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BY

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INTRODUCTION

Compulsory motor insurance has been the object of a lot of controversy in many countries. This type of insurance is practised in Kenya and her citizens should be as concerned as people elsewhere.

In this paper, I discuss the socio-economic aspects of Compulsory Motor Insurance and this will involve a research to find out the damage caused by the motor industry in Kenya. Most people in the country should be well aware of the number of road accidents that occur on our roads. Even though not very many are reported in the newspapers, relatives and friends would tell you every now and then of the tragic road accident of a father, a wife, a daughter. There are pile-ups in which several people are killed at one time, collisions between vehicles and many pedestrians knocked down and killed or injured by reckless drivers. I intend to show the data and statistics of the number of road accidents on Kenyan roads and damage caused by them.

Secondly, these socio-economic aspects will have to be looked into in their historical perspective in order to understand why it became necessary to have legislation at all. Since our law on the subject is adopted from its English equivalent,¹ it will be necessary to trace the socio-economic situation in the U.K that initiated the passing of the relevant legislation.

1. Road traffic Act of 1960: Third Parties (Rights against insurers) Act, 1930 extended into the case of Motor Vehicle Insurance by the Road Traffic Act, 1960.

Here then, is where we pose the crucial questions: What protection is offered by the Act? To whom is this protection offered? And how is it administered? These are some of the ~~ques~~ questions that every policy holder should ask himself. He knows better just how much it costs to pay those ever increasing premiums. The cost of the motor insurance industry to the insured is extremely high, and the least that can be done is to make it clear what protection is offered by the Act and to whom.

A discussion as to the protection given by the Act will invariably bring us to the afore-mentioned controversy. What is the controversy all about? Perhaps the fundamental question being asked about motor insurance is whether payment of claims should continue to be based on a finding of fault. It has been found that adherence to fault as the criterion for payment is the source of many of the deficiencies in the present system. This tort/Negligence aspect of Compulsory motor insurance is the biggest problem caused to any victim of a car accident today. Two vehicles collide and one driver is badly injured: now assuming that both drivers have liability insurance, under the present system, the injured driver would have to prove that the other driver was at fault in order to succeed in his claim. The other driver's insurance company, to whom the injured driver claims, will obviously try their level best to deny liability. The result? A court case. Anyone who has been to a court in Kenya will know that they are usually congested. The court case will take weeks or even months before it is as much as mentioned. The trial itself will take another couple of months, and all this time the injured man is lying in hospital with his bills mounting every day.

He is out of work and is not earning, he has expenses to meet at home and his doctors are eagerly awaiting that 4,000/- from him. Ultimately, he will only succeed in his claim if the court enters a judgement in his favour; that is if the court makes a finding that it was through the other driver's negligence that the accident occurred. If not, the injured man loses all the money he used to engage a lawyer, he still has his hospital bill to pay, he has been out of work and unable to get any wages and he does not get compensated at all.

It is all very well to say that fault should lie where it falls. But in an instance like this, considering all the money that the poor man has spent paying premiums to his insurance company, there clearly has come a time when something will have to be done to improve the present system. This is but one of the many problems that would lead us to the thought, "there must be a better way". The United States, Australia and New Zealand have for sometime been working on finding such a better way to deal with the motor insurance industry. New Zealand has introduced the Accident Compensation Act, 1972 under which every person injured in a car accident is entitled to compensation in lieu of an action for damages. This system is not based on fault as in tort, fault is not the criterion for compensation and third party liability has been completely abolished.

In the paper, I intend to portray the various alternate systems to the present one that would, I believe, be a great improvement on the system as it stands today.

Before embarking on the actual body of this paper, it will be necessary to understand firstly, the meaning of insurance as

western economists know it today; and secondly, to trace the historical development of the insurance law from the 15th century, its reception into Kenya, and its practise in the country today.

CHAPTER ONE: WHAT IS INSURANCE?

There is no single definition of (' insurance ' as the purposes for which the definitions of insurance are invoked differ. The Lawyer, writing about insurance law would define insurance as "a contract whereby one person called the insurer , agrees for a consideration called the premium , to pay to another person called the insured or assured , a sum of money or it's equivalent on the happening of a specified event." ^β

The economist on the other hand , would define insurance as a device for the transfer of some risks of economic loss from the insured who otherwise would have borne the risk, to an insurer in return for a premium .

A Sociologist would define insurance as a device whereby the participants provide financial compensation to those among them encountering the many misfortunes or contingencies that befall humanity. Each of these definitions throw some light on the nature and scope of insurance . However since the business of insurance has become so complex over the years , no single definition can cover all of it's many branches.

In it's fullest sense, insurance can only exist when , (1) a person has an interest in something which can be valued in some commodity valued by his society ; (2) the thing in which he has an interest is subject to a loss by peril e.g fire or disease ; (3) a substantial number of ~~at~~ other ^{People} ~~people have~~ ^e interests in similar things subject to ~~an~~ similar perils ; (4) the chances of loss from that peril can be measured with some degree of accuracy ; and (5) the desire by enough members of the community to share each others losses .

Life is full of risks and every human being is faced with the possibility that one day, one of those hazards that form part of life will befall him and cause him or his survivors some financial loss. The purpose of insurance is to compensate or indemnify the victim for the financial loss suffered as a result of the risks of life.

Insurance does not set out to eliminate the loss, and cannot stop the disaster or misfortune from happening. What it does is to soften the blow in a purely financial ⁶ sense by offering monetary compensation to the victim thereby placing him in the same financial position as he was before.

Insurance may be divided into (1) assurance or life contracts, and, (2) indemnity or non-life contracts. Indemnity contracts include: liability, fire, motor vehicle, personal accident etc. Insurance could also be seen as a form of social security device which offers financial assistance to insurers' victims on similar lines. The extended family system ~~is~~ which is essentially African in origin was the earliest form of social security arrangement practised in Africa. ⁵

* Apart from the extended family system which was by its very nature a social security scheme, there was the age-group association and some clan unions which acted as mutual insurance societies to their members. The age group-associations maintained funds built by individual contributions from members. These funds were collected periodically almost in the same way as industrial life assurance premiums are collected. Mensah also

5. Mensah E. "Insurance Policy conditions in Africa": Conference Papers of The Insurance Institute Of Nigeria, Vol. 1v, 1975, p. 100.

states that from the funds thus collected , funeral expenses for deceased members were met . Where a member died without making some material provisions to tide over his dependants during the critical period immediately following his death, either the extended family or the age group association would take over the responsibility of maintaining the deceased's dependants until they could stand on their own feet.

The concept of insurance is therefore not completely alien to customary or traditional practices in Africa. We must agree however that modern insurance as practised today is foreign in many aspects to our customary practices. In Kenya among the Kamba, where the member of one clan has killed the member of another clan, then he and his fellow clan members must pay compensation or "blood money" to the clan of the deceased man . For a man, the blood payment which was called "maambo", ⁶ was eleven cows, one bull and one goat throughout most of Machakos District. In Kikumbulya the "maambo" was fourteen cows, two bulls, and one goat. ⁷

For a woman, the blood price was four cows , a bull and a goat. In Kilungu , Mukaa Nzaani and Mbitini , it was five cows , one bull and one goat. ⁸

The person responsible for another's death is not required to pay all the blood money himself. His clan helps him once he has produced the first cow goat and bull from his own herd. ⁹

6. Eugene Cotran's "Readings in African Law" Kamba Customary Law pg. 157-58 . EALB, (1965)

7. ibid ., p 158 .

8. ibid ., p. 158-9 .

9. ibid. , p. 159 .

A careful account is kept in each clan group where relationship is fairly close, of those who pay the cattle in any particular case. Furthermore it is laid down in advance which members will have to find the cattle the next time the need arises. Each man knows his future obligation. These payments made to ~~help~~ help a clan member pay "maambo" or blood money are in no sense a loan, a recoverable debt; the giver does not expect another cow to be returned him later. It is regarded as particularly important to meet one's obligation in this matter, and a man will borrow or marry off his daughter hastily in order to obtain the necessary cattle. ¹⁰

Kamba custom has been modified to accord with modern situations. If a man kills another and is charged before a court, he is still liable to pay the blood money - but only a proportion of it for his own punishment is taken into account. For example in 1932, Mangaye wa Nzuki killed Musyoki wa Kilangu with a knife. ¹¹ He went to prison for seven years. On his release, the Kilima Kimwe elders agreed that he should be released six cows from the customary blood payment. ¹²

Among the Nandi apparently, blood money was payable where one man killed another. It was payable in the form of cattle and once again clan members joined hands in helping out their kinsman. ¹³

The same practise was observed among the Bantu of North Kavirondo where Homicide and theft was redressible by compensation in the form of cattle. ¹⁴

10. *ibid.*, p. 159.

11. Case discussed by the Local Native Council - Minute 6/1937.

12. *supra* p. 159.

13. G.S Snell "Nandi Customary Law" pps. 83-84. ✓

14. See Wagner's Essay "The Bantu Of North Kavirondo in African Political Systems".

Another instance of a security system as practised in traditional circles is one ^{where} clan's crop is destroyed by fire or locusts. That clan would not suffer famine because other clans would provide them with enough food until their next crop.

One instance that fits in with the western insurance is the liability of family and clan members to contribute towards the paying of bride price or dowry. The husband to be never has to carry this burden alone. Every clan member contributes in one way or another.

Thus there ~~were~~ were and still are many instances where clan members are obligated in some way to contribute whenever some calamity befalls one of their kin. One should evaluate ^{te} insurance in the context of a given society and its development and needs. Problems arise only when one tries to evaluate the African security system in the western sense. There is no doubt that there are differences between the two, even though ^u basically, they have the same ideals. Under the African system for example one does not have ~~to~~ to pay premiums in order to ~~expect help~~ to expect help from his clansmen. It is an obligation borne of tradition and custom.

CHAPTER TWO

THE HISTORICAL DEVELOPMENT OF INSURANCE LAW

(a) History up to 1870

The business of insurance law had its ^{origin} in the underwriting of ships and their cargoes against perils of the sea. ¹⁵ The history of marine insurance can be traced back without a break to the Italian traders of the 13th century, and it was by the Lombards apparently that its practise was brought into England. ¹⁶ Insurance contracts took the form of a bargain between those interested in a marine adventure and other traders who were willing to take a share of the risk for a money consideration. Bargains of this kind took place at ~~the~~ known meeting places, one of which, Lloyd's Coffee House in London, gave its name to the association and brokers which came to be known during the 17th century as Lloyd's.

Later individual underwriters and also societies or companies, formed for the purposes, began to undertake assurances on human life and against the risk of fire. In 1696 the Hand in Hand Fire and Life Society was established, and in 1710, the Sun Fire Office. ¹⁷ From this time onwards life and fire business grew and prospered.

Such insurance bodies, whether they were called societies, associations, offices or companies, were in fact common law partnerships of a special kind constituted by a deed of settlement which every member had to sign, and were managed by directors

15. See Raoul Colinvaux's, The Law Of Insurance, 3rd Edition publ. by Sweet and Maxwell Ltd 1970 at p .187 .

16. *ibid* ; p . 187 .

17 . *ibid* . , 188.

appointed by the members .

In England
The only way a body of traders could originally obtain the status of a corporation was by Royal Charter or by a private Act of Parliament . Thus in 1720, two insurance companies, Royal Exchange and London Assurance, were created by Royal charters granted by the authority of Parliament . By the Chartered Companies Act, 1837 the crown was empowered to grant any unincorporated body of persons, letters of patents, authorising it to make binding contracts and to sue and be sued in the name of the registered officers of the company. These also limited the liability of each member to the amount of his shares, privileges which, until then, could be had only by means of a private Act of Parliament or a Charter of Incorporation .¹⁸ The Joint Stock Companies Act and a number of legislative vicissitudes followed .

Since 1862 the Companies Acts whose provisions are now consolidated in ^{the} Companies Act, 1948, as amended by the Companies Act 1967 (Cap. 486 laws of Kenya-) have applied ^{to} companies . Since then, any seven or more persons in the case of a public company, or two or more persons in the case of a private company may be registered and ¹⁹ become incorporated under the Companies Acts . Any company or Partnership consisting of twenty members must be registered unless formed by special Act or letters patent, if it has for its object the acquisition of gain . It has been held that a mutual insurance company "is for the acquisition of gain" and therefore requires registration if it has over twenty members .

18. Lord Mansfield in Ernest v Nicholls (1857) ~~1~~ 6 H.L.C 401, 417-419

19. See Companies Act, 1967 s.4(1) *WX*

20. Re Arthur Average Association (1875) L.ⁿ 542

(b) Legislation from 1876 to 1946

While the Companies ^{Acts} were gradually applicable to the formation of insurance companies, a series of enactments were passed in England between 1870 and 1946. The purpose of these enactments was to protect the public from the effect of mushrooming growth of insurance companies lacking the financial resources necessary to carry on business safely. (In Kenya this was done by the formation of the Kenya Re-insurance company.) The striking increase in the number of insurance companies during the previous century, the accumulation of insurance funds which they controlled, and the constant extension of their business to new classes of risks, made such legislation imperative. By the Life Assurance Companies Act, 1870, all new life insurance companies were required to deposit £20,000 in court.

By the Employers Liability Insurance Companies Act, 1967, the business of employers liability was dealt with in same way. The Assurance Companies Act, 1969, applied this principle of control to fire and accident insurance and bond investment business and replaced the Acts of 1870 and 1907.

Motor insurance business was added by s.42(1) of the Road Traffic Act, 1930, and aircraft business by s. 20 of the Air Navigation Act, 1936. Marine and Transit insurance which remained the chief forms of insurance business outside the fold of the Assurance & Companies Acts, were brought within it by the Assurance Companies Act, 1946.

(c) The history of insurance in Kenya

In the absence of specific provisions, the general law governing insurance is the law of contracts.²¹ However insurance makes many exceptions as regards the law.

The Judicature Act, 1967, in s.3(1) sets out the various categories of legal rules in conformity with which the jurisdiction of all courts must be exercised. These rules consist among others

of the substance of the common law, the doctrines of equity and the Statutes of general application in force in England on the 12th August, 1897, the reception date.

.081.q eavod

The earliest reception in Kenya took place under the African Order-in-Council, 1889, which stated that jurisdiction should so far as circumstances permitted, be exercised upon the principles of, and in conformity with, the substance of the law for the time being in force in England."

Our insurance law was thus adopted from England based mainly on the English Common Law. Modern insurance has been known to Kenya since the beginning of this century. In 1904 the London and Lancashire insurance company appointed agents for fire insurance business in Nairobi.²² The Royal Exchange Assurance was the first company to open its doors in a full branch office in Kenya in 1922 followed by the Commercial Union in 1929. By 1961 there were 140 insurance companies operating in Kenya and transacting business in all cases of insurance.²³

Despite the fact that the insurance industry in Kenya started at the beginning of this century, few Africans even as of now possess life assurance policies. In 1968, only 70,000 Kenyans held life assurance policies; and even then it can be confidently stated that very few of those policies were held by Africans.²⁴

This is not because insurance premiums and business have been beyond the means and comprehension of the African, the reason is that the African was statutorily discriminated against during the

21. The Contract Act, Cap 23 Laws of Kenya, -

22. "Insurance Markets of the World", published by the Swiss Reinsurance Company, Zurich, 1964.

23. J.O Irukwu "Insurance Management in Africa" p.231., published by Caxton Press Ltd .

24. See "Who Controls Industry in Kenya" East African publishing

footnote 24 contd.

house p.180. ✓

colonial administration. The first statute to control the officers' attempts to take out life assurance policies was enacted in Kenya in 1945, and was replaced by the African Life (Assurance Control) Ordinance of 1948 .²⁵ This ordinance was repealed by s.48 (4) of the Insurance Companies Act ,1960 .²⁶

Under the Ordinance, no person other than a person approved by the governor-in-council , could effect any life assurance business with an african; and the approval could be withdrawn within two weeks by virtue of s.2 of the ordinance which provided:

"No person shall effect any life assurance with an african unless the form of proposal and any conditions affecting the policy have first been approved by the Chief Native Commissioner"²⁷

Section 4(1) prohibited canvassing or ^osoliciting of any life assurance proposal from any african without first obtaining a written permit with the Provincial Commissioner of the province in which such canvassing or soliciting was to be carried on. The provincial Commissioner had the discretion to issue or refuse to issue such a permit.²⁸

In theory any african could get a certificate of exemption from the operations of the legislation by applying either to the Chief Native Commissioner, or the provincial commissioner.²⁹

The immediate question is what factors had the administrative agency to consider before he could be satisfied that the applicant was a suitable person to hold such a certificate? The Ord-

25. Cap 108 laws of Kenya, 1948 .

26. No. 46 of 1960 .

27. Cap 108 laws of Kenya, 1948 ,s.(3) .

28. An appeal against such decision lay with the governor whose decision was final.

29. ibid . , s.5 .

inance gave no guidelines . But generally speaking, the chief factors seem to have been literacy on the part of the african. This was to ensure that the african could at least read, even he could not grasp the full implications of what he was agreeing to.

In these circumstances, it would appear that the whole legislation was not only unreasonably discriminative; but also misconceived and therefore incapable of protecting Africans.

When all has been said , the result was that the underwriters were effectively discouraged from dealing with africans. The insurance Ordinance also carried punitive measures. ^{in respect of} Transacting life assurance business with an african without the prior approval ^{of} the governor, a fine of upto 10,000/- was provided ^{for}, ³⁰ while for canvassing or soliciting, or failure to have a proposal form attested as required ³¹ , a penalty of 2,000/- fine was stipulated.

Only a foolhardy underwriter , determined to wind up his business, would have dealt with africans under such circumstances. ³² The cost would have been unproportional to the returns, and the result was that the african found himself denied one of the most acceptable securities for bank loans i.e the life assurance ^o _^ policy as collateral . ³³

30. *ibid.* , s.7(1)

31. S.6 of the ordinance of 1948 ^{that} required [^] before a proposal form was accepted from an african, it had to bear the witness of a person appointed by the governor for that purpose by notice published in the gazette.

32. "Business Organizations and the [^] Africa nization of Commerce in Kenya" by O. K Mutungi; J.S.D Thesis, 1974 .

33. IN 1964, only 0.5% of the population of East Africa held life assurance policies and very few of these were held by africans- "Who Controls Industry in Kenya" -supra

Reinsurance

Insurers rely on the principle, that by the operation of the law of chance, the premium received for a large number of risks will, in any given period of time, be more than enough to meet the liabilities incurred. The acceptance of an insurance for an unduly large sum against one event, though desirable in the course of business, endangers the principle, and in such a case it is usual for insurers to reinsure at least a part of their risk with another company.³³

Reinsurance thus consists of a new insurance, effected by a new policy, on the same risk which was insured before, to indemnify the insurer, in whole or in part from his previous liability.³⁵

It is an agreement presupposing a head policy, by way of complete or partial indemnity to the insurer under that policy,³⁶ but the risks covered may be in a narrower or wider form.³⁷

In Kenya before the establishment of The State Re-insurance Corporation (as it was known then) in 1970, insurance companies had to find security outside the country. Most insurance companies were subsidiaries of foreign corporations. The only way an insurance company could get reinsurance was abroad, since no such institution existed in Kenya. The flow of funds out the country was enormous as insurance companies accumulate a colossal amount of money. This flow of funds out of Kenya operated as a major foreign reserve drain. The need to stop

334 . Kay, J. in De Norwich Equitable Fire (1887) 3 T.L.R 781

35. per Lord Mansfield in Delver .v. Barnes (1807) 1 taunt. 48

36. per Lush, J. in Joyce v. Realm Marine (1872) L.R 7 Q.B 580.

37. See Traders and General .v. Bankers and General Insurance(1921) 38 T.L.R 94 .

this flow of funds becomes apparent and in order to do so a reinsurance company had to be established in the country.³⁸ In 1970 therefore, The State Reinsurance Corporation Act³⁹ was enacted establishing a state reinsurance corporation in the country. The functions of the corporation were, " to undertake, carry on, and transact in any manner whatsoever, whether in Kenya or elsewhere, the business of insurance and reinsurance of all kinds, classes, nature and descriptions whatsoever."⁴⁰

Under the Act, every insurer is required to reinsure with the corporation such proportion as the Minister may, by notice in the Gazette, prescribe of each policy.⁴¹ Thus reinsurance is made compulsory for every insurance company. Failure to do so makes the company liable to a fine not exceeding two hundred thousand shillings.⁴²

The Minister of Finance issues legal notices which indicate the proportion the insurance company must reinsure. For example every insurer is required to reinsure with the corporation 10% of each policy of motor insurance, and 25% of each policy of bond insurance (other than a policy of motor or bond insurance).⁴³ The premium payable by an insurer to the corporation in respect of reinsurance must be a pro rata share of the premium actually received or receivable by the insurer from the insured without any deductions whatsoever.⁴⁴

Also every insurer is ^equired to reassure with The Kenya Rein-

38. I talked with Mr. M. Gichohi of The Kenya Reinsurance Corporation who briefed me on this history.

39. Cap. 485 laws of Kenya.

40. *ibid.*, s.4

41. *ibid.*, s.18(1)

42. *ibid.*, s.22

43. ~~ibid.~~, see Kenya Subsidiary legislation, 1973 legal notice No. 233, The State Reinsurance Corp. of Kenya Act, 1970.

44. *ibid.*, s.iv

insurance Corporation every policy of life assurance issued in Kenya, 25% of the excess after the ceding company's net retention.⁴⁶

Thus legal notices issued by the Minister of finance regulate the activities of the insurance companies vis a vis the reinsurers. In 1977 the gross premium income of the corporation was Kshs. 152,140,556⁴⁷, which was 15% of the whole insurance industry's income. In 1978 the gross income was Kshs. 221,091,837 representing an increase of 45% over the 1977 figure. This amount was 25% of the whole industry's income.⁴⁸ The amount of money handled by the corporation is, as can be seen, colossal. The importance of our own reinsurance corporation can therefore be seen in terms of retaining that money in the country by stopping the flow of such amounts out of the country.

45. The name was changed to Kenya Reinsurance Corporation in 1977.

46. Kenya Subsidiary Legislation, 1979, Legal Notice No. 54, The Kenya Reinsurance Corporation Act, Cap. 485 laws of Kenya.

47. 1977 Annual Report and Accounts of the Kenya Reinsurance Corp. p.3

48. 1978 Annual Report and Accounts of the K.R.C p.5

CHAPTER THREE

THE SOCIO-ECONOMIC ASPECTS OF COMPULSORY MOTOR INSURANCE

The use of motor vehicles on our roads has brought unprecedented risks of loss ^{Life} and limb as well as property . In the absence of appropriate insurance, such risks may, as they do in many instances result in ruinous economic loss to the sufferers thereof and / or their dependants .

At Common law, where the causer of injury has been judicially found to have caused the loss either maliciously or negligently , he is ordered to pay damages to the victim as compensation for the relevant loss. But there arises many problems in executing that order by the judgement-holder . It could take months or even years before the judgement-holder gets anywhere. [Meanwhile the accident victim (judgement creditor) may be out of work and completely incapacitated because of his bodily injuries sustained in the motor accident in question . He and his dependants, if any , would be faced with depressing economic and social problems including in some cases even bankruptcy. As a result, the final judgement secured by the motor accident victim (or his dependants) thus proves to be no more than a "a paper remedy" . Where the driver's liability is insured however, the above problems are greatly minimized .

The issue of protecting such accident victims will be seen to be important in light of the considerable number of motor vehicle accidents in which thousands are injured . [If the number had been few , then the protection of such victims would seem to be immaterial, and too insignificant to attract public attention and concerted action. The unfortunate fact is that the number of motor vehicle accidents since the appearance of motor vehicles on highways has generally tended to be very high in most countries where

residents use these machines . 1

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The following statistical data supports this assertion as far as Kenya is concerned .

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Updated

KENYA: TRAFFIC ACCIDENTS 1966 - 1977

| DESCRIPTION | 1966 | 1967 | 1968 | 1969 | 1970 | 1971 | 1972 | 1973 | 1974 | 1975 | 1976 | 1977 |
|------------------------|------|------|------|------|------|------|-------|-------|-------|------|-------|-------|
| Total No. of Accidents | 3847 | 4387 | 4511 | 4196 | 5163 | 6042 | 6613 | 6789 | 6250 | 6534 | 6548 | 5949 |
| Persons Killed | 559 | 596 | 670 | 750 | 944 | 1046 | 1331 | 1402 | 1353 | 1338 | 1640 | 1560 |
| Seriously injured | 1361 | 1621 | 1472 | 1605 | 2204 | 2439 | 3062 | 3386 | 3268 | 3106 | 3924 | 3534 |
| Slightly injured | 3205 | 3728 | 3457 | 3927 | 4608 | 5070 | 6135 | 6209 | 5919 | 5177 | 6345 | 5483 |
| TOTAL | 5125 | 5945 | 5599 | 6282 | 7756 | 8555 | 10528 | 10997 | 10540 | 9621 | 11909 | 10577 |

Source: Central Bureau of statistics - statistical Abstract for 1976 and 1978.

Although the above figures clearly indicate the gravity of the problems created by the use of motor vehicles , they do not indicate

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E.g "In 1957 there were 21,561 accidental deaths in Great Britain ;
in road accidents alone in 1957, 5,550 people were killed and 273,
858 injured, 63,706 of them seriously. During the last fifty years
8,000,000 people have been injured and 250,000 killed in road acci-
dents, and the accident rate is steadily rising rising ." See
Bouglas Payne : Compensating the Accident Victim 13 Curr . L. P 85

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the nature and extent of the advantages derived therefrom . The use of motor vehicles during the above specified years undoubtedly earned for the users thereof enormous advantages ranging from economic gain to social convenience. Thus the use of a motor vehicle presents us with a serious dilemma - it has serious disadvantages as well as enormous advantages.] No driver today can possibly deny the convenience of having a car . [One basic question is who should pay for the losses occasioned by motor vehicles ? At one time , an answer to this type of problem was suggested in the following terms :

It is just and equitable that if a person uses a dangerous machine, he should pay for the damage which it occasions ; if the reward which he gains from the use of the machine will not pay for the damage, it is mischievous to the public and ought to be suppressed, for the loss ought not to be borne by the community or the injured person. If the use of the machine is profitable, the owner should pay compensation for the damage. ²

In many instances motor vehicle users would , under the above rule be barred from using their vehicles because of their inability to pay for the damage caused to the public as a result of using the vehicles . Since many motorists are quite well-off individuals who use their vehicles for pleasure and domestic

2. Powell and Anor .v. Fall (1880) 5Q.B.D 597 at p. 601 per Mellor, J . This case dealt with damage to property due to fire sparks which escaped from a locomotive possessed by the defendant .

3. Also Rylands .v. Fletcher '(1868) L. P 3 H.L. 330 applied

purposes only .

In many countries ³ , including Kenya , the answer as to ^{who} should pay for the loss occasioned by the use of motor vehicles has been presented in a different form - that of imposing a statutory duty on every driver and/or owner of a vehicle to take out such insurance with a certified insurer as would cover him against third party liability arising from the use of the vehicle on pain of paying a fine or undergoing a term of imprisonment or both penalties . ⁴ Under this scheme , it is intended that third party liability shall be met by driver's or owner's insurer on the basis of the relevant insurance policy . ⁵ It would appear that, but for the compulsory motor insurance legislation, very few car operators would take out third party insurance liability policies . ? basis?

Contrary to the suggestion in the above quotation , under compulsory insurance, losses and consequent claims caused by individual drivers are, in proper cases met out of a general motor insurance fund . This means that even those drivers who do not cause damage with their motor vehicles, are under the scheme , compelled to pay for their fellow drivers' faults . This point will be discussed later .

Compulsory motor insurance therefore attempts to supplement a situation which leaves the victim to get whatever he can from the estate of the relevant motorist or bear the loss personally.

3. E.g U.K , Ontario, (Canada), U.S.A, and all other former and present British dependencies .
 4. Cap. 406 Laws of Kenya s.4
 5. ibid. , s.10

It is important therefore to scrutinize the relevant law , its aims and objectives and how it is administered in order to determine to what extent the improvement on common law has been carried out .

The history behind the introduction of compulsory motor insurance

It is important to first consider the socio-economic factors which rendered the introduction of compulsory motor insurance necessary at the time the scheme came into being , . This is necessary for us not only to understand the socio-economic basis of the scheme . . .

Our law emanated from Britain , therefore we must first examine the British socio-economic scene at the ^{time of} passing of the British statutes before considering the position in Kenya at the time when the local statutes were passed .

There are three British enactments that involve our law on the subject : (1) The Road Traffic Act, 1930 ; (2) The Third Parties (Rights against insurers) Act, and , (3) The Road Traffic Act, 1934 all of which are now incorporated in the Road Traffic Act, 1960 . This made compulsory the insurance of motor vehicles against the risk of liability for injury to, or the death of, third parties caused by the driver's negligence .

(1) The increase in motor vehicles

The fact that special legislation concerning compulsory third party risks motor insurance was passed in the 1930's in Britain was a reflection of some objective conditions which give rise to the need for such legislation. One of these objective conditions was that both public and private motor transport had increased

considerably by 1930 and that the risks of life and limb had proved to be quite considerable and had had a worsening effect on the socio-economic situation in Britain which had been suffering general decline for quite a long time. Professor Sidney Pollard has given a vivid account of the rate of development in motor vehicle transport between the two world wars.

"In 1914, the total number of motor vehicles licensed was 369,000. Of these, 152,000 were private cars and 82,000 were goods vehicles and in 1919 these figures had all fallen by 10-20%. By 1929, there were nearly 2,200,000 motor vehicles registered, including 981,000 private cars, and by the 1930's there were over 3 million motor vehicles on the road. The speed with which road transport developed in the 1920's created new problems faster than legislation could cope with....The Royal Commission on Transport urged road safety measures in its first report ... Following this report, the first of the three main statutes affecting road traffic in the inter-war years, the Road Traffic Act of 1930, included ... compulsory insurance against third party risks."

(ii) Unemployment and Pauperism

Another factor

Another factor behind the enactment of the legislation in 1930's was the unprecedented high rate of unemployment and pauperism.

6. The development of the British Economy 1914-50, pp. 150-151 by Sidney Pollard quoted from J.L Kanywanyi's "Compulsory Motor Insurance in Tanzania" unpublished.

The period between the two great wars has been rightfully described as "The Age of Mass Unemployment"⁷. The chief cause of this situation was that after 1914 Britain suffered a relatively decline as an industrial nation. The quality of her exports fell, and she captured a smaller proportion of the world's export trade. This was a period of crisis when the Government would not only attempt ~~to~~ to ^{minimize} use all the socio-economic consequences arising from unemployment but that, indeed, it would also call upon those who were likely to worsen the situation, to make contributions for relief of their victims - particularly those who exposed the life and limb of bread-winners to motor accident risks should make compulsory contribution for the relief of incapacitated motor vehicle victims or the dependants of those who died in motor vehicle accidents. In this way the number of those dependant on the Government dole would somewhat decrease. A review on the relevant facts and figures on the unemployment rate may illustrate this point more clearly.

By 1921, unemployment in insured trades reaches 15%. The coal stoppage of April to June raised the figures to 22%, but even after the dispute was over, the proportion remained obstinately at 16-17% ... The Great Depression of the early 1930's brought with it a level of unemployment that put even the 1920's in the shade. The official unemployment rate reached a peak of 23% or nearly one-quarter of the population in August 1932, and stayed above 20% for over two years. In terms of numbers, this meant a figure of nearly 3 million people without work, but there were in addition several important sections of the population outside the field of insurance, and therefore excluded from the official statistics ... Inclu-

ding (unregistered able bodied persons not registered in the Ministry of labour) the total true number estimated has been 3,369,000 in 1931 and 3,750,000 in the peak ~~pr~~ period of september 1932. Some 6-7^{million} people were living on the dole .

These facts and figures clearly show the general social situation by 1930 when the first of the Traffic Acts were passed. The same author points out that "unemployment of such extent and duration was a social as well as an economic problem.... Men became cynical and bitter and disillusioned, and less sure of their ~~pr~~ moral bearing when they were denied work and found themselves and their families in poverty in the midst of a rich society. For a time the unemployment even became a political force, but due to the impermanent nature of the status of unemployment, they made no substantial impact on the country's political life ."

(iii) Social legislation .

The compulsory motor legislation was part of the general body of "Social legislation" concerning the plight of the poor working classes. With the help of the bourgeois liberals and revolutionary leaders of the working class movement, legislation aimed generally at relieving these "oppressed" classes, has been the activity of the British parliament and the politicians for a considerable period of time . The early technological inventions

8. Arthur Birnie: An Economic History of the British Isles pp. 346-47 , quoted from J.L Kanywanyi's : (article - unpublished.

9. *ibid.* , at p. 346 ;

and factory working conditions which made the socio-economic conditions of the working class pretty miserable, led to the passage of the Factory Acts from the 19th to 20th centuries. In 1944, the fencing of dangerous machinery was made compulsory, and the safety, health of workers, and the sanitation and ventilation of the factories were made the subject of legislation.

Other pieces of social legislation dealt with insurance, unemployment insurance, old age and widow's pensions and finally workmen's compensation.

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(iv) The Assumption of office and growing political strength of the British labour party.

The first labour Government took ^{over} _{place} in 1924 and the second time in 1929-31. In both cases it was a minority Government. These were times when the socio-economic situation in Britain was in a state of crisis, as we have already seen. And this largely explains why the labour party took office. With a labour Government in force in 1930, and given the fact ^{that} a large minority of those hit by the unemployment wave and who were largely exposed to motor accident risks were members of the labour party and had become a "political force", it was not very difficult to get

10. *ibid.* ,pp.320-21
 11. The National Health Insurance Act, 1911 as amended from time to time.
 12. Instituted in 1909 as a non-contributory system.
 13. Established by a series of injury or death during the course of his employment unless the accident was deliberately caused by the injured party. Exemption in coalmining after 1944, this was not made compulsorily insurable.

a compulsory motor insurance Act passed .

The compulsory insurance as a response to the objective conditions (risks to the human life and limb) which the increasing motor vehicle transport had created as well as other factors already discussed, may be seen therefore as part of a historical process of class struggle in Britain.

The four major factors we have just finished discussing may be regarded as part socio-economic foundations of the English Compulsory insurance law of 1930's ; The legislation in East Africa appears to have been partly because of the increased importation of motor vehicles from Europe and partly because there was such legislation in the "Mother country" which had been introduced into other British "dependant legal systems " . The Attorney General of Kenya while introducing the Motor Vehicles Insurance (Third Party Risks) Bill, 1945 had rather curiously observed :

As honourable members are no doubt aware similar legislation is in force elsewhere in practically every civilized country in the world and they are many people in this colony who feel that this legislation is long overdue ."

The effect was that we received virtually the whole of the English legislation through camouflage local pieces of legislation .

14. Kenya Legislative Debates, Vol. 20, p. 457 and : page 458

he stated further: The Bill was submitted ... to the Accident Offices in the U.K and they have made certain suggestions ...which I have no doubt we shall be able to agree to . "

The aims and objectives of the Act | The protection offered by it.

Having discussed the *damage* caused by the motor industry and having explained the socio-economic factors which account for the passage of the law at the particular times in question, I now consider the provisions of the law with a view to finding out what protection is offered *and to whom*.

While introducing and explaining the Bill, the A.G of Kenya indicated that the main aim and objective of the Bill was to provide:

This is the Tanganyika A-G's remarks

"for the compulsory insurance by motor owners against third party risks, that is to say, against claims which may be lodged in the courts by persons injured through the carelessness of motor drivers and which may result in large sums of money being awarded to the claimants which could not be met by the owner of the vehicle through whose negligence the damage occurred."¹⁵

Hence the relevant provision¹⁶ in Cap. 405 laws of Kenya states:

Subject to the provisions of this Act, no person shall use, or cause or permit any other person to use, a motor vehicle on a road, unless there is in force in relation to the user of the vehicle by that person or that other person, as the

15. Kenya Legislative Council Debates, Vol. 20, p. 457

16. Cap. 405, laws of Kenya, s. 4 (1)

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case may be , such a policy of insurance or such a security in respect of third party risks as complies with the requirements of this Act .

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It would appear therefore, that the main aim of the statute was to set up a scheme under which third party victims of road accidents would be protected against the inability of the causers of the accident to indemnify the victims against losses suffered in those conditions. Contravention of this provisions carry heavy penalties for the guilty party will be liable to a fine not exceeding 10,000/- or to imprisonment for a term not exceeding two years. In some cases he may be liable to both such fine and imprisonment.¹⁸

As of the 1st of January, 1980, every person driving a motor vehicle is required to show on his windscreen a certificate of insurance in the prescribed form, place and manner.¹⁹

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It would appear therefore that the ^{most} stringent measures are taken to ensure the protection of third party victims. This new measure makes it easier for the parties involved in an accident to exchange the names of their insurance companies .

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The injured third party will, as long as it is not a "hit and run" case , be able to trace the insured's company who are liable to pay for his claims .

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Section 5 of the Act specifies the type of insurance/policy which complies with the requirements of the statute. Such a policy must be issued by a company which is licensed under s.6 of

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17. The Insurance (Motor Vehicles Third Party Risks) Act, Cap. 405

Laws of Kenya s.4(1)

18. *ibid.* ,s.4("2)

19. *ibid.* ,s.9(1) as amended

Under s.15 , in the event of the insured's bankruptcy (or
winding up in the case of a company) , or making of a scheme of arr-
angement with his creditors , if before or after that event ,
the insured incurs third party liability , his rights against
the insurer under the policy "shall, notwithstanding anything
in any law to the contrary , be transferred to, and rest in the
third party to whom the liability was so incurred. "27

This provision is of great importance to the third party for on
account of the "privity of contract " doctrine, and also the old
rule of "no liability without fault " , the injured third party
would first have to obtain a judgement against the insured befo-
re the duty of the insurer to pay for the damage in question can
arise. This would mean that the third party victim of the acci-
dent ~~is~~ not^{be} entitled to the benefits of the ~~policy~~ policy from
the time of the accident. Therefore in the absence of s.15, the
third party victim, who obtains a judgement against a bankrupt
or an insolvent insured, would not be able to obtain the insu-
red's full indemnity from the insurance company, and he would
have to claim for his debt against the bankrupt or insolvent
estate as any other creditor. By vesting in the third party the
insured's rights against the insurer, therefore, the section
enables the third party to get the full benefits of the protec-
tion given him by the statute. In such a case however, the
insurer would enjoy the same rights and privileges against
the third party as he would against the insured under the insurance
contract, for the third party can get only such rights as he would
get through suing the original insured. 28

27. Cap. 405 laws of Kenya s.15(a) and (b)

28. *ibid.* , s. 15(4) .

The insurer cannot limit his liability under the policy by any condition, in so far as third parties are concerned, if such liability is required to be covered by a policy under s.5 of the Act.²⁹ Such limitations can only operate as between the insured and insurer so that where the insured commits a breach of some conditions in the policy, the insurer may recover from him, any amount paid to the third party which, but for the statute, he would not have paid.³⁰

Under s. 10(4), the insurer is entitled to avoid liability through judicial proceeding if he can show that the policy was obtained "through the non-disclosure of a material fact, or by a representation of a fact which was false in some material particular...." This would mean that the third party, on obtaining judgement would not be entitled to the insurance money in settlement of his judgement-debt against the insured. He would have to enforce it against the insured himself. For this reason, the statute in s. 11 provides that if the insured makes any false statements for the purposes of obtaining compulsory third party risks motor insurance, as a result of which the policy is rendered voidable at the instance of the insurer, the insured thereby commits an offence which is punishable by fine or imprisonment or both these penalties in the manner specified in the statute.³¹

These^{are} provisions which were intended to facilitate the administration of the compulsory motor insurance scheme. There are many instances however where they do not guarantee the rights

Paragraph

30. See provisos to section 8 ;section 16; section 10(5) Cap. 405 laws of Kenya.

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31. See section 17 which provides :

"any person who contravenes any of the provisions of the Act for which no penalty is specifically provided, shall be liable to a fine not exceeding 5,000/- or to imprisonment for a term not exceeding

CHAPTER FOUR.

SHORTCOMINGS IN THE ACT:

(a) The negligence aspect of Compulsory motor insurance .

In my view this is the fundamental shortcoming in the Act. This aspect of the scheme is based on the old common law rule of the thumb of "no liability without fault" which dates as far back as 1875. The law as we have seen, requires a motor vehicle owner to ^{take} out an insurance policy with respect to the use of his car which covers him and/ or any number of persons mentioned therein against third party liability which may be incurred as a result of road accidents "negligently" caused by him or them. It is clear here therefore, that the statute only contemplates cases in which any liability incurred on a road accident was due to negligent driving.

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At the time when this rule of thumb was set up (1875)¹, during the horse cart age, it was probably a reasonable proposition. It was an attempt to devise a method of distributing risks and losses in the pre-motor vehicle age in England. But for us today, to use the rule of thumb underlying it, irrespective of the innumerable number of speedy vehicles driven by ever fallible human beings on confusing road networks; to repeat it in total disregard of the innumerable road net

1. See Holmes and wife .v. Mather (1875) L.R 10 EX. 261 where Bramwell, B. remarked,

".....people as they go along the roads must expect , or put up with, such mischief as reasonable care on the part of others cannot avoid....."

accidents due to use of motor vehicles and the resultant economic losses as well as losses of human life and limb, seems absurd.

The fundamental question we must ask ourselves here, is whether tortious liability should be the basis on which compulsory third party risk motor insurance should be administered.

A suit in negligence is a cause of action taken by the plaintiff in order to recover losses he has suffered through the fault of the

defendant, . . . A plaintiff is awarded damages firstly to punish the defendant for his wrongful conduct², and secondly to give him compensation. This element of punishment makes it look immoral to award damages against a defendant who has committed no wrong against the plaintiff. For where the defendant has acted "reasonably and with due care" towards the plaintiff but, despite that, the plaintiff has suffered damage, it would amount to "punishment without fault" if the defendant in those circumstances were ordered to ^{pay} damages to the plaintiff.

It appears that when tortious liability was first conceived, the awarding of damages only in cases where the injurer's conduct was negligent was two fold: (1) to discourage inadvertence and malicious conduct, and to establish a rational system for distributing losses, arising from ordinary human activities, among the members of the community. The basic rule was "the loss should lie where it falls" ^C _A except where it could be shown

2. Lord Atkin was of the opinion that the principal of "duty of care" on which negligence was founded arose from a "general public sentiment of moral wrongdoing for which an offender must pay" in Doughue v. Stevenson (1932) A.C 562, 579.

3. Salmond in Salmond Law of Torts, p. 16 also 17 Curr. ^{L.R.} 127 at p. 129-30.

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that the person responsible for the loss had conducted himself wrongly at the material time .³" At the time there was no general policy of protecting the injured person against the insolvency of the injurer, nor was compulsory insurance used for this purpose . In the light of the purpose of the statute as we discussed it in chapter three, if we take the two above factors into account, it will be seen that the insured negligent driver , who is supposed to be punished for his wrongdoing , does not meet the whole burden of compensating the injured third party . For in practice , the individual's formal burden of compensation is spread over all car drivers through their insurances . The gross motor insurance fund is the last resort an injured person entitled to claim will look for his compensation ."⁴ It seems most unfair [that other drivers should be punished for the wrongful acts of a particular driver] . This is one reason showing that it is wrong to apply tortious liability in compulsory insurance .

Another reason for objecting against the use of tortious liability or "no liability without fault " as a basis of distributing losses through insurance, is the difficulty involved in proving negligence against the insurer . There must be quite a number of cases where the only witnesses were the injured and the injurer . In such cases , even if the driver had been at fault it would be very difficult for the injured person to establish negligence, for obviously the injurer will deny any negligence on his part .

3. Salmond in Salmond's Law of Torts, p.16 : also 17 Curr. L.R 127 at pp. 129-30 .

4. Hamish, R. Gray, "Liability for Highway Accidents" 17 Curr. L.R 12 at p. 132 .

The scheme that was established for the protection of the third party would in such instances not come to his aid. Nor does he have any other remedy against the de facto "wrongdoer". The same happens where the proceedings do not commence until after a lapse of time, due to the injured party's hospitalization. Here memories of the events as they actually took place at the time of the accident may be beclouded, [or influenced by the lapse of time], and therefore unreliable. In such cases therefore, to hold either that the driver negligently caused the accident or that he did not, would depend mainly on guessing what really happened. If then, such guesswork led to a decision whereby the injured third party loses his claim, then the very purpose of the scheme is defeated. It could even happen that it is almost ^{impossible} to tell whether or not the injurer was negligent.

Driving on our kinds of roads with the rain pelting down in torrents, the roads flooded and the inevitable traffic jams during such weather, one cannot really say for certain what really happened or who did what. If negligence is not proved on the injurer's part, the third party would have to lose his claim.

It seems, therefore, that to base the scheme, which is intended to give protection to third party road accident victims, on the principle of tortious liability, amounts to making the apparently generous protection just a gamble. It may be won or lost depending on whether or not the claimant outwits the defendant in proving that it was the defendant who was at fault.

Again the requirement that the injured third party must first obtain a judgement based on tortious liability against the insured driver in order that he may claim the relevant damages from the insurer has caused some misfortune in certain cases. This means that a third party victim of a hit-and-run driver cannot recover anything from anyone, even if the particular untraceable driver had a proper policy at the material time.⁵ Another shortcoming in the Act is the fact that it is the driver and not the motor vehicle who is insured.⁶ In practical terms, this means that the protection given to the third party is further cut down. For, although when a policy is issued it relates to the use of a particular motor vehicle, if it be negligently driven by a person not mentioned in the policy and injure or kill a third party, the latter or his dependants cannot successfully claim thereon on obtaining a judgement against the relevant driver. Had it been provided by the Act that where an "insured vehicle" causes an accident in which a third party is involved, the insurer on proof of the nature and extent of the injury, and the resultant claim being satisfactorily made, should settle the claim, there would have been no risk of the third party losing his protection on the ground that the driver was not covered by a policy of insurance.] This particular defect was seen by at least one of the colonial members, Major Keyser who, commenting on the Bill said:

5. Such cases are taken care of gratuitously by the Motor Insurers Bureau in Britain, and by the compulsory motor insurance schemes in Newzealand, and Saskatchewan - quoted from Kanywanyi's article on compulsory insurance in Tanzania, unpublished.

6. See ss. 4(1) and 5(b) of the ACT.

disclosure" and " material representation" rule .

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In these cases therefore, the conduct of the insured may disentitle a third party claimant to the benefits under the scheme. Here the position in (c) is the most objectionable for the doctrine of disclosure is far from being a fair doctrine and in most cases the insurer, and not the insured, has a far greater knowledge of what is material and what is not. However, the insured's lack of perception that certain facts which he does not reveal on the proposal form are material in that they may lead the insurer to increase the premium, may result in the third party losing his claim.

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Another circumstance which may enable the insurer to avoid liability towards the third party claimant is where the insured does not appear to have any insurable interest in the vehicle in respect to which the policy is taken out. There is no reason in such a case, why the third party should not recover especially as the insurer took the money for that very purpose. Where a third party is a claimant under compulsory motor insurance, that defence seems to be out of step with the main object of the scheme.] Again this is a result of "no liability without fault" .

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Given all these defects or weaknesses there is no way the fundamental purpose of the Act can be realized. It is important therefore that an alternative method be found so as to make the scheme successful. It has been obvious that the most fundamental defect in the Act is its negligence aspect. Whether or not the third party can recover depends on the conduct of the insured. In part (b) I discuss an alternative method to the present "no liability without fault" one .

3. See section 10(2) (a) to (c) and (i) to (iii) of the Act .

Footnotes contd next

footnotes for p. 48 contd;

part (b):

9. See O.K Mutungi's article on The Doctrine of Disclosure :
A one sided doctrine ? unpublished.
10. See Jubilee Insurance Co. v. John (1965) E.A 233
11. See Dunn .v. Ocean Accident and Guarantee Corporation (1933)
T.L.R 52 .

part (b):

Suggestions for an alternative system | Non-Fault Insurance .

There has been widespread dissatisfaction with the tort system as a method for compensating people for their injuries . This has become apparent throughout the common law world, not to mention Scandinavia and other countries with different legal systems and traditions .

Most of the discussion has been centered around the problem of compensation for road accidents . It is in this area that the tort system is most widely used and in this area therefore that its deficiencies are most generally observed.

One important reform that has been suggested is that the fault system should be replaced by a Government established non-fault system for road accidents.¹² This could be suggested for Kenya as well, for the present system is run by private insurance companies on purely commercial basis .

In the U.S , the process for a new system began in 1958 in a debate between professors Keeton and O'Connell .¹³ The proposals of these two professors triggered off an enormous debate and spawned a huge selection of no-fault plans for road accident victims .¹⁵ After some years of resistance ., the state legislators finally began to move and by early 1974, 18 states had enacted a variety of such schemes .¹⁶

12. Justice Report , Compensation For Road Accident Victims- quote from Atiyah - Accidents, Compensation and the Law, at p. 562
13. Published in Crisis in Motor Car Insurance by University of Illinois Press (1968) .

Butlerworths (1974)

footnote s contd:

14. One of the best known was the New York Plan - Automobile Insurance.....For whose Benefit ? - quoted from Atiyah (supra) a page 562 .

15. See Atiyah (supra) p.562 .

and O'Connell, the scheme would compensate victims of road accidents regardless of who was at fault, for all out-of-pocket losses up to the limit of 10,000 dollars per person¹⁶. As in the case of medical coverage, one would buy this coverage for himself, his family and guests, and he would make his claim and recover benefits from his own insurance company.¹⁷ The insurance company would be required to pay month by month, as in doctor's bills, hospitable bills, or lost wages incurred, rather ^{than} delaying as under the present system until the insured person and the company can agree on a lump sum or have their disagreement dissolved in a long-delayed trial.

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The second main feature of the basic plan is that basic protection insurance would be coupled with a new law that would do away with claims based on negligence unless the damages were higher than 5,000 dollars and 10,000 dollars for all other items such as medical expense and wage loss.¹⁸

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This would mean that all but a very small percentage of the claims for injuries in automobile accidents would be handled entirely under the new basic protection plan. The wasteful expense of bickering over fault - with all the costs of the time spent by investigators, lawyers and the court, would be eliminated except in the few cases where injuries were quite severe. This would sharply reduce the overhead of the

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16. R.E Keeton and J.O O'Connell - Crisis in Car Insurance; University of Illinois Press (1968), p. 43 .
17. *ibid.* ,p.43
18. *ibid.* ,p.44

number of claimants every year and the estimated sum of the scheme's funds .

The scheme could be a Government based social security system wherein the present piecemeal schemes - workmens' compensation , government pensions, compulsory motor insurance, will be remoulded under a comprehensively planned social security scheme. The recommendation that the scheme must be as far as possible comprehensive and that it must be run on a basis of non-fault insurance , naturally leads to the conclusion that a considerably large sum of money would have to be raised for the scheme. So who would bear the costs ? As a general principle, it should be financed by members of the community as a whole and particularly such bodies as actuarial data may show to be the main contributors to the general stock of the risks involved. The rates of contribution of premium should be worked out in accordance with the number and seriousness of the accidents which each activity contributes to the general risk. These contributions may be obtained by way of taxes through the state granting subsidy to the scheme in accordance with an established range of priorities and available resources ; also contributions from public and private corporations , co-operatives and individuals in accordance with their respective risk contributions .

Naturally, doing away with fault as a basis for compensation would necessarily lead to higher premiums since claims would increase. Nevertheless, the savings that would be made on legal fees for the court and advocates , as well as administrative costs would greatly reduce costs.

A second argument against the change to non-fault insurance is that the system would operate to the detriment of the good risk client i.e those who pay cause no claims, would still have to pay premiums just like the bad risks clients .

Another argument against non-fault insurance concerns the suggestion that the funds from the scheme should be collected from the major bodies mentioned before . Taxing, say, the motor industry, would really have no effect since you are dealing only with the agent without considering the principal. Shareholders in a motor car manufacturing company may order that a certain number of cars be produced every every day. They are not concerned about security, all they want is the profits .The motor car manufacturers have got to do what they are told , and they will also not bother about security . It is important therefore to take into consideration those people who authorise such dealings , if you are going to tax the agents. Secondly, although initially the major bodies will be the ones paying into the pool, ultimately every one -the ordinary 'mwananchi' will also pay . Big manufacturing companies are bound to increase their prices on consumer goods, necessitating the 'mwananchi' to dig deeper into his pockets .

O'Connell and Keeton raise the Basic Plan to compensate all injured persons but they do not define "injured persons" . The moment they talk about 'injured person, as a matter of fact, they are falling back on the conventional system. Also, how does a person claim under the proposed system ? It may happen that the injured person was injured by something else not a car; therefore it will be necessary to prove that he was in

fact injured by a car .He has to show that the kind of damage he suffered could only have been caused by an automobile .

This statement itself takes us squarely back to tort .We will not have done away with tort therefore, for an injured party will have to show that the injury he suffered could only have been caused by a car . There is nothing non-fault about this for you are now trying to prove that you suffered an injury through no fault of your own .

Again, fixing maximum and minimum rates for compensation may not be justifiable; if an insurance company fixes a maximum amount of say 50,000/-kshs. and the claimant is able to show his doctor's receipts amounting to 60,000/-kshs., there is here an obvious difference . Under non-fault therefore subrogation would not operate . The principle of subrogation requires that the insured be fully indemnified; with a difference of 10,000/-shs. as in the above case, there is no full indemnity therefore there can be no subrogation and the insured's tort rights are left intact. Thus the rights of the insured which are hitherto enforced under subrogation by the insurer must of necessity be compromised if we accept non-fault insurance. However the compromise arises only if we are not willing to digest the implications of ~~the~~ subrogation. Our main problem here is that we are taking indemnity to be a perfect ~~equi-~~ equitable system which it is not, for why shouldn't ~~the~~ the insured be allowed to pursue his ~~the~~ third party rights without reference to his insurers ?

It is ^{thus} apparent, from the arguments against non-fault, that it is not without its problems .

CONCLUSIONS:

Insurance as we have seen , is a system for compensating people for damages or losses suffered. It is a contract where one person called the insurer, undertakes, in return for a consideration called the premium, to pay to another person , the insured , a sum of money on the happening of a specified event .¹

We have also seen that insurance is not new to african tradition ; insurance should be evaluated in the context of a given society and its development and needs . Problems only arise when one tries to evaluate the African security system in the western sense².

We traced the origins of insurance to the 13th century when marine insurance started . The history of insurance in Kenya has also been seen , our law emanated from England and is based generally on the English common law as received in Kenya on August ,12th, 1897 .

Reinsurance has been seen as a natural following on insurance, for insurance companies must also have some security .

We have seen the reason why it became necessary to have legislation³ from data and statistics of the damage caused by the motor industry . Something simply had to be done in view of the many fatal and non-fatal road accidents in which thousands were involved . The reasons for legislation have been traced to England where (i) the increase of motor vehicles and the resultant casualties ; (ii) the unprecedented high

1. see chapter one

2. ibid. ,p.9

3. Compulsory Motor Insurance

rate of unemployment and pauperism due to inter-war economic decline ;(iii) the assumption of office by the labour party ; and (iv) the long history of social legislation , all contributed to the passing of the statute . These are the socio-economic foundations of the English compulsory motor insurance law of the 1930's . The legislation in Kenya , I conclude was enacted partly because of the increased importation of motor vehicles from Europe, and partly because there was such legislation in the "mother country" which had been introduced into other British dependant legal systems . As a result we received the virtually the whole of the English legislation through camouflage ^{local} pieces of legislation .

We next considered the problems in the provisions of the law, its main weaknesses and the reasons for such weaknesses . We saw that the main problem in the present system is its negligence aspect and that because of this basis, the Act does not successfully ^{protect} the party as it was meant to do .

The question then arose as to whether there is a need for change . There is no question that the present system is not satisfactory . The Key problem is negligence under which the claimant must ~~and~~ prove that he was blameless and that it was the other driver's fault . If this system is strictly followed many hardships would arise . You obviously cannot have two blameless drivers , yet each is required to deny liability .

The system is not conducive to justice since one knows that he stands to lose monetarily if he loses the case . There is a lot of temptation for parties to perjure themselves in court as a result .

The present system is also very cumbersome ;often it does not deliver the goods and when it does , it delivers them too late to benefit the injured person . The long delays due to court congestion make prompt payment impossible in a system where fault must be shown .

Injustice is rampant in the present system , more so because motor insurance is plagued with inherent injustices that occur even when every one is doing his assigned task faithfully and efficiently . The long delays characteristic of the system produce a cruel injustice that strikes harder as injuries are more severe, and hardest at those most in need -the disabled bread-winners and their families . A hard bargaining insurance company can buy the claim of such a person with a penurious settlement offer that capitalizes on his pressing needs in the face of the long wait for trial .

The present system is also appallingly wasteful . American research showed that, less than 50cents of the automobile liability dollar ever reaches the hands of any injured persons ⁴ . The rest goes to agents , adjustors, investigators , lawyers , overhead and profit . These expenses end up injuring the insured for they come out of the premiums and the damages awarded if he wins the case . A lawyer knows he has a stake in the case , so the longer it takes in court, the more his client gets if he wins the case and therefore the larger the lawyer's share of the whole .

This system is topped off with powerful temptations to dishonesty

⁴ R. Keeton and J.C'Connell , Crisis in Motor Insurance (supra),

To the toll of physical injury is added a toll of psychological and moral injury resulting from pressures of exaggeration to improve one's case or defence, and even for outright invention - or perjury to fill any gaps and cure any weaknesses. These inducements strike at the integrity of the driver and the victim alike, all too often corrupting both, leaving the latter twice a victim - physically injured and morally debased. Self deception cannot justify a system which demands that parties reconstruct accidents with split-second accuracy, when no man's powers of observation and memory are that good.

It appears apparent that there is a case for change. Non-fault insurance has been proposed and we have seen that even this is not without its shortcomings. It has been seen that we cannot entirely do away with tort principles in non-fault insurance.

Nevertheless, on a balance of the two, I am of the opinion that there is need for change to a non-fault system. Any change must be viewed in the light of the socio-economic values of our country. Kenya is a capitalistic country and every thing has to be run in accordance with our mode of production. Insurance companies are reaping a substantial profit from the present system and they would not like to see the source of their income go. This applies to lawyers as well as they have a vested interest in the continuance of the present system.

In the light of the inherent weaknesses seen throughout the preceding pages in the conventional system it is my contention that we need a change.

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