

Don't Be Lost: Different Conceptions of Loss in Insurance

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Loss is a central concept in insurance. All indemnity insurance, and most contingency insurance, insures against the risk of certain types of loss befalling the insured. But the concept of loss can be elusive, especially with indemnity insurance. That's because, with indemnity insurance, there can be two quite different conceptions of loss. This paper identifies those conceptions, and illustrates how a failure to keep them distinct can be problematic.

The basic structure of indemnity insurance

In most policies of indemnity insurance the insurer's obligation is expressed as being to indemnify the insured against the happening of certain insured events.

The insured event, or events, will be extensively defined in the policy. The insuring or operative clause might refer to something as prosaic as "accidental loss of or damage to insured property", or more likely something as wordy as "claims first made against the insured during the period of insurance alleging civil liability arising from the professional activities of the insured". In either case, the description of the insured events in the insuring or operative clause will be narrowed by various exclusions (and perhaps supplemented by extension clauses).

The insurer's obligation is very often expressed as simply being to indemnify the insured against the specified insured events. So the insurer may promise to "indemnify the insured against loss of or damage to property". But this common form of expression skips over an important element of the insurer's obligation. The mere happening of an insured event does not oblige the insurer to indemnify the insured: the insurer need only do so if the insured has suffered (or might suffer) loss as a result of the insured event. This is because the very nature of an indemnity obligation (whether arising in insurance or in some other context) is that the indemnifier is promising to keep the other party (here, the insured) harmless against loss, either by compensating for loss or by preventing loss from happening.

As two illustrations:

- Assume that a property owner has insured an old house against "loss of or damage to property". The insured subsequently decides to demolish the house and build apartments. A fire destroys the house before it is demolished. Although there is an insured event (loss of property by destruction), that event does not cause the insured any financial loss, since he was going to demolish the house

anyway (indeed, the insured might have been saved some of the demolition costs). The insured has therefore not suffered any loss in respect of which the insurer is obliged to indemnify. (This is a variation on *Falcon Investments Corp (NZ) Ltd v State Insurance* [1975] 1 NZLR 520.)

- An insurer issued a policy promising to indemnify both lessee and lessor for their respective rights and interests in the leased premises. The lessee caused damage to the premises, reinstated the premises, and obtained an indemnity from the insurer for the reinstatement cost. The lessor (but not the lessee) was also insured by a second insurer against damage to or destruction of the premises. The first insurer sought contribution from the second insurer. It was held that the first insurer had no right of contribution, since it had indemnified only the lessee, but not the lessor. Although the lessor had initially suffered a loss, it obtained an indemnity for that loss from the lessee, when it reinstated. That having happened, the lessor had no loss in respect of which it could obtain an indemnity from the first insurer (or indeed the second insurer): *Collyear v CGU Insurance Ltd* (2008) 15 ANZ Ins Cas 76,561.

An insurer does not promise to indemnify against every type of loss that the insured might suffer as a result of an insured event. If the insured's home is burnt down, the insured will suffer not only financial losses in having to replace the home and contents, but also upset, stress, and discomfort. But the insurer is only promising to indemnify in respect of the financial losses: Clarke, *The Law of Insurance Contracts* (4th ed, 2002) 16-2A3. (That at least is the default position. There is nothing to stop an insurer promising to indemnify against non-financial losses; but the difficulties in doing so are obvious.)

Throughout this paper I will return to these two basic elements of an insurer's indemnity obligation:

- The insured event.
- Financial loss suffered by the insured as a consequence of the insured event.

The distinction between these two elements is sometimes overlooked. The point of this paper is to illustrate how that sometimes happens, and what the consequences of that can be for legal analysis.

The two conceptions of "loss"

In the basic structure of indemnity insurance, the concept of "loss" can appear in both the elements that I have just identified.

First, loss is sometimes an aspect of the insured event. With comprehensive property insurance the insured event usually has, as its central aspect, "loss of or damage to property". Public liability insurance normally protects against legal liability arising from "loss of or damage to" the property of third parties. There are plenty of other examples, some from outside indemnity insurance: loss of documents, loss of limb, and loss of eyesight.

Secondly, loss is always an aspect of the second element, financial loss suffered as a consequence of the insured event.

These two stages use different meanings, or conceptions, of loss. Where it is an aspect of an insured event, the “loss” is loss *of* something: property, limb, and so on. As an aspect of financial loss, “loss” looks to the effect of the insured event *on the insured*.

I will say a few more things about each of these elements, before moving on to some illustrations of where the basic distinctions have not been observed.

Loss as an aspect of the insured event: “loss of property”

The most common instance in which “loss” appears as an aspect of the insured event is where the insuring clause refers to “loss of property”. That is the only example that I shall explore here.

“Loss of property” is usually understood to encompass two different things. First, there can be loss in the sense of a loss of possession. Secondly, there can be loss in the sense of physical destruction. That second possibility is sometimes expressed separately in the insuring clause (“loss, damage, or destruction”).

It is sometimes difficult to determine whether there has been a loss of property in the sense of a loss of possession. This is because loss of possession is a matter of degree: so long as the property has not been physically destroyed, there is always the possibility that possession might be recovered.

Near one end of the spectrum, the insured might have lost possession of an item of property by leaving it behind when visiting an office in another city. The insured knows where the property is, and can recover possession by paying a courier to pick it up and deliver it. Because recovery of possession is so likely, and relatively inexpensive, no one would consider that that loss of possession counted as a “loss of property” in an insurance sense (and so the insured would not even be entitled to indemnity for the courier fee). At the other end of the spectrum, the insured may have lost possession in circumstances such that recovery efforts are dangerous, or are likely to be uneconomic. That will count as a “loss of property” in an insurance sense. It is between those ends of the spectrum that the difficult cases lie: *Moore v Evans* [1917] 1 KB 458, 471.

Because loss of possession is a matter of degree, courts have been reluctant to define when loss of possession will count as a loss of property: *Holmes v Payne* [1930] 2 KB 301, 310. About the most that has been said is that there will be such a loss when, after the insured has taken reasonable steps to recover the property, there is “uncertainty” of recovery. It is not necessary to show that recovery of possession will be “unlikely”: *Holmes v Payne* [1930] 2 KB 301, 310; *Webster v General Accident* [1953] 1 QB 520, 532; *Kuwait Airways Corp SAK v Kuwait Insurance Co* [1996] 1 Lloyd’s Rep 664, 686.

Of course, a test that is expressed solely by reference to whether recovery is “uncertain” is not very, er, ... certain.

It should be noted that a test based on “uncertainty” of recovery appears at first sight difficult to square with *Moore v Evans* [1917] 1 KB 458; [1918] AC 185. There English insureds sent jewellery to European customers on a sale or return basis. War broke out, as a result of which the customers (in Germany or subject to German occupation) could not return the jewellery. The English Court of Appeal and House of Lords held that the insured had not proved that the jewellery had been lost. In the Court of Appeal Bankes LJ said that if the insureds had shown that the possibility of recovering the jewellery was “a mere chance”, loss might have been proven. This sounds as if the courts were requiring something approaching “unlikelihood” of recovery, rather than mere “uncertainty”. But the decision has to be read in light of the fact that the insureds were obliged to prove a loss occurring within the period of insurance, which had expired long before the matter reached the courts. The insureds had not led any evidence that the jewellery was not, during the policy period, still in the safe custody of their customers.

If we return, briefly, to the other possible sense of “loss of property” (loss by physical destruction), there is not the same difficulty in determining whether there has been a loss of that sort. Destruction can, I suppose, happen by degrees, but that’s unlikely to be of any real moment. Although there could be a quibble over whether destruction was sufficiently complete to constitute a “loss of property”, a partial destruction would in any case at least be “damage to property”, and therefore be within the insuring clause.

Loss as financial loss: the proper measure of an insured’s loss

Once an insured event has occurred (whether that be loss of property, damage to property, the making of a claim by a third party against the insured, and so on), consideration has to be given to what financial loss the insured has suffered (or might suffer) as a result of the insured event.

In the case of liability insurance, this question is often easy to resolve. The insured’s loss will usually be quantified by a settlement or judgment, or by the quantum of defence costs that have been incurred. Difficulties do arise where the insurer has not participated in the defence, but those difficulties will normally be about the reasonableness of a settlement, or the reasonableness of defence costs. They will not be measurement difficulties as such.

In property insurance the ground is less certain, because the insured’s loss is not measured objectively. Although market value can provide an objective measure, market value is not always the appropriate measure. That is because the insured’s loss has to be measured subjectively; it is the value of the property *to the insured* that must be measured: *Lucas v The New Zealand Insurance Co Ltd* [1983] 1 VR 698; *Brescia Furniture Pty Ltd v QBE Insurance (Aus) Ltd* (2007) 14 ANZ Ins Cas 76,222 at para 403.

In many cases the insured will value the property, not for the price it might fetch on the market, but for its ongoing use. In those cases the appropriate measure of indemnity will be the cost of repair or replacement. An insured who is not a property dealer should not be forced to go to the market if he or she wants to rebuild: *Reynolds v Phoenix Assurance* [1978] 2 Lloyd's Rep 440.

Moreover, although market value and cost of repair or replacement are the two most common measures of the insured's loss, they do not cover the field. The appropriate measure depends on the particular circumstances of the insured at the time of the insured event. Thus, loss might be measured by the rent that the insured has lost between the time of the insured building being destroyed and the time at which the insured was in any case going to demolish the building (the actual facts of *Falcon Investments Corp (NZ) Ltd v State Insurance* [1975] 1 NZLR 520); or loss might be measured by the cost incurred by the insured in recovering lost property: *Dent v Smith* (1869) LR 4 QB 414.

It remains to be noted that the above rules are merely default rules, and are therefore subject to the express terms of the policy. The policy will usually require the insured to bear an excess or deductible, and place a maximum limit on the insurer's liability. The policy may also provide that the insured can recover more than an indemnity. That is true of full replacement cost (or new for old) policies. It may also have been the case in *Brescia Furniture Pty Ltd v QBE Insurance (Aust) Ltd* (2007) 14 ANZ Ins Cas 76,222, in which the basis of settlement clause provided two alternative measures of the insured's loss, both of which produced amounts that were in excess of what the insurer argued was the insured's actual subjective loss. Hammerschlag J held that the insured was entitled to the benefit of the agreed basis of settlement clause (para 404).

Recovery of prevention costs

I now turn to examine three cases in which, it appears to me, insufficient attention was paid to the distinction between an insured event, and the financial loss that flowed from the insured event.

The first is *E J Hampson & Others Syndicate 1204 v Mining Technologies Australia Pty Ltd* (1998) 10 ANZ Ins Cas 74,114; [1999] 1 Qd R 60 (CA), a case that is probably familiar to most of this audience. The insured's mining equipment was trapped in a mine collapse. The insured's policy provided that the insurer would "indemnify the insured against ... Loss, damage or liability to the [insured] items". The insured incurred considerable cost, over a number of weeks, attempting to recover the equipment. Some of the equipment was not recovered, and the insurer accepted that the insured was entitled to be indemnified for the loss of that equipment. But the insurer declined the insured's claim for an indemnity for the \$725,000 that it spent on its recovery efforts. That money had been well spent, as the insured's efforts had led to the recovery of equipment valued at about \$1.8 million.

A majority of the Queensland Court of Appeal upheld the trial judge's decision that the insured was entitled to be indemnified for the \$725,000. The prime focus of the three judgments in the Court of Appeal was on whether the policy should include an implied term requiring the insurer to indemnify the insured for reasonable costs incurred in preventing loss from occurring. Davies JA held that such a term should be implied. McPherson JA expressed obiter support for an implied term, but held that the costs were within the express terms of the policy. Pincus J, dissenting, rejected recovery on either express or implied terms.

Mining Technologies is usually cited and discussed for its consideration of whether there should be an implied term obliging the insurer to indemnify for reasonable prevention costs. That aspect of the decision has been analysed on other occasions. I want to consider the decision from a different angle: is it possible to say that the mining equipment, although ultimately recovered, had initially been lost, so that an insured event had occurred? If there was such an insured event, I suggest that the insured's recovery costs should be characterised, not as prevention costs, but as the appropriate measure of the financial loss suffered by the insured as a result of the insured event.

Was there an insured event?

In order to determine whether there was an insured event, we must of course start with the insuring clause. This was poorly drafted. It obliged the insurer to indemnify against "loss, damage or liability to the [insured] items". Cover for "loss to property" is unusual and, taken literally, would appear to cover (as Pincus J explained) instances in which the insured property is not in itself lost or even damaged, but some event has happened in relation to it that causes the owner loss (such as a mere fall in market value). Pincus J therefore read the insuring clause as referring to "loss of property". Davies JA did not examine the point at length, but also appears to have read this as "loss of property". ("Loss to property" has also been interpreted as "loss of property" in a recent High Court of New Zealand case, *Technology Holdings Ltd v IAG New Zealand Ltd* (HC Auckland, CIV 2005-404-3450, 13 August 2008), in which Woodhouse J explained at some length his substitution of one preposition for the other.)

Assuming then that the insuring clause should be read as referring to "loss of property", had there been a loss of the equipment? Pincus JA, with whom Davies JA agreed, held that there had not, because "the equipment in question was ultimately recovered" (74,118). McPherson JA was of the same view, holding that it was "plain" that the items of equipment had not been lost, because "they were back in the possession of the [insured]" (74,127).

I think that that reasoning (though not necessarily the conclusion) is flawed. To see the flaw, consider the analogous case of damage to property. If an insured repairs damaged property and then seeks an indemnity from its insurer for the repair costs, it is no answer to the insured's claim for the insurer to say "but the property is ultimately not damaged (because it has been repaired)". This is an ineffective response because it is sufficient for the insured to show that, during the period of insurance, there was an insured event

(damage to property). The fact that the damage has since been repaired does not erase that event from history.

Likewise, in *Mining Technologies* it would have been sufficient for the insured to show that, prior to its recovery efforts, the equipment was lost. That would have required an application of the legal meaning of “loss of property” (discussed earlier) to the facts as they stood prior to the recovery efforts. If it could be said that the equipment was then lost, the fact that it was subsequently recovered would not erase from history the fact that it had once been lost, and therefore that there had been an insured event: *Holmes v Payne* [1930] 2 KB 301, 310.

This is not to say that the conclusion ultimately reached by each of the judges (that there had not been a loss of the equipment) was not a reasonable one. If the equipment was initially lost, it was because of a loss of possession (rather than loss by destruction). As we saw earlier, whether there has been loss of possession is a matter of degree. The legal test, such as it is, is whether, after the insured has taken reasonable steps to recover the property, there is “uncertainty” of recovery. Reasonable minds can differ on the application of that test to a given set of facts.

Nonetheless, given the apparent uncertainties, difficulties, and cost that must have faced the insured when it first turned its mind to recovering the equipment, there is much to be said for the view that the equipment, though ultimately recovered, was initially lost. At the least, the question deserved more attention than it received from the judges, especially as it appears that the insured’s argument for an indemnity was put primarily on this basis.

There is one final point to note on this aspect of *Mining Technologies*. If, as each of the judges concluded, the equipment was never lost, that was presumably because each judge was of the view that the insured’s recovery efforts simply reflected what was required of a reasonable insured. That would be in accordance with the legal test of loss of property: whether, *after the insured has taken reasonable steps to recover the property*, there is “uncertainty” of recovery. What that test is saying is that the insurer is only promising to indemnify the insured if, once the insured has taken those reasonable steps, it is uncertain that the property will be recovered. It does not seem consistent with that view of the insurer’s promise to require the insurer, in circumstances in which reasonable recovery efforts have been successful, to indemnify the insured for the costs of those efforts.

If there was an insured event, what loss did the insured suffer from it?

If we assume for the moment that there was initially a loss of property, and therefore an insured event, the next question would be: what was the insured’s financial loss, for which it was entitled to be indemnified, consequent upon that insured event? The only answer can be that, as a result of losing possession of the equipment, the insured had to spend \$725,000 regaining possession. Thus, if it is accepted that the equipment was initially lost, the appropriate measure of indemnity was the cost of recovery. There are older cases in which the cost of recovering possession of lost property has been recognised as the proper measure of indemnity: *Dent v Smith* (1869) LR 4 QB 414; *Cory*

& Sons v Burr (1883) 8 App Cas 393 (though the claim ultimately failed on an exclusion clause in the latter case).

Note, therefore, that the recovery costs can have alternative characterisations, depending on whether it is concluded that there was a loss of property:

1. If there was a loss of property, the recovery costs are the appropriate measure of the loss suffered by the insured, for which it is entitled to indemnity.
2. If there was no loss of property, the recovery costs are costs incurred to prevent an insured event from occurring. One then has to consider whether there should be an implied term allowing recovery.

The judgments in *Mining Technologies* do not clearly recognise that first possible characterisation of the recovery costs. If that was not recognised, it is perhaps hardly surprising that the judges characterised the costs as being costs of preventing a loss of property, and therefore summarily dismissed the argument that there had already been a loss of property.

The doctrine of imminent peril

The second case is a decision of the High Court of New Zealand, *Bridgeman v Allied Mutual Insurance Ltd* (1999) 10 ANZ Ins Cas 75,125. The Bridgemans were farmers. In an attempt to make their farm more productive, they undertook some contouring work. This involved smoothing the tops off some hills, and using the material from the tops to fill in a gully. This work was not well engineered, and in due course the fill in the gully spilled on to a neighbouring road, which was owned by the local Council. The Bridgemans incurred liability to the Council for the cost of removing the spill from the road. As the Court could have (but unfortunately did not) put it:

There once were farmers who on seeing a hill
Removed the top and put it into a gully as fill
But they forgot their retaining
And when it started raining
They became liable in negligence for a spill

The Bridgemans had liability insurance with Allied Mutual. The policy's insuring clause covered the Bridgemans for their "liability at law for accidental loss of or damage to property of others". The policy would (had it not been for an exclusion clause of no present interest) have covered the Bridgemans for the liability that they incurred to the Council: the spill had caused property damage to the Council's road, that damage was accidental, and the Bridgemans were legally liable for it.

But the Bridgemans wanted to be indemnified not only for their liability to the Council, but also for the costs that they had incurred (subsequent to the spill) in undertaking proper engineering works to prevent further spills. Most of those works were undertaken

in response to an enforcement order that the Council obtained from the Planning Tribunal.

The costs incurred by the Bridgemans could be characterised as prevention costs: costs incurred to prevent the occurrence of a further insured event. However, the Bridgemans did not argue for an implied term requiring the insurer to indemnify against prevention costs (*Mining Technologies* appears not to have been cited to the Court). Instead, the Bridgemans argued that the costs fell within the express terms of the insuring clause.

The Court held that the prevention costs were within the insuring clause, so that (had it not been for the previously mentioned exclusion clause) Allied Mutual would have been obliged to indemnify the Bridgemans for those costs. The Court reached that conclusion by relying on the doctrine of imminent peril. I think that the Court's reliance on that doctrine was misplaced. In explaining why, we will see that the Court did not distinguish between loss as an insured event, and the financial loss flowing from that insured event.

The doctrine of imminent peril was accurately stated by the Supreme Court of Canada in *Liverpool & London & Globe Insurance Ltd v Canadian General Electric Co Ltd* [1981] 1 SCR 600, 620:

If the [insured] peril has actually arisen and damage can be reasonably anticipated from the peril ... then damage suffered as a result of ... preventive measures taken by the insured will be recoverable ...

Liverpool & London involved property insurance. The property was covered against damage caused by, among other things, explosion. Firefighters, mistakenly thinking that the insured's property was about to explode, sprayed water over it. The water caused considerable damage to the property. Damage caused by water was not covered by the policy, so the insured argued (using the doctrine of imminent peril) that the true cause of the damage was the anticipated explosion. The Supreme Court held that, because an explosion was not reasonably anticipated, the doctrine did not apply, and the insured could not recover for the damage.

The classic case in which the doctrine was successfully applied is *The Knight of St Michael* [1898] P 30. That involved marine insurance over the freight to be earned on a voyage carrying coal from Newcastle, NSW. Shortly into the voyage it was discovered that part of the coal was hot. The master deviated to Sydney and discharged half the coal. The insureds lost the freight that they would have earned on that discharged cargo. The court held that the freight had been lost by fire, an insured peril: although there had been no actual fire, "[t]here was imminent danger of fire, and an existing condition of things producing this danger".

These two cases bear a superficial resemblance to *Bridgeman*, because in both cases the insureds (like the Bridgemans) took measures to prevent loss. But in *Liverpool & London* and *The Knight of St Michael* the insureds were claiming that the preventive measures had caused an insured event (damage to property; lost freight), and the issue was whether that insured event *was caused by an insured peril*. The doctrine of imminent peril is

simply a rule of causation: where the doctrine applies, it allows the insured to say that the cause of the insured event was the imminent (insured) peril, rather than the insured's preventive measures. In neither of these cases was the insured seeking to recover from the insurer the *cost* of the preventive measures (the cost of firefighting; the cost of the deviation and discharge).

By contrast, in *Bridgeman* the insureds were not saying that their preventive measures had caused an insured event. They were saying quite the opposite: that the measures had prevented further insured events. They were claiming simply for the cost of those preventive measures. The doctrine of imminent peril has nothing to say about such a claim.

In concluding that the costs were covered by the insuring clause, the Court appeared to be influenced by the undoubted fact that the Bridgemans had suffered financial loss by incurring the prevention costs. But an insured can recover only where the financial loss is a consequence of an insured event. The Court's incorrect use of the doctrine of imminent peril caused it to overlook that basic requirement.

Removal of unharmed property

The last example is *Walker Civil Engineering Pty Ltd v Sun Alliance & London Insurance plc* (1996) 9 ANZ Ins Cas 76,446 (SC of NSW), aff'd (1999) 10 ANZ Ins Cas 74,681 (NSWCA). Here the insured, Walker, had contracted to build three in-ground sewerage tanks. The contract required Walker to repair, at its own cost, any loss of or damage to the tanks, if it was necessary to complete them satisfactorily. Walker was insured with Sun Alliance under a contract works policy, which indemnified Walker against "all risks of physical loss of or damage to property ... owned by the insured or for which the insured may be responsible".

Walker built the sewerage tanks with fibreglass walls, surrounded and topped by concrete. The tanks housed a variety of equipment. The fibreglass walls of the tanks were later found to be defective, so Walker had to replace them. To do this the concrete surrounds and tops (which were not defective) had to be broken up and replaced, and the equipment (which also was not defective) had to be removed and in some cases replaced.

Walker made a claim on Sun Alliance for the costs of removing and replacing the concrete and equipment. Walker accepted that the cost of removing and replacing the fibreglass walls was excluded by an exclusion for "loss or damage directly caused by defective workmanship, construction or design". But the exclusion was subject to a common proviso: "this exclusion shall be limited to the part which is defective and shall not apply to any other part or parts lost or damaged in consequence thereof". Walker argued that the concrete and equipment fell within the proviso.

The judgments of the New South Wales Supreme Court and the Court of Appeal focused on the extent of the proviso. Both Courts held that the concrete tops were integral to the

tanks, and so were not “other parts” in terms of the proviso. The exclusion therefore prevailed.

That holding has no relevance to the issues being discussed here. But there was another aspect to the insurer’s defence that is relevant. At first instance the insurer argued that the damage to the concrete tops was not accidental, since the insured deliberately broke up the tops to remove them. The insurer therefore argued that the damage, being deliberate, did not even get into the insuring clause. The Supreme Court rejected this part of the insurer’s argument summarily, on the ground that the damage was not intended at the time that the concrete was initially poured (p 76,457). The insurer did not pursue the argument when responding to the insured’s appeal.

It seems to me that the Supreme Court’s response to the argument was beside the point: why should you assess intention at the time that the concrete was poured, rather than at the time of damage? The Court’s only explanation was that, if the insurer’s argument were accepted, then if there was damage to property that was covered by the policy, and removal of the damaged property caused even further damage to other property, that further damage would not be covered (a result that the Court thought to be self-evidently wrong).

With that explanation we see a confusion of (1) the insured event (in this instance, property damage) and (2) the proper measure of indemnity (in this instance, cost of repair). If we examine the example given by the Court:

1. There is initially accidental damage to property, which (we assume, in contrast to the facts of *Walker* itself) is not within any of the policy exclusions. That is an insured event.
2. The insurer is therefore obliged to indemnify the insured. The proper measure of indemnity, we’ll assume, is the cost of repairing the damaged property. If the method of repair necessitates the removal of other unharmed property, and perhaps the destruction of that other unharmed property in order to remove it, *the cost of that removal and replacement is simply part of the cost of repairing the initially damaged property*. That cost should therefore be covered (contrary to what the judge assumed).

In that example, then, the insured is entitled to be indemnified in respect of the cost of removing and replacing the unharmed property – not because it is an insured event (it is not, since the removal is not accidental), but because it is part of the loss suffered by the insured as a result of an insured event.

On the actual facts of *Walker*, by contrast, the damage to the fibreglass tanks was not covered by the policy (because of the exclusion), and therefore was not an insured event. The only way, therefore, that the insurer could have been liable to indemnify for the cost of replacing the concrete tops was if the damage to that concrete was accidental, and therefore an insured event. But it was not accidental.

The point that I am making here was touched upon by Mason P in *AXA Global Risks (UK) Ltd v Haskins Contractors Pty Ltd* (2004) 13 ANZ Ins Cas 77,401 (NSWCA). There, having referred to a number of cases dealing with the meaning of “property damage”, Mason P said (para 48) that the cases illustrated “that physical damage may have a cost impact that goes beyond addressing merely the integer of property that is physically marred”.

Conclusion

The distinction between the two key elements in an indemnity insurer’s obligation, an insured event, and the financial loss consequent upon an insured event, may seem trite. But these cases show that the distinction is sometimes not observed. Usually that happens because insufficient attention is given to the scope of those two elements. In *Mining Technologies*, it may be said that the Court was not fully alive to the possibility that, despite the equipment having been recovered, it might initially have been lost. In *Bridgeman*, the Court’s fascination with the doctrine of imminent peril perhaps distracted it from the need to find an insured event. And in *Walker Civil Engineering* the most direct route to finding the insurer not liable was summarily rejected, because the Court did not distinguish insured event from financial loss.

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The insurer's obligation is very often expressed as simply being to indemnify the insured against the specified insured events. So the insurer may promise to "indemnify the insured against loss of or damage to property". But this common form of expression skips over an important element of the insurer's obligation. The mere happening of an insured event does not oblige the insurer to indemnify the insured: the insurer need only do so if the insured has suffered (or might suffer) loss as a result of the insured event. This is because the very nature of an indemnity obligation (whether arising in insurance or in some other context) is that the indemnifier is promising to keep the other party (here, the insured) harmless against loss, either by compensating for loss or by preventing loss from happening.

As two illustrations:

- Assume that a property owner has insured an old house against "loss of or damage to property". The insured subsequently decides to demolish the house and build apartments. A fire destroys the house before it is demolished. Although there is an insured event (loss of property by destruction), that event does not cause the insured any financial loss, since he was going to demolish the house

anyway (indeed, the insured might have been saved some of the demolition costs). The insured has therefore not suffered any loss in respect of which the insurer is obliged to indemnify. (This is a variation on *Falcon Investments Corp (NZ) Ltd v State Insurance* [1975] 1 NZLR 520.)

- An insurer issued a policy promising to indemnify both lessee and lessor for their respective rights and interests in the leased premises. The lessee caused damage to the premises, reinstated the premises, and obtained an indemnity from the insurer for the reinstatement cost. The lessor (but not the lessee) was also insured by a second insurer against damage to or destruction of the premises. The first insurer sought contribution from the second insurer. It was held that the first insurer had no right of contribution, since it had indemnified only the lessee, but not the lessor. Although the lessor had initially suffered a loss, it obtained an indemnity for that loss from the lessee, when it reinstated. That having happened, the lessor had no loss in respect of which it could obtain an indemnity from the first insurer (or indeed the second insurer): *Collyear v CGU Insurance Ltd* (2008) 15 ANZ Ins Cas 76,561.

An insurer does not promise to indemnify against every type of loss that the insured might suffer as a result of an insured event. If the insured's home is burnt down, the insured will suffer not only financial losses in having to replace the home and contents, but also upset, stress, and discomfort. But the insurer is only promising to indemnify in respect of the financial losses: Clarke, *The Law of Insurance Contracts* (4th ed, 2002) 16-2A3. (That at least is the default position. There is nothing to stop an insurer promising to indemnify against non-financial losses; but the difficulties in doing so are obvious.)

Throughout this paper I will return to these two basic elements of an insurer's indemnity obligation:

- The insured event.
- Financial loss suffered by the insured as a consequence of the insured event.

The distinction between these two elements is sometimes overlooked. The point of this paper is to illustrate how that sometimes happens, and what the consequences of that can be for legal analysis.

The two conceptions of "loss"

In the basic structure of indemnity insurance, the concept of "loss" can appear in both the elements that I have just identified.

First, loss is sometimes an aspect of the insured event. With comprehensive property insurance the insured event usually has, as its central aspect, "loss of or damage to property". Public liability insurance normally protects against legal liability arising from "loss of or damage to" the property of third parties. There are plenty of other examples, some from outside indemnity insurance: loss of documents, loss of limb, and loss of eyesight.

Secondly, loss is always an aspect of the second element, financial loss suffered as a consequence of the insured event.

These two stages use different meanings, or conceptions, of loss. Where it is an aspect of an insured event, the “loss” is loss *of* something: property, limb, and so on. As an aspect of financial loss, “loss” looks to the effect of the insured event *on the insured*.

I will say a few more things about each of these elements, before moving on to some illustrations of where the basic distinctions have not been observed.

Loss as an aspect of the insured event: “loss of property”

The most common instance in which “loss” appears as an aspect of the insured event is where the insuring clause refers to “loss of property”. That is the only example that I shall explore here.

“Loss of property” is usually understood to encompass two different things. First, there can be loss in the sense of a loss of possession. Secondly, there can be loss in the sense of physical destruction. That second possibility is sometimes expressed separately in the insuring clause (“loss, damage, or destruction”).

It is sometimes difficult to determine whether there has been a loss of property in the sense of a loss of possession. This is because loss of possession is a matter of degree: so long as the property has not been physically destroyed, there is always the possibility that possession might be recovered.

Near one end of the spectrum, the insured might have lost possession of an item of property by leaving it behind when visiting an office in another city. The insured knows where the property is, and can recover possession by paying a courier to pick it up and deliver it. Because recovery of possession is so likely, and relatively inexpensive, no one would consider that that loss of possession counted as a “loss of property” in an insurance sense (and so the insured would not even be entitled to indemnity for the courier fee). At the other end of the spectrum, the insured may have lost possession in circumstances such that recovery efforts are dangerous, or are likely to be uneconomic. That will count as a “loss of property” in an insurance sense. It is between those ends of the spectrum that the difficult cases lie: *Moore v Evans* [1917] 1 KB 458, 471.

Because loss of possession is a matter of degree, courts have been reluctant to define when loss of possession will count as a loss of property: *Holmes v Payne* [1930] 2 KB 301, 310. About the most that has been said is that there will be such a loss when, after the insured has taken reasonable steps to recover the property, there is “uncertainty” of recovery. It is not necessary to show that recovery of possession will be “unlikely”: *Holmes v Payne* [1930] 2 KB 301, 310; *Webster v General Accident* [1953] 1 QB 520, 532; *Kuwait Airways Corp SAK v Kuwait Insurance Co* [1996] 1 Lloyd’s Rep 664, 686.

Of course, a test that is expressed solely by reference to whether recovery is “uncertain” is not very, er, ... certain.

It should be noted that a test based on “uncertainty” of recovery appears at first sight difficult to square with *Moore v Evans* [1917] 1 KB 458; [1918] AC 185. There English insureds sent jewellery to European customers on a sale or return basis. War broke out, as a result of which the customers (in Germany or subject to German occupation) could not return the jewellery. The English Court of Appeal and House of Lords held that the insured had not proved that the jewellery had been lost. In the Court of Appeal Bankes LJ said that if the insureds had shown that the possibility of recovering the jewellery was “a mere chance”, loss might have been proven. This sounds as if the courts were requiring something approaching “unlikelihood” of recovery, rather than mere “uncertainty”. But the decision has to be read in light of the fact that the insureds were obliged to prove a loss occurring within the period of insurance, which had expired long before the matter reached the courts. The insureds had not led any evidence that the jewellery was not, during the policy period, still in the safe custody of their customers.

If we return, briefly, to the other possible sense of “loss of property” (loss by physical destruction), there is not the same difficulty in determining whether there has been a loss of that sort. Destruction can, I suppose, happen by degrees, but that’s unlikely to be of any real moment. Although there could be a quibble over whether destruction was sufficiently complete to constitute a “loss of property”, a partial destruction would in any case at least be “damage to property”, and therefore be within the insuring clause.

Loss as financial loss: the proper measure of an insured’s loss

Once an insured event has occurred (whether that be loss of property, damage to property, the making of a claim by a third party against the insured, and so on), consideration has to be given to what financial loss the insured has suffered (or might suffer) as a result of the insured event.

In the case of liability insurance, this question is often easy to resolve. The insured’s loss will usually be quantified by a settlement or judgment, or by the quantum of defence costs that have been incurred. Difficulties do arise where the insurer has not participated in the defence, but those difficulties will normally be about the reasonableness of a settlement, or the reasonableness of defence costs. They will not be measurement difficulties as such.

In property insurance the ground is less certain, because the insured’s loss is not measured objectively. Although market value can provide an objective measure, market value is not always the appropriate measure. That is because the insured’s loss has to be measured subjectively; it is the value of the property *to the insured* that must be measured: *Lucas v The New Zealand Insurance Co Ltd* [1983] 1 VR 698; *Brescia Furniture Pty Ltd v QBE Insurance (Aus) Ltd* (2007) 14 ANZ Ins Cas 76,222 at para 403.

In many cases the insured will value the property, not for the price it might fetch on the market, but for its ongoing use. In those cases the appropriate measure of indemnity will be the cost of repair or replacement. An insured who is not a property dealer should not be forced to go to the market if he or she wants to rebuild: *Reynolds v Phoenix Assurance* [1978] 2 Lloyd's Rep 440.

Moreover, although market value and cost of repair or replacement are the two most common measures of the insured's loss, they do not cover the field. The appropriate measure depends on the particular circumstances of the insured at the time of the insured event. Thus, loss might be measured by the rent that the insured has lost between the time of the insured building being destroyed and the time at which the insured was in any case going to demolish the building (the actual facts of *Falcon Investments Corp (NZ) Ltd v State Insurance* [1975] 1 NZLR 520); or loss might be measured by the cost incurred by the insured in recovering lost property: *Dent v Smith* (1869) LR 4 QB 414.

It remains to be noted that the above rules are merely default rules, and are therefore subject to the express terms of the policy. The policy will usually require the insured to bear an excess or deductible, and place a maximum limit on the insurer's liability. The policy may also provide that the insured can recover more than an indemnity. That is true of full replacement cost (or new for old) policies. It may also have been the case in *Brescia Furniture Pty Ltd v QBE Insurance (Aust) Ltd* (2007) 14 ANZ Ins Cas 76,222, in which the basis of settlement clause provided two alternative measures of the insured's loss, both of which produced amounts that were in excess of what the insurer argued was the insured's actual subjective loss. Hammerschlag J held that the insured was entitled to the benefit of the agreed basis of settlement clause (para 404).

Recovery of prevention costs

I now turn to examine three cases in which, it appears to me, insufficient attention was paid to the distinction between an insured event, and the financial loss that flowed from the insured event.

The first is *E J Hampson & Others Syndicate 1204 v Mining Technologies Australia Pty Ltd* (1998) 10 ANZ Ins Cas 74,114; [1999] 1 Qd R 60 (CA), a case that is probably familiar to most of this audience. The insured's mining equipment was trapped in a mine collapse. The insured's policy provided that the insurer would "indemnify the insured against ... Loss, damage or liability to the [insured] items". The insured incurred considerable cost, over a number of weeks, attempting to recover the equipment. Some of the equipment was not recovered, and the insurer accepted that the insured was entitled to be indemnified for the loss of that equipment. But the insurer declined the insured's claim for an indemnity for the \$725,000 that it spent on its recovery efforts. That money had been well spent, as the insured's efforts had led to the recovery of equipment valued at about \$1.8 million.

A majority of the Queensland Court of Appeal upheld the trial judge's decision that the insured was entitled to be indemnified for the \$725,000. The prime focus of the three judgments in the Court of Appeal was on whether the policy should include an implied term requiring the insurer to indemnify the insured for reasonable costs incurred in preventing loss from occurring. Davies JA held that such a term should be implied. McPherson JA expressed obiter support for an implied term, but held that the costs were within the express terms of the policy. Pincus J, dissenting, rejected recovery on either express or implied terms.

Mining Technologies is usually cited and discussed for its consideration of whether there should be an implied term obliging the insurer to indemnify for reasonable prevention costs. That aspect of the decision has been analysed on other occasions. I want to consider the decision from a different angle: is it possible to say that the mining equipment, although ultimately recovered, had initially been lost, so that an insured event had occurred? If there was such an insured event, I suggest that the insured's recovery costs should be characterised, not as prevention costs, but as the appropriate measure of the financial loss suffered by the insured as a result of the insured event.

Was there an insured event?

In order to determine whether there was an insured event, we must of course start with the insuring clause. This was poorly drafted. It obliged the insurer to indemnify against "loss, damage or liability *to* the [insured] items". Cover for "loss *to* property" is unusual and, taken literally, would appear to cover (as Pincus J explained) instances in which the insured property is not in itself lost or even damaged, but some event has happened in relation to it that causes the owner loss (such as a mere fall in market value). Pincus J therefore read the insuring clause as referring to "loss *of* property". Davies JA did not examine the point at length, but also appears to have read this as "loss of property". ("Loss to property" has also been interpreted as "loss of property" in a recent High Court of New Zealand case, *Technology Holdings Ltd v IAG New Zealand Ltd* (HC Auckland, CIV 2005-404-3450, 13 August 2008), in which Woodhouse J explained at some length his substitution of one preposition for the other.)

Assuming then that the insuring clause should be read as referring to "loss of property", had there been a loss of the equipment? Pincus JA, with whom Davies JA agreed, held that there had not, because "the equipment in question was ultimately recovered" (74,118). McPherson JA was of the same view, holding that it was "plain" that the items of equipment had not been lost, because "they were back in the possession of the [insured]" (74,127).

I think that that reasoning (though not necessarily the conclusion) is flawed. To see the flaw, consider the analogous case of damage to property. If an insured repairs damaged property and then seeks an indemnity from its insurer for the repair costs, it is no answer to the insured's claim for the insurer to say "but the property is ultimately not damaged (because it has been repaired)". This is an ineffective response because it is sufficient for the insured to show that, during the period of insurance, there was an insured event

(damage to property). The fact that the damage has since been repaired does not erase that event from history.

Likewise, in *Mining Technologies* it would have been sufficient for the insured to show that, prior to its recovery efforts, the equipment was lost. That would have required an application of the legal meaning of “loss of property” (discussed earlier) to the facts as they stood prior to the recovery efforts. If it could be said that the equipment was then lost, the fact that it was subsequently recovered would not erase from history the fact that it had once been lost, and therefore that there had been an insured event: *Holmes v Payne* [1930] 2 KB 301, 310.

This is not to say that the conclusion ultimately reached by each of the judges (that there had not been a loss of the equipment) was not a reasonable one. If the equipment was initially lost, it was because of a loss of possession (rather than loss by destruction). As we saw earlier, whether there has been loss of possession is a matter of degree. The legal test, such as it is, is whether, after the insured has taken reasonable steps to recover the property, there is “uncertainty” of recovery. Reasonable minds can differ on the application of that test to a given set of facts.

Nonetheless, given the apparent uncertainties, difficulties, and cost that must have faced the insured when it first turned its mind to recovering the equipment, there is much to be said for the view that the equipment, though ultimately recovered, was initially lost. At the least, the question deserved more attention than it received from the judges, especially as it appears that the insured’s argument for an indemnity was put primarily on this basis.

There is one final point to note on this aspect of *Mining Technologies*. If, as each of the judges concluded, the equipment was never lost, that was presumably because each judge was of the view that the insured’s recovery efforts simply reflected what was required of a reasonable insured. That would be in accordance with the legal test of loss of property: whether, *after the insured has taken reasonable steps to recover the property*, there is “uncertainty” of recovery. What that test is saying is that the insurer is only promising to indemnify the insured if, once the insured has taken those reasonable steps, it is uncertain that the property will be recovered. It does not seem consistent with that view of the insurer’s promise to require the insurer, in circumstances in which reasonable recovery efforts have been successful, to indemnify the insured for the costs of those efforts.

If there was an insured event, what loss did the insured suffer from it?

If we assume for the moment that there was initially a loss of property, and therefore an insured event, the next question would be: what was the insured’s financial loss, for which it was entitled to be indemnified, consequent upon that insured event? The only answer can be that, as a result of losing possession of the equipment, the insured had to spend \$725,000 regaining possession. Thus, if it is accepted that the equipment was initially lost, the appropriate measure of indemnity was the cost of recovery. There are older cases in which the cost of recovering possession of lost property has been recognised as the proper measure of indemnity: *Dent v Smith* (1869) LR 4 QB 414; *Cory*

& *Sons v Burr* (1883) 8 App Cas 393 (though the claim ultimately failed on an exclusion clause in the latter case).

Note, therefore, that the recovery costs can have alternative characterisations, depending on whether it is concluded that there was a loss of property:

1. If there was a loss of property, the recovery costs are the appropriate measure of the loss suffered by the insured, for which it is entitled to indemnity.
2. If there was no loss of property, the recovery costs are costs incurred to prevent an insured event from occurring. One then has to consider whether there should be an implied term allowing recovery.

The judgments in *Mining Technologies* do not clearly recognise that first possible characterisation of the recovery costs. If that was not recognised, it is perhaps hardly surprising that the judges characterised the costs as being costs of preventing a loss of property, and therefore summarily dismissed the argument that there had already been a loss of property.

The doctrine of imminent peril

The second case is a decision of the High Court of New Zealand, *Bridgeman v Allied Mutual Insurance Ltd* (1999) 10 ANZ Ins Cas 75,125. The Bridgemans were farmers. In an attempt to make their farm more productive, they undertook some contouring work. This involved smoothing the tops off some hills, and using the material from the tops to fill in a gully. This work was not well engineered, and in due course the fill in the gully spilled on to a neighbouring road, which was owned by the local Council. The Bridgemans incurred liability to the Council for the cost of removing the spill from the road. As the Court could have (but unfortunately did not) put it:

There once were farmers who on seeing a hill
Removed the top and put it into a gully as fill
But they forgot their retaining
And when it started raining
They became liable in negligence for a spill

The Bridgemans had liability insurance with Allied Mutual. The policy's insuring clause covered the Bridgemans for their "liability at law for accidental loss of or damage to property of others". The policy would (had it not been for an exclusion clause of no present interest) have covered the Bridgemans for the liability that they incurred to the Council: the spill had caused property damage to the Council's road, that damage was accidental, and the Bridgemans were legally liable for it.

But the Bridgemans wanted to be indemnified not only for their liability to the Council, but also for the costs that they had incurred (subsequent to the spill) in undertaking proper engineering works to prevent further spills. Most of those works were undertaken

in response to an enforcement order that the Council obtained from the Planning Tribunal.

The costs incurred by the Bridgemans could be characterised as prevention costs: costs incurred to prevent the occurrence of a further insured event. However, the Bridgemans did not argue for an implied term requiring the insurer to indemnify against prevention costs (*Mining Technologies* appears not to have been cited to the Court). Instead, the Bridgemans argued that the costs fell within the express terms of the insuring clause.

The Court held that the prevention costs were within the insuring clause, so that (had it not been for the previously mentioned exclusion clause) Allied Mutual would have been obliged to indemnify the Bridgemans for those costs. The Court reached that conclusion by relying on the doctrine of imminent peril. I think that the Court's reliance on that doctrine was misplaced. In explaining why, we will see that the Court did not distinguish between loss as an insured event, and the financial loss flowing from that insured event.

The doctrine of imminent peril was accurately stated by the Supreme Court of Canada in *Liverpool & London & Globe Insurance Ltd v Canadian General Electric Co Ltd* [1981] 1 SCR 600, 620:

If the [insured] peril has actually arisen and damage can be reasonably anticipated from the peril ... then damage suffered as a result of ... preventive measures taken by the insured will be recoverable ...

Liverpool & London involved property insurance. The property was covered against damage caused by, among other things, explosion. Firefighters, mistakenly thinking that the insured's property was about to explode, sprayed water over it. The water caused considerable damage to the property. Damage caused by water was not covered by the policy, so the insured argued (using the doctrine of imminent peril) that the true cause of the damage was the anticipated explosion. The Supreme Court held that, because an explosion was not reasonably anticipated, the doctrine did not apply, and the insured could not recover for the damage.

The classic case in which the doctrine was successfully applied is *The Knight of St Michael* [1898] P 30. That involved marine insurance over the freight to be earned on a voyage carrying coal from Newcastle, NSW. Shortly into the voyage it was discovered that part of the coal was hot. The master deviated to Sydney and discharged half the coal. The insureds lost the freight that they would have earned on that discharged cargo. The court held that the freight had been lost by fire, an insured peril: although there had been no actual fire, "[t]here was imminent danger of fire, and an existing condition of things producing this danger".

These two cases bear a superficial resemblance to *Bridgeman*, because in both cases the insureds (like the Bridgemans) took measures to prevent loss. But in *Liverpool & London* and *The Knight of St Michael* the insureds were claiming that the preventive measures had caused an insured event (damage to property; lost freight), and the issue was whether that insured event *was caused by an insured peril*. The doctrine of imminent peril is

simply a rule of causation: where the doctrine applies, it allows the insured to say that the cause of the insured event was the imminent (insured) peril, rather than the insured's preventive measures. In neither of these cases was the insured seeking to recover from the insurer the *cost* of the preventive measures (the cost of firefighting; the cost of the deviation and discharge).

By contrast, in *Bridgeman* the insureds were not saying that their preventive measures had caused an insured event. They were saying quite the opposite: that the measures had prevented further insured events. They were claiming simply for the cost of those preventive measures. The doctrine of imminent peril has nothing to say about such a claim.

In concluding that the costs were covered by the insuring clause, the Court appeared to be influenced by the undoubted fact that the Bridgemans had suffered financial loss by incurring the prevention costs. But an insured can recover only where the financial loss is a consequence of an insured event. The Court's incorrect use of the doctrine of imminent peril caused it to overlook that basic requirement.

Removal of unharmed property

The last example is *Walker Civil Engineering Pty Ltd v Sun Alliance & London Insurance plc* (1996) 9 ANZ Ins Cas 76,446 (SC of NSW), aff'd (1999) 10 ANZ Ins Cas 74,681 (NSWCA). Here the insured, Walker, had contracted to build three in-ground sewerage tanks. The contract required Walker to repair, at its own cost, any loss of or damage to the tanks, if it was necessary to complete them satisfactorily. Walker was insured with Sun Alliance under a contract works policy, which indemnified Walker against "all risks of physical loss of or damage to property ... owned by the insured or for which the insured may be responsible".

Walker built the sewerage tanks with fibreglass walls, surrounded and topped by concrete. The tanks housed a variety of equipment. The fibreglass walls of the tanks were later found to be defective, so Walker had to replace them. To do this the concrete surrounds and tops (which were not defective) had to be broken up and replaced, and the equipment (which also was not defective) had to be removed and in some cases replaced.

Walker made a claim on Sun Alliance for the costs of removing and replacing the concrete and equipment. Walker accepted that the cost of removing and replacing the fibreglass walls was excluded by an exclusion for "loss or damage directly caused by defective workmanship, construction or design". But the exclusion was subject to a common proviso: "this exclusion shall be limited to the part which is defective and shall not apply to any other part or parts lost or damaged in consequence thereof". Walker argued that the concrete and equipment fell within the proviso.

The judgments of the New South Wales Supreme Court and the Court of Appeal focused on the extent of the proviso. Both Courts held that the concrete tops were integral to the

tanks, and so were not “other parts” in terms of the proviso. The exclusion therefore prevailed.

That holding has no relevance to the issues being discussed here. But there was another aspect to the insurer’s defence that is relevant. At first instance the insurer argued that the damage to the concrete tops was not accidental, since the insured deliberately broke up the tops to remove them. The insurer therefore argued that the damage, being deliberate, did not even get into the insuring clause. The Supreme Court rejected this part of the insurer’s argument summarily, on the ground that the damage was not intended at the time that the concrete was initially poured (p 76,457). The insurer did not pursue the argument when responding to the insured’s appeal.

It seems to me that the Supreme Court’s response to the argument was beside the point: why should you assess intention at the time that the concrete was poured, rather than at the time of damage? The Court’s only explanation was that, if the insurer’s argument were accepted, then if there was damage to property that was covered by the policy, and removal of the damaged property caused even further damage to other property, that further damage would not be covered (a result that the Court thought to be self-evidently wrong).

With that explanation we see a confusion of (1) the insured event (in this instance, property damage) and (2) the proper measure of indemnity (in this instance, cost of repair). If we examine the example given by the Court:

1. There is initially accidental damage to property, which (we assume, in contrast to the facts of *Walker* itself) is not within any of the policy exclusions. That is an insured event.
2. The insurer is therefore obliged to indemnify the insured. The proper measure of indemnity, we’ll assume, is the cost of repairing the damaged property. If the method of repair necessitates the removal of other unharmed property, and perhaps the destruction of that other unharmed property in order to remove it, *the cost of that removal and replacement is simply part of the cost of repairing the initially damaged property*. That cost should therefore be covered (contrary to what the judge assumed).

In that example, then, the insured is entitled to be indemnified in respect of the cost of removing and replacing the unharmed property – not because it is an insured event (it is not, since the removal is not accidental), but because it is part of the loss suffered by the insured as a result of an insured event.

On the actual facts of *Walker*, by contrast, the damage to the fibreglass tanks was not covered by the policy (because of the exclusion), and therefore was not an insured event. The only way, therefore, that the insurer could have been liable to indemnify for the cost of replacing the concrete tops was if the damage to that concrete was accidental, and therefore an insured event. But it was not accidental.

The point that I am making here was touched upon by Mason P in *AXA Global Risks (UK) Ltd v Haskins Contractors Pty Ltd* (2004) 13 ANZ Ins Cas 77,401 (NSWCA). There, having referred to a number of cases dealing with the meaning of “property damage”, Mason P said (para 48) that the cases illustrated “that physical damage may have a cost impact that goes beyond addressing merely the integer of property that is physically marred”.

Conclusion

The distinction between the two key elements in an indemnity insurer’s obligation, an insured event, and the financial loss consequent upon an insured event, may seem trite. But these cases show that the distinction is sometimes not observed. Usually that happens because insufficient attention is given to the scope of those two elements. In *Mining Technologies*, it may be said that the Court was not fully alive to the possibility that, despite the equipment having been recovered, it might initially have been lost. In *Bridgeman*, the Court’s fascination with the doctrine of imminent peril perhaps distracted it from the need to find an insured event. And in *Walker Civil Engineering* the most direct route to finding the insurer not liable was summarily rejected, because the Court did not distinguish insured event from financial loss.