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## PARECER JURÍDICO

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**PARA:** ACIS

**DE:** CGA

**ASSUNTO:** FATAL ROAD TRAFFIC ACCIDENTS

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Dear Sirs,

Pursuant to your request for a legal opinion, we herewith describe the various procedures to be followed in case of fatal road accidents, in response to your questions.

In order to issue this Legal Opinion, we have considered the following legislation:

- Constitution of the Republic of Mozambique 2004;
- Civil Code ( Decree nº 47344, 25 November 1966);
- Road Traffic Code (Decree nº1/2011, 23 March 2011) - the new traffic code, that came into force in September 2011;
- Penal Code;
- (Decree nº 16489 15 February 1929), and complementary legislation :
  - i. Decree nº 35.007 ,13 October 1945;
  - ii. Decree nº 4/75,16 August;
  - iii. Decree nº 28/75, 1 March;
  - iv. Law nº 5/81, 8 December;
  - v. Law nº 9/92, 6 May;
  - vi. Law nº 2/93,24 June;
  - vii. Law nº 22/2007,1 August;
  - viii. Law nº 24/2007, 20 August.
  
- The Law and Regulation of compulsory insurance (respectively, Law nº 2/2003, 21 January, and Decree nº 47/2005, 22 November 2005).

### Abbreviations

- C.R.M. – Constitution of the Republic of Mozambique;
- C.P. – Penal Code;
- C.P.P. – Code of Criminal Procedure;

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- Cf. – Confer;
- Dec.Law – Decree – Law
- M.P. – Public Prosecutor / Public Prosecutor’s Office
- Cód. Traffic: Traffic Code
- Art. - Article

## Legal Opinion

In accordance with Mozambican law, that is, the Road Traffic Code art .151 n° 1, a vehicle accident, is defined as any internal or external injury, or psychological or nervous disorder, or moral or property damage which result from a sudden, violent external impact caused by any vehicle or means of transport in circulation on a public road.

To this effect, the Road Traffic Code art. 151 n° 2, states that death in a road accident shall be deemed to mean that which occurs up to 30 days after the accident is recorded.

### 1. **Procedures which, by law a driver must follow when involved in a fatal road accident.**

According to that established by the Road Traffic Code, the driver must:

- Present a document proving that the vehicle has public liability insurance (art. 157);
- Provide to all other parties involved, proof of personal identification, as well as the identity of the owner of the vehicle and of its insurer, as well as the number of the insurance policy, and shall, whenever requested, produce documentation in proof thereof (art.92);
- Await the arrival of a traffic officer at the scene of the accident (art. 92 n° 2);
- Provide a breathalyzer sample (art. 80 e 85);
- Preserve the scene of the accident to facilitate the work of police and other experts;

- vi. Wherever possible and when the seriousness of the accident justifies it, the reporting agent shall draw diagram, containing the details observed, or photograph the objects or signs indicating these details; the diagram or photograph shall be attached to reports prepared about the accident (art. 155 n° 6).

**2. Right of the driver to guarantee an appropriate investigation, particularly, in the collection of evidence to support the driver's version, when accused of negligence or drunkenness.**

Where a driver involved in an accident is accused of having acted under the effects of alcohol, which is considered serious misconduct under the terms of art. 153 n° 2 and art. 81 of the Road Traffic Code, and where the driver aims to prove that s/he was not acting under the effects of alcohol, under the terms of art 80 n° 1 of the Road Traffic Code s/he can require that tests be undertaken as follows:

- i. Breathalyzer tests (art. 80 e 85 of the Road Traffic Code);

If this test, has already been carried out and the result has been positive, the driver can demand the performance of a second test (the result of which prevails over that of the first test), but will be obliged to pay all costs arising from the second test, if the result is positive. The second test shall be carried out in one of the following ways, as chosen by the driver being tested:

- a) A new breathalyzer test using an approved device – in this case the driver shall take the test immediately, and, if necessary, be driven to the place where this test can be carried out;
  - b) A blood test – the driver shall immediately be taken to an official health establishment, so that the quantity of blood required for this purpose can be drawn.
- ii. If it is not possible to perform a breathalyzer test, the driver shall be subjected to a blood test, to determine the blood-alcohol level (art. 82 n° 8);
  - iii. If it is not possible to take a blood test the driver shall be subject to a medical examination, to determine the possible influence of alcohol (art. 82 n° 8).

A driver shall be deemed to be under the influence of alcohol if his blood alcohol level is equal or superior to 0,3 mg/l, when tested by way of a breathalyzer, or 0,6 mg/l, if a blood test is conducted (art. 81 n° 3).

### 3. **Witness Statements: who can call these into question?**

Art.152 of Road Traffic Code and art. 166 of C.P.P., determine the relevance of witness statements in road accidents establishing that the police report shall include the identity of at least two witnesses who can testify about the facts and that these shall sign a witness statement.

Witnesses are considered to be those persons involved in the accident, for example persons who were in the vehicle, with the exception of the driver, or persons that were present in the place where the accident occurred and can provide eye-witness testimony.

The witness statements can be called into question by:

- i. Any material proof;
- ii. Witness presented by the other party involved;
- iii. When answers given contradict the facts.

Whenever possible and appropriate the witnesses involved will be heard during the preparatory inquiry, but if this does not happen they should be heard in the cross-examination phase of the investigation, if such takes place (art. 257 C.P.P.).

The witnesses are involved in 2 stages of the process:

- i. During the preparatory phase – assessment of evidences in order to complete the criminal case;
- ii. During the trial stage.

In criminal matters, cross-examination is not permitted during the assessment of evidence while drafting criminal charges (art. 240 C.P.P.), but is permitted when contradictions emerge between witness statements or between these and the statement of the defendant, of the victims or other persons, or between these statements.

**4. By law what happens to a driver that kills someone in a road accident? Must the driver go to the police station? Is the driver automatically be arrested? Are the vehicle and documents seized?**

Firstly when the authority responsible for safety on public roads becomes aware of any vehicular accident, a report must be drafted immediately, containing, in addition to the identification of the drivers, victims, vehicles and their owners, a detailed description of the way in which the accident occurred, its probable causes and consequences, and the date, time, place at which it happened, identification of the victims, name of the reporting agent, identification of the vehicle and its owner, among other details and matters listed in art. 152 of the Road Traffic Code.

In case of fatal road accidents the police authorities will arrest the driver when s/he is deemed to have acted with serious misconduct (as defined in art. 153 n° 1 Road Traffic Code), i.e. breaking the following rules:

- i. Speed limits
- ii. Right of way
- iii. Giving way
- iv. Passing of vehicles
- v. Overtaking
- vi. Prohibited overtaking
- vii. Changing direction (turning)
- viii. Change of direction of travel
- ix. Reversing
- x. Driving under the influence of alcohol, narcotics or psychotropic substances.

This being the case, the driver (transgressor) shall be brought before a Criminal Judge immediately, or within twenty four hours (art. 155 n° 4 and 5 of Road Traffic Code). However, this time period seems to contradict that of 48 hours stipulated in paragraph 21 of Decree n° 35.007 of 13th October, which provides that in the case of arrest the transgressor must be brought before a Public Prosecutor within 48 hours. Also within 48 hours the driver must be brought before a judge along with the information provided by the Public Prosecutor, about the legality and convenience of provisional detention or the submission of bail (Art. 21, line 3 of Decree n° 35.007 of 13 of October).

Seizure of Vehicles – Vehicles can only be seized by the authorities when the accident has been caused by a vehicle without third party liability insurance as stated in

paragraph f) of art. 162 of the Road Traffic Code (insurance that guarantee the responsibility of persons or entities civilly liable for property damage and personal injuries caused to third parties under art. 1 of Law nº 2/2003 of 21st January). The person named on the vehicle identification document is liable for the payment of expenses incurred by its seizure.

Seizure of driver's license and seizure of vehicle identification document:

The vehicle identification document shall only be seized by the authorities, when the vehicle is unusable as a result of accident or when the vehicle is seized because does not have insurance (paragraph 161. 1.c and d of Road Traffic Code).

Regarding the seizure of driver's license - there is no provision in the Road Traffic Code for the seizure of the driver's license in case of fatal road accidents. However, art. 161 nº 2 of Road Traffic Code states that when a vehicle identification document is seized, all other documents relating to the circulation of that vehicle also be seized, and shall be returned when the vehicle identification document is returned. The only cases in which the Road Traffic Code permits the seizure of the driver's license are in the event of an accident when tests conducted to determine the influence of alcohol or psychotropic substances indicate a technical incapacity or physical, mental or psychological inaptitude of the person tested to drive safely (art. 160.2.a of Road Traffic Code); The driver's license shall also be seized when the driver does not present himself for a medical examination required by the authorities when they suspect that the driver was under the influence of alcohol, unless the driver justifies his absence within a period of 5 days. Therefore, when a fatal accident occurs, and suspicions exist that the driver is under the influence of alcohol, the authorities can seize the driver's license if they establish either of the 2 situations described above.

However as a practical matter, when fatal accidents occur, the authorities usually seize the driver's license until the case is concluded.

**5. For how long the authorities hold the vehicle, its documents and the documents of the driver after the accident? Can the driver's passport be seized?**

Regarding the seizure of vehicles: When a vehicle is seized after a road accident, for not having an insurance policy, the seizure shall remain in place until due compensation is proven to have been paid, or, if the respective amount of compensation has not been determined, until a security deposit is paid, in an amount equal to the minimum cost of compulsory insurance (art 162 nº 5 of Road Traffic Code).

Regarding the seizure of the vehicle identification document: for example in cases where the vehicle is unusable because of an accident, the vehicle identification document shall be held for a period of time indicated in the document provided in receipt of the vehicle identification document.

Regarding the passport: Passports cannot be seized in the case of a fatal road accident. If the driver escapes when released from police custody, the judicial process follows its course, and the court will decide; the driver will be notified by public edicts and the judgment will be made in the driver's absence, prejudicing the driver's rights to a defense.

**6. Rights of the driver who has caused the accident - right to legal representation and to make a phone call; if the driver needs a lawyer how can s/he go about this?**

The Mozambican Constitution in art.62, nº 1 and nº 2 respectively establishes that the State guarantees the defendant the right to defense and legal assistance and legal support as well as, the defendant is entitled to appoint a lawyer to assist him at all stages of the process, and defendant who does not have the resources to appoint a lawyer must also be assured the right to representation.

The defendant can appoint a lawyer at any stage of the process; during the provisional indictment at the point where the charge is made in court, in the absence of an appointed lawyer, a public defender must be appointed.

During correctional policing cases a lawyer must be appointed for the trial phase.

In summary procedures the Judge must appoint a public defender defendant so requests or if security measures apply (art. 49 Dec. Lei 35.007 of 13th October 1945).

The lawyer may take part of the entire process from detention, providing advice and instruction on anything important for the defense. The interviewing of suspects under art. 252 of the C.P.P. (during the preparatory inquiry where the basis of the offence committed by the suspect is sought), follows the examination rules for suspects that have not been arrested, and in the initial interviews as well as any subsequent ones, the suspect (or defendant, once arrested) should have a lawyer (art. 265 C.P.P.).The

examination of arrested defendants must be made exclusively by a judge with the assistance of a lawyer (art. 253 C.P.P.).

Any examination without the presence of a lawyer in cases where such participation is required, is invalid, as are those cases where the lawyer was improperly prevented from participating, even if his presence was optional (art. 268 C.P.P.).

#### **7. Rights in terms of water and food for someone held in jail**

Anyone held as a result of a fatal road accident has the same rights to food and water as any other prisoner; meals are available in jail, however if the arrested person has someone who could take food, this should also be allowed.

#### **8. Does the law require payment of security to be allowed out of the jail before the hearing?**

After the Public Attorney's Office has submitted its report to the examining magistrate, the magistrate can among the various options open, opt to apply a security or guarantee.

After the first interview (art. 277 C.P.P), the judge can determine whether or not the driver can put up a guarantee (art. 271 C.P.P), and remain free until the judgment, or if the driver should be held in provisional detention (in this case there is no guarantee).

Guarantees are generally applicable in cases where the possible sentence is a prison sentence of more than six months or correctional policing or a charge before court (art. 271 C.P.P), unless the case falls under paragraphs 2 and 3 of article 291 (namely situations in which a guarantee is not applicable).

The guarantee is determined by the judge, after hearing the representative of the Public Attorney's Office, taking into account the seriousness of the offence, the damage caused and circumstances of the defendant (art. 270 C.P.P).

#### **9. Maximum time limit before a Habeas Corpus hearing must be held**

Firstly should be clarified that Habeas Corpus is not a hearing, but a measure (regulated under articles 312 to 325 of CPP and art. 66 of CRM) which takes two forms:

- Common (art. 212 C.P.P), permits those arrested by authorities whose remit does not exceed that of the District Court area, to require that the Presiding Judge of the District Court in the area in which the defendant is held, to order that the defendant be brought before the court for any of the following reasons:

- a) The period during which the defendant should be submitted to the courts has been exceeded;
- b) The defendant is being held in a place not permitted by law;
- c) The defendant has been held under arrest by order of an authority that does not have the right to order such detention;
- d) The detention is motivated by a fact not permitted under law.

- Extraordinary (art. 315 C.P.P) applies to those arrested illegally and where the foregoing does not apply because it is outside the remit of the provincial or district court, or where there is no appeal process. This therefore only applies in cases where the individual is in effective prison and where this could be illegal for any of the following reasons:

- a) Detention made or ordered without legal authority;
- b) The applicable law does not provide for a prison sentence;
- c) Detention beyond the legal time limits for presentation in court or for the formation of fault;
- d) Extension beyond the time established for a judicial decision, beyond the duration or extension of a penalty or security measure.

In accordance with art. 66 of CRM, a Habeas Corpus order is placed before the Court, and must be decided within 8 days.

**10. Can someone remain detained over a weekend, based on the fact that there is no judge available?**

Yes given that the police must present the detainee to the Public Attorney's Office within 48 hours, meaning that if the person is arrested on Thursday or Friday, this period will coincide with the weekend.

In accordance with art 279 e) of the C.C, the period that ends on Sunday passes to the first working day of the week, and therefore if the Public Attorney's Office, which is responsible for preparing cases and overseeing legality, and is responsible for classifying the form of the process to be followed by controlling the detention period, is not made aware of the occurrence or if the person is not presented for the first examination then the Court will not know that he has been arrested.

In fact, the defendant could be presented to Public Attorney's Office before the deadline of 48 hours, being this the maximum period time. However in practice, when this kind of case occurs on a Friday, in most cases police officials do not immediately present the arrested party to the Public Attorney's Office, that is, they are not flexible, opting to allow the allotted time period to end during the weekend.

However we should clarify that, the role of the Public Attorney's Office is fundamental, as the body responsible for checking the legality and period time of detentions when it receives the reports from the police.

Arrest is considered a matter of urgency which means that the Public Attorney's Office must always be available to answer requests that are made. Therefore in offices which have more than one magistrate in the Public Attorney's Office there should always be a magistrate on duty to supervise any detentions as they occur, in order to avoid people being detained illegally.

#### **11. Rules regarding bail, particularly in the case of tourists who may leave the country. There is a right of appeal if bail is not given?**

A guarantee or security is a form of writ of prevention that comprises giving an asset value as collateral for in exchange for certain obligations regarding the status of defendant. It aims at guaranteeing the presence of the defendant in all the relevant procedural acts of a case as well as guaranteeing the payment of damages and legal costs to which the parties may be entitled.

The guarantee might be provided by third parties through bail (art. 281 C.P.P). If the guarantee is supported by a bank guarantee then documentary proof of this must be provided.

If the guarantee is provided by another kind of bail, then a suitable guarantor, known to the court must be appointed.

An appeal will only take place if the Public Attorney's Office does not agree with the amount set by the judge and lodges an appeal with a higher court.

## 12. **What happens after the first hearing?**

First of all, it should be clarified that only those defendants arrested and accused of committing crimes to which correctional policing or a case before court apply, are submitted to a first court judicial examination.

The criminal judge, having made his initial investigation (under the terms of art. 253 C.P.P. and art. 1 of law 2/93 of 24th June) will assess if Attorney General has grounds to proceed. The criminal judge's investigation seeks to determine if the legal requirements for arrest have been met and if this is the case, the judge will validate the order to jail the defendant, or if he finds insufficient grounds he will rule that the defendant should be released, either based on a guarantee and/or statement of identity and residence or that the defendant be set free without prejudice to the follow up of the preparatory inquiry.

## 13. **What are the legal requirements regarding compensation? Is the driver required by law to pay for expenses for example for a funeral and what are the amounts required?**

In accordance with art. 274 line 1 of the C.C, the judge may require that a defendant whose is recognized to have sufficient resources, provides security or a guarantee for the payment of any indemnity for which he may be convicted.

This security is retained until the final decision in the case, and where a finding is made against the defendant, the judge will require payment of the guarantee, first covering the fine and then court fees and then compensation of the victim. If the amount of the guarantee is insufficient the judge can institute an enforcement order to recover the outstanding amount.

In accordance with art. 495 of the C.C., in a case of injury which has caused death, the person found responsible is obliged to compensate for expenses incurred including those to save the injured party and not excluding funeral expenses. The injured party or anyone from whom the injured party would normally provide for may request additional support.

In case of the victim's death, the spouse who is not lawfully divorced, children and other dependents, or relatives may be entitled to compensation.

Cases seeking civil compensation when these are not deemed to be criminal proceedings fall under the responsibility of the Judicial Court in the place where the accident happened (art. 156 of Road Traffic Code)

#### **14. How long do the cases take to reach the judgment and what can the defendant expect to happen at the judgment?**

This is a subjective question which depends on each individual case, how the case is dealt with, the circumstances thereof, and whether or not the defendant is arrested.

After the accident, the following phases are likely:

- i. Preparatory inquiry (when there are arrested defendants – maximum term of 40 days in querela cases and 20 days in other cases / when there are non arrested defendants, the time periods will be of 60 and 30 days respectively:
  - a) Detention by police authorities (the suspect must have committed an offence which is punishable by detention) - there must be taken the police report – within 24 hours;
  - b) Presentation of the detainees together with the documents related to the case to the Public Attorney's Office – within 48 hours;
  - c) The Public Attorney's Office passes the documents to the Criminal Judge (within 48 hours) who responsible for the initial examination in order to ascertain whether:
    1. The detention is validated;

2. An interim release is to be permitted based on provision of a guarantee or statement of identity, without prejudice to the follow up of the investigation;
3. The case should not proceed due to lack of evidence.

ii. Finalizing the Preparatory Inquiry, the Public Attorney's Office

The Public Attorney's Office considers the prosecution and if necessary requests a cross examination (in cases of summary procedure and of correctional policing, and mandatorily in querela cases) which is to be conducted by the judge. The judge can then accept or decline this request.

When defendants have been detained the time period for this procedure is 3 months in querela cases or 1 month if the sentence which corresponds to correctional policing accrued to a time of not more than 30 days.

If the defendant is not detained then the time periods are 6 months in querela cases and 2 months for correctional policing cases.

NOTE: if the cross examination has taken place after the order appointing the trial date, the judge will assess the outcome of the cross examination within 2 days of having heard both parties (art. 394, line 2 C.P.P);

In cases where there no cross examination is required, the judgment date order and the indictment coincide.

iii. After cross examination, the judge orders the referral of the case to the Public Attorney's Office which must within 5 days decide to:

- a) Proceed with the prosecution or
- b) Amend the prosecution

iv. The final procedures having been completed the case is handed over to the judge to issue a decision :

This must be done within 8 days in querela cases and 3 days in correctional policing cases.

a) When there is concern regarding the evidence of the offence (indictment), there may be leave to appeal

1. The defendant must lodge the counterstatement within 8 days after the notice of indictment;
2. If the counterstatement is lodged at the court, the registrar of the court will file a copy of the counterstatement within 3 days after the expiration of the term of 8 days for the submission thereof.

b) Where the case is rejected by the court (non indictment), there may be leave to appeal

v. Judgment

vi. Appeal:

- a) An appeal stops the progress of the case;
- b) An appeal against non indictment does not suspend the case but is raised in the respective records.

### **15. What can the defendant expect during the trial?**

The defendant may be acquitted or convicted according to the evidence provided. The formality of the proceedings will depend on the type of case, which could be querela, correctional policing, or a summary proceeding.

After the investigation is complete the records of the case are handed over to the judge who will then determine the case.

In correctional policing cases, in accordance to art. 295C.P.P., if the defendant is found guilty, he can either be immediately detained or freed based on payment of a guarantee (art. 541 C.P.P). An appeal can only be lodged when either defence or prosecution expressly declare that further examination of the defendant is necessary.

In a querela case, the Court may convict the defendant for a criminal offence other than the one of which he was accused, even if the crime is considered a felony, as long as the constituent elements of the finding are facts indicated in the judgment. Aggravating factors and recidivism are taken into account. If as a result it is deemed necessary to apply a penalty outside the powers of the court which has heard the initial case, then the case will be referred to a higher court (art. 447 C.P.P).

The Court can convict for offense other than the one of which the defendant was accused based on facts raised by the defense or facts arising during the presentation and debate of the case provided that, in the latter case this serves to reduce the penalty (art. 448 C.P.P).

The sentence handed down must include the penalty applied, compensation due for loss or damage and court fees.

If the sentence suspends any penalty this must be explicitly stated along with the grounds for the decision and the period for which the sentence will remain suspended.

If the outcome is an acquittal the finding must indicate the grounds for this. If the defendant is detained the judge will instruct that he be released; if there is a plaintiff, the sentence may require the plaintiff to pay court fees and payments due to the public defender, if any, along with compensation for any witnesses called upon to be present during the case.

In a summary proceeding (art. 558 C.P.P), the defendant detained in the act of offending, which corresponds to correctional policing, will be summarily sentenced (art. 556 C.P.P).

The judgment will take place with the presentation of the defendant before the court along with the case documents, in the presence of witnesses and the victim, if necessary. If it is not possible to proceed immediately the case will be heard on the next working day unless certain conditions established in art. 558 lines 1, 2 C.P.P are met.

In a summary proceeding an appeal can only be lodged against the final sentence, if the prosecution or the defense declare, prior to the interviewing of the defendant, that they will not waive a request to appeal and this declaration is made ahead of the sentence being handed down (art. 561 C.P.P).



This our legal opinion. It is issued for the exclusive use and benefit of society in general when people face these kind of situations, please take into account the completion date, as mentioned on the first page.

Please feel free to contact us, should any further clarification be required.

Best regards,

Pedro Couto (Partner)

Liliana Chacón (Trainee Lawyer)