CONCLUSION AND SUGGESTIONS
Conclusion

To conclude any study, and more so a research work is difficult and cumbersome task. I am reminded of the immortal words of famous Greek philosopher Socrates who said, “I know nothing except the fact of my ignorance”. My ignorance may be visible everywhere in this study but it may be more prominently visible in this part of work.

Although both Common law and Islamic law provide adequate provisions and guidelines on the principles and practices of insurance, nevertheless both legal systems exist in their own respective rival platforms. This research is limited to a study of the principles and practices of insurance in both legal systems while attempting to discover the actual conflict between both systems. Some arguments have also been advanced for creating a platform in India to introduce insurance on Islamic lines.

The foundation of insurance practices adopted by the Common Law principles originated in the ancient society of Babylon between about 4000-3000 BC through the practices of the Contract of Bottomry. Bottomry basically revolved around the elements of usury. Ever since insurance practices were introduced through the Contract of Bottomry, it revolved around the elements of usury and in the history of the Common law of insurance until to date there has been no proof that there was ever an attempt at Common law to eliminate the elements of usury from its (insurance) practices.

The sources of insurance at Common law are basically the judicial precedents (case laws), relevant statutory provisions or Acts of Parliament, customs, relevant literature and specifically the laws relating to contracts and liabilities.

A policy without an insurable interest is like gaming. Hence, in a life policy the insurable interest is vested in specific persons, i.e. the policyholder himself/herself, spouse, children, ward being under the age of majority, employee and so on.
As far as the doctrine of *uberrimae fidei* is concerned, the Common law principles require the parties to the policy, to make full disclosure of the material facts or matters affecting the policy. The full disclosure of the material facts or matters may be either moral hazards or physical hazards or both; non-disclosure of the material facts or matters will render a policy void ab initio.

The policyholder is under a contractual obligation to pay the regular premiums according to the terms of the policy, but the paid premiums may be forfeited if there be a breach of good faith on the insured’s part.

In a life policy at Common law, the beneficiary of the insured holds a right to make a claim for the whole amount agreed to in the policy, regardless of when the risk to the subject matter takes place, so long as the risk occurs to the subject matter, any time after the commencement and before the maturity of the policy.

The Common law courts of justice have awarded unlimited damages in certain cases, which sometimes exceeded a million dollars. In such awards, the courts of justice seem to be only concerned about the victim, but they do not realise that such an award creates another additional victim (i.e. making the insurer bankrupt). This may be unfair to the insurer. Such an award of unlimited damages may tarnish the fundamental objective of an insurance practice which is to sustain mutual co-operation, between the parties. Therefore, it has been suggested in this research that if a particular victim requires unlimited damages to be covered, he should not rely on a single insurer, but should have multiple policies so that they may provide him with adequate coverage. It has also been suggested that the courts’ powers in awarding unlimited damages should be curtailed so that a fair judgment could protect society without further prejudice or encouraging unwarranted gains.

The origin of insurance practices has been discovered before the rise of Islam, probably even before Prophet Muhammad (PBUH) was born in 570 CE. It was practiced among the ancient Arab tribes as the doctrine of al-
‘aqilah. Later, after the rise of Islam, the Holy Prophet Muhammad (PBUH), himself approved of the doctrine of al-‘aqilah in one of his judgments given against a woman from the tribe of Huzail. Subsequently, the doctrine was well organized and practiced during the time of the second Caliph Syyidina ‘Umar (ra).

The central idea and legal entity of insurance practices justified by the Sharia’h principles as we see today were first discussed by the Hanafi lawyer Ibn ‘Abidin in the early 19th Century. As a result, today we are able to witness almost 20 insurance companies operating in the contemporary world, as justified by the Sharia’h sanctions.

The sources of Islamic insurance law are the Holy Qur’an, the Prophetic sanctions, Ijtihad, analogical sources, the doctrine of masalih al-mursalah, Fiqh and also relevant literatures, statutes, cases, decrees, rules and juristic opinions (fatwa). In other words, the principles of insurance under Islamic law are absolutely subject to the approval of the Divine Sharia’h sanctions.

Islamic insurance is operated based on the divine sanction of mutual co-operation, solidarity and brotherhood. It is practiced basically, on the principles of al-mudharabah profit and loss sharing financing, which is an alternative to the interest-based (riba) financing.

Despite having enough justification to practice insurance under the Sharia’h discipline, the Islamic scholars are divided in their views. There are mainly three groups who hold their own respective views for and against the validity of insurance practices. The first group holds that insurance practices are absolutely valid provided that they are free from riba. The second group accepts general insurance practices, but rejects the idea of life insurance practices. The third group rejects insurance practices entirely. It is sad to note that those ‘Ulamas who reject the idea of insurance practices, base their rejection on the insurance practices operated under the conventional system. They should not be just passive on this point; rather they should come up
with an alternative solution to it as justified by the Sharia’h principles, so that the Muslim Ummah may not be left in a dilemma.

The insurable interest in the policy under Islamic law can only be determined based on the general principles of *faraid*. Therefore, the nominee in a life policy should be treated as a mere trustee, but not an absolute beneficiary of the policy and he is under a duty to receive the benefits under the policy and distribute them among the right beneficiaries, based on the principles of *al-Fara'id*.

In Islamic law, the paid contributions cannot be forfeited under any circumstances. This is because, if the policyholder commits an offence or a breach of good faith, then the policyholder should be penalized for the offence by the law, but this punishment does not extend to forfeiting the paid contributions. Since, the contributions are paid from the policyholder’s wealth, they should therefore, be treated as his savings in a financial transaction.

It has also been suggested in this research work that the beneficiary of a life policy in Islamic law, has no right to claim the whole amount named in the policy but only the total amount of the paid contributions, a share of profits, dividends or bonuses according to the company’s policy and an amount of donation from the company’s charitable fund depending on the beneficiaries’ financial condition.

It has been suggested that in a general policy the contributions should not be regarded as *al-tabarru’* (donation), but should be regarded as *al-musahamah* (contribution), so that there are no clashes with the fundamental teachings of Islamic law.

In Islamic law, there is no justification for the victim or the insured in an insurance policy to claim damages of millions of dollars against a risk. The amount of the claim should be reasonable or justifiable, so that it does not clash with the chief objectives of insurance, that is mutual co-operation, solidarity and brotherhood.
Finally, it has been observed that the Takaful operation in Malaysia is quite advanced as compared to the rest of the world. For the purpose of making the Takaful operation a competitive alternative financial institution to the conventional insurance practices, there are many aspects, which need to be further developed.

**Possible Suggestions and Recommendations**

Although both Common law and Islamic law provide adequate provisions relating to the operation of insurance, there is room in both legal systems for amendment and development, both in principle and practice. The researcher has made an attempt to analyse both Common law and Islamic law insurance practices.

This section seeks to provide some possible suggestions and recommendations for a further development of insurance laws and practice at Common law, and also for a further Islamisation of insurance in both principle and practice, so as to suit the contemporary world’s economy.

**Recommendations for further development of insurance practices under Common Law**

1. It is submitted that a transaction involving the elements of interest may be regarded as an unfair and unfriendly dealing from several ideological and religious points of view. Therefore, it is suggested that the elements of fixed interest in an insurance practice should be eliminated. As an alternative, the doctrine of profit and loss sharing financing technique should be adopted in which the parties concerned may share the risk accordingly, in order to meet the original objective of insurance practices in sharing responsibilities against risk.

2. The main function of an insurance policy is to provide material security against unexpected risks, that everybody in society regardless of age, color, sex or position is at risk. The nature of the risk may be different depending on the fate of the individual but they are nevertheless at risk. Thus, it is wrong to claim that an adult is at risk.
but others such as minors, infants or foetuses in their mother’s wombs are at no risk. These groups of lives too may be at risk, especially to their health, care, education, accommodation and food.

Common law principles provide that the minimum age to buy a policy ranges from 10 to 16 and above, while disqualifying the ones who are below the age of 10, despite the fact that they may also be at risk.

It is therefore suggested that the existing principles at Common law relating to age should be amended. The amended provision should include an infant below the age of 10 and even a foetus in the mother’s womb should qualify to be insured. The policy may be bought under the name of the respective guardian, who may have the role of caretaker on the under-age’s policy to enable him to be protected against unexpected risks.

3. The agents and the brokers, directly or indirectly, contribute to the promotion of the insurance business. The agents and the brokers basically do the work of the insurer. Therefore, it is suggested that the agents and brokers in an insurance practice, should be treated as part and parcel of the insurer’s employees, and they should either be paid monthly salaries by the insurer or they should be given a right to have a share in the profits and other reasonable benefits of the insurance company. In this way, the agents and the brokers should not depend for their benefits on the percentage of the premiums paid by the insured.

4. From the experience of insurance practices at Common law, it has been discovered that a person nominated by the policyholder in a life policy will be the absolute beneficiary after the death of the policyholder. In this situation, the nominee will have an absolute material gain over the policy without sharing with the other beneficiaries or heirs of the policyholder, who are also affected by the death of the policyholder. This seems to be unfair to the other legal heirs of the policyholder.
It is therefore suggested that the policy of the insured should be regarded as part and parcel of his own estate. The nominee in the policy should be treated not as an absolute beneficiary, but a mere executor or trustee who will receive the benefits under the policy and distribute them among the rightful beneficiaries of the insured according to the principles of inheritance. This enables all the beneficiaries of the insured’s estate to be fairly treated.

5. Under Common law insurance practice, it is a general requirement that the parties to the insurance policy must make a fair disclosure of the material facts or matters which are relevant to the policy. The duty to disclose includes both moral and physical hazards of the subject matter of the policy and the policy itself.

It has already been discussed that the past moral hazards of the insured especially in a life policy are immaterial to the policy. This is because the policy is going to be in force in the future, and furthermore an insurance policy is a financial transaction, which should not be subject to the insured’s past moral behaviour.

Thus, it is suggested that the duty to disclose the material facts or matters in a policy should not include the past moral hazards of the insured; rather it should be regarded as irrelevant to the enforcement of a policy.

6. In a life policy at Common law the beneficiaries of the insured hold the right to make a claim for the exact amount named in the policy, regardless of when the insured dies or how much he has paid as premium, so long as the death of the insured is confirmed at any time after the commencement of the policy and before the policy matures. Such a practice under Common law may enable the beneficiaries to hope for a gain, instead of seeking for a material security against risk. The main objective of insurance practices is to uphold mutual co-
operation against unexpected risk, but not to provide one with unlimited material gain.

It is therefore suggested that in a life policy the claim of the beneficiaries may include the total amount of paid premiums, share of profits over the paid premiums, dividends or bonus and also an amount of contribution from the company's fund to be made in favour of the beneficiaries, depending on the beneficiaries' financial standing and company's policy. Mutual co-operation will then be sustained in a true spirit. It is further suggested that the amount of contribution from the company's funds may be an additional amount to meet the exact amount named in the policy, besides the total amount of paid premiums etc.

7. At Common law insurance, the premiums paid by the insured may be forfeited in certain situations upon certain grounds. For example, for a breach of utmost good faith, the notion of forfeiture may take place. It is suggested that a breach of utmost good faith or the commission of other offences may require the insured to be punished but this punishment should not extend to the insured forfeiting his legitimate paid premiums.

8. At Common law insurance, the No Claim Benefit (NCB) is recognised in a general policy. But despite its recognition, the claimant has no right to claim it in cash or by cheque, rather it is treated as a partial payment for the premium required for the renewal of the same policy. It may be unfair to the claimant not to have the right to claim the No Claim Benefit (NCB) in cash or by cheque. It is therefore suggested that for a fair dealing between the insurer and the insured, the No Claim benefit (NCB) should be kept optional at the wish of the claimant. If therefore, the claimant wants to take it in cash or by cheque or as a partial payment for the renewal of the policy, he should be allowed to do so as he wishes.
9. The courts of justice at Common law have used their powers to award unlimited damages of millions of dollars in favour of the victim, especially in accident cases. The courts should not simply use its power to make such an award without considering the fact that an insurance policy is a policy of mutual co-operation and not for gain, in which the victim or insured may be awarded reasonable damages. This will make a reasonable balance between the liable party and the claimant, upon the principles of mutual co-operation and shared responsibilities.

It is suggested that the court's powers to award unlimited damages should be curtailed. Furthermore, if the victim or insured expects more in damages then they should insure their lives through multiple policies. As an alternative, there should be both private and national social security funds from which the insured or victim may seek necessary additional fund. This may enable them to maintain their future without much difficulty, and they will not depend on a single insurer, and the court also should not put an unfair burden on the insurer by awarding unlimited damages to the insured.

Recommendations for further development of Takaful practices in the contemporary economic reality

1. Although Divine sanctions provide necessary guidance on insurance practices as justified by the Sharia'h principles, Islamic scholars and many Muslims are divided in their views. Some of them oppose the idea of insurance entirely, while some oppose it partially. Those who oppose the idea of insurance and keep on doing it have not tried to come up with an alternative model justified by the Sharia'h principles. As insurance plays a great role in providing necessary benefits for the Muslim Ummah, especially economic security against unpredicted risk, the opponents may oppose the idea of insurance practiced under the conventional system. But they should also seriously think of an alternative solution for the contemporary Muslim Ummah, especially for their economic security against risk.
It is therefore suggested that those Islamic scholars and Muslims who oppose the idea of insurance entirely without coming up with possible solutions, may kindly offer their noble skills or knowledge in coming up with an insurance model which is justified by Sharia’h principles, if they are unable to do this, they should at least contribute or give their fullest support to those who are struggling to come up with a comprehensive model of Islamic insurance which suits the contemporary Muslim Ummah.

2. Although insurance plays a vital role especially in everyday commercial life, there is very little literature or research from the Islamic perspective which may benefit the Ummah. It is, therefore suggested that the Islamic scholars should prepare a constructive schedule or plan to spend a portion of their valuable time to come up with an alternative model from the Sharia’h point of view. Meanwhile, both academic and financial institutions which offer and operate Islamic economic systems, may establish research units specifically for the development of insurance practices. The activities in such research units may include relevant course work, seminars, symposiums, conferences and also sponsoring research projects in the various aspects of insurance practices from the Sharia’h perspective.

3. It is admitted that the insurance practices may provide the Ummah with greater benefits, especially in providing economic security against unpredicted risk. It is the fundamental obligation of every government to provide security for its citizens. No government could deny the fact that insurance practices could play a greater role in the economic security of its citizens.

It is therefore suggested that the Muslim governments should take insurance practices as one of the fundamental aspects of the respective nations. The respective government should make the insurance practices compulsory for every citizen. Dr Mohd Daud Bakar has already made a constructive suggestion for the Islamic insurance
practices (Takaful), which could possibly be made as a mandatory financing scheme for the purpose of safeguarding the essential needs of the Ummah in the absence of the practices of al- ‘aqilah. This may not only provide individual material security against risk, but simultaneously may ensure economic prosperity for the Ummah.

4. Quite a number of Islamic insurance companies have been established in several countries, especially in the late 20th Century. Despite such a development in Islamic insurance practices, there are so far no exclusive written statutes behind these insurance companies passed by the Parliaments of respective countries, save Malaysia, which has its own written statute, passed by its Parliament in 1984 to govern Islamic insurance practices in Malaysia. Even though the Islamic insurance companies of the world (except Malaysia) are being governed by some rules, decrees, or juristic opinions (fatwa), these do not provide the same weight as the statutes passed by Parliament.

It is therefore suggested that each insurance company should be established under the banner of Sharia’h teachings, and should have exclusive statutes passed by the legislative bodies of the respective countries, which may provide reliable protection to these companies. This will also afford stability to the operations of these companies.

5. It may not be unusual, despite insurance practice being based on mutual co-operation, solidarity and brotherhood or shared responsibilities against risk, that the parties to an insurance practice may, in certain situations, have disputes among themselves especially when questions of claims or settlements arise. Such disputes may need to be referred to a court of justice for fair judgment between the parties. It may not be justified to bring a dispute arising from a Shari ‘ah based transaction to be settled before a court which is not governed by the Sharia’h principles. In other words, a secular court should not try a case arising from a Sharia’h based transaction. This is because when there is any dispute among Muslims, they must take the directives
from Allah and His Messenger for a just settlement. But, how could a secular court judge would base its judgement on provisions laid down by Allah and Sunnah. This argument is therefore justified by the following Divine sanction, Almighty Allah commanded:

*If you differ in anything among yourselves, refer it to Allah and His Messenger, if you do believe in Allah and the last day, that is best and most suitable for final determination.*

Furthermore, Allah also commanded that if you judge mankind, you must judge with *adl* (justice). Can we expect a secular court to maintain *al-‘adl* (justice) in its judgment in the spirit of Sharia’h sanctions? The answer is definitely no. Allah says to the effect:

*And when you judge between man and man that you judge with justice.*

It is therefore, suggested that countries which have Islamic insurance companies should have an independent Sharia’h court, so that the cases or disputes arising from the Islamic insurance companies may be tried by the respective Shari ‘ah courts, with the spirit of *‘adl* (justice) as expected by the Divine sanctions. It is hoped that the disputes arising from a Sharia’h based institution will be settled by the Sharia’h courts themselves, without having to go before secular courts of justice. In this way, the real spirit of Islam may be sustained in dispute settlements, arising from insurance practices under the Sharia’h discipline.

6. Since there are dual systems of insurance practices existing in many Muslim countries of the world, there is a higher possibility that some of the elements from the conventional insurance practices may be involved in the practices of Islamic insurance, due to the rapid development of insurance under the conventional system as compared to the development under Islamic law. To protect the Islamic insurance companies from being involved in their practices with some elements from the conventional system, it is necessary to have Sharia’h experts as in-house advisers behind each Islamic insurance company besides
establishing the required Sharia'h board, whose role should be to make sure that all aspects of the operation of the company should not involve any element which is contrary to the teachings of Islam.

It is suggested that every Islamic insurance company, before it is established, must have a general provision in the relevant statutes to have a supervisory council, comprising only Sharia'h experts. Those Sharia'h experts may play an important role in making sure that the company operates absolutely on the basis of Sharia'h principles. This council may also from time to time, provide necessary consultation to the company for further development of insurance laws and practices justified by the Shari 'ah sanctions.

7. There are many Muslims both literate and illiterate, who are still not familiar with the idea and significance of insurance practices. Wider publicity may provide constructive ideas about the significance of insurance practices for those people. It is therefore, suggested that the Muslim governments, the Islamic insurance companies and other relevant authorities should take the initiative to have a publicity campaign through any form of mass media, leaflets, speeches and personal interactions to educate the Muslim population. This may provide those illiterate and ignorant people with the necessary understanding about Islamic insurance practices.

8. Holding of seminars, symposiums, conferences, summits and workshops on specific fields, may contribute to producing different categories of literature and also ideas for a particular issue. It is believed that should there be constant seminars, symposiums etc. on the issue of insurance practices from the Sharia'h point of view, they may contribute to a further Islamisation of insurance practices.

It is therefore suggested that the relevant institutions and Islamic insurance companies of today may take the initiative to regularly organize relevant seminars symposiums, workshops, summits and
conferences for the further development of dynamics of Islamic insurance. This will also provide the contemporary Ummah with better knowledge and substantive relevant literature for further research and development.

9. As already been submitted that the insurer in an insurance practice should play a role in undertaking the responsibility to provide reasonable material security against risk to the subject matter of the policy. It is, quite impossible for the insurer alone to provide adequate material securities against the risk. To lighten the absolute burden on the insurer, the idea of the establishment of re-insurance companies occurs. However, despite the existence of numerous re-insurance companies under the banner of conventional systems, the Islamic insurance companies are not allowed to seek coverage from the conventional re-insurer, for the simple reason that the operations of conventional re-insurers involve some elements contrary to the Shariah spirit. In contrast, the operation of insurance under the banner of Islamic law is subject to Divine sanctions.

It is therefore recommended that the respective authorities of Islamic insurance companies of the contemporary world, should take an effective initiative to establish additional necessary re-insurance companies under the banner of Shariah principles besides the existing five (ATG, ARIL, IIRCO, Best Re and IITRCO). Such an initiative may possibly be taken with the co-operation of the Muslim rulers of the countries of the world, and also the OIC (Organization of Islamic Conference) to establish them both, at the local and international levels. This may enable the Islamic insurance companies to seek reinsurance coverage through both, facultative and treaty systems from the Islamic re-insurers, without involving the re-insurers under the conventional principles.