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21st July 2017

Mr. Douglas Mendes SC,
President,
Law Association of Trinidad and Tobago,
95-97 Frederick Street,
Port-of-Spain.

Dear Mr. Mendes,

Re: Report of Ad-Hoc Committee re: amendment to Section 4 (7) of the Motor Vehicles Insurance (Third Party Risks) Act Chapter 48:51

Please find enclosed final report of the *ad-hoc* Committee which was constituted last October to formulate views/ comments / suggested legislative reform required in the light of the decision of the Privy Council in Presidential Insurance Company Limited v Resha St. Hill & Ors [2012] UKPC 33, following the request of the Law Reform Commission to the Law Association.

Yours Faithfully,

MARGUERITA HOSPEDALES
Convenor

Cc:
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To: The Council of the Law Association of Trinidad and Tobago

REPORT OF COMMITTEE
Re: Views/ comments / legislative reform required in the light of the decision of the Privy Council in Presidential Insurance Company Limited v Resha St. Hill & Ors [2012] UKPC 33.

A: Committee and Terms of Reference

On the instructions of the Law Association of Trinidad and Tobago (hereafter called the "LATT") an *ad hoc* Committee was set up on or about October 5 2016 which comprised the following persons: Lennox Sanguinette, Patricia Dindyal, Marguerita Hospedales, Ramnarine Mungroo, and Keston Mc Quilkin. The Committee was asked to look into and communicate a position regarding the issue at caption following a request made to the LATT by the Law Reform Commission (hereafter called the "LRC") by letter dated 18 April 2016. The said LRC's letter referred to the Privy Council decision in Presidential Insurance Company Limited v Resha St. Hill & Ors [2012] UKPC 33 (hereafter referred to as "Resha St. Hill") and focused on Section 4 (7) of the Motor Vehicles Insurance (Third Party Risks) Act (hereafter called "the Act") and to the Honourable Attorney General's request to examine the Act in light of the Privy Council's decision.

B. The Committee's recommendations in relation to Section 4 (7) of the Act.

The Committee noted that in Resha St. Hill the Privy Council held that the 1996 amended Section 4 (7) of the Act "*was (like its unamended predecessor) not intended to impose on any insurer a liability which the policy did not purport to cover in respect of the person insured or the persons driving or using the vehicle with his or her consent.*" (See paragraph 11). In its decision, the Board looked at the entire scheme of the Act and came to the view, expressed at paragraph 15, that Section 4 of the Act was "*concerned with the requirements of a policy complying with the Act and its issue*" and that this section was not one by which the Legislature dealt with restrictions on an insurer's liability to indemnify. It therefore concluded at paragraph 16 that "*.... if the legislator had intended to achieve the purpose which the courts below have attributed to s.4 (7), the natural way to achieve this would have been to expand or add to s.12, by invalidating so much of any policy as purported to restrict the insurance to exclude any person driving or using the vehicle with the policyholder's consent, as respects such liabilities as are required to be covered by a policy under section 4(1)(b)*" .

In the premises, on the basis of the foregoing, the Committee concluded:

(1) That an amendment to Section 4 (7) of the Act is not (a) the requisite nor advisable method of providing protection to third parties where an insurer has issued a restrictive "named-driver" policy nor (b) the relevant section of the Act to be amended.

(2) That any legislative reform must assiduously endeavor to balance both the need to protect the third party and the insurer's interest because of the absolute certainty that higher premiums for policyholders will be the natural result of an insurer's increased exposure to risk. The Committee noted that the contract between the insurer and policyholder was one undertaken on the basis of the latter's good faith together with the insurer's assessment of its exposure to risk, upon which it fixed its premium. The difficulty for insurers with the pre-Resha St.Hill interpretation of Section 4 (7) was encapsulated by the Board at paragraph 20 when it said " *If s.4 (7) exposes insurers, contrary to the express terms of their policies, to having to* ***indemnify any person*** *injured by anyone driving the vehicle with the consent of the person insured, even though the policy precludes the insured from extending cover to such driver by giving such consent,* ***then insurers would face an open-ended exposure.***" (emphasis added). It is submitted that this "open-ended exposure" must necessarily lead to higher premiums.

(3) That it was pointed out by the Privy Council in Resha St. Hill at paragraph 31 that Section 12 of the Act was " *the natural section on which to build, had the intention been to provide compulsory insurance cover, regardless of the policy definition of the persons covered, in respect of anyone driving or using an insured vehicle with the policyholder's consent*" . The Committee however expressed no immediate view regarding any possible amendment to Section 12.

(4) That due consideration should be given in any legislative reform to the special position of those third party victims who suffered injury between 2006 and 2012 whose valid claims against insurers evaporated after Resha St.Hill. The Committee considered that between 2006 and 2012 insurers who issued named-driver only policies are taken to have known that the interpretation by the local courts of Section 4 (7) required them to fix premiums which covered any driver driving with the consent of the insured, whether named or not. These insurers therefore collected premiums on this basis and, following the decision on August 12 2102 of Resha St. Hill, they were no longer obligated to pay the valid claims of these third parties, hence, they would have scored a windfall at the expense of innocent victims who were left with no remedy.

C. The Committee's recommendation on other areas of reform.

The Committee was of the view that amending Section 4 (7) was nothing more than a piecemeal and probably ineffectual effort toward the overall protection of third party victims of motor vehicle accidents, since it purports to deal with those third parties who suffer only where there is a named driver policy. The Committee noted that there are other significant areas of motor vehicle insurance, the reform of which would have the result of not only achieving the Legislature's objective of protecting victims of motor vehicle accidents in named-driver policies, but which would provide broader, deeper and fairer protection and improvements to third party victims as a whole who suffer owing to uninsured drivers.

In summary, the Committee identified the following areas which require reform:

(5) The urgent and immediate establishment of a Motor Insurers Bureau in Trinidad and Tobago.

In Resha St. Hill the Privy Council made the observation that " *Despite public awareness of the issue for at least thirty years, there is in Trinidad and Tobago still no equivalent of the Motor Insurers Bureau or any other facility to ensure that the victims of negligent but uninsured drivers do not go uncompensated*". The Committee considered that the most fundamental and substantial facet to the protection of victims of motor vehicle accidents would be the immediate establishment of a Motor Insurers Bureau (hereafter called " the MIB"). The Committee noted that the desirability of a MIB has been bandied about for decades in both the insurance sector and in/from Government. Further, it is the Committee's understanding that since 1994 the Government has been collecting a surcharge/tax of 6% on each and every insurance policy issued by insurers which has been earmarked to fund the said MIB. This state of affairs requires investigation and confirmation.

If it is a fact that the fund available to the MIB is already in existence, then the Committee recommends that the LATT proposes to the Law Reform Commission and to the Attorney General in the strongest possible terms that rather than the amendment of Section 4 (7), or the amendment of Section 12, the establishment of the MIB is the critical starting point in the Legislature's effort to protect victims of uninsured drivers. The MIB will satisfy the claims of those victims of restrictive named-driver only policies, as well as a broader class of victim, including a victim who is unable to find the negligent driver as in "hit and run" accidents). The UK model of the MIB is suggested as the appropriate model for Trinidad and Tobago.

The MIB was considered as the remedy for third party victims who traveled in "PH taxis" a feature which, although against the law, is endemic in the transportation sector of Trinidad and Tobago and particularly so in rural areas. It was felt that some form of protection should be considered by the Legislature; but concerns were raised that these third party victims would excessively burden the resources of the MIB.

(6) Reform of Section 27 of the Supreme Court of Judicature Act: abolishing the "lost years" claim by the estate of a deceased.

Section 27 of the Supreme Court of Judicature Act is *mutatis mutandis* Section 1 (2) (c) of UK Law Reform (Miscellaneous Provisions) Act 1934. The House of Lords in Gammell v Wilson [1982] 1 AC 27 established that this section gave a right of action to the estate of a deceased for compensation for loss of earnings in the lost years even though the deceased had not initiated such an action in his lifetime, since this right vested in him immediately before his death, and so passed to his beneficiaries, whether they were dependants or not. The unsatisfactory consequence (which was neither "*just nor sensible... because it amounted to double indemnity*") which would flow from its decision did not pass unnoticed by the House, which expressed the need for legislative intervention. The UK reformed its law immediately thereafter and overturned Gammell by the passage of the Administration of Justice Act 1982 which by its section 4, inserted a new Section 1 (2) (a) (ii) to the 1934 Act. By this amendment there could no longer be a cause of action by the estate for loss of earnings in the lost years after January 1 1983. Notably, in the Caribbean, Barbados and Guyana followed Gammell until their own Legislatures intervened.

Gammell v Wilson is however part of the law of Trinidad and Tobago.

The Committee took note of the inherent unfairness on an insurer and, by extension, on the insured and the motoring public (in terms of higher premiums) in respect of a claim for compensation for a deceased's loss of earnings in the "lost years" by the estate. It was recognised firstly that it was quite possible that one death can result in double compensation to be paid by an insurer where the beneficiaries of a deceased's estate and his dependants are not the same persons. Also, where a deceased had no dependants whatsoever, other persons claiming under the estate would in effect receive a payment which was not genuine compensation, but was a "windfall" payment. And further, since the estate claim for loss of earnings in the lost years is likely to be significantly higher that the dependants' claim then (where dependants and estate are the same persons) an assessment of damages would result in dependants being likely to receive far more in damages than that which was their actual loss as a dependant.

The Committee therefore recommends an immediate amendment to Section 27 in similar terms to the UK's Administration of Justice Act 1982, that is to say, by the creation of a new subsection 27 (2) (d) which will provide that damages recoverable by the estate "*shall not include any damages for loss of income in respect of any period after the person's death*".

(7) The implementation/enforcement of Section 4 (6) of the Act
The Committee considered that Section 4 (6) of the Motor Vehicles Insurance (Third Party Risks) Act (which provides for payment of a sum not exceeding $750.00 by the insurer or owner to a hospital where the third party was treated was a legislative failure for all practical purposes. This failure was owing solely to the non-existence of any regulation by which the section could be implemented or enforced.

The Committee recommends that if this section is to have any effect in law in the future, an amendment to the Act is absolutely necessary. This can easily be

accomplished by way of the creation of a new section drafted along the lines of the UK Road Traffic Act 1988 Section 159 (Supplementary provisions as to payments for treatment) which sets out a mechanism by which these payments are to be made.

(8) The Committee noted the uncertainty in the law inherent in Section 4 A of the Act. This section was added by way of amendment in 1996 in order to safeguard third parties who were the subject of accidents involving taxis; and deems the insured to be the employer of the driver. However, the Privy Council in the matter of Presidential Insurance Company Ltd (Appellant) v Mohammed and others (2015) UKPC 4 has said at paragraph 15 that "*a deemed relationship of employment does not alter the terms of the insurance contract. If the policy covered as drivers the insured and his employees or agents generically, the vicarious liability of the insured could fall within its terms, so long as other conditions in the policy (such as that the driver was driving with the insured's permission, or that the driver was licensed to drive the vehicle) did not exclude liability. In contrast with, for example, sections 8(1), 12 and 12A, section 4A does not override the language of the insurance policy to extend its cover*". The upshot appears to be that insurers can restrict their liability to third parties under Section 10. Once again, the Privy Council has mentioned the absence of a Motor Insurers Bureau in its decision at paragraph 25, under the rubric *"(iii) The problem of the uninsured driver*".

(9) Regarding Sections 4 (2) (c) and (d), the Committee noted three areas of concern as follows:

(i) We were given to understand that for administrative inefficiency insurers typically issue one policy of insurance to an insured by which an entire fleet of vehicles is covered. When an accident occurs, having regard to Section 4 (2) (d) of the Act, the limit of liability in respect of every vehicle in the fleet, (be it four vehicles or forty vehicles) is fixed at two million dollars. The potential for negative impact on the claims of third parties was noted and the Committee was of the view that Section 4 (2) (d) should be amended and expressed in the same wording as the preceding subsection (c), such that it becomes clear that each vehicle must be covered up to one million dollars. Clarity would be achieved if the obligation is placed on the insurer where it issues a policy which covers more than one vehicle, to endorse that policy such that it reflects that the statutory limit of liability applies to each and every motor vehicle specified in the schedule to the policy.

(ii) It was further noted that it was more than time enough to increase the sums stated in these two subsections; and the Committee considered that it was fair to increase these sums to one and a half million dollars and three million dollars respectively.

(iii) There is a need for some sort of system for insurers to deal with claims and to effect payments to third parties where there are several claimants under one policy, so as to ensure that each claimant is eventually awarded, if not all, some proportionate part of his claim. In Ram v Motor and General Insurance Company (2015) UKPC 22, the Privy Council dealt with the factual situation where several lives were lost in an accident, and the issue was whether the insurer had a duty to ascertain these claims and devise an arrangement for paying them out in a proportionate manner .The Board was of the view that this was inconsistent with Section 10 of the Act. While an insurer could not manipulate the order of payment the Act itself did not require payment until a judgment or agreement or award had been established.

(10) The Committee noted that Section 10 A (2) produces a result that undermines the intention of the Legislature to protect third parties. The Committee felt that the defences of the insurer should fall within Section 10 A (1) only; and that therefore the words "*or otherwise*" should be deleted.

(11) The Committee noted that insurers are quick and ready to deny claims of third parties where their insured's drivers licence has expired, even by a day, and even if the licence was subsequently renewed. The Committee noted that the provisions of the Motor Vehicles and Road Traffic Act (Section 61 and 61 A) which permits an application and directs the issuance of a renewed permit even after the expiration of a permit. Accordingly, the Committee recommends that Section 12 of the Act should be amended to add that an expired permit, (provided it is later renewed) is not a valid restriction on a policy available to an insurer against a third party claim.

(12) It was noted that Section 3 of the Act provides no defence to an employee who drives his employer's vehicle on the road, by the direction of his employer and unbeknownst to him the vehicle is uninsured.

(13) The Committee discussed the position of persons using vehicles without insurance and felt that the Legislature should consider the need for stiffer penalties (in the form of increased fines and suspension of driver's permit for a limited period of time) which will operate as a deterrent to this practice.

(14) The Committee noted that there could be a number of measures put in place so that claims by third parties are expedited. The following were specifically noteworthy:

(i) That the pre-action protocol in respect of road traffic accidents should be strictly adhered to and Judges entreated to impose strict sanctions. In this

regard, the Law Association could make this recommendation by letter to the Chief Justice.

(ii) The medical reports which are to be tendered by litigants should be in similar format with all the relevant information and easily understandable which would promote early settlement. The Law Association can facilitate this by appointing a committee to propose such a template, possibly with the collaboration of the Medical Association of Trinidad and Tobago and thereafter, the Rules Committee may be petitioned to consider the incorporating of a satisfactory form into the CPR.

D. Input of the Association of Trinidad and Tobago Insurance Companies: ATTIC

The Committee was given to understand that the Association of Trinidad and Tobago Insurance Companies (ATTIC) had held some consultation with the Central Bank of Trinidad and Tobago and the Ministry of Finance and had produced a report outlining its recommendations. The Committee asked for and was kindly supplied with ATTIC's documents. The Committee examined ATTIC's letter dated October 3 2013 to the then Minister of Finance which criticized the amending bill which was laid before Parliament on September 6 2013; and the ATTIC document entitled " Impact of proposed Motor Vehicle Insurance (Third Party Risks) (Amendment) Bill 2013.

Dated this 21st day of July 2017

MARGUERITA HOSPEDALES
Convenor

COMMITTEE MEMBERS:
LENNOX SANGUINETTE
PATRICIA DINDYAL
MARGUERITA HOSPEDALES
RAMNARINE MUNGROO
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