THE DOCTRINE OF INSURABLE INTEREST IN NAMIBIA: IS IT PART OF OUR LAW?

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"I the undersigned hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of LLB is my own original work and that I have not used any other sources than those listed in the bibliography and quoted in the references."

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ABSTRACT

The doctrine of insurable interest originated from English law. Under English law, an insurable interest is requirement for a valid contract of insurance. However, Roman-Dutch law did not require that insurance contracts need to have an insurable interest. Under Roman-Dutch law, a contract of insurance is valid regardless of whether or not the insured has an insurable interest. Roman-Dutch law was only concerned with whether the insured had the genuine intention to insure the subject matter of the contract of insurance.

This dissertation argues that the doctrine of insurable interest is not part of our law. Roman-Dutch law should be regarded as our common law of insurance. Roman-Dutch law did not require that an insured must have an insurable interest in order to enter into an insurance contract. Thus, the courts should only be concerned with whether or not the insured had genuine intention to insure the goods.

This dissertation is aimed at contributing towards a legal jurisprudence in terms of which insurers would be prevented from repudiating insurance contracts due to a lack of an insurable interest on the part of the insured party. A legal jurisprudence in terms which there is certainty regarding the fact that insurable interest is not part of our law would help in avoiding or avoid or minimizing the injustice that occurs when consumers pay insurance premiums for years only to later realize that the payment of insurance premiums was in vain since the insurer can repudiate their insurance claim due to a lack of insurable interest by the insured party. Thus, this dissertation tries to contribute towards a legal climate in terms of which insurers would be prevented from repudiating insurance claims due to a lack of insurable interest by the insured, despite the fact that the insurer has already accepted the premiums from the insured.

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CHAPTER 1: Introduction

1.1 Background to the problem:

An insurable interest exists if an insured party can show that they stand to lose something of appreciable commercial value by the destruction of the insured thing.[1] Furthermore, the case of *Phillips v General Accident Insurance Company Ltd*[2], describes insurable interest in the following terms: "man is interested in a thing to whom advantage may attend it… having benefit in the existence of a thing, or prejudice in its destruction". Therefore, an insurable interest exists when an insured party will suffer a loss if a particular property or item is destroyed or if the insured party will suffer a diminution of any of his or her rights. An insurable interest also exists if an insured party will gain something if a particular property or item is preserved.[3]

According to English Law, insurable interest is a prerequisite for all contracts of insurance.[4] However, in terms of Roman-Dutch law, an insurable interest is not a prerequisite for a valid contract of insurance.[5]

1.2 Statement of the problem

Our courts have not been able to reach a consensus as to whether or not the doctrine of insurable interest is a requirement for a valid contract of insurance. Some judges have followed the English Law approach to insurable interest, while others have chosen to follow the Roman-Dutch Law approach to insurable interest. In terms of English law, an insurable interest is a requirement for a valid contract of insurance.[6] However, under Roman-Dutch law, insurable interest is not a prerequisite for a valid contract of insurance.[7]

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[1] *Littlejohn v Norwich Union Fire insurance Society* 1905 TH 374
[2] *Phillips v General Accident Insurance Company Ltd* 1983 (4) SA 652 (W)
[3] Kangueehi, K., & Hengari A. 2006. *Commercial Law Study Guide*. Windhoek: Centre for External Studies, p84.
[4] (ibid.).
[5] *Phillips v General Accident Insurance Company Ltd* 1983 (4) SA 652 (W)
[6] Kangueehi, K., & Hengari A. (2006:84).
[7] *Phillips v General Accident Insurance Company Ltd* 1983 (4) SA 652 (W)

Consequently, there is a lack of consensus as to whether an insurable interest is a requirement for a valid contract of insurance. The lack of consensus regarding the application of the doctrine of insurable interest has resulted in a situation whereby different judges reach differing conclusions in cases which have a similar or an identical set of facts. Therefore, there is uncertainty as to whether or not the doctrine of insurable interest is a requirement of our law.

1.3 Research objectives

The objectives of the dissertation include:

- The dissertation is mainly aimed at trying to determine whether the doctrine of insurable interest is part of our law.
- Thus, the dissertation will attempt to end the current confusion on whether or not the doctrine of insurable interest is a requirement of our law.
- Consequently, the research will mainly focus on trying to determine whether or not Namibia should be following the English Law or Roman-Dutch Law approach regarding whether or not insurable interest is a prerequisite for a valid contract of insurance.
- In order to try and determine whether the English Law or Roman-Dutch Law approach to insurable interest is part of our law in Namibia, the dissertation will entail a discussion the various ways in which insurable interest has been applied in our legal jurisdiction.

1.4 Significance of the research

By ascertaining whether or not the doctrine the doctrine of insurable interest is part of our law, the research can hopefully contribute towards creating legal certainty as to whether or not the doctrine of insurable interest is part of our law. The requirement that an insured must have an insurable interest can result in a situation whereby an insurer can repudiate an insurance contract and refuse to make a payout in the event that an insured party is deemed not to have an insurable interest. If this research concludes

that insurable interest is part of our law, then hopefully this conclusion can also lead to greater consumer awareness regarding the need in order to have an insurable interest in order to prevent insurers from repudiating insurance contracts. However, if the research concludes that the doctrine of insurable interest is not part of our law, then this research can help contribute towards a legal jurisprudence in terms of which insurers would be prevented from repudiating insurance contracts due to a lack of an insurable interest on the part of the insured party.

Therefore, this research can help to protect consumers by creating certainty as to whether or not an insurable interest is a requirement for a valid contract of insurance. Consequently, this can help avoid or minimize the injustice that occurs when consumers pay insurance premiums for years only to later realize that the payment of insurance premiums was in vain since the insurer can repudiate their insurance claim due to a lack of insurable interest by the insured party.

1.5 Literature review

An insurable interest refers to a financial or other interest that an insured person has in the subject matter of the contract of insurance.[8]

The requirement for insurable interest was aimed at distinguishing a contract of insurance from a wagering contract.[9] In terms of indemnity, insurable interest is also used as a yardstick for the determination of loss or damage by the insured party.[10] Furthermore, the requirement of insurable interest is aimed at minimizing the incentive for an insured party to destroy the insured property.[11]

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[8] Law, J., & Martin, E (Eds). 2006. Oxford Dictionary of Law. Oxford: Oxford University Press, p 279.
[9] *Kosmospoulos v Constitution Insurance Co., [1987] 1 S.C.R. 2*
[10] *Manderson t/a Hillcrest Electrical v Standard General Insurance Co Ltd* 1996 (3) SA 434 (D) at 441G
[11] Ndungula, D. 2001. *Should insurable interest be a requirement for the validity of a life insurance contract in Namibia*, an unpublished LLB Dissertation paper by a student at University of Namibia, p20.

Under English law, gambling and wagering used to be legally recognized and enforceable.[12] However, legislative intervention[13] resulted in a situation whereby the courts became unwilling to enforce insurance contracts which related to wagering.[14]

In terms of English law, insurable interest is a prerequisite for valid insurance. Consequently, in cases such as *Steyn v Malmesbury Board of Executors of Executors & Trust and Assurance Co*[15], the court held that insurable interest is a requirement for a valid contract of insurance. Thus, cases such as *Steyn v Malmesbury Board of Executors of Executors & Trust and Assurance Co*[16] have followed the English Law approach regarding insurable interest. Therefore, in terms of English law, insurable interest is necessary in order for there to be a valid contract of insurance.

Insurable interest became a requirement for all contracts of insurance in the Cape Colony and the Orange Free State by virtue of Ordinance 8 of 1879 and Ordinance 5 of 1902 respectively.[17]

In the other provinces of South Africa such as Transvaal and Natal, insurance contracts were governed by Roman-Dutch law.[18] Roman-Dutch Law was only concerned with whether or not the insured person had the genuine intention to insure the goods or whether he took a gamble.[19] In terms of Roman-Dutch Law, insurable interest is only one of the factors used to determine whether the agreement amounts to a wager or not.[20] Thus, in terms of Roman-Dutch Law, an insurable interest is not a prerequisite for a valid contract of insurance.

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[12] Kangueehi, K., & Hengari A. (2006:84).
[13] For example, according to the Marine Insurance (Gambling Policies) Act of 1909, a wagering agreement is not only void, a wagering agreement was also illegal.

[14] *Kosmospoulos v Constitution Insurance Co., [1987] 1 S.C.R. 2*
[15] *Steyn v Malmesbury Board of Executors of Executors & Trust and Assurance Co* 1921 CPD 96
[16] (ibid.).
[17] Reinecke, M. 2010. *Insurable Interest in the Context of Long-term Insurance*. Available at www.ombud.co.za; last accessed on 25 June 2011.
[18] Midgeley, J. 1985. "Spouses and shareholders – insurably interested?" *South African Law Journal*, Volume No. 102 (Issue No 3): p467.
[19] Kangueehi, K., & Hengari A. (2006:84).
[20] *Phillips v General Accident Insurance Company Ltd* 1983 (4) SA 652 (W)

In terms of Proclamation 21 of 1919, the law applicable in the Cape of Good Hope became applicable in South West Africa.[21] Therefore, Proclamation 21 of 1919 incorporated the English doctrine of insurable interest into the law of South West Africa/Namibia.

However, in terms of the Pre-Union Statute Revision Act 43 of 1977, the statutes that were previously applicable in the Cape Province and the Orange Free State were repealed.[22] Hence, Roman-Dutch law became the only applicable common law of insurance.[23]

1.6 Research questions

1. What is the rationale for the requirement of insurable interest?
2. What is the English Law approach regarding the doctrine of insurable interest?
3. What is the Roman Dutch Law approach regarding the doctrine of insurable interest?
4. Does Namibia follow the English or Roman-Dutch Law approach to insurable interest (Is the doctrine of insurable interest part of our law)?
5. If the doctrine of insurable interest is part of our law, then how did it become part of our law (eg. Was insurable interest incorporated into our law by means of case law, through legislation, through a treaty etc)?

1.7 Research Methodology

The determination of whether or not the doctrine of insurable interest is part of our law will be based on documentary research of materials such as books, journals, case law, legislation and the opinions of eminent authors.

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[21] Horn, N., & Bosl A (Eds). 2008. *The Indepenedence of the Judiciary in Namibia*. Windhoek: Macmillan Education Namibia, p45.
[22] Kangueehi, K., & Hengari A. (2006:84).
[23] Midgeley, J. (1985: 467).

1.8 Structure of the dissertation (chapter outline)

The dissertation will first focus on the nature, rationale and the historical development of the doctrine of insurable interest. The research will then proceed to a discussion of the English Law and Roman-Dutch Law approaches to insurable interest. The dissertation will then conclude with an opinion on whether or not the doctrine is part of our law. Therefore, the dissertation will conclude by focusing on whether Namibia should be following the English Law or the Roman-Dutch Law approach to insurable interest.

CHAPTER 2: Nature of the doctrine of insurable interest & the rationale for the doctrine of insurable interest

2.1 Nature of the doctrine of insurable interest

An insurable interest refers to a financial or other interest that an insured person has in the subject matter of the contract of insurance.[24] An insurable interest is also used in order to distinguish an insurance contract from a bet or wager.[25]

In terms of *Refrigerated Trucking v Zive NO Aegis Joined*[26]:

> The ratio seems to be that where the relationship between the person with the legal right in the property and the insured is such that the insured will be worse off in that, for example, he has to forfeit a benefit or be morally responsible, or through circumstances forced, to replace the article the court will recognise that he has an insurable interest. Insurable interest is an economic interest which relates to the risk which a person runs in respect of a thing which is damaged or destroyed, will cause him to suffer an economic loss or, in respect of an event, which if it happens will cause him to suffer an economic loss. It does not matter whether he personally has rights in respect of that article, or whether the event happens to him personally, or whether the rights are those of someone to whom he stands in such a relationship that he has no personal rights in respect of the article, or that the event does not affect him personally, he will nevertheless be worse off if the object is damaged or destroyed, or the event happens.[27]

Furthermore, in *Brightside Enterprises (Pty) Ltd v Zimnat Insurance Co Ltd*[28], the court stated that an insurable interest with regard to a thing does not only arise as a result of ownership of the thing.

Therefore, ownership of a thing is not the only indicator of the existence of an insurable interest in a thing.[29] Persons can have an insurable interest in a thing despite the fact that such person is not the owner of the thing.[30]

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[24] Law, J., & Martin, E (Eds). 2006. Oxford Dictionary of Law. Oxford: Oxford University Press, p 279.
[25] (ibid.).
[26] *Refrigerated Trucking v Zive NO Aegis Joined* 1996 (2) SA 361 (T)
[27] (ibid.).
[28] *Brightside Enterprises (Pty) Ltd v Zimnat Insurance Co Ltd* 2003 (1) SA 318 ZHC
[29] Reinecke, M., & Van der Merwe, S. 1989. *General Principles of Insurance*. Durban: Butterworths, p84.
[30] *Lucena v Craufurd* (1806) 2 Bos & PNR 269 (HL) 302; *Brightside Enterprises (Pty) Ltd v Zimnat Insurance Co Ltd* 2003 (1) SA 318 ZHC

Lucena v Craufurd[31]describes insurable interest in the following terms:

> A man is interested in a thing to whom advantage may arise or prejudice may happen from the circumstances which may attend it…Interest does not necessarily imply a right to the whole or a part of a thing, nor necessarily and exclusively that which may be the subject of privation, but the having some relation to, or concern in the subject of the insurance which relation or concern by the happening of the perils insured against may be so affected as to produce a damage, detriment or prejudice to the person insuring: and where a man is so circumstanced with respect to the matters exposed to certain risks or dangers, as to have a moral certainty of advantage or benefit, but for those risks or dangers he may be said to be interested in the safety of the thing. To be interested in the preservation of the thing is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction. The property of a thing and the interest driveable from it may be different".[32]

Additionally, according to *Littlejohn v Norwich Union Fire Insurance Society*[33], an insurable interest exists if the "insured can show that he stands to lose something of appreciable commercial value by the destruction of the thing".[34]

In *Brightside Enterprises (Pty) Ltd v Zimnat Insurance Co Ltd*[35], a company had entered into an agreement with one of its directors in terms of which the company would use a director's vehicle in order to carry out the business operations of the company. The company insured the director's vehicle.[36] When the vehicle was stolen, the insurer denied liability by claiming that the company (the insured) lacked an insurable interest in the director's vehicle.[37] However, the court held that an insurable interest would also exist where an insured derives a benefit from the existence of a thing.[38] Thus, an insured will have an insurable interest in a thing merely by virtue of the fact that the insured will derive a benefit from the continued existence of the thing.[39]

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[31] (ibid.).
[32] *Lucena v Craufurd* (1806) 2 Bos & PNR 269 (HL)
[33] *Littlejohn v Norwich Union Fire Insurance Society* 1905 TH 374.
[34] (ibid.).
[35] *Brightside Enterprises (Pty) Ltd v Zimnat Insurance Co Ltd* 2003 (1) SA 318 ZHC
[36] (ibid.).
[37] (ibid.).
[38] (ibid.).
[39] (ibid.).

Therefore, a person has an insurable interest in a thing if they stand to derive a benefit from the continued existence of the thing or if they stand to suffer a prejudice by the destruction of the thing.[40]

Thus, an insurable interest exists when an insured will:

- suffer a loss if the subject matter of the insurance contract is destroyed;
- suffer a diminution of his rights;
- gain something from the preservation of the subject matter of the insurance contract.[41]

The doctrine of insurable interest usually functions as a defense which insurers employ in order to justify the non-payment of an insured's claim after the materialisation of a particular insured event.[42]

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[40] *Phillips v General Accident Insurance Company Ltd* 1983 (4) SA 652 (W); *Brightside Enterprises (Pty) Ltd v Zimnat Insurance Co Ltd* 2003 (1) SA 318 ZHC

[41] Kangueehi, K., & Hengari A. (2006:84).

[42] *Steyn v Malmesbury Board of Executors of Executors & Trust and Assurance Co* 1921 CPD 96

2.2 The rationale behind the requirement of insurable interest

There are three policies that serve as the main justifications for the requirement of insurable interest, these policies are:

- the policy against wagering under the guise of insurance;
- the policy favouring limitation of indemnity and
- the policy that is aimed at minimizing the incentive to destroy the insured property.[43]

2.2.1 Wagering under the guise of insurance

The requirement for insurable interest was aimed at distinguishing a contract of insurance from a wagering contract.[44] Insurable interest was aimed at distinguishing unenforceable insurance contracts from unenforceable gaming and wagering contracts.[45] A contract would be unenforceable if it is discovered that the agreement in question amounts to a wagering agreement. [46]

The requirement that an insured must have an insurable interest is a reflection of the then prevailing public policy in favour of the non-enforcement of wagers.[47] The requirement for insurable interest was intended at preventing the use of insurance contracts to gamble or speculate on ships and lives. English legislators were of the view that the above-mentioned gambling and speculation could be curbed by "striking down" insurance contracts where the insured party lacks an insurable interest in the subject matter of the insurance.

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[43] Ndungula, D. (2001:16).
[44] *Kosmospoulos v Constitution Insurance Co., [1987] 1 S.C.R. 2*
[45] (ibid.).
[46] (ibid.).
[47] *Manderson t/a Hillcrest Electrical v Standard General Insurance Co Ltd* 1996 (3) SA 434 (D)

2.2.1 (a) Distinction between contracts of insurance and wagers

Reinecke is of the view that insurance contracts were originally regarded as a "species of wagers".[48] Thus, Reinecke does not agree with the contention that the doctrine of insurable interest was introduced into English law in order to distinguish wagers from contracts of insurance.[49] Instead, Reinecke contends that the concept of insurable interest was introduced into English law in order to distinguish valid wagers from void wagers.[50]

Nevertheless, today contracts of insurance are regarded as being completely distinct from wagers.[51] Whether or not the parties to the contract have an interest in the subject matter of the contract is what determines whether or not the contract in question amounts to a wager or an insurance contract.[52] Thus, if an insured has no interest in the subject matter of the insurance, then the contract in question should be classified as being a wager.[53]

However, Midgeley argues that the view that insurable interest is aimed at distinguishing contracts of insurance from wagers also has basis in terms of Roman-Dutch law.[54] Midgeley states that a contract will be deemed as being a wager if at the time of concluding the contract there is no possibility that insurable interest will arise during the subsistence of the contract.[55] Thus, Midgeley contends that in terms of both English law and Roman-Dutch law, insurable interest is aimed at distinguishing contracts of insurance from wagers.[56]

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[48] Midgeley, J. 1985. "Spouses and shareholders – insurably interested?" *South African Law Journal*, Volume No. 102 (Issue No 3): p473.
[49] (ibid.:472).
[50] (ibid.).
[51] (ibid.:473).
[52] (ibid.).
[53] (ibid.).
[54] (ibid.:475).
[55] (ibid).
[56] (ibid.).

2.2.2 Limitation of indemnity

2.2.2 (a) Distinction between indemnity and non-indemnity insurance

There are two types of insurance contracts, namely: indemnity and non-indemnity insurance contracts.[57]

Indemnity insurance

Indemnity insurance contracts are aimed at protecting patrimonial interests.[58] In terms of indemnity insurance, the insured must have an interest (financial or otherwise) in the non-occurrence of the event that is insured against.[59] In indemnity insurance, the insurer undertakes to pay the insured for the damage which the insured might suffer if the event that is insured against occurs.[60] According to *Castellain v Preston*[61], an insured party can only recover to the extent to which the interest (insurable interest) is damaged. An indemnity policy is aimed at restoring the insured to the position in which they were prior to the loss.[62] An indemnity policy does not entitle an insured party to make a profit out of the occurrence of the event that is insured against.[63] Therefore, an insured is only entitled to the amount that they have insured for.[64] Thus, in terms indemnity insurance, an insured cannot be compensated beyond the extent that they have suffered loss.[65]

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[57] Havenga, P., Havenga, M., Garbers, C., Meiring, I., Schulze, W., Van der Linde, K., & Van der Merwe, T. 1995. *General Principles of Commercial Law*. Cape Town: Juta & Co Ltd, p139.
[58] Reinecke, M. 2010. *Insurable Interest in the Context of Long-term Insurance*. Available at www.ombud.co.za; last accessed on 25 June 2011.
[59] Havenga, P., Havenga, M., Garbers, C., Meiring, I., Schulze, W., Van der Linde, K., & Van der Merwe, T. (1995:143).
[60] Havenga, P., Havenga, M., Garbers, C., Meiring, I., Schulze, W., Van der Linde, K., & Van der Merwe, T. (1995:140).
[61] *Castellain v Preston* (1883) II QBD 380 (CA) 397
[62] Chronis, M. Year of publication unknown. *Insurable Interest: Is it still required?* Available at www.insurancegateway.co.za; last accessed on 22 October 2011.
[63](ibid.)
[64] Kangueehi, K., & Hengari A. (2006:83).
[65] (ibid.).

The insured does not need to have an interest at the moment the contract of insurance is concluded.[66] However, according to *Petreas & Co v London Guarantee and Accident Co Ltd*[67]:

> "[a]n insurable interest must be shown to exist at the time of the loss, for, if there is no interest then, no loss has been suffered, and the insured is not entitled to an indemnity". Thus, an insurable interest must exist at the time a loss occurs.[68]

Therefore, in indemnity insurance, the interest of the insured in the subject matter of the contract of insurance must exist at the time the loss or prejudice is incurred.[69]

Non-indemnity insurance

Non-indemnity insurance contracts are aimed at protecting non-patrimonial interests.[70] In non-indemnity insurance, the insurer undertakes to pay the insured a certain sum of money if the event that is insured against occurs.[71] With non-indemnity insurance, the amount that the insurer pays to the insurer does not need to be equivalent to the damage or amount of loss that the insured person has suffered.[72]

In non-indemnity insurance, the insured must have an interest in the subject matter of the contract of insurance at the time that the contract is entered into.[73] Nevertheless, with non-indemnity insurance, an insured can be able to claim from an insurer even if the insured party lacks an interest at the time the prejudice that was insured against

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[66] Havenga, P., Havenga, M., Garbers, C., Meiring, I., Schulze, W., Van der Linde, K., & Van der Merwe, T. (1995:144). .
[67] *Petreas & Co v London Guarantee and Accident Co Ltd* 1925 AD 371 at 376
[68] (ibid.).
[69] Havenga, P., Havenga, M., Garbers, C., Meiring, I., Schulze, W., Van der Linde, K., & Van der Merwe, T. (1995:144).
[70] Reinecke, M. 2010. *Insurable Interest in the Context of Long-term Insurance*. Available at www.ombud.co.za; last accessed on 25 June 2011.
[71] Havenga, P., Havenga, M., Garbers, C., Meiring, I., Schulze, W., Van der Linde, K., & Van der Merwe, T. (1995:140).
[72] Kangueehi, K., & Hengari A. (2006:83).
[73] Havenga, P., Havenga, M., Garbers, C., Meiring, I., Schulze, W., Van der Linde, K., & Van der Merwe, T.(1995:144).

occurs.[74] Therefore, in non-indemnity insurance, an insurable interest is only required at the time that an insurance contract is entered into.[75]

2.2.2 (b) How the doctrine of insurable interest is aimed at limiting indemnity

In terms of indemnity, an insurer undertakes to indemnify the insured party for patrimonial loss or damage that is suffered as a consequence of the event that was insured against.[76] Indemnity means that an insured party can only be compensated up to the extent that he has suffered a prejudice as a result of the occurrence of the event that was insured against.[77] Accordingly, it has been contended that an insured cannot have an insurable interest with regard to an event that the insured has not insured against. [78] Therefore, insurable interest is employed as a yardstick for loss or damage.

The principle of indemnity has the effect that the insured is only indemnified for a loss that they might suffer instead of gaining when they have not actually suffered a loss.[79] Thus, it can be said that the principle of indemnity is closely related to the prohibition against wagering agreements.[80]

In non-indemnity insurance, the requiring of insurable interest is aimed at preventing a situation whereby insured parties have an incentive to cause the event that has been insured against.[81]

2.2.3 Minimizing the incentive for an insured party to destroy the insured property

The requiring of insurable interest arose out of concern that insurance created an incentive to commit murder or destroy the subject matter of the insurance (moral hazard).[82] Therefore, insurable interest is aimed at eliminating the potential for a moral

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[74] (ibid.).
[75] *Dalby v The India & London Life-Assurance Company* (1854) 15 CB 365 at 391
[76] Ndungula, D. (2001:19).
[77] In terms of *Castellain v Preston* (1883) 11 QBD 380 (CA) at 397, “Only those who have an insurable interest can recover [and they can only recover] to the extent to which [the insured has suffered a loss]”.
[78] *Manderson t/a Hillcrest Electrical v Standard General Insurance Co Ltd* 1996 (3) SA 434 (D) at 441G
[79] Ndungula, D. (2001:19).
[80] (ibid.).
[81] Ndungula, D. (2001:20).
[82] (ibid.).

hazard.[83] A moral hazard exists in situations whereby the existence of insurance increases the incentives for loss.[84] A moral hazard can described as an insurance contract in which the insured has a "sinister counter interest in having the [insured] life come to an end".[85] Hence, an insurable interest exists when the insured party has an interest in the continuation of the insured life.[86]

Therefore, requiring an insurable interest is based on the belief that if the insured has no interest in the subject matter of the insurance, then they are increasingly likely to destroy the subject matter of the insurance in an attempt to receive the proceeds from the insurance policy.[87] Thus, the requirement of insurable interest is aimed at minimizing the incentive for an insured party to destroy the insured property.[88] Consequently, the doctrine of insurable interest requires that insurance could only be taken out by persons or entities which "had an independent interest in the continuing existence of the subject matter".[89]

[83] (ibid.).
[84] (ibid.).
[85] *Grigsby v Russell, 222 U.S. 149, 154-55 (1911)*
[86] (ibid.).
[87] Ndungula, D. (2001:20).
[88] (ibid.).
[89] (ibid.).

CHAPTER 3: Historical development of the doctrine of insurable interest

The doctrine of insurable interest is derived from English law.[90] However, it is worth noting that initially, under English law, an insured party was not required to have an insurable interest in the subject matter of the insurance.[91] Therefore, contracts of insurance were enforceable even if the insured lacked an insurable interest in the subject matter of the insurance. Gambling and wagering was not prohibited under English law.[92] In actual fact, wagers were enforceable under English common law.[93] Therefore, gambling and wagering used to be legally recognized and enforceable.[94]

However, in 1745, the English legislature promulgated the Marine Insurance Act. The Marine Insurance Act prohibited the practice of wagering on ships (marine insurance). The Marine Insurance Act was motivated by legislative concern that insurance policies on the continued safety of property were subject to abuse due to the fact that such insurance policies provided an incentive for the insured party to jeopardize the safety of the insured property.[95] For this reason, the Marine Insurance Act of 1745 prohibited any form of wagering or gaming on British ships or cargoes.[96] Therefore, in terms of the Marine Insurance Act of 1745, any contract of waging or gaming on British ships and cargoes was null and void.[97] The Marine Insurance Act of 1745 introduced an insurable interest requirement with regard to marine insurance in order to prevent the use of insurance contracts to gamble or speculate upon ships and lives.[98]

The Marine Insurance Act of 1745 was subsequently repealed by the Marine Insurance Act of 1906.[99] The Marine Insurance Act of 1906 required that an insured must have an

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[90] Kangueehi, K., & Hengari A. 2006. *Commercial Law Study Guide*. Windhoek: Centre for External Studies, p84.
[91] Ndungula, D. (2001:7).
[92] Browne, D. 1961. *MacGillivray on Insurance Law*. London: Sweet & Maxwell Limited, p351.
[93] Reinecke, M. 2010. *Insurable Interest in the Context of Long-term Insurance*. Available at www.ombud.co.za; last accessed on 25 June 2011.
[94] Kangueehi, K., & Hengari A. (2006:84).
[95] Bennett, H. 1996. *The Law of Marine Insurance*. Oxford: Clarendon Press, p13.
[96] (ibid.).
[97] (ibid.:13-14).
[98] (ibid.:13).
[99] (ibid.:14).

insurable interest in the subject matter of the contract of insurance.[100] A contract of insurance in terms of which the insured party lacks an insurable interest will be regarded as a being a wagering agreement.[101] Any wagering agreement will be regarded as being void.[102] Furthermore, in terms of the Marine Insurance (Gambling Policies) Act of 1909, it is also an offence to enter into a contract of marine insurance if the insured does not have an interest in "…the safe arrival of the ship in relation to which the contract is made or in the safety or preservation of the subject-matter insured, or a bona fide expectation of acquiring such an interest".[103] Therefore, by virtue of the Marine Insurance (Gambling Policies) Act of 1909, a wagering agreement is not only void, a wagering agreement was also illegal.

Consequently, the Marine Insurance Act resulted in a situation whereby the English judiciary became unwilling to enforce insurance contracts which related to wagering.[104] Thus, it can be said that the Marine Insurance Act was the first statutory expression which required that an insured party must have an insurable interest in order to conclude insurance contracts with regard to a particular subject matter.[105]

In 1774, the prohibition against wagering later extended from marine insurance to life insurance by virtue of the Life Assurance Act of 1774. Therefore, the Life Assurance Act of 1774 was only applicable to life insurance.[106]

The Cape Colony inherited the English doctrine of insurable interest by virtue of Ordinance 8 of 1879. Similarly, insurable interest became incorporated into the law of the Orange Free State by virtue of Ordinance 5 of 1902.[107] Thus, the doctrine of insurable interest became part of the law of the Orange Free State and the Cape

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[100] Section 6(1) of the Marine Insurance Act of 1906
[101] Section 4(2) of The Marine Insurance Act of 1906
[102] Section 4 of the Marine Insurance Act of 1906
[103] Section 1 of the Marine Insurance (Gambling Policies) Act of 1909
[104] *Kosmospoulos v Constitution Insurance Co., [1987] 1 S.C.R. 2*
[105] Bennett, H. (1996:14).
[106] Kangueehi, K., & Hengari A. (2006:14).
[107] Reinecke, M. 2010. *Insurable Interest in the Context of Long-term Insurance*. Available at www.ombud.co.za; last accessed on 25 June 2011.

Province by virtue of the above-mentioned legislation.[108] Therefore, insurable interest became a requirement for all contracts of insurance in the Cape Colony and the Orange Free State.[109]

Consequently, the South African provinces of the Cape Province and the Orange Free State applied English insurance law with regard to fire, life and marine insurance.[110] Meanwhile, the insurance contracts in the other provinces of South Africa were subject to Roman Dutch Law.[111]

Roman-Dutch law was only concerned with whether the insured had the genuine intention to insure the subject matter of the contract of insurance or whether the insured had the intention to make a gamble.[112]

Therefore, there were differing insurance laws that were applicable in the various provinces of South Africa.[113] The Cape Province and the Orange Free State were governed by English law of insurance with regard to life, fire and marine insurance.[114] In the other provinces of South Africa such as Transvaal and Natal, insurance contracts were governed by Roman Dutch law.[115] English insurance law was only applicable in the Transvaal and Natal if the relevant English law principles were not in conflict with Roman Dutch law.[116]

In terms of Proclamation 21 of 1919, the law applicable in the Cape of Good Hope became applicable in South West Africa.[117] Therefore, the doctrine of insurable interest that was part of the law of the Cape became part of the law of South West Africa/Namibia by virtue of Proclamation 21 of 1919.

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[108] Reinecke, M. 2010. *Insurable Interest in the Context of Long-term Insurance*. Available at www.ombud.co.za; last accessed on 25 June 2011.
[109] Kangueehi, K., & Hengari A. (2006:84).
[110] (ibid.:83).
[111] (ibid.).
[112] (ibid.:84).
[113] Midgeley, J. (1985:466).
[114] (ibid.).
[115] (ibid.:467).
[116] (ibid.).
[117] Horn, N., & Bosl A (Eds). 2008. *The Indepenedence of the Judiciary in Namibia*. Windhoek: Macmillan Education Namibia, p45.

However, in terms of the Pre-Union Statute Revision Act 43 of 1977, the statutes that were previously applicable in the Cape Province and the Orange Free State were repealed.[118] Section 1 of the Pre-Union Statute Law Revision Act (Act 43 of 1977) repealed the statutes of the Cape Province and the Orange Free State. Therefore, from 1977 onwards, the courts in the Cape Province, the Orange Free State as well as the courts in Namibia are no longer bound by English law of insurance.[119] Thus, from 1977 onwards, we are governed by the same law of insurance (Roman Dutch law).[120] Hence, Roman-Dutch law became the only applicable common law of insurance.[121]

[118] Kangueehi, K., & Hengari A. (2006:84).
[119] Midgeley, J. (1985:469).
[120] (ibid.:467).
[121] (ibid.).

CHAPTER 4: English law approach regarding insurable interest

The Marine Insurance Act of 1745 prohibited any form of wagering or gaming on British ships or cargoes.[122] Hence, In terms of the Marine Insurance Act of 1745, any contract of waging or gaming on British ships and cargoes was null and void.[123]

The Marine Insurance Act of 1745 was subsequently repealed by the Marine Insurance Act of 1906.[124] The Marine Insurance Act of 1906 required that an insured must have an insurable interest in the subject matter of the contract of insurance.[125] A contract of insurance in terms of which the insured party lacks an insurable interest will be regarded as a being a wagering agreement.[126] Any wagering agreement will be regarded as being void.[127] Furthermore, in terms of the Marine Insurance (Gambling Policies) Act of 1909, it is also an offence to enter into a contract of marine insurance if the insured does not have an interest in "…the safe arrival of the ship in relation to which the contract is made or in the safety or preservation of the subject-matter insured, or a bona fide expectation of acquiring such an interest".[128] Therefore, by virtue of the Marine Insurance (Gambling Policies) Act of 1909, a wagering agreement is not only void, a wagering agreement is also illegal.

In 1774, the prohibition against wagering later extended from marine insurance to life insurance by virtue of the Life Assurance Act of 1774[129].

The Life Assurance Act of 1774 was aimed at preventing the practice of wagering under the guise of insurance contracts.[130] Hence, section 1 of the Life Assurance Act of 1774 provided that:

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[122] Midgeley, J. (1985:467).
[123] Bennett, H. (1996:13-14).
[124] (ibid.:14).
[125] Section 6(1) of the Marine Insurance Act of 1906
[126] Section 4(2) of The Marine Insurance Act of 1906
[127] Section 4 of the Marine Insurance Act of 1906
[128] Section 1 of the Marine Insurance (Gambling Policies) Act of 1909
[129] Life Assurance Act 1774, 14 Geo. 3, c. 48
[130] Reinecke, M., & Van der Merwe, S. 1989. *General Principles of Insurance*. Durban: Butterworths, p82.

> No insurance can be effected on lives or other events in which the person for whose benefit the policy is made has no interest, or by way of wagering.[131]

According to the Life Assurance Act[132], the requirement that there must be an insurable interest is a peremptory provision.[133] Thus, a court must *mero motu* regard an insurance contract that lacks an insurable interest as being illegal and void.[134] The Life Assurance Act requires that an insurable interest must exist at the time that the insurance contract is entered into.[135] If an insurance contract is concluded in the absence of an insurable interest by the insured, then such contract is unenforceable due to the fact that such contract is illegal and void.[136]

Insurable interest must exist at the time of entering into indemnity and non-indemnity contracts.[137] Therefore, in terms of the Life Assurance Act, insurable interest is a requirement of both indemnity and non-indemnity insurance.

Furthermore, section 3 of the Life Assurance Act of 1774[138] provides that no greater sum may be recovered than the value of the interest.[139] Therefore, in terms of the Life Assurance Act, an insured party can only be compensated up to the extent that he has suffered a prejudice as a result of the occurrence of the event that was insured against.[140] Hence, an insured cannot have an insurable interest with regard to an event that the insured has not insured against.[141]

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[131] Reinecke, M., & Van der Merwe, S. 1989. *General Principles of Insurance*. Durban: Butterworths, p81.
[132] Life Assurance Act 1774, 14 Geo. 3, c. 48
[133] *Re London County Commercial Reinsurance Office Ltd* 1922 2 Ch 67 80.
[134] *Gedge v Royal Exchange Assurance Corp* 1900 2 QB 214.
[135] *Dalby v India and London Life Assurance Co* (1854) 15 CB 365 (Ex Ch).
[136] Havenga, P. 1994. "Life insurance contracts and the requirement of an insurable interest". *South African Journal of Mercantile Law*, Volume 6 (Issue No 3): p348.
[137] Reinecke, M., & Van der Merwe, S. (1989:82).
[138] Life Assurance Act 1774, 14 Geo. 3, c. 48
[139] Reinecke, M. 2010. *Insurable Interest in the Context of Long-term Insurance*. Available at www.ombud.co.za; last accessed on 25 June 2011.
[140] In terms of *Castellain v Preston* (1883) 11 QBD 380 (CA) at 397, "Only those who have an insurable interest can recover [and they can only recover] to the extent to which [the insured has suffered a loss]".
[141] *Manderson t/a Hillcrest Electrical v Standard General Insurance Co Ltd* 1996 (3) SA 434 (D) at 441G

The existence of an insurable interest can be used in order to determine the legality of an insurance contract.[142] Thus, a contract which lacks an insurable interest by the parties will be regarded as being unlawful (illegal) and void.[143] Therefore, a contract which lacks an insurable interest will not be enforceable, not merely because the contract amounts to a wager, the contract will also be unenforceable by virtue of the fact that the contract is void and illegal.[144]

Consequently, Gordon and Getz contend that insurable interest is a prerequisite for a valid contract of insurance.[145] Therefore, according to Gordon and Getz, if there is no insurable interest, then there is no valid contract of insurance.[146] Thus, under English law of insurance, the requirement for insurable interests is a legal requirement for the validity of the contract.[147] In order to have a valid contract of insurance, there needs to be an insurable interest.[148] Hence, in *Steyn v Malmesbury Board of Executors of Executors & Trust and Assurance Co*[149], the court held that insurable interest is a requirement for a valid contract of insurance.

***Steyn v Malmesbury Board of Executors of Executors & Trust and Assurance Co*[150]:**

In *Steyn v Malmesbury Board of Executors of Executors & Trust and Assurance Co*[151], the owner of farm had entered into a lease agreement with a tenant. In terms of the lease agreement, the tenant was prohibited from removing chaff, straw or manure from the farm.[152] The farm-owner insured the by-products of the tenant's crop (including the chaff).[153] The chaff subsequently burned down and the farm owner tried to put an

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[142] Reinecke, M., & Van der Merwe, S. (1989:81).
[143] (ibid.).
[144] (ibid.).
[145] Havenga, P. 1994. "Life insurance contracts and the requirement of an insurable interest". *South African Journal of Mercantile Law*, Volume 6 (Issue No 3): p347.
[146] Kangueehi, K., & Hengari A. (2006:91).
[147] Joubert W.A. (2002) *The Law of South Africa,* First Reissue Vol. 12 Butterwoths, Durban at 59
[148] *Lynco Plant Hire & Sales v Univem Versekeringsmakelaars* 2002 (5) SA 85 TPA
[149] *Steyn v Malmesbury Board of Executors of Executors & Trust and Assurance Co* 1921 CPD 96
[150] (ibid.).
[151] (ibid.).
[152] (ibid.).
[153] (ibid.).

insurance claim with the insurer.[154] However, the insurer challenged the farm owner's claim based on the contention that farm owner lacked an insurable interest and was thus ineligible to benefit.[155]

The court in *Steyn v Malmesbury Board of Executors of Executors & Trust and Assurance Co*[156] followed the English law approach to insurable interest and concluded that insurable interest is a prerequisite for a valid insurance.[157] The court stated that the chaff would be a valuable fertilizer for the farm.[158] Hence, the court concluded that the farm owner had an insurable interest in the chaff.[159]

[154] (ibid.).
[155] (ibid.).
[156] (ibid.).
[157] (ibid.).
[158] (ibid.).
[159] (ibid.).

CHAPTER 5: Roman-Dutch Law approach to insurable interest

Insurable interest is a requirement of English law.[160] Even though the doctrine of insurable interest is a part of English law, insurable interest was never part of Roman-Dutch law.[161] Roman-Dutch law was only concerned with whether the insured had the genuine intention to insure the subject matter of the contract of insurance or whether the insured had the intention to make a gamble.[162] Therefore, the intention with which parties conclude an insurance contract is of great significance in determining whether or not the contract in question is an insurance contract or a wagering agreement.[163]

According to Reinecke and van der Merwe, insurable interest is not a requirement of our law.[164] In non-indemnity insurance, insurable interest serves only to determine whether or not the insured had the intention of entering into a contract of insurance.[165] Thus, insurable interest is not a requirement under Roman Dutch law.[166]

Under Roman-Dutch law, a contract of insurance is valid regardless of whether or not the insured has an insurable interest.[167] Thus, Roman-Dutch law did not require that insurance contracts need to have an insurable interest. Therefore, under Roman-Dutch law, the existence of an insurable interest was not necessary in order to determine the validity of an insurance contract.[168]

Roman-Dutch law was more concerned with the prohibition of wagering agreements.[169] Consequently, Roman-Dutch law already had a ban on wagers in an attempt to prevent

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[160] *Steyn v AA Onderlinge Assuransie Assosiasie* 1985 (4) SA 7 (T)
[161] Kangueehi, K., & Hengari A. (2006:88).
[162] (ibid.:84).
[163] Havenga, P., Havenga, M., Garbers, C., Meiring, I., Schulze, W., Van der Linde, K., & Van der Merwe, T. (1995:143).
[164] Kangueehi, K., & Hengari A. (2006:92).
[165] (ibid.).
[166] (ibid.:90).
[167] Reinecke, M., & Van der Merwe, S. 1984. "Insurable interest and reasonable precautions: blessed be the meek (and gullible?)". *South African Law Journal*, Volume No. 6 (Issue No 3): p609.
[168] Reinecke, M. 2010. *Insurable Interest in the Context of Long-term Insurance*. Available at www.ombud.co.za; last accessed on 25 June 2011.
[169] Reinecke, M., & Van der Merwe, S. (1989:81).

the practice of wagering under the guise of insurance contracts.[170] Thus, wagering agreements were unenforceable in terms of Roman-Dutch law.[171]

Insurable interest is only used in order to distinguish an enforceable insurance contract from a wager.[172] Consequently, the court should not be concerned with whether or not the insured has an insurable interest or not.[173] Instead, the court should only be concerned with whether or not the insured party has taken a wager.[174]

***Phillips v General Accident Insurance Co*[175]:**

In *Phillips v General Accident Insurance Co*[176], a man had insured an engagement ring which he had bought for his wife.[177] The insurer had been aware of the fact that the ring belonged to the insured person's wife.[178] Nevertheless, the insurer entered into the insurance agreement with the husband and the insurer also accepted the payment of premiums by the husband.[179] The ring subsequently got lost and when the husband tried to put an insurance claim, the insurer claimed that the husband (the insured party) lacked an insurable interest in relation to the ring.[180] However, the court concluded that the husband did have an insurable interest in his wife's ring.[181] The court stated that the husband had an insurable interest in the ring by virtue of the fact that he would be financially responsible for the replacement of the ring.[182] Therefore, according to the case of *Phillips v General Accident Insurance Co*[183], a person will have an insurable interest in a thing if they are financially responsible for the replacement of the thing.

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[170] Reinecke, M. 2010. *Insurable Interest in the Context of Long-term Insurance*. Available at www.ombud.co.za; last accessed on 25 June 2011.
[171] Joubert, W (Ed). 1988. *The Law of South Africa*. Durban: Butterworths, p87.
[172] *Steyn v AA Onderlinge Assuransie Assosiasie* 1985 (4) SA 7 (T)
[173] (ibid.).
[174] (ibid.).
[175] *Phillips v General Accident Insurance Company Ltd* 1983 (4) SA 652 (W) 659 A-B.
[176] (ibid.).
[177] (ibid.).
[178] (ibid.).
[179] (ibid.).
[180] (ibid.).
[181] (ibid.).
[182] (ibid.).
[183] (ibid.).

Furthermore, the court in *Phillips v General Accident Insurance Company Ltd*[184] remarked that too much emphasis is placed on the doctrine of insurable interest.[185] More attention should instead be focused on whether the contract amounts to a betting or wagering agreement.[186] The determination of whether or not a contract amounts to a betting or wagering agreement should be based on surrounding circumstances such as the intention of the parties.[187] Insurable interest is only one of the factors that are used in order to determine whether or not a contract amounts to a wager or not.[188] Therefore, one should also look at other factors in order to determine whether or not the contract in question amounts to a wager or not.[189] Thus, the intention of the parties is one of the factors that a court must look at in order to determine whether the contract can be classified as a wager or not.[190]

In the event of doubt or uncertainty as to whether or not the contract is a betting or wagering agreement or not, then the insured should be able to receive the benefit since the insurer has accepted the payment of premiums by the insured party.[191]

Pre-Union Statute Revision Act 43 of 1977:

The Pre-Union Statute Revision Act 43 of 1977 repealed the legislation that had brought English law of insurance into our law.[192] Thus, by virtue of the Pre-Union Statute Law Revision Act, our courts are no longer bound by English legal provisions such as the Life Assurance Act.[193] Since the Pre-Union Statute Law Revision Act (General Law Amendment Act) of 1977 abolished the application of the Life Assurance Act (Gambling

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[184] (ibid.:659 B-C).
[185] (ibid.).
[186] (ibid.).
[187] (ibid.).
[188] (ibid.).
[189] (ibid.).
[190] *Phillips v General Accident Insurance Company Ltd* 1983 (4) SA 652 (W) 659 E-H.
[191] (ibid.).
[192] Reinecke, M. 2010. *Insurable Interest in the Context of Long-term Insurance*. Available at www.ombud.co.za; last accessed on 25 June 2011.
[193] Reinecke, M., & Van der Merwe, S. (1989:81).

Act) in terms of our law, then we should only apply Roman Dutch law.[194] Consequently, insurable interest is no longer applicable in terms of our law.

Thus, by virtue of the Pre-Union Statute Revision Act, Roman-Dutch law should be regarded as the common law of insurance in terms of our law.[195] For this reason, the court in *Mutual and Federal Co Ltd v Oudtshoorn Municipality*[196] stated that our law (of insurance) is based on Roman Dutch law principles. Therefore, a contract of insurance will be valid regardless of whether or not the insured has an insurable interest.

[194] *Steyn v AA Onderlinge Assuransie Assosiasie* 1985 (4) SA 7 (T)
[195] *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A)
[196] (ibid).

CHAPTER 6: Conclusion

6.1 Summary of key principles and ideas

An insurable interest refers to a financial or other interest that an insured person has in the subject matter of the contract of insurance.[197] Ownership of a thing is not the only indicator of the existence of an insurable interest in a thing.[198] Persons can have an insurable interest in a thing despite the fact that such person is not the owner of the thing.[199] Additionally, an insured will have an insurable interest in a thing merely by virtue of the fact that the insured will derive a benefit from the continued existence of the thing.[200] Thus, a person has an insurable interest in a thing if they stand to derive a benefit from the continued existence of the thing or if they stand to suffer a prejudice by the destruction of the thing.[201]

The doctrine of insurable interest is derived from English law.[202] Under English law of insurance, the requirement for insurable interests is a legal requirement for the validity of the contract.[203] In order to have a valid contract of insurance, there needs to be an insurable interest.[204] Hence, in *Steyn v Malmesbury Board of Executors of Executors & Trust and Assurance Co*[205], the court held that insurable interest is a requirement for a valid contract of insurance.

Even though the doctrine of insurable interest is a part of English law, insurable interest was never part of Roman-Dutch law.[206] Roman-Dutch law was only concerned with whether the insured had the genuine intention to insure the subject matter of the

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[197] Law, J., & Martin, E (Eds). (2006:279).
[198] Reinecke, M., & Van der Merwe, S. (1989:84).
[199] *Lucena v Craufurd* (1806) 2 Bos & PNR 269 (HL) 302; *Brightside Enterprises (Pty) Ltd v Zimnat Insurance Co Ltd* 2003 (1) SA 318 ZHC

[200] *Phillips v General Accident Insurance Company Ltd* 1983 (4) SA 652 (W); *Brightside Enterprises (Pty) Ltd v Zimnat Insurance Co Ltd* 2003 (1) SA 318 ZHC

[201] (ibid.).

[202] Kangueehi, K., & Hengari A. (2006:84).
[203] Joubert W.A. (2002) *The Law of South Africa,* First Reissue Vol. 12 Butterwoths, Durban at 59
[204] *Lynco Plant Hire & Sales v Univem Versekeringsmakelaars* 2002 (5) SA 85 TPA
[205] *Steyn v Malmesbury Board of Executors of Executors & Trust and Assurance Co* 1921 CPD 96
[206] Kangueehi, K., & Hengari A. (2006:88).

contract of insurance or whether the insured had the intention to make a gamble.[207] Under Roman-Dutch law, a contract of insurance is valid regardless of whether or not the insured has an insurable interest.[208] Thus, Roman-Dutch law did not require that insurance contracts need to have an insurable interest.

6.2 Insurable interest does not form part of our law!

6.2.1 Effect of Pre-Union Statute Revision Act 43 of 1977 and other legislation:

The Pre-Union Statute Revision Act 43 of 1977 repealed the legislation that had brought English law of insurance into our law.[209] Hence, Roman-Dutch law should be regarded as our common law of insurance.[210] Roman-Dutch law did not require that an insured must have an insurable interest in order to enter into an insurance contract. Consequently, insurable interest is no longer applicable in terms of our law. Therefore, in terms of our law, a contract of insurance will be valid regardless of whether or not the insured has an insurable interest.[211] Thus, insurable interest does not form part of our law.

There is no justification for applying English legal principles such as the doctrine of insurable interest.[212] We should instead rely on Roman-Dutch law principles regarding insurance.[213] Consequently, the courts should not be concerned with whether or not the insured has an insurable interest or not.[214] The insured should be able to receive the benefit since the insurer has accepted the payment of premiums by the insured party.[215] Therefore, an insured party who has entered into a contract of insurance should be entitled to receive the benefit from the insurer irrespective of the existence or non-existence of an insurable interest.

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[207] (ibid.:84).
[208] Reinecke, M., & Van der Merwe, S. (1984:609).
[209] Reinecke, M. 2010. *Insurable Interest in the Context of Long-term Insurance*. Available at www.ombud.co.za; last accessed on 25 June 2011.
[210] *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A)
[211] Reinecke, M., & Van der Merwe, S. (1984:609).
[212] *Steyn v AA Onderlinge Assuransie Assosiasie* 1985 (4) SA 7 (T)
[213] (ibid.).
[214] (ibid.).
[215] *Phillips v General Accident Insurance Company Ltd* 1983 (4) SA 652 (W) 659 B-C.

Furthermore, it is worth noting that there is no mention of insurable interest in either the Long-Term Insurance Act (Act 5 of 1998) or the Short-Terms Insurance Act (Act 4 of 1998). Therefore, this serves as further indication of the fact that insurable interest is not a requirement for the validity of an insurance contract in terms of our law.

6.2.2 The need for legislative intervention

As mentioned earlier, the Pre-Union Statute Revision Act 43 of 1977 repealed the legislation that had brought English law of insurance into our law.[216] Furthermore, based on *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality*[217], Roman-Dutch law is our common law of insurance. However, in spite of the Pre-Union Statute Revision Act and the decision of the court in *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality*[218], there still remains confusion and uncertainty among some as to whether the doctrine of insurable interest is a requirement of our law.

The uncertainty that exists regarding the application of the doctrine of insurable interest can best be solved by means of legislative intervention.[219] To this end, in *Manderson v Standard General*[220], the court remarked that the issue of insurable interest is a complicated matter and it can only be best addressed by the legislature. Therefore, legislative intervention is needed in order to end the reluctance of some judicial officers to recognize the fact that insurable interest does not form part of our law.

The requirement that an insured must have an insurable interest can result in a situation whereby an insurer can repudiate an insurance contract and refuse to make a payout in the event that an insured party is deemed not to have an insurable interest.[221] For example, in *Steyn v Malmesbury Board of Executors & Trust Assurance* Co[222] the court

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[216] Reinecke, M. 2010. *Insurable Interest in the Context of Long-term Insurance*. Available at www.ombud.co.za; last accessed on 25 June 2011.
[217] *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419
[218] (ibid.).
[219] *Manderson v Standard General* 1996 (3) SA 434 (D)
[220] (ibid.).
[221] *Steyn v Malmesbury Board of Executors & Trust Assurance* Co 1921 CPD 96
[222] (ibid.).

upheld an insurer's right to repudiate an insurance contract due to an apparent lack of an insurable interest by the insured party.

Legislative intervention which clarifies the role of insurable interest in insurance contracts would help to protect consumers by preventing a situation whereby insured parties have their insurance claims rejected by insurers despite the fact that the insured party has already paid the premiums in terms of the insurance contract. Therefore, legislative intervention would help contribute towards a legal jurisprudence in terms of which insurers would be prevented from repudiating insurance contracts due to a lack of an insurable interest on the part of the insured party.

Legislative action which prevents insurers from repudiating insurance contracts due to a lack of an insurable interest on the part of the insured party would also help be in keeping with the principle of sanctity of contract. In terms of sanctity of contract, contracts which parties enter into must be respected and upheld.[223] Accordingly, if an insurer freely enters into a contract with an insured despite the fact that the insured party lacks an insurable interest in the subject matter of the contract of insurance, then such insurer should be prevented from arbitrarily resiling from such contract. As long as the insured has complied with the terms of the contract, then the insurer should not be entitled to withdraw from the contract and running away from its obligations.

Additionally, the insurable interest requirement constitutes an infringement on the concept of freedom of contract.[224] In terms of freedom of contract, parties should be free to decide on the content of their insurance contracts.[225] The insurable interest requirement infringes on the ability of contracting parties to freely decide on the terms of their contracts (insurance contracts). Therefore, legislative intervention which prevents insurers from repudiating insurance contracts due to a lack of an insurable interest on the part of the insured party would also help uphold the concept of freedom of contract.

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[223] Ndungula, D. (2001:37).
[224] Awoye, O. 2009. *A study of insurable interest in UK life assurance*, an unpublished PhD thesis by a student at the University of Manchester, School of Law. Available at www.law.manchester.ac.uk; last accessed on 21 October 2011.
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