Section 37 (3)[131] provides that an express warranty does not exclude an implied warranty, unless it be inconsistent therewith.

Effect of Breach of a Warranty

A breach of warranty has the same effect as a breach of condition in other branches of law.[132] The assured is discharged from further liability on proof of breach of warranty. Section 36 (2)[133] provides that is no defence for the assured that the breach has been remedied and the warranty complied with before loss. But the assured may prove that a breach of warranty is waived,[134] or that by reason of change of circumstances, the warranty ceases to be applicable to the circumstances of the contract, e.g. when a ship during war is warranted to sail with a convoy, but if peace is made, the warranty becomes inapplicable, or the compliance with the warranty is rendered unlawful by any subsequent law. These are the circumstances when a breach of warranty is excused by law.[135] It is common practice in modern contracts to include a special clause that in case a particular warranty is covered the assured can still be covered in spite of its breach if he pays an additional premium to be arranged.[136] The effects of breach are the same whether it is an express warranty or an implied one. The insurer is the person who alleges the breach of warranty and the burden of proof lies on him to prove the breach.[137]

Warranties Dealt with Under the Act

The warranties expressly dealt with under the Act may be grouped under three heads viz, (a) warranties implied in every contract,[138] (b) warranties implied only when certain other warranties are specified,[139] (c) warranties not implied.[140] Therefore the implied warranties in a marine insurance contract are contained in the first two types.

Implied Warranties

As noted above there are certain warranties always implied in marine insurance policies of certain types and some others implied in policies containing certain express warranties:

Implied in Every Case

Warranty of Seaworthiness of Ship There is an implied warranty of seaworthiness of the ship while there is no implied warranty that the goods are seaworthy.[141] The section starts with the words in a voyage policy which suggests that there is no implied warranty of seaworthiness in a time policy; although under sub-s (5) the assured is precluded from recovering when the vessel is sent to sea in an unseaworthy condition and the proximate cause of the loss was unseaworthiness, of which the assured has neither actual or constructive knowledge.[142] Even with regard to the ship, she, to be seaworthy, need not be absolutely seaworthy. It may be noted that the state of seaworthiness is a relative and not an absolute one. Section 41 (3) says that a ship is seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured.[143] The seaworthiness of a vessel includes the crew, in terms of both numbers and competence with reference to forseeable circumstances of the voyage.[144] The vessel was held to be unseaworthy by reason of defects in the fire-fighting equipment, and the masters massive ignorance with reference to its operation.[145]

A ship may be seaworthy for one port and may not be for another, may be seaworthy only for a river but not for ocean or sea, may be seaworthy for a particular route of voyage but not for another, may be seaworthy for a calm deep sea, but not a whaling voyage etc. So what is to be determined for the purposes of this implied warranty isis the ship fit for the voyage insured? The ship may not be seaworthy for other voyages or adventures but it is sufficient if it is seaworthy enough to encounter the ordinary perils of the particular adventure that is insured. She need not be seaworthy again throughout the voyage. What is required is that she should be seaworthy for a particular adventure insured at the commencement of the voyage. Section 41 (1) says that in a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.[146] But where the voyage is performed in different stages, during which the ship requires different kinds of or further preparation or equipment, at the commencement of each such stage there is an implied warranty of seaworthiness of the ship for that stage in respect of such preparation or equipment for the purposes of that stage. For example, in *Quebec Marine Insurance Co v Commercial Bank of Canada* the policy was taken on a ship on a journey from Montreal to Halifax. At the time the ship sailed there was a defect in her boiler which did not appear in the river until she got into the sea. She was put back to port, repaired and then proceeded on her voyage but was lost in bad weather. It was held that the ship was not seaworthy for the adventure at the commencement of the voyage though she was made seaworthy later and hence it was held that the insurer was not liable.[147] This case also illustrates the point that it is no defence to say that the breach has been remedied and the warranty complied with before loss.[148]*Greenock Steamship Co v Maritime Insurance Co* illustrates the voyage at

stages. In that case the policy was on a ship on a round voyage from England to port or ports in South America with liberty to call at any port. The ship called at Montevideo and her next port was St Vincent. At Montevideo she neglected to take sufficient coal to reach the next port and as a consequence she had to burn some of her fittings and cargo as fuel and claimed the loss. It was held that for coaling purposes the voyage is divided into stages and as to her coaling equipment at Montevideo she was not seaworthy and hence the insurer was not liable for the loss incurred by burning the fittings and cargo.[149] The insurer is liable to the extent the ship is seaworthy. In *Bicard v Shapard* the policy was on copper at and from port *H* and port *N* to *S* At *H* 150 tons and at *N* 250 tons, were loaded which was too heavy for the ship, and the copper was lost. It was held by the Privy Council that the insurer were liable for the loss of first 150 tons and not for the rest treating the policy at stages.[150]

Even if the ship is seaworthy in itself, she may not be seaworthy for the particular adventure. Again if the ship is not seaworthy at any stage of the adventure if the assured is privy to the act of sending an unseaworthy ship the insurer is not liable for any loss attributable to that act.[151] In *Thomas v Tyne and Wear Insurance Ass* Lord Atkin observed that where a ship is sent to sea in a state of unseaworthiness in two respects, the assured being privy to the one and not privy to the other, the insurer is only protected if the loss was attributable to the particular unseaworthiness to which the assured was privy.[152] In *Compania Maritima San Bassils SA v Oceans Mutual Underwriting Ass* (*Bermuda*) the meaning of the word privy in *s 39 (5) Marine Insurance Act* (Comparable to s 41 of the Indian Act) is clarified. When insured goods were lost, in a claim against the insurer, the insurer refused to indemnify on the ground that the ship was sent to sea in an unseaworthy condition with the privity of the assured. The court held that if the ship is sent to sea in an unseaworthy condition with the knowledge and concurrence of the assured personally, the insurer is not liable for any loss attributable to unseaworthiness, that is to unseaworthiness of which he knew, actually or constructively, and in which he concurred. The court also observed that:

> If the shipowner satisfied the court that he did not know the fact or did not realise that they rendered the ship unseaworthy, then he ought not to be held privy to it, even though he was negligent in not knowing.[153]

The burden of proving that a ship is unseaworthy, at the relevant time lies on the insurer to protect himself normally except in cases where the maxim *res ipsa loquitur* applies. In those cases, where the maxim applies, he is relieved of the burden because the thing speaks for itself.

Warranty of Legality [154] The Act says that there is an implied warranty that the adventure insured is a lawful one, and that, so far as the assured can control the matter, the adventure shall be carried out in a lawful manner.[155] An adventure will usually be unlawful when its performance involves a breach either of local or of foreign law. Broadly speaking, an adventure is illegal if it is prohibited by statute or contrary to good morals or public policy.[156] Illegality of part of an adventure renders the whole adventure void if the illegal part is not severable from and forms an integral part of the whole adventure. Not only the adventure insured must be lawful, but the way in which it is carried out should also be lawful unless the assured can say that the illegality crept in in the manner of carrying out the adventure for reasons beyond his comprehension and control. For example, in *Pipon v Cope*, where the ship is arrested in England for the smuggling operations of the master with the connivance of the owner, it was held that the insurer is not liable.[157] On the other hand in *Wilson v Ranking* the master stowed a part of the cargo (timber) on deck and sailed without a certificate from the clearing office which is required by the Customs Consolidation Act 1853. The master did this without the knowledge of the owner. The timber was lost due to perils of the sea. It was held that the insurer is liable as the owner was unaware of the illegal way in which the master acted.[158] Where a voyage is unlawful an insurance upon such voyage is invalid. Mistake of law is no excuse and therefore a contract to do an unlawful act is void, whether the parties know the law or not. This warranty applies only to Marine Insurance.

In *Euro-Diam Ltd v Batherst*, the plaintiffs, diamond merchants in London, as desired by their customer insured their goods in the form of Lloyds slip and sent the diamonds to a German firm, on sale or return basis with an understated invoice which would enable the customer to avoid German custom duty. One of the objections of the insurer was that the implied warranty in s 41 that the adventure would be carried out lawfully was broken. But the court rejected the contentions on the ground that this section does not apply to non-marine policies and policy in question is of non-marine nature. Section 41 of the English Act is adopted in India as *s 43 of the Marine Insurance Act 1963*.[159] But where goods illegally imported without declaration or paying the excise duty were insured against theft, the insurer not being aware that they are uncustomed articles liable to be forfeited, though the policy is not tainted with illegality, it has been held that it is against public policy to indemnify the insured against their loss as it helps him to derive profit from his deliberate breach of law.[160] In *Waugh v Morris* it was held that where a contract can be performed in more than one way and only one or some of the ways of doing it is unlawful, the contract

cannot be avoided by the insurer unless it can be shown that the parties intended to carry out the contract in an illegal way.[161]

Supervening Illegality by Subsequent Hostility

A declaration of war by England operates as an Act of Parliament prohibiting all trading and business intercourse with the enemy. So when a policy is taken on a voyage to a port and war is declared and the destination port becomes an enemy port, the voyage becomes illegal and must be abandoned.[162]

Warranties Implied from an Express Warranty

Where there is an express warranty of (a) neutrality, or (b) good safety, certain warranties are implied from those express warranties.

Warranty of Neutrality: Section 36 Section 36 (1) says where insurable property, whether ship or goods, is expressly warranted neutral, there is an implied condition that the property shall have a neutral character at the commencement of the risk, and that so far as the assured can control the matter, its neutral character shall be preserved during the risk. This clause deals with the cases where the subject-matter of the policy is either a ship or goods. The next clause deals with the cases where the subject-matter of the policy is a ship and it is expressly warranted to be neutral in which case s 36 (2) says that there is an implied condition that so far as the assured can control the matter, she shall be properly documented. A ship is said to be properly documented when she carries the necessary papers to establish her neutrality and that she shall not falsify or suppress her papers, or use simulated papers. The clause further provides that if any loss occurs through breach of this condition the insurer may avoid the contract.[163]

Warranty of Good Safety [164]When the assured knows the condition of the subject-matter of insurance or but for his wilful abstention from inquiry which he ought to have made or gross negligence he would have known it is his duty to disclose that fact under his duty of disclosure dealt with under s 18, and if he fails to do it inspite of his knowledge, actual or constructive, the insurer can avoid the contract. If he does not know the condition, he may insert the clause lost or not lost.[165] If either party knows that the goods are safe or destroyed and suppresses the fact, the other can avoid the contract. When the assured genuinely believes that the subject- matter of the policy is well or in good safety then only s 40 comes into play. It must therefore be read subject to s 20 as to disclosure of facts known to the assured before the contract is concluded. Section 40 reads:

> Where the subject-matter insured is warranted well or in good safety on a particular day, it is sufficient if it be safe at any time during that day.[166]

Where the insurance policy required the insured vessel, when not in use, to be safely anchored or moored or secured with proper watch and ward, held, temporary withdrawal of watch and ward from the vessel for shelter against wind and rain for a few hours did not amount to violation of warranty clause.[167]

No Implied Warranty

The statute makes it clear that there is no implied warranty (a) of nationality,[168] and (b) that the goods are seaworthy.[169] Section 39 states that there is no implied warranty as to the nationality of a ship, not even that her nationality shall not be changed during the risk.[170] In cases where the assured voluntarily changes the nationality of the ship and exposes the ship to risk of hostile capture and if the ship is captured, possible, the loss would be attributed to the act of the assured rather than to the capture and the insurer may avoid his liability.[171]

Again s 42 (1) says that in a policy on goods or other movables there is no implied condition that the goods or movables are seaworthy.[172] In this context it may be noted that the meaning and scope of seaworthiness differs in a conflict between the shipper and shipowner from that in a conflict between the assured and the insurer. A ship may be seaworthy as between the shipper and shipowner and yet may not be seaworthy as between the insurer and the insured. Further the time when the seaworthiness is required also may be different in the two cases. In a contract of insurance it is sufficient if the ship is seaworthy at the commencement of the voyage[173] while in a contract of affreightment between the shipper and the shipowner the seaworthiness must exist with reference to goods shipped at the intermediate port at the time when the goods are shipped. Section 42 (2) says that in a voyage policy on goods or other movables there is an implied warranty that the ship is not only seaworthy at the commencement of

the voyage as a ship but also that she is reasonably fit to carry those goods or other movables to that particular destination contemplated by the policy.[174]

The maritime losses are restricted to losses arising from maritime perils and do not extend to losses on inland waters or any land risk incidental to a sea voyage. However, the same can be extended to those losses in case of express contract or trade usage.[175]

Chapter 27 Loss

Preliminary

The very object of a marine insurance contract and as a matter of fact of any insurance contract is to indemnify the assured of any loss in the manner and to the extent thereby agreed. In marine insurance, loss means losses incidental to marine adventure. The term loss includes damages or detriment as well as the actual loss of the property. We have noted earlier that an insurer is liable only to indemnify loss which is proximately caused by a peril insured against.[176] In this chapter the kinds of losses are discussed.

Kinds of Losses

Broadly speaking all losses may be classified as either (a) total, or (b) partial and any loss other than a total loss is a partial loss.[177] A total loss of a part is a partial loss. A total loss may again be divided as either (a) an actual total loss, or (b) a constructive total loss.[178] Section 56 (3) provides that unless a different intention appears from the terms of a policy, an insurance against total loss includes a contractive as well as actual total loss.[179] In an action for total loss where the evidence proves only a partial loss, unless the policy otherwise provides, recovery for a partial loss may be made. Sub-section 4 and 5 of s 56 state that where goods reach their destination in specie, but by reason of obliteration of marks or otherwise, they are incapable of identification, the loss, if any, is partial and not total.[180] In *Kunjuraman v United India Finance and General Insurance*; a fishing vessel was covered by a policy for a total and/or contractive total loss as per the institute standard TLD clause (Hull) which precluded recovery of any partial loss. It was involved in a fire accident in which there was a constructive total loss in respect of the hull and as regards the engine and machinery there was only a partial loss. The combined effect of the clause and the operation of s 56 (4) and 57 of the *Marine Insurance Act 1963* is that there can be no recovery for any partial loss. As it was found that in respect of the hull there was constructive total loss the claim was decreed and as regards engine and machinery there was only partial loss and the claim was rejected.[181] Similarly, in *Hajee Habib v Commercial Union Assurance Co*, where a policy is taken against total loss only when a cargo of yarn was damaged in water and the insured dried the cargo and sold it and claimed balance of the insured amount the court held that the insurer was not liable as that was a case of partial loss.[182]

Total Loss

As noted earlier total loss may be either (a) actual total loss or (b) constructive total loss.

Actual Total Loss Where the subject-matter insured is destroyed, or so damaged as to cease to be a thing of the kind insured, or where the assured is irretrievably deprived of it, there is an actual total loss. It is not necessary to constitute actual total loss that things should be actually destroyed; it is sufficient if they are so damaged that they cannot be used as things originally insured or the owner is permanently deprived of them.[183] For example, where the ship concerned in the adventure is missing and after the lapse of a reasonable time no news of her has been received, an actual total loss may be presumed.[184] Reasonable time is a question of fact and it varies with the facts of each case. In such cases, if the insurer pays for a total loss and if the ship is found afterwards, it belongs to the insurer. Further it is provided in s 59 that where by in a peril insured against, the voyage is interrupted at an intermediate port or place, under such circumstances as apart from any special stipulation in the contract of affreightment, to justify the master in landing and reshipping the goods or other movables, or in transhipping them and sending them on to their destination, there is no total loss of the goods. The liability of the insurer continues in such cases, notwithstanding the landing or transhipment. It may be noted in this context that the English rules as to transhipment are not very well settled while in some other foreign countries like USA, it is the duty of the master to

tranship wherever it is reasonable and feasible to do so. The extent of the masters power to tranship is determined by the law of the flag.

Constructive Total Loss Section 60 (1) lays down the general rule as to what is constructive total loss and it states:

> Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure has been incurred.

Section 60 (2) formulates some of the more important deductions from the above general rule as:

> In particular, there is a constructive total loss:

(i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and
   (a) it is unlikely that he can recover the ship or goods as the case may be, or
   (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

(ii) In the case of damage to a ship, where she is so damaged by a peril insured against, the cost of repairing the damage would exceed the value of the ship when repaired.

> In estimating the cost of repairs, no deduction is to be made in respect of general average contributions to those repairs payable by other interests, but account is to be taken of the expense of future salvage operations and of any future general average contributions to which the ship would be liable if repaired; or

(iii) In the case of damage to goods, where the cost of repairing the damage and forwarding the goods to their destination would exceed their value on arrival.

From this it can be seen that when there is no total loss, and simply stated when the value of the things remaining is so thin that to bring the subject-matter to its original value and utility would involve an expenditure exceeding its original value, it is prudent to abandon the thing and replace it by a new thing. It lies in state between actual total loss on the one hand and partial loss on the other. In *Moss v Smith*, Maule J gives a nice illustration of constructive total loss as A man may be said to have lost a shilling when he has dropped it into deep water, though it might be possible by some very expensive contrivance, to recover it.[185] The shilling exists and it is also possible to recover it but at what cost is the question? If the cost involved is more than a shilling, it amounts to a constructive total loss. In such cases the insured can treat the factual partial loss as constructive total loss and marine insurance being a contract of indemnity, the insured cannot retain the damaged thing and ask for the value of a new substitute. When he is placed in such a state, he should give a notice of abandonment of the thing damaged or lost and then only can he claim the full value.[186] So in every case of constructive total loss notice of abandonment should be given.

The time at which the classification of a loss as an actual or constructive total loss is to be made, is when the notice of abandonment has been accepted or rejected by the insurer.[187] A Marine Insurance Policy was also covering the risk of the vessel being stranded. The Policy also extended to cover risk of non-delivery of goods by taking additional premium. When the ship was stranded at one port the insured started taking steps to recover the value of the cargo by way of sale to minimise its total loss due to its non-delivery. The insured informed the insurer that the costs of recovering and bringing cargo to the destination would cost more than if sale was effected at a port where the ship was stranded. The Supreme Court observed that the High Court was erred in holding that the contract of carriage had terminated on accounted of seaworthiness of the ship and it also held that the insured is entitled to claim the whole loss treating it as constructive total loss.[188]

Abandonment When damage occurs to the subject-matter of insurance and it amounts to a constructive total loss the assured may either treat the loss as a partial loss, or abandon the subject-matter insured to the insurer and treat the loss as if it were an actual total loss.[189] When he elects to treat it as a constructive total loss, it is always incumbent on the assured to give to the insurer a notice of abandonment to enable himself to recover total loss.

This notice is unnecessary in three cases, namely; (a) the circumstances of the case are such as render the giving of such notice unnecessary for the reason that at the time when the assured received information of the loss there would be no possibility of benefit to the insurer if notice were given to him[190] or (b) where notice of abandonment is waived by the insurer,[191] or (c) where an insurer has reinsured his risk. Barring these three cases, in all other cases he must give notice of abandonment. No particular form is prescribed. It may be given in writing, or by word of mouth, or partly in writing and partly orally.[192]

The next vexed question is about the time when the notice of abandonment should be given, if the assured elects to abandon the subject-matter. If he simply comes to know that some damage was caused, he cannot give the notice. He must have knowledge of all the details necessary to exercise his option. But once he receives the full information he must not delay. It must be given with reasonable diligence after the receipt of reasonable information of the loss, but where the information is of doubtful character the assured is entitled to a reasonable time, to make inquiry.[193] Reasonable diligence, again like reasonable time, is a question of fact. If the insured fails to abandon at a proper time, the right to abandon may cease, unless the right to give such notice may revive by a change of circumstances.[194] Though notice of abandonment is necessary on treating the loss as constructive total loss, the mere giving of notice does not entitle the assured to recover the full amount unless the damage to the property is to be legally regarded as a constructive total loss. That means, in spite of receiving a notice of abandonment, the insurer may reject the notice as damage to property cannot be legally regarded as a constructive total loss. But if he accepts the abandonment, the extent of damage, its sufficiency and the other circumstances need not be gone into. In such cases the insurer pays a total loss and realises what he can, with the property which has been or left abandoned to him. The acceptance of an abandonment may be either express or implied from the conduct of the insurer and it is further provided that mere silence of the insurer after notice is not an acceptance.[195] Where notice of abandonment is accepted the abandonment is irrevocable. The acceptance of the notice conclusively admits liability for the loss and the sufficiency of the notice.

In cases where the notice of abandonment is declined, a difficult situation may arise in the matter of taking measures to prevent further loss and preserving the property. The assured is afraid to take steps as it may lead to an inference of waiver of abandonment and if the underwriter takes steps he may be presumed to have made an acceptance of the notice and so both may not take steps. To avoid this situation the waiver clause is introduced into the policy which reads:

> It is expressly declared and agreed that no acts of the insurer or insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

The effect of abandonment is provided in s 63 of the Act as where there is a valid abandonment, the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured and all proprietary right incidental thereto.[196] If further provides that upon the abandonment of a ship the insurer thereof is entitled to any freight in course of being earned, and which is earned by her subsequent to the casualty causing the loss, less the expenses of earning it incurred after the casualty; and where the ship is carrying the goods of the owner the insurer is entitled to a reasonable remuneration for the carriage of them subsequent to the casualty causing the loss.[197] No better explanation about the effect of abandonment can be given than to quote the observation of Scrutton LJ in *Allegemeine Versicharugs-Gessellshaft Helvetial v Administrator of German Property* [198] which runs thus:

> What is the effect of abandonment under English or German Law, which are assumed to be the same? When the total loss of a thing insured is not actual but constructive, that is, where the thing insured is in specie, but the cost of preserving and repairing it would be more than its value when preserved or repaired,[199] the insured must give a notice of abandonment. This in itself does not pass any property or rights in the thing insured to the underwriter. If the underwriter then pays the assured a total loss, it used to be thought that the payment passed the property and rights incidental to it to the underwriter, as benefit of salvage.

Lord Blackburn in 1877, before the *Marine Insurance Act* 1906, in *Simpson v Thompson* [200] said:

> I do not doubt at all that where the owners of an insured ship have claimed or been paid as for a total loss, the property in what remain of the ship and all right incident to the property, are transferred to the underwriter as from the time of the disaster in respect of which the total loss is claimed for and paid.

He distinguished the case from subrogation to a right to recover damages against a third party in respect of the thing insured, which he says follows on payment for a total loss, but must be exercised in the name of the assured and in respect of his rightbut before the *Marine Insurance Act* was passed in 1906, circumstances arose which rendered it necessary to consider whether an underwriter, merely, by paying, necessarily became the owner of the thing injured. For it might be a *dannosa hereditas*, whose ownership only imposed liabilities which the underwriter did not want. The owner of the ship wrecked in a harbour might be liable to the labour authority for the cost of buoying and removing the wreck. The case of *River Wear Commissioners v Adamson* [201] as explained in *The Mostyn* [202] shows the difficulties of deciding the liability of the owner in such a case, and in 1894, in *Arrow Shipping Co v Tyne Improvement Commissioners*,[203] the question was raised whether underwriters who had paid a total loss were not owners liable for the expense of raising the wreck, and Lord Herschell declined to decide the question. Probably in consequence of this decision when the *Marine Insurance Act* 1906, was passed, s 63 was worded as above. As to the effect of abandonment on the ownership of the remainder after the casualty there were conflicting views. One view was that if notice of abandonment is given but not accepted the property becomes *res nullius*.[204] While in a later case it was held:

> It does not follow that because notice of abandonment is given to an insurer, therefore the vessel which may have some value, is abandoned to all the world, so that it has no owner at all, and becomes what lawyers prefer to describe using the Latin language, as *res mullius*.[205]

Cohen LJ said that the latter view may be preferred to the former.[206]

Partial Losses

A loss which is not total, either actual or constructive, is called a partial loss. Partial loss may be anything short of total loss, actual or constructive and may include; (a) general average, (b) particular average and (c) salvage charges.

General Average The term general average is used indiscriminately. Sometimes it is used referring to the loss and at others to denote contributions. In *Birkeley v Presgrave* the definition given by Lawrence LJ still remains a standard definition. It states:

> All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred for the preservation of the ship and cargo come within general average, and must be borne proportionately by all who are interested.[207]

Sub-sections 13 of s 66 of both the Indian and the English Acts deal with the law of general average. It may be noted that the right to general average compensation and liability for general average contribution are matters absolutely and entirely independent of marine insurance. In *the Brigella,* Barnes J clearly states that the obligation to contribute in general average exists between the parties to the adventure, whether they are insured or not.[208] The principles of general average were recognised long before the marine insurance law was known.[209] The first three sub-ss 13 of s 66 deal with these general principles. They state:

(1) A general average loss is a loss caused by or directly consequential on a general average act. It includes a general average expenditure as well as a general average sacrifice.

(2) There is a general average act where any extraordinary sacrifice or expenditure is voluntarily and reasonably made or incurred in time of peril for the purpose of preserving the property imperiled in the common adventure.

(3) Where there is a general average loss, the party on whom it falls is entitled, subject to the conditions imposed by maritime law, to a rateable contribution from the other parties, and such contribution is called a general average contribution.

Conditions for General Average Contribution In order to give rise to general average contribution the following conditions should exist, namely:

(i) The loss must be voluntarily incurred for general safety;

(ii) There must be real and imminent danger;

(iii) The motive must be for general safety;

(iv) Sacrifice or expenditure must be of extraordinary nature;

(v) It must have been judiciously incurred;

(vi) There must be saving of imperiled property; and

(vii) The danger must not be attributable to the default of the person claiming contribution.

From the foregoing it may be seen that a general average loss arises either due to sacrifices or due to expenditure incurred and this sacrifice or expenditure is called the general average act and the loss caused by it is called the general average loss.

Sacrifice This may be a sacrifice of (a) ship, (b) cargo, and/or (c) freight. In considering sacrifices of ships materials it is always necessary to carefully ascertain whether the loss is caused by the ordinary and usual manner of using the vessel or its appurtenances in which case it will not amount to a general average loss even though there is excessive use. It must be an extraordinary use.[210] If a master in times of peril puts any of her appliances or appurtenances to a use for which they are not intended, e.g., using a sail in order to stop a leak or voluntarily destroying any part of the ship, say by cutting away the masts, spars and sails when the vessel is on her beam ends in order to right her or the settling of a vessel in order to admit water to extinguish a fire, it amounts to a general average loss. In the matter of sacrifice of cargo and freight, jettison provides the best example of general average sacrifice. Jettison is throwing overboard of cargo, or the cutting or casting away of masts, spares, ragging or sails, for the purpose of lightening the ship where the master feels that the ship is not worthy to carry the entire burden. But jettison is normally used in signifying the throwing of cargo for the said purpose. Sometimes cargo may have to be used as fuel when by extraordinary circumstances, the ship runs short of fuel in which case it amounts to a general average sacrifice of cargo. Loss of cargo may also involve loss of freight and that also amounts to a general average sacrifice.

Expenditure Another item for general average contribution is the extraordinary expenditure reasonably incurred for the joint preservation of the common adventure in time of peril. There is a sharp difference between the English common law of general average and the Continental law on the point. The English law treats only the expenditure incurred for the attainment of safety while Continental law includes all expenditure incurred at the completion of the adventure and thereby the English law is narrower than the rule which prevails in nearly all foreign countries. This is also one of the reasons for the comment that the English law of general average is in a somewhat unsatisfactory condition.[211] The inconvenience is avoided by the inclusion of the foreign adjustment clause which makes either some foreign law or the York-Antwerp Rules apply.[212] The common examples of general average expenditure are the amount paid for towage to a safe port, expenses incurred in entering into a port of refuge. The cost of salvage operations also form general average expenditure where the expenses are necessarily incurred to complete the adventure.

For incurring these extraordinary expenses the master has been given a right to sell the cargo which is called forced sale of cargo or by pledging the ship or/and cargo under a bottomry, or cargo only, under *respondentia* bond, moneys under which are repayable to the lender after a certain agreed number of days after the safe arrival of the vessel. If the vessel is lost before arrival at the destination, the lender loses his money and so the rate of interest is generally high and the right to raise the money on *respondentia* is justified only when all the other means of obtaining it, except by a forced sale of cargo, have been exhausted and in exercising this power the master is called an agent of necessity. Such expenses when incurred become general average expenses but a forced sale of cargo or raising funds by *respondentia or bottomry* do not arise in modern times after the invention of the cable.

Adjustment of General Average So far we noted the losses and expenditure which give rise to general average contribution. The party who suffers this loss of expenditure is entitled to a contribution from the others interested in the adventure. It is the duty of the shipowner to arrange for the preparation of the adjustment and he generally engages a professional average adjuster. The shipowner has a lien on the cargo for the contributions due in respect of the general average. Generally he obtains a general average bond before he delivers the cargo. All the interests which have been saved from destruction on the common adventure by the general average act contribute to general average. The ship contributes on her value as saved by the sacrifice; the freight contributes on the net amount of freight saved by the sacrifice and the cargo also contributes on its actual net arrived value at the port of destination, after deduction of freight, if any, payable on delivery, and of such other expenses as must be payable by the cargo owner on delivery and which he would escape in the event of total loss. By this principle of general average, the loss caused by sacrifice or expenditure must be so adjusted that the particular loser, may be ship,

freight or cargo must neither lose nor gain. In this respect it was held in *The Brigella* that if all the contributing interests belonged to the same person there cannot be general average contribution;[213] but this has been overruled by the court of appeal in *The Airlie* [214] and the *Marine Insurance Act* gave statutory recognition to this principle by providing in its sub-s 7 of s 66 that where ship, freight and cargo or any two of those where the interest is owned by the same assured, the liability of the insurer in respect of general average losses or contribution is to be determined as if those subjects were owned by different persons.[215]

Application to Insurance Whether insurance or no insurance the above principles of law apply when there is a general average act. General average exists independently of marine insurance and its application to marine insurance is governed by sub-s 46 of *s 66 of the Marine Insurance Act*. There it is provided that in the absence of express stipulation, the insurer is not liable for any general average loss or contribution where the loss was not incurred for the purpose of avoiding, or in connection with the avoidance of, a peril insured against.[216] If the general average act is not one done with the object of avoiding a peril not insured against, though the assured may be liable for the general average still the insurer will not be liable. Sub-section 4 provides that where the assured has incurred a general average expenditure, he may recover from the insurer in respect of the proportion of the loss which falls upon him and in the case of a general average sacrifice he may recover from the insurer in respect of the whole loss without having enforced his right of contribution from the other parties liable to contribute. Sub-section 5 provides that where the assured has paid or is liable to pay a general average contribution in respect of the subject insured, he may recover therefor from the insurer. The two sub-sections are made subject to any express provision in the policy. Thus the party who suffered the loss is entitled to contribution from the others interested in the adventure and the general average contribution may be recovered from the insurer if the loss has been suffered in connection with the peril insured against. If the same person has more than one interest, the contribution has to be calculated as though the different properties are owned by different persons.

Particular Average Particular average, as distinguished from general average and total loss, is another type of partial loss and is defined in the *Marine Insurance Act* as:

(1) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss.

(2) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average.[217]

A general average differs from a particular average in its nature and incidence. The former is a partial loss voluntarily incurred for the common safety and made good proportionately by all parties concerned in adventure; the latter is a partial loss, fortuitously caused by a marine peril, and which has to be borne by the party upon whom it falls.[218] The particular average loss may be on; (a) the ship; (b) the cargo; and (c) the freight. If a vessel meets with violent weather and damages the ship, it is particular average on ship. If sea water enters into the hold due to the violent weather and damages the cargo, it is particular average of cargo. Again if the cargo were to be sugar and the sea water has caused a part of the sugar to dissolve, it results in loss of a proportionate part of freight to the shipowner, it amounts to particular average on freight. Particular average loss is a partial loss of the subject-matter insured where the loss is caused by a peril of the sea.

Partial Loss of a Ship In case of damage caused to the ship (but not the total loss), subject to any express provision in the policy, the measure of indemnity is as follows:

(i) Where the ship is repaired, the assured is entitled to the reasonable cost of the repairs, less the customary deductions, but not exceeding the sum insured in respect of any one casualty.

(ii) Where the ship has been only partially repaired, the assured is entitled to the reasonable cost of such repairs, measured as above, and also to be indemnified for the reasonable depreciation, if any, arising from the unrepaired damage, provided that the aggregated amount shall not exceed the cost of repairing the whole damage, computed as above.

(iii) Where the ship has not been repaired and has not been sold in her damaged state during the risk, the assured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage, but not exceeding the reasonable cost of repairing such damage computed as above.[219]

The Act provides for situations where the ship is repaired wholly or partially or where the ship is neither repaired nor sold but the English Act provides for a case where the ship is not repaired but is sold in her damaged state during the risk. The amount recoverable in such a case is ordinarily computed on the basis of the estimated

reasonable cost of repairs provided, however, that such estimated cost of repairs do not exceed the amount of loss as actually ascertained by the sale, a factor which must necessarily be taken into consideration in determining the underwriters liability.[220] In India *s 69 (4) of the Marine Insurance Act 1963*, provides the same.

Partial Loss of Goods or Merchandise The Act provides that where there is a partial loss of goods, merchandise or other movable property the measure of indemnity, unless otherwise provided in the policy, is as follows:

(i) Where part of the goods merchandise or other movables insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole, ascertained as in the case of an unvalued policy.

(ii) In the case of an unvalued policy, the measure of indemnity is the insurable value of the part lost, ascertained as in the case of total loss.

(iii) Where the whole or any part of the goods or merchandise insured has been delivered in damaged condition at its destination, the measure of indemnity is such proportion of the sum fixed by the policy in case of a valued policy or of the insurable value in the case of an unvalued policy, as the difference between gross sound and damaged values at the place of arrival bears to the gross sound value.

The Gross value is defined by s 71 (4), as the wholesale price, or if there be no such price, the estimated value, and in either case freight, landing charges and duty paid before hand are to be added to arrive at it; in the case of goods or merchandise customarily sold in bond, the bonded price is deemed to be the gross value. Gross proceeds means the actual price obtained at a sale where all charges on sale are paid by the sellers.

Section 72 provides that where different species of property are insured under a single valuation, the valuation must be apportioned over the different specie in proportion to their respective values, as in the case of an unvalued policy. The insured value of any part of a species is such proportion of the total insured value of the same as the insurable value of the part bears to the insurable value of the whole ascertained in both cases as provided by the Act. Section 18 (3) of the Indian Act [221] defined insurable value and the method of ascertaining the value is as provided in s 71 (1) read with s 18. Where a valuation has to be apportioned, and particulars of the prime costs of each separate species, or description of goods cannot be ascertained, the division of the valuation may be made over the net arrived sound values of the different species, qualities or descriptions of goods.

In adjustment of the particular average on cargo and calculating the liability of the insurer, two rules are laid down; (a) only the prime cost or value has to be taken into consideration and (b) comparison must be made regarding gross values and not the net values, that is, between the market value of the goods in sound condition and the market value in the damaged condition without deducting transportation or any other charges. These rules are laid down in *Johnson v Sheddon*.[222]

Partial Loss of Freight Freight is defined as the reward in money payable either for the hire of a vessel or for the safe conveyance of cargo from one port to another. In either case, usually it becomes payable only on delivery to the consignee in a merchantable condition. In order to earn freight not only goods must be delivered but they must be delivered in a merchantable condition. Under the *Marine Insurance Act* subject to any express provision in the policy, the measure of indemnity in case of partial loss of freight is such proportion of the sum fixed by the policy in the case of a valued policy, or of the insurable value in the case of an unvalued policy, as the proportion of freight lost by the assured bears to the whole freight at the risk of the assured under the policy. Arnould observed:

> The rule for adjusting a partial loss on freight is very simple, namely that where the sum insured is less than the insurable value of the interest at risk, the underwriter pays the same proportional part of the loss that the sum insured is of the insurable value of the freight; if the sum insured equals the insurable value of the interest, then he pays the whole of the loss.[223]

Particular average is different from particular charges because particular charges are incurred in recovering or preserving the subject-matter of insurance which can be recovered from the insurance company under sue and labour clause.

FPA Clause Sometimes insurance is effected on FPA terms, that is, Free from Particular Average. In such cases the insurers will not be liable for particular average. But there is generally a clause laying down that the insurer will be liable if the ship is stranded or sunk or burnt or in the case of goods if they are totally lost in loading or

transhipment or due to collision.

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1 . The *Marine Insurance Act 1963* (hereinafter in this part called The Indian Act), s 3; The *Marine Insurance Act* 1906 (hereinafter called The English Act), s 1.

2 . (1872) LR 7 QB 299, 302.

3 . The Indian Act, s 4 (1); The English Act, s 2 (1).

4 . The Indian Act, s 4 (2); The English Act, s 2 (2).

5 . *[1899] 2 QB 530* .

6 . Later dealt with in detail.

7 . 1981 ACJ 519 (SC).

8 . The English Act, s 3 (1); The Indian Act, s 5.

9 . The Indian Act, s 2 (d); The English Act, s 3 (2).

10 . The Indian Act, s 2 (e); The English Act, s 3, last para.

11 . [1877] 12 AC 495 .

12 .*British and Foreign Marine Ins C v Gaunt [1921] 2 AC 41*, 57.

13 . AIR 1955 Mad 602 [*LNIND 1954 MAD 258*].

14 .*Euro Diam Ltd v Bathurst* [1988] 2 CA 23 .

15 .*American Airlines v Hope* [1974] 2 Lloyds Rep 301, 304 per Lord Diplock; *General Insurance v Tanter*, *The Zephyr* [1984] 1 Lloyds Rep 75 reversed in part on other grounds [1985] 2 Lloyds Rep 529.

16 . (1873) LR 8 Exch 199.

17 . The English Act, s 89.

18 . (1872) LR 7 QB 517.

19 . (1888) 161 IA 60 .

20 . Repealed by Act 11 of 1963, S. 92 (w.e.f. 1-8-1963).

21 . The *Indian Stamp Act 1899, s 7*; but now cll (1), (2) and (3) are repealed.

22 . Section 2 (20), The *Indian Stamp Act 1899*.

23 . The Indian Act s 26; Corresponding to the English Act, s 23, but cll (b) to (e) re-added.

24 . The English Act s 24 (1).

25 . The English Act, s 26.

26 . Ibid, s 30.

27 .*Peacock Plywood (P) Ltd .v The Oriental Insurance Co. Ltd .* (2006) 12 SCC 673 [*LNIND 2006 SC 1090*] : JT 2007 (1) SC 191 [*LNIND 2006 SC 1090*]: 2006 (14) SCALE 300 [*LNIND 2006 SC 1090*]; *Marine Insurance Act, 1963, s. 32*.

28 . The schedule attached to the Indian Act.

29 . Indians Act s 29 (2), corresponding to s 27 (2) of the English Act.

30 . Ibid, s 29 (3), ibid, s 27 (3).

31 . Ibid, s 29 (4), ibid, s 27 (4).

32 .(1761) 2 Burr 1167.

33 . *[1911] AC 129* .

34 .*Inversaviors Manria v Sphere Duke Insurance, The Dover* [1989] 1 Lloyds Rep 69.

35 . Cf The English Act, s 16.

36 . Indian Act, s 81; corresponding to The English Act, s 81.

37 . The Indian Act, s 30; corresponding to The English Act, s 28.

38 . Ibid, s 18 (1); ibid, s 16 (1), in the 2nd para, in the Indian Act mode of valuation of a ship driven by power is provided to include the cost of the machine.

39 . (1783) e Doug 222.

40 . The Indian Act, s 18 (2); The English Act, s 16 (2).

41 . Ibid, s 18 (3); ibid, s 16 (3).

42 . The Indian Act, s 18 (4); The English Act, s 16 (4).

43 . Ibid, s 31 (1); ibid, s 29 (1).

44 . *[1916] 1 AC 281*, 287 (PC).

45 . Cf English Act, s 29 (3).

46 . Arnould, *Marine Insurance*, p 242.

47 . Ibid.

48 . The Indian Act, s 31 (4); The English Act, 2 29 (4).

49 . Cf English Act, 25 (2).

50 . Ibid, s 27 (1); ibid, s 25 (2).

51 . 1976 (3) CA 243 .

52 . (1864) 5 B&S 765.

53 . *[1904] 1 KB 40* (CA).

54 . (English) Interpretation Act 1978, ss 9, 23 (3).

55 .*Balfour v Beaumont* [1984] 1 Lloyds Rep 272.

56 .*Heinrich Hirdes gmbh v Edmund* [1991] 2 Lloyds Rep 546.

57 .*Isaacs v Royal Insurance Co* (1870) LR 5 Ex 296.

58 .(1777) 2 Cowp 666.

59 . The Indian Act, s 6 (1); The English Act, s 4 (1).

60 . Ibid.

61 . English Act, ss 4152.

62 . The English Act, s 42 (1); The Indian Act, s 44 (1).

63 . The Indian Act, Schedule, r 3 (a).

64 . Arnould, *Marine Insurance*, pp 519-21; Ivamy, *Marine Insurance*, 1969, pp 128-129.

65 .*Palmer v Marshall*(1831) 8 Bing 79.

66 . (1866) LR 1 Exch 206.

67 . Rule 2; Arnould, p 430 and Ivamy, *Marine Insurance,* 1969, p 119.

68 . The Indian Act, s 44 (1); The English Act, s 42 (1).

69 . Ibid, s 44 (2); ibid, s 42 (2).

70 . Ibid, s 18; ibid, s 88.

71 . The Indian Act, s 45; The English Act, s 43.

72 . Ibid, s 46; ibid, s 44.

73 . The Indian Act, s 48 (2);The English Act, s 46 (2).

74 . Ibid, s 48 (1); ibid, s 46 (2).

75 . Ibid, s 48 (3); ibid, s 46 (3).

76 .*The Indian City [1939] 3 All ER 444* (HL).

77 .(1797) 7 TR 162.

78 . The Indian Act, s 49; The English Act, s 47.

79 . Cf The English Act, s 31.

80 . The Indian Act, s 33; The English Act, s 31.

81 . The Indian Act, s 50; The English Act, s 48.

82 . Ibid, s 87; ibid, s 88.

83 .*Simon Israel & Co v Sedgwick*(1892) 8 Asp MLC 245 (CA).

84 .(1780) LTR 22.

85 . (1798) 1 B&P 313.

86 .(1863) 3 LJ CP 37.

87 .*Scaramanga v Stamp* (1880) 4 Asp MLC 295.

88 . The Indian Act, s 51 (1); The English Act, s 49 (1); Enumerates the 7 cases of permissible deviation.

89 . The Indian Act, s 51 (2); The English Act, s 49 (2).

90 . Chalmers, *Marine Insurance*, 7th edn, p 152.

91 . CFG Cuffley, *Ocean Freights and Chartering,* 1970.

92 . [1887] 12 AC 509 .

93 . The Indian Act, s 2 (e); The English Act, s 3 (2).

94 .*Continental Illinois National Bank v Bathurst, The Captain Panagos DP* [1985] 1 Lloyds Rep 625.

95 . [1887] 12 AC 498 .

96 .*Hamilton v Pandorf* [1887] 12 AC 325 .

97 . [1887] 12 AC 523 .

98 . *[1912] AC 561* (PC).

99 . *[1940] 4 All ER 169* (PC).

100 .*Compania Naviera Samiti SA v Indemnity Marine Insurance* (1960) 92 Lloyds Rep 469; *[1957] 1 QB 247* and *[1924] AC 840* referred to.

101 . *[1985] 2 All ER 712* (HL).

102 .(1836) 4 Ad&E 420.

103 .*The Xantho* [1887] 12 AC 509; *Sassoon v Western Assn Co [1912] AC 561* (PC).

104 .*Blower v Great Western Rly* (1827) LR 76, 655.

105 . 1985 (2) HL 712.

106 . [1958] 1 Lloyds Rep 546 (QB).

107 .*Hunter v Potts*(1815) 4 Camp 203.

108 . [1887] 12 AC 518 .

109 . Cf The Institute Time Clause (Freight) 1-10-70 Chalmers, *Marine Insurance* p 211.

110 . For further details see Arnould, *Marine Insurance,* p 820.

111 .*Vishira Trading Co v Chriyoda The Mandarin Staircase [1969] 2 All ER 776* (CA).

112 . (1983) 1 HL 745.

113 . Arnould *Marine Insurance,* pp 823-32; Carver,*Carriage of Goods by Sea*, pp 173-79.

114 .*Oriental Insurance Co. Ltd. v. Peacock Plywood (P) Ltd* AIR 2005 Cal 97 [*LNIND 2004 CAL 755*] (DB).

115 . It is called as the Institute War Clause dt 1 July 1971 refer Chalmers *Marine Insurance*, p 180.

116 . [1970] 2 Lloyds Rep 365.

117 . Carver, *Carriage of Goods by Sea*, 4th edn, p11.

118 . *[1934] AC 586*, 600 (PC).

119 . For further examples refer tocarver, *Carriage of Goods by Sea*, p 185187.

120 . For a useful discussion of the rule in general, *Tillmans v Knutsford* (1908) 13 Com Cas 244, 249, 255 (CA); *Chandris v Isbrandtsen Moller Co Ins [1951] 1 KB 240* [*LNIND 1966 SC 183*], 24347 (Devlin J).

121 . [1887] 12 AC 484, 494.

122 . For details on this clause refer to Arnould *Marie Insurance* p 854 and Ivamy, *Marine Insurance*, 1969, pp 198-202.

123 . See the Institute Clause.

124 . Indian Act, ss 3537; English Act, ss 3335.

125 . Cf English Act, s 33 (3).

126 .*Union Insurance Society of Canada v Will & Co (1916) AC 281* .

127 . Indian Act, s 35 (1); English Act, s 33 (1).

128 .*De Hahn v Hartley*(1786) 1 TR 343.

129 . Indian Act, ss 35 (3) and 36; English Act, ss 33 (3) and 34.

130 . Indian Act, s 37 (1); ibid, s 35 (1).

131 . Cf The English Act s 35 (3).

132 .*Bank of Nova Scotia v Hallenic Mutual War Risks Association (Bermuda) [The Good Luck]*, [1992 [I A C 233; *Photo Production Ltd v Securicor Transport Ltd, [1980] AC 827*; *CTN Cash and Carry Ltd v General Accident, Fire & Life Assurance Corp PLC* [1989] 1 Lloyds Rep 299.

133 . Cf The English Act s 34 (2).

134 . The Indian Act, s 36 (3); The English Act, s 34 (3).

135 . Ibid, s 36 (1); ibid, s 34 (1).

136 .*Blower v Great Western Rly* (1872) LR 7 CP 655.

137 .*Simons v Gale, the Cap Tarifa* [1957] 2 Lloyds Rep 485 affirmed in *Enebeca*.

138 . The Indian Act, ss 41 and 43; The English Act, ss 39 and 41.

139 . Ibid, ss 39 and 42; ibid, ss 37 and 40.

140 . Ibid, ss 38 and 40; ibid, ss 36 and 38.

141 . The Indian Act, s 41; The English Act, s 39.

142 .*Compania Maritima San Bassils v Oceans Mutual, The Eurgsthenes* [1976] 2 Lloyds Rep 171.

143 . Cf The English Act, s 41 (3).

144 .*Wood v Associated National Insurance Co*(1984) 1 Od R 507; (1985) 1 Od R 297.

145 .*Manifest Shipping Co Ltd v Uni-Polario Insurance Co Ltd* (*The Star Sea*) [1995] 1 Lloyds Rep 651.

146 . Cf English Act, s 39.

147 . (1870) LR 3 PC 234.

148 . The Indian Act, s 36 (2); English Act, s 34 (2).

149 . *[1903] 1 KB 367*, affirmed in *[1903] 2 KB 657* (CA).

150 .(1861) 14 Moore PC 471.

151 . The Indian Act, s 41 (5); The English Act, s 39 (5).

152 . *[1917] 1 KB 938* .

153 . [1976] 3 CA 243 .

154 . The Indian Act, s 43; The English Act, s 41.

155 . Ibid.

156 .*Gedge v Royal Exchange Assn Co [1900] 2 KB 220* .

157 .(1808) 1 Camp 434.

158 . (1865) LR 1 QB 162.

159 . (1988) 2 CA 23 .

160 .*Geismar v Sum Alliance of London Insurance* [1977] 3 QBD 570; *Mackender v Feldia AG* [1966] 3 QB 847 quoted and relied on.

161 . (1873) LR 8 QB 202.

162 .*British and Foreign Marine Insurance Co v Sandy (Samuel) & Co* [1916] 1 AC 650, 673 (HL).

163 . Arnould, *Marine Insurance,* pp 660-84.

164 . The Indian Act, s 40; The English Act, s 38.

165 . Refer r 1 in the First Sch.

166 . Cf The English Act, s 38.

167 . See *Syed Mohd. v New India Assurance Co. Ltd .* (2003) 11 SCC 744 .

168 . The Indian Act, s 37; The English Act, s 35.

169 . Ibid, s 42; ibid, s 40.

170 . Cf The English Act, s 37.

171 . Chalmers *Marine Insurance*, 17th edn, p 53.

172 . Cf The English Act s 40.

173 . The Indian Act, s 41; The English Act, s 39.

174 . Cf The English Act, s 40 (2).

175 .*New India Assurance Co. Ltd. v Hira Lal Ramesh Chand* (2008) 10 SCC 626 [LNIND 2008 SC 1301] : AIR 2008 SC 2620 [LNIND 2008 SC 1301].

176 . The Indian Act, s 55; The English Act, s 55; the section numbers of both the Indian and English Acts are the same in this chapter.

177 . Ibid, s 56 (1); ibid, s 56 (1).

178 . Ibid, s 56 (2); ibid, s 56 (2).

179 . Cf The English Act, s 56 (3).

180 . Cf The English Act, same sections.

181 . 1987 ACJ 1095 (DB).

182 . AIR 1952 Tra 58 .

183 . The Indian Act, s 57; The English Act, s 57.

184 . Ibid, s 58; ibid, s 58.

185 . (1845) 9 CB 94, 103.

186 . Section 62 of the Indian and English Acts.

187 .*Re The Bamburi* [1982] 1 Lloyds Rep 312.

188 .*Peacock Plywood (P) Ltd. v. Oriental Insurance Co. Ltd .* (2006) 12 SCC 673 [LNIND 2006 SC 1090] : 2007 (4) ALT 12 (SC) : 2007 (1) CTLJ 53 (SC),

189 . Section 61 of both the Acts.

190 . Section 67 (7) of both the Acts.

191 . Section 62 (5) of both the Acts.

192 . Section 62 (2) of both the Acts.

193 . Section 62 (3) of both the Acts.

194 .*Stringer v Eng Marine Insurance Co* (1869) LR 4 QB 676; (1870) LR 5 QB 599, 604.

195 . Section 62 (5) of both the Acts.

196 . Section 63 (1) of both the Acts.

197 . Section 63 (2) of both the Acts.

198 . [1913] 1 KB 672 (CA), pp 687-88.

199 . Section 60 of both the Acts.

200 . *[1877] 3 AC 279*, 292.

201 . *[1877] 2 AC 743* .

202 .*GW Ry Co v Owners of SS Mostyn [1928] AC 57* .

203 . *[1894] AC 508* .

204 . Bihache J in *Boston Corp v France Fenwick & Co Ltd* (1923) 28 Comp Cas 367 .

205 . Green LJ in *Oceanic Steam Navigation Co Ltd v Evans* (1934) 40 Comp 111 Cas (CA).

206 .*Blane Steamships Ltd v Minister of Transport [1951] 2 KB 965*, 991 (CA).

207 . (1801) 1 East, p 228.

208 .(1893) 8 Asp MLL 403Q.

209 . Lord Blackburn in *Aitchison v Lohre*(1879) 4 Asp MLC 169.

210 .*Wilson v Bank of Victorial [1867] 2 QB 203* .

211 . Generally KS Selmer, *The Survival of General Average* (1958).

212 . The present York-Antwerp Rules are of those of 1950. See also for this practice *Australian Coastal Shipping Commission v Green (1971) 1 All ER 353* (CA).

213 .(1893) 8 Asp MLC 403.

214 . (1902) 8 Comp Cas 120 .

215 . The Indian Act, s 66.

216 . Sub-section 6 of s 66 of both the Acts.

217 . Section 64 of both the Acts.

218 . Mcarthur, *The Contract of Marine Insurance*, 2nd edn, 1890, p 163.

219 . Section 69 of both the Acts.

220 .*Pitmand v Universal Marine Insurance Co* [1882] QBD 192, 21819 (CA).

221 . The English Act, s 16 (3).

222 .(1802) 2 East 58.

223 . Arnould,*Marine Insurance*, pp 44, 101.

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Chapter 28 Nature and Scope of Miscellaneous Insurance

Nature and Scope of Miscellaneous Insurance

So far the classical and conventional types of insurance have been discussed in outline, namely, life, fire and marine insurances. As has been noted earlier the categories of insurance is not a closed list and with the progress of civilisation new types of insurance are emerging. In India, the Controller of Insurance publishes insurance data according to the classification adopted by the Indian *Insurance Act 1938* as life, fire, marine and general or miscellaneous insurance. Miscellaneous Insurance business is defined as:

> The Business of effecting contracts of Insurance which is not principally or wholly of any kind or kinds included in clauses (6-A), (ii) and (13-A).[1]

This miscellaneous insurance is in England called accident insurance and in USA it is named as casualty insurance. Though this branch is of recent origin, as it covers a multifarious and varied variety of risks, with rapid development and progress of civilisation, it has an enormous growth. The risks covered under this category can further be broadly classified into three main categories, namely, risks concerning: (a) person (b) property and (c) liability. The first two heads correspond to the classical classification of (a) life and (b) non-life or property or fire and marine insurance.

Personal Accident Insurance

Life insurance and insurance of the person both deal with the persons only but with the difference that life insurance involves death or attainment of a particular age of the person and any injury short of death does not entitle the insured to recover anything. But insurance of the person means insurance for individuals and groups of persons against any personal accident or illness. In this type of insurance in India, the insurer is always the General Insurance Corporation, while Life Insurance is the exclusive business of the Life Insurance Corporation. The risk insured in personal accident insurance is the bodily injury resulting solely and directly from accident caused by violent, external and visible means.

The liability of the insurer is to pay the capital sum insured stated in the Schedule of the policy, if such injury within six small calendar months of its occurrence be the sole and direct cause of (a) death of the insured (b) total loss of sight of both eyes or (c) of actual loss by physical separation of two entire hands or two entire feet, or of one entire foot and one entire hand or (d) of such loss of sight of one eye and such loss of one entire hand or one entire foot. The insurer has to pay 50 percent of the capital sum insured if such injury shall within six months of the occurrence, be the sole and direct cause of the total and irrecoverable loss of (a) the sight of one eye or of the actual loss by physical separation of one entire foot or one entire hand or (b) total and irrecoverable loss of use of a hand or foot without physical separation. The policy also spells out the percentage of the injury resulting in loss to different parts of the body like loss of all toes20 percent; loss of hearing of one ear15 percent; loss of hearing of both ears50 percent, etc If the injury results in temporary disablement payment at a particular percentage of the sum assured per week is provided. This is similar to the scheme provided by the Workmens Compensation Act 1923. Deceased employee was a truck driver. While driving the vehicle for long distance he felt uneasy and he parked the vehicle safely and died soon after parking the vehicle. It was held that stress and strain involved in the nature of employment being material contributory factor accelerating his unexpected death and an accident arising out of and in the course of his employment and the insurer was liable.[2] The liability of the insurer is restricted to the employees of the insured and not to the employees of the hirer of the goods vehicle.[3]

In such policies what is covered is the injury by accident. So if the insured dies a natural death due to disease or old age or due to his intentional act like suicide he is not entitled to recover anything under the policy. Where an act produces unintended, enforceable, and fortuitous consequences it is said to be an accident. The Personal Accident Policies also contain exceptions like death, injury or disablement, directly or indirectly caused by, arising out of or resulting from or traceable to (a) intentional self injury, suicide, insanity or influence of intoxicating drink or drugs or (b) in the case of women, by child-birth, pregnancy, etc.

Janatha Personal Accident Insurance Policy

The General Insurance Corporation recently introduced this scheme of Janatha Personal Accident Insurance covering death or personal injury by accident for all persons within the age groups of 1660 but has since raised it to 1065. It is similar to the Personal Accident Insurance Policy in regard to the types of compensation except that the maximum limit for death or total disablement is set at Rs 15,000.

Property Insurance

Property risks in the accident branch relate to burglary, house breaking, crop insurance, etc. Any property, moveable or immoveable, present or future, vested or contingent can be insured from any losses by accidents other than fire and marine adventure. A recent act covered by insurance is loss due to terrorist activities. The policy covered risk of damage caused by act of terrorism. Terrorism means an act having backing of organisation. (*Ejusdem generis*). The insured suffered loss of goods due to robbery and it was held that it cannot be construed to be an act of terrorism and the insured was not entitled to claim the loss.[4] The most popular form of insurance in this branch is burglary insurance.

Burglary Insurance

In this policy the risk of loss or damage in private dwelling houses by house-breaking and burglary and sometimes by theft too is covered; and in business premises by house-breaking and burglary only is covered. When the definition of the word burglary has been defined in the policy then the cause should fall within that definition. Once a party has agreed to a particular definition, he is bound by it and the definition of criminal law will be of no avail.[5] The insured is liable to pay only when the moveable property insured is lost while it is in the premises described in the Schedule. It may however be extended to the cases where the insured moveable property is temporarily removed to some other premises. Cases of theft are not to be included in this type of policies when the insured property is not in the dwelling houses but in business premises because these are generally within easy access of the public. Insured had taken policy for his business in jewellery. The policy covered the risk of theft but in case the jewellery is entrusted to any person by the insured and the jewellery is lost thereby then the insurer is not liable. When the jewellery was entrusted to the customer who was an unknown person to the insured and when he committed theft then the exclusion clause would not apply. When a customer enters into a jewellery shop the owner or his agent may allow him to inspect the goods. For the said purpose, possession in the legal sense is not handover and the owner or his agent does not lose complete control on the goods handed over to the customer and hence exclusion clause was not applicable and the insurer was liable.[6] Articles possessing sentimental value or fancy value, sculptures, plans, models, etc, money and securities for money like bills of exchange, promissory notes and cheques and documents of title are not included in the cover. The owner is entitled to insure his goods for full value or a portion thereof. When he chooses the latter method he is deemed to be insurer for the balance and he must bear the first portion of the loss and such a policy is called First Loss Policy. The rates of premium are higher in this case than in a policy to cover the full value of the goods. He must also take a fire policy.

Liability Insurance

Just as a person can insure himself against the risk of death and personal injury, or damage, deterioration or destruction of property, it was realised that he can insure himself against the risk of incurring liability to third parties. The liability to third parties may arise by his own conduct or in using his property, but still the risk of liability arising out of the use of the property is not covered by an insurance of that property. Liability policies are generally expressed as providing indemnity against liability in law. This phrase liability at law is invariably understood and primarily used to cover liability arising out of negligence. The Court of Appeal held in *M/s A Swan Engg v Iron Traders Mutual* [7]that term covered besides liability in tort, the liability in contract under the *Sale of Goods Act*. The liability of a building contractor to a third party arising out of the faulty design of a structure was held covered though there is no negligence.[8] In *Mills v Smith*,[9] Paul J, held that the word accident in a householders comprehensive insurance policy covered nuisance liability which had occurred without any negligence on the part of the assured.

This risk must be separately and specifically insured and that type of insurance comes within the category of what is commonly called liability insurance. In this category come:

(i) public liability insurance,

(ii) liability arising in connection with professional negligence,

(iii) compulsory insurance,

(iv) employers liability insurance,

(v) guarantee insurance.

Public Liability Insurance

Public Liability here does not mean liability of the state or its agencies but means liability imposed by law as opposed to self-imposed liability as in contract. The *Public Liability Insurance Act 1991*, is intended to provide immediate relief to the persons affected by accidents occurring while handling any hazardous substance and for matters connected therewith and incidental thereto. This appears to be a sequel to the famous *Bhopal Gas leak* case[10]. Lloyds Standard policy generally covers liability arising from injury to body or damage to property. Again there may be occupiers liability to invitees and licensees and these may be insured and these are included in Householders comprehensive policies.[11]

Professional Negligence

Lloyds have standard policies for professional indemnity cover for accountants, insurance agents, solicitors and other lawyers abroad. Though there are no standard forms of policies, Lloyds and other British insurers cover all other professional men also from risk to loss by their negligence. This type of insurance gained strength and developed in view of the decision of the House of Lords in *Hedley Byne v Heller.* [12] Before this decision it was thought that a negligent statement made by a professional man to a stranger would not make him liable in tort even if the statement was untrue and the stranger suffered damage by such negligent statement. The House of Lords in the above case negatived that idea and thus imposed a heavy liability on bankers, solicitors and other professional men. In *M Veerappa v Evelyn Sequevis*, the Supreme Court took the opportunity, though the matter did not yet directly arise in this case, to clarify some of the rights and liabilities of legal practitioners as compared to that of the barristers in England. Speaking about Indian advocates the court observed:

> No legal practitioner who has acted or agreed to act shall merely by reason of his status as a legal practitioner be exempt from liability to be sued in respect of any loss or injury due to any negligence in the conduct of his professional duties.[13]

This induced them to take insurance against this type of new liability. Lloyds were ready to provide cover for such liability.[14]

Compulsory Insurance

For the welfare of employees social welfare legislations have been passed both in England and in India making it compulsory for employers to insure the safety of the workmen.[15] The English *Insurance Act* 1958 defines employers liability insurance business as:

> The issue of, or the undertaking of liability to pay compensation or damages to workmen in their employment but does not include any business carried on as incidental only to marine, aviation and transit insurance business.[16]

The English Act requires employers, with certain exceptions to insure with an authorised insurer or insurers their liability for personal injuries sustained by employees arising from their employment.

The Indian Act[17] makes it compulsory for the employer to insure his workmen by providing certain benefits to them in the event of their sickness, maternity and employment insurance. Under this Act a corporation is constituted to administer the scheme under it. The corporation has a central board, a standing committee, a medical benefit council and a court of its own. The Central Board consists of representatives of Central and state governments, and of employers, workers and of medical profession. The Standing Committee acts as the executive of the Board and

in matters of administration of medical benefits, the medical benefit council gives advise. Employees state insurance courts decide disputes and adjudicate on claims.

The employees insured under the Act with the corporation shall be entitled to; (a) sickness benefit, (b) maternity benefit; and (c) disablement and dependents benefit.

The funds for providing these benefits and for the administration of the scheme under the Act are derived mainly from contributions from employers and workmen in the nature of premiums for their insurance.

Employer's Liability

Though in olden days the liability of the employer has been extended in law of torts by vicarious liability, in regard to their liability towards the employees number of defences were recognised substantially reducing his liability towards his employee. For example, the doctrine of common employment, the defence of *volenti non fit injuria* were vital defences. But in due course of time, with the due development of industrial and labour welfare measures and legislations, the liability of an employer was considerably extended. The employers are tempted to take out insurances against such liabilities. A contract of insurance is to be construed in the first place from the terms used in it. On a construction of the contract in question it is clear that the insurer had not undertaken the liability for interest and penalty, but had undertaken to indemnify the employer only to reimburse the compensation and so the insurer cannot be made liable to pay interest and penalty to the workmen unless there is a special contract between the parties to that effect.[18] The details of these Acts or even of Acts like the *Employees State Insurance Act 1948* in India fall beyond the scope of this book.

Guarantee Insurance

Guarantee business of insurance companies assumed great importance in modern times. Formerly this was done by contracts of guarantee by which a friend or relative of the promisor or employee used to stand as a surety for the due performance of the promise by the principal debtor or for the honesty of an employee. As the number of contracts requiring guarantee increased, the promisor or employees were placed in a situation where it was easy to secure a contract of business or employment but was difficult to find a surety. For lack of sureties, chances of business and employment had to be lost. In such a case insurance companies and Lloyds underwriters came forward and, developed for themselves considerable amount of guarantee business. There are two methods by which this guarantee was given, namely; (a) the insurance company or underwriter stands a surety for the due completion of a contract or fidelity of an employee; and (b) or the underwriter insures the promisee or employer against the loss arising by non-performance of the obligor or the dishonesty of the employee. The first type of contracts are simple contracts of guarantee which have nothing to do with the law of insurance. It is only the latter type of arrangements with which we are concerned. The chief types of policies included in guarantee insurance are; (a) insurance for performance of contract; (b) insurance of debts, and (c) fidelity policies.

Before dealing with these special types of guarantee policies we have to distinguish an ordinary contract of guarantee from a contract in a guarantee policy. A contract of guarantee is a contract to perform the promise, or discharge the liability of a third person in case of his default, while a contract of guarantee insurance is a contract whereby the insurer undertakes to indemnify the insured from the loss caused as a result of the breach of contract or infidelity. The distinction between the two contracts is subtle. An insurance against liability is a contract of indemnity. A surety promises a creditor that he will be paid while an insurer promises to indemnify him if he is not paid. Payment by a surety discharges the principal debt while payment by an insurer does not effect it. Another point of distinction in English law is that a contract of guarantee falls within the scope of s 4 of the Statute of Frauds 1677 and therefore required to be in writing while contracts of insurance may be oral. The distinction between the two is well stated in *Seaton v Heath* by Romer LJ as:

> Contracts of insurance are generally matters of speculation, where the person describing to be insured has means of knowledge as to the risk, and the insurer has not the same means. The insured generally puts the risk before the insurer as a business transaction, and the insurer on the risk stated fixes a proper price to remunerate him for the risk to be undertaken; and the insurer engages to pay the loss incurred by the insured in the event of certain specified contingencies occurring. On the other hand...the creditor (in a contract of guarantee) does not himself go to the surety, or represent, or explain to the surety, the risk to be run. The surety often takes the position from motives of friendship, and generally not as the result of any direct bargaining between him and the creditor, or in consideration of any remuneration passing to him from the creditor.[19]

The learned judge also made it clear that the difference between the two contracts does not depend on the nomenclature used by the parties to the contract but depends on their intention.[20] *Re Dantons Estate* [21] in which Romer LJS above statement has been approved by Vaughan Williams LJ provides an instance to show that though the parties expressed the contract to be one of insurance it was held to be a contract of guarantee. The House of Lords in *Trade Indemnity Co v Workington Harbour Board* where an insurance company executed a bond for the performance of a contract for a money consideration held the contract to be a guarantee and not an insurance policy.[22]

Insurance for Completion of Contract The subject-matter of such contract is due performance of a contract. *A* enters into a contract with *B* but doubts whether *B* would complete the contract. In such a case *A* may insure *B* s due performance of a contract. These are generally taken in cases of contracts of employment.

Insurance for Repayment of Debt A creditor may insure the repayment of a debt which he advanced or will advance in future. Such policies sometimes cover non-payments from specified causes only and in such cases only the causes for non-payment become relevant. When the creditor insures the repayment of a debt, on default by the debtor, the creditor can straight claim the money from the insurer. The insurance being a contract of indemnity the insurer will be subrogated, on payment to the insured, to all the rights of the creditor against the debtor. When a bank took insurance policy and pays the premiums on behalf of the card holders, in case of accident and delayed payment to the cardholder, it was held that the bank was liable to cardholder but not the insurance company, as there was no privity of contract between the card holder and the insurance company.[23]

Fidelity Policies These are the most common type of guarantee policies and are usually made for a term of one or more years. These generally arise out of contracts of employment where the employee has an opportunity to be dishonest. The risk covered is generally restricted to losses occurring while the employee is engaged in a specified capacity. Even in the employment, the risk covered may vary according to the specific terms of the policy in each case. For example, some are restricted to losses arising by embezzlement or fraud. These policies may be combined with liability policies which are normally restricted to liability incurred through the negligence of the employee while these policies are mainly intended to cover losses caused to the employer by the employees theft or embezzlement of money or securities. For example, in *Wasterman v Blackburn* the plaintiff took a Lloyds policy of insurance by which he was insured against loss or deprivation of bonds, debentures, stocks, scrips, shares, transfers, certificates, coupons, warrants or other securities, cash, cheques, bank notes, bills of exchange, promissory notes, or any documents of value by robbery, theft, fire, explosion, embezzlement, burglary or abstraction, whether with or without violence, or any other loss whatsoever through theft or any other dishonesty. The plaintiff was induced by the employee by false representation to discount certain bills. The bills were subsequently dishonoured and the plaintiff claimed the money loss caused by that dishonour from the insurers The insurers were held liable as the policy covered losses by dishonesty.[24]

Further it may be noted that it is not necessary that the employee must be first prosecuted for embezzlement before the insured can claim the money under the policy unless the policy expressly states so. Even if a declaration is made that a periodic check of accounts will be there, it will not absolve the insurer from his liability simply because there is a lapse in conducting such a periodic check; as such a declaration merely relates to his intention at the time when it is made. A fidelity insurer like a fidelity guarantor is entitled to subrogation.

Health Insurance The Insurer was entitled not to renew the policy when there was a pre-existing disease when the cover was incepted for the first time i.e., before taking the policy. During the currency of the policy in case the insured had contacted or come to suffer a disease then the insurer should not exclude that disease and should not deny renewing the policy.[25]

Mediclaim Policies The insurer refused to renew the policy on the ground that the insured was undergoing the medical treatment. It was held that once policy was taken and it was being renewed from time to time then it becomes a continuous phenomenon and the insured was entitled for renewal of the policy.[26]

Chapter 29 Motor Vehicle Insurance

Nature and Scope

A policy of motor vehicle insurance is, in the ordinary course, a combined insurance. It insures the damage to the motor vehicle and its accessories, liability for damage to property, death of, or injury to, the assured himself or spouse and it also insures the motor vehicle against the risk of liability for injury to, or the death of third parties caused by the drivers negligence. The last type of motor policies concerning third party liability or compulsory insurance are discussed in the next chapter. The policies covering other types of risk or liability are similar to any other property or life insurance policies.

This chapter, deals with the Property Accident Aspect, that is, policies covering the damage to the motor vehicle and its accessories and personal accident aspect, ie, policies providing indemnity for the death or injury to the assured himself or spouse and his driver.

Property Accident Aspect

In motor vehicle insurance, if the motor vehicle is insured, the owner will be indemnified for any loss or damage caused to it by accident. Motor vehicle insurance being a contract of indemnity the insured is entitled to indemnity only, and that too, in the manner stated in the policy. Medical expenses upto a limit are also payable. If the insured car suffers damage the insurer is entitled at his option to repair or replace the car or any part thereof or pay the amount of the loss or damage in cash not exceeding the sum insured or the value at the time of loss whichever is less. It is not often easy to replace parts or accessories especially if it is a foreign vehicle or an outdated and out-modelled vehicle. If the part is not locally available or is exorbitantly costly to obtain from abroad, the insurer often limits the liability to paying in cash the catalogue price issued by the manufacturer or his agent in India together with the cost of fitting such part.

The terms of the policy define the nature and extent of the indemnity provided by the policy. There are two types of policies namely (i) the third party liability policy which is compulsory under the *Motor Vehicles Act* or (ii) a comprehensive policy. It is said that a motor car policy is a unique combination of several types of General Insurance. For example, a private motor car comprehensive policy indemnifies the assured against loss or damage to the insured car by accidental external means, by fire, self ignition, external explosion, lighting, frost, burglary, house-breaking or theft, by malicious act.

Loss of a motor car means loss to the owner of the car. In *Eisinger v GAFL* the owner sold his car and received a cheque for its price and when the cheque could not be encashed he claimed indemnity from the insurer for the loss of the car. The court held that the loss is only loss of the sale proceeds and not loss of the car and so the insurer is not liable.[27] On the other hand in *Webster v General Accident Fire and Life Assurance Corpn*, the insured gave it to an auctioneer for selling it who put it for auction with a reserve price. It could not fetch that price. Taylor, a director of the auction company falsely represented that he had a private offer for 335. The insured agreed for the price and allowed the possession of the car with the company or Taylor. Taylor sent it to another auction signing the entry form in his own name where it was sold for 285 to one Mr. Allis and eventually came into possession of one Mr. Fry. Taylor issued various cheques, to the insured which were returned marked Account Closed. Then the insured tried to get the assistance of the Police there to get the car but in vain was and advised that it was hopeless for him to try to get the car. Then the insured claimed under the policy. The court held, that when he has taken all reasonable steps for recovery and failed to recover it amounts to a loss and the insurer is liable.[28] In *Moore v Evans*, Banks LJ said.

> Mere temporary deprivation would not under ordinary circumstances constitute a loss. On the other hand, complete deprivation amounting to a certainty that the goods could never be recovered, is not necessary to constitute a loss. It lies somewhere in between these two extreme cases.

Commenting on this observation Parker J observed in *Websters* case:

> Every case depends on its own facts. An assured is not entitled to sit by and do nothing. Equally he is not bound to launch into legal proceedings nor is it necessary to carry them to the House of Lords.[29]

This reasoning may be assimilated to a situation of constructive total loss in marine insurance.

Personal Accident Aspect

Besides ensuring his personal safety under an ordinary policy, the extension clause indemnifies the assured for the injury caused to him whilst he is driving a motor car not belonging to him or hired to him and also any person driving the insured car on the insureds order or with his permission. Further by paying extra premium he may get extra cover over and above the general cover under the standard policy like; (a) accidents to his wife and other specified relatives or friends; and (b) loss or damage due to earthquake, flood, etc. The policy indemnifies the insured to the use of the insured car. However, it is extended in two ways, namely; it extends to the insured not only when he is driving his own insured car but also when he is driving a private motor car (but not a motor cycle) not belonging to him nor hired to him.

The benefit of this extension is available only so long as he continues to be the owner of the insured car. In *Tattersall v Drysdale*, where the insured sold away the insured car and thereafter while driving another car met with an accident and claimed indemnity from the insurer. It was held that the policy ceased to have effect on the sale of the insured car and he could no longer get any benefit of insurance under the policy.[30]

It extends also to any driver, driving the vehicle on the insureds order or with his permission.

By the extension clause, the insurer purports to indemnify the authorised driver. The indemnity is however, subject to the terms, exceptions and conditions of the policy in so far as it they can be applied.[31] The owner of an insured car while giving it for servicing authorised the garage employee to drive the car at his convenience for the purpose of warming the oil so that it could be drained out easily. After doing that, the employee took his family for a joy ride and was involved in an accident. He claimed indemnity under the policy as a driver with permission, but the court dismissed his claim because the permission did not extend to the driver when the accident occurred.[32] In *Kelly v Cornill Insurance Co* a person insured his car in April 1959 and allowed his son to drive it. He died in June 1959. The son continued to drive the car and caused an accident in 1960 and claimed indemnity under his fathers policy. The insurance company contended that the permission lapsed automatically with the death of the father. The House of Lords, allowing the claim, observed that in the absence of any express provision in the policy, there was no reason to hold as a matter of law that permission should automatically cease on the death of the owner granting the permission. Permission continues until it was proved that it is terminated.[33] The authorised driver is also deemed to be an insured and in such cases the owner of the car is the primary insured and the driver also is insured. This became important in the interpretation of an exception in the policy. The owner of the car insured it with the usual extension clause extending the cover to the authorised driver. The policy excluded liability to persons in the employment of the insured. When an employee of the owners was riding in the car driven by an authorised driver, she was injured by negligence of the driver. She obtained damages against the driver. The driver claimed indemnity from the insurer and the court decreed the claim on the ground that the victim is not an employee of the driver.

Some of the usual conditions in a motor vehicle policy to make the insurer liable are; (a) the insured will maintain the vehicle in a good state of repair and efficient condition; (b) he takes all reasonable steps and precautions to avoid accidents and to select competent and sober drivers etc; and (3) he takes all reasonable steps to safeguard the car from loss or damage. In *Liverpool Corpn v Marsh Granthvaite* where accident was due to defective brakes the insurer was held not liable;[34] similarly when the loss was due to want of foot brakes[35] or the front tyres were devoid of any trace of tread when the vehicle was taken on icy ground[36] or the vehicle was unroadworthy and in a dangerous condition[37] it was held that the insured did not maintain the vehicle in a good state of repair and effective condition. When any condition of the policy is breached by the insured, the insurer is absolved from his liability to indemnify such an insured.

Chapter 30 Motor Vehicle Insurance Absolute or No Fault Liability

Introduction

A comprehensive motor policy covers not only the above two types of risks but also liability to third parties discussed in the next chapter. With regard to all types of liability, the following two principles namely, knock for

knock agreements (kk) and no fault liability apply.

Knock for Knock Agreements

If there are other insurances on the same vehicle the insurer is liable to pay only a rateable proportion. Similarly, when two motorists, insured under comprehensive policies, are involved in a motor accident, both may be liable. Both cases involve doctrines of subrogation and contribution involving costs and multifarious litigation. To avoid this complication, the insurers enter into agreements known as knock for knock agreements. The knock for knock agreement is meant to simplify the settlement of such claims. It is an agreement between both the insurers that irrespective of whoever was responsible for the accident, provided the liability is covered under the policy, each insurer will indemnify his insured in respect of the damage to the vehicle insured by it and will not enforce subrogation rights. In *Hobbs v Morlowe*, approving *Morley v Moore* it was stated that the existence of a knock for knock agreement between insurers does not deprive the insured of his rights of action against the wrongdoer for the full amount of the damage suffered by him.[38] The wrongdoer cannot urge that the plaintiff has already been indemnified by the insurer.

On similar lines third party sharing agreements are entered into under which each will share equally the third party costs and damages. But their knock for knock and third party sharing agreements have lost their relevance in India, to a large extent by the nationalisation of general insurance in 1972.

No Fault Liability

The *Motor Vehicles Act* 1939 provided for compulsory insurance for the loss or damage to the person on property of the third person when the owner of a motor vehicle is made liable for the accidents, caused by their drivers on the principle of vicarious liability. The Act was amended from time to time, and by the Amendment Act 47 of 1982 which came into effect from 1 October 1982 a new chapter was introduced, Chapter (ss 92A92E) creating no fault liability. Later when the original Act was repealed and replaced by the *Motor Vehicles Act 1988* the same provisions have been re-enacted under Chapter 10 (ss 140-44) under the head liability without fault in certain cases.

The original *Motor Vehicles Act* 1939 was intended to secure speedy and certain remedy for a third party who suffers loss or damage by an accident on a public road. In all types of motor policies there is a recital that the insurers promise to indemnify the assured, subject to the terms, exceptions and conditions in the policy. Though Chapter 8 of the original Act 1939 makes motor insurance compulsory and imposes certain conditions, in other respects it leaves the law of liability and the parties to make their own bargain. What is covered by the policy is only the liability of the owner to third party. The liability of the owner is again left to be determined by the general law. In law of torts, which deals with cases of negligence, the plaintiff to make the defendant liable must show that there is a breach of duty to take care and even in such cases defences like common employment, *volenti non fit injuria*, contributory negligence are provided which involve technicalities. Except in the cases covered by rule in *Rylands v Fletcher* called a case of absolute or strict liability in all other areas the above defences which involve technical difficulties like evidentiary difficulty are accepted. To avoid these difficulties in the liability of an employer to his employee victim, the Workmens Compensation Act was passed abolishing the above defences making the liability of the master, the employer, a strict liability case thus rendering him almost an insurer for the safety of his workmen. Based on that principle, a similar advantage is conferred on the motor vehicle victim. It also provides a speedier remedy than the one provided in original Chapter 8 of the *Motor Vehicles Act* 1939 which itself is intended to provide a speedier remedy than a remedy in an ordinary civil court. Civil proceedings in ordinary civil courts, as is known, are proverbially legally, dilatory and cumbrous, and the path of litigant is strewn with pitfalls and he is lucky if he touches the goal.

The substitution of the claims tribunal in place of civil courts though intended to provide an immediate and instant remedy was also, equally time taking and there was inordinate delay in granting compensation to the motor vehicle victims. In a large number of cases the time taken for passing a final award was over a decade and another decade was spent in execution. In *Gobald Motor Service v Veeraswamy*,[39] the accident was in 1947 and the final decision of the Supreme Court was in 1961 and for execution some more time must have been taken. In *Delhi Municipal Corporation v Subhagavanti,* [40] the accident was in 1951 and the decision of the Supreme Court was after 14 years, in 1965. *Jogendra Kumar v Punjab State*,[41] highlights the pitiable plight of the helpless dependents when the bread-winner of the family is killed or permanently disabled. In this case the victim who died was 23 years of age and the dependants on him were his destitute woeful wife of 21 years age and a helpless child 8 months old who had to litigate for a decree against odds. The Supreme Court repeated its warning in *Motor Owners Insurance Co v Modi* [42] that the time is ripe for serious consideration of creating no fault liability by echoing the observation in *Manjursri Raha v BL Gupta*.[43]

The motor vehicle in a public place has become a lethal weapon on the road covering unmitigated dangers to the public. The unending erosion of population and ever increasing number of motor vehicles emerged an ultra-modern age which has led to strides of progress in all spheres of life, and we have switched from fast to faster vehicular traffic witnessing the incidence of death toll per 1000 vehicles in India 105 times more than that of UK or USA according to a WHO report published even in October 1975 and now it must have increased beyond believable limits. So the legislature rightly thought to provide an immediate remedy without any discussion about fault of the owners of the motor vehicle and so provided this absolute liability.

It is provided that where death or permanent disablement of any person has resulted from an accident arising out of the use of a motor vehicle or motor vehicles, the owner of the motor vehicle shall, or, as the case may be, the owners of the vehicles shall, jointly and severally, be liable to pay compensation provided in the Act in respect of such death or disablement.[44] The expression use of motor vehicle applies when the vehicle is in motion or is static.[45] A static vehicle car may also be the cause of an accident. The amount of compensation payable under s 140 (2) in respect of death of any person is Rs 25,000 and that in respect of total disablement shall be a fixed sum of Rs 12,000.[46] The wording used in this section and s 168 is distinct under this section and the amount mentioned must be paid. It cannot be dismissed on the ground that the deceased were stealing petrol at the time of the accident.[47]

The amount of compensation fixed in the 1982 Amendment under s 92 -A is only Rs 25,000 for death and Rs 12,000 for permanent disability. But by an amendment by Act 54 of 1994 the amount has been raised to Rs 50,000 and Rs 25,000 respectively with effect from 14 November 1994. There is a conflict of judicial opinion as to whether it is retrospective. Section 92A now s 140, is a substantive law and not merely procedural and so, has no retrospective effect.[48]

On the other hand, some courts held that the benefit of an amendment applies to pending cases being a beneficial provision;[49] the new Act applies to cases which are in force on the date of the decision though the accident occurred before amendment. Where there is change in law during the pendency of appeal the changed law applies.[50] In a claim under s 92 A (now s140) in view of the overriding effect of s 92 E (now s144) the only defence available was that the vehicle is not insured.[51]

In fixing these amounts the Act departs from that adopted in the Workmens Compensation Act. In the latter Act, the amount of compensation payable is higher than that for death. The rationale behind the Workmens Compensation Act seems to be that the amount so received is to maintain the victim permanently disabled and his dependants while in case of death, the amount is only for the benefit of the dependants of the victim who may have other sources of income. Sub-section (3) provides that the claimant shall not be required to plead and establish that the death or disablement in respect of which the claim is made was due to any wrongful act, neglect or default of the owner or owners of the vehicle or vehicles concerned or of any other person. This section makes the liability imposed under sub-s (1) absolute; whether fault or no fault, the owner of the vehicle is made liable to pay this amount. Thus this liability is made strict liability. In such cases the rule in *Rylands v Fletcher* will apply.[52] The claim under this section is made indefeasible. Even if proper parties are not added and even if a passenger is taken gratuitously the claim must be allowed.[53] The liability to pay is made a joint and several one for the advantage of the victim. He can demand from any one or some or all of them where there are more than one vehicle owners involved. Further, it is stated that this claim for compensation is indefeasible and irreducible by reason of any wrongful act, neglect or default of the claimant.[54] The payment of compensation is made certain, expedient and expeditious by dispensing with the necessity of proving any fault on the part of the payer and by providing immunity debarring any defences against the receiver of the compensation. The claimant is favoured both ways.

A separate application is not referred for granting the amount under s 140. When an application under s 66 is pending the Tribunal suo motu can grant this compensation.[55] No trial is necessary if it is satisfied prima facie that death or permanent disablement was caused due to an accident by a motor vehicle, the Tribunal has to grant this compensation immediately.[56] A medical certificate from a doctor that the injury amounts to permanent disability is sufficient. There is no necessity of detailed inquiry.[57] If no permanent disability is caused an order granting relief under s 92 A is not valid.[58] Minimum amount payable for loss of life in the absence of other evidence is that amount fixed by the Parliament.[59] The Tribunal is not rectified in rejecting appeal on the ground that deceased was travelling unauthorisedly which must be decided at a fixed hearing.[60]

The amount provided as compensation either for death or disablements is comparatively small; but it may be noted that it is an interim, immediate and expeditious remedy tentatively provided before the claimant can recover the exact compensation receivable by him under any other law.

This is made clear by providing that the right to claim this fixed amount shall be in addition to, but not in substitution of any other right to claim compensation in respect thereof under any other provision of the *Motor Vehicles Act* or any other law for the time being in force.[61] The victim is advised to claim the two reliefs in the interim provided in *s 140 of the Motor Vehicles Act* called the Right of the principle on fault or no fault and the general relief provided in any provision of the *Motor Vehicles Act* or any other law for the time being in force called the right on the principle of fault. When both claims are preferred it is provided that the former under *s 140 Motor Vehicles Act 1988* shall be disposed of as expeditiously as possible in the first place.[62] When the general claim is preferred and it is decided to award a larger sum than that provided in s 140 the balance only is to be paid and if the amount is equal to or less than the said amount the owner having paid the fixed amount need not pay anything nor can he claim refund from the said amount.[63] In case the insurer insists that the cheque should be given by the insured and not by any third party then the cheque should be issued by the insured only, otherwise the insurer can refuse to accept the cheque. In these circumstances when the accident occurred it was held that the Insurer should pay the compensation to the third party and recover the same from the vehicle owner.[64]

Permanent disablement for this purpose is defined as:

(a) permanent privation of the sight of either eye or the hearing of either ear, or privation of any member or joint; or

(b) destruction or permanent impairing of the powers of any member or joint; or

(c) permanent disfiguration of the head or face.[65]

For arriving at a finding of permanent disability percentages of injuries need not be counted. It has been held that where it is proved that a person lost two teeth, it is sufficient to grant Rs 15000, under s 140.[66] These provisions shall have effect notwithstanding anything contained in any other provision of the *Motor Vehicles Act* or any other law for the time being in force.[67] When any death or permanent disablement occurs in cases coming under the Workmens Compensation Act, the provisions of that Act with the necessary modifications be deemed to form part of that Act.

The High Court cannot issue an order in writ against an order of the Tribunal.[68] If the claimant claims both under faulty liability and under no fault liability if the amount due under the former court is greater, the order is liable to pay the balance.[69]

A claimant who is a woman has a right to choose to approach for compensation either the commissioner under the Workmens Compensation Act 1923 or the claims tribunal under this Act.[70] Section 143 (s 93D under the Old Act) makes it clear that this chapter applies to claims under the Workmens Compensation Act 1923 also.[71]

Chapter 31 Third Party or Compulsory Insurance of Motor Vehicles

Nature and Scope

In law of torts if a person negligently drives his vehicle and causes injury or death to a third party, the driver whose negligence caused the damage is liable to the third party. The driver is a servant of the owner of the vehicle and the actual delinquent, the driver is often a person of no means and so common law recognised vicarious liability of the owner of the motor car. The master is liable for the tortious acts of the servant provided the servant does such act in the course of his employment. In *Pushpabai Sudershin v Ranjit G and P Co,* it was held that the determining factor so far as the liability of the master for the act of his servant is concerned in whether the act was committed by the driver in the course of his employment or not and that it does not depend on the lawful or unlawful nature of his act or whether or not he acted against the express instructions of his master or in violation of the rules framed under the statute.[72] This rule of the Supreme Court was applied in *Prithi Singh v Brindaram* where the driver has carried a passenger in contravention of rule 4.60 of the Punjab Motor Vehicles Rules 1940.[73] In the following case the driver acted in violation of the instructions but still the master is made liable.[74] In *Imperial Chemical Industries v Shotwill*, Lord Pearce observed:

> The doctrine of vicarious liability has not grown from any very clear logical or legal principle, but from social convenience and rough justice.[75]

The policies dealt with in this chapter are those concerned with liability of the owner to third parties for causing them injury or death by the use of the motor vehicle. The *Motor Vehicles Act* 1939, in its Chapter 8 deals with this branch of liability insurance. This is another important branch of liability insurance and is made compulsory. It is regulated by the *Motor Vehicles Act* 1939, Chapter 8 containing ss 93-111A. This Act has largely reproduced the provisions of the English law embodied in the Road Traffic Acts 1930 and 1934, the Road Transport Lighting Act of 1937 and the Third Parties (Right Against Insurance) Act of 1930, which were consolidated in the Road Traffic Act 1960, now replaced by the Board Traffic Act 1972. A new chapter, Chapter 7A was introduced providing for Liability without fault in certain cases (ss 92A92E) under the *Amending Act* of 1982, which came into force on 1 October 1982. The entire Act was repealed and replaced by the present *Motor Vehicles Act 1988*. The present Act 1988 splits Chapter 7 of the old Act into two chapters, namely Insurance of Motor Vehicles Against Third Party Risks, Chapter 9 (ss 145-63) and Claims Tribunals (ss 165-76). The old Chapter 7A is now numbered as Chapter 10 (ss 140-44) under the head Liability to pay compensation on the principle of no fault. The purpose of this chapter is to protect the public.[76]

The contract in this type of policy also, like any other contract of insurance, is one of indemnity. The object of this type of policy is to protect the insured against his liability to third parties arising out of an accident caused by the use of a motor vehicle on a public road and it is also made compulsory. The general effect of the Act is that every person who runs a motor vehicle is under a duty not to use or to cause or permit any other person to use it on a road unless any liability, which may be incurred thereby in respect of the death or bodily injury to any person caused by or arising out of this user is covered by a policy of insurance. *Section 146 of the Motor Vehicles Act* 1938 says that no person shall use except as a passenger or cause or allow any other person to use a motor vehicle in a public place, unless there is in force in relation to the use of the vehicle by that person or other person, as the case may be, a policy of insurance complying with the requirements of that chapter. Third party insurance is a must for running a motor vehicle in a public place.[77]

Persons required to be insured are; (a) who uses a motor vehicle except as a passenger, ie, the driver of the vehicle; and (b) one who causes or allows any other person to use a motor vehicle. Under the second category come not only the permanent owner of the vehicle but even one in possession of the vehicle under a contract of loan or hiring, or even owner for the time being and they are required to insure the vehicle under this section.[78] Section 125 of the Act provides a punishment for driving an uninsured motor vehicle by stating that whoever drives a motor vehicle or causes or allows a motor vehicle to be driven in contravention of the provisions of s 146 shall be punished with imprisonment which may extend to three months or with fine which may extend to Rs 1000 or with both. Explanation of sub-s 1 of s 146 provides that a person driving an uninsured motor vehicle merely as a paid employee, shall not be deemed to act in contravention of the sub-section unless he knows or has reason to believe that there is no such policy in force. A public vehicle cannot ply without a permit and the rules framed by the state governments prescribe in the insurance certificate a condition precedent for the insurance of a permit. The section enjoining a refusal of a permit or providing conviction of a driver contains the following ingredients:

(i) It applies to any person other than a passenger;

(ii) What is prohibited is the user by himself or allowing another person to use;

(iii) Such use should be a motor vehicle;

(iv) Such vehicles should be used in a public place;

(v) The using or causing of use by the other person should be without a policy of insurance;

(vi) The policy of insurance should comply with the provisions of the Act.

Persons Governed

It applies to all persons. It includes any company or association or body of individuals, whether incorporated or not. The duty imposed under the section is absolute, it does not matter whether such person has knowledge or not of the fact of having a valid licence. The only category of persons exempted from this duty are the passengers. Then again an explanation is added according to which a qualified exemption is provided in favour of a paid employee who drives the vehicle. The explanation states that a driver should not drive an uninsured vehicle with the knowledge that the vehicle is not insured. If he has no knowledge he is not liable. Further cl 2 of s 146 exempts the

government vehicles from being insured, when used for state government purposes unconnected with any commercial enterprise. The appropriate state governments are empowered to grant exemption with certain conditions in the case of government vehicles used obviously for non-governmental functions.[79] Normally the duty imposed by the section is on the owner of a vehicle; because generally an owner uses his vehicle or causes or allows it to be used on a public road.

He Shall not use or Allow any Other Person to use a Motor Vehicle

This section uses the word use while s 125 uses the word drives. The expression use of a motor vehicle includes driving of a motor vehicle and so user here is of a wider connotation. The word use indicates that the vehicle need not be capable of being driven as such a vehicle, if it is on public road, and can be moved around is also a potential danger to the public.[80] A person may send his vehicle for fetching something for him and in such a case he uses the vehicle though he is not within the vehicle. The word allows is also used in a wider sense. This permission need not be by the owner alone. It can be granted by any person who has even care, management or control of a vehicle.

The Vehicle must be a Motor Vehicle

The Act defines a motor vehicle as any mechanically propelled vehicle adopted for use upon roads whether the power of propulsion is transmitted thereto from an external or internal source and includes a chassis to which a body has not been attached and a trailer, but does not include a vehicle running upon fixed rails or a vehicle of special type adopted for use only in a factory or in any other enclosed premises.[81] The manner of propulsion determines whether a vehicle is a motor vehicle or not. If it is propelled by human or animal force it is not a motor vehicle; but a vehicle which is ordinarily propelled or intended or adapted for non-mechanical propulsion becomes a motor vehicle if in any circumstance it is in fact mechanically propelled.[82] The Act refers to many types of motor vehicles like goods vehicles,[83] heavy transport vehicles,[84] invalid carriages,[85] light transport vehicles,[86] locomotives,[87] motor cabs,[88] motor cars,[89] motor cycles,[90] public service vehicles,[91] state carriage tractors,[92] trailers[93] and transport vehicles.[94] All these are included in the definition of a motor vehicle unless any item is expressly excluded. The question whether a bicycle fitted with an auxiliary engine used as a pedal cycle requires third party insurance is subtle. It was held that when it was used as a pedal cycle after removal of the cylinder piston and connecting though there was some petrol in the tank does not come within the definition of a motor vehicle.[95] On the other hand though the rider was only using the pedal system if its attached engine is in a working condition it required licence and third party insurance.[96] Auto rickshaw falls within the definition of motor cab as it is a vehicle with a limitation of carrying two passengers only.[97] The definition of motor vehicle expressly includes a chassis and a trailer but expressly excludes two types of vehicles namely, vehicles which run on fixed rails, eg, a train or a railway trolley and vehicles adapted for use only in a factory or in any other enclosed premises. A vehicle, otherwise a motor vehicle, when used upon the owners premises, which is not a public place will not attract s 94 (1).

The Use Must be in a Public Place

Public place has been defined as a road, street, way or other place whether a thoroughfare or not, to which the public have a right of access, and includes any place or stand at which passengers are picked up or set down by a stage carriage.[98] The Indian definition includes a bus-stand, a taxi-stand, etc, whether they are private or public sites. It is its user that makes it a public place. In *Pandurang v New India Life Insurance Co*, the question whether a private road or a private place to which the public have a permissive access would be a public place within the meaning of s 2 (24) as well as s 95 (new s 2 (34) and s 147 of the 1988 Act), was answered in the affirmative. The court held:

> The right of access may be permissive, limited or restricted or regulated by oral or written permission or on payment of fee...what is necessary is that the place must be accessible to the members of the public and be available for their use, enjoyment, allocation or other purposes.

In this case the accident happened within the compound of the Tata Electric and Locomotive Company factory within which are situated various structures, open spaces and roads constantly used by the public having business with the company. Persons and vehicles entering are supposed to possess permission or authority to enter. It was held that the accident took place at a public place.[99] In *Bugge v Taylor* where a motor vehicle was left unattended during hours of darkness on the forecourt of a hotel to which the public has access, the defendant was held to have been properly convicted of leaving an unattended vehicle on a road even though the place where it was left was the

private property.[100]

A Policy of Insurance should be in Force

There must be a policy of insurance. Whether the policy was in force was not whether the insurance company considered itself on risk, but whether the insurance company was in law liable to indemnify the user if damage and injury has resulted from the vehicle at a time when no side car was permanently attached.[101] In *Taylor v Allon*, the insurer insured a policy covering the appellants motor car against third party risk which expired on 5 April 1964. The appellant did not want to renew the policy with that insurer. He obtained a cover note from another insurer for 30 days from 16 April 1964. The previous insurer sent him a temporary cover note for 15 days from 6 June 1964; which the appellant did not then cease to accept. On 15 April 1964 when he was using the car he was charged with the offense of driving an uninsured car. The cover note from the second insurer commenced from 16 April 1964 and the cover note issued by the first was not accepted and so it was held that no policy was in force on 15 April 1964 and so convicted him.[102] Issuance of a cover note is sufficient as it is covered in the definition of certificate of insurance,[103] where a cover note is issued to be valid for 15 days or until notice is issued declaring the proposal for insurance, cover note covers insurance after the expiry of 15 days.[104] The insurance company is not liable if the accident occurred before the policy came into effect.[105]

Section 147 (1)(b) mentioned the classes of persons for whose damage an insured is liable under the Act policy. The Act policy covering only third party risk does not make the insurer ipso facto liable for the harm suffered by a passenger travelling in a private car,[106] neither for hire nor for reward. Similarly, a pillion rider on a scooter is not covered. In *K Gopalkrishnan v Narayanan* it was observed that the owner of a scooter is not bound to take a policy in respect of third party risks to cover claim of pillion rider carried gratuitously, and therefore the insurance company is not liable for injuries to a pillion rider unless the owner of the scooter had taken a policy covering such a risk.[107] In *Subash Chander v State of Haryana* it had been held that risk to a gratuitous passenger in a private car is not required to be covered by s 95 (1)(b) and therefore, if a gratuitous passenger travelling in a jeep dies, the insurer cannot be made liable for the same.[108] Similarly when the owner of the goods is travelling along with the goods and dies in an accident, the insurer cannot be made liable because such a case is not covered by a policy issued under s 95 (1)(b).[109] The policy required under this section must be one complying with the requirements of this chapter.

In *Mandidas v Ramadevi* it has been held that when the insured is liable to the third party, the insurance company also will be liable.[110] It was also held that relying on the observations of the Supreme Court in *Skandia Insurance Co Ltd v Kokilaben Chandravadan*,[111] which considering a plea relating to a defence available under s 96 (2) of the old Act corresponding to s 149 of the new Act observed that the said section extends immunity to the insurance company if a breach is committed of the conditions in the licence which means that the insurer to get immunity will have to establish that the insured is guilty of an infringement or violation of a promise of providing a duly licensed driver for the vehicle. In this case it was in evidence that the insurer appointed a licensed driver and his unauthorised delegation to an unlicensed person does not make it a breach and hence the insurer is liable. The driver should have a valid license on the date of the accident.[112] The burden lies on the insurance company to prove that there is no valid license.[113] The scope of s 147 and conditions to be satisfied for its application are elucidated in a few cases.[114]

What type of policy and to what amount must be taken to comply with the requirements of the chapter are stated in s 147 :

Requirements of the policy:

(i) It should be a policy issued by an authorised insurer.

(ii) It should cover the person or persons specified in the policy to the extent specified in sub-s 2 of s 95.[115]

(iii) It need not cover liability in respect of the driver or conductor of the vehicle or other persons carried on the vehicle other than the passengers carried for hire or reward or in pursuance of a contract or to cover any contractual liability.[116] Even though the vehicle is transferred and the same was not informed to the insurer, still the insurer was liable to the third party even under the new Act.[117]

The liability is enlarged by the amendment Act (54 of 1994) of s 147 (b) after which the above line of decisions are no longer good law. After 14 November 1994 an insurance company is liable to compensate the victim or injured persons travelling in the goods vehicle as owner of goods.[118]

An explanation is added by the *Amending Act* 56 of 1969 which came into effect from 2 March 1970 which says:

> For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

This explanation is reiterated in the 1988 Act also without any change. So the place where the act causing the death, injury or damage only occurs, is material but not the place of damage. It is not sufficient if the policy is issued by the required insurer covering the persons mentioned in s 95 (1) but also should extend to the extent of liability limited in sub-s (2) of s 147.

Under s 147 (1) the policy should have been issued by an authorised insurer. Such an insurer on and from 1 January 1973 is only the General Insurance Corporation of India or any of its four subsidiary companies. The cooperative society of transport vehicle owners permitted to issue this type of policy under s 108 of the repealed *Motor Vehicles Act* 1939 has been dropped in the present *Motor Vehicles Act 1988*. Now that insurance is privatised, policy can be issued even by a private insurance company authorised to do general insurance business.

The policy should cover the person or persons mentioned in the policy.

This sub-section in determining the required limits of liability divides the vehicles into two classes, namely, those which are intended to carry goods and those intended to carry passengers. With respect to the first category it states that a policy of insurance shall cover any liability incurred in respect of any one accident up to a limit of Rs 50,000 in all including the liabilities, if any, arising under the Workmens Compensation Act 1923, in respect of the death of, or bodily injury to, employees (other than driver), not exceeding six in number, being carried in the vehicle and in respect of the vehicles in which passengers are carried for hire or reward or by reason of, or in pursuance of a contract of employment...

(i) In respect of persons other than passengers carried for hire or reward a limit of Rs 50,000 in all.

(ii) In respect of passengers :

  (a) a limit of Rs 50,000 in all where the vehicle is registered to carry not more than thirty passengers;

  (b) a limit of Rs 75,000 in all where the vehicle is registered to carry more than 30 but not more than 60 passengers;

  (c) a limit of Rs 1 lakh in all where the vehicle is registered to carry more than 60 passengers; and

  (d) subject to the aforesaid limits, Rs 10,000 for each individual passenger where the vehicle is a motor cab, and five thousand rupees for each individual passenger in any other case.

In all other classes of vehicles, they must be insured to cover the amount of liability subject to a minimum of Rs 2,000 in respect of damage to any property of a third party. These limits have been fixed by the Amendment (Act 56 of 1969) which came into effect from 2 March 1970. But all these limits provided above are omitted in the *Motor Vehicles Act 1988* and it provides unlimited liability ie, the entire liability incurred by the owner in respect of injury or death to a third party and in respect of damage to any property of such third party to an extent of Rs 6,000. Further a proviso has been added to the effect that any policy issued with any limited liability and in force, immediately before the commencement of the Act ie, the *Motor Vehicles Act 1988* shall continue to be effective for a period of four months after such commencement or till the date of expiry of the policy whichever is earlier. Four months time is given for the vehicle owners to replace their policies with limited liability. The prohibition in s 146 (1) applies where the policy is taken covering the entire liability to the third parties. Further the insurer can be made liable to indemnify the assured only if the above conditions are satisfied. This clause which was cl 4A is now retained in the present *Motor Vehicles Act 1988* as cl (4). Further it was made clear by the Supreme Court that there is no basis either in the legislative history or in the provisions of the *Motor Vehicles Act* for the view that proof of negligence on the part of the driver is not necessary to make the owner or insurer liable for the payment of compensation in a motor accident claim. But to this rule an exception has been provided in the *Motor Vehicles Act 1988* creating; No fault liability discussed earlier.

A further condition laid down by s 147 (4) to make a policy comply with the requirements of the chapter is that the insurer should have issued a certificate of insurance. Before giving an insurance policy, a cover note is commonly issued by the insurers. When a cover note is issued it is also treated as a policy of insurance. A special duty is cast

on the insurers who issue a cover note and the Amending (Act 100 of 1956) says that where a cover note issued by an insurer under provisions of this chapter or the rules made thereunder is not followed by the issuance of a policy of insurance within the prescribed time, the insurer shall within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered, or to such other authority as the state government may prescribe. Then it will be deemed again to be an uninsured vehicle. The insurers liability is stated in s 147 (5).

Statutory Contract Between Insurer and Driver Section 147 (5) says that notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons.[119] This provision is *inpari materia* with s 206 (3) of the Road Traffic Act 1960 in England which replaced s 36 (4) of the Road Traffic Act 1930. Speaking about the effect of the provision it has been said that the insurer may by virtue of this provision be made liable to indemnify any specified class of driver, but is not thereby liable to the injured third party himself.[120] Atkinson J in *Sutch v Burns* observed that the effect of this provision, in fact, is to create a contract, between the insurers and any driver of the vehicle who is of a class covered by the policy.[121] This section gives statutory recognition to the practice of extensions to the policy. A satisfactory form of policy therefore not only covers the liability of the policy holder while driving his own car but also extends to indemnify; (a) the policy holder while driving anothers car;[122] and (b) other persons while driving the policy holders car. In *Tattersall* s case a doctor by the name Tattersall insured in his own name in respect of a standard car, disposed of the car to a firm of motor car dealers on 15 August 1934. On August 17 he made an arrangement whereby he could drive a Riley car belonging to and insured in the name of a director of the firm with the permission of that director pending his purchase of another car. While driving the Riley, he injured a third person in a motor accident and brought this action against the insurer of the owner of the Riley as being entitled to sue him direct by virtue of the usual extension clause in the policy covering the Riley car. The court held that Dr Tattersall was not covered by his own policy as he had sold his car and lost interest in it but was found that he was covered by the policy taken by the owner of the Riley car directly.[123] Similarly for the second proposition *Digby v General Accident, Fire and Assurance Corporation Ltd* is in point. In that case Miss Marley Oberon took out a policy with extensions. She was injured when driven negligently in her own car, and obtained judgment against her driver and the question arose whether the driver was entitled to recover under the owners policy. The policy holder, the owner, was considered as a third person in respect of the cover granted to the authorised driver under the policy holders policy. In Lord Porters words; Miss Marley Oberon was a third party in reference to her authorised driver.[124] This case also settled that the effect of the clause extending cover to the permitted driver was to bring into existence a second contract of insurance between the insurer and the permitted driver. This is the second statutory contract which runs subsidiary to the main contract and it stands or falls with the main contract. If the owner sells away his vehicle, his contract comes to an end and along with it the second contract also disappears.

In *Shantilal v Aler Bharadwaj*, the insured transferred the insured vehicle on 2 March 1978 without intimation to the insurer and the accident occurred on 5 March 1978. It was held that the motor insurance policy being a personal contract, the insured cannot transfer the benefits under the policy so long as such benefits are contingent without the consent of the insurer and that the insured liability ceases on transfer unless there is an express stipulation to the contrary in the policy or the benefit conferred by *s 103 A of the Motor Vehicles Act* is available.[125] In *Kondaiah v Yaseam Fatima* the lorry insured by a comprehensive policy was sold and the vehicle delivered to the purchaser; but the insurer was not informed of the sale, nor was an application under *s 31 of the Motor Vehicles Act* 1939 made to transfer the registration certificate in favour of the purchaser. The purchaser used the lorry without obtaining fresh insurance cover for using the vehicle and caused the death of a third party. It was held that regarding third party liability, the comprehensive policy of the seller continued to be effective until the registration certificate was transferred to the purchasers name and that therefore the insurer was liable under the policy. It must be deemed that the transfer allowed the purchaser to use the vehicle in the transitional period as far as the third party liability is concerned.[126] On the other hand in an earlier case in *BP Venkatappa v BL Lakshmayya*, *A* who was the owner of a car and had taken an insurance policy in respect of the car, transferred the car to *B* on 11 September 1966. On 26 October 1966 while *B* was negligent in driving the car, there was an accident resulting in the death of a 16 year old girl. One of the questions which has arisen was, whether the insurance company could be made liable in respect of the policy issued to *A* even after *A* transferred the vehicle to *B*. It was held that since there was no transfer of insurance policy to *B* with the consent of the insurer when the car was transferred the insurance company cannot be made liable.[127]

The recent decision of the Kerala High Court in *New India Assurance Co v EK Muhummad* is also to the similar effect. In this case there was transfer of a motor vehicle from one person to another without information to the insurer. It was held that on such transfer, the insurance company cannot be made liable, only the driver and the transfers were held liable.[128] Assignment or mere handing over the policy is not sufficient. The transfer of policy

must be made with the consent of the insurer. This consent may be express or implied. [129]Further when the permitted driver is covered by two or more policies issued by two or more insurers both the insurers will be liable to contribute rateably towards the loss notwithstanding a restriction in the policies restricting the extension to persons who are not protected against liability by any other insurance. During currency of the insurance, the motor vehicle met with an accident. The vehicle owner and driver claimed that the licence was issued by the licensing authority. On evidence it was found that the license was not issued by the competent authority. It was held that in such circumstances, notwithstanding renewal of the said driving licence, the insurer will not incur any liability.[130] Insurance company was not liable to the insured when the driver of the vehicle was holding fake driving licence at the time of the accident.[131]Even though the insurer was not liable to pay compensation to gratuitous passenger the Supreme Court permitted the claimant to withdraw the amount deposited by the insurer and permitted the insurer to recover the same from the vehicle owner.[132] Liability of the insurer commences from the date of issuance of the cheque and accepted by the insurer but not from the date of encashment.[133]

Rights of Third Parties: The statutory rights, as against the insurers of the injured third party are now governed by s *s 149* and *150* of the *Motor Vehicles Act 1988*. By s 149 a duty is cast on the insurers to satisfy judgments against persons insured in respect of third party risks. Before this duty is imposed, the following essentials must be satisfied:

(i) A certificate of insurance must have been delivered to the policy holder under sub-s (4) of s148.

(ii) Judgment must have been obtained against any person insured in respect of any such liability as is required to be covered by a policy under s 148. If no claim is made and no decree is passed against the insured, the insurance company is not liable as the insurer is a branch and insured is the trunk of the tree and a branch cannot stand unless there is a trunk.[134]

(iii) Subject to s 149 (2) such liability must be covered by the policy.

(iv) The fact that the insurer is entitled to avoid or cancel, or may have avoided or cancelled the policy is no defence against the third party;

But in such a case the insurer will be able to recover from the person insured the amount paid to the third party.

Claimant was travelling as a spare driver in goods vehicle and was not driving the vehicle. He was travelling in the vehicle on the instructions of the employer to visit the work site and was a gratuitous passenger. It was held that the insurer was not liable to pay to the spare driver. The court further observed that the claimant met with the accident when he was 28 years old and was permanently disabled and also he did not receive any compensation for 20 years. The insurer had already deposited the amount in the court. The claimant was allowed to withdraw the amount already deposited by the insurance company. However, the insurance company was also allowed to recover the said amount from the owner. In these circumstances, it was held that giving directions to the insurer to give the compensation to the insured first and claim the same from the latter is valid.[135] The insurer also cannot avoid the liability on the ground that the driver was not holding valid driving license at the time of accident because he failed to renew it.[136]

On the third party satisfying the above conditions the insurer is bound to pay the third party:

(i) any sum payable under the judgment in respect of the assureds liability;

(ii) any amount payable in respect of costs; and

(iii) any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

Under s 96 (4) if the policy restricts the liability to a part of the loss only, the third party will be entitled to the whole by virtue of the provision, but the insurer will be entitled to recover the excess from the assured. At the time of committing the accident, even though the driver was not holding valid driving licence, the third party can claim the compensation from the insurance company. The issue whether the driver was holding valid licence or not is between the insurer and the owner of the vehicle. After paying the compensation to the third party, the insurer can proceed against the owner of the vehicle to claim the amount whatever it paid to the third party.[137]

Limitation

(1) By s 149 (2) the insurer is not made liable to pay any money under such judgment where;

(i) he had not been given notice, before or after the commencement of the proceedings in which judgment is given, of the bringing of the proceedings; or

(ii) execution on the judgment is stayed pending an appeal.

(2) By the same sub-section it is provided that when the insurer is given notice of the proceedings he shall be entitled to be made a party thereto. The right of the insurer to be made a party is created by the Act.[138] When he is made a party he can defend the action on any of the following grounds:

(a) that there has been a breach of a specified condition of the policy, being one of the following conditions, namely;

(i) A condition excluding the use of the vehicle:

(a) for hire or reward, where the vehicle is on the date of the contract of insurance a vehicle not covered by a permit to ply for hire to reward; or

(b) for organised racing and speed testing; or

(c) for a purpose not allowed by the permit under which the vehicle is used, where the vehicle is a transport vehicle; or

(d) without a side-car being attached, where the vehicle is a motorcycle; or

(ii) A condition excluding driving by a named person or persons or by any person who is not duly licenced, or by any person who has been disqualified for holding or obtaining a driving licence during the period of disqualification; or

(iii) A condition excluding liability for injury caused or contributed to by condition of war, civil war, riot or civil commotion; or

(b) that the policy is void on the ground that it was obtained by the non-disclosure of a material fact or by a representation of a fact which was false in some material particulars.

The conditions mentioned in cl (2)(b) can be availed of by the insurer in his defence only if they have been incorporated in the policy and not otherwise.[139]

In *Bhoopathy v Vijayalakshmi,* it was held that the fact that an insurer has been given notice of action, the grounds of defence in the action are limited to those specified by sub-s 2 of s 149 and it is not open to an insurer to avoid liability under a policy on any other ground.[140] In *South India Insurance Co v Lakshmi,* speaking about the scope of the above defences Ramanujam J observed that it is true that the provisions of s 149 set out the defences that are open to the insurer in a claim made by third parties based on the contract of insurance; but they cannot avoid the liability under the policy in relation to claims made by third parties.[141]

The defence mentioned in *s 96 (2)(a) of Motor Vehicles Act* 1939 is omitted in the present *Motor Vehicles Act 1988* as it permitted cancellation of policy by mutual consent to the prejudice of the third party, when a condition in a policy is breached by the insured, the insurer can avoid his liability under the policy. If any of the conditions mentioned in s 96 (2)(b) and mentioned in the policy are breached then alone the insurer can raise the breach of that condition as a defence, even if the insured has broken other conditions not mentioned in s 96 (2)(b), the insurer is liable to satisfy the decree in favour of the third party.[142] In *New Asiatic Co v Pessimal* one of the conditions of a policy issued to the owner Aswani was that the Company will indemnify any driver who is driving the insured car on the insurers order or with his permission, provided that such driver is not entitled to indemnity under any other policy. Pessimal owned a car which was insured and when he was driving Aswanis car with his permission an accident occurred and the insurer contended that as Pessimal was covered by his own policy they are not liable. It was held that the insurer was liable as their ground of defence was not one of the conditions coming within s 96 (2)(b).[143] Though the insurer pays the third party under such circumstances under s 96 (2)(b) he can recover it by virtue of proviso to s 96 (3) which is now *s 149 (4) of the Motor Vehicles Act 1988*.[144]

Insurer not statutorily required to cover liability of unauthorised passengers under section 147 of the Act.[145] Deceased was travelling on the top of the bus and there was no evidence to show that the owner of the bus gave directions to the driver or conductor to allow the passengers on the top of the bus. In these circumstances it was held that the insurer was liable to pay compensation to the deceased-passenger.[146]

Duty to Inform Third Party Section 151 of the *Motor Vehicles Act* imposes a statutory duty on the persons against whom a claim is made in respect of any liability referred to in s 147 (1)(b) to give the third party the necessary information as to their insurance.

The above deals with claims before courts.

Effect of Insolvency or Death on Claims

Insolvency

Section 154 protects the rights of the third party against insolvency of the assured. The broad effect of that section is that all rights and liabilities arising between the insured and the insurers in the case of compulsory motor insurance shall remain unaffected, notwithstanding that a third party has been given larger rights against the insurers than the assured himself had. In this context ss 150-53 also may be read all of which are intended for the above purpose. Section 150 creates a statutory provision that the rights of the third party against the insurers are not affected on insolvency of the insured.[147]

Death of Parties

The general principle of *actio personalis moritur cum persona* does not apply to accidents under this Act. Section 102 provides that notwithstanding anything contained in *s 306 of the Indian Succession Act 1925*, the death of a person in whose favour a certificate of insurance had been issued, if it occurs after the happening of an event which has given rise to a claim under the provisions of this chapter, shall not be a bar to the survival of any cause of action arising out of the said event against his estate or against the insurer. From this the following rules may be laid down:

(i) where the owner of the motor vehicles dies in the accident and the injured third party is alive, the injured third party can make his claim against the estate of the deceased owner unless he died before the accident;

(ii) where the third party dies as a result of the accident his legal representative can make a claim for the compensation before the appropriate tribunal;

(iii) where both the owner of the motor vehicle and third party die in the accident, the estate of the deceased owner of the motor vehicle will be liable to the estate of the dead third party.

(iv) where the third party is not dead in the accident, he can himself make the claim within six months of the accident, in such a case it does not matter whether the motor vehicle owner is alive or dead in the accident.

Where the insurance is running, death of the insured after an accident does not relieve the insurer.[148] The effect of death of the transferor is discussed in a few cases.[149] It may be noted here that where the death of the third party is deliberately caused by the motor vehicle owner or driver it is not an accident. The liability to the third party under the policy arises only if there is an accident. The word accident means an unlooked for and unanticipated event, eg, if a pedestrian is chased and knocked down by a motor vehicle it will not be an accident although it may amount to a crime of manslaughter. Similarly where the third party deliberately with an intention to commit suicide throws himself under a motor vehicle, then also there is no accident. The tribunal refuses compensation to such a third party whether he is alive or dead.

Certificate of Insurance

It is defined as a certificate issued by an authorised insurer in pursuance of sub-s 4 of s 95 ; and includes a cover note complying with such requirements as may be prescribed and where more than one certificate has been issued, in connection with a policy, or where a copy of a certificate has been issued, all those certificates or that copy, as the case may be.[150] A policy is of no effect for the purposes of the Act unless and until the insurer delivers a certificate of insurance to the person by whom the policy is effected. This is a very important document as without it the owner is unable to obtain a licence for his vehicle.

Effect of the Certificate

Even though the policy is not issued but a certificate of insurance has been issued by the insurer, the insurer will

still be liable as there is a policy on the same terms as given in the certificate.[151] If the insurer has issued to the insured a policy described in the certificate, but the actual terms of the policy are less favourable to the person claiming under or by virtue of the policy against the insurer either directly or through the insured, than the particulars of the policy as stated in the certificate, the policy shall, as between the insurer and the other person except the insured, be deemed to be in terms conforming in all respects with the particulars stated in the certificate.[152] The issuance of the certificate under the Act does not stop the insurers from subsequently pleading, either against the insured or third parties, that the policy was obtained by fraud.[153]

Transfer of Certificate of Insurance

The provisions relating to transfer of certificate have been introduced by the Amending (Act 56 of 1969) under s 103 A. Under that section where a person in whose favour a certificate of insurance is issued proposes to transfer to another person the ownership of the motor in respect of which such insurance was taken, he may transfer the certificate to the purchaser with the consent of the insurer. At the time of transfer he must apply to the insurer for such transfer and if the insurer does not refuse the transfer it will be deemed to have been transferred with the consent of the insurer.[154] The insurer, may refuse to transfer the policy and the certificate of insurance to the purchaser, if he considers it necessary so to do, having regard to:

(a) the previous conduct of the other person :

(i) as a driver of motor vehicle; or

(ii) as a holder of the policy of insurance in respect of any motor vehicle; or

(b) any conditions which may have been imposed in relation to any such policy held by the applicant; or

(c) the relation of any proposal made by such other person the issue of a policy of insurance in respect of any motor vehicle owned or possessed by him.[155]

If the insurer refused the transfer he shall refund to such transferee the amount, if any, which under the terms of the policy, he would have had to refund to the insured for the unexpired term of such policy.[156]

Cancellation or Suspension of Policy: Wherever a policy of insurance is cancelled or suspended by the insurer he shall within seven days notify such cancellation or suspension to the registering authority or to such authority as the state government may prescribe.[157] Whenever the period of cover under a policy is terminated or suspended by any means before its expiration by efflux of time, it is the duty of the insured person to surrender, to the insurer the latest certificate of insurance within seven days after such termination or suspension. If such certificate is lost or destroyed he must make an affidavit to that effect.[158] The failure to surrender is made a continuing offence punishable with fine of Rs 15 for every days default subject to a maximum of Rs 500.[159]

Production of Certificate

The certificate must be produced for inspection at the request of the traffic authority.[160] The tax on a motor vehicle covered by s 94 will not be received by the taxing authorities unless the certificate of insurance is produced.[161]

Section 108 of the Motor Vehicles Act 1939 dealt with cooperative insurance and this is abolished with the establishment of the General Insurance Corporation which alone has the exclusive right to issue the Motor Vehicle Policies. So the provisions are omitted in the *Motor Vehicles Act 1988*.

Section 160 is a new section imposing duty on the registering officer and the officer in charge of a police station to furnish particulars of a vehicle on requisition by the insurer against whom a claim for compensation is made or the third party who alleges that he is entitled to a compensation in respect of an accident arising out of the use of the motor vehicle on payment of a prescribed fees.[162]

Hit and Run Motor Accident

Sections 161-63 are sections introduced by the *Motor Vehicles Act 1988*. A hit and run motor accident means an accident arising out of the use of a motor vehicle or motor vehicles the identity whereof cannot be ascertained inspite of reasonable efforts for the purpose.[163] The Central Government is authorised to make a scheme, by notifying in the official gazette, specifying the manner in which the scheme for payment of compensation in case of hit and run motor accidents shall be administered by the General Insurance Corporation. It is made incumbent on

the insurer to pay compensation to third parties in respect of the death of any person; (a) fixed sum of Rs 8,500 and (b) in respect of grievous hurt a fixed sum of Rs 2,000. The provisions of s 166 (1) dealing with filing of applications for compensation to the claims tribunal *mutatis mutandis* apply to these applications also; s 162 provides that payments made under this section shall be deducted out of the regular compensation paid, if any, at a future time. Section 163 provides that the Central Government may, by notification in the official gazette, make a scheme specifying the manner in which the scheme shall be administered by the General Insurance Corporation, the form, manner and the time within which applications for compensation may be made, the procedure to be followed by such officers or authorities for considering and passing orders on such applications, and all other matters connected with or incidental to, the administration of the scheme and the payment of compensation. This is a welcome feature. Before this provision, where the wrongdoer is not identified, which is very common in a case where a vehicle driver hits a poor pedestrian, though the victim has a statutory right to get compensation, he is denied it on the ground that his respondent is unidentified. It is but just, that the General Insurance Corporation, a state instrumentality, should come forward and pay the full compensation for such victims. The amount provided in this section is too meager, but still it must be said that a good beginning is made as something is better than nothing.

A welcome change has been made by the *amending Act*,[164] by introducing ss 163A and 163B fixing the amounts of compensation by adding Schedule II which have come into effect from 14 January 1994. Section 163B gives the claimant an option to file a petition under s 140 or under s 163 A and not under both. The calculation of compensation based on the hitherto multiplier system ranging from 516 has been replaced by the Schedule making the amount certain. The maximum multiplier adopted by the Schedule is 18 depending upon the age group to which the victim belonged.[165] The operation of s 163 A is only prospective.[166]

The introduction of the Schedule quantifying the compensation payable to the victim-claimants commensurate with the current cost of living index breathing certainity which is the prime merit of law is a further welcome change.

Recognising this merit, still it is criticised on the ground that it may at once be pointed out that the calculation of compensation and the amount worked out in the Schedule suffers from several defects.[167]

Further it is a matter of great relief to the claimant that s 163 A (3) empowers the Central Government to amend the second Schedule from time to time keeping in view the cost of living.

Chapter 32 Claims Tribunal

Introduction

Sections 110-110F of the Motor Vehicles Act 1939 which came into force from 16 February 1957 provided for the establishment of motor claims tribunals with the object of providing an expeditious and cheap mode of enforcing the liability of the persons who caused motor accidents.[168] These sections provided for the *constitution* and functions of the tribunals as an alternative forum with a self-contained code and complete machinery for the purpose. The Supreme Court held that the change in law under ss 110-110F was merely a change of forum.[169] It is a change of procedural but not of substantive law. As noted earlier the substitution of the claims tribunals in the place of civil courts intended to provide quick relief also failed and hence a change in the substantive law also is made by the *Motor Vehicles Act 1988* by providing no fault liability discussed earlier. The *Motor Vehicles Act 1988* re-enacted the provisions in s s 110110F of the Motor Vehicles Act 1939 in a separate chapter under ss 165-176.

Constitution of the Claims Tribunals

The state government may, by notification in the official gazette, constitute one or more motor accidents claims tribunals for such area as may be specified in the notification.[170] This tribunal has exclusive jurisdiction to the exclusion of the civil courts jurisdiction and it also insured against an injunction from a civil court while exercising its jurisdiction.[171] The tribunal shall consist of such number of members as the state government may think fit to appoint and where it consists of two or more members, one of them shall be appointed as the chairman thereof.[172] Where two or more tribunals are constituted for any area, the state government may by general or special order regulate the distribution of business among them.[173] A person shall not be qualified as a member of a claims tribunal unless he;

(a) is, or has been judge of a High Court, or

(b) is, or has been a District Judge; or

(c) is qualified for appointment as a judge of the High Court.[174]

In *New India Insurance Co v Molia Delhi* it has been held that there is no bar for the appointment of a person designate by official designation as per *s 15 of the General Clauses Act 1897* and so the appointment of an additional District Judge as a motor accidents claims tribunal by official designation is not invalid in all cases except where the additional district judge is not qualified to be appointed as judge of a High Court.[175]

Functions of the Tribunal

The tribunals are constituted to adjudicate upon claims made by the injured or aggrieved party for compensation in respect of accidents which (a) involved fatal injury; or (b) bodily injury to persons; and (c) loss or damage to property of the third party arising in the course of the use of the motor vehicles.

It is provided that in cases where such claim includes a claim for compensation in respect of damage to property exceeding Rs 2000, the claimant may, at his option, refer the claim to a civil court for adjudication and where a reference is so made, the claims tribunal shall have no jurisdiction to entertain any question relating to such a claim.[176] This proviso has been omitted in the new Act. The claimant is given the right of election of the forum where the claim is above Rs 2000. In *Iswar Devi v Union of India* it has been observed that s s 110110F of the Motor Vehicles Act were intended to provide a cheaper and speedier remedy by way of an application before a claims tribunal instead of the remedy of a suit in a civil court as provided in the *Fatal Accidents Act* and thus this Act is a self contained Act, and as such, an application fild under s 110 A is governed by the provisions of the *Motor Vehicles Act* and not by the *Fatal Accidents Act*.[177]

In *M Ayyappan v Moktar Singh* the word compensation in s 110 has been held to be a very comprehensive term and it includes a claim for damages made in a suit by parents of a child who died in an accident.[178] Further *s 110 B of the Motor Vehicles Act* states that on receipt of an application for compensation under s 110 A, the Tribunal...shall specify the amount which shall be paid by the *insurer* or *owner* or *driver* of the vehicle... Hence in Orissa in *RJC v Uma Kanta Singh* [179] and *Rajapal Singh v Union of India* [180] where railway trains dashed against motor vehicles on the track killing and injuring the persons in the vehicles, claims against the railways were held not maintainable before the tribunals. In *Ellammal v Govt of Tamil Nadu* for a similar reason where the police threw nailed wooden planks to stop a lorry carrying illegally rice bags from Kanchipuram to Sriparambudur which caused the vehicle to dash against a tree killing three passengers, the claim against the TN Government was held not maintainable before the tribunal.[181] Further a claimant is also given an option to make a claim under this Act or the Workmens Compensation Act but not under both.[182]

Application for Compensation

An application for compensation under this Act must be in a prescribed form and shall contain such particulars as may be prescribed.[183] The application shall be filed within six months of the occurrence of the accident; but the delay in filing an application may be condoned by the tribunal provided the applicant can prove to its satisfaction that he was prevented by a sufficient cause.[184] Section 166 (3) prescribing limitation for filing a claim petition is omitted by Act 54 of 1994 with effect from 14 January 1994. It is a welcome change for a claimant but is uncharitable for the wrongdoer to have the Damocles word hanging on his head without a limit of time. The legislature should have prescribed a longer time with the benefit of *s 5 of the Limitation Act*.

Who Can Apply

An application for compensation can be made:

(a) by the person who has sustained the injury; or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any or the legal representatives of the deceased; or

(d) by any agent duly authorised by the person injured or all of any of the legal representatives of the deceased, as the case may be.[185]

In *Binodchandra Goswami v Dr Anandiram Barua,* the application was filed by the brother of the injured not duly authorised by him under s 166 (1)(d); the application was to be made by any agent after being duly authorised and hence the petition was dismissed. On a revision petition filed, the court reversing the impugned order observed that in such cases the only course for the tribunal may not be to reject the application. The learned tribunal may treat the application as if it was preferred by the person entitled, if subsequent to the filing of such claim application, the real claimant appears before the tribunal and indorses the action taken by the authorised person claiming compensation. Legislative intendment to provide immediate relief to the injured person as contemplated under s 140 cannot be allowed to be sacrificed at the altar of technicality.[186]

If all the legal representatives are not available or not willing, still the legal representatives filing the application should file on behalf of all the legal representatives and if some of them are not willing to join the application they should be added as respondents.[187] In *MPSRT Corp v Jabhiram* it was held that where a claim for compensation is made in respect of an accident involving death or bodily injury to persons where there is a policy of insurance against third party risk, the insurer must be made a party to the proceedings.[188] In the above referred Mysore case[189]it has been held that the term legal representative includes the persons referred to as representatives in *s 1 A of the Fatal Accidents Act* namely, the wife, husband, parent or child of the deceased. It has been further made clear that the right that can be exercised under this section cannot be confined only to persons who come within the term legal representative as defined under *s 2 (11) of the code of Civil Procedure*. The right of representatives of the deceased as defined in the *Code of Civil Procedure* to put forward a claim under this section cannot be taken away by means of a rule framed under the rule-making power. The married sister of a deceased who died a bachelor was held entitled to claim compensation under the Act.[190]

The right to sue for recovery of damages for personal injuries will not die with the death of the injured where there is loss to estate of the deceased and the maxim *actio personalis moritur cum persona* has no application in such circumstances.[191]

Procedure and Powers of the Claims Tribunal

On receipt of an application the claims tribunal shall follow the procedure fixed by the rules framed for this purpose. The state governments are empowered to make rules providing form of application, fees to be paid thereon, the procedure to be followed, the powers vested in a civil court exercisable by the tribunal, the form of appeal and any other matter which is to be or may be prescribed.[192] It shall have all the powers of a regular court, subject to any rules that may be made in this behalf. Proceedings before the tribunal are summary in nature. Strict compliance with rules of evidence and pleadings are not required to be followed. Any document of probative value can be looked into while fixing liability.[193] The claims tribunal, for the purpose of adjudicating upon any claim for compensation, is empowered to choose one or more persons possessing special knowledge of any matter relating to the inquiry to assist it in holding an inquiry.[194]

Where in the course of any inquiry, the claims tribunal is satisfied that:

(i) there is collusion between the person making the claims and the person against whom the claim is made, or

(ii) the person against whom the claim is made has failed to contest the claim,

it may, for reasons to be recorded in writing direct that the insurer who may be liable in respect of such claim shall be impleaded as a party to the proceedings and the insurer so impleaded shall thereupon have the right to contest the claim on all or any of the grounds that are available to the person against whom the claim has been made.[195]

Award of the Claims Tribunal

After making a proper inquiry the tribunal is empowered to make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and also shall specify the amount which shall be paid by the insurer, or owner or driver of the vehicle in the accident or by all or any of them, as the case may be.[196] In passing the award the tribunal has to apply the general law of torts and also the crucial rules of evidence which are founded on principles of natural justice.[197]It has also been held that the word award does not take away the tribunal from the scope of the definition of court contained in *s 3 of the Indian Evidence Act*.[198] The claims tribunal has to pass its award in accordance with the principles of natural justice, ie;

(i) the parties must be given an opportunity of being heard;

(ii) take evidence on oath;

(iii) must give opportunity to the adversary to cross-examine; and[199]

(iv) can award damages when negligence on the part of the driver of the vehicle concerned is established.[200]

The tribunal in awarding damages in personal injury cases should determine under different heads, pecuniary and non-pecuniary damages, if any, because unless this is done the High Court cannot determine whether it has made an entirely erroneous estimate of damages and the very purpose of the appeal would be defeated.[201]

A full bench of the Rajasthan High Court tabulated the heads on which compensation is admissible in cases of fatal accidents which includes the following:

(i) Loss of love and affection of spouse/children/parents.

(ii) Consortium.

(iii) Loss of future happy life of deceased.

(iv) Mental shock.

(v) Mental and physical agony, pain and suffering.[202]

In estimating damages, the tribunal need not strictly follow and apply the basis of the assessment of compensation indicated in the various decisions under *Fatal Accidents Act* and under English Law but has to estimate and assess the damages which it deems just compensation on the facts and circumstances before it.[203] Bhagavathi CJ observed:

> We cannot allow our judicial thinking to be constructed by reference to the law as it prevails in England or any other foreign country. We no longer need the crutches of a foreign legal order. We are certainly prepared to receive light from whatever source it comes but we have to build our own jurisprudence.[204]

Chinnappareddy J of the Supreme Court also concurred with him and said:

> The time has perhaps arrived to discourage uninhibited reference to and extravagant use of foreign precedents, though indeed we welcome such precedents when they explored virgin territory and expand the horizons of legal thought.[205]

In passing the award the tribunal may also direct payment of surplus interest at some reasonable rate on compensation awarded from such date not earlier than the date of making the claim.[206] Determination of rate of interest depends upon facts and circumstances of each case. Claim for each in cases where it is satisfied for reasons to be recorded in writing that:

(i) the policy of insurance is void on the ground that it was obtained by representation of a fact which was false in any material particular; or

(ii) any party or insurer has put forward a false or vexatious claim or defence, the court or tribunal may award as compensatory costs to the aggrieved party an amount not exceeding Rs 1000; this amount need not be taken into account in any subsequent civil or criminal litigation that will be taken up subsequently for the fraud committed by the party.[207]

Appeals Against Award

No appeal lies against the award of the claims tribunal if the amount in dispute in the appeal is less than Rs 2000. In all other cases an appeal lies to the High Court. The appeal shall be filed within 90 days; but the High Court is empowered to condone delay if it is satisfied that the party is prevented by sufficient cause from preferring the appeal in time.[208]

If there is delay it may be condoned under *s 5 of the Limitation Act* if sufficient cause is shown. It may be condoned even if there is delay in filing the claim petition. Where a military vehicle was damaged in an accident with a civil truck, time taken in obtaining sanction from Army Headquarters by the Union of India was held not to constitute sufficient cause; more so in the present case where it was intended to file a claim from day one.[209]

A new proviso has been added by the 1988 Act to the effect that no appeal by a person who is required to pay any amount in terms of such award shall be entertained by the High Court unless he has deposited with it Rs 25,000 or 50 per cent of the amount so awarded, whichever is less, in the manner directed by the High Court. This is a welcome feature and does quicker justice to the needy motor vehicle victims.

Execution

The person entitled to any money under an award can make an application to the claims tribunal which passed awards for recovery of money due to him. On such an application, the tribunal is empowered to issue a certificate to the collector for the amount and the collector proceeds to recover the same in the same manner as an arrear of land revenue.[210]

This is another welcome addition as it eliminates the expensive and dialatory execution in a civil court and provides an expeditious and less expensive procedure in realising the amounts of compensation awarded by the tribunal to the victims of motor accidents.

Chapter 33 Insurance Ombudsman

Introduction

The word Ombudsman is a Swedish word which literally means the right of individuals against public authority. Ombudsman in its country of origin is a position created to control public authorities while exercising powers invested in them. In India a similar institution was created and called *Lok Pal* in the Center and *Lok Ayukta* in the states. In the insurance sector, the Malhotra Committee recommended setting up of the institution of Ombudsman with a view to reduce litigation and to protect a consumers interest in the backdrop of privatisation of the insurance sector.

The Central Government, in exercise of the powers conferred on it by the *Insurance Act 1938*, by notification, framed the Redressal of Public Grievances Rules 1998. It is provided in these rules that there should be a governing body of the insurance council and it shall appoint one or more persons as Ombudsman who may be selected from a wider circle including those who have experience or have been exposed to the industry, civil service, administrative services etc, in addition to those from the judicial service. He shall be appointed for three years and their emoluments are equivalent to those of a High Court judge. The Ombudsman appointed will have jurisdiction on both life and general insurance claims, and his office shall be located at such place as may be specified by the Insurance Council from time to time and the governing body shall specify his territorial jurisdiction and he may hold his sittings in his area for expeditious disposal of the cases. The government reserves power to exempt any company from the provisions of the Redressal of Public Grievances Rules if it is satisfied that such insurance company has a grievance redressal cell which fulfills the requirement of those rules. An Ombudsman scheme has been set up in several centres in India. (The centres having the scheme are Delhi, Mumbai, Chennai, Calcutta, Lucknow, Hyderabad, Bhopal, Kanpur, Bhubaneshwar, Bangalore and Chandigarh).

Complaints

When and Who can Present a Complaint

(i) The complainant must first make a written representation to the insurer and if the insurer had:
   (a) rejected the claim of the complainant or
   (b) the complainant had not received any reply written one month after receipt of the complaint by the insurer.

(ii) The complainant may himself or through his legal heirs make a complaint in writing to the Ombudsman within whose jurisdiction the branch or office of the insurer complained against, is located.

Manner of Complaint

The complaint shall be in writing duly signed by the complainant or through his legal heirs. It shall clearly state the name and address of the complainant, the name of the branch or office of the insurer against which the complaint is made, the facts giving rise to the complaint supported by documents, if any, relief claimed by the complainant, the nature and extent of the loss caused to the complainant and the relied sought from the Ombudsman. The complaint should not be on the same subject matter for which any proceedings are pending before any court, arbitrator or consumer forum.

Subject-matter of Complaint

Regulation 12[211] says that the Ombudsman may receive and consider complaints in respect of:

(i) Any partial or total repudiation of any claims by an insurer.

(ii) Any dispute regarding the premium paid or payable in terms of the policy.

(iii) Any dispute on the legal construction of the policies in so far as such disputes relate to claims.

(iv) Delay in settlement of claims; or

(v) Non-insurance of any insurable document to customers after receipt of premium.

Complaints by Mutual Consent

Besides the unilateral complaint by the policy holder regulation 15[212] provides for a bilateral reference by mutual agreement. Both the insurer and insured may agree to refer a dispute of the above nature to the Ombudsman. When such a bilateral reference is made, the Ombudsman shall act as a mediator or counselor. In such a reference the Ombudsman then makes his recommendation and if it is acceptable to the insured, it shall be satisfied by the insurer.

In case of unilateral complaints, the Ombudsman shall pass an award within three months of the filing of complaint. Here also the insurer has to satisfy the award, if it is acceptable to the insured.

Duties and powers of Ombudsman

(i) The Ombudsman may ask the parties for necessary papers in support of the respective claims of the parties.

(ii) He may also collect the factual information available with the insurer if necessary.

(iii) He shall dispose of the complaint fastly and equitably.

(iv) He shall not pass an award giving any compensation in excess of the actual amount of losses suffered by the complainant by an insured peril subject to a limit of Rs 20 lakhs including ex-gratia payments.

(v) The Ombudsman shall furnish a report every year to the Central Government containing a general review of his activities.

Award

(i) Where the complaint is not settled by mutual agreement under r 15, the Ombudsman shall pass an award which he thinks fit in the facts and circumstances of a claim.

(ii) An award shall be in writing and shall state the amount awarded to the claimant.

(iii) The award must be passed within three months from the date of receipt of the complaint.

(iv) A copy of the award shall be sent to both the parties.

Effect of Award

The award becomes binding on the insurer only if it is accepted by the claimant and for that it is provided that the complainant shall furnish to the insurer within one month from the date of receipt of the award, a letter of acceptance that the award is in full and final settlement of his claim.

In receipt of the acceptance letter from the complainant the insurer shall comply with the award within 15 days and it shall intimate the compliance to the Ombudsman.

If the complainant does not intimate his acceptance, the award is not binding on the insurer.

Assessment of his Performance

The Insurance Regulatory Development Authority (IRDA) can review the performance of the Ombudsman from time to time in consultation with the governing body.

Chapter 34 Policy Holder as Consumer

Preliminary

In the beginning, before industrialisation, the consumer was a king and he controlled the market. But with industrialisation and advancement of civilisation, introduction of quicker modes of transportation and communication, establishment of multinational companies running huge industries dumping a variety of sophisticated goods, globalisation of the market converted the buyers market into a sellers market where the king consumer was dethroned. Now the consumer is a pathetic observer ready to be swindled by the big businessmenboth suppliers of goods and service providers. Thanks to Ralph Nadar who started the consumer movement in USA demanding consumer protection, it spread like wildfire and entered the international sphere of law. As a result, 15 March every year is observed as World Consumer Day.

In India in the history of socio-economic legislation, the *Consumer Protection Act 1986* is recognised as a milestone and is mainly intended to ameliorate the position of the Indian consumer.

Object of the Act

The Preamble of the Act declares its main objective as to provide for the better protection of consumers which suggests that there are earlier legislations designed to protect the consumer. This Act does not provide any substantive rights but is mainly intended to provide cheap, simple and speedy redressal to consumer grievances. It provided a four-tier redressal system, namely the Consumer Redressal, District Forum, the State Commission and the National Commission empowered to redress the grievance of the applicant consumer with reliefs of a suitable specific nature and award compensation in other cases. The Act was amended in 1993 enhancing the powers of the redressal agencies and also extended the scope and coverage of the Act.

Complaint of Policy Holders

The first question that arises is whether a policy holder can be a complainant before the redressal agencies. Under the *Consumer Protection Act 1986* the following can file a complaint before the appropriate redressal agency:

(i) a consumer; or

(ii) any voluntary consumer organisation registered under the *Societies Registration Act 1860* or under the *Companies Act 1956* or under any other law for the time being in force; or

(iii) the Central or state governments or administration of the Union Territories; or

(iv) one or more consumers on behalf of numerous consumers who have the same interest.[213]

Is a Policy Holder a Consumer

From this definition it is clear that one or more consumers or a registered consumer association can file a complaint.

So the next question that arises is who is a consumer and whether a policy holder comes within the concept of a

consumer under the *Consumer Protection Act 1986*. The definition of a consumer can be seen below.

Who is a Consumer

For the purpose of the *Consumer Protection Act*, the word consumer has been defined separately as consumer of goods and consumer of services.[214] The insurer agrees to indemnify the policy holder from a contingent loss and the policy cannot be called goods in any sense; but the insurer may be called the provider of service and the policy holder comes under consumer of services, in this context we may examine the definitions of the relevant words in the interpretation clause of the *Consumer Protection Act*.

Consumer

The definition given in *s 2 (1)(d) of the Consumer Protection Act* defines consumer, as noted earlier, under two heads and in that the policy holder comes under consumer of service and the relevant part reads thus:

Consumer means any person who

(i) ...or

(ii) hires or avails of any services for a consideration which has been paid or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration, paid or promised or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person...

From an analysis of this portion of the definition emerges the following:

(i) a consumer means any person;

(ii) he must have hired or availed of any services for a consideration;

(iii) the consideration may be paid or promised or partly paid and partly promised or under any system of deferred payment;

(iv) it includes any beneficiary of such services where he uses or avails the benefits of services with the approval of the original hirer.

In this sense any person who hires or avails the service of another person for consideration is a consumer. Thus the Act makes an assault on the citadel of priority provided in the general principles of contract law. The insurance policy covers loss of property insured in the custody of the insured, his partner or his employee. The gold ornaments were lost when they were in the possession of the apprentice. The insurance company repudiated the claim on the ground that the ornaments were not lost when they were in the possession of the partner or employee and it also claimed that apprentice does not come under the definition of the employee. National Commission held the term employee includes apprentice and hence the company was liable. On appeal, the Supreme Court held that apprentice is a trainee but not employee and hence the claim was not maintainable.[215]

Service

Then the question arises as to what is meant by service. Service is defined as services of any description but does not include service under contract of personal service. Section 2 (1) (o) reads:

> Service means service of any description which is made available to potential users and includes the provision of facilities, in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement, or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

The above definition of the word service specifically includes within its scope the provision of facilities in connection with insurance and a policy holder thus is included in the concept of consumer.

Deficiency of Service A consumer of service can file a complaint seeking any of the reliefs specified in the

Consumer Protection Act if there is any deficiency of service. Deficiency in service is defined in s 2 (1)(g) of the Act as:

> Deficiency means any fault, imperfection, shortcoming, or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

The deficiency in service must be alleged specifically in the complaint and if it is not done but the same allegations are raised in rejoinder, the same does not amount to an allegation in deficiency of service.[216]

A fact mentioned in the complaint that has not been controverted in the written statement was held to be deficiency in service and the complainant was entitled to the relief.[217]

Failure to perform duty imposed by law or under contract amounts to deficiency. Under law an insurer may pay the amount due under the policy within a reasonable time and so unexplained inordinate delay in settlement of insurance claims was held to constitute deficiency in service.[218]

Though the claim is based on deficiency of service if prima facie the insurer has done what he has to do and found that insured has no claim and the insured is not satisfied with the decision of the insurer a complaint is not maintainable before a consumer tribunal. This is not a case where the insurance company did not take prompt action. Having regard to the facts and circumstances of the case and the nature of the controversy, it is a matter fit to be adjudicated before a civil court, where the parties will have ample opportunities to examine witnesses at length, take out a commission for local inspection and also the complaint is dismissed without prejudice to take resort to the remedy by way of civil suit before the proper court.[219]

Where proper steps are not taken and the insurance makes a delay in payment it is a deficiency of services.[220] Repudiation of policy and refusal of an Insurance company to pay the policy money to the wife of a policy holder when the policy holder committed suicide does not come under deficiency of service under the *Consumer Protection Act*, 1996.[221] Where the insured suppressed material facts and on the ground that the insurance company refused the claim it held that it is not a deficiency in service.[222] In these cases the burden lies on the insurer to establish that the policy holder has made a statement fraudulently knowing that the statement is false.[223] Failure to pay money to the nominee or insistence of production of succession certificate by the widow when her name already appears in the policy as assignee constituted deficiency of service.[224]

Where the insurance company is negligent in setting the claim it amounts to deficiency in service and the claimant is entitled to compensation not only for financial loss but also mental stress.[225] When an insurance claim is repudiated by the insurance company after proper investigation on reasonable grounds there is no deficiency in service.[226] Insurance Policy did not cover parts of machinery which were required to be replaced by normal wear and tear and it was held that the insurance company was entitled to exclude the value of those parts while assessing the claim.[227] The insurance company rejected the claim of the insured on the ground that the driver of the vehicle did not possess valid driving licence at the time of accident and the vehicle which was a private vehicle and insured should use for personal use, but was being used as a taxi for carrying marriage parties. The District forum rejected the claim, but on appeal the State Commission allowed the claim on the ground that there was no fundamental breach of the terms of the policy. On revision, the National Commission also supported the State Commissions decision. On appeal, the Supreme Court set aside National Commissions order on the ground that National Commission failed to give any reason for coming to the conclusion that there was no fundamental breach of the terms of the policy and hence it set aside the orders of the State Commission and National Commission.[228] Where the insurance company erroneously repudiated the claim it was held that it amounted to deficiency of service.[229] In *Praveen Kumar v New India Assurance Co Ltd*.[230] where the vehicle was insured for Rs 2 lakhs and due to accident and fire, the vehicle was destroyed, the rejection of complaint was arbitrary and clearly a deficiency of service. The insurance company was directed to pay Rs 1,74,500 with interest at 18 per cent and further observed that that order in no way precludes the complainant from claiming the balance of Rs 25,500 in a civil court. When the insurance company in an insurance for theft of goods tendered the amount assessed by its surveyors it was held that there is no deficiency of service.[231] In a contract of insurance, rights and obligations are strictly governed by the policy of insurance and the courts cannot make any exceptions or relaxations on the ground of equity.[232] Refusal to pay a claim on a lapsed policy does not constitute deficiency of service.[233] Any service which is paid for by a scheme of insurance will fall within the definition of service in s. 2 (1)(0) and the insurer is liable.[234]

Complaint

The next relevant definition in the *Consumer Protection Act* to a policy holder consumer is complaint. It is by filling a complaint a consumer can set a consumer redressal agency in motion to obtain the desired relief. This is defined in s 2 (1)(C) and the relevant portion runs thus:

> Complaint means any allegation in writing made by a complainant that:
>
> (i) an unfair trade practice or a restrictive trade practice has been adopted by any trader or service provider;
>
> (ii) ...
>
> (iii) the services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect
>
> (iv) ...
>
> (v) ...
>
> (vi) ...

From this it can be seen that a policy holder can file a complaint that the services hired or availed of or agreed to be hired or availed of by him suffers from deficiency in any respect and can seek any relief which the consumer redressal agencies can grant. The reliefs that can be granted by the district forum are given in s 14 and identical powers are granted to the state commission under s 18 of the Consumer Protection Section 22 of the Act confers similar powers on the National Commission.

Reliefs

The relevant portion of s 14 granting relief reads as:

> Finding of the District Forum:
>
> (1) if after the proceeding conducted under s 13, the District Forum is satisfied...that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to do one or more of the following things, namely
>
> (a) ...
>
> (b) ...
>
> (c) To return to the complainant...the charges paid by the complainant;
>
> (d) To pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party;.
>
> (e) To remove the...deficiencies in the services in question
>
> (f) To discontinue the unfair trade practice or the restrictive trade practice
>
> (g) ...
>
> (h) ...
>
> (ha)
>
> (hb)
>
> (hc)
>
> (i) to provide for adequate costs to the parties.

The tribunals under the *Consumer Protection Act* can grant only these reliefs.[235]

In general as noted earlier the policy holder can have a grievance for deficiency of service by the insurer. The deficiency for service is when the insurer does not do the duty undertaken by him under the contract contained in the policy. The relief claimed by the policy holder is to direct the opposite party to do his duty under the contract,

namely to settle the claim and pay the amount due under the policy. If there is unreasonable delay in payment or unreasonable repudiation of the claim it may cause mental stress and the tribunals are expressly authorised to pay compensation under s 14 (d) of the Act. The tribunals are also empowered to pay costs under s 14 (c). Though granting of interest for delayed payment is not expressly provided, as a part of compensation it may be granted and in practice, interest has been granted by the tribunals in a number of cases.

There is no power to these tribunals to grant interim reliefs while exercising their original jurisdiction.[236]

Tribunals

To provide speedy, simple and inexpensive redressal to consumer disputes, a quasi-judicial machinery is set up at the district, state and national levels. They are intended to relieve the over-burdened conventional courts. Under s 9, a consumer redressal forum known as district forum is to be established by the state government with the prior approval of the Central Government in each district of the state. Similarly at the state level, the Consumer Redressal Commission is to be established under s 9 (b) and is to be known as the state commission. The National Consumer Dispute Redressal Commission is to be established by the Central Government under s 9 (c) and is to be known as the national commission. These quasi-judicial bodies observe the principles of natural justice and have been empowered to give reliefs of a specific nature and to award, wherever appropriate, compensation to consumers.

Their Jurisdiction

District forums have jurisdiction upto the value of rupees five lakhs, the state commission upto the value of Rs 20 lakhs and the national commission to deal with cases of the value above Rs 20 lakhs. A complaint has to be filed in that district forum or state commission within whose territorial jurisdiction the cause of action has wholly or partly arisen or where the opposite party resides or carries on business or has a branch office or personally works for gain. All the tribunals have original jurisdiction and the state commissions and national commission have appellate jurisdiction also.

Bird's Eye View of the Rest of the Act

Section 12 provides for the manner in which a complaint has to be filed and s 13 deals with the procedure to be followed on receiving the complaint. Section 14 referred above deals with the types of findings that can be given by the district forums. Sections 18 and 22 provide for the procedure to be followed by the state commission and national commission respectively by providing that ss 1214 apply to them also. Section 15 provides for an appeal against the findings of the district forum to the state commission. The appeal is to be filed within 30 days with power to the state commission to condone delay by proving a sufficient cause for delay. Section 19 provides for a further appeal to the National Commission on its original orders as well as appellate orders. The limitation is the same as above. Section 23 provides that any person aggrieved by an order made by the National Commission in exercise of the powers conferred under s 21 (i)(a), ie, orders of the national commission under its original jurisdiction, may prefer an appeal against such an order to the Supreme Court within a period of 30 days with power to condone the delay on proving sufficient cause. The National Commissions order should not be cryptic and unreasoned and it should not summarily dismiss the appeal.[237] In order to determine the extent of liability of insurer, terms of insurance contract have to be strictly construed. It was held that on the date of issuing the policy only six houses were there and so only those six were covered by the policy and it was also held that the surveyors report would not be relevant for construction of insurance policy.[238] Section 24 provides that all orders of all the three tribunals shall be final if no appeal is filed against such order.

Execution

Section 25 specifically provides for enforcements of the orders passed by the three tribunals by providing that they are all to be treated as if they were decrees or orders made in a suit by a civil court.[239]

Section 26 provides for dismissal of frivolous and vexatious complaints.[240] Section 27 provides for penalties and states that where a trader or a person against whom a complaint is made fails or omits to comply with any order made by the three tribunals, each trader or person shall be punishable with imprisonment for a term which shall not be less than one month and which may extend to three years or with fine which shall not be less than Rs 2000 but which may extend to Rs 10,000 or with both.[241]

Limitation

Section 30 empowers the Central and state governments to make rules and in fact rules have been made by all states and they have the force of law.[242]

Provisions to achieve speedy disposal

The very purpose in making this social welfare legislation is to give simple, cheap and speedy redressal to the needy consumer who was king at one time but now has been dethroned and made a passive and pathetic onlooker in the market place by the transformation of the buyers market to the sellers market. For providing speedy reliefs separate tribunals were established and they are ordained to decide complaints, as far as possible, within a period of 90 days from the date of notice received by the opposite party where complaint does not require analysis or testing of the commodities and within five months if it requires analysis or testing of commodities. So far as insurance claims are concerned no analysis or testing of commodities is involved and so every policy holderconsumer of serviceis expected to have redressal within a short span of three months. In the actual working of this Act with pious intention this rule is observed more in breach than compliance. One and half decades is not a short period for evaluating the success of the Act but we can hope that it will achieve that success of giving relief within time in the near future.

Limitation

When a policy provides that the insured shall not have the right to sue after 12 months of repudiation of claim, such a provision is not void under the law of limitation or under the law of contact. The claim filed after 12 months was held not maintainable.[243]

Curtailment of limitation is not permissible in view of s 28 of the Contract Act, but provision for extinction of right unless exercised within a specified time is held valid.[244]

Originally in the *Consumer Protection Act 1986* no limitation was fixed. So at that time, art 113, the residuary article, was applied.[245] But by the Amendment Act 1963, s 24 A was introduced where it is provided that the three tribunals shall not admit a complaint unless it is filed within 2 years from the date on which the cause of action has arisen with a power to condone delay as in the case of appeals.

Chapter 35 Insurance Products: New Developments

The nature of risk is dynamic and subject to changes connected to contemporary developments around the world. New ways of doing business, tensions in world politics and threats to the natural world have created new risks. The result is a host of non-traditional insurance products all of which require regulation. In this chapter we examine a few insurance products and risks which are either, new, uncommon, or unorthodox.

Insurance policies have been devised to cover risks such as uncertainty in Agricultural Crop produce, legal liability arising in clinical trials, environmental liability. These types of insurances go beyond being a contract between the insurer and the insured. This insurance policys impact goes beyond simply addressing the risks of the insured and to making a difference to the society in which it operates. Thus in these areas government intervention is common- either the government creates its own insurance schemes, or makes it mandatory to procure insurance, or creates conditions which makes the market ripe for such insurance products. A sample of such policies has been presented.

Second some insurance policies developed due to changing world conditions such as kidnapping and ransom insurance, terrorism insurance etc are looked at.

Third it is examined how changing market conditions and commercial scenarios have given rise to unorthodox products like unit linked insurance policies, where the insurance policy plays the dual role of insurance and an investment mechanism. Policies such as advanced loss of profits have been devised to address changing commercial risks, to cover the risk of doing business. Businesses inherently carry with them a risk and a corresponding reward. However, today, when high finance costs, interest costs affect the profitability of an enterprise, insurance products have been devised to mitigate such business risk. The increasing use of technology

in commercial spaces has introduced new types risks cyber-attacks, which results in heavy losses, often of information. An attempt to present a few of this type of insurance products has been made.

I Insurance in areas of high societal impact

Agriculture, Crop and Plantation Insurance

The insurance need for agriculture cannot be over emphasised, as it is a highly risky economic activity, on account of its critical dependence on weather conditions. In India, agricultural risks are exacerbated by a variety of factors, ranging from climate variability, frequent natural disasters, uncertainties in yields and prices, weak rural infrastructure, imperfect markets, attack of pests, diseases and lack of financial services. One of the tragic consequences of crop destruction is farmers suicides.

Given, the variables stated above, to design and implement an appropriate insurance programme for agriculture is a complex and challenging task. Crop insurance is a financial mechanism to protect farmers, against financial loss from the uncertainties of crop production, due to natural factors, beyond farmers control.

The fact that India is a primarily agrarian economy has further intensified the need to protect our farmers. The first ever crop insurance scheme was implemented in 1972 in India by the General Insurance Department of Life Insurance Corporation of India on H-4 cotton in Gujarat. Subsequently the scheme was broadened to other crops and states. The scheme continued till 1978-79. Later the task of implementing agricultural schemes was undertaken by the General Insurance Corporation of India.

Agriculture Insurance schemes in India

The Agriculture Insurance Company of India Limited (AIC)[246] was formed by Government of India, to subserve the needs of farmers better and to move towards a sustainable actuarial regime, it was proposed to set up a new Corporation for Agriculture Insurance.[247] The **National Agriculture Policy** was announced in July, 2000 states specifically the need and importance of crop insurance. The policy states: Despite technological and economic advancements, the condition of farmers continues to be unstable due to natural calamities and price fluctuations. National Agriculture Insurance Scheme covering all farmers and all crops throughout the country with built-in provisions for insulating farmers from financial distress caused by natural disasters and making agriculture financially viable will be made more farmer-specific and effective. Endeavour will be made to provide a package insurance policy for farmers, right from sowing of crops to post-harvest operations, including market fluctuations in the prices of agricultural produce. [248]

Generally speaking, there are two types of insurance coverage available in India: single and multi-peril coverage. Single peril coverage offers protection from single hazard while multi-peril provides protection from several hazards.[249] Some agricultural insurance schemes are discussed below:

National Agricultural Insurance Scheme (NAIS)

The Government of India introduced many agricultural schemes throughout the country, beginning with a Comprehensive Crop Insurance scheme in the early 90s, followed by other experimental schemes in the late 90s. In 1999-2000, the Government introduced new scheme titled National Agricultural Insurance Scheme (NAIS) or Rashtriya Krishi Bima Yojana (RKBY)[250]. This scheme operates on the basis of area (defined areas for notified crops for widespread calamities) and on individual basis (for localized calamities such as hailstorms, landslides, cyclones and floods.) The scheme covers mandatorily all farmers who avail loans for agricultural operations from defined financial institutions. It also covers other farmers growing notified crops, who can voluntarily opt for the scheme.

The scheme, while a good financial mechanism to mitigate risk and to bring stability to the countrys economy has been criticised as being in effective due to imperfect implementation.

Pilot Modified National Agricultural Insurance Scheme (MNAIS) [251]

The aim of this scheme was to improve further on the previous model of the scheme and to make the scheme

more farmers friendly. Agriculture Insurance Company of India Ltd. and approved private sector insurance companies mainly engaged in agriculture insurance business have been empanelled by the Government for implementation of pilot MNAIS. The scheme has been approved for implementation on pilot basis in 50 districts. The scheme has coverage of food crops, oil seeds, and annual commercial/horticulture crops. The objective of the scheme is to provide financial support and coverage to the farmers in the event of prevented sowing & failure of any of the notified crop as a result of natural calamities, pests & diseases.[252]

Pilot Weather Based Crop Insurance Scheme (WBCIS)

Private insurance companies have also developed insurance schemes specific to crops, sometimes specific to weather. These are often pilot projects developed with the assistance of Agricultural and Rural Development Department of the World Bank. One such scheme is the WBCIS. The scheme is being implemented by Agricultural Insurance Company of India Ltd. However, to provide competitive service to the farmers, private insurance companies i.e. ICICI-Lombard, IFFCO-TOKIO and M.S Cholamandalam General Insurance Companies have also been involved for implementation besides Agriculture Insurance Company of India (AIC). This scheme aims to mitigate the hardship of the insured farmers against the likelihood of financial loss on account of anticipated crop loss resulting from incidence of adverse conditions of weather parameters like rainfall, temperature, frost, humidity etc. The basic premise on which this insurance is build is that weather conditions have a major impact on agriculture in India. The coverage includes Kharif and rabi crops.[253]

Livestock Insurance

Cattle insurance is another facet of agricultural insurance which is being implemented. Under the various Livestock Insurance Policies, cover is provided for the sum insured or the market value of the animal at the time of death, whichever is less. The Cattle Insurance Policy has been introduced by the Insurance Regulatory and Development Authority (IRDA).[254] The insurance basically provides protection to rural people from financial loss due to the death of the cattle.

Clinical Trial Liability Insurance

Clinical trials are tests conducted in the course of medical research and drug development. These trials help to judge the efficacy and safety of a drug or pharmaceutical product. These tests are often conducted on human volunteers. Clinical trials, while they hold enormous potential for benefiting patients, they also carry a risk.

Clinical trial liability insurance is a product developed by the companies in insurance sector to protect themselves from the risks arising from bodily/physical injury caused to the individual during the process of clinical trials. India has been a preferred option for global companies for clinical trials for multiple reasons:- the most important of them being the large population of our country, availability of cost effective and at the same time good quality of medical resource, technology which is at par with the global world and also the fact that India has a largely english speaking population. Criticism has arisen in the country due to governments failure to take note of legal and ethical ramifications of clinical trials.[255]

In India clinical trials are regulated by Schedule Y of the Drug and Cosmetics Rules, 1945. In addition Rule 122-DAB in the Drugs and Cosmetics Rule, 1945 lays down the requirement of providing free medical management as long as required, in the case of an injury occurring to a clinical trial subject. Further it provides that if the injury suffered by the subject is related to the clinical trial conducted on such subject, he or she shall also be entitled for financial compensation.

The growth in the industry and the legislative measures has led to an increased awareness amongst stakeholders about the severity of the risks associated and the possible financial impact on organisations. This in turn has led to a requirement for the right insurance cover. Initially demand for such a product was primarily driven by the insistence of an international sponsor. However today, all key stakeholders in the chain are aware that conducting a clinical trial without an insurance cover in place would not be a wise and prudent business decision. On one hand, it is imperative to ensure the welfare of a volunteer; however, there is also an urgent need to safeguard the industry from collapsing all of a sudden. Therefore, an insurance instrument that could help in mitigating this risk would ensure that stringent compensation measures can be put in place and at the same time the industry is protected from this burden.

Such policies generally cover legal liability. The insurance company will indemnify the insured against all sums in excess of the deductible costs, that the insured shall become liable to pay as damages or financial compensation

and claimants costs and expenses in respect of any claim made by the research subjects for bodily injury caused by an occurrence happening after the retroactive date within the policy scheme and arising out of the business of the insurers depending on the schedules annexed to the specific policy document. Certain schemes also cover post-trial risks of up to two months.. However, effects such as failure of drugs and nuclear chemical risks are usually excluded from coverage.

Environmental Liability Insurance

In the current legal climate, business owners have greater responsibility for the environment. The polluter pays principle could makes the owner of the business liable for the costs of environmental remedies. Environmental liability can be serious threat to the financial health of many companies. Companies also run the risk of storing, producing or emitting hazardous waste which may damage the environment. Companies faced with such liability have turned to their insurance policies for protection. Environmental liability insurance could help mitigate the losses caused by these associated costs. The insurance may also have the additional advantage of encouraging companies to remove risks to human health and restore the condition of wildlife and habitats, air quality and water.

In India, the *Public Liability Insurance Act, 1991* was enacted making it mandatory to provide for public liability insurance for installations handling hazardous substances to provide minimum relief to the victims. Such an insurance, apart from safeguarding the interests of the victims of accidents, would also provide cover and enable the industry to discharge its liability to settle large claims arising out of major accidents.[256] In addition Indian Courts have not been shying away from imposing high penalties on polluting companies.[257] This has given rise to insurance products that address this risk. While insurance products alone will not give us the desired outcomes, in respect to protecting the environment, pollution abatement policies have advocated the need for combining regulatory instruments with market-based instruments and other supportive measures to deal with environmental protection. [258]

The term environmental insurance is used in a general sense to denote both first-party (property) and third party (liability) insurance policies, whose primary purpose is to manage pollution-related loss exposures. Environmental liability losses can be incurred through torts, contractual obligations, or violations of statutes. In additional to these traditional sources of liability, there is a unique legal aspect to environmental liability that makes these risks more difficult to manage. This aspect is, legislated retroactive, strict liability for clean-up costs, where there is the violation of a law designed to protect human health and environment, or becoming responsible to pay environmental remediation expenses. Pollution exclusions in general liability, automobile liability, and property insurance policies create coverage void for many industrial and commercial insured bodies. To fill this gap in insurance coverage, a number of specialized environmental insurance policies have been developed to address a wide range of loss exposures. Environment insurance coverage extends to:

(i) Third party claims for damage or bodily injury;

(ii) Mandated clean-up costs;

(ii) Legal defence costs;[259]

II Personal Safety Insurances

Kidnapping and Ransom Insurance

As a result of alarming increase in pirate attacks on high seas and the growth of the naxal menace, Kidnapping and ransom insurance have become a buzz word in the insurance sector. Kidnapping and ransom insurance, more popularly known as the K&R insurance, is designed to protect individuals and corporations operating in high-risk areas around the world. Companies that usually avail these services are those that have employees based in high risk areas, those that travel a lot, those who have access to sensitive information and those that handle large amount of money. There has been a dramatic increase in the rate of kidnapping and extortion cases in recent times. Kidnapping and ransom insurance policies typically cover the perils of kidnap, extortion, wrongful detention and hijacking. These are indemnity policies and the insurer reimburses the loss incurred by the insured. In these policies, in case the insured pay the ransom and then he can seek reimbursement under the policy. These policies are especially popular amongst the corporates functioning in the Maoist infested areas. Also, in order to counter the threat of piracy, many shipping companies take the protection of K&R policies.[260]

General coverage of K&R is inclusive of:

(i) Ransom/extortion money