

Impact case study (REF3)

Institution: University of Exeter		
Unit of Assessment: UoA 18 Law		
Title of case study: Reshaping insurance law in England & Wales and New Zealand		
Period when the underpinning research was undertaken: 2012 to date		
Details of staff conducting the underpinning research from the submitting unit:		
Name(s):	Role(s) (e.g. job title):	Period(s) employed by submitting HEI:
Professor Robert Merkin	Lloyd's Professor of Commercial Law	Jan 2012 to date
Period when the claimed impact occurred: 2014 to date		
Is this case study continued from a case study submitted in 2014? N		
1. Summary of the impact		
<p>Before 2015, English insurance law was based on the outdated Marine Insurance Act 1906, its principles rooted in the eighteenth century. Professor Merkin played a pivotal role in the development and enactment of the landmark 2015 Insurance Act. The Act is the most radical change in insurance law for 250 years, with profound implications for the £1.8 trillion insurance industry in the UK as well as the 70 other countries (including New Zealand) who had adopted the 1906 Act. In addition, Merkin's research has helped to inform and shape the law on three specific matters: fraudulent claims and late payment in England & Wales and, in New Zealand, on irrelevant conditions imposed by insurers. As well as shaping the law, Merkin has played a pivotal role in its implementation by advising key industry bodies, particularly on drafting policy wordings.</p> <p>Merkin's role in securing the passage of the 2015 Insurance Act, his specific contribution in shaping the law on fraudulent claims, late payment and irrelevant conditions, and his work with industry on effective implementation, has helped create a better functioning market and to achieve a fairer balance for the insured.</p>		
2. Underpinning research		
<p>English insurance law was, before 2015, enshrined in the Marine Insurance Act 1906, a measure codifying marine principles developed in the preceding two centuries and designed largely for wooden merchant vessels in wartime conditions. Those old marine principles had been extended to underpin other forms of cover as they came onto the market, including property, liability, motor, employers, life and consumer insurance. Over a series of articles and essays (3.1-3.6), Merkin had identified how the law had failed to keep pace with changing times, changing risks and changing markets. His research identified a continuing imbalance in favour of insurers that had developed in the infancy of the industry (3.2, 3.3). The insurer-friendly character of the law was typified by: a rigid adherence to the principle that breach of a policy term, however trivial and detached from the loss, defeated all future claims; the stark contrast between harsh remedies for errors by the insured in the claims process; and the absence of any right to damages where an insurer simply fails to pay.</p> <p>The specific problems and more proportionate solutions advocated by Merkin included:</p> <p>(1) Fraudulent claims: The common law rule was that a lie told in the claims process operated to defeat a claim even where that lie was unrelated to entitlement to recover. Further, if a fraudulent claim was submitted, the cases appeared to give the insurers the incongruous right to avoid the policy ab initio, wiping out earlier valid claims. In (3.1), Merkin & Bugra argued that the law was too rigid in both the definition and the legal treatment of fraud. They also advocated a more flexible and more proportionate approach to reform than proposals then being put forward by the Law Commission.</p>		

(2) **Irrelevant conditions/breach of warranty.** Historically, policy conditions expressed as conditions precedent and warranties, if broken, gave insurers an absolute defence even though the loss had no relationship to the breach: for example, a policy requirement for a working burglar alarm in a building would prevent a claim if the alarm was temporarily out of action when the building was destroyed by an aircraft falling out of the sky. Merkin (3.2, 3.3) had highlighted the unfairness of this approach, with no proportionality between the insured's transgression and the all-or-nothing sanction resulting from it. Merkin suggested a range of possible reforms, including the introduction of the need for a causal link between breach of a policy term and the actual loss.

(3) **Late payment:** Prior to 2015/16, an insurer who delayed in making payment for a valid claim, even to the extent of driving the assured into insolvency, faced no liability in damages other than for the policy moneys themselves, plus interest. That was based on the fiction that damages were payable at the date of the loss, so that there could be no additional damages for failure to pay damages. This was a topic that Merkin had addressed in successive editions of *Colinvaux* (3.2), pointing out the unfairness involved and the stark contrast with the law in other jurisdictions.

3. References to the research

3.1. Merkin RM, Bugra A (2012) Fraud and Fraudulent Claims. British Insurance Law Association Journal 125, 3-22 <https://bila.org.uk/wp-content/uploads/2019/04/Issue-125-Bugra.pdf>

3.2. Merkin RM, *Colinvaux's Law of Insurance* 10th ed (Sweet & Maxwell 2014) and subsequent editions: 11th (2016) and 12th (2019) *Available on request*.

3.3 Merkin, RM and Steele, J. (2013) Insurance and the Law of Obligations. OUP <https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199645749.001.0001/acprof-9780199645749>

3.4. Merkin RM and Gurses, O "Insurance Act 2015" 78 MLR 1004 (2015) <https://doi.org/10.1111/1468-2230.12158>

3.5 Merkin and Gurses, O "Insurance Terms after the Insurance Act 2015", 132 LQR 445 (2016) <https://ore.exeter.ac.uk/repository/handle/10871/20256>

3.6 Merkin, RM "What Does an Assured Know?" (2016) 27 Ins LJ 157 <http://hdl.handle.net/10871/26529>

4. Details of the impact

The UK is the fourth largest insurance market in the world, the largest in Europe and a key exporter of insurance (5.1). In 2018, the value of benefits and claims from the UK insurance industry was €311 billion. The London reinsurance market is one of the world's largest, and many overseas insurers reinsure in London under English law. Even after Brexit, which requires Lloyd's to write European business through its Belgian subsidiary, that business is reinsured back into Lloyd's of London under English law contracts. Most international covers issued in London are subject to English law, and English law is very often chosen as a neutral by law contracting parties not associated with England.

It was vital therefore that the legislative underpinnings of this major industry were fit for the 21st century. Merkin's research was pivotal to the introduction of the landmark Insurance Act 2015 (5.2) and its implementation by industry. Merkin is now advising overseas governments on law reform.

Impact 1: Informing the content and enabling the safe passage of the Insurance Bill

The impact of Merkin's research was facilitated by his appointment to key advisory roles enabling him to achieve evidence-based law reform as a trusted insider. Merkin was the

academic consultant to the Law Commission's insurance law review (2006 to 2015). His research, especially 3.1, 3.2 and 3.3, was a key part of the evidence base (5.5).

The resulting Insurance Bill was earmarked for a special Parliamentary procedure reserved for 'uncontroversial' Law Commission bills. The Bill could only make progress if consensus could be retained, meaning an unusually challenging legislative process requiring expert advice. The Law Commissioner notes "In recognition of Professor Merkin's role and his high profile in the debate he was appointed by Lord Woolf, the chair of the Special Public Bill Committee, as the adviser to the Committee to ensure that all the members of the Committee understood the full ramifications of what was being proposed" (5.4).

That role included preparing questions for members to put to expert witnesses, providing contemporaneous notes for Lord Woolf on issues arising during oral evidence, debriefing after each hearing and making recommendations for drafting changes to the Bill.

The Bill was steered successfully through Parliament, coming into force in September 2016. The Law Commissioner notes, "[Merkin's] was a rare and very pivotal appointment" (5.4), adding "Undoubtedly Professor Merkin had a considerable influence on the development of the Law Commission's final reform proposals and the enactment of the Insurance Act" (5.4).

The significance of the 2015 Insurance Act is hard to overstate. The Treasury's 2014 impact assessment was that the Bill would resolve legal uncertainty and ambiguity, reduce transaction costs and disputes and encourage a well-functioning insurance market allowing for competition and choice, and improving confidence in the industry (5.6).

Impact 2: Achieving a fairer approach to fraudulent claims

The Law Commission originally proposed to codify the existing common law rule that an insurer could treat an irrelevant false statement as a fraudulent claim. Drawing on (3.1), Merkin persuaded the Law Commission to let the courts find a solution to the problem, aware of the ongoing *DC Merwestone* litigation. In July 2016, the Supreme Court held that a lie not going to the assured's entitlement to indemnification should not be regarded as a fraudulent claim at common law. But for Merkin's intervention to prevent the existing common law rule being codified in the Insurance Bill, the Supreme Court in *DC Merwestone* would have had its hands tied and, consequently there would have been no positive change for the insured.

Impact 3: Finding a compromise solution to enable the introduction of late payments provisions and subsequent law reform

A late payments clause was dropped from the Insurance Bill as being too controversial for the Special Procedure. With Lord Woolf's encouragement, Merkin prepared alternative draft clauses providing for compound interest. The clauses were withdrawn on the government's promise that it would bring forward its own proposals. That promise was honoured quickly with Part 5 of the Enterprise Act 2016 on Late Payment of Insurance Claims.

Again, Merkin had been able to resolve problems identified in his own research (3.2) by working strategically with legislators to achieve law reform. Before 2015, late payment was a very significant problem with 42% of risk managers raising concerns about delayed insurance claims payments (5.6).

Impact 4: Informing further legislation: Advising other jurisdictions on law reform after the 2015 Insurance Act

The Marine Insurance Act 1906 has been the basis of insurance law in dozens of jurisdictions. Merkin has advised multiple jurisdictions, including Australia (5.7) and New Zealand (5.8) on possible law reform following the Insurance Act 2015.

In New Zealand, Merkin has been consultant to the insurance law reform programme since 2019, commenting upon proposals and helping formulate recommendations for reform, including

on irrelevant conditions (5.8). The government intends to legislate (5.9) and will seek Professor Merkin's assistance during the drafting phase (5.8).

Impact 5: Improving compliance by advising industry on implementing the Insurance Act reforms

The 2015 Act introduced major changes for the UK insurance industry. As a "thought leader" (5.3), Merkin has given multiple in-house lectures and advice to insurers, brokers and lawyers on drafting in the light of the Act, particularly in relation to disclosure requirements, late payment and contracting out. He has given update lectures to the Lloyd's Market Association, the most important organisation representing underwriters in the UK, charged with the task of drafting policy wordings for the London market. General Counsel to the Newline Group, for example, commended Merkin's "invaluable" expert advice on the "significant undertaking" of having to update their entire library of products to ensure compliance (5.3).

5. Sources to corroborate the impact

5.1: Association of British Insurers, UK Insurance and Long-Term Savings: Key Facts. December 2019.

https://web.archive.org/web/20201218123328/https://www.abi.org.uk/globalassets/files/publications/public/key-facts/key_facts_2019_spread.pdf

5.2: The Insurance Act 2015.

5.3: Testimonial from General Counsel at Newline Group, dated 23rd November 2020. Newline Group are a specialty insurance group underwriting policies in more than 80 countries, with premiums of \$297.6 million in 2019.

5.4: Testimonial from Law Commissioner for the Insurance Reform project, dated 16th November 2020.

5.5: Law Commission/Scottish Law Commission, Insurance Contract Law: Business Disclosure; Warranties; Insurers' Remedies for Fraudulent Claims; and Late Payment. Law Com No 353/Scot Law Com No 238, July 2014

https://web.archive.org/web/20201218123744/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/331737/41872_Cm_8898_Print_Ready.pdf

5.6: HM Treasury, *Insurance Contract Law: Updating the Marine Insurance Act 1906*, Impact Assessment, August 2014

https://web.archive.org/web/20201218123843/https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/708292/HMT_Law_Commission_Insurance_contract_law Updating the Marine Insurance Act 1960.pdf

5.7 Merkin co-authored four background papers for the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry: Background paper 14 (General Insurance), 15 (Catastrophes and Natural Disasters Insurance), 28 (Group Life Insurance) and 29 (Life Insurance)

<https://web.archive.org/web/20201218123932/https://financialservices.royalcommission.gov.au/publications/Pages/default.html>

5.8: Testimonial from the Principal Policy Advisor (Financial Markets Policy), Ministry of Business, Innovation and Enterprise, New Zealand, dated 23rd November 2020.

5.9: New Zealand Ministry of Business, Innovation and Employment, Insurance Contract Law Reforms, December 2019

<https://web.archive.org/web/20210310054727/https://www.mbie.govt.nz/dmsdocument/7478-insurance-contract-law-reforms-proactiverelease-pdf>