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1

Introduction: Insurance in the Law of Obligations

1.1 Our Aim

The aim of this book is to examine the part played by insurance in the law of obligations. The present chapter introduces and summarizes our argument and outlines the nature of the exploration to follow. For this introductory purpose, referencing in the chapter is kept deliberately light; readers will find discussion of relevant sources in the course of the argument as it unfolds.

We argue that insurance operates not at the periphery, but at the core of the law of obligations, in both practical and conceptual terms. Insurance, moreover, performs a number of different roles, and its influence is not to be reduced to the single contribution often attributed to it, namely, 'loss-spreading'. Insurance is not only a feature of public and social responses to risk, but also a core institution of the market and a key feature of market relationships. Indeed, public responses to risk often utilize the potential of insurance markets, which are themselves based upon contractual relationships. We therefore aim to familiarize readers with some little-understood, but centrally important, aspects of the law of obligations in action, and to provide the resources needed to appreciate the terrain afresh. At the same time, we reflect on the implications of our study for existing frameworks of analysis, and ask how incorporation of insurance at the core may affect those frameworks.

Surprisingly, given the range and significance of the issues to be unravelled here, the picture from which we start is one of relative neglect, and even, in some contexts, outright denial, of the conceptual significance of insurance for private law. We suggest that the way in which study of obligations is currently framed has, at least incidentally, had the effect of banishing insurance to the periphery. To some degree, this reflects a distinction between practice and theory which deserves close scrutiny.¹ But more particularly, we call attention below to the 'two-party' frame of analysis favoured by some important conceptual accounts, and which doubtless owes some of its appeal to the fact that it reflects a perspective which is, to one extent or another, more generally shared. Related to this is a near-universal emphasis among accounts of private law on liability principles, to the exclusion not only of recoverability or enforcement, but also of further questions of indemnity and contribution where insurance typically operates.² The need to bring these questions into equal focus is explored in 1.3.

¹ This point is made in relation to insurance in the law of contract by J Lowry and P Rawlings, 'Insurers, Claims and the Boundaries of Good Faith' (2005) 68 *Modern Law Review* 82.

² Arguably an exception is the law of restitution or unjust enrichment, much of which is concerned with recovering funds. The relationship between this branch of obligations law, and insurance, is difficult and particularly under-developed despite some close points of contact: see the discussion in 1.2 and 1.4.

Sometimes, however, the ousting of insurance is not merely incidental. Rather, a narrow frame of analysis has on occasion been adopted expressly in order to exclude insurance, among all factors, from discussion.³ In particular, the exclusion of insurance from accounts of the law of tort has become received wisdom. We suggest that this singular treatment reflects a perception that insurance is a factor extrinsic to the law of obligations, incompatible with responsibility, and yet at the same time so potent that it threatens to replace tort principles with a loss-spreading logic which will reduce the law of tort to an empty shell. That in itself probably reflects the lasting effect of the historic role of insurance, for example in the development of strict liability regimes for workmen's compensation;⁴ and this in turn helps to explain adherence to a particular account of what insurance is.⁵ Our own perspective is different in a number of ways. We consider insurance to be part of a much broader set of phenomena relating to risk (in other words, it is not uniquely potent); we regard it as an inherent feature of private law and private arrangements and even as raising paradigmatic private law issues (it is not an extrinsic and unmanageable 'factor'); we do not associate it uniquely with a loss-spreading logic, and in any case do not regard its loss-spreading functions as free from issues associated with the law of obligations; and we consider it to be both unnecessary and undesirable to exclude it from the conceptual frame. Our exploration therefore also raises the questions of why existing accounts have neglected such a significant phenomenon; whether resistance to the conceptual relevance of insurance in private law can be coherently maintained; and what the sometimes deliberate blindness to insurance suggests both about working models of private lawyers, and about the way in which the current frame of analysis might be expanded.

The next section of this chapter introduces in outline the nature of insurance and the important ideas of risk allocation, risk-pooling, and loss-spreading which are used throughout. The following section, 1.3, introduces some of the conceptual hurdles in the path of our analysis, and indicates how we will deal with these hurdles. In order to position our account in relation to existing approaches, we then briefly outline our approach to aspects of the law of obligations, in 1.4. Section 1.5 outlines the structure of the book, and its contents as a whole.

Chapter 2 more directly addresses the nature of insurance itself, the boundaries of this complex phenomenon, and the ways in which insurance has been studied and conceptualized, drawing on a range of disciplines but with a view to highlighting points of significance for obligations law. In that chapter, addressing the nature and boundaries of the phenomenon of insurance, we question more reductionist approaches which associate or even define insurance in terms of largely extra-legal qualities such as actuarial expertise and governance of risks. We acknowledge a further, and still developing, set of associations related to insurance, particularly compatible with its contractual roots, and pertinent even in many of those areas where insurance does indeed operate to advance social policy and public purpose.

³ We discuss and illustrate this in Chapters 8 and 9.

⁴ Explored in Chapter 9.

⁵ Elaborated in Chapter 2.

1.2 Insurance and Risk

1.2.1 Insurance

We will spend some time over the next two chapters identifying core elements of ‘insurance’, and of insurance relationships. Here, we merely identify some important features of the discussion to come. Insurance exists in both market and social forms, and in the latter case the rise of insurance is associated closely with the rise of the welfare state. Although there are plainly differences between these two forms, both are nonetheless legitimately seen as aspects of ‘insurance’. It is overly restrictive to define insurance solely in terms of the kind of compensation payable and manner of risk-pooling employed—particularly as commercial insurance itself pools risks in a variety of ways, explored in Chapter 6. We suggest in Chapter 2 that approaches to insurance can be grouped around two ‘poles’ of analysis, which draw out different key features as typical, or even definitive, of the phenomenon of insurance. One, the ‘actuarial’ approach, has dominated sociological and indeed many legal understandings of insurance. This model highlights the collectivizing nature of insurance and its role in abstracting from individual instances to classes, on the basis of probabilities. The other has been prevalent in economic studies of insurance but is also compatible with regulatory definitions of insurance business. This defines insurance largely in terms of relationships in which risk is transferred from one party to another. We argue that this second approach, emphasizing the insurance relationship, deserves wider attention. Where market forms of insurance are concerned, even where the state too is engaged in some way, the well-known distributive effects of insurance are themselves achieved through a series of risk transfers. The risk-shifting activity of private parties constitutes the insurance market and neither its contribution to the development of the law of obligations, nor the potential contribution of obligations scholarship in advancing its understanding in relation to insurance, has been fully recognized.⁶

1.2.2 Risk allocation, risk transfer, and loss-spreading

Risk allocation, risk transfer, and loss-spreading are ideas used throughout this book, and we should offer some guidance here as to their meaning. Risk is *allocated* to a party when that party has the responsibility to deal with it, typically because they have an insuring obligation, a duty to indemnify the other against losses or claims, or the burden of a liability. Thus risk may be allocated by contract, by statute (directly by an obligation to insure, or indirectly by an obligation to make financial provision against specific contingencies such as pollution clean-up costs), or by the courts. Parties may themselves *transfer* risks by paying a premium or by otherwise contracting to shift it (or part of it), or by arguing that at least part of the loss or liability is attributable to other tortfeasors or indemnifiers. Losses are *spread* in a range of ways. They may be

⁶ Subrogation is discussed in Chapter 5; contribution (with a focus on insurers) in Chapter 6; contractual duties in Chapter 7; tort duties in Chapter 8; illegality principles in Chapter 11; and civil litigation as a whole, in Chapter 13.

pooled or further transferred, or covered by new premiums or reinsurance; but firms and limited liability are themselves legitimately seen as means of spreading losses, as is social insurance. This final stage is arguably no more the hallmark of insurance than the second, particularly given the variety of mechanisms available to the ‘insurer’ to spread loss, for example over time; and given the significance of diversification of risk, and reinsurance.⁷

It is worth noting at this point that resistance to the significance of insurance for the law of obligations takes a number of guises, but one of its chief sources is its apparent reduction of personal responsibility to questions of channelling risk. Thus, our discussion of tort and (to a lesser extent) contract duties in terms of allocation of risks is likely to be met with particular resistance. In Chapters 7 and 8, we will therefore spend some time demonstrating the compatibility of private law duties with risk allocation rationales,⁸ not least because this will help to highlight the significance of cases where the law does not permit the shifting or spreading of risks.

1.3 Challenges

We have already introduced some likely sources of resistance to our enterprise. In Chapter 2, we expand on the idea that a narrow representation of the nature of insurance has contributed to misunderstanding of its role. In this section, we say a little more about some other existing obstacles to the sort of analysis engaged in here, and how the discussion in later chapters will seek to change the frame of analysis.

1.3.1 Liability versus recoverability

The neglect of questions of enforcement or recoverability is perhaps the biggest factor in concealing the prevalence of insurance, and underlines the existence of a division between the conceptualization of private law, and its operation in practice, referred to above. Questions of recoverability are inherent to the behaviour of litigants, and to the shaping of litigation. Most commercial contracts contain a choice of law and arbitration or jurisdiction clauses, recognizing in advance that disputes are all but inevitable and that enforcement of obligations is essential. Such mechanisms are, however, treated as largely irrelevant by legal theory and indeed by much legal education. The concern of participants in the legal system with outcomes of litigation (not merely the generation of principles) has hidden implications, for the very shape of contracting behaviour, for tort law and its remedies, and for the way in which disputes are argued and—we suggest—decided. It is arguable that some of the most significant tort cases of recent decades have involved attempts to evade contractual or social allocations of risk in which the established insurance position was highly relevant. In response, tort reasoning has been adapted to reflect the importance of risk structures. The same issues may now be said to arise in relation to the law of unjust enrichment. Its broad conceptual framework leaves no obvious space for party risk arrangements to operate;

⁷ These ideas are discussed in Chapters 2 and 6.

⁸ Chapters 7 (Contract) and 8 (Tort).

but scholars, and the courts, have recognized the need to respond to risk issues both in cases where a contract has been discharged, and in cases where no contract has been entered into.⁹ In later chapters we provide evidence of the practical inclinations of the courts in relation to risk arrangements; and of the degree to which courts are aware of the broad, general shape of insurance arrangements. But we would add that we are not seeking to replace principled reasoning with something more uniquely focused on recovery (whether this is thought of as compensation thinking, or reform thinking). Recognizing the presence of these factors changes the location of conceptual questions about responsibility, for example. It does not expunge them.¹⁰

1.3.2 Legal principle versus law in action

One particularly glaring example of the departure of law in theory from law in action is that the presence of insurers in the process of a legal claim—even the identity of one or more of the parties as an insurer rather than the nominal party—is treated as irrelevant in theoretical terms.¹¹ It is a curious feature of much legal theory that it requires certain core elements of reality to be suppressed.¹² Lawyers have a particular affinity, through their training, with the selection of ‘relevant’ and ‘irrelevant’ factors and are adept at this. We argue, however, that the presence of insurers in litigation is not a conceptually irrelevant factor. The reasons are fully developed and illustrated in Chapters 5, 7, 8, and 11, and are sketched in 1.4 and 1.5.

More broadly, where the ‘gap’ between law in action and law in the books is concerned, insurance is highly relevant. For example, insurance provides the funding for the bringing and defending of much litigation, as well as the source for recovery in many instances and in particular in virtually all personal injury cases.¹³ Not surprisingly, it has featured strongly in socio-legal accounts.¹⁴ Insurance, in this context, has

⁹ Recognizing the parallel with the development of tort and particularly emphasizing the significance of risk allocation, see J Beatson, ‘Restitution and Contract: Non-Cumul?’ (2000) 1 *Theoretical Inquiries in Law* 83, 112 (‘the position should be the same as that gradually emerging... in tort’). By contrast H Dagan, ‘Restitutory Damages for Breach of Contract: An Exercise in Private Law Theory’ (2000) 1 *Theoretical Inquiries in Law* 115 compares a number of rationales other than risk allocation. P Davies, ‘Risk in Unjust Enrichment’ (2012) 20 *RLR* 57, argues that treatment of risk in unjust enrichment remains undeveloped, with a focus on ‘risk-takers’ (undertaking work without the benefit of a contractual risk structure). See also G Virgo, ‘Demolishing the Pyramid—the Presence of Basis and Risk-Taking in the Law of Unjust Enrichment’, in A Robertson and T Hang Wu, *The Goals of Private Law* (Oxford: Hart Publishing, 2009); A Goymour, ‘Cobbling Together Claims’ (2009) 68 *CLJ* 37 (why did risk issues affect an action in proprietary estoppel but not unjust enrichment on the same facts?).

¹⁰ Chapter 11 (Illegality).

¹¹ In Chapter 5 we show that this was not the original rationale of the anonymity of the insurer in a subrogated claim, but that this anonymity is reinforced by existing theoretical accounts.

¹² See Kirby J, *Imbree v McNeilly* [2008] HCA 40, para 112, declaring that it was time to dispel a ‘fiction’ brought on by omitting consideration of insurance.

¹³ Chapters 13 and 9.

¹⁴ The key influence is HL Ross, *Settled Out of Court: the Social Process of Insurance Claims Adjustment* (New Brunswick NJ: Aldine Transaction Press, 1970, 2nd edn, 1980). Socio-legal accounts of insurance *per se* are less widely known, perhaps principally among insurance lawyers, eg S Kimball, *Insurance and Public Policy: A Study in the Legal Implementation of Social and Economic Public Policy* (Madison WI: University of Wisconsin Press, 1960). T Baker, ‘Insurance in Socio-Legal Research’ (2010) *U of Penn, Institute for Law and Econ Research, Paper No 10-07* discusses the potency of insurance in socio-legal studies.

been particularly associated with ‘bureaucracy’ (seen as the antithesis of judicial decision-making), and with the mass handling of claims.

In our view, the role of insurers in the processing of claims is significant and ought to be taken into account when addressing both the role of insurance, and the nature of liability. The association of these studies with reform agendas has meant that their significance has not been warmly embraced by the majority of doctrinal scholars. But equally, such studies may be thought about in terms of different lessons in changed times, including the commonalities between private and public handling of claims,¹⁵ and the potential for market forms of ‘governance’.¹⁶ Such issues have only grown in importance in recent years, and we suggest that to appreciate the potential of private law, and particularly the law of contract, to contribute to social purposes will require attention to the operation of the law in context.

1.3.3 Policy, deep pockets, and the ‘fortuity’ argument

One key factor behind the exclusion of insurance from theoretical accounts of private law is a commonly encountered assumption that ‘insurance’ is to be associated with policy factors and particularly with ‘deep-pockets’ thinking. We are eager to move beyond this particular assumption and the debates that follow from it. Associated with the idea that insurance is essentially a ‘policy’ factor inclined to be used in order to attach liability to deep pockets is the suggestion that whether a tort defendant is insured is a purely private matter between the insurer and the assured. That bilateral insurance relationship is insulated from other bilateral relationships which give rise to the claim for a remedy. Two false obstacles, we suggest, are thus introduced. First is the idea that taking note of insurance necessarily means urging that liability follows insurance in order to secure compensation from deep pockets in an individual case. This is not the case. Insurance arrangements are so ubiquitous, and their general pattern often so well understood, that courts may very well perceive the claim as a means of evading the limitations of those arrangements. Taking note of insurance is commonly associated with the refusal of liability and rejection of duty, as we explain in Chapter 8, and not solely in instances where the claimant is thought to be insured (or, indeed, an insurer). The second false obstacle is the idea that the existence of insurance cover is purely fortuitous from the point of view of other parties.¹⁷ We argue that consideration of party arrangements and relationships will, rightly in many cases, include consideration of insurance arrangements, whether those arrangements are privately negotiated,

¹⁵ A point elaborated in a particular form by I MacNeil, ‘Bureaucracy and Contracts of Adhesion’ (1984) 22 *Osgoode Hall LJ* 5.

¹⁶ For discussion based on case studies of public authority decisions in relation to roads, see S Halliday, ‘The Regulation of Compliance with Public Law’ (2013) *Public Law* 312–24.

¹⁷ In *Davie v New Merton Board Mills* [1959] AC 604, at 627, and despite the long history of liability between employer and employee discussed in Chapter 9, Viscount Simonds described the existence of liability insurance on the part of an employer as fortuitous. This statement, as well as his comments in the unfortunate case of *Lister v Romford Ice and Cold Storage* [1956] AC 555, are often relied on as stating an ‘orthodox’ view that insurance is irrelevant to tort doctrine. In Chapter 5, we explain precisely why Viscount Simonds’ approach in *Romford Ice* was misguided and should not, in any case, be relied on as evidence of the irrelevance of insurance. The case is powerful evidence to the contrary.

common practice, or legislatively mandated. In all of these circumstances, insurance arrangements are far from fortuitous so far as other parties are concerned. Just as insurance of D is not entirely fortuitous for C, so also the existence of C is hardly a surprise to D's insurer. The influence of bilateral arrangements on other parties, and the existence of a wider set of relationships, is brought into play.

1.3.4 Two-party models

This brings us to a particularly important element of our enquiry. The 'bipolar' or 'bipartite' model, which has been offered as definitive of private law,¹⁸ is a particular barrier to understanding the nature of the role played by insurance. We consider insurance to be intrinsically and intimately related to many private arrangements, and from this point of view it inevitably raises the problem for two-party models that a third party (at least) is involved, and that this involvement is not purely a private matter. Not only do we argue that adoption of a narrow bipartite frame is likely to miss the manner in which the courts approach tort and contract duties; we also suggest that this narrow frame of reference systematically excludes the dimension of loss-spreading from view. Again, we are not suggesting that loss-spreading provides the answer to the puzzles of contract or tort liability. The point is, rather, that loss-spreading operates through party arrangements and does not operate without restriction; nor does it negate responsibility. We should open our eyes to the extent to which parties seek to place and spread losses using the resources of the law of obligations, and the nature of the restrictions applying to their ability to do so. These will not be discovered without reference to insurance arrangements and insurance law.

Our general point here is that the limitations of insurance, and the role of the law in defining and applying such limitations, are as instructive as its operation. All of this is suppressed by adopting an exclusive focus on two parties. The two-party model operates as a restrictive frame or perspective. It relegates issues of wider party relationships, including much activity which is vital to the operation and shape of the law of obligations, to the edges of the frame. To look at these aspects of the law is not to shift perspective from obligations to something beyond its boundaries; it is, rather, to broaden our perspective to include other parts of the same structure.

1.3.5 Loss-spreading, market, and state

As we see in the next chapter, insurance markets in many respects do not fit the common model of actuarialism and bounded risk pools assumed to characterize them. Losses are spread far and wide, across classes of business and national boundaries, by reinsurance

¹⁸ Most influentially by E Weinrib, *The Idea of Private Law* (Cambridge MA: Harvard University Press, 1995), 1–2: 'The most striking feature of private law is that it directly connects two particular parties through the phenomenon of liability. Both procedure and doctrine express this connection. . . . In singling out these two parties and bringing them together in this way, private law looks . . . to a bipolar relationship of liability'. Many of the following chapters deal with doctrinal questions in light of the presence of multiple parties including insurers. The 'procedural' role of insurers in litigation is discussed particularly (though not uniquely) in Chapter 13.

and by capital market devices such as securitization. As the inadequacy of the model has been increasingly recognized, so it has had implications for the way insurance has been conceptualized outside legal scholarship. Obligations scholarship has yet to catch up with this trend, for the most part, even though it underlines the market character of insurance.

As we will see in Chapter 6, the insurance market spreads losses more widely than the state itself, but it does not do this without significant investment of legal resources. Market relationships and techniques of market regulation are engaged in loss-spreading. This is one of the reasons why 'loss-spreading' is not the answer to the puzzles of the law of obligations, but part of those puzzles. We illustrate that loss-spreading beyond mutual risk pools is definitively not to be associated solely with the guiding hand of government, and that a turn to the state is not the logical consequence of taking loss-spreading seriously. In fact, that is a hugely over-simplified assumption. Even where the spreading of losses is most strongly desired at a political level, states make use of the market in devising—or simply employing—means of spreading losses.¹⁹

1.4 Obligations

1.4.1 Contract

Broadly contractual relationships lie at the core of this book. Our approach to contract adopts a form of contextualism which we consider appropriate to analysis of the law of the market. Insurance contracts, in any case, have a long history and have helped to shape the law itself. So for example when addressing subrogation (the theme of Chapter 5), we emphasize the nature of insurance contracts as shaping the equitable response which has largely formed the insurer's remedies. Although we emphasize contractual relationships and in many instances underline the importance of party risk allocation, we do not suggest that the role of the courts is merely to give effect to the 'will' of the parties. Indeed, we suggest that in general terms the courts have responsibility for regulating insurance activities through the law of obligations, including the law of contract. For example, we suggest that the courts may interpret contractual duties in such a way as to control the exercise of subrogation rights—a possibility which is made less apparent, and perhaps even adversely affected, by redefinition of long-standing principles in terms of general principles of unjust enrichment.

Generally speaking, we consider that insurance is under-emphasized in existing accounts of the law of contract, relative to its practical and—we suggest—conceptual significance. While the relevance of insurance to contract has on occasion been directly denied,²⁰ it is more often under-emphasized (sometimes with unfortunate effects for understanding of the operating issues). One suggestion is that this follows from a more general rejection of the risk-allocation model of contracting.²¹ Risk allocation, as we

¹⁹ Discussed in Chapter 6 (loss-spreading) and Chapter 9 (compulsory insurance).

²⁰ Jane Stapleton, for example, extends her rejection of insurance as an operating factor in relation to tort duties to contractual duties, in a brief discussion referred to in Chapter 7: J Stapleton, 'Tort, Insurance and Ideology' (1995) 58 MLR 820.

²¹ Chapter 7, 7.1 discusses the misplaced prediction that the significance of party risk allocation would decline and contract be absorbed by tort.

have already explained, is at the core of our analysis. We do not suggest that risk allocation is a complete or sufficient model of contracting. But on the most influential accounts of ‘relational’ contracting, risk allocation nevertheless anchors one part of the continuum of contractual relationships.²² We would underline that the role of party risk allocation remains highly significant in contracting activity; and that its affinity with insurance is sufficient on its own to justify greater attention to insurance. In other words, insurance can be seen as paradigmatic of some important forms of contracting activity; and this sheds light both on the nature of insurance, and on the nature of contract. In Chapter 2, we explain why this does not imply an acontextual analysis.

The centrality of insurance to contract can be underlined in a range of ways. Hugh Collins, for example, uses the word ‘insurance’ to refer to the principles of the law of contract themselves, offering the means by which party expectations may be secured. These principles retain their significance in setting the essential element of trust and security on which contracting may be said to be based.²³ Similarly, economists of the stature of Kenneth Arrow and Joseph Stiglitz have recognized the centrality of risk and insurance to economic relations as a whole, to the extent that—as Tom Baker has identified—‘insurance’ is not perceived as confined to the products of insurers, but as provided ‘any time that one party’s actions have consequences for the risk of loss borne by another’.²⁴ By way of example, guarantees and indemnities between the parties commonly form a part of the pattern of contracting. Plainly, this is far broader than the idea of distribution within a common risk pool, and brings insurance to the centre of contracting.

Equally significant is that the element of futurity in contracting has been seen as definitive, so that contract may be defined as ‘relations among people in the course of projecting exchange into the future’.²⁵ For MacNeil, the *nature* of the way in which contracting parties deal with the future is an essential marker of the nature of their relationship—a range of attitudes to future risk is associated with different forms of contracting, from the most ‘transactional’ (discrete exchanges in which definition of risk bearing is definitive) to the most ‘relational’ (in which the ‘paper deal’ is least definitive).²⁶ The issues here are significant both for the understanding of insurance, and we suggest for the understanding of contracting, and we defer fuller discussion to Chapter 2.

1.4.2 Tort

Various dimensions of our approach to tort, and of the influence of insurance in relation to tort, are outlined in 1.5, where we set out the structure of the book. However, a general feature of our account of tort may be underlined at this point. Parties, and indeed legislatures, regard negligently caused harm in particular as a pertinent risk for

²² I MacNeil, ‘The Many Futures of Contract’ (1974) 47 S Cal L Rev 691.

²³ H Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1999), 4.

²⁴ Tom Baker, ‘On The Genealogy of Moral Hazard’ (1996) 75 Texas Law Rev 237, 272. Baker quotes J Stiglitz, ‘Risk, Incentives and Insurance: the Pure Theory of Moral Hazard’ (1983) 8 *Geneva Papers on Risk and Insurance* 4: ‘almost all economic relations are affected by risk, and by the problems of insurance and incentives to which this gives rise’.

²⁵ I MacNeil, ‘Values in Contract: Internal and External’ (1983) Nw U Law Rev 340, 341.

²⁶ How else can the use of non-binding ‘comfort letters’ for example, by the parent of a subsidiary contracting party confirming that its subsidiary will be kept in funds, otherwise be explained?

allocation and spreading, and such risks are often the subject of *ex ante* allocation accordingly. In light of this, the attempt to distinguish tort completely, both from contract and from social insurance, is misguided. Though negligence law will include reparation for some losses which result from weightier wrongs than mere carelessness, insurance in such instances may not respond. Insurance both shows the intimate link between negligence, and risk allocation and loss-spreading, and sets limits to recoverability. Those limits are themselves based in responsibility and set the boundary of legitimate loss-spreading. This raises issues which have seldom been recognized, let alone addressed.²⁷ Insurance, it may be argued, influences the very shape of the law of tort, which in some important respects defies explanation by 'internal' factors such as responsibility or rights. Insurance, in other words, is related to the dominance of negligence in the law of tort. The reach of insurance is not unlimited, and attention to its limits is as informative as attention to its core operation.

1.4.3 Unjust enrichment

We would make two general points about the relationship between unjust enrichment and insurance. The first relates to the involvement of insurers in creating the very subject matter from which some principles now categorized in terms of 'unjust enrichment' have been excavated. The loss-shifting arguments of insurers have been prominent in giving rise, over a long history, to principles of subrogation, contribution, and reimbursement, in particular. It is perhaps curious that the particular contribution of insurance in these principles is not identified and analysed, since insurance cases have been in the vanguard of development of commercial law.

The second point is that where restitutionary liabilities are concerned, insurance can be expected to play little direct part. This is for two reasons. First, many of the situations in which unjust enrichment claims may be brought rest upon some sort of deliberate or illegal conduct on the part of the assured, and that is not covered by insurance policies: these matters are addressed in Chapter 11. For the same reason, insurance policies will rarely respond to liability for breach of equitable obligations. Second, the general principle of indemnity insurance is that it responds to a loss. Insofar as the assured is seeking to recover for a benefit stripped away by principles of unjust enrichment, there is no possibility of recovery: as was said by Lord Phillips in *Moore Stephens v Stone & Rolls Ltd*,²⁸ 'If a person starts with nothing and never legitimately acquires anything he cannot realistically be said to have suffered any loss'.²⁹ Caution is required: the categorization of a remedy as restitutionary rather than compensatory may, therefore, have a negative impact on the capacity of the liable party to recover under an insurance policy.

This final point raises an analogy with the relationship between contract and tort, which has taken many years to clarify (and even now creates disagreement).³⁰ If contractual relations deal with risk, will unjust enrichment principles—which are formulated without express reference to risk—be allowed to develop so as to negate

²⁷ Discussed, in particular, in Chapters 11 and 12.

²⁸ [2008] EWCA Civ 644; [2008] 3 WLR 1146.

²⁹ At para 5.

³⁰ Chapter 8.

the risk allocations that are the product of party arrangements, whether those are broadly or narrowly read and interpreted, or to protect parties who have not secured the benefit of a contractual allocation of risks? Discussion of such issues is, as already noted, at a relatively early stage when compared with the 'painfully emerging' position in the law of tort,³¹ and raises the question of how far the general principles of unjust enrichment are to be read as qualified by risk issues; and how far parties' own allocation of risks, where it exists,³² guides the results. So far as there are boundary disputes between different branches of the law of obligations (as is the case, for example, in relation to subrogation),³³ it may be asked how far it is beneficial (or prudent) to subject existing legal principles to analysis in terms of 'unjust enrichment'. Reconceptualization will not necessarily bring the desired clarity and simplicity. Key principles may be displaced to the margins, or designated as exceptional, because they fail to fit the essential elements of the model. We suggest that the relationship between risk allocation and unjust enrichment is one which will need future attention.

1.5 Structure

The book is divided into three Parts. Part 1 includes introductory material. After the present chapter, Chapter 2 deals with the diverse character of insurance and its significant features so far as obligations law is concerned. It particularly develops the nature of the relationship between contract, and insurance in its market form. Chapter 3 explores core features of insurance contracts and the evolution of today's insurance market. Chapter 4 turns from contract to public law, underlining the relatively specific nature of statutory regulation of insurance in the UK, and significant recent changes.

Part 2 takes forward the themes identified in this introduction through analysis of the detailed operation of insurance in relation to private law. Chapter 5 is concerned with the important and enigmatic issue of subrogation. We argue that subrogation is an unseen force in shaping the law of obligations and that its importance is not always appreciated. We suggest that control of subrogation is essential and that the courts have developed an awareness of this which focuses on party risk arrangements. Chapter 6 deals with the ways in which insurance spreads losses, and gives evidence for our argument that loss-spreading through insurance does not resemble the favoured picture of closed risk pools in which risks may be adequately priced and distributed.

In Chapter 7, we evidence the significance of insurance as a form of risk allocation in commercial arrangements, and illustrate that the courts are often sensitive to the need to protect party arrangements. It is significant that these are often multi-party arrangements, and that claims for indemnification on the part of insurers while superficially giving substance to expanded relationships, for example by identifying reliance through a contractual chain, may well undermine contractual allocations. In these

³¹ Beatson, n 9.

³² Particular questions here surround the continuing effect of party risk allocations where contracts have been discharged: Beatson, n 9.

³³ Chapter 5.

situations, 'insurance' (in the sense of contracting with an insurer) is part of a continuum of ways in which parties may deal with risks. The search for party intentions is not confined to the intentions of insurer and assured—as, indeed, an insurer is frequently arguing that another party should be seen as a primary indemnifier.

In Chapters 8 and 9, we turn our attention from contract to tort. Chapter 8 focuses particularly on the role of insurance arrangements, of one sort or another, in the determination of tort duties. We begin with cases where tort operates within, or close to, a contractual 'matrix' in which the allocation of risks—and with it, inevitably, insurance—is in issue for the reasons explored above. We show that if decisions in relation to tort are guided purely by dominant responsibility-based accounts, applied without compromise or qualification, they will not improve on a contractual analysis, and the supplementing of contract with independent tort reasoning will not fulfil the promise it has been thought to offer. But we also venture beyond the confines of recognized contractual 'matrices'.³⁴ With an emphasis on the nature and structure of tort duties, we show that many claims seeking to expand the boundaries of tort have been influenced by the limits of contractual arrangements, and not solely where contract principles are unduly 'inflexible'. The inflexibility of doctrines such as privity is only one cause of such claims, which may also arise in an attempt to circumvent agreed allocations of risk. This is only a part of our discussion of the role of insurance in relation to tort. It is, however, a significant step in our analysis because it is opposed to the majority of established accounts.

Chapters 7 and 8 therefore take insurance and risk allocation to the core both of contract and of tort, with a focus on duties. However, we readily concede that where tort is concerned, the cases explored in Chapter 8, though conceptually significant, are not representative of the mass of tort claims. Chapter 9, dealing with compulsory insurance, focuses directly on the most familiar and 'conventional' of tort claims, namely road traffic accidents and employee injuries.

Part 3 is concerned with application. We consider a range of discrete issues, applying the lessons of the previous chapters. Chapter 10 is concerned with vicarious liability. Here we expand our argument that obligations law is not best addressed through an inflexible two-party frame. Vicarious liability is secondary liability which was defined in the nineteenth century through concepts which were initially related to risk allocation and became, inevitably, associated with loss-spreading. Understood in this way, vicarious liability also illustrates the limits of loss-spreading, and the intimate association between insurance and negligence, which has been a theme throughout.

These issues around the limits of loss-spreading are further emphasized in Chapter 11, which is concerned with *ex turpi causa* or illegality. The limits to loss-spreading are largely unexplored by tort lawyers, but they represent the operation of responsibility principles in a manner which shows the potential for recovery and liability to unravel. Addressing these issues in relation to fault going beyond mere negligence sheds light on the relative significance of responsibility and compensation in tort law, and on the nature of the relationship between tort and crime.

³⁴ The term 'contractual matrix' is explained in Chapter 8.

The remaining chapters deal with issues of particular current significance and take forward our argument. Chapter 12 shows how a number of threads from the book are brought together in the legal response to mesothelioma claims. We indicate the vital role played by insurance. Finally, the critical issue of insurance in litigation funding is explored in Chapter 13. There is no clearer illustration of the centrality of insurance than the manner in which civil litigation depends upon the insurance market. As we observed earlier, the available mechanisms for supporting litigation have a significant influence on its shape, and inevitably on the substantive law which emerges. The chapter emphasizes one of the points with which we started: it is hazardous for conceptual accounts of the law to omit the formative influences upon it, and particularly unfortunate for this to be done as a matter of choice.

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