1. Introduction

Short History of Insurance Generally and in Australia

- Early days, merchant bore the risk of the trader being robbed on his trip. – The Code of Hammurabi.
- Phoenician risk allocation arrangements.
- Rome offers an indemnity to merchants for a war effort and for helping to solve its gran shortage in a time of drought.
  - Early example of the State getting involved in commercial arrangements with an incidental risk transfer provision.
- The church prohibits usury. – fictional sales contract
- Lloyd's of London

Insurance in Australia

- Insurance Act 1932 – replaced by Insurance Act 1973
- Marine Insurance Act 1909 – replaced by the Insurance Contracts Act 1984

The Nature of Insurance and Insurance Contract

- The formation of an insurance contract is governed by ordinary contractual principles.

Formation of an Insurance Contract

- Intention to create legal relations
- Offer and acceptance - material terms
- Consideration

Offer and Acceptance

- Material terms are:
  - the identity of the parties to the contract: the insurer and the insured;
  - the description of the risk transferred;
  - the period of cover;
  - the amount of the premium (if any);
  - the amount payable by the insurer in the event of a loss;
- An offer and acceptance does not have to be in writing.
- Depending on the circumstances delivery of the information to the insurer might be regarded as an invitation to the insurer to offer insurance to the intending insured – **invitation to treat**.
- Subject to the ICA and Ch 7 of the Corporations Act 2001(Cth), an insured will be bound by an insurer's usual terms for that type of insurance (to the extent they are not inconsistent with anything expressly agreed by the parties), even if:
  - the insurance is arranged orally and neither party refers to those terms;
  - the insured has not been shown, read, or expressly agreed to those terms.
- Acceptance 'subject to usual terms'
- Parties to the contract and the privity doctrine (s 48)

Consideration

- Insurance usually involves an insured paying to an insurer a fixed amount (known as a premium) in consideration for the transfer of risk to the insurer, but that is not necessary element of insurance.

Payment of the premium and qualified acceptance

- There might be insurance in the absence of premium in a variety of situations:
  - in the context of a compulsory insurance scheme;
  - if the insurance is by way of a deed; or
  - in the case of a "provision of insurance" found in a non-insurance contract.
- A non-party can sue on an insurance contract even though it has not paid premium for it, as long as the contract intended to benefit the non-party.
- If there has been a total failure of consideration or if an insurer avoids a contract from the beginning (other than for fraud), then insurer must repay the premium.
  - At common law, if an insurer avoids a policy for fraud, the premium is forfeited to the insurer.

- Subject to the terms of the contract, an insured is not entitled to a return of premium if they cancel the contract after the risk has commenced.

Proposals – Conflict between proposal and policy

- A court will not enforce "a contract whose making or performance" is directly (expressly or impliedly) prohibited by statute or by public policy.
- In considering whether a contract is prohibited by public policy, regard will be had to "the scope and purpose of the statute to consider whether the legislative purpose will be fulfilled without regarding the contract as void and unenforceable".
- Expiration and cancellation

Assignment and novation

- An insured has two main "assignment-type" options:
  - assignment or novation of the insurance contract;
  - assignment of the right to the proceeds of an existing or future insurance claim.

Assignment or Novation

- An insurance contract is personal contract that insures the insured's interest in its subject matter, not the subject matter itself.
- Accordingly, subject to the operation of the ICA (for example, s 50), a person who acquires an interest in the subject matter of an insurance contract taken out by, for or on behalf of someone else, does not also acquire the benefit of the contract unless they become a party to it (by assignment or novation) or the benefit of the contract is expressly extended to them.
- An insured can assign an insurance contract, but only with the consent of
  - the insurer; and
  - any other parties to the contract.
- From an assignee's point of view, there is no point taking an assignment of a first party indemnity insurance contract unless the insured also transfers to the assignee their interest in the subject matter of the insurance contract before a loss. Unless the assignee has an interest in the subject matter of the contract at the time of a loss, it will have no claim on the contract.
- On an assignment of an insurance contract, the assignee becomes a party to the contract and can enforce it in their own name. In effect, an assignment constitutes a novation of the insurance contract in that it:
  - involves the replacement of one of the parties to the contract with another;
  - transfers all the rights and obligations of the replaced party to the new one.

Assignment of the Proceeds of an Existing or Future Insurance Claim

First Party Insurance

- An insurance claim is a chosen in action.
- Accordingly, an insured can assign the proceeds of an existing or future insurance claim, leaving the insured as the insured party under the contract.
- Subject to the policy wording, this type of assignment does not require the insurer's consent, but it does require the insured to comply with certain formalities, including notifying the insurer of the assignment.
- An assignment of the proceedings of an existing or future insurance claim means that the assignee can enforce the claim in its own name if the formalities have been complied.
  - If not, the assignee can only enforce the claim in the assignor's name.
- The insured's right under an insurance contract pass to their personal representatives on death, bankruptcy, and in the case of a company, to its liquidator.

Liability (third party) insurance

- The considerations in relation to the assignment of the proceeds of a claim for indemnity under a liability (third party) insurance are similar to the considerations in relation to a first party insurance.

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384

- The principal matters of general importance which were contested on appeal to this Court raise two issues of construction. The first concerns the construction of the terms of the Policy, it being in a standard form in widespread use.
  - This applies in respect of a "contract of general insurance" within the meaning given to that phrase by s 10 and s 11(6) of the Act. The Policy was such a contract.

1. An "Industrial Special Risks Insurance Policy" which was in a standard form in widespread use, provided that, in a case of property damage, "the basis upon which the amount payable is to be calculated shall be the cost of reinstatement of the damaged property insured at the time of its reinstatement". It also provided that rebuilding work "must be commenced and carried out with reasonable despatch, failing which [the insurer] shall not be liable to make any payment greater than the indemnity value of the damaged property at the happening of the damage".
2. On the other hand, the insured had an option to elect to claim the indemnity value of any damaged property, in which event the insurer was required to pay the value of that property at the time of the damage or to reinstate, replace or repair the property.
3. The insured's premises were damaged by fire on 8 January 1992. The insured lodged a claim the following day. On 22 July 1992 the insurer's solicitors wrote to the insured alleging that the claim was fraudulent and stating that the insurer had decided to refuse the claim and cancel the policy. Condition 5 of the policy allowed the insurer to cancel it where the insured had made a fraudulent claim. The insured was unable to repair the property without payment by the insurer.
4. On 24 September 1992 the insured instituted proceedings in the Supreme Court of New South Wales (Commercial Division) seeking a declaration that the insurer was liable to indemnify it in respect of the damage caused by the fire, as well as damages and interest. On 3 March 1993, another fire occurred which caused significant damage to the premises. The building required demolition.

Held,
the insurer was only responsible for the damage caused by the first fire.

- The primary judge correctly emphasised that in the present case the policy did not impose upon the insurer any obligation itself to reinstate: rather, its obligation was to pay a sum of money for the cost of reinstatement.
- The insurer never came under an obligation itself to reinstate the premises. That being so, authorities that suggested that the insurer would have to bear the increased cost of reinstatement occasioned by the third fire were not in point.
  - The obligation to pay the cost of reinstatement had accrued or, to use the expression in some of the authorities, "attached" to CIC, in the manner and with the particular consequences we have indicated, before the expiry of the Policy. That being so, subsequent events, in particular the third fire, did not change the nature or increase the quantum of that obligation.

- The second concerns s 58 of the Insurance Contracts Act 1984 (Cth) (the Act).
  - Section 58 provides that, in certain circumstances, by force of the section there exists between the parties to an original contract of insurance a further contract, which we will call a statutory policy. The cover under the statutory policy is in respect of the period that commences immediately after the expiry of the cover provided by the original policy.
- It is well settled that at common law, apart from any reliance upon s 15AB of the Acts Interpretation Act 1901 (Cth), the court may have regard to reports of law reform bodies to ascertain the mischief which a statute is intended to cure. Moreover, the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy .
- In our view, the insurance cover of which s 58(2) speaks will not be set to expire within fourteen days and the obligation of the insurer to give notice informing the insured thereof will not arise if, before the commencement of that fourteen day period, the insurer has given written notice of proposed cancellation. If the insured accepts that notice as effective to cancel the subsisting contract, then there is no question of subsequently extending or renewing a cover which the insured accepts has already come to an end, or will do so upon expiry of any balance of the term of the notice. If the insured disputes the effectiveness of that notice, then ss 58 and 59, taken together, do not oblige the insurer to give a second notice to gainsay the effect stated in the first notice.
- That is to say, if the insurer has given notice in writing to the insured of proposed cancellation, in apparent compliance with the procedure laid down in s 59, thereafter the policy is not one which is set to expire within the meaning of s 58. That was this case. It follows, in our view, that no statutory policy came into existence, and the cross-appeal by the Club should be dismissed.
- Where an insurer has given notice in writing to the insured of proposed cancellation, in apparent compliance with procedure laid down in the Insurance Contracts Act 1984 (Cth), s 59, thereafter the policy is not one which is set to expire within the meaning of s 58, and the obligation of the insurer to give notice of expiry does not arise.

Accordingly, the Court held,

- By Brennan CJ, Dawson, Toohey and Gummow JJ, Gaudron J contra, that the failure of the insured to commence the restoration and repair work with reasonable despatch before the later fire meant that the insurer was liable only to pay the indemnity value of the property at the time of the first fire.
- By the whole Court, that an insurance policy of which the insurer had given notice of the proposed cancellation in apparent compliance with s 59 of the Insurance Contracts Act was not a policy which was set to expire within the meaning of s 58 and so the insurer was not required to give the insured notice of the imminent expiry of the policy under s 58(2).
- By the whole Court, that it was unreasonable for the insurer to have withheld payment after the date of expiry of the policy, as by then the time for the insured to elect to claim the indemnity value had passed and the period for the performance of the restoration and repair work had also passed. Interest was therefore payable by the insurer from that date.
  - The period of "reasonable despatch" had passed when the third fire occurred, with the result that the insurer was only obliged to pay to the club a sum representing the indemnity value of the damaged property at the time of the happening of the damage sustained in the first fire.

Pre-contractual non-disclosure and misrepresentation

✦ A co-insured's pre-contractual non-disclosure or misrepresentation will leave the innocent co-insureds without cover: Advance (NSW) Insurance Agencies v Matthews.

Advance(NSW) Insurance Agencies v Matthews [1989] HCA 22

- Where there is more than one insured party, the duty of disclosure under the section 21 of the IC Act extends to all of them, and similarly the references to 'the person who became the insured' in section 28 also means each of the co-insured.

1. Mr and Ms Matthews submitted a proposal form seeking household insurance.
2. In response to the question "have you ever had any...claim rejected?" Mr and Mrs Matthews answered no.
3. They also answered a further question asking whether there were any other facts which should be disclosed in the negative.
4. Mr Matthews failed to disclose an earlier claim for loss arising from a fire suffered by a business in which he had been a partner. He had made a claim on another insurer which had been rejected.
   a. That answer was false to the knowledge of Mr. Matthews but not to that of Mrs. Matthews.
5. AIA rejected a theft claim by Mr and Mrs Matthews on the basis of the non-disclosure and misrepresentation.

Held,
found for the insurance company.

- It is natural to read the reference in that sub-section to "an insured" as a reference to each and every insured when the context is one in which the statute sets out to impose a duty to disclose material facts to an insurer. As Samuels J.A. noted in the Court of Appeal, the insurer has an interest in the individual history and claims record of **each person** who seeks insurance with the insurer. It would not harmonise with this context or with the existence of the duty of utmost good faith imposed by ss. 13 and 14 to read s. 21 as creating only a joint duty to disclose, that is, a duty to disclose limited to the joint acts and omissions of the co-insured.

- Accordingly, a fraudulent non-disclosure or misrepresentation by one of the co-insureds under section 28 will allow the insurer to avoid the contract, even though another co-insured had no knowledge of the breach.
- The court rejected the argument that adopting this construction would lead to injustice for the innocent co-insured. Rather, the court noted that it would be inherently unjust to allow a guilty party to compel performance by the insurer.
- The court also found that whether the contract is joint or composite is irrelevant in this context, noting that even in a composite contract, some obligations are joint.

Code

- The HC (Mason CJ, Dawson, Toohey and Gaudron JJ) in this case held Pt4 of the ICA was a statutory code which replaced the common law.
  - The evident intention of the legislature is to replace the antecedent common law regulating non-disclosure, misrepresentations and incorrect statements by insured persons before entry into a contract with the provisions of Pt IV. To that extent Pt IV is a statutory code which replaces the common law. Accordingly, the circumstances in which it is legitimate to resort to the antecedent common law for the purpose of interpreting the statute are extremely limited: see Gamer's Motor Centre (Newcastle) Pty. Ltd. v. Natwest Wholesale Australia Pty. Ltd. [23] . However, in the light of our view as to the meaning of the relevant provisions of the statute, we do not find it necessary to resort to the common law or to explore the bases on which it may be permissible to engage in that exercise.

Knowledge

- In this case, Young J pointed out the insured must have actual knowledge. Constructive knowledge is not sufficient under s 21.
  - ... However, the insured must have actual knowledge of the thing, the mere fact that he ought in the ordinary course of business to have known is insufficient...

A Contract of Insurance of: Not?

- Generally speaking, an insurance involves an insured transferring to an insurer the burden of a specified category of financial loss the insured must suffer if an event specified in the arrangement:
  - fortuitously occurs during the period of the arrangement ("**occurrence" insurance**); or[1]
  - is the subject of a claim first made against the insured, or of circumstances first notified to the insurer, during the period of the arrangement ("claims made" **liability insurance**).
- The period of the arrangement (insurance period) is a fundamental aspect of an insurance arrangement.
- An insurer takes on that financial burden by promising it will make good such loss by paying money or a corresponding benefit (money's worth) to the insured as required by the terms of the arrangement.

The Essential Characteristics of General Insurance

- Risk transfer
  - Transfer of risk is the sole or primary purpose of an insurance contract.
  - So, for example, a lease is not an insurance arrangement even if it contains an indemnity clause that transfers specified risks to the lessee, because the purpose of a lease is to grant exclusive possession of property to a lessee. The transfer of the risk pursuant to the indemnity clause is an incidental of the lease, not its sole or primary purpose.
  - Insurance can be classified as either "indemnity" or "contingency".
  - Distinguished from a straight investment or a wager, an insurance requires that when the contract is made there is at least an expectation that the interest of the insured or the beneficiaries of the insurance might be adversely affected if the risk eventuates.
- Uncertainty
  - Generally speaking, the happening of a specified event is not uncertain or fortuitous if it is inevitable immediately before the insurance period commences that the event will occur during the insurance period.

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[1] In broad terms and subject to the policy wording, the word "fortuitous" ... carries the connotation that the cause of the loss should not have been intentional or inevitable: CCR Fishing Ltd v Tomenson Inc. (The 'La Pointe') [1991] 1 Lloyd's Rep 89, 91.

- ✳ The "uncertainty" (fortuity) requirement means that unless the arrangement expressly provides otherwise, property insurance will not be cover an insured for damage to or destruction of property if the insured deliberately caused the loss.

✦ Legally binding
- ✳ There is only insurance if an "insurer" is legally bound to accept the financial burden of a specified event if it happens.
- ✳ The essential characteristic of risk transfer is missing if an arrangement allows an insurer to choose whether or not to pay for a loss that falls within the scope of the risks described in the arrangement.

✦ Payment of money or some corresponding benefit (money's worth).
- ✳ An essential characteristic of an insurance arrangement is that an insurer promises to pay an insured money or "some corresponding benefit (money's worth) for an insured loss.

✦ Loss spreading
- ✳ Loss spreading is the primary characteristic of the public aspect of insurance in that insurance works by a large number of insureds with similar risk profiles each privately transferring the same class of risk to the one insurer or group of insurers. – in this way, the cost of the losses that will happen to the few is spread amongst the many.
- ✳ If payable, "premium" is the price paid by each insured to join a premium pool established by an insurer or group of insurers. Because each insured's risk of loss is spread across all the insureds participating in the pool, the premium is usually tiny compared with the size of a loss an insured might suffer if an insured event occurs.
- ✳ If premium is payable, it might only be insurance if premium is paid into, and claims are paid out of, a premium pool.

The Non-essential Characteristics of Insurance

✦ Insurance arrangements are usually contractual, but can be created by statute.
✦ Insurance arrangements are often based on a relationship of indemnity, but can be contingency.
✦ Insurance arrangements usually require the payment of premium, but sometimes do not.
✦ Insurance arrangements are often entered into by an insurer endeavouring to make a profit, but not always.

Common law

✦ There is no legislative definition of a contract of general insurance. It is necessary to look at the common law.
✦ There are necessary elements for a contract to be a contract of insurance. For the necessary elements: Prudential Insurance Co v IRC.
✦ Insurance can be contrasted with a warranty or a guarantee.

1. The Insurance company provided endowment insurance polices. They disagreed with the Commissioners as to whether these were policies of insurance and thus as to how they fell to be stamped. Life insurance was defined in the 1891 Act as 'insurance upon any life or lives or upon any event or contingency relating to or depending upon any life or lives.' The instrument that was to be presented for stamping in that case was the policy of insurance and 'Policy of insurance' was defined to mean 'every writing whereby any contract of insurance is made'.

For our purpose, note the definition of insurance contract.

Prudential Insurance Co v Inland Revenue Commissioners [1904] 2KB 658

- "It must be a contract whereby for some consideration, usually but not necessarily in periodical payments called premiums, you secure to yourself some benefit, usually but not necessarily the payment of a sum of money, upon the happening of some event…the event should be one that involves some amount of uncertainty. There must be either uncertainty whether the event will happen or not, or if the event is one which must happen at some time there must be uncertainty as to the time at which it will happen. The remaining essential is…that the insurance must be against something." (per Channell J.)
- Therefore, five elements from the above judgment:
  a. Contract;
  b. Consideration;
  c. Benefit on the happening of some event;
  d. Uncertainty; and
  e. Against something.

✳ This case is a major case in terms of common law definition of insurance came again and again.

R v Cohen; Ex parte Motor Accidents Insurance Board (1979) 141 CLR 577

- Insurance ordinarily results from a contract, under which the insurer assumes his obligation to the insured in return for a money consideration, called the premium.
- I very much doubt whether the existence of a contract is of itself essential to the legal concept of "insurance". There is much to be said for the view that it is the relationship of indemnity that exists between insurer and insured, rather than the source of that relationship, that is the essence of the concept of insurance, so that it matters not whether the relationship arises by statute or by contract. (per Mason J)

Statute

INSURANCE CONTRACTS ACT 1984

10 Contracts of insurance

(1) A reference in this Act to a contract of insurance includes a reference to a contract that would ordinarily be regarded as a contract of insurance although some of its provisions are not by way of insurance.

(2) A reference in this Act to a contract of insurance includes a reference to a contract that includes provisions of insurance in so far as those provisions are concerned, although the contract would not ordinarily be regarded as a contract of insurance.

(3) Where a provision included in a contract that would not ordinarily be regarded as a contract of insurance affects the operation of a contract of insurance to which this Act applies, that provision shall, for the purposes of this Act, be regarded as a provision included in the contract of insurance.

1. By an agreement dated 27 May 1994, Mr R W Perraton, rented a car from the appellant, Bayswater Car Rental Pty Ltd.
2. His address as set out in the agreement was an address in Brunei.
3. On 2 June 1994, he was driving this hired vehicle and collided with the rear of the respondent's vehicle in circumstances where Mr Perraton was clearly negligent.
4. Mr Perraton returned to Brunei.
5. The respondent brought action in the Local Court against Bayswater Car Rental Pty Ltd for the sum of $1,758.71 being the costs of repairs to his vehicle arising from the collision.

Although it was held that Bayswater was not entitled to contribution, for our purpose, the rental agreement was regarded as an insurance contract.

Bayswater Car Rental Pty Ltd v Hannell 10 ANZ Ins Cas 61-437

- The question which has arisen in this appeal is whether a particular car hiring agreement containing a reference to collision indemnity amounted to a contract of liability insurance so as to permit an outside third party to bring an action against the car owner under the provisions of s51(1) of the Insurance Contracts Act 1984 (Cth).
- s 51(1) provides: Where:
  a. the insured under a contract of liability insurance is liable in damages to a person (in this section called the 'third party');
  b. the insured has died or cannot, after reasonable enquiry, be found; and
  c. the contract provides insurance cover in respect of the liability;

  the third party may recover from the insurer an amount equal to the insurer's liability under the contract in respect of the insured's liability in damages."
- Clause 3(a) of the rental agreement read:
  Not being an insurer, the Owner provides collision indemnity, only during the agreed rental term.
  i) On the rented car.
  ii) On a Court Judgement against the Renter for third party property damages to $500,000 (cover can be forfeited if the Renter proportions blame).
- The respondent in his particulars of claim in the Local Court pleaded the accident and the negligence of the renter and pleaded the fact that the renter, after reasonable enquiry, could not be found. He then pleaded that the hiring contract "provides insurance cover in respect of the insured's liability to the plaintiff" and consequently the appellant was liable to the respondent pursuant to s51(1).

- At first instance, the Commissioner, after considering sections 10(2) and 11(7) of the ICA and relevant authorities concluded that the rental agreement constituted a contract of liability insurance for the purposes of the Act, giving section 51 a liberal reading.

- On appeal, Kennedy J considered that the critical question was whether Bayswater undertook itself to indemnify the renter or whether it undertook simply to arrange for an outside insurer to indemnify the renter against the risks identified in the relevant clause.
- He considered that the relevant clause was sub paragraph (ii) which should be read as indicating that Bayswater will itself provide an indemnity to the renter, limited to collisions, against a Court judgment against the renter for third party property damages up to $500,000.
- He considered that overall, on the construction of the contract, it was more consistent with Bayswater itself providing the indemnity than with it arranging insurance indemnifying the renter.
- He considered that the obligation of the owner to indemnify the renter arises only on the judgment of the Court being obtained by the third party against the renter for an amount of damages. It is only at that stage that the owners liability arises. The third party cannot be placed in a better position than the renter.

- Pidgeon J regarded the essential question as being what was the intention of the parties. He noted the significance of the phrase not being an insurer, the use of the word provides rather than the word indemnify. He also had regard to the fact that the owner is not permitted by law to provide third party motor vehicle insurance. He concluded that it was not the intention

of the parties but the owner would give a personal indemnity, and that all the owner was doing was giving an undertaking that the vehicle was insured by the owner.

- Steytler J found that while the hire agreement would not ordinarily have been regarded as a contract of insurance, it did, nevertheless, contain provisions of insurance and was, by virtue of section 10(2) of the ICA, a contract of insurance insofar as those provisions were concerned. Having regard to the relevant authorities, Steytler J formed the view that each of the requirements stipulated for contracts of insurance was satisfied with clause 3(a)(ii) containing provisions of insurance for the purposes of section 10(2) of the ICA. That conclusion, in his opinion, could not be altered merely because clause 3(1) of the Agreement provided that the owner of the hired vehicle was not an insurer. However, he found that Hannell had no claim against the insurer because the contract of liability insurance in this case provided insurance cover only in respect of a Court judgment. There was no Court judgment and accordingly, section 51 of the ICA did not assist.
- What this means is that s 51 is not intended and cannot alter the terms of the contract between the parties providing they were not contracting out of the section.
- Here, the parties had not contracted out of s 51. – contract out means to agree by a written legal agreement not to be included in something – i.e., the indemnity clause did not say, "except for s 51 of the ICA, on a Court Judgement against..."
- The third party had no rights against the car rental company.
- If the relevant clause of the car rental agreement was a contract of insurance, and if there had been a court judgement, then s 51 would operate to allow the third party to proceed against the car rental company.

- Although in this instance the Court denied the claim for contribution, the differences of opinion expressed by the judges highlights the importance of insurers being alert to the possibility that in any given situation, there may be another contract and or agreement in place which covers their insured and which may incorporate provisions which constitute a contract of liability insurance giving insurers a right of contribution from a third party.

- This is a case about direct access claims case.
- Here, what is concerned is whether or not this constitute an insurance contract.
- The word "we are not the insurer" cannot conclude the contract is not an insurance contract.

Further reference

- Insurance business: s 3(1), Insurance Act 1973.
- Life insurance: ss 9 and 9A of the Life Insurance Act 1995, see below.

Difference Between An Insurance, A Wager, A Guarantee and A Manufacturer's Warranty

Insurance Arrangement

- An insurance arrangement is random because the dollar value of the parties' respective performance is unequal.
- That is because, when the arrangement is made, the parties to it:
  - know the cost payable for the risk transfer; but
  - do not know if an event specified by the arrangement will happen during the insurance period and, if it does, how much the insurer will be obliged to pay the insured.

Wager

- By a wager, the parties agree that one of them will pay money or money's worth to the other depending on the outcome of an uncertain event, usually with neither party having any interest in the transaction other than that created by the wager.
- A wager is not an insurance because:
  - A wager creates a risk of loss for each of the wagering parties; whereas insurance involves the transfer of an existing or anticipated risk of loss from one party to another;
  - Each party enters into a wager in the hope of making a profit; whereas an insured only enters into an insurance arrangement for the purpose of protecting itself against the risk of loss; and
  - In insurance, both parties hope the risk will not eventuate, whereas in a wager at least one of the parties hopes the risk will eventuate.

Guarantee

- Guarantee insurance allocates to the insurer primary (ultimate) liability; a guarantee allocates to the guarantor secondary liability. – that is, the essential difference between guarantee (credit) insurance and a guarantee is that a guarantee (credit) insurer promises its insured creditor that it will indemnify the creditor if the debtor does not perform its obligation; where as a guarantor promises a creditor the debtor's obligation will be performed.
- Other difference:
  - To be enforceable, a guarantee must be in writing: s 4 of the Statute of Frauds, whereas an insurance arrangement can be oral or in writing;
  - A guarantee does not attract a duty of utmost good faith, whereas an insurance arrangement is a contract of the utmost good faith.

A Manufacturer's Warranty

- By warranting its product, a manufacturer agrees to pay or provide to the purchaser of its product money or money's worth for the purpose of making good a financial loss the purchaser might suffer if any of the events specified in the arrangement between the manufacturer and the purchaser fortuitously occur during the period of the arrangement.
- The difference between the two is that, in the usual case of a warranty as part of a sale transaction, the provision of the warranty does not involve the transfer of a risk of loss by, to or from the manufacturer, the distributor or the purchaser. Although the sale transaction transfers property to the purchaser, the manufacturer – by providing the warranty – retains the risk of loss in relation to the subject matter of the warranty. The purchaser cannot transfer a risk to the manufacturer that was not transferred to the purchaser in the first place.
- On the other hand, a manufacturer's warranty is arguably an insurance arrangement if a manufacturer:
  - gives a warranty independently of the sale transaction and for a distinct cost.
  - offers to do more than simply warrant its products against manufacturing defects.

- Note, an extension of the original warranty is not an insurance contract – just an extension of the warranty of the performance of the product.
- Manufacturer has control of what he warrants, whereas an insurer has no control of the risk.

Different classes and types of contracts of insurance

- Insurance can be divided into the categories of general, marine, life and health insurance.

General Insurance

- A general insurance contract is defined as "an insurance contract that is not a life insurance contract": s 11(6), ICA.
- General insurance can be divided into the following overlapping categories:
  - indemnity and contingency;
  - first party and liability (third party);
  - 'occurrence' and 'claim made'; and
  - joint and composite.

Indemnity and Contingency Insurance

- By entering into an indemnity insurance contract, an insurer promises to indemnify against financial loss suffered by an insured as a result of the happening of a risk transferred to the insurer by the contract.
  - Most insurance is indemnity.
  - The scope of indemnity is invariably expressly dealt with in the contract.
  - It is lawful for an insured to take out more than one indemnity insurance contract for the same risk of loss, but between them, the insurers will not be liable to pay more than the loss suffered by the insured if the risk eventuates.
  - Upon indemnifying or agreeing to indemnify an insured for their loss, an insurer is entitled to subrogate itself to the insured's rights against third parties for the purpose of diminishing its loss.
- Contingency insurance protects against the adverse financial impact of a contingent event that:
  - cannot, or cannot easily, be calculated (for example, the financial value of the loss of an eye); or
  - the insurer does not want to indemnify against (for example, actual loss of income as a result of sickness or accident).
  - By enter into such a contract, the insurer promises to pay an agreed amount upon the happening of a contingent event, irrespective of the actual financial loss that an insured or the beneficiaries of the contract would suffer if such an event were to happen.