THE ZAMBIAN JURISPRUDENCE IN LIABILITY CASE
VIS-À-VIS INSURANCE LAW

BY

IAN MALILWE

21041971

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THE UNIVERSITY OF ZAMBIA

SCHOOL OF LAW

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IAN MALILWE

21041971

Being a final year dissertation submitted to the University of Zambia, School of Law, in partial fulfilment to the requirement for the award of the degree of Bachelor of Laws (LL.B.)

APRIL 2010
I recommend that this Directed Research essay prepared under my supervision by

IAN MALILWE
21041971

Entitled

THE ZAMBIAN JURISPRUDENC IN LIABILITY CASE VIS-À-VIS INSURANCE LAW

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Date 7th October 2010

Mrs. Chanda Nkholoma Tembo (Supervisor)

APRIL 2010
DECLARATION

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DEDICATION

To my wife Nchimunya, Hapenga, Baala, Hamweemba, Simuundu and Muuka for being my inspiration and motivation in my life.
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ABSTRACT

It is a fact of life that human behaviour and conduct needs to be controlled for the sake of a peaceful society. Law generally, is designed to do just that. This paper will therefore look at how the branch of law on tort helps maintain and promote peace. As the law of tort is very wide, this paper will limit its discussion to Motor Third Party Liability and Employer’s Liability. This is for the simple reason that it is the two branches of tort law which the Zambian population is more exposed to and which two branches, are quiet active in our court system. To further keep the discussion focused, the paper will predominately discuss mine accidents and the resultant liability court actions on one hand, and on the other, the commercial vehicles accidents, particularly those involving intercity passenger buses, and the liability court actions that follow.

From the above discussion it is clear that one of aims of the law of torts is making the place we live in a better place, by dealing with those acts or deeds outside the province of Criminal and Penal laws. Liability Insurance’s aim is also to ensure that the place we live in is a better one by offering financial planning solutions to the public at large, so that, the policy will pick up the financial obligations, for those found to be legally liable to third parties. These financial plans buy the unforeseen negligent or fortuitous events, from the insuring public by pooling of small premiums commensurate with the risk one wants covered. From these pooled funds, the fortunate many, make it possible for the Insurance Company to settle the financial exposure of the unfortunate few, small or large, through this risk transferring arrangement.

Therefore we can say that, tort law deals with acts for which the tortfeasor is not liable for unless there are reasonably foreseeable and on the other hand insurance liability deals with reasonably foreseeable events but whose occurrence are uncertain or unknown. The common denominators are that they both deal with reasonable foreseeable accidents and both aim at ensuring a peaceful society for all.

This therefore means that both tort liability and liability insurance deal with negligence, in that one determines how it arises while the other offers solutions through which a tortfeasor can absorb oneself from financial obligations that come with legal liability arising
therefrom. The paper will then endeavour to see what impact Liability insurance has on the law of torts vis-a-vis its deterrence objective.

This paper is distinguished from Banda A. Ngoyi’s directed research paper, University of Zambia, 2009 whose gist was the connection or nexus between insurance law and criminality with the following objectives:

i) To find out how Insurance Companies in Zambia handle indemnity insurance contracts;

ii) To ascertain how an insured person’s criminal acts impact upon his claim in such contracts; and

iii) 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 claim under insurance policies.

This paper is not concerned about criminal acts but unforeseen or fortuitous events of a defendant which shocks the conscious of mankind for being reckless or outrageous or for failing far below the expected standards of duty of care. The objectives are therefore to find out how:

i) Zambian courts treat reckless or outrageous behaviour in so far as it defeats the aim of tort to maintain and promote peace in the society:

ii) To ascertain whether Zambian court’s award exemplary or punitive awards to deter these wrongdoers; and

iii) To investigate the impact of insurance liability settlement on tort liability damage awards and consequently how insurance liability settlements affect the deterrence aim of tort law.
LIST OF STATUTES

i) The Law Reform (Miscellaneous) provisions chapter 74, of the Laws of Zambia
iv) Mine Regulations 1921, 902 Mining Act.
v) Roads and Road Traffic Chapter 464 of Laws of Zambia.

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9. Glasgow Corp v Muir (1943) AC 448 at 457, (1942) 2 All ER 44. HL
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22. Quinlan v Liberty Bank Co, 575 So 2d 336, 339
24. Brown v Lumbermen’s Mutual Casualty Co, 390 Se 2d 150
25. British Transport Commission v Gourley (1956) AC 185 at 208, (1955) 3 all ER 796
27. Konkola Copper Mines Plc and Zambia State Insurance Corporation Ltd v. John Kapaya (as Administrator of the estate of the late Geoffrey Chibale and 8 others Administrators) SCZ No. 26 OF 2004 (unreported)
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34. Wilson v Tyneside Window Cleaning Co (1985) 2 Q.B. 110 at 121 – 122
35. Speed v Thomas Swift & Co (1943) K.B. at 557 at 563-564
36. Qualcast (Wolverhampton) Ltd v Hayes (1959) A.C. 743 at 760
37. Admiralty Comrs v SS Susquehanna (1926) AC 655 at 661, per Viscount Dunedin
41. Uren v John Fairfax (1996) 117 C.L.R. 118
42. Gray v Motor Accidents Commission (1998) 196 C.L.R. 1 they are of course, firmly and widely established in the United States
45. Sekani Mwelwa v Mopani Copper Mines 2004/HP/0658
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CHAPTER ONE

1.0 Introduction

Insurance is purchased to protect against losses, and one such major loss, especially in this litigious society, is legal liability. Legal liability is the liability of a party imposed by a court for the party's actions or, in some case, inaction, and for which the courts will award pecuniary damages as a form of redress. A legal wrong is either a violation of a person's rights or the failure to perform a legal duty towards a party.

1.1 Legal Liability Defined

Legal liability arises from three general classes of legal wrongs: crime, tort, and breach of contract. Crime is a wrong in which a person intentionally inflicts injury, or takes something from another, such as murder, robbery, rape, theft, and so on. Torts are legal or civil wrongs committed against people or organizations, causing them a loss. Intentional torts are willful acts or the wilful failure to act when required to do so, resulting in causing injury to someone else. Torts result either because the tortfeasor, who is the one who commits the tort, is either negligent in his duties which arises out of law and not contract, causing someone else a loss, or causes a loss through his actions. For example, causing an auto accident, or failure to make a safe product are torts.

Negligence is the failure to exercise the required amount of care to prevent injury to third parties. For example, if you cause an accident that injures a third party or damages their vehicle because you were driving at an unsafe speed, then you could be sued for negligence.

In some cases, the law imposes absolute liability (strict liability) on specific parties without regard to fault, and, therefore, obviates the need to prove fault in court. For
instance, manufacturers are held strictly liable for defective products that they manufacture or employers by the aid of *res ipsa loquitur* principle.

Legal liability, therefore, arises out of failure to observe a duty of care by one person to the other, for example, employers, manufacturers or indeed motor vehicles owners. What then is this duty of care? Negligence was defined by Pound as: “...going on a principle not of duty to answer for aggression but of duty to answer for injuries resulting from falling short of a legal standard of conduct governing affirmative courses of action.”

This position was espoused in the case of *Amanita Premier Oils Limited, Professional Insurance Corporation (Zambia) Limited v Coin Security (Zambia) Limited*, in which the court said, “since negligence connotes a duty of care, it is trite law that where there is a duty of care, reasonable care must be taken to avoid acts or omissions that can reasonably be seen.”

### 1.2 Historical Developments of Legal liabilities

The genesis of this principle can be traced to the old roman formula. One of the stock questions of the science of law is the nature and system and philosophical basis of situations in which one may exact from another that he “give or do or furnish something” (to use the Roman formula) for the advantage of the former. The classical Roman lawyer, thinking in terms of natural law, spoke of a bond or relation of right and law between them whereby the one might justly and legally exact and the other was bound in justice and law to perform. In modern times, thinking, whether he knows it or not, in terms of natural rights and by derivation of legal rights, the analytical jurist speaks of rights in *personam*, which means an interest protected solely against specific individuals... Pressed further, he may be willing to add “quasi tort” for cases of no fault,

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1. This is a Latin phrases meaning, the thing speaks for itself. This doctrine provides that, in some circumstances, the mere fact of an accident’s occurrence raises an inference of negligence so as to establish a prima facie case in tort-Bryan A. Garner, Black’s Law Dictionary 8th edition, West, a Thomson business 2004 at page 1336
“tort” because procedurally the liability is given effect ex delicto. Ex delicto means from a wrong. Therefore in summing up the above discussion, we can say that a person was held liable or accountable for the wrong he caused to a third person/party.

As this was not good enough for the injured party, then came the introduction of obligation in the 17th century, the Roman term meaning the relation of the parties to what the analytical jurists have called a right in personam... The phrase “right in personam” and its co-phrase “right in rem” are so misleading in their implications and are best left to the analytical jurisprudence. Pound for that reason decided to use the simple word “liability” for the situation whereby one may exact legally and the other is legally subjected to the exaction. This could be said was the genesis of the principle of liability.

Following from this, was then the first theory of liability which was in terms of a duty to buy off vengeance from him to whom an injury had been done whether by oneself or by something in one’s power...As the social interest is in peace, order and the general security of society, in its lowest terms. It becomes more secured effectively by regulation and ultimate putting down of the feud as a remedy, payment of compensation becomes a duty rather than a privilege, or in the case of injuries by persons or things in one’s power a duty alternative to duty of surrendering the offending child or animal. The next step is to measure the compensation not in terms of vengeance to be bought off but in terms of the injury. A final step is to put in terms of reparation... Thus recovery of a sum of money by way of penalty for a delicti is the historical starting point of compensation in tort liability.

It was from this start point that the Roman’s actions in personam and the theories of obligation first saw the recovery of a thing or a sum certain due upon a promise. Whereas, in juristic terms, the central idea of the beginnings of liability, was the duty to make compensation for or otherwise avert the consequences of the acts of vengeance.

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5 ibid
6 ibid
from any injured person, a God or a politically organized society. This lead to persons answering for injuries caused by oneself or done by those persons or things in one's power, and liability for certain promises made in solemn.

Thus the basis of liability has become twofold. It rests on the other hand upon duty to repair injury and on the other hand upon duty to carry out formal undertakings.

Therefore in conclusion Pound said, "for in our Law as it stands one may perceive readily three types of delictal liability: (i) Liability for intentional harm, (ii) liability for unintentional culpable harm, (iii) liability in certain cases for unintentional nonculpable harm. The first two, conform with the doctrine of no liability without fault. The third cannot be fitted thereto."\(^7\)

In reference to the French Civil Code which made the idea of Aquilian culpa into a general theory of delictal liability, saying, "every act of man which causes damage to another obliges him through whose fault it happened to make reparation."\(^8\) It must however be mentioned that the idea of culpable causation was dispensed with in the nineteenth century. It brought about judgment using the abstract standard of blameworthiness. This was contrary to preserving society from the threats to general security as opposed to the culpable exercise of one's will once he and his fellows act affirmatively without coming up to the standard imposed to maintain that security. If he acts, he must measure up to that standard at his peril of answering for injurious consequences. Therefore an injury or damage howsoever caused calls for reparation.

The cost of reparation or repairing damage or injury caused can be prohibitive and further where it is difficult to show how or where the defect developed from. The court was of the view that to render a judgment for the plaintiff it must find new ground of liability. In the court's opinion this proposed liability is put on two grounds: That those who suffer injury from defective products are unprepared to meet the consequences, and that leaving

\(^7\) ibid
\(^8\) ibid
the burden to rest where it falls is a needless misfortune to the person injured since “the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business”\textsuperscript{9}

1.3 Introduction to Liability Insurance

It can be contended that, that was the genesis of insurance theories in liabilities. Insurance has been described as, the fortunate many pay for the misfortunes of a few through the pooling of resources. What this means is that all those that buy the product or service pay/contribute a part of the insurance premium that the manufacturer or operator has paid for the insurance cover/policy. Therefore in the unlikely event of any one of those many customers being unfortunate, the remainder of the customers’ premium will go to the benefit of that or those few unfortunate customers. However it has been argued that why should the client or injured person be made to contribute towards his own reparation when the manufacturer can stand the loss better. A question was asked in Pounds book, if I am not to be my brother’s keeper but am to be his insurer, should not so radical a change in the social order come through legislation rather than through judicial decisions?\textsuperscript{10}

1.4 Liability Insurance Defined

Liability insurance is “any insurance protection which indemnifies liability to third persons”, as expounded in the case of Quinlan v. Liberty Bank Co\textsuperscript{11}, in which the court in construing Louisiana’s direct action statute, the Louisiana Supreme Court recognized a distinction between liability policies and policies of indemnity and held that a plaintiff seeking recovery for loss other than personal injury or corporeal (tangible) property damage cannot bring a direct action against an insurer where the insurance policy unambiguously expresses the parties’ intent that it is an indemnity policy. The policy thus provides cover against a consequent depletion of the insured’s assets. In Australia,

\textsuperscript{9} Roscoe Pound, page 101
\textsuperscript{10} Roscoe Pound, page 102
\textsuperscript{11} 575 So 2d 336,339 (La, 1990 – liability)
according to section 11(7) of the Insurance Contracts Act 1984, it is a contract of general insurance that provides cover in respect of the insured’s liability for loss or damage to another person. The scope and extent of cover is usually defined by the contract of insurance and hence limited to those terms and conditions.

The contract is a contract of indemnity and, in principle therefore, the insurance does not oblige the insurer to pay until the insured has suffered loss. This is as was expounded in the case of West Bake Price & Co v Ching, in the court said,

"the majority distinguished indemnity and liability insurance: "Under a liability policy (in the narrow sense) the insurer is required to make payment although the insured has not yet suffered loss, for by definition the purpose of the liability policy is to shield the insured from being required to make any payment on the claim for which he is liable... In this sense, many English policies are liability but not indemnity insurance; the latter would be instanced by contract with a pay when paid clause.”

Therefore when does this liability attach? There are three views: one is that it does not attach until the insured is ‘out of pocket’, that is, until the insured has compensated the victim; the second is the insurer becomes liable to the insured when the insured becomes liable to the victim; and the third view is that he is only liable once liability has been established giving rise to a right of indemnity either by a court judgment or arbitration or indeed agreement.

1.5 Historical Developments of Liability Insurance

The development of Liability insurance has its roots in the early nineteenth century, or a little before. Its growth was encouraged by rapid developments in industry, trade and transport around this time. Hitherto, only three forms of insurance were commonly available. They were marine insurance, life insurance and fire insurance, the regular

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13 [1957] 1 WLR 45, 49 per Devlin J (liability).
14 Post Office v Norwich Union Fire Ins Sy Limited (1970) 2 QB 363, 373
practice of which, in Europe, dates (approximately) from the fifteenth, sixteenth and seventeenth centuries respectively.\textsuperscript{15}

Industrialization and the growth of the railways created new risks that could lead to accidents, and originally liability insurance formed part of a broad and miscellaneous class known as ‘accident insurance. This name was used to describe any form of insurance that was neither marine insurance, life insurance, nor fire insurance and which covered losses arising from some sudden harmful event, unintended and unexpected by the insured, such as a boiler explosion, or a road or rail accident.\textsuperscript{16}

These risks were assumed initially by specialist insurers, the ‘accident offices’. However, in the first quarter of the twentieth century many of these were bought up by the large fire insurance companies, which thus became the familiar British ‘composite’ insurers. The liability (or ‘third party’) risk referred to compensation claims which victims of accidents might make against insured persons who caused them, as distinct from direct claims which latter might make against insurers for damage to their own property or person. Eventually, Liability Insurance grew into a class in its own right, and at the same time, the term ‘accident’ insurance fell into disuse.\textsuperscript{17}

An alternative term, ‘casualty’ insurance (which seems to have originated in the United States), originally had a meaning that was roughly equivalent to that of accident insurance. However, it has now come to be associated with Liability insurance in particular. Thus, the two main branches of general (non-life) insurance are now ‘property’ and ‘liability’ (or ‘property’ and ‘casualty’).\textsuperscript{18} Prior to the 1880s, Tort liability was not insured in the United States. In 1886, insurance was introduced for an employer’s liability to his workers.\textsuperscript{19} In the 1920s United States introduced Workers Compensation insurance scheme which replaced employers’ liability Insurance.

\textsuperscript{15} http://www.oft.gov.uk/shared_oft/reports/financial_products/ofi659a.pdf
\textsuperscript{16} ibid
\textsuperscript{17} ibid
\textsuperscript{18} ibid
\textsuperscript{19} www.stewarteconomics.com/Cycle
With these new worker compensation schemes an injured employee was entitled to compensations whether or not the employers was at fault or not. With this development there was a reduction in tort action except in case where the employer was not only negligent but reckless. This is still the position in most developed countries.

However, it is my contention that tort liability is not about compensation but much more about ensuring a safe place of work.

Therefore if in the face of the law, one of the aims of tort liability is deterrence, one wonders why the Zambian legal system shuns punitive damages where it is apparent that the employer was not only negligent but recklessly so, thereby deterring a repeat or indeed discourage would be offenders of such deeds.

2.0 Overview of the study

2.1 Introduction

It is important to restate the essentials of legal institutions in society, because it is actually society that shapes these legal institutions in line with the ideologies of the day, be it political, religious or economics. Therefore laws will be designed to further the ideologies of a given regime. Johari\textsuperscript{20} defines the meaning of law as, “there are social laws or customary laws which guide the behaviour of men in their collective life…”

To the Marxists, law, was regard as “an expression of society’s general interests and needs emerging from a given material means of production?”\textsuperscript{21} From this theory I contend that Laws are designed to further the interest of the rich sacrificing those of the poor. It is no wonder, that around 1880 workers abdicated their right to sue for injury

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\textsuperscript{20} Johari J.C., Contemporary Political theory (Sterling Publishers Private Limited, 12edt 2007) page 196  
\textsuperscript{21} Edgar Bodenheimner,The Philosophy and Method of the Law, revised edition, Universal Law Publishing Co. (India fifth reprint) page 71
\end{flushright}
with those employment contracts being known or called as, "workers right to die" or "death contracts".\textsuperscript{22}

Therefore in the face of the foregoing would it be wrong to conclude that law is not a creation of a state or one authored by God as natural law, but one shaped by social development. This supposition was supported by Savigny\textsuperscript{23}, "who took law as 'the organ of folk-right' that moved and grew like every other expression of the life of the people: that was formed by the custom and popular feeling, through the operation of silent forces and not by the arbitrary will of a legislator."

Would one therefore be wrong to conclude or contend that Law is an instrument of social change, was expounded by a Philosopher Roscoe Pound.\textsuperscript{24}

For, Joseph Kohler a German jurist said and I quote, "law plays an important part in the revolution of the cultural life of mankind by taking care that existing values are protected and new ones furthered. Each form of civilization, Kohler said, must find the law which best suits its purposes and aims. There exists no eternal law; the law that is adequate for one period is not so for another. Law must adapt itself to the constantly changing conditions of civilization, and it is the duty of society, from time to time, to shape the law in conformity to new conditions."\textsuperscript{25}

If the foregoing is true then the question one asks is, are the current occupational safety laws and legal practices vis - a vis liability laws enacted when Zambia was a socialist state, adequate in the current form, to deal with this changed Zambian society, following the changes of political ideologies and economic policies towards liberalized ones, after the 1991 multi part elections. Isn't it also true going by Joseph Kohler's teaching, that a good legal system must be flexible so as to reflect the changing needs of the people following from social development or evolution? Is it also not that social change has

\textsuperscript{22} www.ncbi.nlm.nih.gov/pmc/articles
\textsuperscript{23} Supra, page 206
\textsuperscript{24} Edgar Bodenheimier,The Philosophy and Method of the Law, revised edition, Universal Law Publishing Co. (India fifth reprint) page 118
\textsuperscript{25} Ibid, page 113
more to do with altering the established patterns of behavior, that is, the way people relate with each other and not values or in technology26. Some of the legal concerns, that the above questions present will therefore form part of this discussion paper.

2.2 Zambia’s Political, Social and Economic Developments

Prior to 1991 most major industries had businesses that were both state owned and managed. Zambia then being a socialist economy strived to maintain equality among its citizens and therefore exploitative practices had no place. If anything being a socialist economy the means of production belonged to the Zambian citizen himself. This therefore meant that the legal system, of the day then was in their current form were adequate to ensure a safe work place for the worker, as means of production where being maximized for the benefit of Zambian citizen included the worker. The legal system was designed in such a way as to reflect just this. Therefore the employee’s welfare and rights were sufficiently protected as man was the centre of everything in total contrast to the liberalized economic policies of today after 1991. The question that needs answering is, do these laws couched in the one party state still good laws of the liberalized Zambia.

This change in political and economic policies followed the collapse of communism in the Soviet Union and Eastern Europe on which Zambia’s Humanism philosophy was carried. In 1991 following the introduction of Multi Party politics, the Zambian economy was liberalized towards capitalistic practices. What this meant is that there was a shift from mankind being the centre of life to profit. The investors that came onto Zambia economic scene saw a worker as a mere tool of production in their quest to maximize means of production and profit.

It may argued that once the motive of business which was common ownership and service changed to profit and private ownership of business, seeing that we saw an


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increase in Road Traffic Accident involving passenger carrying bus and accidents at places of work specifically in the Mines.

1.3 Statement of the Problem

The rate of accidents in the work place is a source of concern to the Zambian populace, yet the Zambian legal systems seem to be giving a blind eye to these unfortunate developments. The climax of these work place accidents can be traced to two incidents; one at Mopani Copper Mines in 2005 involving a lift cage incident that claimed 6 lives and then the 2006 Beijing Research Institute of Mining and Metallurgy (BGRIMM) incident, in Chambeshi, that killed all employees numbering 49 that were locked in an explosive factory. According to one of the Foremen Chinyemba Kambanja, the accident happened because management disregarded safety measures in the inquest hearing. Unfortunately todate the inquest report on this incident has not been released as it is guarded jealously as though it were a state secret. In fact the Mine Safety Department which ordinarily is charged with the responsibility of investigating mine accidents were not allowed to investigate this incident, instead a special team was assembled to investigate it. The damages of K3.3 million per life to the families of the deceased are also still not paid.

The riots, physical battering of Chinese supervisors, the planned demonstrations when the President of China, Hu was to visit Chambeshi in 2007 and the general acrimony surrounding these accidents suggests that the workers and community have lost faith in the law and decided to take the law in their own hands.

Would these violent reactions by the workers and the community, not be testimony enough, that civilization and society has changed and hence the law needs to change with

27 Mopani Board of Inquiry Report, Musombo Shaft Incident, 18th May, 2005
28 Times of Zambia 20th August, 2005
29 Interview dated 8th February, 2010 Mr. Chewu
30 The post Newspaper 29th December, 2009
31 The Guardian, Lusaka 5th February 2007
32 In Africa, China Expansion 5th February 2007
the times to address society’s changing needs and demands if lawlessness is to be arrested, as espoused by jurists Joseph Kohler and Roscoe Pound.

1.4 Purposes of the study

The purpose of this study is to examine and investigate whether the Zambian jurisprudence in liability cases promotes the maintenance of general security for the Zambian society, and whether that will spur standards to the highest measure of vigilance and diligence to prevent and/or minimize work place accidents. The question here that will beg answering is whether compensatory damages alone strive to promote safety in the work place. The paper will also evaluate the impact of liability insurance on its role to make the place of work a safe one, by looking at the interplay between tort liability and insurance liability.

The questions that we help examine and discuss how the Zambian legal system in the context of the foregoing are:

(1) How effective are the laws on breach of employers liability against would be offenders or tortfeasors having been couched in a communist era
(2) How does the Zambian legal system up hold the deterrence and retribution aims of the Law of tort to ensure the worker’s safety
(3) What impact does liability insurance have on the deterrence aim of tort and the quest to make places of work safe
(4) What ought to be done legally to make the place of work as safe as it can possibly be.

1.5 Significance of the Study

If law is a reflection of the needs and aspiration of people, and not one created by the state but merely recognized by the state. Why has the Zambian legal system lagged behind by not evolving with the social changes that the Zambian society has gone
through, from the communist state to a capitalistic one, despite crises by its people for a better and safe work environment?

It is evident in other legal jurisdictions that reckless or outrageous omission by employers can only be deterred and controlled through the award of punitive damages. This study therefore aims at ascertaining the Zambian legal systems’ position in that regard.

1.6 Methodology

The study will be a desktop study, reviewing relevant literature and case law on the subject matter in issue, interviews with, at least two Claims Managers of any two Insurance Companies in Zambia, government officials from the Ministry of Labour, Power Transport and communication, Justice and Mines.

1.7 Organization of the Study

The Paper comprises four chapters, with the first being the introduction which will provide the background of the study. Chapter two will review the general principles of jurisprudence of tort liability and liability insurance, and also discussion other developed jurisdictions’ e.g. England, America, Australia and Canada in relation to the two concepts. Chapter three discusses the Zambian jurisprudence in tort liability cases, awards of damages and liability insurance indemnification. Chapter four reviews the link between tort liability and liability insurance, and the impact it has on the deterrence aim of tort and concludes the study with recommendation for Zambia.
CHAPTER TWO

1.0 Introduction

Considerable time and emphasis will be placed in discussing tort and the ingredients of the tort of negligence as it is the very ingredients that insurance liability will apply first in determining whether liability attaches and hence within scope of cover and is therefore payable. It must be borne in mind that liability insurance follows tort liability and hence considerable amount of time will be spent discussing tort liability. Then the chapter will discuss the nature of liability insurance, scope of cover, extent of indemnity, indemnity for costs, conduct of court proceedings.

2.0 Definition of Tort

Winfield describes the law of tort as being in practice, concerned with the problem of accidental injury to the person or damage to property and the general approach of the law to these problems rests on two broad principles. Both are subject to a very large number of expectations and qualifications but by and large it is the case first that the victim of accidental injury or damage is entitled to redress through the law of tort if, and only if, his loss was caused by the fault of the defendant or those for whose fault the defendant must answer, and secondly that the redress due from the defendant whose liability is established should be "full" or should, in other words, be as nearly equivalent as money can be to the claimant's loss. Nevertheless, even in those accidents which can be attributed to another's fault, the role played by the law of tort should not be exaggerated.

He further attempts to define it as,

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“Tortious liability arises from the breach of a duty primarily fixed by the law; this duty is towards persons generally and its breach is redressible by an action for unliquidated damages.”

It is argued that this definition did not seek to indicate what conduct is and what is not sufficient to involve a person in tortious liability, but merely to distinguish tort from certain other branches of law. Therefore the law of tort can best be appreciated by looking at what its general characteristics are, but before we do that a comparison with the law of contract will help put the discussion in perception.

2.1 Tortious liability

Tortious duties exist by virtue of the law itself and are not dependent upon the agreement or consent of the persons subjected to them. Further it is suggested that, in tort the content of the duties is fixed by the law whereas the content of contractual duties is fixed by the contract itself.

In comparison to contract, the “core” of contract is the idea of enforcing promises, whereas tort aims principally at the prevention or compensation of harms, and this difference of function has two principal consequences: first, that a mere failure to act will not usually be actionable in tort, for that would be to set at naught the rule that even a positive promise will not give rise to legal liability unless it is intended as legally binding and supported by consideration or the formality of a deed; secondly, that damages cannot be claimed in tort for a “loss of expectation”, or, as it is sometimes expressed, damage in contract put the claimant in the position he would have been in had the contract been performed, whereas damages in tort put him in the position he would have been in had the tort not been committed.

34 ibid, page 5
35 ibid page 7
36 ibid
37 ibid
Another less distinct difference is that the duty in tort is not specific but owed to the public at large whereas in contract the duty is specific to a party or parties arising from the concept of assumption of responsibility.

2.2 Tort and Crime Distinguished

As this paper’s discussion, is mainly on civil liability and its deterrence effect not much emphasis will be placed on discussing criminal law.

Whereas a wrongful act gives rises to civil liability in tort the same if committed as a crime give rise to criminal Liability. The main difference is the requirement to establish mens rea, that is, the intentional of the wrongdoer in criminal law and not the fault or lack of due care of the tortfeasor in tort.38 Tort and crime overlap, so much that, many torts are also crimes at times with same names and elements. Examples of torts that are both tort offences and criminal are battery, conversion, and causing death by dangerous driving.

2.3 Characteristics of Tortious Liability

The basic premises that intention can be only be inferred from conduct we are still left with the problem of defining intention. Everyone agrees that a person intends a consequence if it is his desire or motive to bring it about, but beyond that it is probably not possible to lay down any universal definition for the purpose of tort.

Suffice to say then, that there are different ways in which liability in tort may arise:

1. Liability may be imposed as a legal consequence of a person’s act, or of his omission if he is under a legal duty to act.

38 Ibid, page 16
2. In most cases liability is based upon fault: sometimes an intention to injure is required but more often negligence is sufficient. In other cases, which are called cases of strict liability, liability is in varying degrees independent of fault.

3. Most torts require damage resulting to the claimant which is not too remote consequences of the defendant’s conduct, a few; such as trespass do not require proof of actual damage.

It therefore follows that tort may arise as a result of intention or negligence or the breach of statutory duty. This paper will mainly focus on negligence and breach of statutory duty.

2.3.1 Negligence

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.39

This sense usually signifies inadvertence by the defendant to the consequences of his behavior, simple examples being the motorist who day dreams, the solicitor who forgets about the approach of the limitation period or the doctor who forgets about the patient is allergic to a treatment. It may be that the word should only be used in this sense but for the purposes of the tort of negligence a defendant clearly cannot escape liability because he adverted to the risk if the case is one where even inadvertence would saddle him with liability, as was espoused in the case of Vaughan v Menlove.41

40 Ibid, page 74
41 (1837) 3 Bing N.C.468.
In *Konkola Copper Mines Plc v John Mubanga Kapaya (suing as Administrator)*\(^{42}\) case the court held that, “it can be no defence that although they had such accidents before but they never expected an accident of such magnitude to happen...their misjudgment was fatal... Even when it was obvious that a great calamity would befall, the 1st appellant, through its servants gave instructions for evacuation of machinery first before moving out the workers. That was negligence”.

It is however important to note that, liability for intentional or reckless behavior in those torts is generally more rather than less extensive than liability for negligence...\(^{43}\)

### 2.3.2 Breach of Strict Duty

In some torts, the defendant is liable even though the harm to the claimant occurred without intention or negligence on the defendant’s part. This is as laid down in the celebrated case of *Rylands v Fletcher*,\(^ {44}\) that:

“If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbours, he does so at his peril. If it does escape and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent damage.”

This liability is sometimes styled “absolute” liability, although there are possible defences to it, such as the acts of the third party would exclude liability. This form of Liability is often not dependant on proof of negligence and where an Act requires something to be done without qualification, contravention of the statute automatically establishes liability\(^ {45}\).

\(^{42}\) SCZ No. 5 of 2004 (unreported)  
\(^{43}\) supra  
\(^{44}\) (1868) L.R. 3 H.L. 330 at 340.  
2.3.3 Reasonableness and Reasonable man

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.\(^{46}\) A case in point is the Konkola Copper Mine\(^{47}\) case above, where despite it being evident on the fateful day of the accident that the earth was moving and being called several times by the mine workers, the Mine captain and Safety Captain as supervisors ignored the looming danger.

The real standard is not that of the defendant himself but that of ‘a man of ordinary prudence’,\(^{48}\) a man using ‘ordinary care and skill’,\(^{49}\) a hypothetical man\(^{50}\). Lord Macmillian has said:

The standard of foresight of the reasonable man... eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question.\(^{51}\)

2.3.4 The “Fault Principle”

The claimant in a tort action must generally show that his injuries were caused by the defendant’s fault and until comparatively recently it was taken as almost axiomatic that payment of higher compensation to the victims of fault was justified,...\(^{52}\)

Since the law of tort is a system of establishing liability it is obvious that it could never have compensated all victims of misfortune. At the very least there must be some causal link between an activity of the defendant and the injury to the claimant. There is,


\(^{47}\) SCZ NO. 26 of 2004 (unreported)

\(^{48}\) Vaughan v Menlove (1837) 3 Bing N.C. 468.

\(^{49}\) Heaven v Pender (1883) 11 QBD 503 at 507

\(^{50}\) King v Phillips (1953) 1 qb 429 at 441, (1953) 1 All ER 617, CA per Denning LJ

\(^{51}\) Glasgow Corpn v Muir (1943) AC 448 at 457, (1942) 2 All ER 44. HL

however, no logically compelling reason why the law should have chosen fault as the determinant of this liability.\\(^{53}\)

3. The Aims of the Law of Tort

3.1 Damages and Deterrence

The principle that a person should be called upon to pay for damage caused by his fault may be thought to have an affinity with the criminal law (which the law of tort as a whole certainly did have much earlier in its history) in the sense that one of its purposes is deterrence, the prevention of harmful conduct. It is certainly true that at least some parts of the law dealing with premeditated conduct do help serve this purpose as well as that of deciding whether or not redress for damage already suffered should be ordered: newspaper editors, for example, take steps to avoid publication of defamatory matter.\\(^{54}\)

It is, however, more controversial how far there is any effective deterrent force in those parts of the law relating to accidental injury, where liability is based upon negligence. There are a number of reasons for this… Certain driving practices, for example driving at 60 m.p.h down a crowded shopping street, could be recognized as negligent by ordinary people without any judicial assistance, but the majority of cases do not present such clear cut issues and the number of variable factors is so great that one case is hardly even of persuasive value in another.\\(^{55}\)

Where, however, the accident arises from an alleged defect in a system of work or the organization of a business, it is possible that a tort judgment may play a part in exposing the risk and leading others to take measures to prevent recurrence, whether voluntarily or at the insistence of their insurer.\\(^{56}\)

\(^{53}\) ibid

\(^{54}\) ibid

\(^{55}\) Ibid, page 33

\(^{56}\) ibid
4. **EMPLOYER’S LIABILITY**

As the term reads this is whereby, an employer is made liable for injuries sustained by an employee as a result of accidents that occurs at the place of work. In the United Kingdom there is also an increase in number of cases of liability for illness and disease contracted in the place of work. The idea is to ensure that an employer provides a safe work place to his/her employees.

The recorded history of employer’s liability did not start until 1837, and then it began by denying the worker a remedy. *Priestley v Fowler*, decided in that year, is generally regarded as the *fons et origo* of the doctrine of common employment, which held that the employer was not liable to his employee for injury caused by the negligence of another employee, but the case really went further than that. It came close to denying that an employer might be liable to his workmen on any ground, and there can be no doubt that the judges of the first half of the nineteenth century viewed with alarm the possibility of widespread liability for industrial accidents, as espoused by judges Bramwell B. and Pollock C.B. in the cases of *Dyen v Leach* and *Vose v lanes. & Ry* respectively.

The employer was held liable of torts resulting from, duties personal to the employer, for which as an employer he and only he remained responsible even though the tasks necessary to discharge the duties were entrusted to his servant. In Zambia this position is as stated by the court in *Betty Kalungu (suing as Administrator) v Konkola Copper Mines*, in which the court had this to say, “in this case, where there were instructions

57(1837) 3 M. & W. 1
58
60 (1857) 26 L.J. (N.S.) Ex. 221
61 (1858) 27 L.J. Ex. 249
63 SCZ No. 5 of 2004 (unreported)
and supervision, the negligence of an employee, if he himself is in breach of statutory
duty or common law duty of care to himself, that is negligence of the employer.”

Lord Herschell in support of this concept said,

“that the contract between employer and employed involves on the part of the former the
duty of taking reasonable care to provide proper appliances, and to maintain them in a
proper condition, and so to carry on his operations as not to subject those employed by
him to unnecessary risk. Whatever the dangers of the employment which the employed
undertakes, amongst them is certainly not to be numbered the risk of the employer’s
negligence and the creation or enhancement of danger thereby engendered.”

The employer’s duty was later to be refined by Lord Wright in the famous case of
Wilson and Clyde Coal Co v English as being threefold:

“the provision of competent staff of men, adequate material, and a proper system and
effective supervision.” The duty is not absolute, for it is fulfilled by the exercise of the
due care and skill. “But it is not fulfilled by entrusting its fulfillment to employees,
even though selected with due care and skill.”

Then came the Health and Safety at Work Act 1974 with a generalized duty upon
employers to ensure, so far as is reasonably practicable, the health, safety and welfare at
work of all employees.

We will now briefly discuss the three elements of the employer’s duty in a little more
depth.

4.1 Nature of Employer’s Duty

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64 Smith v Baker (1891) A.C.325 at 362.
65 (1938) A.C. 57.
In truth, however, there is but one duty, a duty to take reasonable care so to carry on operations as not to subject the persons employed to unnecessary risk. “In case there is any doubt about the meaning of ‘unnecessary’ I would ... take the duty as being a duty not to subject the employee to any risk which the employer can reasonably foresee, or, to put it slightly lower, not to subject the employee to any risk which the employer can reasonably foresee and which he can guard against by any measure, the convenience and expense of which are not entirely disproportionate to the risk involved,” this is as was espoused in the John Mubanga case above.

If a worker cannot prove negligence, whether by direct evidence or with the aid of res ipsa loquitur, an action based upon breach of the employer’s personal duty must fail. With this in mind we can consider the various branches of the employer’s common law duty to his workers.

4.2 Competent Staff

The duty to take reasonable care to provide a competent staff is still extant, but it is of comparative little importance since the abolition of common employment. If, however, an employer engages a person with insufficient experience or training for a particular job and as a result a worker is injured, it may well be that there is a breach of this branch of the employer’s duty,” this proposition is canvassed by the court’s decision in the case of Mulenga Chungu (suing as Administrator) v Mopani Copper Mines, when the court held that the duty of a licence holder to give instructions to the guard right was right on spot after the blast not in advance. The lack of proper training of staff nowadays was overshadowed by motive to meet production targets even at expense of safety, compared

67 SCZ NO. 26 of 2004
68 ibid
69 ibid
70 Appeal No. 24 of 2004 (unreported)

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to the Zambia Consolidated Copper Mines days when safety came first before anything else.\textsuperscript{71}

### 4.3 Adequate Plant and Equipment

The employer must take reasonable care to provide his workers with the necessary plant and equipment, and is therefore liable if an accident is caused through the absence of some item of equipment which was obviously necessary or which a reasonable employer would recognise to be needed. He must also take reasonable care to maintain the plant and equipment in proper condition, and the more complex and dangerous that machinery the more frequent must be the inspection...\textsuperscript{72}

### 4.4 Safe Place of Work

Though not expressly mentioned by Lord Wright in \textit{Wilsons and Clyde Coal Co v English},\textsuperscript{73} it is clear that the employer's duty of care extends to the place of work and in some cases may even also apply to the means of access to the place of work.

"The master's own premises are under his control: if they are dangerously in need of repair he can and must rectify the fault at once if he is to escape the censure of negligence..."\textsuperscript{74}

In Zambia the safe workplace is provided for under part II section 6 sub section of the Workers' Compensation Act which reads and I quote, "where any injury is caused or disease contracted by a worker by negligence, breach of statutory duty or other wrongful acts or omission of the employer, or of any person for whose act or default the employer

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\textsuperscript{71} Interview: Mr. Gideon Ngoma Manager Human Resources Grinker LTA:08/02/10  
\textsuperscript{72} Ibid, page 378  
\textsuperscript{73} (1938) A.C. 57 at 78.  
\textsuperscript{74} Wilson v Tyneside Window Cleaning Co (1985) 2 Q.B. 110 at 121 -122

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is responsible, nothing in this act shall limit or in any way affect any civil liability of the employer independently of this Act.\textsuperscript{75}

However it is important to note that although this Act talks of civil liability its main purpose is compensatory in nature and not punishing the tortfeasor. Further the Zambian law precludes the award of punitive damages regardless of the circumstances.\textsuperscript{76}

The Mine and Minerals Act Section 10(4) reads and I quote, "The holder of a mining right shall indemnify, defend and hold the Republic harmless against all actions, claims, demands, injury, losses or damages of any nature whatsoever, including, without limitation, claims for loss or damage to property or injury or death to persons, resulting from any act or omission in the conduct of mining operations by or on behalf of the holder, provided that such indemnity shall not apply to the extent, if any, that any action, claim, demand, loss, damage or injury resulted from any direction given by, or wrongful act committed on behalf of the Republic.\textsuperscript{77}

As this provision is couched in very general terms it is supported by the Mining Regulations. In fact the Zambian courts’ position on these regulations is as stated in the \textit{Steven Mutale (suing as Administrator) v Mopani Copper Mines}\textsuperscript{78} case, "the mining regulations are regulatory. They provide administrative measures and backing the power to bring about safe working environment."

The duty on the employer extends to giving advice, instructions or orders about commonly encountered hazards (a matter which would fall under the next heading). The \textit{Betty Kalungu v Konkola Copper Mines}\textsuperscript{79}, amplifies the court’s position on instructions. Thus it has been held that in modern conditions, the employer of a window cleaner

\textsuperscript{75} Workers' Compensation Act No. 10 of 1999
\textsuperscript{76} The Law Reform (Miscellaneous Provisions) Act Chapter 74 clause 2 Sub section (a)
\textsuperscript{77} The Mines and Minerals Act Chapter 213
\textsuperscript{78} SCZ Appeal No. 66/2003
\textsuperscript{79} SCZ No. 5 of 2004 (unreported)
should place an embargo on cleaning upper floor windows by standing on the sill unless there are anchorage points for safety harness.\textsuperscript{80}

\textbf{4.5 Safe System of Working}

This, the most frequently invoked branch of the employer’s duty, is also the most difficult to define, but it includes:

“... the physical lay-out of the job – the setting of the staff, so to speak – the sequence in which the work is to be carried out, the special instructions. A system may be adequate for the whole curse of the job or it may have to be modified or improved to meet the circumstances which arise: such modifications or improvements ... equally fall under the head of system.”\textsuperscript{81}

The employer’s duty in respect of the system of working is most evident where the work is of regular or routine nature, but its application is not limited to such cases.\textsuperscript{82}

In devising a system of working the employer must take into account the fact that workers are often heedless of their own safety, and this has two consequences. First, the system should so far as possible minimize the danger of a worker’s own foreseeable carelessness. Secondly, the employer must also exercise reasonable care to see that his system of working is complied with by those for whose safety it is instituted and that the necessary safety precautions are observed, see also the case of Mulenga Chungu v. Mopani Copper Mines.\textsuperscript{83} Lord Denning said on one case, however, (and others have agreed) that this is not a proposition of law but a proposition of good sense, so that proof that a worker was never actually instructed to wear necessary protective clothing is not of itself proof of negligence.

\textsuperscript{80} ibid, page 381
\textsuperscript{81} Speed v Thomas Swift & Co (1943) K.B. at 557 at 563-564
\textsuperscript{82} Supra, page 381
\textsuperscript{83} Appeal No. 24 of 2004 (Unreported)
\textsuperscript{84} Qualcast ( Wolverhampton) Ltd v Hayes (1959) A.C. 743 at 760
5 Motor Third party Liability

Motor third party liability is the potential risk that an owner of a vehicle exposes himself by being on public roads that are used by other vehicles and pedestrians. Therefore it is the probable risk of running into another person’s vehicle or causing bodily injury or death who is legally entitled to be on the road. Just like Employers liability, Motor third party liability is about legal liability that one incurs arising out of the ownership or operation of an automobile. Operators of motor vehicles are required to exercise reasonable care for the safety of others. When they fail to exercise a reasonable degree of care and other people are harmed, the operators are legally liable for that harm.\(^{85}\)

We can therefore conclude that the main ingredient for proving liability in a motor third party is the absence of due care by the driver of the vehicle, which has resulted in the plaintiff suffering some tort which tort has some negative effect or financial implication on the defendant as person on his property.

At this point we will discuss insurance and see the connection with tort and thereafter the award of damages and their effect on wrongdoers.

6 Liability Insurance

6.1 What then is Insurance in general terms

A contract of insurance in the widest sense of the term may be defined as a contract whereby one person, called the ‘Insurer’, undertakes, in return for the agreed consideration, called the ‘Premium’, to pay to another person, called the ‘Assured’ a sum

\(^{85}\) Jones R. James, Liability Claim Practices. Canada: American Institute for Chartered Property Casualty Underwriters, 2001, page 1.3
of money, or its equivalent, on the happening of a specified event\(^86\). This definition was confirmed by Channell J. in the case of Prudential Insurance Co v IRC\(^87\),

‘where you insure a sip or a house, you cannot insure that the ship shall not be lost or the house burned, but what you do insure is that a sum of money shall be paid to on the happening of a certain event. That I think is the first requirement in a contract of insurance. It must be a contract whereby, for some consideration, usually, but not necessarily, for periodical payment called premiums, you secure to yourself some benefit, usually but not necessarily the payment of a sum of money upon the happening of some event’…

The specified event must have some element of uncertainty about it,\(^88\) the uncertainty may be either (a) as in the case of life insurance, in the fact, although the event is bound to happen in the ordinary course of nature, the time of happening is uncertain; or (b) in the fact that the happening of the event depends on accidental causes, and the event, therefore, may never happen at all. In the latter case, the event is called an ‘accident’.

In conclusion, this accident must have some adverse or detriment effect/character in it, in that it would actually affect the interest of the insured

\section{6.2 Nature of Liability Insurance}

The specified event imposes on the assured a liability towards third persons. This is where an insured’s legal and contractual liability insurance policy states that the insurer would indemnify the insured ‘against all sums which the insured shall become liable at law to pay as damages’, the word ‘at law’ meant legal liability’, and ‘damages’ meant

\(^{87}\) (1904)2 KB 658 at 663 (life insurance)
\(^{88}\) Ibid
a policy contains a provision by virtue of which the insurers may be bound to pay a claim even though it is legally a bad claim, the policy is, it seems, a policy of contingency insurance, rather than liability insurance.\footnote{Lord Hailsham of St. Marylebone, Halsbury’s Law of England, 4\textsuperscript{th} edition, Volume 25, Butterworths, London, 1994, para. 661}

6.4 Legal Liability

Liability insurance is “any insurance protection which indemnifies liability to third persons”\footnote{Quinlan v Liberty Bank Co, 575 So 2d 336, 339}, thus providing cover against a consequent depletion of the insured’s assets.\footnote{Supra, page 396} The event upon which the obligation of the insurers to indemnity the assured depends on the happening of the liability insured against. Legal liability is what a person making a liability claim or suit must fix on the alleged wrongdoer in order to recover monetary damages or obtain some other legal remedy from the wrongdoer Under most liability insurance policies, the insurer is obliged to pay damages on behalf of the insured only if the insured is legally liable to pay damages to a “third party” that has made claim against the insured.\footnote{Jones R. James, Liability Claim Practices. Canada: American Institute for Chartered Property Casualty Underwriters, 2001, page 1.3}

6.5 Description of Liability

The liability must be the liability described in the policy. If the liability is described as arising out of a particular kind of accident, it must be shown that the kind of accident has happened, if the liability is to arise out of accidents connected with a particular business, liability arising out of accidents not connected with that business is not covered… Hence, the description defines the scope of the insurance, and, if expressed in terms of precision, may have the effect of considerably limiting it.\footnote{Lord Hailsham of St. Marylebone, Halsbury’s Law of England, 4\textsuperscript{th} edition, Volume 25, Butterworths, London, 1994, para. 664}
The question then that needs answering is when does this happen? As discussed earlier, there are three views: one is that it does not attach until the insured is ‘out of pocket’, that is, until the insured has compensated the victim; the second is the insurer becomes liable to the insured when the insured becomes liable to the victim\textsuperscript{97}; and the third view is that he is only liable once liability has been established giving rise to a right of indemnity either by a court judgment or arbitration or indeed agreement.\textsuperscript{98}

6.5.1 The Event
In insurance what triggers a claim is the happening of incidence of loss which should be distinguished from the event that brings the case within the scope of cover, which event should be specified in the contract\textsuperscript{99}. It is actually this event that establishes the insured’s legal liability.

This occurrence giving rise to the insured’s liability is twofold depending on how the underwriter wishes to describe it; occurrence based or claims made.

6.5.2 Occurrence based

This is when the coverage against liability arising out of acts of the insured occurring during the policy period, no matter when a claim is eventually lodged against the insured.\textsuperscript{100} As such, with this type of cover the insurer is unable to predicate the possible future claims to lodged with them.

6.5.3 Claims made

This is when the insured is covered against all claims that are made during the policy period, regardless of when the activity giving rise to the claim occurred.\textsuperscript{101} From a

\textsuperscript{97} Malcolm A. Clarke, The Law of Insurance Contracts, 2\textsuperscript{nd} Edition , Lloyd’s of London Press Ltd, 1994, Page 396-397
\textsuperscript{98} Post Office v Norwich Union Fire Ins Sy Limited (1970) 2 QB 363, 373
\textsuperscript{99} Supra, page 399
\textsuperscript{100} Ibid
\textsuperscript{101} Ibid
layman's point of view this looks up ended but it limits claims being made in a particular policy period thereafter the insure assumes no liability.

6.6 Extent of Indemnity

In some kinds of liability insurance, such as employer's liability insurance, the policy usually provides for a full indemnity against all liabilities falling within the scope of the policy which may be incurred by the assured during the currency of the policy. In the case of motor insurance, so far as compulsorily insurable risks are concerned, it seems that a policy which contains any limitation of the amount payable (except in the case of damage to property) would not comply with the statutory requirements. In other kinds of liability insurance, limitations are often imposed upon the amount recoverable so that the assured may not in fact receive a full indemnity.\textsuperscript{102}

6.7 Need for express provision as to costs

It is open to question how far an insurance against third party liability confers liability against costs unless there is some specific reference to costs in the policy. Where the assured is held to be liable to the third party, and costs also are awarded against him, it is reasonably clear that his liability for costs is part of the legal liability to the third party, against which he is entitled to be indemnified... In the absence, therefore, of some express provision in the policy, the costs of a successful defence are not covered, even though they were incurred with the consent of the insurers.\textsuperscript{103}

6.8 The Duty to Defend

In England the insurer has no the duty to defend the insured against liability claims,\textsuperscript{104} unless the contract specifically imposes it. It is commonly provided that the insurer shall


\textsuperscript{103} Ibid, para 672

\textsuperscript{104} Brice v Wackerbarth (Australasia) Pty Ltd (1974) 2 Lloyds 274
be entitled to defend the action and settle the claim against the insured; however, such clauses do not give the insured a right to be defended by the insurer nor the insurer a duty to defend. Even so it

“everyday practice in third party proceedings for the for the third party (insurer) to support the defendant in his defence, to protect himself against the defendant’s claim for indemnity. It is for third parties to decide the line that they will take…”

In most parts of the United States the position is the same: no duty to defend unless required by contract\textsuperscript{105}. If this duty should exists, the contracts are interpreted strictly against the insurer and the duty to defend arises as soon as the insurer is notified of facts which give rise to claim and court action\textsuperscript{106}.

\textbf{6.9 Compensation}

The word ‘compensation’ is derived from a Latin root, ‘compensare’, meaning ‘weigh together’ or ‘balance’. The fundamental principle of every system of civil law is the principle of justice, not in the sense of a vague moral aspiration but in the precise sense ‘give to each man that which is his right’.\textsuperscript{107}

The part V Workers’ Compensation Act section 51 subsection1 provides compensation for work place accident victims and I quote,

“if an accident or disease occurs to a worker arising out of and in the course of employment and result in the worker’s disablement or death, the worker, or if the worker

\textsuperscript{105} Brown v Lumbermen’s Mutual Casualty Co, 390 Se 2d 150
\textsuperscript{106} Malcolm A. Clarke, The Law of Insurance Contracts, page 409
dies, that worker’s dependanats shall be entitled to compensation in accordance with the proivisions of this Act.\textsuperscript{108}

Lord Goddard said in \textit{British Transport Commission v Gourley},\textsuperscript{109}

‘damages which have to be paid for personal injuries are not punitive, still less are they a reward. They are simply compensation…’

Most actions for damages for personal injuries are founded on tort, such as negligence, breach of statutory duty…in these cases too the same principle is applied:

‘the common law says that the damages due either for breach of contract or for tort are damages which, so far as money can compensate, will give the injured party reparation’\textsuperscript{110}

Therefore in liability claims the purpose of awarding damages is to make the injured party “whole by returning the party to a pre loss position. Damage is the term used to denote the amount awarded as compensation for the loss sustained. Damages with a compensatory purpose are called compensatory damages which are further categories in two:

\begin{enumerate}
\item special damages, are out of pocket expenses that claimant incur as a result of a loss and includes items such as medical bills, prescription bills, lost wages funeral expenses costs to repair or replace damaged property and impairment to earning capacity. These damages are generally verifiable through receipts; and
\item general damages, are more difficult to measure because they are subjectively determined. They include items such as value of the claimant’s pain and suffering,
\end{enumerate}

\textsuperscript{108} Workers’ Compensation Act No. 10 of 1999
\textsuperscript{109} (1956) AC 185 at 208, (1955) 3 all ER 796 at 805
\textsuperscript{110} Admiralty Comrs v SS Susquehanna (1926) AC 655 at 661, per Viscount Dunedin.
inconvenience, disfigurement, emotional distress, permanent injury, loss of employment, loss of consortium and other non economic intangible losses.\textsuperscript{111}

The other head of damages is called punitive which are at times called exemplary damages because they are intended to make an example of the defendant’s wrongdoing. Punitive damages are typically awarded for intentional injury or gross negligence. In negligence cases, terms such as “reckless”, “willful and wanton or “with malice” are used to describe behavior justifying punitive damages.\textsuperscript{112} Punitive damages are in addition to compensatory damages when awarded, according to Jones.

According to Winfield, the injury to feelings and distress may, however, be increased by the bad motive or willful behavior of the defendant and it is then possible to make a corresponding increase in the award as , in traditional terminology, an “aggravation” of damages. Such aggravated damages, unlike exemplary damages, are compensatory in nature.\textsuperscript{113}

It must be mentioned that punitive damages are rare, even “liberal venue” such as Manhattan, New York representing less 1 percent of cases. The most infamous case involved the Ford Pinto. In this case, Ford management knew of the defect with Pinto fuel tanks that made them vulnerable to explosions with rear impact, but they calculated that the cost of repairs( less than $50) would be too expensive in total and decided to accept the risk. When people were injured by rear-impact explosions, a court awarded punitive damages and characterized Ford’s management decision as “corporate malice.” Ford appealed against the size of the award of $ 3.5 million, but the court allowed the award to stand because it represented less than 0.005 percent of Ford’s net worth, less

\textsuperscript{111} Jones R. James, Liability Claim Practices. Canada: American Institute for Chartered Property Casualty underwriters 2001, page 8.7
\textsuperscript{112} ibid
\textsuperscript{113} W.V.H. Rogers,M.A., Winfield and Jolowicz on Tort,7th edt :Sweet and Maxwell, London, 2006, page 940
than 3 percent of its annual net income, and only 1.4 times the amount of compensatory damages.\textsuperscript{114}

Although Exemplary damages are comparatively rare especially in England, they certainly enjoy a continuing vitality in other common law jurisdiction, which by and large, have rejected the various shackles imposed on them in England and extended them to situations to which they never applied here\textsuperscript{115}: New Zealand, for example, they are available for cases of outrageously bad negligence,\textsuperscript{116} though an Australian court has declined to extend them to equitable wrongs like breach of fiduciary duty.\textsuperscript{117}

The United States Courts consider the following factors in determining whether punitive damages should be awarded:

- Nature of the offense
- Need to punish the wrongdoer
- Need to deter the wrongdoer from similar conduct in the future
- Need to deter others from similar conduct.

7 Conclusion

Despite the English court's position on the issue of punitive damages, it can be clearly seen that there is mounting pressure to recognize this category of damages. For example the Law commission on Aggravated, Exemplary and Resitutionary Damages\textsuperscript{118}, after a fairly evenly balanced consultation, concluded that exemplary damages should be retained but the law should be restated and rationalized so that they were available for any tort or equitable wrong (but not for breach of contract) where the defendant had “

\textsuperscript{117} Harris v Digital Pulse Pty Ltd (2003) NSWCA 10, 44 A.C.S.R. 390.
\textsuperscript{118} Number 247 (1997)
deliberately and outrageously disregarded the plaintiff's rights”. However the government has indicated that it is not at present minded to legislate.\textsuperscript{119}

\textsuperscript{119} W.V.H. Rogers, M.A., Winfield and Jolowicz on Tort, 7\textsuperscript{th} edt: Sweet and Maxwell, London, 2006, page 949
CHAPTER THREE

1. Introduction

Most former colonies of Britain inherited not only the statutes of that country but are still guided by the precedents of that country whether or not those legal rules are relevant to this now independent third world countries or not unless otherwise. Further, whether or not these legal rules promote justices given the prevailing condition and situations or not in those third world countries is a question that begs answering.

This paper will therefore try to interrogate the general principles of liability Insurance and then the Zambian jurisprudence to liability cases vis-a-vis liability insurance. This chapter will therefore discuss the scope of cover, extent of indemnity, indemnity for costs, and conduct of court proceedings. In essence that is the claims investigation process to determine what actually happened to then determine whether or not the claim attaches or whether indeed there was a negligent act that falls within the scope of insurance cover. We will also review the Zambian liability cases from the point of view of the Executive, legislator, judiciary and society at large.

1.1 Scope of Cover

In Zambia this is captured under a clause called defined events as opposed to the insuring agreement, as Zambia follows the South African insurance industry wording, but the scope of cover is the same.

The Motor Third Party liability covers events such as; any claimant’s cost and expenses connected to the vehicle which is insured, death of or bodily injuries except for employees and family members of the insured.120 The policy also covers upto K50, 000.00 per person medical expenses for third party claimants

120Interview: Rhodwell Sikazwe, 17/02/10
However, it is important to note that for a third party liability claim to attach and succeeded, there must be a valid contract of insurance in place as was confirmed by the Court in the case of *Zambia State Insurance Corporation Ltd v Anthony Muyana Musutu, African National Congress, Allan Nsengala.*

1.2 Indemnity for Costs

The insurance contract also provides cover for legal costs provided the policy provides for this. However, the Insured needs the consent of the insurer but these cost include legal costs in the magistrate court, high court and supreme court as long as it is within the limit of indemnity.

1.3 Extent of Indemnity

Under this clause, the policy states the maximum amount payable under an individual policy of insurance which is always stated in the schedule of benefits. According to Mr. Sikazwe in the Zambia it is referred to as, “the limit of indemnity” and reads as follows: "The amount payable, inclusive of any legal cost recoverable from the insured by a claimant or any number of claimants, and all other costs and expenses incurred with the company’s consent for any one event or series of events with one original cause or source shall not exceed the limit of indemnity stated in the schedule."

It must be noted that the extent or limit of liability cannot be stretched beyond that which is stated in the policy. This is also referred to as stacking, where an insured attempt to combine limits of two policies with the hope that that insured’s legal liability would then be reduced further or paid in full. This is canvassed by the court’s decision in the case of *Amri Khalef Salim (T/A Taqwa Bus Services) V. Afranc Services Limited & Professional Insurance Corporation,* in which the court agreed with the submission, by Mr. Sikazwe counsel for insurer, that the combined limit payable under the insurance

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121 SCZ Judgment No. 10 of 1994 (unreported)
122 Interview: Rhodwell Sikazwe, 17/02/10
123 2005/HB/55 (Unreported)
policies for the trailer and semi trailer is K95, 000,000.00 and no more, as the ceiling imposed by the third party property damage is set out in the relevant insurance policies.

The brief facts of this case is that following an accident caused by the 1st defendant's negligent driver, the defendant attempted to avail themselves indemnity from the Horse's limit in the sum of K70,000,000.00 dispute it not having been the cause or part of the cause of accident leading to the claim by the plaintiff. This would have brought the limit/extent of indemnity to K165, 000,000.00 and not K95, 000,000.00. This attempt to enjoy much higher liability cover which was not legally the responsibility of the insurance company was therefore curtailed.

Similarly, payment of the limit of indemnity does not release the defendant of his legal obligation to pay the difference if any between the amount awarded as damages and the limit of indemnity as espoused by the case of Duncan Sichula & Muzi Transport Freight and Forwarding Limited v Catherine Mulenga Chewe (married woman)\textsuperscript{124} following the decision in the case of Zambia State Insurance Corporation Limited and Another v. Chanda\textsuperscript{125} whereby it was held that, “it is an essential element of a valid accord and satisfaction that the agreement which constitutes the accord should itself be binding in law. Such agreement can be binding if itself is either made under seal or supported by consideration. There was no valuable consideration to render the releases agreement binding.”

Further, it is important to note that a typical policy of insurance in Zambia excludes punitive or exemplary damages as confirmed by Mrs. Tiziana Gray.

1.4 Deductibles

A typical contract of insurance will have a clause called deductible or excess whereby the insured will contribute an agreed percentage of each and every claim were fault is

\textsuperscript{124} SCZ Judgment No. 8 of 2000(unreported)
\textsuperscript{125} (1990-1992 ) Z.R. 175
attributed to them. However Zambia unlike most other jurisdictions applies this even to this class of insurance and a clause called “first amount payable”. The actual amount is usually reflected in the schedule accompanying the policy.

The whole reasoning or essence of this clause is to ensure that the insured should contribute to his own liability and therefore it is hoped that he will behave more responsibly or as if he were not insured. This ties in well with the principle of insurance which is about insuring unforeseen events.

Further the insured is under obligation as per clause 5 of the Multi Peril policy general conditions to take all reasonable steps and precautions to prevent accidents and losses.\(^\text{126}\)

This is so because Insurance is about insuring unforeseen and fortuitous events not intentional ones.

1.5 Conduct of Proceedings

Under the “Company’s right after an event” clause 7(a) (ii) of the general conditions of the Multi Peril Policy, the company shall, “take over and conduct in the name of the insured the defence or settlement of any claim and prosecute in the name of the insured for their own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings and in settlement of any claim. No admission, statement, offer promise, payment or indemnity shall be made by the insured without the written consent of the company.”

A number of mining houses interpreted this to mean that the insurer would take full conduct and responsibility of all Employers Liability court cases. To a point that there was an attempt by Mopani Copper Mines through their insurance brokers, Aon Zambia Limited, to enforce this by way of a guideline which was couched as I quote,

\(^{126}\text{ibid}\)
“in the event that a claim is first initiated by of a writ of summons by the claimant, such writ will be immediately handed to Professional Insurance and the power of attorney executed thereby authorising Professional Insurance’s attorney to act on behalf Mopani Copper Mines in those cases where Mopani Copper Mines is cited as the defendant. In all instances, the responsibility for entering an appearance to defend will be that of Professional Insurance. If, due to unforeseen circumstances, Mopani Copper Mines is compelled to enter an appearance to defend, it is understood that the subsequent handling of the matter is the responsibility of Professional Insurance. Any legal costs incurred by Mopani Copper mine in such circumstances will be reimbursed by Professional Insurance to Mopani Copper Mine.”127

This was the genesis of the default judgements because there was no way in house counsel could appear for any other person other than his employer as per the Law practitioner practice rules of 2002.128 This so because an advocate who is an employee of a Company and is on that company’s pay roll and therefore not in private practice is precluded from receiving instructions from any other client but his employers as his only client.

1.6 Compensation

This is mainly governed by the Workers Compensation Act No. 10 of 1999 and Law Reform (Miscellaneous Provisions) Act Chapter 74 section 2.

2. THE ZAMBIAN POSITIONS

2.1 Introduction

In order to appreciate and comprehend the Zambia jurisprudence in tort liability cases vis-a-vis liability insurance this paper will in its chapter examine a number of decided cases, out of court settlement cases, findings from interviews with various stakeholders

127 Letter to Mopani Company Secretary and copied to Professional Insurance dated 10th June, 2004
128 The Legal Practitioner Act Chapter 30
that deal with this area of law, for example the insurance company representatives, government ministries and the labour union officials.

2.2 Zambian Legal Cases

In the case of Konkola Copper Mines Plc and Zambia State Insurance Corporation Ltd v. John Kapaya (as Administrator of the estate of the late Geoffrey Chibale and 8 others Administrators),\(^{129}\) the appellants appeal against the findings of the High Court that they were negligent for failing:

2.2.1 to make the working place safe and take precautionary measures regard being to the fact that the pit bottom was known to be potentially dangerous.

2.2.2 To keep the pit bottom in safe conditions with regards to installations of supports which to the 1st appellant’s serveants knowledge had cracks.

2.2.3 recklessness of the 1\(^{st}\) appellant’s servants by continuing operational work at the pit bottom with little or no regard to the safety of the workers.

2.2.4 to immediately close that part of the mine where the accident occurred pending the restoration of the safe conditions.

The appellant contended in their appeal that the accident was as a result of natural disaster as a result of the slope failure which was beyond the control of the appellants and that the slope was unforeseeable.

In upholding the decision of the trial court the Supreme Court said:

i. it can be no defence that although they had such accidents before but they never expected an accident of such magnitude to happen. The magnitude of the situation manifested itself much earlier, in the eyes of an ordinary worker who had to send messages to his superiors visited the site twice. Their misjudgement was fatal.

\(^{129}\) SCZ NO. 26 OF 2004 (Unreported)
ii. there was no evidence that such movements had been experienced before and their failure to act created a dangerous working environment for the workers. Even when it was obvious that a great calamity would befall, the 1st appellant, through its servants gave instructions for evacuation of machinery first before moving out the workers. That was negligence.

iii. the 1st appellants knew of the dangerous situation created by the natural movements of the rocks but they allowed the employees to remain in the danger zone. This is negligence and we cannot fault the finding by the learned trial judge, that the 1st appellant was negligent on the totality of the evidence in this case

It is my view, that this was a good case were the court should have awarded punitive damages for recklessness as the award of compensatory damages was insufficient given the finding. The Supreme Court in declining to revisit the issue of quantum cited Henwood V. Naoumoff\textsuperscript{130} which followed the decision of Nance v British Columbia Electrical Railway,\textsuperscript{131} that the appeal Court must be satisfied either that the judge, in assessing the damages applied a wrong principle of law, or if he did not err in law, then that the amount was either so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damages.

The appeal court in confirming the quantum awarded by the trial Court provided for by way of deductions the portion paid by the insurer and that paid under the Law Reform (miscellaneous) provision Act\textsuperscript{132} It is however good practice for the court to deal purely with the issue of whether the respondent was liable or not without taking liability insurance cover into account. These awards are far insignificant and tort liability is not only about awarding damages which will not even act as a deterrent.

\textsuperscript{130} (1966) Z.R. 78
\textsuperscript{131} (1951) 2 A.L.L. E.R 448
\textsuperscript{132} Law Reform (miscellaneous) provision Act\textsuperscript{132} chapter 74section
In another case, Mulenga Chungu (Administrator of the estate of the late Lovestone Chanda) v. Mopani Copper Mines Plc\textsuperscript{133} despite the court finding the employer wanting as it stated the need for employers who are in dangerous operations, such as mining, to take extra care:

"the more serious the consequences, the greater the degree of care which has to be shown."

This was case of an Explosive licence holder failing to follow lead down regulations that require him to give instructions to the guards right on spot after the blast not in advance contrary to Explosive Regulation number 833(f) which reads:

"a blasting licence holder shall when his required by any of these Regulations to place
guards ensure that such guards fully understand their duties as specified in regulation 851"

and Explosives Regulation 851(i) b:

"when a blasting licence holder is required to place any person to act as a guard when he
is conducting any blasting operation he shall personally ensure that each person is
instructed that he shall not leave such position until instructed to do so by the blasting
licence holder himself."

The court also quotes Winfield on Tort on devising of a system of work before concluding that, the degree of statutory and common law duty of care of an employer to his employee is very high (and rightly so)

To buttress this position the court also refers to its observation in the Stephen Mutale (Administrator) V. Mopani Copper Mines\textsuperscript{134} that, "the mining regulations are regulatory. They provide an administrative mechanism, backing up and underlining the duty to bring about safe working environment by the employers," as earlier stated.

\textsuperscript{133} Appeal No. 24 of 2004 (Unreported)
\textsuperscript{134} Appeal No. 66 of 2003 (Unreported)
It can be well urged that the need for competent or the lack of it is a potential tort risk for employees. If the case at hand is anything to go by, then this is a clear case of what happens when assigning ill skilled/trained employees to supervisor or carry out work. Under the principle of providing a safe place of work the employer is also under a duty to extend his responsibility to giving advice, instructions or orders about commonly encountered hazards to ensure that safety of his employees.

The Court further said, “we want to once again send an unequivocal message to employers that they have a duty to provide safe environment for the workers especially in dangerous operations such as mining...as we said in the case of Stephen Mutale\textsuperscript{135}, when a fatal accident occurs in the courts of employment of a deceased, the doctrine of volenti non – fit injuria cannot be invoked, the court must take judicial notice of the fact the principle is not scientia non-fit injuria.”

The thereby declined the notion that an employee can voluntarily venture into a dangerous course of action because it was common knowledge that he was only duty bound and therefore obeys his employer’ as masters. The in expounded this reasoning cited the case of Betty Kalungu (Suing as Administrator of the estate of the late Emmanuel Bwalya) v. Konkola Copper Mines Plc\textsuperscript{136}, where there were instructions and supervision, the negligence of an employee, if he himself is in breach of a statutory duty or common law duty of care to himself, that is negligence of the employer.”

The court although came down so strong in its finding of negligence and the failure by the Respondents to offer an excusable reason for its lapse on the laid down procedure of blasting did little in punishing that Respondent to ensure that the Respondent is deterred from future omissions of this nature given the fact that the operations they were involved in are dangerous and therefore ought to have taken extra care as is required by the Explosive regulations and common law.

\textsuperscript{135} ibid
\textsuperscript{136} SCZ No. 5 of 2004 (unreported)
The Court merely awarded compensatory damages despite laying such good reasoning as to the importance of safety, giving valid instructions and the use of competent staff.

Therefore cheap labour is not a solution to a problem that requires skilled labour because the consequences are far reaching in the event of an accident or indeed a fatality expect in countries like Zambia and China where employers get away with it.

I aver that because of the court’s decision to tolerate perpetual commission of torts without penalising the defendants. What we saw with time, was an increase in work place accidents and fatalities with employers not wanting to answer for their breaches by staying away from court proceedings for as long as they had liability insurance cover in place and even when the insurance benefits were insufficient to meet the court award. All in all, these amounts were insignificant for these big mining houses as they would pay the shortfall in the amounts of damages awarded without much ado. If the Law is outdated I will urge that it is upto the Judges to interpret the law, taking into account the changes of society as espoused by Judge Cardozo, and also Joseph Kohler as earlier indicated at page 9. If we can go back in history we can clearly see that what moved the courts to start making employers responsible for work place accidents and fatalities, were the work place accidents and fatality that shocked mankind.

3. Default Judgments

We saw an increase in these cases in 2004 up to 2006 in mine accident related cases, for a simple reason that the Respondents never took conduct of theses court cases and thereby depriving the court of any meaningful synopsis of what actually happened, for the court to determine what could have caused the death of the deceased. This was confirmed by Mr Francis Chihanjenkenu Manager Non Motor Claims and Mrs. Tiziana Gray Assistant General Manger Legal at Professional Insurance, that the Respondents would willfully not go to court citing reasons of being busy and asking the insurer’s in-house

137 Edgar Bodenheimer, The Philosophy and Method of the Law, page 120 -
138 Interview date 17/02/10
139 Ibid
lawyer to defend the cases for them. Two things happened as a result, the Insurers in-
house lawyer could not defend the matter on behalf of the defendants because this would 
have been contrary to the Law Association of Zambia Act Chapter 30 clause 24(2), which 
precludes lawyers who are not in private practice to receive instructions from any other 
client but their employers see also page 41 above.

Secondly, the Insurer’s interest was not to challenge whether the defendant was liable or 
not as they were not disposed of the actual facts leading to the accident and therefore 
could not offer any meaningful expert reasons or excuses as to what lead to the accident. 
The Courts would also however proceed to hear these cases, time and again without the 
defendant’s appearance or compelling them to come to court and doing nothing about the 
defendant’s impunity towards providing a safe work environment as can be seen from the 
awards which were limited to compensation. It is my contention that the court abdicates 
its responsibility of ensuring that the place of work was a safe one.

This practice was unbecoming for the insurer as confirmed by Mr Rhodwell Sikazwe\textsuperscript{140} 
of Professional Insurance and Mr. Prince Nkhata Deputy General Manager – Operations 
of Madison\textsuperscript{141} that the insurers put in a number of measures and continued to impress on 
the mining houses on their need to take conduct of tort cases against them. However these 
calls did not yield any traceable result with the only option left for the insurers was to 
give three months notice to go off cover or indeed terminate the Employers liability 
policies in place Mopani for Professional Insurance and Konkola for Madison.

However it is important to mention that although the contract of Insurance with Mopani 
ended on 30\textsuperscript{th} June 2005, Professional Insurance continued to deal and pay a number of 
claims way after that date, as the policy was an Occurrence based.

\textsuperscript{140} Interview date 17/02/10
\textsuperscript{141} Interview date 12/02/10
4. Motor Third Party

In contrast to mine related accidents, there are few cases that ended up in court as the Road and Road Traffic Act specifically deals with the issues of liability to third parties for personal injuries or death and damage to property. Further there was a misconception amongst most insurers that liability in personal injuries and death were strict on the party of the insurer provided the insured give or informed the third party who his insurer is, the third party could claim against the insurer whether the insured had accepted liability or not. For Professional Insurance this misconception was only corrected in 2009 when one motor third party claim was referred to in house lawyers for the correct interpretation of section 88 (1)(b). According to Mrs. Gray, she highlighted and brought to the attention of the Claims Manager that the Act spoke of “liability incurred” and therefore that did not in any way imply strict liability on the part of the insurer. This interpretation Mrs. Gray says was supported by State Counsel Michael Mundashi whose opinion was sought.

Despite this misconception, the alleged strict third party liability did not deter would wrong doers/tortfeasor because of length and delays in the Zambian legal system in dealing with offenders as confirmed by the Road Traffic Commissioner\textsuperscript{142}

\textsuperscript{142} Interview: Richard Nyundu 17/02/10
CHAPTER FOUR

1. Introduction

The chapters above have laid the historical developments of tort liability, general principles of tort liability and those insurance liabilities. Despite that we still see the Zambia Jurisprudence falling short of those standards of making the work place a safe one by emphasizing the compensatory damages more than corrective/punitive ones damages. This chapter will therefore want to investigate and establish the reasons and causes, why the Zambian legal system has not done well in that regard despite the global trends showing the opposite development in that regard.

2. Conclusion

It cannot be argued or indeed, even over emphasized that one of the main aims of tort liability is to ensure a safe work place more than the award of damages. It is like the question of what come first in the egg and chicken analogy. Do you prevent accidents in the first place or do you allow them knowing very well that the injured party has recourse in the form of damages only. As stated by liberals in the United Kingdom, Joseph Chamberlain’s workmen’s compensation scheme failed to address the workers’ safety at the place of work. For Liberals tort liability is about ensuring a safe work place most importantly in the first place, award of compensatory damages s merely collateral to the latter.\textsuperscript{143}

Kenneth Abraham in his paper the liability century: insurance and tort law stresses that the collapse of traditional prejudice against insurance was a prerequisite to the workers’ compensation idea. Of course, liability insurance was thought contrary to good public policy in the early 19th century. At that time, the main concern of tort liability was

\textsuperscript{143} Journals.cambridge.org/action

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ensuring responsible behavior. If individuals and corporations could insure their liability, the whole purpose of tort, it was thought, would be defeated\textsuperscript{144}.

2.1 The Risks the inter play between Tort Liability And Insurance Liability are exposed to.

There is lack of substantial empirical data this aspect of the law but however that is no justification why the Zambian jurisprudence should not have a clear position on the subject. The available empirical data on this subject points at a number of hazards that one should be wary of as follows; “Policyholder risk, “Claimant risk”,” jurisprudential risk” and Underwriting risk.

Of the four this paper will single out policyholder risk and jurisprudential risk as the ones affecting the topic under discussion, namely policyholder risk and jurisprudential risk.

Policyholder risk refers to the possibility that the policy holder, knowing that he is insured, will change his behavior in a way that produces undesirable outcomes; in particular he may become more careless. Whereas Jurisprudential risk concerns the extent to which lawmakers, including courts and legislative assemblies, might be influenced in the application, modification or expansion of liability rules by the existence of liability insurance, see the case of John Mubanga Kapaya in which the court said and I quote, “we wish to state that the insurance benefit has been deducted from the award because it was not taken up by the deceased of his own foresight.”\textsuperscript{145} This misunderstanding of how liability insurance operates in contrast to indemnity insurance probable explains why liability insurance has been a victim of the jurisprudential risk in Zambia, see the Quinlan case above for the legal principle as established by the courts on the difference between the types of cover.

\textsuperscript{144} http://davetorrey.infobook_review_Kenneth _ Abrahams

\textsuperscript{145} Konkola Copper Mines Plc and Zambia State Insurance Corporation Ltd v. John Kapaya( as Administrator of the estate of the late Geoffrey Chibale and 8 others Administrators),
Further it can be argued that the Zambian legal system’s approach to tort and insurance liability can comfortably be said to be against public liability as per Kenneth Abraham preposition, as tort liability has been reduced merely to paying compensation and who pays is not important.

It is my contention that this two risks have influenced the Zambian jurisprudence in liability and therefore the system will do little or rather nothing to bring erring employers to book in order to make the work place safe.

Of the hazards’ or risks worth discussing in the Zambian perceptive would also include, besides the policy holder risk, that of the Lawyer, for lack of a better term, whose an “ambulance chaser”. It may well be argued that the Law firm which seems to pick all these cases have earned themselves a name of being good at prosecuting tort liability cases that are Mine accident related, that is, why they seem to handle most Mine accident or fatalities related cases. Or that they are aware, that most if not all, Mining house have this employer insurance liability policy and it is an easy way to earn their money. The question that begs answering is, why the Mining houses do, not take conduct of their Mine accident cases. Also why do the Mining house, at least then 2006 and before, oppose the appointment of outside Lawyers, to set aside judgments’ in default judgments as was the case in the Sekani Mwelwa v Mopani Copper Mines\textsuperscript{146} and Crispin Kabwe v Mplelembe Drilling Company Limited and Mopani Copper Mines Plc.\textsuperscript{147}

Admittedly the new investors feel that, they are above the law so much that even a straight forward accident on which there are liable and need only refer the employee or Administrator of estate of a deceased employee to the insurer, should the want it to end up in court. This was confirmed by the Union President Mundia Sikufala\textsuperscript{148} who said even in straight forward cases not even the Union can move any mining house unless threatened with court action. This attitude can only be passed for, the investors knowing that the tort liability laws and the legal system in Zambia are weak. Because, if the

\textsuperscript{146} 2004/HP/0658
\textsuperscript{147} 2004/HP/1068
\textsuperscript{148} Interview date 08/02/10
contrary was true, these mining hoses would not like to be dragged to court where the
court would pronounce their operations as not safe and hence award punitive damages.
Is it that, Zambia is so hungry for investors that it does not matter what environment, the
so called investor, subjects the Zambian worker, see the story of the Research Institute of
Mining and Metallurgy (BGRIMM) disaster in the first chapter. Is this not a clear sign
that the Zambian working society or environment has changed and need laws that will
protect the Zambian worker as a compromise with the interest of those that wish or have
invested in Zambia?

2.2 Is Tort Liability about awarding compensatory damages only?

Reading through most judgments lawyer as officers of the court, have not helped the
situation. Why do I say this? For some reason, best known to the Lawyers, no one
Lawyer even ever pleads or prays for punitive damages even when it is so clear that the
Mining house was not only negligent but recklessly so. If the judges are not assisted by
the officers of the court, should they also go to sleep, watching the Zambian worker being
subjected to working, not only in inhuman but risky environments? The only evidence
this author came close to, was a plea for aggravated damages in the case of Reuben
Nkomanga v DAR Farms Limited\textsuperscript{149} but even then, this plea fell off without reason,
along the way despite this case not having been defended at trial stage. Similarly in James
Ngona (suing as Administrator) V ACC Mining Executors Limited and Mopani Copper
Mines PLC.\textsuperscript{150} the claim for exemplary damages was not entertained with no explanation
or reason given. The questions then,is if Judges will not make laws, how did the
neighbour’s principle as expounded in Douoghue\textsuperscript{151} case become law. The Zambian
courts, are on record as having awarded, what was not prayed for as in the case of
Chilanga Cement Ple v Kasote Singogo\textsuperscript{152} One might argue that, the supreme courts
hands were tied as their where reviewing a matter which was adjudicated in the Industrial
relations court, which court, is a court of substantial justice. But, as the highest appellant

\textsuperscript{149} SCZ Judgement No. 25 of 2006 (unreported)
\textsuperscript{150} 2005/HP/106 (unreported)
\textsuperscript{151} Douoghue v Stevenson (1932) A.C. 562
\textsuperscript{152} Supreme Court Judgement No. 13 of 2009 (unreported)
court of the land, if that was not tenable in law, the Supreme Court should have corrected it and given guidance, see the case of Match Corporation Limited v Development Bank of Zambia and Ministry of Finance\textsuperscript{153}

2.3 What role does the executive play in ensuing the safe work place concept?

The Executive through its various ministries is charged with the responsibility of ensuring that the work place is safe. However, the executive has also gone to sleep for lack of a better term. How does the executive on behalf of the people that elected them explain the non availability of manpower and resources to undertake the periodical snap inspections on these employers? An example is the Mine Safety department which has not been funded for the last 12 months, one wonders how this is expected to police these erring employers. At the time of the author visiting the department a Mine incident in which 205 mine workers had been gased at Chambeshi Mine and the department had not been able to visit the scene of the incidence\textsuperscript{154}. The shortage of Manpower and logistical resources was also confirmed by the department of Occupational Health at the Ministry of Labour\textsuperscript{155}. How for goodness sake would these inspectors determine what went wrong and advices on remedial measures if they will only be visiting the scene of accident many weeks if not months after the accident?

2.4 Inadequate Laws

As though this is not bad enough, the current laws on the safe work place or occupational health do not provide for punishment of an employer who is in breach of the minimum safety work place standards, worse still one who does not abide by those standards or indeed one who choose to completely disregard those standards. The employer is

\textsuperscript{153} SCZ Judgement No. Of 1999 (unreported)
\textsuperscript{154} Interview: Bryson Chew, 08/02/10
\textsuperscript{155} Interview: Unison Kasenele, 20/02/10
protected from paying punitive damages by the law\textsuperscript{156} maybe that explains the reason why this class of damages is never pursued vigorously in courts of law. Therefore if the law does not provide for punitive damages and a typical insurance policy also excludes these damages, who is responsible and who should answer for the tort so committed but the innocent worker. This is definitely against public policy by any standard.

This adequacy in laws can be traced firstly to the type of judgments delivered by our courts which never award punitive damages as this is specifically restricted by the laws even when it is clear that these laws are outdated and further even when an employer is responsible for an accident that shocks the Zambian society, for example the Konkola landslide accident, the Mopani cage accident, and the Research Institute of Mining and Metallurgy (BGRIMM) disaster.

Therefore if the courts will not make judge made laws seeing that Zambia enjoys constitutional supremacy and the courts can interpret or review laws according to the changed social circumstances as a final arbiters, as espoused by the court in the Resident Doctors Association of Zambia and Others v The Attorney General\textsuperscript{157}, in which the court said and I quote,

"Courts, as final arbiters, when interpreting the constitution and the laws made thereunder which confer the freedoms, determine the content and parameters of these rights. While it cannot be denied that not all manner of speech and assembly are acceptable, there is need for the court, when interpretation which does not negate the rights. Most jurisdictions have adopted a generous and purposive construction of human rights instruments, so as to confer on a person the full measure in the enjoyment of the rights."

If the right to life is one of the fundamental human rights, I see no reason why the courts should not interpret our laws to preserve not only lives but to uphold the constitution by

\textsuperscript{156} The Law Reform (Miscellaneous Provisions) Act Chapter 74 clause 2 Sub section (a)

\textsuperscript{157} SCZ judgment No 12 of 2003
protecting the right to life, if they have done so for other fundamental rights as in the above case.

That failing the only recourse to the citizenry is the Legislator. However, the legislator has watched work place accidents without doing anything as though their hands were tied, being the second reason. Thirdly, even when the law provides for periodical inspections as one way of minimizing work place accidents. These inspections are not done because the Executive and the Legislator pass a budget that does not seek to arrest the scourge by not providing a budget line to ensure these inspections are done. Therefore, enforcement of the laws by the Executive is also nonexistent.

Quite clearly our occupational safety work place laws do not reflect the misdeamour they ought to be addressing having been borrowed from the United Kingdom many years ago and inherited or couched in the first republic which was a communist state. Should it therefore be surprising when workers take the law in their own hands, like in Chambeshi. Not at all, if anything this is a clear testimony that the Zambian occupational safety laws are lagging behind or indeed anarchy or ancient as they have not evolved with society and the times.

In conclusion, what help then, if any, is the Zambian jurisprudence in tort liability cases to the majority of the Zambian populace who are wallowing in abject poverty, is the law? Condemned to death as in the 18th century, when employees used to sign “death contracts” or “the worker’s right to die”.

2.5 What can be done to improve the current position?

Even if one was to suggest a review of our laws, of what good would that be if the biggest problem is enforcement and delays in the court system in dispensing justice. The Road Traffic Commissioner was of the idea of creation of a court that would speedily deal with Road Traffic Accidents on the lines of the small claims court. The quick

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158 Gregory P. Guyton, a brief history of Workers’ Compensation: www.ncbi.nlm.nih.gov/pmc/articles
disposal of road accident has worked well in neighboring countries like Zimbabwe and Botswana to an extent that motorist (even Zambian bus drivers who culprits of breaking the law in Zambia) are deterred from behaving recklessly or irresponsibly on the road.

Once enforcement mechanisms are in place it would then be good to see the public prosecutors asking the courts to punish careless motorist or indeed mine owners with stiffer punishment. For example in South Africa, although the law does not provide for the offence of murder against reckless motorist, the courts are on record as have successfully secured such punishment last year and are sure to securing it in the case of the pop star Malcom Maarohanye alas Jub Jub with his co accused Themba Tshabalala who were charged with murder following an alleged drug racing accident in which four school children were killed and two injured\(^\text{159}\).

At Corporate level, in the United Kingdom there is debate currently to introduce the offence of “corporate manslaughter” for erring corporate following Potter Bar rail crash. The punishment being suggested range from 2.5 to 10 per cent of annual profits with a minimum of £500,000 depending on the seriousness of the offence. In addition the company the company will be subject to a “publicity order”, under which the company shall advertise the facts of their offence, conviction, fine and remedial orders imposed on them.

If these two examples are not good enough for the Zambian legal system to learn from, that law is dynamic as it emanates from society and because of the changes in society be it economic, social or technology the law needs constant modifying, reviewing, repealing or enacting of new laws. Laws of a given society, should evolve with that society if law is to spur standards to the highest measure of vigilance and diligence to prevent and/or minimize work place accidents, please refer to page 12 above.

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