In the United Kingdom, it has been shown that most courts today are wary of such exercises,[5] in part because the necessary information may not be available to them.[6] Courts depend on the submissions of counsel. Counsel are unlikely to incur the cost of research into disciplines such as economics, generally or in the context of the particular case, unless encouraged to do so by the court. However, the court, too, is expected to be cautious about the duration and cost of litigation and is unlikely to encourage such research except in rare cases.[7]

5. P. Devlin, *The Enforcement of Morals* (Oxford, 1965), p. 56. Latterly see the attitude of the Court in *Charlton* v *Fisher* [2001] EWCA Civ 112, [2002] QB 578. Scholars have less reason for caution on such issues; thus suggesting that tort has no role in determining the existence or extent of tort duties (Stapleton (1995) 58 MLR 301) has been contested by Merkin (2012; 75 MLR 301) in particular as concerns claims on the contract/tort borderline.

6. M. Clarke, *Policies and Perceptions of Insurance in the 21st Century* (Oxford, 2007), pp. 278 ff.

7. With regard to the admission of expert evidence, see Lord Woolf, *Access to Justice: Final Report* (1996), ch. 23; N. H. A. Andrews, *The Modern Civil Process* (Tubingen, 2008), ch. 7; D. Dwyer (ed.), *The Civil Procedure Rules Ten Years On* (Oxford, 2009), Chapter 16.

Concerning the liability of expert witness, see *Jones* v *Kaney* [2011] UKSC 13, in which a psychologist was held to be immune from a professional negligence suit after she signed a joint statement prepared by the respondent's expert which did not reflect her own assessment of the psychological effects of a road traffic accident on a personal injury claimant.

As Lord Roskill once pointed out (of the doctrine of frustration), the court "is principally concerned with the incidence of risk—who must take the risk of the happening of a particular event" and must have "regard to the express provisions of the contract into which the parties have entered,"[8] a matter of construction. Construction is important, in particular, where parties have also sought to handle risk by contracting liability insurance.[9]

8. *National Carriers Ltd* v *Panalpina Ltd* [1980] UKHL 8, at [23] to [24], [1981] AC 675. See also preference for the "construction theory" in the same case by Lord Hailsham at [4] (and Lord Simon at [15]), Lord Hailsham citing in support *Davis Contractors Ltd.* v *Fareham U.D.C.* [1956] AC 696, 729 per Lord Radcliffe. More recently, the importance of the wording actually used was stressed judicially, for example, by Longmore LJ in *Golden Fleece Maritime Inc* v *St Shipping and Transport Inc* [2008] EWCA Civ 584, [15] to [16].

9. See Clarke, ch. 15. The importance of construction in connection with contracts at large has also been recognized in Australia: Carter 33–56. Cf German law (BGB art 313) where the primary rule is "pacta sunt servanda," as that found in Art. 6.2.1 of the Unidroit Principles of International Commercial Contracts, 2004: Janzen (2006) 22 JCL 156.

The purpose of liability insurance is obvious to most. One purpose is the compensation of victim. As one scholar said, liability insurance "is highly desirable if compensatory justice is tort law's objective."[10] From the point of view of the wrongdoer, the purchaser of liability insurance, however, another purpose is to have claims handled by someone else, insofar as the law or the policy itself provides for ALI.[11] Liability insurance under which the insurer is usually obliged to defend the policyholder is hard to find.[12]

10. Schwartz, 75 Cornell L. Rev. 313, 363 (1990).

11. *Montrose Chemical Corp.* v *Superior Court*, 861 P.2d 1153, 1157 (Cal. 1993); *Woo* v *Fireman's Fund Ins. Co*, 164 P.3d 454, 459–60 (Wash. 2007).

12. See below IX. Note that the American Law Institute is currently undertaking a project "expected to develop principles of contract law in the liability insurance context, principles of liability insurance coverage, and principles of the management of insured liabilities": http://www.ali.org/index.cfm?fuseaction=projects.main.

1.2 DEFINITIONS

1.2.1 Insurance

Convincing definitions of insurance do not exist.[13] A plausible theory is the "principal object" test. This test originated in the United States to draw a line between product guarantees (also called product warranties),[14] something ancillary to the sale of the product. In England, some support for the principal object test appears from a judicial observation on the question whether an indemnity that was part of a wider agreement could be treated as (re)insurance.[15] The test was rejected, however, by the Court of Appeal in the *Fuji* case,[16] which concerned life insurance as a vehicle for investment. Nonetheless, it appeared again in a different context, that of the *Digital Satellite* case,[17] the defendants were the providers of extended warranty contracts on domestic satellite equipment. They argued that the principal object of the contracts was the provision of benefits in kind and therefore was not insurance. This argument failed.

13. A survey can be found in Clarke, ch. 1.

14. Williams, 98 Col L Rev 1996, 2019 ff (1998). A "warranty is a form of insurance that manufacturers provide for consumers": Baker, 75 Tex L Rev 237, 272 (1996), with reference to the work of Priest: 90 Yale LJ 1297, 1313 (1981). See, for example, *Vesta Ins Co* v *Amoco Production Co*, 986 F 2d 981 (5 Cir, 1993) in which the undertaking to provide oilwell maintenance services, and to hold the client harmless against liability *inter alia* for personal injuries, was held not to be an insurance contract. The "principal object" test has been of some assistance to classify contracts which mix pure risk and investment risk: for example, *Securities and Exchange Commission* v *VALIC*, 359 US 65 (1959), in which the element of life insurance was "ancillary and secondary to the annuity feature" (p. 73).

15. *L'Alsacienne Premiére* v *Unistorebrand* [1995] LRLR 333, 348 per Rix J. See also Marcus Smith [2010] LMCLQ 386, 401 ff in respect of credit default swaps, already perhaps an item of legal history.

16. *Fuji Finance Inc* v *Aetna Life Ins Co Ltd* [1997] Ch 173 (CA—life). See in particular what was said by Morritt LJ.

17. *Digital Satellite Warranty Cover Ltd* v *Financial Services Authority* [2011] EWHC 122 (Ch); appeal dismissed [2011] EWCA Civ 1413, [2012] Lloyd's Rep IR 112. An appeal to the Supreme Court failed: [2013] UKSC 7.

Warren J contrasted the defendants' reliance on the "principal object" test with the different test set out in FSA guidance. That guidance indicates that the FSA would treat a contract which contains both insurance and noninsurance elements as a contract of insurance, if amongst its various elements the contract contains "an identifiable and distinct obligation that is, in substance, an insurance obligation."[18] If it were so, a similar test would, *a fortiori*, apply in determining which class or classes of insurance the contract fell into; if distinct elements of the insurance fall into different classes, then authorization to carry out business in each class will be required. On the facts of the case itself Warren J concluded that he did not need to decide whether either the "principal object" test or the FSA test was correct. He went on to observe, however that:

> "a strict application of … [the FSA] test could result … in contracts of insurance being found where the insurance element is insubstantial. It may or may not be right to go that far. I rather doubt that it is, especially given the acceptance by the FSA that an ordinary manufacturer's warranty provided as part of a sale agreement does not give rise to a contract of insurance…. So, it seems to me at least, the FSA's statement in the Perimeter Guidance has to be tempered to some extent."

18. FSA *Perimeter Guidance Manual*, 6.6.7G(1).

63. *General Accident Ins Corp* v *Cronk* (1901) 17 TLR 233. See also *Adie & Sons* v *The Insurances Corp Ltd* (1898) 14 TLR 544; and *Rust* v *Abbey Life Ass. Co Ltd* [1979] 2 Lloyd's Rep 334, 339, CA, *per* Brandon LJ. Australia in this sense: Derrington, para. 2–26; USA in this sense: *Eames* v *Homes*, 94 US 621 (1877).

64. Not least if, as sometimes occurs in the Lloyd's market, the terms have been devised not by the insurer but by the broker.

Terms can be incorporated into the contract of insurance by reference.[65] The reference may be to a standard form[66] or to current market practice[67] but not to future agreement. Generally, the law does not enforce reference to a term which remains to be settled by the future agreement of the parties themselves: it is in the nature of people that future agreement may not be reached—it is not sufficiently certain that the matter can be made certain.[68] *Prima facie*, therefore, a term that premium, for example, shall be agreed in future by the insurer and insured is uncertain and such an agreement cannot be enforced as a contract.[69]

65. *Certum est quod certum reddi potest*: that is certain which can be made certain. Such terms will then be construed consistently: Lewison 4.08.

66. For example, *Ricci Burns* v *Toole* [1989] 1 WLR 993 (CA). Australia idem: *Johnson* v *American Home Assurance Co* [1998] HCA 14, (1998) 72 ALJR 610.

67. For example, the Lloyd's practice of stating a term, such as "premium TBA" (to be arranged): the principle was accepted but not applied in *Liberian* v *Mosse* [1977] 2 Lloyd's Rep 560 and *American Airlines* v *Hope* [1973] 1 Lloyd's Rep 233, CA, affirmed on other points [1974] 2 Lloyd's Rep 301, HL.

68. Above. *Mallozzi* v *Carapelli SpA* [1976] 1 Lloyd's Rep 407, CA. *Cf. Sudbrook Trading Estate td* v *Eggleton* [1983] 1 AC 444.

69. In this sense, *Christie* v *North British Ins Co* (1825) 3 Sh & D (Ct of Sess) 519. *Cf. American Airlines Inc* v *Hope* [1972] 1 Lloyd's Rep 253, 260–261, *per* Mocatta J.

2.3.2 Certainty of intention

To be the basis of an enforceable agreement, the offer to contract must indicate a real willingness to be bound on the part of the offeror; this is a matter of construction of the offer. There is a presumption that a document, such as an insurance application, which looks like a firm contract offer is indeed intended as such. The presumption may be rebutted, however, if there is reason to infer otherwise from the circumstances surrounding the alleged offer, the insurance application; in particular, that it so if it is contrary to commercial sense that the applicant should intend to be bound—without more.

On the insurer's side, literature issued inviting applications will not normally be construed as an offer of insurance that can be converted into a contract of insurance by anyone who responds in positive terms, as it makes little commercial sense that an insurer should be bound without first assessing the particular risk.[70]

70. A similar inference may be drawn from the past practice of the particular parties: *American Airlines Inc* v *Hope* (above) loc cit.

2.3.3 Continuing intention

If it is to be accepted, the offer must still be open. Offers come to an end in a variety of ways. First, an offer ends if unaccepted within any period of time for acceptance stipulated in the offer itself. In the absence of a stipulation, the ending of an offer may be inferred simply from the passage of time—the offer has lapsed.[71] Second, an offer ends on the failure of a condition subject to which the offer was made.[72] The condition may be express or implied,

in particular, an offer by an insurer is implicitly conditional on there being no material change in the risk between the time of offer and the time of acceptance.[73] Third, an offer comes to an end on rejection by the offeror. A counteroffer is regarded as a rejection[74] but a response by the offeree is a counteroffer only if it is inconsistent with the offer in a significant respect.[75] Fourth, the offeror is not obliged to wait until the stipulated time or until the condition fails: the offeror may revoke the offer and thus end it[76] at any time before the offer has been accepted, by actual communication of the offeror's revocation to the offeree.[77]

71. *Ramsgate Victoria Hotel Co Ltd* v *Montefiore* (1866) LR 1 Ex 109. Anson, p. 59; Treitel 2-064.

72. *Financings Ltd* v *Stimson* [1962] 1 WLR 1184, CA. Treitel 2-066.

73. *Canning* v *Farquhar* (1886) 16 QBD 727, 733, CA, *per* Lindley LJ.

74. Anson, p. 40; Treitel 2-062.

75. *Jones* v *Daniel* [1894] 2 ch. 332, 335, *per* Romer J. Treitel 2-019. Point applied in a case of reinsurance: *Lark* v *Outhwaite* [1991] 2 Lloyd's Rep 132, 139, by Hirst J.

76. *Canning* (above) at p. 731, *per* Lord Esher MR. For example, if the offeror follows a proposal with a different proposal for the same risk.

77. Lindley J in *Byrne & Co* v *Van Tienhoven & Co* (1880) 5 CPD 344; applied in a reinsurance case: *General Reinsurance Corp* v *Forsak Fennia Patria* [1982] QB 1022 (reversed on other grounds: [1983] QB 856, CA). Generally see Anson, p. 53 ff.; Treitel 2-058 ff.

2.4 ACCEPTANCE

To complete a contract of insurance, neither delivery of a policy[78] nor payment of premium[79] is essential—unless required by the terms of the offer. In any event, acceptance of an offer must be unequivocal, it must correspond with the offer, it must be genuine, it must be unconditional, and it must be communicated to the offeror.

78. *Bhugwandass* v *Netherlands India Sea & Fire Ins Co* (1888) 14 App Cas 83, PC.

79. *Wooding* v *Monmouthshire & S Wales Mutual Indemnity Sy Ltd* [1939] 4 All ER 570, HL.

2.4.1 Unequivocal acceptance

If no particular form of acceptance is specified by the offeror, the law requires only that it be unequivocal[80]; on the part of the insured that might be payment of premium, on that of the insurer that might be the execution of a policy[81] or acceptance of premium.[82] Payment and acceptance of premium are strong evidence of contractual intent and that some kind of cover has begun for, otherwise, the insured is getting little or nothing for the money.[83]

80. Whether the acceptance is expressed in speech or in writing or implied from conduct, it must be unequivocal: *Rust* v *Abbey Life Ass. Co Ltd* [1978] 2 Lloyd's Rep 386; [1979] 2 Lloyd's Rep 334, CA; *Datec Electronic Holdings Ltd* v *UPS Ltd* [2007] UKHL 23, [2007] 1 WLR 1325. Generally see Anson, p. 31 and p. 43; Treitel 2-018.

81. *Xenos* v *Wickham* (1866) LR 2 HL 296.

82. *Xenos,* p. 308, *per* Piggott B.

83. *Zurich Life Ins Co* v *Davies* (1981) 130 DLR 3d 748, 751, SCC, *per* Laskin CJC.

In contrast, silence by an offeree is generally ambivalent and not normally sufficient evidence of acceptance,[84] unless there is previous agreement that conduct (such as simply raising no objection) shall be regarded as consent to what the other has proposed,[85] or the same can be inferred from the circumstances of the case.[86]

doing the same thing again."[129] The clearest cases are those in which at the time the insurance was contracted, the wrong was intended to occur or was at least a likely occurrence and the person (in the role of insurer) who paid the indemnity could be said to be a "participator" in the wrongful act.[130] Liability insurance will rarely come into this category. Examples from the past include a promise by X, an "author," to indemnify the publisher in respect of what X had written against the possibility of libel damages.[131]

129. *Askey* v *Golden Wine Co Ltd* (1948) 64 TLR 379, 380, *per* Denning J. *Cf.*, however, *Osman* v *Moss (J Ralph)* [1970] 1 Lloyd's Rep 313, CA.

130. *Smith (WH) & Sons* v *Clinton* (1909) 99 LT 840 at 841, *per* Coleridge J.

131. *Smith* v *Clinton* (above); cf *Weld-Blundell* v *Stephens* [1920] AC 956 in which an indemnity in respect of malicious libel was upheld. In the USA, however, a promise of indemnity in respect of liability as underwriter of a share issue under a prospectus known to be false was not enforced: *Globus* v *Law Research Service*, 418 F 2d 1276 (2 Cir, 1979), cert den., 397 US 913.

In any event, the contract will be construed, as far as possible, as not extending to cover such matters,[132] not, for example, not within cover of "neglect, omission and error."[133] Moreover, such conduct is also to fall within the "intentional acts" exception to liability cover,[134] if there is one in the policy; and cover of penalties may be excluded as such, as may illegal conduct.

132. *Beresford* v *Royal Ins Co Ltd* [1938] AC 586, 595, *per* Lord Atkin, applied to liability insurance in *Gray* v *Barr* [1971] 2 QB 554, 587, CA, by Phillimore LJ.

133. *Haseldine* v *Hosken* [1933] 1 KB 822; (1933) 45 Ll L Rep 59, CA.

134. See below, 10.7. See also Clarke, 24–5B.

3.4 EXEMPLARY DAMAGES

Whether there can be cover of illegal conduct (above), in theory, there is no public policy against insurance of exemplary damages,[135] (sometime called punitive damages) as there is in some parts of the United States.[136] In practice, cover of exemplary or punitive damages may well be expressly excluded.

135. *Lancashire CC* v *Municipal Mutual Ins Ltd* [1995] LRLR 293; affirmed [1997] QB 897 (CA). Australia *idem*: *Lamb* v *Cotogno* [1987] HCA 47, (1988) 164 CLR 1. See further the Law Commission Report No 247 (January 1998), *Aggravated, Exemplary and Restitutionary Damages*, para 5.138; McKendrick, [2001] LMCLQ 591.

136. Courts in North America have been divided on whether to enforce insurance covering awards of punitive or exemplary damages against the policyholder. For the USA see Markel, 94 Cornell L Rev (2009); and for Canada see Ogilvie [2009] JBL 248. One view is that to allow a defendant to shift the burden to an insurance company would defeat the purpose of such damages. However, some courts are reluctant to see insurers profit by not having to pay claims. Most wish to avoid commercial uncertainty.

3.5 COMPENSATORY DAMAGES

3.5.1 Motor insurance

Such is the importance of the underlying public policy, the liability element in motor insurance has been enforced even when the conduct of the insured was wilful and criminal. In 1971 a leading commentator said that when liability insurance is compulsory, "the need to assure compensation for the injured is recognised as so peremptory that it should be universal"[137] rather than left to the chance of whether the person responsible for the injury could pay, and this policy factor generally overcomes any scruples in the court about the advantage to the

wrongdoer of enforcing the wrongdoer's insurance. It is now clear that the public policy in favor of the third-party victim is so strong that the insurance is valid, whether the damage was done deliberately or not; and, in any event, the existence (and enforcement) of liability cover seems to have had negligible negative effect on the behavior of the insured wrongdoer.

137. Fleming (1971) 34 MLR 176, 179.

In the leading case of *Gardner* v *Moore*,[138] after an "altercation" with G, M got into his van and drove at G, who was on the pavement, dragging him along the road. G went to hospital. M went to prison. M was uninsured and unable to pay damages to G. In such a case, said the House of Lords, the "court has to weigh the gravity of the antisocial act and the extent to which it will be encouraged by enforcing the right sought to be enforced against the social harm which will be caused if the right is not enforced";[139] and, in motor insurance cases such as this, the balance pointed to the latter and the importance of compensating victims; the insurance was enforced.[140]

138. [1984] AC 548.

139. *Hardy* v *MIB* [1964] 2 QB 745 at 767–768, CA, *per* Diplock LJ. Cf *Tinsley* v *Milligan* [1994] 1 AC 340, however, it is submitted that this case does not affect the authority of *Gardner* v *Moore*: Clarke, 24–9D5; see also Derrington, 2–259.

140. Cf. times past: "At the beginning of the nineteenth century, liability insurance would have been unthinkable. It would have been considered as immoral to take out an insurance against the consequences of civil liability as to take out one against the consequences of criminal liability": Tunc, *Encyclopedia of Comparative Law*, Vol IX, Part 1, No 90 In *Robertson* v *London Guarantee & Accident Co Ltd*, 1915 1 SLT 195: the insured injured two lady cyclists, while he "was driving with criminal negligence, being in an extreme state of drunkenness and quite unfit to drive." The action against his liability insurer succeeded in the Outer House of the Court of Session, in spite of a defence based on the insured's crime. Lord Ormidale (p. 196): "I assume that the insured could not have insured against the consequences of his own unlawful (in the sense of criminal) act … but … *I have some difficulty in holding that a man who drives a car recklessly because he is drunk is a criminal in the sense of the law* … although he may be guilty of a statutory offence" (emphasis added). Today, insurance for such cases (uninsured motorists causing injury provided by the Motor Insurers Bureau (MIB); see Clarke 5–9E.

There is nothing in such decisions to suggest that the insured wrongdoer may recover for damage to his or her own vehicle[141] but, as motor cover against liability for damage to the property of third parties is now compulsory, indemnity for damage to somebody else's vehicle is likely to be enforced.

141. In this sense *Hardy* (above), pp. 760–761, *per* Lord Denning MR (CA—motor).

3.5.2 Other liability insurance

At one time it seemed likely that a "balancing" approach similar to that seen in *Gardner* v *Moore* (above *(e)(i)*) would be applied by courts to other kinds of liability insurance. Liability for acts that are torts or lesser crimes is a proper subject of insurance. Were it otherwise, professional negligence cover would be as restricted as the enthusiasm of the professional to take on all but the safest work. On a graph the cases form a curve, one toe of which is staked down by legislation so that, however great the revulsion of the courts, cover is compulsory and enforceable. The other toe of the curve represents liability so inoffensive that the enforcement of insurance is not questioned. The peak of the curve, however, is the point at which the wrong goes above the treeline of judicial tolerance and is a clear target for nonenforcement.

In early motor cases, the courts drew a distinction between liability based on negligent and even grossly negligent conduct, which was insurable,[142] and liability based on acts done

5.2 FACT

The fact in issue, material fact, is to be distinguished in principle from opinion, a distinction sometimes hard to draw. In the context of nondisclosure, however, the precise point at which one shades into the other is usually unimportant. For example, if a partner in a firm insured has been charged with theft, that amounts to no more than the opinion of the prosecutor that the partner has committed an offence; that has yet to be established as fact by a court of law. Nonetheless, the charge itself is a fact that must be disclosed to a liability insurer.[185]

185. *Inversiones Manria SA* v *Sphere Drake Ins Co Plc, The Dora* [1989] 1 Lloyd's Rep 69, 93, *per* Phillips J.

Again, if a client or customer of a firm makes an allegation of negligence, that may be no more than an expression of opinion unsupported by any evidence. However, the insurer may well want to know about it, and if, indeed, such an allegation has been made, the allegation is a fact which the insured firm would be well advised to disclose.[186] In short, what counts is not whether it is factual but whether it is information that is material.[187]

186. This concern is reflected in the common policy extension to notification of occurrences, which *may* give rise to a claim: below, 8.8.

187. What insurers may well want to know about: below, 5.4.

Applicants' integrity is a matter of evident concern to underwriters of liability cover, not least in the case of profession indemnity (PI) cover. If a person has been charged with an offence, that is not a reasonable ground for assuming guilt. However, the risk that that person *might* present as evidenced by the charge, the "moral hazard,"[188] must be disclosed. The moral hazard associated with policyholders is always material and however reluctant applicants may be to mention such matters, disclosure is required. Moreover, the effect of recent (and controversial) litigation is that applicants are also well advised to disclose rumors circulating in the press, however outraged they may be about the press publication, and even though it emerges later that the rumors were utterly untrue. What counts at the time of disclosure is the fact of the rumor.

188. In this sense see *March Cabaret & Casino Club Ltd* v *London Assurance* [1975] 1 Lloyd's Rep 169, 177 *per* May J; *The Dora* (above) p. 73 *per* Phillips J.

Such information, it has been held, somewhat controversially, includes rumors "which materially affect the risk, even when these subsequently turn out to have been unfounded."[189] The matter was debated by Colman J in *The Grecia Express*: on the one hand, he said, it is "unrealistic for underwriters to require disclosure of facts, which the proposer knows to have no bearing on his honesty or integrity, on the basis that a suspicious person when told of those facts might believe that it did have such a bearing."[190] On the other hand, by parity of reasoning,

> if the assured knows of facts which, when viewed objectively, suggest on the face of it that facts might exist ("the suggested facts") which would increase the magnitude of the risk and the known facts would have influenced the judgment of a prudent insurer, the known facts do not cease to be material because it may ultimately be demonstrated that the suggested facts did not exist.[191]

189. *CTI* v *Oceanus Underwiting Assoc (Bermuda) Ltd* [1984] 1 Lloyd's Rep 476, 506, CA, *per* Kerr LJ.; see also *The Grecia Express* (below) p. 132 *per* Colman J; and *Decorum Investments Ltd* v *Atkin, The Elena G* [2001] 2 Lloyd's Rep 378, [27], *per* David Steel J.

190. *Strive Shipping Corp* v *Hellenic Mutual War Risks Assn, The Grecia Express* [2002] EWHC 203 (Comm), [2002] 2 Lloyd's Rep 88, 131 per Colman J.

191. *Ibid*, p. 132. He continued: "That which invests the circumstances with materiality is emphatically not the existence of the *suggested* facts, but the existence of the *known* facts, for the underwriter is entitled to take into account the *risk* that the *suggested* facts may be true and the proposer is not entitled to deprive the underwriter of that opportunity because he personally believes albeit he does not know for certain that the *suggested* facts are untrue."

The applicant does not have to disclose "mere speculations, vague rumours or unreasoned fears."[192] But, if there are what Colman J described as "rumours" having "at least some real substance" when the risk was placed, notwithstanding that the rumor later turns out to have been untrue, these rumors must be disclosed.[193] These are facts that he described as "objectively suspicious."[194]

192. *The Elena G* (above) at [27], *per* David Steel J, with reference to *Carter* v *Boehm* (1766) 3 Burr 1905.

193. *The Grecia Express* (above) p. 132.

194. This view was confirmed by the Court of Appeal in *Brotherton. Brotherton* v *Aseguradora Colseguros (No 2)* [2003] EWCA Civ 705, [2003] 2 All ER (Comm) 298; Clarke [2003] CLJ 556. See also *North Star Shipping Ltd* v *Sphere Drake Ins Plc* [2006] EWCA Civ 378, [2006] 2 Lloyd's Rep 183.

In this connection Colman J referred to *Morrison* v *Universal Marine Ins Co*[195] decided in 1872. In *Morrison* the applicant read newspaper reports to the effect that a ship, which might have been his ship, and for which he was seeking cover, was aground and in peril. His broker made inquiries at Lloyd's, concluded that the newspaper report concerned another ship, and did not mention the report to the insurer when concluding the cover. The Court of Exchequer held that the report should have been disclosed.[196] Before one can conclude that a rumor is material, however, there are two further considerations to be kept in mind.

195. (1872) LR 8 Ex 40 the decision was reversed on a different ground, *ibid*, p. 197.

196. Another example might be that, if there were "substantial" rumors of fraud among the hotel staff, the hotel owner seeking property cover for the hotel would be required to disclose the rumors; see *Insurance Corp of the Channel Islands* v *Royal Hotel* [1998] Lloyd's Rep IR 151 in which Mance J decided that the insured hotel was obliged to disclose that it had prepared fraudulent invoices with a view to deceiving its banker. *Cf.*, however, the opinion of Shelton-Agar and Cruse: (1996) 26 VUWLR 811.

The first is that the materiality of a rumor must be judged subject to the possibility raised by Mance LJ in 2003 in *Brotherton* that, if there had been full disclosure, "it would have embraced all aspects of the insured's knowledge, including his own statement of his innocence and such independent evidence as he had to support that by the time of placing."[197] As he observed, this might very well "throw a different light" on whether the rumor was material. In other words, argued later, materiality must be judged by reference to all of the evidence available at the time of placing, whether actually disclosed or not. This was the argument accepted subsequently in *Meisels*,[198] in which Tugendhat J pointed to a second consideration. The test of materiality by reference to the prudent insurer, he said, is "an objective test, and the characteristics to be imputed to a prudent insurer are in substance a matter for the courts to decide." This gives a robust court scope for maneuvre, including "room for a test of proportionality, having regard to the nature of the risk and the moral hazard under consideration." On that basis there "may be things which are too old, or insufficiently serious to require disclosure."[199] Moreover, by the time the truth is "out," it may be too late for the insurer conscionably to avoid the contract.[200]

197. *Brotherton & Ors* v *Aseguradora Colseguros (No 2)* [2003] Lloyd's Rep IR 746, [22] (re).

198. *Norwich Union Ins Ltd* v *Meisels* [2006] EWHC 2811; [2007] Lloyd's Rep IR 69.

199. At [25].

200. Clarke [2012] LMCLQ 617.

The first reason for that lies in the close connection with the law of nondisclosure for which it is clear that materiality is still a requirement.[237] The second is that, even in the general law, materiality still has a role in the discharge of the burden of proof. In a leading case Lord Jessel MR said that if "it is a material representation *calculated to induce* him to enter into the contract, it is an inference 'of fact' that he was induced by the representation to enter into it."[238] That this is the rule applicable to the conclusion of insurance contracts was confirmed by the Court of Appeal in *Assicurazioni Generali Spa* v *ARIG*.[239] In this respect the role of materiality is much the same whether the case is one of misrepresentation or of nondisclosure.[240]

237. *Pan Atlantic Ins Co Ltd* v *Pine Top Ins Co Ltd* [1995] 1 AC 501.

238. *Redgrave* v *Hurd* [1881] 20 Ch D 1, 21, CA, emphasis supplied. See also in this sense: *Smith* v *Chadwick* (1884) 9 App Cas 187, 196, *per* Lord Blackburn. *Halsbury's Laws of England* (4th ed.), Vol. 31, para. 1067.

239. *Assicurazioni Generali Spa* v *ARIG* [2002] EWCA Civ 1642, [2003] Lloyd's Rep IR 131, [61], *per* Clarke LJ.

240. See *St Paul Fire & Marine Ins Co (UK) Ltd* v *McConnell Dowell Constructors Ltd* [1995] 2 Lloyd's Rep 116, CA, concerning nondisclosure, where the passage from Halsbury (above) was quoted with approval by Evans LJ at p. 127.

5.5 INDUCEMENT

Not only must the relevant information have been material to the judgment of prudent insurers in general[241] but, in addition, the misrepresentation or nondisclosure of that information must have induced the actual insurer to make the particular contract. Moreover, unlike the "influence" required for materiality in general,[242] the influence on the actual insurer must have been decisive: accurately and fully informed, the insurer would have declined the risk or offered different terms.[243]

241. Above, 5.1.

242. Above, 5.4.

243. *Pan Atlantic Ins Co Ltd* v *Pine Top Ins Co Ltd* [1995] 1 AC 501. Similarly in the USA the Restatement Contracts Art. 167 provides that a "misrepresentation induces a party's manifestation of assent if it substantially contributes to his decision to manifest his assent"; clearly this is unlikely to be the case where the insurer is aware of the truth: for example, *Royal Indemnity Co* v *Kaiser Aluminium Corp*, 516 F 2d 1067 (9 Cir, 1975)

Except in the case of self-evident inducement,[244] this must be proved by the insurer seeking to raise the defence.[245] Proof might take the form of evidence from the actual underwriter, if available. If not, the insurer might show that market practice generally suggests that the information was indeed such as would have induced a prudent underwriter to make the contract and therefore, probably had that effect on the actual underwriter.[246]

244. See *Redgrave* v *Hurd* [1881] 20 Ch D 21, CA.

245. *Assicurazioni Generali Spa* v *ARIG* [2002] EWCA Civ 1642, [2003] Lloyd's Rep IR 131, [61], CA, *per* Clarke LJ. In *Pan Atlantic* (above, p. 542), as regards nondisclosure, Lord Mustill referred to a presumption of inducement and to a presumption of causative effect based on "the general law" (p. 551) of contract, that is, of misrepresentation, presumably a reference to what was said by Lord Jessel in *Redgrave* v *Hurd* (above).

246. See, for example, *St Paul Fire & Marine Ins Co (UK) Ltd* v *McConnell Dowell Constructors Ltd* [1995] 2 Lloyd's Rep 116, CA.

This rule has a particular application in the Lloyd's market: if a misrepresentation has been mediated by a broker to a lead underwriter, and the broker knows a following

underwriter will rely on the response of the lead underwriter, then, if the lead underwriter is entitled to raise the defence, the same is true of the following underwriter.[247] This rule is entirely consistent with general contract law, which recognizes that sometimes representations are operative, even though not made directly to a recipient, where the original representor had reason to anticipate that the representation would be passed on and relied upon by the recipient.[248]

247. *Aneco Reinsurance (Underwriting) Ltd* v *Johnson & Higgins Ltd* [1998] 1 Lloyd's Rep 565; affirmed on different grounds [2001] UKHL 51; see also *International Lottery Management Ltd* v *Dumas* [2002] Lloyd's Rep IR 237; *International Management Group (UK) Ltd* v *Simmonds* [2004] Lloyd's Rep IR 247.

248. Treitel, 9-021.

Carelessness on the part of the representee (here usually the insurer), according to one view, is irrelevant. The usual citation in general contract law for this view is *Redgrave* v *Hurd*.[249] However, *Redgrave* v *Hurd* can be explained on the basis that the representor in that case (a doctor) should himself have been much better informed than the misrepresentee about relevant documents in his possession, so the carelessness of the misrepresentee could be excused. The alternative and preferable view of the law here is less simple: courts, even in *Redgrave* v *Hurd*, are "balancing the equities,"[250] case by case; the question in each case is whether the risk should be allocated to the representor or the representee, here the applicant or the insurer. The answer depends on various facts, among them which party was actually or potentially better informed. In this day and age, that person will often be the insurer.[251]

249. (1881) 20 Ch D 1, CA; *contra*, for example, *McInerney* v *Lloyds Bank Ltd* [1974] 1 Lloyd's Rep 246, 254, *per* Lord Denning MR, CA.

250. *Butterworth's Law of Contract* (4th ed., 2010) 4.42. See, for example, *Peekay Intermark Ltd* v *ANZ Banking Group Ltd* [2006] EWCA Civ 386, [2006] 2 Lloyd's Rep 511; and *Kyle Bay Ltd (t/a Astons Night Club)* v *Underwriters* [2007] EWCA Civ 57; [2007] Lloyd's Rep IR 460, [35], *per* Neuberger LJ.

251. In the case of the careless insurer, the court may well find against the insurer that the insurer was not induced in fact or has waived the matter; see below, 5.7.

5.6 FACT KNOWN TO THE INSURER

The grounds on which insurers might defend a claim and avoid the contract are qualified in two respects, concerning information that they knew or should have known at the time of the contract. First, if they plead misrepresentation, one objection to that defence is that they did not rely on what the applicant said[252]—they were not induced by it, although their likely reply, of course, is that they relied on what the applicant said in addition to what they already knew. Second, if they plead nondisclosure, there is the objection that an applicant's duty of disclosure does not extend to information already known to the insurer.[253]

252. *Smith* v *Land & House Property Corp* (1884) 28 Ch D 7, 15, CA, *per* Bowen LJ.

253. *Carter* v *Boehm* (1766) 3 Burr 1905 at 1911, *per* Lord Mansfield. Marine Insurance Act 1906, s.18(3)(b). *Cf. HIH Casualty & General Ins Ltd* v *Chase Manhattan Bank* [2003] UKHL 6, [2003] Lloyd's Rep IR 230, [86–87], *per* Lord Hobhouse. In practice, the insurer may well argue that the information in question was not something the company knew or should have known as the law has not usually demanded much of the corporate knowledge or memory of the insurance company.

6.2 OBJECTIVE INTERPRETATION

The courts' overriding aim in policy interpretation has often been said to be to find the intention of the parties.[344] However, others have spoken of the so-called objective theory that, although the aim is indeed "to give effect to the intention of the parties," the methodology "is not to probe the real intentions of the parties but to ascertain the contextual meaning of the relevant contractual language. Intention is determined by reference to expressed rather than actual intention."[345] To achieve this aim, the courts apply the same rules of interpretation to all kinds of contract.[346] An outline of the rules, as applied to insurance contracts, follows.

344. Generally, see Clarke, ch. 15; MacGillivray, ch. 11. Also K. Lewison, *The Interpretation of Contracts* (4th ed., 2007, supp. 2010). As concerns reinsurance contracts, see Gurzes, *Reinsuring Clauses* (London 2010).

345. For example, *Deutsche Genossenschaftsbank* v *Burnhope* [1996] 1 Lloyd's Rep 113, 122 per Lord Steyn, HL. Australia idem: *CGU Ins Ltd* v *Porthouse* [2008] HCA 30. Derrington, 3–9 ff.

346. *Cementation Piling and Foundations Ltd* v *Aegon Ins Co Ltd* [1995] 1 Lloyd's Rep 97, 101, CA, *per* Sir Ralph Gibson. Australia: *Johnson* v *American Home Assurance Co* [1998] HCA 14 at [12] and [19], (1998) 72 ALJR 610, 613, *per* Kirby J. In this sense also ALI Art. 2(3).

6.3 WORDS: THEIR ORDINARY MEANING

The starting point is that words are to be understood in their ordinary sense,[347] but what is that? One view is that the ordinary sense is that of the man in the street, the popular[348] albeit perhaps "incorrect" sense. Another view, and the one usually adopted in England, is that the ordinary meaning of a word is the dictionary meaning of the word.[349] However, courts are aware that dictionaries have to be updated and so the meaning of even a word such as "insurance," for example, may change.[350] Nonetheless words will be applied in the ordinary sense, as written, unless that was obviously an error.[351] For example, "actually paid" means "really paid" and not "notionally paid" or "prospectively paid."[352]

347. *Reilly* v *National Ins & Guarantee Corp Ltd* [2008] EWCA Civ 1460, [2009] Lloyd's Rep IR 488, [10] *per* Moore-Bick LJ. For discussion of the "plain meaning" presumption in the United States, see *Darner Motor Sales Inc v Universal Underwriters Ins Co*, 682 P 2d (1984).

348. *Reilly* v *National* (above). Australia in this sense: Derrington, 3–34. Cf USA where policy interpretation is "a question of law for the court": *Transport Indemnity Co* v *Dahlen Transport Ins*, 161 NW 2d 546, 548 (Minn. 1968). However courts construe cover broadly, and so as to "give effect to the reasonable expectations of the insured": *Ely Lille & Co* v *Home Ins Co*, 482 NE 2d 467, 471 (Ind. 1985).

349. For example, "explosion": *Commonwealth Smelting Ltd* v *GRE Assurance Ltd* [1984] 2 Lloyd's Rep 608, 611, *per* Staughton J. *King* v *Brandywine Reinsurance Co (UK) Ltd* [2005] EWCA Civ 235; [2005] 1 Lloyd's Rep 655, [90].

350. *Re NRG Victory* [1995] 1 All ER 533, 535A–D, *per* Lindsay J.

351 *Dumford Trading AG* v *OAO Atlantrybflot* [2005] EWCA Civ 24, [2005] 1 Lloyd's Rep 289, [27] *per* Rix LJ.

352. *Charter Reinsurance Co Ltd* v *Fagan* [1996] 2 Lloyd's Rep 113, 116, HL, *per* Lord Mustill; see also *Haydon* v *Lo & Lo* [1997] 1 WLR 198, 204, PC, *per* Lord Lloyd.

6.4 CONTEXT

Each word or phrase is to be understood not in isolation but in context. The context is not only the immediate context of the phrase, the sentence, or the paragraph[353] but that of the

policy as a whole.[354] This has the important consequence that the operative insuring clause is subject not only to the conditions and exceptions expressed in or with it but to all such terms in the rest of the policy.[355]

353. For example, *Shell Int Petroleum Co Ltd* v *Gibbs* [1983] 1 Lloyd's Rep 342 at 348, HL, *per* Lord Roskill; *Cementation Piling and Foundations Ltd* v *Aegon Ins Co Ltd* [1995] 1 Lloyd's Rep 97, 101–102, CA, *per* Sir Ralph Gibson.

354. A recent instance is *Mir Steel UK Ltd* v *Morris* [2012] EWCA Civ 1397, which concerned an indemnity clause.

355. *Woolfall & Rimmer Ltd* v *Moyle* [1942] 1 KB 66, CA.

With regard to the sentence or paragraph, construction in context is carried out according to the *ejusdem generis* rule: if particular words have a generic character, more general following words are construed as having the same character.[356] By contrast, there is the rule *expressio unius (est exclusio alterius)*: the express mention of one thing may imply the exclusion of another related thing.[357]

356. *Thames & Mersey Marine Ins Co* v *Hamilton Fraser (The Inchmaree)* (1887) 12 App Cas 484, 490, *per* Lord Halsbury LC.

357. *Trickett* v *Queensland Insurance Co* [1936] AC 159, 165, PC, *per* Lord Alness. For an important example, see below, 11.2.1.

In contrast with the biopic/focus on what is immediate and obvious, courts now routinely consider the wider context—commercial purpose of the insurance,[358] and the "matrix" in which the policy was concluded.[359] The context is also the context of the time: the sense in which words were then understood by certain social or commercial groups.

358. *Fraser* v *Furman (Productions) Ltd* [1967] 1 WLR 898, 905, CA, *per* Diplock LJ; *Deutsche Genossenschaftsbank* v *Burnhope* [1996] 1 Lloyd's Rep 113, 122, *per* Lord Steyn. See further below (8) *in fine*.

359. See below 6.10 concerning extrinsic evidence.

6.5 INCONSISTENCY

In the event of inconsistency in the ordinary meaning of words in different parts of the contract, in accordance with the general rule (above 6.2), courts seek the meaning that best reflects the intention of the parties. The inconsistency may be intentional—that one part should qualify the other.[360] If not, precedence is given to terms to which the parties gave actual attention[361] or which appear to better reflect their final intention[362] or which best promote the purpose of the insurance.[363]

360. *Woolfall & Rimmer Ltd* v *Moyle* [1942] 1 KB 66 at 73, CA, *per* Lord Greene MR. Indeed this is a common method of drafting documents such as insurance policies where, it being impossible to envisage every situation, that may arise, it is better to draft (cover) in general terms and then exclude what is unacceptable: the point is made succinctly by Lamy para 1914; see also para 2008.

361. *Farmers' Co-Op Ltd* v *National Benefit Assurance Co Ltd* (1922) 13 Ll L Rep 417 and 530, 533, CA, *per* Atkin LJ.

362. For example, what is in the policy is preferred to what is in the proposal: Clarke 15–6D; Derrington 3–63 ff.

363. *Woolfall & Rimmer* (above). In the case of inconsistency between a master policy, usually marine, and a certificate issued to a beneficiary of the policy, priority is accorded to the certificate: *Koskas* v *Standard Marine Ins Co* (1927) 32 Com Cas 160, CA.

At Lloyd's inconsistency may occur between the slip submitted by a Lloyd's broker to the insurer and the policy, produced later. Although the slip is not admissible in evidence to

each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.[404]

404. *Mackay* v *Dick* (1881) 6 App Cas 251, 263, *per* Lord Blackburn; Treitel 2–108. See also *Becher GmbH* v *Roplach Enterprises (The World Navigator)* [1991] 1 Lloyd's Rep 277, 282 per Phillips J.

With regard to insurance contracts, however, English law was unsettled, on whether the continuing duty of good faith rests on an implied term of the contract or whether it arises independently of the intention of the parties and by operation of law, until the decision of the House of Lords in *The Star Sea*,[405] which pointed to the latter.[406] Orthodoxy maintains that there is no general duty of good faith in English contract law,[407] however, in *Socimer*,[408] concerning not a contract of insurance but a contract to value assets, Rix LJ referred to a general "requirement of good faith and rationality." That is precisely what implicit good faith deals with, and he stated: "Commercial contracts assume such good faith, which is why express language requiring it is so rare."[409]

405. Above.

406. See Lord Hobhouse, with whom Lord Steyn and Lord Hoffmann agreed: [2001] UKHL 1, [50] and [52].

407. See, for example, Treitel, 7–102.

408. *Socimer Int Bk Ltd* v *Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep 558 at [116]. See also Toulson LJ in *Daventry DC* v *Daventry Housing Ltd* [2011] EWCA Civ 1153, [173] ff concerning rectification. A view like that in *Socimer*, however, has been expressed in Australia by Peden (2009) JCL 50; by Allsop (2011) 85 ALJR 341; and by Ashton (2011) 22 *ILJ* 81. *Cf* Aikens LJ (BILA Journal No 119 (June 2010) p. 12) that there is a universal principle that policyholders "must not act in bad faith".

409. In the case before the court that was "a sufficient protection" where the "danger to be guarded against … is abuse caused by self interest": at [116].

7.2 TIME OF THE DUTY

The "content of the obligation to observe good faith has a different application and content in different situations," said Lord Hobhouse in *The Star Sea*, noting that the duty of *utmost* good faith applies only until the contract is concluded.[410] However, a duty of good faith, in the sense of a duty to disclose information, continues throughout the contractual relationship at a level appropriate to the moment.[411] In particular, a duty of disclosure revives whenever the insured has an express or implied duty to supply information to enable the insurer to make a decision.[412] There is also a suggestion (but not a decision) that the duty might operate in other cases such as performance by the insured of a duty to give notice of loss.[413] However, in such instances any material falsehood in the notice is likely to be repeated in a subsequent claim in respect of that loss and to be categorized as a breach of utmost good faith in the claim.[414]

410. *Manifest Shipping Co Ltd* v *Uni-Polaris Ins Co Ltd, The Star Sea* [2001] UKHL 1, [2003] 1 AC 469, [2001] 1 Lloyd's Rep 389, at [48].

411. *The Star Sea* (above) [1997] 1 Lloyd's Rep 360, 372 per Leggatt LJ, CA. Australia: *cf* Rein (1999) 10 Ins LJ 145, 153–154.

412. See, for example, *Commercial Union Assurance Co* v *Niger Co Ltd* (1922) 13 Ll L Rep 75, 82 per Lord Sumner (HL).

413. See the discussion in *K/S Merc-Scandia XXXII* v *Certain Lloyd's Underwriters (The Mercandian Continent)* [2000] 2 Lloyd's Rep 357, at [75] ff. by Aikens J.

414. Below, 12.1.

Such a duty might well be thought to apply when the contract requires the insured to notify the insurer of any alteration in the risk, so that the insurer can decide whether to

exercise an option to cancel the cover;[415] or when the insured seeks to rely on a "held covered" clause. However, in *New Hampshire* v *MGN*,[416] the Court of Appeal approved the view of the lower court that the duty of good faith does not trigger obligations of disclosure of matters affecting risk during the period of cover, except in relation to some requirement, event, or situation expressly provided for in the insurance contract to which the duty of good faith attaches.[417]

415. *Hussain* v *Brown (No 2)* [1997] 9 ILM 4 (fire).

416. *New Hampshire Ins Co* v *MGN Ltd* [1997] LRLR 24 (CA).

417. *Ibid*, p. 61, *per* Staughton LJ. Such a case might be one in which the contract required the insured to supply information to the insurer, if the insured was trading in a war zone.

Uncontroversially, the duty of good faith applies when the insured makes a claim.[418] Moreover, in view of the generally mutual character of the duty (above 1), it is at least arguable that the insurer owes a corresponding duty to the claimant, for example, a duty to disclose adjusters' reports. If an insurance claim by the insured is settled, the compromise embodied in the settlement must be *bona fide* and honest.[419] Prior to settlement, if, for example, a claim is not paid as presented but resisted in certain respects, such as the amount due, this is not necessarily a rejection of the claim but may well be part of the process of compromise; it is well settled that in these circumstances parties to the compromise owe a good faith duty of disclosure.[420]

418. *Shepherd* v *Chewter* [1808] 1 Camp 274, 275, *per* Lord Ellenborough in a case of hull insurance.

419. See below, 12.14.

420. True not just for insurance contracts but for all kinds of contract: Clarke 30–6A.

Thus, in *The Star Sea*,[421] Leggatt LJ observed that the "mere fact of rejection of the claim by underwriters would not in our judgment bring the duty to an end." However, in that case disclosure was sought not only when the claim was presented but also later to assist the insurers in their defence. Rejecting this, Leggatt LJ adopted the opinion of the court below that there is "no reason why adversaries should be under a duty to provide ammunition for each other."[422] The decision of the Court of Appeal was affirmed by the House of Lords,[423] where Lord Hobhouse said that when a writ is issued "the rights of the parties are crystallised" and there "is no longer a community of interests. The parties are in dispute and their interests are opposed. Their relationships and rights are now governed by the rules of procedure … The battle lines have been drawn and new remedies are available to the parties. The disclosure of documents and facts are provided for with appropriate sanctions."[424] A sufficient remedy is provided by the rules of procedure.[425]

421. *Manifest Shipping Co Ltd* v *Uni-Polaris Shipping Co Ltd, The Star Sea* [1997] 1 Lloyd's Rep 360, 372 (CA).

422. *Ibid*. the opinion of Tuckey J: [1995] 1 Lloyd's Rep 651, 667.

423. [2001] UKHL 1, [2003] 1 AC 469. United States in this sense: Turner, Mahler & Stafiej, 43 Tort, Trial & Ins Practice LJ 199 (2008).

424. At [75]; Lord Steyn and Lord Hoffmann agreed with him.

425. In this connection both Lord Hobhouse (p. 197) and Lord Scott (p. 199) approved statements made in *Rego* v *Connecticut*, 593 A 2d 491, 497 (Conn, 1991).

Lastly, whether or not the insured and insurer become adversaries in the field of litigation, when the claim has been paid, if the insurer exercises rights in subrogation, it must exercise those rights in good faith.[426]

426. See Mullins (1991) 4 Ins LJ 83.

in insurance markets such as Lloyd's, as well as being a major insurance concern in Asia.[500] Of climate change, an experienced English practitioner observed[501] that contract "provision is always harder where invariably, as here, a combination of causes will be responsible for losses."[502] Traditional limiting phrases such as "exclusively caused by" or "exclusively attributable to" will make forms with such phrases hard to sell.[503] Moreover, the effects of climate change will not be insurable unless limited by aggregation clauses and the like.[504] The factor of insurability also suggests that third parties should have no rights or standing in such matters but, of course, some influential social groups will not agree.[505]

500. "Climate change and insurance law": Hardy BILA Journal no 123 (2011) 50, 51 ff. refers for instance to the decision of AIDA which adopted this subject as a major theme of future work at its XIIIth World Congress in Paris in May 2010. The problem has been recognized in France, where the insurance industry appears to be understandably cautious: Lamy paras 1906 and 2069 ff.; see also para 1912(c). At least one leading liability lawyer the Netherlands is prepared to assume, for discussion at least, that there is liability for unnecessary emissions: Spier in (Schoubroek et al., eds.) Liber Amicorum Herman Cousy (Antwerp 2011) 687, 688.

501. Hardy (p. 55) notes the wide UNFCCC definition: "a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods." He also notes (p. 55) the increase in "climate-related litigation," mostly, however, injunctive relief sought by environmental pressure groups or government regulators against major emitters.

502. The possibility of two or more proximate or effective causes is now widely accepted; see, e.g., *Kos* v *Petroleo Brasileiro* [2012] UKSC 17, [2012] 2 Lloyd's Rep 292, [71] ff per Lord Clarke.

503. Be that as it may, "gradual pollution damage" has already been accepted as an exclusion in current policies: Rokas in Liber Amicorum Herman Cousy (above) p. 249. Rokas (e.g., p. 253 ff) is one of those who argue that for there to be effective insurance it must be mandatory for major emitters, i.e., those who pursue certain activities, such as those of the offshore gas industry. In this respect he is critical of the European Directive (2004/35/EC) on liability with regard to the prevention and remedying of environmental damage (ELD)

504. See Spier (above) p. 695.

505. Point discussed by Rokas in Liber Amicorum Herman Cousy (above), p. 265. In the United States there has been extensive litigation on such issues; see, for example, *Comer* v *Murphy Oil USA Inc* (concerning actions arising from the consequences of Hurricane Katrina) in respect of which the petition dismissed by the Supreme Court on 10 January 2011.

One associated issue, for example, is what amounts to a "flood";[506] and from discussion of such issues a further question is whether climate change raises any issues of definition that have not already been addressed in the context of property damage or liability for such damage. In any event, even if it is all a matter of property damage, finer points may well be difficult to resolve; it is easy to imagine extensive (and expensive) technical debate over whether there has been "real" damage to protected species or habitats.[507]

506. On this see Bell (2012) 23 *ILJ* 312.

507. Rokas in Liber Amicorum Herman Cousy (above), p. 262 ff.

8.4 NEGLIGENCE

Although occurrence-based cover is found less often today, the concept of occurrence may still be important where a policy limit or excess depends on whether, according to common wording, the loss and/or occurrence arises out of (is in some sense caused by) one occurrence or event.[508] In most cases it is easy to identify the occurrence in question, assuming that it lasts over a relatively short period of time. An example is the promulgation of a (negligent) decision or plan but the implementation of a decision, plan or strategy might well be different.[509]

508. Also cover for legal costs incurred by the insured may be referable to a "claim or series of claims arising out of the same occurrence."

509. *Midland Mainline Ltd* v *Commercial Union Assurance Co Ltd* [2003] EWHC 1771, [2004] Lloyd's Rep IR 22.

Indeed, the prime example of what might well be problematic arises where the insured is negligent over a period of time. Is that a single event or occurrence giving rise to a number of losses (a hydra of negligence with heads of loss) or are there as many events or occurrences as there are losses? Sometimes the contract answers this kind of question. Contracts may even leave it to the insured, in practice, the reinsured, to determine. As long as what the reinsured determines is not unreasonable and in good faith, it will be upheld.[510] If, however, the contract does not answer the question, the court must interpret the contract as best it can. Under certain reinsurance contracts the reinsurer was obliged to pay in respect of "each and every loss and/or occurrence arising out of one event." As will be apparent, the meaning depends to a significant degree on the context,[511] nonetheless the judgments in these cases are considered below.[512]

510. *Brown* v *GIO Ins Ltd* [1998] Lloyd's Rep IR 201, CA.

511. *Kuwait Airways Corp* v *Kuwait Ins Co* [1996] 1 Lloyd's Rep 664 at 684, 689, *per* Rix J. Derrington, 8–425 *et seq*.

512. Below, 12.7.1 ff.

8.5 CLAIMS MADE

Whenever the relevant damage or injury, which gives rise to liability to a third party, is latent, difficulty may be encountered in pinning the damage to a particular period and a particular insurance policy. This is the case of the so-called "long-tail" claim. With such claims in mind, some markets have "cut off the tail":[513] turned from "occurrence" policies, which require the damage to be located in both place and time, to "claims-made" policies,[514] not least in PI insurances, although asbestos-related claims are perhaps the prime example.[515] These policies specify the insured event as the *claim* by a person, usually a third party, arising out of the occurrence, rather than the occurrence itself. The insurer's viewpoint was put by Staughton LJ in a leading case thus:

> One could say that any liability incurred during the policy period by the [insured] surveyors should be covered. That would have the result that claims might be brought home to roost months or years after the policy had expired. The insurer would have no way of determining within reason when their liability had ended, or what reserves ought to be made after they thought that they had paid all claims. A second method is that adopted in this case of providing that claims made during the year in question are covered by insurance. … The third method would be to provide that a policy would only cover claims which were actually paid in the years of insurance. … That would be a disaster, because it would mean that the insured would have to disclose on renewal if a claim was threatened. It does not seem very likely that he would then be able to renew his policy until the time came when the claim was actually paid.[516]

513. Cousy in Koziol and Steiniger (eds), *European Tort Law* 2001 p. 50; the author considers (p. 51) the "outright distrust and fierce opposition from certain courts and legislators," notably the French *Cour de Cassation* which declared such policy provisions illegal and void.

514. See Abraham, 71 Va L Rev 403 at 413 (1985); Wetterstein (1990) 3 Ins LJ 172 at 180 *et seq*.; Derrington, 8–67 ff.

was once asserted (by the Ontario Court of Appeal) that indeed a claim "other than one made by way of institution of legal proceedings may be made" but "only by notifying the person against whom the claim is being asserted of such a claim;"[539] and in this connection the issue of a writ created notice to the world at large.[540] Short of a writ, close attention must be paid to the content of the notification. An English court would probably concur with the Supreme Court of Canada in requiring communication of a clear intention to hold a person responsible for the loss in question.[541] In Australia it has been held enough to send a draft summons and a covering letter,[542] but in England, it appears that that is not likely to be enough.[543]

537. *Ching*—above 8.5.1.

538. Pierce, 19 Western Univ LR 165, 172 (1992). *Cf.*, however, *St Paul Fire & Marine Ins Co* v *Missouri Utd School Ins Council*, 98 F 3d 343 (8 Cir, 1996).

539. *Re St Paul Fire & Marine Ins Co* (1983) 1 DLR (4th) 342, 349.

540. *Ibid.* with reference to *Worsley* v *Earl of Scarborough* (1747) 26 ER 1025, 1026, *per* Lord Hardwicke LC.

541. *Reid Crowther* v *Simcoe & Erie* (1993) 99 DLR (4th) 741, 753–754, *per curiam.*

542. *Drayton* v *Martin* [1996] FCA 1504, (1996) 137 ALR 145. Sutton (1998) 26 Austral Bus L Rev 147.

543. See the *Robert Irving* case [1998] Lloyd's Rep IR 258, discussed below. Cf a leading Canadian case (of cover against "claims made and suits brought"), suit was not brought until the issue of the writ so cover was not triggered until that had been done: *Re St Paul Fire & Marine Ins Co* (1983) 1 DLR (4th) 342 (Ont).

With regard to the institution of proceedings, in *Thorman* v *NHIC*,[544] a leading English case, the Court of Appeal held that the issue of the writ endorsed in wide general terms constituted a claim (and one which embraced all the matters subsequently pleaded in the statement of claim)—either the issue of the writ or its service. However, the decision has been criticized,[545] and distinguished by reference to the particular policy.[546] Indeed, on any view of the facts of the case there was an insured claim.[547] Subsequently, in *Robert Irving & Burns* v *Stone* (unlike *Thorman* a "claims made" case), the Court of Appeal held that, although a writ had been issued in respect of a claim, the ordinary meaning of "the words 'claims made' indicate that there has been a communication by the client" to the defendant surveyor of "some discontent which will, or may, result in a remedy expected from the surveyor"; and that the issue of the writ (without more—some other kind of communication) was not enough.[548] Noting that it was not disputed that to post a letter which did not arrive would not be enough, Staughton LJ asked: "Would a claim be made if it was put on the internet and nobody ever looked at it, or at any rate not the person at whom it was aimed? Those considerations, to my mind, make it most implausible that a claim can be made without notification."[549] Generally, therefore, a claim requires a certain degree of formality and assertiveness.

544. [1988] 1 Lloyd's Rep 7, CA.

545. In Australia: *Drayton* v *Martin* [1996] FCA 1504, (1996) 137 ALR 145 at 165, FCA, *per* Sackville J.

546. "Professional Liability. The Company will indemnify the Insured against loss arising from any claim or claims for breach of duty in the professional capacity … by reason of any neglect omission or error whenever or wherever the same was or may have been committed by the Insured … during the subsistence of this Policy."

547. See Sir John Donaldson, MR, [1988] 1 Lloyd's Rep 7, 12.

548. [1998] Lloyd's Rep IR 258 at 261, *per* Staughton LJ, with reference to *Re St Paul* (above). *Robert Irving* was applied by the Supreme Court of Appeal (South Africa) in *Immerzeel* v *Santam Ltd* [2005] SASCA; [2007] Lloyd's Rep IR 106.

549. [1998] Lloyd's Rep IR 258 at 264. With regard to the meaning of notification, see below, 8.8.

Sight must not be lost, however, of the significance of the context in which the question, whether or not there has been a "claim," arises.[550] In the context of "pension misselling," sellers were instructed to review personal pension plans (PPP) sold in the past to determine

whether the sales had been made on the basis of inappropriate advice. In cases of inappropriate advice, a statutory scheme was in place whereby PPP buyers could be compensated. In *Rothschild Assurance Plc* v *Collyear*,[551] one question was whether the response of persons revealed by the review to be entitled to compensation could be described as claims within the insuring clause of the sellers' liability insurance. Rix J stressed the need to do "justice to the context of the regulatory regime as a whole," which he said, as the liability insurers well knew, was designed to make claiming easy. It was like the discovery of a widespread fault in motor manufacture, "by delivering their cars to their dealers car owners are claiming to have those cars repaired in accordance with a car manufacturer's recall of them."[552] So it was for PPP buyers.

550. The context or "matrix" has become a factor that regularly affects interpretation of contracts, including insurance contracts; see above, 6.4.

551. [1999] Lloyd's Rep IR 6.

552. *Ibid.* at 28.

8.7 CLAIMS NOTIFIED

Policies often cover claims actually made (in the sense discussed above (8.7.1)) after the insurance period, provided that the insurer has been notified during the insurance period of circumstances suggesting that such a claim might be made.[553] Otherwise not only would such claims not be covered by that insurance but they would have to be disclosed to the insurer when contracting the next period of cover, and might be a ground for declinature of cover for the next period or give rise to cover only with a steep rise in premium.[554]

553. Although the function of the relevant clause is mainly an extension of cover beneficial to the insured, it is usually found not in the insuring clause but in the general conditions—because notice is a condition of the extension. Generally concerning notification clauses, see Gurzes, *Reinsuring Clauses* (London 2010) 9.06 ff.

554. See *Rothschild* v *Collyear,* above 7.1.

Notification also allows the insurer to get involved in the defense of an eventual claim at an early stage.[555]

555. Generally see Orin, 31 Tort & Ins LJ 711 (1996). Moreover, a "rule of law that would inhibit insurance companies from eliminating risks known to manufacturers and sellers but concealed for purposes of commercial advantage is undesirable": *Commercial Union Ins Co* v *Int Flavors & Fragrances, Inc,* 822 2d 267, 271 (2 Cir 1987). In France, however, such clauses met hostility and were declared unlawful: *Cass.civ.19.12.1990.*

8.7.1 Circumstances

Notification of circumstances (suggesting that such a claim might be made) means that the insurer must be given notice[556] of relevant circumstances of that kind, of which the insured was aware.[557] As to what is relevant,[558] once a can of worms has been opened, it may well be an issue whether the notification is sufficient for the entire can or just for the worm at the top.

556. Concerning what constitutes effective notice see below, 12.4.1.

557. Failure to give timely notice may be excused "by proof that the insured either lacked knowledge of the occurrence or had a reasonable belief of nonliability": *Commercial Union Ins Co* v *Int Flavors & Fragrances, Inc,* (above) *loc cit.*

10.2.1 Precautions

A particular concern about moral hazard is the danger that, knowing that cover is in place, the policyholder, being "only" human will "relax his (or her) guard." This concern has led to terms (often described as conditions but operating usually as exclusions) such as that which requires the insured to "take reasonable precautions to prevent" loss. Read literally such terms would remove the cover for ordinary negligence that is central to liability policies; however, these terms are not read literally but construed narrowly: the term is broken only if the insured has been reckless. In a leading case,[645] Diplock LJ said:

> What, in my judgment, is reasonable as between the insured and the insurer, without being repugnant to the commercial purpose of the contract, is that the insured, where he does recognise a danger, should not deliberately court it by taking measures which he himself knows are inadequate to avert it. In other words, it is not enough that the employer's omission to take any particular precautions to avoid accidents should be negligent; it must be at least reckless, that is to say, made with actual recognition by the insured himself that a danger exists, and not caring whether or not it is averted. The purpose of the condition is to ensure that the insured will not, because he is covered against loss by the policy, refrain from taking precautions which he knows ought to be taken.

645. *Fraser* v *Furman (Productions) Ltd* [1967] 1 WLR 898, 906, CA. See also *Aswan Engineering Establishment Co Ltd* v *Iron Trades Mutual Ins Co Ltd* [1989] 1 Lloyd's Rep 289; *Devco Holder Ltd* v *Legal & General Assurance Sy Ltd* [1993] 2 Lloyd's Rep 567, CA. Similar concerns can be seen in Australia: Derrington, 9.50 ff; and in France: Lamy para 2001 ff.

10.2.2 Fidelity

Another concern about moral hazard is the possibility that a policyholder will be tempted to steal the money or property of clients and customers. Hence exclusion of cover for liability arising out of such theft is also found, but such exclusions are construed narrowly.[646] Policies sometimes exclude cover specifically in these terms but, in any event, fraud by the insured employer personally is not covered, whether specifically excluded or not.[647]

646. Such an exclusion would apply to the insured employer but not to the employees, a point applied to care in *Fraser* v *Furman* (above) loc cit. The employer would nonetheless be expected to be careful in the selection of staff: *Woolfall & Rimmer Ltd* v *Moyle* [1942] 1 KB 66, 74, CA, *per* Lord Greene MR.

647. See below, 10.7.

10.3 BREACH OF CONTRACT

If the claim against the insured is based on both negligence (covered) and breach of contract (neither expressly covered or excluded), the claim is covered.[648] However, cover in respect of liability for breach of contract alone is commonly excluded,[649] even if the circumstances also give rise to liability in tort.[650]

648. *Capel-Cure Myers Capital Management Ltd* v *McCarthy* [1995] LRLR 498, 503, *per* Potter J.

649. *Jan de Nul (UK)* v *NV Royal Belge* [2001] Lloyd's Rep IR 327, [97] ff, *per* Moore-Bick J (liability); appeal dismissed: [2002] 1 Lloyd's Rep 583. See further discussion of cases such as *Dominion Bridge Co Ltd* v *Toronto General Ins Co* [1963] SCR 362, [1964] 1 Lloyd's Rep 194 (SCC) below this section *in fine*:

650. *Dominion Bridge Co Ltd* v *Toronto General* (above) Rein (1994) 6 Ins LJ 193, 199 ff; Schultz, 33 Tort & Ins LJ 257, 267 (1997).

Indeed, in the United States, it has been presumed as a matter of interpretation that sums which, for example, the insured becomes "legally obligated to pay as damages" cover liability in tort but not liability for breach of contract;[651] as the Wisconsin court put it, a general liability policy "is not a performance bond."[652] In England, too, insurance against "legal liability for damages in respect of … accidental loss of or damage to property" has been construed to provide "an indemnity in respect of certain types of tortious liability,"[653] but not environmental clean-up costs that the policyholder was obliged to pay by statute at the insistence of the Environment Agency.[654] Likewise "liability at law," *prima facie* wide enough to cover both liability in tort and liability in contract, has been construed as confined to tort.[655]

651. For example., *Standard Ranch Inc* v *Maryland Cas Co*, 89 F 3d 618, 624 (9 Cir, 1996); and *Jacobs* v *NPS*, 264 F 3d 365, 371 ff (3 Cir, 2001).

652. *Vogal* v *Russo*, 613 NW 2d 177, 182 (Wis, 2000).

653. *Bartoline* v *RSA* [2007] Lloyd's Rep IR 423, [110], *per* HH Judge Hegarty, QC (QBD, MDR). The court pointed out [44] that the Agency could compel such payments even though the Agency itself had suffered no loss; and [45] that the statute "and the law of torts seek to protect very different interests." Bartoline was ordered to pay clean-up costs of £770,000.

654. Water Resources Act 1999, s 161, which created a "statutory debt": [61]. The distinction between such a debt and damages had been drawn in certain marine insurance decisions, to which the court referred: Note also that on 1 March 2009 the Environmental Liability Directive (2004/35/EC) was transposed into UK law; see further the Environmental Damage (Prevention and Remediation) Regulations 2008.

655. *Tesco Stores* v *David Constable* [2007] EWHC 2088 (Comm); [2008] EWCA Civ 362; [2008] Lloyd's Rep IR 636.

Whether a policy covers breach of contract by the policyholder, which is possible, is a question of construction.[656] However, if the breach is deliberate, the presumption is strong that it is not covered by the policy. To avoid doubt, breaches of this kind that the insurer does not intend to cover may be excluded in some detail. A policy, for example, has been known to exclude liability arising out of any "contract where the Assured acts as a Contractor whether in conjunction with his/their profession as stated in the Schedule or not."[657] Alternatively it may exclude "the cost of replacing or making good defective materials [or] goods."[658]

656. It may be included by a Contractual Liability Extension; see, for example, *Tesco Stores Ltd* v *David Constable* [2007] EWHC 2088 (Comm); [2008] Lloyd's Rep IR 302, [26] *et seq.*; [2008] EWCA Civ 362; [2008] Lloyd's Rep IR 636.

657. One for consultant engineers.

658. Inapplicable, however, to damages intended to put a third party in a position to do that: *Aswan Engineering Establishment Co Ltd* v *Iron Trades Mutual Ins Co Ltd* [1989] 1 Lloyd's Rep 289.

Like any other exclusion, these will be construed in context and consistently with the purpose of the policy.[659] For example, in *Dominion Bridge Co Ltd* v *Toronto General,* the firm responsible for the steel work in a bridge and liable for the collapse of part of the bridge caused by its negligence found that liability cover was excluded under its insurance because it was "liability … assumed by the insured under any contract."[660] Literally these words extended the exclusion to liability to any casual passer-by injured by what fell from the steel work that the firm had contracted to do. But this construction was not consonant with the purpose of the cover, so the exclusion was limited (by the Canadian Supreme Court) to a claim by a party to the contract on a matter reasonably closely connected to the insured's contractual obligations.[661]

659. Above, 6.4. Rein (1994) 6 Ins LJ 193 at 199 *et seq.* offers an instructive analysis of the operation of (such) exclusions.

660. *Dominion Bridge Co Ltd* v *Toronto General Ins Co* [1963] SCC 362; [1964] 1 Lloyd's Rep 194.

661. [1962] 2 Lloyd's Rep 159 at 167, *per* Davey J, affirmed on appeal: [1963] SCC 362, [1962] 2 Lloyd's Rep 159.

10.4.6 Professional activity

Cover purports to cover the activity of the professions. At one time it was possible to identify the professions and by implication exclude the activity of other persons. Today there is no accepted general meaning of "profession," so the activity covered by what is still called a PI policy is 1ikely to be defined by the policy itself.[697] An alternative approach by an insurer with a particular concern is to exclude certain kinds of activity. For example, a policy covering design consultants may exclude liability for activity which is, in essence, that of insurance broking. However, it should be kept in mind that a person may be acting in an insured capacity one moment and not the next[698] and that much depends on what the insured has undertaken to do for the particular client.[699] In 1997 in *Gray*,[700] for example, under a property syndication scheme, solicitors (in Australia) purchased properties without instructions and then promoted and sold them to clients and did the necessary legal work. Although the scheme had investment and tax advantages for the clients, the federal court held that, viewed as a whole, the activity was entrepreneurial and lacked enough nexus to the solicitors' practice for their liability to purchasing clients to be covered by the practice insurance.

697. True also in France: Lamy para 1994.

698. For example, *Whitworth* v *Hosken* [1939] 65 Ll L Rep 48 concerning the business activity of a chartered accountant.

699. *Midland Bank* v *Hett Stubbs & Kemp* [1979] Ch 384 at 402, *per* Oliver J.

700. *Solicitors' Liability Committee* v *Gray* [1997] FCA 652, (1997) 147 ALR 154.

More recently, in England in *Professional Funding* v *Bakewells*,[701] HHJ Hegarty QC considered the conduct of a firm of solicitors acting for clients making claims for personal injury and disease, allegedly sustained in coal mines. Fees were conditional and the solicitors made interim funding arrangements for the clients. The case arose when the firm claimed under its PI cover, a claim resisted on the ground that making interim funding arrangements, in respect of which the firm had been sued in debt, was not covered because, broadly speaking, the liability did not arise from the performance of legal services. The defence succeeded. The firm carried on both a profession and a business; what had occurred in this case was not that of professional solicitors and fell within an exclusion of trading liabilities.

701. [2011] EWHC 2658 (QB).

10.4.7 Fraud

If a claim made against the insured alleges not only negligence but also fraud, there is no cover for the fraud. Fraud is excluded, if not by a term of the insurance policy, by public policy against cover of intentional wrongdoing and by construction,[702] with regard to the person or persons actually guilty of fraud.[703]

702. Clarke (1996) 7 Ins LJ 173. A borderline case is *Regus (UK) Ltd* v *Epcot Solutions Ltd* [2008] EWCA Civ 361, [2009] 1 All E.R. (Comm) 586.

703. As regards partnerships and comparable groups, see the practice of including antiavoidance clauses, above 5.3.1; also Clarke, 27–2C6(b) *in fine*.

If a layman wanted a phrase such as "claims in respect of negligence" to be altered to read … "claims in respect of negligence but not in respect of fraud," a lawyer would tell him that these additions were superfluous, since negligence meant negligence and nothing else and did not include fraud.[704]

704. *West Wake Price & Co* v *Ching* [1957] 1 WLR 45, 58, *per* Devlin J. See also *Davies* v *Hosken* [1937] 3 All ER 192.

The same has been held in Australia (New South Wales Supreme Court) in respect of "errors or omissions" cover.[705] However, the experience of some courts in the USA has been that victims, aware that they will recover no damages from a wrongdoer unless the wrongdoer has enforceable liability cover, tailor their claims to the terms of the cover (such as negligence) and eschew any suggestion of excluded activity (such as fraud or other criminal acts).[706] So, the courts there, as well as courts in England,[707] look behind the form and face of the claim to "ascertain the real nature of the claim" and look at the substance of the matter as well as the form.

705. *Warrender Proprietary Ltd* v *Swain* [1960] 2 Lloyd's Rep 111 (NSW).

706. For example, *Winnacunnet* v *National Union*, 84 F (3d) 32 at 35–36 (1 Cir, 1996).

707. *West Wake* (above) at 48, *per* Devlin J. See also *Rigby* v *Sun Alliance & London Ins Ltd* [1980] 1 Lloyd's Rep 359, 362, *per* Mustill J; and *Haydon* v *Lo & Lo* [1997] 1 WLR 198, 204, PC, *per* Lord Lloyd. That the way a claim is framed is not decisive was reaffirmed in *Omega Proteins Ltd* v *Aspen Ins UK Ltd* [2010] EWHC 2280 (Comm), [2011] Lloyd's Rep. I.R. 183. See also *Persimmon Homes Ltd* v *Great Lakes Reinsurance (UK) Plc* [2010] EWHC 1705 (Comm), [2011] Lloyd's Rep. I.R. 101.

10.5 DOUBLE COVER: OTHER INSURANCE

Double cover arises "when two or more insurers cover the same interest against the same risk, although the liability need not arise from the same type of policy. It is essential that each policy must indemnify the same assured in respect of the same loss."[708] If loss is doubly covered, by both contract A and contract B, one contract may well purport to exclude loss covered by the other;[709] such clauses have been described as "contribution" clauses, "coinsurance" clauses, or simply "other insurance" clauses. As these clauses are inserted by and for the benefit of the insurer, they are construed *contra proferentem.* Nonetheless, interpretation may well be problematic.

708. *GIO* (above) at [17]; the court also stated [27] that "the manner in which the original claim by the injured person is framed … is not capable of being determinative of whether or not dual insurance applies." In England, see, for example, *NFU Mutual* v *HSBC Ins (UK)* [2010] EWHC (Comm), [2011] Lloyd's Rep IR 86.

709. This is what has also been called "dual" insurance, e.g,. in Australia: *GIO General Ltd* v *Insurance Australia Ltd t/as NRMA Insurance* [2008] ACTSC 38. American lawyers speak of "stacking": for example, in a motor case *Farm Bureau Mut Ins Co* v *Ries*, 551 NW 2d 316, 318 (Iowa, 1996). For years courts have maintained a "policy" of "antistacking," for example, *Breaux* v *American Family Mutual*, 553 F 3d 447 (6 Cir, 2009).

The underlying rule of law is that where there is double insurance, the insured may recover loss, the entire loss, from any one or more of the insurers on risk;[710] but in the case of indemnity insurance such as liability insurance, having recovered the entire loss from insurer A, a claimant is unable to recover any more money from insurer B.[711] From the point of view of the insured, this rule is simple and perhaps that is how it should be. However, in practice there seems to be no coherent general strategy of coordination.[712]

710. *Godin* v *London Assurance Co* [1758] 1 Burr 489 (cargo). MIA, section 32(2). For similar principles applied in Australia, see, for example, *Collyear* v *CGU* [2008] NSWCA 92.

711. Life Assurance Act 1774, s 3. *Hebdon* v *West* [1863] 3 B & S 579 (life), applied in *Sims* v *Scottish Imperial Ins Co* [1902] 10 SLT 286 (Ct Sess); *Caledonian North Sea* v *London Bridge Engineering* [2000] Lloyd's Rep IR 249, 275 *per* Lord Sutherland (Ct Sess), which was affirmed on other points of law: [2002] UKHL 4, 2002 SLT 278. See also the leading judgment of Stephenson LJ in *National Employers' Mutual* v *Haydon* [1980] 2 Lloyd's Rep 149, 152 (CA).

necessary that the word "warranty" be used, as any form of words clearly expressing a term as a condition of the enforceability of the contract may be enough to constitute a warranty.[744] To the insurance lawyer, the words "condition precedent" in an insurance policy should suffice.[745] However, in practice, in some policies containing "conditions" some of them are referred to as "conditions precedent" and some are not. Such policies are affected by the rule of construction *expressio unius* that indicates that the latter are not to be treated as warranties.[746]

742. *Wheelton* v *Hardisty* [1857] 8 El & Bl 232 at 300, *per* Bramwell B.
743. *Thomson* v *Weems* [1884] 9 App Cas 671 at 682, *per* Lord Blackburn.
744. *Dawsons Ltd* v *Bonnin* [1922] 2 AC 413. Note that for consumers, reform of the law to something less draconian is likely; see *Insurance Contract Law, a Joint Scoping Paper* (London 2006), para 2.1: http:/www.lawcom.gov.uk/insurance_contract.htm.
745. See *The Good Luck* (above).
746. *Coleman's Depositaries Ltd and Life and Health Insurance Assn, Re* [1907] 2 KB 798, 812–813, CA, *per* Buckley LJ; see also *Bradley and Essex and Suffolk Accident Indemnity Sy, Re* [1912] 1 KB 415, CA. As to the rule *expressio unius*, see further above, 6.4. Perhaps, in anticipation of that rule of construction, some policies provide that the due observance of all of the conditions, in so far as they relate to anything to be done or complied with by the insured, shall be conditions precedent of the liability of the insurer.

In this situation, the safest way to draft a term as a warranty, if that is the intention, is to do so by spelling out the consequences of breach. A common policy term to this effect is one stating that, if the insured "shall refer any claim knowing the same to be false or fraudulent as regards amount or otherwise" the policy shall become "void and all claims hereunder shall be forfeited."[747] For the most part this draft is unnecessary, as any such claim would be a serious beach of the legal duty of good faith,[748] however, it also indicates that any claims must be made in good faith[749] and that the term is a warranty.

747. See *Lek* v *Mathews* [1927] 29 Ll L Rep 141, HL. With regard to "forfeiture," see Clarke, 27–2C4.
748. Derrington, 9–232. See below, 12.1.
749. Few policies address the problem of a partnership and whether the fraud of one affects the claims of the rest. *Cf.* the view taken in Canada in *Fisher* v *Guardian Ins Co of Canada* [1995] 123 DLR (4th) 336, 350, that between partners in a law firm responsibility is not joint but individual. In England clauses dealing with the problem, variously described as "anti-avoidance clauses," "breach of warranty clauses," "incontestable clauses," and "severability clauses" have been enforced: see, for example, *Toomey* v *Eagle Star Ins Co Ltd (No 2)* [1995] 2 Lloyd's Rep 88.

11.2.2 Basis clauses

Another way of creating warranties was at one time and is still (in theory) to write a "basis" clause in the proposal,[750] a clause, for example, that the proposal "shall be the basis of this contract and incorporated herein." Strictly speaking the last three words are superfluous because the previous words "can only mean that their truth is made a condition exact fulfilment of which is rendered by stipulation foundational to its enforceability."[751] However, perhaps the extra words were retained because for many years courts, regarding them as something of a trap for the insured,[752] have not been sympathetic to these basis clauses.[753] One reason for the courts' hostility to basis clauses is that people do not expect important terms of their insurance contract to be in the proposal rather than the policy itself. That objection is easily overcome by inserting the term the policy itself. In any event, a clearly drafted basis clause will be enforced,[754] albeit only if the court can find no adequate reason for not enforcing it.[755]

750. *Dawsons Ltd* v *Bonnin* [1922] 2 AC 413.
751. *Dawsons* (above) at 425, *per* Viscount Haldane.
752. *Zurich General Accident & Liability Ins Co Ltd* v *Morrison* [1942] 2 KB 53, 58, CA, *per* Lord Greene MR.

753. For example, *Provincial Ins Co Ltd* v *Morgan* [1933] AC 240 at 252, *per* Lord Wright.
754. For example, *Unipac (Scotland) Ltd* v *Aegon Ins Co (UK) Ltd* [1996] SLT 1197 (Ct Sess).
755. In any event, With regard to insurance sold to consumers, basis clauses were banned by the Consumer Insurance (Disclosure and Representations) Act, 2012, section 6; Clarke LIC 23–19.

11.2.3 Nature of warranties

If the policy wording is not sufficiently indicative of whether a term is a warranty or not, the next step is to seek the essential nature of the term in issue. A warranty has been said to be an undertaking given by the insured to the insurer which has a "*material* bearing on the risk."[756] Whether it is material turns on both degree and duration. As to the latter, if a term is concerned with circumstances that give rise to no more than a *temporary* increase in the risk, if any, the term is not likely to be a warranty and most likely to be viewed as an exclusion. If, however, the term concerns circumstances in which there is or might be a *permanent* increase in the risk, it is likely to be read as a warranty.

756. *HIH Casualty & General Ins Ltd* v *New Hampshire Ins Co* [2001] EWCA Civ 735, [2001] 2 Lloyd's Rep 161, [101], *per* Rix LJ (emphasis added); applied in *Toomey* v *Banco Vitalicio de Espana* [2004] EWCA Civ 622, [2005] Lloyd's Rep IR 423, [40] by Thomas LJ.

For example, reference in a term to an award of exemplary damages against the insured, even a term called an "exclusion," would likely lead to the term being seen as a warranty. The same is true of any term concerning fraud on the part of the insured. In circumstances suggesting fraud or other bad conduct by the insured, the insured now appears to be the kind of organization or person that the insurer may not want to insure—at all or not without reconsidering the level of premium. The risk may or may not have changed, but the insurer's perception of the risk has changed and the insurer is accorded a right to reconsider.

11.3 AGGRAVATION OF RISK

Of a person with fire insurance it was once said that he "may light as many candles as he please in his house, though each additional candle increases the danger of setting the house on fire."[757] Insurers have attempted to write conditions against "candles," that is, increases in the risk for which the insured might in any sense be responsible, such as conditions requiring reasonable care;[758] and also clauses requiring notification of changes, of which the insured is aware, that might aggravate the risk.

757. *Baxendale* v *Harvey* [1859] 4 H & N 445 at 452, *per* Pollock CB.
758. Above, 10.2.1.

11.3.1 Notification

Notification clauses have been strictly construed.[759] The clause may be specific, for example, a clause requiring notification of a change of management. The clause may also be more general: for example, a clause requiring the insured to disclose as soon as reasonably practicable all material changes in information previously supplied to the insurers as part of the proposal. The insurance law duty of disclosure,[760] which normally applies only when insurance is contracted, modified or renewed, is known to be one that most insured find

Notice of loss must be in the form, if any, required by the contract.[777] In London there has developed the practice of using electronic claims forms (ECF). Whatever the (appropriate) form, it is important that the claimant's notice has the content required.[778] However, it is usually sufficient that the contents serve the purpose of notice, without having to be couched in technical terms.

777. For example, in writing: *Brook* v *Trafalgar Ins Co* [1946] 79 Ll L Rep 365 (CA). If written form is not stipulated, it may be oral: *Re Solvency Mutual Guarantee Sy* [1862] 31 LJ Ch 625.

778. See *HLB Kidsons* v *Lloyd's Underwriters* [2007] EWHC 1951 (Comm), [2008] Lloyd's Rep IR 237, [72], *per* Gloster J (PI). An appeal against her decision was dismissed: [2008] EWCA 1206, [2009] Lloyd's Rep IR 178.

Notice of loss must be given by the claimant or by a person acting on the claimant's behalf,[779] and nobody else because, for example, the insured may prefer to retain a "no claim bonus." Nonetheless, notice is valid if it comes from a third party, if the source is reliable[780] and if it is clear from the nature of the case that a claim by the insured is likely.[781]

779. *Siderurgicia del Orinoco SA* v *London SS Owners Mutual Ons Assn Ltd, The Vainqueur José* [1979] 1 Lloyd's Rep 557, 564–565, *per* Mocatta J.

780. For example the police: *Barratt Bros (Taxis) Ltd* v *Davies* [1966] 2 Lloyd's Rep 1, CA.

781. See *Hassett* v *Legal & General Assurance Sy Ltd* [1939] 63 Ll L Rep 278, 283, *per* Atkinson J.

Notice must be delivered to the right address, and actually brought to the attention of the proper person there,[782] although there is a case for saying that it is enough to put it into the post.[783] If the contract requires that notice be sent or delivered to the insurer at a particular place, such as the head office, that requirement must be observed.[784]

782. *Holwell Securities Ltd* v *Hughes* [1974] 1 All ER 161 (CA).

783. According to the Supreme Court of Canada in *Milinkowich* v *Canadian Mercantile Ins Co* [1960] 25 DLR (2d) 481, a case of fire insurance based on the English rule in *Household Fire Ins Co* v *Grant* [1879] 4 Ex D 216.

784. *Brook* v *Trafalgar Ins Co Ltd* [1946] 79 Ll L Rep 365 (CA).

Sometimes, however, a local agent[785] has actual or apparent authority to receive notice. Moreover, even if receipt at head office is required, the local agent may be authorized to transmit (but not formally receive) notice, and it is enough to give notice to that agent for transmission to head office,[786] provided that it is given to the agent in time for it to reach head office in the normal course of business within the contract notice period.[787]

785. For example, the agent who effected the insurance: *Herbert* v *Railway Passengers Assurance Co* [1938] 1 All ER 650, 653, *per* Porter J; *Re Solvency Mutual Guarantee Sy* (1862) 31 LJ Ch 625.

786. *A/S Rendal* v *Arcos Ltd* [1937] 58 Ll L Rep 287 (HL), concerning notice under a charterparty.

787. If A holds B out as a proper channel of communication, it is A who bears the risk that the channel does not work as it should.

Notice of loss must be timely: it must be given within the time specified by the contract or, in the absence of specification, within a reasonable time.[788] Much depends on the definition of the event that triggers the duty to give notice. If notice is required in PA cover "within 14 days of the accident," notice months later, when the claimant was first aware of his injury, was held to be too late.[789] The decision to this effect was an old one, and since then, to temper the strictness of such a rule, some courts have insisted that the insurer can defend on the basis of lack of notice only if it has been prejudiced thereby.[790] Furthermore, it has been held that notice need not be given at all if notice has become pointless.[791]

788. *Hadenfayre Ltd* v *British National Ins Sy Ltd* [1984] 2 Lloyd's Rep 393, 402, *per* Lloyd J.

789. *Cassel* v *Lancashire & Yorkshire Accident Ins Co Ltd* [1885] 1 TLR 495: impossibility and ignorance are no excuse. See also *Adamson* v *Liverpool & London & Globe Ins Co* [1953] 2 Lloyd's Rep 355.

790. See *Pioneer Concrete (UK) Ltd* v *National Employers' Mutual General Ins Assn Ltd* [1985] 2 All ER 395, 400 ff, *per* Bingham J; *Alfred McAlpine* v *BAI (Run-Off) Ltd* [1998] 2 Lloyd's Rep 694, 698–699, *per* Colman J, [2000] 1 Lloyd's Rep 437, 442, *per* Waller LJ (CA); *Friends Provident Life & Pensions Ltd* v *Sirius Int Ins* [2005] EWCA Civ 601, [2005] 2 Lloyd's Rep 517 at [26], *per* Mance LJ.

791. *Barratt Bros (Taxis) Ltd* v *Davies* [1966] 2 Lloyd's Rep 1, 5 per Lord Denning (CA).

A contract requirement of "immediate notice" is not read literally,[792] but usually interpreted to require "all reasonable speed" in the circumstances.[793] A requirement of notice "as soon as possible" is not read literally either; it is likely to be understood as what is reasonably possible for a person in the claimant's position. Thus in one case,[794] even notice a year after the insured event was sufficient when the claimant was unaware until then of the existence of the policy. The same it seems is true of notice "as soon as reasonably practicable."[795] Regardless of the language used, notice must be given within a reasonable time, and there "is of course no such thing as a reasonable time in the abstract," and "the only sound principle is that the 'reasonable time' should depend on the circumstances which actually exist."[796] Even so, in practice there are certain factors that may influence the courts in reaching a decision.

(a) *Evidence.* Insurers want notice as soon as possible so that they may test the genuineness of claims before the trail becomes cold[797] and avoid the expense of following trails obscured by time.[798]

(b) *Loss limitation.* In general insurers liable to pay a claim want to minimize loss and thus the amount they may have to pay; to this end, in the case of liability insurance, they want to be sufficiently well informed to perform the role of *dominus litis* effectively,[799] and thus to better minimize loss. Moreover, when the claim is large, insurers may require time to provide a sufficient reserve fund or, if no claim is made, to know when they can disregard the possibility with a view to ensuring an appropriate level of reserves for future liabilities. To achieve this insurers want notice as soon as possible.

(c) *Knowledge.* The court will consider the knowledge of the claimant or the knowledge available to the claimant. If the claimant was totally unaware of the possibility of a claim, unaware perhaps of the facts giving rise to a claim, that may affect what is a reasonable time.[800] A case in point is the ignorance of a claimant (insured but) who is not the policyholder and who did not contract the insurance.

792. *Accident Ins Co* v *Young* [1891] SCR 280, 291, *per* Patterson J (PA).

793. *Re Coleman's Depositories and Life & Health Assurance Assn* [1907] 2 KB 798, 807, *per* Fletcher Moulton LJ (CA). Recently, see for example, *Loyaltrend Ltd* v *Creechurch Dedicated Ltd* [2010] EWHC 425 (Comm), [2010] Lloyd's Rep IR 466.

794. Notice of accidental death: *Verelst's Administratrix* v *Motor Union Ins Co* [1925] 2 KB 137, 142–143, *per* Roche J.

795. Wording under discussion in *HLB Kidsons* v *Lloyd's Underwriters* [2008] EWCA Civ 1206, [2009] Lloyd's Rep IR 178.

796. *Hick* v *Raymond* [1893] AC 22, 29, *per* Lord Herschell LC.

797. *Mason* v *Harvey* [1853] 8 Ex 819, 821, *per* Pollock CB; *Re Coleman's Depositories and Life & Health Assurance Assn* [1907] 2 KB 798, 807, *per* Fletcher Moulton LJ (CA); *Pioneer Concrete (UK) Ltd* v *National Employers' Mutual General Ins Assn Ltd* [1985] 2 All ER 395, 400, *per* Bingham J.

798. *Stoneham* v *Ocean Ry & General Accident Ins Co* [1887] 19 QBD 237, 240, *per* Mathew J.

799. *Pioneer Concrete (UK) Ltd* v *National Employers' Mutual General Ins Assn Ltd* [1985] 2 All ER 395, 400, *per* Bingham J.

800. *Verelst's Administratrix* v *Motor Union Ins Co Ltd* [1925] 2 KB 137; *Baltic Ins Assn Ltd* v *Cambrian Coaching & Goods Transport Ltd* [1926] 25 Ll L Rep 195 (motor).

indemnity except life and PA insurance: *Theobald* v *Railway Passengers Assurance Co* [1854] 10 Exch 45, 53, *per* Alderson B.

837. *Page* v *Scottish Ins Corp* [1929] 140 LT 571 (CA), with reference to what was said in *Simpson* v *Thompson* (above) by Lord Cairns LC; and in *Castellain* v *Preston* (above) by Brett LJ.

The sums must indeed be due. If the insurer pays a doubtful claim, can it be said that, not having been strictly obliged to pay under the contract of insurance, the sum paid was not due? And the insurer not subrogated to the rights of the insured to recover an amount equivalent to that payment? According to the equitable theory of subrogation, if the insured has been fully indemnified by the insurer, the possibility of unjust enrichment exists and the insurer should be entitled to subrogation.[838]

838. In this sense, Goff & Jones, *The Law of Restitution* (7th ed., London 3007) 3-017. Authority to this effect is *King* v *Victoria Ins Co Ltd* [1896] AC 250. In practice, this issue may be governed by contract terms, ensuring that the insurer has rights of subrogation as soon as it has paid. Generally, however, rights of subrogation may be limited or excluded by the contract of insurance: *Morris* v *Ford Motor Co Ltd* [1973] QB 792, 812, *per* James LJ (CA).

On subrogation liability policies are mostly silent. The reason for this is that the rights to be exercised are the rights of the insured. In the case of insurance that is triggered by the insured's liability, the insured event is unlikely to give rise to any *rights* in the insured except against the insured's own employees. Moreover, English courts are not sympathetic to the enforcement by an employer of such rights against employees.[839] This is commonly reflected in a policy condition headed "waiver of subrogation" whereby the insurer waives rights to proceed against any employee of the insured, unless the claim against the insured was "brought about or contributed to by the dishonest, fraudulent, or criminal or act or omission" of the employee.[840]

839. As a matter of industrial relations policy; see *Morris* (above).

840. Clarke, 31-5A1.

11.4.2.3.3 Coinsurance

In *Tyco* v *Rolls-Royce*[841] it was argued[842] that there was something like a rule of law that claims could not be brought in subrogation against persons co-insured under the same policy. *Obiter* Rix LJ rejected that view. He preferred the view of Lord Hope that "the true basis of the rule is to be found in the contract between the parties."[843] He could "well see that a provision for joint names insurance may influence, perhaps even strongly, the construction of the contract in which it appears … [But] if the underlying contract envisages that one co-assured may be liable to another for negligence even within the sphere of the cover provided by the policy, I am inclined to think that there is nothing in the doctrine of subrogation to prevent the insurer suing in the name of the employer to recover the insurance proceeds which the insurer has paid in the absence of any express ouster of the right of subrogation, either generally or at least in cases where the joint names insurance is really a bundle of composite insurance policies which insure each insured for his respective interest."[844]

841. *Tyco Fire & Integrated Solutions (UK) Ltd* v *Rolls-Royce Motor Cars Ltd* [2008] EWCA Civ 286, [2008] Lloyd's Rep IR 617.

842. With reference to a statement by Lord Bingham in *Cooperative Retail Services Ltd* v *Taylor Young* [2002] UKHL 17, [2002] 1 WLR 1419, [19].

843. *Tyco* v *Rolls-Royce* (above) at [76]. Keene LJ at [84] and Sir Anthony Clarke MR at [85] agreed with the judgment of Rix LJ. For the view of Lord Hope, see *CRS* v *Taylor Young* (above) at [65].

844. At [77].

11.5 BREACH OF WARRANTY

11.5.1 Breach

Although warranties are sometimes described by the policy as "conditions precedent to the insured's right to recover,"[845] the onus of proving breach of warranty is usually on the insurer.[846] Although, ultimately the issue is one of construction of the contract and in theory the onus may be changed by clear words in the contract,[847] at common law it takes only the slightest breach of warranty to terminate the contract.[848] Substantial performance is not enough at common law; however, this only matters on the assumption that the warranty has been broken, and in practice the strictness of the rule is softened by construction, sometimes leading to the conclusion that the warranty has not really been broken anyway.[849]

845. See, for example, *The Good Luck* [1992] 1 AC 233, 263, *per* Lord Goff.

846. *Farnham* v *Royal Ins Co Ltd* [1976] 2 Lloyd's Rep 437, 441, *per* Ackner J (fire); confirmed recently in *United Marine Aggregates* v *GM Welding & Engineering* [2012] EWHC 779 (TCC), [2012] All ER (D) 81. In Australia relevant common law is similar to the law of England: Derrington, 5.2 ff.

847. *Bond Air Services Ltd* v *Hill* [1955] 2 QB 417 (aviation).

848. *Pawson* v *Watson* [1778] 2 Cowp 785, 787–788, *per* Lord Mansfield (hull); *Newcastle Fire Ins Co* v *Macmorran & Co* [1815] 3 Dow 255, 262, *per* Lord Eldon (HL). This may follow even though that breach may be quite immaterial to either risk or loss: *Thomson* v *Weems* [1884] 9 App Cas 671; *Dawsons Ltd* v *Bonnin* [1922] 2 AC 413.

Moreover, if the insured has warranted the truth of a statement, it is "not the less untrue because [he] is not apprized of its untruth": *Duckett* v *Williams* [1834] 2 C & M 348, 351, *per* Lord Lyndhurst CB (life).

849. See, for example, *Dobson* v *Sotheby* [1827] M & M 90.; and *Provincial Ins Co Ltd* v *Morgan* [1933] AC 240, a case of motor insurance.

Practice, for instance, indicates a trend to construe statements as warranties of opinion rather than as warranties of fact. Thus, if the insured states that he or she "believes" something to be true, the truth of these warranties is judged by the insured's state of mind.[850]

850. *Economides* v *Commercial Union Assurance Co plc* [1998] QB 587 (CA). Furthermore, as to state of mind, if the warranty or question on which the warranty is based is drafted by the insurer, the insured's answer will be construed in the light of construction of the warranty or question *contra proferentem*, that is, in the sense in which the insured "should reasonably have understood it."

However, if there is a breach of warranty, the insured seeks in vain to raise a defence of impossibility that excuses the breach of warranty but leaves his insurance cover in force,[851] except perhaps that the insured may be excused by ignorance.

851. *Farnham* v *Royal Ins Co Ltd* [1976] 2 Lloyd's Rep 437, 441, *per* Ackner J (fire).

If he or she failed from the start to comply with a warranty, not because it was inherently impossible to perform but because they neither knew of the warranty nor had the opportunity to know of it, the insurance may be enforced without the warranty; this is because the warranty was not a term of the contract or was not intended to apply, until the terms including the warranty had been communicated.[852] Furthermore, it has been held of a continuing warranty, requiring the insured to take reasonable care or reasonable precautions, that there is no breach of that warranty, unless the insured has actual or constructive knowledge of circumstances giving rise to a need for care and precautions.[853]

852. See, for example, *The Good Luck* [1992] 1 AC 233, 263, *per* Lord Goff.

853. In *Melik & Co Ltd* v *Norwich Union Fire Ins Sy* [1980] 1 Lloyd's Rep 523 (burglary) it was held that a term that a burglar alarm should be kept in efficient order was not broken until the insured was aware that it was out of order.

potential importance of notice in time is self-evident, but how much it matters in each case may not be apparent until later; and that is an argument for regarding notice of loss conditions not as conditions precedent determined *a priori* but as innominate terms assessed *ex post* (above 11.6.1).

897. *Stoneham* v *Ocean, Railway & General Accident Ins Co* [1887] 19 QBD 237, 240, *per* Mathew J.

898. *Re Bradley and Essex & Suffolk Accident Indemnity Sy* [1912] 1 KB 415, 422, *per* Cozens-Hardy MR (CA), who referred to the *contra proferentem* rule of construction (above 6.7) and to what he considered to be the triviality of the term in question.

899. *Stoneham* (above) *loc cit*. More recent examples are *George Hunt Cranes* v *Scottish Boiler Ins Co* [2001] EWCA Civ 1964, [2002] Lloyd's Rep IR 178; and *Shinedean* v *Alldown Demolition* [2005] EWHC 2319 (TCC), [2006] 1 All ER (Comm) 224. See above 6.4.

900. For example *Stoneham* (above) *loc cit*; and *Re Bradley* (above), p. 422, *per* Cozens-Hardy MR. Or even the purpose of the entire policy. As this perspective, see further above VI(d). In the United States, see, for example, *Pantropic Power Products* v *Fireman's Fund*, 141 F Supp 2d 1366 (SD Fla, 2001).

The purpose of proof of loss is such that its importance is self-evident, and this has influenced decisions. It makes little sense for insurers to agree to pay before receipt of the stipulated proofs from the claimant: that "is a necessary preliminary to his right to recover on the agreement."[901] However, it does not follow from that that such a condition is a condition precedent in the sense that lack of a particular kind of proof will always defeat a claim. More than a century after proof was said to be a necessary preliminary, the House of Lord indicated that, such a consequence was possible but, to be so, the condition must be "precise, so that the insured can know exactly what he is obliged to do."[902] Indeed, courts today are likely to start from the rule *contra proferentem* and conclude that it is for insurers to make it absolutely clear by express terminology, such as "condition precedent," that they want a right of this kind.[903]

901. Lord Westbury LC in *Roberts* v *Brett* [1865] 11 HLC 337, 351.

902. *Scott Lithgow Ltd* v *Secretary of State for Defence* [1989] 45 BLR 1, 10, *per* Lord Keith.

903. For example, *Friends Provident* v *Sirius* [2005] EWCA Civ 601, [2005] 2 Lloyd's Rep 517 at [27] and [31], *per* Mance LJ (CA).

11.6.3 Suspensive conditions

The possibility that a procedural policy condition may be suspensive is well recognized.[904] A clear example (from Australia) is that of the contract requiring notice of loss within 15 days, which continued that "unless and until" the information was given no claim should be payable.[905] In the absence of clear words like that, this construction is less likely in a case of liability insurance where the condition concerns notice of loss, where prompt notice of a third party claim is more likely to be important, than other matters such as proof of loss. As Waller LJ once said, "a situation in which the insured has details of a claim to the knowledge of the insurer and the insured refuses even on request to supply the details" is likely to be such that "the term will at the very least be construed as a suspensive condition disallowing the claim until details are provided."[906] If, indeed, a procedural condition is a suspensive condition, in principle the claimant may recover when the condition has been performed, even though compliance was late.

904. For example, by Longmore LJ in *K/S Merc-Scandia XXXXII* v *Certain Lloyd's Underwriters* [2001] Lloyd's Rep IR 802 (CA), [13].

905. *Western Australian Bank* v *Royal Ins Co* [1908] HCA 11, (1908) 5 CLR 533.

906. *Friends Provident* v *Sirius* [2005] EWCA Civ 601, [2005] 2 Lloyd's Rep 517 at [41].

11.6.4 Intermediate terms

In a leading case, *BAI*,[907] a notification clause was held not to be a condition precedent; being "promissory in nature," Colman J considered that the exercise of construction to decide whether non-compliance "operates as a substantive defence to the claim" like a condition precedent "or merely gives rise to a cross-claim for damages if a claim should be brought, involves some but not all of the considerations material to deciding whether" in the general law of contract:

> a term of a contract is a condition any breach of which will amount to a repudiatory breach or an innominate term breach of which will only give rise to a right to treat the contract as terminated if the consequences of the breach are such as substantially to deprive the innocent party of the whole benefit of the contract.[908]

907. Above.

908. *Alfred McAlpine* v *BAI* [1998] 2 Lloyd's Rep 694, 699. See also in this sense *The Beursgracht, Glencore Int* v *Ryan* [2001] EWCA Civ 2051, [2002] Lloyd's Rep IR 335 (hull), in which the insured had broken an implied innominate term requiring notice. The question for the court, said Tuckey LJ, "is whether the breach was so serious in respect of the Beursgracht risk that they are entitled to avoid liability".

In Australia it was applied in *Koompahtoo Local Aboriginal Land Council* v *Sanpine Pty Ltd* [2007] HCA 61, (2007) 233 CLR 115; however, doubted as promoting uncertainty by Gamble (2009) 34 Monash ULR 457. On *Koompahtoo* see Carter (2008) 24 JCL 226.

On appeal, [2000] 1 Lloyd's Rep 437, [2000] Lloyd's Rep IR 352, the decision in *Alfred McAlpine* v *BAI* was affirmed on other grounds but the possibility, that a procedural condition might be an innominate term, was endorsed *obiter*.

The point was subsequently revisited by Mance LJ in *Friends Provident* v *Sirius*,[909] in which he accepted that a condition might be an innominate (or intermediate) term such that the effect of breach would depend on the consequences of breach in the particular case.[910]

909. [2005] EWCA Civ 601, [2005] 2 Lloyd's Rep 517, [41]. He continued, however, to suggest that it is not impossible that it could amount to a repudiation "in extreme circumstances of consistent breach over a number of claims."

910. At [28].

11.6.5 Partial discharge?

In *Sirius*[911] the majority (Mance LJ and Sir William Aldous), while apparently accepting that a notice clause might be an intermediate term, rejected the associated idea and argument that the consequence in law might not be confined to termination of the contract (and thus defeat of the claim) but defeat of the claim without termination of the contract.[912] The argument to that effect was based largely on what was said by Waller LJ in *BAI*, that once a condition is:

> construed as something less than a condition precedent, it will still be important to ascertain precisely what its contractual effect is intended to be and what the effect of a breach of that term will be [and that] one should consider the possibility that a breach … might in some circumstances be so serious as to give a right to reject the claim albeit it was not repudiatory in the sense of enabling BAI to accept a repudiation of the whole contract. The very fact that condition 1(a) is aimed at imposing obligations in relation to individual claims which BAI might be obliged to pay, ought logically to allow for the possibility of a "repudiatory" breach leading simply to a rejection of a claim.[913]

911. *Friends Provident* v *Sirius* [2005] EWCA Civ 601, [2005] 2 Lloyd's Rep 517.

912. At [30] Mance LJ found no authority to support the suggestion "that a party to a contract may be relieved from a particular obligation under a composite contract such as the present, by reason of a serious breach with serious consequences relating to an ancillary obligation, absent some express or implied condition precedent or other provision to that effect. Either some conditional link can, as a matter of construction, be found between performance

921. See above 9.4.2.
922. Above 7.

Whenever the insured supplies information required by the insurer in order that the insurer may make a decision about the cover, the insured must observe a legal duty of good faith, a duty which continues throughout the insurance period at a level appropriate to the information and the decision in question.[923] As regards a particular claim the duty of good faith ends when the claim has been met by the insurer or has been rejected in terms that make it clear that there is no more room for negotiation and that the insured must accept the rejection or commence proceedings.[924]

923. *Boulton* v *Houlder Bros & Co* [1904] 1 KB 784, 791–792, *per* Mathew LJ (CA); *Orakpo* v *Barclays Insurance Services* [1995] LRLR 443, 451, CA, *per* Hoffmann LJ; *New Hampshire Ins Co* v *MGN Ltd* [1997] LRLR 24, 61, CA, *per* Staughton LJ; *K/S Merc-Scandia XXXXII* v *Certain Lloyd's Underwriters* [2001] Lloyd's Rep IR 802, [11] per Longmore LJ (CA); *Manifest Shipping Co Ltd* v *Uni-Polaris Ins Co Ltd (The Star Sea)* [2001] UKHL 1,[2003] 1 AC 469, [48], *per* Lord Hobhouse, quoting McNair J: *Overseas Commodities Ltd* v *Style* [1958] 1 Lloyd's Rep. 546, 549. See also above 7.1.

Also in this sense: *Distillers-Bio-Chemicals (Australia) Pty Ltd* v *Ajax Ins Co Ltd* [1975] HCA 3, (1973) 130 CLR 1, 31, *per* Stephen J; *Deaves* v *CML Fire & General Ins Co Ltd* [1979] HCA 12, (1979) 23 ALR 539, 580, *per* Murphy J.

Note that in *Socimer Int Bk Ltd* v *Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] 1 Lloyd's Rep 558, [116] Rix LJ referred to a general "requirement of good faith and rationality," one applicable to all kinds of contract.

924. *The Star Sea*, above.

Hence the duty arises when the insured gives the insurer notice of loss, and in this connection, it has been long accepted that policyholders making claims must make "full disclosure of the circumstances of the case".[925] Moreover, in view of the generally mutual character of the duty,[926] it is at least arguable that the insurer owes a corresponding duty to the insured claimant, for example, a duty to disclose adjusters' reports.[927]

925. *Shepherd* v *Chewter* (1808) 1 Camp 274, 275, *per* Lord Ellenborough.
926. Above 7.1.
927. Furthermore, it is clear that the liability insurer who conducts the insured's defense owes a duty of disclosure described as one of good faith: above 9.2.1.

The strictness of the duty of disclosure (and thus of the duty of good faith) varies according to the phase in the relationship. It is "the relationship between the parties which is one of utmost good faith, and that there may be incidents of that relationship which require different duties, with different duties, in different contexts."[928] Disclosure at the time of first contracting, for example, is required in respect of all material information. At other times, the level of duty "becomes more elusive."[929] When a claim is made the rule is clearly different from that when insurance is first contracted. Innocent misrepresentation or nondisclosure at the time of claim does not defeat a claim; for that there must be fraud.[930]

928. David Foxton QC in Rhidian Thomas (Ed), *Marine Insurance: The Law in Transition* (London, 2006), ch 4 at 4.96.
929. *The Star Sea* (above) at [54]. per Lord Hobhouse.
930. *The Star Sea* [1997] 1 Lloyd's Rep 360 (CA). Mere negligence in supplying the information on which a claim is based does not constitute a breach of the duty of good faith: *Alfred McAlpine* v *BAI (Run Off) Ltd* [2000] 1 Lloyd's Rep 437; [2000] Lloyd's Rep IR 352 (CA).

12.3 DEALINGS WITH THIRD PARTIES

In practice, the insurer may have to deal not only with the insured but also with the third party with a liability claim against the insured. On the one hand, the insured will need to know

from the insurer whether the third party's claim is covered. At the same time, the insured *may* still have a commercial or professional relationship to maintain with that person. On the other hand, the concern of the insurer will be to handle the claim in a manner that reassures the insured without, however, prejudicing the possibility of taking points later about whether the claim is covered by the policy. At the same time, the insurer has an obvious interest in seeing that the insured's defense to the third party's claim is handled in such a way as to minimize the insured's liability to the third party in case the insurance does indeed have to pay.

Sooner or later, the insurer will have to decide whether to exercise the right, found in most liability policies, to take over the insured's defense of the third-party claim.[931] The insurer may prefer a strategy of "masterly inactivity," whereby the insurer does not take over the defense but does not deny liability to the insured either, but may mean that the insurer is liable to the latter for the continuing costs of the defense.[932] In any event, the insurer will need information about the circumstances surrounding the claim and should not overlook that it may eventually face direct action by the third party.[933]

931. If the insured lacks funds to defend the claim it may go by default. Moreover, if the insured's defense on the merits is hopeless, this may be the cheapest course. In deciding what action to take, if any, the insurer must act in good faith: *Can Ins Co Ltd* v *Tai Ping Ins Co Ltd* (Nos 2 and 3) [2001] EWCA Civ 1047, [2001] Lloyd's Rep IR 667, 679, [68] *et seq*.
932. *Capel-Cure Myers Capital Management Ltd* v *McCarthy* [1995] LRLR 498.
933. The insurer may be joined to court proceedings brought by the third party against the insured under the Third Parties (Rights against Insurers) Act 1930.

See also the Third Parties (Rights against Insurers) Act 2010, which seeks to facilitate direct actions, and is due to come into force in 2013. Where both the policyholder's insolvency and liability to a third party occur before that date, the 1930 Act remains applicable. Where they occur later a third party may "bring proceedings to enforce the rights" of the insured against insurer "without having established" the liability of the insured; however, the third party "may not *enforce* those rights without having established that liability": s 1(3). Certain policy defenses may be raised against the third party; see s. 10 ff. Generally see Clarke 5-8G.

12.4 ASSESSING CLAIMS

In these circumstances, the insurer is advised to demand to see and approve communications between the insured and the third party and seek an undertaking that what is stated by the insured is correct. This gives the insurer some idea about what is going on and gives the insured some reassurance that the matter is being handled properly.[934] Alternatively, the insurer might exercise the right to take over the defense by appointing a solicitor to conduct the defense. Part of the mandate of the solicitor, who will owe professional duties to both insurer and insured,[935] will be to investigate the circumstances surrounding the third party's claim. The insured is obliged to cooperate—usually by a term of the policy as well as by the general duty of continuing good faith.[936] Only when the insurer has the facts will it become apparent whether there are likely to be issues with the insured about the scope or validity of the cover. With this possibility in mind, the insurer who takes over the defense is advised to make an express "reservation of rights" under the policy.[937]

934. Not least to ensure that the insured does not admit liability: above 11.4.2.2.
935. The same is true of a broker, the agent of the insured, if the broker assumes administrative duties on behalf of the insurer in the handling of the claim.
936. Above 11.4.2.
937. As regards reservation of rights, see above 9.2.

(a) The proximate cause is the event, whether peril or exception, which, in all the circumstances prevailing at the time of the event, led inevitably[1057] to the kind of loss in question.[1058]
(b) If under Rule (a) loss was the inevitable result of a peril, the full extent of that kind of loss will be recoverable, if the extent, although not inevitable at the time of the peril, was not unlikely to result[1059] or, in other words, was a natural consequence in the circumstances.[1060]
(c) Generally, the application of Rule (a) and Rule (b) is not affected by the negligence of the insured, either in the face of the peril[1061] or in the events leading up to the peril,[1062] unless the negligence is itself the subject of a peril or exception, or the contrary follows from construction of the policy.[1063]
(d) The application of Rule (a) and, possibly, Rule (b) is not affected by the reasonable efforts of the insured to avoid the peril or to minimise its effects,[1064] unless what the insured does in that respect is itself the subject of a peril or an exception.
(e) A peril that is proximate under Rule (a) is not the proximate cause, if it is preceded by an excepted cause which is also proximate under Rule (a). If an excepted cause leads inevitably and in the same chain of causation to both peril and loss, the proximate cause is the excepted cause.[1065]
(f) If the application of Rule (a) gives two concurrent and proximate causes, one a peril and the other an exception, and if these causes are interdependent, in that neither would have caused loss without the other, the exception prevails.[1066] The premise of concurrent causation gives rise to difficulties such that courts are inclined to avoid the premise.[1067]
(g) If an insured peril leads inevitably to an exception and then to loss, the proximate cause is the peril.[1068]

1057. Note that inevitability is assessed in the light of current human ability. See further Clarke 25-4.

1058. Similarly, in the United States, in marine cases the proximate cause is "the one that necessarily sets the other causes in operation"— *Aetna Ins Co* v *Boon*, 95 US 117 (1877), 24 L Ed 395, 398, *per* Strong J; see also in this sense *Lanasa Fruit SS & Importing Co* v *Universal Ins Co*, 302 US 556, 562 ff (1938), citing with approval the leading English decisions on the point: *Reischer* v *Borwick* [1894] 2 QB 548 (CA) and *Leyland Shipping Co Ltd* v *Norwich Union Fire Ins Sy Ltd* [1918] AC 350.

1059. *Reischer* v *Borwick* (above).

1060. *Leyland Shipping* (above), p. 362 *per* Lord Haldane.

1061. *Yorkshire Dale SS Co Ltd* v *Minister of War Transport* [1942] AC 691; also *Canada Rice Mills Ltd* v *Union Marine and General Ins Co Ltd* [1941] AC 55, 69 *per* Lord Wright.

1062. *Shaw* v *Robberds* (1837) 6 Ad & E 75, 84 per Lord Denman.

1063. Above 6.

1064. *Canada Rice Mills* (above). With regard to causation, such action is generally seen as part of the peril insured and Rule 4 is believed to encourage the insured to take such action. Note, however, that the cost of prevention may not be insured loss: below 12.10.

1065. See, e.g., *Samuel & Co Ltd* v *Dumas* [1924] AC 431.

1066. *Samuel* v *Dumas* (above) p. 467, *per* Lord Sumner; *Wayne Tank & Pump Co Ltd* v *Employers' Liability Assurance Corp Ltd* [1974] QB 57 (CA), [1973] 2 Lloyd's Rep 237; see, in particular, Lord Denning p. 240. However, the *Wayne Tank* decision was doubted by the Supreme Court of Canada in *Derksen* v *539938 Ontario* (2001) 205 DLR (4th) 1, [46].

1067. See *The Aliza Glacial* [2002] EWCA Civ 577, [2002] 2 Lloyd's Rep. 421, [47], *per* Potter LJ and *Global* v *Svarikat* (above), [79] to [80] per Lord Mance. The difficulties are illustrated by *Bell* v *Lothiansure*, 1993 SLT 421, Ct Sess.

1068. *Mardorf* v *Accident Ins Co* [1903] 1 KB 584; and *Re Etherington and Lancashire & Yorkshire Accident Ins Co* [1909] 1 KB 591 (CA).

Finally, these "rules" of thumb can be adapted by the draftsman[1069] or in some cases avoided by the court. For example, the rules differ according to whether competing causes are consecutive or concurrent. So, the result of a case may turn on how the court sees the sequence.

1069. E.g., "*Occasioned by …*," words that stretch the connection between cause and loss, thus increasing the power of the cause. See *Spinney's (1948) Ltd* v *Royal Ins Co Ltd* [1980] 1 Lloyd's Rep 406, 442 per Mustill J.

"*Directly or indirectly caused by …*". The direct cause has been held to mean the proximate cause: *Oei* v *Foster* [1982] 2 Lloyd's Rep 170; by implication, "indirectly caused" refers to something less proximate.

"*Arising out of …*," a phrase, which is clearly wider than "directly or indirectly caused by": see, for example, *Insurance Commission of Western Australia* v *Container Handlers Pty* [2004] HCA 24. On this phrase in English courts, see *Dunthorne* v *Bentley* [1996] RTR 428; [1999] Lloyd's Rep IR 560 (CA).

12.9 MITIGATION OF LOSS

As a condition of cover policyholders are sometimes required to take steps to prevent loss, such as fitting locks on windows as a condition of household insurance. If indeed the contract states the condition in clear usually specific terms such as this, the condition will be applied in spite of a strong presumption that insurance is intended to cover policyholder negligence.[1070] To cover human fallibility is one of the purposes of insurance. At some point in time, however, the loss insured is no longer something to provide against or prevent but has actually occurred, and the policyholder is said to have a duty to mitigate—not a high level of duty but nonetheless a duty to respond in a way that implies some degree of care.[1071] Nero may fiddle while Rome burns but once the fire has reached his palace he must down his fiddle and put his hand to the pumps.

1070. *Shaw* v *Robberds* (1837) 6 Ad & E 75, 84, *per* Lord Denman; *State of Netherlands* v *Youell* [1998] 1 Lloyd's Rep 236, 245, *per* Lord Phillips (CA).

1071. E.g. Ivamy, *Fire Insurance and Motor Insurance* (4th ed, 1984), p. 143: The policyholder "must do his best to avert or minimise the loss" and "take such measures as are reasonable to extinguish the fire or to prevent it from spreading."

Insurance law writers, past and present, usually with different kinds of insurance other than liability insurance in mind,[1072] have asserted that, if the insured has no express duty to mitigate, a duty of mitigation will nonetheless be implied. This view found little clear support from judges, until the duty was affirmed—not, however, as a distinct feature of insurance law but as "the corollary of the principle that losses which are reasonably avoidable are not recoverable in the law of contract, and … thus expressed as 'the duty to mitigate'."[1073] Breach of that "duty" breaks the chain of causation between the liability of the other party (contract breaker or insurer) and the loss suffered by the party who has failed to mitigate.[1074]

1072. E.g., Ivamy (above).

1073. *Yorkshire Water Services Ltd* v *Sun Alliance & London Ins plc* [1997] 2 Lloyd's Rep 21 32 (CA) per Otton LJ (at 32).

1074. *Sotiros Shipping Inc* v *Sameiet Soholt, The Soholt* [1983] 1 Lloyd's Rep 605, 608, *per* Sir John Donaldson MR. Also in this sense Colman J in *National Oilwell (UK) Ltd* v *Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582, 618.