NARROW YET BROAD; CLEAR YET BLUR: THE LAW OF CONTRACT OF INDEMNITY IN INDIA

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Abstract

The Contract of Indemnity is a wide used clause used frequently within the mercantile fraternity. However, the same has been down written in the Indian Contract Act under two sections, namely, 124 and 125. There is yet an ongoing dilemma whether the two clauses cover implied indemnity within its ambit and on when does the indemnity contract comes into play in favor of the promisee. Moreover, there is ambiguity on whether the term indemnity is synonymous to the terms such as damages, compensation, reimbursement and restitution. The following article distinctly attempts to resolve these obscurities. Furthermore, there are frequent mercantile disputes where the crystal yet coinciding line between indemnity, insurance and subrogation are blurred out. Therefore, the author comes up with a concentric circle mode of solution to resolve the entire vagueness of the Indian Contract of Indemnity, 1872. In addition to this, the author has also pointed out that despite the two sections being looked down upon as being a narrow scope of indemnity to be compatible with the transnational disputes; if the contemporary precedents being taken into account and the parent contract of indemnity is examined cautiously, the two plain sections are a massive ground to rely upon while resolving contemporary transnational as well as domestic trade disputes on indemnification. Lastly, the author recommends a few suggestions that can be taken into account while resolving the civil law disputes of indemnification in the contemporary era unless a massive amendment is undergone by Sections 124 and 125 of the Act, 1872.

Keywords: *indemnity cum insurance; indemnity cum subrogation; concentric circle mode; conclusiveness; equity; narrow yet enlarged; crystal clear yet blur.*

Table of Contents

Introduction

The Indian Contract Act, 1872 (*hereinafter the Act*) provides a number of sections that specify the nature of an indemnity contract and the promisee's rights thereunder.[1] A contract has a bilateral nature.[2] Section 124 of the Act of 1872 is in some ways incomplete because the definition only takes into consideration the duties and obligations of one party.[3] Only acts against the party who has been indemnified are covered by this section when read in conjunction with Section 125 of the Act of 1872.

As a result, it appears that the main issue was with promises made to the promisee to protect them from third-party claims or liabilities.[4] Since the definition of "indemnity" is flexible, it can be applied more broadly to any agreement that forbids a party from suffering loss. The duties of indemnification arise in a number of additional contexts outside of contracts, whether through operation of statute or common law (including equity). Following is a succinct summary of the significance of the obligation and right to indemnity:

A right to indemnification is not restricted to contractual situations but may exist in any an express or inferred manner. However, there are instances where the law imposes an obligation on one party to indemnify the other as a result of that party's implied promise to act as would be appropriate in the given circumstances.[5]

The legal precedent for the so-called 'English rule' of contract interpretation is based on the instances of ***Darell v. Tibbits*** and ***Castellain*** which are respectively the founding cases for the same.[6] It is unknown and questionable where the English Law of Indemnity originated. In the English case ***Adamson v. Jarvis***, when the plaintiff sold certain livestock at the defendant's request and the circumstances further developed to reveal that the cattle in question did not initially belong to the defendant, the principle of indemnity was first recognised with its implications. Due to the fact that the plaintiff followed the defendant's instructions given to him in accordance with the indemnification contract, the defendant was sued by the plaintiff for the loss.

Sections 124 and 125 of the Act of 1872 deals with indemnification arrangements when the promisee is guaranteed complete protection from loss. Care must inevitably be taken to avoid the idea of indemnity being viewed as undue enrichment of the promisee and the third party. Real indemnity contracts were therefore used to support the idea of indemnity.[7]

The research study that follows, however, stops to investigate two specific sections of the Indian Contract Act, 1872, namely Sections 124 and 125, rather than looking into the various alternative indemnity provisions that are currently in effect around the world.

The scope of Adamson v. Jarvis, however, does not fit under section 124 of the Indian Contract Act's two indemnity sections, which is silent for the indemnity-holder from suing for losses they themselves created.

Therefore, it is extremely astounding to see that only sections 124 and 125 of the Act of 1872 apply to the "contract of indemnity," which is a crucial and regularly used legal document in the mercantile community.

The Act of 1872, which only includes two parts, doesn't clearly address a few yet major significant issues. In addition, judicial interpretation and the expansion of the law of indemnity give us the impression that these two sections' legislative text has not altered significantly.

As a result, the study report includes a gap analysis of Sections 124 and 125 of the Act of 1872 as well as a brief assessment of the ambiguous areas and areas in the draught that need quick improvement. The study thus proceeds in a chronological fashion, highlighting first the gaps in the Sections as indicating solely the express vows. Secondly, there is a fine line between an obligation to indemnify someone by returning money to him after he has paid it, in which case no equitable relief is required, and an obligation to relieve a person by preventing them from having to pay their debt, in which case equity will provide relief in the form of *quia timet relief*. There is a distinction between damages and indemnification that can be made in the indemnity clause of any statute (in the following research paper its the Act of 1872), when it specifies the conclusiveness of the Contract of Indemnity which is discussed below. Such differentiation denotes two types of dilemmas against the obligation to indemnify. The aforementioned analysis leads to the examination that sections 124 and 125 of the Act, 1872 are narrow in description but enlarged in interpretative use in determining decree on obligation of indemnity, which is explained later. This is indicated by the use of these sections in civil suits and their decision-making with a larger interpretation.

The indemnity clauses found in sections 124 and 125 of the Act of 1872 are not all-inclusive, and the preamble of the Act of 1872 welcomes amendments with every step of mercantile development in the modern era, whence, the paper includes recommendations for resolving grey areas.[8]

'WHEREAS it is expedient to define and amend certain parts of the law relating to contracts.'

The idea of subrogation and the duty of indemnification were briefly discussed in the paper's final part because it only applies to contracts requiring indemnity.[9] It is important to take into account the fact that the subrogation concept has not received much criticism from legal writers. This is due to two factors. First, the majority of works on indemnity law have been written with practitioners in mind, and practitioners are not generally engaged in policy discussions. And secondly, the subrogation doctrine dates back at least 200 years.[10] Such a notion is an essential component of the requirement of indemnity given its longevity of more than a century. Nothing could be more advantageous than for an indemnifier to retain the recovery in trust for the benefit of the "innocent indemnifier" and penalise the perpetrator.[11]

There is only one type of subrogation that is covered by the indemnity contract, and although, though insurance and indemnity are two different contracts, they are sometimes categorized as the same by default. The doctrine of subrogation only applies to contracts of indemnity. As a result, as detailed in the following subsections, the author clarifies the doctrine of subrogation, as well as how it applies to and contrasts with the contract of indemnification and insurance.

The Dilemma on Express or Implied Contract of Indemnity

If there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify, or by statute, the obligation to indemnify may emerge from an express or implied contract of indemnification, or from an obligation flowing from the parties' relationship.[12]

When a person with a statutory or common law ministerial duty is called upon to exercise that duty on the request, direction, or demand of another, and acts in a manner that appears legal but is in fact illegal and a breach of the duty, and thus incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against third parties. It makes no difference whether the individual making the request is unaware of the inadequacy of his title.[13] In every sector of day-to-day mercantile and common actions, there is an obligation to indemnify. It starts with vicarious culpability in a master-servant relationship and progresses to a duty of care between parties who are in close proximity to one another. Indemnification is also an implied agreement between the principal and the agent, as well as between the partners in a partnership. Factors such as the acceptable risk allocation between the acting and asking parties, the terms of any other contract between them, the nature of the loss claimed, and any separate negligence on the acting party's part in complying with the request appear to be important.[14] It provides the employee's written account of how he went about doing his work.

In general, practicing lawyers think that the courts are more concerned with the parties' explicit intent than with concepts of justice and equity.[15] However, to avoid overreaching, express indemnity terms shall be rigidly construed as narrowly as possible.[16]

Only in the event of dishonesty, lack of good faith, or failure to comply with the request of the person who discharged the responsibility, did the person undertaking the act on someone else's request negate the application of the indemnity by the primary doer to the secondary doer.[17]

In terms, the current sections 124 and 125 of the Indian Contract Act, 1872 apply solely to express pledges; nevertheless, it should be emphasised that an obligation to indemnify may be affixed to numerous types of contracts by operation of law.[18] The idea of indemnification also applies when a person having a statutory or common law responsibility is asked to perform that duty at the request, instruction, or demand of another, or when the person seeking indemnity is acting in his or her own free will.[19]

Since the Indian Contract Act, 1872 is both an amending and a consolidating Act, it does not cover all aspects of contract law that Indian courts must consider. Sections 124 and 125 of the Act, 1872 do not contain the entire law on the subject of indemnification contracts.[20]

The contract of indemnity is exceedingly unclear and an open invitation to endless delegation based on its ill-defined provisions under Sections 124 and 125 of the Act, 1872. As a result, the Indian Law Commission has really urged that the definition of contract of indemnity and its instrumentalities be broadened by defining each class of contract of indemnity disputes as quasi-contractual, and that a part of the required effects be included.[21]

1. Right to Indemnity or Right to Damages

There is a clear distinction between promising to pay a creditor if the principal debtor defaults on a payment and promising to keep a person who has committed or is going to enter into a contract of responsibility indemnified against that liability regardless of whether or not a third party defaults.[22] The indemnity contract is fully dependent on the recital and the agreement's operative part.[23] The promisor is liable for both future and past transactions if the recital of the indemnity bond contained the phrase "may be, may from time to time, may in any way suffer," but the operative part of the bond contained the phrase "and shall also, all the time indemnify for all losses, injury, and damages suffered."[24]

The author again poses a rhetorical question to the reader, asking whether a contract of indemnity is a payment for a breach of contract in the form of damages or compensation, specific performance of the contract, or actual performance of the contract at the agreed-upon time for the purpose of discharging the obligation against actual losses suffered by the promisee.

The right to indemnification is granted by the initial contract, whereas the right to damages comes as a result of that contract's breach. These two rights are sometimes confused, and one reason for this is because when a contract is breached, indemnification is frequently found to correspond with the number of damages. In these instances, whether the right is referred to as a right to indemnification or a right to damages, the effect is essentially the same, and it is sometimes overlooked that these two rights embody two fundamentally different legal concepts.[25]

Any money paid under an indemnity contract is the promisor's execution of a legal obligation against the promisee's obligation under the parent contract; however, when there is a breach of contract, the case is dealt with under section 73 of the Indian Contract Act, 1872.[26]

When the promisee suffers the actual loss, the legal obligation is fulfilled within the scope of the indemnification contract [27] or where there is a risk of loss as a result of the agreement's construction, whether there is an absolute obligation or an independent requirement.[28]

However, if the promisor refuses to indemnify the promisee at the moment of indemnification, or fails to perform the obligation, or renders himself incapable of doing so, there is a violation of the indemnity contract, and the promisee can seek damages or compensation.[29]

Therefore, a breach of contract may occur as a result of

a) A breach can occur when one party fails to complete his responsibility by the contract's deadline;
b) A breach can also occur when a party clearly announces that he will not perform his promise;
c) A breach can also occur when a party does something that prevents him from performing his obligation.

The term "compensation" refers to a monetary award or other kind of remuneration granted to a person who has suffered a loss as a result of the other party's violation of contract.[30] The term "damages" refers to an estimate of a loss or injury that has occurred. Damages are monetary compensation for the harm that a party suffers as a result of the other contracting party's failure to perform.[31]

Despite the fact that the outcome of compensation, damages, and indemnity may be all the same, the right of indemnity is provided by the original contract, which provides for the promisor to reimburse the promisee for the precise amount of the real loss experienced [32] A right to damages (pecuniary compensation) or compensation arises from a breach of contract and is either the estimated or actual worth of the loss sustained. At times, the damages or compensation may be significantly more than the actual losses sustained by the promisor.[33]

The court's discretion and the affecting party's will (liquidated damages within the parent contract) determine whether damages or compensation will be granted to the affecting party before or after the contract's actual termination date.[34] However, whether you have a claim to indemnity insurance after or before you experience a loss is determined by how the contract between the two parties is drafted.[35]

It's also worth remembering that when a contract is broken, neither the party that broke it *eo instanti*, i.e., at the time of the breach, incurs any financial obligation, nor the party complaining about the breach becomes entitled to a debt owing from the other party. As a result, no financial duty exists until the court determines that the party alleging a breach is entitled to damages.[36]

A contract of indemnification, on the other hand, is an existing arrangement between the contracting parties in which the promisor promises to compensate the promisee in the event of the promisee's real loss. As a result, there is no question as to whether indemnity performance is specific performance for a contract breach or obligated performance of the original contract's obligated indemnity. However, when the promisor's responsibility is fulfilled, it is fully dependent on the form of the indemnification contract.[37]

The contractual parties will find it quite simple to determine the amount of indemnification in terms of express contract. However, in the instance of an implied contract of indemnity, the court must consider the promisor's unjust enrichment, unfairness, and hardships before granting the promisee's indemnification decision.[38] As an equitable relief, the court's next order must include specific performance of the implied contract of indemnity.[39] As a result, specific performance under an implicit contract of indemnity is at the discretion of the courts, whereas the right to indemnification under an express contract stems from the already obligatory conditions of the principal contract.[40]

2. **Statement of Enquiry (What is the conclusiveness of the Contract of Indemnity)**

When a person undertakes to indemnify another, it is held in Calcutta, Madras, Patna, and Allahabad High Courts that the latter may compel the indemnifier to put him in a position to meet the liability that may be placed upon him, without having to wait until he has actually discharged it. The Bombay is now of the same mind.[41] There is however a prima facie requirement of proof to prove the specific amount of loss that the promisee will suffer in order to compel the indemnifier to endure the incoming losses that would be sustained by the promisee. To establish that the promisee will suffer any loss, any collateral event must occur in order for the promisee to incur the impending certain loss.

A contract of indemnity, on the other hand, is a separate contract in which the right to demand indemnification arises only if a contingency in the main contract between the promisor and the promisee occurs.[42] In an indemnity, the risk of any loss occurring is only contingent in the case of the indemnifier.[43] Therefore, the happening of the contingency is of utmost importance.

A contingent contract, according to Section 31 of the Indian Contract Act of 1872, is a contract to do or not do anything if some event, collateral to the contract, occurs or does not occur.[44] Similarly, section 124 of the Indian Contract Act, 1872, stipulates that any collateral event required for the section's application is loss inflicted to the promisee by the promisor or any other person.[45]

The indemnifier does not become liable until the indemnified has experienced the actual loss, i.e., until the contingency takes its actual turn, according to the Punjab and Nagpur decisions.[46] As a result, a pledge to be principally and independently accountable for the actions of another person could be construed as a contract of indemnity.[47]

In general, it is imputed that insurance arrangements are similar to indemnity contracts. It is, of course, a question of construction whether an insurance policy is merely loss insurance or a contingency policy. When an insurance is simply a contingency policy, the insurer is required to pay if a defined contingency occurs, and the payment represents either a mere loss or the prospect of loss that the event involves.[48] A cause of action develops under an indemnity contract when the damage that the indemnity is meant to cover occurs, therefore a suit filed before the real loss has occurred must be dismissed as premature.[49] The distinction between an insurance (except life insurance) and an indemnity contract is hazy, but it is crystal evident based on the facts and form of the parent contract between the promisor and the promisee.[50]

The author hereby again wants to draw the reader's attention by rhetorically questioning whether courts of equity have any role to play once the promisor and promisee have drafted a contract.

It was quickly apparent that indemnification could be worthless if the indemnified could not pursue his indemnity until the loss had been reimbursed. The court of equity stepped in at this point.[51]

When the parties have already made a contract establishing their liability boundaries, equity has no capacity to reshape it into a new contract that is more favourable to the indemnitee. Equity would not be permitted to offer relief in advance of the contingency or event on which the contract is to be performed on any basis.[52] The indemnitor's obligation is created by a special agreement between the parties, and that agreement alone must decide the extent of the defendant's liability, both at law and

in equity; for there is no concept on which a court of equity or law can expand the legal impact of the agreement.[53]

3. Whether the Court of Equity has the jurisdiction of Civil Suits

A court of equity, also known as an equity court or a chancery court, is a court that has the authority to apply equity principles to matters (both civil and criminal).

The subject of contract law is listed as item 7 of the concurrent list (list III) in the seventh schedule to the Indian Constitution.[54]

Contract law is a branch of law that falls under the ambit of Article 13 (3) of the Indian Constitution. When contract disputes are brought before courts of equity where there is an obvious conflict with the law, the essential structure of India's constitution is violated, and the judicial review power must be invoked.[55] Any contract issue between the parties must be resolved through civil court litigation.[56] Because the commitment to indemnify under section 124 of the Act of 1872 is conditional on loss, the liability will not emerge until the condition, express or implied, is met.

In the resolution of legal problems, the precise language of the terms of reimbursement for loss sustained by the promisee is critical.[57]

As a result, it is now evident that the heart of any indemnification clause is that the indemnified must suffer an actual loss, as defined by section 124 of the Indian Contract Act, 1872. When the promisee suffers an actual loss as a result of the promisor's independent liability under the indemnity contract, the indemnifier becomes liable. Contract law is a type of civil dispute in which the court of equity has no role to play because it is outside the scope of the law.[58]

After removing the uncertainty between general insurance (except life insurance) and indemnity contracts, it is a question of construction as to whether the contract's obligation is an absolute obligation to incur liability prior to the actual loss or one of indemnity.[59] When a promisor incurs an absolute obligation against the promisee's liabilities, he can sue for its enforcement even if the promisee has not suffered any actual harm.[60]

It's also worth noting that, according to the insurance policy, establishing potential damages may be more difficult than proving out-of-pocket losses and expenses for indemnification. It would allow the promisee to receive the maximum compensation for the smallest loss.[61]

4. Narrow yet Enlarged Contract of Indemnity in India

The earliest legislative idea of loss compensation, or indemnity, derives from England's unique legal system. Its origins can be traced back to equity law. There used to be a popular statement that compensation without liability was not authorised at all.[62]

A contract of indemnity, according to section 124 of the Indian Contract Act, 1872, is one in which the promisor agrees to rescue the other (promisee) from loss caused by the promisor's behaviour or the action of a third party.[63] In the broadest sense, it refers to remuneration for any loss or liability sustained by a person, whether as a result of an agreement or otherwise.

The various forms of the indemnity provision arise from the working out of the contracting parties' freedom.[64] Despite the fact that section 124 of the Act, 1872 refers to the promisee's indemnification for losses caused solely by human agency, presently extended mercantile practises include indemnity for any sort of loss, as well as financial restitution and indemnification against loss caused by the promisee's own conduct.[65] There are further grounds for the mentioned if one considers the implied indemnification agreement. By obfuscating the distinction between a contract of indemnification and a general insurance provision (except life insurance), one can consider including damages sustained by activities not directly caused by human conduct.[66]

Furthermore, the indemnification idea is employed in international contracts, which generally follow common law and include any damages incurred by the indemnified party.

It is important to realize that tort and indemnity insurance are inextricably linked. Insurance is an alternative to tort for obtaining compensation for harm to a plaintiff, and it is a technique for a defendant to avoid the harm of having to pay for his torts to a defendant. It is common knowledge that an insurance contract, particularly fire insurance, is an indemnity contract, and that when a loss

happens, the assured must establish the real amount of his loss. The amounts indicated in the policy only show the defendant company's liability limit on the outside.

Indemnity, as applicable to marine insurance, must not be an indemnity, as contemplated by the Indian Contract Act, as the loss in such a contract is covered by the contract itself and such loss is not caused to the assured by the conduct of the insurer nor by any other person. However, there is an implied indemnification clause in maritime insurance that states that, if the loss is proven, the insurer will reimburse the loss sufferer. As a result, one can conclude that, while section 124 and 125 of the Act, 1872 are ambiguous, they are generic and must be read in conjunction with the insurance clauses, because under the contract of indemnity, loss (the collateral event for indemnification and the contingency) must be suffered by the promisee, whereas under the insurance clause, loss must be suffered or absolute to be suffered by the promisee upon proof of an upcoming loss (the collateral event to loss). When the indicated collateral is proven, it is the actual and definite loss that the promisee will suffer, where the indemnifier will incur all the expenses itself as a matter of and so, indemnification and insurance converge at this point, increasing the extent of indemnification under the narrower illustration of section 124 and 125 of the Act of 1872.

One can take the day-to-day example of car insurance. When a car meets with an accident, it is absolute that an upcoming monetary loss will be suffered by the insured and hence the insurance company saves the insured from the upcoming absolute loss by itself incurring all the expenses without involving the promisee to pay for the damages. This is indemnification. However, at this point it will depend upon whether the amount discharged by the insurance policy is exactly equivalent to the loss suffered or the entitled amount.

Analysis of the provision of indemnity clause between the Indian Contract Act, 1872 and International counterparts (USA & Europe)

Why a particular provision needs to be compared with the International Counterparts?

An international comparison fosters a broader public interest in discouraging illegal activity and maintaining the fairness of the judicial system,[67] as well as the parties' consideration of justice.[68]

It is therefore crucial that every single provision of any statutes be clearly described and free of any ambiguities. An illustration will help you to understand this.

If the illegal transaction is unenforceable and there is a strong enough link between the claim and the illegality, a contractual claim may be tarnished by it.[69] Like thus, in an indemnity contract, if the indemnity-holder asks indemnification in line with the parties' agreement owing to any illegal action the indemnity-holder has engaged in and these sufferings are being covered by the innocent indemnifier. The indemnity clause under the Act of 1872 is only covered up in two paragraphs, despite the provision being of the utmost importance and usage, therefore there is a chance that the indemnifier would be held accountable for losses incurred by the indemnity-holder as a result of illegal or unjust conduct.

Comparative analysis between USA, Europe and India

Particulars	United States of America	Europe	India
Gross Negligence	Depends upon the contract's express reference and public interest	Based on the type of indemnity, whether, indemnity insurance or indemnity of fixed sums	Not mentioned specifically
Unequivocal Standard	The indemnification cannot be implemented by the indemnifier against the indemnified if in case of joint-liability	The operation of the indemnity clause is based on 8-principles	There is indemnification for loss caused by the indemnifier himself or by any other person

Joint Liability of the Indemnified & Indemnifier	The indemnification cannot be implemented by the indemnifier against the indemnified if in case of joint-liability	There must be inclusion of such '*promissory warranty*'	There is indemnification for loss caused by the indemnifier himself or by any other person
Provision of strict-liability and pre-existing condition	Varies from state-to-state	There is a principle of duty of disclosure of material facts	Based upon the matter to which the promise of indemnity applies
Specific time of implementation of indemnity clause	The loss has to be incurred as per the definition of the clause of contractual indemnity	Admissibility of the indemnity clause is to reimburse the losses of the indemnity-holder	Based on whether the construction of the contract of indemnity

Analysis

Inclusion of gross negligence: Regarding the indemnification clause in the United States, it mostly depends on how the indemnity contract is drafted. It is possible to cite a significant piece of case law. In ***Marquette Transp. Co. Gulf-Inland LLC v. Unknown Potential Claimants***, the court determined that the indemnity obligation must cover gross negligence if the contract of indemnity makes express mention of negligence and there are numerous assertions that the contract of indemnity applies to damages regardless of how damage was caused.[70]

The practicality of splitting indemnity contracts into 'insurance indemnity' and 'indemnity of fixed sums' is highlighted by the European countries.[71] This clause implies that the contract of indemnity encompasses egregious negligence. The insurance indemnity ensures that the indemnifier is required to reimburse the indemnified for the real harm brought on by the occurrence specified in the indemnity contract. This strongly suggests that the actual amount of the damage is paid to the indemnified under the terms of the indemnity contract if the indemnified event includes losses brought on by gross negligence.

Unequivocal Standard: According to US state law, the intention to indemnify must be stated in 'unequivocal terms.' This can be supported by US state court precedent. The court decided in ***Charles v. Gervais*** that the contractual indemnification clause had to clearly refer to the indemnitee's 'negligence' in order to meet the 'unequivocal standard' under 'Louisiana law.'

In light of this, it is important to note that a contract of indemnity must specifically state the circumstances under which the indemnified will be compensated by the indemnifier.[72]

The ideas of the indemnity contract are highlighted by Russian experts, who are from a European nation. These particular principles close the loophole in the indemnification contract that prevents good faith, equivalence, and the protection of the vulnerable party from being accommodated,[73] Significantly, these principles serve as the cornerstone of an indemnity contract and are comparable to the idea of stated terms that should be included in such a contract. Reference can be made from the brief elaboration of each of the principles, such as, **Principles[74] of** *utmost good* [indicating fair exchange of information between the indemnifier and the indemnified]; *interest of the indemnified* [the indemnified must be prevented from turning the indemnity contact based on a contingency into a gambling and hence must ensure their best that the cause of action leading to the occurrence of the events under the indemnity contract would not occur]; *restoration to the previous status of the indemnified* [indicating that the indemnified is not doubly benefitted than the actual damage suffered by him]; *lad causa proxima* [the indemnification should be precisely and specifically for the event/issue mentioned in the contract of indemnity]; *action directa* [indicates that the indemnified has the absolute right to claim indemnification directly from the indemnifier] *solidarity-based compensation* [indicating that when the indemnified is concluding indemnification from several contract of indemnity, the amount of indemnification should not exceed the actual damage suffered by the indemnified]; *efforts for reduction of damage* [the indemnified must ensure utmost care for the non-occurrence of the indemnified event in the same manner as the indemnified would have taken in the absence of the

particular contract of indemnity]; and lastly, *right of subrogation* [the indemnifier has the right to get into the shoes of the indemnified after indemnification of the damages caused to the indemnified for acquiring the damages from the person who caused the damage]. This eliminates the need to deal with 'unequivocal standards' in indemnity lawsuits by making the aforementioned principles official provisions of the indemnification contract in European states.

Joint Liability of the indemnified and the indemnifier: Despite the indemnifier and the indemnified sharing shared liability, it is a well-established principle in the states of the USA that the indemnifier cannot seek compensation for damages incurred by the indemnified. In the case of ***Texas Dept. of Transportation v. Metro. Transit Auth. of Harris County***, the court held that the "express negligence doctrine" in the contract of indemnity did not apply when the indemnified had been found to be at fault and was attempting to recover indemnification for joint enterprise liability imposed upon it as a result of the indemnifier's negligence.[75]

Conversely, in the European country, similar to the UK's practise of indemnification, there have been a popular warranty provision known as the *promissory warranty*, by which the indemnified guarantees the indemnifier of the existence of certain circumstances at the moment of risk transfer for the future, i.e., during the entire period of the indemnification.[76] Therefore, it can be inferred that the indemnified is required to provide a promissory warranty stating that the possibility of joint culpability damages exists in the event that indemnity is withheld by the indemnified for joint-liability scenarios from the indemnifier. Even in the absence of a causal connection between the warranty breach and the risk materializing, the consequence of breaching the promissory warranty would otherwise have the catastrophic consequences of cancellation of the indemnity contract and release of the indemnified from payment of the indemnity.

Provision of strict liability and pre-existing condition: The scope of the indemnification contract differs from state to state in the USA. However, situations from the United States can be cited where the court instructed the party negotiating an indemnification agreement to expressly list every type of damage that the indemnity contract would be covering. Referring to the case law of ***Atlantic Richfield Co. v. Petroleum Pers., Inc.,*** a Texas appellate court denied indemnity because there was no specific mention of the kind of negligence that was covered, even though the indemnity provision covered all claims under the phrase "including but not limited to any negligent act or omission" on the part of the indemnitee. Even if the ruling was overturned on appeal, ambiguity should be avoided whenever possible.[77]

The duty of disclosure, which derives from the doctrine of absolute good faith (also known as uberrima fides) and is related to the risky nature of the object of indemnity, is a principle that is explicitly stated in European countries like the UK. It states that the indemnity-holder must provide the indemnifier with accurate information about the objects of the indemnity and the risk factors.[78]

The method of the indemnified's initiative to risk disclosure is still permitted by European law, but modern indemnity contracts and business practise prefer the questionnaire method, in which the indemnified is provided with a questionnaire by the indemnifier and is required to provide truthful responses to the questions.[79] This in turn ensures the wide coverage of the events of the contract of indemnity.

Specific time for implementation of the indemnity clause: Unlike the Indian Contract Act, 1872, section 124 does not address the question of whether the indemnity clause is applied to "save" the promisee before the loss is incurred or to hold the promisee harmless after the loss is incurred. Instead, it proceeds with the clause of indemnification to "save" the promisee against loss caused to the promisee. The phrase "save" suggests the promisee's rescue before to falling into the harm pit, but "indemnity" implies payment to the indemnity-holder. As a result, there are certain problems with the indemnification contract in India.

However, in USA, the definition of the indemnity clause proceeds with the usage of the phrase, 'indemnity as a provision in which one party agrees to 'answer' for harm……..'[80]. Therefore, the contractual indemnity in USA is clear with the time of conclusion of the contracts of indemnity, hereby, the indemnity-holder incurs the loss (*say a situation or a problem*) and the indemnifier is liable for the task of solution to the problem (*say the answer to the suffered harm*).

The insurance indemnity (*actual amount of indemnification payment*), which must be provided primarily in cash and the contract of indemnity is to 'reimburse' the losses for the goal of indemnification, is a

type of limitation against the indemnifier in European countries.[81] This sort of limitation of the type of insurance indemnity is possible only when the indemnified suffers the loss and the actual and exact amount of damages incurred by the indemnified can then be summarized. Therefore, this type of indemnity insurance significantly implies the time of indemnification, or the time of conclusion of the contract of indemnity is as and when the indemnified encounters the indemnified event and suffers the loss.

It is high time for India to expand the scope of indemnification from just two sections to a specific statute after the comparison of some key details under the contract of indemnity mentioned above. In the age of globalisation, indemnity is crucial in the conduct of business and the services of professionals. Therefore, maintaining a '*professional indemnity policy*' is essential for upcoming business entities (to avoid scenarios in which a business entity might incur losses due to the negligence of a professional engaged in the business) and for the professionals involved in the business entities to '*purchase a professional indemnity*' to shield themselves from their own professional liability.[82]

Analysis on Contrast and Coincidence between Insurance and Indemnity in India

Insofar as the obligation of the insurers is constrained to the real loss that can be demonstrably attributed to them, the majority of insurance contracts fall within the general category of indemnification. The insured cannot be compensated for more than the amount insured because it is the maximum amount for which the insurers would be held liable and is the amount for which the insured has paid premiums. However, because the indemnity contract is one of indemnity only, the indemnity holder may only be able to recover the actual amount of his loss and not any additional amounts, regardless of how much he may have estimated his loss would likely cost or how much in premiums he may have paid based on that estimate.[83]

The contract of Indemnity under the Indian context is not free from ambiguity. Where there is confusion between express and implied contract of indemnity, there are also vague perspective upon whether insurance policy and the contract of indemnity are one and the same thing.

Though section 124 and 125 of the Indian Contract Act, 1872, on a plain reading provides us only with the possibility of the promisee to claim indemnity from the loss suffered by the actions of human agency (i.e., the promisor or the third person) but due to the development and the transnational trade and mercantile activities, the indemnity clause within section 124 and 125 of the Act, 1872 are getting wider with every dispute of indemnity in the civil law due to the linkage of the insurance policy (except the life insurance) with that of the contract of indemnity.

Keeping in view to all the grey areas within the two afore-mentioned sections and the precedents laid down by the court, the author puts forward the analysis that can be used as a tool to resolve the disputes related to mercantile indemnity and the coinciding yet crystal line of differentiation between the insurance and indemnity.

Thus, the author comes up with the mode of concentric circle to showcase the linkage yet contrasting line between insurance and the contract of indemnity. Therefore, the author initiates the step to fill the gap of the ambiguous statement that insurance and the contract of indemnity goes hand in hand. One must diligently look upon the construction of the original contract before drafting a conclusion on whether the valid agreement is a contract of indemnity or a mere insurance scheme or a collision of both.

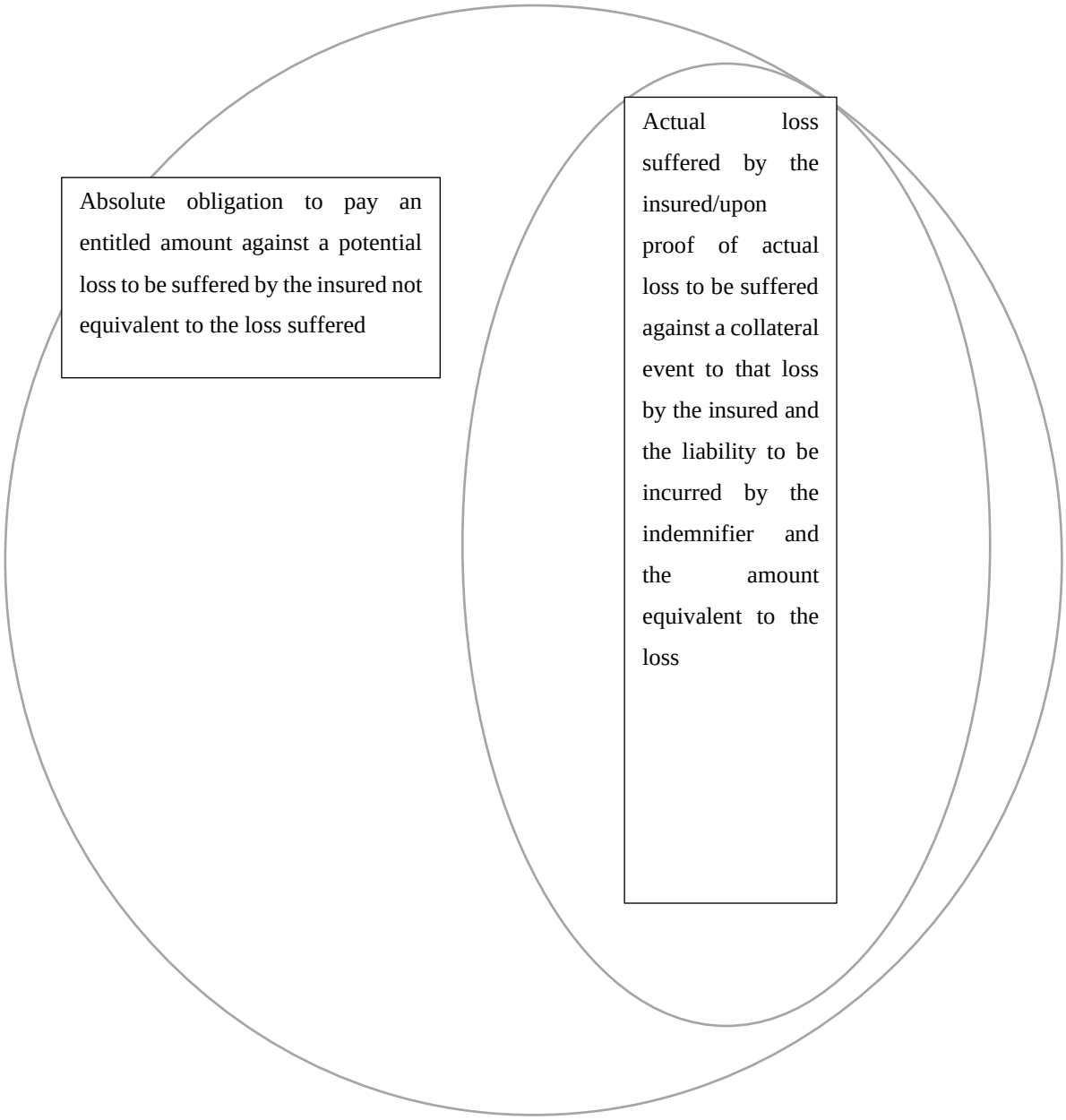


Fig.1

The outermost circle is the insurance circle excluding the (life insurance); the inner circle is the indemnity circle. (Fig.1)

Under the indemnity clause, the assured/promisee must be reimbursed or saved with the exact amount of loss that he had undergone or about to undergo.

When the author states that there must be proof of the actual loss to be suffered by the promisee which is against some collateral events related to the obvious loss that the promisee will suffer, the author would like to clarify the above-mentioned statement within the following day-to-day example for the readers' convenience.

For E.g., Person A makes a car-insurance policy under XYZ Policy Bazaar. The insurance can be claimed to incur the actual amount of loss that Mr. A will suffer if his car meets with an accident. Suppose Mr. A's car meet with an unpredictable accident during one fine day, and his car gets damaged to the amount of Rs. 5000, the insurance policy bazaar will either pay Mr. A with Rs. 5000 to renovate his car or the policy bazaar will itself incur the actual damage suffered by Mr. A.

Under the above-scenario, Mr. A is an indemnity cum insurance holder and the XYZ Policy Bazaar is an indemnifier cum insurer since, the basic principle of indemnity is reimbursement and to save the indemnity-holder against the actual loss suffered.

Hence, it can be concluded that if the insurance claim is equivalent to the amount of the loss suffered with the actual loss or the proof of actual loss to be suffered by the assured upon proof of the collateral event to that loss, then at that point insurance and indemnity are one and the same thing.

As a consequence, a drafter must be absolutely clear with what indemnity signifies under the general notion and how does the original insurance policy is drafted to examine whether the insurance policy coincide with the contract of indemnity or it indicates the crystal differentiation based the amount of loss that the indemnity-holder or the policy-holder will be entitled to.

Thus, not all insurance policy is contract of indemnity but a part of the insurance policy is an indemnity contract.

5. Subrogation and Indemnity in India

Subrogation, which arose as an equitable theory, allows for the modification of rights in a variety of situations to avoid unjust enrichment. When an insurer indemnifies an insured who is entitled to reimbursement for the loss from another source, the insurer may be subrogated to the insured's rights in specific circumstances.[84] The doctrine of subrogation does not apply to life and personal accident insurance contracts.[85]

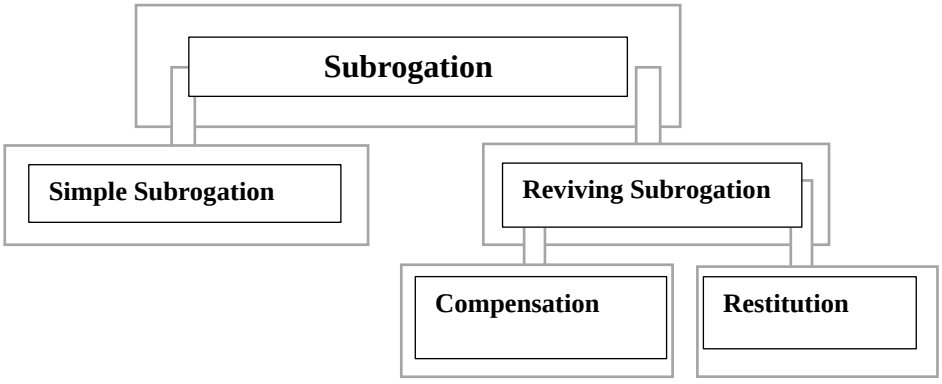
There are two kinds of subrogation, *simple subrogation* and *reviving subrogation.*[86]

The assured has the right to recover the real damage from the indemnifier, as well as continuing rights against the third party that is principally accountable for the assured's loss, in simple subrogation.[87]

However, in reviving subrogation, the indemnifier in the preceding example steps into the shoes of the assured and can sue the third party for damages for its primary liability once the indemnifier originally indemnifies the assured according to the original contract's terms.[88]

Suretyship is an example of revived subrogation, whereas insurance is an example of simple subrogation. When the insurance contract expressly stipulates that subrogation applies, the surety assumes responsibility for all damages incurred by the assured as a result of a third party's negligence. As a result, the insurance company identifies itself as the surety against the assured and the subrogated against third-party damages when it draughts the original contract with the subrogation provision.[89]

Without subrogation, there would be a significant moral hazard, which might have a significant impact on insurance premiums, as people would be driven to collude to commit acts that appear to be torts.[90]



Whether subrogation (reviving/simple subrogation) falls under the ambit of Indemnity in India?

When an insurer indemnifies an insured who is entitled to reimbursement for the loss from another source, the insurer may be subrogated to the insured's rights in specific circumstances to claim the damages as per the court's discretion against the wrong done by the third party.[91] If compensation and not the actual amount that the insurer paid to the insured is granted by the discretion of the court, in no case does the compensation system fall within the umbrella of indemnification.

If, on the other hand, the subrogate holder's *(i.e., the insurer in the shoes of the insured)* right to recovery against a third party are truly restitutionary, the insurer may be able to recover the costs it

expended in modifying the assured's loss.[92] Subrogation (restitutionary subrogation within the scope of reviving subrogation) falls under the umbrella of indemnity in this scenario.

If the measure of recovery is incompatible with restitutionary subrogation, in which the insurer, in the shoes of the assured, can only claim damages rather than the actual loss incurred by the assured and indemnified by the insurer, but falls outside the scope of indemnity, then subrogation cannot be considered a form of restitution.[93]

In simple subrogation, the assured might seek damages from the wrongdoer who is not within the indemnification circle. Simple subrogation, on the other hand, is not a kind of implied indemnity even if it is equal to the amount of damage experienced by the assured.[94] Subrogation is a norm of equity, and equity will never allow the injured to be compensated twice by the insurance and the person responsible for the loss.[95] It is completely contrary to the spirit of indemnification contracts for a person to recover his loss more than once; it follows that if he has already recovered from a third party, there can be no culpability under the indemnity contract.[96]

The principle of indemnity states that no one should be entitled to more than what he is owed in a legal procedure, and that recoveries are for losses. Furthermore, no one should be entitled to more than the entire indemnity for his insured losses under an insurance policy.

As a result, only restitutionary subrogation under reviving subrogation falls under the contract of indemnification, express or implied, as it falls under the ambit of recovery of the actual loss sustained.

Analysis on contrast and coincidence between subrogation-insurance in indemnity in India

There is often a dilemma whether subrogation is equivalent to the Contract of indemnity since, the principle of subrogation is to compensate the insurer after the insurer has paid the loss suffered by the insured due to the wrongful act of the third-party.

The third-party here will be explained via a day-to-day example.

For E.g., Mr. A has a brand-new Ertiga. After buying the car, Mr. A holds an insurance claim under the XYZ Policy Bazaar if his car meets with any unfortunate accident. On one unfortunate day, the car was hit from behind due to the negligent and rash driving of Mr. B. upon proof of the accident, the insurance-holder, i.e., Mr. A is entitled either to the full amount of loss that he is obvious to incur to renovate the car (indemnity cum insurance) or a minimal amount (based on the policy).

Now, in the absence of subrogation, Mr. A has a right to sue Mr. B for his rash and negligent driving. But, once the XYZ Policy Bazaar signs and agreement of subrogation with Mr. A, the policy bazaar comes in the shoe of Mr. A. It can either claim damages from Mr. B where under the court's discretion the policy bazaar will get a mere compensation OR it can be entitled to the restitutionary amount, i.e., the equivalent amount that XYZ Policy Bazaar granted to Mr. A.

Here, the twist comes where, insurance holder despite giving the mere entitled amount to Mr. A which is not equivalent to the actual loss suffered by him (absence of contract of indemnity between Mr. A and XYZ Policy Bazaar) but if the Policy Bazaar gets the exact mere entitlement that it gave to Mr. A upon his loss as per their agreement from Mr. B, there comes into the picture, the implied indemnity contract.

Therefore, a mere entitled amount by the insurer to the insured despite falling outside the circle of indemnity, if under subrogation, the insurer restitutes that mere entitled amount from the third party, there exists the Contract of indemnity.

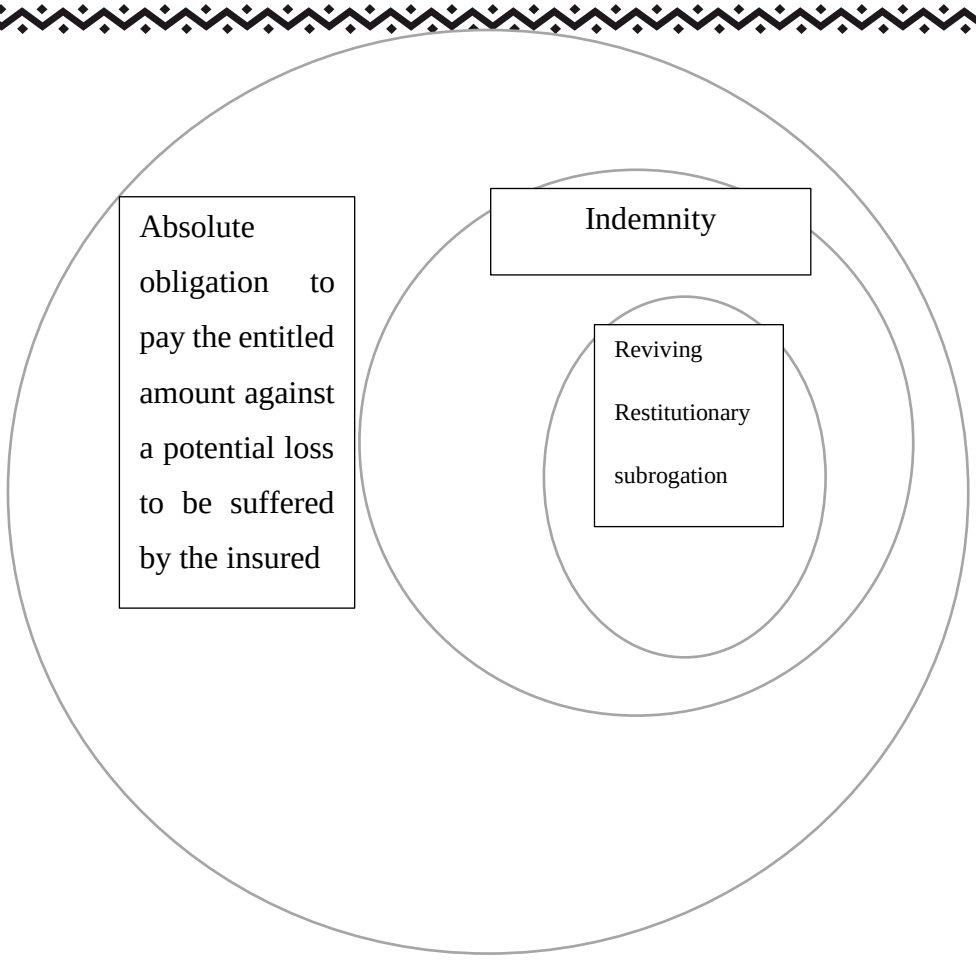


Fig. 2

The outermost circle is the insurance policy (excluding life insurance). The inner circle within it is the indemnity circle. The common circle within the indemnity and the insurance circle is the reviving restitutionary subrogation circle.

It implies that, the reviving restitutionary subrogation clause within the indemnity-insurance policy as well as mere insurance policy falls within the ambit of contract of indemnity as the very purpose of the contract of indemnity is restitution or reimbursement against the amount of loss suffered by the promisee.

6. Conclusion

The entire research paper took up the issue of identifying and picking up the ongoing dilemma cum grey areas of sections 124 and 125 of the Indian Contract Act, 1872. It must be noted that, the Contract Act of 1872 must undergo a massive amendment to meet the contemporary transnational trade disputes. However, narrowing down the generalized statement, the author derives the readers' attention towards the contract of indemnity. It is obvious that a draft of 1872 is incapable of meeting the trade disputes of the contemporary era. Moreover, the illustration of section 124 and section 125 of the Act, 1872 are highly incompatible to be taken into account where trade disputes are not only matters of a mere sum of Rs. 100 but the inclusion of digital currency and the man-made inconvenience which are not directly but indirectly a loss accompanied by human agency.

Therefore, the author suggests the following recommendations that can be followed until the draft of section 124 and section 125 of the Act, 1872 undergoes an utmost required amendment in the hands of legislature.

Recommendation to fill in the grey areas of Contract of Indemnity in India

1) *Firstly*, it is high time for the legislature to amend section 124 of the Indian Contract Act, 1872 with an inclusion of the phrase ***a contract 'express' or 'implied'*** *by which one party promises*

to save the other from the loss caused by the human agency. (i.e., the promisor himself or any other person)

2) *Secondly,* there have been a never-ending dilemma upon whether the indemnification must be made before the loss suffered or after the loss suffered by the promisee. Due to absence of any specific explanation whether indemnification is the exact reimbursement after the loss suffered by the promisee or a concept of equity within the civil law where indemnification can be claimed before the loss suffered by the promisee.

As per the author's analysis, the upcoming contemporary civil law disputes on indemnification must be solved with the *concentric circle mode keeping the draft of the parent contract within its focal point.*

3) *Thirdly,* the Indian Contract of indemnification is always under-looked as a narrow scope of indemnity for its plain explanation in only two sections describing the losses suffered due to the actions of the human agency. However, the contemporary mercantile fraternity has started taking up the issues of *vis major* due to the extraordinary transnational trade practices being carried out within the entire globe. Therefore, it is high time for the legislature to expand the definition of ***any other person*** within Section 124 of the Act, 1872 along with a brief explanation on the inclusion of the *vis major* activities.
4) *Fourthly,* the ambiguity between insurance and indemnity must be solved under the *concentric circle mode (fig.1),* since, every layman is under false obviousness that insurance and indemnity are one and the same thing. The same, follows up under the contract of subrogation which is already explained in the above-depicted *concentric circle (fig.2).*

Therefore, the author came up with the very notion that, contract of indemnity under Section 124 and 125 of the Act, 1872 is generic and enlarged though narrow in illustration. Unless the legislature amends the very sections or incorporates the changes introduced in the 13th Law Commission report[97, the conflict under sections 124 and 125 of the Act 1872 must be read in the *concentric circle mode* precisely emphasizing the original draft of the contract of indemnity and the insurance. Hence, contract of indemnity is a matter of construction of the original draft of the parent contract.

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