to insurable interest on marine and property insurance remains the same and does not in any way improve the position of the insured's recovery or any aspect of insurable interest.[733] It is suggested that many factors examined in this chapter deem it necessary to review the test of ascertaining whether an insured is entitled to recovery. The modern insurance market practices have called for it, the difficulties encountered by different courts in resolving disputes that concern different classes of insurance calls for it and some lessons can be adopted from insurable interest reforms from the laws of other developed countries.

4.7.2. Post - English Marine Act of 1906

One major criticism of the current state of insurable interest doctrine in England is that it is simply outdated and needs an express revision.[734] As noted by Merkin, it is 'in a confused state' and an 'illogical mess'.[735] To improve the current law, the English Law Commission, in two issues papers,[736] and one Consultation Paper for reform of insurable interest,[737] has taken steps to review practical problems that are caused by the law on insurable interest in England and

[731] *Ibid* (n 236).
[732] Section 1 Insurance Bill 2016.
[733] Sec 145 (1) & (2) Part XVII restates the old law in sec 7 MIA 1961; See section 4.1.1. of this chapter.
[734] Graham Douds, 'Insurable Interest in English Marine Insurance Law: Do We Still Need It' (2012) 25 USF MAR LJ 323, 330; Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 209; John Birds, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell 2019) 69.
[735] Robert Merkin, 'Reforming Insurance Law: Is There A Case for Reverse Transportation? A Report for the English And Scottish Law Commissions on the Australian Experience of Insurance Law Reform' (2007) 79.
[736] The LCs Issues Paper 4, 2008; and Issues Paper 10 (2015) on Insurable Interest: Updated Proposals.
[737] The LCs Joint Consultation Paper on *Insurance Contract Law: Post Contract Duties and Other Issues* (Law Com CP No. 201/Scot Law Com No. 152, 2011) Chapter 3, Part 10 refers to issues relating to insurable interest.

Wales.[738] The consultation started since January 2008, but to date, it has not resulted in an adopted legal Act. However, a proposed 2016 Bill on insurable interest is in process.[739]

4.7.2.1. Whether Insurable Interest Bill 2016 improves the current state of the English law?

According to Clause 3(1), it provides that, at the time of the entering the contract, the insured must have either: (1) an insurable interest; or (2) a reasonable prospect of acquiring an insurable interest during the policy term. If the insured has no insurable interest or reasonable prospect of acquiring one, the policy is void. In such circumstances, the policy is effectively worthless.[740] By implication, if an insured has an insurable interest in the insured subject matter at the outset but is subsequently divested of his interest in the subject-matter, he will not be able to claim for losses occurring after he has lost his interest, although the contract remains valid as the insurer has been on risk.[741] It appears the purpose of the new Bill is not too clear and there is doubt whether in practice it would amount to any material change. On insurable interest consequences for lack of interest at the time of a claim, Clause 3(2) provides that, to claim on a policy, the insured must also have an insurable interest at the time of the insured event. If there is no interest at that time, any claim would not be payable. However, the insurance contract would not be void.[742]

The current English legal requirement adopts the approach of a legal and equitable insurable interest.[743] The proposed Bill sets out in, Clause 3(3) a non-exhaustive 'definition' of insurable interest.[744] It appears the insured must still have a right in the subject matter and insurance contract for a claim to subsist, which simply still represents the orthodox 'legal interest test'.[745] The insured must also have a right to possession or custody of the insured subject-matter, which

[738] The problems identified for indemnity insurance are as follows: (i) indemnity contract rules are difficult to pin down, complex, confusing, and inconsistent; and the redundancies of some of the legislations. For instance, the impact of the Gambling Act 2005 which renders a marine insurance contract enforceable (such as a PPI), even though it lacks insurable interest; yet, under the MIA 1909, such a contract would be a wager and thus deemed a crime was a major flaw. They also proposed that the criminal penalty imposed by section 1(1) of the Marine Insurance (Gambling Policies) Act 1909 should be abolished and reviewing the consequences of section 23 of MIA 1906.

[739] Law Commission of England and Wales and Scottish Law Commission on Reforming Insurance Contract Law: Short Consultation on Draft Bill: Insurable Interest (2016) was published in April 2016.

[740] Law Commission Bill 2016, Clause 6, paras 3.3.

[741] Franziska Arnold-Dwyer, 'Insurance Law Reform by Degrees: Late Payment and Insurable Interest' [2017] 80(3) MLR 489, 505.

[742] Law Commission Bill 2016, Clause 6, paras 3.5.

[743] Sec 5, MIA 1906 and Common Law (*Macaura* and *Lucena*).

[744] Law Commission Bill 2016, Clause 6, paras 3.10.

[745] *Lucena v Craufurd* (1806) 2 Bos & Pul (NR) 269 codified in section 5(2) MIA 1906.

will either constitute proprietary or contractual right.[746] An extension of the current black letter law is the one that vests an insurable interest, '*where the insured will suffer an economic loss if the insured event relating to the subject matter occurs.'* [747] The scope in which the insured is deemed to have an insurable interest is wider than the current English law, and not only that it changes the meaning of insurable interest and no longer undermines the principle of indemnity.

This is a considerable shift away from the traditional and strict legal approach to a broader economic interest test based on economic losses suffered by the insured in relation to property and liability insurance. It is agreed that the new approach represents the market practice and addresses some legal concerns.

A statutory restatement is welcome because if eventually the proposal presented become law in England, it will be the first significant overhaul of the law of insurable interest in over 200 years. It will, in a way, improve and clarify the legal uncertainty regarding the definition, the timing of when an insurable interest has to subsist, and the legal consequences flowing from a lack of insurable interest. Although it is argued that the law has still not been simplified because the laws are not in one piece.[748] Consolidating the law on insurable interest into a single statute would dramatically reduce the complexity of the law.

However, the changes are positive, and it will promote the following (i) consistency of treatment across all classes of insurance by putting the requirement for insurable interest on a statutory footing; (ii) by harmonizing the consequences flowing from lack of an insurable interest;[749] (iii) creates greater 'legitimacy' for insurers raising the defence of lack of insurable interest; [750] and finally (iv) reduces the use of lack of insurable interest as a technical defence.[751] It is submitted that the proposed laws have introduced some changes and improved the strict test that prevents the insured's recovery of economic losses, but the interpretation might be

[746] In English property law, possession is a 'root of legal title' and, if coupled with a right to possession, is regarded as a proprietary interest; See, H. Beale, M. Bridge, L. Gullifer and E. Lomnicka, *The Law of Personal Security* (Oxford: OUP, 2007).
[747] Law Commission of England and Wales and Scottish Law Commission on Reforming Insurance Contract Law: Short Consultation on Draft Bill: Insurable Interest (2016) Clause 6, paras 3.10
[748] Law Commission Bill 2016 Clause 6, paras 5.4. '*The industry has told us that the provisions of the 1906 Act work well and should not be disturbed. Without a strong case for reform, we agree they should be left as they are, even if that creates a separate regime for marine insurance.* In essence, the Law Commissions' proposals still envisage three, possibly four, different regimes: for marine insurance the provisions on insurable interest in the Marine Insurance Act 1906 would continue to apply, and there would be separate regimes for life-related insurance and non-life-related, non-marine insurance within the new statute
[749] Franziska Arnold-Dwyer, 'Insurance Law Reform by Degrees: Late Payment and Insurable Interest' [2017] 80(3) MLR 489, 505.
[750] *Ibid.*
[751] The insurers' enquiries would raise the proposers' awareness of, and promote compliance with, the insurable interest requirement.

difficult in practice. As noted by Franziska, it raises the question of what degree of causality must be shown between the (anticipated) insured event and the (anticipated) economic loss in order to qualify as insurable interest, bearing in mind that the existence of an insurable interest is tested at the time of the contract. [752] For marine insurance, two pieces of legislation, i.e. Marine Insurance (Gambling Policies) Act 1909[753] and the Marine Insurance Act 1788 has been repealed by Clause 7.[754]

4.7.3. Post - Enactment of the Australian ICA 1984 and MIA 1909

Until 1984 Australian insurance law was, to a large extent modelled on English law.[755] The English Marine Insurance Act 1906 was adopted for all intents and purposes word for word in the Australian Marine Insurance Act 1909, and the small number of English statutes relating to insurance – the Life Assurance Act 1774, the Fire Prevention (Metropolis) Act 1774 and the Marine Insurance Act 1788 – all formed a part of the law.[756] However, legislative reforms have made substantive changes to common law principles on insurable interest.

An approach opposite to the English legal interest test was adopted in the Australian statutory laws on an insurable interest which is reflected in the provisions of sec 16 & 17, ICA, 1984. In the Act, the restrictive proprietary interest test was abandoned in favour of one based on economic loss. The main argument was that the legal interest test inhibits the recovery of losses.[757] Currently, section 16 of the ICA provides that a contract of indemnity insurance is

[752] Franziska Arnold-Dwyer, 'Insurance Law Reform by Degrees: Late Payment and Insurable Interest' [2017] 80(3) MLR 489, 505.

[753] The Act made it a criminal offence punishable by a fine or prison for up to six months against those who took out marine policies without insurable interest. This Act appears to be a dead letter because there is no evidence of prosecutions under the Act, and it is unnecessary to impose criminal liability as any problems in the market are subject to financial services regulation.

[754] This Act requires the names of those interested in the insurance to be inserted into the policy. The Act was repealed by the Marine Insurance Act 1906, but only insofar as it applies to marine insurance. It appears to continue to apply to non- marine insurance but is routinely ignored.

[755] Robert Merkin, Reforming Insurance Law: Is there a Case for Reverse Transportation? A Report for the English and Scottish Law Commissions on the Australian experience of insurance law reform (2007) 7.

[756] *Ibid* Merkin (2007) p 7; Ian Enright and Robert M Merkin, *Sutton's Law of Insurance in Australia* (4th ed, Thomson Reuters 2015) paras 22.10; Two different regimes in respect of the law on insurable interest: one for marine insurance, which is governed by the Marine Insurance 1909 MIA (Cth); and the other for non-marine insurance, which is subject to the 1984 ICA.

[757] ALRC 91, p 77; As Greg Pynt comments: 'The ICA came into effect when, at common law, it seemed that an insured could only recover under an indemnity insurance contract if they had a legal and equitable interest in the subject matter of an insurance contract at the time of a loss. The ICA **alleviates** that requirement by providing that an insured will be regarded as having an insurable interest in the subject matter of a general insurance contract if they suffer a pecuniary or economic loss as a result of the insured property being damaged or destroyed even if that does not amount to a legal or equitable (s 17). The notion of insurable interest is almost certainly irrelevant to indemnity insurance subject to the ICA, because if an insured can prove they have suffered a loss, they will satisfy the 's 17' test for insurable interest'. See Greg Pynt, *Australian Insurance Law: A First Reference* (4th edn, LexisNexis Butterworths Australia 2018) 199.

not void because the insured did not have an insurable interest at the date of the contract, and sec 17 modifies the indemnity principle by stating that proof of pecuniary or economic loss should suffice. Merkin suggests this development to be a more robust approach for non-marine general insurance.[758]

However, Australian marine insurance laws still retain the legal or equitable relation required at the time of loss.[759] The ALRC 20 in 1982 discussed the need for insurable interest and concluded that the patchwork of legislative measures served no real function and that the indemnity principle provided sufficient protection against gambling.[760]

Notably, the Australian Marine Insurance Act 1909 is unaffected by the 1984 changes.[761] Thus, because the experience under the ICA had been a positive one without problems,[762] in 2001, ALRC 91 recommended the same rules be extended to marine insurance by repealing ss 10 - 12 of the Marine Insurance Act 1909 with the wording equivalent to that of ss 16 – 17 of the ICA.[763]

For marine insurance, the core focus was on the decision in *NSW Leather*[764] should be modified by allowing a buyer on 'Free on Board' (FOB) terms to insure goods once he had paid for them,[765] and that the law should be clarified by an express statement that a secured lender should be regarded as having an insurable interest to the extent of his security.[766] The legislation

[758] Robert Merkin, 'Reforming Insurance Law: Is There A Case for Reverse Transportation? A Report for the English And Scottish Law Commissions on the Australian Experience of Insurance Law Reform' (2007) 79.
[759] Sec 11, MIA 1909 (Aus.); section 6(2) of New Zealand's MIA 1908.
[760] The result of the ALRC recommendations can be found in Part III of the (Australian) Insurance Contracts Act 1984. ALRC 20, at [108]-[120]; W I B Enright, Robert Merkin, *Sutton on Insurance Law* (4th edn, Thomson Reuters 2015) Volume 2 p746;
[761] Galbraith 'An Unmeritorious Defence – The Requirement of Insurable Interest in the Law of Marine Insurance and Related Matters' (1993) 5(3) Ins LJ 177; Taylor 'Is the Requirement of an Insurable Interest in the Marine Insurance Act Still Valid?" (2000) 11 Ins LJ 147, 156-157; Sarah Derrington, 'Australia: Perspectives and Permutations on the Law of Marine Insurance' in *The Modern Law of Marine Insurance* edited by Prof D. Rhidian Thomas (LLP, Volume 2, 2002) Chapter 11, 371.
[762] Since the implementation of the provisions in ICA there has been few cases dealing with ss 16 and 17. In *Advance (New South Wales) Insurance Agencies Pty Ltd v. Matthews* (1988) 12 NSLWR 250, Samuels JA found that, under s.17, a husband had an economic interest, and therefore, insurable interest in his wife's clothing and other personal effect; others include, *Pacific Dunlop Limited v Maxifirm Boilers Pty Limited* (1997) 9 ANZ Insurance Cases 61-357; and *Howard v Australia Jet Charter Pty Limited* (1991) 6 ANZ Insurance Cases 61-054.
[763] Recommendation 28, ALRC 2001.
[764] See section 4.3.4. for a *critique* of *NSW Leather Co Pty Ltd v Vanguard Insurance Co Ltd (1990) 103 FLR 70; (1991)25 NSWLR 699 (NSWCA).*
[765] Recommendation 30, ALRC 2001.
[766] Recommendation 30 ALRC 2001; W I B Enright, Robert Merkin, *Sutton on Insurance Law* (4th edn, Thomson Reuters 2015) Volume 2, 746.

in Australia leave the marine position untouched, but the market has not.[767] The same is even more true in Nigeria.

4.8. Other Problems Affecting the Insurable interest doctrine

The chapter has identified the main issues that affect the efficiency of the doctrine of insurable interest, i.e. a lack of a precise definition, and scope in furthering the insured's recovery of actual economic losses which undermines the principle of indemnity. However, there are other consequential ambiguities which have sufficed over the years from judicial decisions. This has caused the law of insurable interest to be littered with problems that it no longer attains the legal and regulatory goals it is set up to achieve.

One problem is that diverse approaches have led to different inconsistent results.[768] This is as a result of the judicial desire to see justice done. However, the inconsistent decisions result in negative results in practice like high litigation cost and lack of predictability.[769] Because insurance lawyers do not know which approach the court would apply, it might lead to a prolonged dispute and increased cost of litigation for clients. Such ambiguities in the law create an unsatisfactory basis for attorneys to counsel their clients in matters concerning insurable interest requirements.[770] Particularly in the context of offshore and construction projects where the rights, obligations and liabilities owed between those involved in the project are often designed in accordance to the policy arrangements made for or by each of them.[771]

Another issue is that the outcome of a decision, where the insured is not wagering works adversely on the insured. It is submitted that ambiguities in the law create an opportunity for

[767] More generally, the ALRC recommended the adoption of ss 16 and 17 of the Insurance Contracts Act 1984 for the marine market, thereby abolishing the requirement for insurable interest at the outset and allowing the assured to recover if he could prove that he had suffered loss (whether or not he possessed insurable interest). As a necessary consequence of this new approach, it was also recommended that the rule in s 51 of the Marine Insurance Act 1906 (s 57 of the Australian 1909) Act prohibiting assignment of a marine policy by an assured who had lost insurable interest, be repealed. Rhidian Thomas, *The Modern Law of Marine Insurance Law* (Volume 4, Informa Law from Routledge 2016) 14; Julian Long, 'The Concept of Insurable Interest and the Insurance Law Reform Act 1985' (1992) 7 Auckland University Law Review 80, 97.

[768] For example, same facts and different decision in *Wilson v. Jones* [1867] L.R. 2 Ex. 139, 140 an insured could recover for the profits derived from the successful completion of the contract even though he lacked personal proprietary or contractual rights to the subject matter insured. By contrast, the sole shareholder and only creditor in *Macaura v. Northern Assurance, [1925] A.C. 619, 630-631* who clearly had a pecuniary interest in the company's timber nonetheless lacked an insurable interest in the timber on the grounds that he had no legal relationship with the subject matter.

[769] M. Templeman, '*Insurable Interest: A Suitable case for treatment*? In Baris Soyer (eds), Reforming Marine and Commercial Insurance Law, (Informa, 2008) 208.

[770] Graham Douds, 'Insurable Interest in English Marine Insurance Law: Do We Still Need It' (2012) University of San Francisco Maritime Law Journal 323, 332.

[771] Pervasive Interest discussed for subcontractors discussed in section 4.5.2.

insurers to exploit less sophisticated insurance purchasers by acquiring premium for the value of a loss, yet turning around to refuse payment for what was received. Thus, the insurable interest doctrine also obstructs the goals of equity and fairness in the market of insurance.[772] First, insurance companies sell their products to customers, not minding whether or not insurable interest exists. Second, where the insured peril happens, insured's escape financial obligations for want of insurable interest. As argued that a strict approach to insurable interest further aid the insurance companies' nefarious activities as there is no way to show whether the insurer issued a policy in bad faith. The insurance company's gamble pays off as the company walks away with a net windfall of the premiums paid. It is submitted that a redefinition of insurable interest using the factual expectancy test can justify a 'legitimate' defence of lack of insurable interest.

The third problem associated with the doctrine of insurable interest is the inefficiency it can create in the insurance market as a whole, thereby negatively impacting both policyholders and insurers. Where parties are certain and well aware of the consequences of the lack of insurable interest, they will possibly not sign up the contract at all. In the instance, the requirement of an insurable interest acts as an arbitrary and undesired cap on the kinds of insurance consumers may desire, and insurers may be willing to provide. Where insurance contracts do not pose a high risk of moral hazard and thus will have no socially harmful effect, the strict insurable interest requirement will prevent parties from securing the benefits of these benign contracts, when both parties to the insurance contract are prevented from engaging in mutually beneficial trade, deadweight loss and inefficiency result.[773]

As the preceding examples demonstrate, the insurable interest doctrine, when applied too rigidly, may create inefficiencies in the market by prohibiting beneficial commercial practices that do not pose a high risk of moral hazard yet are impermissible under the insurable interest doctrine as it currently exists under both Nigerian and English laws. Thus, the question is, should insurable interest be abolished or retained in insurance?

[772] Jacob Loshin, 'Insurance Law's Hapless busybody: A case against insurable interest requirement', (2007) 117 Yale L.J 474, 495.
[773] *Ibid* p 498.

4.9. Retained, Modified or Abolished Doctrine of Insurable Interest?

The upsurge or growth of major criticisms summarised above has increased the need to either altogether abolish the insurable interest requirement or refine its legal operations. The thesis argues strongly that the requirements of insurable interest should be retained on the following grounds: (i) it is the hallmark of insurance; (ii) it reinforces market discipline; and it stands as a barrier against invalid claims. The concept of insurable interest may also be useful in other circumstances, such as specifying the location of insurance.

(i) Whether it is the hallmark of Insurance

Arguably, insurable interest is not only a trademark of insurance, but it also demarcates the general boundary within which the Nigerian insurance industry operates. This boundary is essential for legal, regulatory and tax purposes.[774] Therefore, its function is not limited to only the contractual area but the regulatory aspect of insurance law. Also, it creates a dividing line between gambling and insurance. Thus, the absence of insurable interest would increase the potential for fraud and the risk of undesirable consequences such as gambling on the lives of strangers and property. With the high unemployment rate in Nigeria, betting, gambling and yahoo, yahoo (internet fraud) is the new norm, which might expose insurance companies to more losses. Also, some religious faith in Nigeria are against gambling and are only supposed to offer a range of Shari'a- compliant financial products, including insurance.[775] Therefore, the removal of an 'automatic' legal requirement for insurable interest in all policies might deprive individuals of the right and ability to enter into insurance contracts that have such a provision. Finally, on this point, the abolition of the insurable interest doctrine will make Nigerian law less competitive.

(ii) Whether it improves market discipline and efficient underwriting procedure

Another merit that justifies the necessity of the legal requirement of insurable interest is the impact it has on market discipline. The requirement appears to be a contributory factor

[774] Different regulatory and tax regimes apply to insurance compared to other commercial risk transfer products or to gambling. It is therefore often necessary to distinguish insurance from (for example) credit derivatives or betting.

[775] There are currently two takaful insurance companies in Nigeria: Jaiz Takaful Insurance Plc and Noor Takaful Plc.

restraining the insurance industry from entering into speculative forms of trading.[776] In addition, the campaign or arguments against moral hazard set limits on the contracts that insurers may enter, it protects insurers from themselves–from writing insurance which is overly speculative, or which encourages wrongdoing.

(iii) Whether insurable interest is a tool in refusing invalid claims

Insurers often regard insurable interest as a useful device in declining invalid claims. This was particularly true for marine insurance policies on goods, where the benefit may be assigned, but claims may only be brought by those to whom the risk has passed under a contract of sale.[777] Requiring an insurable interest ensures that only one interested party can claim. It will also, help in insurers from identifying fraudulent claims in general insurance.[778] Finally, the requirement for insurable interest may help define where insurance is located, which is increasingly important for regulatory and tax purposes.[779]

On arguments for abolishing the requirements, some scholars suggest that the doctrine of insurable interest is pernicious and does more harm than good.[780] It is suggested, that even though the current approach in England and Nigeria is not perfect, the insurance companies

[776] Insurance might in this context be contrasted with the practice of derivative trading, which has come under considerable scrutiny since the 2008 financial crisis. One of the alleged causes of the crisis was the involvement of banks and investors in financial instruments, such as swap and derivative contracts, which did not require the parties to show a direct interest in the trigger events; The LCs Issues Paper 10 Insurable interest: Updated proposals 27 March 2015 para 2.3.

[777] Discussion on FOB purchasers discussed under 4.4.3.

[778] In Nigeria, secondary data also shows that policyholders are the highest source of insurance claims fraud with 38.9%, followed by insurance brokers, employees, loss adjusters and insurance agents; Sunday Ajemunigbohun and others, 'Insurance Claims Fraud In Homeowner's Insurance: Empirical Evidence From The Nigerian Insurance Industry' (2019) 16(1) Economics and Organisation 103, 109 https://doi.org/10.22190/FUEO1901103A.

In the UK, insurance fraud is on the rise as noted by the Association of British Insurers. Every day, 1300 insurance application fraudulent claims are exposed. Normally, the criminals use 'crash for cash' to deliberately cause road accident for financial gains. Consequently, innocent motorists are injured and the criminals in hot pursuit for fraudulent insurance claims. The total number of fraudulent claims and applications detected in 2018, at 469,000, rose by 3% on 2017. Motor insurance scams remained the most common and most expensive, with 55,000 dishonest claims worth £629 million detected. Of the 55,000 motor insurance frauds, 80% involved personal injury fraud. These ranged from staged crash for cash frauds to opportunistic scams. The report is available at <https://www.abi.org.uk/news/news-articles/2019/08/detected-insurance-frauds-in-2018/> assessed 10 August 2020;

[779] The Law Commission and Scottish Law Commission, *Reforming Insurance Contract Law, Insurable Interest: Updated proposals* (Issues Paper 10, 2015) paras 2.3 suggests this point for England. It is suggested that this will be helpful in Nigeria.

[780] Howard Bennett, The Marine Insurance Act 1906: Reflections on A Centenary, (2006) 18 Singapore Academy of Law Journal, 669, 679 – 680 noted 'if the concern is gambling, public policy can operate without the insurable interest doctrine.

Sharo Michael Atmeh,Regulation Not Prohibition: The Comparative Case Against the Insurable Interest Doctrine, (2011) 32 Nw.J.Int'lL.&Bus.93,94<http://scholarlycommons.law.northwestern.edu/njilb/vol32/iss1/3> assessed 10th August 2020.

(while it might seem that they benefit more from the outcome of a lack of insurable interest) should also be shielded from insureds who seeks to make a profit from insurance contracts. The purposes of insurance and indemnity principle must be preserved. The law must strike a balance. In addition, there should be a commensurate remedy for insurance companies who fail to ask the necessary material information at the pre-contractual stage of the contract.

Arguably, another and more important reason for a push to remove the rules of insurable interest might be because of the imbalance of the rules. Simply put, the insured suffers more than the insurer for lack of insurable interest. The unfairness stems from the fact that 'the insurer solicited the insurance, charged and accepted a premium, investigated the property and the insured, and then seeks to avoid its part of the bargain by considering that the insured was not entitled to coverage, whereas such discovery was not made before the loss when the prospective insured's premium was a source of easy profit before it'.[781] Unfortunately, only the insurer is allowed to raise a defence of lack of insurable interest. It appears a return of premium with interest would suffice so that the insurer can also bear the impact where they fail to solicit for material facts to be disclosed before accepting the risk.

It is submitted that insurable interest doctrine plays an integral function in supporting indemnity and in insurance generally, thus would be implausible to remove rules of insurable interest from the Nigerian 1961 Act.[782] However, suppose for argument's sake, the requirement of insurable interest had been removed from marine insurance law, the principle of indemnity cannot provide sufficient ground to prevent the assured from obtaining an indemnity where the policy is not wagering but a lack of insurable interest.[783] In this event, although the assured satisfies the element of acquiring the interest necessary to the indemnity principle, the assured is not entitled to the recovery at least in a marine insurance claim. Therefore, it is unlikely that the indemnity principle will be able to substitute the requirement of insurable interest in insurance law. Notably, for marine insurance, there appears to be a significant impact on the level of the development of the insurance market in Nigeria.[784]

In summary, if the reason for removal is because the rules on insurable interest are complex, uncertain and unpredictable, then perhaps it should be a key driver for reform rather than

[781] R Pinzur, 'Insurable Interest a Search for Consistency' [1979] 46 Ins. Counsel J. 109,128.
[782] Meixian Song, 'Insurable Interest in the Law of Marine Insurance' [2011] 1 Southampton Student L Rev 75,79 argues for the same point for the English jurisdiction.
[783] *Ibid.*
[784] Nwokoro I. A. and Ndikom Obed B. C., 'An Assessment of the Contribution of Marine Insurance to the Development of Insurance Markets in Nigeria (2012) 5 (8) Journal of Geography and Regional Planning' 212-221 shows that a huge premiums are collected from the department of marine section of insurance companies.

abolishment. It is submitted that many justifications for retaining the insurable interest doctrine outweigh why it should be abolished. However, because it is integral to the definition of insurance and how policies are written, the law should the clarified, and a general rule made applicable to all classes of insurance.

4.9.1. Should Indemnity Be a Substitute for Insurable Interest?

Whether the indemnity principle can do the same job as insurable interest has been an issue of discussion in the legal and academic arena.[785] This is because it is sometimes difficult to see what the requirement of insurable interest has added to the common law principle of indemnity. Many jurisdictions have argued for removing the insurable interest doctrine in the 21st century, primarily because the doctrine of indemnity has the same effect.[786] For example, the principle of indemnity is a sufficient barrier to prevent the insureds from making a profit, where he has suffered no loss, and can prevent moral hazards and gambling in the guise of insurance. A role which insurable interest also plays. In other words, the principle that an assured may not recover more than he has lost and the principle that most insurances must be supported by insurable interest will often lead to the same conclusion. However, the focus of both principles is distinct on the basis that they: (i) possess different nature;[787] (ii) have distinct origins;[788] and (iii) different outcomes.[789]

The legal basis of establishing the indemnity principle is to ensure the insured is fully compensated and does not make a profit from the contract. The requirement of an insurable interest is commonly said to be founded on three policy considerations inclusive of the goal of

[785] Law Commission of England and Wales and Scottish Law Commission, *Insurance Contract Law Insurable Interest* (Issues Paper 4, 2008) paras 7.34.
[786] See ALRC 20, p72; Gary Meggitt, 'Insurable Interest – The doctrine that would not die' [2015] 35 (2) Legal Studies 280.
[787] Indemnity requires that the policyholder will only be compensated when they have suffered a loss, insurable interest ensures that the insured has a specific type of relationship with the subject-matter insured in order to have suffered a loss; Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 197.
[788] The principle of indemnity is a requirement at common law and takes effect as an implied term in the agreement between the parties, by contrast, the rule of insurable interest is a statutory requirement.
[789] Where an insurer promises to indemnify, it is a primary obligation that must be fulfilled because it goes to the root of insurance. The failure of the insurer to fulfil these obligations will amount to a breach of contract. For the insurable interest doctrine, by contrast, it is the insured's obligation to ensure that he has a connection with the subject matter of insurance. Failing which the insurer might choose not to compensate the insured for lack of interest without remedy of return of premium; Sec 8 (1) and (2) MIA 1961 (Nig); Section 6 MIA 1906 (UK.); W I B Enright, Robert Merkin, *Sutton on Insurance Law* (4th edn, Thomson Reuters 2015) Volume 2, 85.

indemnity.[790] While the indemnity principle protects the interest of the insured for full indemnification, disclosure of relevant material facts in line with the principle of utmost good faith will help the insurer understand and decide on accepting the risk. The insurable interest rule takes a further step and gives the insurer extra protection where the insured lacks interest, and the claim can be denied.

Finally, the indemnity principle only applies to all contracts of indemnity, while insurable interest applies to all contracts of insurance. The principle of indemnity can be modified by parties,[791] while an insurable interest cannot be waived or amended by an agreement.[792] Under the indemnity principle, where an assured is unable to satisfy the indemnity requirement by proving any loss, the position is quite simply that the insured party cannot recover under the policy.[793] By contrast, for insurable interest the time the loss occurs essential.[794] It is concluded that the indemnity principle cannot be a substitute for the principle of indemnity, but both must exist to complement each other.

4.9.2. Disproportionate Impact and Consequences for Lack of Insurable Interest

Under the Nigerian statute, the absence of an insurable interest renders the insurance contract void.[795] Because insurance companies make money from the premiums paid by insured parties, every ambiguous claim that results in a court finding lack of insurable interest will result in a net gain or windfall for the insurance company.[796] This potential for a windfall in the case of ambiguity regarding the insurable interest creates a perverse incentive for insurance companies to over-insure in instances in which there may be a high probability of moral hazard.[797]

Only the insurer can raise the absence of insurable interest as a defence to a claim. Thus, in *University of Nigeria, Nsukka v. Edwards W. Turner and Sons (W.A.) Ltd. and Anor,*[798] the

[790] Meixian Song, 'Insurable Interest in the Law of Marine Insurance' (2011) 1 Southampton Student L Rev 75, 77; Julian Long, 'The Concept of Insurable Interest and the Insurance Law Reform Act 1985' (1992) 7 Auckland University Law Review 80, 84; LC's (Issues Paper 4, 2008) paras 5.1.
[791] See chapter three, section 3.5. for examples of valued policies.
[792] Sec 6 MIA 1961 (Nig.); Sec 4 1906 (UK).
[793] Robert Merkin, *Colinvaux's Law of Insurance* (1st Supp, 12th edn, Sweet & Maxwell 2019) 197 para 4 -009.
[794] Sec 8 (1) MIA 1961(Nig.); This is a common law position in *Sutherland v Pratt* (1843) 11 M.&W. 296, A rule now in the Marine Insurance Act 1906 and MIA 1961; *Anderson v Morice* (1876) L.R. 1; App. Cas. 713.
[795] Section 6 (1) of the Marine Insurance Act 1961; Under the English Law the position is the same section 4(1), MIA 1906.
[796] Jacob Loshin, 'Insurance Law's Hapless busybody: A case against insurable interest requirement', (2007) 117 Yale L.J 474, 493-494.
[797] Ibid 493.
[798] *University of Nigeria, Nsukka v. Edwards W. Turner and Sons (W.A.) Ltd. and Anor* (1965) L.L.R 33

plaintiffs in 1962, sought to invest in Sinking Fund Assurance Policy for an assured sum of ₦3 million over 50 years. After paying the first premium of ₦25,830, the insured discovered that the insurance company had paid up capital of only ₦25,000. The University sued for deliberate or negligent non-disclosure of material information that would have helped it in deciding whether to take the policy or not. It claimed for damages, and refund of the premium so far paid. It was held, among others that the agreement between the parties was not a contract of insurance requiring utmost good faith, since there is no insurable interest on the part of the insured. The action therefore failed.[799]

As highlighted above, the thesis argues that there are not many instances in which courts have addressed the question whether an insurer that successfully avoids paying a claim based on the absence of the requisite insurable interest is obligated to return the premiums that were paid for the insurance policy. A lesson can be learnt from the English current reforms. While, on the consequences for the contract being void, the English Law Commissions' draft Bill does not make specific provision for the return of the premium in other cases, where there has been no deliberate or reckless untrue statement.[800] Clause 4, however, provides that, if an insured makes an untrue statement about the nature of its insurable interest and either knows it is untrue or does not care whether or not the statement is true, then the insurer may retain the premiums paid in pursuance of the void contract.[801]

Hence, the decision of whether to challenge the contract of insurance for the absence of insurable interest amounts to an option held by the insurer, which can be breached without paying any damages. In a case where the insured event or risk never occurs, the option to challenge the existence of an interest will not be needed. However, if the insured event happens, the option to invalidate the contract for lack of insurable interest can be exercised by the insurer.

4.10. Redefining the Scope of Insurable Interest under the Nigerian Law

From the preceding discussions, it is obvious that the definition of insurable interest is pivotal in shaping the rights and obligations of the parties. Based on the analysis of the problems

[799] Shamsi Ubale Jibril, Ishaq Abubakar Baba, and Abdulkarim Kabiru Maude, 'Critical Analysis of Fundamental Principles of Insurance Under the Nigerian Law' (2018) (4) 7 International Journal of Advanced Academic Research Arts, Humanities and Education 28, 35.

[800] There is an exception for consumer insurance on Return of premium to a fraudulent insured is inconsistent with the provisions of CIDRA 2012 and the Insurance Act 2015, which provide that the insurer can retain premiums paid where an insured has acted deliberately or recklessly in the course of its pre-contractual disclosure.

[801] Law Commission of England and Wales and Scottish Law Commission on *Reforming Insurance Contract Law: Short Consultation on Draft Bill: Insurable Interest* (2016) Clause 6, paras 4.8.

associated with insurable interest under Nigerian law, the thesis suggests that the scope of insurable interest has to be redefined to meet modern practices. Furthermore, for the satisfaction of the purposes of the indemnity principle as discussed, the factual expectation of loss better implements the purposes of indemnity.

The adoption of an economic test would give added protection because, should the event insured against occur, the insured might suffer a financial loss. The purchaser of an insurance policy must have an insurable interest in the subject matter of that contract, and since insurance protects only against financial losses, the buyer must have a pecuniary interest in the event of a loss. The thesis does not suggest that the requirement of insurable interest is abolished, but that the test should be changed. On the definition of insurable interest, it is suggested that a clause should be included in support of the provisions of sec 7 MIA 1961 (Nig.) to set out a non-exhaustive 'definition' of insurable interest in a property, marine and non-life context.

Thus, for property and marine insurance, the test of insurable interest satisfied if: *(i) the assured has legal or equitable title to the subject matter; or (ii) if the assured is in possession or custody of the subject matter; or (iii) if the assured is not in possession of the subject matter but may be either responsible for, or suffer an economic loss in the event of, any loss or damage to the subject matter*.

The thesis recommends the introduction of an economic interest test so that where an insured is economically disadvantaged by loss, the insurer cannot escape performing their obligation simply because the insured lacked a legal or equitable interest in the property will change the draconian meaning of insurable interest. The insured must still prove a factual expectancy of loss or gain from the insured property, failing which, there is no insurance contract if the economic loss has not be proven.

Another area that needs to be refined is introducing a legal requirement on insurers to check that policyholders have an expectation or a chance of loss at the outset of an indemnity contract of insurance. It is submitted that to minimise insurers using lack of insurable interest as a defence, it is suggested that the Nigerian law provides a corresponding pre-contractual duty as follows: (i) to take reasonable steps to make enquiries as to the existence and nature of the proposer's interest, and (ii) to decline entering into a contract of insurance, if before entering into that contract, the insurer knows or ought to know that the insured has no insurable interest in the subject-matter of the contract, and no reasonable prospect of acquiring one. The insurers'

enquiries would raise the proposers' awareness of, and promote compliance with, the insurable interest requirement.

Most importantly, because the principle of insurable interest is derived from the principle of indemnity, the thesis suggests, the law must form a clear definition of insurable interest, because an insured cannot be indemnified for a loss of a property unless there is an interest recognised by law. The law should permit the broader economic loss test and leave the insurers to enquire on the nature of insurable interest to safeguard themselves against fraud. However, the requirement for insurable interest should not be abolished in Nigeria, but only relaxed in light of the evolution of modern market circumstances in relation to indemnity insurance. Therefore, this thesis suggests that in formulating the meaning of the doctrine of insurable interest, it is legally imperative to strike a balance that best accommodates the purposes of the insurable interest requirements and the business and personal interests of those who use insurance.

4.11. Conclusion

The legal concept of insurable interest and its application has changed dramatically over the years to keep up with the changing market. As noted, the concept of insurable interest has an important place in indemnity insurance law, mainly, to prevent insurance from being used for wagering and it deters policy owners from bringing about the event insured against. By so doing, it safeguards the principle of indemnity. As discussed in this chapter, the law governing insurable interest is a fundamental principle of insurance law well provided in the Nigerian, English, and Australian legislation. The objective, therefore, was to inquire the extent to which the current legal interest requirement of insurable interest under the Nigerian insurance laws undermines the nature of the principle of indemnity in comparison to the English laws and Australian laws.

This chapter concludes that the application of the current law to contracts of indemnity is overly strict, ambiguous and rigid. Most seriously, because it inhibits the insured from recovering actual financial losses. The chapter argued that the aim of insurance is for financial protection and not for establishing ownership rights. It is suggested that the law of insurable interest should be simplified, redefined and relaxed based on these key findings:

At present, the legal requirement in relation to sec 7 (1) MIA 1961 (Nig.) is that the insured must show a strict proprietary interest in, or some legal or equitable relation to, the subject

matter of the insurance. The fact that personal loss has been suffered as the result of the destruction of property which has been insured is not sufficient. In addition, the chapter has revealed from precedent-setting cases that a strict approach to interpreting the meaning of insurable interest is a technical rule that stands as a barrier to the recovery of genuine losses. This is evidenced by the judicial decisions discussed in this chapter.

Second, modern trends are shifting towards factual expectancy test. The test acknowledges the insured's economic or pecuniary interest as a sufficient pre-requisite for recovery. In supporting the policy behind insurable interest, the economic interest test would not increase the danger of deliberate destruction of the subject matter insured by the insured. As the chapter has argued, it is hard to say that a person will have more intention to destroy an insured property in which he has only an economic interest than the property in which he has a legally recognised interest.

Third, a comparison between the two competing approaches reveals that for commercial benefits, a restrictive definition of insurable interest is counterproductive. Besides, it limits the freedom of parties to contract on terms that protect real interest. This is evidenced in subcontractors' cases with pervasive interests and purchasers who negotiate on FOB, C&F and CIF terms.

Fourth, a comparative analysis of laws of similar common law jurisdictions reveals a divergence in the expansion of the meaning of insurable interest, evidenced in case laws, reforms and statutes considered in England, Australia, Canada and South Africa. These countries have adopted a more flexible concept of economic or pecuniary loss which the chapter suggests is more reasonable. Nevertheless, the Nigerian law in the 21st century still maintains the strict legal and proprietary approach to insurable interest. It is suggested that the legal interest approach is unfair on the insured and undermines not only the principle of indemnity but also acts as a disincentive for the promotion and procuring insurance.

Fifth, the chapter also identified a legal gap of how insurer's issue out policies without eliciting useful information regarding the insured's relationship. The major aspect which the law has to intervene is to address a situation where policyholders would often take out insurance cover, and pay a premium over a period of time, only to find out that the policy is void at the point of recovery. This is a form of exploitation exhibited by insurers to cheat the insured, by clinging on legal barriers.

Thus, the chapter has identified strong reasons to retain the principle of insurable interest in Nigerian insurance law. However, the current definition and test as it applies to indemnity insurance are unsatisfactory. This assertion is made based on the highly technical provisions under sec 7 (1) MIA, 1961 and some unjust judicially created rules governing the law of insurable interest in Nigeria. This research submits that to circumvent the problems of non-recovery posed by the Nigerian Act where the insured suffers a genuine loss; it is commercially and legally expedient for an alternative test to be adopted. It is further suggested that a buyer be allowed to seek cover for any loss of value of the goods with risk attaching as soon as the goods are paid for and not when the parties to a contract of marine cargo insurance may deem that a buyer under a contract of sale has an insurable interest from or for a defined time, regardless of when risk or property is to pass under the contract of sale.

It is suggested that a restatement of the law is needed through legislative reform. A statutory footing is recommended to aid the court in difficult situations. The chapter, therefore, suggests that the principle of insurable interest be redefined to suit the purposes of indemnity which aims to place the insured in the position occupied preceding the loss. Conclusively, in line with Brett LJ's position, '… *any rule which either will prevent the assured from obtaining a full indemnity, must be certainly wrong'.*[802] Suggestions and proposals are made in chapter six of this research on how to reconcile the wrong rules of insurable interest that undermines the principle of indemnity. The next chapter thus considers another fundamental principle of insurance law – subrogation.

[802] *Castellain v Preston* [1883] 11 QBD 380, 386.

CHAPTER FIVE: THE DOCTRINE OF SUBROGATION

5.1. Introduction

As indicated in the preceding chapter, the insurable interest doctrine supports the indemnity principle with the requirements that, the insured must have a relationship with the subject matter of insurance, for any entitlements under the insurance contract. This chapter examines the role of the principle of subrogation, established as another distinctive feature of insurance contract law to protect the integrity of indemnity. By definition, subrogation refers to the right of the insurer, who has paid for a loss, to pursue the wrongdoer in the name of the insured.[803] The main goal of subrogation is to prevent the unjust enrichment of the insured and to impose a financial burden as a deterrence on the commission of negligent conducts.

Historically, the doctrine of subrogation as an equitable principle developed in England and it has since been applied to insurance contracts for well over 200 years.[804] A number of countries' laws, including Nigeria[805] and Australia,[806] have adopted the principle of subrogation, but the application and interpretation of the rules differ. In this chapter, the practical consequences of the insurer's subrogation right that still troubles judicial and commercial practices to date is critiqued.

One controversial aspect of subrogation is the distribution of subrogation monies recovered from a negligent third party. The chapter asks: How should subrogated monies recovered from third parties be distributed between the insurers and insured to reflect the nature of the indemnity principle under the Nigerian laws, in comparison with the English laws and Australian laws?[807] In response, the chapter critically reviews principally the English and Australian approaches to resolve the problem of apportioning subrogation proceeds. The chapter examines whether the insured's priority or the insurer's priority is a suitable approach and considers the implication which any model adopted has on the insured, which could stand as an obstacle to achieving full compensation for his total loss or as a means for obtaining a full indemnity. On the issue, the Nigerian law is unclear, because it does not provide a standard model and few of the governing rules gives priority to the insurer.

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[803] Brett LJ in *Castellain v Preston* (1883) 11 QBD 380, at 387: 'that doctrine (subrogation) does not arise upon any of the terms of contract of insurance...it is a doctrine in favour of the underwriters or insurers in order to prevent the assured from recovering more than a full indemnity; it has been adopted solely for that reason.'

[804] This is evidenced by, a case on the right of subrogation in the context of insurance which was first mentioned in *Randall v Cockran* (1748) 1 Ves. Sen. 98; 27 E.R. 916.

[805] Sec 80 MIA, 1961 (Nig). with similar provision in Sec 79 MIA, 1906 (UK.).

[806] Sec 67, ICA 1984 (Aus).

[807] Section 5.4.2. of this chapter provides answers to this question.

Similarly, the chapter argues that the English approach relied upon is not problem-free because it is in favour of insurers.[808] By contrast, the Australian approach is arguably more balanced on the basis that it is viewed to be comprehensive, robust and equitable.[809] The chapter argues that where the insured is deprived of recovering a full indemnity, then the essence of subrogation is lost. Also, the chapter contends that any rule that confers priority on an insurer who have received payments in exchange of providing financial protection, at the expense of the insured's interest does not reflect the nature of the principle of indemnity. Therefore, the chapter critically examines current legislation, latest case laws, academic debates, Law Commission's reports, and legal practitioner's views on how the dilemma of allocation can be resolved.

Another problem associated with subrogation is not restricting subrogation rights against specific categories of persons. Therefore, the chapter inquires whether it is justifiable for certain persons to be immune to subrogation actions because of the economic interdependence and relationship with the insured, for example, the insured's family member and a co-insured. Another issue, which the chapter investigates is the importance of subrogation actions. Some leading academics have proposed that the doctrine be abolished, while some defend its usefulness for insurance companies. Based on the problematic aspects of subrogation identified, the chapter examines in detail the current legal position, particularly in Nigeria, England, Australia, and other countries. The chapter makes further investigation on whether the proposed Insurance (Consolidated) Bill 2016 by the Nigerian Law Commission in any way improve the current law on subrogation.[810]

The objective of this chapter is to critically analyze, amongst other problems, the extent to which the application of the current Nigerian marine and property insurance rules on subrogation particularly on the distribution of subrogation recoveries allow the insured to be fully compensated for their losses arising from subrogation proceeds in comparison with English and Australian laws. Thus, in consideration of the ultimate problems, a preliminary investigation is made into the origin, meaning, justification of subrogation under the Nigerian, English and Australian legislative framework. The chapter then discusses the two limbs that justifies the nature of subrogation as a subset of the principle of indemnity. Next, the chapter critically examines the controversial aspects

[808] *Napier and Ettrick (Lord) v Kershaw* [1993] 1 All E.R. 385; *England v Guardian Insurance Ltd* [2000] Lloyd's Rep. I.R. 404.
[809] Sec 67 ICA, 1984; ALRC 20; Insurance Contracts, Australian Law Reform Commission Report No 20, para 305; Robert Merkin, A presentation on Reforming Insurance Law: Is there a Case for Reverse Transportation? A Report for the English and Scottish Law Commissions on the Australian Experience of Insurance Law Reform (2015) 85 <http://www.lawcom.gov.uk/app/uploads/2015/03/ICL_Merkin_report.pdf> assessed 10 November 2018.
[810] Sec 217 (1) & (2) Part XVII of the Insurance (Consolidated) Bill 2016 relates Subrogation.

of subrogation. It explores various approaches and comes to a conclusion on which method is most suitable for the Nigerian laws in implementing the aims of the principle of indemnity. Other procedural matters and reasons why subrogation actions should not be allowed in all circumstances are justified. The conclusion of this chapter summarises the deficiencies of existing rules with a view of recommending specific details for reforms.

5.2. Historical Perspectives, Current Laws, and Meaning of Subrogation

5.2.0. Origin of Subrogation

The origin of subrogation has attracted lengthy discussions with controversies about its juridical nature.[811] Subrogation, as a legal concept, dates to Roman times and the concept was derived from Roman law.[812] Since then, the doctrine has been applied to other body of law like sureties, and it is now common practice in insurance contract law. Concerning insurance, subrogation was recognised in the eighteenth century by Lord Mansfield.[813] The case of *Adelowore v Adisa*[814]is often cited to establish the approximate date by which subrogation was considered by the Nigeria courts, although it was enacted in the Nigerian statutes in 1961.

Over the years the legal basis of subrogation has been a subject of controversy. Even leading cases in insurance law did not provide sufficient evidence on the precise basis upon which the doctrine of subrogation is founded.[815] As a result, courts have different views on whether the insurer's right of subrogation is founded on equitable principles[816] or contractual terms by

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[811] Lengthy and detailed discussions on origin of subrogation can be found in the following: S. R. Derham, *Subrogation in Insurance Law*, (The Law Book Company Limited, 1985) 4 -5; M. L. Marasinghe, 'An Historical Introduction to the Doctrine of Subrogation: The Early History of the Doctrine' (1975) 10 Val. U. Law Review 45 <http://scholar.valpo.edu/vulr/vol10/iss1/3> accessed 5 Jan 2018; Horn, R., Subrogation in Insurance Theory and Practice (University of Pennsylvania, 1964) 11-12; M Luey, 'Proprietary Remedies in Insurance Subrogation' (1995) 25 Victoria. U. Wellington. L. Rev. 449, 457.

[812] Under the reign of Emperor Hadrian (AD 117-AD 138) Roman law began to shape the building blocks of subrogation; Both the name and the doctrine are borrowed from Roman institutions and as observed in *John Edwards & Co Ltd v Motor Union Insurance Co.Ltd* [1922] 2 K.B. 249, by Mc Cardie J that the doctrine of subrogation 'was derived by our English courts from the system of Roman law …'

[813] About mid-18th century, a statement on the right of subrogation in the context of insurance was first mentioned in *Randall v Cockran* (1748) 1 Ves. Sen. 98; 27 E.R. 916 by Lord Hardwick who gave the insurers a right to assert a right in the name of their insureds'. Thereafter Lord Mansfield in *Mason v Sainsbury* (1782) 3 Doug 61, at 64 observed : '*Every day the insurer is put in the place of the assured. If the insured declined to enforce his rights against a third party after payment by his insurers the insurer were allowed to sue the third party in his shoes.'*

[814] *Adelowore v Adisa* [1979] N.C.L.R.404 at 406.

[815] For instance, Lord Justice Brett L.J in *Castellain v Preston* (1883) 11 Q.B.D. 380 at 387, commented that the doctrine of subrogation '*does not arise upon any of the terms of the contract of insurance'.*

[816] The rule in equity is to avoid unjust enrichment of the insured and not deny him good fortune. For example, Bosanquet J. in *Yates v. Whyte* (1838) 4 Bing. (N. C.) 272; E. R. 793 at 798 said that the insured 'has the legal right to the damages, and if the underwriters have an equitable right they will establish it in another court "; *Morris v Ford Motor Co Ltd* (1973) Q.B. 792, at 801 Lord Denning said: 'subrogation was an equitable remedy and could be refused where it would be inequitable'; *Randal v Cockran* (1748) 1 Ves. Sen. 98 at 99 The insurer's entitlement in the words of 'Lord Hardwick' was referred to as '*the plainest equity that could be'*.

operation of law.[817] After much consideration of the views, the court in *Napier* deliberated upon whether the insurers were entitled to exercise any proprietary rights by way of trust or lien over subrogation monies. The latest decision by the English Court of Appeal on subrogation has resolved the conflict in favour of equity in the case of *Lord Napier and Ettrick v Hunter.*[818]

The current position is that equity is the basis of the nature of the insurer's right of subrogation. One fundamental principle in *Napier* was that an insurer does not just have a personal claim to recoupment against the assured of the amount of the overpaid indemnity, where the assured obtains recoveries which diminish losses for which he is compensated for by the insurer. Also, the insurer can assert an equitable lien or charge over recoveries, as security for the insurer's personal claim to recoupment, which arises because of those recoveries.[819] On practical grounds, the insurer's claim to recoupment was afforded security to ensure or facilitate recoupment[820] and based on the sound principles of equity according to which equitable interest might arise from specifically enforceable obligations to transfer or hold the property for another.[821] Their Lordships stressed that although the insurer's right of subrogation later came

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[817] Based on Diplock J's theory *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd* [1962] 2 Q.B. 330 at 341 *'The doctrine of subrogation is not restricted to the law of insurance. Although often referred to as any 'equity' it is not an exclusively equitable doctrine. It was applied by the common law courts in insurance case long before the fusion of law and equity…' Hobbs v Marlowe [1978] A.C. 16; Orakpo v Manson Investments [1978] A.C. 95; Darrell v Tibbits (1880) 5 Q.B.D 560 at 562;* James M. Mullen, 'The Equitable Doctrine of Subrogation' (1939) 3 Maryland Law Review 202.

[818] *Napier and Ettrick v Hunter [1993] A. C. 713; 1 All E. R. 385:*

Lord Templeman at 737-738 noted

> '*…In my opinion, promises implied in a contract of insurance with regard to rights of action vested in the insured person for the recovery of an insured loss from a third party responsible for the loss,* ***confer on the insurer an equitable interest in those rights of action to the extent necessary to recoup the insurer who has indemnified the insured person against the insured loss****…'*

Lord Browne – Wilkinson at 752 emphasised

> '*…since equity regards as done that which ought to be done under a contract, this specifically enforceable right gives rise to an immediate proprietary interest in the monies recovered from the third party. In my judgment, this proprietary interest is adequately satisfied in the circumstances of subrogation under an insurance contract by granting the insurers a lien over the monies recovered by the assured from the third party. This lien will be enforceable against the funds so long as it is traceable and has not been acquired by a bona fide purchase of a value without notice. In addition to the equitable lien, the insurer will have a personal right of action of action at law to recover the amount received by the assured as monies had and received to the use of the insurer.'*

See also N H Andrews, Subrogation and contract of Insurance: Case and Comment (1993) The Cambridge Law journal 223*; In England v Guardian Insurance Ltd* [2000] Lloyd's Rep. I.R. 404 *the case also raises the question of whether an assured is entitled to any sums from the insurer over and above the amount insured, by way of additional damages, the court held that an insurer has an equitable lien or charge over subrogation recoveries; Arab Bank Plc v John D Wood Commercial Ltd* [2000] Lloyd's Rep. I.R. 471.

[819] F.D Rose, *Marine Insurance Law and Practice* (2nd edn, Informa, 2012) 606 para 27.143; A. D Olden, 'Contracts to Bar Subrogation and to Avoid Legal Liability' (1989) 7 Can. J. Ins. Law. 90; Chioma Kanu Agomo, *Modern Nigerian Law of Insurance* (2nd edn, Concepts Publication Limited 2013) 191.

[820] *Napier v Hunter* [1993] AC 713, 737-738 (Lord Templeman).

[821] *Ibid* [1993] AC 713, 752 (Lord Browne – Wilkinson).

to be expressed based on the contractual relationship between the assured and the insurer through some implied obligation on the assured, these contractual promises did not prevent the creation of equitable interests.[822] However, beyond all doubts, equity still prevailed, although its application can be modified, excluded or extended by contract.[823]

The doctrine of subrogation, while enforceable in a court of law, is equitable in origin, based not on contract, but on the principle of unjust enrichment, and includes every instance in which one who is not a volunteer pays the debt of another. Furthermore, it has been noted that since it is a creature of equity, it will not be enforced where enforcement will work an injustice.[824] Notwithstanding, there is no doubt on the insurer's right to step into the shoes of the insured once he has discharged his liability under the policy, to take over and prosecute in the name of the insured all rights of action the insured might have against the third-party wrongdoer. This vindicates the primary purpose of subrogation to prevent infringement on the principle of indemnity.

MacGillivary suggests that it may be proper for reconciliation purposes to classify subrogation in insurance law as a legal doctrine supported by equity.[825] What the court must do is to see that the two strands of authority – at law and in equity, is moulded into a coherent whole. [826] Again, a better view of the juridical basis of subrogation could be suggested to be based on common law contractual doctrine and equity interceding to reinforce the insurer's right of subrogation since the role of equity is to mitigate the harshness and inadequacies of the common law.

[822] The implied obligation on the assured from the contract includes (a) to take proceedings against the wrongdoing third party in order to diminish his loss; (b) to account to the insurer for the proceeds of any such action; c) to allow the insurer to use the assured's name in order to proceed against the third party in the event that the assured himself failed to do so; and (d) to act in good faith in proceeding against the third party.
[823] John Birds, *Birds' Modern Insurance Law*, (11th Edn, Sweet & Maxwell 2019) 336.
[824] Cecil G King, 'Subrogation under Contracts Insuring Property' (1951) 30 Tex L Rev 62,63.
[825] John Birds, Ben Lynch and Simon Paul, *MacGillivary on Insurance Law* (1st Supp 14th edn, Sweet & Maxwell 2019) 729.
[826] *Napier v Hunter* [1993] AC 713,743.

5.2.1. Legislative Framework in Nigeria

Nigeria inherited the doctrine of subrogation from the English law by transplantation of the common law and the statutory provisions of the MIA 1906 (UK.).[827] In marine and property insurance law, subrogation rights arise according to either case law or statute or both in several jurisdictions.[828] In Nigeria, subrogation has been governed by the common law for general insurance and the common law concept codified in the Marine Insurance Act 1961 for marine insurance.

The provision of Section 80 (1), MIA 1961(Nig.) confirms the insurer's right of subrogation. It states that where the insurer has paid a total loss claim under an insurance policy, two distinct rights are available to the insurer. First, an entitlement '*to take over the interest of the assured in whatever may remain of the subject-matter so paid for*'; second, a right to be '*subrogated to all the rights and remedies of the insured in and in respect of that subject-matter as from the time of the casualty causing the loss.'* The second sub-section, section 80 (2), MIA 1961 applies to cases of payment by the insurer for a partial loss: in such cases, the insurer acquires no title to the subject-matter insured, but '*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 casuality causing the loss, in so far as the assured has been indemnified, according to this Act, by such payment for the loss.'* These statutory laws are examined in detail in later chapters. However, the above discussion, with emphasis on the statutory provisions in the MIA 1961 (Nig.) shows that subrogation is an integral part of insurance law which provides support for the indemnity principle.

[827] The key sections that govern subrogation in England is sec 79 (1) & (2) MIA 1906 (UK.) for marine insurance and the common law for general insurance; In Australia, subrogation is founded in both case law and also affected statutes under Part VIII of the Insurance Contracts Act (Cth) ICA 1984.

[828] For example, in the United States subrogation rights arise pursuant to case law in California (*Allstate Ins Co v Mel Rapton, Inc*, 77 Cal App 4th 901, 908 (Ct App 2000)) and according to both case law and statutes in Massachusetts (In Massachsetts General Laws C 231b, Section 1(d); In China, the laws applicable to subrogation in China are statutory governed by Arts 46,60,61,62 and 63 of the Insurance Law 2009 for non-marine insurance and for marine, the Articles 252 to 254 Maritime Code 1992.

5.2.2. Definition of the Concept of Insurance Subrogation

In a general sense, subrogation means 'the substitution of one thing for another, or of one person into the place of another for rights, claims, or securities.'[829] In an insurance context, the doctrine of subrogation, in the case of *Burnard v Rodocanachi,* was defined in clear terms as follows;

> *'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 equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back.'*[830]

Similarly, the whole concept was well illustrated in the case of *Simpson v Thomson,*[831] as a situation:

> *'where one person has agreed to indemnify another, he will, on payment of 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. It is on this principle that the underwriters of a ship can assert any right which the owner of the ship might have asserted against a wrongdoer for damages for the act which has caused the loss.'*

Thus, in insurance law, it is a process whereby the insurer who has discharged his obligation for which a third party is responsible is substituted for the insured so that the insurer may enforce the insured's right and remedies against the third party for his benefit.[832] For example, if a negligent third party damages an insured's property, there are two possible means of

[829] W.W. Buckland, *Equity in Roman Law* (London, 1911) 47 '…the term *subrogatio* was used in Roman constitutional law as a term to signify the choice of an official to replace, or sometimes to act as colleague with, another…'

[830] *Burnard v Rodocanachi* (1882) 7 App Cas 333, HL, at 339 or 239.

[831] S*impson v Thomson* (1877) 3 App Cas 279 HL , per Lord Chancellor.

[832] The party to whom the rights and remedies pass is called "subrogee"; and the party whose rights and remedies are succeeded to is called the 'subrogor'. This means the insurer is 'substituted' for the insured in regard to either all or some portion of the rights that the insured has to receive compensation from another source. In this case, the insurer is considered as the subrogee and the insured as the subrogor.

recovery from (his insurer and negligent wrongdoer). Subrogation thus allows the insurer to step into the shoes of insured to recover from this wrongdoer that which has been paid out.[833]

By interpretation, once the insurer has fulfilled his side of the contractual obligation to the insured, he can engage the wrongdoer to recoup payments in the name of the insured. This position was clearly stated in the leading case of *Castellain v Preston,*[834] *'as the right of the insurer having performed his obligation of settling the claims of the insured, to take over the advantage of every right of the insured against third parties, which may reduce or extinguish the insurer's loss'*. Subrogation, therefore, attaches upon the transference of such rights and has formed the basis of subrogation in Nigeria.

In the Nigerian judicial arena, some judges have applied this definition in some cases. For instance in *Ojo v Reliance Insurance Co.Ltd,*[835]it was noted that an insurer upon paying for a loss has equity to recoup the amount spent from anything in the hands of the insured, which diminishes the loss. Besides the definition given by the courts, many legal and insurance scholars have provided general definitions of subrogation.[836] Perhaps, the best explanation is provided by the editors of MacGillivray on Insurance Law namely that, '*subrogation is the name given to the right of the insurer who has paid a loss to be put in the place of the assured so that he can take advantage of any means available to the insured to extinguish or diminish the loss for which the insurer has indemnified the assured.' [837]*

5.2.3. Purpose for the Doctrine of Subrogation

Subrogation has its roots in the principle of indemnity to safeguard indemnity rules in indemnity insurance. Thus, the goal of subrogation limits the insured who might recover more

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[833] Simply explained as where A (insurer) has fully indemnified B (insured) for loss caused by C (third party) to B (insured) under some form of agreement between A (insurer) and B (insured), A(insurer) is entitled to exercise B's (insured's) rights against C; Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 760.

[834] Diplock J (as he then was) in the case of *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd* (Nisbet) [1962] 2 Q.B. 330 referred to *Castellain v Preston* (1883) 11 Q.B.D 380 as 'the *locus classicus* of subrogation in insurance'.

[835] *Ojo v Reliance Insurance Co.Ltd* [1983] 2. F. N. R. 313 at 320; *United Nigeria Insurance Co. v. Kajopaiye* [1981] 4.O.Y.S.H.C. 609.

[836] Robert Merkin classified subrogation into three: (a) the transfer to the insurers of the assured's right of action against a third party; (b) the right of the insurers to recover from the assured sums received from a third party before a claim is made against the insurers; and (c) the right of the insurers to recover from the assured sums received from a third party after the insurers have provided an indemnity. He opined that situation (a) is the only true instance of subrogation; situation (b) is in essence recovery of a payment made by the insurers under mistake, and (c)is the enforcement by their insurers of their equitable lien over sums received by the assured; Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 760.

[837] John Birds, Ben Lynch and Simon Paul, *MacGillivary on Insurance Law* (1st Supp 14th edn, Sweet & Maxwell 2019) 721.

than a full indemnity and to prevent such a result the rule that '*the insured shall be entitled to only one full indemnity for the injury or damage sustained'* is central to insurance law. This aim is the desired result which the law seeks to achieve by conferring on insurers the right of subrogation. In addition, the application of subrogation comports with public policy to allow the ultimate economic burden to be borne by the party, causing the loss in the first place.[838]

Thus, the justification for the creation of subrogation is to prevent the unjust enrichment of the insured from an unduly benefit and enjoyment of double recovery from both the insurer and tortfeasor. An insurance company, therefore, acquires distinct rights after stepping into the shoes of the insured: (i) any benefit or legal rights in the hands of the insured; and (ii) right to any cause of action to a third party.[839] Thus, enabling the insurer to maintain a cloak of anonymity. While subrogation is more beneficial to insurers, it must also be borne in mind that the insured must be fully indemnified for losses (not receive less than his actual loss) in line with the principle of indemnity. Practically all the cases in which the nature of the insurer's right of subrogation is discussed in England and Nigeria is illustrative of the nature of the insurance contract as one of indemnity.[840] For this reason, an insurer's right of subrogation is purely derivative, which makes a subrogating insurer inherits no greater rights against the tortfeasor than those possessed by the insured and is subject to the same defences assertable against the insured.[841] Underlying subrogation, therefore, is the principle of indemnity and such judicial explanations refer primarily to its role of preventing the insured from receiving more than full payment at the expense of his insurer and the negligent third party.[842]

5.2.4. Limitation of Subrogation Rules

Many authors believe that subrogation rules should be extended to accommodate life policies,[843] while others suggest that limiting the application of subrogation to contract of

[838] According to this rationale, (i) it can prevent a tortfeasor from profiting from insurance paid for by the insured if the insured would forego suit once made whole by his insurance; (ii) it can impose a burden that might act to deter the commission of torts.
[839] Nicholas Pengally, 'When can an Insurer exercise its Right of Subrogation?' (2013) 24 Insurance Law Journal 89.
[840] See section 5.3. of this chapter for case law analysis.
[841] Johnny C. Parker, The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation (2005) 70 Mo. L. Rev. 723,724.
[842] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 383; Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 760; Olusegun Yerokun, *Insurance Law in Nigeria Insurance* (Princeton Publishing Company, 2013) 408.
[843] Kimbal and Davis, 'The Extension of Insurance Subrogation' (1962) 60 *Michigan Law Review* 841-872 opined '*the fact that full indemnification is unusual, difficult to prove, or even difficult to conceive, in such lines of insurance, is irrelevant, for exhypothesi the settlement of all questions between insurer and insured has been made independent of full indemnification'.*

indemnity because measurement of the harm is extremely difficult to determine. Whether subrogation rules can be extended to life policies, has been an issue of contention. [844] However, precedent-setting cases and statutory laws confirm that subrogation is only applicable to contracts of indemnity like fire, motor, property, and contracts of marine insurance.[845]

In *Ojo v. Nigeria Reliance Insurance Co*.,[846] the court adopted the approach that subrogation rules are only applicable to indemnity contracts. This position simply means that life insurers are not entitled to subrogation, for example, on the theory that they contract not to cover the economic losses of the insured but rather to pay a stipulated sum in the event of the insured's death-their contract is more of an investment than an insurance contract.[847] The common-law logic in providing or denying subrogation for different types of policies is interesting in its own right and raises puzzles that are beyond the scope of the analysis here. However, the discussion of subrogation here is to vindicate the principle of indemnity and that there is no role for subrogation in respect of life or accident policies. Subrogation is justified by the indemnity character of the insurance contract, and denial of subrogation must rest on the fact that the contract of insurance in question is not an indemnity contract.[848]

5.3. Key Components of Subrogation

In insurance law, there are two limbs of subrogation: (a) the insured cannot make a profit and (b) the insurer's right against a third party. It is essential to examine the two aspects of subrogation in details because only one side is often cited and presented as a key aspect of subrogation. Even academic writers focus only on the point that the insured cannot make a profit. In the same vein, it is essential to understand the point at which the insurer is entitled to

[844] According to Patterson, 'Insurable Interest in Life' (1918) 18 Col L Rev 381, the author argued that there was a considerable indemnity element in life insurance. He further reiterated in his book, Patterson, *Essentials of Insurance Law* (New York, McGraw-Hill Book Co 1957) that: 'The English Courts, obedient to a statute enacted in 1774 have rather half-heartedly treated the life policy as an indemnity contract'; Similarly, Kimbal and Davis, 'The Extension of Insurance Subrogation' (1962) 60 *Michigan Law Review* 841,872 argued that 'applying subrogation on the grounds of indemnity and non-indemnity policies casts suspicion on why the insurer has a right of subrogation in a valued policy in marine insurance...'

[845] In *Theobald v Railway Passengers Assurance Co* (1854) 10 Exch 45 at 53, Alderson B noted that '*This is not a contract of indemnity, because a person cannot be indemnified for the loss of life, as he can in the case of a house or ship'*; Sec 3, MIA 1961 (Nig.); Sec 1, MIA 1906 (UK); *Castellain v Preston* (1883) 11 Q.B.D. 380.

[846] [1983] 2 F.N.R. 313 at 320.

[847] John F. Dobbyn, Insurance Law in a Nutshell (3d ed. 1996). 285-286; Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 382; Peter MacDonalds Eggers QC, 'The Place of Subrogation in Insurance Law: The Deception Depths of a Difficult Doctrine' in *The Modern Law of Marine Insurance* edited by Prof D. Rhidian Thomas (Informa Law from Routledge, Volume 4, 2016) 191.

[848] Kimball & Davis, The Extension of Insurance Subrogation, (1962) 60 Mich. L. Rev. 841, 849.

exercise his subrogation rights for recouping what has been paid out. As will be shown, the totality of subrogation rests on both elements.

5.3.1. The Insured Cannot Make a Profit

Under the Nigerian insurance laws, the doctrine of subrogation is a corollary of indemnity which ensures that the insured does not profit from his loss by recovering a double indemnity.[849] This is because where a loss caused by a third party occurs, the insured is open to various ways of recovery. As a consequence, there are four possible solutions which could either be that (i) the policyholder would recover from his insurer and the third party, permitting double recovery and profit;[850] (ii) the third person might choose to deny responsibility based on insurance benefits;[851] (iii) his insurer is made first to indemnify the insured party, and after that pursue the third party (iv), he would be made to account of any excess received from the third party.

While the first and second solutions do not only violate the rules of subrogation in insurance, the first leads to unjust enrichment prohibited on equitable grounds, the third and fourth solutions are consistent approaches to recovery in insurance contract law. This work aligns with the point that the intervention of the doctrine of subrogation in indemnity contracts is sound enough to protect the principle of indemnity.[852] However, subrogation rights must not be used to deprive the insured of full compensation for losses. Hence where the insurer has paid the insured, any sums recovered by the insured from the third party are held in equity for the insurer;[853] and where the insurer is required to pay an insured who has received an indemnity from the third party, the insurer is entitled to set off from his payment the amount

[849] Section 80 MIA 1961 (Nig); *Ojo v Reliance Insurance Co.Ltd* [1983] 2. F.N.R. 313 at 320.
[850] In *West African Airways Corporation (Nigeria) Ltd. v. De Beijer* (1969) N.C.L.R 261 it was clearly stated that the insured has a right to obtain indemnity under the policy, while at the same time obtain compensation from other sources in respect of the same loss from a tortfeasor. It is presumed that the US courts tend to be more explicit in their pursuit of policy goals in the area of double recovery (from both the insurer and third party) and profit making by the insured than the Nigerian courts as well as the English Courts. See Lowry and Rawlings, *Insurance Law Cases and Materials* (Hart Publishing Oxford- Portland Oregon 2004) 591 on American case analysis.
[851] In *Parry v Cleaver* [1970] AC 1 it was held that the third party cannot deny liability on the ground that the insurer has or will indemnify the insured. John Lowry and Philip Rawlings, *Insurance Law: Doctrines and Principles* (2nd edn, Hart Publishing 2005) 287.
[852] William R. Vance, *Handbook of the Law of Insurance* (1st edn, 1904) 423 '*If the insured were allowed to recover the amount of his loss from the tortfeasor and also from the insurance company, his misfortune would result in profit, rather than loss, and undoubtedly tend to greatly increase the number of such misfortunes.*'
[853] The insurer is limited to the amount he has paid out to the insured. Any excess or surplus over the insurer's payment accrues to the benefit of the insured.

received by the insured.[854] Also, where the insured recovers a sum to compensate for his loss for which the insurer has already made payment to him, he should repay the insurer.

An extract of the English leading case of *Castellain v Preston*[855] which is recognised and applied in the Nigerian case of *United Nigeria Insurance Co. v. Kajopaiye* [856] is most enlightening on the insured's width and limit in a contract of indemnity. In *Castellain,*[857] the court held that the insurers were allowed to recover their payment out of the sale proceeds of the house, thereby prohibiting the vendor from receiving both hands. The decision was based on the fundamental nature of the indemnity principle on marine and fire policies, to place the insured in the position occupied preceding the loss and nothing more.[858]

In the Nigerian case of *United Nigeria Insurance Co. v. Kajopaiye*,[859] the defendant insured some saw chains ordered from Scotland against loss. The carrier (British Caledonian Airways) admitted liability in the non-delivery of the goods and, thereupon, compensated the insured by paying the suppliers the cost of the goods so that the insured was no longer obliged to pay the purchase price. Meanwhile, the insurer has indemnified the insured in respect of the loss sued him to recover the sums paid. The judge, in holding that the insurer was entitled to succeed, based his decision on two grounds (i) the principle of indemnity and (ii) the payment for the loss by the carrier which had the effect of relieving the insured of his obligation to pay the suppliers '*is an advantage in the hands of the insured which must be passed on to the insurer, since as at that stage it is clear that the insured has suffered no loss'.*[860]

In *AFG Insurances Ltd v City of Brighton,*[861] the Australian high court emphasised that an insured would be more than indemnified for a loss if they could keep insurance payout and any compensation paid to them by a third party for the same loss. Also, in *Speno Rail Maintenance Australia Pty Ltd v Metals & Minerals Insurance Pte Ltd*[862] reiterated that the primary purpose

[854] Robert Merkin, *Colinvaux's Law of Insurance* (11th edn, Sweet & Maxwell 2016) 623.
[855] (1883) 11 Q.B.D. 380 at 386.
[856] [1981] 4.O.Y.S.H.C. 609; *Adelowore v Adisa* [1979] N.C.L.R. 404 at 406.
[857] See section 3.2.2. of the thesis for a detailed discussion on the case of *Castellain v Preston* (1883) 11 Q.B.D. 380 at 386 under the principle of indemnity.
[858] The same principle was applied in *Darrell v. Tibbitts* [1880] L. R. 5 Q.B.D. 560 the premises were held on a lease containing a covenant, under which the lessee was liable for damage caused by gas explosion. The lessor insured the premises with the plaintiff against fire. A gas explosion having damaged the premises, the tenant repaired them. The plaintiff, in ignorance, paid the insurance money. The court held that the plaintiff (insurer) is entitled to recover his money back and not liable because contract of fire insurance is a contract of indemnity, and the assured is not entitled to recover more than the amount of the loss he has suffered.
[859] [1981] 4.O.Y.S.H.C. 609.
[860] *Ibid* (at p613).
[861] [1972] 126 CLR 655 per Mason J; A Tarr, 'Subrogation and the Ash Wednesday Bushfire Disaster', (1987-1988) 11 Adel. L.Rev. 237.
[862] *[2009] WASCA 31 at [201].*

of the doctrine of subrogation in the insurance context is to prevent an insured been paid twice.[863]

If the insured receives any recovery in an insurance contract that gives more than a full indemnity, it is inconsistent with the principle of indemnity. However, the rule that the insurer should not make a profit from losses is subject to three limitations. First, the insured party is accountable only when fully indemnified.[864] Secondly, if the insured party receives a gift following the loss, this may not necessarily be taken into account.[865] Thirdly, if surplus results after the insurer have recouped its money, it seems that the insured is entitled to keep it on the basis that the insurer's right is only limited to the amount paid out to the insured.[866]

The usual approach to pursuing the goals of indemnity through subrogation where an insured suffers an insured loss is modelled in the following manner. The insurer pays the insured party on the insurance policy. After that, a payment is received by the insured from the negligent third party for the same loss, which means an amount received by the insured exceeds the amount of loss. In this situation, a claim can be brought by the insurer against the insured party for the excess money paid by the third party which over-indemnifies the insured.[867]

Another situation is where the insured has suffered a loss, and the insurers are unaware that the insured has received payment, from the third party in respect of the loss. In these circumstances, if the insurer has paid the insured for the loss, that payment can be recovered from the insured, as money had and received, paid by mistake of fact.[868]

Conclusively, the peculiarity of the first aspect of subrogation – insured not making a profit – in insurance transactions, especially in Nigeria commercial operations dissuades using insurance as a wagering or gaming contract,[869] and it is of economic importance to the Nigerian

[863] Greg Pynt, *Australian Insurance Law: A First Reference* (2nd edn, LexisNexis Butterworths Australia 2011) 390 for more analysis of the Australian cases in support of full compensation proposition. The insurer's right of subrogation is codified in section 85 MIA 1909.
[864] John Birds, *Birds' Modern Insurance Law*, (11th Edn, Sweet & Maxwell 2019) 338.
[865] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 391.
[866] *Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd [1962]* 2 QB 330; See later Sec 5.4.2. for discussion on the destination of surplus under the Nigerian, English and Australian laws.
[867] The English House of Lords recently held in *Lord Napier and Ettrick v Hunter* [1993] AC 713 that the money received by the insured from the third party is subject to an equitable lien in the insurer's favour.
[868] Law Explorer, 'Subrogation, Abandonment and Double Insurance' May 2016 https://lawexplores.com/subrogation-abandonment-and-double-insurance/ accessed 5th June 2017.
[869] Olusegun Yerokun, *Insurance Law in Nigeria* (1st edn, Princeton 2013) 410.

economy. Such that insurance companies' loss will be limited, and recoveries will contribute more to the Gross Domestic Product.

5.3.2. The Insurer's Right of Subrogation against a Third Party

That the insurer is entitled to exercise his right against the third party that caused the loss is the other aspect of subrogation. In practice, subrogation rights are very beneficial to insurers such that it is a norm to include in an insurance contract, provisions or clauses for subrogation or reimbursement for payments. Thus, it is not uncommon for insurers to include both subrogation and reimbursement provisions in a policy.[870] The Nigerian insurance statutory laws with similar content in the English and Australian law expressly provide that such rights arise upon payment by the insurer in respect of the total or partial loss.[871]

The application of this second limb in insurance contracts is supportive of the goal of the indemnity principle and traditionally is used to ensure the insured does not make a profit. It bestows upon the insurer, two distinct rights. First, the insurer has a right to oblige the insured to pursue any remedy he may have against a third party for the benefit of the insurer;[872] and secondly, the right to recover from the insured any benefit received by the insured in diminution or extinction of the loss for which he has been indemnified.[873] The transference the insured's legally enforceable right to the insurer in insurance law is referred to as subrogation.

This is based on the principle that the doctrine of subrogation does not confer a new and independent right of action on the insurer, but merely gives him the benefit of any personal

[870] Johnny C. Parker, The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation (2005) 70 (3) Missouri Law Review 723.

[871] Sec 80, MIA 1961(Nig.); Sec 79 MIA, 1906 (UK); Sec 67, ICA (Aus.); Kyriaki Noussia, *The Principle of Indemnity in Marine Insurance Contract: A Comparative Approach* (Springer 2010) 218; Peter MacDonalds Eggers QC, 'The Place of Subrogation in Insurance Law: The Deception Depths of a Difficult Doctrine' in *The Modern Law of Marine Insurance* edited by Prof D. Rhidian Thomas (Informa Law from Routledge, Volume 4, 2016) 192; Susan Hodges, *Cases and Materials on Marine Insurance Law* (Cavendish Publishing Limited, 1999) 19, 25.

[872] The English decision by Kerr LJ in *MH Smith (Plant Hire) Ltd v DL Mainwaring (TLA Inshore)* [1986] 2 Lloyd's Rep 244 at 246 states that 'the right arises in any situation where a third party is liable for the loss and not simply where that liability arises in tort'. See also John Lowry and Philip Rawlings, *Insurance Law: Doctrines and Principles* (2nd edn, Hart Publishing 2005) 27.

[873] *Ojo v. Nigeria Reliance Insurance Co.* [1983] 2 F.N.R. 313 at 320; and *Castellain v Preston* [1883] 11 Q.B.D 380 still remains the classic English decision on this point; In *Sobrany v UAB Transtira* [2016] Lloyd's Rep IR 266, This was a subrogated claim by an insurer who had paid credit hire charges for the hire of a replacement motor vehicle. Per Christopher Clarke, emphasised that payment by the insurers is treated as payment by the claimant, and the insurers will have the right to pursue by way of subrogation, and in the name of the insured, any claim for damages which its insured has in respect of the indemnified loss. So there can be no question of double recovery.

right that the insured himself has against the third party.[874] Accordingly, Brett LJ's dictum in *Castellain* [875] states in broad terms that:

> *'To apply the doctrine of subrogation … the full and absolute meaning of the word is … the insurer must be placed in the position of the assured. To carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried out to this extent…that as between the underwriter and the assured, the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on or already insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured, by the exercise or acquiring of which right or condition the loss against which the assured is insured, can be, or has been diminished.* [876]

Based on this English rule, the Nigerian courts have upheld this principle consistently in settling disputes and in awarding claims, for instance, in *Kayode v. Royal Exchange Assurance*[877] and *Okpalaugo v. Commerce Assurance Ltd.*[878] A more recent English example of the insurer's right of subrogation is the case of *Caledonian North Sea Ltd v. British Telecommunications Plc*,[879] where the insurers were allowed to recover the amount paid out to the insured.

It must be emphasised that there is a clear distinction between the existence of a right of subrogation and the exercise of such right under the Nigerian laws of insurance. According to

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[874] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 393; Funmi Adeyemi, *Nigerian Insurance Law* (2nd edn Dalson Publications Limited, 2007) 253; Doris Helen Afejuku, *Motor Insurance Law in Nigeria* (Lucky Odoni (Nig) Enterprises, 1994) 109; Chioma Kanu Agomo, *Modern Nigerian Law of Insurance* (2nd edn, Concepts Publication Limited 2013) 190.

[875] *Castellain v Preston* (1883) 11 Q.B.D. 380.

[876] [1883] 11 QBD [380], [495].

[877] [1955-56] W .R .N .L .R. 154; [1958] W.R .N .L .R. 56 (S.C), the Supreme Court reversed the decision of the lower court which awarded the pre-accident value of a damaged vehicle treating it as a total loss though evidence showed it was only partially damaged and the insurer had elected to repair as it was entitled to.

[878] [1976] N.C.L.R. 273, a claim by the insured for either the cost of replacing his insured vehicle, or its market value before the accident was rejected by the trial judge because the vehicle was found to be damaged and not completely lost. It was further held that, in any event, the insured could not recover the whole of either of the amount claimed since they exceeded the maximum sum insured.

[879] [2002] UKLH 4; [2002] Lloyd's Rep. I.R.261. Here, the matter arose because of the Piper Alpha disaster when a fire on a North Sea oil rig killed many people thereon. The insured's legal liability to the dependants of the victims had been satisfied by their insurers, who then successfully claimed by way of subrogation against various contractors engaged on the project to build the oil rig who had given indemnities to the insured against their liability.

80 (1) & (2) of the MIA, 1961(Nig),[880] the right exists at the time of making the contract of indemnity while the exercise of his right is dependent on the insurer compensating the insured for the loss. In other words, the insurer's right of subrogation is triggered when the insured has been indemnified.[881] This legal position is well established and addressed by the Nigerian Supreme Court in *British India General Insurance Co. Ltd. v Kalla* [882] where the court held that the insurer's right of subrogation does not arise until he has admitted his liability to the insured and paid him the amount of his loss. Furthermore, the insurer is only subrogated to the rights available to the insured and no other.

The legally enforceable right against a third party secured by the insured can be wholly or partially transferred to the insurer depending on the circumstance.[883] Although the law is clear that the insurer can exercise his rights of subrogation upon payment of indemnity, neither the insurer nor third party can interfere with the right of the insured to claim compensation against the negligent third party that caused the loss.[884] Especially in circumstances where the loss suffered by the insured is greater than the indemnity received under the policy of insurance.

In the case of *Adelowore v Adisa,*[885] the insured claimed against a negligent *tortfeasor* for the cost of repairs and other damages sustained because of a motor accident after his insurer had paid for the cost of repairs to the damaged vehicle. The court upheld the insurer's right to claim from the insured any amount recovered from the third party to the extent of the amount by

[880] This position is enshrined in the English law set out under section 79 MIA 1906(UK).
[881] The English case of *Napier v Hunter* [1993] AC 173 has put judicial certainty on the point that full indemnity under the policy means that insurer has discharged his obligation.
[882] [1965] All N.L.R. 251. The facts of this case extracted from Omogbai Omo- Eboh, *Casebook on Insurance Law in Nigeria* (West African Book Publishers Limited 2012) 242: In November 1961, Jarmakanis Limited was adjudged liable to the respondent for damages. The insurer of the former, as appellant in this action, outrightly denied liability to indemnify the insured against the judgement debt on the ground of an alleged breach of policy condition. Subsequently, in the second half of 1962, there was arbitration between the insured and the insurer in consequence of which the latter accepted to indemnify the insured on the consideration that the insured would issue to it, a letter of subrogation with which to pursue an appeal against the decision of the trial court in its own name. Afterwards, it was revealed that in January 1962, prior to the arbitration, the insured itself had already given up an appeal against the respondent following an agreement reached between them. The Supreme Court judges held that the subrogation right of the insurer did not arise until it paid the judgment debt in the second half of 1962. The insured, however, had already abandoned his right of appeal against the respondent earlier in January of that year, therefore, there ceased to be any right which the insurer could be subrogated to in that respect.
[883] Ray Hodgin mentioned that the legally enforceable rights would cover '*all widest possible rights'*; Ray Hodgin, *Insurance Law Text and Materials* (2nd edn Cavendish Publishing Limited 2002) 642.
[884] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 385; The same position in Australia in *The Owners Strata Plan 66601 v Majestic Constructions Pty Ltd & Ors* [2008] NSWSC 735 at [18].
[885] [1979] N.C.L.R.404 at 406; *America International Ins Co. (Nig) Ltd v Edo Agencies Nig. Ltd.* (1980) O. G. S.L.R. 31.

which the insurer had indemnified the insured. The court, however, allowed the insured to recover damages in full for the loss against the third party.[886]

5.4. Controversial issues Arising from the Application of Subrogation Rights

The concept and components of subrogation discussed above appear simple in theory; however, the practical application of the principle affects the rights of parties for recoveries. The areas examined in this section relates to (i) when an insurer can exercise his subrogation rights; and (ii) the allocation of policy proceeds, mainly where there is a shortfall in recovery from the third party. Based on judicial practice, the application of subrogation rights ignores its real purpose of preventing a double indemnity but strips the assured of any benefits at all arising from the total loss even where a potential claim against a third party has been compromised. The detailed investigation of weaknesses of this point under the Nigerian laws are critically examined. Also, the English and Australian approaches are analysed to determine whether their rules comply with the principle of indemnity, which could be adopted to strengthen the Nigerian laws.

5.4.1. Insurer's Pre-requisite for Recovery: Full indemnity or Policy Limit?

There are many questions and different conflicting opinions regarding when an insurer can exercise his subrogation rights to recoup what has been paid.[887] This is because it is unclear if whether indemnity refers to the totality of the insured's loss or to that part of the insured's loss, which is acknowledged by the policy? This controversy leads to the debate on the concept of 'full indemnity' in the context of subrogation. By implication, specific clauses included in an

[886] The court in *Adelowore v Adisa* [1979] N.C.L.R.404 at p. 405 emphasised that '*If a person suffered a loss for which he can recover against a third party and that person has insured himself against such a loss, the insurer cannot avoid liability on the ground that the insured had a claim against the third party. Conversely, a third party cannot avoid liability on the ground that the insured had been or will be adequately compensated by his insurer'.*

[887] The point at which the insurer's right of subrogation is noteworthy for Nigerian insurance companies because it serves as a determining factor on the following: assumption of control of efforts to recover monies from a negligent third party, to appoint a lawyer, to decide what form of alternative dispute resolution (ADR) to adopt, and to make a decision regarding the settlement. To emphasise on the ADR aspect, often in Nigeria, the most popular, less cost effective and fastest mode of dispute resolution is Arbitration, Mediation or Negotiation. Based on statistics the cost of litigation especially on contracts is more expensive and parties would rather opt to resolve disputes through a neutral third party. Dr Emilia Onyema, The Multi-door Court House (MDC) Scheme in Nigeria: A Case Study of the Lagos MDC (2012) <https://eprints.soas.ac.uk/14521/1/Final_Report_on_LMDC_2012.pdf> accessed 10 Sept 2018 where the writer opined that 'Mediation is without doubt the preferred alternative dispute resolution process under the LMDC scheme'.

insurance contract or type of losses can alter the meaning of indemnity before the insurer is subrogated.[888]

It is generally acknowledged that the application of the doctrine of subrogation often occurs at the expense of the insured, to prevent the insured from obtaining more than full indemnity or making a profit. Notwithstanding, it is settled law in Nigeria and England that the insured cannot be deprived of an indemnity as the result of the enforcement of subrogation rights by the insurer.[889] The insurer cannot exercise any right of subrogation until he fully performs his obligation to indemnify the insured. The provisions of Sec 80 MIA 1961(Nig) provides:[890] 'Where the insurer pays *(reinstates or repairs)* for a total loss… of the subject-matter insured, he thereupon becomes entitled to take over the interest of the insured in whatever may remain of the subject-matter so paid for…'[891] Furthermore, the Nigerian Supreme Court's decision in *British India General Insurance Co. Ltd. v. Kalla,*[892] reiterates that the insurer's right of

[888] For instance, where the insured is **underinsured**, according to the provisions of sec 82, MIA 1961(Nig); Sec 81, MIA 1906(UK.); For example, the property insured for £200 is worth £400 or costs **£**400 to replace. If the property is destroyed, is it sufficient for the insurer to pay £200 which is the value covered by the policy, and thereafter recoup from the insured additional sums or balance of £200 received from the negligent third party responsible for the loss on the ground that, the insured has been fully indemnified under the terms of the policy? Another example concerns where the policy contains an **excess clause or deductibles**, of which the insured bears a certain percentage (say 10%) of any loss. If he recovers (the loss he bears) from the party responsible for the damage, is he accountable to the insurer for payments received from third parties to cover his excess? This was the main issue in *Napier v Hunter* [1993] AC 713; The third situation concerns consequential losses for example, where a car insured is damaged in an accident, and is repaired or reinstated by the insurer. After that, the insured recovers sums from the third party responsible for the damage to cover his **consequential losses** for which he was not insured such as the cost of hiring a substitute car or taxi fares incurred, and if the insured needed his car for business purposes, loss of profit while his car was out for repairs. As was the case in *Hobbs v Marlowe* [1977] 2 All E.R. 241. These situations are examined in in section 5.4.2. of this section.

[889] The leading Nigerian case is *Adelowore v. Adisa* [1979] N.C.L.R. 404, 406. In this case, the plaintiff's insured car had been damaged in an accident due to the negligence of the defendant. After the cost of repairs to the damaged car had been paid to the insured by his insurer by way of indemnity, he then brought this suit against the defendant, claiming the cost of repairs to his car and general damages. The court held it is not open to the defendant to resist this claim on the ground that his insurers had fully indemnified the insured. Upon the settlement of an insurance claim, an insurer becomes entitled to receive the benefit of rights and remedies which the insured may have against a third party. Where, however, as in the circumstances of this case, the insured has exercised the rights, the insurer can recover such compensation from the insured. Gomes J, held that the plaintiff is entitled to the sum of ₦1,264.62, but the insurance company has a right to claim this amount back from the plaintiff after having his car repaired by the insurance company to be paid a sum again with respect to the same repairs.

[890] Similar provision in England. See Sec 79 (1) & (2), MIA 1906 (UK); Similarly, the common law statement made by Brett L.J. in *Castellain v Preston* [1883] 11 Q.B.D. 380 that an insurer *'cannot be subrogated into a right of action until he has paid the sum insured'* would seem to indicate that his Lordship thought that a full indemnity for the insured's loss is required before the insurer can enforce its right of subrogation.

[891] Emphasis in *Italics* are the author's words. This is because payment is not only limited to monetary terms.

[892] [1965] 1 All N.L.R. 240 at 241, Per Sir Vahe Bairamian J.S.C.

subrogation does not arise and cannot be exercised until 'the insurer has admitted their liability to the assured and paid him the amount of his losses.[893]

Thus, it is essential to have a clear understanding of how to interpret this concept best whether to mean a full indemnity for all losses (both insured or uninsured) or an indemnity to the extent of the policy limits is required before the insurer may insist on exercising its right of subrogation. Hence, the concept of indemnity for subrogation actions can be interpreted in debatable diverse contexts. For example, the English Court of Appeal in *Scottish Union & National Insurance Co v. Davis* [894] refused and rejected a claim to the insurer for failure to pay the insured in respect of the loss. From the basis of *Scottish Union & National Insurance Co v. Davis* [895] decision, the fundamental prerequisite for the insurer's assertion for a right to be subrogated under marine and property insurance contract is that he must fully perform his obligation. However, doubts have arisen as to whether the insurer is said to have entirely performed his obligation where the insured has been fully indemnified for his actual losses, and the loss exceeds the sums payable by the insurer under the policy, alternatively, in cases where there is an excess clause inserted in the policy or consequential losses recouped by the insured or on valued policies. There is a wealth of support for the notion that the insured must fully be indemnified for his total loss.[896]

[893] This also includes that an insurer liable to pay under the policy for different types of loss to the assured, must pay for all types of damage before he can be subrogated to any particular right of the insured. By way of example, an insurer will not be subrogated to the rights of the assured in respect of damage to the car where a motorist takes out a policy covering third party liability, personal injury to himself and injury to his car, unless he has made full payment in respect of each head of liability under the policy.

[894] [1970] 1 Lloyd's Rep. 1, on the facts, the defendant insured's damaged car was handed to a garage for repair with the consent of the insurers. After three attempts at repair by the garage, the insured was not satisfied with their work and took the car elsewhere. The garage nonetheless sent their bill to the insurers who paid it without getting a satisfaction note signed by the insured. The latter then recovered compensation from party originally responsible for the damage and used this money to repair the car properly. The insured thereafter claimed the latter sum which was rejected by the Court of Appeal based on the fact that the insurer had not yet fully indemnify the insured to trigger their rights of subrogation. See also similar decision in *Page v Scottish Ins Corp* (1929) 33 L1 L Rep 134, 138.

[895] [1970] 1 Lloyd's Rep. 1.

[896] J Birds, 'Insurance: Subrogation in the House of Lords', (1993) Journal of Business Law 294; M Hemsworth, 'Subrogation: the Problem of Competing Claims to Recovery Monies' (1998) Journal of Business Law 111; A Tarr, 'Subrogation and the Ash Wednesday Bushfire Disaster', (1987-1988) 11 Adel. L.Rev. 232; Malcome A Clarke with Julian M Burling and Robert L Purves, *The Law of Insurance Contracts* (6th edn, Informa 2009) 1029-1030; John Birds, Ben Lynch and Simon Paul, *MacGillivary on Insurance Law* (1st Supp 14th edn, Sweet & Maxwell 2019) 733; John Birds, *Birds' Modern Insurance Law*, (11th Edn, Sweet & Maxwell 2019) 339; Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 388; G Veal, 'Subrogation: The Duties and Obligations of the Insured and Rights of the Insurer Revisited', (1992) 28 Tort & Ins.L.J 69, 74.

Similarly, in *Page v Scottish Ins Corp*,[897] the English court left open the question of whether the insurer 'is not subrogated though he has paid the whole amount due on his policy if the insured has a further loss.' It was not clear from earlier authorities,[898] whether the insured must merely be fully indemnified within the terms of the policy before a duty to account to the insurer arises, or whether he must be fully paid even though some of those losses are not covered under the policy.

The current position is that subrogation rights are only exercisable upon payment as required by the policy, regardless of whether the insured has sustained other losses or if the actual loss exceeds that figure.[899] The Australian approach to the dilemma of the concept of full indemnity was considered in *State Government Insurance Office (Qld) v Brisbane Stevedoring Pty Ltd ('Brisbane Stevedoring'*) with strong assertions that 'it is settled law that an insurer who has paid the amount of a loss under a policy of indemnity is entitled to the benefit of all the rights of the insured in the subject matter of the loss and by subrogation may enforce them…'[900] While the position is criticised because the insured is allowed to bear some losses, however, one point is that the insurer must pay under the policy first. The insured must be made whole under the policy, and it could be argued that the made whole or full indemnity doctrine is a doctrinal weapon used to curb the harsh effect of subrogation on the rights of the insured where insurers seek to outplay the insured. As a result, the common law developed the made whole

[897] (1929) 33 L1 L Rep 134, 138; 140 LT 571, 576 where, the defendant drove the insured's Buick negligently and damaged not only the Buick but also a passing Rolls Royce. With the consent of the insurer the defendant himself repaired the Buick and then, as repairer, claimed the cost from the insurer, who counter-claimed in the name of the insured for the same sum from the defendant, as wrongdoer. However, pending settlement of a claim by the owner of the Rolls Royce, the insurer had yet to pay the insured. The defendant's plea, that the insurer was not subrogated to the rights of the insured until he had paid the insured, was upheld by the Court of Appeal; See also A Brown, 'An Insurer's Rights in Litigation or Contractual Subrogation: An Oxymoron?' (1996) 8 Ins.L.J. 60; A Green, Strengthening the Insurer's Subrogation Rights', (1995) 3 (10) Int .I Lr 348, 349; S. R. Derham, *Subrogation in Insurance Law*, (The Law Book Company Limited, 1985) 51-56 for an in-depth discussion on old English and Canadian Conflicting authorities in relation to the question of whether a full indemnity or an indemnity to the extent of the policy limits is required before the insurer may insist on exercising its subrogation rights; Howard Benneth, *The Law of Marine Insurance* (2nd edn, Oxford University Press, New York 2006) 779 paras 25.11.

[898] *Scottish Union & National Insurance Co v. Davis* [1970] 1 Lloyd's Rep. 1*; Page v Scottish Ins Corp* (1929) 33 L1 L Rep 134, 138; 140 LT 571, 576.

[899] *Lord Napier and Ettrick v Hunter* [1993] AC 713; Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 383.

[900] (1969) 123 CLR 228; In *Speno Rail Maintenance Australia P/L v Metals & Minerals Insurance P/L* [2009] WASCA 31. Beech AJA (as he then was) stated: 'There is a formidable body of judicial statements … to the effect that the payment or offering of a full indemnity by an insurer, at least to the full extent covered by the policy, is a pre-condition to the exercise by the insurer of a right of subrogation.' Per Chief Justice Sir Garfield Barwick.

doctrine, which limits the use of subrogation before an insured party receives full compensation for damages.[901]

There are two justifiable reasons why the insured should be fully compensated for his actual losses as a pre-requisite for the insurer's recovery. First, the principle of subrogation is a derivative of the principle of indemnity. Thus, while the purpose of indemnity is to make the insured whole and not more than whole, subrogation assists in ensuring that the insured is not unjustly enriched. Therefore, it is only when the insured is over-compensated (payment from his insurer and the negligent third-party) that subrogation attaches. This circumstance should be the basis of any rule or principle derived or applied to any subrogation cases. If any rule then deprives the insured of obtaining full indemnity for all actual losses then, it is wrong.[902]

Second, the insured must be made whole for all losses before the insurer can recover anything from the third-party wrongdoer because that is the optimal risk which the insurer has agreed to bear based on the contract. As a legal writer puts it, the insured is risk-averse while the insurer is risk-neutral.[903] Thus, if the insurer has received premium to cover the risk for the insured, that must be a solid foundation for full compensation, irrespective of further rights which the law bestows on him for recoupment. Moreover, an insurance contract contains a basic promise to pay in the event of the insured loss occurring, which should be subordinated to the insured's right to full compensation.[904] Meaning, the obligation of the insurer must be performed first. Hence, when the whole money recovered from the third party as compensation and policy proceeds is less than the insured's total loss, the question of who goes unpaid arises as between the insured and insurer. It is suggested that for equitable reasons, the insurer should bear the loss. This suggestion is based on the fact that the insurer has been paid by the insured to assume

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[901] Johnny C. Parker, The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation (2005) 70 Mo. L. Rev. 723; John Lowry, Philip Rawlings and Robert Merkin, *Insurance Law, Doctrines and Principles* (3rd edn Hart Publishing Oxford and Portland Oregon 2011) 353; A Tarr, 'Subrogation and the Ash Wednesday Bushfire Disaster' (1987-1988) 11 Adel. L.Rev. 232

[902] Brett L.J in his classic judgment in *Castellain* held that: "*if ever a proposition is brought forward which ... will prevent the assured from obtaining a full indemnity ... that proposition must certainly be wrong*."

[903] Alan O. Sykes, Subrogation and Insolvency (2001) 30 (2) The Journal of Legal Studies, 383,385; In this context that the insured is risk-averse refers to a situation where the insured party is willing to assure against a potential loss, but will pay only up to a certain price for this insurance; while insurance companies that take on purely risky customers will still be risk neutral as they will raise the premiums to offset the extra risk; As argued in E Rinaldi, 'Apportionment of recovery between insured and insurer in a subrogation case', (1993-1994) 29 Tort & Ins. L. J. 803, 808-809 '*Premium is a sufficient valuable consideration which is paid to the insurer for his promise of making payment in the event of loss. Where there is no third party involved, or the subrogation rights are not available to the insurer premium is the only benefit the insurer can obtain. Where the third party wrongdoer is insolvency or incapable of compensating the insured, the insurer must also bear the loss'*.

[904] Johnny C. Parker, The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation (2005) 70 Mo. L. Rev. 723,758.

the risk in the event of any losses. Therefore, if the burden of becoming uncompensated rest on the insured, it is unfair.

If there is any surplus or excess above the insured's actual total loss (i.e. where the sum combined of the recovery from the third-party wrongdoer and payment by the insurer exceeds the insured's total loss), the surplus is recouped by the insurer. It is only the surplus, and not the total money recovered that diminishes or reduces the insured loss. When the insured has not received a full indemnity, there is no unjust enrichment through the combination of both the insurer's payment and compensation from the third-party wrongdoer. By the same token, it is the insurer who is unjustly enriched at the expense of the insured by gaining a windfall if allowed to receive both subrogation rights to recover monies from a third party and retention of the premiums paid by the insured, where the insured is yet to be fully compensated.

There are some authorities in many jurisdiction's laws which support the view that the insurer is not entitled to any subrogation recovery until the insured has been fully indemnified. An Irish authority on this point is *Driscoll v Driscoll,*[905]which states '*the foundation of the doctrine of subrogation is to be found in the principle that no man should be paid twice over in compensation for the same loss. The corollary to this is that a contract of indemnity against loss should not have the effect of preventing the insured from being paid once in full*…'

In the Australian case of *AFG Insurances Ltd v Mayor, Councilors and Citizens of City of Brighton,*[906] it was emphasised that an insurer is not subrogated to those rights of the insured '*when the continued enjoyment of those rights by the insured is not inconsistent with the principle of indemnity.*' Thus, the High Court of Australia held that the doctrine of subrogation must not be allowed to infringe the principle of indemnity so that the exercise of the right would result in the insured being less than fully indemnified for his or her losses.

In Canada, the Supreme Court in *Ledingham v. Ontario Hospital Services Commission*,[907] took a further step to protect the insured's right to receive full compensation for damages. Based on

[905] Per O'Connor M.R remarked in *Driscoll v Driscoll* [1918] 1 I.R 152,159 '*an insurer, having paid out in respect of damage to insured property, sought to be reimbursed from an amount recovered by the policyholder from a lessee under a covenant to repair. The insurer contended that whatever sum was recovered by the policyholder should go to reimburse insurers, irrespective of whether the policyholder had been fully indemnified in respect of the loss. The policyholder, on the other hand, maintained that he was not obliged to contribute anything to the insurer until he was fully compensated'.*

[906] (1972) 126 CLR 655 at 663-664, per Mason J.

[907] (1974) 46 D.L.R. (3d) 699.

equity, the court dismissed the statute-based subrogation right of the insurer, which gave him the right to share with the insured in any amount recovered from a third party. The court held that no special meaning could be given to subrogation as none was expressed in the statute and that the Commission had no claim until the insureds had recovered complete indemnity from the third party. This is so because the subrogation had the ordinary meaning assigned to it by equity and where the insureds are not fully compensated, there is no unjust enrichment or other equity capable of supporting a claim by the Commission to share *pro rata* with them.[908]

Similarly, in *The National Fire Insurance Company v McLaren,*[909] it was held that an enforceable right of subrogation does not arise until the insured has been fully indemnified for his loss. Another case law in support is the *Ontario Health Insurance Plan v. United States Fidelity & Guarantee Co* [910] where the court held that full indemnity for the insured's total loss was fundamental to the exercise of subrogation rights, this view is submitted does protects the insured in many respects but to a greater degree seems harsh on the insured. Given the circumstance, several provincial legislation has modified the common law position. For instance, in British Columbia, payment or assuming liability under the policy allows for the exercise of subrogation rights.[911] In the US, most court decisions also support the view that the insured should be fully indemnified. Several courts insist that the insured be made whole before the insurer receives anything despite a seemingly clear provision to the contrary in the contract.[912]

It is clear that judicial decisions seek to preserve the principle of indemnity when interpreting the rights of the insured concerning subrogation. The insurer is entitled to step into the insured shoes and exercise his subrogation rights, only if the insured has been fully indemnified for his loss. The equitable principle not only justifies the insured's full compensation but recognises

[908] (1974) 46 D.L.R. (3d) 699,701.
[909] (1886) 12 Q.R. 682.
[910] (1989) 68 O.R. (2nd) 190 (ONCA).
[911] Insurance Act, RSBC 2012, C 1, s 36(1).
[912] In *Garrity v. Rural Mutual Insurance Co*., 77 Wis. 2d 537, 253 N.W.2d 512 (1977) the insured's loss exceeded the amount recoverable under a standard fire insurance policy. The Supreme Court of Wisconsin held that the insured is 'entitled to be made whole before the insurer may share in the amount recoverable from the *tortfeasor'*. The Court emphasised that it was the insured who had priority to the amount recoverable from the *tortfeasor,* notwithstanding the payment of a full indemnity in terms of the policy; In *Duncan v. Integon General Insurance Co. 482 S.E. 2d 325 (Ga. 1997)* The court held that in the absence of the insurance policy limiting the insured's right to complete compensation, it must be strictly construed against the insurer. As a consequence, the insurer is not entitled to any recoupment until its insured has received full compensation for his loss.

the insurer's subrogation rights to be exercised in a case of the insured receiving double recovery.

5.4.2. Allocation of Subrogation Recoveries (Nigerian, UK and Australian Approaches)

The most problematic aspect of insurance subrogation which often causes legal disputes is the distribution of subrogation recoveries. In practice, the issue of allocation comes into question because insurance proceeds frequently do not compensate fully for damages sustained as a result of a loss. Where the insured has recovered from the third party a sum representing all or part of the damage caused by the third-party wrongdoer, the question arises of how the subrogated recoveries are to be distributed between the insured and the insurer. On this basis, when the insured is not fully reimbursed for the loss under the policy, there is a split of authority among jurisdictions as to whether the insurer or the insured has a superior interest in amounts recovered from third-party tortfeasors.[913]

As outlined below, a number of jurisdictions have different rules and approaches to this point. For some, the insurer rank in priority, while the insured bears the ultimate risk; others favour the insured's losses and allow recoveries based on the indemnity principle; while some are in between. This section, therefore, examines in details a critique of how subrogation rules are applied where there is a competing interest. Notably, in situations where the insured is underinsured; or where there is an excess clause contained in the contract of insurance; or valued policies peculiar to marine insurance and where third parties' recoveries are not sufficient to make the insured whole.

However, the Nigerian Insurance Law does not in any way address this question. Thus, this section is aimed at critically investigating the Nigerian laws on this problem and its implication

[913] Keeton, a leading authority in the field of insurance has summarised three approaches: The possible approaches and rules include: (i) that the insurer is to be reimbursed first out of the recovery from the third party for the full amount of the insurance benefits paid to the insured, and the insured is then entitled to any remaining balance (pro tanto rule); (ii) the recovery from the third person is to be prorated between the insurer and the insured in accordance with the percentage of the total original loss for which the insurer provided indemnification to the insured under the policy (pro rata rule) and (iii) that the insured is to be made whole by being reimbursed first out of the recovery from the third party for any loss that was not covered by insurance, the insurer is then entitled to be reimbursed fully, and the insured is entitled to anything that remains from the amount paid by the third party so that any surplus goes to the insured. Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016) 203.

on the indemnity principle for omitting this aspect. In England, the distribution of subrogation recoveries has been disputed strongly, however, there are leading judicial decisions that have partially resolved the issue.[914] On the other hand, Australian law seems to be more robust and comprehensive with rules that favour the insured's interest in compensation of actual losses.[915] For this reason, the Nigerian law is discussed with reference to the English and Australian laws, to suggest which approach is consistent with the indemnity principle.

5.4.2.1. The Nigerian Approach

Under the Nigerian laws, if the insurers have met their obligation under the policy, they acquire a right of monies recovered or recoverable from third parties, which reduced the insured loss through subrogation actions, and are entitled to exercise their rights of subrogation.[916] Thus, following the payment of indemnity, the proceeds of any recovery against third parties are shared between the insured and the insurer. While Sec 80, MIA 1961 (Nig.), recognises the rights of subrogation, it does not provide a specific rule on how subrogation monies are to be applied where there is a competing interest between the insured and insurer. Bearing in mind the principle of indemnity, the insured's right under the insurance contract to recover full indemnity for losses must not be affected by the insurer's right of subrogation.

Consequently, in the Nigerian rules, certain provisions exist that stand as a barrier for allowing the insured to recoup his actual financial losses. While, judicial practices are solely dependent on the English court decisions, however, as will been seen some of the English laws and approaches used as a model are inconsistent with the principle of indemnity and penalises the insured unjustly for actual losses. Also, some of the rules enacted in the 1961 MIA(Nig.) are interpreted differently without understanding the origin and intent of such provisions. Similarly, certain problematic situations in subrogation are not explicit, and the Nigerian insurance law drafters have only limited subrogation rules to only when the insured has been fully indemnified. However, this is not always the case of the not so simple practical issues which might cause conflict or legal actions between the insured and the insurer and even a third party both in general and marine insurance.

[914] See later section 5.4.2.3. for discussions on English cases.
[915] See later section 5.4.2.4. for discussions on the Australian rules.
[916] Sec 80, MIA 1961 (Nig.).

It might be difficult to find a solution to satisfying the insured losses not covered in a policy because the principle of subrogation is a rule in favour of the insurers or underwriters. More seriously, when monies received from the third-party wrongdoer is not sufficient to compensate the insured for total losses, there is no specific authority on how to deal with such competing interests under the Nigerian law. Neither has the Insurance Consolidated Bill 2016 injected certainty in this area of insurance law.[917] Thus the courts will struggle with these uncertainties. Many of the judicial decisions are interpreted based on the individual judges' perception of what is equitable or inequitable. In which in most circumstances leaves the insured in a worse position preceding the loss and creates several avenues that expose the weaknesses of the doctrine of subrogation under the Nigerian law that undermines the principle of indemnity. The Nigerian general rules are critically examined as follows:

5.4.2.2. General rules on Allocation of Recovered Funds: Who Ranks in Priority?

Under the Nigerian laws, five guiding rules apply concerning ascertaining competing interests between the insurer and insured from subrogation monies.

(i) Where a loss occurs and affects the subject-matter insured, the insurer or third-party wrongdoer, cannot interfere with the insured's ability to claim compensation against the wrongdoer. [918]

(ii) The insured is entitled to be fully indemnified under the policy as a pre-condition for the exercise of the insurer's right of subrogation.[919]

(iii) Where there is a surplus from the recoveries received from the third- party wrongdoer, the insured is allowed to retain the excess after the insurer has recouped the amount paid under the policy.[920] This is based on the principle that the insurer is limited to the amount paid out.

(iv) Where there is an excess clause or deductible inserted in the policy, the insured bears the portion of the excess, while the insurer is compensated fully for his losses.[921]

(v) In the case of a valued policy, the agreed value is conclusive.[922]

[917] See later discussions in sec 5.8, of this chapter.
[918] *Adelowore v. Adisa* [1979] N.C.L.R. 404; Sec 80 MIA 1906 (Nig.).
[919] *British India General Insurance Co.Ltd. v Kalla* [1965] 1 All N.L.R. 240 at p. 241, per Sir Vahe Nairamian J.S.C. The Nigerian Supreme court held that the insurer's right of subrogation does not arise until '*the insurers have admitted their liability to the insured and paid him the amount of his loss'.*
[920] *Yorkshire Insurance Co v Nisbet Shipping Co* (1962) 2 Q.B. 330.
[921] Sec 82, MIA 1961 (Nig.).
[922] Sec 29, MIA 1961 (Nig.).

Concerning these rules, the following situations occur in relation to instituting an action for monies received as compensation from a third party or making claims: (i) where the insured has been fully indemnified, and the insurer has recouped his payment, but the recovery proceeds provide a surplus; (ii) where there is an excess clause that limits the insured's interest in the recovery; and (iii) where parties have agreed beforehand on the value of the insured subject matter.

(i) The insurer cannot interfere with the insured's ability to recover for losses

In the case of *Adelowore v. Adisa,*[923] the insured claimed against a negligent *tortfeasor* for the cost of repairs and other damages sustained as a result of a motor accident after his insurer had paid for the cost of repairs to the damaged vehicle. The court upheld the insurer's right to claim from the insured any amount recovered from the third party to the extent of the amount by which the insurer had indemnified the insured. The court, however, allowed the insured to recover damages in full for the loss against the third party. It was held that:

> *'if a person suffers a loss for which he can recover against a third party and that person has insured himself against such a loss, the insurer cannot avoid liability on the ground that the insured had a claim against the third party. Conversely, a third party cannot avoid liability on the ground that the insured had been or will be fully compensated by his insurer'.*[924]

Also, to the above principle of law, the decision in both *Oloruntade v. Dantodo* [925] and *Bakare v. Solel Boneh* [926] , the sums recovered from third parties after their insurers had indemnified the respective insureds were said to be held in trust for the insurer who may or may not claim it. However, one problem which Nigerian insurers might face in practice is that having paid the insured for his loss, he is unlikely to be aware of the subsequent action and recovery by the insured to claim at least, what it had paid, in which case the insured is compensated twice in some respect for the loss.[927] This approach is a clear violation of the principle of indemnity.

[923] [1979] N.C.L.R. 404.
[924] *Ibid.*
[925] *Oloruntade v. Dantodo* [1976] N.C.L.R 57.
[926] *Bakare v. Solel Boneh* [1980] O.Y.S.H.C. 503.
[927] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 387.

In the same vein, the judge in *Adelowore v. Adisa*[928] looked for a practical way to protect the insurer's interest as a result ordered that a copy of the judgment in the insured's action against the negligent third party should be sent to the insurer and that the insurer's name be given to the court so that he might be informed of what had transpired. The rationale behind this decision espoused by the court was that 'it will be wrong for the insured after having his car repaired by the insurance company to be paid a sum again concerning the same repairs.[929]

(ii) Destination of Surplus where subrogation proceeds are greater than insured's total loss

The question of whether an insurer who has paid out a full indemnity to the insured, can under any circumstance recover more than he paid out is necessary to be considered. Under the Nigerian rules, the answer is in the negative. The principle is clear that if there is a surplus after the insurer has recovered the money paid out to the insured upon a loss, the insured is entitled to keep the surplus. The authority is the common law rule which applies in Nigeria is *Yorkshire Insurance Co v Nisbet Shipping Co.*[930] Here the excess was given to the insured on the principle that the insurer is not entitled to recoup more than that which has been paid under the policy.

The case raises interesting points on how the court interpreted the meaning of subrogation to suit the insured. The court construed the decision in *Yorkshire* by relying on the English sec 79(1) MIA 1906 in support of their decision. The section is the same as sec 80(1) MIA 1961 in Nigeria.[931] The interpretation of subrogation meant that the insured could recover from his insurers no more than the loss he has suffered. However, if the assured recovered from a third party, a sum above that loss, the insurer's right would be limited to the sum paid by the insurer to the assured.[932] Thus, while the insured had been fully paid for the total loss, an addition was given again as the remainder of the subrogated sums. This amounted to a benefit in the hands of the insured which negates the purpose of subrogation, insurance and indemnity.

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[928] *Adelowore v. Adisa* [1979] N.C.L.R. 404.
[929] *Ibid* 404 at 406.
[930] (1962) 2 Q.B. 330, where Yorkshire Insurance paid Nisbet for the loss of its ship in a 1945 accident with a Canadian vessel. Yorkshire paid Nisbet £72,000 under the policy, but the actual value of the ship was around £75,514. In 1958 when the Canadian Government, the tortfeasor, finally paid the value of Nisbet's ship in dollars, the pound had been devalued and the dollars were worth £126,971. Both Yorkshire and Nisbet claimed the £55,000 difference.
[931] See sec 5.2.1 for the legislative framework of subrogation in Nigeria.
[932] Chioma Kanu Agomo, *Modern Nigerian Law of Insurance* (2nd edn, Concepts Publication Limited 2013) 192; Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 390.

It is suggested that to determine which rule better implements the principle of indemnity, the insured's interest must first be considered. If the insured has been fully indemnified for his actual financial losses, then the insurer should be reimbursed next. Therefore, when both parties have been fully indemnified, it is suggested on strong grounds that the fruit of the excess subrogation monies should not be given rigidly to the insured, but the court should be flexible in distribution on equitable grounds because there are circumstances in which the insurer may deserve part of the excess. Many factors must be taken into consideration (i) whether the insurer has been indemnified fully both for the effects of inflation and also for being deprived of the use of the money in the period following indemnity; and (ii) the proportion of amount invested into administrative and litigation cost if the insurance company initiated the action.[933] On this basis, it is suggested that this common law rule should be reversed.

(iii) Who bears the loss where the policy contains an Excess Clause or deductible?

Where the subject matter is fully insured, the insured shall be fully indemnified for his actual total loss. Hence, these questions do not arise. The situation that creates some difficulty is where the policy contains an excess clause or deductibles. For instance, where an insurance policy contains an excess clause by which the insured bears a certain percentage (of about 10%) of any loss occurring while the insurer only pays the balance above that percentage.[934] Would the insurers be permitted through subrogation to recover from the insured any payments received by him from third parties to cover his excess? The Nigerian law does not provide a solution to how subrogated proceeds will be shared where the policy contains an excess clause. Thus, the uncertainty is whether it is equitable for the insured to suffer the percentage he has agreed to bear even when he is yet to be fully indemnified for his total losses.

By definition, an excess clause stipulates that the insured is to bear a named amount of any loss, expressed either as an amount of money or as a named percentage. In *Great Nigeria Insurance Co. Ltd. v. Ladgroups Ltd.*,[935] the necessary elements of an excess clause for the party relying on it to plead it precisely in its claim were explained by the courts. Similarly, in *K. Chellarams Ltd v Palm Line Agencies Ltd.*,[936] the insured was made to bear part of the

[933] Although cost of litigation was ignored in the case of *Yorkshire case.*

[934] An example of an excess clause in an insurance policy is extracted from the case of *Calliden Insurance Ltd v Chisholm* [2009] NSWCA 398 'Where an Excess is shown in the Schedule or within Your Policy wording... you must first bear the amount of the Excess for each and every claim arising out of the one event or occurrence before becoming entitled to cover under Your Policy.'

[935] [1986] 4 N.W.L.R.

[936] [1974] 1 W.L.R. 909.

excess. Such clauses may confer on the insurer the right to exercise rights of subrogation before fully indemnifying the insured or after indemnifying him partially.[937]

The latest English model for allocation of recoveries where there is excess is the case of *Napier v Hunter*.[938] This principle will be persuasive and applied by the Nigerian courts. The decision in *Napier* places the insured last in the chain in priorities. Accordingly, if the assured obtains a policy for £1000 in excess of a deductible of £100, and suffers a loss of £1500 only £800 of which is recoverable from the third party, the £800 is allocated first to the assured for his uninsured loss as the notional top layer insurer (£400), then to the insurers (£400), with the deductible being borne by the assured himself. Arguably, the English court has misinterpreted the very essence of including an excess clause in the policy. The real intention of the insured and the insurer to the risk under an excess clause should be considered. It is hard to say that this risk is assumed by the insured, because the excess clause is stipulated not by the insured but by the insurer, in order to reduce transaction costs and to encourage the insured to be risk-averse.[939] Although the insured does agree to bear that layer of risk when making a claim against the insurer for the insured loss, it is arguable whether he intends the subrogation sum recovered from the wrongdoer to go to the insurer first, leaving himself under-compensated.

Another situation is where the insured bears the consequential losses. For instance, in the case of *Edema v. Express Insurance Co. Ltd.*,[940] the plaintiff assured sued the defendant company for the sum of ₦10,000, being special and general damages suffered by him as a result of the company's failure to indemnify him under a comprehensive motor policy he took with the defendant on his Peugeot 504L when his vehicle, which he insured through the Commonwealth Agencies of Ife, was stolen on December 25th 1980 at Lagos. The plaintiff claimed ₦3,500 as the value of the said vehicle, ₦2,730 for loss of use of the vehicle - that is ₦10 per day for 270 days, from January to September 1981 - and ₦3,770 as general damages. The plaintiff also claimed further N10 per diem as loss of the vehicle from the 1st day of October 1981 until the date of judgment. Amongst other contention, the defendants raised an argument that the consequential loss is not payable under the policy. The court gave judgment to the plaintiff and

[937] Birds 'Contractual Subrogation in Insurance' (1979) JBL 124; Brown, 'An Insurer's rights in litigation or Contractial Subrogation an Oxymoron?' (1997) 8 Ins.L.J. 60.
[938] *Napier and Ettrick (Lord) v Kershaw* [1993] 1 All E.R. 385.
[939] In M.A Clarke, The Law of Insurance Contracts, (6th edn, Infoma, 2009), 1029 the author noted that in most policies issued by insurance companies, that without an excess, the cover would cost more, so the insured does agree to bear that layer of risk, but not for subrogation purposes.
[940] (1985) 1 Nig. Bul. C.L 76 (Suit No. 1/36/81 of 24th May 1981 of Ibadan High Court).

awarded him ₦3,500,[941] being the insured value of the vehicle with ₦3,000 costs, but rejected the claim for the consequential loss because it was exempted under the policy. This work submits that the judgement seems to be unfair and harsh on the insured.

In common law countries, like England and Nigeria, most policies are issued and drafted without explanations of the effects of specific clauses and how it might affect their subrogation rights. Neither are the insured well knowledgeable about insurance laws. Thus, when agreements are made, the insured becomes bound without knowing the implication of excess clauses. Therefore, penalising the insured and giving the insurers priority against subrogation proceeds is inconsistent with the principle of indemnity for preventing the insured from recovering his actual financial loss. The insured is placed in a worse position, by stripping him or her of what would make him whole. Further discussions are made in this chapter to determine which law better suits this situation.

The Nigerian approach in treating the insured last undermines the essence of the fundamental principle of indemnity. The goal of subrogation as a corollary of indemnity is to prevent unjust enrichment or double recovery and not to prevent the insured from obtaining full compensation for actual losses. The implication of the common law rule and Nigerian court's interpretation of excess clauses is that after the insurer has fulfilled his side of the bargain, he recovers first from the subrogation monies, and there is usually nothing left to make up of the insured's total losses. It is argued that where the insured is not unjustly enriched, then he should receive the first call of recovery with the remainder going to the insurer. Similarly, if there is nothing left for the insurers, then there should not be a problem, because that is the risk which they have assumed to bear.

The second reason why the insured should have priority is that the insurer assumed the risk of loss by accepting the insured's premiums. Thus, the insured's right of recovery should take precedence, and if any party must go unpaid, it should be the insurer that bears the loss, for the risk has already been paid for by the insured. Except where the insured is underinsured, the insured is deemed to be its own insurer in respect of the uninsured balance.

It is submitted that even if an excess clause exists in a policy of insurance, it should not in any way strengthen the insurer's subrogation position. In a comparison between the insured who is not fully compensated for his total loss and the insurer who has received insurance premium to

[941] The symbol '₦' represents the Nigerian currency called 'Naira'.

bear the risk of loss, it is submitted that the insurer should stand behind the insured when the subrogation recovery is distributed. Giving the insurer the right to take priority over the insured, who is not compensated for the loss under the excess clause, is unfair to the insured because the insurer can minimise any sum which should be paid to the insured. When compared to other jurisdictions laws like in Canada, Australia and America, the Nigerian approach is far from fair.[942]

The foundational judgement of Brett L.J. in *Castellain v Preston*[943] sets the standard the must be aligned within subrogation issues. He said, '*if ever a proposition is brought forward which…will prevent the assured from obtaining a full indemnity… that proposition must certainly be wrong'*.[944] Therefore the interpretive allocative rule should be that the insured has the first claim on any compensation recovered from a third party to the extent required to achieve a full indemnity.

It is submitted that if the insurer is given right of recovery before the insured is made whole, it will be unfair on the insured. This is because the insurer may have made the full payment required by its contract of insurance, but such money is not sufficient to indemnify the insured fully. Therefore, giving a right of subrogation against the insured would mean the compensation received by the insured is less than his loss.

(iv) Where the policy is an unvalued policy, who ranks in priority?

Under the Nigerian rules, sec 30 MIA 1961(Nig.), defines an unvalued policy as *'a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained in the manner specified in section 18 of the statute'*.[945] Consequent upon this statutory definition, what distinguishes an unvalued policy from a valued policy is that there is no specificity as to the value of the subject matter. However, compensation and measure of indemnity are subject to the maximum sum insured, and the insurable value of the subject matter is left to be determined at the time of

[942] For instance, the statement in the Canadian case of *National Fire Insurance v McLaren* [1886] 12 O.R. 682 emphasised that '*the primary consideration is to see that the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the benefit of the insurance company.*

[943] (1883) 11 Q.B.D. 380 at 386.

[944] *Ibid.*

[945] See Appendix 2 for the statutory provision of Sec 18 MIA, 1961 (Nig.) which provides for the Measure of insurable value.

loss.[946] The sum specified in the policy as the amount of insurance, if any, indicates the limit of the insurer's liability. [947]In other words, where there is no agreed determination between the insured and insurer as to the value of the insured subject matter at the time the contract is entered into, upon loss or damage, the actual value of the insured subject matter at the time of the occurrence of the insured event shall be the basis for calculating the amount of the indemnity payment. [948] Therefore, the assured must prove the actual value of the insured subject matter in the event of a loss.[949] The measure of indemnity under an unvalued policy sec 68 (2), MIA 1961 (Nig.) states that it is the insurable value of the subject-matter insured.[950]

Under Nigerian law, where a policyholder is not fully insured under an unvalued policy, the insured has a right to control the cause of action or proceedings against the third-party wrongdoer. In the same vein, any amount of the subrogation recovery necessary to make up for the shortfall under the policy can be retained by the insured before accounting the remainder to the insurer. The common law case of *Hobbs v Marlowe*[951]allows for the insured to recover for his where the insured is not fully insured under an unvalued policy. The Nigerian position is fair to the insured with priority accorded first to the insured from the subrogated monies, leaving the surplus for the insured. This approach is consistent with the indemnity principle.

(v) Where the policy is a valued policy, is the agreed value conclusive?

Most marine insurance contracts are based on valued policies wherein parties are at liberty to modify the terms of the policy. Under the Nigerian rules, sec 29 MIA 1961 (Nig.), defines a valued policy as one which specifies the agreed value of the subject-matter insured. Thus, the measure of indemnity is based on the agreed value and parties are not allowed to contest it.[952] Where it is a total loss, the sum is fixed by the policy and distribution of monies received from

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[946] Chioma Kanu Agomo, *Modern Nigerian Law of Insurance* (2nd edn, Concepts Publication Limited 2013) 192.
[947] E.R. Ivamy, *General Principles of Insurance Law* (6th edn, Butterworths 1993) 231.
[948] Zhen Jing, *Chinese Insurance Contracts Law and Practice* (Informa law from Routledge 2017) 575; Kyriaki Noussia, *The Principle of Indemnity in Marine Insurance Contract: A Comparative Approach* (Springer 2010) 135.
[949] This has to be proven by the production of invoices, vouchers, estimates and other evidence.
[950] On the measure of indemnity, Sec 68 makes provision for the extent of liability of insurer for losses as follows: (1)The sum which the assured can recover in respect of a loss on a policy by which he is insured, in the case of an unvalued policy to the full extent of the insurable value, or, in the case of a valued policy to the full extent of the value fixed by the policy is called the measure of indemnity; (2)Where there is a loss recoverable under the policy, the insurer, or each insurer if there be more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy.
[951] [1978] A.C. 16.
[952] Sec 68, MIA 1961 (Nig.) provides that '*where there is a loss recoverable under the policy, the insurer, or each insurer if there be more than one, is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy.*

a third party is based on the fixed sum. [953] Possible problems will arise when the amount recovered from the third-party is either greater or less than the insured's actual loss and where the actual value of the subject matter exceeds the agreed value.

Leading common law decisions on this issue are in favour of the insurer's interest. Where the policy is a valued policy, and the subject matter is insured for its full agreed value, any recoveries by the assured is allocated first to the insurer.[954] However, where the valued policy is not subject to an average,[955] again the leading common law 'top down' principle applied in the case of *Napier v Hunter*, ensures that the insured recovers the uninsured losses first.[956] This approach is consistent with the principle of indemnity.

In certain circumstances, the insertion of an average clause in the valued policy leaves the insured to bear the loss which he has agreed to share.[957] By interpretation, the recoveries are shared proportionately such that the uninsured losses are recovered based on the portion that has been agreed to bear.[958] Meaning that the insured is deemed to be his own insurer for his own balance, while the insurer recovers first. This is inconsistent with the principle of indemnity. The result of the allocation of subrogation recovery from the third-party wrongdoer under Nigerian laws is wrong in principle. It deprives not only the insured of the right to be fully compensated for his loss but also the right to share with the insurer, in proportion, any amount recovered from the third party.

Few Nigerian cases have dealt with the distribution of subrogation recoveries because the principle of subrogation in marine and property insurance laws in Nigeria is still growing. Also,

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[953] On total loss, Sec 69 (1), MIA 1961 *provides that Subject to the provisions of this Act and to any express provision in the policy, where there is a total loss of the subject-matter insured, if the policy be a valued policy, the measure of indemnity is the sum fixed by the policy.*

[954] *North of England Iron Steamship Insurance Association v Armstrong (1870) LR 5 QB 244; Thames & Mersey Marine Insurance Co v British & Chilean Steamship Co. [1915] 2 KB 214; Goole & Hull Steam Towing Co v Ocean Marine Insurance Co [1928] 1 KB 589; Yorkshire Insurance Co Ltd v Nisbet Shipping Co Ltd [1962] 2 QB 330.*

[955] An average clause' is defined as a clause in an insurance policy requiring that the insured bears a proportion of any loss if your assets were insured for less than their full replacement value.

[956] See section 5.4.2.3. of this chapter for more explanation.

[957] Sec 67 (3), MIA 1961 (Nig.). provides that '*where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties interested, and such contribution is called a general average contribution.*

[958] Sec 82, MIA 1961 (Nig.) espouses the effect of underinsurance as follows: '*where the assured is insured for an amount less than the insurable value or, in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance'.*

the Marine Insurance Act 1961 is silent on any principle that guides the distribution of subrogation monies received from third parties between the insurer and the insured. Based on evidence from literature, it appears that decided cases on the distribution of subrogation recoveries in marine and property insurance are insufficient due to a lack of enabling laws. Over the years, subrogation laws as operates in proximate nations in terms of the common legal system has been applicable in Nigeria.

Also and very essential, one of the objectives of the study is to strengthen the insurance laws in Nigeria, and the English laws could be introduced as a suitable model because every statutory and judicial law, especially on the subject of marine and property insurance, is a derivative of the English laws. Similarly, the Australian Insurance law provides a detailed regulatory framework. In light of the circumstance, a critical evaluation of the English, Australian and other similar countries' approaches is embarked upon to identify an equitable model suitable to strengthen the weaknesses in the Nigerian laws to match up with global practices as well as provide possible plausible solutions. A specific rule adopted will help the courts when faced with diverging issues on allocation, make decisions that are consistent with the principle of indemnity– to prevent the assured's over-indemnification and fully indemnify for loss.

The study suggests it is vital for the Nigerian statutory laws on subrogation to specify who has priority over subrogation proceeds. Failure to provide a rule makes the insurer's right of subrogation too broad without limitations. Similarly, in the absence of a judicial principle, it is much more difficult to apportion a recovery obtained from a negligent third party who caused the loss when the insured contends that he or she is not fully compensated, which means that there is a need for the law to be reviewed as a solution to the question of who bears the risk of recovery in subrogation monies for excesses, surplus and uninsured losses that comply with the principle of indemnity.

5.4.2.3. The Principles Governing Subrogation Recoveries Rule under the English Law

As discussed previously, the Nigerian law is under-developed, and many barriers prevent the insured from recovering for full losses. Most times, the common law and English decisions that are followed also penalise the insured unjustly. Thus, it is essential to examine the English guiding rules on allocation critically. In situations where there is a success in subrogation proceeds, the English law on the distribution of recoveries in the absence of an express

provision in the policy until recent years was unsettled and uncertain. Also, Sec 79, MIA 1906 (UK.), only provides for the right of subrogation and does not give guidance or clarity to the distribution of recoveries. For this reason, there are some difficulties encountered by the court in different circumstances as follows:

(i) In a situation where the insured is yet to be fully indemnified under the insurance policy, then he is entitled to monies recovered for the loss from the third-party that caused the loss,[959] and any excess of his actual loss is held by the insured as a debtor for the insurer.[960]
(ii) If the insured has agreed to bear a part of his own loss by way of deductible or excess that part is to be disregarded in ascertaining whether the insured has received a full indemnity for the loss suffered.[961]
(iii) The law has been modified on the principle that the insured must receive a full indemnity before the insurer has any right over the proceeds, where the insurance policy is subject to an average. The rule is that the allocation of recoveries as between the insured and insurer is following their interests and liabilities.[962]
(iv) The concept of indemnity is fulfilled for valued policies when the insurer makes the payment of the agreed value.[963] Thus such insurer has priority from the subrogation proceeds.[964]
(v) The final principle is that the insurer can only recover the amount that it has paid to the insured.[965]
Each point identified above is illustrated next in detail to determine whether the English rule favours the insured or the insurer and whether it abides by the principle of indemnity

(i) Where the insured receives full indemnity under the policy

[959] The authority in *Commercial Union Assurance Co v Lister* (1874) L.R. 9 Ch. 483, is clear that the insured can commence and control the proceedings and remains *dominus litis* if he has not been fully indemnified or has been partially compensated by the insurer and the insurer has no rights to stop the insured from commencing the action. It must be noted that the insurer's interest must be protected.
[960] *Napier and Ettrick (Lord) v Kershaw* [1993] 1 All E.R. 385.
[961] *Ibid (Napier)*; *England v Guardian Insurance Ltd* [2000] Lloyd's Rep. I.R. 404. As noted, the concept of indemnity refers not to the totality of the insured's total loss but rather to that portion of the insured losses acknowledged by the policy.
[962] *The Commonwealth* [1907] p 216.
[963] The valuation agreed between the insurer and the insured is conclusive of the insurable value of the subject matter insured; see also s.27(3) & 68(1) MIA 1906 (UK).
[964] *North of England Ins Assn v Armstrong* (1870) LR 5 QB 244; *Thames & Mersey Marine Insurance Co v British & Chilean Steamship Co* (1915) 2 K.B. 214.
[965] *Glen Line v Attorney -General* (1930) 6. Com. Cas. 1 at 14.

In a situation where the insured has insurance cover for full losses, any payments made can be recouped by the insurer from the third party. Thus, where the insured receives full indemnity under the policy, and the insurer recovers their money from the wrongdoer, there is a possibility of recovering additional funds. Based on judicial decisions, any excess or surplus of the actual loss is to be accounted for and retained by the insured.[966]

The leading English principle establishes that the insurer's subrogation rights extend only to the amount they paid to the insured for the loss and not more. This principle was applied by denying awarding an excess of subrogation monies recovered by an insurer who has been indemnified in the case of *Yorkshire Insurance Co v Nisbet Shipping Co.*[967] The issue of determination before the court was to decide who was entitled to the surplus of £55,000 that represented the interest accrued from the subrogation proceeds as between the insured and the insurer. Lord Diplock held that a subrogated insurer is not entitled to profit from the exercise of the right, and therefore is not entitled to recover any more than the amount of his payment to the insured.

As a consequence, the decision in *Yorkshire's* case on the distribution of recoveries where there are surplus monies was in favour of the insured because of the relationship between parties under a contract of indemnity. However, the decision in *Yorkshire* has been strongly criticised for giving a windfall profit to the insured in excess by recovering from his insurer and the third-party wrongdoer, which is greater than his actual loss.[968] It could be argued that this illustrates a form of unjust enrichment which subrogation principle is against. Notwithstanding, the court construed sec 79 MIA 1906 (UK.), and it emphasised that the insurer was only entitled to the amount paid out to the sum of £72,000, which renders 'irrelevant any consideration of the particular interconnected circumstances which enable the assured to recover from the Canadian

[966] *Yorkshire Insurance Co v Nisbet Shipping Co* (1962) 2 Q.B. 330.
[967] (1962) 2 Q.B. 330.
[968] For instance, the United States criticised this rule in comparison with the case of *Urban Industries, Inc. v. Thevis No.* C 75-0342 L(A) (W.D. Ky. July 13, 1978*), appeal docketed, No. 78-3615 (6th Cir. Nov. 7, 1978) where the court held that that an insurance company subrogee may recover more than the amount which it paid its subrogor; See* Jay S. Bybee, Profits in Subrogation : An Insurer's Claim to Be More than Indemnified (1979) BYU L. Rev. 145,152; However, other English writers Hodgin, 'Subrogation in Insurance Law [1975] Journal of Business Law 114, approved the decision in Yorkshire principle that limits the insurer's recovery only to the amount paid out. By contrast, the Australian Law Reform Commission recommended against *Yorkshire* principle, with proposals that the insurer should retain excess payments; A.L.R.C. Report on Insurance Contract, p.186.

Government a sum in sterling in excess of the value of the ship at the time of the loss'.[969] Birds, described the result as 'somewhat unfair' because it was the insurer who was out of pocket for 13 years or more, while the insured had received an immediate indemnity.[970]

On this basis, it is questionable whether this decision is consistent with the principle of indemnity. An emphasis is placed on the rule in *Castellain,*[971] that the insured should not receive more than a full indemnity for his loss. Although, the court was not confronted with whether an insurer may profit from subrogation surplus in *Castellain*, yet that is the foundation of insurance law. By holding that the insurance company is limited to its payments, the court allowed Nisbet Shipping to benefit from both the insurance and the tortfeasor's payment.[972] It is submitted that this approach is inconsistent with the principle of indemnity.

(ii) Where the insured is covered for his full loss, subject to a deductible or excess clause[973]

Where the subject matter is fully insured, the insured shall be fully indemnified for the actual total loss. However, where the policy contains an excess clause or deductibles, the question arises as to who should bear the loss under the excess clause if the payment from the third party is insufficient to meet the insured's total loss.[974] The leading case on subrogation rights in England is *Lord Napier and Ettrick v Hunter*.[975] The court critically analysed the effect of an excess clause on subrogation monies recovered from third parties.

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[969] *Yorkshire Insurance Co v Nisbet Shipping Co* (1962) 2 Q.B. 330, 346; In later case commented on *Yorkshire*, by Megaw LJ in *L. Lucas Ltd. v. Export Credit Guarantee Dept* [I973] 2 All E.R. 984 (C.A.), found that all pounds must be treated the same, without regard for the exchange rate or the purchasing power of the pounds.

[970] John Birds, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell 2019) 342.

[971] *Castellain v. Preston* (1883) 11 Q.B.D. 380, 386

[972] The only solution which would have indemnified Yorkshire Insurance without giving Nisbet Shipping a windfall profit would have been for the Canadian Government to pay the equivalent of £72,000. But this solution would have relieved the Canadian Government from full responsibility for the shipping accident. It would thus violate the subrogation policy of holding the responsible party liable.

[973] Excess clauses and deductibles are common in indemnity insurances like motor vehicle and they provide that the insured is to bear the first amount of any loss, expressed either as an amount of money or a stated percentage of any loss.

[974] John Birds, *Birds' Modern Insurance Law*, (11th Edn, Sweet & Maxwell 2019) 339; Margaret C. Hemsworth, 'Subrogation: The problem of Competing Claims to Recovery Monies' (1998) Journal of Business Law 112, 113; Nicholas Pengally, 'When can an Insurer exercise its Right of Subrogation?' (2013) 24 Insurance Law Journal 89, 98.

[975] [1993] AC 713; John Birds, *Birds' Modern Insurance Law* (11th edn, Sweet & Maxwell 2019) 340; Anthony J Saunders, 'Five Problems in Canadian Subrogation Law' (2003) 27 Advoc Q 443, 468.

The facts of *Napier* involved a reinsurance policy.[976] The insureds, in that case, were 'Names' within Lloyd's syndicate, which reinsured the risks they had agreed to bear by insuring with 'stop-loss' insurers. The stop-loss insurers agreed to: ... *'indemnify the assured for the amount by which the assured's overall ascertained nett underwriting loss as hereinafter defined for the underwriting year(s) of account shown in the schedule exceeds the amount stated as 'excess' in the schedule'*.[977] Losses occurred, and the 'Names' brought claims under their policies as a result of the syndicate's underwriting manager having purchased inadequate reinsurance for asbestosis claims against the stop loss insurers. The insurers indemnified the insureds within the limits of the insurance policy. Money was consequently recovered from the third party whose negligence had caused the loss to the insureds to the sum of £166 million. A firm of solicitors held these recoveries. In the subrogation action, on top of claiming for the subrogated amount/insured losses, the insurers also assisted the insured to sue for their uninsured losses. However, the subrogated monies were insufficient to meet the totality of the insured and uninsured losses. As a result, the House of Lords had to determine whether the insurers are entitled to (a) the entire subrogated amount in priority, leaving the balance to the insured for the uninsured losses or (b) whether the insurer and the insured have to share the amount recovered proportionately.

For simplicity and clarity, Lord Templeman used some set of hypothetical figures for his argument and decision.[978] The question was how to distribute the subrogated monies of £130,000 recovered from the negligent third party. It was held that the insured should stand behind the insurer so far as the recovery in respect of the excess was concerned.[979] Lord Templeman distinguished between the excess and the losses above limitation. Thus, formulating a 'pay up and recover down' principle which is best illustrated in the diagram below.

[976] A reinsurance policy is a policy under which an insurer transfers a portion of its written insurance business to another insurer (or insurers) by way of cession. See Olusegun Yerokun, *Insurance Law in Nigeria Insurance* (Princeton Publishing Company, 2013) 490 for reinsurance in Nigeria.

[977] The definition of nett underwriting loss stated: The underwriters liability hereunder shall not exceed the amount stated as limit in the schedule. The limit and excess shall apply separately to each underwriting year of account covered hereunder.

[978] The loss suffered by the insured was £160,000. The sum insured under the policy was £125,000, which represented the insurers limit, and there was an excess of £25,000. The insurer paid the insured the sum of £100,000, in full settlement of the claim under the terms of the policy.i.e., the sum the insured £125,000 less the excess £25,000. The insured recovered the sum of £130,000 as compensation from the third-party responsible for the loss.

[979] *Lord Napier and Ettrick v Hunter* [1993] AC 713.

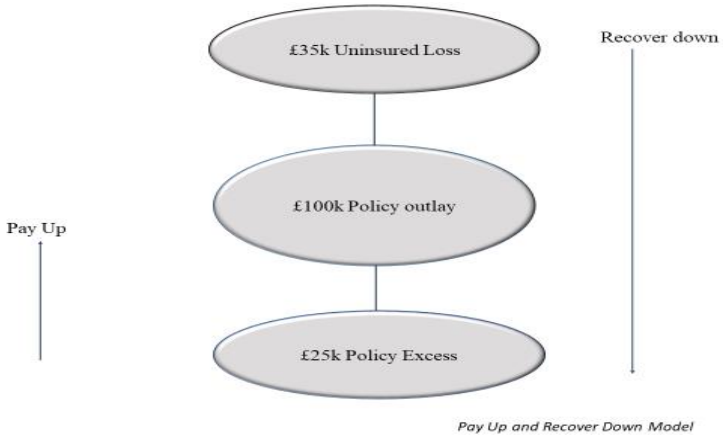

Figure 7: This diagram shows the method adopted by the English court for distributing settlement monies of £130,000 as if there were three insurance layers. The first payment is £35,000 which goes to the insured for uninsured losses (excluding excess); The stop loss insurers would then be entitled to the next slice of £95,000 towards the £100k they had paid the insured; The last slice goes to the insured's excess (as in Napier's case, there would be nothing left. Similarly, for payment, the first up to £25,000 to be borne by the assured under the excess; the next between £25,000 and £125,000 agreed to be borne by the insurers, and the last or 'top' layer above £125,000 to be borne once more by the assured as a sum above the policy limit.

The diagram and explanation above represent the current English position for policy excess, which implies the insured comes last in the chain of priority.[980] Lord Templeman justifies his view, by emphasising that the principle that '*the insure cannot recover until the insured is fully indemnified contemplates only an indemnification against the loss insured'*.[981] By which he interpreted to mean that '*an insured is not entitled to be indemnified against a loss which he has agreed to bear.'*[982] As a result, an excess clause entitles the insurer and underwriter to have priority over subrogation monies where there is a competing interest in a policy that has an excess clause.

In summary, the overriding principle to be drawn from *Napier* is as follows: (i) the insurer is not entitled to recover anything until the insured has received full indemnity; (ii) Next, the insured is entitled to recover its uninsured losses first, followed by the insurer up to the full

[980] Per Lord Templeman, *Lord Napier and Ettrick v Hunter* [1993] AC 713 at 730; [1993] 1 All ER 385; Per Lord Jauncey in *Napier* at 748, expressed the matter somewhat differently but with the same result. His argument laid stress on the fact that subrogation is concerned only with the loss against which the policy is addressed rather than any general loss: *if the assured has suffered an insured loss and an uninsured loss full indemnification of the former subrogates the insurers irrespective of the fact that the assured has not yet recovered the uninsured loss.'*
[981] *Lord Napier and Ettrick v Hunter* [1993] AC 713 at 731E.
[982] *Ibid.*

extent of the indemnity it has paid; and (iii) Any funds left after that will go to pay the insured's excess or deductible. The first principle on indemnity appears to be good law but for the excess slice which leaves the insured with nothing.

It is submitted that the decision in *Napier* regarding excesses is too harsh on the insured, inequitably in favour of the insurer and inconsistent with the principle of indemnity. As noted earlier in this chapter, the purpose of subrogation is to prevent the insured from being paid twice, whereas the effect of disregarding the excess is that the insured is deprived of the right to be paid in full at all before the insurer is reimbursed for what he was initially contracted to do. It cannot be said that the insured has been paid twice (from his insurer and third-party wrongdoer) when a portion of the loss is yet to be compensated for. On this basis, the insurer is not entitled to exercise his subrogation right, because there is no opportunity to make a profit in the circumstance. The only possible avenue that would make the insured whole for uninsured losses is with the third-party's compensation.

Similarly, the result in *Napier* concerning excess clause without the court's view on the intention of policyholders on such provisions has been criticised by leading academic scholars in England.[983] It is argued that an excess clause merely presents the agreement between the insured and the insurer on a portion of the insured's loss irrecoverable from the insurer. Where there is a responsible third party involved, it does not presume that the insured agrees to be deprived of his right to recover from the third party in respect of the excess. If the insurer has a prior right to recoup the amount under the excess clause from the subrogation recoveries, resulting in the insured being under-compensated, it is not clear why the insured should stand in a worse position than the insurer. This approach seems to penalise the under-compensated insured. Not only might the insured not recover under the policy, but also, he must stand behind

[983] Birds view was that the '*logic of the reasoning in this case is difficult to fault, but it seems hard to assume that the insured agrees to bear the loss under an excess clause and to stand behind the insurer when the subrogation recovery is distributed… insureds do not in reality agree in many classes of insurance, they have no choice as to whether or not there is an excess in their insurance policies…'*; See J Birds, 'Insurance: Subrogation in the House of Lords', (1993) J.B.L 294, 298; John Birds, *Birds' Modern Insurance Law*, (11th Edn, Sweet & Maxwell 2019) 340-341; In M.A Clarke's critical argument, '*The excess clause does not merely render a portion of his loss irrecoverable from his insurer, but also disables him from recovering from the third-party wrongdoer in respect of the loss falling below the excess clause until after the insurer has recouped himself*'; See M.A Clarke, The Law of Insurance Contracts, (6th edn, Infoma, 2009), 1029; Similarly, C Mitchell, described the result of excess clauses as '*curious'*; See C. Mitchell, *The Law of Subrogation* (Clarendon, Oxford, 1994) 85.

the insurer when the recovery sum is distributed: the first result was part of the contract, but there is no clear reason for the second.[984]

After *Napier's* decision, another case that has dealt with the issue of allocation of recovery in favour of insurers is *England v Guardian Insurance Ltd.*[985] The court had to decide the extent of the insurers' right over subrogation recoveries. The court held that (i) insurers were entitled to lien over recoveries which could not be undermined by the insurer's unreasonable delay in making payment to the insured; (ii) the insurer's equitable proprietary claim took precedence over any right in the Legal Aid Board by way of statutory charge since the statutory charge could not bite on monies until they have been recovered by insured and the monies recovered were subject to the insurer's lien; (iii) insureds entitled to make deductions from recoveries for uninsured losses and for costs incurred in obtaining recoveries. This appears to be an unfair result had the insurers paid in time; the Legal Aid Board's charge would not have incurred.

It is suggested that the interpretation of the rules on allocation of subrogation recovery should be based on whether the insured has fully indemnified for both insured and uninsured losses, rather than favouring the insurer that has received premium to cover the risk as his primary business obligation.

(iii) The insured is not fully insured under an unvalued policy[986]

Where a policyholder is not fully insured under an unvalued policy, the insured has a right to control the cause of action or proceedings against the third-party wrongdoer. In the same vein, any amount of the subrogation recovery necessary to make up for the shortfall under the policy can be retained by the insured before accounting the remainder to the insurer.[987]

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[984] As noted by Hemsworth in M Hemsworth, 'Subrogation: The Problem of Competing Claims to Recovery Monies', (1998) J.B.L 111, 114 '*This seems to penalise the under assured; not only may he not recover under the policy, but he must stand behind the insurer when recovery monies are distributed'*

[985] *[2000] Lloyd's Rep. I.R. 404,* where the insured England ('E') effected a household policy with the defendant Guardian Insurance Ltd ('GIL'). E'S home was damaged by piling work being carried out on an adjacent site. E's claim was refused by GIL and the denial of liability was maintained over five years. E took legal actions with the support of the Legal Aid Board against the relevant third parties and the insurer GIL separately. The action brought against the third party was successful and judgement was made for the insured. The insurer paid insured monies into the court in the late stage in the proceedings*;* See for more analysis *Robert Merkin, Allocation of Subrogation Recoveries [2000] 12 ILM 1.*

[986] An unvalued policy pursuant to Sec 28, MIA 1906 (UK) is defined as '*a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained...'*

[987] Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 779.

The leading English authority on this principle is *Hobbs v Marlowe.*[988] The County Court held that the insured was entitled to retain the amount of £73.53 representing the out-of-pocket sum and for full damage.[989] Similarly, the insurer's claim is limited in instances, where the insured has uninsured losses. In principle, when the insured has a settlement with the third party for an independent form of loss in addition to the insured loss, the insurer cannot claim any sum that discharges the liability of the uninsured losses.[990]

It is submitted that the English insurance rules on issues relating to uninsured losses under an unvalued policy are consistent with the principle of indemnity because the insured ranks in priority when sharing settlement monies received from the third party. The underlying principle is to aim that the insured is fully indemnified for all losses arising from the damage and the insurer can thereafter recoup any excesses.

(iv) The policyholder under a valued policy (which is not subject to average)

Valued policies are common with marine insurance contracts and operate in a conventional way rather than as a perfect indemnity.[991] Based on these circumstances, a different principle of recovery concerning subrogation actions may apply. For valued policies, sec 27 MIA 1906 (UK.) defines it as '*a policy which specifies the agreed value of the subject-matter insured'*. On this basis, the amount recoverable in the event of a loss of cargo or ship is either agreed upon by parties or fixed by the marine policy.[992] As a consequence, the value determined is conclusive.[993] Based on this premise, several English case laws underpin salient principles and

[988] [1978] A.C. 16; On the facts, the plaintiff's car was damaged in a collision caused by the negligence of the defendant. The cost of repairs to it was £237.59. The plaintiff hired another car for the duration of the repairs, which cost £63.53. The plaintiff's insurers paid £227.59 under the policy for the repairs costs, there being a £10 excess. The policy did not cover the hiring cost to recover his out-of-pocket expenses totalling £73.53 he after that sued in the county court. His insurers had no interest in the proceedings since that had concluded a 'knock-for-knock' agreement with the wrongdoer's insurer.

[989] The decision was both upheld in the Court of Appeal and the House of Lords.

[990] *Law Fire Assurance Co v Oakley* (1888) 4 T.L.R. 309; *Young v Merchants' Marine Insurance Co Ltd* (1932) 2 K.B. 705.

[991] See section 3.6. chapter three for discussions on valued policies.

[992] On the issue of parties reaching an agreed value, The Court of Appeal in *Stace & Francis Ltd v Ashby* [2001] EWCA Civ 1655; [2002] Lloyd's Rep IR, *encountered what on its face appeared to be a complex point of principle. The question was whether a builder who was employed by an insurer to make good insured losses suffered by the assured, and who failed to do so adequately, was entitled to seek a deduction of the insurance moneys from damages sought by the assured on the basis that the insurers themselves had undertaken to effect repairs. The Court of Appeal ultimately ruled that the insurers' rights of subrogation were paramount.; Clothing Management Technology Ltd v Beazley Solutions Ltd* [2012] EWHC 727 (QB); *Kuwait Airways Corp v Kuwait Insurance Co SAK* [2000] Lloyd's Rep. I.R. 439.

[993] The conclusive nature of a valued subject-matter 'intended' to be insured is confirmed in Section 27 (3) MIA 1906 (UK) which provides that 'subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and assured, conclusive of the insurable value of the subject intended to

approaches for allocating subrogation recoveries between an insured and his insurer under a valued policy. As will be seen, the main problem arises when the amount recovered from the third-party is either greater or less than the insured's actual loss and where the actual value of the subject matter exceeds the agreed value.

Where the policy is a valued policy, and the subject matter is insured for its full agreed value, any recoveries by the assured is allocated first to the insurer.[994] Based on the principle that the insurer has discharged his obligation under the policy. For instance, if a policyholder under a valued policy (which is not subject to average) is insured to the full agreed value of the subject matter (say, £80,000) but the agreed value is less than its actual value (of, say £100,000). Where the insurer pays the agreed value of (£80,000), he has met his obligation. Thus, if the recovery from the third party is only £70,000, it would be payable first to the insurer. By implication, the insured has been fully indemnified upon the payment of the agreed value of £80,000. The corollary is that the insurer has a claim to recoupment against the insured in the amount of the insured's recovery, up to the amount of the indemnity paid to the assured. [995] The agreed valuation of both parties supports this approach.

The principle for valued policies is summarised as follows with support of leading cases that give priority to insurers even before the insured is yet to be fully indemnified. First is the case of *North of England Iron Steamship Insurance Association v Armstrong,*[996] which illustrates that insurers are entitled to recover from the assured the full amount of the third-party recovery obtained by the assured, where the actual value of the subject matter exceeds its agreed value. Thus, where the insured's actual loss exceeds the indemnity paid by the insurer, the insured is left with nothing.[997] Similarly, the insurer receives the full amount even where it exceeds payment made to the insured. This is inconsistent with the principle of indemnity as it becomes a case of leaving an insured to bear his financial losses while the insurer makes a profit. In such

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be insured, whether the loss be total or partial'. See also Ozlem Gurse, *Marine Insurance Law* (Routledge 2015) 281.

[994] Relevant case law discussed in subsequent paragraphs.

[995] F.D Rose, *Marine Insurance Law and Practice* (2nd edn, Informa, 2012) 594 -595.

[996] (1870) LR 5 QB 244 where a vessel with an actual value of £9,000 was insured for £6,000, the agreed value is £6,000. After the vessel had sunk in a collision, the insurers paid the assured £6,000 for a total loss. Subsequently, £5,000 or so was recovered by the assured in respect of the insured ship by way of settlement with the owners of the other ship. It was held that the insurer was entitled to recoup the full amount of recovery from the owners of another ship involved in a collision, even though the real value of the insured vessel was greater than the policy valuation.

[997] *Ibid* per Lush J at p 250 '…*If each of the parties agrees that a certain sum shall be deemed to be the value of the thing insured, the underwriter, in the case of a total loss, is not to be at liberty to say the thing is not worth so much; he is bound to pay the amount fixed upon, whether it is the proper amount or not. And, on the other hand,* ***the assured is not at liberty to say it is worth more; he is bound by that amount'.***

cases the policy valuation is conclusive, and the insured is not entitled to say 'my loss exceeds the policy coverage'. Therefore, it follows that the insurer has priority to any recovery from a third-party tortfeasor.

Secondly, the case of *Thames & Mersey Marine Insurance Co* v *British & Chilean Steamship Co*.[998] is an authority that the insurers will be entitled to recover the full amount of the third-party recover, which reflected the greater actual value of the subject matter or a proportion where it did not exceed the amount paid by the insurers under the policy. The third principle is illustrated in *Goole & Hull Steam Towing Co* v *Ocean Marine Insurance Co.,*[999] which holds that where there is a partial loss, the insurers would be entitled to recover the full amount of the third-party recovery, as that would not exceed the amount paid by the insurers. Thus, when calculating the measure of indemnity, one must take into account the agreed or conventional value even when it leaves the insured under-indemnified.[1000] This is inconsistent with the principle of indemnity. Mainly because the insured is not permitted to argue that the loss, he suffered is greater than the loss indemnified by the insurer. Also, the principle that the insured is to be fully indemnified for his actual loss before any recovery by the insurer is said not to apply in the case of a valued policy.[1001]

[998] [1915] 2 KB 214, where a ship was insured for £45,000, its full agreed value. Following a collision, the insurers paid the insured sum as for a total loss. In subsequent proceedings, both ships were held responsible. The insured owners, therefore, recovered judgment for damages reflecting only 5/12ths of their losses. However, for that judgment, the ship's value was taken to be its actual value, which was £65,000. The insurers were held entitled to recover the full amount of the third-party recovery.

[999] [1928] 1 KB 589, where a ship, insured for its full agreed value of £4,000, suffered a partial loss in a collision, leading to repair costs of £5,000. The assured recovered £2,500 from the other party responsible for the collision, and then sought payment for its outstanding £2,500 loss from the insurers. The judge considered that the insurers' liability to make payment under the policy in those circumstances fell to be determined by the same principles as would determine the insurers' entitlement to recoupment if payment had been made under the policy. On that basis, the insurers were entitled to the benefit of the full amount of the third-party recovery, and their outstanding liability under the policy was therefore only £1,500. It was assumed that, if the insurers had paid £4,000 for the partial loss, the insurers would have been entitled to recover the full amount of the third-party recovery, as that would not exceed the amount paid by the insurers.

[1000] Peter MacDonalds Eggers QC, 'The Place of Subrogation in Insurance Law: The Deception Depths of a Difficult Doctrine' in *The Modern Law of Marine Insurance* edited by Prof D. Rhidian Thomas (Informa Law from Routledge, Volume 4, 2016) 204. In Nigeria, the use of specific clauses like average clause is common in marine insurance and the MIA 1961 exempts insurers from paying out in certain instances. For instance, when issuing a policy, an insurer may incorporate the terms of cargo or hull and machinery policies which exempt its liability in several instances.

[1001] Margaret C. Hemsworth, 'Subrogation: The Problem of Competing Claims to Recovery Monies' (1998) Journal of Business Law 111,118.

(v) The policyholder under a valued policy (subject to average)

The effect of an average principle in a policy is that it makes the insurer and insured to be deemed co-insurers where the policy does not cover the full amount of the insured losses.[1002] Where the insured under-insures the vessel or cargo so that, in the event of a loss, the principle of averaging applies, on the basis that the insured is to be treated as its own insurer for the uninsured element.[1003] For example, if the assured is insured for £8,000 under a valued policy (subject to an average) and the agreed value and actual value of the subject matter of insurance is £10,000. Here the insured is under-insured, and the policy includes an average clause. According to the average principle, the insured is treated as his own insurer for £2,000 and bears a proportion of one-fifth of the loss.

The application of average clause dictates that any subrogated recovery is to be apportioned between the insured and insurer on a pro-rata basis in which they share the risk. i.e. 80:20. This was the decision in *The Commonwealth.*[1004] In this case, the vessel was insured up to a limit of £1000, but with an agreed value of £1,350. The sum of £1000 was recovered as compensation from the owner of the steamship which had collided with the insured vessel. It was held the recovery sum. i.e. £1000 was to be apportioned between the insured and insurer in the proportions 1,000:350 which represents the liability of each party.[1005]

It is argued whether the principle of average applied in *The Commonwealth*[1006] can be a general application to both marine and non-marine cases where the uninsured losses are in excess of a policy limit. This is on the premise of the leading judgment in England, i.e. *Lord Napier,* which established the 'top-down' principle to permit the insured to recoup himself first for uninsured

[1002] Robert Merkin, *Colinvaux's Law of Insurance* (10th Edn, Sweet & Maxwell, 2014) 640; Peter MacDonalds Eggers QC, 'The Place of Subrogation in Insurance Law: The Deception Depths of a Difficult Doctrine' in *The Modern Law of Marine Insurance* edited by Prof D. Rhidian Thomas (Informa Law from Routledge, Volume 4, 2016) 205.

[1003] The English laws clearly state the effect of underinsurance in section 81 of the MIA 1906 (UK) as 'where the assured is insured for an amount less than the insurable value or, in the case of a valued policy, for an amount less than the policy valuation. He is deemed to be his own insurer in respect of the uninsured balance.'

[1004] [1907] 216,223.

[1005] *Ibid* Per Sir Gorell Barnes P views 'when the underwriter pays the assured he is subrogated to his rights having regard to the risk he has taken- that is to say, in the present case, when the assured's name is used for the purpose of enforcing an action against the wrongdoer, **the remedy is sought for the underwriter to the extent to which he had insured, and for the assured to the extent to which he had left himself uninsured.** That being so, it seems logically to follow that when the money which is recovered is in hand it ought to be divided in proportion to their respective interests.' See also per Tomilson's similar dicta in *Dornaoch Ltd v Westminister International BV (The WD) Fairway)* [2009] EWHC 889 (Admlty), [2009] Lloyd's Rep IR 573, para 61 differentiating abandonment from subrogation rights.

[1006] *The Commonwealth* [1907] P 216,223.

losses above the insured sum.[1007] In principle, where a loss exceeds the aggregate limit, any recoveries in excess of the limit will accrue entirely to the assured on the 'top-down' principle until the limit is reached.[1008] The question arises as to whether the value of recovery should be allocated to insured until fully indemnified or whether the recovery should be divided between the insurer and the insured in proportion to the sums insured and uninsured with respect to the provisions of Sec 81, MIA 1906 (UK.).

The latest decision that resolves this dilemma was in *Kuwait Airways Corporation v Kuwait Insurance Co SAK*,[1009] where the 'top-down' approach was applied in a case of under-insurance on the non-marine property. Because the insured had suffered considerably uninsured losses, Rix J considered that it was proper to adopt a 'top-down' approach, rather than the proportionate sharing approach which was adopted in cases of underinsurance in marine insurance cases—which would have involved allocating the recoveries in proportion to the sums insured and uninsured. The judge considered the top-down principle as 'the principle which most closely conforms to the underlying rationale of subrogation',[1010] assuming that the rationale is the avoidance of unjust enrichment. Therefore, the court held that the insured should have priority with respect to recoveries until full compensation had been achieved.

Again, this approach is consistent with the principle of indemnity because the insured was entitled to apply for the recovery monies first to the uninsured losses of the aircraft before the insurer's interest so long as the recoveries did not exceed that sum. However, the top-down principle only applies where there is no average clause.[1011] Where there is no such clause, the insured is entitled to claim the full amount insured, and if this is insufficient to compensate the insured party, whatever is recovered from the third parties cannot be retained until a full indemnity has been received and need only hand over the excess to the insurer. This must be

[1007] See Figure 7 at page 204, on illustration on the recover down principle; See also FD Rose 's F.D Rose, *Marine Insurance Law and Practice* (2nd edn, Informa, 2012) 605 para 27.142.

[1008] Kyriaki Noussia, *The Principle of Indemnity in Marine Insurance Contract: A Comparative Approach* (Springer 2010) 229.

[1009] The case of *Kuwait Airways Corporation v Kuwait Insurance Co SAK* [1999] 1 Lloyd's Rep. 803 was an aviation property insurance policy where fifteen aircraft belonging to the insured were removed from Kuwait airport by invading Iraqi forces. The insurer's liability was limited to USD300 million, which they duly paid, leaving the insured underinsured by USD 392 million. Subsequently, the insured had recovered a number of the planes.

[1010] *Ibid at p695.*

[1011] As was the case in *Kuwait* and *Lord Napier* that did not contain average clauses. There are a number of authorities which support this view. In the marine insurance case of *Sea Insurance co v Hadden* (1884) 13 Q.B.D 706 which was concerned with under insurance, it was held that the recovery sum should go first in favour of the insured in respect of his losses not covered by the policy. It was held in *Law Fire Assurance Co v Oakley* (1888) 4 T.L.R. 309 that if the insured's loss includes damage which is not covered by the policy, the insurer is not entitled to be subrogated to any payment or liability in respect of the uninsured loss.

the case because the insurer assumed the risk of loss by accepting the insured's premiums, and the insurer's payment under the policy is not *prima facie* fully compensated for the insured's entire loss.

Indeed, it has since been accepted, in *Lonhro Exports Ltd v ECGD,*[1012] that the decision of the House of Lords in *Napier* was an authoritative restatement of the general law on the rights of insurers in respect of recoveries in England. Based on the above analysis, it is possible to argue that the insurers now have priority over the insured in respect of any recovery where the monies recovered relate to both insured and uninsured losses. Especially, where the uninsured losses arise out of an excess, or deductible, that the insured chose to self -insure and provided the insurer has fully indemnified the insured in terms of the policy.

The outcomes of the decision in *Napier and Ettrick Ltd v Kershaw*[1013] which adopts a 'recover down' approach, deny the assured recovery of his deductible in the event of a shortfall. Also, the courts seem to approach the issues from the insurer's standpoint and do leave the insured in worse situations in certain circumstances where there is an excess clause in the policy and valued policies that are not subject to average. Thus, it is necessary to review the Australian law on the distribution of subrogation recoveries as it appears to have shifted from some English common law rules.

5.4.2.4. Current Australian Governing Principles on the Distribution of Recoveries

The law of subrogation also operates in Australian insurance law as an equitable principle to prevent double recovery.[1014] Similarly, the issue of allocation of subrogation monies was an area of much problems before section 67 of the Insurance Contracts Act 1984 was amended by the Insurance Contracts Amendment Act 2013.[1015]

[1012] *Lonhro Exports Ltd v ECGD [1996] 4 All E.R. 673*
[1013] [1993] AC 713.
[1014] *Insurance Commission of Western Australia v Kightly* [2005] WASCA 154 at [48].
[1015] The Insurance Contract Amendment Act 2013 (No. 75, 2013), schedule 7, 'Subrogation.' On 28 June 2013, the Insurance Contracts Amendment Act 2013 (Cth) (Amendment Act) was brought into law with the effect of introducing a number of long-awaited changes to the Insurance Contracts Act 1984 (Cth). The changes are aimed at streamlining the operation of the ICA, with some of the changes taking effect from the commencement date of 28 June 2013; The Australian Law Commission did recommend that the provisions of ICA s 67 be enacted into the MIA as a new s 85A but modified and extended to meet the criticisms of ICA s 67 and to provide a comprehensive scheme for the disposition of money recovered from third parties; - Recommendation 32, Australian Law Reform Commission (ALRC) Review of the Marine Insurance Act 1909 (Report 91), April 2001 paras 12.18.

Thus, the current law for general insurance is the Insurance Contracts Amendment Act 2013, which provides a new section and substitutes a new s 67 into the Insurance Contracts Act 1984 (Cth) with a detailed and comprehensive provision on the destination of subrogation recoveries.[1016] It is interesting to note that the Australian regime has deviated from the English rules on allocation of subrogation recoveries with specifics on apportioning litigation and administrative costs and equitably treating excess clauses.

The revised version in sec 67 ICA places emphasis on who has funded the recovery action. It sets out the general rule as follows: '(1) Where an insurer, in exercising a right of subrogation in respect of a loss, recovers an amount, and the insured may recover that amount from the insurer. A further section (2) states that unless there is an express provision in the contract of insurance if the insurer recovers the amount in exercising the insurer's right of subrogation in respect of the loss: (a) the insurer is entitled to so much of the amount as does not exceed: (i) the amount paid by the insurer to the insured in respect of the loss; (ii) the amount paid by the insurer for administrative and legal costs incurred in connection with the recovery; and (b) if the amount recovered exceeds the amount to which the insurer is entitled under (a)— the insured is entitled here to so much of the excess as does not exceed the insured's overall loss; and (c) if the amount recovered exceeds the sum of the amounts to which the insurer and the insured are entitled under (a) and (b)—the insurer is entitled to the excess.

By interpretation, where the insurer makes a subrogation recovery, the insurer is entitled to retain the amount paid to the insured plus the costs incurred by the insurer in effecting the recovery. If there is a surplus in the hands of the insurer, and the policy moneys have not fully indemnified the insured, the insured is entitled to so much of that sum in order to provide a full indemnity. It is only where the insured has been fully indemnified that the insurer receives any surplus benefit. It is reasonable that the insured ultimately recovers from the insurer under the insurance contract or the third party in the recovery action, or both in combination, the full amount of its loss (not just the measure of indemnity under the policy).[1017]

[1016] See also Julie-Anne Tarr, Accountability 30 years on: Insurance Contracts Act Reform (2015) Australian Business Law Review, 43, 68-74 for review of the Australian current laws.
[1017] Robert Merkin, A presentation on Reforming Insurance Law: Is there a Case for Reverse Transportation? A Report for the English and Scottish Law Commissions on the Australian Experience of Insurance Law Reform (2015) 87 <http://www.lawcom.gov.uk/app/uploads/2015/03/ICL_Merkin_report.pdf> assessed 10 November 2018.

This approach appears to be a departure from the common law approach on valued policies where the agreed sum is incontestable, and recovery is based on the agreed sum.[1018] What the insured is entitled to under the Australian in relation to valued polices is the actual rather than the agreed amount of his loss. Only the remaining surplus belongs to the insurer. Besides, what makes the Australian model stand out is giving priority to the insured to recover the amount of any self-insured excess from a surplus obtained by the insurer, on the basis that the amount of the excess constitutes a part of the insured's overall loss. Furthermore, another unresolved issue concerns who is entitled to have priority where the subrogation recovery is effected by the insured.

According to Sec 67 (3) ICA 1984, the insured is entitled to retain so much of the recovery as does not exceed the amount of his loss plus the costs incurred in pursuing the subrogation action. If there is a surplus, the insurer is entitled to that surplus but capped at the amount paid by the insurer. However, if the sum recovered from the third party exceeds the insured's loss and the insurer's payment, the surplus belongs to the insured.[1019] Similarly, pro-rata arrangements reflecting these principles apply where an amount is recovered jointly by the insured and insurer if there are insufficient funds to reimburse them in full.[1020] It is submitted that the model is clear and robust; however, when applied, it overrides the rights of the insured and insurer on agreements reached in respects of losses.[1021] Conclusively, the Australian model set out in sec 67 is submitted to be very equitable and well-structured to allow the insured to

[1018] Marine Insurance Act 1909 (Cth) s 87. ; A Tarr, 'Subrogation and the Ash Wednesday bushfire disaster', (1987-1988) 11 Adel. L. Rev. 232, 237.

[1019] Sec 67 (3) ICA 'If the amount is recovered by the insured: (a) the insured is entitled under this paragraph to so much of the amount as does not exceed the sum of the following: (i) the insured's overall loss; (ii) the amount paid by the insured for administrative and legal costs incurred in connection with the recovery; and (b) if the amount recovered exceeds the amount to which the insured is entitled under paragraph (a)— the insurer is entitled to so much of the excess as does not exceed the amount paid by the insurer to the insured in respect of the loss; and (c) if the amount recovered exceeds the sum of the amounts to which the insured and the insurer are entitled under paragraphs (a) and (b)—the insured is entitled to the excess.

[1020] Insurance Contracts Act 1984 (Cth), s 67(4) to s 67(6); F Marks and A Balia, *Guidebook to Insurance Law in Australia* (3rd ed CCH Sydney 1998) 526. This is a reiteration of the common law position except that s 67(4) provides that the amount recovered is to be construed as the amount recovered less the administrative and legal costs incurred in connection with recovery of the amount.; However, the assured is entitled to an indemnity for uninsured losses from any third party recovery. In *Johnston v Endeavour Energy* [2015] NSWSC 1117 the New South Wales Supreme Court discussed in detail the question whether an insurer has subrogation rights where a part of the assured's loss is not covered by the policy. The court's conclusion was that the assured retained the right to control the litigation against the third party in that situation, and that no subrogation rights attached. The point arose in the context of representative actions permitted under the law of New South Wales. See Robert Merkin, Subrogation: Effect of Partial Indemnification of the Assured' (2015) Insurance Monthly Law < https://www.insurancelawmonthly.com/claims/subrogation/subrogation-effect-of-partial-indemnification-of-the-assured-114126.htm> Assessed 10 Dec 2018.

[1021] Insurance Contracts Act 1984 (Cth) s 67(7).

participate in any recovery action and to achieve full indemnity. This approach is very consistent with the principle of indemnity.

If we compare the Australian position to some models applied in the US courts, it appears the approach is more balanced and comprehensive.[1022] For example, in *Gibson v Country Mutual Insurance Co,*[1023] the subrogation clause provided that the insurer would be subrogated to any recovery from a third party to the extent of its payments. The court found no violation of public policy in allowing subrogation, even though the insured had not been made whole. The court reasoned that subrogation would not deprive the insured of benefits paid for, since she only paid for coverages stated in the policy.[1024] By contrast, a Californian court in *21st Century Ins. Co. v. Superior Court,*[1025] applied the rule that the insured is to be made whole by being reimbursed first out of the recovery from the third party for any loss that was not covered by insurance, the insurer is then entitled to be reimbursed fully, and the insured is entitled to anything that remains from the amount paid by the third party so that any surplus goes to the insured. It is submitted that the application of this latter rule does not undermine the indemnity principle.

5.4.3. Comparing Approaches and Proposing a Suitable Model for Nigerian Laws

This section has critically examined and compared, amongst other jurisdictions, different approaches in the Nigerian, English, and Australian laws as it applies to the distribution of subrogation recoveries from a negligent third party. Based on the analysis, the question to be answered here is which of these approaches, if any, can be recommended to strengthen the inconsistent aspects that weaken the indemnity principle under the Nigerian law of subrogation. The following conclusions and suggestions are reached:

[1022] Elaine M. Rinaldi, 'Apportionment of Recovery between Insured and Insurer in a Subrogation Case' (1994) 29 Tort & Ins. L. J. 803, 807; Johnny C. Parker, The Made Whole Doctrine: Unraveling the Enigma Wrapped in the Mystery of Insurance Subrogation (2005) 70 Mo. L. Rev. 723, 773; Robert Keeton, Alan I Widiss and James M Fisher, *Insurance law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices* (2nd edn, West Academic Publishing 2016) 201-203; Alan O. Sykes, Subrogation and Insolvency (2001) 30 (2) The Journal of Legal Studies, 383-399 for more discussion on American cases.

[1023] *Gibson v. Country Mutual Insurance Co*. 549 N.E.2d 23 (Ill. App. Ct. 1990).

[1024] Other cases following this pattern includes in Michigan in the case of *Foremost Life Ins. Co. v. Waters*, 329 N.W. 2d 688 (Mich. 1982) where the court held that a subrogation clause conferred upon group disability insurer the right to be reimbursed out the injured person's recovery from third-party tortfeasor.

[1025] *21st Century Ins. Co. v. Superior Court*, 213 P.3D 972, 976 (Cal. 2009).

It is concluded that the Nigerian law is significantly deficient concerning the allocation of money proceeds received from subrogation actions because there are no statutory provisions on who has priority when there is a competing interest. Traditionally, the English legal principles are persuasive in the Nigerian courts as a result of the common law affinity. Although it can be said that the English rules which Nigeria emulates emphasise that the insured be fully indemnified under the policy before subrogation rights are triggered. An example is the law's position for unvalued policies; the insured has a first claim to the third party's payment. However, as discussed above, some of the English court principles and rules derived from *Napier* undermine the aim of the principle of indemnity for uninsured losses. Mainly, because the rules on valued policies, interpretation of who bears the burden when a policy has an excess clause are in favour of the insurers and penalise the insured unjustly from recovering actual losses.

Similarly, the English position in *Yorkshire,*[1026] holds that if there is excess money after which both parties (insured and insurer) have been fully recouped, the surplus goes to the insured on the premise that the insurer cannot receive more than it has paid out. Arguably, fluctuating exchange rates might affect the sum which the insurers are seeking to receive as recoupment. On this basis, insurers should not be deprived of their benefits.[1027] Therefore, it cannot be concluded that the English law is not problem-free on the issue of subrogation distribution. Also, neither has the English[1028] or Nigerian law[1029] specified the order of allocation if either the insured, insurer or both funds the recovery proceedings. By contrast, the Australian model analysed above is fair, clear, robust, comprehensive and equitable on the insured and insurer. Therefore, suggestions are made as follows:

Whether or not an insured has agreed to bear a part of his own loss by way of deductible or excess, should not be regarded in giving priority from subrogation proceeds. The purpose of subrogation is to prevent the assured from being paid twice, whereas the effect of disregarding the deductible is that the assured is deprived of the right to be paid in full at all before the

[1026] *Ibid* (n 967).
[1027] The ALRC Report No 20, para 302, page 186, proffered a very sound argument and justification '*Where the insured has received a full indemnity for his loss, the insurer chooses whether to exercise its rights of subrogation. Gains may occur in some cases as a result of fluctuating exchange rates. In other cases, losses may be suffered. The insurer cannot recover a loss from the insured. Nor should it be required to pay over a gain. Provided the insured has recovered a full indemnity for his loss, the insurer should be entitled to retain any amount which it recovers in excess of the amount it has paid over to the insured'.*
[1028] Sec 79 MIA 1906 (UK.).
[1029] Sec 80 MIA 1961 (Nig.).

insurer seeks reimbursement. It is suggested that the law's starting point should be that an insurer has no claim to recoupment in respect of a third-party recovery obtained by the assured, even after the insurer has fully indemnified the insured under the policy until the insured has been fully indemnified for his actual losses. Therefore, any recovery should be allocated to the insured's uninsured losses first, and the insurer could only claim the benefit of the third–party recovery to the extent that it exceeded the insured's outstanding uninsured losses. On no basis should the insured stand behind the insurer. This approach is consistent with the principle of indemnity and compatible with the Australian model.

Even for valued policies, where the agreed sum cannot be disputed when a loss occurs, there should be an exception to this rule. The reason is that some other types of losses could be attached to a subject matter, where there is already an agreed value concluded. For example, a truck is covered by insurance for its full agreed value, and on the occurrence of the peril, the truck and the goods on the car are destroyed or damaged due to negligence of a third-party wrongdoer. The insured should have a first claim to the subrogation monies recovered in respect of the uninsured loss of the goods. Where the policy is a valued policy not subject to an average clause and the parties expressly stipulate that the sum insured is less than the policy valuation, the insured should have a priority from the third party's payment for the difference between the valuation and sum insured. The reason for this submission is that there is no presumption that the insured is his own insurer for the under-insured balance. The underlying rationale behind the principle of indemnity is that the insured should be fully compensated for his total loss.

Finally, on administrative and litigation cost on who funds the proceedings, the Australian approach provides a clear model. It is concluded, that depending on who funds the actions, he must be compensated for it. In a country like Nigeria, it would be the insurer that will possibly fund the action, and therefore where there is a successful recovery, it is equitable for such amounts to be deducted first before the insured receives any payments.

5.5. Restricting Insurer's Rights Against Categories of Persons

The main aim of subrogation is to prevent the insured from being over-indemnified alongside the goal of indemnity.[1030] The study inquires whether it is justifiable for certain persons to be immune to subrogation actions because of the economic interdependence and relationship with the insured. Furthermore, from the perspective of the purpose of subrogation, such as to prevent the unjust enrichment of the insured, it is argued that to immunize some relevant persons like family members or co-insured from subrogation action is not against the principle of indemnity, cannot render the insured unjustly enriched and cannot defeat the goals of indemnity because it amounts to a claim against the insured himself. Although different jurisdictions lay down a different legal basis for the immunity of some persons from subrogation action, it seems illogical why the Nigerians laws and English laws do not restrict subrogation actions against certain persons. This is because the economic relationship between the insured and the relevant persons is one of the fundamental reasons, namely avoiding the situation that giving with one hand and taking away with the other. This section examines the Nigerian, English and Australian approaches on the restriction of subrogation action on family members and current trends in denying subrogation action against co-insureds.

5.5.1. Granting Immunity to Insured's Family Members for Economic Purposes

5.5.1.1. The Nigerian and English Position: The Insured Family Members are not Exempted

Under the English common law principle, it is quite logical that a person cannot sue himself. Similarly, under the Nigerian rules, subrogation does not apply to the insured.[1031] Hence the insurer has no right of subrogation to sue the insured party who causes the loss for himself. As a consequence, subrogation thus becomes irrelevant for the lack of any shoes to borrow.[1032] The English leading case of *Simpson & Co. v Thomson*[1033] clearly illustrates this point with the House of Lords pointing out that the insurer's use of subrogation rights in these circumstances would amount to the insured suing himself. Thus, it was held that a subrogation action could not be brought against the insured. It is presumed that invoking subrogation without a specified

[1030] See section 5.2.3 for aims of subrogation.
[1031] Chioma Kanu Agomo, *Modern Nigerian Law of Insurance* (2nd edn, Concepts Publication Limited 2013) 198.
[1032] Ozlem Gurses, Subrogation against a Contractual Beneficiary: A New Limitation to Insurers' Subrogation? (2017) Journal of Business Law 557, 569.
[1033] In *Simpson & Co. v Thomson* (1877) 3 App Cas. 279, the insured was the owner of the two vessels which, due to the negligence of the master of one of them, collided and were damaged. The insurers argued that their liability for the vessel not at fault was extinguished by their rights to proceed against the insured for the negligence of the master of the vessel at fault.

third party would be irrelevant, thereby producing an unjust result.[1034] Derham,[1035] submits that the decision is logically correct on the basis that subrogation only gives an insurer the benefit of any right that the insured himself possesses.

Although the Nigerian laws and English laws are in support of the insurer not taking action against his insured, the situation whether his family members enjoy this right leaves a judicial loophole, which may give rise to difficulty. The question is, should an insured's right be allowed against a member of his own family?[1036] Even though the main objective of subrogation is the prevention of double indemnity, it is presumed that the insured would not be willing to rely on his recoupment rights, where he has an intra-familial relationship with the negligent third party.

Unfortunately, no provision restricts the insurer's subrogation right against any family members in the Nigerian laws. It is argued that subrogating a spouse or family member against the damage caused to another would mean stepping into the shoes of the insured against himself.[1037] Unlike some other jurisdictions, Nigerian laws are yet to place statutory restriction against taking a subrogation action against one's family member. In a way, this would seem like receiving what has been paid to the insured.

In the United Kingdom, the issue of subrogation within families remains unresolved at a regulatory level, nor has it been seriously debated upon within the insurance industry. Under the English laws, the doctrine of subrogation has potentials of causing hardship in situations

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[1034] See also for more critique of the English decision - James, 'The Fallacies of *Simpson v Thomson'* (1971) 24 Modern Law Review 149, 154; The United State also has a similar approach known as the 'Pinski Rule' derived from *Home Ins. Co. v. Pinski Bros., Inc,* 500 P.2d 945 (Mont. 1972). The Rule states thus:

> '*No right of subrogation can arise in favor of an insurer against its own insured since, by definition, subrogation exists only with respect to rights of the insurer against third persons to whom the insurer owes no duty… it is axiomatic that (an insurance company) has no subrogation rights against the negligence of its own insured…'*

[1035] S. R. Derham, Subrogation in Insurance Law, (The Law Book Company Limited, 1985) 75.

[1036] The most obvious cases concern domestic insurance. For example, where an insured's cousin who does not carry a liability cover visits his house and carelessly dropped a lighted match into a wastepaper basket, and as a result, there was a fire outbreak that destroyed the insured's furniture. Would the insured be willing to sue his cousin? Ordinarily, the insurer is entitled to bring an action against the relative in the insured's name. The action may not be successful because the Nigerian social and legal thinking is strongly linked to the family system.

[1037] In Nigeria, family refers to a group of closely related people known by a common name and usually consisting of a man and his wives and children, his son's wives and children, his brothers and half-brother and wives and children, and probably other near relations. Upon marriage, therefore, a man and his wife become one. This is predicated on the marital vows and the biblical principles that 'a man shall leave his mother and father and become one in Genesis 2:24 (NKJV); EI Nwogugu, *Family Law in Nigeria* (3rd edn, Hebn Publishers PLC 2014); *Okulate v. Anosanya* (2000) 2 NWLR 530, 542.

where the insured is in a family relationship.[1038] By the fiction of the common law, the husband and wife are one legally. The legal existence of the woman was merged in that of the husband; the woman lost all legal identity by marriage.[1039]

In the context of the application of subrogation, an illustration of a tortious action between spouses was made in *The Midland Insurance Co. v. Smith and Wife.*[1040] In this case, the insured' the right of an insurer to bring an action by way of subrogation against a negligent employee s wife set fire to his own house, and the insurers paid. The court held that they had no right of subrogation against her because under the law as it stood at the time the insured could not sue his wife.[1041]

In the Nigerian and English rules, there is currently, no laws to prevent its avoidance, by outlawing any attempt by the insurers to take an assignment of the assured's rights. A subrogation action against a friend or family member would almost certainly have the effect of requiring that third party to bear a deductible under his own policy and a possible penalty on renewal.[1042] If subrogation actions are therefore allowed against the negligent family member who caused the loss, it would, therefore, be a case of giving the insured (spouse) insurance benefits with one hand and receiving it with another. However, this is not the same situation under the Australian rules, which is examined next.

5.5.1.2. Subrogation Rights Restricted Against Insured's Family in Australia

The restriction of the insurer's right against a family member is an aspect of the Australian law that has been reformed. The current law is section 65 of the Insurance Contract 1984 which removes the right of insurers to exercise subrogation against a third person [1043] in circumstances where the assured would not reasonably have been expected to have exercised any cause of

[1038] John Dobbyn, 'Subrogation and the Innocent Spouse Dilemma' (2004) 78 (4) St. John's Law Review 1095.
[1039] Husband and Wife-Tort Action by Wife against Husband (1929) Indiana Law Journal: Available at: <http://www.repository.law.indiana.edu/ilj/vol5/iss3/8> assessed 10 December 2018.
[1040] *Midland Insurance v. Smith* (1881) 6 Q.B.D 561.
[1041] However, interspousal immunity was abolished in England in 1962 by the Law Reform (Husband and Wife) Act.
[1042] Robert Merkin, A presentation on Reforming Insurance Law: Is there a Case for Reverse Transportation? A Report for the English and Scottish Law Commissions on the Australian Experience of Insurance Law Reform (2015) 85 <http://www.lawcom.gov.uk/app/uploads/2015/03/ICL_Merkin_report.pdf> assessed 10 November 2018.
[1043] ALRC 20, para 305.

action either because of a family or other personal relationship or by reason of the fact that the assured had consented to the third party's use of a motor vehicle covered by the insurance.

Even if this requirement is not met, or if the third party has been guilty of wilful or severe misconduct[1044] or was an employee of the assured, a subrogation action cannot go ahead if the third party was not himself insured. The section goes on to prevent its avoidance, by outlawing any attempt by the insurers to take an assignment of the assured's rights. This section is considered to be fair because of the economic relationship that exists between the insured and third party that caused the loss is preserved.

Having critically examined the position of the law in Nigeria, and England, one point is clear, that there is no restriction of subrogation actions against an insured's family member whether or not an economic relationship exists. This position has been reformed in the Australian jurisdiction and adjudged equitable. It is therefore suggested that both Nigerian and English laws should be reviewed to limit insurers' rights of subrogation against persons who the policyholder has not pursued and might reasonably be expected not to pursue. This, in a way, allows the insured to enjoy the benefits of an insurance contract, with no adverse impact. It is, therefore, necessary for economic reasons to restrict the insurer to exercise subrogation rights against a third party who has a personal relationship with the insured, for example, the insured's friend, spouse, or family member, where the insured has not exercised, and might reasonably be expected not to exercise, his right. However, it must be emphasised that this immunity of the insurer's rights of subrogation should not operate where the conduct of such a third party that gave rise to the loss was willful misconduct.

5.5.2. Subrogation in Co-insurance cases: New Trends for indemnity purposes

The nature of co-insurance is such that two or more parties are insured under the same policy.[1045] Academics report that matters of co-insurance is another complicated and

[1044] This must relate to the event itself and not to the subsequent investigation of it: *Lennock Motors Pty Ltd v Pastrello* (1991) 6 ANZ Ins Cas 61-033.

[1045] See John Birds, *Birds' Modern Insurance Law*, (11th Edn, Sweet & Maxwell 2019) 354; John Birds, Denying subrogation in Co-insurance and Similar Situation, Lloyd's Maritime and Commercial Law Quarterly, 194. Hence, where parties have insured their separate interests in the same policy, there is said to be co-insurance and the parties are co-insureds. For instance, co-insurance relationships exists between vendor and purchaser, landlord and tenant, mortgagor and mortgagee, owner and hirer, bailor and bailee or employer and employee.

challenging aspect in respect of the application of the principle of subrogation.[1046] The difficulty arises because there is an instinctive assumption that an insurer should not be proceeding against a co-assured in respect of an indemnity provided to an indemnified assured. It has been argued that if the assured is not permitted to bring a subrogation action against a co-assured, the objective of subrogation will not be defeated. There is no possibility of double recovery as the insurance provision in the underlying contract will exempt the liability of a contracting party so long as the insurance covers the matter.

A number of cases in England[1047] and few in Nigeria[1048] over the past 20 years have had to resolve the complexities that connect subrogation and co-insurance. Under the common law rules, if parties have insured their separate interests in the same policy like in a co-insurance case, and the parties are co-insureds, the insurance is for the benefit of both so that, upon indemnification of one party, the insurer cannot exercise his right of subrogation against the other party who is at fault. This is derived from the principle that an insurer cannot exercise rights of subrogation against its insured since the insured has the benefit of the insurance in the first place.[1049]

[1046] Peter MacDonalds Eggers QC, 'The Place of Subrogation in Insurance Law: The Deception Depths of a Difficult Doctrine' in *The Modern Law of Marine Insurance* edited by Prof D. Rhidian Thomas (Informa Law from Routledge, Volume 4, 2016) 208; Brownie, J., 'Co-insurance and subrogation' (1991) 3 Ins.L.J. 48. See also, incorporating discussion of many of the later cases; C. Mitchell, 'Subrogation, Co-insurance and Benefit of Insurance Clauses' (1998) 6 Int.I.L.R. 263; P.Mead, "Of Subrogation, Circuity and Co-insurance: Recent Developments in Contract Works and Contractors' all risk policies' (1998) 9 Ins.L.J. 125; S.Warne, "In search of the rationale for the co-insured subcontractor's immunity from subrogated actions in contractors' all risks policies" (1999) 10 Ins.L.J. 262; Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 783.

[1047] *Petrofina Ltd* v. *Magnaload Ltd* [1984] 1 Q.B. 127; *Stone Vickers Ltd* v. *Appledore Ferguson Shipbuilders Ltd* [1991] 2 Lloyd's Rep. 288; [1992] 2 Lloyd's Rep. 578; *National Oilwell (UK) Ltd* v. *Davy Offshore Ltd* [1993] 2 Lloyd's Rep. 583; *Hopewell Project Management Ltd* v. *Ewbank Preece Ltd* [1998] 1 Lloyd's Rep. 448; and now *Co-operative Retail Services Ltd* v. *Taylor Young Partnership Ltd* [2001] Lloyd's Rep. I.R. 122,. These authorities have been heavily influenced by the decision of the Canadian Supreme Court in *Commonwealth Construction Co. Ltd* v. *Imperial Oil Ltd* (1977) 69 D.L.R. (3d) 558. All these cases have also been influential in Australia: see *Co-operative Bulk Handling Ltd* v. *Jennings Industries Ltd* (1997) 9 A.N.Z. Ins. Cas. 61–355 and *Woodside Petroleum Developments Pty Ltd* v. *H & R—E & W Pty Ltd* (1998) 10 A.N.Z. Ins. Cas. 61–395.

[1048] In the Nigerian case of *Weide & Co. Ltd. v Hashim Transport*, [1968] N.C.L.R. 330 the defendants who operated a transport business contracted to carry the plaintiff's goods. It was a term of the agreement that in consideration for the defendant lowering the freight charge, the plaintiff would insure the goods in respect of loss resulting from the carriage. The plaintiff having recovered from its insurer in respect of the loss of the goods resulting from an accident involving the carrying vehicle sought to recover against the carriers on behalf of its insurer. The carrier resisted the subrogation claim on the ground that the intention behind the agreement was that they were to have the benefit of the insurance effected by the plaintiff. Sowemimo J. found that the carriers had been negligent and that the action was in fact that the insurer but allowed the claim on the ground that the insurance was effected for the benefit of the plaintiff owner only.

[1049] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 399.

This presupposes that where the wrongdoer is a co-insured under the policy, the courts will recognise an implied term that an insurer is not permitted to bring an action against a person who is himself entitled to an indemnity under the policy.[1050] The principle seems logical since subrogation aims to prevent over-compensation of the insured. In the case of indemnity policies, the insured is not permitted to make a profit, and this is a very common justification for subrogation. If the insured is not permitted to bring a subrogation action against a co-insured, this objective of subrogation will not be defeated.[1051]

In England, latest court cases,[1052] emphasis that the basis for denying subrogation actions in co-insurance cases against insurers is because insured parties are often insured against the same risk under the same insurance policy'. In the case of composite insurance, however, the position can be somewhat more complicated, as illustrated by the Commercial Court's decision in *Rathbone Brothers Plc & Anor v Novae Corporate Underwriting & Ors.*[1053] The Court held that the insurers were entitled to be subrogated because Rathbone Brothers' liability under the indemnity was not covered under the insurance policy and there was no relevant exclusion of subrogation.

The recent authority on the basis upon which subrogated claim can be brought against the third party wrongdoer is *Gard Marine & Energy Ltd v China National Chartering Co Ltd.,*[1054] where the English Supreme Court discussed the insurer's subrogation against a co-assured or a party who may be a contractual beneficiary to the insurance. Their Lordships, including the minority view, acknowledged that in the case of co-insurance where the insurance is taken out for the wrongdoer assured as well as the assured who suffered loss, the insurer's subrogation rights are not exercised. [1055] However, the subcontractor third party might lose subrogation privileges in several instances which were illustrated in *National Oilwell (UK) Ltd v. Davy Offshore*

[1050] Austin J Buckley, *Insurance Law* (3rd edn Round Hall Thomson Reuters 2012) 185.
[1051] See Ozlem Gurses, Subrogation against a Contractual Beneficiary: A New Limitation to Insurer's subrogation? (2017) Journal of Business Law 1, 15 for a methodological analysis for the interpretation of insurance contracts to determine whether the insurer can exercise a subrogation rights.
[1052] *Co-operative Retail Services Ltd* v. *Taylor Young Partnership Ltd [2002] 2 All E.R 865 [2001] Lloyd's Rep. I.R.*. 122, 127.
[1053] *Rathbone Brothers Plc & Anor v Novae Corporate Underwriting & Ors* [2014] Lloyd's Rep IR 203.
[1054] *Gard Marine & Energy Ltd v China National Chartering Co Ltd [2017] UKSC 35*.
[1055] Recent case laws on this point was revisited by the Scottish courts in *SSE Generation Ltd v Hochtief Solutions AG and another* [2018] CSIH 26 and by the English court in *Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd and others* [2018] EWHC 558 (TCC).

Ltd[1056] Colman J took the view that, if wilful misconduct were proven, the subcontractor would lose subrogation immunity.

It is of the view of the author that the although *Gard Marine*, clarifies that co-insurance arrangements exclude liability between the co-insured parties some questions remain unanswered. Two of these were: what is the strength of the implied term that one co-insured party may not sue another, and when it may be rebutted? What are the juridical basis for the implied term and its consequential impact on sub-contractors? These issues have arisen in two recent cases, which are briefly examined.

The first is *Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd and others,*[1057] wherein the courts considered amongst other issues, what rights insurers have to pursue subrogation claims against sub-contractors on a project. In reaching his decision, Fraser J referred to the recent Supreme Court decision in the case of *Gard Marine and Energy Ltd v China National Chartering Co Ltd*, which held that while subrogated claims cannot be brought against co-insureds, 'like all questions of construction, it depends on the provisions of the particular contract'. [1058] Express contractual terms can override the legal principles governing subrogation claims. This decision again confirms that for a potential subrogation claim against a co-insured, the focus will be on the underlying contract between the 'co-insureds', rather than the policy. It is submitted this is a reasonable approach because it does not punish a co-insured unjustly, as one who shares a similar interest in one policy.

The second case is *Prezzo Ltd v High Point Estates Ltd.*[1059] This case concern a landlord, and tenant issue wherein the courts considered whether landlord's insurers had subrogation rights against the tenant in the context of a leasehold property. The Court, in this case, accepted that

[1056] *National Oilwell (UK) Ltd v. Davy Offshore Ltd* [1993] 2 Lloyd's Rep. 583 Colman J
[1057] *Haberdashers' Aske's Federation Trust Ltd v Lakehouse Contracts Ltd and others* [2018] EWHC 558 (TCC).
[1058] (per Lord Toulson, para 139).
[1059] *Prezzo Ltd v High Point Estates Ltd* [2018] EWHC 1851 (TCC). The fact of the case goes thus: Prezzo Ltd. had a lease of the ground floor and basement of a property which they used as a restaurant. A fire broke out in the restaurant, causing damage to the restaurant and the rest of the building. The insurance clause in the lease was unusual because the landlord was only obliged to insure the 'Premises' i.e. the restaurant and not the whole of the building. The landlord made a claim on its buildings insurance policy. After the landlord's insurer paid the claim, the landlord's insurance company then wanted to step into the shoes of the landlord and make a claim against Prezzo for the damage caused by the tenant's negligence in starting the fire. This "stepping into the shoes of the landlord" is the concept of subrogation. However, in this case, this result was probably not the outcome the landlord and tenant intended when they negotiated the lease.

the principle in *Mark Rowlands Ltd v Berni Inns Ltd*[1060] applied in respect of the restaurant premises. [1061]

The landlord also wanted to claim against Prezzo for the damage the fire had caused to rest of the building. The question was – could the principle in Berni Inns also prevent the landlord from claiming against Prezzo for the damage to the rest of the building? The landlord was only obliged to insure on behalf of both itself and Prezzo for the 'Premises' and not for the whole of the building. Therefore, the Berni Inns principle only applied to the tenant's premises as defined in the lease. Therefore Prezzo was only protected for their restaurant and not for the damage caused to the rest of the building. This meant that the insurer was able to exercise a right of subrogation against Prezzo in respect of the damage caused to the remainder of the building, even though Prezzo's lease limited the landlord's insurance obligations to the restaurant only.

In Nigeria, one typical relationship where co-insurance might arise is one between landlord and tenant.[1062] Therefore, it is a good law to limit subrogation actions against a co-insured like tenants who have contributed or paid premium, as the insurance is for the benefit of both the landlord and tenant. One possible problem is where there is no evidence that insurance is for the benefit of both parties. For instance, an oral tenancy is common in Nigeria, where the insured might default in paying insurance rent. Then a right of subrogation might be available against the tenant. However, it is argued that a claim against such tenants should only succeed where the tenant's conduct causes reckless damage rather than a negligent one.

Some other jurisdictions like the United States and Canada, have held that rights of subrogation will be denied the insurer against one of the parties whose fault has caused the loss in such cases where the courts find that the insurance effected by one party enures for the benefit of the other either because it was the commercial intention of the parties construed from their agreement or implied in it, or because the party not named as insured in the policy paid

[1060] *Mark Rowlands Ltd v Berni Inns Ltd* [1986] Q.B. 211.

[1061] That principle means that where insurance has been put in place for the benefit of both the landlord and the tenant, no claim can be brought against the tenant. In this case, the landlord's insurance for the restaurant was for the benefit of both the landlord and the tenant, and therefore, the landlord could not claim against Prezzo for the damage caused to the restaurant.

[1062] Property law in Nigeria is a very complex situation. Landlords are always quick to punish tenants for losses caused to the property even when the tenant has a benefit. Accordingly, landlords evict tenants using an assortment of tricks, phony legal cases, intimidation, locking out tenants, and physically throwing them of their property or even employing thugs to deal with the tenants.

premiums or gave some consideration to enable the other party to insure for their mutual benefit, thereby fulfilling his covenant to insure.[1063] The insurers must not be allowed to exercise subrogation rights against a co-insured. It would be punishing the same party who has the same interest or is affected by the same loss.

5.6. Procedural Matters and Litigation

In instituting subrogation actions in the court of law, some difficulties arise as to whose name the legal proceedings can commence. There are different perspectives on whether an insurer can file a complaint against the third-party wrongdoer in the insurer's name. In Nigeria, the insurer must bring the action and commence legal proceedings in the insured's name to exercise subrogation rights.[1064] In the case of *IAL 361 Inc. v. Mobil Oil (Nig.) Plc,*[1065] Mustapha J. reiterated that 'it is trite law that the insurance company cannot bring or maintain the action in its name as it does not have any direct right of action against the defendant.'

This principle is parallel to what is obtainable in the English laws, and there are several authorities in support.[1066] This situation Hasson calls a 'fictitious plaintiff' who is suing in the name of the insured.[1067] As noted by Lord Mansfield, in an 18th Century case of *Mason v Sainsbury,*[1068] '*…every day the insurer is put in the place of the assured…the insurer uses the name of the insured…*' As noted by Kyriaki, it is immaterial whether the loss is total or partial.[1069] This proposition is based on the fact that the insurer has no direct rights against anyone other than the insured. This is also a long-established rule in other common law

[1063] The American and Canadian cases have towed this line of reasoning; Hasson, 'Subrogation in insurance law – A Critical evaluation' (1985) 5 Oxford J. Legal Studies 416, 428-435.

[1064] *Prestige Assurance Plc. V. Owners/Charterers of M.V. Wieniaswski* [1996] F.H.C.L.R. 452; *Prestige Assurance Plc. V. M.V. Clara Maersk* [1999] 1 F.H.C.L.R. 347; *British India General Insurance Co. Ltd. v Kalla* (1965) N.M.L.R. 347; *Alhaji Kalla v. Jarmakani Transport Ltd* (1961) 1 ALL N.L.R. 747; *Midland Galvanising v Comet Shipping* (2014) (Unreported) The Court of Appeal, per Iyizoba JCA, held as follows, *'... a suit in court must be instituted in the name of the insured and not in the name of the insurance company as there is no privity of contract between the insurance company and the defendant.'*; Omo-Eboh 'The Doctrine of Subrogation Law and Practice – An overview' (1987) 2 The Legal Practitioners' Review, 43-50.

[1065] In *IAL 361 Inc. v. Mobil Oil (Nig.) Plc.* [2002] 2 F.H.C.L.R. 340, 352 the court held that the underwriters, having paid the loss payee can continue to maintain the action in the name of the latter. It could not bring the action or even ask for a substitution of names as it did not have any direct right of action against the defendant.

[1066] In *Esso Petroleum Co Ltd v Hall Russell & Co Ltd (The Esso) Bernica)* [1986] AC 643 Lord Jauncey stated that '…where an indemnifier is subrogated to the rights of someone whom he has indemnified he can only pursue those rights in the name of that person…'.

[1067] Reuben Hasson, 'Subrogation in Insurance Law - A Critical Evaluation' (1985) 5 Oxford J Legal Stud 416, 420.

[1068] (1782) 3 Doug 61,64.

[1069] Kyriaki Noussia, *The Principle of Indemnity in Marine Insurance Contract: A Comparative Approach* (Springer 2010) 224.

jurisdictions like Australia,[1070] except some states in the United States.[1071] However, an insurer can sue the third party in its own name if the insured assigns to the insurer their cause of action against the third party.[1072]

Also, where judgment is given, it must be entered in the name of the nominal plaintiff, the insured, and the third-party defendant will obtain a good discharge only if he pays the insured and not the insurer as held in *Lion of Africa Insurance Co.Ltd. v Scanship Ltd.*[1073]Similarly, in a situation where the insured is a company that has gone insolvent and ceases to exist, it will be too late for the insurer to seek to use the company's name in the subrogation proceedings. In such exceptional circumstances, the insurer can seek an order for the insured's proprietary interests to be vested in them.[1074]

Another procedural issue concern the controls the proceedings in a subrogation action in litigation matters commonly referred to as the *Dominus Litis.* In practice, the insurance policy will not fully compensate the insured for all losses, and difficulties arise respecting the extent, if any, to which the insured's rights against the wrongdoer pass to the insurer and how the insurer can exercise those rights. These difficulties lead to practical problems about who has the right to commence an action, control the litigation, and account to whom when a judgment is obtained, or a claim is compromised. Under the Nigeria rules, when the insurer has fully

[1070] The Australian law also requires that the insurer must sue in the insured's name because upon making of an insurance contract, the insurer becomes entitled to the benefit of the insured's right as against third parties. According to Greg, this is so because the making of the contract does not assign those rights to, or vest them in, the insurer; Greg Pynt, *Australian Insurance Law: A First Reference* (2nd edn, LexisNexis Butterworths Australia 2011) 395; W I B Enright, Robert Merkin, *Sutton on Insurance Law* (4th edn, Thomson Reuters 2015) 320.

[1071] Generally in the US, there are different rules, In Montana, the use of the insured's name for subrogation action was considered in the case of *Home Insurance Co v. Pinski Brothers Inc*. (1972) 500 P (2d) 945; By contrast in New York, the insurer is allowed to institute an action and sue in his own name by the operation of the '*real party in interest'* rule. N.Y. Civil Practice Act, section 210; The real party in the interest rule designed to avoid splitting the cause of action and making the *tortfeasor* defend two suits for the same wrong; In Alaska, the insured can sue alone, for the whole loss, in cases of partial payment but in doing so, the allocation of the recoveries is then uncertain as to who should have the first claim, and it is less clear whether the insured is liable to the insurer in damage if he does not make *bona fide* consider the insurer's interest; *North River Insurance Co v Mackenzie* [74 SO 2D 5990 (Ala. 1954); Kyriaki Noussia, *The Principle of Indemnity in Marine Insurance Contract: A Comparative Approach* (Springer 2010) 235-236. for more analysis more analysis of American cases and difficult situations that may arise.

[1072] *Smith (MH) (Plant Hire) Ltd v Mainwaring* [1986] 2 Lloyd's Rep 244 at 245 (O'Connor LJ), 246 (Kerr LJ).

[1073] [1969] N.C.L.R. 317 where the plaintiff insurer upon paying the insured for damage to certain goods claimed against the defendant as an agent of the carrier in its own name purporting to exercise its right of subrogation. The court objected and held that the insurer ought to have sued in his name. Taylor C.J. at 321 stated: *'In the absence of a formal assignment of the right of action, the insurers cannot sue the third party in their own names; they must bring the action in the name of the assured. It is the duty, on receiving a proper indemnity against costs, to permit his name to be used in such action'*

[1074] *Re Ballast PLC* [2006] EWHC 3189 (Ch); [2007] Lloyd's Rep IR 742.

indemnified the insured, the insurer can take over control of proceedings instituted in the name of the insured on undertaking to indemnify the insured against his costs of maintaining the proceedings.[1075] The English law also stands on the principle that in the absence of anything contrary to the policy, the insurer has the right to sue the wrongdoer and control the proceedings.[1076] However, the insured can commence and control the proceedings where the insured party has not received full indemnified or has been partially compensated by the insurer, and the insurer has no rights to stop the insured from commencing the action.

On the authority of *Commercial Union Assurance Co v Lister,*[1077] the insured remains the *dominus litis* until it has been fully reimbursed for his total loss. However, where the insured has been fully compensated for his total losses, the insurer becomes the *dominus litis* regarding a subrogation action brought against a third party wrongdoer.[1078] If the insured remains *dominus litis*, there might be a conflict of interest between both parties. One potential problem may arise, where the insured does not consider the insurer's interest and only pursues uninsured losses. In so doing, he has total control of the proceedings and remains *domis litis*. The insured may be in breach of duty in the following circumstance: (i) where the insured settles a subrogation action at a gross undervalue. This disposition harms the insurer because he loses his subrogation right. However, the law permits the insurer to bring an action for damages against the insured for prejudice.[1079]

However, the New South Wales Supreme Court in Australia held in *Johnson v Endeavour Energy*[1080] that unless there is an express contractual right to do so, an insurer who has only paid out part of the total loss does not have authority to conduct and control the insured's right to recover both the insured and uninsured loss, until the insured party has been fully indemnified. It is submitted that the rules on who controls the proceedings appear fair and balanced for the insured and insurer's interest.

[1075] Omogbai Omo – Eboh, *The Law of Insurance Contracts in Nigeria* (West African Book Publishers Limited, 2012) 395.
[1076] John Birds, *Birds' Modern Insurance Law*, (11th Edn, Sweet & Maxwell 2019) 345; Robert Merkin, *Colinvaux's Law of Insurance* (12th edn, Sweet & Maxwell 2019) 773.
[1077] *Commercial Union Assurance Co v Lister* (1874) L.R. 9 Ch. 483; *Napier v Hunter* (1993) A.C 713.
[1078] The Canadian approach is somewhat strict on the issue of control; In Nicholas Pengally, 'When can an Insurer exercise its Right of Subrogation?' (2013) 24 Insurance Law Journal 89, 95-96 the author analysed the Canadian judicial approach to control of proceedings.
[1079] In *Commercial Union Assurance Co v Lister* (1874) L.R. 9 Ch. 483 it was held that the insured is not to act to the prejudice of the rights of the insurers.
[1080] *Johnson v Endeavour Energy* [2015] NSWSC 1117.

5.7. Retained, Restructured, or Abolished Law of Subrogation?

Based on the complex rules of subrogation and the effect on the insured, many questions also relate to the justification for the reasons why subrogation should be retained in insurance law. The primary purposes of subrogation rules in insurance law are to prevent the insured from receiving a double indemnity and to serve as deterrence of wrongdoing by allowing the party responsible for the loss to bear the financial consequences of the loss.[1081] However, other issues concern whether subrogation is wasteful and has any impact on premium reduction. The argument on whether subrogation rules be retained or abolished are discussed in detail.

(i) Is Subrogation Wasteful and Unreal?

The doctrine of subrogation has been criticised on the basis that the results achieved by subrogation are wasteful and harmful.[1082] For example, in the case of *Bee v Jensen* (No 2),[1083] it might seem that subrogation is wasteful because the action was for the sum of £610. It is argued that no matter how small the sum, the insured must be allowed to be fully indemnified and insurers have some recoupments. This is because insurance premiums are not usually a huge sum compared to what the insurers payout. It is submitted that subrogation is an important principle, and if the sum is very reasonable, then subrogation is not wasteful. Convincingly, Nigerian insurance companies need it more as most insurances like motor vehicle have become compulsory.[1084] Thus subrogation should be retained if motor insurers are concerned, about whether if they provide a replacement hire-car under arrangements already made, and which might cost more than their insured would be liable to pay by shopping around, they can

[1081] As shown in *Lister v. Romford Ice and Cold Storage Co.Ltd* [1957] AC 555 where the House of Lords upheld the right of an insurer to bring an action by way of subrogation against a negligent employee of its insured. In as much as this has been criticised for being a bad law and is inconsistent with sound practice in the field of industrial relations, it is justifiable to enforce subrogation rights against employees where there has been wilful misconduct on the part of the employee; Both Nigerian and English laws do not restrict subrogation actions against employees. A better law is the Australian sec 66 ICA 1984 provides that the insurer cannot be subrogated to the rights of the insured against the employee.

[1082] Reuben Hasson, 'Subrogation in Insurance Law - A Critical Evaluation' (1985) 5 Oxford J Legal Stud 416, 417;

[1083] For instance in Subrogation action was held to be wasteful in the case of *Bee v Jensen* (No 2) [2007] EWCA Civ 923; [2008] Lloyd's Rep. I.R. 221, where the claimant, which in reality was his insurers, was held entitled to recover the reasonable loss of hiring a replacement vehicle, which had been paid by his insurers, when his car was damaged by the negligence of the defendant. In reality the action was against the latter's insurers, for the sum of just over £610. The Court of Appeal confirmed that they can do so as long as those costs are reasonable.

[1084] Section 68, Insurance Act of 2003; In the Nigerian situation motor accidents are quite popular due to the bad roads and rickety condition of some vehicles which are not insured. Unfortunately, the insurers in many circumstances forsake exercising their subrogation rights especially where claims are very small, or because it is time consuming; Rashidat Adebisi is the CEO/Excecutive Director, AXA Mansard Plc Nigeria was a panelist at The Development of Insurance Law and Practice in Nigeria: Prospects and Challenges seminar, organised on the 8th Oct, 2020, also confirmed these problems at the seminar.

nonetheless recover the actual costs. This is on the basis that insurance is about risk distribution when compared with the premium paid to the actual compensation costs. Thus it is justifiable for such cost to be recovered back by insurers.

Another point why it has been proposed that subrogation is abolished according to Hasson is the principle seems unreal because in subrogation not only do we invariably have a fictitious plaintiff who is suing in the name of the insured but very often-perhaps in the vast majority of the cases-a fictitious defendant.[1085] Hasson emphasised that '*there can be no justification for concealing the true identity of parties in litigation… the idea of letting insurance companies use disguises to influence the outcome of a case is an obscenity which should not be tolerated in a civilized legal system*'.[1086] To counter this argument, using the insured's name is essential to limit the wings of the insurers. If insurers are allowed to commence proceeding without connection with the insured, the insured might be short-changed. More importantly, subrogation is a legal right dependent on the insured's right and interest not an independent right.

(ii) Does Subrogation Impact Premiums

One of the reasons why subrogation must be retained is that subrogation is necessary for the survival of the insurance industry. For instance, subrogation actions and recoveries in the Nigerian insurance market is currently underdeveloped when compared to other more sophisticated markets, namely Australia, USA[1087] and the UK. Records from these developed countries showed it has helped to keep insurance companies solvent.[1088] Another advantage why it is beneficial to retain the insurer's right of subrogation is that it is a cost-saver for insureds and helps to reduce the premium.[1089] As postulated by scholars, '*insurance companies might after taking 'net subrogation recoveries' into account be able to offer their customers*

[1085] Reuben Hasson, 'Subrogation in Insurance Law - A Critical Evaluation' (1985) 5 Oxford J Legal Stud 416, 420.
[1086] *Ibid.*
[1087] Meyers, 'Subrogation Rights and Recoveries Arising Out of First Party Contracts', 9 Forum 83 (1973).
[1088] In 1972 fire insurance companies in the United States paid out $973,636,000. Subrogation recoveries amounted to $6,620,000 a net recovery of o.68 per cent of paid losses. Again, consider the figures for homeowners' insurance provided by the same author. In 1972, homeowners' claims paid by the insurance industry came to $1,636,147,000. Subrogation recoveries totalled $13,089,000 a net recovery of 0.80 per cent of paid loss.
[1089] Hasson, does not believe this notion is true 'If subrogation recoveries helped reduce premiums, one would expect insurance companies to pursue subrogation recoveries aggressively' but occasional expensive lawsuit, it would seem that subrogation might well have the effect of making insurance more expensive'. The research disagrees with Hasson's theories and argues that the statute can step in to specify how administrative costs on litigation should be disbursed.

lower premiums.'[1090] Thus, in a place like Nigeria, if insurance companies reduce premiums for the benefit of subrogation actions, then ordinary insurance might be affordable because of the level of poverty.

Consequently, in developing countries, it is economically and politically expedient that the large sums accumulated by insurers are invested in the local economy for development purposes. Thus, subrogation rights enable the insurer to recover payments to the insured, who theoretically should have been made whole through those payments.[1091] Consequently, a healthy commercial environment should be created to attain fair trading practices and secure the continued growth of an important industry. Also, subrogation has been found under modern conditions to boost the legitimate expectations of those selling insurance products and, if abolished, will adversely affect the crucial socio-economic role which insurance is expected to perform in a developing country like Nigeria.

5.8. Does the Insurance Consolidated Bill 2016 Improve the law of Subrogation in Nigeria?

Amongst other insurance law principles, the doctrine of subrogation is yet to be reviewed or deliberated upon by the Nigerian Law Reform Commission, which has led to reform.[1092] The Insurance Consolidated Bill 2016 on the subject of insurance law and businesses proposed by the Law Commission to provide an effective mechanism for settlement of insurance disputes is the current Bill on indemnity insurance in Nigeria. An examination of the Bill shows that the aspect that touches on the principle of subrogation remains the same with no improvement on the provisions of sec 80, MIA 1961 (Nig.). The proposed law on the right of subrogation is set out in section 217 (1) & (2) was copied word for word. [1093]

There appears to be no changes or modification on the problematic aspects of subrogation, and the Nigerian Law Commission has not produced any justification. More seriously, the issue of the allocation of recoveries is not addressed. Consequently, no reform of problematic areas of subrogation like the restriction of subrogation actions on an insured's family member is not

[1090] R. C. Horn in this book, *Subrogation in Insurance Theory and Practice* (Homewood, Illinois, R. D. Irwin, 1964) 25; McCoid, Allocation of Loss and Property Insurance (1964) 39 Indiana LU 647.
[1091] E Rinaldi, 'Apportionment of recovery between insured and insurer in a subrogation case', (1993-1994) 29 (4)Tort & Ins. L. J. 803, 817. Charles refers to this a 'restitution to the insurer for payments made'. Charles Mitchell, The Law of Subrogation (1994) 8-15.
[1092] In July 1986, the deliberation to reform insurance contract law centered around the doctrine of Warranties which is contained in the Law Reform Journal, Issue No 5, July 1986.
[1093] See Section 5.2.1. for the provision and interpretation of Sec 80, MIA, 1961.

addressed. It is submitted that this is not good enough because subrogation plays an essential role in insurance law and business.

5.9. Conclusion

It is appropriate to conclude this chapter that the concept of subrogation has an essential place in marine and property insurance laws mainly, to prevent an insured from receiving a double payment from an insurer and the negligent third-party. The primary purpose of subrogation is that an insurer who has met the total of the insured's loss is then entitled to all the rights which the insured has against third parties which may extinguish or diminish the loss is fundamental in insurance law. By so doing, it safeguards the principle of indemnity and deters negligent behaviours in a society. The author finds that although the application of the subrogation rules and actions are widely criticized, yet its legal concept remains unchanged and robust to protect the principle of indemnity which is apparent in the Nigerian, English, Australian statutory laws and several other legal systems.

The main question of inquiry was to find out whether the model for distributing subrogation recoveries under Nigerian law is fair and reasonable on the insured. The objective, therefore, was to inquire the extent to which the current legal requirement under the Nigerian insurance laws, particularly on the allocation of subrogation recoveries, undermines the nature of the principle of indemnity in comparison to the English and Australian laws. The following changes in the law of subrogation are essential to modify the Nigerian laws based on these key findings:

First, it is essential to amend Sec 80 MIA 1961 (Nig.) under the Nigerian statutory laws because the issue of allocation of subrogation proceeds is uncertain and not addressed. As shown, the English case laws and models that are relied upon are not problem-free either. However, some of the Australian approaches discussed in this chapter provide a well-structured, comprehensive and fair approach on the question of allocation, by giving priority to the insured in certain circumstances. Based on the outcome of the model, it appears to be equitable and fairer in scope and does not in many ways cause problem or contradict the aim of indemnity principle, or the underlying policies of subrogation but justifies a legitimate defence of insurer's recoupment of any extra money which the insured wishes to claim.

For this reason, the chapter concludes that the application of the current laws in Nigeria not only contradict the aims of indemnity but the purpose of subrogation. Significantly, because, it strips the insured of any benefits at all when there has been a compromise for the insurer to pursue a potential claim against a third party. Also, the insurer who has received premium ranks in priority, as opposed

to the insured who has paid for financial protection over all losses. The chapter argued that the essence of subrogation is not to deprive the insured of full recover for actual losses but to prevent unjust enrichment of the insured. So, when the insured does not have a potential of having an excess payment, the insurer's right of subrogation should not exist, or all they should be entitled to should be the remnant from the proceeds.

It is therefore suggested that where the insured is yet to be compensated for all actual losses resulting from damage or has uninsured losses not covered by the policy, the insured's priority should come first from subrogation recoveries because the principle of indemnity is bound up with the doctrine of subrogation and are indeed complementary to it. Thus, where double recovery is not in issue, the insurer should not take priority until the insured has been fully indemnified. This approach is consistent with the principle of indemnity. If insureds have suffered an actual loss not covered by the policy, and not given priority, the insured party is deprived of full indemnity, leaving the burden of going uncompensated on the insured, which means that the essence of subrogation could be abused by insurers seeking to recoup what has been paid out. The indemnity principle does not prevent the insured from attaining full compensation for a total loss; it merely prevents retention of any further profit.

Second, the chapter advocates that it is not appropriate that subrogation rights should be available in such a case, and recommended that it should not apply where because of family, or other personal relationships, the policyholder could not reasonably be expected to bring a claim against the person who caused the loss. This is the position in Nigeria and England. For this reason, it is justifiable for certain persons to be immune to subrogation actions because of the economic interdependence and relationship with the insured. It is also recommended that in such cases the policyholder should remain free to exercise his or her rights or to assign them to the insurer after the occurrence of a loss, but should not be required or invited to do so as a condition of the receipt of a direct or indirect benefit from the insurer.

Finally, there are good reasons why the principle of subrogation should be retained in the Nigerian laws mainly because of the potential benefits for insurers and reduction of premiums. This supports the concept of insurance as a risk distribution mechanism. As discussed above, other countries like the United Kingdom and Australia have reviewed certain parts of subrogation to protect the insured's interest. It is thus, hopeful that the suggestions proposed in chapter six of the thesis could be the basis for reforming and improving the current subrogation rules in Nigeria to comply with the principle of indemnity.

CHAPTER SIX: CONCLUSION, RESULTS, AND RECOMMENDATIONS

The research has presented a doctrinal and comparative analysis of three fundamental principles, namely indemnity, insurable interest and subrogation applied under the Nigerian, English and Australian indemnity insurance laws. The central research question examined in the thesis concern how the current legal requirement of insurable interest and rules for distributing subrogation recoveries under the Nigerian laws can be modified and redefined to suit the purposes of indemnity. In response to the objective of the study, the inconsistent rules of insurable interest and subrogation under the Nigerian laws that cause problems and undermines the aims of the principle of indemnity has been identified and critically examined in comparison to the English and Australian laws for better solutions. The thesis thus contributes significantly to the improvement and development of insurance laws and regulation in Nigeria, with proposals and recommendations to reform the inconsistent areas in line with best international practices.

Therefore, the final chapter of the thesis consists of two sections. The first section discusses the general conclusion, which summarises the problems identified in the research. Based on the comparative analysis in this study, the section further produces results of the research questions investigated alongside the critical findings on the controversial areas of insurable interest and subrogation. In conformity with Siems' theory, producing recommendations is one of the possibilities of a comparative study and its final step.[1094] Therefore, the second section proposes some recommendations on how to resolve the problems and suggest ways to improve the current Nigerian insurance laws as it relates to the three fundamental principles.

6.1. An Analysis on the Comparative Study of Nigerian, English and Australian Laws

6.1.1. The Influence of the English Law on Nigerian Jurisprudence

One key conclusion that can be drawn from this study on insurance law and practices in Nigeria is that it follows a similar pattern with the English law. As discussed, not only are the statutory laws identical in drafting, even English judicial decisions are still referenced and applied by Nigerian courts to date. Therein lies the problem wherein the courts might inherit inequitable principles, as highlighted in this study, rather than develop its legal principles. Although the English insurance laws do have a long history of development, compared to Nigerian laws, some problematic laws have been reformed while the Nigerian situation remains the same.

[1094] Siems Mathias, *Comparative Law* (2nd Edn, Cambridge University Press 2018)1.

Therefore, it is essential to have a blueprint of statutory laws and limit the court's reliance on external laws. As shown, the English law has a world-wide reputation, very competitive and are considered as model laws by several countries, including Australia. However, based on modern realities and commercial convenience, the Australian regime has either abolished or modified some of the provisions of MIA 1906 and common laws transplanted into its MIA 1909 and ICA 1984 (Cth), like laws on insurable interest and subrogation. However, this is not the case in Nigeria, as some harsh principles are still retained in the MIA 1961. There is thus an increasing need to think of what is appropriate and realistic for Nigeria.

Another problem is that the Nigerian government and legislature have overtime concentrated more on rejuvenating policies on regulatory mechanisms to improve the insurance market, but the developments of legal principles have been deprioritised. As noted in this thesis,[1095] in 2019 insurance regulators proposed an increment in the capital base of insurance companies, yet the Law Commission is yet to review the current state of the law, on whether to inject certainty or to abolish areas that appear unjust. While it is agreed that the current proposal for capital increase will boost the viability of insurance companies to pay claims, it is submitted that sustainable and efficient laws are essential to protect the interests of contracting parties especially the insured in every insurance transaction.

Also, the procedure for reviewing the laws in Nigeria is not transparent and thorough as it is done internationally, based on political, cultural and religious reasons. Although the consolidation of laws, which propelled the Insurance (Consolidated) Bill 2016 is a welcome development, it is not enough. The changes only tidy up the law rather than reforming its content. It is suggested that the Nigerian Law Commission can glean lessons from both the UK's Law Commission and Australian's Law Commissions' mode of a thorough review of the law, extensive research and employing the expertise of stakeholders before reforms are made. This will build a more robust legal and regulatory framework, curb sharp practices, reduce technical defences used by insurers to avoid payments, encourage consumer participation, international investors and competition, and insurance penetration when standard laws are in place. Besides, well-reviewed laws will propel legislators to draft better laws.

[1095] Section 2.3.3., Chapter 2.

6.1.2. Critical Findings on Indemnity Principle

It is hypothesised in this thesis that 'Nigerian insurance rules on insurable interest and subrogation deprives the insured of obtaining full compensation for actual economic losses suffered, which do not fully reflect the aims of the indemnity principle'. To support this claim, a brief analysis of the functions and goals of indemnity was examined in chapter three of the study as a foundation for discussions in subsequent chapters.

It is concluded that the principle of indemnity is a fundamental concept of insurance law, and the interpretation is universal in Nigeria, United Kingdom and Australian laws. In all these three jurisdictions, the primary yardstick that determines the outcome of an insurance contract is indemnity to place the insured in the financial position occupied preceding the loss. Also, an analysis of case law emphasises on the two sides of the principle of indemnity: (i) to prevent unjust enrichment of the insured; and (ii) to ensure that insurers perform their side of the bargain to fully restore the insured's losses, not more or less.[1096] To support and preserve these goals, doctrines like insurable interest, subrogation, double insurance, the right to contribution, and abandonment are common law principles developed in marine and other indemnity insurance. Although the thesis only examined the problematic aspects of insurable interest and subrogation, which are inconsistent with the principle of indemnity, other principles not examined in this thesis are suggested areas for future research.

As discussed in this study, a large proportion of disputes relates to the second limb of indemnity .i.e. the insured being deprived of his full right under the insurance contract. The research finds that many judicial decisions, legal principles, court opinions and statutory provisions have contributed to the abuse of the indemnity principle and deprives many insureds full recovery. As a consequence, a comparative study of English and Australian approaches reveal that these judicially created barriers did exist in these jurisdictions; however, the law has been reviewed and reformed to address the weaknesses. Nevertheless, the Nigerian law on insurance enacted in the MIA 1961 still upholds the harsh regime, that places insureds in a worse position by depriving them a full reimbursement of actual losses. Thereby making the insurers benefit and denying the insured the fruit of transacting an insurance contract. In light of the circumstances,

[1096] *Castellain v Preston* [1883] 11 QBD 380, 386.

a summary of the critical findings of insurable interest and subrogation is presented and comcludes suggested reforms to resolve the problems of insurable interest and subrogation, which undermines the nature of the indemnity principle under Nigerian laws.

6.1.3. Findings and Discussions on the Principle of Insurable Interest

Chapter four of the thesis asks: How can the current legal interest test of insurable interest in indemnity insurance under the Nigerian laws be redefined for fairness to reflect the nature of the principle of indemnity in comparison to the English laws and Australian laws? The basic concept of insurable interest means that the validity of a contract of insurance depends on the insured's relationship with the subject-matter. However, the test of insurable interest has been the most controversial aspect of what determines the insured's relationship to be entitled to claim any recoveries for losses sustained.

The objective, therefore, was to inquire whether the current legal interest requirement of insurable interest under the Nigerian insurance laws undermines the nature of the principle of indemnity in comparison to the English and Australian laws. To arrive at a logical conclusion, two theories that underlie policies behind the insurable interest requirement were critically analysed in chapter four of this thesis, to determine whether the legal interest approach or factual expectancy test better supports the aims of indemnity.

Based on a comparative analysis, the result shows that for more than two hundred years, the legal approach has been accepted under the English law and for more than fifty years under Nigerian law, which is reflected in court decisions and the statutory laws of both jurisdictions.[1097] It is submitted that the approach, works adversely on an insured who has genuinely contracted to secure recovery of any financial losses that may occur but is refused compensation for lack of ownership title.[1098] The thesis affirms that this position not only conflicts with the essence of procuring insurance but does not adequately implement the policies behind insurable interest doctrine. On this basis, it is concluded that the legal approach is counterproductive, too 'restrictive' and 'narrow' and does not exhibit the aims of the principle of indemnity but serves as a barrier for recovering actual economic losses.

[1097] Sec 7 (1) MIA 1961(Nig.), and sec 5 (1) MIA 1906 (UK.); *Macaura v Northern Assurance Co*. [1925] A.C. 619; *Law Union and Rock Insurance Ltd v Livinus Onuoha* (1998) NWLR (pt. 555) 576.

[1098] As explained under section 4.4. of this thesis, shows the limitations imposed by the application of the legal interest test on shareholders, unsecured creditors, FOB purchasers, and innocent buyers of stolen goods to get insurance cover for their real economic losses.

Furthermore, the legal interest approach creates other problems like insurer's raising illegitimate defences to avoid paying claims and harsh consequences for lack of insurable interest which only penalises the insured, even when insurers failed to carry out their duties diligently. It is suggested that the insurer ought to be held accountable to perform their duty of utmost good faith to identify who or what are covered in the policy. Thus, it is suggested that there should be a statutory penalty for failure to diligently perform their duty at the pre-contractual stage of negotiation. The disclosure of the relationship and connection of the insured to the subject-matter of insurance is a material fact that the insurer ought to elicit from the insured. As illustrated, there is no form of liability or damages required by law where insurers act in bad faith. It, therefore, creates doctrinal uncertainty and legal gap for insurers to hide under the cloak of acting in good faith, issuing policies not supported by an insurable interest. To an extent, the current English Law Commission Bill 2016 improves the current position and is much broader in scope, because it clarifies and expands the definition by incorporating an economic interest, timing of when an insurable interest has to subsist, and the legal consequences flowing from a lack of insurable interest. This means that common law rules concerning insurable interest are superseded. Importantly, it means that contracts which are void for lack of insurable interest can no longer be treated as illegal. Therefore, as discussed in chapter 4, there is scope for premiums to be recovered by the insured, when the English Bill becomes law. However, Nigerian law is still unsatisfactory, and the Insurance (Consolidated) Bill 2016 does not in any way address or correct this problem.

As demonstrated, modern realities have encouraged the courts to allow for recovery where the insured has some pecuniary interest, as shown in leading cases and statutory laws in England, Australia, Canada and South Africa.[1099] It is submitted that the insured's economic interest as a sufficient pre-requisite for recovery is satisfactory. One justification for this stand is that it is difficult to say whether a person will have more intention to destroy an insured property in which he has only an economic interest than the property in which he has a legally recognised interest. In supporting the policy behind insurable interest, the economic interest test would not increase the danger of deliberate destruction of the subject matter insured by the insured party.

To meet the needs and demands of a developing insurance market like Nigeria, the scope of insurable interest must be redefined, in line with the factual expectancy test, for the satisfaction of the purposes of the indemnity principle. Most importantly, because the principle of insurable

[1099] Sec 4.5. of chapter 4 of the thesis examines in detail the case laws and statutory provisions that applied the factual expectancy theory and how it exposes the inadequacies of a restrictive approach.

interest is derived from the principle of indemnity, the thesis suggests, the current law's position should be re-examined because an insured cannot be indemnified for a loss of a property unless there is an interest recognised by law. The thesis re-emphasises that the aim of insurance is for financial protection and not to establish ownership rights. Therefore, the law should permit the broader economic loss test and leave the insurers to enquire on the nature of insurable interest to safeguard themselves against fraud. However, the thesis does not suggest that the requirement of insurable interest is abolished, but that the test should be changed and relaxed considering the evolution of modern market circumstances concerning indemnity insurance. Therefore, this thesis suggests that in formulating a new test of doctrine of insurable interest, it is legally imperative to strike a balance that best accommodates the purposes of the insurable interest requirements and the business and personal interests of those who use insurance.

In summary, the application of the current Nigerian insurable interest rules on indemnity insurance appears overly strict, ambiguous and rigid. However, the research acknowledges that the principle of insurable interest distinguishes insurance from not only wagering contracts, but it is the hallmark of insurance, improves market discipline and efficient underwriting procedure and a tool for refusing invalid claims. Hence, the stand that it must not be abolished but redefined under Nigerian insurance law.

6.1.4. Findings and Discussions on the Principle of Subrogation

Chapter five of the thesis asks: How should subrogated monies recovered from third parties be distributed between the insurers and insured to reflect the nature of the indemnity principle under the Nigerian laws, in comparison with the English laws and Australian laws? The chapter also investigated whether it is fair and reasonable to restrict subrogation actions against certain categories of persons.

In response, the thesis finds that the most controversial aspect of subrogation is the allocation of subrogation recoveries that many jurisdictions have had troubles with over the years. Based on the comparative analysis, the study finds that there are different approaches to the distribution of subrogation recoveries.[1100] While the Nigerian statutory laws do not provide a clear guideline, leading judicial decisions in England as examined appears to be unfair and in

[1100] Sec 5.4.2.. provides discussions on several approaches of the allocation of recoveries.

favour of the insurers.[1101] On the other hand, Australian law seems to be more robust and comprehensive with rules that favour the insured's interest in compensation of actual losses. All mainstream work and literature in the Nigerian jurisdiction are silent on the method utilized in its court, and none referred to legal disputes handled by the courts that have arisen in this area. This gap leaves the insured in a hopeless situation where there is neither a statutory provision nor an equitable common law provision.

To determine which approach is equitable and best to be recommended to strengthen the uncertain aspect of Nigerian law; first, the purposes of subrogation must be used as a yardstick. In principle, subrogation is a derivative of the principle of indemnity, and the essence is to prevent the assured from being paid twice. Thus, it is concluded that it is only in situations where there is the possibility of the insured receiving double payments that the insured should be deprived of the excess and be made to account to the insurer. It must be noted that risk allocation lies at the heart of the priority issue. It is the party that recovers last that bears the risk of incomplete recovery from the tortfeasor. It should, therefore, be noted that insurance companies are utterly indifferent as to which rule is adopted since they can always spread their risks among their policyholders. Whatever approach the court adopts the insurance company will take care of itself. Courts should therefore not focus on contract terms or on whether the insured is paying for subrogation priority, but on risk allocation.

Secondly, most policies in Nigeria are issued and drafted without explanations of the effects of specific clauses and how it might affect their subrogation rights. Neither are the insureds well knowledgeable about insurance laws. Thus, when agreements are made, the insured becomes bound without knowing the implication of excess clauses. Therefore, penalising the insured and giving the insurers priority against subrogation proceeds is inconsistent with the principle of indemnity for preventing the insured from recovering his actual financial loss. The insured is placed in a worse position, by stripping the insured party off what would make him whole.

Unfortunately, as indicated in the thesis, under the English rule, the insured is made to recover last.[1102] Therefore, any approach in treating the insured last undermines the essence of the fundamental principle of indemnity. On this basis, whether or not an insured has agreed to bear

[1101] Sec 80, MIA 1961 (Nig.); *Napier and Ettrick (Lord) v Kershaw* [1993] 1 All E.R. 385; *England v Guardian Insurance Ltd* [2000] Lloyd's Rep. I.R. 404.
[1102] See section 5.4.2., chapter 5.

a part of his own loss by way of deductible or excess, should not be regarded in giving priority from subrogation proceeds. The effect of disregarding the deductible is that the assured is deprived of the right to be paid in full at all before the insurer seeks reimbursement.

In response to the question on how subrogation proceeds should be allocated under the Nigerian laws, it is suggested that the law's starting point should be that an insurer has no claim to recoupment in respect of a third-party recovery obtained by the assured, even after the insurer has fully indemnified the insured under the policy until the insured has been fully indemnified for all actual losses. Therefore, any recovery should be allocated to the insured's uninsured losses first, and the insurer could only claim the benefit of the third–party recovery to the extent that it exceeded the insured's outstanding uninsured losses. Under no circumstances should the insured stand behind the insurer. This approach is consistent with the principle of indemnity and compatible with the Australian model.

Also, the research concludes that it is justifiable for certain persons to be immune to subrogation actions because of the economic interdependence and relationship with the insured.[1103] The research found that different jurisdictions lay down a different legal basis for the immunity of some persons from subrogation action. One of which is the economic relationship between the insured and the negligent third party, which could be a family member in the case of domestic insurance. The research has argued that placing no statutory restriction does not defeat the goals of subrogation, instead of creating a situation that gives the insured with one hand and taking away with the other. The Nigeria law is weak in this regard, and English common law does not proffer a solution. Again, the Australian law is used as a model to revise the Nigerian law on immunity against subrogation actions. Conclusively, subrogation has an essential role and affirms that the rule be retained because it impacts on premium reduction and in a way, sustains insurance companies. However, the Nigerian Insurance (Consolidated) Bill does not improve the weak areas; thus, it is suggested that proposals in this thesis can fill the gap

[1103] Section 5.5., Chapter 5 of the thesis examines restriction of insurer's rights.

6.2. General Recommendations on Improving Current Nigerian Laws

6.2.1. Amendment to Statutory Sections Relating to Insurable Interest

Recommendation 1: Sec 7-10 MIA 1961 (Nig.) should be changed concerning the requirements for an insurable interest as follows:

(1) a contract of marine and non-marine insurance *is not void by reason only that the insured did not have an interest* in the subject matter of the contract at the time when the contract was entered.

(2) where the insured under a contract of marine or non-marine insurance has *suffered a pecuniary or economic loss* because of damage to the insured property, the insurer is not relieved of liability under the contract by reason only that the insured did not have an interest at law or in equity in the property.

Alternatively, suppose the above is not adopted, and the requirement for insurable interest is retained, a new provision should provide that purchasers/buyers of insurable property acquire an insurable interest in the goods or property *by no later than the time when payment is made* for the property or when it becomes bound to pay for the property provided that it subsequently pays for it.

Recommendation 2. Sec 6 MIA 1961 (Nig.) (Inclusion of new section)

(3) If an insured makes an untrue statement about the nature of its insurable interest and either knows it is untrue or does not care whether or not the statement is true, then the insurer may retain the premiums paid in pursuance of the void contract.

(4) If the insured has made no deliberate or reckless untrue statement, then the insurer should be made to return the premium.

6.2.2. Amendment to Statutory Sections Relating to Subrogation

Recommendation 3: Sec 80, 1961 (Nig.). should be amended to provide for the allocation of subrogation recoveries, subject to any agreement between the insurer and the insured, in the following order:

(1) After the insurer has paid the insured for the insured's loss, any subrogation recoveries from a negligent third party shall *first satisfy the insured for the uninsured losses* excluded from the insurance policy, after that the surplus will go to recoup the insurer.

(2) Where the recoveries from the third party are not sufficient to satisfy the insured for his uninsured loss and the insurer for its payment to the insured, the *insured should have the*

priority to be paid for his part of the uninsured loss from his recoveries before the insurer can recoup.

(3) Where there is an excess clause or deductible inserted in the policy, the *insurer must stand behind the insured to recover from the subrogation monies the portion of the excess* which the insured has agreed to bear, while the insurer recoups from the remainder.

(4) The party or parties funding the recovery action are reimbursed for the administrative and legal costs of that action, pro rata if there is more than one such party and there are insufficient funds to reimburse them in full.

(5) In the case of a valued policy, if the sum insured is less than the agreed value, *the insured ranks in priority*, before his insurer from the subrogation recoveries.

(6) If there is any excess or windfall recovery after the insured and insurer have been full recouped, the insured should retain the surplus. If *any interest or surplus accrues due to a long delay* of recovering the subrogation monies, after the insured has been fully indemnified, the *insurer should retain the surplus.*

Recommendation 4: Inclusion of New section Restricting Subrogation Actions

(7) Where the negligent third-party has a family or personal relationship with the insured, the insurer's rights of subrogation are restricted against such persons, except where the loss occurs as a result of wilful misconduct.

6.3. Suggested Future Research

In carrying out this research, the author identified many other areas not investigated in the thesis in detail that require further research which relates to the principle of indemnity. They include other principles of insurance like double insurance, the right to contribution, and abandonment which are common law principles developed in indemnity insurance to support the principle of indemnity. Therefore, it is essential to critically examine whether there are rules derived from these sub-principles that undermines the aims of indemnity.

Finally, the thesis advocates that the indemnity principle under the Nigerian insurance law and practice must not be diluted. To this end, the principle can be reinforced by ensuring that developments relating to the sub-principles of insurable interest and subrogation are consistent with the primary fundamental objective. Encouragingly, as outlined above, such harmonisation is possible–feasible legislative amendments, which draws on lessons learned from good practice in other jurisdictions, is a realistic prospect.

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Commercial Code of Japan

European Legislations

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French Insurance Code
German Insurance Contract Act
Italian Civil Code
Swiss Insurance Contract Act
Canadian Marine Insurance Act 1993

APPENDIX 1: PERFORMANCE OF THE NIGERIAN INSURANCE INDUSTRY

Table 1: Insurance Status in Nigeria (1981 to 2018)

Year	Maritime		Life		Other Insurance Premium		Total Income		
	Amount ₦Million	% to GDP	Amount' ₦Million	% to GDP	Amount' ₦Million	% to GDP	Total Insurance Income ₦Million	% to GDP	GDP in ₦Million
1981	42.11	0.03	47.70	0.03	150.86	0.10	240.67	0.17	144,831.16
1982	43.25	0.03	51.44	0.03	164.82	0.11	259.51	0.17	154,978.39
1983	-2.9	0.00	45.32	0.03	186.21	0.11	228.63	0.14	162,999.81
1984	24.62	0.01	47.10	0.03	165.88	0.10	237.6	0.14	170,377.78
1985	12.22	0.01	40.65	0.02	152.22	0.08	205.09	0.11	192,273.27
1986	34.74	0.02	52.27	0.03	176.68	0.09	263.69	0.13	202,436.32
1987	95.09	0.04	83.24	0.03	241.63	0.10	419.96	0.17	249,439.08
1988	103.521	0.03	100.43	0.03	302.73	0.09	506.68	0.16	320,328.54
1989	149.501	0.04	139.10	0.03	413.16	0.10	701.76	0.17	419,196.39
1990	188.58	0.04	207.82	0.04	652.04	0.13	1,048.44	0.21	499,676.85
1991	213.208	0.04	264.47	0.04	856.55	0.14	1,334.23	0.22	596,044.69
1992	363.484	0.04	499.09	0.05	1,655.32	0.18	2,517.90	0.28	909,803.31
1993	566.597	0.05	1,169.73	0.09	4,164.93	0.33	5,901.26	0.47	1,259,070.46
1994	10,703.49	0.61	2,908.18	0.16	1,060.01	0.06	14,671.68	0.83	1,762,812.82
1995	9,083.42	0.31	2,891.52	0.10	2,612.70	0.09	14,587.65	0.50	2,895,201.36
1996	2,771.95	0.07	2,606.67	0.07	7,771.94	0.21	13,150.56	0.35	3,779,133.07
1997	1,786.40	0.04	3,274.35	0.08	11,458.26	0.28	16,519.02	0.40	4,111,640.63
1998	1,624.01	0.04	3,537.48	0.08	12,684.98	0.28	17,846.47	0.39	4,588,989.84
1999	2,349.66	0.04	2,156.53	0.04	6,373.44	0.12	10,879.63	0.20	5,307,361.52
2000	3,103.37	0.04	2,784.46	0.04	8,159.69	0.12	14,047.52	0.20	6,897,482.48
2001	3,997.07	0.05	3,655.27	0.04	10,788.36	0.13	18,440.70	0.23	8,134,141.81
2002	4,269.54	0.04	4,346.43	0.04	13,311.65	0.12	21,927.62	0.19	11,332,252.82

2003	7,219.71	0.05	7,295.92	0.05	22,292.04	0.17	36,807.67	0.28	13,301,558.86
2004	7,959.76	0.05	8,212.37	0.05	25,259.02	0.15	41,431.15	0.24	17,321,295.24
2005	10,983.38	0.05	9,979.90	0.04	29,384.99	0.13	50,348.27	0.23	22,269,977.83
2006	10,493.41	0.04	10,279.29	0.04	31,086.02	0.11	51,858.72	0.18	28,662,468.77
2007	10,757.81	0.03	16,274.39	0.05	78,347.08	0.24	105,379.28	0.32	32,995,384.35
2008	16,510.25	0.04	30,735.72	0.08	109,960.05	0.28	157,206.02	0.40	39,157,884.39
2009	17,191.14	0.04	36,833.33	0.08	135,935.98	0.31	189,960.45	0.43	44,285,560.50
2010	21,264.62	0.04	43,039.17	0.08	136,072.19	0.25	200,375.98	0.37	54,612,264.18
2011	22,558.84	0.04	57,996.13	0.09	153,197.91	0.24	233,752.88	0.37	62,980,397.22
2012	16,283.93	0.02	64,909.06	0.09	177,209.31	0.25	258,402.30	0.36	71,713,935.06
2013	15,557.49	0.02	80,520.24	0.10	180,451.27	0.23	276,529.00	0.35	80,092,563.38
2014	15,949.50	0.02	85,952.58	0.10	179,941.35	0.20	281,843.43	0.32	89,043,615.26
2015	24,478.05	0.03	90,952.32	0.10	173,911.11	0.18	289,341.48	0.31	94,144,960.45
2016	25,487.53	0.03	124,500.00	0.12	176,126.49	0.17	326,114.02	0.32	101,489,492.20
2017	31,526.86	0.03	161,068.12	0.14	179,245.63	0.16	371,840.61	0.33	113,711,634.67
2018	33,445.67	0.03	169,178.00	0.13	187,785.33	0.15	390,409.00	0.31	127,762,545.58
Average	8,662.92	0.06	27,069.36	0.07	27,069.36	0.07	89,935.17	0.29	27,569,368.69

Sources: CBN (2018), NAICOM (2018), CEIC (Nigeria)2020[1104]

[1104] Census and Economic Information Center (CEIC, 2020) <https://www.statista.com/statistics/307942/insurance-industry-gross-written-premiums-in-the-united-kingdom-uk/> Assessed 30th July 2020; Central Bank of Nigeria (2018) Statistical Bulletin official data manual of central bank of Nigeria; National Insurance Commission (NAICOM)(2020 Annual Reports).

APPENDIX 2: EXCERPT OF THE RELEVANT PROVISIONS FROM MIA 1961

1. Marine Insurance Act 1961

Sec 3. Marine Insurance Defined

A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure.

Sec 5. Marine adventure and maritime perils defined

(1) Subject to the provisions of this Act, every lawful marine adventure may be the subject of a contract of marine insurance.

(2) In particular there is a marine adventure where:

(a) Any ship goods or other moveables are exposed to maritime perils. Such property is in this Act referred to as 'insurable property';

(b) The earning or acquisition of any freight, passage money, commission, profit, or other pecuniary benefit, or the security for any advances, loan, or disbursements, is endangered by the exposure of insurable property to maritime perils;

(c) Any liability to a third party may be incurred by the owner of, or other person interested in or responsible for, insurable property, by reason of maritime perils

(3) For the purpose of this section, "Maritime perils" means the perils consequent on, or incidental to, the navigation of the sea, that is to say, perils of the seas, fire, war perils, pirates, rovers, thieves, captures, seisures, restraints, and detainments of princes and peoples, jettisons, barratry, and any other perils, either of the like kind or which may be designated by the policy.

Insurable Interest

Sec 6. Avoidance of wagering or gaming contracts

(1) Every contract of marine insurance by way of gaming or wagering is void.

(2) A contract of marine insurance is deemed to be a gaming or wagering contract— (a) 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; or (b) Where the policy is made "interest or no interest," or "without further proof of interest than the policy itself," or "without benefit of salvage to the insurer," or subject to any other like term: Provided that, where there is no possibility of salvage, a policy may be effected without benefit of salvage to the insurer.

Sec 7. Insurable interest defined

(1) Subject to the provisions of this Act, every person has an insurable interest who is interested in a marine adventure.

(2) In particular a person is interested in a marine adventure where he stands in any legal or equitable relation to the adventure or to any insurable property at risk therein, in consequence of which he may benefit by the safety or due arrival of insurable property, or may be prejudiced

by its loss, or by damage thereto, or by the detention thereof, or may incur liability in respect thereof.

Sec 8. When interest must attach

(1) The assured must be interested in the subject-matter insured at the time of the loss though he need not be interested when the insurance is effected: Provided that where the subject-matter is insured "lost or not lost," the assured may recover although he may not have acquired his interest until after the loss, unless at the time of effecting the contract of insurance the assured was aware of the loss, and the insurer was not.

(2) Where the assured has no interest at the time of the loss, he cannot acquire interest by any act or election after he is aware of the loss.

Sec 9. Defeasible or Contingent Interest

(1) A defeasible interest is insurable, as also is a contingent interest.

(2) In particular, where the buyer of goods has insured them, he has an insurable interest, notwithstanding that he might, at his election, have rejected the goods, or have treated them as at the seller's risk, by reason of the latter's delay in making delivery or otherwise.

Sec 10. Partial Interest

A partial interest of any nature is insurable.

Sec 18. Measure of Insurable Value

Subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows:

(1)In insurance on ship, the insurable value is the value, at the commencement of the risk, of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure contemplated by the policy, plus the charges of insurance upon the whole:

The insurable value, in the case of a steamship, includes also the machinery, boilers, and coals and engine stores if owned by the assured, and, in the case of a ship engaged in a special trade, the ordinary fittings requisite for that trade:

(2)In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at the risk of the assured, plus the charges of insurance:

(3)In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole:

(4)In insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance.

Sec 29. Valued policy

(1) A policy may be either valued or unvalued.

(2) A valued policy is a policy which specifies the agreed value of the subject-matter insured. (3) Subject to the provisions of this Act, and in the absence of fraud, the value fixed by the policy is, as between the insurer and assured, conclusive of the insurable value of the subject intended to be insured, whether the loss be total or partial.

(4) Unless the policy otherwise provides, the value fixed by the policy is not conclusive for the purpose of determining whether there has been a constructive total loss.

Sec 30. Unvalued policy

An unvalued policy is a policy which does not specify the value of the subject-matter insured, but, subject to the limit of the sum insured, leaves the insurable value to be subsequently ascertained, in the manner herein-before specified.

Measure of Indemnity

Sec 68 Extent of liability of insurer for loss.

(1) Where there is a loss recoverable under the policy, the insurer, or each insurer if there be more insurers than one, shall be liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy in the case of a valued policy, or to the insurable value in the case of an unvalued policy.

(2) For the purposes of this section, 'measure of indemnity' means the sum which the assured may recover in respect of a loss on a policy by which he is insured, being in the case of a valued policy the full an unvalued policy to the full extent of the value fixed by the policy, and in the case of an unvalued policy, the full extent of the insurable value.

Sec 69. Total loss

Subject to the provisions of this Act and to any express provision in the policy, where there is a total loss of the subject-matter insured,

(1) If the policy be a valued policy, the measure of indemnity is the sum fixed by the policy: (2) If the policy be an unvalued policy, the measure of indemnity is the insurable value of the subject-matter insured.

Rights of Insurer on Payment

Sec 80. Right of subrogation.

(1) 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, he thereupon becomes entitled to take over the interest of the assured in whatever may remain of the subject-matter so paid for, and he is thereby subrogated 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.

(2) Subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he 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 such payment for the loss.

Sec 82. Effect of under insurance

Where the assured is insured for an amount less than the insurable value or, in the case of a valued policy, for an amount less than the policy valuation, he is deemed to be his own insurer in respect of the uninsured balance.

APPENDIX 3: CONFERENCE PRESENTATION AND AWARDS

ENGAGEMENTS AND CONFERENCE PRESENTATION

The Tenth Annual Maritime Law and Policy Postgraduate Research Conference (Held at City, University of London, April 5, 2019). A presentation on subrogation actions and distribution of subrogation recoveries: The Need for Reforms under the Nigerian Insurance Laws

The Association for Law, Property, and Society's 10th Annual Meeting (Hosted at Syracuse University College of Law, New York, May 16-18, 2019). A presentation on the English perspectives on Subrogation in Insurance

Postgraduate Legal Research Conference 2019 (Held at Queen Mary University of London 'Silver Linings', June 5-6, 2019) A poster presentation on The Distribution of Subrogation Recoveries: The Need for Reforms under Nigerian Insurance Laws

Advanced Higher Education (HE) Teaching and Learning Conference 2019 (Held at University of Northumbria, Newcastle Tyre, United Kingdom 2-4 July 2019) – Co–presented on Aligning Blooms' Taxonomy with Scaffolding, contextual and collaborative teaching methods to improve learner outcomes

Inaugural Conference of the Commercial Law Research Network Nigeria (CLRNN) 2019 (Held at University of Reading School of Law, September 13 - 14 2019) Presented on Subrogation Actions and the Allocation of Subrogation Recoveries: The Need for Reforms Under Nigerian Insurance Laws

AWARDS

Santander Award - Recipient of the Santander Universities Mobility Awards 2019