

"DAMAGES FOR PERSONAL INJURIES; AN  
ANALYSIS OF THE NATURE OF THE AWARDS GRANTED"

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A dissertation submitted in partial fulfilment  
of the requirements for the LL.B. Degree,  
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By

REBECCA OKONG'O

NAIROBI.

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DEDICATION

Dedicated to my sister Maria, who got injured in a motor accident in 1976 but was unable to recover any damages.

A C K N O W L E D G M E N T S

I would like to thank all my friends with whom I shared many useful discussions. Special thanks go to my supervisor Mr. B. Ogolla whose discussions and advice contributed a lot in shaping and bringing this paper to its present form. I would also like to thank Mr. Kuloba (Resident Magistrate) for his assistance in compiling some of the cases which I have included in this study and Mr. H. Omware for making the typing of this paper possible. Lastly, my utmost gratitude is extended to my parents for their encouragement when my morale was particularly low.

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ABBREVIATIONS

A.C.	.....	Appeal Cases
All E.R.	.....	All England Reports
Cap.	.....	Chapter
C.L.J.	.....	Cambridge Law Journal
Col. L.R.	.....	Columbia Law Review
Ex	.....	Exchequer
Harv. L.R.	.....	Harvard Law Review
H.C.C.C.	.....	High Court Civil Case
K.B.	.....	Kings Bench
L.T.	.....	Law Times reports
Q.B.	.....	Queens Bench
S.J.	.....	Solicitors Journal
T.L.R.	.....	Times Law Reports
W.L.R.	.....	Weekly Law Reports

## INTRODUCTORY NOTE

### 1. THE PROBLEM

This study is to critically analyse the nature and basis of the awards granted in respects of personal injuries covered by the Insurance (Motor vehicles third party risks) Act. Caps. 405 of the Laws of Kenya.

Byrne J. commenting on the award of damages in a case in which a man lost his right arm as a result of an accident had this to say,

"This is a case in which money cannot compensate at all for the loss of enjoyment or the curtailment of his ability to do what he would like to do in the way of earning a living and clearly it must be a case in which damages are substantial."<sup>1</sup>

The award of damages for personal injuries/made <sup>is</sup> difficult by the fact that particularly where non-pecuniary loss is concerned there exists no market value or mathematical format for calculation. How does one arrive at a particular figure as being adequate compensation for disfigurement, pain and suffering, loss of amenities and loss of expectation of life? It should be noted that everything is left to the discretion of the judge in the exercise of which factors such as his general outlook to life and his sympathies will be influential. The task of awarding damages is made difficult by the fact that no two injuries are ever similar in all respects. It is therefore difficult to have standardised format for calculation.

The essential question is whether there is to be found a common denominator governing the award of damages in this area. I do realise that there can never be anything like "the perfect

compensation" but where wide disparities exist in the awards being granted for similar injuries then what explains these disparities?

In Chapter One, I propose to examine the meaning and objectives of compensation and how liability for compensation arises, I shall also set out the general principles governing the award of damages.

In Chapter Two which is intended to be an illustrative chapter I shall examine with the aid of case law the nature of damages being awarded by the courts in this country and their adequacy.

Chapter three shall comprise a general critique of the present system of compensation in respect of personal injuries. I shall also make recommendations for reform based on what my study shall have revealed.

## 2. HYPOTHESES

The award of damages for personal injuries depends in the final analysis on the judge rather than on any underlying fundamental principles.

Our present system of compensation in respect of personal injuries is inadequate and too restrictive in the number of persons which it is able to cover.

## 3. THEORETICAL FRAMEWORK

The award of damages for personal injuries sustained in motor accidents is based on the principle "Restitutio In Integrum" meaning that the law will endeavour in so far as money can do it

to place the injured person in the same position he would have occupied had not the accident occurred. It is based on Tort Law which is concerned mainly with the redress of harm done by one party to another.

C.A. Wright<sup>2</sup> traces the development of the law of torts to the various clashes of activities of persons living in a common society carrying on business in competition with each other. Their activities are bound to affect the property and the person of others. The purpose of the law of torts is to adjust the losses and afford compensation for injuries sustained by one person as a result of the Conduct of another.

The tort of negligence developed against a background of greater industrialisation and mechanisation following the industrial revolution which resulted in an increased risk of injury to the person and property. This was also the era of "Laissez Faire" a doctrine based on a policy of a minimum interference by the government in the economic life of the individual. The emphasis was on the promotion of individual initiative as a means to an end, the end being the prosperity of the capitalist enterprise.

Against protection of the person and property, the law of torts sought to balance the interests of the industrialists in freedom of action. To give an illustration; in Donoghue v. Stevenson<sup>3</sup> Lord Atkin described the neighbour to whom one owes a duty of care as

". . . 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<sup>v</sup> are called in question."

*that*

Roscoe Pound<sup>4</sup> states that it is the duty of the law to give effect to the conflicting interests in Society with the least sacrifice, the least friction and the least waste as *much* is possible. The law of torts may therefore be seen as performing the role of social engineering in its attempt at striking a fair balance between security in the person and property on the one hand and freedom of action on the other.

4. METHODOLOGY AND DATA

I shall conduct most of my research in the University of Nairobi Library although I hope to be able to obtain some additional information from the High Court Library.

The data which I intend to use shall consist of both reported and unreported judicial decisions and Scholarly published materials.

THE NEED TO COMPENSATE

1.1 HOW LIABILITY FOR COMPENSATION ARISES

Liability for compensating road accident victims arises under the tort of negligence. Tort law is concerned with the redress of harms done by one party to another. In fact the word "tort" is derived from the Latin word "tortus" which means crooked or twisted or wrung i.e. wrong denoting a conduct that is not straight or right.

Negligence consists of the omission to do something which a prudent and reasonable man would do or the doing of something which a prudent and reasonable man would not do<sup>2</sup>; it consists of measuring injurious behaviour against an abstract standard of reasonable conduct which in theory corresponds to a social norm<sup>3</sup>; it is a breach of legal duty to take care owed by the defendant to the plaintiff resulting in damage to the plaintiff. Its breach is redressible by an action for unliquidated damages<sup>4</sup>.

It is apparent that negligence is concerned with an inadvertent act on the part of the defendant which results in some damage to the plaintiff. The tort arises from a breach of a duty which is owed to persons generally. Indeed the courts have been reluctant to award damages where although the defendant was at fault there was no duty to take care owed by him to the plaintiff<sup>5</sup>. But in practice the issue of the existence or non existence of duty does not take up much of the courts time. In the case of injuries arising out of motor accidents the obvious is usually assumed.

The duty principle is closely connected with the issue of foreseeability of the damage. Lord Atkins<sup>6</sup> famous neighbour principle restricts the liability of the tortfeasor to only such persons whom he ought as a reasonable man to have in contemplation as being affected by his acts or omissions<sup>7</sup>.

In Overseas Tankship U.K. Ltd. v. Morts Dock and Engineering Co.<sup>8</sup> it was held that the essential factor in determining liability for the consequences of a tortious act of negligence is whether the damage was of a kind as the reasonable man is likely to have foreseen. The damage need not be the direct "natural" consequence of the precedent act. But a man should not escape liability however "indirect" the damage if he foresaw or could have foreseen the intervening events which led to its being done. But the law does not require extra-ordinary foresight such that a man will not be responsible for his actions however disastrous if they are such as could not have been foreseen by a man of ordinary prudence<sup>9</sup>. This issue touches on remoteness of damage which lays down the rule that a plaintiff is not entitled to damages where the damage to him is too remote. As their Lordships held in Overseas Tankship U.K. Ltd. v. Morts Dock & Engineering Co.,<sup>10</sup> there is not one criterion for determining culpability and another for determining compensation. As Viscount Simonds puts it,

"There can be no liability until the damage has been done. it is not the act but the consequences on which tortious liability is founded".<sup>11</sup>

There can be no liability unless fault on the part of the defendant is established. Where it cannot be proved that the defendant was at fault then the loss will be left to lie where it has fallen and the victim will go uncompensated<sup>12</sup>.

Contributory negligence on the part of the plaintiff also has a bearing on the liability of the defendant to pay him damages. Contributory negligence has been described as constituting want of care on the part of the plaintiff which has contributed to the damage occasioned by the negligence of the defendant that but for such want of care the damage would not have occurred<sup>13</sup>. At law where the plaintiff was partly to blame for the resultant damage he was denied a remedy. This was also the law in Kenya until the passing of the law reform act which makes provision for the apportionment of damages according to the extent of blame. Such apportionment is left entirely on the discretion of the judge. There is a controversy whether children of tender years should be held contributory negligent. As a general rule they are not<sup>15</sup>. The test is whether the child is of such an age as to be expected to take precautions for his or her own safety<sup>16</sup>. In A.G. v. Vinod<sup>17</sup> a boy of 8½ years who ran across the road from a gap between two parked vehicles was held to have been contributory negligent to an extent of 10% in sum therefore the question as to liability for compensation centres around the breach of a duty to take care which results in a foreseeable damage to the plaintiff. Fault on the defendants part must be proved before the plaintiff becomes entitled to compensation.

Proof of fault on the defendants part does not however end all the plaintiff's problems. There remains the problem of enforcing the courts judgement against the defendant. It could happen that he cannot pay damages because he does not have the money. Even if the plaintiff were to have his property attached it might not be enough to pay off the damages. It would be of no use committing him to a civil jail because the plaintiff would most likely end up paying for his stay there and then end up receiving no payment. In such circumstances the award granted by the courts would amount to no more than a paper remedy. It was in appreciation of the difficulties which the plaintiff faced that the insurance (motor vehicles third party risks) Act<sup>18</sup> was passed. The Act aims at protecting the third party from the risk of the tortfeasor being unable to indemnify him on account of the accident. The tort system and the compulsory system of insurance are thus co-existent.

By S. 4 of the Act no person will be allowed to use or permit to be used a motor vehicle on the road unless there is a policy of insurance in respect of third party risks. By S. 5 the policy must be by a person authorised to carry on motor vehicles insurance business. The insurance company is required to deposit a security. This aims at protecting third parties against the insolvency of the insurance company. The insured is under a statutory duty under the provisions of S. 12 to give all such information as is necessary in pursuing the claim. Under

S. 15 in the event of the insured's winding up or bankruptcy or the making of a composition or scheme of arrangement with his Creditors, if before or after that event the insured incurs third party liability his rights against the insurer under the policy shall be transferred to and vest in the third party to whom the liability was incurred. By S. 8 any conditions imposed by the insurance company will only operate between it and the insured.

The Act sets up a system of liability insurance under which a plaintiff still needs to establish fault before he becomes entitled to recover any damages. It's primary aim was to attempt to create more certainty in the outcome of accident litigation. Yet S. 10 allows the insurers to avoid liability where it is evident that there was non-disclosure of a material fact or a misrepresentation of facts. I propose to examine the shortcomings of this Act in another Chapter<sup>19</sup> but at this point it will suffice to note that the requirement of proof of fault and the provision in S.10 allowing insurers to evade their liabilities under a policy, certainly do not do much by way of creating certainty in this branch of the law.

## 1.2 THE MEANING AND OBJECTIVES OF COMPENSATION

The word "compensate" in ordinary everyday use is generally taken to mean, recompense, counter balance or to make amends<sup>20</sup>. The word is derived from a Latin root "compesare" meaning weigh together and could be expressed as give to each man that which is due. The principle underlying the award of damages for personal

injuries is expressed in the maxim "Restitutio in intergrum" meaning that the law will endeavour in so far as money can do it to place the injured person in the same position he would have occupied had not the accident occurred.

The award of damages involves the taking away of money from one person and giving it to the injured party. How may this be justified? Before one becomes entitled to receive damages from the other party he must first prove that party was at fault. Where fault cannot be proved then the injured party will receive no relief<sup>21</sup>. The emphasis on fault is a little misleading because it implies the finding of moral blame worthiness on the defendant's part. Looked at this way it means that the court will have to involve itself in an examination of the state of mind which the act was committed and yet negligence is concerned with inadvertent acts such that the state of mind with which an act was committed is irrelevant.

It is perhaps from the rule of no liability without fault that the idea of awarding damages by way of retribution has sprung from<sup>22</sup>. Importing the idea of retribution into the award of damages for personal injuries involves the question of awarding punitive damages in order to punish the tortfeasor for what may be termed the evil which he has committed. As I have already pointed out, mens rea is not a feature of the tort of negligence. Besides, the case of Rookes v. Banard<sup>23</sup> has cleared the position by laying it down as law that punitive damages are entirely outside the scope of tort law except in two situations. First,

when the defendant being in the position of a public authority is guilty of arbitrary, oppressive or unconstitutional conduct and secondly, where the defendant has made a profit out of his wrongdoing which exceeds the loss to the plaintiff.

The law of tort, as I have pointed out elsewhere<sup>24</sup> performs the role of social engineering in that it seeks to strike at a fair balance between security in the person on the one hand and freedom of action on the other. Awarding damages for personal injuries could be regarded as one way of doing this.

It is arguable that the law by awarding damages aims at deterring future tortfeasors. This argument does not carry much weight because with the existence of compulsory third party insurance it means that the damages are being paid out of a common pool and the blame such as it is attaches to all the contributors to that pool. What deterrent effect the finding of fault against a tortfeasor would have is watered down especially as it is the insurers who will have to pay the damages. Criminal actions are a more effective deterrent than tort law. Fear of injury to oneself should of itself work as a deterrent. If it does not then it is very unlikely that fear of injuring another would have any such effect<sup>25</sup>.

By far the most convincing reason justifying the award of damages for personal injury is that of compensation. It is an attempt to make good that which has been lost. It is awarded recognition that a harm has been done and that such harm has resulted in a loss. As Lord Halsbury put it in The Mediana<sup>26</sup>

"..... where by the wrongful act of one man something belonging to another is either itself so injured as not to be capable of being used or is taken away so that it cannot be used at all, that of itself is a ground for damages".

In assessing damages the aim is to consider in pecuniary terms that which he has suffered as a result of the wrong done to him<sup>27</sup>, There is no arithmetical calculation by which the exact amount of money which would represent such a thing as pain and suffering but nevertheless the law recognises that as a topic upon which damages may be given<sup>28</sup>.

That the award of damages is purely compensatory is borne out by the heads of damage recognised. Under pecuniary loss, damages awarded include that of loss of future earnings, loss of career, medical and hospital expenses as well as the pecuniary loss up to the time of the trial. Under the head of non-pecuniary loss damages are awarded for the injury itself, for pain and suffering, nervous shock, loss of amenities, disfigurement and the shortening of life.

In assessing damages for pecuniary loss, since the aim is compensation and not punishment deductions to the total sum are allowed in order to take account of taxes<sup>29</sup>, which the plaintiff is bound to pay and also his contributions to National Insurance Schemes. Deductions are also made in order to take account of the contingencies in life e.g. failure of business, sickness and early death.

Atiyah<sup>30</sup> describes the damages awarded for non-pecuniary loss as solace compensation. In Wise v. Kay and another<sup>31</sup> a young

woman sustained brain injuries in an accident as a result of which for three and a half years she was in hospital as a state aided patient helpless and unconscious. There was no prospect of her recovery and she had not and she would never have any knowledge of her condition. She was awarded £15,000 for future loss of earnings and loss of expectation of life. No damages were awarded for pain and suffering because medical evidence revealed that she could not feel any. In Benham v. Gambling<sup>32</sup> the shortening of life was held to involve a consideration of the loss of a measure of protective happiness. The court would consider the character and habits of the deceased and determine whether these were calculated to lead him to a future of happiness or despondency which would justify the giving of a smaller award<sup>33</sup>. In Wise v. Kay and Another<sup>34</sup> it was held to be irrelevant that the plaintiff being in the state she was, would not be able to enjoy personally the award of damages. In McGrath Trailer Property Ltd. v. Smith<sup>35</sup>. The plaintiff became childlike and perfectly happy to potter about in the garden and no longer wanted to lead his former useful life. It was held to be irrelevant that he was not aware of his condition and did not miss his inability to live a normal life. The fact was that as a result of the injuries he had sustained he was now leading an abnormal life. Yet in H. West and Son Ltd. v. Sherpard<sup>36</sup> where the plaintiff was paralysed on all four limbs it was stated that her condition could be worse than Wise v. Kay<sup>37</sup> because she might have some knowledge

of her condition and that she might die within five years. She awarded £17,000 as general damages which was substantially higher than had been awarded in Kays' case.

The cases are illustrative of the courts appreciation of the loss that a plaintiff has suffered, a loss which needs to be made up for. To this extent it does not matter whether or not the victim recognises his predicament. The fact remains that through the negligence of the defendant he has suffered an injury and the damages he is awarded are intended to place him in the same position he would have occupied had not the accident occurred in so far as this is possible. This ideal is much easier to achieve in relation to damages for pecuniary loss than for non-pecuniary loss.

### 1.3. GENERAL PRINCIPLES IN THE AWARD OF DAMAGES

The principles underlying the award of damages for personal injuries fall into two categories. The first category comprises the head of damages awarded for pecuniary loss and the second, that awarded for the personal loss arising out of an accident. }

#### PECUNIARY LOSS

*Special Damages*

Under this head damages are awarded for loss of earnings both up to the time of the trial as well as future loss of earnings and for additional expenses incurred as a result of the accident such as medical expenses. Under this head the damages awarded should be the exact amount of money lost<sup>38</sup>, but this is

only possible with loss of earnings or expenses incurred up to the time of the trial. As far as prospective loss is concerned its calculation is left to the discretion of the court in exercise of which consideration will be given to the ordinary contingencies of life such as early death, sickness and bankruptcy<sup>39</sup>. Allowance is also made for the fact that it is being awarded in a lump whereas under ordinary circumstances he would have received it in bits over a long period of time. In Fletcher v. Auto Car and Transporters Ltd.<sup>40</sup> It was noted that when money is paid out in a lump sum it can be invested and the interest on it used at once.

In assessing damages for prospective loss the court needs proof of the plaintiff's earnings at the time of the accident if he was employed. Other relevant considerations include whether there was a possibility of promotion or he was in a trade or profession in which the rates of pay increased from time to time or if he possessed such exceptional qualifications or had opportunities which would have led to an improvement of his financial situation. Where the plaintiff was out of work at the time of the accident and was not therefore earning because he could not find work rather than he did not care to work the court would have to estimate his prospects of gaining employment in the future and at what level. If the injured plaintiff is a child then the court must make a "guesstimate" of how well the child if not injured would have fared on attaining adulthood. In Jones v. Lawrence<sup>41</sup> the plaintiff a boy of seven

years sustained severe injuries including a fractured skull and as a consequence of the brain damage he suffered he was unable to concentrate on his school work. He had been a fairly bright child but as a result of his injuries he did not perform as well as could have been expected in his examinations and so he missed a place in a grammar school. It was held that his failure to obtain a place in a grammar school could, as well as his lack of concentration, affect his employment potential. Had he not been so injured he would probably have had a prospect of a brighter future. Because of its speculative nature, damages for loss of prospective earnings are usually claimed as a part of the general damages.

That a plaintiff is in an occupation in which there is a high rate of unemployment is also a factor to be taken into consideration<sup>42</sup>. There are cases where although a plaintiff may be physically capable of working after he has recovered from the accident, either in the same employment or in something different, the after effects of the accident may make it more difficult for him to find work or to retain his work especially at times when there is general unemployment. In such circumstances the damages may be increased to take account of this factor, e.g. in Norris v. Syndic Manufacturing Co. Ltd.<sup>43</sup> in which the plaintiff had lost three finger tips and although he was able to resume his pre-accident work without loss of earnings, were he to be thrown back into the labour market his injury would be a huge handicap<sup>44</sup>.

Where the plaintiff has people whom he was maintaining with his earnings it is relevant to estimate the length of time for which his survivors (if he died) would have continued to need his support. In Williamson v. John 1 Thorny Croft & Co. Ltd. and others<sup>45</sup> which concerned a claim by a widow in respect of her husband's death and the widow died before the trial it was held to be a relevant consideration that at the time of her husband's death she was seriously ill herself and would not have outlived him by more than a few months. The damages awarded were on that account confined to the period in which she had survived her husband. In Fletcher v. Autocar and Transporters Ltd.<sup>46</sup> Lord Denning M.R.<sup>47</sup> was of the view that the court in awarding damages in respect of loss of prospective earnings for the plaintiff who had a wife to support should award a sum which would ensure that he would not want for anything that money could buy and would ensure that his wife would be able to live for the rest of her life in the comfort he would have provided for her.

On the basis of the decision in Pickett v. British Rail Engineering<sup>48</sup> a plaintiff can recover damages for earnings lost during his "lost years" where his life expectancy has been reduced<sup>49</sup>.

Loss of earning capacity is calculated by taking the figure of the plaintiff's annual earnings at the time of the injury less the amount if any which he can now earn annually and multiplying this by a figure which while based on the number of years during which loss of earning power is expected to last, is reduced so as to allow for the fact that a lump sum is being given now instead

periodical payments over the years. The former figure is known as the multiplicand and the latter as the multiplier. Adjustments on both can be made depending on taxation, inflation, probability of future increase or decrease in the annual earnings and the contingencies in life. Computation is to be made on the earnings after the deduction of income tax which would have been payable on them.<sup>50</sup> In Britain, national insurance contributions are also deducted in arriving at the earnings. It is usually the multiplicand rather than the multiplier which is increased or decreased. Where inflation is taken account of as in Mitchell v. Mulholland<sup>51</sup> the multiplier or the multiplicand is increased to accommodate it. Where the plaintiff has taken out an accident insurance the monies received by him under the insurance policy are not to be taken into consideration<sup>52</sup>. Neither are any deductions to be made in relation to pension monies except for the period after which the plaintiff would have retired and become entitled to pension<sup>53</sup>. In Browning v. The War Office<sup>54</sup> however, where an injured technical Sergeant in the U.S. Air Force received disability pension from the time of his discharge from hospital it was held that this disability pension ought to be taken into consideration because the aim in awarding damages for pecuniary loss is to compensate the injured not to punish the tortfeasors wrong doing.

As far as medical expenses are concerned a plaintiff is entitled to damages for medical expenses reasonably incurred

by him as a result of the injury. He is also entitled to recover any other expense which he can show resulted from the injury for example having to employ extra help or change his living conditions. It is usually ascertainable and so it is claimed as special damages. In calculating it, the figure of annual expenses (multiplicand) is multiplied by a figure which while based on the number of years during which expenses will continue (the multiplier) is reduced so as to allow for the fact that a lump sum is being given now instead of periodical payments over the years. On the basis of Parry v. Cleaver<sup>55</sup> it is arguable that there can be no discount on account of medical expenses which have been paid gratuitously by a third party. Where, as in Fletcher v. Autocar & Transporters<sup>56</sup>, the plaintiff's wife comes to his assistance by doing most of the nursing herself, damages for the cost of outside care is calculated only from when it is anticipated that he will be transferred to a home or institution. In Schneider v. Eisovitch<sup>57</sup> the plaintiff was able to recover out of pocket expenses of her brother-in-law and his wife who had flown to England to assist her back home. Paull J. in that case specified that three conditions need to be satisfied before a claim such as this succeeds. First, that the services rendered were reasonably necessary as a consequence of the tortfeasors tort. Second, that the out of pocket expenses of the friend who rendered these services are reasonable and third, that the plaintiff undertakes to pay the sum awarded to the friend or friends. Where the expenses are likely to continue for a substantial period of time, account must be taken

of the future cost of maintaining and replacing from time to time surgical aids such as artificial eyes and limbs.

PERSONAL LOSS — General Damages :

Under this head damages are awarded for pain and suffering, loss of Amenities of life and loss expectation of life.

Both past and prospective pain and suffering will be taken account of. <sup>It</sup> will include any pain caused by medical treatment or surgical operation rendered necessary by the injury inflicted on the plaintiff. Suffering does not necessarily relate to the physical pain. It could include mental anguish caused by fear of incapacity, humiliation or embarrassment caused by disfigurement or as in H. West and Son Ltd. v. Shepard <sup>58</sup> a knowledge of ones helplessness or certain death. In Heaps v. Perrite Ltd. <sup>59</sup> Greer L.J. said,

"we have to take into account not only the suffering which he had immediately after the accident but the suffering that he will have throughout his life in the future".

That was a case in which the plaintiff lost both hands in an accident. For the rest of his life he would be handless, unable to do ordinary work or dress himself or even to play sports.

The head of loss of Amenities concentrates on the curtailment of the plaintiff's enjoyment of life due to his inability to pursue the activities he had pursued before, e.g. if he was a rugby player and can no longer play the game or if he has lost his sight or his sense of smell or if there has been an interference with his sexual life. All the little things

which matter so much to an individual. In Fletcher v. Autocar and Transporters Ltd.<sup>60</sup> Lord Denning pointed out that in the case of a man with expensive habits regard should be had to the amount of money he would have had paid in order to enjoy these habits. Age, although of relevance in considering the damages awardable under this head does not always justify a reduction in the sum awarded. In Bird v. Cocking<sup>61</sup> it was observed that the plaintiff being sixty-three at the time of the trial was not likely to work again such that the damages in his case need not be very high. In Frank v. Cox<sup>62</sup> on the other hand where the plaintiff sustained a hip injury which caused him alot of pain and restricted his movements, Sachs L.T. admitting that the plaintiff had not many years to live with the pain and discomfort and impairment of movement observed,

"But it is important to bear in mind that as one advances in life one's pleasures and activities.... become more limited and any substantial impairment in the limited amount of activity and movement which a person can undertake in my view, becomes all the more serious on that account."

The head of loss of expectation of life was first introduced by the case of Flint v. Lovell<sup>63</sup>. Most actions brought under this head are for the benefit of the estate as in Rose v. Ford<sup>64</sup>. In Benham v. Gambling<sup>65</sup> it was held that damages awarded under this head is mainly for the loss of a predominantly happy life. If the character and the habits of the individual were calculated to lead him to a life of despondency or unhappiness that would be a circumstance for justifying a smaller award. Thus in Burns v.

Edman<sup>66</sup> the court reduced what otherwise would have been its award because the deceased had led a criminal life and therefore in the assumption of the court an unhappy one.

There exists no yardstick for measuring non-pecuniary loss. Full compensation cannot be given in the sense that no amount however large can fully compensate for a serious physical injury<sup>67</sup> Usually the amount awarded is conventional depending on other previously decided cases.

In England since the early 1970s there has been a movement away from global awards to itemised ones, such that it is possible to tell how much a judge has awarded under each head. All the same each one is not calculated on its own but all should go towards the giving of one sum as general damages<sup>68</sup>. There is a possibility in treating the heads as separate, of overlapping especially as concerns loss of amenities of life and loss of future earnings. It was with this in mind that Lord Denning pointed out that in assessing damages for loss of amenities of life regard must be had to the amount the plaintiff would have had to pay in order to maintain his habits<sup>69</sup>.

In Kenya damages for pain and suffering, loss of amenities and loss of expectation of life are not itemised. Loss of prospective earnings is treated as general damages. One sum is given for all three heads<sup>70</sup>. As regards special damages the plaintiff must prove items he includes in the claim<sup>71</sup>.

CHAPTER TWO - THE QUANTUM OF DAMAGES.

This Chapter is to illustrate the nature of the awards which have been granted by the Courts in Kenya over the last twelve years.

In granting awards in cases of personal injuries the Courts use previously decided cases as a guide. Since no two cases are ever similar in all respects, they have always tended to look for broad similarities in the cases rather than exactness. It is therefore difficult to classify the great variety of possible injuries in a way that is entirely satisfactory.

In order to facilitate a comparative study of the cases, I have classified them into two broad categories. First, the permanent injury type and second, the partial injury type. The difference between the two categories lies in the degree of incapacity rendered on the plaintiff by his injury. Thus in the first category are included cases in which the victim has to depend on the nursing and care of others, or where the victim is a complete cripple and those in which there is complete incapacity for work. Examples of the cases which fall in this category are, injuries resulting in paralysis, loss of limb and brain damage. In the second category the accident victim while he may have lost use of a limb is still able to go about the ordinary business of life. He still has a capacity to work although it may not be at the same scale or of the same nature as his pre-accident work. It is mainly the victims enjoyment of life which has been affected.

.....

The cases included in this category concern injuries resulting in loss of use of limb (as opposed to loss of limb) injury causing blindness, disfigurement and injury to the jaw and teeth. As I have already pointed out, the difference between the two categories is one of degree and the cases which fall into the second category can be analysed more easily by comparing them with those in the first.

2. 1 INJURIES RESULTING IN PERMANENT INCAPACITY.

Damages for the injuries which fall in this category range from Shs. 200,000 to Shs. 2,000,000/-

In Uganda Cement Industry V Imelda Kawa' the plaintiff sustained a double fracture of the Spine at the level of the eighth and ninth vertebrae and the first to third lumbar vertebrae. Her right femur was fractured as were a number of ribs on both sides. She is now paralysed completely from waist downwards and will have to spend the rest of her life in bed or on a wheel chair. She has lost all prospects of matrimony and motherhood. She was awarded general damages of Shs. 300,000/-. In Mondo v Jessa<sup>2</sup> a case decided about five years before Imelda's case an award of Shs. 300,000/- general damages had been granted to the plaintiff who had sustained a fracture of the spine and as a consequence was paralysed in his legs and bladder and would need constant help.

In Elizabeth Miruru & others v Emmy Mwatha Annan<sup>3</sup>, one of the Plaintiffs, Naomi sustained a fracture of the skull, injuries to her back and lower right limb. She has scars over her forehead, lower back, hips and the back of her right heel.

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Her right pupil is dilated and does not react to light. There is a weakness of the facial muscles on the right side. The right upper and lower limbs are weaker than the left. She has permanent distorted Vision. Her right arm and fore-arm are thinner by one centimetre compared with the other side. The right upper limb is short as compared to the left side. The right leg is thinner than the left although it is not shorter. There is a permanent inability to close the right eye completely. She was awarded general damages of Shs. 800,000/-.

In Morris Wambua Musila v Zablon Mariga & Kamau<sup>4</sup> also a case on paralysis, the plaintiff sustained a fracture of the spine resulting in paralysis of the left limbs. He now suffers a permanent urinary tract infection and chronic constipation. He has been rendered impotent. He has considerable difficulty in attending toilet requirements such as bathing, dressing or undressing. He suffers stiffness in the left ankle and wasting of the left quadriceps. The muscles of his left hand have become very weak. There is a stiffness in the right knee which is held in a position of 30° and cannot be bent beyond right angle, probably involving that knee in extensive degenerate discharge of osteo-arthrits. He was awarded general damages of Shs. 1,965,755/-.

In Dr. Samuel Mburu v Mr. Nderitu Njuuna & others<sup>5</sup> the plaintiff a doctor at Nyeri general hospital sustained an injury to his spinal column as a result of which he was totally paralysed. Mr. Justice O'kubasu awarded him general damages of Shs. 2,368,850/.

Wide disparities are apparent in these cases although in all of them the victim has been paralysed and rendered incapable of working or taking care of themselves. One possible explanation could be the year of decision. Mondos<sup>6</sup> case is the earliest and Dr. Mburu's<sup>7</sup> the latest. Assuming that the courts were taking account of inflation this could explain some of the disparity. Another possible explanation is the nature of the plaintiff's work. Damages tend to be higher where the plaintiff is in a higher paid job group because damages for loss of earnings will be high. In Imelda Kawa's<sup>8</sup> case the facts do not reveal the nature of the plaintiff's employment, while Naomi in Elizabeth Miruru's<sup>9</sup> case was just a little girl and so the award did not include damages for loss of earnings. In Morris Musila<sup>10</sup> the plaintiff was a production superintendent with a possibility of promotion to assistant plant Manager. He was awarded damages of Shs. 279,439 for loss of earnings for the period January, 1979 to October, 1981 and Shs. 573,597/- for the period when he would have been promoted to assistant plant Manager. With most cases involving paralysis, the degree of paralysis also counts. Thus one would expect a case of total paralysis (Quadriplegia) as in Dr. Mburu's case to receive a substantially higher award than cases of partial paralysis (paraplegia) such as in Elizabeth Miruru<sup>12</sup>, Imelda Kawa<sup>13</sup> and Morris Musila.<sup>14</sup>

By comparison to cases involving paralysis damages for loss of limb have been rather low, ranging from Shs. 200,000/- to Shs. 500,000. In Peter Kitwai v Davinder Singh,<sup>15</sup> the plaintiff, a male aged thirty three sustained crush injuries to both ankles as a result of which both legs were amputated below the knee.

His left femur was fractured. He had five major Operations and was in hospital for eighteen months. He is now Crippled and disfigured. He was engaged to be married but his fiancée has left him. He was awarded general damages of Ss. 537,600/-.

In Ugenya Bus Service v James Kongo Gachoki<sup>16</sup> the plaintiff, a former agricultural officer, had to give up his work when he sustained leg injuries as a result of which his right leg had to be amputated leaving a stump about six inches long from the tibia turnacle. He was no longer able to play football or dance and even in sitting was restricted in position. He was awarded general damages of Ss. 200,000/-.

In Mahindra v Miwani Sugar Mills<sup>17</sup> the plaintiff sustained fractures of the right femur right tibia and fibula. He also sustained a compound fracture of the right wrist. He is unable to play sports or sit for any length of time. He cannot use an Asian type of toilet. He has been left incapacitated, deformed and unemployable, a doubtful candidate for marriage at the young age of thirty. He is a permanent patient with a possibility of losing one leg by amputation. He was awarded general damages of the Ss. 240,000/-

In John Owiro Osor v Njugi Njoroge<sup>18</sup> the plaintiff was a former labourer aged twenty eight. He sustained fractures of the right humerus, the left tibia and the left fibula. The right arm and the left leg became gangrenous and above the knee amputation of the left leg was done and also an above the elbow amputation of the right arm. Medical opinion was that he had been maimed grossly. He will never work as a labourer again even with an artificial limb. He was awarded general damages of Ss. 312,000/-.

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In principle there is no reason why the damages in this class of injuries should be so much less than the amount awarded for injuries resulting in paralysis. In both types of cases the victims enjoyment of life has been reduced. There is mental anguish by way of the awareness of ones total helplessness although a quadraplegics case is much worse because his paralysis is total and the degree of helplessness much more extreme. But a paraplegic such as the plaintiff in Imelda Kawa<sup>19</sup> can be compared to the plaintiff in Peter Kitwai<sup>20</sup> who lost both legs. When this is done the wide disparity in these cases becomes even more difficult to justify. Damages awarded for loss of limb are mainly for disfigurement and loss of Amenities of life. In Ugenya Bus Service v James K. Gachoki<sup>21</sup> the fact that he was no longer able to play football or dance was a relevant consideration. In Mahindra<sup>22</sup> and Peter Kitwai<sup>23</sup> the plaintiffs disfigurement and reduced marriage prospects seemed to have some bearing on the damages awarded. It is difficult however to ascertain exactly how much of the damages was awarded for disfigurement or loss of amenities of life because the awards in this country are not itemised.

The next lot of cases concern injuries causing brain damage with and without epilepsy. On average the damages awarded for these type of injuries range from Shs. 200,000/- to Shs. 300,000/-. In Oluoch v Robinson<sup>24</sup> the plaintiff sustained multiple injuries including four fractures of the skull. He suffered brain damage which resulted in epilepsy. He was awarded general damages of Shs. 220,000.

In Mrs. Rahima Tayab v Anna Mary Kinanu.<sup>25</sup> The plaintiff, a young girl sustained head injuries resulting in epilepsy. The trial judge Mr. Justice Nyarangi awarded her total general damages of Shs. 750,000/-. This award was found by the court of Appeal to have been excessive and reduced to Shs. 270,000/-. The court held that the trial judge had missaprehended the facts of the case in that the type of epilepsy which the plaintiff had developed was one in which that type of epilepsy was controllable by drugs and that in such cases the damages are never all that high.

The plaintiff in Bashir Ahmed Butt v Uwais Khan was a boy aged 7½ years. He sustained a fractured skull, the fracture line extending from the frontal bone to the base of the skull. As a result he suffered a mental handicap of 50%. He was awarded general damages of Shs. 300,000. The award of the high Court had been Shs. 400,000 but it was reduced by the court of appeal on grounds that it was excessive considering the amount awarded in similar cases. Also that the trial judge had acted under the mistaken impression that the possibility of the plaintiff developing epilepsy was 25% when it was in reality considerably less. On the basis of the award in Bashir Butt<sup>27</sup> the plaintiff in Joyce Wanjiku Magatha v E.A.P.T.<sup>28</sup> who suffered brain injury resulting in a mental handicap of 50% was also awarded damages of Shs. 300,000. Shs. 300,000 seems to be the basic award for all injuries resulting in brain damage although from hints given in Bashir Butt<sup>29</sup> and Rahima Tayab<sup>30</sup> if the victim develops a type of epilepsy uncontrollable by drugs then the amount of damages awarded could be much higher.

2: 2 INJURIES RESULTING IN PARTIAL INCAPACITY

For injuries involving fracture to the leg and consequent shortening of the leg or the possibility of developing Osteo-athritis the awards granted range from Shs. 200,000 to Shs. 300,000. Compared to cases involving actual loss of limb where the awards are on average Shs. 300,000, the awards given for this type of injury is only slightly less although the injury sustained is more severe in cases involving amputation. Future pain and suffering & Operations are relevant considerations.

In Bhogal v Burbidge and Another,<sup>30</sup> the plaintiff sustained multiple injuries including a fracture of the left tibia, a fracture of the ankle and of the left wrist. He developed osteo-athritis in the knee and was unable to walk more than half a mile without experiencing severe pain. The athritis would get worse. He was awarded general damages of Shs. 220,000/.

In James Gakere v Peter Nguoi<sup>32</sup> the plaintiff sustained fractures of the femur and right tibia. There was a 1.6" shortening of the leg. Osteo Athritis of the ankle is a likely possibility. He was awarded general damages of Shs. 198,000/- being 90% of Shs. 220,000. He was found to have been contributorily negligent to the extent of 10%.

In Malde v Angira<sup>33</sup> Malde sustained a fracture of the right upper ankle joint which required operation. He has developed Osteo-athritis which could get worse with the passage of time. He will suffer backaches for most of his life until his left leg and foot were fused by another operation. He was awarded general damages of Shs. 120,000. Angira sustained a fracture of the Humerus and the right ankle joint. His right leg is shorter than his left and the fingers of his right hand are clawed.

He was awarded general damages of Shs. 160,000. The plaintiff in Jonathan Glen & Another v Joseph Musembi<sup>34</sup> sustained a leg injury as a result of which he had leg shortening of two inches. He will have to wear a heel raise for the rest of his life. He can no longer play sports. He was awarded general damages of Shs. 375,000/-.

Cases involving loss of use of limb are based mainly on damages for loss of amenities and loss of career. In Evelyn Opuka v Akamba Public Road Services, Ndambuki Ndunda<sup>35</sup> the plaintiff a young woman of 29 who worked as a telephonist sustained arm injuries as a result of which she suffered total paralysis of the fore-arm. There are scars on her left arm and on the right fore arm. She cannot shake hands with her friends or hold a fork, spoon or knife. She cannot do any house work and has to wear long sleeved dresses to disguise the scars. She was engaged to be married but her boyfriend has since deserted her. She was awarded general damages of Shs. 171,000/-. In Matiwo Mutuya v Wilfred Mbwika<sup>36</sup>, the plaintiff an artisan sustained crash injuries to his left hand and fore-arm up to his elbow. He is now unable to hold things with his left hand and has scars on his forearm that burn and itch especially in the hot weather. He has patches on his left arm which are different in colour from the rest of his body. His elbow movement is restricted and his left thumb and ring fingers have no movement. He cannot clench his left hand. Its only use is to help in pushing forward or putting backwards or moving from side to side something between both hands. He was awarded general damages of Shs. 200,000.

In Wambua Ndamu v Ganijee Brothers<sup>37</sup> the plaintiff sustained a crushed right hand wrist as a result of which his right hand could not function properly. There was a cut on his wrist going to a depth of four inches. He had a scar at this place and the tendons of his thumb and fingers had stuck to the scar. As a result he had no feeling in the right hand. He was awarded general damages of Shs. 78,405/-.

Damages for eye injury are on the low scale ranging from Shs. 50,000 to 150,000. In Mohammed Juma v Kenya Glassworks Ltd,<sup>38</sup> the plaintiff a male aged 41 was a labourer earning fourteen shillings a day. He sustained an injury to his left eye as a result of which he lost sight in it completely. The court of appeal awarded him damages of Shs. 70,000/-. In Olive Lubia & Another v Kemfro Africa Ltd,<sup>39</sup> Olive sustained a fracture of the right side of the frontal bone with destruction of the right eye. A pronthetic eye was inserted. Her looks have been spoilt. The dummy eye is smaller in size than the left eye and waters a good deal. She was awarded general damages of Shs. 150,000/-. The rather high award in this case as compared to Mohammed Juma<sup>40</sup> could be explained by the fact that Olive's good looks had been mar ed by the injury. Damages for disfigurement tend to be rather high when a woman is concerned than for a man. We appear to have adopted the attitude of the English Courts which are still suffering from a hangover of victorian times, when large awards for disfigurement were based on the loss of prospects of marriage which was then considered the career for most women. The following cases illustrate this point.

In Mukai Mwanza v Joseph Matheka & Others<sup>41</sup>, the plaintiff a widow aged 36 years sustained severe burns over most of her body. This resulted in ugly scars which get irritated by the sun. She can no longer work in her garden. Her fiancée left her for another woman. She was awarded general damages of Shs. 354,000 and special damages of Shs. 3,300/-.

Valerie Cooke, an attractive unmarried woman in Khan v Cooke,<sup>42</sup> sustained severe facial injuries including a fractured jaw. She lost nine teeth and had to undergo a series of painful operations. Her marriage prospects have been reduced. Her speech and ability to chew Food might improve with dental treatment. Plastic surgery could restore her confidence to meet people. She was awarded general damages of Shs. 120,000/-.

In Stephen Kombe v Walter Bigi Safaris Ltd.,<sup>43</sup> the plaintiff sustained bruises on his arms and chest, severely contused wounds on the right side of his face with loss of skin and tissue and the lower half of his ear had been wrenched off. A skin graft was done on his face. As a result of his injuries his face is now grossly disfigured. His lower face is pushed slightly to the left because the right side is paralysed. The angle of his mouth droops downward to the right. A drop of saliva oozes out of the scar on his right cheek every minute. His speech is slurred. He can no longer pucker his mouth to whistle. His condition could be improved by plastic surgery although the finer features can never be recaptured. He was awarded general damages of Shs. 150,000/.

In Firozali Mohammed Lalji v Elias Toka & Others,<sup>44</sup> the plaintiff sustained injury to his mouth. As a result his teeth have "Point" Contacts. This causes him severe pain. He was awarded Shs. 75,000 for the mouth injury and Shs. 20,000/- for future operational Costs. In Wilson Chege v Ambaraka Brothers & Others<sup>45</sup>, the plaintiff sustained concussion and laceration of the upper lip and nose and lost three upper incisors and one premolar. He now experiences difficulty in eating hard food. A dental bridge will have to be fixed to overcome this difficulty. He was awarded general damages of Shs. 150,000/-. Among the main considerations in this type of case is the cost of future operations where this is necessary. If the plaintiff's condition could be improved by operation but such operation is too risky, it could be a ground on which to increase the damages because the plaintiff will continue to experience pain and discomfort when eating or talking.

### 2.3 GENERAL OBSERVATIONS

One of the questions which arise from a case study of the awards granted by the Courts in Kenya is do the awards indicate the existence of a common denominator explaining why they take the form that they do? The award of damages for personal injury is an area covered entirely by judicial discretion. Discretion exists as a hole in a doughnut surrounded by a tight ring of human prejudice and emotions. A judge is only human and the possibility of very human emotions overcoming his sense of judgement cannot be overlooked, especially at the trial stage. At that stage there is usually one judge hearing the case. It is significant that of the cases which I have included in this study all the exceptionally high awards have been decisions of the high Court.<sup>45</sup>

The Court of Appeal on the other hand appears to have adopted a policy of moderation in the awards. In most cases where the high court awards are rather high the Court of Appeal on Appeal has always been willing to reduce it. In Olouch v Robinson,<sup>47</sup> the Court of Appeal reduced the high Courts award of Shs. 280,000 to Shs. 220,000 on grounds that it was excessive. Similarly in Rahima Tayab v Anna Mary Kinanu<sup>48</sup> Mr. Justice Nyarangi's award of Shs. 750,000/- was reduced to Shs. 270,000 and in Bashir Butt v Uwais Khan<sup>49</sup> the damages were reduced from Shs. 400,000 to Shs. 300,000.

To the question whether or not there is a common denominator running through these cases the answer must be in the negative. I have attempted to explain some of the variables in the amount of damages being awarded for similar injuries. Although the factors which I have mentioned such as, the nature of the plaintiff's work, his sex and the year of the decision do influence the outcome of a case they do not establish the existence of a Common denominator. In Kenya, since the awards are not itemised it is not possible to ascertain how much of the award has been granted for each head of damage. From the judgements there is seldom a clear indication of how a figure has been arrived at. After reading the medical report on the plaintiff's injuries and examining other cases cited to him in which similar injuries were involved, the judge just quotes a figure as adequately covering the injuries sustained by the plaintiff in the particular case at hand. One cannot tell how or why he arrived at that particular figure as being adequate compensation. In the final analysis, the outcome of the case shall depend on the judge rather than on any fixed or determinate principles.

In Bhogal v Surbidge, Kneller<sup>5</sup> as he then was, said,

"The fall in the value of money and the rise in the cost of living are matters that can be taken into account."<sup>50</sup>

The cases which I have included in this study range from 1972 to 1982, and yet there appears to be very little difference in the amount of damages recoverable. The basic amount of damages recoverable for head injuries has remained between Shs. 200,000 and Shs. 300,000 as it was when Olucch v Robinson<sup>51</sup> was decided in 1973. The amount recoverable for loss of limb is, on average, still Shs. 200,000 as it was in 1972 when Mahindra v Miwani Sugar Mills<sup>52</sup> was decided. According to economic surveys from the Central Bureau of Statistics, the cost of living for low income earners was 4.4% in 1972 and 14.9% in 1981. If the damages awardable for loss of limb was Shs. 100,000/- in 1972 (that is, taking a hypothetical case), it follows that in 1981, the compensation payable for injuries of similar nature should be equal to Shs. 338,600/-.

The principal underlying the award of damages for personal injury is to put the plaintiff in the same position he would have occupied had not the accident occurred. It is not possible to award a perfect compensation, but at the very least, the plaintiff ought to receive adequate compensation. The awards being granted by the courts in this country have remained more or less stagnant while they continue to pay lip service to the theme of taking inflation into account. As long as the high cost of living is not reflected in the amount of damages recoverable, the awards shall be no more than a form of solace rather than a true assessment of the injury suffered by the plaintiff.

CHAPTER THREE - RECOMMENDATIONS FOR REFORM.

3.1 DEFECTS IN THE PRESENT SYSTEM OF COMPENSATION.

In tort and under the provisions of the insurance (motor vehicles third party risks) Act<sup>1</sup>, a plaintiff must prove that the defendant was at fault before he becomes entitled to damages. It is not always easy to prove fault. The long delays before a case comes up for hearing means that by such time a witnesses recollection of what had taken place is vague. Sometimes the witnesses cannot even be traced. It could even happen that the only witnesses of the accident are the injured party and the tortfeasor which will make it even more difficult to prove fault on the latter's part. The injured party may have been the victim of a hit and run accident in which case there will be no one on whom to attach the blame. It could happen that he has been injured in an accident in which no one was at fault. In all these situations where fault cannot be established, the victim will have to bear the full burden of his loss.

The unfair results of treating fault as the only criteria on which liability is based is well illustrated by the case of Karanja Kago vs Karoki Njenga and another<sup>2</sup> in which the appellant was severely injured in a motor accident as a result of which his right arm had to be amputated above the elbow. The accident was found to have been caused by a burst tyre and not due to any negligence on the part of the driver and that the driver faced with a sudden emergency when the tyre burst did all that could be expected of a reasonably competent driver but could not prevent the bus from moving over the crown and hitting the car in which the appellant was travelling as a passenger. Madan J.A commenting on the unfairness of this situation said,<sup>3</sup>

"A real contribution which I wish to make..... is to emphasise for the attention of the authorities that be the barren vacuum and impotence of a situation whereby a person who suffers serious and grave injuries like the appellant here..... is left without monetary address because his claim fails for want of negligence on the part of the other vehicle or inability to trace him. The payment of some form of compensation by the state ought to be devised. Without any monetary assistance they are condemned to abject lives which form a stain upon our society."

The principle of no liability without fault was been justified on the basis of morals. That the party at fault ought to make amends for the wrong which he has committed. The tort of negligence is concerned with inadvertent acts. It involves the application of an objective standard of measurement which has nothing at all to do with the characteristics of the parties involved. The defendant need not be morally blameworthy.

The Plaintiff is compensated irrespective of subjective fault. With the development of liability Insurance the emphasis is no longer on the punitive aspect of awarding damages and the moral blame which may attach to the defendant has been very much watered down. There appears to be no strong reason why we should retain the fault principle in respect of personal injuries arising out of motor accidents. The use of the Motor Vehicle has created foreseeable risks which society should insure against. A price is paid for physical progress and part of that price is represented in human costs. The compensation scheme should be reorganised in such a way that the human costs are reduced. Frank Grad<sup>4</sup> uses an interesting analogy to illustrate the proposition that the payment of compensation ought to be the concern of society. He says that, if we want to enjoy the use and consumption of industrially manufactured goods we must be willing to pay the cost of industrial accidents as part of the cost of production. Similarly if we want to enjoy the benefits of the motor vehicle we must be willing to pay the cost of motor vehicle accidents as a part of enjoying that benefit. This should be irrespective of the fault principle.

The aim of establishing a compulsory third party risks insurance scheme was to ensure that the third party was protected from the risk of the tortfeasor being unable to indemnify him on account of the accident. Yet within the provisions of the Insurance (Motor Vehicles third party risks) Act are to be found clauses which enable the insurance companies to disclaim liability.

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First, where under the provisions of S.10(2)(a) the insurer has not been given notice of the bringing of proceedings before or within fourteen days after the commencement of the proceedings. Secondly, where before the happening of the event which was the cause of the death or bodily injury giving rise to liability the policy was cancelled by mutual consent. By s. 10(4) the Insurer shall not be liable to pay any sum if he has obtained a declaration that he is entitled to avoid the policy on the ground that it was obtained by non disclosure of a material particular or by a representation of fact which is false in some material particular.

Insurance Companies are basically money making institutions. Within Insurance practice there are built in principles that ensure profit maximisation, one of these is the principle of disclosure. By this principle, Insurance Contracts are treated as contracts of a special type "uberrima Fides", which require utmost good faith. It requires the insured to disclose all material facts of such nature as to influence the judgement of a prudent insurer in determining whether he will take the risk and if so at what premium and on what conditions.

It assumes that the insured has a better knowledge about the state and condition of the subject matter of Insurance which is not usually the case. Non-disclosure is used by insurance companies in order to avoid meeting their obligations under a claim. It is unfair that a third party should lose his right to claim damages because of the dishonesty or inadvertence of the Insured. It would be better for the insured rather than the third party to suffer, such that the insurer should meet the claim of the third party and thereafter seek recoupment from the insured.

Where the insured happens to have no insurable interest in the vehicle in respect of which the policy is taken out the insurer may avoid liability towards a third party claimant. The principle of insurable interest is yet another device which insurance companies use to defeat claims. It has some very unjust results,<sup>6</sup> because the Insurer is not under any obligation to disclose to the insured that he cannot take out a policy unless he has an insurable interest in the subject matter of insurance. There is no rational basis for excluding liability towards a third party claimant since the very reason why the policy was taken out by the insured was to protect him against third party liability. The need for insurable interest is justified on grounds of preventing gambling in Insurance but as far as compulsory third party Insurance is concerned, that argument does not hold any substance.

It appears that within what was intended to be a social scheme there has been left a lot of room for the application of commercial principles. The purpose of the scheme is bound to fail since it is being operated by profit minded insurance companies that are always eager to rid themselves of claims which are put forward in connection with accidents. The Act provides them with the means by which they may do this.

The compulsory third party Insurance Scheme excludes certain people from its application. By s.5 of the Act, a policy of insurance does not cover liability in respect of death arising out of and in the course of his employment of a person insured by the policy or bodily injury sustained by such person in the Course of his employment. Also it does not include members of the insured's family and other gratuitous passengers.

In the former case it is assumed that the workmens compensation will provide the necessary remedy. It does not cater for a situation in which the employer is unable to pay the necessary compensation. There is no reason why his third party risks motor Insurance policy should not cover the workman's loss. As concerns the second situation it is quite common for a hard up driver especially drivers of government vehicles to carry people for reward and these people are not covered by the Insurance policy. If the compulsory third party scheme is to achieve it's purpose as a social scheme the scope of the number of persons covered under it ought to be widened.

Another shortcoming of the Act is that a person injured by a motor vehicle which has not been insured stands less of a chance of recovering damages from the tort feaser. The Act only concerns itself with insured motor vehicles, such that the victim of an accident caused by an uninsured motor vehicle still suffers the same disabilities he suffered before the passing of the Act. There is no certainty of compensation under the provisions of this Act because it still retains the requirement of proof of fault which as has already been pointed out is not always easy to prove.

The long delays in the payment of compensation and where there has been a dead lock in negotiations for an out of Court settlement the resultant expenses of a trial are yet some other defects in the present compensation system. To take a hypothetical case Mr. X, who is the family head suffers severe injuries in a motor accident and can no longer work. His daughter has had to take up some form of temporary employment.

The salary she earns is not enough to keep the family of six going and the debts keep accumulating. The payment of compensation is pending and the negotiations for an out of court settlement have been going on for one year. It is not surprising that faced with problems such as those experienced by Mr. X the injured party will sometimes accept the terms of an out of court settlement which is in most cases much less than equity demands. Litigation is expensive and not everyone can afford the services of a good advocate.

Payments are usually made in a lump sum. Where such a sum is paid out to a relatively poor citizen it takes a very short time before the money is completely dissipated. Meanwhile he may be permanently disabled or his earning may have been reduced by injuries he sustained in the accident. It would be more beneficial to him and his family if the payments were made periodically for life or for a fixed term where appropriate.

As I have argued elsewhere,<sup>7</sup> in the award of damages for personal injuries, the amount of damages recoverable shall in the final analysis depend on the judge rather than on any fixed or determinate principles, especially in so far as damages for non-pecuniary loss is concerned. Whereas it is not possible to place controls on the exercise of judicial discretion, if a system were devised by which the outcome of one's case was made more determinate it would be much fairer for the parties involved and more in the interest of justice.

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### 3.2 RECOMMENDATIONS FOR REFORM

Discontent with tort as the basis for compensating accident victims has been expressed throughout the common law world. I propose to examine recent developments in Britain, Canada, New Zealand and United States with a view to establishing which system if any should be adopted in this Country.

In Canada, in 1932 the Columbia Committee to study compensation for automobile accidents made a report which showed that there was little chance of recovery by an accident victim from any but insured motor vehicles. The Committee suggested that fault be repudiated as the basis of liability and that a compensation plan analogous to workmans compensation be adopted. By their proposals compulsory compensation insurance is to be imposed on all owners of motor vehicles for personal injury or death caused by the operation of such vehicles. Injured persons would be assured of compensation in all accidents where the vehicle was driven by the owner Or with the owners consent. Only hit and run cases and those where the vehicle was driven without the owners consent would fail to recover. The rate of compensation is to be based on the injured person's average earnings or average profit in the case of self employed professional or businessmen with certain maxima and minima.

In Saskatchewan, the Saskatchewan Automobile Accident Insurance Act<sup>B</sup> provides the injured party with a wide coverage. It provides protection to every person against loss resulting from bodily injuries sustained in an accident while driving or riding in a motor vehicle in Saskatchewan or as a result of collision with or being run over by a motor vehicle.

This is regardless of fault. An injured party can receive compensation whether or not the party causing the accident carried an insurance. There is an exclusive state fund to which all drivers and car owners must pay government insurance annually, concurrently with their applications and renewals of licenses and registrations. This scheme goes much further than the proposals of the Columbia Committee in improving the common law position. The scheme covers a wider range of persons than is covered under a compulsory third party scheme such as the one we have in this Country. The hit and run victim and the victim of an accident caused by an Uninsured or unlicensed motor vehicle stand a chance to recover compensation. The scheme does not depend on litigation so the injured party is saved a lot of expense. This defect of the compensation scheme is still retained in the Columbia Scheme and a hit a run accident victim cannot recover damages. Under the Saskatchewan Scheme there is little delay in the payments of benefits. Payments usually begin sixty days after proof of the claim. The scheme is more like a social scheme of compensation where everyone contributes to a common pool in order to mitigate the human costs arising from the use of the motor vehicle. There is no room for the practice of evasive principles by the Insurance Companies.

In the United States professors Keeton and O'Connell<sup>9</sup> have proposed a conversion of the present liability insurance policy for personal injury arising out of motor accidents into a mixture of personal and liability insurance. Under the basic protection plan, payments are to be made regardless of fault and are to be made as losses accrue rather than in one lump sum for both past and future losses.

It preserves tort actions for cases of severe injury. This is where the injury exceeds ten thousand dollars or the injury causes death or so many people are injured in one accident that some particular persons share of the total per accident coverage is less than ten thousand dollars. A person injured in a road accident would be insured for Financial loss up to ten thousand dollars by his own insurance policy.

The motorists policy would cover his family and guests as well as himself, so anyone injured in a motor vehicle accident while driving or being driven in a motor vehicle will have automatic recourse to compensation up to a sum of ten thousand dollars. There would be a maximum benefit of \$ 750 for income loss. Anyone earning an income above this figure would be able to take out additional coverage if he wanted to. No compensation would be provided for pain and suffering. This scheme widens the scope of the number of persons who may be able to recover damages. No mention is made however of the fate of a victim of a hit and run accident or that of an accident caused by an uninsured or unlicensed motor vehicle. This scheme was designed for the American market in which the main problem, the very high sums in damages that were being awarded by the juries, was a cause of great concern. This is not our problem. On the contrary the damages awarded in this country are still on the low side.

The report of the New Zealand Royal Commission on compensation for personal injury which was published in 1967, proposed the abolition of the tort system as far as it concerns actions for damages for personal injury.

It proposed to replace tort law by a compensation state accident Insurance Scheme, which would embrace road accidents, industrial accidents, Criminal injuries and all other accidental injuries which at present go uncompensated. The new scheme is to be financed by employers liability insurance and road traffic Insurance premiums together with a small contribution by the government representing the cost at present borne by the government in self insurance. The scheme would provide earnings related benefits payable weekly. A suggested maxima would be \$ 120 a week. Disability payments would be made periodically in serious cases and in lump sum in minor cases. Like the Saskatchewan Scheme, this scheme is wide ranging in the scope of persons it protects. The reform proposed is comprehensive in that it covers all accidental injuries and not just road accidents alone. This reflects a wide outlook towards reform of the whole compensation system. Accidental injuries are after all a part of the risks we are exposed to as a result of our technological development and we should be ready to shoulder the responsibility for them. Another advantage of this scheme is that it gets rid of the disadvantages of lump sum payments.

In Britain the motor Insurers Bureau was set up by the Insurance Industry in 1946. It is a limited liability Company whose members are all insurance Companies engaged in road traffic insurance in the United Kingdom. It was set up to provide some redress for those injured in road accidents by the negligence of uninsured defendants. The bureau by agreement with the Ministry of Transport undertakes to meet any unsatisfied judgement in respect of liability required to be insured under the Road Traffic Act. In practice there are four situations in which the bureau may be made liable.

First, where there is an identified uninsured motorist who is responsible for the accident. Secondly, where the motorist responsible is identified and there was infact a policy of insurance at the material time but the Insurer is not liable under the policy, for instance where the policy has been obtained by fraud or misrepresentation. In such a case the policy will be treated as though it was a valid one. This is possible because of a domestic agreement between the bureau and its members. Third, where an identified motorist was insured but the insurer is unable to meet the liability because it has become insolvent or is in liquidation. Fourthly, where one has been injured by a hit and run driver. This is by agreement with the Ministry of transport reached in 1968 whereby the bureau undertook to accept liability where no defendant could be traced. The bureau investigates claims in such cases and if satisfied that the claimant was injured in circumstances in which insurance was compulsory under the Road Traffic Act will offer compensation assessed on normal common law principles. The bureau is liable only where an accident was caused by negligence. It is not liable in respect of liability to passengers unless carried for hire or reward nor in respect of injuries arising from an accident not caused on a public road. The advantages of the bureau over the common law remedy and statute is that it mitigates the harshness of insurance practice such as evasion of liability under a policy on grounds of misrepresentation of facts. Also it covers the hit and run accident victim and the victim of an accident caused by an uninsured motor vehicle.

However it still retains the tort system with all its delays, lump sum payments and damages based on imponderables such as pain and suffering. Fault still needs to be proved before the bureau becomes liable, except in the case of hit and run accident victims.

In March 1978, the Pearson report was released. The Pearson Commission was concerned with the question of the future of the relationship between the tort system and social security. It favoured a retention of the "mixed system" of tort liability complementing social security in Britain. It recommended either a no fault or strict liability for specific kinds of accidents such as road, airline and vaccination. It advocated for the exclusion of all damages for non-pecuniary loss in respect of the first three months after the injury. It was expected that this would eliminate most smaller claims. It also recommended payment of periodical instead of lump sums and for the extension of "loss of faculty" feature of industrial injury benefits to the no-fault scheme for road accidents. The awards would be subject to review by the courts in order to take account of any later changes in the victim's condition. In order that the awards be inflation proof they are to be re-evaluated annually in time with changes in average earnings. The scheme would be financed by the government. The costs could also be allocated to the motorist by placing a levy on petrol. These recommendations have not yet been implemented.

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The Law Commission report on Insurance law, non disclosure and breach of warranty is worth noting. Among it's recommendations was that the duty to disclosure material facts imposed on a proposer for Insurance or an insured seeking renewal of his policy should be retained but modified. While the test of materiality would remain as under present law (i.e. a fact is material if it would influence the judgement of a reasonable insurer in deciding whether to accept the risk or what premium to charge or whether to impose particular terms), the proposer would be bound to disclose only those material facts he knows or ought to know which a reasonable man in his position would disclose having regard to the nature and extent of the Insurance cover sought. The recommendations of the committee have been criticised<sup>12</sup> because it appears to have been based on a compromise position. It was intended to mitigate the harshness of the law without over antagonising the Insurance Industry. It does not go far enough in protecting the insured. Instead of recommending the total exclusion of non-disclosure it recommends it's retention in a modified form. Even in this modified form the average proposer is unaware of it's existence and even if he were aware of it he is more likely than not to be unaware of what it comprehends, particularly when material fact depends on what a reasonable insurer would regard as material. The recommendations of the Pearson Committee and the Law Commission are not far reaching. They fall short of advocating for an overhaul of the entire compensation system. There are just timid suggestions for an adoption of a no-fault system of liability but no agreement as to what this system will look like and how it will work.

One of the first questions that arise when one is contemplating setting up a compensation scheme is who should bear the burden of the costs. I will begin by advancing a general proposition that the costs should be borne by those who contribute to the risk according to their share of contribution. In Kenya over a period of five years from 1978 - 1982 there have been an average of one thousand five hundred and sixty nine persons killed every year in motor accidents, an average of four thousand four hundred persons seriously injured and about six thousand eight hundred and ninety seven people who have been slightly injured every year.<sup>13</sup> In the years 1979 - 1981 pedestrians have on average contributed to 20% of the accidents, drivers of motor vehicles to 50% and passengers to a very negligible 5%.<sup>14</sup> From the statistics available it is evident that motor accidents are caused mainly by the drivers. As the people who contribute most to the risk it is a natural assumption that the entire burden should fall on them.

Yet it is undeniable that the motor vehicle has assumed such importance in our lives that life without it would be inconceivable. A lot of people commute to work. Without transport consumer goods would never reach their destination and the sick would experience difficulty in getting to hospitals. Accidents can be reduced but they cannot be totally eradicated unless we get rid of the motor vehicle. There are two possible solutions to the problem. Ways must be sought to mitigate the unfairness involved in the present system of compensation. Secondly, we must attempt to reduce the number of motor accidents by adopting more rigid methods of supervision and accident prevention.

In Kenya, among the social schemes we have there is the National Social Security Fund and the National hospital Insurance Scheme. The national social security Fund is a kind of provident fund by which the contributaries are able to save some money for the future, when they retire.<sup>15</sup> The benefits include, age benefits, survivors benefit, invalidity benefit and emigration grant. The amount recoverable shall depend on the total standard of contributions paid by the member together with interest at a rate to be declared annually by the Minister.<sup>16</sup> This scheme is compulsory for all those in permanent or temporary employment. Casual workers are excluded from the scheme.<sup>17</sup> The employees portion of the contribution may be deducted by the employer.<sup>18</sup>

The National Hospital Insurance Scheme was set up as a follow up of providing free medical care for children and adult out patients,<sup>19</sup> so that hospital expenses would be met out of a common pool to which everyone contributes. Anyone who has attained the age of eighteen years is liable to pay a standard contribution to the fund at the end of every month. The standard contribution is payable by a person in respect of income in respect of which that person becomes liable to income tax in Kenya. Benefits include an allowance in respect of hospital and medical treatment for contributors as well as their wives (or husbands) and children. This is the closest that we have come to establishing social schemes. But the benefits of these schemes only go to the contributaries and their families. The unemployed or the casually employed do not benefit from them.

What we need is an all embracing scheme as in New Zealand which will cover all accidental injuries and death as well as benefits such as those obtained under the National Social Security Fund. The immediate problem we are faced with is how such a scheme would be financed. All persons in private or government employment should be required to pay a flat rate contribution to the scheme. Cooperatives and private enterprises should be required to make contributions according to their profits and the number of cars they own. The owners of motor vehicles will have to pay a fixed premium which may be increased depending on the use to which the vehicle will be put e.g. a higher rate should be charged public transport vehicles because since they are on the road all the time their risk causing potential increases. Alternatively, instead of having special rates for them a surcharge could be placed on petrol at something like twenty cents per litre so that they will end up paying more since they consume the most petrol. Drivers who have in the past been convicted of dangerous or reckless driving could be charged higher premiums than the more careful drivers in addition to this, the fines imposed on them for such reckless driving could go towards financing the scheme. The government could as under the New Zealand scheme also make a small contribution representing the cost at present borne in self-insurance.

The scheme is expected to operate on a no-fault basis. Everyone will be entitled to recover irrespective of whether or not they are employed except as regards loss of future earnings. Payments are to be made periodically in cases of severe injury and in lump sum in minor injuries. No compensation will be awarded for imponderables such as pain and suffering.

As with the New Zealand Scheme there should be a statutory maxima of recovery of up to 80% of lost earnings both past and prospective. In order that inflation be taken account of a special Commission should be set up to review the compensation in the light of changes in the Country's economic set up. The only proof that will be required of the injured party is medical evidence on the injury and the extent of disability and proof of lost earnings or other expenses incurred as a consequence of the accident. The Courts should be involved as little as possible in the implementation of this scheme. This will reduce the delays. There should be set up a special body for the administration of the scheme. Payments for the nature of the injury itself should be made according to a fixed schedule akin to the one involved in workman's compensation.

The compensation scheme will be accompanied by measures aimed at reducing the accident rates in the Country. Among the major contributory factors to road accidents have been. Violations of traffic rules such as causing obstructions, failing to keep to the proper lanes, failing to stop at stop signs, failing to give way to pedestrians especially at Zebra crossings and failure by the Pedestrians to observe traffic lights at signal controlled crossings. Other contributory factors include, carelessness, error of judgement, overspeeding, cutting in and overtaking, driving under the influence of drink or drugs, overloading and driving physically defective motor vehicles.<sup>20</sup> In order to decrease the accidents greater police surveillance and supervision will be necessary.

Road safety could be made an integral part of the education in our national education curricular. Vehicles should be checked every six months or so to ensure that they are road worthy. Roads should be properly maintained and sign posted. The government should set up a commission to look into the possibilities of improving our road structure and maintaining the existing roads in good condition. These measures together with the higher premium rates to be charged reckless drivers as well as the existant criminal sanctions could go a long way in curbing accident rates.

#### C O N C L U S I O N

When a scheme such as the one I have proposed has been set up, it will not mean that all the problems which beset this area of our law shall have been solved. There may still be a certain amount of delay before claims are met. There is also a possibility that some officials will be corrupt in assessing the loss suffered by the claimant. However I donot expect that to affect the operation of the scheme much because payments made in respect of loss of future earnings is expected to be at the maximum 80% of lost earnings. Compensation for the type of injury sustained shall be based on a fixed schedule as under the workmans compensation Act. Cap. 236 and payments shall not be made for imponderables such as pain and suffering.

The major handicap which the scheme would face however is the economic and political policies of our government, especially the latter. A similar scheme has been recommended for Tanzania.<sup>21</sup> The possibility of it working out there is higher than it is here<sup>22</sup> because of her intention to build up a socialist economic system.

In this country, the insurance companies seem to exert a lot of pressure. The attempts at control have so far been compromise measures that are not far-reaching in their consequences. No attempts have been made to mitigate the harsh effects of insurance practice such as non-disclosure and insurable interest which insurance companies continue to use in order to evade their obligations under insurance policies. There is little evidence that the Kenya Reinsurance Company which was set up to reduce the repatriation of foreign capital by the insurance companies has succeeded in doing so. The Foreign investments protection Act<sup>23</sup> actually makes provision for the transfer out of Kenya of profits after taxation by the holder of a certificate of approved investment. There will definitely be opposition from the insurance companies towards setting up of the scheme such that, to ensure it works out, will need a change in the policy of the Government.

The scheme if adopted, will take care of the problem of delays, lump sum payments, the unpredictability of the result of one's case, the problem of the hit and run accident victim, the problem of non-disclosure, misrepresentation and the unfairness of treating fault as the sole criteria of liability. It also has the additional advantage that everybody will be able to recover damages from it and they need not fall within a class of named persons as required under the provisions of the Insurance (Motor Vehicles Third Party risks) Act.<sup>24</sup> It is a social scheme and, as such, there will be absolutely no room in it for the operation of Commercial Principles.

FOOTNOTES INTRODUCTORY NOTE

1. Rushton v National Coal board [1953] 1 All E.R 314
2. "Introduction to the law of torts" 8 C-L-J 238
3. [1932] A.C. 562 at 580
4. Jurisprudence III quoted by Alan Hunt in the sociological movement in law at P. 22

Footnotes for Chapter One

1. Szakats Alexander, Compensation for road accidents  
(Sweet and Maxwell 1968 P. 10)
2. Blyth v Birmingham Waterworks Co. Ltd. (1856) II Ex. 781
3. Milner M.A. Negligence in Modern Law (Butterworths 1967)  
at P.7 also Lord Atkin in Donoghue v Stevenson [1932] A.C. 562  
at 580, describes negligence as that duty of care owed to all  
such persons who are so closely and directly affected by ones  
act that one should have them in mind as being so affected when  
directing his mind to the acts or omissions which are called in  
question.
4. Salmond on the law of torts edit. R.F. Heuston 14th ed.  
(sweet and Maxwell 1965.)
5. Bourhill v Young [1943] A.C 92 Also in King v Philips  
[1953] 1 Q.B. 429. Both these cases concerned shock  
sustained by persons to whom such injury was not foreseeable.  
In Bourhill the limits of the duty owed by a motorist to  
fellow users of the highway was discussed.
6. Supra
7. His dicta was applied in Overseas Tankship U.K. Ltd v Morts  
Dock and Engineering [1961] A.C. 388
8. Ibid
9. Fardon v Har Court Rivington [1932] 146 L.T 391
10. Supra
11. Supra at page 425
12. As in Karanja Kago v Njenga and Another Court of Appeal Civil  
Appeal No. 1 of 1979 (unreported).
13. underhill A summary of the law of torts (Butterworths London  
1949) at page 196.
14. Chapter 26 of the laws of Kenya
15. Lynch v Nurdin [1841] 1 Q.B. 29 also Oliver v Birmingham

and Midland Motor Omnibus Co. Ltd. [1938] 1 K.B. 35

- 16. Gough v Thorne [1966] 1 W.L.R. 1387
- 17. [1971] E.A. 147
- 18. Chapter 405 of the laws of Kenya passed in 1945. The Act was actually an adoption of three English statutes of the 1930's. The third parties (rights against insurers) Act of 1930 and the Road Traffic Acts of 1930 and 1934. These statutes were subsequently incorporated in the Road Traffic Act of 1960
- 19. See Chapter Three
- 20. The Oxford dictionary VOL. 11 P. 717 (1933)
- 21. As in Karanja Kago's case (Supra) where the accident was found to have been caused by a burst tyre not by any negligence on the defendant's part.
- 22. Glanville Williams, Foundations of tortious liability (1939) C.L.J.
- 23. [1964] A.C. 1129. The dicta of Lord Devlin in this case was applied in Obongo & Another v Municipal Council of Kisumu [1971] E.A. 91 and also in Kampala City Council v Nakaye [1972] E.A. 440
- 24. See Introductory note
- 25. Keeton and O'Connell "Objectives of automobile Claims systems" 78 Harv. L.R. page 329
- 26. [1900] A.C. 113 at 116
- 27. Viscount Dunedin in Admiralty Commissioners v S.S. Valeria [1922] 2 A.C. 242 at 248.
- 28. Lord Halsbury in The Mediana (Supra) at 116 - 117
- 29. British Transport Commission v Gourley [1956] A.C. 185
- 30. Accidents, Compensation and the law (Wilmer Bros. Ltd. 1970).

31. [1962] 1 Q.B. 638
32. [1941] .C. 157
33. As in Burns v Edman [1970] 2. QB 541 in which judicial notice was taken of the fact that the life of a Criminal is an unhappy one and the award was accordingly reduced.
34. Supra
35. [1956] v L.R. 738 (cited in Wise v Kay. Supra).
36. [1964] A.C. 326. In Povey v Governors of Rydal School [1970] 1 All E.R. 841. where the plaintiff who sustained injuries which resulted in tetraplegia but through his strong character was able to overcome his disabilities and continue studying. It was held to be an irrelevant consideration as far as the defendant's liability was concerned that because of his nature he had been able to avoid the severe depressions which normally accompany such injuries.
37. Supra
38. British Transport Commissioner v Gourley [1956] A.C. 185
39. Fletcher v Autocar & Transporters Ltd. [1968] 1 All E.R. 726
40. Supra
41. [1969] 3 All E.R. 267
42. C.F. Rouse v Port of London Authority [1953] 2 Lloyd's Rep. 179
43. [1952] 1 All E.R. 935
44. Also in Ashcroft v Curtain [1971] 1 W.L.R. 1731 in which the plaintiff's capacity to work as an engineer outside of his Company which, following his injury had virtually collapsed, was taken account of.
45. [1940] 4 All E.R. 261
46. Supra
47. Supra at 733
48. [1978] 3 W.L.R. 955
49. This decision overruled Oliver v Ashman [1963] 2 Q.B. 210

in which it had been held that a plaintiff could not recover damages for loss of earnings during the period when but for his injuries he would have been alive.

50. British Transport Commission v Gourley (1956) A.C. 185

51. [1971] 2 W.L.R. 1271

52. Bradburn v G.W. Railway (1874) L.R. 10 Ex. 1

53. Parry v Cleaver [1970] A.C.1

54. [1963] 1 Q.B. 750

55. Supra

56. Supra

57. [1960] 2 Q.B. 430

58. [1964] A.C. 326

59. [1937] 2 All E.R. 60

60. Supra at 734

61. [1951] 2 T.L.R. 1260

62. [1967] 111 S.J. 690

63. [1935] 1K.B. 354

64. [1937] A.C. 826

65. [1941] A.C. 157

66. [1970] 2Q.B. 541

67. Philips v S.W. Ry. Co. Ltd. (1879) 4 Q.B.D. 406

68. Damages are divided into special and general damages.

Special damages may include subheads as medical expenses, nursing care and loss of prospective earnings.

69. Fletcher v Autocar & Transporters Ltd. [1968], All E.R. 726

70. Bhogal v Burbidge [1975] E.A. 285. Uganda Cement Industry Ltd v Emelda Kawa Court of Appeal Civil Suit No. 108 of 1975 (unreported)

71. FIROZALI MOHAMED LALJI v ELIAS TOKA & OTHERS court of Appeal. Civil Appeal No. 46 of 1986 where an additional Shs. 20,000/- was awarded for future operational costs.

Footnotes For Chapter Two

1. Court of Appeal Civil Appeal No. 51 of 1975 (unreported)
2. (1969) E.A. 156
3. H.C.C.C. No. 2938 of 1979 (unreported)
4. H.C.C.C. NO. 376 of 1979 at Nakuru (unreported)
5. Reported in the Daily Nation 11th February 1984, a decision of the High Court of Kenya at Nyeri.
6. Supra
7. Supra
8. Supra
9. Supra
10. Supra
11. Supra
12. Supra
13. Supra
14. Supra
15. H.C.C.C. NO. 942 of 1978. Mombasa (unreported)
16. Court of Appeal Civil Appeal No. 66 of 1981 (unreported)
17. H.C.C.C. No. 646 of 1972 (unreported)
18. H.C.C.C. NO. 133 of 1977 (unreported)
19. Supra
20. Supra
21. Supra
22. Supra
23. Supra
24. (1973) E.A. 108
25. Court of Appeal Civil Appeal NO. 29 of 1982 (unreported)
26. Court of Appeal Nairobi Civil Appeal NO. 40 of 1979 (unreported)
27. Ibid
28. H.C.C.C. NO. 2536 of 1977 (unreported)
29. Supra

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30. Supra
  31. (1975) E.A. 285
  32. Court of Appeal Civil Appeal NO. 36 of 1980 (unreported)
  33. Court of Appeal Civil Appeal NO. 12 of 1981 (unreported)
  34. H.C.C.C. NO. 722 of 1979 (unreported)
  35. H.C.C.C. NO. 1684 of 1976 (unreported)
  36. H.C.C.C. NO. 442 of 1980 (unreported)
  37. H.C.C.C. NO. 722 of 1979 at Mombasa (unreported)
  38. Civil Appeal NO. 1 of 1980 (unreported)
  39. H.C.C.C. NO. 2582 of 1979 (unreported)
  40. Supra
  41. H.C.C.C. NO. 216 of 1975. Mombasa (unreported)
  42. (1975) E.A. 318
  43. H.C.C.C. NO. 296 of 1980 Mombasa (unreported)
  44. Court of Appeal, Civil Appeal NO. 46 of 1980 (unreported)
  45. H.C.C.C. NO. 2178 of 1977 (unreported)
  46. See Elizabeth Miruru & Others v Emmy Mwatha Annan (Supra)  
Morris Wambua Musila v Zablon Mariga & Kamau (Supra)  
Samuel Mburu v Mr. Nderitu Njuguna & Others (Supra)
  47. Supra
  48. Supra
  49. Supra
  50. As in Jonathan Glen & Another v J. Musembi (Supra). How did the judge arrive at Shs. 75,000 and not Shs. 10,000 or something else as representing pain and suffering?
  51. Supra at P. 292
  52. Supra
  53. Supra
  54. "Economic Survey" 1973 and 1982 prepared by the Central bureau of statistics, Ministry of Finance and Planning.

Footnotes For Chapter Three

1. Chapter 405 of the Laws of Kenya.
2. Court of Appeal. Civil Appeal NO. 1 of 1979 (unreported)
3. Ibid at page 4 of the judgement.
4. "Recent developments of automobile accident Compensation"  
50 COL. L.R. 300 at page 326
5. Joel v Law Union and Crown Ins. Co. [1908] 2 K.B. 863
6. As in Sat Dev. Sharma Driving School v The Home Insurance Company of New York [1968] E.A. 8 where the insurance company disclaimed liability in respect of injury suffered by one of the insured drivers on the ground that the proprietor of the school had taken out a policy whereas he had no insurable interest in his drivers. Yet the Insurance Company knowing this had pocketed all the premiums.
7. See Chapter Two.
8. Statutes of Saskatchewan 1947 Chapter 15 amended in 1948 adding a liability insurance Coverage over and above the compensation remedy.
9. "Basic protection for the traffic victim - a blue print for reforming automobile insurance." (1965) A detailed description of this scheme is to be found in 78 Harv. L.R. 329.
10. Cmnd. 7054
11. NO. 104 Cmnd. 8064 (1980)
12. See Birds J "The reform of insurance law" 1982 journal of Business law P. 449
13. See Table A appendix.
14. See Table B appendix
15. The National Social Security Fund Act Cap. 258 of the laws of Kenya
16. section 19
17. section 7
18. section 11

19. The assistant Minister for Health Mr. Matano introducing the bill. See House of representatives debates 1965 pt. 1
20. See Appendix Table C
21. Kanywanyi JL "Compulsory Motor Insurance Scheme in Tanzania. The need for a new approach."
22. As per the Arusha Declaration 1967
23. Chapter 518 of the laws of Kenya
24. Chapter 405 of the laws of Kenya 5.10.

APPENDIX

STATISTICS ON ROAD ACCIDENTS IN KENYA

TABLE A-ROAD ACCIDENT STATISTICS FOR THE PERIOD 1973-1983.

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YEAR	TOTAL NO. OF ACCIDENTS	NO. OF PERSONS KILLED	NO. OF PERSONS SERIOUSLY INJURED	NO. OF PERSONS SLIGHTLY INJURED	APPROXIMATE NO OF VEHICLES ON THE ROAD
1973	6,789	1,402	3,386	6,209	164,222
1974	6,250	1,353	3,268	5,919	184,086
1975	6,534	1,338	3,106	5,177	199,715
1976	6,548	1,640	3,924	6,345	215,857
1977	5,949	1,560	3,534	5,483	237,700
1978	6,956	1,588	4,269	6,587	N/A
1979	8,049	1,661	5,083	8,096	N/A
1980	6,162	1,413	3,459	5,441	N/A
1981	7,250	1,720	4,208	6,959	N/A
1982	7,524	1,462	4,978	7,400	N/A
1983	8,023	1,515	5,017	8,509	N/A.

Source: Central Bureau of Statistics.

TABLE B - PERSONS PRIMARILY RESPONSIBLE.

PERSONS	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982
DRIVERS	3,081	2,803	3,342	3,225	4,180	361	4,167	3,316	3,280	-
PEDESTRI- ANS	1,851	1,596	1,524	1,813	2,668	2,872	1,909	644	1,914	-
PEDAL CYCLISTS	484	342	312	325	565	665	356	246	383	-
PASSENGERS	263	303	273	353	565	6,436	444	257	373	-
OTHER CAUSES	1,110	1,206	1,083	1,157	2,234	2,110	1,173	1,679	1,300	-

Source: Central Bureau of Statistics.

TABLE C - MAJOR CONTRIBUTORY FACTORS RELATING TO ROAD ACCIDENTS - 1974- 1978

	1974	1975	1976	1977	1978
1. Losing Control Swerving or Skidding	635	600	594	600	746
2. Carelessness, negligence error of judgment etc.	458	487	646	398	508
3. Proceeding at excessive Speed	400	491	446	354	149
4. Failing to comply with traffic signs & signals	358	431	448	471	651
5. Cutting in & Overtaking improperly	356	427	433	312	264
6. Misjudging clearance distance or speed	303	639	463	378	500
7. Inexperience with type of vehicle	61	76	82	63	68
8. Under influence of drink or drug.	60	57	63	33	28
9. Physically defective vehicles	45	18	15	14	4
10. Inattention or divided attention	31	18	31	43	11
11. Fatigue, Asleep or ill	21	19	9	15	11
12. Other causes	75	79	78	70	67
Total	2,803	3,342	3,308	2,751	3,009

Source: Kenya Police, Traffic Operations.

N.B. Figures relate only to those cases whose causes have been established.



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- Birds, J., "The reform of insurance law"  
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- Grad, F., "Recent developments in automobile  
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