

Institution: University of Southampton
Unit of Assessment: 20 Law
Title of case study: 20-03 The Third Way: Guiding New Policy Over Third-Party Insurance
<p>1. Summary of the impact</p> <p>Influential work on insurance law by Professor Rob Merkin led directly to the repeal of the outmoded and increasingly unpopular Third Parties (Rights Against Insurers) Act 1930. With its predecessor criticised for its demands on time and costs, a new Act made it simpler, faster and cheaper for a third-party claimant to recover compensation from an insurer without instituting proceedings against the insured. Merkin not only drew policymakers' attention to the old Act's defects but provided a detailed basis on which to formulate its successor, which earned Royal Assent in 2010.</p>
<p>2. Underpinning research</p> <p>The Third Parties (Rights Against Insurers) Act 1930 stood for more than three quarters of a century, during which time the issues to which it principally related, insurance and insolvency, gradually changed beyond recognition. Research by the University of Southampton has made a pivotal contribution towards highlighting the need for – and helping to shape – a new Act.</p> <p>Rob Merkin, Professor of Commercial Law at Southampton Law School (2000-2012) has been conducting research in the field of insurance law for more than 20 years. He co-founded the School's insurance law research group (ILRG), now comprising nine members of academic staff; Hjalmarsson (Informa Senior Research Fellow in Maritime and Commercial Law joined 2004), Staniland (Professor of Maritime Law, joined 2007), Gurses (Senior Lecturer joined 2010), Lista (Senior Lecturer joined 2008), Rose (Professor of Maritime and Commercial Law joined 2012), Hudson (Professor of Equity and Finance Law joined 2012), Todd (Professor of Commercial and Maritime Law joined 2012), Bek (Research Fellow joined 2013), Steer (Research Fellow joined 2013).</p> <p>In the early 1990s the English Law Commission reviewed the concept of privity of contract in common law, the doctrine that provides that a contract cannot confer rights or impose obligations on any person other than the parties to it. The 1991 consultation paper, Privity of Contract: Contract for the Benefit of Third Parties (Law Commission Consultation Paper No. 121), although recommending general reform, remarked: "There are various exceptions to privity, including the 1930 Act, which works very well."</p> <p>Merkin responded by contacting the Commission to highlight the deficiencies of the 1930 Act. Following further consultation – including with the Law Society's Insurance Law Sub-Committee, of which Merkin was a member – the Commission resolved to investigate the Act in full. Merkin was asked to supply written evidence, and the Commission's 2002 report, Third Parties – Rights Against Insurers (Law Commission Report No. 272), referred in detail to both this and his wider work on the issue.</p> <p>In the summer of 2009, using a new system for the rapid enactment of Law Commission reports, the government decided to implement the 2002 report in legislation. A Bill was introduced into the House of Lords in November that year. It was important the Bill should not need substantial amendment, as this would prevent the use of the new expedited procedure. As one of only three people invited by Lord Bach, Parliamentary Under-Secretary of State at the Ministry of Justice, to give oral evidence to a House of Lords Special Committee, Merkin was tasked with demonstrating the bill was "fit for purpose" as it stood.</p> <p>Merkin prepared two reports. The first was used by the Committee as a basis for its deliberations. The second offered a point-by-point rebuttal of suggestions regarding potential defects in the new legislation, so helping remove doubts raised with and by the Committee. The House of Lords</p>

Impact case study (REF3b)

passed the Bill, publishing a report containing Merkin's written and oral evidence (House of Lords Paper No. 58, House of Lords Special Public Bill Committee: Third Parties (Rights Against Insurers) Bill, February 9 2010), and the Third Parties (Rights Against Insurers) Act 2010 received Royal Assent on March 25 that year.

3. References to the research

Colinvaux's Law of Insurance, 9th edition 2010, chapter 21. This work, and its previous editions (Merkin has written the 6th edition onwards) is regarded as one of the leading practitioner texts and has many citations in common law jurisdictions

Report of the House of Lords Special Committee on the Third Parties (Rights against Insurers) Bill 2010, HL Paper 58, February 2010, 64 pp. Merkin's two memoranda to the Committee appear on pages 19-33 and a transcript of Merkin's evidence appears on pages 33-43. Lord Mance's memorandum, published on pages 44-46 adopts a number of Merkin's points, as does his oral evidence published on pages 47-54.

4. Details of the impact

The Bill that led to the Third Parties (Rights Against Insurers) Act 1930 was described as a measure that would "commend itself to all quarters of the House" (Hansard, October 29 1929, volume 231, column 128). This proved to be the case, but the Act increasingly failed to keep pace with the changing landscape of insurance and insolvency.

The Act applied where a person or company took out liability insurance. If the insured became liable to another person – a third party – the latter would ordinarily be able to sue the insured, with the liability covered by the insurer; but under common law the third party was unable to proceed if the insured became insolvent (instead becoming a general creditor). The Act transferred the insured's rights under the insurance policy to the third party, enabling direct proceedings against the insurer.

Over the years the Act attracted mounting concern over its encouragement of time-consuming procedures and unnecessary costs. The principal purpose of the 2010 Act was to make it easier, quicker and less expensive for a third-party claimant to recover compensation from an insurer without first having to institute proceedings against the insured. Merkin was one of the 1930 Act's foremost critics, drawing on his research to argue for the need for change and personally directing the Law Commission's attention to its shortcomings – detailed in a 20-point letter – after the legislation was spared immediate reform in a wider investigation into privity of contract in 1991.

Merkin's research thus led directly to the new Act, playing a key role in shaping the legislation so as to correct the defects of its predecessor. His expertise in this field, demonstrated in written and oral evidence, provided a point-by-point basis for the House of Lords Committee to determine the feasibility of the new Act and to ensure the Bill could be passed quickly and without the need for a debate (5.1, 5.2, 5.3, 5.4). This process represented peer review in every sense, with the Committee comprised of retired Law Lords, QCs, former cabinet ministers and other Lords with extensive knowledge of the law. Law Commissioner David Hertzell and The Right Hon the Lord Mance, former Lord of Appeal and now Justice of the Supreme Court, were both heavily involved with the legislative changes (5.5). The Rt Hon. the Lord Lloyd of Berwick DL, chairman of the House of Lords Special Committee, told Merkin at the end of the hearing: "It could not have gone better." The House of Commons passed the Bill in less than an hour.

Chief among the new Act's improvements is that a third party has a direct claim against an insured's insurers, ensuring policy moneys go to pay the victim's claim instead of being diverted to the insured's other creditors. The effects of this should include ensuring the victims of asbestos exposure obtain compensation; allowing victims to obtain information as to the adequacy of any insurance before proceedings are commenced; and preventing insurers from relying on policy

conditions affecting claims where those conditions have been disregarded by an insolvent insured. It is not yet possible to gauge the precise benefits of the revised legislation, as the Act has not yet come into force; but they are expected – and, indeed, were designed – to be significant. In 2013 the Government indicated its intention to amend the Act to introduce further specified insolvency situations and then to implement it as soon as is reasonably practicable (5.6).

The new Act met with approval from the wider law industry. For example UK law firm Mills and Reeve wrote in 2010 (5.7):

“Whilst the new regime is likely to result in more claims from third parties, as it will now be possible to bring proceedings first against insurers to resolve policy issues, if the policy defence is a good one costs should ultimately be saved. In addition, if the policy defence fails, insurers will now have ample opportunity to contest both liability and quantum of the third party's claim to indemnity under the policy rather than being presented with a monetary judgment obtained in default against the insolvent insured which simply has to be paid.”

A recognised leader in his field, Merkin continued to shape wider thinking on insurance law both nationally and internationally. His work on the 2010 Act, in addition to being detailed in a House of Lords paper and freely downloadable minutes of evidence, forms chapter 21 of the ninth edition of Colivaux's *Law of Insurance* (2010), described by publisher Sweet and Maxwell as the “essential companion for insurance practitioners”.

Other ILRG members have also contributed to the understanding of the Act by those who will need to apply it in their commercial activities through articles in practitioner newsletters and journals (*Shipping & Trade Law*, *Insurance Law Monthly* and *Asia Pacific Law Review* in 2010); the practitioner reference works *Marine Insurance: Law and Practice* (2012); and *Insurance Disputes 3rd edition* (2011); and in the text book *Maritime law* 2nd edition (5.8).

They have also delivered professional development courses in the UK and overseas including on the renowned Short Course in Maritime Law (each year from 2010 onwards) for a combined audience of approximately 200 to date. The Short Course is provided in Southampton by the Institute of Maritime Law for an audience consisting of market practitioners such as solicitors, barristers and insurance and shipping professionals each year in August and September.

The Act has also been covered on the Institute of Maritime Law Singapore Short Course, which runs in Singapore annually over two weeks in May. The Act has been covered in 2012 and 2013 and included in the course materials in some previous years. The course is co-organised with the Singapore Maritime Foundation and aimed at professionals practicing shipping law in Singapore.

Dr Ozlem Gurses and Professor Paul Todd spoke about the implications of the Act at a bespoke course on marine insurance provided to Raets P&I, a marine insurer, in the Netherlands on 10-11 June 2013, a two-day intensive course on English insurance law. The audience was all members of the underwriting team and claims handlers of Raets.

Most recently, advice on the implications of the Act has been provided to a Turkish law practitioner dealing with an insurance policy incorporating English law in April 2013. The issue was related to the third party's right to bring a direct action against insurer under English law because the policy, being on aviation insurance, was based on English standard terms of aviation insurance. The same issue was also discussed at the conference on liability insurance in Istanbul in March 2013 at which Ozlem Gurses was one of the speakers.

The third party liability insurance market, to which this Act will apply once it enters into force, is considerable, even excluding motor insurance (which is separately regulated by the Road Traffic Act 1988). According to the Association of British Insurers, the UK insurance industry is the largest in Europe and the third largest in the world, accounting for 7% of total worldwide premium income. About 30% of the UK insurance industry's net premium income comes from overseas business,

most of which is long-term business (£46 billion) (5.9).

The likely reach of the Act is global, as English law is the law of choice for many business insurance policies.

5. Sources to corroborate the impact

5.1 Memorandum to House of Lords Special Committee on the Third Parties (Rights against Insurers) Bill 2010 – full details of underpinning arguments in favour of 2010 Act.

<http://www.publications.parliament.uk/pa/ld200910/ldpublic/third/58/10012602.htm>

5.2 Supplementary memorandum to House of Lords Special Committee on the Third Parties (Rights against Insurers) Bill 2010 – full rebuttal of points raised against new legislation and consequent expedited passing of Bill.

<http://www.publications.parliament.uk/pa/ld200910/ldpublic/third/58/10012603.htm>

5.3 Oral evidence to House of Lords Special Committee on the Third Parties (Rights against Insurers) Bill 2010 – full discussion of arguments in favour of 2010 Act.

<http://www.publications.parliament.uk/pa/ld200910/ldpublic/third/58/10012601.htm>

5.4 Third Parties (Rights Against Insurers) Act 2010, National Archives. Full official government explanation of changes to legislation. <http://www.legislation.gov.uk/ukpga/2010/10/contents>

5.5 House of Lords Special Public Bill Committee: Third Parties (Rights against Insurers) Bill [HL] www.publications.parliament.uk/pa/ld200910/ldpublic/third/58/58.pdf

5.6 Written Ministerial Statement from The Parliamentary Under-Secretary of State for Justice 25 April 2013: http://www.parliament.uk/documents/commons-vote-office/April_2013/25-04-13/12.Justice-ThirdParties.pdf

5.7 Sample welcoming of new Act – Mills & Reeve law firm, March 2010.

<http://www.mills-reeve.com/the-third-parties-rights-against-insurers-act-2010-03-25-2010/>

5.8 Article about the reforms created by the act published in practitioner newsletter Shipping & Trade Law at Hjalmarsson, Johanna (2010) P&I insurers' information duties. Shipping and Trade Law, 10, (4), 5-7. This article has been downloaded from i-law 124 times since its publication;

The 2010 Act was analysed in two articles by professor Rob Merkin in the practitioner newsletter Insurance Law Monthly, 2010(22) No 11, Liability insurance – Third Parties (Rights Against Insurers) Act 2010, pp 1-4 and Employers' liability insurance – tracing insurers, p 6; The 2010 Act is covered in the practitioner work of Francis Rose on marine insurance: Rose, Francis (2012) Marine insurance: law and practice, 2nd Edition, Zug, CH, Informa Law, 864pp. (Lloyd's Shipping Law Library); The 2010 Act was covered in the marine insurance chapter of the third edition of the practitioner work Insurance Disputes, edited by Lord Mance et al – full reference: Hjalmarsson, Johanna (2011) Marine insurance. In, Mance, Jonathan, Goldrein, Ian and Merkin, Robert (eds.) Insurance Disputes, 3rd Edition. London, GB, Informa; The 2010 Act is also briefly covered in the textbook Baatz, Yvonne (ed.) (2011) Maritime law. 2nd edition, Andover, GB, Sweet & Maxwell, 642pp, written by members of the Institute of Maritime Law at the University of Southampton; The 2010 Act was dealt with in Hjalmarsson, Johanna (2010) Direct claims against marine insurers in the English legal system. Asia Pacific Law Review, 18, (2), 259-276. This article was cited by a Danish professor of law at Ulfbeck, Vibe (2011), Direct Actions against the Insurer in a Maritime Setting: the European Perspective. Lloyd's Maritime and Commercial Law Quarterly, (2), 293-306.

5.9 Source: Association of British Insurers: http://www.abi.org.uk/Facts_and_Figures/65276.pdf