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Foreword

We are all bound by the laws of obligations one way or another. They are the un-noted attendants to our everyday activities such as buying a new washing-machine, driving the car to work, operating a bank account or cultivating a hedge as boundary to the garden. Law students will, after a moment's thought, point out how these activities involve the laws of contract, tort, trusts, land law and, even, criminal law. At the same time, perhaps without us realising it, insurance has now become central to life in the Western world. We take out life insurance, motor insurance, household insurance (which, like motor insurance, includes liability insurance), insurance against the cost of repairing goods (like the washing machine), travel insurance, personal accident insurance and payment protection insurance. In the business world, insurance against loss or liability can be found for any activity engaged in under the sun.

Yet the two legal worlds, that of the laws of obligations and that of the law of insurance, have always remained strangely apart. Thus, the received view of the law was that matters concerning insurance cover should be ignored when considering who the claimant is or his right to substantial damages or whether the defendant was being funded by an insurer. The fact that the claimant was actually a subrogated insurer and the defence was being maintained by the defendant's liability insurer have traditionally been treated as the unacknowledged elephants in the court room.

And the academic study of the laws of obligations and of insurance have maintained this curious divide. Insurance law is, traditionally, seen as something esoteric, an "add-on" to the general study of the laws of obligations and a subject that might be examined as an optional extra after the basics of the laws of obligations have been mastered.

This book is a trail-blazer because it challenges all these traditional attitudes and approaches. It demonstrates that insurance is central to the laws of obligations and how it has moulded the development of the common law of contract and tort in particular. So the authors ask such fundamental issues as how insurance has influenced the development of the law of tort, quite apart from the vexed questions raised by mesothelioma and asbestosis cases; how it has influenced the development of contractual obligations, particularly in business areas such as development and construction and oil and gas where, often, there are multi-parties all having insurance of various forms. The authors ask the pertinent question: is our attitude to the interpretation of commercial contracts and to tortious liability actually influenced by the knowledge of where and how the parties are covered by insurance; and if it is, is it not time this was acknowledged frankly?

The authors also analyse how the presence of insurance has fundamentally effected the evolution of both the practice and the substance of litigation. It is easy to forget that in many commercial cases it is an insurer who sues (in the name of the claimant) by right of subrogation and the defendant's case is actually being conducted by its liability insurer because the law has always insisted that be disregarded. The authors ask

whether it is time that we recognise the central position that insurance takes in the way legal disputes are decided.

In one single volume the authors enable the reader to understand the philosophical basis of the law of insurance, the key practical aspects of insurance and re-insurance and, through a broad based analysis of different topics, where and how insurance and the law of insurance is now an intrinsic part of our laws of obligations. This book should be read by all scholars and practitioners who are concerned with the laws of obligations, insurance or both. It will shake them out of their insularity, make them question some of their pre-conceptions and provide much material for new debate and argument.

It might even make the judges have a rethink and some might say "about time too"!

Sir Richard Aikens
Lord Justice of Appeal

Preface

Ask any practising lawyer to describe the role of insurance in her or his professional activities, and the almost inevitable response will be: 'Pervasive'. The lawyer must have liability insurance just to participate in the profession, and it is important to monitor potential third-party claims so that they can be notified to insurers and so that information can be gathered for renewal negotiations. Everyday conveyancing requires the purchaser to be protected by insurance against the risk of destruction between contract and conveyance, and if funding is to be obtained from a mortgagee then there will be a demand for insurance protection over the secured property given that it is likely to be the borrower's major asset. Establishing a family trust entails obtaining professional indemnity insurance for the trustees, and setting up a company—whether family or multinational—entails obtaining directors' and officers' liability insurance for present and future incumbents. A personal injury victim will almost inevitably be seeking to recover any award of damages from the liability insurers of the tortfeasor, and it may be necessary to make immediate contact with those insurers to make sure that they are aware of the proceedings as well as ascertaining from the victim whether he or she has insurance funding for the litigation. Other victims seeking to recover damages for property or financial losses will be advised that it may only be worth pursuing a defendant who is insured, and in many such cases the victim will have first-party insurers who will pay losses and then seek to recoup their outlay by subrogation proceedings. Moving to the world of commercial transactions—sales, construction, licensing and the rest—contract negotiations inevitably involve agreement between the parties on the allocation of risks, who is to bear them, and who is to insure against them. The lawyer, in the same way as any other person tendering for work, may well have to satisfy the other party that there is adequate liability insurance in place to cover risk of loss.

All of these matters are about risk. If a party faces the risk of injury or loss, insurance will be taken out by way of protection. If a party is at risk of inflicting harm, insurance will be obtained to fund any award of damages. If the parties are entering a contractual relationship, they will determine where risks lie. The desire either to shift risk, or to protect against it where it cannot be shifted, is shared by most. The law of obligations, embracing both contract and tort, has to be seen in this context.

If it is the case that litigation is conducted or funded by insurers, damages are generally paid by insurers, and the very incidence of liability is underpinned by insurance, why is it also the case that the relevance of insurance is ignored, and indeed often denied, in analyses of the law of obligations? Academic orthodoxy, to begin with a focus on tort law, has the starting point that tort liability (or non-liability) is dictated by personal responsibility, and that the duty and standard of care, and indeed causation, in any one case have to be determined by principle and not by wider distributive notions. If that is right for tort, then it follows that contract liability should be determined in the same way. Insurance, therefore, is a personal decision and is the mechanism for enforcement and the spreading of loss throughout society rather than the driver of

liability. The fortuitous presence or absence of insurance therefore tells us nothing about how legal principle should be developed.

This book argues that the orthodox approach should be reappraised. We suggest that an entirely different vision is possible if the starting point is relational. All contracts to a greater or lesser extent encompass risk allocation, and such allocation, varying with the degree of the contract's complexity, rests upon explicit insuring duties or implicit understandings as to how insurance is to be arranged. Of course risk allocation is not perfect, and the unforeseen is inevitable, but the agreed or assumed incidence of insurance may inform the court in ascertaining the objective intentions of the parties. Moving from there to tort, we then suggest that tort liabilities are relational to a far greater extent than has been recognized. Professional negligence claims, actions against suppliers or contractors and employment injuries all spring from contracts. Actions against neighbours, local authorities, medical practitioners and road users are, to a lesser and less obvious extent, also relational. It is only rarely that a novel situation, calling for the application of principle or legal policy in the absence of a familiar or agreed risk allocation, arises. Our analysis of insurance thus extends from the accepted distributional role to the equally significant but under-analysed relational role.

It may be appreciated that our analysis differs in one fundamental respect from much of what has gone before, and that is that we regard legal principle not as an overarching imposition of personal responsibility but, in many relationships, as a default mechanism. If the parties can agree which of them should bear a risk, and they act accordingly, then as long as there are no public policy considerations and no harm is inflicted on third parties there is no reason for high principle to intervene and to reverse their arrangements (particularly where it thereby allows a particular party, often an insurer, to subvert those arrangements). Other, social mechanisms with an influence on the allocation of risks are also sometimes in play. If particular activities raise familiar hazards (such as employing or driving), insurance may, as a matter of public policy, be demanded by the state. In the case of driving, the form of that insurance has been closely defined. We are of the view that the academic focus on the exceptional rather than the mundane distorts the portrayal of the significance of insurance in and to the law of obligations. That point has been made before in relation to the mass of cases which never reach court and are dealt with instead through routine settlement processes heavily influenced by insurance and insurers. Here we extend the point, in relation to the shaping of litigation and of legal doctrine.

The most fundamental objection to the doctrinal relevance of insurance perhaps stems from a fear that the ability of a person to insure, rather than legal principle and notions of personal responsibility, will thereby come to determine whether that person owes or is owed a duty or enhanced standard of care. We suggest that this objection has no part to play where the incidence of established risks has been agreed or understood: if the legal system regularly trumps those arrangements or understandings, the response will be that both potential claimants and potential defendants will have to insure, thereby unnecessarily increasing the cost of their activities. Our suggestion is, therefore, that once risks have been ascertained (by agreement or by law), the allocation arrangements (backed by insurance) adopted to deal with them should be honoured and not disregarded. Looking at that allocation explains a lot about the outcome of

contract and tort cases. But to bring insurance out from the shadows may assist understanding of legal principles in a range of other ways, also. Certainly, it should assist in understanding the way that claims are framed—yet the framing of claims has been promoted within formalist approaches as an expression of the pure bipartite (or bipolar) relationship between two parties. It will also draw more attention to the boundaries of acceptable risk-shifting and loss-spreading, and therefore to different aspects of the idea of 'responsibility', such as wrongdoing which goes beyond mere negligence, or breaches of duty which constitute personal rather than vicarious liability. The implications of these factors for the very shape of the law have been underemphasized, because the habitual insurance of more routine risks and shortcomings (including vicariously) has also been neglected.

This book focuses on risk allocation, and also upon the role of insurance in spreading loss from the risks as allocated. It is not a treatise on insurance law, but rather a discussion of why insurance matters to obligations lawyers and why disregarding insurance removes our understanding of a key element in how the law actually works, and how its principles are developed and deployed. As we were writing, developments in the law seemed to us to sustain our view. In particular, the prolonged development of mesothelioma litigation, the dispute as to whether expert witnesses should have immunity from suit, and the enhanced focus on the operation of compulsory motor insurance, all gave us the opportunity to extend our analysis to matters of current concern. At the end of the day, we also hope that our analysis will help to equip obligations lawyers to make their own distinct contribution to the study of insurance as an important social institution.

We owe thanks to a number of individuals and organizations. Jenny owes a large debt of thanks to the Leverhulme Trust, whose funding through a Major Research Fellowship on 'Liability, Insurance, and Society' has secured the necessary research leave in which to develop the ideas in this book, and to York Law School for its support. We have had the help of a large number of colleagues in getting the book to completion. In the closing stages, Charlie Bishop gave us invaluable assistance in the preparation of the manuscript. Before that, various of the chapters were read in draft form and we benefited immeasurably from comments received from an almost embarrassing number of people. Though none should be held responsible for emerging arguments, many thanks are due to Kit Barker, Jill Poole, Paula Giliker, Bob Lee, James Goudkamp, Matt Dyson, Malcolm Clarke, Andrew Tettenborn, Paul Mitchell, Jamie Lee, Phillip Morgan, TT Arvind, and Carol Forrest, for their help and generosity in this respect. Meixian Song provided valuable research assistance on the history of workers' compensation. We would also like to thank the team at Oxford University Press, particularly Natasha Flemming and Emma Brady, for keeping this project on track so professionally at a very busy time. And, finally, we would like to thank our families. Jenny is grateful as ever to Adrian, Joe, and Theo for sharing valuable time with another book, and Rob is similarly grateful to Barbara for her accustomed forbearance.

List of Abbreviations

ABI	Association of British Insurers
AIDA	International Association of Insurance Law
AIG	American International Group, Inc
APIL	Association of Personal Injury Lawyers
ART	Alternative Risk Transfer
ATE	After the Event
BIA	British Insurers Association
BTE	Before the Event
CFA	Conditional Fee Agreement
CJEU	Court of Justice of the European Union
CLC	International Convention on Civil Liability for Oil Pollution Damage 1992
COBS	Conduct of Business Sourcebook
CP	Consultation Paper
CPR	Civil Procedure Rules
CRU	Compensation Recovery Unit (of the DWP)
D&O	Directors and Officers
DWP	Department for Work and Pensions
ECGD	Export Credit and Guarantee Department
EIB	Employers Insurance Bureau
EIL	Environmental Impact/Impairment Liability
EL	Employers' Liability
EQC	Earthquake Commission
ERISA	Employee Retirement Income Security Act 1974
FCA	Financial Conduct Authority
FOS	Financial Ombudsman Scheme
FSA	Financial Services Authority
FSCS	Financial Services Compensation Scheme
FSMA 2000	Financial Services and Markets Act 2000
GFC	Global Financial Crisis
GIBKR	General Insurance Broker
GISC	General Insurance Standards Council
HRA	Human Rights Act 1998
IBRC	Insurance Brokers Registration Council
ICOBS	Insurance Conduct of Business Sourcebook
INSPRU	Prudential Sourcebook for Insurers
IOB	Insurance Ombudsman Bureau
IUA	Insurance Underwriting Association
JCT	Joint Contracts Tribunal
LC	Law Commission
LCCD	Law Commission Consultation Document
LCCP	Law Commission Consultation Paper
LCIP	Law Commission Issue Paper
LEI	Legal Expenses Insurance
LMX	London Market Excess

MASS	Motor Accident Solicitors Society
MIB	Motor Insurers' Bureau
MII	Mortgagees' Interest Insurance
MMI	Municipal Mutual Insurance
OFT	Office of Fair Trading
ORSA	Own Risk and Solvency Assessment
P&I	Protection and Indemnity
PL	Public Liability
PPI	Payment Protection Insurance
PRA	Prudential Regulatory Authority
PRIN	Principles for Business
QOCS	Qualified One-way Costs Shifting
RDC	Running-Down Clause
RTA	Road Traffic Act
SPE	Special Purpose Entity
SRP	Supervisory Review Process
SSA	Social Sciences Association
SUP	Supervision
TNA	The National Archives
URDG	Uniform Rules on Demand Guarantee

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