INSURABLE INTEREST IN THE CONTEXT OF LONG-TERM INSURANCE

1. INTRODUCTION

“Insurable interest” is one of the basic concepts of insurance law. It refers to an insured’s interest or concern in the non-occurrence of the event insured against. What it precisely entails is not clear and there is indeed widespread uncertainty as to the necessity and import of insurable interest especially in the context of assurance on the life of another.

In an effort to bring some clarity on this topic, the Office for Long-term Insurance has thought it appropriate to put forward some ideas for general discussion. Because of the nature of the problem it is necessary to provide an overview of diverse aspects that have a bearing on the subject.

2. SOME SPECIFIC PROBLEMS

In the context of assistance assurance (commonly referred to as funeral insurance) it happens frequently that persons insure not only their close family members (such as parents and children) but also extended family members, for instance siblings, uncles and aunts, nephews and nieces and even fathers or mothers in law. Insurance by persons living together as man and wife is also common. Very often one and the same policy covers several of these lives. The ostensible rationale of these contracts is to make provision for funeral expenses but it would appear that this type of policy serves a wider purpose. The question arises whether contracts of this nature are valid and enforceable. Two side issues also arise. The relationship with the life insured is often not correctly described (an insured life is for instance referred to as the insured’s wife while the parties are not legally married, etc.) Another difficulty is that insurers put a ceiling on their liability for a specific life. Mr X for instance has three children. They each insure their father’s life for R10 000. However, each policy reads that the maximum amount that may be recovered in respect of all policies on a particular insured life is R10 000. Thus if upon the death of the insured life, insured number one recovers R10 000, the other two can recover nothing.

The Office has also taken note of a scheme in KwaZulu Natal. The operator of the scheme gets hold of the names and particulars of patients in hospital. He then insures these lives either in his own name and for his own benefit or in the name of the life assured but for the benefit of the operator or his nominee. Or he may have the policy issued in the name of the life assured and then takes cession to himself or his nominee. He pays the premiums in the expectation that the life assured will die in the near future. This practice has taken on alarming proportions and the question arises whether there is any objection to it from the perspective of insurable interest or otherwise.

On more than one occasion a life assured has complained to this office that his life has been assured by a partner in business or co-director of a company for a rather extravagant sum. In the circumstances the life insured expressed fears for his safety and approached our office for clarification of his position.

3. ORIGIN OF THE CONCEPT OF INSURABLE INTEREST

The concept 'insurable interest' first surfaced in the lex mercatoria of the middle ages.[1] At that stage insurance was understood to be of a pure indemnity nature covering the insured only for patrimonial loss or damage caused by the peril insured against. The earliest references to insurable interest simply emphasised this characteristic of insurance. Since the insurer's contractual undertaking was to indemnify the insured for patrimonial loss, the latter had to prove that he had a financial interest upon the happening of the insured event because there could be no loss without an interest.[2] In this very respect insurance was considered to differ from a wager because wagers did not contain an indemnity clause.

The English common law was much to the same effect until 1774 when the Life Assurance Act[3] was adopted. This Act introduced some important changes.

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[1] See Reinecke et al *General Principles of Insurance Law* (2002) par 102 referring to the work by De Casaregis.
[2] Ibid.
[3] 14 Geo 3 c 48. The Act, contrary to its misleading title, is not confined to life insurance.

South Africa inherited the English doctrine of insurable interest. This was brought about by certain colonial legislation[4] which adopted English insurance law in the then Cape Colony and the Orange Free State. For this reason English law must be considered.

4. ENGLISH LAW

The Life Assurance Act of 1774 was enacted at a time when wagering contracts were still enforceable at common law as it stood prior to the passing of the Gaming Act of 1845. Its stated purpose was to prevent wagering under the cloak of insurance. According to section 1 of this Act no insurance could be effected on lives or other events in which the person for whose benefit the policy is made had no interest. Section 3 laid down that no greater sum may be recovered than the value of the interest. The Act is still in force today.

Contracts of life assurance were originally held to be no different from indemnity insurance[5] (i.e. as to the nature and time of the interest) but in 1854 in the landmark decision of *Dalby v Indian and London Life Assurance Co*[6] the Court broke away from the principle of indemnity. In interpreting the Life Assurance Act the court held that under the Act an interest is required to exist at the time of the conclusion of the contract. A future or speculative interest would therefore not do. The Court also decided that the interest need not continue until the occurrence of the insured event, unlike the position with indemnity insurance. Consequently, it would not matter if the interest fell away after conclusion of the contract, e.g. where a person has insured the life of his wife whom he divorced before she died. According to section 3 of the Act the interest must be capable of valuation and this led the Court to the conclusion that the interest under the Act must be of a pecuniary nature. An insured may not recover in total more than the sum total of his interest from his insurer or insurers in case of multiple insurances. The breakaway from the principle of indemnity in *Dalby* was therefore not complete but half-hearted .

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[4] Ord 8 of 1879 (Cape Colony) and Ord 5 of 1902 (Orange Free State).
[5] *Godsall v Boldero* (1807) 9 East 72.
[6] (1854) 15 CB 364 (Ex.Ch.).

If a contract does not comply with the Act, it is unlawful and void and not merely unenforceable like ordinary wagers since the Gaming Act of 1845.

The rule that the interest must be of a pecuniary nature has since *Dalby* been subjected to some exceptions. It has been decided that a person may insure his own life for an unlimited amount. The same holds true for assurance by a husband on his wife's life and vice versa. In these cases it is conceded that the interest insured is not a pecuniary but rather an abstract or immaterial interest.[7]

In the recent case of *Feasey v Sun Life Insurance Corp of Canada*[8] the Court confirmed that the interest necessary for life assurance must sound in money. At the same time it acknowledged the differences between indemnity and non-indemnity insurance. Special emphasis is put on the question of precisely what interest the parties intended to insure.

It is clear that English law has not made much progress over the years. The rule that assurance on the life of a third party is limited to the actual pecuniary value of the interest is said to be honoured more in the breach than in the observance.[9] It has even been suggested that insurable interest in life assurance in many respects is clearly out of touch with reality and that reform is necessary.[10]

5. SOUTH AFRICAN LAW

It has been pointed out that South African law inherited the English law of insurance (including the rules on insurable interest). Following the example of English courts, the principle of patrimonial indemnity has been emphasised in earlier local decisions dealing with indemnity insurance.[11] Despite the high incidence of life assurance there is no decision from this period which specifically dealt with insurable interest in the context of non-indemnity (life) insurance.

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[7] See *Feasey v Sun Life Assurance Corp of Canada* 2003 Lloyd's Rep (IR) 637 (CA) 657.
[8] note 7. See p 659.
[9] Clarke *The Law of Insurance Contracts* 4th ed par 3-6D.
[10] Birds & Hird *Birds' Modern Insurance Law* 5th ed p 46. See also Havenga 1999 *TSAR* 630 633.
[11] See Reinecke et al par 109.

In 1977 the legislature repealed the colonial legislation that imported English law of insurance.[12] This has been interpreted to mean that the Roman-Dutch law of insurance has been restored as our common law in respect of insurance matters[13] but English influence is still very strong.

Turning to Roman-Dutch law, it is clear that Roman-Dutch law did not entertain a doctrine of insurable interest comparable to the English doctrine.[14] The authorities simply emphasised that a contract of insurance is a contract to transfer a risk threatening the patrimony of the insured. This implied that the insured must prove an interest upon the insured event in order to prove that he has in fact suffered a loss. Life assurance was not really present in the minds of the institutional writers and indeed some writers created the impression that life assurance was prohibited.[15] This assessment of insurable interest fully conformed to the views expressed in the lex mercatoria. Insurable interest was therefore not an independent requirement for the validity of a contract of insurance. Roman-Dutch law contented itself with the ban on wagers in order to deal with wagering under the cloak of insurance. Not much direct assistance can therefore be derived from Roman-Dutch sources on the nature of interests amenable to life insurance.

Since the 1977 legislation nothing much has developed on the front of insurable interest except that the inherited concept of insurable interest has been judicially challenged in the context of indemnity insurance.[16] However, there still is no leading decision dealing with insurable interest in the context of life assurance.

South African textbooks generally expound and repeat the English rules on insurable interest necessary for life insurance.[17] Some important aspects of the English rules on insurable interest have indeed become firmly entrenched by trade usage and no turn-around seems possible, e.g. the rule that a person may insure his or her own life and that of his or her spouse for any amount he or she deems appropriate. On the

[12] Pre-Union Statute Revision Act 43 of 1977.
[13] *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 SA 419 (A).
[14] See Havenga *The Origins and Nature of the Life Insurance Contract in South Africa with Specific Reference to the Requirement of Insurable Interest* (thesis, 1993) ch 3; Reinecke par 103.
[15] See Havenga ch 3.
[16] See *Phillips v General Accident Ins Co of SA Ltd* 1983 4 SA 652 (W); *Steyn v AA Onderlinge Assuransie Assosiasie Bpk* 1985 4 SA 7 (T). See Reinecke et al par 101.
[17] Cf Reinecke et al par 85.

other hand, some important matters must after the repeal of the provincial ordinances be considered as being open. Thus the question may be asked whether the existence of an *actual* insurable interest at the time of contracting is a separate requirement in law for the validity of a true contract of insurance? May a *future* interest for instance be insured on condition that the interest materialises before occurrence of the insured event?

Perhaps the most important open question is whether the interest in the life of another must necessarily be of a pecuniary nature. Why should abstract interests be excluded from insurance cover? Is it not merely an unnecessary limitation of contractual freedom and an needless obstacle in the way of legitimate insurance business? If abstract interests do qualify, what interests will be regarded as sufficient for this purpose? An ancillary question is whether it is sufficient if the interest existed at the time of the contract but not thereafter. There can after all be no question of the transfer of a risk (as is required for true insurance) once the interest in the insured event has ceased to exist.

In the absence of common law authority and case law, we must deal with these questions in terms of the general principles of South African law but cognisance must also be taken of the developments in comparable jurisdictions. To this end a cursory overview of certain modern laws must be obtained.

6. AMERICAN LAW

America also inherited the English law of insurance. However, the modern American rules on insurable interest are more flexible than those of English law.[18] Apart from own life insurance, an insurable interest is recognised where the insured has a close relationship of affinity, love and affection with the life to be insured, for instance a fiancée has an interest in the life of her fiancé and vice versa; a parent or a child has an interest in the life of the other and siblings have an interest in each other's lives. An insurable interest can also be based on an expectation of benefit such as that enjoyed by a person who is de facto maintained by another without there being any

[18] See Clarke par 3-5, Havenga ch 7.

legal duty on him to do so. In a few states consent by the life insured is sufficient proof of insurable interest.

7. AUSTRALIAN AND NEW ZEALAND LAW

Australian law made a partial breakaway from English law in terms of their Insurance Contracts Act of 1984 while the breakaway in New Zealand was total. Section 19 of the Insurance Contracts Act (Australia) confirms the insurable interest a person has in his/her own life and in the life of his/her spouse. The section also provides that a parent and a guardian has an insurable interest in the life of a child who has not yet attained the age of 18 years. Furthermore, it contains a general provision that a person who is likely to suffer pecuniary or economic loss as a result of the death of some other person has an insurable interest in the life of that other person. Examples of the latter interest given by the section is the interest a body corporate has in the life of an officer or employee of the body corporate; the interest an employer has in the life of an employee and the interest a person has in the life of another on whom he depends for maintenance. In all instances where the section confers an interest in the life of another the amount of that interest is unlimited.

According to the New Zealand Law Reform Act of 1985 the requirement of insurable interest has been abolished. Hence the legislature has put its trust in the prohibition on wagers to contain undesirable contracts under the cloak of insurance.[19]

8. DUTCH LAW

In terms of the Wetboek van Koophandel an insurable interest is required but the parties are free to determine the amount of the insurance. It would appear that abstract interests other than pecuniary interests are amenable to insurance. The proposed new Burgerlijke Wetboek does not require an interest for assurance on the life of a third party.[20]

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[19] See Kelly & Ball *Principles of Insurance Law* (1991) p 33 -34.
[20] See Clausing & Wansink *Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht.* Deel 4 *De Verzekeringsovereenkomst* p 336-337. They state the position as it was in 1998.

9. BELGIAN LAW

The Belgian Insurance Act of 1992 provides that a person who takes out life assurance must have a lawful or justified interest. Such an interest in the life of another is present if the insured consented to the insurance.[21]

10. GERMAN LAW

According to the German Insurance Contacts Act of 1908 insurable interest is not a formal requirement for a contract of life assurance but if the life of a third person is insured, the life insured must give prior written consent where the sum insured exceeds the ordinary burial costs.[22] However, wagers are not enforceable. In order to escape the ban on wagers, an insured will have to prove in borderline cases that the policy was intended to protect an interest worthy of protection whether the interest is of a financial or abstract nature.

11. THE ROLE OF PUBLIC POLICY IN THE SOUTH AFRICAN LAW OF CONTRACT

It has been postulated that the general principles of South African law must be applied in order to deal with the questions posed above. The first of these principles is that a contract must be lawful in order to be valid. A contract is unlawful when it is prohibited by the common law or legislation. The common law renders illegal all contracts contrary to public policy and good morals.

A contract is against public policy if it is inimical to the interest of the community or runs contrary to social or economic expedience.[23] In deciding whether a contract is harmful to the public interest, the interests of the community at large are of paramount importance but sectional interests based on cultural considerations may also be taken into account. It has even been said that simple justice between man

[21] See section 48 of the Belgian Insurance Act of 1992.
[22] Par 159(2) VVG.
[23] The leading case is *Sasfin(Pty) Ltd v Beukes* 1989 1 SA SA 1 (A)

and man should be considered. The enquiry is directed towards the tendency of a transaction rather than its actual result. A court will not lightly regard a contract as contrary to public policy.

From early times most legal systems frowned on aleatory contracts, i.e. contracts of chance. The definition of a contract of chance is not easy but contracts of insurance (including life insurance) prima facie fits this label. This is so because the 'insured' must render his performance, no matter what, while the 'insurer's' performance is subject to an uncertainty. The objections to contracts of chance are varied. It is for instance said that such contracts tempt persons to squander their money to the detriment of themselves and their dependants. They also discourage people from working for a living. A rather more serious objection to an aleatory contract dressed up as a contract of insurance is that it may entice the 'insured' to bring about the event 'insured' against, e.g. by murdering the 'life assured.' The common law branded undesirable contracts of chance as wagers or gambling contracts and condemned them for being contrary to public policy. Freedom of contract had therefore to be sacrificed in favour of the best interests of the community at large. However, such contracts were not rendered void but are merely unenforceable.

Roman-Dutch law distinguished true contracts of insurance from wagers on the ground that a contract of insurance serves to protect an interest. Contracts of insurance operating on interest are therefore prima facie enforceable but the validity of a contract is not guaranteed by the class to which it belongs. Even true insurance contracts may be unlawful if found to be against public policy.[24]

Public policy is an ever changing concept. The above exposition reflects traditional perceptions on wagering agreements but it would seem that the unconditional condemnation of wagers is waning. The legislature has validated certain gambling contracts which were formerly regarded as extreme examples of undesirable contracts of chance.[25] Furthermore, it has been suggested that honourable wagers (ie wager super re honesta) escape the general prohibition on wagers.[26] The

[24] Cf *Richards v Guardian Ass Co* 1907 TH 24.
[25] See National Gambling Act 33 of 1996 s 18.
[26] See *Rademeyer v Evenwel* 1971 3 SA 339 (T).

common law rule on wagers has even been judicially challenged.[27] Could it be that there are no longer fundamental objections to wagering and gambling unless special circumstances exist? How will this affect insurance contracts not supported by an interest?[28]

The question whether a contract is lawful for being against public policy, is regarded as fundamental to the issues concerning insurable interest.

12. PROTECTION OF ABSTRACT INTERESTS IN THE LAW OF DELICT

A further principle of South African law that may be of importance in dealing with the above questions, is that in South African law the concept of loss or damage is two-sided. Damage covers both patrimonial and non-patrimonial loss. Patrimonial loss or damage occurs where, as the result of an uncertain or unplanned event, a person's estate or patrimony is diminished.[29] Compensation that can be claimed for patrimonial loss is termed "damages".

Non-patrimonial loss, on the other hand, relates to a loss or infringement of a non-patrimonial right or interest. Various rights of personality are known, such as the right to physical and psychological integrity. These rights also carry with them various competencies or interests, for instance the interest to be free from pain and physical diseases; the aesthetic interest in having a body which is not disfigured; the interest in completing one's normal or expected life-span; and the interest in the companionship ("*consortium*") of a spouse. If any right or interest of this nature is infringed, an actual if abstract (or non-patrimonial) loss is at hand.

Provided all the requirements for delictual liability have been complied with, monetary compensation can be claimed for an abstract loss, for instance in an action for loss of amenities of life, or in an action for pain and suffering. The amount that can be

[27] See *Nichol v Burger*1990 1 SA 231 (C).
[28] See Reinecke et al par 155.
[29] For a discussion of the concept of patrimonial loss or damage and the elements of an estate, see Reinecke pars 54 *et seq post*.

claimed is also termed ‘damages’ and it serves as satisfaction or consolation (“*solatium*”) for the harm suffered.[30]

13. THE PURPOSE AND BASIS OF LIFE INSURANCE

The traditional belief is that a contract of non-indemnity insurance such as life assurance is not primarily intended to serve the insured’s pecuniary interests. It is after all per definition not a contract of indemnity. It is nevertheless indisputable that the parties to a true contract of non-indemnity insurance are not motivated by a desire to gain excitement by speculating on the outcome of an uncertain event which is so typical of wagers. Neither is it their motive to enrich any one of them as would be the case where wagering is contemplated. An event qualifying for life assurance is undoubtedly seen by the parties as an undesirable event. Its occurrence gives rise to demonstrable harm or prejudice and the ensuing condition of imbalance creates a need for consolation or satisfaction. What, then, is in fact the purpose of such a contract?

It is plain that the most important examples of accepted insurable interests are of an abstract and personal nature. This is in line with modern international perceptions. No proper market value can for instance be placed on the fundamental interest a person has in his own life, health or limbs, or in the life of his spouse, fiancée or fiancé. Admittedly, some of the interests which are being treated as insurable, do have financial overtones but that does not contradict their essentially non-pecuniary nature. On the other hand, interests of a purely pecuniary nature have also been recognised, such as the interest a person has in the life of his debtor. However, it is doubtful whether pure financial interests are proper objects of non-indemnity insurance.[31]

The typical consequences following upon the infringement of an interest insured under a non-indemnity contract of insurance are injury to the insured’s body, limbs or mind; pain and suffering upon bereavement of a beloved like a spouse or a close

[30] About non-patrimonial loss, see generally Visser and Potgieter *The Law of Damages, LAWSA* vol 7 (Damages) pars 83-86.
[31] See Reinecke et al par 43.

family member; distress; grief; mental shock; inconvenience; destitution and insecurity about sustenance; etc. It is precisely against such consequences that insured desire to protect themselves by concluding non-indemnity insurance.

It has been observed that the ordinary concept of loss or damage also comprises non-patrimonial loss or damage following on the infringement of a personal or abstract interest. It seems that the type of loss intended to be covered by a non-indemnity contract, closely resembles non-patrimonial loss recoverable in delict. If satisfaction could be claimed in delict for such non-patrimonial loss, there clearly could not be any objection to an express or tacit contractual undertaking providing satisfaction for a loss resulting from the infringement of a proper abstract or personal interest.

Against this background it is submitted that the protection of worthy albeit abstract interests of a personal nature is the true purpose or basis of a contract of non-indemnity insurance including life insurance.[32] Hence, a true contract of non-indemnity insurance is designed and structured to provide the insured with a sum of money as consolation or satisfaction for the loss or impairment of a worthy personal interest caused by the occurrence of the insured peril.[33] If this theory is accepted, it may serve as a guideline when the insurability of new interests crop up for decision.

Having said all this, it must nevertheless be emphasised that the question whether a particular abstract interest which has not yet been recognised as insurable, may indeed be insured, must in the final analysis depend on considerations of public policy. The general principles of our contract law (as explained above) must therefore be applied. Is the particular contract in other words harmful to public interest on account of its terms or is it not? Does it for instance promote mischiefs similar to those countenanced by wagering contracts? In assessing lawfulness a court must

[32] This approach is explained more fully by Reinecke et al pars 31-50. See also pars 51-95 and pars 102 et seq.
[33] It is instructive that the court *a quo* in *Standard General Insurance Co Ltd v Dugmore* [1996] 4 All SA 415 (A) 421; 1997 (1) SA 33 (A) held that payment of the proceeds of a non-indemity insurance contract could not be viewed as compensation for loss of earnings or earning capacity, but rather constituted a *solatium* for the totality of the consequences of the disability suffered by plaintiff.

take into account that a contract voluntarily entered into is not lightly found to be contrary to public policy[34] and that the condemnation of wagering has softened.

14. CESSIONARIES AND BENEFICIARIES

Where a person takes out life assurance in his own name, he may cede his rights to a third party. It is likewise trite that a person may take out a life policy in his own name and nominate a third party as a beneficiary. In both cases the third party acquires a right contingent on the death of the life insured without himself having to show an insurable interest. How can this be explained and justified? It would seem important that in both cases the third party acquires a right with the consent of the insured. There is consequently something to be said for the approach followed in some countries mentioned above that a person who feels the need to insure the life of another, may, by obtaining the consent of the life insured, acquire a right to insure. In any event, it seems wise to require consent by the life insured not merely to confirm the third party's insurable interest but also to reduce the risk of foul play. This is already observed (albeit indirectly) in those cases where the life insured is required to submit to a medical examination.

15. EXAMPLES OF INSURABLE INTERESTS

In accordance with the principles advocated above, it is suggested that the following examples of interests should be regarded as insurable. In all these instances death of the insured life will invariably cause the insured serious abstract loss such as grief and shock. The list is not intended to constitute a numerus clausus. Further instances of insurable interest may develop in the course of time and in accordance with the principles advocated above.

1. A person has an interest in his own life.
2. A person has an interest in the life of his/her spouse.
3. A person may also be interested in his former wife/husband where ties of affection and care continue to exist.

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[34] See *Sasfin (Pty) Ltd v Beukes*, supra. Also in *Feasy* (supra) p 645 the court reiterated the established principle that a court will lean in favour of an insurable interest.

4. A person has an interest in his/her putative spouse.
5. A person has an insurable interest in a "spouse" by virtue of a traditional marriage.
6. A person has a interest in a cohabitant whether or not of the same sex. In the light of a recent case, such interest is apparently not contra bonos mores.[35]
7. A person has an interest in the life of his/her fiancée/fiancé based on the ties of affection between them.
8. A parent has an interest in the life of his/her child (whether legitimate or not). The interest is based on the bonds of love and affection as confirmed by the contingent right to support. The extent of this interest is in certain cases limited in terms of the Long-term Insurance Act.[36]
9. A child has an interest in the life of his parents.
10. A person has an interest in family members close to him provided there are bonds of affection and love, e.g. members such as a brother, sister, grandparent, grandchild, step child, foster parent, uncle, aunt, cousin and nephew.
11. A person could have an insurable interest in the lives of his parents in law and other members of his family in law. Once again there must be a bond of affection and love between the insured and insured life.
12. It is submitted that a person has an interest in the life of a person who he reasonably expects to bury whether or not there is a legal duty on him to bury that person. In this context cultural customs may be of importance.
13. A person has an interest in the life of any person against whom he may have a contractual or common law right of support. This interest may even be extended to any person who de facto maintains the insured.
14. An employer has an interest in the life of his employee. This interest is based not only on the employer's contractual right to the employee's services but also on the fact that the death of an employee may cause considerable disruption and inconvenience in the workplace.
15. An employer has an interest in the life of a keyman. This interest is similar in nature to the interest of an employer in the life of an ordinary employee but the

[35] Cf *Du Plessis v Road Accident Fund* 2004 1 SA 356 (SCA). A partner in a same sex relationship had a claim for loss of support due to the death of a breadwinner partner.
[36] See sec 55 of the Long-term Insurance Act 52 of 1998.

employer may understandably put a much higher value on the life of a keyman.

16. An employee has an interest in his employer's life. Death of the employer may cause considerable uncertainty and insecurity.
17. A partner has an interest in the life of his co-partner(s) and so has a member of a close corporation in the life or lives of his co-members.
18. It is usually said that a person has an interest in the life of his debtor but it has been pointed out above that it is doubtful whether such insurance should be accommodated under non-indemnity insurance.
19. Parties embroiled in litigation may have the need to insure the life of the presiding judge to protect them from financial loss and inconvenience should the judge die. In so far as they wish to safeguard their financial interests, the contract should be structured as a contract of indemnity but otherwise a life assurance contract may be appropriate.

16. THE AMOUNT OF THE INSURANCE

It is clearly not possible to put an exact value on any of the above insurable interests for the purpose of quantifying the loss upon an infringement of such an interest. The same problem is encountered by a Court which must award compensation for non-patrimonial loss in a delictual action.[37] The best evidence must suffice.

The amount that may be insured should in principle be left to the parties without any artificial limitation. The amount agreed upon should therefore be prima facie enforceable. However, certain caveats must be noted. First of all the contract must be supported by the serious intention to be legally bound. Hence, a person cannot enforce a contract for a large sum insured at a premium he could not afford and had no hope to pay.

Secondly, there may be instances where there the legislature has for good reasons put a limit on the insurable amount.

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[37] Cf *Road Accident Fund v Marunga* 2003 5 SA 164 (SCA).

Finally, an amount insured may be out of proportion to what is reasonably required to compensate for the loss or infringement of the particular interest involved. Such a contract would be harmful to the public interest and therefore invalid. Admittedly it would be difficult to draw the line but this is not sufficient reason to avoid responsibility.

17. DIFFERENCE BETWEEN INDEMNITY AND NON-INDEMNITY INSURANCE

A contract of indemnity insurance serves to protect patrimonial interests while a so-called contract of non-indemnity insurance is intended to protect non-patrimonial interests. In a broad sense of the word both are in fact aimed at providing an indemnity.[38]

It has been suggested[39] that the interest necessary for non-indemnity insurance must exist upon the occurrence of the insured event. The contract must in other words be conditional on the existence of interest at the time of the loss. At the same time it is contended that the parties are free to defer payment of the sum insured until a date after the loss of the interest involved. Suppose for instance a man takes out a whole life policy on the life of his wife but the marriage ends in divorce. The loss is already apparent at the time of divorce but there is no objection to payment being deferred until the death of the insured life when the loss of the insured's abstract interest becomes indisputable and irreversible. This view may be contrary to traditional perceptions but it would bring non-indemnity insurance in line with a fundamental principle of insurance law, viz that insurance serves to transfer a risk in which the insured has an interest.

18. DISTINCTION BETWEEN INSURANCE AND WAGERS

[38] See Reinecke et al par 50.
[39] See Reinecke et al par 48.

Payment of a wagering debt is not conditional on the existence of an interest while both indemnity and non-indemnity insurance become payable only in the event of the loss or impairment of an interest whether patrimonial or non-patrimonial. Thus the time honoured view of the lex mercatoria on this point as received in Roman-Dutch insurance law can be confirmed for both classes of insurance.[40]

10. SOME SPECIFIC SOLUTIONS

Reverting to the specific problems mentioned in paragraph 2, it would seem that there should be no reason in principle to object to the assurance of extended family members and perons living together as man and wife. Misdescription of family members should be dealt with in terms of ordinary principles relating to misrepresentation. There is furthermore no real reason for a contractual limitation on the amount insured by all parties on a particular life (as is described in paragraph 2 above) although nothing prevents insurers from including such a clause.[41] This type of provision is the cause of much discontent amongst insured.

As regards the scheme operated in KwaZulu Natal, it clearly is a fraudulent scheme. General principles are adequate to deal with the problem. One such general principle is that simulations cannot be upheld. The operator obviously has no insurable interest and cannot take out assurance on the lives of unrelated patients. Neither can he achieve the same financial result by inventing a simulated contract in favour of a third party or a bogus cession to himself or his nominee.

Assurance of key men and assurance of the lives of partners and directors should be approached with extreme caution especially where the sum insured runs into millions. It is suggested that large sums could only be insured on the basis of indemnity insurance requiring a financial interest to exist at the time of the loss.[42]

11. CONCLUSION

[40] See Reinecke et al par 48.
[41] However, it must be kept in mind that the duty to observe good faith cuts both ways. In certain circumstances there may well be a duty on the insurer to disclose the amounts already insured on a specific life.
[42] See in this regard Reinecke et al par 43.

It is observed that our law of insurance on insurable interest pertaining to life assurance is in a state of flux and, like a ship without a rudder, in need of direction. The English notion to limit life assurance to pecuniary interests existing at the time of the contract, does not meet the needs of insured or insurance business. To make provision for these needs, it is suggested that a contract of life assurance be accepted as being designed and structured to provide the insured with a sum of money as satisfaction for the loss or impairment of an abstract interest. Whether a particular interest does qualify for insurance, depends, in the final analysis, on considerations of public policy which determine the validity of contracts. The amount of the assurance should be left to the parties but must be reasonably commensurate with the loss.

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