INDEMNITY AND INDEMNIFICATION IN RELATION TO PERSONAL ACCIDENT INSURANCE IN ETHIOPIA.

By: Tesfaye Abate Abebe(Alpha University College, Faculty of Law, LL.B, LL.M)

ABSTRACT

The general principle of law of insurance was that the principle of indemnity applies to the insurance other than insurance of persons. But does not the principle applicable to insurance of persons? This article investigates the issue whether the principle of indemnity and indemnification apply to personal accident insurance in Ethiopia. The research confirms that personal accident insurance is not purely non-indemnity insurance. The article focuses on two points: A) indemnity and indemnity in general; and B) personal accident insurance. The research was carried out by examining and analyzing the practical cases decided by courts and insurance policies evaluating them against internationally accepted rules and principles. The concept that the principle of indemnity is applicable to personal accident insurance is not well developed. The article identified that principles of personal accident are being treated as contracts of indemnity. The article confirmed that the classification of personal accident policies as non-indemnity contracts has become only theoretical.

INTRODUCTION

Personal accident insurance, being part of insurance of persons has been considered to be non-indemnity

insurance. Life insurance and personal accident insurance have been commonly treated as non-indemnity contract contrary to property insurance. Property insurance is a typical example for non-contingent or indemnity contract. However, are life insurance and personal accident insurance truly non-indemnity insurance? This paper tries to analyze this question from the theoretical and practical point of view in our country.

Thus, the article dwells on two basic points: indemnity and indemnification in general; and indemnification in relation to personal accident insurance in Ethiopia. So, the first part of this paper is devoted to analyze the principle of indemnity, insurable interest and subrogation. Personal Accident Insurance will be dealt under the second part of this paper. Finally, we will wind up our analysis by way of conclusion.

1. INDEMNITY AND INDEMNIFICATION IN GENERAL

1.1. Definition

Blacks defines indemnity as a duty to make good any loss, damage, or liability incurred by another. It is further more defined as the right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty.[1] We understand, from this definition that there must be a person who claim right of indemnity from other. This person should suffer an injury to claim reimbursement for the loss, damage or liability.

[1] Garner, A Bryan, **Black's Law Dictionary**, (eighth Edition),2004, at 342

The injured person can claim reimbursement from the person who has such a duty.

A contract of indemnity is the basis for indemnity. A contract of indemnity, under Indian Law, is defined as "a contract by which one party promises to save the other from loss caused to him[her] by the conduct of the promisor himself, or by the conduct of any other person"[2] There are two parties to the contract of indemnity: the promissory and the promise. A promissory is a person who promises, or undertakes the obligation to make good the loss. The promissory is also called the indemnifier because s/he undertakes the duty to indemnify the promisee. To indemnify means to reimburse the promise for a loss suffered or to give the promisee security against such a loss.[3] To indemnify means to restore the victim of a loss. The loss may be total or partial. The restoration of the victim may be made by payment, repair or replacement. To indemnify also means to save harmless. To hold harmless means "to absolve [the promise] from any responsibility for damage or other liability arising from the transaction."[4]

The other party who participates in indemnity contract is the promisee. Promisee is the one who is protected and assured of being compensated for the loss based on the contract. The promisee is the person whose loss is to be made good. The promisee is the indemnity-holder or the

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[2] Bulchandany, K. R, **Business Law**, Himalaya Publishing House, 2003 at 165

[3] Garner, **supra note 1**, at 342

[4] **Id**.

person who is indemnified.[5] In insurance, a contract of indemnity is a contract whereby the insurer undertakes to indemnify the insured, in manner and to the extent thereby agreed, against losses.[6]

Under Ethiopian Commercial Code, property and liability insurances are insurances of indemnity because they are insurances for damages. Pursuant to Article 654(2) of the Commercial Code, insurance of properties may be taken as indemnity insurance. The provision under Art, 678 of Commercial Code may be considered as pertinent in relation to indemnity. In light of this provision a contract of insurance of a property is contract of indemnity.

1.2.Principle of Indemnity

Indemnity insurances are also called non-contingency insurances. The insured must be fully indemnified in case of loss against which the policy has been made. The insured must never be more than fully indemnified. In case of non-contingency insurance the insured has the right to be indemnified to the extent of the loss s/he suffered: recovery under indemnity policy cannot be more than the sum insured, which represents the maximum amount that may be recovered under the indemnity policy.[7]

In accordance with the principle of indemnity, the amount of insurance benefits paid when a loss is sustained by an insured is not to exceed the economic

[5] Bulchandany, **supra note** 2 at 265
[6] Merkin,R., **Colinvaux's Law of Insurance**, 1997, at 6
[7] Zekareas, K., **Some Notes on the principle of Indemnity**, at 1

measure of the loss.[8] Indemnity insurance contracts are designed to provide no more than reimbursement for an insured. However, this does not mean that the amount of an insurance payment must necessary be equal to the loss[9]

For example, A insured his/her property, say his/her car. The car was totally damaged because of the peril covered by the indemnity insurance policy. Assume that the value of the car was held to be Birr 51,751.00. In this case the insured, A, is only entitled for payment not more than this value of the car. However, the payment given to A would be less than this Birr 51,751.00, not exceeding the amount agreed in the policy.

The maxim: in no circumstances is the insured entitled to make a profit from his/her loss is not strictly accurate. The parties to the contract of indemnity insurance are at liberty to determine freely the amount to be paid to the insured at the time of loss. In their contract they may agree to pay more amount than the actual value of the subject matter of the policy. Therefore, the principle that the insured should recover no more than his loss may be modified by the express agreements or terms of the insurance indemnity policy.[10]

[8] Keeton and Widiss; **Insurance Law: A Guide to Fundamental Principles, Legal, Doctrines, and Commercial Practices: Student Edition,** 1988 at 135

[9] **Id**

[10] Merkin; **supra note** 6 at 6

The principle that the insured should not benefit from loss is incorporated under Art. 678 of Commercial Code of Ethiopia. In light of this provision the insured must be compensated. The phrase which reads as. The compensation shall not exceed the value of the object insured on the day of the occurrence may be taken as indicating that the insured may not be benefited form the loss but be fully and only fully compensated.[11]

However, the provision of Art. 678 may be taken as erroneous compared with the provisions of Art. 665(2). Art. 665(2) provides that the insurers liability shall not exceed the amount specified in the policy. Article 678 seems not to envisage under or over insurance; it may be applied as it is when the true and actual value of the property insured and the amount stated in the policy are equal.[12] But this would happen as an exception; otherwise, the actual value of the property may be less or more than the amount stated in the policy.

1.3. Insurable Interest

No insurable interest no insurance is a maxim of the law of insurance. Insurable interest is required by law rather than by the terms of the contract.[13] The principle of indemnity is much related with the doctrine of insurable interest doctrine requires the existence of some significant relationship between the insured and the subject of an insurance contract. The doctrine of insurable interest avoids one or more of the potential evils that

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[11] Zekarias, **supra note** 7 at 3
[12] **Id.** at 3-4
[13] Kuchhal; 1992: at 461

might result from allowing insurance that afford chances for net gain as a result of the happening of insured event. The doctrine of insurable interest, in common law, has developed from legislative and judicial actions. It applies to all types of insurance contracts. It is used by courts to implement the indemnification principle.[14]

Definition

The following is the most commonly quoted definition of insurable interest:

> *A man is interested in a thing to whom advantage may arise or prejudice may happen from the circumstances which may attend it and whom it important that its condition as to safety and other quality should continue To be interested in the preservation of a thing, is to be so circumstanced with respect to it as to have benefit from its existence, prejudice from its destruction*[15]

The interest must be an enforceable one. This is the governing principle. The mere hope of acquiring an interest is not sufficient. A person has an interest in an event if s/he will gain an advantage if it does not happen and suffer a loss if it does. What is important to note here is that the advantage or loss must depend up on some right. The right may be contractual or proprietary, legal or equitable, and this should be enforceable in courts. Hence, a husband and a wife, who are living together,

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[14] Keeton and Widis; **supra note** 8, at 135-136

[15] Merkin, **supra note** 6, at 62

have insurable interest in their properties, for they are by law entitled to enjoy in it.[16]

Insurable interest must be a pecuniary interest. Insurable interest must be in a reasonable sense capable of valuation in money. But this does not mean that the difficulty of such valuation is a bar. Thus interests which might be exceedingly difficult to calculate are commonly insured by valued policies. For example, the obligation of a husband or wife to his wife or her husband, respectively, can not be strictly described as pecuniary The interest of a person in his/her own life may not be descried as pecuniary. But, these persons have insurable interest. Therefore, "pecuniary loss affords a most unsatisfactory test as to the existence of an insurable interest".[17]

Time when Insurable Interest Must Attach

In England, the time when insurable interest must attach is treated based on contract or law. But the nature of the interest is similar in both cases.

Contractual Interest- in the case of contractual interest, it should exist at the time of the loss. However, it is subject to the express terms of the contract. If the insured can prove the interest, s/he may be given an indemnity. There is an exception in case of marine insurance where the insured insures lost or not lost and acquires interest after a loss. Otherwise, it is sufficient for the insured to prove his/her loss and there is no need for him/her to

[16] **Id.**

[17] **Id.** at 65

demonstrate that s/he has an insurable interest at the inception of the policy in other cases.[18]

Statutory interest. In case of life insurance, the insured shall have insurable interest at the time of the contract. It is argued that life insurance policies are not contracts of indemnity, and therefore, do not contain any contractual requirement for interest, it is sufficient that the insured possesses insurable interest at the time of the conclusion of the contract rather than at the date of the maturity of the contract. That is why life policies are freely assignable.[19]

Consequences of Lack of Insurable Interest

Colinvaux[20] wrote as to the consequences of lack of insurable interest in general as follows: There is nothing illegal about the insurers paying on a policy other than a life policy without interest, and, except in the case of marine polices; a policy will not be invalid simply because it contains a provision that the insurers will pay, interest or no interest.

Statutory Interest- Under the Life Assurance Act 1774 of England, a life policy which is made without insurable interest at the date of the conclusion is illegal and not merely void. Hence, the insured can neither cover under the policy nor reclaim his/her premiums. Since the policy is illegal the court is duty bound to refuse jurisdiction in the event that a claim under the policy should come

[18] **Id.** at 67
[19] **Id.** at 68
[20] **Id.** at 69

before it,. even though the insurer fails to raise the defense of illegality.[21]

Contractual Interest - A policy other than life insurance, which is made without interest is prima facie law full, unless it is gaming or wagering. If the policy is not a wager, but the insured has no insurable interest at the date of the loss, s/he can not suffer any loss and thus s/he is prevented from any recovery by the principle of identity. The insured may have never obtained any interest but has subsequently lost it. So in this case the insured has no right of recovery since s/he has not suffered any loss.[22]

When we come to our law, insurable interest is not defined in the Commercial Code. Therefore, in the absence of such a definition of insurable interest, we have to adopt the definition we found in legal literature that we discussed in the foregoing.

1.4.Subrogation

In relation to insurance law, subrogation, literally, means a right of the insured who has indemnified his insured to step into the shoes of the insured, and in his/her name pursue any right of action available to the incurred which may diminish the loss insured against.[23] Subrogation is a right of the insurer to exercise in the shoe of the insured if the insured has any legal right against third party. Subrogation may be applied when the indemnification is made to the insured by someone other than the insurer. The insurer is duty bound by a contract entered into with

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[21] **Id.**

[22] **Id.**

[23] Birds and Herd, **Birds' Modern Law of Insurance**,2001, at 209

insured to indemnify the latter. But the insured may have the right to claim from other third party, who is liable because of a contractual relationship or extra-contractual. In addition, where the insured is indemnified by the insurer, in this case, the insurer is allowed to use the insureds name to recover such payout from the tortfeasor or contract breaker. This is called subrogation.[24]

The doctrine of subrogation applied to property and liability insurance. Property and liability insurance are indemnity insurances. Therefore, the doctrine operates through out the contracts of indemnity. Whether life insurance and accident contracts are contracts of indemnity is a point of controversy. Professor Patterson argued that there is a considerable indemnity element in life insurance.[25]

Applicability of the doctrine of subrogation

In principle, the doctrine of subrogation applies only to contracts of indemnity. So it is applicable to insurance of property and liability insurance, including marine insurance. But the application of the doctrine in life and accident insurance has been remained the issue of debate. In the words of Hasson:[26]

> *Life insurance contracts and accident insurance contacts were held not to be contracts of*

[24] Reuben Hasson, "Subrogation in Insurance Law-A Critical Evaluation", **Oxford Journal of Legal Studies**, Vol, 5, No. 3, 1985, at 417

[25] **Id.**

[26] **Id.** at 418

> *indemnity, despite the fact that it is clearly the intention of purchasers of these contracts to indemnity either their families (in the event of death) or, in the event of an accident, to compensate themselves for their lost earnings. Why the loss of property should be treated differently from a loss of an arm, when both result in economic losses to the person who sustains them has never been explained.*

The result of not classifying life insurance and accident insurance as contracts of indemnity is that an insured victim is allowed to accumulate recoveries from as many sources as s/he can. Some of Canadian courts seem to do away with such a classification.. Some courts have accepted disability insurance contracts as contracts of indemnity. The Manitoba Court held that disability benefits are indemnity because they are intended to compensate for loss of income. The New Brunswick Court of Appeal and the Ontario High Court accepted the decision of the Manitoba Court.[27]

In general, the trend in Canada seems to be to regard disability insurance as being a contract of indemnity. Based on this, Hasson[28] concluded that disability insurance is indemnity insurance just as much as life and accidence insurance. If life insurance and accident insurance are considered to be indemnity insurance, the doctrine of subrogation is applicable; because we have

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[27] **Id.** at 419
[28] **Id.**

said, earlier that the doctrine of subrogation is applicable to indemnity insurance.

Subrogation usual is not included in life insurance and accident insurance policies and courts, in common law, rarely have imposed an implied subrogation right in regard to claims that might exit in connection with events that produced losses that were compensated by such coverage. Nevertheless, policies would include subrogation provisions if the insurer and insured agreed.[29]

In case of property insurance there is subrogation right as apposed to life insurance and accident insurance, even in the absence of an express provision and courts have been interpreting the policies accordingly. Courts have been reluctant to grant subrogation right in life and accident insurance, in the absence of clear provision. Keeton and Widiss[30] identified the following three differences of property insurance on the one hand, and life and accident insurance on the other hand.

First, in property insurance the amount of economic damage is readily evaluated in property losses. But this is not the case in the loss of a life of an accidental injury. In the words of Keeton and Widiss[31] placing a monetary value on a persons life, the loss of a limb, or a personal injury is, at best, far more of a approximation than determining the market value or replacement cost of a building.

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[29] Keeton and Widiss, **supra note** 8, at 226

[30] **Id.**

[31] **Id.**

Second, property insurance policies are sufficient to provide full indemnity, life and accident insurance seldom do so. Third, many types of life insurance are received as investment as well as an indemnity contract. Whole life insurance has an investment feature. Life insurance could be subrogation.[32]

Subrogation provisions have begun to be included by insures in some types of life and accident policies.[33] In fact, there is little reason to question the resolution of issues involving subrogation rights in life and accident insurance police generally in most circumstances. However, the principle of subrogation is acceptable in a situation where it is possible to quantify the economic loss sustained by a beneficiary. For example, when a life insurance coverage is used in a business content, subrogation is possible.[34]

The doctrine of subrogation is operational in relation to a contract of property insurance in our country. Article 683 of the Commercial Code provides for the operation of subrogation in property insurance contracts. But the operation of the doctrine of subrogation in relation to contracts of insurance of persons is not provided for under our Commercial Code.[35]

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[32] **Id,** at 227-228
[33] **Id,** at 228
[34] **Id.**
[35] See Atnafu Bogale, **Insurable Interest under Ethiopian Law,** Addis Ababa University Faculty of Law, 1978, at 63

The underlying principle of subordination is that it is concerned primarily with the legal rights of the insured against third parties. By virtue of the doctrine of subrogation, the insured, must cede the ways and means open to him/her to repair his/her loss, being indemnified by the insurer, fully or partially. The insured must exercise these ways and means for the benefit of the insurer. The insured is prevented from taking advantage of the fact of being indemnified by both the insurer and the third party. On the other hand, the third party who is liable to make good the loss caused to the insured is prevented from taking the advantage of the insurance policy by being exempted from liability. the insurer has also the right to proceed against the insured for loss of subrogation right if the latter has given away or other wise improperly compromised those rights.[36]

An insured person may settle the matter with the tortfeasor by agreement, for instance. S/he may admit the liability without the consent of the insured.[37] Let say a fathers car collides his sons car. The son insured his car against an accident. If the son waives his right of compensation from his father,. Who is a wrongdoer, the right of the insurer to claim from the father in the name of the son, may be jeopardized, after indemnifying the son.

Purpose of Subrogation

[36] Merkin, **supra note** 6, at 172-173

[37] Commercial Code of the Empire of Ethiopia, Proclamation No. 166 of 1960, **Negarit Gazeta**, Art. 686

In the event of loss due to the fault of other person, the insured may claim against such a person. In this case, the insured must inform the insurer(s) about his/her rights so that the insured will be prevented from recovering more than his/her actual loss. On the other hand, a third part cannot defend on the ground that the person to whom s/he is liable is paid by the insurer(s).[38] Therefore, the insurer has the right to claim, in the name of the insured (the person who sustained damage), from the third party who is liable to make good the damage. We can conclude that the purpose of the doctrine of subrogation is prevention of the unjust enrichment of the insured, being paid by the insurer and the third party liable.[39] So, based upon the principles of equity the insured is relieved from his/her liability to pay directly or indirectly by the doctrine of subrogation. In the opinion of this writer, the wrongdoer, particularly in case where damage is done to the insured person due to the fault of third party, that third party is also punished for being faulty. The equity seems to choose to punish the wrongdoer and relieve the prudent insurer.

2. PERSONAL ACCIDENT INSURANCE

2.1. General

Before directly dealing with the issue of personal accident insurance vis-à-vis indemnity and indemnification, it would be proper to discuss some essential points about accident insurance in general.

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[38] Merkin, **supra note** 6, at 173

[39] Birds and Hird, **supra note** 23, at 290

Accident insurance is the youngest of all classes of insurance. The rise and development of accident insurance is related with the advancement and development of industry and technology in the 19th century. Motor insurance is one type of accident insurance. Thanks to technology, the first mechanically-pro-peeled vehicle has come into being in 1894. Following this development, the 1896 High Way Act paved the way for the introduction of motor insurance from 1898 on wards. The development of motor vehicles made accidents inevitably to increase. So, law is needed to regulate this problem. The 1960 Road Traffic Act clearly defines various liabilities of motor insurance.[40]

Policies on motor vehicles are generally wider and include: (a) damage to the motor vehicle itself; (b) liability to damage to property; and (c) death or injury to the insured himself.[41]

Commercial vehicle policy of the Ethiopian Insurance Corporation includes also "liability at Ethiopian Law for compensation ...for death of or bodily injury to any person caused by the lawful use of any vehicle described in the schedule..." but it does not include:

1. the employee of the insured in the course of such employment;
2. any member of the insured's household;

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[40] Gebre-Egziabher Abraha, **Analysis of Indemnity Insurance and Various Limitations under Ethiopian Law**, Addis Ababa University Faculty of Law, 1977, at 16-17

[41] **Id.**, at 17

3. "any person being carried in or upon or entering or getting on to or alighting from such vehicle at the time of the occurrence of the event out of which any claim arises"[42]. Aviation insurances are other areas of accident insurance.[43]

However, the focus of this article will be on personal accident insurance.

2.1 Definition of "Accident"

Defining the term "accident" has been constituted a considerable problem in courts particularly of common law countries. Particular problem arises in personal accident insurances such as motor insurance and liability insurance, which contain a personal accident as a component.[44]

"Accident" is defined in Black's Law Dictionary as follows:

> *an unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated... An unforeseen and injurious occurrence not attributable to mistake, neglect, or misconduct.*[45]

From this definition, it is clear that the injurious occurrence must not be intended and foreseen. From the practice of human beings, it is possible to anticipate reasonably the occurrence of events in their usual course.

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[42] Commercial Vehicle Policy, Ethiopian Insurance Corporation
[43] GebreEgziaher, **supra note** 40, at 17
[44] Birds and Hird, **supra note** 23, at 214
[45] Garner, **supra note** 1, at 6

Human beings, therefore, are capable of being anticipated. However, if the occurrence of some events cannot be reasonably anticipated, foreseen, that is called an accident. This definition excludes events that are caused by mistake, neglect or misconduct.

Mustill L.J has given us the definition of "accident" for insurance purposes, which reads as: "The word 'accident' involves the idea of something fortuitous and unexpected, as opposed to something proceeding from natural causes; and injury caused by accident is to be regarded as the antithesis to bodily infirmity by disease in the ordinary course of events" [46]

Mustill L.J. distinguished between two categories of accidents, based upon decided cases. The first category of accidents is that

> *Where the injury is the natural result of fortuitous and unexpected cause, as for instance, where the assured is run over by a train, or thrown from his horse while hunting, or injured by a fall, whether through slipping on a step or otherwise; or where the [insured] drinks poison by mistake, or is suffocated by the smoke of a house on fire or by an escape of gas, or is drowned while bathing. In this case the element of accident manifests itself in the cause of the injury.*[47]

The second category of accident is illustrated by Mustill as follows:

> *Where the injury is the fortuitous or unexpected result of a natural cause as for instance, where a*

[46] **Merkin; supra note 6, at 374**
[47] **Id.**

> *person lifts a heavy burden in the ordinary course of business and injures his spine, or stoops down to pick up a marble and breaks a ligament in his knee, or scratches his leg with a nail while putting on a stoking, or ruptures himself whilst playing golf. In this case the element of accident manifests itself, not in the cause, but in the result.*[48]

In short, accident is unforeseen, unintended, happening.

2.2 Nature of Personal Accident Insurance

Life insurances often make no attempt to accurately value a beneficiary's insurable interest. Hence, some have concluded that life insurance policies are not contracts of indemnity. It has been argued that life insurance policies are not indemnity contracts since various rules are inconsistent with the indemnity principle, particularly (1) the requisite duration of an insurable interest, (2) the possible rights of subrogation, and (3) over valuation, among others. Other writers argued that it is appropriate to classify life insurance policies as contracts of indemnity. They base their argument on the fact that a beneficiary of life insurance policy who has sustained a loss of some benefits as a consequence of the decedent's death will usually be provided with the insurance proceeds.[49]

It is said that neither life insurance not any other form of insurance is invariably a pure indemnity contact. All forms of insurance are subject to the influence of the principle of indemnity. But the influence of the principle of indemnity may not be the same in all forms of

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[48] **Id.**, at 374-375

[49] Keeton and Widiss, **supra note** 8, at 141-142

insurance: it would be less pervasive in some forms of insurance, for example in life insurance, than other forms of insurance such as property insurance.[50]

An accident insurance policy may be made as follows: "to compensate him to any amount, not exceeding [$] 1,000, for the expense and pain and loss caused to him by accident."[51] This kind of contract was considered as a contact of indemnity. A policy insuring against personal accident to a third person was accepted as a contract of indemnity in England.[52]

It is also explained that "some courts have started to describe disability insurance contracts as contracts of indemnity" wrote because such kind of insurance contracts are intended to compensate for loss of income. Hasson wrote:

> *If we ignore the confusion in doctrine, the trend in Canada seems to be to regard disability insurance as being a contract of indemnity. From one angle this makes a lot of sense. Disability insurance is indemnity insurance just as much as life and accident insurance...*[53]

So, from the above we can understand that personal accident insurance, at least form the practical point of view; is considered to be contract of indemnity. When we come to our law, one would come to the same conclusion.

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[50] **Id.**, at 142
[51] Merkin, **supra note** 6, at 371
[52] **Id.**, at 372
[53] **Id.**, at 419

In practice accident insurance policies are more of indemnity insurance policies than non-indemnity, because, it is recovering what the insured expend, and that is indemnity. Now let us examine accident policies whether they are indemnity or non indemnity.

2.3 The Practice in Ethiopia

2.3.1 Personal Accident Policies

Nowadays there are different insurance companies in our country. The Ethiopian Insurance Corporation is one of these different insurance companies the ownership of which is governmental. This Ethiopian Insurance Corporation (E.I.C) has been established long years ago when compared with other privately owned insurance companies. Under this topic we will deal with workmen's compensation policies first, and then personal accident policies.

Workmen's Compensation Policies

In accordance with the standard contract of workmen's compensation policy E.I.C. will be liable to pay the insured or the worker where the insured "sustain death or bodily injury by accident or occupational diseases occurring at the place..." and time of work "if the Insured shall be liable to pay compensation for such death, bodily injury, or occupational disease under Ethiopian Law..." There are terms of exceptions, limitations and conditions that are stipulated under the policy which will enable the corporation liable only to limited perils. What is more, it is stipulated under the policy that "...the corporation will indemnify the Insured against all sums for which the insured shall be so liable and will in addition be responsible for all costs and expenses insured with its

consent in defending any claim for such compensation" [emphasis added].

It is clearly stated under the policy that the E.I.C. will indemnity the insured. The other important point included under the policy is that the E.I.C. will also compensate all costs and expenses incurred in defending claims of compensation. But the Corporation should give its consent in such defences. These costs and expenses would be incurred when any person, who has a legal right to claim compensation from the insured in relation to the peril insured against institute a claim in a court of law.

The maximum amount of sum that would be payable will be fixed under the policy. There is a scale of benefits payable; which is divided into four: (a) death "occurring within twelve calendar months from the happening of the accident or occupational disease"; (b) permanent total disablement ("occurring within twelve calendar months from the happening of the accident of occupational disease"); (c) temporary total disablement; and (d) "Medical, Pharmaceutical, Hospital. Funeral and other expenses necessitated by the employee as the result of accident or occupational disease covered under this policy."
The above scale of benefit seems designed based on the liabilities that the insured would be liable to the work persons, particularly based on for example labor law.

The other important point is that there is a scale of permanent disablement under the policy. The liabilities are divided into

A) permanent total disablement
   - Total loss of sight of both eyes, loss of both legs, loss of both feet etc, is valuated

B) permanent partial disablement head
   - Loss of sight of one eye, complete deafness of one ear, etc. are valuated

C) Upper limbs
   - Loss of one arm or hand (right had is more than the left one) for example, is given under the policy.

D) Lower limbs
   - Amputation of thigh (upper half, lower half) etc. is given under the policy.

We can observe from this that even though the maximum amount that will be paid is fixed before the peril happens; there is a trend of compensating the parts of the body of work persons valued on head. This clearly indicates the basic feature of indemnity.

The workmen's compensation policy of the Global Insurance Company S.C. has almost identical policy with the E.I.C. The phrases and sentences used under the policy are similar with that of E.I.C. and similar scale of benefit payable is also adopted by the Global Insurance Co.S.C. [54]

The United Insurance Company S.C. has also adopted similar workmen's compensation policy. Here, there is a

[54] See Global Insurance Co.S.C. Workmen's Compensation Policy.

difference in that the scale of benefits payable is not included under his policy. Otherwise, the policy is similar with that of E.I.C. work person's compensation policy. [55]

Personal Accident Policies

The standard personal accident policy of the Ethiopian Insurance Corporation (E.I.C.) provides that

> *...subject to the terms, exceptions and conditions contained herein or endorsed hereon if the insured shall sustain any bodily injury caused by violent accidental external and visible meant which injury shall independently of any other cause be the direct and immediate cause of death, loss or disablement, then the corporation will upon receipt of satisfactory proof be subject and liable to make good and satisfy to the insured or in the event of death of the insured to the insured's executors or administrators such one of the capital sums or allowances as set out in the schedule of benefits.* [56]

There are a lot of terms, exceptions and conditions incorporated under the policy for example; the policy does exclude death or bodily injury consequent upon 'the insured suffering from any per-existing physical defect or infirmity, earthquake, volcanic eruption" etc.

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[55] See the United Insurance Company S.C workmen's Compensation Policy

[56] Ethiopian Insurance Corporation; Personal Accident Policy.

The beneficiary under the policy in the event of bodily injury is insured her/him/self whereas in the event of death the money will be paid out to the estate of the inured.

The accident should be violent, external, and visible. The meanings we discussed in the forgoing are applicable here. The injury should occur independently of any other cause. It should be the direct and immediate cause of the happening of the peril insured against. So the E.I.C. will be liable to make good and satisfy the insured. This indicates that the policy is more of indemnity.
In accordance with the policy the maximum amount that would be paid will be fixed by the agreement of the contracting parties. Within that maximum limit there is a schedule of indemnities. So payment will be effected in accordance with this schedule of indemnity per head of the body of the insured, including loss of life. [57] This clearly indicates that personal accident insurance is treated as contract of indemnity.

The schedule includes the amount of compensation to be paid in the event of

1. death
2. permanent total disablement
3. temporary total disablement
4. temporary partial disablement
5. medical, surgical and Hospital expenses incurred in relation to an accident.

[57] Ethiopian Insurance Corporation; Supplementary Accident Insurance Contract.

The schedule of compensation for permanent disablement contains percentages of sum that will be paid, for example, in the event of loss of two limbs, loss of both hands, loss of arm at different points, loss of different fingers. So the parts of the body of the insured will be valuated per head and will be compensated, which clearly indicates that personal accident contracts are treated as indemnity contracts.

The United Insurance Company S.C. also adopts similar personal accident policy with that of the Ethiopian Insurance Corporation. So, it needs no comment or explanation; the points we made above are also applicable here.

2.3.2 Cases

In the case Ethiopian Insurance Corporation V Technical Trading Company an appeal was lodged before the Supreme Court 4th Civil Division for reversal of a decision of the arbitrators. The case arose because Mr. Mishel Dimalji, one of the workers of Technical Trading Company who is covered by an accident insurance entered into by the Technical Trading Company and the Ethiopian Insurance Corporation, has died on March 2, 1983, after he feel down at his bath in his home.

The Ethiopian Insurance Corporation (E.I.C.) refused the payment of Birr 132,000.00 in accordance with the policy, even though it was asked to pay for the heirs who argued that Mr. Mishel has died on an accident which is covered by the policy.

The E.I.C. argued that it would be liable to according to the policy only if the death was the direct consequence of an accident. The cause of the death of Mr. Mishel was not

an accident but a result of accidental diseases, E.I.C. argued. Because it is proved by medical evidence that he was died because of the pre existing disease, i.e. blood pressure. The cause of his death blood pressure was proved by medical evidence of the medical expert of Yekatit 12 Hospital. Therefore, argued the E.I.C., the cause of the death of Mr. Mishel was blood pressure, not an accident, so the case be dismissed.

The Appellate Court examined the case in light of the issue whether Mr. Mishel has died because of the disease or the accident of falling down in the bath. The Appellate Court examined witness testimony given to the Kebele Shegno about the event. The witness testimony proved that Mr. Mishel has fallen down in the bath room.

The doctor, who first examined the deceased, witnessed to the Kebele that he had seen him in his bed in a serious condition. His blood pressure was high due to the fact that he fell down. It was indicated that his blood was dangerously flowing in his brain. Because the deceased was not able to speak, his eyes could not move and his left body was near paralysis. Therefore, he witnessed that he referred him to be rushed to a hospital.

A doctor who examined the deceased in Yekatit 12 Hospital winessed that the deceased was tired because he was busy on his work all that day, so that he failed to stand or to walk; that at the time of examination he could not speak, his eyes were turned to grey and no response to light. Thus, he died because his blood pressure was

beating high and his blood vessel blasted, witnessed the doctor.

The court examined whether the event caused the death of the deceased violent, accidental and visible. It was proved that Mr. Mishel has died because his blood vessel broke in his brain. But the court cannot decide as to what caused the blood pressure to go up.

A doctor, who was elected by both the parties, suggested the matter to be dealt by a medical board, because the matter was disputable. Then, a medical board was established. The board had presented its opinion after studying the medical history of the deceased found in Yekatit 12 Hospital. The board proved that the deceased have suffered from a serous blood pressure. But cited two causes for the cause which made the blood pressure go up.

1. It is possible to say that there were conditions which caused the blood pressure to go up when the deceased got in bath room. Therefore, the board concluded, it is possible to give opinion that Mr. Mishel was died because of the problem of the blood pressure disease.
2. In the second opinion of the board, it may also be said that falling down of the deceased caused the blood pressure to go up. Therefore it may be possible to give an opinion, said the board, it is the fact of falling down which caused the death by making the blood pressure increase.

Therefore, the board concluded that the blood pressure would be the direct cause of the death or the death was caused due to the fallen down of the deceased.

The Appellate Court decided by majority that the death of Mr. Mishel was caused by the sudden increase of his blood pressure due to the accident of falling down. And the court held that, accident not the disease which caused the death so that the E.I.C. shall pay the indemnity according to the policy. In doing so, the Appellate Court confirmed the decision of the arbitrators by majority.

But the dissenting judge reasoned that the accidental falling down is an external where as accidents of blood pressure and heart failure are caused because of the internal disease of a person. The falling of the deceased did not prove the existence of external cause. The medical board has given not a strict and one fold opinion. To admit the falling as an accident to be superior and prior would diminish the higher status of the blood pressure. So, he argued that the falling event to be the cause of his death was not established by evidence. Hence, he accepted the second opinion of medical board that the deceased died because of the disease of blood pressure. So that, he concluded that the E.I.C. is not liable to pay indemnity.

We understand that the cause of the deceased had not been established/ identified whether it be the blood pressure (the disease) or the falling down. What is established in the case is that the blood vessel of his

brain broke which inevitably caused his death. On the other hand, the extent of the accident of falling was not established whether it was able to cause the death of deceased.

In the case the phrases "violent, external and visible" were point of dispute. In common law countries, as well as in our country the policies insured against bodily injury caused "by violent, accidental, external and violent means only" And the decisions turned mainly on the question whether or not the death of deceased was caused by accidental means. The expert opinion given by the medical board has no help rather it adds some oil to the dispute, by forwarding two alternative opinions.
"Violent" means very strong and sudden and that would ended up in the killing of a person. [58] "Violent means" include any external, impersonal cause such as drowning, or inhalation of gas, or even undue exertion on the part of the [insured]" [59]

External is "connected with or situated on the outside of some body" In the words of Colinvaux :

> *"External" is used to express any thing which is not "internal," and any cause which is "external" in this sense is also "violent" within the meaning of an accident policy. These words refer to the accident, not the injury, and are used to distinguish injuries*

[58] Hornby, A.S. **Oxford Advanced Learners' Dictionary of Current English,** 2001, at 1332.
[59] Merkin, **supra note** 6, at Ibid

> *covered by the policy from those due simply to such causes as disease or senility which arise in the body of the assured.*[60]

The case in our hand could be tested in light of this. But what was not established is as to whether or not the blood pressure caused first.

In the opinion of the medical board, the accident caused the death. And that accident was external. The accident should be visible. "An accidental injury" is "an injury resulting from external, violent, and unanticipated causes; especially, a bodily injury caused by some external force or agency operating contrary to a person's intention. Unexpectedly, and not according to the usual order of events." [61]

Disease is not bodily injury. But if the disease has been bought on by an accident which has physically affected the insured, for example, where the insured suffers blood poisoning or pneumonia following an accident causing physical injury.[62] It is a bodily injury. In our case the accident of falling down did not cause the blood pressure; the blood pressure pre existed before the event. So, in this case it would be important to examine the causation.
The cause of the loss must be immediate and proximate. The doctrine of proximate cause is based on the presumed intention of the parties as expressed in the insurance contract. It is applicable to all branches of insurance. The

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[60] **Id.,**
[61] Garner, **supra note** 1, at 350
[62] Merkin, **supra note** 6, at 378

doctrine must be applied proper so as to give effect to the intention of the parties.[63]

The application of the doctrine depends upon whether the loss was caused by the peril insured or not.[64]

A. **Where the last cause is the event insured against.**

If the last of successive causes happens to be the peril insured against, there is the presumption that the loss is caused against. Here no necessary to inquire into the preceding causes to ascertain to which of the causes brought the peril in to operation. But if the question arises as to whether the peril was brought in to operation by an excepted cause we have to inquire which is the cause of loss.[65]

In the case the last cause was not ascertained. It is said that the insured fell after the blood pressure increased. In this case the accident killed the insured, so that it is insured against. But it is said that immediate cause of the death of the insured was the disease, not the accident.

B. Where the peril insured against is not the last cause

If the peril insured against is not the last cause it is necessary to investigate the last cause is so intimately connected either immediately or by transmission through a chain of circumstances. So, if it is connected to the first cause which is insured against, it is considered as covered the policy.

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[63] Ivamy; E.R, Hardy, **General Principles of Insurance Law**, at 380-381

[64] **Id.**, at 383

[65] **Id.**, at 383-384

If there is no break in the consequences of causes to the last cause, and if each cause being the reasonable and probable consequence, directly and naturally resulting in ordinary course of events from the cause which precedes if, the peril is said to be the insured one. [66]

> *Thus, where accident fall, whether from a horse or otherwise, is followed by disease which is either caused by the fall itself or directly attributable to the enfeebled condition of the assured in consequence of the fall, the death, though caused by disease is proximately caused by the accidental fall.* [67]

Therefore, it is held, in common law, that "where the tuberculosis latent in the insured's system would have remained harmless but for the accident" that the accident is the cause of the loss. [68]

In our case the accident, the fall itself may or may **not** cause the death of the insured, but the medical evidence has proved that the direct and proximate cause of the death was the disease. The blood pressure was said to be very serious, not latent. Therefore, it would be safe to say that it is not the accident, rather the disease which caused the death of the insured. Thus, it is the disease, which is excepted by the policy which was the cause of the death. The opinion of the dissenting judge seems to be correct.

In a case w/ro Emebet Birhane (in her name and in the name of her child Atsede Aschalew) V

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[66] Ivamy, **supra note** 63, at 384-385].
[67] **Id,** at 385.
[68] **Id.**

1. W/ro Bisrat Tadesse in her child name Anteneh Aschalew
2. W/ro Aselefech Negash in the name of her child Yenenesh Ashcalew

the former Suprreme Court examined the issue related with life insurance and personal accident insurance.

The parties litigated disputed in two separate cases. In file No 195/79[69] W/ro Emebet Birhane was an appellant and W/ro Bisrat Tadesse and W/ro Aselefech Negash respondents. In the file No 1539/79-W/ro Emebet was an appellant whereas W/ro Bisrat Tadesse only was a respondent.

In file No. 195/79 W/ro Bisrat was a claimant who asked the court to examine the insurance policy which is there in the hands of Wonji Sugar Factory and their share to be paid accordingly.

The appellant in the Supreme Court contended on her part, that she and W/re Bisrat had come to an agreement by Family Council to share the insurance money.

w/ro Aselefech Nega, on her part, argued that the issue of filiations of Yenenesh Aschalew was not settled so that the agreement could not be enforced.

W/ro Aselefech Nega, on her part, argued that the issue of filiations of Yenenesh Aschalew was not settled so that the agreement could not be enforced.

[69] Federal Supreme Court, Case Book, Vol.1, W/o Emebet Birhane-Appelant, W/o Besrat Tadesse and W/O Aselefech Negash-Respondents, Civil Appeal No. 195/79, 1982 EC, pp. 62-70

The then High Court of Shoa Region rejected the question of execution of the agreement make by family councils but held that the insurance money which was entered by the Wonji Sugar Factory for personal accident be paid to the heirs of Dr. Aschalew namely

1. child Anteneh Aschalew
2. child Atsede Aschalew
3. child Yenenesh Aschalew and let the guardians of the children, respectively receive the money in the names of the children. In case the issue of filiations of child Yenenesh will be reversed by the Supreme Court, let the money be paid to the child Anteneh Aschalew and child Atsede Aschalew. The date of decision was on 28th Hamle 1978 E.C.

In the File No 1539/79 the history of the case was as fallows:-

A. W/ro Emebet Birahne and the deceased D/r Aschalew had given birth to a son baby in wedlock. D/r Aschalew has passed away due to car accident.
B. W/ro Bisrat claimed that she gave birth to a child from the deceased out of wedlock. The two women agreed on Ginbot 8, 1976 E.C. that half of the insurance money be paid to the wife of the deceased and the remaining to the two children equally.
C. It was asked for the reversal of the decision of agreement W/ro Emebet and W/ro Bisrat made because it contravenes the benefit of the child.

The then Awraja Court held that since the agreement made between the two women was against the interest of the child, the agreement for the division of insurance money is invalid.

The now appellant appealed against this decision to the High court. The High Court confirmed the decision to invalidate the agreement based on Article 1715 Civil Code. The appeal was again lodged to the Supreme Court to reverse this decision. The former Supreme Court examined the cases by joining the two cases together.

One of the arguments of W/ro Emebet was that half of the insurance money Birr 85,000.00 must be paid to her being the wife of the deceased.

1st respondent W/ro Bisrat argued that the insurance money is not life insurance but an accident insurance entered by the employer for the event of bodily injury. So, it must be paid to heirs in light of Art. 711 Com. C. not to the wife. The provisions of life insurance She argued, are not applicable to the personal accident insurance in accordance with Art. 712 Comm. C. Finally she prayed the Supreme Court to confirm the decision of the High Court.

The Attorney of the 2nd respondent, on his part, argued that the decision of the family councils could not be valid because its contents are not legal. As to the insurance policy, the insurance which is the subject of disputing not a life insurance puling but an accident insurance policy which is different from life insurance policy in accordance with Art-712 Comm. C, and finally, he prayed the Supreme Court to decide the Birr 85,000.00 to be paid to Dr. Aschalew or to his heirs.

The Supreme Court examined the case. The committee which decided the insurance money to be shared between the wife and the child is found, by the Supreme Court, to be not acceptable because it did not identify any other property of the deceased and the decision was not in conformity with the insurance policy and the relevant provisions of the Commercial Code. Hence, the Supreme Court held that the agreement could not be effective. The committee was said to be the liquidator of the properties of the deceased, and that is why that court reasoned and held as above.

As to the issue of whether the wife should be paid half of the accident insurance money, the Supreme Court examined that the policy entered with the Insurance Company by the employer of the deceased, the Wonji Sugar Factory, was proved to be an accident insurance for the beneficiaries.

The court reasoned that since the agreement was not valid in the eyes of the law, it could not be the basis for argument. The court reasoned that the premium was not paid from the salary of the deceased but from the employer for the purpose of the beneficiaries of the worker in the event of death or for the worker himself in the event of bodily injury. Thus, the court rejected the argument of the appellant that the premium was paid from her communal property and half of the insurance money be paid to her in light of Art. 652 Civil Code of Ethiopia. The court reasoned that the policy is not life insurance policy but for bodily injury. The beneficiaries

should be treated according to Art. 711 Comm. C. Since the deceased failed to register the beneficiary of the policy in the event of death, the money shall be paid to his heirs. Wife cannot be an heir of her husband, so it is the legitimate children of Dr. Aschalew who are the heirs, should be beneficiaries, reasoned the court.
The court held that the insurance money shall be paid to the heirs of the deceased and confirmed the decision of the high court.

The suffer Dr. Aschalew faced was serious bodily injury. Serious bodily injury is defined as "serious physical impairment of the human body; esp., bodily injury that creates a substantial risk of death or that causes serious, permanent disfigurement or protracted loss of impairment of the function of any body part or organ".[70] Serious bodily injury may end up with death. This was what happened to Dr. Aschalew.

The Supreme Court was correct in identifying the policy as an accident insurance. The life of the person would be lost because of an accident. In this case it is not the deceased, but third party who would be indemnified. The person who suffers loss should be indemnified. In this case it is not only the children of the deceased who suffered loss, but also his wife, because a husband means a lot to wife. The loss may not be repaired by money. Any how, in the default of designation of beneficiaries, the fruits of the policy should be paid to the estate of the

deceased. So the heirs would be beneficiaries. Thus, the decision of the court is correct.

From the case we can say that indemnification is made to the children based up on maximum amount specified in the policy, i.e. Birr 85,000.00

CONCLUSION

We have seen that indemnity is a duty to make good a loss damage or liability incurred by another. To indemnity means to restore victim of loss.

In accordance with the principle of indemnity, the insured has the right to be indemnified to the extent of the loss s/he suffered in case of non-contingent, or indemnity contract. The principle of indemnity is based upon the principle that the insured should not benefit from loss. This principle is incorporated under Article 678 of Commercial Code of Ethiopia.

The principle of indemnity is interwoven with the doctrine of insurable interest. The insurable interest doctrine requires the existence of some significant relationship between the insured and the person, the object or the activity which is the subject of insurance contract. Therefore, in personal accident insurance the person should have an insurable interest. The doctrine of insurable interest helps us to avoid wagering and betting.

Subrogation is other important principle in relation to indemnity. Subrogation is the right of the insurer who has indemnified his insured to step into the shoes of the insured, and in his/her name pursue any right of action available to the insured which may diminish the loss insured against.

In principle the doctrine of subrogation applies only to contracts of indemnity. So, we have seen that it is applicable to insurance of property and liability

insurance, including marine insurance. But, we have seen that the application of the doctrine in life and accident insurance has remained an issue of debate. It has been argued that life insurance and accident insurance policies are non-indemnity contracts since various rules are inconsistent with the indemnity principle, particularly

1. the requisite duration of insurable interest.
2. the possible right of subrogation, and
3. over valuation, among others.

However, we have seen that there is a trend to treat personal accident insurance as a contract of indemnity. The Canadian Courts seemed to recognize personal accident insurance as contract of indemnity.

Defining the term "accident" has been a considerable problem in courts. Particular problem arises in accident insurances such as motor insurance and liability insurance, which contain a personal accident component. An "accident" would be defined as something fortuitous and unexpected, as opposed to something proceeding from natural causes. An injury caused by accident is an injury suffered out of natural or ordinary course of events. Accident may exclude injury caused by natural disease.

The argument to exclude personal accident insurance from indemnity contract is that the body of human being is extra-commercium and the exact value could not be exactly valuated. However, there is a trend to valuate the body of human being so that the insurance company will

pay the amount not exceeding the maximum amount agreed under the policy when the peril happens.

This is what we observe from the practice in our country. Policies of personal accident are being treated as contracts of indemnity and indemnification is effected to the insured.

It is clearly provided under Article 689 of Commercial Code that personal accident insurances are not insurances of indemnity of compensation. The payments for personal accident insurances are usually of a fixed sum. However, we can conclude from the analysis of this article that it is possible and in fact has become the practice to agree that payments be made in relation to specified heads of losses suffer by the insured. These kinds of agreements and practices render personal accident policy an indemnity contract. In general, the classification of personal accident policies as non-indemnity contracts has become only theoretical; it has become a common practice to consider personal accident policies a contract of indemnity.

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