Statutory Intervention on the Duty of Disclosure in Insurance Contracts in Botswana

Jimcall Pfumorodze,* Thabo F. Khumalo and Tamanda A. Kamwendo*****

ABSTRACT

One of the most contentious issues in insurance law is the duty of disclosure in insurance contracts. An insurance contract is dubbed as a contract "uberrima fidei," meaning that it is a contract which must be entered into in utmost good faith. The duty of disclosure under common law has been described as broad and as inequitable and as heavily in favour of the insurers at the expense of the insureds. This paper seeks to examine the extent to which the Botswana legislature has intervened on the common law relating to disclosure in insurance contracts. This paper recommends statutory intervention on the duty of disclosure. This should focus on the nature and scope of the insured's duty of disclosure; the test of materiality; and statutory remedies where the duty has been violated. Furthermore, it should be mandatory for the insurer to advise the policyholder of the duty to disclose facts that are material to the risk insured. These changes would go a long way in mitigating the harsh effects of common law position on non-disclosure on the part of the insured.

1. INTRODUCTION

One of the most contentious issues under insurance law relates to the duty of disclosure in insurance contracts. This area is said to have "generated innumerable cases, legislative enactments, law reform initiatives and commentary."[1] An insurance contract is dubbed as a contract *uberrima fidei,* meaning that it is a contract which must be entered into in utmost good faith. This principle of utmost good faith applies to insurers as well as the policyholders. At common law,

* LLB (Hons) (UZ); LLM (*Cum Laude*) (UWC and Amsterdam); LLD (Pretoria); Senior Lecturer, University of Botswana.

** LLB (Hons) (UZ); LLM (UNISA); Lecturer, University of Botswana.

*** LLB (UB).

1 J.R. Tarr, "Disclosure in Insurance Law: Contemporary and Historical Economic Considerations" *International Trade & Business Law Ann.* (2001), p. 209.

there is a pre-contractual duty where a would-be policyholder should disclose material facts prior to the conclusion and renewal of an insurance contract.[2] The duty of disclosure under common law has been described "as broad and as inequitable"[3] and as heavily in favour of the insurers at the expense of the insureds. In many jurisdictions, the legislatures have used statutory intervention as a means of mitigating the harshness of the common law position.[4] This paper seeks to examine the extent to which the Botswana legislature has intervened on the common law relating to disclosure in insurance contracts. The next section discusses the nature and scope of the duty of disclosure under common law. This is followed by an evaluation of statutory intervention in Botswana as well as in other selected jurisdictions. The paper will wind up with a conclusion and some recommendations for reforms.

2. NATURE AND SCOPE OF THE DUTY OF DISCLOSURE AT COMMON LAW

2.1 RATIONALE FOR THE DUTY OF DISCLOSURE

As highlighted above, the insurance contract is characterised as a contract of utmost good faith. The insured is under a duty to disclose all material facts, that is, all facts which have a bearing on the assessment of risk to be taken over by the insurer in terms of a specific contract of insurance. Several justifications have been put across for the duty of disclosure. First, the absence of concealment is said to be an implied condition of insurance contracts. Second, concealment, it is has been argued, would prevent a meeting of the minds. Third, the duty is said to be derived from the special nature of the insurance contract. In expounding on this justification, the court, in the much celebrated and erudite judgment in the case of *Carter* v *Boehm,* adumbrated as follows:

2 J.P. van Niekerk, "The Insured's Duties of Disclosure: Delictual and Contractual; Before the Conclusion and During the Currency of the Insurance Contract: *Bruwer* v *Nova Risk Partners Ltd*," 23 *South African Mercantile Law Journal* (2011), pp. 135-144, at p.135.

3 J.P. van Niekerk, "Goodbye to the Duty of Disclosure in Insurance law: Reasons to Rethink, Restrict, Reform or Report the Duty (Part 1) *17 South African Mercantile Law Journal* (2005) p. 150.

4 These countries include Australia, New Zealand, Canada, United Kingdom, South Africa and Zimbabwe.

> "Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstances in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist. The keeping back of such circumstances is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without fraudulent intention; yet still the underwriter is deceived, and the policy is void; because the risque run is really different from the risque understood and intended to be run at the time of the agreement."[5]

This reasoning is premised on that there is information asymmetry between the insurer and the insured where it is believed that the insured has exclusive knowledge on the risk whereas the insurer only knows what has been disclosed. Although this reasoning could have been valid in the nineteenth century and early twentieth century, it is no longer accurate in the present day. In this age, insurers have at their disposal advanced and modern ways of actuarial risk estimation and such expertise far exceeds that of the insured. Thus, the insurer is now in a stronger position than the insured. Most policyholders lack knowledge in insurance business particularly in the assessment of risk. Therefore, by imposing such a weighty duty on the policyholder, the law places the policyholder in the insurer's position under the insurance contract. The policyholder is tasked with second-guessing what the insurer might consider to be material. The insurer is in a position to extract relevant information, concerning the risk to be insured against, from the insured by asking relevant and specific questions. Through such questions in the proposal form, the insurer can get more relevant information more than what he can get by asking the insured to volunteer information he thinks may be material to the risk. Thus, the common law duty on disclosure in insurance is based on a faulty premise which is archaic and is no longer relevant in the modern age. Resultantly, the legislature has a duty to modify these common law rules to make them in sync

5 *Carter* v *Boehm* (1766) 3 Burr. 1905.

with current business efficacy. Where there is no legislative intervention, the courts are left with no choice but to apply the law as it is and impose such a stringent duty on the policyholder.[6]

2.2 SCOPE OF THE DUTY OF DISCLOSURE

The policyholder is under duty to disclose all material facts during the contract negotiations and upon renewal. These include previous refusals of cover even where this was unrelated to the current policy, [7]and previous convictions.[8] It is worth noting that under the duty of disclosure, rumours, opinions and other information that come to a policyholder's knowledge but which he may be unsure about may be deemed to be facts within the knowledge of the policyholder, requiring disclosure. This is so even where the uncertain information is subsequently found to be untrue. The duty of disclosure also extends to facts which the policyholder had constructive knowledge of.[9] However under life insurance, a policyholder who is not a medical expert of the facts as to his health cannot be expected to give more than an opinion.[10]

This is an onerous burden imposed on the policyholder, all in an attempt to satisfy the duty of disclosure. The policyholder is also under a duty to disclose not only known facts but also such facts, which in the ordinary course of business, he, the policyholder, might reasonably be expected to find out.[11] It can be argued that this standard is unreasonably high as it is difficult to come up with a test of what a reasonable policyholder is likely to observe in the ordinary course of business. Furthermore, this unreasonable burden creates a loophole

6 L.E. Trakman, "Mysteries Surrounding Material Disclosure in Insurance Law," *34 University of Toronto Law Journal* (1984), p.421.

7 See In *Locker & Wolf Ltd* v *Western Australia Insurance* [1936] K.B. 408, where a previous refusal of a motor insurance was held material in a fire insurance policy.

8 This was evident in the case of *Roselodge* v *Castle* [1966] 2 Lloyd's Rep 113, where the insurer repudiated the contract for failure to disclose that the principal director of the policyholder had 20 years before been convicted of bribing a police officer. The policyholder's sale manager had also been convicted for smuggling diamonds. The court was of the view that the knowledge of the convictions had a bearing on the underwriter's assessment of risk and, therefore, were material facts which ought to have been disclosed.

9 *Mutual & Federal Insurance Co Ltd* v *Oudtshoorn Municipality* [1985] 1 All SA 324 (A).

10 This was stated in the case of *Joel* v *Law Union & Crown Insurance* [1908] 2 KB 863, where the policyholder made a health statement that she had suffered from acute depression. This was regarded as a statement of opinion and therefore one cannot disclose what they do not know.

11 See, *Australia and New Zealand Bank Ltd* v *Colonial and Eagle Wharves Ltd* [1960] 2 Lloyd's Rep. 241.

which might be exploited by insurers to avoid an otherwise genuine claim.

Despite the onerous duty placed on the policyholder, he\ she is not under a duty to disclose certain facts. He\ She is not under duty to disclose facts that are already known to the insurer. In the case of *Bates* v *Hewitt*[12] the court said:

> "The insured is not bound to communicate facts or circumstances which are within the ordinary professional knowledge of an underwriter. He is not bound to communicate facts relating to the general course of a particular trade, because all these things are supposed to be within the knowledge of the person carrying on the business of insurance and which, therefore, it is not necessary for him to be specially informed of."

The insurer may also waive certain information and once he has done so, he cannot expect to retain the right to avoid liability if this information is not disclosed to him by the policyholder. Such information can be expressly waived in the proposal form. In the case of *Whyte* v *Dominion Insurance*[13], the court stated that the construction of questions in the proposal form may significantly alter the duty of disclosure. This is to say that the construction of questions may amount to a tacit waiver of the duty of disclosure on the policyholder. The court noted that when certain matters are not made subject to a warranty in the proposal form, the intention of the insurer can be inferred to be to waive the information which may be deemed immaterial and invite more information on the other matters deemed more important. [14]

2.3 THE TEST FOR MATERIALITY

Material facts have been defined as contingencies, state of affairs, or events which have fundamental effects upon the insured risk. Material facts are therefore those facts that are vital to the risk insured. The policyholder is under a duty to disclose such vital facts so as to enable the insurer to determine whether

12 [1867] LR 2 QB 595 at p. 611.
13 1945 TPD 382
14 *Ibid.,* at p.404

or not to assume such risk and the premium to be paid by the policyholder. Where the policyholder positively misrepresents or conceals such material facts, the insurer is misled as to the gravity of the risk it is about to assume and consequently there is an incorrect calculation of premium to be paid by the policyholder.[15]

There is uncertainty as to the test to be applied to determine if a misrepresentation is material or not. The materiality of facts seems to be measured in various ways. It can be ascertained in light of the actual policyholder's perceptions, by a reasonable policyholder, by the actual insurer or by a reasonable insurer, and it cane be materiality as the court deems fit. In *Lambert* v *CIS*[16] four possible tests to determine the materiality of non disclosed facts were: the test of the reasonable insured; the test of the reasonable insurer; the test of the actual insurer; and the test of a reasonable man. The court in this case adopted the test of the reasonable and prudent insurer. This test is unfair as the policyholder is denied the opportunity to assess what constitutes a misrepresentation or concealment. The insurer in this case is expected to make a [discriminatory determination]? as to what amounts to material facts.

In *Pan Atlantic Insurance Company* v *Pine Top Insurance*[17] the court attempted to lessen the burden placed on the policyholder by introducing an additional requirement that the non disclosure of the material fact must have also induced the insurer to enter into the insurance contract. Although this requirement may seem to favour the policyholder, it is difficult for the policyholder to actually prove that the insurer was not induced by such non disclosure.[18]

South African courts, however, have held that the test is that of a reasonable man.[19] The reasonable man test is neither biased on the insurer nor the policyholder. Therefore the question becomes whether reasonable person would have recognized that it was material to disclose the facts in question. It is irrelevant whether the policyholder appreciated the materiality of the

15 L.E. Trakman, "Mysteries Surrounding Material Disclosure in Insurance Law," *34 University of Toronto Law Journal* (1984), p. 421.
16 [1975] 2 Lloyd's Reports 485.
17 [1995] 1 AC 501.
18 J. Brock, "Hurricane Damage and the Law," *32(1) Commonwealth Law Bulletin* (*March 2006*), p.11.
19 *Mutual & Federal Insurance Co Ltd* v *Oudsthoorn Municipality* 1985(1) SA 419 (A).

undisclosed facts or not.

There is no solid pattern of reasoning by the courts in light of what standards are to be used to determine the materiality of the misrepresentation. In the case of *Qilingele* v *South African Mutual Life Assurance Society*[20] a subjective test was laid down for the materiality of positive representations as opposed to non disclosure. This case distinguishes the *Oudsthoorn Municipality*[21] case and seeks to suggest that there are two separate tests for materiality when dealing with non disclosure and a positive misrepresentation on the part of the policyholder. Consequently, the reasonable man test which is an objective test only applies to instances of non disclosure, whereas the subjective test is used for positive misrepresentation.[22] This subjective test is satisfied by the actual insurer proving that it would have considered the misrepresented facts as material to the risk. In this instance the court essentially applies the test of the actual insurer as outlined in *Lambert* v *CIS.*[23] Under common law, there is no duty placed on the insurer to inform the policyholder of the nature and effect of the duty if disclosure.

Given that the common law on the duty is very broad and harsh, there is a need for statutory intervention to mitigate such harshness. The next section examines the extent to which there is such a statutory intervention in Botswana.

3. STATUTORY INTERVENTION IN BOTSWANA

The insurance industry is currently governed by the Insurance Industry Act, No. 10of 2015. However, for the purpose of historical and contextual analysis, this section starts by analyzing the Insurance Industry Act, No. 21of 1987, the law which preceded the current Act.

3.1 THE INSURANCE INDUSTRY ACT, 1987

Some provisions in the Insurance Industry Act, 1987, may be construed as dealing with the duty of disclosure. These include provisions relating to life policies and provisions relating to all policies.

20 1993 (1) SA 69 (A).

21 *Mutual & Federal Insurance Co Ltd* v *Oudsthoorn Municipality* 1985(1) SA 419 (A).

22 J.P. Van Niekerk, "Information and Disclosure in the Insurance Context: An Overview of the Current Position and Recent Developments," *11 South African Mercantile Law Journal* (1999), p.182-183.

23 *Supra.*

3.1.1 PROVISIONS RELATING TO LIFE POLICIES

With respect to life policies, the Insurance Industry Act, 1987 proposed some notable modifications to the common law. Section 91 (1), for example, provided that the proposer should specify the place and date of birth of the person whose life is proposed to be insured, and the person making the proposal shall supply those particulars of birth to the best of his knowledge and belief. This modified the level of disclosure to a point where it was not absolute and limited culpability to cases of intentional misrepresentation of age. This raised the bar on the duty of disclosure to the level of intention, which is higher than the general levels relating to non-disclosure, which include innocent and negligent misrepresentation

Further, Section 92 of the 1987 Act provided that a life insurance policy could not be avoided by reason of a misstatement of the age of the insured. Where the age was found to be greater than what the policy was based on, the insurer was entitled to alter the premiums payable or the amount of compensation to be paid under the policy.[24] The same remedy was available where the age proved to be less than that which the policy was based on. In this instance, the premium payable will therefore be reduced and the insurer had to repay the policyholder the amount of over-payments of premiums.[25] This section allowed for proportionality adjustments in instances where there have been misstatements of age, and did not render the contract voidable.

This section also contained a proviso that where the age was found not be within the limits under which the insurer issues policies, the insurance contract was void *ab initio.* The insurer was obliged to repay the policyholder all premiums paid after deducting expenses incurred by the insurer on the policy. This introduced the concept that if the insurer would have still entered into the contract under different terms, the contract would still be valid. The insurer could only avoid the contract if it could prove that it would not have entered into the contract at all. If the insurer would have still have entered into the contract under different terms, the remedy of cancellation was removed and the insurer could only make proportional adjustments to the payments made under

24 See Section 92(1) (a) of the Insurance Industry Act.
25 Section 91(1) (b) (i) and (ii) *ibid.*

the policy. Furthermore, in instances where the insurer would not have entered into the said contract had he known the true age of the policyholder, the insurer was still required to refund premiums paid after subtracting costs incurred and not claim back payments made under the policy to the policyholder. This section also introduced the concept of materiality to the disclosure, and if the misrepresentation was not material it would not affect the contract. The insurer needed to prove that the non-disclosure of documents was material before a contract could be avoided.

Section 92 could, therefore, be said to be lenient on policyholders who misrepresented their true age in life policies. Instead of awarding the insurer with the remedy of cancellation, the insurer was only entitled to modify the payments made under the policy. Furthermore, even in instances where it was discovered that the insurer would not have entered into the said contract had he known the true age of the policyholder, the insurer was still required to refund premiums paid after subtracting costs incurred, and was not expected to claim back payments made under the policy to the policyholder.

These provisions related to Long Term Life and other polices, but did not apply to indemnity insurance. This meant that modifications on the duty to disclose by statute did not apply to other types of insurance business.

3.1.2 PROVISIONS RELATING TO ALL POLICIES

There were modifications concerning the duty of disclosure involving documents.[26] The Insurance Industry Act provided that no person could make a statement in any document required for the purposes of that Act which is 'false in any material particular', knowing such statement to be false or not believing it to be true. This section prohibits misrepresentation, removing it from the ambit of common law. It included the use of terms such as 'wilfully' and 'knowingly' which introduced an element of fault in positive misrepresentation with relation to documents. It raised the standard of fault necessary to the intention to 'defraud or deceive'. This meant that innocent and negligent misrepresentation is not included as relating to the misrepresentation in documents. This section also introduced the element of materiality in cases of misrepresentation.

26 Section 126 of the repealed Act.

3.2 THE INSURANCE INDUSTRY ACT, 2015

A key element of this Act, not adequately addressed in the 1987 Act, is protection of the policy holder. This is covered in Part VII of the Act. . Aspects which relate to the duty of disclosure in Part VII are: the validity of contracts; persons involved in the insurance contract; and, disclosure of commission. Each of these is discussed below briefly.

3.2.1 VALIDITY OF CONTRACTS

Section 53 of the Act addresses the validity of the contract. This section provides that a contract shall not be void for a failure to comply with a written law. The term 'written law' is not defined in the Act and one has to resort to the ordinary legal definition, which limits it to legislation. This means that failure to comply with the common law is not included. Therefore, a failure to comply with common law requirements would still render the contract void. The duty of disclosure has not been modified by this section because it falls largely within the realm of common law, and is not modified by this section.

3.2.2 PERSONS INVOLVED IN INSURANCE CONTRACTS

The Act modifies a contract of insurance through expansion of persons who are recognised as part of the insurance contract process.[27] Section 54 of the Act

27 The general rule is that if a proposer completes the proposal form on behalf of the insured , he is transformed into being an agent of the insured. The leading case is that of *Newsholme Brothers* v *Road Transport and General Insurance, (1929) 2 KB 56.*In the case, a proposer for motor insurance verbally gave correct answers to the agent of the insurance company relating to the previous losses. The agent however, wrote down these answers incorrectly. The proposer then signed the proposal form which contained the usual declaration to the effect that it was to be the basis of the contact. The insured claimed for a loss and the insurers repudiated liability on the basis that there has been a misstatement in the proposal form. The court held that the knowledge of the agent that certain answers were filled in was not notice to the insurer since the agent was the agent of the proposer. The court justified its conclusion for the following reasons. First, that if the answers were untrue and the agent knows he is committing a fraud which prevents his knowledge from becoming the knowledge of the insurer. This reasoning, however, defies the ordinary principle of the law of agency that an agent does not cease to bind his principal because he has fraudulently misprepresented that he is acting within the scope of his apparent authority. Secondly, the court held that the authority to receive information and the authority to fill in a proposal form are different so that if the proposer requests that the agent fill in his proposal form or even if the agent himself volunteers to fill in the proposal the agent would be acting as an agent of the proposer and not the insurer. Thirdly, the insured was negligent in signing in the proposal form without insuring that all answers are correct. Consequently, he was estopped by his negligence and this negligence broke the

amends the duty of disclosure by making certain standard clauses regarding disclosure void. Insurers may no longer be exempted from liability for any act or omission of persons acting on the insurer's behalf in relation to the policy.[28] This is important because it will cover persons including brokers or agents. In addition, it also covers others persons who also play a role in insurance contracts. These include independent contractors such as doctors and assessors. Employees would ordinarily be covered under vicarious liability. However, by inserting that all persons involved in the contract should be recognised, it broadens the applicability of this Act to include even independent contractors. Representations by such persons can no longer be dismissed as representations of third parties. Generally, if third parties misrepresented, these representations did not have a bearing on the contract.

Under common law, any person who assists the insured was deemed to be an agent of the insured. The use of the insurance brokers is the primary method through which insurance companies conduct their business. Thus, these brokers were deemed to be agents of the insured. In terms of the Act, the person who assists the potential insured shall no longer be referred to as being appointed by the person who entered into the policy. The insurer can no longer assert that person to be the agent of the insured. This is important because brokers and agents tend to be the only people that interact with the potential insured towards the conclusion of the contract. This created a moral hazard because due to the nature of the commission contracts of brokers and insurance agents because they stand to benefit if they misrepresent. It was unfair to impart this conduct on the insured. There were no consequences to the insurer when this happened and this conduct by the brokers/ agents did not affect the validity of the contract. The potential insured has little or no contact with any of the employees or the agents of the insurance company.

Once brokers and agents are no longer viewed as the agents of the insured, it shifts the onus of proof in determining whose agent they are. This has the effect of improving the rules of disclosure in that any misrepresentation

causation chain. Fourthly, to allow evidence of what the agent actually knew to be introduced would be in violation of the parole evidence rule. Lastly, where the insured allows the agent to fill in the proposal form and signs the proposal form , he is liable for whatever appears above his signature in accordance with the *caveat subscripto* doctrine.

28 Section 54(a) of the Insurance Industry Act of 2015.

or non-disclosure made by the broker shall not be automatically be attributable to the insured. This modifies the doctrine of imputation of knowledge in that any disclosure made to the broker can now be subject to proof as to whether the insurer was aware of the information.[29] This means that when disclosure is made to the broker the matter is not dismissed off-hand as non-disclosure.

3.2.3 DISCLOSURE OF COMMISSION

The Act introduces a new requirement of disclosure on the part of an intermediary Section 71 of the Act requires tdisclosure by a broker to the prospective insured of the commission to be earned by the broker on that particular transaction. This requirement did not exist in the previous Act. This has the advantage that it draws the attention of the insured to the fact that the broker may not be his\her agent; that the broker benefits from the transaction; and that this is essentially a business transaction. Whilst these developments are commendable, they do not go far enough as regards the duty of disclosure. The Act does not make it a requirement that the broker should advise the potential insured of their duty of disclosure, and to explain fully the requirements for disclosure. It has been noted that in most instances the reasons for refusals to pay claims is due to non-disclosure of material information, even if the non-disclosure has no bearing on the loss.[30]

3.3 EVALUATION OF STATUTORY INTERVENTIONS ON THE DUTY OF DISCLOSURE IN BOTSWANA

Part VII of the new Act focuses on policyholder protection amongst other things. Policy holder protection was not an issue under the previous Act. This

29 In order for the knowledge of the agent to be imputed to the insurer, the following should be established:
1. That the agent was the agent of the insured;
2. That the agent had the authority to acquire the knowledge;
3. That the knowledge was acquired in the course and scope of his employed;
4. That the proposed insured was not responsible for any duty of disclosure and;
5. That the omission to disclose the knowledge was solely the fault of the agent.

It is for this reason that there are very exceptional cases in which the insured has successfully imputed knowledge to the insurer. The onus is on the insured to establish all these, see, *MacDonald* v *Law Union and Rock Life Insurance* 1928 1 KB 554.

30 J.P. van Niekerk, "The Test for Materiality in Insurance Law: the Reasonable Person in Context" *16 South African Mercantile Law Journal* (2004), p. 113.

creates the impression that policy holder protection is seminal in the Act. Yet this is not the position, as the progress made in the previous Act on the duty to disclose were not carried forward. The new Act in fact e reinstated the common law. . The improvements made by the new act should have been in addition to the disclosure modifications that existed in the previous Act The new Act does not have provisions relating to misrepresentation with regards to documents. The previous Act had modified insurance law in that this had been limited to intentional misrepresentation. This means that non-disclosure with regards to documentation has been returned to the common law position which includes innocent and negligent misrepresentation.

4. STATUTORY INTERVENTIONS IN SELECTED JURISDICTIONS

Under South African law, The Long-term Insurance Act [31]and the Short-term Insurance Act[32] address the duty of disclosure as placed on the policyholder. These Acts, in Section 59 and Section 53 respectively, also address remedies for misrepresentation by the policyholder.. The sections provide that the insurer is only allowed to avoid the contract on the basis of misrepresentation where the misrepresentation had a bearing on the assessment of risk.

Similarly, the Zimbabwean Insurance Amendment No 3 of 2004 is replete with provisions that address the duty of disclosure. It provides that where the policyholder's misrepresentation is immaterial to the risk, the insurance contract remains valid and therefore the insurer is liable to pay claims under the policy.[33] Additionally, under common law the insurer is not under any duty to advise the policyholder on the duty. However, Section 83A of the Zimbabwean Insurance Act stipulates that the insurer is under duty to advise the policyholder of the duty to disclose facts that are material to the risk insured. This is a very important provision because most policyholders, even acting in utmost good faith do not know of the existence of the duty of disclosure and are clueless as to which facts are material to the assessment of risk.

31 Act Number 52 of 1998.
32 Act Number 53 of 1998.
33 Section 83B(2) of the Insurance Act, Cap 24:07, Laws of Zimbabwe.

However, the Zimbabwean Insurance Amendment Act and the South African statutes are silent on the test for materiality. Statutory intervention on this test is vital as there is great inequality that arises between the policyholder and the insurer on the basis of this test for materiality. Under an insurance contract, the insurer is the party that is in most need of the information for the purposes of assessment of risk. Therefore, since the policyholder is the party equipped with such knowledge, it is unmerited for the law to punish the policyholder for misrepresentation or concealment of information that the insurer was unable to attain on its own. In most instances such information is not information that is privately known to the policyholder alone and which the insurer can obtain from other sources. The insurer should therefore take the initiative to obtain some information from other sources rather than merely relying on the voluntary disclosure by the policyholder.[34] Also, there is need for legislation to expressly state that the policyholder need not disclose certain classes of information.

In Australia, most contracts of insurance are governed by the Insurance Contracts Act of 1984.[35] Under this Act, the duty of utmost good faith is implied in every contract which is subject to the Act.[36] The Australian Act provides a separate duty of disclosure for the insured.[37] It provides as follows:
"The insured's duty of disclosure

1) Subject to this Act, an insured has a duty to disclose to the insurer, before the relevant contract of insurance is entered into, every matter that is known to the insured, being a matter that:
   (a) the insured knows to be a matter relevant to the decision of the insurer whether to accept the risk and, if so, on what terms; or
   (b) a reasonable person in the circumstances could be expected to know to be a matter so relevant.

34 J.P. van Niekert, "Goodbye to the Duty of Disclosure in Insurance Law: Reasons to Rethink, Restrict, Reform or Repeal the Duty (Part 2)," *17 South African Mercantile Law Journal* (2005), p.336.
35 Contracts of reinsurance and contracts of marine insurance are not governed by this Act.
36 See section 13(1) of this Act.
37 See section 21 of the Act.

(2) The duty of disclosure does not require the disclosure of a matter:

(a) that diminishes the risk;

(b) that is of common knowledge;

(c) that the insurer knows or in the ordinary course of the insurer's business as an insurer ought to know; or

(d) as to which compliance with the duty of disclosure is waived by the insurer.

(3) Where a person:

(a) failed to answer; or

(b) gave an obviously incomplete or irrelevant answer to;

a question included in a proposal form about a matter, the insurer shall be deemed to have waived compliance with the duty of disclosure in relation to the matter."

The Australia approach which provides for a statutory duty for the insured is laudable in that it alters the common law position and clarifies the nature and scope of the duty of disclosure. It also delineates on what is material and what is not material. In addition, section 28 provides for remedies for non-disclosure. These remedies differ in degree depending on the nature of non-disclosure. Where there is innocent misrepresentation or non-disclosure, the insurer cannot avoid a contract. The remedy available on the insured under these circumstances is that the insurer is entitled to reduce its liability in respect of the claim in order to place the insurer in a position it would have been had the non-disclosure not occurred.[38] This statutory intervention shows a great attempt by the legislature to strike a balance between the interests of the insured and the insurer, thereby mitigating the consequences of non-disclosure on the insured. Where there is fraudulent non-disclosure, the insurer is entitled to avoid the contract.[39] This is a great shift from the common law position where the remedy

38 Section 28(3) of the Act.

39 Section 28(2) of the Act. For other remedies specific to life policy, see section 29 of the Act.

for non-disclosure is avoidance of payment on the policy.[40]

In the United Kingdom, duty of disclosure relating to consumer insurance is governed by the Consumer Insurance (Disclosure and Representations) Act of 2012. Under this Act, the insured does not have a positive duty of disclosure and there are no sanctions for innocent non-disclosure. A new set of rules relating to commercial insurance is set out in the Insurance Act, 2015, which will be effective from August 2016. This Act will introduce the duty of fair representation. The essence of this is that the overall information presented by the insured to the insurer will be evaluated in order to establish whether there was a fair representation. This Act will significantly modify the remedies for non-disclosure.[41] Where the non-disclosure is deliberate or reckless, the insurer is entitled to avoid the policy without even returning the premiums.[42] However, the remedies are different where the non-disclosure is either innocent or negligent. Where the non-disclosure goes to the root of the contract in that the insurer would not have concluded the insurance contract, the insurer is entitled to avoid the contract but must return premiums.[43] Where the insurer would have entered into the contract but would have charged higher premiums, the insurer is entitled to reduce the claim proportionately to the premium it would have charged.[44] Thus, the Act introduced the principle of proportionality.[45]

6. CONCLUSION

This paper has discussed the nature and scope of the duty of disclosure under both the common law and the statutory law of Botswana. It has demonstrated the harshness of the common law and the failure by the courts to mitigate it. On comparative basis, it has been established that the legislature in the United Kingdom, through the Consumer Insurance (Disclosure and Representations)

40 See, *Banque Financiere De La Cite* v *Westgate Insurance Co Limited* (1991) 2 AC 249.

41 See, G. Blackwood, "The Pre-contractual Duty of (utmost) Good Faith: The Past and the Future" *LMCLQ* (2013), p. 311.

42 Insurance Act 2015, Schedule 1, Part 1, sections 2-6.

43 Ibid, at section 4.

44 Ibid at section 6(1).

45 For a discussion of this Act, see See, G. Blackwood, "The Pre-contractual Duty of (utmost) Good Faith:The Past and the Future" *LMCLQ* (2013), pp. 311; J. Hjalmarsson, "The Insurance Act 2015-a new beginning or business as usual?" *15 (2) Shipping and Trade Law* 15 (2) pp.5; L. Reeves, "The Duty of Pre-Contractual Disclosure in English Insurance Law: Past and Future-Dies the Law Need to be Changed?" *5 Southampton Student Law Review* (2015), p. 1.

Act, 2012 and the Insurance Act, 2015, have gone a long way in mitigation the duty of disclosure by the insuredSimilarly, Australia, has since 1984, curtailed the harsh effects on the common law on disclosure on the insured.

From the discussion above, it can be concluded that the Botswana legislature has not done much in mitigating the harsh effects on the duty of disclosure on the insured. It seems a few provisions which attempted to mitigate such effects in the Insurance Industry Act 1987, were eroded by the Insurance Industry ct, 2015. Thus, the statutory intervention is very minimum and inadequate. The harsh common law position still prevails in the absence of any statutory intervention.

Consequently, this paper recommends statutory intervention on the duty of disclosure. These interventions should be modelled along the Australian Insurance Contracts Act to include the nature and scope of the insured's duty of disclosure, the test of materiality and statutory remedies where the duty has been violated. Furthermore, it should be mandatory for the insurer to advice the policyholder of the duty to disclose facts that are material to the risk insured. These changes would go a long way in mitigating the harsh effects of common law position on non-disclosure on the part of the insured.