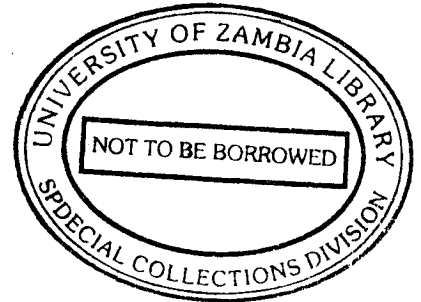


**A CRITICAL ANALYSIS OF PROVISIONS RELATING TO  
COMPULSORY THIRD PARTY INSURANCE UNDER PART VII  
OF THE ROAD TRAFFIC ACT NO. 11 OF 2002**

**BY**



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**A directed research essay submitted to the School of Law of  
the University of Zambia in partial fulfillment of the  
requirements for the award of the Degree of Bachelor of  
Laws (LL.B) programme.**

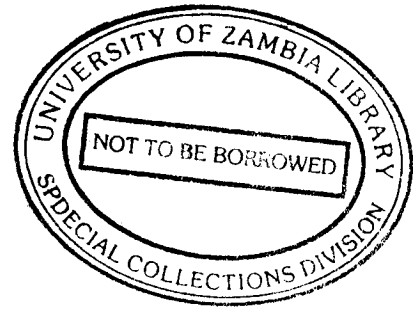
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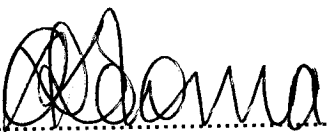
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Mrs. Nkoloma Chanda Tembo

## DEDICATION

I dedicate this obligatory essay to my son, Fumbani and my parents Mr. Henry Mwale and Mrs. Margaret Kabuka Mwale.

Fumba, you are the joy of my life and have been a great source of inspiration and hope in everything I do. May the Almighty God give you the strength and courage to reach the greatest levels of education in life.

Mum, your fondest and everlasting love, care and understanding that you have always shown to me have made me reach this far in my education endeavors and I am forever indebted. You are indeed the world's greatest mother!

Dad, although our paths may have crossed more times than many, I am still convinced in my heart that all you wanted to bring out of me was the best person I could ever be. I am deeply grateful for all the guidance and love that you have given me and cannot ask for more. I am now able to see what you have always wanted me to see, *a bright future!*

To my love, confidant and soul mate, Cecilia Sakala who stood by me in the most difficult times during the preparation of this work. Baby, thank you for all the support, encouragement and love that you have always given me and I remain forever indebted to you.

To my brothers and sisters, ba Jah, ba Roy, ba Edson, ba Andy, ba Sissy, Jessy, Chawezi and Tiyani, without your love and encouragement, I would never have had the strength to go on. Thank you all for who you are to me.

## ACKNOWLEDGEMENTS

I wish to express my gratitude and special thanks to my supervisor, **Mrs. Nkoloma Chanda Tembo** under whose guidance and tutelage this study was carried out, and for being so patient with me during my research.

I also wish to thank Mr. Tobias Milambo of Goldman Insurance Limited who patiently attended to my questions on a regular basis. My other acknowledgements go to Mr. Kelvin Chisongo of Zambia State Insurance Corporation and Mrs. P.S. Mwaba of the same company. In the same vein, I appreciate the assistance I was given by Mr. A.H. Kayumba of Madison Insurance and Zambia Police Service Traffic Officer, Mr. F. Siandenge.

My sincere gratitude goes to my colleagues and classmates Gibson, Kazimbe, Rose, Kaizala, Jennipher and Mr. Imasiku. Other acknowledgements go to my friends without whose assistance this research would not have been possible, Gerald, Sydney, General, Collins, Ernest and Mannix.

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## **INTRODUCTION**

It is estimated that over three quarters of a million people are killed and tens of millions are injured on the roads in low-income countries each year\* and Zambia is no exception. Many, if not most, will come from poor households particularly vulnerable to the risk of road trauma and its economic consequences. Therefore, while road safety is traditionally focused on prevention activities, fair and timely compensation systems will help bereaved families and injured victims recover from the shock of a road traffic accident. In this vein, the Zambian parliament has put in place prescriptive measures requiring motor vehicle and trailer owner to have a policy of insurance or a security in respect of third party risks.

Consequently, this paper gives a critical analysis of provisions relating to compulsory third party insurance under Part VII of the Road Traffic Act No. 11 of 2002. The paper is divided into four chapters.

Chapter One discusses the emergence and development of insurance law in Zambia. It goes further and discusses the nature of compulsory third party insurance and its legal implications under the Road Traffic Act No. 11 of 2002.

Chapter Two critically analyzes Part VII of the Road Traffic Act No. 11 of 2002 and discusses the adequacy and limitations of provisions relating to compulsory third party insurance.

Chapter Three looks at the extent to which compulsory third party insurance under the aforementioned Act is observed in Zambia.

Finally, Chapter Four gives the summary, recommendations and conclusion of the paper.

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\* Aeron-Thomas, A (2002) The Role of the Motor Insurance Industry in Preventing and Compensating Road Casualties, TRL, Crowthorne, UK prepared for DFID.

# CHAPTER ONE

## 1.0 Introduction

Over three quarters of a million people are killed and tens of millions injured on the roads in low income countries (hereinafter referred to as LICs) each year<sup>1</sup>, and Zambia is not an exception. Many if not most, will come from poor households particularly vulnerable to the risk of road trauma and its economic consequences<sup>2</sup>. While road safety is traditionally focused on prevention activities, fair and timely compensation systems will help bereaved families and injured victims recover from the shock of a road traffic accident. Road deaths are only the tip of road casualty 'iceberg'. Conservative estimates indicate that between 30-45 injuries occur annually for every road death<sup>3</sup>. Many involve permanent disability and due to their ongoing care and support requirements, will incur lifetime cost greater than that of a road death. The Harvard Magazine also reports that twenty million people around the world are injured or disabled each year by road traffic injuries<sup>4</sup>. These now rank ninth on the grisly list of leading causes of disability, but are projected to rise to third place by 2020 as the number of motor vehicles grows. Therefore, the search and desire for a system of road safety in Zambia makes imperative the need for the law to regulate road

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<sup>1</sup> Aeron-Thomas, A (2002) The Role of the Motor Insurance Industry in Preventing and Compensating Road Casualties, Scoping Study-TRL, UK prepared for DFID.

<sup>2</sup> Ibid

<sup>3</sup> G J et al (2000) Estimating Global Road Fatalities, TRL Report 445

<sup>4</sup> Harvard Magazine (2002) November-December Issue



traffic. With this in mind, one would logically assert that the want of road safety is an expression of the danger that exists on the roads to one's life and limb; traffic hazards that are usually manifested in road accidents could be regarded as the mischief which the legislature tries to put an end to in enacting the law on road traffic through the prescription of various instructive measures of road safety such as compulsory third party insurance under Part VII of the Road Traffic Act<sup>5</sup>(hereinafter referred to as the Act).The aforementioned Act regulates road traffic in Zambia.

At common law, losses lie where they fall, that is, on the party liable. In some cases the law may shift these losses from that party to a wider group or to a person more able to pay. The commonest and most efficient means of guarding the risk is by insuring against it. A contract of insurance is effectively a contract by which a person pays someone else, the insurer, to bear the risk.<sup>6</sup>An insurance contract may broadly be defined as an agreement in which a person called the insurer agrees for consideration called the 'premium' to pay a sum of money or to provide services for the benefit of another person called the insured on the occurrence of a specified event whose happening is uncertain.<sup>7</sup> Insurance in Zambia is governed by the Insurance Act No. 11 of 1997 which repealed the former Insurance Act<sup>8</sup>. The enactment of the Insurance Act No.11 of 1997 was

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<sup>5</sup> Act No 11 of 2002

<sup>6</sup> Malila, M(2006) Commercial Law in Zambia: Cases and Materials,449

<sup>7</sup> Ibid

<sup>8</sup> Chapter 392 of the Laws of Zambia

necessitated by the imperious need to strengthen control and regulation of the insurance industry following the deregulation of the insurance market in 1992. The common law no doubt continues to play a significant part in insurance as it does in other spheres of life.<sup>9</sup> In terms of road traffic insurance, part VII of the Act mandates every vehicle owner to have in force a policy of insurance in respect of third parties. The extent to which this part of the Act is observed remains to be ascertained.

Insurance compliance is a problem for many countries worldwide. However, several southern African countries collect third party insurance through a fuel levy and thus have been able to eliminate non-compliance. With eighty five percent of all road deaths worldwide estimated to occur in LICs where road safety culpability is just being developed, the scale of the human tragedy is unlikely to decrease in the foreseeable future. While the traditional focus of road safety interventions has been on prevention activities, that is, "prevention is better than cure", this has often led to a lack of, or at least a belated, consideration of those casualties not prevented. As the basic objective of insurance systems is to compensate for losses incurred, the motor and personal injury insurance sector has a potentially key role in ameliorating the consequences of those casualties and accidents not avoided. They will also have

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<sup>9</sup> Ibid

an economical interest in the outlays, via a reduced number of casualties and accidents.

### **1.1 The Emergence and Development of Insurance Law in Zambia**

The history of insurance in Zambia dates back to the era of colonial rule when Zambia was then known as Northern Rhodesia<sup>10</sup>. During that time there were a number of private insurance companies that carried out insurance business. These insurance companies were run by private individuals and were largely controlled from Salisbury, in Southern Rhodesia (now Zimbabwe). This meant that the rules and requirements regulating insurance practice were based on the various practices of the various countries of origin of particular insurance companies, especially those of England. In this regard the rules and practices of Lloyds of London were of utmost importance in guiding the satellite offices that were formed in Rhodesia. Insurance in Zambia remained a matter of private enterprise for many years before independence. After independence, however, in 1967 the Zambian government sought to acquire control over insurance business in the country. It was argued that the prevailing system whereby the insurance profits were externalized without due regard to the needs of the less privileged and without much concern for national development, was unsatisfactory. The then Zambian President, Dr Kenneth Kaunda, put the position thus:

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<sup>10</sup> Ibid

*...in order to avoid the possibility of the emergency of local  
over mighty commercial barons...insurance...would be  
under the local forms ownership, management and control...<sup>11</sup>*

This led the Zambian Parliament to pass the Insurance Companies (Cessation and Transfer of Business) Act<sup>12</sup> in 1970, whose main aim was to introduce a national insurance business solely carried out by the Zambia State Insurance Corporation (hereinafter referred to as ZSIC).

It was anticipated that by passing the Insurance Companies (Cessation and Transfer of Business) Act the service and facilities of insurance would reach every Zambian including the less privileged since there would be adequate and effective supervision as insurance 'would then be under the local forms ownership, management and control'. The formation of the state owned monopoly, ZSIC, was accompanied by a Presidential directive that twenty-six foreign-based insurers should transfer their assets to ZSIC. Up until 1992, ZSIC remained the only institution permitted under Zambian law to transact insurance business. In 1992, after the introduction of multi party politics, Zambia saw a change in economic policies shifting from a state controlled economy to a free

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<sup>11</sup> K.D. Kaunda *Humanism in Zambia*, Lusaka: Government Printers (1967) pp. 63-64, Quoted by Malila

<sup>12</sup> Then Chapter 711 of the Laws of Zambia. See Part III section 4(3) which provides that (after 31 December 1971) no person other than the corporation (ZSIC) shall carry on any insurance business, or enter into any contract of insurance in Zambia.

market economy which entailed that from then on ZSIC was no longer to be the only player in the insurance industry.

## **1.2 Nature of Compulsory Third Party Insurance (CTPI)**

Insurance, as stated earlier, is a contract in which the insurer agrees for consideration called "premium" to pay a sum of money or to provide services for the benefit of the insured on the occurrence of a specified event whose happening is uncertain. Insurance services are available for a wide range of areas and activities, including life, home and contents, and travel. In most cases, individuals freely choose whether to insure themselves, based on their personal circumstances and their own assessment of the risks they face. However, there are some types of insurance that are required by law. One of these is compulsory third party motor vehicle insurance. Compulsory Third Party Insurance (hereinafter referred to as CTPI) is a form of insurance which indemnifies vehicle owners and drivers who are legally liable for injury to any other road user in the event of a motor vehicle accident<sup>13</sup>.CTPI covers personal injury costs for people injured in motor vehicle accidents including drivers, passengers, and pedestrians. The Act has mandated third party motor vehicle insurance because a person likely to suffer harm in a motor accident is not necessarily the person who is in the best position to control the risk. CTPI

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<sup>13</sup> M Nakazwe Obligatory Essay titled Passenger Safety Under the Road Traffic Act, Cap 766:A Critical Analysis(1993)p 12

recognizes that motorists have a duty of care to other road users and compulsory insurance ensures that someone injured by the action of another in a motor vehicle will be able to be compensated. In addition, driving is a high risk activity; therefore, the Act seeks to ensure that the large number of people injured on our roads receive adequate compensation. This is particularly important given that the costs of claims are, on, average high.

The absence of mandatory insurance would mean that people injured in a motor accident would have to seek compensation through costly private legal action with the risk that they could be unsuccessful. The financial consequences for those involved would often be disastrous and could result in the injured party not receiving the medical care they need.

Compulsory insurance is also an effective way of ensuring that the personal injury cost resulting from road accidents is borne by motor vehicle owners rather than the community at large. The High Court in the case of ***Zambia State Insurance Corporation Limited V Musutu & African National Congress & Msangala***<sup>14</sup> held that a policy giving insurance in respect of damages to property is not a policy issued for the purposes of Part VII of the Roads and Road Traffic Act<sup>15</sup> and therefore no direct claim against an insurance company in respect of such damage can arise under section 137 or otherwise. This section is

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<sup>14</sup>(1993-1994)ZR 133

<sup>15</sup> Repealed cap 766 of the Laws of Zambia

verbatim with section 90 of the current Road Traffic Act.<sup>16</sup> Therefore, it should be noted that CTPI only covers death and bodily injury and not damage to property.

Some jurisdictions such as the state of Queensland of Australia operate a common law 'fault' based compulsory third party scheme. The scheme provides motor vehicle owners with an insurance policy that covers their unlimited liability for personal injury caused by incidents to which the Motor Accident Insurance Act 1994(of Queensland) applies. For the injured party it (Motor Accident Insurance Act ) provides access to common law ,that is ,the injured person has a right to approach a law court to seek monetary compensation from the person "at fault" for the personal injury and other related losses. As a fault based scheme, it requires proof of liability, that is, the injured party must be able to establish negligence against an owner or driver of a motor vehicle. This insurance scheme compensates accident victims with personal injuries involving a registered motor vehicle. This is so because the compulsory third party premium in Queensland is included in the registration payment.

In Zambia, what seems to apply is a 'no fault' system or strict liability. This can be seen from the wording of section 91 of the Act which provides, as far as material, thus:

*Any condition in a policy given under this part providing that, in*

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<sup>16</sup> Supra note 5

*the event of some specified thing being done or omitted to be done no liability shall arise under the contract ,or that in such event any liability so arising shall cease, shall be of no effect in connection with any claim in respect of which the policy holder is required to be insured by virtue of the provisions of this part*

Similarly, section 92 reinforces the provisions of section 91 with respect to public service transport. This section provides thus:

*Any contract for the conveyance of a passenger in a public service vehicle, so far as it purports to negate or to restrict the liability of any person in respect of any claim made which may be made against that person in respect of the death of, or bodily injury to the passengers while being carried in, entering, or alighting from the vehicle, or purports to impose any condition with respect to the enforcement if such liability shall be void.*

Clearly, it can be seen from the sections above that the vehicle owner or the driver's liability to victims in the event of a road traffic accident is unlimited. Therefore, the victims are entitled to compensation regardless of their faulty conduct.



## **1.3 Legal Implications of Compulsory Third Party Insurance Under the Act**

Compulsory third party insurance under the Act has quite a number of legal implications such as the following;

### **1.3.1 Policy of Insurance**

Insurance compliance is a major problem in LICs. In 2002, Zambia was reported to have 15 per cent compliance.<sup>17</sup> In effect this meant that 85 per cent of motor vehicle owners did not have in place a policy of insurance in respect of third party risks. Typically, insurance compliance in LICs varies from 5 to 80 per cent<sup>18</sup>. This means that many vehicles that are involved in road traffic accidents are not insured and consequently the victims and their families rarely receive compensation for injury and loss. Every vehicle owner has to have in force a policy of insurance in respect of third party risks without which any use of a motor vehicle or trailer would be an offence according to section 86(1) and (2) of the Act. Such a policy has to be issued by an insurance company registered by the Registrar of Pensions and Insurance appointed under the Pensions Scheme Regulation Act<sup>19</sup>. Alternatively a person has to have a security in respect of third party risks in compliance with Part VII of the Act. This security must consist of an

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<sup>17</sup> Ibid

<sup>18</sup> Ibid

<sup>19</sup> No 26 of 1996

undertaking by the giver of such security to make good, subject to any condition specified in the security, and up to an amount approved by the Road Transport and Safety Agency (hereinafter referred to as RTSA), any failure by the owner of the motor vehicle or trailer or such other persons or classes of persons as may be specified in the security duly to discharge any such liability as is required to be covered by a policy of insurance under section 88 of the Act which may be incurred by such owner or persons. This means that the security giver is obliged to bear the liabilities of the vehicle owner to the victim as does the insurer under section 88 of the Act. In fact, according to section 86 (3) of the Act, it is mandatory for all Government motor vehicles to have a policy of insurance of such a security in respect of third party risks as the Minister of Transport and Telecommunications, in consultation with RTSA, may prescribe.

### **1.3.2 Payment of Premium**

In Zambia, premiums are paid by the insured directly to the insurer. According to Zambia State Insurance Corporation (ZSIC) Manager-Aviation, Motor and Marine Insurance, Mrs. P.S. Mwaba, motorists usually pay premiums quarterly, that is, every three months which most of them consider to be economical<sup>20</sup>. However, she pointed out that it is advisable to buy premium for twelve months. If, for example, the period for which the premium was paid expires and there is no

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<sup>20</sup> Interview conducted with Mrs Mwaba at Premium House, ZSIC offices on May 12, 2006.

renewal, then the vehicle owner will be committing an offence if he continues using the motor vehicle. In some countries such as South Africa, however, insurance premiums are paid indirectly through a charge related to road use, that is, by way of a levy added to the price of fuel. This has made non-compliance with mandatory third party insurance virtually impossible. The Road Accident Fund of South Africa, which provides third party insurance for personal injury, collects its fees by adding a levy to the price of fuel<sup>21</sup>. In countries such as UK, British Columbia and Sweden a 'bonus malus' system is employed. According to Wikipedia<sup>22</sup> "bonus" usually is a discount in the premium which is given on the renewal of the policy if no claim is made in the previous year and "malus" is an increase in the premium if there is a claim in the previous year. In other words, a bonus malus system refers to the use of premium discounts for claim-free driving and surcharges for accident involvement.<sup>23</sup> However, no-claims discounts are easier to justify as a marketing tool rather than as an effective safety intervention. In fact, it is submitted that no-claims discount encourage non-reporting of claims, especially minor claims rather than safer driving.

### **1.3.3 Compensation**

Compliance with insurance does not necessarily mean that those entitled to benefits as a result of a road traffic accident receive compensation. Mrs Mwaba

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<sup>21</sup> Ibid

<sup>22</sup> <http://en.wikipedia.org/wiki/Bonus-Malus>

<sup>23</sup> Supra note 1

of ZSIC<sup>24</sup>, however, noted that the number of people claiming compensation, whom she dubbed 'ambulance chasers' was overwhelming. According to section 90 of the Act, the victim of a road traffic accident is entitled to use the insured's name to recover directly from the insurer. This is known as subrogation. Subrogation in insurance law refers to the right of one person to stand in the place of another in order to avail himself of that other's rights and remedies.<sup>25</sup> In the American case of **Anold v. Green**<sup>26</sup>, subrogation was defined as 'the mode which equity adopts to compel the ultimate payment of a debt by one who in injustice, equity and good conscience ought to pay it'. It should be noted, however, that the rights of any person claiming directly against the insurer shall not be greater than the rights of the person insured against such insurer; this is according to section 90(1)(i) of the Act. On the other hand, if the insurer pays to the victim any amount more than what is due to the insured, then the insurer can claim the excess amount from the insured using the same principle of subrogation according to section 90(2) of the Act

However, in some countries, the victims' claims can be reduced if they are found to have contributed to the accident, or to its severity. In Botswana, the Road Accident Fund states that compensation will be reduced by 25 per cent if victims were not wearing seat belts.<sup>27</sup> In British Columbia, the Insurance Corporation of

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<sup>24</sup> Supra note 20

<sup>25</sup> Supra note 6, p 502

<sup>26</sup> 161 NY 566

<sup>27</sup> Supra note 1

British Columbia warn clients that settlements can be reduced if, firstly, the victim was not wearing a seat belt. Secondly, if the head restraint was not properly adjusted and finally if the two wheel rider/passenger was not wearing a safety helmet<sup>28</sup>.

In South Africa, there is unlimited liability except for certain categories of passengers which are limited to claiming up to (R25,000) against their own driver.<sup>29</sup>

Pain and suffering is not compensated for in some countries, while in others it is limited or only accessible through the court system. Sweden offers compensation payments for non-economic loss, that is, pain and suffering, only during the period of acute illness.<sup>30</sup> In Zambia, it is doubtful whether pain and suffering is included in the compensation or not since the Act only obligates the insurer to pay hospital expenses reasonably incurred in respect of bodily injury to any person who has received treatment in a hospital. From the foregoing, it is submitted that a road traffic accident victim can sue the driver in a law court under the common law tort of negligence. In such a situation, the victim has to discharge the burden of proof to the extent that the driver's negligence caused the accident as a result of which injury arose.

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<sup>28</sup> Ibid

<sup>29</sup> Ibid

<sup>30</sup> Ibid

## 1.4 Conclusion

Indeed, road traffic accidents almost always, unfortunately, affect people who are vulnerable and are less able to pay for their treatment and other expenses which may arise as a result of an accident. In an attempt to cure the mischief, the Zambian parliament through the enactment of the Road Traffic Act No.11 of 1997 has mandated all trailer and motor vehicle owners to have in force a policy of insurance in respect of third party risks known as compulsory third party insurance and is provided for under part VII of the aforementioned Act. This policy indemnifies vehicle owners who are legally liable to third parties and compensates the victim for the injury incurred in a road accident. It is important, however, to note that compulsory third party insurance only covers death or bodily injury and not damage to property, as evidenced by the High Court's decision in ***Zambia State Insurance Corporation Limited V Musutu & African National Congress & Msangala***<sup>31</sup>. The provisions of the Act entail that the vehicle owner maintains a policy of insurance with an insurance company registered by the Registrar of Pensions and Insurance who is appointed under the Pensions Scheme Regulation Act No 26 of 1996. Alternatively, a motor vehicle owner has to have a security in respect of third party risks in compliance with part VII of the Act. As regards insurance policies, the insured is at liberty to choose his/her insurer since the insurance industry has been liberalized following

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<sup>31</sup> Supra note 14

the introduction of multi party politics in 1992. Therefore, the insured is further at liberty to negotiate the intervals at which premium is to be paid. In consequence, a policy of insurance implies that the victim of a road traffic accident is entitled to compensation when death or bodily injury results. In fact, section 90 of the Act provides that the victim of a road accident is entitled to use the insured's name to recover directly from the insurer. However, section 90(!)(i) of the Act provides that the rights of any person claiming directly against the insurer shall not be greater than the rights of the person insured against such insurer. On the other hand, if the insurer pays to the victim any amount more than what is due to the insured, then the insurer can claim the excess amount from the insured, according to section 90(2) of the Act.

## **CHAPTER TWO**

### **2.0 Critical Analysis of Part VII of the Act**

Part VII of the Act provides for compulsory third party insurance which every vehicle and trailer owner needs to have before using his/her motor vehicle on the road. This chapter critically analyses the provisions under the aforementioned Part of the Act.

#### **2.1 Payment of premium**

As noted earlier in Chapter One, Part VII of the Act mandates every vehicle or trailer owner to have in force a policy of insurance or a security in respect of third party risks; this is found under section 86 of the aforementioned Part of the Act. Section 88 reinforces the provisions of section 86 by stating thus:

*86(1) In order to comply with the requirements of this*

*Part, a policy of insurance must be a policy which-*

*(a) is issued by an insurance company registered by the*

*Registrar for purposes of this Part...*



From the above provision, it is clear that the insured must have an insurance policy issued by an insurance company registered by the Registrar of Pensions and Insurance appointed under the Pension Scheme Regulation Act No 26 of 1996<sup>32</sup>. This means that since the insurance industry has been liberalized, the vehicle owner is at liberty to insure the vehicle or trailer with the insurer of his/her choice as there is freedom of contract. Under such a situation, the insured is further at liberty to negotiate the period within which the policy of insurance will be in force; that is, the period at the end of which the premium should to be paid. With this system in place, there is every likelihood that the period for which premium is paid may expire without the insured renewing it in time. For instance, it is common practice among motor vehicle owners, according to Mrs. P.S.Mwaba of ZSIC<sup>33</sup>, to buy premium for a period of three months, that is, quarterly. When this period elapses, the insured has to further 'buy' premium for the next period of three months. As a result, a vehicle may be involved in a road traffic accident at the time the insurance policy has expired. In such a situation, insurance non-compliance is highly probable and consequently, there is a risk that the victim may not be compensated when an accident occurs.

In South Africa, the Road Accident Fund, which provides third party insurance for personal injury, collects its fees (premium) by adding a levy to the price of fuel. This in effect makes payment compulsory since fuel is inevitably needed for

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<sup>32</sup> Section 88 (2) of the Act

<sup>33</sup> Interview conducted with Mrs. Mwaba on May 12, at Premium House, ZSIC offices, Lusaka. She is ZSIC Manager- Aviation, Marine and Motor Insurance

every vehicle to run. Premium is the consideration furnished by the insured for the risk run by the insured<sup>34</sup>. The same system also obtains in New Zealand where vehicle owners pay premium in form of a surcharge on gasoline tax rather than as periodic premiums of the conventional sort. As a result, non-compliance in these countries is virtually impossible. Therefore, this system is a possible solution to Zambia owing to the fact that every vehicle owner will have no choice but to pay premium through a fuel levy which, in effect, will make non-compliance very unlikely.

## **2.2 Penalty for Non-Compliance**

Section 86 (2) of the Act penalizes causing the use of a trailer or motor vehicle which is not insured against third party risks. The aforesaid section provides thus:

*82(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*

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<sup>34</sup> R. Lowe, Commercial Law (London, 1983)p364

*not exceeding twelve months, or to both.*

Looking at the emotional and economic implications which come with road traffic accidents, the penalties for non-compliance with Part VII of the Act are nothing but a mockery. This is because road traffic accidents sometimes cause irreparable damage to the victims, both physical and emotional. Therefore, the penalties imposed for non-compliance should reflect an exemplary element so that would-be violators of the law are deterred. Additionally, these penalties do not seem to effectively compel vehicle owners to comply with the provisions of the Act. According to Section 3 of the Fees and Fines Act,<sup>35</sup> a "fee unit" means one hundred and eighty kwacha (K180) and section 86(2) of the Act imposes, on first offenders, a fine not exceeding three thousand penalty units for violating the provisions of section 86(1). In monetary terms, this means that a person who is guilty of contravening section 86(1) of the Act is liable to pay K540, 000 as a fine or to imprisonment for a period not exceeding twelve months, or to both. Similarly, in case of a second or subsequent offence, a person found guilty of contravening section 86(1) is liable to a fine not exceeding seven thousand five hundred penalty units or to imprisonment for a period not exceeding twelve months, or to both. In monetary terms, the fine converts to K1, 350,000. However, the courts have the discretion to fine offenders amounts lower than those stipulated in the Act depending on the facts of each particular case.

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<sup>35</sup> Chapter 45 of the Laws of Zambia

Therefore, these penalties for non-compliance should be revised so that the current fines are replaced with substantial fines that may effectively compel vehicle owners to comply with the provisions of the Act.

Punishment is a corollary not of law but of lawbreaking.<sup>36</sup> The retributive theory of punishment holds that the justification of punishment is always to be found in the fact that a rule has been broken for the violation of which a certain penalty is specified, whether or not the offender incurs any moral guilt.<sup>37</sup> The offender, properly apprised in advance of the penalty, voluntarily assumes the risk of punishment, and when he or she receives comeuppance, he or she can have no complaint.<sup>38</sup> On the other hand, the utilitarian theory of punishment holds that punishment is never good in itself, but is (like bad-tasting medicine) justified when, and only when, it is a means to such future goods as correction (reform) of the offender, protection of society against other offences from the same offender, and deterrence of other would-be offenders. In the United States of America, penalties for not insuring one's vehicle vary by state but often involve a substantial fine, license and/or registration suspension or revocation, as well as possible jail sentence in some states<sup>39</sup> Usually the minimum required by law is third party insurance to protect third parties against the financial consequences of loss, damage or injury caused by a vehicle.

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<sup>36</sup> J. Fienberg, *Philosophy of Law* (California, 1986)p,588

<sup>37</sup> Ibid

<sup>38</sup> Ibid

<sup>39</sup> Faure, M, G *Economic Criteria for Compulsory Insurance in The Geneva Papers*, 2006, vol.31, No 1 pp 149-168

## 2.3 Limitations of Compulsory Third Party Insurance

Indeed the major argument in favour of compulsory liability insurance is the insolvency of the potential injurer whose insolvency may lead to under deterrence. Although, seemingly, this may be cured through making the purchase of insurance compulsory, there are equally a few limits and warnings with respect to the introduction of a duty to insure which are presented.

Firstly, one should be cognizant of the fact that with insurance there will always be the moral hazard problem.<sup>40</sup> The moral hazard problem is the risk that the presence of the contract of compulsory third party insurance will affect the behaviour of the insured, where, for instance coverage against a loss might increase the risk-taking behaviour of the insured. This means that if the risk of injuring road users is fully removed from the vehicle owner and shifted to the insurer, the former will have no incentive to take care which he would ordinarily take when there is the deterrent effect of having to pay compensation to the victim in case of an accident. Marc Pauly has, by the way, indicated that in fact this behavior of the potential injurer (insured) is not immoral but completely rational since he simply reacts to varying costs for his behavior.<sup>41</sup> In fact, the Act

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<sup>40</sup>Ibid

<sup>41</sup> Pauly, M, "The Economics of Moral Hazard: Comment" in American Economics Review, 1968, pp531-545

seems to limit the possibilities to expose the insured vehicle owner to risk by providing under section 90 that:

*90(1) any person having a claim against a person insured  
in respect of any liability in regard to which a policy  
of insurance has been issued for the purposes of this  
Part shall be entitled in that person's own name to  
recover directly from the insurer...*

Indeed, with compulsory third party insurance the duty to insure is often equal to the total amount of liability.<sup>42</sup> Hence, the total risk is shifted to the insurer, which means that the only instrument available for the insurer to cure the moral hazard problem is a monitoring of the insured. If this seems difficult or very costly, then compulsory third party insurance might indeed create problems. In any case, compulsory insurance does seem problematic if the moral hazard problem cannot be controlled adequately.<sup>43</sup> Fortunately, though, the Act seems to give the insurer the right of subrogation by providing that;

*...nothing in this section shall be taken to render void  
any provisions in a policy requiring the person insured  
to repay the insurer any sums which the later may have  
become liable to pay under the provisions of section*

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<sup>42</sup> Supra note 4

<sup>43</sup> Ibid

*ninety and which have been applied to the satisfaction  
of the claims of third parties.*<sup>44</sup>

This means that the insurer can take action for recovery of amounts paid to third parties when the accident is caused by the insured's drunkenness, malice or recklessness as the may be. In Spain, article 7 of the Law on Civil Liability and Motor Vehicle Insurance<sup>45</sup> establishes that the insurer, once compensation has been paid, can take action for recovery against the driver, the owner of the vehicle responsible and the insured if the damage caused was due to actual malice on the part of either of these, or to the driver being under the influence of alcohol, drugs or psychotropic substances.<sup>46</sup>

In line with the foregoing, it is true that the basic purpose of insurance is to protect the insured against catastrophic events which would otherwise spell financial disaster, rather than to save him (insured) harmless from the minor eventualities, particularly when these are in some measure consequences of his activities. Indeed if one goes as far as possible in the direction of the sanction against fault approach compatible with a reasonable degree of protection against catastrophe, what would seem to be called for would be some form of co-insurance or deductible amount in liability insurance. It is somewhat anomalous that liability insurance never provides for a deductible amount, so that the insured motorist is typically relieved of all burden of compensating other victims

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<sup>44</sup> Section 91(1) of the Act

<sup>45</sup> Additional provision No. 8 of Law 30/1995, 8 November (planning and Supervision of Private Insurance.

<sup>46</sup> Ibid

of his faulty behavior but must often bear the burden of a deductible if he is the innocent victim of an accident that is not demonstrably the result of another, so that he must look to his own collision insurance for compensation.<sup>47</sup> Ideally, the amount of the loss to be borne by the driver at fault should be fixed in relation to his income or wealth so as to represent a sacrifice commensurate with the degree of fault involved.

As an alternative to compulsory third party insurance, some writers have argued that first party insurance is more desirable.<sup>48</sup> A first party insurance is a system whereby the insurance coverage is provided and compensation is awarded directly by the insurer to the victim.<sup>49</sup> The underlying principle in a first party insurance is that the insurance undertaking-in principle-pays as soon as damage occurs, provided that it can be proven that the particular damage has been caused by the insured risk. Payment by the insurance undertaking occurs irrespective of the fact whether there is liability.<sup>50</sup> The argument in favour of first party insurance is that the transaction costs would be lower and that risk differentiation might be a lot easier. The reason is simply that with first party insurance the insurer covers directly the risk of damage with a particular victim. The idea is that it is therefore much easier for the insured to signal particular

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<sup>47</sup> Vickrey, W, Automobile Accidents, Tort Law, Externality, and Insurance: An Economist's Critique In Law and Contemporary Problems. Vol.33 1968, pp 464-487

<sup>48</sup> Ibid

<sup>49</sup> Ibid

<sup>50</sup> Ibid



circumstances, which may influence the risk to the insurer.<sup>51</sup> The problem with third party insurance is that the insurer is always insuring the risk that his insured (potential injurer) will harm a victim (third party) of which the properties are unknown en ante (beforehand) to the insurer. Moreover, under liability insurance there are a lot of uncertainties; for example how the court will interpret the specific liability of the insured. In the ideal world of first party insurance the insurer directly covers the victim, that is, the risk. He can, therefore, monitor directly the risk and in principle provide a much better risk differentiation.<sup>52</sup>

### **2.3.1 Claims Settlement Delays**

Although Part VII of the Act provides for compensation to be given to the victim of the accident, it does not spell out the procedure or time frame within which such compensation should be effected but only provides that the right to recover directly from the insurer shall terminate upon the expiration of three years from the date upon which the claimant's cause of action against the person insured arose<sup>53</sup>. Little wonder, therefore that some victims go for years without being compensated. Long delays in compensation payment can be discouraged by legislation which requires offers to be made within a fixed time period, backed up by penalties if the action is taken to court and the insurer is found liable.

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<sup>51</sup> Ibid

<sup>52</sup> Ibid

<sup>53</sup> Section 90 (1)(ii) of the Act

Consequently, Part VII of the Act should be amended in order to make it possible to develop rules of procedure in settling claims that will be much more conducive to rapid settlement, out of court and greater fairness than characterize the present procedure. In developing such a procedure, it is important to get rid of the fiction that the case is between individuals of equal resources and bargaining power, and recognize explicitly that the typical case is between an individual of limited means and a large insurance company with legal personality. The fact that the insurance company has legal personality means that it is treated in law as a person with legal rights and duties, capable of suing and being sued. Therefore, the two parties (the victim and the insurance company) are not at par and consequently the victim is at a disadvantage.

### **2.3.2 Contributory Negligence**

As equity would have it, 'He who comes to equity must come with clean hands'. Similarly, for the victim of the accident to justly benefit from the compensation provisions of Part VII of the Act, he should not have contributed to the accident's causation or to its severity. Unfortunately, the Act does not provide for the effect of contributory negligence on the part of the victim. However, the court in the case of ***Betty Kamanga V Konkola Copper Mines Plc***<sup>54</sup>, held that in case of contributory negligence, the damages recoverable by the plaintiff are to be

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<sup>54</sup> SCZ/5/2004

reduced "to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage. It should be noted, nonetheless, that the duty imposed on the insurer under the Act is that of strict liability and compensation does not necessarily take into account the claimant's faulty conduct. In other jurisdictions<sup>55</sup>, contributory negligence affects the amount of compensation to be given to the victim of a road traffic accident. In South Africa, the victim's claim can be reduced by the extent to which they were held responsible for the accident and Botswana's Road Accident Fund specifically states that a claim will be reduced by 25% if the claimant was not wearing a seat belt at the time of the accident.<sup>56</sup>In Russia, damages can be reduced, and even denied, depending on the extent of contributory negligence by the victim.<sup>57</sup>In fact, at common law, if the plaintiff's injuries have been caused partly by the negligence of the defendant and partly by his own negligence, then the plaintiff can recover nothing.<sup>58</sup> However, in many countries such as the United Kingdom and India civil claims can still be awarded when no charge has been laid. The Indian Supreme Court has recently ruled that motor vehicle owners must pay compensation to victims (and their families) on the basis that the accident occurred while the vehicle was in use.<sup>59</sup>In a recent landmark case in the United Kingdom, an insurance company accepted liability for a child who was seriously brain injured in a car accident. While the child had caused the accident,

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<sup>55</sup> Such as Botswana and British Columbia, see <http://www.grsproadsafety.org/?pageid=104>

<sup>56</sup> Ibid

<sup>57</sup> Ibid

<sup>58</sup> W.V.H.Rodgers,(1979) Winfield and Jolowicz on Tort. 11<sup>th</sup> Ed London: Sweet & Maxwell

<sup>59</sup> WHO-SEARO, 2001

it was the vehicle speed that was held responsible for the injury severity. Although the driver had not exceeded the speed limit, he had been warned about children playing in the area and previous accidents in the same area had only resulted in minor injuries due to reduced vehicle speeds.<sup>60</sup>

Similarly, in 1985 France reformed its system of civil responsibility and made drivers liable for non-driver injuries.<sup>61</sup> Known as the Badinter law (after the Minister of Justice), pedestrian victims were assumed to have the right to compensation, save for instances where they have committed an "unforgivable fault which is the exclusive cause of the accident"<sup>62</sup> However, no such restriction applies to victims under 14 or over 70 years age, as the driver will be held responsible except where suicide can be proved. These victims are described as being "super protected".<sup>63</sup> These restrictions do not apply in Zambia as far as compulsory third party insurance is concerned and all victims are treated the same.

A similar policy exists in the Netherlands where drivers are held fully liable with vulnerable road user victims (pedestrians and cyclists) under the age of 14 or older than 70 years. For all other vulnerable road user victims, the driver is

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<sup>60</sup> Aeron-Thomas, A (2002) The Role of Motor Insurance Industry in Preventing and Compensating Road Casualties. Scoping Study-TRL, Crowthorne, UK prepared for DFID

<sup>61</sup> *ibid*

<sup>62</sup> *Ibid*

<sup>63</sup> *Ibid*

assumed to be 50% liable with the other 50% dependent upon the guilt of the driver and the victim.<sup>64</sup>

With the high percentage of vulnerable road user involvement in road traffic accidents, driver liability with cyclists and pedestrians is an important consideration. In COMESA's (Common Market for Eastern and Southern Africa) Yellow Card compendium, nine of the eleven countries reported that fault had to be proven. Only Eritrea and Ethiopia (where motor vehicle insurance is not compulsory) allowed the victim to claim compensation without proving the motorist was at fault. However, Ethiopia has since updated its legislation and now requires fault to be shown<sup>65</sup>.

## **2.4 Are Provisions Under Part VII of the Act Adequate?**

Clearly, the aim of compulsory third party insurance, as a matter of public policy, is to protect the general public (third parties) against financial difficulties that may arise as a result of a road traffic accident which may be caused by an insolvent vehicle owner or driver. However, though the Act provides for compensation to be given to victims of road traffic accidents caused by insured motor vehicle drivers, it does not seem to concern itself with 'hit and run' victims or victims of accidents caused by uninsured motor vehicles. In Zimbabwe, victims of hit and run accidents are compensated from a fund financed by a levy on

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<sup>64</sup> Ibid

<sup>65</sup> Ibid

insurers.<sup>66</sup>In the United Kingdom, insurance companies also contribute to a fund which covers victims of uninsured drivers –although this is effectively a cost passed on those who do insure through higher premiums. Therefore, the Act needs to be amended so that adequate provision is made for compensation of hit and run victims. However, the more common problem is that hit and run victims often receive less than that received by other injured motorists.<sup>67</sup> In Swaziland, the compensation limit is actually lower for hit and run victims.<sup>68</sup>

In line with the foregoing, the Act does not adequately provide for compensation in that the procedure and time limit within which claims should be settled are not clearly stipulated. Therefore, there is need to provide for prompt and adequate compensation by amending Part VII of the Act and provide for guidelines as to how and when compensation should be effected.

Additionally, the fact that the Act provides for compulsory third party insurance does not necessarily mean that vehicle owners comply with this provision owing to the fact that the insured seemingly has some freedom to insure with the insurer of his/her choice. Therefore, non-compliance is very likely. To remedy

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<sup>66</sup> Supra note 23

<sup>67</sup> Ibid

<sup>68</sup> Ibid

this mischief, the Act should be amended to provide for compulsory payment of premiums through a levy on fuel prices.

## 2.5 **Conclusion**

In conclusion, Part VII of the Act needs serious attention through amendments in order to provide for important matters such as time limits for settlement of claims, payment of premium through a fuel levy so as to, inter alia, provide for hit and run victims. Alternatively, insurance premiums should be calculated not on the basis of expected damage compensation paid by the insurance company; instead they should reflect all expected accident costs within a damage category like transport accidents including those caused by uninsured motorists. In addition, in order to make the system effective, third party victims should also be held responsible for their faulty conduct by reducing their compensation based on their contribution to the accident. On the other hand, penalties for non-compliance with the provisions of Part VII of the Act are not sufficient enough to compel vehicle owners to comply with the Act. Therefore there is need to amend the Act in this direction.

## **CHAPTER THREE**

### **3.0 To what Extent is Compulsory Third Party Insurance under the Act observed in Zambia?**

This chapter looks at the extent to which compulsory third party insurance under the Road Traffic Act No. 11 of 2002 is observed in Zambia. The information given in this Chapter has been obtained through interviews with stakeholders in the insurance industry, namely the insurance companies and the police who are the enforcers of the law.

As earlier mentioned in the paper, compulsory third party insurance is a form of insurance which indemnifies vehicle owners and drivers who are legally liable for injury to any other road user in the event of a motor vehicle accident<sup>69</sup>. This type of insurance covers personal injury costs for people injured in motor vehicle accidents including passengers and pedestrians

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<sup>69</sup> M Nakazwe Obligatory Essay titled Passenger Safety Under the Road Traffic Act, Cap 766:A Critical Analysis (1993) p 12



It is commonplace that having a law in place is one thing and observing it is another. However, compulsory third party insurance under the Act is generally said to be observed by most vehicle owners. According to the Chief Business Development officer at Goldman Insurance, Mr. Tobias Milambo<sup>70</sup>, the extent of compliance with compulsory third party insurance by vehicle and trailer owners is very high since it is required by law and one cannot get an insurance license renewed without evidence of compulsory third party insurance. The price for this type of insurance is K350, 000 and K500, 000 for private and commercial cars respectively. Mr. Milambo was, however, quick to point out that there are instances when compulsory third party insurance is not complied with due to problems such as fake cover notes, corruption and lack of knowledge.

### **3.1 Fake Cover Notes**

In some cases, some motor vehicle owners connive with employees of some insurance companies and forge insurance cover notes. These cover notes are only exposed when an accident occurs and their authenticity is in question. And Zambia Police Service Traffic Officer, Mr. F. Siandenge<sup>71</sup> also cited fake cover notes as one way in which people evade compliance with the Act especially when a large fleet of vehicles from one company is involved. Mr. A. H. Kayumba of Madison Insurance Limited also stressed the issue of fake cover notes as being

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<sup>70</sup> Interview conducted on 20<sup>th</sup> November, 2006.

<sup>71</sup> Interview conducted Service Headquarters on 15<sup>th</sup> November, 2006.

rampant<sup>72</sup>. In line with fake cover notes, Mr. Kelvin Chisongo of Zambia State Insurance Corporation<sup>73</sup> (hereinafter referred to as ZSIC) stressed that sometimes motor vehicle owners connive with police officers and insurance brokers to backdate the cover notes when an accident occurs after the insurance policy has expired.

### **3.2 Corruption**

Most of the people interviewed, as cited in the preceding paragraph, also cited corruption as one other reason why people do not comply with compulsory third party insurance. Mr. Milambo of Goldman Insurance Limited alleged that due to corruption, some officers at the Road Transport and Safety Agency (hereinafter referred to as RTSA) do not request for insurance cover evidence when issuing vehicle licenses contrary to section 98(a) and (b) of the Act.

### **3.3 Lack of Knowledge**

Lack of knowledge of insurance requirements was also said to be another reason for non-compliance.

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<sup>72</sup> Interview conducted at Madison Insurance Headquarters on 21<sup>st</sup> November, 2006.

<sup>73</sup> Interview conducted at ZSIC offices, Premium House on 6<sup>th</sup> November, 2006.

### 3.4 Minimum Insurance Cover

Most, if not all, insurers seem to have misinterpreted the provisions of Section 88(1) of the Act. The section provides that;

*In order to comply with the requirements of this Part  
a policy of insurance must be a policy which-*

*(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 any one 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.*

When multiplied by k180 provided under section 3 of the Fees and Fines Act<sup>74</sup> as the equivalent of a "fee unit", (i) and (ii) above become K30006000 and

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<sup>74</sup> Cap 45 of the Laws of Zambia

K60003000 respectively. In practice, however, these amounts are taken to be K30.1 million and K60.1 million respectively. The aforementioned figures should be minimum cover, according to the Act, because of the phrase 'at least' that has been employed in the section. However most, if not all, insurers deem these figures as though they were maximum cover and not the minimum. They contend that K30.1 million is too much an amount of money to be minimum cover since they are also in business to make profit.<sup>75</sup>

Indeed, in all cases of statutory obscurity, it is a sound principle of construction that ambiguous words should not be interpreted to the detriment of the individual,<sup>76</sup>(in this case the third party victim). If an Act of parliament is so drawn as to make it really difficult to identify the intention of the legislatures and what facts come within it, the benefit of that obscurity should be given to that person<sup>77</sup>(victim). In line with the foregoing, however, it is difficult to deem the phrase 'at least' as being ambiguous or obscure. As Tidal, CJ once said in *Sussex Peerage case*,<sup>78</sup> the only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the parliament which passed them. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound these words in their natural and ordinary sense thereby applying the literal meaning of the words. The words

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<sup>75</sup> Supra note 1

<sup>76</sup> Allen, C K, Law in the Making, p. 487

<sup>77</sup> Per Humphrey J in *Binns v Wardale* [1946] KB 451 at 457

<sup>78</sup> [1844] 11 cl.&F.85, at 143

themselves alone do in such cases best declare the intention of the lawgiver. Therefore, it is clear from previous Chapters of this essay that the aim of parliament in providing for compulsory third party insurance under Part VII of the Act is to protect third party victims from the insolvent motor vehicle owner. In this regard, it is submitted that since the purpose of insurance is to indemnify the person covered in the insurance policy, the amounts stated in section 88(1) are justified although, strictly speaking, the person injured or killed in a road traffic accident cannot be restored back in his/her original position.

However, some insurance companies reiterated that although their liability under the Act is strict, it could not be limitless in the sense that the Act only states the minimum cover without stating the maximum. In fact Mr. Milambo observed that the section 88(1) (b) is ambiguous because insurers could not assume unlimited liability as they are in business to make profit. This attitude puts the third party victim at a disadvantage and it is therefore incumbent upon the Road Transport and Safety Agency, as the body mandated under the Act to promote road safety, to ensure that the provisions of Act are strictly complied with.

### **3.5 Right of Subrogation under Part VII of the Act**

As alluded to earlier in the paper, subrogation refers to the right of one person to stand in the place of another in order to avail himself of that other's rights and

remedies. Consequently, another area of concern under Part VII of the Act is section 90(2) which provides, as far material, that;

*...nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of the operation of this subsection shall be recovered by the insurer from that person.*

Clearly, the above provision entails the insurer's right of subrogation against the insured. Mr. Milambo intimated that the right of subrogation is difficult to pursue in a situation where the cover given is limited, that is, K30.1million. He stated that in practice, the insurer usually pays the amount for which they are liable (which is determined by medical doctors in case of injury) and then the victim is at liberty to sue the insured for the remainder. For example, since the maximum cover, according to insurers, is K30.1million for personal injuries and death per person, the insurer will only go up to K30.1 and the victim's family will have to claim the rest of the money from the insured if they are claiming more than K30.1 million. Clearly this practice is in contravention of section 88 (1) (b)(i) and (ii) of the Act. The reason cited for this practice is the financial instability of the insured which may make it difficult for the insurer to recover their money in the event that they pay more than K30.1million.

### **3.6 Hospital Bills**

Subsection (1) of section 93 of the Act mandates insurers to pay hospital expenses reasonably incurred in affording treatment of a person in respect of the death or bodily injury arising out of a road traffic accident. However, hospital authorities do not seem to activate their right to be paid the medical expenses by not demanding for them, according to Mr. Milambo who conceded that indeed they were under an obligation to pay these expenses. On the other hand, Mr. Chisongo of ZSIC observed that in most cases, victims are asked to foot the medical bill and later get a refund upon production of receipts. This view was also held by Madison Insurance Limited. However, this practice is not in accordance with the provisions of subsection (1) of section 93 of the Act.

Further, contrary to section 91(1) of the Act which imposes strict liability on the insurer, ZSIC seem to modify the provision by stating that certain acts or omissions on the part of the victim may result in under compensation, for example when the victim is found to be drunk at the time of the accident. Again, this practice is not in compliance with the provisions of subsection (1) of section 91 of the Act.

### **3.7 Conclusion**

In the final analysis, this Chapter has shown that, on paper, compulsory third party insurance compliance under the Act is very high, according to interviews that were conducted with various stakeholders, since motorists are required by law to have compulsory third party insurance. For instance, ZSIC, Madison Insurance Limited and Goldman Insurance rated compliance to be very high. This same view was held by Zambia Police Service Traffic Division. However, despite this high level of compliance, certain factors such as corruption, fake cover notes and lack of knowledge of insurance requirements by some motor vehicle owners play a negative role in as far as compulsory third party insurance compliance is concerned. Further, misinterpretation of the Act's provisions under Part VII seems to be another mischief committed by insurers in the implementation of compulsory third party insurance. For example, K30.1million is treated as the maximum cover instead of the minimum. Strictly speaking, the fact that motorists obtain compulsory third party insurance provided for under Part VII of the Act does not necessarily mean that all the provisions under this Part are complied with.

The next and final Chapter of this essay will outline the summary of the paper, recommendations and conclusions.



## **CHAPTER FOUR**

### **4.0 Summary**

The first chapter has outlined the emergence of insurance in Zambia and the nature of compulsory third party insurance in general. Compulsory third party insurance has been defined as a form of insurance which 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 the same chapter, the legal implications of compulsory third party insurance under Part VII of the road Traffic Act No. 11 of 2002 have been analyzed. This has been done by bringing out legal implications such as motorist's policy of insurance given by an insurance company registered by the Registrar of Pensions and Insurance appointed under the Pensions Scheme Regulation Act, payment of premium and compensation.

It has further been shown in Chapter One that compulsory third party insurance only covers liability for bodily injury and does not cover liability for damage to property.

Chapter Two gave a critical analysis of the provisions relating to compulsory third party insurance under Part VII of the Act. It was noted in this Chapter that owing

to the fact that the insured have the liberty to obtain a policy of insurance from an insurer of their choice, there was increased likelihood of non-compliance when it came to renewing the insurance policy. In the same Chapter, it was submitted that paying insurance premium through a fuel levy would make insurance non-compliance virtually impossible. It was further submitted in Chapter Two that penalty for non-compliance should reflect an exemplary element to deter would be violators of the law. This was done by making reference to the theories of punishment; namely, retributive and utilitarian theories of punishment.

The second Chapter also made an analysis of the limitations of compulsory third party insurance under Part VII of the Act such as the moral hazard problem which is the risk that the presence of the contract of compulsory third party insurance will affect the behaviour of the insured, where for instance, coverage against a loss might increase the risk-taking behaviour of the insured. In view of the foregoing, it was submitted in this Chapter that there should be some form of co-insurance whereby the insured motorist is obliged to pay a certain amount in proportion to his faulty conduct with regard to the accident.

First party insurance was also discussed in Chapter two as a system whereby insurance coverage is provided and compensation is given directly to the insured. It was argued that the reason was simply that with first party insurance, the

insurer covers directly the risk of damage with a particular victim. The idea is that it is therefore much easier for the insured to signal particular circumstances, which may influence the risk to the insurer.

Chapter three discussed the extent to which compulsory third party insurance under part VII of the Act is observed in Zambia. This was ascertained by holding personal interviews with stakeholders in the insurance industry namely, insurance companies, the Road Transport and Safety Agency and the Zambia Police Service. The general view amongst the stakeholders was that compliance with compulsory third party insurance was high. However, non-compliance was manifested in vices such as fake cover notes, corruption and lack of knowledge of insurance requirements. In this same chapter, it was noted that, in practice, insurance companies treat minimum insurance cover provided for under section 88(1) of the Act as a maximum cover. In essence, the phrase 'at least' that has been employed in the aforementioned section has not been construed in its literal sense thereby negating the Parliament's intention of protecting the general public at large.

The third chapter also discussed the insurer's right of subrogation which refers to the right of one person to stand in the place of another in order to avail himself of that other's rights and remedies. It was noted that insurance companies were reluctant to pay more than K30.1million to accident victims citing the insured's

financial incapacity to refund them as the inhibiting factor. Despite the justification by the insurers, this practice is clearly in blatant violation of section 88(1) of the Act.

In addition, the insurance companies are required under subsection (1) of section 93 of the Act to pay hospital expenses reasonably incurred in affording treatment of a person in respect of the death or bodily injury arising out of the road traffic accident. However, victims are asked to foot the medical bill and later get a refund upon production of receipts. This is particularly done by Zambia State Insurance Corporation. It was noted that this practice is in violation of subsection (1) of section 93 of the Act.

#### **4.1.0 Recommendations/Proposals**

##### **4.1.1 Shared Liability as an Incentive for Care**

Indeed, if one goes as far as possible in the direction of the sanction against fault approach compatible with a reasonable degree of protection against road traffic accidents, what would seem to be called for would be some form of co-insurance or deductible amount in liability insurance under the Act. It is somewhat anomalous that liability insurance in the Act never provides for a deductible amount, so that the insured motorist is typically relieved of all burden of compensating other victims of his faulty behavior because he looks to his

insurer for compensation. Ideally, the amount of the liability to be borne by the driver at fault should be fixed in relation to his income or wealth so as to represent a sacrifice commensurate with the degree of fault involved. At this point one can well call for the explicit adoption of a rule of relative or comparative negligence whereby the driver at fault bears a percentage of liability depending on his fault. Difficult as this may be to apply, otherwise there would be no incentive for motorists to take care with regard to other road users.

#### **4.1.2 Contributory Negligence**

On the other hand, as earlier mentioned in the paper, equity demands that "he who comes to equity must come with clean hands". Consequently, for road accident victims to justly benefit from compensation, it is only prudent that their conduct in relation to the accident is without fault. Therefore, the amount to be given to the victim as compensation should reflect the victim's blameworthiness in as far as the accident is concerned. This way road users will also be more careful when they are on the road.

#### **4.1.3 Insurers' Contribution to Road Safety**

Since the aim of compulsory third party insurance is to protect third parties from the insolvent motor vehicle owner or driver, it is imperative that 'hit and run'

victims and those of uninsured motor vehicles are compensated as much as those victims of insured motor vehicles. This could be achieved by adopting a scheme similar to the one obtaining in Zimbabwe and the United Kingdom whereby insurers are mandated by legislation to make a contribution to a fund from which all accident victims are compensated.

#### **4.1.4 Fuel Levy as Premiums**

Alternatively, government could devise a system such as the one employed in South Africa whereby insurance premiums are obtained through a fuel levy. This could be made possible by establishing a Fund (like the Road Accident Fund in South Africa), which will be charged with the responsibility of, inter alia, administering the collection of premiums from fuel dealers on behalf of the government and compensating road accident victims. Besides being a pool of fund from which accident victims are to be compensated, this system of placing a surcharge a fuel prices as premium would make non-compliance with third party insurance virtually impossible owing to the fact that corruption and fake cover notes will no longer exist.

#### **4.1.5 Claims Settlement**

Owing to the fact that the Act does not provide for the time frame within which compensation to accident victims should be effected, it is vitally important that the Act makes an express provision as to when this should be done. This will avoid unnecessary delays in as far as claims settlement is concerned. In addition, settlement guidelines should also be provided for. For instance, the Act should mandate insurance companies to give immediate interim or advance payments to cover expenses such as funeral costs and loss of earnings and consider whether part of the compensation should be paid by the defendant including scope for court confiscation of guilty driver's assets. This will effectively make motor vehicle owners and drivers more responsible towards other road users as liability will be apportioned between the insurer and the insured.

#### **4.1.6 Suspension/Revocation of License as Penalty**

Besides the current penalty fees for non compliance with compulsory third party insurance provided for under the Act, there is need to prescribe stiffer penalties considering the enormity of financial difficulties that arise as a result of road traffic accidents. Consequently, suspension or revocation of the driver's license would help promote good driving practice amongst vehicle owners and drivers.

In the final analysis, the list of recommendations is in no way exhaustive but simply illustrative of what could be done if the interests of the Zambian people at large are to be served

## **4.2 Conclusion**

Law is an important instrument of social change. It can only be an effective instrument of change when its interpretation and application serves the interests of the people who are the target of change.<sup>79</sup> This study has shown that although compliance with the provisions relating to compulsory third party insurance under Part VII of the Act is high, there is need to revisit these provisions in view of their inadequacy if the interests of the Zambian people are to be protected.

As earlier mentioned in the paper, while road safety is traditionally focused on prevention activities, fair and timely compensation systems will help bereaved families and injured victims recover from the shock of a road traffic accident. Clearly, the aim of compulsory third party insurance, as a matter of public policy, is to protect the general public (third parties) against financial difficulties that may arise as a result of a road traffic accident which may be caused by an insolvent vehicle owner or driver.

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<sup>79</sup> W. Friedman, Law in a Changing Society, p450



In line with the foregoing, one of the defects of Part VII of the Act is that it does not specify the time frame within which the insurer should compensate victims of road traffic accidents. This makes it difficult for poor third parties, who are mostly victims of road traffic accidents, to access quality health care in good time. Further, the Act does not provide for 'hit and run' victims or those of uninsured motor vehicles. In some countries such as Zimbabwe, victims of 'hit and run' accidents are compensated from a fund financed by a levy on insurers. In the United Kingdom, insurance companies also contribute to a fund which covers victims of uninsured drivers—although this is effectively a cost passed on those who do insure through higher premiums.

Furthermore, insurers treat the amount of K30.1 provided for under section 88(1) of the Act as being the maximum instead of the maximum. This tends to disadvantage the victims in view of the fact a determination as to how much will be paid to the victim is made by the medical doctors on behalf of the insurers.

Despite the fact that there is high compliance with compulsory third party insurance by motor vehicle owners, there is need to devise a system that will make non-compliance virtually impossible. This 'non compliance' usually manifests itself in vices such as corruption, fake cover notes and sometimes lack of knowledge especially when it comes to premium renewals. In some countries such as South Africa and Botswana, the problem of non-compliance has been

addressed by imposing a surcharge on fuel prices as premium for compulsory third party insurance.

On the part of the insured, there seems to be little or no incentives to take care with regard to other road users as liability is shifted from the insured to the insurer upon buying compulsory third party insurance. Consequently, there is need to put up measures to ensure that drivers and motor vehicle owners are legally bound to compensate the accident victim and not just through the courts by way of the victim's law suits for the common law tort of negligence.

## **BIBLIOGRAPHY**

### **BOOKS**

Aeron-Thomas, A (2002) The Role of the Motor Insurance Industry in Preventing and Compensating Road Casualties. Crowthorne; UK prepared for DFID.

Allen, C.K (1946) Law in the Making. Toronto: Oxford University Press

J, Feinberg. (1986) Philosophy of Law. California: Wadsworth Publishing Company.

K.D. Kaunda (1967) Humanism in Zambia. Lusaka; Government Printers

Malila, M (2006) COMMERCIAL LAW IN ZAMBIA: Cases and Materials. Lusaka; UNZA Press

R, Lowe (1983). Commercial Law. London: Sweet & Maxwell

W.V.H. Rodgers, (1979) Winfield and Jolowicz on Tort .11<sup>th</sup> Edition. London: Sweet & Maxwell.

### **REPORTS/ARTICLES**

Faure. M.G. Economic Criteria for Compulsory Insurance in The Geneva Papers, 2006, Vol. 31 No. 1

Harvard Magazine (2002) November-December Issue

Jacob, G et al (2000) Estimating Global Road Fatalities, TRL Report

Pauly, M. "The Economics of Moral Hazard: Comment" in American Economics Review, 1968, pp 531-545

Vickery, W. Automobile Accidents, Tort Law, Externality and Insurance: An Economist's Critique In Law and Contemporary Problems, 1968, Vol 33, pp 464-487

WHO-SEARO, 2001

### **THESES**

Nakazwe, M (1993) Passenger Safety Under the Roads and Road Traffic Act, Cap 766: A Critical Analysis. (LL.B Obligatory Essay)

## **STATUTES**

Fees and Fines Act, Cap 45 of the Laws of Zambia

Insurance Companies (Cessation and Transfer of Business) Act, Cap 705 of the Laws of Zambia (repealed)

Pensions Scheme Regulation Act No. 26 of 1996

Road Traffic Act No. 11 of 2002

Roads and Road Traffic Act, Cap 766 of the Laws of Zambia (repealed)

Spanish Law on Civil Liability and Motor Vehicle Insurance, Additional provision No. 8 of Law 30/1995

Zambia state Insurance Corporation Act, Cap 392 of the Laws of Zambia.

## **CASES**

Anold v Green 161 NY 566

Betty Kamanga v Konkola Copper Mines Plc SCZ/5/2004

Binns v Wardale [1946] KB 451

Zambia State Insurance Corporation Limited v Musutu & African National Congress & Msangala (1993-1994) ZR 133

## **INTERVIEWS**

Personal interview conducted with Mr. Tobias Milambo Of Goldman Insurance on 20<sup>th</sup> November 2006 at National Savings & Credit Bank of Zambia Building.

Personal interview conducted with Mr. F. Siandenge at Zambia Police Service Headquarters on 15<sup>th</sup> November 2006.

Personal interview conducted with Mr. Kelvin Chisongo at ZSIC offices, Premium House, on 6<sup>th</sup> November 2006.

Personal interview conducted with Mr. A.H Kayumba of Madison Insurance at Madison Insurance Headquarters on 21<sup>st</sup> November 2006.

Personal Interview with Mrs. P.S. Mwaba on 12<sup>th</sup> May 2006 at ZSIC offices, Premium House, Lusaka.

### **WEBSITES**

[www.grsproadsafety.org](http://www.grsproadsafety.org)

[www.wikipedia.org](http://www.wikipedia.org)