IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Law, Potter & Hancox JJA)

CIVIL APPEAL NO.29 OF 1982

BETWEEN

TAYAB.....APPELLANT

AND

KINANU.....RESPONDENT

JUDGMENT

This appeal arises out of a road accident at Meru which happened on September 21, 1976, in which a girl who was then nine years of age (and not eight years old as the learned trial judge held) was struck by a motor car whilst crossing a road. I shall refer to the girl, who sued through her father and next friend, as 'the plaintiff'. She is the respondent in this appeal. The appellant, an Asian lady, was the driver of the car. I shall refer to her as 'the defendant'. The plaintiff suffered injuries which were not in themselves very serious. They consisted of a linear fracture of the right parietal bone of the skull, and bruises over the right side of the face, head and hip. The plaintiff alleged that she also suffered from a fractured pelvis, but this was not borne out by the medical evidence, and was rightly disregarded by the learned judge. The plaintiff made a good recovery from her physical injuries, and was discharged from hospital after a month. Unfortunately, some eight months later, she developed epilepsy. She was seen by Dr Mwinzi, a senior consultant physician neurologist at the Kenyatta Hospital, on October 1, 1979, some three years after the accident, and the doctor's conclusion is summarised in his report dated October 10, 1979, as follows:

"This girl has grand mal (major) type of seizures that developed eight months after a head injury and therefore can be regarded as post-traumatic in origin, especially in the absence of family history of epilepsy. It is most likely that she will remain epileptic for the rest of her life especially now that the fits have persisted for over two years. Her intellect and behaviour is also bound to suffer partly because of the initial brain injury and partly because of the repeated fits and also as a side effect of the drugs she has to take to control the fits. All these will have a profound effect on her future life as her confidence has been undermined, her capacity for learning reduced, and her future suitability for gainful employment interfered with."

Dr Mwinzi gave evidence at the trial. In cross-examination he said, *inter alia*:

"… it is possible to control the majority of cases [of epilepsy] with medication. The use of drugs will

depend on dosage - we gauge the correct dosage of the drugs. Given a correct dosage under advice the fits could be controlled."

There were no independent eye-witnesses to the accident. The plaintiff's evidence was to the effect that before starting to cross the road, she looked right, then left, then right again, and started crossing. She did not see the defendant's car coming from the right. The first she knew of its presence was when she was 'knocked' while crossing the road. She was walking, not running. The defendant's evidence was that she did not see the plaintiff before she was hit, she had come from the left, and appeared to be in a hurry.

The police evidence was that brakemarks made by the defendant's car were visible at the scene of the accident. They were 14 feet long, and five feet from the defendant's near side of the road. Bloodstains on the road showed that the plaintiff had been thrown to the offside of the road, approximately level with, or slightly behind, where the brakemarks started.

The trial judge, on the issue of negligence, found that the accident

"was caused completely by the ... defendant's negligent act in driving at an unreasonably high speed and in failing to keep a proper look-out".

He held that the plaintiff 'had the requisite road sense' but that she was entirely without blame as, in his view, 'there is not the evidence on which a finding of contributory negligence to any degree could be based'. On the issue of damages, the learned judge awarded the plaintiff Kshs 600,000 for pain and suffering and Kshs 150,000 for loss of amenities, making a total of Kshs 750,000, adding that he would have given the same sum as a global award had the claim for general damages not been itemised.

From this decision the defendant (appellant) has appealed. She is represented by Mr Noad. The plaintiff (respondent) is represented by Mr Hayanga. The grounds of appeal challenge the judge's findings of fact, his apportionment of liability, and the quantum of damages awarded. As regards the facts, Mr Noad has attacked the judge's findings that the defendant 'must have been driving at an unreasonably high speed. She must have been hurrying to take her child to school.' As I have already pointed out, there were no eye-witnesses who could depose to the manner in which the car was being driven. There is however the police evidence, supported by a sketch plan made at the time, of brake marks 14 feet long, which indicated that the car was on its proper side of the road. Allowing for 'waiting' or 'reflex' time, it would seem that the defendant brought the car to a standstill within, at the most, 20 feet after the impact. The road was straight, dry, and asphalted. There was no other traffic on the road at the time. Accordingly to generally accepted tables, see for instance *Bingham's Motor Claims Cases* (6th Edn) at p 86, the minimum stopping distance on dry asphalt at 20 mph is 19 feet. In my view, the evidence of the brake marks in this case does not support the judge's finding that the car was being driven at an unreasonably high speed, which he did not attempt to quantify. I do not think, on the evidence available, that the defendant was driving at more than 20 mph at the time of impact. Even allowing for the fact that, to the defendant's knowledge, there were several schools along the road, and that at the time of the accident children could be expected to be crossing the road, I do not think that a speed of 20 mph was an unreasonably high speed in the circumstances.

This brings me to consider the question of liability. The judge considered that the defendant had been shown to be negligent on two grounds, excessive speed and failure to keep a proper look-out. As I have already indicated, I do not think that the finding of excessive speed can be supported. Mr Noad submitted that, in these circumstances, the accident can only have been caused by the plaintiff suddenly darting out into the road, having been concealed from sight by vegetation growing by the side of the

road, and that the accident was inevitable. As to this, the defendant frankly admitted that she did not see the plaintiff until the moment of impact, and the judge found as a fact that the plaintiff paused on the side of the road, and looked both ways, before beginning to cross. An appellate court will be slow to interfere with a judge's findings of fact based on his assessment of the credibility and demeanour of a witness who has given evidence before him, and I would not differ from the judge's finding that the plaintiff paused on the side of the road before beginning to cross. That being so, the defendant should have seen the plaintiff before the moment of impact. I agree with the judge that she was not keeping a proper look-out. Had she seen the plaintiff at the roadside, she might have been able to avoid hitting her by slowing down or taking avoiding action. I would accept as correct, in these circumstances, the judge's finding that the defendant was negligent.

Mr Noad's next submission was that, even if the defendant was negligent, the judge was not justified in holding, as he did, that there was no evidence on which a finding of contributory negligence to any degree could be based. That evidence, Mr Noad submitted, was to be found in the plaintiff's own evidence that although she looked both ways before starting to cross, she did not see the defendant's car at all. But the car was there, and it cannot have been far away. Mr Noad submitted that the plaintiff was negligent in not having seen the car, alternatively that she must have begun crossing the road without looking to see if there was any traffic approaching, in which case she was in any event guilty of negligence. Mr Hayanga understandably had difficulty in dealing with these propositions.

He submitted that even if the plaintiff was negligent, she should not be held guilty of negligence which contributed to the accident, in view of her tender age. He relied in this respect on the dictum of Madan JA in his judgment in *Butt v Khan* (1982-88) 1 KAR 1 in which the learned judge of appeal said:

"Indeed, I am of the opinion the practice of the civil courts ought to be that normally a person under the age of ten years cannot be guilty of contributory negligence, and thereafter, insofar as a young person is concerned, only upon clear proof that at the time of doing the act or making the omission he had the capacity to know that he ought not to do the act or make the omission."

This dictum is entitled to the greatest of respect. It will be noted that Madan JA did not say that a person under the age of ten years cannot be guilty of contributory negligence, but that such a person cannot normally be guilty of such negligence. We do not know the exact age of the plaintiff in this case. She says she was nine at the time. Dr Mwinzi, who saw her in October 1979 put her age then at 12. At the date of the accident, she was probably somewhere between nine and ten years of age. The judge erroneously put her age at eight years, but he seems to have considered her to be capable of contributory negligence as he commented on her developed road sense. He found her not to have been guilty of contributory negligence because, in his view, there was no evidence on which such a finding could be based, and not because of her age. The impression I have formed is that if the judge had found evidence of negligence on the plaintiff's part, he would have found contributory negligence. I have myself no doubt that the plaintiff was negligent in failing to see the approaching car. Having regard to her age, should contributory negligence be imputed to her in this case" It is very much a border-line case in this respect. In *Attorney General v Vinod* [1971] EA 147 this court's predecessor upheld a finding that a boy aged 81/2 years, who ran out from a line of parked cars into the path of an oncoming car, was contributorily negligent to the extent of 10%. In his judgment Mustafa JA said:

"In dealing with contributory negligence on the part of a young boy the age of this boy and his ability to understand and appreciate the dangers involved have to be taken into consideration"

and he cited the following passage from the judgment of Lord Denning in *Gough v Thorne* [1966] WLR 1387:

“A very young child cannot be guilty of contributory negligence. An older child may be. But it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety; and then he or she is only to be found guilty if blame is attached to him or her. A child has not the road sense of his or her elders. He or she is not to be found guilty unless he or she is blameworthy.”

In the instant case, the trial judge held in clear terms that the plaintiff had the requisite road sense. Her failure to see the approaching car was in my view blameworthy. In the case of a grown-up person, the proportion of blame would have been substantial, but having regard to the plaintiff’s tender years I would follow the precedent of *Vinod’s* case, and assess her degree of liability at 10%.

There now remains the question of damages. In the course of his address in this appeal, Mr Hayanga applied for leave to adduce fresh evidence to show that since the trial the plaintiff’s condition has worsened, evidence which might affect the quantum. Mr Noad very properly did not oppose the application, which we allowed in accordance with the decision of Spry JA in *Dick v Koinange* (No 1) [1973] EA 165, but in the event Mr Hayanga decided not to adduce any additional evidence. I will accordingly consider the judge’s award of general damages of Kshs 750,000 or £ 37,500, on the basis of the evidence available at the trial. Mr Noad submits that this award was manifestly excessive, in the light of comparable awards, but Mr Hayanga supports it. The most relevant case to which we have been referred by Mr Noad is *Burke v Woolley and Maughan* [1980] CA No 744, reported in 2 *Kemp & Kemp* (4th edn) at pp 3311 and 3459. The facts in that case are in many respects similar to the facts involved in this appeal. The plaintiff was ten years old. She was injured when struck by a car while crossing a road. She was unconscious for ten days. Two and a half years later she began epileptic attacks. The major attacks were of frequent occurrences. She suffered about six major attacks a month and about eight minor attacks a day. By contrast, the plaintiff in the instant case was unconscious for two days; she developed major epilepsy after eight months, and had a fit every three months. Clearly, her condition, at the time of the trial, was less serious than that of the plaintiff in *Burke’s* case. The plaintiff in Burke’s case was found to have been 25% to blame for the accident, although only ten years old at the time, and this apportionment does not appear to have been challenged on the appeal to the Court of Appeal. On the basis of total liability, it was held that the award of general damages for pain and suffering and loss of amenities which the trial judge had fixed at £ 24,000 was an appropriate award. In the course of his judgment in *Burke’s* case, Lawton LJ said:

“How then is the court to approach this case" Unfortunately, the books have very few reports of cases of epilepsy. Judicial experience has been that cases of epilepsy tend to fall into three categories. The first is where, following a head injury, there is a risk of epilepsy. The second is where epilepsy undoubtedly has occurred but is kept under control with anti-convulsant drugs. And the third is this type of case, which in my experience is rare, where the epilepsy cannot be kept under control and the future is uncertain.”

The plaintiff in *Burke’s* case fell within the third category, and the award of £ 24,000 in her favour for general damages on the basis of total liability was upheld. As regards the plaintiff in this case, the medical evidence was that her epilepsy could be controlled with appropriate drugs. She accordingly fell within the second category enunciated by Lawton LJ and Mr Hayanga agrees that this is so. In a comparable case, *Jones v Griffith* [1969] 2 All ER 1015, an appeal against an award of general damages of £ 6,000 was dismissed by the Court of Appeal. Widgery LJ in his judgment expressed the opinion that, if the evidence had indicated a virtual certainty of recurrence of attack (in other words, a third category type of case) the ceiling figure would be in the order of £ 10,000, to £ 11,000, which in today’s terms would not be far from the £ 24,000 approved in *Burke’s* case. Mr Hayanga has cited a number of cases comparable to the one now under consideration, the most recent of which was *Muiruri v Emmy Annah*

(HCCC No 2938 of 1975) in which Cotran J awarded a girl aged 10 general damages of Kshs 800,000 in April 1982. The injuries in that case were somewhat more serious than in this case, but with respect I do not think that Cotran J's award is a reliable precedent, as he took as his starting point the award of Kshs 750,000 made in this case by Nyarangi J in January 1982, an award which in my view cannot be supported. This appeal concerns a second category type of case. Allowing for inflation since 1969, I would have thought that the range for second category cases today would be in the order of £ 13,000 to £ 16,000. On any basis, however, the judge's award of £ 37,500 was manifestly excessive. Furthermore, this court has often commented that awards by foreign courts do not necessarily represent the standards which should prevail in Kenya, where the conditions relevant to the assessment of damages may be very different, see for instance *Kimothia v Bhamra Tyre Retreaders* [1971] EA 81. In this case the judge has awarded more than twice the amount recognised as the ceiling in England. That cannot be right. Doing the best I can in all the circumstances, I think that the correct award in the High Court, having regard to the plaintiff's physical injuries and the supervening but controllable epilepsy should be Kshs 300,000 on the basis of total liability, and not the Kshs 750,000 awarded by the learned judge.

If my view of the appropriate general damages and of the plaintiff's contributory negligence is right, the award of Kshs 300,000 must be reduced by 10%, making Kshs 270,000.

The orders which I propose are as follows:

1. That this appeal be allowed with costs;

2. That the judgment and decree appealed from be amended by substituting the sum of Kshs 270,000 as general damages for the sum of Kshs 750,000 general damages awarded by Nyarangi J;

3. The plaintiff will have the costs of the suit in the High Court. Those costs have been taxed and paid on the basis of award of Kshs 750,000. Leave is given to the defendant to have the bill re-taxed in the light of the substituted award of Kshs 270,000, if so advised.

Finally, as the plaintiff is an infant, the learned judge should have given directions as to how the general damages should be disposed of. We are informed that the sum of Kshs 750,000 has already been paid to the plaintiff's father and next friend. As he has no doubt incurred substantial expenses in connection with the plaintiff's maintenance and with this litigation, I would not interfere with this payment. The order which I propose is that the balance of the general damages be paid into an interestbearing bank or trust account, to be agreed by the parties, in the name of the plaintiff, such account to be operated jointly by the Registrar of the High Court and the next friend. Payments out to the next friend for the plaintiff's maintenance shall not exceed the interest from time to time accruing. On attaining the age of eighteen years, the sum standing to the credit of the account will become the property of the plaintiff absolutely. As Potter JA agrees, the appeal is allowed on the terms set out in my judgment, and there will be orders accordingly.

Potter JA. I have had the advantage of reading in draft the judgment of Law JA. I agree with him that the appellant driver was negligent in failing to keep a proper look-out. She frequently drove along the road where the accident occurred, as often as four times a day, taking her child to and from school. She was well aware that there were several schools along the road. The accident occurred at 1 pm. The children were released from school at about 12.15 pm. There was no evidence that the appellant was driving at an excessive speed. The evidence of the brake marks and of the state of the road surface indicated, as Law JA explains in his judgment, a speed of not more than 20 mph. That was by no means an excessive speed in the circumstances. The road was straight, level and dry. Visibility was good.

From the evidence of the appellant and of the sketch plan it is clear that the appellant was driving on the left side of the road and that the respondent child crossed from that side of the road and had nearly crossed the path of the vehicle when she was struck by the off-side front corner of the vehicle and thrown further to the right hand side of the road.

In her evidence, which was given nearly five years after the accident, the appellant tried to describe where the child was when she first saw her. In examination-in-chief she said that the child 'had come very close'. In cross-examination she said 'I did not see the child before she was hit'. In re-examination she said 'when I first saw the child she was in front of the right hand headlight'. As that was the part of the car that struck the child, the driver could not have seen the child any appreciable moment of time before the vehicle struck the child, and that was what the learned trial judge found. The appellant repeatedly stated in her evidence that the child ran across the road, but it is difficult to understand how she had the opportunity to observe that the child was running if she only saw her at the moment she was being struck. Children of nine or ten years of age, the age of the respondent child at the time of the accident, do run across roads on their way home, even after looking both ways. But I do not think that there is any ground in this case for disagreeing with the learned judge, who believed the child when she testified that she looked right, then left, then right again, and then walked across the road. Had the appellant seen the child as she started to cross the road, as she should have done, she should have been able to brake and to take some avoiding action.

The respondent child testified that she did not see the vehicle before it struck her. The judge found that the child, who was nine or ten years of age at the time, had a developed road sense. The judge believed her when she said that she looked right, left and right again before crossing the road. The car was coming from the right on a straight road in broad daylight. In my judgment the child should have seen the approaching vehicle, and I have no doubt that her negligence contributed to the accident. I am also satisfied, applying the test in *Attorney General v Vinod* [1971] EA 147, that the respondent child was of sufficient age to be expected to take care for her own safety and to understand the dangers of crossing a road frequented by motor traffic. I would assess the degree of liability in this case at 10%.

I now turn to the matter of the assessment of damages. In the field of personal injury insurance, whether it be of road accidents or of factory accidents, or whatever, it is of the highest importance that the maximum possible proportion of claims should be settled out of court, hopefully to the satisfaction of all the parties. This is only possible if the courts are reasonably consistent in their awards, and if the insurers and advocates involved in the delicate art of settlement have sufficient case law to guide them. I would commend to trial judges the following passage from the speech of Lord Morris of Borth-y-Gest in the case of *West (H) & Son Ltd v Shephard* [1964] AC 326 at 345:

"But money cannot renew a physical frame that has been battered and shattered. All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation. In the process there must be the endeavour to secure some uniformity in the general method of approach. By common consent awards must be reasonable and must be assessed with moderation. Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards. When all this is said it still must be that amounts which are awarded are to a considerable extent conventional."

The approach of Lord Morris to the matter of compensatory damages was supported by Lord Denning MR in *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 1 All ER 332 at 339:

"In considering damages in personal injury cases, it is often said: 'The defendants are wrongdoers, so make them pay up in full. They do not deserve any consideration.' That is a tendentious way of putting

the case. The accident, like this one, may have been due to a pardonable error such as may befall any one of us. I stress this so as to remove the misapprehension, so often repeated, that the plaintiff is entitled to be fully compensated for all the loss and detriment she has suffered. That is not the law. She is only entitled to what is in the circumstances, a fair compensation, fair both to her and to the defendants. The defendants are not wrongdoers. They are simply the people who have to foot the bill. They are, as the lawyers say, only vicariously liable. In this case it is in the long run the tax payers who have to pay. It is worth recording the wise words of Parke B over a century ago.

‘Scarcely any sum could compensate a labouring man for the loss of a limb, yet you do not in such a case give him enough to maintain him for life ... You are not to consider the value of existence as if you were bargaining with an annuity office ... I advise you to take a reasonable view of the case and give what you consider fair compensation’.”

Later in his judgment, at 341, Lord Denning had this to say about extravagant awards:

“I may add, too, that if these sums get too large, we are in danger of injuring the body politic, just as medical malpractice cases have done in the United States of America. As large sums are awarded, premiums for insurance rise higher and higher, and they are passed to the public in the shape of higher and higher fees for medical attention. By contrast we have a national health service. But the health authorities cannot stand huge sums without impeding their service to the community. The funds available come out of the pockets of the tax payers. They have to be carefully husbanded and spent on essential services. They should not be dissipated in paying more than fair compensation.” It seems to me that we should keep in the forefront of our minds the wise directions of B

aron Parke, Lords Morris and Denning, and not overlooking the words of caution expressed by Law JA in *Kimothia v Bhamra Tyre Retreaders* [1971] EA 81, that awards of damages by foreign courts must be viewed with caution, having regard to comparative standards of living, levels of earnings and many other factors. Having pointed myself, I hope, in the right direction, I am content to follow the reasoning of Law JA in adapting *Burke’s* case and *Jones v Griffith* [1969] 2 All ER 1015, in the light of the conditions (including inflation) of Kenya. My own estimate of fair compensation leads to the same award for general damages (before reduction for contributory negligence) of Kshs 300,000 and for the same reasons.

In arriving at this figure, I wish to say that I agree entirely with the view of Hancox JA that when comparing awards of damages in England and in Kenya, the comparative financial position of the patient requiring regular medical supervision and a regular supply of drugs, must be kept well in mind. For the reasons I have given, I agree with the orders proposed by Law JA.

Hancox JA. This unfortunate girl, who is the former plaintiff who sued by her father and next friend, and is now the respondent to this appeal, was knocked down and injured as she was crossing the tarmac road which runs from Meru to Kaaga at about 1 pm on September 21, 1976. She must have been aged between nine and ten years at that time, and in common with a number of other school children from four schools in the vicinity, was going home for lunch during the school break for that purpose, which lasted from 12.40 to 2 pm.

The vehicle driven by the appellant who was the first defendant, a Peugeot 504 KPX 779, was the car which admittedly collided with the infant plaintiff. I shall refer to them as Anna and Mrs Tayab respectively. Mrs Tayab had her deaf-mute son, also aged 9, with her, whom she was taking to school. The road and the weather were clear, and it is evident from the plans and photographs exhibited that this was a straight and level stretch of road, bordered on each side by a grass verge with some bushes, which were not as tall as shown in the first photograph, taken by the insurance investigator Mr Dhadialla

some eight months after the accident. According to him there was a hedge on the right hand side of the road facing Meru, the side from which Anna started to cross, with a gap in it giving on to the side track or path depicted in exhibit C.

Despite the serious consequences of Anna's injuries, and the fact that she was thrown some distance by the impact, to point C on the respective plans, there was only minor damage visible on Mrs Tayab's car, namely some dents on the moulding of the left head lamp, (the glass of which was not broken) as found by PC Muriithi, who arrived on the scene soon after. There was no evidence that even that was caused by the car striking Anna, for it will be remembered that the defendant said that the 'girl hit the right side of the car'. The lack of damage, or serious damage on the car is an indication, so Mr Noad for Mrs Tayab says, of the moderate speed at which she said she was travelling, (20-25 kph) plus the fact that the brake mark (B to A on the plan) was only 14 feet 3 inches long. Moreover he submitted that had her speed been any greater, Anna's injuries would inevitably have been more severe. Mrs Tayab was subsequently convicted of having a defective vehicle and fined Kshs 100. There was no evidence as to the nature of the defect or that it had anything to do with this accident.

There was a suggestion at some stage that Anna had sustained a fracture of her pelvis and/or her right leg. This arose because of her statement in evidence that when she recovered consciousness she had 'plaster above the knee'. Neither party pursued this suggestion and the judge rightly made no finding on it. It is clear from the record that she had abrasions, scrapes and bruising around the right hip region and that this occasioned the plaster. The injury with which both this and the High Court were and are concerned is the linear skull fracture and the consequences to this girl which flowed from that, which are confined to the brain injury and epilepsy, as her counsel, Mr Hayanga did not pursue the question of the eye trouble from which he suggested she is now suffering.

Before dealing with the quantum of damages Mr Noad criticised the learned judge's findings of fact as set out in grounds 2 to 5 of the memorandum of appeal, and summarised by Law JA in his draft judgment which I have had the advantage of reading. Two of these relate to positive findings of fact, one relates to the judge's assessment of the relative credibility of the witnesses, and one sets out four matters which the judge allegedly did not take into account. Secondly, Mr Noad dealt with the conclusions of culpability, or the lack of it, which he said should have been reached, and he referred extensively to both counsels' written submissions in the court below (Mr Hayanga's not being intended as such, as they were his personal notes). Although Mrs Tayab was found wholly to blame for the accident it is of course legally possible for some degree of contributory negligence to have been attributed to Anna.

Mr Noad submitted that there was no basis for finding that Mrs Tayab was negligent. Unless she was to proceed 'at the speed of a tortoise' (as the 5 mph suggested in *Moore v Poyner* (infra)) she could hardly have been going slower than she was, that the duty of care is reasonable, not absolute, and that whatever understandable sympathy might be felt for Anna, the court's duty was to discard that and reach proper findings on liability and quantum on the evidence alone. While conceding that there were contradictions in Mrs Tayab's evidence, he said that this was what might be described as an inevitable accident, caused by a child suddenly crossing in the path of an oncoming vehicle and that there was a degree of negligence in the girl, upon which aspect he cited several authorities. Moreover she cannot have told the truth when she said that she looked right, left and right again (as in the Highway Code), and that the judge should not have found her 'truthful and credible'.

Mr Hayanga argued on Anna's behalf that the evidence did establish negligence by Mrs Tayab. She knew there were schools in the area, was familiar with the road along which she drove four times a day, and on which there was some evidence of signs indicating children crossing (which Mr Noad said may

not have been there at the material time). Had she kept a proper look out she would inevitably have seen the child pass across her field of vision before coming into contact with the front offside of her car and could have swerved to avoid her. As she failed to see the child in good time she thus failed in her duty of care. There was no basis, he said, for holding the child contributorily negligent; he relied strongly on Madan JA's dissenting judgment in *Butt v Khan* (1982-88) 1 KAR 1, and quoted a passage from *Salmond on Torts* (15th edn) for the proposition that the test of such a finding was subjective.

Some of the authorities cited, of course related to heavily built-up areas in England where the child in question emerged from between parked cars, or similar obstructions, and ran out into the path of a vehicle whose driver was unable to avoid hitting the child. For instance in Mr Noad's first authority, *Moore v Poyner*, to be found at p 127 of the 1975 Road Traffic Reports (RTR), a boy of 6 dashed out from a pathway and in front of a parked coach (which concealed the defendant's view) into the path of the defendant's car which was found to be going at no more than 30 mph. It was a dry Sunday afternoon. In allowing the defendant's cross-appeal on liability Buckley LJ said at 132:

"I think that one must test his duty of care not by reference to what the plaintiff actually did but by what sort of conduct by any child, at any moment of time, the defendant ought reasonably to have anticipated, and to consider what course of action he would have had to take if he was going to make quite certain that no accident would occur. There is nothing to indicate that the defendant was aware of the existence of the little passage out of which the boy ran, or that he could see it. It would have been masked from him, at any rate at a time shortly before the accident as he was coming down to pass Mr Buzzard's coach, by that coach. I think the question is: ought the defendant to have slowed down to such an extent that there could have been no possibility of a child's running out at any moment in front of him, and his being unable to stop without striking the child"

It seems to me that to have achieved that, the defendant would really have had to slow down to something like 5 mph, he would have suggested that if he had slowed down, even to 20 mph, he would have been later in reaching the front of the coach and the accident might not have taken place. That may be, but I do not think that is the way in which to test the position, for that is testing it by reference to the conduct of the plaintiff himself and the precise moment at which the plaintiff emerged into the roadway. The question is: what ought the defendant reasonably to have anticipated might happen; and, if it is to be said that he ought to have anticipated that a child would run out into the roadway, to avoid an accident happening in those circumstances he would have had to slow down to such an extent that at the moment he passed the front of the coach he would have stopped instantaneously as the child ran into his path, and to do so, I think he would have had to slow down to something like 5 mph.

I cannot believe that that is a reasonable assessment of the duty of care which a driver owes in circumstances of this kind. It seems to me that this is a case in which there was an appreciable risk that a child might be masked by the coach and that he might run into the path of the defendant's car; but the likelihood of that happening at the precise moment at which he was passing the coach was so slight that it is not a matter which the defendant ought to have considered to require him to slow down to the extent that I have indicated."

In *Davies v Journeaux* [1976] RTR 111, again a 40% finding of liability was reversed (the child of 111/2 having, be it noted, been found at first instance 60% to blame) where a young girl stepped off a platform just past a curve in the road, and was looking in the opposite direction to that in which the car was coming. Edmund Davies LJ's remarks at p 115 really summarise Mr Noad's submissions as to the emotional aspect of this case:

"I cannot hold that, in all the circumstances, the judge, from whom I am regretfully differing, was entitled

to say that negligence was established by a failure to keep a sufficient look-out to see the child at the moment that the passenger saw her, and, having seen her, in failing at that moment to sound his horn.

This is, of course, a most unfortunate case, with most regrettable consequences for the infant plaintiff, but I have to say that, in my judgment, great though one's sympathy must be for her, it would not be fair to hold this driver to blame."

In the first Kenya case cited, *Mwadime v Yamani* [1975] EA 246, again there was an obstruction at the side of the road in the shape of a bus from behind which the woman knocked down suddenly emerged. That of course was an adult woman in relation to whose conduct Law JA said at 248:

"In my view, the presence of a stationary bus on the first respondent's off-side of the road should have alerted him to the possibility of a pedestrian suddenly emerging on to the roadway from behind the bus. There was, however, no reason for the first respondent to anticipate that the deceased would emerge in the way she did, that is to say running straight into the path of his on coming car, without apparently looking to her left."

The next case on Mr Noad's list, *Attorney General v Vinod* [1971] EA 147 involved a child of 81/2 to which Law JA has referred as regards the apportionment of blameworthiness to the child. The relevant passage and the citation from *Gough v Thorne* [1966] All ER 398 have already been quoted by him and there is no need for me to do so again, save to add that at 399 in *Gough's* case Lord Denning added that if the child (of 131/2) had been older she might have wondered whether a proper signal had been given and looked to see if anything was coming, and Salmond LJ said that it was quite wrong to expect a child of that age to go through such mental process. In my view it is hardly surprising that the English Court of Appeal absolved the child in *Gough's* case from all blame, because she was crossing in a group where there were bollards and a refuge in the middle of the road. A lorry driver had stopped and beckoned the children to cross. The tragic accident was caused by a bubble car passing the lorry 'blind' and hitting her as she crossed. Finally, as regards the English cases cited by counsel on the issue of liability, Mr Hayanga referred to *Jones v Lawrence* [1969] 3 All ER 267 where, again, a boy (of seven years) ran out from behind an obstruction, namely a parked van, and was hit by a motorcyclist going at 50 mph in a built up area (meaning there was a limit of 30 mph). As it deals with the time at which children were expected to leave school and with that which they are taught to do I will set out in full Cumming Bruce LJ's words at 270:

"Although it is true that the time when school children pour out of school on their way home and passed, I do not accept that a school sign by 5.10 pm has become a warning which a reasonably prudent motorist or motorcyclist is entitled to disregard. On the contrary, at that time in the afternoon in my view it is still a warning to put the motorist or motor-cyclist on notice that he is in a position in which particular care for keeping an eye open for children and their movements is incumbent on him. I doubt, however, that the school sign comes very much into this case. In my view it was the speed of the defendant which materially caused this accident by depriving the defendant of the opportunity which, in my judgment, existed of avoiding the infant plaintiff when he ran out.

Now I come to contributory negligence. Of course, the infant plaintiff, then aged seven years and three months, should not have run out across the road in the path of a motor bicycle driven down the road at about 50 mph. The problem is whether in the case of a boy of seven years and three months the defendant has proved that the boy showed a culpable want of care for his own safety. Of course, it is true that he had been taught road discipline and now aged eleven he described in the witness box with perfect skill what he had been taught and did it very nicely. I do not doubt that he had received that teaching before the date of the accident and that if he had given the matter a thought he would have

realised it was his duty, as a matter of taking reasonable care for his own safety, to advance with the utmost caution and look round the corner of the van in order to see whether anything was coming before he walked or ran across the road. The propensity, however, of infants of seven years and three months to forget altogether what they have been taught was sensibly described by his school mistress. She made an observation that if a child of that age wants to get anywhere, he will forget all he has been taught."

That passage to my mind, bearing in mind the disparity in age, seems to me to be very close to the considerations which are material here. Before coming to Madan JA's dictum in *Butt v Khan* (supra), which Law JA has set out, I revert to the facts of this case. It was common ground that there was no obstruction at the side of the road from behind which Anna could have emerged. Mrs Tayab had clear vision in front of her and in her immediate vicinity. There was no obstruction on the pathway. She knew the stretch of road, passing along it frequently and that there were several schools bordering it, that children crossed, that it was the school lunch time, and that:

"Generally about 1 pm there would be many children near that place."

Before going any further on the conduct of Mrs Tayab I ask myself 'did the child stop to view the road, looking right, left and right again and then start to walk' as the learned judge found at one stage he said that she looked left, right and left, in that sequence, but I think that must have been a slip. To my mind that finding is untenable, because if she had done so pausing to view the road beforehand, she must have seen Mrs Tayab's car on this straight and level stretch of road, and on this fine day, remembering the car was coming from her right, in which direction she said she looked twice. I find myself regretfully unable to agree with Law and Potter JJA, that that finding can possibly have been right on this evidence. I do not believe that she did so. But I do not think, either, that the fact of whether she did that which she said she did or not, is central to the issue of her contributory negligence (as opposed to that of the negligence of Mrs Tayab). It does not affect the correctness of the judge's conclusions that Anna had the requisite road sense, that she knew she had to cross in a manner that would ensure her safety and that she understood and appreciated the dangers of using the road. Whether Anna was 'truthful and credible' or otherwise on this point is not the crucial question because she knew that was what she should do, for, unless she had been taught that she would not have told the judge (and probably her mother and teachers too) that she had done so, albeit untruthfully. I therefore find myself impelled to the only conclusion which is in my opinion possible on the evidence, which is that she crossed the road without looking.

In the recent case of *Kite (an infant) v Nolan* (1982) 126 SJ 821, the court dismissed an appeal absolving the motorist from negligence where a boy (the age is not stated) had run out from between parked cars to get to an ice cream van on the other side of the road, Donaldson MR said that in determining what was a reasonable standard of care in all the circumstances of the case the following four factors, *inter alia*, had to be considered:

"(1) the likelihood of a pedestrian crossing the road into the motorist's path;
(2) the nature of the pedestrian, whether a child or adult;
(3) the degree of injury to be expected if the pedestrian was struck;
(4) the adverse consequences to the public and to the defendant in taking whatever precautions were under consideration."

Applying those principles and with my differing view of the child's actions was Mrs Tayab yet negligent" While she cannot have been going very fast, certainly no faster than the 20 mph Law JA has said, why did she not see the child if she was keeping a proper look out and had her attention on the road" There

were no obstructions like parked cars and she had a clear immediate field of vision. At the time of day and with the known schools in the vicinity, in Cumming-Bruce LJ's words, the motorist is put on notice that he or she must exercise particular care for keeping an eye out for children and anticipating that they might cross without looking. Her failure to see Anna, who started to cross without looking, and who passed across the front of her car, and her failure to stop or swerve, must in my view constitute negligence on her part. That is the conclusion to which I have come having considered all the evidence in the High Court, counsels' submissions both in that court and in this one, and all the relevant authorities.

But that is very far from being an end of the case on liability because of Mr Noad's very cogent plea that Anna was contributorily negligent. Mr Hayanga very correctly replied that the onus of establishing that as a matter of probability lay on the defendant - see *Jones v Lawrence* (supra) at 270: Mr Hayanga said that a child of that age was not really capable of being contributorily, negligent, but as Law JA has pointed out, the dictum of Madan JA in *Bhutt v Khan* (supra) (which he has set out) does not go that far as regards children under 10. This is confirmed by *Clerk & Lindsell* (14th Edn) at para 999, that there is no age below which, as a matter of law it can be said that a child cannot be guilty of contributory negligence. It may be that in England the Royal Commission on Civil Liability has recommended that contributory negligence shall not be pleaded against a child under 12, but we have to deal with the law as it is, both here and now.

As I said, Mr Hayanga urged that the test of a child's contributory negligence is subjective, and for that he cited *Salmond on Torts* (15th Edn) at 702. Out of deference to him I will deal with this part of his submissions. The quotation from O'Byrne J in the Irish case of *Fleming v Kerry* CC (1955-6) IR 72, only eflects what has been reiterated in countless other cases, but the learned author goes on to state:

"In other words the test in contributory negligence may be subjective, where in negligence it is objective."

But it so happens that the authors abandoned the above passage in *Salmond* (17th Edn) at p 522 presumably because it did not follow from the passage cited from *Fleming's* case that there was a different standard to be applied in the case of contributory negligence, as opposed to original negligence.

The reference is only of interest because the *fons et origo* of the law relating to the conduct of children (well before the advent of the motor car or of the crystallisation of the doctrine of contributory negligence) is stated in *Salmond* to be *Lynch v Nurdin* (1841) 1 QB 30, a case in Mr Hayanga's list but not cited. There a boy aged between 6 and 7 mischievously got into a cart, off which he fell, fracturing his leg. Lord Denman CJ said that the boy's misconduct was the 'active instrument' of his injury. Nevertheless he had, 'acting without prudence or thought', shown those qualities in as great a degree as he could be expected to possess them. That case is only relevant inasmuch as, though the court rejected the view that because the boy was the co-operating cause of his own injury he should be deprived of his remedy, it clearly envisaged, as early as 1841, that a child was capable of being blameworthy even though in that particular case he was too young to have blame attributed to him.

I therefore do not consider Mr Hayanga's extensive references to *Salmond* affect the general propositions stated above (in particular by Madan JA and by Cumming-Bruce LJ), tempered as they are in this case by the judge's finding that Anna had the requisite road sense and apprehension of potential danger, but (as I think) failed to make use of that road sense or heed the danger. In those circumstances it seems to me to follow inevitably that the child was negligent within the principles of *Vinod's* case, and I too would assess Anna's degree of contributory negligence at 10%. So in the result, I agree with the conclusions of both Law and Potter JJA on the parties' respective liability.

I turn now to the issue of quantum of damages. As regards quantum we have had the two opposing submissions, by Mr Noad that Nyarangi J's award was so high as to have been made on wrong principles, and by Mr Hayanga that there was no error in principle and that the award should be upheld.

The learned judge devoted much care to the question of the proper amount to be awarded as general damages, which he assessed at Kshs 750,000. This sufficiently impressed Cotran J to award even more, Kshs 800,000, to the child Naomi in *Muiruri v Emmy Annah* HC Civil Case 2938 of 1979, where the consequences were graver. Curiously, since he considered Anna's loss of amenities in so much detail, he divided the award as to Kshs 600,000 for pain and suffering and only Kshs 150,000 for loss of amenities.

The starting point in considering epilepsy cases is the recent English decision of *Burke v Woolley and Maughan* [1980] *Kemp & Kemp* (Case No 3-311 and 3-463) and the comprehensive judgment of Lawton LJ.

The facts of that case have been summarized by Law JA and I need not repeat them, save to note that there liability was by agreement apportioned as to 75:25 in the girl's favour, she being ten years old at the date of the accident. Since that judgment was delivered on October 17, 1980 it could have been, but was not, cited to Nyarangi J, as the hearing before him began on January 29, 1981 and the final submissions were not made until September 28, 1981. Counsel instead concentrated on *Butt v Khan* (supra) where epilepsy had not in fact supervened, though the chances of it doing so were assessed at 5% by this court. Nevertheless, the judge held that Anna's injuries were slight as compared with those in *Butt v Khan*, where the degree of permanent disability due to brain damage was assessed at 50%.

In *Burke's* case the infant plaintiff fell into the third of the three categories of epilepsy cases which Law JA has set out *in extenso*, and received £ 24,000. Although Mr Hayanga indicated at one stage that he was proposing to call evidence that Anna's condition had worsened this evidence did not materialise. In the result we are left with the evidence that Anna came within the second category. As Lawton LJ said in *Burke's* case:

"In this type of case, because of the lack of comparable awards, it has been impossible to say that there is a conventional amount for damages. It follows that the next step this court has taken is to try to put this case in the spectrum of personal injuries, one end of which is concerned with the trivial and the other end with the terrible injuries which can arise as, for example, in cases of quadriplegia."

Anna's injuries are certainly not trivial. Neither are they as devastating as quadriplegia or even the third type of epilepsy. Had *Burke's* case been decided at the time of *Butt v Khan* then presumably, so far as the risk of epilepsy was concerned it would have been held to be within the first category.

Lim Poh Choo v Camden and Islington Area Health Authority [1979] 1 All ER 332 cited by Mr Hayanga, was of little relevance on quantum in the instant case because it was at the extreme end of the spectrum stated by Lawton LJ, being if that is possible, worse than quadriplegia, the plaintiff, a former senior psychiatric registrar, needing constant care and supervision for the rest of her life, as a result of medical negligence. But there are one or two passages which I think, are of general application. As Bristow J said, the plaintiff's appalling disability was a very great tragedy, but he continued:

"In justice to defendants as well as to Dr Lim the sum (that is awarded) must be in proportion to awards in other cases of those who have suffered injuries of comparable severity."

As Lord Denning MR said in the Court of Appeal (he was the dissenting judge in the upholding of the award of nearly £ ¼ million):

“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 the Kenya case of *Bhogal v Burbidge* [1975] EA 285, also cited by Mr Hayanga, Law Ag P said:

“The general picture, the whole circumstances, and the effect of injuries on the particular person concerned must be looked at. That is so, but some degree of uniformity must be sought in the award of damages, and the best guide in this respect is, in my view, to have regard to recent awards in comparable cases in the local courts ... the Kshs 300,000 awarded by the trial judge, a figure which, with respect, I consider to be based on a wrong principle when measured against awards in other comparable awards in recent local cases.”

The next case, *Joyce v Yeomans* [1981] 2 All ER 21, where the English Court of Appeal, inexplicably, increased an award to a boy of under ten who suffered brain damage to only £ 6,000, where there was severe brain damage with epilepsy, was an award which seems to me so low as not to merit serious consideration in this case, particularly in view of the severe effect on the child’s education. In *Young v Redmond & Peake* (1980) Current Law Year Book Case 659, where there was severe and lasting brain damage to a boy of under 9, £ 32,500 was given for pain, suffering and loss of amenities.

Reverting to the judicial pronouncements as to the comparability of awards, to which I would add that Lawton LJ said in *Burke’s* case in adopting Lord Morris’s words in *West (H) & Son Ltd v Shephard* (infra) at 346:

“Furthermore, it is eminently desirable that so far as possible comparable injuries should be compensated by comparable awards.”

It seems to me that the court has to strike a balance between endeavouring to award the plaintiff a just amount, so far as money can ever compensate, and entering the realms of very high awards which can only in the end have a deleterious effect on the very class of persons whom the court is trying to protect, for the reasons given by Lord Denning MR (supra). But, of course, as Mr Hayanga said, the court must bear in mind that in England treatment, certainly for children, is either free or of low cost to most people, and that leads me to the rest of Lord Denning’s quotation, that in America:

“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 impeding their service to the community.”

So Mr Hayanga’s submission in that sense cuts both ways.

I have borne in mind the words of Law JA in *Kimothia v Bhamra Tyre Retreaders* [1971] EA 81 where he said:

“Mr Vohra has cited a number of English cases, in which higher damages were awarded for comparable injuries. In my view awards made by foreign courts, although 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."

The court in that case refused to increase an award of Kshs 20,000 for the loss of three fingers of the appellant's right hand, as not being manifestly so low as to warrant interference.

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. It may be that she gets some medical attention and treatment free, but free medical attention is by no means as widely available as in England where they have the National Health Service. I consider these are factors which should be taken into account in the award.

As against that it must be borne in mind that Anna will be getting a lump sum which can, presumably with proper safeguards by the court, be invested to produce income, which, even with the possible incidence of tax, will still produce a sizeable sum per annum, which will help towards her care and medical attention.

In *Butt v Khan* (supra) one of the factors which influenced Law JA in reducing the award was the disparity between the English Pounds Sterling and the Kenya Shilling. As he said, at that time, five years ago, an award of £ 20,000 in England represented an award of only £ 15,000 in Kenya. But this is no longer the case. Not only has Kshs 20 become almost at par with the pound sterling, but there is the fall of the value of money generally to be taken into account; as Browne LJ recognised in *Lim's* case (supra):

"Counsel for the plaintiff put before us an advance copy of a table which is to appear in the new edition of Kemp & Kemp. The Quantum of Damages, showing the value of the pound at various dates. Without going into detailed figures, it is clear that if the awards in the four cases to which I have referred are translated into their 1977 equivalents they would be far more than the £ 20,000 or £ 26,000 awarded by the judge in the present case, something like £ 40,000 or £ 50,000 or even more."

Mr Hayanga, also cited *Kemp & Kemp* and suggested that the award in *Jones v Griffiths* [1969] 2 All ER 1015 (cited by Mr Noad) should be multiplied by 3.1 to take account of the drop in the value of money since 1969. Mr Noad said that the £ 5,000 there awarded would have become £ 12,000 by 1983. Unfortunately the inflation table he cited in *Kemp & Kemp* only goes up to 1979. Since then there has been an even more marked drop in the value, of money. I do not think it of much use to compare the figure in *Jones v Griffiths* in 1969 with the present day. That was thirteen years ago. Of this Sir Patrick Browne said in *Burke's* case:

"I do not propose to take up time going into differences between that case and this case, or the validity of that figure of £ 10,000 or £ 11,000. I assume that it was about right in 1969 for a serious case of epilepsy. I should be the last person to suggest that, when you are comparing a case in 1969 with a case now, you can apply any sort of mathematical approach, but it does seem to me that it would be quite unrealistic to say that an increase from £ 10,000 or £ 11,000 to £ 24,000 is out of step with the general fall in the values of money."

I think it more realistic to compare *Burke's* case in 1980, two and a half years ago. There, £ 24,000 was upheld for category three epilepsy. So category two would be less. But there has been, as I said, a further drop in the value of money since then. According to the table in vol 2 of the latest available edition

of *Kemp & Kemp* at p 601 the value of the pound sterling as at January 1981, and as at January 1980, was 1.11 and 1.26 respectively of that in December 1981. So, on that basis, £ 24,000 on October 17, 1980 would be multiplied by approximately 1.16 to obtain the figure for January 28, 1982 when Nyarangi J delivered his judgment, say £ 27,840: at par Kshs 556,800 in Kenya money.

Having considered all these factors it seems to me that the learned judge's award in this case was altogether too high. I do not dispute that which Lord Morris said in *West (H) & Son Ltd v Shephard* [1964] AC 326 at 353, namely:

"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 by 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."

Nevertheless if Kshs 750,000 is to be maintained for second category epilepsy, the mind cringes at the award third category epilepsy, and then quadriplegia, would carry. Some balance has to be maintained, though, as I have already remarked it has to be said in fairness that, *Burke's* case was not cited to the judge. Had it been cited to him he might have taken a different view. We are considering Anna's damages in the light of *Burke's* case whereas he could not. After due consideration I consider that Anna should be awarded a global sum for pain, suffering and loss of amenities, and I think this sum should be Kshs 400,000 on the terms of total liability.

I, therefore, would reduce the judge's award to 90% of that amount, namely Kshs 360,000. In all other respects, I concur in the orders proposed by Law JA.

Dated and delivered at Nairobi this 30th day of March 30, 1983.

E.J.E LAW

……

JUDGE OF APPEAL

K.D POTTER

……

JUDGE OF APPEAL

A.R.W HANCOX

……

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR