

ASSESSMENT OF DAMAGES IN THE LAW OF TORTS

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DEDICATION

To my Beloved Parents,

Mr & Mrs. Sinyo M.N. of Gwasiland

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I N T R O D U C T I O N

In this paper, assessment of damages in tort is to be discussed. In every tort case there are three issues to be looked at. The first issue is whether there is a breach of a legal duty or whether a defendant committed a tort against the plaintiff. This would establish the defendant's initial liability. Secondly, if the defendant is liable, then for what consequences of his conduct can the plaintiff recover? This involves the principle of remoteness of damage. Thirdly, the court is concerned with the amount of compensation which can be recovered for the consequences or losses which have already been established to be not too remote. In this paper we are mainly concerned with the third question that is: measure of damages.

Since it is not an easy task to reach a conclusion as to what is the formula for assessing damages

in any tortious act committed. I am merely endeavouring to convey to the reader the knowledge I have gathered from my study of that topic through books and cases.

In the first chapter of this paper the purpose of tort, that is the adjustment and allocation either through shifting or distribution of losses incurred will be discussed.

In the second chapter there will be a brief survey of compensatory and non-compensatory kinds of damages available to the plaintiff. The third chapter will deal with the damages for personal injuries. Typical instances are harm-sustained in industrial accident or in highway collisions. In all but a few exceptional cases the victim of personal injury suffers two distinct kinds of damage which may be classed as pecuniary and non-pecuniary. By pecuniary damages is meant that which is susceptible to direct translation into money terms and includes, loss of earning and earning capacity, and future loss of earnings while, non-pecuniary damages include such immeasurable elements as: bodily harm, pain and suffering, loss of ammenity, loss of expectation of life and the like.

In chapter four, compensation for damage to property has to be assessed. The basic principle value of property which the defendant has damaged or of which he has deprived the plaintiff, and in addition, any necessary expenses incurred as a direct result of the tort will be taken into account. The actual method of assessment must, of course, vary according to circumstances and facts of the cases. Lastly, the final chapter which is the conclusion will include, amongst other things, the writers views and comments on the observation of the theme of this paper as a whole.

The writers interest in discussing this topic has been motivated by the fact that, today, the human race is passing through a new stage of its history. Profound and rapid changes are taking place around the whole world. Man with his creative energies and intelligence triggers these changes and may cause them even to recoil upon him. By affecting his dreams and desires, both individually and collectively it affects his manner of thinking and acting with regard to people and objects. Hence, one can already speak of a time of social and cultural transformation.

As happens in any crisis of growth, this trans-

formation has brought serious difficulties in its wake. Faced with the calamities which the human race has made possible after recourse to modern highly mechanised industries, man has been led into greater awareness of his responsibility to find means of compensating those who suffer irreparable injuries in factories, on the roads and in the air. The law endeavours to do this by means of assessment of damages in the law of tort.

A plaintiff who brings a civil action does so with the object of obtaining some relief or other outcome beneficial to him. Amongst the forms of relief relevant to the law of tort are first and foremost, damages. Damages are compensation for a wrong and are assessed subject to certain rules in such a way as to make up to the plaintiff for his loss. An award of money retains its character of damages even though there is a subjective element in assessment. For example, in most personal injury cases, there will be included in the plaintiff's damages an amount in respect of pain and suffering endured and the future loss of mental or bodily faculties. From a purely pecuniary point of view, this may mean that the plaintiff is

better off than before the accident; but the compensatory principle remains intact because judges think money is the sole instrument of restoring the status quo; thus, the injured party will be given reparation for the wrongful act and for all the natural and direct consequences of the wrongful act, as far as money can compensate.

CHAPTER ONETHE PURPOSE OF TORT

We should begin with the description rather than the definition of tort, which may be said to be concerned with the shifting and distribution of those losses which are bound to occur in our society. It is obvious that in any society of people living together, numerous conflicts of interests will arise and that the action of one man or group of men will from time to time cause damage to others. This damage may take many forms: injury to the person, physical damage to property, damage to financial interest, injury to reputation and the like. Whenever a man suffers damages, he is inclined to look to law for redress but the granting of redress by the law means that some person or group of persons will be required by the law to do or refrain from doing something normally but not invariably to pay money to the sufferer by way of compensation.

With this in mind the purpose of tort in this paper will be treated as the study of the extent to which the law will shift the losses sustained

in modern society from the person affected to the shoulders of one who caused the loss.

It follows, however, that no system of law could possibly decree that whenever a man suffers loss of damage he should ultimately be entitled to redress. There must be some reason in any given case for calling upon another to provide it, or in other words for shifting the loss. The law cannot go even so far as to order every person, whose action may be regarded as morally culpable, to make redress to those who suffer by it. In the words of Lord Atkin in the case of Donoghue v. Stevenson.

"Acts or omissions which any moral code would answer cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way, rules of law arise which limit the range of complainants and the extent of their remedy"¹

It is obvious therefore that the law of tort could not attempt to compensate persons for all losses. Such an aim could not only be over ambitious but in conflict with the basic notions of social policy. Society has no interest in mere shifting of losses between individuals for its own sake. The loss has already occurred and whatever benefit might be derived from repairing the future of one person is exactly offset by the harm caused by taking that amount away from another. However, the economic assets of the community do not increase and expense is incurred in the process of reallocation. Hence the shifting of loss is justified only when there exist special reasons for requiring the defendant to bear rather than the plaintiff in whom it happens to have fallen.

On the other hand, another approach suggests that the proper functions of the law of tort should be not so much the shifting as the distribution of losses, typically involved in modern living. How best to allocate these losses in the interest of public good is the task confronting the law of tort. This attempt has been made by loss spreading (distribution of losses) through insurance and other means.

We have seen that no social value attaches to shifting of loss so long as its effect is merely to impoverish one individual for the benefit of another. If certain types of losses are looked upon as a more or less inevitable by-product of a desirable but dangerous activity it may well justly distribute its costs among all those who benefit from that activity. Such a basis of administering losses has been variously described as "social insurance", "collectivisation of losses" or "loss spreading" (distribution). This leads to the selection of defendants, not necessarily because they happen to be morally blameworthy but because of their superior ability to absorb the cost of compensation. In this, attention is focused on those who have greater capacity to bear the loss and also who occupy the most strategic position to administer the laws by passing it into a wider section of the public either through insurance or price calculation.

An auxiliary criterion looking much into the same direction is "loss prevention". The allocation of risk to a particular party may stir him to devise more fool-proof safety precautions. But the cost of adapting these or alternatively the cost of

paying for the losses which occur as the result of his wanting to or his being unable to reduce the accident will raise the cost of his activity. If he is in business it will raise the price of his products and thus affect his relative competitive position. A good illustration of the above approaches is furnished by Workman's compensation. It was increasingly felt that instead of the workman having to subsidize the growth of industrial development, at the cost of his eye or broken limbs, industry itself should bear the cost of its accidents by writing it off as overhead charges of its operation. In response to this change of attitude the first system of social insurance was inaugurated whereby the casualties of accidents suffered in the course of employment became entitled to compensation regardless of whether negligence in a conventional sense could be established or not. Liability for compensation was placed on the employers who in turn had to cover himself against the risk by compulsory insurance. This meant that responsibility for industrial accidents was not simply allocated to the employer on account of his superior risk bearing capacity, but also that he would be able to pass it to the public at large through

charges of service through public utilities, or prices of goods manufactured in case of products of factories , or prices of goods in agriculture raised. The above development is now usually justified by proclaiming that it is not the function of tort law to fix liability where liability ought to be fixed, but to spread the laws arising from injury as widely as possible by casting it upon society as a whole rather than upon the person injured. Thus it is argued that the law of tort should deal not so much with the shifting as with the distribution of losses, typical in an industrial society. Attention should be directed not only to those who have the greater capacity to bear laws but also to those who are in a position to spread it by passing/into the public by way of increased /it prices or insurance premium.

The existence of insurance has the effect that an adverse judgement no longer merely shifts the loss from one individual to another, but tends to distribute it among all policy holders carrying insurance on this type of risk. Thus insurance spreads the loss on those who are best able to bear it. As such, the person cited

as the defendant is in reality only a nominal party to the litigation, a mere "conduct through whom this process of distribution starts to flow."

The fact that some of the benefits through this device of industry insurance are already being attained under our traditional rules of tort law, suggests several observations. In the first place, insurance cover eliminates completely whatever admonitory effects an adverse verdict would otherwise have had in deterring reasonable dangerous conduct. There is no evidence, however, that this has fostered irresponsibility. On the contrary the steady proportional decline in the accident rates, both on the roads and in factories points to the conclusion that the assumed deterrent value of tort damages has been some-what overated and that accident prevention can be as effectively promoted by other pressures which have not been effected by the preference of insurance. Secondly, it may be asked to what extent, if at all, the courts have adapted themselves to this new situation? From the point of view of orthodox legal theory, the impact of insurance is quite frankly ignored. A contract of indemnity is treated as a matter between the insurance and a stranger and is of no concern as other litigants. Indeed the

existence of insurance from being considered relevant is inadmissible in evidence and its disclosure may provide ground for trial because of its apprehended prejudicial effects on the jury. Nevertheless, insurance of itself is not a reason for imposing liability. Chamberlain, J. said in the case of *Executor Trustee & Agency Co. Ltd. v. Hearse*:

"There is reason to believe that the chain which binds the wrong-doer to his responsibility may have acquired a little extra tensile strength since the advent amongst other things of compulsory insurance and contributions from tortfeasors. Whatever the theoretical position the fact of widely held insurance has produced substantial changes in the actual operation of the law of tort"².

Most important has been the stimulus it has given to stricter, if not strict liability. Thus in those fields of accident law where insurance is either compulsory or very widespread as in industrial and mortal accidents there has been a steady rise in the standard of care exacted from defendants to a degree that makes the distinction between negligence and strict liability often almost illusory. Jurists are well aware of the realities of the situation and pay scant attention to exculpatory

pleas by defendants in the knowledge that the deep pocket of the insurance companies will ultimately defray the costs of compensation. Concurrently defences to liability like voluntary assumption of risk, common employment and contributory negligence have been progressively narrowed or completely eliminated. The combined effect of these developments has been a substantial re-allocation of risks in a manner conducive to effective collectivisation and distribution of accident losses in the situation affected.

Liability insurance is not the only road to risk pooling. Its greatest drawback as a system to compensation is its link to tort liability. The benefits being contingent on a prior determination of tort responsibility are often complex, contentious and protracted. This is not only directly prejudicial to the accident victim but vastly increases the cost of the system so much so that more than half the premium is lost to administrative expenses. Despite these defects, insurance satisfies, on the one hand the need to compensate the victim and to protect him against the impecunious defendant. On the other hand, insurance also prevents any one person from being crushed financially by having to pay heavy damages.

So far we have considered shifting and re-allocation of losses suffered by the plaintiff, to the defendant. The losses to which we have referred are in reality the damages that the plaintiff incurs.

Damages are the pecuniary compensation obtainable by success in an action for a wrong which is a tort; the compensation being in the form of a lump-sum which is awarded and is expressed in Kenyan currency. The heads or elements of damage recognised as such by law, are divisible into two main groups; pecuniary and non-pecuniary losses. The former comprises all material and financial loss incurred, such as loss of business, profits, or expenses of medical treatment. The latter includes other losses such as physical pain, or injury to feelings. The former being a money loss is capable of being arithmetically calculated in money, even though the calculation must sometimes be a rough one where there are difficulties of proof. The latter, however, is not easily calculatable in terms of money.

The question then arises: What is the object of the award of damages? Ordinarily an award of damages is made in order to compensate the plaintiff for his injury. He is entitled to damages for any item of loss he may have suffered, provided that it is not too remote, therefore "so far as possible to make good to him the financial loss which he has suffered and will probably suffer as a result of the wrong done to him for which the defendant is responsible", is primarily the object of such an award. It gives the plaintiff compensation for the damage loss, or injury he has suffered. Nevertheless, proof of causal connection does not ensure success for the plaintiff. He must have suffered harm of the kind that is within the scope of a particular wrong, for the damages for which a plaintiff is entitled to receive from the defendant in respect of a wrongful act must be recovered once and for all. He cannot bring a second action on the same facts simply because his injury proves to be more serious than was thought when judgment was given. As such there are then clear and established principles governing these elements of damages which are attributable to the defendant's act and recoverable in any particular course of action. In all

actions, whether incontract or tort, with regard to quantum of damages one over-riding principle governs the measurement of damages; Quoting Lord Blackburn in the case of Livingstone v. Railyards.

"where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages, you should as nearly as possible get at a sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in, if he had not sustained the wrong for which he is now getting compensation or reparation".³

CHAPTER TWOKINDS OF DAMAGES

The usual remedy in tort is the award of a sum of money by way of damages said to be at large in the case of all torts. Although the interest promoted may not have a cash value, the court is free on proof of the commission of tort, to award substantial damages or nominal, special or general, contemptuous, aggravated, parasitic, exemplary or punitive.

a) NOMINAL DAMAGES:

Nominal damages are small sums of money, awarded not as compensation but solely because the plaintiff has proved a tort having been committed against him for instance in case of trespass to land, there is no physical damage to the land or any loss to the plaintiff.

Nominal damages will be awarded either where the court decides in the light of all the facts that a damage has been sustained, or where a plaintiff whose rights have been injured fails to prove that he has sustained actual damage. Ordinarily nominal damages are given only in respect of torts actionable per se.

In the case of Ashby v. White⁴ for instance where a returning officer failed to register a duly cast vote of the plaintiff, it was held that the plaintiff could properly be awarded nominal damages although there was no actual damage and the candidate for whom the vote was rejected was duly elected.

Similarly in Constantine v. Imperial London Hotels Ltd⁵ the plaintiff, a well known West Indies Cricketer was refused admission to defendants' hotel without reasonable cause. He suffered no special damage - still the court held his exclusion was tortious and he could recover nominal damages of five guineas only.

Thus, nominal damages are then a means of rendering an adverse judgment against the violation of a right even when it is proved that no loss has been caused.

Since every injury imports a damage, the plaintiff is entitled to receive nominal damages from the defendant. Thus a plaintiff claiming damages must prove his case. To justify an award of substantial damages he must satisfy the court both as to the fact of damage and as to its amount. If he satisfies the court on neither, his action will fail or at most he will be awarded nominal damages where a right has been injured. If the fact of damage is shown but no evidence as to its amount is given, so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages. On the other hand where it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages. The fact that damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity to pay damages.

b) General and Special Damages:

Special damages on the other hand has to be proved at the trial. The actual damage has to be proved. This actual damage is what is often called "special damage". It must be substantial damage capable of pecuniary assessment. Such things as loss of accrued earnings or medical expenses which need only to be added up to be ascertained are in this category. For example, if the plaintiff's injury interferes with the ability of his earning a living, he is entitled to damages for loss of earnings, actual and prospective. Actual loss of damage which has already accrued at trial is classed as "special damage", and will normally be calculated simply by reference to the period of disability and the pre-accident rate of earning. Future loss cannot however be easily calculated because of the many imponderables which enter into the assessment and, it is therefore classed as "General Damages". The court must estimate the period of future disability and the plaintiff's probable rate of earnings, to arrive at a lump-sum, and this must then be discounted to allow for the fact that he receives a lump-sum instead of payments spread over a period of time, and for the normal vicissitudes of life.

Therefore general damages is the kind of damage which the law presumes to flow from the wrong complained of. They are awarded in respect of losses such as: Loss of reputation, pain and suffering or loss of future earnings which are not precisely calculable, and which fail to be quantified by the court or jury, and they are sometimes referred to as being "at large".

On the contrary, special damages are the particular damages which result from the particular circumstances of the case and of the plaintiffs claim to be compensated for which he ought to give warning in his pleadings in order that there may be no surprise in the trial.

The case of Wanza Ndonye v. George Okoth⁶ does illustrate appropriately the distinction between special and General damages. Here, the plaintiff, a pedestrian was run over by the defendant one morning as she was crossing the road. The defendant rushed her to hospital where she was admitted for four months. The plaintiff brought an action for damages and the court held that both she and the defendant were liable for contributory negligence

for the commission of the accident. The ratio of their liability was 20% for the plaintiff and 80% for the defendant. Thus the plaintiff was awarded 3,000 shillings for special damages agreed by both parties and 80,000 shillings for general damages which with one fifth reduction for her own negligence would then amount to shillings 64,000/=. The judgment was entered for the plaintiff for shillings 67,000 in all.

c) Contemptuous Damages:

The amount awarded in contemptuous damages indicates that the court has formed a very low opinion of the plaintiffs bare legal claim or, that his conduct was such that he deserved at any rate morally, what the defendant did to him. Damages of this kind may imperil the plaintiffs chance of getting his costs for, although costs nowadays usually follow the event of the action, yet the award is at the discretion of the judge.

A Ugandan case, Njaraketa v. D.O. Medical Services⁷ is a good illustration wherein contemptuous damages were awarded. Here the appellant had

a malignant growth on his leg and the doctors found it necessary to amputate his leg to save his life. The plaintiff at first consented but later withdrew his consent for amputation. Nevertheless his leg was amputated and his life was saved. Surprisingly the patient brought an action against the doctors for having amputated his leg without his consent. The court held that the doctors were indeed liable for trespass to his person but nonetheless, the appellant suffered no damages for were it not for the amputation of his leg his children would be fatherless and his wife a widow. Therefore the appellant was awarded one cent only as contemptuous damages, the court having formed a very low opinion of the appellant's bare legal claim.

d) Aggravated Damages:

In each case evidence will be permitted in the circumstances accompanying the commission of a tort for which damages at large is a head of permissible damages. When that evidence tends to show that a higher sum of damages will be appropriate, that higher award is often called "aggravated damages", not being some separate head of damages. These damages will be important in, causes of action such as adultery and defamation which recognise these heads of damages. Similarly certain

heads of damages such as compensation for humiliation and insult lend themselves most readily to claims of aggravated damages. Thus aggravated damages as such "is not a term of art" it merely describes a term of quality of those heads of damage which are at large. Anyhow these aggravated damages are trully compensatory being given for the injury to the plaintiff's proper feelings of dignity and pride. However, the term aggravated damages could be used in another sense. If further damages claimed arose out of the original wrong which the plaintiff pleaded, he could recover further damages which aggravated the wrong even though, there could also have been recovered in some seperate cause of action. In this area, aggravated damages overlap parasitic damages.

In other instances, however, the courts have awarded exemplary damages where aggravated damages could not be established.

e) Parasitic Damages:

The scope of parasitic damages in the law of torts cannot exactly be defined, but it is claimed that, sometimes heads of damages other than those which the tort conceives has been primarily designed to protect, may be recovered. The term "parasitic damages" is used a head of damage which if it were as the only head of damage proved, in respect of a particular tort, would not be recoverable but which becomes recoverable for that tort if some other head of damages is also proved. Lord Buckley in Horton v. Goldyn⁷ in an attempt to identify the role of parasitic damages in the law of tort said:

"If an actionable wrong has been done to the claimant, he is entitled to recover all the damage resulting from that wrong, and nonetheless, because he would have had no right of action for some part of the damage if the wrong had not also created a damage which was actionable:"

f) Exemplary Damages:

In any case in which damages are at large, where they cannot be precisely calculated in money terms, the court may take into account the motives and conduct of the defendant and, where this aggravate the plaintiff injury, the damages will be correspondingly increased. These "increased damages other than the normal compensatory damages could be classified as either "aggravated damages or exemplary or punitive damages". The essential formal distinction between these two kinds of damages, is that aggravated damages purport to measure harm however intangible to the plaintiff, whereas exemplary damages are related solely to the defendant's for, "to sustain an award of exemplary damages, the defendant must have intended to annoy, abuse, or insult the plaintiff, or have behaved in an insolent or arrogant manner so that it is desirable to punish or make an example of him. Reckless disregard amounting to insult is enough, but probably not mere recklessness".⁹

The primary object of an award is to compensate the plaintiff for the harm done to him: A possible secondary object is to punish the defendant for his conduct in inflicting that harm;

Byles J. said this in Bell v. Midland Ry.

"Such a secondary object be achieved by awarding in addition to the normal compensatory damages, damages which are variously called: Exemplary damages, punitive damages, vindictive damages even retributory damages",¹⁰

and comes into play whereas the defendant conduct is sufficiently outrageous to await punishment as it discloses malice, fraud cruelty, insolence or the like. Therefore exemplary damages are not compensatory but are awarded to punish the defendant: In the words of Pratt L.C.J.;

"Damages are designed not solely to injured person but likewise as a punishment for the guilty, to deter him from any such proceeding in the future and, as a proof of the detestation of the jury to the action itself."¹¹

Exemplary damages are awarded to achieve the following objects; proper satisfaction for the urge of revenge felt by the victims; punish the wrongdoer to atone for his wrong doings; deter the defendant from repeating his wrong; make an example of the defendant to deter others from committing the

same wrong; to make the courts condemnation of the defendant's behaviour.

In so far as the object of exemplary damages to punish, the calculation of the amount to be awarded must clearly be based on criteria different from those employed in the calculation of the compensatory damages.

In Rookes v. Banard¹² Where a plaintiff a skilled draftsman employed by the British Airways Corporation in their design office at London airport for nine years, resigned his membership of the Association of Engineering and Shipping Building Draftsman, a registered trade Union; but he continued to work in the office "a closed shop". The union members informed the corporation that they would withdraw the labour unless the plaintiff was removed from the office within three days. As a result, the corporation being afraid that members of other unions would strike in sympathy with those in the design office, suspended the plaintiff immediately and, two months later, dismissed him. In an express contract of an employment agreement between the employers and the employees, no lockouts or strikes were to take place and, all disputes were to be referred to

arbitration. As such, the threat by the union members to withdraw labour was illegal, not conforming to the terms of the contract agreement.

The plaintiff brought an action for damages against the defendants for using unlawful means to induce the corporation to terminate its contract of service with him, and/or conspiring to have him dismissed by threatening the corporation with strike actions if he were retained. On appeal in the House of Lords, the defendants were found liable of having committed the tort of intimidation (though not an established tort) by threatening to breach their contract, being an unlawful means to achieve their object yet, their action was done in furtherance of a trade dispute.

This case established that exemplary damages should be awarded in the following types of cases: (a) where there is appressive, arbitrary or unconstitutional act by government servants; (b) where the defendants conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff; and (c) where exemplary damages are expressly authorised by statute. Neither exemplary nor

aggravated damages could be awarded to the plaintiff as the circumstances and facts of these cases could not fit any of the three principle rules under which exemplary damages are awarded, or in the general requirements for an award of aggravated damages. Therefore, a new trial for damages was order to invite the jury to look at all the surrounding circumstances and award an amount which approximated the pecuniary loss proved by the plaintiff.

In Rooke's case Lord Devlin stated three considerations which should always be born in mind when awards of exemplary damages are in issue: A plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour; The awards should be moderate; The means of the parties; for a small exemplary award would go unnoticed by the rich defendant while a moderate award might cripple a poor defendant, so that the size of the defendant's bank balance to influence the size of the award is fully appropriate. To sum up, the exemplary damages being a feature of tort law can be awarded in three main categories of cases. Two of these categories are a common law feature and the second one is of major significance in the modern societies. The three cases are; express authorisation by statute. This is self-explanatory by and

as such much discussion on it is thereby limited.

First common law category. Here the government servants must have acted in an oppressive, arbitrary or unconstitutional manner. The justification of retaining this category in the law is that, "here an award of exemplary damages, as stated by Lord Davlin in Rookes v. Barnard, can serve a useful purpose in indicating the strength of the law and thus affording a practical justification for admitting into the civil law, a principle which ought logically to belong to the criminal law. More important here is the particular justification - which is put by way of contrast between public service on one hand and private corporations and individuals on the other. With the latter, where one man is more powerful than another, it is inevitable that he will try to use his power to gain his ends; and if this power is much greater than the other's he might perhaps be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary ways but he is not to be punished simply because he is the most powerful. In the case of the Government it is different for the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service".¹³

In East Africa the Uganda case of A.B. Sindano v. Ankole District Administration¹⁴ illustrates this first common law category. Here the plaintiff brought an action and claimed damage for wrongful arrest and false imprisonment from the defendant's administrators who were vicariously liable for the wrong doings and torts committed by its officers and agents. The court held that heavy awards of damages (exemplary damages) against local administrators may well encourage those authorities to choose, train and control their local chiefs and officers with more care for the public will ultimately benefit from more complete truthful and better trained local officials. Thus the administrators were vicariously liable because the local officials they appointed treated the plaintiff in an arbitrary and unconstitutional way, resulting to the plaintiff being awarded exemplary damages due to their oppressive conduct as government servants.

Cases where the defendant's conduct has been calculated by him to make profit for himself which may well exceed the compensation payable to the plaintiff, is the second common law category as laid down by Rooke's case. The point here is that the

defendant must not be allowed to make a profit from his own wrongful act. This category is not confined to money in a strict sense; As Devlin said, in Rooke's case:

"It extends to cases where the defendant is seeking to gain at the expense of the plaintiff some object perhaps some property he covets which he either could not obtain at all or, not obtain except at a price greater than he wants to put down."¹⁵

In the modern society, this second common law category is greatly applied by courts in cases of libel, but, Widgery commented in Manson v. Associated Newspapers:

"The mere fact that a newspaper is run for profit and that everything published in the newspaper is in a sense with a view to profit, does not automatically bring newspaper defendants into the category of those who may have to pay exemplary damages on the footing that what they have done has been with a view to profit."¹⁶

The conditions for the application of this second common law category are satisfied where it can be inferred that a newspaper has deliberately published a statement, in the words of Widgery in Manson's case:

"Conscious of the fact that it had no solid foundations and with the cynical and calculated intention to use it for what it was worth, on the footing that it would produce more profit than any possible penalty in damages was likely to be."¹⁷

For the first time the case of Broome v. Cassell¹⁸ was held to fall within the second common law category. Here a distinguished naval officer sued the publisher and author of a book telling of a war time destruction of a navy escort convoy, and libelous of the plaintiff in importing to him responsibility for the disaster. The court of appeal was satisfied that there was a sufficient calculation of profit by both author and publisher to justify an exemplary award. In Lord Dennings view, the second category should be construed broadly so as to

include all cases whether a defendant knows that his words are or may be libelous and yet take his chance because of the profit he hopes to make from the book as a whole.

CHAPTER THREE

MEASURE OF DAMAGES:

DAMAGES FOR A PERSONAL INJURY

I. PECUNIARY.

The two distinct kinds of damage which the victim of personal injury suffers may be classed as pecuniary and non-pecuniary. The former is that which can be translated in money terms and includes loss of earnings or loss of future earnings; while the latter includes such immeasurable damages elements as pain and suffering, loss of amenities and loss of expectation of life, to mention only a few -

Pecuniary Damages:

The two aspects of pecuniary damage that will be discussed in this paper are (i) loss of earnings or earning capacity.

(ii) medical hospital and nursing expenses.

I LOSS OF EARNING OR EARNING CAPACITY.

In a personal injury action the plaintiff is entitled to damages for loss of his earning and earning capacity resulting from the injury. Both earnings already lost by the time of trial and prospective loss of earnings are included. While the rules of procedure require that the past loss be pleaded as a special damage and the prospective loss as general damages, there would appear to be no substantial difference between the two, the dividing line depends purely on the time when the case comes on for hearing. The only difference points out that the former are a reality and the latter a matter of estimate.

"if the plaintiff's injuries interfere with his ability to earn his living, he is entitled to damages for loss of earnings actual and prospective. Actual loss of earning which has already accrued at trial is classed as special damage and will normally be calculated simply by reference to the period of disability and the pre-accident rate of earning. Future loss cannot however, be easily calculated because of the many imponderables which enter into the assessment and it is therefore classed as general damage. The court must estimate the period of future disability and the plaintiff's probable future rate of earnings, to arrive at a lump-sum and this must then be discounted to allow for the fact that he receives a lump-sum instead of payments spread over a period of time and, for the normal vicissitudes of life".

Loss of earnings which has already been suffered at the time of trial is something which can exactly be calculated and specifically claimed by way of special damages and these damages may also include other accrued losses such as medical expenses, or the cost of necessary transport already incurred which results from the wrong. Loss of accrued earning therefore calls for no discussion.

To illustrate this point is the case of Bhogal v. Burbidge.²⁰ A car driven by the appellant in which the first respondent was a passenger, collided with a lorry owned by the second respondent. As a result of this the first respondent suffered serious injuries and at the trial the judge awarded him K.Shs.61,256/35 as special damages and K.Sh.300,000 by way of general damages, which he defined as including; pain and suffering both past and future and loss of earnings since the date of the accident and a manifestly reduced capacity for physical work for the rest of his life. On appeal Harris J. said by way of clarification on the point of accrued loss of earnings, that,

the loss of earnings since the date of the accident until the trial should, strictly speaking have been assessed seperately as special damages. As it is we do not know how much of the 300,000 K.Sh. awarded as general damages relates to that loss of earnings and how much was awarded to compensate Mr.. Burbidge for his injuries."²¹

He decided that the amount awarded for loss of earnings should not be disturbed but he reduced the compensation for general damages considerably to 220,000 K.Sh.

Loss of future earnings is another matter, for what a person would have earned but for an injury can never be known. Yet it is a real and substancial loss.

Now the question is over what period of time must his earning capacity be measured? Is it to be measured over the period of time during which he would have reasonably expected to work if the there had not been an accident, or over the period of time he actually lived after the accident. The courts have been serving between these two approaches:

(a) Two approaches,

(i) (a) First approach:

Whether the damages of or prospective loss of earnings should be calculated by reference to the period during which he could have expected to work had it not been for the accident is discussed in two outstanding cases:

Roach v. Yales²² and Pope v. W. Murphy and Sons Limited.²³

In the first case the appellant sustained serious brain injuries in a motor accident. As a result, he constantly needed two attendants to look after him. His wife and sister-in-law gave up their jobs to do this. To calculate the loss of wages Slesser L.J. was of opinion that the appellant's normal expectation of life was 30 years so he should be awarded the amount of wages he would have earned throughout this period a deduction for the normal contingencies of life having been subtracted. In addition to this the cost of maintenance of his reduced expectation of life to 16 years must be given at about £3 per week. This view was more clearly expressed by James L.J. in the following words;

"The proper direction to the jury, as it seems to me, would have been to tell them to calculate the value of the income as a life annuity, and then make an allowance for its being subject to the contingencies of the plaintiff's retiring, failing in his practice and so forth."²⁴

The decision therefore was that the plaintiff should be awarded the wages he would have earned in his natural and normal expectation of life and not only for the number of years he actually lived after the accident.

In the second case the plaintiff incurred injuries as a result of a head on collision with the defendant's car driven by a third party. Therefore he brought an action for his shortened expectation of life and for loss of future earnings. Here again the court was of the opinion that damages in respect of prospective loss of wages should be the sum which the plaintiff would have earned, for what, but for the accident would have been his normal life, subject to certain deductions, to quote Streatfield J.,

"that the measure of damages is the probable income that the plaintiff would have had during his normal earning life, subject of course to the ordinary deductions in respect of the ordinary charges and chances of life".²⁵

It was thus held that the proper approach to the question of loss of earning capacity was one which compensated the plaintiff for what he had in fact lost; That what he had lost in this case were the prospective loss of earnings for the remainder of his normal expectation of working life. Accordingly, it was wrong to limit the damages for loss of future earnings to the period of the shortened expectation of life.

(ii)(a) Second approach:

Now coming to the second to the second approach that the plaintiff can recover only in respect of the period of his reduced expectation of life; The case

in point is that of Rose v. Ford.²⁶ Due to the negligence of the defendant, a young woman Rose was seriously injured in a motor accident including a combined fracture of her right leg and thigh. Two days later gangrene set in, and it became necessary to amputate the leg. But the injection had already spread above the point of severance, and two days later she died as a result of the injury, having been unconscious the greater part of the four days she survived the accident. Her father as her administrator brought an action claiming damages (inter alia) under the Law Reform (miscellaneous provisions) Act 1934 for the shortening of her life expectation. In this case however the issue of loss of earning was not in issue but it laid down the principle of a plaintiff recovering damages only for the days he survived after the accident. It was held that as the deceased survived the accident for two days, she would have been entitled to nonimal damages in respect of these two days only. A similar view was adopted in the case of Oliver v. Ashman.²⁷ Here a boy aged twenty months received a serious brain injury in a motor accident due to the admitted negligence of the defendants. As a result of the injury the boy became mentally defective, requiring constant care, control and medical supervision and such re-education as was possible. His life expectation was also reduced from about 60 to 30 years. In considering his future loss of earnings, it was contended that he would only be allowed to recover the lost wages limited only to the 30 year period he was expected to live. The case of

Harris v. Bright's Asphalt Contractors Ltd.²⁸

is by far the best illustration in this area. The plaintiff fell from a roof receiving serious injuries on his body. He was 35 years at the time of the accident and he brought the action two years latter claiming damages for his shortened expectation of life. On appeal the appellants argued that:

"it had never been suggested that a claim should include an item in respect of the possible earnings of the deceased person throughout his normal working life. To award damages on such a basis would not be justified because if the plaintiff were alive to earn the wages he would have to support himself out of them".

Holding that the respondent's claim for loss of earnings should be limited only to the period of two years that he was now expected to live, it was stated: ,

"Nothing can lengthen the plaintiff's life by the period by which it has been shortened as a result of the accident ... restitutio in that sense is impossible ... and I cannot think it right that I should give damages for loss of earnings for a period during which X - hypothesis he is not alive to earn them. If I were to give them I would not know upon what possible basis to assess them ... As a dead man has not to keep himself and cannot spend money, I should be giving him that sum on the footing that he was alive and able to earn the salary when infact he would be dead, and would not be able to spend it."29

Thus Slade J. held that 'a living person can, as a matter of law, recover nothing in respect of his loss of salary or wages between the anticipated date of

death due to his shortened expectation of life, and the date to which he could have normally lived.'³⁰

Out of these two approaches the first one supported by Roach K. Yates and Pope v. M. Murphy has an advantage that it does not allow the defendant an apparent benefit from the fact that he has caused a reduction in the plaintiff's expectation of life. Whereas in the second approach, the tortfeasor is enabled to say, in the words of Steatfeild J.:

"I have reduced your expectation of life, from say, twenty years down to five. You are entitled to a normal sum of loss of expectation of life as such, but with regard to your prospective loss of earnings you are only entitled to claim them over the period of time that I, the wrong doer, have left for you. You are not entitled to claim in respect of the period which but for my wrong, you would reasonably have expected to earn that income."³¹

(b) DEDUCTIONS

An important adjustment that would have to be made in assessing damages for loss of earnings is deduction. The problem here is in essence the need to avoid double compensation. The issue here is,

'To what extent if any, ought a benefit which comes to the plaintiff as a result of the wrong to be weighed against the loss resulting from it so as to reduce the amount of the damages which the defendant ought to pay?'

There is no single answer to this question. Indeed as will appear, different answers' have been given in different contexts: To quote Lord Reid in Parry v. Deaver,

'It is a universal rule that a plaintiff cannot recover more than he has lost but it is well established that there is no universal rule with regard to sums which come to the plaintiff as a result of the accident but which would not have come to him but for the accident ... The common law has treated this matter as depending on justice, reasonableness and public policy". 32

This being so, it will be illustrated by example

(i) Accident Insurance:

In the leading case of Bradburn v. Great Western Railway,³³ the plaintiff brought an action to recover damages for injuries that he sustained while he was travelling as a passenger on the defendant's line. The issue here was whether accident Insurance could be deducted from the compensation awarded to the plaintiff as loss of earnings. It was held that a sum ~~of~~ received by the plaintiff in respect of an accident Insurance policy cannot be applied in reduction of damages awarded to him for his personal injuries, Pigatt B. Said,

"the plaintiff is entitled to recover the damages caused to him by the negligence of the defendant and there is no reason or justice in setting off what the plaintiff

has entitled himself to and a contract with third persons by which he has bargained for the payment of a sum of money in the event of an accident happening to him. He does not receive that sum of money because of the accident but because he has made a contract providing for the contingency. An accident has to occur to entitle him to it but it is not the accident, but the contract which is the cause of his receiving it."34

Thus the reason for the decision was that it was not but a contract wholly independent of the relation between the plaintiff and the defendant which gave the plaintiff his advantage. Therefore though the circumstances are comparatively unusual in that the intentional conduct that is making the contract of Insurance precedes the contingency which leads to the benefit to the plaintiff nonetheless, that intentional conduct and not the contingency of the defendant's tort, is properly regarded as the cause of the receipt of the benefit. Lord's Morris and Reid contended in Parry's case that;

"The argument is in favour of non-deduction in that even if in the result of the plaintiff may be compensated beyond his loss he has paid for the accident insurance with his own money and the fruits of this thrift and foresight should in fairness enure to his and not to the defendant's advantage."35

(ii) Pension Rights:

Pension rights have raised controversy. In a case where as the result of an injury the plaintiff loses earning capacity, but also due to his consequent physical incapacity becomes entitled to a pension, the question arises; should the benefit of the pension be deducted from the amount awarded in respect of the loss of earnings? The cases present two answers. One answer is that the value of the pension ought to be deducted, for in Lord Morris' view in Parry's case,

"There is a firm and rationale principle that ... damages should be assessed so that an injured person will receive such sum of money as will represent the actual loss that has resulted to him..."³⁶

If then he is allowed both full damages for loss of earning capacity and his pension too, he receives more than he would have received but for the wrong. He becomes doubly compensated and the rationale principle is disregarded. The other answer is that a pension is something remote from the wrong, something which arises from his employment as an added remuneration over and above his agreed pay making it a separate part of his contract analogous to insurance. It follows according to this view that if he is disabled by his injury and has to give up his employment, he may take with both, Lords damages and pension too. This latter view has now prevailed for it was adopted in Parry v. Cleaver.³⁷ The plaintiff, a police constable, aged 35 was severely injured by a motor car driven negligently by the defendant.

As a result this entitled him as of right to a pension on being discharged from the police force for disablement. He therefore received a pension payable throughout his life. The full scope of this decision however, is not perhaps, entirely sure, because it turned only upon the matter of a disability pension and avenues were left for distinction. But in general it seems that the ruling was that pension rights whether under a contributory or under a non-contributory scheme, whether as a matter of binding obligation upon the employer or discretionary are to be disregarded; so that no deduction is to be made in respect of them as against a claim for lost earnings.

(iii) Payments by Third Parties:

The Courts appeared never to have taken into account in the assessment of damages for loss of earning capacity money gratuitously conferred from private services upon the plaintiff as a mark of sympathy and assistance. This approach is fully supported in Parry's Case³⁸ by majority and minority alike; Lord Reid said;

"It would be revolting to the ordinary man's sense of justice and therefore contrary to public policy that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large, and that the only gainer would be the wrong doer."³⁹

The best illustration in case law comes from North Ireland. In Redbath v. Belfast and County Down Railway,⁴⁰ the plaintiff, a victim of the railway disaster had received money from a distress fund to which the public had made voluntary subscriptions and the court refused to make any deduction for the money so received. Andrews C.J. in a passage cited by Lord Reid in Parry's Case stated:-

"It would be startling to the subscribers to that fund if they were to be told that their contributions were really made ease for in case and for the benefit of the negligence of the railway company."⁴¹

for if they were, then,

The inevitable consequence in the case of future disasters of a similar character would be that the springs of private charity would be found to be largely if not entirely dried up."⁴²

The comment of Shall J. in Jones v. Prunnell⁴³ is appropriate here.

"The law seems to me to have endeavoured to form a moral judgment as to whether it is fair and reasonable that a defendant should have the advantage of something that has accrued to the plaintiff by way of recoupment or other benefit, as a result of the defendant's infringement of the plaintiff's right."⁴⁴

(iv) Income Tax:

The case of British Transport Company v. Gowley⁴⁵ is the outstanding authority here. The plaintiff had been permanently disabled as a result of an accident caused by the negligence of the defendants. In awarding damages for loss of earnings the defendants contended that income tax should be deducted before the plaintiff could be given the amount due to him. Thus the only question was whether the amount of damages awarded for a loss of earnings should take into account the income tax and surtax which the plaintiff would have had to pay if he had continued at work. In the house of Lords, counsel for the defendant argued,

"excluding cases of Penal or exemplary damages, the rule is that where injury is to be compensated by damages the tribunal assessing them should as nearly as possible arrive at a sum which would put the injured party to the same position financially as he could have been in if he had not sustained the injury. Where damages involve a pre-estimate of possible future earnings one should take into account the tax which could have been payable on them."⁴⁶

It was further argued,

"The plaintiff must be compensated for what he has in fact lost. In cases of tort the only damages recoverable are those directly attributable to it. He may get less than a complete indemnity but in no

circumstances can he get more. What he is to be compensated for in the case of loss of earnings capacity due to physical injuries is loss of his capacity to earn which is a capital asset. The compensation will be the value to him of the lost earning capacity and nothing more. The gross amount of money which he could have earned would not be fair compensation; it is part of the evidence from which unfair compensation may be deducted. The loss can only be measured by taking into account the diminution of the fruits of his work which could have occurred if he had not been injured. If the compensation were assessed on the basis of those earnings without any diminution for income tax and surtax the plaintiff could be receiving more than he could have received if he had not been injured and so could be put in a more beneficial state."47

Counsel for the appellant were of the opinion that one cannot earn money without having to pay income tax and therefore it must be taken into account the insurance cases being irrelevant;

"The object of awarding damages for personal injuries is to compensate the injured person for what he has lost in the past and is likely to lose in the future. All that the plaintiff has lost in the past and is likely to lose in the future is the amount of his earnings less tax. The true way to compensate him is to give him the sum equivalent to what he would have enjoyed from his earnings after paying the liabilities attached to these earnings. To do this otherwise could be to enable him to make a profit out of his injuries."48

The House of Lords decided the case in favour of the appellant holding in assessing damages for permanent loss of earning capacity or loss of earnings in an action for personal injuries an allowance must be made for the tax which would have been payable on the earnings which the plaintiff would have otherwise obtained. This condition is applicable subject to these two conditions. In calculating damages reference is made to income which could be taxable, and, the sum awarded by way of damages is by law or by concession of the litigants based on inland revenue practice not taxable because it is deemed to represent a capital sum.

(v) Social Security

The advent of large scale-national insurance and social security introduced by the national Insurance Legislation from 1946 has inevitably affected the law in this field. The issues here are;

"should the benefits derived from the state replace the right to damages? Or should they on the other hand be alternative to the common law claim? Should they perhaps be regarded as wholly collateral, so as to let the plaintiff take with both hands? Should there be a compromise whereby the state benefits count against the damages so as to reduce them, but not to extinguish them entirely?"⁴⁹

This problem has troubled both parliament and the Courts.

Parliaments treat the challenge by adopting though only partially, and within a limited sphere the fourth solution. It is provided by the Law Reform (personal injuries) Act 1943 section 2(i) that;

"In an action for personal injuries, there shall in assessing those damages be taken into account, against any loss of earnings or profits which have accrued or probably will accrue to the injured person from the injuries, one half of the value of any rights which have accrued or probably will accrue to him therefrom in respect of industrial injury benefit sickness (or invalidity) benefit for the five years beginning with the time the cause of action accrued."

It would have been thought this subsection would at least necessitate the judge separating his award for "loss of earnings" from other heads of damage, but the legislature saw a particular virtue in excusing the judge this task by adding;

"This subsection shall not be taken as requiring both the gross amount of the damages before taking into account the said rights and the net amount after taking them into account to be found separately."50

Some have treated the expression "loss of earnings" as indicating that damages cannot be awarded for loss of earning capacity. Others have held that the expression excludes loss that a plaintiff might incur through being a handicap on

the labour market. Neither view seems tenable. The concern of the section is to define not the recoverable heads of damage, but only those heads of damage from which the deduction of one half is to be made. And if in the event of a recession the plaintiff is likely, because of his injuries to be employed sooner than an ordinary person in his trade the Court's estimate of the cash value of that likelihood falls within the expression "loss of earnings." If it should be English law of that damages for loss of earning capacity beyond loss of earnings are recoverable then this section does not prevent that excess from being recoverable. It merely provides that insurance benefits shall not be deducted from that excess. Sometimes the plaintiff is awarded a lump-sum disablement gratuity in respect of a permanent partial incapacity. The deduction must then be such sum as would bear the same proportion to help the gratuity as that part of the five years from the accident which remained unexpired when the gratuity was paid to the plaintiff's expectation of life.

(2) MEDICAL HOSPITAL AND NURSING EXPENSES

The plaintiff is entitled to damages for the medical expensses reasonably incurred by him as a result of the injury. These damages may be awarded in respect of both past and future medical expenses and may include the cost of; medical treatment, attendance of doctors and nurses, medicine and appliances,

hospital fees, transportation to hospital nursing attendance between the place of injury and the plaintiff's home. Whilst injury may cause loss of earnings, it may also necessitate extra expenses expenses arising from the injuries which have accrued by the time of trial may of cause like accrued loss of earnings, be pleaded as special damages and recovered as such. But here again future expenses like future earnings are strictly incalculable and the assessment of damages in respect of them, is similarly beset by complications and uncertainty so that once more the multiply method is used. Typical expenses are the cost of future nursing and medical care. However the nursing and medical attention have to be assessed by a different multiply method depending upon the duration of the injury and this should not affect the award of future loss of earnings which has been calculated by a different and independent multiply method.

If a plaintiff has incurred medical or hospital expenses before trial he will still be able to recover them even though he would have obtained free faculties under the National Health Services Act, provided that the expenses are in other respects reasonable. In Oliver v. Ashaman⁵¹

where there was evidence that the plaintiff could receive better care and medical treatment in a state institution than at home for the rest of his life, Parker C.J. was right when he said;

"where it is intended to find a private institution for an incapacitated child although state institutions are available and although it is probable that the child's condition will later be such that it will have to enter state institution, he is entitled to compensation for the probable cost of private hospital treatment".⁵²

Benefaction may come to an incapacitated person not in money but in kind. In particular relatives may provide the required attendance and so save him the expenses of a paid nurse and the like in these circumstances it is questionable whether a plaintiff can claim to be awarded damages based on the value of the attendants which have been rendered to him without changes, unless the the benefactor has incurred positive financial loss by giving up their employment or by himself incurring expenses where the plaintiff's medical expenses are paid by employer, husband or parent upon whom rests on obligation to pay them whether by contract or under general law. It appears that a plaintiff cannot include these expenses within his or her claim for damages. This has been decided in relation to a wife in Gage v. King⁵³ where Diplock J. refused a recovery of the expenses

incurred for, the plaintiff's wife's medical care, which had been paid by her husband, in the absence of a legal liability, on the wife to pay for them. The husband and wife had a joint bank account from which the medical expenses of the wife's nursing care were paid. The issue was whether the husband had to recover these expenses as special damages or the wife recover them in her own right. Counsel for the plaintiff argued for the wife;

"The mere fact that the expenses incurred by reason of the injuries to the wife were paid out of a joint banking account fed by money belonging to both, although in equal proportions means that the wife has suffered a loss. The balance in the account belongs to both and had the wife herself drawn the cheques in payment for the expenses she could have recovered the whole amount. It can make no difference that the cheques were in fact drawn by her husband. It is/was as much her money as his. Alternatively one half of the sum paid is recoverable by the wife as her loss."54

Diplock J.'s argument against the wife's recovery of the award, was that he considered that as the husband was 2/3rds to blame for the accident and had a legal duty, as a husband, to provide the necessaries for his wife he should only be awarded a 1/3 of the special damages claimed.

This is a fair compensation otherwise the plaintiff would have been over compensated.

In the not infrequent cases where a wife is prepared to care for her seriously incapacitated husband until such time as the task becomes too great for her, after which her husband will have to enter a home or institution, generally the damages for the cost of outside care are calculated only from the time when it is anticipated that the husband will be transferred to the home or institution. It is true that if the plaintiff were to be allowed recovery of damages in respect of the gratuitous extra labour taken on by his relatives he might consider himself to be under a moral obligation or in Green L.J's words, in Roach v. Yales; ⁵⁵

'He could literally feel that he ought to compensate them for thier work. In this case the plaintiff rendered a helpless invalid by the injury did indeed recover substantial damages for the prospective cost of nursing attendance although he was receiving this gratuitously at the hands of his wife and sister-in-law but these relatives had given up paid work in order to care for him.'

However in Schneider v. Eisovitch, ⁵⁶ a contrary view was held by Paul J. that, he did not think that the test would be whether there was a moral duty to pay. Here the plaintiff was injured while holidaying in France. Her brother-in-law and his

wife flew out there from England to assist her back home and she claimed as part of damages these out of pocket expenses.

Paull J. said:-

"Before such a sum can be recovered, the plaintiff must show first, that the services rendered were reasonably necessary as a consequence of the tort feason's tort, secondly, that the out of pocket expenses of the friend or friends who rendered these services are reasonable bearing in mind all the circumstances including whether expenses would have been incurred had the friend or friends not assisted, and, thirdly that the plaintiff undertakes to pay the sum awarded to the friend or friends".57

He held that the first two conditions were satisfied and thus the plaintiff could succeed in claiming them. The plaintiff said,

"Particularly as she speaks no French, had of necessity to have help. She was entitled to hire help. She could have ... hired an English speaking nurse to accompany her home."58

Paull J. was of the opinion, relating to the third condition, that when a friend does you a kindness, he does this freely expecting no reward, and to pay him back his out of pocket expenses for his help would alter the character of his services. In view of this he rejected this part of the claim.

Therefore any pecuniary damage which is not a remote consequence of the personal injuries inflicted to the plaintiff by the defendant is recoverable. A plaintiff who proves that he has suffered a pecuniary loss does not fail because he cannot quantify it precisely for pecuniary loss indirect consequence of a tort is recoverable even though it is awarded in respect of an interest which is not protected by that or any other tort.

3. NON PECUNIARY LOSSES

In a claim for damages for personal injuries, whether caused by trespass or by negligence, or by breach of statutory duty the damages are apart from special damages, at large, and will be given for the physical injury itself and, in case of loss of limbs, disfigurement or disablement, for its effects upon the physical capacity of the injured person, to enjoy life, as well as for his bodily pain and suffering and for shock or injury to health. Such damages cannot be a perfect compensation but must be arrived at by a reasonable consideration of all the heads of damage in respect of which the plaintiff is entitled to compensation and because of his circumstances, making allowances for the ordinary accidents and chances of life.

Tort infact straddles all the recognised heads of non pecuniary loss. There are several such heads; bodily harm ... which includes both loss or impairment of anatomical structures (bodily tissues) and loss or impairment of physiological functions; Physical pain and suffering; mental suffering (injury to feelings) loss of ammenities and expectations of life; loss of society of spouse or child. These damages are to be campensatory and are not punitive. Their size must be in relation to the various effects which they produce on the plaintiff; inflation must be taken into account.

(1) BODILY HARM:

The most obvious loss in personal injuries cases is the injury itself. The loss or impairment of some of the physical members such as an eye, a hand, or a leg, sums which are necessarilly conventional (since no money will compensate the loss of a pound or any other weight of flesh) and which varies with the gravity of the harm and with the importance of the member impaired, are awarded under this head. But it must be appreciated that the money does not represent the 'price' of the 'flesh' for a man is not compensated for the physical injury, but he is compensated for the loss which he suffers as a result of the injury.

(a) Loss or Impairment of anatomical and Physiological Functions.

In personal injuries a defendant is liable for the harm his negligence causes, not for the harm later ensuing from the operation of a new and independent cost. If a man who is injured is thereby made more vulnerable to injury in the future, that will count in assessing the damages. The loss of one of eye increases the risk of total blindness; but it is not to be compensated as if it had caused the blindness that followed the blinding of the other eye by accident later. As such the courts hold that where further injury arises which is not caused by the tort in question, the full extent of that harm is not recoverable but once the court is satisfied that the plaintiff is either more likely to be harmed in the future or, if harmed likely to suffer more damage, the court will increase the damages to take account of that likelihood but no more. The case of Farehal Meral v. Kenatco Transport Co.Ltd. and Tarantini Michele⁵⁹ from the high court of Kenya illustrates this point. A car driven by the second defendant and agent of the first defendant, collided with the plaintiff's vehicle and caused him multiple injuries. Amongst these injuries, the conspicuous one was damage caused to the eyes. The left eye was now virtually a total loss. The right

eye after the operation to remove the broken glass was now scarred on the cornea, and a splinter of glass remained in the eye because removal could cause further damage. This eye was now astigmatic and spectacles were needed to correct this. The possibility of the plaintiff becoming totally blind if the right eye failed to function was taken into account in assessing general damages.

In other instances damages have been awarded for loss or impairment of anatomical structures. These include loss of a leg, an arm, the tongue, the external ear, loss of teeth or impairment such as damage to the spine, an arthritic knee, a limp arm, that is, loss of use of the hand or injuries to the wrist, and even loss of fingers. In the case of Mworia v. Corrugated Sheets Ltd,⁶⁰ the plaintiff lost four of his fingers when his left hand was caught in the rollers of a roller budler machine. The medical evidence said that the left hand was useless and had no capacity to grip. He underwent three operations and needed to take great care of the stump of amputated hand as the grafted skin was very delicate. It would take a long time to adjust to a daily routine and work without the use of the left hand. This being a permanent disability, the number of jobs open to him were very few. Therefore in awarding damages a global sum for pain and suffering which still continues to some degree in cold weather, loss of amenities of life and loss of future earnings were taken into account by Sir D. Sheridan, when he awarded a lump sum of Sh. 76,271/85.

Alternatively the loss of any physiological functions affects a separate head of damages and are awarded for the loss of performance of functions as well as for loss of enjoyment. Sometimes the effect of interference with his physiological functions is to produce a complete change of character and where, as in Stewart v. War Office⁶¹ a company director is made like an unstable defective of twelve years, having lost that portion of the brain which controls thought and behaviour, he is entitled to substantial damages on that account, quite apart from those of loss of earnings and mental suffering. Damages under this head have been allowed for loss of hearing, loss of smell and or taste, for impairment of speech, for inability in a male or female to procreate, double vision, sleeplessness, in fact any loss of bodily vigour, any impairment of function or reduction in health standard is sufficient ground for the plaintiff to claim damages. In Smith v. Bren and Lewes Hospital Management Committee,⁶² a middle aged woman was given an overdose of streptomycin. This resulted to damage of her eighth cranial nerve which affected the organs of balance in her ears. This was an unrepairable condition and was with her all day and every day. It would create an impression of intoxication as things seemed to be moving about. She suffered permanent embarrassment and it seriously affected her social life. This woman was awarded £2,500 (including (£686) special damages) as compensation for impairment of her balance system.

(b) Pain and Suffering:

In all cases of personal injury these will be some pain and suffering; and probably some degree of shock. The worse the injury is, the greater the pain and suffering is likely to be, The pain and suffering is now as a term of art; so constantly has it been used by the courts and there now exists no exact difference between pain on the one hand and suffering on the other. It has been suggested that pain is the immediate felt effect on the nerves and brain of some lesion or injury to a part of the body; it will include for the purpose of damages, any pain caused by medical treatment or physical operation rendered necessary by the injury inflicted by the defendant, while suffering is distress which is not felt as being directly connected with any bodily condition. Suffering would include fright at the time of the injury, fear of future incapacity either as to health or possible death to sanity or the ability to make a living, and humiliation sadness and embarrassment caused by disfigurement. An award for pain and suffering may take into account suffering caused by the plaintiff's knowledge that his expectation of life has been reduced and that he must spend his remaining days in pain and misery. Further, if injury so disabled the plaintiff as to lessen more negatively his enjoyment of life by impeding or preventing the pursuit of his former

activities, he may recover damages for what is now generally termed "loss of amenities". This element could probably have been subsumed under suffering but the courts are today intending to erect it into a separate head of damage, although in practise it turns out to be little more than a verbal distinction, whenever as is common, a single assessment is made to cover both matters. For instance, in the holding of Moris L.G.E. in the case of Njoroge Kioi v. Arjan Singh,⁶³ it was there stated;

"Taking into account the extremely severe injuries suffered by the plaintiff and the life long prospect of perpetual unemployment, impairment and almost complete inability to share in the usual enjoyment of life..."

No attempt was made to categorise the different heads of damages and a lump sum of ^{KSL} £200,000 for general damages was awarded. Here the plaintiff Njoroge Kioi who was a taxi driver for the defendant Arjan Singh,, sustained an injury to spine. His condition deteriorated over the years and in 1972, 5 years after the accident his condition was described as 'a paralysed cripple with but little power'. Therefore an action was brought before the court for him to recover damages for personal injury.⁶⁴

(c) Mental Suffering

In some cases pain and suffering is related to mental suffering. Sometimes traumatic injury may also cause mental anguish. For instance disfigurement and diformity will often be accompanied by mental suffering for which damages are allowed. In Flint v. Lovell⁶⁵ damages were awarded for knowledge of impending death, similarly in Davies v. Smith,⁶⁶ the court expressly awarded damages for the mental agony suffered by the plaintiff from the knowledge that his life was cut short.

(2) Loss of Amenities of Life

This head of non-pecuniary loss is sometimes more aptly called 'enjoyment of life' or less aptly 'loss of faculty'. It embraces everything which reduces the plaintiff's enjoyment of life, considered apart from pain and suffering and apart from any material loss which may be attended upon the plaintiff's injuries which deprive him of the ability to pursue the activities he pursued beforehand. To cite the words of Bukett L.J. in Manley v. Rugby Portland Cement Co. Ltd.⁶⁷

"The man made blind by the accident will no longer be able to see the familiar things he has seen all his life; The man who has had both legs removed will never again go upon his walking excursions - things of that kind are loss of amenities"

In Kenya the case of Evelyn Opika v. Akamba Road Public Road Services Ltd. (1st defendant) and Ndambuki Ndunda⁶⁸ (second defendant) illustrates this idea. The plaintiff was injured in a bus accident while travelling between Nakuru and Nairobi. Her right arm was paralysed permanently, it has been left there as a natural limb only for decorative purposes. The judge held that the second defendant was a hundred per cent liable for the accident, thus the 1st defendant was more vicariously liable. In awarding general damages the judge took into consideration pain plus suffering, future prospects and loss of amenities. As regards the latter, Judge Muli said:

"The woman has lost her vital right hand. The arm is useless. She cannot use it even to shake hands with her friends or to eat with it. She cannot attend to her personal needs with it including dressing herself up. She has and will continue to suffer serious social handicaps. She cannot dance or swim or even enjoy other social functions ..."

He awarded her £8,500 to compensate for her injuries.

Lord Reid's opinion in West v. Shepherd⁶⁹ supported this decision:

"if there had been no curtailment of his expectation of life, the man whose injuries are permanent has to look forward to a life of frustration and handicap and he must be compensated, so far as money can do it for that and for the

mental strain and anxiety which results ... there are two type of compensation. One so that the man is simply being compensated for the loss of his leg or for the impairment of his digestion. The other is that his real loss is not so much his physical injury as the loss of opportunities to lead a full and normal life which are now denied him by his physical conditions ... for the multitude of deprivations and even partly annoyances which he must tolerate. Unless unprevented by authority I would think that the ordinary man is, at least often the first few months of loss, concerned about his physical injury than about the distructions of his normal life. So I would think that compensation should be based much less on the measure of the injuries than on the extent of the injured man's consequential difficulties in his daily life ... I think that there are two elements; what he has lost and what he must feel about it and of the two I think the latter is generally the more important to the injured man."

Loss of amenities is an an objective matter, and is divorced from the prime, non-pecuniary category of pain and suffering with its subjective standard. With this, it was inevitable that the subjective and objective test would clash. It came with the case of the unconcious plaintiff, first in Wise v. Kave⁷⁰ in the court of appeal and soon after in West v. Shepherd⁷¹ in the House of Lords.

Damages under this head will not be reduced because the plaintiff is unconscious of his loss. This view was held by Lord Morris in West v. Shepherd when he said:

"An unconscious person will be spared pain and suffering and will not experience the mental anguish which may result from knowledge of what in life has been lost or from knowledge that life has been shortened. The fact of unconsciousness is therefore relevant in respect of and will eliminate these heads or elements of damage which can only exist by being felt or thought or experienced. The fact of unconsciousness does not however, eliminate the actuality of the deprivations of the ordinary experiences and amenities of life which may be the inevitable result of some physical injury."⁷²

As with pain and suffering it is virtually impossible to give clear guidance on amounts to be awarded for loss of amenities, since here awards vary with the particular injury, the particular circumstances and the particular judge. It is useful to attempt to ascertain the range of awards under this head referring to case where the plaintiff has been since he is unaware of his plight, and no award can be made for physical pain or mental suffering, the whole non-pecuniary award is attributable to loss of amenities. In Wise v. Kaye⁷³ where this was the position, £15,000 was awarded for loss of amenities; In West v. Shepherd⁷⁴ the increase to £17,500 was based upon the fact that the plaintiff was dimly aware of what had befallen her.

The damages awarded for loss of amenities will depend to some extent to the plaintiff's expectation of life at the date of the trial. This applies no less to an unconscious plaintiff than to a conscious plaintiff. Singleten J. said in Bird v. Cocking,⁷⁵

"Just as a consideration of age must be remembered when arriving at a loss of earnings in the case of a plaintiff who can never work again, so it appears to me, must that element be remembered, when damages are being assessed for loss of amenities of life ..."

As loss of amenities and expectation of life are inter related to some extent, the latter is the next heading to be discussed.

(3) Loss of Expectation of Life.

In 1934 the court of appeal in Flint v. Lovell⁷⁶ decided that the injury of the plaintiff shortened his expectation of life. He was entitled to damages in respect of this shortening, thus establishing a head of damage since known as "loss of expectation of life." In this case the trial judge found that the healthy sixty nine year old plaintiff, in the ordinary course of events could have lived for at least another eight or nine years. He also found that as a result of his injuries the plaintiff was

unlikely to live more than a year. The judge therefore awarded £4,000 general damages which no doubt included a considerable amount for a loss of expectation of life, which formerly probably always formed an implicit part of the damages for non-pecuniary losses awarded in personal injury cases being in effect incorporated into the general recovery for pain and suffering. This case therefore gave loss of expectation of life a separate existence. In Rose v. Ford⁷⁷ the House of Lords decided that the damages for loss of expectation of life could be awarded and did award £1,000 to the plaintiff under the Law Reform (miscellaneous provisions) Act 1934, but their lordships expressly left open the question of the proper measure of damage in claims of this nature.

Until Benham v. Gambling⁷⁹ awards of damages for loss of expectation of life had varied enormously. The House of Lords in Benham v. Gambling which was also a claim under the law Reform Act in effect decided that only moderate awards should be made under this head. The effect of the case was to cut down every substantially the awards for loss of expectation of life in the case of the deceased victims, the House in Benham v. Gambling, itself substituting for a figure £1,200 an award of £200. The real reason for prescribing such moderate

awards was to ^{curtail} by a process of judicial legislature, the spate of litigation set off by a combination of the provisions of the Law Reform (Miscellaneous Provisions) Act 1934 as to survival of the actions and the House of Lords even decision in Rose v. Ford⁷⁹ whereby the estate of the deceased person reaped the benefit of a non-pecuniary loss basically personal to the deceased himself. The House of Lords in Benham v. Gambling was really required, within the framework of precedent, to say the same thing for actions by living plaintiffs, for logically there can be no distinction where the standard is set as an objective one, between the amount awarded to the estate of the deceased person. Indeed in Oliver v. Ashman⁸⁰. "Pearce L.J. said that there was "no distinction between damages for loss of expectation of life awarded to a living plaintiff and those awarded to the executors of a dead man."⁸¹ "Lord Devlin thus rightly stated in West v. Shepherd⁸² that Benham v. Gambling⁸³ "was intended to set and has set a standard of uniformity of the assessment of damage for the loss of expectation of life where there is no mental suffering."

The relevant principles were stated by Viscount Simon L.C. in Beham v. Gambling thus;

"In the first place, I am of opinion that the right conclusion is not to be reached by applying what may be called the statistical or actual test ... the thing to be valued is not the prospect of length of days but the prospect of a predominantly happy life. The age of the individual may, in some cases be a relevant factor. For example, in extreme old age the hunting of what life may be left, may be relevant, but as it seems to me, arithmetical calculations are to be awarded only for the reason that it is of no assistance to know how many years may have been lost, unless one knows how to put a value in the years. It would be fallacious to assume, for this purpose that all human life is continuously an enjoyable thing, so that the shortening of it calls for compensation to be paid to the deceased's estate on a quantitative basis. The ups and downs of life, its pains and sorrows as well as the joys and pleasures - all that makes up life's fitful fever - have to be allowed for in the estimate in assessing damages for shortening of life, therefore, such damages should not be calculated solely or even mainly, on the basis of the length of the life that is lost ... The question thus resolves itself into that of fixing a reasonable figure to be paid by way of damages for the loss of a measure of prospective, happiness. Such a problem might seem more suitable for discussion in an essay in Aristotelian ethics than in the judgment of a court of law, but in view of the earlier authorities we must do our best to contribute to its solution. The learned judge observed that the earlier

decisions quoted to him assumed that human life is on the whole good. I would rather say that, before damages are awarded in respect of the shortened life of a given individual under this head, it is necessary for the court to be satisfied that the circumstances of the individual life were calculated to lead in balance, to a positive measure of happiness, of which the victim has been deprived through the defendant's negligence. If the character or habits of the individual were calculated to lead him to a future of unhappiness or dispondency that would be a circumstance justifying a smaller award. As Lord Wright said in Rose v. Ford special cases suggest themselves where the termination of a life of constant pain and suffering cannot be regarded as inflicting injury or at any rate as inflicting the same injury as in more normal cases. I would further lay it down that, in assessing damages for this purpose, the question is not whether the deceased had the capacity or ability to appreciate that his further life or earth would bring him happiness. The test is not subjective and the right sum to be awarded depends on an objective estimate of what kind of future life the victim might have enjoyed whether he had justly estimated that future or not. Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not of loss of future pecuniary prospects.

The main reason, I think, why the appropriate figure of damages should be reduced in the case of a very young child is that there is necessarily so much uncertainty about the child's future that no

confident estimate of the prospective happiness can be made. When an individual has reached an age to have settled prospects - having passed the risks and uncertainties of childhood and having in some degree attained to an established character and to firmer hopes - his or her future becomes mere definite and the extent to which good future may probably attend him at any rate becomes less incalculable. I would add that in the case of a child, as in the case of an adult, I see no reason why the proper sum to be awarded should be greater because the social position in prospects worldly possession are greater in one case than another. Lawyers and judges may here join hands with moralists and philosophers and declare that the degree of happiness to be obtained by a human being does not depend on wealth or status.

It remains to observe as Goddard L.J. pointed out, that, stripped of technicalities, the compensation is not being given to the person who was injured at all, for the person who is injured is dead. The truth of course is that in putting a money value on the prospective balance of happiness in years that the deceased might otherwise have lived, the jury or judge in fact is attempting to equate incommensurables. Damages that would be proper for a disabling injury may well be much greater for deprivation of life. These considerations lead me to the conclusion that in assessing damages under this head whether in the case of a child or an adult, very moderate figures should be chosen. While noble and learned friend Lord Roche was well advised when he printed out in Rose v. Ford the danger

of this head of claim becoming unduly prominent and leading to inflation of damages in cases which do not really justify a large award.

My Lords, I believe that we are all agreed in thinking that the proper figure in the case would be £200 and that even this amount would be excessive if it were more favourable. In reaching this conclusion, we are in substance correcting the methods of estimating this head of loss, whether in the case of children or adults, which have grown up in a series of earlier cases, and which Asquith J. naturally followed and are acquiring a standard of measurement which, had it been applied in these cases would have led at any rate in many of them, to reduced awards. I trust that the views of this house expressed in dealing with the present appeal, may help to put a line or standard of measurement than has hitherto prevailed for what is incapable of being measured in coin of the realm with any approach to real accuracy."84

In this speech the principles which should govern the assessment are fully laid down. The prime factor to be kept in mind is that what has to be valued is "the prospect of a "predominantly happy life," what has to be fixed is "a reasonable figure to be paid by way of damages for the loss of a measure of prospective happiness..." If the character or habits of the individual were calculated to lead him to a future of unhappiness or dissipation, that would be a circumstance for justifying a smaller award. In one case the court reduced what would otherwise have been its award because the deceased had led the life of a criminal and consequently, in the assumption of the court, an unhappy one. Under this head of damages, the test must be objective not subjective and the damages are in respect of loss of life not of future pecuniary prospects and wealth and social status must be ignored because happiness does not necessarily depend on them.

With rare exceptions pounds 200 was taken as the invariable figure for the ordinary adult death, as the recognised amount awarded in Benham v. Gambling. However, in Naylor v. Yorkshire Electricity Board⁸⁵ the amount was raised to pound 500 because the deceased was not a child and further increased the sum taking into account a quarter of a century's inflation of the currency. The result of this decision of the House of Lords to raise the amount because of inflation is that the conventional sum to be awarded stands today at pounds 500. "Except for the extremities of childhood and old age prospective length of years makes no difference.

The sum of pounds 500 as a standard for compensation for loss of expectation of life, has been followed in East Africa. The case of S.A. Henwood v. D.A. Naumoff⁸⁵ whereby Mrs. Henwood lost her husband for a few months due to the negligent driving of the defendant is not able in the fact that the pounds 500 awarded under the Law Reform Act 1846 - 1908 was not challenged by either party in the court of appeal.

(4) Loss of Society of Spouse or Child:

Today, this head of damages is recovered only for the loss of consortium of a wife, from its social as opposed to its financial aspect in a husband's action per Quod Consortuim Amisit. Lord Porter in Best v. Fox⁸⁷ stated the present position thus:

"Today the damages which a husband receives for injury to his wife are commonly measured by his expenses, whether for medical treatment of the wife or in payment for household services which her injuries prevent her from performing, and little if any attention is paid to a loss of consortium which involves other considerations beyond those two. The expenses so recovered by the husband fall upon him whereas his wife does not incur any similar liability and therefore it is natural that he should recover and she should not."

A wife is not entitled similarly to claim for loss of consortium of her husband, nor may a parent claim for loss of society of his or her child in the action per quod servitum amisit and even in the husband's claim the consortium aspect is probably of little importance today.

The action per quod servitum amisit may be defined briefly thus; it is a tort to the husband parent or master for a defendant to act so as to deprive him of the services, and also in the first case of the consortium, of his wife, child or servant respectively in circumstances where the action is also a tort to the wife child or servant. As such in the past, torts infringing family relationships provided a head of damages for recovery by the plaintiff for the loss of the society of his or her spouse or child but, with the abolition of these torts, today they are under this head, the husband's action per quod consortium amisit.

In assessing damages for non-pecuniary loss it has been held to be irrelevant that the plaintiff would be unable to enjoy the damages personally because the gravity of the injuries here made him powerless to dispose of them. This was first decided in Wise v. Kaye⁸⁸ and was subsequently endorsed by the majority of the House of Lords in West v. Shepherd.⁸⁹ Lord Morris here said:

"if damages are awarded to a plaintiff on correct bases, it seems to me that it can be of no concern to the court to consider any question as to the use that will thereafter be made of the money awarded. It follows that if damages are assessed on a correct basis there should not then be a paring down of the award because of some thought that a particular plaintiff would not be able to use the money."⁹⁰

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Through this discussion on personal injury, we have seen that the law tries as much as possible to take into account injuries incurred by the plaintiffs. A uniform standard of precedence is thus maintained in both pecuniary and non-pecuniary losses, as regards compensation is concerned.

CHAPTER FOUR:

Loss of or Damage to Property:

Loss or damage to goods is an actual taking of, or any direct and immediate injury to goods in the possession of the plaintiff, as stated in Bullen & Leake's Pleadings:

"The plaintiff in an action of trespass must at the time of the trespass have the present possession of goods, either actual or constructive, or a legal right to the immediate possession (as, e.g. a bailor in the case of a bailment determinable at his will) which is said in the case of personal property to draw to it the possession."91

But as in the case of trespass to land, any kind of possession is good against a wrongdoer. A reversioner cannot sue in trespass, though he may bring an action of cause for any permanent injury to his reversionary interest.

Property by its nature can be divided into two categories; movable chattels and immovable chattels. In the former are included ships, cars, furniture or stocks or shares and these are subject to the torts of conversion and detinue. In the latter 'land' is the best example and is subject to the tort of trespass.

1. Chattels:

"Trespass to chattels is actionable without proof of actual damage and a plaintiff is at least

entitled to nominal damages for any unauthorised direct physical interference with chattels in his possession,"⁹² as stated in Isaack v. Clarke. A stress on value runs through the cases on damage to property, a stress which is not found in the other branches of the law of damages. Depending on the circumstances, value can be interpreted into various ways: sometimes it connotes 'exchange value,' the purchasing power which a chattel confers on its owner, measured in terms of what other commodities you may obtain in exchange. Value may be an estimate of how much money could be in exchange for certain goods:

The value of a property to its owner is identical in amount with the adverse value of the entire loss and indirect that the owner might expect to suffer if he were deprived of his property.

Despite these varying meanings of value the courts' attitude to the interpretation of value has always been the 'standard market value, thus, all these difficulties are avoided. Where the goods have been destroyed, for instance the normal measure of damages is the amount by which its value has been diminished, and in the case of ships and other chattels, this will always be ascertained by reference to the cost of repair,

but if the repair serves only partially to make good the damage inflicted, the plaintiff can recover both the cost of repairs and the outstanding diminution in value. Where the goods still exist and have been restored to the plaintiff, but have depreciated in value, the measure of damages is the extent to which they have depreciated.

(a) Negligence:

In cases where a chattel has been damaged by negligence, the owner of the chattel or any other person entitled to sue may recover the cost of repairing it, and the difference, if any, between the value of the chattel before it was damaged and its value after repair. If the chattel was damaged beyond repair, its value is recoverable, and this is ordinarily the market price of a similar article. This point is illustrated by the case of Darbishire v. Warren.⁹³ Here, the plaintiff's car was damaged by the negligence of the defendant. The vehicle having been badly damaged, the plaintiff was warned that it was uneconomical to have it repaired. Nevertheless, he spent £192 for its repair while, his car's value was about £85 at the time of the accident or, another similar make found in the market could be valued at the range between £85 and £100. The plaintiff's insurance company compensated him with £80 for the value of the car. Therefore he brought an action to claim the amount between

the insurance compensation and the one he used to repair his car. In defence the defendant contended that the rules of mitigation could appropriately be applied against the plaintiff. In this principle, it is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realises that an interest of his has been injured by a breach of contract or a tort and he is then bound to act as best as he may, not only in his own interest but also in those of the defendant. He is however, under no obligation to injure himself, his character, his business, or his property to reduce the damages payable by the wrong doer. He need not spend money to minimise the damages or embark on dubious litigation. Nevertheless, the burden of proof of mitigation is upon the defendant.

In tort cases, a defendant may, to diminish the damages show that the plaintiff has not done his best to minimise his loss or that the loss has been increased or affected by some act or conduct of the plaintiff, Where the defendant seeks to prove that the plaintiff has himself

increased the damage, the onus is upon him to show both that the damage has been increased by the plaintiff's by unreasonable conduct and that the damage would probably have been less if the plaintiff had acted reasonably. In this case Pierson L.J. observed:-

"in my view it is impossible to find from the evidence that the plaintiff took all reasonable steps to mitigate the loss or did all that he reasonably could do keep down the cost. He was fully entitled to have his damaged vehicle repaired at whatever cost, because he preferred it. But he was not justified in charging against the defendant the cost of repairing the damaged vehicle when that cost was more than twice the replacement market value and he had made no attempts to make a replacement vehicle"94

Infact the defendants submitted,

"it has come to be settled that in general the measure of damage is the cost of repairing the damaged article. But there is an exception if it can be proved that the cost of repairs greatly exceeds the value in the market of the damaged article. This arises out of the plaintiff's duty to minimise his damages!95

Greer L.J. in his judgment said, 'where you are dealing with goods which can be readily bought in the market, a man whose rights have interfered with is never entitled to more than what he would have to pay to buy a similar article in the market.

That rule has been acted upon over and over again, and that I think means that, where there is a market, the man whose rights have been interfered with is bound to diminish the damages by going into the market and buying the goods in the market, so as to put himself in the position in which he would have been if he had not suffered any wrong at all.' Therefore it was held that the damages were to be assessed on the basis of the market price, not the higher cost repairing the damaged car, because the plaintiff had not as between himself and the defendant taken all reasonable steps to mitigate the damage according to the practical business or economic point of view, as the car was not an irreplaceable article.

'where the cost of repairs would exceed the market value of the article and in the absence of special circumstances, the reasonable method must be to purchase a comparable article. By 'market value' in this connection is meant the price at which the article before damage, or a comparable article, would be purchased. As a rule, the scrap value of the damaged chattel must be brought into account but this is not a factor here."96

Therefore, the contention of the defendants quoting Vicant Haldane in the case of British Westing House Electric and Manufacturing Company Ltd. v. Underground Electric Railways Company of London Ltd. 97

"the fundamental basis is that compensation is for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps." 98 was upheld.

On the other hand, where goods have been taken permanently from the plaintiff, the measure of damages is their value, as Greer L.J. said in Dabishire's Case,

"what he is entitled to as damages for conversion or detention in respect of the article so detained or converted and not returned, is the value of that article."99

The cost of replacement may at times be the market value of a damaged chattel where there is no market or similar article.

This principle was applied in the case of Leishosch Dredger v. Edison S.s.¹⁰⁰ where, the Edison felled the moorings of the Lisbosch Dredger, carrying the latter out to the sea where it sunk. The appellants not being in a good financial position to buy another Dredger, were compelled to hire one at a high rate of hire from Italy due to the threat of their contract being terminated. This new dredger was more expensive to maintain than the latter. The Substantial issue here was, what in such a case as the present would be the true measure of damage?

The respondents contended that all that could be recoverable as damages was the true value to the owners of the lost vessel as at the time and place of loss. That is, all that was recoverable was the market price of the dredger together with the cost of transport to Patras and interest. The appellants however claimed that, in effect that they should recover in all the circumstances, in particular their want of means, must be taken into account and hence the damages must be based on their actual loss. In addition they claimed to be also entitled to damages incurred during the period of inevitable delay before the substituted dredger could arrive and start work at Patras. Lord Rights' opinion as regards the appellants claim was positive, "provided only that they acted reasonably in the unfortunate predicament in which they were placed even though but for their financial embarrassment they could have replaced the Leisbosch at a moderate price and for comparatively moderate delay."¹⁰¹ Thus, in his judgment, Lord Right said,

"In my judgment the appellants are not entitled to recover damages on this basis. The respondents tortious act involved the physical loss of the dredger; that loss must somehow be reduced to terms of money. But the appellants actual loss in so far as it was due to their impecuniarity arose from that impecuniosity as a seperate and concurrent course, extreneous too and distinct in character from the tort. The impecuniosity was not traceable to the respondents act and in my opinion was outside the legal purview of the consequences of these acts.

The law cannot take account of everything that follows a wrongful act. It regards some subsequent matters as outside the scope of its selection because it were infinite for the law to judge the causes of Causes, or consequences of Consequences,... - in the varied web of the affairs the law must abstract some consequences as relevant not perhaps on grounds of pure logic but simply for practical reasons. In the present case if the appellants as a consequence of the respondents tort, I think it as too remote but I prefer to regard as an independent course, though its operative effect was conditioned by the loss of the dredger."102

Quoting Dr. Lushington in the Columbus Case the respondents argued,

"The true of law in such case would, I conceive, be this, Viz, to calculate the value of the property destroyed at the time of the loss and pay it to the owner as a full indemnity to them for all that may have happened without entering for a moment into any other considerations."103

However Lord Right submitted, "the true rule seems to be that the measure of damages in such case is the value of the ship to her owner as a going concern at the time and place of the loss. In assessing the value regard must naturally be had to her pending engagements either profitable or the reverse. The rule, however, obviously requires some care in its application; the figure of damage is to represent the capitalised value of the vessel as a profit earning machine, not in the abstract but in view of the actual circumstances. The value of prospective freights cannot simply be added to the

market value but ought to be taken into account in order to ascertain the total value for the purpose of assessing the damage, since if it is merely added to the value of a free ship, the owner will be getting pro tanto his damages twice over." 104

Therefore, the House of Lords held that no special loss or extra expense due to the financial of one or other of the parties would be taken into account in assessing the damages. They held that the measure of damages was the value of Liesbosch to her owners as a profit earning dredger at the time and place of her loss; and that it should include; a capital sum made up (a) the market price on Nov. 26.1928 of a dredger comparable to the Liesbosch (b) the cost of adopting the new dredger and of transporting and insuring her from her moorings to Patras, and (c) compensation for disturbance and loss suffered by the owners of Loesbosch in carrying out their contract during the period between Nov. 23 1928 and the date on which the substituted dredger could reasonably have been available for use at Patras including in that loss such items as overhead charge and expenses of staff and equipment.

In conclusion therefore, the Edisons Case 105 lays down a significant principle, in the words of Greer L.J., in Darbishires case, "A plaintiff who is suffering from in Darbishires a wrong committed by the defendant Case, is entitled in so far as money can do it

him
to be put/in the same position as if he
had not suffered that wrong, that is
what is referred to as 'restitutio in
integrum'¹⁰⁶

He further qualifies this rule in Edison's Case
by saying:-

"...the owners of the former vessel are
entitled to what is entitled restitutio
in integrum, which means that they
should recover such a sum as will replace
them, go far as can be done by compensation
in money, in the same position as if the
loss had not been inflicted on them,
subject to the rule of law as to remoteness
of damage."¹⁰⁷

Thus by applying the principle of restitutio in
integrum the plaintiff was awarded reasonable damages
that he incurred with the exception of those considered
too remote.

An earlier case, Reavis v. Clan Line Steamers.¹⁰⁸
brings out almost the same principle as laid down in
Edison's case. The plaintiff lost the original music
scores for her Orchestra. On a claim for loss of
the music, she could not lead evidence of how much
she could have earned from publishing, performing
and mechanical playing rights. The court distinguished
her earning capacity from the earning capacity of
the music, for a value of the former would include
the latter. At the same time, it was held that,
if the orchestra could not play until the music could
be replaced, a claim for loss of profits during that
period was valid.

The wrongful taking of a chattel may be followed by a wrongful keeping amounting to a conversion, and where the taking was itself not wrongful, and so was not a trespass, the detention may be. Whether the action is trespass, conversion or detinue, the principles upon which damages for the wrongful deprivation of chattels are to be assessed are the same.

(b) Conversion.

In conversion the plaintiff sues in respect of the wrongful act^{of} conversion. It is doubtful whether 'market value' can ever be ignored where the claim is in tort of conversion, the explanation being that, since a satisfied judgment in conversion is in the nature of a compulsory transfer of title to the defendant, the defendant's liability therefore, is to pay the market price. In action for conversion the measure of damages is ordinarily the value of the goods at the date of conversion. Thus, if the goods fall in value after the time of conversion, the defendant is still liable for the 'market value' at the time of the conversion; But the only increase in value after the conversion which can be claimed in conversion, is that which occurs before the plaintiff ought to have discovered the conversion and mitigated it by buying a replacement. Therefore, ordinarily, if the defendant converts the plaintiff's goods and he then increases their value, the plaintiff cannot normally recover that increased value.

In the circumstances where the defendant offers and the plaintiff accepts re-delivery of goods at any time before the action has proceeded to judgment, this does not go to bar the action but goes only in reduction or mitigation of the damages. The plaintiff may proceed for damages resulting from his being out of possession of the goods and although he may succeed in recovering only nominal damages, he is entitled at least to these. However, since the plaintiff in conversion is suing not for the goods but for their value, it is logical that he should be entitled to demand their value as damages and to reject any offer made by the defendant before the action is proceeded to judgment, to return them even though the goods have in no way deteriorated since the time of conversion. In an East African case, Abdullah Jaffer Thawer v. Archibeild,¹⁰⁹ Pickering C.J. put it thus,

"it would not seem possible to reduce the damages on the ground that chattels of value have been returned to the owner"

Here, the appellant in the company of five others removed the respondent's car by driving it away from the sunrise Hotel, Having made use of the car, the appellants returned it outside the hotel, but it was damaged seriously as a result of the accident they had encountered. It was held that the plaintiff

was entitled to recover all the special damages, the defendants having failed to prove their claim that they had put the plaintiff in restitutio in integrum.

(c) Detinue

In actions of detinue, the judgment is usually for the return of the chattel detained or its value together with damages for its detention, whether or not it has been returned. Where the goods have fallen in value between the refusal to return and judgment, the damages for detention will include the amount of that fall in value. The defendant has to pay the plaintiff damages for detention since he made benefit from the goods. The general rule that the damages are to be measured as at the date the wrong or breach of duty occurred, as in conversion, is not applicable in detinue. The plaintiff here is entitled to the value of the goods at the date of the trial, the time of judgment being the relevant date for assessment. Any increased value of the property by the defendant is taken into account at the date of judgment; Lintsky J. submitted in Munro v. Wilmott,¹¹⁰ this:-

" . . . when I am asked to give damages in detinue for the value of a motorcar as at today and when I find that a large sum of money has been spent upon it for the purpose of making it even saleable, I must take that into account in assessing what is the value of the property which the plaintiff has lost."¹¹¹

From the foregoing discussion it appears that the value of the goods converted or detained is ordinarily assessed by reference to their market value. Where there is no market in the goods, the value is assessed by the cost of replacing them; and, if no market exists in which to replace them, their value is to be fixed at what the plaintiff could get by sale to a solvent buyer.

A part from the question of the general value of the goods, the plaintiff may be able to show that he has suffered special damages by their conversion or detention. Such damage, if claimed and if they are reasonably foreseeable result of the defendant's unlawful act, is recoverable. As in the case of assessment in the general value of the goods, recovery in respect of particular value to the plaintiff may depend, it seems, on the knowledge of the defendant on that particular value. This knowledge may, however, be no more than imputed knowledge. Further, the question of knowledge becomes irrelevant where the defendant has by conversion or other certious conduct deprived the plaintiff of the use of a chattel. Thus, where the defendant has detained goods of the plaintiff normally let out for hire, the plaintiff may recover the full market rate of hire for the whole period of detention; and where the defendant has converted goods of the plaintiff normally used by the latter in his trade, the plaintiff will recover loss of trade profits. The conclusion is, therefore, whether the plaintiff sues in conversion or detinue,

he will recover any loss sustained by him which is attributable to the defendant, save to the extent of which he ought to have mitigated that loss.

(d) Loss of Use:

The plaintiff may also recover damages for loss of use of the chattel while being repaired or replaced and, in the case of a chattel of Commercial use or value this will include any loss of profit resulting directly from his being deprived of its use. Here, damages for the loss of use will give compensation for what, apart from uncertain, speculative or special profits, would otherwise have been earned by its use during the period when by reason of the tort, that use was not available to the person entitled to it, for such is the direct loss suffered. The plaintiff must show that the chattel was capable of profitable use, for otherwise, loss of profit does not enter in as an element of loss and, where damages are given for loss of profits, the plaintiff cannot also in respect of the same period have damages for loss of use. Thus the damages will normally be such loss in trade profits as are proved.

In the case of a chattel which is not a profit earning chattel, or commercially employed, the plaintiff is entitled to have as damages for loss of use the reasonable and proper monetary equivalent of its wrongful withdrawal. In the case of chattels, which although not profit earning or commercially employed, are provided for the performance of a public service, or other specific purpose of the owner, the value of the loss of use during repair of damage or detention is often, but not always, to be calculated on the basis of percentage of the capital value of the chattel when the damage was inflicted or the detention commenced, acting upon the assumption that in a well conducted business the machinery engaged will generally be forward in use to be worth the money spent on it.

Reasonable expenses properly incurred by the plaintiff in mitigating his loss, such as a hire charge paid for a temporary substitute is provided without charge by the defendant, no damages for loss of use of the damaged chattel are recoverable so long as the substitute is available. Thus, where a substitute chattel has been hired to take the place of a damaged chattel in order to avert or minimise the loss, the hire paid would prima facie be the amount of damage sustained, if no other

chattel would be found to replace the chattel damaged, the measure of damages is not altered but the court is deprived of one, possible means of assessing it. Where the chattel is one hired out as a matter of business, the damages are the normal hire charges for the period.

IMMOVABLE PROPERTY:

(a) Trespass

In an action of trespass to land the plaintiff is entitled on proof of the trespass to recover damages even when he has not suffered actual loss, and where actual damage has been caused he is entitled to a full compensation. If however by a trespass injury is done to land, the measure of damages is the depreciation in the selling value of the land, or in the selling value of the plaintiff's interest in it, and not the amount of money required to put back the land into its previous condition or the premises into repair. Thus, the true measure of damages here is the interest before and after the injury which will not necessarily be the same as the cost of re-instatement. In addition, where by the trespass the plaintiff has been wholly deprived of his land, he is to be compensated according to the value of his interest; and if he is a freeholder entitled to compensation the damages will be the value of the

produce of the land during the period of deprivation subject to deduction for the expense of management, or, in the case of permanent deprivation, its selling value.

(b) Nuisance or Negligence:

Where the injury to land is caused by nuisance damages will be given for the loss or inconvenience actually suffered but not normally for any consequential depreciation of the selling value of the land, for if the nuisance continues damages will be recovered in successive actions by the person entitled to possession the right to bring such actions accruing with the damage suffered de di in diem. Similarly where injury to land results from negligence, the measure of damages is, as a rule, when the plaintiff is in possession the cost of making good the damage actually done if that would be the reasonable cause to take, but where it would not be reasonable to make good the damage and it is of a permanent character damages are assessed on the basis of the depreciation in the value of the property injured.

To conclude, that just as a plaintiff in personal injury can recover damages for the reasonable loss that he has incurred so also, can he recover damages inflicted on his property provided that they are not too remote.

CHAPTER FIVE:

CONCLUSIONS:

Throughout the discussion that has preceeded we have observed that a plaintiff, does usually recover damages for the loss of, or injury to person and property. This being so in the absence of special circumstances, it appears that the courts ordinarily have a basic criterion for ascertaining damages. The fundamental principle by which the courts are guided in awarding damages generally is restitutio in integrum. It means that the law will endeavour so far as money can do it to place the injured party in the same situation or in the same position he occupied before the occurrence of the tort which adversely affects him. This principle of restitutio provides a rule as to the measure of damages allowed. It is only adopted subject to the qualification that the damage must not be remote. Thus it can be said in general terms that, in cases arising in tort, only such damages are recoverable as arise naturally and directly from the act complained of. The principle restitutio in integrum is thus largely theoretical. Nonetheless the measure of damages should, as nearly as possible adequately compensate the plaintiff for any injury suffered. When the plaintiff has suffered damage to property or pecuniary loss, the compensation can be accurately calculated. However, compensation awarded to the plaintiff because of pain or suffering and loss of expectation of life to mention only a few, is difficult to calculate.

Normally damages are to be awarded by reference to the position of the plaintiff on the date the Commission of the tort, However, if during the time between the commission of the tort and judgment, the value of property has increased, the tort of conversion and detinue must take this fact into account when assessing the damage at the time of judgment.

To summarise, therefore, the measure of damage is the standard or method of calculation by which the amount of damages is to be assessed, having taken into account the kinds of injury or loss suffered. Where however, injury has been caused to the plaintiff's credit or reputation and in particular where the injury has been aggravated by the conduct of the wrongdoer, it is not possible to standerfizethe calculation of damages, and an award can only be assessed where evidence proves the actual loss incurred. In instances where damages are at large, they must bear a reasonable relationship to the wrongdoer. If the damages are general, must be pleaded that the damage has been suffered but, the quantity of the damage is a question to be decided by the judge. Thus no rigid rule can be laid down to apply in all cases. If there is any special damage attributable to the wrong act, that special damage must be pleaded and proved, and if proved awarded.

The purpose or function of the law of torts is well stated by C.A. Wright in these words;

"Arising out of the various and ever increasing clashes of the activities of persons living in a common society, carrying on business in competition with fellow members of that society, owning property which may in any of a thousand ways affect the persons or property of others - in short, doing all the things that constitute modern living - there must of necessity be losses or injuries of many kinds sustained as a result of the activities of others. The purpose of the law of tort, is to adjust these losses and to afford compensation for injuries sustained by one person as a result of the conduct of another."112

However, this original aim of the law of tort failed in one important aspect. This was in respect of awarding compensation in cases of personal injuries arising out of accidents on the highways and in factories. Here, it was not the law of torts that awarded the remedy, but insurance. This in itself was made possible through the law of tort by the principle of the shifting or distribution of losses which directly involves a third party, the insurance.

Nonetheless, the law of tort endeavours to maintain its aim in providing social fairness and protection to the community at large, by one means or another.

If this then is the aim of the law of tort, its application in East Africa at large particularly Kenya has proved to be problematic. I have tried to cite Kenyan cases in this paper relevant to the topic under discussion, but we must remember that these suits predominantly are brought by the middle or upper class people of the country. The poor person in East Africa, with minimal education is neither aware of his legal right nor even if he did would not have the financial capacity to file a suit. Therefore, very few people in this category, go to the courts for compensation, as they assume that these mishaps are 'acts of God.' To quote Cockburn C.J. in Fair v. London and N.W. Railway¹¹³ a century ago when England faced similar conditions to Kenya;

"it is very true that these street accidents seldom come into our courts. They generally occur to poor persons who are satisfied with comparatively small compensation which is readily given them."

Ideally every citizen must be aware of his legal rights, and this can be possible though the aid of legislation. Goddard J.¹¹⁴ saw the importance of this point when he said,

"The late Swift J. who at the time of his lamented death, had an unrivaled experience of these cases, said, on more than one occasion, using the vigorous language which characterized him, that if parliament allowed such potentially dangerous things as motor cars to run on the public streets, it ought also to provide that people who were injured by them, through no fault of their own should,

receive compensation though not necessarily compensation from the driver if the driver has been guilty of no negligence."

I wonder whether the aforesaid observations will ever reach the ears of the legislators or even get their attention when it is researched by scholars, such as the writer, during the course of normal academic work. A lot more would be achieved if the legislators took a keen interest in research findings, as a means of communicating the people's needs and demands to the legislature rather than regarding such papers as this, as academic efforts only.

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3. 1880 5 App. Cases, 25.

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6. Civil Case No. 2265 of 1973.
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10. 1861 10 C.B. (N.S) 287. 1 at 308.
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CONCLUSION

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