THE EFFECTIVENESS OR OTHERWISE OF THE MOTOR VEHICLE THIRD PARTY RISKS ACT IN REGULATING THE INSURANCE SECTOR OF KENYA

By

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JUNE, 2015

DECLARATION A

"This dissertation is my original work and has not been presented for a degree or any other academic award in any university or institution of learning".

KOMBE LARRY MAFAWI

Name and Signature of Candidate

12. 6. 15

Date

DECLARATION B

"I confirm that the work reported in this dissertation was carried out by the candidate under my supervision"

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12/06/2025

Date

APPROVAL

This dissertation entitled **"THE EFFECTIVENESS OR OTHERWISE OF THE MOTOR VEHICLE THIRD PARTY RISKS ACT IN REGULATING THE MOTOR VEHICLE SECTOR IN KENYA"**, has been submitted by **KOMBE LARRY MATAWI** for examination with my approval as the university supervisor, and it's now ready for presentation for the award of a Bachelor of Laws of Kampala International University.

Signed .....date 2/06/2025

Counsel Sserunjogi Nasser

DEDICATION

I hereby wish to dedicate this work to my parents Mr. Simeon Kombe wa Nzai, Elizabeth Mwenda Kadenge, Margaret Sidi Baya for their outstanding support that they have shown me all through my education life. It has been a tough struggle but by the grace of God, they took me through to this level. May the Almighty God grant them long and happy life

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CHAPTER ONE
INTRODUCTION

This study seeks to evaluate the effectiveness or otherwise of the Motor vehicle Third Party risks Laws in regulating the motor vehicle sector in Kenya. This chapter is dedicated towards unveiling the basics of the study. It contains background of the study, statement of the problem, significance, and literature review.

1.1 Background of the study

The fundamental commercial concept of insurance has been amidst the African continent for quite a long time. Members of a community pooled together resources to create a "social insurance fund". The concept of premiums ranged from material to moral support or other payments in kind. It was from these collected funds that payment was made from. Those who seemed to be less unfortunate in the society and who were exposed to perils qualified from the fund,[1] "the emergence of commercial insurance in Kenya is viewed to be from the historical emancipation of Kenya as a nation. This is seen right from the conquest of Kenya as a British colony, settlers initiated various economic activities, particularly farming, and extraction of agricultural products. However the Idea of substantial investments necessitated sound needed some form protection against several risk exposures. The colonial masters thus saw a mouthwatering opportunity to venture into this and responded by establishing agency offices to service the colony's insurance needs. Their efforts yielded some positive results and in turn the colony justified expansion of these agencies to branch networks with more autonomy, and expertise to service the growing insurance needs. By the time of independence[2] most branches had been transformed to fully-fledged insurance companies and it is since this period Kenyan insurance industry has flourished.[3] By 2002 Kenya had almost 41 registered insurers, 15 transacting general business, 2 transacting life business while 24 were composite insurers transacting both life and general insurances

Motor vehicle insurance is insurance purchased for cars trucks motorcycles and other road vehicles. Its primary use is to provide financial protection against physical damage and or bodily

[1] Rand Graham K, 'diagnosis and improvement of service quality in the insurance industries of Greece and Kenya, see also http://www.lums.co.uk/publications
[2] Kenya gained independence in 1963 from the British
[3] By the year 2002, the insurance industry in Kenya had a total of 41 registered insurers

injury resulting from traffic collisions and against liability that could also arise there from the specific terms of the vehicle insurance vary with legal regulations in each region. Benjamin Mwangangi underwriting manager at CIC insurance group ltd in Kenya in a recent interview stated that Motor vehicle insurance is as old as the invention of the motor vehicle itself. After few days of inception, it was soon realized that man wasn't in full control of the machine. It had the potential to cause harm to which adversely might result in death. That is why it was christened a *lethal machine*. That is when the thought of countering its lethality was born. Motor vehicle insurance was then born as a result of widespread use of the automobile began after the First World War. Cars were relatively fast and dangerous by that stage, yet there was still no compulsory form of car insurance anywhere in the world. This meant that injured victims would seldom get any compensation in an accident, and drivers often faced considerable costs for damage to their car and property. A compulsory car insurance scheme was first introduced in the United Kingdom with the Road Traffic Act 1930. This ensured that all vehicle owners and drivers had to be insured for their liability for injury or death to third parties whilst their vehicle was being used on a public road. This explains how motor vehicle got introduced in common wealth countries Kenya in particular by virtue of the ordinances which were directly operational in Kenya. This can be justified by the introduction of the formal manning of insurance industry by the colonial masters as discussed above.

1.2 Statement of the Problem

The insurance industry in Kenya is faced by both Legislative challenges, where the laws set by parliament to govern the insurance industry have not responded to its needs and Jurisprudential challenges, where the courts awards are arbitrary. This proposal has been met with a lot of skepticism, some arguing that a structured compensation scheme works best in a no fault system while Kenya's insurance industry is based on the fault system. Other argue that it is a more equitable way of compensation since it is based on an individuals earning capacity unlike the current system where courts give excessive awards not based on any scientific calculation[4]. A structured compensation scheme, which entails a fixed compensation for each body part and capping maximum compensation at KES 3 M as compensation for total disability, loss of sight or death, will essentially leave in place the traditional court developed law in determining liability

[4] Supra note 1

but awards of bodily injury will be guided by the schedule.[5] There is thus need to address these legislative and jurisprudential challenges which render the insurance industry impracticable with regard to public service vehicle insurance in Kenya. In this paper, I addressed the applicability of a structured compensation liability schedule and its shortcomings in our countries legal framework.

1.3 Research Objectives

The main objective of this study is to examine the legislative challenges as well as the jurisprudential challenges in line with structured compensation liability schedule on the Kenya's' legal and regulatory framework and its applicability or inapplicability.

Specific objectives are;

i. To examine the relevance of laws of insurance and the general nature of insurance industry regulation with regard to public service vehicle insurance as governed by the insurance Act cap and the. *The Insurance (Motor Vehicles Third Party Risks) (Amendment) Bill* 2010 and their challenges
ii. To examine the relevance of the structured compensation schedule stipulated in the Motor Vehicles Third Party Risks
iii. To identify the challenges faced in regulating the insurance sector as a result of the Motor Vehicles Third Party Risks
iv. Recommend on the adoption of a public service vehicle insurance regulation that is responsive to the needs of the insurance industry and insurance policy holders.

1.4 Research Questions

This study intends to have the following questions answered;

i. How relevant are the laws of insurance in regulating the insurance industry with regard to public service vehicle insurance as governed by the insurance Act cap and the *The Insurance (Motor Vehicles Third Party Risks) (Amendment) Bill* 2010)?
ii. What is the relevance of the structured compensation schedule stipulated in the Motor Vehicles Third Party Risks?

[5] *The Insurance (Motor Vehicles Third Party Risks) (Amendment) Bill* 2010

iii. What are the challenges faced in regulating the insurance sector as a result of the Motor Vehicles Third Party Risks?

iv. What should be done to ensure public service vehicle insurance regulation that is responsive to the needs of the insurance industry and insurance policy holders?

1.5 Research Hypothesis

This study proceeds on the following assumptions;

i. That the current legal and regulatory framework of the insurance industry in Kenya, in relation to public service vehicle insurance needs to be reconstructed so as to cure the defects within the industry.

ii. That a structured compensation liability schedule will have a positive and negative impact on the current legal and regulatory framework of the insurance industry in Kenya.

1.5 Significance of the study

The Kenyan insurance sector is faced by a number of drawbacks that make its function far from realization. My research is thus intended to closely scrutinize specific laws falling under both the legislative and the jurisprudential challenges.

According to the Kenya insurance report released in 2010 Kenya insurance business has got some positive strides and quite promising which thus prompt me to conduct this research and perhaps try to seal any drawbacks that would probably influence such development negatively. According to the report Kenya provides evidence that the insurance industry can thrive in Sub-Saharan Africa in face of highly challenging economic and especially political problems. At the end of 2008, combined assets of Kenya's 42 insurers amounted to KES 46.12bn, or nearly US$2bn. Both the non-life and life segments sustained double digit growth over the last five years.[6] Thus an analysis of the legislative and jurisprudential challenges would aid in the requisite application especially with regard to the current legal framework and try to look for a way forward for Kenya's insurance economy.

[6] Business, *Kenya Insurance Report April 2009*

1.7 Research Methodology

My study mostly entailed secondary sources of data. Mostly from the sources discussed herein. In regard to Legislation; I analyzed various legislative provisions especially in the Insurance Act, Cap 487 Laws of Kenya and the Insurance Motor Vehicles Third Party Risks Act, Cap 405 of Kenya, in an attempt to examine the adequacy of the existing legal and regulatory framework of the insurance industry in Kenya in relation to public service vehicle insurance.

Library research; I undertook to project the opinions of various authors on the legal and regulatory framework of the insurance industry in Kenya and the impact of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Bill 2010 on the insurance industry in relation to public service vehicle insurance. and also rely on similar topics done in regard to this research topic I also briefly made some comparisons with other jurisdiction especially on the jurisprudential analysis on how they have handled this topic and further determine how much the Kenyan legislations are wanting in this regard

1.8 Literature Review

John Birds in *Modern Insurance Law*[7] says: "The contract of insurance is basically governed by the rules which form part of the general law of contract but there's equally no doubt that over the years it has attracted many principles of its own.

Ivamy in his book, *"General Principles of Insurance Law"*[8] "asserts that A contract of insurance in the widest sense of the term may be defined as a contract whereby one person called the insurer undertakes in return for the agreed consideration called the premium to pay to another person called the insured a sum of money or its equivalent on the happenings of a specified event."

According to John Birds,[9] a body can act as an insurer, only if it satisfies the regulatory requirements established by detailed and complex legislation. He further says that these requirements exist because of the very nature of most insurance businesses. The insured entrusts his money to the insurer, but in return receives only a promise of payment in the event of

[7] Birds, John. Modern Insurance Laws. 9th. Sweet and Maxwell, 2013.
[8] Hardy, Ivami E R. General Principles of Insurance Law. New York: ButterWorths Law, 1993.
[9] Supra note 7

specified events happening. Regulation is also important to ensure as far as possible that insurers are able to meet their promises.

W.F Young[10] proposes that the principal immediate object of this regulation is to assure the performance by insurers of their obligations by prescribing safeguards against insolvencies. The safeguards contemplated by Young here are for example the introduction of a structured compensation liability schedule to cure the defects within public service vehicle insurance in Kenya. This regulatory framework performs the overall objective of guarding policy holders against insolvency. It also creates an atmosphere for growth of the insurance industry.

In the words of Robert E. Keeton,[11] most measures of insurance regulation have been initiated to serve one or more of three main objectives: first, to avoid overreaching by insurers; second, to assure solidity and solvency of insurers; third, to assure that rating classifications and rates are reasonable and fair. Furthermore Dr Busalile Jack in his article insurance law averred that Conventional insurance writers have observed that insurance has two basic roles:

1. The transfer and shifting of risk from an individual to a group; and

2. The sharing of loss on an equitable basis by members of the group.

These roles constitute the Insurance mechanism. Insurance attempts to shift individual risk to a group and does so equitably should the risk attach. Arguably therefore, insurance is an economic device whereby the individual substitute a small certain cost for a large and uncertain financial loss in the future which could exist or arise but for insurance.

Other roles include:

1. Source of revenue for the state;
2. Source of employment;
3. Encourages investments;
4. Facilitates growth of capital markets by creating effective demand for securities;

[10] 17wf young, 'Is Insurance a Niche Business? Reflections on Information as an Insurance Product' (1995) 1:1,
[11] Supra, n 17 p, 556.

5. Encourages savings (especially in life and provident insurance); and

According to Randall R. Bovbjerg,[12] a system of structured payments leaves in place the current liability system of courtroom justice and payment through liability insurance, but modifies the rules and procedures of traditional court developed Law. Kenya thus has no otherwise than stick on the traditional court system to determine the liability but shift the award of bodily injury damages in accordance with the schedule. My research is therefore aimed at evaluating how the proposed structured compensation liability schedule is applicable in the Kenya's legal system

According to Anthony Sebok[13], it is a platitude that tort law in America changed in character sometimes in the middle of the twentieth century. He says that at some point maybe 1950, maybe 1960, tort experienced, that is, in the words of two recent commentators, 'a plaintiff oriented expansion.' He further says that virtually all commentators, regardless of their particular normative views, agree that as a matter of empirical fact, courts and legislatures changed tort doctrines in ways that made it easier for injured persons to recover.

Comparative fault replaced the defense of contributory negligence and many courts merged the defense of assumption of risk into comparative fault[14]. Courts and legislature relaxed the rules of causation as well, first with the introduction of alternative liability, then with the expansion of substantial factor test through the introduction of concepts like market share liability and loss of chance[15]. My research thus sought to take in hand some of the legislative and jurisprudential changes that Kenya's legal system may have to undertake as a result of the introduction of a structured compensation liability schedule.

According to Timothy D. Lytton,[16] for over forty years, tort reform proponents in America have disparaged the tort system as a lottery, arguing that it produces arbitrary outcomes. The tort system on this account is both unfair and unpredictable. These criticisms have often served as justification for proposals that would replace the tort system with some form of no fault accident

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[12] Randall R. Bovbjerg, 'Lessons for Tort Reform from Indiana' (1991) 16 (3) *Journal of Health Politics, Policy*

[13] Anthony J. Sebok, 'The Fall and Rise of Blame in American Tort Law' (2003) 68:4 *Brooklyn Law Review,*

[14] Supra 19

[15] ibid

[16] Timothy D. Lytton et al, 'Tort as a Litigation Lottery: A Misconceived Metaphor' (2010) 52 *Boston Law Review*

insurance in order to provide fairer and more reliable compensation to accident victims, the no fault system.

Under the No Fault scheme, mostly applicable in New Zealand, Britain, India, Algeria, Fiji Quebec and Saskatchewan compensation to 3rd parties will be automatic. Victims are not required to establish negligence for liability to attach. Litigation costs are saved so as is the problem of delay. Victims of hit and run and persons injured by uninsured motor vehicles are covered. The awarding of damages is standardized and the judiciary is freed from running down cases. For instance, in Britain, a 3rd party receives 70-80% within 6 months of the accidents. In Canada, the amount lies between 65 – 75%.

The no Fault scheme is victim specific. It looks at motor accident and victims in the totality of general loss of income by the community due to technological developments to which man is exposed. In the words of Atiyah in Accident Compensation and the Law "The essence of all no-fault schemes is in principle the same, namely, that every person injured in a road accident should
have a right to claim compensation from an insurance fund without proof of fault. It is a claim which does not require proof of negligence". A no-fault scheme is a just and efficient method of compensating victims of motor vehicle accidents.

Timothy D. Lytton[17] says that claims discrediting the tort system; obscures the tort systems shortcomings, more than it clarifies them. He proceeds to concede that tort outcomes produce horizontal inequities among accident victims with similar injuries, and that the outcomes can also be unpredictable. There point is that the comparison to random by lottery both misrepresents how the tort system decides cases and exaggerates its unpredictability. He contends that, arbitrariness is endemic in compensation systems of necessity, all compensation schemes set coverage limits that inevitably create horizontal inequities among claimants with similar injuries and reduce predictability in many borderline cases. While addressing one kind of arbitrariness, compensation schemes alternatives cannot escape from creating other kinds of arbitrariness and having to make pragmatic tradeoffs among them that cannot be justified by any uncontroversial principle. These structural necessities will entail some unpredictability and horizontal inequity.

[17] ibid

According to Ronen Avraham,[18] damage caps have at least three adverse upshots for efficiency. First, damage caps are in a way "regressive" (in the sense that their fiscal impact is larger for severe injuries, than for minor injuries) so they might prevent many victims with totally legitimate claims from obtaining legal representation. Second, caps distort deterrence; potential tort feasors will take less than due care, knowing that their liability is capped that is, caps will distort marginal deterrence of activities with higher risks of severe bodily harm. Third, caps present problems on optimal insurance grounds, the other goal of an efficient tort law, because risk averse victims generally prefer to insure against large losses rather than insuring only against minor losses.

According to Peter McKenzie[19] during the 1960s, New Zealand experienced a growing disquiet regarding the adequacy of the common law and the Workers' Compensation Act as systems for providing compensation in the case of road accidents and industrial accidents. The strengths of the common law system were the moral basis on which it awarded compensation and the targeting of the damages to the individual circumstances of the plaintiff. Where fault could be established, the injured person had the satisfaction of receiving compensation from the wrongdoer (albeit derived in most cases through the medium of insurance) and of receiving compensation not only for loss of earnings and other pecuniary losses, but also what the law called a "solatium" for the pain and suffering and loss of enjoyment of life arising from the accident.[20]

Peter McKenzie[21] 28also says that the rigor of the system was reduced by the almost universal use of the jury trial. An experienced advocate could often obtain a sympathy verdict for the accident victim. Although a jury could never be told that the defendant was insured, most juries were well aware of that factor. It was not without some significant anecdotal support that the common law system was described as a "lottery."

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[18] Ronen Avraham, 'Putting a Price on Pain and Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for change' (2006) 100:87 *Northwestern University Law Review,* 87-98

[19] 26 Peter McKenzie, 'The Compensation Schedule No One Asked For: The Origins of ACC In New Zealand' (2003) 34 *Victoria University of Wellington Law Review* 196.

[20] ibid

[21] ibid

According to Ailsa Duffy,[22] when the accident compensation scheme was first introduced in New Zealand in 1974, it was heralded by its proponents as a revolutionary new measure which would remove the uncertainty and cost of litigation and encourage early rehabilitation of victims.

In her paper, Ailsa Duffy quotes the Court of Appeal of New Zealand as having described the accident compensation scheme in one of its seminal cases on the early legislation, as being designed fundamentally to supplant the vagaries of actions for damages for negligence at common law. She continued to say that the legislation has however not always achieved this result. Over the years there has been a retreat from the original comprehensive scheme. With this retreat has come a renewed resort to common law remedies. The results of all this are themselves vagarious. Today, a better description of what prevails is that the recognized vagaries of common law actions for compensatory damages have simply been supplanted by new vagaries[23].

[22] Ailsa Duffy, 'The Common Law Response to the Accident Compensation Scheme' (2003) 34 *Victoria*

[23] Supra

CHAPTER TWO

THE INSURANCE REGULATORY FRAMEWORK IN KENYA

2.1 Introduction

This Chapter starts by outlining the current legal and regulatory framework of the insurance industry in Kenya. It then proceeds to focus on problems facing the industry with specific focus on PSV insurance. It then concludes with a finding that the current system has failed in responding to the needs of both the industry and policy holders.

2.2 The Insurance Act

The Insurance Act, Cap. 487 Laws of Kenya is the main legislation governing the entire insurance business in Kenya it was enacted in 1984 and came into operation in 1987. Over the years, there have been several piecemeal amendments to the Act. The end result was that it ended up looking like a patchwork. There was thus need to reorganize the Act so as to capture all the amendments that had been made over the years in a structured manner. This culminated in the revision of the existing Insurance Act. The end product was a more coherent and better organized revised Insurance Act of 2013. The revised Insurance Act marks the culmination of the era of amendments to the Insurance Act that was enacted in 1984.

This Act is rightly supplemented by the Insurance (Motor Vehicle Third Party Risks) Act, Cap. 405 Laws of Kenya which to a greater extent deals inter alia with the compulsory third party insurance for all motor vehicles in Kenya. The Insurance Act provides among other functions a set of function on the insurance regulatory authority. Before 1st May 2007 the functions of regulating and supervising the insurance industry were under a defunct department of insurance in the Ministry of Finance[24]. The Insurance Regulatory Authority (IRA) was established by the Insurance (Amendment) Act of 2006 and came into operation on 1st May 2007. The Authority was established with the mandate of regulating, supervising and developing the insurance industry. The main areas of the insurance Act relevant to this study are described below:

[24] *The Insurance Act*, Cap. 487

Establishment of the Insurance Regulatory Authority (IRA):- The Act provides for the establishment of "a Kenyan Insurance Regulatory Authority" as a body corporate with perpetual succession and a common seal and provides that it shall in its corporate name be capable of suing and being sued, taking purchasing or otherwise acquiring, holding charging or disposing of movable and immovable property, borrowing and lending money and doing or performing all other things or acts for the furtherance of its functions under the provisions of the Insurance Act.

Section 3A[25] enumerates the objects and functions of the authority inter alia to ensure the effective administration, supervision, regulation and control of insurance and reinsurance business in Kenya and to protect the interests of insurance policy holders and insurance beneficiaries of any insurance contract. With regard to section 3A, the IRA in its strategic plan 2008-2012 has purposed to address among others the challenges of; streamlining PSV insurance and an outdated legal institutional framework to supervise PSV underwriting. In this regard the IRA came up with a taskforce to address the issue of PSV underwriting. According to the strategic plan is PSV underwriting is faced with legal problems of; a slow judicial process, inconsistency in court awards, lack of a structured compensation scheme and corruption and fraud.

In my research I seek to analyze and criticize I argue on the issue of a structured compensation liability schedule intended to address the problems of a slow judicial process and discrepancy in court awards since the courts will be guided in awarding damages in respect of death of or bodily injury to any person caused by or arising out of the use of a vehicle on the road.

Definition of Insurance: -

A contract by which one party (the insurer) undertakes to indemnify another party (the insured) against risk of loss, damage, or liability arising from the occurrence of some specified contingency, and usu. to defend the insured or to pay for a defense regardless of whether the insured is ultimately found liable. An insured party usu. pays a premium to the insurer in exchange for the insurer's assumption of the insured's risk. Although indemnification provisions are most common in insurance policies, parties to any type of contract may agree on indemnification arrangements (BLACKS LAW D 8TH ED 2004)

[25] Insurance Regulatory Authority, *Strategic Plan 2008 – 2012* at 11 May 2010.

The Insurance Act[26] defines insurance business as the business of undertaking liability by way of insurance (including reinsurance) in respect of any loss of life and personal injury and loss or damage, including liability to pay damage or compensation, contingent upon the happening of a specified event.

2.3 The Insurance (Motor Vehicles Third Party Risks)

Motor insurance in Kenya is governed by the Insurance Motor Vehicle Third Party Risks Act Chapter 405 of the laws of Kenya with the commencement date being 1st October 1946 which is essentially a public liability devise to provide for the compulsory insurance to protect the public for road traffic injuries and to forestall the effects of adverse selection on the insurers. It is cited as an Act of Parliament that makes provisions against third party risks arising from the use of motor vehicles. The Act makes provisions with regard to the fact that any person who uses, or causes or permits any other person to use, a motor vehicle on a road must ensure that there is in force in relation to the user of the vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks. This very aspect represents the scope of compulsory cover. The policy must be issued by a person who is authorized to carry out insurance business in Kenya otherwise referred to as an insurer. According to the Insurance Act cap 487 of the laws of Kenya, an insurer means a person, registered under the insurance Act who carries on insurance business and includes a re insurer. There is a penalty if the owner of the motor vehicle required to be covered does not take out cover to protect third parties. Subsection two of the above mentioned section provides that, Any person who contravenes the provisions of subsection one shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to imprisonment for a term not exceeding two years or to both, and such person upon a first conviction for such offence may, and upon a second or subsequent conviction for any such offence shall, unless the court for special reason thinks fit to order otherwise, be disqualified from holding or obtaining a driving license or provisional license under the traffic Act for a period of twelve months from the date of such conviction or for such longer period as the court may think fit. In this regard, the aspect of taking out such cover is not optional.

[26] *The Insurance Act*, Cap. 487, s 1.

The policy however does not cover liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; liability in respect of the death of or bodily injury to persons being carried in or upon or entering or getting on to or alighting from the vehicle at the time of the occurrence of the event out of which the claims arose; or any contractual liability on a road consists only of moving it by road from one part of the land of the owner thereof to another part of the land of such owner. This covers risks causing death or bodily harm to a passenger. The section shall not apply to any motor vehicle owned by the Government, or to a motor tractor or other motor vehicle used solely or mainly for agricultural purposes, if the use of such motor tractor or other motor vehicle on a road consists only of moving it by road from one part of the land of the owner thereof to another part of the land of such owner.

The other specifications under Sections 4 and 5 are in lieu to the use of a vehicle. The main words used are the 'use' and to 'cause' or 'permit'. The use of a vehicle in this case includes leaving a vehicle on a road or other public place, even though it is incapable at present of being mechanically propelled[27]. This however changes if the vehicle is totally immovable. John Birds, *Birds modern insurance law*[28]. In instances where a person is not in control of their vehicles, they are not governed by the principle of use. In Megaw J[29], held a driver who hit a pedestrian as she was opening the door to her car was not liable as she was not causing or permitting her to use it thus not liable in damages for breach of statutory duty in not insuring her against her potential liability. The word "cause" involves an express or positive mandate to use a car in a particular way, whereas permit, as per Lord Wright in[30] where a man appointed his brother as manager of his farm and bought him a car that was insured for business and private use. The car having proved unsatisfactory, the man authorized his brother to buy a van instead; this was insured for business use only, but was in fact used for private purposes. It was held that the man had permitted his brother to use the van while uninsured. The van was given to him for the same purposes as the car and the brother was not told to use it for private purposes looser and denotes an express or implied license to use a vehicle.

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[27] Elliot v Grey (1960) 1 QB 367
[28] 6th edition, (2004) at page 374
[29] *Browns v Roberts (1965) 1 QB 1* at 15
[30] *McLeodvs. Buchanan20 (*20{ 1940}, 2 ALL E.R 179 at 187,

Section seven of the Insurance Motor Vehicle third party risks Act provides that a certificate of insurance must be issued to a person to whom a policy of insurance is effected Section seven under subsection two provides that such certificate of insurance shall be in the prescribed form and shall contain such particulars of any conditions subject to which the policy is issued, and of any matters as may be prescribed and different forms and different particulars may be prescribed in relation to different cases and circumstances). In this regard, the aspect of compensation cannot act retrospectively. The fact that a certificate of insurance is issued after an accident has already occurred does not lay any liability on the insurer to satisfy any claims arising from the culprits of the accident.

However the certificate of insurance is only evidence that a policy has been taken out but is not of itself a contract of insurances. The consequence of a failure to license a public service vehicle is twofold. First, it is a criminal offence under the Traffic Act (Cap 403 of the laws of Kenya under section 95 on first conviction to a fine not exceeding five thousand shillings or to imprisonment for a term not exceeding six months or to both, on second or subsequent conviction to a fine not exceeding ten thousand shillings or to an imprisonment not exceeding one year or bot)

Secondly, any person who suffers loss as a result of failure to take out the policy can sue in tort and recover damages from the owner of the vehicle. The aspect of vicarious liability that is commonly dealt with in most motor claims continues to raise a strong point as to the guarantee of compensation of the injured parties. In *Morgans vs. Launchberry*[31] the permitted driver, the husband of the insured gave permission to another to drive the car. That person was negligent and caused an accident that injured the passengers. The House of Lords held that the owner of the vehicle was not liable. Lord Denning on appeal[32] stated that if the owner was not liable, then the insurers were not liable to indemnify the passengers because the driver did not have the owner's permission. Most Kenyan courts throw out running down traffic matters on the aspect of lack of proof of vicarious liability. In this regard it is essential for the government to establish the motor insurers' bureau which would be clothed with the mandate of settling claims where there are uninsured drivers in the absence compulsory insurance. From the foregoing, it is clear that the reason for the enactment of this Act was for the protection of the injured third parties in case

[31] *({1973} A.C 127)*
[32] ({1971} Q.B 245 at 253)

of road traffic accidents. What the law has done instead is require the proof of fault from the injured person in order to find the owner of the motor vehicle liable in damages, an aspect that this paper seeks to remedy. This is an Act of Parliament that makes provisions against third party risks arising out of the use of motor vehicles. The main areas of the Insurance Motor Vehicles Third Party Risks Act relevant to this study are described below:

Compulsory third party insurance:-The Act provides for the legal compulsion for third party insurance for all motor vehicles in Kenya. Section 4 (1) of the Act provides as follows

(1) Subject to the provisions of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle on a road unless there is in force in relation to the use of the vehicle by that person or that other person, as the 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.

In *Thomas Muoka Muthoka & another v Insurance Company of East Africa limited*[33] the learned judge D.A. Onyancha found it relevant to establish the policy behind the enactment of the Insurance (Motor Vehicles Third Party Risks) Act that establishes the legal compulsion for third party insurance for all motor vehicles in Kenya. According to him, the mischief that existed at the passing of the Act was that a third party who was injured by a motor vehicle got no compensation for his suffering or inconvenience if either the owner or the driver of the vehicle happened to be poor.

The judge proceeded to state that that was the reason why it became the clear object of the legislature to pass the Act to provide a remedy so that people who walk along the road would be protected against the hazards of motor accidents. Onyancha J. A in his judgment[34] quoted Lesta J. A in the *case New great Insurance Company of India ltd v Lillian Evelyn Cross and Another (1966) E.A 90* where Lesta J.A said; that the Act seeks to achieve that object not by placing the whole burden of compensating third parties injured in motor accidents on the insurers but by combination of two means which are; (1) by making it obligatory, on pain of punishment for any person who uses or causes or permits any other person to use a motor vehicle on the road, to

[33] Thomas Muoka Muthoka and Another Vs Insurance Company of East Africa LTD. 389-2007 (High Court of Kenya - Nairobi, June 13, 2008).
[34] *Ibid*

have in relation to the user of the vehicle (*The Insurance (Motor Vehicles Third Party Risks) Act,* Cap. 405, preliminary. *The Insurance (Motor Vehicles Third Party Risks)*[35] *Thomas Muoka Muthoka & another v Insurance Company of East Africa limited.*[36]

Policy of insurance which satisfies the requirements of the Act. (2) By restricting the right of insurers to avoid liability to third parties.43 The legislature in order to achieve the above purpose then laid the relevant legal duty upon both the owner of the motor vehicle who authorized its use on the road on the one hand and the insurer who issued insurance cover on the other hand. **Duty to satisfy judgments**:-Section 10 imposes a duty on the insurer to satisfy judgments against persons insured. It states that if after a policy of insurance has been affected, judgment in respect of any such liability as is required to be covered by a policy under the Act is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable there under in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

Judicial interpretation of Cap 405.

In the colonial period it had been adjudged difficult and with great uncertainty with many of the judicial decisions holding that it the statute only applied to motor vehicles habitually used for the conveyance of passengers.

In *Alamansane Kakooza vs. R*[37]*;* passengers who had paid Kshs 5 each for a lift were denied compensation on the ground that the vehicle in question was not habitually used for passenger transport. In *Ramadhani Ali vs. R; 1958 EA 344*, the Court of Appeal held that commercial vehicles were not required out take out 3rd party insurance cover. However, in Kenya the High Court had already stated the legal position that all motor vehicles on the road were obliged to have 3rd party policies.

[35] *Act,* Cap. 405.
[36] [2008] eKLR. 42 Ibid.
[37] *1958 EA 444*

The statute was authoritatively interpreted by Court of Appeal in the case of New *Great Insurance Co. of India vs. Cross & Another*[38]. The respondents were injured in a motor accident. The driver who had the insured's permission was at the time disqualified from holding a driving license. Notice of proceedings against the insured was duly given to the insurer in account with section 10 of the Act. The insurer repudiated liability on the ground that the insured bad breached the conditions of the policy hence the policy was voidable at the insurer's option. However, the court held that since the driver had been authorized by the owner, the insurer was liable. The court observed that:

i. The effect of sections 4 and 5 of the Act was to impose a statutory duty upon the owner of a motor vehicle to cover by insurance any liability he might incur in respect of injury to 3rd parties arising from the use of the vehicles on the road by such person(s) or classes of persons as may be specified in the policy.
ii. Section 8 made ineffective condition providing that no liability shall arise under the policy in so far as it related to such liabilities as were required to be covered under section 5 and so far as any such condition was invoked to avoid liability to a 3rd party. The liability in this case was both required to be covered by section 5 and in fact was so covered since the condition which excluded liability in the case of a disqualified driver was rendered ineffective by section 8.
iii. It is the user, not the driver that is required to be covered by the policy so that a condition restricting the class of drivers will not avoid the independent liability of the insurer.

Lord Newbold said: "I am satisfied that the intention of the Act was to provide protection to 3rd parties who receive injury". Crabbe J.A said "In this particular case, the driver was using the car with the authority of the owner; there was a policy in force which would protect 3rd parties and in my view, it was immaterial whatever or not the driver himself was covered by a policy of insurance. The mischief which existed at the passing of the Act in 1946 was that a 3rd party who was injured by a motor vehicle got no compensation for his suffering and inconvenience if either the owner or the driver of the vehicle happens to be impecunious. It was then the clear object of the legislature, by passing of the Act to provide a remedy. People are therefore entitled to feel assured as they walk along the street that parliament has protected them against the hazards of

[38] *1966 EA 95*

motor accidents. Then I think it is the duty of this court to construe the Act in such a way as to suppress all maneuvers which tend to frustrate the spirit and policy of the Act."

CHAPTER THREE

THE STRUCTURED COMPENSATION LIABILITY SCHEDULE

3.0 Introduction

The regulatory framework of the insurance industry has been briefly discussed in the aforementioned chapters.

Under this chapter, I begin by discussing the philosophy underlying compensation, and then proceed to show that the current public perceptions that a structured compensation liability schedule introduces the no fault system in Kenya are indeed a great misconception. Finally, I discuss the proposed structured compensation liability schedule with regard to its applicability in Kenya's legal system.

3.2 The Philosophy Underlying Compensation

Payment of damages, or any other act that a court orders to be done by a person who has caused injury to another. In theory, compensation makes the injured person whole.[39] The aspect of damages in accident claims is derived from the severity of the injuries sustained. The word injury is defined as harm or hurt and is usually applied to damage inflicted on our body, especially by an external force.[40] For legal purposes, injury to a human body occurs when there is evidence of deterioration in function of the human body, either temporarily or permanently as a result of one or more particular physical damage, imposition of mental strains, or exposures to unsatisfactory occupational situations. The term damages is defined to be the monetary compensation awarded by a court in the course of trial against the defendant for the benefit of the plaintiff for injuries sustained or loss suffered by the plaintiff in the hands of the defendant.[41]

The award of damages is guided by the compensatory principle. This is the principle relating to the various aspects that should be put into consideration before a court can informatively decide how much such compensation is worth. This principle is also Latinized *restitutio in integrum*[42]

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[39] Black's law dictionary 8th edition

[40] (R. Kuloba, Measure of damages for bodily injuries, (2006) Law Africa)

[41] Ibid

[42] This means that an award of damages is meant to be compensatory in nature meaning that the plaintiff should receive no more or no less of his actual loss.).

Therefore damages should place the plaintiff in the position he should have occupied before sustaining his injuries.

The general rule for the measure of damages for personal injury which cannot be calculated in terms of money or money value is that the amount is entirely in the disposition of the trial courts subject to the supervision by superior courts of law, if unreasonably large or unreasonably inadequate. This means that in actions for torts which result in non-pecuniary personal injury a court must not attempt to give damages to the full amount of a perfect compensation for the injury, but must take a reasonable view of the case, and give what it considers, under all circumstances a fair compensation41. It should however be remembered that the amount awarded should not be overly generous. It should be a realistic amount that will compensate the injured party for all he has suffered, all he will suffer and all he will have to incur directly as a result of the accident. The passage of time which has brought about a change in conditions also indicates the awarding of bigger awards than hitherto made in a case of similar nature. (*Wachira kimondo v Kenneth L Hunter*[43] The award of damages for personal injuries should be fair but not perfect.

According to Professor Joseph W. Glannon, plaintiffs bring lawsuits for a variety of reasons, but when such as obtaining monetary compensation for injury. He further claims that the usual balm that the law provides to personal injury plaintiffs is thus money. And such payments are called compensatory damages. To some they are intended to repair the plaintiff's injury or make him/her whole as nearly as that may be done by an award of money.[44] This aim according to professor Glanon goal is an idle dream in many cases, since; no amount of money could possibly compensate an active, healthy adult rendered paraplegic in a motor vehicle accident. That the plaintiff can never be put back in his/her pre injury position and none of us would incur his/her injury for any sum.[45]

Glannon however, says that while money damages for such injuries may seem an inadequate response to such injuries, they do help. A paraplegic with a KES 1.8 M trust fund is a lot better off than he/she would be with no money and impaired earning power. A remedy that provides

[43] [1971] High Court of Kenya at Nairobi civil case number 169 (unreported).
[44] Ibid.
[45] Ibid.

the trust fund is, if imperfect, still a good deal better than nothing.[46] William Olotch, '*The Kenya Insurance Market*' The African Reinsurer volume 020, June 2006, 44. Joseph W. Glannon,[47]. Tort law thus endeavours to provide to the injured plaintiff a sum of money adequate to compensate him/her, though certainly not to restore him/her to his/her pre-injury position.

The compensatory principle however has exceptions; first, the principle is subject to the rules of law as to the remoteness of damage which limit potential endless liability within reasonable bounds. This exempts the causative aspects outside the scope of accident. The other aspect is the issue of contributory negligence whereby the plaintiff is liable for the failure to take any mitigating steps to avoid the accident. These two exceptions limit the plaintiff's recovery to loss other than the actual loss. In assessing damages, various types of harm should be taken into consideration. These are also referred to as the heads of damages. These are further categorized as either pecuniary damages which constitutes loss of earning capacity and the expenditure on injuries created by the accident. Non pecuniary damages constitute damages for pain and suffering, loss of expectation for life and loss of amenities.

3.3 Comparisons of the Structured Compensation Schedule, the Fault and the No Fault System

3.3.1 The Fault System of Insurance

According to the Black's Law Dictionary, the term liability refers to the quality or state of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment. The term liability is one of at least double signification. In one sense it is the synonym of duty, the correlative of right; in this sense it is the opposite of privilege or liberty. If a duty rests upon a party, society is now commanding performance by him and threatening penalties. In a second sense, the term liability is the correlative of power and the opposite of immunity In this case society is not yet commanding performance, but it will so command if the possessor of the power does some operative act. If one has a power, the other has a liability. It would be wise to adopt the second sense exclusively. Accurate legal thinking is difficult when the fundamental terms have shifting senses.[48], *Principles of the law of contract,*

[46] Supra, n 79 p, 266
[47] The Law of Torts (2nd ed, 2000), 265
[48] (William R Anson & Arthur L Corbin(eds)

(1919) as quoted in Black's Law Dictionary) Liability or responsibility is the bond of necessity that exists between the wrongdoer and the remedy of the wrong. This *vinculum juris* is not one of mere duty or obligation; it pertains not to the sphere of ought but to that of must[49], as quoted in Black's Law Dictionary)

The fault principle has traditionally been understood as a principle of morality which can justify not only the imposition of liability for death and personal injury but also the assessment of compensation according to the full compensation and hundred percent principles. Grosser fault may even be seen as justifying the award of exemplary or punitive damages. In moral terms the fault principle suffers from serious defects and can be attacked on social and practical grounds.[50] The doctrines of tort law are hoarse and buggy rules in an age of machinery, and they might well have gone to the scrap heap some time ago had not the tremendous growth of liability insurance and the progressive ingenuity of the companies made it possible to get some of the benefits of social insurance under or perhaps in spite of the rules (Fleming James, 'Accident liability reconsidered: the impact of liability insurance')[51]

Once fault is established, damages shall be given to the injured party. A degree of fault on the part of someone justifies compensating the plaintiff for all the losses suffered provided the plaintiff was in no way personally at fault. It may be inferred that most of the serious accidents are seriously and undeniably culpable, such as driving while intoxicated or speeding. Yet, many injured persons in this country walk out of a judgment uncompensated because they could not prove liability. According to Salmond, the ultimate purpose of the law in imposing liability on those who do harm to others is to prevent such harm by punishing the doer of it. He is punished by being compelled to make pecuniary compensation to the person injured. It is clear, however, that it is useless to punish any person, either civilly or criminally, unless he acted with a guilty mind.

Pecuniary compensation is not in itself, the ultimate object or a sufficient justification of legal liability. It is simply the instrument by which the law fulfils its purpose of penal coercion. The aspect of contributory negligence is often raised in tort cases especially in running down matters. It is however imperative to understand that, between a tortfeasor and a totally innocent and

[49] Glanville L Williams (ed), Jurisprudence, (1947 10th edition
[50] Supra fn 34 at page 144)
[51] 1948), Yale Law Journal 549 at page 569.

wounded victim, it is only fair that the harm suffered be borne by the tortfeasor or his insurance company rather than be shared between the two. The fault system of insurance capitalises on negligence or the failure to take reasonable care. As Peter Cane argues, if the reason for adopting an objective standard of fault is that when the damage is done the plaintiff has been hurt and deserves to be compensated whether or not there has been subjective fault, it is hard to see why it does not also follow that a plaintiff should be compensated whether or not there is fault at all, whether objectively or subjectively judged.

In the case of *Carmarthenshire County Council vs. Lewis* a little girl was wandering out of a nursery school maintained by the defendants, down a lane, through a gate and onto a busy road where a lorry driver trying to avoid hitting the child crashed into a tree and was killed. The Court of Appeal held that the child's teacher was negligent in failing to keep a sufficient eye on him, but the House of Lords exonerated the teacher from liability while still holding that the county council was liable as it had failed to maintain a gate at the school. This case goes on to ascertain that it is indeed very hard to properly establish who was at fault in accident claims. Therefore instead of trying to ascertain who was at fault, the injured person should be compensated especially in motor accident claims where there is compulsory insurance cover for third party risks.

The main focus of liability insurance is the compensation of the injured victims rather than penalizing tortfeasors. This is also reflected under the section 4 of the Insurance[52]. The standard of care required in the law of negligence has been tightened up over the years partly as a response to the prevalence of liability insurance. It is noteworthy that it is based on tort law and the fact that the defendant is insured, the plaintiff should succeed. Tort law is, as discussed in the following section a system of rules and principles of personal responsibility for conduct and its responsibility for conduct and its consequences. Although tort law could not operate as effectively as it does as a form of compensation, its basis is personal responsibility, not the availability of insurance. The fact that liability insurance was available only tells us that the defendant could pay any damages awarded not that the defendant should be held liable to pay compensation.

[52] (Motor Vehicle Third Parties Risks) Act.

The fact that insurance companies take time to compensate should be an indication that the services offered are devoid of quality. If loss has occurred under a compulsory insurance policy then compensation under a structured policy should follow. The obligation of insurers and insured persons to handle tort settlements in good faith is a problem facing insurance based on fault. The insured has a right to take or defend the matter. Thus when the claim is within the policy limits and the company admits coverage, the insured assumes a secondary role and is more like a witness than a party. (Henderson Pearson Siliciano,[53] As stated in the case of *Marginian vs. Allstate Insurance Company*[54] the court ruled that the insurer could settle the claims within the policy limits in the face of specific objection to the settlement by the insured and if a claim goes to trial, in most instances the lawyer for the defence will be selected and paid by the insurer. Thus, from the perspectives of everyone involved with the claim, the real defender of the case in most cases is the insurer. (In the case of *Kairu vs. Lion of Kenya Insurance Company limited*[55]. In this case the court dealt with the question of whether the Defendant was a proper defendant to sustain the suit. The court concluded that the defence was faulty because the defendants did not serve the plaintiff within the prescribed time.)

In most cases, the insurer in the event that it cannot of its own accord represent itself in court appoints an attorney who appears or handles the case on its behalf. Where the lawyer is appointed to represent the insured the lawyer owes primary loyalty to the insured. He owes the insured an undeviating and single allegiance. In most cases in Kenya an insured will be represented by an advocate while the plaintiff cannot afford one, yet compulsory insurance cover is provided for. This usually depicts an unfair contest in the quest to prove negligence. The litigation process is characterized by the burden of proof. The traffic accident cases are brought both under the Traffic Act and the Civil Procedure Act for compensation. The burden of proof is on balance of probability. In the Kenyan situation, the failure to proof Negligence often leads to the dismissal of most cases.

In the case of *Kangutuu Mbithi vs. Henkel Kenya Limited & Another*[56] Justice Angawa dismissed this case brought under the Law Reform & Fatal Accidents Act because the representative of the Estate of the deceased did not prove the issues before court as per order XVII rule 2(1) of the

[53] "The Torts Process" (1994) 4th Edition, Aspen publishers)
[54] 18 Ohio Street 3d 345, 481 N.E 2d 600 (1985)) .
[55] 1988) KLR
[56] HCCC No 1566 of 1997

Civil Procedure Rules with regard to proof of ownership of the Motor Vehicle. The fact that a police officer was not called to take measurements of the skid marks on the road shows that no proof of fault was established. Traffic cases in instances of fatal accidents are admissible as evidence in Running down civil matters by dint of section 34 of the Evidence Act chapter 80 of the laws of Kenya. Documentary evidence for proof of special damages and age is also requisite under these circumstances, if not produced, the quantum cannot be calculated. Some judges exclude the evidence of crucial witnesses and rule purely on a speculative aspect. Such an instance was seen in the case of *Haji vs. Marair Freight Agencies Limited*[57] the Court of Appeal stated that it is the duty of the court to arrive at a finding of the facts however difficult the situation may be.

The Kenyan courts have developed the aspect of citing the case of *Lakhamishi vs. A.G*[58] anytime there is a conflict of evidence. The learned judge stated that I accept that a judge is under a duty when confronted by conflicting evidence to reach a decision on it. I accept that in relation to most traffic accidents it is possible on a balance of probability to conclude that one or other party was guilty or that both parties were guilty of negligence. I accept that in many cases, as for example where vehicles collide near the middle of a wide, straight road in conditions of good visibility with no obstruction or other traffic affecting their courses, there is in the absence of any explanation, an irresistible inference of negligence on the part of both drivers, because if one was negligent in driving over the center of the road, the other must have been negligent in failing to take evasive action. I think that it is usually possible, although often extremely difficult, to apportion the degree of blame between two drivers both guilty of negligence, but I accept that where it is not possible it is proper to divide the blame equally between them. Where, however, there is a lack of evidence as opposed to a conflict of evidence, I am inclined to think that the position is different. I personally find it difficult to see how a party can be found guilty of negligence if there is no evidence that he was in fact negligent and if negligence on his part cannot be properly inferred from the circumstances of the accident.

In other instances, defendants file counter claim disregarding the plaintiff's averments. An important point to note here is that the difficulties of proof mean that the process of deciding what caused an accident and who was at fault is an extremely expensive and time consuming

[57] [1983] KLR at page 139
[58] [1971]E.A 118, 120

process in many cases. In fact it is these difficulties that make people abandon tort claims or make no claims at all[59].

A careful study of road accidents should be commenced and things such as the width of a street, its curvature or gradient, the quality of its surface, the flow of traffic and its speed, all influence the probability of accidents and therefore the number of accidents should appear in the frame of factors important in accident causation. Ignoring normal aspects of accident causation gives rise to a tendency to ascribe most accidents to human factors such as carelessness, since it is usually possible to believe that there would have been no accident if someone had acted differently

In this regard therefore, it is imperative to encourage out of court settlements instead of court litigation (which is very expensive). The dynamics of the settlement process are very different from those in the court room. It is important also to understand that what is reached to in an out of court settlement does not reflect on what the court could have arrived at. When an insurance company discharges a voucher, they must follow the rules of accord and satisfaction to the latter.86 According to Richard Kuloba, where an injured person is in dire financial strain to save his life as a result of the accident, and he is ill to the knowledge of the insurers, then on the authority of the English case of *D&C Builders vs. Rees* any discharge voucher signed under such circumstances is not a valid discharge. It is trite law that true accord exists only where the injured person has, with full knowledge of his rights freely and voluntarily agreed to accept the one sum in discharge of all his claims. Independent legal advice and the state of health are crucial.

So, if an injured person is seriously impaired, it may be inferred that the acceptance of the payment is merely for the purposes of saving life before negotiations can proceed. In the process of replacing fault insurance with no fault insurance, it is important to note that this could have serious implications on the legal profession. It is also important that Research on Road safety (HMSO, 1963) 3-4 Accord and satisfaction is the purchase of a release from an obligation by means of valuable considering, not being the performance of the obligation itself.

Proposals for reform should grasp this nettle, and not dismiss the problem with an airy reference to vested interests. The concern of lawyers cannot, in the long run, be allowed to determine the shape of the law relating to compensation for personal injuries. Law is a social service and in the

[59] Supra fn 25 at page 38

long run, interests of the consumers according to Peter Cane and not the administrators must prevail. He adds that, the abolition of tort actions would clearly be a slow process with a long transition period because of the backlog of old cases waiting to be disposed off when the legislation takes effect.

In introducing the no fault law and eliminating the cumbersome litigation process, special tribunals should be established to assist injured persons negotiate settlements. These tribunals should be the mandate of the Association of Kenyan Insurers (AKI) on the one hand, the legal profession and the government on the other hand to create a balance of interests. In this case then, insurance companies can be represented by lawyers in negotiation as well as injured persons with the mandate of conceding at a reasonable figure within **a well-structured no fault compensation scheme.**

3.3.2 The Influence of Insurance under the Fault System.

The presence of insurance[60] will influence the judge in making his decision. The judge said that, "everyone knows that all prudent professional men carry insurance and the availability and cost of insurance must be a relevant factor". The legal system refuses to acknowledge the presence of insurance is embedded in the doctrine of subrogation. Standing in its clients shoes, an insurer has a right to defend the claim or bring an action to recoup monies it is liable to pay out under a policy. This involvement in litigation via subrogation is accomplished by using not the name of the insurer itself, but that of its policyholder alone. In such instances some countries that have a jury system have refused to acknowledge liability of a defendant because according to him, the wrong people were sued.90 Celia wells & Derek Morgan have posed a question as to what the relationship between the laws of tort on the one hand and the availability of insurance on the other[61]. It has been argued that judges appear more ready to impose liability when insurance enables the cost of compensation to be more widely distributed. Tort rules have been said to have been adopted in favor of claimants, at least in situations where they have been less able to protect themselves by taking out their own first party insurance. There is no doubt that insurance profoundly influences the practical operation of the law of tort. Liability insurance is not merely an ancillary device to protect the insured, but it's the primary medium for the payment of

[60] Lord Griffith in Smith vs. Bush

[61] Celia Wells & Derek Morgan, 'Insurance and the Tort System', (2005), volume 25, The Journal of the Society of Legal Scholars

compensation, and tort law is a subsidiary part of the process[62]. Although the majority of defendants in tort are individual people, they are almost all insured. In most cases, policyholder's cede control over their case to their insurance and thereafter usually play little or no part in the litigation process[63]. In most cases insurers determine how the defense is to be conducted and even make admissions without the consent of the insured. The discretion however has limits as expounded in the case of *Groom vs. Crocker*[64]. Most insurers have developed highly systematized technology. They have increasing structured their business and closely monitor the performance of their claim handlers and lawyers. Economic pressures mean that communication between the parties takes place on the telephone rather than via letters or face to face meetings and the outcome of a claim is likely to be influenced as much by a computerized assessment as by the discretion of the claim handlers involved. Insurer's influence upon settlements is even more pronounced than it is upon decided cases. For a lawyer asked by his client to advise on the merits of a claim, the realities of the litigation system are the ones that are of the concern rather than the formal rules of law. According to Ross[65] textbook rules on tort are often transformed when they come to be used in the system in three ways. First, they are simplified, secondly they are made more liberal, and thirdly, they are made more equitable. Simplification occurs because the rules are too uncertain when applied to the individual facts of particular accidents. When accidents happen, there is neither time nor resources to instruct experts to analyze each scene of accident and precisely measure its effect upon the individual claimant. Liberality is weighted in favor of insurers and results in much inequality. Delay uncertainty and financial need and other pressures cause claimants to accept sums much lower than a judge would award. The eagerness of claimants and their lawyers to get something from the system reflected in the fact that they have been found to be very keen to accept the first formal offer made to them by the insurer. Those who suffer most are the severely injured. Although the greatest in need, they will find their high value claim scrutinized in detail and processed very differently from the average case which typically involves a minor upset and little if any financial loss. Those seriously injured are much less likely to receive full compensation than those suffering minor injuries, which, for a variety of reasons, are likely to be over compensated[66]. The overall result of the settlement

[62] Supra fn 39 at page 191
[63] DW Elliott & H Street, Road Accidents, (1968), London Penguin, at page 209
[64] [1939] 1 KB 194
[65] HL Ross, Settled out of the Court, (1980) New York, Aldine publishing
[66] D Duff, Exploring the domain of accident law; Taking the facts seriously,(1996), Oxford press at pg 19

system is that rough and ready justice is dispensed much influenced by insurance company personnel and procedures and driven by the needs of the insurance industry.[67] Road Accidents predominate because that is an area where tort insurance is compulsory.

In *Nettleship vs. Weston*[68] Lord Denning stated that, parliament requires every driver to be insured against third party risks. The reason is so that a person injured by a motor car should not be left to bear the loss on his own, but should be compensated out of the insurance fund. The fund is better able to bear it than he can. But the injured person is only able to recover if the driver is liable in law. So the judges see to it that he is liable, unless he can prove care and skill of a high standard. Thus we are moving away from the concept no liability without fault. We are beginning to apply the test, "on who should the risk fall?" morally, the learner driver is not at fault, but legally she is liable to be because she is insured and the risk should fall on her. In *Morris vs. Ford Motor Company limited*[69], he continued that, the damages are expected to be borne by the insurers. The courts themselves recognize this every day. They would not find negligence so readily or award sums of such increasing magnitude expect on the footing that damages are to be borne, not by man himself, but by an insurance company.

3.3.3 The Place of the Injured Party under the Fault System

Among the most important questions arising in this paper is whether and to what extent the injured party can recover directly against the assured. In the fault system Kenya has adopted, there is no possibility of this happening. Most injured parties cannot recover damages due to want of proof of negligence or inability to trace the driver, therefore the state should **devise a Motor and Industrial Insurers' Bureau** to compensate such unfortunate victims.

In their benevolent outlook for the welfare of society, our parliament could legislate for the establishment of a Motor Insurers' Bureau to provide, notwithstanding and in addition to the requirements of compulsory insurance against third party risks, for the payment of compensation in cases where there is no insurance or effective insurance covering the driver of the vehicle

[67] Ibid
[68] [1971] 2 QB 691 at 699
[69] [1973] QB 792 at 798

involved in an accident of which our 'matatus' were until recently a sorrowful and dejecting example[70].

As was so magnificently presented by Madan J in the case of *Karanja Kago vs. Kariuki James Mungai,*[71] "parliament whose wisdom is unlimited, already owes the enactment of such novel and bold social legislation to the nation to give the people a new social deal for their welfare. When that happens, we will have juridically bejeweled Africa." One of the cases that show the magnitude with which such legislation is necessary is the case of *Kiki Papacharalampous vs. Robert Ouko & Others*[72] where the plaintiff was left with a fracture to the pelvic bone, lacerations on the face and a lifetime of discomfort.

However, she was so injured she could not recall the happenings at the scene of accident and the police had lost their records. The insurers were also unknown. The court at trial could only say and conclude, 'I must leave this appalling case like this. I shall ask that it be sent to the Attorney General to consider whether steps should be taken to preserve police inquiries. We have been asking for this since 1976'. This shows that the injured person has no easy time claiming redress for injuries suffered as a result of an accident for which the defendant is insured. This is a sad state of affairs and the law should be reformed.

The no-fault insurance.

This is any type of insurance contract under which the insured are indemnified for losses by their own insurance company, regardless of fault in the incident generating losses. It was the view of Lord Denning that, in the present state of motor traffic, any civilized system of the law should require, as a matter of principle, that the person who uses this dangerous instrument on the roads-dealing death and destruction all round should be liable to make compensation to anyone who is killed or injured by consequence of the use of it. There should be liability without proof of fault. To require an injured person to prove fault results in the gravest, injustice to many innocent persons who have not the wherewithal to prove it[73].

[70] Supra fn 25 at page 28
[71] Civil Appeal Number 1 of 1979(unreported)
[72] Civil Suit number 1333 of 1981(unreported)
[73] (Lord Denning, 'What next in the law', Cambridge Law Journal,[1982], at page 81)

One of the basic and inescapable requirements of every civilized community is the duty which every member of that community has to conduct himself and his activities in such a way as not to interfere with or damage the person, property or rights of any other member of that community. If he fails in the observance of this duty, the rules of the community invariably provide that he becomes liable to compensate, usually in terms of money, the person who has in consequence suffered injuries, loss or damage[74].

The fault insurance is always said to be a social symbol, a cultural mirror that reflects the morals of society. It focuses on the party at fault. The no-fault system on the other hand is an administrative remedy that is largely devoid of a moral content. This system is used to describe any type of insurance contract under which insured persons are indemnified for losses by their own insurance company, regardless of fault in the incident generating losses. Thus the policyholders or the injured parties are compensated by the insurance companies without proof of fault. They are also restricted in the right to seek recovery through the civil justice system for losses caused by other parties. The main goal of the no-fault insurance is that of lowering premiums costs by avoiding expensive litigation over the causes of accidents, while providing quick payments for injuries[75].

The no-fault system provides for prompt payment to accident victims regardless of how the accident happened or who was at fault. Unlike the current insurance regime in Kenya where an injured party has to file a suit to recover damages in regard of a motor accident, the no fault system offers faster settlement of damages and is more efficient as it avoids delays, expenses in litigation and uncertainty.

In Kenya for example, seriously injured victims are collecting nothing from the insurance industry and most are getting inadequate compensation after several years of attending court hearing. According to Aponte and Denenberg, the no fault system really does deliver as promised; better values for the insurance dollar, better care for the accident victims, faster payment of claims and sharply reduced legal and administrative costs[76].

[74] .(Collin Smith, Insurances of liability, [1988] Burlington press, Foxton Cambridge, at page 1)
[75] (Jerry J Phillips & Stephen Chippendale, Who pays for car accidents, (2007), George Town University Press)
[76] (Aponte and Denenberg, 'The automobile problem in Puerto Rico; dimensions and proposed Solution' (1968))

No-fault systems generally exempt individuals from the usual liability for causing body injury if they do so in a car accident; when individuals purchase "liability" insurance under those regimes, the insurance covers bodily injury of the insured and the insured's passengers caused by a car accident, regardless of which party would be liable under ordinary common law tort rules. No-fault insurance has the goal of lowering premium costs by avoiding expensive litigation over the causes of accidents, while providing quick payments for injuries or loss of property. Further, no-fault systems often grant "set" or "fixed" compensation for certain injuries regardless of the unique aspects of the injury or the individual injured. Workers compensation funds typically are run as "no fault" systems with usually a fixed schedule for compensation for various injuries.

The no fault system of insurance contains two key components; compulsory first party coverage for personal losses, such as medical and funeral expenses, lost earnings and personal services without regard to fault; a limitation upon the right of a victim of someone else's negligence to sue and recover damages from that person in tort action. Thus the concept behind no fault insurance is that the motor vehicle accident victim is entitled to recover for his/her economic losses regardless of fault. On the other hand, the Insurance (Motor Vehicles Third Party Risks) Amendment Bill 2010 introduces a schedule of structured payments of compensation under the Act. The Bill essentially proposes to introduce what is known as a statutory cap on damages. The system in effect leaves in place the current liability system of courtroom justice and payment through liability insurance, but modifies the rules and procedures of traditional court developed law for example in Kenya's case, regard to the general conditions prevailing in the country generally and to previous comparable and relevant decisions.

It is thus clear that while the no fault system offers economic benefits in return of the victim surrendering his/ her right to sue in tort, the statutory cap on damages system leaves in place the current liability system of courtroom justice and payment through liability insurance, but modifies the rules and procedures of traditional court developed law.

3.3.4 Victim Compensation under No-Fault Insurance

No fault rests on the premise that all auto accident victims should be compensated for their economic losses. This premise itself can be seen as resting on either a liberal, humane concern for cushioning the consequences of hardship; or on a theme of horizontal equity pursuant to which people with equivalent needs should receive equivalent benefits or in economic notions

concerning efficient insurance.[77] According to Keeton and O'Connell, a thicket of common law doctrines that can bar a victim's recovery, even when another motorist has driven negligently include contributory negligence, immunities, limitation of actions and proof of negligence[78].

The tort system provides compensation as both general and special damages. In Kenya for example, an award of general damages is awarded in consideration to previous awards for similar injuries, inflation and for the sake of those who have to pay insurance premiums, medical fees or taxes, the awards should not be excessive[79]. Various moves should be made by the government to reduce delays in the court system and to take pressure off courts by encouraging use of Alternative Dispute Resolution (ADR) mechanisms such as arbitration and mediation. As a personal injury compensation mechanism, the tort process of making a claim adds salt to injury and the impact of liability insurance drastically reduces the potential impact of the tort process on individual process[80].

No fault law concentrates on the injuries rather than on the way the injuries were caused. The most radical type of reform of the law concerning compensation for personal injuries involves abolishing the tort system entirely and incorporating no fault security system. According to the most thoroughgoing version of this approach, all those who suffer disabilities for which society accepts responsibility should receive financial and other support from the state according to the same criteria of need, regardless of the source or nature of the disabilities[81]. In the event that the no fault compensation scheme is adopted in Kenya, the state would only intervene in determining the compensation guidelines and appointing representatives to sit at a special tribunal established for determining suitable amounts within a structured compensation system. A special body would also be established for the supervision of the common fund from which the compensation would be drawn.

Compensation afforded by participation in a no fault scheme would not be any less adequate than that afforded by participation in a system of tort law. Some people have argued that replacing the

[77] Mark M Hager, 'No fault Drives Again: A contemporary Primer', (1998) Miami Law Review, at page 793

[78] Robert E Keeton & Jeffrey O'Connell, (1965) Basic protection for the traffic victim: A blueprint for reforming automobile insurance.

[79] This was expressed in Jabane vs. Olenja (1986) KLR at page 2

[80] Supra fn 39 at page 399

[81] J. Stapleton, Disease and the compensation debate, (1986), Oxford Press, at page 158

tort liability system with no fault would be tantamount to denying the victims their right to sue for a wrongdoing. While there could be no fault schemes which much are closely resembled a tort-based system of assessing damages, it is unlikely that one which did so would be sufficiently efficient to be attractive. In general, then, plaintiffs can expect to receive fewer damages for negligent harms under a no fault scheme than they would if successful in their suit under a system of tort. Against that, however, is the benefit that one need not prove who was at fault under a no fault scheme. There is therefore certainty that the plaintiff will get something as recovery. This is acceptable as less money will be spent on lawyers' fees, judges' salaries, and private investigators and other costs incurred in the process of determining negligence and extent of damages, as occurs in tort based systems

Critics of no-fault argue that dangerous drivers not paying for the damage they cause encourages excessive risky behavior, with only raised premiums and a higher risk rating as the potential consequence, and no jury awards or legal settlements. Detractors of no-fault also point out that legitimate victims with subtle handicaps find it difficult to seek recovery under no-fault. Another criticism is that some no-fault jurisdictions have among the highest automobile-insurance premiums in the country, but this may be more a matter of effect than cause e.g., the financial savings from no-fault may simply make it more popular in areas with higher automobile-accident risk, or high insurance rates may cause more drivers to go uninsured, increasing the attraction of a no-fault system

3.4 Structured Compensation liability Schedules

A structured settlement is a financial or insurance arrangement whereby a claimant agrees to resolve a personal injury tort claim by receiving periodic payments on an agreed schedule rather than as a lump sum. Structured settlements were first utilized in Canada after a settlement for children affected by Thalidomide. Structured settlements are widely used in product liability or injury cases (such as the birth defects from Thalidomide). A structured settlement can be implemented to reduce legal and other costs by avoiding trial. Structured settlement cases became more popular in the United States during the 1970s as an alternative to lump sum settlements.

Courts in Kenya as a fore illustrated have indeed made unpredictable awards based on personal wishes, feelings or perceptions rather than on objective facts, reasons or principles.

As per Bovbjerg et al[82] tort law traditional methods of computing damages for personal injury and death are under attack and understandably so. According to Bovbjerg et al[83] legal reformers have long argued that present law, when combined with the courts discretion, inflates damage awards and creates problematic outcome variability. In their article,[84] they argue that the open ended and unpredictable nature of tort exposure has, in turn, threatened the liability insurance system that funds most tort compensation. They also argue that the determination of awards on an ad hoc and unpredictable basis, especially for "non-economic" losses, also tends to subvert the credibility of awards and hinder the efficient operation of the tort law's deterrence function.

The problems facing tort laws' traditional methods of computing damages, envisioned by Bovbjerg et al, can be likened to the problems facing PSV underwriting in Kenya where the industry is faced by huge unpredictable awards made by the courts.[85] Bovbjerg et al[86] came up with three solutions to the problems facing the tort system of awarding damages. One, a system that embodies a matrix of values that would award fixed damage amounts according to the severity of injury and age of the injured party. Secondly, a system that gives the courts systematic information on appropriate awards based on past experience. A system with fixed limits on awards of non-economic damages is the third.

In the first approach by Bovbjerg et al,[87] the matrix values would be binding of courts findings of non-pecuniary damages although the possibility of unusually severe or minor cases may call for ranges of values within the matrix. In the second approach, instead of binding matrix awards, the courts are provided with a small set of paradigmatic injury scenarios with associated monetary values. These values would serve as nonbinding Randall R, Bovbjerg, Frank A. Sloan and James F. Blumstein, 'Valuing Life and Limb in Tort: Scheduling Pain and Suffering,' benchmarks for assessing the case at trial. A court would be free to award any amount, but the benchmarks would serve to guide the award. In the third approach a single cap is placed on all non-economic damages.

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[82] 'Valuing Life and Limb in Tort: Scheduling Pain and Suffering'
[83] Ibid
[84] Ibid
[85] Ibid
[86] Randall R, Bovbjerg, Frank A. Sloan and James F. Blumstein, 'Valuing Life and Limb in Tort: Scheduling Pain and Suffering,' (1989) 83 North Western University Law Review, 908-939.
[87] Supra, n 97

Gregory B. Rodgers, proposed two solutions to the problems facing the tort system; limit compensation for pain and suffering, develop descriptive schedules and guidelines to provide rational standards for pain and suffering awards Gregorys' proposals are similar to those of Bovbjerg et al in that they encompass both a cap on damages, by limiting compensation for pain and suffering and a matrix of awards through descriptive schedules and guidelines.

3.5 The Kenyan Structured Compensation Liability Schedule

Article 4[88] of the Bill introduces a schedule of structured payments of compensation under the Act. The Structured Compensation Liability Schedule provides for compensation payable, in respect of death of or bodily injury to any person caused by or arising out of the use of a vehicle on the road, as a percentage of the maximum compensation prescribed under the Act.

Article 3[89] of the Bill proposes to amend Section 10 of Cap 405 by providing that the sum payable under a judgment of liability pursuant to Section 10 (which provides for the duty of insurer to satisfy judgments against persons insured) shall not exceed the sum specified in the schedule. Taking a look at the proposed schedule, one can identify some of Bovbjerg et al[90] and Gregorys[91] ideas. Article 4[92] proposes to introduce a schedule of structured payments. The concept of a schedule borrows heavily from the ideas propelled by Bovbjerg et al and Gregory. 99 Gregory B Rodgers, 'Estimating Jury Compensation for Pain and Suffering in Product Liability Cases Involving Nonfatal Personal Injury' (1993) 6(3) *Journal of Forensic Economics*, 251.

Bovbjerg et al[93] came up with a matrix of values that would award fixed damage amounts while Gregory came up with descriptive schedules and guidelines to provide rational standards for pain and suffering awards. Kenya's schedule awards fixed damage amounts in respect of death of or bodily injury to any person caused by or arising out of the use of a vehicle on the road[94]. Article 3(a)[95] provides that the maximum award of damages shall not exceed the maximum prescribed in

[88] The Insurance (Motor Vehicles Third Party Risks) (Amendment) Bill 2010.
[89] Ibid.
[90] Supra, n 92.
[91] Supra, n 99.
[92] Supra, n 102.
[93] Supra, n 92.
[94] The Insurance (Motor Vehicles Third Party Risks) (Amendment) Bill 2010, (Memorandum of Objects and Reasons).
[95] The Insurance (Motor Vehicles Third Party Risks) (Amendment) Bill 2010.

the schedule (KES 3M). Article 3(a)[96] essentially puts a cap on damages just as Bovbjerg et al[97] and Gregory had contemplated. Article 3 (a) states, 'provided that the sum payable under a judgment for liability pursuant to this section shall not exceed the maximum percentage of the sum specified in section 5(b) prescribed in respect thereof in the schedule'. The implication of Article 3 (a) is that it leaves in place the current liability system of courtroom justice and payment through liability insurance but modifies the rules and procedures of traditional court developed law.

It is however important to note that the proposed Kenyan hybrid schedule left out an important aspect envisioned by Bovbjerg et al and Gregory, that is, instead of placing a single arbitrary cap on all non-pecuniary awards, the best approach is a system of flexible floors and ceilings that vary with injury severity and victim age. The Kenyan schedule is a system of flexible floors and ceilings only in respect of injury severity. For example, if a victim suffers articular (joint instability) at the hip he or she will be awarded damages ranging from KES 900,000 to KES 1,050,000 depending on the severity of the injury.

On the other hand, take two victims, one aged 21 years and the other 70 years, and both suffer from articular (joint instability) at the hip as a result of a motor vehicle accident, according to the schedule, they will be both awarded damages ranging from KES 900,000 to KES 1,050,000 depending on the severity of the injuries and not the age of the victims. As per Bovbjerg et al one expects different age groups to react differently to injury. For temporary injuries, a younger person should recover more quickly from psychic harm than an older one, just as their bodies recover more quickly from physical injury. For permanent injuries, however, a younger person can be expected to endure the attendant intangible effects across a greater life expectancy.

Upshots of the Kenyan Structured Compensation Liability Schedule

The Kenyan schedule would work rationally and fairly in an aggregate sense. "Vertical equity," the fairness between separate categories of injury[98] is rather good. The problem is with regard to "Horizontal equity," the extent of variation within a single category,[99] this is with regard to the

[96] Ibid.
[97] Supra, n 92.
[98] Randall R, Bovbjerg, Frank A. Sloan and James F. Blumstein, 'Valuing Life and Limb in Tort: Scheduling
[99] Pain and Suffering,' (1989) 83 North Western University Law Review, 908-912.

age of the victims, and one would expect that the awards in the schedule correlate to the victim's age.

The other problem is with regard to the caps on damages. As per Ronen[100], damage caps are in a way "regressive" (in the sense that their fiscal impact is larger for severe injuries, than for minor injuries) so they might prevent many victims with totally legitimate claims from obtaining legal representation. Ronen argues that the problem increases over time as the cap's size remains fixed at the initially legislated amount in nominal terms despite inflation.

Bovbjerg et al,[101] also say that policy makers should consider the importance of increasing matrix award levels over time. According to them, common sense suggests that values should increase over time just to keep pace with inflation. The Kenyan schedule does not have a provision of adjusting awards over time in due regard to inflation. It would thus be prudent to incorporate such a provision in the schedule.

3.6 Conclusion

In this chapter I have established the following points; that the proposed structured compensation schedule does not in any way introduce the no fault system in Kenya. That a structured compensation liability schedule will solve the problem of arbitral awards facing PSV underwriting in Kenya since it caps the maximum award at KES 3M and provides a series of structured payments payable in respect to specific bodily injuries.

That the schedule will have no legislative problems in adapting to the current legal system since it leaves the current liability system in place. The schedule only provides for rational standards for pain and suffering awards as much as sentencing guidelines have been established, for example in our Traffic Act Cap 403 Laws of Kenya. I have gone ahead and discussed the pros and cons of a structured compensation liability schedule. I thereby conclude by stating that the faults of the schedule identified in this chapter are a mere drop in the ocean compared to the benefits such a schedule would bring to our countries insurance industry. The problem of horizontal equity with regard to age of victims and that of adjusting awards over time to cater for inflation can be rectified through legislative amendments. I therefore strongly recommend the adoption of the schedule.

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[100] Supra, n 25.

[101] Randall R, Bovbjerg, Frank A. Sloan and James F. Blumstein, 'Valuing Life and Limb in Tort: Scheduling

CHAPTER FOUR

CHALLENGES FACING MOTOR VEHICLE INSURANCE

4.1 Introduction

For an insurance company to underwrite a risk, it must accept an offer from the insured person through the proposal form.[102] The risk on the other hand is the event against which the insurance is taken out. The event which will cause loss has to be particularized. The conditions under which that loss may lead to a successful claim also have to be mentioned. In this regard, when an insurer issues a policy or makes an express acceptance of the proposal form, then a contract of insurance is said to be complete. However the insurer can reject a proposal form and be in no way liable to explaining reasons for rejecting the proposal form.

4.2 General Challenges Facing the Sector

The insurance industry has been under close scrutiny with little or no action since the year 1989. In that year, the industry was in a crisis which led to the appointment of a presidential commission of inquiry whose primary sources of reference was to among others inquire: into all aspects of the insurance industry in particular relating to the insurance of motor vehicles and reasonableness or otherwise of premiums.[103] Secondly, the commission was to find ways and means of limiting by legislation or otherwise the maximum compensation to be awarded for motor vehicle accidents. The committee recommended the adoption of the two-tier no fault scheme of a reasonable ceiling of 1.5 million which meant that persons claiming less than 1.5 million would not be required to file any court proceedings.[104] Hancox J in the case of *Mariga vs. Musila*[105] was of the view that inordinately high awards in accident cases would lead to monstrously high premiums for insurance of all sorts and that is to be avoided for the sake of

[102] The proposal form is said to be the vehicle through which the offer is made. It highlights the nature and condition of the subject matter of insurance, the extent of the risk to be insured and the type of liability to be covered.
[103] Premium is defined under the Insurance Act to include consideration for the granting of an annuity) payable
[104] Mugambi Nthiga, 'Insurance Companies Battle With Lawyers over Accident Claims', *The Lawyer*, September 1999, Page 8.
[105] [1984] KLR 251(1982-88) 1 KAR 507

industry. This continues to stir erosion in consumer confidence that news of such liquidation invariably invokes. The collapse of such companies has diverse implications on innocent third parties, other insurers, other insurers, policyholders, suppliers of goods and services and the industry at large.

4.3 Challenges in Regard to Motor Vehicle Underwriting.

It has been observed in subsequent researches conducted that many of the insurance companies that avoided PSV risks attributed the problems to company policies. The key factors in underwriting PSV risks were vehicle carrying capacity, use of the vehicle and the type of cover. The main contributor to PSV underwriting problems was cited as moral hazard. The key problems in underwriting PSV risks were weak enforcement of traffic laws, lack of industry integrated motor insurance data system, fraudulent claims, weaknesses in regulatory framework and generous judicial awards buttressed by damage assessment standing out as one of the major challenges which much consideration I have given as seen below. Charging of uneconomic premium rates is also attributed to stiff competition and undercutting within the industry. The main contributors to fraudulent claims include; fraud aided by lawyers, claimants and medical personnel. Most underwriters reported that their IT systems could not capture all details necessary for underwriting even though many had reported that their underwriting process was fully automated. However in my study I intent to focus on

Damage assessment. This is the preliminary but fairly accurate onsite evaluation of damage or loss caused by an accident or natural event before filing a formal claim or disaster declaration. It records the extent of damage, what can be replaced, restored or salvaged and time required for their execution (online business dictionary). Be as it may be the victim is usually entitled to compensation for the costs he would not have incurred but for the accident. In *Decos vs. National Coal Board;*[107], the court observed that "it is a fundamental principle of English law that damages for personal injury are compensatory and intended, as far as money can, put the plaintiff in the same financial position as if the accident had never happened".

Courts of law use money to compensate victims and their next of kin for lack of a better alternative since money cannot adequately compensate for pain or other physical injury. In the award of damages, courts attempt to ensure that compensation is full and adequate. At common

[107] 1987 1 All ER 540

law, damages are assessed once and for all and an award is made on the basis of present and prospective loss. This entails the estimation of fair compensation in respect of future loss. In *British Transport Commission vs. Gourley*[108], the court stated that damages must be assessed as a lump sum once and for all, not only in respect of loss accrued before the trial but also in respect prospective loss".

The basic approach in the assessment of damages has been that:

i. Where the injury results in pecuniary loss, whether past or prospective, the plaintiff is awarded full compensation
ii. Where the damage is as a result of an injury which does not admit to assessment by arithmetical calculations, the plaintiff should be awarded fair and reasonable compensation assessed in the light of previous awards in respect of comparable damages. In the words of Lord Morris in *West vs. Shepherd*[109], "money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation.
iii. With regard to pecuniary loss, monetary awards are intended to compensate the claimants and hence damages are strictly compensatory. In the words of the Lord Goddard in *British Transport Commission vs. Gounley* "The basic principle so far as loss of earning and out of pocket expenses are concerned, is that the injured person should be placed in the same financial position so far as can be done by an award of money as he would have been had the accident not happened."

Another challenge according to the IRA strategic plan 2008-2012, PSV underwriting in is faced with the problem of huge and unpredictable awards that have been made by the courts. *46In Hassan v Nathan Mwangi Kamau Transporters & 4 others*[110] it was stated that inordinately high awards will lead to monstrously high premiums for insurance, which is a consequence that should be avoided. The correct approach to an award for motor vehicle injury damages was laid down in *Jabane v Olenja48* (Kneller, Hancox, and Nyarangi JJA) as;

- each case depends on its own facts;

[108] 1956 AC 185
[109] 1964 AC 326
[110] Hassan v Nathan Mwangi Kamau Transporters & 4 others. [2008]1 KLR G & F 901.

- awards should not be excessive for the sake of those who have to pay insurance premiums, medical fees or taxes(the body politics);
- Comparable damages should attract comparable awards; *Jabane v Olenja*[111]
- inflation should be taken into account; and

unless the award is based on the application of a wrong principle or misunderstanding of relevant evidence or so inordinately high or low as to be an entirely erroneous estimate for an appropriate award leave well alone.

4.4 Empirical Evidence of the Challenges

In *Michael Hubert Kloss & another v David Seroney & 5 others*[112] the learned judge Bosire clearly stated that the assessment of quantum of damages is a matter for the discretion of the individual judge so long as it is exercised judicially and with regard to the general conditions prevailing in the country generally and to previous comparable and relevant decisions. He further stated that in order for an appellate court to interfere it has to be demonstrated that the award was so inordinately high as to represent an entirely erroneous estimate of the compensation to which the claimant was entitled.

In Hassan v Nathan Mwangi Kamau Transporters & 5 others[113] the Court of Appeal stated that it is only entitled to increase an award of damages by the High Court if it is so inordinately low it represents an entirely erroneous estimate or the party asking for an increase must show that in reaching that inordinately low figure the judge: (a) proceeded on a wrong principle; or (b) misapprehended the evidence in some material respect.

It is however sad to note that despite the correct approach of awarding damages being laid down in precedent, the system has failed and hence the arbitrary awards in our Kenyan courts as can be illustrated by the following cases. In *Hassan v Nathan Mwangi Kamau Transporters & 5 others*[114] the appellant was the father and administrator of the estate of the deceased one Ishtaq who died at the age of 18 as a result of a motor vehicle accident for which the respondents

[111] [1986] KLR 9
[112] Michael Hubert Kloss & another v David Seroney & 5 others. [2009] eKLR.
[113] Supra, n 47.
[114] Ibid.

accepted liability. The appellant claimed damages on the deceased behalf under the heads of pain and suffering, loss of expectancy of life and for lost years.

The parties had agreed on a figure of KES 7,500 for the first and KES 25,000 for the second. The total of those two sums is KES 32,500 (UK Pounds 1,625). This left only the third, the 'lost years', for assessment and the figure reached by the judge was KES 320,000 (UK Pounds 16,000). And how did the judge calculate that sum? He estimated that Ishtiaq would have earned an average of KES 60,000 (UK Pounds 3,000) a year and then he deducted two thirds for his expenses which left Ishtiaq with KES 20,000 surplus a year. Next he multiplied that sum by 16 (the multiplier having been agreed by the parties) and so he came to his KES 320,000 (UK Pounds 16,000) for the 'lost years.

Ishtiaq was 18 when he died. He hoped to be an architect and had been admitted at the university. In the trial hearings, two career architects testified as to their own careers and earnings and what Ishtiaq might have earned[115]. In submissions counsel for the plaintiff came up with a figure of KES 923,000 (UK Pounds 46,170) as a reasonable award which the defence castigated as completely speculative and invited the learned judge Mr. Justice Aragon to exercise the discretion of the court in finding a figure roundabout KES 200,000 (UK Pounds 10,000).54

The judge found all this cogent, lucid and most helpful. He went on to make some calculations. He begun with the salary of a High Court judge which he put as KES 128,000 (UK Pounds 6,400) a year, deducted 45% for income tax which brought it down to KES 70,400 (UK Pounds 3,520) a year and then lopped off another KES 10,400 (UK Pounds 520) which left Ishtiaq with KES 60,000 (UK Pounds 3,000) an years income. Not satisfied with the ruling, the plaintiffs appealed. The appeal was on the grounds that learned judge misdirected himself by; ignoring the material evidence of the expert witnesses, took into account his own experience of life at the University which was irrelevant, and drawing inferences adverse to Ishtiaq based on the differences in living and working conditions in Mombasa and Nairobi. The Court of Appeal observed that there were some unfortunate asides which plainly affected the learner's judge approach in awarding damages and led him into error. The learned judge had it in mind that Ishtiaq might change his mind about being an architect.

[115] Ibid.

This was a possibility but there was nothing to suggest this was probable. The learned judge did so after his first two years in his university, he revealed, but that, with respect, was irrelevant. He also wondered if Ishtiaq might change his career when he had qualified as an architect. This, again, was not prompted by anything in the evidence.[116] These thoughts led the learned judge to declare the evidence of the expert witnesses to be of no assistance in determining what Ishtiaq would have earned had he qualified and practiced as an architect. He added to that by saying that he knew the expert witnesses and that they are exceptionally gifted in their callings whereas Ishtiaq was unexceptional. The learned judge overlooked the fact that Ishtiaq had begun well enough by being accepted by the University to read architecture and the judge's own views of the ability of the expert witnesses should not have been allowed to influence his view of the value of testimony which was relevant and unchallenged[117]

The judge also brought in the differences in the competition among professionals in Nairobi and Mombasa and how that would affect the earnings of Ishtiaq. The expert witnesses made helpful general observations on the salaries of emerging architects and were not questioned on the differences between those for Nairobi and Mombasa architects so that was also something the judge imported into the trial which he should not have done. It was not clear why the judge chose as his starting point the salary of a High Court judge when all along the evidence was kept to Ishtiaq's ability and probable future as an architect. And an average of only UK Pounds 3,000 a year salary for Ishtiaq is probably an unwarrantedly low estimate. The Court of Appeal found that the learned judge, with respect, proceeded on those wrong principles and in so doing reached an inordinately low figure. It then proceeded to assess the damages and arrived at a figure of KES 380,000 as compensation. This is KES 60,000 (UK Pounds 3,000) more than the learned trial judge had awarded.

In *Blue Shield Insurance Company ltd v Joseph Mboya Oguttu* the respondent in this case was involved in an accident where his motor vehicle collided with a motor vehicle insured by[118] the appellants and owned by a construction company. He was severely injured and his motor vehicle was extensively damaged. The trial court entered judgment against the construction company

[116] Supra, n 47
[117] Ibid.
[118] Blue Shield Insurance Company ltd v Joseph Mboya Oguttu [2009] eKLR .

and awarded the respondent KES 1,098,354 /= as damages for pain and suffering and loss of amenities together with special damages and cost of future operations.

Armed with the judgment the respondent moved for a declaratory suit in the same court against the appellants blue shield insurance company ltd seeking judgment against the defendants as follows; (a) declaration that the defendant is obliged to satisfy the decree against the defendant's insured, which decree remains due and payable in favor of the plaintiff (b) payment of the decretal sum due in respect of the first case which remains unpaid to date (c) costs and interest at court rates (d) any such further and or other relief as the honourable court may deem fit and expedient so to grant.[119]

The appellants filed defense which the respondents sought to strike out on among other grounds, that it was scandalous frivolous and vexatious and that it may otherwise prejudice, embarrass or delay the fair trial of the action in court which application was duly granted. In doing so, the learned Judge addressed himself inter alia, "I have already highlighted the salient features of the plaintiff's case and they certainly show that his case is water tight, and the defense which was purportedly filed is definitely sham which I hereby strike out and dismiss with costs. There shall be judgment for the plaintiff as prayed in this plaint with interest and costs."[120] The appellant was aggrieved by this ruling and appealed on among other grounds that the learned Judge failed to consider that a claim for material damages is not a claim that falls under Cap 405 Laws of Kenya.

When coming up with the judgment the learned judge O'kubasu considered that the award sought to be enforced was for the entire sum of KES 1,098 354 /= together with costs and that the award was awarded in respect of general and special damages which were claimed on both loss of motor vehicle and medical expenses incurred. He also observed that the trial court entered judgement for the full amount yet the appellant in his defense which was struck out had stated that the claim was not valid as it included a liability which was not required to be covered under the provisions of section 5 (b) of Cap 405. The appeal was allowed. *John Mugo Ngunga v Rahab Micere Murage & 2 others*[121], this case, is an appeal arising from a suit which was initially filed in the High Court by Rahab Micere Murage (hereinafter referred to as the 1st respondent). The

[119] Supra, n 62
[120] Supra, n 62
[121] John Mugo Ngunga v Rahab Micere Murage & 2 others [2010] eKLR

1st respondent brought the suit in her capacity as the legal representative of Kinyua Ayub Murage (hereinafter referred to as the deceased). The suit was against the Hon. Attorney General, Simon Peter Mwangi and John Mugo Ngunga (hereinafter referred to as the 2nd, 3rd respondents and the appellant respectively).

The suit arose from an accident involving a motor vehicle belonging to the government, a motor vehicle belonging to the 3rd respondent and a motor vehicle belonging to the appellant. The deceased was allegedly a passenger in the motor vehicle owned by the government at the time of the accident. He is alleged to have suffered fatal injuries from which he died[122]. The 1st respondent maintained that the accident was caused by the negligence of the 2nd respondent, 3rd respondent, the appellant or all of them or their drivers or agents. The 1st respondent therefore filed a suit on behalf of the deceased's dependants and deceased's estate for recovery of loss and damages. The 2nd respondent, 3rd respondent and the appellant each filed a defense denying the 1st respondent's claim[123].

The trial magistrate found that there was no concrete evidence as to who was to blame between the three drivers and held all the three drivers to blame and apportioned liability at 50% against the 2nd respondent, 25% against the 3rd respondent and 25% against the appellant. The trial magistrate adopted a multiplier of 27 years, an income of KES.4, 000/= and a dependency ratio of 1/3 and awarded general damages for lost years at KES.432, 000/= and pain and suffering at KES.10, 000/=[124]. Being aggrieved by that Judgment, the appellant lodged an appeal raising inter alia; that it was an error on the part of the presiding magistrate to find that the deceased was entitled to compensation for pain and suffering and awarding KES.10, 000/= by way of compensation yet no evidence was adduced to the effect that the deceased did not die on the alleged spot of the accident. The appellate court found substance on the ground of appeal in respect of pain and suffering, which was not justified, the 1st respondent having pleaded that the deceased died instantly the appeal was thus allowed to the extent of setting aside the apportionment of KES 10,000/= for pain and suffering and judgment of the lower court on liability.

[122] Supra, n 66.
[123] Supra, n 66
[124] Ibid.

4.5 Conclusion

The above discussed cases show that problems facing PSV underwriting are real, that courts have indeed made unpredictable awards based solely on personal wishes, feelings or perceptions rather than on objective facts, reasons or principles. This can be evident in the cases of *Hassan v Nathan Mwangi Kamau Transporters & 5 others,* there was a disparity of KES 60,000 between the award made by the High Court and that made by the Court of Appeal because the judge chose to disregard material evidence and instead relied on personal wishes, feelings or perceptions. In *Blue Shield Insurance Company ltd v Joseph Mboya Oguttu,* it was found that in its award for damages the trial court had included material damages, a liability that is not covered under the provisions of section 5 (b) of Cap 405. In another decision of John *Mugo Ngunga v Rahab Micere Murage & 2 others,* it was found that the trial court had awarded damages of KES 10,000 in respect of pain and suffering yet no evidence had been adduced to that effect.

The tort system of allocating damages for bodily injury can thus be described as a system that overcompensates the slightly injured as seen in *John Mugo Ngunga v Rahab Micere Murage & 2 others,* and *Blue Shield Insurance Company ltd v Joseph Mboya Oguttu* and one that under compensates the seriously injured as seen in *Hassan v Nathan Mwangi Kamau Transporters & 5 others.* A structured compensation liability schedule would serve to cure the above defects in the current system in that courts would have to award damages in accordance with the stipulated amounts in the schedule thus doing away with the problem arbitrariness. It would also serve to reduce litigation and to substitute in its place a sure method of recovery.

The Insurance (Motor Vehicles Third Party Risks) Amendment Bill 2010 introduces a schedule of structured payments of compensation under the Act. Article 4 of the Bill proposes to amend Insurance (Motor Vehicles and Third Party Risks) Act by inserting a structured compensation liability schedule after section 18 of the Act.[125] The implications of Article 4[126] are that a judge in the assessment of quantum of damages must not only make sure that he/ she exercises his/ her discretion judicially and with regard to the general conditions prevailing in the country generally

[125] The Insurance (Motor Vehicles Third Party Risks) (Amendment) Bill 2010
[126] Ibid.

and to previous comparable and relevant decisions[127] but also make sure that he or she awards damages in accordance with the stipulated amounts in the schedule.

The proposed system will be discussed in the following chapter where I will discuss the applicability of a structured compensation liability schedule in our countries' legal system in relation to the fault system of insurance and the challenges and benefits of adopting a structured compensation liability schedule in Kenya. Below are some of the other challenges discussed in a nutshell unregulated nature of *matatu* operations which has led to indiscipline and as result continual increase of road accidents.

Malpractice and fraud–this is perpetrated by a syndicate of fraudsters comprised of ambulance chasing lawyers, medical doctors ,private investigators, insurance companies 'staff, shareholders, claimants ,law enforcement agencies and the Judiciary. Lack of a structured benefits scheme for various injuries leading to victims invariably seeking legal redress under common law, which is an opening for the fraud and ambulance chasing referred to above.

Cap 405 which imposes strict liability on the insurers issuing auto third party liability covers. The fact is that the owner of a PSV has no obligation to do anything to mitigate the risk. The insurer cannot avoid liability even in the case of breaches of warranties or policy conditions by the insured a very odd scenario which precludes the vehicle owner from taking up responsibility as a stakeholder.

[127] Supra, n49.

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

Having analyzed the insurance sector and particularly the feasibility of the motor vehicle third party Risks Act of Kenya which has taken into consideration on the proposed structured compensation liability schedule. The Kenya's legal and regulatory framework of the insurance industry with regard to PSV insurance the motor vehicle industry in Kenya the structured compensation liability schedule with regard to its applicability in Kenya's legal system the fault and no fault system I now turn to chapter five of my work it being the last chapter and rightly scrutinizing the recommendations of the drawbacks and loopholes envisaged in the motor vehicle insurance industry as seen in the a fore mentioned chapters.

5.2 Summary of Discussions

This study began with delving into the background of insurance regulation in Kenya before introducing the problem so as to create a better understanding of how it came about. Having stated the problem in chapter one, the second chapter analysis Kenya's legal and regulatory framework of the insurance industry with specific focus on PSV insurance. It also looks at specific cases in order to create a better understanding of how the system has failed to respond to both the needs of the industry and policy holders.

Having shown that the current system has failed to address the problem of arbitral awards facing PSV underwriting, I further moved to address a critical analysis of the proposed structured compensation liability schedule and made a sound comparison between it, the fault and no fault system of insurance. I refer to it as a 'hybrid schedule' since it incorporates a schedule and a cap on damages.

5.3 Conclusions

This study was premised on the issue of effectiveness or otherwise of the Motor Vehicles Third Party Risks Act and its Impact on Kenya's motor vehicle insurance industry. I have established that through the Motor Vehicles Third Party Risks Act there is a proposal to amend the insurance

laws. This can be attained by introducing a structured compensation liability schedule to provide for compensation payable, in respect of death of or bodily injury to any person caused by or arising out of the use of a vehicle on the road. This research paper has also established that contrary to what some people perceive, the proposed schedule does not introduce 'no fault insurance' into the country's legal system; on the contrary, it is a hybrid system which leaves the current liability system in place. The study has also endeavored to look at fault and no fault system from various jurisdiction coupled with the one addressed in Kenya plus the compensation structure .This research paper comes to the following conclusions; that the proposed schedule will solve the problem of arbitral awards facing the insurance industry especially PSV insurance since it caps the maximum award at KES 3M for death or total blindness. It also provides a series of structured payments payable in respect to specific bodily injuries to guide the courts in the award of damages for pain and suffering. The proposed schedule will not have any legislative problems in adapting to the current legal system since it leaves the current liability system in place. The proposed schedule lacks horizontal equity with regard to the age of victims. Its drafters failed to consider that different age groups react differently to injury. For temporary injuries, a younger person should recover more quickly from psychic harm than an older one, just as their bodies recover more quickly from physical injury. However, for permanent injuries, a younger person can be expected to endure the intangible effects across a greater life expectancy. A younger person should thus recover more for permanent injuries than an older one and vice versa. That the proposed schedule which is highly backed does not have the mechanism of adjusting awards over time to make sure that the award given judicially correspond to the rate of inflation in the country.

5.4 Recommendations

Some of those major recommendations include introducing the following;

5.4.1 Motor Insurer's Bureau

Particular concern has existed with regard to the operation of liability insurance for road accidents. Many people injured by motor vehicles find that they are unable to obtain compensation because of the gaps in the private insurance system such as where injuries were caused by someone illegally driving without insurance. The principle of compulsory insurance therefore, having once been accepted, appears to us that no scheme can be regarded as wholly

satisfactory if it admits of an injured third party without any fault of his own, failing to obtain the compensation which he is intended to secure[128].

In this regard, the Kenyan government should enter into an agreement with insurers to compensate victims of uninsured drivers. They should form the Motor Insurers' Bureau which should take considerable advantage of the technicalities resulting from the requirements of service. Kenya should also consider amending the companies Act[129] to make it possible to restore a defendant company solely in order for it to be sued, even though it has been dissolved. Thus an insurer cannot avoid liability merely because it has been dissolved[130].

This however comes with technicalities because an individual defendant and not an insurer is technically the party to the action. The government and the Motor Insurers Bureau should set up a central fund just for this purpose. The agreement must be signed by the chairman of the Association of Kenyan Insurers, the Insurance Regulatory Authority, the minister of transport and other representatives of other companies and associations dealing with motor insurance. However, the agreement should be devoid of government interference. The most important use of the scheme would be in relation to drivers who cannot be traced. This agreement should however be made available to the public in order to avoid ignorance of rights secured. To avoid problems in enforcement, this agreement should be incorporated into the law. The enactment of an Accidents Compensation Act should adequately cover the Motor Insurers' Bureau. Lord Denning in *Hardy vs. M.I.B*[131] stated that the Motor Insurers'

Bureau is as important as any statute. In this regard, it should be incorporated in statute because insurance transactions & institutions are subject to regulation in broad sense, not only at the hands of administrative agencies specifically created for this purpose but also at the hands of legislatures and courts. The Motor Insurers' Bureau in Kenya however will only deal with claims under the no fault system in case the drivers or owners of the motor vehicles cannot be traced or in case of uninsured motor vehicles. In case the claim exceeds the ceiling of 1.5 million shillings, then a judgment from a court of law against the uninsured or untraced person must be obtained

[128] Richard Lewis, 'Insurers agreements not to enforce strict legal rights: bargaining with government and in the shadow of the law' (1985), The Modern Law Review volume 48 number 3 page 278.)
[129] (Cap 486 of the Laws of Kenya)
[130] (Examples of dissolved companies in Kenya include Invesco Insurance, United Insurance, and Lakestar among other insurance companies)
[131] ([1964] 2 QB 745 & 757)

and notice of such proceedings against an uninsured person must be given to the Bureau within 21 days after the commencement of such proceedings.

The Bureau must accept applications for payment in respect of death or bodily injury resulting from the use of the motor vehicle on a road where, first, the applicant cannot trace any person responsible or where more than one person was responsible, cannot trace one of those persons[132]. Secondly, the death or injury was caused and if that untraced person were to go to court, he would be liable in damages. Thirdly, that the untraced person's liability is required to be covered by insurance under the Insurance (Motor Vehicle Third Party Risks) Act[133]. The bureau must be furnished with enough personnel to aid in the investigations when an application has been placed before it. This is so as to ensure that it does not satisfy case of deliberate running down

5.4.2 Adopt a Structured Compensation Liability Schedule

Pain and Suffering,'[134]. This research paper has established that indeed, the insurance industry especially PSV insurance is faced with the problem of arbitrary court awards[135]. It has also established that these problems can be eradicated through the adoption of a structured compensation liability schedule which is in operations in several states in America and New Zealand[136]. I thereby recommend that the country adopts a structured compensation liability schedule to guide the courts in the awarding of pain and suffering damages as a result of motor vehicle accidents.

However; two loopholes in the proposed schedule were identified in this research paper, these are; one, it lacks horizontal equity with regard to the age of victims, two; it lacks a mechanism of adjusting awards over time to make sure that awards correspond to the rate of inflation. This research paper recommends that article 4 of the Bill,[137] which is currently in its first reading,[138] be amended to incorporate into the schedule, a system where the various awards vary with the age of the victims just as they vary with the severity of the injury and a mechanism of reviewing

[132] (A person is declared untraced if he cannot be served)
[133] (Mc Gillivray & Parkington on insurance law, (1975), 6th edition, Sweet and Maxwell at page 2341)
[134] 1989) 83 North Western University Law Review, 908-941
[135] Supra, n 37.
[136] Supra, n 29.
[137] Supra, n 102.
[138] Kenya Law Reports: Bill Tracker 2010,

awards periodically so that monetary values in the awards correspond to the rate of inflation in the country.

5.4.3 Establish an Inter Professional Working Party

This is yet another recommendation that the government of Kenya ought to adopt to increase the efficacy and feasibility of the motor vehicle insurance industry. This can be done by establishing a formal working group of the Actuarial Society of Kenya, the Law Society of Kenya and the Association of Kenya Insurers to come up with a report on the feasibility and desirability of issuing authoritative tables for the assistance of the Motor Accidents Special Tribunal in assessing an award of damages for continuing pecuniary loss arising out of personal injury or fatal accident claims. Secondly, to provide explanatory notes that would be required to assist in selecting the appropriate table to be applied to suit each individual case and also to form the basis of guidance under the Motor Accident Compensation Act

5.4.4 The enactment of the Motor Accident Compensation Act in Kenya

This piece of legislation will outline the powers of the Tribunal and lay down various structured injuries and the amount payable upon such injuries. It must also provide extensive medical benefits and limited non fault benefits of other types while preserving tort actions for larger claims[139]. The scope of this no fault law in Kenya should cover reasonable expenses incurred within two years from the date of accident for necessary medical services, net loss of support to family members in the event of the death of the bread winner186 and net loss of earning power for employed persons. However there should be recourse to litigation if, the reasonable and necessary expenses for medical and hospital services exceed 1.5 million shillings.187 The source of funds for the no fault system will be derived from the premiums paid for third party insurance risks which will be placed in a pool managed by a body formed by the government from the Association of Kenyan insurers and individual insurer representatives. As stated earlier, the premiums for a given year will cater for compensation for injuries suffered within that given year.

The Act will also establish an Accident Compensation Corporation which will be funded by the insurance companies as opposed to community responsibility. In community responsibility,

[139] This resembles Aponte and Denenberg's assertions in, 'The automobile problem in Puerto Rico: Dimensions and proposed solutions', (1968), Insurance Law Journal at page 884.

levies are from the employers, drivers, and owners of automobiles who are said to provide the funds, with any shortfall covered out of the country's general revenues. if accident compensation is available to a large number of people, it should not increase recklessness; rather, it should be embraced for genuine disabilities.

5.4.5 Establish a Motor Insurance Ethics Act

The main purpose for this would be to counter some fraudulent practices and stop ambulance chasing practice in Kenya and the need for supervision of insurance intermediaries. These include insurance brokers and Agents. Agents should be subject to a code of practice for the administration of insurance agents which should govern the market conduct of insurance agents. Brokers need to be either directly authorized by the insurance authority under the law or become a member of a body of insurance brokers approved by the insurance authority. The Motor Insurance Ethics Act will seek to address the issue of insurance fraud from persons directly involved or insurance intermediaries. After the establishment of the no fault insurance system, the government in conjunction with the Association of Kenya Insurers must put in place adequate measurers to contain motor insurance fraud.

This could take the form of ambulance chasing. In Florida for example, this kind of fraud has been turned into a personal slush fund for legal and medical practitioners[140]. It takes many forms but usually it starts with the solicitation of patients by runners. Every time the police are called to a scene of accident, a crash report must be filed with the local police station. Runners pick up copies of the crash reports in bulk and use them to solicit accident victims or sell the list to at third party for the purpose of solicitation[141]. Usually, the runners keep the information and solicit the victims either by telephone or by visiting the victim's home. The runner convinces the patient that they need to see a doctor and usually, medical practitioners are willing to pay up to 500 dollars for each patient referral. The Act must therefore criminalize the act of ambulance chasing. Unethical medical professionals contribute to the problem of personal injury protection, insurance fraud. Part of the problem in the medical field comes from accident or pain clinics that are not owned by physicians. Brokers also set up appointments for patients at diagnostic clinics and bill the insurance company for their services. Unethical attorneys also contribute to the

[140] Fifteenth statewide Grand Jury report, report on Insurance Fraud Related to Personal Injury Protection(August 2000) available at http://legal.firn.edu/swp/jury/fifteenth.html as at 3rd February 2009

[141] Ibid

problem of insurance fraud. Some personal injury attorneys will also refer their clients to a medical practitioner who will find that the injured party has some permanent disability. This finding allows the injured party to sue the insurer for pain and suffering. Thus in an effort to contain personal injury protection fraud, Kenya must enact a statute designed to prevent accident reports from being used for commercial solicitation of the victims. Since the medical profession is self-regulating, the Motor Insurance Ethics Act must stipulate how medical practitioners dealing with motor accident victims should conduct themselves in the course of dealing with the patient. Solicitation of patients must also be criminalized by this law.

5.4.6 Institutions to support the no-fault system in Kenya

Before the adoption of any institutions in support of the no fault system, it is important to understand that, Traffic Accident Schemes fall into two broad categories. First, there is add-on schemes which typically provide limited no fault benefits for pecuniary losses arising from personal injury, but no no-fault benefits for non-pecuniary loss or property damage. Under such schemes the tort action remains intact, but there are provisions requiring no-fault benefits to be set off against tort damages to prevent double recovery. The second type of no fault scheme can be called the modified scheme.

Under modified schemes, the no-fault benefits are similar in type to those available under adds-on schemes, although sometimes greater in amount. However, the right to sue for tort damages for non-pecuniary loss is abolished in less serious cases. In some jurisdictions, the right to sue in tort in respect of pecuniary losses is not affected, but setoff provisions prevent double recovery; in other jurisdictions, this right is abolished to the extent that the plaintiff is entitled to recover no fault benefits.

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