CHALIMBANA UNIVERSITY

DIRECTORATE OF DISTANCE EDUCATION

BUSINESS LAW

FIRST EDITION 2019

CHALIMBANA UNIVERSITY,

PRIVATE BAG E 1,

LUSAKA.

WEBSITE: [www.chau.ac.zm](http://www.chau.ac.zm)

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 ACKNOWLEDGEMENTS

I would like to thank the staff at Chalimbana University for having accorded me a chance to prepare this module of business law. I further thank professor Patrick Osode, professor Simon Kulusika and Dr justice PhilpMusonda for having academically exposed me to a compendium of laws making up business law.

**RATIONALE**

Business law is an important component for any person pursing the frontiers of business studies. It is well settled that teachers of business studies in secondary schools require this vital part of the course.

The modern trend is that learners must be inculcated with the entrepreneur skills. Not every graduate at university, college and secondary school levels will be able to take up formal employment. The graduates may take up informal employment by creating or incorporating one form of business or another. This, in turn has proved to be of prime importance in growing the economy of the country and the world at large, there by eradicating poverty and increasing the standard of living which impacts greatly on people`s life expectance.

This phenomenon is also applicable to any student studying accountancy, marketing, business administration, purchasing and supply and other related business courses**.**

AIM

The course aims at meeting the needs of every student studying business courses at bachelor`s degree level. It enables a student to understand and appreciate the world of business and be able to comfortably fit in any form industry upon graduation.

**LEARNING OUTCOMES**

It is expected that at the end the business law course learners will be able to:

a) Comprehend the relationship between the business law and their respective study areas.

b) Use the business law knowledge acquired in order to widen their scope of the business environment.

c) Use the business law knowledge in order to incorporate their companies or any other form of firms.

d) Apply the business law knowledge for them to be competent and well-grounded employees.

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**UNIT ONE**

**1.1 SOURCES OF LAW IN ZAMBIA**

**1.0 INTRODUCTION**

Learners must have a general overview of law. Laws are dynamic, they are never settled, and they change with society. Laws are never uniform; they vary from one society to the other. A typical example would be in a criminal law setting in Zambia and South Africa. In Zambia if a person is found guilty of murder he/she will face a mandatory sentence of death penalty also known as capital punishment while in South Africa when one found guilty of murder he/she imprisoned for life as was propounded in a ground breaking case of*S vMakwenyane and anothers*( 1995).

**LEARNER OUTCOMES**

By the end of this unit learners must

1. Have the general understanding of the law
2. Be able to list down explain the various sources of the law in Zambia.

**DEFINATION OF LAW**

Law is a set of rules enforceable by courts. Law is an instrument of social control. It is designed to control unacceptable behaviour. Its function is to specify standards of behaviour that is deemed permissible or not. These rules are backed by punishment. Punishments also known as sanctions could be in form of custodial sentences, fines or remedies such as payment of damages

The following are the sources of law in Zambia:

1. The Constitution of Zambia
2. Customary law
3. Statutory instruments.
4. Common law
5. Judicial precedents *( ratio decisis)*
6. Acts of Parliament
7. By laws

**1.2 THE CONSTITUTION OF ZAMBIA**

The constitution of Zambia is the supreme law of the land. This means that any other law is subordinate to it. If any other law is found to be inconsistent with the constitution that other law must be struck down by the courts to the extent of its inconsistence by the courts.

The constitution of Zambia is concrete; it cannot easily be changed by Parliament. Take for instance, the Bill of Rights also known as Human Rights part of the constitution can only be changed by Zambians themselves by way of a Referendum. It would therefore be asserted that the Zambian constitution is protected.

**1.3 CUSTOMARY LAW**

This form of law is derived from the traditions, and other norms of our society. For example one may choose to contract marriage under customary law which is potentially polygamous. The bulk of this law is enforced by local courts.

**1.4 STATUTORY INSTRUMENTS**

These are pieces of legislation made by line ministries in order for them to expedite their administrative functions. A typical example of how such laws could come about is when the ministry of Health, during an outbreak of cholera, proscribes the general public from having gatherings or large meetings.

**1.5 COMMON LAW**

This is law that issues from the practices and traditions of the commonwealth countries. If a lacuna is seen to exist in the Zambian laws the courts may look beyond the boundaries of the country and discover how a similar case was handled by courts in that other commonwealth country.

This practice makes the law to be applied in a uniform manner, to some extent, within the commonwealth community. In a nutshell one would aptly say that these are judicial precedents drawn from countries in the commonwealth community.

**1.6 JUDICIAL PRECEDENTS**

These are judge made laws also known as *ratio decisis.* In order for the law to be uniform courts decide cases in alike manner. Similar cases decided on by the courts become a point of reference in making future judgments.

**1.7 ACTS OF PARLIAMENT**

Acts of Parliament are also known as statutes. These are laws made by Parliament. They are introduced into Parliament for debate as private bills or government bills... These bills become part of the Zambian laws after the president has assented to them.

**1.8 BY LAWS**

These are laws made by the councils. They are only applicable within the boundaries of the respective councils. By laws are may differ from one district council to another. Take for instance some councils have passed laws within their chambers such as grain levy or anybody owning a bicycle within its jurisdiction are asked to pay levy.

In order to foster democracy these by laws are made by the representatives of the people called councillors. These are elected in the Local government elections together with the Mayors.

**1.9 COURT STRUCTURES IN ZAMBIA**

The court structure in Zambia is as follows using the bottom up approach;

Local court, small claims court, the magistrate’s court, the High court, the Appeals court, the constitution court and the Supreme Court.

The Industrial relations court has now been annexed to the High court for Zambia under the amended 2016 constitution. The Constitution court is the court that handles constitution matters.

The Supreme Court is at the apex of the judicial system though for issues concerning the constitution, the Constitution Court decisions are final. Sometime the have been attempts for the aggrieved parties to take constitutional matters to the Supreme court once not satisfied with the constitution court`s holdings.

**2.0 UNIT TWO**

**2.1 LAW OF TORT**

Tortious liabilities fall under the branch of civil law unlike criminal law. This law is private.

**LEARNING OUTCOMES**

By the end of this unit learners should be able to:

1. Distinguish the law of tort from other laws.
2. Enumerate and explain the types of torts.
3. Cite case law on various torts and explain the principle derived from them.

A tort is a civil wrong. A tort consists of the breach of duty imposed by the law. The law of the tort seeks to provide a legal remedy for the victims of certain harmful conduct. Tort duties are owed to a wide range of persons and are not dependent on any contractual obligations. The remedies for tortious liabilities are many. They range from payment of damages to restitution.

He/she who commits a tort is called a tortfeasor and he/she whom complains of harm or an apprehension of it is said to be the plaintiff. A plaintiff will usually bring an action in the courts of law against the tortfeasor.

**2.2 TYPES OF TORTS**

**2.2.1 BATTERY**

This is a physical harm caused to an individual, the harm need not be painful, and a mere bodily contact will suffice.

**2.2.2 ASSAULT**

Under English law assault is an apprehension of harm. This was illustrated in *Tuberville v Savage(1669),* where Savage said, “ Had it not been asieze I could not have taken such words from you.”

In this case the court held that the words said by Savage negated harm and accordingly Savage was not found liable for the tort of assault.

**2.2.3 VICARIOUS LIABILTY**

This is a tort imputed to an employer for the wrongful acts of an employee in the course of his duty. When an employ commits a tort while on duty both the employee and the employer will be found liable. This is because an employer is better placed financially to meet the cost of compensation or payment of damages.

Vicarious liability is a tort actionable *perse*. This means that an employer does not need to prove that he is not liable to the tort committed by the employee in the course of his/her duty.

This tort extends to other forms of relationships of a master- servant nature. This was elucidated in the case of *Reylands v Fletcher (1868)*. Where it was said that, “ if you collect a thing and keep, if that thing escapes and causes harm, the one who collected if found liable.”

**2.2.4 NEGLIGENCE**

 This is the failure to exercise the standard of care that a reasonable prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm. Negligence may connote culpable carelessness.

Negligence is a matter of risk, it is a recognisable danger of injury. It is an omission to do something useful.

Donoghue v Stevenson [1932] UKHL 100 was a landmark court decision in Scots delict law and English tort law by the House of Lords. It laid the foundation of the modern law of negligence, establishing general principles of the duty of care .

Negligence is tort is which arises from specified circumstances. Negligence involves harm caused by failing to act as a form of carelessness possibly with extenuating circumstances.

**2.2.5 DEFAMATION**

 Defamation is when one utters disparaging remarks against another before the rightful thinking members of society. There are two types of defamation. These are libel and slander.

**2.2.6 LIBEL**

This when one publishes demeaning remarks against another in the eyes of the rightful thinking members of society. This publication must be in a written form. This may be done in any form of writing such as in daily tabloids and other form of periodicals such as magazines.

For the tort of libel to succeed in the courts of law damage must be proved.

**2.2.7 SLANDER**

Slander is when one publishes disparaging remarks against another orally before the eyes of the rightful thinking members of society.

**2.2.8 EMPLOYERS LIABILITY**

This tort falls under strict liability just like vicarious liability is. This tort only applies to torts committed by employees on duty which are imputed on to an employer.

**2.2.9 FALSE IMPRISONMENT**

The tort of false imprisonment is committed when is prevented from leaving a place, room or building. For a tort of false imprisonment to succeed the restraint or confinement must be complete, thus there must be no any other way of leaving the confinement.

This scenario was properly stated in *Bird v Jones (1859),* where it was stated that for a tort of false imprisonment to succeed the restraint must be complete.

**2.3.0 MALICIOUS FALSEHOOD**

This tort arises when one is deprived of his/her pecuniary advantage. For example if Mr Mwale Wale is prevented from jumping on the plane by the hotel security officer for not having followed the checking out procedures accusing him of not having left the keys to the room he occupied, Mr Mwale may take action under the tort of malicious falsehood if it turn out that Mr Mwale had actually left the keys at the reception of the hotel.

**2.3.1 NUISANCE**

There are two types of nuisances. These are private nuisance and public nuisance

A tort of private nuisance is one where one does something to the inconvenience of another, such as playing a radio above the normal decibels.

Public nuisance is a scenario where one does something to the inconvenience of the general public, such as dumping garbage on the road.

**2.3.2 CAUSATION**

Liability of tort is dependent on making a connection between the defendant’s wrongful conduct and the damage suffered by the claimant. If the damage was caused by some other factor, the defendant will escape liability. The factual cause of the damage is established by applying the ‘but for’ test, i.e. would the damage have occurred ‘but for’ test the defendant’s tortious conduct? An example of the application of this test in the context of a claim in negligence is given as follows:

*Barnett v Chelsea & Kensington Hospital Management Committee* **(1968)**

Mr. Barnett, a night watchman, attended the defendant’s hospital in the early hours of the morning complaining of vomiting. The casualty doctor failed to examine him but instead sent a message that Mr. Barnett should see his own GP in the morning if he was still unwell. Mr. Barnett died five hours later from arsenic poisoning. The court held that, although the hospital doctor was negligent in failing to examine Mr. Barnett, the failure to take reasonable care was not the cause of his death. The evidence was that, even if Mr. Barnett had been examined, correctly diagnosed and treated, he would have died anyway.

Even if a claimant can establish a causal connection between the defendant’s tortious conduct and the damage he has suffered using the ‘but for’ test, he cannot necessarily recover his loss. The damage may be too remote a consequence of the defendant’s actions and, therefore, not the cause in law. The test for remoteness in tort derives from the decision of the Privy Council in a case known as the *Wagon Mound* (No 1) (1961).

In *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound***) (1961)**

The defendants were the charterers of a ship called the Wagon Mound. As a result of the carelessness of the defendant’s servants, a quantity of furnace oil was spilled in Sydney harbour. The oil was carried towards the claimant’s wharf where welding operations were being carried out. After receiving expert advice that the oil would not ignite on water, welding continued. However, a few days later the oil ignited when hot metal fell on a piece of cotton waste floating in the oil. The resulting fire caused extensive damage to the claimant’s wharf. The Judicial Committee of the Privy Council held that reasonable foreseeability was the proper test of remoteness of damage in tort. The court would have awarded damages for oil damage to slipways had this been claimed since such damage was a reasonably foreseeable consequence of the defendant’s negligence. However, it was not reasonably foreseeable that the oil would ignite in the circumstances which occurred and, therefore, damage caused by the fire was not recoverable.

Damage may be too remote if the chain of causation is broken by a new unforeseen act of a third person. Such an event is referred to as a *novusactusinterveniens* — a new act intervening — and its effect is to relieve the defendant of the liability for the claimant’s loss.

*Cobb v Great Western Railway (1894)*

The defendant railway had allowed a railway carriage to become overcrowded. The claimant was jostled and robbed of £89. The claimant sued the defendant to recover his loss. The court held the loss was too remote as the actions of the thief were a *novusactusinterveniens*, which broke the chain of causation.

**2.3.3 DEFENCES**

There are several defenses which are available generally to a defendant facing an action in tort. These general defenses are:

* consent
* contributory negligence
* statutory or common law justification
* necessity
* Illegality

Special defences which apply to particular torts will be considered in the context of the tort concerned.

**2.3.4 CONSENT**

Consent or assumption of risk, as it is sometimes known is a complete defence to an action in tort. Consent may arise either from an express agreement to run the risk of injury or may be implied from the claimant’s conduct. An example of express agreement is where a patient signs a consent form before an operation. If this formality were not carried out, the surgeon could be sued for trespass to the person (battery). Implied consent is often referred to as *volenti non fit injuria* (no harm is done to one who is willing). Participants in a boxing match, for example, are deemed to have consented to the intentional infliction of harm which would otherwise amount to a trespass. The defence of consent was of greater importance in the 19th century when it was used by employers to defeat claims by their employees for injuries suffered during the course of employment caused by the employer’s negligence. However, the significance of the defence in employment cases diminished greatly as a result of the decision of the House of Lords in *Smith v Baker & Sons* (1891). Their Lordships held that an employee who continued working despite knowing that he ran the risk of injury from stones falling from an overhead crane was not volenti. Consent cannot be inferred from knowledge of the risk: it must also be shown that the claimant freely and voluntarily accepted the risk. So, to establish the defence today, the defendant must prove that the claimant not only had full knowledge of the risk but also freely consented to run the risk.

*Morris v Murray* (1990)

The claimant and defendant had engaged in a prolonged drinking session before taking a flight in a light aircraft piloted by the defendant. The plane crashed, the defendant pilot was killed and the claimant was seriously injured. The Court of Appeal held that the claimant’s action against the deceased pilot’s estate was barred by volenti.

Conduct which might give rise to the defence of consent is also likely to involve contributory negligence. These days the courts are more likely to make a finding of contributory negligence which has the effect of apportioning fault between the parties, rather than consent which is a complete defence.

The defence of consent is not normally available in what are known as ‘rescue cases’. These are situations where a claimant is injured while attempting to rescue someone or something from a dangerous situation caused by the defendant’s negligence. Provided that the claimant’s actions are reasonable in the circumstances, the defences of consent and contributory negligence will not apply.

*Haynes v Harwood* (1935)

The claimant policeman was injured trying to stop runaway horses pulling a van along a crowded street. The defendant had left the horses and van alone and a boy had caused them to bolt. It was held that the claimant could recover damages for his injuries. The defences of volenti and contributory negligence did not apply.

**2.3.5 CONTRIBUTORY NEGLIGENCE**

Before 1945 contributory negligence was a complete defence to liability in tort. However, the Law Reforms has now modified this harsh rule by providing for apportionment of blame between the claimant and defendant. Section 1(1) provides as follows:

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such an extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage.

The effect of the provision is that any award of damages may be reduced to the extent that the claimant was to blame for the injury or loss. For example, if the court assesses the claimant’s loss as £100,000, but finds that he was 25 per cent to blame for what happened, his damages will be reduced by 25 per cent and he will receive £75,000 damages. Failure to wear a seat belt is contributory negligence and can result in a 25 per cent deduction if wearing the belt would have prevented the injury, and a 15 per cent deduction if the belt would have reduced the injury *Froom v Butcher* (1975). Another illustration of the application of contributory negligence principles is provided by a recent Court of Appeal case.

*Eagle (By Her Litigation Friend) v Chambers*(2003)

The claimant (E), who was 17, sustained serious injuries when she was struck by a car driven by the defendant (C). E was walking down a dual carriageway late at night in light clothes. The road was straight and the street lighting good. E was in an emotional state and was not walking in a straight line. Bystanders and other motorists had noticed her and, being concerned for her safety, had tried to persuade her to stop. At the time of the accident C was driving at about the speed limit of 30 Kilo meters per hour. He failed a roadside breath test but when tested later at the police station he was under the limit. The trial judge found that had C exercised the standards expected of a reasonable driver, he would have seen E earlier and been able to avoid her. C had been negligent. The judge also found that E was partly to blame for the accident; she had drunk too much, was emotional and had placed herself in a dangerous position. She was 60 per cent to blame for the accident and her damages would be reduced by 60 per cent. E appealed against the judge’s finding of 60 per cent contribution. C accepted that E was not drunk and the most that could be said from the evidence was that she had probably had a drink or two. The Court of Appeal reduced the level of E’s contribution from 60 per cent to 40 per cent for the following reasons:

* A car is a potentially dangerous weapon and as a result a heavy burden of responsibility should be placed on drivers to take care. Drivers should look out for pedestrians. The road in question was in the middle of a busy seaside resort where you would expect to find pedestrians at that time of the night. The trial judge had concluded that C would not have failed to see and avoid any pedestrian, including one whose conduct could not be criticised.
* E had been careless for her own safety, justifying a finding of contributory negligence. However, it could not be said that she had been more to blame than the driver. She had not staggered or changed direction suddenly. C’s conduct was much more causatively potent than E’s behaviour.

Contributory negligence does not just apply to actions based in the tort of negligence. ‘fault’ is defined very broadly so as to include most forms of liability in tort. The only major torts for which the defence is not available are deceit and conversion.

**2.3.6 STATUTORY OR COMMON LAW JUSTIFICATION**

A person may have a good defence to an action in tort if he can show that his acts are covered by statutory authority. Police have powers of arrest, entry and search. If these powers are exercised lawfully, this would provide a good defence to an action in tort. There may also be justification at common law for tortious acts. Self- defence and chastisement of a child by a parent are both defences to the tort of trespass to the person, provided that the force used is reasonable.

**2.3.7 NECESSITY**

If a person commits a tort but only in order to prevent a greater harm from occurring, he may be able to raise the defence of necessity. The defendant must be able to show that there is an imminent threat of danger to person or property and that his actions were a reasonable response to the circumstances. Necessity was successfully raised by prison officers who forcibly fed a suffragette who was on hunger strike in *Leigh v Gladstone* (1909) and by an oil company facing an action for nuisance in respect of a discharge of oil from one of its ships into an estuary as was illustrated in *Esso Petroleum Co Ltd v Southport Corporation (1955).*

**2.3.8 ILLEGALITY**

It is a general principle of law that a person will not be able to maintain a cause of action if he has to rely on conduct which is illegal or contrary to public policy. This principle is expressed in the Latin phrase of *ex turpicausa non orituractio*. The following case is an example of how the defence of illegality applies in the law of tort.

*Thackwell v Barclays Bank*(1986)

Thackwell brought an action against the bank for conversion of a cheque to which he claimed to be entitled. The cheque represented the proceeds of fraud against a finance company in which Thackwell had been a party. The court held that Thackwell’s claim was barred by illegality. It was contrary to public policy to allow him to enjoy the proceeds of his fraud.

**2.3.9 REMEDIES**

The remedies which are generally available in respect of tortious conduct are damages and an injunction. Damages consist of a payment of money by the defendant to the claimant. Tort damages are intended to be compensatory, i.e. the aim is to put the injured party in the position he would have been in had he not sustained the wrong. In some situations the courts will award non-compensatory damages. **Nominal damages,** for example. will be awarded in respect of torts which are actionable per se, e.g. trespass to land, where the claimant cannot show that he has suffered any loss.

**2.4.0EXEMPLARY DAMAGES**

Which are designed to punish the defendant, are available only in certain special cases, e.g. where there is arbitrary, unconstitutional or oppressive action by government servants such as false imprisonment by the police.

An **injunction** is a discretionary order of the court requiring the person to cease committing a tort. There are different kinds of injunction. An interim injunction is a temporary order which can be granted pending a full trial of the action. A ***quiatimet injunction*** may be ordered before any damage is done as a preventative measure. A prohibitory injunction will stop the defendant from committing a tort, while a mandatory injunction requires the defendant to take positive steps to stop a tort from /being committed. If the defendant fails to obey the injunction, he or she will be in contempt of court and may be dealt with by way of fine or imprisonment.

**2.4.1 LIMITATION OF ACTIONS**

The right to bring legal action does not last indefinitely. The time limits within which action must be brought are covered by the Limitation Act 1980 and are as follows:

**1** An action in tort must normally be brought within six years of the date when the cause of action accrued. The period of limitation normally runs from the date when the tort was committed or when the damage occurred.

**2** An action in negligence, nuisance or breach 0f statutory duty for damages for personal injury must be brought within three years. The period of limitation runs from the date when the cause of the action accrued (i.e. the date of injury) or the date of the claimant’s knowledge that the injury was significant and that it was attributable in whole or in part to the acts or omissions which are alleged to constitute the negligence, nuisance or breach of duty. These time limits may be extended as follows:

(a) where fraud, concealment or mistake is alleged, time does not run until the claimant has discovered the fraud, concealment or mistake or could with reasonable diligence have discovered it;

(b) if the claimant is under a disability, such as minority or mental incapacity, the time limits do not start to operate until the disability is removed, i.e. in the case of a minor, on reaching the age of 18.

The Defamation law reduced the limitation period for actions in defamation and malicious falsehood from three years to one year. The court can exercise its discretion to allow a later claim if this is reasonable.

**2.4.2 SPECIFIC TORTS RELEVANT TO BUSINESS**

**NEGLIGENCE**

The tort of negligence is concerned with certain kinds of careless conduct which cause damage or loss to others. The foundations of the modern law of negligence were laid down in one of the best known cases in English law - *Donoghue v Stevenson (1932)*

*Donoghue v Stevenson*(1932)

Mrs. Donoghue and a friend visited a café in Paisley run by Mr. Minchella. The friend bought a bottle of ginger beer for Mrs. Donoghue. Mr. Minchella opened the bottle, which was made of dark opaque glass, and poured some of the ginger beer into a tumbler. Unsuspecting, Mrs. Donoghue drank the contents, but when her friend refilled the tumbler, the remains of a decomposing snail floated out. Mrs. Donoghue suffered shock and severe gastro-enteritis as a result. She could not sue Mr. Minchella for compensation for her injuries because she had not bought the ginger beer herself. So she brought an action against the manufacturer of the ginger beer, Stevenson, arguing that he had been negligent. The House of Lords held that, provided Mrs. Donoghue could prove her allegations, she would be entitled to succeed. We shall never know whether there was, in fact, a snail in the bottle because the case was settled out of court for £100.

In order to establish negligence a claimant must

**1** the defendant owed him a legal duty of care;

**2**  the defendant was in breach of this duty; and

**3** the claimant suffered injury or loss as a result of the breach.

All three elements are essential to a successful negligence claim. We shall consider each of the requirements in turn.

**2.4.3 DUTY OF CARE**

It is important to know in what circumstances one person will owe a duty of care to another. In *Donoghue v Stevenson (1932*), Lord Atkin formulated a general test for determining the existence of a duty of care which could be applied to most situations. His statement of general principle, which was to become known as the ‘neighbour’ principle, is as follows:

You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

Lord Atkin’s statement of the requirements for duty of care to exist involved two main elements: Reasonable foresight and proximity. A duty of care would be imposed if the damage was reasonably foreseeable and the relationship between the parties was sufficiently close (proximate).

The flexible nature of the ‘neighbour’ principle enabled the courts to recognise the existence of a duty of care in a variety of fact situations unless there were policy reasons for excluding it. This approach culminated in Lord Wilberforce’s now discredited two-stage test for establishing the existence of a duty of care which he propounded in *Anns v Merton London Borough Council* (1977). Stage one required courts to apply the neighbour principle by asking whether there was sufficient proximity between the parties that the harm suffered by the claimant was reasonably foreseeable. Stage two involved the courts in considering whether the duty should be restricted or limited for reasons of economic, social or public policy.

In recent years the courts have sought to place limits on the expansion of the duty of care to new situations by adopting a so-called ‘incremental’ approach. The three-stage approach to establishing a duty of care recommended in *Caparo Industries plc vDickman* (1990) requires consideration of the following questions:

* Was the harm suffered reasonably foreseeable?
* Was there a relationship of proximity between the parties?
* Is it fair, just and reasonable in all the circumstances to impose a duty of care?

 An example of the application of this approach is provided by the following case.

*John Munroe (Acrylics) Ltd v London Fire Brigade & Civil Defence Authority and Others*(1997)

Four fire engines were called out to a fire on wasteland. When they arrived, it appeared that the fire had been extinguished and, as there were no signs of fire, they left. Unfortunately, some of the debris was still smouldering. It later set alight and destroyed the claimant’s premises, which were adjacent to the wasteland. The Court of Appeal held that a fire brigade is not under a duty to answer a call nor is it under a duty to take care when it is at the scene of a fire. There was not a sufficient proximity between a fire brigade and the owners of property for a duty of care to be imposed. It was not fair, just or reasonable to impose a personal duty of care to individual occupiers.in addition to the statutory duty which was designed to benefit the public in general.

Comment. Although the courts have been reluctant to find that the emergency services, such as the fire brigade and coastguard, owe a duty of care to members of the public, in *Kent v Griffiths and Others* (2000) the Court of Appeal took the view that the ambulance service may owe a duty of care to individuals to provide a prompt service and to provide appropriate treatment during the journey to hospital.

**2.4.4 BREACH OF DUTY**

After establishing the existence of a duty of care, the claimant must show that this duty has been broken by the defendant. The test for deciding whether there has been a breach of duty is whether the defendant has failed to do what a reasonable person would have done or has done what a reasonable person would not have done. Whether the defendant’s conduct amounts to a breach of duty depends on all the circumstances of the case. The court will consider a range of factors including:

* the likelihood that damage or injury will be incurred;
* the seriousness of any damage or injury;
* the cost and ease of taking precautions;
* the social need for the activity.

It is normally the responsibility of the claimant to show that the defendant did not act reasonably, i.e. the burden of proof lies with the claimant. If the claimant is unable to present appropriate evidence, his case will fail. However, there are some situations where the only or most likely explanation of an accident is that the defendant was negligent. If this is the case, the claimant may claim res ipsa loquitur

 The facts speak for themselves. This has the effect of placing the burden of proof on the defendant who must show either how the accident occurred or that he has not been negligent. Two conditions must be satisfied for res ipsa to come into play:

**(a)** The event which caused the accident must have been within the defendant’s control; and

**(b)** The accident must be of such a nature that it would not have occurred if proper care had been taken by the defendant.

*Cassidy v Ministry of Health* (1951)

The claimant went into hospital for treatment with two stiff fingers. When he left hospital he had four stiff fingers and a useless hand. The Court of Appeal held that the defendant hospital was liable for the injuries. *Res ipsa loquitur* could be applied to assist the claimant in establishing his case. Lord Denning took the view that the claimant was entitled to say: ‘I went into hospital to be cured of two stiff fingers. I have come out with four stiff fingers and my hand is useless. That should not have happened if due care had been used. Explain it, if you can.’

**2.4.5 DAMAGE**

Finally, the claimant must show he has suffered some damage, that it has been caused by the defendant’s breach of duty and is not too remote a consequence of it. The kinds of damage which will give rise to an action in negligence are: death, personal injury, nervous shock, and damage to property and, in limited circumstances, financial loss.

**2.4.6 DEFENCES**

The defendant may raise a number of defences to an action in negligence. Consent, for example, is a complete defence and negates any liability. Contributory negligence is a partial defence and has the effect of reducing any award of damages. We will now examine in more detail the potential business liability by considering the extent of liability in tort for defective goods and services.

A consumer must establish first of all that the manufacturer owed him a duty of care. In *Donoghue v Stevenson* the House of Lords established the principle that a manufacturer owes a duty of care to all persons who are likely to come into contact with his goods:

**A**a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer’s life or property, owes a duty to the consumer to take that reasonable care.

There is no limit to the type of goods covered by the principle established in Donoghue: cases have involved goods as diverse as cars as was the case in *Herschtal v Stewart & Arden Ltd* (1940), underpants *Grant v Australian Knitting Mills* (1936) and hair dyes *Holmes v Ashford* (1950). Since 1932, the pool of potential defendants has been extended from manufacturers to cover anyone who does some work on the goods, for example a repairer. The word ‘consumer’ has been given a wide interpretation to cover anyone who is likely to be injured by the lack of care.

**UNIT THREE**

**3.0 CONRACT LAW**

**3.1 INTRODUCTION**

Business law is the body of law which governs business and commerce and is often considered as a branch of civil law and deals with both issues of private law and public law. Business law is sometimes called commercial law or mercantile law.

Generally, law governs our conduct from cradle to the grave and it influences even extends from before our birth to death.

**LEARNING OUTCOMES**

By the end of this unit learners must be able to:

1. State and explain the various types of contracts.
2. Discuss the significance of contracts in the business world.
3. Compare and contrast an Agent and role of the Principal in the contract of Agency.

A contract is an agreement between two parties enforceable by courts. A contract is initiated by an offer ( Proposal) being made by an offeror which when accepted by the offeree becomes a subsisting contract. Parties entering into a contract have to benefit after performance. This benefit is called consideration. Consideration could either be in cash or in kind. Consideration need not be adequate. The courts are not will to start suggesting as what could be befitting benefit of a party to the contract after performance, the courts will simply respect what is contained in the contract as long as the subject matter on which the contract is premised is not illegal.

**3.2 INVITATION TO TREAT**

This is a request to the general public to make an offer. An invitation to treat is not an offer in itself. An offer is made a specific individual, organisation or any firm. At times an invitation to treat may be said to be an appeal to the whole world inviting interested natural persons or juristic personality, sometimes known as artificial persons.

The foregoing was vividly espoused in *Mrs Carill vCarboric (1892) smoke ball co.*

**3.3 THE DIFFERENCE BETWEEN AN INVITATION TO TREAT AND AN OFFER**

An offer is a statement by none party of a willingness to enter into a contract on stated terms, provided that the terms are , in turn acceptable by the party or parties to whom the offer is addressed. There is generally no requirement that the offer be made in any particular form. It may be made orally, in writing or by conduct . The offer must be clear., definite and capable of acceptance. An offer must not be vague. This is clearly illustrated *in Scamellv Ouston* (1941), where the parties entered into an agreement to buy goods on hire purchase, it was held that the agreement was too vague to be enforced because there were many different types of hire purchase agreements in use. These agreements varied widely in thyeir content and was not clear as to what type hire purchase was envisaged.

An offer being a statement of intention as *in Storer v Manchester City Council* (19740), where it was said that an offer was an expression of interest and willingness to contract on certain terms, made with the intention that it it is to become binding as soon as it is accepted by the person to whom it is addressed.

at £ 900 as asked by youy.” Faceylatwer declined to sell the property later and was sued by Harvey for an alleged breach of contract. During the conduct of the case , Harvey argued that Facey `s telegram constituted an offer which Harvey had accepted when he sent a final telegram to Facey.

It was held by the Privy Council that no contract existed . The court took the view thatin the circumstance it was Harvey who had in effect made the offer and that Facey was who was in the position to decide whether to accept it or not.

On the other hand Under this objective test of agreements an apparent intention to be bound may suffice , that is the alleged offeror may be bound if his words or conduct are such as to induce a reasonable person to believe that he intended to be bound, ecven though infact he had no such intentions.

In the supply oif information as *in Harvey vFacey* (1893), Facey sent a telegram to the respondent, “will yousell us Bumper Hall Pen? Telegraph the lowest cash price.” Facey sent the following telegraph in reply , “ lowest price for Bumper Hall Pen £900.” Harvey responded by sending a further telegram which stated, “We agree to buy Bumper Hall Pen an invitation to treat is simply an expression of willingness to enter into negotiations which ,it is hoped, will lead to the conclusion of the contract at a later date.

The general rule is that a newspaper advertisement is an invitation to treat rather than an offer. *In Partridge v Crittenden*( 1953), where the appellant advertised cocks and hens for sale at a stated price. He was charged with an offence of offering for sale wild live birds contrary to the protection of birds Actof 1654.. It was held that an advertisement was an invitation to treat and not an offer.

However, there are exceptions to the rule relating advertisements as was the case in *Carill v Carbolic Smoke Ball Co*.(1893). The defendants, who were the manufacturers of carbolic smoke ball,issued an advertisement in which they offered to pay £ 100 to any person who caught influenza after having used one of their smoke balls and they deposited £ 1000 in the bank to show their good intention. The claimant caught influenza after using the smoke ball in specified manner. She sued for £100. It was held that the advertisement was not an invitation to treat but was an offer to the whole world and that a contact was made with those persons who performed the condition on the faith of the advertisement.

The display of goods in a shop window is an invitation to treat rather than a offer. The applications of this rule can be seen in the case of Pharmaceutical Society of *Great Britain V. Boots Cash Chemists*. The defendants organised their shop on a self-service basis. They were charged with a breach of Section 18(1) of the Pharmacy and Poisons Act 1933 which required that a sale be supervised by a registered Pharmacist. It was held that the sale took place at the cash desk and not when the goods were taken from the shelves; the display of the goods was simply an invitation to treat.

Since the advertisement was not itself an offer to sale goods but only an invitation to treat. In an auction sale a prospective purchaser makes a bid, he accepts the offer of a sale “without reserve” and the auctioneer, if he then puts a reserve price upon any of the lots, is liable to an action of breach of contract. But if the auctioneer were to refuse to hold any sale at all, he would not be breaking any binding promise and could not be sued. This is because a notice to hold an auction sale is an invitation to treat and not offer.In*Harris V Nickerson (1873)*  theplantiff failed to recover damages for loss suffered in travelling to the advertised place of an auction sale which was ultimately cancelled. It was held that no agreement is complete unless and until the auctioneer acknowledges the acceptance of the bid by the fall of his hammer.

**3.4 THE POSTAL RULE AND ITS EXCEPTIONS**

An acceptance by the offeree must be communicated. Even if the offeree has made up his mind to final acceptance , the agreement is not yet complete . There must be an external manifestationof assent of some word spoken or act done by the offeree or by his authorised agent which the law can regard as the communication of acceptance to the offeror. In *Felthouse v Bindley (1862)*, where Paul Felthouse wrote to his nephew offering to buy his horse and stating that “ if I hear no more I will consider the horse mine.” It was held that silence does not vitiate consent.

The postal rule is clearly illustrated in *Byrne & Co. v Leon Van Teinhoven&Co*.(1879), on 1st October Van teinhoven in Cardiff posted a letter to Byrne I Newyork offering to sell certain goods . That letter was received by Byrne on 11th October and it immediately cabled its acceptance. However, on 8th October, Van Teinhoven had posted a letter revoking its offer but this letter did not reach Teinhoven until 20th October.

It was held that a binding agreement existed between the parties as the revocation was ineffective.

There are, however exceptions to the general postal rule. It does not apply to instantaneous communications as was illustrated *in Entores v Miles Far EastCorporation (*1955). In this case Entores was a London Company which has business dealings with Miles Far East Corporation, an American Company whose agents were based in Amsterdam. Both the holding company and the Amsterdam branch had telex machines by means of which messages could be relayed from one company to the other. The message would be typed on one machine and almost instantly received on the other. Entores used this system to make an offer of purchase of certain goods. The Amsterdam agent telexed an acceptance which was received on Entores` telex in London. When the dispute arose between the parties Entores wished to serve a writ on the seller and have the matter determined in English Court.

It was held that the contract was made in England. In holding so the court applied the rule which pertains to face-to-face dealings and instantaneous communications. The rule about instantaneous communication is that the contract is only complete when the acceptance is received by the offeror and the contract is made at the place where the acceptance is received.

If the mode of acceptance is mandatory, no other method can be used. Where an offer states that it can only be accepted in a specified way, the offeror is not, in general, bound unless acceptance is made in that way. In *Howell Securities V Hughes* the widest expectation to the general rule was recognised. It was suggested that the postal rule ought not to apply where it would lead to manifest of inconvenience and absurdity.

**3.5 ESSENTIALS OF A CONTRACT**

Essentials of a contract are also known as elements of a contract. The following are the essential of a contract:

1. **ACCEPTANCE**

Acceptance is when an offer is accepted by an offeree. However, it must be noted that acceptance must be communicated. In communicating acceptance the Postal Rule may apply or the instantaneous method as is the case with acceptance being communicated on phone .

When the postal Rule is applied it is submitted that acceptance takes place immediately the letter of acceptance is posted. On the other continuum in instantaneous communication acceptance takes place immediately the offeree makes a phone call expressing acceptance.

1. **CONSDERATION**

The parties must show that their agreement is part of a bargain; each side must promise to give or do something for the other.

1. **INTENTION**

The law will not concern itself with purely domestic or social arrangements. The parties must have intended their agreement to have legal consequences.

1. **FORM**

In some cases certain formalities must be observed. The contract may take the form of written orally done.

1. **CAPACITY**

The parties must legally capable of entering into a contract. For example minors have no capacity to enter into binding a contract except for contract of necessaries.

1. **GENUINESSES OF CONSENT**
2. The agreement must have been entered into freely involving the “the meeting of the mind”.
3. **LEGALITY**

The purpose of the contract must not be illegal or contrary to the public policy

.

A contract which possesses all these requirements is said to be valid . If one of the parties fails to live up to his/ her promises, hat part may be sued for breach of contract. The absence of an essential element may render the contract void or voidable.

**3.6 VOID CONTRACTS**

Void contract means that the contract never existed from the start. All moneys or goods obtained under the agreement must be returned. Where items have been sold to a third part must be recovered. A contract may be rendered void for example by some form of mistake.

**3.7 VOIDABLE CONTRACTS**

Contracts entered into through misrepresentation including some agreements entered into with minors are voidable. The contract may operate in every aspect as a valid contract unless and until one of the parties takes steps to avoid it. Items received under the contract cannot be reclaimed.

**3.8 TYPES BOFCONTRACTS**

**3.8.1 CONTRACT OF BAILMENT**

This is contract entered into by the bailor and the bailee. If one takes his drapery to the laundry for cleaning purposes, the owner of the drapery shall be called the bailee while the owner of the laundry shall be called the bailor.

It is expected that the bailee will get back his/her drapery without any damage. Should any damage be made such damage must be made good of.

**3.8.2 QUASI CONTRACTS**

This is a contract where one part to a contract is perceived to be benefiting more than the other part.

**3.8.3 CONTRACTS FOR THE SUPPLY OF GOODS**

The most common form of transactions in the business world is a contract for the sale of goods. The goods could be bought from a supermarket or from a retail shop they all result in a contract of supply of goods. The supply of goods is regulated by the sale goods Act. The supply of goods could either be on cash, credit or on barter system basis.

The contract of sale of goods is governed by the English sale of goods Act 1893 and common law. The sale of goods Act was received in the Zambian legal system as an English Act through the application of the English law (Extent of application) Act.

THE Act defines the contract of sale of goods . Section1 (i) of the Act provides that a contract of sale of goods is a contract where by the seller transfers or agrees to transfer the property in the goods to the buyer for money consideration called the price. Just like in any other contract , the contract of sale of goods for it to be valid , there must be an offer, acceptance, consideration, and intention for the parties to contract or to enter into a legal relationship. MumbaMalila articulates, “ a contract of sale of goods must satisfy certain minimum requirements if it is to be recognised as a contract and enforced as such. There must be an offer and acceptance, sufficient consideration and intention to enter into legal relations.”

The statutory definition of contract of sale recognises four basic ingridients in any contract of sale.

. it is a contract between a seller and a buyer

.the subject matter of the contract must be goods

. the purpose of the contract must be to transfer the property in the goods

. the transfer of the property i9n the goods must be for a consideration called the price.

**3.8.4 EMLOYMENT CONTRACTS**

These are contracts concluded by an employee and employer giving rise to a master- servant relationship. These type of contracts are also known as contracts of service distinct from contracts for service which is a company to company relationship and it does not create master – servant relationship.

**3.8.5 CONTRACTS OF AGENCY**

An agent is someone who is employed by a principal to make contracts on his behalf with third parties. An employee who makes contracts on behalf of his of his employer is acting as an agent. A shop assistant, for example, is in this category. Alternatively, an agent may be an independent contractor who is engaged for his specialist skills and knowledge. A person who wishes to sell his shares will usually employ the services of a stockbroker to arrange the sale for him. Travel agents, estate agents, auctioneers, insurance brokers are all examples of agents. An agent may fall into one or more of the following categories:

1. **GENERAL AGENT**

A general agenthas the power to act for his principal in relation to particular kinds of transaction, e.g. an estate agent.

1. **SPECIAL AGENTS**

A special agentis limited to acting for the principle in respect of one specific transaction.

1. **MERCANTILE AGENT**

A mercantile agentor factor is defined as an “agent having in the customary course of his business as such agent authority either to sell goods or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods.

1. **DEL CREDERE AGENT**

A *delcredere*agentis an agent who, in return for extra commission, guarantees that if the third party he has introduced fails to pay for goods received, the agent will indemnify the principle.

The reward for this type of an agent is the commission that he receives known as delcredre commission.

**3.8.6 CONTRACTS CONCERNING LAND**

Every business man must consider where he will locate his operations. A sole trader, such as a painter and a decorator, may find that he can work successfully from home. In many cases, however, the nature of the business or the size of the operation will mean that separate premises have to be found. One of the decisions that must be taken is whether to buy or rent.

Transactions relating to land are governed primarily by the Law of Property Act 1925

**3.8.7 MORTGAGES**

A mortgage is a method of borrowing money on the security of some property. The borrower (mortgagor) transfers an interest in the property to the lender (mortgagee): the lender may realise this interest if the loan is not repaid. Any kind of property (land, goods, and insurance policies) may be subject of a mortgage but, in practice, most mortgage advances are secured on land.

**3.8.8 INSURANCE CONTRACTS**

Insurance is the pooling of economic risks. This is where an insurance company, herein, called the insurer undertakes to indemnify the insured in exchange for a sum of money called premium**.**

A prudent businessman wills always asses the risks that might befall his business: he may fall ill, his premises might be destroyed by fire, or his stock stolen. These risks may be minimised by insurance. A contract of insurance is an agreement whereby an insurance company undertakes to compensate a person, called the insured, if the risk insured against does in fact occur. The insured will be required to complete a proposal form. The contract is formed when the insurer accepts the proposal. Insurance contracts are contracts of utmost good faith (*uberrimaefidei)*. This means that the insured must voluntarily disclose all relevant information which may affect the insurer`s decision to insure or the premium that will be charged. Failure to do so, however innocent, will allow the insurer to avoid the contract. The financial services industry is subject to a system of regulation under the FinancialServices Ac**t** 1986 and the Financial Services and Makers act 2000.

**3.8.9 STANDARD FORM CONTRACTS**

Whatever the nature of a contract, the law is based on the assumption that the terms of an individual contract are the result of bargaining between equals. It has long been the case, however, that businesses contract on the basis of standard terms contained in a pre-printed document known as a standard form contract. The terms are not usually open to negotiation: the customer must either accept them in their entirety as part and parcel of the deal or take his business elsewhere. The use of standard form contracts has several clear advantages for business:

1. If the terms of the contract are contained in a written document, the parties will be quite clear about what they have agreed to and this likely to minimise the possibility of disputes at a later stage.
2. It would be very time-consuming to negotiate individual terms with every customer, especially where a fairly standard service is offered to a large number of people. For example, train services would soon come to a standstill if every intending passenger had to negotiate an individual contract before setting out a journey.
3. Once an organisation has adopted standard terms of business, the formation of a contract becomes a relatively routine matter which can be delegated to junior staff.
4. Businesspeople are constantly seeking ways to minimise potential risks. A standard form contract can be used to “dictate” terms which will be favourable to the businessperson. He may include, for example, limitation or exclusion clauses which seek to limit or exempt him completely from liabilities which might otherwise be his responsibility

The use of standard form contracts may be convenient and economical for businessman, but it puts his customers at a considerable disadvantage. The drawbacks are as follows:

1. Standard terms of business are often expressed in language which is virtually unintelligible to most people. A consumer may find himself bound by a contact even though he did not properly understand what had been “agreed”. In some cases, the document may be so awe-inspiring that it is not read at all.
2. The concept of freedom of contract, on which the law contract is founded, would seem to suggest that if the terms contained in a standard form contract are unacceptable, the customer can simply shop around for a better deal. This may well happen in a competitive market where the parties possess equal bargaining powers, but, in practice rarely contract as equals. Consumers, in particular, have found themselves in a weak bargaining position, victims of very one-sided contracts. In recent years, Parliament has stepped in to redress the balance in such measures as the Unfair Contract terms .

**UNIT FOUR**

**4.0 SOLE TRADER AND PARTNERSHIP BUSINESSES**

**4.1 INTRODUCTION**

The law recognises the different types of businesses that exist all over the world. For the purposes of this unit we shall discuss sole trader and partnership types of businesses.

**LEARNING OUTCOMES**

By the end of this unit learners should be able to:

1. State the law that regulates both the sole trader type of business and that of a partnership business.
2. Distinguish between sole trader business and partnership business.
3. Discuss the circumstances under which partnership business may be dissolved.

**4.2 SOLETRADER BUSINESSES**

A sole trader is a businessman who registers and runs business on his owner. He contributes capital to the business and enjoys the profit alone. Sole traders businesses are registered under the Business Names Act NO 16 of 2011. This followed the repeal of the Business Names Act CAP 389 of the laws of Zambia.

This type of business is limited in scope and size. Expansion of such businesses is limited because of limited capital. The liability of the owner of the business is unlimited and therefore may lose his personal assets should the business close at the time its owing its customers. The customers may petition to recover the money owed to them.

Borrowing from financial institutions in order to expand the business may not be easy as the proprietor of the busin3ss may not be in possession of high value assets to serve as collateral security in the borrowing process.

**4.3 PARTNERSHIP BUSINESSES**

A partnershipbusiness is where two or more people come together to run a business in common. It may also be said to be an association of persons who contribute money to the common stock and share profits and losses arising there from. A partnership business is registered under the Business Names Registration Act NO 16 0f 2011. It is also regulated by the Partnership Act of 1890 inherited from our colonial master, Britain.

Partnership businesses have chances of expansion because they can borrow from financial institutions. This is because one or more partners may have limited liability. The partnership may also have more assets to enable them save as collateral security.

Partnership businesses may come to an end under various circumstances.

**4.4 INSOLVENCY**

This where the firm acquires more liabilities than the assets it has. This situation makes it difficult for the firm to meet its running costs. This in turn results into a closure of the business.

**4.5 LUNACY**

If one of the partners to the business becomes mentally unsound or develops a disease of the mind the partnership may dissolve.

**4.6 DISHONEST.**

If there is a misunderstanding between partners the aggrieved partners may apply the court to have the partnership dissolved.

**4.7 WINDING UP OF BUSINESS**

## Some partnerships are formed to undertake a project. Once the project comes to an end the partnership also dissolves.

## **4.8 TYPES OF PARTNERS**

Here we will look at six types of partners we come across on a regular basis. This list is not exhaustive, the Partnership Act does not restrict any unique [kind of partnership](https://www.toppr.com/guides/business-laws/the-indian-partnership-act/kinds-of-partnership/)that the partners want to define for themselves. Let us take a look at some of the important [types of partners](https://www.toppr.com/guides/business-laws/the-indian-partnership-act/types-of-partners/).

**ACTIVE PARTNER/MANAGING PARTNER**

An active partner is also known as Ostensible Partner. As the name suggests he takes active participation in the firm and the running of the [business](https://www.toppr.com/guides/business-studies/nature-and-purpose-of-business/concept-and-characteristics-of-business/). He carries on the daily business on behalf of all the partners. This means he acts as an [agent](https://www.toppr.com/guides/business-laws-cs/indian-contract-act-1872/classes-of-agents/) of all the other partners on a day to day basis and with regards to all ordinary business of the [firm](https://www.toppr.com/guides/business-laws-cs/indian-partnership-act/goodwill-of-a-firm/).

Hence when an active partner wishes to [retire](https://www.toppr.com/guides/principles-and-practices-of-accounting/retirement-of-a-partner/final-payment-to-retiring-partner/)from the firm he must give a public notice about the same. This will absolve him of the acts done by other partners after his retirement. Unless he gives a public notice he will be liable for all acts even after his [retirement.](https://www.toppr.com/guides/principles-and-practice-of-accounting/retirement-of-a-partner/)

**DORMANT/SLEEPING PARTNER**

This is a partner that does not participate in the daily functioning of the [partnership firm](https://www.toppr.com/guides/accountancy/dissolution-of-partnership-firm/), i.e. he does not take an active part in the daily activities of the firm. He is however bound by the action of all the other partners.

He will continue to share the [profits and losses](https://www.toppr.com/guides/accountancy/accounting-for-partnership/distribution-of-profit-among-partners/) of the firm and even bring in his share of [capital](https://www.toppr.com/guides/principles-and-practices-of-accounting/introduction-to-partnership-accounting/capital-accounts-fixed-and-fluctuating) like any other partner. If such a dormant partner retires he need not give a public notice of the same

.

 **NOMINAL PARTNER**

This is a partner that does not have any real or significant [interest](https://www.toppr.com/guides/quantitative-aptitude/si-and-ci/simple-interest/) in the partnership. So, in essence, he is only lending his name to the partnership. He will not make any capital contributions to the firm, and so he will not have a share in the profits either. But the nominal partner will be liable to outsiders and third parties for acts done by any other partners.

**PARTNER BY ESTOPPEL**

If a person holds out to another that he is a partner of the firm, either by his words, actions or conduct then such a partner cannot deny that he is not a partner. This basically means that even though such a person is not a partner he has represented himself as such, and so he becomes partner by estoppel or partner by holding out.

**PARTNER IN PROFITS ONLY**

This partner will only share the profits of the firm, he will not be liable for any liabilities. Even when dealing with third parties he will be liable for all acts of profit only, he will share none of the liabilities.

 **MINOR PARTNER**

A minor cannot be a partner of a firm according to the contractAct. However, a partner can be admitted to the benefits of a partnership if all partner gives their consent for the same. He will share profits of the firm but his liability for the losses will be limited to his share in the firm.

Such a minor partner on attaining majority (becoming 18 years of age) has six months to decide if he wishes to become a partner of the firm. He must then declare his decision via a public notice. So whether he continues as a partner or decides to retire, in both cases he will have to issue a public notice.

**UNIT FIVE**

**5.0 COMPANIES**

**5.1 INTRODUCTION**

Companies are the most preferred forms of businesses. Whether private companies or public companies, companies have been known to be the engine of economic growth.

**LEARNING OUTCOMES**

By the end of the unit learners should be able to:

a)Justify the role of the directors in a company.

b) Discuss the duty of care skill and diligence and fiduciary duty of directors.

c) Explain the role of good corporate governance in the corporate world.

**5.2 A COMPANY**

A company in Zambia is incorporated under the Companies Act NO 10 of 2017. This Act replaced the Companies Act, CAP 388 of the laws of Zambia. An Act to promote the development of the economy byencouraging entrepreneurship, enterprise efficiency,flexibility and simplicity in the formation andmaintenanceof companies; provide for the incorporation,categorization, management and administration of different types of companies; provide the procedure for the approval of company names, change of name and conversion of companies; provide for shareholders‘ rights and obligations, the conduct of meetings and the passing of resolutions by shareholders; to encourage transparency and high standards of corporate governance by providing for the functions and obligations of company secretaries and directors; provide for issue of shares, share capital requirements, procedures for alteration and reduction of share capital and disclosure requirements of companies; provide for the public issue of shares, the issue and registration of charges and debentures; incorporate financial reporting provisions, maintenance of accounting records, and access to financial information of companies;provide for amalgamations; provide for the registration of foreign companies doing business in Zambia; providefor the deregistration of companies; repeal and replace the Companies Act, 1994; and provide for mattersconnected with or incidental to the foregoing

A company is an artificial person with perpetual existence. A company is separate from its shareholders. It has a separate legal entity, it can sue be sued in its own name. This was vividly espoused in *Salamon v Salamon and Co (1897).*

A company is made up members called shareholders. These shareholders make decisions during Annual General Meeting through their resolutions. At times they hold Extra ordinary General Meetings when need arises

.

**5.3 ARTICLES OF ASSOCIATION**

At the time of registering the company, theconstitution of the company known as the articles of Association are deposited with the registrar of companies at PACRA.

In the Zambian company law the memorandum of Association has been outlawed in the sense that the contents of the memorandum o Association have been fused in the Articles of Association.

The articles of association also serves as a contract between shareholders a between shareholders and the company itself.

**5.4 REGISTERED SHARE CAPITAL**

At the time of incorporation the company will state in its Articles the capital with which they wish to register the company. Registered share capital is also known as nominal capital or authorised share capital.

**5.5 PROSPECTUS**

Public companies upon incorporation will require to furnish the Registrar of companies with the prospectus. This document shows the number of share on issue and their nominal values. This will include the type of shares being issued such as preference share capital, ordinary share capital, founder members share capital among others.

**5.6 BOARD STRUCTURES**

In a two tier board structure there are two types of directors. These are the non-Executive directors and the Executive director. The executive directors are responsible for the day to day operations of the company. The non- executive directors provides checks and balance to the Executive directors by supervising them and making them account for their actions.

Unlike in the two tier board structure the one tier board structure has only one set of directors. This is usually applicable to small usually privately owned companies.

Due to the fact that directors are the directing and controlling mid of the company. They are expected to observe the two duties put before them by law.

**5.7 FIDUCIARY DUTIES OF DIRECTORS**

This a duty of a director to act in good faith when making decisions on behalf of the company. The law under this duty proscribes directors from seizing business opportunities duty to the company.

**5.8 DUTY OFDIRECTORS OF CARE, SKILL AND DILIGENCE**

This duty of care, skill, and diligence must be observed by all directors. It is expected that when a director is making a decision on behalf of the company will make it with care. However the directors’ abilities will not be expected to be higher than his qualifications.

Directors may act based on the information from an expert employee of the company. A decision may be made on to use the available finance on advice from the Chief Accountant. Directors are brought on board because of business acumen.

UNIT SIX

**6.0 INTELLECTUAL PROPERTY**

Prior to 2010 Zambia did not have a piece of legislation of her own to regulate patent rights, trade marks, industrial inventions, folklore and other forms of intellectual creations. The country has now piece of registration under Patents and Companies Registration Agency (PACRA).

**LEARNING OUTCOMES**

By the end of the unit learners should be able to:

1. Appreciate the role intellectual property plays in enhancing wealth creation in the country.
2. Identify businesses that fall under intellectual property law

Intellectual Property is an interesting issue for a number of reasons. Some do not understand what it means; others do not understand their rights, whilst others claim anything to do with Intellectual Property is irrelevant in Zambia as there is nothing you can do to protect and enforce laws concerning it.   Whilst the law is fairly complex covering a multitude of areas, it can be possible to understand what intellectual property means, what your rights are and how your intellectual property can be protected and the best way to go about enforcing the law. According to World Intellectual Property Organization (WIPO), Intellectual property, known as IP, refers to creations of the mind – inventions, literary and artistic works, and symbols, names, images and designs used in commerce. IP is divided in to two categories – industrial property; which includes inventions (patents), trademarks, industrial designs and geographic indicators of source; and Copyright, which includes literary and artistic works such as novels, poems and plays, films and musical works, artistic works such as drawings, paintings, photographs and sculptures, and architectural designs. These are handled by the Patents & Companies Registration Agency (PACRA). Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs.

  These are handled by the Copy- right Administration department of the Ministry of Information and Broadcasting Services. A patent is an exclusive right granted for an invention, which is a product or a manufacturing process which provides a new way of doing something, or offers a new technical solution to a problem. A patent is something which is new, novel and involves an inventive step. It provides protection for the invention to the owner of the patent for a limited period, generally 20 years. An industrial design is the unique aesthetic property of an article, like the shapes of things like a model of a vehicle. The design to be protected must not be related to the usage of the item, like the handle of a mug for example. The Coca Cola bottle is a classic example of an industrial design. It can also be classified as a copyright. Registration and renewals typically provide protection for 15 years.

  Most patents and industrial designs in Zambia are registered by international companies, but there have been a lot of submissions by the School of Natural Sciences at UNZA, who have registered things like agricultural products and chemicals. Some submissions by UNZA fall under the protection of genetic resources which can include types of seeds for particular crops which can only be found in Zambia. A geographical indication is used on goods that have a specific geographical origin and often possess qualities or a reputation that are due to that place of origin. One example of this could be Mwinilunga Pineapples. Trade Secrets is protected information which is not generally known or readily accessible , has commercial value because it is secret and proof can be given that reasonable steps have been taken by owners of the secret to protect its secrecy. The recipe for Coca Cola could be another good example of this. Steps are being taken to recognize service marks, which identifies certain services and can be applicable in the insurance, finance and airline industries for example.   Efforts are also being made globally to protect traditional knowledge and cultural expressions of folklore. The Maasai tribe in Kenya and Tanzania have founded the Maasai Intellectual Property Initiative. The Maasai name, image and reputation are used around the world on products ranging from cars to shoes, and exercise equipment and is worth billions of dollars. The in- come from Maasai IP is gained by companies across the globe with- out their permission, whilst around 80% of the tribe lives in poverty. The aims of the Maasai Intellectual Property initiative are to protect the culture, images and Intellectual Property of the Maasai, to regain control over their cultural brand, to return and improve income for the Maasai people, to represent the tribe in a dignified manner, to improve cultural awareness concerning IP rights, to educate the Maasai about their IP rights and to distribute income fairly when it is received. Estimates value the Maasai brand as worth more than $10m USD per year. The Navajo in the US and the Aborigines in Australia have had some success in the past when it comes to defending their intellectual property.   This can have wide reaching implications for other tribes in Zambia. A community must be able to prove that their expression or cultural invention has been passed down from generation to generation. Items relevant to PACRA have to be registered with them. 8 months is the average waiting period for something to be approved. Searches for protected material can be done at PACRA offices in Lusaka, Livingstone, Kitwe and Chipata and an automated search can be done through IPAS (intellectual Property Automated Services). If you have something registered, it is best first to approach the offending party and if things are not resolved to your satisfaction, it is best to seek legal advice and pursue the matter in court if necessary. Copyright is an issue which tends to receive more press coverage in Zambia. This is handled by the Copyright Administration Unit at the Ministry of Information and Broadcasting Services. Copyright describes rights given to creators for literary and artistic works (including computer software). Related rights are granted to performing artists, producers of sound recordings and broadcasting organizations in their radio and television programs. One area in which many in Zambia feel they lose out on is through the disclosure of ideas through business proposals. If you have disclosed ideas without first protecting yourself you are leaving yourself vulnerable. The best way to protect yourself in such circumstances is first by signing a non-disclosure agreement with the party you are disclosing the information to. It is also good to limit the amount of people that are exposed to certain information and write-in non-disclosure clauses within employment contracts.   In terms of copyright, the best and easiest way to protect a copyright is by posting a date stamped letter to yourself through the Post Office containing the copyrighted works. This letter must remain sealed until an infringement has been spotted and your legal advisors ask you to open it. Copyrights can also be registered with the Ministry of Information or at a Commissioner of Oaths. Arbitration can be provided through ZAMCOPS for issues relating to musical copyright infringement or the IP Unit under Zambia Police. The two areas that have received the most publicity in Zambia have been in the exploitation of audio visual works through piracy and the use of audio visual work by corporations without permission. Official audio visual works will now contain holograms and any audio visual works for retail not containing this hologram will now be destroyed.

  Counterfeit goods are also an issue which frequently crops up in the media. When counterfeiting has been suspected brand owners will typically go to the Police first and the offending party will usually settle out of court. The biggest challenge is that the producers of counterfeit materials are typically overseas and it can be difficult to trace them. A lot of commitment is required by the brad owners to see the process through. Samsung is one such brand that showed its commitment in this respect. There was a time when there were a lot of cheap knock-offs in the market place and sales were greatly affected as a result. Consumers should ask themselves the question, “why is this item so cheap?”, says Kingsley Nkonde, the Managing Director of CyCorp, a private investigation firm that assisted Samsung and Zambia Police with their investigation in to counterfeit items, resulting in the destruction of thousands of fake items. Counterfeiting normally occurs when a product is relatively new to the market place, so consumers should seek as much information as possible about that product before making a purchase. Nkonde says, “More can also be done in terms of educating ZRA to stop these items from entering the country in the first place.”   The public can play a big role in sharing information to their fellow consumers about genuine items and can highlight cases to the authorities of where they suspect fake items on the market. Brand owners and retailers should also remain vigilant. All in all, intellectual property is a complex field and for those wanting to protect themselves, they should seek additional advice from PACRA and the Ministry of Information and Broadcasting Services

UNIT SEVEN

**7.0 BENEFITS OF REGISTERING BUSINESSES WITH PACRA**

**INTRODUCTION**

Formalization of a business through registration, is critical for the business community and the nation and the patents and Companies Registration Agency (PACRA) is making easy and affordable.PACRA is mandated to register and regulate businesses and industrial property through patents, trademarks and industrial designs. Two types of business registration are available.

LEARNING OUTCOMES

By the end of the unit learners should be able to:

1. Enumerate a number of undertakings that that PACRA is involved in with a view of growing the Zambian economy.
2. List down the various avenues available for an individual or individuals to engage in a business in Zambia.

Business name registration and company incorporation. A business name is an unincorporated entity lacking legal personality meaning the proprietor(s)’ liability is unlimited. A business name could be a sole trader or partnership between incorporated orunincorporated entities. A company is a legal entity which enjoys legal personality separate from that of the shareholders. The liability of shareholders is limited to the amount unpaid on the shares allotted to them.

A business registration system is critical in fostering orderly trade It ensures businesses do not operate under names which are confusingly similar or misleading, are traceable and therefore better regulated. It makes it possible for business related information to be accessed from one central location. One of the core functions of PACRA is to serve as a repository of business information. This includes particulars of businesses including shareholders or proprietors,  registered offices and places of business. Records kept at the registry are updated through various returns lodged. Several benefits accrue from business registration at firm, sector and national level. It is a legal requirement under the Registration of Business Names Act for a business carried out under a name other than that of the proprietor(s) of the business to be registered. Failure to do so is a criminal offence which may result in one year’s imprisonment. Registration of a business confers exclusive rights to the name under which a business operates.

A business can invest in a name and build goodwill and reputation assured that it has legal rights and protection of this name. PACRA takes care to ensure that names approved for registration are distinct to avoid free-riding by other  enterprises. Business formalization facilitates access to tenders. Only registered businesses can participate in Government tenders under the Zambia Public Procurement Authority (ZPPA). Businesses should be up-to-date with the filing of annual returns. Sector regulators, local authorities and well-established private sector organisations will typically only deal with formal businesses. Formalization is critical in accessing business development services. Financial and lending institutions will only deal with formal businesses. A registered business is more likely to obtain a loan or secure funding from the Citizens Economic Empowerment Commission (CEEC). Registration represents good corporate governance. If a business violates the law by operating without registration, it is unlikely to respect other laws and obligations. The state benefits through easy taxation of formal businesses.

Registering a business in Zambia is now easy thanks interventions by PACRA. PACRA has decentralized its services to all provincial capitals bar Kabwe and has eased and reduced the costs associated with registration. PACRA has entered into strategic partnerships with local authorities and employs them as service points. Applicants for business registration can now lodge applications and collect certificates through respective local authorities. PACRA has embraced information technology and introduced an on-line name availability search facility. Applicants for business registration can enquire electronically on the availability of a proposed name. This facility is accessible via the website www.onlinepacra.org.zm. PACRA is in the process of establishing a call center to ensure timely and effective handling of customer queries and digitizing business records to convert them from paper to electronic.

PACRA is spearheading the review of the Companies Act to strengthen corporate governance, align it with relevant laws, simplify registration procedures and create a platform for modernization. Provisions relating to receiver-ships and liquidations will be removed from the Companies Act and merged with personal bankruptcy provisions in a separate statute; the Insolvency Act. The Insolvency Act will provide for rescue of financially troubled companies whilst strengthening the regulation of insolvency practitioners. For those going into business, there are two options available; business name registration or company incorporation.

UNIT EIGHT

**8.0 CORE PRINCIPLES OF GOOD CORPORATE GOVERNANCE**

**INTRODUCTION**

The core principles of good corporate governance are the good practices expected of staff tasked with the management of business entities. These good practices in corporate governance enhance the profitability and viability of businesses and consequently growing the economy of the nation.

**LEARNING OUTCOMES**

By the end of the unit learners must be able to:

1. Illustrate the seven ( 7) principle of good corporate governance
2. Demonstrate that good governance permeates across the whole spectrum of governance

**8.1 ACCOUNTABILITY**

This is the process of being answerable. The shareholders, the directors, managers and workers of the company have a duty to account. The shareholders have a duty to account to the community in which a company exists through their resolutions during Annual Meetings and Extra Ordinary Meetings. The Directors must account to the shareholders. Managers account to the directors. Workers are expected to account to the managers. The shareholders, directors and managers and workers are answerable in the way they utilize the resources of the company. Directors, for example, have great powers as such the company law and some ways of making them accountable must be put in place.The board of directors, which is the collective action of directors, is the controlling mind of the company. The powers to manage companies are vested in the board of directors to the extent that the general meeting may not interfere with their exercise, except by removing the board or by enforcing the duties which are imposed on the directors. This power invested in the board of directors is subject to abuse if not checked.

**SHAREHOLDERS**

Shareholders have to account for their actions arising from their resolutions in their Annual General Meetings. The ‘proper principle rule’ which was laid down in *Foss V Harbottle*that any wrong done the proper claimant is the company itself and that the company can convene an Extra Ordinary Meeting to ratify the wrong. This case also stresses the essence of the majority rule.’ The proper principle rule and the majority are not absolute.

In *Edwards v. Halliwell* It was said that an aggrieved individual shareholder could bring an action against the decision of the majority shareholders to hold them to account in certain cases

In *Cook v. Deeks* the directors who were also the majority shareholders were involved in a fraud involving land belonging to a company. The minority shareholders took action and succeeded. It is said that equity will never permit a wrong suffered without a remedy.

**MANAGERS AND WORKERS**

Managers and workers as employees must be held to account for their actions in relation to their duties. This then requires that an employer avails her employees with a written statement of the terms of his employment. This may include any collective agreements directly affecting the terms and conditions of employment. Failure to account may lead to a dismissal. These statements are taken into account by courts and tribunals.

Impliedly terms in collective agreements may be incorporated into contracts of employment. In *Joel V. Cammell Laird Ship Repairers Ltd* a collective agreement related to transfers of employees between ship repair and ship building. It was held to be incorporated into the contract of employment because the employee concerned had indicated that they were aware of the provisions.

In *Roberson v. British Gas* meter readers and collectors employed by North Thames Gas received an incentive bonus of about £400 per month. The scheme was negotiated by their union and was referred to in the written statement of terms of each employee. Management gave the union six months’ notice to terminate the agreement. The union successfully argued in the Appeal Court that it was a breachOf contract. From the foregoing it would be aptly deduced that shareholders, directors, managers and workers have a duty to account.

**8.2DISCIPLINE**

This is a system of control gained by enforcing compliance. Persons managing the company must exhibit good behaviour.

It would be indiscipline for the officers of the company such as directors to buy and sell shares while in possession of information which will affect the price of the shares and which other members or the public generally are not privy.

The law proscribes insider dealing for example, in Zambia “a person who deals, or counsels insider trading or procures another person to deal, in securities of a company concerning which he has any knowledge that-

1. Is not publicly available; and
2. Would, if it were publicly available, materially affect the price of the securities, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding five years or both.

**8.3FAIRNESS**

The managers of a company must assume a balanced approach in all their actions. For instance remuneration offered to workers by the board of directors should be sufficient to attract, retain and motivate quality staff. The implication is that the company through its board of directors should not only consider the profit motive of the company but also remunerate its staff adequate

**8.4INDEPENDENCE**

Independence is the concept which advances the notion of not being a subject to the control or influence of another. A company must be able to exist on its own. If independence of a company is not real and genius then the company becomes a mask through which other people or organizations operate business.

**8.5RESPONSIBILITY**

The management of the organization must do things correctly. If they fail to operate responsibly sanctions must be meted out.

The development and implementation of an adequate and sound system of internal controls are the responsibility of senior management. The board of directors is ultimately responsible for ensuring that such a system is established, implemented and maintained.

The audit committee shall ensure that the institution complies with regulatory requirements, including prudential requirements, taxation rules and various reporting obligations. The corporate governance framework shall include systems for ensuring that all statutory and regulatory requirements are being coupled with and to highlight potential or actual breaches as and when they occur.

The board shall review at least annually the system of internal controls to determine whether it works to expectations and to ensure it remain appropriate.

**8.6SOCIAL RESPONSIBILITY**

Social responsibility as a principle of good corporate governance is premised on the need for an organization to identify social issues and respond to them. This include the monitoring of the company’s activities having regard to any relevant legislation, other legal requirements or prevailing codes of best practice, pertaining to good corporate citizenship, in respect of equality, community contribution, donations and charity.

Furthermore, this principle of good corporate governance fosters consumer relationships, public relations and compliance with consumer protection laws.

**8.7 TRANSPARENCY**

Those who are vested with power to manage organizations must do so with an open door policy. They must disclose all material facts that would adversely affect those that have connections with that organization.

Transparency is paramount for sound and effective corporate governance. It advocates for accurate disclosures in the annual reports.

Transparency requires that inter alia the director should ensure that the annual accounts of the company are audited by an independent external auditor and the auditor’s report relating to the annual accounts are approved by the shareholders at the Annual General Meeting.

It is also mandatory for the directors to prepare the ‘directors report’ at the end of the year to be tabled at the annual general meeting. In addition the company should ensure timely, reliable and relevant information is disclosed.

**8.2.0THE IMPORTANCE OF ACCOUNTABILITY AND TRANSPARENCY IN CORPORATE GOVERNANCE**

**8.2.1 INVESTMENT**

Investment is the foregoing of the consumption of goods today in order to achieve greater future consumption in the future. Investment in financial instruments is also called portfolio investments. In portfolio investment investors primarily aim at diversifying their holdings of financial investments.31Accountability and transparency if adhered to by the company could greatly enhance investment. This is because investors both local and foreign would have confidence in the way companies are run and be willing to invest.

It must be said that lack of accountability and transparency would serve as deterrence to enhanced investment. The Securities Act Chapter 354 of the Laws of Zambia, in order to encourage good corporate governance proscribes, inter alia, improper trading practices.

**8.2.2 FALSE TRADING AND MANIPULATION OF THE MARKET**

False trading and manipulation of the market is prohibited by the Act and sanctions prescribed in order to deter the would be offenders. “A person shall not create or cause to be created or do anything with the intention of creating

1. A false or misleading appearance of the volume of trading in any securities exchange; or
2. A false misleading appearance of the market for, or the price of any such

The Act further states that anyone who contravenes the Section will beguilty of an offence and shall be liable on conviction to a fine not exceeding two hundred

Thousand penalty units or to imprisonment for a term not exceeding five years or both.

**8.2.3 USE OF DECEPTIVE STATEMENTS AS INDUCEMENTS**

A person who induces or attempts to induce another person to deal in securities by making or publishing any statement, promise or forecast that he knows to be misleading, false or deceptive shall be guilty of an offence and shall be liable on conviction to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding five years or to both.

In *Scott v. Brown*the Plaintiffs deliberately asked stockbrokers to purchase a company’s shares on the market at a premium. The plaintiff’s intention was to induce the public into believing that there was a bonafide market for the shares and that the shares were trading at a genuine premium. The court held that the plaintiff’s contract with the stockbrokers was void for illegality. On appeal, Lindley J stated that “the plaintiff’s purchase was an actual purchase, not a sham purchase, that is true but it is also true that the sole object of the purchase was to cheat and mislead the public.”

 **8.2.4 FRAUDULENT TRANSACTIONS**

The Securities Act prohibits fraudulent transactions when dealing in securities. It states “A person who, directly or indirectly, in connection with any transaction with any other person involving the purchase, sale or exchange of securities –

1. employs any device, scheme or plans to defraud that other person, or
2. engages in any act, practice or course of business which operates as a fraud or deception, or is likely to operate as a fraud or deception of that other person, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding five years or both.

In *R vKylsant* the defendant was the director and controller of a company which issued a prospectus in 1927. The prospectus stated that the company had consistently paid dividends in the three to four immediately preceding years. The statement in the prospectus did not disclose the fact that the dividends were paid out of hidden revenue reserves. The court held that the defendant was liable on the basis that the statement in the prospectus was misleading by creating an impression that the company made a profit in each of the three to four immediately preceding years.

**8.2.5 FALSE OR MISLEADING STATEMENT IN CONNECTION WITH SALE OF SECURITIES**

When securities are being traded false and misleading statements are forbidden. The Act does this in order to protect innocent investors.

The Act states that “A person who, directly or indirectly , for the purpose of inducing the sale or purchase of the securities of any company, makes with respect to those securities, or with respect to the operations or the past or future performance of the company-

1. any statement which is, at the time and in light of the circumstances in which it is made, false or misleading with respect to any material fact and which he knows or has reasonable ground to believe to be false or misleading or
2. any statement which is, by reason of the omission of a material fact, rendered false or misleading and which he knows or has reasonable grounds to believe is rendered false or misleading by reason of omission of the fact, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding two hundred thousand penalty units or to imprisonment for a term not exceeding five years or to both.

This is reflective of the International Organization of Securities Commission (IOSCO) category A principles relating to the regulator’s mandate, such as Securities and Exchange Commission in Zambia, to enforce the need for those dealing in securities to always have clear and objective statement of responsibilities, operational independency and accountability.

**8.2.6 INSIDER DEALING**

Insider dealing is where an individual or organization buys or sells securities while knowingly in possession of some information of confidential nature which is not generally available and which is likely, if made available to the general public, to materially affect the price of the securities.

The Securities Act promulgates “A person to whom this section applies who deals or counsels or procures another person to deal, in securities of a company concerning which he has any knowledge that:-

1. is not publicly available and
2. would, if it were publicly available, materially affect the price of the securities shall be guilty of an offence and shall be liable on conviction to a fine not exceeding two hundred thousand penalty units or imprisonment for a term not exceeding five years or to both.

In *US v Raj Rajaratnam*Raj was a billionaire hedge fund manager from 2003 to 2009. Raj repeatedly traded on non-public information. The information was value sensitive, based on the inside information Raj traded in stocks of companies. He was charged along with various co-conspirators all of whom pled guilty. Raj was found guilty of insider dealing. He was sentenced to eleven (11) years imprisonment, fined $102.8 million and was made to forfeit $53.8 million.

Liability, therefore, can only be incurred by an insider who acts with the knowledge of inside information.

**8.2.7POWER OF INSPECTION**

The Securities and Exchange Commission, in order to enhance accountability and transparency may appoint any person to inspect books of accounts and any other relevant documents. “The Commission from time to time inspects under conditions of secrecy the bank accounts, documents and transactions of a person licensedto deal in securities. A person licensed under this part who fails, without reasonable excuse, to produce any book, accounts or documents to the inspector, or to furnish any information or afford the use of any facilities as required under the Section shall be guilty of an offence and shall be liable on conviction to a fine not exceeding one hundred thousand penalty units or to imprisonment for a term not exceeding three years or both.

**8.2.8 WEALTH CREATION**

The purpose of any Companies Act is to promote the development of a country’s economy by encouraging entrepreneurship and enterprise efficiency. It is aptly argued that the basic objective of all commercial undertakings is to create the wealth of the enterprise. The wealth must be created more efficiently.

It is, therefore, evident that accountability and transparency as core principles of good corporate governance create a conducive environment for wealth creation through increased investment from both local and foreign investment.

A drift from the best practices of corporate governance might hinder accelerated wealth creation and ultimately retard the economy of the country.

**8.2.9 RISK MANAGEMENT**

Companies should have corporate governance structures that advance effective identification, monitoring and management of material business risks. It is incumbent upon the board of directors to put in place appropriate processes that identify measure and manage potential and relevant risks. Training programs must be developed by the board to train staff responsible for risk management. The directors and senior management must also be trained in order for them to have a robust understanding of the nature of the business, the nature of the risks, the consequences of being insufficiently managed and the appreciation of the techniques for managing the risks effectively.

Risk management has become a prime aspect of business management and governance has a role to play in this because a full understanding of such governance and its implications can reduce risks.

In dealing with a risk there are three steps to be considered and these are: risk assessment, risk analysis and risk management.

**8.3.1 RISK ASSESSMENT**

This is the identification of risks which could occur and an identification of which particular risk could happen in the area which raises concern. When risks are identified it becomes possible to plan strategies to manage the risks and also to undertake an analysis of the possible effect of the risk.

**8.3.2 RISK ANALYSIS**

This is the statistical quantification of the effects of the risks identified during risk assessment.

**8.3.3 RISK MANAGEMENT MITIGATION**

This involves the development of strategies for dealing with the risk. This is dependent upon the assessment of the types of risk to which the situation is susceptible and the quantification of the possible analysis.

From the foregoing one would deduce that accountability and transparency as core principles of corporate governance are key to risk management in a company.

 **8.3.4 SUSTAINABILITY**

Generally sustainability is concerned with the effect for which action taken in the present has in the future. If resources are used in the present then they are no longer available for use in the future, and this is of a particular concern if resources are finite in quantity. Sustainability therefore, means that organizations must use no more of a resource than can be regenerated.

In the case of sustainability of reporting King II has a chapter dedicated to integrated sustainability reporting. The concept of reporting on economic, social and environmental performance, “the triple bottom line.” King III requires that a formal process of assurance with regard to sustainability reporting should be established. The audit committee should consider and recommend to the board the need to engage an external assurance provider to provide assurance on the accuracy and completeness of sustainability reporting to stakeholders.

The board may delegate the responsibility for and review of integrated sustainability reporting to either the risk committee, sustainability committee or audit committee. The audit committee should however, assist the boardin its review of the sustainability reporting by ensuring that the information is reliable and that no conflicts or differences arise when compared to the financial results. All this stresses on the essence of accountability and transparency in corporate governance.

Companies should recognize the need to protect the environment, public health and safety and generally to conduct their activities in a manner contributing to the wider goal of sustainable development.

**8.3.5 STAKEHOLDERS**

The expansion of corporate governance has included the concern for all stakeholders. Stakeholders are groups or individuals who could affect or be affected by the achievement of the organization’s objectives. It could also be an individual or group that has an interest in any decision or activity of an organization. The following could be considered to be stakeholders: shareholders, employees, customers, managers, investors, suppliers including government, society at large and the local community.

### It is further amplified that the board should respect the interest of stakeholders within the context of institution’s ownership and its fundamental purpose. The board should have clear written policies for the institution’s relationship with significant stakeholders. For the purposes of accountability and transparency the board of a company must include in its annual report information of their activities, performance and how they have served the interest of their stakeholders.

### **UNIT NINE**

### **ZAMBIA DEVELOPMENT AGENCY (ZDA)**

**INTRODUCTION**

The Zambia Development Agency was born out of the Zambian government initiative. It was created by an Act of Parliament as a way of enhancing business in Zambia through investment in various sectors of the economy.

LEARNING OUTCOMES

By the end of the unit learners must be able to:

1. list the institutions that were merged to form Zambia Development Agency
2. Demonstrate the understanding of the many ways in which the Zambia Development Agency is promoting business in Zambia.
3. Espouse the functions of the Zambia development Agency

The Zambia Development Agency (ZDA) was established under the ZDA Act No. 11 of 2006, which came into effect on July 7, 2006. The ZDA is a merger of the Zambia Privatization Agency, Zambia Investment Centre, Export Board of Zambia, Zambia Export Processing Zones Authority and the Small Enterprises Development Board. The merged institutions started operating as one institution after 1st January 2007. The Act was later amended gave rise to Act No 1 of 2010.

The Agency expects major investments in various sectors of the economy. Major investments are expected in financial, mining, cement and fertilizer production and the agricultural sector. This is due to the confidence that has been created by favourable Government economic policies, macroeconomic stability, peace and stability that the country is experiencing as well as the country’s strategic location.

The Zambia Development Agency will with the financial support of the European Union launch a sustainable promotional drive in regional markets particularly in the Great Lakes Region and other regional markets.

In addition, the Zambia Development Agency will launch the Zambia Export Development Fund in the week beginning 6th January 2008. The fund will be financed by the European Union. The Zambia Export Development Fund will finance export transactions for non-traditional exporters.

With regard to the MSMEs, the Zambia Development Agency remains committed to the development of this sector. MSMEs Sector in Zambia forms a large portion of the economic players in the economy and the Zambia Development Agency will ensure that the sector grows and contributes significantly to the Zambian economy.

**ZDA FUNCTIONS**

**The specific functions of ZDA are provided in the ZDA Act as follows:**

1. Give advice to the Minister on matters relating to industry, industry development and productivity, investments, exports of goods and services, operations of multi-facility economic zones and matters relating to micro and small-scale business enterprises;
2. On the request of government, study market access offers received from trading partners under COMESA, WTO or SADC and advise the government on opportunities and challenges generated;
3. Make detailed impact analysis on select sectors of the economy such as textiles, agriculture, mining, tourism, education, skills training, communication, transport, infrastructures development, automobiles, information technology, chemicals and steel engineering goods, through a multi-disciplinary team;
4. Establish a database of facilities, human resource and their skills, sources of finance, technology, raw materials, machinery, equipment and supplies with the view to promoting accessibility of these industry;
5. Develop entrepreneurship skills and the business culture in the citizens of Zambia;
6. Promote and facilitate the development of micro and small business enterprises;
7. Formulate investment promotion strategies;
8. Promote and coordinate government policies on, and facilitate, investment in Zambia;
9. Assist in the security from any state institution any permission, exemption, authorization, licence, bonded status, land and any other thing required for the purposes of establishment of operating a business enterprise;
10. Undertake economic and sector studies and market surveys so as to identify investment opportunities;
11. Plan manage, implement and control the privatization of state owned enterprises;
12. Oversee all aspects of the implementation of the privatisationprogramme;
13. Monitor progress of the privatization programme in Zambia;
14. Monitor post privatization activities to ensure compliance with any agreement entered into for the privatization of any state owned enterprises;
15. Develop-multi facility economic zones or facilitate the development of multi-facility economic zones by any investors;
16. Administer control and regulate multi-facility economic zones and ensure compliance with this act and any other laws relevant to the activities of multi-facility economic zones;
17. Monitor and evaluate the activities, performance and development of enterprises operating in multi-facility economic zones and prescribe and enforce measures, for the business or activity carried out within a multi-facility economic zone so as to promote the safety and efficiency of its operations;
18. Promote and market multi-facility economic zones among investors;
19. Facilitate adjustment to structural changes in the economic hardships arising from those changes;
20. Protect the interests of industries, employees, consumers and the community that are likely to be affected by the measures proposed by the agency;
21. Increase employment in Zambia;
22. Promote regional development, cooperation and integrity;
23. Monitor the progress made by Zambia’s trading partners in reducing both tariff and non barriers;
24. Ensure that industry develops in a way that is ecologically sustainable;
25. Ensure that Zambia meets its international obligations and commitments, including those under the WTO, COMESA and SADC; and
26. Maintain regular, productive and effective dialogue and cooperation with the public and private sector and encourage public-public dialogue, private-private and private to public dialogue

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