IN THE COURT OF APPEAL AT NAIROBI

(Coram: Hancox, Nyarangi JJA & Platt Ag JA)

CIVIL APPEAL NO. 52 OF 1984

Between

IDI AYUB OMARI SHABANI.....APPELLANT

AND

CITY COUNCIL OF NAIROBI.....RESPONDENT

(Appeal from the High Court at Nairobi, Aluoch J)

JUDGMENT

March 6, 1985, **Hancox JA** delivered the following Judgment.

This unfortunate boy, aged nearly eight and a half at the date of the accident on June 19, 1980, was walking home from school in Johnstone Muthiora Road, Nairobi when he was struck by a lorry which was coming at a high speed and which, in order to avoid people who were drawing water from the City Council supply there, came over to the side of the road where he was walking. As a result of this he suffered various injuries, the most serious of which was the one to his left arm and elbow, which is now permanently disabled. The degree of disability may be reduced to a limited extent by a further operation, in addition to the three operations he has already undergone.

Those were the facts found by the learned judge, who awarded the appellant (who sued by his next friend) Shs 150,000 by way of general damages and Shs 6,850 as special damages. It is against the first of these awards that this appeal is brought, Mr. Dhanji, who appears for the appellant, contending that this figure is manifestly too low and should be increased to, at a conservative estimate, at least Shs 300,000, plus the cost of the proposed future operation, which is varyingly stated to be between Shs 20,000 and Shs 30,000. The test as to when an appellate court may interfere with an award of damages was stated by Law JA in *Butt v Khan*, Civil Appeal 40 of 1977 (a case referred to in another context by the learned judge) as follows:-

> "An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

This direction has since been followed frequently by this court.

The assessment of damages is a question which we who have had the task of doing so have frequently found to be one of the utmost difficulty. As Lord Morris said in *H West & Son Ltd v Shephard* [1964] AC 326, at p 353:-

> "The difficult task of awarding money compensation in a case of this kind is essentially a matter of opinion of judgment and of experience. In a sphere in which no one can predicate with complete assurance that the award made by another is wrong the best that can be done is to pay regard to the range and limits of current thought. In a case such as the present it is natural and reasonable for any member of an appellate tribunal to pose for himself the question as to what award he himself would have made. Having done so, and remembering that in this sphere there are inevitably differences of view and of opinion, he does not however proceed to dismiss as wrong a figure of an award merely because it does not correspond with the figure of his own assessment."

It is therefore with some trepidation that I approach the question of whether the general damages awarded by Mr.s Aluoch J, in the instant case were manifestly so low as to be a wholly erroneous estimate of the monetary compensation to which the appellant is entitled for his severe injury. Having said that, and having borne the foregoing principles in mind, and the cases cited to us, I nevertheless consider that, following her admirable and lucid finding of the facts on liability, she arrived at a figure for damages that was a wholly erroneous estimate and was manifestly too low.

Nyarangi JA, whose judgment I have had the advantage of reading in draft, has reviewed the authorities cited by Mr. Dhanji and it is unnecessary for me to deal with them again. It is sufficient to say that I wholly agree with his reasoning and conclusions, and that, although it is more correct in principle to itemise an award, so far as this is possible, rather than to arrive at a global sum, the figure of Shs 350,000 is the amount which should be awarded in respect of general damages in the instant case.

There are, however, two aspects of the case on which I desire to comment. The first is that Mr. Dhanji insisted again and again, despite indications, that the judge rightly included in her award a sum in respect of loss of future earnings despite the lack of evidence on this issue.

In one of the High Court decisions cited to us, *Hajija Olesa v Bayere Peugeots Services and Kibigon*, Civil Case 297 of 1984, O'Kubasu, J said that in the case of a girl of similar age to the appellant this was a problematic aspect of the case. He rejected counsel for the defendant's submission that loss of earnings should be left out of account as the plaintiff was a young girl still in primary school. He held that that was inconsistent with *Connolly v Camden Area Health Authority* [1981] 3 AER 250, as applied by this court in *Zablon W Mariga v Musila*, Civil Appeal 66 of 1982, and awarded Shs 150,000 under this head. Similarly in the tragic case of *Oratah v Otieno and Another*, Nakuru High Court Civil Case 109 of 1983, where the infant plaintiff, then aged three, had both legs amputated, Masime J, awarded Shs 250,000 for loss of future earnings or loss of future earning capacity, the latter probably being a more accurate description of this item of damages. In *Connolly's* case, where the injuries following an overdose of anaesthetic were described by Comyn J, as quite dreadful, the court awarded £7,500 for the loss of future earnings. He stated that the only yardstick that could be taken was the injured plaintiff might have followed in his father's footsteps as a plasterer.

I recognize that in cases such as these it is impractical to get a precise or even a general idea of the infant plaintiff's capabilities of earning, say, ten years hence. Mr. Dhanji sought to persuade us that it was self-evident that the appellant would have at the very least an impaired working capacity. So it may be, but that does not relieve a person alleging from proving every aspect of his case which is not admitted, although I understood Mr. Hawkes, on behalf of the respondents, to concede at one stage of his submissions before us that the appellant was entitled to some damages under this head. In *Firozali N Lalji v Elias Kapombe Toka and Others*, Civil Appeal 46 of 1980, Law JA in rejecting the portion of the claim relating to loss of salary and profits, cited the following passage from Lord Goddard CJ's judgment in *Bonham-Carter v Hyde Park Hotel Ltd* [1946] 64 Times Law Reports, 177 at page 178:-

> "Plaintiffs must understand that, if they bring actions for damages, it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying 'This is what I have lost, I ask you to give me these damages.' They have to prove it. The evidence in this case with respect to damages is extremely unsatisfactory."

Basing myself in particular on *Connolly's* case, in my judgment, a court is quite right to make a modest

award for loss of future earnings, or as Masime J more correctly put it, loss of future earning capacity, in the case of a child, provided that there is some evidence thereof. I am not prepared, for myself, to accept in any particular case that the facts necessarily speak for themselves, as seems to have been stated by O'Connor LJ in *Watson v Mitcham Cardboards Ltd* [1981] *Kemp & Kemp* Case 9.792 – though it must be said that in that case there was some factual basis for the judge's conclusion under the head that was being considered. In this case there was no testimony by witnesses or in the agreed medical reports as to the factor of loss of earning capacity. I should have thought it a simple matter for counsel to put a question to a medical witness on these lines:

> "Difficult though it may be can you offer any view as to the future earning capacity of this child?"

The witness would then state that which might appear to be obvious, namely that this appellant would be unable to do much, if any, manual work, nor could he follow his father's employment, which is driving for one of the Ministries. Thus the likelihood would be that he would be confined to clerical work or the professions. The evidence was reasonably comprehensive as to the appellant's future disabilities during his school life, so why not thereafter?

The judge, however, expressly included the factor of loss of future earning capacity in the global sum. She made her own observation of the plaintiff in open court, for she said:-

> "I also had a look at the arm during the hearing it is as good as useless. It looks shorter than the other arm. As a result of this accident the boy suffered a permanent disability on the arm, which is now bent and cannot be stretched."

That was direct observation by her and led in part to her findings as to the disability, assessed by Mr. Hicks at 30% overall, and by Mr. Suleman at 46% twenty-one months earlier. Can this form a basis for a finding as to loss of future earning capacity? In my view it can, as it did in *Watson v Mitcham Cardboards* (*supra*), though I deprecate the inevitable substitution that this involves for direct testimony, rather than as an adjunct to it. In these circumstances I would treat the learned judge's figure of Shs 150,000 as including the factor of loss of earning capacity.

Secondly, I feel it right to emphasise the message passed to us by Mr. Hawkes in his admirably succinct but nevertheless valid observations when making his submissions for the respondents. He urged us to develop the common law of Kenya in a consistent way as regards awards of damages in accident cases, and to see that the awards do not get out of line. In a country where the per capita income is undoubtedly less than in Britain, though more than in Tanzania, the Shs 150,000 awarded in this case would represent a small fortune to a person coming from a humble village.

I accept those propositions up to a point. In *Rahima Tayab and Another v Anna Mary Kinanu*, Civil Appeal 29 of 1982 I drew attention to the warnings sounded by Lord Denning MR. in *Lim Poh Choo v Camden & Islington Area Health Authority*, [1979] 1 AER 332, as follows;-

> "As large sums are awarded ... These are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have here a national health service. But the health authorities cannot stand huge sums without impending their services to the community."

And he continued:

> "If these sums get too large we are in danger of injuring the body politic; just as medical malpractice cases have done in the USA. As large sums are awarded, so premiums for insurance rise higher and higher."

He felt the Court of Appeal should "exercise a restraining hand.". In *H West & Son v Shephard* (*supra*), Lord Morris also said:

> "Furthermore, it is eminently desirable that so far as possible comparable injuries should be

compensated by comparable awards."

So there is ample support in those passages for the propositions advanced by Mr. Hawkes.

Mr. Hawkes also invited us to say that we should temper the effect of the English decisions cited to us by Mr. Dhanji, bearing in mind the circumstances prevailing in Kenya and those of its inhabitants. Again I agree. As Law JA said in *Kimothia v BhaMr.a Tyre Retreaders and Another*, [1971] EA 81, awards made by foreign courts, though helpful as a guide, do not necessarily represent the standards which should prevail in Kenya where the conditions relevant to the assessment of damages, such as wages, rents and cost of living generally may be very different.

Recent support for this view is to be found in the Privy Council decision in *Chan Wai Tong v Li Peng Sum* [1985] Law Society's Gazette, January 16, where it was said that there is a substantial body of authority that a court should in general have regard only to awards in the same jurisdiction or in a neighbouring locality where the relevant conditions are similar. At the same time it cannot be gainsaid that the most conveniently assembled awards of damages in injury cases, classified according to their type and severity, do appear in the reports and collections of reports of English cases, which, apart from the Kenyan authorities, are the most widely available here. It is therefore natural that practitioners will gravitate towards these authorities in an effort to find a decision opposite to their own; and I do not think that this practice should be discouraged, provided it is borne in mind, as Law JA said, that there are marked differences in the respective conditions and that they are helpful as a guide only.

Mr. Hawkes then referred us to passages from Volume 33 of the *Modern Law Review* [1970] and PS Atiyah, *Accidents, Compensation and the Law*, which show the widely differing awards made in the United States on the one hand, and Denmark and Mexico on the other, and the unsatisfactory solution of measuring injuries and loss of amenities of life in money terms.

I agree with all these statements, which are in general terms, and that the residual injuries in this case are not as bad as the "useless claw" to which Muli J said the plaintiff's hand had been reduced in *Opuka v Akamba Public Road Services Ltd*, HCCC 1684 of 1976, nor the "clumsy and useless appendage" which the plaintiff's left arm became in'*Isabella Wanjiru Karangu v Washington Malele*, Civil Appeal 50 of 1981, in which the damages for pain, suffering and loss of amenities were increased from Shs 160,000 to KShs. 200,000. In both these cases, however, the accident occurred many years before the present one when money values were different.

In *Opuka's* case judgment was given in the High Court on July 14, 1977, nearly eight years ago, and Shs. 170,000 was given as general damages. In *Isabella's* case judgment was given by this court on July 1, 1983, nearly two years ago. Perhaps the case most comparable to the present one is *Mativo Mutuya v Wilfred Mbika and Another*, Mombasa High Court Civil Case 442 of 1980, where, in August, 1982 Kneller J, as he then was, awarded Shs 250,000 for severe damages to the adult plaintiff's left arm and hand resulting from a traffic accident, and added a further sum for loss of earning capacity.

Nevertheless it cannot be disputed that the appellant's disability is severe, that it will affect him adversely during the remainder of his schooling, and for the rest of his life. As I said in *Rahima Tayab v Anna Mary Kinanu* (*supra*), which was a case of epilepsy:-

> "In the case of loss of earning power obviously the Courts cannot award sums comparable to those in England where wages for similar jobs are very much higher (because the loss is not as great here), but when it is considering the cost of medical attention and drugs I agree with Mr. Hayanga that a girl from a rural area in Meru District should not be unduly disadvantaged, as against children elsewhere, by reason of her or her family having to pay quite large amounts for drugs and medicines, which are essential for keeping her within the second category of epilepsy. It is a fact of life that drugs are expensive here and may have to be imported."

I remain of this view. It may be that the awards are getting higher and that medical charges and insurance premiums will get correspondingly higher, but none of these considerations relieve us from the duty of

awarding as fair and just compensation as we can, bearing in mind that no amount of money can ever provide adequate recompense to this young boy, and that in that sense the solution is an unsatisfactory one. It is an appalling thing that a boy of eight or so, on his way home from school, in an area where there are schools, so that any driver is, in Cumming–Bruce LJ's words in *Jones v Lawrence* [1969] 3 AER 267, at page 269:

> "put on notice that he or she must exercise particular care for keeping an eye out for children"

should be struck down almost at the inception of his life by a lorry driver who, with supreme arrogance, cannot take the trouble to stop or slow down when encountering an obstruction, but must veer across the road at high speed and maim or even kill those in his path.

Finally Mr. Hawkes asked us not to place accident victims in a privileged class by increasing awards as the years pass, and thus insulating them against inflation, which the rest of us have to grin and bear. All I need say in relation to this is that the authorities in recent years, both in Kenya and in England, have taken into account in awarding damages the fall in value in the Shilling and the Pound Sterling: see in particular the judgment of Madan JA in *Ugenya Bus Service v Gachoki*, Civil Appeal 66 of 1981: to which we were referred, that of Law JA in *Butt v Khan* and of Sir Patrick Browne in *Burke v Woolley and Maugham* [1980], Kemp and Kemp, Case no 3-311 and 3-463. Moreover in *Chan Wai Tong's* case (*supra*) the Privy Council expressly said that an increase in the award by about 50% to take account of inflation was "not unreasonable". I therefore consider that it is perfectly proper, and right, for a court to take inflation into account when comparing other cases in making an award of damages.

For these reasons, as I have already said, I agree with Nyarangi JA, that the general damages should be increased to Shs 350,000, which for the further reasons I have endeavoured to give, should include the element of loss of earning capacity. This, as was said in *Chan Wai Tong's* case, should always be specifically pleaded. I agree also with the order of costs.

The appeal will accordingly be allowed with costs. For the order of the High Court that the plaintiff (the appellant) should receive Shs 150,000 by way of general damages, there will be substituted an award of Shs 350,000. Orders accordingly.

Nyarangi JA. On June 19, 1980, at about 4.30 pm, Idi Ayub Omari Shabani, (the appellant) then aged 8 years and attending school at Muslim village was walking home along a murram road known as Johnstone Muthiora Road where there are three other schools, many residential and business premises occupied by many people and also where there is a City Council water supply. The appellant was walking on the left side of the road. The City Council water supply is on the right side of the road. A vehicle registration mark KHX 087 owned by the City Council and being driven by the second respondent, an employee of the City Council, was being driven towards where the appellant was. As the appellant was crossing the road to get to his house the City Council's vehicle approached at high speed, did not hoot and as there were people on the right side of the road, the second respondent attempted an avoiding step and swerved to the appellant's side hitting and seriously injuring the appellant's left arm.

The appellant fell under the vehicle, was picked by passersby and taken to hospital where he stayed on this occasion for 33 days. The arm was stitched but cannot now be stretched, is painful during cold weather, can touch but not hold objects and is not growing any more. The appellant was initially treated by Dr J D Patel but requires further operation whose cost is estimated at between Shs 25,000 and Shs 30,000. The judge held that the respondents were wholly liable and after considering the location, and the effect of the injury and the relevant court authorities made a global award of Shs 150,000. The appellant through his next friend is aggrieved by the decision of the judge on the question of damages made in HCCC 3569 of 1981, the action in which the appellant, an infant sued by his next friend, Yusuf Juma. The grounds of appeal are:-

1. The learned judge grossly under-estimated the amount of general damages in awarding to the first appellant a global sum of Shs 150,000 only by way of general damages, which award is manifestly low and/or wholly erroneous estimate of damages in view of the serious nature of injuries suffered

by the first appellant.

2. The learned judge misdirected herself and failed to give proper consideration and weight to the relevant decided authorities on the quantum of general damages for pain, sufferings and loss of amenities of life given in comparable cases in Kenya relating to similar injuries as those suffered by the first appellant in making an award for general damages.
3. The learned judge failed to evaluate properly the evidence on record and particularly failed to appreciate the effect of uncontroverted and unchallenged medical evidence relating to the seriousness of the injuries suffered by the first appellant and future incapacity in awarding the damages.
4. The learned judge erred in failing to award separately the cost of future operation amount to Shs 30,000 in making an award of general damages.
5. The learned judge erred in failing to consider and take into account separately the loss of future earnings which the first appellant will suffer in making an award of general damages.
6. The learned judge erred in failing to give adequate consideration to the principles relating to loss of future earnings and loss of future earning capacity and failed to take into account separately the said head of damages and erred in this respect in making an award of general damages.
7. The learned judge erred in failing to consider adequately and award separately the cost of future nursing care and medical attention, and future prospects in making an award for general damages.

The appellant asks that the general damages be varied, re-assessed and appropriately increased and that he be paid the costs of the appeal.

Mr. Dhanji for the appellant argued the appeal solely on the issue of damages and complained that the award is so inadequate as to be manifestly low and represents an entirely erroneous estimate, that the award is out of step having regard to recent awards in comparable cases in local courts, that taking into account the estimated cost of the further future operation, the balance is at most Shs 130,000, that the judge did not take into account the future loss of earning capacity notwithstanding that the injury was so self-evident and therefore that the appellant would be affected because he would not earn a living as a normal man would and finally that in the circumstances, a conservative figure for the quantum would be Shs 300,000 excluding Shs 30,000 for the further operation which factor should not be provided for.

Mr. Hawkes for the respondents said his researches have not enabled him to find cases of similar circumstances where awards have been less and conceded, much to his credit, that on pain, suffering and loss of amenities plus cost of future operation together with some award for loss of earning capacity, this court is likely to award a figure in excess of the Shs 150,000. Mr. Hawkes hastened to add first that it is necessary to consistently develop a Kenyan common law so that there is a definite bracket within which awards can be made and secondly that a watchful eye should be kept on development affecting awards to ensure that it is all under control having regard to local conditions. It was urged that if the award is considered from that angle, the figure is not such a small sum. Mr. Hawkes posed the question who ultimately is going to pay the awards and cited a passage in *Accidents Compensation and the Law*, 3rd Edn, 1980 page 213 for his submission that the effect of inflation should be construed modestly.

This Court will not interfere with the question of damages awarded by the trial court unless it is satisfied that the award was based on some wrong principle or is so manifestly excessive or inadequate that a wrong principle may be unferred; *Witu v Peake* (1913/1914) 5 EALR 17, *Chori v Gabbett* (1934) 1 EACA 134, *Traill v Bowker* (1947) 14 EACA 20, *Singh v Kumbhar* (1948) 15 EACA 21, *Marumba v Clark* (1952) 19 EACA 60, *Obongo v Municipal Council of Kisumu* [1971] EA 91 *Butt v Khan*, Civil Appeal 40 of 1977 (unreported) and *Kemfro Africa Ltd v Lubia*, Civil Appeal 21 of 1984. The test as to when an appellate court may interfere with an award has therefore held sway for a long time. The assessment of damages is no mean task:

> "for there are so many incalculable factors which interpose to make the assessment of a perfect compensation impossible";

Singh v Singh (1932) 14 KLR 42 There is no doubt that,

> "some degree of uniformity must be sought in the award of damages and the best guide in this respect is ... to have regard to recent awards in comparable cases in the local courts ..."

Bhogal v Burbidge [1975] EA 375 at page 289, Letter C – D per Law Ag P.

Turning to the cases, I would start with *Mativo Mutuya v Mbika and Kaypee Enterprises* HCCC 442 of 1980, Mombasa where the plaintiff who was aged about 21 years, had his left hand and forearm up to his left elbow crushed when the vehicle in which he was travelling hit a road kerb and overturned.

The damages for pain and suffering and loss of amenities were assessed at Shs 250,000 in August, 1982. The plaintiff went to school for a short time and completed standard 6. In *Opuka v Akamba Public Road Services Ltd* HCCC 1684 of 1976, the plaintiff aged 29 years sustained a fracture of both bones of the right forearm and soft tissue injuries to the left chest. As a result of the injury, the lady plaintiff could not shake her hand with her friends... could not hold a fork, spoon or knife to eat... suffered social embarrassment for the rest of her life. The hand was "a useless claw". She was awarded Shs 170,000 as general damages for her injury in July 1977. In *Isabella Karangu v Washington Malele*, Civil Appeal No 50 of 1981, the respondent's most serious injury was to his left arm which was permanently and totally paralysed from shoulder to fingers.

> "a clumsy and useless appendage ..."

This court (Potter JA) awarded damages of Shs 150,000 in July 1983 for pain, suffering and loss of amenities. The respondent was an adult and in employment. The High Court in England (Donaldson J), as he then was, in 1978 awarded $15,000 for pain and suffering and loss of amenities to a boy aged 8 at date of negligent treatment who had suffered left arm fracture, who was left with mutilated, stiff and almost useless left forearm; See *Clare v Lambeth Southwark & Lewisham Area Health Authority* para 753, 1978 CLY Book.

The appellant was aged 8 years at the time of the accident, 11 years when he gave evidence and in standard 4. The left arm is greatly deformed and barely functions – the medical evidence was that the loss of function is 75%. JD Patel, Consultant Surgeon, examined the appellant at the age of 11 years and concluded as regards the obvious limitation of the movements of the left elbow that;

> "all that will hinder his activities in school",

referring I think to physical, rather than mental activities. Andrew Hicks who examined the appellant about four months after the accident thought the boy was doing fairly well and was then in standard three. So, up to the time of the trial the accident doesn't appear to have adversely affected the appellant's classwork as opposed to outdoor school activities.

Nevertheless there can be no doubt, in my judgment, that on any fair view of the matter, the appellant's capability in the performance of manual and physical work has been very considerably lessened. As an adult, the appellant will require his own house and the other buildings that would go with it. He could not be expected to cut and carry heavy building material of the type normally used for constructing huts in the rural areas. His ability to participate meaningfully in soil cultivation and in general agricultural work has been reduced for all time. Even as a herdsman he would be expected to do some fencing and construct structures for stock. He will require tremendous assistance, to be paid for, from others to carry out these normal physical acts. His physical appearance which shocked the trial judge is bound to worsen with the passage of time. That will cause him anguish and embarrassment. His chances of getting married to a girl of his chance are in the main gone and in all probability he will have to settle for the second or third best. It is not unreasonable to say that no girl of reasonable education and possessed of marketable skills would easily accept marriage to the appellant. All these matters are self evident bearing in mind the appellant's environment and, may be, the trial judge had them in mind in her reference in the judgment to the appellant's

> "future condition due to these injuries".

I return to the cases. The 21 year old adult in *Mativo, supra*, who was in no better position than a man with no left hand and forearm was awarded Shs 250,000 in 1982. Today he would get a little more because of inflation. The award in *Mativo* was made for an injury somewhat similar to the appellant's injury, and therefore the judgment of Kneller J (as he then was) deserves respectable consideration and weight. It is almost certain that the award would have been slightly higher if *Mativo* were of the age of the appellant at the time of the accident. The award in *Opuka* was in respect of injuries to the right arm and hand of a woman. The type of hand and sex of *Opuka* are in my opinion distinguishing features. In *Isabella* the award of Shs 15,000 was for an adult and was made about two years ago for an injury to the left arm. It is no speculation to say that the award may well have been higher if the respondent was aged eight years and at school at the time of the accident. In *Clare*, an award of £15,000 was made for injuries only 4 or 5 degrees more serious to an English boy aged 8 who additionally benefit from the welfare state services. The relevant local awards and the one very persuasive English authority persuade me to the finding that the award made by the trial judge must be interfered with and that in the circumstances an award of Shs 350,000 for general damages is about adequate. I would allow the appeal and revise the judge's award accordingly. I would award costs to the appellant.

I agree with Hancox JA for the reason he gives that the figure of Shs 350,000 should include an element of loss of earning capacity. The amount of the special damages is Shs 8,697 as agreed. It is correct as Hancox JA says, that decisions here eg *Lalji v Toka & Others* CA No 46 of 1980, have taken into account the fall in value of the Kenya Shilling in awarding damages. The English courts have in recent years made higher awards due to inflation. For example in *Pickett v Bree Ltd* [1980] AC 136, Lord Wilberforce at page 151 had this to say:

> "Increase for inflation is designed to preserve the 'real' value of the money; interest to compensate for being kept out of that 'real' value".

Incidentally, insurers are reported not to have been slow in altering their practice in accordance with the judgment of the English Court of Appeal in *Birkett v Hayes* [1982] 1 WLR 816 where the House of Lords' decision in *Pickett* was applied: See O'Hare and Hill, *Civil Litigation*, 2nd Edition 1983 page 67.

Platt Ag JA. I have had the great benefit of studying the draft judgments of Hancox and Nyarangi JJA in which the facts have been fully set out. But with great respect I am inclined to think that the damages proposed are as much too high as the learned trial judge's award was too low.

Very shortly, I agree that this is a case in which this court should interfere on the principles set out in *Butt v Khan* (Civil Appeal 40 of 1977). I agree also that this boy's damaged arm calls for an award of damages under the headings of pain and suffering and loss of amenities. Because the boy is still in primary school, it is not possible to award damages for loss of future earnings as such; but it is possible to add to his present loss of amenities, a sum for future loss of amenities, including the obvious fact that a person whose left arm is permanently defective, will have a greater difficulty in seeking and maintaining employment, than one who is fully able-bodied. In that sense, a sum to compensate this greater difficulty in gaining and maintaining employment is appropriate.

The principles on which an award of damages should be based are well known. Even though money can never compensate this boy for the loss of that enjoyment of life experienced by the able-bodied boys around him; nevertheless in principle a capital sum awarded should offer him such compensation as will help to offset his disability. The income from such a sum may be able to put him in an income bracket, similar to that which he could have provided for himself, had he not been injured. It is right to calculate that sum having generally in mind the circumstances of this particular boy; and it is not right to put him far above his peers. It is very pertinent to bear actively in mind the warning of Lord Denning MR. (as he then was) in *Lim Poh Choo v Camden Islington Area Health Authority* [1979] 1 All ER 332 to which Hancox JA has drawn attention. There is a danger of awarding such large sums that the body politic is at risk. Already due to the large number of vehicle accidents, the maintenance and insurance of vehicles is very costly. There must be a balance, and for this reason damages in the past have always been modest. In addition attempts have been made to try to preserve similarity awards for similar injuries. Lord Morris' views in *H West & Son Ltd v Shephard* [1964] AC 326 have been referred to by Hancox JA on this point.

Finally there should be a discount for advancing capital sum at an early stage.

It is a misfortune to find that the basis on which an award, such as this, should be made, was not presented in the evidence.

On the medical side, it would have been preferable for the court to have called Mr. J D Patel, the Consultant-Surgeon who provided the most up to-date report, to give evidence, in order to set at rest the various controversies arising out of the previous medical reports. What was the real cost of the future operation? All there is, is the cost allegedly given to the elders of the injured boy and reported by them. What was the degree of general injury reported as less severe by Mr. Hicks than by Mr. Suleman? Was the patient improving in fact in 1982 after the first report in 1981? What exactly could the boy do with his left hand? It seems that the wrist was relatively serviceable, and that the fingers were undamaged – at least they are not mentioned as injured. Despite wasting of the arm, if the hand was largely undamaged, that is a most important factor in assessing the present and future position. Without evidence to the contrary, the hand must be assessed to be largely serviceable, but as the consultant said, with only half its strength. It is said he cannot hold heavy objects. Of course heavy objects vary, and one would like to know what objects could be carried. The picture of this injury is obscure.

On the prospects in life of this injured boy, one would have liked to know the standard of life of his father, what prospects the boy had, and what his chances in school were. Suppose for instance that the boy was of a rich family and could automatically be employed in a family concern, and enjoy the prospect of a comfortable inheritance, the diminution of his future livelihood by injury could be ruled out. We have been given some details from the bar, and we understand that the father is a driver of Ministerial motor vehicle by trade. It appears that the boy is getting on in primary school, but we have no idea whether he is of secondary school material, or would have been. The life of the boy is obscure.

In these unflattering circumstances, I can only assume that this boy is an average boy with primary school education who would seek either manual or lower clerical employment. I must assume that his injuries are as reported in the latest reports and that he has the use of a hand. I should calculate on some possible improvement after the operation, while bearing in mind that the arm will probably not grow to full use, and will be somewhat bent and weak. He has no other permanent injury. There is no evidence that he will need daily personal attention or general looking after.

Other similar cases may act as a guide. The nearest similar case, (those referred to us from England being cases of far greater injury) is *Mativo Mutuya v Wilfred Mbika* Mombasa High Court Civil Case No 442 of 1980, (unreported). That was a case where the injured young man had his left hand and fore-arm crushed up to his left elbow. The evidence reveals the sort of information which ought to have been forthcoming in this case. Indeed it would be well if the court and counsel studied it with care. The only use of the left hand was to push forwards or pull backwards something between his hands. It was thought that the left hand was so useless that it might as well be amputated and he was treated as if he had no left fore-arm, comparing that situation with the present case, this is not a case of a useless left hand even if the arm was termed by the learned judge as “as good as useless,” a term which is difficult to fully appreciate together with Mr. Hick’s finding of 50% power. It will be appreciated therefore that the injury in the present case is not so serious as that in *Mativo Mutuya’s* case, who was awarded Shs 250,000 for pain, suffering and loss of amenities, exclusive of the sum awarded for actual loss of earning.

Other cases have been studied. In *Isabella Wanjiru Karangu v Washington Malele*, Civil Appeal 50 of 1981, where the complainant suffered a permanently total sensory loss, this court raised the damages to Shs 200,000. That was a more serious case. Here, the boy has his reflexes, and sensation is normal. Against that there is, of course, to be weighed the handicap this boy must suffer throughout his life. *Opuka v Akamba Public Road Services Ltd* HCCC 1684 of 1976 was a case of the right upper limb being useless with total paralysis of the nerve of the fore-arm. The wrist was affected with limited supination and pronation. Shs 175,000 was awarded for this more serious injury than that of the plaintiff in this case. *Clare’s* case, also referred to, was a case of very much greater injury (See *Clare v Lambeth Southwalk and Lewisham Area Authority* [1978] CLY 753, left arm and hand reduced to a “club”.)

It is clear that general damages have been mounting. It should be proved that further increases are justified which has not been shown in this case. Indeed last week in The Times, £4,500 was awarded for fractures of the left fore-arm (See *Rigg v Centre Electricity General Board*). This plaintiff should receive something less than Mr. Mativo Mutuya by parity of reasoning, and less than either Mr. Malele and Mr. Opuka. Then there is to be added the element of difficulty in securing further employment, a difficulty faced by Mr. Mitivo Mutuya. In this case, it is only possible to add a conventional figure. I would put the figure for pain and suffering and loss of amenities at Kshs 200,000 and add Kshs 50,000 for the loss of future prospects of employment.

I agree that the cost of the future operation should be added separately. It is unwise to deal in "global sums" where it is convenient to indicate the separate parts. As this evidence is vague and untested, the lowest figure should be taken at Kshs 20,000. To that should be added the further sum for pain and suffering of the operation and the attempt to give the arm more flexion. I would add another Kshs 5,000.

In all I would award the plaintiff Kshs 275,000. I would then cross-check to see how the figure of Kshs 250,000 would fit in with the circumstances of this boy. Supposing that sum is invested in a Building Society at 14%, that would produce an income of Kshs 2,925 per month before tax is deducted. After tax, that would at present give the plaintiff a monthly income rather in excess of the average income of an adult person in the apparent circumstances of this boy. He will not need this income in this form until he is older, but his schooling will be assured. He deserves it. When he reaches majority he will have a capital sum which will provide him with sufficient security and income and take into account the effects of future inflation. I would be satisfied therefore that he had received generous compensation for his loss, in the sum of Kshs 275,000.

On the other hand, as we are differing from the learned judge, it ought to be said that this was a serious injury, with the probable results that *Mativo Mutuya's* case illustrates. It is true that children who grow up with an adversity often learn to offset it. But to propose the sum of Kshs 125,000 (less the future operation costs), as adequate for injury to so important a limb as the left arm, and having compared the income derived from such a sum, with his needs in the assumed standard of life of this boy, that would surely leave him without adequate safeguards for the future. Apart from the general damages to be awarded I agree that the special damages amounted to the sum of Kshs 8,697. I would concur in the award of costs as proposed by my Lords.

On March 8, 1985, **Hancox, Nyarangi JJA & Platt Ag JA** delivered the following Order.

The order of the court is that the whole of Kshs 350,000 general damages awarded in this case be paid into an interest bearing account in the name of the plaintiff, with any one of the following four banks namely the Standard Bank, Barclays Bank, Kenya Commercial Bank or National Bank of Kenya, the account to be operated jointly by the Registrar of the High Court and the next friend. There will be liberty to withdraw on application up to a total of upto Kshs 50,000 for the necessary expenses that Dhanji has mentioned, subject to the Registrar being satisfied by production of medical reports, accounts and receipts, that the expenditure has been, or is being, incurred.

The income from the account may be paid out to the next friend for the infant's maintenance, and medical expenses and treatment. On attaining 18 years the capital sum standing to the credit of the account shall become the property of the plaintiff absolutely.

Dated and delivered at Nairobi this 6th day of March, 1985 .

A.R.W HANCOX

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JUDGE OF APPEAL

J.O NYARANGI

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JUDGE OF APPEAL

H.GPLATT

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AG. JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR