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Reform of the Law Relating to Insurable Interest in Property—Some Thoughts on Chadwick v. Gibraltar General Insurance

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in 1959. A review of the new Act is published in Volume 3 of the Canadian Bar Journal (1960), at page 28. This is not the place to summarize the provisions of the Act. Suffice it to say that many of the shortcomings of the old Act, some of which are noted in the Working Paper of the Law Reform Commission were corrected in the new Act. As far as I am aware, both the legal profession and the credit community consider its operation during the last 24 years to have been reasonably effective and practical and not unduly burdensome. I am of the view that any effort in Ontario to repeal or restrict it would be considered retrograde.

Without holding out the Ontario Act as a model, I would commend its examination by the Commission. I would urge, too, a study of our experience with the Act in Ontario, and finally a return to the drawing board.

F. M. Catzman, Q.C.*

REFORM OF THE LAW RELATING TO INSURABLE INTEREST IN PROPERTY — SOME THOUGHTS ON CHADWICK v. GIBRALTAR GENERAL INSURANCE

The decision in Chadwick v. Gibraltar General Insurance Co.1 deserves to be rescued from the comparative obscurity of the Ontario Reports. The reason for this is that the case shows, yet again, the need to reform the law relating to insurable interest.

The facts of the case are as simple as the result is outrageous. The plaintiff purchased a vehicle and took out an “all perils” policy with the defendant insurance company. The car was later discovered to have been stolen and was seized by the police. The insurer conceded that the plaintiff was an innocent purchaser for value without notice of the fact that the car was a stolen vehicle. Despite this the insurer refused to indemnify the plaintiff on the basis that the insured had no insurable interest in the car. This claim was upheld by Webb Co. Ct. J.2

2 The plaintiff's claim was also rejected by the judge on the ground that the loss occurred in such a bizarre way that it (the loss) could not be said to be covered by the “all perils” provision of the policy. This is egregiously wrong but it need not detain us here.
bizarre, even for the law of insurance which specializes in producing weird doctrines, that one feels certain that this result must be wrong. Sadly, the decision is legally impeccable. In order to see how the law has come to develop in the way it has, it is necessary to look at some legal history.

The story begins with the decision of the House of Lords in *Lucena v. Craufurd*. In that case, the Royal Commissioners insured a number of vessels and their cargoes. After two trials, the Royal Commissioners were held entitled to recover in respect of their losses. The importance of the case lies in the radically divergent views of insurable interest expressed by Lawrence J. and by Lord Eldon.

For Lawrence J., insurance "is applicable to protect men against uncertain events which may in any wise be of disad-
vantage to them". To confine insurance "to the protection of the interest which arises out of property" would be to add "a restriction to the contract which does not arise out of its nature". Thus, Lawrence J. formulated a theory of insurable interest which focussed on whether the insured had suffered a loss and ignored the question of whether the insured had any property rights in what was lost. These views were anathema to Lord Eldon. For him an insurable interest could not exist "unless [there] be a right in the property, or a right derivable out of some contract about the property". As Professor Robert Keeton has pointed out:

> The conclusion seems inescapable that Lord Eldon's conception of insurable interest included a requirement of some kind of legally enforceable right. It also appears that, when finding such a legally enforceable right, he would have found an insurable interest even if the factual expectation was that the right would be economically worthless.

The factor that seems to have persuaded Lord Eldon to embrace a property approach appears to be the fear that if the factual expectation of loss test were to be adopted, there would be no limit on those who could insure. In his Lordship's words:

> If moral certainty be a ground of insurable interest, there are hundreds,
perhaps thousands, who would be entitled to insure. First the dock
company, then the dock-master, then the warehouse-keeper, then the
porter, then every other person who to a moral certainty would have any
thing to do with the property, and of course get something by it.\textsuperscript{8}

The notion of impecunious seamen insuring their interest in a
ship is one that is too fanciful for words. Sadly, it is out of such
absurdities that legal doctrine is often fashioned.

In the middle of the 19th century, the courts began to give signs
that they might be abandoning the Eldon property test. Thus, in
\textit{Paterson v. Harris}\textsuperscript{9} and in \textit{Wilson v. Jones},\textsuperscript{10} the courts allowed
two shareholders in a company that was established for the
purpose of laying down a submarine cable between the United
Kingdom and the United States to recover once the cable had
been destroyed. Neither shareholder, of course, had any right of
ownership in the cable or any legally enforceable right therein.

These cases were effectively, if not formally, overruled by the
decision of the House of Lords in the notorious decision in
\textit{Macaura v. Northern Assurance Co. Ltd.}\textsuperscript{11} In that case, Macaura,
owner of the Killymoon estate, obtained five policies of fire
insurance on timber situated on the estate. Title to the timber was
in the Irish Canadian Saw Mills Ltd., of which Macaura was the
sole shareholder. He was also the sole creditor of the company
except for debts "trifling in amount". Yet the House of Lords
held that Macaura had no insurable interest in the timber. The
House stated that "a legal or equitable interest" was
\textsuperscript{12}

As Professor Keeton has rightly pointed out:

\begin{quote}
The case involved charges of fraud and it is difficult to reject the inference
that, though not proved, they influenced the court to reach a theory of
insurable interest that is nothing short of pernicious.\textsuperscript{13}
\end{quote}

Like many bad English insurance precedents,\textsuperscript{14} \textit{Macaura} has
found a Canadian home. The decision was embraced by a

\textsuperscript{8} \textit{Supra}, footnote 4 at p. 324.

\textsuperscript{9} (1861), 1 B. & S. 336, 121 E.R. 740.

\textsuperscript{10} (1867), L.R. 2 Exch. 139.

\textsuperscript{11} [1925] A.C. 619.

\textsuperscript{12} Lord Buckmaster, giving the leading judgment, placed heavy reliance on a dictum by
Walton J. in \textit{Moran, Galloway & Co. v. Uzielli}, [1905] 2 K.B. 555 at p. 562, where the
judge stated that a "legal or equitable" interest was required to establish an insurable
interest; see, \textit{supra}, footnote 11 at p. 626.

\textsuperscript{13} See Keeton, \textit{op. cit.}, at p. 117.

\textsuperscript{14} See \textit{e.g.}, \textit{Rayner v. Preston} (1881), 18 Ch. D. 1 (C.A.); \textit{Newsholme Bros. v. Road
Transport & General Insurance Co. Ltd.}, [1929] 2 K.B. 356 (C.A.); \textit{Gray v. Barr,
majority of the Supreme Court of Canada in *Guarantee Co. of North America v. Aqua-land Exploration Ltd.*\(^{15}\) In that case, the plaintiff had lent money to the builders of a marine drilling tower. In order to safeguard his loan, the plaintiff insured the tower. When, shortly after this, the tower collapsed, the plaintiff sued to recover his loan. The Supreme Court, by a three to two majority,\(^{16}\) held that the plaintiff had no insurable interest. Mr. Justice Ritchie, writing for the majority, relied heavily on Lord Eldon in *Lucena v. Craufurd*\(^{17}\) and on the decision in *Macaura*.\(^{18}\) Strangely, the majority did not refer to the highly pertinent words of Brett M.R. in *Stock v. Inglis*:\(^{19}\)

> In my opinion it is the duty of a Court always to lean in favour of an insurable interest, if possible, for it seems to me that after underwriters have received the premium, the objection that there was no insurable interest is often, as nearly as possible, a technical objection, and one which has no real merit, certainly not as between the assured and the insurer.\(^{20}\)

The decision in *Chadwick v. Gibraltar General Insurance Co.*\(^{21}\) then, is legally correct. Webb Co. Ct. J. could not have found a "property" interest or a "legal or equitable" right on the part of the plaintiff. The judge (as well as the plaintiff) was the victim of a grotesque series of legal developments which have left the law in a disgraceful state. In the present case, if we assume (as is likely) that the true owner had also insured the car, then two insureds had paid premiums for the same risk but neither insured could recover from his/her insurer.

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\(^{16}\) Justices Cartwright and Judson dissented but their dissent was based on very narrow grounds. Mr. Justice Cartwright (with whom Judson J. concurred) went so far as to employ Eldon's test for the existence of an insurable interest. In his Lordship's view, the plaintiff "had a right derivable out of a contract about the tower"; see, *ibid.*, at p. 231 D.L.R., p. 135 S.C.R. Thus, even if the minority position had prevailed, there would still be an urgent need for reform.

For a good critical comment on the decision, see the comment by R. M. McLeod, "Aqua-land Exploration Ltd. v. Guarantee Co. of North America: Insurable Interest in an Indemnity Policy", 24 Fac. of L. Rev. 154 (1966).

\(^{17}\) *Supra*, footnote 3.

\(^{18}\) *Supra*, footnote 11.

\(^{19}\) (1884), 12 Q.B.D. 564 (C.A.).


The Outline of a Reform Statute

The first need is obviously to abandon any definition of insurable interest that is tied to ownership, or to legal and equitable rights in property. The need for this change was brilliantly argued by Harnett and Thornton 35 years ago.\(^{22}\) If their arguments had been accepted, results such as the decision in *Chadwick v. Gibraltar General Insurance Co.*\(^{23}\) would not have been reached and scores of other cases would have been decided in accordance with minimal standards of fairness.

Second, there is a need to reverse the decision of the Supreme Court of Canada in *Howard v. The Lancashire Insurance Co.*\(^{24}\) This decision followed a statement by Lord Hardwicke in *The Sadler's Co. v. Badcock*\(^{25}\) that it is necessary for the insured to have an interest at the time of insuring and at the time of loss by fire. As Professor Keeton has pointed out, the doctrine, if accepted, would have disastrous results. One need give but two examples of what would happen if the orthodox view applied. First, builder's risk policies would be worthless since there the risk attaches as construction progresses and the builder's risk increases.\(^{26}\) Second, a floating policy on a fluctuating stock of goods would be unenforceable as to after-acquired property.\(^{27}\)

Third, there is a need to adopt James L.J.'s dissenting judgment in *Rayner v. Preston*,\(^{28}\) the effect of which would be to make the vendor a constructive trustee with regard to the purchaser of any moneys received from the insurer after a fire. At the present time, both vendor and purchaser have to purchase overlapping coverage — a state of affairs which is doubtless of benefit to insurers but is unfair to the insuring public.

Finally, the reform of stat. con. 2 of the fire insurance policy is long overdue. The section requires an applicant for insurance to disclose the interest of any other person whose property is being


\(^{23}\) *Supra*, footnote 21.

\(^{24}\) (1885), 11 S.C.R. 92.

\(^{25}\) (1743), 2 Atk. 554 (Ch.), at p. 555, 26 E.R. 733.

\(^{26}\) See Keeton, *op. cit.*, at p. 107.

\(^{27}\) *Ibid.*

\(^{28}\) (1881), 18 Ch.D. 1 (C.A.).
insured. The condition has been largely ignored by the courts and it seems ripe for abolition.

Conclusion

I have ventured beyond Mr. Chadwick’s case to outline a modest programme of reform for the law relating to insurable interest in property. The subject is not the most pressing legal problem of the day. Yet it deserves the urgent attention of those regulators and politicians whose function it is to ensure that our legal rules do not fall into complete disrepute.

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