THE PRINCIPLE OF OPPORTUNISM AND ITS EFFECT ON THE INSURANCE BUSINESS IN KENYA.

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TABLE OF CONTENTS

CHAPTER TWO

CHAPTER THREE

DEDICATION

This dissertation is dedicated to my loving father, William Manyal for giving me an option to study; to my adorable mother, Loice Manyal for her support; to my brother and sisters Emmanuel, Caro, Faith and Chebet who have been such a great inspirational force in my life and who have worked tirelessly towards my achieving the law degree.

DECLARATION

I Beatrice Chepkemoi Manyal, declare that the dissertation presented to Kampala International University is my original work and has never been submitted to any institution /organization for any award

Signature.....................................

BEATRICE CHEPKEMOI MANYAL

Date..20/12/10.................................

RESEARCHER

APPROVAL

This work has been done under my supervision as an institution supervisor and with my Approval

Signature……………………………………..

Mr. NASSER SSERUNJOJI.

Date 25/12/2010…………………………………………

SUPPERVISOR

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1.0 INTRODUCTION

Opportunism is the practice of grasping at opportunities without regard for moral considerations. It is the practice of adjusting one's policy in light of each new situation as it arises, not according to the principle or plan[1].

A contract of insurance is based on scientific calculation of risk and the amount of premium is ascertained after taking into account the various factors affecting the risk. The party who promises to pay is called the insurer while the party to whom the guarantee/protection is given is called the insured.

The principle of opportunism in insurance law takes the form of unjust enrichment which will form the subject of our discussion. The insurer usually takes opportunity of the insured's position in not only calculating the risk but also during the indemnification stage when he takes over the salvage in situations where there has been subrogation.

Unjust enrichment is thus part of the opportunistic nature of the insurers. It has three elements. **First**, the insured must have provided the insurer with something of value a expecting compensation in return. **Second**, the insurer must have acknowledged, accepted, and benefited from whatever the insured's provided. **Third**, the insured must show that it would be inequitable or unconscionable for the insurer to enjoy the benefit of the insured's actions without paying for it. In **Garland vs. consumers' gas co**[2], **iacobucci J** observed:

"As a general matter, the test for unjust enrichment is well established in Canada. It has three elements, (1) an enrichment of the defendant (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for enrichment"

In the decision in ***KPMG (Trustee in Bankruptcy of Ellingsen) v. Hallmark Ford Sales Ltd.***[29],

[1] The New Webster's dictionary and Thesaurus of English language.

[2] QL. at p.10

Lambert J.A., of the British Columbia Court of Appeal, made the following comments regarding the

Test – the third element in particular – for unjust enrichment in a commercial relationship:

"But like most simple legal tests it must be applied thoughtfully and not mechanically, particularly with respect to whether there is a juristic reason for the enrichment which is said to have taken the enrichment out of the category of being "unjust". The juristic reason may be legal or equitable or both. But it must be measured in accordance with the principles of equity which underlie the remedies of restitution and the remedial constructive trust. So the "injustice" of an enrichment must be measured by the standard of "good conscience" and, in a commercial case, the "good conscience" must be good commercial conscience.

In the Kenyan case of **George Montet vs. Fredrick kokai kusero**[3] two motor vehicles were involved in a collision. The defendant was held liable. The value was computed at the value of shillings ksh 170,000. The amount of ksh 420,000 was not objected to less the salvage amount of shillings 170,000. In a case where the insured retains salvage after an accident, he will be paid the cost of the subject matter less that salvage

In another case of **Joseph Ndungu Gachoka vs. united insurance co. ltd**[4] the plaintiff obtained a policy of insurance on motor vehicle and it was a one year comprehensive policy covering inter alia, the event of theft of the motor vehicle and the insured's value was shilling 1,000,000. The motor vehicle was stolen from his employees and the matter was reported to the police and the defendant. Shortly thereafter it was found but it was completely vandalized leaving only the shell. The plaintiff called upon the defendant to comply with the terms of the policy and completed claim forms but the defendant did pay and he sued. The court held that the event of theft was covered under the policy and that the indemnity should be paid to the plaintiff by the defendant.

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[3] **(1995) HCCC No 2027 of 1995, 11th April 2000 (unreported)**

[4] **(1996) H.C.C.C no. 2309 of 1996, 12th April 2002 (unreported)**

It is for this reason that any benefit that an insured receives after the loss will have to be accounted for to the insurer which therefore reduces the indemnity sum either payable or already paid by the insurer.

One of the more prominent statements of the principle of unjust enrichment includes the early and oft-repeated dictum of **Lord Mansfield** in **Moses vs. Macferlan**[5]**:** the gist of this kind of action is that the defendant upon the circumstances in the case is obliged by the ties of natural justice to refund the money.[6]Another is that of **Lord Wright** in **Fibrosa Spolka Akcyjna vs** Fairbairn **Lawson Combe Barbour ltd.**[7] *"... any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which is against conscience that he should keep."*

In **Peter vs. Beblow**[8] **Cory J** adeptly described the test for determining whether there is an absence of juristic reason for the defendant's enrichment as follows: "... *when a claimant is under no obligation, contractual, statutory or otherwise to provide the work and services to the recipient, there will be an absence of juristic reason for the enrichment."*

In calculating the insurers profit therefore, all the insurers' source of income should be taken into consideration. For this case, where the insurer gets excessive profit, then; he should pay some money to the insured because he will be unjustly enriched if he retains the whole amount. Also in cases where there is no coverage the insurer should return the premium.

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[5] (1558-1774) ALLER. Rep. 581 KB

[6]At. P. 585

[7] (1943) A.C.32CH.L

[8] (1993), 101 D.L.R (4[TH]) 621(S.C.C)

1.1 BACKGROUND OF THE STUDY.

The insurance industry is currently undergoing extensive change: companies are not only effectuating mergers and acquisitions at a rapid pace, but are also being challenged by new competition from the financial services industry. In an effort to keep pace with globalization and the evolving market economy, the insurance industry has come into conflict with (insured's) whom the guarantee/protection is given in situations where the industry tries to make supernormal profits without due regard to the interests of the insured's.

This has led to claims of unjust enrichment by the insured's. The Roman jurist **Pomponious** wrote that "this by nature is equitable, that no one be made richer by another's loss. Consistent with these antecedents, courts and scholars often simply assume that unjust enrichment is in some sense an "equitable" principle. The doctrine of unjust treatment is not found in any statute rather it's an old judge made law that allows one party to claim compensation from another party on the basis of unjust treatment. It falls under the justificatory categories. It means that where the law is settled, determining the legal position involves identifying an authoritative rule that uncontrovertibly applies to the facts in question. Where there are no settled laws or no authoritative applicable rule, giving an uncontroversial account of legal reasoning is hard. Analogical reasoning is applied in such cases. This is done by drawing on principles underlying other rules that are inapplicable to the facts. A few people are of the opinion that where the issue is not resolved by an authoritative rule, then, judge determines the appropriate moral principles to apply, in case if there are differences as to what counts as settled law and whether judges are confined to narrow their incrementalism or whether more far reaching changes are legitimate. Theoretical reasoning promotes consistency and thereby enhances the coherence fairness and clarity of the law[9]

[9]Peter Jaffey`Classification and Unjust Enrichment' (2003) the Modern Law Review 1012.

As the insurance industry tries to spread its claws in spreading risk, it ends up in conflict with the insured's who would not only want the return of the premium money where there is no coverage but also in indemnity and subrogation issues where the

1.2 STATEMENT OF THE PROBLEM

When an insured takes out insurance cover insuring his property he pays premiums to the insurer in return for the insurer covering the loss of his property from a particular specified risk. In the event of occurrence of the risk insured against the tortfeasor, the insurer upon payment of indemnity takes over the salvage.

At the same time subrogation gives the insurer the right to stand in the insured's shoes for that reason therefore the insurer has the right to enforce for their own benefits all the rights and remedies if the insured posses against the 3rd party.[10] An indemnity insurer's right to subrogation arises out of the nature of the insurance contract as a contract of indemnity. It arises by operation of law when the insurer makes its payment to the insured: ***Napier v Hunter***[11] The insurer on paying the amount of the loss is subrogated only in a corresponding amount to the
Insured's right of action against any third party responsible for the loss.

In addition to that the insured owes the insurer an obligation to account to him any money or benefits that he receives after he has been indemnified. These instances are where;

(i) The payment is made as a gift linked to the loss
(ii) The payment is made by a tortfeasor
(iii)The payment arises under the contract of insurance itself

This is meant to ensure that the insured is not more than fully indemnified and anything that is over and above the indemnity value belongs to the insurer.

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[10] Lister v Rumford Ice Cold Storage Co Ltd [1957] AC 55, HL.

[11] [1993] AC 713.

In the case of **Leonard Munga Githinwa vs. united insurance co. ltd (2002) H.C.C.C no. 383of 2000, 18th july 2000 (unreported)** the plaintiff sued the defendant following the judgment which he obtained in HCCC No.1937 of 1995 in his favor against the defendant in that case who was Peter Mwanthi Njenga who was the present defendant insured. The defendant then refused/neglected to indemnify the insured by paying the discrete sum. The court held that it was satisfied that the defendant was bound to indemnify the insured in HCCC of 1995. Judgment was entered in favor of the plaintiff.

To add on that the insurer gets investment income by investing the premiums paid by the insured. This enables the insurer to earn profit and this increases their income

Lastly, subrogation rights include the right to appropriate interest. When the insurer institutes a suit in the insured's name, they are entitled to claim interest for their own benefit. The insured does not benefit from this interest.

On the other hand, the insured only gets the indemnity only. That is in the event of an occurrence of the risk insured against; the insured shall be fully indemnified but shall never be more than fully indemnified.[12] According to **Penne father in Vance vs. Foster ;**[13] A policy of insurance is a contract of indemnity and while the insured may name any sum that he likes as a sum for which he will pay a premium, he doesn't do so by proposing that sum nor does the company by accepting the risk conclude themselves as to the amount which the plaintiff is to recover in consequence of the loss because, although the plaintiff can't recover beyond the sum insured upon each particular item... he can't recover even that sum unless he proves that he has sustained damage and then he will recover a sum commensurate the loss he has sustained

In some cases however they get bonus where the insured has not been involved in any risk. They are not entitled to any other benefit whatsoever. The opportunistic nature of the insurer is seen in these instances by the insurer being unjustly enriched at the expense of the insured.

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[12] Castellan v Preston (1883) 11 QBD 380, Court of Appeal.

[13] (1841) I.r.c.r Rep. 47

1.3 OBJECTIVE OF THE STUDY.

This working paper had several objectives. First it sought to examine the refusal of the courts to consider the insured as being unjustly enriched as opposed to the insured in a case where he gets everything over and above indemnity, in respect of contracts of indemnity only; the insured on the other hand only gets the indemnity only. That is in the event of an occurrence of the risk insured against; the insured shall be fully indemnified but shall never be more than fully indemnified. Related to this was the analysis of the principle of indemnity as a form of unjust enrichment and the principle of subrogation as a form of unjust enrichment to the insurers. It also assessed any remedies available to the insured in case of unjust enrichment.

1.4 SIGNIFICANCE OF THE STUDY.

1. To highlight the concept of unjust enrichment.
2. This study aims to enlighten the society on the opportunistic nature of insurers where they are usually unjustly enriched at the expense of the insured's and remedies in case of unjust enrichment. .
3. The study may also be used as a reference material by other students wishing to undertake research on the same.

1.5 LITERATURE REVIEW

It should be recalled that unjust enrichment is relatively new to Kenyan jurisprudence. It requires flexibility for courts to expand the categories of juristic reasons as circumstances require and to deny recovery where to allow it would be inequitable. The Court's approach to unjust enrichment, while informed by traditional categories of recovery "is capable, however, of going beyond them, allowing the law to develop in a flexible way as required to meet changing perceptions of justice". But at the same time there must also be guidelines that offer trial judges and others some indication of what the boundaries of the cause of action are. The goal is to avoid guidelines that are so general and subjective that uniformity becomes unattainable.

Not so much has been written about unjust enrichment in Kenya particularly in insurance law. However there exists written literature concerning unjust enrichment thus this research assesses and reviews the existing literature

In his work, **Remedies The law of damages, on line (Irwin Law, 2000), Jamie Cassel's** explains the evolution and present status of the law of unjust enrichment in Canada in the following terms; in Canada the development of the law of unjust enrichment has been achieved primarily through the evolution of the constructive trust. In a series of cases involving the property rights of cohabiting couples like in **Becker vs Pettkus**[14] the supreme court of Canada substantially consolidated the principle of unjust enrichment. In these cases the court affirmed that when one cohabitee contributes in money or services towards the acquisition of the property by the other, the principle of unjust enrichment may require restitutionary remedy in favor of the contributor. Liability in this situation doesn't turn on a contract between the parties, their intent, a tort committed by one against the other or a statute. It turns simply on the autonomous principle of unjust enrichment. The court retaliated that the remedy was available when there has been 1) an enrichment of the defendant (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for enrichment.

An informative review of the concept of unjust enrichment and the manner in which it is compensated is provided for **by Mitchell Mc Innes**, in his article entitled "**the measure of restitution" (2002) 52 U.T or LJ 163**. Therein he writes; in English law the court must be satisfied not only that the defendant received an enrichment but also that the plaintiff suffered a corresponding deprivation. There must not only be a plus but also a minus in division. Moreover, both sides of the equation must be capable of being expressed in economic terms. As **Mr. Justice La forest** explained in **Air Canada vs. British Colombia**, the action in unjust enrichment is not intended to provide windfalls to plaintiffs who have suffered no loss. Its function is to ensure that where a plaintiff has been deprived of wealth that is either is in his possession or would have accrued for his benefit it's

[14] (1980) 2 scr 834

restored to him[15]. Consequently the defendant enrichment is relevant only in so far as it was received at the plaintiff's expense.[16]

The current ALI Draft takes a somewhat Delphic stand on the nature of the principle of unjust enrichment. Comments to the introductory sections of the new Restatement deny any intention "to repudiate the traditional, equitable explanation of restitution liability." Yet they note that "the purely equitable account of the subject is open to substantial objections. Saying that liability in restitution is imposed to avoid unjust enrichment effectively postpones the real work of definition, leaving to a separate inquiry the question whether a particular transaction is productive of unjust enrichment or not." The comments also propose that restitution is not concerned with unjust enrichment in a "broad sense, but with a narrower set of circumstances giving rise to what is more appropriately called unjustified enrichment . . . . Unjustified enrichment is enrichment that lacks an adequate legal basis . . . ." The work of **Peter Birks in 1985,** building foundation of Golf and Jones explained that unjust enrichment was a substantive category of private law and provided an underlying theory. He proposed an approach to unjust enrichment that requires a positive reason or unjust factor. **Lord Mansfield** in the case **of Moses vs. Macfarlane**[17] stated that money paid by mistake or on a consideration which happens to fail or for money got through imposition (expressed or an undue implied) or extortion or oppression or undue advantages taken of the plaintiffs situation. Others include policy reasons such as the principle that taxes will not be exacted without lawful authority[18].

1.6 HYPOTHESIS

The working hypothesis was; are the insurers unjustly enriched at the disadvantage of the insured?

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[15] (1989) 59 D.L.R at 194

[16] At p.172

[17] (1760)2 Burr 1005, 1012; 97 ER 676,681.

[18] James Edelman, `Limitation Periods and the Theory of Unjust Enrichment' (2005) 68 The Modern Law Review 848

1.7 SCOPE OF THE STUDY`

1.7.1 GEOGRAPHICAL SCOPE

This study was carried out in Kenya. It analyzes the concept unjust enrichment in insurance law and its impact thereof.

1.7.2 CONTENT SCOPE

This paper has been approached from both a legal and a social perspective. In this regard it has considered unjust enrichment from the law maker's point of view and the moral view too.

1.8 METHODOLOGY

Due to limited financial resources, a field research/study was not possible. The required data by way of interview was also not obtained. This would have limited the research to some extent, however the greater part needed for this was covered

This is a desk and library based research. As such it sought reliance from both published and unpublished material. Internet sources were also widely referred to. The study also analyzed primary sources of data such as case law

Research methods were therefore heavily dependent on prior public documents, secondary data, and textbooks from the library.

1.9 OUTLINE OF CHAPTERS

This paper will be divided into five chapters**.** **Chapter one** contains the introduction, background and statement of the problem, objectives, scope and hypothesis, significance of the study, methodology, literature review and outline of chapters.

Chapter two discuses the principle of indemnity as a form of unjust enrichment.

The **third chapter** deals with the principle of subrogation as a form of unjust enrichment to the insurers.

The **fourth chapter** will consider remedies for unjust enrichment.

Finally in **chapter five**, recommendations and conclusions will be considered

CHAPTER TWO

2.0 Principle of Indemnity as a Form of Unjust Enrichment

2.1.0 Introduction

Indemnity is an insurance principle that seeks to restore the insured in so far as in financial terms to the position he was in before the occurrence of the loss. The insurer thus seeks to identify any circumstances that would reduce his liability and avoiding situations where the insured will get more than his loss after his indemnity. It is for this reason that any benefit that the insured receives after a loss will have to be accounted for to the insurer, which therefore reduces the indemnity sum, either payable or already paid by the insurer.

Despite the exercise of liability of the assured to account for any benefit received being clear, and that it is based on the principles of indemnity is beyond question defining the nature of the right of the insurers is not easy, or in saying on what ground the liability of the assured may be enforced. This right of the insurer may be a right to cover back what they have paid or it may be merely a right to the benefit of what the assured had received. The nature of the right is material in some cases. In a case where the assured receives a benefit through the payment of a sum which purports to be a full indemnity, but which is less than the amount already paid by the insurers the amount for which the assured must account necessarily differs according to the view adopted as per the rights of the insurers. There are views, which have been formulated in regard to this. These are:

1. The insurer's rights depend on an implied contract that the assured holds for the benefit of the insurer or pay over to the insurer whatever he may afterwards receive from other sources in respect of the loss. In **King V Victoria Insurance Co.**[19] it was stated that the opinion has been expressed, on the one hand and the insured is a trustee for the insurer

[19] [1986] AC 250, at 252, pc

to the extent of money received. In **Symon v Mulken**[20], on the other hand, it was stated that the insured is a mere debtor.

2. The right of the insurer is dependent on the doctrine of subrogation, which is not confined to the enforcing of remedies, but confers to the insurers the right to receive the advantage of any remedy which has been applied by the assured to himself.

3. The rights of the insurers depend on the fact that the insurers made their payment on the condition that the assured had suffered a loss for which he made his claim entitling him therefore, on it turning out that he has sustained no loss at all, to sustain an action for money had received to recover what they paid.

4. The rights of insurers depend on promise on the part assured, which is to be implied from the payment by the insurers of the loss, that if the loss is afterwards made good from other sources, he will repay them what he has received from those sources. In **Darrel v Tibbitts**,[21] it was stated that the right has however, been said to be not a right to recover back what he has been paid, but merely a right to the benefit of what is received by the insured.[22]

2.2. Indemnity explored.

This chapter deals with how the principle of indemnity operates in a way that unjustly enriches the insurer. It seeks to show how this principle unjustly enriches the insurer as it tries to prevent the insured from being unjustly being enriched. This principle together with the principle of subrogation are principles that are meant to prevent unjust enrichment to the insured and they in turn end up unjustly enriching the insurer. Contracts of indemnity are contracts of indemnity and indemnity only. This contract means that the assured in case of a loss against which the policy has been taken, shall be fully indemnified, but shall never

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[20] [1882] 46 LT 763 (Transit Insurance)

[21] (1880) 5 QBD 560, CJ (fire insurance) per Brett LJ

[22] John Birds, Modern Insurance Law (2nd Ed, 1993)

be more than fully indemnified. The insured will not be entitled to keep all the profits alone and the law does not consider this unjust enrichment on his side. This then gives the insurer the right to take anything that benefits the insured.[23]

Indemnity seeks to restitute an insured to his previous position that he was in before the occurrence of the risk. This means that in case of a loss against which the policy has been issued occurs, the insured shall be paid the actual amount of loss, an amount not exceeding the amount of the policy, i.e. shall be fully indemnified.[24] The object of every contract is to place the insured in the same financial position as nearly as possible after loss, as if the loss had not taken place at all. In the cause of **Joseph Ndungu Gachoka v United Insurance Company Ltd, the plaintiff**[25] obtained a policy of insurance on motor vehicle and it was a one year comprehensive policy covering inter alia, the event of theft of the motor vehicle and the insured value was K.Sh. 1 million. The motor vehicle was stolen from his employees and the matter was reported to the police and the defendant. Shortly thereafter it was found but it was, completely vandalized leaving only the shell. The plaintiff called upon the defendant to comply with the terms of the policy and completed claim forms but the defendant did not pay and he sued. The court held that the event of theft was covered under the policy and that the defendant indemnity should be paid to the plaintiff by the defendant.

In the case of **Leonard Munga Githinwa v United Insurance Company Ltd**,[26] the plaintiff sued the defendant following the judgment which he obtained in HCCC No. 137 of 1995 in his favour against the defendant insured. The defendant then refused/neglected to indemnify the insured by paying the discretal sum. The court held that it was satisfied that the defendant was bound to indemnify the insured in HCCC No. 1995 Judgment was entered in favour of the plaintiff.

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[23] Customer support, fundamental Principles of Insurance (as of 2000 – 2003). http://www.helpline.com/docs/main.php3? =INSU2 at 5 Feb 2008.

[24] C Hamblin and B. Wright, ONC/OND Commercial Law (1979).

[25] (1996) HCCC No. 2309 of 1996, 12 April 2002 (unreported)

[26] (2002) HCCC No. 383 of 2000, 18 July 2000 (unreported)

It is for this reason that any benefit that an insured receives after the loss will have to be accounted for to the insurer which therefore reduces the indemnity sum either payable or already paid by the insurer. At common law, there are three circumstances or situation under which the insured must account to the insurer in relation to any money or benefit received after loss where indemnity has been paid i.e. the case in which the insurers may become entitled to have a payment made to the assured brought into account are;

1) Where the payment is made as a gift;

2) Where the payment is made by a tortfeasor; and

3) Where the payment is made under a contract.[27]

2.2.1 Where the Payment is made as a Gift

The insurer is not necessarily precluded from claiming the benefit of a gift, if it results in diminishing or extinguishing the loss which the assured has sustained on the ground that the payment is made voluntarily by a third person as a gift or even as a matter of grace by a person who is in fact, though not in law, responsible for the loss. In **Blaauwpot v Da Costa**,[28] the broker paid to reinsured's claim against the re-insurer's gratuitously for commercial reasons (i.e to save them work and to keep the reinsured's good will). It was held that, since the payment had been made solely for the reinsured's benefit, the reinsurers had no right to the sum, which had been paid, and accordingly the case would be remitted to the arbitrators.

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[27] **Castellain v Preston (1996) H.C.C.C no. 2309 of 1996, 12th April 2002 (unreported)**

[28] (1758) 1 Eden 130. Ref to MacGillivray & Parkington on Insurance relating to all risks other than marine. 7th Edition at pg 478

The question as to whether the insurer will have a right over the payment that is made as a gift depends solely on the intention with which the payment was made and its effect on the position of the insured. In **Castellain v Preston**[29], the court stated that,

"Suppose that a man who has insured his house has it damaged by fire, and suppose that his brother offers to give him a sum of money to assist. The effect on the position of the underwriters will depend on the real character of the transaction. Did the brother mean to give the money for benefit of the assured? If he did, it seems to me the insurers are entitled to the benefit, but if he did not, but only gave it for the benefit of the assured……then the gift was not given to reduce the loss and for the benefit of the insurer's as well as the assured, the case would fall on the other side of the line, and be within **Burnand v Rodocanachi.**[30] If it was given to reduce the loss and for the benefit of the insurers as well as the assured, the case would fail on the other side of the line, and be within **Randal v Cochran[31]; Merret v Capitol Indemnity Corp**[32]; "it is a question of fact in each case whether a gift has or has not been paid in diminution of the loss and if it established that the payment was intended solely for the benefit of the assured, it has not been paid in diminution of the loss. In that event it must be disregarded in assessing the assureds' recoverable loss' (Per Steyn J.)[33]

For the insurers to be able to claim the right, some conditions must be fulfilled. These are;

- the insurers must not have been excluded by the donor from the benefit of the payment. For them to benefit, it is not necessary that they should be expressly referred to by the term of the gift; it is sufficient if the gift, on a fair and legitimate construction of its terms, operates in favour of the insurers. In **Castellain v**

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[29](1883), 11 QBD 380 (fire insurance)

[30] (1882) 7 A. C. 333 (Marine Insurance)

[31] (1748) 1 Ves sen 97 (Marine Insurance) Ref to MacGillivray & Parkington on Insurance relating to all risks other than marine. 7th Edition at pg 475

[32] (1991) 1 Lloyd's Rep 169 (reinsurance)

[33] supra

Preston,[34] it was stated that, "in **Burnard v Rodocanachi(1882) 7 A. C. 333 (Marine Insurance)**, the foundation of the judgment, to my mind, was that what was paid by the United States Government could not be considered as salvage but must be deemed to have been only a gift. It was only a gift to which the assured had no right at any time until it was placed in their hands. I am aware that with regard to the case of reprisals, or that which a person whose vessel had been captured got from the English government by way of reprisals, the sum received has been stated to be, and perhaps in one sense was, a gift of his own government to himself, but it was always deemed to be capable of being brought within the range of the law as to insurance, because the English Government invariably made the "gift", so invariably that as a business it had to be considered as a matter of rights".

- The effect of the payment must be to extinguish the loss or reduce it to an amount less than the sum already paid by the insurer. If the insured's loss exceeds the sum so paid, and the payment relates only to the excess, having been made with the intention of making good, not his whole loss, but only such apportion of it as should not have been covered by insurance, no question of double indemnity can arise since the assured, by receiving and retaining both sums, is not more than fully indemnified.

- The payment must have been made with the intention on the part of the donor of diminishing or extinguishing the loss in respect of which the insured has already been indemnified by the insurer. This was evident in the case of **Steans v Village Main Reef Gold Mining Co Ltd**[35], where the South African Government detained defendant's insured gold. The insureds were paid the value of the gold by the insurance Co Ltd. Subsequently, the government returned the gold to defendant in its public relation exercise to attract support in relation for the latter's agreeing to keeps the mine open. The court held that the defendant claim succeeds i.e the insurers were entitled to

[34] Darrell v Tibbits (1880) 5 QBD 560, CJ (fire insurance) per Brett LJ

[35] (1882) 7 App. Cas 89 per Vaugham Williams LJ

recover the equivalent of that money because it had been given in order to diminish the insured's loss.[36]

2.2.2 Where the Payment is made under a Contract

In a case where the contract imposes on the person making the payment a liability towards the assured to make good the loss which he has sustained, as e.g. where such person is a carrier, or a tenant under a covenant to repair, such payment, being a discharge of the liability, operates as an indemnification of the assured in respect of the loss against which he had insured and for which he has already received an indemnity from the insurers. For any payment by a third party tortfeasor should be accounted to the insurer. In the case of **Yorkshire Insurance v Nibset Shipping Co,**[37] a ship got lost in 1945 because of collision. The agreed value of the ship was $72,000, which the insurer paid. The insured's stated proceedings against the Canadian Government, the owners of the other ship with the insured's consent. In 1955 the government was found liable for the loss and damages awarded were $75,000 which was properly converted to Canadian dollars at the rate of exchange prevalent at the time of collision. The insured received this sum in 1958, but it produced a sum of $126,000 and the insured could not of course deny the insurers' entitlement to $72,000. They however, disputed that they were entitled to the surplus of about $55,000. The court held that the subrogation rights of the insured extended only to the sums they had paid out. The court held that the subrogation right of the insurer extended only to the sum they had paid out. The result is somewhat unfair and the insured had the benefit of prompt payment of the money in 1945. The court held that the insurers exercised their right to sue the Canadian Government in the insured's name because they would have the benefit of claiming interest.[38]

[36] **(1996) H.C.C.C no. 2309 of 1996, 12th April 2002 (unreported)**

[37] (1882) 7 A. C 89

[38] (1884) 13 QBD 706, CA (Marine Insurance)

If the insured receives compensation from the insurer and also payment under the contract, he will be doubly indemnified and he cannot retain the payment as against the insurers. It is not necessary that the person in making good the payment should by the terms of the contract be required to make good the loss. The contract must not necessarily relate to the loss, provided that it related to the subject matter of insurance, the principle of indemnity being equally applicable so long as the effect of the payment is to diminish or extinguish the loss.[39]

2.2.3 Where the payment is made by a tortfeasor

The general rule is that, any payment by a third party tortfeasor should be accounted to the insurer except in the case of **Yorkshire Insurance v Nibset Shipping Co Ltd**[40]. Where the payment is made by the person to whose negligence or default the loss is attributed, the payment is made by way of compensation for the loss, where it is recovered in an action in tort for damages, or where it is made voluntarily by the tortfeasor. In a case where the payment is made in respect of loss not covered by the policy, the insurer cannot claim the benefit of it. In the case of **Sea Insurance Company v Hadden,**[41] the insurers on ship, who paid for a constructive total loss by collision, were held not to be entitled to claim from the owner the compensation, which they had received from the tortfeasor for loss of freight.

The insured cannot be allowed to retain any money for a tortfeasor in addition to the sum paid by the insurer under the policy covering the loss, since he would thus receive double indemnity. The insured is however, entitled to an allowance in respect of the cost insured in maintaining any necessary action to recover the compensation. In **Darrell v Tibbits**[42] the insurer had indemnified the landlord after his house was destroyed by fire. The landlord

[39] (1884) 13 QBD 706, CA (Marine Insurance)

[40] (1961)2 ALL ER 487

[41] (1884) 13 QBD 706, CA (Marine Insurance)

[42] (1880) 5 QBD 560, CJ (fire insurance) per Brett LJ

later sued the tenant who had caused the fire and obtained compensation. The insurer then sued for compensation and the court held that the insurer was entitled to the money because he had already indemnified the landlord and to allow him to be given indemnity and compensation is inequitable.[43]

In the **Scottish Union and Nation Assurance Co. v Davis**[44], the respondent had insured his car with the appellant. The car was taken for repair at a garage and while it was there, it was damaged by a falling stone from a nearby building. The insurer then paid under the policy by way of setting repair charges from the damage of the stone. When insured went to collect the car, he found the repairs were shoddy and he refused to sign any voucher and sued the owner of the building from which the stone had fallen. He was paid money by the owner of the building and the insurer filed a suit claiming the money since he had already indemnified the insured. The court held that the claim of the insurers failed since they had not fully indemnified the insured, as the repairs were shoddy and the tortfeasor payment would help in the full indemnity.

2.3. Indemnification before Payment

When the insured suffers a loss, it can be partially or in some cases be wholly made good from other sources, before payment by the insurers, whose liability is correspondingly diminished or extinguished. In the case of **Sagoo Radiators Ltd. V Mohammed Ali and Another.**[45] Sagoo Radiators Ltd (the plaintiff) was the registered owners of a motor cycle while the respondent was the registered owner of a motor vehicle. An employee of the plaintiff was ridding the said motor cycle when he was knocked by the said vehicle at the front by the vehicle's mudguard. The court held that the second defendant was negligent and he was held liable to the plaintiff. In the case of **John Award v Standard Ltd**,[46] the plaintiff claimed compensation for defamation and he wanted Mr. Pravin Bowry to be

[43]LS Sealy and RJA Hooley, Commercial Law- Texts, Cases and Materials (2nd ed, 2003)

[44] (1970) 1 Lloyd's Rep. 1

[45] (1995) HCCC No. 149 of 1995, 23 March 2004 (unreported)

[46] (2005) HCCC No. 1062 of 2005, 5 November 2006 (unreported)

added as the second defendant in the suit. Mr. Bowry agreed to be solely responsible and he took out an indemnity form and undertook to be solely responsible for the contents of the advertisement. In the case of **Mwangi Mathai v Rocky Driving School**,[47] the plaintiff and the defendant were involved in a road accident and the defendant was found liable to compensate the plaintiff for the loss. The defendant's insurance was held to indemnify the defendant to the extent of Kshs. 600,000 and the defendant would pay the balance.

The nature of the loss determines the action of the assured as is really is at the time of action brought. The contract of the insurers is to make good the loss and if the loss is made good aliunde, the insurers are not liable, since there is no loss. They may receive a sum of money or other benefit from a third person which has the effect of diminishing or extinguishing the loss. Whether such person is under some liability to the assured in consequence of the destruction of the subject matter, and makes the payment in discharge of his liability or whether lies makes it voluntarily with the intention of assisting the assured to bear his loss is immaterial. In the case of **Mathewson v Western Assurance Co**[48], a mortgagee was held not entitled to recover under a policy covering his own interest, on the ground that the mortgagor had reinstated the mortgaged property before action brought and the mortgagee's security was therefore undiminished. The assured must give the insurers credit for the sum, which he has been paid, or for the value of benefit, which he has received, as the case may be. The insured cannot recover as against them more than the balance, if any, of his loss, since, if he were allowed to claim a full indemnity from them, and to retain the payment or benefit already received from third person, he would be more than fully indemnified.[49]

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[47] (1998) HCCC No. 174 of 1998, 14 March 2001 (unreported)

[48] (1859) 10 LCR 8 Ref to MacGillivray & Parkington on Insurance relating to all risks other than marine. 7th Edition at pg 62

[49] **(1996) H.C.C.C no. 2309 of 1996, 12th April 2002 (unreported)**

2.4 Indemnification after Payment

In a case where the insurers have paid to be assured the amount recoverable under the policy, the assured remains liable to account to them for any benefit which he subsequently receives from third person in respect of the loss, and which results in diminishing or extinguishing the loss against which the insurers have indemnified him. In the case of **Smith Plant Hire v Main Waring**[50], it was held that, "it has been the law, where insurers have paid a claim that they stand in the shoes of the assured in order to recover anything which is relevant to that claim. The law has long been that subrogation entitles the insurers to bring an action in the name of the assured against the wrongdoer to recover anything that is recoverable. The reason for that is that the right of action is vested in the assured. The cases show that an action can be brought by the insurer in its own name where he has taken a legal assignment of the course of action from the assured. In the case of **P.N Mashru Ltd v The Hon Attorney General,**[51] the plaintiff owned a motor vehicle which was dully being driven by its authorized driver. The vehicle was damaged as a result of a prison motor colliding into it. The Attorney General conceded to enter into consent in liability. The court stated that where the insurer has already indemnified the insured, the insurer is entitled to the right of subrogation against the insured since the insured cannot again wish to be paid as they have already been paid.[52]

In the case of **Kenya Airfreight Handling Ltd v Indemnity Insurance Company of North America and 3 others,**[53] the first, second and third respondents were co-insurers of a consignment of currency notes amounting to US $ 1 million which was being transmitted by Swiss Air Transport Limited, the fourth respondent, to Citibank N.A Nairobi, in two packages weighing 11kg each. The consignment arrived in Nairobi on January, 1997 and was subsequently released by the fourth respondent into custody of the appellant, a subsidiary of Kenya Airways, while at the appellant's premises; the consignment either

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[50] (1986) 2 Lloyds Reports 244

[51] (1995) HCCC No. 3534 of 1995, 25 May 2005 (unreported)

[52] Robert Bradgate, Commercial Law (3rd ed, 2000)

[53] (2000) CA No. 217 of 2000, 29 June 2001 (unreported)

disappeared or was released to persons unknown to the consignee and without the authorization or knowledge of the consignee. The court stated that, "the respondents were entitled to bring the action in their own names by virtue of a formal assignment from the insured in respect of the claim and having indemnified the consignees for the loss thereby occasioned, the respondents are entitled to subrogation of the insured rights in respect of the consignment."

In **Castellain v Preston, Preston**[54] and others in July 1878, owned certain land and building in Liverpool, and they contracted to sell the property to their tenants, Rayners. Two weeks later, part of the building was damaged by fire. The owners claimed their loss from their insurers and, after negotiation; they were paid a sum of $330. They also completed the sale of the land and received full purchase price from the buyers. In this action, the court held that, since the owners had sustained no loss, they were bound to repay the $330 to their insurers.

Cotton LJ, in this case the appellant's company insured a house belonging to the defendants, and before there was any loss by fire the defendants sold the house to certain purchases. Afterwards there was a fire, and an agreed sum was paid by the insurance office to the defendants in respect of the loss...

The company seeks to obtain the benefit either wholly or partly of the amount paid by them out of the purchase money which the defendants have received. In my opinion, the plaintiff is right in that contention. I think that question turns on the consideration of what policy of insurance against fire is, and on that the right of plaintiff depends. The policy is really a contract to indemnify the person insured for the loss which the assured may have sustained by reason of the fire which has occurred. In order to ascertain what that loss is, everything must be taken into account which is received by and comes to the hand of the assured, of indemnity, which is to be paid after taking into account and estimating those benefits or sums of money which the assured may have received in diminution of the loss...

[54] (1883) 11 QBD 380

Brett LJ. The foundation, in my opinion of every rule which has been applied to insurance law is this, namely, that the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only and that this contract means that the assured, in case of a loss against which the policy has been made, shall be fully indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proportion is brought forward which is at variance with it, that is to say, either which will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity, that proposition must certainly be wrong.[55].The liability of the insured in this case is based on the principle of indemnity, and is intended to prevent the assured from retaining what is in effect a double indemnity. In the case of **Re Miller and Company Ltd,**[56] the export credits guarantee department of the Board of Trade issued to a firm of exporters a policy in respect of a buyer's inability to pay for goods, which had been sold to him, on account of his inability to transfer currency owing to foreign exchange control difficulties, it was held that the department, which had paid the sum due under the policy, was entitled to claim the sum which the buyer finally paid when the controls were relaxed. The principle of indemnity is intended to prevent the assured from retaining what is in effect, a double indemnity. In **Darrell v Tibbits**[57], it was held that if after payment by the insurers, assured receives compensation for his loss from other sources, the insurers are entitled to recover from him any sum received by him in excess of the loss actually sustained by him. Brett LJ, said "if the company cannot recover the money back, it follows that landlord will have the whole extent of his loss as to be building made good by the tenants and will also have the whole amount of loss paid by the insurance company. If that is so, the whole doctrine of indemnity would be done away with: the landlord would be not merely indemnified, he would be paid twice over."

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[55] LS Sealy and RJA Hooley, Commercial Law- Texts, Cases and Materials (2nd ed, 2003)

[56] (1957) ALL ER 226.

[57] (1884) 13 QBD 706, CA (Marine Insurance)

2.5 The Measurement of Loss

In the policy of indemnity insurance, the amount recoverable by the insured is governed by the terms of contract. In particular, the maximum amount recoverable by the insured depends on the amount of cover provided by the policy, and if the amount of loss exceeds the amount insured, the insured must bear the loss himself. The policy may contain an excess policy: if so, the effect is that the insured must bear the first part of loss in person: for instance, if the policy has an excess of Ksh. 1000, the insured must bear the first shs. 1000 for any loss himself. If the loss is not more Ksh. 1000 the insured must bear the whole of the loss. A marine insurance policy may contain a franchise clause. The effect of such a clause is to relieve the insurer of liability for any loss below the figure fixed by the clause; however, if the insured loss exceeds the franchise figure, the insurer is liable or the whole of the loss

If a valid claim is made, the insurer is obliged to satisfy it. If he fails to do so, he is in breach of contract, so that the claim by the insured to enforce the policy is a claim for damages for breach of contract. The measure of the insured's damages is prima facie the amount of claim and the Court of Appeal recently held that the insured cannot claim additional damages for losses caused by delay in payment: there is no claim for damages for late payment of damages at common law. The insurer may be in breach of an implied term that claims should be processed with reasonable diligence but the court held that there was no remedy in damages for breach of such a term. Under a third party liability policy, such as public policy, the amount payable to the insured is the amount required to indemnify him against the third party's claim, subject to the ceiling fixed by the policy and any excess or franchise payable. However, in a case of first party insurance on property, the valuation of loss may be difficult. The principles applicable may differ according to whether the property is good or realty and whether he claims is total or partial loss.

2.5.1 Total Loss

In the case of goods, the measure of loss in a case of total loss is the market value of the goods at the time of the loss. Thus, unless the goods are new at the time of loss, the insured will not recover sufficient to buy new goods, unless the policy provides for replacement on a "new" for "old" basis. A higher premium will be charged for such cover.

In case of buildings insurance the situation may be difficult. As result of building costs inflation, the market value of the premises at the date of loss may be considerably less than the cost of rebuilding the premises. If the insured is only given the market value of the premises, he may be forced to move, or to recover less than his real loss. It therefore seems that the insured is entitled to recover the cost of reinstating the premises, subject to the ceiling fixed by the sum insured, if he genuinely intends 'for any reason that would appeal to an ordinary man in his position' to reinstate so that the claim for reinstatement is 'a mere pretence'.[58]

2.5.2 Partial Loss

In case of partial loss, where goods or premises are damaged but not destroyed, the position is more complicated. Essentially, the measures of loss then, for both goods and premise, is the cost of repair, subject to a deduction for betterment if the result of repair is to leave the property better than it was before the loss. The insured is entitled to be restored to the position prior to loss. Again, the sum insured fixes a ceiling on the amount recoverable by the insured; however, provided that the amount of the loss is less than the sum insured; the insured is prima facie entitled to recover the whole of his loss, even if the property is insured for less than its full value.[59]

Simple premiums for property insurance are normally fixed by reference to the value of the property and therefore the sum insured; the insured may be tempted to insure the property for less than its full value in order to reduce the premium payable. He will not be properly protected if the property is wholly lost, but since total loss is relatively that may appear to be a risk worth taking. In order to guard against under insurance and encourage the insured to insure property for its full value, a commercial policy on goods is likely to contain an

[58] Darrell v Tibbits (1880) 5 QBD 560, CJ (fire insurance) per Brett LJ

[59] supra

average clause. In the case, the insured who under insures will not recover the full amount of his loss, even if the amount of the loss is less than the sum insured. Instead he will recover the proportion of his loss which bears the same relationship to his actual loss as the sum insured bears to the actual value of the property. For instance, if goods worth Ksh 2000 are insured for Ksh, 1000, and suffer damage which would cost Ksh. 400 to repair, the insured will only recover 50% of his actual loss Ksh. 200. Similar principles apply by statute to contracts of marine insurance.[60]

Where there is an average clause in the policy it is therefore important to ensure that the property is insured for its full value. In addition, since the value of property is a material fact, if property is insured for less than its full value, the insured may be guilty of misrepresentation or non-disclosure, and if that comes to light the insurer will be entitled to avoid the policy ab initio. Alternatively, the policy may contain a provision by which warrants the value of goods. If the valuation is accurate at the time of the policy, the insured is therefore guilty of breach of warranty. If the property increases in valued after the policy is made, there is no breach of warranty unless the warranty requiring the insured to notify the insurer of increases in value or maintain the insurance at the value of the property.[61]

2.6 Conclusion

The principle of indemnity is one of the principles that is used to ensure that the insured is not unjustly enriched. It is meant to ensure that the insured gets the actual amount of loss not exceeding the amount of the policy. As the principle tries to prevent the unjust enrichment to the insured, together with the principle of subrogation, they end up unjustly enriching the insurer. The law however does not consider this unjust enrichment to the insurer.

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[60] Darrell v Tibbits (1880) 5 QBD 560, CJ (fire insurance) per Brett LJ

[61] supra

CHAPTER THREE

SUBROGATION AS A FORM OF UNJUST ENRICHMENT TO THE INSURERS

3.0 Introduction

Subrogation is a principle of insurance that means the assumption by the insurer of the rights that the insured had in the ownership of the subject matter upon payment of full indemnity. The assumption is that upon the risk insured against occurring, the subject matter of insurance is not totally destroyed there remains salvage to which rights still resolves and it is to those rights that the insurer subrogates. These may either include right to sue or choose in action of subject matter.[62]

The doctrine of subrogation has its basis in the unjust enrichment. It has two aspects. One aspect is the one illustrated by the case of **Castellain v Preston**[63] is the rule that an insured cannot ever receive more than a full indemnity for his loss and if he does receive more, he is entitled to be accountable to the insurer for it. An insurer who has indemnified his insured is entitled to succeed to all the rights of the latter-as it is commonly put, to 'stand in his shoes' and so he may for instance, sue any third party who is liable to the insured for the loss in an action of tort or contract. In this case he may use the insured's name in the suit. In **Lister v Romford Ice and Cold Storage Co. Ltd**,[64] Lister a lorry driver employed by the Romford Ice Company, had negligently injured his father when reversing his lorry. The company's insurers paid damages to the father and then sued the company's name to recoup the money from Lister. The court held that the insurers were entitled to do so for, standing in the company's shoes they could;

1. Allege that he was in breach of a term in his contract of employment that he would drive with reasonable care and skill and
2. Alternatively claim contribution from him as a joint tortfeasor.

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[62] LS Sealy and RJA Hooley, Commercial Law – Texts, Cases and Materials (3rd ed, 2003)

[63] (1883) 11 QBD 380, Court of Appeal

[64] (1957) AC 555. HL

Subrogation is the rights of the insurers to enforce for their own benefit all the rights and remedies which the insured possesses against third parties in respect of the subject matter.

Subrogation is thus the substitution of one person in place of another in relation to the claim, its rights, remedies and securities.[65]

The doctrine of subrogation purports to prevent the assured from recovering more than full indemnity i.e placing the insurers in the position of the assured. In **Castellain v Preston**, it was stated that, "The doctrine does not arise upon any terms of the contract of insurance; it is only another proportion which has been adopted for the purpose of carrying out the fundamental rule (i.e. indemnity) which I have mentioned and is a doctrine in favour of the underwriters or insurers in order to prevent the assured from recovering more than full indemnity; it has been solely for that reason".

Lord Cairns LC in the case of **Simpson v Thomson** stated that, 'I know of no foundation for the right of underwriters (i.e. Subrogation) except the well known principle of law that where one person has agreed to indemnify another, he will on making good the indemnity, be entitled to succeed to all ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. It is on this principle that the underwriter of a ship that has been lost is entitled to the ship in specie if the owner of the ship might have asserted against a wrongdoer for damage for the act which has caused the loss".

Subrogation therefore, entitles the insurer as between the assured and themselves, "to the advantage of every right the assured, irrespectively of whether such right consists in contract, fulfilled and unfulfilled or already instead on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be, or has been exercised or has accrued, and whether such right could or could not be enforced by (them) in the same of the insured, by the exercise or acquiring of which right or condition the loss against which the assured can be or has been diminished'. This definition was given in **Castellain**

[65] (1884) 13 QBD 706, CA (Marine Insurance)

v Preston[66] by Brett LJ, and was intended to express the doctrine of subrogation in the possible form. In **Darrell v Tibbitts**[67], Brett LJ stated that, "The Doctrine is well established that where something is insured against loss, the insurers are put into the place of the assured with regard to every right given to him by the law respecting the subject matter insured and with regard to every contract which touches the subject-matter insured and which contract is affected by the loss or the safety of the subject matter insured by reason of the peril insured against.

3.1 Subrogation explored.

This chapter examines the way the principle of subrogation together with the principles of indemnity and salvage operate in a way that it ends up unjustly enriching the insurer. This is because the principle requires that the insurer after he has indemnified his insured is entitled to succeed to all the rights of the latter – as it is commonly put, to 'stand in his shoes' and so he may, for instance, sue any third party who is liable to the insured for the action of tort or contract.[68] All the three principles combined end up unjustly enriching the insurer.

The principle of subrogation has its basis in the principle of unjust enrichment. The principle is applicable only to contracts of indemnity, means that the insurer has the right to take any necessary action, which the insured could have taken against third parties who caused the loss.[69]

3.2 The insured cannot make a profit

The purpose of the doctrine of subrogation is to prevent the assured from recovering more than a full indemnity. The principle seeks to place the insurers in the position of the insured. I.e. the insurer stands in the shoes of the insured and so the insured cannot be

[66] (1883) 11 QBD 380

[67] Darrell v Tibbits (1880) 5 QBD 560, CJ (fire insurance) per Brett LJ

[68] . supra

[69] SS Gulshan, Mercantile Law (2nd ed, 2004)

allowed to make profit out of his insurance. In the case of **Joseph Yumbya and Jackson Musembi v Robert Nzissi and two others,**[70] the applicants who had been insured by Blue shield insurance were unsuccessful parties in a damages claim against the applicant. Blues Shield insurance exercised its right of subrogation in the respondents' suit against their insured's.

In the case of **Castellain v Preston**,[71] a vendor of house that was burnt down between the contract and the completion recovered money from his insurer for which he was held not accountable to his purchaser. The latter subsequently completed the purchase, as he was bound to do so despite the fire, and paid the agreed price. The court held that the vendor was therefore bound to account to his insurer for the money the latter had paid. The court stated that, "the fundamental rule of insurance law" is that the contract of insurance contained in a marine or fire policy is a contract of indemnity and of indemnity only, and this contract means that the insured, in the case of a loss against which the policy has been made, shall be fully indemnified.[72] The decision in this case follows the decision of **Rayner v Preston**.[73]

The court of appeal in deciding this case followed the earlier decision in the case of **Darrell v Tibbits**,[74] where the owner of a house that was let to a tenant insured it against fire. The Local Authority caused an explosion that damaged the house. The authority then paid compensation to the tenant and the insurers paid the insured, but then sought to recover this sum. The court held that they were entitled to recover, as the insured had already been compensated by virtue of the tenant's receiving the compensation that had been to repair the house. To have allowed the insured to keep the insurance money would have meant that he would have been doubly indemnified, and would have profited from his

[70] (2000) CA No 176 of 2000, 27 Oct 2000 (unreported)

[71] (1883) 11 QBD 380

[72] LS Sealy and RJA Hooley, Commercial Law- Texts, Cases and Materials (2nd ed, 2003)

[73] (1881) 18 Ch D1

[74](1880) 5 QBD 560, CJ (fire insurance) per Brett LJ

loss. In this case, the tenant had agreed to do repairs on the house in the event that losses occurred and it was clear stated that results would be the same if the insurer upon payment to the landlord used his own name to sue the tenant under the agreement.

There are three limitations to this rule i.e. that the insured cannot make a profit. These rules are as follows;

1) He is accountable only when he has been fully indemnified.

2) If he receives a gift following the loss, this may necessarily be taken into account

3) If a surplus result after the insurer has recovered back his money, it seems that the insured is entitled to keep it.

3.2.1 Full Indemnity

The insured is accountable to the insured only when he has been fully indemnified. In the case of **Scottish Union and National Insurance Co. v Davis**, the insured's car was damaged and it was taken to a garage for repair with the consent of the insurers, three attempts were carried out to repair the car by the garage but the insured was not satisfied with their work. He took the car to another garage. The garage nonetheless sent their bill to the insurer who paid it without getting a satisfaction signed by the insured. The party originally responsible for the damage paid compensation to the insured where he used the money received to have his care properly repaired. A claim was lodged by the insurer claiming the latter sum. The Court of Appeal however, rejected their claim whereby it stated that, "you only have a right to subrogation in a case like this when you have indemnified the insured, and one thing that is quite plain is that the insurers have never done that"[75]

[75] LS Sealy and RJA Hooley, Commercial Law- Texts, Cases and Materials (2nd ed, 2003)

In the case of **Waguthu Farmers Ltd v United Insurance Company Ltd**,[76] the plaintiff insured his motor vehicle with the defendant. While the policy was current the plaintiff's motor vehicle was involved in an accident as a result of which it was damaged beyond repair. The plaintiff then filed a suit to recover the sum of K. sh 180, 833 when the defendant refused to indemnify him. It was held that there was ample evidence to show that the defendant was bound to compensate the plaintiff for the loss and damage sustained in the accident. The plaintiff was paid indemnity of Ksh. 1,820,833. In the case of **Mwamba Transport Co. Ltd v Kenindia Assurance Co. Ltd**[77], the plaintiff's motor vehicle was covered by an insurance cover from the defendant. It was involved in an accident and it was written off. The defendant repudiated liability on the ground that the plaintiff refused to cooperate. It was held that the defendant was bound to indemnify the plaintiff for the damages incurred as a result of the accident. What is relevant to the claim was that, the vehicle was insured for the sum of K.sh. 280,000 and the plaintiff was entitled to be indemnified for K.sh, 280,000, the sum insured.

In the case of **Lonsdale and Thompson Ltd v Black Arrow Group PLC**[78] and another, the landlords covenanted to insure the demised for their full reinstatement value and "in the case of destruction or damage to the premises by any insured risk...To ensure... that all moneys payable... be laid out and applied in... reinstating the premise." The insurance policy taken out by the landlords specified the basis upon which the amount payable under the policy was to calculate to sell the freehold. Before completion the premises were destroyed by fire, but the sale proceeded and the price of the freehold was paid in full to the landlord without regard to the fire damage. The insurer therefore refused to pay for the rebuilding of the premises on the ground that the policy provided for the indemnity of the landlords' freehold interest, whereas the landlords had parted with their beneficial interest in the freehold from the date of the contract and, having received the full price on completion, had been indemnified for their loss. It was held that the question whether the

[76] (2001) HCCC No. 374 of 2001, 2 Dec 2001 (unreported)

[77] (1991) HCCC No. 6859 1991, 2, Oct 2000 (unreported)

[78] (1991) 2 W.L.R 815

accountable to the insurer? In the last examples, suppose the subject matter of insurance insured for $3,000 may be worth $ 5,000 to replace i.e. it under – insured. In case uninsured loss of $60,000, less the amount of the excess, and balance of $95,000 was insurers.[80]

Where recovery from a third party diminishes the insured's loss, whether before or after indemnification has been made, the loss is calculated by subtracting the recovery less the ultimate loss and this is the sum that the provision of policy of insurance apply including any provision to the excess. The ultimate loss was K.sh. 30,000 i.e. the initial loss of K.sh. 160,000 less the recovery of Ksh.130, 000, and the excess of Ksh. 25,000 applied to K.sh. 30,000 so that the insured recovered only Ksh.5, 000. It seems that the **Napier's case** was concerned only with effect of an excess to subrogation recoveries. It is likely that the same would apply in the case of under insurance, indeed **Lord Templeman** expressly stated that the insured is deemed to be his own insurer of any loss above the sum insured i.e. the insured bears the amount of excess.[81]

3.2.2 A Surplus

There can be a surplus after the insurers have fully recovered their money. The insured is entitled to keep this excess sum meaning that the insurer's subrogation rights extend only to the amount they paid to the insured as compensation. This point was illustrated in the case of **Yorkshire Insurance Co v Nisbet Shipping Co**. The case involved a ship that got lost in 1945 as a result of collision. The agreed value of the ship was $ 72,000 which the insurer paid. The insured started proceedings against the Canadian government, the owners of the other ship with the insurer's consent. In 1955 the government was found liable for the loss and the damages awarded were some $75,000 and were properly converted into Canadian dollars at the rate of exchange prevalent at the time of collision.

The insured received this sum in 1958, but it produced a sum of $ 126,000 and the insured could not of course deny the insurer's entitlement to $ 72,000. They however disputed that

[80] LS Sealy and RJA Hooley, Commercial Law- Texts, Cases and Materials (2nd ed, 2003)

[81] Darrell v Tibbits (1880) 5 QBD 560, CJ (fire insurance) per Brett LJ

they were entitled to a surplus of about $55,000. The court held that the subrogation rights of the insurers extended only to the sums they had paid out. The result is somewhat unfair and the insured had the benefit of prompt payment of the money in 1945. The court held that the insurers exercised their right to sue the Canadian government in insured's name because they would have the benefit of claiming interest. This was stated in the case of **Cousins v D. and C. carrier**.[82]

3.2.3 Gifts

The insured is required by the law to account to the insurer for any gifts he receives if he has been fully indemnified for the loss. Such gift should have been given with a purpose of mitigating the effect of his loss. This was discussed in the case of **Steans v Village Main Reef Gold Mining Co**,[83] where the South African Government detained defendant's insured gold. The insured were paid the value of the gold by the insurance company. Subsequently, the government returned the gold to the defendant in its public relations exercise to attract support in return for the latter agreeing to keep the mine open. The court held that the plaintiff's case succeed i.e the insurers were entitled to the equivalent of that money because it had been given in order to diminish the insured's loss.

Another illustration similar to the above case in the case of **Burnand v Rodocanachi.**[84] During the American Civil war, the insured ship was destroyed by a confederate cruiser. The insurers paid the agreed value and the insured subsequently received a gift from the United States government. The court held that according to the law authorizing the payment, this money was paid purely as a gift and it was to benefit the insured over and above any insurance money, the insurance money, the insurers were not therefore entitled to claim it. This case establishes an exception rather than the general rule. When the gift

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[82] [1971] 2 QB. 230

[83] (1884) 13 QBD 706, CA (Marine Insurance)

[84] Ref to MacGillivray & Parkington on Insurance relating to all risks other than marine. 7th Edition at pg 480

was intended as extra compensation for the insured, then the insured is entitled to retain it.[85]

3.3 The Insurer's claim for interest

The question is to whether insurers suing in their insured's name are entitled to claim interest for their own benefit.[86] That award normally goes to the insured i.e. the claimant but the insurers' subrogation right includes the right to appropriate interest under **section 51 of Supreme Court Act, of 1981**. In the case of **Cousins and Co. Ltd v Carriers Ltd.**[87] It was argued that , the in an action for damages for breach of a contract of carriage claimant was entitled to interests only in respect of the period that he really suffered, namely, until he was indemnified by his insurers. The court held that there was no reason as to why the claimant should not be awarded interest to the date of judgment on usual basis, because the appropriate part of it would rightly, insure to the benefit of the insurers. The contrary views however were expressed in the case of **Harbutts "Plasticine" Ltd v Wayne Tank and Pump co**;[88] the views were clearly based on a misunderstanding.

3.5 The wrongdoer's position vis-avis the insurer

Where the claimant in a case is actually an insurer and the nominal claimant has already been fully indemnified/compensated for the defendant's wrong, the wrongdoing defendant cannot claim or use this as a defense.[89] In the case of **Duncan Mwangi Weru v Lawrence Gikaria,**[90] a judgment had been entered against the applicant where he was required to indemnify the respondent. The applicant appealed and the appeal was refused and he was ordered to compensate the respondent. **In Pan Africa Insurance co. Ltd.** ***v*** **Clarkson and**

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[85] LS Sealy and RJA Hooley, Commercial Law- Texts, Cases and Materials (2nd ed, 2003)

[86] (1884) 13 QBD 706, CA (Marine Insurance)

[87] (1971) 2 QB. 230

[88] (1971) 1 QB. 477

[89] Wikipedia foundations, subrogation http://en.wikipedia.org/wiki/subrogation at 27November 2007

[90] (1999) HCCC No. 293 of 1999, 4 December 2003 (Unreported)

Southern Ltd,[91] the plaintiff sued the defendant in tort to recover damages for the defendant's negligence. The court allowed the plaintiff's suit against the defendant. The court stated that, "the court finds the defendant liable to the plaintiff in tort for negligence."

The form of the insured's indemnification does not matter. For instance, in **Brown v Albany Construction Co**[92] it took the form of the insurer purchasing the insured's house at full market value. In assessing damages, the proceeds of insurance are ignored, a principle that operates by way of exception to the rule against double recovery. Equally, it is no defense for the defendant to claim that the insurer satisfied the claimant's claim when in law he was not bound to. In **Lister *v* Romford Ice & Cold Storage Ltd**[93] an employee of the respondent negligently injured another employee when reversing his lorry. That employee happened to be his father. The company's insurer paid damages to the father and then brought his action in the company's name to recover the money from Lister. The claim was that the employee had failed to exercise the reasonable care and skill impliedly expected as part of an employee's duty to his employer, and, by a majority the House of Lords held that the claim succeeded. The court also held that there was an implied term in the employee's contract of employment which he had broken. The main defense of the appellant was that even if he would have acted with reasonable skill and care, if in fact his employer had insured against the consequences of a breach to a third party, there was equally to be implied in his contract of employment a term, that he would be entitled to the benefit of that insurance. This appears correct in principle, that the defendant cannot rely upon a purported waiver by the insured after he knows of the insurer's payment to the insured and thus, that the insurer's subrogation rights were crystallized.[94]

In the case where the insured brings a suit personally, and judgment is entered against a wrongdoer, the insurer will not be able to subsequently reopen the judgment on the ground that the insured failed to claim for his insured losses from the wrongdoer. In **Hayler v**

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[91] (1987) HCCC No. 4828 of 1987, 6 Oct 2002 (Unreported)

[92] (1995) N.P.C 100

[93] (1957)AC 555. HL

[94] (1884) 13 QBD 706, CA (Marine Insurance)

Chapman[95] it is evident that the insured who acts in this way without the sanction of his insurers subrogation rights. More so, if insurers who are exercising their right of subrogation settle their insured's claim against a tortfeasor and a form of discharge of claim is signed referring to all claims which are likely to arise out of the relevant event, they will not be able to reopen the claim because they will be bound by that.

It is important to know whether a defendant can rely on 'subrogation waiver claim'. Such clause may provide for example, that insurers will not exercise rights of subrogation against companies that are associated or subsidies with the insured or someone who is a co-insured. The position has been that the defendant could not rely on such a clause unless he was a party to the insurance contract, otherwise the defendant would contradict the principle of privy of contract.[96]

3.5 The insured's actions should not prejudice the insurer

Where the insured sues the wrongdoer, he must sue or his whole loss, even if the insured partly indemnified him against the loss suffered, and such insurer declined to exercise their rights of subrogation. The right of subrogation exists for the benefit of the insurers and the insured must not do anything that might prejudice those rights on pain of him being able to repay to the insurers as damages the amount which the insurers have paid or, where appropriate, of the insurer being able to avoid liability.'[97] Acting in such manner by the insured amounts to breach of the duty of good faith that he owes to the insurer.[98]

Insured's action should not prejudice the insurer. In **Amos Akello Ogutu v Joseph Magio and Kabari Mutemba,**[99] the appellant appealed against a court order, setting aside a consent order entered into by the parties on the grounds inter alia that the order had not been validated by the insurers of the respondents. The appellant, a fare paying passenger

[95] (1989) 1 Lloyd's Rep 490

[96] National Oil (UK) Ltd v Davy Ltd (1993) 2 Lloyds Rep. 582

[97] LS Sealy and RJA Hooley, Commercial Law- Texts, Cases and Materials (2nd ed, 2003)

[98] This was confirmed in the case of Napier v Hunter (1993)2 WLR 42

[99] (2000) HCCC No. 13 of 2000, 4 Oct 2001 (unreported)

suffered injuries in a vehicle owned and driven by the respondents. The vehicle was insured by an insurance company called Lake Star Insurance Company. The appellant sued the respondents for damages sustained in the said accident without joining the company. The insurer filed an application to set aside the consent judgment based on the ground that *inter alia*, that the advocate did not have authority to act for insurers. The court held that the court had no ground to set aside the consent judgment against the respondents.

The insurer will be bound by a compromise entered into between the insured and the wrongdoer, whether agreed before or after indemnity by the insurers, such a compromise will amount to a breach of the duty of the insured. The insured must actually prejudice the insurer's position, so that if his claim against the third party is a doubtful one, and he acts bonafide in the interest of the insured as well as himself, he will not suffer.

In the case of England **Fire Insurance Co. v Isaacs**,[100] the defendant insured property in which he was the sub- tenant. Following a fire, he recovered money from the insurers, which he paid to the tenant of the property who had agreed with both him and the head landlord to insure. The court held that the insured was liable to return the equivalent money to the insurers, having prejudiced their potential right to use his name and to sue the tenant for breach of the covenant. The principle applies if the insured personally sues the wrongdoer and only recovers his uninsured loss. This is probably a common occurrence illustrated by the facts of the case of **Hayler v Chapman**.[101] It is likely that the principle could unjustly penalize the innocent insured who is not aware of the intricacies of subrogation and tort actions. This may for example be a case where following a ship collision accident, an innocent insured might because his insurance is comprehensive, agree reasonably with the other captain that he will not pursue the claim against him. If that were binding agreement, it would prejudice the insurer's subrogation rights and yet it is likely a harsh application of the principle.[102]'

[100] (1897) I QB. 226

[101] (1996) HCCC No. 3034 of 1996, 17 June 1997 (unreported)

[102] LS Sealy and RJA Hooley, Commercial Law- Texts, Cases and Materials (2nd ed, 2003)

3.6 The Rights in Respect of which Subrogation Arises

3.6.1 Rights over the Subject Matter

There may be sufficient amount of salvage which possesses value after the occurrence of the total loss. In such a case, the insured cannot claim both to receive full indemnity from the insurer for his loss and retain the salvage, since he would be more than fully indemnified. The insured for that case, has the duty of receiving payment in full, to hand over to the insurer the salvage. The title of the insurers relates back to the date of when the loss took place, e.g., the date of the accident in case of a motor vehicle accident. In the case of **Rankin v Potter,**[103] Lord Blackburn J. stated that, "When, therefore, the party indemnified has the right to indemnity and has elected to enforce his claim, the choice of any benefit from an improvement in the value of what is in existence and the risk of any loss from its deterioration are transferred from the party indemnified to those who indemnify ;and, therefore, if the state of things is such that the steps may be taken to improve the value of what remain, or to preserve it from future deterioration, such steps, from the moment of election, take steps for his own protection."

The ownership of salvage may carry with it onerous and expensive responsibilities, a question arises as to whether the property in the salvage passes to them as from the date of loss by the fact of payment, or whether they are entitled to exercise an option in the matter so that the property does not pass to them unless they think fit to take over the salvage. The latter alternative is likely to be correct, so that if by taking it they would be incurring liability to third parties, they can refuse to take the over the salvage.

3.6.2 Rights Arising out of Contract

In a case of indemnity contract, where an insurer has the obligation of making compensation to the insured in respect of the loss, the benefit of that obligation passes to

[103] (1873) LR 6 HL. 38 (Marine Insurance) Per Lord Black Burn J. Ref to MacGillivray & Parkington on Insurance relating to all risks other than marine. 7th Edition at pg 496

the insurers as was in the case of **Liverpool and Globe Insurance Co.**'[104] In this case, where the goods insured are destroyed in the hands of an agent, the insurers may sue him on the agency contract. This is also applicable in a case of where an employee whose fidelity is insured is guilty of defalcations, they may enforce the right of the employer under a guarantee given to secure the employees fidelity or the right against the banker whose negligence has enabled the defalcation to be committed. This also applies in the case of a fire policy where a house which is demised to a tenant under a covenant to repair or to rebuild it and which is insured by the landlord on his own behalf, is burned as was the case of **Darrell v Tibbits,**[105] the benefit of the covenant to rebuild passes to the insurer on payment. In the above named case, the insurer had indemnified the landlord after his house was destroyed by fire. The landlord later sued the tenant who had caused the fire and obtained compensation. It was held that the insurer was entitled to the money because he had already indemnified the landlord and to allow the landlord to be given indemnity and compensation is inequitable.

3.6.3 Rights Arising out of a Tort

In order for a tortfeasor to be responsible in damages to the insured, the tort must be concerned with the loss. In the case of a fire policy, the insurers have been held to be entitled to recover damages against a railway company in respect of a fire caused by negligence, to or against an incendiary, and they are entitled to enforce any right of compensation, which the assured may possess against a public authority.[106]' In the case of **Pan African Insurance Company Ltd v Clarkson and Southern Ltd,**[107] the plaintiff sued the defendant in tort for the recovery of damages due to defendant's negligence. The court allowed plaintiffs' suit against the defendants and it stated that, "the court found the defendant liable to the plaintiff in tort for negligence."

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[104] (1877) 5 ChD 569 per Jessel MR ref to Insurance Law Basic Text by Robert E Keeton at page 111

[105] (1884) 13 QBD 706, CA (Marine Insurance)

[106] (1884) 13 QBD 706, CA (Marine Insurance)

[107] [1987] HCCC No.4828 of 1987, 6 Oct 2002 (unreported)

In a case where a third party has been injured by negligent driving of a car by the employee of the insured, the insurers on payment of indemnity to the assured in respect of the damages which he has had to pay to the third party, are entitled to sue the employee to pay the third party, are entitled to sue the employee in order to recoup themselves. In **Lister v Romford Ice and Cold Storage Co. Ltd**,[108] Lister, a lorry driver employed by Romford Ice Company, had negligently injured his father while reversing his lorry. The company's insurers paid damages to the father and brought this action in the company's name to recoup the money from Lister. It was held that the insurers were entitled to do so for in standing in the company's shoes they could:

1. Allege that he was in breach of a term in contract of his employment that he would drive with reasonable care and skill; and
2. Alternatively, claim compensation from him as a joint tortfeasor.

The damages recovered by the insured from a wrongdoer in respect of loss are subject to an equitable proprietary lien or charge in favour of the insurers. In the case of fidelity policy, the insurers, after payment are entitled to claim against defaulter reimbursement of amount which they have paid. In such a case, the insurers after such a payment are entitled to claim the proceeds of the burglary if they can be traced. In a case of policy against damages to goods, they are entitled to claim damages from the person responsible.[109]

3.6.4 Rights under Statute

The insurers are subrogated to the insured rights in the case where the assured would be able to recover, under the terms of a statute, the whole or part of his loss. In fire insurance this arises in case of destruction of or damage to property as a result of fire. In the case of motor vehicle insurance, it arises in case of destruction or damage to the motor vehicle because of collision.[110] In the case of **Tahir Sheik Said Transporters v Charles**

[108] (2004) HCCC No. 89 of 2004, 14 June 2006 (unreported)

[109] (1884) 13 QBD 706, CA (Marine Insurance)

[110] LS Sealy and RJA Hooley, Commercial Law- Texts, Cases and Materials (2nd ed, 2003)

Mugabo[111] the appellant was the defendant in a suit for damages arising out of motor accident, he was represented at the hearing of the suit by advocates who, had through subrogation, been instructed by the applicant's insurance company, which its directors became defunct to act for the applicant. The court held that, to the ordinary person, once the insurance company has taken over the defense of a suit on his behalf, the matter is left in the hands of the insurance including the payment of damages that may be awarded.

3.7 The Effects of Subrogation

The insurers are entitled to the take place of the assured and are subrogated to all his rights and remedies after the payment of a full indemnity whether in respect of total or partial loss. In this case, the assured is under obligation to account to the assured for any profit, which they may have made from the exercise against third persons of any rights of action, which may have existed.[112]' In **Smith Plant Hire and Mainwaring**'[113] it was held that, "it has long been the law, where insurers have paid a claim that they stand in the shoes of the assured in order to recover anything that is relevant to that claim. The law has long been that subrogation entitles the insurer to bring an action in the name of the assured against the wrongdoer to recover anything that is recoverable. The reason for that is that the right of action is vested in the assured. The cases show that an action can be brought by the insurer in its own name where it has taken legal assignment of the cause of action from the assured.[114]

In the case of **Mashru Ltd. v The Hon. Attorney General,**[115] the plaintiff MIS P. N. Mashru Ltd who owned a motor vehicle that was duly being driven by its authorized driver, had his vehicle damaged as a result of a prison motor vehicle colliding into it. They court stated that since the plaintiff's insurer had already indemnified the plaintiff for the loss,

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[111] 1997) CA No.119 of 1997 (unreported).

[112] (1884) 13 QBD 706, CA (Marine Insurance)

[113] (1986) 2 Lloyds Reports 244.

[114] (1957) ALL ER 226.

[115] (1995) HCCC No. 3534 of 1995, 25 May 2005 (unreported).

they are entitled to subrogation in the suit, and that the plaintiff cannot wish to be paid as they had already been paid. In **Yorkshire Insurance v Nisbelt Shipping Co Ltd**.[116] a ship was insured for $72,000.It became a total loss in 1945 as a result of a collision with a Canadian Government vessel. The insured indemnified the insured for $72,000, and claimed damages from the Canadian Government. This action was successful, but in the meanwhile the Sterling pound had been devalued in 1949 and the loss, when qualified and converted into English currency, came to nearly $127,000. The insured then repaid the $72,000to the insurers and claimed that they were entitled to keep the balance, i.e. about $55,000. It was held that this contention succeeded. In a case where the insured recovers anything in an action over and above that portion of the loss he suffered, he will hold it as a trustee, on behalf of the insurers.

3.8 Salvage as a Form of Unjust Enrichment

Salvage means the remains or the shell of the subject matter of insurance after the risk insured against has occurred. It is premised on the theory that, upon the occurrence of the risk insured against, the property of the subject matter of insurance may either be totally destroyed (total loss) or partially destroyed (partial loss). When there is partial loss, there are chances that the subject matter may be repaired. When the repairs are done under the policy the insurer pays for the repairs and it is called reinstatement. When however there is total loss, the physical remains of the subject matter of insurance is called the salvage. Since the insurer would have indemnified the insured, the right of salvage belongs to the insurer who subrogates to the insured rights therein.[117]

When the insurer has compensated the insured for the loss of the insured property, all rights are ceded by operation of law to the insurer who thereby becomes their owner. Therefore, if a car or a ship is so damaged that it is uneconomical to repair it, and the insurer pays its owner its full value, the insurer can exercise this right of salvage against the wrecked

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[116] (1884) 13 QBD 706, CA (Marine Insurance)

[117] supra

property and secure for what it will fetch.[118] In **Caltex Oil Ltd v Auto Spring Manufacturers Ltd**,[119] an employee of the plaintiff was assigned a motor vehicle to use in the course of his employment. While traveling, the vehicle collided with the defendant's vehicle and he sued for damages. The assessor gave the lump sum of Ksh. 800,000 as the pre-accident value and Ksh. 150,000 as the salvage value and excesses was said to be Ksh. 20,750. The court held that the defendant was to blame for the accident and that he was solely liable against the plaintiff. The court further held that the report of the assessor did not specify the cost of each of them and the value added, and this figure should exceed the value of the motor vehicle. There were no figures to show the cost of repairers- being the total cost of repairs and cost inclusive of labour. This amount should be deducted from the value of the motor vehicle to arrive at whether or not the repairs would be economical or not. If the cost of repairs is more than the cost of the motor vehicle, then the vehicle is considered to be written off. The report did not indicate anywhere that the vehicle was indeed to be written off. The value of the salvage is to be disclosed by the sale of the salvage to the court. The sale price is to be deducted from the pre-accident value of the vehicle to give the price due to be recovered. The claim was dismissed for having not been proved as per the law.

In the case of **George Montet v Fredrick Kokai Kusero**,[120] two motor vehicles were involved in a collision. The defendant was held liable. The value was computed at the value of Ksh. 170,000. The amount of Ksh. 420,000 was not objected to less the salvage amount of Ksh. 170,000. In a case where the insured retains salvage after an accident, he will be paid the cost of the subject matter less than salvage. In the case of **Martin M. Mugi v Attorney General**,[121] the plaintiff sued the Attorney General on behalf of the Kenya Police for damages and injuries he sustained as a result of the accident for which the police were held liable. The court stated that: "as for damages, the plaintiff is entitled to the sum of

[118] (1884) 13 QBD 706, CA (Marine Insurance)

[119] (1998) HCCC No.1469 of 1998, 28 Jan 2004 (unreported).

[120] (1995) HCCC No. 2027 of 1995 11 April 2000 (unreported)

[121] (1999) HCCC No. 791of 1999 18 Oct 2002 (unreported)

Ksh. 423,500 which was the value of the vehicle less the salvage value." In **Summer Limited Mero v Moses Kithinji Nkatana,**[122] the plaintiffs motor vehicle collided with the defendants car and the plaintiffs car was written off. Judgment was entered against the defendant. The court in determining the question relating to salvage relied in the case of **Khanna v Samwel,**[123] where it was held that, "the damage to the car should be reduced by the extra amount for which the work has been sold." In the instant case, the wreck was useless and could not be sold and the damage was held to be the whole of the pre- accident value.

In any case where the loss is more than the value of the subject matter insured, it is usually treated as total loss so that whatever remains is the salvage. Where the loss is valued at less than 50 % or half of the subject matter, it may be repaired in order to reinstate the previous position immediately before the loss. It therefore follows that the insurer will require notice of occurrence of any loss to enable them to calculate the cost of repairs and to decide whether they should consider it a total loss or partial loss that may be called reinstatement. In the case of **Yunis Noor Mohammed Mangra v The Attorney General,**[124] the plaintiff's car collided with the defendant's motor vehicle. The plaintiff's car was written off and the defendant was held liable. The court stated that, "Where the sum of the cost of repairs is over and above the sum of the value of the vehicle then the vehicle is uneconomical to repair. That it is advisable to buy a new vehicle rather than do the repairs. It must be sold off as a scrap and the amount that is the most difficult aspect of insurance business is the underwriting of policies .Using a wide assortment of data, insurers predict the likelihood that a claim will be made against their policies and prices product accordingly to this end, insurers use Actuarial Science to qualify the risk they are willing to charge to assume them .The data is analyzed to fairly accurately project the rate of future claim based on a given risk. Actuarial Science uses static and probability to analyze the risks assorted with range of perils covered ,and those scientific principles are used to

[122] (2004) HCCC No. 89 of 2004, 14 June 2006 (unreported)

[123] (1973) EA 225

[124] (1996) HCCC No. 3034 of 1996, 17 June 1997 (unreported)

determine an insurer's overall exposure .Upon the determination of a given policy ,the amount of premiums collected minus the amount paid out in claims is insurer's underwriting profit on that policy.'[125]

An insurer's underwriting performance is measured in its combined ratio. The loss ratio (incurred losses and loss adjustment expenses divided by net earned premium) is added to the expenses ratio (underwriting expenses divided by net premium written) to determine the company's combined ratio .The combined ratio is a reflection of the country's overall profitability. A combined ratio if less than 100% indicate an underwriting loss. Insurance companies also earn investment profit on 'float'. 'Float' or an available reserve is the amount of money, at hand at any given time that an insurer has collected and continued to earn interest on them until claims are paid.[126]

3.9 Conclusion

The principle subrogation has its basis in the principle of unjust enrichment. it works to the benefit of the insurer as it operates to avoid unjust enrichment to the insured. It therefore ends up unjustly benefiting the insurer. Subrogation does not operate to avoid unjust enrichment to both parties but it biased against the insured.

[125] (1996) HCCC No. 3034 of 1996, 17 June 1997 (unreported)

[126] (1996) HCCC No. 3034 of 1996, 17 June 1997 (unreported)

CHAPTER FOUR

4.0 What remedies are available to the insured?

It is necessary to distinguish personal remedies from proprietary remedies. A personal remedy asserts that the defendant must pay the claimant a sum of money. By contrast, a proprietary remedy asserts that some property in the defendant's possession belongs to the claimant, either at common law or in equity. There are several arguable examples in the English case law of the courts giving a proprietary remedy in an unjust enrichment claim. However, some commentators maintain that, in English law, unjust enrichment only ever triggers a personal remedy.

There are several reasons why it may be important for the claimant to seek a proprietary rather than a personal remedy. The most obvious is that showing that one is entitled to a proprietary interest in some property means that one need not compete with the defendant's unsecured creditors in the event of his insolvency. It is also generally accepted, although with little justification, that a claimant who is entitled to a personal remedy only will be restricted to simple interest, while a claimant who is entitled to a proprietary remedy can get compound interest. The availability or non-availability of a proprietary remedy may also have consequences for limitation periods and for the conflict of laws.

English law gives effect to restitutionary proprietary interests (assuming that it does at all) through a number of devices. One of these devices will be discussed and another two will be mentioned briefly.

The most important battleground in this controversial area of law is that of **resulting trusts**. One view, whose most notable proponent is William Swadling, holds that a resulting trust will arise either because of a presumed declaration of trust in the transferor's favour by the transferor (consent), or when created by a court if a trust fails (for uncertainty of objects, for example)--the so-called 'automatic' resulting trust (according to Swaddling we do not know what event causes this: it 'defies legal analysis'). Either way, they do not arise in response to unjust enrichment. The opposing view, whose principal proponents have been Peter Birks and Robert Chambers, argues the contrary, that resulting trusts arise in response to unjust enrichment. It is possible to cite English cases in support of both views. There is a good deal of discussion of presumptions in the cases, which might be thought to lend particular support to the Swaddling view. However, Birks and Chambers explain that discussion by suggesting that the presumption in question is not a presumption of intention to create a trust but a presumption of lack of intention to benefit the recipient (or to make the recipient an express trustee for a third party).

4.1 Quantum meruit

Quantum meruit evolved in law as a means to preventing the "unjust enrichment" that might occur where a party who had performed a service was without a contract remedy because of the strict pleading requirements of the common law writ system. Therefore, courts in discussing quantum meruit sometimes refer to the normative goal of preventing a party from becoming "unjustly enriched". [127].

The term "quantum meruit" actually describes the measure of damages for recovery on a contract that is said to be "implied in fact. The law imputes the existence of a contract based upon one party's is having performed services under circumstances in which the parties must have understood and intended compensation to be paid.[128] Therefore, recovery in quantum meruit is said to be based upon the "assent" of the parties and, being contractual in nature, it sounds in law. To recover under quantum meruit one must show that the recipient: 1) acquiesced in the provision of services; 2) was aware that the provider expected to be compensated; and 3) was unjustly enriched thereby

Quantum meruit recovery is appropriate where the parties, by their conduct, have formed a relationship which is contractual in nature, even though an enforceable contract may never have been created. For example, where a written agreement between an owner and a contractor is deemed unenforceable as a result of a technical deficiency or because it violates public policy, the contractor may still recover in quantum meruit. As a general

[127] Tobin & Tobin Ins. Agency, Inc. v. Zeskind, 315 So. 2d 518, 520 (Fla. 3d DCA 1975)

[128] Tipper v. Great Lakes Chem. Co., 281 So. 2d 10 (Fla. 1973).

rule, one should not look to recover in quantum meruit unless there have been direct dealings between the parties that create the basis for the contract to be implied "in fact."

Since specific terms in an implied contract are absent, the law supplies the missing contract price by asking what one would have to pay in the open market for the same work. Thus the measure of damages under quantum meruit is defined as "the reasonable value of the labor performed and the market value of the materials furnished" to the project.[129]

[129] Moore v. Spanish River Land Co., 159 So. 673, 674 (Fla. 1935)

CHAPTER FIVE

5.0 RECOMMENDATIONS AND CONCLUSION

5.1 Recommendations

The court should consider the insurer as being unjustly enriched in a case where he gets excessive profit. The calculation of insurer's profit should be reviewed to include all the income received by the insurer. Thus, it should include:

1. The premiums paid by the insured .When the insured takes out an insurance policy covering his property; he is required to pay premiums to the insurer in consideration for the coverage of the risk.

2. In a case where the risk insured against attaches, subrogation gives the insurer the right to 'stand in the insured's shoes'. For that reason therefore, the insurer has the right to enforce for their own benefit the rights and remedies which the insured possessed against the third party. This entails the payment from a tortfeasor.

3. The salvage .The insurer is entitled to take over salvage where he has fully indemnified the insured.

4. The insured owes the insurer an obligation to account to him any money or benefit that he receives after he has received indemnity. This is where;

   a) The payment is made by a tortfeasor

   b) The payment is made as a gift linked to the loss

   c) The payment arises under the contract of insurance itself.

5. The insurer gets the investment income by investing the premiums he receives from the insured.

6. The insurer right to subrogation includes the right to appropriate interest .The insurer institutes suits in the insured's name and they are entitled to claim interest for their own benefit.

Receiving all this money should be seen or treated as unjust enrichment on the insurer's part. In the calculating of the insurer's profit, the entire income of the insurer should be taken into consideration for the correct amount of profit to be arrived at. By using the formula,

Earned premium + Investment Income -Incurred loss – Underwriting expenses in calculating the insurer's profit will leave out other sources of income not included in the formula. This therefore, undervalues the amount of profit earned by the insurer and it gives a wrong figure of the profit earned.

In calculating the insurer's profit therefore, all the insurer's sources of income should be taken into consideration .For this case, where the insurer gets excessive profit, then; he should pay some money to the insured because he will be unjustly enriched if he retains the whole amount. In the same way that the principles of indemnity, subrogation and salvage are aimed at preventing the insured from unjustly being enriched, they should also prevent the insurer from being unjustly being enriched.

5.2 CONCLUSION

The principles of indemnity and subrogation are aimed at preventing the insured unjustly being enriched. Contracts of indemnity are contracts of indemnity and indemnity only. Anything that the insured receives over and above indemnity belongs to the insurer and, he takes it.[130] They are aimed at ensuring that the insured is not unjustly enriched, and the insured end up therefore, not receiving any profit. The principle against unjust enrichment should be aimed at preventing both the insured and insurer from being unjustly enriched.

On the other hand, the insured is allowed to make profit but it is not regarded as unjust enrichment on his part. Due to the various ways through which the insurer receives income,

[130] [1971] 2 QB. 230