

AN ANALYSIS OF THE EFFECT OF AN INSURED PERSON'S CRIMINALITY UPON
CLAIM IN INDEMNITY INSURANCE CONTRACTS IN ZAMBIA

By

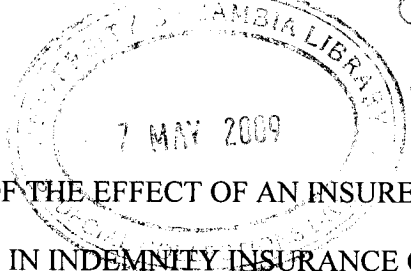
BANDA ANSBERTO NGOYI, Computer No. 25076256

A dissertation submitted to the University of Zambia in partial fulfillment of the requirements
of the Degree of Bachelor of Laws (LLB)

THE UNIVERSITY OF ZAMBIA

LUSAKA

JANUARY, 2009.



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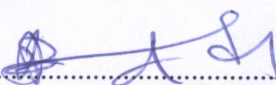
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I do hereby declare that the content of this work is based on my own research and that any other person's work consulted has been dully acknowledged. I further declare that this dissertation has not previously been submitted for a Degree at this or another University.


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I, CHANDA NKOLOMA TEMBO (MRS), recommend that the Obligatory Essay prepared under my supervision by BANDA ANSBERTO NGOYI Computer No. 25076256 entitled;

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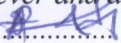
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DEDICATION

I dedicate this Obligatory Essay to my Mother, Cecilia Joyce Vinkumbu, and my young brother, Sandras Ngoyi.

“Sandras, I see the purpose of life according to God’s ultimate plan in you. You are a beauty and a great source of inspiration in everything I do. May the Lord, God, Our Father give you the strength and courage to reach the greatest levels of education in life.

Mum, your fondest and ever flourishing love brought me to UNZA. Your understanding has always shown me how momentous it is to ‘Love Others Just as I Love Myself’. You are indeed the World’s Greatest Mother! I am forever indebted to you Mum. May God bless you forever and also add unto the days of your life with us here on earth.” Per Ngoyi A.B.A. 

ABSTRACT

This study dubbed ‘An Analysis of the Effect of an Insured Person’s Criminality upon a Claim in Indemnity Insurance Contracts in Zambia’ is aimed at analysing some principles of insurance law vis a vis indemnity contracts. One of the principles of insurance law is that one should not benefit from his criminal acts. This is a common law principle stated in the Latin phrase ‘*ex turpi causa non actio*’. But questions arise as to whether there is a consistent effect of a person’s criminal acts upon a claim in an insurance contract of indemnity. Some scholars have noted that even persons who are found guilty of some criminal acts under some statutes may succeed in a claim for indemnity under insurance law. One good example is when an insured person takes a policy for indemnity of a third party, even if the insured commits a crime negligently under the Road Traffic Act. In ordinary parlance, it is difficult to appreciate why at times, criminal acts are put into contemplation when considering a claim under an indemnity insurance contract while in other instances, a claim may be given without such considerations. This seems to be a source of controversy, and this research will constantly bear this in mind and focus on finding a better understanding of the insurance law principles surrounding indemnity contracts.

Insurance is in essence a risk sharing devise. However, insurance law is one branch of the law that has too many rules to comprehend as each type of insurance has its own peculiarities. The principles surrounding indemnity insurance contracts in England greatly influenced the enactment of the Roads and Road Traffic Act there (and later in Zambia), which also imposes a statutory obligation on all motorists to insure their legal liability for causing death or bodily injury to third parties. However, the Act does not state if a person’s criminal liability under the Act has any bearing upon any policy of insurance taken by the alleged wrongdoer. This situation leaves out a *lacuna*. This gap comes up because of the lack of pragmatism with the public policy under insurance law which upholds that no man should be allowed to recover over what are the fruits of the crime of the insured. And there is no proper guideline as regards the disparities between the effects of different crimes upon a claim in indemnity insurance. This paper will therefore endeavour to clarify such blurry areas of this branch of the law. Finally, recommendations will thus be made for the better understanding of this area of insurance law.

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Every successful work of my hands, I attribute it to you Lord, God the Almighty Father for making it possible for me, once more, to reach this end for the good of your own people around me and whom you have called upon to always “*Ora et Labora*”.

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ACRONYMS, ABBREVIATIONS AND LAW REPORTS

A.C. – Appeal Cases

All ER –All England Reports

A.L.R. –African Law Reports

CAP – Chapter

Ch –Chancery Law Reports

Ch. D. – Chancery Division

DPP – Director of Public Prosecutions

E.A.L.R. –East African Law Reports

KB –Kings Bench

LJ – Lord Judge

LR Ex. –Exchequer Law Reports

LLB – Bachelor of Laws Degree

N.R.L.R. –Northern Rhodesia Law Reports

P.I.A. –Pensions and Insurance Authority

Q.B. – Queens Bench

Q.B.D. – Queens Bench Division

SJZ –Supreme Court of Zambia Judgment

UNZA –University of Zambia

WLR – Weekly Law Reports

ZSIC – Zambia State Insurance Corporation

ZR – Zambia Law Reports

IN ZAMBIA.

1.1. Introduction

In business, as in private life, there are dangers and risks of every kind. Anyone can encounter such risks at any time. Commercial activity necessarily entails risks; for example, in a sale of goods transaction, the seller may fail to deliver the goods in time, or the buyer may fail to pay the sum due, or the goods may be delivered but they may be defective, or they may fail to do the job for which they were bought, or they may be lost or damaged in transit or indeed anything prejudicial can happen to the same goods. Similarly, the owner of a motor car or a house can never be certain that his property will not be damaged or destroyed by anything or even lost. In any such case, there is potential loss to one party or the other. Hence the advent and development of insurance law in the world. Through the ages, it has been discovered that the commonest and most efficient means of guarding against risk is by insuring against it. Insurance is thus essentially a risk sharing devise. The aim of any form of insurance is to make provision against such dangers which beset human life and dealings. Therefore, this paper will endeavor to explain in detail the nature of insurance law. The Chapter begins by setting out the problem upon which this study endeavours to explore. It also outlines the objectives of the study, research questions, the rationale of the study as well as the methodology employed in the research. The paper then proceeds to give the definition of insurance law and the fundamental principles surrounding it. And, since the analysis in this paper dwells on the nexus between criminality and insurance claims, the Chapter will also give a brief account of the nature of Criminal law. Thereafter, a conclusion of this Chapter will be given.

1.2. Statement of Problem

It cannot be over emphasized that a person's illegal acts have a bearing on his claim under an insurance contract. The problem is that due to variance in the types of insurance, the effect of such

acts seems not to be consistent in all types of insurance. Infact, practically, it appears that an insured person who commits a crime may at times recover money under certain policies while not allowing such persons to do so under other instances. For instance, a motorist who is found guilty of a crime under the Road Traffic Act¹ may still succeed in a claim under indemnity insurance. One question arising under such a scenario is whether some crimes are more serious than others, such that for the less serious ones, any person with the capacity to insure should go ahead and insure against them. Another one is whether it is prudent to cushion people's criminal wrongs by forcing them to enter into third party insurance contracts. Thus, such different conceptualizations of what public policy demands require a candid explanation of the philosophy behind such law. It is assumed in this research that some principles of criminal law are ignored under insurance law, and it is one of the aims of this study to make clear to the public what the rationale for such principles is.

1.3. Study Purpose (Objectives)

The general objective of this study is to identify pitfalls in the practice and understanding of indemnity insurance contracts in Zambia; to highlight what causes such pitfalls; and to establish means and ways of making insurance claims a non-complicated issue (as opposed to most ordinary Zambians' perception that insurance business is not straightforward), thereby rendering insurance law more effective and responsive towards its ultimate objective(s). And to evaluate any matter incidental to the aforesaid. The specific objectives of the study include:

- (a) To find out how insurance companies in Zambia handle any claims under indemnity insurance contracts.
- (b) To ascertain how an insured person's criminal acts impact upon his claim in such contracts.
- (c) To underline the role of the Road Traffic Act in determining the liability of any offender who happens to be a motorist, with reference to claims under insurance policies.

¹ Act No.11 of 2002.

- (d) To determine how insurance companies objectively or subjectively effect statutory provisions under law either for or against insured persons.
- (e) To remove the perception from an ordinary man's mind that insurance business is complicated.
- (f) To find out how the Insurance Act² regulates insurance business in Zambia with specific regard to claims under indemnity insurance contracts.

1.4. Research questions

1. Does insurance law allow one to insure against their acts or omissions amounting to crime?
2. Under compulsory third-party insurance, does the insured insure against their unlawful acts or their liability?
3. Do both the insurer and insured persons always practice the principle of 'utmost good faith'?
4. Do insurers in Zambia always indemnify the insured persons satisfactorily?
5. Do parties experience any cases of fraud by either party to an insurance contract?
6. Do insurers always meet their obligations to indemnify insured persons?
7. Do insurance brokers or agents play an adequate role in protecting the interests of either the insured or insurer?
8. What is the link between criminal acts and insurance business?
9. Are insured persons adequately aware of the nature of insurance law in Zambia?
10. How can respective parties to insurance contracts work together to improve insurance business in Zambia?

1.5. Rationale of the Study

Studies conducted elsewhere indicate that an insurance policy contains the terms of contract applicable to the parties, that is, the insurer and the insured. And that some terms may however be implied into the contract either by law (statute) or by custom and/or practice, vis a vis the common law conception of insurance law. But it is vital to note that the Zambian legal system has its own peculiar practices and legislation. Some English laws are no longer applicable in Zambia

² No.11 of 1997

after its birth and the passing of some local legislation. This study will therefore dwell on the effect of local (home grown) legislation on the terms of an indemnity insurance contract in Zambia. In other jurisdictions, every crime by the insured negates his claim under a policy. This appears not to be the situation in Zambia. The research thus intends to investigate further how this is tenable under Zambian laws.

Bearing in mind the fact that, inevitably, society is not static; the study also endeavors to establish how Zambian Insurance laws and practice have evolved in the face of the current arising challenges and problems. Hence, this research is a contribution to the available literature in the form of comparative study, and recommendations have, at the end, been made on the need to amend, if not repeal, legislation attached to this kind of business in Zambia.

And since the definitions of specific types of crimes differ from jurisdiction to jurisdiction, this study will thus help to explain some principles on the nexus between a person's criminality under the Zambian Criminal Law and his claim under an insurance contract.

1.6. Methodology

This research is a qualitative one. It will include both desk research and field investigations. The desk research shall be through collection of secondary data in the form of journals, books, Law Reports, newspapers, magazines, dissertations, classroom lectures as well as the Internet. Field investigation shall be in the form of open ended interviews conducted with relevant officials from insurance companies, insurance brokers and the police service; although, even here, the focus will be on secondary data analysis, that is records and reports under the custody of such relevant offices.

1.7. Definitions and the Nature of Insurance Law.

To start with, an insurance contract may be broadly defined as an agreement in which a person called the insurer agrees for a consideration called the "premium" to pay a sum of money or to provide services for the benefit of another person called the insured or the assured on the

occurrence of a specified event whose happening is uncertain.³ Other scholars have defined insurance as:

*“an agreement or contract of indemnity, whereby a person, who is termed the insurer or underwriter, in consideration of a specified sum, denominated as premium, undertakes to secure another who is called the assured, from certain risks or perils that is casualties, to which he is or may be exposed. This contract is termed a policy.”*⁴

Insurance covers a quite adverse field of events, and policies can be taken out against a great variety of risks. An insurance policy need not be of human beings, but may be of any property, for instance livestock, a house or a field of crops, against any loss or damage that may occur to the property at any time. An insurance contract gives rise to what are termed claims. A claim is the assertion of right. A policy of assurance becomes a claim when the event insured against happens.⁵ Of course, an insurance policy is a contract in itself. A contract is an agreement enforceable at law; an essential feature of contract is a promise by one party to another to do or forbear from doing certain specified acts. Thus, an insurance policy is ‘the particular contract of insurance or a document containing a contract of insurance’.⁶ To insure means to secure, by payment of a premium, the payment of a sum of money in the event of a loss or to issue or procure an insurance policy on or for someone or something.⁷ The insurer is ‘the person who agrees, by contract, to assume the risk of another’s loss and to compensate for that loss.’⁸ A contract of insurance is embodied in a written document called a policy. The usual procedure followed as regards offer and acceptance is for the person seeking insurance to complete a proposal form which is then submitted to the insurers. “If they accept it, a contract may come into existence.”⁹ The word ‘may’ is used here because the precise moment at which the contract comes into existence also depends on the construction of the policy itself: For example, if the relevant

³ Mumba, M. Commercial Law in Zambia: Cases and Materials. Lusaka, UNZA Press, 2005.p451.

⁴ Khanna, N. Company Law Lexicon. Allhabad: A.H. Wheeler & Co.Ltd, 2000.p 104.

⁵ Rodger, B. *Osborne’s Concise Law Dictionary*. 7th ed. London: Sweet & Maxwell, 1983.p 449.

⁶ Gardner, B.A. (Ed) *Black’s Law Dictionary*. 8th ed. St Paul: Thomson West Publishing Co., 2004. p.820.

⁷ Black’s Law Dictionary, p.823.

⁸ Ibid

⁹ Lowe, R. Commercial Law. 6th ed. London: Sweet and Maxwell, 1983.p332.

document provides that 'no insurance can take place until the first premium is received', it is clear that there is no cover until the premium is paid or tendered. In **Canning v Farquhar**¹⁰, Lord Esher, M.R. further suggested that even if the premium is tendered, the insurers are at liberty to change their minds and decide not to proceed.

It should be noted also that there are two categories of insurance namely indemnity and contingency insurance. Indemnity insurance is the insurance which provides an indemnity against loss, such as in a fire policy on a house or a motor vehicle. Here, within the limits of the policy, the measure of the loss is the measure of the payment. On the other hand, Contingency insurance is that insurance which provides monetary payment on a contingent event, such as a life policy or a personal injury policy.¹¹ Here, the sum to be paid is not measured by the loss but is stipulated in the policy itself. The stated contractual sum is paid if the life ends or the limb is lost irrespective of the value of the life or limb. However, what basically underlie a contract of insurance in both of these forms of insurance are its three main elements viz:

- (a) It is a contract for some consideration called premiums, which gives the assured a right to receive money or moneys worth, upon the happening of some event.
- (b) The event insured against must be one which involves some degree of uncertainty. "There must uncertainty whether or not the event will ever happen, or if the event is one which is bound to happen at some time, there must be uncertainty as to the time at which it will happen."¹²
- (c) The uncertain event must be an event which is *prima facie* adverse to the interest of the assured. This requirement is enforced by the law stipulating that there shall be an insurable interest in the assured at the time of the making of the contract of insurance.¹³

The contract of insurance is also called an aleatory contract because it depends on an uncertain event. If such a thing happens, for instance, if a house is burnt down, the insurer will pay the value of it. At first sight, this would seem to be a wagering transaction, the insurer betting with the assured that his house will not be burnt and giving him the odds of its value against the

¹⁰ [1886] 16 Q.B.D. 727.

¹¹ Dobson, P. Charlesworths Business law. 16th edn. London: Sweet and Maxwell, 1997. P.581.

¹² Dobson, P. Charlesworth's Business Law. 16th ed. London: Sweet and Maxwell, 1997. p582.

¹³ Ibid

premium.”¹⁴ It is because of this uncertainty that Lord Mansfield, in the case **Carter v Boehm**¹⁵, described insurance as “a contract on speculation”. However, the contemporary view is that an insurance contract is not a speculative or wagering contract. Neither is it merely a gamble on an uncertain future. A contract of insurance is in reality a perfectly valid contract, for the assured is only indemnified as per agreement, and he does not gain by the happening of the event insured against; he does not make any profit. In addition, the insured must have an insurable interest in the subject matter insured, while for a wager, no insurable interest is present. “*Therefore, although it is an aleatory contract, depending upon an uncertain event, it is not a speculative or wagering contract, nor is it merely a gamble on an uncertain event.*”¹⁶

1.8. Fundamental Principles of Insurance Law

There are certain principles upon which insurance transactions are conducted. These principles are common to all types of insurance except the principle of indemnity which does not apply to life assurance, which is a contingency insurance. These principles are: good faith, insurable interest, indemnity, mitigation of loss, attachment of risk, *causa proxima* as well as subrogation. At this juncture, it is prudent to look at what these principles actually constitute.

(a) Good Faith

A Contract of insurance is a contract based on utmost good faith. It is a contract *uberrimae fidei*, and if the utmost good faith is not observed by either party, the contract may be avoided by the other. Since insurance shifts risk from one party to another, it is essential that there must be utmost good faith and frankness between the insured and the insurer; the whole truth must be told about the subject matter of the insurance and all circumstances surrounding it. This is so because the underwriter has to know the extent of his risk and assess how much he must charge for the insurance of it. Fraud invalidates the contract, and deprives the party committing it of all his rights arising out of the insurance. Misrepresentation of any material fact or its concealment will entitle

¹⁴ Shukla, M.C. Mercantile Law. 13th Ed. New Delhi: S. Chand and Co., 2004. p.241.

¹⁵ [1765] Sm. L.C. 546.

¹⁶ Shukla, M.C. 2004. p.241.

the insurer to avoid payment of the claim. Lord Blackburn, in the case of **Brownlie v Campbell**,¹⁷ emphasized the importance of this duty in the following terms:

"In policies of insurance...there is an understanding that the contract is uberrimae fidei that if you know any circumstances at all that may influence the underwriter's opinion as to the risk he is incurring and consequently as to whether he will take it or what premium he will charge if he does take it, you will state what you know. There is an obligation (or a duty) there to disclose what you know; and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy."

All in all, what the principle of utmost good faith requires is that the relationship between the insurer and the insured should be based on truth, and on truth only; otherwise the contract fails.

(b) Insurable Interest.

This principle requires that the assured must either own part or whole of the property insured, or that he must be in such a position that injury to it would affect him adversely. In **Lucena v Crawford**¹⁸, Lawrence, J. stated that the insured must be *"so situated with regard to the thing insured that he would have benefit by its existence, loss from its destruction."* The existence of insurable interest is an essential element of every contract of insurance. "Insurable interest is the pecuniary (monetary) interest in the subject matter of insurance."¹⁹ Every owner of a property has an insurable interest in it, and he/she may insure the same. And so is any other person who will suffer a direct monetary loss on the destruction of any property. Thus, the insurable interest on property may arise on account of (a) ownership, (b) lawful possession and (c) contract. Ownership is self explanatory in most instances except for rare occasions when it is either legal or equitable; for example, a purchaser under an agreement to purchase property has an equitable interest in it. Persons with an insurable interest by virtue of lawful possession include 'a warehouse man, a common carrier, a commission agent, a pawn broker, an innkeeper, a factor, an Official Assignee or Receiver in the property of the insolvent, a finder of goods as well as a trustee'.²⁰ As regards

¹⁷ [1880] 5 App. Cas. 925

¹⁸ [1806] 1 Taunt. 325

¹⁹ Gogna, P.S. A Text book on Mercantile Law. New Delhi: S. Chand and Co., 2005. p.733.

²⁰ Gogna, P.S. A Text book on Mercantile Law. New Delhi: S. Chand and Co., 2005. p.734.

persons having insurable interest by virtue of contract, they include 'a mortgagee or pledgee in the property mortgaged or pledged to him to the extent of debt secured by mortgage or pledge, a bailee in the goods entrusted to him, a tenant in the property under his tenancy, and the insurance company itself in the property insured to it'²¹. It was held in **Mark Rolands v Bernie Inns Ltd**²², that when the insured has no insurable interest in the property insured, the policy may be void as a wagering contract under the Gaming Act 1845. And in **Siu (Yin Kwan) v Eastern Insurance Co**²³, insurable interest was simply defined to mean a proprietary interest or a contractual right to the property.

(c) Indemnity

*"A contract of indemnity is a contract in which one person promises to indemnify or compensate the other for the loss or damage suffered by him (the latter)."*²⁴ It is a contract where one person promises to make good the loss suffered by the other person. An indemnity is a collateral contract or security to prevent a person from being damnified by an act or forbearance done at the request of another.²⁵ And thus, to indemnify means to reimburse another for a loss suffered because of a third party's or one's own act or default."²⁶ In **Castellain v Preston**,²⁷ it was categorically stated that the object of the principle of indemnity is that you cannot recover more than what the indemnity provides. In the case of **Zambia State Insurance Corporation v Serios Farms Ltd**²⁸, Ngulube, D.C.J. emphasised the principle of indemnity in the following terms:

"He (the assured) cannot recover more than the sum insured, for that sum is all he has stipulated for by his premiums and it fixes the maximum liability of the insurers. Even within that limit, however, he cannot recover more than what he establishes to be the actual amount of the loss. The contract being one of indemnity, and indemnity only, he recovers the actual amount of his loss and no more...An insurance policy only covers the

²¹ Ibid

²² [1986] QB 211

²³ [1994] 1 All ER 213

²⁴ Gogna, P.S. 2005. p.731.

²⁵ Ibid, note 10. p.177.

²⁶ *Black's Law Dictionary*, 8th edn. p.783.

²⁷ [1881-5] All ER Rep. 493.

²⁸ [1987] ZR 93

loss which were the subject matter of the insurance itself and that any consequential losses cannot be claimed under the policy unless expressly stipulated in the contract.”

In other words, an indemnity insurance contract only covers the losses which were contemplated as the subject matter of the insurance policy itself and that any consequential losses cannot be claimed under the policy unless there was an express provision to that effect. This is simply meant to ensure that the assured does not get compensated more than what is due to him.

(d) Mitigation of Loss

This principle provides that in the event of some mishap to the insured property, the owner must act as though he were not insured, and make every effort to preserve his property. He must take such steps to this end as he considers prudent. In other words, should the insured's property be touched by peril, he must do everything in his power to minimize the loss and to save what is left. Meaning that the insured must act as a prudent uninsured person would do in similar circumstances. It should be noted however that though a man is bound to do his best for his insurer, he is not bound to do it at his own peril. Hence, 'if any reasonable effort was made and precaution taken to save the property, the insurer will be held liable for all loss resulting from the peril insured against'.²⁹

(e) Risk Must Attach

The next essential principle is that a contract of insurance can be enforced only if the risk has attached. If the risk is not run, the consideration fails and therefore, the premium received by the insurer must be returned to the assured. It is so even where the cause of the risk being not run is the fault, will or pleasure of the insured person. It was held in **Tyrie v Fletcher**,³⁰ that "the underwriter receives a premium for running the risk of indemnifying the assured, and if he does not run the risk, the consideration for which the premium was put into his hands fails and therefore he must return it." And while a policy does not attach till the risk begins, it can equally not attach after the risk is determined one way or other, except in those special insurances where

²⁹ Shukla, M.C.2004.p.243.

³⁰ [1777] 99 E.R. 1997.

both parties being ignorant of the position of the thing insured, contract to insure it lost or not lost.³¹

(f) *Causa Proxima* (Proximate Cause)

The term *causa proxima* means the proximate or immediate cause.³² The person insuring his property can recover the loss from the insurance company only when it is caused by an event insured against, and such event is the immediate cause of the loss. In **Stanley v Western Insurance Company**³³, Kelly, C.B. held that “every loss that clearly and proximately results, whether directly or indirectly, from the event insured against is within the policy.” The maxim, in full, is *causa proxima non remota spectatur*, meaning the proximate and not the remote cause is to be looked to, and if the cause of the loss is the peril insured against, the assured can recover. “*The question which is the causa proxima of a loss can only arise where there has been a succession of causes. When a result has been brought about by two causes, you must in... insurance law, look to the nearest cause, although the result would, no doubt, not have happened without the remote cause.*”³⁴ Therefore, in order to make the insurer liable for loss, such loss must have been proximately caused by the peril insured against.

(g) Subrogation

The doctrine of subrogation was summarized by Lord Blackburn in the case of **Burnard v Rodocanachi**³⁵ as follows:

“When there is a contract of indemnity...and a loss happens, anything which reduces or diminishes that loss reduces the amount which the indemnifier has to pay, and if the indemnifier has already paid it, then if anything which diminishes the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back.”

Simply put, an insurer who has paid an indemnity assumes the rights of the insured against any third party who is liable to the insured in respect of that loss or damage concerning the subject

³¹ Pícard, Elements of Insurance Law.p.3.

³² Gogna, P.S. A Textbook on Mercantile Law. 2005.p.735.

³³ [1886] 3 Ex at 74

³⁴ Per Lord Esher,M.R. in *Pink v Fleming*[1899] 25 QBD 396

³⁵ [1882] 7 App. Cas. 333 at 339

matter of insurance. In **Edwards v Motor Union**³⁶, McCardie, J held that such an action should in fact be brought in the name of the insured, who can be compelled to lend his name to the proceedings, on tender of a suitable indemnity as to costs. "Once the insurers have themselves been indemnified in respect of the sum paid by them and costs, any additional damages belong to the insured."³⁷ Subrogation, thus, means that the insurer is entitled to enforce any remedy which the assured himself might have enforced against any third party. This applies to rights both in tort and contract; and 'if the assured renounces any such benefit or rights of action against third parties, the insurer is equally discharged to that extent'.³⁸ The doctrine of subrogation is a corollary of the principle of indemnity; it applies only to those contracts of insurance which are contracts of indemnity. By requiring any means of reducing or extinguishing a loss to be taken into account, it prevents the insured from recovering more than the full indemnity. In **Nappier v Hunter**³⁹, it was held that 'if the insured holds money to which the insurer is entitled by way of subrogation, the latter has an equitable interest in the fund'. "The insurer can sue in his own name only if there is a formal assignment of the right of action; otherwise, he must bring the action in the name of the assured who is under an obligation to permit his name to be used in this way."⁴⁰ In fact, in order to give efficacy to the contract of insurance and to ensure both that the insured is not over compensated for the loss and the insurer is not under-compensated, the principle of subrogation is deemed in practice to be an implied term in the contract if there is no express provision to that effect in a policy. If the assured would be allowed to recover the full extent of the loss from the insurer and then he gets compensation from third parties in respect of the same loss, the assured will be more than fully indemnified and the whole doctrine of indemnity would be defeated.

1.9. Sources of Insurance Law In Zambia

Zambia, a former British Colony in Central Africa, became independent in 1964 under the leadership of Kenneth David Kaunda as its first Republican President. The inception of British

³⁶ [1922] 2 K.B. 249

³⁷ Lowe, R. Commercial Law. London: Sweet and Maxwell, 1983 .p.376

³⁸ Phoenix Assurance Co. v Spooner [1905] 2 KB 753.

³⁹ [1993] 2 W.L.R. 42.

⁴⁰ Dobson, P. Charlesworth's Business Law. London: Sweet and Maxwell, 1997.p.594.

rule in the territory then called Northern Rhodesia also saw the introduction of English laws into this Central African colony, just as in several other territories that were under the dominion of the British Crown.⁴¹ Such laws included Land laws, Administrative Laws, Tort law as well as Insurance law, to mention but a few. This is the more reason why even today most of Zambian laws are in most areas like those of England. In fact there is Zambian Legislation such as the English Law [Extent of Application] Act⁴², the British Acts [Extension] Act⁴³ as well as the High Court Act⁴⁴ and Subordinate Courts Act⁴⁵, which still allow the importation of some English laws into Zambia. It is through such a relationship and history that the principles of English Insurance Law were imported into the Zambian Legal System. Thus, the main sources of insurance law in Zambia include the English common law, English statutory law, Local statutory law as well as Case law. It is prudent at this juncture to give an overview of these sources of insurance law in Zambia.

Before independence, insurance business in Northern Rhodesia (now Zambia) was controlled by the insurance laws in operation in Southern Rhodesia (now Zimbabwe), which were in turn the rules and practices of the Lloyds of London. After independence, the first statute to be passed with regard to insurance business was the Insurance Companies (Cessation and Transfer of Business) Act, 1970⁴⁶. The Act was aimed at introducing a national insurance business solely carried out by one statutory corporation, the Zambia State Insurance Corporation (ZSIC). The ZSIC Act⁴⁷ was subsequently also passed. Under section 4(3) of the Insurance Companies (Cessation and Transfer of Business Act), the Law provided that:

"After 31 of December 1971, no person other than the Corporation shall carry on any insurance business, or enter into any contract of insurance in Zambia."

The Corporation referred to here was ZSIC. The president also issued a directive to the effect that all the 26 foreign based insurers that existed by then should transfer all their assets to ZSIC.

⁴¹ The Queen or King of England.

⁴² CAP 11 of the Laws of Zambia.

⁴³ CAP 10 of the Laws of Zambia.

⁴⁴ CAP 27 of the Laws of Zambia

⁴⁵ CAP 28 of the Laws of Zambia.

⁴⁶ CAP 711 of the Laws of Zambia

⁴⁷ CAP 705 of the Laws of Zambia.

Government controlled and centralized the insurance business up until 1992 when Parliament passed a new law to liberalise insurance business in Zambia. The current law regulating insurance business in Zambia is the Insurance Act Number 11 of 1997. This Act repealed the former Insurance Act⁴⁸. The Pensions and Insurance Authority was also established in 1997; this is the body responsible for the supervision of insurance industry in the country. The Authority operates under the auspices of the Ministry of Finance. The Pension Scheme Regulation Act⁴⁹ is the one that provides for the appointment of the Registrar of Pensions and Insurance, whose duties are however outlined in Section 99 of the Insurance Act, 1997. The Act provides that the Registrar shall have the functions and powers conferred on him by or under this Act or indeed any other written law. Some of the functions of the Registrar outlined under this Act include: The formulation and enforcement of standards in the conduct of the business of insurance with which a member of the insurance industry must comply; Directing insurers and re-insurers on the standardisation of the contracts of compulsory insurance; Directing an insurer or re-insurer where he is satisfied that the contract of insurance issued by the insurer or re-insurer is obscure or contains ambiguous terms or terms and conditions which are unfair or oppressive to the policy holders, to clarify, simplify, amend or delete the wording, terms or conditions as the case may be, in respect of future contracts; Formulation of standards for the conduct of insurance business; Making recommendations to the Minister on any matter affecting the insurance industry; Advising the Government on adequate insurance protection for national assets and properties; and Performing such other functions as the Minister may assign to him.⁵⁰

According to Sections 4 and 11 of the Act, no insurance business can be undertaken in Zambia without a license issued; this licensing is done by the Pensions and Insurance Authority. The license is valid for one (1) year, but subject to renewal. Section 41 of the Act empowers the Minister of Finance to prescribe, by Statutory Instrument, the minimum paid up share capital to be maintained by a licensed insurer. Insurers are obliged to submit solvency statements within ninety

⁴⁸ CAP 392 of the Laws of Zambia.

⁴⁹ Act No.26 of 1996

⁵⁰ Section 99(2) (a) –(g)

days after the end of each financial year.⁵¹ They are also required, within ninety days after the end of each financial year, to file audited insurance accounts prepared in accordance with the regulations. These capital adequacy and solvency requirements are intended at safeguarding the interests of the insuring public. The Registrar is empowered to require the insurer to maintain assets of such value as appears desirable to ensure that the insurer is able to meet their obligations⁵². Under the Act, the Registrar also has vast powers to met out disciplinary sanctions on erring members of the insurance industry. These include power to suspend, revoke, or refuse to renew a license held under the Act.

1.10. Definitions and the Nature of Criminal Law

A Crime is an act, default or conduct prejudicial to the community, the commission of which by law renders the person responsible liable to punishment under special proceedings (prosecution) normally instituted by officers in the service of the state.⁵³ A Criminal is one who has committed a criminal offence or one who has been convicted of crime. Criminality refers to ‘the state or quality of being criminal or an act or practice that constitutes a crime.’⁵⁴ It also refers to the fact of people being involved in crime or criminal acts.⁵⁵ Crime Insurance, on the other hand, refers to ‘insurance covering losses occasioned by a crime committed by someone other than the insured.’⁵⁶

Thus, essentially, a crime is an act or sometimes a failure to act that is deemed by statute or by the common law to be a public wrong and is therefore punishable by the state in criminal proceedings. Every crime consists of the *actus reus* (wrongful act) accompanied by a specified *mens rea* (a guilty mind), unless it is a crime of strict liability. Crimes of strict liability are those crimes whose liability is imposed without the necessity of proving *mens rea* with respect to one or

⁵¹ Section 45

⁵² Section 67

⁵³ Bird, R. Osborne’s Concise Law Dictionary.7th ed.London: Sweet and Maxwell, 1983.p.102.

⁵⁴ Gardner, B.A. (Ed) *Black’s Law Dictionary*.8th ed. St. Paul: Thomson West Publishing Co., 2004.p 402.

⁵⁵ Hornby, A.S. (Ed) *Oxford Advanced Learners Dictionary*. Oxford University Press, 2000.p276.

⁵⁶ Gardner, B.A. (Ed) *Black’s Law Dictionary*.8th ed. St. Paul: Thomson West Publishing Co., 2004.p 816.

more of the elements of the crime.⁵⁷ As it was held in **Patel's Bazaar v The People**⁵⁸, 'there is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by words of the statute creating the offence or by the subject matter with which it deals, and both must be considered'. In **Copperfields Cold Storage Co. v R**⁵⁹, Thomas, P stated that:

"Now, there is no doubt that the maxim 'actus non facit reum nisi mens sit rea'... is applicable to statutory as well as to common law offences, except in those cases where the legislature intended to create an offence in which mens rea was not a necessary ingredient. The legislature may absolutely prohibit the doing of an act and constitute an offence without reference to the state of mind of the offender and regardless whether he had an intention of breaking the law, or otherwise doing a wrongful act".

Commenting on the import of strict liability, Lord Evershed stated in the case of **Lim Chin Aik v The Queen**⁶⁰ that:

"When the subject matter of the statute is the regulation for the public welfare of a particular activity...it can be and frequently has been inferred that the legislature intended that such activities should be carried out under the conditions of strict liability. The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of mens rea".

Liability for road traffic accidents is one form of strict liability that exists in Zambia. Here, negligence infact works much more strictly than in other areas of the law, so much so that it has become artificial to continue calling it by that name. The requirement of criminal law is that the prosecution must prove these elements of the crime beyond reasonable doubt. This is referred to as the burden of proof of a criminal charge. It always lies with the prosecution. In **Woolmington**

⁵⁷ E.A. Martin(Ed). Oxford Dictionary of Law.5th ed.Oxford: Oxford University Press, 2003.

⁵⁸ SJZ 10 of 1965

⁵⁹ 5 N.R.L.R. 248.

⁶⁰ [1963] 1 All ER 223.

v DPP ⁶¹, it was stated that ‘no matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law...and no attempt to whittle it down can be entertained’.

Crimes differ in species. Some are serious wrongs of moral nature, for instance murder or rape; others interfere with the smooth running of society, for example parking offences or breaches of peace. Most prosecutions for crime are brought by the police, although they can also be initiated by private people; some require the consent of the Attorney General. Under the Zambian jurisdiction, some crimes are not triable by magistrates; they can only be tried by the High Court for Zambia; although others are triable either way. The punishments for crimes also differ. They include death penalty (for treason⁶² or murder⁶³), life imprisonment, imprisonment for a specified period of time, suspended sentences of imprisonment, conditional discharges, probation, binding over, and fines. Usually, on non-mandatory and on lesser sentences, judges have discretion in deciding on the punishment to be meted out.

Some crimes may also be civil wrongs; they may be torts too. For example, theft is a crime punishable by imprisonment, but it may also amount to the tort of conversion for which the victim may claim damages. Another example is the crime of causing injury or death by reckless driving⁶⁴, under which the victim can also sue for damages under a civil action for negligence. These examples show that the distinction between a crime and a civil wrong cannot be stated as depending upon what is done, because what is done may be the same in each case. In **Seaman v Burley**⁶⁵, Lord Esher M.R. held that, ‘the true distinction resides, therefore, not in the nature of the wrongful act but in the legal consequences that may follow it’. Nevertheless, it is vital to note that there is a hybrid of offences, which can be classified as being either civil or criminal depending on which action the victim opts to pursue. This is particularly common under statutory offences or breaches of statute, some of which fall under what in criminal law is termed strict

⁶¹ [1935] All ER 1

⁶² S.43, Penal Code, CAP 87 of the Laws of Zambia.

⁶³ S.200, Penal Code, CAP 87 of the Laws of Zambia.

⁶⁴ S.155, Road Traffic Act No. 11 of 2002.

⁶⁵ [1896] 2 QB 344 at 346

liability. Normally, criminal and civil proceedings are brought in different jurisdictions (courts) and even the procedure is different; the terminology is different and so is the remedy following an action.

1.11. Conclusion

In a nutshell, this chapter endeavoured to explain what the main principles surrounding insurance law as well as criminal law are. Having looked at the above definitions and explanations of these two branches of the law, it is the view of the author of this paper that the next Chapter may proceed to explain the nexus between criminal acts insurance claims.

CHAPTER 2: THE LINK BETWEEN CRIMINAL LIABILITY AND INSURANCE

CLAIMS

2.1. Background of the Link Between Criminal Conduct and Insurance Claims

As noted in the preceding Chapter, it is indisputable that crimes have a bearing on an insured's person's claim. The link comes in because as a matter of fact, crimes do affect several other aspects, including different branches of the law to a more or less extent depending on the circumstances of the case. And insurance law is no exception.

Generally, it has been the policy of the courts to declare contracts with a tendency to lead to crime, immorality or other effects prejudicial to the public as void on grounds of public policy. At times in different jurisdictions, the question of public policy has raised serious controversies due to the evolutionary and dynamic nature of the law when one considers it in the light of changing values of a particular society. In **Richardson v Mellish**⁶⁶, Burrough, J famously remarked in his dictum that public policy is indeed an 'unruly horse'. Unfortunately or fortunately, as the case may appear for any critical mind, a cardinal guiding principle of public policy is summed up in the maxim '*ex turpi causa non actio*' (no action can arise from a wrongful cause). It is actually a fundamental principle of common law that a man may not profit from his own crime or any other wrongful conduct. And since the Zambian jurisdiction has imported the English common law principles, any claim made under a policy of insurance is subject to the above stated principle.⁶⁷ And since insurance contracts are understood as intended to protect the insured against misfortune and not against own willful misconduct, the insured who intentionally brings about the event insured against will not generally be allowed to recover. Infact, this extends to the willful act of the insured's agents. Thus, all in all, an insurance cover should not extend to loss or damage deliberately caused by the insured.⁶⁸

The legal principle that no person should benefit from the fruits of his wrong doing is also found in Tort law, Contract law, Criminal law as well as several other branches of the law. For instance, in tort, a person cannot sue for damages upon an act which has resulted from his deliberate

⁶⁶ [1824] 2 Bing 229 at b252

⁶⁷ Zambia State Insurance Corporation v Northern Breweries [2000] ZR 42.

⁶⁸ www.iais.org/causation. Site last visited on 3rd October, 2008.

negligence. In other words, if the cause of action can be proven to have been actuated by the person seeking to benefit from it, the law would not allow such an action.

2.2. The Nature of Criminal Acts that May Affect an Insurance Claim

It is trite law that the object of insurance is to guard against a fortuitous act happening from without, so that the policy will not usually cover damage caused by the insured's willful act.⁶⁹ Hence, the personal representatives of a life insured will not (unless otherwise agreed) be able to recover if the insured commits suicide when sane since the assured will be 'guilty' of crime except that they are now dead. Such deliberate mischiefs are not condoned under insurance law. In the case of **Beresford v Royal Insurance Co. Ltd** ⁷⁰, the insured committed suicide. On a claim for policy moneys under his life assurance by his representatives, the court held that insurance does not cover loss due to the willful act of the insured, unless the policy expressly so provides. Of course, suicide is distinguished between that committed by a sane person and an insane person. In the English landmark case of **Horn v Anglo-Australian Life Assurance Co.** ⁷¹, it was categorically stated that if the insured commits suicide when insane, his act will not be treated as willful and the policy moneys will be payable, unless the policy provides otherwise. A suicide committed by a sane person could also cause hardship to innocent third parties, like an assignee for value of the policy; and it is quite usual to find a clause in the policy providing that on a sane suicide the policy shall become void unless the policy is at that time in the hands of an assignee for value.

Similarly, in **Upjohn v Hitchens**⁷², Scrutton L.J. held that an insurer under a fire policy should not be liable if the assured actually deliberately fires his own property. Other criminal acts that they may affect an insurance claim include murder and manslaughter. In **Cleaver V. Mutual**

⁶⁹ *ibid*

⁷⁰ [1938] AC 586

⁷¹ [1861] 30 L.J. Ch 511

⁷² [1918] 2KB 48

Reserve Fund Life Association,⁷³ a man took out a life policy for the benefit of his wife who later poisoned him. It was held that where a beneficiary murdered the insured, the policy moneys were payable but neither the murderer nor his estate could benefit. In other words, the money can never be paid to the murderer who is the beneficiary. No claim of this sort would be entertained and so the moneys are in principle forfeited; they will be paid to no one since the entitled person has chosen to deprive himself by wilful misconduct. In **Re Hall**⁷⁴, the Court held that the rule can apply equally where the person entitled to the policy moneys kills the insured by manslaughter, the underlying principle being that "a man shall not slay his benefactor and thereby take his bounty."

Generally, on the grounds of public policy, an insured can not recover for the consequences of an intentional criminal act. In **Hardy v Motor Insurers Bureau**⁷⁵, it was held that this is so even though the insured was unaware that the act was in fact a crime. In the case of **Gray v Barr**⁷⁶, the court emphasized this principle in the following words:

"The logical test ... is whether the person seeking the indemnity was guilty of deliberate, intentional and unlawful violence, or threats of violence. If he was, and death resulted there from, then, however unintended the final death of the victim may have been, the Court should not entertain the claim for indemnity."

It is submitted that this principle also applies where the insured intentionally commits a tort, such as defamation.⁷⁷

Further examples of criminal incidences that may affect an insurance claim include previous convictions for dangerous driving (under motor insurance); previous convictions for shop breaking or smuggling goods (under a theft policy); deliberate fires (fire policy); the insured's conviction for driving whilst drunk (under an accident policy). Once more, it is clear that the basis of an insurance policy is to guard against the consequences of fortuitous events, so that it will not cover a loss by the willful act of the insured. This is certainly, a rule of construction and it exists side by

⁷³ [1892] 1 QB 147

⁷⁴ [1914] p.1

⁷⁵ [1964] 2 All ER 742

⁷⁶ [1971] 2 All ER 949

⁷⁷ [www.iais.org/Effects of Criminal Acts](http://www.iais.org/Effects_of_Criminal_Acts). Accessed on 22nd September, 2008.

side with another rule,(which is based on public policy) that the person entitled to the policy cannot recover for loss due to his intentional criminal act. For instance, in the English case of **Amicable Society v Bolland**,⁷⁸ the life insured party committed forgery and was executed. It was held that his personal representatives could not recover under the policy. These rules of public policy also govern the question of whether the offender (criminal) can recover an indemnity under his own legal liability policy.⁷⁹ This paper will discuss this aspect in detail in the next chapter. Thus, in a nutshell the above explained are the criminal acts that may affect an insurance claim in varying extents, depending on the circumstances of the case.

2.3. Are Insurance Policies Fairly Constructed?

At the first instance when one comes across this question, they have to contemplate also of who are the parties bound by this insurance policy; which are basically the insurer and the insured. As earlier noted, the insured seeks insurance but he does not formulate the insurance policy, this is the preserve of the insurer, which are the insurance companies. They determine the contents of the policy. The policy contains questions for which the insured has to provide answers in the form of a written interview. The insured, at the end of filling in the proposal form has to declare that they understand the policy and are willing to be bound by it. "An insurance policy is therefore some kind of standard form contract."⁸⁰ In other words, an insurance policy is a contract offered by the insurer and accepted by the insured accompanied by the payment of premiums as consideration. Even when an insurer uses insurance agents or brokers, the broker only distributes/effects policies already formulated by the insurance company.

Hence, a policy of insurance is to be construed in the same way as any other written document. In **Scragg v U.K Temperance and General Provident Institution**,⁸¹ it was emphasized that the words used in the proposal form must be given their ordinary and popular meaning, unless the context shows that a different meaning was intended, or unless they have acquired a different

⁷⁸ [1830] 4 Bligh (N.S) 194

⁷⁹ Lowe, R. Commercial Law. 6th ed. London: Sweet and Maxwell. 1983. p.384

⁸⁰ Shukla, M.C. Mercantile Law. 13th Ed. New Delhi: S.Chand and Company, 2004. p 241.

⁸¹ [1976] 2 L 1LR 227

meaning by the usage of a particular trade. Technical legal words, however, are given their strict legal meaning. If there is any ambiguity the words will be construed ‘contra proferentem’ against the person who inserted it, that is the insurer. For instance, in **Houghton V. Trafalgar Insurance Company**,⁸² a policy in the respect of a private four seater car contained a clause excluding the insurer’s liability if it was used to carry a load in excess of that for which it was constructed. An accident occurred coincidentally whilst two extra passengers were carried in the car. It was held that the clause relating to “loads” was intended to cover lorries built to carry a specified load, and did not apply to the carriage of passengers in a private car. Consequently, the insurers were liable. It should be noted also that if two constructions are possible, the Court normally prefers one that makes the policy effective, rather than ineffective. For example, in **Frewin v Poland**⁸³, an author who insured his manuscript against, “loss ...resulting in the necessity for the assured to rewrite” was held entitled to recover under the policy when a loss occurred, even though he did not in fact rewrite the book.

Some other forms of policies do require the insured to notify the insurers of the loss or claim within a specified time. With very few exceptions, especially under compulsory motor vehicle insurance, such clauses are valid, effective and are frequently construed as a condition precedent to the insurer’s liability.

In insurance practice in Zambia, research has shown that the above explained system of construction of policies is the one that prevails on the ground. And policies are constructed by the insurers and the insured only has the choice of which policy to take. And where insurance is compulsory, for instance motor vehicle insurance under the **Road Traffic Act**⁸⁴, there is essentially no choice at all for the insured except that he or she may only choose which company appears more appealing after considering the aspects of efficiency or quality service delivery.

But, generally most of those in the practice of insurance business have commended the drafting of insurance policies by the insurance companies. The only problem noted, especially by insurance

⁸² [1953] 2All ER 1409
⁸³ [111968] 1 Lloyd’s Rep 100
⁸⁴ Act No 11 of 2002..

brokers, is that most Zambians are still ignorant about the benefits of insurance and so do not bother to insure themselves or their property. It is also perceived among many Zambians that insurance business is not straightforward business because the insurers are usually not willing to indemnify the insured. However, research has revealed that for some reasons this perception is not true. One reason being that most Zambians are still not quite literate. Some cannot read and understand the English language such that they end up not appreciating the whole policy if its not well explained to them. This is usually so if a broker or agent is not involved as these are persons who normally belabour to explain the policy in detail to the insured persons. Another reason is that those seeking insurance sometimes hurriedly rush into signing the agreement and paying the premiums without considering some other details of the policy in which case they tend to breach the duty of disclosure. As it was explained in the previous Chapter, insurance is a contract of utmost good faith and it is of the gravest importance to commerce that the position should be observed.⁸⁵ In the United States of America, the principle of utmost good faith is known as the 'doctrine of non-concealment'. The practical effect of this principle is that each party to the contract must not only refrain from actively misleading the other but must disclose and not conceal any material information relating to the proposed insurance. The law obliges the parties to disclose all material facts. '*Suppressio veri*' is the Latin maxim denoting concealment or suppression of the truth under an insurance contract. It should be remembered that the principle of *uberimae fidei* is three fold:(1)a duty to disclose material facts;(2)a duty not to misrepresent material facts ;and (3) a duty not to make a fraudulent claim. Hence, as most insured rush in signing policies, they tend to 'crush'; they tend to either leave out necessary information or even present wrong information altogether, and end up suffering the consequences of either a void or voidable policy at the instance of the insurer. The duty of disclosure requires the insured to disclose all material facts of which he knows or ought to have known. "*In practice the doctrine can work harshly against the insured, especially as there is no duty to disclose [this] duty of*

⁸⁵ Per Scrutton ,L.J. in *Greenhill v Federal Insurance* [1927] 1 KB 65 at p75

disclosure."⁸⁶In the end, the illiterate insured or one who does not read the policy in detail before taking it ends up breaching the duty of disclosure which is fatal to him.

Thus on the question of whether insurance policies in Zambia are fairly constructed, the answer is in the affirmative. Infact, the Zambia Pensions and Insurance Authority(PIA) supervises this activity as it is accordingly mandated under the Insurance Act⁸⁷. Such that even the insured who finds himself in jeopardy due to some criminal conduct would not complain of unfair construction of policies. All that is required is clear understanding of the policy details before an insured decides to be covered by a particular insurance policy.

2.4. Conclusion

In a nutshell,it can be said that an insured persons criminal acts may affect his policy.If he/she is criminally liable on the goods he claims to have an insurable interest in,he cannot take out a valid insurance cover against the peril on such goods. And if his insurable interest is tainted by some crime subsequently committed,for instance the taking of one's life in a life policy,such action forfeits the whole policy. This equally applies to a beneficiary of such a policy who deliberately commits crime with the hope of benefiting from his criminal action. Thus,it is seen here that criminal activities do have a bearing on one's claim since the crime actually stains his insurable interest.

⁸⁶ Lowe, R. p.335.

⁸⁷ Act No 11 of 1997

CHAPTER 3: THE EFFECTS OF THIRD PARTY INSURANCE UPON CLAIM FOR INDEMNITY

3.1 Enforcement of Insurance Indemnity Provisions Under the Road Traffic Act⁸⁸

As it was seen in Chapter 1, sub-heading 3, an indemnity insurance contract is one where in the event of a loss resulting from a risk insured against, the insured is placed in the same position that he was in immediately before the occurrence of the event insured against. Here, the insured is not, under any circumstances, to recover more than his actual loss. And as long as the policy is aimed at indemnifying the assured, the contract remains one of indemnity even if the value of the potential loss is higher than the actual loss.⁸⁹

The best example indemnity that one would give as regards third-party insurance is the mandatory insurance for motorists as provided by the Road Traffic Act. This type of insurance is required by law. Provisions pertaining to it are actually found under Part (VII) of the Act. It is thus mandatory for all users of motor vehicles to be insured against third party risks. To this effect, the Act provides under Section 86 that:

“86. (1) No person shall use or cause or permit any person to use a motor vehicle or trailer on a road unless there is in force in relation to the use of such vehicle or trailer by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Part.

(2) Any person who contravenes the provisions of this section commits an offence and is liable, upon conviction, in the case of a first offence to a fine not exceeding three thousand penalty units or to imprisonment for a period not exceeding twelve months, and in case of a second or subsequent offence, to a fine not exceeding seven thousand five hundred penalty units or to imprisonment for a period not exceeding twelve months, or to both.

(3) Notwithstanding the provision of any other written law, there shall be in respect of all Government vehicles such policy of insurance or such a security in respect of third

⁸⁸ Act No.11 of 2002.

⁸⁹ Malila, M. Commercial Law in Zambia. Lusaka: UNZA Press, 2006. P.496.

party risks referred to in sub-section (1) as the Minister, in consultation with the Agency, may prescribe.”

Section 87 of this Act also provides that a person charged with using a motor vehicle or trailer in contravention of section of eighty-six shall not be convicted if that person can prove that the vehicle or trailer did not belong to him/her and was not in that person’s possession under a contract of hiring or loan. It is also a defence if that person was using the vehicle or trailer in the course of his/her employment, or that such person did not know or had no reason to believe, that there was not in force or in relation to the vehicle or trailer, such a policy of insurance or security as complies with the requirements of this Part of the Act.

In order to be a valid policy of insurance under this part of the Act, it must meet the following requirements: It must be a policy which;

“(a) is issued by an insurance company registered by the registrar for the purpose of this Part; and

(b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by that person or such persons in respect of the death of or bodily injury to any person caused by, or arising out of the use of the motor vehicle or trailer on a road to an amount of at least—

(i) one hundred and sixty-six thousand seven hundred fee units in respect of anyone person killed or injured; and

(ii) three hundred and thirty-three thousand three hundred and fifty fee units in respect of any one accident or series of accidents due to or arising out of the occurrence of any one event:

Provided that any policy in terms of this section shall not be required to cover—

(A) any liability in respect of the death of, or bodily injury to, a person in the employment of any person insured by the policy, if such death or bodily injury arises out of and in the course of that person’s employment; or

(B) any contractual liability."⁹⁰

Under this section, the term "Registrar" refers to the Registrar of Pensions and Insurance appointed under the Pension Scheme Regulation Act, 1996.

It should be noted that this type of insurance indemnifies vehicle owners and drivers who are legally liable for injury to any other road user in the event of a motor vehicle accident. In Zambia, compulsory motor vehicle third party insurance covers death or bodily injury and not damage to property.⁹¹ In other words, it indemnifies vehicle owners who are legally liable to third parties and compensates the victim for the injury incurred in a road accident.

A closer look at Sections 86 to 88 of the Road Traffic Act⁹² reveals that the insurer shall indemnify the assured against any third party claims despite the fact that there might have been breach of duty on the part of the insured, that is irrespective of the insured's negligence or guiltiness of some crime. In other words, an insurance company must indemnify a motorist who has insured against third party risks, even where the third party's death or injury has been caused by such negligence on the part of the insured as to amount to manslaughter or causing grievous bodily harm which are crimes under the same Statute. The Act in fact penalises carelessly driving⁹³, reckless or dangerous driving⁹⁴ as well as causing death by reckless or dangerous driving⁹⁵. For instance, section 161 of this Act provides that:

"161. (1) Any person who causes the death of another person by the driving of a motor vehicle on the road recklessly, or at a speed, or manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be on the road, commits an offence and shall be liable, upon conviction, to a fine not exceeding thirty thousand penalty units or to imprisonment for a period not exceeding five years, or to both."

⁹⁰ Section 88, Insurance Act No. 11 of 1996.

⁹¹ *Betty Kamanga v Konkola Copper Mines Plc.* SCZ/5/2004 (Unreported).

⁹² No. 11 of 2002.

⁹³ Section 154

⁹⁴ Section 155

⁹⁵ Section 161

The Penal Code equally incriminates the reckless or dangerous acts committed by any motor vehicle user as he/she uses the road. It provides that any person who in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any person, drives any vehicle or rides on any public way, is guilty of a misdemeanour.⁹⁶

Thus, what the provisions for compulsory third party insurance under the Road Traffic Act imply is that the motor vehicle owner and user have to be insured irrespective of their criminal culpability arising out of their use of the insured vehicles. Damage to third parties is cushioned by the policy which the insured takes. Thus, there is indemnity here to the assured, and compensation to a third party even if the assured was to commit a deliberate or negligent harmful act to third parties because, after all, he or she has already insured against it.

3.2 Analysis of the Indemnity of Third Parties.

After having a close look at the provisions relating to compulsory third party insurance in Zambia, one dominant factor seems to arise here; which is that the insurer has no choice but to indemnify a motorist, who has insured against third party risks. This appears to be so even where the third party's death or injury is caused by such recklessness or negligence on the insured person's part as to bring about manslaughter. This reasoning was at the core of the decision in the English case of **Tinline v Whitecross Insurance**⁹⁷. This was a case where the insured had taken out a motor car policy covering him in respect of third party risks. He negligently killed a pedestrian whilst driving at an excessive speed, and was found guilty of manslaughter. He claimed an indemnity under the policy in respect of the damages which he had to pay, but the insurance company claimed that it was not liable on the ground that it would have been against public policy to give effect to this contract. It was held that this contention must fail and that the insurer was accordingly liable to indemnify the assured. Bailhache, J stated:

"The defendants say that ...it is against public policy to indemnify a man against the civil consequences of his criminal act. I think it is true to say that it is against public policy to

⁹⁶ Section 237(a), Penal Code, CAP 87 of the Laws of Zambia.

⁹⁷ [1921] 125 LT 632

indemnify a man against the consequences of a crime which he knowingly commits ,and in the word 'crime' ,I conclude the breach of any statutory duty which renders a man liable to fine or imprisonment...I want it to be clearly understood(here) that if this accident had been due to an intentional act on the part of the plaintiff,this policy could not possibly protect him,but then if a man driving a motor car at excessive speed intentionally runs into a man and kills him,the result is not manslaughter but murder,the reason being that manslaughter is the result of accident murder is not,and it is against accidents only that this policy insures..."

This was established as the principle of law at that time. However,it should be noted that the insurer's obligation to indemnify is not an absolute obligation;⁹⁸ it may be challenged. In the case of **ZSIC Ltd v Musutu ,African National Congress and Msangala**,⁹⁹ a road traffic accident occurred whereby the first respondent's vehicle collided with the second respondent's vehicle which was driven by its servant,the third respondent. In the lower court,the appellant was joined as defendant under provisions of the Roads and Road Traffic Act¹⁰⁰. In its defence ,the appellant (who was respondent) claimed firstly that it did not insure the second respondent's motor vehicle,and in the alternative, that going by the policy,the second respondent should have notified the appellant of any claims brought against it. The trial court held that the appellant was, under Section 137 of the Act,liable to pay the first defendant for damages caused to the motor vehicle. The appellant appealed, arguing that its liability under Section 137 was only for damages arising out of personal injury or death as set out in Section 135 of the same statute. The said Sections 135 and 137 were provided under Part IX of the Act as follows:

"135. In order to comply with the requirements of this part ,a policy of insurance must be a policy which-(b)insures such a person ,or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death,or bodily injury to any person caused by ,or arising out of the use of the motor vehicle or trailer on a road;It follows ,therefore,that a condition that enables an insurance

⁹⁸ R v Mangana[1963] ALR 498

⁹⁹ [1993-1994] ZR 133

¹⁰⁰ The then Chapter 766 of the Laws of Zambia.

company to avoid liability is only of no effect in connection with claims in respect of bodily injury or death. So far as claims in respect of damage are concerned, any breach of condition by a policy holder will effectively prevent a third party from claiming from the insurance company.”

“137. Any person having a claim against a person insured in respect of any liability in regard to which policy of insurance has been issued for the purpose of this part shall be entitled in his own name to recover directly from the insurer any amount not exceeding the amount covered by the policy for which the person insured is liable to the said person having claim.”

In construing these provisions, the Supreme Court held that from the wording of Section 135, the purpose of Part IX of the Act was to provide for compulsory third party insurance in respect of death or bodily injury only. It was settled that a policy giving insurance in respect of damages to property is not a policy issued for purposes of Part IX of the Act, and therefore no direct claim against an insurance company in respect of such damage could arise under Section 137 or otherwise. This was a clear illustration of the circumscription of the liability of the insurer as regards indemnification of third parties for the wrongs of the insured person.

3.3 Some Contentious Matters Arising Under Indemnity Insurance Claims

One of the main grounds for refusal to indemnify the assured by the insurers is the issue of insurable interest. Of course, to this respect, even the Insurance Act¹⁰¹ itself has provisions designed to prevent insurance being used as a means of gaming or wagering. Thus, failure to comply with the statutory requirements will render the policy void in some cases and illegal in others.¹⁰² However, there are instances when the common law will allow the question of insurable interest to be determined or required by policy. *“The question of whether the policy requires interest is essentially one of construction and there is nothing unlawful in paying on a policy*

¹⁰¹ Act No. 11 of 1997

¹⁰² www.insurancelink.com/policy/illegality. Site accessed on 1st November, 2008.

where no interest exists.”¹⁰³ In practice ,most policies do require proof of interest because of the very important principle of indemnity; that a contract of insurance should indemnify the assured in respect of loss suffered by him.From this ,it follows that it is a must for an assured to have some insurable interest at the time of the loss, otherwise there will be nothing to indemnify and the insurers do validly refuse to pay. Practically,the defence of lack of interest is frowned upon and is not often used by insurance companies.¹⁰⁴ In a nutshell,all contracts of insurance are construed as contracts of indemnity(thus requiring interest), except life insurance,insurance against accident or sickness of the insured himself and certain contingency policies as, for instance,those against rain. Such policies are usually, but not invariably,construed as cotracts to pay a lump sum when the event occurs,regardless of actual loss.For example,in the English case of **Theobald v Railway Passengers Assurance Company**¹⁰⁵,an accident policy to indemnify the assured against medical expenses and loss of earnings was held to be a contract of indemnity.Such principles of insurasnce are what sometimes do raise suspicions among non legal minds in the public parlance because such rules appear to be inconsistent on the face of it,unless one digs deep into insurance practice in order to appreciate them fully.

Another area of concern is the concept of negligence as encountered in insurance law.The common law appears to be that in the absence of contrary agreement,a policy will cover loss due to the negligence of the assured.One common example is a comprehensive motor policy which may cover damage to the insured person’s car,even if the insured drove the car negligently.Here one sees that negligence does not penalise the assured under his/her claim unless there is express provision to that effect in the particular policy.This too appears to be double standards;the same act may produce two different results depending on which insurance company one opted to take insurance cover with. Under one policy,a claim may succeed even if the assured negligently contributed to or indeedd wholly actuated their loss,while in another it will fail just because the insurer remembered to make use of an ‘express provision against negligence’.In the case of

¹⁰³ Lowe,R.Commercial Law.London:Sweet and Maxwell,1982.p347.

¹⁰⁴ Ibid

¹⁰⁵ [1854] 10 Ex 45

Harris v Poland¹⁰⁶, a lady who had insured the contents of her house against damage by fire hid some jewellery in the grate of her fire place to protect it against theft. Later that evening, she lit a fire forgetting that the jewellery was still there and it got damaged. It was held that the damage came within the risk covered by the policy and the insurer was liable. However, in the case of **Zambia State Insurance Corporation v Northern Breweries Ltd**¹⁰⁷, it was held that a policy expressly excluding liability for negligence is equally valid. In this case the policy provided that “it did not cover damage and/or liability caused by the willful act or wilful neglect of the insured”. Here, the defendant had taken a policy generally known as the ‘Boiler and Pressure Vessel Insurance Policy’ to indemnify the defendant in case of damage to the Boiler and other apparatus in the schedule of the policy and to other property of the insured. On evidence, it was found that the defendant’s employee, an electrician, negligently caused the damage to the defendant’s property. The court held that insurance companies are not there to cover negligent acts. Chirwa, J.S. said:

“Insurance policies covering mobile chattels such as ships or motor vehicles do anticipate a negligent operation of chattels. It is doubtful with static chattels such as boilers. In our present case, there was a wilful act ...the trial judge misdirected himself in holding that insurance companies are there to cover such acts...”

This kind of judgment simply affirms the view that in insurance business, where a policy makes a particular term a condition precedent to the insured’s right to recover, it is for the insurer to prove that the insured has not complied with that term.¹⁰⁸ The notion that the cause of some damage is immaterial unless it was the deliberate act of the insured himself or someone acting with his knowledge or his consent (that is his agent), is not so plain or clear in practice as a legal mind may imagine it. A lot of difficulties are met by the insured; sometimes, their claims are unjustly forfeited. Deliberateness, it should be noted, is not so easy to establish and/or to distinguish it from negligence. Most insured persons have expressed difficulties in trying to draw a distinction between what would be deemed to be negligence and what constitutes wilful acts. It all boils

¹⁰⁶ [1941] All ER 204

¹⁰⁷ [2000] ZR 42

¹⁰⁸ Bond Air Services v Hill [1955] 2 QB 417 at 418

down to the interpretation of the construction of the particular insurance policy taken by an assured.

3.4. Conclusion

What this Chapter has revealed is that third party insurance contracts have their own unique rules when it comes to recovery of claims. Compulsory third party insurance as provided under the Road Traffic Act provides some form of compensation to third parties who suffer tortious damage. It has also been seen in this Chapter that the doctrine of privity of contract does not apply to the injured third parties. Although, it has also been seen that the whole concept of third party compensation does get affected by an insured person's commission of some statutory strict liability offences. All in all, it has been established that all the above stated observations may not affect a third party insurance claim because the assured has to be indemnified to the extent of the loss he/she suffers when held liable to compensate someone he/she has injured due to negligence.

CHAPTER 4: CRITICAL ANALYSIS OF THE ACTUAL NEXUS BETWEEN CRIMINAL LIABILITY AND INSURANCE CLAIMS

4.1. Analysis of the Rationale for Severing 'Intentional' from 'Unintentional' Criminal Offences when Considering an Insurance Claim.

Having looked at the means and ways which may impact negatively upon an insurance claim, it is considered prudent at this juncture to critically analyse what actually prevails on the ground as regards claims where an insured person is in one way or the other criminally culpable either under the Penal Code or under any other legislation incriminating some wrongful acts. The initial point, of course, is that it is certainly a general policy of the courts to declare contracts with a tendency to lead to crime, immorality or other effects prejudicial to the affairs of the public as void on grounds of public policy. The principle '*ex turpi causa non actio*' (no action can arise from a wrongful cause) is under scrutiny here: The underlying factor being that in some of the cases cited in the previous chapters, it has been seen that sometimes an insured person who commits a crime or other wrongful conduct is allowed to successfully claim indemnity to cushion their own wrongful conduct. However, there are occasions also when such persons have been held to have no claim at all if their criminal conduct was willful. Hence, the other matter to be considered here is what amounts to willful acts of an insured person or that of his agent, and how culpability for such willful wrongs negates a claim under an insurance policy.

Thus, to start with, the rule that insurance cover should not extend to loss or damage deliberately caused by the insured in word clearly contrasts with the general presumption that cover does extend to loss caused by the negligence of the insured.¹⁰⁹ What any legal mind may be prompted to analyse here is why a negligent person should not be culpable in insurance law for their wrongs; more so, if their wrongful act (negligence) amounts to crime. Another question that may be asked is why such crime seems to attain special status in insurance law, if at all it does. A number of cases have since established that the insured who intentionally and without lawful

¹⁰⁹ Malila, M. Commercial Law in Zambia: Cases and Materials. Lusaka: UNZA Press, 2006. p.510.

justification brings about the event insured against, he will not generally be allowed to recover. For instance, in **Geinsmar v Sun Alliance and London Insurance Company**¹¹⁰, the insured smuggled certain jewellery into Britain without declaring them and paying the requisite taxes as prescribed by the law, rendering the goods liable to forfeiture if discovered. The owner insured them together with some other goods with the defendant insurers. The goods were stolen and he claimed indemnity for them. It was held that the insured could not recover in respect of the jewellery, as to allow recovery in those circumstances would enable the insured to benefit from his deliberate criminal act, even though the profit was sought indirectly under the policy of insurance. Another example could be that of **Beresford v Royal Insurance**¹¹¹, where the deceased had insured his life but he shot himself with a view to benefiting his personal representative. At the time he shot himself, he was sane, and his act amounted to the crime of suicide then. When his personal representative sought to claim under the policy, it was held that he could not recover because public policy prohibited a person to benefit from his criminal acts. McMillan, L.J said:

“I feel the force of the view that to increase the estate which a criminal leaves behind himself is to benefit him...And no criminal can be allowed to benefit in any way by his crime ...His executor or administrator claims as his personal representative, and ,as his representative, fails under the same ban.”

In **Gray v Barr**¹¹², the insured who had planned to frighten someone having an affair with his wife ended up killing this person after the two were involved in a scuffle. When the deceased's wife brought an action in tort against the insured, the latter joined the insurer, claiming that they were liable to indemnify him under the policy he had taken which provided that he would be indemnified if the loss was 'caused by accident'. The court held that firstly, he was in fact guilty of manslaughter, and secondly, that public policy required that he could not recover from his insurers the damages he was liable to pay to the claimant in tort. It was observed in this case that

¹¹⁰ [1977] 2 Lloyd's Rep. 62

¹¹¹ [1938] A.C. 586

¹¹² [1970] 2 KB 554

the carrying of a loaded gun and threatening violence with it was a willful and culpable act, thus negating the insured's claim for accident.

The principle against recovery for willful misconduct seems to be confined to the misconduct of the insured or his agent. Other insured persons with separate interest in the same subject matter may recover to the extent of their interest unless their interest is 'so inseparably connected with that of the wrongdoer that his loss or gain necessarily affects all of them'¹¹³. However, cases of third party insurance seem to receive peculiar considerations. They appear to have unique status under insurance law. An insured who deliberately commits a wrong against a third party for which the insured is liable for damages in tort would generally not be covered by the insured's liability insurance. There appears to be a conflict in public policy considerations here: While the deliberate wrongful act of an insured person has to be discouraged, insurance law purports not to deny a third party victim from receiving damages resulting from an insured person's willful wrongful act. There is a conflict here because the assured is not per se penalized for his wrongful conduct. Infact, he or she would go ahead deliberately committing a wrong which he/she knows before hand will be compensated under an insurance policy. He knows he will be indemnified because he has already taken a policy to that effect. For example, in **Tinline v White Cross Insurance Association**¹¹⁴, the assured took out a third party cover in respect of death or injury arising out of the use of his motor vehicle. Whilst driving at an excessive speed, which act was illegal, the assured was involved in an accident which resulted in the death of a pedestrian. He was prosecuted and convicted of manslaughter. A question arose as to whether the insurers were liable to indemnify the insured against the damages he was liable to pay in tort. It was held that the insurers were liable to indemnify the assured in spite of the fact that the insured was in essence benefiting from his criminal action. In the case of **James v British General Insurance Co**¹¹⁵, the insured took out a similar policy to that of **Tinline**, and while in a state of intoxication, the assured so negligently drove his car as to cause an accident in which a pedestrian was killed.

¹¹³ [http:// www.iais.com/public_policy/ third party claims](http://www.iais.com/public_policy/third_party_claims). Site accessed on 23rd September, 2008.

¹¹⁴ [1921] 3 KB 327

¹¹⁵ [1927] 1 KB 311

The insured was equally convicted of manslaughter. As regards indemnity, the court held that the insurer was nonetheless obliged to indemnify the assured for liability in tort to the third party.

On the other hand, in **Haseldine v Hosken**¹¹⁶, an action for indemnity failed on the ground that the assured was guilty of a crime. In this case, a solicitor had a professional indemnity policy. He suffered loss by entering onto a chapeitous agreement and sought to enforce his professional indemnity policy. He pleaded that he did not know that he was committing the common law misdemeanour at the time of the agreement. Here, it was held that he could not recover. Scrutton, L.J. said:

"It is clearly contrary to public policy to insure against the commission of an act, knowing what act is being committed, which is a crime, although the person committing it may not at the time know it to be so."

These cases simply illustrate the fact that at times, the insured's criminal culpability will prevent him from recovering indemnity while in others he will still be indemnified. In either case, the conclusion depends on public policy, which seems not to be rigid. It applies only dependent upon the particular circumstances of the case. It purports to protect third parties whether the insured's conduct is wrongful or not. But, if the policy is not one involving third parties, the insured is most likely not to recover.

Despite the above observations as regards the link between criminal culpability and insurance claims, it is vital to remind ourselves of the concept of illegality and its consequences in insurance law. This is necessary because in certain situations, an insurance contract may be void for illegality.¹¹⁷ An insurance contract may be illegal and therefore void for one of the following reasons:

"(a) That it was entered into in order to achieve a purpose which is illegal and contrary to public policy. For example, a contract entered into with an insurer who has no insurance license issued under the Insurance Act would be illegal."

¹¹⁶ [1933] 1 KB 822

¹¹⁷ Malila, M. Commercial Law in Zambia. Lusaka: UNZA Press, 2006.p.538.

(b) *Where property is used unlawfully, for example, where the property insured is used for an unlawful purpose.*"¹¹⁸

The basis of these reasons is that the law will not admit the validity of an insurance contract which assists or encourages the insurers or assured in the commission of an unlawful act. Therefore, "if the interest of the assured is tainted with illegality, he cannot recover on his policy."¹¹⁹ However, one is here still faced with the question as to whether some criminal acts are unique such that allowing an indemnity contract on them is of no fault at all, as it was seen in the cases **Tinline v White Cross Insurance**¹²⁰ or that of **James v British General Insurance Co.**¹²¹: Or whether the so called public policy overrides the concept of criminal culpability or unlawful conduct of an insured person; or indeed whether these principles are actually in consonance. Nonetheless, one underlining principle seems to prevail in insurance practice. This is the principle that when considering a claim under a contract of insurance, a court will consider whether allowing the claim in respect of a particular event would be contrary to public policy, having regard to the nature of that event. The blanket principle is that no man should be allowed to profit at another's expense from his own criminal act. Thus, the murderer in **Re Crippens' Estate**¹²² as well as the felonious suicide in **Beresford v Royal Insurance Co. Ltd**¹²³, or indeed those claiming through them, have had their claims defeated on the grounds that it would be contrary to public policy to assist a personal representative to recover what were infact the fruits of the crime committed by the assured person. An analysis of this conception of the law reveals that the aim of this law is two fold: Firstly, it is to deter the intending criminal by ensuring that no one shall indemnify him against loss he may incur as a result of his crime (though this appears not to apply in practice to negligent motorists who commit crimes); secondly, it shows that the courts function is not to assist those who do commit deliberate crime to recover money to which they can lay claim only by proving the commission of that crime. Of course, the holding in **Tinline v White**

¹¹⁸ House of Manji v Liverpool Marine Insurance Co. Ltd. (Kenya). E.A.L.R. p.693.

¹¹⁹ MacGillvary on Insurance Law.5th ed.Vol.1 para.508.

¹²⁰ [1921] 3 KB 327

¹²¹ [1927] 1 KB 311

¹²² [1911] p.108.

¹²³ [1938] AC 586

Cross Insurance Association(ante), where a man was indemnified by an insurer even after he pleaded guilty to a charge of manslaughter arising from his wrongful conduct, seems to fly in the face of the above principles. Although it was stated in this case that if the occurrence had been due to intentional criminal act on the part of the assured, the policy would not have protected him. But a question to be asked here is ‘how does manslaughter become unintentional because there can be no manslaughter without a guilty mind (*mens rea*) as required by principles of criminal law, otherwise the accused ought to be acquitted’. Such a question arises because from Criminal law manslaughter is known not to be a strict liability offence. It is an offence where one can only be convicted upon proof of a guilty mind as well as a wrongful act as required by Section 199 of the Penal Code which provides that ‘any person who by unlawful act or omission causes the death of another person is guilty of a felony termed manslaughter, and that an unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm’.¹²⁴ However, third parties still seem to be accorded special status under indemnity insurance claims because it appears that to some extent the aspect of criminal liability is ignored when considering a claim provided that it is protecting the interest of third parties, not the insured himself. The case of **Gardner v Moore**¹²⁵, clearly illustrates this. It was held in this case that even a deliberate criminal act by the assured will not debar third parties from being indemnified by an insurer for an insured’s wrongs. It is seen here that even a deliberate criminal act by the insured does not debar an innocent third party from claiming from the insurers where, especially in motor vehicle insurance, that procedure is provided for. To some extent, this conception contradicts what was established in **Gray v Barr**¹²⁶ that the logical test where death occurs is:

“Whether the person seeking the indemnity was guilty of deliberate, intentional and unlawful violence or threats of violence; if he was, and death resulted therefrom, then, however unintended the final death of the victim may have been, the court should not entertain a claim for indemnity.”

¹²⁴ CAP 87 of the Laws of Zambia.

¹²⁵ [1984] A.C. 548

¹²⁶ [1970] 2 Q.B. 626

How, then, would one reconcile such an assertion with the holding of some insurers liable to indemnify an erring insured. A suitable approach would be to give third parties a special status so that even if the insured was criminal in conduct, which conduct he had 'insured' against, then he should be allowed to be indemnified by the insurer. This factor, though not spelt out as such in insurance law seems to be a plausible explanation for what may generally be referred to as public policy under the law of insurance.

4.2. Overview of the Application of the Concept of Public Policy in Common Law Jurisdictions.

"Public policy is that principle of the law which holds that no subject can unlawfully do that which has a tendency to be injurious to the public or against the public good."¹²⁷ One funny thing with the concept of public policy is that it is a rather vague and elastic term, and it may vary in conception with different judges.¹²⁸ The doctrine of public policy is only a branch of common law and, just like any other branch of common law, it is governed by precedents; "*the principles have been crystalised under different heads and though it is permissible for the court to expound them and apply them to different situations, the doctrine should only be invoked in clear and incontestable cases of harm to the public.*"¹²⁹ Though the heads under public policy are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of the society not to make any attempt to discover new heads of public policy in these days. As proposed by Cheshire and Fifoot, "the judges must expound, not expand, this particular branch of the law (i.e. public policy)."¹³⁰ This notion makes it difficult even for the judges in Zambia to be very innovative when it comes to matters of public policy; they would rather stick to the English principles of public policy than invent anything new to suit the Zambian situation. Thus, changing the conception of public policy under insurance law may seem not so appealing at the moment, but

¹²⁷ www.insurancelink.com/policy/public; site last visited on 28th October, 2008.

¹²⁸ Shukla, M.C. Mercantile Law. 13th edn. New Delhi: S. Chand and Co., 2004. p.55.

¹²⁹ Shukla, M.C. Mercantile Law. 13th edn. New Delhi: S. Chand and Co., 2004. p.56.

¹³⁰ Furmstone, H. Cheshire, Fifoot and Furmstone's Law of Contract. 10th edn. London: Butterworths, 1981. p.322.

the author of this paper hopes that some things could be revised in the near future so as to conform with the demands of changing times; such as the strict punishment of the increasing numbers of irresponsible motorists who, even with the guilty mind, hide under the umbrella of negligence to claim indemnity from the insurers.

4.3. Conclusion

What emanates from the above discussion is that a policy against liability for negligence is perfectly valid and enforceable. On the other hand, an insured cannot, on the ground of 'some' public policy, recover for the consequences of an intentional criminal act even though he was unaware that the act was in fact a crime.¹³¹ Some scholars submit that this principle is also applicable where the insured intentionally commits a tort.¹³² However, if the assured commits an act of criminal negligence (such as reckless driving) or a statutory offence (such as over speeding), this does not prevent him from recovering under an indemnity policy. Such crimes are not deemed to negate an insurance claim. They appear to be given a special status under insurance law and practice to the effect that they do not affect an indemnity claim by the assured. Therefore, a motor car owner has to insure against his damage to be caused to any third party in any way or face the temerity of his wrongful acts; he will be liable in damages to an injured third party for breach of the statutory duty to insure. He is mandated to take insurance so that a third party can be compensated by his policy whether his acts are criminal or not. The cases of **Tinline v White Cross Insurance Co** and **James v British General Insurance Co** clearly exemplify how this special status is espoused and upheld under the umbrella concept of public policy. It is cardinal to note also that both of these cases were greatly doubted by the British Court of Appeal in **Haseldine v Hosken** (explained above), but (fortunately or unfortunately, depending on any legal scholar's opinion about them) they have not been overruled; and in the case of **Gray v Barr** (supra), they were treated as good law. They have similarly been applied in the Zambian jurisdiction since the inception of English insurance law in Zambia. If these cases are wrong, or

¹³¹ *Haseldine v Hosken* [1933] 1 K.B. 822; *Hardy v Motor Insurers Bureau* [1964] 2 Q.B. 745.

¹³² MacGillvary and Parkington on Insurance Law, 7th edn. London, p.825.

were wrongly decided then many thousands or probably millions of indemnity claims have been wrongly paid out to insured persons who have also been found guilty of criminal conduct.

CHAPTER 5: CONCLUSIONS AND RECOMENDATIONS

5.1. Conclusions

As seen from Chapter 1 of this Paper, a contract of insurance is one in which one party, called the insurer, agrees in consideration of a single or periodical payment, called the premium, to accept a risk to which the assured is subject, and to compensate or indemnify the assured for or against any loss which may occur if the risk insured against happens. Under insurance practice, there is a practical difference between the terms insurance and assurance, although there is an increasing tendency to treat the two words as synonymous. Insurance implies that the contract is designed to indemnify the insured against unforeseeable loss or damage which may or may not occur, for example, damage to property by fire. A contract of assurance is one in which the assured or his representatives are to receive a sum of money on the occurrence of an event which is bound to happen at some time, although the time of happening is uncertain, for example, the death of the assured.¹³³ Some scholars call the former as Indemnity Insurance and the latter as Contingency insurance.¹³⁴

It was also seen that insurance is a contract upon speculation where the special facts upon which the contingent chance is to be computed lie generally in the knowledge of the assured only, so that good faith requires that he should not keep back anything which might influence the insurer in deciding whether to accept or reject the risk.¹³⁵ This is known as the principle of *uberrimae fidei*.

In a nutshell, the discussion in Chapter 2 of this paper has at least revealed that everyone runs the risk of becoming liable to pay damages to some other person as a result of committing a tort or any other wrongful act. Cover for such liability is frequently part of other types of insurance; for instance, insurance of houses, or motor vehicles, but the scope of third-party insurance is apparently much wider and can be separately insured against. This was discussed in depth under Chapter 3 of this paper. The object of such insurance is to be indemnified against legal liabilities,

¹³³ Keenan, D and Smith, K. Mercantile Law. 5th edn. London: Pitman Publishing Inc., 1982.P.378.

¹³⁴ Dobson P. Charlseworth's Businees Law. 16th ed. London: Sweet and Maxwell, 1997.p.581.

¹³⁵ Carter v Boehm, Hasson 32 MLR 615,Per Lord Mansfield, L.J.

and the legal liability must come within the categories of the particular policy. Insurance for such liabilities what is tautologically called 'Liability Insurance'.

It was as well seen in Chapters 3 and 4 that a policy covering liability for negligence is valid but an insured person cannot recover for an intentional criminal act, nor for a tort intentionally committed such as defamation. However, acts of criminal negligence, such as reckless driving, or the committing of statutory offences, such as over speeding, do not prevent the insured recovering under liability insurance.

And as regards Motor vehicle insurance, Chapter 3 candidly explained the fact that although a motorist will often take out a comprehensive policy covering a variety of risks, the Road Traffic Act 2002,¹³⁶ places a legal duty on the motorist to insure in respect of injury or death to third parties. Failure to take out this compulsory insurance is a criminal offence and both the owner and driver, where these are different persons, are liable to prosecution, and usually subject to imprisonment or a fine.

The paper further revealed that there can be no insurance contract to commit a crime, tort or a fraud on a Third- Party. It was infact emphasised that an agreement is illegal and void if its object, direct or indirect, is the commission of a crime or a tort. And so is a contract prejudicial to the public policy.¹³⁷

In addition, the paper has shown that logically, a third party insurance policy is essentially liability insurance, and an insured would have no claim against an insurance company unless he was liable to a third party victim. Which, to some extent, connotes that in most tort actions, the insurer is not worth suing unless they carry liability insurance.¹³⁸ It was also seen that the doctrine of privity of contract does not apply to insurance contracts. And that this is the reason why third parties have at times successfully sued the insured together with the insurer in a contract to which the law deems them to be a party.

¹³⁶ Part VII of the Act

¹³⁷ Cheshire and Fifoot, pp.319-329

¹³⁸ Atiyah. Accidents, Compensation and the Law. 3rd edn. London. Chs 9 and 10.

As explained in the third Chapter of this paper, a third- party is one who is a stranger to a transaction or proceeding.¹³⁹ A ‘third party risk policy’ is a policy of insurance against liability in respect of injury caused by the insured or his servants to the property or persons of others. Chapter 4 of this paper also revealed that a motorist who is insured against liability for damages payable to third parties injured as a result of his negligent driving, is entitled to an indemnity under the policy even though the negligence has been so gross as to amount to manslaughter. However, it was also observed that the right does avail him if the injury has been deliberately caused in cold blood.¹⁴⁰ Even in this case, nonetheless, the victim of the assault, if he receives no compensation from one who is guilty of the crime, has a right of recovery against the insurers in accordance with the compulsory insurance regulations laid down by the Road Traffic Act.¹⁴¹

It is also seen from all the precedent Chapters that the principle that no benefit can accrue to a criminal from his crime must certainly not be pushed too far. Nowadays, there are many statutory offences, some of them involving no great degree of turpitude, which rank as crimes, and several doubts still exist as to whether they are all indiscriminately affected by the rule of which **Beresford’s Case**¹⁴² is an example. In other words, it has been seen in this paper that not all forms of crimes do debar an insured person’s claim to an indemnity under an insurance policy. And that it is the concept of public policy that endeavours to draw a line between which crimes do forfeit an indemnity of the assured or his representatives and which ones do not depending on whether the crime is intentional or not. It was shown that judges are reluctant to develop new heads of public policy despite the fact that public policy itself is originally a product of the common law; and that the principles of Insurance law seem not to be developing in line with changing times in our society.

It was also observed in Chapter 4 that the development of the no-fault insurance to replace the tradition basis of liability in tort law in many areas jurisprudentially poses a problem of conflict.

¹³⁹ Bird, R. Osborne’s Concise Law Dictionary. London: Sweet and Maxwell, 1983.p.323.

¹⁴⁰ Furmstone, H. Cheshire, Fifoot and Furmstone’s law of Contract.10th ed. London: Butterworths, 1981.p.321.

¹⁴¹ Under Part VII of the Act.

¹⁴² [1938] AC 586

That on the one hand, it meets the need to compensate third party victims especially those who sustain catastrophic loss through some trivial fault, by protecting them against impecunious assured persons. On the other hand, in so far as it may reduce or abandon emphasis on wrongdoing, it could have a long term effect of not deterring wrong doers. Thus, severing the link between compensation for third party victims and the fault of insured persons is beneficial provided the inadmissible inference is not drawn that because compensation for victims is not dependent on fault, therefore fault is irrelevant. In any case, the fault of insured persons is as worth punishing as it is important to compensate victims of such wrongs.

5.2. Recommendations

Since public policy reflects the mores and fundamental assumptions of the Community, the content of the rules should vary from country to country, and from era to era. "Evolution of the concept of public policy is not a bad idea at all; after all, public policy has always evolved."¹⁴³ Some scholars argue that unlike the Physical Sciences where there is no interim stage between effect and no effect ('yes' and 'no'), in legal science the effects of disobeying a legal rule may be graded to suit the individual situation.¹⁴⁴ Therefore, it is recommended that parliament enacts laws clearly clarifying the effect of particular crimes or species of crimes on insurance claims, unlike just relying on the common law concept of public policy which may seem unclear in some instances due to changes in the Zambian society that are influencing implementation of insurance laws. Of course, this should be done in contemplation of the changing values of the Zambian society.

More controversy also surrounds the question of whether the courts still retain freedom to recognize new heads of public policy. It has been denied that any such freedom exists¹⁴⁵, and Lord Thankerton emphasised the point that the task of the Judge in this area was 'to expound and not to expand' the law.¹⁴⁶ It may be thought surprising however that in this of all areas, the courts

¹⁴³ Cf. *Cowan v Milbourn* [1867] LR Ex Ch 230 and *Bowman v Secular Society* [1917] AC 406.

¹⁴⁴ Cheshire, Fifoot and Furmstone's *Law of Contract*. 10th edn. London: Butterworths, 1981.p.318.

¹⁴⁵ *Geismar v Sun Alliance and London Insurance Ltd* [1977] 3 All ER 570 at 575

¹⁴⁶ *Fender v St. John Mildmay* [1937] 3 All ER 402 at 407

should abrogate their function of developing the law. It is recommended therefore that judges in Zambia should take a more positive approach in employing the concept of public policy. Times are changing and therefore revision of the law vis a vis public policy is not a bad idea. It is thus recommended that even under the concept of public policy, judges should hold that any kind of crime, no matter how it is committed, forfeits an insured person's claim for indemnity so that no person can hide under an insurance contract, for instance as negligent motorists does, to cushion their criminal culpability.

As regards third-party claims, the general rule of insurance practice is that only the insured can demand payment from the insurer on his contract, not the third party. It is hereby recommended that the current **Insurance Act** should be amended to include a provision expressly allowing third parties to claim compensation directly from the insurers of an assured who has caused injury or death even without enjoining the assured provided there is a policy of insurance to that effect. This provision can be enacted in the Insurance Act as an amendment to the statute. This would make insurance practice a more clear and straightforward business for the ordinary citizen. In line with this, the law should clearly provide that what compulsory third party insurance implies is that the insurer must pay a third party who has obtained judgment against the insured. And that therefore, this right of recovery belongs to the third person, not the assured.

It is further recommended that liability insurance should only cover damages in tort not to extend to crimes. Crimes should only be the subject of Penal laws. It is also recommended that Persons convicted of manslaughter should not recover indemnity. They are guilty of an intentional criminal act by virtue of the implied malice which comes along with their guilty mind (*mens rea*). Therefore, to deter would be offenders, persons guilty of such crimes should be severely punished; they should also be held to have no right under an indemnity insurance claim.

It is recommended that the Insurance Act should be amended so as to clearly state that strict liability criminal offences do not debar indemnity of the insured; and how all such offences are deemed to be non-intentional. To achieve this, the definition section of the Statute should clearly

define what intention means for purposes of insurance claims. This would fill in the gap that exists in the current law which seems to heavily rely on Judge made law for purposes of defining intentional or non-intentional criminal acts.

It is also recommended that even in the face of the current law some crimes such as manslaughter can upon proper interpretation by the judges be held to be a crime with intent so as to reduce the scope of unintentional crimes, and thus punish all those who breach the criminal law. The author of this paper is of the view that such measures would deter would be offenders and thus produce more responsible citizens than those who do not care about what happens to others provided that any of their wrong acts is insured against.

Finally, it is recommended that since the meaning of indemnity in the strict sense refers to a collateral contract or security to prevent a person from being damnified by an act or forbearance at the request of another, the term indemnity should, under Insurance law literature, only refer to the assured person's claim for some loss he/she suffers, and not to compensation paid to third parties.

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