

**KASIA GINDERS**

**WHAT WE TALK ABOUT WHEN WE TALK ABOUT  
A PRINCIPLE OF INDEMNITY:**

**The principle of indemnity in light of *Ridgecrest NZ Ltd v  
IAG New Zealand Ltd***

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## *Abstract*

*When the Supreme Court discussed the principle of indemnity in Ridgecrest New Zealand Ltd v IAG New Zealand Ltd, it referred to it as ‘awkward’ in the context of a replacement policy. The application of the indemnity principle in the case raises further questions about the nature of the principle in insurance contracts. It is submitted that the indemnity principle is currently enforceable not as a legal test or as a policy-based presumption; rather, it is applicable mostly because it is presumed the parties intended it to apply. While some policy arguments underlying the principle can be made, these are less relevant than they once were. The rationales and rules of, exceptions to, and law reform concerning the principle are considered in this paper in order to evaluate the status of the principle. Conclusions are drawn from analysis of these elements and in light of Ridgecrest and two other cases from 2014, one in the Court of Appeal and another in the Supreme Court.*

**Key words:** Indemnity principle – insurance law – *Ridgecrest New Zealand Ltd v IAG New Zealand Ltd*

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## *I Introduction*

The principle of indemnity in insurance law holds that an insured is entitled to receive a full indemnity for his or her loss, no more and no less. However, in the aftermath of the Canterbury earthquakes, a recent case in the New Zealand Supreme Court has brought the nature of the ‘principle’ into doubt. In *Ridgecrest NZ Ltd v IAG New Zealand Ltd*, the insured was able to claim up to the full amount of the sum insured per happening, despite being underinsured and not having repaired the damage from earlier losses when the insured building became a total loss.<sup>1</sup> This paper explores the uncertainties surrounding the nature of the principle, particularly in light of the decision in *Ridgecrest*. While the focus in the case is on property insurance and issues arising from multiple earthquakes in close succession, the conclusions drawn about the principle are also applicable to indemnity insurance more generally.

Two other cases from 2014 dealing with the indemnity principle and the Canterbury quake damage are also considered. First, the Supreme Court case of *Tower Insurance Ltd v Skyward Aviation 2008 Ltd (Skyward)*, a decision released a few months after *Ridgecrest* which is confirmatory of the approach in *Ridgecrest*.<sup>2</sup> Also discussed is the decision in *QBE (International) Insurance Ltd v Wild South Holdings Ltd (QBE International)*, released soon after *Ridgecrest*, in which the Court of Appeal clearly stated the principle ‘survived’ *Ridgecrest*.<sup>3</sup>

The question at the heart of this paper is whether the principle of indemnity is truly a legal principle at all. Does it operate as a policy-based principle which contracts must be interpreted consistently with, or is it simply descriptive of a particular type of contract? In other words, do courts have a discretion or perhaps an obligation to interpret contracts to be consistent with the principle, or is the concept of a “no more, no less”, full indemnity merely applicable where it can be presumed the parties intended it to apply? This paper argues the latter appears more likely following *Ridgecrest* and in a modern context.

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<sup>1</sup> *Ridgecrest NZ Ltd v IAG New Zealand Ltd* [2014] NZSC 11, [2015] 1 NZLR 40.

<sup>2</sup> *Tower Insurance Ltd v Skyward Aviation 2008 Ltd* [2014] NZSC 185, [2015] 1 NZLR 341.

<sup>3</sup> *QBE (International) Insurance Ltd v Wild South Holdings Ltd* [2014] NZCA 447, 2 NZLR 24.

## *II Indemnity*

### *A Various Meanings*

The word 'indemnity' has several interlinked meanings in the insurance context. It may describe a type of policy, a measure of loss, or the so-called “principle” of indemnity. This paper seeks to more accurately assess the scope of the third meaning. Courts may use the term 'indemnity' without clearly distinguishing which meaning is intended, leading to some confusion. For clarity, the first two meanings mentioned are briefly explained below before entering into discussion of the principle itself.

First, 'indemnity' provides a distinction between contracts of indemnity, which provide cover for loss suffered, and contracts based on contingencies. 'Loss suffered' in itself indicates the premise upon which the indemnity principle is based; loss is an essential element of indemnity insurance.<sup>4</sup> Contingency contracts, in comparison, provide for a specified amount of money to be paid when an insured event occurs irrespective of loss suffered, for example, life insurance.<sup>5</sup> The difference lies principally in the fact that one cannot put a price on certain things, like a loss of life, so the insurance received cannot be based on pecuniary loss.<sup>6</sup> The indemnity principle, unsurprisingly, operates only in the context of indemnity policies.

Secondly, in the case of an insured event occurring under an indemnity contract, policies may offer different options for measuring the loss that the insurer is required to secure the insured against. 'Indemnity value' is one method of calculating such loss. It involves measuring the loss caused directly by assessing the difference between the insured's position immediately before and after the event. This can be contrasted with replacement cover, where the amount required to indemnify the insured is calculated based on the cost of replacing or reinstating the thing insured, without making deductions for depreciation in value (or the increased cost of meeting new building standards in respect of property insurance).

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<sup>4</sup> Robert Merkin and Chris Nicoll (eds) *Colinvaux's Law of Insurance in New Zealand* (Thomson Reuters, Wellington, 2014) at 1.1.2(9).

<sup>5</sup> See *Gould v Curtis* [1913] 3 KB 84 (CA) at 95 per Buckley LJ.

<sup>6</sup> At 95.

## ***B Scope of the indemnity principle: options***

In the leading 1883 case of *Castellain v Preston*, the indemnity principle was described as ‘fundamental’ to insurance,<sup>7</sup> but the current status of the principle is somewhat uncertain. The scope of the indemnity *principle*, it is submitted, lies somewhere along a scale between ‘legal test’ as a high water-mark, and merely a ‘measure of loss’ at the low water-mark. Four definitions are used in this paper as points of reference to help determine where the principle fits on the scale.

### a) Legal test

While the principle is said to be vital to insurance, there is little to suggest it constitutes a strict and compulsory legal test. It is not explicitly enshrined in statute,<sup>8</sup> and there are several exceptions to the principle which clearly demonstrate that it is not compulsory.<sup>9</sup> Few, if any, substantive arguments exist for affording the principle the status of a legal test, and this paper does not submit it as a possibility, but it is useful as a point of comparison for the other definitions.

### b) Policy-based presumption

This option is closer to the upper end of the scale, and allows the principle greater scope to play a guiding role in interpreting contracts. Professor McGee seems to take this approach, stating that the principle is ‘properly regarded as a presumption rather than a rule of law’, and that the presumption may be rebutted by appropriate wording in a policy.<sup>10</sup> The effort required to rebut such a presumption reflects the policy arguments underlying the principle; these arguments indicate the presumption should not be disregarded lightly.

### c) Presumed intention

This more descriptive approach views the indemnity principle as something that acts to prevent the intentions of the parties being frustrated by presuming no more than a full indemnity was intended. Not carrying the same weight as a policy-based presumption, this option focuses more on the intentions of the parties than policy and is accepted as the most likely option by Neil Campbell and Barnaby Stewart in their paper “Prevention of

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<sup>7</sup> *Castellain v Preston* (1883) 11 QBD 380 (CA) at 386 per Brett LJ.

<sup>8</sup> Although the Marine Insurance Act 1908 indirectly acknowledges the principle with provisions that conform to the requirements of the indemnity principle: see for example ss 33 and 67-69.

<sup>9</sup> See below, *II C 3*.

<sup>10</sup> Andrew McGee *The Modern Law of Insurance* (3<sup>rd</sup> ed, LexisNexis Butterworths, London, 2011) at 4.17.

Performance in Replacement Cost Insurance – Preventing a Fictional Response”.<sup>11</sup> They state that the indemnity principle:<sup>12</sup>

can be explained either as a matter of presumed intention (this is what the parties mean by “indemnity”) or as one of broad policy (the law should not allow insurance contracts to be used as a means of improving the insured’s position).

They go on to suggest that the former is more likely in Commonwealth countries; this reasoning is discussed in more detail below.<sup>13</sup>

d) Business practice

This option leaves the indemnity principle as merely descriptive of a common method of crafting insurance policies or measuring loss. It has the potential to carry more weight than just a measure of loss in that if clearly recognised as common business practice, the courts might choose to follow the principle when faced with an ambiguity in a policy. However, the discussion in *Ridgecrest* on the indemnity principle suggests it has more legal substance than a method of business practice.

It is reiterated that these definitions are starting points, not clear cut options; the final answer submitted lies somewhere between a policy-based presumption and a presumed intention approach.

***C Evaluating the scope of the principle***

In assessing the scope of the indemnity principle, several aspects of the principle are considered: the rationales and rules of, exceptions to, and law reform concerning the principle. Analysis of these elements provides a framework for exploring the scope of the indemnity principle, one that is added to below when the judgment in *Ridgecrest* is considered.

Despite not being a strict test, the principle does influence and underlie legal rules applied to the interpretation of insurance contracts (indeed it is considered the foundation of all such rules in *Castellain v Preston*)<sup>14</sup>. Nevertheless, several exceptions to the principle demonstrate it is by no means compulsory. Its role in insurance law has also been

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<sup>11</sup> Neil Campbell and Barnaby Stewart “Prevention of Performance in Replacement Cost Insurance – Preventing a Fictional Response” (2002) 10 Otago LR 229. See also Paul Michalik and Christopher Boys *Insurance Claims in New Zealand* (LexisNexis, Wellington, 2015) at 5.3, where a similar approach is taken.

<sup>12</sup> At 230.

<sup>13</sup> See below, IV A.

<sup>14</sup> See below, II C 3(a) and II C 4.

considered by Parliament during statutory reform.<sup>15</sup> These three aspects all provide insights into the scope of the principle.

However, the rationales of the indemnity principle are the key starting point. Understanding these rationales and their current relevance is necessary to assess the weight of the policies on which a principle that is more akin to a legal test or presumption might be based. The extent to which the rationales have become superfluous indicates the extent to which the scope of the principle should fall somewhere lower on the scale, towards mere business practice.

### *1 Rationales*

Three reasons are commonly given as justification for the principle of indemnity: avoiding windfalls to the insured, fraud prevention, and ensuring that the contract is not a wagering one.

#### (a) Avoiding windfall

Inherent in the notion that an insurance contract should provide no more and no less than a full indemnity is the goal of preventing windfalls to either party. This aspect is emphasised in *Castellain v Preston*. Brett LJ, in the English Court of Appeal, declared that:<sup>16</sup>

The very foundation [...] of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought forward which is at variance with it ... that proposition must certainly be wrong.

This strongly-worded statement intimates the influence the principle has over indemnity contracts by denying the validity of any conflicting interpretation. The object of indemnity is simply to put the insured in the position they would have been in.<sup>17</sup> Similar views were expressed by Viscount Finlay in the 1921 case of *British & Foreign Insurance Co Ltd v Wilson Shipping Co Ltd*, where he warned against extending the indemnity principle in that

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<sup>15</sup> See below, *II C 6*.

<sup>16</sup> *Castellain v Preston*, above n 7, at 386 per Brett LJ.

<sup>17</sup> Malcolm Clarke *Policies and Perceptions of Insurance Law in the Twenty-first Century* (Oxford University Press, New York, 2005) at 220.

it would lead to a situation ‘not in the region of indemnity against loss, but in the region of profit-earning.’<sup>18</sup>

An example of a New Zealand case where the principle prevented unfair profit by the assured is the requirement in *Guardian Royal Exchange Assurance of New Zealand Ltd v Roberts (Guardian)* that the assured account for any amount received that exceeded her personal liability for the property insured.<sup>19</sup> The respondent Roberts hired a car from Hertz for 16 days, under a contract limiting liability for damage to \$100. Roberts entered into an insurance contract with the appellant for damage caused to the vehicle. The car suffered \$6775.20 of damage during the hire period. The insurer sought to limit its liability to Roberts’ personal liability of \$100; it was argued this was the true indemnity value.

While the court noted that an insured could insure to protect against the full amount of loss or damage, if so they would be required to account for the amount over and above their personal liability for the property to the true owner.<sup>20</sup> This was therefore not ‘inconsistent with the overriding principle that insurance of goods is a contract of indemnity’,<sup>21</sup> as the insured herself could not profit from the loss.

An argument against the necessity of the indemnity principle to prevent unfair profit is that in most insurance contracts, an interpretation which allowed an insured to profit from a loss would be obviously outside the contemplation of the contracting parties, unless an appropriate premium was calculated. For example, replacement policies, where premiums are calculated based on the possibility of more than an indemnity being received.<sup>22</sup> Therefore, interpretation using ordinary contract principles equally achieves the purpose of avoiding unfair profit. The principle under this approach becomes somewhat of a self-fulfilling prophecy; it applies mostly because the parties expect it to apply, and structure their contract accordingly. This would align the principle more closely with the business practice definition.

However, it would be unfair for an insured to obtain more than a full indemnity if a third party were consequently detrimentally affected. For example, a bailee whose interest is

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<sup>18</sup> *British & Foreign Insurance Co Ltd v Wilson Shipping Co Ltd* [1921] 1 AC 188 (HL).

<sup>19</sup> *Guardian Royal Exchange Assurance of New Zealand Ltd v Roberts* (1990) 2 NZLR 106 (HC).

<sup>20</sup> At 114.

<sup>21</sup> *A Tomlinson (Hauliers) Ltd v Hepburn* [1966] 1 ALL ER 418 (HL) at 422 per Lord Reid; cited in *Guardian Royal Exchange Assurance of New Zealand Ltd v Roberts*, above n 23, at 112.

<sup>22</sup> John Lowry and Philip Rawlings *Insurance Law Doctrines and Principles* (3<sup>rd</sup> ed, Hart Publishing, Oxford, 2011) at 265.

limited but who insures for the full value of the item. To the extent that avoiding windfall acts to protect the interests of third parties like Hertz and also those of insurers in cases of subrogation, the principle probably retains a much more compulsory nature.<sup>23</sup> However, while the doctrine of subrogation seeks to vindicate the principle of indemnity,<sup>24</sup> the principle itself is not necessary to prevent windfall. Subrogation may also be enforced through an equitable remedy to prevent unjust enrichment, where not contractually arranged for.<sup>25</sup> Further, Lord Reid stated that an insured's accountability to a true owner (like Hertz) was that of a trustee in *A Tomlinson (Hauliers) Ltd v Hepburn*, suggesting equity fulfils the same purpose as the principle in this type of situation.<sup>26</sup>

#### (b) Prevention of fraud

A more persuasive reason for not allowing an insured to profit is fraud prevention. If the insured stands to profit following a loss, the incentive to cause loss increases, and the motivation to take precautions to avoid loss or damage is diminished. The latter is more insidious as it is not in itself fraudulent. If claims increase (or insurers perceive that they have increased), eventually so will premiums, distorting the process of spreading risk through insurance, as honest people end up paying for those who are dishonest or deliberately careless.<sup>27</sup>

Lord Mansfield CJ notes in *Godin v London Assurance Co* that “the rule was calculated to prevent fraud; lest the temptation of gain should occasion unfair and wilful losses.”<sup>28</sup> By referring to it as a ‘rule’ necessary to discourage wrongdoing, Lord Mansfield raises the significance of the principle. However, this statement was made in 1758, and the insurance market and commercial world has undoubtedly changed substantially since then, and new methods have been adopted to alleviate the threat of fraud. In fact, insurers are required under the Insurance (Prudential Supervision) Act 2010 (IPSA) to be subject to an appropriate risk management programme.<sup>29</sup> The programme must describe the insurer's

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<sup>23</sup> In cases of marine insurance, statute makes the situation clear for marine insurance - insurers have an automatic right to subrogation under s 79 of the Marine Insurance Act 1908.

<sup>24</sup> *Lord Napier v Hunter* [1993] AC 713 (HL) at 744.

<sup>25</sup> Malcolm A Clarke *The Law of Insurance Contracts* (6<sup>th</sup> ed, Informa Law, London, 2009) at 1022-1025.

<sup>26</sup> *A Tomlinson (Hauliers) Ltd v Hepburn*, above n 21, at 422 per Lord Reid.

<sup>27</sup> JP Van Niekerk “Fraudulent Insurance Claims” (2000) 12 SA Merc LJ 69 at 71. See also Clarke, above n 17, at 252-253.

<sup>28</sup> *Godin v London Assurance Co* (1758) 1 Burrow 489, 97 ER 419 (KB) at 421 per Lord Mansfield CJ.

<sup>29</sup> Insurance (Prudential Supervision) Act 2010, s 73(1).

risk assessment process and procedures for identifying and managing risks to financial security, including insurance risks.<sup>30</sup>

One example of adapting to change concerns the introduction of replacement value policies, which offer cover on a new-for-old basis. The insured is able to obtain cover for purchase of a new version of the insured subject matter, often allowing for receipt of more than a full indemnity, creating an increased moral hazard for insurers.<sup>31</sup> Two steps are typically taken to manage the moral hazard associated with replacement cost insurance.<sup>32</sup> The first is by placing limitations that require the proceeds of the policy to be spent on reinstating the property, and the second is requiring reinstatement to be implemented with reasonable despatch.<sup>33</sup>

In one sense, the development of such mechanisms illustrates the value of the indemnity principle in preventing fraud when replacement value insurance is not offered. If the risk of profit justifies special measures to prevent wrongdoing, impliedly they are necessary to plug a gap normally filled by the indemnity principle. The Insurance Council of New Zealand's approach to indemnity further supports the argument that fraud prevention is still a relevant rationale; it states that if an insured were in a "better position after an insurance claim there would be a financial incentive to make claims."<sup>34</sup>

However, there has not been the same resistance to the introduction of replacement value policies in Commonwealth jurisdictions that took place in the United States, suggesting less importance is placed in New Zealand on the indemnity principle as a method of fraud prevention. In the United States, where the principle is considered a 'matter of public policy', replacement value policies initially required legislative approval.<sup>35</sup> In fact, initially replacement coverage was only offered where the moral risk was deemed low, for example for insuring public utilities, and large manufacturers.<sup>36</sup> Campbell and Stewart argue the freedom to contract out of the principle in Commonwealth jurisdiction means a presumed intention rationalisation of the principle is more likely.<sup>37</sup>

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<sup>30</sup> Section 73(2).

<sup>31</sup> Campbell and Stewart, above n 11, at 232.

<sup>32</sup> At 232.

<sup>33</sup> At 232.

<sup>34</sup> "Insurance Concepts" (13 June 2014) *Insurance Council of New Zealand* <[www.icnz.org.nz](http://www.icnz.org.nz)>.

<sup>35</sup> Campbell and Stewart, above n 11, at 231.

<sup>36</sup> Leo Jordan "What Price Rebuilding? A Look at Replacement Cost Policies" (1990) 19 *Brief* 17 at 18.

<sup>37</sup> Campbell and Stewart, above n 11, at 231.

The development of self-regulation methods through IPSA and in response to the risks associated with replacement policies also supports the notion that the indemnity principle is now more appropriately deemed a default presumption of intention, and that parties have the freedom to make their own assessment of risk and contract accordingly. That is to say, the intentions of the parties are more critical to the interpretation of an insurance contract than the principle's role in fraud prevention. The requirements of IPSA indicate that insurers have the ability to manage the risk of fraud through other methods if they choose, and therefore the indemnity principle is not strictly necessary.

A counter to this argument is that it is also possible to interpret these changes as meaning a presumption that the principle applies may *only* be rebuttable where the contract shows evidence of careful management of the risk of fraud. That is to say, the courts have allowed replacement policies and other policies which may allow a profit with little fuss only because they believe insurers have taken proper steps to address the risk. This slightly more paternal approach aligns more closely with a policy-based conception of the principle, placing the need to discourage fraud above contractual intent.

#### (c) Wagering contracts

The High Court of Australia has declared that underlying the indemnity principle is 'the law's policy not to allow gambling in the form of insurance'.<sup>38</sup> Bowen LJ also warned against insurance contracts becoming mere 'speculation for gain' in *Castellain v Preston*,<sup>39</sup> and McGee has raised concerns about the extent to which a replacement value policy becomes a wagering one by allowing an insured to make a profit.<sup>40</sup> This is because while an insurance contract usually only protects a pre-existing interest, the potential for profit creates a new interest in the outcome, encouraging entering into the contract because of the chance for profit.

However, while wagering contracts remain illegal in other jurisdictions such as Australia and England, this rationale has little legal application in New Zealand today. The provision in the Insurance Law Reform Act 1985 prohibiting contracts by way of gaming or wagering<sup>41</sup> was repealed in the Gambling Act 2003,<sup>42</sup> although they remain illegal in

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<sup>38</sup> *British Traders Insurance Co Ltd v Monson* (1964) 111 CLR 86 (HCA) at 94.

<sup>39</sup> *Castellain v Preston*, above n 7, at 399 and 401.

<sup>40</sup> McGee, above n 10, at 4.17.

<sup>41</sup> Insurance Law Reform Act 1985, s 7(2)(b).

<sup>42</sup> Gambling Act 2003, s 374.

respect of marine insurance.<sup>43</sup> This renders the third rationale largely obsolete in New Zealand, it is also not the social problem it was when wagering contracts were first made illegal.<sup>44</sup>

## 2 Rules

It was made clear in *Castellain v Preston*, and is noted by John Lowry and Phillip Rawlings, that “the overriding requirement of indemnity can be seen to underlie the rules which operate in the event of an insured loss.”<sup>45</sup> Some of these rules have already been mentioned, for example the doctrine of subrogation and the method of measuring loss by indemnity value. Other ‘rules’ include (but are not limited to) the doctrine of merger and the distinction between the loss to the insured and rateable value.

The doctrine of merger holds that where a partial loss is followed by a total loss, unfinished repair costs are subsumed in the costs payable for the total loss. It is primarily an issue in marine insurance, where further loss may occur before repairs are able to be completed. While it was deemed to also be applicable in non-marine insurance in *Crystal Imports Ltd v Certain Underwriters at Lloyd’s of London*,<sup>46</sup> the Supreme Court in *Ridgecrest* decided otherwise, although the authors of *Colinvaux’s Law of Insurance in New Zealand (Colinvaux)* raise some doubts about this analysis.<sup>47</sup>

*Falcon Investments Corporation (NZ) Ltd v State Insurance General Manager* is a case which demonstrates the distinction between indemnity against the loss to the insured rather than for the value of the subject matter. The insured purchased a house, intending to demolish it and replace it with flats. While this was being arranged, the house was leased, and insured for fire damage. Not long after, the tenant caused damage to the house and three days after that, it was damaged beyond repair by fire. The judge determined that in the circumstances, the loss to the insured was distinguishable from the value of the house. The actual harm suffered was the loss of rent from the house for the 12 months it was to be

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<sup>43</sup> Marine Insurance Act 1908, s 5.

<sup>44</sup> Michalik and Christopher Boys, above n 11, at 5.2.

<sup>45</sup> Lowry and Rawlings, above n 22, at 264.

<sup>46</sup> *Crystal Imports Ltd v Certain Underwriters at Lloyd’s of London* [2013] NZHC 3513, (2013) 18 ANZ Insurance Cases 61-997.

<sup>47</sup> See *IV B* below.

let before demolition. Deducted from this was the cost of repairing the damage caused by the tenants and the saving made in demolition costs as a result of the fire.<sup>48</sup>

These rules demonstrate the potential scope of the principle in influencing contract interpretation and show it is more than just business practice, but do not go so far as to establish it as being of mandatory application, as the exceptions discussed below demonstrate.

### 3 Exceptions

Despite Lord Mansfield's suggestion that any proposition contrary to the principle must be incorrect, it is clear the principle can be contracted around or rebutted. Examples of situations which are difficult to reconcile with the principle of indemnity include replacement value policies and valued policies. Parties may also agree to a sum insured that is less than the full value of the subject matter, thus preventing a full indemnity being obtained.

In a 'valued' policy, the value of the property is agreed when forming the contract, which may be more or less than the true value of the property.<sup>49</sup> In *Irving v Manning*, Patteson J stated that "a policy of assurance is not a perfect contract of indemnity. It must be taken with this qualification, that the parties may agree beforehand in estimating the value of the subject assured".<sup>50</sup> The authors of *Colinvaux* suggest the law permits this on the understanding that the agreed amount, although not necessarily a perfect indemnity, can be regarded as such by reference to the terms of the contract.<sup>51</sup> and a valued policy will be valid in the absence of fraud.<sup>52</sup> These policies must be distinguished, however, from non-valued policies, and the construction of the contract must make it clear what is intended. The use of the phrase "sum insured" in itself has been held to refer only to a maximum sum for liability.<sup>53</sup>

*Young & Anor. v Commercial Union General Insurance Company Ltd* demonstrates how it is difficult to rebut the presumption that the indemnity principle applies. It considered the application of a policy insuring household contents and personal effects in respect of a

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<sup>48</sup> *Falcon Investments Corporation (NZ) Ltd v State Insurance General Manager* [1975] 1 NZLR 520.

<sup>49</sup> Merkin and Nicoll, above n 4, at 8.2.1.

<sup>50</sup> *Irving v Manning* (1847) 1 HL Cas 287, 9 ER 766 (QB) at 774-775 per Patteson J.

<sup>51</sup> Merkin and Nicoll, above n 4, at 8.2.1.

<sup>52</sup> *Elcock v Thomson* [1949] 2 KB 755 (KB) at 760.

<sup>53</sup> Merkin and Nicoll, above n 4, at 8.2.1.

sterling silver tea set that was stolen. The policy held that no more than 5% of the total sum insured would be paid for any one item (with some exceptions) unless specified. The tea set was listed a specified item, with a price beside it of \$22,125. A valuation was obtained and provided to the insurer to support this price.<sup>54</sup>

The Court found that on proper construction of the policy the insurer was only required to indemnify the insured for the indemnity value of the tea set when stolen, in this case the cost of obtaining a comparable tea set at \$6,000. The Court concluded that the specifying of the value was only for the purpose of avoiding the 5% limit, and the provision of the certificate of value was deemed solely to be intended to advise the insurer of its possible liability in order to calculate premiums.<sup>55</sup>

The indemnity principle itself is not mentioned in the judgment, but its application is evident in the way that the policy is construed. The court's decision shows a preference for measuring loss by indemnity value rather than by a value agreed upon, despite the insured being liable to pay premiums calculated based on the specified value of the tea set. The case signals a requirement of very clear wording to rebut a presumption that cover will be measured according to indemnity value, or actual loss. This could be read as a confirmation that policy underlying the principle is paramount, but is probably still compatible with a simple assumption that the parties did not contemplate the receipt of more than an indemnity.

The position of replacement value policies in respect of the principle of indemnity is not clear. Lowry and Rawlings state firmly that such contracts do not accord with the notion of indemnity.<sup>56</sup> However, there has been no real resistance in Commonwealth jurisdictions to the introduction of such policies, as discussed above and also noted by McGee.<sup>57</sup> Importantly, Lowry and Rawlings also note that although new-for-old policies are inconsistent with the principle, the principle is contractual in origin, and is therefore variable.<sup>58</sup> This justification for exceptions to the principle points toward a conclusion the

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<sup>54</sup> *Young v Commercial Union General Insurance Company Ltd* (1988) 5 ANZ Insurance Cases 60-875 (NZCA).

<sup>55</sup> At 75,514.

<sup>56</sup> Lowry and Rawlings, above n 22, at 265.

<sup>57</sup> McGee, above n 10.

<sup>58</sup> Lowry and Rawlings, above n 22, at 265.

principle really is about the presumed intention of the parties and not based on policy issues.

#### *4 Law Reform*

In 1985, the Insurance Law Reform Act was passed. Among other things, it removed the requirement for an insurable interest in non-marine insurance.<sup>59</sup> The need to prove an insurable interest was deemed an ‘unnecessary technicality’ by the Statutes Revision Committee, as in indemnity insurance one could only recover when loss was proved.<sup>60</sup> Geoffrey Palmer reiterated this sentiment during the second reading of the bill when he noted that the change reflected the “fact that under an indemnity contract an insured person only recovers the actual amount he has lost when property is lost or damaged.”<sup>61</sup> From this it seems likely the Statutes Revision Committee (and Geoffrey Palmer) considered the principle to be one of broad policy, although the somewhat brief consideration of its relevance does not permit any substantial conclusions.

#### *5 Conclusions*

The discussion above provides some evidence of how the principle works to ensure the plaintiff does not recover more than a full indemnity. However, it is also clear there are exceptions to these rules which limit the scope of the principle. Despite this, previous case law has demonstrated the need for strong wording to rebut a presumption that the indemnity principle applies, and also the way it underlies rules of insurance contract interpretation. The utilisation of underlying rationales in justifying these rules further strengthens the argument that the indemnity principle has, at least in the past, been considered a principle based strongly on policy, one not easily displaced. The necessity of the principle in achieving the purposes that supposedly underlie it is doubtful in a contemporary context though, making a presumed intention approach more likely.

### *III The Canterbury Cases*

On September 4, 2010, a 7.1 magnitude earthquake struck the Canterbury region. Several substantial aftershocks followed, including a 6.3 magnitude quake on February 11, 2011, which was even more devastating than the original quake. 185 lives were tragically lost,

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<sup>59</sup> Insurance Law Reform Act 1985, s 7.

<sup>60</sup> (12 June 1985) 463 NZPD 4766.

<sup>61</sup> (13 June 1985) 463 NZPD 4873.

and the road to recovery has been a long one. The total cost of the earthquakes in private insurance claims is estimated at NZ\$17 billion,<sup>62</sup> and insurers had paid out almost NZ\$15 billion in settling claims by May 2015.<sup>63</sup> The earthquakes have shaken the New Zealand insurance industry. The challenges of reinsurance,<sup>64</sup> costly open ended replacement policies and numerous protracted disputes over claims (many remain unresolved) are among the issues faced.<sup>65</sup> The cases discussed below arose within this wider context.

#### ***A Ridgecrest New Zealand Ltd v IAG New Zealand Ltd***

Ridgecrest had insured a building in Christchurch with IAG. The policy provided for a maximum coverage of \$1,984,000 'per happening'. This cap was to be reset after each happening, and cover was either for the loss or damage or estimated cost of repairs or, where replacement cover had been agreed, the cost of restoration or replacement if the building was damaged beyond repair. The liability cap was much less than the actual value of the building, and this was clearly understood by both parties.<sup>66</sup>

During the currency of the policy, the building was damaged in the course of four earthquakes. After each of the first two earthquakes in 2010, IAG assessed the damage and commissioned repairs, but these were only partially completed when the February 2011 earthquake struck, after which all repair work stopped. There was a further aftershock in June 2011, by which point the building was damaged beyond repair (with IAG contending the building was a total loss after the February earthquake).<sup>67</sup>

The issue for the Supreme Court was whether Ridgecrest was entitled to claim up to the liability limit in respect of each happening. Ridgecrest claimed for the full \$1,984,000 in respect of the destroying earthquake, and for all the losses caused by earlier earthquakes. IAG contended that it was only required to pay for repairs actually undertaken in addition

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<sup>62</sup>“Four years on: Insurance and the Canterbury Earthquakes” (February 2015) Vero <[www.vero.co.nz](http://www.vero.co.nz)>.

<sup>63</sup> “Rebuild Statistics: Insurers Settle \$15 billion Canterbury Claims” (11 May 2015) Insurance Council of New Zealand <[www.icnz.org.nz](http://www.icnz.org.nz)>.

<sup>64</sup> See Rob Merkin “The Christchurch Earthquakes Insurance and Reinsurance Issues” (2012) 12 *Canta LR* 119.

<sup>65</sup> Bill Bennett “Christchurch Rebuild: Quakes force policy change” *The New Zealand Herald* (online ed, Auckland, March 25 2014).

<sup>66</sup> *Ridgecrest NZ v IAG New Zealand Ltd*, above n 1.

<sup>67</sup> At [11].

to the sum for the final earthquake. The High Court and Court of Appeal had both found for IAG, although on different grounds.<sup>68</sup>

In discussing whether Ridgecrest's claim was precluded by the indemnity principle, the Court held that the principle was not 'engaged' as the \$1,984,000 cap was not based on, and was mutually understood as being less than, the replacement value of the building.<sup>69</sup> The Court stated that the indemnity principle was an 'awkward' phrase in respect of replacement value policies.<sup>70</sup>

The Court found that the policy placed only three limits on the insured's rights: there could be no double counting; each happening gave rise to a separate claim subject to the specified limit; and the total of all claims could not exceed the replacement cost of the building.<sup>71</sup> This final limitation was described as a result of the indemnity principle. It was suggested the principle might also apply in respect of any separately identifiable building component damaged and then destroyed in later events.<sup>72</sup>

The Court's reasoning in the decision focused on the wording of the policy. It construed the words 'per happening' as meaning cover was reinstated up to the limit after each event, the full amount being claimable even for damage not repaired and now unreparable. The claims were not able to be subsumed into the total loss claim for the final earthquake under the merger doctrine. However, it was determined that the unrepaired damage was to be assessed on an indemnity basis by diminution in value rather than by replacement costs.<sup>73</sup>

It then considered whether the claim limit of \$1,984,000 should be deemed the replacement value of the building under the terms of the policy. The Court determined that an 'approach based firmly on the policy wording as to the resetting of liability limits' was preferable.<sup>74</sup> The policy in issue was then evaluated, with four factors leading the Court to decide the limit was not deemed to be replacement value. They were:

- a) IAG had never presented its case on that basis;

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<sup>68</sup> *Ridgecrest New Zealand Ltd v IAG New Zealand Ltd* [2012] NZHC 2954, [2013] Lloyd's Rep IR 67 [Ridgecrest (HC)]; *Ridgecrest New Zealand Ltd v IAG New Zealand Ltd* [2013] NZCA 291, [2013] 3 NZLR 618.

<sup>69</sup> *Ridgecrest NZ Ltd v IAG New Zealand Ltd*, above n 1, at [61].

<sup>70</sup> At [54].

<sup>71</sup> At [62].

<sup>72</sup> At [54].

<sup>73</sup> At [50]-[52].

<sup>74</sup> At [60].

- b) It would result in the cap being applied to more than one happening, which would be inconsistent with the cap resetting;
- c) Full replacement value would have caused the previous liabilities to be subsumed because it would not simply discharge liability for IAG, it would also cover all of Ridgecrest's previous losses, but the \$1,984,000 was insufficient to do this;
- d) It would treat the policy as if it were an agreed replacement value one set at \$1,984,000, when the policy was not structured at all like a valued policy and there was no indication in the policy of an intention to set an agreed value – it was mutually understood that the cap was not based on and significantly less than the true replacement value of the building.<sup>75</sup>

***B Skyward Aviation 2008 Ltd v Tower Insurance Ltd (Skyward)***<sup>76</sup>

The Supreme Court decision in *Skyward* was released a few months after *Ridgecrest*. It both endorses some of the reasoning in *Ridgecrest* and provides an example of a situation where the principle appears applicable, although the Court did not discuss it in detail and it was not decisive of the case.

After their house was damaged beyond economic repair in the Christchurch earthquakes, Skyward received a total of \$788,000 from various sources. Skyward claimed that a further \$314,000 would be required to repair the house on the land (this would fix the amount they could receive for buying a new house under the policy), with Tower arguing that its liability had already been discharged in this respect by the payment it had already made of \$166,000 for house damage.<sup>77</sup>

Tower also contended more generally that accepting Skyward's measure of indemnity would be 'contrary to settled principles of indemnity', because it would result in Skyward recovering approximately \$1,100,000 for a property that had a pre-earthquake value of approximately \$492,000, and was bought for just \$450,000 two years prior to the earthquakes.<sup>78</sup> The Court found for Skyward, and the case certainly seems strange in light of the principle: Skyward essentially made a "profit" of just over \$600,000 from their loss. The Court did not address this aspect of Tower's argument in detail its judgment, saying

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<sup>75</sup> At [61].

<sup>76</sup> *Skyward Aviation 2008 Ltd v Tower Insurance*, above n 2.

<sup>77</sup> At [4]-[11].

<sup>78</sup> At [11].

the appeal to the principle had ‘little resonance’, but it did make a few brief references to the principle.

First, the Court reiterated its comment in *Ridgecrest* that the principle was ‘awkward’ in the context of a replacement policy, adding in a footnote that *Ridgecrest* demonstrated how the ‘applicability of the principle is subject to the wording of the policy under consideration.’<sup>79</sup> This latter statement would seem to be the one that most closely resembles the Court’s approach in respect of the principle in the case: the focus was, as in *Ridgecrest*, on the meaning of the policy wording. The Court made reference to *Castellain v Preston* as authority for indemnity as a core principle of insurance,<sup>80</sup> but the result suggests it is not a principle that will necessarily require courts to seek Lord Mansfield’s perfect indemnity when interpreting contracts.

The court noted that such policies brought with them moral hazards, but described Tower as having been content to manage this with certain provisions in its policy. These included reinstatement of the house and limiting replacement value recovery to reimbursement for expenditure actually incurred by the insured.<sup>81</sup>

### *C QBE (International Insurance) Ltd v Wild South Holdings Ltd (QBE)*<sup>82</sup>

Coming out just two weeks after *Ridgecrest*, *QBE* dealt with several preliminary issues from three consolidated High Court cases. All three involved policies with full replacement cover to a sum insured and annual aggregate with automatic reinstatement of cover after loss. In each case, insured commercial buildings had sustained damage in the September 2010, February 2011 and June 2011 earthquakes. The relevant preliminary question to this discussion was whether the marine insurance doctrine of merger applied to material damage policies.

The Court held that *Ridgecrest* confirmed the doctrine of merger could not apply to non-marine insurance policies. However, the Court emphasised that this did not prevent the insurers from relying on the indemnity principle.<sup>83</sup> This is interesting in light of the fact

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<sup>79</sup> At footnote 12.

<sup>80</sup> At footnote 6.

<sup>81</sup> At [26]-[28].

<sup>82</sup> *QBE (International) Insurance Ltd v Wild South Holdings*, above n 3.

<sup>83</sup> At [1]-[3] and [15].

that the insurer, when arguing for the application of merger, stated that they were seeking to ensure the application of the principle of indemnity itself.<sup>84</sup>

But the Court stated that the concepts were not co-extensive, and that the principle of indemnity ‘survived’ *Ridgecrest*,<sup>85</sup> stating that the principle ‘inheres in any contract of indemnity’.<sup>86</sup> The court stated that under the principle, if the total cost of reinstatement was more than the sum insured but the damage from each separate event was less than the sum insured, the actual loss would still be recoverable. This was provided the total amount was also less than the replacement cost of the building. However, the insured could not claim more than was necessary to repair the combined damage after the final event, as this would likely be less than the notional cost of repair following each event.<sup>87</sup>

This combining of repair costs in line with the principle of indemnity was in order to prevent the insured making a profit, be recovering expense that would not actually be incurred would allow the insured to “realise a profit from the policy, a result probably not intended in a contract of indemnity.”<sup>88</sup>

#### *IV The Ongoing Relevance of the Principle*

It is submitted that *Ridgecrest* signals a change in the status and scope of the principle; its so-called ‘fundamental’ nature is less of a factor in interpretation of policies than it purportedly was in 1883. This is especially so in New Zealand, a Commonwealth jurisdiction, and one where wagering policies are no longer illegal unless they fall into the much narrower category of gambling. It is further submitted that the principle now falls somewhere closer to presumed intention, although a few arguments for a policy-based presumption remain.

##### *A Presumed Intention or Broad Policy?*

The approach in *Ridgecrest* is very much based on the unusual<sup>89</sup> wording of the policy. The crux of the decision was, essentially, the interpretation of the words ‘per happening’ and the understanding that the \$1,985,000 was never intended to equate to full replacement

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<sup>84</sup> At [72].

<sup>85</sup> At [77]-[80].

<sup>86</sup> At [79].

<sup>87</sup> At [85]-[89].

<sup>88</sup> At [86].

<sup>89</sup> Merkin and Nicoll, above n 4, at 519.

cover. In light of a result that may seem unsatisfactory for the insurer considering Ridgecrest was underinsured, it does appear that the principle had a rather more limited role to play in the case.

This is confirmed by the comment in *Skyward* that the ‘applicability of the principle is subject to the wording of the policy under consideration’.<sup>90</sup> This statement can be interpreted in two ways. It can be read as merely meaning the principle is a strong presumption that may be rebutted by clear wording in the policy. But more probably, it treats the principle as reflecting the presumed intention of the parties, therefore easily displaced by wording even slightly inconsistent with the principle. This would imply that although in *Ridgecrest* the insured could not recover more than the replacement value of the building, an insured may still recover for notional loss rather than actual loss in indemnity insurance, if the policy so provides. The Court of Appeal’s emphasis in *QBE International* on profit being ‘a result probably not intended’ in an indemnity contract,<sup>91</sup> rather than calling it undesirable for substantial policy reasons also supports a focus on the intentions of the parties.

The Supreme Court does not comprehensively address the incompatibility between replacement coverage and the indemnity principle in the *Ridgecrest* and *Skyward* judgments, calling the principle ‘awkward’ in the context of replacement coverage but not expanding on the point. Campbell and Stewart’s paper is referenced in *Skyward* when noting the principle applied subject to policy wording, suggesting the Supreme Court does not disagree with the views espoused in the paper.<sup>92</sup>

The Supreme Court’s comments in respect of double counting in *Ridgecrest* provide further support for a presumed intention status for the indemnity principle. The decision addresses how double counting is prevented by the principle of indemnity applying more broadly in respect of any separately identifiable building element first damaged and then later destroyed in successive events.<sup>93</sup> When explaining the problem with double counting, however, the Court stated ‘such a result would rationally be seen by insurers as unintended’ as justification for suggesting the courts ‘endeavour to avoid’ it.<sup>94</sup> The emphasis, instead

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<sup>90</sup> *Skyward Aviation 2008 Ltd v Tower Insurance Ltd*, above n 2, at footnote 12.

<sup>91</sup> *QBE (International) Insurance Ltd v Wild South Holdings Ltd*, above n 3, at [86].

<sup>92</sup> *Skyward Aviation 2008 Ltd v Tower Insurance Ltd*, above n 2, at footnote 12.

<sup>93</sup> *Ridgecrest NZ Ltd v IAG New Zealand Ltd*, above n 1, at [14] and [86].

<sup>94</sup> At [14].

of being based on a policy argument of preventing a profit to the insured, is again on interpreting the intentions of the parties.

### ***B Merger and Unsatisfactory Outcomes***

The authors of *Colinvaux* have compared the treatment of the principle in both *Ridgecrest* and *QBE* and found the former wanting. They disagree with the reasoning behind the non-application of merger in non-marine insurance, submitting that the doctrine should apply to both types unless ousted by agreement.<sup>95</sup> They found the Court of Appeal's conclusions in *QBE International* that indemnity could be applied although merger was foreclosed by *Ridgecrest* unconvincing: 'merger is, after all, no more than an application of the indemnity principle in the limited situation where a partial and total loss occur in the same policy period.'<sup>96</sup> They conclude the Court of Appeal decision was in conflict with the Supreme Court on this point, and that the former's reasoning, being more compatible with the principle of indemnity, is preferable.<sup>97</sup> It should be noted that Merkin (an editor of *Colinvaux*), writing on behalf of DLA Piper New Zealand, states that the firm believes the judgment is restricted to policies mirroring four particular features of the one in *Ridgecrest*.<sup>98</sup> However, Michalik and Boys believe it will apply generally.<sup>99</sup>

While it is not possible to discuss the merger issue in further depth here, one might draw the conclusion that the guaranteed application of the merger doctrine in marine insurance gives the principle the effect of a legal test. In contrast, the clear unavailability of the doctrine in non-marine insurance following *Ridgecrest* limits the scope of the principle outside of marine insurance.

### ***C Current Relevance of the Principle***

There are two substantive points made by the Supreme Court that appear to derive directly from the indemnity principle and suggest its future scope. These are two of the three limitations on *Ridgecrest*'s claim: no double counting and no recovery exceeding the replacement cost of the building. The Court also acknowledges indemnity as a 'core

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<sup>95</sup> Merkin and Nicoll, above n 4, at 517-519.

<sup>96</sup> At 519.

<sup>97</sup> At 519.

<sup>98</sup> Robert Merkin "Supreme Court Refuses to Apply Doctrine of Merger to Damage" (2 September 2014) DLA Piper <[www.dlapiper.co.nz](http://www.dlapiper.co.nz)>.

<sup>99</sup> Michalik and Boys, above n 11, at 5.19.

principle’ of insurance in *Skyward*.<sup>100</sup> It dedicates a substantial part of the decision to considering its application, which is itself an acknowledgement of the principle’s relevance. The consideration given to the principle by academics and in numerous other cases is further evidence that the principle of indemnity is certainly much more than mere business practice.

However, it is submitted that the majority of the reasoning and the overall outcome indicate that the principle’s influence is strictly limited by the wording of a policy. In this sense, the principle, being less based on achieving its original purposes and directed more at not frustrating the intentions of the parties, is certainly more akin to a concept which describes an assumption of contractual intention rather than an overarching policy-based principle.

The *Ridgecrest* and *Skyward* approach is a more focused on policy wording than public policy in comparison to previous (especially historical) case law, seemingly content to describe the principle as ‘awkward’ in respect of replacement cost insurance. This further suggests the principle is not a vital to insurance contracts as was suggested in *Castellain v Preston*. ‘Awkward’ can be read as another way of saying subsidiary to ordinary contract law. Paul Michalik and Christopher Boys have also come to this conclusion, interpreting the discussion in *Skyward* as an illustration of how “courts have been alive to the primacy to be given to the insurer’s policy promises as overriding any understanding that insurance in general gives only an indemnity.”<sup>101</sup>

#### ***D Is This Approach Anything New?***

It is submitted that the new conception of the principle following *Ridgecrest* is likely to be mostly revelatory rather than revolutionary. While the principle was once deemed a fundamental one and is still referred to as such, this has not in the past prevented the courts from allowing flexibility for agreed value policies and new-for-old provisions. Situations arose following the Canterbury earthquakes that brought novel cases in respect of property insurance considering successive losses not repaired before further or total loss. But it does not necessarily follow that these decisions that seemingly subvert the principle are creating sudden, new change.

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<sup>100</sup> *Skyward Aviation 2008 Ltd v Tower Insurance Ltd*, above n 2, at footnote 6.

<sup>101</sup> Michalik and Boys, above n 11, at 5.1.

While older case law like *Castellain v Preston* and *Godin v London Assurance Co* seems to make the position very clear and base the principle strongly on underlying rationales, daring anyone to contradict it, the principle has become somewhat superfluous in relation to these purposes. The judgment in *Ridgecrest* illustrates that a result obviously unintended by either party is to be avoided, yet it may be in most cases that it is very obvious neither party intended a result at odds with the indemnity principle; in essence it may simply become a self-fulfilling prophecy.

A presumed intention approach allows more freedom of contract and accordingly is likely to better fulfil the intentions of the parties. Perhaps what the principle has done is create an attractive method for parties to utilise in the assessment of loss after an event, one that aids in understanding the meaning of loss. However, as replacement value insurance, agreed value policies, IPSA and *Ridgecrest* demonstrate, parties are perfectly capable of agreeing to distribute risk according to their own preference and contracting out of the principle. Perhaps what is needed now is to recognise that the principle merely provides a set of rules that one may contract *into*, although it will be presumably still apply in cases of any ambiguity. *Insurance Claims – come to the same conclusion*. It is possible that these decisions, in making such change more evident, will precipitate further change. In other words, the *Ridgecrest* and *Skyward* decisions may both reflect and instigate changes in thinking; yet another a self-fulfilling prophecy.

In terms of addressing any new issues of moral hazard perhaps arising from a principle of indemnity that is focused more on presumed intention, it seems reasonable to assume that where a profit is contemplated or at least possible, insurers will have the foresight to include provisions to mitigate their risk (and indeed they are required to address such issues under IPSA). The cases following the Canterbury earthquakes provided examples of new situations to be considered and accordingly addressed if insurers find it necessary. For example, insurers now offer sum insured replacement policies in property insurance instead of open ended policies.<sup>102</sup> A principle that is more obviously restricted is a consideration insurers can take into account when writing insurance policies, and the precautions taken in respect of replacement insurance might easily be applied to other policies.

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<sup>102</sup> Zane Kennedy and Iva Rosic “Understanding Insurance Cover in the New Zealand Property Insurance Market” (4 December 2014) *Minter Ellison Rudd Watts* <[www.minterellison.co.nz](http://www.minterellison.co.nz)>

Another possibility, however, is a potential return to treating the principle in a broad policy sense as a counter to what may be seen by some as an undesirable direction for the law. As discussed, one expert in conjunction with a major insurance law firm, has already taken the approach that the case ought to be confined to the specific and unusual wording of the policy at issue. A broad policy-based presumption approach is probably still a workable interpretation following *Ridgecrest* and *Skyward*; it still allows room for acknowledgement of the terms of the policy.

It is this author's opinion that the willingness of the courts, insurers and insureds to adapt where required suggests the 'change' may be a more permanent one though. For example, the introduction of replacement value policies, which are more attractive to the market. Indemnity value simply does not always adequately address the needs and desires of an insured. Insurers have adapted to meet market demand, and addressed their risk accordingly. Surely recognition of the new conception is appropriate in a modern context, rather than clinging to strict principles developed hundreds of years ago in a different commercial environment. This author believes that what is paramount now is not whether the principle is based on policy or presumed intention, but that its status is made clear to contracting parties. Greater certainty is desirable; it provides parties with the ability to better manage their risk.

## *V Conclusion*

Indemnity is 'fundamental' to insurance; one cannot receive more than a full indemnity; the principle prevents recovery of more than an indemnity. These phrases and their like are often repeated, perhaps at risk of sounding hollow, without clarification of their meaning.

In *Ridgecrest* and *Skyward*, the purposes underlying the principle were not as important as the wording of the policy itself, and indeed some of those underlying purposes can now be achieved through other methods, if they are not almost obsolete already. The approach taken towards the principle by the Supreme Court suggests it is in fact not that contentious for parties to contract out of the principle if they so desire. An understanding that the principle is contractual in origin necessitates that the contractual intention of the parties will take priority over any notion of a general indemnity principle. The principle is still relevant under this presumption of intention approach though; it will apply where the policy does not contradict it and in cases of ambiguity. What is important now is that this is made clear to insurers and insureds alike, that they may be fully informed when contracting.

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