Singapore Journal of Legal Studies
[1997] 499 – 531

INSURABLE INTEREST IN SINGAPORE

Any lawyer who knows anything about the law relating to insurance will be familiar with the concept of insurable interest. In England, this requirement, in the context of general insurance, is imposed by the Life Assurance Act 1774. However, in Singapore this requirement is imposed by the Insurance Act. The provisions which relate to insurable interest do not just reproduce the English position. There are material differences between the English and the local positions. It is the aim of this article is to explore the possible implications of these differences and to attempt to make suggestions as to the local legal position.

I. INTRODUCTION

ONE of the things which distinguish contracts of insurance from general contracts is the requirement that the person taking out the policy or for whose the benefit the policy is taken out has to be able to show that he has an insurable interest in the subject matter of the insurance. The failure to show an insurable interest leaves the purported insured in peril of being uninsured for the risk which he perceives since the contract would be null and void.[1] Often we are tempted to look at this requirement from the English

[1] See s 1 of the Life Assurance Act 1774 which provides that:

> From and after the passing of this Act no insurance shall be made by any person or persons, bodies politick or corporate, on the life or lives of any person or persons, or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof *shall be null and void to all intents and purposes whatsoever*. (emphasis my own)

S 64(1) of the Insurance Act, Cap 142, Rev Ed 1994, provides for the same as follows:

> No insurance shall be made by any person on any event wherein the person for whose use or benefit or on whose account the policy is made has no interest, or by way of gaming or wagering; and *every assurance made contrary to this subsection shall be void*. (emphasis my own)

Similarly, s 59(1) of the Insurance Act, *ibid*, provides for life policies as follows:

> A life policy insuring the life of anyone, other than the person effecting the insurance or a person connected with him as mentioned in subsection (2), *shall be void unless that person effecting the insurance has an insurable interest in that life at the time the insurance is effected*... (emphasis my own)

law angle. However, in Singapore, we have statutory provisions which may have an impact on the way this requirement is to be enforced.

The first thing to note is that at common law there is no requirement for insurable interest.[2] Arguably, as long as the subject matter of the insurance is certain and the usual mantra of offer and acceptance as well as there being valid consideration is satisfied, there is no reason why the contract should not be valid and enforceable. However, this common law position has been altered by way of legislative intervention. Before we proceed to look at the legislative intervention which took place, it is worth noting that even in the absence of this statutory requirement of an insurable interest in the subject matter of the insurance, the nature of a contract of insurance may require some proof of insurable interest as the time of loss.[3] The reason for this is simple – in a contract of indemnity, while the insured's bargain is to pay premiums to secure the insurer's agreement to cover him for the risk in question, the insurer's side of the bargain is to indemnify the insured in the event that he should suffer a loss. If the insured is unable to show he has somehow suffered a loss, then one cannot even begin to speak of the insurer's obligations. This is the principle of indemnity. Of course, since this is merely an implied incident of every contract of indemnity, there is nothing to stop the parties from dispensing with it. This may either be express or it might be inferred from the circumstances of the case.

The first legislative initiative was in the Marine Insurance Act 1745. It was soon followed by the curiously named Life Assurance Act 1774. The reasons for the legislative intervention was really two-fold. Firstly, it was to curb gaming. It was probably felt that the then prevalent practice of taking out policies on subject matter to which the insured had no relation to was a waste of economic resources. Further, there was concern that to allow such practices to continue may inevitably lead to there being an inducement to commit murder or arson.[4] The culmination of all this statutory intervention was evidenced in the rendering of all gaming or wagering contracts as null and void by virtue of section 18 of the Gaming Act 1845.[5]

2 See Birds, *Modern Law of Insurance* (3rd Ed, 1993) at 33-34. See also Merkin, "Gambling by Insurance – A Study of the Life Assurance Act 1774" (1980) 9 Anglo-American LR 331, at 333-37.

3 See Birds, *ibid*, at 34.

4 See the preamble to the Life Assurance Act 1774. See Merkin, *ibid*, at 331-3. See also Patterson, "Insurance Interest in Life", (1918) 18 Col LR 381, at 385-6. See also Tarr, "Insurable Interest", (1986) 60 ALJ 613, at 613-614.

5 Which *in pari materia* with s 6 of the Civil Law Act, Cap 43, Rev Ed 1994.

II. Insurable Interest Defined

Before we begin to look at the various statutes which govern the local position, it might be appropriate to examine what it meant by "insurable interest". One thing which must be pointed out is that although all the statutes require the insurable interest to be shown at the peril of having the contract rendered null and void or simply unenforceable, nowhere has there been any attempt at a statutory definition of the term. It has thus been left to the courts to judicially define what constitutes sufficient insurable interest to satisfy the statutory requirement.

The logical place to begin with the case of *Lucena* v *Crauford*.[6] The facts which gave rise to the case are pretty straightforward. The Commissioners of Admiralty were empowered to take charge of ships captured from the Dutch. They had not taken possession of four enemy Dutch ships which had been captured but nonetheless insured them for their homebound voyage from St Helena to England. The ships were lost due to perils of the sea and the Commissioners made a claim for this loss under the policy. The House of Lords were required to decide if the Commissioners had sufficient insurable interest to support such a policy. It should be noted that although the Commissioners had not taken possession of the ships in question, there was no doubt that, as a matter of course, these enemy ships would be condemned by the High Court of Admiralty as prizes of war and thereupon the Commissioners would be given possession of these ships for sale and management, as was their right under statute.

There were two main decisions that need detain us here. The first was that of Lawrence J who held that

> A man is interested in a thing to whom advantage may arise or prejudice happen from the circumstances which may attend it ... (I)nterest does not necessarily imply a right to the whole, or a part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in the subject of the insurance, which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment, or prejudice to the person insuring; and where a man is so circumstanced with respect to matters exposed to certain risks or dangers, as to have a moral certainty of 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 benefit from its existence, prejudice from its destruction.

6 (1806) 2 Bos & Pul (NR) 269

> The property of a thing and the interest deviseable from it may be very different: of the first the price is generally the measure, but by interest in a thing every benefit and advantage arising out of or depending on such thing, may be considered as being comprehended.[7]

On the other hand, Lord Eldon took a more conservative view of what constitutes insurable interest and chose to limit it to legally enforceable interests:

> I have in vain endeavoured however to find a fit definition of that which is between a certainty and an expectation; nor am I able to point out what is an interest unless it be a right in the property, or a right derivable out of some contract about the property, which in either case may be lost upon some contingency affecting the possession or enjoyment of the party. ...as to expectation of profits and some other species of interest which has been insured in later times, there is nothing to show that they were considered as insurable.[8]

The first thing which would strike any reader who cares to make a comparison between the two competing formulations is that while Lawrence J was comfortable with the idea that a mere expectancy or moral certainty of loss would suffice to found an insurable interest in the subject matter of the insurance, Lord Eldon took a much more legalistic point of view: nothing less than a legal right to the subject matter would suffice.

It should be noted that Lord Eldon's definition is the one that has been accepted by English courts to represent the true position. Lawrence J's definition was not accepted by the rest of the House of Lords. It was considered to be too wide as it would cover a mere certainty of profit or loss. English law now requires some sort of legally recognised right in the subject matter insured and this includes the incurring of legal obligations. An example of the acceptance of Lord Eldon's formulation as representing the correct position in English law is the incorporation of that formulation in section 5(2) of the Marine Insurance Act:[9]

7 *Ibid*, at 302-3.

8 *Ibid*, at 321.

9 Cap 387, Rev Ed 1994. This is a reprint of the UK Marine Insurance Act 1906 which was made applicable without any amendments by virtue of its inclusion in the First Schedule of the Application of English Law Act (Cap 7A, Rev Ed 1994). S 9(1) of the latter Act empowers the Law Revision Commissioners appointed under the Revised Edition of the Laws Act (Cap 275, Rev Ed 1994) to prepare and publish a revised edition of any English enactment specified in the said First Schedule. All further references made to, or discussions with regard to, one statute are equally applicable to the other.

> 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 damage thereto, or by the detention thereof, or may incur liability in respect thereof.[10]

Such a definition which is based on legal or equitable relation to the subject matter of insurance could perhaps be criticised on the basis that it may be overly restrictive. If the mischief to be eradicated by the statutory imposition of the requirement of insurable interest is to strike out wagering contracts as well as remove any temptation which might otherwise exist to destroy the subject matter of the insurance, then it is difficult to understand why there is a need to restrict such interest to only legal or equitable interest. Surely, where the insured person has a moral certainty of loss or prejudice if the subject matter is destroyed, it is difficult to see why the contract would be one of mere idle speculation. Further, if one were concerned as to the offering of temptation to destroy the subject matter of insurance where one only has an expectancy of loss, it could be drawing a fine line between a situation where the insured only has this interest and a situation where he actually stands in some form of legal or equitable relation to the subject matter. There are many cases in the law reports where fraud, by way of arson, is still practised on insurers despite the existence of such legal or equitable relation to the subject matter. It is not clear that temptation in one situation is necessarily greater than in the other.[11]

[10] Entitled "insurable interest defined".

[11] See Merkin, *supra*, note 2, at 333. See also *Constitution Insurance Co of Canada* v *Kosmopoulos* 34 DLR 209, at 224, *per* Wilson J:

> It has also been said that if the insured has no interest at all in the subject-matter of the insurance, he is likely to destroy the subject-matter in order to obtain the insurance moneys. Thus, 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. Frequently an insured with a legal or equitable interest in the subject-matter of the insurance has intimate access to it and is in a position to destroy it without detection. If Lawrence J's definition of insurable interest in *Lucena* v *Craufurd* were adopted, this moral hazard would not be increased. Indeed, the moral hazard may well be decreased because the subject-matter of the insurance is not usually in the possession or control of those included within Lawrence J's definition of insurable interest, *ie*, those with a pecuniary interest only. It seems to me, therefore, that the objective of minimizing the insured's incentive to destroy the insured property cannot be seriously advanced in support of the *Macaura* principle.

III. Insurable Interest in Life Policies

A. *Section 59*

In Singapore, the requirement for insurable interest is found in two sections of the Insurance Act.[12] Section 64 provides for the general requirement while section 59 specifically provides for the requirement in life policies.

Section 59 reads as follows:

> (1) A life policy insuring the life of anyone other than the person effecting the insurance or a person connected with him as mentioned in subsection (2) shall be void unless the person effecting the insurance has an insurable interest in that life at the time the insurance is effected; and the policy moneys paid under such a policy shall not exceed the amount of that insurable interest at that time.
>
> (2) The lives excepted from subsection (1), besides that of the person effecting the insurance, are those of that person's wife or husband, of that person's child or ward being under the age of majority at the time the insurance is effected, and of anyone on whom that person is that time wholly or partly dependent.

Section 59 has adopted an approach similar to the English law approach to insurable interest:[13] there is the general requirement of insurable interest in the life or lives insured, while reserving certain classes of persons in whose life insurable interest is presumed. There is no presumption of interest, *ie*, an insurable interest must be shown, in cases where someone insures the life of someone other than himself, subject to the exceptions in section 59(2). The first thing to note is that, in common with most of the statutes relating to insurance, although section 59 speaks of "insurable interest", nowhere is this term defined in the Act. As such, one has to turn to the English decisions on insurable interest for the purposes of life assurance, *ie*, pecuniary interest must be established. Presumably this would include cases of a creditor insuring the life of a debtor, an employee insuring the life of his employer and that of an employer insuring the life of an employee.

It may also be worth noting that section 59(1) requires not just the existence of an insurable interest at the time of taking out the policy. It also touches

[12] *Supra*, note 1.

[13] Of course, the English law approach relating to classes of life assured where interest is presumed is by way of case law rather than statute.

on the quantification of that insurable interest in that the sum to be recovered is limited to that insurable interest. Another preliminary point worth noting is that, it is clear by the general words used, the exemption offered in relation to the classes of lives in section 59(2) would be to both the existence as well as the quantification of insurable interest. Thus, it would appear that no limit would be set on the insurable interest that the insured has in the lives excepted in section 59(2).

As has been pointed out earlier, section 59 takes a similar approach to that taken under English law in that there is a dichotomy of approaches: firstly, there is the general requirement that insurable interest must be proved in all cases where a life policy is taken out; secondly, this is however subject to certain categories where such interest will be presumed. However, the interesting to note is that section 59(2) seems to have captured a larger number of such classes than is reflective of the position under English law. Section 59(2) lists the classes of persons where there is no need to prove an insurable interest, the requirement of which is imposed by section 59(1). The classes of persons in whom the insured person is presumed to have an interest in the life thereof is much wider than that which are recognised under English law. Of course, as in English law, section 59(2) presumes that a person has an insurable interest in his own life and that of his spouse.

B. *Interest in Life of Child or Ward Under Age of Majority*

In addition, the Act contains the presumption of insurable interest where a person is insuring the life of a child or ward under the age of majority. This is clearly a departure from English law where it has been held that no such interest exists.

However, it is intriguing what exactly is the scope of the exemption. At first impression, one might well come to the conclusion that it is statutory affirmation of the case of *Barnes* v *London*[14] which has been taken as authority for the proposition that a mere moral obligation, as opposed to a legal one, to maintain a child will give rise to an insurable interest, on the part of the person who undertakes this obligation, on the life of the child in question.[15]

[14] [1892] 1 QB 864.

[15] Insofar as this case implied that a mere moral obligation to repay one's benefactor can support an insurance, it has been criticised, and would not on principle appear correctly to represent the law. The true rule appears to be that support given to a dependant does not give an insurable interest in his life unless it can be shown that he was liable to repay the money expended on him.

It is worth noting that AL Smith J in *Barnes* itself, *ibid*, at 866-867, distinguished this case from one involving a parent insuring the life of his child or a guardian insuring the life of his ward. In both these situations, there is a legal obligation on the person taking

It has been suggested by one local commentator[16] that in law, such expenses would constitute the supply of necessaries which is a recoverable expense. Such expenses would be at risk if the child dies. Seen in this light, the case is clearly consistent with existing authorities.

This is an interesting suggestion but it does not answer all questions satisfactorily. There may well be difficulties in applying this debtor and creditor analogy to this case. To begin with, the cases on the supply of necessaries to infants only get around the problem of the lack of capacity to contract on the part of an infant. However, such an analysis may not be enough to get around the problem of the lack of intention to contract. To begin with, it must be remembered when the law speaks of the lack of the capacity to contract on the part of minors or infants, it is contemplating "infants" or "minors" in the sense of the contracting party being below the age of majority. Such words are not used as in common parlance. Many of the cases on necessaries relate to minors who are quite mature. However, it is difficult to understand how such an intention to create legal relations can be similarly applied to a child who has not reach a sufficient degree of maturity to understand what he is agreeing to. Moreover, the plaintiff stood *in loco parentis* to the kid, and the courts are loathe to impose any sort of legal relationship in such domestic situations, not to mention when it concerns maintenance of the child, which could hardly be considered to be any sort of business arrangement.[17] Even if it is admitted that maintenance of a child and all its attendant expenditure constitutes the supply of necessaries,[18] the price to be paid must be a reasonable one.[19] Thus, if the analogy

out the policy to maintain the person insured. Where there is an obligation imposed by the law to maintain, money expended in the maintenance of the child is not a recoverable expense so that no loss would occur if the child dies. The position, however, would be different if the person providing the maintenance is under no obligation to do so. It can therefore been seen that when the court in *Barnes*, *ibid*, placed emphasis on the fact that the obligation owed by the insured was merely a moral one, it was to distinguish it from the situation where there was a legal obligation to maintain the child, for it would be rather odd to allow someone who is obliged by law to do so to be able claim pecuniary interest in the life of the child, especially since any expenditure incurred thereto would not be claimable against the child. In fact, that has been how subsequent courts have construed the decision: see *Harse* v *Pearl Life* [1903] 2 KB 92, at 96, *per* Lord Alverstone CJ; see also *Griffiths* v *Fleming* [1909] 1 KB 805, at 819.

16 See Poh Chu Chai, *Law of Insurance, Vol 1: Principles of Insurance Law* (4th Ed, 1996), at 26.

17 See Andrew Phang, *Cheshire, Fifoot and Furmston's Law of Contract: Singapore and Malaysian Edition* (1994), at 202-203.

18 Andrew Phang, *ibid*, at 631.

19 *Ibid*, at 633.

with a debtor-creditor situation is to be taken to its logical conclusion, the plaintiff will have to be limited to such a reasonable sum. In any event, the court in *Barnes* v *London*[20] did not seem to directing its mind to the question of necessaries at all.

One observation may be made on the utility of the decision in *Barnes* v *London*[21] in Singapore. The court took great pains to hold the situation before it in contradistinction against a situation where the persons maintaining the child were under a legal obligation to maintain the child. It may well be that locally that premise has been statutorily altered where the child has been accepted as a "child of the family". Section 70(1) of the Women's Charter[22] reads as follows:

> Where a person has accepted a child who is not his child as a member of the family, it shall be his duty to maintain that child while he remains a child, so far as the father or mother of the child fails to do so, and the court may make such orders as may be necessary to ensure the welfare of the child.

This section imposes the duty on an adult in an informal relationship with a child where such relationship is not one of parent-child, *ie*, not biological or adoptive relationship.[23] One interesting thing which one should note about this duty is section 70(3) which provides that:

> Any sums expended by a person maintaining that child shall be recoverable as a debt from the father or mother of the child.

Of course, the first observation that one may make about this provision is that since the sums expended may be recovered from the child's parents as a debt, then the person who is maintaining the child may have an insurable interest in the parent's life as a creditor. However, this is not particularly useful in a situation similar to that in *Barnes'* case[24] where the parent has died. But the more engaging question is whether this provision would tend

20 *Supra*, note 14.
21 *Ibid*.
22 Cap 353, Rev Ed 1997.
23 See Leong Wai Kum, *Principles of Family Law in Singapore*, 1997, at 860, and at 861: The basis under s 70(1) ... is the person voluntarily assuming this responsibility when he or she had a real choice to do so. By accepting the child as a member of his or her family, he or she has represented to the child that he or she accepts the duty of maintenance of the child.
24 *Supra*, note 14.

to lead the courts to be reluctant to hold that the child owes the person who has accepted him as a child of the family a debt. This would be particularly true if the duty to maintain the child is premised upon a voluntary assumption of duty. Thus, in light of the local statutory provisions relating to an analogous situation to that in *Barnes'* case, the same debt analysis may not be applicable.

Be that as it may, it would appear on the face of it that section 59(2) is seeking to cover analogous situations by allowing parents and guardians to insure the life of a child under the age of majority. It is really a curious provision. One can understand the scepticism of commentators as to its true utility. If the intention of the legislature was to benefit the minor on the premise that the life policy could be assigned to the minor later on, then surely there are better ways in which to achieve the same aim.[25] The solution could be for the minor to take out a policy on the life of the parent or the guardian instead.[26] After all, the Insurance Act has statutorily altered the common law position as to the contractual capacity of minors insofar as insurance contracts are concerned. Section 60 provides that a child above the age of ten may enter into an insurance contract, although he has to obtain the written consent of his parent or guardian if he is under the age of sixteen.[27] Concern has also been expressed on the possibility that the ability on the part of parents or guardians to take out policies on the life of their child or ward may act as an inducement to murder, albeit by subtle means.[28]

It is interesting to note that in all these years, there has been no local judicial clarification of this provision. Of course, the term "parent" may be cause less difficulty. But the use of the word "guardian" does beg the question of the exact nature of the relationship which must exist before the adult can be classified as standing in such a position *vis-à-vis* the child. It may well be that the term "guardian" has attained the status of a term

[25] See Tan Lee Meng, "Insurable Interest in Life Policies" (1981) 23 Mal LR 137, at 142.

[26] Of course, this suggestion would necessarily be premised upon the child being able to prove insurable interest in the life of the parent or guardian. It has also been suggested that some safeguard ought to be in place to prevent the parent or guardian from influencing the child into assigning the benefits of such policies: see Tan Lee Meng, *ibid*, at 142-3.

[27] S 60 is entitled "Capacity of infant to insure" and reads as follows:

> Notwithstanding any law to the contrary, a person over the age of 10 years shall not, by reason only of being under the age of majority, lack the capacity to enter into a contract of insurance; but a person under the age of 16 years shall not have the capacity to enter into such a contract except with the consent in writing of his parent or guardian.

[28] See Tan Lee Meng, *supra*, note 25, at 142. The learned author also suggests that there should be financial limits placed on such policies on the life of children in order that the temptation of a windfall not be so strong: see *ibid*, at 143.

of art.[29] Thus construed, it is generally agreed[30] that there are three types of guardianship: by natural or parental guardianship,[31] testamentary guardianship,[32] and guardianship arising from an order of court to that effect.[33]

Thus circumscribed, perhaps the danger of the permitting of such policies on the life of a child may be more apparent than real. After all, it could be assumed that in all these situations, the parent or the guardian will show genuine affection for the child. The Court of Appeal in *Griffiths* v *Fleming*[34] had held that a husband is no more likely to indulge in "mischievous gaming" on his wife's life than a wife on her husband's and thus such policies would be hardly within the mischief of any statute requiring insurable interest.[35] Moreover, the interest of a husband is "the personal interest founded on affection and mutual assistance, and not a pecuniary interest".[36] Such arguments

[29] See Leong Wai Kum, *supra*, note 23, at 251:

> Guardianship ... is entirely a creation of the law. It is the status which the law bestows upon a particular adult *vis-à-vis* a particular child to empower the adult to exercise some or all of the rights and powers he would have had if he had been a parent of the child.

[30] See Leong Wai Kum, *supra*, note 23, at 322. See also OS Khoo, *Parent-Child Law in Singapore*, 1984, at 90-3.

[31] Of course, as has been observed by Leong Wai Kum, *supra*, note 23, at 252-3, this is in a sense superfluous since the rights of a natural guardian are no greater than the rights of a parent, nor would the lack of such status as a natural guardian detract from the natural authority of a parent. Another interesting question is the status of an adoptive parent under the Adoption of Children Act (Cap 4, Rev Ed 1985). Does such a person acquire the status of a natural guardian by virtue of the fact that he now takes over from the biological parents or is he a guardian appointed by the court by virtue of the fact he is the parent as a result of a court order? Of course, all this may be inconsequential in light of the fact that he does not need to rely on his status as a guardian to exercise his rights over the child since the adoption order, he takes over as the parent, and as suggested earlier, the denial of the status of a natural guardian would not detract from his status as a parent, particularly if one accepts the definition of adoption suggested by Leong Wai Kum, *ibid*, at 314:

> Adoption is the process whereby the parental relationship between a child and his biological parents is severed irrevocably and replaced by a new parental relationship created between the child and his adopters.

In any event, it may well be irrelevant for the purposes of our discussion which form of guardianship an adoptive parent takes since s 59(2) provides that insurable interest shall be presumed in either the parent or the guardian. Of course, this is again premised upon the assumption that when the adoption order is made, the adoptive parent takes over as a parent for all intents and purposes. It might also be worth noting that *de facto* adoptions are not recognised locally: see Leong Wai Kum, *ibid*, at 314-6.

[32] Where either parent of the child appoints, by deed or will, any person to be a guardian of the child after his demise.

[33] Under the Guardianship of Infants Act, Cap 122, Rev Ed 1985.

[34] *Supra*, note 15.

[35] *Ibid*, at 820-1.

[36] *Ibid*, at 823, *per* Kennedy LJ.

can surely be extended to the parents of a child as well. No doubt, there might be some perverse parents who might be tempted to take a policy on the life of their child and accelerate the demise of that child in order to acquire a windfall, but surely this danger can be no greater than that in spousal insurance. With regards to guardians, other than natural guardians, they are appointed by the parents or by the court, both of whom can be trusted to have the best interests of the child at heart when entrusting the care of the child to the guardian. Thus, it may well be that in such a situation, the danger of an inducement to murder may be more apparent than real.

This argument would also bolster the argument that the legislature intended that "guardians" be understood in the technical sense, and not merely someone *in loco parentis*. Surely it could not have been the intention of the legislature to include a category whereby the aim of the statutory provision would be undermined. It perhaps noteworthy that the Australian legislature has deemed it fit to amend the provisions relating to insurable interest in minor children. Under section 86(1)(a) of the Life Assurance Act 1945 (Cth),[37] insurable interest is deemed to be had by, *inter alia*, a parent of a child under 21 years of age, or a person *in loco parentis* of such a child, in the life of the child. This has been modified in section 19(2) of the Insurance Contracts Act 1984 which lowers the age of the child to 18 years of age, and confines insurable interest to a parent or a guardian of the child. The class of persons who are deemed to have an insurable interest in the child is more restrictive. The Law Reform Commission of Australia was of the opinion that the phrase "persons *in loco parentis*" was too wide and would include persons like a headmaster of a boarding school who, in their view, ought not to have an insurable interest in the life of the child.[38] This limitation of the deeming of interest, other than in parents, to guardians is perhaps understandable. Although it is not stated explicitly, the Law Commissioners were probably concerned that having too wide a class of persons, including

[37] S 86(1) provides as follows:

An insurable interest shall be deemed to be had by –

(a) a parent of a child under 21 years of age, or a person *in loco parentis* of such a child – in the life of the child;
(b) a husband – in the life of his wife;
(c) a wife – in the life of her husband;
(d) any person – in the life of another upon whom he is wholly or in part dependent for support or education;
(e) a corporation or other person – in the life of an officer or employee thereof; and
(f) a person who has a pecuniary interest in the duration of the life of another person – in the life of that person.

[38] Report No 20, "Insurance Contracts" (1982) Australian Law Reform Commission, at para 147.

persons who might not have such an unimpeachable interest in the child's life, would be undesirable as it may act as an inducement to murder. As has been pointed out, the restriction to "guardians" would probably serve to minimise the mischief behind the statutory requirement of interest since such persons can be assumed to harbour no such sinister intentions on the child's life.

One last point may be made about this category under section 59(2). If the terms "parent" and "guardian" are to be assigned their technical meanings, then it would mean that the situation in *Barnes* v *London*[39] would not fall into this category. Thus, whether the judicial recognition given to an insurable interest in the life of a child whom one takes in voluntarily is applicable in Singapore will depend on whether the local courts accept the reasoning in the decision itself, as well as whether the local statutory provisions relating to the duty to maintain such a child would preclude such reasoning from applying.

C. *Interest in Life of Person on Whom Insured is Dependent*

A most interesting class of persons who are presumed to have an insurable interest in the life of the person whose life is insured is that of persons who are wholly or partly dependent on the person whose life is insured. It is not clear whether this creates a separate category of cases where there is insurable interest even where there exists no legal obligation to provide or is it merely a reflection of English law and nothing short of a legal obligation will suffice, a mere voluntary or moral undertaking being insufficient. The issue is simply whether this category, where interest is presumed, only contemplates a situation where there is legal dependency or is it meant to cover situations where there is *de facto* dependency as well. Unlike the previous class of persons in whom it is presumed to be insurable interest in the life to be insured, this category presents problems because there are no technical terms which can be accepted as being intended by the legislature.

The first question which this category begs is what is meant by "partly" – just how much dependency will suffice? There is the further problem of the nature of this dependency. Are we concerned with financial dependency here or does the provision other forms of dependency, *eg*, emotional dependency? As noted by a commentator,

[39] *Supra*, note 14.

> Admittedly, the hitherto inflexible attitude of English courts in regard to the categories of persons for whom insurable interest is presumed to exist needed changing as it created unnecessary hardship for some persons. However, providing for such deserving cases through the wide statutory formula of "dependents" is hardly the right answer to such problems since this benefits too wide a class of persons.[40]

It is perhaps unfortunate that such obscure language was used if such was the laudable intention of the legislature in adding this class to those where interest is presumed. It has been suggested that this category will allow children to insure the lives of their parents or guardians, and *vice versa*, for their parents or guardians to insure their lives.[41]

Under English law, it has been held that children have no insurable interest in the lives of their parents or *vice versa*.[42] It is not entirely clear if the same position is to be taken locally. With regards to children, it may be that this provision might not even be necessary in the local context since under the Women's Charter,[43] parents are under a duty to maintain their

[40] Tan Lee Meng, *supra*, note 25, at 143.

[41] *Ibid*, at 143-4.

[42] One of the interesting category of cases which has been considered by the courts under English law is that of parent and child. Under English law, it has been held that both parent and child did not have an insurable interest in the other's life: see *Richard Halford* v *Kymer* (1830) 10 B & C 724 where a claim by a father on a policy on the life of his son was denied by the court on the basis that it would not be valid under the Life Assurance Act 1774 since he did not have any pecuniary interest in the life assured. The reason for the court's decision was that a parent is not under any legal obligation to incur any expenses upon the death of the child. Even if the parent was being maintained by the child, since it is in discharge of a merely moral obligation, as opposed to a legal one, there is no pecuniary interest sufficient for the purposes of the requirement of insurable interest.

For the converse situation, see *Harse* v *Pearl Life Assurance Co Ltd* [1904] 1 KB 558 where it was similarly held that a child had no insurable interest the life of a parent. In this case, a son had insured the life of his mother who was living with him. She also kept house for him. The policy was expressed to cover funeral expenses he might incur upon her death. The Court of Appeal held that the policy ought to be struck down for lack of insurable interest. According to the court, there was no legal obligation on the child to bury his mother, nor was she legally obliged to keep house for him. A similar decision was arrived at in *Howard* v *Refuge Friendly Society* (1886) 54 LT 644.

It is interesting to note two things about these decisions under English law. Firstly, the cases appear to addressing the factual matrix of adult children who take out policies on the life of the parents. Further, even in the case of infant children, at common law there is no duty, on the part of the parents, to maintain them. Which would explain why the cases tend to devote themselves to considering if any legal obligation to incur expenditure would arise upon the death of the insured person.

[43] *Supra*, note 22.

children.[44] So presumably, since the child would stand to lose the benefit of this legal right to be maintained upon the death of the parent and, as a consequence, would suffer a pecuniary or financial loss, the child has an insurable interest in the life of both parents.[45] Of course it might be argued that the insurable interest would arise only when a maintenance order is made. However, that might be a fallacious argument as the maintenance order is only the enforcement procedure open to the child in question when the parent fails to fulfil his legal obligation.[46]

[44] See generally s 68 of the Women's Charter, *ibid*, which provides that:

> Except where an agreement or order of court otherwise provides, it shall be the duty of a parent to maintain or contribute to the maintenance of his or her children, where they are in his or her custody or the custody of any other person, and whether they are legitimate or illegitimate, either by providing them with such accommodation, clothing, food and education as may be reasonable having regard to his or her means and station in life or by paying the cost thereof.

See also s 69(2) which provides for the legal remedy should the parent fail to perform this duty of maintenance:

> A District Court or a Magistrate's Court may, on due proof that a parent has neglected or refused to provide reasonable maintenance for his child who is unable to maintain himself, order that parent to pay a monthly allowance or a lump sum for the maintenance of the child. ...

S 69(6) goes on to provide that such an order shall cease to have force when the child turns 21 years of age unless such order provides to the contrary. See further on this duty of the parent to maintain the child: Leong Wai Kum, *supra*, note 23, at 855-876.

[45] See *MacGillivray & Parkington on Insurance Law* (8th Ed, 1988), at para 100:

> It is arguable that in view of the comprehensive provision now made by statute for the granting of maintenance orders against parents who fail to maintain their children, the absence of a general common law obligation is of no contemporary importance.

See also Birds, *supra*, note 2, at 39.

[46] Be that as it may, having a maintenance order being in force does offer a certain advantage in that it would obviate any problems there might be in calculating the extent of the child's interest in the parent's life. Of course, s 59 has done away with this problem since, not just the existence of interest but also, the extent of interest is presumed.

This renders superfluous what might have been an interesting question (which still exists under English law): What is the extent of insurable interest that a child has in the life of a parent? As has been pointed out, in a situation where there is a maintenance order in force, it is perhaps referable to the value of such maintenance payable under such order. This would be the quantum of the monthly maintenance as calculated against the period of time for which the maintenance continues to be payable, *ie*, until the child reaches the age of majority, or until such time when the order lapses: see *MacGillivray & Parkington*, *ibid*, at para 99:

> In such a case, there may be a maintenance agreement or a court order by which the father is bound to make periodical payments for the maintenance of the child. There is no authority on the point, but it seems reasonably clear in principle that there is an insurable interest where there is such an agreement or order. The valuation of the interest presents no difficulty, as the obligation is to make payments at a fixed rate for a determinate period of time.

In any event, there is no reason why the courts should not view such policies in the same light as they do policies taken out by assureds on their own lives or those taken out on the life of their spouses. There is no real danger with there being any gaming or wagering. If the courts take the view that spouses would not entertain any evil thoughts or harbour such intentions towards their partners, then why should the same view not be taken with regards to their issue? Thus, if one were to bear in mind the *raison d'être* behind the legislative intervention, there would be no danger in the mischief envisaged by the statutes requiring insurable interest manifesting itself.

Of course, some reservations have to be made here relating to the applicability of the arguments raised in favour of recognising an insurable

Of course, since the English statutes only require that the insurable interest be in existence and be limited to that extent as referable at the time when the policy is first taken out, it would not take into account any revision of such maintenance orders. However, there is nothing in principle to prevent the child from taking up another policy on the life of the parent for the shortfall should the need arise.

This method of quantifying the extent of the interest which the child has in the life of the parent works only if there is a maintenance order. However, the fact that there are practical difficulties in determining the extent of that interest does not mean that the courts should simply throw up their hands in despair. Such difficulties are never insurmountable. One simply has to look at how courts arrive at the loss of earnings figure in personal injuries and wrongful death cases to bear witness how the courts can adapt to the needs of the situation. One possible solution is that the court, if the issue of the extent of interest is in dispute, can take a similar approach as it would in a situation where a maintenance order is asked for while taking into account future needs of the child. The other possibility, of course, is for the courts to simply adopt the same sort of reasoning as they do with life policies on own lives and on the life of spouses – presume the extent of the interest as well: see *MacGillivray & Parkington*, *ibid*, at para 100:

> It is arguable that in view of the comprehensive provision now made by statute for the granting of maintenance orders against parents who fail to maintain their children, the absence of a general common law obligation is of no contemporary importance. There are, however, problems of valuation ... A possible solution is to presume an interest of unlimited amount in this case, as in that of husband and wife, but this may be a step too large to be achieved without legislation.

Of course, some of the above arguments may well be buttressed by the legislative intent behind s 73 of the Conveyancing and Law of Property Act (Cap 61, Rev Ed 1985), which corresponds to s 11 of the Married Women's Property Act 1882 in England, which provides for imposition of a statutory trust where a life policy is taken out by a person and the spouse or the children or the spouse and children are named as the beneficiaries of the policy. The imposition of such a statutory trust in favour of the immediate family members of the insured perhaps goes some way to show that there is legislative concern that the spouse and children of any person should be protected in the event of the untimely death of the life assured. It is then difficult to see how it would be possible to reconcile a refusal to recognise the existence of a child's insurable interest in the life of the parent with such concern.

interest on the life of a parent on the part of a child. The first one relates to the age of the child taking out the policy. The basic premise for arguing that such interest exists is that there is a legal obligation on the part of the parent to maintain the child. As such, in light of the Women's Charter,[47] having been amended, stipulating that such legal obligation terminates upon the child reaching the age of twenty one,[48] the argument for the existence of interest must necessarily be limited to a situation where the policy is taken out while the child is under the age of majority.[49]

With regards to children who take out policies on the life of their parents, it may well be that this category does not add much since under local legislation the parents are, in any event, under a legal obligation to maintain them, thereby giving rise to a legal dependency.[50] However, in the case of parents who are financially dependent on their children and wish to secure themselves against their demise, this provision will be useful if it is not premised upon a legal dependency. This is especially so in light of the fact that the Maintenance of Parents Act[51] does not appear to create a legal duty on the part of the adult children to maintain the parent.[52]

The most crucial issue here has to be whether the legislature intended merely to reflect the English law position, in which case nothing short of a legal obligation will suffice, or did it intend to alter the hitherto held view and extend insurable interest to include cases where a mere moral obligation to maintain is present. The use of the rules pertaining to statutory

47 *Supra*, note 22.

48 S 69(6).

49 Unless, of course, such order is expressed to extend beyond the time when the child shall attain the age of 21 years: see s 69(6). In this case, even if the child is above the age of 21, he shall continue to have insurable interest in the life of the parent or parents as long as the maintenance order shall continue to be in force.

If not for the presumption of the extent of interest under s 59 of the Insurance Act, this would have had implications as well for the question of the quantification of the extent of that interest, if any. As has been argued earlier, the extent of the interest could be calculated as if there had been a maintenance order being made in favour of the child as against the parent in question. Such quantification will thus be determinable in terms of this period of time.

50 The only utility of this provision may well be in the presumption of the extent of interest as well, thereby obviating any problems outlined in *supra*, note 46, which might have otherwise arisen with regards to the quantification of the extent of the interest that a child may have in the life of a parent.

51 Cap 167B, Rev Ed 1996.

52 See Leong Wai Kum, *supra,* note 23, at 879:

> The applicant cannot, on the basis of this Act, claim to be entitled to maintenance from his or her children as of right. At most, he or she may, as a privilege, obtain an order ... that a mature child should provide maintenance.

interpretation are not particularly helpful either. On the one hand, one could argue that if Parliament intended to alter long established rules of English law, it would have done so much more unequivocal language. On the other hand, if it is merely reflective of the English law position, what then is the utility of restating that position in a statute. This is especially so when one category is restated to the exclusion of others.[53]

It may be of interest to note that the Australian Life Insurance Act 1945 (Cth) has a similar provision in section 86(1)(d):

> An insurable interest shall be deemed to be had by –
> ...
> (d) any person – in the life of another upon whom he is wholly or partly dependent for support or education; ...

The understanding of this provision has not been free of conjecture either. The Australian Law Commission has appeared to take a broad view of the provision and has, as such, suggested that under this provision, many relationships which were previously held to be inadequate to create an insurable interest were now sufficient, *eg*, *de facto* spouses could now insure the life of their partners.[54] Commentators also seem confident that this was sufficient to include situations where a sick woman who was being supported by her brother.[55] The decision of the Supreme Court of New South Wales in *Coleman* v *NRMA Life Ltd*[56] is not very helpful either. In this case, the insured had insured the life of a close personal friend with whom he had a period of co-habitation. However, the claim failed because evidence was adduced to show that the insured was in no way financially dependent on the life insured. Thus, it seems to be simply assumed that the Australian provision alters the common law position. However, there may some light shed upon the requirements of section 86(1)(c) when the court in *Coleman* v *NRMA Life Ltd*[57] considered the other ground on which the insured relied upon to found insurable interest in the life of his close friend. This is section 86(1)(f) which provides that there is insurable interest in the life of a person the duration of which the insured has a pecuniary interest.[58] It is interesting here, that the court seemed to take the view in order to fall within this

[53] *Eg*, debtor-creditor situations as well as employer-employee situations.
[54] *Supra*, note 38, at para 134.
[55] Wickens, *The Law of Life Insurance in Australia* (5th Ed, 1979), at 31-32.
[56] (1984) 3 ANZ Insurance Cases #60-566.
[57] *Ibid*.
[58] It is interesting to note that the court here seemed to take "pecuniary" as simply something which is quantifiable in terms of money.

section the insured would have to prove a type of arrangement which could have constituted a legally recognised relationship, in that it must be the sort of arrangement from which an enforceable claim could have arisen. If this is the restrictive view of this provision that the Australian courts take, then one wonders if they would be inclined to be any more generous in their interpretation of "dependent" in section 86(1)(c)?

While the Australians seem to be little troubled by such a wide extension of the relationships which may found insurable interest, there may still lurk the spectre of the temptation to commit murder in order to get hold of an instant windfall. One can only speculate as to the exact nature of the relationships which will fall within the fold of this category. Unlike the previous category under section 59(2), where parents and guardians can, in most situations, be presumed to have only the best interests of the life assured at heart, the same cannot be said of all persons who may fall within the present category if a strict legal obligation is not required. Taken to its logical conclusion, it may well be the case that a hoodlum who extorts "protection money" from stallholders at a hawker centre may be able to take out policies on the lives of these stallholders, since he is at least partly financially dependent on them to maintain his lifestyle. In a situation such as this, it does not require too fertile an imagination to see how the inducement to kill may arise. The breadth of this category may also bring in relationships which may bring to the fore questions of whether allowing such insurances to be taken out is socially desirable.[59] Thus, although it may presently be a matter for conjecture, it may well be that when the courts should ever have the occasion to consider the width of this category, they may wish to bear in mind the mischief behind the statutory requirement of insurable interest and, as such, may wish to limit the class of relationships which may conceivably fall within this category where, perhaps, there is sufficient love and affection to ensure there is no danger of the insurance acting as an inducement to murder.[60]

[59] See Tan Lee Meng, *supra*, note 25, at 144:

> ... While these situations may seem socially acceptable, one might well ask whether an old man who is being given some money every month by his neighbour ought to have an insurable interest in that neighbour's life. To go further, it surely does not seem proper that a young female university graduate, who has her own career, should be able to insure the life of her married lover whose monthly allowance allows her to live beyond her own means. Clearly, the last limb of s [59](2) ought to have more precise about the meaning of the term "wholly or partly dependent". The law could well nurture unhealthy counter interests against the persons whose lives are insured if this phrase is given too wide a meaning.

[60] See also Tan Lee Meng, *ibid*, at 143-144, where the learned author seems to suggest that the limit could perhaps be of close family relationships.

IV. General Requirement of Interest

A. *Origins of Section 64*

There used to be no specific local legislation that governed insurances other than life policies. However, by virtue of the Second Charter of Justice 1826, the English Life Assurance Act 1774 applied. The Life Assurance Act applied because section 1 provides that it covers among other things, insurance on "any other event or events whatsoever". It is to be noted that insurances on real property did not fall within the exclusions under section 4 as that only excludes from its operation, insurances on "ships, goods or merchandises".

However, with effect from 12 November 1993 with the coming into effect of the Application of English Law Act,[61] and its attendant insertion of section 64[62] into the Insurance Act, by virtue of section 64(4) all contracts of indemnity are not covered by the requirement of insurable interest under section 64(1). This is because although section 64(1) paraphrases section

[61] Cap 7A, Rev Ed 1994. S 4 and s 5 deals with the application of English statutes in Singapore. Under s 4(1), the English statutes specified in the second and third columns of the First Schedule shall apply to the extent specified in the fourth column of the same schedule. It also provides that any other English statute which applies by virtue of any other written law shall continue to apply.

Part I of the First Schedule deals with Imperial Acts. Part II deals with enactments relating to commercial law. These enactments will apply subject to the extent specified in the fourth column and also subject to the amendments made in Part III of the Schedule. (see s 4(2)) S 4(3) stipulates that to the extent to which any of the provisions of any English Act so brought into effect is inconsistent with any local Act, the provisions of the local Act shall prevail.

S 5(1) is the most important s in the sense that it provides that other English enactments are not part of the law of Singapore.

S 6(1) provides for the repeal of the dreaded s 5 of the Civil Law Act.

S 7 provides for the amendment of local Acts as found in the Second Schedule.

[62] This has been done by re-enacting the provisions of the Life Assurance Act 1774 as s 61A of the Insurance Act. Of course, this has since been renumbered s 64.

[63] S 64(1) reads as follows:

> No insurance shall be made on any event wherein the person or persons for whose use, benefit or on whose account the policy is made has no interest, or by way of gaming or wagering; and every assurance made contrary to this subsection shall be void.

As a matter of comparison, s 1 of the Life Assurance Act 1774 reads:

> From and after the passing of this Act no insurance shall be made any person or persons, bodies politick or corporate, on the life or lives of any person or on any other event or events whatsoever, wherein the person or persons for whose use, benefit, or on whose account such policy or policies shall be made, shall have no interest, or by way of gaming or wagering; and that every assurance made contrary to the true intent and meaning hereof shall be null and void to all intents and purposes whatsoever.

1 of the Life Assurance Act 1774,[63] section 64(4) specifically excludes from the operation of section 64 all contracts of indemnity. Section 64(4) provides that

> Nothing in this section shall extend to insurance made by any person on ships or goods, *or to contracts of indemnity against loss by fire or loss by other events whatsoever*. (emphasis my own)[64]

B. *Raison d'être for Exempting Contracts of Indemnity*

It has been suggested that section 64(4) is a statutory attempt at incorporating the Privy Council decision of *Siu Yin Kwan* v *Eastern Insurance Co Ltd,*[65] where the Privy Council laid to rest the issue which has been plaguing the English courts for quite some time.[66] At first glance, there should not be any cogent reasons why the Life Assurance Act 1774 should not apply to contracts of indemnity. After all, section 1 of the Act does speak of insurances on "any other event or events whatsoever". That would seem to suggest that although the name of the Act would appear to be limited to life policies only, these words which lay down the requirement of insurable interest may be of wider application. This view is particularly substantiated by the limited classes which have been excluded – only marine insurance and insurance on chattels and merchandise. The requirement of insurable interest in contracts of indemnity does not, of itself, seem objectionable in light of the legislature's intention that gaming or wagering contracts should be discouraged as well as taking away the inducement, which might otherwise

64 These words are not found in s 4 of the Life Assurance Act 1774.

65 [1994] 2 AC 199.

66 See Tan Lee Meng, *Insurance Law in Singapore* (2nd Ed, 1997), at 64, where the learned author commented that:

> The exclusion of contracts of indemnity from the ambit of s 64 is to be welcomed. If contracts of indemnity fell within its ambit, difficulties would arise, and especially so in relation to s 64(2), which requires the insertion in a policy of the names of the persons interested therein, or for whose use or benefit or on whose account such policy was made.

Cf: Poh Chu Chai, *supra*, note 16, at 42:

> S 64 of the Insurance Act has the effect of declaring that all contracts of indemnity are not subject to the requirement of insurable interest. This in fact goes further than the controversial decisions in *Mark Rowlands Ltd* v *Berni Inns Ltd*, and *Siu Yin Kwan & Anor* v *Eastern Insurance Co Ltd*, where it was decided that the requirement in s 2 of the Life Assurance Act 1774 stipulating that a person interested in an insurance policy was to be named in the policy did not apply to a contract of indemnity. This obviously could not have been the intention of the legislature when it enacted s 64. It is a matter of some speculation as to how this strange result came about.

manifest itself, to destroy the subject-matter of the insurance. However, sections 2 and 3 of the Life Assurance Act do present problems in the context of contracts of indemnity. As has been pointed out by *MacGillivray and Parkington*:[67]

> Complex and intricate problems sometimes arise concerning the extent to which a person who possesses either a limited interest in property or no interest at all may effect a valid insurance on it for the benefit of someone else, and recover an indemnity to the full value of the property in the event of a loss.

It is pertinent to note that these problems do not arise in the insurance of goods because of the specific exemption in section 4 of the Life Assurance Act, and therefore this issue has never cropped up in the development of the case law relating to a bailment situation where the bailee has been held to be able to insure, not just his own limited interest but also, the full of value of the goods and he may thereafter, upon a loss, recover not just his own interest but up to the full value of the goods. Of course, he has to hold the balance of the monies paid out, after deducting his own interest, on trust for the bailor.[68] This exception to the normal doctrine in the law of contract that the parties to a contract cannot confer an benefit enforceable thereunder to a third party is sanctioned by the courts on the grounds of commercial convenience. The reason is simple – if the courts did not recognise this, then these situations would invariably entail two or more sets of insurances being taken out on the same goods with the result there would be duplicity of cover as well as a few sets of premiums being paid out for effectively the same risk.[69] This exercise of taking out policies which overlap and duplicate one another would also be economically wasteful.

However, this "commercial convenience" argument would be a bit difficult to apply in the context of insurances not exempted under section 4 of the Life Assurance Act. Although it might make sense, for instance, for a tenant to agree to contribute towards the premiums to be paid on fire policy for the tenanted property which the landlord undertakes to effect, a question may arise as to whether the tenant would be able to claim the benefit of

[67] *Supra*, note 45, at para 152.

[68] See *Waters* v *Monarch Fire and Life Assurance Co* (1856) 5 E & B 870; see also *Tomlinson* v *Hepburn* [1966] AC 451. Of course, whether such a result will arise is all dependent on the words used in the policy to describe the risk being insured: see *North British & Mercantile Insurance Co* v *Moffat* (1871) LR 7 CP 25 and *Engels* v *Lancashire & General Assurance Co Ltd* (1925) 51 TLR 408.

[69] See *Tomlinson* v *Hepburn*, *ibid*, at 470-471 and at 481.

the contract although he is not named in the policy as required by section 2 of the Act.[70] It was stated, in *dicta*, by Lord Denning in *Re King*[71] that the Act did apply to insurances of real property as well.[72] However, in a later decision of the Court of Appeal, there was *dicta* in *Mark Rowlands Ltd* v *Berni Inns Ltd*[73] to the opposite effect, where Kerr LJ has stated that section 2 of the Act

> Although obviously directed primarily at life insurance, the words "or other event or events" admittedly widen its scope. A literal application of the language of section 2 would create havoc in much of our modern insurance law. ... In my view ... this ancient statute was not intended to apply, and does not apply, to indemnity insurance, but only to insurances which provide for the payment of a specified sum upon the happening of an insured event.[74]

The Privy Council has taken the stand that the Life Assurance Act 1774 should not apply to contracts of indemnity. In *Siu Yin Kwan* v *Eastern Insurance Co Ltd,*[75] Lord Lloyd of Berwick, delivering the speech of the Privy Council, took the view that the *obiter* observations of Lord Denning MR in *Re King*[76] was suspect because firstly, the court did not have the benefit of hearing full arguments on the point, and secondly, the observations were purely *dicta* as well as not reflected in the decisions of the other members of the court. His Lordship decided that the view held by Kerr LJ in *Mark Rowlands Ltd* v *Berni Inns Ltd*[77] was the correct one for two main reasons:

[70] The application of s 3 of the Act would also present problems when one party with either full or limited interest in the property insures it both for himself as well as on behalf of the other party with either the limited or full interest respectively. This is because s 3 specifies that where the insured has an interest, he can recover no more than the value of his interest. Thus, even where the other party is named in the policy, the sum which can be recovered under the policy would nonetheless still be limited to the interest of the insured. Of course, it has been suggested by Birds, *supra*, note 2, at 48, that one could get around this apparent problem by reading it purposively and that it only represents an affirmation of the principle of indemnity.

[71] [1963] Ch 459, at 485.

[72] *Ibid*, at 485 where his Lordship stated his reason as follows:

> No person can recover thereon unless he is named therein, and then only to the extent of his interest. That is clear from the Life Assurance Act 1774, ss 2, 3 and 4, which by its terms applies to "any other event" as well as life. If the tenant insures, therefore, in his own name alone, it is only to the extent of his interest.

[73] [1986] 1 QB 211.

[74] *Ibid*, at 227.

[75] *Supra*, note 65.

[76] *Supra*, note 71.

[77] *Supra*, note 73.

> In the first place the words "event or events" in section 2, while apt to describe the loss of the vessel, are hardly apt to describe Axelson's liability arising under the Employees' Compensation Ordinance, or at common law, as a consequence of the loss of the vessel. Second, section 2 must take colour from the short title and preamble to section 1. By no stretch of the imagination could indemnity insurance be described as "mischievous kind of gaming". Their Lordships are entitled to give section 2 a meaning which corresponds with the obvious legislative intent.[78]

The Privy Council's robust reasoning seems to be less than satisfactory. To begin with, as a matter of language, one fails to see why the word "event" would not be apt to describe the insured's liability under the workman compensation legislation – one could simply characterise the "event" as one where such liability would arise. The terse remark that contracts of indemnity cannot be considered as "a mischievous kind of gambling" is also superficial. Surely, they become wagering or gaming contracts precisely where no interest can be shown. Moreover, if his Lordship is contemplating that contracts of indemnity cannot be gambling contracts because, by their nature, a loss must be shown before recovery can be allowed, it has been seen in the context of insurance on goods that such a requirement, being merely contractual rather than statutory, can be waived by the parties.[79]

As been pointed out, this construction placed on the Life Assurance Act 1774 may defeat the purpose of the Act, which is to prevent gaming or wagering contracts, since to hold that contracts of indemnity are not covered by the Act would mean removing a large part of all contracts of insurance from the purview of the Act. In any event, the decision avoids explaining why section 4 of the same Act, which exempts certain classes of insurances, does not mention contracts of indemnity. This surely must show the intention of Parliament to include contracts of indemnity within the scope of the Act unless, of course, it can be shown that when the Act was passed, contracts of indemnity were unknown and therefore could not have been contemplated by the legislature. One cannot understand why the local legislature could not instead have done away with the provisions which corresponds to sections 2 and 3 of the Life Assurance Act, or at least except contracts of indemnity from the application of those two provisions. There surely is no real objection

[78] *Supra*, note 65, at 211.

[79] *Eg*, *Prudential Staff Union* v *Hall* [1947] KB 685 and *Williams* v *Baltic Insurance Association of London* [1924] 2 KB 282.

to retaining the requirement of insurable interest for contracts of indemnity. In their desire to get around the problems posed by sections 2 and 3 in the context of contracts of indemnity, both the Privy Council and section 64 may have thrown out the baby with the bathwater.[80]

Be that as it may, we are left with a statutory attempt to incorporate the decision of the Privy Council by including contracts of indemnity in section 64(4), which corresponds with section 4 of the Life Assurance Act. What this means is that in the local context at least, it is now clear that contracts of indemnity are exempt from the general requirement found in section 64(1) that an insurable interest must be shown by the insured at the time when the policy was taken out. One thing is clear – life policies would be governed by section 59. Given that there are two main types of insurances – contingency insurance (which includes life insurance and personal accident insurance) and indemnity insurance and life insurance are already governed by section 59, one does wonder about the utility of section 64, particularly since by virtue of section 64(4) one entire class of insurances are not covered by it. The one remaining type of insurance which may still be within the purview of section 64 is personal accidents policy, and even then, they might well be classified as life policies if they do cover

[80] See Poh Chu Chai, *supra*, note 16, at 10:

> Excluding contracts of indemnity from the Act would mean that most contracts of insurance would not be covered by the Act. The implication of this is that there will be no legal requirement of insurable interest for most contracts of insurance, and this is clearly contrary to the object of the Act which is, namely, to impose a requirement of insurable interest on all contracts of insurance whether they be contracts of indemnity or not so that insurance contracts would not be used as a cover for wagers.

The curious approach taken by the provision gives rise to another conundrum: if contracts of indemnity are not subject to the perils of wagering because of the principle of indemnity, then one does wonder what is the rationale for retaining the requirement of insurable interest in the context of marine insurance: see ss 4 and 5 of the Marine Insurance Act, *supra*, note 9. Other than historical reasons, it is difficult to see how any logical distinction may be maintained between contracts of indemnity on marine adventures and those which arise in a non-marine context. It may then be merely an accident of circumstance whether the statutory requirement of insurable interest is to be imposed on a particular contract of insurance. This would indeed be a very unsatisfactory state of affairs, especially in light of the harsh consequences of a breach of this requirement.

[81] See *Fuji Finance Inc* v *Aetna Life Insurance Co Ltd & Anor* [1996] 4 All ER 608, where the Court of Appeal, albeit while considering a capital investment bond, opined that as long as the event on which the benefit under the contract became payable was sufficiently life or death related, the contract would be recognised as a life assurance policy: see Morrit LJ, *ibid*, at 618-619. See also Hobhouse LJ, *ibid*, at 627:

> The terms of policies may take a wide variety of forms. There may be other rights given by the contract besides the right to be paid a sum dependent upon a contingency of human life. These other rights do not mean that there is not a contract of insurance.

death resulting from accidents.[81] The only utility of section 64 may then be in section 64(2) and (3), which could then have been instead incorporated into section 59 rather than standing on their own.[82]

C. *Contracts of Indemnity after Section 64(4)*

The question which remains is what now for contracts of indemnity? Of course, due to the nature of contracts of indemnity, there would still remain the need to show insurable interest at the time of loss in order to make a claim under the contract. However, since this is only an incident of the contract, it can be dispensed with or be waived. It has been suggested that section 6[83] of the Civil Law Act[84] and its prohibition against gaming or wagering contracts may still bring in the concept of insurable interest.[85] The current position begs three questions:

(1) Does this prohibition against gaming or wagering contracts still bring in insurable interest, albeit *via* the backdoor?

The reasoning used by the Court of Appeal may be similarly applied to personal accidents policies: so long as there is an element of life or death involved, the fact that they also confer benefits in situations where death does not occur do not detract from their classification as life policies.

See also s 4(1) of the Life Insurance Act 1945 of Australia which defines a life policy as being a policy insuring payment of money on death, and not being by accident and specified sickness only, or on the happening of any contingency dependent upon the termination or continuance of human life. By contrast, s 11(3) of the Insurance Contracts Act 1984 extends the definition of life policies to include such contracts.

82 See Poh Chu Chai, *supra*, note 16, at 34. See also Tan Lee Meng, *supra*, note 66, at 65-66:

> However, if s 64(2) of the Insurance Act does not apply to life policies, there will be no requirement that the names of the persons interested therein, or for whose use or benefit or on whose account such policy was made, be inserted in a life policy. This cannot be so. S 64 re-enacts the provisions of the Life Assurance Act 1774 and there is no reason why one of its most important provisions should not apply to life assurance in Singapore.

83 S 6(1) reads as follows:

> All contracts or agreements, whether by parol or in writing, by way of gaming or wagering shall be null and void.

84 Cap 43, Rev Ed 1994.

85 Poh Chu Chai, *supra*, note 16, at 43:

> Until the controversy created by s 64 of the Insurance Act is laid to rest, we may assume that a person taking out an insurance will still have to show that he has an insurable interest in the risk insured if the contract of insurance is not to be treated as a mere wager.

(2) Or does the statement in the Privy Council's decision in *Siu Yin Kwan* v *Eastern Insurance Co Ltd*[86] indicate that in order for the insurance not to be a wagering contract, the contract must be shown to be a contract of indemnity?

(3) Is gaming or wagering a much wider concept, than insurable interest, such that the test of factual expectancy can take the place of insurable interest?

It is a matter of conjecture as to whether local courts, when looking at the question of whether the contract of insurance is one of wagering, will be tempted to fall back on familiar territory and have resort to the notion of insurable interest and ask if such interest exists at the inception of the policy. One might be initially taken aback by this suggestion. After all, the legislature did intend to remove this very requirement by the amendment to the local counterpart of the Life Assurance Act by excepting in section 64(4) all contracts of indemnity. However, if one were to take a closer scrutiny at the issue, one will see that this argument may have its merits. To begin with, it is a concept which is familiar to the courts and hence, it may negate the need for years of searching for a workable, not to mention certain, formula. In any event, the imposition, by statute, of insurable interest as a requirement for insurance contracts was precisely to combat the evils of wagering. Moreover, it has to be pointed out that the Marine Insurance Act had taken the same tack with regards to wagering. Under section 4 of the Act, it is provided as follows:

(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; ...

So, it may not be such a novel idea to suggest that the courts may well take this view since insurable interest was introduced by the legislature

[86] *Supra*, note 65.

precisely as a means of combating wagering contracts. In any event, it is probable that if the local legislature in bringing into effect section 64(4) was to incorporate the ruling of the Privy Council in *Siu Yin Kwan* v *Eastern Insurance Co Ltd,*[87] then such a suggestion would get around the problems faced by the courts arising out of the requirements laid down in sections 2 and 3 of the Life Assurance Act[88] while preserving the vigilance against wagering by way of requiring insurable interest to be shown at the time the policy is taken out.[89]

The approach taken by the Marine Insurance Act with regards to the requirement of insurable interest actually brings up an intriguing possibility of refining this test even further. Section 6(1) of the Act provides that the assured must be interested in the subject-matter insured at the time of loss though he need not be interested when the insurance is effected. This provision, read together with section 4(2)(a) of the same Act, would mean that in order to take the contract out of the ambit of what is deemed to be a wagering contract, all that is necessary is that the insured is able to show that he has an insurable interest in the subject of the insurance at the time of loss, *ie*, a statutory affirmation of the indemnity principle. This would very much be in line with the comments of the Privy Council where it was suggested that contracts of indemnity could not be wagering contracts. Thus, it may well be that in order to ensure that contracts entered into are not wagering contracts, they must be shown to be genuine contracts of indemnity.

This approach of holding that a contract of insurance is valid even if the assured should not have an insurable interest at the time of first taking out the policy, as long as he has a reasonable expectation to acquire it later is not unusual. In fact, this was precisely the sort of test which was recommended by the Law Reform Commission of Australia,[90] which has received the statutory stamp of approval in section 16(1) of the Insurance Contracts Act 1984 (Cth), which reads:

> A contract of general insurance is not void by reason only that the insured did not have, at the time when the contract was entered into, an insurable interest in the subject matter of the contract.

[87] *Supra*, note 65.

[88] Which correspond with s 64(2) and s 64(3) of the Insurance Act, *supra*, note 1, respectively.

[89] Of course, one must be aware of the fact that this argument may run up against the point that Parliament has specifically exempted all contracts of indemnity from the first three subsections of s 64, perhaps thereby showing an intention that insurable interest itself is not required since this is imposed by s 64(1).

[90] See *supra*, note 38, at para 117.

Although section 16(1) relieves the insured of the need to possess an interest at the time when the policy is first effected, it must be that the insured is still required to prove some form of interest of loss by the nature of the contract being one of indemnity. In fact, the Australians have gone one step further than the Marine Insurance Act, and have done what the Canadian courts have done by case law development,[91] by enacting section 17 in the same Act:

> Where the insured under a contract of general insurance has suffered a pecuniary or economic loss by reason that property the subject matter of the contract has been damaged or destroyed, the insurer is not relieved of liability under the contract by reason only that, at the time of the loss, the insured did not have an interest at law or in equity in the property.

It must be pointed out that although section 17 has changed the nature of the interest which is required for the validity of the claim, and consequently the contract, it does not go so far as to relieve the insured from showing any form of interest in the subject matter of the insurance. Thus, notwithstanding the provision that the insurer is not relieved from his liability to pay under the policy simply on the basis that the insured does not possess some legally recognisable or enforceable right in the subject matter of insurance, it is inherent in section 17 that the insured will still have to show some form of interest in order to be able to claim under the policy. But what section 17 does is that it clears the way for the courts to take a broader approach than has been taken thus far by the courts in determining if there is sufficient interest in the subject matter. Thus, it is now open in Australia for the courts to move away from denying claims purely on the basis of technical rules based on strict proprietary interests. As suggested by one commentator:

> The courts are invited to return to the underlying rationale behind the concept of insurable interest, namely, the desire to avoid the evils inherent in wagering contracts of insurance or adding to the risk of the destruction of the property insured, and to ask whether or not the particular contract of insurance constitutes a wager or promotes the destruction of the property insured.[92]

[91] See *Constitution Insurance Co of Canada* v *Kosmopoulos*, *supra*, note 11, discussed in Birds, "Recent Common Law Developments Regarding Insurable Interest and Subrogation", (1988) 1 ILJ 171, at 171-172. See also Birds, "A Shareholder's Insurable Interest in His Company's Property", [1987] JBL 309.

[92] Tarr, *Australian Insurance Law* (2nd Ed, 1991), at 59.

This comment, of course, brings us back to the crux of the question: now that insurable interest is no longer required by statute to be in existence at the time of the policy, the only statutory prohibition which one need to be concerned with is that against gaming and wagering under section 6 of the Civil Law Act.[93] The crucial question then is: what is gaming or wagering; and will some form of interest less than that of insurable interest, as strictly understood under the Life Assurance Act 1774 suffice in order not to offend this statutory prohibition?

We can do no better than to refer to the *locus classicus* definition of what constitutes a wagering contract:

> A wagering contract is one by which two persons, professing to hold opposite views touching the issue of a future certain event, mutually agree that, dependent upon the determination of that event, one shall win from the other, and that other shall pay or hand over to him, a sum of money or other stake; 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.[94]

It will apparent, at first sight, that such a definition of what constitutes wagering may well be too wide to be of much use as a working definition in the context of insurance. To begin, an insurance contract is also a contract

[93] Of course, one will notice that s 64(1) does prohibit any insurances "by way of gaming or wagering" and that s 64(4) exempts all contracts of indemnity from the application of s 64. Does this then mean that there is no prohibition against contracts of indemnity which are gaming or wagering contracts? However, even in England, where contracts of insurance on goods have always been exempted from the operation of the Life Assurance Act 1774 (which contain a similar prohibition against contracts of insurance by way of gaming or wagering, consistent opinion has been expressed that the courts have to nonetheless consider if such contracts may be caught by the Gaming Act 1845 since the latter Act is of general application: see MacGillivray & Parkington, *supra*, note 45, at para 32; see also Birds, *supra*, note 2, at 34-35. See further Poh Chu Chai, *supra*, note 16, at 4 and at 58-59. See Tan Lee Meng, *supra*, note 66, at 76-77:

> At common law, a policy is, without more, valid even though the insured has no insurable interest in the subject matter of insurance. As such, where an insurable interest is not required by statute but is required because the policy is one of indemnity, the requirement of an insurable interest may be waived in appropriate circumstances so long as the policy does not contravene s 6 of the Civil Law Act, which prohibits contracts of gaming and wagers.

[94] *Per* Hawkins J in *Carlill* v *Carbolic Smoke Ball Co* [1892] 2 QB 484, at 490-1.

whereby the two parties stake something valuable on the outcome of a future event.[95] The only thing to go on then would be the second part of the definition – that a wagering contract is one where the parties have no interest in other than the wager itself, *ie*, the fact of the wager is the only thing which creates such an interest in the contract.[96] This means of defining a wagering contract by negative reference to interest is fine as long as it is clear where the line should be drawn.[97] If we agree that the main reason for the imposition of insurable interest by the legislature was to combat the evil of wagering contracts, now that such a requirement has been removed by Parliament insofar as contracts of indemnity are concerned, it may well be that one may be entitled to take a broader view of the extent of interest required in order that the contract not be classified as one of wagering.[98] In the event that the layman normally sees insurance as a device by which to hedge

[95] See Clarke, *The Law of Insurance Contracts* (2nd Ed, 1994), at para 4-2C. Of course, Andrew Phang, *supra*, note 17, at 491, points out that a wager is nevertheless one even where it touches upon a past or present fact or event, rather than merely one in the future.

[96] See Patterson, *supra*, note 4, at 385:

> Thus, a marine insurance policy and a bet upon a horse-race are alike in the sense that each is a promise to pay money upon the happening of an event which may or may not occur. A consideration of the objects or purposes of the two agreements, however, shows that the resemblance is only superficial. The purpose of the promisee in making the bet is to gain by the transaction; the purpose of the promisee is procuring the marine policy is to lessen the hardship from his misfortune in losing his ship. Since the promise is pay the amount of loss sustained, this is the only purpose (barring fraud) which the insured can have in taking out such a policy. Such a purpose – to lessen hardship from pecuniary misfortune – may be called an "indemnity purpose". Here the "insurable interest" of the insured is his maximum possible pecuniary loss from the happening of the event.

See also Harnett & Thornton, "Insurable Interest in Property: A Socio-Economic Reevaluation of a Legal Concept" [1948] 48 Col LR 1163, at 1181:

> It is also clear that the sociological arguments against gambling have in general little bearing on insurance. There is no anti-social aspect to insurance, for it is not a matter of one losing and the other gaining; rather do both gain. The insured is fortified by the knowledge of the security of his economic expectations, enjoying quiet reliance, and the successful insurer reaps a profit which unlike that of the typical gambler, is invested for socially beneficial purposes. The criminal and domestically disruptive aspects of gambling are not at all in evidence in insurance contracts. Property insurance is not commonly contemplated as a wagering transaction; if a wager is desired, far more usual and convenient devices are available with far greater chance of fortuitous success.

[97] See Clarke, *supra*, note 95 at para 3-1:

> As wagering is defined negatively by reference to interest, we know that they are mutually exclusive; but not where the line is to be drawn between them.

[98] MacGillivray & Parkington, *supra*, note 45, at para 32 (on the Gaming Act 1845):

> Insurance policies, therefore, are clearly within the Act if made without any interest or concern in the subject-matter. It is doubtful, however, whether the Gaming Act requires any insurable interest in the strict sense in which an insurable interest is required by

against risks attendant to his activities, there are no cogent reasons why the broader "factual expectation of loss" of interest cannot be accepted for the purposes of sifting the wagering contracts from the genuine insurances.[99] In fact, since section 6 of the Civil Law Act does not stipulate when the

> the Acts of 1745 and 1774. The Act relates only to gaming and wagering, and there is no reference in it to insurances or insurable interest. It is clear on the authorities that an expectation of future benefit does not create an insurable interest within the meaning of the Insurance Acts; but if the expectation is more likely to be realised than defeated a contract to insure against its loss is not a contract by way of gaming or wagering. It is submitted that an absence of insurable interest in the strict sense does not by itself import the element of gaming so as to avoid the contract under the Gaming Act.

See also Australian Law Reform Commission, *supra*, note 38, at para 120:

> Abandonment of the strict proprietary interest in favour of one based on economic loss would allow for more flexibility to insurers and to the insuring public, without in any way promoting gaming and wagering in the form of insurance or adding to the risk of the destruction of the property insured.

[99] See Harnett & Thornton, *supra*, note 96, at 1187:

> Since men unlearned in law regard their insurance policies as instruments of security and assurance, it is a grievous sociological error on the part of the judicial fraternity to allow insurance policy obligations to flake away mysteriously, and to prevent the procurement of insurance policies by interested parties who do not own traditional property rights. There must be a true perception of property right concepts in insurable interests, and a thorough recognition that "insurable interest" implies merely a relationship to a property unit that will lead to economic disadvantage if the property unit is impaired. The insurance carrier serves a valuable function in society, that of shifting economic risks. His service as indemnitor should not be limited to a judicially approved panel, but should extend to all the members of society who possess economic relationships confronted with loss by potential fortuitous events.

See also Harnett & Thornton, *ibid*, at 1181:

> Property insurance is not commonly contemplated as a wagering transaction; if a wager is desired, far more usual and convenient devices are available with far greater chance of fortuitous success.

See also *Constitution Insurance Co of Canada* v *Kosmopoulos*, *supra*, note 11, at 222, *per* Wilson J:

> However, 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 a serious wagerer.
>
> If wagering should be a major concern in the context of insurance contracts, the current definition of insurable interest is not an ideal mechanism to combat this ill. ...
>
> The *Macaura* principle, in my view, is an imperfect tool to further the public policy against wagering. By focusing merely on the type of interest held by an insured the current definition gives rise to the possibility that an insured with the "correct" type of interest, but no pecuniary interest, will be able to receive a pure enrichment unrelated to any pecuniary loss whatsoever. Such an insured is, in effect, receiving a "gambling windfall". But this same approach excludes insureds with a pecuniary interest, but not the type of interest required by *Macaura*. Such insureds purchase insurance policies to indemnify themselves against a real possibility of pecuniary loss, not to gain the possibility of an enrichment from the occurrence of an event that is of no concern to

interest must exist, there should be no problems taking the approach that the Marine Insurance Act has taken insofar as the time for showing interest in the subject-matter of the insurance, *ie*, any time before the loss occurs.[100]

Increasingly, more jurisdictions are recognising that in order to combat the social evil of gaming it is not necessary to adhere to the strict regime of legally recognised proprietary rights or liabilities. Now that the local legislature has taken the first step of removing the shadow originally cast by the Life Assurance Act 1774, perhaps the local courts should take the opportunity to reassess the whole rationale behind the initial imposition of insurable interest and return the whole paradigm of reference back to sound and rational grounds.

V. Conclusion

The aim of this paper is to scrutinise the provisions relating to the whole question of insurable interest in the local context. It is hoped that the future development of the concept in Singapore will follow a coherent and considered path – when the courts have the opportunity to consider the provisions, perhaps it should be recognised that the whole idea behind insurable interest was founded on certain policy arguments, and these should always be kept sight of in drawing up any particular rules. There is much scope for the courts to break free of slavishly applying the maze of technical rules that has sprung up behind the footsteps of the English courts and it is hoped that the local courts will heed the call of other jurisdictions for a more rational approach to insurable interest.

Lee Kiat Seng*

them.... 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": see Harnett and Thornton, *supra*, at 1181. ... I agree with their conclusion and find, therefore, that the restrictive definition of insurable interest set out in *Macaura* is not required for the implementation of the policy against wagering.

[100] See MacGillivray & Parkington, *supra*, note 45, at para 32:

> But however that may be, it is clear that the Gaming Act does not require the interest to subsist at any particular time, and therefore an insurance made with an expectation of interest should not be void in the event of interest being acquired before the loss, nor would an insurance made on an interest actually subsisting at the time of the contract be void by reason of want of interest at the time of the loss.

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