

INSURANCE LAW IN ENGLAND AND CAMEROON

A Comparative Study - with Specific Reference to
Motor Vehicle Insurance

by

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A B S T R A C T

The purpose of this research study is to examine the present state of insurance law in Cameroon with particular reference to motor insurance, bringing out the fact that with the exception of certain areas, there exist two systems of insurance law in Cameroon; one in the English-speaking part and the other in the French-speaking part. This work proposes that this distinction ought not to continue and advocates the unification of insurance laws. For reason of space not all the fundamental principles of insurance law and regulation will be attempted: hence some valuable material cannot be included in this thesis.

Motor vehicle insurance was chosen for these reasons. First, it is the most common form of insurance in both English and French-speaking Cameroon. Second, it is, in practical terms, the most important type of liability insurance. It is therefore, of greatest interest and relevance to the Cameroonian public comprising insurance companies, policyholders, victims of accidents and the dependants of victims. This has led the state to intervene in regulating motor vehicle insurance a great deal more than in other branches of insurance.

The approach adopted throughout is a comparative one, involving English, French and Cameroonian law.

In order to provide the reader with a background to the existence of the two legal systems in Cameroon, the introductory chapter traces the evolution of law with particular reference to the colonial era. The Reason for Government Regulation of certain aspects of insurance law in the countries involved is then examined (Chapter One). This intervention has been exercised through Government Control of Insurance Concerns (Chapter Two), Compulsory Motor and other Insurances (Chapter Three), the provision of a Motor Insurance Fund (Chapter Four) and Regulation of Insurance Intermediaries (parts of Chapter Six). In the above areas where the government has intervened there now exists considerable uniformity in insurance law and practice throughout the Republic of Cameroon. However, there are still other aspects of the insurance transaction in which there

are no uniform laws (see parts of Chapter Three dealing with the conceptual basis of liability and parts of Chapter Six dealing with Insurance Intermediaries and Disclosure. Further, see Chapters Five, Seven and Eight dealing with the Formation of the Insurance Contract, the Construction of the Insurance Contract and the Settlement Process respectively.

Finally, this work concludes with proposals for reforming the present laws based on the material discussed, and in particular, a proposal for a Uniform Insurance Code for Cameroon.

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IN

GRATITUDE

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- 1934 Road Traffic Act (24 and 25 Geo.5, c.50).
- 1945 Law Reform (Contributory Negligence) Act (8 and 9 Geo. 6, c.28).
- 1950 Arbitration Act (14 Geo. 6, c.27).
- 1960 Civil Aviation (Licensing) Act (8 and 9 Eliz. 2, c.38).
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- 1972 Constitution of the United Republic of Cameroon.
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- 1935 Decree of 30 June 1935 establishing a Court of Appeal at Brazzaville.
- 1937 Decree of 19 March rendering applicable in Cameroon the law of 13 July 1930.
- 1962 Decree No. 62-DF-437 of 18 December 1962 stipulating regulations relating to investments of insurance organisations in the Federal Republic of Cameroon.
- 1965 Decree No. 65-DF-565 of 29 December 1965 to implement Law No. 65-LF-9 of 22 May 1965 rendering third party motor insurance compulsory.
- Decree No. 65-DF-566 of 29 December 1965 organising the Central Bureau of Rates, Supervision and Conciliation of Disputes.
- 1967 Decree No. 67-DF-332 of 4 August 1967 laying down conditions for applying Ordinance No. 62-DF-36 of 31 March 1962 to Lloyd's of London.
- Decree No. 67-DF-495 of 17 November 1967 fixing the regulations of the Motor Insurance Fund.
- 1968 Decree No. 68-DF-153 of 8 April 1968 defining the technical conditions and functions of the National Re-Insurance fund.
- 1973 Decree No. 73-237 of 10 May 1973 regulating the investments of insurance concerns in the Federal Republic of Cameroon.
- Decree No. 73-349 of 10 July 1973 publishing a Protocol agreement between the (United) Republic of Cameroon and Les Mutuelles du Mans.
- 1976 Decree No. 76-3212 of 2 August 1976 transferring Workmen's Compensation to the National Social Insurance Fund.
- Decree No. 76-334 of 6 August 1976 relating to compulsory insurance of goods imported into Cameroon.
- 1977 Decree No. 77 - 318 of 17 August 1977 rendering compulsory the insurance of risks relating to construction.
- 1984 Decree no. 84-1105 of 25 August 1984 organising the Ministry of Finance.

Ordinances

- 1945 Ordinance of 29 September rendering applicable in Cameroon all basic French insurance legislation.
- 1959 Ordinance No. 59-86 of December 1959 integrating customary courts into the judicial system.
- Ordinance No. 59-100 of 31 December 1959 relating to Workmen's Compensation.
- 1962 Ordinance No. 62-OF-36 of 31 March 1962 fixing the legislation applicable to the operation and organisation of insurance companies.
- 1972 Ordinance No. 72-6 of 26 August 1972 organising the Supreme Court.
- Ordinance No. 72-21 of 19 October 1972 organising the structure of the courts in the (United) Republic of Cameroon.
- 1973 Ordinance No. 73-14 of 10 May 1973 fixing regulations applicable to insurance concerns.
- 1974 Ordinance No. 74-1 of 6 July 1974 establishing rules relating to land tenure.
- 1985 Ordinance No. 85-3 of 31 August 1985 relating to insurance business.
- Ordinance No. 85-004 of 11 December 1985 relating to insurance of imports (modifying article 6 of Ordinance No. 85 - 003 of 31 August 1985).

Laws

- 1930 Law of 13 July 1930 relating to insurance contracts.
- 1955 Southern Cameroons High Law 1955.
- 1965 Law No. 65-LF-9 of 22 May 1965 rendering third party motor insurance compulsory.
- 1967 Law No. 67-DF-495 of 17 November 1967 fixing regulations applicable to the Motor Insurance Fund.
- Law No. 67-LF06 of 12 June 1967 codifying Labour Law.
- Federal Law No. 67-LF-1 of 12 June 1967 introducing Book 11 of the Penal Code.
- 1968 Law No. 68-LF-17 of 18 November 1968 rendering applicable in English-speaking Cameroon the provision of Ordinance No. 59-100 of 31 December 1959 relating to Workman's Compensation.

1975 Law No. 75-14 of 8 December 1975 rendering the insurance of imports of goods compulsory.

Law No. 75-15 of 8 December 1975 rendering construction insurance compulsory.

NIGERIA

1945 Motor Vehicle (Third Party Insurance) Act.

1948 Illiterate Protection Acts.

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- 1952 Décret no. 52-763 du 30 juin 1952, Portant règlement d'administration publique pour l'application de l'art. 15 de la loi no. 51-1508 du 31 déc. 1951 créant un fonds de garantie au profit des victimes d'accidents d'automobile D.1952.1.235.
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- 1951 Loi no. 51-1508 du 31 décembre 1951, Relative aux comptes spéciaux de Trésor pour l'année 1952 D.1952.1.37.
- 1958 Loi no. 58-208 du 27 février 1958, Instituant une obligation d'assurance en matière de circulation de véhicules terrestres à moteur D.1958.1.124.
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- 1976 Insurance Companies (Intermediaries) Regulations (S.I. 1976 No. 521).
- 1978 Insurance Brokers Registration Council (Code of Conduct) Approval Order (S.I. 1978 No. 1394).
- Insurance Brokers Registration Council (Registration and Enrolment) Rules Approval Order (S.I. 1978 No. 1395).
- Insurance Brokers Registration Council (Constitution of the Investigating Committee) Rules Approval order (S.I. 1978 No. 1456).

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1971 Order No. 1110-MINFI-DCE of 26 October 1971 relating to the calculation of technical reserves of insurance companies.

1972 Order No. 137 MINFI-DCE of 6 March 1972 fixing the rate of Commission of Motor Vehicle Insurance.

1973 Order No. 212 MINFI-CEI of 29 June 1973 listing the documents to be submitted by all concerns intending to do insurance business in Cameroon.

Order No. 358 MINFI-CEI of 27 December 1973 regulating the profession of insurance intermediaries.

1976 Order No. 102. MINFI-MINEP of 27 April 1976 implementing Decree No. 76-334 of 6 August 1976 relating to compulsory insurance of goods imported into Cameroon.

1978 Order No. 37 MINFI-CES of 24 February 1978 fixing the amount of contribution by the insurance companies to the Motor Insurance Fund for the period of 1st January to 31st December 1978.

1980 Circular No. 015166/MINFI-CE of 4 June 1980 relating to the activities which are incompatible with insurance business.

Order No. 352 MINFI-CEI of 30 June 1980 modifying Order No. 358 MINFI-CEI of 27 December 1973 relating to the profession of insurance intermediaries.

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Order No. 97 MINFI-CE-A modifying and completing certain provisions of Order No. 339 MINFI-CE-A of 3 October 1977 fixing the rate of commission applicable to motor insurance.

1982 Order No. 44 MINFI-CE-A of 2 September 1982 fixing the tariffs applicable to motor vehicles.

1985 Order No. 000618 of 2 February fixing premium rates applicable to motor vehicles.

Order No. 750-MINFI-DCE5 of 7 August 1985 fixing the amount of contribution by the Insurance Companies to the Motor Insurance Fund for the period of 1st January to 31st December 1985.

GENERAL INTRODUCTION

The purpose of this general introduction is to present the essential characteristic features of the Cameroonian legal system. The approach to the subject adopted here is historical as the present legal structure reflects Cameroon's colonial past.

I HISTORICAL BACKGROUND OF THE CAMEROONIAN LEGAL SYSTEM

After its discovery by European explorers and merchants, Cameroon¹ underwent a triple colonial experience - German, English and French domination.²

1 At the end of the fifteenth century, Portuguese explorers baptised the Wouri River on whose estuary stands the coastal territory around the modern city of Douala, 'Rio dos Cameroes' after the large pink prawns found there; from this came the country's present name: Cameroon. The appellation Cameroon was spelt differently throughout the country's colonial history: Kamerun by the Germans; Cameroun by the French and Cameroons by the English. In this study all these forms of the name will be found according to whether mention is made of the territory under German, French or British Colonial rule. For the period since unification (that is, 1961 and beyond), the form Cameroon will be used.

2 See Monie J.N., The Development of the Laws and constitution of Cameroon, unpublished Ph.D. thesis, University of London, July 1970. Further details on Cameroon in the colonial era can be found in the following works:- H.R. Rudin, Germans in the Cameroon 1884-1914, New Haven, 1938; David E. Gardiner, Cameroon: United Nations Challenge to French Policy, London, Oxford University Press, 1963; Victor T. Le Vine, The Cameroon Federal Republic, Cornell, 1971; Harold D. Nelson, Area Handbook for the United Republic of Cameroon, Washington D.C., 1974; Mveng Englebert, Histoire du Cameroun, Paris, 1963; W.R. Johnson, The Cameroon Federation: Political Integration in a Fragmentary Society, Princeton, 1970.

GERMAN ANNEXATION OF CAMEROON

The Germans were the first European power to establish a protectorate over Kamerun. On 12 July 1884 Gustav Nactigal, Bismarck's envoy, signed a treaty with two Cameroonians in Douala on behalf of the German Government. Two days later on 14 July 1884 the German protectorate of Kamerun was officially proclaimed. At the Berlin Conference Britain and France agreed to abandon any further claims on Cameroon and recognised Germany's annexation of Kamerun³. Germany then proceeded to demarcate the western boundary with French Equatorial Africa. By 1887, German sovereignty over the Kamerun was firmly established. For some thirty two years thereafter until March 1916, Kamerun was a German colony subject to Imperial German Law⁴.

During German rule civil administration was closely allied to jurisdiction in the courts. The head of the German administration in Kamerun was the Governor who was initially responsible to the Chancellor but later to the Colonial Office. The Governor was empowered to legislate for the country and to administer the courts. The English-supervised Douala Court of Equity which had been set up in 1856 by the European Mercantile Community to resolve trade disputes continued to operate. Such a vestige of British influence was irksome to the Germans. Consequently this court was abolished in 1885. Governor Soden set up a temporary court (similar to the consular courts in British territories) in Douala with himself as President.

Two basic Acts were passed declaring German law applicable to Europeans in German colonies. The first was the law regarding Consular Jurisdiction

3 See: Cameroon - Handbook prepared under direction of the Historical section of the Foreign Office - No.118 February 1919, pp.15-25.

4 See generally, Victor T. Le Vine, op. cit., pp.22-31; N. Rubin, Cameroon: An African Federation, London, 1971 pp.23-43.

dated 7 April 1900 and the second was the Colonial Law dated 10 September, 1900. In terms of these instruments the administration of justice with regard to Europeans in the territory was to be governed by the laws of the German civil and criminal codes which became applicable in Kamerun. The administration of justice with regard to Cameroonians was governed by ordinances. Section 4 of the Colonial Law of 1900 vested in the Kaiser the right to legislate for the colonies by virtue of his royal prerogative. Generally, the exercise of his powers was delegated to the Imperial Chancellor and the Governor. There was no codification of the substantive law and procedure. In practice, the civil code, tempered by such customary laws as could be ascertained, applied.

The system of courts also followed a dual pattern: two sets of courts were established, one for Europeans and another for Africans. An evaluation of German colonial justice would portray a discriminatory policy. Paradoxically, this was beneficial for the well-being of the indigenes as it maintained, encouraged and fostered native law and custom, which today is the only law truly Cameroonian in origin.

THE BRITISH AND FRENCH IN CAMEROON

The Germans were defeated in the First World War by the British and French forces in Cameroon in 1916. In 1915 Britain and France agreed to maintain a condominium until the collapse of German resistance in the territory. An agreement was reached on 4 March, 1916 which ended the condominium and delineated the zones of influence of France and Britain. France obtained the bulk of Cameroon land area and population and Britain acquired two non-contiguous strips of Cameroon territory bordering Nigeria.

Britain's primary concern was to secure what she regarded as better boundaries for her vast territory of Nigeria⁵. By the treaty of Versailles, Germany renounced all rights over her overseas possessions including Cameroon in favour of the Principal Allied and Associated Powers⁶.

Britain and France jointly recommended to the Council of the League of Nations the conferment upon themselves of mandates to administer the territory of Cameroon in accordance with article 22 of the Covenant of the League of Nations. Great Britain administered the portion of the territory lying to the west and France that lying to the east of the frontier line fixed by a joint declaration signed in London on 10 July, 1919⁷. The recommended mandates were confirmed by the League of Nations, the terms of which were defined by Acts done at London on 20 July 1922. The terms of the mandates agreement were identical. Article 9 stipulated that:

"The Mandatory shall have full powers of administration and legislation in the area subject to the mandate. This area shall be administered in accordance with the laws of the Mandatory as an integral part of his territory....."

It further provided that:

"The Mandatory shall therefore be at liberty to apply his laws to the territory subject to the mandate, with such modifications as may be required by local conditions....."

5 See N. Rubin, op cit., pp.71-79; Victor T. Le Vine, op. cit., p.32.

6 Article 119 of the Treaty of Versailles, 28 June 1919.

7 For the Franco-British declaration of 1919 fixing the frontier line between the two Cameroons, see, Annexes 374f and 374g to the Minutes of the Nineteenth Sessions of the Council of the League of Nations, Appendices: League of Nations Official Journal, August 1922, 872 and 877.

This article provides the basis, and officially marks the beginning, of the duality of Western legal systems which the people of Cameroon have since experienced and to which they remain subject to this day. Consequently, it is of crucial importance in the legal history of Cameroon.

After the second World War, events took a different turn and new elements were introduced in the process of international supervision - the trusteeship system was created by the United Nations. Pursuant to articles 75 and 77 of the United Nations Charter of 26 June, 1945 France and Britain indicated their desire to place their respective portions of Cameroon under the new international trusteeship system⁸. The General Assembly of the United Nations converted the existing mandates into trusteeships and defined their terms by virtue of article 85 of the U.N. Charter⁹. Article 5(a) of the Trusteeship Agreement with Great Britain and Article 4(1) with France re-enacted Article 9 of the League of Nations Mandate, the terms of which have been mentioned previously.¹⁰ Clearly then, with effect at least from 29 July 1922, Cameroon was divided into two parts^{10A}; one, administered by

8 See the preamble to the respective Trusteeship Agreements for British Administration in Cameroon and French Administration in Cameroon; the United Nations General Assembly Official Records, 1946, Supplement No.513 December 1946, New York 1946.

9 These terms are set out in the United Nations General Assembly Official Records, 1946, op. cit., pp.21-22 in respect of British Cameroons and pp.27-28 in respect of French Cameroon.

10 Supra, at p.4.

10A At present the Republic of Cameroon comprises the territory formerly under French mandate and the southern portion of Cameroon formerly under British administration.

Great Britain and subject to the English system of law and justice and the other administered by France and subject to French law and justice. Both Britain and France were to lead Cameroon to independence¹¹.

Great Britain further divided her portion of Cameroon into two territories - Northern and Southern Cameroons, both of which she administered as integral parts of her neighbouring colony of Nigeria through which the institutions and practices of English justice were transplanted into British Cameroon. It is in this connection that it will be seen^{11A} how English law was received into Cameroon.

The main facet of British colonial administration was indirect rule. Indirect rule implies the slow and gradual development of customary law and institutions along traditional lines but it also necessitates the existence of a native court system side by side with a system of British established courts which applied English law to cases involving non-natives or concerning non-customary disputes. The whole arrangement resulted in a kind of legal dualism with respect to both the two bodies of law and the two sets of courts. There was the British established system of courts applying mainly English law subject to local adaptations and modifications and the indigenous system of traditional courts applying mainly customary law or such part of it as was not considered to be repugnant to the principles of 'natural justice, equity and good conscience'. One of the inevitable consequences of British rule over dependent territories was the introduction into them of English law and legal system alongside the existing local laws.

11 See Victor T. Le Vine, The Cameroon from Mandate to Independence, University of California Press, 1964, pp.88-104 and 211 et seq.

11A Infra, pp.11-12.

France administered her portion of Cameroon together with her colonies in French Equatorial Africa¹². French policy did not aim at fitting the inhabitants of her colonies for eventual and complete self-government. Its colonial policy oscillated between the two poles of Assimilation and Association¹³. The system of dual legal status found further expression in the courts and the legal system. Separate legal systems existed to distinguish those Africans assimilated to European law (Citoyens) from those

12 It should be noted that Cameroon was technically not a colony of France. The head of the colonial administration in French Cameroon was the Commissioner of the republic - Commissaire de la République appointed by, and representing the government in Paris. His functions were similar to those of the Governor-General and regional Governors of the colonies in French Equatorial Africa. As will be seen later, this technical difference in international legal status made some difference to the way France administered the territory. The laws in France and French Equatorial Africa were not directly applicable in Cameroon unless rendered as such by subordinate legislation. For a detailed account of French administration of Cameroon see: Jean Suret-Canale, French Colonialism in Tropical Africa: 1900-1945, PICA Press, New York 1971, pp.37-42; J.H. Godfrey, French Equatorial Africa and Cameroons, Geographical Handbook Series, Naval Intelligence Division, Oxford 1942, pp.242-299.

13 For details on French colonial policy see generally, David E. Gardiner, Cameroon: United Nations Challenge to French Policy, London, Oxford University Press 1963; Victor T. Le Vine, op. cit., pp.88-105.

subject to native custom (Sujets)¹⁴. For 'citoyens' in Cameroun (as in French Equatorial Africa) the full set of Metropolitan Codes (Civil, Commercial and Penal, to mention a few) were applicable.

The system of 'justice indigène' was created in Cameroun by a decree of 23 April 1921 and was administered by tribunals. These tribunals had jurisdiction over all Cameroonian 'sujets' and followed the procedure prescribed by local custom and applied customary laws so long as they did not conflict with the principles of French civilisation.

International surveillance of Cameroon under the British and French administrations was of considerable significance throughout the period of the mandate and trusteeship system. Colonial administration of Cameroon bequeathed a considerable legacy of development not only in the legal sphere but also in respect of economic, social and political advancement. This was in consonance with article 76 of the United Nations Charter which provided that the trusteeship existed in order to:

"...promote the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned ..."

The spirit of this article was carried through when Britain and France granted independence to their dependencies.

14 A 'citoyen' was a Frenchman or native who had attained French culture and had the civil and political rights of persons of French origin (also known as assimilés or évolués). A 'sujet' was a native who had not been assimilated.

From Independence to Present Day

On 1 January 1960, the Eastern Cameroun which had been administered by the French gained independence from France and later that year on 1 October 1960, Nigeria became independent. The Northern Cameroons voted in a United Nations supervised plebiscite held on 11 February 1961 in favour of accession to independence by joining the neighbouring Federation of Nigeria and duly became part of the latter. The then Southern Cameroons opted to unite with East Cameroon instead of staying with Nigeria through which it had been administered by the British. Consequently, on 1 October 1961 the Federal Republic of Cameroon was born with two states having different languages, laws and legal systems. Within the Federation the former British territory (Southern Cameroons) became the state of West Cameroon and the former French territory, the state of East Cameroon. The Federation was transitional and ultimately by a referendum on 20 May 1972 the Federal Republic of Cameroon was abolished and the United Republic of Cameroon came into being¹⁵.

It will be seen^{15A} in our discussion on the sources of law in Cameroon that the colonial history was not without its impact on the legal system of Cameroon. At independence it inherited all the existing laws in both federated states. This dual system accounts for the common and civil law flavour in the Cameroonian legal system.

15 By a constitutional amendment of January 1984, the epithet "United" was dropped out of the name of the country which henceforth is to be known simply as the Republic of Cameroon.

15A Infra., pp.10-24.

II THE SOURCES OF LAW IN CAMEROON

Before the arrival of the European colonisers indigenous legal institutions - (customary courts) were found everywhere. Nevertheless their arrival had far-reaching effects on the Cameroonian legal system. Professor Allott has observed that:

"The arrival of European colonial powers wrought a fundamental revolution in African legal arrangements, the results of which are with us to this day. The nature of the revolution varied somewhat with the different colonial powers, but in general each power first introduced its own legal system or some variant of it as the fundamental and general law of territories, and second, permitted the regulated continuance of traditional African law and judicial institutions except where they ran counter to the demands of colonial administration or were thought 'repugnant' to 'civilised' ideas of justice and humanity"¹⁶.

In this respect the sources of law in Cameroon can be traced to the foreign received laws and the indigenous sources. Cameroon's legal heritage is derived basically from two extraneous legal systems. Mention could be made of the influence of German law but since that law had no material influence on the insurance law of Cameroon, the present discussion will be substantially devoted to the reception of common and civil law into Cameroon.

A. FOREIGN SOURCES OF LAW

1. German Law

As has already been pointed out^{16A}, German rule in Cameroon lasted for only thirty years from 1884 to 1914. This is a short period by any standard

¹⁶ See A.N. Allott, New Essays in African Law, London, Butterworths, 1970 at p.11.

^{16A} Supra, at p.2.

but the German administration established some basis in the economic and social fields. Its main concern was economic. In this connection it concentrated in the establishment of plantations. The Germans left little imprint by way of legal development. Much of what is left is in the field of land law. The present land law, Ordinance No.74-1 of 6 July 1974 in Cameroon establishing rules governing land tenure is a reflection of German colonial land policy - Schutzgebiet Von Kamerun.

2. The reception of English law in Cameroon via Nigeria

It was earlier observed^{16B} that under the mandate and trusteeship systems Britain administered Cameroon integrally with her colony of Nigeria. It was in this connection that English law was received into Cameroon, namely, through Nigeria.

The British Cameroons Administration Order in Council No.3 of 1923 provided that those parts of the Cameroon under British Mandate adjoining the northern and southern provinces of the protectorate of Nigeria should be administered as integral parts of Northern and Southern Nigeria, respectively. By virtue of Ordinance No.5 of 1924, all Ordinances enacted in Nigeria after February 1924 were applicable to the Cameroons under British Mandate. This ordinance is thus the enabling legislation which makes the application of Nigerian and English law possible in Cameroon.

In conformity with the political wishes of the Southern Cameroonians, the Southern Cameroons achieved in 1954 quasi-regional status within the colonial Federation of Nigeria and was endowed with its own Legislative House and Executive Council¹⁷. The Nigerian (Constitution) Order in Council, 1954

^{16B} Supra, at p.6.

¹⁷ See Report of the Conference on the Nigerian Constitution held in London in July and August 1953. Cmnd.8934, London, H.M.S.O. 1953 Annex VI at p.22.

provided for the 'regionalisation' of the judiciary. It provided for High Courts for each of the regions, a High Court for Lagos and a High Court for the Southern Cameroons and established a Federal Supreme Court as a Court of Appeal from the High Courts. The responsibility of administering the law thus received was that of the Supreme Court of Nigeria in Lagos.

Section 11 of the Southern Cameroons High Court Law of 1955 provided that:

"Subject to the provisions of this Law or any other written law, the common law, the doctrines of equity, and the statutes of general application which were in force in England on the first day of January, 1900, shall be, in so far as they relate to any matter with respect to which the Legislature of the Southern Cameroons is for the time being competent to make laws, be in force within the jurisdiction of the courts constituted by this law".

This triple formula by which English law was generally transplanted into British Cameroons and other British territories has given rise to academic controversy as to whether the cut-off date of 1 January 1900 applies to all three sources of law - common law, equity and statute - or only to statute¹⁸. Whatever the outcome of this controversy, courts in the former British Cameroons continue to this day to cite English cases decided long after

18 See A. Allott, New Essays in African Law, London 1970, pp.28-69. For other views on the subject, see A.E.W. Park, The Sources of Nigerian Law, London, Sweet and Maxwell, 1963, pp.19-21; O.B. Nwabueze, The Machinery of Justice in Nigeria, London, Butterworths, 1963 pp.19-22; T.O. Elias, The British Colonial Law, London, Stevens and Sons Ltd., 1963 pp.35-36.

1900 as authority for their decisions¹⁹. The significance of the general reception of English law is that it provides the residual law of English-speaking Cameroon, to which reference is made in the absence of any express rule deriving from specific local law.

3. The reception of French Law

The French-speaking portion of Cameroun as mentioned earlier^{19A} was not a colony under the League of Nations Mandate²⁰. In any case, the French Parliament did not legislate directly for the colonies; and an Act of Parliament did not apply to the colonies unless it was specifically extended to them by an additional instrument²¹. Generally, legislation for the

19 See, for example, cases in the English Speaking Cameroon: Emmanuel Agu Ukpai and S.O.R.A.R.A.F. Compagnie Général d'Assurances v. Regina Azongfack Fongkwa and 7 others, Civil Appeal No.CAS WP/16/75 of 12 January 1976, Buea, (Unreported). In this case Justice O.M. Inglis cited and considered the judgment of Greer L.J. in Flint v. Lovell [1935] 1 K.B. 354 at 360; see further judgments: Samuel Jengob Gizang v. Onuoha John, John Ngassa and Guardian Royal Exchange Assurance (Cameroon) Ltd., Suit No.HCSW/6/75 of 4 August 1976, Buea (Unreported) in which justice O.M. Inglis relied on the judgment of Lord Morris in West v. Shephard [1964] A.C. 326 at 346; In cases of Henry Che v. Charles N. Tayim and Mutuelle Agricole d'Assurances, Suit No.HCB/18/1976 of 18 February 1977, Bamenda (Unreported) and Boniface Fuh v. Simon Nfonkwa Philimone Nsah and Mutuelle Agricole d'Assurances, Suit No.HCB/1976 of 5 July 1977, Bamenda, (Unreported) Justice T.E. Mbuagbaw relied on three post 1900 English decisions in establishing negligence - two of which are: National Coal Board v. England [1954] A.C. 403; and Kemp and Dougal v. Darngavil Coal Co. Ltd. (1909) S.C. 1314 at 1319. See further, A.N. Allott, "The Authority of English Decisions in Colonial Courts", (1957), J.A.L. 23. A justification for references to common law judgments after 1900 may be based on the fact that common law is a fluid concept and cannot be determined with reference to any particular period. Common law and the doctrines of equity are ambulatory in their application and therefore cannot be stultified at any particular date.

19A Supra, note 12.

20 The signatories to the Franco-British declaration of 1919 fixing the frontier boundaries were not foreign Ministry Officials - for Great Britain the responsible official was the Secretary of State for the Colonies and for France, the Minister of the Colonies.

21 For a discussion of the application of French law in French African countries, see Jeswald W. Salacuse, An Introduction to Law in French-speaking Africa, Vol.I: Africa South of the Sahara, 1969, pp.11-12.

colonies was enacted by decree of the President. Before coming into force in any colony the presidential decree had to be promulgated locally by order of the Governor. The laws in force in the colonies of French West Africa and French Equatorial Africa did not apply ipso facto in Cameroun. In 1924 all laws so far applicable in French Equatorial Africa were rendered applicable en bloc to the mandated territory of Cameroun by decree of 22 May 1924²². The laws in force in French Equatorial Africa embraced French Acts of Parliament, Presidential Decrees, Orders in Council of the Governor General, French Codes, Administrative law and Native customary law. Clearly then, the decree of 22 May, 1924 is the enabling statute which renders the application of French law possible in Cameroun. The effect of this was to introduce, among others, the French Civil Code (Code Civil or Code Napoléon) and the French Commercial Code (Code de Commerce) which continue to serve as the primary source of civil law in the French-speaking Cameroun²³. Further laws were rendered applicable by order of the Governor of French Cameroun. In 1930, the Insurance Law of 13 July, 1930²⁴ was passed by the legislator in France. Seven years later the 1930 law was rendered applicable to Cameroun by Decree of 19 March 1937. Furthermore, an Ordinance of 29 September 1945 rendered applicable in Cameroun all basic French insurance legislation

22 See Rapport Annuel du Gouvernement Français sur l'Administration sous mandat des territoires du Cameroun pour l'année 1924, Paris, 1925 at p.31.

23 See Gaston-Jean Bouvenet and René Bourdin, Codes et Lois du Cameroun Vol.II 1956, see pp.9-160 for provisions of the Civil Code and pp.331-509 for the provisions of the Commercial Code.

24 This law is hereinafter referred to and cited as 'the Law of 13 July 1930'.

thereby importing the French law of June 1938 regulating insurance companies²⁵.

To give effect to the exportation of French laws, the court structure was organised for complete reception. By a Presidential decree of 30 June 1935, a Court of Appeal at Brazzaville was constituted. This court dealt with appeals from Cameroun and from its decision there lay a further appeal to the 'Cour de cassation'²⁶ at Paris. The local tribunals of the 'Justice Française' in the Cameroun followed the model of that in French Equatorial Africa. These were a criminal court sitting normally at Douala, a tribunal of first instance at Douala, a Justice of the Peace Court with ordinary jurisdiction in other regions. Thus French law was also received through the judicial system by the courts applying French law.

B. INDIGENOUS SOURCES OF LAW

1. Customary law

Customary law was kept alive by the British and French who applied it to the natives. There is no single, uniform set of customs prevailing throughout the country due to the numerous ethnic groupings, each with its own traditions and institutions. Customary law is a blanket description covering many different systems largely tribal in origin and usually operated within the area occupied by the tribe. One feature of customary law which transcends the whole structure is that it is unwritten, and a "mirror of accepted usage"²⁷. Native law is the legal aspect of tribal life, established by evidence and by

25 For the text of the French insurance legislation reproduced in whole in French-speaking Cameroon see: Gaston-Jean Bouvenet and René Bourdin, op. cit., pp.161-219.

26 See note 34, below, for authority of the decisions of the Cour de cassation. This court is the highest judicial tribunal in France.

27 Owonijin v. Omotosho (1961) 1 All N.L.R. 304 at 309.

judicial notice in customary courts. These courts have original jurisdiction in civil matters especially in respect of family, land and property matters but no criminal jurisdiction.

In the English-speaking provinces of Cameroon, customary law is recognised by section 27 of the Southern Cameroon High Court Law of 1955. It provides that:

"The High Court shall observe and enforce the observance of every native law and custom which is applicable and is not repugnant to natural justice, equity and good conscience, not incompatible either directly or by implication with any law for the time being in force, and nothing in this Act shall deprive any person of the benefit of any such native law and custom."

Customary laws are subject to certain general tests of validity before they can be enforced²⁸. In this respect T. Olawale Elias noted that²⁹:

"Whenever English law was introduced into a colony the traditional British policy has been to give recognition to such aspects of customary law as are found to be well established and not contrary to morality or justice. Sometimes, recognition is clear and prompt, as when the local community has at the time of British advent reached a comparatively advanced stage of civilization and its customary law is fairly firm and ascertainable, at least in essentials".

28 See T. Olawale Elias, British Colonial Law - A Comparative Study of the Interaction between English and Local Laws in British Dependencies, London, Stevens & Sons, 1962 pp.101-110.

29 Ibid., at 101; Customary laws were recognised if they were purged of all primitive ideas and origins, that is, not barbarous, see further discussion at pp.106-110.

Similarly, in English law Sir William Blackstone commented that ³⁰:

"When a custom is actually proved to exist, the next enquiry is into the legality of it; for if it is not a good custom it ought to be no longer used. "Malus usus abolendus est is an established maxim of the law. To make a particular custom good, the following are necessary requisites ... That it have been used so long, that the memory of man runneth not to the contrary ...".

He went on to list other tests of validity such as that the custom must have been continued, peaceably enjoyed, reasonable, certain, compulsory and, finally, consistent with other customs.

In the French-speaking provinces of Cameroon customary courts were integrated into the judicial system in 1959 by Ordinance No.59/86 of December 1959. At present, Customary courts are included in the hierarchy of courts under the Ministry of Justice^{30A}.

Article 46 of the 1961 Constitution of the Federal Republic of Cameroon, now Article 38 of the Constitution of (United) Republic of Cameroon, maintains the observance of "native law and custom" as a source of Cameroonian law.

2. Local Legislation

At the present day legislation is the principal agency of law reform and with the tendency towards codification, it is becoming the most important source of Cameroonian law. Local statutes take precedence over all the other

³⁰ See William Blackstone, Commentaries on the Laws of England: A Facsimile of the First Edition of 1756-1769, Vol.I - 'Of the Rights of Persons', Univ. of Chicago Press, 1979 p.76 and pp.77-78.

^{30A} Ordinance No.72/21 of 19 October 1972, organising the structure of the courts in the (United) Republic of Cameroon.

sources of law. Local legislation may abolish, alter, supersede or maintain in force any foreign received laws. Foreign laws are abrogated if local legislation is enacted whose content makes it clear that it is intended to cover ground previously covered by English or French law.

A further characteristic feature of Cameroonian legislation that enhances its importance among the other sources of law is its unlimited territorial application, that is, it is the only source of law whose rules prima facie apply to the entire country. Since 1961 the aim has been to harmonise the laws in both the English and French-speaking provinces. By 1967, the process of harmonisation and integration of laws had really progressed. Federal Law No.67 - LF - 1 of 12 June 1967 introduced Book II of the Penal Code which came into force on October 1, 1967.

Before that, Book I was introduced in 1965 and entered into force on 1 October 1966. The Cameroon penal code applies equally and uniformly throughout the country. It is the result of a detailed study of both systems of criminal law by a commission comprising judges and lawyers both in private practice and in government service and of Cameroonian, French and English nationality. Following this, Labour Law was codified by Law No.67 - LF - 6 of 12 June 1967. These are examples of legal integration by way of codification of laws to eradicate Cameroon's legal hydra (dualism). In the specific domain of insurance law, although there is as yet no general uniformity, isolated instances increasingly exist of legislation which is intended to apply uniformly throughout Cameroon³¹.

31 See infra pp.43-297 on the uniform legislation applicable to the Republic of Cameroon in Chapters One to Four and parts of Chapter Six of this study. See further legislation in Législation Camerounaise de l'Assurance, Imprimerie Nationale, Yaoundé. And also see S.A. Fonkam, "Insurance Law and Practice in Cameroon", (1985) 19, No.2 Journal of World Trade Law 136.

There is a mass of statute law, much of it enacted only since the Federation. The Constitution of the Federal Republic of Cameroon, in its article 46 maintained in force all existing laws in both federated states which were not in contradiction with the Constitution itself. Upon the demise of the Federation, a similar provision of the unitary Constitution of 2 June 1972, article 43, carried over:

"The legislation resulting from the laws and regulations applicable in the Federated State ... in all of their dispositions which are not contrary to the stipulations of this Constitution ...".

One result has been the perpetuation of two systems of law in Cameroon.

The 'existing laws' in the French-speaking provinces (former East Cameroon) comprise local legislation and such French laws and instruments as were expressly applied before independence. A broad categorisation of these comprises: (a) Legislation of the various legislatures of French Cameroon until 1960; (b) Legislation of the Republic of Cameroon between 1 January 1960 and 1 October 1961; (c) Legislation of the East Cameroon House of Assembly and of the Federal Assembly between 1961 and 1972 and (d) Legislation of the National Assembly of the (United) Republic of Cameroon since June 1972.

The 'existing laws' in the English-speaking provinces (former West Cameroon) comprise basically: (a) the laws applicable in Nigeria, that is, the general principles of English law and equity together with English statute law before 1 January 1900; (b) Any instrument such as an Order in Council emanating directly from the United Kingdom government; (c) the Legislation of the Southern Cameroons House of Assembly from 1954 to 1961; (d) Legislation of the West Cameroon House of Assembly and of the Federal Assembly between 1961 and 1972 and (e) Legislation of the National Assembly of the (United) Republic of Cameroon since 1972.

Article 43 of the Constitution of the (United) Republic of Cameroon preserves all legislation passed before June 1972, which has not been amended or repealed by subsequent enactments. From time to time the President of the Republic exercises the power to legislate over certain matters by way of decrees and ordinances³² and to issue statutory rules and orders³³.

3. Case Law

A body of Cameroon case law is growing up around the local legislation and foreign received laws of Britain, France and Nigeria. The hierarchy of the courts ensures the respectability of decisions of higher courts in the stratum with the Supreme Court as an overriding authority of the law of the land.

The organisation of the courts and the doctrine of precedent

The quest for the unification of laws found favour with the organisation of the courts. The hierarchy of the courts converged and culminated in the organisation of the court structure of the (United) Republic of Cameroon in 1972. Article 1 of Ordinance No.72-21 of 19 October 1972 provides that:

"Justice shall be administered by

- (a) The Courts of First Instance (Tribunaux de Premières Instances);
- (b) The High Courts (Tribunaux de Grande Instance);
- (c) The Military Courts;
- (d) The Courts of Appeal (Cour d'appel); and
- (e) The Supreme Court (Cour suprême)."

32 Article 21 of the Constitution of the (United) Republic of Cameroon.

33 Article 9(9) and 22, ibid.

The Ordinance on judicial organisation of the Supreme Court, No.72-6 of 26 August 1972, as amended, introduced an essentially uniform system of courts throughout (United) Republic of Cameroon, replacing the two systems hitherto in existence on either side of the legal divide.^{33A}

Article 18(2) of Ordinance No.72-6 of 26 August 1972 raises an interesting point. It provides that, until such time as a proper procedure is enacted to be followed in the Supreme Court, in deciding an appeal, this court is to adopt the procedure applicable in the court against whose decision the appeal has been brought. In essence, therefore, this requires that the procedure applicable in the English-speaking provinces is to be followed if the appeal is from a decision of one of the Courts of Appeal in the two English-speaking provinces, and that of the French-speaking provinces if the appeal is from a decision of the Court of Appeal in a French-speaking province. It is worth noting that the Ordinance does not go further to specify the composition of the court according to whether it is considering a case from the French-speaking or English-speaking province^{33B}. One may question the competence of a court comprising mainly or wholly judges trained in the procedure of one system to decide an appeal in application of the other system's procedural rules. In practice, however, this situation has been resolved to some extent. There exists at the Supreme Court level, an English-speaking division bench and a French-speaking division bench of

33A On the judicial system in French-speaking Cameroon before 1972 reform, see Michel Guermann, "L'Organisation Judiciaire au Cameroun Oriental", (1973) 3 Rev. Cam. de Droit 24, esp. pp.29-30; A. Martiou Riou, "L'Organisation Judiciaire du Cameroun", Penant 1969 Doctr. 33, esp. pp. 52-53. On the system in English-speaking Cameroon before 1972, see J.A. O'Brien Quinn, "The Organisation and Structure of the Courts in West Cameroon", (1973) 3 Cam. L. Rev. 17 esp. pp.18-19.

33B See Article 2(2) and (3) of Ordinance No.72-6 of 26 August 1972.

judges^{33C} with each division hearing appeals from their respective provinces.

Article 8 of Ordinance No.72-21 of 19 October 1972 provides that judicial decisions and orders shall be enforceable throughout the territory of the Republic.

The judges and practitioners of the English-speaking provinces imbued in the dynamic and developing common law tradition encourage the citation of cases. In courts of both English and French-speaking Cameroon, decided cases are often cited. But in English and French-speaking Cameroon, there is, in theory, no doctrine of binding precedent as known in England³⁴. Nevertheless, in practice the lower courts in those provinces hardly disregard previous decisions of higher courts, notably the Cour d'appel and

33C Field investigation - interview with Justice Ekema, Judge at the Supreme Court, Yaounde, July 1983.

34 As to the significance and practical effects of the decisions rendered by the Cour de cassation, tout-chambres réunies, see: the law of 1 April 1837 now the law of 3 July, 1967. In view of this law, binding effect is given to the decision rendered after a second renvoi, in solemn session by the Cour de cassation, the highest tribunal in France and the lower courts must decide a case according to the indication of the Cour de cassation. For a discussion of the authority of decided cases in France, see: Amos and Walton, Introduction to French Law, 3rd. ed., by F.H. Lawson, A.E. Anton and L. Neville Brown, Oxford, Clarendon Press, 1967, pp.7-12; René David and John E. Brierly, Major Legal Systems in the World Today, 2nd. ed., London, Stevens & Sons, 1978 pp. 121-132 esp. pp.123-4 and p.131; O. Kahn-Freund, Claudine Lévy and Bernard Rudden, A Source-book on French Law: Systems - Methods - Outlines of Contract, 2nd. ed., Oxford, Clarendon Press, 1979 p. 284; see especially the authority or weight of interpretation given to article 1384 by the Cour de cassation, infra pp.153 and in René David, English Law and French Law - A Comparison in substance, Tagore Law Lectures, London, Stevens & Sons 1980, p.23.

the Cour suprême³⁵. In English-speaking Cameroon the doctrine of binding precedent applies in theory: courts of first instance and high courts within an English-speaking province are bound by the decisions of the Court of Appeal of that province and, ultimately, by decisions of the supreme Court. Nevertheless, the proper functioning of the doctrine of binding precedent in English-speaking Cameroon is subject to two major difficulties. First, there is the absence of a sustained system of law reporting since the West Cameroon Law Report of 1965, 1966, and 1967, compiled and annotated by O'Brien Quinn on behalf of the West Cameroon Bar Association, was discontinued. Nevertheless, throughout the country court files are available to the judges, practitioners and the public whose constant recourse to them reveals the leading cases of the land. At a seminar in February 1979, for judicial and legal officers in English-speaking Cameroon, the participants expressed concern about the lack of effective law reporting of judgments of Cameroonian courts. This deficiency, it was said, had resulted in a tendency among practitioners of English-speaking Cameroon to cite Nigerian and English decisions whereas there are adequate Cameroon cases that could be cited³⁶. The only surviving system of case reporting is the Bulletin d'arrêts de la Cour suprême which started in 1960.

35 Articles 1 and 16 of Ordinance No.72/6 of 26 August 1972 on the organisation of the supreme court and subsequently modified by law No.76/28 of 14 December, 1976 organising the supreme court states that:

"The judgments of the supreme court shall be binding on the lower courts".

The supreme court is the unifying body of case law in the (United) Republic of Cameroon. Its function has been to see about the unification of case law in the (United) Republic of Cameroon. Thus, it is only at the Supreme Court level that the doctrine of binding precedent is conceivable. See also, the Constitution of the (United) Republic of Cameroon of 2 June 1972, art. 32.

36 See the Minutes of the 1979 Seminar for Judicial and Legal Officers Held in the Court of Appeal in Buea on Tuesday 27 February 1979, p.19.

Second, the existence of a Court Appeal for each of the two English-speaking provinces and of several High Courts, one for each division of a province, has tended to undermine the effectiveness of stare decisis in English-speaking Cameroon. Whereas in England the effectiveness of the doctrine of binding precedent is enhanced by the existence throughout that country of only one High Court, one Court of Appeal, and one House of Lords, in English-speaking Cameroon the simultaneous existence of two Courts of Appeal and nine High Courts has had a deleterious effect on the vitality of the doctrine of binding precedent.

III PROBLEMS OF INTERNAL CONFLICT OF LAWS IN A BI-JURAL COUNTRY

The present discussion will be confined to the subject of insurance, though similar problems may arise in other areas of law.

Prior to 1962, as has already been observed^{36A}, there was no insurance legislation uniformly applicable throughout the national territory comprising both English and French-speaking Cameroons. After re-unification there was increasing business and commercial interaction between the two 'Cameroons' and it became necessary to harmonise and standardise certain aspects of insurance law and practice. In 1962, therefore, the decree of the Federal Government mentioned above introduced measures which purported to unify certain aspects of insurance law. Aspects of insurance law and practice which were not treated by any national legislation continued to obey the insurance law specifically applicable to French-speaking Cameroon on the one hand and English-speaking Cameroon on the other. In those areas of law which are still governed by the two respective systems of law, internal conflict of laws problems may arise.

^{36A} Supra, at pp.11-15 and p.20.

The conflicts in this area are but one manifestation of a more general situation. In all branches of civil law, the laws in the English-speaking Cameroon differ from those in the French-speaking Cameroon. In the last few years since unification there has been increasing interaction between the inhabitants of English-speaking Cameroon and those of French-speaking Cameroon. In particular, there has been interaction between business-men within the framework of commercial transactions, between suppliers of goods and services who tend to be based in French-speaking Cameroon and consumers who are to be found or based all over the country including English-speaking Cameroon. The effect of this is that, quite often, a consumer in English-speaking Cameroon who is otherwise subject to English-derived laws finds himself entering into a contract for consumer services, for example, electricity, water and, what is most pertinent here, insurance, with a supplier whose headquarters are based in French-speaking Cameroon and whose business, although carried out throughout the country including English-speaking Cameroon, may be governed by French-derived laws. When the customer in English-speaking Cameroon enters into a commercial contract with a supplier based in French-speaking Cameroon, is the contract governed by the internal law of English-speaking Cameroon which relates to the subject matter of the contract or is that contract governed by the internal law of French-speaking Cameroon relating to the subject matter of the contract?³⁷

37 For a discussion of the proper law of contract and the autonomy under which the parties are free to choose the governing law, see Cheshire and North, Private International Law, 10th. ed., 1979, London, Butterworths pp.195-202; R.H. Graveson, Conflict of Laws: Private International Law, 7th. ed., 1974, London, Sweet & Maxwell pp.400-404.; Kelly, "Reference, Choice, Restriction and Prohibition" (1977) 26 I.C.L.Q. 857 esp. p.871; Ole Lando, "The Proper Law of the Contract", (1964) 8 Scandinavian Studies in Law 105, 109-147. The answer to this question in Cameroon, is provided by inquiries in the course of field research work carried out during the months of June to September 1983, see below, pp.26-30.

The attitude of the courts in both English-speaking and French-speaking Cameroon has been to ignore the existence of this conflict of laws problem. The courts on both sides of the country when confronted with an issue which raises a putative conflict of laws issue have tended to decide that issue by automatically adopting the lex fori as the lex causae. The courts seem to work on the principle that when parties submit their dispute before them they thereby intend that the law of the forum should govern the issue. The courts thus show a regrettable lack of awareness of the conflict of laws situation involved in the dispute submitted before them. They appear to confuse choice of jurisdiction with choice of the proper law.

Insurance companies specifically mention at the top of their policies that the contract will be governed by the law of 13 July 1930. This is, in effect, a proposal of a choice of law clause to the prospective policyholder. If the prospective policyholder then completes and signs this proposal form and accepts the policy in total awareness of the clause he must be deemed to have accepted the choice of law clause proposal which was made to him by the insurance company. In that case, in the event of a dispute the law of 1930 ought to apply even where the dispute is submitted before a court in English-speaking Cameroon, a territory in which the law of 1930 ordinarily has no application, in view of the fact that, that law has never been extended to English-speaking Cameroon by any legislation passed since its coming into force.

The basic principle of the law of contract is that parties are free to agree not only on the terms of their contract but also on the choice of a system of law to govern any dispute that may arise between them in connection

with that contract³⁸. However, divergent views³⁹ obtain on the question whether their freedom is completely unfettered or is restricted to the choice of law with which the contract is factually connected. This raises questions such as whether the parties directed their minds to the matter and in fact reached an agreed conclusion. Furthermore, does the 'intention' (whether subjective or objective) signify the common intention that the parties would have held had they considered the matter, or does it merely mean the intention which as reasonable persons, they ought to have formed, having regard to all the relevant facts? In order to answer these questions, in the light of our particular study, the intention of the parties may have to be ascertained. Insurance contracts are standard form contracts or contracts of adhesion in which the element of actual consent may be either negligible or completely absent. Where is the intention of parties? Is it mutual or unilateral? Clearly, without a deeper analysis it is scarcely possible to be content with the aphorism that the proper law is the law intended by the parties. The only justification one may advance for the express choice of

38 Vita Food Products Inc., v. Unus Shipping Co., [1939] A.C. 277 per Lord Wright at 289-290; For the view that the intention of the parties must prevail see: R. v. International Trustee [1937] A.C. 500 at 529; British Controlled Oilfields v. Stagg (1922), 127 L.T. 209; For a contrary view see, Lord Denning in Boissevain v. Weil [1949] 1 K.B. 482, at 491 cf L. Denning in Tzortzis v. Monark Line A/B, [1968] 1 W.L.R. 406, at 411.

However, this freedom of the parties to choose the applicable law may be expressly restricted and perhaps even excluded by legislation. If there is legislation to this effect, (which unfortunately is absent on the point in Cameroon), that prevails over any chosen system of law of the parties.

39 See Cheshire and North, op. cit., pp.195-202; David F. Cavers, "A Critique of the Choice-of-Law Problem", (1933) 47 Harv. L. Rev. 173-208; F.A. Mann, "The Proper Law of Contract", (1950) 3 I.L.Q. 60 esp. at 61; R.H. Graveson, "Philosophical Aspects of the English Conflict of Laws", (1962) 78 L.Q.R. 337-370; Albert A. Ehrenzweig, "A Treatise on the Conflict of Laws", (1963) 79 L.Q.R. 441-445; D. St. L. Kelly, "Reference, Choice, Restriction and Prohibition" (1977) 26 I.C.L.Q. 857-883 esp. at 871.

the proper law of the contract is the certainty which it provides which, therefore, puts the proper law beyond doubt and thus saves delay and cost of disputed litigation.

In the absence of legislation restricting the freedom of the parties to choose the proper law of their contract, it will be curious if the courts do not consider what the parties intended to be the proper law of the contract.

It is therefore astonishing that in English-speaking Cameroon courts have been inclined to apply that territory's insurance law to settle disputes submitted to them by parties to an insurance policy which the parties had earlier agreed would be governed by the French-speaking law of 13 July 1930. Thus in Aguh Thomas v. Société Nationale d'Assurance Cameroun (SNAC)⁴⁰, the policy provided by SNAC whose headquarters is situated in Douala, stipulated that the contract will be governed by the law of 13 July, 1930 and the policy incorporated the provisions of the 1930 law in its general conditions: the insurance company in pleading as a defence the breach of the general conditions consequently invoked the provisions of the 1930 law. The judge, in considering the issues between the parties, applied English law as to the breach of a warranty in the contract and upheld the repudiation of the contract. In fact, a generalised objection could be made in respect of all the insurance cases brought before the English-speaking provinces as all the five insurance company's policy documents have a similar headed wording with the incorporation of the provisions of the 1930 law⁴¹.

Furthermore, the point of jurisdiction was raised in the Bamenda Court of Appeal in David Che Johny v. Total Afrique Ouest and Soger Co.

40 (1980) Reference No.3455/81 Buea (Unreported).

41 See later, Chapters Five to Seven, pp.299-439.

Assurance⁴². The counsel for the defendant contended that article 13 of the agreement duly signed on 30 April 1968 in Douala conferred jurisdiction on the Douala Commercial court in the case of a dispute arising under the contract. Here, Justice H. Ekor Tarh said:

"The dichotomy of civil law in the legal system of the (United) Republic of Cameroon at present is a notoriety. Therefore apart from the formal validity of a contract, its essential validity, interpretation, the effect and obligations of the parties to it are governed by the law which the parties have agreed or intended or which they presume to have been intended to govern them. That is the proper law of the contract.

Ip so facto, where the parties to a contract stipulate expressly that the contract shall be governed by a particular law that law will be the proper law of the contract, provided the selection is bona fide and there is no objection on grounds of public policy. Accordingly, if contracting parties freely and expressly stipulate the 'lex loci contractus' as the proper law of the contract between them, then the courts have no reasons to interfere in such a choice. The relevant case in issue is "Vita Food Products Inc., v. Unus Shipping Co. Ltd.", [1939] A.C. 277, House of Lords at page 292."

On this basis the judge was persuaded to uphold the objection raised by the defence and ruled that the jurisdiction of the court was expressly excluded

42 Suit No. H.C./14/71 of 11 December 1972, Bamenda (Unreported) a town in the English-speaking province of Cameroon.

and the suit could not be entertained in the Bamenda Court. This approach by the judge in this case to dismiss the case is not desirable. According to conflict of laws principles, although parties to a contract may agree to submit their differences to the courts of their choice, they cannot by doing so oust the jurisdiction of another court⁴³. The validity of such a clause is a matter for the proper law of the contract in particular whether it provides for the exclusive jurisdiction of its court. If in that law there is a prohibition against ousting the jurisdiction of the court in a particular context, no jurisdiction clause can prevail against it. In English domestic law there is one such statutory prohibition. This is section 141 of the Consumer Credit Act 1974, which provides that the county court shall have jurisdiction to hear and determine any action by the creditor or owner to enforce a consumer credit agreement, and that such an action shall not be brought in any other court. By analogy, in the absence of any stipulation in the 1930 law itself, in Cameroon, parties ought not to oust the jurisdiction of another court and such objections as in the above case should not be entertained by judges. The judge ought to consider the country with whose law a dispute has the closest connection (the proper law) and the country with whose courts a dispute arising thereunder has the closest connection (the proper court).

IV ORIGIN AND DEVELOPMENT OF INSURANCE IN CAMEROON

In every society there exist various arrangements for spreading amongst members the effects of a loss which falls directly upon one or a few of them.

43 The Fehmarn [1958] 1 W.L.R. 159. Cf. The Eleftheria [1969] 2 W.L.R. 1073. For further explanation see: E.I. Sykes and P.C. Pryles, International and Interstate Conflict of Laws: Cases and Materials, 1975, London, Butterworths pp.128-153 and pp.440-457.

In small communities which are homogeneous in character all members of the community usually participate in these arrangements. For example, in some areas of Cameroon where a member's home is destroyed by fire the entire community considers it its responsibility to contribute a general effort in time, money and other resources to build that member a new home. This form of loss participation which constitutes a mutual assistance association (in a sense collective responsibility) is at present widespread in various parts of Cameroon especially outside the urban areas.

However, where society has attained a certain stage of evolution in which, due to the conditions of living (economic, social and otherwise) and the diversity of peoples forced to live together, homogeneity is lost, communal loss sharing becomes less practicable. This creates a necessity for the establishment of professional organisations whose business is to assume the obligation to repair a loss which has befallen an individual in return for that individual's obligation to pay the professional body a certain amount of money in consideration of the organisation undertaking to redress the future loss. This is the substance of insurance. MacGillivray and Parkington said⁴⁴:

"A contract of insurance is one whereby one party (the "insurer") promises in return for a money consideration (the "premium") to pay to the other party (the "assured") a sum of money or provide him with some corresponding benefit, upon the occurrence of one or more specified events."

Insurance in the modern sense described by MacGillivray and Parkington has

44 MacGillivray and Parkington, On Insurance Law - relating to all risks other than marine, 7th ed., London, Sweet & Maxwell 1981 at p.3. A useful working definition can be derived from that given by Channell, J. in Prudential Insurance Company v. Inland Revenue Commissioners [1904] 2 K.B. 658 at 663.

long been a feature of the economic and social life of the people of Cameroon.

However, differences may be conceived between traditional systems of insurance and modern insurance. In respect of the latter premiums are collected on an annual basis. Furthermore, the insured forfeits the premium or any benefits deriving therefrom if no misfortune or fortuity occurs and no claims are made. Insurance, therefore, is an aleatory contract, with a certain payment on one side equated to a much larger but uncertain payment on the other. By contrast with the traditional system, insurance operates more like a banking institution as at one time or the other the contributors must benefit from the monies collected.

Traditional forms of 'insurance'⁴⁵ schemes

The 'extended family' system was the earliest form of social insurance. Under this system, which is based on humanitarian African philosophy, everybody is expected to be "his brother's keeper". The progressive and well-to-do members of each family, that is, of both the immediate and extended family (in some cases this may extend to the whole village or clan) are expected to cater for the interests of the less successful members of the family. The family structure is based on mutual solidarity. Individual security stems from belonging to a large family. Thus in traditional African society the extended family system was a very useful and effective method of providing security.

45 The use of the word "insurance" here should not lead the reader to extrapolate its meaning from "insurance" properly so called in Western legal systems because since legal concepts are in fact defined in relation to a complete legal system, it is highly unlikely that "insurance" in the modern sense should fit into a very different legal system like that of Cameroon, if one intends to be precise and specific. The purpose, therefore, of employing the word "insurance" in this context is aimed more at drawing the reader's attention to the existence of this concept in some form (presumably still in its puberty form) in the Cameroonian context.

Furthermore, echoes of insurance practices in Cameroon can be found in the various ethnic and tribal groupings. Practices such as the 'Essusu', 'Njange', especially in the Bameleke tribe, are a sort of contribution scheme for occasions such as marriage, death and birth celebrations or unforeseen contingencies such as fire disasters, poor crop yields due to drought, famine or flood. In Cameroon today, there still exist unions formed by members of the same village or clan living in urban areas who arrange to meet periodically, usually on a monthly basis to discuss matters relating to the welfare of their members and the improvement of their village community. One such group in existence is the Pinyin Development Organisation formed by Pinyin inhabitants living in urban centres such as Yaounde and Bamenda⁴⁶. The organisation contributes every month some money to meet the needs of its individual members. At the end of the year, usually at Christmas time, and New Year, they organise some festivities. Among other contribution schemes organised, the members of these unions make regular contributions into a fund - the 'sobriquet' - the trouble bank. This fund, as its name suggests, operates on a lending basis to members in times of calamities or unforeseen expenditure and sometimes assists members in times of crisis.

Allied to the village or clan unions is the 'age grade association'. This institution acts as a mutual insurance society to members on a basis similar to the English ancient guilds. The association maintains funds contributed by individual members. These monies are collected periodically almost in the same manner as industrial life assurance premiums are collected. The expenses for weddings and funeral expenses of the deceased member's family are incurred from the funds thus accumulated. In addition,

46 See A.S. Fonkam, "Insurance Law and Practice in Cameroon", (1985) 19, No.2 Journal of World Trade Law, p.136.

the funds serve to 'tidy over' the deceased's debts. In cases of unexpected deaths (especially accidental deaths) in which case the deceased might not have made provisions for his dependents, the "age grade association" takes over the responsibility of sustaining and maintaining the deceased member's dependents until they can provide for themselves.

Similarly, in more advanced cultures, functionally similar phenomena exist. Thus, in medieval society the reciprocal rights and duties which made up the feudal relationship provided both a feeling of security and a reasonable measure of actual security against many of the pressing vicissitudes of life, for Lord and man alike. When the Lord-vassal relationship did not provide the security, the church or specially developed institutions like the medieval guild did. The presence everywhere in pre-capitalist societies of insurance-like institutions led William Graham Sumner to describe⁴⁷ religion as a species of the genus "insurance" which was, he thought:

"...a generic conception covering the methods of attaining security, of which the modern devices are but specific, highly elaborated, and scientifically tested examples ...

Insurance is a grand device and is now a highly technical process; but its roots go further back than one would think, offhand. Man on earth, having always had an eye to the avoidance of ill luck, has tried in all ages somehow to insure himself, to take out a "policy" of some sort on which he has paid regular premiums in some form of self denial or sacrifice."

47 Sumner and Keller, The Science of Society, 1927, 749, passim. in Spencer L. Kimball, "The purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law", (1961) 45 Minn. L. Rev. 471 at 479-480.

The needs for security and for a feeling of security seem universal, but the particular forms they take and the institutions that satisfy them are extremely varied and are culturally determined. In pre-capitalist forms of social organisation and traditional societies, man achieved security, both economic and psychic, through a variety of interpersonal relationships which were central to the society and were highly institutionalised. Thus in many primitive societies kinship was the basis of social organisation, and one of the chief purposes of the network of rights and duties making up the kinship pattern was the provision of mutual aid to distressed individuals⁴⁸.

In Western Europe, when the capitalist revolution swept away feudal society, it destroyed the structure that provided security through interpersonal relationships. Men no longer had personal relationships comprehensive enough, or dependable enough, to provide the security and the feeling of security that are the final goals of much of the human struggle. Those goals had to be sought through new institutions. One ultimate consequence was the development of a ubiquitous system of insurance, in the modern sense of a scientifically organised technique for the distribution of risks through an institution that has no other purpose. This institution provides security through commercial companies operating in the market and through governmental organisations operating in an analogous manner. In these ways modern man secures for himself all the tangible security and a large part of the feeling of security that were lost when the old order was

48 See White, The Science of Culture, 1949, 347, 355 and Hoebel, Man in the Primitive World, 1958 2nd ed., 347, 355 in Spencer L. Kimball, op. cit., p.479; Also see Kenneth S. Carlston, Social Theory and African Tribal Organisation: The development of socio-legal theory, 1968 Univ. of Illinois Press, Urbana, Chicago, London pp.98-108. Laura Nader, Law in Culture and Society 1969, Chicago.

swept away. Insurance is a central institution in contemporary society, having replaced prior basic institutions as the way of providing for the pervasive security demands of the human being. It is the contemporary manifestation of man's search for security, which demands the extension of insurance to protect the society at large in the way that the primitive kinship system did. The contemporary drive, as will be seen later,^{48A} to extend social security to provide for victims of accidents, especially road traffic accidents, is only one illustration.

There were in existence in Cameroon as in most parts of Africa⁴⁹, some organised forms of insurance arrangements entirely indigenous to Africa. The existence of these structures hampered the desire for technically structured forms of insurance as is known today. Moreover, the economy was basically agricultural and farming, which was the main pre-occupation of the people, was at subsistence level, the accompanying catastrophies of which were sufficiently redressed by the self-reliant organisations. As a corollary, the absence of great commercial activity, industrialisation and a vibrant economy with inherent and attendant risks and speculation did not awaken the need for more sophisticated and modern structures of insurance institutions.

The introduction of great commercial ventures by the European traders in the nineteenth century necessitated the construction of roads, bridges, building complexes which involved heavy capital expenditure. These ventures were fraught with great risks which ordinary prudence and common sense required to be insured against. Thus, industrialisation and urbanisation of modern life, with the attendant deterioration of such social institutions as

48A Infra, pp.195-239.

49 See J.O. Irukwu, Insurance Management in Africa, 1981, Caxton Press, (West Africa) Ltd., Ibadan, pp.6-10; E. Mensah, "Insurance Policy Conditions in Africa", (1975), in Conference Papers of the Insurance Institute of Nigeria, Vol.IV, p.100.

the extended family, which were of vital importance in generations gone by, have brought pressing social problems which demand further solutions.

The development of modern insurance

Insurance in its modern form was not known in most of black Africa until early nineteenth century. The early European colonisers brought to their various territories the idea of modern insurance. In the English-speaking Countries, the idea was introduced by the early British merchants and today insurance law and practices in these areas are almost entirely patterned along British lines. Similarly, in the French-speaking countries of Africa that came under French influence, insurance principles and practices adopted are that of Metropolitan France.

Until the 1950's there were no indigenous insurance companies operating in Cameroon. Contracts of insurance were effected with established insurance companies in France and Britain. Later on, these insurers appointed local agents to represent them and maintained their headquarters in the mother country. These agents were principally expatriate banks and traders who were given powers of attorney to effect insurance business, issue cover notes and service claims. In the case of the Royal Exchange Assurance Limited, Barclays Bank DCO was their principal agent. Subsequently, branch offices of the main companies with sub-branches in urban centres of the country were opened. One of the first insurance companies to have branch offices in Nigeria and thereafter in English-speaking Cameroon was the Royal Exchange Assurance in 1921⁵⁰. British insurance companies operating in Nigeria extended their activities to the then Southern Cameroons through their Nigerian headquarters. Similarly, in French-speaking Cameroon, the first

50 See generally, Barry Supple, The Royal Exchange Assurance: a history of British insurance 1720 - 1970, 1970, Cambridge University Press; Harold E. Raynes, A History of British Insurance, London 1964; Charles Wright and C. Ernest Fayle, A History of Lloyd's, 1928.

French insurance agencies operating in 1953 were Groupement Français d'Assurances now Assureurs Conseils Camerounais; Agence de Compagnie Française now Société Camerounaise Assurance et Ré-assurance and Assurance Générale de France now Chanas et Privat d'Assurance.

With independence and the consequent economic involvement of Cameroonians and the government in all spheres of the economic life of the country legislation was passed to organise insurance companies in Cameroon. This may have been inspired by the desire to consolidate the national insurance market and further to restrict the free flow of foreign exchange from the country. The first of these legislation were Ordinance No.62 - OF - 36 of 31 March 1962 fixing the legislation applicable to the operation and organisation of insurance and Decree No.62 - DF - 437 of 18 December 1962 stipulating regulations relating to investments of insurance organisations in the Federal Republic of Cameroon⁵¹. Foreign insurance companies were merged to form domestic insurance concerns, but they maintained very close ties with the parent company in France and Britain. The first national insurance company was Assurances Mutuelles Agricoles du Cameroun (AMACAM) which was established in 1965. Originally, it took the form of a mutual (Mutuelle) or cooperative society (coopérative d'assurance) having been created by the Chamber of Agriculture, Forestry and Fishery, thus emphasising the main

51 These laws have been subsequently abrogated and replaced by Ordinance No.73 - 14 of 10 May 1973 fixing regulations applicable to insurance concerns and Decree No.73-237 of 10 May 1973 abrogating Decree No.62 - DF - 437 of 18 December 1962 mentioned above. However, now see Ordinance No. 85-3 of 31 August 1985 modifying these laws. For a discussion of this later Ordinance, see infra. Chapter Two relating to Government Control of Insurance Concerns, pp.57-111.

economic activity which was agricultural. It has, however, lost the character of a mutual society and now operates more like a joint stock company or limited liability company (société anonyme)⁵².

At present there are six national or domestic insurance companies: Assurances Mutuelles Agricoles du Cameroun (AMACAM), Société Camerounaise d'Assurances et de Réassurances (SOCAR), Société Nouvelle d'Assurances du Cameroun (SNAC), Compagnie Camerounaise d'Assurances et de Réassurances (CCAR), Guardian Royal Exchange Cameroon Ltd. (GREACAM), and Cameroon American Insurance Company S.A. (CAMICO). The government participates in at least 50 per cent of the registered capital of these companies⁵³. The government does not promote the mushroom growth of petty insurance companies. The above mentioned companies now underwrite a substantial volume of the total insurance business in the Cameroon market.

52 Mutual companies are generally not constituted for commercial purposes but in order to serve some well-defined and explicit interests of their members. In insurance, mutual companies could be recommended for a large number of classes where many small homogeneous risks for a specific and limited group of persons were to be covered. On the other hand a joint stock company is a business enterprise with a separate legal existence, having shareholders whose liability is limited. Its main disadvantages are that, it tends to put profit-making over and above all other considerations which is detrimental to the interests of the insured. Furthermore, a joint stock company could fall into the hands of small groups, for example, families and lose its true anonymous character. For further details see: UNCTAD, Insurance Legislation and Supervision in developing countries, 1972, U.N. Publications Sales No. E 72 11 D at p.9.

53 See: in the case of SOCAR, Decree No.73-349 of 10 July 1973 to publish a Protocol Agreement between the (United) Republic of Cameroon and Les Mutuelles du Mans. In this company Cameroon interest is 55% and 45% belongs to a consortium of foreign companies.

Foreign insurance companies operate through the medium of branch offices, agencies and delegations. Premium income of insurance companies operating in Cameroon is increasing at a very substantial rate⁵⁴.

TABLE 1: Premium Income of Insurance Companies in Cameroon

(in billions of Francs CFA)

YEAR	1975	1976	1977	1978	1979	1980
Motor Insurance	2,907.05	3,420.79	4,479.36	5,764.47	5,819.1	6,850.8
Other Insurance Businesses	3,321.57	4,151.22	5,268.24	6,235.27	6,977.2	8,084.3
TOTAL	6,228.62	7,572.01	9,747.60	11,999.74	12,796.30	14,935.10

SOURCE: Cameroon National Re-insurance Fund, Yaounde

54 See statistics provided by Cameroon National Re-insurance Fund (CNR), above. For notable types of insurance business underwritten in Cameroon, see S.A. Fonkam, State Regulation of Private Insurance in Cameroon, Unpublished Ph.D. Thesis, London 1980, p.60.

See also Institut International des Assurance, Le Marche Camerounaise des assurances No.4, January 1977 pp.5-7.

After reunification and the unitary state attention was directed towards the coordination and unification of insurance legislation in both English and French-speaking Cameroon.⁵⁵ The motivation generally has been clearly towards harmonisation, unification and integration of laws. These are amongst the most pressing needs in Cameroon today. The present legal duality causes serious repercussions such as differential treatment of citizens within the same country. The observations made previously lend support to the view that the end of the colonial period did not bring an end to imported law. One can rightly say that throughout independent Africa there is no question of abandoning the Western Law which prior to Independence had become their 'droit commun',⁵⁶. These laws were mainly copies of laws made for the parent country. At independence some of these laws were retained and others have since been modified.

The legal system in Cameroon is in the process of development. This development is necessary so as to harmonise her laws which are based on two distinct legal systems - the common law and civil law of England and France respectively. The existence of a dual legal system means that the same issue may be governed by two different concepts depending on the jurisdiction of the court. On issues where there is no uniform legislation, the applicable law will be either the common law or civil law, depending on whether the

55 See, for example, A. Fonkam, op. cit., pp.50-52. For further discussion see infra Chapters One, Two and Three in which the legislation discussed apply to the Republic of Cameroon.

56 See, N.N. Rubin and E. Cotran, Annual Survey of African Law, 1967, Vol.I pp.335-347; "Unification of laws in Africa", (1968) 15 Am. J. of Comp. Law, p.84; also see, Jean Foyer, "Les destinées du droit français en Afrique", (1962) 72 Recueil Penant pp.1-6; E. Loi Langoul, "Problèmes particuliers de Codifications du Cameroun", (1960) 20 Rev. Jur. Pol. Ind. Coop. 106 at 108-110. Salfo Albert Balima, "Les Assurances en Afrique Francophone - Leur rôle dans une perspective de développement (séminaire école internationale de Bordeaux)", 1978 32, Rev. Jur. Pol. Ind. Coop. 709-720; André Tunc, "La Vie du droit en Afrique", (1978) 32, Rev. Jur. Pol. Ind. Coop. 721 et seq.

court is in the former French or English territory. This thesis is an inquiry into the insurance laws of Cameroon and, in the final analysis, a quest for uniform laws.

It may be recalled that this legal duality found further expression in the languages adopted in the English and French-speaking Cameroon. This has resulted in translation of legal terms and concepts from one language into another, the dangers of which are well recognised. This study avoids most of them by refraining from translation as much as possible. However, as the profile of each chapter is drawn, the opportunity will be taken to substitute and explain foreign terms, expressions and concepts in order not to render the text unintelligible. This, it is hoped, will facilitate understanding.

In addition, in this thesis no attempts have been made to convert the value of Cameroon Francs in relation to the Pound Sterling as fluctuations in the value of currency may be experienced. However, at the time of submission the exchange rate of Francs CFA to Sterling was 595 Frs. CFA. to £1.

A few comments seem appropriate here about the proposals advanced with respect to Chapter Three of this study in particular. On very close and deeper analysis, the issues raised and discussed are, or become too complex and multifaceted to admit of simple or even practical solutions. An attempt has been made to present, to some extent, a reasonably balanced discussion of the assigned issues rather than to advance a view in support of a given measure. However, in some respect the discussion reflects some persuasion as to how the issues ought to be resolved. Consequently, no official "school solutions" are proffered as being uniquely acceptable. In addition, the discussion is not so much to resolve issues as to raise and explore them; rather it is designed to provoke and stimulate academic thought and

discussion on the subject. It would not therefore be surprising to find that alternative views may be expressed.

It is hoped that the following account is up-to-date to November 1985, though it has been possible to incorporate some later English developments.

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C H A P T E R 1

THE REASON FOR GOVERNMENT CONTROL OF INSURANCE CONCERNS

I INTRODUCTION

Governmental control of insurance concerns has been variously described as official supervision of insurance companies, governmental intervention or interference in insurance concerns.¹

There is hardly any state in the world today in which the old policy of laissez-faire still commands general adherence. The right of governments to interfere in the affairs of their peoples is universally recognised. The only question is as to how far their interference should go. There are many different views on this fundamental issue but so far as insurance is concerned, the weight of opinion appears to be that at least some intervention is necessary.

During the past hundred years governments throughout the world have considered it necessary to place the insurance industry under official supervision. On December 8, 1904 the President of the United States of America in his annual message to Congress said.²

1 Y. Lijadu, "Government Control of the operations of Insurance Companies", Conference Papers of the Insurance Institute of Nigeria, 1972, Vol. 1 at p.77.

2 Kailin Tuan, Modern Insurance Theory and Education, 1972, Vol. 1 at p.165

"The business of insurance vitally affects the great mass of the people of the United States and is national and not local in its application. It involves a multitude of transactions among the people of different states and between American companies and foreign governments. I urge that Congress carefully consider whether the power of the Bureau of Corporations cannot constitutionally be extended to cover interstate transactions in insurance."

Similarly, in Cameroon, the Minister of Finance, speaking of insurance business said:³

"The rapid development of the insurance business, its extent, the enormous amount of money and diversity of interests involved and the present business methods suggest that under existing conditions insurance is commerce and should be subjected to government regulation."

In the United Kingdom the official supervision of the insurance industry is a subject of significant concern to both the providers of insurance cover and the buyers of insurance. It is generally accepted that any industry which solicits large sums of money from the public in exchange for a promise of a future benefit must be subject to an adequate system of official supervision in order to protect its customers against the

3 See: Minutes of a Conference held at Douala by the Association of Insurance Companies and representatives of the Government Department of Insurance on May 5, 1972. Recently, the President of the Republic of Cameroon, S.E. Paul Biya, expressed concern on the value of insurance to the national economy and for the people of Cameroon; see for example, "Le nouveau visage du marché des assurances", Cameroon Tribune, No.3406, 24 October 1985 at p. 1. Subsequently, this led to some modifications in the Cameroonian insurance legislation, see for example Ordinance No. 85-3 of 31 August 1985 relating to insurance business; hereinafter referred to as "the 1985 Ordinance". See also, Le ministre délégué à la Présidence, chargé de l'Informatique, "Actes du chef de l'État", Cameroon Tribune, No.3448, 12 December 1985. The intention of this legislation is without doubt to strengthen the hand of the government in the regulation and practice of insurance business in Cameroon. However, the legislation itself is only the tip of the ice-berg; much remains to be done through supplemental regulations which have not yet been devised. Other parts of it are mainly a re-enactment of the 1973 Ordinance.

possibility of loss through dishonest and incompetent management.^{3A} However, in the United Kingdom the principle which has applied was once described as "freedom with publicity".⁴ This consisted essentially in letting the insurance industry operate with minimum state intervention provided adequate information was furnished to enable the public to know if the companies were financially sound. The concept of freedom with publicity, though still at the heart of British insurance regulation, is a little frayed at the edges more recently, legislation governing insurance companies has been thoroughly revised and more stringent controls have been introduced with a considerable and growing body of insurance supervisory legislation governing the industry in the United Kingdom. Two basic factors account for these developments in legislation, namely, the serious failures of insurance companies between 1966-1974 and an external influence with wide ranging effects. We will briefly examine these. In July 1966, the Fire Auto and Marine Insurance Company went into liquidation. The immediate consequence was the enactment

3A In fact a look at the history of legislation on governmental regulation of insurance in Britain reveals that legislation in this field is invariably influenced by the need to protect the policyholders and third-party claimants against the risk of insolvency after some insurance concerns have collapsed. Thus the collapse of the Albert Life Assurance Society in 1868 led to the passing of the Life Assurance Companies Act 1870. For further accounts of the 1870 Act see: Raynes, A History of British Insurance (1964) 2nd ed. pp.345-365; M. Pickering, "The Control of Insurance Business in Great Britain", (1969) Wis. L. Rev. 1141 et seq. This Act was the fore-runner of legislation in Britain dealing with the regulation of the insurance industry. Even the most casual reading of this Act will reveal the resolve of the government of the day to avoid future insolvencies. Further measures have been passed between 1870 and 1982 with the object of protecting the public from the effects of the mushroom growth of insurance companies lacking the financial resources necessary to carry on business. Present legislation regulating the insurance industry consists of the Policyholders Protection Act 1975 and the Insurance Companies Act 1982, and subordinate regulations passed under these Acts. For up to date details and analysis see: Ellis, T.H. and Wiltshire, J.A. Regulation of Insurance in the United Kingdom and Ireland, 1983, Kluwer Publishing Co.

4 Cockerell, H.A.L. and Dickinson, G.M., Motor Insurance and the Consumer, 1980 at p.8.

of Part 11 of the Companies Act 1967 which extended the powers of intervention of the then Board of Trade and introduced the requirement that an insurance company could not transact business without prior authorisation of the Board. Later in 1971, the failure of the Vehicle and General brought a further strengthening of the legislation, with the Insurance Companies (Amendment) Act 1973, which introduced the requirement for insurance companies to be managed and controlled by fit and proper persons and extended the range of interventionary powers available to the Department of Trade.⁵ Finally, the failure of Nation Life in 1974 resulted in the consolidation of the 1967 and 1973 Acts into the Insurance Companies Act 1974, which extended the powers of the Department of Trade to make regulations and further, the Policyholders Protection Act 1975⁶ was introduced.

The external factor is the entry of the United Kingdom into the European Economic Community (E.E.C.). This is currently the most significant influence in the development of regulatory powers and supervisory laws in the United Kingdom. As part of the harmonisation process in 1973 and 1979, respectively, the Non-Life Establishment Directive⁷ and the Life

5 See: Report of the Tribunal appointed to inquire into certain issues in relation to the circumstances leading up to the cessation of trading by the Vehicle and General Insurance Company, Limited. (Chairman: Hon. Mr. Justice James) (H.L. 80, H.C. 133) 1972 London: H.M.S.O.

6 For further details on the Policyholders Protection Act 1975, see infra at pp.125-138.

7 73/239/EEC: First Council Directive of 24 July 1973 on the coordination of Laws, Regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (O.J. 1973, L228/3); and 73/240/EEC: Council Directive of 24 July 1973 abolishing restrictions on freedom of establishment in the business of direct insurance other than life assurance (O.J. 1973, L228/20).

Establishment Directive⁸ were adopted. A series of regulations were issued by the Department of Trade in 1977, 1978, 1979 and later consolidated into the Insurance Companies Regulations 1981 and in 1982 a consolidating legislation was passed bringing together the provisions of the 1974 and 1981 Insurance Companies Acts. These regulations and legislation implemented the above mentioned Directives.

There has since been a considerable and growing body of insurance supervisory legislation governing the industry in the United Kingdom and dealing with such matters as authorisation to commence business, the maintenance of an adequate financial base, the pursuit of a prudent investment policy, and the observance of certain ethical principles in the conduct of insurance business. This body of legislation will be considered in Chapter Two of this study.⁹

The motivation for the enactment of regulatory legislation and the establishment of controlling department of government have depended very much on the political philosophy of the government concerned and the social framework of the state. One consideration appears to be the desire to protect the insuring public¹⁰ against the possibility of loss through the operations of dishonest or badly managed insurers. Another is the desire to

8 79/267/EEC: First Council Directive of 5 March 1979 on the co-ordination of Laws, Regulations and administrative provisions relating to the taking-up and pursuit of the business of direct life assurance (O.J. 1979, L63/1).

9 Infra, pp.57-124.

10 The position is precarious in a country such as Cameroon where there is no national social welfare comparable to that of England which could assist persons in desperate situations. It has been pointed out in the introduction to this work that the 'extended family' system helps a lot in Cameroon; but the system whereby relations help other less fortunate ones in the family or clan appears to be gradually thinning out. Thus, there is a strong need for the government to provide measures for the protection of the insuring public by ensuring that insurance companies are properly managed.

control and direct the investments of institutions owning a substantial proportion of the industries of a country. These considerations are allied to two factors which call for government control of the insurance industry, namely, the inequality of the parties to an insurance contract and the need to maintain the solvency of insurance companies.

II THE INEQUALITY OF PARTIES TO AN INSURANCE CONTRACT.

In a free society, it is generally accepted that if parties having the capacity to act enter into an agreement, the agreement, in the absence of some vitiating factor such as fraud, misrepresentation, duress, undue influence or mistake becomes law between the parties which courts of law ought to enforce. As Kessler has pointed out, "rational behavior within the context of our culture is only possible if agreements will be respected. It requires that reasonable expectations created by promises receive the protection of the law".¹¹ The contract mechanism in fact is an indispensable tool within a free enterprise system. Its proper functioning, however, rests very firmly on the ability of the parties to bargain freely, and reach an understanding or meeting of minds.

An ideal contract is one in which the parties who are brought together by the play of market forces meet each other on a footing of approximate social and economic equality and are free to bargain. It was perhaps with such an ideal situation in mind that Sir George Jessel, M.R. made his famous dictum:

"..... if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily

¹¹ F. Kessler, "Contracts of Adhesion: Some thoughts about freedom of contract", (1943) 43 Colum. L. Rev. 629.

shall be held sacred and shall be enforced by Courts of justice."¹²

The Master of the Rolls was here enunciating the doctrines of freedom and sanctity of contract. The role of the court was limited to interpreting the instrument which embodied the parties' agreement. The court was, and is, not expected to make a contract for the parties.

The development of large scale enterprise with its mass production and mass distribution appeared to have made the introduction of a new type of contract inevitable. This new type of contract destroyed most of the basis on which the contract mechanism was built, namely, the possibility for parties of approximate economic standing freely to discuss the terms on which they intended to contract. Seemingly, this new phenomenon, a natural consequence of industrialisation, is variously described as standard form contract¹³, contract of adhesion¹⁴ or block contract.¹⁵

An insurer carries on business by issuing proposal forms and policies. These are standard form contracts consisting of standardised terms in printed form. The proposer therefore has no opportunity of changing anything in the contract. Notionally, the party invited to accept such a contract is free to choose whether or not to do so, but the choice is usually one of "take it or

12 Printing and Numerical Registering Co. v. Sampson (1875) 19 L.R. Eq.462 at 465.

13 Note that certain types of insurance contracts have long existed in standard forms, for example, marine insurance.

14 The phrase "contract of adhesion" was introduced into legal vocabulary by Professor Patterson, "The Delivery of a Life Insurance Policy", (1919) 33 Harv. L. Rev. 198 at p.222; For more literature on the subject see: R Powell, "Good Faith in Contracts", (1917) Cur. Leg. Prob. 16 at p.27; Nathan Isaacs, "The Standardizing of Contracts", (1917) 27 Yale L.J. 34; Llewellyn, "What Price Contract - An Essay in Perspective", (1931) 40 Yale L.J. 704; R.F. Hallman, "Insurance as a Contract of Adhesion", (1978) Ins. L.J. pp.274-283.

15 The term "block-contract" is used by Professor Llewellyn in a book review (1939) 52 Harv. L. Rev. 700 at 701.

leave it." A person who exercises his right of refusal does so at the expense of foregoing services which can be secured in no other way. As Professor Dennis Lloyd said:¹⁶

"This is a way in which the commercial community is able to impose its own practices and requirements in a quasi-legislative fashion. Some of these standard form contracts are devised rather to consolidate and confirm rules and usages which are best fitted to protect the interests of the particular sellers, rather than to strike a balance between the needs and practices of all concerned, including the humble consumer".

Any protection for a purchaser in these circumstances ought to be statutory. Protective legislation would seem particularly appropriate in the case of compulsory insurance contracts, for example, under the Road Traffic Acts.^{16A}

An insurance contract is a contract of adhesion par excellence.¹⁷ The policy and other essential documents are mass-produced in advance and the buyer of insurance merely has to complete details without the possibility of changing any terms in such documents. One cannot therefore talk of bargain within the framework of the relationship between seller and buyer of insurance since bargain in usual business activities assumes that the buyer is able to negotiate with the seller the terms on which the article is sold and bought.

In Cameroon, the position is perhaps rendered worse by the fact that in some urban centres only one insurance company operates, making it impossible for the prospective buyer who would not wish to accept that company's terms to seek another insurer. Given this obvious imbalance between the buyer and

16 Lord Lloyd, The Idea of Law, 1964 at p.249.

16A See later discussion in Chapter Three of this study, pp.204-226.

17 Yvonne Lambert-Faivre, Droit des Assurances, 2^e éd., Précis Dalloz, 1977 at p.99: "Le contrat d'assurance est élaboré, rédigé, imprimé par l'assureur, et l'assuré qui adhère à un contrat pré-établi dont il n'a pas discuté les conditions se contente souvent de remplir les blancs de l'imprimé."

seller of insurance it became necessary for the state to intervene and protect the interests of the buyer. The recent intervention by the state in Cameroon was prompted because of the upsurge of fire and road traffic accidents and in particular, the recognition that insurance companies are prompt to collect or accept premiums but are slow to settle claims made against them by the insured and his claimants who are less well-informed of the mechanism of insurance.^{17A}

In England, France and the United States of America, courts of law were the first to intervene in an attempt to do justice to the buyer of insurance. Such techniques as construction contra proferentem and the doctrines of waiver and estoppel were called in aid to protect the insured.¹⁸ The rules of construction of policies will be discussed in Chapter Seven of this work.¹⁹ The above techniques devised by the courts, however, proved inadequate given the plethora of weapons the seller has in his armoury for insuring that the contract of insurance is invariably to his advantage.²⁰

In France, the legislator intervened much earlier in regulating the insurance contract and insurance companies. Here, insurance supervision in the sense in which it is now understood may be said to have come into being

17A This imbalance becomes especially more apparent in a country where there are poor, if at all, informal settlement procedures. In respect of this, see Chapter Eight, pp.464-465 and the proposals advanced in Chapter Nine, pp.504-505, to ameliorate this situation.

18 For a typical example of a case where an English court used the contra proferentem rule see: English v. Western [1940] 2 K.B. 156.

19 Infra pp.415-439.

20 For a useful discussion of some defences used by insurers to defeat the claims of policyholders, see: Hasson, "The Basis of the Contract Clause in Insurance Law", (1971) 34 M.L.R. 29; J.R. Birds, "Warranties in Insurance Proposal Forms", [1977] J Bus. L. pp.231-246.

in 1930.²¹ The law of July 13, 1930²² comprised two main bodies of rules: rules applying to the conduct of insurance concerns²³ and rules applying to the contract of insurance.²⁴ The 1930 law lays down specific details on the form of the insurance contract, rules relating to the terms of the contract, rules relating to the modification of the contract, rules for assessing claims, duties of the insurer, and so on. This French law is the main piece of legislation governing the insurance contract in Cameroon today.

In England, on the other hand, legislative interference in the insurance industry has never included control of the terms of the insurance contract. This is undoubtedly explained by the philosophy underlying governmental control of the insurance industry, namely, "freedom with publicity".²⁵ More recently, recommendations were, however, made by the Law Commission²⁶ in 1980 for some measure of legislative control of the terms of insurance policies and other similar documents.

III THE NEED TO MAINTAIN THE SOLVENCY OF INSURANCE COMPANIES

One of the fundamental and most widely accepted reasons for

21 M. Picard and A. Besson Les Assurances Terrestres en Droit Français - Les Entreprises d'Assurances, Vol. II, 4^e édn., Paris 1977.

22 Hereinafter referred to as "the 1930 Law".

23 This aspect is principally governed by the decree of 14 June, 1938.

24 O.E.C.D., Supervision of Private Insurance in Europe, 1963, Country Reports prepared by the Insurance Supervisory Service in France.

25 This has already been explained above, see p.46.

26 Law Commission, Insurance Law - Non-Disclosure and Breach of Warranty, (Law Com. No.104) Cmnd. 8068, London H.M.S.O. 1980. The existence of certain deficiencies in the law as noted by the Fifth Report of the Law Reform Committee, "Conditions and Exceptions in Insurance Policies", 1957, Cmnd. 62 and more recently in 1980 the Law Commission made recommendations highlighted by the Fifth Report in a more general way. However, it is unlikely that the Law Commissions proposals will be enacted. See later p.339 note 125.

governmental regulation of the insurance industry is the need to protect policyholders and other third party beneficiaries against the risk of the insurer's insolvency.²⁷ This overriding need is recognised in Cameroon.²⁸

The function of insurance which Wendell Berge describes as "a mechanism of minimising the fortuitous risks of life so that man's energies will be free to assume other risks in adventurous grappling with those problems which he has a chance to solve"²⁹ can only be fulfilled if the finances of the insurance company are sound. Similarly, Spencer L. Kimball said:³⁰

"The importance of insurance in meeting some of the most basic needs of the human being leads inevitably to the central goal of insurance regulation. If insurance is to do its job, that is, if it is to insure, then the insurance enterprise must be solvent. Solvency is the most important goal of all insurance law and regulation ...".

He further went on to say:

" ... there must be a degree and type of solvency that ensures that the policyholder will be protected in any reasonably

27 M. Picard and A. Besson, op. cit., at p.156; O.E.C.D., Supervision of Private Insurance in Europe, 1963, para. 3; G.A. Olawayin, "Government Control of Insurance in Nigeria", (1974) Nig. L.J. 81.

28 Article 55(1) of the 1985 Ordinance. This piece of legislation reiterates the essential aim of supervision as defined in article 1 of the French Decree of 14 June 1938. It is possible to discern that, while the underlying purpose is similarly the protection of the policyholder, other considerations may also be apparent. The 1985 Ordinance is designed to enable close control to be exercised over the investment of an insurer's funds. Moreover, the more traditional concept of consumer protection which is concerned with solvency is not neglected in the new legislation.

29 See: "Insurance as a system of free enterprise", an address before the New England Association of Insurance Agents, Poland Springs, Me., June 28, 1946, reprinted in C.G. Center and R.M. Heins, Insurance and Government, McGraw Hill Books Co. Inc. 1962, at p16.

30 Spencer L. Kimball, "Insurance Regulation at the Crossroads: where do we go from here ?", reprinted in Modern Insurance Theory and Education edited by Kailin Tuan, Vol. 2, 1972, at p.335; See generally, Kimball, "The Goals of Insurance Law: means versus ends", (1962) 29 J. of Ins. pp.19-29, reprinted in "Essays in Insurance Regulation, Readings selected from published writings of Spencer L. Kimball", 1966, pp.20-24.

foreseeable situation. The enterprise must be more than solvent, it must be solid. The Swedes speak of 'Soliditet' as a main aim of insurance regulation. Their term expresses the main goal of insurance law much more adequately than solvency."³¹

The peculiar nature of the insurance transaction requires the insured to repose some confidence and have faith in the insurers. The insured in an insurance transaction is buying an invisible product and cannot determine its quality until he puts it to the test and makes his claim, by which time it may be too late to take remedial action if the company is insolvent; the insured at the time he pays the premium obtains nothing really concrete or tangible as such from the insurer except the latter's promise to honour his own obligations at a future date on the happening of the specified event insured against. The buyer of insurance should therefore be protected by the taking of steps to ensure that the insurance concern is likely to be in a position to honour its promise if and when the fortuitous event insured against occurs. For this purpose, insurance needs strict consumer protection measures to ensure that the financial position of the insurer is such that he will always be able to meet his engagements.

The need to ensure the continued solvency of the insurance company is even more necessary in the case of long-term insurance where premiums are paid many years before the company is called upon to make good any claims.³²

31 Spencer L. Kimball, Modern Insurance Theory and Education, op. cit., at p.335.

32 Maugham J., puts this succinctly in the English case of Re North and South Insurance, (1933) 47 Ll. L.R. 357 at 357-358.

"An insurance company differs in its nature from almost every other trading concern. It starts, in the first instance, without liabilities. It obtains premiums sometimes in very large amounts, Inasmuch as the claims come in every case after the premiums have been secured, there is always a risk that an insurance company may, by offering what look like very advantageous terms to the public, obtain a very large premium income which, as a result of the practical working of the company, proves to be insufficient income for the purpose of meeting claims".

In most states nowadays legislation makes it compulsory for every motorist to ensure with an approved insurance company. The emergence of the motor car and, subsequently, compulsory motor insurance^{32A} meant that many people became involved in claims for damage, injury and death caused by motor accidents and that motor insurance acquire greater importance.³³ The innocent victim of a road accident clearly could not be allowed to suffer because an insurance company was unable to meet its obligations. If one of the approved insurers were to be found incapable of paying its claims the resultant public outcry might be very embarrassing politically to the government. These developments meant that governments became compelled to act with a view to ensuring the solvency of insurance companies operating within their territorial jurisdiction. The result is the legislation mentioned earlier in this chapter and described in detail in the next, namely, the Insurance Companies Act 1982 and the Policyholders' Protection Act 1975 and regulations made thereunder.

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32A See infra, pp.195, 198 and 204.

33 This statement should be taken with caution as before motor insurance was widely used there had been in existence fire, life and marine insurance business.

C H A P T E R 2

GOVERNMENT CONTROL OF INSURANCE CONCERNS

I INTRODUCTION

Government supervisory authorities have laid down elaborate legal, financial and technical requirements which must be complied with before an insurance concern commences business. These requirements ensure that insurance concerns commence business on a sound basis. As we have already observed¹, the state regulates the insurance industry because of the need to protect policyholders and beneficiaries of insurance policies. These interests are not transient but of a continuing nature given the nature of the insurance contract itself. A system set up to regulate the insurance industry as a means of safeguarding the interests of policyholders and other third parties must consequently be organised in such a way that supervision is carried out on a more or less continuous basis. State regulation of the insurance industry ought therefore to be concerned with its financial situation before it commences business as it is with the continual solvency of an insurance concern. If this were otherwise insurance regulation will lose most, if not all of its significance. It is for this reason that England and Cameroon which regulate the insurance industry have in addition to laying down conditions which have to be fulfilled before a licence is granted to commence business, also take steps to ensure that throughout its existence, the insurance concerns continue to abide by the existing legislation. Regulation of insurance therefore precedes and accompanies the undertaking's transaction.

1 See: Chapter One of this study pp.44-56.

II THE CONDITIONS FOR FORMING AN INSURANCE CONCERN

In this section we will examine the legal, financial and technical requirements for the formation of and the carrying on of an insurance business in Cameroon and England.

The Legal Requirements for the Formation of an Insurance Company.

The legal requirements are mainly concerned with the form of the concerns and the documents on which contracts are to be based and which determine the contractual relationship with policyholders.

Form of the concerns.

At the very threshold of insurance activity, statutes exhibit the state's interest in solidity by control of the form of the company through which insurance business should be carried on. In Cameroon and England the supervisory authority requires insurance concerns to assume a particular legal form. In Cameroon only incorporated associations are allowed to transact insurance business. The acceptable forms of incorporation are limited liability companies, limited partnerships, mutual companies and mutual societies.² Most concerns transacting insurance business take the form of limited liability companies. Originally, the only mutual insurance company was the Assurances Mutuelles Agricoles du Cameroun (AMACAM). Presently it is a mutual company only in name. Limited Partnerships and mutual societies are not common forms of insurance concerns. Article 11 does not include individuals or unincorporated associations among those who may be authorised to carry on insurance business. The reason for this probably lies in what was pointed out in the UNCTAD Report on Insurance Legislation and Supervision in Developing Countries thus:

2 Article 11 of the 1985 Ordinance.

"Regarding the legal form of insurance concerns, the experts agreed that both joint stock companies with limited liability and mutual concerns should be considered, in principle, as having adequate legal forms because both were apt to warrant, in addition to financial resources adapted to the business requirements, the permanence which is a qualification of great importance in insurance in view of its long term nature. Individuals were to be³ rejected as insurers, as they did not offer these guarantees.

It may be noted, however, that although individuals are not allowed to be insurers in Cameroon, Lloyd's of London insures some risks notably aviation and marine risks.⁴

In England, insurance business can be carried out both by natural and legal persons. The persons and bodies authorised to carry out insurance business are: a member of Lloyd's; a body registered under the enactment relating to friendly societies; or a trade union or employers' association where the insurance business carried on by the union or association is limited to the provision for its members of provident benefits or strike benefits.⁵ Further, section 4 permits existing insurance companies authorised under sections 3 and 4 of the Insurance Companies Act 1981 to carry on insurance business. It may be noted that in England, individuals⁶

3 UNCTAD, Insurance Legislation and Supervision in Developing Countries, 1972, United Nations Publications, New York, para. 19 at p.9

4 Decree No.67-DF-332 of 4 August 1967 laying down conditions for applying Ordinance No.62-DF-36 of 31 March 1962 to Lloyd's of London.

5 Section 2 of the Insurance Companies Act 1982.

6 The Association of Lloyd's underwriters of London are an example of individuals who act as insurers in Britain - they are individual underwriters authorised by Lloyd's; the statutory corporation called Lloyd's does not insure as such, see: Scrutton L.J. in Rozanes v. Bowen (1928) 32 Ll. L.R. 98 at 101. "Lloyd's as such never insures; the corporation never insures. It requires from the members who join it that they give security with which to meet their engagements, and deposits are made with the Society by the individual members; but Lloyd's insures nobody and takes no liability except to the extent of the deposit for claims made on its individual members; its individual members underwrite"

may underwrite insurance but only as members of an association of underwriters, and in accordance with the provision of a trust deed approved by the Department of Trade and Industry.⁷ The conditions of membership of Lloyd's call for the provision of strict financial guarantees equivalent to the minimum capital requirements applied to registered companies.⁸

The Cameroonian legislation requires insurance companies to be registered or incorporated under Cameroonian law.⁹ Notwithstanding the provisions herein stated, some foreign underwriters may be authorised to carry out insurance transactions in Cameroon under conditions which will be

7 The members of Lloyd's Association act or participate personally for the corporation. See: Dew Gibb, Lloyd's of London, A Study in Individualism, 1957 MacMillan & Co. For the course of business at Lloyd's see: E.R.H. Ivamy, General Principles of Insurance, 4th ed., 1979, London, Butterworths, pp.596-602.

8 R.S. Ferguson, "Self-Regulation at Lloyd's: The Lloyd's Act 1982", (1983) 46 M.L.R. 57-63. See also sections 83-86 of the Insurance Companies Act 1982; MacGillivray and Parkington, On Insurance Law relating to all risks other than marine insurance, 7th ed., 1981 London, Sweet & Maxwell, pp.913-927

Any person who wishes to continue to trade as an underwriter at Lloyd's must pass the Lloyd's solvency test. Under Lloyd's rules the principle of unlimited liability in the market, in which underwriting members are responsible to meet the full extent of their losses from their own resources applies in so far as it relates to losses sustained in the normal course of business at Lloyd's. Lloyd's has studied various ways to assist underwriting without compromising the market principle of unlimited liability. At no time do underwriting members (Names) contest this principle but they do object to applying that principle in the case of losses arising from fraud or professional negligence. The recent troubles at Lloyd's which resulted in losses of £130m falling on 1,525 underwriting members of Lloyd's sparked off debates of whether the underwriters should be helped out of their predicament but this would seem to be compromising or departing from the principle of unlimited liability: See, The Financial Times, June - July 1985.

9 Article 3(1) of the 1985 Ordinance

made by a special instrument.¹⁰ Since this Order has not been promulgated, it is not clear in what form foreign companies may be authorised to carry out business in Cameroon.

Nevertheless, these provisions seem to be aimed at consolidating the Cameroonian insurance market. Before the 1973 Ordinance there were twenty eight insurance companies, all of which except for Assurances Mutuelles Agricoles du Cameroun (formed in 1965), were foreign companies or branches of foreign companies.

Presently, there are six domestic concerns. Foreign insurance companies operate only through the medium of agencies and branch offices. It is apparent that the government are being empowered to restrict the development of foreign companies and increase Cameroon private and public sector participation in insurance business.¹⁰ Whilst such measures may be justifiable in the national interest, it is hoped that considerations of protection for the public will not unduly interfere with the free play of market forces and competition. Regard ought to be given to a second plan of action in terms of sensible targets for expansion at reasonable costs, capital resources, and expertise should match freedom as it is obvious that progress of insurance companies rests very substantially on the financial expertise of its management.

Furthermore, individuals are not allowed to transact insurance business in Cameroon.¹¹

10 The registered capital of limited liability insurance companies, the minimum of which will be fixed by decree, must comprise private or public Cameroonian shares at least equal to one third of its amount: article 3(2) ibid.; See also, Waffo Mongo, "L'État des assurances au Cameroun: Vers la suppression des sociétés étrangères et une plus grande Camerounisation des cadres", Cameroon Tribune, No. 3406, October 1985

11 However, Lloyd's of London has been transacting insurance business for a long time in Cameroon and their representation is under process at the moment: Waffo Mongo, op. cit.

In England, a foreign insurance concern may underwrite insurance contracts in any of the classes specified in the Insurance Companies Act 1982 whether by means of a branch office or permanent agent.¹² There are different requirements for a company having its head office in the United Kingdom or in a member state of the European Community and that whose head office is not within the community.¹³ Where the body's head office is in the United Kingdom, the applicant must be a company defined in section 735 of the Companies Act 1985 or section 399 of the Companies Act (Northern Ireland) 1960; or a registered society; or a body corporate established by Royal Charter or Act of Parliament and already authorised under section 3 or 4 of the Insurance Companies Act 1982 to carry on insurance business.¹⁴ In respect of companies whose head office is in a member state of the EEC other than the United Kingdom the company must have a representative who is resident in the United Kingdom¹⁵ and authorised to act generally and accept service of any document.¹⁶ If the representative is not an individual, it must be a company as defined in section 735 of the Companies Act 1985 or section 399 of the Companies Act (Northern Ireland) 1960 with its head office in the United Kingdom and must itself have an individual representative resident in the United Kingdom who is authorised to act generally, and to accept service of any document on behalf of the company in its capacity as representative of the applicant.¹⁷

12 Sections 8 & 9 of the Insurance Companies Act 1982.

13 Sections 7-9 of the Insurance Companies Act 1982.

14 Section 7(1) of the Insurance Companies Act 1982.

15 Section 8(1) ibid.

16 Section 10(1) ibid.

17 Section 10(5) ibid.

In the case of a company from another member-state restricted to reinsurance business, the applicant must be a body corporate entitled under the law of that state to carry on insurance business.¹⁸

Finally, companies whose head office is not within the Community must satisfy the following additional requirements: first, the applicant must be a body corporate entitled under the law of the place where its head office is situated to carry on long-term or general business there; second, the applicant must have assets in the United Kingdom of at least one-half of the minimum guarantee fund; and third, the applicant must have made a deposit in accordance with section 9 (1) (c) of the 1982 Act.¹⁹

A significant requirement concerning all these companies is that, the company's director, controller, manager, representative or main agent²⁰ must be a "fit and proper person" to hold such office.²¹ This phrase is not defined in the Act. Clearly the requirement would exclude a person with a bad record, a conviction for a relevant offence, a history of bankruptcy or misconduct or malfeasance. Further, it may relate to competence, for example, lack of knowledge, ability or experience for the responsibility.

18 Section 8(3) ibid.

19 Section 9(1) ibid.

20 Main agents are persons with authority to commit a company and who write an account of unlimited size or the amount of business written is over 10% of a company's gross annual income. The raison d'être for this step is that prudent supervision should extend to a company's principal business producers if its operation is such that a significant proportion of its portfolio comes from one or, at best only a small number of underwriting agents.

21 Sections 7(3) and 8(2) of the 1982 Act. The information which has to be supplied about directors, controllers, managers representatives and others is prescribed in schedule 6, forms A, B and C of the Insurance Companies Regulations 1981 S.I. 1981, No.1654.

Most difficult of all are cases where the issue is one of irresponsibility or lack of good faith.²² The fitness provisions of the Insurance Companies Act 1982 may entitle the Secretary of State to exercise statutory powers of intervention in relation to that company if the director, controller or manager appears to him "not a fit and proper person" to be a director, controller or manager. The use of this power has been most controversial and on occasion has been criticised by the Ombudsman and on occasion has led to proceedings before the European Commission of Human Rights.²²

Similarly, in Cameroon, managers of insurance companies must produce documents evidencing that they are of honourable character and have the appropriate training and experience required to manage and control insurance companies.²³ Furthermore, administrators and managers of insurance companies are prohibited from taking or having a direct or indirect interest in an insurance company, contract, agreement or business or financial transaction made with the company or on its behalf, unless they are duly authorised by the General Assembly.^{23A} Similar to the broad interpretation of the "fit and proper person" provision under English law, this latter requirement in the Cameroonian legislation seems to be aimed at ensuring that managers of insurance companies exercise good faith in their dealings with the company.

22 See infra pp.116-119.

23 Article 45 of the 1985 Ordinance. Article 47 ibid. lists a number of offences for which if a manager has been convicted, he will be precluded from running an insurance company.

23A Article 46(1) ibid. Article 46(2) provides for the disclosure of any commitments, agreements and business or financial transactions authorised by the General Assembly in accordance with article 46(1) above in a report. For an example of the exercise of this power see infra p.111.

The Documents on which Contracts are to be Based.

Basically, insurance law is concerned with regulating two broad fields: the functioning of insurance concerns and the contractual relationship between insurance concerns and policyholders. In Cameroon,²⁴ article 59(1) of the 1985 Ordinance requires insurance concerns to send their policies, general policy conditions, proposal forms and other documents intended for the public or to be distributed or supplied to policyholders to the Minister of Finance who may recommend any necessary corrections or modifications before business is commenced. The approval of these documents is a prerequisite for the grant of a licence to operate. The object of this inspection of documents by the supervisory authority is to ensure that the contractual relationship is founded upon a legal basis which is not prejudicial to the interests of the insured.²⁵ Similarly, in England, insurance companies are required by regulation 29, schedule 5 (12) of the Insurance Companies Regulations 1981 to submit to the Secretary of State before an authorisation is given, the nature of the commitments which the company proposes to take on and the general and special policy or treaty conditions which it proposes to use.²⁶ However, by contrast to England, in Cameroon the law of 13 July 1930 stipulated the form, content, terms and conditions of insurance policies. The supervisory authority is required to

24 A similar provision is afforded in article R.310.6 of the Insurance Code 1976 in France. See: M. Picard and A. Besson, op. cit., pp.197-198.

25 Insurance contracts in Cameroon and France are made subject to the law of 13 July 1930 and the French Insurance Code of 1976, respectively. The reason for the submission of these documents may be classed as consumer protection, or perhaps more aptly, in the case of insurance, purchaser protection, see: M. Picard and A. Besson, op. cit., pp.197-198.

26 Schedules 4 and 5 of the Insurance Companies Regulations 1981, S.I. 1981, No. 1654.

scrutinise the clauses and actual policy wordings to ensure that none of the clauses of the contract which the concern proposes to use conflicts with the requirements of the law on insurance contracts. In England, on the other hand, the submission of the general and policy conditions to the supervisory authority is concerned with the determination of whether or not the insurance concern is financially able to undertake its commitments.

The Financial Requirements for Carrying on an Insurance Business

Once the form of the company is chosen, the concern of the law to implement the solidity principle becomes more profound and significant demands are made to ensure adequate capitalisation of the new enterprise. In the early days of an insurance company, capital plays a crucial role as this enables the company to operate with assurance as merely a risk distributor. It is not surprising therefore, that fairly substantial sums of paid-up capital are requisite to the formation of an insurance company.

In Cameroon, the legislation relating to the financial requirements before an authorisation is granted makes provision for the setting up of initial share capital and of initial guarantees. Limited liability insurance companies are required, prior to the final incorporation of the company to pay up not less than one-third of their holdings in cash.²⁷ However, with respect to mutual insurance companies an initial capital of not less than the amount to be provided for by decree must be paid up.²⁸ On the other hand,

27 Article 13(2) of the 1985 Ordinance. Contributions in kind must be fully and immediately paid up and must appear on the assets side of the balance sheet of the company under a separate heading: Article 13(3) ibid. Article 14 requires the disclosure of the amount of the registered capital of the company concerned in documents, such as prospectuses, notices, advertisements and other documents generally intended for third parties.

28 Article 17 ibid. As in respect of limited liability companies, the amount of the initial share capital must be disclosed in their articles of association: article 18 ibid.

insurance companies undertaking life insurance business and capital accumulation transactions are required to set up guarantee reserves.^{28A} These guarantees are intended to guard against any financial difficulties such as, any deficiency in the technical and actuarial provisions which a newly incorporated company might face.^{28B} The establishment of guarantee reserves exempts companies subject to these provisions from establishing the initial share capital generally required of limited liability companies.^{28C}

In addition, it is interesting to realise that the Cameroonian legislation has imported the margin of solvency concept and requires insurance companies to maintain a guarantee fund.^{28D} However, the legislation does not appear to lay down a formal or minimum margin of solvency. Moreover, it does not specify the valuation bases for purposes of solvency such as the admissibility of assets and liabilities, the way in which assets should be valued and tested for certain purposes including that of establishing the margin of solvency. Nevertheless, it is to be expected that much of the detailed regulation and control proffered will be provided for in the Orders still to be made.

In the United Kingdom, section 5 of the Insurance Companies Act 1982 confers on the Secretary of State the power not to issue an authorisation under section 3 of the Act unless the applicant has submitted to him such proposals as to the manner in which it proposes to carry on business, such financial forecasts and such other information as may be required by or in accordance with regulations under the Act, and he is satisfied on the basis

28A Article 8(1) ibid.

28B Article 8(2) ibid.

28C Article 8(3) ibid.

28D Article 8(4) ibid.

Technical Requirements.

A factor on which the control authorities in both the United Kingdom and Cameroon have to be satisfied before granting authorisation is the adequacy of a company's reinsurance arrangements³² and premium rates. These provisions are to ensure that the company does not undertake risks of a character or of an amount likely to result in undue strain on its financial resources without there being some evidence that adequate reinsurance arrangements have been made. Knowledge of the reinsurance arrangements would, in theory at least, enable the control authorities to intervene whenever they consider it necessary to prevent the insurer from overburdening itself financially. In Cameroon, the provisions as to reinsurance arrangements are stipulated in article 2 of Decree No. 68-DF-153 of 8 April 1968. This article requires all insurance concerns operating in Cameroon to re-insure 10 per cent of their technical reserves as from December 31, every year, with the National Re-Insurance Fund. Insurance companies may further reinsure their risks with foreign companies. In this regard, article 36(2) of the 1985 Ordinance provides that all re-insurance agreements or contracts with foreign companies under which over 50 per cent of the premiums paid in Cameroon are to be retroceded, must be approved by the Minister of Finance before they are put into effect.^{32A}

In the United Kingdom, similar requirements are provided by regulation 29 of the Insurance Companies Regulations 1981.³³ This regulation provides

32 For the role of reinsurance see: R.L. Carter. Reinsurance 2nd ed., 1983 London, pp.1-10.

32A However, article 36(3) prohibits all reinsurance agreements with foreign companies which involve the transfer of more than 50% of their premium.

33 Schedules 4 and 5 of regulation 29 of the Insurance Companies Regulations 1981 S.I. 1981, No.1654.

of that and any other information received by him that the application ought to be granted. In accordance with this requirement, regulation 29 and schedules 4 and 5²⁹ in respect of long-term business and general business respectively require first, the submission to the Secretary of State of a statement showing the amount by which the assets are expected to exceed liabilities at the date of authorisation (after application of valuation regulations)³⁰ and how it is calculated; second, the date on which the company's financial year will end; third, the name and addresses of the auditors of the company; fourth, names and addresses of the company's principal bankers; fifth, the assets which represent or will represent the minimum guarantee fund being assets admissible under and valued in accordance with the Assets Valuation Regulations;³¹ sixth, the estimated costs of installing the administrative services and organisation for securing business, and the financial resources intended to cover those costs and finally, projections for each of the first three financial years following authorisation; a forecast balance sheet (on both optimistic and pessimistic bases), a plan (on both optimistic and pessimistic bases) setting out detailed estimates of income and expenditure in respect of direct business, reinsurance acceptances and reinsurance cessions and estimates relating to the financial resources intended to cover underwriting liabilities and the margin of solvency.

29 Insurance Companies Regulations 1981 S.I. 1981, No.1654.

30 Parts V & VI of the Insurance Companies Regulations 1981 S.I. 1981, No.1654.

31 Regulations 37-49 *ibid.* These regulations seek to strengthen insurance companies assets. They are designed to ensure that assets are widely spread so that the solvency of a company is not vulnerable to the failure of, or to its inability to dispose of, one or two individual investments.

that all insurance companies must submit to the Secretary of State, information concerning the guiding principles relating to re-insurance of business written in the United Kingdom including the company's maximum retention per risk or event after all reinsurance ceded. Furthermore, the companies must submit as aforementioned, copies and drafts of any separate reinsurance treaties covering business in the United Kingdom. The Department of Trade and Industry will not normally allow more than 20 per cent of the liabilities of an applicant company to be reinsured with its holding company, more than 10 per cent of liabilities to be reinsured with any other company or more than 25 per cent of liabilities to be reinsured within any one country other than the country in which the applicant company has its head office.³⁴ As in Cameroon, extensive use is made in the United Kingdom of the capacity provided by foreign reinsurers. This is essential as it ensures a satisfactory spread of cover by domestic companies and so avoids a concentration of United Kingdom risks in the London market. Regulations further require in respect of long-term business the submission of the technical bases which the actuary who will be appointed for the purposes of section 19 of the 1982 Act proposes to employ for each class of business including the bases needed for calculating premium rates and technical reserves, including mathematical reserves and schedule 5 requires the submission of the tariffs which the company proposes to apply for each category of business in respect of general business. The latter requirement is more specific. Finally, a certificate by the actuary that he considers the premium rates to be suitable must be obtained. The submission of the tariffs to the supervisory authority is more concerned with the solvency of

³⁴ See: Department of Trade and Industry, Guidance Notes on Insurance Legislation, para. 6.013, Release 3: 13-ii-85.

insurance companies. In contrast in Cameroon, article 81 of the 1985 Ordinance requires insurance concerns to submit the premium rates of all types of business they propose to undertake to the Minister of Finance for approval before they are put into effect. This article is silent as to what requirements premium rates must satisfy before they are approved. One would assume that before any rates are approved, the supervisory authority must be satisfied that they are not inadequate, excessive or unfairly discriminatory. However, these criteria, considered in isolation do not provide very much guidance. For instance, an excessive rate is one which is too high or too low in relation to the risk to which it applies. There is very little guidance to be derived from the definition. In the last resort, the supervisory authority has to take a decision in the light of all the circumstances that exist in the country such as the market structure and performance, including changes in market share, entries and exits, profitability, price, availability and adequacy of consumer information. These considerations require that officials of the supervisory service be educated and experienced in taking well reasoned decisions. This is an area where discretion alone will not suffice.

III LEGISLATION GOVERNING THE OPERATION OF THE INSURANCE INDUSTRY.

In almost all the developing countries as in the developed countries insurance companies may carry on insurance business only if they have obtained prior authorisation from the state. The grant of authorisation takes the form of an administrative act. Prior authorisation is commonly called 'agrément' in French administrative practice and 'licence' in the United Kingdom practice. The licence is evidence of state approval that the insurance undertaking has fulfilled all the legal, financial and technical requirements prescribed by law and deemed necessary for the protection of the

interest of the policyholders and the general interest of the states' economy.

The necessity of licensing insurance concerns was stressed by the UNCTAD experts in their Report on Insurance Legislation and Supervision in developing countries. They said that:³⁵

"mere formal registration was not sufficient, but should be preceded by a comprehensive pre-licence examination of the technical and economic conditions of the concern, of its plan of business to be transacted in the coming few years, of the technical skill and integrity of its managers and its reinsurance arrangements".

In this respect, it was pointed out that only a thorough analysis carried out by the supervisory authorities could lead to valid conclusions and that ample discretionary powers should be given to the authorities in approving all these factors as this would prevent to a large extent untrustworthy concerns from entering into the business.

In the United Kingdom, the Insurance Companies Act 1982 requires an insurance company to apply for and receive an authorisation from the Secretary of State in respect of the class or classes of business it wishes to transact.³⁶ By virtue of section 3 (1) of the 1982 Act, the Secretary of State may authorise a body to carry on in the United Kingdom such of the classes of insurance business specified in schedule 1 or 2 to the Act, or such part of those classes, as may be specified in the authorisation. Section 3 (3) further enacts that: "an authorisation under this section may identify classes or parts of classes of general business by referring to the

35 UNCTAD, Insurance Legislation and Supervision in Developing Countries, 1972, United Nations Publications, New York, para. 13 at p.8

36 The consequences of the failure to obtain an authorisation in the United Kingdom and Cameroon will be discussed later on in this chapter pp.138-145.

appropriate groups specified in Part 11 of Schedule 2 to this Act".³⁷ An authorisation is, thus, not a blanket approval to insurance concerns to engage in all classes of insurance business.

In Cameroon, the licence is granted by the Minister of Finance in the form of a ministerial order, known in French as "arrêté", which is published in the Official Gazette.³⁸ As in the United Kingdom, it is not granted for all insurance operations, but is restricted to the conduct of a specified number of classes of business which the applicant concern must identify in its application. If the concern decides in the course of its business to engage in other classes of insurance operations, it must make the appropriate application to the competent authority. Article 35(1) of the 1985 Ordinance provides that approval must be requested separately for each category of insurance business enumerated in that article. The applicant insurance concern must therefore specify in its application which of the nineteen classes of insurance business it intends to engage in. As we have already observed,³⁹ the financial guarantees required by the supervisory authority differ with the number and type of classes of insurance business which the concern wishes to transact.

In addition to restricting the classes of insurance business which an insurance company may undertake in England, section 16 of the Insurance Companies Act 1982⁴⁰ provides that authorised insurance companies are prohibited from carrying on in the United Kingdom or elsewhere any activities

37 This section implements article 7 of the EEC Non-Life Establishment Directive No.73/239/EEC, (O.J. 1973, L228/3). op. cit.

38 Article 35 of Ordinance No.85-3 of 31 August 1985 relating to insurance business.

39 Supra., pp.66-68.

40 See also article 8 of Directive No. 79/267/EEC of 13 March 1979, (O.J. of European Communities, 1979 L63/5) op. cit.

which are not in connection with or for the purposes of their insurance business.⁴¹ A corresponding restriction may be found under Cameroonian law.⁴²

In some countries, notably, India, the Republic of Viet-Nam and some African countries, namely Tunisia, Benin Republic and Malagasy Republic, in order to safeguard the interests of holders of long term policies, primarily life assurance, there are legal provisions prohibiting insurance concerns conducting this class of business from engaging in other types of general business. This is called the principle of specialisation. In the United Kingdom, the principle of specialisation used not to be formally embodied in any instrument though regulations do stipulate that concerns must keep separate accounts (capital and reserves) for life insurance and any other classes of business they undertake.⁴³ However, section 6 of the Insurance Companies Act 1982 (implementing article 13 of Directive No. 79/267/EEC)⁴⁴ prohibits the issue of authorisation to carry on both long-term and general insurance business in the United Kingdom. In practice however, the Secretary of State may allow new insurers to conduct the two types of business in separate companies.⁴⁵ One may assert that this practice would render the principle of specialisation unnecessary since the two companies may be

41 For the interpretation of insurance business see: Section 95 of the Insurance Companies Act 1982.

42 By virtue of article 33(1) of the 1985 Ordinance, insurance companies may not carry out any other business other than the transactions listed in article 32 of this Ordinance. This provision is also applicable in France, see: M. Picard and A. Besson op. cit., at pp. 156 et seq. and article R.322.2 of the Insurance Code 1976.

43 See, for example, section 16 of the English Insurance Companies Act 1974.

44 O.J., of the European Communities, L63/5 of 13 March 1979, op. cit.

45 Department of Trade and Industry, Guidance Notes on Insurance Legislation, para. 6-008 on composite insurers, Release 3: 13-ii-85.

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44 O.J., of the European Communities, L63/5 of 13 March 1979, op. cit.

45 Department of Trade and Industry, Guidance Notes on Insurance Legislation, para. 6-008 on composite insurers, Release 3: 13-ii-85.

subsidiary companies of the same holding company. It is therefore, sensible that separate accounts should be maintained in respect of long-term and general business.

In Cameroon, apart from the American Life Assurance Company which has so far confined its insurance operations to life assurance, all insurance companies engage in more than one of the categories of transactions referred to in article 32 of the 1985 Ordinance. However, article 33(3) requires insurance companies to establish special management and keep separate accounts for each category of transactions.

As we noted earlier⁴⁶ in this chapter the UNCTAD experts recommended that the supervisory authorities should possess wide discretionary powers in admitting new industries into the insurance market. This recommendation is followed by Scandinavian and some developing countries. In Sweden as a result of deliberate government policy Swedish law gives the government supervisory authorities power to restrict the entry of new companies into the market place. A new Swedish insurance company or a foreign concern seeking admission into the market is obligated to show to the satisfaction of the insurance department that it is needed in the market and is likely to promote sound insurance practice.⁴⁷ The Swedish authorities encourage a trend towards the merger of existing firms in order to reduce the supposed adverse effects of excessive competition such as an increase in the cost of marketing resulting from too many companies. The result of the Swedish "need test" has been to keep the market organisation of the insurance business well within the comprehension of the regulator and subject to his effective control.

46 Supra, p.72.

47 Spencer L. Kimball, "The Purpose of Insurance Regulation: A Preliminary Inquiry in the Theory of Insurance Law", (1961) 45 Minn. L. Rev. 471 at pp.514-517.

This view is held by Lijadu who says that:⁴⁸

"The superintendent of insurance should have discretionary powers in the granting of licences, so that he may exercise these powers when the economic and social conditions make it desirable to do so, thus, when it is feared that too many concerns will be established in relation to the local market causing its saturation or throwing it out of balance, the superintendent may either withhold further licences or apply new criteria stricter than those required by the existing laws, in order to exclude the less qualified applicants".

Cameroon unlike Britain, subjects the granting of a licence to the economic conditions prevailing on the domestic market at the time of the application. The Minister of Finance is empowered by virtue of article 63 of the 1985 Ordinance to suspend or restrict grants of approval for all or any categories or sub-categories of insurance transactions where the circumstances of the market so require. This does not seem to be the position in the United Kingdom. By virtue of the European Economic Community directive No. 73/239/EEC of July 24, 1973,⁴⁹ a member of the E.E.C. cannot refuse a licence to an insurance concern of one of the member states because of the unfavourable economic circumstances of the national insurance market. The introduction of a common market means implementation of the "economic" freedoms set out in the Treaty of Rome. Articles 52-58 of the Treaty of Rome 1957 provide for the gradual abolition of restrictions on the right of establishment and for the right of insurance companies bearing the nationality of one state to cross into another state and establish an agency, branch or subsidiary in that state.

48 Y. Lijadu, "Government Control of Operations of Insurance Companies", Conference Papers of the Insurance Institute of Nigeria, Vol.1, 1972, at p.87.

49 O.J., of the European Communities, L228/20, 1973, op. cit.

IV. THE ORGANS IN CHARGE OF INSURANCE REGULATION AND THE SUPERVISION OF THE INDUSTRY.

The effectiveness of insurance regulation depends on the bodies responsible for insurance regulation and supervision.

The Organs in Charge of Insurance Regulation.

In England the Secretary of State for Trade and Industry has very wide powers of intervention under the Insurance Companies Act 1982.⁵⁰ The Secretary of State is assisted in the exercise of these powers by a number of insurance advisers within the Insurance Division of the Department of Trade and Industry.⁵¹ Each insurer authorised under the Insurance Companies Act 1982 is required to comply with all the requirements of the Act and its compliance is monitored by the Insurance Division.

Professional associations also play a valuable role in the supervisory process as the practice of the Insurance Division is to consult widely with interested bodies before recommending new legislation to the Secretary of State for submission to Parliament. The bodies consulted are notably the British Insurance Association,⁵² the Life Offices Association, the Associated Scottish Life Offices, the Industrial Life Offices Association, the linked Life Assurance Group, the Institute of London Underwriters, the Corporation of Lloyd's and the British Insurance Brokers Association.

50 Sections 37-48 of the Insurance Companies Act 1982.

51 At 31 December 1983, the staff of the Insurance Division of the Department of Trade and Industry numbered 88. The Division has the assistance of the Department's Solicitor, Accountancy Services Division, Companies Investigation Branch and Government Actuary. See: Department of Trade and Industry, Insurance Annual Report 1983, London, H.M.S.O. para. 19 p.3 and Appendix 6.

52 Very recently this organisation has become the Association of British Insurance (A.B.I.)

Because the English approach to insurance regulation is to keep governmental intervention to a minimum, the professional associations play a role in self-regulation. An example of regulation of the insurance industry by the British Insurance Association is afforded by Statements of Insurance Practice⁵³ which these associations issue from time to time on behalf of their members. We will in Chapter Five discuss the contribution of these Statements to the law of non-disclosure, misrepresentation and breach of warranty.⁵⁴

The professional associations also submit evidence on a representational basis to Royal Commissions, Committees of Inquiry and Tribunals. Notable examples of this role are evidence submitted before the Monopolies Commission Into the Supply of Fire Insurance, the Hilary Scott Committee on Property Bonds and Equity-Linked Life Assurance, the Tribunal which investigated the collapse of the Vehicle and General Insurance Company.

Regulation of the insurance industry in Cameroon as in Britain is the joint responsibility of a government body and professional organisations. In Cameroon the government department in charge of regulation is the Sub-Department of Insurance (*Sous-Direction des Assurances*) of the Ministry of Finance.⁵⁵ Insurance regulation in Cameroon is thus carried out, as in France and many French-speaking African countries, under the authority of the Minister of Finance. The present organisation of the Sub-Department of Insurance is governed by Decree No.84-1105 of 25 August 1984 which

53 These Statements are reproduced in Appendix A of the Law Commission Working Paper No.73 - Insurance Law: Non-Disclosure and Breach of Warranty, 1979, London H.M.S.O.

54 Infra, pp.316, 323 and 339.

55 See: article 57(1) of the 1985 Ordinance which provides that state control of the insurance industry shall be exercised under the authority of the Minister of Finance.

reorganised the Ministry of Finance. Article 36(1) of the decree provides that the Sub-Department of Insurance shall be placed under the authority of the Sub-Director and shall be responsible for the formation, supervision and enforcement of legislation on insurance.

The Sub-Department of Insurance comprises of two services and a Corps of Insurance Inspectors. The two services are:

- (a) the Studies and Approvals Services, (services des études et des agréments); and
- (b) the Insurance Companies Control Service, (le service du contrôle des entreprises d'assurances).

The service in charge of studies and authorisation is responsible for examining applications made by concerns intending to do insurance business in Cameroon. It studies the documents which must be submitted by all prospective insurance concerns, and makes recommendations to the Minister of Finance who decides either to grant or refuse an authorisation on the strength of the recommendations.⁵⁶ This service is responsible for the examination of premium rates, policy forms and other documents issued by insurance concerns operating in Cameroon. Thus, to a considerable extent, it is this service which determines the level of premium rates and the contents, length and print of insurance policies and proposal forms.

Insurance inspectors come under the auspices of the Insurance Companies Control Service.^{56A} They are the principal officers in charge of implementing insurance legislation in Cameroon.

56 Article 36(2) of Decree No.84-1105 of August 1984. See also, Order No. 212-MINFI-CEI of 29/6/1973 for a list of documents to be submitted by all concerns intending to do business in Cameroon.

56A Article 36(3) of Decree No.84-1105 of August 1984.

Another government body which is indirectly responsible for regulating the insurance industry in Cameroon is the National Re-Insurance Fund (Caisse Nationale de Ré-assurance).

It ensures that all insurance companies compulsorily reinsure ten per cent of their premium income⁵⁷ and keep up to date statistics which are published and submitted to the control authorities.

The Conférence Internationale des Contrôles d'Assurances des États Africains et Malgache (C.I.C.A.) also play an important part in insurance regulation in Cameroon, especially within the framework of regional co-operation in this field.⁵⁸ This body acts as a co-ordinator and advisory body to all the French-speaking West African countries. It organises conferences and seminars for the discussion of problems facing the states grouped under it. It plays a supervisory role over the training and education of insurance experts. The only professional association in Cameroon is the Association des Sociétés d'Assurances du Cameroun (A.S.A.C.) which acts as an intermediary between insurance concerns and the supervisory authority.⁵⁹

Furthermore article 76 of the 1985 Ordinance provides for the establishment of an advisory body called the National Insurance Board. This

57 Supra p.69.

58 CICA is a regional insurance organisation grouping the following French-speaking West African countries: Cameroon, Central African Republic, Congo, Togo, Ivory Coast, Gabon, Upper Volta, Mali, Niger, Senegal, Chad, Dahomey, Mauritania and Malagasy Republic.

59 Article 78(1) of the 1985 Ordinance. All insurance companies approved in accordance with article 31 ibid must become members of the Professional Association of Insurance Companies: article 77 ibid. See articles 79 and 80 ibid for the functions and competence of the Association of Insurance Companies. For a detailed account of the role of C.I.C.A. and A.S.A.C. see: S.A. Fonkam, State Regulation of Private Insurance in Cameroon, unpublished Ph.D. thesis, University of London, 1980, pp.244-245.

body is required to give opinions on matters submitted to it by the supervisory authority relating to insurance contracts, the functioning of insurance companies, the practice of the professional association and the withdrawal of approvals. In this capacity, it is expected that this body will formulate proposals on the prevention of risks, conditions for the compensation of accidents, general conditions of insurance contracts, rules on tariff regulation and guiding principles relating to reinsurance. By virtue of article 76(4) a decree will regulate the duties, composition and functioning of the National Insurance Board. This decree has not yet been passed. However, it is hoped that the members of this body would involve the government, insurance companies and the Association of Insurance Companies. In this regard, this provision could be seen as a unique and edifying experience recognising the value of sensible co-operation between the legislators and those for whom the legislators are legislating.

The Supervision of the Insurance Industry by these Organs.

The control and supervision of insurance companies is a continuing exercise; hence apart from the pre-registration regulations which must be complied with by every insurance company which desires to start an insurance business, there are post-registration regulations to ensure that throughout its existence, the insurance concern continues to abide by existing legislation. It is to the consideration of these regulations and requirements that we will now turn.

In both England and Cameroon supervision of the business of licensed insurance concern involves:

(i) the examination of returns and other documents which must be submitted to the supervisory authorities;

(ii) inspection at the place of business to verify that the information given in the returns and other documents corresponds with the actual state of the concern's business affairs.

I. The Examination of Returns and other Documents.

The examination of returns and other insurance documents is concerned with legal, financial and technical controls.

A. Legal Controls.

In England, the legal control is in connection with constitution of an insurance company. Changes relating to the constitution of an insurance company must be notified to the Registrar of Companies.⁶⁰ Further, the Secretary of State is empowered by virtue of section 37 of the insurance Companies Act 1982 to exercise certain powers of intervention. He has the power to obtain information and require production of documents at such time and place as he may specify.⁶¹ The information to be submitted pursuant to section 5 (1) of the Insurance Companies Act 1982 is listed in regulation 29, Schedules 4 and 5 of the Insurance Companies Regulations.⁶² Amongst others, this information relates to the date and place of incorporation, the registered number of the company, a brief summary of the objects of the company, the names of the persons who will be directors, controllers or managers of the company (changes of which have to be notified to the Secretary of State), and the particulars of any association which exists or which is proposed to exist between the directors or controllers of the company and any person who acts or will act as an insurance broker, agent, loss adjuster or reinsurer for the company. Within his powers the Secretary of State may require documents relating to insurance contracts such as general and special policy conditions to be submitted to him.

60 Section 380 of the Companies Act 1985.

61 Section 44 of the Insurance Companies Act 1982.

62 Section 29 of the Insurance Companies Regulations 1981, S.I. 1981No.1654, pp.53-61.

With regard to Cameroon, the two areas where continuing legal controls are exercised are concerned with the articles of association of insurance companies and the documents intended for the public.

(i) Articles of association

In Cameroon, insurance companies, both limited liability companies and mutual insurance companies, must submit proposed amendments of their articles of association to the Minister of Finance before they become effective.⁶³ By requiring the insurance companies to notify any changes in their articles of association to the Minister of Finance, the supervisory authority ensures the due observance of existing laws.

(ii) Documents intended for the public

As we observed earlier,⁶⁴ the 1985 Ordinance provides that policies, prospectuses, proposal forms and any other printed matter intended for the public or to be distributed or supplied to policyholders must be sent to the Minister of Finance who may recommend any necessary corrections or modifications before they are put to use. Thus any subsequent modifications which affect the document must be approved by the supervisory authority.

B. Financial Controls

To secure the financial stability of the insurance concern, financial controls are exercised on a continuing basis.

In England, legislation has always relied for the protection of the policyholders largely on regular publication of the financial affairs of insurance enterprises. Thus, the supervisory authority is concerned essentially with the following:

⁶³ Article 58(1) of the 1985 Ordinance. In the case of limited liability companies see: articles 13 and 14 of the 1985 Ordinance in respect of mutual insurance companies see: articles 18 and 20 of the 1985 Ordinance.

⁶⁴ Supra at p.65.

- (1) the collection of material relating to the financial condition of the insurer which it is required to publish;
- (2) the verification of the maintenance of the prescribed degree of solvency;
- (3) the maintenance of assets in the United Kingdom; and
- (4) requirements on investments.

We will be concerned with these four aspects, particularly with the examination of legislation dealing with each of them.

1. The collection of material relating to the financial condition of the company for publication.

Companies registered in the United Kingdom and carrying on any "Act"⁶⁵ class of insurance must make returns covering the whole of their insurance business including "non Act" classes, throughout the world; they are required to distinguish the United Kingdom part of their business only in the case of life assurance. Companies not registered in the United Kingdom underwriting insurance business of any "Act" class in the United Kingdom must make similar returns.

These returns include a revenue account for the year, a balance sheet at the end of the year and a profit and loss account for the year or in the case of a company not trading for profit, an income and expenditure account for the year.⁶⁶ Furthermore, section 20 of the 1982 Act requires insurance companies to prepare annually statements of the prescribed class of insurance

65 An "Act" class of insurance business means any class of insurance business specified in schedules 1 and 2 of the Insurance Companies Act 1982 and "non Act" class of business refers to any business not specified in the Act.

66 Section 17 of the Insurance Companies Act 1982.

business they are undertaking. The accounts must be audited by such persons as may be prescribed.⁶⁷ The form and content of these accounts are prescribed by regulations.⁶⁸

In addition, companies carrying on "long-term" business for example, life assurance, must cause periodic actuarial investigation of their financial condition at intervals not exceeding twelve months, including a valuation of their liabilities.⁶⁹ New insurance companies are required to submit quarterly returns.

Section 22 of the Insurance Companies Act 1982 requires the deposit of every account, balance sheet, abstract or statement required by sections 17, 18 and 20 of the Act and any report of the auditor of the company made in pursuance of section 21 to be printed and five copies deposited with the Secretary of State within six months after the close of the period to which the account, balance sheet, abstract or report relates.⁷⁰ The whole of the material contained in the returns is held available for public inspection and is published either in full or in summary in annual reports issued by the Department of Trade and Industry. Insurance companies are also required to supply copies of their accounts and actuarial abstracts on demand to any policyholder.⁷¹ These stringent requirements assist the Department of Trade and Industry in its task of monitoring the solvency of insurance companies.

67 Section 21 ibid.

68 Insurance Companies (Accounts and Statements) Regulations 1983, S.I. 1983, No.1811.

69 Section 18 of the Insurance Companies Act 1982.

70 The Secretary of State may use his powers of intervention by virtue of section 42 to make actuarial investigations into a company's financial position and by Section 43 accelerate the production of information required by accounting provisions.

71 Section 23 of the 1982 Act.

2. The verification of the maintenance of the prescribed degree of solvency

The Department of Trade and Industry must be satisfied that the requisite margin or margins of solvency⁷² (or the minimum guarantee fund if greater) needed at the beginning of the fourth year following authorisation is maintained.⁷³ New undertakings must have margins of solvency at least equal to the appropriate minimum guarantee fund.⁷⁴ The amount of an insurer's solvency margin requirement for general business depends on its corporate status:⁷⁵ the size of the company's account; which of two calculations, applied to its premium income and claims payments, produces the higher result;⁷⁶ the extent to which the company reinsurers its account; and in the case of companies with a small account, the classes of business for which the company is authorised.⁷⁷ Having established the solvency requirement, an insurer then has to test its assets to make sure that it possesses sufficient assets of an acceptable nature to meet the requirements.⁷⁸ An insurance

72 The concept of a minimum solvency margin - a minimum amount by which the assets of an insurer must exceed its liabilities was included for the first time in the Assurance Companies Act 1946. In 1977, regulations were made to implement the provisions of the Non-Life Establishment Directive with effect from July 1978. These regulations have been repealed and incorporated into the Insurance Companies Act 1982 and Insurance Companies Regulations 1981, S.I. 1981, No.1654.

73 Department of Trade and Industry, Guidance Notes op. cit., para. 10 p.3.

74 Ibid., especially paras. 11 and 12.

75 For United Kingdom companies and pure reinsurers - section 32(1); external direct companies - section 32(2); and Community companies - section 34 of the Insurance Companies Act 1982.

76 Regulation 4, schedule 2 of the Insurance Companies Regulations 1981, S.I. 1981, No.1654.

77 Regulations 4 and 9 of, and Schedules 1, 2 and 3 to the Insurance Companies Regulations 1981, S.I. 1981, No.1654.

78 Regulations 37-49 together with schedules 7 and 8 ibid. set down rules for valuing the assets of an insurance company for solvency purposes.

company which fails to maintain the margin of solvency must at the request of the Secretary of State submit a short-term financial scheme for the restoration of its financial position, propose modifications to the scheme if the Secretary of State considers it inadequate and give effect to any scheme accepted by him as adequate.⁷⁹ The scheme must include measures not only for short term support but also the general improvement of the capital base.

3. The Maintenance of Assets in the United Kingdom.

The Secretary of State may require that assets of a company of a value which at any time is equal to the whole or a specified proportion of the amount of its domestic liabilities must be maintained in the United Kingdom.⁸⁰ He may direct that for the purposes of any such requirement assets of a specified class or description must or must not be treated as assets maintained in the United Kingdom.⁸¹ He may also direct that the domestic liabilities of any class or description must be taken to be the net liabilities after deducting any part of them which is reinsured.⁸² *In computing the amount of any liabilities all contingent and prospective liabilities must be taken into account but not liability in respect of share capital.*⁸³

In addition to the Secretary of State's power to impose a requirement on a company to maintain assets of a value equal to the amount of its domestic liabilities, he may impose an additional requirement that the whole or a specified proportion of the assets must be held by a person approved by him as trustee for the company.⁸⁴

79 Sections 32(4) and 33 of the Insurance Companies Act 1982.

80 Section 39(1) of the 1982 Act.

81 Section 39(2) ibid.

82 Section 39(3) ibid.

83 Section 39(6) ibid.

84 Section 40 ibid.

Further protection of the assets of the company is provided by section 28 which requires insurance companies to maintain the separation of assets and liabilities attributable to long-term business and section 29 requires the application of assets of the company with long-term business only for the purpose of that business.

Where there is an established surplus in which long-term policyholders are eligible to participate and an amount has been allocated to policyholders of that category in respect of a previously established surplus, section 30 requires the company not to apply assets representing any part of that surplus but to make allocations to policyholders of that surplus.

4. Requirements on Investments.

The Secretary of State is given the power to require a company not to make investments of a specified class or description and to realise, before the expiration of a specified period, the whole or a specified proportion of investments of a specified class or description held by the company.⁸⁵ Part 5 of the Insurance Companies Regulation 1981 sets out the valuation of assets of the company and listed investments which a company ought to undertake.⁸⁶

In Cameroon, legislation on the financial controls exercisable by the supervisory authorities as a measure of safeguarding the insurance company's continued solvency in the interest of policyholders and beneficiaries deals with the following: first, the share capital; second, the keeping of accounts and balance sheets; third, guarantee reserves, guarantee fund and margin of solvency, fourth, technical reserves; and fifth the investment of these reserves.

85 Section 38 ibid.

86 Regulations 37-49 of Insurance Companies Regulations 1981 S.I. 1981, No.1654.

1. Share Capital.

Although the initial share capital provides security to policyholders and beneficiaries at the early stages of its existence, in a going insurance business, capital plays a relatively subordinate role. The business operates on an essentially mutual basis distributing risks among all participants, with capital serving merely as an added buffer against unpredictably high losses.

In cases where a share capital or initial fund or a particular amount is required for each different class of insurance business, there must be a re-adjustment whenever the concern proposes to carry on any additional class of business.

The share capital may be reduced to offset a loss in the balance sheet, but where the reduction brings the share capital below the statutory minimum the company must either increase it to the prescribed minimum or confine itself to those classes of business for which the capital is still adequate.

Article 15 of Ordinance No.85-3 of 31 August 1985 provides that in the event of loss of half of the registered share capital, the Board of Directors must convene an Extraordinary General Meeting of all shareholders for the purpose of resolving to wind up the company; and that should it be impossible to convene such a General Meeting, the company may be wound up by a court of law in the area where the company has its head office, on the application of the Minister of Finance. Thus to continue in existence, a company must not reduce its actual share capital to less than half of the registered share capital.

2. The keeping of accounts and balance sheets.

In Cameroon, the keeping of accounts and balance sheets is dealt with by article 58 of the 1985 Ordinance. This provides that insurance concerns operating in Cameroon must forward or produce to the Minister of Finance all

documents likely to facilitate the supervisory authority in the checking of their financial situation and operations in a manner and at intervals to be prescribed by an Order of the Minister of Finance. This Order has not been passed hence reliance is placed on the provisions of articles 33(3) and 54 of the 1985 Ordinance which require the keeping of separate accounts for each class of business carried out by insurance companies. These articles require insurance concerns to draw up and submit annually to the supervisory authority revenue and expenditure accounts. The 1985 Ordinance does not seem to provide adequately for the type of accounting documents that must be kept by insurance companies. However, in respect of the items to be included in the balance sheet articles 49, 50 and 51 lists certain items and assets that must be earmarked for the liabilities and assets side of the balance sheet. Insurance companies nevertheless remain subject to the ordinary rules of company law in this respect.⁸⁷ It is hoped that the intended Orders implementing the 1985 Ordinance will clearly make provisions which will closely supervise newly authorised companies by requiring them to make frequent and detailed returns, accounts and statements. On the other hand, in respect of already established companies, the supervisory authority ought to exercise interventionary measures such as restricting the taking up of new business, maintaining and realising certain assets for solvency purposes and restricting the company's ability to make certain loans where there is reasonable suspicion of insolvency or rather reason to believe or know that the legislation is not being complied with. These measures seem desirable if the spirit of the legislation reflects the spirit in which the legislation was conceived.

87 Article 54 of the 1985 Ordinance.

3. Guarantee Reserves, Guarantee Fund and Margin of Solvency.

As a further safeguard, in case an insurance company runs into financial difficulties, the legislation provides for the constitution of guarantee reserves to meet any deficiency in the actuarial and technical provisions.⁸⁸ Furthermore, insurance companies are required to maintain throughout the life of the concern, a margin of solvency and a guarantee fund.^{88A} These provisions have not been elaborated upon and article 8(4) provides that the conditions for the constitution of the reserves and the statutory amounts of the guarantee reserves, the solvency margin and the guarantee fund will be fixed by decree. It is unnecessary to add that the efficacy of these provisions will depend to a large extent on the actual and continuous exercise of tighter controls and supervision by the supervisory authority in the interest of policyholders and beneficiaries without unduly impairing the service and enterprise which insurance companies ought to demonstrate. As will be seen, in the United Kingdom, the law has protected not only the policyholders and claimants, but also those who provide insurance services.

4. Technical Reserves.

The company's commitments in respect of claims towards policyholders, beneficiaries and third parties are covered by the technical reserves. The nature of the insurance transaction shows the importance attached to the technical reserves. There may be a considerable length of time between the conclusion of an insurance contract and the settlement of a claim, during which the insurer collects and accumulates premiums which technically speaking do not belong to the company, but indicate the extent to which the

88 Article 8(1) ibid.

88A Article 8(3) ibid.

company is committed to settle claims which may arise. Moreover, in motor insurance business, for example, claims which arise in the current year may be settled or paid for five years or even longer. In practice, the largest and therefore most difficult claims take a long time to settle.⁸⁹ It is therefore necessary that some of the assets of an insurance company be available immediately to pay those claims which are quickly settled and other assets must remain available until some unspecified future date in order to pay those outstanding claims which are slow to mature and which involve uncertainties as to liability and quantum. A major cause of financial instability is the insurer's tendency to underestimate the amount of its outstanding claims. This danger is greatest with liability insurance as the total amount of outstanding liability claims is difficult to estimate. The reasons for this include the effect of inflation on awards and the changes in the attitude of judges.⁹⁰

In order that the insurance company may be in a position to honour its promise if and when a claim is made, the insurer must set aside the premiums collected from the policyholders in the form of technical reserves. Thus article 48 of the 1985 Ordinance sets out different types of technical reserves according to the main classes of insurance business undertaken namely: Technical reserves for life, marriage and birth insurance; Technical reserves for annuities for which the insurer is liable and Technical reserves to be constituted by all concerns doing insurance business. In the case of non-life insurance, premiums are normally payable for annual periods beginning at any point in the financial year. Consequently the insurer may not have earned all the premiums by the end of that year and a

89 See later, Chapter Three, pp.166-167.

90 See later, in Chapter Three on the discussion on the award of damages, p.172, 177-183.

reserve must therefore be set up to cover the part of the premiums for the period during which the insurer is still liable for any claims which may be made. This is the reserve for "unexpired risks" or "premium reserve", and represents the premiums paid in advance for the period subsequent to the date of drawing up the balance sheet. A second type of reserve known as "reserves for outstanding claims" is established by the insurer but still outstanding at the date on which the balance is drawn up.

Article 48(3)(b) of the 1985 Ordinance provides that the Minister of Finance may by Order publish in the Official Gazette prescribe other technical reserves which must be constituted by insurance companies operating in Cameroon.

In maintaining the financial equilibrium of an insurance concern, accurate calculation of the technical reserves and a sound choice of investments to cover these reserves are of cardinal importance. Therefore, as the role of the supervisory authority is essentially to see that the concern remains solvent throughout its existence, legislative and supervisory powers are exercised in Cameroon to ensure that technical reserves are calculated⁹¹ and invested properly to cover the contractual commitments to policyholders and third party beneficiaries.

5. The investment of reserves.

The Cameroonian insurance legislation makes provision for the investment of reserves in order to secure the financial stability of insurance concerns. Article 52 of the 1985 Ordinance merely provides that when the provisions concerning the formation of the liabilities referred to

91 For detailed account of the manner in which the technical reserves are calculated in developing countries, especially in C.I.C.A. Countries, see: the UNCTAD Secretariat Report, Insurance Legislation and Supervision in developing countries, *op. cit.*, pp.49-59. In the particular case of Cameroon see: Order No.1110-MINFI-DCE of 26 October 1971 relating to the calculation of technical reserves of insurance companies.

in articles 49 to 51 have been complied with, the remaining funds are entirely at the disposal of insurance companies. These may be invested in accordance with the memorandum and articles of association of the company and with the rules of the ordinary law. However, in the absence of any express provisions, it seems sensible to rely on Decree No.73-237 of 10 May 1973 repealing Decree No.62-DF-437 of 18 December 1962 regulating the investments of insurance concerns in Cameroon. Here, the control of investments include the drawing up of lists of approved investments and rules on the maximum proportion of assets that may be invested in any one type or in any single investment.

Article 1 of the decree provides that technical and mathematical reserves of insurance concerns operating in Cameroon will be represented on the assets side of the balance sheet either by cash in hand or cash deposits in banks, premiums due within three months or, with respect solely to mathematical reserves, advances on policies or investments. Article 2 (1) enacts that cash in hand or in banks or premiums due within three months must not exceed 30 per cent of the total amount of technical reserves.

Article 2 (2) further stipulates that premiums due within three months and earmarked to cover technical and mathematical reserves must within the above mentioned percentage not exceed 40 per cent of liquid assets.

Article 3 (1) provides a catalogue of acceptable investments as follows:-

- (1) Government bonds and other government guaranteed securities especially treasury bonds and other treasury securities.
- (2) Stocks, shares or debentures of public or semi-public corporations and local councils guaranteed by the government.
- (3) Deposits made with such bodies.
- (4) Post Office bonds.
- (5) Immovable property situated in Cameroon with the special authorisation of the Minister of Finance.

(6) Stocks and shares of low rental real estate companies provided the authorisation of the Minister of Finance is granted and

(7) Funds deposited as security in a Treasury account.

Article 3 (1) states that an Order of the Minister of Finance will determine the conditions for the return of securities and the withdrawal of funds deposited with the Cameroon Development Bank and the National Investment Corporation which are set aside for covering technical and actuarial provisions and the conditions under which the evaluation of investment will be carried out. The following may, however, not exceed 20 per cent of overall investments:-

- first mortgage loans on buildings in Cameroon, if the whole of the primary mortgage in respect of any one building does not exceed 40 per cent of its estimated value;
- securities officially quoted on a stock exchange within the franc zone, provided that:
 - (1) the securities issued or the loans obtained by any one borrower do not exceed 5 per cent of investment in that category and;
 - (2) the total investments of this nature entered on the balance sheet do not exceed 25 per cent of the reserves.
- Any other investments under conditions laid down by Order of the Minister of Finance.⁹²

Undoubtedly, insurance concerns are the repository of very large funds. The control of investments is perhaps more understandable in developing

92 Article 3(3) of Decree No73-237 of 10 May 1973 regulating the investments of insurance concerns in Cameroon. The provisions of this decree are very similar to those which obtain in other C.I.C.A. Countries. See the UNCTAD Secretariat Report op. cit., at pp. 60-61. Regrettably, in the guidance officially given to developing nations by the UNCTAD, their recommendations for the establishment of national insurance markets for the ostensible reason of keeping insurance funds within the country, ignore this basic insurance principle.

countries such as Cameroon where the funds of insurance companies are an obvious source on which to draw for use in projects which will develop the country's economy. Therefore to permit insurance premiums to be invested outside the country represents a loss of vital capital resources. On the other hand, such measures seem to overlook the fact that insurance companies' first duty is to look after the interests of their policyholders and in this, it appears to be much more important for the concern investing large sums of money to be certain that their resources can produce the compensatory cash promptly in the event of catastrophes. If a country of limited economic resources chooses to restrict insurance business to its own domestic companies and further insists that the companies invest all or most of its insurance funds in local assets, the consequences of a natural disaster are fairly obvious. It would be an easy assumption to make in the light of the geographical position of Cameroon and in particular, the occurrence of an earthquake in Cameroon in the sixties, that Cameroon is not prone to natural catastrophes. Consequently, one ought not to ignore the fundamental necessity that insurance funds should be invested in assets not themselves subjected to the same peril as the property insured. Thus, where government intervention in insurance virtually prevents this elementary provision, it would be somewhat difficult for insurers to raise the funds necessary to rebuild the properties destroyed.

(c) Technical controls

Technical controls are, as in the case of pre-licence technical requirements concerned essentially with the requirement of reinsurance arrangements and the regulation of premium rates.

(i) Reinsurance

Reinsurance is a vital tool for the distribution or sharing of risks

and also an important method of risk control.⁹³ This wide sharing of risks ensures that losses are spread over a number of insurers and reinsurers sometimes on an international basis. Thus the primary object of reinsurance is to protect the primary insurer or the ceding company from being crippled by large losses beyond the financial capacity of the insurer concerned.

It is desirable that developing countries, especially Cameroon, should find a suitable balance between retention of premium funds and maximum protection against catastrophes which might impair the insurance industry's ability to provide good services and broaden their scope for innovation. It is obviously necessary to set some limits on a subject of potentially wide ranging ramifications. This fundamental need to spread risk has been recognised by the Cameroonian legislation but there are nevertheless restrictions placed on insurers. These restrictions however seem reasonable. As we have already observed⁹⁴ government intervention and involvement in the business of insurance extends to reinsurance.⁹⁵ In the case of Cameroon a state-owned reinsurance institution which is empowered to operate in every aspect as a professional reinsurer with special privileges as far as domestic business is concerned was created on 22 May 1965 by law No. 65/LF/10.

Called the National Re-Insurance Fund (Caisse Nationale de Ré-Assurance), this body is responsible for the compulsory re-insurance of all

93 For a classic description of the purpose and function of reinsurance, see R.L. Carter, Reinsurance, 2nd ed., London 1983, pp.3-21; K. Cannar, Motor Insurance Theory and Practice, 1st. ed., 1979 London, Witherby & Co Ltd., p.211; See also, J.O. Irukwu, Reinsurance in the Third World, 1982, London, Witherby & Co. Ltd., pp.1-6.

94 Supra, p.69.

95 For the advantages of national reinsurance institutions in a developing country see: J.O. Irukwu, op. cit., p.10.

insurance concerns operating in Cameroon.⁹⁶ Decree No. 68-DF-153 of 8 April 1968 provides in article 2 that insurance concerns operating in Cameroon must reinsure every year 10 per cent of their premium income to the Fund. The insurance concerns are required to submit to the Fund every year documents to enable it to ensure that the right sums are paid over to it by all insurance concerns. The Fund is then able to compile statistics which are submitted to the Sub-Department of Insurance. The supervisory authority monitors that these arrangements remain adequate throughout the life of the insurance concern.

Compulsory cession of a fixed percentage of premium income to a state-owned reinsurance corporation is a feature common to developing countries. In Brazil for instance, 100 per cent of reinsurance must be placed with the Institute of Brazil which is the country's only reinsurance company.⁹⁷ Most other countries in the third world such as Nigeria, Kenya, Iran require the insurers in the local market to cede business compulsorily between 20 per cent to 30 per cent to their state-owned reinsurance company. In the case of Nigeria, section 3 (3) of the Nigerian Reinsurance Corporation Decree No.49 of 1977 provides that the Nigerian Reinsurance Corporation must have the right of first refusal of any reinsurance business from Nigeria before such business is placed in the international reinsurance market.

In contrast to Cameroon and other developing countries, in the United Kingdom, there is no compulsory cession of a specified percentage of the business underwritten by insurance companies. In the United Kingdom, as we mentioned earlier,⁹⁸ one of the conditions for granting a licence by the

96 Article 3 of Law No.65/LF/10 of May 1965.

97 J.O. Irukwu, op. cit., p.10.

98 Supra at p.70.

Secretary of State is the requirement that adequate reinsurance arrangements have been made. Thus section 37 (1) (d) of the Insurance Companies Act 1982 gives the Secretary of State power to intervene in relation to any insurance company if he is not satisfied that adequate arrangements are in force for the reinsurance of risks insured by the company in the course of carrying on business.⁹⁹ In order to monitor compliance with this requirement insurance companies must reveal the name and address of any reinsurer accepting a significant amount of its general reinsurance business, a note of any connection between the company and the reinsurer and the amount of reinsurance premium payable to the reinsurer in the year.¹⁰⁰ The fact that regulations enable any major reinsurer to be identified would mean that inquiries could be made into such arrangements including those with overseas reinsurance companies. Further, insurance companies must state amounts due to them from major treaty reinsurers. This provision is principally designed to deal with the problem of unpaid claims. Where a company relies unduly on one particular reinsurer with whose financial status the Department of Trade and Industry is dissatisfied, the Secretary of State has the power to reduce the amount of business written by that company or to stop the company writing business altogether.

(ii) Premium rates.

In the case of Cameroon as we mentioned earlier,¹⁰¹ article 81 of the 1985 Ordinance requires the prior approval of premium rates by the supervisory authority before they are put to use. In practice the tariffs

99 For the powers of intervention exercised by the Secretary of State see infra pp.112-114.

100 Insurance Companies (Accounts and Statements) (Amendments) (General Business Reinsurance) Regulations 1983, S.I. 1983 No.469, regulation 5.

101 Supra at p.71.

for most of the classes of insurance business are drawn up by the Sub-Department of insurance.^{101A} This State Department computes and promulgates premium rates and all insurers are required by law to adhere to the uniform state-promulgated rates. This system of regulation is applied in Cameroon in the case of motor vehicle insurance. Rates are fixed periodically, usually, by a Ministerial Order which lays down the maximum and minimum rates that can be charged for any given category of motor vehicles.¹⁰² Insurance companies then, fix the rates within these limits. Competition in the sense of favourable tariffs operates in motor insurance business where some insurance companies grant rebates to policyholders,¹⁰³ and through the operation of 'bonus malus clause' (no-claim bonus discount). Under the latter clause, the insurance companies grant a certain percentage discount for 'good drivers' while 'bad risks' drivers may incur higher premiums. The percentage discount

101A The 1985 Ordinance further provides that a National Insurance Board which is an advisory body will be set up and placed under the authority of the Minister in charge of insurance. This body will be required to give opinions on matters submitted to it by the supervisory authority and formulate proposals on the rules of tariff regulation and the guiding principles in matters of reinsurance. It seems that this body would work in liaison with the Sub-Department of insurance in this respect: article 76 of the 1985 Ordinance.

102 Article 1 of Order No.000618/MINFI/DCE/A of 2 February 1985 fixing premium rates for motor vehicle insurance. Note that subsequent orders are passed every year to this effect. See also Order No.44/MINFI/CE/A of 2 September 1982 fixing the tariffs applicable to motor vehicles. This minimum and maximum rate regulation is a feature also common in France, see: Article L.310-7 of the Insurance Code 1976 in Guy Courtieu and Gilbert Croquez, Code des Assurances, 4^e édn., 1983 L'Argus Paris, p.95; M. Picard and A. Besson op. cit., at p.200. Through the requirement of prior rate regulation the state has been able to hold down the rates in the motor vehicle class which has been reputed for doing bad business over the years, much against the wishes of the insurers who think they ought to charge higher premiums to make good the losses they incur.

103 For example, Assurances Mutuelles Agricoles du Cameroun gives 20% discount to university teachers.

and willingness to provide the discount differ from company to company.

In contrast, in the United Kingdom, there is open rating in the field of premiums. Each insurance concern is free to fix its level of tariffs. However, the Secretary of State has the power by virtue of section 41 of the Insurance Companies Act 1982 to limit the premium income of insurance companies.¹⁰⁴ Furthermore, regulation 29, schedules 4 and 5 require the submission of information concerning the technical bases needed for calculating premium rates and the insurance companies are required to obtain a certificate from the actuary that he considers the premium rates to be suitable. So far, we have seen¹⁰⁵ in respect of Cameroon two types of rate regulation, namely, state made rates¹⁰⁶ where a state agency computes and promulgates premium rates and all insurers are required by law to adhere to the uniform state promulgated rates and prior approval of rates by a state

104 Because of the Secretary of State's responsibility under the Insurance Companies Act for overseeing the solvency of insurance companies, section 9 of the Counter Inflation Act 1973 gave the Secretary of State the responsibility for applying price control to insurance premiums. The provision was given permanent effect by section 14 of the Price Commission Act 1977. Of necessity, control of premium increases was applied only to those kinds of general insurance business for which insurers have scheduled rates. In effect this limited control chiefly applies to motor and property insurance. The insurance companies were required to seek prior approval for premium increases and keep records in justification of increases and make them available to the Department of Trade and Industry on request. See: Department of Trade Insurance Business: Annual Report, 1978, London, H.M.S.O., p.13 para. 52-53. However, the Competition Act 1980 has abolished the Price Commission and repealed associated legislation, including the power in the Counter Inflation Act 1973 to control insurance premiums. In consequence the special arrangements made by the Department, mentioned in paragraph 53 of the 1978 Report; with the British Insurance Association and with Lloyd's for notification of certain premiums have lapsed. See: Department of Trade Insurance Business: Annual Report, 1978, London, H.M.S.O., p.9 para. 54.

105 Supra pp.71 and 99-100.

106 This represents an extreme form of government regulation of premium rates.

agency.¹⁰⁷ A question which one might ask at this point is whether state regulation of premium rates is necessary. Would it not be better to have a system of free competition as practised in the United Kingdom wherein the forces of supply and demand control premium levels on the insurance market? We will briefly look at the arguments advanced in favour of rate regulation and open rating.¹⁰⁸ The main arguments advanced in favour of a system of rate regulation are that consumers of insurance are protected from excessive rates; rate regulation ensures that rates are not unjustifiably discriminatory; it ensures that insurers do not make excessive profits thereby ensuring the adequacy of premiums and the availability of insurance; and finally rate regulation avoids rate wars and insolvencies. However, there are also some merit to open rating. Under a system of open competition, price responsiveness to cost keeps premium rates at a reasonable level, encourages availability of insurance and fair treatment of claimants and policyholders. Further, competition spurs research and innovation within

107 A majority of the states in the United States of America and most continental countries have adopted this system which requires insurance companies to file rates and supporting data with the commissioner for his approval thereof, before they become effective. Other types of rate regulation practised in the United States include, bureau promulgation of mandatory rates under which rating organisations to which members are affiliated fix rate which members of the bureau are required to use; and the use and filing system which permits insurers to promulgate a revised rate first and file the necessary rate information with the regulatory authority subsequently. For other types of regulation being practised in the United States of America see: Aaron Trupin, M.A., "Open Rating in Insurance" in Issues in Insurance, 1st ed., Vol.I, edited by John D. Long, 1978 at p.251. (Note that this monograph has been deleted in the 2nd. ed. 1981 of this work, see preface by Edwin S. Overmann. However, it is nevertheless up to date but not very much a topical issue in comparison to the monographs which have been retained.

108 For a fuller account of the arguments in favour of rate regulation and open rating see: Aaron Trupin, ibid, pp.283-289. See also, Robert E. Keeton, Insurance Law: Basic Text, 1971 at pp.557-567 for persuasive arguments in favour of rate regulation.

the industry. It permits better use of public funds saved from rate regulation which is very costly. And finally, open rating does not make insolvencies more likely. These arguments were summed up by William O. Bailey that rating freedom and competition will benefit the consumer by promoting "innovation in coverages, classifications, services, and other areas... greater availability of insurance protection, improved response to changing markets and individual preferences and free choices for informed consumers".¹⁰⁹ Whatever the merits of these arguments, it is clear that none of the systems is perfect. It has been assumed that in an open rating system insolvencies are more frequent because unscrupulous insurers may indulge in cut-throat competition by charging very low premiums in order to attract business and accumulate adequate reserves to meet the settlement of claims.¹¹⁰ There is no evidence to show that insolvencies have been substantially reduced or eliminated in countries where premium rates are regulated.¹¹¹ Thus in spite of all that might be said in favour of rate regulation, it certainly is not a panacea for all the problems facing the insurance industry. The manner in which either of the two systems works in practice is very much dependent on the conditions prevailing in each country. In the United Kingdom, for instance, open competition in the field of premium rates has worked reasonably well. This has been due largely to the fact that the British Insurance market is well established, with a long tradition behind it. The existence on the market of insurance companies with a long

109 US correspondent, "The future of rate making", Post Magazine and Insurance Monitor, Vol. CXLI, No.30, 24 July 1980, p.1696.

110 The example of the Vehicle and General Insurance Company collapse, being a case in point in Britain, see Ronald Beale, After the V & G Crash, The City Press, 1972.

111 Robert E. Keeton, op. cit., p.557 et seq.

and honourable record, and in general, the English sense of fair play and justice are all factors which have worked in favour of open-rating. These factors do not exist to the same extent in Cameroon and in most developing Countries. Insurance, a product of colonialism is relatively new in Cameroon¹¹² and most of Africa. There are also fewer insurance companies. Most crucial perhaps, is the unavailability of insurance in many parts of the country.¹¹³ If one considers the fact that "the theoretical model of pure competition assumes that any given market has numerous buyers and sellers acting independently, and that each buyer is free to select any seller and, conversely, each seller, any buyer" and also that "in such a market, no individual or group of buyers or sellers is large enough to exert any appreciable influence on the demand, the supply, or the price of the product",¹¹⁴ then of course, one realises that the conditions do not exist for such open competition on the Cameroonian insurance market. In order to avoid a situation where an insurance company finding itself in a monopoly situation is tempted to charge premiums, it is therefore necessary for the state to intervene in regulating the level of premium rates. Rate regulation by the supervisory authority in Cameroon is commendable and ought to be encouraged until such a time that the conditions in the market place make it feasible for open competition to thrive without prejudicing the interests of consumers of insurance.

II Inspection at place of Business

The supervisory authorities in the United Kingdom and Cameroon are

112 Supra, pp.10, 30-39.

113 In Kumbo for instance, there is only a branch of the **Mutuelles Agricoles** while in Nkambe there is none at all.

114 See Aaron Trupin, op. cit., at pp.220-221.

empowered by law to carry out inspection at the place of business of the insurance concerns. As in the case of examination of returns, the inspection is concerned with legal, financial and technical aspects of the concerns activities. The aim of such an inspection being either verification of information given in the return or a 'spot check' of the whole of the insurer's affairs.

With respect to Cameroon the legislation provides for compulsory inspections at the place of business at least twice a year and the inspectors may at any time make a "spot" check¹¹⁵ - that is, one without giving the company prior notice. This inspection procedure has been criticised as being costly and time consuming as the area of supervision extends widely.¹¹⁶ This criticism is hardly justified as most of the insurance companies lack sufficient, competent and qualified personnel conversant and experienced in insurance matters.¹¹⁷ There is evidence of lack of probity on the part of directors and managers of the companies and lack of understanding of the

115 Article 36(3) of Decree No.84-1105 of 25 August 1984 re-organising the Ministry of Finance. As in France, there are two inspection procedures - at the place of business (inspection sur place) and the insurance companies are required to send their documents to the supervisory authority annually (inspection sur pièce) see :M. Picard and A. Besson, op. cit., 164-166.

116 Remarks by the Director of the Sub-Department of Insurance in an interview with him on 10 June 1983. It is probable that the reason for the heavy cost and time involved in inspection may be due to the fact that there are only three insurance inspectors: article 37 of Decree No. 84-1105 of 25 August 1984 op.cit. Undoubtedly, the present insurance inspectors are to a large extent qualified for this responsibility as they possess a postgraduate diploma - Diplôme du Cycle Supérieur from the International Institute of Insurance in Yaounde, after which they participated in seminars on insurance and pursued three months' training in the Department of Insurance of the Ministry of Economy and Finance in Paris (France) - Reply to inquiry from the Sub-Department of Insurance of the Ministry of Finance, letter dated 28 October 1985.

117 See Institut International des Assurances, "La formation du Personnel en matière d'assurance" in Le Marché Camerounais des Assurances No.4, January 1977 at p.21.

nature of the insurance business and of the caution with which the business should be conducted.¹¹⁸ In Cameroon, the principal constraint on development is shortage of executive capacity - there is not enough skilled manpower to go around and this affects the quality of service available. However, progress is expected in the future as the International Institute of Insurance embarks on the training of professional insurance executives.

In Cameroon where the institution of qualified public auditors is not developed, inspection constitute an integral part of state control of insurers. By virtue of articles 57(1) of the 1985 ordinance state control is exercised under the authority of the Minister of Finance by a corps of sworn civil servants called insurance inspectors. They are attached to the control service of the Sub-Department of Insurance. Inspectors are empowered, upon presentation of their identification papers, to demand full details and all documents relating to the undertaking's business. In particular they can inspect the undertaking's books (for example, registers of contracts, investments, claims, reserves, reinsurance arrangements and accounts and balance sheets).¹¹⁹ Inspectors are bound to observe official secrecy.¹²⁰

If it appears from an inspection at the place of business that:

- (a) there has been a breach of the conditions under which the concern has a legal right to carry on business, whether under its articles of association, the term of its licence or the statutory regulations, or
- (b) the general trend of the concern's financial affairs is likely to imperil its solvency, the insurance inspectors may prepare a report on their findings and observations and forward it to the Minister of

118 Ibid.

119 Article 36(3) of Decree No.84-1105 of 25 August 1984.

120 Ibid. Article 60(1).

Finance who determines the necessary remedial action.¹²¹ The supervisory authority may request that a recovery programme comprising all necessary measures to restore the balance of the company be forwarded to him within one month for approval. He may appoint an insurance controller to carry out permanent surveillance of the company in difficulty.^{121A} In the event of failure to draw up a recovery programme, or the proposed programme not being approved by the supervisory authority, or if approved, the programme not being carried out under the prescribed conditions and time limit, the supervisory authority may take any measures to protect the interest of policyholders and beneficiaries.^{121B} He may:^{121C}

- (a) restrict or forbid the company's freedom of access to its assets;
- (b) order any issuing person or body to refrain from carrying out any transaction on securities belonging to the company in question and from paying interest and dividends on the said securities;
- (c) register a mortgage on the property of the company;
- (d) demand that the first authentic copies of mortgage loans granted by the company be deposited at the Deposits and Consignment Fund and that all the funds, titles and shares held or owned by the company be deposited in a frozen account at the Central Bank for a given period and under conditions to be fixed by the supervisory authority;
- (e) order that the account is not debited by order of its owner except on special authorisation from the supervisory authority and for

121 Ibid. Article 64(1).

121A Ibid. Article 64(2).

121B Ibid. Article 64(3).

121C Ibid. Article 64(4).

a given amount.

Further conditions for the recovery of insurance companies concerning solvency requirements will be fixed by decree.^{121D} This decree has not yet been promulgated.

It seems that additional powers to control the financial activities of insurance companies are necessary if the government department responsible for the granting and continuance of insurance licences is to take effective action when the solvency of a company and in consequence the security of its policyholders and claimants is in jeopardy. However, it is hoped that the legislation envisaged in the present decree will be designed to facilitate close control over companies in financial difficulties similar to the stringent requirements in respect of the maintenance of the solvency margin under English law.

In addition, article 70(1) of the 1985 Ordinance empowers the Minister of Finance to withdraw or suspend all or some of the classes of business the concern is licenced to undertake in two circumstances:

- (a) where the financial standing of the company is such that it cannot provide adequate financial guarantees to meet the commitments towards policyholders and other creditors. This might arise where the technical and guarantee reserves are not adequately constituted.
- (b) where the company is not complying with insurance legislation.

According to article 70 (2), suspension or withdrawal of a licence becomes effective three months after the supervisory authority has formally notified the insurance company of its decision to suspend or withdraw its licence. In the situation where a concern's licence has been suspended in accordance with the above provisions no new contracts may be concluded or old

^{121D} Ibid. Article 64(5). Article 65 provides penalties on directors of a company subject to the recovery measures, who fails to comply with these measures.

contracts renewed in those classes affected by the suspension order.^{121E} Contracts still valid in the categories or sub-categories affected by the suspension order will be supervised by the company concerned under conditions provided for by the policies until their termination or expiry.¹²² Failing an amicable transfer approved in accordance with the provisions of article 68 of the 1985 Ordinance in respect of a voluntary cessation of activity, the supervisory authority may order the company concerned to automatically transfer all or part of its portfolio to one or more other approved and consenting companies.¹²³

In respect of a licence being withdrawn of all the classes of insurance business, the concern must be wound up and dissolved.¹²⁴ In which case articles 74(2) and 86(5) of the 1985 Ordinance calls for the appointment of a liquidator who will be responsible for the winding up operation. French insurance and general commercial law seems to have very substantially influenced insurance legislation and regulation in Cameroon as to the meeting of a company's liabilities on winding up on the fate of current contracts in the event of the total withdrawal of a licence.

With respect to general insurance business, article 73(1) of the 1985 Ordinance, following article 26 of the French Decree of June 14, 1938, now embodied in Article L. 326.12 of the Insurance Code 1976, provides that all contracts must terminate at mid-day on the 40th day following the publication

121E Article 71(1) of the 1985 Ordinance.

122 Article 71(2) of the 1985 Ordinance.

123 Ibid. Article 72.

124 Ibid. Article 74(1).

of the withdrawal order in the Official Gazette.¹²⁵ Premiums paid or due are only retainable or claimable pro-rata to the period of insurance, up to the date of termination. By virtue of article 73(2) provision is made for the continuation of long-term insurance business. This article stipulates that the liquidator must provisionally carry on the long-term business of the company pending a decision by the responsible Minister who may by Order do one of the following:

- (1) call for the cancellation of all contracts by a given date,
- (2) extend the expiry date of contracts,
- (3) transfer the business either partially or wholly to another company.

In this way the policyholder is protected by another insurer assuming the commitments of his present insurer who had encountered financial difficulties.

Special provision is made for securing the interests of policyholders during the process of winding up. In accordance with article 53 of the 1985 Ordinance which has exactly followed article L.327.2 of the French Insurance Code, a preferential line is created in favour of policyholders and third-party beneficiaries over the movable assets of the insurance company.

It is interesting to note that no insurance company has been compulsorily wound up by the supervisory authority in Cameroon.^{125A} However, Mutuelle Camerounaise d'Assurance went into voluntary liquidation in 1975.

125 We will recommend later that the provision of a policyholders protection legislation in Cameroon similar to that in the U.K. will assist policyholders in the event of withdrawal or cancellation of a licence, see pp.135-136. It is possible that the National Insurance Board provided for by article 76(1) of the 1985 Ordinance would be a competent body to undertake this responsibility though as envisaged by the legislation, it seems that it will be a mere advisory body: See supra, p.100, note 101A.

125A Field investigation concluded in Cameroon July 1983, Sub-Department of Insurance, Yaounde. Further confirmed by a reply to inquiry letter dated 28 October 1985 from M. Bile Ebenezer, Sub-Director of the Sub-Department of Insurance, Cameroon.

In addition, Sun Alliance Insurance Company (an English company) withdrew from business in Cameroon in 1980. This was confirmed by Mr. D. Klean, Superintendent, Overseas Division who commented^{125B} that the voluntary withdrawal of their group company concerned from Cameroon was dictated purely by commercial considerations (which of course remains confidential to the company).

Nevertheless, the supervisory authority has exercised its power of intervention in respect of a broker.^{125C} The companies concerned in this case were Assureurs Conseils Franco-Africains (ACFRA) and Compagnie Camerounaise d'Assurances et de Réassurances (CCAR). The manager of CCAR was alleged to have been passing on business to ACFRA, a company in which, the said manager had a substantial interest and thereby in breach of article 46(1) of the 1985 Ordinance. This was found out by the managers of Société Camerounaise d'Assurances et de Réassurances (SOCAR) (the most affected insurance company) which reported to the Minister of Finance. After due investigations, it was revealed that there was no substantial evidence to show that the insurance broker, (ACFRA) and the insurance company, (CCAR) exchanged business in bad faith and the case was dismissed. Presently, ACFRA is still in business.

In contrast to Cameroon, there is no compulsory inspection at the place of business by the control authorities in the United Kingdom. However, if it appears to the supervisory authorities that a business is being so conducted that there is a risk of the company becoming insolvent, the Secretary of State may impose on the company all or any of the following requirements:-

125B Reply to inquiry, letter dated 18 December 1985.

125C Reply to inquiry, letter dated 28 October 1985 from M. Bile Ebenezer, Sub-Director of the Sub-Department of Insurance, Cameroon. Note that insurance agents and brokers are supervised through insurance companies whom they represent.

- (a) a mandatory request that the company must make investments of a specified class or description and must realise the whole or a specified proportion of investments of that class or description held by it immediately before the requirement is imposed,¹²⁶
- (b) that assets of the company of a value which at any time is equal to the whole or a specified proportion of the amount of its domestic liabilities be maintained in the United Kingdom,¹²⁷
- (c) an additional requirement that the whole or a specified proportion of its assets be held in the custody of a person approved by the appropriate authority as trustee for the company,¹²⁸
- (d) that the company take all such steps as are requisite to secure that the aggregate of the premiums to be received by it in consideration of the undertaking by it of liabilities in the course of carrying on business of a specified class must not exceed a specified amount,¹²⁹
- (e) that the company furnish him or the appropriate authority at special times or intervals, with information about specified matters.¹³⁰

Where, however, the information so obtained does not remove the doubt as to the solvency of the company the Department of Trade and Industry may appoint an inspector to make a more detailed investigation. This is rarely

126 Section 38 of the Insurance Companies Act 1982.

127 Ibid., section 39(1).

128 Ibid., section 40(1).

129 Ibid., section 41(1).

130 Ibid., section 44. See further sections 42, 43 and 45 of the Insurance Companies Act 1982 for other powers of intervention in table 2 below at p.114.

necessary as the examination of the statutory returns most often suffices. The returns and documents submitted to the supervisory authority in the United Kingdom contain sufficient information to enable the Department of Trade and Industry to monitor the progress of each company and if necessary to exercise the powers of intervention granted to the Secretary of State. Section 37 of the Insurance Companies Act 1982 states the grounds upon which the Secretary of State may exercise the considerable powers of intervention which he enjoys under the Act. The powers conferred by sections 38 and 41 to 45 are exercisable by the Secretary of State if he considers it desirable for protecting policyholders or potential policyholders of the company against the risk that the company may be unable to meet its liabilities or, in the case of long-term business, to fulfill the reasonable expectation of policyholders or potential policyholders.¹³¹ Furthermore, he may exercise his powers under the Act if it appears to him that the company or a company of which it is a subsidiary or a subordinate company has failed to satisfy its obligations under the legislation;¹³² if it appears to him that the company has furnished misleading or inaccurate information under and for the purposes of any provision of the Act;¹³³ and if it appears that there has been a substantial departure from any proposal or forecast submitted to him by the company in accordance with section 5.¹³⁴

These powers were exercised in respect of newly authorised companies, on change of control and on other occasions during 1983 as shown in the table overleaf. In addition 16 companies were required to take non-statutory remedial action.

131 Ibid., section 37(2)(a).

132 Ibid., section 37(2)(b).

133 Ibid., section 37(2)(c).

134 Ibid., section 37(3)(f). See also section 37(2)(2)(d)(e) and (g).

TABLE 2 : The Exercise of the Powers of Intervention by the Secretary of State in the United Kingdom.

Section	Power	Number of times used		
		On or within five years of authorisation under s37(5)(a)	On or within five years of change of control of company under s37(5)(b)	In other cases under s37(2), (3), (4) & (6)
38	Requirements about investments	15	1	-
39	Maintenance of assets in UK	-	-	1
40	Custody of assets	-	-	1
41	Limitation of premium income	15	-	2
42	Actuarial investigations	6	-	2
43	Acceleration of information required by accounting provisions	-	-	1
44(1)	Obtaining information (at specified times or intervals)	18	1	3
44(2)	Obtaining information (by production of specified books or papers)	-	1	2
45	Residual power to impose requirements for protection of policyholders	15	-	2

SOURCE: DEPARTMENT OF TRADE AND INDUSTRY
INSURANCE ANNUAL REPORT 1983
LONDON H.M.S.O.

The number of times the powers of intervention was exercised as shown in the above table, reveal that, in a great majority of cases, these powers are exercised in respect of newly authorised companies which are still getting used to the British Insurance market. An example of this can be afforded by the Department of Trade and Industry's intervention in the affairs of Castle Life Assurance Company in 1974. This company was authorised to commence business on September 4, 1973 after it had submitted its "business plan" and approval had been obtained from the Department of Trade and Industry. On September 14, 1973, under the normal request, to notify any changes in its policies within seven days of any such occurrence arising, the company informed the Department of Trade and Industry that it was planning to issue two policies, namely, a renewable term assurance and a guarantee income bond. The Government Actuary's Department took the view that this altered the company's "business plan" basis as originally submitted. As the new policies were being put on sale only ten days after authorisation had been granted, the Department of Trade and Industry expressed doubts as to whether the company had not got these policies already in mind, in which case they should have been submitted before authorisation. Inquiries were begun by the Department of Trade to find whether "misleading or inaccurate information" had been supplied for the purpose of authorisation. On April 9, 1974, the Department finally imposed restrictions on the company, not to carry on any new contracts of insurance.¹³⁵

135 These restrictions were made under section 13 of the Insurance Companies Amendment Act 1973. A corresponding restriction could be made under section 11 of the Insurance Companies Act 1982.

In addition to placing varying restrictions¹³⁶ on the company, the Department found Mr. X,¹³⁷ chairman and managing director of the company "not to be a fit and proper person" to be a controller of the company. The Department of Trade and Industry had taken this action on the ground that he had permitted or caused the company to furnish misleading information in connection with an application for authorisation. The director in question complained to the Ombudsman that the Department's action in finding him to be not a "fit and proper" person was unjustified and excessive. He also complained that after having taken the statutory opportunity to make both written and oral representations he had subsequently been refused a further hearing. Under the stringent requirements to protect the public, the Department is given extensive statutory powers under which there is no appeal to the courts except possibly under the concept of "natural justice", and so this complaint to the Ombudsman was the first time they have ever been challenged in such a way.¹³⁸ This case brought out some of the difficulties the Department faces in implementing such legislation with its far-reaching powers. They have to

136 Other restrictions under sections 14-16 of the 1973 Act such as limitation on premium income, maintenance of assets in the UK and preventing the company from keeping investments which were unsuitable were made.

137 The identity of Mr. X is not revealed in the anonymised report of the Ombudsman, See: Second Report of the Parliamentary Commissioner for Administration, Session 1976-77 Annual Report for 1976, House of Commons Paper 116, H.M.S.O. London, Appendix B. Case No. C.618/V - Action taken under the Insurance Companies Amendment Act 1973 at 26.

138 Although the Department of Trade has complete discretion to decide on the fitness of a person under the regulations, its exercise of such power must be free from arbitrariness.

protect the public as a whole, as far as possible, from the unscrupulous.¹³⁹
At the same time the individual must be protected from arbitrary actions on the part of the Executive. The Department takes the view that it must have full confidence in the good faith of controllers of insurance companies. In this case, it felt apparently, that because Mr. X was experienced as an actuary in insurance company authorisations he had been involved either in deliberate deception over the "Business Plan" as far as the guaranteed bond scheme was concerned or inadvertent deception through incompetent control and so in either case it could not have confidence in the way the company was run. Its concern over "misleading information" was not concealed from Mr. X, who was no stranger to getting authorisation. It was not surprising that the Department felt that something was being held back from it. But its failure to give Mr. X a clearer indication of matters at issue on some occasions needlessly deprived him of an earlier opportunity of expanding his explanations. The Department was criticised for acting unfairly against Mr. X.¹⁴⁰
In accordance with the Ombudsman recommendations the Department reviewed the case through officials unconnected with its previous inquiries. As a result of the review, the Secretary of State concluded that the director concerned

139 During the passage of the Bill which became the Insurance Companies Amendment Act 1973, disquiet was expressed in Parliament over the "fit and proper" powers. It was thought that there were inadequate safeguards against the arbitrary use of power, with insufficient opportunity for a person to defend himself against such charges as no appeal machinery was introduced against such a finding. The Bill was amended to incorporate a provision that particulars of the grounds must be given in a notice served on the company. See: 857 Hansard, (5th series) H.C. Cols. 118-178 (21 May 1973). It is clear from a reading of Hansard that there was recognition in both Houses of Parliament that the central purpose of the Bill was to give powers to enable the Department to protect the public, so far as possible, from the unscrupulous.

140 Parliamentary Commissioner for Administration op. cit., pp.46-48.

(and one of the other directors who had similarly been found "not to be a fit and proper person") should no longer be regarded in that light.¹⁴¹

The control of the Castle Life, renamed Igal, passed to Mr. Joseph Kaplan, managing director of Indemnity Guarantee Assurance Ltd. On November 4, 1975, the Secretary of State gave notice to the company that he was considering exercising his powers under section 29 of the 1974 Insurance Companies Act on the ground that Mr. Joseph Kaplan, was not 'a fit and proper person'. The reasons concerned the valuation attached to a freehold property (at Clifton Street London EC2) and an insurance on that property. This was based on the proposition that Mr. Kaplan had signed the accounts to 31st. December 1974 knowing or having reason to believe that the valuation assigned therein to Clifton Street was misleading and inaccurate and because Mr. Kaplan knew or had reason to believe that the insurance effected to protect against any reduction in value of Clifton Street was for the purpose of representing that the value of the premises was higher than its true value. On February 1976 the Secretary of State served a notice on the company under section 29 of the Act imposing restrictions on its ability to enter into or vary insurance contracts. Mr. Kaplan maintained that the matters in issue should, under article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms 1948, have been decided by a court. He submitted that the civil rights and obligations of himself and the company were determined without a public hearing before a court and also maintained that the allegations against him amounted in substance to a criminal charge. He alleged that article 6 was thus applicable and was breached. On 23

141 See: Parliamentary Commissioner for Administration, Second Report (Session 1978-1979). Annual Report for 1978, House of Commons paper 205, London, H.M.S.O. para. 71.

January 1981, the Committee of Ministers' Deputies of the Council of Europe resolved that there had been no violation of the Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁴²

We mentioned earlier that the underlying philosophy of the supervisory legislation in the United Kingdom has been described as "Freedom with publicity",¹⁴³ whereby the supervisory function has been exercised by a government department largely on the basis of annual returns designed to provide sufficient information to enable the department to monitor the overall financial position of an insurer. However, in the light of recent legislation one would question the appropriateness of this phrase. In the past twenty years the volume of supervisory regulation has expanded at a tremendous rate in response to changing circumstances within the industry and a changing external environment in which self-regulation is perceived as somewhat anachronistic. The Department of Trade and Industry has come to possess over the years a steadily enhanced supervisory role over the insurance industry. It is thought that the only realistic method of controlling insurance companies is by government regulation although Lloyds in the United Kingdom must be mentioned as a unique exception.

The legislation introduced may not have changed the underlying philosophy but the degree of supervision is clearly intended to result in the closest possible scrutiny of the affairs of an insurer; extremely detailed returns are required at more frequent intervals than previously. These returns enable the Department of Trade and Industry to monitor the progress

142 Joseph Kaplan v. United Kingdom (1982) 4 EHRR 64, Application No.7598/76; Yearbook of the European Convention on Human Rights 1981, Martinus Nijhoff, Publishers, a member of the Kluwer Academic Publishers Group, Hague, Boston, Lancaster.

143 Supra, Chapter One, p.46.

of each company and therefore facilitate the detection of any cloud as soon as it appears on the horizon and, if necessary, the supervisory authority exercises the powers of intervention granted to the Secretary of State. Perhaps the most significant is the power of the Secretary of State to intervene directly in the affairs of an insurer where there is evidence of potential insolvency and consequent risk of financial loss to policyholders. The effect of these legislative provisions, though still falling short of outright control has resulted in an increase in the intervention and direction of an insurer's affairs. The justification of these powers was the need to protect policyholder's interests by speedy departmental action to prevent interim depletion of assets and the power to impose requirements on newly authorised companies were intended to stop less desirable characters getting control of a company which was already authorised. Supervision has been based on an early warning system to detect adverse trends in order that remedial measures may be instituted in good time. These measures have included devices to avoid insolvency by attempting to improve the position of ailing insurance companies. Improvement may result from efforts to obtain additional funds, reduce premium writings, improve operational profitability, acquire appropriate reinsurance arrangements and upturn in investments. These powers of intervention in the interest of policyholders follow from scrutiny of insurers financial condition and has been the acid test of the effectiveness of the legislation and of the Department of Trade and Industry's stewardship under the Act. Stricter supervision of insurance companies by the Department of Trade and Industry is acceptable as inevitable

in the light of earlier weaknesses which it has been argued¹⁴⁴ stemmed from the department's limited powers. The Department of Trade and Industry has been criticised¹⁴⁵ in the past for the error of allowing a company to continue in business longer than it should. Clearly, the Department of Trade and Industry's powers of intervention are sufficient to enable them to handle any conceivable situation effectively. The hope must therefore be that the Department of Trade and Industry should not indulge in overkill by imposing too stringent requirements which will stifle insurance companies initiative. Further, action should be taken preferably in as quiet a manner as possible as loss of public confidence may bring about the collapse of any institution particularly an insurance company that relies for its existence upon acting as a trustee for other people's money.

The principal measure of consumer protection inherent in the Insurance Companies Act 1982 is the constant monitoring of the solvency of insurance companies to ensure that they are able to meet their ultimate liabilities. One of the ways of measuring the effectiveness of supervision is by studying the presence or absence of insurance companies insolvencies. Another is by analysing the extent to which policyholders have suffered in numerical or monetary terms. This latter method is difficult to determine. During the period 1969-1974 some thirty-two companies failed¹⁴⁶ affecting millions of policyholders of which more than 55 per cent were insured with three companies only; the Fire Auto and Marine, the Vehicle and General and Nation

144 Ronald Beale, After the V & G Crash - An inquest into Motor Insurance, City Press, London 1972, pp.104-128.

145 Ibid.

146 Department of Trade, Insurance business; Annual Reports, 1969-1974, London, H.M.S.O.

Life Assurance Company. Whereas in the nine years from 1974 to the end of 1983 only nineteen insurance companies have been wound up¹⁴⁷ giving a lower annual failure rate. The comparatively small number of failures during the latter period are indicative of the fact that the stringent and increased powers of supervision by the Department of Trade and Industry are effective in avoiding or reducing failure of insurance companies. The objective and significant consequence of the Insurance Companies Act 1982 has been to ensure that companies did not fail. Nevertheless, no system of supervision, however, tight, can provide a complete guarantee against failure, as insurance is the business of taking risks. The protection scheme which will be considered below¹⁴⁸ is, therefore complementary to the new supervision arrangements.

As we have observed in both countries,¹⁴⁹ the supervisory authorities may enforce special requirements to redress the insurance concern's position. They may even oblige the concern to suspend all or part of its business before resorting to one of the two ultimate sanctions - withdrawal of the licence or compulsory winding up.^{149A}

An insurance company may be wound up in the United Kingdom on one of three grounds: first, on the order of a court in accordance with the provisions of the Companies' Act 1985;¹⁵⁰ second, on the petition of ten

147 Department of Trade, Insurance business; Annual Reports, 1975-1983, London, H.M.S.O.

148 Infra, pp.125-138.

149 Supra, pp.107-115.

149A For rules on winding up, see in England, the Insurance Companies (Winding Up) Rules (S.I. No.1985/95) made under section 59 of the Insurance Companies Act 1982 and bringing into force sections 54(3), 55 and 56 of that Act. In respect of Cameroon, see articles 74 and 75 of the 1985 Ordinance.

150 Section 53 of the Insurance Companies Act 1982.

or more policyholders owning policies of an aggregate value of not less than £10,000, provided that such a petition is presented with leave of the court¹⁵¹ and third, the Secretary of State may also present a petition for winding up an insurance company on the grounds that; the company is unable to pay its debts within the meaning of sections 517 and 518 or section 572 of the Companies Act 1985; the company has failed to satisfy an obligation to which it is or was subject by virtue of the 1982 Act or any enactment repealed by the Act or by the Insurance Companies Act 1981; or the company has failed in its obligation imposed by section 221 of the Companies Act 1985 to keep proper accounting records or produce records kept in satisfaction of that obligation and the Secretary of State is unable to ascertain its financial position.¹⁵²

In the event of winding up, section 55(3) of the Insurance Companies Act 1982 provides that the assets representing the fund or funds maintained by the company in respect of its long-term business must be available only for meeting the liabilities of the company attributable to that business and the other assets of the company must be available only for meeting the liabilities of the company attributable to its other business.

Furthermore, section 56 of the 1982 makes provision for the continuation of long-term business of the company being wound up. Thus the liquidator must, unless the court otherwise orders, carry on the long-term business of the company being wound up, with a view to its being transferred as a going concern to another insurance company, whether as an existing company or a company formed for that purpose; and, in carrying on that business as aforesaid, the liquidator may agree to variation of any contracts

151 Ibid.

152 Ibid, section 54.

of insurance in existence when the winding up order is made, but must not effect any new contracts of insurance. The Insurance Companies Act 1982 contains adequate measures for the handling of assets on the winding up of an insurance company.¹⁵³

We have noted that where an insurance company is unable to meet its liabilities the eventual consequence is winding up of the concern's business.¹⁵⁴ Where this happens the interests of policyholders and other beneficiaries are at stake. The extent to which these interests will be prejudiced will of course vary with each individual case. We have briefly looked at the procedure laid down in the United Kingdom and Cameroon for safeguarding the interests of policyholders in the event of winding up.¹⁵⁵ It is however, evident that where the cause of winding up is the inability of the insurance concern to meet its liabilities the measures we have been examining in the above systems can only go some of the way to minimise the extent of the loss suffered by policyholders and third party claimants. The question one might ask at this point is whether the supervisory authority, having failed to prevent insolvencies should allow the policyholders to suffer the brunt of the very thing that it set out to avoid? This could hardly be seen to be the best course to adopt from the point of view of policyholders. It can be argued, rightly it is submitted that the best course to adopt is to ensure that policyholders receive full or some compensation. This is especially necessary in the cases where the state has rendered insurance compulsory. It is in this light that the United Kingdom Policyholders Protection Act 1975 is of particular relevance.

153 Ibid, section 59.

154 Supra, p.109 and p.122.

155 Supra, pp.109-110 and pp.123-124.

V. THE UNITED KINGDOM POLICYHOLDERS PROTECTION ACT 1975.

This Act came into force on November 13, 1975. Section 1 of the Policyholders Protection Act 1975 established the Policyholders Protection Board which is empowered to take the measures provided in the Act for indemnifying in whole or in part, or otherwise assisting or protecting Policyholders and others who may be prejudiced in consequence of the inability of insurance companies carrying on business in the United Kingdom to meet their liabilities under policies issued or securities given by them. The Policyholders Protection Board was set up in the wake of the collapse of Nation Life Insurance Company.¹⁵⁶

1 The Policyholders Protection Board

Section 1 of the 1975 Act provides for the establishment of a statutory body the Policyholders Protection Board, to administer the protection scheme. Schedule 1 to the Act provides that the Board shall consist of five members appointed by the Secretary of State from the management of insurance companies, and at least one must be qualified to represent the interests of Policyholders.¹⁵⁷ Members of the Board hold office for not more than two

¹⁵⁶ It is somewhat ironic that Nation Life Policyholders were not able to benefit from the scheme since the protection scheme only applied to policyholders of insurance companies which went into liquidation after 29 October 1974. Nation Life went into liquidation in July 1974.

¹⁵⁷ The Secretary of State may also appoint in respect of each member of the Board, an alternate member to perform his duties as a member in his absence. See: Schedule 1 and articles 1-5 for a fuller account of the nature and scope of Member's duties.

years.¹⁵⁸ The Secretary of State appoints one of the Board Members to be the Chairman thereof. The Chairman holds office only for as long as he remains a Member of the Board.¹⁵⁹ Members are remunerated whenever the Board meets. For the year ending March 31, 1977, the rate of remuneration was £45 per day for the Chairman and £30 per day for other Members or alternate Members.¹⁶⁰

2 Duties of the Board.

The duties of the Board arise when an insurance company goes into liquidation or is in provisional liquidation. The main duty of the Board as we have indicated above¹⁶¹ is to indemnify or otherwise assist or protect policyholders and others who have been or may be prejudiced by the inability of an authorised insurance company to meet its liabilities under policies issued or securities given by them.¹⁶² For this purpose, in the case of compulsory insurance, the Board shall secure the payment of a sum equal to the full amount of any liability of the company in liquidation towards any policyholder or security holder under the terms of any policy or security, as soon as reasonably practicable after the beginning of the liquidation.¹⁶³ In the exercise of this duty, the Board has settled ten cases totaling some £12.000 arising out of unexpected claims made against the Cotton Trade

158 Para. 2(1) and (2) of schedule 1 to the 1975 Act.

159 Schedule 1 of the 1975 Act.

160 Half of these rates were payable for periods of half a day or less. See: Policyholders Protection Board, Reports and Accounts for the year ended 31 March 1976, p.1. See also schedule 1 paras. 5 and 6.

161 Supra, p.125.

162 Section 1(2) of the 1975 Act.

163 Section 6(4) ibid.

Insurance Association Limited which transacted employers liability insurance business.¹⁶⁴

In the case of non-compulsory insurance, the Board shall ensure that a sum equal to 90 per cent of the amount of any liability of a company in liquidation towards a private policyholder under the terms of any policy which is a U.K. policy at the beginning of the liquidation is paid to the policyholder as soon as reasonably practicable after the beginning of the liquidation.¹⁶⁵ In the exercise of this duty, the Board is given certain powers. It is to the consideration of these powers that we will now turn.

3 Powers of the Board.

The Board is empowered by the 1975 Act to assist policyholders of insurance companies in liquidation or in provisional liquidation, by making interim payments¹⁶⁶ so that policyholders do not suffer hardship during the interval which is bound to elapse between the time when an insurance company gets into financial difficulties and the time when some appropriate rescue operation is organised by the Board. Under section 28 of the 1975 Act the Secretary of State is required when an insurance company is in liquidation or financial difficulties to make a report to Parliament giving details of the exercise of his powers under the Insurance Companies Act 1982 in relation to the company. In 1975 the Secretary of State reported on Fidelity Life

164 See Policyholders Protection Board, Reports and Accounts for the year ended 31 March 1984 p.5. Note that employer's liability is a compulsory class of general business and policyholders are entitled to the protection of the Board under section 6(1) of the 1975 Act.

165 Section 8(1) and (2) of the 1975 Act. Section 8(4) excludes marine, aviation, transport insurance business and contracts of reinsurance from the provisions of this Act.

166 Section 15 ibid.

Assurance Limited and Capital Annuities Limited that there was no reasonable prospect of their being able to meet their liabilities to their policyholders and other creditors.¹⁶⁷ These two cases were the first to be handled by the Policyholders Protection Board.¹⁶⁸ They illustrate the different ways in which interim payments may be made. For Fidelity Life Assurance Company interim payments were made out of the company's funds under an indemnity given to the provisional liquidator by the Board. The issue arose whether the Board's power under section 15 (3) (b) was confined to affording a liquidator or provisional liquidator indemnity against any personal liability resulting from interim payments or whether the Board was authorised to give to the company itself an undertaking to make good any shortfall of assets resulting from interim payments. In interpreting section 15 (3)(b) of the 1975 Act the court held in the case of Policyholders Protection Board v. Official Receiver¹⁶⁹ that not only is the Board able to indemnify the provisional liquidator in his personal capacity; it is also empowered to give the company an undertaking to make good any shortfall of assets which may result from making the interim payments. Brightman J., made a declaration that the Policyholders Protection Board has the power under section 15 (3)(b) of the 1975 Act to enter into a three-party deed of indemnity between the

167 These reports were made on 26 July 1976 and 21 December 1976 respectively. The company needed an increase in its assets by at least £750,000 without a corresponding increase in its liabilities. The Department of Trade and Industry had not been satisfied that the value of Fidelity Life's assets exceeded its liabilities and on 14 January 1975, the company had undertaken not to issue new policies. See: Department of Trade, Insurance business: Annual Report, 1976, London H.M.S.O., 1976, paras.5 and 6 at p.1.

168 Policyholders Protection Board, Report of activities for the period 12 November 1975 (date established) to 30 September 1976, p.1.

169 [1976] 1 W.L.R. 447 Ibid, at p.450.

Board, Fidelity Life Assurance Ltd., in provisional liquidation and the provisional liquidator whereby the provisional liquidator should make interim payments until a winding up order was made or a scheme approved by the Board was operating, and the Board would indemnify the provisional liquidator against any personal liability arising from the fact that he permitted such payments to be made and would indemnify him for the benefit of the company with the object of protecting the company against loss. The court took the view that to confine the indemnity to any personal liability of the liquidator would largely stultify the intention of the paragraph, so that the true construction was the wider one.¹⁷⁰ This ruling by the court is favourable to policyholders.

In making interim payments to policyholders of Fidelity Life Assurance, the Board leaned heavily on Fidelity's United States parent company, Fidelity corporation of Richmond, Virginia. The Board managed to avoid any expense itself whilst safeguarding the policyholders. The Board's efforts on behalf of policyholders of Fidelity Life Assurance appear to have paid off. The second case, that of Capital Annuities Limited, differs from the first in that there was no parent company available to provide additional funds. There was thus no possibility of a 100 per cent rescue and policyholders could only be protected at the 90 per cent level, subject to any scaling-down for excessive benefits. It was necessary in this case to raise a levy from the industry to finance the interim payments.¹⁷¹ It is clear that without the Board's intervention policyholders of Capital Annuities would still be waiting for payments from the company, for at the time it went into

170 Ibid., at p.453.

171 See later discussion on the financial resources of the Board at pp.133-135.

provisional liquidation, the company was totally illiquid.¹⁷²

Another power of the Board is to protect policyholders of companies in financial difficulties by taking any measures appearing to them to be appropriate for securing or facilitating the transfer of all or part of the insurance business carried on by a company in financial difficulties to another authorised insurance company on terms appearing to the Board to be appropriate in any case or description of case.¹⁷³ In 1978, the Board established a scheme by which under the Board's guarantee Capital Annuities Limited would be managed by Commercial Union Assurance Group.¹⁷⁴ And in accordance with section 11(3) of the 1975 Act, arrangements were made with Commercial Union Assurance Group whereby 1,200 policyholders were offered continuation or substitute policies with that company at the level of 90 per cent of non-excessive benefits. A similar arrangement was made in respect of 450 policyholders of Underwriters National Assurance Company who were offered substitute policies by Guardian Assurance PLC.¹⁷⁵

Upon liquidation of a company in the field of non-compulsory general insurance, the Board must secure 90 per cent of the liability to each private policyholder and for long-term policies must additionally secure continuity of insurance to the level of 90 per cent of the future benefits under the policy (but excluding any policy bonus not declared before the beginning of

172 This company has been in liquidation since 1978 and until 1984 continued assistance was given to some policyholders. See Policyholders Protection Board, Report and Accounts for the year ended 31 March, 1984, p.4.

173 Section 16(4) of the Policyholders Protection Act 1975.

174 Policyholders Protection Board, Report and Accounts for the year ended 31 March, 1978, p.4.

175 Policyholders Protection Board, Report and Accounts for the year ended 31 March, 1982, p.5.

the liquidation) or if this proves not to be practicable, to pay the policyholder a sum equal to 90 per cent of the value of his policy.¹⁷⁶ In the exercise of this power by section 17(4), the Board may reduce or disregard any disproportionate or excessive benefits under long-term policies provided that an independent actuary reports to the Board that the benefits in question are excessive. This power was used, following a report to that effect, in respect of Capital Annuities Limited.¹⁷⁷ The Board, the Institute of Actuaries and Faculty of Actuaries all suggested that the duties of the independent actuary to whom the Board would refer long-term policies which provided benefits which might be regarded as excessive needed clarification.¹⁷⁸ The duties under sections 12(1) and 17(4) might be interpreted as restricting the actuary in his determination of excessive benefits to a comparison with the 'premium paid or payable and to any other terms of the policy.' They suggested that the actuary should be free to take into account all the factors which he considers relevant.¹⁷⁹

The Board may also assist a company in financial difficulties by giving such assistance as may enable it to continue to carry on insurance business.¹⁸⁰ In the case of Underwriters National Assurance Company, the Board attempted to arrange for the company's business to be continued but in the light of legal and actuarial advice, it concluded that such arrangements

176 Section 10 of the 1975 Act.

177 See: Policyholders Protection Board, Report and Accounts for the year ended 31 March, 1979, p.4.

178 See infra, pp.134-135. See also Report on the Policyholders Protection Act 1975, 1981 (1980-1981, H.C. 363) London H.M.S.O., para. 18 at pp.8-9.

179 Ibid

180 Section 11(3) of the 1975 Act.

were not practicable.¹⁸¹

The duties and powers of the Board are only exercisable in relation to authorised insurance companies, an authorised insurance company being one which is permitted to carry on business in the United Kingdom by virtue of the Insurance Companies Act 1982 or of the Insurance Companies Act (Northern Ireland) 1968.¹⁸² Cavalier Insurance Company had been authorised to transact insurance classes 7, 8 and 9 (Goods in Transit, Fire and Natural Forces and Damage to Property). This company was put into liquidation in February 1984 after it was discovered that it had written more than 100,000 extended warranties without authorisation. Under the terms of section 8 (2) of the 1975 Act, the Board is protecting the interests of private policyholders to the extent of 90 per cent of claims under the authorised policies.¹⁸³ The Policyholders Protection Board is uncertain whether claims on extended warranties underwritten by Cavalier Insurance Company should be met from its funds.¹⁸⁴

Since the insurance cover was not valid, it has been argued that policyholders would not be protected by the Board as it was only empowered to act where policies were legal, the problem has been compounded by two

181 Policyholders Protection Board, Report and Accounts for the year ended 31 March, 1983, p.5.

182 Section 3 of the 1975 Act.

183 See Policyholders Protection Board, Report and Accounts for the year ended 31 March, 1984, p.5

184 Ibid., at p.5.

conflicting court decisions as to the validity of unauthorised policies.¹⁸⁵
The Policyholders Protection Board is seeking legal advice to clarify its rights and duties.¹⁸⁶

A policyholder is eligible for the assistance or protection of the Board only in respect of a policy of insurance which was a United Kingdom policy for the purpose of the Act at the material time, namely, when the performance by the insurer of any of his obligations under the contract evidenced by the policy would constitute the carrying on by the insurer of insurance business of any class in the United Kingdom.¹⁸⁷

4 Financial Resources of the Board.

The Policyholders Protection Act authorises the Board to impose levies on the insurance industry for the purpose of financing the performance of its activities.¹⁸⁸ Sections 19 and 20 provide for levies on intermediaries who

185 See later discussion on pp.138-142. In the case of the Bedford Insurance Company Ltd. v. Instituto de Resseguros do Brazil and others [1984] 3 W.L.R. 726, it was held that contracts written by an insurance company outside the scope of its authorisation were void. The indication was that the Board had no rights or duties in relation to the extended warranty business. In April 1984, the judgment in the Bedford case was contradicted in the case of Stewart v. Oriental Fire and Marine Insurance Co. [1984] 3 W.L.R. 741.

186 Policyholders Protection Board, Report and Accounts for the year ended 31 March, 1984 p.5.

187 Section 4 of the 1975 Act. By analogy to a broad construction given in Stewart's Case [1984] 3 W.L.R. 741-749, the phrase "effecting and carrying on of insurance business" in the Insurance Companies Act 1974, means that the insurer has a reasonable presence in the United Kingdom. Furthermore, it has been emphasised that both "the effecting and carrying out" or "the decision either to effect or to carry out" must be taken in the United Kingdom: See, Department of Trade and Industry Press Notice, "Carrying on Insurance Business - Alex Fletcher Statement", Ref:470, 25 July 1985.

188 Section 21(1) and (2) empowers the Board from time to time for the purpose of financing general insurance business expenditure, to impose a levy on authorised insurance companies carrying on general business in the UK and a separate levy on authorised insurance companies carrying on long-term business within the UK for the purpose of financing long-term expenditure.

have earned substantial commission in respect of insurance business from a failed company.¹⁸⁹ The amount each company may be required to pay under any levy in respect of either class of insurance business shall be calculated by reference to the net premium income of the company for the year ending last before the beginning of that financial year in respect of general and long-term U.K. policies held at the relevant time.¹⁹⁰ Such levies for any one financial year shall not exceed one per cent of any income of the company for the year ending last before the beginning of that financial year which is income liable either to the general business or long-term business.¹⁹¹ The levy imposed on long-term business in 1976 to which we have made reference was at the rate of 0.25 per cent.¹⁹² *The amount raised was £1.5 million.* The Board may not impose any levy for the purpose of financing expenditure of any description unless the expenditure has already been incurred by the Board or it appears to the Board that the expenditure will be incurred within twelve months of the imposition of the levy.¹⁹³

The sharing of the burden of the levy may give rise to inequity between Life offices. For example, in the early years of the operation of the Act, Life Offices specialising in single - premium contracts will bear a greater proportion of the levy than they will after many years of operation, when the premium income from periodical premium policies effected after 31 December

189 See also Schedule 11 of the 1975 Act for detailed provisions on intermediaries.

190 Section 21(3) and (4) of the 1975 Act. For details on the calculation of the companies income see section 21(5) - (9) of the 1975 Act.

191 Schedule 111 para.4 of the 1975 Act.

192 Policyholders Protection Board, Report and Accounts for the year ended 31 March, 1977 p.5

193 Schedule 111 of the 1975 Act.

1974 will have built up and account for a greater proportion of leviable premium income. In this respect two suggestions were made.¹⁹⁴ The Life Offices Association suggested that it would be more equitable if the calculation of the levy were to be based on the average of the net premium income for each of the three financial years preceding the financial year in question rather than on the net premium income for only one year. The Linked Life Assurance Group further suggested that, in the case of single premium policies, only a fraction of the premium income for example, one-fifth, should be regarded as income for any one year in arriving at the basis for assessing the levy.¹⁹⁵ These proposals were acceptable in principle and may be taken into consideration when amendments are to be made to the policyholders Protection Act.¹⁹⁶

To assist the Board in the performance of its duties every authorised insurance company is required to send to the Secretary of State before March 1, every year, a statement of any income of the company for the previous year which is income liable to the long-term business or general business levy.¹⁹⁷

The Board also has powers to borrow money up to £10 million and is empowered to invest any funds which are not required from time to time.¹⁹⁸

The United Kingdom Policyholders Protection Act 1975 is an outstanding example of the state's desire to carry out to its logical conclusion the main function of insurance regulation, namely, the protection of policyholders and third party beneficiaries. The Act will continue to form the basis of the

194 Report on the Policyholders Protection Act 1975, op. cit., para.20 at p.9.

195 Ibid at p.9.

196 Ibid at p.9.

197 Schedule 111 para.4(1) and (2) of the 1975 Act.

198 Section 1(3) of the 1975 Act.

security which policyholders desire. Regrettably, there is no piece of legislation in Cameroon similar to the United Kingdom Policyholders Protection Act. Although there are no recorded cases of insurance company collapses in Cameroon, there is a real need for some provision to be made for protecting policyholders and other beneficiaries of insurance policies from any such collapse.

So far only six cases have been referred to the Board and policyholders have received protection which otherwise would not have been available if such a body was not set up. It has been an effective arrangement for the protection of policyholders in the event of insurance companies going into liquidation. In 1981 the Secretary of State presented a report *in pursuance* of section 30 of the Policyholders Protection Act 1975 on the operation of the Act and its effectiveness as a method of protecting policyholders of authorised insurance companies carrying on business in the U.K. The consensus expressed in the review¹⁹⁹ was that on the basis of the three cases reported to the Policyholders Protection Board, the Act has been shown to be capable of achieving its objectives. It is satisfactory from the standpoint of the policyholders, of the insurance companies and the general public interest, that the Act has so far been little used. It is desirable that the need to invoke the Act's safeguards should not arise. The effectiveness of the protection offered by the Policyholders Protection Act 1975 may be associated with the effectiveness of the Department of Trade and Industry's supervision of the activities of insurance companies. The report concluded²⁰⁰ that the 1975 Act should be retained, substantially in its

199 Report on the Policyholders Protection Act 1975, 1981 (1980-1981, H.C. 363) London H.M.S.O. at p.5; See also, 985 Hansard (5th series) H.C. Cols.206-207 (21 May 1980); 7 Hansard (6th series) H.C. Col.136 (25 June 1981).

200 Ibid., p.10

present form, there being no present case for changes in the scope of the Act, the levels of protection or the composition of the Board and that the level of protection should remain at 90 per cent. The Department of Trade and Industry considered²⁰¹ that the limit should not be altered for the policyholder, should continue to have incentive to prudence when deciding with which institution he should take out insurance. Certain proposals mentioned above²⁰² would however be given further consideration when a suitable opportunity occurs for insurance legislation.

Representatives of the insurance industry indicated²⁰³ their opposition in principle to a statutory scheme for safeguarding policyholders interests on the grounds that this would encourage irresponsibility among some insurance companies. While this may be true, it is already in the power of the Department of Trade and Industry, possibly nudged by the market, to preclude "unfit persons" from transacting insurance business. A more general argument against the scheme is that, it is unfair on the policyholders of prudent companies, who have to contribute to the protection of the less prudent.²⁰⁴ This argument rests on assumptions that are difficult to sustain. It is assumed that an ordinary person can distinguish between a prudent and an imprudent company. It should be noted that few people have the information to make this judgment. The fact is that not all, nor probably most policyholders of imprudent companies are themselves imprudent. Moreover, an impeccably prudent company may in the course of time, before a

201 Ibid., p.10.

202 Supra., p.135.

203 Report on the Policyholders Protection Act 1975, op. cit., at p.7; See further, 360 Hansard (5th series) H.C. cols.202-289 (6 May 1975); cols.1191-1275 (20th May 1975) and cols. 1413-1507 (22 May 1975); 891 Hansard (5th series) H.C. cols.993-996 (5 May 1975).

204 Ibid.

policy matures, have changes in management, and competence of management can vary over a period of years. There is unfortunately no guarantee that a company, however prudent, may not find itself in difficulties in the future. The principle behind the Act is that all policyholders of all companies are deserving of protection; and equally that, all companies should contribute to that protection. The scheme is meant to support supervisory legislation and it is therefore desirable that the existence of such funds should not result in any relaxation of the regulatory controls available, or the vigilance with which these controls are exercised, for otherwise the fear that the more stable insurers might find themselves subsidising their less stable competitors would be well founded.

VI SANCTIONS AND ENFORCEMENT OF INSURANCE REGULATIONS

We have already explained^{204A} that there are both pre- and post-registration regulations which must be complied with by every company desiring not only to start an insurance business but also to stay in business. However, comprehensive any set of regulations to control the operation of insurance business may be, the real test lies in how far they are really made to work, and this, in itself will largely be determined by the way the regulations are enforced.

Consequences of lack of authorisation

The authorisation of a company to commence insurance business is a necessary pre-requisite to the granting of a licence as an insurer. In both England and Cameroon failure to obtain such a licence before commencement of insurance business is an offence contrary to the insurance regulations. It is clear that the criminal offence could only be committed by the insurance company and not by the insured, unless he knowingly aids and abets the

204A See supra, pp.58-124.

commission. In this respect, section 14(3) of the Insurance Companies Act 1982 in England, provides that any person found guilty of such an offence will be liable to a fine not exceeding £1000 or imprisoned for a term not exceeding two years.²⁰⁵ Similarly, in Cameroon, article 86 of the 1985 Ordinance provides penalties for breach of article 31 thereof, of a fine ranging from 1,000,000 CFA francs to 5,000,000 CFA francs and imprisonment ranging from twelve months to two years or alternatively, either of the two penalties only.

In England, the Insurance Companies Act 1982, did not render the performance of the insurance contract per se objectionable or illegal; it merely prohibited the insurer from transacting a class or classes of insurance business for which it had not obtained the requisite authorisation. The offending section of the 1982 Act is the act of "effecting or carrying out of insurance contracts" by an insurance company by way of business.²⁰⁶ Evidently, this can only be done by an insurance company. The enforcement of this regulation was brought to the test in Bedford Insurance Co. Ltd. v. Instituto de Resseguros do Brazil and others.²⁰⁷ In this case, the court decided that a policy of an insurance company unauthorised for the class of business concerned was so tainted with illegality that even an innocent assured could not enforce it against the insurance company. It was further held that the original contracts were not only illegal and void ab initio but also that the plaintiffs would be unable to recover under the reinsurance contract as the Insurance Companies Act of 1974 and 1981 prohibited both contract and performance. However, in Stewart v. Oriental Fire and Marine

205 In England, see section 14(1) of the Insurance Companies Act 1982.

206 For an elaboration of this phrase, see the Department of Trade and Industry Press Notice, supra, p.133, note 187.

207 [1984] 3 W.L.R. 726. Note that it was a reinsurance transaction.

Insurance Co. Ltd.²⁰⁸ on very similar facts, a contrary decision was held as regards the consequences of contracts performed by an illegally established insurance company. Here, the plaintiff was a representative member of Lloyd's Syndicate. The syndicate wished to reinsure against a risk written by the syndicate as primary insurers. The reinsurers were defendants whose registered office was in South Korea and another foreign corporation. Neither the defendants nor their agents had any authority from the Department of Trade and Industry to conduct in Great Britain any relevant class of insurance business and the plaintiffs, the syndicate and their representatives were at all material times, unaware whether any authority had been obtained. The plaintiff wished to recover under the reinsurance contract. The plaintiff submitted that the conduct which the Act prohibited was the carrying on without authorisation of certain classes of business identified in the Act. The court in holding in favour of the plaintiff said the 1974 Act did not invalidate expressly each transaction made in the course of carrying on insurance business without authorisation.²⁰⁹ Furthermore, the Act did not regulate rights and liabilities of insurer and insured inter se: it was principally designed to ensure the financial soundness of insurers. Therefore, the contracts made in the course of carrying on insurance business of an unauthorised class were enforceable at the suit of the insured.

Evidently, the purpose of the Insurance Companies Act 1974 and 1981 was to provide for regulation by the Department of Trade and Industry of insurers carrying on business in Great Britain in order to ensure that they were able to honour their commitments to their insureds. They were and are no direct

208 [1984] 3 W.L.R. 741.

209 Ibid., at pp.755-757.

references to contracts of insurance in the 1974, 1981 and now 1982 Insurance Companies Acts. The essential difference between carrying on insurance business and effecting or carrying out contracts of insurance appear to be that whereas the business may be carried on only by insurers, the contracts may be made between insurer and insured. What is aimed at and therefore prohibited by the regulations is the conduct of insurance business without authorisation. It does not seem to be the intention of the statute to leave a person uninsured who has entered into an apparently valid contract of insurance of a relevant class with an insurer who turned out, unbeknown to the person seeking insurance, to have effected it without authorisation. As a matter of commercial practicality and public policy contracts of insurance ought not to be rendered unenforceable by an innocent insured who has paid all the premiums. The immediate effect of rendering contracts of insurance illegal would be the wholly undesirable one of allowing insurers to keep premiums paid while releasing them from their obligation to pay claims. The decision in the latter case therefore, seems to be a better and sensible result, and presumably will be preferred and followed in later decisions.^{209A} However, this case left open a number of questions. Firstly, the right of an unauthorised company to enforce against a reinsurer reinsurance of its unauthorised contracts and secondly, the right of an insured who is not 'innocent' but knows that the insurance company is unauthorised. The first question seems to have been decided by the case of Phoenix General Insurance Co. of Greece S.A. v. Halvanon Insurance Ltd.²¹⁰ Here, Phoenix General, inadvertently, effected and carried out insurance business for which it had not obtained authorisation and further reinsured those risks with a Greek

209A This view is also held by J. Birds "Illegality and Insurance", [1984] J.B.L.298 at 300.

210 [1985] 2 Lloyd's Rep.599

company based in London. With respect to the original insurance contract, the court held that Phoenix was liable to the original assureds as the contracts were not void but became merely unenforceable - the innocent assured could enforce the contract as the ultimate intention of the statute was clearly to protect potential assureds.²¹¹ On the other hand, Phoenix was precluded from recovering against the reinsurers in respect of business written in contravention of the 1974 Act as amended by regulation 6 of the Insurance Companies (Classes of General Business) Regulations 1977,²¹² since it sought to rely on its own illegal conduct. This decision seems to be favourable to insured persons as opposed to insurance companies. The reason for this may be that the Insurance Companies Act 1974 and 1982 subjected insurance companies to supervision and regulation if they carried out unauthorised business.

Rather timely, perhaps, the Financial Services Bill [51] of 18 December 1985 implementing the proposals of the government White Paper²¹³ makes reference to insurance contracts effected in breach of section 2 of the Insurance Companies Act 1982. Clause 113(3) may allow a contract of insurance to be enforced or money or property transferred under it to be retained by an unauthorised insurer under certain circumstances. In the light of this the decisions in Bedford and Phoenix cases would no longer be good law. In addition, Clause 113(1) of the Financial Services Bill 1985

211 This reasoning is similar to that adopted in Stewart's Case, op. cit.

212 S.I. 1977 No.1552, Sched. 3.

213 Financial Services in the United Kingdom: A New Framework for Investor Protection, Cmnd 9432, January 1985, London H.M.S.O. para. 15.18. See also L.C.B. Gower, Review of Investor Protection, Report, Part I, Cmnd. 9125, January 1984, London, H.M.S.O., para.91. And in respect of the Bedford and Stewart cases see, Report: Part II, London, H.M.S.O., para.5.07.

provides that a contract of insurance entered into by an unauthorised insurer is unenforceable against the insured. However, the insured will be entitled to recover any money or other property paid or transferred by him under the contract, together with interest on any such money. It appears that clause 113 of the 1985 Bill will render the secondary obligation to pay or recover damages in the absence of performance valid but not the primary obligation of performance. Furthermore it expressly provides in Clause 113(6) that any breach of section 2 of the 1982 Act will not make a contract of insurance illegal or invalid and a breach of that section in respect of a contract of insurance will not affect the validity of any reinsurance contract entered into in respect of that contract. This clearly touches on the point made in the Phoenix case.

In contrast, in Cameroon, the position concerning contracts of insurance made by unauthorised insurers is clearly stated by the 1985 Ordinance itself. Article 5(3) provides that "Contracts concluded in breach of the provisions of this Ordinance shall be null and void: Provided that such nullity shall not be applicable to bona fide insured persons, underwriters^{213A} and beneficiaries". In contrast to the Insurance Companies Act 1982 of England, the Cameroonian Ordinance of 1985 makes a direct reference to contracts concluded by unauthorised insurance companies. Clearly, an innocent insured can recover any claim brought under such contracts. The question may, however, arise as to where the resources would be provided for the satisfaction of such claims, bearing in mind that a fraudulent company may be without sufficient funds to meet its commitments. In this respect, article 29(1) of the 1985 Ordinance provides that "where a company is declared null, the founders to whom the nullity is ascribable and

213A Added emphasis.

the directors in office at the time the nullity was incurred shall be jointly and severally liable towards third parties for any damage resulting from this annulment."

It is interesting to note that, the Cameroonian legislation makes reference to bona fide underwriters.

The existence of sanctions is meaningless without mechanism for their effective vindication. The enforcement or procedural protection is merely another side of the context of the regulation. It has become common-place to observe that affirmative action by the state is necessary to ensure that the regulations are enforced. Accordingly those involved in the enforcement machinery and therefore empowered to make periodical checks on insurance companies ought to be more vigilant and active in the discharge of their duties. Furthermore, the Insurance Division of the Ministry of Finance must ensure that only qualified persons with a proven record of honesty and integrity are allowed to operate as insurance supervisors. One would question of what use are government regulations if they are not enforced against insurance companies. Surprise checks and raids are much more effective than complete reliance on mere regulations. This is likely to prove a useful and effective deterrent to stealthily operated and unlicensed business. However, it should be noteworthy that this involves an extensive task on the supervisory authorities especially in a country like England where the population is dense and there are back streets where possibly unscrupulous business could be undertaken without the supervisory authority knowing of its existence. Despite the supervision and control carried out in England, Cavalier Insurance Company carried out extended warranty insurance

for sometime before they were detected.²¹⁴

The control and supervision of insurance companies is a continuing exercise; hence apart from the immediate pre-incorporation requirements to be observed by a company which proposes to do insurance business there are documents which must be filed annually with the supervisory authorities. The failure of an insurance company to comply with post-registration requirements could lead to the cancellation and withdrawal of its licence. Furthermore, in both England and Cameroon the legislation provide for heavy fines and penalties in the case where insurance companies supply misleading information to the authorities.²¹⁵

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214 Supra, pp.132-133. For another recent example, see Department of Trade and Industry Press Notice, "DTI Petition to Wind up Bloomside Ltd.", Ref:128, 1 March 1985.

215 In England, see further sections 14(42); 71(2), 81,91 and 92 of the Insurance Companies Act 1982. In Cameroon, see article 86 of the 1985 Ordinance.

C H A P T E R 3

THE REASON FOR AND SCOPE OF COMPULSORY INSURANCE¹

I INTRODUCTION

This study, as we have already indicated,² is concerned principally with the law of insurance with respect to motor vehicles. The purpose of this chapter therefore, is to examine the *scope of compulsory insurance which underlies the basis of motor insurance in England, France and Cameroon.* However, a better understanding of the law requires an examination of the raison d'être of compulsory insurance. Compulsory insurance is a benign attempt to provide an insured person and his victims with a semblance of 'blanket' cover³ in circumstances where he is legally liable to pay for

1 Note that this Chapter is not limited to motor vehicle insurance only. A brief discussion of other types of compulsory insurance will be attempted. They are not particularly relevant to this work but show the need felt by governments to regulate aspects of insurance in respect of personal injuries to persons generally to ensure compensation of victims.

2 See the abstract of this study, supra, p. v.

3 This phraseology is employed here to emphasise the point that although compulsory insurance seeks to provide adequate compensation to an insured person and his victims, it is still subject to liability being found and certain vitiating factors in the contract of insurance. As to the statutory restrictions on contractual rights in respect of this cover, which relate to these latter factors, see infra, pp. 211-213. For further discussion of misrepresentation and basis of the contract clause, see Chapter Five pp.323-356 and with respect to conditions in policies of insurance, see Chapter Seven, pp.434-439. However, in this Chapter, our discussion would be concerned with the law of civil liability and the provisions of compulsory insurance laws.

injury caused to such victims. This guarantee, that is, liability insurance monies, is linked to the institution of adversarial legal proceedings - the law on civil liability. We will briefly, therefore, deal with an acute problem of our present day life, namely, the problem created in the law of liability with respect to the use of motor vehicles; the result of which may be settlement in court or settlement out of court.⁴

It cannot be seriously doubted that, the enormous increase in litigation in this branch of our study is the result of the upsurge of accidents on our roads.⁵ Each year about 7,600 people are killed and some 400,000 are injured in road accidents in the United Kingdom. Almost all the deaths and 85 per cent of the injuries occur in accidents involving a motor vehicle.⁶ The statistics overleaf provide an indication of the situation.

4 For a discussion of the latter, see Chapter Eight of this work, pp.444-476.

5 This is more grimly described by one writer in an article, albeit somewhat outdated now: see, Kenneth Cannar, "The statistics of sorrow : road accident casualties, 1976", Post Magazine and Insurance Monitor, 9 June, 1977 Vol.CXXXVIII, No.23 at 1442.

6 Report of the Royal Commission on Civil Liability and Compensation for Personal Injury, (Chairman: Lord Pearson) Vol.1, Cmnd.7054-1, 1978, para. 958 at p.205. Hereinafter cited as 'Pearson'.

TABLE 3 : Road Accidents in Britain (excluding Northern Ireland) 1977 - 1981

	Vehicles on the Road (1975 = 100)	No. of Casualties	Killed	Seriously injured	Slightly injured
1977	108	348,061	6,614	81,681	259,766
1978	112	349,795	6,831	82,518	260,446
1979	112	333,799	6,350	80,274	247,175
1980	116	328,600	6,010	79,400	243,190
1981	116	324,840	5,846	78,259	240,735

Source: British Insurance Association :
Facts and Figures 1981 London.

In Cameroon 10 per cent of untimely deaths are caused by accidents on the road.⁷ The absence of global statistics covering the entire country renders a complete view of the accident situation hard to determine. The table overleaf reveals the accident statistics for the commercial town of Douala.⁸

7 Shey Mabu, "Death On Our Roads: Any Way Out ?". Cameroon Tribune, No.472 July 6, 1983, p.1.

8 Statistics compiled from the accident register of the Central Police Station at Douala during the course of field work carried out in July 1983.

TABLE 4 : Road Accidents in Cameroon (Douala only) 1978 - 1982.

Year	Number of Accidents	Number of Mortal Accidents	Number involving Bodily Injuries	Number involving Property Damage
1978	3,824	624	1,568	2,329
1979	3,768	635	1,597	2,393
1980	3,646	502	1,463	2,397
1981	3,707	715	1,701	2,436
1982	3,981	807	2,435	2,450

Source: Commissariat Central Douala 1983.

The causes of this increase in the number of accidents are many. The number of accidents and injuries caused by motor vehicles in England, Cameroon as well as in Europe and the United States has increased in proportion to the increase in the number of automobiles.⁹ The plurality of causes of traffic accidents, namely the condition of the road, the number of cars on the road, the mechanisms and structures of the vehicles involved, the speed and efficiency of the drivers and the availability of traffic signs all contribute to produce and increase road accidents.¹⁰

9 In Cameroon the Department of Transport Report of 1978/79 activities disclosed that there were over 22,000 registered vehicles: See, Minutes of the Meeting held at the Ministry of Transport on 16 July, 1979 under the Chairmanship of Mr Ndum Amadou, Director of the Ministry of Transport.

10 For causes of road accidents in Cameroon see: Radio Broadcast, two week information campaign on the prevention of road accidents, 2 - 16 July 1983.

Furthermore, the increase in the volume of road traffic and industrialisation resulted in a phenomenal rise in the rate of personal injuries and fatal accidents with disruptive effects on the victims and their dependents. While efforts and adequate action ought to be made to reduce the number of casualties on the highway, it is equally important to focus attention on the unavoidable problem of compensating victims of such accidents. What follows then, is a study of the methods by which the laws of England, France and Cameroon have endeavoured to solve the problems of determining liability for injury and damage caused by the use of motor vehicles and consideration of the process through which these methods were devised, pointing out the changes which have resulted.

II THE CONCEPTUAL BASIS OF LIABILITY

English and Cameroonian law subscribe to the principle of fault in determining the civil liability of the person responsible for road traffic accidents: a person injured by a motor vehicle will recover tort compensation only if the defendant was at fault.

In England and the English-speaking part of Cameroon, the tort of negligence is largely concerned with three essential elements: first, a duty to take care; second, a breach of that duty; and third, damage to the plaintiff caused by that breach of duty.¹¹

11 For a classic statement of the principles behind the tort of negligence, see the speech of Lord Atkin in Donoghue v. Stevenson [1932] A.C. 562 at p.580.

For an elaborate discussion of these principles, see the text books on the law of Tort: Winfield and Jolowicz, On Tort, 12th ed., by W.V.H. Rogers, 1984 London pp.69-116; Salmond and Heuston, The Law of Torts, 18th ed., by R.F.V. Heuston and R.S. Chambers, 1981, London, pp.181-226; Street, The Law of Torts, 7th ed., 1983, London, pp.93-173; John G. Fleming, The Law of Torts, 6th ed., 1983, London, pp.97-299; Hepple and Matthews, Tort : Cases and Materials, 2nd ed., 1980, London, pp.64-372; and Tony Weir, A Casebook on Tort, 5th ed., 1983, London, pp.15-218.

In the French-speaking part of Cameroon the law of tort is governed by five articles of the Civil Code: articles 1382 to 1386.¹² The chief domain of subject liability in which the idea of fault retains its traditional character and role is that of liability for direct personal acts, (responsabilité du fait personnel). This is based on articles 1382 and 1383 of the Civil Code. Article 1382 provides that: "Any act whatever of man which causes damage to another obliges him by whose fault it occurred to make reparation"¹³ And article 1383 lays down that: "Each one is liable for the damage which he causes not by his own act but also by his negligence or imprudence"¹⁴ These articles are applicable where the damage has been

12 For the provisions of the articles of the Civil Code in Cameroon, see G.J. Bouvenet and R. Bourdin, Codes et Lois du Cameroun, Vol. II 1956, pp.102-103. These texts are notable for their brevity being drawn up in 1804, an age when the problems of civil liability were very much fewer and very much less important than at the present time. On the French law of torts, see:

(a) in French: Geneviève Viney, Traité de Droit Civil: Les Obligations, La Responsabilité: conditions, 1982, Paris, L.G.O.J. pp.304 et seq.; Alex Weill et Françoise Terré, Droit Civil: Les Obligations 3è éd., Dalloz, Paris, 1980. H.L. Mazeaud, J. Mazeaud, et François Chabas, Traité Théorique et Pratique de la Responsabilité Civile : Délictuelle et Contractuelle, III, 6è éd. 1983, Paris; A Tunc, La Responsabilité Civile, 1981, Paris; Phillippe Le Tourneau, La Responsabilité Civile, 3è éd. 1982; H.L. Mazeaud et J. Mazeaud, Leçons de Droit Civil; Obligations: Théorie Générale, 6è éd., par F. Chabas, 1978, Paris, pp.340 et seq.; Michel de Juglart, Cours de Droit Civil, 9è éd., 1978, Paris, pp.211-299; J. Charbonnier, Droit Civil : Les Obligations, 11è éd., Paris, pp.351-481; M. Planiol et G. Ripert, Traité Pratique de Droit Civil Français: Obligations, Vol. VI, 2è éd. 1952, Paris, pp.639-776.

(b) in English: Amos and Walton, Introduction to French Law, 3rd ed., by F.H. Lawson, A.E. Anton and L.N. Brown 1967, Oxford Clarendon Press, pp.200-238; Von Mehren, The Civil Law System - Cases and Materials for the Comparative Study of Law, F.H. Lawson, Negligence in the Civil Law, 1950, Oxford Clarendon Press; M.D. Chorlton, "The Basis of the French Law of Torts", (1977) N.L.J. 465; P. Esmein, "Liability in French Law for Damages Caused by Motor Vehicle Accidents", (1953) 2 Am. J. Comp. L. 156; P. Catala and J.A. Weir, "Delict and Torts: A Study in Parallel", (1963) 37 Tul. L. R. 572-620.

13 Translation by John H. Crabb, The French Civil Code (as amended to July 1, 1976), New Jersey, at p.253.

14 J.H. Crabb, op. cit. at p.253.

directly caused by the defendant without the intervention of a 'thing' or the agency of another person.

The action in negligence under English and the English-speaking Cameroonian law is akin to an action under articles 1382 and 1383 of the Civil Code. The element of fault is denoted by the requirement of a breach of the duty of care, while in French-speaking Cameroon it is expressly mentioned in articles 1382 and 1383, in a rather general way.

Side by side with this traditional liability, there have been developed in France forms of liability where the part played by fault has been considerably diminished. Such are liability for the act of another person, (responsabilité du fait d'autrui) and the liability for damage caused by things (responsabilité du fait des choses). These are based on articles 1384, 1385 and 1386 of the Civil Code.¹⁵ Article 1384 provides that:

"He is liable not only for the damage which he caused by his own act, but also for that which is caused by the act of persons for whom he is responsible, or by things which has in his keeping."¹⁶

A plain reading of this article indicates that fault is not a necessary requirement for liability to be found. The article thus comes into operation when one person is held liable for damage caused by another person for whom

15 Articles 1385 and 1386 are outside the scope of this study and therefore call for no comment or discussion. See P. Esmein, op. cit., pp.256-266; Mvogo Dieudonné-Célestin, Application des Articles 1382 et 1384 du Code Civil en Matière d'Accidents de Circulation, (Étude de Jurisprudence de la Cour Suprême et de la Cour d'Appel de Yaoundé, 1961 - 1973), Memoire de Licence, Yaounde, May 1973.

16 J.H. Crabb, op. cit., at p.253; The pronoun 'he' in the text should be properly read as 'a person' or 'any person' and 'in his keeping' denotes in a person's care and control.

the first is vicariously responsible or for damage caused by a 'thing' in the defendant's control.¹⁷

The decisive element of liability under articles 1382 and 1383 of the Civil Code is undoubtedly, the traditional principle of "no liability without fault". However, it should be observed that no express condition of fault is required by article 1384. This article seems to carry implications of liability arising without fault, a concept reinforced by articles 1385 and 1386. For our purposes therefore, a discussion of the disparity produced by these three articles, and a consideration of the process through which changes have been effected by the courts¹⁸ to affect the law regarding liability, will be the main theme.

Originally, the word "things" was understood to denote only animals and buildings.¹⁹ Gradually however, through a complex and tortuous process of judicial interpretation, the provision was declared applicable to motor

17 See Francis Deák, "Automobile Accidents: A Comparative Study of the Law of Liability in Europe", (1931) 79. Univ. Pa. L.R. 271 at p.274 for a suggestion that article 1384 should be read in the light of the two preceding articles (1382 and 1383) which were drafted and enacted at the same time and by implication include the element of fault. Since a thing cannot act either negligently or otherwise, should not liability attached to "acts of things" be held dependent on the fault, negligence or imprudence of the person in control. Also arguable is the fact that, since the text omitted the word fault, should it not be considered intentional by the legislature in imposing a liability regardless of fault with respect to either or both of these situations dealt with in article 1384, namely, liability for damages caused by the acts of 'persons' for whom one is responsible and damages caused by 'things' which are under one's control ?

18 One remark ought to be made at this point. The interpretation and elaboration of article 1384 of the Civil Code were made by the French courts. These cases are applicable in French-speaking Cameroon, see, the introduction to this work, pp.13-15. For this reason the discussions that follow on the interpretation by the French courts seems appropriate. For discussion of subsequent changes in the law in France, see infra, pp.185-194.

19 See, P. Esmein, op. cit., 156 at p.157

vehicles.²⁰ In the test case of Jand'heur c. Les Galeries belfortaises,²¹ the Cour de cassation sitting tout-chambres réunies finally pronounced the applicability of article 1384 to all automobile accidents. Article 1384 has been construed to impose upon the "custodian", usually the owner of a "thing", a presumption of liability for the damage caused by the "thing".²² The Cour de cassation declared that the presumption of liability established by article 1384 as to one who has under his control an inanimate object that caused harm to another can be rebutted only by proving a cas fortuit, force majeure or cause étrangère that cannot be imputed to him.²³

Two observations seem to be appropriate with respect to the Jand'heur decision. First, the owner or "custodian"²⁴ (gardien) of a thing is subjected to what has been regarded successively as a "presumption of

20 Ibid. at pp.157-159; See also, J. Bedour, "Le Risque Juridique de L'Assurance Automobile: Réflexions sur son Passé et son Avenir", in Études Offertes à Monsieur le Professeur A. Besson, 1976, Paris, p.27 et seq.; F. Deák, op. cit., at pp.275-294; Starting from a very narrow legal base French judges (like the English judges developing common law) have built up a theory which the legislator had not foreseen. They have done this while both respecting the fundamental principle of the written law and displaying much ingenuity in adapting the law to new situations: a typical example of how the courts, even under a code system respond to social change in the absence of, or delay in, legislative intervention.

21 Cour de cassation, Ch. réun., 13 February 1930. D. 1930. 1. 57 (note Ripert), S. 1930. 1. 121 (note Esmein). This decision rendered by the highest judicial court in France, in solemn session of all the chambers sitting en banc became for all practical purposes, law which in all likelihood will be followed by the lower courts.

22 Ibid. at p.57.

23 See in French-speaking Cameroon, the decision of the Supreme Court: Henreiki Michel c. La Société Internationale de Transports (S.I.T.) Arrêt No.6 of 6 November 1966, Bulletin des Arrêts de la Cour Suprême No.15, 1966, 1536 Yaounde.

24 The "custodian" may be the "thing's" owner or another person who has been entrusted with it and granted broad freedom in its use.

liability" (présomption de responsabilité), a presumption of fault (présomption de faute) and a "prima facie liability". The expression presently used by the Cour de Cassation is "responsabilité de plein droit."²⁵ This suggests an evolution towards a stricter liability.²⁶ Second, the "custodian" is discharged from liability if he can prove that the accident was caused not by the "thing", for example, a motor vehicle, but by a "foreign cause", which could neither be foreseen nor avoided.²⁷ This is usually an act of nature or of a third person or - as in most cases in which a defence (contributory negligence) is available - an act of the victim himself.²⁸ The custodian may be only partially relieved of liability if the "foreign cause" was not the

25 For example see: Jouffre c. Dame Bouescq et autres, Cour de cassation (2^e Ch. civ.), 16 June, 1965 D.S. 1965. 1. 662.

26 See: André Tunc, "Analysis of the French Auto Accident Compensation System", in Department of Transportation: Automobile Insurance and Compensation Study, Comparative Studies in Automobile Accident Compensation, April 1970 at p.3; A Tunc, "Traffic Accident Compensation in France: The present law and a Controversial Proposal", (1966) 79 Harv. L. Rev. 1409 esp. at pp.1412-1413.

27 H. Mazeaud, L. Mazeaud et A. Tunc, op. cit., pp.635-650

28 For further details of this trilogy of causes or concepts, see F.H.L. Lawson and B.S. Markesinis, Tortious Liability for unintentional harm in the Common law and the Civil law, 1982, Vol.I, Cambridge University Press, pp.126-134.

sole cause of the damage.²⁹ In the case of Fetgo Hilaire c. Caillerez François³⁰ in the French-speaking Cameroon, the fault of the victim (contributory negligence) was not an unavoidable and unforeseeable act constituting force majeure to exonerate all responsibility of the other party to the accident and an apportionment of responsibility was made. But in Ngouang Benoît c. M.P. et Sinon Celli.,³¹ the court held that the owner of the vehicle was exonerated from responsibility under article 1384 since there was proof of a cas fortuit or force majeure which made the accident unforeseeable and unavoidable. Moreover the accident was caused exclusively by the victim's gross negligence in suddenly and unexpectedly emerging into the highway in front of the oncoming vehicle. The court found that the driver did all that was humanly possible to avoid the accident.

29 Professor Tunc's view is that, after the decision in Jand'heur, the French courts began to accept that the fault of the victim - contributory negligence in English law - which did not amount to force majeure operated to reduce the damage to which the plaintiff (victim) is entitled under article 1384(1) and hence the respective and comparative fault of the parties was recognised; See: Mazeaud et Tunc, op. cit., esp. at pp.642-644. This apportionment of the damage has been applied to acts of nature, see in France, (1) Transports maritimes de l'État c. Veuve Brossette et Bastard ès qual. (The Lamoricière decision), Cour de cassation, Ch. civ., sect. com., 19 June 1951, (2 arrêts), D. 1951. 1. 717. (note Ripert) and also to acts of third persons, see Larribe c. Époux Saulle et demoiselle Boutin, Cour de cassation Ch. civ., 2è sect. civ., 15 January 1960. D. 1961. 1. 681 (note Radouant); Berthier et Caisse rég. de l'Est central c. Veuve Lamende, Cour de cassation, Ch. civ., 2è sect. civ., 17 December 1963. D. 1964. 1. 569 (note Tunc).

30 Arrêt No.9 of 12 October 1965, Bulletin des arrêts de la Cour Suprême No.13, 1965 Yaounde 1154.

31 Arrêt No.416 of 13 March 1962, Bulletin des arrêts de la Cour Suprême No.6, 1962 at p.270.

Since the decision of Jand'heur, article 1384(1) has been applied in traffic accident cases.³² The requirement of proof of fault has been displaced in many cases by the presumption of liability established by article 1384(1). This construction by the French courts of the Civil Code provisions relating to tort liability has been sufficiently favourable to victims of traffic accidents who have been compensated irrespective of the fact that there may not have been any negligence whatsoever. The increase in traffic accidents and advances in technology have influenced the law; and changes made, indicate that the law is very much a living law in this field. However, one must not lose sight of Friedmann's comment³³ that,

"the transformation of a law through judicial lawmaking so as to adapt it to social change, while immensely important, has inevitably proved inadequate. This is due to a variety of factors: the chanciness of cases coming up for decision; the ad hoc character of judicial decisions; the vast differences of judicial philosophy - varying from jurisdiction to jurisdiction, from court to court and between the different judges and altogether the increasing need for a specific regulation of the legal responsibilities, particularly of industrial enterprises and motorists towards employees and the public. This can be done effectively only by Statutory and Administrative regulation."

32 Articles 1382 and 1383 apply in traffic accident suits when the damage results in a penal action as well, for example, breach of articles 319 and 320 of the Penal Code (the same articles and provisions are found in the Cameroon Penal Code) which results in homicide and bodily injuries to the victim. (Interview with Professors A. Tunc and Besson, Paris, February 1984). In criminal proceedings the civil remedy of reparation provided by articles 1382 and 1383 is awarded, conforming to article 2 of the Criminal Procedure Code.

33 W. Friedmann, Law in a changing Society 2nd ed., New York, 1972 at p.168.

This comment expresses disenchantment for reform through the courts but advocates legislative intervention. It is also worth noting that the change brought about by the French court in interpreting article 1384 of the Civil Code was a result of a slow evolution which created disparity in judicial decisions in the same courts and in the various jurisdictions, in line with Freidmann's comment.³⁴

As far as English law is concerned, problems such as to whom the driver owes a duty of care are rarely relevant.³⁵ The important questions concern contributory negligence. The Law Reform (Contributory Negligence) Act 1945 introduced the principle of apportionment of damages between the plaintiff and defendant, where the plaintiff has failed to take reasonable precautions for his own safety in respect of the particular danger which in fact occurred, so that he thereby contributed to his own injury.³⁶ In the English-speaking Cameroon, the 1945 Act is not applicable³⁷ (since it is an

34 See F. Deák, op. cit., pp.271-295.

35 See later discussion on pp.162-166.

36 Froom v. Butcher [1976] Q.B. 286. See: Salmond and Heuston, The Law of Torts 18th ed., 1981, London, pp.479-487.

37 Justice Gwamesia in Valenti Domas and others v. Nji Stephen Mbandi, (1980) Civil suit No. CASWP/25/80 of 20 November 1980, Buea (Unreported) at p.7, said that "There is no doubt that the question of contributory negligence does not apply on this side of the Republic until the laws are harmonised."

enactment after the limiting date of 1900). The 'last opportunity rule'³⁸ has always been considered and caused the court not to apportion responsibility. In practice, however, insurance companies do seem to arrange to apportion the liability among themselves.

In England, France as well as in Cameroon, various norms are set up as an attempt to provide a convenient legal standard for measuring fault. In England and the English-speaking Cameroon, the standard of care required by this duty is that of a reasonable man.³⁹ In France and French-speaking Cameroon, the present tendency is to adopt a comparative standard. In order to discover whether or not there has been fault, the conduct of the author of the damage must be *measured against an ideal standard*, based upon the theoretical conduct of an ordinary person or a bonus pater familias,⁴⁰ from which he ought not to have deviated. This type of ideal individual is called the bon père de famille. L. and H. Mazeaud and Tunc say⁴¹ fault consists of "an error of conduct which would not have been committed by a prudent person placed in the same external circumstances as the person responsible for the

38 The doctrine invented by Salmond in 1912 has also been called, the "last clear opportunity" or the "last clear chance". He says "Ex hypothesi in all cases of contributory negligence the defendant has been guilty of negligence which caused the accident: therefore in all cases he could by the exercise of reasonable care have avoided the accident; and therefore ... he is liable notwithstanding the contributory negligence of the plaintiff. Clearly, therefore, something more than a mere opportunity of avoiding the accident by reasonable care is required in order to bring the rule in Davies v. Mann into operation ... Subject to certain qualifications it would seem that the true test is the existence of the last opportunity of avoiding the accident...." See Salmond and Heuston op. cit., at p.481.

39 See Anderson B. in Blyth v. Birmingham Water Works Co., (1856) 11 Ex. 781 at 784.

40 F. Deák, op. cit., at p.271.

41 Traité Théorique et Pratique de la Responsabilité Civile, 1970 at p.434.

damage." The test thus applied corresponds to the "reasonable man test" of English law. The judge in deciding if there has been fault asks himself what would have been the attitude or reaction of the bon père de famille. If he considers the bon père de famille would have acted in the same way, he will decide that the tortfeasor was not at fault and should not incur legal liability. Similarly, as in English law, the existence of a breach of duty is tested by an objective standard; a defendant is not relieved by proof that his behaviour did not deviate from his own norm. The context of the *standard* common law duty is invariable - the actor must behave as a reasonable man in the objective behavioural context.

In England and Cameroon the burden of proving fault rests with the plaintiff. In England and the English-speaking Cameroon there are in the practice of the courts certain principles which assist the plaintiff to discharge this burden. The plaintiff may plead res ipsa loquitur (the facts speak for themselves). It must be remembered that 'the res' can only speak so as to throw the inference of fault on the defendant in cases where the exact cause of the accident is unexplained.⁴² However, if the facts of an accident are sufficiently known to enable the issue of negligence to be determined, then it ceases to be a case of res ipsa loquitur⁴³ and the solution must be found whether, on the facts as established, negligence is to

42 Where this maxim applies the plaintiff is entitled to rely upon the mere happening of the accident as evidence of negligence.

43 For a case in the English-speaking Cameroon in which res ipsa loquitur was not applicable, see William and others v. Njie and La Foncière Assurance, (1975) Appeal No. CASWP/21/75, Buea (Unreported) 1975. See further discussion of this principle in T. Ellis Lewis, "A Ramble with Res Ipsa Loquitur", (1951) 11 C.L.J. 74; D.P. O'Connell, "Res Ipsa Loquitur: The Australian Experience", (1954) C.L.J. 118-132.

be inferred or not. The scope of application of the maxim in English law was laid down by Erle C.J. in Scott v. London and St. Katherine Docks Co.,⁴⁴

"There must be reasonable evidence of negligence.

But where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

This wording thus suggests an immediate analogy with the French-speaking Cameroonian law relating to damage done by a thing under the defendant's control - a person is presumed liable for damage caused by things *under his 'control'*.⁴⁵ Nevertheless there is no similarity between the common law doctrine of res ipsa loquitur and the French doctrine of presumption of fault or presumption of liability.⁴⁶ The presumption of fault raised by article 1384 against the owner of a thing causing damage does not mean a true presumption which can be rebutted by the defendant by proving that he was not

44 (1865) 3 H & C 596 at 601; See also Barkway v. South Wales Transport Co., [1948] 2 All E.R. 460 at 471 per Asquith L.J. The Barkway case was relied on and applied by the courts in the English-speaking Cameroon in Mbu v. Walla and Royal Exchange Assurance Co., (1973) Suit No. WC/35/72 of 10 July 1973, Buea (Unreported), even though it was decided after 1900, the reception date of the reception of English law, but as we have seen supra, pp.13 and 29-30, the courts in English-speaking Cameroon constantly cite and rely on English decisions well after 1900.

45 See in French-speaking Cameroon: Olobo Mathien c. M.P. and Ngogo Ebogo Daniel, Arrêt No.287 of July 1975, Bulletin des arrêts de la Cour Suprême No.33 1975 Yaounde.

46 See Crabb, "Res Ipsa Loquitur and Article 1384 of the French Civil Code", (1962)4 Inter. Am. L. Rev. 256; Also see F. Deák, op. cit., at p.278.

negligent (or at fault). In the language of the Cour de cassation in the Jand'heur⁴⁷ case the presumption of liability cannot be rebutted except by proving force majeure or an unforeseen event (cas fortuit) or a cause not imputable to the person presumed liable - for example contributory negligence or the fault of a third party. Consequently, presumption of fault or liability is a rule of substantive law imposing liability regardless of fault. This has a much more far reaching effect than res ipsa loquitur. In contrast, the presumption raised by the doctrine of res ipsa loquitur is a procedural device which operates to shift the burden of going forward with the evidence⁴⁸ - the defendant would not be liable if the evidence shows that he was not at fault.

The application of the doctrine to traffic accidents, however, is of considerable importance. Many accidents occur in a split second, leaving the facts in doubt. The maxim is commonly applied in three types of case : those in which damage is caused to a passenger, or to a pedestrian on a pavement, or to a stationary vehicle. One of the earliest cases in which a motorist was held to have sufficient control over his vehicle to attract the application of the maxim was Halliwell v. Venables.⁴⁹ The defendant was driving a sports car along a broad road on a dry night. There was no other

47 It is significant to note that the Cour de Cassation spoke of presumption of liability (présomption de responsabilité) instead of the traditional presumption of fault, (présomption de faute) based on the idea of risk created.

48 Bohlen, "The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof". (1919) 68 U. of Pa. L. Rev. 307; The presumption of fault (présomption de faute) often referred to by writers in relation to article 1384 is misleading. The true presumption which results in shifting the burden of proof (renversement de la charge de la preuve) akin to that known to the common law jurisdictions also exists in French jurisprudence.

49 (1930) 99 L.J.K.B. 353.

traffic about the road. After a slight bend the car turned over and bounced along the road. The defendant admitted that his speed was about thirty-five miles per hour and that he was driving with only one hand on the steering wheel, as was his usual practice. It was held that in the absence of a reasonable explanation by the defendant, the widow of a deceased passenger could rely on the facts as evidence of negligence. In Ellor v. Selfridge and Co. Ltd.,⁵⁰ the defendant's vehicle mounted a pavement and knocked down the plaintiff. The defendant offered no evidence and so the plaintiff was awarded damages. There is some controversy amongst jurists as to the strength of the presumption of negligence raised by the application of the maxim res ipsa loquitur. Some jurists suggest that the defendant must positively disprove negligence; others say he need only adduce evidence which produces a reasonable explanation of how the accident may have occurred without negligence.⁵¹ The cases do not appear to follow a clear principle and judicial pronouncements in support of either view may be found.⁵² The tendency exhibited in later traffic accident cases⁵³ is to favour the first view, that is, to require the defendant to satisfy the court that he did not act negligently. It is submitted that this is fair, for the defendant must

50 (1930) 46 T.L.R. 236; See also McGowan v. Stott (1930) 99 L.J.K.B. 357n.

51 T. Ellis-Lewis, "A Ramble with Res Ipsa Loquitur", (1951) 11 C.L.J. 74; D.P. O'Connell, "Res Ipsa Loquitur", (1954) C.L.J. 118; G.H.L. Fridman, "The Myth of Res Ipsa Loquitur", (1953-54) 10 Univ. of Toronto L.J. 233.

52 See, for example, Lord Loreburn L.C. in Angus v. London, Tilbury, and Southend Railway Co. (1906) 22 T.L.R. 222 at 223 in favour of the first view and Lord Dunedin in Ballard v. North British Railway Co., (1923) S.C. 43 at 54 in favour of the second view. Although the latter was dissenting, his view was approved by Willmer J. in The Aralia (1949) 82 Ll.L.R. 884 at 887.

53 Ludgate v. Lovett [1969] 2 All E.R. 1275 at 1277; Henderson v. Jenkins (Henry E.) & Sons Ltd. [1969] 3 All E.R. 756.

be assumed to have exclusive knowledge of the facts bearing on causation as the vehicle is in his control.

In France and French-speaking Cameroon the action under article 1384 has been developed to ensure that in most cases, the victims of the accidents have the right to compensation - all that is required is that damage has been caused by the action of a thing in the control of the defendant. A victim may avoid the difficulty of proving fault by relying on article 1384(1). The presumption of liability operates to the benefit of every person who suffers damage whether in his person or in his property. In the case of damage caused by automobiles, it operates to the benefit of pedestrians as well as of persons in another vehicle. In the case of collision between two vehicles, in the absence of fault shown on the part of the one or the other of the operators the court⁵⁴ maintains the presumption of liability as regards each of the custodians and holds him liable for the damage suffered by the other vehicle or its occupants. The court may consider the presumption inversely as annulling its liability or may cumulate the damages so as to apportion the responsibility between the two custodians.⁵⁵

The difference between the French-speaking Cameroonian law of civil liability and torts known to the common law as found in England and the English-speaking Cameroonian law is that the former system, unlike the latter, has a single definition of which the constant features are damage and causation. A third feature, fault, is more or less necessary according to

54 See, in the French-speaking Cameroon, Simé Félix, Cooplabam, Lartique Roger and A. Michel c. Lartique Roger, A. Michel, Simé Félix and Cooplabam, Arrêt No.123 of 18 May 1965, Bulletin des arrêts de la Cour Suprême, No.12, 1965, Yaounde 1001 at p.1002.

55 La Société S.A.C.A.F.O.M. and Tamo Martin c. Omgba Christophe, Arrêt No.56 of 13 December 1966, Bulletin des arrêts de la Cour Suprême, No.15, 1966, Yaounde p.1469.

the different cases and more or less easy to establish in the courts. One observation that can be drawn from our discussion so far is that the French-speaking Cameroonian practice stands between a system of liability based on the behaviour of the parties and a system of liability disregarding behaviour and would, thus, move from liability based on no liability without fault to no fault liability, if this process of interpretation continues. In contrast, under England and the English-speaking Cameroonian law, negligence must be proved in every case.

In Cameroon,⁵⁶ even where the basis of liability is still technically fault the requirement is easily satisfied, for example by proof of a breach of one of the regulations laid down in the Highway Code, (Code de la Route). The courts take the view that negligence is presumed (and even established) against anyone who violates a traffic statute. In Dame Watiné and Watiné Gonzague c. Kona Joseph,⁵⁷ a case in the French-speaking Cameroon, the Court decided that breach of article 40 of the Code de la route demonstrated negligence and imprudence under article 1382 and 1383 of the Civil Code. Also in Valentin Domas and others v. Nji Stephen Mbandi,⁵⁸ a decision in the

56 In Cameroon, note that the law applies to both French-speaking and English-speaking Cameroon.

57 Arrêt No.48 of 6 December, 1966, Bulletin des arrêts de la Cour Suprême, No.15, 1966, 1467, Yaounde. See also Balep Bissai Moïse c. Perrussel Pierre, (1966) Arrêt No.54 of 13 December 1966, Bulletin des arrêts de la Cour Suprême No.15, 1966, 1467, Yaounde.

58 Civil Suit No. CASWP/52/80 of 20 November 1980, Buea (Unreported) at p.7. For a corresponding decision in French-speaking Cameroon, on similar facts see S.Y. Heng and others c. M.P. Bonda Joseph, (1969) Arrêt No.130 of 4 March, 1969, Bulletin des arrêts de la Cour Suprême No.20, Yaounde, 1969, pp.2360-2362.

English-speaking Cameroon Justice Gwamesia said that;

"It is a principle of law as laid down by the Highway Code and Regulations that any driver emerging from a side road has the duty to stop before entering the major road. Since there was proof that the first defendant never stopped at the junction next to the Figara Night Club before swerving towards Bokwango, there is no doubt that there was a breach of that duty, and she has to bear its attendant consequences."

A different approach is adopted in England. The highway code is not binding as a statutory regulation; it is only a set of directions for the guidance of persons using roads made under statutory authority by the Ministry of Transport and as such a document which may be regarded as information and advice to drivers. Section 37 of the Road Traffic Act 1972 provides that a failure to observe any provision of the Highway Code may in any civil proceedings be relied upon by any party to the proceedings as tending to establish or negative any liability which is in question in those proceedings and in Croston v. Vaughan,⁵⁹ Greer L.J. said "... it does not follow that, if they fail to carry out any provision of the Highway Code, they are necessarily negligent." Apart from the Highway Code, there are innumerable statutory provisions concerning road traffic in England, for example, on the construction and use of vehicles and traffic infringements. When violations of statutes of this nature are held tortious in England, this is because English law recognises a tort quite independent of negligence - the action for breach of statutory duty.

The shortcomings of the tort system in providing compensation to victims of road accidents have been due to the role of fault in the

59 [1938] 1.K.B. 540 at 557.

determination of liability. The need of the injured person to assert both that another was at fault in causing the accident and that he himself was legally blameless confronts the victim of a traffic accident with severe problems of proof.^{59A} Delay is another factor that causes dissatisfaction with the legal system.^{59B} Often justice delayed is justice denied. Nevertheless delay can be justifiable,^{59C} but can often aggravate pressure on the plaintiff to settle prematurely. The problem of delay is also experienced in Cameroon. In the course of field work,⁶⁰ it was observed that the Kumba High Court is reputed for delay in accident claims cases. There was a backlog of automobile personal injury cases going as far back as 1976. In response to an inquiry as to the reasons for this accumulation of 'running down' cases, most of the judges and counsel said that the High Court sits during assizes and priority is given to criminal suits. They further remarked that, even when the court sits to dispose of the civil suits on road traffic cases, the trial takes a long period of time to be settled - sometimes more than three years.

59A For an elaborate discussion of this see, R.E. Keeton and J. O'Connell, Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance, 1965, Little, Brown and Co., Boston, pp.18-19; Pearson, op. cit., at p.210; Conard et. al., Automobile Costs and Payments: Studies in the Economics of Injury Reparation, 1964, University of Michigan Press, p.149 Table 4-11. See also the case of Snelling v. Whitehead, The Times, 31 July 1975.

59B Pearson, op. cit., at p.211.

59C It may be in the plaintiff's own interest that the case should not be settled before his medical condition has sufficiently stabilised to allow a proper prognosis; and a quick settlement may well result in less compensation being paid. However, in England, see section 6 of the Administration of Justice Act 1982, infra., p.172 and note 70.

60 Research carried out from October 1980 - November 1981 and June 1983 - September 1983.

The operation of the tort system is excessively expensive.⁶¹ To some extent costs of administration are part of the inescapable burden which account for 45 per cent of the total cost of determination of liability and compensation for road traffic accident injuries.⁶² Because of the role of fault in the present system, contests over the intricate details of accidents are routine. In cases of relatively modest injury, the expense of the contest often exceeds the amount claimed as compensation. All this expense is added to automobile insurance costs and borne by the motoring community through increases in insurance premiums. Thus it is argued that such moneys could be devoted to extending the scope of compensation without proof of fault. The tort system is sometimes difficult for the injured persons to understand and operate and they usually need the advice of solicitors.

Ignorance accounts for a majority of cases in which civil suits are not instituted in the courts.⁶³ This lack of awareness or consciousness of bringing of suits or redressing a wrong through the courts is prevalent in Cameroonian society. Here there are still many poorly educated and semi-illiterate people. Many of these know nothing about legal aid or solicitors and they think of the law (if at all) as something meted out by magistrates (that is, the criminal law). Again, in Cameroon, legal aid is very restricted; it is mainly recognised in criminal actions and not generous as regards civil actions. Until quite recently in Cameroon, very few personal injury or death claims were made. In the rural areas there used to be a strong moral and religious objection to the practice of "making money" out of

61 See Conard et. al., op. cit., esp. chap. 4 pp.137-180.

62 Pearson, op. cit., at p.211.

63 See: Abel-Smith Zander and Brooke, Legal Problems and the Citizen, London, 1973, pp.169-178 and 183-185.

an accident. In the early days of motor insurance it might have been considered immoral and a disservice to the memory of the dead for a person to claim money from an insurance company in respect of his deceased relation. Anthropologists have shown⁶⁴ that, in the early days religion and ethics provided a symbolic system of supernatural rewards and reinforced adherence to approved norms of social behaviour in tribal societies. Religion acted as a mode of social control. However, with time, societies, through interaction and learning from other societies' experience, undergo a process of change. Such change may also be a reflection of the pressure brought upon it by social and economic conditions. These factors may affect other means of social control such as custom, mores, convention and religion; which may then cease to be the primary mode of control. Further as the society acquires wealth and awareness of living conditions (in this case even the realisation of the existence of insurance companies) a new type of sanction may be provided for the infraction of a legal rule, namely, the requirement to make reparation or payment of compensation to the injured party. The psychological basis of the desire to make reparation wrought as a consequence of breaking a rule of conduct is said to be out of a sense of guilt. When a violator of a valued norm is subjected to a sanctioning process of a retributive or reparational character, then law and legal institutions emerge as a regulatory machinery.

It may therefore be suggested that religious stands and moral beliefs loosened their impact and were no longer strongly held. The demands and

64 Kenneth S. Carlston, Social Theory and African Tribal Organisation: the development of Socio-legal Theory, 1969, Chicago; Witchcraft may be said to have played a part in people not bringing unexplained accidents for trial. In Cameroon, this notion called 'Nyongo' is often spoken of today in common parlance as reasons for not instituting suits. When someone dies in a sudden and unexpected accident, others say, his father or uncle has given him up to the 'gods' as a form of some sacrifice or reward.

needs of Cameroonian society brought an awareness that people should compensate for their wrongful acts. Thus there was a reaction within Cameroonian society analogous to the changing attitude of the courts in France towards the interpretation of article 1384 of the Civil Code (an enactment of 1806 made in the horse and buggy age and subsequently found to be inappropriate to serve the demands of the public as a result of mechanisation and industrialisation).

The textual criticisms of the fault principle - the law and its administration - has posed and is posing a social problem in this field of our study and has been recognised by many⁶⁵ as unfair, lacking in certainty and no longer adequate. In an attempt to encapsulate the criticisms which have so far been levelled against the tort system Professor Keeton and O'Connell write of the present system :

"It provides too little too late, unfairly allocated, at wasteful cost, and through means that promote dishonesty and disrespect for law."⁶⁶

It seems appropriate to note that delictual actions were more closely linked with the idea of vengeance than with that of reparation for the damage

65 Leonard M. Ring, "No-Fault Auto Insurance: Hoax or Cure?", (1971) 52 Chicago Bar record, 451-459; In France: A Tunc, "Les Problèmes Contemporains de la Responsabilité Civile Délictuelle", (1967) 19 Rev. Int. Dr. Comp. 757-777; Tunc, "The Twentieth Century Development and Function of the Law of Torts in France", (1965) 14 I.C.L.Q. 1089-1102; In England see: Gray, "Liability for Highway Accidents", (1964) 17 Cur. Leg. Prob. 127; H. Street, "The Twentieth Century Development and Function of the Law of Tort in England", (1965) 14 I.C.L.Q. 862-877.

66 Keeton and O'Connell, op. cit., at p.3.

suffered - they gave rise to penalties.⁶⁷ However, in all modern societies these penalties have been abandoned in favour of individual assessment of damages and it has now been recognised that the function of an award of damages is compensation and not punishment.⁶⁸ The courts in the English and French-speaking Cameroon acknowledge these principles.⁶⁹ It may therefore be recognised that, the overall aim and objective of tort law is similar in England and Cameroon.

Traffic accidents all too frequently result in personal injury, death and damage to property. The position with regard to the assessment of damages differs in each of these cases which must be considered *seriatim*. The differences in the assessment of damages as will be observed are matters of detail and are due to the methods or approaches adopted in the two countries under consideration. In this work, for reasons of space as much as relevance, we will limit our discussion of the assessment of damages *only in* so far as it reveals the differences in application of the law and any weaknesses that may be found. In the case of personal injury, damages are

67 Salmond and Heuston, The Law of Torts, 18th ed., 1981, pp.18-21; Glanville Williams, "The Aims of the Law of Tort", (1951) 4 Curr. Leg. Prob. 137 et seq., stating the raison d'être of the Law of Tort; J.A. Jolowicz, "Liability for Accidents" (1968) C.L.J. 50 at 55 et seq.

68 See, for example, Lord Goddard in British Transport Commission v. Gourley A.C. 185 at 208; and also, Lord Denning in Browning v. War Office [1963] 1 Q.B. 750 at 758; Viscount Dunedin in Admiralty Commissioners v. S.S. Valeria [1922] A.C. 242 at 248.

69 See the case of Emmanuel Agu Ukpai and S.O.R.A.R.A.F. Compagnie Général d'Assurance v. Regina A. Fongkwa & 7 others, (1975) Civil Appeal No. CASWP/16/75, Buea (Unreported) where Justice Inglis cited Viscount Dunedin in Admiralty Commissioners v. S.S. Valeria [1922] A.C. 242. In much similar terms, Max Le Roy stated the French principle of assessing damages: M. Le Roy, "Bases Juridiques de la réparation du dommage corporel en droit commun", in Le Concours Médical, documentation professionnelle permanente (1982) No.7, February Issue, at p.7. Compare with Viscount Dunedin in Admiralty Commissioners v. S.S. Valeria [1922] A.C. 242 at 248.

awarded for both pecuniary and non-pecuniary loss. These heads of damages are common in England and Cameroon but there are variations in the mode of assessment. The victim is entitled to recover all expenses he is put to as a result of his injuries. This includes loss of earnings and medical expenses. The victim's incapacity may not have ceased prior to the trial, in which case the court will need to estimate its duration from the evidence of medical experts. In England, section 6 of the Administration of Justice Act 1982 has vested a new power in the High Court to make declaratory judgments to enable damages in a personal injuries action to be assessed on the basis that the plaintiff will not suffer at some future time serious deterioration in his physical and mental condition, or develop some serious disease. If, therefore, either eventuality does occur the case can be re-opened and further compensation may be granted.⁷⁰ This approach is similar to that in the French-speaking part of Cameroon where a provisional payment is made if the victim has not recovered and started working. In contrast, in the English-speaking part of Cameroon, only lump sums are awarded after judgment. The periodic payment seems a desirable form of compensation, as it takes

70 This section stems from the majority recommendation of the Pearson Royal Commission in 1978 that provision should be made for damages in the form of periodic payments for claims of 'serious and lasting injury which affect earning capacity or otherwise cause substantial pecuniary loss'. See: Pearson, op. cit., Vol.1, para.584. For further discussion on this see, Kenneth Cannar, "Legal pot-pourri and law change", Post Magazine and Insurance Monitor, 4 July 1985, Vol.146 No.27 p.1748; "Judgment for better damages", Post Magazine and Insurance Monitor, 18 July 1985, Vol.146 No.29 pp.1904-1905; Richard James and John Molesey, "A second bite at the cherry", Post Magazine and Insurance Monitor, 24 October 1985, Vol.146 No.43 pp.2951-2952; For an academic discussion see, Winfield and Jolowicz, On Tort, 12th ed. by W.V.H. Rogers, 1984 London, Sweet & Maxwell, pp.613, 631-632.

account of the period of recovery or deterioration of health.^{70A} Furthermore it is a flexible method during periods of inflation.^{70B}

In England, the position with regard to death of the victim, is governed by the Fatal Accidents Act 1976 as amended by section 3 of the Administration of Justice Act 1982 and the Law Reform (Miscellaneous) Provisions Act 1971. In the English-speaking part of Cameroon only the Fatal Accidents Act of 1846 is applicable.⁷¹ The claim here is for lost dependency by certain relatives of the deceased. In the French-speaking part of Cameroon, the action for death or fatal accident is founded on article 1382 of the Civil Code. The most important claim here is for préjudice moral which is similar to the English award for bereavement. The dependents of the deceased also have a right to claim for their loss dependency as in English law. The assessment of damages is within the discretion of the judge.⁷² It is not clear what principles actually guide the courts in Cameroon in determining the sum which has to be paid out. There are no tables to provide any guidance such as exist in France and England. There are isolated cases

70A Nevertheless, it is to be expected that where periodic payments are being made, there will be those victims who will not be quite so anxious to resume their employment, for example, back injuries, and this might worsen the position of the insurance company.

70B Payments can be inflation-proofed by annual reviews which would keep them in line with average earnings: see, Pearson op. cit., Vol.1 para.,586.

71 Cathalina Shu and others v. K. Okeke, (1962) W.C. [14] 1962 West Cameroon Law Report (1962-1964) at p.6.

72 Mbida Thomas c. M.P. et Mbana Bengono Lucas, (1982) Arrêt No.206 of 24 April 1975, Bulletin des arrêts de la Cour Suprême, No.32 Yaounde 1982, pp.4672-4673.

in which the judges in the English-speaking part of Cameroon, refer to Kemp and Kemp,⁷³ which has to a great extent created some uniformity in judicial decisions in England. This table is hardly relevant to the Cameroon courts as factors such as age, standard of living conditions, wages or salaries differ greatly from that in England. Moreover, even though the English-speaking part of Cameroon follows Common Law principles and statutes before 1900, recognition ought to be given to local circumstances⁷⁴ which in this regard may affect the judges' discretion on awards. For example, in Cameroon, as a result of the extended family structure, a wide range of persons has been construed by the courts to be the 'near relatives' of deceased and invariably are eligible to claim as dependents. Often this claim could be extensive.⁷⁵ In the English-speaking Cameroon counsel⁷⁶

73 Kemp & Kemp, On the quantum of damages in personal injury and fatal accident claims, 4th ed., by Derrick Turriff et. al. Vol.2 Law and Practices: Personal injury reports, 1975, London, Sweet & Maxwell; Harvey McGregor, On Damages, (Common Law Library No.9) 14th ed., 1980, London, Sweet & Maxwell. See the case of Margaret Scott v. Jude Osuju & others and Mutuelle Agricole Assurance, (1976) Suit No. H.C.S.W./18/74, of 4 June 1976, Buea (Unreported), in Cameroon. In England, see comment by Lord Parker of Waddington, "Compensation for Accidents on the road", (1965) 18 Curr. Leg. Prob. 1 at 4. He remarked that there is a very substantial degree of uniformity not merely between the judges themselves, but between the judges and the Bar and the legal advisers. This may be supported by the fact that in England, it is not uncommon to find after judgment that the amount paid into court is only slightly less than that awarded by the judge.

74 Note, the discussion in the introduction to this work, supra. pp.4, 32-34 and further, see infra, p.482 for Lord Denning's remarks on this point. Perhaps the task of deciding issues on the award of damages would have been simplified if there existed a systematic form of law reporting, see criticisms and proposals discussed in the introductory and concluding chapters of this study, supra., p.23 and infra., p.507 respectively.

75 See, for example, a case cited below at p.182.

76 See Gorji Dinka, counsel for the plaintiffs in Regina A. Fongkwa & others v. E.A. Ukpai & S.O.R.A.R.A.F. Compagnie Général d'Assurance, (1971) Suit No. WC/47/71 Buea 1971 (Unreported).

often seek to refer to awards in the French-speaking Cameroon, where awards are normally very high to provide some basis for comparison. This measure alone cannot create uniformity in judicial decisions. It is desirable to construct a table such as obtains in France or work out some guiding principles based on our local conditions for the use of judges and practitioners to assist them in their pleadings.

In relation to property damage, the role of tort law may be supplementary to that of private insurance in England and Cameroon.⁷⁷ It is arguable that fault is here a less suitable determinant of liability than in personal injury cases. Indeed, the insured can normally claim on the policy even if the property was damaged through his own negligence, but not his own deliberate act.⁷⁸ Loss insurance in both countries under consideration entitles the insured to claim from his insurer the cost of repairs should his vehicle be damaged and this is assessed by obtaining garage bills. Where the vehicle becomes a "write off" a claim is made on the value of the vehicle.

77 This is "loss" or "first party" insurance under which the owner of property, in the case of motor insurance, the vehicle and its contents obtains cover against loss or damage to the vehicle for risks described in the policy such as fire and theft, whether or not the loss occurs through the fault of any person.

78 Note, however, that policy terms requiring the insured to take reasonable care (for example, see Fraser v. Furman (B.N.)(Productions), [1967] 1 W.L.R. 898 a case of liability insurance) to avoid accidents or to maintain the vehicle in a roadworthy condition, may have the effect of avoiding the insurer's liability where the insured has been negligent: see Chapter Seven, p.428.

This is normally in England and the English-speaking Cameroon, the market value or, in French-speaking Cameroon, the valeur vénale, of the vehicle before the accident. The prevalence, therefore, of loss insurance removes most vehicle owners' incentives to litigate.⁷⁹ Further, the existence of "knock for knock"⁸⁰ agreements in England and similar agreements in France and Cameroon renders the pursuit of claims in relation to property damage a wasteful and expensive exercise, as insurers agree amongst themselves to bear the loss in respect of the vehicle they insure. The observations made in this section reveal the disparity in the existing law of Cameroon as between the English-speaking and French-speaking Cameroon.⁸¹ This, as we have seen, results in different substantive laws and procedure being applied by the courts in the two sectors. The requirement to prove fault and the rather modest mode of assessment of damages in the English-speaking Cameroon, together with the adversary nature of trial proceedings, result in lower awards of damages being made to victims in this part of Cameroon than in the French-speaking Cameroon. It is the purpose of this thesis to reveal such

79 However, it is likely that with the implementation of Article 1 of E.E.C. Directive No. 84/5/EEC : Second Council Directive of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (O.J. 1984), L8/17) requiring compulsory insurance with respect to property damage, there will be potential heavy claims. Property damage might be widely defined to include roads, bridges and consequential loss. See further, Department of Transport Consultative Document, Giving effect to the Second European Community motor insurance Directive, 1984, paras. 4.2 and 4.9 which proposes to deal with damage to roads and bridges by exclusions in insurance policies. A separate insurance cover is necessary to cover such losses. Damage caused by impact arising from the negligence of the driver is covered by the normal motor insurance policy.

80 See later for a discussion on the methods of accelerating settlement of claims in relation to property damage pp.464-475.

81 For other areas revealing this disparity in the law, see further, Chapter Five, pp.309-357 and Chapter Seven, pp.416-439 of this work.

discrepancies and, in the pursuit of reform, proposals will be made in Chapter Nine to harmonise the laws. It is hoped that this inspiration will prompt reform in the law to eliminate the differential treatment of the citizens of Cameroon presently subject to two systems of laws.

The effect of liability insurance.

The growth of liability insurance and the realisation that losses can be borne by an anonymous body - an insurance company - have to some extent changed the nature of liability and affected the assessment of damages. The importance of economic and social factors in shaping and changing some of the rules on civil liability should not be underestimated.

It has also been suggested⁸² that legal rules have been 'invisibly' affected by the existence of insurance. In England, statutory modifications⁸³ such as the Third Parties (Rights Against Insurers) Act 1930 and the provisions of the Road Traffic Act 1972 recognise that the purpose of liability insurance is to protect the accident victim. Section 149 of the Road Traffic Act 1972 and the Third Parties (Rights Against Insurers) Act 1930 concern the possibility of bankruptcy on the part of the defendant and therefore, provide a direct right of action by third parties *against insurers* which is only applicable on the bankruptcy of the insured. Further, extensions in the coverage of insurance policies have also influenced the

82 P.S. Atiyah, "Res Ipsa Loquitur in England and Australia", (1972) 35 M.L.R. 337; Accident Compensation and the Law, 3rd ed., 1980, London, pp.270-285; Fleming James, J.R. "Accident Liability Reconsidered: The Impact of Liability Insurance", (1948) 57 Yale L.J. 549 at 552; Jaffe, "Damages for Personal Injury: The Impact of Insurance", (1953) 18 Law & Contemp. Prob. 219-212. Henry Ussing, "The Scandinavian Law of Torts: Impact of Insurance on Tort Law", (1952) 1 Am. J. Comp. L. 359 et seq., Frank P. Grad, "Recent Developments in Automobile Accident Compensation", (1950) 50 Colum. L.R. 300-330.

83 For a discussion of these, see infra., pp.208, 211 and 215.

effectiveness of present tort liability. Medical payment provisions enure to the benefit of the victim without regard to fault, and because of conditions in the policy do not affect the rights of the accident victim.

Similarly, in Cameroon, that is, in both English and French-speaking Cameroon, this direct right of action against the insurance company was enacted by article 4(3) of Law No.65-LF-9 of 22 May 1965 relating to compulsory third party motor vehicle insurance. This allows the victim to sue the tortfeasor's liability insurer directly, sometimes without even joining the individual tortfeasor.⁸⁴ Normally the tortfeasor does not bear any part of the judgment and has no interest in the litigation, rather the victim and the insurer alone are interested parties.⁸⁵ The resulting benefit is not solely procedural. The victim's right against the insurer is not defeated by any breach of the insurance contract by the tortfeasor.⁸⁶

In effect, the presence of the insurance company shields the actual defendant - the tortfeasor from bearing any civil liability which result from his acts. The word "liability" therefore becomes entirely misleading⁸⁷ as the consequences or liability for the damage are borne directly by the insurer, and eventually by vehicle owners collectively. Civil liability is only a screen. Liability insurers thus become managers in charge of risks

84 See, for example, in English-speaking Cameroon, the case of Mange W. Ndikum and G. Mukong v. S.O.C.A.R., (1979) Suit No. HCB/4/78 of 24 January 1979, Buea (Unreported), where only the insurance company was sued. In some cases the insurance company is joined as a party to the proceedings. See, for example, Fomekong Jean v. Daniel Mba, Atanga Wanka and Agence Général Groupement Français d'Assurance, (1976) Suit No. HCB/12/74 of 18 June, 1976, Bamenda (Unreported).

85 See G. Viney, Le Déclin de la Responsabilité Individuelle, 1964, Paris, L.G.D.J.

86 Article 53 of the Law of 13 July 1930.

87 The word applies to someone who is at fault and will have to bear the consequences.

created by their clients. In French-speaking Cameroon, together with the strict liability of article 1384⁸⁸ and the authority of the Code de la Route,⁸⁹ the question of 'whose fault was it that the damage occurred' has perhaps been replaced by 'at whose risk is the damage'.

In England, the principle of no liability without fault still dominates judicial expressions. However, a subsurface encroachment upon the principle is apparent, even though such deviations in practice are largely concealed in judicial opinions.⁹⁰ While, we may concede that the existence of insurance is not of itself a reason for imposing liability, one may suggest that it does add "a little extra tensile strength" to the chain which binds a tortfeasor to his responsibilities.⁹¹ The conversion from 'fault' to negligence without fault through the res ipsa loquitur doctrine⁹² which reverses the burden of proof for unexplained accidents on those whose activities cause them, permits some of the benefits of insurance in the case of many more claims. Judges have denied that any hardship can be done to a defendant by observing that he (the defendant) could have insured against liability. In 1778, Lord Mansfield⁹³ justified the imposition of vicarious liability on a sheriff for the acts of his officer by observing that it was

88 Supra, pp.152-155.

89 Supra, pp.165-166.

90 See for example, Morgans v. Launchbury [1973] A.C. 127 at 135-137.611, per Lord Wilberforce; Viscount Simonds in Lister v. Romford Ice and Cold Storage Co. Ltd. [1957] A.C. 555 at 577.

91 White v. Blackmore [1972] 2 Q.B. 651 at 668.

92 See Supra., pp.160-161.

93 In the case of Ackworth v. Kempe (1778) 1 Doug K.B. 40; See also Lord MacNaghten in Lloyd v. Grace Smith & Co. [1912] A.C. 716.

possible and common for a sheriff to protect himself against such liability by obtaining an employee's fidelity bond - a species of liability insurance. The tendency to objectivize the standard of care and to ignore the personal characteristics of the defendant especially in the case of learner drivers⁹⁴ displays an anti-defendant attitude which may also have been influenced by insurance considerations. Furthermore, the fact that more subjective considerations are taken into account in deciding questions of contributory negligence than in deciding questions of negligence suggests that liability insurance is exerting some influence on these issues. In addition in cases in which a trivial act of negligence has resulted fortuitously in serious personal injury, the courts seem to be 'bending' the law in the direction of the plaintiff.⁹⁵ This can hardly be pure coincidence.

In legal theory in England, the accident victim can only sue the individual person responsible for the accident or the employer of the tortfeasor. He does not in law sue the defendant's insurance company. Traditionally it was considered improper to inform the court that a defendant was insured.⁹⁶ This is now regarded as an "old fashioned rule".⁹⁸ Such a recognition is inevitable in the case of motor vehicle insurance where everyone knows that liability in respect to third parties is rendered compulsory by the Road Traffic Act 1972. Now that passenger insurance has been made compulsory there is no reason in law for one member of the family

94 Nettleship v. Weston [1971] 2 Q.B. 691.

95 Robinson v. Post Office [1974] 1 W.L.R. 1176; op. cit. at p.227; See also, P.S. Atiyah op. cit., at 227.

96 Davie v. New Merton Board Mills Ltd. [1959] A.C. 604, at 627.

97 Morey v. Woodfield [1964] 1 Q.B. 1.

98 Post Office v. Norwich Union Fire Insurance Society Ltd. [1967] 2 Q.B. 363 at 368; Morgans v. Launchbury [1973] A.C. 127.

recovering damages against the other since the damages will eventually have to be paid by an insurance company. Lord Denning has been particularly prone to bring the insurance issue into the open in discussing points of law.⁹⁹

In Skelton v. Collins,¹⁰⁰ Windeyer J. said insurance has given "a new horizon to damages." As Atiyah has observed :¹⁰¹

"It can hardly be supposed that judges would be habitually awarding thousands of pounds in damages without a thought for the effect of such awards on the defendant if they did not appreciate that the damages would not be paid by the defendants themselves."

Indeed, judges have expressed fears that damages might become excessively high with the result that insurance premiums would become so exorbitant that business would become impossible,¹⁰² and small insurance companies would go bankrupt.¹⁰³ This speculation, it is submitted, is untenable. Provided that premiums reflect loss probability¹⁰⁴ and are effectively managed,¹⁰⁵ it is

99 Sees Morris v. Ford Motor Co. Ltd. [1973] 1 Q.B. 792 at 798.

100 (1966) 39 A.L.J.R. 480 at 494.

101 See P.S. Atiyah, op. cit., at p.273; Lord Denning made a similar remark in Morris v. Ford Motor Co. Ltd. [1973] 1 Q.B. 792 at 798.

102 Heaps v. Perrite Ltd. [1937] 2 All. E.R. 60 at p.61 per Greer L.J.

103 Fletcher v. Autocar and Transporters Ltd. [1968] 2 Q.B. 322, at 335 per Lord Denning M.R.

104 Premiums ought to be fixed partly by reference to the level of awards made by the courts and past experience of claims settlement should be a guide for regulating premium rates for the next cumulative years.

105 The failures of insurance companies operating in motor insurance business were attributable to the fact that the companies were not properly conducted, but this is much less likely now given the controls available in the Insurance Companies Act 1982. See supra, Chapter Two on Government Control of Insurance Companies, pp.57-124. Administrative and managerial costs form a greater proportion of the total costs of insurance companies and this leaves suspect any arguments about high awards being a primary factor in causing an insurance company going to ruin.

clear that the solvency of an insurance company can be maintained. On the other hand one must admit that volatile changes in the law and inflation may create some difficulties for insurance companies. In Cameroon, the heavy burden of court awards in damages because of the large family size and extended family system is especially felt by insurance companies. The multiplicity of the various heads of damages in respect of each defendant renders the size of awards enormous. For example, in the case of Société Camerounaise de Banque and S.O.C.A.R. (Assurance) v. Angela N.Njob,¹⁰⁶ the court awarded 216.000 Francs CFA to each of the four wives and 136.000 francs CFA to each of the eighteen children.

Another case in the French-speaking Cameroon, M.P. and Fotso Kankew Jacques c. Meyiwon Appolinus and Mbou Jacques¹⁰⁷ provides a further example. This was a claim for fatal accident by thirty seven wives and forty nine children of a deceased chief in Baffousam, in which the court awarded one hundred and ninety eight million, nine hundred and fifty thousand francs CFA (198. 950.000 frs CFA). This case, amongst others, has had serious repercussions on the portfolio of insurance companies. It was regarded as a 'scandalous decision' by the Contentieux of Assurance Mutuelle Agricole du Cameroun, and in June 1983 a report was made to the Ministry of Justice for investigation and advice on such cases. In fact one could question the propriety of such decisions, as it can be argued that the court should have required strict proof of the fact that these wives and children were actually dependants of the chief.^{107A} It is commonly known that in an African

106 Appeal No. BCA/13/77 of 22nd. February 1973, Buea, (Unreported). It should be noted that this case came on appeal by the insurance company for a review of the damages awarded by the lower court. Moreover, the deceased was a low income earner; the result would have been astronomical if the victim was a well-to-do personality.

107 Judgment No. 576/COR of 22 Dec., 1982, Baffousam (Unreported).

107A For a discussion of similar problems in East Africa, see R.W. Hodgkin, "Claims Under the Fatal Accidents Acts of East Africa", (1974) 10 East African L.J. 165-193.

chieftancy system, the chiefs depend on their wives, elder children and their local community for their well-being. Moreover, the age of the chief should be another important consideration in determining the dependency factor of the defendants.

These observations reveal a fundamental dilemma implicit in many judicial decisions. It seems probable, although incapable of demonstration by empirical evidence, that the prevalence of liability insurance has had its impact on the development of the law. We may only suggest that since it is common knowledge that the defendants are not paying the damages personally, judges may be consciously or unconsciously more concerned with the hardship to the victim and less with the tortfeasor and may, therefore, be more willing to find a tortfeasor negligent. This exhibits a desire to compensate the unfortunate victim. This, it is suggested, is desirable as the existence of insurance enables judges to give effect to the desire to compensate a victim without imposing hardship on the tortfeasor. Insurance thus vitiates the secondary purpose of damages and incidentally ensures that the primary purpose is more often achieved.¹⁰⁸

108 See Glanville Williams, "The Aims of the Law of Tort", (1951) 4 Cur. Leg. Prob. pp.137-176; For an affirmation of punitive or exemplary damages, see House of Lords decision in Pickett v. British Railway E. Ltd. [1980] A.C. 136 and conflicting dicta by Lords Reid and Wilberforce on the function of compensation in the law of torts see Cassell & Co. Ltd. v. Broome [1972] A.C. 1027. It could be admitted that punitive damages in other areas of the law of torts such as defamation and nuisance are desirable for they can act as deterrents to future actions as they are premeditated torts. The punitive aim of tort which is reflected in exemplary damages in some cases ought to be discouraged in the case of road traffic accidents. It may be argued that such damages do not serve any deterrent effect. One can realistically assert that an insured defendant can hardly be deterred by the prospect of losing a no-claims bonus, or by an increase in premium for bad risk drivers on renewal of their policies. We have observed that the causes of most accidents are due to human frailty, a moments inadvertence can lead to catastrophic disasters and it is worthwhile realising that the drivers would not generally, deliberately cause accidents as their own lives are also at risk.

If then, the unlimited liability coverage provided by the compulsory insurance laws of England, France and Cameroon fulfills the main objective of compensation, it seems desirable that the law be so designed as to keep the cost of compensating victims as low as possible. A more drastic alternative may lie in the reappraisal of compensation methods and their replacement by some form of an extended social security system.¹⁰⁹ The likely cost of this, however, makes it an unlikely possibility in Cameroon at any rate for the immediate future. From a social point of view, compensation through collective sources has obvious advantages. Perhaps a better reform would be to encourage first party insurance.¹¹⁰ Here, the insurer on the occurrence of the fortuity pays reparation regardless of fault. Along with this, a blend of the various systems of compensation or some kind of compromise between the tort system based on fault or risk may be appropriate.¹¹¹ This

109 In Cameroon, social security as is known in England and France, is very recent and much more limited in scope. see, Decree No.76-321 of 2 August 1976 to entrust the management of occupational risks to the National Social Insurance Fund throughout the (United) Republic of Cameroon. Only civil servants, employees of nationalised corporations and employees of private enterprises who pay some contribution to the National Social Insurance Fund (Caisse Nationale de Prévoyance Sociale) are entitled to any benefits from the Fund: Benson, Odia, Ambassade du Nigeria and S.O.C.A.R. c. C. Claude, Sté Hamelle Afrique et autres and Groupement Française d'Assurance, Judgment No.219 of 27 June 1978, Yaounde (Unreported). For other citizens, the extended family system, age-grade associations and tribal or clan groups were and still are, the only sources of self help.

110 Life, health and accident insurance are much less developed or common in Cameroon than in England, see for example, Tables 5 and 6, written premium income of insurance companies, at pp.247 and 248. In England, the development of insurance, in particular, private and social insurance have tended to relegate the law of tort to a secondary role especially in the field of accident compensation as the legal system is showing symptoms of malaise as criticisms are made of the fault principle.

111 For a discussion on our proposals on this see, Chapter Nine, pp.492-495.

may attract questions such as that, will fault ever go away? and comments - no fault compensation - a sign of things to come in Cameroon. This is not far-fetched as we will see below in the case of France.

Limited no fault liability in France

In France, the interpretational power of the courts was a prelude to new legislation.¹¹² The Cour de cassation in particular has been known for stepping ahead of legislation.¹¹³ The Jand'heur decision in 1930 definitely

112 Loi No.85-677 du 5 juillet 1985 tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation, Journal Officiel de la République Française du 6 juillet 1985, 7584: Hereinafter referred to as 'the law of July 1985'. Note that the first Chapter of this new law does not alter the nature of civil responsibility. The law applicable therefore, is contained in articles 1382 and 1384 of the Civil Code and in the case of contract, article 1147 thereof applies. For a detailed discussion of this law see: François Chabas, "Commentaire de la loi du 5 juillet 1985, tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation" J.C.P. 1985. I. 3205; Pierre Estoup, "L'indemnisation des victimes d'accidents de la circulation: L'amalgame de la responsabilité civile et de l'indemnisation automatique", D. 1985 Chr.237; André Tunc, "La réforme du droit français des accidents de la circulation : une modeste réforme est un vœu", Le Journal des Procès, 7 September 1984, p.10.

113 See supra, pp.153-154.

established the applicability of article 1384(1) to motor vehicle accident disputes. It is paradoxically this decision which initiated the whirl of judicial thinking in France.¹¹⁴ Subsequently, in a remarkable reversal of

114 There have been previous projects drawn up by about ten Commissions on the reform of the law on accident compensation, most notable amongst them was that of André Tunc: "Sur un projet de loi en matière d'accident de la circulation", (1967) 65 Rev. Trim. Dr. Civ. 82; Pour une Loi sur les accidents de la circulation, (1981) éd. Economica. Here he advocated the initiation of no fault liability in motor insurance in France. However, the present legislation owes its origin to the Bellet Commission, see Henri Margeat, "Le projet de loi Badinter", Journal International des Assurances, l'Argus, 16 November 1984, No,5877, p.2567. Road traffic accident compensation has provoked so many problems and criticisms and an infinite variety of solutions have been advanced. Its peculiarities, for example, the inevitability of accidents; the cost of highway accidents to the social security funds, the state and insurance companies; the incidents of accidents and the importance of the insurance factor prompted tort lawyers to re-think much of their traditional ideas on civil liability. Undoubtedly, the real explanation behind this, is the desire to afford the victim of traffic accidents the maximum possible source of having his harm properly and fully compensated, which is the primary function of the law of tort.

case law the Cour de cassation in Arrêt Desmares¹¹⁵ held that, in proceedings founded on article 1384, only the complete defence of force majeure is available : apportionment of damages would be disregarded. This meant that, except in the case of acts of God (or nature) the tortfeasor is entirely responsible for the harm caused. As acts of God are rare, it may be assumed that the victim will always be compensated: in other words, the tortfeasor will always be held responsible.¹¹⁶ This decision it may be rightly said,

115 La Mutualité industrielle - Louis Paul Desmares c. Pierre Charles - S.N.C.F. C.P.S.S., 2^e Ch. civ., 21 juillet 1982. D. 1982. I. 449. In this case, an elderly couple were knocked down and injured by M. Desmares' car on a crossing in a small town in the Ardennes. The couple had admitted that perhaps they had been careless themselves in venturing on to the crossing when the vehicle was so near to it. They contended that, on the basis of article 1384(1), the vital point was not whether or not the motorist was at fault. Rather the fact that the motorist drove the car which caused the injury fixed him with civil responsibility. It was held that, apart from entirely unforeseeable circumstances beyond the control of the driver, a situation that could not be postulated here, the motorist was liable under article 1384 since strict liability was imposed upon persons for any harm caused by others, by the objects within his control. For a detailed discussion of the implications of this judgment see: André Tunc, "Accident de la circulation: faute ou risque?", D.1982, Chr.103; "La réforme du droit française des accidents de la circulation", (1983) Rev. drt. intern. et drt. Comp., 180 esp. at 185-190; J.A. Jolowicz, "Traffic Accidents and Contributory Negligence - Insurance - A New Departure in France", (1983) 42 C.L.J. 61 at 62. G. Viney, "L'indemnisation des victimes de dommages causés par le «fait d'une chose» après l'arrêt de la Cour de cassation (2^e Ch.civ.) du 21 juillet 1982", D. 1982. Chr.201; Y. Lambert-Faivre, "Aspects juridiques moraux et économiques de l'indemnisation des victimes fautives (Civ.2^e, 21 juillet 1982, Desmares)", D. 1982 Chr.207; Bigot, "L'Arrêt Desmares: retour au néolithique", J.C.P. 1982 I. 3090; E. Bloch, "Est-ce le glas du partage de responsabilité? (arrêt Mutualité industrielle de la deuxième chambre civile de la Cour de cassation du 21 juillet 1982)", J.C.P. 1982 I. 3091; J.L. Aubert, "L'arrêt Desmares: une provocation... à quelles réformes?", D. 1983 Chr. I.; Evelyne Serverin et Marie-Claire Rondeau-Rivier, "Une essai d'évaluation du changement du droit: la mesure des incidences de l'arrêt Desmares", D. 1985, Chr.227.

116 This consequence is clearly underlined by Charbonnier - the Attorney General (l'Avocat Général) who declared that total compensation for the victim, even if at fault, has been made possible through insurance, ibid. at p.420.

went beyond the strict limits of motor accident victim's compensation. It produced uncertainty in the law and practically divided the French courts.¹¹⁷ Indeed, contrary to expectations, the judgment was not beneficial to a victim who was at fault. It provided for either total compensation or none at all, and forbids the sharing of responsibility regardless of the behaviour or contributory negligence of the victim.

Be that as it may, this decision made necessary the intervention of legislation. The twin objectives of the new law of July 1985 on limited no fault liability introduced in France are : firstly, to reduce the amount of litigation and secondly, to guarantee reasonable and speedy compensation for accident victims. Seemingly, this has been achieved by the legislation. The following brief discussion seeks to raise the potential problems with the new law rather than attempting (assuming that this were possible) to provide any clear answers since it is as yet premature to make any concrete evaluative judgment.

117 It led to a situation in France which may be poignantly described as a form of provincial legal territoriality. On the one side, there were the courts respecting the judgment, see for example, Jean-Marie Collery c. S.A.R.L. Cogel, Antoine Trin, la M.A.A.F. et C.P.C.A.M. des Hauts-de-Seine, Cour d'appel de Versailles (3^e Ch.), 29 September 1983: Gaz. Pal. 1983, 2, 587; on the other, those completely ignoring it, for example, Didier Patu c. Didier Le Henaff, Compagnie La Fraternelle et C.P.C.A.M.R.P., Cour d'appel de Paris (17^e Ch.A), 8 December 1982: Gaz. Pal. 1983, 2, 640; whilst others were able to find distinctions in what may appear to be the same basic circumstance. It may even be noted that there was another decision of the Versailles court which went against the Desmares judgment as well. In fact the approach in some districts or tribunals to the Desmares judgment meant the effective transformation of third party risks into first party risks without a corresponding enlargement of premium. In consequence, the government, late in November 1982, realised this result and authorised insurance companies to increase their premiums by 3%.

The main thrust of the reform concerns the 'exoneration clauses', that is to say, the defences that could be pleaded in particular, the concept of contributory negligence.¹¹⁸ Force majeure and the act of a third party cannot be set up as a defence to any claim against any victim or beneficiaries.¹¹⁹ The fault of the victim alone is the only reason for exoneration of the tortfeasor's liability.¹²⁰ In this respect the law makes a distinction by reference to whom a defence can be raised. By virtue of article 3(1) of the 1985 law, victims of a road traffic accident involving a motor vehicle, with the exception of drivers, must be compensated for prejudice resulting from personal injury without the possibility of a defence on the grounds of their own misdemeanour.¹²¹ However, there is a 'sole exception to this strict liability based upon the victim's inexcusable fault, should this have been the sole or exclusive cause of the accident.¹²² Furthermore, unless the victim is under 16, or over 70 years of age or at the time of the accident is certified as at 80% permanently disabled, his conduct

118 This concept embraces the trilogy of concepts we mentioned earlier, supra, p.155, that is, force majeure or act of God; act of a third party; and fault of the victim himself. It may be convenient here to state that the term 'fault' as used here, should be understood as negligence and in appropriate circumstances contributory negligence should be applied.

119 Article 2 of the law of July 1985.

120 Article 3 Ibid.

121 Our translation. See also, Kenneth Cannar, "The Desmares route is completed", Post Magazine and Insurance Monitor, 3 October 1985, Vol.146, No.40 p.2705. In respect of property damage see article 5 of the law of July 1985. By virtue of article 5, contributory negligence of the victim will be considered with respect to claims on property damage. But note that reference to property damage claims is not made in the law, save only so far as they concern medical supplies or equipment provided on prescription, when the same considerations as those applicable to personal injury claims operate.

122 Added emphasis. Article 3(1) op. cit.

can be taken into consideration by the court if he was 'inexcusably' at fault and in addition his 'inexcusable fault' constitutes the sole cause of the mishap.¹²³

We may recognise at this point three categories of victims. First, the privileged class consisting of young persons under 16, old persons over 70 and handicapped persons. To this group a full blooded no fault liability concept has been applied as their fault is disregarded and therefore not a barrier to the tortfeasor's compulsory assumption of strict liability. The second category consists of pedestrians, passengers and cyclists. With respect to this group, the no fault principle is not absolute: mere negligence or inadvertence cannot be claimed against them except their inexcusable fault but this must have been the sole or exclusive cause of the accident. A third category : drivers are responsible for their negligence of whatever nature. The fault committed by the driver of motor vehicles will limit or exclude compensation for damages he personally suffers. He may not receive any compensation if his negligence was the exclusive cause of the accident.¹²⁴ If the driver or person responsible for the vehicle can no longer claim force majeure, or act of a third party, it seems that he is subjected to not an obligation but a guarantee of liability. The underlying principle of the law envisages a limited possibility of a valid defence in respect of the behaviour of the victim. The combined effect of articles 2, 3 and 4 seems to go beyond the Desmares decision. The law seems to be based on the vague idea of creating risk (risque créé) - an idea imported by the Jand'heur decision. The drivers are the only persons whose fault of whatever

123 Article 3(2) Ibid.

124 Article 4 Ibid.

nature is taken into consideration. In this light it appears that the law recognises the secondary aim of tort law - the punitive element. Perhaps, more importantly, is the realisation that drivers' civil responsibilities towards third parties are compulsorily covered by insurance. But it is noteworthy that drivers are not covered by compulsory insurance.¹²⁵ Insurance of civil responsibility will only apply to them if they are victims of injuries caused by another motor vehicle. This may indicate that the law wishes to punish those who are called the creators of risk.¹²⁶ A better reform would have been to oblige drivers to take on personal accident insurance.

Furthermore, it seems inevitable that the interpretation of the defence would lay upon the courts the often and expensive task of having to decide abstract legal concepts such as 'exclusive clause' and 'inexcusable cause' of the accident through the medium of contributory negligence. The principle of inexcusable fault seems difficult to establish.¹²⁷ Questions such as what is inexcusable fault and in what way can the behaviour of a victim be inexcusable are bound to arise. This may import or re-import the notion of foreign

125 However, compulsory insurance now covers the civil responsibility of unpermitted and unauthorised drivers: Article 8 Ibid. It is probable that this provision was included in the new law as a result of Article 2(1) of the Second Council Directive 84/5 of 30 December 1983, on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles. (O.J. 1984, L8/17).

126 Querre the creation of risk by pedestrians and cyclists. It appears that the law is favourable to other victims and beneficiaries except drivers. Contrast the position of the second and third category of victims discussed in the text. In this respect, one may contend that the law seems to be discriminatory.

127 See the recent case of Veuve Guy c. L'hopiteau et autres, Trib. gr. inst. Chateauroux, Réf., 2 August 1985, J.C.P. 1985, II. 20476. Here the contentious issues of 'inexcusable fault' and 'exclusive cause' have not been argued and decided upon, but a provisional payment has been made to the widow.

cause, unavoidable and unforeseeable cause.¹²⁸ Nothing can prevent a judge from considering that an unforeseeable and unavoidable act constitutes gross negligence amounting to an inexcusable fault, thus exonerating a defendant who is sued in a negligence action. The law of July 1985 does not state the basis on which responsibility would be shared if need be. The Civil Code itself is silent on the rule of apportionment of liability on the basis of the gravity of the respective faults of litigants. It therefore seems that reliance would be placed on French judge-made rules which are based on wider considerations of equity rather than on any particular question of the doctrine of causation. Moreover, in deciding these issues, it is possible that consideration will be given to the litigant's particular circumstances such as his ability to carry the risk and thus create room for judicial manoeuvre. An expected side effect could be a re-appearance of a lot of legal disputes on arguments in respect of fault. The hope however, is that this principle of 'inexcusable fault' or 'exclusive cause' should not be difficult to establish in order that the first objective set by the legislation should be achieved.

The second objective relates to the provision of a simplified and speedy machinery for amicable settlements of disputes.¹²⁹ Article 12 of the law of July 1985 requires the insurer concerned or an insurer who has a mandate given by the others to present a compensation proposed to any victim incurring personal injury within a maximum period of eight months from the

128 It may be worth noting that a number of decisions by the Cour de cassation based on the interpretation of these notions have been made and these gave rise to a lot of arguments in the courts and by French jurists, see note 29 above.

129 See articles 12-27 of the 1985 law. Note that the limitation period for claims to be brought has been reduced from thirty years to ten years counted from the date when the injuries became apparent or the date when their aggravation occurred: Article 37 Ibid.

date of the accident.¹³⁰ In the case where the injuries have not yet stabilised, as usually will be the case where they are serious, the proposal may be a provisional one, in which event a final proposal must be made within a maximum period of five months from the date on which the insurer is informed that the victim has reached the stage of maximum recovery.¹³¹ In his initial correspondence, the insurer must, under penalty of rendering the settlement void, inform the victim of his right to medical and legal assistance and a copy of the police report.¹³² This provision seems to have been complemented by article 26 of the law which requires the government to publish an average table of awards granted to victims by court decisions. This may in appropriate cases provide necessary guidelines to insurers, the legal and medical profession. However, insurers are subjected to certain penalties if a proposal by an insurer is not accepted by a victim and subsequently the claim is adjudicated. If the presiding judge considers the proposal as 'obviously inadequate', the insurer must pay to the Fonds de Garantie Automobile¹³³ a sum not exceeding 15 per cent of the compensation

130 An insurer who invokes an exception clause in the policy, must nevertheless make a proposal and carry it out on behalf of the others: Article 23 Ibid.

131 If these time scales laid down for insurers are not adhered to, a penalty is imposed in the form of additional interest (currently the standard rate is 9.5%) at a rate double that of the statutory rate, and calculated over the period from the date when the proposal should have been made to the date at which one is made or a final order made by the court - Article 16 Ibid. Contrast section 6 of the Administration of Justice Act 1982, in England in respect of provisional payments, see supra pp.172-173 and Article 12 and 22 of the law of July 1985.

132 Article 13 Ibid.

133 The organisation is responsible for managing the funds set up to indemnify road accident victims where no effective insurance exists. See Articles 7-11 of the law of July 1985. For a similar body in England and Cameroon, see infra, pp.249-298.

that is awarded plus of course the difference between what the court has assessed, and the amount originally offered.¹³⁴

On the other hand, the victim may within a fortnight of the date of any amicable settlement repudiate an offer of compensation by registered letter.¹³⁵ However, if a settlement is agreed, the amount in question must be paid over within one month of the expiry of the "cooling off" period, that is, within six weeks of the date of the agreement to settle.¹³⁶ It seems that these provisions are inspired by consumer protection considerations as they recognise that the victim requires adequate information and advice and further some time within which to enter into any commitment in a transaction. Furthermore, the law in imposing heavy penalties on insurers seems to be attempting to redress the balance between the 'stronger party' - that is, the insurer and the 'weaker party' - the victim.

Primarily, the legislation has sought to curtail the defences available to drivers or rather their insurers and has thus created to some extent a near absolute form of liability which would only be refuted upon proof of an inexcusable fault on the part of the victim. This approach coupled with the provision of some machinery for amicable settlements seems to go some way towards compensating victims of traffic accidents who previously would have limited chances of receiving compensation. It is obvious from this schematic

134 Article 17 Ibid. There seems here to be a penalty upon parsimony.

135 Article 19 Ibid. This article further prohibits any attempt to contract out of these provisions.

136 Article 20 Ibid. Any failure or delay in payment automatically gives rise to payment of interest at the statutory rate plus half of this for the first two months and thereafter, at double the statutory rate. In the case of a delay in implementing a court award, even of a provisional nature, the statutory interest is increased by 50% where payment is not made within two months of judgment, and 100% after four months from when the judgment has expired: Article 21 Ibid.

treatment of French law on motor accident compensation that the existence of insurance companies is a prime motivation for the measures adopted.

III BACKGROUND TO COMPULSORY INSURANCE SYSTEM

The legislation of England, France and Cameroon have responded to the exigencies of our daily life by a search for ways in which law responds to the pressure brought upon it by changing economic and social conditions.

In the years preceding 1930, those motorists in England, France and Cameroon who insured did so voluntarily. Compulsory insurance was contested in the early twentieth century as an infringement of economic liberalism. The fear of the progressive intervention by the state in professional organisations provoked a hostile reaction¹³⁷ from insurers against any idea of compulsory insurance of any nature.

In England public opinion was in favour of governmental introduction of legislative measures to combat the tragic consequences of road traffic accidents. The Royal Commission on Transport made an inquiry in 1929. In its report it recommended¹³⁸ that the Minister of Transport should make the insurance of motor vehicles compulsory so as to ensure that the victims of motor accidents obtained adequate compensation. The Minister then consulted the Association of British Insurers who did not favour this idea of compulsory motor insurance. British insurers saw in this measure a new extension of state control over their industry. They expressed the fear of running undesirable risks which might result in heavy losses to themselves.

137 See below, pp.195-197 : in England, the opposition from the Association of British Insurers and in France, the failure of proposals to render motor insurance compulsory.

138 The Royal Commission on Transport: First Report. The Control of Traffic on Roads. July 1929 Cmnd. 3365 at p.25.

Such losses might force them to raise the rate of premium which they charged their policyholders, a situation which might prove not only hard upon the latter, but detrimental to the insurance companies themselves. In spite of these objections the legislators thought it necessary to make insurance against motor liability obligatory. The British Road Traffic Act 1930¹³⁹ introduced compulsory insurance for the first time.¹⁴⁰ The introduction of compulsory motor insurance was the first step towards ensuring the protection of third parties. Compulsory insurance alone could not achieve the desired aim; hence it has been followed by legislation designed to protect third parties against the insolvency of the insured¹⁴¹ or the insurer¹⁴² and against certain conditions in policies.¹⁴³ No system of compulsory insurance would be complete without some provision being made for the compensation of victims of uninsured motorists.¹⁴⁴ In 1946 the Motor Insurers' Bureau was

139 The Road Traffic Act of 1930 was followed by the Road Traffic Act 1934. These two enactments were codified in the Road Traffic Act 1960, which has been revised and presently the Road Traffic Act 1972 is the applicable law. For a full account see: M.R. Russell Davies, The Laws of Road Traffic in Great Britain 5th ed., London 1973.

140 Other countries have followed with similar legislation. In 1932 by a federal law Switzerland made motor insurance compulsory. Germany joined the list in 1939. Later on Luxembourg in 1935, Belgium in 1956 and France in 1958 enacted compulsory insurance laws.

141 The Third Parties (Rights against Insurers) Act 1930.

142 See now the Insurance Companies Act 1982 and the Policyholders Protection Act 1975, discussed supra pp.53-145 in Chapters One and Two: For greater protection of the insured and beneficiaries of such insurance policies, the governments of England and Cameroon regulate the operations of insurance companies who issue contracts of insurance.

143 The Road Traffic Act 1972 s.148.

144 See infra, comment on Employers liability insurance pp.232-233 below.

created to fulfill this function.¹⁴⁵

In France, initial proposals for compulsory motor insurance failed. In 1935 compulsory insurance was introduced for public transport vehicles and racing drivers.¹⁴⁶ Proposals to extend the scope of the legislation were bitterly opposed. The main grounds were that it was contrary to the freedom of the individual to compel a person to insure and insurers would be deprived of their freedom to select risks. The protection of third parties was developed in a very different manner. *Instead the government preferred first of all, to protect the public against insolvent insurers. This was achieved in the main by legislation in 1938 which regulated the insurance industry.*¹⁴⁷ On the other hand opinions were in favour of the creation of a Motor Guarantee Fund. This was realised in 1951 when the Finance Law No.1508 of 31 December 1951 established the Fonds de Garantie Automobile in its article 15. Later, however, the financial deficit of the fund rendered the law on compulsory motor insurance inevitable. Compulsory insurance was introduced for all motorists in 1958 by Law No.208 of 27 February 1958 and Decree No.135

145 See Chapter Four on Protection of Road Traffic Accident Victims, pp.253-254. This measure may be regarded as an additional assurance of protection to remedy the deficiency created by compulsory insurance laws.

146 For public transport vehicles of passengers: Decree of 25 february 1935; public transport vehicles of goods: Decree of 13 July 1935; Racing cars and motorcycles: Decree of 25 July 1935.

147 Decree of 30 December 1938; now the provisions of this decree have been incorporated into the Insurance code 1976; see Collection d'École Nationale d'assurances, l'assurance - théorie - pratique - comptabilité, 1983, l'Argus, Paris, pp.137-226.

of 7 January 1959.¹⁴⁸ Thus in France, compulsory insurance completed the protection of third parties rather than started it as in England.

The idea of compulsory insurance was recognised quite early in West Africa. The British legislation on the subject was extended to four West African countries - Nigeria by the Motor Vehicles (Third Party Insurance) Act 1945¹⁴⁹; Gambia, by the Motor Vehicle (Third Party Insurance) Ordinance 1948; Ghana, by the Motor Vehicle (Third Party Insurance) Ordinance 1949 as amended in 1960. Cameroon later introduced compulsory motor insurance by law No.65 - LF - 9 of 22 May 1965.¹⁵⁰ As in the Western countries, the main reason for the introduction of compulsory insurance in all these countries is to ensure that money is available to compensate the innocent victims injured or killed in road accidents whatever may be the financial position of the tortfeasor, that is, the negligent motorist.

IV COMPULSORY INSURANCE AND FREEDOM OF CONTRACT

The law on compulsory insurance in respect of motor vehicles requires that before a person can put a vehicle on the road he must obtain the statutory cover against third party risks. Other compulsory insurances also require that persons must insure against certain statutory risks before they undertake their activities.¹⁵¹ This obligation to insure defies the

148 For the evolution of compulsory insurance in France see: E. Claeys, L'assurance obligatoire de la responsabilité des accidents d'automobile, 1962, L'Argus, Paris pp.3-56; Lucien Sicot and Joseph Bienvenu, L'Assurance Automobile Obligatoire, 1959, Paris.

149 In the former West Cameroon, that is, the English-speaking provinces of Cameroon, the compulsory insurance law of Nigeria was applicable.

150 It will be seen later that this law also established the Motor Insurance Fund (Fonds de Garantie Automobile) in its article 7. For a discussion on this subject see infra, Chapter Four on Protection of Road traffic Accident Victims at p.253.

151 In the case of other compulsory insurances see, below pp.226-239.

traditional doctrine of freedom of contract. In the nineteenth century the freedom of contract¹⁵² doctrine entailed that the parties were the best judges of their own interests. If they freely and voluntarily entered into a contract the only function of the law was to enforce it. It was immaterial that one party was economically in a stronger bargaining position than the other. Freedom of contract is of little value when one party has no alternative between accepting a set of terms proposed by the other or doing without the goods or services offered. With respect to motor vehicle insurance, vehicle owners can no longer opt between buying an insurance and driving without one. Furthermore, proposers for insurance are faced with standard form contracts, the terms of which have already been prepared by the other party to the contract; they are faced with the problem of accepting a policy hedged with conditions and warranties against them.¹⁵³

In England, as will be observed,¹⁵⁴ a person may retain his individual liberty by providing a security instead of taking out an insurance policy. However, there is no machinery to assist people who cannot provide that security in obtaining insurance. It is up to each individual to persuade an insurer to contract with him.

From our interviews with policyholders in Cameroon, we realised that motor vehicle insurance is recognised as one of those requirements which one must fulfill before driving a motor vehicle on the highway. However a majority of people do not see the need to insure and consider it as an expensive exercise which goes to enrich insurance companies. They fail to

152 Chitty, On Contracts: General Principles, Vol.I, 25th ed., 1983 London, Sweet and Maxwell pp.4-6.

153 Some compulsory insurance statutes have tried to limit the effect of certain restrictive conditions in compulsory insurance policies. See infra, pp.208, 211, 215 and 229-230.

154 Infra, at p.219.

realise that insurance is only expensive before an accident. There are a good number of drivers who do not comply with the law in their obligation to insure. Unfortunately, there are no comprehensive statistics on the number of uninsured motorists in Cameroon. In a limited survey carried out at Yaounde police station in the month of July 1983, it was revealed that 150 vehicles were impounded for failure to insure. Furthermore, insurance companies revealed that most policyholders in Cameroon only insure against their civil liability in respect of third party injury and damage. There are a few instances of policyholders insuring comprehensively or against theft or damage to the car by fire. The general limitation of cover strictly to the requirements of the law is indicative of the general reluctance to insure.

In England, the statistics are not illuminative of the actual situation of uninsured motorists. They show¹⁵⁵ that the findings of guilt at all courts for vehicle offences in 1977 was 149,501; in 1978, the figure was 150,010; and in 1979, 158,910. The statistics do not make any distinction between uninsured motorists and other vehicle offences such as failure to obtain a road fund licence.

In England, the obligation to insure is imposed on the user of vehicles. The question arises whether there is a corresponding duty on insurance companies to accept proposals from all persons required by law to insure. In Cameroon, this question is much debated.¹⁵⁶ Insurers do not seem

155 Home Office Statistics on offences relating to Motor Vehicles in England and Wales 1977, Cmnd.7349 p.50; 1978, Cmnd.7687 p.58; Cmnd.8087 p.62. However, the Accident Offices' Association produced figures suggesting that about one and half million motorists drive without any insurance cover: The Guardian, 31 August 1983.

156 M. Maurice Nkouendjin Yotnda, "Le refus d'assurer les TPV", October 1977, Argus, 1762-1765; "A propos du refus d'assurer" Cameroon Tribune No.805, 26 February 1977; "La protection des automobilistes en justice est assurée", Cameroon Tribune No.2688, 1 June 1983 at p.15.

to have this contractual freedom as it is considered to be incompatible with compulsory insurance. In order to deal with the situation where insurance companies seek to frustrate the scheme of compulsory insurance, the government has set up an administrative body charged with the duty to deal with cases of refusals by insurance companies. In Cameroon there is an established body called the 'Central Bureau of Rates, Supervision and Conciliation of Disputes.'¹⁵⁷ It is an arbitral body consisting of representatives of insurers, the public and the government. The Central Bureau is responsible in the case where a person subjected to compulsory insurance has been refused insurance cover or proposed conditions exceeding the normal tariff by an insurance company, (a) to decide on the propriety of such refusal; (b) where applicable, to lay down the terms on which the insurance company is bound to insure. Insurance companies who wittingly refuse to apply the decisions of the Central Bureau may incur a withdrawal of their licence. There is an express administrative procedure for consultation in order to avoid arbitrary decisions. Firstly, the Central Bureau must establish whether there has been a refusal. There is no difficulty in the case where the insurer expresses his intention not to accept the proposal. If the proposer is obtaining cover for the first time eight days silence is taken as an implicit refusal.¹⁵⁸ An insurer may instead of refusing cover, offer a policy extending beyond the scope of compulsory insurance. In the course of field research in Cameroon, it was observed that most insurance companies have a policy to persuade proposers and insureds of motor vehicles

157 In Cameroon, see: Article 6(1),(2) and (5) of Law No.65-LF-9 of 22 May 1965 establishing the Central Bureau of Rates, Supervision and Conciliation of Disputes and Decree No.65-DF-566 of 29 December 1965 organising the Central Office of Rates, Supervision and Conciliation of Disputes.

158 Article 2 of Decree No.65-DF-566 of 29 December 1965.

to insure against individual persons transported or take up personal accident insurance and in some cases require a life policy and insurance against responsabilité civile - chef de famille to cover members of the insured's family. When asked why they instituted such a practice, one insurance company said,¹⁵⁹ "C'est la politique de la compagnie pour faire l'équilibre du portefeuille de la compagnie". The legislation has not dealt satisfactorily with such a situation. This sort of case should be treated as a refusal to insure the risk proposed by the insured.¹⁶⁰ Secondly, the Central Bureau decides whether the proposed risk is abnormally high. The insurer and proposer are bound to furnish all relevant information concerning the subject of insurance. If the risk is classed as normal, the Central Bureau will apply the standard tariff. Where, however, the risk is classed as abnormally high, the Bureau has one of three alternative courses to apply: it may fix the premium at a higher level than normal; or apply the normal tariff and include a franchise clause; or combine the two alternatives. Once the Central Bureau has adjudicated on the matter the insurer must conclude the contract.

This system is more favourable to the proposer than the English laissez faire. But this raises a question as to what would be the legal basis for extending the obligation to insure on insurance companies to hire out their

159 Interview with Mr. Charles Alaka, Manager of service contentieux of Assurances Mutuelles Agricoles du Cameroun, July 1983. In spite of the high premium income realised in the motor insurance branch, it is reputed for bad business as the number of claims and settlements far exceed the revenue collected. See further, Jean Bosco Abogo, "L'Assurance Automobile: Clé de Voûte de l'Assurance Camerounaise?", Cameroon Tribune (No.2000) 11 and 12 February 1981, p.13.

160 On the other hand, it seems to be a desirable practice, which ought to be endorsed by legislation, particularly in respect of drivers. See further our proposal in Chapter Nine of this work, at p.494 and note 35.

services. Insurance companies are commercial undertakings. Should the companies in the face of increasing frequency of accidents and soaring underwriting losses (especially in the motor field) be required to insure every driver who has a licence to drive and every vehicle regardless of the risk run? A balance ought to be observed between the legal requirement incumbent on persons who are compulsorily required to take out insurance and the special commercial and professional undertaking to provide security. Insurance companies should be free to select their risks as this would affect their loss ratio and eventual solvency. It would be undesirable to impose on insurance companies business which they cannot support, especially in motor insurance which is notable in Cameroon as the class where bad business is experienced. Mr. C. Alaka pointed out that the claims and awards by the courts far exceed their premium income.¹⁶¹ This is difficult to verify as regrettably there are no statistics on the payments made on claims and awards in the motor insurance branch. In 1977-1978 insurance companies in a concerted action through the Association of Insurance Companies in Cameroon refused to insure certain makes of vehicles¹⁶² and vehicles of a certain age especially public transport vehicles even if this would lead to a withdrawal of their licence. As a result of this action the Ministry of Finance has proposed to fix a maximum age limit of vehicles that should be insured.

161 The same point was made by Jean Bosco Abogo, op. cit., see note 159 above.

162 See M. Nkouendjin Yotnda, "Problème de droit Camerounaise - Le refus d'assurer les Transports Publiques de Voyageurs", L'Argus, 1977 pp.1762-1765; "A propos de refus d'assurer", Revue Institut International des Assurances, No.4, 1977 pp.25-27.

V TYPES OF INSURANCE BUSINESS THAT ARE RENDERED COMPULSORY BY THE STATE

Of the various classes of insurance business carried out in England the following are rendered compulsory by the state: motor vehicle insurance; employers' liability insurance; public liability insurance in respect of riding establishments, contractors in the construction industry, operators of a nuclear establishment and aircraft operators; and professional indemnity insurance in respect of insurance brokers. Professional indemnity insurance may be required not by statute, but by the rules of a profession such as the Law Society.

In Cameroon, except for the following types of insurances which are decreed compulsory there is no obligation to insure: motor vehicle insurance, contractors' all risk insurance and insurance of imports.

One of the most difficult problems in the institution of compulsory insurance is to decide on the exact scope of the risk to be covered. Persons are not obliged to insure against, for example, all risks arising out of the use of a motor vehicle. A compromise has to be reached on the rights of the third party, the insured and the insurer.

We will study the various categories of compulsory insurance seriatim.

I Motor Vehicle Insurance

In England, section 143(1) of the Road Traffic Act 1972 provides that it is not lawful for a person to use or to cause or permit any other person to use a motor vehicle on a road unless there is in force in relation to the use of the vehicle by that person or that other person, as the case may be, a policy of insurance or a security in respect of third party risks as complies with the requirements of Part VI of the Act. Similarly, in Cameroon, article 1(1) of Law No. 65 - LF - 9 of 22 May 1965 provides that: "No person natural

or legal, may use or cause to be used on roads a mechanically propelled vehicle, trailer or segment of an articulated vehicle unless the owner's civil liability is covered by a contract of insurance satisfying this law and any regulation issued under it."

A detailed analysis of these provisions would reveal some similarities and differences in their application. The important questions for discussion on the ambit or scope of compulsory insurance would be: first, what risks are required to be covered by compulsory insurance for example, liabilities in respect of death and bodily injuries and property damage; second, for whose benefit is such liability to be incurred; third, the persons on whom the obligation to insure is imposed and those exempted; and fourth, the circumstances under which such persons could be found liable.

In contrast to Cameroon, in England it is only in relation to liability for the death of, or bodily injury to, third parties¹⁶³ that the Road Traffic Act 1972 has given a special character to motor insurance. By virtue of section 145(3) of the 1972 Act, the policy of insurance (a) must insure such person, persons, or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by, or arising out of, the use of the vehicle on a road; and (b) must also insure him or them under the provisions of this part of this Act relating to the payment for emergency treatment. It should be noted therefore that insurance is not compulsory in respect of liability concerning damage to the property of a third party.

163 For other types of insurance cover see: R.L. Carter, Handbook of Insurance, Vol.II, London, 1973-84, 7.1-18; J. Birds, Modern Insurance Law, 1982 London, 313; M.R. Russell Davies, The Laws of Road Traffic in Great Britain 5th ed., London 1973, Shaw & Sons Ltd, p.427.

One of the steps towards harmonisation in member countries of the European Economic Community is to extend compulsory third party insurance to cover damage to property as well as cover against personal injury and death.¹⁶⁴ In this respect but to a certain extent, as will be seen in the following discussion, this Directive is the first to produce any significant effect upon United Kingdom Road Traffic legislation.¹⁶⁵ The Directive¹⁶⁶ allows each member state to decide whether compulsory insurance cover obtained by its own nationals will be limited but sets certain minimum figures. We should however note that United Kingdom legislation requires cover against personal injury to be unlimited in amount.¹⁶⁷ Generally, insurance policies provide unlimited cover for damage to property but usually

164 Article 1 of the Second Council Directive of 30 December 1983 on approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles. (O.J. 1984, L8/17) (84/5EEC). Any changes to national laws must be made by December 31, 1987, and be implemented by December 31, 1988: Article 5(2) Ibid.

165 However, this Directive does not impinge on the law of civil liability.

166 Article 1(2) Ibid. In the case of personal injury the limit is 350,000 ECU (£200,000) for any one victim or 500,000 ECU for any combined injuries arising from any one accident. A minimal amount of damage to property irrespective of the number of victims in any one accident is 100,000 ECU (£67,000). In the case of personal injury and damage to property arising out of one event, a minimum overall amount of 600,000 ECU per claim can be imposed, irrespective of the number of victims or the nature of the damage. For the definition of European Currency Unit see Article 3 Ibid. and further article 1 of Council Regulation (EEC) of 18 December 1978 changing the value of the unit of account used by the European Monetary Cooperation Fund (O.J. No.3180/78) 30:12:78 at p.1

167 One of the problems facing the government and the insurance industry is whether there will be insistence upon the same requirement for property damage claims. This would require an amendment to the terms of third party sections of most commercial policies: see Department of Transport Consultation Document, Giving Effect to the Second European Community Motor Insurance Directive, 1984, paras. 4.2 and 4.3.

restrict liability for damage caused by commercial vehicles.¹⁶⁸ It appears that the extension of compulsory insurance to property damage will itself have only a limited effect on the amount paid out in compensation under insurance policies.¹⁶⁹

In rendering third party property cover compulsory, it seems necessary to ensure that the benefits of compulsory property insurance are accorded to third parties. This raises the perennial question of notification of accidents.¹⁷⁰ It is proposed¹⁷¹ that the requirements which now apply to personal injury accidents under section 149 of the Road Traffic Act 1972 should be extended to cover third party property damage. The driver of a vehicle involved in any accident will be required by law to give details of his insurance cover to anyone who reasonably requires this information and

168 The restriction for commercial vehicles is however well above the Directive's figure stated in note 166 above. This figure seems adequate for property damage likely to be caused by a car, but commercial vehicles are usually larger and the loads they carry may well pose an additional threat.

169 However, it seems that there might be higher claims frequency particularly to the Motor Insurers' Bureau, see *infra*, p.267. This may eventually be covered by higher premiums payable by policyholders.

170 It hardly seems practicable for the police to note all accidents involving damage to property. Coupled with this situation is the common problem of motorists not reporting accidents to their insurers, see Department of Transport comment in the Consultative Document, *op. cit.*, para. 2.6. Thus, even where liability is fairly obvious and the guilty motorist's insurance company is ready and willing to meet a claim, the company is under no obligation to indemnify the claimant unless the motorist officially notifies his insurer.

171 See: Department of Transport, Consultative Document, *op. cit.*, para. 2.7.

failing that at a police station.¹⁷² The arrangements under section 149 of the Road Traffic Act 1972 secure that, except in certain specified circumstances where insurance policies are cancelled, or where they have been obtained fraudulently, an insurer is obliged to deal with any third party claim or meet any court judgment requiring compensation for the victims of an accident whether or not his policyholder has reported the accident to him. This in effect gives the third party a direct right against the insurer analogous to that provided under the Third Parties (Rights against Insurers) Act 1930.¹⁷³ It may be noted that this direct right of action against the insurer is only exercisable when judgment has been given against the insured. Linked to this, is the question of direct access to third party insurers. One may question whether complete protection of all third parties in relation to motor accidents has been provided. Ultimately, there seems to be a need for the victim or third party to sue the insurer concerned by name in his original action especially in compulsory motor insurance. Admittedly, in most cases the real defendant is an insurer, one of whose functions is to guarantee that if the nominal defendant is found liable the award will be

172 This would require an amendment to section 166 of the Road Traffic Act 1972. It appears that until the central issue of future police involvement for reporting property damage accidents is resolved, the target date of the end of 1986 (intended by the government) for implementation of the Directive is unlikely to be met: Reply to inquiry from Mr. M. Ainsworth, Department of Transport, letters dated 2 October and 21 November 1985 and 31 January 1986. It is not clear whether the Government will provide any sanction by making it a criminal offence not to report major damage only accidents. However, any measure that would force drivers to report accidents seems favourable to insurers. It will enable insurers to keep tighter checks on their client's driving records. This further recognises the problem of non-disclosure which is at the root of too many disputes over motor insurance. For further discussion of this see, Chapter Five of this work, pp.301-326.

173 This latter right is only exercisable in cases of insolvency of the insured: section 1 of the Third Parties (Rights Against Insurers) Act 1930. See further, J. Birds, op. cit., pp.300-304.

met. In addition, it seems unnecessary to bring the nominal defendant when the real defendant - the insurer - is the one who would eventually conduct the case. Perhaps, a better reform would be for the plaintiff to sue the insurer direct. This is the case in Cameroon. By contrast to section 149 of the Road Traffic Act 1972 in England, in Cameroon, article 4(3) of Law No.65 - LF - 9 of 22nd May 1965 does not make such a distinction. The third party may initially sue the insurance company directly without joining the insured or may sue the insured and the insurance company jointly.¹⁷⁴

In contrast to the present legislation in England, compulsory insurance is required against personal injury and damage to property. Article 2 of Decree No. 65-DF-565 of 29 December 1965 provides that the guarantee prescribed in article 1¹⁷⁵ must include bodily injuries and property damage resulting either from a burst of flame, explosion or fire coming from the vehicle or the goods carried on it whatever may be the cause of the said burst of flame, explosion or fire or from objects falling from the vehicle.¹⁷⁶

174 See supra, p.178.

175 See below, p.210.

176 Article 3 of the same Decree, further reinforces this as it provides for the replacement of a damaged vehicle under the compulsory cover. However, article 4 excludes from compulsory insurance damage to property belonging, let or entrusted to the insured party or the driver and damage resulting from loading or unloading operations of the insured vehicle. As in England, it is customary for the owner or carrier to obtain a separate 'goods in transit' insurance cover. But quære implications of such an exclusion in regard to passenger's luggage and possessions conveyed in a vehicle and damaged through the negligence of the driver who has not taken advantage of the additional insurance available to indemnify himself against such losses: See Department of Transport Consultative Document, op. cit., para. 4.6.

It is worth noting certain points which arise from the wording of article 1 of Decree No. 65 - DF - 565 of 29 December 1965, especially the aspect of the financial limit imposed. Article 1(1) provides that the compulsory insurance provided for by Law No. 65 - LF - 9 of 22 May 1965 must guarantee:-

1. Civil liability towards persons not transported, not exceeding 50 million Francs CFA per vehicle, trailer or semi-trailer and per accident;
2. Unlimited civil liability towards persons transported for valuable consideration even occasionally;¹⁷⁷
3. Unlimited liability towards third parties for accidents caused by:
 - (a) Vehicles the total authorised loaded weight of which exceeds 3,500 Kilogrammes, or built to carry more than eight persons excluding the driver, or towing a trailer or semi-trailer the total authorised loaded weight of which exceeds 750 Kilogrammes.¹⁷⁸

The limited liability in respect of persons not transported, such as pedestrians and other third parties who are not passengers in article 1(1) seems anomalous. On a strict application, where there are several victims in an accident and the total claim exceeds 50 million francs CFA, each victim can only claim a proportion of the indemnity. In practice, however, insurance companies apply an unlimited guarantee for bodily injury and property damage¹⁷⁹ caused to third parties following an accident.

177 For reasons of convenience, we would delay discussion in respect of article 1(2), see infra pp.216-217.

178 In respect of article 1(3), the unlimited civil liability concerns vehicles whose driver requires a driving licence of class C,D or E as specified by regulation 42 of the Highway Code: Decree No.79/341 of 3 September 1979 laying down regulations relating to Road Traffic. Such driving licences are required by drivers of commercial and public transport vehicles.

179 But note the exception in article 4 at note 176 above.

In both England and Cameroon, policies frequently contain clauses restricting the liability of the insurers in various ways. For example, by reference to the driver of the vehicle, the condition of the vehicle or the purposes for which the vehicle is used. In England the Road Traffic Act 1972 interferes with the contractual rights of insurers for the benefit of third parties to whom the insured is legally liable to pay damages. By virtue of section 148(1) of the Road Traffic Act 1972, the insurer cannot avoid liability under a policy in respect of a claim brought by a third party cover for which is required under Section 143 of the 1972 Act.¹⁸⁰ Furthermore, article 2(1) of the Directive will require additional items to be added to the list in Section 148(1) of the 1972 Act of conditions which afford no defence against an injured third party, such as conditions relating to the condition or safety of the vehicle, or the use of vehicles by unauthorised or unlicensed drivers.¹⁸¹ The proviso to section 148(2) allows insurers to

180 Because first, of a failure of a person insured under the policy to observe any condition in the policy which is precedent to the liability of the insurer to pay the claim. Second, any restriction in the policy relating to (a) the age or physical or mental condition of the persons driving the vehicle; (b) the condition of the vehicle; (c) the number of persons that the vehicle carries, the weight or physical characteristics of the goods that the vehicle carries; (d) the time at which or the areas within which the vehicle is used; (e) the horse power or cylinder capacity or value of the vehicle; (f) the carrying on the vehicle of any particular means of identification other than any means of identification required to be carried by, or under the Vehicles (Excise) Act 1971 are of no effect against a third party's right of recovery. Further, section 148(2) invalidates other breaches of condition by the insured with regard to a claim made by a third party. The conditions referred to are those providing that no liability shall arise under the policy, or that any liability so arising shall cease, in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to the claim. This covers a breach by the insured of a condition regarding notice or particulars of loss and an admission of liability in breach of a standard condition.

181 The latter requirement can be found in the new French law of July 1985, article 8.

insert in their policy provisions, clauses allowing them to recover back from the insured money which they have had to pay to a third party only by virtue of this sub-section.

The extension of avoidance in relation to unauthorised or unlicensed drivers will not prevent an insurer from continuing to offer policies restricted to named or approved drivers.¹⁸² However, since the law precludes reference in certificates of insurance to policy conditions which are subject to avoidance, the certificate would no longer be a means of discouraging a breach of the policy restrictions. It is proposed¹⁸³ that by amendment of the Motor Vehicles (Third Party Risks) Regulations 1972,¹⁸⁴ the creation of a summary road traffic offence¹⁸⁵ of driving in breach of certain policy conditions to which section 148 of the Road Traffic Act 1972 applied would be required on insurance certificates without misrepresenting the insurance protection given to third parties.

It should be noted that the insurer, in spite of section 148, can avoid liability as against a third party for any other condition¹⁸⁶ not referred to in section 148 of the Road Traffic Act 1972, any condition limiting the use¹⁸⁷ of the vehicle and for breach of non-disclosure and misrepresentation.¹⁸⁸ In these cases, as will be discussed in Chapter

182 Department of Transport Consultative Document, op. cit., para. 2.4.

183 Ibid para. 2.5.

184 S.I. 1972 No.1217

185 With penalties similar to those for the offence of driving a motor vehicle without insurance, see infra, p.242.

186 See for example, National Farmers' Union Mutual Insurance Society v. Dawson [1941] 2 K.B. 424.

187 Jones v. Welsh Insurance Corporation [1937] 4 All. E.R. 149.

188 For further detail, see discussion on pp.323-325 and 345-346.

Four,¹⁸⁹ the Motor Insurers' Bureau will have to satisfy the third party's judgment. In the light of the existence of the Motor Insurers' Bureau which satisfies judgments in the situation where a policy is ineffective, it is hard to see any reason for retaining an inexhaustive list of conditions in respect of breach of which the insurer cannot avoid liability. In contrast, in Cameroon, the legislation on compulsory insurance does not provide special protection to the injured third party from the strict contractual rights of the insurer as against the insured who is in breach of conditions in the policy.¹⁹⁰ Before 1967, the injured parties might receive no compensation if the insured himself could not satisfy the claim. However, article 12 of Decree No.67 - DF - 495 of 17 November 1967 fixing the status of the Motor Insurance Fund provides that, in the case of compulsory insurance, insurance companies should notify the Motor Insurance Fund if they intend to raise a defence of non-compliance with the terms of the contract. In practice, however, the insurance company repudiates liability and the case is considered as one of no insurance cover. In this situation the third party's only recourse is against the Motor Insurance Fund,¹⁹¹ a similar body to the Motor Insurers' Bureau in England.

Furthermore, the effect of section 145 of the Road Traffic Act 1972 in England, is that insurance cover is required in respect of any liability for the death or bodily injury of any person including a passenger. There is no

189 See infra, p.287.

190 This list will be increased but still be inexhaustible because of the provisions of the E.E.C. Directive already discussed, see supra, p.211 and note 180.

191 Instead, the legislation penalises an insured who obtains a policy with exclusions of guarantee in breach of the compulsory insurance requirements: See, article 5 of Decree No.65-DF-565 of 29 December 1965.

distinction between fare paying passengers and gratuitous passengers.¹⁹² Compulsory insurance in respect of passengers was first introduced by section 1 of Motor Vehicles (Passenger Insurance) Act 1971. Before 1972, it was not compulsory to insure in respect of liability for death or bodily injury sustained by passengers carried in a vehicle unless they were carried for hire or reward or by reason or in pursuance of a contract of employment.¹⁹³ This created a fairly substantial gap in the law and gave rise to some consequences. In Morgans v. Launchbury,¹⁹⁴ the permitted driver, husband of the insured, gave permission to a friend to drive the car. The latter was negligent and the passengers were injured. The issue involved in this case was whether the insured as owner of the car was vicariously liable for the acts of the driver. It was held that the insured was not liable. If the insurance company were not liable then the passengers would get no compensation at all. It would have been of no avail for the passengers to make a claim on the Motor Insurers' Bureau as the Bureau was not obliged to pay for injury to passengers. However, now that liability to passengers has to be insured against, there is the possibility of making a claim to the Motor Insurers' Bureau in the last resort.

192 Section 145 of the Road Traffic Act 1972.

193 Section 203(3) of the Road Traffic Act 1960 now see article 145(4) of the Road Traffic Act 1972. The 1972 Act does not concern itself with liability for death or bodily injury to an employee of the person insured where such injury arises out of and in the course of his employment: Compulsory Insurance for this risk is included in the provisions of the Employer's Liability (Compulsory Insurance) Act 1969, see infra, p.226-233. In respect to contracted liabilities, it would seem unfair to burden an insurer with some unknown liability arising out of an agreement involving, as it usually does, liability outside tort except those prescribed by Common Law and Statute.

194 [1973] A.C. 127; On appeal from Launchbury v. Morgans [1971] 2 Q.B. 245 at 253.

Moreover, in respect to passengers section 148(3) of the Road Traffic Act 1972 has provided statutory protection by modification of the Common Law defence of volenti non fit injuria: It provides that the fact that the passenger has willingly accepted as his the risk of negligence on the part of the user (that is, the owner or driver of the motor vehicle), is not to be treated as negating any such liability of the latter for any injury that may be incurred. The full effect of section 148(3) of the Road Traffic Act 1972 seems to be unclear in the light of two conflicting decisions at first instance. In Gregory v. Kelly,¹⁹⁵ Kenneth Jones J. considered that the provision effectively prevented a volenti defence being raised against an injured passenger. The decision on this particular point was based on a concession by both counsel.¹⁹⁶ However, in Ashton v. Turner & McLune,¹⁹⁷ per Justice Ewbank decided that a plea of volenti could be entertained despite section 148(3) where an accomplice passenger was suing a negligent driver who had an accident when both of them were escaping from the scene of a burglary in which they had been involved. The actual decision here was based on the principle of public policy¹⁹⁸ and therefore the consideration of the defence of volenti non fit injuria together with the attendant question of the effect of section 148(3) does not seem to be strictly necessary to the decision. It may be contended that both cases were decisions by single judges and the question arising under section 148(3) of the Road Traffic Act 1972 was dealt with in somewhat telegraphic terms. This seems to suggest that the point may not have been fully argued in either case and therefore, there is room for

195 [1978] R.T.R. 426 esp. at 430.

196 The brief observations by Kenneth Jones J. was technically obiter.

197 [1980] 3 W.L.R. 736 esp. at 746.

198 Ibid 740 esp. at p.745.

argument either way. One may argue that section 148(3) of the Road Traffic Act 1972 was designed to deal with the normal case of volenti non fit injuria¹⁹⁹ in view of the daunting finality of such a defence. The fact of raising a plea of volenti non fit injuria infers that a defendant has been negligent. The result of a successful plea of volenti non fit injuria effectively means that the defendant who is basically a wrongdoer provides no compensation. It may therefore be contended that section 148(3) was aimed at obviating or preventing a victim, in this case, a passenger with a remedy. In any event, if there is effective insurance in the background, the defence of volenti would seem to be a defence of dwindling importance for obvious practical reasons.²⁰⁰

In contrast, in Cameroon, the legislation makes a distinction between gratuitous passengers and persons transported for valuable consideration.²⁰¹ Article 1(2) seems to suggest that gratuitous passengers are not covered by compulsory insurance. In Alfred T. Tarkang v. Royal Exchange Assurance,²⁰² the deceased was a pillion passenger who promised to fuel the insured's motor cycle. The court held that even if that amounted to a valuable consideration, the insurers could not be liable in damages because the motor cycle was not insured for the purposes of carrying persons for valuable consideration. The motor cycle was insured for social, domestic and pleasure purposes and

199 See further, the Scottish case of Winnik v. Dick (1984) 2 S.L.T. 185 esp. at 190 per Lord Hunter.

200 See the views of the other judges in respect of the doctrine of res ipsa loquitur, supra pp.179-181. For further discussion of the defence of volenti non fit injuria, see A.J.E. Jaffey, "Volenti non fit injuria", (1985) 44 C.L.J. 87 esp. at pp.94, 101-104.

201 See supra, p.210; By virtue of articles 1 and 8 of the Law of July 1985, in France both gratuitous and paying passengers are now covered by compulsory motor insurance.

202 Civil Appeal No. WCCA/10/71 of 22 December 1971, Buea, (Unreported).

and for the insured's business.²⁰³ This seems to confirm the fact that gratuitous passengers are not covered by the compulsory motor insurance laws in Cameroon thus creating a gap similar to that which, as has been seen, existed in England before 1971.

Unlike in England, the Cameroonian legislation is silent on the issue of volenti non fit injuria in respect of passengers who are covered by compulsory insurance. In the absence of any express statutory protection to third parties similar to the provisions of section 148(3) of the Road Traffic Act 1972, it may be assumed that the legislation simply provides for a compulsory guarantee of liabilities to third persons transported for valuable consideration without regard to the defence of volenti non fit injuria. On the other hand, no similar privilege is accorded to gratuitous passengers. It appears that in such cases these victims will seek compensation from the Motor Insurance Fund.

In England, the obligation to insure is imposed on any person using or causing or permitting another person to use a motor vehicle.²⁰⁴ The expression "any person" includes a limited company and is not confined to the driver of the vehicle.²⁰⁵ Similarly, in Cameroon, the obligation to insure falls on any person, natural or legal who may use or cause to be used on roads a vehicle. Companies are included in this definition as they are legal persons. Further, in the light of articles 1382 and 1384 of the Civil Code three categories of persons could be civilly liable for any tortious acts.

203 Ibid at p.3. It was mainly for the latter reason that the judge advised the plaintiff to apply to the Motor Insurance Fund.

204 For an elaboration of the words "using" or "causing" or "permitting", see infra, pp.221-222.

205 Williamson v. O'Keefe [1947] 1 All. E.R. 307 esp. at 308 per Lord Goddard, L.C.J.; See also, section 143(2) of the Road Traffic Act 1972.

Firstly, the person whose physical act causes the damage, namely, the driver. Secondly, persons liable by virtue of article 1384 for the acts of others, such as parents and employers of drivers. Thirdly, the owner of the vehicle on whom a presumption of liability falls by virtue of article 1384(1). However, the obligation to insure is not placed on each of these persons concurrently. The law limits the obligation on persons who put the vehicle on the road. Normally, this would be the owner of the vehicle.

In both England and Cameroon, there are some statutory exemptions from the obligation to insure. This may arise by virtue of their status.²⁰⁶

206 These include vehicles in the public service of the crown: section 144(2)(a) ibid; vehicles owned by a public authority or the Receiver for the Metropolitan Police District or vehicles while being driven for police purposes, by or under the direction of a constable or a police employee: section 144(2)(b) ibid; vehicles being driven on a journey for salvage purposes under the Merchant Shipping Act 1894: section 144(2)(c) ibid; or used for certain purposes under the Army or Air Forces Act 1955: section 144(2)(d) ibid; tramcars and trolley vehicles operated under statutory powers: section 198(5) ibid; and pedestrian controlled motor mowers: section 193 ibid; vehicles owned by the London Transport Executive while being driven under the owner's control: section 144(2)(e) ibid. However, the majority of local authorities buy insurance where it is considered a more viable method of coping with the risk and some prefer to self-insure, for example, Glasgow District Council and the scheme is operated by charging a premium to each department within the Council, or fund motor claims from internal resources. With respect to invalid carriages: section 143(3) of the Road Traffic Act 1972. The D.H.S.S. arranges third party insurance cover and it is left to the user to insure for damage if he/she chooses to do so. This risk is usually tacked on to a Householder's insurance policy. The number of Invacar users is however decreasing by about 10% each year as people either give up motoring in exchange for the allowance provided or opt for the motability scheme. See: Post Magazine and Insurance Monitor motor correspondent, "Invalid Cars", Post Magazine and Insurance Monitor, 25 March 1976, Vol CXXXVII, No.13, pp.709-710; Dan Cassidy, "Compulsory motor insurance and the alternative: 2", Post Magazine and Insurance Monitor, 17 October 1985, Vol.146, No.42 at p.2860.

Their operations are being funded ultimately by the Government, thus making it unnecessary to compel any form of monetary guarantee. Similarly, in Cameroon, only the state is totally exempt as its solvency cannot be doubted.²⁰⁷ However, the system of exemption in England is more flexible than that in Cameroon as it provides alternatives to conventional insurance cover, namely, the deposit and the security. In England unlike in Cameroon, a person can maintain his individual liberty by depositing the sum of £15,000 with the Accountant General of the Supreme Court.²⁰⁸ In 1984,²⁰⁹ there were six depositors under section 144(1) of the Road Traffic Act 1972. It may be worth noting that, in England a policy does not include any financial limit on cover against third party risks, yet a person is exempted from the obligation to take out a policy if he deposits the sum of £15,000 with the Accountant General of the Supreme Court. This seems to be a sort of soft option to make people feel they have an alternative to compulsory insurance. However, it is far-fetched to expect that advantage will be taken of this

207 Article 3 of Law No.65-LF-9 of 22 May 1965. There is a right of action against the state in the event of any of its vehicles causing injury and/or damage to third parties. Further, article 10 of Decree No.65-DF-565 of 29 December 1965 provides that "with regard to the use of state owned vehicles registered under normal series and not covered by an insurance, an attestation of the ownership must be established by the responsible authority".

208 Section 144(1) ibid. This has been confirmed by the Principal of the Court Funds Office London, in reply to an inquiry, letter dated 11 January 1984. It seems rather curious that this provision still survives.

209 Reply to an inquiry, letter dated 13 March 1984 from Mr. M. Ainsworth, Department of Transport. Currently, nine deposits have been made: see Dan Cassidy, "Compulsory motor insurance and the alternative:2", Post Magazine and Insurance Monitor, 17 October 1985, Vol.146, No.42, 2860 at p.2862; The exemption from compulsory insurance operates only while the vehicle concerned is used under the depositor's or exempt authority's own control: Department of Transport Consultative Document, op. cit., para. 6.3. See infra, p.263 note 40A for the case where the vehicle is used without the owner's authority and without the required insurance.

opportunity to maintain individual liberty.²¹⁰ The sum of £15,000 may represent third party insurance premiums of ten to fifteen years. Most people would prefer to pay the ordinary third party premiums yearly than hold down such an amount of money. It is, therefore, not surprising that not many people and in particular, individuals have taken advantage of this option. Admittedly, a limit has to be fixed in the case of a deposit of security but the present one seems too low: a policy against third party risks has no financial limit. The deposit of £15,000 has stood at this level since 1930 and is now completely inadequate in relation to current levels of awards in respect of compensation for bodily injury and death.²¹¹ There is no guarantee that the exempt person will have the additional finances necessary to satisfy an award in excess of £15,000.

The person subjected to compulsory insurance must 'use', 'cause' or 'permit' another person to use a 'motor vehicle' on a 'road'. We would briefly examine the implications of these requirements.

In England, the word "use" has given rise to some difficulties. However, it appears that this involves at least some element of control, management or operation of the vehicle. It has been held that a passenger who opens the door of a car negligently and injures a pedestrian is not

210 It is worth remarking that out of the nine deposits we mentioned at note 209 above, three of these are from branches of the same organisation. Being large enterprises, the amount of the deposit is trivial in comparison to the potential of third party injury claims: See, Dan Cassidy, op. cit., at p.2862.

211 It is probable that this deposit would be updated in the near future when compulsory insurance for damage to third party property is implemented. In the case of securities see, article 146(1) of the Road Traffic Act 1972. This measure also bears similar criticisms as in the case of deposits. See further, Dan Cassidy, op. cit., at p.2862.

'using' the vehicle within the meaning of the statute.²¹² A passenger does not "use" a car since there is no element of control, management or operation by him and thus the compulsory policy need not cover the liability of passengers to third parties. Further, in B (a minor) v. Knight,²¹³ the defendant entered as a passenger in a van which was being driven by another who unknown to the defendant, had taken the van without the owner's consent and without insurance cover. In the course of the journey the defendant learned of the taking without consent but did not ask to be allowed to get out. He was convicted by the justices of using the van uninsured in contravention of section 143(1) of the Road Traffic Act 1972. On appeal against conviction it was held, allowing the appeal, that a passenger in a vehicle who had no power of control over its drivers did not use the vehicle within the meaning of section 143(1) of the Road Traffic Act 1972 and did not aid and abet the uninsured use of a vehicle merely by letting himself be driven even if he knew of the lack of insurance and that accordingly, the justices had erred and the conviction was quashed.

In addition to the prohibition against using a motor vehicle on a road personally without effective insurance, to "cause" or "permit" any other person to breach the requirement is also unlawful.²¹⁴ Here, "causing" may

212 Brown v. Roberts [1965] 1 Q.B.1 at p.11 per Megaw, J.; The word "use" must be distinguished from the word "drive" and is equivalent to "have the use of" a motor vehicle on a road. See for example, Elliott v. Grey, [1960] 1 Q.B. 367 esp. at p.370; per Lord Parker, L.C.J.: The word "use" in the 1972 Act probably intends to cover a motor vehicle both when it is being driven and when it is not being driven on the road.

213 [1981] R.T.R. 136 esp. at p.138; Brown v. Roberts [1965] 1 Q.B. 1; Smith v. Baker [1971] R.T.R. 350; Garrett v. Hooper [1973] R.T.R. 1; cf. Drysdale and others v. Harrison [1973] R.T.R. 45; Cobb v. Williams [1973] R.T.R. 113; see also, Bennett v. Richardson [1980] R.T.R. 358 esp. at p.361.

214 See note 215 below.

involve some express or positive order or authority, but "permitting" denotes permission expressed or implied as distinguished from a definite order or authority.²¹⁵

In Cameroon, the legislation does not define the circumstances in which a person uses or causes or permits another to use a vehicle on the road. However, it is implicit from the legislation that the offence is committed by the owner and driver as they are normally the persons having the use of the vehicle as well as its management and control.²¹⁶ Perhaps, more properly, an interview with the Director of the Department of Insurance as to the elaboration of the compulsory insurance provisions threw some light on these phrases. He replied that, "L'obligation d'assurance joue des que la mise en circulation du véhicule créé un risque d'accident susceptible d'entraîner la responsabilité civile de l'utilisateur que la circulation ait lieu à l'intérieur d'une propriété privée ou sur une voie publique."²¹⁷ The phrase mise en circulation connotes and necessarily means "put to use", "cause" or

215 For example, see Monk v. Warbey and others [1935] 1 K.B. 75. This decision renders the owner of the car liable in the case where he has allowed someone else to drive the car and therefore in practice may place his insurance company at risk, see infra, p.242. Thus the effect of the decision in Monk v. Warbey, supra, is that even where a policy does not cover any person driving a car with the owner's permission (as most policies provide in their permitted drivers clauses) such cover is, in effect, compulsorily written into the policy. The importance, however, of this decision has been greatly reduced by the creation of a Motor Insurers Bureau which provides compensation to victims where the tortfeasor's insurance policy is ineffective: See infra, Chapter Four, pp.266-290. Moreover, if article 2(1) of the Second Council Directive (O.J. No. 1984 L8/17) op. cit., is implemented, the third parties would be protected by the provisions of section 148(1) of the Road Traffic Act, see supra, p.211.

216 See below at pp.240-241 for a discussion of articles 8 and 9 of Law No.65-LF-9 of 22 May 1965 relating to enforcement and sanctions for non-compliance with the legislation.

217 Added emphasis. The phrase mise en circulation can also be found at article 6 of Decree No.65-DF-565 of 29 December 1965.

"permit" when it refers to the use of a motor vehicle. This would normally be done in the case of "use", or alternatively allowed in respect of "cause" and "permit" by the owner to a driver who had the control, management or operation of the vehicle.

Furthermore, the use of the vehicle must be on a road. In this connection "road" as defined by section 196 of the Road Traffic Act 1972 means "any highway and any other road²¹⁸ to which the public has access, and includes bridges over which a road passes". An accident which occurs after a vehicle has left the highway and entered a private road is not one arising out of the vehicle's "use" on the road²¹⁹, but in Randall v. Motor Insurers' Bureau,²²⁰ the plaintiffs suffered injury whilst the greater part of the lorry was on a road though part was on private land. It was held that in such circumstances the lorry was using a road and accordingly the driver had to be insured against third party risks. Further, in Oxford v. Austin,²²¹ the issue arose as to whether a car park was a road. The defendant who left his uninsured motor vehicle which was without an MOT test certificate in a car park with parking spaces marked by white lines was charged with unlawful use of the vehicle on a road within the definition of section 196(1) of the Road Traffic Act 1972. The justices were of the opinion that the area of the car park was privately owned and was primarily intended for the use of shop workers, residents of flats and shoppers for the parking of vehicles as indicated by signs at the entrance and that the area was one to which only a restricted class of persons had access by virtue of restrictions on the

218 Added emphasis.

219 Lister v. Romford Ice and Cold Storage [1957] A.C. 555.

220 [1968] 1 W.L.R. 1900.

221 (1981) R.T.R. 416; CF. Griffin v. Squires [1958] 1 W.L.R. 1106 at 1108 per Lord Parker, C.J.

entrance and therefore not a road. On appeal it was held, allowing the appeal, that on a question about a car park being a road within section 196(1) of the Road Traffic Act 1972 the justices had to determine first, whether the car park was a road in that there was a definable way between two points over which vehicles could pass and they then had to determine whether the public or a sector of the public had access to the road and that if both questions could be answered affirmatively the car park was a "road" for the purpose of section 196(1) of the Road Traffic Act 1972.

It appears that the definition of a "road" within the meaning of section 196(1) of the Road Traffic Act 1972 is fairly wide and goes beyond public thoroughfares to which members of the public have access by virtue of a positive right. It therefore includes what are normally termed "private roads". Furthermore, it seems that the eligibility of members of the public to access does not have to stem from a positive right, but may derive from a mere licence, simply because their presence is tolerated by the owners.²²² The test is not whether the public has right of access but whether it is a fact that the public has access.²²³ The relevant issue is the actual access had by members of the public as such.²²⁴ If, however, access to the road in question was obtained by overcoming an obstruction or in defiance of an

²²² But see however, the following discussion.

²²³ Cox v. White [1976] R.T.R. 248 at 250; See also Blackmore v. Chief Constable of Devon and Cornwall, The Times, 6 December 1984.

²²⁴ It appeared that the attitude of the owners of the road to that use ought to be consent rather than tolerance: Cox v. White [1976], supra. In addition, there ought to be a sufficient degree of use by members of the public in general to satisfy the test of whether the public in general have access. Access which fell within the maxim de minimis non curat lex would not suffice to establish the public use test required by section 196(1) of the Road Traffic Act 1972. See: Kreft v. Rawcliffe, The Times, 12 May 1984.

expressed or implied prohibition, for example, a trespass, then it has been stated that the road concerned would not be a "road within the definition of section 196(1) of the Road Traffic Act 1972."²²⁵ It may be worth noting however, that in practice most English policies cover use on private land.

On the other hand, in Cameroon, the legislation itself does not provide any definition as to the meaning of a "road". We may therefore, reiterate the comment by the Director of the Department of Insurance in particular, the phrase, à l'intérieur d'une propriété privée ou sur une voie publique²²⁶. This seems to suggest that a vehicle must be covered by insurance whenever it is in a place open to traffic, private or public and regardless of whether it is moving or stationary. Prima facie persons injured on private land are better protected in Cameroon than in England where only use on a road to which the public has access need be covered.²²⁷

It is interesting to note that the Cameroonian legislation applies to motor vehicles²²⁸ as does the English. The English legislation incorporates a definition of a "motor vehicle". It is a "mechanically propelled vehicle intended or adapted for use on roads."²²⁹ This definition makes it clear that such things as hovercraft, lawnmowers and railway engines are outside the

225 Cox v. White [1976] R.T.R. 248 esp. at 251.

226 See supra, p.222.

227 In England, the issue seems to be debatable: see, notes 223, 224 and 225 above.

228 Article 1 of Law No.65-LF-9 of 22 May 1965.

229 Section 190(1) of the Road Traffic Act 1972. For a further discussion on this, see: Kenneth Cannar, "The Frontiers of compulsory insurance", Post Magazine and Insurance Monitor, 22 March 1979, Vol.CXL, No.12 pp.877-878.

scope of the legislation.²³⁰ They are not "intended or adapted for use on roads".

Whether a vehicle is mechanically propelled will depend on the circumstances. Thus, in Smart v. Allan,²³¹ the defendant was convicted of using a Rover car without there being a policy of insurance. Evidence was given that he had bought the vehicle for £2 as scrap. He had towed it on two wheels from place to place and ultimately left it on the road. The engine, incomplete and in a rusty condition, did not work. The tyres, one of which was missing, were flat. There was neither a gearbox nor a battery, and the vehicle certainly could not move of its own accord. The defendant appealed and his conviction was quashed. Lord Parker, L. C. J. observed²³² that where, as in the present case, there was no reasonable prospect of the vehicle ever being made mobile again, it seemed that it had ceased to be a mechanically propelled vehicle. On the other hand, in Newberry v. Simmonds²³³, Widgery, J. observed²³⁴ that, "... a motor car does not cease to be a mechanically propelled vehicle on the mere removal of the engine if the evidence admits the possibility that the engine may be replaced and the motive power restored".

2. Employers' Liability Insurance

In England, unlike in Cameroon, Employers' Liability Insurance is compulsory. By virtue of the Employers' Liability (Compulsory Insurance) Act

230 In Cameroon, see, article 2 of Law No.65-LF-9 of 22 May 1965.

231 [1963] 1 Q.B. 291 at 298; See also, Lawrence v. Howlett [1952] 2 All E.R. 74; However contrast, Law v. Thomas (1964), 108 Sol. Jo. 158.

232 Ibid p.298.

233 [1961] 2 All. E.R. 318 at p.320.

234 Ibid at p.320; see also Law v. Thomas (1964), 108 Sol. Jo. 158; Mc. Eachran v. Hurst [1978] R.T.R. 462.

1969 and the regulations made there-under it is compulsory for the vast majority of employers carrying on business in Great Britain to have employers' liability insurance. Section 1 of the Act provides, inter alia that every employer must insure and maintain insurance under one or more approved policies with an authorised insurer against liability for bodily injury or disease sustained by his employees arising out of and in the course of their employment.²³⁵ The purpose of employers' liability insurance is to protect employers against claims for damages brought by employees and to ensure that such claims would be met by an authorised insurance company. The Act²³⁶ exempts certain employers from the obligation to insure, for example, nationalised industries, local authorities and police authorities. The grounds for such exemption are evidently that any claim made against such bodies will be satisfied out of monies provided by Parliament. The employees²³⁷ to be covered by insurance are basically only those employed under contracts of service²³⁸ or apprenticeship. Close relatives and self-employed persons are excluded from the obligation to insure.

The amount for which an employer is required by the Act to insure and maintain insurance is £2 million in respect of claims relating to anyone or

235 The Act relates to bodily injury and disease, death is embraced in the expression bodily injury. The Act requires no form of property damage cover. Damage to employee's effects may be covered by a public liability policy.

236 Section 3 of the Employers Liability (Compulsory Insurance) Act 1969.

237 Section 2 ibid.

238 For details on the distinction between contracts of service and contracts for services, see Rideout, Principles of Labour Law, 4th. ed., by R. W. Rideout and Jacqueline Dyson, London, 1983, chapter 1.

more of his employees and arising out of any one occurrence.²³⁹ The expression 'any one occurrence' seems to mean any single accident.²⁴⁰ Insurance companies are apparently reluctant to accept unlimited liability.²⁴¹ Thus a single occurrence causing serious injuries to a large number of employees may restrict an employee to less than the full compensation to which he is entitled.

The phrase "arising out of and in the course of employment" appears as the standard limit in employer's liability policies.²⁴² It has been given an extended meaning in the social security context.²⁴³ The classic formulation of Lord Loreburn in Moore v. Manchester Liners Limited²⁴⁴ provides that, "in the course of" employment means that an accident must arise when the employee "is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time to do that thing". Thus the limits to the course of employment are determined by three different criteria: place, time and activity. A claimant

239 Section 1(2) of the Employers Liability (Compulsory Insurance) Act 1969 hereinafter referred to as 'the 1969 Act' and Regulation 3 of the Employers Liability (Compulsory Insurance) Regulations 1971 (S.I. 1971 No.1117) hereinafter referred to as the Regulations.

240 Forney v. Dominion Insurance Co. Ltd. [1969] 1 W.L.R. 928.

241 R.C. Simpson, "Employers Liability (Compulsory Insurance) Act 1969", (1972) 35 M.L.R. 63 at 66.

242 A typical insuring clause will provide as follows: subject otherwise to the terms, exceptions, limits and conditions of this policy the insurers will indemnify the insured against all sums which the insured shall become legally liable to pay as damages in respect of bodily injury sustained by an employee and caused during the period of insurance arising out of and in the course of his employment by the insured in connection with the business and occurring within the geographical limit. (Emphasis added.)

243 Section 53 of the Social Security Act 1975.

244 [1910] A.C. 498 at 500-501; see also Ogus and Barendt, The Law of Social Security, 2nd ed., 1982 London, pp.276-287.

will set up a prima facie case if he is able to show that the accident occurred at his normal place of work during his normal hours of work. The activity must be connected with his employment and not merely matters incidental to employment.²⁴⁵ Therefore, employees travelling to and from work in the employer's vehicle are not in the course of their employment²⁴⁶ unless their terms of employment oblige them so to travel.²⁴⁷

The Act provides protection to employees by prohibiting certain conditions in employers' liability policies.²⁴⁸ Insurance has to be under approved policies with authorised insurers. An approved policy is defined as one not subject to any conditions and exceptions prohibited by regulations.²⁴⁹ Statutory Instrument No.1117 made under the Act provides that:

"Any condition in a policy of insurance issued or renewed in accordance with the requirements of the Act after the coming into operation of this Regulation which provides (in whatever terms) that no liability (either generally or in respect of a particular claim) shall arise under the policy, or that any such liability so arising shall cease -

- a) in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy;

245 R.v. National Insurance Commissioner, ex parte Michael [1977] 1 W.L.R. 109.

246 Vandyke v. Fender [1970] 2 Q.B. 292.

247 Paterson v. Costain & Press (Overseas) Limited [1979] 2 Lloyd's Rep.204

248 Section 1(3) of the Employers Liability (Compulsory Insurance) Act 1969 and Regulation 2 of the Employers Liability (Compulsory Insurance) General Regulations 1971.

249 Section 1(3)(a) ibid.

- b) unless the policy holder takes reasonable care to protect his employees against the risk of bodily injury or disease in the course of their employment;
- c) unless the policy holder complies with the requirements of any enactment for the protection of employees against the risk of bodily injury or disease in the course of their employment; and
- d) unless the policy holder keeps specified records or provides the insurer with or makes available to him information therefore,

is hereby prohibited for the purposes of the Act."

The purpose of these provisions is to prevent policies including conditions which relieve the insurer from his contractual liability to pay compensation to injured employees since it is the policy of the Act to ensure that such compensation is paid. The first condition prohibited in (a) above covers such matters as failure to give notice or particulars of loss in time, and any unauthorised admissions of liability. This is analogous to section 148(1) of the Road Traffic Act 1972.²⁵⁰ The effect of these words is to reverse decisions such as Farrell v. Federated Employers Insurance Co.²⁵¹ where an employee's claim was defeated because his employer gave details of the accident outside the period prescribed by the policy. However, it is not clear whether the words of regulation 2(1)(a) above may be sufficient to render invalid as against any employee's claim a condition providing that payment of premiums is a condition precedent to liability, as it only covers

250 See p.211 supra.

251 [1970] 1 W.L.R. 1400.

things "after the happening of the event". In Murray v. Legal and General Assurance Co,²⁵² the court decided that on the construction of that particular policy, a provision making the payment of insurance premiums a condition precedent to liability did not have that effect. The second prohibition in (b) above relates to conditions which would preclude liability if the employer failed to take reasonable care for the safety of his employees. As will be discussed later in Chapter Seven on the Construction of the Insurance Contract, the courts have construed²⁵³ conditions in liability policies generally requiring the insured to take reasonable care as applicable only if an employer is more than merely negligent.²⁵⁴ The third prohibition relates to failure to comply with statutory safety requirements. Many statutes impose liability on the employer and a breach of any of the provisions of such a statute may expose the employer to liability, for example, the Factories Acts, the Construction Regulations, Offices, Shops and Railways Premises Act. The prohibition ensures that where the employer is in breach of a statutory regulation, his liability will be covered by a policy of insurance. Finally, the fourth prohibition relates to the keeping of specified records, such as wages and salaries ledgers. These are most often used for adjusting premiums. A failure to maintain such records cannot now defeat an employee's claim. However, it should be noted that, as in the case of the Road Traffic Act 1972, Regulation 2 (2) of the Employers' Liability (Compulsory Insurance) Regulations 1972 provide that a policy can expressly provide for the insured to pay the insurer any sums which the insurer is

252 [1970] 2 Q.B. 495.

253 Woolfall & Rimmer v. Moyle [1942] 1 K.B. 66; Fraser v. Furman (B.N.) (Productions) [1967] 1 W.L.R. 898. See infra, at p.430.

254 See J. Birds, "Modern Insurance Law", 1982, London at pp.346-7; cf. R.A. Hasson, "Employers Liability (Compulsory Insurance) Act - A Broken Reed" [1974] I.L.J. 79 at p.85.

liable to pay and which have been paid to employees.

It would seem that the Employers' Liability (Compulsory Insurance) Act 1969 has made an attempt to ensure that employees do not go uncompensated through the prohibition of certain conditions. Unfortunately, the Act is far from adequate.²⁵⁵ There is no provision for an established body such as the Motor Insurers' Bureau, as in the case of motor vehicle insurance from which an injured employee may be able to claim when his employer has simply failed to insure or if insured, the policy is ineffective for any other conditions not stipulated by the prohibitions and is unable to meet his claim. As will be seen in the next chapter, in the case of compulsory motor insurance, when someone is injured by an uninsured motorist such a person may claim from the Motor Insurers' Bureau. Moreover, there is nothing in the Act dealing with the insurer's defences of breach of the basis of the contract clause or warranty, non-disclosure and misrepresentation. An insurance company which intends to use these defences does not even have to give notice to the plaintiff that it intends to raise these defences. It should be noted that motor vehicle insurers are not given any such privileged treatment. As we have already observed section 149(3) of the Road Traffic Act 1972 requires a motor vehicle insurer who intends to use the defence of misrepresentation or non-disclosure to give notice of that fact to any accident victim who is seeking to recover. The effect of this subsection is to make it impossible for a motor vehicle insurer to rely on a breach of a "basis of the contract clause" as against the injured victim. And even in the event of the defence succeeding, the injured person will be able to claim from the Motor Insurers'

255 For a critical analysis of the 1969 Act see R.A. Hasson, op. cit., pp.79-86; J. Birds, op. cit., chapter 20 esp. at pp.348-349. Recently the same point has been made in Alfred James Dunbar v. A & B Painters Ltd. and Economic Insurance Co. Ltd. and Whitehouse & Co. [1985] 2 Lloyd's Rep. 616 esp. at pp. 618 and 622 per J. Pratt; see also on appeal, Dunbar v. A & B Painters Ltd., The Times, March 14, 1986, per Balcombe, L.J.

Bureau. It will be observed in Chapter Five that warranties and the doctrine of disclosure operates very unfairly against the insured in the field of insurance law. There seems to be no justification for retaining it in this particular area. To achieve completely the aim that no employee injured at work should be denied compensation because of the inability of his employer to meet his claim the establishment of an employers liability insurers' bureau would appear to be essential.

The Act seeks only to improve the present system of compensation. However, this must be seen against the background of current re-thinking of the problem of providing adequate compensation for the injured worker principally in terms of comprehensive state insurance and compensation regardless of fault.²⁵⁶

The origin of the modern social security system in England can be traced back to 1897, when the first Workmen's Compensation Act was passed. This Act introduced into employment law the concept of liability without fault and the provision of cash benefits as of right and without a test of means. Thus it conferred on workmen (or their dependants) a right to compensation for any accident 'arising out of and in the course of his employment'. In effect this Act treated workmen as insured against such risks, although employers were not themselves compelled to insure against their new statutory liability. In Cameroon, workmen's compensation insurance was made compulsory by Ordinance No.59-100 of 31 December 1959. In the English-speaking Cameroon the Workmen's Compensation Ordinance of the Federal Laws of Nigeria was applicable. After the unification, Law No.68 - LF - 17 of 18 November 1968 rendered applicable in the English-speaking Cameroon the provisions of Ordinance No. 59-100 of 31 December 1959. This class of

256 P.S. Atiyah, Accident Compensation and the Law, 3rd ed., London 1980, pp.617 et seq.; see supra, pp.170 and 185-194.

business is not now transacted by the private insurance companies but by the National Social Insurance Fund²⁵⁷ (Caisse Nationale de Prévoyance Sociale). In England as well Workmen Compensation Acts have now been repealed and replaced by a compulsory scheme of national insurance.

Public Liability Insurance

There is no legal obligation generally to have public liability insurance either in England or in Cameroon. However, in England, the Riding Establishment Act 1970 requires riding establishments to have a public liability insurance against liability for any injury sustained by those who hire and use a horse from them and against the liability of the latter for injury to third parties. In addition, in England, the operator of a nuclear establishment is required to effect insurance under the Nuclear Installations Act 1965-1969. Furthermore, certain provisions in the Finance (No.2) Act 1975 have had the effect of imposing a compulsory insurance requirement. By virtue of sections 68-71 of the Act contractors in the construction industry have to deduct income tax before paying certain sub-contractors, unless a sub-contractor has an exemption certificate from the Inland Revenue. In order to obtain such a certificate, it is in general necessary for a sub-contractor to show inter alia that he has public liability insurance cover for at least £250,000.²⁵⁸

In Cameroon, only in respect of construction insurance is anyone obliged to take up public liability policies. Construction insurance was rendered compulsory in Cameroon by Law No.75 - 15 of 8 December, 1975. The purpose of this insurance is to protect members of the public against the

257 See Decree No.76/321 of 2 August, 1976, transferring Workmen's Compensation to the National Social Insurance Fund.

258 See Schedule 2 of Finance (No.2) Act, 1975.

financial consequences of defects resulting from faulty construction and damage to property adjoining the construction site. Article 1(1) of the law provides that all natural persons or corporate bodies responsible as prime contractors for construction projects in Cameroon shall be bound to take out comprehensive insurance against "site risks" (tous risques chantier) and "assembly risks" (tous risques montage) with an insurance company licensed to do business in Cameroon. Article 2(1) further provides that the persons mentioned in article 1, notably building contractors, architects and consulting engineers shall be additionally bound to insure their civil liability in respect of defective construction or workmanship. The insurance cover shall run for a period of ten years from the date of official acceptance of the project.²⁵⁹ The scope of the insurance cover is set out in article 2 of Decree No.77-318 of 17 August 1977. Compulsory insurance provided for in article 1 of Law No.75-15 of 8 December 1975 mentioned above must include a comprehensive site insurance covering:

- (a) Civil liability for damage to the construction project while it is being executed.
- (b) Civil liability for damage caused to third parties during the execution of the project.
- (c) Damage to the project during the period of maintenance which runs between the provisional and final handing over of the project to the owner; and
- (d) Damage to building machinery while it is being assembled.

Article 4(1) further provides that "comprehensive site insurance" shall be taken out for all building projects whose value is at least equal to 100 million francs CFA and by article 5(1) the policy of insurance must be

259 Article 2(2) Law No.75/15 of 8 December 1975.

underwritten before the commencement of any work on the site. In addition, in England and Cameroon, although statute does not in terms require insurance, aircraft operators are in practice required to insure against third party liability. An applicant for an air service licence must state in his application form, the provision which he has made or proposes to make against any liability in respect of loss or damage to persons or property which may be incurred in connection with the aircraft operated by him.²⁶⁰ An applicant without any insurance cover is hardly likely to be granted a licence. For all practical purposes this requirement has the effect of compulsory insurance for any aircraft operator under the Civil Aviation (Licensing) Act 1960.

Professional Indemnity Insurance

In England, the Insurance Brokers Registration Act 1977 sections 11 and 12 and the Estate Agents Act 1979 ensures that insurance brokers and estate agents must take out specified professional indemnity insurance. This is not the case in Cameroon. Furthermore, in England, professional indemnity insurance may be required, not by statute, but by the rules of profession. For example, a member of the Law Society is required to be a member of the Master Policy Scheme run by the Society in order to practise. In Cameroon as well advocates at the Bar are required to take up insurance policies before they can set up in practice.

²⁶⁰ Civil Aviation (Licensing) Regulations 1964, S.I. 1964 No.1116, Regulations 4(1)(g) enacted pursuant to section 2(2)(b) of the Civil Aviation (Licensing) Act 1960, section 2; see for further details, MacGillivray and Parkington, On Insurance Law, 7th ed., London 1981 pp.880-883.

Compulsory Insurance of Imports

In England, there is no requirement that importers should take up insurance. However, in Cameroon, by virtue of Law No. 75 - 14 of 8 December, 1975, all goods imported into Cameroon whose F.O.B. value is 500,000 Frs. CFA or more must be insured.²⁶¹ The insurance must be taken with an insurance concern in Cameroon authorised to transact insurance business in Cameroon.²⁶² It is not clear why insurance for the importation of goods should be rendered compulsory. The only probable reason is the desire of the state to consolidate the national insurance market by requiring all importers to insure with the local insurance companies. The limit of goods imported into Cameroon whose F.O.B. value is 500,000 Frs CFA may seem arbitrary. However, it is significant to note that claims above 500,000 Frs are tried by the High Courts. Insurance claims are technical and it is arguable that the high courts are deemed to be conversant with such civil claims. Thus this may be a probable reason for the imposition of a limit of 500,000 Frs CFA in this case.

261 Decree No.76-334 of 6 August 1976, Article 1.

262 Article 6 of Ordinance No.85-004 of 11 December 1985; Article 1(1) and (2) of Law No.75-14 of 8 December 1975; Article 3 of Decree No.76-334 of 6 August 1976 relating to the implementation of Law No.75-14 of 8 December 1975 rendering insurance of imports compulsory. Article 5 of Order No.102/MINFI/MINEP applying Decree No.76-334 of 6 August, 1976 relating to compulsory insurance of goods imported into Cameroon.

Article 2(2) of Decree No.76-334 of 6 August 1976 provides that in the absence of a comprehensive coverage, the insurance policy must be taken out, in the case of sea transport, under the minimum conditions guarantee "free of particular average".²⁶³

Further, article 2(2) provides that for all other means of transport compulsory insurance shall be limited to the coverage of "total loss". And article 4 of the Decree provides that the goods or cargo transported must be insured from the port or airport of landing to the port or airport of delivery: the parties may, however, agree to an insurance coverage for preliminary or supplementary risks of travel by sea or air. This legislation does not regulate the contractual rights of the insured and insurer as article 2(1) specifically states that the type of insurance shall be fixed by the parties. Moreover, there is no protection afforded to the insured who is in breach of any conditions as we observed in the case of motor vehicle insurance and employers' liability insurance in England. Thus it does seem to confirm the view stated above that the purpose of rendering compulsory insurance in respect of goods imported is to consolidate the national insurance market and further to place a check on importation of goods into Cameroon.

²⁶³ Particular average warranties, in marine insurance, are clauses excepting the insurer from liability for partial losses. Where the subject-matter insured is warranted free from particular average, the assured cannot recover for a loss of a part, other than a loss incurred by a general average sacrifice unless the contract contained in the policy is apportionable, the assured may recover for a total loss of any apportionable part: Marine Insurance Act 1906 s.76(1). See further sections 76(2) and (3); see E.R.H. Ivamy, Dictionary of Insurance Law, 1981, London pp.56-57 and 103-104; For the meaning of general average sacrifice and general average loss. For a detailed account of the meaning of the phrase in Marine Insurance see: Arnould, Law of Marine Insurance and Average, Vol.2, 16th ed., 1981 London, Stevens and Sons, para.841 p.713 and para.1100 p.887.

We may conclude this section by stating that the development of liability insurance and in particular, compulsory insurance appears to depend on the evolution of the law which has throughout tended to augment the scope of potential liabilities. This trend may continue in the future either directly by legislation or indirectly by the requirements of professional bodies as a condition of a licence to practice. The former may be effected eventually through the introduction of some system of no fault liability and the latter through private insurance. There seems to be some validity for Professor Hugh Cockerell's comment²⁶⁴ that, "No fault liability and compulsion to insure are alike symptoms of the public's demand for security." Nevertheless, private insurance would in one area or another, play an increasing role to complement this desire.

VI ENFORCEMENT AND SANCTIONS

There would be little point in instituting compulsory insurance unless there were measures for its enforcement accompanied by sanctions for the breach of the obligation. In both England and Cameroon penal as well as civil sanctions have been provided by legislation to compel compliance. However, penal sanctions against the errant culprit are no remedy for the injury suffered by an innocent victim of a motor vehicle accident. Admittedly, it is such persons that the legislation on compulsory insurance in both England and Cameroon set out to protect, subject to liability being found.

264 Hugh Cockerell, "Insurers and no fault", Post Magazine and Insurance Monitor, 26 August, 1982, Vol.CXLIII, No.34, 2050 at p.2051.

To comply with the enactments in respect of motor vehicle insurance the law requires that the policies must be issued by authorised insurers.²⁶⁵ The insurance companies must issue a certificate of insurance which is proof that the requirements of the law have been met.²⁶⁶ In Cameroon article 4(2) of Law No.65 - LF - 9 of 22 May 1965 provides that the insurance company shall on acceptance of a proposal issue a certificate of insurance in a form to be prescribed by decree. In 1965 a decree was enacted in pursuance of the aforementioned law.²⁶⁷ Article 6 of this decree requires that a certificate of insurance must be obtained before the vehicle is put into circulation. Further, article 8(1) provides that the insurance company must deliver free of charge a document in proof of insurance for each of the vehicles covered by the policy and where the guarantee applies at the same time to a motor vehicle and to its trailers or semi-trailers only one document in proof may be delivered on condition that it specifies the type of trailer or semi-trailer which may be used with the vehicle as well as, where applicable, their registration number.

In Cameroon the police and gendarme officers conduct routine road checks to ensure that all motor vehicles are in possession of a valid policy of insurance covering the drivers liability towards third party risks or a certificate of insurance. Article 9(1) of Law No.65 - LF - 9 of 22 May 1965 provides that any driver of a vehicle who is not in a position to produce to the officers or officials responsible for investigating traffic offences a

265 In England, this is provided by section 145(2) of the Road Traffic Act 1972; and in Cameroon by article 4(1) of 65-LF-9 of 22 May 1965.

266 In England section 147(1) of the Road Traffic Act 1972 makes provision for a certificate of insurance and section 147(2) of the same Act requires a certificate of security.

267 Decree No.65-LF-565 of 29 December 1965 applying the Law No.65-LF-565 of 29 December 1965.

document evidencing its insurance under article 3 shall be punished with a fine of up to 10,000 Frs CFA. Further section 9(2) provides that failing the said production and until evidence of insurance has been furnished the vehicle shall be impounded by the police authorities and the costs incidental to the impoundment, transport and custody of the vehicle shall be borne by the owner. It must be observed that article 9(1) makes it clear that an offence is committed once the driver fails to produce a certificate of insurance. The provision nevertheless does not mention anything about a subsequent production, for example, whether a fine would still be imposed. In practice, however, the police authorities detain the vehicle and prosecute only when the driver has failed to produce a certificate within a reasonable time. Thus the only offence which the courts take into consideration is the actual failure to insure the vehicle. This offence is punishable under article 8(1) of Law No.65 - LF - 9 of 22 May 1965 with a fine of up to one million francs CFA or with imprisonment of up to twelve months or with both such imprisonment and fine. The offender's driving licence may at the same time be suspended for up to twelve months²⁶⁸ and any fine imposed shall be increased by half payable to the Motor Insurance Fund.²⁶⁹ This provision ensures that some of the burden imposed upon the community by uninsured motorists falls on the offenders themselves. This seems fairer than the English system whereby the Motor Insurers' Bureau is financed solely by contributions from insurance companies. Evidently, the insurance companies meet this cost by an increase in premiums. Premiums higher than really necessary to cover the risk have to be paid in order that the insurers may contribute to the Bureau's funds. In the end result only the insured motorist community bear this burden.

268 Article 8(2) of Law No.65-LF-9 of 22 May 1965.

269 Article 8(3) ibid.

Although in Cameroon, the penalty for non-compliance with the compulsory insurance law is severe, the courts in practice seem to extract a small fine. In the People v. Konye Ohaechesi Benedict,²⁷⁰ the accused drove a vehicle with an expired insurance certificate. The Court held him liable to pay a fine of 16,000 Francs CFA or seven days imprisonment with hard labour and a further 8,000 Francs CFA payable to the Motor Insurance Fund. The penal sanction in England is not as severe as that provided under Cameroonian law. A 'user' of a motor vehicle who is not insured or secured against third party risks will be liable on summary conviction to a fine not exceeding fifty pounds or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.²⁷¹ A failure to insure may lead to civil proceedings as well.²⁷² English defaulters expose themselves to an action for breach of statutory duty.²⁷³ The measure of damage will be the damage suffered by the plaintiff as a result of the breach, in other words, that suffered in an accident caused by the uninsured motorist. The advantage of this action is that, where the motorist is without means, the victim may sue directly any person who caused or permitted him to use the vehicle without insurance. In practice, however, this action has fallen into disuse, since compensation for damage caused by uninsured motorists may be

270 Charge No. TM/14C/84 of 5 January 1984 Tiko(Unreported); see also The People v. Kamsi Michel, Charge No. TM/34C/84 of 12/1/84 Tiko (Unreported) and The People v. Longla Joseph Charge No. TM/157C/84 of 29 March 1984 Tiko (Unreported).

271 Section 143(1) and Schedule 4, of Part 1 of the Road Traffic Act 1972.

272 Section 143(2) ibid.

273 Monk v. Warbey and others [1935] 1 K.B. 75 at 79. See further, Dan Cassidy, "Compulsory motor insurance and the alternative: 1," Post Magazine and Insurance Monitor, 10 October 1985, Vol. 146, No.41, 2795.

obtained from the Motor Insurers' Bureau.²⁷⁴

Even though the sanctions may serve to deter motorists from committing an offence, a considerable number of persons still drive uninsured. A system of prevention is most desirable. In England a vehicle's excise licence cannot be obtained without the production of a certificate of insurance, security or exemption. Admittedly, this does not prevent a motorist becoming uninsured in the course of the period of its validity but at least it prevents him starting off without an insurance. Moreover, quite a lot of people do not even obtain a road fund licence.²⁷⁵ In Cameroon there is no requirement preventing a motorist licensing a vehicle without effective insurance in force. The best system of control and prevention exists in Germany. There, the certificate of insurance consists of a tag which must be affixed to the vehicle's registration disc. If the insurance is terminated for any reason this tag must be surrendered to the administrative body that issued it. The latter must be notified of the termination by the insurer. This enables the body to take steps to ensure compliance with the law.

With regard to employers' liability insurance in England, the enforcement machinery embraces both criminal and administrative sanctions. The administrative procedure is based on the issuing, display and production of certificates of insurance. By virtue of section 4(1) of the 1969 Act and regulation 5, insurance companies are required to provide employers with

274 See later Chapter Four, pp.265-290. However, a third party is still at liberty to bring such an action even in spite of the existence of the Motor Insurer's Bureau, though, of course, he will not be entitled to retain both the compensation paid by the Bureau and the damages recovered from the owner of the vehicle - Corfield v. Groves [1950] 1 All E.R. 488 at p.62.

275 See Home Office Statistics on Offences relating to Motor Vehicles in England and Wales 1977, Cmnd.7349 p.50; 1978, Cmnd. 7687 p.58; Cmnd.8087 p.62. Furthermore, the Accident Offices' Association produced figures suggesting that about one and a half million motorists drive without insurance cover: The Guardian, 31 August 1983.

certificates of insurance in prescribed form within thirty days of the insurance commencing or being renewed. The employer is required to display copies of the certificate at each place of business where he employs an employee whose claim may be subject to an indemnity under the insurance policy.²⁷⁶ The responsibility for enforcing the duty to insure and the duty to display insurance certificates is placed on inspectors of the Health and Safety Executive. Thus section 4(2)(b) and regulation 7 empowers an inspector to require an employer after reasonable notice, to send to the executive either the original or a copy of the certificate and section 4(2)(c) and regulations 8 and 9 empower inspectors to demand inspection of certificates or policies of insurance at the employer's place of business. A failure to comply with any of these requirements is liable to a fine of £50.²⁷⁷ Furthermore, failure to hold insurance required by the Act can render an employer liable to a fine of £200 for each day of such default.²⁷⁸ Consequently, the observance of the Act depend very much on the efficiency of the administrative sanction of inspection.

In Cameroon, the measures for ensuring compliance with the compulsory insurance of imports are provided for by Decree No.76/334 of 6 August 1976. Article 5 of the Decree provides that the insurance company must deliver free of charge to the insured importer a certificate of insurance which shall be prima facie proof that the obligation to insure has been complied with: a duplicate of such a certificate must be made available to the insured at his request in the event of loss or theft thereof. Furthermore, article 2 of Ministerial Order No.102 MINFI/MINEP of 27 April 1976 implementing the

276 Section 4(2)(a) of the Employers' Liability (Compulsory Insurance) Act 1969 and regulation 6 of Employer's Liability (Compulsory Insurance) General Regulations 1971 (S.I. 1971 No.1117).

277 Section 4(2)(b) and Regulation 7 ibid.

278 Section 4(2)(c) and Regulation 8 and 9.

Decree provides that the certificate of insurance must be issued by the insurer in four copies each made available to the service in charge of External Commerce, the Service of Exchange Control, the importer and the Custom department; the certificate of insurance must be appended to the application for a foreign exchange permit. The prospective importer will not qualify for a foreign exchange permit if he fails to produce proof of insurance as required by the order. The importer must also present a copy of the certificate of insurance to the custom officers before he can take delivery of his goods. Further article 7 of the Decree provides that the issue or renewal of any import licence must be subject to the presentation of a copy of the insurance certificate. Further sanctions for failure to insure imports are provided by article 3 of Law No.75/14 of 8 December 1975; the importer is liable to a fine equal to one quarter of the value of the goods imported and/or imprisonment of up to twelve months.

With regard to construction insurance in Cameroon, article 6 of Decree No.77-318 of 17 August 1977 provides that, at the time of signing the insurance contract, the insurance concern must issue free of charge to the insured person a document showing evidence of insurance. Further article 7 of the Decree stipulates that the payment of the first installment for contract work or the execution of any other agreement relating to realisation of a project must be subject to presentation of the document showing evidence of insurance. By virtue of article 6 of Law No.75 - 15 of 8 December 1975, failure to obtain an insurance cover is punishable by fine from one million to ten million francs CFA and by imprisonment for one to five years, or one or other such penalty only. In England, any failure by the constructors to obtain a public liability policy will result in a denial of the certificate provided by the Act. And finally, a failure by riding establishments to obtain the above insurance is an offence under the principal Act of 1964 and punishable by a fine not exceeding £50.

Despite the existence of other forms of compulsory insurance, it is clear that motor insurance is by far the most important. As shown in Table 5 overleaf, the premium income from motor insurance in relation to other classes of insurance business reveals that motor insurance accounts for almost half of the premium income of insurance companies. This also seems to be the case in England. This preponderance is probably due to the fact that this class of insurance is more commonly obtained than other classes of insurance business.

Table 5 : CAMEROON WRITTEN PREMIUM INCOME 1975 - 1981

BRANCH OF BUSINESS	YEAR AND SHARE OF MARKET OCCUPIED (%)						
	1975	1976	1977	1978	1979	1980	1981
Motor Vehicle Insurance	49.91	42.59	42.23	44.36	42.86	42.46	41.37
Fire Insurance	11.64	11.41	5.05	10.22	11.67	11.39	12.02
Theft/Burglary	1.80	1.39	1.26	1.55	1.67	1.75	2.71
Personal Accident	1.75	1.78	1.85	3.38	4.21	4.87	1.65
Sickness Insurance	4.05	3.98	3.88	3.92	3.85	3.85	4.66
Aviation Insurance	1.98	1.75	1.91	1.65	1.84	1.84	3.75
Workmen's Compensation	14.08	17.38	10.01	0.68	0.06	0.02	0.01
Liability Insurance	3.84	4.34	4.76	3.92	4.62	5.20	5.47

Source : Department of Insurance 1982, Yaounde

Table 6 : U.K. NET WRITTEN PREMIUM INCOME 1977 - 1981

YEAR	1977	1978	1979	1980	1981
Branch of Business	£m.	£m.	£m.	£m.	£m.
Liability	320	379	414	456	443
Motor	873	1,064	1,290	1,544	1,694
Pecuniary Loss	170	200	216	253	291
Personal Accident	68	73	97	117	126
Property	788	924	1,099	1,397	1,635
TOTAL GENERAL	2,219	2,640	3,166	3,767	4,189

Source: Insurance Facts and Figures 1981.
British Insurance Association, London.

C H A P T E R 4

PROTECTION OF ROAD TRAFFIC ACCIDENT VICTIMS

I INTRODUCTION

In the last chapter we examined the reason for and scope of compulsory motor insurance in England and Cameroon. An extension of the idea underlying compulsory insurance would be government concern for compensating those injured where compulsory insurance should have been in force, but was not. The study of protection of road traffic accident victims in this chapter will, therefore, look primarily at what happens when motor insurance has not been taken out.

The use of motor vehicles causes enormous risks to individuals. According to statistics obtained from the Ministry of Transport in Cameroon, the severity of road accidents was alarming, especially before 1965.¹ Vehicles in circulation as at 1st. January 1962 numbered approximately 27,000. By 1965 the number had risen to 45,000, an increase of 57 per cent.² Between 1961 and 1965 the number of accidents on the road in Cameroon

1 In 1965 the insurance of motor vehicles against the risk of liability for injury to, or death of, third parties caused by the driver's negligence was made compulsory: Article 1 of Law No.65-LF-9 of 22 May 1965. See Chapter Three, supra, pp.204-205.

2 Cameroon: Ministry of Transport, Department of Statistics, 1966.

increased from 530 to 1900 and the number of deaths and injuries increased from 800 to 2850.³

The seriousness of these accidents poses problems which the general law on civil liability seemed inadequate to deal with, particularly on the subject of compensation for personal injuries and death.⁴ In respect of these accidents it seemed⁵ that more than 60 per cent of the vehicles were not insured and accordingly in some accidents numerous victims had no effective redress.

Although it was possible to punish the authors of such accidents criminally through the courts, there were no other means under the then existing regulations of guaranteeing compensation to the victims. Since the

3 **TABLE 7: Road Accidents in Cameroon (excluding existing towns), 1961-1965**

Year	Number of Accidents	Number of Fatal accidents	Number of Persons Killed & injured
1961	530	280	500
1962	550	300	800
1963	850	500	1000
1964	1100	750	2000
1965	1900	1150	2850

The above figures were obtained from the Gendamerie Nationale for the whole of the national territory excluding the then existing towns in the course of field research in 1982. The absence of statistics for the entire country makes the information inadequate.

4 This subject has been dealt with in Chapter Three of this work. See supra., pp.150-177.

5 Cameroon: Ministry of Transport, Select Committee Report on problems caused by Road Traffic Accidents 1964, at p.4.

abolition of "an-eye-for-an-eye"⁶ amongst the clans, injury arising from road accidents can only be repaired by compensation: the victim is awarded damages. Unfortunately, few people in Cameroon are in a position to meet from their personal means, the financial obligations flowing from road accidents for which they are responsible. Consequently, their victims remain without a remedy even when a court awards them damages for loss and injury sustained from road accidents. It became necessary to impose compulsory motor vehicle insurance against third party liability⁷ with the object of providing injured third parties with a sure financial source from which to recover any damages to which they may become entitled.

If the obligatory insurance policy is of help to victims, it is far from being an absolute guarantee against the risks caused by motor vehicles. There are cases where an injured victim may be deprived of compensation because he can find no one to sue, for example, if he is injured by the negligence of a 'hit and run' driver, or the person responsible is uninsured or the insurance company is insolvent or goes into liquidation.

Furthermore, even where an insurance policy has been obtained, the policy may be ineffective for many reasons: for example, breach of conditions, terms and exceptions of the policy.⁸ In Cameroon, few of the drivers or owners of vehicles plying the highway have ever gone to school or

6 See: T. Olawale Elias, British Colonial Law - A Comparative Study of the Interaction between English and Local Laws in British Dependencies, London, Sweet & Maxwell, 1962, p.101 et seq.

7 See note 1 above. Third Party motor vehicle insurance has been compulsory in Britain since 1930 by the Road Traffic Act 1930 and in France since 1958. One purpose of the Road Traffic Act 1930 as stated in the preamble was "to make provision for.....the protection of third parties against risks arising out of the use of motor vehicles."

8 This will be discussed in Chapter Seven on construction of insurance contract, see infra pp.434-439.

are educated enough to understand the technicalities of an insurance contract. Nor may they be able to resist the high-pressure sales tactics of local insurance agents who issue policies and claim that the insured is covered in all respects whereas there may be certain conditions and exceptions limiting their liability. It is not uncommon to find vehicles insured for the carriage of 'goods only' used to convey passengers. This practice, mostly carried out in the suburbs and cities under cover of darkness, is unofficially condoned by the authorities. Again, it is not unusual to find a vehicle carrying more than the restricted number of passengers and a member of the forces of law and order as a conspicuous passenger sitting in front to avoid any police road checks, notwithstanding that the insurance policy covering the vehicle contains an exception clause stating that the underwriters will not be liable for loss or damage whilst the insured vehicle is 'conveying passengers in excess of the number for which it was constructed.' However, not until there is an accident are the victims or third parties informed by the insurance companies that their claims cannot be met for the policy of insurance does not cover that particular risk. These are only a few of the malpractices in which drivers indulge and the result is that many victims of road accidents go without compensation from insurance companies.

Similarly, in England, further protection of victims of road accidents who received no compensation despite the protection afforded by the Road Traffic Act 1930 was realised. The initiative came from the then Ministry of Transport (now the Department of the Environment).

II ESTABLISHMENT AND ORGANISATION OF THE MOTOR INSURANCE FUND IN CAMEROON AND OF THE MOTOR INSURERS' BUREAU IN ENGLAND

There was a need for state intervention to protect its citizens against the risk of accidents due to the intensification of traffic. The legislator nevertheless did not lose sight of the fact that whatever the scope of any law and the rigour with which it is applied, defaults are always possible.

Thus, in Cameroon, article 7 of the same law making motor insurance obligatory, provided for the creation of a Motor Insurance Fund.⁹ The M.I.F. is a public establishment with a legal personality and financial autonomy whose status is governed by Decree No.67-DF-495 of 17 November 1967.¹⁰ This decree came into force on 17 December 1967¹¹ in pursuance of article 7 of Law No.65-LF-9 of 22 May 1967.

In Britain, while the Road Traffic Act 1930 made insurance against third party liability compulsory, there was no provision in the Act, or elsewhere, for third parties to be compensated where a motorist had been

9 Hereinafter referred to as the M.I.F. Cameroon was fortunate to learn from the experience of other countries and made provisions in one enactment. As stated already, the same law that made third party liability compulsory established the Motor Insurance Fund; whereas in England there was no provision in the Road Traffic Act 1930 under which victims could be similarly compensated.

10 Article 7 of Law No.65-LF-9 of 22 May 1965.

11 Decree No.67-DF-495 of 17 November 1967 fixing the status of the Motor Insurance Fund. The Cameroon legislator got inspiration from article 15 of Law No.51-1508 of 31 December 1951 creating the 'Fonds de Garantie Automobile' in France. The regulations governing the operation of the fund in France are more specifically defined in Decree No.52-763 of 30 June 1952: D. 1952, 235. For a discussion on the background and purposes of the 'Fonds de Garantie Automobile' in France see, generally, Suzanne Tunc, "Establishment of 'Fonds de Garantie' to compensate victims of Motor Vehicle Accidents", (1953) 2 Am. J. Comp. Law 235; M. Picard and A. Besson, *op. cit.*, pp.614-623; M. Picard, "Le Fonds de garantie pour les victimes d'accidents d'automobile", D. 1952 Chr. 97.

negligent and was not covered for some reason or another by a policy of insurance. Even if it was not fully realised at the time, it soon became apparent that there were certain types of risks for which there was no protection under the Act. It was because of this situation that a committee to consider compulsory insurance was set up under the chairmanship of Sir Felix Cassel.¹² On December 31, 1945, the Ministry of War Transport (now the Department of the Environment) and the insurance companies dealing with motor insurance business entered into an agreement for the establishment of a fund to be administered by a body to be set up and which is known as the Motor Insurers' Bureau (M.I.B.). The M.I.B. is a limited company¹³ whose members are all insurance companies engaged in motor insurance in the United Kingdom.¹⁴ By virtue of section 20 of the Road Traffic Act 1974, it is now a condition of authorisation to transact motor insurance business that insurance companies and Lloyd's syndicates be members of M.I.B. Limited. The main object of the agreement was to implement the recommendations of the Cassel Committee. The Committee proposed the compensation of victims of road accidents where no compensation was available or recoverable due to the absence or ineffectiveness of insurance cover of the driver liable for the accident. Practice showed that there was another loophole. The 'hit-and-run' driver who could not be traced could not be sued. The agreement for the compensation of victims of uninsured drivers was inapplicable in this case. In 1969 another agreement between the government and the M.I.B. was entered into dealing with compensation for the victims of untraced drivers.

12 For the recommendations of the Cassel Committee, see Report of the Committee on Compulsory Insurance, London 1937, Cmnd.5528. See further, 649 Hansard, H.C. Cols.1814-1824 (5 March 1965).

13 The M.I.B. was incorporated under the Companies Act 1929 (see now the Companies Act 1985).

14 Article 3 of the Articles of Association of the M.I.B. adopted by special resolution passed on 24 September 1974.

Eventually, in 1972 the two agreements¹⁵ were updated as: (a) the agreement for "Compensation of victims of Uninsured Drivers", and (b) the agreement for the "Compensation of victims of Untraced Drivers", both of which are dated November 22, 1972. In 1977, a third agreement¹⁶ supplemented to the second agreement was entered into dealing with 'hit-and-run' cases. This agreement simply provides for claims in respect of the victims of hit-and-run drivers. Thus there are now three agreements between the Secretary of State for the Environment and the M.I.B.

Whereas the Motor Insurance Fund in Cameroon is created by an Act of Parliament, the Motor Insurers' Bureau in England is the result of an agreement between the Secretary of State for the Environment and motor insurance companies. The agreement can be dissolved at any time by the Secretary of State or the M.I.B. on twelve months notice without prejudice to the continued operation of the agreement in respect of accidents occurring before the date of termination.¹⁷ The agreements of 1972 and 1977 are on the face of them, contracts under seal between the Secretary of State for the Environment and the motor insurance companies and this contract cannot be

15 For the full text of the Agreements, see Department of the Environment, Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers), London H.M.S.O. 1972, (SBN 11 550268 8) in respect of the first agreement and (Compensation of Victims of Untraced Drivers), London H.M.S.O. 1972, (SBN 11 550267 X) in respect of the second agreement. See also E.R.H. Ivamy, Fire & Motor Insurance, 3rd ed., 1978 London, Butterworths, Appendix XIII, p.459. For a detailed discussion of the agreements of 1972, see E.R.H. Ivamy, op. cit., pp.337-353; D.B. Williams, Hit and Run and Uninsured Drivers - Personal Injury Claims, (The Rôle of the Motor Insurers' Bureau), 4th ed., 1983 Barry Rose Publishers, Chichester; "The 'hit and run victims' charter", Law Society Gazette, May 1969, pp.304-305.

16 Department of Transport, Motor Insurers' Bureau (Compensation of Victims of Untraced Drivers), London H.M.S.O. 1977.

17 Clauses 24 and 5 of the Agreements relating to Untraced Drivers 1972 and 1977 respectively and clause 3 of the Uninsured Drivers Agreement 1972.

enforced by the accident victim because of the doctrine of privity of contracts.¹⁸ In theory, no doubt, if the M.I.B. broke this agreement the Department of the Environment might be able to get an order of specific performance requiring the M.I.B. to comply with the agreement.¹⁹ In practice, however, injured parties sue the M.I.B. directly²⁰ and the point that they have no cause of action is not raised by the M.I.B. or by the court.²¹ In Hardy v. Motor Insurers' Bureau²² Lord Denning said that he hoped the point would never be taken. However, it may be possible that if the M.I.B. violates this agreement, the whole scheme or some alternative would be put onto a statutory footing, possibly by nationalisation of motor insurance business.

The Motor Insurance Fund in Cameroon is placed under the authority of the Minister of Finance.²³ The National Reinsurance Fund is responsible for the management of the Motor Insurance Fund, and all the personnel of the

18 See the remarks of Lord Denning M.R. and of Diplock L.J. in Hardy v. Motor Insurers' Bureau [1964] 2 Q.B. 745 at pp.757 & 766 and also in Gurtner v. Circuit [1968] 2 Q.B. 587 at pp. 596 & 598. It may be this difficulty can be overcome by the Secretary of State against the M.I.B., followed by an enforcement of the judgment by the injured party. If the Secretary of State refuses to sue, he might conceivably be joined as defendant in an action brought by the injured party against the M.I.B. See, Gurtner v. Circuit [1968] 2 Q.B. 587 per Lord Denning at p.596, Salmond L.J. ibid. at p.606.

19 Beswick v. Beswick, [1968] A.C. 58; Gurtner v. Circuit [1968] 2 Q.B. 587.

20 Lees v. Motor Insurers' Bureau [1953] 1 W.L.R. 620; Buchanan v. Motor Insurers' Bureau [1955] 1 W.L.R. 488; Coward v. Motor Insurers' Bureau [1963] 1 Q.B. 259.

21 Albert v. Motor Insurers' Bureau [1972] A.C. 301 esp. at 302 per Viscount Dilhorne; Hardy v. Motor Insurers' Bureau [1964] 2 Q.B. 745; Coward v. Motor Insurers' Bureau [1963] 1 Q.B. 259.

22 Ibid. at p.757.

23 Article 2(2) of Decree No.67-DF-495 of November 17, 1967.

M.I.F. are those of the National Reinsurance Fund.²⁴ They share a common administration, namely, the Board of Governors, the Managing Director and the Auditors. The Board has the widest powers of management and administration of the M.I.F. It decides on the general policy of the M.I.F. and regulates and controls its activities.

III THE FINANCIAL RESOURCES OF THE MOTOR INSURANCE FUND IN CAMEROON AND OF THE MOTOR INSURERS' BUREAU IN ENGLAND

The financial resources of the M.I.F. in Cameroon are provided for by decree. These resources are from three kinds of contribution, namely, contributions by insurance companies; by uninsured motorists and by the government.²⁵ In England, the M.I.B. is financed by insurance companies²⁶ and government contributions.²⁷

Contributions by Insurance Companies

Insurance companies engaged in motor insurance business in Cameroon are obliged by decree to contribute towards the financing of the Motor Insurance Fund. This contribution is assessed on the premium income of insurance companies in the motor insurance business received in the course of the preceding calendar year after deduction of tax and cancellations. It is fixed each year before 31st. January by an order of the Minister of Finance. Article 1 of Order No. 750/MINFI/DCE5 of 7 August 1985 provides that 1.75 per cent of the motor insurance premium should be contributed to the Motor

24 Articles 4 & 5 of the 1967 Decree, ibid.

25 Articles 7 & 8 of the 1967 Decree, infra. pp.260-263.

26 Article 35(1) of the Articles of Association of the Motor Insurers' Bureau 1974.

27 See infra. pp.262-263.

Insurance Fund.^{27A} The source of financing here is therefore limited to the number of insurance companies and the volume of business in the motor insurance branch. Consequently, with every increase in the total amount of premiums and the number of insured persons, there will be a corresponding increase in the contributions by insurance companies.

Similarly, in England, the M.I.B. makes calls or levies on any of its members by way of contribution to the finances of the Bureau to enable it to discharge its obligations.²⁸ However, unlike in Cameroon where contribution is assessed on a fixed percentage basis, in England, any contribution required by the M.I.B. is apportioned between each member pro rata on the motor insurance premium income received by the companies during the calendar year immediately preceding that in which the call or levy in question is made.²⁹ It seems therefore that in England, the contribution is flexible and varies according to the amount required each year to finance the scheme and further, as in Cameroon in proportion to the total amount of premiums held by insurance companies. In addition, members each pay a subscription calculated according to the table as shown overleaf.

27A It is worth pointing out that this percentage has not been changed since 1978.

28 Article 35(1) of the Articles of Association of the Motor Insurers' Bureau 1974. The M.I.B. in England, basically assumes the position of a liability insurer.

29 Article 7 of the Articles of Association of the Motor Insurers' Bureau 1974.

TABLE 8: Premium Income and Subscription of Member
(or Group) of the Motor Insurers' Bureau in England

Premium Income of the Member or Group	£	Subscription	£
Up to & including	100,000	For each £1,000 of premium income	1
Exceeding but not exceeding	100,000 250,000	Flat rate	200
Exceeding but not exceeding	250,000 500,000	Flat rate	400
Exceeding but not exceeding	500,000 1,000,000	Flat rate	800
Exceeding but not exceeding	1,000,000 5,000,000	Flat rate	1,200
Exceeding but not exceeding	5,000,000 10,000,000	Flat rate	1,400
Exceeding	10,000,000	Flat rate	1,600

SOURCE: Article 7 of the Articles of Association of the Motor Insurers' Bureau 1974

It is interesting to note that for the year ended 31st. December 1983, the Members contribution and subscription paid to the M.I.B. amounted to £10,717,498.³⁰

It is without doubt that the financial resources of the M.I.B. and

³⁰ Motor Insurers' Bureau: Balance Sheet and Accounts for the year to 31 December 1983, Jordan & Sons Ltd., Search Report 17/04/85, Re: Motor Insurers' Bureau, Company Number 000412787.

M.I.F. in England and Cameroon respectively, are partly a charge on insurance companies generally, to which of course insuring motorists eventually contribute.

Uninsured Motorist Contribution

In Cameroon, as we saw earlier in Chapter Three³¹, there is a penalty imposed by law for failure to insure. By virtue of article 8(3) of the 1965 Law, all fines imposed on motorists for failure to insure shall be increased by one half which is payable to the M.I.F. Thus the M.I.F. indirectly punishes those who breach the law on compulsory motor insurance. In The People v. Thomas Ateh,³² the Magistrates Court found the accused guilty of driving without insurance cover contrary to article 1(1) of the 1965 Law. He was fined 10,000 francs CFA plus 5,000 francs CFA payable to the Motor Insurance Fund or three months imprisonment. In another case, Mekoulou Félicien c. Agang Elono and others,³³ an accident occurred on 28 October 1973. The insurance policy of the vehicle responsible for the accident expired on 23 October 1973 and was renewed on 9 November 1973. A charge was brought against the driver for failure to comply with article 1(1) of Law No.65-LF-9 of May 22 1965, conduct punishable under article 8(1) of the same law. The driver was found guilty and fined 10,000 francs CFA plus half thereof, that is, 5,000 francs CFA payable to the M.I.F. or three months imprisonment.

31 Supra pp.239-242.

32 Charge No. KM/1121 T/28, 1978 Kumba (Unreported); See also, The People v. Fombin Charles, Charge No. BA/692C/71, Bamenda (Unreported) per Magistrate Nganje (as he then was) giving similar judgment to the above case on similar facts.

33 Judgment No.224 of 19 December 1977, Yaounde (Unreported).

This contribution by uninsured motorists could be very substantial if the maximum penalty for failure to insure is imposed.³⁴ The courts seem to be soft on the imposition of heavier fines. In practice fines are so meager for example 50 per cent of a fine of 5,000 francs CFA would be only 2,500 francs CFA. Moreover, these fines are paid to the treasury of the Ministry of Finance and it is often difficult for the M.I.F. to obtain these fines despite many letters reclaiming them.^{34A} In the Douala court³⁵ for instance, between 1983-1984,³⁶ out of 266 judgments pronounced the total fines imposed amounted to 7,370,000 francs CFA. However, it is doubtful whether the M.I.F. recovered this amount from the Ministry of Finance.^{36A}

By contrast, in England, there is no requirement that uninsured motorists contribute to the running cost of the M.I.B.

Government Contribution

The Motor Insurance Fund also benefits from government contribution.³⁷ Between 1968 and 1972, the Motor Insurance Fund received a total sum of 61,007,626 francs³⁸ CFA from the government. Since then no other

34 The maximum penalty is 1 million francs CFA.

34A Reply to inquiry, letter dated 26 October 1985 from Mr. Ngwa Che, Director of the Motor Insurance Fund, Yaounde: It seems that this difficulty experienced by the M.I.F. is due to high bureaucracy involved within government departments.

35 Reply to inquiry carried out in March 1985, in correspondence with Justice Pius Takam, Douala Court. This court is notable for imposing heavier penalties than other courts in the Republic of Cameroon, probably because Douala is a commercial town.

36 In Cameroon the judicial year starts from the first day of October and ends on the last day of September of the following year: The 1983-1984 judicial year chosen by us covers the period running from 1 October 1983 to 30 September 1984.

36A See further, Table 9, p.264.

37 Article 8 of Decree No.67-DF-495 of 17 November 1967.

38 Figures supplied by Essongo Mbella Ferdinand, Financial Secretary of the Motor Insurance Fund in an interview in July 1983.

contributions have been received.^{38A} The M.I.F. may receive a grant annually from the government depending on the financial commitments of the M.I.F. after the preparation of its budget by the financial division.

Similarly, in England, the Department of Transport contributes to the financing of the M.I.B.³⁹ However, this contribution is not required by the formal agreement between the Secretary of State and the M.I.B. but, it is nevertheless an established practice. It is paid in recognition of the fact that a certain (though obviously unknown) number of payments made by the M.I.B. under the untraced Drivers' Agreement will be in respect of accidents caused by vehicles exempt from compulsory insurance, for example, vehicles owned by the Crown or a local authority. Since the motor insurance market which finances the Motor Insurers' Bureau's operations receive no premium income in respect of such vehicles, it has been agreed⁴⁰ that the Government

38A See Table 9 at p.264.

39 Motor Insurers' Bureau: Balance Sheet and Accounts for the year to 31 December 1983, op. cit.

40 Reply to an inquiry, letter dated 11 July 1985 from M. Ainsworth, Department of Transport.

should make a payment to the M.I.B. in recognition of these cases.^{40A} The amount is assessed by calculating the percentage of the total vehicle population represented by these "legally uninsured" vehicles. The Government contribution is then taken as that percentage of the M.I.B.'s total payments under the Untraced Drivers Agreement in the previous year. It is worth noting that the Department of Transport's contribution to the M.I.B. in 1983 amounted to £19,000.^{40B}

A separate and indirect source of financing for the M.I.F. is provided by article 7(7) of Law No 65 - LF - 9 of 22 May 1965 which provides that: "On payment to the party to whom the damages are due, the M.I.F. shall have a right over against the party principally liable. The M.I.F. shall furthermore be entitled to interest calculated at the official rate in civil matters

40A It is worth pointing out that the M.I.B.'s liability will be increased with the extension of compulsory third party insurance to cover property damage: See supra, p.206. In this respect it is proposed that the depositors and exempt authorities could be made liable for all use of their vehicles where compulsory insurance is required whether such use is authorised by them or not. On the other hand, the owners of such vehicles could be liable to pay a contribution to the M.I.B. based on the number and type of vehicles they run: see, Department of Transport Consultative Document, op. cit., paras. 6.3, 6.4 and esp. para. 6.5. It seems that the first possibility will create an anomaly between the settlement of personal injury claims and property damage claims since the M.I.B. will be required to settle claims in the case of the former and not the latter. However, the second possibility appears to incorporate both claims under the M.I.B. agreement. The better view seems to be that the depositors and exempt authorities ought to pay such contribution to the M.I.B. as is equitable to cover to some extent the cost of claims in respect of accidents caused by their vehicles. Alternatively, it could well be possible for the financial deposit and security provisions to be updated to take account of this extension of liability: See supra p.219 for criticism of this financial limit. It should be recognised that any increase in the financial limit will require a further increase in Government contribution to the M.I.B. If such contribution is not made it would be inequitable for the M.I.B. (which is funded by motor insurers from premium income) as it would be vulnerable to claims in respect of accidents caused by vehicles for which insurers have received no income from insurance premiums.

40B Motor Insurers' Bureau: Balance Sheet and Accounts for the year to 31 December 1983, op. cit.

and to the collection charges." Hence there is a legal subrogation to the rights of the victim against the person responsible for the accident. It appears from the Table below that the M.I.F. has never exercised this right. Similarly, in England, Clause 4 of the first agreement 1972 in respect of Uninsured Drivers provides that contracts of insurance can still provide that all sums paid by the insurers or by the M.I.B. by virtue of the agreement will be recoverable from the insured or any other person. Obviously, this provision is inapplicable to Untraced Drivers as the tortfeasors would remain untraced.

The table below shows the actual sum received by the Motor Insurance Fund in Cameroon. Regrettably, the amounts received by the treasury of the Ministry of Finance to whom payments in respect of awards made by the court against uninsured motorists are required to be made have not been obtained by the M.I.F. It therefore seems that the significant source of finance comes

TABLE 9: Insurance Companies Contribution to the Motor Insurance Fund in Cameroon 1968 - 1986 (in francs CFA)

Year	Contributions by Uninsured Motorists	Contributions by Insurance Companies	Government Contribution (Subvention)
1968) -	
1969) -	
1970)- 43,613,094	61,007,626
1971) 40,283,118	Paid by the Government between 1968 and 1972
1972) 24,101,291	
1973		28,259,653	
1974		31,640,787	
1975		34,145,252	
1976	Court awards from	41,741,877	
1977	uninsured drivers paid	58,883,604	
1978	to the Government	80,235,403	
1979	Treasury, but the MIF	110,378,574	Nothing has been paid by the Government since the last payment in 1972.
1980	has never had its	102,485,669	
1981	share from the	107,934,819	
1982	Government, though it	145,285,937	
1983	is supposed to have	175,379,676	
1984	50% of the award.	217,539,120	
1985		249,449,185	
1986	Up to 7 April	Awaiting decision from Ministry of Finance for Government contribution, if any, for the year 1986.	

SOURCE: Motor Insurance Fund (Fonds de Garantie Automobile), Yaounde, 1983 - 1986.

from the insurance companies' contributions.

IV THE ROLE OF THE MOTOR INSURANCE FUND IN CAMEROON AND OF THE MOTOR INSURERS' BUREAU IN ENGLAND IN THE PROTECTION OF ROAD TRAFFIC ACCIDENT VICTIMS.

In Cameroon, the Motor Insurance Fund is required to play a dual role in questions of motor insurance: a social role of indemnifying victims of accidents who sustain personal injuries in the type of cases considered below⁴¹ and the role of prevention of motor accidents by financing road accident prevention schemes.⁴² Clearly the M.I.B. could do something in that field as it falls within the scope of its objects clause.^{42A} However, it is not realistic to expect the M.I.B. to forward such projects because the Department of Transport fosters and finances road accident prevention schemes and there is in England an established road research laboratory and road repair centre at Thatcham.

Unfortunately, in Cameroon, the M.I.F. has not been able to do anything in this field. The reasons for this may be explained by the fact that they receive increasing claims every year and they have limited funds at their disposal to meet all their claims.^{42B} Moreover, such activities seem to be conducive to one of the primary function of the Department of Transport which presently is engaged in nation wide campaigns and activities for enhancing road accident prevention schemes. In addition, the establishment of the

41 Article 7(3) of Law No.65-LF-9 of 22 May 1965. See infra pp.266-290.

42 Article 7(8) ibid.

42A Article 3(0) of the Memorandum of Association of the Motor Insurers' Bureau, 24 September 1974.

42B See Table 13 at p.285.

National Insurance Board^{42C} which would work in liaison with government departments would do a great deal to complement this role.

In Cameroon, there are four types of cases in which the M.I.F. may be made liable. First, where there is an identified uninsured motorist who is responsible for the accident. Second, in the case where a 'hit and run' driver cannot be identified or traced. Third, where the motorist responsible is identified and there is in fact an insurance policy in force at the material time, but the insurer is not legally liable under the policy. For example, the policy may have been obtained by fraud and misrepresentation or the insured may have been in breach of the conditions in the policy or the policy does not cover the liability at all, for example, because of an exception clause limiting the use of the vehicle for domestic purposes and it was being used for business purposes at the time of the accident. And fourth, where a motor vehicle insurer becomes insolvent. Similarly, in England, the first two cases are dealt with by the Motor Insurers' Bureau. However, in respect of the third and fourth cases quite a different approach is adopted in England. In cases where there is an insurance policy in existence, the practice of the M.I.B. is for the insurers concerned to deal with the claim⁴³ although this would not normally be the responsibility of the insurers. The fourth case is now covered by sections 6 and 7 of the Policyholders Protection Act 1975 which provides that the Policyholders Protection Board has a duty fully to satisfy the claims of the insured whose insurer becomes insolvent when the insurance was compulsory.⁴⁴ It may be noted that there is no such Board in Cameroon, thus, it is only fair that the

42C See supra, p.100 note 101A.

43 Note 4, Department of the Environment, Motor Insurers Bureau (Compensation of Victims of Uninsured Drivers Agreement), 1972 op. cit., see infra, p.287.

44 Supra, pp.125-137.

M.I.F. ought to continue to deal with such claims.

The determination of claims by the Motor Insurance Fund in Cameroon and of the Motor Insurers' Bureau in England.

One significant similarity between the Motor Insurance Fund in Cameroon and the Motor Insurers' Bureau in England is that they only compensate for personal injuries and not for damage to property although in Cameroon compulsory cover does extend to the indemnification of third parties for loss of their property. However, as a parallel to the introduction of compulsory third party property damage insurance^{44A} the United Kingdom Government favours the extension of the Uninsured Drivers Agreement 1972 with the M.I.B. under which third parties are at present compensated for personal injury caused by uninsured drivers. On the other hand, the Government does not seem to propose a similar extension in respect of the Untraced Drivers Agreement 1972.^{44B} Undoubtedly, extension of the M.I.B.'s remit on uninsured drivers' claims to include property damage will increase considerably the volume of claims they handle, and will of course result in extra sums paid out in settlement of claims.^{44C} Consequently, the total extra cost and its effect

44A See Chapter Three of this study, pp.206-208.

44B Article 1(4) of EEC Directive No. 72/166/EEC (O.J. 1972, L103/1), permits such an exclusion. The reason for this appears to be that claims against the M.I.B. for property damage would open the way to obvious possibilities for fraud by unscrupulous persons who damage their own property and then allege that an unidentified driver was responsible: Reply to inquiry, letter dated 31 January 1986 from Mr. M. Ainsworth; see further, the Department of Transport Consultative Document, op. cit., para 1.9.

44C Clearly, there are vastly more property damage claims than personal injury claims; some claims of course combine both aspects. In a property owning democracy, the Directive appears to be in line with consumer sentiments. However, it is worth pointing out that the cost of administering and settling claims against uninsured motorists is met from the premiums paid by those who do insure. The amount therefore paid could be regarded as a supplementary premium paid to ensure reasonable treatment in the event of being injured by an uninsured motorist. As a corollary, the cost of such improved protection will eventually have to be recovered by higher premiums.

upon premiums will eventually depend on what use is made of the provision the Directive makes for limiting the call on the 'guarantee fund' and the capacity in which the M.I.B. will be acting.

A practical difficulty in implementing article 1(4) of the E.E.C. Directive No. 72/166/EEC may arise. The M.I.B. would be entrusted with a much larger task of providing compensation of at least up to the limits of the insurance obligation for damage caused by an unidentified driver or a vehicle for which the insurance obligation has not been satisfied. The Directive itself shows some recognition of these problems in article 1(4) in two respects. Firstly, it provides that the government may limit or exclude payment of compensation by the M.I.B. in the event of property damage by an unidentified vehicle. Secondly, in the case of an identified but uninsured vehicle article 1(4) permits the operation of an excess of up to 500 ECU's (about £260). It is probable that the effect would be to limit payments by the M.I.B. leaving those whose property had been damaged to recover amounts falling below the excess from their own property damage insurance.^{44D}

In addition, article 1(4) of the E.E.C. Directive No. 72/166/EEC recognises the issue of subsidiarity^{44E} whereby, any settlement of claims with respect to property damage would first take into account compensation for damage available from other sources such as, comprehensive motor insurance, insurance in respect of other fixed property, consequential loss insurances and vehicle recovery or replacements arrangements (for example, agreements between insurers). This seems desirable as widespread public

44D In the absence of no claims being made against the M.I.B. for an amount less than the excess, the number of small claims on which the M.I.B. would otherwise incur the usual cost of investigation would be limited.

44E Contrast settlements in respect of personal injury accidents which are not made on this basis. See further, Department of Transport Consultative Document, op. cit., para. 5.1.

sympathy is unlikely to be raised for victims of property damage as in personal injury cases where the consequences are social and involve the community at large. For example, the loss of a "bread" winner in an instant second has serious repercussions on the dependants and even the society depending on the personality of the deceased.^{44F} Moreover the incidence of loss in relation to property damage often involves very small amounts and could easily be averted by purchasing an insurance policy to cover the risk, thus questions like "he ought to have insured against the risk" would be raised.

Admittedly the subsidiarity principle would largely permit the M.I.B. to foster the underlying social purpose of a guarantee fund, and further be expected to reduce the additional costs of its added responsibilities in meeting property damage claims.^{44G} Nevertheless, this might require differential treatment in compensation depending on whether damage is caused by an insured or uninsured driver. However, it is arguable that this difference is not crucial. With respect to damage caused by an insured driver, it is contended that the result will not be inequitable as premiums would have been paid somehow to cover the cost whereas any damage caused by uninsured drivers would have to be met from premiums paid by the former.

With respect to the determination of claims by the Motor Insurance Fund in Cameroon and the Motor Insurers' Bureau in England, a crucial difference which is a startling departure from the English system lies in the measure of compensation. In England, the M.I.B. either satisfies a judgment or a settlement negotiated in favour of the victim of an uninsured driver in

44F Corstvet, "The Uncompensated Accident and Its Consequences", (1936) 3 Law & Contemp. Prob. 466 et seq.

44G For a similar view see, Department of Transport Consultative Document, op. cit., para. 5.2.

respect of the first agreement of 1972.⁴⁵ Such an award is naturally assessed according to the ordinary principles of common law. Thus any degree of personal injury is compensated for. However in respect of the second agreement,⁴⁶ since there will be no judgment against a tortfeasor or the untraced driver the M.I.B. awards to the applicant a payment of an amount which is assessed in the same manner as a court would assess damages in a tort action except that the M.I.B. does not award damages for pain and suffering or loss of expectation of life or loss of earnings in so far as they have been paid by the applicant's employer.⁴⁷ On the other hand, in respect of untraced drivers, the M.I.F. in Cameroon, works on the certificate of a medical officer stating the degree of disability and a fixed scale is stipulated. By article 10 of the 1967 Decree, the victim of the accident must have a total temporary incapacity (incapacité temporaire totale or I.T.T.) of at least 10 days or partial permanent incapacity (incapacité permanente partielle or I.P.P.) of at least 10 per cent. It should be observed that where the percentage incapacity is less than 10 days the M.I.F. is not liable. This seems unfair to daily paid workers and self-employed persons who would receive no wages for the days they are out of work.

In Cameroon, in the case of total temporary incapacity, the compensation is for expenses incurred and any loss of salary and fringe benefits, though credit must be given for benefits received from social insurance authorities or employers, as the case may be. The I.P.P. is assessed by a doctor authorised to act as an expert by the courts and is

45 Clauses 2 and 5(d) of the Uninsured Drivers Agreement 1972 op. cit.

46 Untraced Drivers Agreement 1972.

47 Clauses 3 & 4 of the Untraced Drivers Agreement 1972 op. cit. and Clause 3 of the supplemental Agreement between the Secretary of State for Transport and the Motor Insurers' Bureau, 1977.

calculated on a percentage basis taking into account future discomfort and loss of pleasure as well as a reduction in the victim's physical capacities.⁴⁸ The medical report stating the degree of incapacity must be sent to the M.I.F. From an interview with Mr. Ngwa Che, the Managing Director of the M.I.F. it emerges that there is a fixed amount of compensation per percentage point. Each percentage point of incapacity is equivalent to 100,000 Francs CFA in money's worth.⁴⁸ This appears to be an arbitrary evaluation as it fails to take account of the degree of disability, the nature of employment of the injured plaintiff, and his age. It is therefore desirable that a table be drawn up taking into consideration the above relevant factors.

In Cameroon, the victim of the accident or his representative in interest must be entitled to compensation as against the owner, driver or other person in charge of the motor vehicle according to the laws of civil liability.⁴⁹ Similarly, in England, negligence of the tortfeasor must be established in every case.⁵⁰ The mere fact of the accident therefore does not support a claim against the M.I.F. or the M.I.B.

In Cameroon, by virtue of article 16 of the 1967 Decree, claims can be brought by persons responsible for the accident. Such claimants are mostly

48 This method of evaluating damages in respect of personal injury claims has also found favour in the courts: Samuel Jengob Gizang v. John Ngassa, Onouba John & Guardian Royal Exchange Ltd., Suit No.HCSW/6/75 of 4 August 1976, Buea (Unreported), where the judge awarded 350,000 general damages for 35% functional disability. (A case in the English-speaking Cameroon). For a decision in the French-speaking Cameroon, see Affaire Soundja Gaston c. Ekobe Ewane Joseph, Douala 1981, (Unreported). For a similar approach under french law see, P. Hawkes, "The Law and Practice Relating to Accident Claims on France", The Law Society's Gazette, 6 October 1976, p.821.

49 See Chapter Three of this work, supra., pp.150-170.

50 As in tort law, this is also required by Clause 2 of the Uninsured Drivers Agreement 1972; Clause 1(c) and Note 3(b) of the Untraced Drivers Agreement 1972 op. cit.

uninsured motorists, that is to say, persons driving a motor vehicle in contravention of the provisions of article 1 of Law No. 65 - LF - 9 of 22 May 1965. The person responsible for the accident should notify the M.I.F. within one month from the occurrence of the accident. It should be noted however that the M.I.F. satisfies such claims only if the person responsible for the accident is unable to meet the claim and this must be clearly established before any payment is made. The person primarily liable in damages is deemed unable to pay the damages awarded against him if a judgment debt remains unsatisfied during a period of one month.^{50A} In England, it is a condition precedent to the M.I.B.'s liability that notice of the bringing of proceedings or the intention to bring proceedings against any uninsured person be given to the M.I.B. before or within seven days after the commencement of such proceedings.⁵¹ In practice the Motor Insurers' Bureau does not require the case to be fought to judgment, but acts precisely as an insurance company itself, that is, it negotiates with the claimant or his solicitors over the claim, but if no settlement is arrived at, the M.I.B. normally defends the proceedings on behalf of, and by agreement with, the uninsured defendant. In both England and Cameroon, the claimant must be unable to obtain compensation either from the responsible party or from any other source. If the victim or his representative in interest is able to claim partial damages in another respect, the M.I.F. in Cameroon⁵² and the M.I.B. in England⁵³ only assumes responsibility for the additional portion.

50A Article 14(2)(b)(ii) and article 16(1) of the 1967 Decree.

51 Clause 5(1)(a) of the Uninsured Drivers Agreement 1972 op. cit.

52 Article 18 of the 1967 Decree.

53 Clause 5(2)(c) and (d) of the Uninsured Drivers Agreement 1972 op. cit.

The plaintiff is permitted to accept compensation under a settlement negotiated on his behalf from the person or persons responsible.

There are certain procedural requirements in the case where the person liable remains untraced. In Cameroon, when the person responsible for the accident remains unknown, the victim or his representative in interest may make a claim to the M.I.F. within one year following the accident.⁵⁴ The victim must forward to the M.I.F. information about the date and place of the accident, the type of vehicle involved, the authority who made out the report on the accident and the amount of the claim for damages for personal injuries or death resulting from the accident. It is necessary that the person responsible for the accident remain untraced.⁵⁵ The injured party has to submit evidence that it is not possible to identify the tortfeasor. For this purpose, all police or gendamerie reports concerning the accident are required to mention whether the individual responsible for the accident is known or unknown. These reports are transmitted by the police to the M.I.F. within one year following the accident. The M.I.F. investigates the circumstances of the accident to establish the liability of the untraced driver before deciding to pay the claim. In England, under the Untraced Drivers Agreement any injured third party may apply directly to the M.I.B. within three years from the date of the event giving rise to the death or

54 Articles 9(2) and 17(1) and (3) of the 1967 Decree. Note that the M.I.F. does not take any measures or sue anyone responsible for the accident. It is the duty of the police and the gendamerie to pursue the insurance defaulters. Once the defaulters are recovered or caught, the M.I.F. can take over investigation. Otherwise, the M.I.F. will settle the claim for any victim affected by a hit and run driver.

55 Article 7(3) of the 1965 Law.

injury.^{55A} The M.I.B. makes a preliminary investigation in which the applicant must give all such assistance as may be reasonably required to ascertain that the person responsible for the accident fully or partially cannot be traced⁵⁶ and that on a balance of probabilities the untraced person would have been liable to the applicant in damages. On the basis of a report, the M.I.B. proposes an award to the claimant of compensation. The applicant whose claim is refused, or who objects to the award offered, has a right to appeal to an arbitrator selected from a panel of Queen's Counsel appointed by the Lord Chancellor.⁵⁷ The decision of the arbitrator is binding on both the M.I.B. and the claimant. Attempts have been made to circumvent this procedure by bringing proceedings in court, though these have failed. In Clarke v. Vedel⁵⁸ the plaintiff was run down by a motor cyclist who gave his name as David Vedel. In fact the date of birth and address given by the so-called David Vedel was unknown. The plaintiff sued David Vedel but being unable to serve a writ successfully obtained an order for substituted service under Rules of the Supreme Court Order 65, rule 4 on the M.I.B. The Court of Appeal confirmed that the order should be set aside. In effect, there is no right to sue M.I.B. unless and until they have refused to consider an application in respect of a negligent driver who is untraced.⁵⁹

55A Clause 1(f) of the Untraced Drivers Agreement 1972. The three years period stipulated here is the same as the limitation period under the Limitation Act 1980: see note 68 below. In Cameroon, the limitation period for the bringing of claims to the M.I.F. is normally one year. It seems rather curious that this period is different from the three years limitation period (in English-speaking Cameroon and ten years in French-speaking Cameroon) in personal injury cases. However, as we will see later at p.276 the M.I.F. does not adhere strictly to these periods.

56 Clause 7 of the Untraced Drivers Agreement 1972.

57 Clauses 11 & 18 ibid. For an outline of the appeal procedure see, clauses 12 - 22 ibid.

58 [1979] R.T.R. 26.

59 Persson v. London Country Buses [1974] 1 W.L.R. 569.

Thus, only if the plaintiff's cause of action is against an uninsured driver, can an order for substituted service be obtained. The procedure for dealing with claims under the Untraced Drivers Agreement 1972 is somewhat lengthy. In 1978, a new accelerated procedure⁶⁰ was introduced for claims up to £20,000.⁶¹ Instead of causing a report to be made on the application as provided by Clause 7 of the 1972 Agreement, the M.I.B. may offer to the applicant a sum, assessed in accordance with Clause 3 of the Principal Agreement.⁶² The claimant has the option, but is not obliged to use the simplified procedure. However, it is a condition precedent to application of this procedure⁶³ that there must be unidentified potential defendants only involved: if there is a joint tortfeasor element, or a passenger in a public transport vehicle is concerned, then the former procedure applies. A further exclusion from this procedure is of cases involving unusual features, for example, a point of principle or a question of interpretation of the M.I.B. Agreement or of the Road Traffic Act 1972. A case may switch itself from the new procedure to the former because it has proved impossible to reach a negotiated settlement. A claimant who elects to pursue his case under this procedure, gains the advantage of a speedier procedure in that some of the formalities that have to be followed in the former procedure are relaxed and hopefully should get a quicker decision on his claim. What he loses in

60 Department of Transport, Motor Insurers' Bureau (Compensation of Victims of Untraced Drivers) dated 7 December 1977, London H.M.S.O.

61 The limit is subject to periodic review. The original figure was £3,000 and no doubt will increase to some extent with inflation.

62 Clause 1 of the Untraced Drivers Agreement 1977 ibid.

63 Clause 1 and Note 3 of the Untraced Drivers Agreement 1977 ibid.

return for this advantage is the right of appeal.⁶⁴ For this reason the claimant must be legally represented before the option may be taken.

As regards the various limitation periods mentioned above, the M.I.F. is very flexible and provides no sanction for non-compliance with limitation periods.⁶⁵ Claims are heard out of time if there is enough evidence to support the claim. The M.I.F. see the limitation periods as merely encouragement to claimants to bring their actions in time so as to facilitate investigation.

In England it appears that quite a lot of claims are rejected. In 1983 out of 9700 claims handled by the M.I.B., approximately 2500 claims were paid and 6,200 claims were carried forward into 1984; 1000 claims were rejected for three reasons.⁶⁶ The obvious reasons were first, cases where liability had not been established against the alleged "Untraced" or "Uninsured" driver, and secondly cases where the claimant could obtain compensation from another source such as an identified and insured motorist involved in the same accident. The third reason concerns cases where there has been a breach of time limit for notice of the bringing of the claim or notice of the bringing of legal proceedings. Unfortunately, the figure of 1000 rejections relate to all the above three reasons.⁶⁷ It may well be that most of the claims are rejected on the first ground which obviously does not fall within the M.I.B. agreements. However if a significant proportion of claims were

64 Clause 2 and the Schedule referred to therein of the Untraced Drivers Agreement 1977.

65 Interview with Mr. Ngwa Che, Managing Director of the Motor Insurance Fund, August 1983. See supra, pp.272-273.

66 Reply to letter from Mr. C.B. Garwood, Secretary of the Motor Insurers' bureau, dated 29 March 1985.

67 The M.I.B. does not retain statistics for different categories of claim rejection. Reply to inquiry, letter from Mr. C.B. Garwood, Secretary of the Motor Insurers' Bureau, dated 8 July 1985.

rejected for breach of the limitation period this would be attributable to the failure of the lawyers. On the other hand, the claimants may perhaps not know in time that they have a claim against the M.I.B. This may be the case where the seriousness of a victim's injuries is only established at a later date. In such cases time begins to run out for the purpose of legal proceedings when the victim is aware of the injury.⁶⁸ It is suggested that there should be some amendments to Clause 1(f) of the Untraced Drivers Agreement 1972 to take account of the realisation of the injury by the victim. This clause ought to include that the application should be made within three years from the date of knowledge (if later) of the person injured.

Finally, there are certain exceptions to the liability of the Motor Insurance Fund and the Motor Insurers' Bureau. In both England and Cameroon, the victim is not entitled to recover, where he was a passenger and party to some scheme to steal the vehicle or, being the owner of or user of the vehicle, he knew or had reason to believe that there was no insurance in force as required by the Road Traffic Act 1972.⁶⁹ In England, the case of Porter v. M.I.B.⁷⁰ illustrates this point. The plaintiff brought a car into England from Holland but was not insured to drive it. She asked a friend to assist her, knowing that he drove a car and assuming that he was also insured. It turned out that he was uninsured. The Motor Insurers' Bureau argued that they were not bound to satisfy the judgment awarded against the friend by virtue of the exception. The court held that they were liable.

68 Sections 11(b), 12 and 14 of the Limitations Act 1980.

69 In England, see Clause 6(1)(c) of the Uninsured Drivers Agreement 1972 and Clause 1(2)(b) of the Untraced Drivers Agreement 1972 op. cit. In respect of Cameroon, see article 10 of the 1967 Decree.

70 [1978] 2 Lloyd's Rep.463.

The victim assumed that the friend was insured and there was nothing which should have caused her to have reason to believe otherwise. The exception was therefore construed from the point of view of the victim.

It is worth noting that the M.I.B. only satisfies a judgment in respect of any relevant liability which is required to be covered by insurance.⁷¹ In Gardner v. Moore and Another,⁷² the plaintiff suffered serious injuries when the defendant deliberately drove his motor vehicle at the plaintiff and injured him. At the time of the accident the defendant was not insured against third party risks as required by sections 143 and 145 of the Road Traffic Act 1972. Judgment was obtained in favour of the plaintiff and the M.I.B. was called upon to satisfy the claim by virtue of clause 2 of the Uninsured Drivers Agreement 1972. The sole question for decision depended on whether the events that had happened constituted a "relevant liability" within the meaning of Clause 2 of the Uninsured Drivers Agreement.⁷³ It follows from the construction of sections 143 and 145 of the Road Traffic Act 1972 that a motorist is required to take out a policy of insurance indemnifying him against "any liability" however arising, incurred by him in respect of the death of or bodily injury to any person "caused by, or arising out of the use of", a vehicle on a road. The plaintiffs injuries were so caused and accordingly, if the judgment against the defendant remained unsatisfied, the M.I.B. would be liable to indemnify the plaintiff. The

71 Clause 2 of the Uninsured Drivers Agreement and Clause 1(c) and (d) of the Untraced Drivers Agreement 1972.

72 [1984] 2 W.L.R. 714. See also Hardy v. M.I.B. [1964] 2 Q.B.745 on very similar facts.

73 "Relevant liability" means a liability in respect of which a policy of insurance must insure a person in order to comply with part VI of the Road Traffic Act 1972: see Clause 1 of the Uninsured Drivers Agreement 1972.

M.I.B. invoked a general principle of insurance law⁷⁴ and indeed of the wider law of contract⁷⁵ that a person might not stand to gain an advantage arising from the consequences of his own iniquity. That was rooted in the idea of public policy.⁷⁶ Essentially that principle exists to prevent wrongdoers benefiting themselves as a result of their crime, but does not preclude innocent victims from being compensated⁷⁷ by a machinery set up by the Road Traffic Act 1972 and the M.I.B. Agreements 1972.⁷⁸ This principle has effectively deprived a plaintiff who was a joint participant in a criminal offence of a right of action against the defendant. The actual decision in Ashton v. Turner⁷⁹ was based on the principle of public policy and therefore the consideration of the defence of volenti non fit injuria together with the attendant question of the effect of section 148(3) of the Road Traffic Act 1972 were not strictly necessary to the decision.⁸⁰ However, the House of Lords to some extent, seems to have settled this question. In Gardner v. Moore and Another,^{80A} the House of Lords countered the argument on public policy that there was also a countervailing public policy that innocent victims of motor vehicle accidents ought to be compensated by virtue of the

74 Gray v. Barr [1971] 2 Q.B. 554.

75 Beresford v. Royal Insurance Co. Ltd. [1938] A.C. 586.

76 Hardy v. M.I.B. [1964] 2 Q.B. 745 at 760.

77 Cleaver v. Mutual Reserve Fund Life Association [1892] 1 Q.B. 147.

78 The satisfaction of the defendants liability to the plaintiff was incidental to the main purpose of the Agreement which was the protection of innocent third parties, supra, pp.253-255.

79 [1980] 3 W.L.R. 736 esp. at 740-741, 743-745.

80 Ibid. pp.746-747; c.f. Gregory v. Kelly [1978] R.T.R.426 at 430 and Winnik v. Dick (1984) 2 S.L.T. 185 at 188-190. See further, supra, p.214.

80A [1984] 2 W.L.R. 714 esp. at pp.721 and 723.

provisions of the Road Traffic Act 1972 and the M.I.B. Uninsured Drivers Agreement 1972.

Furthermore, the M.I.B. is under no duty to satisfy a judgment if the liability did not arise out of a liability which was required to be covered under the Road Traffic Act 1972. In Cooper v. Motor Insurers' Bureau⁸¹ the relevant issue turned on the wording of section 145(3)(a) read with section 143 of the Road Traffic Act 1972. Section 145(3)(a) provides that the policy of insurance must insure the user in respect of any liability which may be incurred by him in respect of death of, or bodily injury to any person caused by, or arising out of, the use of the vehicle on a road. The phrase "any person" here refers back to the third party section in section 143. Section 143 refers to "use" of a vehicle and basically means that the driver must be insured against his liability to third persons, that is, persons other than himself, and of course extends to cover the liability to such third persons of someone causing or permitting the driver's use. In this case, the words "any person" were given their ordinary meaning of any member of the public.⁸² The policyholder did not come within the terms not because he was not a person: but because the clause only relates to a claim by any person which the policyholder is legally liable to pay. Consequently, such a liability cannot exist on a supposed claim and at the same time by and against the policyholder. It is suggested that the decision is clearly correct and that any other construction would have extended the compulsory insurance requirements beyond what the Road Traffic Act 1972 warrants. This reveals a lacuna in the protection afforded to third parties by the Road Traffic Act 1972 and the M.I.B. Agreements 1972. It is desirable that the Road Traffic Act and the Agreement between the M.I.B. and the Secretary of State should be

81 [1985] 1 W.L.R. 248.

82 Ibid., at p.252.

revised to offer such protection. The case may be thought to illustrate yet again the need for a system of no-fault-compensation for the victims of road accidents. In England, the M.I.B. is under a duty to indemnify the third party only if the injuries arise out of the use of a vehicle on a road; the word "road" being defined under section 196 of the Road Traffic Act 1972 as "any highway and any other road to which the public has access. However, the M.I.B. will be liable if only part of the vehicle causing the injury is on a "road" at the time of the accident.⁸³ By contrast, in Cameroon as in the case with compulsory insurance as we have already seen in Chapter Three,⁸⁴ there is no distinction made between private and public road. A victim can recover whether the accident occurred on private land or on a public highway.

In Cameroon, the persons entitled to apply to the Motor Insurance Fund are insurance companies, victims of accidents and persons responsible for the accident. In England, an application to the Motor Insurers' Bureau for a payment in respect of the death of or bodily injury to any person may be made by the applicant, that is, the person for whose benefit the payment is to be made; or any solicitor acting for him; or any other person whom the M.I.B. may be prepared to accept as acting for him. Since the creation of the Motor Insurance Fund in 1967 substantial sums of money have been paid out to victims of accidents in Cameroon who otherwise would have gone without compensation. Nevertheless, with the exception of 1982, it does not seem that the M.I.F. has been very generous if one compares its revenue in Table 9 to the total payments made in Table 13. It is possible that administrative costs account for most of its expenditure. In England as well, increasing

83 Randall v. Motor Insurers' Bureau [1968] 1 W.L.R. 1900; Buchanan v. Motor Insurers' Bureau [1955] 1 W.L.R. 488.

84 Supra, p.223.

claims are being made to the M.I.B. every year. The following tables show the extent to which the M.I.B. in England and the M.I.F. in Cameroon has settled claims brought under the Agreements in the case of England and with respect to Cameroon under the legislation.

TABLE 10: Awards and Payments in respect of the Motor Insurers' Bureau Uninsured and Untraced Drivers Agreements in England 1978 - 1984

YEAR	Uninsured Drivers Agreement		Untraced Drivers Agreement	
	Number of Awards	Total Payments (£)	Number of Awards	Total Payments (£)
1978	750	2,276,635	854	2,014,738
1979	704	3,138,725	1029	2,285,114
1980	656	3,508,750	1085	3,240,218
1981	805	4,384,027	1395	4,132,045
1982	852	5,877,059	1313	4,223,688
1983	1044	6,591,723	1447	4,664,225
1984	1120	8,120,180	1469	5,826,030

SOURCE : Department of Transport, London 1984.

TABLE 11: Awards and Payments in respect of Uninsured and Untraced Drivers in Cameroon by the Motor Insurance Fund 1968 - 1986

YEAR	Uninsured Drivers Agreement		Untraced Drivers Agreement	
	Number of Awards	Total Payments (CFA)	Number of Awards	Total Payments (CFA)
1968	2	2,350,000	-	-
1969	-	-	-	-
1970	1	250,000	-	-
1971	3	1,700,000	-	-
1972	-	-	-	-
1973	6	6,650,000	-	-
1974	1	1,000,000	-	-
1975	3	12,100,000	2	825,000
1976	4	16,125,000	2	3,250,000
1977	3	10,650,000	2	1,950,000
1978	8	21,567,000	2	2,100,000
1979	8	26,775,000	1	3,875,000
1980	5	17,100,000	7	11,500,000
1981	4	16,100,000	5	13,179,915
1982	10	24,716,666	7	16,385,818
1983	4	8,563,200	15	33,246,279
1984	-	-	7	23,230,220
1985	2	1,350,000	3	9,466,807
1986 Up to 7 April	-	-	-	-

SOURCE : Motor Insurance Fund, (Fonds de Garantie Automobile), Yaounde 1983 - 1986

TABLE 12: Awards and Payments in respect of Liquidation of Insurance Companies and Breach of Insurance Companies' Conditions by the Motor Insurance Fund in Cameroon 1968 - 1986

YEAR	Liquidation		Breach of Policy Condition	
	Number of Awards	Total Payments Francs (CFA)	Number of Awards	Total Payments Francs (CFA)
1968	-	-	-	-
1969	1	1,500,000	1	1,000,000
1970	13	7,504,067	6	10,710,000
1971	-	-	9	6,210,000
1972	-	-	5	6,430,000
1973	-	-	4	9,800,00
1974	-	-	2	10,310,000
1975	-	-	5	10,075,000
1976	-	-	2	4,550,000
1977	-	-	3	6,350,000
1978	-	-	7	17,285,000
1979	-	-	9	19,532,000
1980	-	-	8	27,545,000
1981	-	-	15	43,211,989
1982	-	-	12	65,050,000
1983	-	-	12	16,950,000
1984	-	-	6	14,806,500
1985	-	-	4	10,450,000
1986 Up to 7 April	-	-	-	-

SOURCE : Motor Insurance Fund,
(Fonds de Garantie Automobile), Yaounde 1983 - 1986

TABLE 13: Total number of Claims and Awards and Total Payments made by the Motor Insurance Fund in Cameroon 1968 - 1986

Year	Number of Claims	Number of Awards	Total Payments (Francs CFA)
1968	4	2	2,350,000
1969	28	2	2,500,000
1970	108	20	18,464,067
1971	86	12	7,910,000
1972	94	5	6,430,000
1973	122	10	16,450,000
1974	103	3	11,310,000
1975	79	10	23,000,000
1976	85	8	23,925,000
1977	113	8	18,950,000
1978	282	17	40,952,000
1979	488	18	50,182,500
1980	470	20	56,145,000
1981	620	24	72,491,904
1982	958	29	106,152,484
1983	674	31	58,759,479
1984	614	13	38,036,720
1985	856	9	21,266,807
1986 up to 7 April	157	-	-

SOURCE : Motor Insurance Fund -
(Fonds de Garantie Automobile), Yaounde 1983 - 1986

In Cameroon where the person responsible for the accident is known and insured, judgment may be entered against the insurance company to pay the damages which have been awarded. In the face of such a situation the insurance company held liable to pay the damages can adopt one of two different attitudes. It may pay the damages awarded or deny liability on the grounds such as nullity or suspension of the insurance contract⁸⁵ or that the loss fell within an exception clause in the policy or that the insured has broken a condition in the policy. The insurance company must notify the M.I.F. within 15 days by registered letter of its intention to deny liability to the victims or third parties.⁸⁵ The M.I.F. has the right to verify the

85 Article 12 of the 1967 Decree.

validity of the refusal by the insurance company to pay the damages and to examine the arguments raised by it. If the M.I.F. intends to contest the validity of the arguments it must, within three months of receiving the registered letter of the insurance company, inform it as well as the victim of the accident of its intention to do so. Where the M.I.F. is in agreement with the objection raised by the insurance company, the victim or the beneficiaries would be informed and they will forward a claim to the M.I.F. The M.I.F. is bound to settle such claims where the insurance company has grounds to deny liability.

In the case of Fouda Sébastien c. Passagère Morte and others⁸⁶, an accident occurred on the Obala/Yaounde road in which one person died and two were injured. A car in the service of the Ministry of Health was used for social and domestic purposes. The insurance company, Assurances Mutuelles Agricoles du Cameroun (AMACAM) declined responsibility on the basis that the passengers were being transported clandestinely. The vehicle was insured exclusively for transporting goods and not passengers. The court made an award of 3,060,000 Francs C.F.A. An application was made to the M.I.F. The M.I.F. arranged for the circumstances of the accident to be investigated fully. The argument of the insurance company was upheld. The M.I.F. undertook to pay damages of 2,500,000 Francs C.F.A. in respect of the death of and personal injuries suffered by the victims but declined to pay damages in respect of the car. The M.I.F. however recovered part of this amount from the owner of the vehicle pursuant to article 22 of the 1967 decree. In the case of Njappa Josua c. Piéton and others⁸⁷ an infant of four years was killed in an accident. The car was insured under category 1, that is to say,

86 Judgment No.967/COR of June 20, 1978, Yaounde (Unreported).

87 Judgment No.336/COR of January 27, 1977, Yaounde (Unreported).

for social and domestic purposes. At the time of the accident the car was used for business purposes, carrying passengers for reward. This was confirmed by the police report. The insurance company denied liability and made an application to the M.I.F. Damages of 2,000,000 Francs C.F.A. were awarded to the mother of the deceased victim.

By contrast, in England, the practice of the M.I.B. where it is ascertained that there is in existence a policy issued in compliance with the Road Traffic Act 1972, but the policy is ineffective in respect of the accident, for example, the vehicle was being used for a purpose other than the permitted use described in the policy or the insurer is entitled to repudiate a claim through non-disclosure or misrepresentation is to require insurers to settle the claim.⁸⁸ In such circumstances, the insurer who issued the policy is the "insurer concerned" and under the terms of the domestic agreement between the M.I.B. and its members, the insurer will deal with the claim.⁸⁹ The claimant does not have to give separate notice of proceedings to the M.I.B. but does of course to the insurer.⁹⁰ Section 149 of the Road Traffic Act 1972 provides for payment by an insurer to third parties of any judgment in respect of liability under a policy of insurance even though the insurer may be entitled to avoid or cancel the policy. The insurer retains the right to recover the amount they have paid to third parties from their own insured. In this way the burden is spread over the insurance companies and Lloyd's syndicates who would in any event ultimately contribute to the M.I.B.'s funds.

With regard to insolvent tortfeasors in Cameroon, the injured party has

88 Note 4 of the Uninsured Drivers Agreement 1972 op. cit.

89 Regrettably, there is no central record of such cases.

90 Clause 5(1)(a)(ii) of the Uninsured Drivers Agreement, ibid.

three years within which to call upon the M.I.F. He must present evidence of the insolvency of the author of the accident. When the compensation has been established by judgment or agreement the injured party gives notice to the person liable demanding payment. If the demand is not complied with, a claim may be made on the M.I.F. within a month. The lawyer or 'Huissier de Justice' makes a 'signification commandement'. This shows all the property of the person liable. Where this is not sufficient to meet the claim, the 'Huissier' makes a 'procès verbal de carence' which is forwarded to the M.I.F. If the victim or beneficiaries are able to recover part of the award from the individual responsible for the accident, the M.I.F. assumes responsibility for the additional portion only. The victim cannot have more rights against the M.I.F. than he had or would have had against the person who caused the accident. In all cases, the M.I.F. is to be informed of all suits instituted in court by victims of motor vehicle accidents, so that it may follow or intervene in such suits.⁹¹

Insurance companies submit claims to the M.I.F. when they do not have sufficient funds to meet their liabilities. In John Nkem v. Joseph Ashu, Anayo Okaye and le liquidateur de la Mutuelle Camerounaise d'Assurances,⁹² the plaintiff claimed 5,225,000 Francs C.F.A. for injuries and losses sustained as a result of an accident which was caused by a vehicle insured with Mutuelle Camerounaise d'assurance against all third party claims. The court awarded damages to the plaintiff to the tune of 3,500,5000 Francs C.F.A. The owner of the car left for Nigeria without leaving an address and the driver was unable to meet this sum. The insurance company applied to the M.I.F. The M.I.F. sent a representative to assess all the assets of the

91 Article 14 of the 1967 Decree.

92 Suit No.WC/106/69, Buea High Court (Unreported).

insurance company. The investigation revealed that the insurance concern could not meet its liabilities and as a result the M.I.F. paid to the victim such part of the damages as were related to personal injuries sustained. However, where an insurance company goes into liquidation or does not have sufficient funds to meet its liabilities the M.I.F. cannot be held liable to pay damages which have been awarded to the victim unless it is proved that the person responsible for the accident is insolvent or otherwise unable to settle the award. The case of Ngufor III c. Andreas Chefor and the Motor Insurance Fund⁹³ illustrates this practice. The plaintiff, Fon Ngufor III of Nkwen brought an action against the defendants as father of a child who died in a motor vehicle accident for which the first defendant, Andreas Chefor, was alleged to be responsible. On February 22, 1969, the defendant, owner and driver of the motor vehicle was insured with Mutuelle Camerounaise d'Assurance, an insurance concern which had gone into liquidation during the hearing of the case. The plaintiff's claim was for funeral expenses, loss of expectation of life and loss of services. Since the first defendant was insured at the time of the accident, he had to be indemnified by his insurers. The first defendant's insurer having gone into liquidation, the court invoked article 7(3) of Law No. 65-LF-9 of May 22, 1965 which provision requires the M.I.F. to pay under such circumstances. The Motor Insurance Fund was accordingly ordered to pay the damages awarded against the first defendant. The Motor Insurance Fund appealed to the Bamenda Court of Appeal⁹⁴ on the grounds, inter alia, that the judge had erred in law by failing to determine the insolvency of the first defendant-tortfeasor before ordering the M.I.F. to pay. Article 7(3) of Law No. 65-LF-9 of May 22, 1965,

93 Suit No. HC/17/69 Bamenda High Court (Unreported).

94 Appeal No BCA/4/1975, Bamenda Court of Appeal (Unreported).

requires that the person responsible in damages, in this case the first defendant, must be found to be wholly or partially insolvent as well as his insurer. Thus the court held that since the insolvency of the first defendant had not also been established by the learned trial judge, the M.I.F. were not liable to pay the award made against the first defendant. The decision of the Bamenda Court of Appeal was later confirmed in another case, Fonds de Garantie Automobile c. Kamga Joseph⁹⁵ by the Supreme Court. Here, an appeal was made by the Motor Insurance Fund to set aside the judgment of the Bafoussam Court of Appeal which had ordered the M.I.F. to pay an award of 2 million Francs CFA made against an insured whose insurer had gone into liquidation. The M.I.F. contended that the Bafoussam Court of Appeal had failed to establish the insolvency of the party primarily liable, in this case, the insured tortfeasor before making the order. Accordingly, the judgment of the Bafoussam Court of Appeal was set aside.

By contrast, in England, the Policyholders Protection Board⁹⁶ is responsible for paying claims in cases where the insurance company is insolvent. Therefore in such situations the M.I.B. would not be called upon to settle the claim.

With respect to Cameroon, the accident must have occurred in Cameroon and the claimants must be of Cameroonian nationality or be resident in Cameroon or be nationals of a state which has reciprocal agreements with Cameroon.⁹⁷ It appears from an interview with the Managing Director of the Motor Insurance Fund that no agreement has been concluded with any country. Therefore foreigners travelling or staying for a short time in Cameroon are

95 Arret No. 17/CC of December 11, 1975 Yaounde.

96 Supra pp.125-137.

97 Article 9 of the 1967 Decree.

generally excluded from the benefit of the M.I.F. even though they may have taken out temporary insurance cover. This may appear unfair, since foreigners pay their share in financing the M.I.F. when they obtain insurance in Cameroon. It is arguable, however, that their contribution is not intended to be the counterpart of the risks to which they are exposed but of the risks which they create.

In Europe, the problem of compensating a foreigner who is a victim of a motor accident has been resolved by the Green Card System which was established on January 1, 1953.⁹⁸ By this system insurers in 26 European countries set up a Bureau in each country.⁹⁹ The Bureau has two functions:

98 See, Motor Insurers' Bureau, "Uniform Agreement between Bureaux," (a private agreement between national Bureaux based upon recommendations which were adopted by the Sub-Committee on Road Transport at Geneva on the 25th January 1949; "summary about the European Green Card System, "OSM/MF, Council of Bureaux, December 1982. One of the characteristics of the Green Card System is that it is based on agreements under private law entered into bilaterally between the national insurance bureaux using a standard form of contract known as 'Uniform agreement between Bureaux' - see above. Pursuant to those agreements each national Bureau undertakes on the one hand, to settle claims arising in its own country out of accidents caused by vehicles registered in other member countries in respect of which a 'Green Card' has been issued and, on the other, to reimburse foreign bureaux which have settled claims arising out of accidents caused by vehicles insured in its own country. For further details, see Donald B. Williams, op.cit. pp.13-15. Its legal basis is to be found in the Motor Vehicles (International Motor Insurance Card) Regulations 1971 S.I. 1971 No. 792 as amended by Motor Vehicles (International Motor Insurance Card) (Amendment) Regulations 1977 S.I. 1977 No. 895.

99 Ibid. See also, Motor Insurers' Bureau, "Supplementary Agreement between National Bureaux dated the 12th December 1973 which is as the term states, a supplementary agreement to the Uniform Agreement referred to in note 98 above. The Supplementary Agreement between National Bureaux dated 12 December 1973 included non-member countries of the EEC.

as a Paying Bureau to provide international motor insurance cards (Green Cards) for issue by members of the Bureau to their policyholders¹⁰⁰ and as a Handling Bureau to deal with claims brought against visiting motorists who carry the Green Cards. The various national Bureaux enter into agreements under which the Paying Bureau agrees to reimburse the Handling Bureau. The Motor Insurers' Bureau is both the Handling and Paying Bureau for the United Kingdom. It also acts as the international secretariat for the Council of Bureaux to administer the Green Card system. Where the foreign negligent motorist is the holder of a valid Green Card, the M.I.B., following settlement of a claim, recovers its outlay from the foreign insurer issuing the green card or, failing this, from the Bureau which provided the Green Card. On the other hand, British motorists involved in accidents in other countries who have adopted the Green Card system are required to notify such accidents to their insurers' appointed representative in that country or to the local Bureau. A claim which falls within the ambit of the local compulsory third party insurance law will be disposed of by the Bureau in that country, who will seek reimbursement of their outlay from the insurer in the United Kingdom issuing the Green Card or from the Motor Insurers' Bureau.

One particular area which still causes confusion among the motoring public is the desirability or even necessity of obtaining a Green Card for travel to certain countries.¹⁰¹ The inspection of Green Cards was abolished at the internal frontiers of the nine E.E.C. countries and at the common frontiers of the E.E.C. countries with Austria, Finland, Norway, Sweden and Switzerland as a result of a multilateral agreement signed by the Green Card

100 The cost of the Green Card is determined by each insurance company on the basis of the insured premium, the duration of stay abroad, the age of the insured, the type of vehicle and the use of the vehicle.

101 P.H. News, Policy Holder Insurance Journal, October 8 1976, No.40, Vol.94 at p.1784.

Bureaux of six countries which came into force on 15 May, 1974.¹⁰² For travel to other European countries not covered by the non-inspection requirements it is still necessary to obtain a Green Card. In January 1974, all United Kingdom motor insurance policies were extended to provide the minimum legal cover required by E.E.C. countries and Austria, Finland, Norway, Sweden and Switzerland.¹⁰³ It should be emphasised that the continental cover which is provided automatically in United Kingdom policies is only for the minimum legal requirement in the 16 countries. Therefore, it is important to realise that motorists who drive abroad without consulting their insurance company and so rely on the extra cover automatically written into the policy could find themselves without insurance in many situations, such as, accidental damage to their own vehicles or loss by fire or theft, or

102 Article 1(e) of the Uniform Agreement between Bureaux, op.cit., and articles 1 and 2(a) of the Supplementary Agreement entered into between the Bureaux inter alios dated 12 December 1973 made pursuant to article 2 of Council Directive No.72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability (O.J. 1972, L103/1), Part I, English Special Edition 1972 (ii) p.360. The above two agreements seem to be consistent with the construction of the obligation in article 2(2) of Council Directive No. 72/166/EEC. The primary object of the Directive was to abolish such checks in order to facilitate the free movement in the Community of vehicles normally based in the Member States: Added Emphasis. See later, pp.294 to 298, for the consequences of this expression: article 1(4) ibid. In 1975 these arrangements were extended to Czechoslovakia, German Democratic Republic and Hungary: See also article 7(2)ibid. The scheme thus provided for by article 2 of the Directive was extended by a Supplementary Agreement (Second Commission Decision No. 74/167/EEC Annex) concluded on 12 December 1973 by the National Bureaux to vehicles normally based in the territory of certain non-Member countries in conformity with the principles of article 7(2) of the Directive. In addition, it is necessary to mention the Second Commission Decision No. 74/167/EEC of 6 February 1974 relating to the application of the aforesaid Council Directive which appointed 15 May 1974 as the date when checks on vehicles 'normally based' in the European territory of the Member States and other third countries, inter alios should cease.

103 Articles 3 and 6 of Council Directive No. 72/166/EEC of 24 April 1972, op.cit.

in the event of an accident in some countries causing injury to passengers, particularly if the passenger is the driver's spouse or a member of his family.¹⁰⁴

In the case of Britain it should be noted that the M.I.B. deals with claims only in respect of personal injuries against foreign motorists in the United Kingdom whereas other national Bureaux who have adopted the Green Card system and whose compulsory motor insurance laws require policies against third party property damage consider the liability of British motorists in this respect. It is therefore apparent that an element of reciprocity is lacking in the extent of their liabilities. It is relevant to note here, as mentioned earlier^{104A} in this chapter that the Directive of 30 December 1983¹⁰⁵ will extend compulsory insurance to cover liability for property damage. However, two areas of difference will still remain, namely, the M.I.B. may, if the Member State wishes, be relieved from satisfying an award for damage to property caused by an unidentified vehicle in view of the danger of fraud whilst in the case of damage caused by uninsured vehicles an excess of up to 500 ECU (about £260) may be applied.¹⁰⁶

It may be convenient here to examine the implications of the provisions of article 2 of Council Directive No. 72/166/EEC of 24 April 1972 in respect of exemption from the checking of Green Cards at the frontiers of Member States in the context of 'vehicles normally based in another Member State or third countries' who are party to the Uniform and Supplementary Agreements

104 In 1981, the Automobile Association, the Association of British Travel Agents and Norwich Union teamed up to produce the Extrasure European Motoring Insurance Policy - a comprehensive insurance package for drivers on the continent.

104A Supra at p.267.

105 Second Council Directive No. 84/5/EEC, (O.J. 1984, L8/17), op. cit.

106 Article 1(4) ibid.

and in particular, the expression 'in accordance with the provisions of national law on compulsory motor insurance' which refers to the settlement of claims. It is to be noted that the questions raised have apparently been widely canvassed in the different Member States and are of general importance especially as concerns considerations in the implementation of Council Directive No. 84/5/EEC of 30 December 1983.¹⁰⁷ By a judgment of 22 February 1983, the Cour de cassation referred to the European Court of Justice of the EEC for a preliminary ruling under article 177 of the Treaty of Rome 1957 on the meaning first, of the expression - 'provisions of national law on compulsory motor insurance' contained in article 2(2) of Council Directive No. 72/166/EEC of 24 April 1972 as amended by Council Directive No. 72/430/EEC and second, as to whether a vehicle which has been taken out of circulation in a Member State of the European Economic Community in which it had been registered may be regarded as still normally based in the territory of that state within the meaning of article 1(4) of Council Directive No.

107 However desirable it may be that the law on compulsory insurance for motor vehicle accidents should be identical in each Member State of the Community, so that the citizens know that they will be covered everywhere on a uniform basis, it does not seem that Council Directive No. 72/166/EEC of 24 April 1972 goes that far. It is to be noted that it abolished the need for 'Green Card' inspection and control at the frontier whilst leaving intact the provisions of national law on compulsory insurance save where express obligations were imposed (see for example, article 3(i) ibid.) The exemptions referred to in article 3(1) ibid. have been slightly modified by article 2(1) of Council Directive No. 84/5/EEC of 30 December 1983. However, article 2(2) of Directive No. 72/166/EEC as amended by article 1 of Council Directive No. 72/430/EEC of 19 December 1972 (O.J. L291/162 of 28 December 1972 and even article 2(2) of Council Directive No. 84/5/EEC do not themselves impose an obligation on the National Bureaux of Member States but envisage that the National Bureaux of Member States would conclude an agreement guaranteeing settlement of claims arising out of the use of a vehicle required by the law of the Member State where the accident occurs, to be covered by insurance and this would include claims in respect of a vehicle acquired by theft or duress if the national law of the Member State where the accident occurs requires claims arising out of the use of a vehicle acquired by theft or duress to be covered by compulsory insurance.

72/166/EEC of 24 April 1972. In Bureau Central Français v. Fonds de Garantie Automobile and others,¹⁰⁸ there was a collision in France between a car registered in France and a car bearing number plates issued in the Federal Republic of Germany. It emerged that the latter had been stolen and its driver was not covered by accident insurance under German or French Law. On the questions, first, concerning the expression guarantee the settlement of claims "in accordance with provision of national law on compulsory insurance" in article 2(2) of Council Directive No. 72/166/EEC, the court held that this referred to the limits and conditions of civil liability applicable to compulsory insurance, provided always that the driver of the vehicle at the time at which the accident occurred was deemed to be covered by valid

108 [1985] R.T.R. 142 esp. at pp. 163-164 See also Gambetta Auto S.A.V. Bureau Central Français and Fonds de Garantie Automobile [1985] R.T.R. 129 esp. at p. 141 (a car belonging to a French company was damaged by a vehicle registered in Austria where authorisation had been withdrawn and insurance cancelled. It was impossible to trace the owner of the vehicle); and Bureau Belge des Assureurs Automobiles ASBL v. Fantozzi and Another [1985] R.T.R. 225 esp at p. 228, 233-235 (here, a Belgian national insured his car with a Belgian company in Belgium and the car was damaged through the negligence of a stolen car registered in France - the insurance company refused to accept liability. In these cases the courts adopted the same ruling as in Bureau Central Français v. Fonds de Garantie Automobile and others, op.cit.

insurance in conformity with that legislation.¹⁰⁹ Second, that when a vehicle bore a properly issued registration plate that vehicle was to be regarded as being normally based, within the meaning of article 1(4) of the Directive in the territory of the state in which it was registered, even if at the relevant time the authorisation to use the vehicle had been withdrawn, irrespective of the fact that the withdrawal of the authorisation rendered the registration invalid or entailed its revocation. It appears that there is no longer any need to inquire whether or not a vehicle is insured. Registration seems to be the sole and necessary criterion for determining the territory in which a vehicle is normally based (whether valid or not). Consequently, claims are borne by the country of origin in exchange for free passage at frontiers and payment of claims in the first instance by the Bureau of the country in which the accident takes place. This principle has

109 See especially discussion in note 107 above. The Council Directive No. 84/5/EEC of 30 December 1983 article 2(1) and (2) (O.J. 1984 L8/17) made changes in the law relating to compulsory insurance of motor vehicles. It is hoped that these changes would influence the courts decisions if and when national legislation have been altered in conformity with the Directive's provisions. Furthermore, it is anticipated that the Directive will modify the existing system by removing the possibility of pleading theft against a third party victim but would allow Member States, by way of derogation, to provide for a national formulae which nonetheless eliminates all risk of disputes and legal proceedings. In respect of French law, see the scope of compulsory insurance cover in article 8 and the conditions under which the Fonds de Garantie is expected to pay compensation in article 9 of the law of July 1985. The law refers to unauthorised drivers but seems to be silent on the question of stolen vehicles. It is probable that compulsory insurance is not required in the latter case as in the former law. However in England, see discussion in Chapter Three of this study, pp.215-216 concerning the uncertainty created by two conflicting decisions of first instance in interpreting section 148(3) of the Road Traffic Act 1972. And also see supra p.279, the case of Gardner v. Moore and Another [1984] 2 W.L.R. 714 esp. at p.721 and 723. Nevertheless, note the exemptions under the Untraced Drivers Agreement 1972 Clause 1(2)(b)(i) and the Uninsured Drivers Agreement Clause 6(i)(c)(i) at p.277 supra. One may emphasise that the expression refers only to the binding rules of national law defining the scope of the obligation to insure and determining the minimum amount of the guarantee. It does not refer to any optional exemption which national laws may allow so as to refuse the insurance guarantee.

the advantage of helping the victims by allowing them to avoid having to take part in litigation in which they have no direct interest but which delays the settlement to which they are entitled because their ultimate debtors cannot agree among themselves.¹¹⁰ Moreover, the objective which Council Directive No. 72/166/EEC sought to achieve requires that the territory in which the vehicle is normally based may be identified without any possible doubt. It is possible that to require that the registration be both legal and valid would result in the re-establishment of frontier checks and the replacement of the Green Card check abolished by Council Directive No.72/166/EEC by a systematic check on the validity of the registration. It should therefore be emphasised that the result of any other interpretation *would be to deprive* the Directive of a great part of its usefulness.¹¹¹

Accordingly it seems clear that the Directive facilitates the entry of motor vehicles by temporary visitors in the United Kingdom (and Member States and other third countries) and further guarantees the payment of compensation, indeed whether the de facto registration was valid or by reason lack of insurance. It is therefore desirable that Cameroon ought to consider the introduction of such a system with at least its frontier countries.¹¹²

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110 If it were otherwise the investigation of the validity of a registration could raise detailed and lengthy enquiries contrary to the clear intention of the Directive.

111 A necessary pre-condition of the removal of control was that national insurance Bureaux in the Member States should guarantee compensation in respect of loss or injury, giving entitlement to compensation caused in the territory of the Member States of each of the national insurance Bureaux and that all Community Vehicles travelling in the Community should be covered by compulsory insurance against civil liability throughout the Community. These essential characteristics are clearly set out in the last three recitals in the preamble to Council Directive No.72/166/EEC of 24 April 1972.

112 For our proposal, see Chapter Nine of this study, pp.499-500.

C H A P T E R 5

FORMATION OF THE INSURANCE CONTRACT

I INTRODUCTION

It is customary, when discussing the formation of contracts in general, to examine such matters as offer and acceptance, consideration and intention to create legal relations¹. These matters are as relevant to the contract of insurance as they are to contracts of other types. However, in the present discussion of the formation of the contract of insurance, it is not intended to embark upon a general study of the above mentioned matters. Instead, this chapter focuses on the phenomenon of disclosure, a concept fundamental to every contract of insurance. However, we do intend to provide a comprehensive discussion of this topic which can be found in many sources². The emphasis will be on comparing and contrasting the position in English and English speaking Cameroonian Law on the one hand and French and French speaking Cameroonian Law on the other. The possible reform of the law is discussed throughout and some conclusions are drawn at the end of the chapter.

Parties to an insurance contract are expected, in their pre-contract negotiations, to disclose to each other certain vital facts, situations and circumstances within their knowledge. It is on the basis of facts³ so disclosed by the proposer that the insurer decides whether or not to

1 See, for example, G. H. Treitel, The Law of Contract, 6th ed., 1983, Chaps. 2-4, pp. 8-132; Cheshire and Fifoot's Law of Contract, 10th ed., 1981 Chaps 3-5, pp. 28-105.

2 See especially MacGillivray and Parkington, On Insurance Law relating to all risks other than marine, 7th ed., 1981, London Sweet & Maxwell.

3 In this discussion, unless the context otherwise requires the word "facts" when used shall include situations and circumstances.

accept the proposed risk and, if so, at what premium. For his part, the proposer finally decides in the light of questions asked by the insurer whether to insure with that particular insurer or with another.

Disclosure, as used here, has two senses: one wide, and the other narrow. In its wide sense, it stands for the representation of facts by one party to the other. Such representation can be effected either positively or negatively. Positive representation is the assertion of a fact. This assertion is disclosure in its narrow sense. In this sense it stands in contradistinction to negative representation. Negative representation can take one of two forms: first, abstention from asserting a fact that exists, is known to exist and ought to be asserted; second, the assertion that a fact exists which is known not to exist or that a fact does not exist which is known to exist. Negative representation in its first form is non-disclosure. In its second form it is misrepresentation.

Facts are not immutable. They are constantly changing. They may change between the moment of their initial representation and the conclusion of the insurance contract. Or they may change between the conclusion of the insurance contract and the occurrence of the event which gives rise to the insured's claim to be indemnified by the insurer. The mutability of facts gives rise to certain important questions. Is a party to an insurance contract under a duty to warrant the continuing existence of a particular fact throughout the duration of the contract? This question is at the basis of the concept of "warranty" in English and English speaking Cameroonian insurance law. Must a party disclose to the other throughout the duration of the contract, all changes affecting a previously represented fact? This question underlies the French and French speaking Cameroonian insurance law concept of "aggravation du risque". Yet another question may be asked: what

are the consequences, if any, of non-disclosure, misrepresentation, breach of warranty or aggravation du risque?

In the light of the foregoing considerations, the discussion in this chapter of Formation of the Contract of Insurance will proceed in four parts: first, disclosure next, non-disclosure and misrepresentation; then, warranty and aggravation du risque; and finally, the consequences of non-disclosure, misrepresentation, breach of warranty and aggravation du risque.

The nature of the insurance transaction is such that the duty of disclosure in its wide sense weighs more heavily on the proposer/insured than on the insurer. Consequently, without wishing thereby to suggest that the insurer has no obligations in the matter, the following discussion will focus primarily on the duty of the insured.

II DISCLOSURE

A The Rationale of the duty to disclose

It is settled law in England, France and Cameroon that a person proposing to take out an insurance policy must disclose all material facts to the insurer before the conclusion of the contract of insurance. Two considerations have traditionally been advanced as the rationale of this duty to disclose.

The first consideration concerns fairness between policyholders and the equal treatment of equal risks. In order that the insurer may equitably classify and assess the risk, thus enabling him to require each insured to pay a premium commensurate with the proposed risk, it is necessary that each proposer should make full disclosure of all facts affecting the risk.

The second and more important consideration is the idea that facts affecting the proposed risk are usually in the peculiar knowledge of the

proposer, the insurer being in a very weak position to discover them. Thus, in England, Scrutton L. J. declared⁴:

"....as the underwriter knows nothing and the man who comes to him to ask him to insure knows everything, it is the duty of the assured, the man who desires to have a policy, to make full disclosure to the underwriters without being asked of all the material circumstances, because the underwriter knows nothing and the assured knows everything."

The origin of this idea may probably be traced to early practice in marine insurance. In the 18th Century, when marine insurance was the dominant type of insurance, prospective insurers were usually people with good knowledge of sea perils. As professionals in the field, they were more likely than the insurer to know or to have available information concerning the hazards of a particular voyage that might affect the risk which they proposed to insure. Marine insurance was effected on ships while they were at sea, the insurer sometimes being in no position to inspect the ship or any other subject-matter of the insurance. Insurers lacked the means of communication necessary for long-distance enquiries. Furthermore they generally lacked the capacity to calculate the probabilities of the insured event occurring.

These factors are no longer prevalent. Today, in addition to the means of long distance communication which modern science has placed at their disposal and the use of advanced statistical methods to assess proposed

4 In Rozanes v. Bowen (1928) 32 LI. L. Rep.98 at 102. See also: Greenhill v. Federal Insurance [1927] 1 K.B. 65 at 76.; Seaton v. Heath (Burnard) [1899] 1 Q.B. 782 at 793 per Romer L.J. For similar views in France, see: M. Picard and A. Besson, Les Assurances Terrestres en Droit Français, 5th ed., 1982, pp.123-134.

risks, insurers have the opportunity, in the case of property insurance, of arranging for pre-contract inspection of property by surveyors and other experts and, in the case of life insurance, of arranging for medical examination. They make preliminary enquiries by requiring the proposer to answer a long list of detailed questions touching upon the proposed risk. Indeed, insurers in various branches of insurance today dispose of sophisticated facilities of acquiring most of the relevant information.

These radical changes in the means of acquiring information and evaluating risks render substantially untenable in modern times such a view as that "the underwriter knows nothing and the assured knows everything". Not surprisingly, this view has come under attack in recent years. Hasson, for example, criticises it for mistakenly assuming that even if the insured had greater knowledge of the facts than the insurer, this would not necessarily put him in a stronger position than the insurer. On the contrary, he argues, the insurer is in a stronger position since he alone decides which information, out of the mass in the proposer's possession, is relevant to the conclusion of the insurance contract.⁵

Do the insurer's improved facilities for acquiring relevant information of his own initiative inexorably lead to the conclusion that the proposer ought today to be released from his traditional duty to disclose all relevant facts? The answer to this question must be in the negative. The use of some of the facilities available to the insurer necessitates considerable expense which could be avoided by requiring the proposer to disclose facts within his knowledge rather than calling upon the insurer to investigate and discover

5 See R. A. Hasson, "The Doctrine of Uberrima Fides in Insurance Law - A Critical Evaluation", (1969) 32 M.L.R. 615; see also, R. Merkin, "Uberrimae Fidei Strikes Again", (1976) 39 M.L.R. 478 esp. at p.479-480.

those facts. Policyholders as a class would thus be saved higher premiums which they otherwise would pay if the insurer were to pass on to them increased costs incurred in ascertaining by expensive means relevant facts within the knowledge of the proposer. Furthermore, there must, on the nature of things, be a residue of relevant facts which are peculiarly in the knowledge of the proposer and which the most assiduous and sophisticated investigation by the insurer could never discover. Discovery of such information can only be the result of disclosure by the proposer himself. It seems, therefore, that even in modern times a duty of disclosure which the law of insurance in England, France and Cameroon casts upon the proposer must remain. This view has been supported by the English Law Commission in its report⁶ although the Commission recommended significant changes to the scope of the duty of disclosure. References to their comprehensive review of this area of insurance law are made throughout this chapter.⁷

It does not follow, however, that the basis of that duty must continue to be the idea that the insured knows everything while the insurer knows nothing. It seems rather that the basis of the duty must, in modern conditions, be "good faith", an old notion in the law of contract.

B The Principle of Good Faith

The notion of "good faith" looms large in English law. Whereas its genesis may lie in equity, its application may be observed in various branches of the law which involve dealings between persons: partnerships,

6 Law Commission: Insurance Law: Non-Disclosure and Breach of Warranty 1980 Report No. 104, Cmnd, 8064, paras. 4.47 - 4.60, London H.M.S.O.

7 As to the prospects of legislation in England to implement the report, see infra, p.340 note 125.

company promotions, family settlements, succession to land, and so on.⁸ English law does not, as a rule, impose a duty of good faith on parties to a contract.⁹ There is an exception in respect of the so-called contracts of utmost good faith - contracts uberrima fides -, the most important of which is the contract of insurance. It is a fundamental requirement of insurance law that the parties should observe the utmost good faith in dealing with each other. As James V.-C. said in Mackenzie v. Coulson:¹⁰

"There is no class of documents as to which the strictest good faith is more rigidly required in Courts of Law than policies of assurance..."

In connection with the proposer's duty to disclose material facts to the insurer, Lord Mansfield said as long ago as 1766:¹¹

"Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary."

The doctrine of good faith applies substantially to contracts of

8 On "good faith" generally, see: Chitty Joseph, Chitty on Contracts, Vol.I, General Principles, paras.460-463, Vol.II, Specific Contracts, paras,3684-3692, 25th. ed., 1983, London Sweet and Maxwell; R. Powell, "Good Faith in Contracts", (1956) 9 Cur. Leg. Prob. 16; G. Gilmore, "The Commercial Doctrine of Good Faith Purchase", (1954) 63 Yale L.J. 1057; Sumners, "Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code", (1968) 54 Virg. L. Rev. 195; Littlefield, 'Good Faith Purchase of Consumer Paper: The Failure of the Subjective Test'. (1966) 39 So. Calif. L. Rev. 48

9 See Keates v. Cadogan (Earl of) (1851) 10 C.B. 591, 138 E.R. 234; Fletcher v. Krell (1873) 42 L. J. Q. B. 55. French law, by contrast imposes a general duty of good faith in respect of all contracts: see Art. 1134 of the Civil Code.

10 (1869)8 L.R.Eq. 368 at 375.

11 In Carter v. Boehm (1766) 3 Burr. 1905 at 1910; see also Mathias Djoumessi v. Guardian Royal Exchange Assurance (Cameroon Ltd.) (1975), Suit No. HCB/18/74 of 11 July 1975, Bamenda (Unreported) a case in the English-speaking Cameroon.

all kinds of insurance.¹² However, in the rules which the courts have developed in this respect, clear distinctions may be observed which take into account the variety in types of insurance and differences in the nature and object of each type. In the case of marine insurance, the common law rules developed since Carter v Boehm¹³ were codified and given statutory authority in sections 17 and 18 of the Marine Insurance Act 1906¹⁴.

As Powell points out, good faith can be either objective or subjective. "By objective good faith", he explains, "I mean the standards of the ordinary man. Subjective good faith means individual honesty ..."¹⁵

A concept of good faith, similar to that prevalent in English law, is known to French law and French-speaking Cameroon¹⁶. Article 1134 of the French Civil Code stipulates that contracts, including, of course, those of insurance, must be performed in good faith. The Code does not define good faith; nor does it provide the standard by which it is to be judged. Planiol and Ripert explain that article 1134 means that every contracting party must

12 See, for example, Joel v. Law Union and Crown Ins. Co. [1908] 2 K.B. 863, at 878 (life insurance); Rozanes v. Bowen (1928) 32 LI.L.R 98, at 102 (burglary insurance); Locker and Woolf Ltd. v. Western Australian Insurance Co. Ltd. [1936] 1 K.B. 408 (fire insurance); Seaton v. Heath (Burnard) [1899] 1Q.B. 782 (Solvency insurance).

13 (1766) 3 Burr. 1905.

14 See also a recent emphasis of the requirement of utmost good faith in a marine insurance case: Black King Shipping Corporation and Wayang (Panama) S.A. v. Massie [1985] 1 Lloyd's Rep. 437 at 507-519, where the insured failed to disclose the fact that 'The Litsion Pride' would sail into the Persian Gulf - a war zone. The court held that the insured was required to notify any relevant information from time to time and as they failed to do so they were in breach of a material warranty.

15 R. Powell, op. cit., at 23.

16 For the view that the general notion of bona fides may be traced to Greek influence, see Fritz Pringsheim "L'Origine des contrats Consensuels", (1954) 32 (4E Serie) Revue Historique de Droit Français et Étranger 475. See also by the same author, The Greek Law of Sale Weimar, Hermann Bohlaus Nachfolger, Germany, 1950, pp.14, 58, 87 and 418.

act as an honest man in everything connected with the conclusion and execution of the contract.¹⁷ In this opinion echoes of Powell's concept of subjective good faith can be discerned. With specific reference to insurance contracts, a French writer has remarked:

"... on observe un phénomène parallèle en Angleterre et en France pour affirmer que le contrat d'assurance est un contrat de bonne foi et que les parties doivent échanger entre elles tous les renseignements nécessaires pour apprécier le risque, faute de quoi le contrat d'assurance est déclaré nul..."¹⁸

Does the duty of disclosure which weighs upon the proposer require him to represent to the insurer all facts within his knowledge, without discrimination, or does it extend only to facts of a particular character? It has long been recognised in both England and France that the proposer could not be expected to tell the insurer just anything and everything. A criterion had to be established for discriminating between facts that had to be disclosed and those that did not need to be. That criterion now is the "test of materiality". Section 18(2) of the Marine Insurance Act defined 'material fact' thus:

"Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk."

Any suggestion that this definition is valid only for marine insurance, the subject-matter of the 1906 Act, would be untenable¹⁹ in the light of

17 See: Planiol and Ripert, Traité Pratique de Droit Civil Français, Vol.6, Obligations by Paul Esmein, 2nd ed., 1952, 508.

18 See: Borham Atallah, L'Action Directe Contre l'Assureur de la Responsabilité Automobile Obligatoire, 1967, at 152-153. See also Picard and Besson, op. cit. at 126.

19 Mutual Life Ins. Co. of New York v. Ontario Metal Products Co. [1925] A.C. 344, 351.

section 149(5)(b) of the Road Traffic Act 1972 which, with regard to motor insurance, defined material facts as facts which are "of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium, and on what conditions". Similarly, in Lambert v. Cooperative Insurance Society²⁰ it was decided that a fact is material for the purposes of disclosure if it is one which would influence the judgment of a reasonable or prudent insurer²¹ in deciding whether or not to accept the risk or what premium to charge or whether to impose special terms such as an excess or an exclusion clause in the contract with the proposer²². This definition was adopted by the Law Commission²³. In Container Transport International Inc. v. Oceanus²⁴, the court in interpreting section 18 of the Marine Insurance Act 1908 said the word "influenced" means that the fact is one which would have had an impact on the formation of the prudent insurer's opinion and on his decision-making process in relation to matters covered by S.18(2) rather than his final decision whether or not to take the risk.

20 [1975] 2 Lloyd's Rep.485. See also: Woolcott v. Sun Alliance Ltd. [1978] 1 W.L.R. 493; Reynolds v. Phoenix Assurance Co. Ltd. [1978] 2 Lloyd's Rep. 440 at 456-457.

21 The expressions 'reasonable insurer' and 'prudent insurer' are apparently, interchangeable in the present context. See: E.R.H. Ivamy, General Principles of Insurance Law 4th ed., 1979, at 136.

22 For a discussion of this definition of 'material fact', see Birds, Modern Insurance Law London, 1982, p.90.

23 See Law Commission: Insurance Law - Non-Disclosure and Breach of Warranty (1980) No. 104, Cmnd, 8064, para.4.48; Clause 2 of the Draft Insurance Law Reform Bill (L.C. Report, No.104 Appendix A) gives effect to the recommendations of the Report.

24 [1984] 1 Lloyd's Rep.476 at 492.

French and French-speaking Cameroonian definition of material fact differs from that of the English and English-speaking Cameroonian definition which has just been considered.

According to article 15(2) of the law of 13 July 1930, the insured is obliged to declare accurately at the time of concluding the contract all the circumstances known to him "that are of the nature to enable the insurer to assess the risk he is undertaking". In relation to the content of the duty of disclosure, the article relates the facts to be disclosed to the insurer.²⁵ This simply means the particular or actual insurer. Thus by relating the facts to be disclosed to the particular insurer's assessment or acceptance of the risk, the article potentially goes further than English law which only requires an applicant to disclose those facts which would influence the judgment of a prudent insurer.²⁶ The formulation of a legal test of materiality does not of itself resolve the issue whether a particular fact is material or not. To answer this question with respect to a particular fact in a given case requires application by the courts of the materiality test to that particular fact: is the fact of such a nature as to have influenced the decision of the insurer as to acceptance of the risk, evaluation of premium and imposition of special conditions? In England this question is determined by the court after hearing the evidence of expert witnesses.²⁷ Whether a particular fact is material depends, in the final analysis, upon the circumstances of the particular case and the type of

25 Added emphasis.

26 See: P. Catala and J. A. Weir, "Déclaration du Risque en Droit Français et Anglais Comparé", (1966) 37 Rev. Gén. Ass. Terr., 449 at 459-462.

27 See Seaton v. Heath [1899] 1 Q.B. 782, at 791; see also Container Transport International Inc. v. Oceanus [1984] 1 Lloyds Rep. 476.

insurance involved. A similar situation prevails in France. According to the Cour de cassation,²⁸ it is for the judge at first instance to determine whether or not a particular fact is of such a nature as to have influenced the insurer's assessment of the risk. No sanction is applied for failure to disclose a fact which, in the opinion of the court, was not of a nature to change the object of the risk or to diminish the insurer's opinion of the risk.²⁹

Material facts are generally classified into two groups: those that influence the insurer in determining the rate of premium and those that influence his decision whether or not to accept the proposed risk. These two categories are not necessarily exclusive, since a fact which increases the proposed risk may also induce the insurer to demand a higher premium. Nevertheless, it is important for purposes of analysis to maintain the distinction between the two types of fact. The distinction is recognised in both English law where facts of the first group are generally termed the 'physical hazards' and those of the second group 'moral hazards' and French law where facts of the former group constitute 'risques objectifs' while those of the latter group make up 'risques subjectifs'.³⁰

Examples of facts of the first group include: the exposure of the subject matter of insurance to abnormal danger by reason of its nature, condition, use or location; facts which suggest that the liability of the insurer will be greater than it otherwise might have been, for example, where the insured entrusting insured goods to a carrier enters into a special contract with the carrier under which the latter is relieved of his common

28 La Protectrice c. Veuve Poiron et autres, Cour de cassation (1re Ch. civ.), 24 January 1968(1968) 39 Rev. Gén. Ass. Terr. 485 at 486.

29 Ibid.; Motor Union c. Cons. Gillet, Cour d'appel de Paris (4è Ch.), 10 July 1942, (1943) 14 Rev. Gén. Ass. Terr. 344.

30 See, Catala and Weir, op. cit., 460.

law liability for damage to the goods;³¹ in the case of motor insurance, facts relating to the age of the vehicle,³² its value,³³ the actual price paid by the owner,³⁴ its make, the place of habitual garaging and the profession of the insured;³⁵ in fire insurance of a building, the material in which the building has been constructed, the location of the building and the social class, mental condition and profession of its occupants. Among facts of the second group, the following may be cited: any fact which suggests that the particular proposer's application for insurance ought to be subjected to special scrutiny, for example, on account of his previous convictions;³⁶

31 Tate v. Hyslop (1885) 15 Q.B.D. 368 (Marine insurance).

32 Santer v. Poland (1924) 19 LI.L. Rep.29

33 Brewtnall v. Cornhill Ins. Co. Ltd. (1931) 40 LI.L. Rep. 166.

34 Allen v. Universal Automobile Ins. Co. Ltd. (1933) 45 LI.L. Rep.55.

35 James v. British General Ins. Co. Ltd., [1927] 27 LI.L. Rep. 328; In France see Dame Basile c. La Concorde, Cour de cassation (1re Ch. civ.), 8 May 1979, (1980) 51 Rev. Gén. Ass. Terr. 40; F.C.A. c. Consorts Gargowitsch, Cour de cassation (1re Ch. civ.), 15 February 1972, (1973) 44 Rev. Gén. Ass. Terr. 71; Garantie Mutuelle des Fonctionnaires c. Voisin, Cour de cassation (1re Ch. civ.), 29 February 1972, (1972) 43 Rev. Gén. Ass. Terr. 506; Fonds de garantie automobile c. Buttet et Compagnie l'Union et le Phénix espagnol, Cour de cassation (1re civile), 2 April 1974, Gaz Pal. 1975. 1. 429.

36 Schoolman v. Hall [1951] 1 Lloyd's Rep. 139; Regina Fur Ltd. v. Bossom [1958] 2 Lloyd's Rep.425. It is to be noted, however, that by virtue of S.4 of the Rehabilitation of Offenders Act 1974, the proposer in England need not disclose previous convictions which are 'spent'. But section 5(1) provides an exception to the Act if a sentence of imprisonment for a term exceeding 30 months is imposed, the conviction cannot become spent. Further, section 7(3) gives the court a discretion to admit evidence as to spent convictions if the court is satisfied that "justice cannot be done in the case except by admitting it." The issue arose in Reynolds v. Phoenix Assurance Co. Ltd., [1978] 2 Lloyd's Rep. 22; [1978] 2 Lloyd's Rep. 440,460,457-459. It is unfortunate that the general effect of this provision and in particular the extent to which it affects the insured's duty of disclosure was left uncertain by the Court of Appeal. Cf. Cameroon: rehabilitation by lapse of time: Art. 70 of the Penal Code.

previous refusals of insurance³⁷ or a long history of previous losses or insurance claims;³⁸ in motor insurance the proposer's previous driving experience, the period for which he has held a licence and whether his driving licence had ever been withdrawn or endorsed by judicial or administrative decision;³⁹ proposer,⁴⁰ his occupation,⁴¹ his age⁴² and his

37 London Assurance v. Mansel (1879) 11 Ch. D. 363; Glicksman v. Lancashire and Gen. Ass. Co. Ltd. [1927] A.C. 139; Locker and Woolf Ltd. v. Western Australian Ins. Co. [1936] 1 K.B. 408.

38 Condogianis v. Guardian Ass. Co. [1921] 2 A.C. 125; Rozanes v. Bowen (1928) 32 LI.L. Rep.98. See however, Ewer v. National Employers Mutual Gen. Ins. Ass. Ltd. [1937] 2 All E.R. 193 at 197, where it was said that it is not necessary to disclose every sort of claim which the proposer may have made during his life time. For French authority on the point in the text, see; F.G.A. c. La Nationale, Cour de cassation, (1re Ch. civ.), 27 January 1971, (1972) 43 Rev. Gén. Ass. Terr. 56; Les Assurances Françaises c. Moll, Cour de cassation, (1re Ch. civ.), 20 October 1971, (1972) 43 Rev. Gén. Ass. Terr. 397; Caisse Sécurité Sociale Bouches-du-Rhône c. La Flandre, Cour de cassation, (1re Ch. civ.), 24 March 1971, (1972) 43 Rev. Gén. Ass. Terr. 58. Where the insured did not disclose the fact that he had six accidents in the previous two years, the contract was held null in application of Art.21 of the Law of July 1930.

39 Corcos v. De Rougemont (1925) 23 LI.L.Rep 164; Babatsikos v. Car Owners' Mutual Ins. Co. Ltd. [1970] 2 Lloyd's Rep 314; in France see La Providence c. Pays, Cour de cassation, (1re Ch. civ.), 8 October 1974, (1975) 46 Rev. Gén. Ass. Terr. 366.

40 The proposer's name may indicate the person the insurer is required to deal with. A deliberate mis-statement of name is a very strong indication of fraud: McCormick v. National Motor and Accident Ins. Union Ltd., (1934) 50 T.L.R. 528.

41 Some professions and callings involve significantly higher accident rates than others: see Holmes v. Cornhill Ins. Co. (1949) 82 LI. L. Rep. 575; per Lord Denning M.R. in McNealy v. Penine Ins. Co. [1978] 2 Lloyd's Rep. 18. If the proposer has several occupations in relation to which he wishes the insurance to be operative he must state all of them especially where the premium will be affected: Bigger v. Rock Life Assurance Co. [1902] 1 K.B. 516; Perrins v. Marine Ins. Soc. (1856) 2 El. & El. 317; Ayrey v. British Legal and United Provident Assurance Co. [1918] 1 K.B. 136.

42 The proposer's age is always relevant to the premium since for example, young persons are less experienced and may be more careless: Broad v. Woland (1942) 73 LI.L. Rep. 263.

physical condition in so far as it affects his capabilities as a driver.⁴³

C. The Mechanism of Disclosure

Under English, French and Cameroonian law the proposer is required, in discharging his duty of disclosure, to volunteer all relevant information even where such information has not been specifically asked for by the insurer. This rule probably originated in the practice of marine insurance where the prospective insured, being skilled and experienced, could be expected to give the insurer the relevant information on his own initiative. In this branch of insurance it has not been customary to elicit information through questions on proposal forms. Once the insurance bargain extended to other types of insurance, insurers found that they could not rely solely on the initiative of the proposer or on the latter's 'good faith' to obtain information on all material facts. It became evident that policyholders on the whole could not be expected to appreciate what facts the insurer considered material. To aid the proposer in the discharge of his duty of disclosure, therefore, insurers resorted to the device of questions in insurance proposal forms, declarations or other documents to elicit the necessary or material information. This development has presented the courts with a problem in the field of non-marine insurance: does the use of questionnaires prepared by the insurer to elicit information from the proposer relieve the latter of his legal duty to volunteer information? In other words, has a duty to volunteer information been replaced by a duty to answer questions? The weight of opinion in both England and France has been against any idea of abolishing the insured's duty to volunteer information⁴⁴. Thus, in England, Viscount Dunedin stated in a case of burglary insurance that alongside questions in the proposal form, there was "the duty of no concealment of any consideration which would affect the mind

43 James v. British Gen. Ins. Co. Ltd. (1927) 27 LI.L. Rep.328.

44 See e.g., The recommendations of the Law Commission: Non-Disclosure and Breach of Warranty, No. 104, 1980 Cmnd.8064 para. 4.59.

of the ordinary prudent man in accepting the risk".⁴⁵ In Schoolman v. Hall⁴⁶ a duty to disclose previous convictions was imposed in the absence of any question on the matter. Cohen L. J. held in that case that questions, whether asked or not, did not "relieve the proposer of his general obligation at common law to disclose any material which might affect the risk which was being run ...". As Scrutton L. J. said in Rozanes v. Bowen⁴⁷; "It has been for centuries in England the law in connection with insurance of all sorts, ...that, ...it is the duty of the assured, ...to make a full disclosure to the underwriters without being asked of all material circumstances...". Significantly, in Regina Fur Co. Ltd. v. Bossom⁴⁸ (all risk insurance) counsel for the insured, faced with the insurer's plea of non-disclosure of previous convictions of the insured who was the director of a company, did not even raise the contention that such a matter had not been the subject of any question by the insurer. The position of French and French-speaking Cameroonian law on this issue is similar to that of English and English-speaking Cameroonian law.⁴⁹ The proposer is required to take the initiative to volunteer information.⁵⁰ Questionnaires, where they are issued by the insurer, are intended simply to facilitate the proposer's task of disclosure and to draw his attention to some facts which the insurer particularly

45 See Glicksman v. London and General Ass. Co. Ltd. [1927] A.C. 139 at 143.

46 [1951] 1 Lloyd's Rep. 139 at p.142.

47 (1928) 32 L.I.L. Rep. 98, at 102; see also: Roselodge v. Castle [1966] 2 Lloyd's Rep. 113 (jewelry insurance).

48 [1957] 2 Lloyd's Rep.466.

49 See Picard and Besson, op. cit., 131-133.

50 Alliance Assurance Ltd. c. Izoard, Cour de cassation, (1re Ch. civ.), 17 November 1970, (1971) 42 Rev. Gén. Ass. Terr. 405.

considers 'material',⁵¹. Where precise and clear questions are addressed to the proposer, he fulfills his obligation if he responds loyally, precisely and completely to all of them. But where his attention has been drawn to matters not asked which he knows are important to the risk, his failure to disclose those facts will result in bad faith being inferred; this might lead, where appropriate, to nullity of the insurance contract in application of article 21 of the law of July 1930.⁵²

The rule that by requiring answers to a series of specific questions in a proposal form the insurer does not waive the need to disclose material facts falling outside the scope of the questions asked has been criticised on the ground that the insured may well have been misled to suppose that no further information was required to be disclosed by him.⁵³ To this it may be answered that the questions are designed only to ease the task of the insured in discharging his legal duty of disclosure. The Law Commission advocates the use, in addition to specific questions, of a general question such as whether there were any other facts which might influence the judgment of a prudent insurer in accepting the risk and fixing the premium.⁵⁴ A general question of this kind would reiterate the proposer's residual duty to

51 A questionnaire is usually annexed to the policy and constitutes the basis for appreciating the risk. See La Minerva de France c. Veuve Cantaloube, Cour de cassation, (1re Ch. civ.), 8 January 1969, (1969) 40 Rev. Gén. Ass. Terr. 506; Mutualité Industrielle c. C.P.A.M., Cour d'appel de Pau (2è Ch.), 28 October 1971 (1972) 43 Rev. Gén. Ass. Terr. 362; D... c. Compagnie X..., Cour d'appel de Rouen (2è Ch.), 16 February 1973 (1974) 45 Rev. Gén. Ass. Terr. 360.

52 See Massador c. Union Industrielle et de Commerce, Cour de cassation, (1re Ch. civ.), 11 March 1970, (1970) 41 Rev. Gén. Ass. Terr. 542; La Foncière c. F.G.A., Tribunal de grande instance de Lyon (1re civ.) 22 October 1969, (1970) 41 Rev. Gén. Ass. Terr. 396.

53 See Birds, 'The Statement of Insurance Practice - a measure of regulation of the insurance contract', (1977) 40 M.L.R. 677 at 680. See also: The Law Commission Report, No. 104, op. cit., para. 3.60.

54 Law Commission Report, op. cit., para. 4.57 esp. at para. 4.58 pp.52-53.

volunteer further information. Its further advantage is to draw the proposer's attention specifically and explicitly to his obligation to disclose all material facts. It is now settled that questions asked by the insurer in the proposal form which he issues are immaterial to the existence of the applicant's residual duty of disclosure. The recent practice of some insurance companies, however, is to treat the insurer's questions in the proposal form as exhausting the material information which the insured is under a duty to give.⁵⁵

Nevertheless, they can affect the extent to which he may be held to the discharge of that duty. Where a question is ambiguous, only a fair and reasonable construction must be placed on it. Accordingly, if an ambiguous question is put to a proposer in a proposal form, the insurer cannot rely on any inaccuracy in the answer as a ground for repudiating the policy if that answer is true having regard to the construction which a reasonable man might put on the question and which the proposer did in fact put upon it.⁵⁶ It must be noted, however, that in this matter the courts do not presume that the construction most favourable to the proposer is necessarily the fair and reasonable one.^{56A}

The scope of the proposer's duty of disclosure may also be limited by the so-called doctrine of waiver by the insurer, a doctrine known to both English and English speaking Cameroonian law on the one hand and French and French speaking Cameroonian law on the other. The following examples may be offered of circumstances in which the doctrine would operate. Where

55 See the circular letter of Guardian Royal Exchange Assurance Issue No.33 January 1981 to its agents. The residual duty of disclosure could possibly become obsolete.

56 Law Commission Report, No. 104 op. cit., para. 4. 84; see also Clause 6(2) of the Draft Insurance Law Reform Bill (L.C. Report No.104 Appendix A).

56A Holt's Motors v. S.E. Lancashire Ins. Co. (1930) 37 LI.L.R. 1, per Scrutton L. J. at 4.

questions are asked on a particular subject in such a manner as to invite only a limited answer from the proposer it may be inferred that the insurer has waived his right to information either on the same subject but outside the scope of the questions or on kindred matters.⁵⁷ Thus, when certain information is sought in respect of a particular period of time, this necessarily implies a waiver concerning the same sort of facts occurring outside that period. Mackinnon J. said in Jester-Barnes v. Licenses and General Ins. Co. Ltd.⁵⁸

"If they ... asked him ... "have you or your driver during the past five years been convicted of any offence", ... and he had said: "No", and that was true, I should have come, without any hesitation, to the conclusion that they were not entitled, ... to take it to mean that he had failed to disclose that he had been convicted eight years ago ... "

Recently, in Hair v. Prudential Assurance Co. Ltd.,⁵⁹ a generous and broad interpretation of the doctrine of waiver was applied. Here, the plaintiffs completed a proposal form for insurance of a house with the defendants and stated inter alia, in answer to specific questions raised in the proposal form that the buildings were kept in good state of repair; the property was occupied by the insured's son but owned by the proposer; and the premises were left unattended regularly apart from holidays for eight hours daily. The house was later destroyed by fire and the plaintiffs claimed for an indemnity against this loss. The defendants contended that the plaintiffs had

57 Laing v. Union Marine Ins. Co. (1895) 1 Com. Cas. 11 at 15; See also MacGillivray and Parkington op. cit., para.625 at p.255.

58 (1934) 49 Ll.L Rep.231 at 237. See also Schoolman v. Hall [1951] 1 Lloyd's Rep. 139 at 143.

59 [1983] 2 Lloyd's Rep.667 esp. at p.673. For fuller detail as to the result of this case see: J. Birds, "Warranties and Waiver of the duty of disclosure", [1984] J.B.L., March, pp.163-165.

failed to disclose material facts which ought to have been disclosed, that is, an order imposed by the Local Authority under the Housing of the Working Class Act 1890 on the grounds that premises were unfit for human habitation.⁶⁰ It was held that the existence of the closing order was relevant to the state of repair of the premises and their occupancy and as these matters were the subject of specific questions, the plaintiff was relieved of any duty to disclose the fact of the order. The result in this case offers a pointer to what is likely to be the legal position if and when an Insurance Law Reform Bill is enacted following the Law Commission's recommendations for reform.⁶¹ The Law Commission as will be seen later,⁶² recommended that the duty of disclosure should be reformulated to require disclosure of only those material facts which a reasonable man would disclose. Since a reasonable man would not normally consider that he had to provide more or additional information than that expressly solicited when a proposal form is completed, it may well be that any residual duty of disclosure would disappear.

A second situation in which the doctrine of waiver may operate is where the proposer discharges his duty of disclosure so as to "call the attention of the underwriters in such a manner that they can see that if they require further information they ought to ask for it".⁶³

Waiver may also be inferred if in the particular circumstances the

60 Ibid. at p.673

61 Law Commission Report No. 104 op. cit., paras. 4.61 - 4.62; Clause 6(3) and (4) of the Draft Insurance Law Reform Bill (L.C. Report, No.104 Appendix A); Department of Trade and Industry, Insurance Contract Law Consultation Document, 7 June 1984, para.12.

62 Infra, p.321.

63 Asfar v. Blundell [1896] 1 Q.B. 123 at 129, per Lord Esher, M.R. See also: Robert v. Avon Insurance Co. [1956] 2 Lloyd's Rep. 240; Greenhill v. Federal Ins. Co. [1927] 1 K.B. 65, at p.85 per Scrutton L.J.

insured is justified in assuming that the insurer is waiving disclosure of material facts as to which he appears to be indifferent or uninterested. If the insured leaves a question wholly unanswered, the insurers cannot "... at some subsequent date, say that they have been misled by the form of the answer ..." ⁶⁴ In other words, the insurer by his conduct - the failure to inquire about the blank answer - waives any future allegations of breach of duty on the part of the insured and the common law duty of general disclosure in respect of the subject-matter of the question ceases to apply. As in English law, the concept of waiver is recognised in French law. Where for example, questions are asked requiring information for a given duration, it is implied that the duration is unequivocal and thus the obligation is limited to the period stipulated. ⁶⁵

D. The Extent of the duty to disclose

Another question that arises in connection with the proposer's duty to disclose material facts is whether this duty is confined to facts within the actual knowledge of the proposer or whether it embraces facts which, even though not actually known, ought to have been known to him. So far as marine insurance is concerned, the question has been settled in England by section 18(1) of the Marine Insurance Act 1906 which provides that:

"... the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the

64 Robert v. Avons Ins. Co. Ltd., [1956] 2 Lloyd's 240 at 249.

65 Les Assurances Françaises c. Moll, Cour de cassation (1re Ch. civ.), 20 October 1971, (1972) 43 Rev. Gén. Ass. Terr. 397. The insured had been asked to declare previous convictions for the past twenty-four months. It was held that this obligation in this regard was limited to the past two years.

ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract."

Clearly, then, in a proposal for marine insurance the duty of the insured is not only to disclose material facts actually within his knowledge, but also those which he ought to know - that is to say, those within his "constructive knowledge". Indeed, by providing that the assured is "deemed to know every circumstance which, in the ordinary course of business, ought to be known by him" the 1906 Act appears to be creating a category of "imputed knowledge". Does the same rule apply to non-marine insurances? It is arguable that a proposer for a non-marine insurance policy is under a duty to disclose facts of which he has only constructive or imputed knowledge because section 18, which imposes such a duty in respect of marine insurance, reflects common law rules in respect of all classes of insurance.⁶⁶ Since insurers are entitled to assume that they are being put in possession of all material facts some duty would seem to be incumbent upon a proposer to make enquiries as to matters which he ought to know. The proposer would clearly be acting in 'bad faith' if his ignorance of material facts were due to his failure to make such enquiries as he might reasonably have been expected to make in the circumstances. However, in Joel v. Law Union and Crown Insurance, Fletcher Moulton L. J. said:⁶⁷

"The duty is a duty to disclose, and you cannot disclose what you do not know. The obligation to disclose, therefore, necessarily depends on the knowledge you possess".

The insistence upon the learned Lord Justice's view, the obligation to disclose material facts covered only facts actually known. It has been

66 See Lambert v. Cooperative Ins. Society [1975] 2 Lloyd's Rep.485.

67 [1908] 2 K.B. 863, at 884.

argued, however, that statements such as the one in Joel's case that a proposer is bound to disclose only what he knows should be taken to cover not only what he actually knows but also what was ascertainable by him by means of such enquiries as reasonable business prudence required him to make⁶⁸. It seems that the question as to disclosure of 'facts constructively known' remains an open one so far as concerns non-marine insurance⁶⁹. However, the Law Commission^{69A} recommended that the proposer should disclose any fact which a reasonable man "in the position of the proposer"^{69B} would disclose to the insurer, having regard to the nature and extent of the insurance cover which is sought and the circumstances in which it is sought.

Under French and French speaking Cameroonian law, article 15(2) of the law of 13 July 1930 and French law (now article L.113-2 of the Insurance Code 1976)⁷⁰ provide that the insured is obliged to declare accurately at the time of conclusion of the contract all the circumstances known to him which are calculated to affect the assessment of the risk. French courts have interpreted this provision as including circumstances which the insured ought to know are capable of leading the insurer either to refuse the risk or to

68 See Halsbury's Laws of England, Vol, 25 4th ed., 1978, 206 para.373.

69 See Australian and New Zealand Bank v. Colonial and Eagle Wharves; Boag (Third Party) [1960] 2 Lloyd's Rep. 241, at 252, per McNair, J. (concerning an all-risk policy). In this case the question whether S.18(1) of the Marine Insurance Act 1906 represented the general rule was left open. Only in respect of life assurance has actual knowledge alone been required.

69A Law Commission Report No. 104 op.cit., para. 4.50. See also Clause 2(1)(b) of the Draft Insurance Law Reform Bill (L.C. Report No.104 Appendix A).

69B The reasonable man test set out above, would be made more objective by omitting the concept "in the position of the proposer". This concept could encourage arguments that the standard of disclosure was affected by all the circumstances bearing on that particular proposer. See Department of Trade and Industry, Insurance Contract Law Reform Consultation Document, 9 August 1983.

70 See Codes des Assurances, 2nd ed., 1979, L'Argus p.18.

charge a higher premium.⁷¹ Thus the duty of disclosure in French law is not confined to such facts as are within the actual knowledge of the insured but extends to all material facts which the insured ought to know as a diligent and reasonable man. This interpretation has been reiterated in the Fifth Draft of the European Economic Community Directive on the co-ordination of the legislative, statutory and administrative provisions governing insurance contracts 1979 as amended in 1980.⁷² Article 3(1) of the Draft requires an applicant for insurance to declare to the insurer any circumstances of which he ought reasonably to be aware and which he ought to expect to influence a prudent insurer's assessment or acceptance of the risk.

Finally, it may be noted that the duty of disclosure exists on renewal of the insurance policy. In England in contrast to France, most policies other than life insurance are contracts for a term of one year and are renewable annually. The renewal of an existing policy is regarded in law as the making of a new contract of insurance. In the result, the insured is subject to a fresh or repeated duty of disclosure on each application for renewal.⁷³ The extent of the duty of disclosure on renewal is the same as on the original application.

71 See, e.g., Orlowski c. Martin, Cour de cassation (Ch. civ., sect civ.), 26 January 1948, (1948) 19 Rev. Gén. Ass. Terr. 45; Houillot c. La Savoyarde, Cour de cassation (Ch. civ., 1re sect. civ.), 2 November 1954, (1955) 26 Rev. Gén. Ass. Terr. 37. See also A. Besson, "Vers une certaine coordination des lois sur le contrat d'assurance dans les six pays du marché commun", (1966) 37 Rev. Gén. Ass. Terr. 145-173, esp. at 159.

72 Proposal for a Council Directive on the coordination of laws, regulations and administrative provisions relating to insurance contracts (O.J. No. C 190/2) 28:7:79 as amended by Amendment of proposal for a Council Directive on the coordination of laws, regulations and administrative provisions relating to insurance contracts (O.J. No. C 355/30) 31:12:80

73 Lambert v. Cooperative Insurance Society Ltd. [1975] 2 Lloyd's Rep.485.

One criticism has been leveled at the duty of disclosure on renewal,⁷⁴ namely, that the insured may not be aware of the existence of his duty and of its extent since he is not in possession of documents previously supplied to him by the insurer and in which the information is recorded. The First Statement of Insurance Practice 1981⁷⁵ provides that renewal notices should contain a warning about the duty of disclosure including the necessity to advise changes affecting the policy which have occurred since the policy's inception.

III NON-DISCLOSURE AND MISREPRESENTATION

A failure on the part of the proposer to disclose a material fact in accordance with the law described above is known in English and English speaking Cameroonian law as "non-disclosure", or "concealment".⁷⁶ Misrepresentation may be defined as an inaccurate or untrue statement made by one of the parties to the contract of insurance, or by his agent, prior to the conclusion of the contract or at its renewal. It may be either oral or in writing and often takes the form of an answer to a question in the proposal form. As here defined, non-disclosure and misrepresentation are both concepts known to French and French speaking Cameroonian insurance law where they are respectively known as 'réticence' and 'fausse déclaration' -

74 See R. Merkin, "Uberrimae Fidei Strikes Again", (1976) 39 M.L.R. 478, at 480.

75 First issued on 4 May 1977: see 931 Hansard (5th series) H.C. Cols.218-220 (4 May 1977) following discussions between representatives of leading insurers and the Government, and in 1981, see 15 Hansard (6th series) H.C. Cols. 341-342 (22 December 1981). See further, infra, pp.336-339; see also, Law Commission Report, No.104, op. cit., paras. 4.74 - 4.77 and Clause 4 of the Draft Insurance Law Reform Bill (L.C. Reoprt, No. 104, Appendix A)

76 Per Jessel M.R. in London Assurance v. Mansel (1879) 11 Ch.D. 363, at 370: "Concealment properly so called means non-disclosure of a fact which it is a man's duty to disclose, and it was his duty to disclose the fact if it was a material fact".

silence and false declaration.⁷⁷ These expressions are evocative, since non-disclosure consists essentially of silence on the part of the proposer while misrepresentation takes the form of false declaration.

While non-disclosure and misrepresentation are conceptually distinct, they are, in practice, not easily distinguishable. Total non-disclosure can hardly amount to misrepresentation. Where non-disclosure is only partial, however, the boundary between non-disclosure and misrepresentation becomes tenuous. The courts have tended to confuse the two⁷⁸, often approaching a case of misrepresentation in terms of non-disclosure, and vice versa⁷⁹. Indeed, it appears to be standard practice for an insurer wishing to repudiate a contract of insurance or to avoid his liabilities under such a contract to plead both misrepresentation and non-disclosure.

To illustrate the possible confusion between misrepresentation and (partial) non-disclosure, it seems desirable to mention the following examples. On a fire insurance proposal form it was asked whether the proposer had "ever been a claimant on a fire insurance company in respect of the property now proposed, or any other property? If so, state when and name of company". The proposer answered: "Yes. 1917, 'Ocean'". This was held to be true so far as it went, but incomplete inasmuch as in 1912 another claim had been made. The partial non-disclosure in respect of the 1912 claim rendered the statement in respect of the 1917 claim a misrepresentation⁸⁰. As James Landel stated:

77 In France, see article L.113.8 of Codes des Assurances 1976.

78 See, e.g., London Assurance v. Mansel (1879) 11 Ch.D. 363; Godfrey v. Britannic Assurance Co. [1963] 2 Lloyd's Rep.515.

79 See London Assurance v. Mansel, *supra*. note 78.

80 Condogianis v. The Guardian Ass. Co. [1921] 2 A.C. 125. See also: Holts Motors Ltd. v. South East Lancashire Ins. Co. Ltd. (1930) 37 Ll.L. Rep. 1, per Scrutton L. J. at p.3.

"en cas de reponse incomplete ou equivoque a une question sans ambiguite l'assure est presume avoir fait une fausse declaration"⁸¹.

In the French-speaking Cameroonian case of Nyamsi Kong v. Agence Camerounaise d'Assurance,⁸² the proposer in response to a question whether he had ever been refused insurance previously replied: "one refusal, last year". In fact two insurance companies had refused to insure his other vehicles because of their unroadworthiness. The court considered this incomplete answer as reticence and false declaration. In London Assurance v. Mansel,⁸³ the proposer was asked: "Has a proposal been made on your life at any other office or offices; If so, where?"

"Was it accepted at the ordinary premiums or an increased premium?" The proposer replied: "Insured now in two offices for £16,000 at ordinary rates. Policies effected last year". This answer was partially correct since two offices had issued policies on the insured's life. But it was thoroughly misleading because five offices had declined to insure the proposer. In a case in English-speaking Cameroon, Mathias Djoumessi v. Guardian Royal Exchange Assurance (Cameroon Ltd)⁸⁴, the defendant resisted a claim made by the plaintiff because of breach of section 9 of the policy which stated that the defendant's liability should depend upon the truth of the statements and answers in the proposal form. The plaintiff answered "yes" to the question whether the vehicle will be driven by the proposer and "no" to the question whether the vehicle will be driven by a paid driver. An accident ensued in

81 James Landel, Fausse déclarations et réticences en assurance automobile, 1982 L'Argus, Paris, p.14.

82 Judgment No.200 of 27 June 1979, Douala, (Unreported).

83 Supra, notes 78 and 79.

84 Suit no. HCB/18/74 of 11 July, 1975 Bamenda (Unreported).

which a paid driver was responsible. The court held that the insurer was entitled to avoid the contract and repudiate liability because the insured's undertaking to drive the car himself which induced the defendants to enter into the insurance contract was a material mis-statement and a breach of a fundamental term of the contract.

IV. WARRANTY AND AGGRAVATION DU RISQUE

Under English and French as well as Cameroonian law, the time at which the proposer's answers must be correct is the time at which the contract is concluded or renewed. The proposer is required to declare and correct any changes in his declaration up to the *conclusion of the contract*.⁸⁵ The statements made continue in their effect until the contract is concluded. Any failure to correct them, where necessary, between their making and the conclusion of the contract would render them false declarations. If any new material fact arises before acceptance of the proposal, or if an existing fact which was previously immaterial becomes material owing to a change of circumstances it must be disclosed⁸⁶.

85 See, in respect of France, Article L.113.8 Code des Assurances 1976; in French-speaking Cameroon Article 15 of the law of 13 July 1930; Silla Nkongue v. Chanas et Privat, Arrêt No.114/CC of 11 June 1981 Yaounde (Unreported). And see in respect of England: With v. O'Flanagan [1936] 1 Ch.575, at 585; Smith v. Kay (1859) 7 H.L.C. 750, per Lord Cranworth at 769; Davies v. London Provincial Marine Insurance Co. (1878) 8 Ch.D. 469; Re Yager and Guardian Assurance Co. Ltd. (1912) 108 L.T. 38, per Chanel J. at 44; Canning v. Farqhar (1886) 16 Q.B.D. 727 per Lindley L. J. at 733 and per Lord Esher M.R. at 731. See also: A.H. Hudson, 'Making Misrepresentation', (1967) 30 M.L.R. 369-370; Treitel, The Law of Contract 6th ed., 1983, Chap.9.

86 See, in England, Looker v. Law Union and Rock Life Ins. Co. Ltd. [1928] 2 K.B. 554-559; Allis Chalmers Co. v. Maryland Fidelity and Deposit Co. (1916) 114 L.T. 433, per Earl Loreburn at 434; Harrington v. Pearl Life Assurance Co. Ltd. (1914) 30 T.L.R. 613.

Facts disclosed by the proposer prior to the conclusion of the insurance contract may change over the duration of the contract. When circumstances occur after the conclusion of the contract which change the nature of the risk, the equilibrium of the contract is disrupted. Where the risk increases in the course of the contract, it would be inequitable to require the insurer to cover at the same premium a risk greater than that which he originally undertook. Conversely, where the risk has been diminished it would be inequitable to hold the insured to payment of premium at the rate originally fixed in contemplation of a higher risk. The question therefore arises whether the insured should be under a duty to disclose material facts which occur, after the conclusion but over the duration of the insurance contract.

French and French-speaking Cameroonian law manifestly favour modification of the insurance contract in the light of changes affecting the risk. These legal systems have, by statute, instituted a scheme of continuous disclosure by the insured in the course of the contract of changes in material facts. The insured is required to notify the insurer of matters stipulated in the contract for the continuous assessment of the risk throughout the duration of the contract, while the insurer is allowed to propose corresponding adjustments of premium or other terms of cover in case of "aggravation du risque" that is, the change of material facts during the currency of the contract.⁸⁷

By contrast, under English common law and English-speaking Cameroonian law, there is no general duty to disclose material facts which occur after the conclusion, but during the period, of the insurance contract. English law casts the duty to disclose material facts upon the proposer and insured

87 See in Cameroon article 15(3) and 17 of the law of 13 July 1930 and in France article L.113-2 and article L.113-4 of the Insurance Code 1976. The proposed EEC directive (O.J. No.C 355/30) op. cit. on insurance contract law refers to this sort of disclosure in articles 4-6. See, also, the English Law Commission Report No.104. op. cit. paras. 5.1. - 5.18, pp. 74-79.

only until the conclusion of the contract, for the former, and at renewal of the policy, for the latter. In Pim v. Reed⁸⁸ the insurance was on machinery in a mill. At the time of effecting the policy the mill was being used for the manufacture of paper, but during the currency of the policy the insured started the business of a cleaner and dyer of cotton waste, using the same mill. This was a more hazardous use. A loss occurred for which the insurer refused to indemnify the insured on the ground that the change in use of the mill had not been disclosed. It was held that in the absence of the alteration contravening any description of the subject-matter of the insurance, the change of trade did not invalidate the policy. Until the middle of the nineteenth century, therefore, the insurer was not protected by English law against the non-disclosure of changes in material facts occurring after the conclusion but during the period of the contract. Subsequently, however, by the "ingenuity of insurance lawyers and the genius of Lord Mansfield,"⁸⁹ the instrument of the "warranty" which was invented in the field of marine insurance,⁹⁰ was used to alter this in the area of non-marine insurance⁹¹.

There are two types of warranties: promissory warranty⁹² and warranty as to past or present facts. By promissory warranty the proposer warrants

88 (1843) 6 Man. & G. 1. See also for example, Baxendale v. Harvey (1859) 4H. and N.445, at 452.

89 See Kessler, "Forces shaping the Insurance Contract," (1954) Ins. L.J. 151 at 162.

90 Pawson v. Watson (1778), 2 Cowp. 785; De Hahn v. Hartley (1786) 1 T.R. 343.

91 For an early example of the use of the warranty in a non-marine insurance case, see Newcastle Fire Insurance Co. v. MacMorran (1815) 3 Dow.255.

92 The word promissory is ambiguous in this context since every warranty is in a sense 'promissory' in so far as the insured is giving an assurance in respect of facts warranted, present or future: See Farnham v. Royal Insurance Co. Ltd., [1976] 2 Lloyd's Rep. 437.

that a given state of affairs will exist throughout the duration of the insurance contract and not merely at its inception. Thus certain contracts of insurance, notably those in fire insurance, in practise incorporate clauses imposing upon the insured a duty to disclose facts occurring during the insurance contract which materially increase the risk or any specified change in circumstances such as any addition or alteration to the insured premises, and changes in the nature of adjoining premises.

Warranties of past or present facts consist of representations made by the insured before the completion of the contract. They arise normally as a result of a completed proposal form where the statements and questions and answers thereon are warranted to be the basis of the contract⁹³.

A breach of warranty, as will be seen later in this chapter⁹⁴, entitles the insurer to be released from all liability under the policy. Thus, through this device, the English insurer, who is not otherwise entitled to be informed of changes in material facts occurring after the conclusion of the contract but within its duration, is able to protect himself against liability for any increased risk which may result from the change in material facts.

It will be observed that the underlying purpose behind both warranty in English and English-speaking Cameroonian law and "aggravation du risque" in French and French-speaking Cameroonian law is the maintenance of a consensus ad idem between the insured and insurer and the observance of the agreement in the sense that the risk the insurer is assuming is at all times commensurate with the premium paid by the insured. Premiums vary with the risk: the insurer undertakes a certain risk for a certain premium under certain

93 For the legal mechanism for the creation of this warranty, see below, pp.337-339.

94 Infra, pp.354-355.

conditions. It is necessary that in so highly speculative a contract the risk proposed should be accurately defined⁹⁵. Warranty in English and English speaking Cameroonian law and aggravation du risque in French and French speaking Cameroonian law represent two methods by which attempts to define the risk accurately have been made.

WARRANTY IN ENGLISH AND ENGLISH-SPEAKING CAMEROONIAN LAW

In a formula resembling that employed by s.33(1) of the Marine Insurance Act 1906⁹⁶, MacGillivray and Parkington define a warranty as:

"... a written term of the contract of insurance in which the assured warrants, owing to the force of express words or through the operation of law, either that certain statements of fact are accurate, or that certain statements of fact are and will remain accurate, or that he will undertake the due performance of an obligation specified therein".⁹⁷

The Characteristics of Warranties.

From this definition four characteristics can be discerned as constituting the nature of a warranty. First, a warranty is a term of the insurance contract and is therefore, to be found in the contract documents evidencing the parties agreement. Of these documents the two most common are: the policy and the proposal form. The latter is usually incorporated into

95 See Vance, "The early history and development of Warranty in Insurance Law" (1911) 20 Yale L. J. 525, at 526.

96 Promissory warranty is:

" a warranty by which the assured undertakes that some particular thing shall or shall not be done or that some condition shall be fulfilled or whereby he affirms or negatives the existence of a particular state of facts".

97 MacGillivray and Parkington, On Insurance Law, 7th ed., 1981, at 290. For an elaborate discussion of the subject, see Patterson, 'Warranties in Insurance Law'., (1934) 34 Colum. L. Rev. 595-631.

the policy and made part of it. As Lord Wright observed in Provincial Insurance v. Morgan⁹⁸ the general scheme which has long been in use by insurance companies comprises a proposal form, signed by the assured, containing various particulars and answers to various questions, a declaration that the answers are to be the basis of the contract and an agreement to accept the company's policy; a recital in the policy incorporating the proposal and declaration and setting out the risk insured, certain exceptions and conditions and a schedule embodying various particulars.

This general scheme of policy has often been criticised by judges who point out, as Lord Wright did, that:

"... it must be very puzzling to the assured, who may find it difficult to fit the disjointed parts together in such a way as to get a true and complete conspectus of what their rights and duties are and what acts on their part may involve a forfeiture of the insurance. An assured may easily find himself deprived of the benefits of the policy because he has done something quite innocently but in breach of a condition⁹⁹, ascertainable only by the dovetailing of scattered portions".

In comparison with the general scheme just mentioned, the practice, sometimes resorted to, of not referring in the policy at all to a proposal which the insured has warranted to contain true answers is even more objectionable. The omission of words of reference altogether is quite contrary to the spirit of consumer protection legislation in other areas of the law of contract which requires that vital terms in a complex agreement must be delineated with special clarity¹⁰⁰.

Material warranties are of such importance to the insured that he ought

98 [1933] A.C. 240, at 252.

99 Ibid. See also: Yorkshire Insurance v. Campbell, [1917] A.C. 218.

100 See, for example, Consumer Credit Act 1974

to be able to refer to a written document in which they are contained¹⁰¹. The Law Commission has recommended¹⁰² that the insurer should be obliged, as a condition precedent to the legal effectiveness of the warranty, to furnish the insured with a "document containing the warranties" as soon as practicable after the insured has given the warranty in question. It seems desirable that where a proposal form has been completed a copy should be sent to the insured; and if no proposal form is used promissory warranties should be incorporated as an individual term on the face of the policy or in an endorsement thereon. In the case of failure to comply with these formal requirements, the insurer should be precluded from relying on a breach of warranty in question as a ground for repudiating the policy or rejecting a claim.

A second characteristic of warranty is that the facts warranted need not be material to the risk. Unlike misrepresentation which entitles the insurer to avoid the contract only if the misrepresented fact is material to the risk, a breach of warranty gives the insurer a right to repudiate the contract whether or not the fact warranted affected the risk or in any way influenced the insurer when he undertook the risk. As Lord Watson said in Thomson v. Weems¹⁰³:

"When the truth of a particular statement has been made the subject of warranty, no question can arise as to its materiality or immateriality to the risk, it being the very purpose of the warranty to exclude all controversy upon that point".

101 See E. R. H. Ivamy, "Insurance Law Revision", (1955) Cur. Leg. Prob. 147, at 158.

102 See Law Commission Report No.104, Cmd. 8064 p.84 para.6.14. Lord Mansfield held in some decisions that a separate document, even if delivered with the policy, could not form part of the policy: e.g., Pawson v. Watson (1778) 2 Cowp, 785. He also held that even where the document was wafered on to the policy a warranty contained therein would only be a representation: Bize v. Fletcher (1779) 1 Dougl. 284.

103 1884) 9 App. Cas. 671, at 689. See also: Yorkshire Insurance v. Campbell [1917] A.C. 218; Condogianis v. Guardian Assurance [1921] 2 A.C. 125; Dawsons v. Bonnin [1922] 2 A.C. 413.

In Dawson v. Bonnin,¹⁰⁴ a motor vehicle insurance case, a mis-statement by the insured as to the place where a vehicle was garaged was held to be immaterial; nevertheless the insured was precluded by it from recovering under the policy since he had warranted it to be true.

There has been considerable criticism of this aspect of the law of warranties¹⁰⁵. Further, the Law Commission considered¹⁰⁶ that insurers should not be entitled to repudiate the policy for breach of an undertaking which is immaterial to the risk even if the word "warranty" is used or if the true construction of the contract provides the insurer with the right to repudiate for breach of warranty. It further recommended that a term of the contract should only be capable of constituting a warranty if it is material to the risk, in the sense that it is an undertaking relating to a matter which would influence a prudent insurer in deciding whether to accept the risk and if he decides to accept it, at what premium and on what terms.

Warranty evinces a third characteristic: there must be strict and exact compliance with the obligation or statement that is warranted¹⁰⁷.

104 Note 103 supra. But see the dissenting judgments of Viscount Finlay at 430-431, and Lord Wrenbury at 436-437; See also p50 infra See in English-speaking Cameroon, Mathias Djoumessi v. Guardian Royal Exchange Assurance (Cameroon Ltd) Suit No. HCB/18/74 of 11th July 1975 Bamenda (Unreported).

105 See for example, Lord Wrenbury in Glicksman v. Lancashire and General Assurance Co. Ltd. [1927] A.C. 139, at 144-145.

106 Law Commission Report No. 104, op. cit. para. 6.12; Clause 8 of the Draft Insurance Law Reform Bill (L.C. Report No.104 Appendix A).

107 In Pawson v. Watson (1778) 2 Cowp. 785, at 787-788 Lord Mansfield said that where there was a warranty "nothing tantamount will do or answer the purpose; it must be strictly performed as being part of the agreement".

In De Hahn v. Hartley¹⁰⁸ he returned to the same theme and said:

"There is a material distinction between a warranty and a representation. A representation may be equitably and substantially answered: but a warranty must be strictly complied with. Supposing a warranty to sail on the 1st. of August, and the ship did not sail till the 2d, the warranty would not be complied with. A warranty in a policy of insurance is a condition or a contingency, and unless that be performed, there is no contract. It is perfectly immaterial for what purpose a warranty is introduced; but, being inserted, the contract does not exist unless it be literally complied with"¹⁰⁹.

In English law it makes no difference that a breach of warranty occurred without the fault or even the knowledge of the insured or owing to someone else's fault or that the risk is not increased by its breach¹¹⁰. English courts have recognised that an insurer may require the insured to warrant the accuracy of all statements made by him in the proposal form irrespective of his personal knowledge. If an insured warrants that his statements are true not only is subjective truthfulness warranted but also their absolute accuracy. In Duckett v. Williams¹¹¹ Lord Lyndhurst remarked that a statement is not the less untrue because the party making it is not apprised of the untruth. However, the insured may warrant the truth of his statements only

108 (1786) 1 T.R. 343 at 345-346.

109 In Allen v. Universal Automobile Ins. Co. (1933) 45 LL.L.R. 55, a proposer for motor insurance was asked: "what was the actual price paid by the owner?" He answered: "£285". It was held that there had been a breach of warranty since he had in fact paid only £275. In Newcastle Fire v. MacMorran (1815) 3 Dow. 255 a store pipe three feet long was held not to answer a warranty that it was two feet long.

110 Phillips v. Baillie (1784) 3 Dougl. K.B. 374; Trickett v. Queensland Insurance [1936] A.C. 159, at 165, per Lord Alness; Worsley v. Wood. (1796) 6 Term Rep. 710; Newcastle Fire v. MacMorran (1815) 3 Dow. 255.

111 (1834) 2 C. + M. 348, at 351.

so far as he knows it. In this case he declares that his answers to questions asked are true to the best of his knowledge and belief.¹¹² For example, the General Accident proposal form provides:

"I/We declare that the information given in this 'Keep Motoring Proposal' is to the best of my/our knowledge and belief correct and complete in every detail and will be the basis of the contract between me/us and General Accident."

A fourth and final characteristic of warranty is that its breach need not have caused a loss for the insurer to be entitled to repudiate the policy. Thus, if the insured under a motor policy warrants that as a condition of the insurer's liability he will maintain the insured vehicle in an efficient or roadworthy condition and the insurers can prove that the vehicle was not in such a state they will have a defence to the insured's claim arising out of an accident involving the insured vehicle without having to prove that the poor condition of the vehicle caused or contributed to the accident.¹¹³

The result could be even more absurd with regard to policies which cover more than one risk. For example, it is compulsory under section 145 of the Road Traffic Act 1972 in a motor insurance policy to cover liability in respect of death or personal injury caused to third parties. The same policy may, at the insured's option, provide cover against fire or theft if the vehicle; a comprehensive policy may, in addition to the above, cover loss or

112 This modification is a consequence of the Statement of Insurance Practice, para. 1(a). This affects insureds in their private capacity only. C.F. General Accident proposal form for commercial vehicles, infra, p.338.

112A See General Accident 'Keep Motoring Proposal Form 1985'.

113 Jones v. Provincial Insurance (1929) 35 Ll.L.Rep. 135; Brown v. Zurich General Accident [1954] 2 Lloyd's Rep.243; Conn v. Westminster Ins. Co. [1966] 1 Lloyd's Rep. 407.

damage to, the vehicle and its contents. Suppose that in such a multi-risk policy the insured warrants the roadworthiness of the vehicle. A defect in the headlights would increase the chances of an accident occurring and would be a breach of the warranty as to the vehicle's roadworthiness. If, in these circumstances, the vehicle is stolen, the risk which actually occurred would be found to be of a different nature from that which was increased by breach of the warranty as to roadworthiness. Yet, under the present law the insurer would be entitled to repudiate the policy and to reject the insured's claim in respect of the theft of his vehicle.

Where the insured is in breach of a warranty which is relevant to a risk other than that which actually materialises, it seems manifestly unfair that the insurer should be able to rely on the breach to repudiate liability for the actual loss. The Statement of Insurance Practice provides, in paragraph 2(b)(ii), that except where fraud, deception or negligence is involved an insurer should not unreasonably repudiate liability to indemnify a policyholder where there had been, a breach of warranty or condition with which the loss was not connected¹¹⁴. This provision would in effect confer a discretion upon insurers to repudiate a policy on technical grounds, for example, where they suspect fraud but are unable to prove it.

While the initiative of the Association of British Insurers and Lloyd's is clearly a step in the right direction, it is thought that the protection of the insured and third parties requires more than self-regulation measures by the insurance industry. Reform of the law of warranties is necessary¹¹⁵. In what is referred to as "the nexus test", the Law Commission recommended that the insured should not be entitled to reject a claim if the insurer's

114 See p.335 supra.

115 For the reasons, see Law Commission Report No. 104 op. cit., paras. 6.9-6.10

breach of warranty could not have increased the risk of loss occurring in the way it actually did, even though the loss was of a type which the warranty was intended to make less likely.

The Creation of Warranties

In order to give a statement the force of a warranty, no formal or technical wording is required. The court construes the entire document containing the terms to determine whether the parties intended the term to possess the attributes of a warranty.

Basically, a warranty may be created in one of the following ways. First, the parties may expressly provide for it by use of the word "warranty", for example, in the phrase "the insured warrants ...". This may not be conclusive. The court might conclude that, as a matter of construction, the parties could not have intended a warranty. In De Maurier (Jewels) Ltd. v. Bastion Ins. Co.¹¹⁷, despite the presence of the phrase "[Warranted] road vehicles (whether owned by assured or otherwise) fitted with locks and alarm system (approved by underwriters) and in operation" in an all-risk insurance effected by jewellers, the court held that the clause was merely descriptive of the risk¹¹⁸.

Second, the use in the policy of the phrase "condition precedent" may create a warranty. This depends on the construction of the whole document containing the term. What a policy describes as a condition precedent may on its true construction be a warranty where it is clear that performance of the condition is precedent to the validity of the policy and that on breach of

116 Law Commission No.104 p.89 para. 6.22; Clause 10 of the Draft Insurance Law Reform Bill (L.C. Report, No.104 Appendix A).

117 [1967] 2 Lloyd's Rep.550.

118 Ibid.

the condition, the insurer is entitled to repudiate the policy.¹¹⁹ Breach of a mere condition, on the other hand, entitles the insurer to claim damages, for such loss as he has suffered, but not to repudiate the policy¹²⁰.

Third, warranties may be created by the "basis of the contract" clause. Insurers often pre-empt the issue whether a particular fact is material by including in the proposal form a declaration whereby the proposer warrants the accuracy of all answers to the questions, the exact truth of which then becomes a condition precedent to the validity of the policy. The usual formula is:

"I/We declare that:

- (a) the answers and particulars given are true and correct and that I/We have not withheld any information which might influence the acceptance of this proposaland declaration will form the basis of the contract of insurance between the Corporation and myself/ourselves and shall be held as incorporated in the policy."¹²¹

Further in the policy it is stated that:

" ... the truth of the statements and answers in the said proposal shall be conditions precedent to any liability of the Corporation to make any payment under this Policy."¹²¹

119 See Conn. v. Westminster Ins. Co., supra. note 113. See also Mathias Djoumessi v. Guardian Royal Exchange Assurance (Cameroon Ltd.) Suit No. H.C.B./18/74 of 11 July 1975 Bamenda (Unreported) where the words "condition precedent" were interpreted as a warranty.

120 For more details see, MacGillivray and Parkington, On Insurance Law relating to all risks other than marine, 7th ed., 1981 pp.296-297.

121 See General Accident 'Goods-Carrying Vehicle Insurance' proposal form and policy; See, Borrie and Diamond, The Consumer, Society and the Law, 4th ed., 1981, 250. See also: J Birds, 'Warranties in Insurance Proposal Forms', [1977] J.B.L., 231; c.f. General Accident proposal form for private vehicles, supra, p.336.

The legal effect is that answers in the proposal forms are incorporated into the contract as warranties. In the event of any inaccuracy in any of the answers, the insurer may repudiate the contract for breach of warranty regardless of the materiality of the particular answer to the risk and whether or not the insured answered the question in good faith and to the best of his knowledge and belief.¹²² The clause modifies the law regarding the time of disclosure and the stage of the truthfulness of the representations. It is accepted law that disclosure and truthful representations should be made until the moment of conclusion of the contract. But once the disclosed facts and representations are governed by the "basis clause" they may be construed as "continuing" throughout the period of insurance and thus have the effect of "promises" instead of representations.¹²³

The absolute nature of the basis of the contract clause has been judicially criticised as constituting a trap for the insured,¹²⁴ and its

122 See The Fifth Report of the Law Reform Committee, Conditions and Exceptions in Insurance Policies, 1957, Cmnd., 62, para.6; Dawsons Ltd. v. Bonnin [1922] 2 A.C. 413, esp. per Lord Haldane at 423; Mackay v. London General Insurance Co. (1935) 51 LI.L. Rep.201, esp. per Swift J. at 202;

123 Provincial Insurance v. Morgan [1933] A.C. 240.

124 Zurich General Accident and Liability Insurance Co. v. Morrison [1942] 2 K.B. 53, per Lord Greene M.R. at pp.58-59; Anderson v. Fitzgerald (1853) 4 H.L. Cas. 484, 507; 10 E.R. 551, 560 per Lord St. Leonards. Here, the court considered that to give effect to such a clause rendered the policy in which it was contained not worth the paper on which it was written and liable to produce a result whereby no prudent man would effect a policy of insurance with any company without having an attorney at his elbow to tell him what the true construction of the document was. For academic criticism, see R.A. Hasson, "The basis of the contract clause in insurance law," (1971) 34 M.L.R.29; G.H. Treital, The Law of Contract 6th ed., 1983 pp. 259, 596; Cheshire and Fifoot's Law of Contract, 10th ed., 1981 pp. 132 et seq.

abolition has been recommended by the Law Commission¹²⁵.

AGGRAVATION DU RISQUE IN FRENCH-SPEAKING CAMEROONIAN LAW¹²⁶

Unlike English and English speaking Cameroonian law, French and French speaking Cameroonian law places the insured under a positive obligation to declare to the insurer all increases in the risk which occur after the conclusion of, but during, the contract of insurance.. Article 17 of the law of 13 July 1930 stipulates:¹²⁷

"When, by his act, the insured increases the risks in such a manner that, if the new state of affairs had existed when the contract was concluded, the insurer would not have entered into the contract or would have required a higher premium, the insured must give prior notice to the insurer by registered letter."

"Where the risk is increased otherwise than by act of the insured, the latter must give notice by registered letter within eight days from the time he had knowledge of the circumstances increasing the risk."

These provisions of article 17 call for closer analysis. It will be observed that unlike warranties in English and English speaking Cameroonian law, article 17 of the 1930 law deals only with the narrower notion of increase of

125 Law Commission Report No. 104, op. cit., paras. 7.8-7.9; Clause 9 of the Draft Insurance Law Reform Bill (L.C. Report No.104 Appendix A). However, Clause 9(2) makes it clear that 9(1) will not affect the creation of promissory warranties. As to the effect of the Statement of Insurance Practice see paras, 2(b)(ii); Actual legislation is unlikely for the foreseeable future: see, 70 Hansard (6th series) H.C. Cols. 273-274 (20 December 1984) written answer to a Parliamentary question.

126 See P. Catala and Weir, "La déclaration du risque en droit français et anglais comparé - l'aggravation du risque" (1967) 38 Rev. Gén. Ass. Terr. 145-163.

127 Our translation of the original text. Article 17 does not apply to life insurance.

risk occurring after the conclusion of the contract and in the course of it¹²⁸. In the words of Picard and Besson:

"There is an increase of risk when after the conclusion of the contract there arises, with regard to the circumstances declared at the time of this conclusion, a change which increases the likelihood of the risk occurring or of its extent:¹²⁹".

It must be emphasised that increase of risk presupposes that the risk has been completely and correctly declared before the conclusion of the contract. A false declaration or omission in the proposal form amounts not to an increase in risk, but to misrepresentation or non-disclosure under article 15 of the 1930 law. This is in stark contrast to the wider notion of warranty in English and English speaking Cameroonian law. As we have seen,¹³⁰ the latter embraces misrepresentations and non-disclosure affecting answers to questions on proposal forms whose accuracy is warranted to be the basis of the contract by a declaration signed by the insured as well as warranties to the future (promissory warranties) applying in the course of the contract.

Under French speaking Cameroonian law the obligation to declare increases in risk implies that the circumstances increasing the risk arise

128 In the event of a decrease in risk a reduction in premium is justified and the insured is entitled to terminate the contract if the insurer does not consent to a proportionate reduction in premium. The insurer must then refund a proportion of the premium corresponding to the period for which cover is not provided: see M. Picard and Besson, Les Assurances Terrestres - Le Contrat d'Assurance - Vol. 1, 5th ed. 1982, pp. 147-149 and Article 17 of the law of 1930.

129 Our translation of M. Picard and A. Besson, Les Assurances Terrestres - Le Contrat d'Assurance, Vol.1, 5th ed., 1982, 132-133: "Il y a aggravation du risque lorsque, postérieurement à la conclusion du contrat, survient, par rapport aux circonstances déclarées lors de cette conclusion, un changement qui augmente soit la probabilité, soit l'intensité du risque".

130 Supra, pp.323, 330 and 338.

after the conclusion of the contract. It is essentially a change which increases the chances of the fortuitous event happening and of the consequences of the event being more serious. It is necessary that the new risk be such that had the new state of things existed at the time of the conclusion of the contract, the insurer would not have contracted or would only have contracted for an increased premium. Examples of increase in risk include: in a fire policy, the introduction of inflammable material into the insured building¹³¹; and in a personal injury policy, the change of the insured's profession to one involving a more dangerous activity¹³².

Unlike English and English speaking Cameroonian law which dispenses with materiality of facts for the purposes of warranty¹³³, in French and French speaking Cameroonian law materiality is relevant to the insured's obligation to declare increases in risk. The only changes that need be declared are those which either have an influence on the rate of premium (for example, in a motor vehicle policy, the change in use from private to commercial purposes)¹³⁴ or those which affect the insurer's opinion about the risk such that he would prefer not to contract at all. As in English and English speaking Cameroonian law, however, under French and French speaking

131 Emmanuel Nkwangu v. Groupement Français d'Assurance, Affaire No.572/CC of 9 December 1972, Douala, (Unreported).

132 Sam Jimea v. Royal Exchange Assurance Affaire No.714/cc of 5 April, 1965; Douala, (Unreported).

133 See supra, pp.333-334.

134 Jean Tandem v. Agence Camerounaise d'Assurance, Affaire No.519/CC of 3 March 1970, Douala (Unreported)

Cameroonian law there need not be any connection between the circumstances increasing the risk and the loss that actually occurs.¹³⁵ Indeed, the increase of risk being independent of any accident, the declaration of facts increasing the risk should be made even though no accident has yet occurred.

Under article 15(3) of the law of 13th July 1930 the insured's obligation to declare increases in risk pursuant to article 17 is restricted to circumstances specified in the policy which are likely to result in increase in risk.¹³⁶ This obligation is not, therefore, as wide as that of initial disclosure under article 15(2). It is limited to circumstances which the insurer has expressly mentioned in the policy as likely to increase the risk.¹³⁷ The practice of some insurance companies which stipulate that, if the risk is modified or increased in whatever way the insured must notify the insurer, has been criticised as conforming neither to the letter nor to the spirit of article 17 which exists in the interest of the insured. Case law is strict on the specification of the circumstances which increase the risk. The (then) East Cameroon Supreme Court insisted on a strict interpretation of article 15(3) and declared that the specification must be precise, requiring the mention of the facts increasing the risk with reference to article 17.¹³⁸

In contrast to the warranty regime under English and English speaking Cameroonian law which does not require proof of knowledge or any fault on the part of the insured, article 17 submits the insured to an obligation to declare an increase in risk only when he has knowledge of

135 See article 17 of the law of July 1930.

136 See James Landel, Fausses déclarations et réticences en assurances automobile, 1982, 14.

137 See M. Picard and A. Besson op. cit., pp. 132-134. These circumstances are expressly mentioned in Cameroon motor insurance policies of all insurance companies.

138 Valentine Domas v. Société Nouvelle d'Assurance du Cameroun, Affaire No.258/CC of 4th July 1966, Douala (Unreported).

the facts responsible for the increase. The article distinguishes two situations. In the first, where the increase in risk arises by act of the insured, he is required to give prior notice of it to the insurer. He cannot plead lack of knowledge, since he is himself the author of the increase. In the second situation, the risk may have been increased by the act of a third party without the insured's knowledge, for example, where the neighbours of a person holding a fire policy on his premises introduce inflammable materials to their adjoining property without the insurer's knowledge. In this situation article 17 requires the insured to declare the new facts within eight days¹³⁹ of obtaining knowledge of them.

Declaration of increase in risk in conformity with article 17 must be, as the article itself stipulates, by registered letter.¹⁴⁰ The policy may provide a simpler procedure, such as an ordinary letter, for giving notice of increase in risk¹⁴⁴. Subject to this, unless it is waived by the insurer, the registered letter is a condition precedent for the validity of the declaration of increase of risk¹⁴².

139 The parties may by mutual agreement increase, but not reduce, the time limit of eight days: see Art. 15(1)(3) and 15(2) of the law of 13 July 1930.

140 See Françoise Chapuisat, "l'Utilisation de la lettre recommandée en droit des assurances," (1981) 52 Rev. Gén. Ass. Ter. 473-489.

141 M. Picard and A. Besson, Les Assurances Terrestres - Le Contrat d'Assurance, Vol. 1, 5th ed., by A. Besson, 1982, Paris, pp.136-137.

142 M. Picard and A. Besson, op.cit., at p.138.

V THE CONSEQUENCES OF NON-DISCLOSURE, MISREPRESENTATION, BREACH OF
WARRANTY AND AGGRAVATION DU RISQUE

A The Consequences of Non-Disclosure and Misrepresentation

The distinction between non-disclosure and misrepresentation is of more than academic interest. The tenuous nature of that distinction is unsatisfactory: it renders it more difficult to differentiate between insured persons who actively mislead insurance companies and those who merely fail to volunteer information.¹⁴³ For underlying the consequences of non-disclosure and misrepresentation in England, France and Cameroon is the idea of fraud, the obligation of good faith. As a general rule total non-disclosure of a fact does not amount to any kind of fraud unless there is a legal duty to disclose the fact. Once there is such a duty, however, its breach produces adverse consequences for the offender under English and English-speaking Cameroonian law, notwithstanding that the breach was innocent. Since Lord

143 See Hasson, "Misrepresentation and Non-Disclosure in Life Insurance - Some Steps Forward" (1975) 38 M.L.R. 89.

Mansfield's judgment in Carter v. Boehm¹⁴⁴ it has been decided that in the case of non-disclosure an insurer can avoid the insurance policy even in the absence of a fraudulent intent on the part of the insured. Mistake or forgetfulness affords no defence. Thus Cockburn C. J. said in Bates v. Hewett:¹⁴⁵

"... it is also well established law, that it is immaterial whether the omission to communicate a material fact arises from intention, or indifference, or a mistake, or from it not being present to the mind of the assured that the fact was one which it was material to make known".

By contrast, as will be seen presently, French-speaking Cameroonian law does not hold a non-disclosure or a misrepresentation against the party to an insurance contract who is guilty of it unless he acted in bad faith. Bad faith is often referred to as "dol", a term which in civil law means¹⁴⁶ a fraudulent manoeuvre whose object is to deceive one of the parties to a legal transaction in order to obtain his consent. According to article 1116 of the Civil Code, "le dol" is a ground of nullity of contract where the manoeuvres of one of the parties are such that it is clear that, without them, the other party would not have contracted.

The burden of proof of bad faith is on the insurer¹⁴⁷. It is within the "pouvoir souverain" of the trial judge to appreciate the insured's bad

144 (1766) 3 Burr. 1905 at 1909. See also: Lindenau v. Desborough(1828) 8 B & C 586; Godfrey v. Britannic Ass. Co. [1963] 2 Lloyd's Rep. 515; Anglo-African Merchants v. Bayley [1970] 1 Q.B. 311. And see: R.A. Hasson, "The doctrine of Uberrimae fides in insurance law - A critical evaluation", (1966) 32 M.L.R. 615, at 616-617.

145 (1867) 2 L.R.Q.B. 595 at 607.

146 See: Raymond Guillien and Jean Vincent et al, Lexique de termes juridiques, 5th ed., 1981, 161; Gabriel Marty and Pierre Raynaud, Droit Civil - Les obligations, Vol. 1, 1962, 124-130.

147 Le Phénix - Accidents c. Saly [Éd. G.], Cass. Soc. 9 May 1947, J.C.P. 11. 1947, 3852: "C'est à l'assureur qu'il incombe d'établir la mauvaise foi de l'assuré ...".

faith¹⁴⁸. In the French-speaking Cameroonian case of Ebendeng Emmanuel v. Mutuelle Agricole d'Assurance¹⁴⁹ the court said that bad faith was characterised by intention to deceive the insurer¹⁵⁰. The fault, in the ultimate analysis, was that the insured told the untruth with the knowledge that the insurer would not have accepted the risk had the facts been correctly declared. Bad faith is not difficult to prove where the attention of the insured has been drawn to a specific and unambiguous question in the proposal form to which he gives an equivocal answer¹⁵¹. In any event, it is relatively easy under French-speaking Cameroonian law to establish bad faith. The view that article 1134¹⁵² of the Civil Code provides for a residual obligation of honesty has produced a considerable expansion of the concept of fraud. There has been a wide extension of the idea of fraud by silence by resorting to the obligation of good faith¹⁵³. What, then are the consequences of non-disclosure or misrepresentation? In English and English speaking Cameroonian law a failure on the part of the insured to disclose a material fact renders

148 La Patrimoine c. Robillard, Cour de cassation (Ch. civ. 1re sect. civ.), 11 July 1966, (1967) 38 Rev. Gén. Ass. Terr. 175; Caisse Sécurité Sociale Indre c. La Confiance, Cour de cassation (1re Ch. civ.), 16 June 1969, (1970) 41 Rev. Gén. Ass. Terr. 163-164.

149 Arrêt No.108/CC of 5 October 1978, Yaounde (Unreported). See also: Lyon Caen G., "De l'évolution de la notion de bonne foi", (1946) Rev. Trim. Dr. Civ. 75.

150 See also in France, M. Picard and A. Besson op. cit., p.128.

151 Ibid. at p. 136-138.

152 See above, p.306

153 See Michel de Juglart, "L'Obligation de Renseignements dans les contrats", (1945) Rev. Trim. Dr. Civ. 1 et. seq.

the policy voidable at the option of the insurer¹⁵⁴. The insurer may on discovering the facts elect to avoid the contract of insurance. Upon the exercise of that right the contract is void ab initio, but it remains in force until avoided by the insurer¹⁵⁵. In the result, if the insurer has already paid a claim, he is entitled to demand repayment of the sum so paid. Repayment is made on the basis of money paid over under a mistake of fact. On the other hand, the insured is entitled, in the absence of wilful, or fraudulent concealment, to demand the repayment of such premiums as he may have paid¹⁵⁶. The premiums are returnable on the basis of a quasi-contractual action for money paid against a total failure of consideration¹⁵⁷.

In French and French-speaking Cameroonian law the sanctions for non-disclosure and misrepresentation provided for by the law of 13 July 1930 and Codes des Assurances 1976 make a distinction as between where the insured was actuated by bad faith and where he acted in good faith. In the former case, he incurs, by virtue of article 21 of the law of 1930, nullity of the contract. In the latter case article 22 of the law of 1930 applies. Article 21 stipulates that independently of any ordinary grounds of nullity, the contract of insurance is null and void in the case of non-disclosure or misrepresentation if the non-disclosure or misrepresentation on the part of the insured changes the object of the risk or diminishes the opinion of the insurer in evaluating or assessing the risk even if the risk omitted by the

154 Carter v. Boehm (1766) 3 Burr. 1905. See also in English-speaking Cameroon, Mathias Djoumessi v. Guardian Royal Exchange Assurance (Cameroon Ltd) Suit No. H.C.B. 18/74 of 11 July 1975.

155 Mackender v. Feldia A. G. [1966] 2 Lloyd's Rep. 449

156 Cornhill Ins. Co. v Assenheim (1937) 58 Ll.L. Rep. 27 at 31.

157 Feise v. Parkinson (1812) 4 Taunt 640; Marine Insurance Act 1906, S.84(3).

insured had no connection with the loss. The contract is thus not merely voidable as in England but void. The guarantee provided by the insurer retroactively disappears. The insurer has the right to reclaim all money paid for previous losses and to keep all premiums already paid; he also has the right to further payment of premiums that have fallen due¹⁵⁸.

Article 21 is not applicable unless the insured's non-disclosure or misrepresentation was intentional and, therefore, in bad faith.¹⁵⁹ Where bad faith on the part of the insured has not been established, the policy cannot be avoided on grounds of non-disclosure or misrepresentation.¹⁶⁰ Instead, article 22(2) and (3) apply.

Article 22(2) deals with the situation where a non-disclosure or misrepresentation without bad faith is discovered before the occurrence of a loss giving rise to a claim of indemnity. Here the insurer has the option between maintaining the contract for an increased premium and rescinding it. The decision to increase the premium cannot be taken unilaterally, but in agreement with the insured, in conformity with the general law requiring consent and mutuality in contracts. Where the insurer rescinds the contract, he has no right to demand further premiums. If premiums have been paid in advance, he must make a pro rata repayment of the premium for the period during which the insured was not covered. And if the premium falls due he can only require payment for the period up to the time of rescission.

Article 22(3) deals with the situation where a non-disclosure or misrepresentation without bad faith is discovered after the occurrence of a loss. In this case the insurer is bound to pay only that proportion of the

158 Article 21(2) of the Law of 13 July 1930. And see: Picard and Besson, op. cit., 158-160.

159 Article 21(1). Ibid.

160 Article 22(1). Ibid.

loss which the premium paid bears to that which would have been payable if the risk had been completely and accurately disclosed.^{160A} The application of this provision is termed the "proportionality principle". The provision applies even though the non-disclosed or misrepresented fact had no connection with the loss. It is intended to reduce the amount recoverable by the insured in certain cases of failure to comply with his duty of disclosure but without depriving him of the whole of his claim. The proportionality principle thus avoids the "all or nothing" approach of English law.

However, the application of the principle of proportionality is not without some practical problems and certain inherent limitations have been recognised.¹⁶¹ The idea underlying the principle appears to be that the insured's entitlement is to be determined as though the insurer had been aware of the undisclosed facts at the time of the proposal and had fixed the premium on that basis, as it states that if the insurer would have charged a higher premium, the insured's claim is to be reduced to the ratio between the actual premium and the notional higher premium. In this respect there are difficulties in proving the notional premium. Would it be what the particular insurer concerned would have charged or what a prudent and reasonable insurer would have charged? In the former alternative it would be difficult and burdensome for the insured to challenge successfully the insurer's evidence as to the notional premium which he subjectively would have demanded. In the latter alternative the court would have to hear expert evidence to determine the level of the notional premium.

160A See for example, Lassus c. Compagnie Nationale Suisse, Cour d'appel de Pau, 13 April 1973, (1974) 45 Rev. Gén. Ass. Terr. 22.

161 See: The Law Commission Report, No.104 Insurance Law: Non-Disclosure and Breach of Warranty, 1980, Cmnd. 8064, para 4.5 The proportionality principle gives no guidance as to how the insured's entitlement is to be computed. Any reduction by the courts or the insurer in the amount due to the insured would necessarily be a question of guesswork. See further infra pp.351-352.

The proportionality principle has been applied in motor insurance where there is a comprehensive system of fixed tariffs supervised by administrative control and premiums corresponding to the circumstances of the risk to be covered. However, tables of tariffs can only correlate specific quantitative factors such as the age of the car, its date of manufacture, its engine capacity and its use.¹⁶² In the usual case where the undisclosed fact is qualitative rather than quantitative in nature, notably facts relating to the personal integrity of the insured (moral hazard), tables of tariffs will almost certainly be unable to assist in the computation of the notional premium. Yet, they are facts which would influence the insurer's decision whether or not to contract.

Furthermore, as the English Law Commission points out¹⁶³ there are other ways in which the insurer might have reacted to the undisclosed or misrepresented facts than by increasing premium. He might, for example, have declined the risk altogether or imposed additional warranties on the insured. He might have narrowed the scope of the risk through the use of exclusion clauses or he might have imposed or increased an "excess" clause - stating in the policy a sum which the insured himself must bear in the event of a loss. The insurer might have re-insured the risk or a higher proportion of it. The proportionality principle offers no guidance as to how the insured's entitlement is to be computed if the insurer would have reacted to the undisclosed or misrepresented facts in any one or more of these ways.

162 In England there is no comprehensive system of administratively controlled tariffs. Insurers have in motor and life insurance detailed rates relating to the make of the vehicle, age, occupation of the owner, but these vary from one insurer to another.

163 Law Commission Report No.104 op.cit., para 4.5 at p.31.

In France where the law embodies the principle of proportionality the Cour de cassation has maintained¹⁶⁴ that in the absence of tariffs, it is for the court to determine a fair reduction in the insured's entitlement as a matter of fact and discretion. This discretionary reduction has been criticised by Picard and Besson:¹⁶⁵ "Elle risque d'être théorique, arbitraire et de ne pas correspondre à la réalité des faits". They further ask whether it is just to oblige an insurer to indemnify partially an insured if one is certain that had the insurer known of the undisclosed fact he would not have contracted at all.¹⁶⁶ For these reasons various French courts have refused to apply the proportionality principles.¹⁶⁷ The consequences of non-disclosure or misrepresentation could in theory be far reaching in the case of motor insurance, as third parties may be affected by the avoidance of a policy. However, in practice, in England, third parties will never be

164 La Participation c. Veuve Tesseyre et Cazabou ès-qual, Cour de cassation (Ch. civ.), 9 June 1942, (1942) 13 Rev. Gén. Ass. Terr. 265; See also; Enterprise Gauthier-Dutartre c. Choisy et La Préservatrice, Cour d'appel de Lyon (1re Ch.), 17 May 1956, (1956) 27 Rev. Gén. Ass. Terr. 194; Fonds de Garantie Automobile c. La Préservatrice et autres, Cour d'appel de Grenoble (1re Ch. aud. sol.), 23 January 1962, (1962) 33 Rev. Gén. Ass. Terr. 483; For an illustration of a nominal deduction, see Jallain c. La Foncière, Cour d'appel de Paris (19è Ch.), 28 April 1964 (1965) 36 Rev. Gén. Ass. Terr. 87, where the court considered the difference in premium at 7 per cent and fixed 15.000 francs as the amount of the reduction.

165 Picard and Besson, Les Assurances Terrestres en Droit Français, 5th ed., 1982, Vol.1, 160.

166 It may be noted that article 6 of the French law on marine insurance of 3rd July 1967 excludes the proportionality principle where it is established that the insured would not have covered the risk if he had known of all the circumstances of the risk.

167 See, for example, De Goeje c. Phénix Accidents, Tribunal civil de la Seine (5è ch), 23 December 1946, (1947) 18 Rev. Gén. Ass. Terr. 253; Consorts Tisseyre c. La Participation, Cour d'appel de Toulouse (1re ch.), 31 May 1943 (1943) 14 Rev. Gén. Ass. Terr. 239. Sweden which previously practised the principle of proportionality has now abandoned the concept in the Consumer Insurance Act 1980.

prejudiced where their loss is one in respect of which insurance is compulsory.¹⁶⁸ First of all section 149 of the Road Traffic Act 1972¹⁶⁹ restricts an insurer's right to rely upon a non-disclosure or misrepresentation as against such a third party. More importantly, the Motor Insurers' Bureau Agreements¹⁷⁰ will always protect such a third party and in fact, as we have seen,¹⁷¹ the practice is for the insurer concerned to pay the victim's damages. Thus, so far as compulsory motor insurance is concerned, even section 149 is to all intents and purposes redundant.¹⁷²

In France the third party normally has a direct right of action against the insurer in the case of motor insurance by virtue of the decree of 7 January 1959. Article 14 of this decree stipulates that in all cases where a contract has been subscribed to satisfy the requirement of compulsory insurance, the insurer who intends to invoke in a case of an accident causing bodily injuries, the nullity of the contract, or its suspension, or suspension of the guarantee to the victim or those entitled to claim on his behalf must by registered letter communicate this intention to the French equivalent of the English Motor Insurers' Bureau - the Fonds de Garantie Automobile.

168 See Section 149(1) and (3) of the Road Traffic Act 1972.

169 See for full detail, Chapter Three and Four, supra pp. 208 and 287 respectively.

170 See supra, p.287.

171 supra p.287.

172 However, section 149 of the Road Traffic Act 1972 may become important again when the EEC Directive No. 84/5/EEC of 30 December 1983 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (O.J. 1984, L8/17) is implemented. Supra, Chapters Three and Four pp.206-209 and 267, 287 respectively.

Similarly, in Cameroon, as we have already seen in Chapters Three¹⁷³ and Four, Law No. 65-LF-9 of 22 May 1965 gives a direct right of action to a third party against insurance companies.¹⁷⁴ Further article 7 creates the Motor Insurance Fund which indemnifies victims of accidents in the case where the insurance policy is ineffective.¹⁷⁵

B The Consequences of Breach of Warranty and Aggravation du Risque

In the event of breach of promissory warranty as well as of breach of warranty of past or present fact, the insurer is entitled to repudiate the policy and to put an end to his liability under the contract. However, different principles determine in one case and in the other whether the insured is entitled to recover the premium. The breach of promissory warranty leaves untouched any right which has already vested in the insured at the time of the breach¹⁷⁶. The insured may still claim in respect of a loss that occurred before the breach. On the other hand, breach of a warranty as to past or present facts deprives the insured of all rights under the policy and the insured is entitled to the return of his premium if the insurer repudiates as he has never been on risk¹⁷⁷. Reflecting criticisms of the strictness of the law, particularly where the breach of warranty arises

173 Supra, pp.209.

174 See also, Mange Winifred Ndikum (suing by next friend) and Mukong George v. S.O.C.A.R., Suit No. HCB/4/78 of 24 January 1978, Buea (Unreported).

175 See supra, Chapter Four, pp.265-290.

176 Union Insurance of Canton v. Wills [1916] 1 A.C. 281, at 286-287, per Lord Parmoor.

177 Section 33 (3) of the Marine Insurance Act 1906; But not if the policy provides otherwise: Kumar v. Life Assurance Corporation of India [1974] 1 Lloyd's Rep. 147.

from an immaterial mis-statement in a proposal form declared to be the basis of the contract,¹⁷⁸ the Law Commission has recommended¹⁷⁹ that if insurers exercise their right to repudiate a policy for breach of warranty, that repudiation should take effect for the future only and should no longer be retrospective to the date of the breach. The effective date of repudiation should be the date on which the insurer serves a written notice of repudiation on the insured. The insurer would therefore remain on risk between the date of the breach and the effective date of repudiation but would be entitled to reject all claims which occur during that period unless the insured could show that there was no connection between the breach and the loss.

The French and French speaking Cameroonian legal systems do not concede to insurance companies such a generous power to mould the law in their own favour as is represented in England by the warranty and the court's attitude to its effects. The 1930 law regulates the form of the contract and the obligation of the parties and provides sanctions. It leaves only a very narrow margin of manoeuvre by insurance companies in the making of policies. An insured who, having knowledge of an increase in risk, omits to declare it not with intention to deceive but by simple negligence does not act in bad faith. In the event of the risk occurring, only the sanctions of article 22 of the law of 1930, already considered above,^{179A} would apply. If the insured does not know the circumstances increasing the risk, he will not

178 Mackay v. London General Insurance Co. (1935) 51 LI.L. Rep. 201 esp. at 202 per Swift J.; Zurich General Accident and Liability Insurance Co. v. Morrison [1942] 2 K.B. 53 at 61. Supra at pp.338-339.

179 Law Commission Report, No.104 op. cit., p.89 para.6.23. Clause 10 of the Draft Insurance Law Reform Bill (L.C. Report No.104, Appendix A).

179A Supra, pp.349-350.

incur any sanction. If he deliberately fails to declare increases in risk of which he knows this will be an indication of bad faith. The contract would be nullified pursuant to article 21 of the law of 1930. In the French-speaking Cameroonian case of Tenjoh James v. La Foncière Assurances¹⁸⁰, a vehicle was insured for social and domestic purposes. It was involved in an accident when being used for commercial purposes. The court upheld the nullity of the contract as bad faith was established from the fact that the insured was aware of the clause in the policy restricting the use of the vehicle and voluntarily failed to declare the change of use. Moreover, he had on several occasions used the vehicle for commercial purposes and had never made any declaration to that effect. The intention to deceive the insurer was clear, for the insured knew the premiums would be increased as a result of the change of use.

More specifically, article 17 of the law of July 1930 governs the consequences of an increase in risk in French and French speaking Cameroonian law. Once the increase has occurred, whether or not by act of the insured, the insurer has the option between repudiating the contract and proposing a new rate of premium. If the insured refuses the new rate of the premium, the contract is rescinded but the insurer retains the right, where the increase of risk was by act of the insured, to claim an indemnity from the insured before the courts¹⁸¹. The insurer can no longer rely on the increase in risk either to rescind the contract or to propose a new rate of premium if, upon becoming aware of the increase in whatever manner, he consents to the maintenance of the insurance policy especially by continuing to receive

180 Affaire No.371/CC of 7 February 1969, Douala (Unreported).

181 Law of 13 July 1930, article 17(3).

payments of premium or by paying upon the occurrence of the insured event, any indemnity¹⁸².

VI REFORM OF THE LAW

Throughout this chapter, we have noted criticisms and proposals for law reform. The rise in consumerism has extended the need for regulation of insurance to embrace some supervision of insurance contract law. This may raise the question of how and by what means regulation of insurance should be pursued if the criticisms and reforms discussed in this Chapter are to be achieved.

In both England and Cameroon the regulation of insurance companies has been primarily the concern of the government.¹⁸³ However, in England the machinery of regulation of insurance contracts has embraced some measure of self-regulation by the insurance industry through the Statements of Insurance Practice agreed by various insurance industry associations and Lloyd's and the institution of complaints bodies.¹⁸⁴ This latter method has not yet been a significant feature of the Cameroonian regulatory system. To this extent the examination of the relative merits of government and self-regulation, which in the present context cannot be more than schematic, seems desirable.

Self-regulation depends on the acceptance by the industry that certain standards are desirable in principle. This has the advantage that moral persuasion may work at its most powerful and it may be easier to enlist high-powered executives to play an active role in regulation. Its effectiveness

182 Ibid., Art. 17(4)

183 See supra, Chapter Two of this study, pp.57-124.

184 See infra, Chapter Eight, pp.444-465.

reflects the acceptance of the spirit of the agreements rather than their letter. Principles and practices agreed in this way are likely to be adhered to more enthusiastically than statutory controls. In particular, it is less likely that the industry will spend time, money and ingenuity in trying to get round the spirit and letter of an agreed Statement which the industry itself has drawn up. Another benefit is that it is possible to revise or expand them when necessary relatively quickly. An essential strength of self-regulatory Statements is that they are flexible and can be adapted to meet developing needs¹⁸⁵. On the other hand, changing the law by legislation is slow, time consuming and expensive.

However, there are clearly limits to the protection that could be offered by self-regulatory Statements. Firstly, there may be imprecise and vague rules formulated by the industry¹⁸⁶. Further, resorting in some circumstances to self-regulation, conducted internally within the industry, may leave a suspicion in the minds of the public that justice has not properly been done thus sapping public confidence. Moreover, there may be difficulties of effective enforcement over non-members and probably no sanctions at all over members. In the latter case, an insured would have no legal remedy if an insurer failed to act in accordance with the provisions of the Statements and indeed, a liquidator of an insurance company would be bound to disregard the Statements. An example of this in the provisions of the Statements of Insurance Practice is paragraph 2(b)(ii) where it is stated that an insurer should not act "unreasonably in repudiating liability or

185 For example, the 1981 revision of the Statement of Insurance Practice: 15 Hansard (6th. series) H.C. Cols. 341-342 (22 December 1981).

186 See for example paragraph 2(b)(ii) of the Statement of Insurance Practice, infra. p.358.

rejecting a claim". This is not satisfactory as the insurer is left to be the sole judge in any particular case. The Director of Fair Trading has come out in favour of law reform rather than self-regulation¹⁸⁷. Where the line should be drawn between legislation and self-regulation is hardly capable of clear definition. How this issue is resolved in any society at a particular period depends on the political structure of the state in that society, the manner in which state power is conceived and exercised, the degree of liberty accorded to the insurance industry and the objective it seeks to achieve. The practical regulations affecting insurance in modern societies disclose one reality, that is, the protection of policyholders and beneficiaries of insurance contracts which, it is submitted alone ought to serve as the basis of any regulatory law. On the other hand, the state must not use its powers and resources in such a way that insurance companies' business is stifled from excessive interference. Clearly therefore, the interests of the policyholders, the purpose of the state and the interests of insurance companies all require that the state which regulates insurance should not make excessive and oppressive use of its regulatory powers. Insurance depends essentially on the good faith of insurers and their clients and legislation alone cannot ensure good faith although it can prevent serious abuses. If the regulatory environment is to ensure the sound practice of insurers, it must involve a combination of legislation and self-regulation ranging from formal and widely accepted agreements to the maintenance of standards by insurers because they are recognised as desirable. In so far as the protection of the policyholder is concerned, it is fundamentally desirable to review the working of such agreements as a specific exercise at certain intervals. Such a review can determine whether the agreements are

187 Director General of Fair Trading Report, Household Insurance, September 1985, paras. 6.13-6.16, at p.28.

being complied with, whether the consumers are being adequately protected and whether improvements are called for. The two methods of regulation should not be regarded as antithetical but as complementary. The ideal would be to weld self-regulation and government regulation into a coherent statutory framework in which each would perform the role which it does best, working harmoniously together.¹⁸⁸

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188 For a similar proposal, see: L.C.B. Gower, Review of Investor Protection - A Discussion Document, January 1982, London H.M.S.O.; Review of Investor Protection, Report:Part I, Cmnd. 9125, 1984, and Part II Cmnd. 1985; Department of Trade and Industry, Financial Services in the United Kingdom - A framework for Investor Protection, Cmnd. 9432 1985 London H.M.S.O.

C H A P T E R 6

INSURANCE INTERMEDIARIES AND DISCLOSURE

I INTRODUCTION

The insurance industry has grown from modest origins to a position where it provides protection against a multitude of risks and at the same time the market has grown so that purchasers of insurance include business organisations, local authorities, public corporations, societies and individuals. To reach this public the sellers of insurance have developed a system of specialised 'middlemen' - agents and brokers. Most insurance business is in practice transacted through intermediaries. Insurers are almost always incorporated companies¹ which can only act through the medium of insurance agents, from the directors down to a local agent soliciting proposals for insurance.

Agency is recognised in all modern legal systems as an indispensable part of the existing social order as it assists in organising the division of labour in the national and international economy by making it possible for the principal to extend his individual sphere of activity.²

1 The growth of commerce in the seventeenth century led to the development of the use of companies as a trading medium. As a company in the modern sense is a legal entity separate from the individual members, it can only act through the agency of an intermediary.

2 This need is most felt in Cameroon where there are only five insurance companies transacting the business of insurance: these companies rely on intermediaries for the marketing of their products.

As we have already seen in Chapter Five^{2A} of this work, in modern insurance practice the insurance proposal form forms the basis of the insurance contract. It constitutes an offer of invitation from the proposer to enter into a binding insurance contract. The completion therefore, of that form is of crucial importance and the participation of an agent in the formation of an insurance contract constitutes one of the most important functions of an agent. Indeed given this importance it is proposed in this chapter to confine our discussion of the role of an insurance intermediary to his participation in the completion of the insurance proposal form. It should be noted that intermediaries are of necessity sometimes involved in the receipt of notices of claims, the investigation of claims and also play a part in the settlement process. However, these other roles will not be given detailed consideration in this work.

II CLASSIFICATION OF INSURANCE INTERMEDIARIES

In England, a broad range of insurance intermediaries can be identified.³ First, there are full time agents tied to particular insurers such as canvassing agents and employees of insurance companies engaged to solicit business. This category of intermediary also exists in Cameroon. The agent is exclusively linked to a particular insurance company by the mandate of his appointment agreement (Traité de nomination). This mandate prohibits him from working for any other insurance company. The agent undertakes to represent solely the insurance company and may only represent other insurance companies as regards risks refused or not covered by his company or in the case of co-insurance. The agents are registered by the

2A Supra. p.331.

3 See J Birds, Modern Insurance Law, 1982, pp.147-148

insurance companies whom they represent. Secondly, in England, there are insurance brokers registered under the Insurance Brokers' Registration Act 1977^{3A} and hence genuinely independent of any particular insurer. Similarly, in Cameroon, there are brokers registered by the 'Registre du Commerce'. These brokers are commercial agents; they therefore figure in the commercial register.⁴ This emphasises their independent nature. The broker is a free intermediary who has no exclusive mandate linking him to any particular insurance company. He represents his clients with all freedom vis-a-vis any insurance company of his choice without any restriction. Thirdly, in England, Lloyd's underwriters are always represented by brokers recognised by them. The public has no direct access to Lloyd's underwriters. They can only be approached through a Lloyd's broker. With regard to Lloyd's Corporation or underwriters, their intermediary - Lloyd's brokers, stand apart from any other broker; there is no other insurance company which is always represented by a particular broker. In contrast, in Cameroon, there is no equivalent of a Lloyd's broker. Fourthly, in England, there exist part-time or occasional agents such as persons in non-insurance occupations. This category includes estate agents, building societies, motor dealers, accountants and solicitors, whose principal occupation brings them in contact with prospective clients for insurance. In Cameroon, this category of insurance intermediary used to exist as in England. But now it has been

3A See further pp.393-409, infra

4 For a similar position in France see Guy Picarda, "Commercial agents and distribution in France", in Commercial agency and distribution agreements in Europe, published by the British Institute of International and Comparative Law, Special Publication No.3 (1964), pp.24-35 and pp.76-87. A commercial agent is an agent who without being bound by a service agreement but by way of a usual and independent profession, negotiates and where necessary concludes contracts of purchase, sale or hiring or service agreements for and on behalf of producers, manufacturers or traders. A commercial agent is entitled to accept other agencies without having to refer to his principal.

prohibited by legislation which considers the occupation concerned as incompatible with the transaction of insurance.⁵ Fifthly, in England, there are other independent insurance agents not tied to particular insurers and also not registered under the Insurance Brokers Registration Act 1977, and hence not entitled to call themselves "insurance brokers". But they may describe themselves as "insurance consultants" or other such names so long as they do not offer the impression that they are registered or enrolled brokers.^{5A} By contrast, in Cameroon, this class of intermediary does not exist.

Thus, whereas in England there are five classes of insurance intermediaries, in Cameroon insurance intermediaries are agents (Agents généraux) and brokers (Courtiers). Article 2 of Order No.358/MINFI/CEI of 27 December 1973 regulating the profession of insurance intermediaries⁶ enumerated persons who can act as insurance intermediaries in Cameroon. These include :-

- (a) Natural or legal persons who hold a licence delivered by an insurance concern or any other body empowered to do so - Agents (Agents généraux).

5 See note 73 below.

5A It has been suggested that this class of intermediaries should be assimilated under the auspices of the Insurance Brokers Registration Act 1977 thereby extending the Insurance Brokers Registration Council's role: See, L.C.B. Gower, Review of Investor Protection - A Discussion Document, January 1982, London H.M.S.O., paras. 3.21 and 9.06. See also, the White Paper, Financial Services in the United Kingdom: A new framework for investor protection, Cmnd. 9432, January 1985. This will not happen in respect of intermediaries in the non-life insurance field in the immediate future as the Financial Services Bill 1985 [51] which implements the above White Paper is not concerned with insurance other than certain types of life insurance.

6 Hereinafter referred to as 'the 1973 Order'.

(b) Natural persons figuring on the commercial register as brokers
(Courtiers).

The word 'agent' in this chapter will be used in two senses: in common parlance and in a broad sense it includes brokers but in a technical and more narrow sense it refers to persons directly employed or tied to particular insurance companies and it is in this narrow sense, unless otherwise stated that the term will be employed here.

An insurance agent is basically someone who is employed by an insurance company to solicit proposals and effect insurance. The insurer authorises him expressly or implicitly to represent the insurance company in dealings with third parties. This position is quite distinct from that of a broker who acts as a middleman between the insured and the insurer. The broker as we have already seen^{6A} is an independent intermediary under no employment from any special company whose purpose is to assist the public by means of his experience and contacts in the insurance market to purchase insurance on the most favourable terms. Brokers are therefore specialists in assessing the insurance needs of an individual and provide disinterested advice on the insurance offices which offer a service closest to his requirements. Agents and brokers exercise very similar functions, namely, they act as an intermediary between the insuring public and the insurance company by bringing all prospective clients to insurance companies; they sell insurance to the public and are paid by commission on the amount of business they bring to insurance companies (normally on a percentage basis of premiums earned).

6A Supra. at p.363.

III AUTHORITY OF AN AGENT^{6B}

When the agents for each party carry out their instructions properly no complication arises: the acts of the agent are imputed to and bind the respective principals. Quit facit per alium facit per se (he who does something through another does it himself): the agent's act is deemed to be the act of the principal so that the principal will get the benefit of it and similarly will be answerable for its consequences. The power conferred by law on the agent is a facsimile of the principal's own power. It is this notion that led Pollock⁷ to state that by agency the individual's legal personality is multiplied in space. A similar description can be found in French law. According to article 1984 of the Civil Code, "agency or procuration is an act whereby one person gives to another the power to do something for the principal in his name ..."⁸

However, complications arise when an agent fails to follow the instructions of his principal with the result that a third party is adversely affected by his misconduct. Can the principal be held responsible for such a misconduct? Whether he can depends on the scope of authority of the agent. The principles of agency law concerning authority of agents are of crucial importance here.⁹ It is not proposed here to set forth a treatise on the

6B The word agent here is employed in a broad sense and refers to an intermediary whether 'agent' or broker.

7 Principles of Contract, 13th ed., 1950, London, Stevens & Sons Ltd. at p.45.

8 Translated by John H. Crabb, The French Civil Code (as amended to July 1, 1976) 1977, p.358.

9 On the question of authority see, Fridman, The Law of Agency, 5th ed., 1983, London, Butterworths, pp.47-115; S.J. Stoljar, The Law of Agency, 1961, London, Sweet & Maxwell, pp.21-25. .

general law of agency which can be found in text books on agency.¹⁰ Nevertheless, it would be helpful to state briefly some of the basic principles on the authority of an agent.

There is great similarity between the English and English-speaking Cameroonian law and the French and French-speaking Cameroonian law of agency. In all three systems a principal is bound by the acts of his agent within his actual, apparent (or ostensible) or usual authority and by any unauthorised acts ratified by him. In English and English-speaking Cameroonian law, actual or real authority is the authority conferred by contract or agreement with the agent. It may be express or implied. It is express when the whole of its content can be discovered from the actual words used by the principal whether orally or in writing.

Similarly, in French and French-speaking Cameroonian law, article 1985 provides that :

"An agency may be given either by a public instrument or by writing under private signature, even by letter. It may also be given verbally; but oral testimony is received on it only in conformity with the Title Contracts or Conventional Obligations in General.

Acceptance of an Agency may be only implied, and result from the execution given to it by the agent."

The insurance agent is normally vested with actual authority to carry out certain acts for the company in the "Traité de Nomination". Such powers include the authority to conclude contracts for the company.

10 For example, Fridman, op. cit.; B.S. Markesinis and R.J.C. Mundy, Outline of the Law of Agency, 1979, London, Butterworths. For an elaboration of the principles of agency see, Abbot, "The Nature of Agency", (1896) 9 Harv. L.R. 507. Dowrick, "The Relationship of principle and Agent", (1954) 17 M.L.R. 24-40; Seavey, "The Rationale of Agency", (1920) 29 Yale L.J., pp.859-895; W. Müller-Freienfels, "The Law of Agency", (1957) 6 Am. J. Comp. L., 165.

In insurance transactions (as well as others where the principle of agency applies) third parties are not generally in a position to know the extent of the agent's actual authority. In England, France and Cameroon (both English and French-speaking Cameroon), the concept of apparent or ostensible authority was formulated to protect bona fide third parties.¹¹ There may be an appearance of authority even though there is no authority in fact.¹² What really brings the rules of apparent authority into operation is the principal's own conduct. In England, Slade J said¹³

"Ostensible or apparent authority which negatives the existence of actual authority is merely a form of estoppel, indeed, it has been termed agency by estoppel, and you cannot call in aid an estoppel unless you have three ingredients: (i) a representation, (ii) a reliance on the representation, and (iii) an alteration of your position resulting from such reliance."

Under the title 'Agency by estoppel', holding out, Bowstead writes:

"Where a person, by words or conduct, represents or permits it to be represented that another person is his agent, he will not be permitted to deny the agency with respect to anyone dealing, on

11 Rama Corp. Ltd. v. Proved Tin General Investments Ltd. [1952] 2 Q.B. 141; For the position in France see: Planiol and Ripert, Traité Pratique de Droit Civil, Vol.11 by Savatier para.1500, p.951; Jacques Léauté, "Le Mandat apparent dans ses rapports avec la théorie générale de l'apparence", (1947) 45 Rev. Trim. Dr. Civ., pp.288-307.

12 Montrose, "The basis of the power of an agent in cases of actual and apparent authority", (1932) 16 Can. Bar. Rev. 756, esp. at p.964.

13 Rama Corp. Ltd. v. Proved Tin General Investments Ltd. [1952] 2 Q.B. 147 at pp.149-150.

the faith of such a representation, with the person so held out as agent ..."¹⁴

Also in the English-speaking Cameroonian case Alhaji M. Garba v. Mutuelle Agricole Assurance Justice Ekor "Tarh said,¹⁵

"If a principal by conduct or otherwise permitted someone to advertise himself as the agent of that principal, he can no longer be heard to deny that no proper agency relation existed between them."

Similarly, the French and French-speaking Cameroonian courts have declared that only by protecting the interests of third persons acting in good faith could the law conform "au véritable intérêts des sociétés et même du commerce en général".¹⁶ Where the insurance company held out the agent as having the authority to conclude contracts and the insured legitimately believed he had such authority, the insurance company would be held liable to any third party who relied on the agents apparent authority.¹⁷ What matters is the manner in which third parties perceive the authority of the agent: "Le mandataire apparent de l'assureur" is characterised by "la croyance légitime du tiers."

The doctrine of estoppel plays a very important role in common and civil law systems. At its simplest, in English law, estoppel is based on the idea of consistency. No one can blow hot and cold at the same time. If a

14 Bowstead, On Agency, 15th ed., 1985, London, Sweet & Maxwell, p.90. The notion of holding out had to evolve and expand to meet the needs of speedy commercial transactions. It made it unnecessary for a person dealing with an agent who appeared to have his principal's authority.

15 Suit No.HC/35/73 of 4 June 1975, Bamenda, (Unreported).

16 Marcel Nyondo v. Agence Camerounaise d'Assurances, Affaire No.675/CC of 10 December 1975, Yaounde, (Unreported).

17 See, Jacques Léauté, op. cit., pp.288-307.

person admits or represents to another that a certain state of affairs exists he will not be permitted afterwards to deny the existence or the truth of this state of affairs. He is "estopped" or "precluded" from alleging the contrary of what he has already admitted or represented to be true.¹⁸ As in English law the doctrine of "apparence" in French law is based on the principle of consistency. What appears to be true is taken in law to be true without any further inquiry into the real state of things. "La vérité est sacrifiée à l'apparence". The needs of the "sécurité juridique" are considered more important and more vital for the community than the exigencies of the pure "réalité juridique".¹⁹ Reliance which is the same concept in English, French and Cameroonian law must not be confounded with good faith. Bad faith excludes reliance since it is illogical to submit that someone can rely on a state of things which he knows not to be true. But reliance does not necessarily imply good faith. In many cases, the third party relies on an appearance or representation but he fails to make sure of the authority of the agent. It suffices to note that the courts in many instances require that the reliance must be honest.²⁰

Appointing an agent to a particular position confers on him ostensible authority to bind his principal in respect of the usual acts which someone in

18 Freeman and Lockyer v. Buckhurst etc., [1964] 2 Q.B. 480; Panorama Developments (Guilford) v. Fidelis Fabrics, [1971] 2 Q.B. 711; Eagle Star Ins. Co. v. Spratt, [1971] 2 Lloyd's Rep. 116.

19 See: J. Calais-Auloy, Essai sur la Notion d'Apparence en Droit Commercial, Thèse, Montpellier (1959) published in Paris (1961). The theory of 'apparence' is also dealt with in monographs on the notion of good faith. See for example, Vouin, La Bonne Foi, Notion et Rôle Actuel en Droit Privé, Thèse, Paris 1939; Planiol, Ripert and Boulanger, Traité de Droit Civil Vol.2, 1957 Paris, S, 2423 pp.846-847; Encyclopédie Dalloz (1) "Droit Civil" pp.1-12.

20 Marcel Nyondo v. Agence Camerounaise d'Assurances, Affaire No.675/CC of 10 December 1975, Yaounde, (Unreported).

that position would have authority to do. A third party is entitled to rely upon the representation of authority which derives from the appointment, unless he is aware of any limitations on the appointee's power. It does not matter that the agent is actually not authorised to do some of the usual acts, for example, an agent in possession of cover notes issued by insurers has ostensible authority to grant interim cover to an applicant for insurance. His possession of the cover notes indicates prima facie that he is authorised by the insurer to grant cover.²¹

We may now consider the agent's authority in filling in proposal forms.

IV THE PARTICIPATION OF INSURANCE INTERMEDIARIES IN THE COMPLETION OF PROPOSAL FORMS

Insurance companies usually make the completion of a proposal form an essential requirement for obtaining an insurance policy.²² It appears always to have been common for the proposer to be assisted in this task by the intermediary who brings the form to him for completion. Sometimes answers to questions in proposal forms are filled in by the intermediary. Even where the intermediary does not fill in the form he usually assists in its completion by advising as to what answers are required. We have already observed that contracts of insurance are based upon the common law principle of utmost good faith calling for full disclosure by the insured of facts

21 Mackie v. European Assurance Society (1869) 21 L.T. 102. See also in Cameroon, Marcel Nyondo v. Agence Camerounaise d'Assurances - note 16 above.

22 The proposal form traditionally has formed the basis of the contract and is incorporated into the contract itself by words to that effect. See supra, Chapter Five, pp.338-339.

material to the risk.²³

The participation of the insurance intermediary in the completion of the insurance proposal form has given rise to difficulties as to whom to hold responsible for any inaccuracies which may be contained in a form completed by or with the assistance of the intermediary.²⁴ Should responsibility for such inaccuracies be borne by the insured or by the insurer?

In favour of the proposition that responsibility should be borne by the insurer is the argument that in the absence of any expressly stated prohibition the intermediary should be taken to have the powers to fill in proposal forms.²⁵ In Bawden v. London, Edinburgh and Glasgow Assurance Co.,²⁶ it was held that as the intermediary was described as "the agent of the company", it could be implied that he had authority to "negotiate and settle the terms of a proposal and to put them into shape".²⁷ Indeed, in the Bawden case, the Court of Appeal relied, in effect, on the principle of estoppel: the fact that agents are provided with insurance proposal forms and frequently complete them to the knowledge of insurers arguably gives them

23 See generally, Chapter Five esp. pp. 304-312. The obligation of good faith applies to the insured as much as to the insurer: Re Bradley and Essex and Suffolk Accident Indemnity Society [1912] 1 K.B. 415 at 430 per Farwell L.J.

24 See: J.F. Timmins, "Misrepresentation in insurance proposal forms completed by agents" (1974), Vic. Univ. of Wellington L.R. 217.

25 Facer v. Vehicle and General Insurance Co. [1965] 1 Lloyd's Rep. 113.

26 [1892] 2 Q.B. 534.

27 Ibid., per Lindley L.J. at p.540.

ostensible authority to complete the forms.²⁸

However, Bawden's case was decided on its peculiar facts and it is questionable whether it can be taken to represent the general law regarding the incidence of responsibility for inaccuracies contained in an insurance proposal form completed by or with the assistance of an intermediary. In that case the insured on whose behalf the form was completed was illiterate. The intermediary who filled the form was fully aware that the proposer was blind in one eye but failed to record this fact in the form. Instead, he stated, misleadingly, that the insured had no physical infirmity rendering him peculiarly liable to accidents. When the insured lost his other eye, the insurer resisted his claim on the ground that there had been a mis-statement in the proposal form. The Court of Appeal, in unanimously rejecting the insurer's contention, considered that the intermediary had completed the form as "the agent of the company" and held that the company was estopped from denying the ostensible authority which their intermediary had to negotiate and settle the terms of proposals and to put them into shape.²⁹

While Bawden's case may have been correctly decided on its peculiar facts, the better view would seem to be that responsibility for inaccuracies, contained in an insurance proposal form - even where the form was completed

28 This approach of the Court of Appeal in Bawden derives support from the Law Reform Committee which in its 5th Report recommended that "any person who solicits or negotiates a contract of insurance should be deemed for the purposes of the formation of the contract to be an agent of the insurers and that the knowledge of such persons should be deemed to be the knowledge of the insurers."

See: Law Reform Committee 5th Report, Conditions and Exceptions in Insurance Policies 1957, Cmnd.63, para.14 at p.7. See further the Department of Trade, Insurance Intermediaries 1977, Cmnd.6715.

29 Bawden's case was applied and followed in Stone v. Reliance, etc. [1972] 1 Lloyd's Rep. 469, the facts of which will be discussed later.

by or with the assistance of an intermediary, should lie upon the insured. This proposition is founded upon the argument that since the duty of completing an insurance proposal form is that of the insured, any person performing this duty on his behalf or assisting him in its performance does so as his agent, so that he alone ought to be held responsible for any inaccuracies attributable to that person. As Halsbury states:³⁰

"It is irrelevant to inquire how the inaccuracy arose, or whether the agent acted honestly or dishonestly, whether the agent had forgotten or misunderstood the correct information he had been given or whether the answers were a mere invention on the part of the agent. If the result is that inaccurate or inadequate information is given on material matters or that a contractual stipulation as to accuracy or adequacy of any information given is broken, it is the proposer who has to suffer."

The general rule of law laid down in Parsons v. Bignold³¹ is that where there is prima facie a breach of warranty the onus of proof is on the proposer to show that he did not make the answer that is the occasion of the breach. A man is deemed to be responsible for what he signs. In Bigger v. Rock Life Assurance Company,³² a proposer signed a completed proposal form without reading it. It was held that it was his duty to read the answers in the proposal form before signing it and that he must be taken to have read

30 Laws of England, 4th ed., 1978, Vol.25, para.396 at p.219.

31 (1846) 15 L.J. Ch.379.

32 [1902] 1 K.B. 516. See also New York Life Insurance Co. v. Fletcher (1885), 117, U.S. 579. However, although this American case is in line with prevailing English law, it does not represent American decisions, see: J.F. Timmins, "Misrepresentation in Insurance Forms Completed by Agents", (1973) 7 Vic. Univ. Wellington Rev. 217 at 230-232.

and adopted them. As Scrutton L.J. said in L'Estrange v. F. Graucob Ltd.,³³ "when a document containing contractual terms is signed, then in the absence of fraud, or misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not".

In Newsholme Bros. v. Road Transport and General Insurance Co.,³⁴ the proposal was for motor insurance and the agent of the insurance company who had been told the true facts filled in answers which were materially untrue in the proposal form and the proposer signed it. The answers to the questions were warranted by the proposer's signature to be true and to form the basis of the contract. It was found as a fact that the agent was not authorised by the insurance company to fill in proposal forms, and it did not appear that the company knew that he had in fact done so. The company successfully repudiated liability on the ground of mis-statement in the proposal form. It was made clear that if the agent filled in the form at the request of the proposer for that purpose he must have been acting as the agent of the proposer and not of the insurers. Lord Justice Scrutton stated³⁵ that:

"I find considerable difficulty in seeing how a person who fills up the proposal can be the agent of the person to whom the proposal is made. A man cannot contract with himself. A makes a proposal to B. by signing it, and communicating it to B. If A gets someone - C. - to fill up the form for him before he signs it, it seems to me that C. in doing so must be the agent of A.

33 [1934] 2 K.B. 394 at 403; see also Treital, The Law of Contract, 6th ed., 1983, pp.248-251

34 [1929] 2 K.B. 356.

35 Ibid. at p.369, see also, McMillan v. Accident Insurance Co. Ltd., (1907) 14 S.L.T. 710.

who has to make the proposal, not of B. who has to consider whether he will accept it."

Further on in his judgment, the learned Lord Justice added³⁶

" ... I have great difficulty in understanding how a man who has signed, without reading it, a document which he knows to be a proposal for insurance, and which contains statements in fact untrue, and a promise that they are true and the basis of the contract, can escape from the consequences of his negligence by saying that the person he asked to fill it up for him is the agent of the person to whom the proposal is addressed."

This decision establishes that the agent in filling in the answers ceases to be the agent of the insurer. He becomes the agent of the proposed assured and therefore his knowledge cannot be imputed to the insurer. By signing the proposal, the proposed assured adopts the answers as his own and is responsible for any inaccuracy.

It is undeniably plausible to declare the signatory bound by the legal effect of that to which he puts his signature and this seems to be a sufficient reason for a decision in favour of insurance companies. However, this may not justify the assertion stated by Lord Justice Scrutton, that the insurance agent was the proposer's agent to enter false answers. It may be assumed (though this was not the position in Newsholme's case), that in the majority of cases it is within the authority of the insurance agent to insert answers in the proposal form in accord with the information supplied to him by the proposer. In so doing he acts as the agent of the insurance company, and cannot be said to become at this point the agent of the proposer. When he invents answers and thus acts in fraud of his principal, plainly that

36 Ibid. at p.376.

agency then ceases, and this is the view taken in the Newsholme's case. What is difficult to apprehend and therefore concede is why at this juncture a new agency with the proposer supplements the old. If, as Scrutton L.J. said, the agent can never be the company's agent to invent answers, the authority he receives from the proposer should surely be regarded as extending only to truthful answers, which conform to the information supplied,^{36A} (except where the agent and proposer have acted in collusion in a fraud on the insurance company). It is suggested that it is not desirable to hold that the proposer impliedly authorised falsification of information accurately supplied by him, and that just as the agent ceases to be the agent of the insurance company when he acts in fraud of the latter, so he cannot then become the agent of the proposer, who is similarly the victim of his fraud.

Another English decision which brings Bawden's case into focus is Stone v. Reliance Mutual Insurance Society.³⁷ The insurer's agent who was instructed by the insurer to fill in the proposal forms for proposers filled in without consulting the insured, the answer "none" to both the questions on whether the insured had made any previous claims and whether any previous policies had lapsed. In addition to the usual basis clause, the proposal form concluded with the following declaration :

36A It may be argued that the agent's knowledge of the truth ought necessarily be imputed to the insurer; for a fuller discussion of the knowledge rule see: G. Tedeschi, "Assured's Misrepresentation and the Insurance Agents' Knowledge of the Truth", (1972) 7 Israel L.R. 475-495.

Ayrey v. British Legal and United Provident Ass. [1918] 1 K.B. 136; Blackley v. National Mutual Life Ass. of Australasia [1972] N.Z.L.R. 1038; See also J. Birds Modern Insurance Law, 1982, pp.88-89 and pp.154-155.

37 [1972] 1 Lloyd's Rep. 469.

"... in so far as any part of this proposal is not written by me the person who has written the same has done so by my instruction and as my agent for that purpose."

When the insured suffered a fire loss the insurer repudiated liability on the grounds of misrepresentation. It was held that the policy was not voidable. Lord Denning said³⁸ "It is quite clear that in filling in the form, the agent here was acting within the scope of his authority" as it was the company's policy and instruction that the agent "should put the questions, writing down answers". This distinguishes the present case from Newsholme's case where the agent had no authority to fill in the proposal form and was merely the amanuensis of the proposer. It was the insured's duty therefore to check the completed proposal form before adopting or signing it. In Stone's case, the agent was authorised to fill in proposal forms and the erroneous answers were brought about by the fault of the insurer's own agent acting in his capacity as such so that the insurance company could not treat the insured's non-disclosure as material. The agent may have inserted the wrong answer, either deliberately so as to earn a commission or because he had forgotten or misinterpreted the insured's instructions. It would seem that the insurer would be taking unconscionable advantage of the insured if the second declaration above was allowed, that is, a notice to the effect that the insurance agent is the agent of the insured in filling in proposal forms. On the other hand, whilst it is plausible to disregard such a declaration, a prudent insurer may reduce the effects of Stone's Case by simply rescinding all instructions to his agents to fill in proposal forms, although the

38 Ibid. at 474. Clearly, the agent in Stone's case was more than a canvasser, he was an inspector of reasonable position who had authority to fill in proposal forms; this fact distinguishes it from Newsholme's case.

illiterate, as we will see in the case of Cameroon, will still have to rely on the agent for assistance in filling in the proposal form.

Similarly in English-speaking Cameroon, in so far as the duty to declare material facts by completing an insurance proposal form lies upon the proposer, anyone performing this duty on his behalf or assisting him in its performance acts for this purpose as his agent. However, in certain cases the insurance company may expressly or implicitly take upon itself the duty of completing the insurance proposal form, for example, by adopting as its policy that all forms should be completed by its nominees or by instructing its employees or nominees to complete all forms. In these cases the nominee or employee is considered to be acting as the agent of the insurance company when he fills in an insurance proposal form.³⁹

In Cameroon the common practice has evolved whereby employees or nominees of insurance companies with whom the proposer negotiates an insurance policy fill in the insurance proposal form without giving the proposer, even a literate proposer, the option to complete the form himself or nominate someone to complete it for him or to assist him in its completion.⁴⁰ In so doing these employees or nominees of the insurance companies appear to be carrying out the policies and instructions of the companies in this regard. By analogy with such cases as Bawden and Stone in England, and for the same reason as in those cases, those employees or nominees of Cameroonian insurance companies ought to be held to be acting as agents of the companies rather than of the proposer when they complete insurance proposal forms.

39 See, for example, the decisions of the Court of Appeal in Bawden and Stone.

40 Enquiries among agents and insurance companies in Cameroon confirmed this in the course of fieldwork - August 1983.

Nonetheless, the rule in Newsholme's case appears firmly entrenched in English-speaking Cameroon. In Mathias Djoumessi v. Guardian Royal Exchange Assurance (Cameroon) Ltd.⁴¹, the proposal form was filled in by the insurance company's agent and signed by the plaintiff. The answer "yes" was inserted to the question whether the vehicle would be driven by the proposer (the plaintiff) and "no" to the question whether the vehicle would be driven by a paid driver. The defendant insurance company's liability depended upon the truth of the statements and answers in the proposal form as a condition precedent to liability. On a claim on the policy the insurance company contended that the plaintiff made a material mis-statement in answering the questions on the proposal form. The plaintiff alleged that he did not understand the questions and the answers were given by the agent for him to sign. He further argued that as the agent was the agent of the defendant, he would not be responsible for any mis-statement contained in the proposal form filled in by them. The court held that the agent who produces an insurance proposal form to the insured and then completes it for him acts as the agent of the insurer in producing the form, but as the agent of the insured in completing the form by answering the questions contained in it. This decision recognises the fact that a man is deemed responsible for what he signs and further, in so far as the proposer delegates to another (the agent) the responsibility of filling in a proposal form, that person becomes his agent for that purpose and not the agent of the insurance company.

With respect, this sort of decision does not produce a desirable and sensible result in the situation of Cameroonians. Given the fact of widespread illiteracy, the multiplicity of languages and also the widespread practice by which the agents who canvass insurance business for the insurance

41 Suit No. HCB/18/74 of 11 July 1975, Bamenda, (Unreported).

companies regularly assume the filling in of proposal forms for proposed insureds and assist in its completion by advising as to what answers are required, the law's response in this field of insurance law ought to be comparatively well litigated upon in favour of the insured.

Insurance contracts as we observed in Chapter One are standard form contracts which are almost inevitably drafted by companies. In the selling of this invisible product, the insurance company employs an agent who plays a big role in the explaining of and filling in of the proposal form. This, in effect, is a recognition of the disparity between the bargaining positions of the insurer and insured. Furthermore, the insured perceives the agent as being the agent of the insurance company and therefore accepts his representations as being both authoritative and on behalf of the insurance company. The insurer benefits from his position that this agent holds and ought not to be allowed to deny that the agent is acting on his behalf as he has clothed the agent with implied or apparent authority and is aware of the practices that the agent adopts. The responsibility is on the insurance company to recruit reliable and honest agents and if they fail in this, they ought to bear the consequences in the ordinary course of business as business losses; part of being in a profit-making enterprise is the responsible assumption of the normal risk which that enterprise entails and insurance business is one of them. In fulfilling the reasonable expectations of proposers or insureds therefore, it is desirable that the insurer ought not to be permitted unconscionable advantage of an insurance transaction even though the policyholder has manifested fully informed consent.

Furthermore, with regard to Cameroon, if there is any area of the common law where English case law must be adopted sparingly, that area is the law of insurance. English insurance law is unjustifiably weighted against

the consumer; insurance companies are entitled to avoid liability by invoking legal technicalities. They claim to invoke technicalities to avoid contracts whenever they suspect fraud on the part of the insured but they cannot prove it.^{41A} The only probable reason why no change of the law has been effected in England, is the restraint exhibited by insurance companies in England which have not availed themselves of all the opportunities for legislative control. For example, the Unfair Contract Terms Act 1977, was not applicable to insurance contracts because of the pressure exercised by the powerful lobby of the insurance industry.

In view of this, it is hoped that the English-speaking Cameroonian courts will, when another occasion arises, interpret Newsholme and Stone's line of cases in a manner that will relieve some of the hardships of the insured which are caused by the sharp practices of insurance companies.

By contrast, in French-speaking Cameroon, the role played by the agent at the time of the subscription of the contract is subordinated by the appreciation of good and bad faith of the insured and the liability of the insurer concerning reticence and/or false declaration depends on the extent and degree of participation of agent - whether he is passive or active.⁴² In determining the good and bad faith of the insured, the intellectual level of the insured is taken into consideration. In this regard, the illiteracy and

41A See, for example, insurance company's defences- breach of warranty and basis of the contract clause, supra pp.330-355.

42 For a discussion on this in France, see: Chapuisat, "La participation de l'agent général d'assurance à la déclaration du risque imposée à l'assuré", (1975) 49 J.C.P. 1975. 1. 2719; P. Drancey, "Le pouvoir d'engagement de l'agent général d'Assurances", (1977) 48 Rev. Gén. Ass. Terr. pp.596-604; L'Agent Général d'Assurances -Qualité juridique et liberté de placement, 1982, Paris Argus, pp.95-129; J.F. Lusseau, "Circonstances et modalités de l'engagement de la société d'assurances par l'intermédiaire de son agent général", (1979) 50 Rev. Gén. Ass. Terr. pp.132-156.

level of education of the insured are an indication of whether he understood the nature and importance of the declaration. The bad faith of the insured would be difficult to prove where the agent had been negligent (not having communicated the declarations that have been made to him) or dishonestly modifies the declaration to get the insured the best conditions and tariffs and earn his commission. In this, the agent actively participates in the fraud on the insurer. On the other hand, the agent may passively allow the insured to be deceived. Picard⁴³ considers that the silence of the agent is no fault on his part. He justifies this attitude by the fact that it is the duty of the proposer under article 15(2) of the 1930 law to make full disclosure of all material facts to the insurer. He recognises the fact that most proposers would be unlikely to perform this duty without some assistance in the identification of material facts. To help him in this regard insurance practice has devised forms, referred to as 'proposal forms', which set out questions designed to elicit material facts from the proposer. The completion of such forms is the responsibility of the proposer. In this he may be assisted by the insurer's agent. But when the latter assists the proposer in completing the insurance proposal form he acts as agent not of the insurer but of the insured since in doing so he performs a duty which falls not upon the insurer but upon the insured. The agent is described in French in this capacity as Le mandataire occasionnel du souscripteur.

Where the agent is the agent of the insurer, and he has the authority to conclude contracts, he represents the insurer and the knowledge he possesses of facts omitted or incorrectly declared is the knowledge of the insurer. In this case the principle of apparent authority comes into play if

43 M. Picard, "La Connaissance par l'assureur des faits omis ou inexactement déclarés par l'assuré", (1935) Rev. Gén. Ass. Terr. p.20 et seq.

the agent has been held out as having such authority. If effectively, the agent has been informed or becomes aware of facts relating to the risk from his own observation, he should communicate such information to the insurer. Failing to do so is a fault committed in the exercise of his functions and the insurer is responsible for the acts of his agents. In the case of Namjin Garba v. La Foncière d'Assurance,⁴⁴ the agent knew at the time of the conclusion of the contract, the infirmity of the assured (amputated leg) and that the latter had had road accidents as a result of this infirmity. His failure to mention these particulars in the proposal was regarded as a fault committed in the exercise of his functions. Similarly, the insurer would be responsible for the agent's acts if the agent had by his actions or affirmation led the insured to believe that his declarations were regular. In the case of Nchandjo François v. S.O.R.A.R.A.F.,⁴⁵ on a question whether the insured had sustained any previous accidents the insured orally told the agent that he had two accidents causing damage to the body of the car. The agent estimated that by reason of their triviality it was not necessary to mention them. The bad faith of the insured - that is, an intention to make a false declaration - not having been established, the nullity of the contract could not be pronounced. In another case,⁴⁶ the insured declared that he had no infirmity. He was slightly deaf. The agent noticed that to communicate with the proposer he had to shout or have recourse to signs. In all these cases the insurer was held responsible for the erroneous declaration. The agent had to transmit, correctly, all the information of which he had

44 Affaire No.237/CC of 6 April 1965, Douala, (Unreported).

45 Affaire No.874/CC of 4 June 1965, Douala, (Unreported).

46 Chongwa v. Chanas et Privat Assurance, Affaire No.177/CC of 28 May 1979, Yaounde, (Unreported).

knowledge. The insurer cannot take advantage of an error when he has accepted the conclusion of the contract following the information furnished by his agent who knew of the incorrectness and did not inform the company. The insurer cannot in these circumstances claim to have been induced in error by a proposal of insurance containing false declaration as the knowledge of the agent was imputed to the insurance company.

However, notwithstanding that the questionnaire was filled by the agent, the declarations contained in it are deemed to be those of the insured where the latter signs the document against the words "read and approved". By his signature at the bottom of the questionnaire the insured guarantees the correctness of the declaration. In Yangadou Emil v. Mutuelle Agricole d'Assurance⁴⁷ the insured failed to disclose previous convictions in respect of road accidents causing death and bodily injuries. The court without difficulty considered this a reticence and intentional false declaration and applied article 21 of the law of July 1930. The agent had written the response on the indications that the insured provided and this had been confirmed and certified by the insured's signature after the mention "lu et approuvé".

Furthermore, the insurer is not liable for the concerted fraud between the agent and the insured. In Jenges Gisang v. Sogerco Assurance,⁴⁸ the insured falsely declared the age of the car and gave the wrong engine number. It was found as fact that the agent had inspected the car. It was held that the complicity of the agent and insured excluded the civil responsibility of the insurer. The insured could not rely on the fault of his accomplice and

47 Affaire No.936/CC of 25 March 1972, Yaounde, (Unreported).

48 Affaire No.498/CC of 29 November 1977, Douala, (Unreported).

the agent's fraud could not be imputed to the insurance company. If the insured knew of the falsity he could not complain that he had been badly informed or advised.

The insurer is vicariously liable for the faults of his agent acting in the course of his employment⁴⁹ except where he acts in collusion with the insured.

Where there is a doubt as to the respective responsibility of the insured and the agent, the intentional character of the false declaration or reticence would not be considered as established and in the absence of proof of bad faith the sanction of article 22 of the law of July 1930 would be applicable.⁵⁰

It should be noted that a similar inconsistency in the decisions of English cases would also be found in Cameroonian cases.

The lack of unanimity in the attitude of the courts regarding the incidence of responsibility for inaccuracies contained in insurance proposal forms completed by or with the assistance of agents is equally discernible when one considers the incidence of responsibility for inaccuracies in forms completed by or with the assistance of insurance brokers. One of the many unsettled questions in this branch of the law is "For whom? and For what? is the broker 'agent'?"

The position of brokers was first stated in the much-quoted case of Rozanes v. Bowen.⁵¹ Here, Scrutton L.J. observed that in all matters relating to the placing of insurance, the insurance broker is the agent of

49 Article 3 of the 1973 Order. The insurance company can also have an action against his agent.

50 On the application and effect of article 22 see Chapter Five pp.349-355 above.

51 (1928) 32 Ll. L. Rep. 98. Anglo-African Merchants v. Bayley [1970] 1 Q.B. 311; North and South Trust v. Berkley [1971] 1 W.L.R. 470.

the insured and of the insured only. It would seem that Scrutton L.J. was influenced particularly by Lloyd's practice^{51A} and further that general insurance brokerage was not common at the time.

However, recent decisions have regarded particular brokers as agents of the insurer.⁵² Where, for example, there is a close relationship between the brokers and the insurers and the former is actually authorised to conclude interim contracts of insurance, the knowledge of the broker of certain matters concerning the insurance contract is deemed to be knowledge of the insurers. Thus in Stockton v. Mason,⁵³ the insured's wife instructed the brokers to transfer an existing motor policy from a Ford Anglia to an M.G. Midget. The brokers acknowledged that the insured was covered. On a claim on the policy, the issue depended on whether the insurers were bound by the broker's oral statement purporting to authorise the M.G. to be substituted entirely for the Anglia. The Court of Appeal held that the insurers were bound, as the brokers had implied authority to issue on behalf of the insurer or enter into temporary contracts of insurance as agent for the insurer. Similarly, in Woolcott v. Excess Insurance Co. Ltd.,⁵⁴ the insured failed to disclose a series of convictions for crimes he had committed. He answered all the questions put to him by the broker truthfully. The broker became aware of the insured's criminal record in the course of business but did not bother to alter the policy. A fire occurred in the insured's premises and a claim was made. The insurer resisted the claim on the basis of non-

51A For the course of business at Lloyds see MacGillivray and Parkington op. cit., para.674 at p.278 et seq.

52 Stockton v. Mason [1978] 2 Lloyd's Rep. 430; Woolcott v. Excess Ins. Co. [1979] 2 Lloyd's Rep. 210.

53 [1978] 2 Lloyd's Rep. 430.

54 [1979] 2 Lloyd's Rep. 210.

disclosure. The court held that the knowledge of a material fact by the broker was imputed to the insurers and that the latter's defence of non-disclosure failed.

However, the broker will be liable in damages to the insured if he fails to ask the insured questions about facts which he knows are material to the risk. It was so held in McNealy v. Penine Insurance Company Ltd.⁵⁵ The insured was a property repairer and part-time professional musician who disclosed his first but not his second occupation to his insurance broker. The broker completed the proposal form failing to read over to the insured the list of excluded occupations supplied to him by the insurer. The broker was held liable in damages in respect of the plaintiff's liability to a third party as the insurer avoided the policy. The brokers with their knowledge that the insurer refused to cover certain risks were under a duty to the insured to ask him whether he was engaged in any occupation involving such risks. In the McNealy case, it was clearly expressed that the broker was solely the agent of the insured and therefore there was no ground for imputation of knowledge. The brokers were clearly instructed by the insurer not to undertake certain risks and therefore not to conclude insurance contracts on those terms. Eventually, however, the insured will recover from either the insurer or the broker. On the Woolcott basis, the insured will recover from the insurer who will in turn recover from the broker,; and on the McNealy basis he will recover from his broker directly. If the broker is insolvent, the insured may be left without a remedy. However, it would seem

55 [1978] 2 Lloyd's Rep. 18. On the ground of misrepresentation and non-disclosure of material facts in proposal forms, the recent case of Alfred J. Dunbar v. A & B Painters Ltd. and Economic Insurance Co. Ltd. + Whitehouse & Co. [1985] Lloyd's Rep. 616 esp. at 620, emphasised the obligation and responsibility of insurance brokers not to misrepresent facts in proposal forms: to all intents and purposes, the insured would not really be insured at all because a policy which is voidable in these circumstances is as bad as no policy at all. See further on appeal, Dunbar v. A & B Painters Ltd., The Times, 14 March 1986.

that, to a certain extent, this situation has been alleviated by the provision in the Insurance Brokers (Intermediaries) Act 1977⁵⁶ which requires insurance brokers to obtain professional indemnity insurance and also requires the Council to maintain a special fund whereby people who suffer loss from the bankruptcy, negligence or fraud of a registered broker are entitled to compensation. It should, however, be noted that this provision does not cover unregistered "brokers" and in such cases the insured will remain remediless.

In so far as the primary duty lies on the insured rather than the broker in respect of disclosing material facts and answering questions correctly, it appears unlikely that the court would hold the broker under a duty to warn the insured of his duty to disclose these facts if he is unaware of material facts. In O'Connor v. Kirby,⁵⁷ the plaintiff insured his car through the defendant broker who incorrectly answered a question on the proposal form relating to the garaging of the car. The insurer avoided the policy for breach of warranty. The plaintiff sued the broker for failing to complete the form properly. The broker was held not liable as the plaintiff signed the form containing the mistake and was solely responsible; it was the insured's and not the broker's duty to disclose material facts and to check that the information in the proposal form was correct. In this case the broker had fulfilled his responsibility and had given the form to the insured to check; the incorrectness of the representation was only due to a slip or misunderstanding which the insured's perusal of the form could have revealed. This case is reconcilable with McNealy case, in that, in the latter the broker was aware and had knowledge of material facts which affected the risk and were not therefore under a duty to the insured to ask him whether or not

56 See later for a discussion of this, pp.399-401.

57 [1972] 1 Q.B. 90.

he was affected by the excluded risk.

The Insurance Brokers Registration Council's Code of Conduct lays down that insurance brokers must place the interests of their clients before all other considerations and must use their skill objectively in their client's best interest.⁵⁸ In accordance with the decision in O'Connor v. Kirby above, the Code specifically states⁵⁹ that; "In the completion of the proposal form, claim form, or any other material document, insurance brokers shall make it clear that all the answers of statements are the client's own responsibility. The client should always be asked to check the details and told that the inclusion of incorrect information may result in a claim being repudiated". One pertinent question that may be raised here is that, could the Code of Conduct be used as a basis for a professional negligence action if it is not complied with in comparison to the fact that a failure to observe a Highway Code is evidence of negligence?^{59A} It seems that there may be an action in negligence assuming that the insured has suffered a loss.

In Cameroon, article 3 of the 1973 Order provides that any person who sells insurance on behalf of an insurance concern shall be deemed in law to be the agent of the concern, who shall be vicariously liable by virtue of article 1384 of the Civil Code, for the damage caused by the fault, imprudence or negligence of the agent in the exercise of his functions notwithstanding any provision to the contrary. Brokers are in law generally regarded as agents of the insured and not of the insurer and thus the

58 Insurance Brokers Registration Council (Code of Conduct) Approval Order 1978. (S.I. 1978 No.1394) rule 3(c)(14).

59 Ibid.

59A See supra, Chapter Three, pp.165-166.

provisions of article 3 above are inapplicable to them.⁶⁰ This approach seems desirable, as the insured who is dealing with a broker will not in practice have any direct communication with his insurer and thus the exact nature of the broker's duty with regard to advising his client about insurance matters is vital. His responsibility and liability therefore are to his clients.

V THE REGULATION OF INSURANCE INTERMEDIARIES

The plethora of insurance intermediaries raises doubts concerning their suitability and qualifications. In England there had been no restriction placed on any person who wished to set up in the business of selling insurance and calling himself an insurance broker. Another area of public concern⁶¹ was the potential conflict of interest faced by the insurance broker. He received remuneration through the commission system and in order to get the policies that pay him the best rate of commission he may use "high pressure" sales techniques to sell insurance unsuitable to his client's needs. The insurance intermediary who appears to the public to be a disinterested adviser often is not. The intermediary may have a financial interest in some insurance companies. Notwithstanding this state of affairs, and in contrast to insurance companies which are closely controlled by the Insurance Division of the Department of Trade and Industry by virtue of the Insurance Companies Act 1982 and other legislation, intermediaries had not

60 For a similar position in France see article 31 of the Decree-law of 14 June 1938 now article L511.1 of the Insurance Code 1976; see further on this, Yvonne Lambert-Faivre, Droit des Assurances, 10th ed., 1977, Précis Dalloz, Paris, paras.599-601.

61 See the British Insurance Brokers Association (BIBA) Consultative Document (1976), paras. 3 and 4, pp.5-6; Department of Trade, Insurance Intermediaries 1977, Cmnd.6715 paras. 3 and 4; For further detail see, Morgan, "Insurance Intermediaries - Recent and Projected Developments - Insurance Brokers (Registration) Act 1977", (1978) 39, L.M.C. L.Q. pp.39-48.

prior to 1977 been subject to much control and supervision, in spite of the fact that it is with the insurance intermediary that the public most frequently comes into contact.

By contrast, with respect to Cameroon the regulation of intermediaries was contemporaneous with the regulation of insurance companies by Ordinance No.73-14 of 10 May 1973 fixing regulations applicable to insurance concerns.^{61A} Article 71(1) of the 1973 Ordinance lays down the requirement of prior authorisation as a necessary condition for operating as an insurance intermediary. Article 71(2) of the same Ordinance provides that the classification of insurance intermediaries, the duties and conditions governing the practice of their profession shall be fixed by an order of the Minister of Finance. To this effect Order No.358 - MINFI-CEI of 27 December 1973 was passed regulating the profession of insurance intermediaries. Article 4 of this Order provides the conditions that must be fulfilled before a natural or legal person can operate as an insurance intermediary. Intermediaries listed in article 2⁶² must satisfy conditions as to morality in article 70 of Ordinance No.73 - 14 of 10 May 1973 fixing regulations applicable to insurance concerns, possess certain professional qualifications and establish their status. In contrast to England, entry into the profession was restricted.

In England, however, increasing preoccupation with consumer protection led to two regulatory provisions. The first regulatory provision applied generally to all intermediaries and the second concerned only the registration and regulation of insurance brokers. The Insurance Companies

61A Note that there is a new Ordinance No.85-3 of 31 August 1985 relating to insurance business, see supra, Chapter Two pp.58-111 of this study. The Order implementing this Ordinance in respect of intermediaries has not been made. It is expected that further provisions would be made but there will be no change in substance. In this chapter we will continue to use the old one.

62 Supra, p.364.

Regulations 1981,⁶³ made under what is now section 74 of the Insurance Companies Act 1982,^{63A} require any intermediary who invites a member of the public (ordinarily resident in the United Kingdom) to make an offer or proposal with a view to entering into a contract of insurance with an insurance company and is connected with that company to disclose in writing details of his connection. It further requires a similar information where the insurer is not authorised under the 1982 Act, for example, in the case of overseas insurers. These provisions are made primarily to enable the percipient purchaser to distinguish an agent from an independent broker. Failure to comply with these requirements is a criminal offence. An intermediary is considered to be connected with an insurance company if the intermediary is a partner, director, controller or manager of an insurance company and vice versa. A connection also occurs if the intermediary or controller thereof has a significant interest in the shares of the insurance company.^{63B} Disclosure of a connection is also required where the intermediary has an arrangement with the insurance company whereby he undertakes not to perform any services relating to any class of insurance business for another insurance company. This would include an agent under a contract for services tied to a particular insurer but not an employee of an insurer.

Further consumer protection measures were taken by the passing of the Insurance Brokers (Registration) Act 1977. The 1977 Act dealt with the competence, solvency and professional objectivity of insurance brokers.

63 S.I. 1981 No.1654, regs.67 and 68, formerly the Insurance Companies (Intermediaries) Regulations 1976 (S.I. 1976 No.521).

63A First introduced as section 64 of the Insurance Companies Act 1974.

63B For the description of "significant interest", see regulation 67(2) of the Insurance Companies Regulations 1981, S.I. 1981 No.1654.

Under this Act an Insurance Brokers' Registration Council was established to register eligible insurance brokers and supervise their activities.⁶⁴

Educational Requirements

To be eligible for registration a broker needs to have obtained a recognised professional qualification and a minimum of three years' experience in the profession.⁶⁵ Applicants not holding professional qualifications are only eligible for registration if they have at least five years' experience. Section 5(1) and (2) of the 1977 Act makes provision for appeal against a refusal to register and further provides that a statement of reasons must be given to any individual or corporate body which is refused enrolment or registration. In refusing registration therefore, the Insurance Brokers' Registration Council ought to identify in what respects an applicant's professional experience is deficient. The application of this provision is desirable as it provides a useful balance between the rights of refused brokers and the vital need to operate a system of registration that is effective in keeping out unsuitable applicants. In Pickles v. Insurance Brokers' Registration Council,⁶⁶ the appellants had been in partnership for more than five years as estate agents, surveyors, valuers and insurance brokers. They applied for registration and the Council sought further information as to how much of their time was devoted to insurance broking. The appellants refused to supply that information and their application was refused. The appellants challenged the refusal of the defendants to register

64 Section 2 of the Insurance Brokers (Registration) Act 1977.

65 Ibid. Section 3. At present, there are both a body with statutory oversight over registered brokers (the IBRC) and a trade association, British Insurance Brokers Association (BIBA) which accepts into membership only those eligible for registration by the IBRC.

66 [1984] 1 W.L.R. 748 esp. at pp.755-756.

them as insurance brokers and claimed that they had an automatic right under section 3(1)(c) of the 1977 Act to registration. The Court held rejecting that argument that the provision of the Act requires someone who had carried on business for not less than five years to an extent which provided him with adequate practical experience of insurance broking and therefore there was no automatic right to registration. This is a desirable result, as section 3 of the 1977 Act can be seen as providing adequate powers to test the practical experience of insurance brokers. The 1977 Act seeks to achieve professionalism in insurance broking basically on the basis of a recognised academic or professional qualification and three years experience but many brokers, perhaps the majority, have been registered on the alternative alone.⁶⁷ While one may welcome the establishment of qualifications as one valuable criterion for the demonstration of competence, it is probable that admission through a period of practice as a broker unsupported by a recognised qualification may militate against the achievement of professional standards. Furthermore, once a broker is registered he is entitled to use the description 'Insurance Broker' and canvass for business of any class or all classes notwithstanding that his qualification or experience may be in two or three classes only and not necessarily the class in question.⁶⁸ This is a defect in the Act, although it is arguable that the provisions of the Code of Conduct require brokers to advise clients only in those areas in which they are experienced.⁶⁹ It is desirable that increasing emphasis should be made on

67 Tom Roberts, "A Company view on the Registration of Brokers", 14 September, Insurance Week 1984, Vol.102, No.37 at p.29; Robert Carter, "Broker quality concerns Carter", 15 October, Policy Holder Insurance Journal, 1977, Vol.97, No.40 at p.13.

68 Note that insurance companies are authorised on a class by class basis, supra Chapter Two, p.72.

69 See infra. pp.402-403.

brokers to be able to demonstrate technical competence and be professionally qualified. The actual competence of a broker depends to a considerable degree upon the demonstration in practice by individual brokers of the reliability which can be placed upon their expertise across the range of their business. This can be nurtured and sustained with consistency over time and can be greatly reinforced by exacting standards for qualifying examinations. The Act enables the Insurance Brokers Registration Council to ensure the availability of adequate and appropriate educational facilities and qualifying examinations and continuously to review the standard and relevance of these facilities and examinations.⁷⁰ The British Insurance Brokers Association has adopted a five year education training programme to supplement the courses offered by the Chartered Insurance Institute. It organises seminars and provides a forum for debate on topics of current interests to brokers.

Similarly, in Cameroon, the legislation requires insurance intermediaries to hold certain professional qualifications and experience in insurance business before an authorisation can be granted to commence business. Article 8 of the 1973 Order provides a list of professional qualifications which insurance agents and brokers must attain. These qualifications include a

70 Sections 6 and 7 of the 1977 Act.

diploma of the International Institute of Insurance,⁷¹ a diploma of the Paris National Insurance School or their equivalent in any recognised school. Insurance inspectors who have served the Ministry of Finance for at least three years are also eligible to become insurance agents and brokers. Since the coming into force of the 1973 Ordinance there has been a significant increase of trained Cameroonian personnel in the insurance industry.⁷² This is a desirable development. As has been pointed out previously it can be surmised that the average consumer of insurance (especially in Cameroon due to illiteracy and the general level of education) is ignorant of the most rudimentary notions of insurance due to its technical nature. To provide the services effectively, the personnel of insurance intermediaries must possess some professional knowledge and ability to meet the requirements of their customers.

Agents are prohibited from practising the functions of brokers and vice versa. Either one decides to be a broker independent of any insurance

71 The International Institute of Insurance was created by CICA - a regional insurance organisation grouping the following French-speaking West African countries: Cameroon, the Ivory Coast, Mauritania, Malagasy Republic, Niger, The Peoples Republic of Congo, Senegal, Togo and Upper Volta, in November 1973 to promote regional cooperation in insurance education and Africanisation of the insurance industry. It provides member states with qualified personnel and facilitates the free flow of man power as is the case within the European Economic Community. Junior personnel are also required to hold certificates in insurance. One such certificate is the "Certificat d'Aptitude Professionnelle" (C.A.P.), equivalent in England to the General Certificate of Education (G.C.E.), ordinary level standard of education in insurance.

72 See, "La Formation du Personnel en matiere d'assurance" Revue I.I.A. No.4, January 1977, pp.19-21; For the need of trained personnel in the insurance industry see, Eric Jelfs, "The training of Middle and Junior Management", in Conference Papers of the Insurance Institute of Nigeria, Vol.1 1977, pp:118-128; see also J.O. Irukwi, "Insurance Education and Training in West Africa" WAICA Journal, Vol.1 1975, pp.45-52.

company or establishes as an agent linked to a particular insurance company. The aim of this prohibition is to protect insurance companies from unfavourable competition and avoid possible conflicts of interest in broker-client and agent-insurance company relationships.

By contrast to the position in England, article 5 of the Order prohibits its persons in certain professions from acting as insurance intermediaries.⁷³ These include car dealers, building contractors, solicitors and land estate corporations. This eliminates the anomalous category of insurance agents or unregistered persons calling themselves insurance consultants as we saw earlier in the case of England.

Intermediaries are also required to obtain a professional licence granted by the Association of Insurance Companies in Cameroon. They should be members of the "Syndicat des Intermédiaires d'Assurance Agréé du Cameroun" (SIAAC), which is a professional organisation registered as a member of the Bureau International des Producteurs d'Assurances et Réassurances with headquarters in Paris.

73 Order No.325/MINFI/CE of 1980 modifying Order No.358/MINFI/CE of 27 December 1973 regulating the profession of intermediaries; and Circular No. 015166/MINFI/CE of the Ministry of Finance of 4 June 1980 concerning activities incompatible with presentation of insurance operation. See further article 4 of the 1973 Order and also supra. at pp.363-364.

Financial Requirements

With respect to solvency, in England, the Insurance Brokers Registration Council made rules as to the conduct of insurance brokers business.⁷⁴ Insurance brokers are required to have a minimum working capital of which at least £1000 is paid up and be able to demonstrate to the Registration Committee that there are adequate assets to meet their liabilities.⁷⁵ They are required to place insurances with a sufficient spread of insurers to ensure that they are not unduly dependent on one insurer.⁷⁶ Insurance brokers must submit annual accounts and statements in accordance with rules 8 and 9.⁷⁷ One of the most noteworthy of these accounting rules is the requirement that brokers must keep insurance money in approved banks and in a special account called the Insurance Broking Account for each separate insurance business which they carry on.⁷⁸ These monies must be used solely for the purposes set out in this regulation. This provision provides extra security for premiums and claims in transit between policyholders and insurance companies. However, the protection afforded is

74 Sections 11 and 12 of the Insurance Brokers (Registration) Act 1977; Insurance Brokers Registration Council (Accounts and Business Requirements) Rules Approval Order 1979 (S.I. 1979, No.489); Insurance Brokers Registration Council (Accounts and Business Requirements) (Amendment) Rules Approval Order 1981 (S.I. 1981, No.1630); See also Insurance Brokers Registration Council (Indemnity Insurance and Grants Scheme) Rules Approval Order 1979 (S.I. 1979, No.408).

75 Regulations 3 and 4 of the Insurance Brokers Registration Council (Accounts and Business Requirements) Rules Approval Order 1979 (S.I. 1979, No.489).

76 Regulations 5(1) Ibid.

77 Regulations 5(2) Ibid.

78 Regulations 6 Ibid. See also Regulations 3 and 6 of the Insurance Brokers Registration Council (Accounts and Business Requirements) (Amendments) Rules Approval Order 1981 (S.I. 1981 No.1630). For further details of accounting procedures see, Hugh Cockerell, "How brokers will have to account", 22 October, Post Magazine and Insurance Monitor, 1981, Vol. CXIII, No.43 at pp.2648-2650.

limited as it permits brokers to invest premiums and claims monies in transit for their own benefit and allows them to pledge those investments as collateral for bank overdrafts.

Insurance brokers are required to take out professional indemnity insurance covering them against losses arising from claims in respect of any description of civil liability incurred by them or their employees in connection with their business.⁷⁹ This provision is commendable as it is likely that where there is significant doubt about the competence or standing of a broker, he will find it difficult to obtain the necessary cover in the market. The professional indemnity policies currently on the market have exclusions and clearly do not cover brokers from losses of "any description". This has been shown by the Signal Life scandal⁸⁰ where the professional indemnity insurers have rejected liability on the grounds that Signal Life was a financial failure, an event not covered under policies sold to the brokers. It would appear that the Insurance Brokers Registration Council have failed to ensure that the conditions of the Statutory Instrument have been met or the professional indemnity insurers have not produced a product which conforms with the requirements laid down in the above Statutory Instrument. This failure highlights the weakness of the present arrangements to compensate policyholders. It is therefore, desirable that the Insurance

79 Section 12 of the 1977 Act. The policy must be for at least £250,000 or a sum equal to three times the brokerage of the business for the last accounting period ending prior to the inception or renewal of the policy, whichever sum is the greater. However in no case will the minimum limit of indemnity be required to exceed £7,500,000. See Regulation 3 of the Insurance Brokers Registration Council (Indemnity Insurance and Grants Scheme) Rules Approval Order 1979 (S.I. 1979 No.408).

80 Neil Thaper, "Signal discovery hits all brokers", 2 August 1984, Post Magazine and Insurance Monitor, Vol. CXLV, No.30, at p.1834. The key problem is that the professional indemnity policies exclude cover in cases involving an insurer's collapse.

Brokers Registration Council ensure that policies of insurance brokers offer adequate protection for its registered members.⁸¹

A further attempt to ensure protection is provided by section 12(2) of the 1977 Act which establishes a grant scheme designed to relieve or mitigate the losses suffered by victims of negligence, fraud or bankruptcy of a registered broker.⁸² The compensation is raised by a levy on registered brokers and paid to individual members of the public and unincorporated bodies holding United Kingdom policies only.⁸³ It is noteworthy that payment out of this fund is not made unless policyholders take legal action against brokers and negligence must be proved not just a demonstration that a loss has occurred.⁸⁴ For example, in the Signal Life Affair the Insurance Brokers Registration Council refused to pay out of the special fund until successful legal action was brought against brokers. It seems unnecessary that legal action must be brought in order to compensate the luckless policyholders when

81 It is doubtful whether commercial insurers will be able to offer professional indemnity policies as wide ranging as that intended by the Registration Act. For an expression of this remark, see, Neil Thaper, "Signal discovery hits all brokers," Post Magazine and Insurance Monitor, 2 August 1984, Vol.CXLV, No.30 at p.1834. One may suggest that what is needed is a bonding scheme similar to that run by the Association of British Travel Agents which requires agents to put up a cash bond before they are allowed to go into business. It is probable that such a bonding scheme with its attendant compensation fund may offer some real protection to investors. See further, note 102A below.

82 Regulation 6 Ibid.

83 Regulation 9. Ibid. The maximum amount of levy which can be raised from a broker in any one calendar year is related to the size of the broking firm. The commitment to the fund by insurance brokers collectively will not exceed £1m. in any one year. Note that the argument that well-managed firms will be financing the activities of poorly-managed firms analogous to that in respect of the Policyholders Protection Act 1975 equally applies here, supra. pp.137-138.

84 Note also that the fund is one of "last resort", that is, it will be utilised only after any other possible rights which the insured person might have against other parties to the insurance contract have been exhausted.

registration was 'sold' as a way of ensuring better protection against bad advice from registered brokers. It is suggested that positive action ought to be taken by the Insurance Brokers Registration Council to provide the benefit of an out of court settlement which provides a solution for policyholders who have chosen to do business with registered brokers instead of a convoluted chain of legal action which would involve time and expense.

In Cameroon, the solvency controls are exercised by the Ministry of Finance via insurance companies.^{84A}

Ethical requirements

In England, professional objectivity is maintained by the Council which has power to draw up a Code of Conduct for registered brokers approved by the Secretary of State.⁸⁵ The effect of the Code is modified by the fact that it is stated⁸⁶ to be only a guide and the mention or lack of mention of a particular act or omission is not conclusive of any question of professional conduct. Regulation 3 of the Code lists nineteen examples of the ethical principles which all registered insurance brokers are required to adhere to. The Code of Conduct⁸⁷ requires brokers to display in their offices a notice to the effect that the Code is available on request and that the Council may be approached by any member of the public who wishes to make a complaint or seeks the assistance of the Council in resolving a dispute.⁸⁸ It is doubtful

84A For a discussion of this control, see Chapter Two on Government Control of Insurance Companies, pp.66-67, 88-96 and 104-111.

85 Section 10 of the 1977 Act.

86 Regulation 1 of the Insurance Brokers Registration Council (Code of Conduct) Approval Order (S.I. 1978 No.1394).

87 Regulation 3(19) Ibid.

88 An aggrieved client may complain either to the British Insurance Brokers Association or to the Insurance Brokers Registration Council; a consumer relations officer has been appointed to handle complaints from clients against Insurance Brokers.

whether this is sufficient to draw the attention of clients. It will probably be better if brokers are required to include a copy of the Code in the client's premium book when they conclude contracts of insurance.^{88A}

It is interesting to note that the British Insurance Association formulated Codes of selling practice for intermediaries other than registered brokers. These Codes embody sales principles similar to those for registered brokers. Intermediaries are required to give advise only on those matters in which they are competent and to seek or recommend other specialist advice if this seems appropriate. There is also provision for intermediaries to keep a proper account of all financial transaction with a prospective policyholder which involve the transmission of money in respect of insurance. The observance of the Codes by intermediaries is the responsibility of individual insurance companies through their contractual and commercial arrangements or through their normal supervisory procedures in the case of companies' own sales staff. However, it is regrettable that the policing role has been left with the insurance companies⁸⁹ themselves and no formal and independent complaints procedure or body has been established to deal with complaints and review its working and to identify from a study of any complaints any further points that need to be covered. An independent arbitration appears to be a

88A This Code could be simplified and made reasonably comprehensive into a leaflet or pamphlet. For example, see the Code of Practice For All Intermediaries (Including Employees of Insurance Companies) Other Than Registered Insurance Brokers, issued by the Association of British Insurers in 1981.

89 This is not perhaps the best guarantee of impartiality especially when the intermediary may be placing substantial amounts of their business. Contrast the Insurance Brokers Registration Council Disciplinary Committee which provides an overall complaints procedure for all registered brokers, infra, pp.404-405.

desirable method by which a consumer's complaint can be equitably examined and adjudicated.

In addition, there exist two rival organisations: the Federation of Insurance Consultants and the Institute of Insurance Consultants⁹⁰ for unregistered intermediaries; all with their own Codes of Practice. Gower criticises⁹¹ these Codes of Practice for containing moral exhortations instead of prescribing precise rules and regulations. One essential feature of any scheme appears to be the imposition of very clear obligations designed to enable a policyholder to take effective action against an intermediary who sells a policy other than that which is in the best interest of the policyholder.

The extent to which registration protects the consumer depends directly upon the standard laid down by the requirements of the legislation, the efficiency of the disciplines and the rigour with which they are adopted and sustained. With regards to registered brokers professional discipline is provided by independent bodies.⁹² Where a complaint is made against a registered broker a preliminary investigation is carried out by an Investigating Committee⁹³ of the Council. Thereafter, it is if necessary

90 See Institute of Insurance Consultants Reference book and list of members, 1985.

91 L.C.B. Gower, Review of Investor Protection, Report; Part I, Cmd.9125, 1984 London H.M.S.O. para. 8.52 pp.120-121.

92 Sections 13 to 20 of the 1977 Act; Insurance Brokers Registration Council (Procedures and Disciplinary Committee) Rules Approval Order 1978 (S.I. 1978, No.1456).

93 Regulation 3 of the Insurance Brokers Registration Council (Constitution of the Investigating Committee) Rules Approval Order 1978 (S.I. 1978, No.1456).

reported to a separate Committee, the Disciplinary Committee,⁹⁴ which has power to erase the name of a broker from the register. A broker's name may be erased from the register under section 15 of the 1977 Act for conviction of a criminal offence or material contravention of the rules under Sections 11 and 12 relating to financial and professional indemnity matters or unprofessional conduct in the judgment of the Disciplinary Committee. There is no further definition and the discretion of the Disciplinary Committee seems to be the important factor.⁹⁵ The majority of firms have been struck off the register for failure to meet the statutory requirements with respect to accounting disciplines especially in respect of accounts showing substantial shortages in the Insurance Broking Account and maintenance of professional indemnity insurance.⁹⁶ These firms then drop the description "insurance broker" and continue trading exactly as before on the same terms and conditions as if nothing had happened. It is arguable whether standards can be raised appreciably while it is possible simply to leave the "club" and carry on as before. However, as no details of the judgments of the Disciplinary Committee are published⁹⁷ it seems that, it would be contrary to

94 Regulation 3 of the Insurance Brokers Registration Council (Constitution of the Disciplinary Committee) Rules Approval Order 1978 (S.I. 1978, No.1457).

95 In James v. Insurance Brokers' Registration Council [1984] The Times, 16 February 1984, James appealed against a decision of the Disciplinary Committee to direct his name to be erased from the register of insurance brokers under section 15 of the 1977 Act relating to professional indemnity insurance which had rendered him unfit to have his name on the register. His Lordship held that the court would be slow to interfere with the professional judgment of a tribunal such as the Disciplinary Committee which could justify its decision.

96 The Insurance Brokers Registration Council Bulletin, 1985.

97 Reply to inquiry dated 18 February 1985 from E. Jane Rees, Deputy Registrar, Insurance Brokers Registration Council.

natural justice for insurance companies not to continue to accept business from de-registered brokers unless there is sure and certain evidence that they are 'not fit and proper' persons. It is possible that some brokers may use the failure to comply with the rules under sections 11 and 12 of the 1977 Act, as a means of de-registration as it appears that there is no other machinery available to them.⁹⁸

It seems clear that one obvious deficiency in the 1977 Act is that the Council cannot discipline those who contravened the rules. The Council has no statutory obligation to prosecute and moreover the funds to do so are extremely limited.⁹⁹ There is a complete lack of penalties other than warning or striking off the name of a registered broker from the register. It is suggested that errant brokers should be fined or suspended rather than simply struck off the register. Further, the profession ought to be required to set up procedures whereby persistent deviants are identified and not allowed to practice as brokers. The incompetent broker who sells the product of an insurance company should be struck off the register in just the same way as a doctor carelessly prescribing the wrong medicine.

Under section 22 of the 1977 Act, it is an offence, punishable on summary conviction by a fine not exceeding £400, or on conviction on indictment by an unlimited fine, for an unregistered person to use the description "insurance broker" or "assurance broker" or "reassurance broker" or any other description falsely implying registration or enrolment. However, the Act does not prevent unregistered persons from carrying out the

98 See, Regulation 16 of the Insurance Brokers Registration Council (Registration and Enrolment) Rules Approval Order 1978 (S.I. 1978, No.1395).

99 Roger Anderson, "Unregistered Brokers and the IBRC", 6 May 1983, Policy Holder Insurance News, Vol.101, No.18 at p.9.

functions normally associated with the occupation of insurance brokers so long as he does not call himself a broker. In practice, descriptions such as "insurance consultants"¹⁰⁰ are used by persons who wish to carry on insurance business without bringing themselves under the Act. For example, a Shropshire firm was charged with displaying a notice in front of its premises which read "Lane Phillips Insurance Brokers" when the company was not registered as a broker although its letter headings used the term insurance consultants. On a plea of guilty, the firm was fined £500 with £70 costs.¹⁰¹ Nevertheless the firm whose trading standards were never in doubt continues in business much as before with support from insurers and clients as many others who have decided not to register with the Insurance Brokers Registration Council.¹⁰² It seems that neither the public nor insurers discriminate against unregistered intermediaries. As such the registered broker is left with greater administrative burden without any added advantage over his non-registered counterpart. On the other hand, it does not seem that the public is adequately protected by the operations of the non-registered broker.

Clearly, the main weakness of the Insurance Brokers (Registration) Act 1977 is that brokers voluntarily became registered and consequently other intermediaries are able to remain outside the regulatory process. It may be noted that too much should not be claimed for registration in itself, it is

100 Supra. pp.404 and 406.

101 Shropshire County Council v. Ian K. Phillips and Lane Phillips Ltd., 1983-4 (Unreported) Shinfal Magistrates Court, 16 December 1983, details supplied by D.C.E. Roberts, Chief Inspector of Trading Standards, letter dated 29 November 1985. Note that the prosecution was brought by Shropshire Trading Standards Office.

102 See, Tom Roperts, op. cit., at p.29

not a solution but it does provide an essential basis for development. If one considers the sale of Signal Life^{102A} bonds through registered brokers one may argue that the fact that a firm is registered with the Insurance Brokers Registration Council does not necessarily guarantee total protection and satisfactory dealings with clients. Nevertheless, the point is that the policyholders have some form of redress, though not as adequate as it ought to be. On the other hand, if an unregistered intermediary does not satisfy a client's needs, the client has no clear source of help or compensation. The unregistered intermediary may have professional indemnity insurance but he is not obliged to do.^{102B} The registration requirements for IBRC members contain certain minimum standards. One can claim that the IBRC regulations overall are very much stronger than the Codes of Practice designed by insurance companies and we have seen¹⁰³ that the disciplinary powers of bodies responsible for non-registered intermediaries do not contain any sanction. It is not satisfactory that the disciplines that the Registration Act imposes

102A See, "Compensation: Court victory on investment advice will open floodgates," The Times, 25th February 1984; Press Release, Coordinator: John Potter, "High Court victory for signal gilt bond investors," 14th July 1985. A convoluted chain of unreported legal actions in the County Court and High Court have been won by investors of Signal Life bonds. Many of the intermediaries who sold the bonds were both registered brokers and members of the British Insurance Brokers Association and unregistered intermediaries. In the case of registered insurance brokers, however, the Insurance Brokers Registration Council grants scheme would come into operation at this point and might reimburse investors; but see above discussion supra, pp.401-402.

102B The Institute of Insurance Consultants requirement for professional indemnity cover is less than that of the IBRC members for business where turnover is less than £50,000 per annum. In addition, the educational requirement depends upon experience and/or qualification, with the possibility that if the requirements are not fulfilled an applicant may write a thesis of 500 words on an insurance topic in order to be registered as a member.

103 Supra, pp.403-404.

on brokers should co-exist with the apparent freedoms available to non-brokers.

This points to the need for a self-regulatory body to have statutory powers, but as we have seen with insurance brokers a statute needs to be very tightly drawn. If insurance brokers are to be regulated and disciplined it is essential that there should be only one class of insurance brokers, that is, those registered under the scheme outlined above. It should be a necessary corollary that an individual will not be able to sell insurance unless he has registered with the self-regulatory authority. It will also imply that if he contravenes any of the rules and regulations and he is struck off the register he will be out of business possibly for all time. It is hoped that some form of registration covering all brokers with one Self-Regulatory Agency¹⁰⁴ capable of overseeing and monitoring the activities of brokers and if necessary exercising, within the aegis of the law, disciplinary measures is established to ensure that all concerned act in an ethical fashion and provide the best possible service for the general public. Certainly, the Insurance Brokers Registration Council's powers could be strengthened to assume that role. Indeed, it is quite clear that the introduction of registration schemes will not necessarily lead to elimination of persons who are prepared to act illegally. Nevertheless, as in the case of the regulation of insurance companies¹⁰⁵ legislation should provide for criminal and civil sanctions against unauthorised establishments.

The regulation of insurance brokers only, cannot, of itself be a complete panacea as, clearly there is a need for some form of control and,

104 The arguments for a comprehensive system of statutory regulation for life assurance intermediaries apply equally to the non-life area. See, L.C.B. Gower, Review of Investor Protection, Report: Part 1, Cmnd. 9125, London, H.M.S.O.

105 Supra, Chapter Two, pp.138-145.

indeed, supervision of non-broker intermediaries through whom business is obtained by the insurance companies. As regards insurance companies' agents this more properly is a matter for the companies themselves to regulate probably in agreement with the Department of Trade and Industry. Perhaps if insurance companies were made responsible for the compensation of policyholders when their agent defaulted,^{105A} they would make more diligent enquiries regarding the character and financial stability of their agents.

In contrast to England, as has been seen,¹⁰⁶ entry into the profession in Cameroon was restricted from the outset. With respect to the moral integrity of an insurance intermediary article 70(1) of the 1973 Ordinance prohibits persons who have been convicted of certain offences from becoming insurance intermediaries. It provides thus :

"The following may not in any way found, direct, administer, manage, or wind up any type of insurance, re-insurance or capital accumulation concern, and may not act as insurance or re-insurance agents or broker:

- (a) Persons who have been convicted of crime under ordinary law, theft, breach of trust, fraud, abstraction committed by a public trustee, extortion of funds and securities, uttering worthless cheques in bad faith, undermining the credit of the state, receiving and concealing objects obtained by means of these offences;

105A As, for example, under clause 4(2)(b) of the Draft Insurance Law Reform Bill (L.C. Report, No.104, Appendix A), whereby notices etc. sent out by insurance brokers to policyholders regarding renewal would be deemed to be renewal notices within the meaning of clause 4 and hence would have to include a warning about the duty to disclose material facts, on penalty of the insurer being unable to rely upon non-disclosure (subject to clause 4(5)).

106 Supra, pp.362-365.

- (b) Persons who have been convicted of attempting to commit the offences above or of aiding and abetting them;
- (c) Persons who have been sentenced to imprisonment of not less than one year, regardless of the nature of the offence;
- (d) Undischarged bankrupts."

Article 70(2) further provides that :

"The same prohibitions may be pronounced by law courts against:

- (a) Any person convicted for infringement of insurance legislation or regulations;
- (b) Directors, administrators or managers of insurance concerns which have been wound up following the withdrawal of approval."

The range of prohibited offences contemplated by the 1973 Order thus appears great, while the term of imprisonment necessary for this purpose need be only one year. The effect of this is to render ineligible to act as insurance intermediaries a wide class of persons. This is a welcome result since insurance operations necessarily involve the management of large funds of public money which ought to be entrusted only to persons of honour and integrity. Furthermore agents and brokers in Cameroon, are equally subject to supervision by the Ministry of Finance whose Department of Insurance is empowered by article 15 of the 1973 Order to cause a withdrawal of a broker's name from the commercial register or to withdraw the professional licence of an insurance agent if the requirements regarding their professional qualification and moral integrity have not been met.

Finally, mention should be made of the regulation of commission of insurance intermediaries in Cameroon. We noted earlier¹⁰⁷ the temptation

107 Supra, p.391.

which intermediaries, especially brokers paid by commission might face to secure more business for themselves whilst paying little regard for their client's insurance needs. In this respect the Cameroonian legislation but only in so far as motor insurance is concerned, places limitation on the amount of commission.¹⁰⁸ Articles 2 and 3 of Order No.137 of 6 March 1972 classifies intermediaries according to the various functions¹⁰⁹ they fulfill and provides the maximum percentage of premium income pertaining to the insurance which they can earn as their commission. This is as follows :

- (1) Ordinary insurance salesmen: 4 per cent of insurance of public passenger or goods transport and 6 per cent for other insurance of land motor vehicles;
- (2) Insurance salesmen with powers: 8 per cent for insurance of public passenger or goods transport and 10 per cent for other insurance of land motor vehicles.
- (3) Insurance agents with restricted powers: 12 per cent of insurance of public passenger or goods transport and 15 per cent for other insurance of land motor vehicles;
- (4) Insurance agents with full powers: 18 per cent for insurance of public passenger or goods transport and 20 per cent for other insurance of land motor vehicles.

Further article 5 provides that as from 1971, insurance concerns must, if the

108 Article 1 of Order No.137 MINFI/DCE/OF 1 of 6 March, 1972 fixing the rate of commission of motor vehicle insurance; Order No. 97/MINFI/CE/A modifying and completing certain provisions of Order No.339/MINFI/CE/A of 3 October 1977 fixing the rate of commission applicable to motor vehicle insurance. It was felt unnecessary to regulate commissions of insurance intermediaries in England, see article by Morgan op.cit., on p.40.

109 The differences in powers and status between the various categories are specified fully in the relevant articles which list a number of functions and duties of the agents.

commission and other remuneration of the same kind granted by them to their intermediaries exceed the percentages provided for in this Order, progressively reduce the rate as stipulated in the article. It was hoped that this restrictive remuneration scheme would be an incentive for insurance intermediaries to be cautious in selecting the risks of their clients best suited to their needs without their necessarily aiming at a high commission.

Basically, the standards required of insurance intermediaries in England and Cameroon are appreciably high as a result of the registration with their respective authorities. Direct state licensing does not exist in either country; in England regulation is in the hands of the insurance industry (more of a self-regulatory machinery) probably because of its favour of free enterprise, whereas in Cameroon there is a somewhat partial or indirect government control and supervision. Agents in England, unlike in Cameroon, have not yet been regulated though proposals in this direction are envisaged. As we saw earlier,¹¹⁰ the 1977 Act was concerned only with registered brokers and aimed at a high level of professionalism and the maintenance of high standards. However, the lacuna left by the Act, is the regulation of agents and "insurance consultants" ex cetera, of whom there is a good number. It is hoped that legislation will be made for the supervision and control of agents by the insurance companies whom they represent. The ultimate result would be that insurance agents would be limited to those tied to particular insurance companies by an agency agreement, or if "insurance consultants" insurers would be responsible for them. This will eliminate the superfluous category

110 Supra pp. 393-408.

of insurance agents mentioned previously (that is, part-time or occasional agents).¹¹¹ Henceforth the classification of insurance intermediaries would be confined to registered brokers and agents of insurance companies.

Allusion should be made to developments within the European Economic Community in respect of Insurance Intermediaries. Pursuant to article 57 of the Treaty establishing the European Economic Community (the Treaty of Rome, March 25, 1957), the Council of the European Community issued Directive No.77/92/EEC¹¹² for the mutual recognition of diplomas, certificates and other evidence of formal qualifications. The object of coordinating these qualifications is to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers, thereby avoiding undue constraint on the nationals of member states. The closer relation between member states would lead to greater expansion and accelerate the raising of standards.

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111 See the Government White Paper, Insurance Intermediaries 1977, Cmnd.6715, para.14.

112 Directive of 13 December 1976 on measures to facilitate the effective exercise of freedom of establishment and freedom to provide services in respect of the activities of insurance agents and brokers (ex. ISIC Group 630) and, in particular, transitional measures in respect of those activities (O.J. 1977, L26/14) 31:1:1977. See further, T.H. Ellis, European Integration and Insurance (creating a Common Insurance market), 1980, London, Witherby & Co. Ltd., pp.133-139. It should be noted that the United Kingdom had at the time no requirement of professional qualification and therefore the 1977 Act was an implementation of the 1976 Directive as it provides for the registration of all insurance brokers and the maintenance of professional standards especially in sections 6 and 7.

CHAPTER 7

CONSTRUCTION OF THE CONTRACT OF INSURANCE

I INTRODUCTION

One of the greatest difficulties in insurance law has perhaps been to determine the precise coverage of a given policy. In England, France and Cameroon, the contract of insurance will invariably in practice consist of not just the policy document itself, but also the completed proposal form. The proposal and statements and declarations therein contained may be and usually are incorporated into the contract by reference. When a policy refers to and incorporates other documents, such as the proposal, declarations and statements, they all have to be considered in order to apprehend the full terms of the contract.¹

The proposal, statements and declaration are the first documents in order of time. They occur contemporaneously and appear, in reality, as one instrument. They are documents usually put before a proponent for his signature and are intended to convey to his mind the terms to which he is asked to pledge himself when entering upon the transaction. We observed earlier in Chapter Five² that the declaration may be one as to the absolute and literal truth of the answers in the proposal or it may be merely a declaration that the answers are accurate to the best of the proponent's

1 For the incorporation of documents into the insurance contract in France see, Nicholas Jacob, Les Assurances, 2nd ed., 1979, Paris, p.82.

2 Supra, pp.338-339.

knowledge and belief. Where relevant, and often in addition, other documents, including, in some cases, renewal notices, cover notes and slips pasted onto the policy, all form part of the contract.

The broad judicial solution in England and the English-speaking Cameroon, has been to adopt canons of construction intended to point towards the true meaning of the words used in the determination of the extent of coverage offered by an insurance contract. However, in France and the French-speaking Cameroon, the rules of construction are laid down by the Civil Code. These rules or canons of interpretation are nonetheless similar in their application. This chapter will briefly review the most important of these rules, with special emphasis on the approach of the Cameroonian courts in cases of motor insurance.

II THE ROLE OF THE COURT IN THE INTERPRETATION OF THE INSURANCE CONTRACT

In England, France and Cameroon the construction of a contract is a matter for the court. The contract or policy is construed according to the law of the country where it is granted. Insurance policies are construed according to the principles of construction applicable to commercial contracts generally, and there are no peculiar rules of construction applicable to the terms and conditions in a policy which are not equally applicable to the terms of other mercantile contracts.³

The primary task of the court endeavouring to interpret the contract of insurance is to ascertain the intention of the parties in relation to the

³ As to English Law see, Drinkwater v. Corporation of the London Assurance (1767) 2 Wils. 363 at 364; also see MacGillivray and Parkington, op.cit., para. 1031 at p.433. As to French and French-speaking Cameroonian Law see, articles 1134, 1135, 1156 to 1164 of the Civil Code. See also, Sir Otto Kahn-Freund, Claudine Lévy and Bernard Rudden, A Source-book on French Law, 2nd ed., 1979 Oxford Clarendon Press, p.425.

point in dispute⁴. In France and French-speaking Cameroon, article 1156 of the Civil Code states that:

The common intention of the contracting parties must be sought in agreements rather than to stop at the literal sense of terms."⁵

Further, article 1163 adds that:

"However general may be the terms in which an agreement is conceived, it includes only the things on which it appears that the parties proposed to contract."⁶

Such intention is, however, to be gathered from the wording of the policy itself⁷ and from the wording of any other documents which may be incorporated with it.⁸

The intention of the parties can be collected only from the agreement itself and it alone is to be looked at for the purpose of interpreting the contract. Where there are both written and printed words in a policy, the policy is to be construed as a whole⁹ but the written words (whether hand-written or type-written) prevail over the printed words in the event of an inconsistency or variance, as written words are specially inserted to show the intention of the parties.

4 In England, see, Tarleton v. Staniforth (1794)5 T.R. 695 at 699

5 John H. Crabb, The French Civil Code as amended to July 1, 1976, 1977 New Jersey, p.224. Note that the translation seems to be inelegant but the meaning is clear.

6 Ibid.

7 M'Swiny v. Royal Exchange Assurance (1849) 14 Q.B. 634 at 661.

8 Nicolas Jacob, op. cit., at p. 82.

9 Article 1161 of the Civil code states that:

"All clauses of agreements are interpreted through one another by giving to each one the sense which results from the entire document."

John H. Crabb, op. cit., p.224. Emphasis added.

Extrinsic or parole evidence is inadmissible to vary or contradict the written terms. Thus a person cannot free himself from an agreement by saying that he thought it meant something different from what it does mean.¹⁰

It must be pointed out that, in England, the primary rule that the intention of the parties must prevail is, in the majority of cases, founded on a priori assumption (the dubious premise) that the insurance contract is the result of bargaining between the parties of equal strength, who having bargained, reduced their agreement to writing. While certain judges may have complained occasionally about the form of insurance policies, there are very few signs of any attempt to give weight to criticism by the adoption of rules of construction more favourable to the insured.¹¹ This contrasts with the position in many of the states in the United States of America. Here, doctrines described as "fulfilling the reasonable expectations of the insured" and "disallowing the insurer any unconscionable advantage" are well established.¹² This follows from an early recognition of the contract of insurance as a "contract of adhesion" par excellence¹³; in other words, as one of the classic cases in which there is absolutely no chance of the

10 See, Newsholme Bros. v. Road Transport and General Insurance Co. [1929] 2 K.B. 356, a case really on parole evidence rule. For further details see Chapter Six above pp. 375-376.

11 A notable exception is the judgment of Farwell L.J. in Re Bradley and Essex and Suffolk Accident Indemnity Society [1912] 1 K.B. 415. Common law courts exercise significant control over freely negotiated contract terms through the process of interpretation.

12 See, especially, Keeton, "Insurance Law Rights at Variance with Policy Provisions", (1970) 83 Harv. L.R. 961 and 1281. See generally, Hasson, "The Special Nature of the insurance Contract: A Comparison of the American and English Law of Insurance", (1984) 47 M.L.R. 505, 517-519

13 See, generally, Kessler, "Contracts of Adhesion - Some Thoughts About Freedom of Contract", (1943) 43 Colum. L.R. 629; J Birds op. cit., pp. 170-172.

insured bargaining over the terms of the contract. This approach was followed by the Supreme Court of New Jersey in Gerhardt v. Continental Insurance Companies.¹⁴ The plaintiff held a householder's comprehensive insurance policy issued by the defendant. A section of the policy provided for indemnity against any sums which the insured would become legally liable to pay to a third party for personal injury or property damage arising out of his occupation of his house, but set out on a separate page were certain exclusions to this section, one of which provided that the cover did not apply with respect to bodily injury to a resident employee arising out of and in the course of his employment by the insured. Such an employee was injured in the insured's house and sued the insured who called upon the insurer to conduct her defence. The insurer relied on the exclusion but it was held that they were not entitled to do so. Read by itself, the exclusion appears to have been clear and, on ordinary principles of construction, applicable. However, the court said that, on a simple reading of this policy, which was prepared unilaterally by the company and sold on a mass basis as affording broad coverage to home owners, the average insured noting the section covering third party liability, would assume that an injury to a domestic employee was covered. The exclusion was not conspicuous and the cover was described as comprehensive, and, while the insurer had the right to exclude particular types of liability, the doctrine of honouring the reasonable expectations of the insured required that it did so unequivocally.

If a "reasonable expectation of the insured" test had been applied to for example, the English case of Samuelson v. National Insurance and Guarantee Corp. Ltd.¹⁵, the insured would probably have been covered, without

14 [1967] 1 Lloyd's Rep. 380.

15 [1984] 3 All E.R. 107

the need to construe difficult, unclear and fairly standard terms in a motor policy. In this case, the plaintiff left his car with a repairer and in the course of the repairs, the latter drove the car to the premises of the sole agent for that type of car in order to obtain spare parts. The car was parked nearby. While the repairer was away from the car, it was stolen and was never traced. The plaintiff had insured the car against such loss with the defendants and claimed its value from them. The appropriate terms of the policy were contained in the policy, in the schedule to it and in the certificate of motor insurance referred to in it. In resisting the claim by the plaintiff, the insurers relied on the fact that the general exceptions in the policy excluded liability when the car was being driven or, for the purpose of being driven, was in the charge of anyone other than the insured. Furthermore, they contended that the certificate stated that the car should be used for social, domestic and pleasure purposes only and this excluded the use of the car for "any purpose in connection with the Motor trade" and excluded driving by anyone other than the insured. The plaintiff argued that he was entitled to recover because paragraph 1(a)(i) of the general exceptions provided that the exclusions of use for purposes in connection with the motor trade was not to prejudice the indemnity to the insured whilst the vehicle was in the custody or control of a member of the Motor Trade for the purposes of its repair. This produced an ambiguity. The judge found for the insurers, agreeing with their argument that the policy distinguished between use of the car and driving of it, and was never intended to apply when anyone other than the insured was driving it or, as in the circumstances, had charge of it for that purpose¹⁶. However, the decision was reversed on appeal with some slight indication that the judges considered

16 Ibid. per Esyr Lewis J. at 110.

the insured.^{15A} It was decided that the function of paragraph 1(a)(i) of the general exceptions is, as appears from its own wording, to ensure that an exclusion of use for any purpose in connection with the Motor Trade should not prejudice the indemnity to the insured while the car in question is in the custody or control of a member of the Motor Trade for the purpose of being repaired. It was established that at the relevant time when the car was stolen, it was in the repairer's charge for the purpose of its repair^{15B}. The above provision of the policy seems to contemplate that cover under the policy will ordinarily be applicable in such circumstances.

The doctrine of honouring reasonable expectations can be said to be the desirable in so far as it might cause insurers to clarify their policies. But decisions of this nature depend entirely upon cases coming before the courts for adjudication¹⁷. The principle therefore is vague and it is impossible to predict the result on the facts of any particular case. It is most unlikely that an English court would adopt such an approach. Far better, it is submitted, would be a regime of prior approval of policy forms within the guidelines laid down by statute.

In France and Cameroon, policies of insurance, as we observed^{17A} in Chapter Two, are subject to the approval of the Sub-Department of Insurance of the Ministry of Finance whose business it is to rectify any anomalies in

15A [1985] 2 Lloyd's Rep. 541 esp. at p. 544.

15B Ibid. at pp. 542, 543 and 545 Note that there was more than one purpose, that is, the purpose of repair and the purpose of driving, but on the approach adopted in Seddon v. Binions and Others [1978] 1 Lloyd's Rep. 381, see infra pp.438-439, regard should be had to the primary purpose which was plainly the purpose of repair - driving was contemplated as an activity incidental to the process of repair.

17. The contingency fee system in the United States of America encourages litigation much more than in England. In this regard the doctrine of reasonable expectation is a workable principle in that system.

17A Supra, pp.65 and 83.

the policy provisions. The legislature frequently intervenes in the formation of contracts and places many restrictions on the freedom of parties to bargain as they will¹⁸. There does not exist in the common law any general requirement that a contract satisfy certain "minimum decencies"¹⁹ in order to be enforceable nor can the court overtly reconstruct the contract to supply such minimum decencies. Instead the court purports only to construe the contract, in order to ascertain what the parties intended. The search for the intention of the parties is a method used in common with the Anglo-American systems but the express incorporation of good faith²⁰ and general usage into the process of interpretation in civil law are departures from the ostensible common law method. The most important rules of construction therefore in France and French-speaking Cameroon are that contract terms must be interpreted in order to give effect to the real intention of the parties rather than to the literal meaning of the language used and that in the interpretation of contracts both good faith and general usage are factors that must be considered. In addition, the nature of the contract and the goals sought by it are weighed heavily in the process of interpretation²².

18. The normal method by which the legislature itself controls the terms of insurance policies is, however, through the enactment of insurance contract codes: legislation on insurance contract primarily serves the purpose of fixing rules of law. The law of July 1930 applicable in French-speaking Cameroon and which has been codified in France in the Insurance Code of 1976 has restored to a certain extent the balance between the parties in protecting the insured by interfering extensively with insurance contract terms.

19. The expression is borrowed from Llewellyn, Book Review (1939) 52 Harv. L. Rev. 700 at 703.

20. Article 1134 of the Civil Code.

21. Gabriel Marty and P. Raynaud, Droit Civil - Les Obligations, Vol.1, 1962, para. 219 at pp.208-209.

22. Article 1157; see generally, Nicolas Jacobs, op.cit., pp.81-83.

In determining the extent of coverage of insurance contracts, the fact that the contract is intended to provide security is thought to justify the extension of coverage in doubtful clauses²³. The role of the court is to apply the law and on the whole to affectuate the "will" of the parties. Judicial action serves to determine whether the contracts comply with legislative standards and to enforce them to the extent that they do. In this respect the civil law judge has more extensive authority than the common law judge. It should be noted that what the common law judge does covertly, his civil law counterpart is authorised by statute to do overtly.

It is not intended to cover all the rules of construction²⁴ and we will in the following pages look at some of the canons used by the courts in England, France and Cameroon.

1 Previous interpretation

In England, France and Cameroon the proper construction to be placed on words is a matter of law for the court²⁵.

Consequently in England, as with all questions of law the ordinary rules of the doctrine of precedent apply. Once a word or phrase has been judicially considered, that decision should be followed according to the usual rules of precedent²⁶. It is thus of overriding consideration in construing any phrase or form of words in a policy to enquire whether these have been the subject

23. Spencer L. Kimball and Werner Pfennigstorf, "Legislative and Judicial Control of the Terms of Insurance Contracts: A Comparative Study of American and European Practice". (1964) 39 Indiana L.J. 675, 772.

24. For a comprehensive list, see E.R.H. Ivamy, General Principles of Insurance Law, 1979, 4th ed., London, Butterworths, Chapter 35, pp.353-393.

25. Simmonds v. Cockell [1920] 1 K.B. 843; Starfire Diamond Rings Ltd. v. Angel [1962] 2 Lloyd's Rep. 217 at 219; In France, see generally, Sir Otto Kahn-Freund, Claudine Lévy and Bernard Rudden, op. cit., at p.99.

26. Lane (W.J.) v. Spratt [1970] 2 Q.B. 480 at 491-193 per Roskill.

of any prior decision by a court. The court interpreting the words which have already been the subject of construction will either be bound to follow the previous court's interpretation or strongly be persuaded to do so. When a higher court has placed an interpretation upon a phrase to be construed, an inferior tribunal has no option but to follow that interpretation²⁷.

In France and the French-speaking Cameroon, though Stare decisis is not an official doctrine of the law, the weight of a well considered case by the Cour de cassation in the former and the Supreme Court in the latter may be very considerable indeed and in the interpretation of policies it may be decisive²⁸. However, this rule of interpretation is practically difficult to follow in Cameroon because of the lack of regular law reporting²⁹.

2. Ordinary meaning

As a general rule, in England, France and Cameroon, the words to be construed are given their ordinary and proper meaning³⁰. The parties to the contract must be taken to have intended as reasonable men, to use words and phrases in their commonly understood and accepted sense. In a case in Cameroon, Royal Exchange Assurance v. Layu³¹ the Court of Appeal was faced

27 Ibid at pp.491-492 per Roskill J.; Fraser v. Furman(B.N.) (Productions) [1967] 1 W.L.R. 898; Woolfall and Rimmer v. Moyle [1942] 1 K.B. 66; See also, Bankes L.J. in Re Hooley Hill Rubber and Royal Insurance Co. [1920] 1 K.B. 257 at 269.

28. Spencer L. Kimball and Werner Pfennigstorf op.cit., at p.722.

29. See further discussion on this in the introductory chapter, p.23 and the General Conclusion, p.507.

30. Robertson & Thomson v. French (1803) 4 East. 130 at 135; Thomson v. Weems (1884) 9 App. Cas 671 at 687; Young v. Sun Alliance and London Insurance Co. [1977] 1 W.L.R. 104; Anderson v. Norwich Union Soc. Ltd., [1977] 1 Lloyd's Rep. 253; For a good example, see the construction of "left unattended in a jewelry block policy in Starfire Diamond Rings Ltd v. Angel, [1962] 2 Lloyd's Rep. 217 at 219.

31. (1973) Suit No. BCA/8/73, Bamenda, (Unreported) (English-speaking Cameroon).

with the interpretation of the words "no-claims bonus". The plaintiff/respondent insured his car comprehensively with the defendant/appellant Royal Exchange Assurance. The policy issued by the insurer contained a no-claim bonus clause which stated:

"In the event of no-claim being made or arising under this policy during a period of insurance specified below immediately preceding the renewal of the policy, the renewal premium for such part of the insurance as is renewed shall be reduced ...".

The plaintiff/respondent, after driving his car for one year without making a claim, renewed his policy with the defendant/appellant, but limited the cover to third party liability only. He then wrote to his insurers for "no-claim bonus" to be calculated at 10 per cent as provided by the policy. The point at issue was whether the 10 per cent "no-claim bonus" was to be calculated from the premium of the preceding year or from that of the renewal premium. The respondent contended that the bonus was to be calculated on the basis of the premium paid for the preceding year in which he had made no claim. The Court of Appeal held that the respondent's contention was unfounded and entered judgment for the appellant. Justice O.M. Inglis said:

"What we are in effect asked to do here is to interpret this "no-claim bonus" clause in the policy. This should present no difficulty since the words which are used in the clause must be understood in their plain, ordinary and popular sense, unless they have generally in respect of the subject-matter, as by the known usage of trade or the like, acquired a peculiar sense different from the popular sense of the words or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract be understood in some other peculiar sense ...

The clause means in effect that if no claim arose out of, or was made under the policy in respect of the preceding year of insurance, the insured is entitled to a bonus, which is worked out on the renewal premium for such part of the insurance as is renewed for the current year. This bonus is then calculated by taking a given percentage of the renewal premium of the renewed insurance and reducing the renewal premium by that amount of such percentage."

Similarly, in France and French-speaking Cameroon, if a clause of a contract is claire et précise the very attempt to interpret these words is a violation of law³².

However, the presumption that words in a policy should receive their ordinary, natural and unrestricted meaning is displaced if it can be shown that they are legal terms of art, or they have acquired a special meaning by force of long usage in a particular trade or business or the context in which they appear compels a restricted or modified meaning to be given to them³³. In this respect articles 1158 to 1160 of the Civil Code provide some guidance in the law of France and French-speaking Cameroon. Article 1158 provides that:

"Terms susceptible to two senses ought to be taken in the sense which is most suitable for the subject-matter of the contract."³⁴

Further article 1159 states:

"That which is ambiguous is interpreted by the usage in the region where the contract was made."³⁵

Finally article 1160 enacts that:

"Clauses which are customary are to be supplied in the contract even though they are not expressed there."³⁶

32. Sir Otto Kahn-Freund, Claudine Lévy and Bernard Rudden, op.cit., at p.99.

33 Clift v. Schwabe (1846) 3 C.B. 437 at 649.

34 John H. Crabb, op. cit., at p. 224.

35 Ibid.

36 Ibid.

3. Businesslike Interpretation

In England, it is an accepted canon of construction that a commercial document such as an insurance policy, should be construed in accordance with sound commercial principles and good business sense, so that its provisions receive a fair and sensible application. The literal meaning of words is not permitted to prevail where it would produce an unrealistic and generally unanticipated result as, for example, where it would absolve the insurer from liability on the chief risks sought to be covered by the policy³⁷. The language used must be interpreted having regard to the business nature of the transaction. The real question is what the legal effect of the agreement is on the commercial object or function of the clause and its apparent relation to the contract as a whole. An analogous principle of interpretation could be found in the Civil Code of France and the French-speaking Cameroon. Article 1157 provides that:

"When a clause is susceptible of two meanings, it must be understood in the one in which it can have some effect rather than in the sense in which it could not produce any."³⁸

Some standard conditions in insurance policies require the insured to take reasonable precautions or care to avoid loss. Such a clause construed

37 Fraser v Furman (B.N.) Productions [1967] 1 W.L.R. 898.

38 John H. Crabb op. cit., at p.224

literally would negate a large part of the cover intended to be effected, since one of the major purposes of liability insurance is to insure the insured against liability in negligence, and negligence is a failure to take reasonable care when a duty of care is owed. In Fraser v. Furman(B.N.) (Productions)³⁹ the Court of Appeal construed such a condition so that only recklessness on the part of the insured would amount to a breach of this condition. The insured's omission or act "must be at least reckless, that is to say, made with the actual recognition by the insured himself that a danger exists, and not caring whether or not it is averted. The purpose of the condition is to ensure that the insured will not, because he is covered against loss by the policy, refrain from taking precautions which he knows ought to be taken."⁴⁰ Reasonable care does not mean reasonable as between the insured and a third party but as between insured and insurer having regard to the commercial purpose of the contract which includes indemnity against the insured's own negligence. This interpretation was given in the Cameroonian case of S.O.R.A.R A F v. Micheal Zeno Bassok.⁴¹ The respondent insured his taxi against third party liability, fire and theft. The taxi was parked at the respondent's premises as usual and it caught fire. The police investigation disclosed that the fire was purely accidental and an experts' report disclosed that the fire was caused by short circuit of electricity. The appellants repudiated liability on the ground that article 15 of the insurance policy excluded liability in case of fire caused by short circuit of electricity. The court, in construing the policy as a whole and the

39 [1967] 1 W.L.R. 898; See also Woolfall and Rimmer v. Moyle [1942] 1 K.B. 66.

40 Ibid, at p.906, per Diplock J.

41 (1976) Civil Appeal No. CASWP/25/76, Buea, (Unreported). (English-speaking Cameroon.)

purpose of the contract, rejected the exclusion clause as this would defeat the object of the contract. The court said, as regards perils covered under a fire insurance policy, "The cause of the fire is immaterial, unless it was the deliberate act of the insured himself or someone acting with his knowledge or consent. Loss by fire caused by the insured's negligence is covered ... To recover under a fire policy it must be proved that the loss claimed was proximately caused by fire, that is, that it was the reasonable and probable consequence of fire ..." The court considered it unconscionable to uphold the repudiation of liability based on article 15 of the policy.

It is interesting to note here that the court, in giving effect to the contract, was in some way recognising the fact that a reasonable insured would have expected himself to be covered by such a policy.⁴²

4. Construction to avoid unreasonable result

In England, France and the Cameroon, if the wording of a clause is ambiguous and one reading produces a fairer result than the alternative, the reasonable interpretation should be adopted. It is to be presumed that the parties, as reasonable men, would have intended to include reasonable stipulations in the contract. In this respect, as well, the rule of interpretation, stated in article 1157 of the Civil Code referred to above, lends support. Further, article 1135 adds that:

"Agreements obligate not only for what is expressed therein, but also for all the consequences which equity, usage or the law gives to an obligation according to its nature."⁴³

42 See supra, p.419.

43 John H. Crabb op. cit., at p.221

In the Cameroonian case of Paul Salle v. Elsen Hans, Presbyterian College Nyasosso and Royal Exchange Assurance⁴⁴ the High Court was called upon to interpret a clause in an insurance policy which excluded the insurers from liability if death or bodily injuries arose out of, and in the course of the claimant's employment. The plaintiff was injured in a car accident, the car being driven at the time by the first defendant. The car was insured by the third defendants who filed a defence in which they did not deny that the car had been negligently driven at the time of the accident, but sought to rely on a clause in the policy which exempted them from liability. The clause stipulated that:

"Subject to the limits of liability, the company will indemnify the insured in the event of accident caused by or arising out of the use of the motor car against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of: (a) Death of, or bodily injury to any person except where death or injury arises out of, and in the course of the employment of such person"

At the time of the accident, the plaintiff was a member of a party of teachers and their wives from the Presbyterian College Nyasosso, on their way to a holiday excursion in Douala. The trip was paid for by contributions from members of staff of the college. The High Court held in the circumstances that a reasonable construction of the clause did not exempt the insurers from liability under the contract because the plaintiff could not be reasonably said to have been in the course of his employment at the time of the accident.

44 (1971) Suit No. WC/77/71 Kumba High Court, (Unreported). (English-speaking Cameroon.)

Even though the wording of a condition in a policy is apparently plain, the court will sometimes narrow its scope or place a gloss on its words in order to make it reasonably applicable. So where a policy contains a condition requiring that "every claim, notice, letter, writ or process served on the employer shall be notified or forwarded to the Association immediately on receipt", the words "immediately on receipt" have been construed to mean "with all reasonable speed".⁴⁵ In this case, the element of ambiguity arose from the fact that an absolute literal interpretation would have produced results which were not merely unfair but quite impracticable. Therefore, some gloss on the words became essential.

5. Contra Proferentem

The insurance company which frames the documents is bound to make its meaning as clear as possible in order to prevent insurers being misled with a belief that they are to receive benefits to which in fact they are not entitled and this especially applies to conditions, the breach of which may create forfeitures. The consequence is that if there is any ambiguity in the language used in a policy, it is construed against the insurer.⁴⁶ A party who proffers an instrument cannot be permitted to use ambiguous words in the hope that the other party will understand them in a particular sense. Written words may be the language of the insured, as, for instance, where the description of the property or limits of the risk are taken verbatim from the

45 Re Coleman's Depositories Ltd. and Life and Health Assurance Ass. [1907] 2 K.B. 798 at 807.

46 English v. Western [1940] 2 K.B. 156 at 165; Provincial Insurance Co. v. Morgan [1933] A.C.; Re Bradley and Essex and Suffolk Accident Indemnity Society [1912] 1K.B. 415 at 422. For the rule of contra proferentem in French general contract law see article 1162 of the Civil Code.

proposal. In such cases the rule that the instrument is to be construed against the party who prepared it is likely to operate in favour of the insurer.

In construing a contract of insurance it is important to observe that the questions in the body of the proposal are framed by the insurer. If an answer is obtained to a question which is, upon a fair construction a true answer, it is not open to the insurance company to maintain that the question was put in a sense different from or more comprehensive than that which the proponent's answer covers. Where an ambiguity exists, the contract must stand if an answer has been made to the question on a fair and reasonable construction of the question. In the Cameroonian case of Agence Camerounaise d'Assurance v. Simon Oshijirin⁴⁷ the respondent insured his taxi with the appellant insurance company for commercial purposes and paid the premium and received a cover note to the effect that he was covered for the commercial use of the vehicle. Whilst the car was being used as a taxi it became involved in an accident wherein damage was caused to a house. The insurance company contended that the car was not insured as a taxi but for private and business purposes only. When the appellant, a French company in Douala, received the proposal form written in English and saw the word "commercial" the clerk who dealt with the preparation of policies translated it as Affaire and drew up the policy for "Affaire et promenade". Thus, when the respondent reported the accident, the appellant perused the policy and came to the conclusion that the company was not liable, as the written words in the proposal and cover note revealed the intention of the parties when they entered into the contract. The ambiguity thus created by the translation in the policy was construed against the insurance company.

47 (1971) Appeal No. WCCA/9/70, Buea, (Unreported). (English-speaking Cameroon.)

The principle of fair and reasonable construction is applied to answers given by the insured to questions on the proposal form. If on such construction an answer is found to be ambiguous, the contract may be avoided even though, upon a literal construction of the words used, the answer is unambiguous. It is the duty of the court to determine the limits of reasonable interpretation. This canon of construction is nothing more, however, than an aid to construction in the case of ambiguity and ought not to be used for the purpose of creating an ambiguity where none exists.⁴⁸ If the terms ascertained from the documents are unambiguous in themselves and independently consistent with each other, effect must be given to each according to its tenor.

In most statements of the rule of construction contra proferentem, it has been justified by the fact that the insurance company drafted the contract. When the basis for the rule disappears and when the policy is subject to administrative control, there seems to be reason to reconsider and perhaps to abrogate the rule. Thus it would appear that the standard policy provisions that are left partly free to be drafted by insurance companies should not be construed against the insurance company but in accordance with the fair meaning of the language they contain. In Cameroon, as we have already seen, insurance policies are approved by the state and they are required to make necessary corrections and modifications as they think fit. Arguably, therefore, the contra proferentem rule should be applied sparingly against insurance companies under such a system.

48 London and Lancashire Fire Ins. Co. v. Bolands [1924] A.C. 836 at 848; see also Cole v. Accident Ins. Co. (1888) 5 T.L.R. 736 at 737. "... one must not use the rule to create the ambiguity - one must find the ambiguity first."; Alder v. Moor [1961] 2 Q.B. 57 per Sellers J. at p.60.

III CONDITIONS AND EXCEPTIONS IN MOTOR INSURANCE POLICIES

The general layout of English, French and Cameroonian policies is similar in so far as they relate to third party risks. They open with a broad statement of the risk covered. This is then qualified by diverse clauses, most of which have the effect of reducing the cover.

A typical English policy states that the insurer will indemnify the insured against liability at law for damages and claimant's costs and expenses in respect of death or bodily injury to any person and damage to property where such death, injury or damage arises out of an accident caused by or in connection with a vehicle.⁴⁹ Similarly, in France and Cameroon, the insurer covers the insured against pecuniary consequences of liability that he may incur by reason of damage to persons and property caused in the course of the use of the insured vehicle.⁵⁰ The clauses reducing the insured's cover may fall into certain well-defined categories, namely, clauses relating to the driver, the condition of the vehicle and the use of the vehicle. These may be expressed in the policy in the form of a condition, warranty or in respect of France and Cameroon, aggravation du risque or as an exception in the policy.⁵¹

In England, France and Cameroon, the standard terms and conditions found in motor policies are relevant to both compulsory and non-compulsory insurance. As we have already seen in Chapter Three, some of them may not be enforceable against a third party victim where insurance is compulsory.⁵²

49 See Guardian Royal Exchange Assurance Motor Insurance Policy.

50 See in France, André Besson, Les conditions générales de l'Assurance de responsabilité automobile obligatoire (1960), Paris, p.10-11.

51 See further, Chapter Five, supra pp.326-345.

52 See supra, pp.211-213.

However, they remain of effect between insurer and insured. The insurer who has had to pay the third party, may later be entitled to recover any sums of money from the insured. The conditions in respect of the use of the vehicle considered below are enforceable against a third party because they are not within the listed categories of conditions provided in the proviso to section 148 of the Road Traffic Act 1972. However the third party victims are entitled to recover from the Motor Insurers' Bureau, and, therefore, the distinction made by section 148 of the Road Traffic Act 1972 is redundant.

In England, France and Cameroon, motor insurance policies usually cover other permitted drivers of the insured vehicle mentioned in the contract by the insured. In England, by virtue of section 148(4) of the Road Traffic Act 1972 ,

"... a person issuing a policy of insurance under section 145 of this Act shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons."

It should be noted that the subsection refers to "a person issuing a policy under section 145" which, of course, concerns only compulsory insurance. However, it is further stated that the insurer must indemnify the third party "in respect of any liability which the policy purports to cover." In this respect if the policy satisfies section 145 of the Road Traffic Act 1972, it is arguable that the third party will be covered by it in respect of any third party liability within the policy's terms, unless there is anything to the contrary in the policy.⁵³ In Cameroon and France, the

53 For the effect of the EEC Directive No. 84/5/EEC: Second Council Directive of 30 December 1983 on the approximation of laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles (O.J. 1984, L8/17), see supra, Chapter Three, pp.211-212.

obligation to insure a motor vehicle extends to personal injury and damage to property of any third party. Further, article 13 of the law of July 1930, provides that the insurer is liable for losses and damage caused by persons for whom the insured is civilly responsible by virtue of article 1384 of the Civil Code.

Naturally, insurers do not wish to cover incompetent drivers. In this respect, policies in England, France and Cameroon make it a condition of liability that the driver of the vehicle should possess a valid driving licence, breach of which results in the repudiation of the policy.

Generally, motor insurance policies provide that the insurers are not to be liable when the insured vehicle is being driven in an unsafe or unroadworthy condition and/or if the insured fails to maintain the vehicle in an efficient and roadworthy condition. Furthermore, insurers have usually established various categories of permitted use of an insured vehicle. These vary from, for example, use covering social, domestic and pleasure purposes, use by the insured for travel to and from his place of business and use by the insured in person or use by others in connection with the insured's or his employer's business. Where a vehicle is insured for any of these purposes, a deviation in the use of the vehicle may well result in breach of the contract. This is enforceable even against an injured third party. In England, these provisions may be drafted as exceptions to the risk or found under the heading conditions so that they may be interpreted as conditions precedent or possibly promissory warranties. The effect of having such clauses as warranties, as we saw in Chapter Five⁵⁴, is that there need not be any causal connection between the breach of the clause and a loss, and the

54 Supra, pp.335-336 and pp.355-356.

insurers may repudiate the contract and recover from the insured, as damages for breach of a condition, the money which he has had to pay to a third party.

In Cameroon, the above clauses are drafted in the policies as an aggravation du risque, in which case a breach of any of the stipulations render applicable the provisions of articles 21 and 22 of the law of July 1930.⁵⁵ Where the vehicle is in an unroadworthy condition or is being used other than for the purposes for which it is insured, this is considered as an increase of risk which has to be declared to the insurer for an augmentation of the premium. In the event of a failure to do so and of a claim being made, the policy may be rendered null, in application of article 21 of the 1930 law where bad faith of the insured is proved, or the indemnity awarded to the insured may be reduced according to application of article 22 of the 1930 law where bad faith is not established.

However, the insertion in Cameroon policies of the principle of aggravation du risque produces disparity in the application of the law in the English-speaking and French-speaking Cameroonian courts. Despite these provisions in the policies in Cameroon, the courts in English-speaking Cameroon follow English law principles. This will be considered below.

In England, in the case of Clarke v. National Insurance and Guarantee Corporation⁵⁶, a four seater car was driven with nine people in it. The Court of Appeal held, allowing the insurer to repudiate liability that the

55 For a full discussion on the effect of these provisions, see Chapter Five, pp.348-351 and pp.355-356.

56 [1964] 1 Q.B. 199.

car was thereby rendered unroadworthy,⁵⁷ although, with the normal number of people in it, it would have been quite safe. A similar approach was adopted by the English-speaking court in the case of Royal Exchange Assurance v Raphael Ekane,⁵⁸ where a goods only vehicle was so heavily loaded that an accident ensued. The court held that the insurers were entitled to repudiate liability as the insured was in breach of a condition in the policy as to the capacity of goods to be carried on the vehicle, the breach of which rendered the vehicle unroadworthy. In contrast, in the French-speaking Cameroonian case of M. Kamden Joseph v. Kondo Samuel and S.O.C.A.R.,⁵⁹ a commercial vehicle was insured to carry nine persons. An accident ensued and it was found that the vehicle was carrying more than the stated number of persons for which it was insured at the time of the accident. This was held by the court as a case of surcharge and the insured's indemnity was reduced accordingly.

Furthermore, in England and English-speaking Cameroon, where a vehicle has been insured for social, domestic and pleasure purposes and is later used for business purposes, the insurer is entitled to repudiate liability.⁶⁰ It would appear that where the purposes of the journey are mixed, for example, an insured covered for social, domestic and pleasure purposes and not for

57 Note that unroadworthiness does not relate to just the mechanical condition of the vehicle, but can include other relevant factors; by analogy to marine cases, in which overloading can render a ship unseaworthy.

58 (1975) Civil Appeal No. CAWP/9/75 of July 1975, Buea, (Unreported); see also, Aben and Aben v. Fomenky Enterprises, Suit No. HCK/2/77 of 28 August 1978. Kumba (Unreported).

59 (1976) Civil Judgment No. 175 of 5 April 1976 Nkongsamba, (Unreported). See also, Djimeli Boniface v. Cie d'Assurances "Le Patrimoine", (1976) Civil Judgment No. 175 of 5 April 1976, Douala, (Unreported).

60 For example, in England, see Wood v. General Accident, Fire and Life Assurance Corporation Ltd., (1948) 82 Ll. L.R. 77.

business purposes used the car to travel to a business meeting followed by a social dinner, would not be covered if the car was partly being used for an unauthorised purpose.⁶¹ It seems clear that in the French-speaking Cameroon the rule of proportionality would be applicable where appropriate.

However, in Cameroon, where the policy is repudiated by the insurer for breach of conditions or an aggravation du risque, the third party victims are entitled to an indemnity from the Motor Insurance Fund which, as we saw in Chapter Four, indemnifies victims of motor accidents where a policy has become ineffective by virtue of article 12 of Law No. 67-DF-495 of 17 November 1967.

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61 Seddon v. Binions and others [1978]1 LLOYD'S Rep. 381

CHAPTER 8

THE SETTLEMENT PROCESS

I INTRODUCTION

The settlement of insurance claims, particularly from the point of view of any policyholder, is the ultimate fulfillment of the insurance contract.¹ The purpose of this chapter is to deal with yet another aspect of the settlement process - settlement out of court. It is clear that claimants scarcely resort to civil litigation and would prefer to settle by a machinery out of court. This has often been pointed out² in relation to tort claims following accidents on the road or at work which in practice will involve negotiation between an injured plaintiff and the defendant's insurers. This sort of out of court settlement has been formalised in relation to disputes between insured and insurers.^{2A} *The reasons for these are dictated by a variety of factors and considerations.*

1 It has been recognised that the wording of policies is not normally seen as important by policyholders until a claim arises and at that time it is examined simply with the object of discovering whether a particular event is effectively insured. See, the Insurance Ombudsman Bureau, Annual Report, 1983 p.9

2 Report of the Royal Commission on Civil Liability and Compensation for Personal Injury, (Chairman: Lord Pearson) Vol. 2 Table 24, Cmnd. 7054-11 London H.M.S.O. 1978; Winn Committee Report, Personal Injuries Litigation, Cmnd. 3691, London H.M.S.O. 1968 paras 117 and 118; T.S. Ison, The Forensic Lottery, 1967 London, Staple Press p.155 note 5; P.S. Atiyah, Accidents Compensation and the Law, 3rd ed., 1980 at p.296

2A See infra pp.444-466.

II FACTORS AND CONSIDERATIONS DETERMINING SETTLEMENTS OF INSURANCE

CLAIMS OUT OF COURT.

Settlements out of court appear to be predominant, especially in cases in which liability is not in dispute and a claim is made merely to determine the quantum of damages. In such cases therefore, the insurance companies may make a payment into court, awaiting acceptance by the claimant or suggest negotiation of the amount of damages. The incentives to such proposals are fear of the risk involved and the necessary cost of a judicial hearing.³ The contestants of the negotiation process may be the solicitors of the plaintiff or the claimants themselves and solicitors of the insurance companies or the insurance adjusters each acting for one of their parties. They are then placed in a bargaining position⁴ and confronted with risk averse behaviour. On the part of the claimant, a decision on whether to accept an offer from an insurance company involves some consideration and notion of what his claim is worth. This entails some predictive judgment of what a court would do if confronted with the case. There are two perspectives to this prediction. First, an assessment of the strength of the claimants case on liability; second, a forecast of the amount of damages. The legal adviser has to contend with the probable outcome in the first situation, though on the

3 Usually, assisted litigants, that is, those obtaining legal assistance often agree on a fair compensation settlement for reasons observed below - pp.441-443.

4 For notable examples of insurers bargaining with the government to secure private agreements see, Richard Lewis, "Insurers' Agreements not to Enforce Strict Legal Rights: Bargaining with Government and in the Shadow of the Law", (1985) 48 M.L.R. pp. 275 - 291. Private bargaining within the criminal justice system has also been explored, see: J Baldwin and M McConville, Negotiated Justice: pressures to plead guilty, 1977 Law in Society series, London; A.E. Bottoms and J.D. McClean, Defendants in the Criminal Process, 1976, London, International Library of Social Policy.

question of the amount of damages, he is less likely to be without some knowledge of the judicial tariff, as a result of his study of the various publications which report the amounts awarded as damages, his knowledge of current judicial practice, his experience and acquaintance with other members of the profession.

Furthermore, the trial process is characterised by delay and the claimant confronts the possibility of not receiving any compensation except social security benefits while, as a result of his injury, his earning capacity is possibly reduced and his expenses may be increased. On the other hand, the insurance companies almost invariably would prefer to settle claims brought against their clients for better public impression. Moreover, most claims made are small from the insurance company's point of view in relation to the large number of risks pooled; the insurance companies are more likely to be risk averse where a small sum is involved since only a small proportion of their wealth is at stake. They regard small claims as a nuisance to be settled quickly because the administrative costs may be very high relative to the size of the claim. In addition, both parties are faced with the potential costs in pursuing a claim further in the light of the probable result of a court judgment. Insurance companies have great experience in assessing what the outcome of the trial is likely to be and often make a discount in settlement offers, taking account of the probable cost of litigation. The claimant will usually accept an offer not because it is adequate but in recognition that settling the case at a smaller sum immediately represents the most prudent consideration, rather than proceeding with an uncertain litigation process with the expectation of a higher but less certain sum if the case ever went to trial. One important consequence, therefore, of the settlement process is that the claimant may receive less

than a court award. For these reasons recourse to the courts and ultimately trial of an action is rare.⁵ This behavioural attitude of litigants to the negotiation process has as much right to be regarded as part of the machinery of justice as the process of settling claims by trial as it bears a close affinity with the rational considerations involved in the court process and therefore cardinal to the principles of justice.

From this perspective, so long as pressure is not brought to bear on claimants to accept offers, the settlement of claims by negotiation serves a salutary purpose in legal systems primarily designed for attributing liability. In Horry v. Tate and Lyle Refineries Ltd.,⁶ the court established that there is a relationship between the victim and an insurance company settling on behalf of the tortfeasor which imposed on the insurers a fiduciary duty of care in the course of negotiations between the parties. Here, the court found that there was undue influence by the insurance company as they offered a considerably lower amount than that which would have been offered had the case gone to court and they failed to make the victim understand the true nature of the settlement⁷. In this respect they were in breach of their duty to the plaintiff and therefore the settlement could be set aside. This case demonstrates the potential interest an insurance company would exhibit in the settlement process.

Perhaps a better approach would be to retain tort with an independent settlement procedure concerned with negotiation of compensation. This

5 P.S. Atiyah, Accident Compensation and the Law, 3rd.ed., 1980 at p.296; see also, T.S. Ison, The Forensic Lottery, 1967, London, Staple Press, p.155 note 5; Pearson Report, op. cit., Vol.2 Table 24; Winn Committee Report, Personal Injuries Litigation, Cmnd. 3691, London H.M.S.O. 1968 paras 117 and 118.

6 [1982] 2 Lloyd's Rep. 416

7 Ibid. at pp. 420 -423

chapter, therefore, also serves a subsidiary purpose. It offers occasion for the necessary explanation of how self-regulation by the insurance industry can assist in redressing the balance between parties to an insurance contract without active government intervention.

III SETTLEMENT OF INSURANCE CLAIMS OUT OF COURT

One recent development has been the establishment by a number of insurance companies of the Insurance Ombudsman Bureau (IOB) in March 1981 and the Personal Insurance Arbitration Service (PIAS) in 1982. These measures were taken by insurance companies in recognition of the desirability of providing personal policyholders with a simple and effective independent procedure for speedily resolving disputes on their contracts. Perhaps, the most important consideration is the realisation that the Common Law of insurance with regard to personal insurance business has tended to favour the insurer as against the policyholder and this has been widely recognised as unsatisfactory⁸. Indeed, one could well argue that as the courts do not take into account the insurance industry's Statements of Insurance Practice, it is easy for an insurance company to win a case on a technicality. For this reason and for obvious financial considerations, it has often not been practicable for the aggrieved policyholder to gain satisfaction through the courts. We will in the following discussion see how the insurance industry has proceeded to establish separate arrangements as alternatives to the court system to determine contentious issues.

1. The Insurance Ombudsman Bureau

The Insurance Ombudsman Bureau was set up as an unlimited company

8 Supra, Chapter Five of this study pp.301-357.

without share capital⁹, governed by a Board of Directors. The Board¹⁰ appoints members of the Council¹¹, a majority of which are independent of the insurance companies concerned. The Council of the Insurance Ombudsman Bureau is responsible for the appointment of the Ombudsman for a renewable period of not more than two years. The Ombudsman is protected to some extent by the Council, of which at least four appointees are representatives of consumer interests chosen from consumer organisations such as the Consumer Association, the National Federation of Consumer Groups as well as the Citizens Advice Bureau. Two of the six members are insurance companies' representatives. The Chairman of the Council is also Vice Chairman of the National Consumer Council. This decision to appoint a Council Chairman of consumerist leanings may seem to negate any suggestion that the Insurance Ombudsman Bureau is operating within the industry. It was for the interest of consumers that this body was set up.

The Board decides the Bureau's annual budget and membership levy. This levy is split into two parts: half is calculated according to the member company's premium income and the other half according to the number of complaints brought against the insurance company. This appears to be a fair and equitable manner of financing the scheme as the first determination takes into consideration the share of the market represented by each member company whilst the second would, to some extent, ensure that the complaints that are

9 The cost of actually setting up the scheme was borne by the three founder member companies: Guardian Royal Exchange Assurance plc, General Accident Fire and Life Assurance Corporation plc and Royal Insurance plc.

10 The maximum number of members of the board is twelve and the minimum is three.

11 The Council is made up of not more than twelve and not less than six members.

brought to the Ombudsman are those which necessarily need his attention. This would provide a deterrent to frivolous references to the Ombudsman. Furthermore any argument that the less efficient companies are financing the more efficient companies would seem to be untenable.

The Ombudsman deals with complaints relating to personal insurance issued in the United Kingdom and taken out by a policyholder or by some person who has acquired legal title to it^{11A}. The Insurance Ombudsman Scheme is designed to provide a publicised, informal independent and free procedure for dealing with policyholders complaints, disputes on facts, liability and quantum and claims made in connection with or arising out of policies of insurance effected with member companies of the Bureau¹². In this, the Ombudsman acts as an independent conciliator, counsellor, arbitrator and adjudicator in cases involving disputes as to liability. However, it should be noted that the Ombudsman is not an arbitrator in the real sense^{12A} because he has no power to make an award which is binding on the insured party, although it is possible that the insured party may have a legal right to enforce his award against the insurer by virtue of the insurer's acceptance of the Articles of Association with the Bureau¹³. Where the Ombudsman's findings result in a monetary award, all member companies have agreed to

11A Persons pursuing third party claims against member companies are normally advised, according to the size of the claim, to consult a solicitor or Citizens Advice Bureau or to consider a claim in the courts.

12 See note 13 below.

12A See the Personal Insurance Arbitration Scheme below, pp.453-462.

13 See Abstract of the Bureau's Memorandum and Articles of Association and of the Ombudsman's Terms of Reference in the Insurance Ombudsman Bureau, Annual Report, 1981 pp. 28-29.

abide by the Ombudsman's decision up to a maximum monetary award of £100.000¹⁴ but policyholders can reject his decision if they wish, without prejudice to exercising their full legal rights against the insurance company. One may argue that this does not bring equity between the two parties to the insurance contract as one party, the insurer gives up all rights in favour of the decision by the Ombudsman and the other party, the insured, has nothing to lose and everything to gain¹⁵. This however, may be considered as a genuine will on behalf of companies which support the scheme to ensure that complaints are handled in an impartial manner. With respect to complaints involving two or more insurers the Insurance Ombudsman Bureau will be unable to adjudicate unless all the companies are in membership¹⁶. With respect to complaints and enquiries relating to non-member companies which are members of the Association of British Insurers and the Life Offices Association, an arrangement has been made for the Insurance Ombudsman Bureau to send enquiries on or refer the caller to the appropriate body¹⁷. If the Insurance Ombudsman Bureau had within its membership all companies dealing

14 Ibid.

15 This appears to be one of the reasons why initially some insurance companies did not consider that the Insurance Ombudsman Bureau was an appropriate service for them: Reply to inquiry dated 4 March 1985, from Mr. B.W. Vigrass, Director and Secretary, Chartered Institute of Arbitrators. See also, letter dated 27 February 1985, from P.N. Baker, Manager, Cornhill Insurance Group: one of the founder members of the Personal Insurance Arbitration Service.

16 See note 13 above; Note that half of all enquiries related to non-member companies: see Table 14 at p.451 of this study.

17 Complaints concerning an intermediary are referred to the British Insurance Brokers Association. Similarly all enquiries relating to industrial life assurance policies are forwarded to the Industrial Assurance Commissioner. The Insurance Ombudsman Bureau has thus become an unofficial clearing house for insurance consumer complaints.

with personal insurance, its ability to decide on such issues would have been greater.

Before a policyholder can take a complaint directly to the Ombudsman, all normal channels of negotiation with the member company must have been exhausted. This means that the complaint must have been considered not only by the branch office but also by the senior executive of the company concerned. This ensures that a genuine attempt is made to resolve disputes at responsible level. Thus it is still necessary to maintain company complaint services as they are better placed to conduct adequate investigation of disputes. In the event of a disagreement, the company will, in communicating its final decision, draw the policyholder's attention to the services provided by the Insurance Ombudsman Bureau. The policyholder then has up to a maximum of six months to refer a complaint to the Ombudsman¹⁸. When a complaint is made to the Ombudsman, he will require both parties to provide evidence in the form of documentation. If this is not sufficient to arrive at a conclusion he will carry out his own investigation. He does not rely solely on the cases put forward by policyholders and defended by companies. The Ombudsman's job is inquisitorial, not accusatorial or adversarial¹⁹. This enables him to inspect member companies' books, claim files and policy covers. In this way he is most likely to gather sufficient details concerning disputes which are brought for his consideration. He then decides whether the company's terms and conditions have been fairly applied by the company concerned.²⁰ In interpreting a

18 Any legal proceedings instituted by the policyholder must be withdrawn before a complaint can be considered.

19 The Insurance Ombudsman Bureau, Annual Report, 1983 p. 3.

20 See Appendix (i), Abstract of the Bureau's Memorandum and Articles of Association and the Ombudsman's Terms of Reference in the Insurance Ombudsman Bureau, Annual Report, 1981 at p.28.

member company's standard policy, the Ombudsman can hold the insurance company bound by the terms of the contract but not the insured.²¹ If this is as a result of uncertainty or lack of clarity in policy terms one may consider this reasonable, as the Ombudsman is meeting reasonable expectations.²² Furthermore, in the determination of disputes the Ombudsman is required to act in conformity with any applicable rule of law or relevant judicial authority, codes of practice, standards of insurance practice, his Terms of Reference and general principles of good insurance practice.²³ The two latter considerations have been criticised²⁴ as ambiguous as there is no indication of what should take priority in the event of conflict²⁵. It is argued²⁶ that as the Ombudsman is not confined to strict legal principles and can go beyond the terms of policies and Statements of Insurance Practice, his decision will be based on wider considerations than the applicable law and agreed Statements of Insurance Practice. Consequently, this will result in an undesirable element of uncertainty in insurance practice. However, it is

21 See, for example, Item No. 1, Annex II to Insurance Ombudsman Bureau, Annual Report, 1981 pp. 21; For the interpretation of policies generally see Ibid., at p.11 and the Insurance Ombudsman Bureau, Annual Report, 1984 p. 7.

22 See supra, Chapter Seven on the Construction of Insurance Contracts pp.418-421.

23 See note 20 above; For examples of these, see, cases 3 and 25 in Annex 1 to the Insurance Ombudsman Bureau, Annual Report, 1983 pp. 4-8.

24 Working party report, Complaints Procedure - An Alternative to the Insurance Ombudsman Bureau, 24 June 1981 para 3.5

25 Contrast the Personal Insurance Arbitration Scheme, infra, pp.458-459.

26 Working Party report, op. cit., para 3.5. Note also that this is one of the features of the Ombudsman Scheme which caused concern among insurers who refused to join the scheme.

arguable that since the Ombudsman is required²⁷ to collaborate with any government bodies, consult with other companies and seek independent expert opinion relating to complaints involving specialist areas, some element of uniformity within the industry may be enhanced. Undeniably, discretion has to operate at all levels of claim settlements as long as decisions are seen to be fair and just.

The Ombudsman publishes each year a summary of his findings in a report showing the number and type of complaints dealt with. This is illustrated overleaf in Table 14.

It has been noted²⁸ that there is a steady increase not just in the number of complaints but also in requests for information and advice. The reasons for the increasing number of enquiries are: first, an increase in the number of member companies, and secondly, more consumer awareness of the Insurance Ombudsman Bureau as an independent complaints body.²⁹ Perhaps one may contend that this increase in enquiries has been due to a deliberate policy of some companies to refer all cases to the Insurance Ombudsman Bureau where the insured will not immediately accept their explanation. Furthermore, it is probable that inadequate investigation by chief executives of companies may result in some cases being readily referred to the Ombudsman which would otherwise have been resolved by the company itself.

27 G.L. Williams, Chairman of the Insurance Ombudsman Bureau reply in letters to the Editor, "IOB Terms", Policy Holder Insurance News, March 18 1983, p 13; See also para. 3(b) of the Memorandum of Association of the Insurance Ombudsman Bureau, Appendix (ii), Abstract of the Bureau's Memorandum and Articles of Association and of the Ombudsman's Terms of Reference in the Insurance Ombudsman Bureau, Annual Report, 1983 p. 41.

28 Joan Mackintosh, Chairman of the Insurance Ombudsman Bureau, in the Preface to the Insurance Ombudsman Bureau, Annual Report, 1983, p.1.

29 See leaflet circulated by the Insurance Ombudsman Bureau, "How the Insurance Ombudsman could help you", November 1982.

TABLE 14 : Operation of the Insurance Ombudsman Bureau 1981 - 1985

YEAR	1981	1982	1983	1984	1985
All Enquiries including non-members	1,571	2,504	2,857	3,477	4,728
Member Companies only	441	1,232	1,642	2,105	3,054
Motor	166	451	565	536	708
Cases adjudicated by the IOB	39	179	284	465	629
Confirmed	30	141	232	389	486
Revised	9	38	52	79	143
Summary advice	41	25	17	14	5
Cases resolved after referral to company	59	298	475	494	-
Budget (in £ Sterling)	64,000	105,000	-	173,000	-

SOURCE : THE INSURANCE OMBUDSMAN BUREAU REPORT FOR 1981, 1982, 1983, 1984 and 1985

On the other hand, it may well be, that as it is in the interest of member companies to ensure that as few complaints as possible actually reach the Ombudsman, member companies will be inclined to seriously investigate claims.

Inadequate investigation can prejudice a company's public image and goodwill and policyholders will lose confidence in their ability to obtain a fair settlement. Moreover, the company will be faced with heavy financial costs if all or most of the complaints it receives are referred to the Ombudsman.

Table 14 also reveals that, of the total cases that the Ombudsman refers to the chief executives via a letter from the policyholder that mentions his involvement in 1983 and 1984, one third now result in a settlement move as compared to one quarter over 1981 and 1982, which seems to be a sizeable improvement. It seems, therefore, that it is reasonable for the companies concerned and most especially the chief executives to adequately investigate claims in order to avoid the time, expense and uncertainty of going before the Ombudsman on relatively small claims. As shown in Table 14 above, of the total enquiries received by the Insurance Ombudsman Bureau, only a little more than half the cases could be handled and adjudicated by the Ombudsman as he is empowered to act only when a member company is involved. Within its membership, there are 163 insurance companies comprising 63 group members and this represents approximately 70% of the total personal insurance market³⁰. Yet even the total enquiries received from member companies represent only a tiny proportion of personal insurance claims dealt with by all the existing complaints procedures³¹. Indeed one could well argue that the essential weakness of the Insurance Ombudsman Bureau is the fact that it could not be said to be satisfying the need to provide a forum to which policyholders generally could refer complaints.

30 The Insurance Ombudsman Bureau, Annual Report, 1985, pp.35-40.

31 For other complaints handling services, see infra, pp.453-464.

More importantly, these enquiries reveal areas of misunderstanding between companies and policyholders and point out areas which need clarity, such as a failure of communication and an inability of insurance companies to explain policy cover and limitations. These reports have stimulated more extensive criticisms³² which will provide food for thought between periods of enacting legislation, and the insurance industry could do a lot to improve services provided by good insurance practice^{32A}. Further, the digest of decisions will build up a system of precedent^{32B} of value to the industry.

2. The Personal Insurance Arbitration Service

The Personal Insurance Arbitration Service was set up in August 1982 as an alternative complaints procedure aimed at achieving a similar objective to the Insurance Ombudsman Bureau. Rather like the Insurance Ombudsman Bureau, this scheme is limited to United Kingdom residents insured in their private

32 John Peverett, "The Ombudsman: another year, another report", Policy Holder Insurance News, 25 February 1983, Vol. 101, No. 8 pp. 28-30; "Digesting the Ombudsman's Report", Policy Holder Insurance News, 4 March 1983, Vol. 101, No. 9, pp. 21 and 23; "The Ombudsman Throws Down the Gauntlet", Insurance Week, 15 June 1984, Vol. 102 No. 24, pp. 22-23; "In collision with the Ombudsman", Policy Holder Insurance News, 11 March 1983, Vol. 101, No. 10, pp. 22, 24-25, Henry Ellis, "Policyholder protection and policy terms", Policy Holder Insurance News, 11 March 1983, Vol. 101, No. 10, pp. 20-22; John Duncan, "Stamps, teeth, storms and the Ombudsman", Policy Holder Insurance News, 23 July 1982, Vol. 100, No. 29, pp. 15-16; Policy Holder Correspondent, "The case against the Ombudsman", Policy Holder Insurance News, 26 June 1981, Vol. 99, No. 25, pp. 22-23.

32A It is hoped that more extensive and detailed reports will be useful for review of Codes and Statements of Insurance Practice by the industry, see further, Chapter Five, supra, pp.357-360.

32B Note however that the ombudsman is not bound by precedent: See, Insurance Ombudsman Bureau, Annual Report, 1981, Abstract of the Memorandum and Articles of Association and the Ombudsman's Terms of reference, Appendix (i) at p. 28.

capacity under policies issued in the United Kingdom³³. This scheme provides an informal method of resolving disputes in which an insured person claims to have suffered financial loss through alleged failure of an insurance company to fulfill its obligations under a contract of insurance³⁴. Informality is the essence of the scheme. An independent arbitrator appointed by the Chartered Institute of Arbitrators decides disputes by reference to documents supplied by the parties. If the insured prefers that the decision is made after a hearing and the Arbitrator accepts that the application for such a hearing is justified on its merits, then an informal hearing may be arranged. The procedure appears to be simple and speedy³⁵. However, the procedures of arbitration require that even in a relatively simple dispute, certain formalities should be gone through to ensure that each party has had a fair chance to submit his case: even the simplified procedure of the PIAS can seem rather cumbersome if all that is in dispute is a sum of say £25 or £50^{35A}. It is worth noting that, although the time scale set down in the rules of the Service provides for a total period of about three months from the date of application for arbitration to issue of the award, the average time so far has been less than two months^{35B}.

33 Rule 2, Personal Insurance Arbitration Service Rules (1983 Edition). The scheme is not designed to accommodate disputes which arise from third parties nor does it apply in the case of insurance effected by employers.

34 Rule 1, Ibid.

35 Rules 7 and 8 Ibid.

35A Reply to inquiry, letter dated 25 March 1985 from L.G. Slade, Deputy Registrar, Chartered Institute of Arbitrators.

35B Bertie Vigrass, "Personal Arbitration - The PIAS in operation", Policy Holder Insurance News, 20 August 1982, p.23.

Similarly to the Insurance Ombudsman Bureau, the costs of arbitration under the PIAS scheme are borne by the insurance company involved and the service is free to the insured³⁶. However, it could be argued that the agreement by the insurers to pay all the costs of arbitration under the PIAS scheme may render it an unlawful agreement. In Windvale Ltd. v. Darlington Insulation Co. Ltd.³⁷, Lord Justice Walton held that a provision in an arbitration agreement whereby one party agreed in advance to pay the costs of both parties was prohibited by section 18(3) of the Arbitration Act 1950^{37A}. In this case, his Lordship said³⁸ that this provision applied even where the agreement was outside the strict wording of the sub-section because it required one party to pay the cost of both. However, he added³⁹ that an agreement on the costs entered into after the dispute had arisen was not prohibited by section 18(3). This qualification will probably apply to arbitrations under the PIAS as the agreement on costs is not contained in the arbitration condition on the policy and the agreement under the PIAS scheme is arranged after the dispute has arisen and is entered into voluntarily by

36 Note that the insured's costs of preparing and submitting documents or of attending a hearing are at the Arbitrator's discretion and the insurer pays its own costs of preparing and submitting documents. See, Rules 6, 11 and 12 op. cit.

37 The Times, 22 December, 1983.

37A This subsection provides that:

"Any provision in an arbitration agreement to the effect that the parties or any party thereto shall in any event pay their or his own costs of the reference or award or any part thereof shall be void, and this Part of this Act shall, in the case of an arbitration agreement containing any such provision, have effect as if that provision were not contained therein:

Provided that nothing in this subsection shall invalidate such a provision when it is a part of an agreement to submit to arbitration a dispute which has arisen before the making of that agreement".

38 The Times, 22 December, 1983.

39 Ibid.

the policyholder. It would seem, therefore, that PIAS is not an unlawful agreement. The costs of the scheme as incurred by the Chartered Institute of Arbitrators, and which are thus in addition to those incurred by the insurer in compiling its own evidence, are levied on the following basis⁴⁰: first, on an annual standing charge, the amount of which varies from company to company. This depends upon the number of companies participating and the expected volume of cases. Second, an administrative charge in respect of each case registered which is normally around £25; and third, the arbitrator's costs in the case which vary from case to case and are calculated according to the amount of time the arbitrator is engaged in the case⁴¹. For cases involving no local hearing, and therefore judged only on documents, the fee for each case is likely to be modest - probably no more than £100 in many instances^{41A}. Because the latter factor is variable, it does not seem possible to provide any indication of total amounts paid as fees to arbitrators and consequently one cannot estimate what the actual cost of arbitration is likely to be⁴². The cost of arbitration under the PIAS scheme therefore, may not be any less than that which would have been incurred if the case had

40 Reply to inquiry, letter dated 20 November 1985, from L.G. Slade, Deputy Registrar, Chartered Institute of Arbitrators.

41 The Arbitrators fees and expenses are paid by the Institute and are part of the operating costs of the scheme - Rule 9 op. cit.

41A Working Party Report, op. cit., para. 6.8

42 It is regrettable that, the Chartered Institute of Arbitrators is not authorised by the insurers to issue annual reports and figures on the total of amounts awarded and total of amounts paid as fees to the Arbitrators. The only detailed explanation on the operation of the scheme is provided by Bertie Vigrass, Director and Secretary of the Chartered Institute of Arbitrators, "Personal Arbitration - The PIAS in operation", Policy Holder Insurance News, 20 August 1982, Vol. 100 No. 33, pp.23-24.

gone to court. It is probable that the cost of arbitration may be one of the reasons why so few cases ever go to arbitration. Up to the middle of November 1983 the PIAS had received 156 references to arbitration under the scheme and these were dealt with by 16 different arbitrators^{42A}.

The insurance companies which are members of the PIAS scheme have adopted different maxima regarding the level of claims they will accept under the Rules of the service and the monetary limit is between £25,000 and £100,000⁴³. The service is designed to operate after all the normal complaints procedures of the insurer at the highest executive level have failed to achieve an amicable settlement, and in this it is similar to the Insurance Ombudsman Bureau. In contrast, the arbitration scheme has a narrower scope than the Insurance Ombudsman Bureau, particularly as it is concerned only with the resolution of disputes in accordance with the law in the United Kingdom, terms of the contract concerned and Statements of Insurance Practice applicable to insurers in respect of non-life or long term insurance as the case may be⁴⁴. It is interesting to note that the rules of the PIAS expressly⁴⁵ provide that, in the event of conflict between the

42A John Peverett, "PIAS: A Binding Solution", Insurance Week, 8 June 1984, Vol. 102, No. 23, p.14.

43 Bertie Vigrass, op. cit.; at p.23.
The normal arbitration services of the Chartered Institute of Arbitrators are however available for the parties to cover disputes likely to fall outside the scope of the PIAS. The scheme is not designed to accommodate disputes in which the issues are unusually complicated or the sum involved is in excess of an agreed amount: Working Party Report, Complaints Procedure - an Alternative to the Insurance Ombudsman Scheme, 24th June 1981, para. 6.10

44 Rule 5 op. cit.

45 Ibid.

applicable cover and a Statement of Insurance Practice or Code, the interpretation more favourable to the insured is to prevail.⁴⁶

The most important difference between the Personal Insurance Arbitration Service and the Insurance Ombudsman Bureau scheme is the binding nature of the PIAS decision.⁴⁷ The PIAS acts as an independent final arbiter in disputes between insurers and policyholders. Both parties must agree to refer the matter to arbitration and the arbitrator's decision is binding. The policyholder is under no obligation to use the service but if he elects to do so, he must agree to be bound by the arbitrator's decision. This seems reasonable provided that the arbitrator is shown to be completely independent. The insurance companies and policyholders ought to be certain that the arbitrators' have a sufficient knowledge of the rules of arbitration. This makes it essential to know how the arbitrators are selected, their qualification and occupation. Arbitrators are selected for appointment by the President or vice President of the Chartered Institute of Arbitrators from its own Arbitrators' membership⁴⁸ and all appointments are within the Institute's exclusive and unfettered control.⁴⁹ Under the PIAS scheme, a total of 16 different arbitrators were appointed in November 1983⁵⁰ and these

46 Contrast the scope the Insurance Ombudsman Bureau scheme, supra, pp. 449-450.

47 John Peverett, "PIAS: A Binding Solution", Insurance Week, 8 June 1984, Vol. 102, No. 23, p.14-15. See also, supra, pp.447-448.

48 It has a membership of around 4800, mainly from the U.K. but also from seventy two other countries throughout the world: See, B.W. Vigrass, "Arbitration and the work of the Chartered Institute of Arbitrators", Chartered Institute of Insurance Journal, April 1981.

49 The Institute has had many years of experience in arbitration. It was formed in 1915 and was granted a royal charter in March 1979: B.W. Vigrass, op. cit.

50 John Peverett, op. cit., p.14

included three practising barristers (two of whom were Queen's Counsel) a senior solicitor, an architect, a consulting marine engineer, two civil engineers, a chartered engineer, five quantity or building surveyors and two professionals from the insurance industry. It seems clear that the appointed arbitrators are independent of the insurers involved in any dispute in that they are appointed by the Institute and not the insurers. In addition, it cannot be doubted that the arbitrators are qualified and experienced to act as arbitrators.

In contrast to the Insurance Ombudsman Bureau Scheme, policyholders need their insurers' consent to refer to the Personal Insurance Arbitration Service. They may proceed unilaterally to the Insurance Ombudsman Bureau.⁵¹ In consequence, the full value of the independence of the PIAS may be unjustifiably dimmed in the eyes of the average consumer.

Another difference between the two schemes is that a policyholder can pursue a matter to court if he is unhappy with the Ombudsman's decision⁵² but any decision made by the PIAS is binding and cannot then be taken through the legal system. In this respect, it is similar to the ordinary arbitration provided for, in respect of amount, by the terms of insurance policies

51 See supra, p.448.

52 See supra, pp446-447; Policyholders have a one way option in availing of the service of the IOB, that is, proceeding to court to get an improvement.

arbitration condition.⁵³ This involves the disadvantage that there has historically been a disinclination on the part of policyholders to allow disputes to be finally settled by arbitration,⁵⁴ but on the other hand, the policyholder has the advantage that he will not have to pay the cost of the arbitration. Arbitration is a process the average policyholder is not familiar with and he may view the binding nature of the outcome with less enthusiasm. It is interesting to note that an arbitration clause does not now appear in any policy issued by Guardian Royal Exchange in the United

53 Note however that, the arbitration condition on the contract of insurance does not apply to the PIAS scheme. For a standard arbitration condition, see for example, condition 10 of Sun Alliance motor insurance policy thus:

"All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties within one calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon the reference. The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the Company. If the Company shall disclaim liability for any claim hereunder and such claim shall not within twelve calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein contained then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

54 Law Reform Committee, Fifth Report, Conditions and exceptions in Insurance policies, 1956 Cmd. 62 para. 13.

The arbitration clause, which in the post-war national campaign against private courts, applied to the fundamental question whether there was liability under the policy in a given dispute, represented an infringement of the insured's basic right to lay an issue before the court. The Law Reform Committee played a part in this campaign and insurers met the wishes of the Committee by modifying what had been a standard clause to require only disputes as to amounts, liability otherwise admitted, to be taken to arbitration.

Kingdom.⁵⁵ There was a general agreement⁵⁶ between insurers about twenty nine years ago which tended to remove the need for an arbitration clause, because it was felt that it was better to give the insured the ability to take civil proceedings against his insurer in those few cases where a dispute arose. However, the full scale arbitration clause has been reintroduced, admittedly on a voluntary rather than compulsory basis, since a dissatisfied policyholder does not have to avail himself of the IOB and PIAS arrangements, even if his dispute is with one of the member companies of both schemes. But if he does, and the parties are unable to resolve their differences save by a hearing before the Ombudsman, the latter's decision, whilst subject to a period of one month in which to make an appeal, if accepted by the parties becomes binding on them both, provided that the sum involved does not exceed £100,000. Therefore, an eligible insured who accepts the Ombudsman's services is in a position not so far removed from what used to happen in the pre-1957 days of arbitration.

However, the aim of the Insurance Ombudsman Bureau and the Personal Insurance Arbitration scheme is basically similar, namely, to provide protection for members of the public in disputes with their insurers in respect of personal insurance. The two schemes provide a simple and inexpensive procedure. There is in fact nothing to prevent a company belonging to both organisations. The only effect joint membership has is to present a policyholder with a choice of which adviser to go to. Sun Alliance

55 Reply to inquiry, letter dated 25 November 1985, from H.W. Laws, Assistant Claims Manager, Guardian Royal Exchange.

56 see note 54. The clause does still appear in some policies which are issued in the Republic of Ireland and some English policies, see for example, condition 10 of Sun Alliance motor insurance policy, supplied by D. Klean, Superintendent, Sun Alliance Insurance group incorporating Phoenix Group, letter dated 18 December 1985.

Insurance Company⁵⁷ took the lead by joining the Insurance Ombudsman Bureau on the basis that complaints can be referred first to conciliation with the Ombudsman, and then referred to arbitration under the PIAS if the Ombudsman's decision fails to dispose of the case. This may be regarded as a move to bring the industry a step nearer a single complaints system.⁵⁸ With respect to companies who are members of neither the IOB nor PIAS scheme, the facilities available to the policyholders remain something of a lottery.⁵⁹ As we have already seen⁶⁰ only the policyholders of subscribing companies to the Insurance Ombudsman Bureau can turn to the Ombudsman. The IOB may hear from policyholders of non-member companies and in this case it will be powerless to act. The Association of British Insurers,⁶¹ the Life Offices Association and the Corporation of Lloyd's⁶² operate complaints investigation services for policyholders although in the case of member companies who are parties to either the IOB and PIAS, a complaint received would be referred to the newer schemes. The outstanding weakness of the Association of British

57 This company is one of the founder members of the Personal Insurance Arbitration Service. The other founder members of the PIAS are: the Co-operative, Crusaders, Eagle Star, Northern Star, Provincial and Cornhill Insurance Companies.

58 For a proposal on a single dispute settlement procedure for life insurance, see, L.C.B. Gower, Review of Investor Protection, Report: Part I Cmnd. 9125 para. 8.56

59 See also, Roger Anderson, "Report stresses role of IOB as diplomat", Policy Holder Insurance News", 26 February 1982, p.5.

60 Supra p.447.

61 The Association of British Insurers Annual Reports 1983-1985 disclosed that in 1985, telephone and written enquiries from individuals and consumer organisations notably, Citizens Advice Bureaux exceeded 20,000; about the same number as in 1983 and 1984.

62 Lloyd's has an established complaints procedure involving its advisory department. The Corporation guarantees the liability of each syndicate; the situation is different from the relationship between the Association of British Insurers and member companies.

Insurers and Life Offices Association complaints body is that neither organisation has any power of adjudication. Moreover, both organisations are trade bodies set up by the industry. Consequently, the companies are, in effect, supplying counsel for the defence and prosecution plus judge and jury in any dispute. This appears to have been a strong influence in the original germ of the Insurance Ombudsman Bureau idea. In addition to the above industry complaints handling schemes, an increasing number of complaints relating to insurance are passed on to the Office of Fair Trading⁶³ issuing from trading standards offices, citizens advice bureaux and local advice centres. Furthermore, the Department of Trade and Industry received 344 complaints by letter and 138 by telephone from policyholders in 1984.⁶⁴ The Secretary of State, however, has no statutory powers of intervention in disputes between policyholders and their insurers, complaints received by the Department of Trade and Industry are dealt with on an informal basis. Policyholders also receive an indirect form of non-statutory protection, particularly during the negotiation stage of their contracts, by virtue of codes of conduct and practice applicable to registered insurance brokers and non-registered intermediaries.⁶⁵

It seems that, in the event of a dispute, the current industry complaints handling procedures are inadequate and ought to be reviewed and

63 Gordon Borrie, Director General of the Office of fair Trading, "When the consumer complaints...", Policy Holder Insurance Journal, 15 February 1980, Vol. 98, No. 7, pp. 20-26. These complaints amount to approximately 6000 per year. See also, Ken Addison, "Borrie speech: When criticism was not based on fact." Policy Holder Insurance Journal, 7 March 1980, Vol. 98, No. 10, pp. 35-38.

64 Department of Trade and Industry, Insurance Annual Report, 1984, London H.M.S.O., para. 43, at p.9. For existing Complaints Handling Procedures see: Department of Trade and Industry and the Office of Fair Trading, Guidance on the Handling of Consumer Complaints about Insurance, [Release 3: 13-ii-85] London H.M.S.O.

65 Supra, Chapter Six, pp.402-404.

strengthened. It is regrettable that there is not one complaints handling service available to all policyholders. Perhaps it will be better if the industry can agree on a single insurance consumer complaints forum acceptable to all or at least to the great majority of insurers. It is desirable that the aim of such an agency ought to be the provision of a simple and effective independent procedure for speedily resolving disputes on contracts for personal policyholders. It is possible that something could be done to centralise the system without necessarily interfering with the present set up. A way forward would be to seek changes which would require all insurance companies to be members of the IOB and PIAS by legislation. The Insurance Ombudsman Bureau's role would be the attempted settlement of disputes involving all insurance companies. It could be empowered to make a formal ruling and be allowed to settle matters amicably. If a settlement cannot be reached the issue could go to formal arbitration under the PIAS scheme. The IOB will therefore offer an effective conciliation service but its decision will not be binding on the consumer, so further proceedings remain necessary to obtain finality. Thus the hope is that, eventually, virtually all insurers will see fit to participate, otherwise some policyholders will be at a disadvantage. It is also hoped that such a scheme would redress the balance between an individual policyholder and the insurance companies and would submit a large number of companies to the discipline of independent decision making. A single complaints agency for all insurance matters would instill co-operation between complaints bodies for insurance companies, brokers and other intermediaries.

In Cameroon, every insurance company has a service contentieux which deals with disputes and settlement of claims. In an interview in Yaounde⁶⁶

66 Inquiry carried out during field work in July 1983: Yaounde.

with Mr. Charles Alaka, Head of the service contentieux of one of the leading insurance companies, the Assurance Mutuelle Agricole du Cameroun, he revealed that his service "vigorously denounces any court action and would prefer to settle their claims out of court". It is relevant to observe that the Bamenda branch of the American Life Insurance Company has never been a party to any court proceedings. The reason, as disclosed by the branch manager⁶⁷, is that "the company deals with life not spare parts. Spare parts are easily replaced, not life". She further remarked that there is no need to refuse payment which is likely to bring about a court action.

Furthermore, in Cameroon, all policies contain an arbitration clause whereby the victim, tortfeasor and insurance companies may settle their claims without necessarily going to court. However, there is no independent arbitration body, such as the Insurance Ombudsman Bureau or the Personal Insurance Arbitration Service obtainable in England, who can settle disputes fairly without the necessity of reopening issues in court. Such a body would be very desirable in the settlement process as it would ease congestion in the courts.^{67A}

IV METHODS OF ACCELERATING THE PROCESS OF SETTLEMENT OF CLAIMS OUT OF COURT

This section seeks to demonstrate how insurance companies are aware of the need to settle claims by negotiation. It is undeniable that it is in the interest of both motorists and insurers that the cost of settling claims should be kept as low as possible. The former's benefit, which may not be immediately apparent, is that premiums are kept to a minimum. In particular,

67 Interview with Mrs Wazie, Manager of the Bamenda Branch of American Life Assurance Company, June 1983: Bamenda.

67A For possible lines of reform see Chapter Nine, infra, pp.504-505.

the method of self-regulation by the insurance industry has been applied so as to avoid the uncertainties of legal rules and the expense of court judgments.⁶⁸ It may be worth noting that in respect of damage to vehicles in road accidents, the role of the law of tort has largely been replaced by the prevalence of first party insurance in England and Cameroon. In England, unlike in Cameroon, insurers have concluded agreements amongst themselves relating to the payment of claims which thereby facilitate the settling process and reduce vehicle owner's incentives to litigate on disputes concerning damage to their respective vehicles. It is however, not intended to delve into all the market agreements but an illustration of a few examples may reveal the efficacy of this particular means of regulation. The main inter-insurer claims agreements are the "knock-for-knock" Agreement, Third Party Sharing Agreement, Immobile Property Agreement, Common Law Claims Agreement and the Dual Indemnity Undertaking.⁶⁹ Briefly, Third Party Sharing Agreement, unlike the "knock-for-knock" Agreement, applies where a third party is injured in a collision between two vehicles. Each insurer agrees to disregard the question of blame of their respective insured for the accident. The third party claim is settled on an equally shared basis but usually these claims are subject to an upper financial limit. Under the Immobile Property Agreement, where a motor vehicle strikes insured immobile property, the motor

68 Richard Lewis, "No 'legal' agreements", Post Magazine and Insurance Monitor, 9 August 1984, Vol. CXLV, No.32, p.1902; "Insurers' Agreements not to Enforce Strict Legal Rights : Bargaining with Government and in the Shadow of the Law", (1985) 48 M.L.R. at p.275.

69 It is important to observe that these methods of accelerating the process of settlement of claims apply mainly to motor insurance. See Claims Agreements issued by the Association of British Insurers, letters dated 26 November and 17 December 1985 from B.E. Robinson, Technical Officer, Liability and Accident Committee.

insurer pays three quarters of the cost of repairing such property. The Common Law Claims Agreement requires that, when a claim could be the subject of both the motor policy and an employers' liability policy, the claim will in fact be dealt with under the latter policy. It is worth pointing out that this agreement is only made between insurers who underwrite both motor and employers' liability insurance, for it is based on the idea that the concession lost in relation to the one type of policy will be gained in the long term in relation to the other. The Dual Indemnity Undertaking which operates between all motor insurers relates to the situation where cover is provided under the "driving other cars" clause of a motor insurance policy and the insured is driving some other person's vehicle, with that person's permission. The owner of that vehicle has a policy which permits driving of his car by other people. In the event of an accident occurring the resulting claim will be dealt with by the insurer of the vehicle which was being driven, thus obviating the loss of no claim discount under both policies. It should be noted that "driving other cars" cover only covers liabilities to third parties.

The most notable of these agreements is the "knock-for-knock". Under this agreement,⁷⁰ motor insurers have agreed to indemnify their respective insured's, that is, bear their own loss in respect of the vehicle they

70 The agreement is set out in part in Hobbs v. Marlowe [1978] A.C. 16 at p.35 in L. Diplock's speech. See also, the "knock-for-knock" Agreement supplied by D. Klean, Superintendent, Overseas Legislation Unit, enclosed in a letter dated 18 December 1985. For a discussion of these agreements see Richard Lewis, op. cit., p. 1902; "Insurers' Agreements not to Enforce Strict Legal Rights : Bargaining with Government and in the shadow of the Law", (1985) 48 M.L.R. at p.285-287.

insure,⁷¹ regardless of their strict legal liability in tort, following an accident in which both or all the damaged vehicles are insured against first party damage, normally, under the usual comprehensive motor policies. The insurers thereby reciprocally undertake to waive their contribution and subrogation rights as the pursuit of such claims, often for very small amounts, would be a wasteful and unnecessarily costly exercise.⁷² This emphasises the point that the agreement is of no effect when one of the vehicles involved is not covered against the risk of damage to it. Here, liability will have to be investigated. If one of the damaged vehicles is insured for third party risks only, the owner of the damaged vehicle would have to bear the repair cost and then pursue recovery against the other insurer subject to ordinary considerations of legal liability. The effect of the agreement would be to prevent the insurer giving comprehensive cover from obtaining recovery of his outlay from the insurer providing third party cover. For this reason the partial indemnity clause⁷³ has been introduced by some insurers in order to alleviate the problem,⁷⁴ and the general effect of the clause is that the insurer providing third party cover is required to

71 This is subject to the policy conditions and limitations, see below, pp.469-470. See Clause 1(i)(c) of the "knock-for-knock" Agreement, Ibid.

72 Fleming, "The Role of Negligence in Modern Tort Law", (1967) 53 Virg. L. Rev. 815, 835-837.

73 The Partial Indemnity Clause which is an integral clause of the "knock-for-knock" Agreement and is limited to two vehicle collisions only, states that in all cases where one of the vehicles involved in the collisions is insured for a third party risks only, under a fleet rated policy, the insurer of such vehicle will pay 50% of the repair costs to the insurer of the other vehicle: See, Clause 2 of the "knock-for-knock" Agreement, Ibid.

74 Reply to inquiry from Mr H.W. Laws, Royal Exchange Claims Manager, Guardian Royal Exchange, letter dated 25 November, 1985.

reimburse the comprehensive insurer for one-half of his outlay irrespective of liability.

The operation of the "knock-for-knock" agreement can thus constitute a financial disadvantage to insurers who issue predominantly comprehensive policies if their competitors issue a large proportion of policies for third party cover only. It was this imbalance in the portfolio make-up of Service Motor Policies, Take Service Motor Policies and Shead Motor Policies at Lloyd's which prompted the cancellation of "knock-for-knock" agreements.⁷⁵ Service Motor Policies faced a gradual concentration of its motor account portfolio for fully comprehensive policies in the region of 88% with the remaining 12% in third/third party, fire and theft. This reveals that, for most insurers who have similar spreads or the same balance of third party and comprehensive cover as those of their competitors, the "knock-for-knock" agreement may be a sensible way of handling motor claims.

It should be recognised that the agreement is one between insurers and thus does not prevent the innocent insured from pursuing his tort claim against the negligent tortfeasor.⁷⁶ This agreement leaves outstanding important questions of uninsured losses, excesses and bonuses. Most policies

75 Leigh Sharpe, "Knock-for-Knock is given a shake-up", Policy Holder Insurance News, 17 February 1984, Vol.102, No.7 at p.9; Jenny Harris, "Another Nail in the Coffin?", Post Magazine and Insurance Monitor incorporating Insurance Week, 7 November, 1985, Vol. 146, No. 146 at p. 3067; John Vann, "Losing faith with knock-for-knock", Insurance Age, September 1984 p.27.

76 Hobbs v. Marlowe [1978] A.C. 16; Morley v. Moore [1936] 2 K.B. 359 at 369 per Scott L.J.; Bourne v. Stanbridge [1965] 1 W.L.R. 189, especially the dissenting judgment of Lord Salmon at pp, 197-199.

contain excess clauses⁷⁷ and this raises a problem in the application of the "knock-for-knock agreement. Is an insured liable to pay the excess when he is in fact blameless? Indeed, in Hobbs v. Marlowe,⁷⁸ the plaintiff pursued legal proceedings against the negligent motorist to recover his uninsured excess and his uninsured loss, namely, damages for consequential loss in hiring a substitute car. Here, the court confirmed⁷⁹ the practice that each insurer indemnifies his insured to the extent that the latter's damage is not covered by an excess clause. The insured is left to try and recover the excess in whole or in part, from the other party's insurer. In fact as one commentator points out,⁸⁰ "the excess looks like a hidden extra premium, in that it is a charge payable in the event of a loss, with no extra protection from the insurer". Furthermore, if the insured recovers damages after he has already been indemnified by his insurer he must repay that indemnity less his uninsured losses on request to his insurer who is then under the agreement bound to pay them to the defendant's insurer.⁸¹

The agreement, therefore, is only an administrative device, a scheme which works only on the basis that a no claim discount is unaffected by any claim admitted. In practice the no claim bonus system (reductions in annual premiums when no claim is made on the insurers) is not always a contractual

77 This is a questionable practice generally in motor insurance though often justifiable as it lessens the effects of inflation on insurers' cost and obviously discourage small claims.

78 [1978] A.C. 16.

79 Ibid. at pp.35-41.

80 See John Birds, "Motor Insurers and the Knock-for-Knock Agreements", (1978) 41 M.L.R. 201 at 203 and also for an illustration of its operation.

81 Hobbs v. Marlowe [1978] A.C. 16; Morley v. Moore [1936] 2 K.B. 359.

entitlement and its operation may rest entirely in the discretion of individual insurers. Even in Cameroon where the Direction des Assurances requires⁸² insurance companies to operate a fair system of the bonus - malus - clause type, the amount of such bonus is entirely up to the insurer and some claims, even of a fairly minor nature, will affect the increase in premium and others will not. During field investigation,⁸³ an insured, Dr. B. Nassa complained against one of the leading insurance companies Mutuelle Agricole for not considering a no claims discount in his favour in spite of his not having filed a claim for the past twenty years.

The Insurance Ombudsman Bureau has had an increasing number of complaints⁸⁴ about insurance companies settling third party claims without consulting their policyholders.⁸⁵ In one case,⁸⁶ the insurer confirmed their

82 Article 1 of Arrêté No. 96/MINFI/CEA rendering obligatory the application of the clause-type de malus relating to contracts of motor insurance.

Article 2 Ibid. : The conditions for applying the malus clause mentioned in article 1 are at the discretion of the insurance companies.

Article 3, Ibid. : Any disputes which arise between the contracting parties as a result of the application of the above provisions are within the competence of the Central Bureau of Tarification, Control and Conciliation created by article 6 of Law No. 65/LF/9 of 22 May 1965, rendering motor insurance obligatory. For a discussion of this organisation, see, Chapter Three, supra, p.201.

83 Interview carried out in August, 1983 : Yaounde.

84 See the Insurance Ombudsman Bureau, Annual Report, 1982, at p.10.

85 Note that every policyholder is obliged by his policy conditions to report an accident but he need not claim indemnity. See for example, Clause 5 of Sun Alliance Insurance Company motor insurance policy, op. cit. Where the position is not made clear, a policyholder may find that the claim form which he used to report the accident is treated by the claims department as automatic authority to settle a comparatively minor claim.

86 Reference No. 82/11/63. B218; See also, reference No. 83/12/18. CB5; cases supplied by Heather Ridge for the Insurance Ombudsman Bureau in correspondence dated 14 March 1985. The identities of the parties were not disclosed for reasons of confidentiality.

"knock-for-knock" Agreement with the third party's insurers without first asking the policyholder if he wished to deal with the matter himself without claiming indemnity under his policy and, as a result, the policyholder's no claim bonus was forfeited.⁸⁷ It was considered⁸⁸ that the insurer acted in an arbitrary manner as the policyholder's inherent right not to claim indemnity where only property damage was concerned was ignored. The Ombudsman suggested⁸⁹ that policyholders should be given the option of handling claims and thus preserve their bonuses.⁹⁰ One major insurance company⁹¹ has revised its motor claims form, the completion of which is required for information only, and this will not affect the no claim discount under the policy. Some policies save trouble by stating that the no claim discount will be retained if the policyholder is blameless. More recently, insurance companies⁹² have introduced protected no claim discounts. For instance,

87 Motorists dread the incident of a "knock-for-knock" agreement, as they believe it is a means of depriving them of their no-claims bonus by settlement for accidents notwithstanding that they may be blameless.

88 Reference No. 82/11/63. B218, op. cit., pp. 3-4

89 Ibid. at p.4; See also the Insurance Ombudsman Bureau, Annual Report 1982, pp. 10 and 14.

90 This option becomes significant, if the value of the discount lost is greater than the maximum which the policyholder would have had to pay in any circumstances as a result of the accident. Conversely, if the maximum probable payment is more than the discount was worth, then the loss of the option is not to the policyholders disadvantage. However, note that, in making this calculation no account should be taken of the expense and time lost in correspondence and possible attendance at court as these factors are difficult to estimate.

91 See Guardian Royal Exchange Assurance, Accident Claim Form. The accident report form is not itself a request for indemnity.

92 See General Accident, 'Keep Motoring' Insurance Policy, at p.19.

Commercial Union⁹³ offers a full no claim discount protection for the motor insurance element, if a policyholder insures his household contents and a private car under a key policy, subject to a £35 excess.

While it might seem unfair to a policyholder that he loses his bonus when the company has paid out nothing on his behalf, the general picture that one can perceive is that the losses incurred by one insurer as a result of not claiming from the other will be offset by those claims from which he himself is spared. At the same time there will be a large saving in administrative costs which would normally have been incurred in the claim settling process.

In Cameroon where there is no "knock-for-knock" Agreement, it was observed⁹⁴ that recovering repair outlay is not usually all that speedy a process. In terms of the enormous volume of accidents in any one year,⁹⁵ the "knock-for-knock" Agreement seems to be a desirable method of disposing of some relatively small claims. Most especially, to apply the "knock-for-knock" Agreement where both parties are comprehensively insured results in each vehicle's repairs being authorised and paid for without much delay.

Oddly enough, these agreements do, however, highlight the fact that insurers, through their marked efforts in co-operation, put into practice the no-fault concept.

93 John Gaselee, "Knocking Knock-for-Knock", Post Magazine and Insurance Monitor, 24 January 1985, Vol. No. 4, at pp. 188-189.

94 Interview with Mr Charles Alaka, Head of the Service Contentieux of Assurance Mutuelle Agricole du Cameroon, July 1983 : Yaounde.

95 In respect of England and Cameroon, see Chapter Three, Tables 3 and 4 at pp.148 and 149 respectively.

In Cameroon, the process of settlement by negotiation is facilitated by the use of a document called constat amiable⁹⁶ (an agreed statement). The form is designed to elicit the information required and each insurance company would get the same version of how the accident occurred. The document contains routine information, such as the number of the policy, the name of the insurance company as well as a series of straight forward questions to establish the circumstances of the accident. The Agreement is produced in duplicate which requires both drivers to fill in the details in good faith and append their signature. The 'constat amiable' document provides a chart of various collisions between two vehicles in relation to direction, points of contact, and the load carried by each vehicle. In this way, the responsibility for the accident is determined with the aid of the rules in the code de la route; the relevant claims associated with each accident can readily be identified. This is a much more reliable approach than eye-witness accounts which tend to be biased towards one driver or the other and moreover less accurate. Passengers of a certain vehicle also tend to be biased in favour of their driver. This document became invaluable because gendarme and police officers only intervened in accidents in which any of the victims actually sustained bodily injury. The principle of the document is absolute: the account of the accident given by the motorists cannot be questioned or revoked. Responsibility for the accident can only be determined from the chart or sketch. Each insurance company pays an indemnity proportional to the responsibility of his client. This indemnity is either total or part of the whole or even nothing if the client is entirely

96 This document is also used by insurance companies in France. See: J.P. Bauer, L'Assurance Automobile, 2e edn. 1968, Paris, L'Argus, at p.263; See also, Charles de Bez de Villas, Le Règlement Amiable des indemnités dues à la suite d'accidents corporels, Librairie du Recueil Sirez, Paris.

blameless. This principle is extended to accidents involving more than two vehicles.

The success of this procedure depends on the availability of the agreed statement forms. Failure to draft the 'constat' leads to many problems: a future attempt to reconstruct the accident may be met by contradictory accounts from the two drivers and witnesses. Consequently, insurance companies emphasise the need to carry this document in the glove compartment of all vehicles. It would appear that this scheme is desirable in any legal system in which most claims, trivial as they might be, would have to be investigated, as it would be cheaper and more certain than if the drivers and witnesses were later to be required to provide statements and accounts of what happened at the time of the accident.

A similar document, known as the European Accident Statement is used by many insurers in England but only in circumstances where an insured has indicated his intention to take his vehicle to the continent of Europe. They are not used domestically within the United Kingdom. In 1974,⁹⁷ General Accident Insurance Company carried out an experiment on the use of the statement within the United Kingdom but this experiment was unsuccessful simply because other insurers did not wish to use the form domestically.⁹⁸

97 Squaremiler, "Favours from the fair maid of Perth?", Policy Holder Insurance Journal, 18 October 1974, Vol.92, No.42 p.2318. Personal letter dated 18 November 1985 from J. Brown, Motor Branch General Accident Fire and life Assurance Corporation plc.

98 Reply to inquiry, letter dated 17 December 1985, from B.E. Robinson, Technical Officer, Liability and Accident Committee, Association of British Insurers.

V CONCLUSION

After examining all these examples of out of court settlements, we arrive at the conclusion that it would be misleading to base evaluation of the settlement process on a mere appraisal of the few reported cases in the law reports. In fact the settlement process is characterised by thousands of unreported private sessions between claimants or their solicitors and insurance companies. In the light of this proliferation of out of court settlements the courts may be regarded as a remote forum of compensation. As Professor Atiyah observes:⁹⁹ "... the whole of the tort system could be regarded as an administrative process designed to compensate accident victims, in which a right of 'appeal' is given to the courts of law." However, these 'appeals' are very rare for only the very difficult cases for which there is disagreement ever reach the courts. Suffice it to state that there is much truth in Conard's observation¹⁰⁰ that, a reading of tort text books gives us a "small view of a large universe."

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99 P.S. Atiyah, Accidents, Compensation and the Law, 3rd. ed., 1980 at p.297. This comment may equally apply to other civil disputes.

100 Conard et. al., Automobile Costs and Payments: Studies in the Economics of Injury Reparation, 1964, University of Michigan Press, at p.242.

C H A P T E R 9

GENERAL CONCLUSION

The motivation for undertaking this study was the need for a uniform system of law for Cameroon and, what is more pertinent here, the perceived need to unify the substantive law of motor vehicle insurance law in Cameroon.

As already pointed out in the introductory chapter on the legal system of Cameroon¹, the laws of insurance in Cameroon are derived from French and English law and there is a dearth of local legislation in this area of law. At present there are two systems of law, one in the English-speaking Cameroon and the other in French-speaking Cameroon, in part parallel in their operation. These two sets of legal systems with different substantive and procedural rules may at the same time apply to one individual in relation to one set of circumstances. The obvious consequence is that the chances of failure or success of litigation may depend upon which court takes cognisance of the case. The co-existence therefore of common law and civil law in one country is patently unsatisfactory and ought to be eliminated.

The equal treatment of the citizens of one nation before the law connotes their subjection to one and the same system of substantive and procedural law. In Cameroon, dual citizenship was ruled out since the emergence of Unification of the two Cameroons. Every national enjoys one citizenship only, that of the Republic of Cameroon. The Preambles of both the Federal Constitution of September 1, 1961 and the Unitary Constitution of June 2, 1972, affirm the equality of all persons before the law. Political aspirations before reunification and the formation of the unitary state were

1 Supra, pp.10-15

for one law for one Cameroon - one nation - hence imbued with an egalitarian philosophy. In this regard, the case for differential treatment before the law is even less sustainable. As Kenneth Roberts-Wray remarked:²

"It cannot be seriously denied that the ideal for any country is one law and one judicial system for everybody."

This argument in favour of consolidation of national laws ought to find its primary expression in the domain of civil law. Upon the indigenous law in Cameroon, there have been superimposed the general body of English law (that is, the common law, doctrines of equity and statutes of general application before 1900) and French civil law. There ought therefore to be a process of reconciliation between the received English and French laws.

Before embarking on specific proposals for law reform in connection with the laws already discussed in the preceding chapters, we would attempt a discourse on the framework within which the process of unification and harmonisation of the laws in Cameroon might be expected to proceed.

To achieve the integration of laws in Cameroon, the process of harmonisation would ideally derive its principles and practices from four principal sources: namely, the realities of Cameroon contemporary society - economic, social and political considerations; its colonial inheritance; indigenous laws and comparative experiences of other countries.

One cannot, however, exclude the possibility of legislative change dictated by economic, social and political realities of any given society. Even the colonialists realised the desirability of adapting the laws which they exported to the colonies by subjecting them to such modifications as the local circumstances could permit and in a way suited to the needs of the

2 Sir Kenneth Roberts-Wray, "The Need for Study of Native Law", (1957)
1 J.A.L. 82 at 83.

people.³ This was also recognised by the legislators of the Cameroonian Insurance Legislation as they expressed the view that:⁴

"... il y avait donc place pour une législation Camerounaise de l'assurance, susceptible de refléter les choix supérieurs et les préoccupations de la Nation.

L'ordonnance No.62-OF-36 du 31 mars 1962 fixant la législation applicables aux opérations et organismes d'assurances constitué une première étape décisive dans la volonté nationale d'adapter les institutions de l'assurance aux réalités Camerounaises."⁵

The basic proposition and axiom is that law reflects societal values and expectations. It is a 'mirror' of political, social and cultural events of any given society. From this point of view, there is no consideration of whether any particular system of law is bad. One cannot compare two legal systems to determine which is better than the other as each is responding to its social set up. But this point of view contains a serious flaw which makes it in the final analysis unacceptable as it rests upon the dubious premise that in its development, a society's legal system inexorably progresses in one direction unaffected by interruptive or diversionary factors of internal origin and immune from outside interference.

Our second source of the content of law in the pursuit of law reform is Cameroon's colonial inheritance. Cameroon's adoption of the colonial legal system is a factor that was bound to influence the shaping of its law. That as we have already indicated⁶ led to a situation in Cameroon whereby two colonial legal systems exist together. No legislation designed for Cameroon

3 See the introductory chapter on the legal system of Cameroon, p.4.

4 See Preface to the Cameroonian Insurance Legislation, Imprimerie Nationale, Yaoundé, 1971 at p.10.

5 Emphasis added.

6 Supra, pp.10-15.

can purport to ignore the colonial legacy as its principles, rules and practices have become the 'droit commun' of the Cameroonian people. Since the end of colonialism followed by the reunification of the two 'Cameroons' there has long been a need and move to unify laws throughout the country, in other words, to produce a uniform legal system. The Federal Law Reform Commissions were established to prepare a code of civil and commercial obligations in 1964.⁷

It is recognised that England and France do not belong to the same family of legal systems.⁸ The differences between the English and French legal systems, common law and civil law respectively, have traditionally been regarded as so great and fundamental that each of these two systems is often portrayed as the other's antithesis and alternative. This traditional view of common law and civil law overlooks the very considerable similarities in their overall objectives, underlying principles and origin that exist between the two systems. They clearly emerge when both systems are subjected to a close comparative examination and analysis. In broad terms the French and English systems seem to share a common origin and a general Western European philosophy. It must be conceded, however, that these considerable similarities between the English and French systems relate rather to their overall structure and underlying principles and objectives. A synthesis and an analytical study of both systems would reveal that numerous divergences are perceptible, nonetheless on points of detail, many of which are minor neither in their character nor in their consequences. It is, indeed, these

7 Eloi Langoul, "Problèmes Particuliers de Codification du Cameroun", (1966) 20 Rev. Jur. Pol. Ind. Coop. 107-112.

8 René David and John E. Brierly, Major Legal Systems in the World Today, 2nd. ed., London, Stevens & Sons, 1978 pp.21-24, 31-141 and 285-367.

differences of detail that expose the distinct character of either system. They are the focus of the traditional view that the French civil law and the English common law are antithetical. They may be ascribed to conceptual differences between French and English legal theory on the role of the state. In France, the state is seen as an instrument of social control⁹ and therefore there is more government interference in regulating companies, industries and contracts of insurance than in England, where the laissez faire philosophy and freedom of contract still survives to a greater extent. Other areas of government intervention in France could be seen in the areas of criminal law and procedure. Here there are comprehensive penal and criminal procedure Codes whereas in England the Theft Act covers only certain areas of the criminal law.

In the promulgation of law for Cameroon, it would be arbitrary, discriminatory and objectionable to adopt wholesale either of the laws of England or France to the total exclusion of the other. From the point of view of human rights, that would result in the favour of one sector of the people of Cameroon to the disadvantage of the other. Moreover, if the bulk of English law should necessarily supplant French law, it should be observed that there are parts of English law which though they are suited to England and the English, are not suitable for Cameroon and Cameroonians. English law and system work in England only because their true foundation is embedded on the mores and convention of its society. Therefore, one should recognise the fact that transplants may not produce similar results, or rather that not all legal transplants can survive well on foreign soil. Consequently, and in

9 Richard P. Claude, "Comparative Rights Research: Some Intersections between Law and the Social Sciences", in Comparative Human Rights, edited by Richard P. Claude, The John Hopkins University Press, Baltimore and London, 1976, pp.382-405, esp. p.386.

consonance with our first source of the content of our uniform laws, the law reformers ought to adopt what is commendable and appropriate for Cameroon.

The enactments applying the general body of English law are invariably accompanied by a proviso which enables the courts to make any exceptions and qualifications required by local circumstances.¹⁰ It may be questioned whether sufficient use has been made of what Denning L.J. in Nyali Ltd. v. A.G.¹¹ called "this wise provision". Whether this is so or not, the proviso is not available where English or French legal principles have been specifically reproduced in local statutes, perhaps with inadequate attention to the need to eliminate technicalities and anachronism¹². Examples of wholesale legal transplants can be found in the Cameroonian Insurance Legislation already mentioned above¹² in Chapters Two, Four and parts of Chapters Three and Six of this work where uniform laws in the form of local legislation have been enacted. The content of these laws and regulations are essentially French in origin, probably because the legislators had a strong French influence. Disparity in insurance substantive laws exist in the areas where there are no uniform laws.¹³ Essentially it is in these areas of law that the reformers for a uniform motor insurance code hereby proposed, are expected to concentrate their efforts.

Where there is found to be a conflict in certain specific areas and details, it is probable that a choice of either English or French law would

10 See the terms of the Mandate and Trusteeship Agreements supra, p.4.

11 [1955] 1 All E.R. 646, esp. at pp.652-653.

12 See supra, pp.57-145, 249-298, 204-246 and 391-413 respectively.

13 See supra, Chapter Three, pp.150-194, Chapter Five, pp.299-360, Chapter Six, pp.366-390 and Chapter Seven, pp.415-439.

be found to be suitable for the entire country and all its inhabitants. Such a choice of or preference for one principle has to be based on rational considerations. Where there is found to be a conflict in certain specific areas and details, it is probable that a choice of either English or French law would be found to be suitable for the entire country and all its inhabitants. Such a choice of or preference for one principle has to be based on rational considerations. Where there is uniformity between the French and English systems the likelihood would be that Cameroon would adopt the principles and practices of these countries, unless that particular aspect is against or contrary to Cameroon's realities and contemporary society. But where both English and French laws appear adequate then both would be unacceptable and we would have to devise an original rule.

On the other hand, in those branches of law which are in general adequately covered by uniform laws there may be no case for intervention, at least for some time to come, except that where necessary, modifications may be made to suite changing circumstances.

We have observed earlier¹⁴ that before the coming of Europeans there existed some indigenous laws which regulated the Cameroonian society and in particular, some practices very similar in their objectives and purpose to insurance. However, the concept of insurance as we know it today, if it existed at all, was likely to have been in an extremely fluid and rudimentary state. Commercial customs such as those from which Lord Mansfield¹⁵ in the early part of the eighteenth century in England moulded a segment of the common law of insurance cannot be expected to be found in a community whose

14 Supra, pp.30-37

15 See, H.G. Gutteridge, Extrait de Recueil d'Études sur les Sources du Droit en l'honneur de Françoise Gény: Lord Mansfield, a comparative jurist of the 18th Century, Recueil Sirey, Paris, 1935, pp.239-246.

philosophy cannot conceive of the transactions to which they relate. This nonetheless does not dispense with the suggestion that a search for the principles, rules and practices of customary law in respect of an insurance transaction should not be undertaken if there is anything meaningful that is to be gained by its incorporation in the law. It is with such reservation that critics of adherents to the preservation of indigenous laws can sustain a criticism for chauvinism and conservatism. On the other hand, admitting the difficulties of defining and ascertaining the content of customary law as observed elsewhere,¹⁶ one may come to the conclusion that if a society has to progress in line with others well ahead of it, especially in matters which entail international transaction it would be a wasteful effort to begin by ascertaining by empirical study the existence and dimensions of customary law and then proceed to filling in the gaps where necessary. The view of Professor Arthur Phillips that the application of English law or indeed any other modern law with modifications is to be preferred to the invention of pseudo-customary rules is more sustainable.¹⁷ This point of view was recognised by the Commission which drafted the Cameroonian Penal Code as they pointed out that:¹⁸

16 See C.M.N. White, "African Customary Law: The Problem of Concept and Definition", (1956) 9 J.A.L. 86; A.T. Denning in the Foreword to the Journal of African Law (1957) 1 J.A.L. at p.1; Eloi Langoul, "Problèmes Particuliers de Codification du Cameroun", (1966), 20 Rev. Jur. Pol. Ind. Coop. 107; A.N. Allott, The Future of Law in Africa, 1960, London, Butterworths; Kenneth Roberts-Wray, "The Need for Study of Native Law" (1957) 1 J.A.L. 82.

17 Kenneth Roberts-Wray, , op. cit., p.82

18 Eloi Langoul, "Le Projet de Code Pénal Fédéral du Cameroun", (1965) 20 Rev. Sc. Cr. Dr. P. Comp. at 212.

"... l'objectif des rédacteurs du projet à été de dépasser les coutumes Camerounaises, pour respectables qu'elles soient, d'inventorier les lois pénales existant tant au Cameroun oriental qu'au Cameroun occidental, et de tenir compte des grands courants de la pensée internationale en ce qui touche les fins du droit pénal¹⁹ et les méthodes modernes de lutte contre la criminalité."

This objective, it may be submitted, ought to be paramount in the reform and unification of motor insurance law of Cameroon. Commercial dealings in general have no internal origin in any particular country. Even English commercial laws are Norman-French in origin yet we talk of English customary laws in respect of commerce. Lord Mansfield was able to derive some principles, for example, the doctrine of non-disclosure from the expansion of international commercial dealings especially in respect of marine insurance.

This leads us to our fourth source of the content of laws required for the reform and harmonisation of the proposed motor vehicle insurance code. It is conceded that the attitude of nations borrowing laws from another is not objectionable. In order to achieve progress and development, the experiences of one country and the solutions applied to solve its problems may provide a lesson for another going through comparable experiences and faced with similar problems. Nations do share experiences even in technology. However, the borrowing of rules and practices for reform ought to take account of the fact that the laws of one country and the solutions applied to them may not be found suitable for the receiving country. Hence any such incorporation ought to look for the present and well ahead in order to be meaningful and useful.

To conclude therefore, the primary consideration for the formulation of laws in any given country ought to concern itself with the contemporary realities of the country.

19 Emphasis added.

Having disposed of these preliminary considerations, we must now proceed to identify the major problem areas dealt with in the earlier chapters of this work and then advance some possible solutions.

In Chapters Two and Three of this work we noted^{19A} that motor insurance is the branch in which bad business is experienced by insurance companies in Cameroon. Further, as was seen in Chapter One and Two of this work on the reason for government control of insurance concerns, the main emphasis of the law is on the financial stability of the insurance company. This is a natural consequence of our conviction that the only sound justification for the supervision of insurance companies is the need to ensure the continuous viability of insurance companies to fulfill their obligations.

One can fairly surmise that in both the United Kingdom and Cameroon, the means of ensuring the financial stability of insurance companies are commendable. Without over labouring the point, financial stability is the sine qua non of a successful insurance company. In insurance regulation, all the ado about licensing, regular returns, inspection, will lead to naught unless a stringent margin of solvency is adopted and enforced.

The financial regulations in both England and Cameroon are not restricted to the requirement of only a guarantee deposit. The solvency margin concept in England and Cameroon, and the flexible guarantee and technical reserves methods in Cameroon are better alternative approaches. The guarantee deposit is not particularly effective in ensuring that insurance companies are always able to meet their obligations for it ties up capital and may worsen rather than improve the financial security of an insurance company. While we concede that a statutory deposit may discourage the formation of out-and-out unsatisfactory companies, as a young company grows, the

19A Supra, at p.100 note 102 and p.202 note 159.

shareholders' capital will bear little or no relation to the liability of the company. It does not make any contribution to the overall solvency of the insurance company.

Insurers trade in uncertainties. Past experience of risk, though the basis of underwriting, is no certain guarantee of future trends. The conditions under which business is transacted change rapidly, a fact which non-life insurers recognise by granting policies on an annual basis. There are many ways in which an insurer can come to ruin. It can accept highly speculative and unprofitable classes of business (for example, motor insurance) over a number of years; it can transact profitable business on an extremely competitive basis, resorting to cut-rates, high commissions and excessive costs of advertisements and acquisitions of business in the form of agency commissions and inspectors' expenses; it can be quixotic in claims settlements, partly from the desire to acquire business by becoming known as the generous company; it can under-estimate its outstanding claims owing to lack of experience or poor judgment; it can be exposed to the devastating blow of an immense disaster such as the numerous fires that result from technology and industrialisation and may collapse through incautious underwriting by incompetent staff.

Unlike the statutory deposit, the margin of solvency bears a definite relationship to the liabilities of a company. The margin of solvency concept, as we have already observed,²⁰ is a requirement that the assets of a company should exceed its liabilities by a fixed amount or a certain percentage. Another method for calculating the solvency margin is the dual test laid down in the E.E.C. Non-Life Establishment Directive which has the advantage of reflecting individual companies' claims experience as well as

20 See supra Chapter Two p.86.

responding to the growth in premium income.²¹ The margin of solvency method, thus, ensures the provision of adequate reserves as a protection for policyholders and also for use during periods of violent fluctuations. As well as being the main bulwark and source of security for the insured, it provides the investible funds.

Further the investment policies required by the legislation of both England and Cameroon are desirable. According to figures released by the British Insurance Association, British insurance companies in 1976 made a record underwriting loss of £151 million on their world wide general business, excluding marine. However, this overall loss was offset by the total investment income of £631 million, thus resulting in a net profit before tax of £480 million.²² The sheet anchor of insurance against predictable underwriting losses, which are more prominent than profits, is investment income. While the underwriting profits of one year may suddenly be replaced by losses, the investment income from the asset portfolios of the company which are enlarged each year by further investment, will rise over a period of time. This investment income is earned on the insurer's own portfolio of strengthened assets, built up over the years by ploughing back profits to the capital base and from the investment of premium monies.

The legislation of both countries provides a wide basis and diversification of investment. An unwise investment policy, for example, concentrating all the eggs in one basket, that is, in a particular form of investment

21 H.A.L. Cockerell and G.M. Dickinson, Motor Insurance and the Consumer, 1980, London, p.36; See also article 16(3) of Council Directive of 24 July 1973 abolishing restrictions on freedom of establishments in the business of direct insurance other than life assurance (73/240/EEC): O.J. of the European Communities No. L228/20, 16 August 1973.

22 British Insurance Association, Insurance Facts and Figures, 1976, (1977) at p.1.

instead of securing the safeguard of spread and an inflexible investment policy in rapidly changing times can slowly bleed a company to death.

In Chapter Three of this work,²³ we saw that the law has increasingly come to recognise the value of insurance as a guarantee that liabilities, when they arise, will be met. This is shown by the periodical extension of compulsion to insure.²⁴ Nevertheless, this guarantee is still subject to the law on civil liability. The present system of tort liability has been subjected to criticism in France and Britain as no longer offering the best means for the compensation of road traffic accident victims. France has established a limited no fault scheme, in which certain categories of accident victims would expect to receive compensation without any determination as to who was at fault in the course of the accident.²⁵ Similar proposals have been made in England.²⁶ The adoption of no fault schemes can be found in New Zealand, Singapore, Australia, Canada, Massachusetts and some other states in the United States of America.

The need for similar schemes may be even greater in Cameroon. In Cameroon there is a less well developed social security system compared to the English and French social security systems. In fact, the only persons eligible for state benefits in Cameroon are civil servants and employees of nationalised corporations. Allied to this, there is no National Health

23 See supra, pp.177-198.

24 See supra pp.204-239, where compulsory insurance is increasingly applied to liabilities of other types: riding establishments for example, have been singled out in Britain as a fit subject for compulsion to insure.

25 See supra, Chapter Three, pp.185-194.

26 Royal Commission on Civil Liability and Compensation for Personal Injury [Chairman: Lord Pearson] Vol.1, Cmd. 7054-1, London H.M.S.O., pp.212-224. See also Chapter Three supra, p.167-168.

Service. Medical bills are borne by the individuals themselves - everyone is his own caretaker, especially those who are not civil servants. A third reason for the establishment of a no fault scheme is that the family ties which provided social security are rapidly disintegrating. Fourthly, there is a greater use and dependence on motor vehicles as the principal means of transport. This, coupled with the bad roads, bridges and low level of infrastructure result in a high incidence of accidents.

There is therefore a case for the introduction of a no fault scheme in Cameroon. The aim to provide road accident victims with adequate, speedy and certain recompense is laudable but the validity of transporting conclusions from other countries places doubt on the original premises upon which the theory of no fault is based.²⁷ We have noted earlier²⁸ that a system suitable and acceptable in one country or community may be quite unsuitable in another. This study recognises that a complete no fault scheme in Cameroon would not achieve better results than the tort system and such a solution would produce results inimical to the best interests of a large proportion of Cameroon population. It is worth noting that Cameroon is a developing country. It is indeed a question of who should finance such a scheme. Experience of claims settlement by the Motor Insurance Fund discussed in Chapter Four²⁹ and the National Social Security Fund reveals that claims settlement is not generous and there is a possibility of mismanagement by government officials; further, high administrative costs would be involved in the operation of such

27 See for example the experience of no fault in America: The Economist March 6, 1976, Vol 258, No.6912 at p.69 "Help, help, fetch a lawyer."

28 Supra, at p.481.

29 Supra pp.265-289 esp. Tables 9 and 13 on pp.264 and 285 respectively.

a scheme. The cost of implementing complete no fault scheme would clearly increase the cost of motor insurance to most Cameroonians, a majority of whom at present cannot afford it.

It is arguable that a complete no fault scheme does not provide a complete answer for the results of every accident. The standard scale of benefits leaves many eventualities uncatered for and the benefits payable are largely fixed and inflexible.

Moreover, with the complete abolition of tort liability, insurers will find themselves excluded altogether from the field of liability for personal injury by accident especially in the motor field which represents an average of 40 per cent of their premium income.³⁰ This would probably be the case notwithstanding the fact that underwriting results for motor insurance have been worsening during recent years as a result of the upsurge in road accidents.³¹ On the other hand, motor business does represent a cash-flow with a resultant investment income which would disappear with such a change. Furthermore, insurance provides a great percentage of Cameroon national income³² which may diminish under a complete no fault scheme. It could also well be that the legal profession would lose a great deal of civil suits and may have to rely on contract, criminal and divorce cases which are relatively rare in Cameroon. In this light one may contend that there may be social

30 See supra, p.40 Table 1 of premium income of insurance companies in Cameroon. There may be plenty of scope for continued exercise of other faculties and growth or potential growth in products and professional indemnity liability but this appears very doubtful since Cameroon is not an industrial country.

31 Institut International des Assurances, Le Marché Camerounaise des Assurances, January 1977, No.4, pp. 5-7; Institut International des Assurances, Une assurance automobile plus compatible avec le développement, Lomé 15-20 October 1979, Revue 11A Spécial, No. 4 "Rapport sur l'Assurance Automobile au Cameroun", at pp. 16 - 20 esp. at p. 16.

32 Ibid.

arguments in favour of no fault compensation, but it does appear that there are no grounds or rather, a weak basis for such a scheme to survive in Cameroon, at any rate for the present.

Here, we would seek to search for ways of improving the system. In this endeavour, where the principles and practices of other countries seem unsuitable, an original principle would have to be derived. The solution which this study advances is that there should exist a two tier system, that is, the continuation of tort remedies and an extensive social security scheme to provide alternative measures of compensating road accident victims. There are two possible alternative approaches to this idea. The first approach may require claimants to elect whether to sue in tort to recover compensation or opt for compensation under the proposed no fault scheme. Claimants accepting payment under the no fault scheme would agree that payment is in full and final settlement. If therefore, a claimant feels he would do better by litigating he will be free to do so. The state however will not sponsor his case. On the other hand, with the second approach, the claimant can use both types of machinery to achieve compensation. Here, none of these systems will be in substitution for the other. Rather, the proposed no fault scheme will be complementary to the tort system, that is, it will provide supportive payments leaving the injured victim with his right to sue for additional damages.

The proposed no fault arrangement suggested under these two approaches will co-exist harmoniously with tort liability. The administration of the scheme would be either run by the motor insurers direct or by the state, with insurers acting as its agents. The proposed scheme would provide compensation³³ for anyone who suffered personal injury as a result of a road accident, as well as the dependents of such victims, although if the victim himself had been guilty of some gross or willful misconduct, his compensation would be

reduced. The cumulative effect of these proposals may have the effect of restricting tort claims to cases of serious injury and substantial pecuniary loss thereby reducing the number of court cases in trivial cases. As a result, there might be considerable savings both in damages and administrative costs in the really trivial cases, a larger fraction of which could be paid out in benefits instead of having to be spent on the costly and protracted procedures of investigating legal liability - the forensic lottery^{33A} in which many accident victims would usually receive no compensation.

The choice of either approach in preference to the other will depend on the economic and social conditions in Cameroon. This may require some study and investigation of what lies behind the present realities of Cameroon. Reforms ought to evolve out of informed analysis. We may only venture in this study to suggest some possible sources of financing the proposed scheme. It should be recognised that the task becomes formidable when a new procedure has to be costed without clear guidance. However, it is suggested that it should be the collective responsibility of the community to finance the scheme.³⁴

33 Loss of earnings could be paid for on an agreed scale and at a ceiling rate or percentage leaving high earners to sue for additional damages if they claim more but hospital expenses and rehabilitation would be paid for in full. The reduction of awards for economic losses and in particular, even the elimination of some non-economic losses such as pain and suffering under the proposed no fault scheme would ensure that insurance premiums do not get out of control. The losses may be claimed by the plaintiffs in civil proceedings for negligence, as in the case of additional damages in respect of high earners suggested here.

33A This expression is attributable to T.S. Ison, The Forensic Lottery, 1967 London, Staple Press.

34 This may represent a dent into individual responsibility which characterises the tort system. Further, this suggestion reflects a utilitarian approach towards compensation for road traffic accidents - it stands in stark similarity to the traditional forms of insurance schemes mentioned in the introductory chapter, pp.32-36.

Under this scheme, compensation would be paid out of a central fund contributed to by the state, by motorists, both vehicle drivers and owners by way of a levy on driving licences, road fund licence fees, an annual levy on all registered vehicles, a slight increase in premiums and an extra tax on petrol and by employers and employees where necessary by a general levy on taxation. One could well argue that since drivers and pedestrians benefit and create the risk of accidents by the presence of vehicular traffic they should also contribute towards the central fund. It is desirable that drivers and pedestrians should retain maximum sense of responsibility on the roads.³⁵ A good theoretical case could be made out for the proposition that they should have to pay a small part of any damages awarded. Unfortunately, this would mean in many instances that a plaintiff or victim would not receive the whole of his award, and present arrangements to guarantee that given a valid cause of action, the plaintiff or victim will not get his damages paid in full. The idea of personal responsibility for an accident is basically a moral one which in practice is vitiated by insurance as claims are met from the pool of policyholders contribution rather than the wrongdoer himself.³⁶ Any question of punishment ought solely to be a matter

35 The unanswerable question here would be, how will the pedestrians' contribution be collected if they are neither employers nor employees? Secondly, would some persons not be subject to multiple contribution? Perhaps one ought to ignore these questions as these would raise arguments which are not dissimilar from those on tort claims especially in relation to the idea of creating risk. A better idea for ameliorating the position of drivers and pedestrians would be to encourage personal accident insurance which does not depend on the vagaries of tort liability and on the other hand, is not detrimental to insurance companies.

36 Moreover, the growth of liability insurance and the thought that the loss could be borne by an anonymous body has to some extent changed the nature of liability and affected the assessment of damages: see, for example, Morgans v. Launchbury [1973] A.C. 127 at 135 per Lord Wilberforce; Lister v. Romford Ice and Cold Storage Co. Ltd., [1957] A.C. 555 at 577 per Viscount Simonds. See further, G. Viney, Le Déclin de la Responsabilité Individuelle, 1964, Paris, L.G.D.J.

for the criminal law. Rather unfairly perhaps, this suggestion would perpetrate the injustice that a negligent defendant's civil liability is determined not by reference to his culpability but purely arbitrarily by reference to the damage suffered by the injured plaintiff. In general society expects that wrongdoing will be followed by retribution in some form. This would still be so in the proposed no fault arrangement because it is an aspect that the criminal law would look after exactly as it does at present. Nevertheless, it seems that the civil code of justice echoes this idea in many guises even though in no apparent systematic fashion. This is manifested by insurance practice when motorists forfeit their no claim discount and are required to pay an increased premium. Furthermore, if the victim himself is guilty of contributory negligence this is taken into account and his compensation is reduced.

The proposition for automatic compensation is desirable but, of even deeper and greater significance, the government should become more involved in accident prevention schemes - as the axiom goes, prevention is better than cure. This could be achieved through improving the roads, providing modern road traffic laws and enhancing road safety measures for the prevention of accidents through nationwide campaigns.^{36A} Insurers could concentrate their efforts on improving safety with greater liaison between safety advisors and safety officers of their clients. Perhaps greater emphasis should be placed

^{36A} This seems to have been recognised by the Government and may be evidenced by a round-table conference discussion on this issue in Cameroon: See for example, Ministry of Transport, "Prévention routière: La plus grande partie des accidents se produisent dans les zones urbaines - révèle la table-ronde organisée au lancement de la campagne à Yaoundé", Cameroon Tribune, No 2936, 27 March 1984, p.3; See also, interview by Laurent-Charles and Boyomo Assala, "Preventing Road Accidents: How To Cut Our Death Rate By 10% " and "Road Accidents Prevention Fortnight: Most Accidents Are Caused By Highway Code Violations - Ngbwa", (interviewee) Cameroon Tribune, No.472, 6 July 1983, p.1 and p.3 respectively. It was acknowledged here that the sensitization of the public is an important measure but is a long-term task. See further, Shey Mabu Peter T. "Death On Our Roads, Anyway Out?", Cameroon Tribune, No.472, 6 July 1983, p.1.

on repair and maintenance facilities. The conditions in insurance policies with respect to failure to keep vehicles in a roadworthy condition could be a serious ground for contributory negligence of the driver and owners of vehicles. In England, there is a voluntary organisation with branches all over the country providing advanced training courses to already licensed drivers to improve safety standards. In addition, there is an established motor vehicle repair centre at Thatcham.

The inability of the French law of civil responsibility and the English law of tort to which Cameroon owes its historical reception should awaken us to the undue complexity, inadequacy and archaism of these laws in their country of origin and further prompt us for a search of rules that are more just, more practicable, simpler, capable of wide acceptance and suitable for our needs.

In addition, with respect to Chapter Three on the Reason for and Scope of Compulsory Insurance and Chapter Four on the Protection of Road Traffic Accident Victims, a wider proposal may be advanced on an international basis to provide co-operation and development in West African countries in the legal sphere. It would be desirable to establish and implement a Brown Card System similar to the Green Card system in Western Europe or the Orange Card in the Arab countries with regard to motor vehicle insurance. This idea was first mooted in 1977³⁷ after various exchanges both with the British Insurance Association and the UNCTAD Secretariat and a draft Brown Card Agreement has been produced by the Committee of West African Insurance Companies Association (WAICA) charged with this responsibility. In a Round Table Conference held in Yaounde Cameroon, in November 1976, the UNCTAD Secretariat was mandated to prepare a draft agreement for the establishment of an Inter-African Vehicle Third Party Liability Insurance Card and has nonetheless

37 See, F.C. Ozomah, "Ecowas and Motor Insurance in West Africa - the Brown Card System", 1979, Vol. V., WAICA Journal, pp. 85-89.

proceeded to evolve the Brown Card which will be used in the Sub-Region of West Africa.

Having regard to the colonial histories from the sixteenth century one will no doubt appreciate that the laws applicable in West African countries with particular reference to insurance generally, and more so in the field of motor vehicle insurance, follow the laws applicable in England and France. In the WAICA countries which comprise the English-speaking countries, the motor vehicle insurance legislation follows closely that of England.³⁸ Similarly, those of the CICA countries of West Africa which comprise the French-speaking countries follow the French civil law model.

In order to satisfy the law on compulsory insurance in the English-speaking countries, the user of a motor vehicle need only have an insurance cover which will indemnify him against damages for death and bodily injuries in respect of third parties. On the other hand, in the French-speaking countries the requirement for a compulsory cover is in respect of death and personal injury to third parties and in addition property damage. The recognition of this disparity may cause difficulties in the implementation of the proposed Brown Card system. However, the European Green Card system has established and fostered the free movement within the Community of motor vehicles, even with similar attendant difficulties, due to the implementation in each member state, of an E.E.C. directive³⁹ to the effect that the possession of a motor insurance policy would be regarded as having satisfied the compulsory motor insurance laws of any country of the E.E.C. Consequently,

38 See, the Motor Vehicle (Third Party Insurance) Act 1945 in Nigeria; the Motor Vehicle (Third Party Insurance) Act 1958 of Ghana; the Motor Vehicle (Third Party Insurance) Act 1948 of Gambia; the Motor Vehicle (Third Party Insurance) Act 1949 of Sierra Leone.

39 Council Directive of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles, and to the enforcement of the obligation to insure against such liability (72/166/EEC) O.J. No.L103/1 1972 Part I, Special Edition.

a similar solution is possible within the West African Community.

In Chapter Five of this work on the formation of the insurance contract and subsequent chapters we witness the disparity between the law in English-speaking Cameroon and French-speaking Cameroon, each following English or French law respectively. It is worth noting that there is substantial similarity between the broad statements of principle in respect of the duty of disclosure as the laws of insurance in France and England have a common origin - marine insurance in the eighteenth and nineteenth century.⁴⁰ Further international interaction has whittled down the scope of disagreement, but not completely eliminated the conceptual differences and the detailed application of the principles.

We observed earlier⁴¹ that in England, France and Cameroon there exists a duty to disclose material facts in insurance contracts. And further, that there has been recent criticism in England of the doctrine of non-disclosure, questioning the retention of an eighteenth century rule of law which, it is said, is unduly harsh on the insured and unnecessarily favourable to the insurer under current insurance conditions.⁴² In addition the courts and academic writers have criticised the law on non-disclosure as being far too

40 See, Emérigon, Traité des Assurances et des Contrats à la grosse, 1938, Paris.

41 See Chapter Five of this study, esp. pp.301-326.

42 Richards, On Insurance, 5th ed., 1952, Vol.2, Chap.10, "The Anachronistic Doctrine of Concealment"; Harnett, "A Remnant in the Law of Insurance", (1950) 15 Law and Contemp. Prob. 391.

stringent.⁴³ It is important to note that the majority of American state jurisdictions have refused to apply the strict English rule of disclosure to non-marine insurance. In American law only a deliberate non-disclosure avoids liability and the insurer is under a duty to ask for information.

Clearly, there is some need for a duty on the part of the insured to provide information on the risk he requires an insurer to undertake. However, the onerous character of the duty placed upon the insured, by the law, to disclose any fact which a prudent insurer would consider to be material and the failure or breach of which, entitles the insurer to repudiate the policy and to reject any claim is far too wide and stringent on the insured. An honest and reasonable insured may be quite unaware of the existence and extent of this duty, and even if he is aware of it, he may have great difficulty in forming any view as to what facts a prudent insurer would consider to be material. Material facts are defined as facts which are likely to influence the rate of premium fixed by the insurer and to determine his decision whether or not to accept the proposed risk. This means, in effect, that the proposed insured is expected to decide in advance which facts are material in accordance with the above definition. In order to do this he would have, quite independently, to form an opinion as to what factors are likely to affect the insurer's decision with regard to the rate of premium and/or acceptance of the risk. The insured is thus required, in effect, to undertake an excursion into the mind of the insurer. The onerous character of the burden thus placed upon the insured becomes all the more striking when a dispute subsequently arises as to the materiality of a given

43 See the Law Commission Report (No.104), Non-Disclosure and Breach of Warranty, 1980, Cmnd.8064; Hasson, "The Doctrine of Uberrima Fides in Insurance Law - a Critical Evaluation", (1969) 32 M.L.R. 615; J. Birds, "The Reform of Insurance Law", [1982] J.B.L. 449-459.

fact. To prove the materiality of such a fact the insurer would have to call expert evidence of other insurers. We are thus in a situation where the question whether a particular fact would have affected the insurer's decision as to the rate of premium and the acceptance of the risk had to be answered by the insured without any assistance from the insurer if it arose before the conclusion of the contract, whereas it could be answered by the insurer only with the assistance of expert witnesses if it arose after the conclusion of the contract. The burden thus placed upon the proposed insured is evidently too high. A more realistic duty would be to require the proposed insured to disclose not the facts which are likely to affect the decisions of the insurer as to the rate of premium and the acceptance of the risk but those which, in the opinion of a reasonable insured, he ought to disclose. The Law Commission has recommended⁴⁴ a reduction of the duty of disclosure to a duty to disclose any material facts which the proposer knows or can be assumed to know and which a reasonable man in the position of the proposer would disclose after making such enquiries as are reasonable having regard to the nature and extent of the cover which is sought, and the circumstances in which it is sought.

There is yet a second problem which the duty of disclosure poses. The question arises whether the duty to disclose is voluntary or whether the insurer is obliged to ask questions. If the insurers are obliged to ask questions then it may reasonably be supposed that any matter which is not made the subject of any question is not relevant and therefore the proposed insured disposes of his duty to disclose after answering specific questions supplied by the insurer. The duty of disclosure operates harshly on the

44 Law Commission Report, (No.104), op. cit., para.4.47-4.52. See also Clause 2 of the Draft Insurance Law Reform Bill (L.C. Report No. 104, Appendix A).

insured, and produces something of a trap for the insured in relation to proposal forms and renewals of the cover. In relation to proposal forms even a reasonable insured is likely to be unaware that after answering a series of specific questions he remains under a residual duty to volunteer further information to which no question has been directed. In relation to renewals even a reasonable insured is likely to be unaware that in law these constitute fresh contracts of insurance and that the duty of disclosure arises afresh on every renewal. Lord Mansfield in Carter v. Boehm⁴⁵ made it clear that both parties must act in good faith. By this he must reasonably be understood to mean that whilst the insured must act in good faith in disclosing all the relevant information, the insurer must also on his part act in good faith in informing the insured seeking insurance cover what his legal duties are. In this respect there is a recommendation⁴⁶ to the effect that proposal forms and renewal notices should contain prominent warnings of the proposer's duty and extent of his duty of disclosure, not only when he makes the first contract of insurance but also on renewal, and that he should keep copies of information supplied by him to the insurer. The insured will be further protected by the requirement that he will be supplied by the insurer with a copy of the proposal form which he has completed and of any information which he has given to the insurer on renewal.

The proposals for reform which we have just alluded to advanced by the English Law Commission after a close study of the issues are equally applicable to proposers of insurance in Cameroon. The circumstances in Cameroon may in particular be more demanding of protection for the insured,

45 (1966) 3 Burr. 1905. See, supra, p.305.

46 Law Commission Report, (No.104), op. cit., para.4.60. See also Clause 4(3) of the Draft Insurance Law Reform Bill (L.C. Report No. 104, Appendix A).

due to the prevalence of illiteracy, ignorance and lack of awareness of contractual rights which affects one out of every two persons in Cameroon.⁴⁷ There are essentially three problems involved where an illiterate person is a party to an insurance contract. First, in the discharge of his duty of disclosure, he may not be aware of what facts are material for the purposes of disclosure and this of course would affect the quality of enquiries which it would be reasonable to expect him to make. Second, where the illiterate party is assisted by an insurance agent in fulfilling his duty of disclosure, he may be quite unaware of its legal implications. Third, since the contract of insurance is a written contract, the contract may contain terms, such as conditions and exclusions, limitations or penalty clauses which the illiterate party is ignorant about. Cameroonian courts have demonstrated an acute lack of sensitivity in this respect.⁴⁸ In spite of the seriousness of this problem, there is no legislation for the protection of illiterate parties to an insurance contract. Related to the problem of illiteracy is that the proposal form and policy may be written in a language alien to the insured, a problem which recurs constantly in as much as there are two official languages in Cameroon, English and French. A contracting party may be literate in English and not in French, or vice versa. We observed in Chapter Seven⁴⁹ on the construction of the insurance contract that a translation by an insurance clerk of the phrase "affaire et promenade" produced quite a different result. There is certainly a case for enabling insured parties to benefit from legislation designed to protect illiterates.

47 See, Bureau Central du Recensement, Recensement général de la population et de l'habitat, April 1976, Vol.4 - Scolarisation - Niveau d'instruction, p.71.

48 See, Chapters Six and Seven of this work, supra, pp. 379-385 and 416-433 respectively.

49 See, supra, p.432.

The policy of insurance is a highly legalistic document which is presented to consumers who are unable to read and even if they do read them, they would be unable to understand its contents. It is suggested that there must be a legislative duty based on public policy on insurance intermediaries to explain the terms of the insurance contract to the illiterate party. In this connection, there must also be a presumption that the dominant party to the contract, the insurer, is bound by what the agent proffers as the terms of the contract and has knowledge of the meaning and scope of the terms thus proffered: the insurance intermediary acting for him is his agent for the purposes of effecting an insurance contract. This will prevent such dominant parties, the insurers, from pleading that the insurance intermediary is not his agent. The legislative provisions should also incorporate the requirement on all writers of documents to explain the documents to the illiterate persons for whom they write, that is, a provision similar to the Nigerian provisions, described below. Failure to comply with the above should render the contract voidable. Nigeria has an illiterate Protection Act 1948,⁵⁰ the pith and marrow of which is section 3 which provides :

"Any person who shall write any letter or document at the request, on behalf, or in the name of any illiterate person shall also write on such letter or other document his own name as the writer thereof and his address; and his so doing shall be equivalent to a statement:-

(a) that he was instructed to write such letter or document by the person for whom it purports to have been written and that the letter or document fully and correctly represents

50 The different states in Nigeria have different Illiterate Protection Laws, although they provide substantially the same provisions: Illiterates Protection Act (Lagos), Cap.83; Illiterates Protection Law (former Eastern Region), Cap.64; Illiterates Protection Law (former Northern Region), Cap.51; Illiterates Protection Law (former Western Region), Cap.47; See further, E.I. Nwogugwu, "An Examination of the Position of Illiterates in Nigerian Law", (1968) 1 J.A.L. 32; S.K. Date-Bah, "Illiterate Parties and Written Contracts", (1971) 3 Review of Ghana Law 179.

his instructions; and (b) if the letter purports to be signed with the signature or mark of the illiterate person, that prior to its being so signed it was read over and explained to the illiterate person and that the signature or mark was made by such person."⁵¹

With respect to the insurance contract the insurance intermediary would normally be the person who would fill in the proposal form on behalf of the illiterate person and in so doing he would be making an undertaking that the written document correctly represents what the insured stated. Further the insurance intermediary would be under a duty to explain to the illiterate party the full import of the document he is signing. This seems necessary because, despite all the boldly printed warnings on proposal forms and renewal notices, the duty to disclose material facts and the penalty for failure thereto are clearly not understood by many policyholders who inhibit a fundamental misunderstanding about insurance cover.⁵² It is hoped that some explanation from either brokers or their insurers about the meaning of an insurance contract in general and particularly the cover a client wishes to purchase would assist illiterate and semi-illiterate parties in insurance transactions.

More appropriately, an arrangement could be made within the insurance industry to establish an independent Central Advisory and Disputes Bureau⁵³ with local branches in all the provinces of the Republic of Cameroon to cater for insurance matters. This form of self-regulation would increase and facilitate the dissemination of insurance information throughout the country.

51 Section 3, Illiterates Protection Law (former Eastern Region) Cap.64.

52 Especially terminologies, such as "covered," "comprehensive cover", "all risk insurance" in fire, household and motor policies. See for example in England, The Insurance Ombudsman Bureau, Annual Report 1984 pp.27-33

53 See supra, Chapter Eight of this work on the Settlement Process, pp. 444-465.

In consequence, public awareness of the availability of advice providing services and disputes settlement procedures might bridge the gap between the 'insurance man' and the lay man.

We have earlier stated⁵⁴ that the primary motive, and indeed the most important consideration for the present study, is a proposal for a uniform motor vehicle insurance code. In this respect we would consider in the foregoing discussion, in what form such reform and unification of the laws ought to proceed. The question then is, are the courts the best institution to make reforms in the law which are of such cardinal importance? Or should the legislators take the initiative? This question can be answered simply and easily by the age-old adage that courts do not make laws. However, one cannot overlook the usefulness of the courts as an instrument of law reform. In both common and civil law⁵⁵ countries through the use of rules of interpretation, courts have been known and found to develop the law. For instance, we observed⁵⁶ that the Cour de cassation in Arrêt Jand'heur in 1930⁵⁷ made a formidable interpretation of article 1384 of the Civil Code. The French Civil Code is now so old that the courts have been compelled, in the absence of legislative amendment, to give some of the articles an interpretation that could never have been predicted by anyone who had recourse only to the text of the articles.

54 See supra, at p.482 and the Abstract to this study at p.(v).

55 For the importance placed on jurisprudence as a source of law in France see, Otto Kahn - Freund, Claudine Lévy and Bernard Rudden, A Source-book on French Law: System- Methods : Outlines of Contract 1979 2nd ed., Oxford Clarendon Press esp. pp. 116-166.

56 See, supra, Chapter Three of this work on the Reason for and Scope of Compulsory Insurance, pp.153-155.

57 Ch. reunies, 13 February 1930, D.1930. 1.57.

In the case of Cameroon, the question of the courts being an alternative agency or instrument for reform is debatable. On the other hand, it may be observed that the courts may provide the forum for illuminating and identifying the problem areas of the law and place them in the proper perspective for future discussion. It is significant to point out the limitations which the courts in Cameroon may face. It has been constantly made clear that Cameroon has a pluralist legal system - French law, English law and customary law⁵⁸. In view of this decentralised nature of Cameroonian courts, it is questionable whether the courts can effectively carry out the task of unifying the laws. There has been a gradual whittling down of the influence of the judiciary, while on the other hand, the pervasiveness of the executive has been intensified - most enactments from the legislature are designed to apply to the entire country, thus ensuring and enhancing uniformity. Indeed, this negative attitude towards the judiciary is reflected in the constitution of the personnel of the courts. Most of the judges before reunification were learned in one of the two existing legal systems. With this limitation, they have not generally proven themselves to be equal to the task of properly analysing the issues involved. As already observed⁵⁹ in the introductory chapter, even highly qualified judges have not generally delivered satisfactory judgments in connection with or when issues of conflict of laws arise. They rather resort to the law they are acquainted

58 See the introduction to this study, supra, pp.1-37.

59 Supra, pp.28-30.

with and hence integration has not taken the course it ought to have taken. The expectation is that a change may be realised in the future in the constitution of the courts as the school of magistracy is designed to incorporate into the mainstream of the judiciary lawyers and advocates of both English and French law.

Allied to the weaknesses of the judicial officers is a further limitation arising from the structure of the courts. In Cameroon there are ten courts of appeal in the ten provinces, eight in the French-speaking Cameroon operating on purely the civil law received from France and two courts of appeal in the English-speaking Cameroon applying principally English common law. The total absence of any proper system of law reporting in these provinces and in the entire country as a whole, coupled with the fact that there is no strict adherence to precedent in Cameroon as conceived in England makes it difficult, to say the least, to determine exactly what the courts will decide in any given case and further, renders any comprehensive review of the decisions of the courts an uphill and an arduous task. It has been remarked⁶⁰ that the only unifying body in the judicial system is the Supreme Court of the Republic of Cameroon. Nevertheless even at that level uniformity is only a paradox, as within the Supreme Court there are two divisions - one hearing appeals from the courts of appeal of the English-speaking provinces and the other attending to appeals from the courts of appeal of the French-speaking provinces.

This leads to a third major criticism of the courts in the process of reforming and unifying the law. This concerns the assessability of legal materials. The courts are not well-equipped and do not have the sources of

60 Supra, at p.23 note 35.

information to be involved in more far reaching research for the considerable legal analysis that needs to be carried out. In view of what has been said about the Cameroonian judiciary above, they clearly lack any fact gathering facilities or machinery and therefore lack the expertise to analyse facts and legal issues adequately. Even in the common law countries where judges make valuable pronouncements in their judgments which may be offered as 'food for thought' in the process of reform, it takes years of litigation and learned commentary to produce a set of acceptable working rules for general application.

Another factor that imposes severe constraints on the courts is the handling of litigation - case load, time, expense and the frustration of repeated law suits. Probably more important is the fact that the courts in any particular case cannot deal with the various factual situations that are involved in a legal rule. Because the courts proceed on a case by case approach their effectiveness is stifled. They tend to deal with specific instances rather than with general patterns thus having little diversionary capacity. In Cameroon, in particular, in view of the fact that only a small number of cases involving disputes on rules and principles of law reaches the courts, the influence of the courts is bound to be negligible.

It is for these reasons that one can assert that the courts in Cameroon are manifestly ill-suited as a starting forum for the determination of legal reform. Undoubtedly, the courts would exercise their judicial freedom in interpreting the laws and filling in the gaps where necessary. Nevertheless it seems that codification by the legislators is the only hopeful solution.

While it is conceded that a comprehensive and satisfactory code can hardly be hoped for, as it would resemble an encyclopedia in its size, nature and cost, it would be a timid approach to conceive that the task is too big and completely unattainable and that events should be allowed to take their

course. Cameroon is developing rapidly - economically, industrially, socially and otherwise and the pace of reform may be too 'hot' for a laissez faire approach in the legal field. There is already codification in other areas of law such as the criminal procedure code, the penal code and labour code, and a tendency towards codification of civil law since 1964. In like manner, the same spirit ought to be carried through towards rationalisation and harmonisation of motor vehicle insurance law to adjust it to the changing mores and conditions before the time is ripe, with the consequent danger that a premature amalgam may lose much that is good for Cameroon and retain ingredients from English and French law that would be better left out.

The study, recording of data, the organisation of conferences and seminars all have their part to play for the eventual codification of the law. Law reporting of judicial decisions ought to be encouraged by the government who should create a directorate of the Ministry of Justice in charge of law reporting.

The integration of members of the two sectors of Cameroon is developing and in the present state of Cameroonian society ample room should be left for it to continue to do so. As this develops, it may with advantage be encouraged to absorb as much of English and French principles and practices as is appropriate, with a view, primarily, to securing uniformity so far as is practicable. The goal seems to be something like this: as much of English law as is sound and suited to local circumstances, together with as much of French law as is worthy of preservation.

If a conscious effort is made to guide development in the right direction, then those engaged in the task ought to possess a sound knowledge, not only of English law but of French law, as well as other Anglo-French jurisdictions. This reiterates our fourth consideration of comparative lessons and experience from other countries as a source of the content of our

uniform laws. The Commission, set up for embarking on codification should make use of the joint effort and collaboration of specialists in related disciplines - academics, sociologists, anthropologists, politicians, historians, advocates, judges and civil servants of the Ministries of Justice, Education and Finance.

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III OFFICIAL AND SEMI-OFFICIAL PUBLICATIONS

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