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THE LEGAL REGULATION OF COMPULSORY MOTOR VEHICLE INSURANCE IN ZIMBABWE

by

Lawrence Tshuma

Introduction

Insurance is the commonest and most important method of risk management. Risk is the uncertainty contingent upon the happening of an unwelcome event. The happening of the event may result in economic loss of one form or another to a person or organisation exposed to risk.

Central to the concept of insurance is the idea of risk-distribution and risk-transfer. While there are a number of other methods for the management of risk, such as risk avoidance and risk retention, insurance, i.e. risk-distribution and risk-transfer, is the most popular risk management technique. What is distributed and transferred is not the physical risk but the economic consequences of that risk.

Persons exposed to the same or similar types of risk distribute it by paying an actuarially pre-determined amount, the premium, to an insurer which administers a common fund to which premiums are paid. The insurer undertakes to make good the losses of those persons who suffer economic loss of a specified type as a result of the happening of a specified event. Risk is distributed in the sense that compensation for the unfortunate few who suffer loss is borne by all who contribute to the common fund out of which the insurer makes payment.

By assuming liability to compensate persons exposed to risk who suffer economic loss of a specified type, the insurer ensures that the economic consequences of an adverse event are transferred to itself. A person exposed to risk transfers the economic consequences of such risk to an insurer by paying a small sum in return for a promise by the latter that it will make good any losses consequent upon the happening of a specified adverse event. The person exposed to risk protects himself or herself from suffering an uncertain large loss should it materialise by accepting to suffer a small certain one in the form of a premium.

While persons exposed to risk individually transfer the economic consequences of risk to an insurer who undertakes to compensate them should they suffer loss, the

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The section of this paper on third party cover on government vehicles was conceived and researched by a colleague, Mrs Pat Lewin. However, because of other pressing commitments she has been unable to write it up. While Pat meant it to be an article on its own, I have subsumed it in a longer article. All credit for the conception of and research for this section should go to Pat. However, like every midwife who has participated in and facilitated the painful process of childbirth, I hope I am not being immodest in claiming credit for the write up. I hope Pat will forgive any possible deformities and mutilations which may result from my inexperience as a midwife.

insurer for its part distributes the risk among many persons exposed to the same or similar risk. Thus the insurer facilitates risk-transfer and risk-distribution. The insurer assesses the risk it assumes and fixes the premium payable for such assumption.

The transfer and distribution of risk is regulated and facilitated by law through the mechanism of the contract of insurance. The terms and conditions of the contract of insurance and the conduct of the business of insurance are generally subject to common law and/or statutory regulation. The nature of legal regulation may be determined by the nature of the risk sought to be regulated. Most risks, though important, are usually left to individual initiative to insure against while others are "sufficiently important to justify the state instituting a coercive system to ensure that compensation is paid to the victim by some other person."¹

This article analyses and assesses the legal regulation of the insurance of one type of risk which is considered sufficiently important to justify the use of a coercive system to ensure that compensation is paid to the victim by some other person; the risk of delictual liability to third parties arising out of the use of motor vehicles. The paper is divided into two parts: Part I discusses the theoretical aspects of compulsory motor vehicle insurance. Part II discusses legislative regulation of compulsory motor vehicle insurance in Zimbabwe.

Theoretical issues in compulsory Motor Vehicle Insurance

As pointed out above, some risks are of sufficient importance to justify the state in instituting a coercive system to ensure that they are insured against. Instead of leaving it to legal subjects to decide how to regulate their rights and obligations and how to protect their interests through private law, the state intervenes by introducing laws which regulate such rights and obligations. Legal regulation through state intervention may reflect the dominant class interests, for example, in the area of labour relations, or it may reflect the interests of all, for example regulating compulsory motor vehicle insurance. This is a result of the fact that while the state is a class institution, it has an element of autonomy and must generally appear as a representative of society as a whole.

Compulsory motor vehicle insurance is one example of the state's use of law as an instrument to regulate the rights and obligations of legal subjects². Under compulsory motor insurance schemes, the taking out of insurance against risk of delictual liability to third parties is made compulsory by requiring all those exposed to potential delictual liability to insure against the risk. The invention of the the motor car, introduced new risks to pedestrians and occupants of these contraptions; the risks of bodily injury or death arising out of the negligent use of motor vehicles.

Under the common law, a negligent driver or owner of a motor vehicle is liable for any damages sustained by a third party as a result of the negligent use of the vehicle.

¹ P Cane, *Atiyah's Accidents, Compensation and the Law* (4th Ed, Wiedenfield and Nicholson, London, 1987) at p 5.

² In the main, the terms and conditions of the contract of insurance in Zimbabwe have remained unregulated by statute although the Insurance Act No 27 of 1987 does regulate some terms of life policies.

Through the concept of negligence in the law of delict, common law rules shift economic losses sustained by an injured third party to the party whose negligence resulted in the losses. As a result, certain groups of individuals are, by the very nature of their activities, exposed to the risk of liability to third parties. Drivers and owners of motor vehicles are one such group. Through insurance, individuals exposed to risk of liability to third parties have a mechanism for shifting loss to another person more capable of paying than them; the insurer. Such loss shifting takes the form of contract.

Left to the individuals exposed to potential liability and in keeping with the doctrine of freedom of contract, the insurance against the risk is a private affair. If the individual decides to insure, the resultant contract embodies the terms and conditions agreed upon by the individual and the insurer. If he decides not to insure and causes loss to a third party, such party has a right of recourse to the common law rules of delict for the vindication of his/her rights.

However, by its very nature, the use of motor vehicles poses grave dangers to third parties. The gravity of the danger is such that the state, representing society in general, has been compelled to intervene and regulate the rights and obligations of individuals by making the consumption of third party liability insurance compulsory. The state has not stopped there- it has also intervened and regulated the terms and conditions of the contract of third party liability insurance. State intervention represents an inroad into the doctrine of freedom of contract. The individual is denied the freedom to choose how to manage the risk to which he is exposed contrary to the doctrine of freedom of contract. Another instance of interference with the doctrine of freedom of contract is the rendering unenforceable of certain terms and conditions which are usually found in insurance contracts and which, if not complied with, have the effect of defeating the insured's claim. Looked at from another angle, this is an implied admission that equality of legal subjects is a fiction which may be departed from in the interest of society.

Compulsory Motor Vehicle Insurance in Zimbabwe

1. Who is Obligated To Insure?

Compulsory motor vehicle insurance is governed by Part III of the Road Traffic Act.³ Section 22 (1) thereof provides that it is an offence to use a motor vehicle or trailer on a road unless there is in force in relation to the use of the motor vehicle or trailer, a policy of insurance or security in respect of third party risks which complies with the requirements of the Act. Failure to comply with the above provision is an offence punishable by a fine not exceeding one thousand dollars or imprisonment for a period not exceeding twelve months or both such fine and imprisonment.⁴

³ No 48 of 1976.

⁴ Section 22 (5).

The operative word in Section 22 (1) is the word "use". The word is defined in section 2 (1) to include "cause or permit to be used." The word has not received judicial interpretation in Zimbabwe. However, the word has been interpreted by English courts to involve a sufficient element of controlling or operating the vehicle.⁵ Having regard to the fact that English decisions are of persuasive authority in Zimbabwe, it is likely that our courts would adopt the same approach. The word "use" is wider than the word "drive". There may well be situations where it may be said a person is not driving a car but where it may be said he is using it.⁶ Obvious examples of using but not driving a car are carelessly opening the driver's door after stopping and leaving an unlighted vehicle on the roadway at night. The above examples involve an element of controlling and operating the vehicle without necessarily driving it.

Like the word "use", the words "cause or permit to use" have not been interpreted by Zimbabwean courts. In England, the word "cause" has been held to involve an express or positive mandate to use a car in a particular way while "permit" is looser and merely denotes express or implied allowance to use a vehicle.⁷ What has been said about the persuasive weight of English decisions in respect of the word "use" applies equally to the words in question.

The wording of Section 22 (1) illustrates the intention of the Legislature to ensure that the user of a motor vehicle or trailer on a road is insured. The intention is illustrated by the word "use" which has been given a wider meaning than drive and the imposition of a criminal sanction for non-compliance with the provisions of the Act. Thus every person who controls or operates a motor vehicle or who permits another, whether expressly or impliedly, to control or operate a motor vehicle is obliged to insure against third party liability.

2. Which Liabilities Must Be Insured?

Section 23 (1) (a) (ii) provides that a statutory policy shall cover liability which may be incurred in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or trailer concerned on a road. It is clear from the wording of the section that liability for damage to property is not required to be compulsorily insured against. A third party whose property is damaged as a result of a motor vehicle accident caused by the negligence of the driver cannot recover the loss under a statutory policy. He can have recourse to his common law rights.

⁵ *Brown v Roberts* [1963] 2 All ER 263.

⁶ For example, See RH Christie, *Business Law in Zimbabwe* (Juta & Co. Ltd, Cape Town 1985) at pp 225-256.

⁷ *McLeod v Buchanan* [1940] 2 All ER 179 at 187. See also J Birds, *Modern Insurance Law* (2nd ed, Sweet and Maxwell, London, 1988) at pp 295-296 for English cases.

A statutory policy is not required to cover:

- a) claims in respect of employees of the insured killed or injured in the course of their employment;
- b) claims based on contract; and
- c) claims in respect of passengers in the vehicle concerned.⁸

However, a statutory policy is required to provide cover for passengers who are carried **pursuant to a contract of employment or for hire or reward**. As regards passengers who are carried in a vehicle as a result of a contract of employment or for hire or reward, the Act provides a statutory maximum cover of up to \$20 000 for each passenger injured or killed but not more than \$200 000 for any one accident.⁹ Owners and operators of vehicles which carry passengers for reward or for hire and employers are therefore under a statutory obligation to insure their liability against third party risks up to the prescribed maximum. For passengers to be covered by the statutory policy, they have to be lawfully carried. If they are carried pursuant to an unlawful agreement, they cannot be covered under the statutory policy.¹⁰

Employees who are injured or who are killed while they are being carried in motor vehicles in the course of their employment are covered by the National Social Security Authority (Accident Prevention and Workers' Compensation Scheme) Notice 1990.¹¹

3. *Indemnity For Other People Besides the Insured Person*

Section 23 (1) (a) (ii) requires a statutory policy to "insure such persons or classes of persons as may be specified in the statutory policy ..." It is clear from the above wording that the statutory policy is not confined to covering the insured person only but extends to other people who may be named or specified in the policy. As Christie argues,

If insurers confined their policies to covering the insured named in the policy and no other person, in respect of the vehicle described in the policy and no other vehicle, their policies would technically comply with s 23 (1) (a) (ii) but the system would soon become unworkable because every time anyone wanted to lend his car to a friend or borrow a friend's car, he or his friend would have to obtain another policy in order to avoid committing an offence under s 22.¹²

Thus section 23 (1) (a) (ii) makes provision for extension clauses covering other people other than the person named in the policy. The usual extension clauses cover:

- i) drivers who drive the vehicle described in the policy with the consent of the insured person, and
- ii) the insured person while driving another person's car with the consent of that other person.

⁸ See section 23 (1) (b) (i) (ii) and (iii).

⁹ See section 23 (1) (ii).

¹⁰ *Royal Exchange Assurance v Petzer* 1967 RLR 239 (A).

¹¹ S I No. 68 of 1990.

¹² RH Christie *op cit* 255.

These extension clauses obviate the problems discussed by Christie in the passage quoted above. In addition to section 23 (1) (a) (ii), section 23 (2) (a) provides that a person issuing a statutory policy shall, notwithstanding anything contained in any law, be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the statutory policy purports to cover in the case of such person. This section gives a statutory right of indemnification to the authorised driver who, under the general principles of contract law, would be met with the argument of privity of contract. The statutory right is intended to protect third parties who are injured in accidents involving motor vehicles from the impecuniosity of authorised drivers. This, of course, is not at the expense of insurers as discussed below.

4. Statutory Protection For The Victim

Section 25 (1) provides the third party with a right to proceed against the insurer. The third party is permitted to recover from the insurer in his own name any amount not exceeding the amount covered by the statutory policy.¹³

If the third party's claim exceeds the amount insured, he has a right to recover the excess from the insured or any person indemnified.¹⁴ The right to recover direct from the insured prescribes upon the expiry of a period of two years from the date on which such claim arose.¹⁵ The two year period may be interrupted if the insurer indicates an acknowledgement of liability either expressly or by implication.¹⁶ It has been decided that the two year prescription period applies to the third party's right to claim directly from the insurer and does not apply to the driver's right to be indemnified by the insurer. Thus a third party who wishes to claim outside the two year period but within the general three year prescription period laid down by the Prescription Act,¹⁷ can proceed against the driver who will, in turn, seek an indemnity from his insurer.¹⁸ This of course, assumes that the driver will have satisfied the usual terms and conditions relating to the claims process e.g. notification of any event which may result in a claim.

The third party's right is another example of legislative interference with the general principles of contract. Under the general principles of contract, the third party would be met with the argument that he is not a party to the contract and therefore cannot claim under it. To expedite the claims process and to ensure that third parties are not prejudiced in their rights by insureds, the Legislature saw it fit to give third parties rights enforceable against insurers. This again underlines the importance attached to compensation for injury or death arising out of motor vehicle accidents.

¹³ Section 25 (1) (a).

¹⁴ Section 25 (1) (b).

¹⁵ See Proviso (ii) to section 25 and *Sadomba v Uzumba* 1982 (3) SA 558 (ZH).

¹⁶ See *Parry v Santam Insurance & Anor* 1979 RLR 389 (GD) .

¹⁷ No 31 of 1975.

¹⁸ *Guardian Royal Exchange v Commercial Union* 1976 (1) RLR 381 (GD) .

Dependants of a deceased person whose death resulted from an accident involving a motor vehicle have a statutory right to claim damages arising out of the death of a person on whom they were dependant. To prevent a multiplicity of claims, the Act provides that only one action must be instituted against the insurer in the name agreed upon by all dependants or, failing such agreement, in the name of a person appointed by the court.¹⁹ It has been recently decided that an African woman who was married to the deceased in an unregistered customary law union is a dependant for purposes of third party insurance.²⁰ This is an important and far-reaching decision which looks at the substance rather than the form of the marriage. The amount recovered from the insurer must be divided between the dependants.²¹ The third party has no better rights against the insurer than the insured.²²

In addition to the right to recover direct from the insurer, the third party is further protected in that the Act provides that if he proceeds against the insurer directly, no condition in a statutory policy purporting to restrict the insurance of the persons insured or the indemnification of the persons indemnified thereunder²³ shall be of any force or effect. The provisions of Section 26 appear to be similar to those of section 25 (2). Beck J's comments in *Guardian Royal Exchange v Commercial Union Assurance Company of Rhodesia*²⁴ suggest that there is some tautology in the two sections due to the history of the Act. With due respect, it appears that section 25 (2) applies to a situation where the third party is claiming direct from the insurer, whilst section 26 applies to a situation where the insured is claiming an indemnity from the insurer. For example, an insured who is sued by a third party who cannot sue the insurer because of the two year period of prescription can join the insurer as a defendant. The effect of the above provisions is to nullify terms of the statutory policy which if breached, would deny the third party a right to recover from the insurer.

In interpreting the above provisions, it has been held that an insurer who is sued by a third party cannot have recourse to a warranty that the insured's answer to questions in the proposal form are correct and form the basis of the contract.²⁵ It has also been held that a condition in the policy which excludes indemnity where the insured is covered by another policy is of no force or effect.²⁶ An insurer cannot escape liability on the basis that the vehicle was being used by an unlicensed driver at the time of the accident and that there is an express provision in the policy excluding liability under such circumstances.²⁷

¹⁹ See Section 25 (5).

²⁰ *Zimnat Insurance Company Ltd v Chawanda* 1990 (2) ZLR 143 (S); 1991 (2) SA 825 (ZS).

²¹ See section 25 (6).

²² Proviso (i) to section 25 (1).

²³ Section 25 (2) (a) and (b).

²⁴ 1976 (1) RLR 381 at 384.

²⁵ *Felton & Anor v Lewis & Ors*, 1960 R & N 97 (), *Stumbles v New Zealand Insurance Co. Ltd* 1963 R & N 77 (G).

²⁶ *Lawn v Rhodesian Eagle Insurance Company Ltd* 1977 (1) RLR 201 (GD) at 206 — 207.

²⁷ *R v Graham* 1965 R L R 41 (GD).

Sections 25 (2) and 26 do not affect the insurer's common law rights to avoid the contract *ab initio* on the basis that there was a misrepresentation or a non-disclosure of a material fact.²⁸ When sued by a third party, the insurer can thus avoid liability by relying on his common law rights rather than on a condition contained in the policy. As suggested in the judgement in *Stumbles v New Zealand Insurance Company (supra)*, the Legislature, either by omission or design, left a loophole in the Act. This loophole can be relied upon to the prejudice of the third party.

Sections 25 (2) and 26 are yet another instance of legislative intervention in contractual relations in the interests of third parties. The risk of loss arising out of an injury or death caused by the negligent use of a motor vehicle justifies a departure from the generally accepted doctrines of freedom and sanctity of contract. Through statutory regulation, those conditions in a policy which would defeat a third party's claim are rendered invalid in circumstances where the third party is claiming direct from the insurer. They are however, valid as against the insured who seeks an indemnity.

5. The Insurer's Right To Recover

Section 25 (4) provides that any sum paid by an insurer in or towards the discharge of any liability to a person which is covered by the statutory policy by virtue only of the provisions of section 25 shall be recoverable by the insurer from the person. If the insurer is compelled to satisfy a third party's claim which has been brought by the third party direct against him and which he would have repudiated on the grounds of breach of condition but for sections 25 (2), the insurer can claim the amount paid in satisfaction of the claim from the insured or the authorised driver. The authorised driver cannot raise the argument that he is not a party to the contract and therefore has no obligation to reimburse the insurer. The insurer has a statutory right to seek reimbursement.

In addition to section 25 (4), the proviso to section 26 provides that a provision in a statutory policy which requires the insured or the indemnified person to reimburse the insurer for disbursements made to third parties in terms of statutory policy shall not be void. This provision permits insurers to introduce terms in their policies which entitle them to recover moneys which they would not have paid to the third party but for the requirements of the statutory policy. The above provisions are meant to protect the interests of insurers. Third parties are granted a right which is not subject to any restrictive conditions to claim direct from insurers because insurers are better placed to satisfy the claim than the users of motor vehicles. Insurers in turn are given a right to claim reimbursement from insureds or persons indemnified.

6. Compulsory Insurance on Government Owned Motor Vehicles

Section 22 (2) provides that the Government itself may undertake to insure against third party risks in relation to motor vehicles or trailers owned by it as if it were an insurer. The use of the word "may" indicates that the provision is directory rather

²⁸ *Stumbles v New Zealand*, *supra* and *Van Biljon v Guardian Royal Exchange* 1979 RLR 385 (GD).

than peremptory. Thus, the Government has an option either to insure with an insurer as required by Section 22 (1) or to undertake the insurance itself. If the Government chooses the latter option, the relevant Minister is required to publish in the Gazette the terms and conditions of, and any amendments to or revocation of the undertaking made under section 22 (2).²⁹ The Minister published such an undertaking in Government Notice No. 876 of 1972 which was repealed and replaced by Statutory Instrument 607 of 1983. Thus the Government undertook insurance in respect of third party risks in relation to motor vehicles owned by it in all respects as if it were an insurer for purposes of Part III of the Act. Since the Government chose to insure its own motor vehicles against third party risks, the provisions of section 22 (1) do not apply to any motor vehicle or trailer owned by the Government.³⁰

The operative provision of SI 607 of 1983 is section 3 which provides that subject to the provisions of the Act and the undertaking, the state will indemnify an officer in respect of any liability which may be incurred by him in respect of the death or bodily injury to any person caused by or arising out of the private or official use by him of a vehicle on any road, in all respects as if the state were an insurer for the purposes of Part III of the Act. The remaining provisions of Section 3 are similar to the provision of Section 23 (1) (b).

The issue whether the undertaking provides the third party with the same rights as those provided under the Act has come before the High Court in two cases. In *Badenhorst v Minister of Home Affairs*.³¹ the plaintiff sued the Minister for damages resulting from injuries sustained when a police vehicle in which he was a passenger was involved in an accident which, the plaintiff alleged, was caused by the negligence of the police driver. The plaintiff stated that he was suing the Minister of Home Affairs as an insurer of the Police Government vehicle by virtue of Section 22 of the Road Traffic Act. The High Court held that section 25 of the Act, which gives an injured party the right to proceed direct against the insurer, did not apply to the Government and that liability had to be established against the driver first before the Government became liable. With due respect, liability against the driver has to be established in all cases under compulsory motor vehicle insurance. The third party can only proceed against the insurer where the insured is liable.

In the case of *Webster & Anor v The Government of Zimbabwe & Anor*³² Court reaffirmed that the Government's liability is limited by the terms and conditions of the undertaking and that accordingly, an injured party could not sue the Government direct. He must first establish the legal liability on the part of the driver of the vehicle. It was further held that the words of the undertaking do not provide an undertaking to indemnify any other person. It does not create an enforceable right of payment against the Government by the injured party. Thus if the Government employee does not seek an indemnity from the Government, the injured party has no enforceable right against the Government.

²⁹ Section 22 (3) .

³⁰ Section 22 (4).

³¹ 1984 (1) ZLR 221 (H).

³² 1987 (1) ZLR 376 (H).

It appears therefore, that third parties who suffer loss from accidents involving Government owned vehicles have lesser rights than those injured in accidents involving other classes of vehicles. The only sound explanation for this anomaly is that the interpretation of SI 607 of 1983 does not reflect the intention of the Legislature for the following reasons: firstly, it is anomalous that a statutory instrument should provide less rights than those provided by the enabling Act to the same class of people: secondly, if Section 22 (2) gives the Government an option either to insure its vehicles under section 22 (1) or to give an undertaking under section 22 (2) as stated by Mfalila J in *Badenhorst v Minister of Home Affairs (supra)*, it is anomalous that by choosing the second option, the Government automatically denies third parties the right to proceed direct against the insurer, a right which they would have enjoyed had the Government chosen to insure. It is suggested that the Government is given the option for reasons of expediency and convenience. The Government owns a large number of motor vehicles and has adequate resources to compensate third parties for losses sustained in accidents involving motor vehicles it owns. It is for these reasons that the Legislature gave the Government an option to insure its own vehicles "as if it were an insurer." The Government is given the option to be its own insurer for the same reason that a party with adequate resources can give security rather than insure with an insurer.

Further to the above arguments, the position taken by the High Court in the two cases discussed above defeats the rationale behind compulsory insurance cover which is the protection of third parties against the impecuniosity of the driver. Cases such as *Wester & Anor v The Government of Zimbabwe & Anor (supra)* make bad law. By the time judgment was granted in favour of the Appellants, the second Respondent had disappeared and therefore could not claim indemnity from the first Respondent. The judgement turned out to be a *brutum fulmen* since the Appellants could not sue the Government directly. Reform is not only necessary but overdue in this regard.

7. The Motor Insurers Bureau Agreement

There may well be situations where the third party suffers loss in an accident involving an uninsured driver. In such situations, the criminal sanctions provided for in Section 22 will not be of any assistance to the third party. The knowledge that the uninsured driver has been fined one thousand dollars or has been imprisoned for a period of 12 months or both will not help the third party to pay his hospital bills or to recover lost earnings. If there is another party who has "caused or permitted" the uninsured driver to use a motor vehicle or trailer without a policy of insurance covering it in respect of third party risks, the third party can sue that other party for damages for breach of a statutory duty. This is not likely to be of much help to most third parties.

To protect those who may suffer loss as a result of accidents involving the use of motor vehicles which are not covered against third party risks, the Motor Insurers' Bureau, a company composed of all insurers who transact motor insurance business and who are approved under Section 23 (1), entered into the Motor Insurers Bureau (MIB) agreement with the then Minister of Roads and Road Traffic in 1962. The agreement provides that if damages are awarded by a court in respect of death or personal injury arising out of the use of a motor vehicle on a road in circumstances where liability is required to be covered by the insurance under the Road Traffic Act, and such damages or any part of them, remain unpaid twenty eight days after the

judgement became enforceable, the Bureau will pay the unrecovered amount to the person in whose favour the judgment has been given against a cession of the judgment debt. The Bureau's liability only arises when the plaintiff has successfully established his case against the wrongdoer and judgment has been given in his favour.

Where there is a policy of insurance at the time of the accident covering the use of the motor vehicle against third party risks, the third party should notify the insurer who issued it. The insurer will satisfy the third party's claim even though he may be in a position to repudiate liability on the grounds of breach of conditions. The insurer retains his rights against the wrongdoer. The wrongdoer is not released from his contractual obligations to the insurer. The third party is required to:

- a) give written notice of proceedings by registered post before the commencement of proceedings.
- b) supply the insurer with a copy of any summons or any statement of claim which may be issued; and
- c) undertake that he shall not seek to obtain judgment before the expiry of thirty days from the date of the sending of the copy of the summons.

Where there is no policy or where the existence of a policy is in doubt, the third party is required to notify the Bureau of his claim and should follow the same steps as if there was a policy.

Finally, where a person has sustained serious and permanent disablement or has died as a result of injury in circumstances where it is reasonably certain that the disablement or death was caused by the negligent driving of a mechanically propelled vehicle, the owner or driver of which cannot be traced, the Bureau will, at their discretion, give sympathetic consideration to making an *ex gratia* payment. Payment will only be made where, if the driver had been traced, he would have been found by a court to be under a liability to the third party.

The MIB agreement is yet another illustration of the importance that the state attaches to the compensation for injury or death arising out of the use of motor vehicles. It seeks to provide relief to third parties who are injured in accidents caused by the negligence of uninsured drivers. It resulted from realisations that criminal sanctions did not deter drivers from using motor vehicles without insurance against third party risk. The agreement was concluded by the then Minister on behalf of accident victims. In law, the victims are not parties to the agreement. Their right to claim under the contract may therefore be doubted. However, it may be argued that the contract was made for their benefit which is possible under the *stipulation alteri* in Roman-Dutch Law. In any event, the MIB is not likely to dispute their right to claim under the agreement.

8. The Yellow Card Third Party Insurance Scheme

The Road Traffic Act prohibits the use of a motor vehicle or a trailer on a road unless there is in force in relation to that use, a policy of insurance or security in respect of third party risks. Visitors to Zimbabwe are therefore under an obligation to take out insurance in respect of third party risks for the duration of their stay in Zimbabwe. Since most countries have laws which require compulsory insurance against third party risks, Zimbabwean visitors to neighbouring countries are also

required to take out insurance in respect of third party risks for the duration of their stay in those countries.

Where there is a lot of cross-border travel and trade within a region, taking out compulsory insurance at the border may be inconvenient for travellers and visitors. It becomes necessary for governments within the region to enter into reciprocal agreements which facilitate the taking out of insurance in respect of third party risks within the region. In December 1986 member states of the Preferential Trade Area (PTA) signed a Protocol on Third Party Insurance. The Protocol makes provision for the issue of a yellow card third party insurance policy in Member States.

The Road Traffic Amendment Act No 18 of 1990 gives effect to the Protocol. It amends the Road Traffic Act by inserting Part III A after the existing Part III of the Act which deals with compulsory third party insurance. The new Part IIIA is headed "Yellow Card Party Insurance." Section 291D (1) permits the use of a motor vehicle on a road without a policy of insurance or security in respect of that use as required by section 22 if there is a yellow card in force in Zimbabwe in relation to the use. The certificate issued in connection with the yellow card insurance has to be carried in the vehicle or trailer at the time of use.

The essence of the new provisions is that a yellow card third party insurance policy issued in another PTA member state will be recognised in Zimbabwe and a third party with a claim against the holder of such a policy arising in Zimbabwe will be able to claim compensation due to him direct from the National Insurance Council of Zimbabwe in much the same way as a third party with a claim against the holder of an ordinary third party insurance policy is able to claim compensation direct from the Zimbabwean insurance company that issued the policy.³³ The yellow card scheme is not a substitute for a statutory policy or security if it is issued in Zimbabwe as it provides third party cover for the use of a motor vehicle outside Zimbabwe.

A person normally resident in Zimbabwe may take out a yellow card insurance policy from a Zimbabwean insurer. Such policy will cover the use of his motor vehicle in other PTA member states. In terms of the Protocol, the policy will be recognised and claims arising from the use of the motor vehicle will be met by the national bureaux of those states.³⁴ Yellow card insurance policies issued in other member countries are only recognised in Zimbabwe if that country has been designated for by notice in the Gazette. A member state will be designated only if the President is satisfied that the member state concerned has made satisfactory arrangements for the enforcement of the yellow card scheme in its territory.³⁵

In terms of section 29E the scheme covers bodily injury or death arising out of the negligence or other unlawful act of the person using the motor vehicle or trailer. Thus, property claims are not covered. All other provisions applying to compulsory

³³ 1990 No 3 *Bulletin of Zimbabwean Law* 67.

³⁴ Section 29 I of Act 18 of 1990.

³⁵ Section 29C and *Bulletin of Zimbabwean Law, ibid.*

motor vehicle insurance discussed above apply to the yellow card scheme. Of importance to note is that conditions relating to or applying to a yellow card scheme, or any provision of any law, including the common law, which purports to restrict the liability of the National Insurance Council of Zimbabwe shall not be of any force or effect. This is wider than a similar provision with respect to a statutory policy as it includes common law restrictions.

The yellow card scheme thus provides protection to Zimbabweans who suffer injuries or die in accidents caused by the negligent use of motor vehicles from neighbouring countries in Zimbabwe. Once the scheme is fully operational, such Zimbabweans will have the same protection as that which is provided in Part III of the Road Traffic Act.

Conclusion and Suggestions For Reform

This paper has attempted to show that compulsory motor vehicle insurance is a form of insurance regulation whereunder the consumption of insurance in respect of liability to third parties arising out of injury or death is made compulsory. The state has been compelled to interfere with the doctrines of freedom and sanctity of contract to ensure that third parties are compensated for loss sustained in motor vehicle accidents. It is suggested that a number of reforms are necessary to ensure the efficacy and the efficient operation of the scheme.

Firstly, section 23 (1) (a) (ii) should be amended to include liability for damage to property. Third parties whose property is damaged as a result of the negligence of the user of a motor vehicle on a road have either to look up to their own insurers, if they have any, or to the wrongdoer. It makes sense to suggest that the scope of compulsory insurance should be extended to cover liabilities for damages to property. It may be argued, against this suggestion, that if it is adopted, it would result in an increase in premiums. In reply, it may be argued that a minimum and a maximum amount insured could be stipulated in the Act; the minimum to ensure that a reasonable amount is available to the third party in the event of an accident, and the maximum to ensure that premiums are affordable. Since insurance not only transfers risk, but also distributes it amongst the insureds, it is suggested that compulsory insurance against liability for damage to a third party's property will distribute risk amongst a large number of insureds thereby reducing the premium payable by each of them.

Secondly, compulsory insurance should also extend to cover passengers who are carried in the motor vehicle concerned even if they are not carried pursuant to a contract of employment or for hire or reward. Motor vehicles are not readily available in Zimbabwe. The public transport system cannot cope with demand. Under these circumstances, people are forced to travel in motor vehicles which are not authorised to carry passengers for hire or reward. It is therefore necessary to provide compulsory insurance for such passengers in the event of injury or death.

Thirdly, the Government's undertaking given in terms of section 22 (2) should provide the third party with a right to proceed direct against the Government. In view of the large number of motor vehicles owned by the Government, it is essential that third parties be granted a right to proceed direct against the

Government. As the law presently stands, it is difficult to justify the prejudice to which third parties who suffer losses in accidents involving Government owned vehicles are exposed to in comparison to those injured in accidents involving other classes of motor vehicles.

Fourthly, the statutory maximum cover which is provided under Section 23 (1) (ii) for any one accident should be increased from the present \$200 000. Experience has shown that \$200 000 is not enough to compensate victims and dependants of victims of bus disasters for losses sustained in one accident. Further to this suggestion, procedures that would ensure immediate compensation should be adopted. More often than not, victims of motor vehicle accidents do not receive compensation when they need it most.

Fifthly, the insurer should not be permitted to rely on his common law rights to avoid the third party's claim. The position should be the same as where there is a condition in the statutory policy which restricts the liability of the insurer. The insurer can always recover what he has been compelled to pay out to the third party from the insured or the authorised driver.

If adopted, the above suggested reforms would go a long way towards improving compulsory motor vehicle insurance in respect of third party risks. Additional regulatory measures would certainly benefit victims of motor vehicle accidents without adversely affecting the rights and commercial viability of insurance companies.



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