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THE DOCTRINE OF SUBROGATION IN ETHIOPIAN INSURANCE REGIME: ITS SIGNIFICANCE AND APPLICABILITY TO LIABILITY INSURANCE

A Thesis Submitted in Partial Fulfillment of the Requirements for the Award of Master of Laws (LL. M) in Business Law at School of Law, College of Law and Governance Studies, Addis Ababa University

By: Mawcha Geremedhn

Addis Ababa, Ethiopia

February 2020

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Declaration

I, ***MAWCHA GEREMEDHN***, hereby declare that the thesis titled '*the Doctrine of Subrogation under Ethiopian Insurance Regime: Its Significance and Applicability to Liability Insurance*' is my original work and that it has not been submitted for any degree or examination in any other university. I also pledge that all sources used in any form are duly acknowledged.

Mawcha Geremedhn

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Date: _____

Addis Ababa University
College of Law and Governance Studies
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Thesis Approval Sheet

Mawcha Geremedhn's thesis, titled: *"***The Doctrine of Subrogation under Ethiopian Insurance Regime: Its Significance and Applicability to Liability Insurance***"* is approved by the undersigned members of the examining board.

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Dedication

This paper is dedicated to in loving memory of Hagos G. and G/mechael H. who accidentally passed away while attending my LL.M. study!

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First and foremost, I want to thank the Almighty God for everything he does to me and placing where I am by now in the journey of my life. Whenever I praise God, I never forget the love of his Mom (St. Mary) and I shall say: "**ሰአሊ ለነ ቅድስት**!"

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Table of contents

Acronyms and Abbreviations

AAU	Addis Ababa University
Art.	Article
Arts.	Articles
C.C.	Civil Code of the Empire of Ethiopia 1960 (Proc. No.165)
CII	Chartered Insurance Institute
Com. Code	Commercial Code of the Empire of Ethiopia 1960 (Proc.No.166)
E.C.	Ethiopian Calendar
E.I.C.	Ethiopian Insurance Corporation
Fed. Neg. Gaz.	Federal Negarit Gazzetta
GDP	Gross Domestic Product
No.	Number
Proc. No.	Proclamation Number
S.C.	Share Company
UK	United Kingdom
USA	United States of America

Abstract

The doctrine of subrogation is considered as one of the fundamental principles of insurance that applies to both indemnity insurance: property and liability. Despite this fact, the Com. Code is silent about the applicability of the doctrine in respect of liability insurance which could possibly challenge subrogating insurers. To this end, the researcher, using qualitative methodology, argues that insurers can do away the problem by incorporating clear 'subrogation clause' into their liability policies. Short of such clauses, however, the legal gap must be filled by interpretation. In doing so, the basic canon of interpretation, i.e. analogy from property insurance must be employed. On the top of this, the legal, social and economic benefits of subrogation in liability insurance must be weighed to fill the gap in favor of insurers. However, as such approach alone doesn't warrant the application of the doctrine to the gap, the researcher recommends for a legislative measure to be taken.

CHAPTER ONE

1. INTRODUCTION

1.1. Background of the Study

Human life is often characterized by uncertainties related with the happening of unknown events resulting in loss. In view of such happenings, the techniques employed to manage risks of losses are two: risk control and risk financing.[1] Insurance system, the most common type of risk financing, tries to transfer the risk of people and businesses to insurance companies while the latter also distribute it among the formers.[2]

In this era of globalization, where mass production, transportation and social interconnectedness have significantly increased than before, people are exposed into civil and criminal liabilities in the course of their employment relationships, production processes, social interactions and so on. By and large, it is said that such technological development induced civil liabilities result in a rapid growth of the issuance of a variety of liability insurances.[3]

According to the African-Re, Ethiopia's insurance industry is relatively underdeveloped which is characterized by the sector's low penetration level, representing merely 0.5% of the GDP.[4] Despite this latter fact, there are different types of liability insurance policies like product liability, professional indemnity and public liability in the country.[5] Moreover, anyone who drives or uses a vehicle is required by law to buy a compulsory third party motor insurance cover.[6]

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[1] George Rejda and Namara Michael, *Principles of Risk Management and Insurance* (12th, Pearson Education, Boston 2014) 30

[2] Robert Keeton, *Basic Text on Insurance Law* (West Pub Co., St. Paul, Minn 1971) 2

[3] Diane Lear and Massimo Vascotto, *Liability Insurance* (CII, 2018/19) 14

[4] Africa-Re, ' African Insurance Regulation Directory ' (2015) 10-15 <https://www.schanz-alms.com/files/downloads/44c98852789f722fc0412d71a5b04b85/Africa-ReInsurance-Regulatory-Directory.pdf> accessed 10 March 2019

[5] Kahase G/Michael, 'Ethiopian Insurance Sector and its Contribution to Economic Growth' (Masters of Business Administration Thesis, AAU 2018)12

[6] Vehicle Insurance against Third Party Risks Proclamation No. 799, Fed. Neg. Gaz. 19th Year No.53, 23th July 2013, Art 3(1)

Insurance, including liability insurance, has certain basic legal principles up on which it basically operates like the principle of indemnity, insurable interest, subrogation, utmost good faith, etc.[7] Among these principles, the principle of subrogation, which is also known as 'the doctrine of subrogation', is a common parlance of law of contracts in general and insurance in particular. In the field of insurance, subrogation allows an insurer, after paying a compensation to an insured, to proceed against a tortfeasor by substituting itself to the rights of the insured.[8]

The benefits of subrogation in insurance are said to be manifold. Firstly, it prevents unjust enrichment of the insured by earning compensation from both the insurer and the third party tortfeasor.[9] Secondly, recoveries from subrogation play a robust role in increment of insurance companies' income.[10] In connection to this, subrogation helps to decrease the rate of insurance premiums in return of recoveries gained from third party tortfeasors.[11] Thirdly, it discourages carelessness of persons in the sense that negligence would bear ultimate personal liability.[12]

Being a corollary to the principle of indemnity, it is generally argued that the doctrine of subrogation operates throughout the field of indemnity insurance, property and liability.[13] However, it isn't applicable to life insurances because life insurance is not based on the principle of indemnity.[14] The above-stated being the general jurisprudence, the Com. Code, which governs the insurance regime of the country, is silent whether subrogation right is accorded to insurers in cases of liability insurance.

Hence, the very purpose of this research is to thoroughly analyze the gap of the law and practical applicability of the doctrine of subrogation to liability insurance by courts and insurance companies.

[7] George Rejda and Namara Michael (n 1)184-192.

[8] Reuben Hasson, ' Subrogation in Insurance Law - A Critical Evaluation' [1985] 5 Oxford J. Legal Stud. 416, 417.

[9] Ronald Horn, *Subrogation in Insurance: Theory and Practice* (S.S. Huebner Foundation, Homewood 1964) 26.

[10] ibid 3-4.

[11] George Rejda and Namara Michael (n 1) 189.

[12] ibid.

[13] S. Krishnan, *Liability Insurance* (2nd, Insurance Institute of India, 2005) 9.

[14] Ronald Horn (n 9) 37.

1.2. Literature Review

Issues of subrogation in respect of liability insurance are considered under the realm of indemnity insurance. Though great deal of literatures have been written regarding indemnity insurance to which the doctrine of subrogation is applicable, as corollary to the principle of indemnity, the significance and applicability of subrogation to liability insurance as an independent subject matter is little studied.

There is a widely held view that the doctrine of subrogation is applicable to indemnity insurance. Thus, the doctrine is applicable to liability insurance for the latter is usually considered as indemnity insurance.[15] On the other hand, non-indemnity insurances, life and accident, don't invite the application of the doctrine. However, Reuben Hasson argues that life and accident insurances as well should be treated as contracts of indemnity whenever the parties to the insurance contract have consented thereto and thereby making the doctrine of subrogation applicable.[16]

In Ethiopia, let alone the applicability of subrogation to liability insurance, the whole indemnity insurance regime doesn't seem to have been properly studied. The only single academic work, to the best knowledge of the researcher, relating to the principle of indemnity, and to the doctrine of subrogation, is Mr. Tesfaye Abate's work.[17] In his article entitled: "*Indemnity and Indemnification in Relation to Personal Accident Insurance in Ethiopia*", the author has impliedly noted that the doctrine of subrogation is equally applicable to both forms of indemnity insurances i.e. property and liability insurances as they are insurance for damages.[18] However, with the exception to make a mention of the general jurisprudence on the issue, he has not considered the apparently existing gap in the law nor has he shown how liability insurance is insurance of indemnity by buttressing the pertinent provision/s of the law.[19] Moreover, he did not

[15] ibid 52.

[16] Reuben Hasson (n 8) 418.

[17] Tesfaye Abate, 'Indemnity and Indemnification in Relation to Personal Accident Insurance in Ethiopia' [2008] 1 Jimma U. J.L.

[18] ibid 343 and 350.

[19] On the other hand, one can allege the indemnity nature of insurance of objects from Art. 678 of the Com. Code which reads as *"[A] contract for the insurance of an object is a contract for compensation. The compensation shall not exceed the value of' the object insured on the day of the occurrence."*

address the application of subrogation to liability insurance by courts. Therefore, this study aims to explore the application of the doctrine of subrogation to liability insurance in Ethiopian insurance laws, insurers' policies and by courts to cases.

1.3. Statement of the Problem

The Com. Code, which has been in place for almost the last six decades, seems to have a gap as to the applicability of the doctrine of subrogation to liability insurances. The Code, while clearly providing for the applicability of the doctrine to insurance of objects[20], it explicitly disallows its applicability to insurance of persons.[21] However, the applicability of the doctrine to liability insurance is not clear for the Code failed to address the issue.

Despite the above-stated widely held view as stated in the section dealing with background of the study that the doctrine of subrogation is applicable to liability insurance, the existence of such view alone doesn't warrant its applicability in Ethiopia in the absence of a clear law to that effect. Moreover, one might argue that so far as applying the doctrine to liability insurance is not clearly prohibited, subrogation is allowed on the basis of commonly known canon of interpretation: 'what is not expressly forbidden is considered as an allowed.' However, such argument appears to be futile because, firstly, such canon usually works in criminal laws and, thus, its applicability to civil matters is doubtful. Secondly, the way subrogation is clearly allowed in property insurance and disallowed in insurance of persons while the law is silent in respect of liability insurances doesn't warrant to conclude that the silence of the law is deliberate and that gives subrogation right to insurers. To date, this feature of our infant insurance industry is not well studied and, thus, calls for a systematic study to be undertaken on it by assessing benefits of applying subrogation to liability insurance.

When a law appears to be unclear with respect to subrogation in insurance, the defense of 'real party in interest' might be brought against an insurer, and subrogation agreements are believed to play an important role in filling the gap.[22] In this regard, the C. C., with a caption 'insured victim', seems to make a mention as to the possibility of contractual subrogation by

[20] Com. Code, Proc.No.166, Neg. Gaz., 19th Year. No. 3, Art 683. The Com. Code uses the phrase 'insurance of objects' to refer the class of insurance commonly called 'property insurance'.

[21] Id, Art. 690

[22] Andrew Hecker, "Subrogation - Potential Defenses" (1982) 18 Forum 615.

stipulating:*"[T]he insurance contract may, however, provide for the subrogation of the insurer to the victim's claim against the person liable*." [23] However, this provision may beg for a question running: what did the law intend to include under the caption of 'insured victim'? Furthermore, though it may be argued that having good liability insurance policies may serve to fill the legal gap in Ethiopia, there exists a substantial variation from policy to policy as to the inclusion of subrogation clauses.[24] Hence, considering the extent to which the right of subrogation is envisaged in liability insurance policies may also be worthwhile. Therefore, the absence of a clear law as to the applicability of the doctrine of subrogation to the field of liability insurance and the literature gap examining its applicability by courts and policies of liability insurance invites to conduct a research.

1.4. Research Questions

This research is conducted to answer the following major research questions.

1- What are the significances of applying the doctrine of subrogation to liability insurance?
2- Why did the legislator mention subrogation only in relation to insurance of objects and omit it in the section dealing with liability insurance in the Com. Code? How should this legal *lacuna* be filled?
3- How do liability insurance policies sold by Ethiopian insurers regulate the issue of subrogation?
4- What is the stand of Ethiopian Federal Courts in applying the doctrine of subrogation to liability insurance, if prayed?

1.5. Objectives of the Research

1.5.1. General Objective

The general objective of this study is to examine whether the doctrine of subrogation is applicable to Ethiopian law on liability insurance and the practical application of the doctrine by Ethiopian insurers and courts.

[23] C. C., Proc. No.165, Neg. Gaz., 19th Year. No. 2, Art 2093 (3).

[24] For instance, the E.I.C. Vehicle Insurance Policy against Third Party Risks expressly stipulates a subrogation provision under condition 8 while Nib Insurance S.C. Carrier's Liability Insurance Policy lacks clarity on the same issue. (Both Available as of July 2019).

1.5.2. Specific Objectives

The specific objectives of the study are:

1. To assess the benefits of applying the principle of subrogation to liability insurance;
2. To examine the place of subrogation in the Ethiopian liability insurance law;
3. To examine the applicability of contractual subrogation in liability insurance policies sold by Ethiopian insurers;
4. To explore the practical applicability of the doctrine of subrogation in liability insurance by courts; and
5. To put forward recommendations for policy decision making.

1.6. Methodology of the Research

This research is predominantly a doctrinal inquiry that is aimed to analyze relevant legal provisions, insurance policies and court decision on subrogation in respect of liability insurance. A non-doctrinal method is also employed to expound some practical issues related to the research. To achieve such objectives, a qualitative approach of data collection has been employed as it is more appropriate to explore the experiences and attitudes of participants.[25] The research has made use of an interplay of both primary and secondary sources of data.

As primary source of data, laws and interviews are used. In order to analyze the law governing the subject matter at hand, explanation of relevant provisions of laws and legal analysis has been conducted. As explanation of laws alone cannot show the practical applicability and significance of the doctrine of subrogation in respect of liability insurance, an interview with 3 insurance attorneys, 3 insurance experts and 3 judges is held to solicit their attitudes and experiences. Participants of the interviews are selected on the basis of purposive sampling method taking into account their expertise, position, knowledge and experience in the area. In conducting the interview, a semi structured type of interviewing is undertaken because such approach allows the researcher to be consistent and flexible in asking questions with a view to probe important data.[26]

The secondary sources of data that are reviewed in this research are literatures, standard form insurance policies and court case. Literatures such as books, journal articles and other research

[25] Catherine Dawson, *Practical Research Meth*ods (1st, Cromwell Press, Oxford 2002) 14.

[26] ibid 29-30.

results which lay the conceptual framework of liability insurance and the general applicability of subrogation are utilized. Liability insurance policies utilized by Ethiopian five insurance companies[27] are examined to assess how these policies have addressed the issue of contractual subrogation.

Initially, the researcher planned to analyze court cases from Federal First Instance, Federal High Court and Federal Supreme Court in Addis Ababa. But, the researcher cannot secure enough cases except one from the Federal Supreme Court. Hence, this case is considered to illuminate the application of the doctrine to liability insurance by the court.

Finally, data are analyzed based on their nature. Thus, insurance policies are analyzed using qualitative thematic method of analysis. The analysis of laws and court decision are carried out taking into account the basic principles of laws. The data collected through an interview are analyzed using descriptive techniques.

1.7. Scope of the Study

The research is limited to examine the significance and applicability of subrogation to liability insurance. Hence, legal issues revolving around subrogation in respect of insurance of persons and property aren't within the scope of the research.

1.8. Organization of the Study

The research is comprised of four chapters. The first chapter is an introductory chapter consisting of background of the study, literature review, statement of the problem, research questions, research objectives, research methodology and scope of the study. The second chapter deals with the general conception of liability insurance and the doctrine of subrogation. Moreover, it scrutinizes the general applicability of subrogation to indemnity insurance. The third chapter examines the significance and applicability of subrogation in Ethiopian liability insurance regime. Lastly, chapter four puts conclusions and recommendations of the study.

[27]The basis for the selection of insurers from a total of 17 companies is purposively done to comprise government and private companies, and in such a way to include companies established at different times. E.I.C. (1976) being government owned, the following companies are private companies: Awash Insurance S.C. (1994), Nib Insurance S.C. (2002), Lion Insurance S.C. (2007) and Berhan Insurance S.C. (2011). See the list of all Ethiopian insurance companies and their respective date of establishment with < https://www.nbe.gov.et/financial/insurer.html>accessed 12 March 2019.

CHAPTER TWO

2. AN OVERVIEW OF LIABILITY INSURANCE AND THE DOCTRINE OF SUBROGATION

2.1. Conceptual Framework and Functions of Insurance in General

2.1.1. Essence of Insurance and Insurance Contracts in General

It is a generally understood phenomenon that there are numerous risks of losses in every sphere of life. The term risk is an abstract concept that refers to the happening of uncertainties to people and businesses which results in loss.[28] There could exist risk of fire, flood, death, personal disability, loss of property, perils at sea, financial liability, and so on everywhere across the world. These types of universal happenings can't be totally prevented from occurring.

Nevertheless, the intricacies of modern businesses require an effective means of managing risks that face any undertaking.[29] Insurance, thus, is mentioned to be the most common type of managing risks of losses by financing losses, *inter alia* mechanisms. As a tool of risk management, it tries to transfer the risk of people and businesses to insurers while the latter also distribute it among the former.[30]

The term insurance, sometimes called "assurance"[31], doesn't have universally agreed upon definition. It is said that the search for an exact and generally applicable definition of insurance has been found out to be a difficult task.[32] Perhaps, insurance is "*a popular concern for future*

[28] Robert Keeton and Alan Widiss, *Insurance Law* (1st, West Pub Co., St. Paul, Minn. 1988) 30.

[29] Mark Greene, *Risk and Insurance* (4th, South-Western Pub Co., Cincinnati 1977) 65.

[30] Robert Keeton (n 2) 2.

[31] The term "assurance" is sometimes interchangeably used with the term "insurance". Despite such usage, however, there are some scholars who argue that the word "assurance" must be used in cases of life coverage only because these kinds of contracts don't insure the life of a person against death nor are of an indemnity nature but financially benefit survivors of the deceased; See S. Gulshan and others, *Business Law including Company Law* (14th. New Age Pub Ltd, 2009) 573.

[32] Robert Keeton and Alan Widiss (n 28) 3.

uncertainties".[33] Despite lack of uniformity in having a definition of insurance by scholars, it is defined in a law dictionary as follows:

> *Insurance is a contract by which one party, the insurer, undertakes to indemnify another party, the insured, against risk of loss, damage, or liability arising from the occurrence of some specified contingency, and usually to defend the insured or to pay for a defense regardless of whether the insured is ultimately found liable*.[34]

Similarly, George Couch defines insurance as a contract where by one party undertakes to pay a money in return of getting a sum of money from another party up on the happening of a specified risk.[35] However, this kind of definition, as opposed to the earlier stated, does not clearly tell us the specific parties of the contract. Hence, the term insurance could be described as a contractual device in which a sum of money, called premium, is paid by the insured to the insurer in consideration of the latter's promise to pay possibly a bigger sum of money, called compensation or benefit, to the insured up on the happening of a particular incident.

The device by virtue of which insurance is effected is called insurance contract or policy. As a contract of a proprietary nature, the general principles for the formation of a valid contract are essentials of insurance contracts as well. Insurance contracts have certain features in common. Insurance contracts are conditional contracts in the sense that their performance is dependent on the fulfillment of a certain condition.[36] Directly related to this, the outcome of insurance contracts is determined by chance like gambling which makes it an aleatory contract.[37] Unlike bilateral contracts where both parties make enforceable promises, insurance contracts are unilateral where the insurer is indebted to discharge its obligation as far as premium is paid in advance.[38] Moreover, insurance contracts are classed as contracts of adhesion, of which the

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[33] <https://shodhganga.inflibnet.ac.in/bitstream/10603/3795/9/09_chapter%201.pdf > Accessed 14 May 2019

[34]Bryan Garner (ed), *Black's Law Dictionary* (9th West. St. Paul, Minn 2010) 870.

[35]George Couch, "Covering Insurance of all Kinds", *Couch Cyclopedia on Insurance Law*, Vol.2 (2nd. The Lawyers Cooperative, New York 1959)27-28.

[36] Emmett Vaughan and Therese Vaughan, *Fundamentals of Risk and Insurance* (10th. John Wiley and Sons, Hoboken, NJ 2008) 175.

[37] ibid 176.

[38] George Rejda and Namara Michael (n 1) 194.

insured has lesser chance of bargaining, and it follows that any indistinctness in the policy is interpreted against the drafter, i.e. the insurer.[39]

Insurance has certain generally accepted and systematically laid down principles to achieve its underlying objectives. The most common types of principles of insurance are the principle of indemnity, insurable interest, subrogation, utmost good faith, etc.[40] These principles are helpful to interpret insurance norms and social occurrences associated thereto.[41]

2.1.2. Classification of Insurance

By and large, classification helps our understanding of a given subject matter by looking at various ways in which it could be seen from. Even though there might sometimes exist a risk of misnomer on any system of classification, classification balances the interests between generalization and particularization in treatment of cases.[42] Thus, classification is so essential to determine the applicability or non-applicability of legal doctrines to certain matters.[43]

Likewise, classification of insurance is useful to decide the applicability of certain legal principles in the analysis of insurance cases.[44] There are different modes of classifying insurance. It could be classified as life, fire, marine, social and miscellaneous depending the nature of insurance itself.[45] From the business of insurance point of view, it could be much broadly grouped into life and general insurance while each of them also carries sub-categories.[46] On the basis of the nature of insuring organization, there are two types of insurance: public and private; while the former refers to government owned insurance companies, the latter refers to private insurance companies.[47]

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[39] Mark Greene (n 29) 183.

[40] George Rejda and Namara Michael (n 1)184-192.

[41] Mark Greene (n 29)169.

[42]ibid 16.

[43] ibid.

[44] ibid.

[45] B. Bodla and others, *Insurance: Fundamentals, Environment and Procedures* (Deep and Deep Pub, 2003) 9.

[46] ibid.

[47] Mark Greene (n 29)101

Insurance is also generically classified as social and voluntary.[48] While the first represents 'compulsory government insurances' which are meant to protect economic security of citizens, the latter belongs to 'voluntary private insurances' which takes the majority share of commercial insurances.[49] As can be inferred from such categorization, this kind of distinction primarily hinges up on whether the cover is mandatory or not on the basis of government choice.

The most common type of classification of insurance is on the basis of the nature of the risk an insurance comprises.[50] According to this type of classification, the USA has developed three main classes of insurance contracts namely 'life and accident', 'fire and marine', and 'causality' insurance.[51] The last category, causality insurance, involves liability, workers' compensation, accident and health, burglary, collision, property damage, theft, and so on.[52] Similarly, the Com. Code roughly categorizes insurance into 'insurance against damages' and 'insurance of persons'.[53]

2.1.3. Functions of Insurance

Taking into account the merits of insurance to the parties of the contract, it is said that "insurance is an arrangement for transferring and distributing risk."[54] For the insured, thus, it is a mechanism of risk transfer to the insurer up on payment of a premium. For the insurer, on the other hand, it is a device through which homogeneous risk is distributed among a number of insured persons. Hence, it could be said that insurance benefits both the insurer and the insured.

With all the benefits of insurance as a system, it would be important to note that insurance never prevents a risk from being materialized but finances the loss of the insured. Thus, the main

[48] David Bickelhaupt and John Magee, *General Insurance* (8th, R. D. Irwin, Homewood 1970) 43

[49] ibid 44.

[50] Robert Keeton and Alan Widiss (n 29)18.

[51] Robert Keeton (n 2) 11.

[52] George Rejda and Namara Michael (n 1) 45

[53] Com. Code, cited above at note 20, Art. 654(2) and (3)

[54] Robert Keeton (n 2) 2.

function of insurance is indemnification of loss of the insured in the form of cash payment, replacement, repair or reinstatement.[55]

In addition to the above-mentioned core function of insurance i.e. indemnification of a loss, there are some alleged specific functions of an insurance. Particularly, the commonly stated and vital purposes of insurance are mentioned to include the following: 1) it gives psychological relief to policyholders there by reduces anxiety[56]; 2) it smoothens the functioning of business transactions by securing them against possible risks involved therein[57]; 3) it stimulates national saving[58]; 4) it provides investment capital for an economy[59]; and 5) it serves as a source of specialization in preventing and handling of risks. [60]

2.2.Conceptual Framework of Liability Insurance

2.2.1. Essence of Liability and Liability Insurance

The term liability, be it civil or criminal, refers to a specific kind of responsibility enforceable at law.[61] Property, contract and tort laws constitute the major bodies of civil liability law.[62] Legal scholars mention three objectives of legal liability: compensating victims, deterring injurers and distributing risks.[63] From economic point of view, on the other hand, legal liabilities are purported to bring efficiency of incentives and risk-bearing schemes.[64]

Everyone might face the possibility of being sued for damages and may be held liable if s/he causes harm to another. An owner of a certain property may be required to bear responsibility

[55] Hailu Zeleke, *Insurance in Ethiopia: Historical Development, Present Status and Future Challenges* (Master Printing Press 2007)32.

[56] David Bickelhaupt and John Magee (n 48) 53.

[57] ibid.

[58] ibid 54.

[59] ibid.

[60] ibid 55.

[61] Bryan Garner (n 34) 997.

[62] Robert Cooter, 'Economic Theories of Legal Liability' (1991) Summer Journal of Economic Perspectives 15(3)11 < https://pubs.aeaweb.org/doi/pdf/10.1257/jep.5.3.11 > accessed 14 June 2019.

[63] ibid.

[64] ibid.

whenever his property causes harm. People may have also liabilities in discharge of their employment relationships. Hence, it isn't uncommon to mention a number of legal liability risks arising from the use of automobiles, the occupancy of buildings, employment relationships, professional misconduct and the manufacture of products. These kinds of liabilities are oftentimes civil matters and result in the payment of damages to the victim.

In fact, liability insurance and liability in tort are interrelated in many ways. With the existence of such civil liabilities related to the significant increase of the complexities of modern life, it is now getting common to issue various products of liability insurance.[65] Liability insurance provides an indemnity to the insured in respect of the financial loss arising from negligence and strict liability laws.[66] Therefore, the rationale behind the introduction of liability insurance is to provide indemnity to the insured in respect of financial consequence of legal liabilities.[67] The social objective of liability insurance, i.e. giving protection to third parties is also mentioned for the very need of such types of insurance.[68]

2.2.2. Origin and Development of Liability Insurance

As opposed to marine insurance which is said to be the eldest branch of insurance, liability insurance, having originated in England, is relatively a recent type of insurance.[69] It is believed that the social and economic changes related with technological developments of the 18th and 19th century have contributed to the emergence of liability insurance.[70] In the beginning of its development, liability insurance was considered as one type of accident insurance which is different from marine, life and fire classes of modern insurance.[71]

The Ship-Owners Mutual Protection Association established in 1855, by John Bagwell Holman, in the UK to insure third party liabilities is considered as a milestone for the development of modern liability insurance.[72] The first enactment relating to liability insurance was the 1880

[65] S. Krishnan (n 13) 4.

[66] Numan Williams, *Insurance: An Introduction to Personal Risk Management* (South Western, Cincinnati 1984)85.

[67] ibid 86.

[68] Robert Keeton and Alan Widiss (n 29) 376.

[69] James Rhodes, 'The Liability of Insurance Contract' (1911) 4 Me L Rev 65, 65.

[70] Mary McNeely, 'The Genealogy of Liability Insurance Law' (1941) 7 U Pitt L Rev 169, 185.

[71] Diane Lear and Massimo Vascotto (n.3) 14.

[72] The Shipowners' Club, <https://www.shipownersclub.com/160-years/> accessed 14 September 2019.

England Employer's Liability Act which was subsequently followed by Workmen's Compensation Act in 1897.[73] Employer's liability insurance was voluntary arrangement with a purpose of protecting legal liabilities of the employer to pay damages to his employees.[74] On the other hand, workmen's compensation was compulsory to the employer having the intention of conferring direct protection to workers.[75]

In the USA, there were times when liability insurance was considered as an illegal act. Thus, there was a trend of not giving legal protection to liability insurance by USA courts believing that such sort of insurance would encourage recklessness.[76] In relation to this, opponents of liability insurance had a firm belief that"*…it will weaken the civil liability function and trigger the crisis of the tort law."*[77]

Having incorporated in the USA, Employers' Liability Assurance Corporation of London opened an office in Boston in 1886.[78] Later on, the Fidelity and Casualty Company of New York working on employers' liability coverage was established as the first American insurer company in the area.[79] By and large, liability insurance is said to be the result of bringing successful law suits against individuals for negligence.[80] In connection to this, it was advocated that there is a need for financial protection and that the existence of liability insurance cover does not encourage recklessness.[81]

In this era of globalization, where mass production, transportation and social interconnectedness have significantly increased more than ever, people are exposed to civil liabilities in the course of their employment relationships, production processes, social interactions and so on. In

[73] James Rhodes (n 69).

[74] Mary McNeely (n 70) 192.

[75] ibid.

[76] Luo Can, 'On the Coordinated Development of Public Nature and Commercial Nature of Liability Insurance' (2019). 7 China Legal Sci. 80, 95-96.

[77] ibid 95.

[78] Mary McNeely (n.70) 191.

[79] ibid.

[80] Mark Greene (n.29) 312.

[81] ibid.

connection to this, it is said that such technological development induced civil liabilities result in a rapid growth of the issuance of a variety of liability policies.[82] For example, the USA has the most developed liability insurance market where the day to day economic life of its people is considerably affected by liability insurance.[83] According to Insurance Information Institute, the USA has the largest market for commercial liability insurance, a total of $86.6 billion liability claims, followed by $10.6 billion in the UK in 2014.[84]

2.2.3. Nature and Scope of Liability Insurance

As any class of insurance, liability insurance is carried by insurers for a profit which makes it to be of a commercial nature.[85] Indeed, it has the object of ensuring compensation to the injured party found in a weaker position.[86] In doing so, liability insurance plays its public nature aspect as well.[87] Hence, liability insurance exhibits both commercial and public nature.

An important point with respect to nature of liability insurance is the usual distinction made between compulsory and voluntary insurances. Cases involving traffic accident across many jurisdictions of Europe are covered by compulsory liability insurance; in such cases, the victim is allowed to bring a direct suit against the insurer.[88] There are also liability insurance policies which are not compulsory by their nature.

In property insurance, most of the times, claims are paid to the insured, who has direct contractual relationship with the insurer. However, in liability insurance, claims can be paid to third party victim on behalf of the insured.[89] Liability insurance may also be distinguished from property insurance in that although claims might be paid to the insured, the ultimate coverage

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[82] Diane Lear and Massimo Vascotto (n 3) 14.

[83] Luo Can (n 76) 95-96.

[84] Insurance Information Institute, < https://www.iii.org/fact-statistic/facts-statistics-product-liability#Defense%20Costs%20And%20Cost%20Containment%20Expenses%20As%20A%20Percent%20of%20Incurred%20Losses,%202015-2017%20%281%29 > accessed 15 June 2019.

[85] Luo Can (n 76) 94.

[86] Robert Keeton and Alan Widiss (n 29) 376.

[87] Luo Can (n 76) 94.

[88] Gerhard Wanger (ed), 'Tort Law and Liability Insurance' (2005) 16 Springer Wein New York 311 <http://booksdescr.org/ads.php?md5=77C2AE4CC5BB4DBE6FAEE25641D33A83 >accessed 14 June 2019.

[89] ibid 312.

and payment is meant to protect the injured party.[90] In this regard, the insurer has a contractual relation with the insured while a non-contractual one with the injured party.

The scope of liability insurance is predominantly determined by law or insurance policy entered between the insurer and the insured in respect of legal liabilities of the insured. Thus, a specific product of liability insurance may vary, in coverage and exclusions, from another product of liability insurance. But it is commonly understood that liability insurance policies cover both legal costs and disbursements for which the insured party would be responsible depending on the amount of insured.[91]

Liabilities arising out of intentional damages and contracts are not, oftentimes, covered under liability insurance policies.[92] However, issuing insurance products for liabilities in relation to the performance and non-performance of contractual terms doesn't seem to offend any public policy. That is why there are some jurisdictions like the UK which have introduced contractual liability insurance.[93]

2.2.4. Basic Principles of Liability Insurance

Liability insurance contracts, like other insurance contracts, are subject to the commonly acknowledged principles of general insurance. Hence, in addition to those general principles that apply to all valid contracts, the special legal characteristics of insurance contracts are also applicable to liability insurance. Thus, the principle of insurable interest, indemnity, subrogation, contribution and utmost good faith are applicable to liability insurance contracts as well.

2.2.4.1. The Principle of Insurable Interest

The principle of insurable interest, legally required under any form of insurance contract, denotes that the insured must demonstrate a financial loss sustained as a result of damage/loss of an object, health or life.[94] This principle is salutary in preventing insurance from becoming a gambling contract.[95] In liability insurance, thus, the insured must potentially have a legal liability

[90] ibid 314.

[91] George Rejda and Namara Michael (n 1) 45.

[92] <https://www.investopedia.com/terms/l/liability_insurance.asp Accessed 20 October 2019

[93] Diane Lear and Massimo Vascotto (n 3) 3/17.

[94] George Rejda and Namara Michael (n 1) 187.

[95] ibid.

to another person to which such liability is covered by the insurance contract in order for an insurable interest to exist.[96]

2.2.4.2.The Principle of Indemnity

Closely related to the above principle, indemnity is a contractual principle that states a person may not collect a benefit more than the actual loss s/he underwent.[97] The insurance payment, however, shouldn't necessarily be commensurate to the loss as partial coverage agreement is possible.[98] The principle of indemnity is a well-known legal principle that underlines all types of liability insurance.[99] That is why liability insurance is called indemnity insurance along with property insurance.

2.2.4.3. The Principle of Subrogation

As a corollary to the principle of indemnity, the principle of subrogation affirms the right of insurers to receive all the rights of the insured against third parties liable.[100] It is commonly said that principle of subrogation is applicable to indemnity insurance, both property and liability insurance.[101] The most important rationale behind the application of the principle of subrogation to various classes of insurances is to achieve the principle of indemnity by preventing unjust enrichment of the insured by making profit.[102] So, applying this legal doctrine to liability insurance appears unquestionable.

2.2.4.4. The Principle of Utmost Good faith

The principle of utmost good faith (*uberrimae fidei*) asserts that the insured who knows or ought to know all the material information about the risk must disclose them to the insurer; falling short of meeting such commitment makes the contract *void abinitio* or in some cases voidable.[103] The

[96] S. Krishnan (n 13)6.

[97] Robert Keeton and Alan Widiss (n 26) 135.

[98] ibid.

[99] S. Krishnan (n 13) 9.

[100] M. Mishra and S. Mishra, *Insurance: Principles and Practices* (18th ed. S. Chand and Company Ltd, New Delhi 2011)24.

[101] S. Krishnan (n 13) 9.

[102] Emmett Vaughan and Therese Vaughan (n 36)174.

[103] ibid 176; See also Com. Code, as cited above at note 20, Art 668

principle of utmost good faith is an indispensable requirement in any insurance contract.[104] Hence, this principle is also applicable to liability insurance contracts.

2.2.5. Classification of Liability Insurance

Liability insurance is commonly known as one part of causality insurance to refer the"…*protection given against liability for harm the insured may cause to others*…."[105] It is divided into different types of cover depending on the kind of classification adopted. The insurance industry has formulated a lot of liability insurance policies, but it would be superfluous to consider them all. From a stand point of the risk covered, the following can be mentioned as some common types of liability insurance across different jurisdictions.

1. **Third party motor vehicle insurance**- also called 'automobile liability insurance' "protects the insured against loss arising from legal liability when his or her automobile injures someone or damages another's property."[106]
2. **Product liability insurance**- is a coverage against liability of manufacturers, processors, distributors and sellers to the general market by defective nature of their products.[107] This type of insurance is built up on the theories of breach of warranty and strict liability.[108]
3. **Public liability insurance**- is a broad type of insurance that covers legal liabilities arising from both industrial and non-industrial risks to the public.[109] The tortious liability of an owner of a building may be covered by this type of liability insurance.
4. **Professional liability insurance/Professional indemnity-** is designed to fulfill the liability of professionals arising out of negligence in discharge of their professional duties.[110] This type of insurance product is often sold to physicians, surgeons, engineers, architects, lawyers, etc.

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[104] S. Krishnan (n 13) 10-11

[105] Frederic Miskin and Stanly Eakins, Financial Markets and Institutions (8th, Pearson Education, Boston 2015) 519.

[106] Emmett Vaughan and Therese Vaughan (n 36) 532.

[107] Harold Hirsh, 'Product Liability Breach of Warranty/ Strict Product Liability' (1987) 6 Med & L 259, 397.

[108] ibid.

[109] S. Krishnan (n 13) 42.

[110] Emmett Vaughan and Therese Vaughan (n 36) 513.

5. **Carriers' liability insurance-** is an insurance cover for carrier's liability arising under transportation contracts on land, air or sea.[111]
6. **Workmen's Compensation insurance -** is designed to cover the legal liability of an employer for medical expenses, bodily injury, or death sustained by an employee while at work.[112]

It must be noted that many types of liability insurance policies are not mutually exclusive in respect of a number of risks that can be covered under each policy. A given product of liability cover may also be sold together with another type of insurance.[113] In this regard, in the USA, the so called 'general liability insurance', by excluding automobile liability insurance and employers' liability insurance, is divided into individual and business general liabilities, each comprising different and distinct category of products.[114] Similarly, Ethiopian insurance market is broadly classified into 'general insurance' which constitutes both 'property and liability insurance' on the one hand and 'life insurance' on the other hand.[115]

2.3.The Doctrine of Subrogation

2.3.1. Meaning, Origin and Applicability of Subrogation in General

The doctrine of subrogation is also known as the 'principle of subrogation'. Some literatures also interchangeably employ the phrase 'right of subrogation' or 'remedy of subrogation.' In its rudimentary sense, subrogation is defined as "*the right of one person, having indemnified another under legal obligation to do so, to stand in the place of that other and avail himself of all the rights and the remedies of that other, whether already enforced or not*."[116] It allows the substitution of a new creditor in the 'shoes of the principal creditor' to enjoy the rights of the latter against the debtor.[117]

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[111] <https://www.deas.eu/range-of-services/carriers-liability-insurance/ > Accessed 29 September 2019.

[112] Diane Lear and Massimo Vascotto (n 3) 4/3.

[113] See, for example, Nib Insurance S.C. Commercial Vehicle Policy and Contractors All Risks Policy which give cover to the insured's third-party liability in addition to other coverage/s. (Both available as of September 2019)

[114] Emmett Vaughan and Therese Vaughan (n 36) 512.

[115] Hailu Zeleke (n 55) 269-270.

[116] Chris Parsons, *Insurance Law* (CII, 2018/19) 12/2.

[117] Jonathan Eddy, 'Payment with Subrogation under the Ethiopian Civil Code' (1973) 9 J. Eth.L.No.1, 106

The parties to the system of subrogation are called *subrogee* and *subrogor*, the *subrogee* being a person to whom the right subrogation is granted in his favor, while the *subrogor* is a person who had an original right against the third party liable for whom the *subrogee* has substituted.[118] Hence, it is the *subrogee* who substitutes the *subrogor* in claiming the benefits and remedies of the latter against the third party liable. It is, thus, broadly identified as the substitution of one person in place of another with respect to the latter's claims, rights, remedies or securities.[119]

With regard to when the doctrine was begun, it is much associated with the Roman times.[120] The similarity between the ancient and modern subrogation is limited to the fact that the doctrine is premised on the notion of natural justice.[121] It is said that the word subrogation is derived from a Latin term "surrogare" which is literally meant "to put in the place of another or to substitute."[122] Therefore, one can find a predecessor of the modern subrogation in the Roman institutions and norms.

However, strictly speaking, it is believed that the doctrine begun to be used in its modern sense in 17th century in England case laws which originated from equity.[123] The rationale behind the applicability of subrogation in insurance cases was manifested in one of the earliest recorded case, Burnand *v.* Rodocanachi as "*…to put forward that the insurer, having indemnified a person, was entitled to receive back from the insured anything the latter might receive from any other source.*"[124]

As it is not unique to one discipline, it could have different meanings in varying fields of study. The doctrine of subrogation is known and applicable to many fields of obligations. Therefore, it is of prime importance to state the context in which the word is used while defining it. Indeed, it is a common parlance in the law of contracts in general and insurance contracts in particular.

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[118] Ronald Horn (n 9) 12.

[119] S.Gulshan and others, "Business Law including Company Law" (14th, New Age Pub, 2009) 570.

[120] Ronald Horn (n 9) 15.

[121] ibid.

[122] ibid 12.

[123] ibid 15-16.

[124] Burnand v. Rodocanachi (1882) cited in Chris Parsons (n 116) 8/11.

In the context of insurance, subrogation refers to the right of the insurer, after paying a compensation to the beneficiary or the insured as the case may be, to proceed against tortfeasors by substituting to the rights of the insured.[125] Thus, in insurance, subrogation is an entitlement of insurers to enforce for their own benefit all the rights and remedies possessed by the insured against third parties. Nevertheless, subrogation shouldn't be confused with abandonment. Both subrogation and abandonment are mechanisms to enforce the principle of indemnity in insurance. However, while abandonment is an insured's act to let an insurer own a damaged property of the insured when a claim is paid, subrogation is simply insurer's substitution to the rights of an insured against third parties.[126]

In contracts of guarantee, subrogation refers to the right of guarantors to get back their money from principal debtors by stepping into the shoes of the original creditors. In tort law as well, subrogation enables a person who has paid a compensation in excess of his share or wholly to recover what he has paid from a person who is finally liable.[127] The doctrine is also applicable to law of succession and indemnity contracts of all kind.

2.3.2. Types of Subrogation

As mentioned earlier, the doctrine of subrogation is known and applicable to many fields of obligations. Thus, depending on the field of study to which the principle is applicable, a number of categorization can be derived in line with each specific field of study.

Basically, a distinction is usually made between legal and conventional subrogation in the law of insurance.[128] Such dichotomy is established based on the ways in which the right can arise. The first, legal subrogation, refers to an entitlement to the rights of the *subrogor* just by the operation of the law.[129] This exists when a subrogation emanates from both statute and judicial

[125] Eric Dolden and Dan Richardson, 'Practical and Substantive Aspects of Subrogation' (2015)4 <http://www.dolden.com/wp-content/uploads/2016/06/032-Practical-and-Substantive-Aspects> accessed 21 September 2019).

[126]Michael Parkington and others, *MacGillivary and Parkington on Insurance* (Sweet and Maxwell, London 1988) 479.

[127] C. C., cited above at note 23, Art. 2161.

[128] Ronald Horn (n 9) 22.

[129] ibid.

decisions.[130] In such cases, it is irrelevant whether an insurance policy provides for subrogation right or not.

Conventional subrogation, as its name suggests, arises directly from an express agreement between the insurer and the insured as entered in the policy. [131] As such, it seems tenable to conclude that this kind of subrogation is governed by general contract law principles. Conventional subrogation would obviously have a paramount importance when insurance policies are not regulated by law.

2.3.3. The Applicability and Nature of Subrogation in Indemnity Insurance

In simple terms, the principle of indemnity in insurance entails that the loss of the insured must be fully compensated, but not over compensated.[132] Accordingly, if an indemnified insured from the insurer is also allowed to recover a compensation from a third party who is legally liable for the loss, this will let the insured receive an over compensation and thereby, make profit. Hence, the critical foundation for the application of subrogation is that the insured party, who has a right to indemnity in respect of the covered risks, should be disallowed to recover anything more than the actual loss suffered. So, in order for the underlying principle of indemnity be enforced, subrogation has been an essential feature of insurance since one of the earliest insurance case of Castellain v. Preston, in the UK, as stated below:

> *That doctrine (subrogation) doesn't arise up on any terms of the contract of insurance: it is only another preposition which has been adopted for the purpose of carrying out the fundamental rule i.e. indemnity which I (the judge) have mentioned, and it is a doctrine in favour of the underwriters or insurers in order to prevent the assured from recovering more than a full indemnity; it has been adopted solely for that reason.*[133]

The above decision, by Brett L.J., clearly shows that subrogation is a corollary to the principle of indemnity with the purpose of preventing unjust enrichment of the insured. Given the fact that subrogation allows the insurer, after payment of loss, to substitute the insured in claiming the rights and remedies owed to the latter, it is a mechanism through which the principle of

[130] ibid.

[131] ibid.

[132] Michael Parkington and others (n 126) 477.

[133] Castellain v. Preston (1883) cited in Chris Parsons and others, "*Contract Law and Insurance* "(CII, 1991) 8/11.

indemnity can be enforced.[134] That is why the doctrine is equated as a corollary to the principle of indemnity. It is premised on the principle of natural justice, up on the legal principle that "no one should be enriched by another's loss".[135]

In the same vein, after having fully compensated to the insured, subrogation gives two alternative rights to the insurer. One is the right to receive all the benefits, rights and remedies the insured can claim against third parties.[136] Secondly, it allows the insurer to claim any benefit the insured has secured from third party in the form of compensation.[137] Hence, subrogation allows the insurer to ask a benefit not only from third parties liable but also from the insured himself who got compensated. But insurer's right of subrogation from its own insured is disallowed as it defeats the very purpose of purchasing an insurance cover.[138]

It must be clear at this juncture that subrogation is not 'ipso facto' applicable to indemnity insurance. Thus, for the principle of subrogation to take place, there are certain criteria that must be met all the time. Before an insurer goes to make use of the right of subrogation, it must first pay a damage to the insured.[139] This means that the insurer's right of subrogation does not arise up until it has admitted its liability to the insured and makes a payment of specific amount of compensation. An insurer should also bring a subrogation suit in the name of the insured.[140] Another important point with respect to subrogation in indemnity insurance is that the insured isn't allowed to impair the insurer's right of subrogation nor his/her consent is required for the application of the right.[141] Thus, the moment an insured waives to sue a wrongdoer, he waives his right to collect compensation from the insurer.

The doctrine of subrogation, however is not cost-free right of insurers. Thus, there are some inherent impediments which are likely to confront the subrogee insurer. The first alleged challenges of subrogation is explained in '*volunteer*' theory. According to the '*volunteer'* theory,

[134] Emmett Vaughan and Therese Vaughan, (n 36)170.

[135] Chris Parsons (n 116) 12/3.

[136] Michael Parkington and others (n 126) 477.

[137] ibid 478.

[138] George Rejda and Namara Michael (n 1) 190.

[139] ibid 189.

[140] Chris Parsons (n 116) 12/8.

[141] George Rejda and Namara Michael (n 1) 189.

if an insurer without any legal obligation gratuitously effects a payment to the insured, then the wrongdoer can avoid liability by raising such theory and hence, insurer's right to subrogation is barred.[142] Doubtful payments made by insurers for certain perils which are not strictly covered under insurance policy or claims paid to avoid possible litigations are prone to be categorized as volunteer payments which invite for a possible defense against subrogation.[143] Hence, if an insurer gratuitously effects payment for which it is not liable, subrogation right of insurer might be challenged by third party defendants.

The concept of 'covenants to insure', also called, 'the doctrine of legal immunity' can also be mentioned as a second potential defense against the insurer's right of subrogation. The notion of covenants to insure alleges that if the potential defendant to subrogation proceedings has either legal or contractual immunity from liability to the insured, subrogation right of the insurer must be barred as the insurer cannot have a right which is not available to the insured.[144] Thus, in such cases insurers' right of subrogation would be at stake.

Thirdly, a very evident prohibition against the insurer's right of subrogation is an introduction of an express 'subrogation waiver clause' into the insurance policy.[145] Here, 'waiver' is a contractual agreement that sets aside insurers' right to pursue subrogation claims. Insurers might enter in to waiver clause agreements when the third party is insured to avoid wasteful and expensive litigations.[146] Theoretically, when the money to be recovered is not enough to satisfy claims of the insurers, waiving the right doesn't seem to be disputed. Therefore, an insurer may waive its right to subrogation on the rights of the insured and in such cases subrogation is banned.

Finally, there is a procedural impediment to subrogation called the defense of 'real party in interest". Challenges associated with 'real party in interest" might arise as a potential defense by third party defendant when an insurer brings a suit in the name of the insured. As every action must be sued in the name of an interested party, an insurer's action in the name of an insured

[142] Eric Dolden and Dan Richardson (n 125) 11.

[143] ibid 11-12.

[144] ibid 21 and 45; See also Andrew Hecker (n 22) 628.

[145] Andrew Hecker (n 22) 631.

[146] Chris Parsons (n 116) 12/8.

who isn't a party to the suit might be objected to by the defendant.[147] Having such potential defenses against subrogation, it might be safely argued that legal proceedings arising from the right to subrogation aren't embarked upon every case. Rather, there could exist cases to which insurers might not be successful to recover for losses they have covered for their insured. So, challenges of subrogation need to be considered in deciding as to whether the right to subrogation to specific cases of indemnity insurance must be pursued.

[147] Andrew Hecker (n 22) 615.

CHAPTER THREE

3. THE SIGNIFICANCE AND APPLICABILITY OF SUBROGATION TO THE ETHIOPIAN LIABILITY INSURANCE REGIME

3.1.Introduction

The applicability of the doctrine of subrogation to Ethiopian liability insurance is a subject matter neglected by researchers so far. The reason could be attributable to the allegation that those classes of insurance to which the doctrine of subrogation is applicable are commonly known by people working in the industry.[148] The application of the doctrine of subrogation to indemnity insurance including liability insurance is so important for the growth of insurance industry and in shaping the social responsibility of a given society.[149] Against such benefits of subrogation and the general jurisprudence on the applicability of subrogation to liability insurance, one may reasonably expect a legal framework that affirms regulation of the issue.

Puzzlingly, the Com. Code, which has been in force for the last six decades, is silent as to the applicability or non-applicability of the doctrine to liability insurance. This might need to be seen in light of the way subrogation is treated in the Code regarding property insurance and insurance of persons. The Code clearly provides insurers' right of subrogation in property insurance while emphatically prohibits the right in insurance of persons.[150]

Therefore, the most crucial question is that why the Com. Code omitted the right of subrogation in relation to liability insurance? Of course, taking into account the way the Code clearly allowed subrogation to property insurance while disallowing it in insurance of persons, silence of the law does not seem to have been deliberately chosen. So, the legal lacuna must be filled. Thus, assessing benefits of subrogation to indemnity insurance seems to be worthwhile. As a result, this chapter deals with how the legal *lacuna* with respect to the applicability of subrogation to liability insurance must be filled. Besides, the possible ways on how this *lacuna* can be avoided

[148] Interview with Ato Eyuel Ewnetu, Insurance Broker (Addis Ababa, 14 October 2019).

[149] Ronald Horn (n 9) 3-5 and 33.

[150] Com. Code, cited above at note 20, Arts. 682 and 690.

See also Art. 323 of the 1960 Ethiopian Maritime Code which provides for subrogation right of marine insurers.

by insurance contracts and one case on the practical applicability of the doctrine by the Federal Supreme Court are analyzed.

3.2.The Ethiopian Insurance Regime in General and Liability Insurance in Particular

The Com. Code, under Title III of Book III[151], deals with the subject matter of insurance. Additionally, marine insurance is regulated by the Maritime Code.[152] Though the Com. Code does not define what insurance is, it defines the term 'insurance policy'. Thus, 'insurance policy' is defined as "*a contract whereby a person, called the insurer, undertakes against payment of one or more premiums to pay to a person, called the beneficiary, a sum of money where a specified risk materializes*."[153]

The Code roughly categorizes insurance into insurance against damages and insurance of persons, the first comprising those classes of insurance generally known as indemnity insurance while the latter is the non-indemnity ones.[154] There are certain legal provisions of the Code which are applicable to all forms of insurance. Art. 658 can be mentioned as an example, and the most important provision that lists down the particulars required by any kind of valid insurance contract. It is alleged that there are some worrisome contradictions between the provisions the Com. Code and insurance policies in use in the Ethiopian insurance market as regards concealment of material facts and declaration of false statements.[155] Such discrepancy might be attributable to the fact that the Code is predominantly taken from a continental legal system while insurance policies are taken from common law countries.[156]

The Ethiopian insurance industry has shown remarkable growth both in terms of financial position of companies and the number of policies marketed since 1994.[157] Nevertheless, it is relatively underdeveloped yet which is characterized by the sector's low penetration level,

[151] The Com. Code is constituted of 6 Books; each Book is also divided into Titles. Four Chapters (Arts. 654-712) of the Code, with other laws, are devoted to regulate the legal framework of insurance in Ethiopia.

[152] Maritime Code of the Empire of Ethiopia 1960, Proc. No. 164, Neg. Gaz., 19th Year. No. 1, Arts. 288-369

[153] Com. Code, cited above at note 20, Art 654(1)

[154] Id, Art 654(2) and (3)

[155] Zekarias Keneaa, 'Rights and Duties of Insurers and Insured under Ethiopian Law' (2010) 24J.Eth.L.No.1, 18 and 48-49.

[156] ibid.

[157] Hailu Zeleke (n 55) 91-98.

compared to many Africa countries, representing merely 0.5% of the GDP.[158] Among the 18 populous African countries, Ethiopia, Nigeria and Sudan have the lowest and similar insurance penetration rate, 0.5%, which is below the average of African countries, i.e. 1.8%.[159]

Despite the low level of insurance penetration in Ethiopia, there are different types of insurance policies marketable in the field. The Ethiopian insurance market is broadly classified into 'general insurance' (also called 'property and casualty insurance') and 'life insurance'.[160] The main gross written premium in the country is contributed from general insurance.[161] Liability insurance, which encompasses different types of policies, is grouped in the first category.

With respect to the Ethiopian liability insurance, which is generally understood as indemnity insurance, it is regulated in a section with a caption 'insurance of liability for damages'. In that section, only four Articles are devoted to regulate liability insurance. The Code, without defining what liability insurance is and the risks covered under the same, goes to provide for as to when an insurer is liable.[162] One can't reasonably expect a detailed normative framework from such scanty provisions that address the possible issues associated thereto. Thus, the possibility that some issues in respect of liability insurance remain in vein is unsurprising. A good example in point is as to what does liability insurance include is not answered. Indeed, the scope of third party motor insurance is addressed in Proc. No. 799/2013 to include "*...compensation payable for death, bodily injury, damage to property and the expenses of emergency medical treatment arising from the insured vehicle.*"[163] Apart, the issue whether liability insurers are legally granted with subrogation right to entitlements of an insured isn't properly addressed in the Code nor in Proc. No. 799/2013.

Thus, many issues of liability insurance need to be regulated by an insurance policy in conformity with mandatory provisions of general law of contract and insurance laws. In

[158] Africa-Re (n 4) 10-11.

[159] Kahase G/Michael (n 5) 9.

[160] Hailu Zeleke (n 55) 269-270.

[161] Kahase G/Michael (n 5) 7.

[162] Com. Code, cited above at note 20, Art 654/1.

[163] The Vehicle Insurance against Third Party Risks Proclamation, cited above at note 6, Art. 4(2)

Ethiopia, there are different types of liability insurance policies like motor third party liability, product liability, professional indemnity and public liability.[164]

Motor insurance, which includes third party motor insurance cover, contributes the lion share of gross written premium in the country.[165] Particularly, as the case is in many countries of the world, the increasing catastrophic injuries caused by vehicles to third parties have necessitated for having a compulsory third party automobile insurance in the country.[166] That is why third party motor insurance cover has been enacted into law.[167] As a result, vehicle insurance policy against third party risks which is designed to protect against the actions or claims of third parties has been sold in Ethiopia since 2008. Federal court advocates[168], insurance agents[169] and insurance brokers [170] are also mandatorily bound to buy professional indemnity cover to run their businesses in the country.

3.3.The Significance of Applying the Doctrine of Subrogation to Liability Insurance in Ethiopia

Subrogation is held as the most important and useful doctrine in indemnity insurance. Generally speaking, it benefits both insurers and the society at large. In connection to such benefits of subrogation, as liability insurance is an indemnity insurance by its nature, the following can be considered as benefits of subrogation in liability insurance.

For one thing, legally, subrogation prevents unjust enrichment of the insured in cases of indemnity insurance.[171] In other words, in the absence of subrogation, an insured could enjoy double recovery resulting in excessive compensation by collecting it from both the insurer and

[164] Kahase G/Michael (n 5) 12; See also Hailu Zeleke (n.55)269-270 on the products of liability insurance marketed at the Ethiopian insurance industry.

[165] Kahase G/Michael (n 5) 7-8

[166] The Vehicle Insurance against Third Party Risks Proclamation, cited above at note 6, Preamble

[167] Id, Art 3/1

[168]Federal Courts Advocates' Licensing and Registration Proclamation No. 199, Fed. Neg. Gaz. 6th Year No. 27, 9th March 2000, Art 12/1; Art 12/2 of the same requires an implementing regulation to be issued as a condition precedent to meet the obligation of buying a professional indemnity cover despite no regulation is issued to date.

[169] Directive No. SIB/30/2007 Licensing of Insurance Brokers, Art 8

[170] Id, Art 9.

[171] Chris Parsons (n 116) 12/3.

the wrongdoer. Hence, if an insured chooses to get a benefit from an insurance company for full compensation, his rights of recovery from a torfeasor is directly transferred to an insurer. So, subrogation is a mechanism that discourages unjust enrichment of the insured in a given legal system.

The Ethiopian legal system can't be an exception to the above assertion. The C.C. aspires to prevent unjust enrichment in many circumstances. The C.C. provision with respect to the rule that compensation must be equal to damage is a general rule which achieves the principle of indemnity.[172] Another important feature of the C.C. that intends to avoid unjust enrichment is enshrined under Book III, Title XIII in Chapter 2 of the Code.[173] Therefore, the C.C. aspirations to avoid unjust enrichment can be achieved by an application of the doctrine of subrogation in cases of liability insurance.

Secondly, subrogation discourages carelessness of persons in the sense that their negligence would bear an ultimate personal liability.[174] If an insurer, after making payment to the insured, sues and recovers compensation from a third party upon whom the ultimate legal liability rests, such third party will, in no case, escape liability. That is why the doctrine of subrogation is regarded as a mechanism which assists to build a justice system that does not help tortfeasors avoid responsibility.[175] The principle of subrogation is a good system that achieves a public policy of placing the burden of loss on the members of societies who are primarily liable under law.[176]

It is stated that the ever-increasing traffic accidents and the need to provide emergency medical services to victims have led Ethiopia to adopt a law on compulsory third party motor insurance cover.[177] This being one scenario where civil liability could arise, such laws alone never make tortfeasors cautious in their relationships with others. Hence, the principle of subrogation should

[172] C. C., cited above at note 23, Art. 2091

[173] Id, Arts. 2162-2178

[174] S. Krishnan (n 13) 9.

[175] Dorota Kozubovska, 'Subrogation in Insurance: Theoretical and Practical Aspects' (LL.M Thesis, Mykolas Romeris University 2010)30 <https://vb.mruni.eu/object/elaba:1889541/1889541.pdf> accessed 05 December, 2018).

[176] Ronald Horn (n 9) 4.

[177] The Vehicle Insurance against Third Party Risks Proclamation, cited above at note 6, Preamble

be in place to let third-party bear costs of his/her act or omission in accordance with liability laws of the country. So, subrogation could help to achieve a public policy of shaping societal behavior by placing the financial consequences of loss on the person primarily responsible. In this manner, the doctrine of subrogation is beneficial to deter injurers not to be negligent and shapes the behavior of people in a country.

The economic efficacies of subrogation could also be mentioned as the last, but by no means the least, benefit of the doctrine. Subrogation allows insurance companies to recover money that helps them to be solvent.[178] Evidently, recoveries from successful subrogation would help to boost the income and profitability of insurance companies. This advantage of subrogation in return is essential to decrease the rate of premiums which ultimately benefits insureds as well.[179] Therefore, these economic importance of subrogation to the insurance industry essentially makes it an invaluable feature of an insurer's legal right.

The above-mentioned economic benefits of insurance are also important to Ethiopia where its insurance industry is expected to develop yet. Particularly, it is believed that subrogation in liability insurance against uninsured third-party indirectly contributes for the development of the insurance industry.[180] In this regard, a certain insurance broker noted:

> *Sometimes, risk happens between an insured victim and uninsured negligent third-party resulting in loss. When such happens, the insured victim prefers to collect insurance payment from an insurer than litigating with the negligent party. After making a payment to the insured, the insurer immediately brings an action to collect compensation from the negligent third-party. The negligent third-party then bears the compensation since s/he doesn't have an insurer to transfer the risk. Realizing an insurance company could have covered such loss, I have many customers who begin buying insurance product for a potential loss they may cause in the future. Thus, subrogation is indirectly helping our people to buy a cover thereby improve the poor insurance density ratio of our country.*[181]

[178] Robert Keeton(n 2) 554

[179] George Rejda and Namara Michael (n 1) 189.

[180] Interview with W/ro Aster Abebe, Cliams Officer, Claims Department of Head Office, Nib Insurance S.C. (Addis Ababa, 4 December 2019).

[181] Interview with Ato Tesfaye Migbaru, Owner and Manager of Ultimate Insurance Broker (Addis Ababa, 07 November 2019).

In Ethiopia, recoveries by way of subrogation in indemnity insurance are believed to reimburse costs of insurers paid for compensation.[182] Usually, recoveries from subrogation in indemnity insurance helps insurance companies in the market to be liquid in their financial status.[183] Similarly, Claim Officer of Nib Insurance S.C. states that "*a substantial amount of recovery earned annually by way of subrogation, especially on third-party vehicle risks has increased our company's income and thereby profitability*".[184]

It must be clear, however, as subrogation isn't a cost free instrument, there are some challenges that confront subrogating insurers in Ethiopia with respect to liability insurance. According to Ato Fekadu and Ato Girmaw, there are instances where subrogation in respect of liability insurance isn't pursued where insurance payments are effected to an insured while the company wasn't strictly bound to do so.[185] There are also procedural challenges relating to subrogation in indemnity insurance including liability insurance like the inability to know as to who the third-party defendant is.[186] In a bid to triangulate such challenge, the study has also undertaken an interview with another insurance lawyer and learned that*"[T]here are some challenges associated with securing the identity and address of a third party liable against whom subrogation must be brought*."[187]

Hence, with all the inherent challenges of subrogation, the above discussed legal, social and economic significances of subrogation on liability insurance could have a positive ramification on the development of Ethiopian insurance sector and the public wellbeing at large.

[182] ibid.

[183] Interview with Ato Eyuel Ewnetu (n 148).

[184] Interview with W/ro Aster Abebe (n 180).

[185] Interviews with Ato Fekadu Yami, Team Leader of Legal Services, E.I.C. and Ato Girmaw Amare, Senior Attorney, Legal Services Directorate, E.I.C. (Addis Ababa, 06 December 2019).

[186] Interview with Ato Haileab Yihdego, Acting Manager, Legal Department, Lion Insurance S.C. (Addis Ababa, 05 December 2019).

[187] Inteview with Ato Fekadu Yami (n 185).

3.4. The Applicability of Subrogation to Liability Insurance in Ethiopia

3.4.1. Legal Applicability of Subrogation to Liability Insurance

3.4.1.1.The Commercial Code

As stated earlier, the Com. Code, clearly provides insurers' right of subrogation in property insurance while plainly prohibits the same right in insurance of persons. However, the section dealing with liability insurance of the Code, which has only four provisions, is silent as to the applicability of the doctrine of subrogation.[188] As far as a law appears to be unclear with respect to subrogation in insurance, the defense of 'real party in interest' might be brought against an insurer, and subrogation agreements are believed to play an important role in filling the gap.[189] It is a task of civil procedure law to provide that relief of civil actions are to be sued in the name of the real party in interest. In relation to this, the 1965 Ethiopian Civil Procedure Code stipulates, "[*N]o person may be a plaintiff unless he has a vested interest in the subject matter of the suit.*"[190] Hence, as there is no clear law on insurers' right of subrogation in respect of liability insurance, when an insurer brings subrogation suit against third-parties, the latter might raise a defense that an insurer hasn't an interest in substituting the insured. With such silence of the law, thus, a defendant tortfeasor may potentially assert a preliminary objection that an insurer has no vested interest to sue in the name of an insured.[191]

Now, the logical question worthy of consideration appears to be why did the legislator mention subrogation only in relation to insurance of objects and omit it in the section dealing with liability insurance in the Com. Code? Stated differently, how did the legal *lacuna* with respect to the applicability or non-applicability of subrogation to liability insurance regime occur?

In giving an answer to the above question, the approach adopted as to how subrogation is conferred or disallowed to other classes of insurance in the same Code would be helpful. Thus, the way subrogation is clearly allowed in property insurance and disallowed in insurance of persons while it is silent in respect of liability insurance doesn't tempt one to conclude that the silence of the law is deliberate. It can possibly be said that had the legislator wanted to allow or

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[188] Com. Code, cited above at note 20, Arts. 685-688

[189] Andrew Hecker (n 22) 615.

[190] Civil Procedure of the Empire of Ethiopia 1960, Decree No. 52, Neg. Gaz., 25th Year. No. 3, Art 33(2)

[191] Id, Art 244(2) (d)

deny the right of subrogation in liability insurance, it wouldn't have clearly allowed and prohibited its application to insurance of objects and persons respectively. That is to say that there seems to be no valid reason regarding not regulating the issue of subrogation in liability insurance despite Krzeczunoicz's view that *"[S]ubrogation clearly has no relevance to insurance of liability*."[192]

So, an attempt to explore the background of the drafting process of the Com. Code seems apt to trace if there is a reason as to why such legal *lacuna* occurred. It is important to consider that two professors of law, at different times, one after another had worked on the drafting process of the Code and if the gap is attributable to plurality of drafters. At the outset, the drafter of the Com. Code was Professor Jean Escarra who is said to have drafted Books II, IV and V and submitted to the Codification Commission.[193] However, his death in 1954 interrupted the drafting process and it was Professor Alfred Jauffret who was entrusted to continue with the works of the first drafter and come up with a draft of Books I and III of the Code.[194] Thus, it was the latter who submitted the final work's text with a final report on 1st March, 1958 which was then approved in 1960 by the then Parliament.[195] Therefore, as Book III of the Com. Code, where in provisions dealing with insurance are found, is solely drafted by Jauffret, the credit and blameworthiness of the work seem to go to him. Thus, one can safely conclude that the error wasn't committed by the first drafter.

In his general report, Jauffret has included what he had considered and favored in inserting certain provisions dealing with insurance including the prohibition of admission by an insurer in liability insurance and the bar against the insurers' right of subrogation in insurance of persons.[196] He, however, didn't deal with the rationale behind the silence of the law with respect to the applicability of subrogation to liability insurance. Given the indemnity nature of liability insurance to which the principle of subrogation could be applicable, it is impossible to imagine a valid reason for not incorporating the principle in the Com. Code. Hence, it seems amenable to

[192] George Krzeczunoicz, *The Ethiopian Law of Compensation for Damage* (AAU, 1977) 85.

[193] Peter Winship (ed. and trns.), *Background Documents of the Ethiopian Commercial Code of 1960* (Addis Ababa, 1974) 35.

[194] ibid.

[195] ibid.

[196] ibid 83 and 85-86.

conclude that Professor Alfred Jauffret didn't deliberately omit the principle of subrogation in the section dealing with liability insurance of the Code.

The very reason for the gap and its possible solution can be expressed in the words Michael Ogwezzy, on his general work on legal gaps and their solutions, as *"[L]egal gaps result from the legislator's mistake, short-sightedness, carelessness or tardiness and are meant to be filled by judges because no legal problem or issue must defy legal solution."*[197] Hence, the legal lacuna as to the insurers' right of subrogation in respect of liability insurance wouldn't have any possible *expose des motifs* but an omission of the drafter accompanied by oversight of the approving Parliament. As characterizing the problem in such manner can't be a solution by itself, an effective legal solution must be sought. Now, how should this legal lacuna be filled? Should the gap be solved by legal interpretation?

Before going deep into whether the legal lacuna should be solved by way of interpretation, the essence and scope of legal interpretation must be clear. Coming to an interpretation of law, it could be defined as "…*a rational activity that gives meaning to a legal text*".[198] Thus, legal interpretation seems to be limited to securing the true essence of an existing legal text. However, in its broadest sense, legal interpretation involves filling the gaps in the text of the law as well.[199] Thus, the gap within the Com. Code with respect to the applicability of subrogation to liability insurance must be solved by interpretation of the Code. Undeniably, one might argue that so far as the application of the doctrine to liability insurance is not clearly prohibited in the Code, it must be construed as an allowed one on the basis of canon of interpretation called 'what is not expressly forbidden is considered as allowed.' However, this line of argument appears to be futile because such principle usually works in criminal laws. Hence, the applicability of this legal canon to civil matters including commercial matters is doubtful.

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[197] Michael Ogwezzy, 'Appraisal of What Constitutes Legal Gaps and How they are Filled in Different Jurisdictions' (2014) 41 (1) JMCL 172 <https://ejournal.um.edu.my/index.php/JMCL/article/download/14340/8777/> accessed 2 December 2019.

[198] Princeton University Press, 'What Is Legal Interpretation' <http://assets.press.princeton.edu/chapters/s7991.pdf> accessed 2 December, 2019.

[199] ibid.

Regarding the method that fits the legal gap, one could be analogizing the gap with laws that treat similar cases. As the provisions of liability insurance stand now, they are incorporated in same chapter with those provisions of the law dealing with insurance of objects. Hence, both areas of insurance fall under a chapter entitled 'insurance against damages'. On the other hand, insurance of persons, is treated under a different chapter. Thus, to automatically fill any gap in the law of liability insurance, by drawing an analogy from 'insurance of objects' is more convincing than from that of 'insurance of persons'. So, using the legal rule concerning insurance of objects analogously to liability insurance could be a solution to the legal gap. The Code asserts the indemnity nature of property insurance in requiring the insured's loss must be fully compensated, but not over compensated.[200] Furthermore, it clearly confers legal subrogation right to property insurers as well.[201] Neither the indemnity nature nor the applicability of subrogation is mentioned in the section dealing with liability insurance, however. Therefore, the indemnity nature and subrogation right that exist in insurance of objects needs to be analogously applied in the field of liability insurance. The stand of some legal professionals working in the area regarding the issue is not different from such interpretation.[202]

It is also better to recall that the general jurisprudence and comparative experience of other countries with modern liability insurance regime is also in favor of applying the principle of subrogation to such cases.[203] An effective interpretation of the legal gap also requires weighing the significance of applying subrogation in liability insurance. In connection to this, theoretically, applying the doctrine of subrogation in liability insurance is legally, socially and economically useful. Moreover, as there is no any theory nor literature to date which warrants its inapplicability to liability insurance, the law needs to be interpreted in such a way that allows the applicability of subrogation to liability insurance.

However, it must be clear that interpretation of a law to fill the legal gap in the above manner should not be a long lasting solution while enacting a new law is theoretically possible. Ethiopia

[200] Com. Code, cited above at note 20, Art 678.

[201] Id, Art.683.

[202] Interview with Ato Getahun G/meskel, Judge in Insurance and Banking, Lideta Bench, Federal First Instance Court (Addis Ababa, 4 December 2019) and Interview with Ato Girmaw Amare (n. 185)

[203] Chris Parsons (n 116) 12/3; See also Emmet Vaughan and Therese Vaughan (n 36) 174.

is now at the eve of revising its Com. Code. Nevertheless, the proposed Draft Commercial Code has not tried to address the legal gap as to whether the principle of subrogation should be applicable to liability insurance and the problem with the gap will persist if the draft is to be approved as it stands now. But why, unlike to what it has done in property insurance and insurance of persons[204], the proposed Draft has failed to state a clear position on the issue?

The fact that the issue of subrogation in respect of liability insurance is not incorporated yet in the Draft Code might have resulted from the fact that the drafters aren't cognizant of the issue. According to Getaneh Simachew, a former member of the Committee which revised the recent proposed Draft Commercial Code, the gap of the law on the applicability or non-applicability of the doctrine of subrogation in respect of liability insurance wasn't noticed.[205] A 'Team of Fourteen National Experts' who had been mandated to go through the draft and contribute an input into the final Revised Draft Version of the Code, has prepared its comments and recommendations in July 2008. The team has stated that the chapter dealing with insurance on the Com. Code is well but needs a little amendment.[206] However, the gap of the law at hand has not been considered in their work which may appear to say that the problem in the law didn't cross their mind.

The team of experts mentioned above has proposed a new section that incorporates a provision which uniformly applies to both property and liability insurance regarding insurable interest.[207] It is the firm belief of this researcher that the new section proposed by the above mentioned team of experts to be retained and to further contain a subrogation provision that generally applies to both indemnity insurance, i.e. property and liability.

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[204] Ministry of Justice, "Draft Commercial Code" (2010 E.C.), Arts. 702 and 709; The Ministry has changed its official name into "Attorney General" and being called with the latter by now.

[205] Interview with Ato Getaneh Simachew, Judge in Insurance and Banking, Chirkos Bench, Federal First Instance Court (Addis Ababa, 4 December 2019)

[206] Private Sector Development Hub/Addis Ababa Chamber of Commerce and Sectorial Association, "Position of the Business Community on the Revision of the Commercial Code of Ethiopia" PSD Hub Publication No.8 (2009) 32.

[207] ibid 41.

3.4.1.2.The Civil Code

One may possibly argue that the legal gap as to the applicability of the doctrine of subrogation with respect to liability insurance can be filled by contract of insurance entered between insurers and insured using the main principle of contract called 'freedom of contract'. Indeed, parties to any contract, including insurance contracts, are free to waive or undertake any promise, without losing right of the mandatory provisions of the law. In the absence of a clear law as to the applicability of subrogation, thus, an insurance policy may provide or prohibit subrogation right of insurers.

It is usually the task of Civil Codes to regulate general obligations including contract and tort laws. Thus, as tort liabilities and liability insurance could possibly interrelate with each other, viewing the effect of insurance coverage on insured victim in the C.C. seems essential. In that regard, the C.C. reads as follows:

Art. 2093.-Insured Victim

(1) Where the victim is insured, he may claim compensation for the damage he has suffered on the same terms as though he had not been insured.

(2) The insurer may not claim compensation on his own behalf from the person who by his act has brought about the risk covered by the insurance contract.

(3) The insurance contract may, however, provide for the subrogation of the insurer to the victim's claim against the person liable. [208]

As plainly outlined under Sub-Art. 1 of the above provision, an 'insured victim' is allowed to collect compensation from a tortfeasor in spite of his insurance coverage. Stated differently, an insurance coverage of the victim can't be a defense to the third-party liable for not paying the full amount of compensation. However, what does an 'insured victim' really mean seems to be an issue that must be answered from the outset. Literally, an 'insured victim' could mean any juridical person which sustained a civil loss covered by insurance. The loss may be of financial nature which possibly includes a damage to a person which has legal liability to others in accordance with laws relating to negligence, strict and vicarious liability. In relation to indemnity insurance, anyone who has insurance against an indemnification to the loss of his property or financial liability to others might be an insured victim. Therefore, one with liability insurance

[208] C.C., cited above at note 23, Art 2093

cover can be a victim of legal liabilities by tort laws despite the fact that ultimate liability rests upon others in cases of the insured's strict and vicarious liabilities.

Once what an 'insured victim' is made clear in the above manner, one might say that an 'insured victim' with liability coverage may claim compensation from the ultimate tortfeasors without subtracting his insurance payments. Now, would this mean an insured victim is entitled to double compensation from both an insurance company and a third-party defendant? This issue must be seen in light of the indemnity nature of property and liability insurance along with rules against unjust enrichment. Thus, if an 'insured victim' with liability coverage is allowed to collect a compensation from an insurance company and a third-party defendant at a time, such would obviously derogate the principle of indemnity which results in unjust enrichment of the 'insured victim'. Hence, the provision shall be construed to mean an insured victim can either choose to bring an action against a third-party wrongdoer instead of collecting insurance payment or claim a damage against the same in excess of an insurance payment as sometimes an insurance coverage could be less than the actual loss.

What follows in Sub-Art 2 of the above provision makes it clear that an insurer can't directly sue the third-party defendant who caused the damage. This rule might be chosen to prevent tortfeasors incurring double payment of compensation.[209] However, exceptionally, an insurer is allowed to subrogate to the rights of the insured by virtue of insurance contract pursuant to Sub-Art 3 of the provision.[210] Indeed inserting contractual subrogation into a property insurance policy using this legal provision is simply a reinstatement of what is provided by the Com. Code.[211] However, taking in to account the gap of the law in respect of liability insurance in the Com. Code, Art 2093/3 of the C.C. seems important provision in allowing contractual subrogation. Thus, theoretically, one can say that contractual subrogation with respect to liability insurance is allowed under the C.C. Yet, would this mean that the law is disallowing subrogation

[209] George Krzeczunoicz (n 192) 81.

[210] What is provided "በተበዳዩ ስም" in the Amharic version of the C.C. under the same proviso, which literally means "*in the name of the victim*" that constitutes the most important element of subrogation, is missed from the English version of the same.

[211] Com. Code, cited above at note 20, Art. 683; See also George Krzeczunoicz (195) 86, George Krzeczunoicz argues that any contractual subrogation in respect of property insurance is 'superfluous' for it adds nothing on what is provided by law.

in the absence of 'subrogation clause' in liability insurance policies? When Art 2093(2) and (3) are cumulatively read, contractual subrogation is exceptionally provided for and it seems that there is no insurers' right of subrogation in the absence of 'subrogation clause' in a policy. However, such interpretation would be absurd for disallowing subrogation enables the insured to be entitled to double compensation which results in unjust enrichment. Hence, this provision must be construed to mean contractual subrogation, which avoids the potential 'real party in interest' defense, is allowed in the C.C.

3.4.2. The Applicability of Subrogation in Insurance Policies

As a rule, since insurance is a contract, parties are at liberty to undertake any sort of promises without violating the mandatory provisions of the law.[212] In Ethiopia, there is no mandatory provision of the C.C nor Com. Code that expressly prohibits an inclusion of subrogation clause into liability insurance contracts. In fact, as stated above, the C.C. provides for a possibility of inserting subrogation right of an insurer in insurance contracts.[213] Thus, having subrogation clause in insurance contract is permissible and essential for insurers in selling liability insurance. However, it should be noted that such is not possible in life insurance policies as subrogation is legally forbidden in such cases.[214]

It is generally believed that the inclusion of an express subrogation clause into insurance policies relieves insurers' from somehow a burdensome task of proving the existence of a right to that effect.[215] Hence, in so far as liability insurers' right to subrogation is not clearly stated in the law, the inclusion of a clear subrogation clause into specific policies is particularly important when a law, like the Com. Code, is silent with respect to the issue at hand.

Ethiopian insurers have been issuing liability insurance policies, but it would be superfluous to consider them all. Some common liability insurance policies marketed by the selected insurers in the country are analyzed with an emphasis being given to elements that are common to all and

[212] C.C., cited above at note 23, Art 1731(2)

[213] Id, Art. 2093(3)

[214] Com. Code, cited above at note 20, Art. 690.

[215] George Couch (n 35) Vol.16, 253.

how the principle of subrogation is addressed therein.[216] Regarding the content of insurance policies, although insurance policies differ from one insurer to another and a little bit in form, almost all considered policies have five sections dealing with declarations on the preamble of the policy, insuring agreements, exclusions, conditions and schedule, each section serving a definite purpose in the insurance contract. Sometimes, an endorsement is also prepared in a separate document and attached to policies for the purpose of entering variations.[217] However, standard form policies developed by insurers offer less variations by way of endorsements.[218]

The condition section stated above deals with rights afforded to and duties imposed on both an insurer and insured during the period of the contract. Usually, the right of subrogation to benefit the insurer is found under conditions section. Many of the liability insurance policies, examined by the writer of this thesis, have included subrogation clause with varying degrees of expressions.[219] Hence, an important question now seems how far these policies have clearly incorporated subrogation clauses.

The most common and compulsory liability insurance policy, 'vehicle insurance policy against third party risks', sold by Ethiopian insurers clearly incorporates the right of subrogation to insurers. The following subrogation condition under the heading of "Conduct of Claim/Subrogation" provides how the right to subrogation of an insurer is stated:

> *[N]o admission, offer, promise, or payment shall be made by and on behalf of the insured or any person claiming to be indemnified without the written consent of the insurer which shall be entitled, if it so desires, to takeover and conduct in the name of the insured the defense in civil cases or the negotiation and settlement of any claim or to institute civil action in the name of the insured for its own benefit any claims for indemnity or damages or otherwise against any third party and shall have full discretion in the conduct of any proceedings and in settlement of any claim and the*

[216] The liability insurance policies analyzed under this research are 'Vehicle Insurance Policy against Third Party Risks'; 'Workmen's Compensation Policy; 'Professional Indemnity Policy, Public Liability Insurance and Product Liability Insurance'.

[217] Com. Code, cited above at note 20, Art. 657(2).

[218] An interview with Ato Tesfaye Migbaru (n 181).

[219] The liability insurance policies considered under this research are those specimen standard form policies in use by Ethiopian insurers as of July 2019.

insured shall furnish all such information and assistance as the Corporation may require.[220]

Vehicle insurance policy against third party risks of other insuring companies are almost a *verbatim* copy of the above condition.[221] Similarly, other liability insurance policies have adopted the same wordings in asserting subrogation clause.[222] Thus, all these types of insurance policies considered under this work provide for subrogation right of an insurer. In fact, the above standard wordings are also shared by many property insurance policies according to which an insurer is subrogated to the rights of an insured by law.[223] As can be gathered from the above-quoted wordings, the insurer's right "*...to institute civil action in the name of the insured for its own benefit for any claims…against third party…*" is enshrined in clear terms. Furthermore, an essential nature of subrogation that the pursuit of the right is solely determined by an insurer and the insured's duty to cooperate in the realization of the right is outlined.

However, the above-quoted condition which provides conventional subrogation is too long and might be challenging to understand not only by an ordinary person who buys an insurance product but also a lawyer who would be in a better position to understand written contracts. An interview with an insurance broker also shows that such lengthy provisions throughout insurance policies sold in the market are least appreciated by insureds during and after conclusion of an insurance contract.[224] With the exception to vehicle insurance policy against third party risks, major insurance products are subject to reinsurance and written in the working language of

[220] E.I.C. Vehicle Insurance Policy against Third Party Risks, Condition 2

[221] Awash Insurance S.C. Vehicle Insurance Policy against Third Party Risks, Berhan Insurance S.C. Vehicle Insurance Policy against Third Party Risks, Lion Insurance S.C. Vehicle Insurance Policy against Third Party Risks and Nib Insurance S.C. Vehicle Insurance Policy against Third Party Risks (All under Condition 4)

[222] E.I.C. Workmen's Compensation Insurance, Condition 5; Awash Insurance S.C. Workmen's Compensation Insurance, Condition 5; and Lion Insurance S.C. Workmen's Compensation Insurance, Condition 7

[223] Political Violence and Terrorism Insurance Policy sold by Berhan Insurance S. C. (Condition 8); Lion Insurance S.C. (Condition 6) and Nib Insurance S.C. (Condition 6) have clear subrogation clause. However, Awash Insurance S.C. Fidelity Guarantee Policy has no clear subrogation provision.

[224] An interview with Ato Eyuel Ewnetu (n. 148) and Ato Tesfaye Migbaru (n. 181) (Addis Ababa, 07 November 2019)

reinsurers, i.e. English which makes the same a task of some difficulty to understand by many insureds.[225]

E.I.C's 'Professional Indemnity Policy for Architects and Civil Engineers', however, is precise and much shorter than 'Vehicle Insurance Policy Against Third Party Risks' mentioned above in stipulating subrogation right of the insurer, which reads: *"[I]t is hereby agreed that if any payment is made under this insurance in respect of a claim, the insurer is thereupon subrogated to all the insured's rights of recovery in relation thereto.*"[226] Thus, such wordings in a condition section can be easily understood by an insured.

However, some liability insurance policies, including professional indemnity sold by other insurers, lack clarity. For example, a condition that confers insurers' right to "…*take over and conduct in the name of the insured the defense or settlement of any claim*" is enshrined in many policies".[227] Such wordings lack clarity in stating the very subrogation right that can be conferred on insurance companies. Some may argue that the right to conduct 'settlement of any claim' includes insured's right of recourse for indemnity against third party and, hence, subrogation claims are also impliedly stipulated. On the other hand, one may argue that any indistinctness in the policy must not be construed in favor of the drafter, i.e. the insurer, because insurance by itself is an adhesive contract which is prepared by an insurer. A third party defendant may also potentially raise either a preliminary objection that an insurer lacks vested interest to bring a subrogation suit or a defense that there is no contractual subrogation right granted to it. At any rate, such policies are open to interpretations despite interpretation of contracts should have been

[225] ibid

[226] E.I.C Professional Indemnity Policy for Architects and Civil Engineers, Condition 6

See also Nib S.C. Insurance Professional Indemnity Policy for Insurance Brokers and Agents, Condition 4 and Berhan Insurance S.C. Professional Indemnity Policy for Insurance Brokers and Agents, Condition 4, which have almost the same wordings.

[227] E.I.C Professional Indemnity Policy for Architects and Consulting Engineers, Condition 1(b) 2nd Paragraph; Awash Insurance S.C. Professional Indemnity Policy, Condition 3; Berhan Insurance S.C. Carrier's Liability Insurance, Condition 2(d) 3rd Paragraph; Nib Insurance S.C. Professional Indemnity Policy for Architects and Consulting Engineers Condition 1(b); Nib Insurance S.C. Carrier's Liability Insurance, Condition 2(d) 2nd Paragraph Lion S.C. Insurance Professional Indemnity Policy for Architects and Civil Engineers, Condition 2 and Lion Insurance S.C. Professional Indemnity Policy for Insurance Brokers and Agents, Condition 2

an option of a last resort.[228] Thus, such lack of clarity could have been simply avoided by inserting clear subrogation clause in a policy.

Some types of liability insurance mention insurers' right of subrogation under the heading of "Claim of Procedure" within a condition section of a policy. In the words of such policies:

> *…the Company which shall* be entitled if it so desires *to takeover and conduct in the name of the insured for its own benefit any claim for indemnity or damages or otherwise against any third party and shall have full discretion in the conduct of any proceedings and in settlement of any claim and the Insured shall furnish all such information and assistance as the Company may require.*[229]

As can be inferred from the above wordings, the insurer is impliedly conferred with the right to subrogate to all rights of recovery owed to the insured against others and may bring an action to enforce them. Particularly, the idea for whose benefit does the insurer undertake the proceedings and settlement with respect to the subject matter is so important in deciding insurer's subrogation right. Unlike E.I.C's Professional Indemnity Policy for Architects and Civil Engineers and other liability policies discussed earlier, the above wording of a condition shows that an insurer takes over and conduct a proceeding or settlement of claim for its benefits.[230] Thus, one may possibly infer that subrogation right of insurers is impliedly asserted via such liability policies. This kind of condition with respect to subrogation is also adopted by a variety of liability policies.[231]

Having considered the extent to which the right of subrogation is included in liability insurance policies, an examination of its counterpart, i.e. waiver of subrogation in the policies seems to be fair. In principle, as subrogation is a right, insurers' have the right to waive it, either by contract or conduct. Hence, against the applicability of the doctrine of subrogation, 'waiver clauses' are manifested in some Ethiopian liability insurance policies as an exception to insurers' right of subrogation.[232] The 'waiver clauses' under these policies considered above show that insurers'

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[228] C.C., cited above at note 23, Art. 1733

[229] Berhan Insurance S.C. Workmen's Compensation Insurance Policy, Condition 3; and Nib Insurance S.C. Workmen's Compensation Policy, Condition 3

[230] See n 227.

[231] E.I.C. Product Liability Insurance, Condition 2; Awash Insurance S.C. Product Liability Insurance, Condition 2; and Lion Insurance S.C. Public Liability Insurance, Condition 1(2nd Paragraph).

[232] Lion Insurance S.C. Professional Indemnity against Insurance Brokers and Agents, Condition 4; and Nib Insurance S.C. Professional Indemnity for Architects and Consulting Engineers Project Cover, Condition 7.

right of subrogation is not allowed against an employee of the insured so far as the latter has not been 'dishonest, fraudulent and criminal of malicious act or omission' in the matter that brought the claim.[233] Indeed, these kinds of waiver clauses along their exceptions are similar to what is provided under Art. 683 (3) of the Com. Code that applies to property insurance.

But reasons why 'waiver clauses' are included in insurance policies seem to be an important issue worthy of consideration. It is said that 'waiver clauses' are usually stated regarding a circumstance that potentially concerns both an insured and insurer as Eric Dolden and Dan Richardson have put it rightly below:

> *Customarily, insurers provide for a waiver of their right to subrogate in circumstances where there is such close personal or business proximity between potentially adverse parties, that to allow a subrogated claim to proceed would irreparably harm an existing business or family relationship.*[234]

Thus, as subrogating against an employee of the insured could adversely affect the latter, the above quoted justification could also work for the introduction of waiver clauses into some Ethiopian liability policies. As to whether a negotiation leading to include a 'waiver clause' into an insurance policy is practically possible, according to an interview with an insurance broker:

> *As there is no clear public policy against bargaining to alter a condition of policy with respect to subrogation by way of an endorsement, an attempt to insert 'waiver clause' into insurance policies is theoretically possible up on an increase of premium payment despite such practice is unknown to the field of liability insurance.*[235]

To conclude, many liability insurance policies considered above have incorporated subrogation clauses in favor of an insurer. However, some insurance policies have not clearly stated it. As a result, these kinds of policies could potentially open a room for interpretation which might theoretically result in challenging a subrogating insurer. Given the silence of the law and benefits of subrogation to both insurers and to the public at large, the use of conventional subrogation in liability insurance policies plays an indispensable role in filling the gap of the law and achieving the purposes of subrogation in Ethiopia.

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[233] ibid.

[234] Eric Dolden and Dan Richardson (n 125).

[235] An interview with Ato Eyuel Ewnetu (n 148) (Addis Ababa, 07 November).

3.4.3. The Applicability of Subrogation by the Judiciary

Courts are expected to fill legal gaps by way of interpretation whenever parties haven't agreed on cases that brought them into dispute. Regarding subrogation recoveries, a third-party against whom subrogation is sought might have an insurer for his liability. When s/he has an insurer, subrogation is usually pursued by writing a recovery letter based on expert evidence to the insuring company that has given a cover to the ultimately liable person.[236] It is said that almost all subrogation recoveries between or among insuring companies are achieved using this method to smoothen the business relationship with their customers and avoid costs of litigation.[237] However, when the insurers don't agree upon the expert evidence which proves as to who is the ultimately liable insured party, they may resort to court.[238]

As regards third-party tortfeasors without insurance cover, there seems unfamiliarity with asking a relief for the application of subrogation to some liability insurance cases where the injured party has sustained loss in relation to his health, body or death.[239] An interview with judges also shows that subrogation in such cases of liability insurance is least pursued in courts.[240] This might be attributable to the industrial perception that when an injured person sustains a damage of bodily injury, illness, or death which are similar to that of damages in insurance of persons, they are wrongly considered as non-indemnity insurance to which subrogation is inapplicable.[241] Hence, cases involving issues of subrogation in such types of liability insurance are least prayed in courts.[242]

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[236] Interview with Ato Eyuel Ewnetu (n.148); Ato Tesfaye Migbaru (n.181); W/ro Aster Abebe (n. 180) and Ato Girmaw Amare (n.185)

[237] Interview with W/ro Aster Abebe (n. 180); Ato Hialeab Yihdego (186); Ato Tesfaye Migbaru (181) and Ato Girmaw Amare (n.185)

[238] ibid

[239] Interview with Ato Fikadu Yami and Ato Girmaw Amare (n.185)

[240] Interview with Ato Fikadu Yami and Ato Girmaw Amare (n.185); Interview with Ato Getaneh Simachew (n. 205); and Interview with W/ro Roza Abebe, Insurance and Banking Judge, Lideta Bench, Federal First Instance Court (Addis Ababa, 04 December 10, 2019)

[241] Interview with Ato Fikadu Yami and Ato Girmaw Amare (n.185)

[242] Interview with Ato Fikadu Yami (n.185)

To date, there is only one decided case in this regard by the Cassation Bench of the Federal Supreme Court to the best knowledge of the writer of this thesis.[243] In that case, *Ethiopian Insurance Corporation Vs Africa Beza College-Awassa Compus*,[244] the Cassation Bench decided that the insurer which has paid compensation for the death of an employee has the right of subrogation to the rights of the insured, the employer, against third party liable person in workmen's compensation. It could be said that the court's ruling in allowing the insurer's right of subrogation is in conformity with the spirit of the law as discussed earlier. Moreover, the court reasoned that the amount of compensation is a fixed sum which must lead to subrogation right of the insurer.[245] This reasoning, however, seems far from convincing because let alone in a liability insurance, a policy for insurance of a person to which subrogation is inapplicable might state a fixed amount benefit. Thus, such reasoning of the court seems illogical. Hence, the court should have either mentioned an authoritative law or interpreted the gap in the law while giving its verdict. Undeniably, the decision could have far reaching effect to similar cases of workmen's compensation.

[243] An attempt to secure such cases from all insurance decisions of Federal Supreme Court and randomly taken samples decisions of Federal High Court and Federal First Instance Court by the researcher was done but results in vein.

[244] Ethiopian Insurance Corporation Vs Africa Beza College-Awassa Compus, Federal Supreme Court, Cassation Devision, File No. 99179, Unpublished Decided on September 25/2008 E.C)

[245] Ibid

CHAPTER FOUR

4. CONCLUSIONS AND RECOMMENDATIONS

4.1. Conclusions

The doctrine of subrogation, which literally means 'putting in the shoes of the original creditor' is applicable to laws of contract, succession, insurance and tort. Particularly, it is considered as one of the fundamental principles of insurance, just as a corollary to the principle of indemnity. The *modus operandi* as to the applicability of the doctrine of subrogation to insurance is that it equally applies to both forms of indemnity insurance, property and liability. This is so because the doctrine is firmly believed to give an effect to the grand principle of indemnity applicable to indemnity insurance contracts.[246] Thus, the applicability of subrogation to liability insurance isn't much contentious.

Coming to Ethiopian insurance law, however, it has been found that the Com. Code is silent in respect of liability insurers' right of subrogation to the rights and benefits of an insured. Yet, it is believed that the applicability of the doctrine of subrogation to liability insurance regime could have legal, social and economic significances to the country's underdeveloped insurance industry. Legally, subrogation enforces the fundamental principle of indemnity in which liability insured must not be overcompensated. Socially, it discourages carelessness of third-party tortfeasors by making them liable for their acts or omissions. Finally, recoveries by way of subrogation have an invaluable economic significance to the insurance industry in general and liability insurers in particular.

Despite the above benefits of the doctrine of subrogation, its applicability to liability insurance is unsettled in the Com. Code. The way subrogation is clearly regulated in property insurance and life insurance while it is silent as regards to liability insurance does not reasonably lead to conclude that the gap of the law on the issue is deliberate. Rather, the gap is possibly attributable to error of the drafter of the Code, Professor Alfred Jauffret, accompanied with oversight of the then legislature of the country in ratifying it.

[246] Emmett Vaughan and Therese Vaughan (n 36)170

So, how should this legal *lacuna* be filled seems to be an important question that must be answered. Hence, the legal gap must be filled taking into account the basic canons of legal interpretation and the alleged dividends of applying the doctrine to the field of liability insurance. An effective interpretation in such cases appears to be use of analogy from property insurance as both classes of insurance are indemnity insurance by their nature and are regulated in the same chapter. Making use of the general jurisprudence on the issue and the above mentioned significances of applying subrogation to liability insurance lead to conclude that arguing in favor of the same seems to be convincing. However, as interpretation can't be a long lasting solution, a legislative decision on the issue is also required. Thus, legislative measure seems apt in the revision of the Com. Code which is now underway.

The other possible alternative to the problem is contractual subrogation which can be a good device to solve the gap of the law whenever insurance policies contain 'subrogation clause'. Regarding the extent Ethiopian liability policies have incorporated such subrogation clause, analysis of policies in this research show that many of them have tried to include such clauses. However, some of these policies are too long which makes a task of some difficulty to understand. Moreover, some policies are not clear enough in stating the insurers' right of subrogation. Coupled with the gap of the law, lack of clarity in this regard might raise a defense of 'real party in interest' by a potential defendant challenging an action for subrogation of insurers.

It is said that subrogation in relation to liability insurance isn't oftentimes prayed in court of law. This could be attributable to the fact that when a risk materializes between two insured persons, subrogation would take place among insuring companies unless the same company insured them. Intercompany subrogation cases are usually undertaken by writing claim recovery letters based on an expert evidence that shows as to who is the tortfeasor upon whom the ultimate liability rests. Another reason for such cases are to be least known in courts is that there is an industrial perception that some liability insurance policies are wrongly understood as non-indemnity insurance.

Finally, though the case considered in this thesis doesn't fully show the jurisprudence of Ethiopian courts' practice, the Federal Supreme Court in its Cassation Bench has not appropriately characterized and shown the gap of the law that deserves an effective

interpretation. The Bench is constitutionally empowered to give cassation over any level of court decision containing basic error of law.[247] Moreover, its interpretation in giving decisions is binding as of law in the country.[248] Thus, the court is expected to give decisions that escalates the jurisprudence of a law on the issue whenever a case is brought to its attention.

4.2. Recommendations

The legal gap as to the applicability of the doctrine of subrogation in liability insurance and failure to address this issue clearly on some policies could be mentioned as an important problem of the Ethiopian infant insurance industry that seeks policy attention. Hence, on the basis of the above conclusions, the writer of this thesis would like to forward the following recommendations:

I. The general jurisprudence on the law of insurance shows that liability insurance is an indemnity insurance that must be enforced, among other things, subject to the doctrine of subrogation. The legal gap with respect to liability insurers' right of subrogation in the Com. Code seeks a solution that achieves the indemnity nature of liability insurance. It has been a bit longer time since Ethiopia has begun to revise the Com. Code. As a result, the Com. Code, in its forthcoming revision, shall be amended in such a way that allows liability insurers to subrogate to the rights of the insured. In doing so, a statutory subrogation provision that equally applies to both property and liability insurance must be inserted in a new section which carries general provisions applicable to both liability and property insurance.

II. It has been said that the effect of an express subrogation clause, in the absence of legal subrogation, in an insurance policy is to make it unnecessary for the insurer to prove facts giving rise to a right of subrogation. Accordingly, in the absence of a clear law that bestows subrogation right on insurers, insurance companies, while drafting standard forms of liability policies, should insert clear subrogation clauses. Therefore, as some liability insurance policies in Ethiopia failed to expressly provide subrogation clauses, insurance companies are recommended to draft their liability insurance policies with clear and precise 'subrogation

[247] Federal Democratic Republic of Ethiopia Constitution, Proc. No. 1, Fed. Neg. Gaz. 1st Year No., 21st August 1995, Art 80(3/1-a)

[248] Federal Courts Proclamation Re-Amendment Proclamation No. 454/, Fed. Neg. Gaz. 11th Year No.42, 14th June 2005, Art 2(1)

clause' as it could possibly reduce challenges of subrogation up until a legislative measure is taken.

III. Subrogation suits in respect to liability insurance against third-party defendants without an insurance cover are least known in the Ethiopian litigation system according to the data collected through interview and the quest for relevant cases by the researcher. It has been said that such is partly attributable to the insurance industry perception of mingling some liability insurance cases with insurance of persons to which subrogation is inapplicable. Hence, insurance companies should seek a relief in collecting subrogation recoveries from third party defendant in cases of such nature.

IV. Finally, theoretically, courts need to interpret the legal gap clearly in such a way that achieves the aims and functions of indemnity insurance and decide in favor of applying the doctrine of subrogation in liability insurance. Particularly, the Federal Supreme Court via its Cassation Bench, is recommended to give clear and well researched interpretations that fill the gap of the law when cases of such nature are submitted to it.

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Annex 1: Case

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መዝገቡን መርምረን የሚከተለውን ፍርድ ተሰጥተናል፡፡

ፍ ር ድ

ይህ ጉዳይ የደቡብ ውሃ ሥራዎች ኮንስትራክሽን ድርጅት ሰራተኛ በሆነው በአቶ ሙላት ሃዋዝ ሞት ምክንያት በሰጠሁት የመድን ሽፋን መሠረት የከፈልኩት የካሳ ክፍያ እንዲተካልኝ በማለት የቀረበ ክስን መሠረት ያደረገ ክርክር ነው፡፡ የጉዳዩ አመጣጥ ሲታይ፡- የስር ከሳሽ (የአሁን አመልካች) በሀዋሳ ከፍተኛ ፍ/ቤት ባቀረበው ክስ ከሳሽ ከደቡብ ውሃ ሥራዎች ኮንስትራክሽን ድርጅት ጋር ባደረገው የሰራተኞች ጉዳት የመድን ሽፋን ውል በሰራተኛ ላይ በስራ ላይ በሚደርስ ጉዳት ለመካስ የተዋዋለ መሆኑን የዚህ ድርጅት ሰራተኛ አቶ ሙላት ሃዋዝ በስራ ቦታ ላይ የካቲት 9 ቀን 2003 ዓ/ም ንብረትነቱ የተከሳሽ በሆነ የሰሌዳ ቁ.3-21546 አ.አ ተሸከርካሪ ገጭቶት ሕይወቱ ያለፈ መሆኑን በዚህ ምክንያት ከሳሽ ለሟች ወራሾች ብር 88,920 (ሰማንያ ስምንት ሺህ ዘጠኝ መቶ አየ) ካሳ የከፈለ መሆኑን እና የተሸከሪካሪው ሾፌር አቶ አየለው ጎሹ ህግና ሥርዓትን ጠብቆ ባለማሽከርከር ያደረሰው አደጋ መሆኑን የሀዋሳ ከተማ አስተዳደር መንገዶችን ትራንስፖርት ጽ/ቤት የገለፀ መሆኑን የሚገልጽ ሆኖ ተከሳሽ ጉዳት ያደረሰው ተሸከርካሪ ባለንብረትና የሾፌሩ አሰሪ ሲሆን ይህን ገንዘብ ሊተካልኝ ኃላፊነት ስላለበት እንዲካፍለኝ እንዲወሰንልኝ በማለት ጠይቋል፡፡

ይህን ክስ በተመለከተ የሥር ተከሳሽ (የአሁን ተጠሪ) ባቀረበው መልስ የንግድ ሕግ አንቀጽ 690 በመጥቀስ ለተጠቃሚው የከፈለ ኢንሹራንስ ሰጪ ጉዳት እንዲደርስ ባደረጉት ወገኖች ላይ በእነርሱ መብት ተተክቶ ክስ ሊያቀርብ አይችልም። ስለዚህ ከሳሽ ለሚች ወራሾች የከፈለውን ካሳ እንዲከፈለው ለመጠየቅ መብት የለውም በማለት ተከራክሯል።

ከዚህ በኋላ ፍ/ቤቱ ግራ ቀኙን በማከራከር በሰጠው ብይን ከሳሽ ራሱ ክፍያውን የፈፀማ ለሞት ጉዳት ካሳ መሆኑን እየገለጸ በመሆኑ በንግድ ሕግ አንቀጽ 690 መሠረት የመዳረግ መብት ወይም ተተክቶ የመክሰስ መብት የሌለው በመሆኑ ተከሳሽን ለመክሰስ መብት የለውም በማለት ክሱን ውድቅ በማድረግ መዝገቡን ዘግቷል። ይህ በይግባኝ ለክልሉ ጠቅላይ ፍ/ቤት ሲቀርብ ፍ/ቤቱ ግራ ቀኙን ካከራከረ በኋላ በሰጠው ውሳኔ ከሳሽ ያቀረበው የመዳረግ መብትን መሠረት ያደረገ ክስ በአግባቡ ሆኖ ሳለ የሥር ፍ/ቤት ለጉዳዩ አግባብነት የሌለውን የንግድ ሕግ ድንጋጌ ያለቦታው በመጥቀስና የተከሳሽን መቃወሚያ በመቀበል ከሳሽ ለመክሰስ መብት የለውም በማለት የሰጠው ብይን ተቀባይነት የለውም በማለት ብይኑን በመሻር የስር ፍ/ቤት በክሱ ፍሬ ነገርና በሚቀርቡት ማስረጃዎች ላይ ግራ ቀኙን በማከራከር አጣርቶ የመሰለውን ውሳኔ እንዲሰጥ በፍ/ብ/ሥ/ሥ/ሕ/ቁ.341 መሠረት ወደ ሥር ፍ/ቤት መልሶታል።

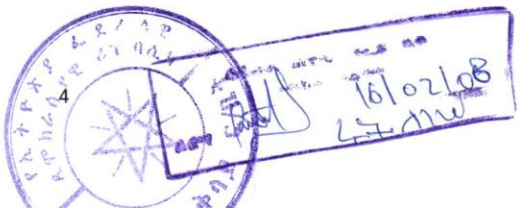
በዚህ መሠረት የሀዋላ ከፍተኛ ፍ/ቤት መዝገቡን በማንቀሳቀስ ተከሳሽ ያሻሻለውን መልስ በመቀበል ግራ ቀኙን በማከራከር ይህ የመድን ዋስትና ሽፋን የኃላፊነት ዋስትና ሽፋን ነው? ወይስ የሕይወት እና የአካል ጉዳት መድን ዋስትና ነው? መተካት ይቻላል ወይ? የሚለውን ጭብጥ በመያዝ በሰጠው ውሳኔ ከሳሽ ለደቡብ ውሃ ሥራዎች ኮንስትራክሽን ድንጅት የገበው የኢንሹራንስ ፖሊሲ እንደሚያመለክተው ሠራተኞች በሥራ ላይ የሚደርስባቸውን የሞት የአካል ጉዳት እና የሕመም አደጋን የሚሸፍን ስለሆነ የሕይወት መድን ዋስትና ነው፣ ከሳሽ የኃላፊነት መድን ዋስትና መስጠቱን በአሳማኝ ማስረጃ አላስረዳም። ለሚች ወራሾች የከፈለውን የሞት ጉዳት ካሳ ሚችን ተክቶ መክሰስ በንግድ ሕግ አንቀጽ 654 (3) እና 690 መሠረት መብት የለውም በማለት ክሱን ውድቅ በማድረግ ወስኗል። የሥር ከሳሽ ይህን ውሳኔ በመቃወም ለክልሉ ጠቅላይ ፍ/ቤት ይግባኝ ማመልከቻ በማቅረቡ ፍ/ቤቱ ግራ ቀኙን በማከራከር በሰጠው ውሳኔ የስር ፍ/ቤት መጀመሪያ የሰጠው ውሳኔ ተሸሮ በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 341 (1) መሠረት ቢመለስለትም የበፊቱን አቋም ይዞ መዝገቡን መዘጋቱ በሥነ ሥርዓት ሕግ አግባብነት የለውም የክልሉ ውሃ ሥራዎች ድርጅት በሥራ ላይ በሠራተኞች ላይ ለሚደርሰው ጉዳት በአዋጅ ቁ.377/96 አንቀፅ 96 (1) እና 97 /ሀ-መ/ የሚመጣበትን ኃላፊነት በአግባቡ

ለመወጣት የከሳሽ ድርጅት ጋር የመድን ሽፋን ፖሊሲ ማድረጋቸው ይታያል ይህ ደግሞ የኃላፊነት መድን ውል እንጂ የሕይወት ወይም የአካል ጉዳት ወይም የጤንነት መድን አይደለም ከሳሽ ተተክቶ የመክሰስ መብት ስላለው ተከሳሽ ብር 88,920 ለከሳሽ የክፈል በማለት የሥር ውሳኔ በመሻር ወስኗል። የሥር ተከሳሽ ይህን ውሳኔ በመቃወም የይግባኝ ማመልከቻውን ለፌዴራል ጠቅላይ ፍ/ቤት ያቀረበ ሲሆን ፍ/ቤቱ ግራ ቀኙን በማከራከር በሰጠው ውሳኔ ከሳሽ የሰጠው የመድን ሽፈን ስለሰዎች እንሹራንስ የሚመለከት መሆኑን እና የሰዎች ኢንሹራንሽ ክፍያ ሲፈጸም በመተካት በጉዳት አድራሹ ላይ ክስ ማቅረብ እንደማይቻል በንግድ ህጉም ሆነ በፍትሓብሔር ህግ የተመለከተ ስለሆነ ከሳሽ ተተክቶ የመክሰስ መብት የለውም በማለት የክልሉ ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት ውሳኔ በመሻር የሀዋሳ ከፍተኛ ፍ/ቤት ውሳኔን በማጽናት ወስኗል። ይህ የሰበር አቤቱታም የቀረበው ይህን ውሳኔ በመቃወም ለማስለወጥ ነው።

የአሁን አመልካች መጋቢት 22 ቀን 2006 ዓ/ም በተፃፈ አቤቱታ አመልካች የቀረበውን ክስ በተመለከተ ሀዋሳ ከፍተኛ ፍ/ቤት በመዝገብ ቁ.12602 በ29/12/2004 ዓ/ም በሰጠው ብይን አመልካች የመዳረግ መብት የለውም በማለት ክሱን ውድቅ ማድረጉን በመቃወም፣ አመልካች ይግባኙን ለክልሉ ጠቅላይ ፍ/ቤት ያቀረበ ሲሆን ፍ/ቤቱ የሥር ብይን በመሻር አመልካች የሰጠው የኃላፊነት መድን ስለሆነ የመዳረግ መብት አለው በማለት የሥር ፍ/ቤት ጉዳይ ላይ ውሳኔ እንዲሰጥ በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 341 /1/ መሠረት መልሶለት እያለ የሥር ፍ/ቤት ይህን ትዕዛዝ ባለመቀበል የሰጠው ውሳኔ አግባብነት የሌለው ነው። የአመልካች የመድን ደንበኛ የደቡብ ውሃ ሥራዎች ኮንስትራክሽን ድርጅት ነው እንጂ ሚች አቶ ሙላት አዋዝ አልነበሩም። በአመልካች እና በደቡብ ውሃ ሥራዎች ኮንስትራክሽን ድርጅት መካከል ያለው የመድን ፖሊሲ ውሃ የኃላፊነት ኢንሹራንሽ ስለመሆኑ መድን ገቢው ሳይቀር አረጋግጧል። ይህ ሆኖ ሳለ የሥር ፍ/ቤት የመድን ውሉ ስለሰዎች (life Insurance) ነው በማለት የሰጠው ውሳኔ መሠረታዊ የህግ ስህተት ነው። ለሞት ጉዳት ካሳ የተከፈለ ኢንሹራንስ ሁሉ ስለሰዎች የተደረገ እንሹራን /የሕይወት ኢንሹራንስ/ ነው ብሎ ለመደመደም የሚያስችል ምንም የሕግ ድጋፍ የለም። በኃላፊነት ጊዜም ለሞት ጉዳት ካሳ ሊከፈል ይችላል። ስለዚህ የፌ/ጠ/ፍ/ቤት ይግባኝ ሰሚ ችሎት አመልካች የሕይወት ኢንሹራንስ ስለሰጠ በንግድ ህጉ አንቀጽ 689 እና 690 መሠረት መዳረግ አይችልም በማለት የሰጠው ውሳኔ መሠረታዊ የሕግ ስህተት ነው። የፌ/ጠ/ፍ/ቤት የንግድ ህግ ቁ.683 (1) ለዕቃዎች ኢንሹራንስ ብቻ ነው ያለው መሠረታዊ የህግ

ስህተት ነው። ምክንያቱም ድንጋጌው የሚገኘው ስለጉዳት ካሳ ኪሳራ ኢንሹራንስ በሚል ምዕራፍ 3 ስር ስለሆነ ይህ ማለት በካሳ መርህ የሚመራ ኢንሹራንስ በመሆኑ የኃላፊነት ኢንሹራንስ ደግሞ በካሳ መርህ ስለሚመራ መድን ሰጭው በከፈለው ካሳ መጠን ጉዳት እንዲደርስ ባደረገው ሶስተኛ ወገን ላይ በቁ.683 (1) መሠረት በመዳረግ ክስ መመስረት እንደሚችል ያመለክታል። የተጠሪ ኃላፊነት የተሸከርካሪው ባለንብረት ስለሆነ ቀጥተኛ እና ጥፋት ላይ ያልተመሰረተ ስለሆነ የደረሰውን ጉዳት ሙሉ ለሙሉ ለመካስ ግዴታ ስላለበት ከሁለት በላይ በተደጋጋሚ ጊዜ በኃለፊነት የሚጠየቅበት ዕድል መኖሩ ብቻውን አመልካች የመዳረግ መብት የለውም የሚያስብል ስላልሆ የፌዴራል ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት የሰጠው ውሳኔ መሠረታዊ የህግ ስህተት ያለበት በመሆኑ እንዲሻርልን አመልካች የከፈለውን ካሳ ተጠሪው ከሀጋዊ ወለድ ጋር እንዲከፍለን እንዲወሰንልን ወጪና ኪሳራ እንዲቆረጥልን በማለት አመልክቷል።

የሰበር አጣሪ ችሎትም መዝገቡን በመመርመር አቤቱታው በሰበር መቅረብ አለበት በማለት ተጠሪ መልስ እንዲሰጥ በታዘዘው መሠረት ነሐሴ 27 ቀን 2006 ዓ/ም የተፃፈ መልስ አቅርቧል። የመልሱም ይዘት የክልሉ ከፍተኛ ፍ/ቤት የክልሉ ጠቅላይ ፍ/ቤት በፍ/ብ/ስ/ስ/ሕ/ቁ. 341 መሠረት የመለሰለትን ጉዳይ የግራ ቀኙን ማስራጃ ሰምቶና አጣርቶ የሰጠውን ውሳኔ የክልሉ ጠቅላይ ፍ/ቤት የሻረ ቢሆንም የፌዴራል ጠቅላይ ፍ/ቤት የክልሉን ጠቅላይ ፍ/ቤት ውሳኔ በመሻር ስለወሰነ በክልሉ ከፍተኛ ፍ/ቤት የተጣለ የስነ ስርዓት ጉድለት የለም። አመልካች የከፈለው የሕይወት ጉዳት ካሳ መሆኑን ራሱ ስላልካዳ የሰው ሕይወት በገንዘብ ሊተመን ስለማይችል አመልካች የከፈለው ካሳ ከሟች ሕይወት ጋር ተመጣጣኝ ሊሆን አይችልም። ስለዚህ የተመጣጣኝ ካሳ መርህን የተከተለ አይሆንም የሟች ወራሾች ከጉዳት አድራሽም ጨምሮ የጉዳት የካሳ ለመጠየቅ ይችላል በዚህ መሠረት ተጠሪ ለሟች ወራሾች ተገቢውን ካሳ በመክፈል ግዴታውን ተወጥቷል። አመልካች በፍ/ብ/ሕ/ቁ. 2093 (3) መሠረት በተበዳዩ ስም ተዳራጊ ሆኖ የከፈለውን የኢንሹራንስ ካሳ ጉዳትን ካደረሰው ሰው መጠየቅ አይችልም። አመልካች ለሟች ወራሾች የከፈለውን የኢንሹራንስ ካሳ ሞት ካሳ መሆኑን ያመነና በማስረጃም የተረጋገጠ ስለሆነ ለከፈለው ካሳ በንግድ ሕግ ቁ.690 እና በፍ/ብ/ሕ/ቁ. 2093 (2) መሠረት ሊጠይቅ አይችልም። ምክንያቱም ሟች ንብረት ወይም ዕቃ ባለመሆኑ በንግድ ሕግ ቁ. 683(1) መሠረት ለከፈለው ካሳ ተተክቶ ሊጠይቅ አይችልም። ስለዚህ የፌ/ጠ/ፍ/ቤት ውሳኔ



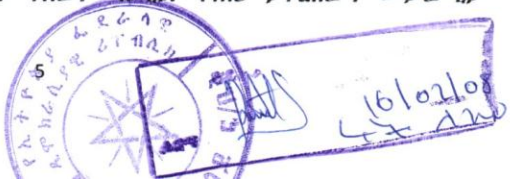
በማጽናት ወጪና ኪሳራ አመልካች እንዲከፍለን እንዲወሰንልን በማለት ተከራክሯል። አመልካች የመልስ መልሱን ስላላቀረበ ይህ መብቱ ታልፎበታል።

የጉዳዩ አመጣጥ ከላይ እንደተመለከተ ሲሆን ይህ ሰበር ሰሚ ችሎትም የግራ ቀኙን ክርክር ለሰበር አቤቱታው መነሻ ከሆነው ውሳኔ እና አግባብነት ካላቸው የህግ ድንጋጌዎች ጋር በማገናዘብ

1. የክልሉ ከፍተኛ ፍ/ቤት የሰጠውን ብይን የክልሉ ጠቅላይ ፍ/ቤት ሽሮ መልሶበት እያለ ከፍተኛ ፍ/ቤቱ ለተሻረው ብይን ምክንያት የነበረውን ጉዳት መሠረት አድርጎ መልሶ የቀረበውን ክስ ውድቅ ያደረገው በአግባቡ ነው ወይስ አይደለም?
2. አመልካች የሰጠው የኢንሹራንስ ሽፈን የሕይወት መድን ውል ነው? ወይስ የኃላፊነ ኢንሹራንስ ውል ነው?
3. አመልካች በመዳረግ መብት ተጠቅሞ የከፈለውን ካሳ ለመጠየቅ ይችላል ወይ? የሚለውን ጭብጦች በመያዝ እንደሚከተለው ተመርምሮታ።

የመጀመሪያውን ጭብጥ በተመለከተ፡

ከመዝገቡ መገንዘብ እንደሚቻለው የአዋሳ ከፍተኛ ፍ/ቤት በመዝገብ ቁ.12602 በ29/12/2004 ዓ/ም በሰጠው ውሳኔ አመልካች የኃላፊነት ኢንሹራንስ ሳይሆን የሕይወት ኢንሹራንስ ስለሰጠ በንግድ ሕግ ቁ. 690 መሠረት ተተክቶ የከፈለውን ካሳ ጉዳት ካደረሰው አካል መጠየቅ ስለማይችል የመክሰስ መብት የለውም በማለት ወስኗል። የክልሉ ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት ደግሞ በመዝገብ ቁ.57984 በ13/03/2005 ዓ/ም በዋለው ችሎት በሰጠው ውሳኔ አመልካች በዚህ የካሳ ክፍያ ምክንያት ኢኮኖሚያዊ ጥቅሙ ጉዳት ለደረሰበት ደንበኛው የከፈለውን ገንዘብ ለጉዳቱ ኃላፊ የሆነውን ተጠሪ እንዲተካለት በደንበኛው ስም ተደራጊ ሆኖ በከፈለው ካሳ መጠን ክስ ለማቅረብ ህገዊ መብት ያለውና ኢንሹራንሽም ስለሰዎች የተደረገ የሕይወት ወይም የሞት ኢንሹራንስ ሣይሆን በካሳ ክፍያ ምክንያት በደንበኛው ኢኮኖያዊ መብት ላይ የሚደርሰውን ጉዳት ለመካስ የተገባ የጉዳት ኪሳራ ኢንሹራንስ ሆኖ በንግድ ሕግ ቁ.683 ሥር የሚሸፈን መሆኑ እየታወቀ የካሳ ክፍያ የተፈጸመው ለሞት ጉዳት በመሆኑ አመልካች በዳንበኛ /በተጎጂው/ መብት ተተክቶ ክስ ለማቅረብ ከንሕ.ቁ.690 አንጻር መብት የለውም በሚል ተጠሪ ያቀረበውን መቃወሚያ



የሥር ፍ/ቤት ተቀብሎ መዝገቡን በብይን መዝጋቱ በአግባቡ ሆኖ አላገኘንም አመልካች የመዳረግ መብት አለው በማለት የስር ውሳኔ በመሻር የስር ፍ/ቤት በክሱ ፍሬ ነገርና በሚቀርቡት ማስረጃዎች ላይ ግራ ቀኙን በማከራከር አጣርቶ ውሳኔ እንዲሰጥበት በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 341(1) መሠረት መልሶታል። ከዚህ ውሳኔ መገንዘብ እንዳሚቻለው የክልሉ ጠቅላይ ፍ/ቤት በሰጠው ውሳኔ አመልካች የሰጠው የመድን ሽፋን የሕይወት ኢንሹራንስ ሳይሆን የኃላፊነት ኢንሹራንስ እንደሆነና አመልካች የመዳረግ መብት ስላለው በካሳ ክፍያ ምክንያት የደረሰበት ኢኮኖሚያዊ ጥቅም ተተክቶ ጉዳት ካደረሰው ተጠሪ ለመጠየቅ እንደሚችል አረጋግጦ ስለወሰነ ተጠሪ ስልጣን ላለው ፍ/ቤት ይግባኝ አቅርቦ እስካላስለወጠ ድረስ በዚህ ጭብጥ ላይ ድጋሚ ዳኝነት የሚታይበት አግባብ የለም። ከዚህ አንጻር የፍ/ብ/ሥ/ሥ/ሕ/ቁ. 320 /1/ 323 /2/ 327፣ 343 /1/ 348 /1/፣ ማየት ይቻላል። የሀዋሳ ከተማ ከፍተኛ ፍ/ቤት ጭብጥ ተይዞ የክልሉ ጠቅላይ ፍ/ቤት የመለሰለትን ጉዳይ በተሠጠው ትዕዛዝ መሠረት በፍሬ ጉዳይ ላይ ግራ ቀኙን አከራክሮ በማስረጃ አጣርቶ የካሳ መጠን ከመወሰን ውጭ የክልሉን ጠቅላይ ፍ/ቤት ውሳኔ ወደ ጎን በመተው የቀድሞ ውሳኔን መሠረት አድርጎ የቀረበውን ክስ ውድቅ ማድረጉ የፍርድ ቤቶችን የስልጣን ተዋረድ መሠረት የደረገ ባለመሆኑ ተቀባይነት ሊሰጠው የሚገባ ሆኖ አልተገኘም። ስለዚህ የከፍተኛ ፍ/ቤቱ የክልሉ ጠቅላይ ፍ/ቤት የሰጠው ውሳኔ ግልፅ ሆኖ እያለ፣ ከውሳኔው ላይ ቅሬታ ያለው አካል በይግባኝ እስካላስለወጠ ድረስ በተሰጠው ውሳኔ መሠረት የመፈጸም ግዴታ አለበት። ስለዚህ የሀዋሳ ከፍተኛ ፍ/ቤት የክልሉ ጠቅላይ ፍ/ቤት የሰጠውን ውሳኔ ወደ ጎን በመተው ቀድሞ በሰጠው ብይን መሠረት አመልካች የሕይወት መድን ሽፋን ስለሰጠ የመዳረግ መብት የለውም ተተክቶ መክሰስ አይችልም በማለት የሰጠው ውሳኔ ካላይ የተጠቀሱት ምክንያቶች መሠረታዊ የህግ ስህተት የተፈጸመበት ነው ብለናል።

ሁለተኛ ጭብጥን በተመለከተ

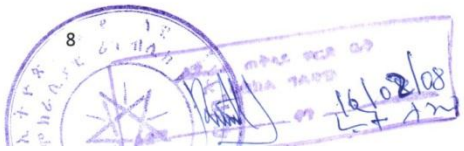
ከክርክሩ መረዳት እንደሚቻለው የመድን ሽፋን ውል የተደረገው በአመልካች እና ደንበኛ በሆነ በደቡብ ውሃ ሥራዎች ኮንስትራክሽን ድርጅት እንደሆነ ግልጽ ነው። የኢንሹራንስ ውሉም ዓለማ የደንበኛው ሰራተኞች በሥራ ቦታ ወይም በሥራው ምክንያት እና በስራ ሰዓት የሚደርስባቸው የሞት ወይም የአካል ጉዳት ወይም በሥራ ምክንያት ስለሚመጣ በሽታ ደንበኛው በኢትዮጵያ ህግ መሠረት ካሳ ለመክፈል ተጠያቂ የሚሆን ከሆነ ኢንሹራንስ ኩባንያው ደንበኛው የከፈለውን ካሳ በሙሉ ለመተካት ግዴታ የገባ መሆኑን የቀረበው

የሠራተኛ ጉዳት ካሳ ውል /ፖሊሲ/ ያመለክታል። የደቡብ ውሃ ሥራዎች ኮንስትራክሽን ድርጅት /ደንበኛ/ ከአመልካች ጋር የተዋዋለው የመድን ውል /ፖሊሲ/ ከድርጅቱ ጋር በአሠሪና ሠራተኛ አዋጅ ቁ.377/96 መሠረት የስራ ውልን መሠረት ያደረገ ግንኙነት ያላቸውን ሰራተኞች በተመለከተ በስራ ቦታ እና ጊዜ የሚደርስባቸው‹‹ በሥራ ላይ የሚደርስ ጉዳት›› ማለትም ‹‹በሥራ ላይ የሚደርስ አደጋ ወይም በስራ ምክንያት የሚመጣ በሽታ›› አሠሪው ጥፋት ባይኖርበትም ኃላፊነት እንዳለበት /liability irrespective of fault/ አንቀጽ 95 /2/ እና 96 /1/ መገንዘብ ይቻላል። በአዋጁ አንቀጽ 94 /መ/ መሠረት ሰራተኛው ስራውን በማከናወን ላይ ባለበት ጊዜ በአሰሪው ወይም በሶስተኛ ወገን ድርጊት ምክንያት የደረሰበት ጉዳት ‹‹በሥራ ላይ የሚደርስ አደጋ›› እንደሆነ ይደነግጋል። ስለዚህ በዚህ አዋጅ መሠረት አሰሪው ሰራተኛ ‹‹በሥራ ላይ ለሚደርስበት ጉዳት›› ጥፋት ባይኖርበትም ኃላፊ ስለሆነ፣ በምዕራፍ ሶስት የካሳና የተለያዩ ክፍያዎች ለሰራተኛው፣ የካሳ ክፍያን ለጥገኞች የመክፈል ግዴታ በሕግ ተጥሎበታል። ከዚህ አንጻር የአዋጁን አንቀጽ 103–112 ማየት ይቻላል። ከእነዚህ ድንጋጌዎች መገንዘብ እንደሚቻለው አሠሪው በስራ ላይ ጉዳት ለደረሰበት ሰራተኛም ሆነ ለሠራተኛው ጥገኞች ሊከፈል የሚገባ የካሳም ሆነ የተለያዩ ክፍያዎች መጠን በሕጉ በግልጽ ተቀምጧል። አሠሪው በዚህ ምክንያት ለሰራተኛውም ሆነ ለሰራተኛው ጥገኞች የሚከፈለው መጠኑ የሚታወቅ በመሆኑ መጠኑ እንደማይታወቅም ተደርጎ የሚቀርበው ክርክር ተቀባይነት የለውም። ስለዚህ የደቡብ ውሃ ስራዎች ኮንስትራክሽን ድርጅት በዚህ መሠረት በአሰሪና ሰራተኛ አዋጅ በሰራተኛ ላይ በሥራ ላይ በሚደርስባቸው ጉዳት ምክንያት በማድረግ የሚመጣበትን ኃላፊነት በተመለከተ ከአመልካች ኩባንያ ጋር የመድን ውል የፈጸመ መሆኑ ነው። ይህ ደግሞ የኃላፊነት መድን ውል/ liability Insurance/ ነው እንጂ የሰዎች ህይወት ኢንሹራንስ ውል /life Insurance/ ሊባል አይችልም። የደቡብ ውሃ ሥራዎች ኮንስትራክሽን ድርጅት በሥራ ላይ በአንድ ሰራተኛ ላይ በሚደርሰው ጉዳት ምክንያት የሚከፈለው ካሳ ወይም ክፍያዎች በሕግ በግልጽ ተደንግጎ ስለተቀመጠ ከሕጉ ከተመለከተው ካሳ ወይም ክፍያ በላይ ሊከፍል የሚችልበት አገጣሚ የለም ሠረተኛው በስራ ላይ እየለ በሦስተኛ ወገን ለደረሰበት ጉዳት አሰሪው ካሳም ሆነ የተለያየ ክፍያዎችን ለመክፈል የሚገደደው በአዋጁ ላይ የተመለከተውን ክፍያ ሲሆን ሰራተኛው ወይም የሰራተኛው ጥገኞች የካሳ ክፍያ በአዋጁ መሠረት ከአሠሪው ከተቀበሉ በኋላ ጉዳት ካደረሰው ሶስተኛ ወገን ድጋሚ ክፍያ የሚጠይቁበት አጋጣሚ የለም። ሰራተኛው ወይም የሰራተኛው ጥገኞች በሕጉ ላይ ከተመለከተው ካሳ በላይ መግኘት

ስለማይችሉ አሠሪው ካሳውን ከፍሎ፣ ይህ የከፈለው ክፍያ እንዲተካለት ጉዳት ያደረሰውን ሦስተኛ ወገን በከፈለው ገንዘብ መጠን መጠየቅ የማይችልበት ምክንያት የለም። ስለዚህ በአመልካች እና የደቡብ ውሃ ሥራዎች ኮንስትራክሽን ድርጅት መካከል የተደረገው የመድን ውል፣ የሕይወት መድን ውል ሳይሆን የኃላፊነት መድን ውል ሆኖ ሳለ የሀዋሳ ከፍተኛ ፍ/ቤት እና የፌዴራል ጠቅላይ ፍ/ቤት የሰዎች ኢንሹራንስ ውል ነው በማለት የሰጡት ውሳኔ መሠረታዊ የሕግ ስህተት ያለበት ነው ብለናል።

ሦስተኛ ጭብጥን በተመለከተ

ከላይ እንደተመለከተ አመልካች ለደንበኛው /የደቡብ ውሃ ሥራዎች ኮንስትራክሽን ድርጅት/ የሰጠው መድን ሽፋን የኃላፊነት መድን ውሃ ነው እንጂ ሰዎች ኢንሹራንስ ወይም የሕይወት ኢንሹራንስ እንዳልሆነ በመረጋገጡ የንግድ ሕግ ቁ.689፣ 690 እና የፍ/ብ/ሕ/ቁ. 2093 ተፈፃሚነት የላቸውም። በሰራተኛው ላይ ለደረሰው ጉዳይ የሚከፈለው ካሳ ወይም ለሰራተኛው ጥገኞች የሚከፈለው ካሳ መጠን በግልጽ በሕጉ እስከተመለከተ ድረስ ሰራተኛው ወይም ጥገኛው ከዚህ ክፍያ በላይ የመግኘት መብት እስከሌላው ድረስ ከኢንሹራንስ ሰጭውም ካሳ ወስዶ በጉዳት አድራሹ መጠየቅ ስለማይችል አመልካች በደንበኛው እግር ተተክቶ ለሚች ወራሾች የከፈለውን ካሳ መጠን በደንበኛው በኩል የሚች ወራሾችን ተክቶ ጉዳት አድራሽ ከሆነው ከተጠሪ ካሳው እንዲከፈለው መጠየቅ የሚከለክለው የለም። የሚች ወራሾች ከደቡብ ውሃ ሰራዎች ኮንስትራክሽን ድርጅት የጉዳት ካሳን የሚጠይቁት በአሰሪና ሰራተኛ አዋጅ ቁ.377/96 ነው እንጂ የመድን ውል መሠረት በማድረግ አይደለም። አሠሪም ከመድን ውል የመነጨ ግዴታ ሳይሆን ከዚህ አዋጅ ብቻ የሚመነጭ ኃላፊነት ነው ያለበት። የደቡብ ውሃ ሥራዎች ኮንስትራክሽን ድርጅት ከሰራተኞቱ ጋር ተያይዞ የሚመጣበትን ኃላፊነት ለመወጣት ከአመልካች ጋር የመድን ውል ማድረጉን እንጂ ለሰራተኞች የሕይወት ኢንሹራንስ ውል መዋዋሉን የሚያመለክት ነገር የለም። ስለዚህ ተጠሪ የሚች ወራሾች ካሳውን ከአመልካችም ሆነ ከተጠሪ መጠየቅ ስለሚችሉ ካሳ ክፍዬአቸዋለው ይበል እንጂ የከፈለው የገንዘብ መጠን ስንት ብር እንደሆነና ያቀረበውን ማስረጃም ያልጠቀሰ ሲሆን ከፍሎም ቢሆን ካላይ በተጠቀሰው መሠረት ኃላፊነቱ የራሱ ስለሆነ ያቀረበው ክርክር ተቀባይነት የለውም። ሰለዚህ የንግድ ህጉ 3ኛ መፅሐፍ፣ አንቀጽ 3፣ምዕራፍ 3 ስለ ጉዳት ኪሳራ ኢንሹራንት ክፍል 1 የዕቃዎች ኢንሹራንስ በተመለከተ በአንቀጽ 683 መሠረት ኢንሹራንት ሰጪው ለተጎጂው የከፈለውን ካሳ መጠን በዚህ መጠን ተተክቶ ጉዳት



ባደረሰው ሶስተኛ ወገን ክስ አቅርቦ መጠየቅ እንደሚችል ያመለክታል። ምክንያቱም የካሳው መጠን በቁጥር የታወቀ ስለሆነ ተጎጂውም ከዚህ በላይ መግኘት ስለማይችል ኢንሹራንስ ሰጪው ካሳ በከፈለው መጠን ተተክቶ መጠየቅ ይችላል። አሁን ወደ ተያዘው ጉዳይ ስንመለስ የሚች ወራሾች አመልካች ከከፈላቸው ካሳ መጠን በላይ ከጉዳት አድራሹ /ከተጠሪ/ ጠይቆ ማግኘት ስለማይችሉ የዚህን የንግድ ህጉን ድንጋጌ ለዚህ ጉዳይ በማመሳሰል /analogy/ መርህ ተፈጻሚ ማድረጉ አግባብነት ያለው ጉዳይ ነው። ስለዚህ አመልካች በተጎጅው የመዳረግ መብት ተጠቅሞ የከፈለውን የካሳ መጠን ከተጠር መጠየቅ መብት እያለው የሀዋሳ ከተማ ከፍተኛ ፍ/ቤት እና የፌዴራል ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት መተካት አይችልም በማለት የሰጡት ውሳኔ መሰረታዊ የህግ ስህተት ያለው ስለሆነ የሚከተለው ውሳኔ ተሰጥቷል።

ው ሳ ኔ

1. የሀዋሳ ከፍተኛ ፍ/ቤት በመዝገብ ቁ.12602 በ11/06/2005 ዓ/ም የሰጠው ውሳኔ እና የፌዴራል ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት በመዝገብ ቁ.90825 በ30/04/2006 ዓ/ም የሰጠው ውሳኔ መሰረታዊ የሕግ ስህተት የተፈጸመበት ስለሆነ በፍ/ብ/ስ/ስ/ህ/ቁ. 348/1/ መሠረት ተሽሯል።
2. የደቡብ ብ/ብ/ሕ/ክ/መ/ ጠቅላይ ፍ/ቤት ይግባኝ ሰሚ ችሎት በመዝገብ ቁ.58922 በ13/09/2005 ዓ/ም የሰጠው ውሳኔ በፍ/ብ/ሥ/ሥ/ሕ/ቁ. 348 (1) መሠረት ጸንቷል።
3. የዚህ ውሳኔ ግልባጭ ለስር ፍ/ቤቶች ይድረስ ብለናል።
4. ግራ ቀኙ በዚህ ችሎት ለደረሰባቸውን ወጪና ኪሳር የየራሳቸውን ይቻሉ ብለናል።

መዝገቡ በውሳኔ ስለተዘጋ ወደ መዝገብ ቤት ይመለስ ብለናል።

የማይነበብ የአምስት ዳኞች ፊርማ አለበት

ሩ/ለ