JUDICIARY

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

Civil Appeal Cause No 67 of 2013

Between

GEORGE SAKONDA APPLICANT

And

S.R. NICHOLAS LIMITED DEFENDANT

CORAM: JUSTICE D F MWAUNGULU

Mwanguluwe, Counsel for the Applicant

Banda, Counsel for the Defendant

Mwanyongo, Official Court Interpreter

Mwaungulu, J

JUDGMENT (on damages)

Introduction

Where, like here, the suggestion is that trial judges in this court, as indeed it is in courts subordinate to it, must handle liability and damages questions, where they arise, in one trial, this split judgment is probably antithesis. The solace is in that, in a majority of cases, this will not be the case. It was necessary to examine the law because of the extent and the divergence in Counsels pecuniary and non-pecuniary awards. These prompted policy consideration. Awards cited and about one hundred and more examined to inform the decision demonstrate, even considering changes in the value of money, discrepancies and are inconsistent with High Court judges and Supreme Court of Appeal awards. The awards impact insurance industry and threaten victim's prospect of compensation for the future. Indirectly, such awards increase costs and are a social cost on premium payers.

There is little ado for pecuniary losses since these, whatever the nature, can and should, as we see later, be ascertained with a modicum of precision. According to this formulation, even for future losses, it may not be necessary, though it may be essential to use actuaries and Ogden tables. It is for the rather indeterminate damages, namely pain and suffering, loss of amenities, loss of earning capacity and loss of life expectation where discussion is necessary.

The applicants' Counsel submits that I should award K30, 000, 000 as damages. He cites the case of *Kusowa v United General Insurance Company Ltd* (2010) Civil Cause No 2028 (HC) (PR) (unreported) where the Registrar, for an applicant who suffered a fracture of a femur and cuts on the thigh and buttocks, awarded K10, 287, 500. Although the record does not mention this, it was a case of paraplegia in the left leg. The defendant's Counsel submits that the right award here is K6, 000, 000. He relies on the cases of *Kondowe v Bula et al* (2008) Civil Cause No 62 (HC) (ZADR) (unreported); and *Smith v Prime Insurance Co. Ltd.*,(2009) Civil Cause No 1242 (HC) (PR) (unreported) where the Registrars awarded K5, 000,000. The defendant's Counsel submits that the latter case is much like the present. Both Counsel cite this Court's decision of *Tembo v City of Blantyre et al* (1994) Civil Case No 1355 (HC) (PR) (unreported). Both Counsels, however, submit the awards as global.

The applicant's injuries and claims

The applicant suffered paraplegia folling fracture spine described (weakness of the lower extremities due to fracture of spine (12) and other injuries. The applicant lost permanent and complete control of lower limbs and cannot stool, urinate or walk. The applicant suffered 100% permanent incapacity. He was earning MK7, 500 per a month. He is unfit for manual work and unable to perform his previous job. He recovered MK 400, 000 under the Workers Compensation Act. The applicant claims damages for pain, suffering, disfigurement, loss of amenities, loss of past earnings, future nursing and loss of earning capacity. Can a court award for loss of earning capacity and loss of earnings at the same time? Should a court award an applicant for loss of past earnings up to the time of judgment?

Policy on Damages

The policy of the law is, if money can do it, to afford the victim fullest compensation to bring the victim to the position before the wrong (*Chidule v Medi* (1993) M.S.C.A. Civil Case No 2016 of 2010 (unreported): *Manica (Malawi) Ltd v Mbendera t/a P G. Stationery*. The policy, although the scope of compensation is large, in awarding damages, where it is possible and money can do it, is to fully compensate one in and for the new circumstances one is because of wrongful acts or omissions of another. Once remoteness is overcome, and the victim should recover, courts endeavour to adequately compensate a victim. Various heads of damages courts create set limits of what to compensate while ensuring coverage of all a victim's possible losses. Non-pecuniary losses fall in essentially three categories so as to anticipate all possible losses arising from liability involving personal injury however caused: pain and suffering, loss of amenities and loss of earning capacity, discussed fully in *Tembo v City of Blantyre* (1994) Civil Cause

No 1355 (PR) (unreported) and almost subsumed by the Supreme Court in *Tabord v David Whitehead & Sons (Malawi Ltd* and *Chidule v Medi*). Courts, therefore, compensate for pecuniary and non-pecuniary losses. When awarding damages for pecuniary loss the court makes certain value judgments on matters which are areas of precise mathematical figures, a situation that is impossible for non-pecuniary losses.

Non-pecuniary losses; pain and suffering and loss of amenities

Under non-pecuniary losses, courts aim to compensate recognised injury incapable of quantification. Some degree of pain and suffering accompany injury. Pain covers the physical experience of the senses. Suffering projects mental anguish and experience of pain and injury. In loss of amenities, courts regard loss of the enjoyments of life: one that plays tennis cannot do so anymore through loss of limb or health. Quantification is impossible. Were it possible, it would be difficult to ascribe meaningful monetary value. Once loss is recognised, there is a duty and courts must compensate the victim. The compensation must be such, nevertheless, as is with all such compensation, that, as Lord Devlin punctuated in *West v Shephard* (1964) A.C. 326, 357, the wrongdoer must be able to "hold up his head among his neighbours and say with their approval that he has done the fair thing." It is necessary that, as Holmes J in Pitt v Economic Insurance Company Ltd 1957 (3) SA 284 (D) 287 E-F that the award "must be fair to both sides – it must give just compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendant's expense".

Fairness Assured by Conventional Awards

Fairness on non-pecuniary losses occurs where, for both the applicant and the defendant, the court compensates, in space and time, comparable awards for similar injuries. Similar injuries must be similarly compensated. Comparable in this sense does not, however, only mean that similar injuries must be similarly compensated. It connotes as well that awards must compare with awards in different injuries. It is unfair to compensate immensely for minor injuries; it is also unfair to compensate lowly for otherwise serious injury. Situations should not arise, if they do, they should be rare, where victims, in space and time, complain that court awards on injuries, similar in nature and degree, attract disparate or desperate compensation. Conversely, awards, even if for injuries different, must compare substantially with injuries the basis of the award. In *Wright v British Railway Board* (1938) A.C. 1173, 1177, Lord Diplock said:

> *"Non-economic loss…is not susceptible of measurement in money. Any figure at which the assessor of damages arrives cannot be other than artificial and, if the aim is that justice meted out to all litigations should be even-handed instead of depending on idiosyncrasies of the assessor, whether judge or jury, the figure must be basically a conventional figure derived from experience and from awards in comparable cases."*

When awarding damages for non-pecuniary losses courts, therefore, have regard to awards of damage awarding tribunals, and I am using the word 'tribunal' advisedly. As this Court said in *Tembo v City of Blantyre* ((1994) Civil Cause No 1355 (HC) (PR) (unreported) :

> *"It is assumed, correctly in my view, that judges and arbiters who are involved in the exercise acquire and are vested with the knowledge of the circumstances and the considerations that ultimately bear on the awards actually made."*

Comparison based on awards within the jurisdiction or comparable economies

Comparison of awards for pain and suffering, unless there is a scientific way of comparing states at different levels of economic development, cannot be had from awards in jurisdiction at disparate

economic development. In *Jag Singh v Tong Fong Omnibus Co.* (1964) 1 W.L.R. 1382, 1385, Lord Morris, in the Judicial Committee of the Privy Council, said:

> *"That to the extent to which regard should be had to the range of awards in other cases which are comparable such cases should as a rule be those which have been determined in the same jurisdiction or in a neighbouring locality where similar social, economic and industrial conditions exist."*

Value of Money and Inflation

Moreover, conventional awards must factor inflation and value of money changes. Awards made at a higher value of money and low inflation cannot compare to similar awards at lower value of money and high inflation. Victims stand to lose; wrongdoers stand to gain. Courts must, therefore, regard money value and inflation, as the Court said in *Moriarity v Mclartey* (1978) 1 W.L.R. 155), quoted in *Tembo v City of Blantyre*, "for any other view involves the necessary implication that the victims of personal injuries should bear a reduction in the level of their compensation as the value of money falls though there is no rational justification for such reduction"

Precedents

Supreme Court decisions, however, bind this Court and Registrars. High Court Judges and Registrars, where such judgments exist, must follow Supreme Court of Appeal decisions (*Wright v British Railways Board* [1983] A.C. 773), more especially where the decision sets limits with which other awards must comply (*Housecroft v Burnett* [1986] 1All E.R. 332). Setting guidelines is not for trial courts, but the Supreme Court of Appeal and the High Court Judges (*Alsfold v British Telecommunications Plc* [1986] C.A. No 979). Paucity of Judges of the High Court and the Supreme Court decisions means that comparison is limited and the few existing decisions could be over or under used. On the other hand, as with pain and suffering, use of such decisions is controlled by that awards depend on the facts of the case and individual endurance, a point the Supreme Court of Appeal aptly made in *Chidule v Medi* (19930 M.S.C.A. Civil Case No 2016 of 2010:

> "*In assessing damages for pain and suffering, the court must consider the pain which the particular plaintiff has suffered because the circumstances of the particular plaintiff are bound to have a decisive effect in the assessment of damages Supreme Court of Appeal Awards*

It is important, given the importance of Supreme Court of Appeal awards for this Court and Registrars, to examine, for what they are worth, the two Supreme Court Appeal decisions: *Chidule v Medi* and *Manica Tabord v David Whitehead & Sons (Malawi) Ltd* . Both decisions, recognising the different heads of damages for personal injury, do not fully discuss the principles. Both Supreme Court of Appeal decisions must be understood as guiding and in that sense binding on courts below it. All judgments, including those of High Court Judges and Registrars, curiously, never refer to the Supreme Court's actual awards in these two cases. Curiously, the Supreme Court itself in *Tabord v David Whitehead & Sons (Malawi Ltd* never considered the *Chidule v Medi* award.

In *Chidule v Medi* (15 April 1994), the applicant suffered what the Supreme Court described as injuries 'very serious indeed,' injury to nerves that left the applicant in avid pain long after the accident. He was "permanently impaired and "greatly disabled." The Supreme Court did not, albeit it could have ordered, order the Judge or Registrar of the court below to assess damages, the court below having dismissed the claim. The Supreme Court, Banda C.J., Mkandawire and Chatsika J.J.A. sitting, awarded MK

15,000 ($3371.468 ($1 = MK 4.13246) or £2265 (£1 = MK6.622517) for pain and suffering; MK 5,000 ($1123.823 or (£755)) for loss of amenities.

Normally, courts award damages for loss of earning capacity where, having suffered the injury, the plaintiff continues in employment (*Tembo v City of Blantyre* (1994) Civil Cause No 1355 (PR) (unreported)) and courts assess the prospect of losing employment or reduced earnings in the future. Generally, this award, like other non-pecuniary losses, is unascertainable and incalculable and is, therefore awarded, on convention to comport fairness. The award is a modest sum (*ibid*). The *Chidule v Medi* award is, if it be for loss of earning capacity, many times over the conventional awards in England and Wales. The appellant in *Chidule v Medi*, however, was at the time of the accident, from the judgment, employed and earning MK 500 per a month. The Supreme Court could not, therefore, have been awarding for loss of earning capacity, rather for loss of earnings at the multiplier of 10. Since the applicant's earnings were known, the award should have followed the multiplicand/multiplicand approach based on the applicant's age. The judgment is silent on the applicant's age.

The next major case, as seen, is *Tabord v David Whitehead & Sons (Malawi) Ltd.* In this case, the plaintiff suffered a fracture of a femur and injuries to the hip. The Supreme Court, Banda C.J., and Chatsika and Unyolo J.J.A. sitting, on 9 June 1995 awarded MK 50,000 ($7042.353) for pain and suffering; MK 25,000 ($3521.176) for loss of amenities, at the exchange rate $1 = MK7.0999; MK50, 000 (£6970), MK25000 (£3485) at the exchange rate £1 =7.173601. The Supreme Court refused to award damages for loss of earning capacity. The Supreme Court reasoned as follows:

> *"Next, the appellant further claims damages for loss of earning capacity. He went to great trouble to convince the court that he has not been able to secure any employment as a result of the injuries he sustained in the accident. The appellant was employed by the respondents on a 36 months' contract which commenced at the beginning of the year 1981 and was to expire at the end of 1983. The contract was renewable by agreement. At the end of the initial 36 months, the respondents refused to renew the contract. The appellant stated that his contract was not renewed because he had been injured. The respondents denied this. They stated that the reasons for not renewing the appellant's contract had nothing to do with the appellant's injury. The appellant also contended that he could not be employed because the respondents told prospective employers not to employ him because he had had an accident. This was not supported by any evidence. We, therefore, came to the conclusion that the reasons for not renewing the appellant's contract were other than that he was involved in an accident. Finally, we accepted the Insurance Assessors' report, which was based on medical evidence, that after receiving treatment for the injury sustained in the accident, the appellant was fit for work. He is, therefore, fit to work and is employable. In the event, his claim for loss of earning capacity must fail, and it is dismissed."*

Again, the Supreme Court seems to equate loss of earning capacity with loss of earnings. Loss of earning capacity is a projection of losses for someone who is employed on the prospect of losing a job or having reduced earnings on account of the injury (*Ronan v Sainsbury's Supermarket* 2006] EWCA Civ. 1074. On the Supreme Court's judgment, it is clearly loss of earnings that the Court is considering and, therefore, the applicant's refusal to take up a job and subsequent dismissal on other grounds reduced such earnings, probably completely. However, the Supreme Court should have, now that the applicant was out of job, calculated a chance of the applicant being employed. That one is fit does not necessarily guarantee employment in the future when the consequences of injury may be more manifest or pronounced. Loss of earning capacity, however, is different from loss of earnings.

The distinction between loss of earnings and loss of earning capacity may be subtle but necessary. It is necessary because whenever it occurs it determines the method of arriving at an appropriate award for losses which, by definition, are pecuniary and futuristic. In both the court is predicting and accurately providing for future losses. I am aware of the remarks of the court of appeal in *Foster v Tyne & Wear CC* [1986] 1 All E.R. and the remarks of the Law Commission;

> *"One must not lose sight that the court is attempting as best it can to estimate the current value of the claimant's prospective loss of income, so where one can be reasonably confident that a claimant will suffer a quantifiable loss of earnings for an appreciable time the multiplier/multiplicand approach should generally be taken. See per Lloyd L.J. in* Foster v Tyne & Wear CC*:*
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> *"For myself, I would be inclined to agree with the views expressed by the Law Commission in their Report on Personal Injury Litigation. Assessment of Damages (Law Com. No. 56) para.204. That paragraph reads:*
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> *The courts sometimes draw a distinction between "loss of future earnings" and "loss of earning capacity" but this distinction seems to be based on nothing more concrete than the precision with which, from the evidence available, it is possible to quantify the loss. There is, we think, no real distinction between these two heads of damage; where the evidence precludes mathematical ```assessment the court has perforce to make the best estimate it can, but that estimate is still an estimate of probable future pecuniary loss.'*
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> *That passage is echoed in the report of the Royal Commission under the chairmanship of Lord Pearson (Cmnd.7054 (1978) para.338; I think it is sufficient to read the first sentence of that paragraph, which says:*
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> *'The Law Commission have suggested that there is no real distinction between damages for loss of earning capacity and damages for future loss of earnings.'*
>
> *We agree*."

I do not agree, precisely for the reasons indicated earlier that the distinction may be inevitable so that the losses are properly provided for. Loss of earning capacity goes to the ability to earn; loss of earnings goes to lost earnings. In either case the court must account for the loss and provide for it. The losses are different and that is why the methods of arriving at them differ. Where one continues in the same job at the same earnings, the claim can only be for loss of earning capacity unless of course where there has been a shortening of life, but that is covered by loss of earnings in lost years. In arriving at the award the court may, as has been the case, award around a conventional sum or still use the multiplicand and multiplicand approach arrive at the lost earnings and evaluate a chance of the prospect that the victim will be disadvantaged in the labour market and award based on that assessment. These will be a majority of cases. On the other hand, are cases where earnings are unascertainable, because you cannot determine the multiplicand at all, while the method for arriving at loss of earnings may be moot. In that case, the court is

not considering loss of earning capacity. As a matter of fact, the applicant may be continuing to earn the unascertainable sum, with no loss of capacity to earn that money. The court is trying its competent best to ascertain the loss. That is quite different from loss of earning capacity. Even after arriving at a guess estimate of loss of earnings, where the applicant will continue to earn that money, the court may, where capacity to earn is impaired, award nothing for loss of earnings but will have to award the applicant for loss of earning capacity. Loss of earning capacity, therefore, as distinct to earnings for lost years due to shortening of life expectation, is compensated where the applicant continues to earn income despite the injury. In that sense loss of earning capacity seems to be in the middle of pecuniary and non-pecuniary losses.

Awards for loss of earning capacity evaluate the chance of an employee, who is actually working, losing a job or earning less on account of the injuries sustained or earning more in spite of the injury sustained. In *Tembo v City of Blantyre,* the Court said:

> *"[W]here there has been no change in earnings or as was the case here, there has been in fact an increase, there cannot be a claim for loss of earnings. Courts, however, are not naïve. They do not approach the problem from the perspective that no damages should be awarded because there is no loss of earnings or there is an increase in earnings. They consider the prospect of the victim loosing the job because of the injuries which now appear to have no impact on his earnings. Where there is such a prospect courts have made awards under the style of loss of earnings capacity to distinguish it from loss of earnings* (Smith v Manchester Corporation *(1974) 17 K.I.R.I.*; Clarke v Rotax Aircraft *(1977) W. L. R. 1570*; and Cook v Consolidated Fisheries *(1977) ICR 63j). The prospect of such an advantage must be substantial* (Moeliker v Reyrolle *(1977) I. W. L. R. 132)."*

Supreme Court of Appeal Awards Comparison

The Supreme Court decided the two cases within almost a year of each other. Two Justices of Appeal sat in both cases, Banda, C.J. and Chatsika J.A. The sterling Kwacha value was almost the same or, if it had, not changed as significantly as the change in the awards. Moreover the injuries in the earlier case, on balance, were more serious and consequential. The award in the latter is almost doubled for pain and suffering and the award for loss of amenities was increased five times. One plausible and possible explanation is the premise used to award for pain and suffering and loss of amenities. In *Chidule v Medi* and, as we shall see later, in *Tembo v City of Blantyre,* the Supreme Court and the High Court assessed awards based on the Kwacha value within the jurisdiction. In *Chidule v Medi,* the Supreme Court does not suggest that the award based on similar awards by it or courts and tribunals below it. Certainly, in *Tembo v City of Blantyre,* this court, aware that that foreign awards, like those in the United Kingdom, would be, without explanation, imperfect guides for Malawi, stressed that the award based on considering similar awards within the jurisdiction. The Supreme court of Appeal in *Tabord v David Whitehead & Sons (Malawi) Ltd* premised the award on foreign awards and awards within jurisdiction.

Probably there were no High Court judges' decisions. Certainly, there was a Supreme Court decision; two justices sat in both cases. Counsel never informed the Court of the earlier decision; any one of the two Justices of Appeal in the panel could have recalled the earlier decision. The disparity in the awards for pain and suffering, on the one hand, and loss of amenities, on the other, in the two Supreme Court of Appeal judgments would have been avoided or explained. The second explanation, therefore, must be reference to English awards. The Supreme Court should not have used a foreign persuasive award where one in its own jurisdiction was, unless overruled or departed from, binding on it. Secondly, the disparity between the Malawi economy and the English economy, without more, makes reference to English awards daunting.

The Supreme Court awards in *Tabord v David Whitehead & Sons (Malawi) Ltd* were actually equal to if higher than awards in the United Kingdom in the same period. The United Kingdom awards for similar injuries hovered around £4,000 to £10,000. The Supreme Court actually referred to 1968 awards in Kemp & Kemp, The Quantum of Damages: *Williams v Leighton-Bryce* (Kemp & Kemp Vol. 2 and *Ashby v Bumbridge* (in the same volume). The awards in the same period as the Supreme Court's decision for pain and suffering and loss of amenities for similar injuries as *Tabord v David Whitehead & Sons (Malawi) Ltd* are from paragraphs14-022 of the 2008 edition of Kemp & Kemp, Quantum of Damages: *Lanera v Regan*, £10,000 (17 October 1998; *Peach v Tesco Stores*, £10,000 (23 July 1998; *Re Begum* £15,000 (28 February 1995); *Hicks v Munley*, £15,000 (24 October 1995); *Lee v Clark*, £15,000 (April 28, 1998); *Promfret v County Plastine Housing Society Ltd*, £12,000 (23 February, 1996; *Hodgkinson v Dutton*, £10,000 (31 March 1995); *Stokes v Forestry Commission*, £10,000 (25 June 1996); *Craggs v Rowan Hankinson Ltd*, £10,000, (22 October 1997); *H (A Child) v Oldroyd*, £12,000, (19 April 2005); *Sinfield v Department of Transport*, £10,000, 2 March 1998; *E (A Minor)v Greaves*, £10,000, 16 June 1998; *Richley v Cooper*, £8,500, 25 August, 1992; *Orchad v Phoenix Taxis*, £10,000, 17 February 1999; *Cobby v London Borough of Southwark*,£9,000, 21 November 1997; *Fulcher v Siegert*, £10,000, 23 October 2002; *Wilson v Busways Travel Services*, £8,250, 1 March 1995; *Carver v Queen Square Petroleum Ltd*, £8,000, 15 June 1998, *Reid (A Child) v Parsons*, £9,000, 1 April 2004; *Davies v Gravelle Plant Ltd*, £8,000, 1 July 1999, *D (A Minor) v Martin*, £8,000, 19 July 1999, *Attwood v Booth*, £7,000, 3 July 1996; *R (A Child) v Hull City AFC*, £5,500, 18 July 2001, *B (A Child) v Pleasure Leisure Corp*, £5,250, 16 November 1999; *Jones (A Minor) v Wrexham CBC*, £4,250, 24 June, 1998, *Ahmed v Hilma Properties Ltd*, £4,750, 24 January 2003, *M (A Child) v Premier Creche Services Ltd*, £5,000, 15 August 2005, *Shakesby v Kelly*, £4,500, 5 December 2001; *Rhodes v Soor*, £4,000, 6 April 1998. These are just a few cases that I have been able to enlist in order to show the trend of pain and suffering and loss of amenities awards in the United Kingdom around the period.

The Supreme Court of Appeal award in *Tabord v David Whitehead & Sons (Malawi) Ltd* is £10, 455 for pain and suffering and loss of amenities. This is higher than the average of £ 5000 in England and Wales at the time. The award is very high for our economy. In fact in England, post 1995-96, the awards have remained on average around £12,000 for similar injuries. There could be many criteria for comparing the Malawi economy to the English economy. If one sees it from wages, the minimum wage in Malawi is essentially MK70 per hour. Under the National Minimum Wage Act 1998, the minimum wage in the United Kingdom is £6.50. The Malawi daily wage is slightly over £1 compared to £52 in the United Kingdom. That is fifty time over. The South African economy, although more advanced than Malawi, would be a comparable economy to ours than the United Kingdom. The Supreme Court in awarding MK50, 000 for pain and suffering only, at an exchange rate of £1 = MK7 but that time, was awarding £7000. That is excessive for a small and fragile economy Malawi's economy is known to be. On the same exchange rate, which did not vary much in the 14 months between the two decisions, the awards in *Chidule v Medi* would be, respectively, £2,143 and £714, for pain and suffering and loss of amenities. The latter awards, in my judgment are more like it and I would think that the Supreme Court of Appeal, apart from overlooking *Chidule v Medi*, proceeded on wrong principles.

I would, therefore, think that the Supreme Court of Appeal award in *Chidule v Medi* should guide lower courts and, to some degree, the Supreme Court in similar injuries as well as being the benchmark for referencing different injuries. This because the Supreme Court of Appeal never compared its latter award with its earlier award. Certainly, the Supreme Court of Appeal award in *Tabord v David Whitehead & Sons (Malawi) Ltd* was not made for the Malawi economy. Relatively, *Tabord v David Whitehead & Sons (Malawi) Ltd* masquerades an untrue parity between the Malawi and British economy.

High Court Judges' Awards

In *Tembo v City of Blantyre*, of 13 February 1996 I did not refer and I should have referred to the two Supreme Court's decision. Dr. Benson Tembo, current director of Malawi Broadcasting Corporation, suffered 6 fractures in the ribs and the pelvis, a neck twist and head injuries. This, he was told, was affecting sight. He underwent surgery because of pulmonary internal bleeding. A hole was drilled in the chest to do so. He had acute spasm pains. He was hospitalized for several weeks. He went to South Africa for further treatment. This Court awarded MK 60, 000 ($3946.33 or (£2526),) for pain, suffering and loss of amenities (exchange rate $1 = MK15.204; exchange rate £1 = 23.75297).

This award, although this court never referred to the Supreme Court of Appeal decisions, coheres and is consistent, precisely because of the same reference, to wit, awards within the jurisdiction, with *Chidule v Medi.* The sterling Kwacha exchange rate was £1 = MK15 and, considering the award was global and injuries more consequential, there can be criticism of the award in *Tembo v City of Blantyre* for not referring to the Supreme Court decisions, but that is a tepid criticism indeed.

In *Tembo v City of Blantyre*, following English Common law, this court never made separate awards for pain and suffering, on the one hand, and loss of amenities, on the other. In Malawi the Supreme Court does it; and we can as well do so although I did not follow that in *Tembo v City of Blantyre.* I, for one, do not think that it really matters. On the other hand, separating loss of amenities from pain and suffering allows more examination of the compensation and insures against overlapping. On loss of earning capacity, *Tembo v City of Blantyre* suggests two awards This Court said:

> *"The question turns out on the nature of the injuries, the qualification, professional or otherwise of the victim, and the labour market. The nature of the injuries might be so devastating that even in a stable economy and a good qualification the job could still be lost. In* Martin v John Mowlen *and Co. Ltd (1951) C.A. No 272, Lord Denning approved of this statement from the court below:-*
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> > *"Employees must consider their own interests, and, as the time comes when anyone has to be stood off ,a sthe expression is, quite obviously they do not stand off a man least capable and the man who has been incapacitated to a certain extent."*
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> *The nature of the injuries here leaves the prospect of a reduction in earnings or loss of a job a real and substantial possibility. Where the prospect is substantial I would suggest that an award in several thousands of Kwachas would be appropriate. Where the prospect is serious awards above K10, 000 would be appropriate. In this case the appropriate award is K6, 000."*

This was a case of real award for loss of earning capacity. As we noted, the Supreme Court of Appeal awards in *Chidule v Medi* and *Tabord v David Whitehead & Sons (Malawi Ltd* are unclear on this award and they were, in fact, awards for loss of earnings rather than awards for loss of earning capacity. Consequently, Registrars and courts below, until the Supreme Court decides for another award should have been guided by the awards in *Tembo v City of Blantyre.* MK 6,000 to 10,000 was £252 to £421 and $394 to $658, respectively, at the exchange rates £1= MK 23.75297 and $1= MK 15.204 .

Registrars' Awards

As noted, in all Registrars' awards examined to inform assessment in this case, Registrars never refer to *Chidule v Medi* and *Tembo v City of Blantyre* for actual awards. There are instances of over compensation and under compensation. In some cases omission of a head causes or overlooking High

Court and Supreme Court Judges' awards are causes of overcompensation or under compensation. Most certainly on loss of earning capacity, Registrar's awards have been consistent and not quite off the mark. Registrar's, like the Supreme Court of Appeal, however need guidance on awards for financial losses. More importantly, on comparison, Registrars awards in some cases are closer or higher than similar awards in England.

In *Amosi & Another v Prime Insurance Company Limited,* (2013) Civil Cause No 33 (HC) (PR) (unreported) the applicant suffered fractures to both legs and wounds on the left knee, shoulder dislocation and post trauma arthritis. He was treated by open fracture reduction and internal fixation. He was now using clutches The Registrar awarded K 4,000,000 for pain and suffering, K2, 000,000 for loss of amenities. In *Botoman v Chayandika et a*l (2009) Civil Cause No 79 (HC) (ZADR) (unreported) (19/2/2011), one applicant and another suffered fracture of the hip and dislocation and fracture of clavicle shaft. The Registrar awarded K900, 000 and K1, 000, 000, respectively, for pain and suffering. In *Chibwawa v Prime Insurance,* (2009) Civil Cause No 1179 (HC) (PR) (unreported) (21/10/2009) for a cut wound on the elbow, severe head injuries, visible scars around the wounds, level of incapacity put at 100%, the Registrar made a global award for K5, 000, 000 for pain, suffering and loss of amenities. In *Gama v. Southern Timbers* (2013) Civil Cause No 311 (HC) (PR) (unreported) (6/11/2012) for pain, shock and bruises all over her body, open fracture on the left wrist, there was a global award of 3,005,500 for pain and suffering and loss of amenities of life. In *Imedi v Attorney General* (2011) Civil Cause No 962 (HC) (PR) (unreported) for amputated leg, a global there was an award of 5,000,000.00 for pain and suffering and loss of amenities of life. In *Jeremiah v Southern Timbers* (2013) Civil Cause No 312 (HC) (PR) (unreported) (11/11/2013) the Registrar awarded for injury to forehead and shoulders a global award of 1,105,500 for pain and suffering and loss of amenities of life. In *Kamenya v Chitawo et al*, (2013) Civil Cause No 374 (HC) (PR) (unreported) (23/07/2013) for soft tissue injuries in the form of bruises to a hand and ankle, painful back and hand, and permanent scars there was a global award of 700, 000 for pain and suffering and loss of amenities of life. In *Kayila v Nomanda et al* (2010) Civil Cause No 1909 (HC) (PR) (unreported) (15/02/2011) for a fractured femur (thigh bone) and soft tissue injuries to the head, there was global award of2,500,000. In *Kazembe v Mseka et al* , (2011) Civil Cause No 825 (HC) (PR) (unreported) (22/05/2013) for cut wounds, bruises, permanent scars, pain in an elbow and ankle and limited motion of a hand there was a global award of K1, 200, 000.

In *Makhanga v Suleiman et al* (2012) Civil Cause No 391 (HC) (PR) (unreported) (30/10/2013) for head injury, laceration on the scalp and left elbow bruises on a finger there was , global award of K1,505,500 for pain and suffering and loss of amenities of life. In *Makina v Sammy's Transport Ltd et al* (2011) Civil Cause No 89 (HC) (PR) (unreported) (3/11/20110 for severe burns on the arm and scar and permanent incapacity of 45% there was global award of K2,500,000 for pain and suffering, loss of amenities of life. In *Malichi v Prime Insurance Co. Ltd* (2012) Civil Cause No 639 (HC) (PR) (unreported) (19/07/2013) one plaintiff suffered fracture of mandible and multiple bruises and lacerations on the right arm and face and the other suffered multiple wounds on the left shoulder, throat, leg and right buttock, bruises on right upper arm and head there were, global awards of 1,900,000 and 650, 000.00 respectively pain and suffering and loss of amenities of life. In *Manyowa v Phiri et al* (2012) Civil Cause No 139 (HC) (PR) (unreported) (15/04/2013) for an open fracture of his tibia on the left leg and head injury there was a global award of 2,800,000.00 for pain and suffering and loss of amenities of life. In *Mathews v. Polypack* Ltd (2012) Civil Cause No 514 (HC) (PR) (unreported) (13/06/2013) for a palm sliced there was a global award of K8,000,000 for pain and suffering and loss of amenities of life. In *Matsimbe v Kapachira et a l*(2009) Civil Cause No 585 (HC) (PR) (unreported) (3/6/2010) for two deep cuts at the back of the head, two cuts on a nose, a wound on the nose, several cuts on upper chin, a cut on the lower lip, several cuts on the neck, a scratch on right shoulder, a deep wound on index finger, a deep wound on the lower leg and swelling on the right foot there was a global award of K2, 000, 000 for pain and suffering and loss of

amenities of life. In *Mazambani v Prime Insurance* (2009) Civil Cause No 1029 (HC) (PR) (unreported) (14/06/2010) for a wound on the thigh and a big cut wound on the head, several wounds at the back of the head and bruises all over her arms there was a global award of K2, 211,000 for pain and suffering and loss of amenities of life. In *Mkwamba v Nico General Insurance Company Limited* (2009) Civil Cause No 1861 (HC) (PR) (unreported) (10/8/2009) for head injury and multiple bruises on the scalp, a deep cut wounds on the eye nose injury and chest injury, sprained knee and shoulder there was a global award of K900,000 for pain and suffering. In *Muheka v Katsala et al* (2010) Civil Cause No 1649 (HC) (PR) (unreported) (18/04/2011) for , fracture of right tibia and fibula, multiple soft tissue bruises on legs and scalp, leg was shortened by 10cm, permanent incapacity of 40% there was a global award of K1,524,500 for pain and suffering, loss of amenities of life. In *Nedi v Mwalija et al* (2011) Civil Cause No 632 (HC) (PR) (unreported) (18/07/2013) green stick fracture resulting in an arm deformity and multiple soft tissue injuries there was a global award of K1, 700, 000.00 for pain and suffering and loss of amenities of life. In *Paulo v United General Insurance Co. Ltd* (2012) Civil Cause No 2265 (HC) (PR) (unreported) (24/01/2011) for an open fracture to tibia and fibula, a sizeable scar on right leg, scar and elbow there was a global award of K1,600,000 for pain and suffering, loss of amenities. In *Phiri v. General Alliance Insurance Co* (2012) Civil Cause No 350 (HC) (PR) (unreported) (19/04/2013) for a fracture midway between the ankle and knee, a fracture and dislocation on the left ankle and head injuries there was a global award of 4,203,300.00 for pain and suffering and loss amenities of life. In *Smith v Prime Insurance et al* (2009) Civil Cause No 1242 (HC) (PR) (unreported) (26/08/2011) the injuries were not described but the consequences were that the victim was confined to a wheel chair, needed support to stand, could not climb steps, had difficulties sleeping, was sexually dysfunctional and could not perform household chores there was a global award of K7, 000, 000, 3,000,000.00 pain and suffering and loss of amenities. In *Yobe v Prime Insurance Co. Ltd,* (2011) Civil Cause No 389 (HC) (PR) (unreported) (8/8/2013) for big cut wound on knee and multiple soft tissue injuries there was a global award of K7, 000, 000 for pain and suffering and loss of amenities.

In determining what to award for pain and suffering under the Supreme Court of Appeal and Judge of the High Court decisions, respectively, in *Chidule v Medi* and *Tembo v City of Blantyre,* High Court Judges, Registrars and indeed the Supreme Court itself must proceed as follows. The first consideration is the injury itself. Secondly, the Supreme Court, the High Court Judge or Registrar must consider whether the Supreme Court of Appeal has dealt with the same injury. Thirdly, if the Supreme Court of Appeal covered the injury, subject just to degree, the Supreme Court, the High Court or Registrar must apply the Supreme Court award. The question here is whether the injuries are the same in the sense that the court compares like injuries; finger with finger, or something to that effect. If the injuries are the same, unless there are reasons, the court, *ceteris paribus,* must apply the Supreme Court decision one of which is the extent of the injury in the new case.

Fourthly, if the injuries are different, as described, the next question is, are they similar? Injuries to different parts of the body can be similar in degree or nature. If they are, the Court must apply Supreme Court decisions, unless there are reasons beyond comparison.

Fifthly, where injuries are totally different, the court must describe them succinctly and sufficiently and consider whether the Supreme Court of Appeal in the case before it laid threshold or a guideline. Where the injury before the court was severe, for example, on a case similar to this, where the earlier case was for quadriplegic as opposed to the minor paraplegic, the Supreme Court must be understood to laying a lower threshold for paraplegics and a guideline for quadriplegics.

Sixthly, where injuries are totally different, in the absence of a Supreme Court of Appeal decision must look for comparable awards in comparable injuries in the sense that certain injuries even if they be different can be comparable. Injuries that affect the senses may be compared. For example, injuries

involving severe effect or complete loss of one of the senses may be matched against each other, for losing a sense of hearing may be just as bad as losing a sense of hearing.

Seventhly, while the courts must, as it must be, consider awards in the same jurisdiction, comparison can be made with awards in a jurisdiction at the same level of economic development. There are bound, however, to be cases where the injury is of novelty and, therefore, where no such award compares, a court can, given availability of data or information, after carefully factoring the differences, regard awards in a jurisdiction cognate or even different in the level of economic development. For, far must be the day when awards in a lower economy must struggle to match awards in larger economies even if our sense of pain or suffering or loss of amenities be the same.

Eighthly, therefore, awards for pain and suffering and loss of amenities must be based on the economy of the awarding court. While, therefore, awards in other countries may inform an award in one judicial economy, especially where the injury is novel and has not been covered before, the awards must be based on the economy and the money of the awarding court.

Ninthly, and more importantly, the court must, as a matter of public policy, give reasons for awarding differently from Supreme Court of Appeal decision. When awarding lesser or more than the Supreme Court's awards, the court must also recognize that, apart from everything else, Supreme Court of Appeal decisions could, from a policy point of view be determining levels or thresholds of awards which, depending on the nature of injury, inferior courts, receiving guidance from superior courts, must depart at the peril of reasons. Giving reasons for departure assures a victim and a tortfeaser, past and present, that the court has done the just and fair thing.

All this review was important to, from decided cases in superior courts, the Supreme Court and High Court, ascertain a threshold for damages for non-monetary loses in personal injury cases. That threshold is, according to *Chidule v Medi* (and probably *Tembo v City of Blantyre*), at the time of the awards, around MK 15,000 ($3371.468 ($1 = MK 413.246) or £2265 (£1 = MK6.622517) for pain and suffering; MK 5,000 ($1123.823 or (£755)) for loss of amenities for the sort of injuries earlier described. Damages for loss of earning capacity were, according to *Tembo v City of Blantyre*, £252 to £421 and $394 to $658 at the time of the award. It is true, as the Supreme Court of Appeal stated in *Chidule v Medi*, that, at least in relation to pain and suffering, the awards must be individuated.

There is, however, no *carte blanche* in the Supreme Court's principle that its awards must be used comparatively for similar injury that these awards cannot be used comparatively when the injuries are different (*Road Accident Fund v Marunga* 2003 (5) SA 164 (SCA)). t In *Schmidt v Road Accident Fund* (2005/4834, Van Oosten, J., in the High Court of Witwatersrand said:

> "*Counsel on both sides have referred me to a number of decisions on the quantum of general damages awarded in previous cases but none of these cases is comparable with the present case in all material respects. Those awards however are of course of some use and guidance …"*

Consequently, Supreme Court awards in one kind of injury may be used for an award of a different injury by comparison. They are of some use and guidance, where injuries differ. This is inevitable given, as we saw shortly from Registrar's decisions, different injuries and circumstances victims of personal injury claims find themselves in. When different circumstances rise, the reasons given for departure become more critical to ensure fairness in awards for diverse injuries and circumstances. There will, therefore, be a duty on courts or tribunal awarding compensation to explain departures from awards made by superior courts based on variegated circumstances and injuries of personal injury victims. There is no fairness in treating

different injuries in the same way. Conversely, there is no fairness in treating like injuries differently. The reasons advanced by the awarding court assuage criticisms of unfairness and injustice.

Balancing Social Costs

Those explanations should have primarily the ultimate concern for justice and fairness to both victims and wrongdoers by awarding condign, benign and soigné compensation. This is tapered by the social cost of such awards. There are many personal injury claims arising from product liability and industry and mobility. Liabilities flowing from wrongs in these cannot be born singly. Social arrangements mean that liability and risks are shared among users through insurance. Consequently, while awards must, as it must be, achieve fair compensation, it must not be at all costs, at least awards must assess the social cost of disproportionate damages and domino effect on insurance premiums, premium payers and the industry itself. Unreasonably disproportionate awards bite fingers that feed them as they redound into a social cost to increased insurance premiums for payers, defaults in insurance purchases and bankruptcies in the insurance industry. Less insurance risks germane victims of personal injury claims not getting adequate compensation from the industry: Alan Mason, "The insurance crisis is a public liability,' http://www.onlineopinion.com.au/view.asp?article=1900; Dr. S Bown Counting the cost of litigation, http://www.medicalprotection.org/southafrica/casebook-january-2012/counting-the-cost-of-litigation.

Pecuniary Losses

For financial losses it is, so to speak, a question of kwachas and tambalas. There are many factors to consider. Mathematical information is itself subjected to preponderances and factors not scientifically amenable. Courts can, however, achieve adequate compensation if the applicant proves the figures. In *Picket v British Rail Engineering* (1980) A.C. 136 B.P Lord Scarman said:

> *"But, when a Judge is accessing damages for pecuniary loss, the principle of full compensation can properly be applied. Indeed anything else would be inconsistent with the general rule. Though arithmetical precision is not always possible and though in estimating future pecuniary loss a judge must make certain assumptions (based upon evidence) and certain judgement, he is seeking to estimate a financial compensation for financial loss. It makes sense in this context to speak of full compensation as the object of the law."*

Besides loss of earning capacity which is a conventional award fixed by a superior court, personal injury may entail reduced or total loss of earnings. The Malawi Common law, like English Common law, uses the multiplier and multiplicand approach. As R.J Koch in 'Damages for Personal Injury and Death: Legal Aspects Relevant to Actuarial Assessments,' South African Actuarial Journal Saaj 11 (2011) 111–33http://dx.doi.org/10.4314/saaj.v11i1.4h observes, South Africa, that merges Common and civil law systems, uses actuaries more often and more readily than ordinary Common law jurisdictions. The House of Lords in `*Wells v Wells* [1998] 3 All E.R. 481 approved use of the actuarial approach and as a primary method of assessing future losses based on which Ogden tables developed. Lord Lloyd stressed at page 498:

> *"The explanation for the different approach of the House of Lords in Hunt v Severs may be a continuing hesitation to embrace actuarial tables. I do not suggest that a judge should be a slave to the tables. There may well be special factors in particular cases. The tables should be regarded as the starting point, rather than a check. A judge should be slow to depart from the relevant actuarial multiplier on impressionistic grounds, or by reference to 'a spread of multipliers in comparable cases …"*

Where, like here, the earnings are known, after due deductions, the actual award in a particular case can accurately be ascertained with or without the assistance of actuaries or Ogden tables. Ogden tables

depend on the rate of interest which, according to *Wells v Wells*, varies from time to time when, as happens there and, the rate of interest to use is the return on index-linked government stocks. More precisely, unless we have our own tables, the Ogden Tables have a limited use. The method used here can be used to create tables which I may have to. This method is flexible and accurate to accommodate different multiplicands and interests rates. To make it easier for judges, clients and lawyers the formula is in EXCEL format in this judgment so that it can be applied to whatever amount is determined as the annual periodical payment that determines the actual award. Before describing the method, it is important to discuss the fundamental principles.

Future Loss Awarding Principles

Whether it is total or partial loss of earnings, courts aim at arriving at a an annuity which, by reducing from the capital (award) and the income (interest) from the investment, affords a claimant to afford the periodical payments of reduced or total loss of earnings up to the determining event (*Wells v Wells*). Courts avoid creating a perpetual award that accrues to the victim or the victims' beneficiaries after the determining event. Justice cannot be served by a prospect that wrongdoers would pay annuities beyond the determining event. The multiplier/multiplicand approach becomes the method of ascertaining the annuity because the wrong doer compensates the victim many years before payments are due. An award, therefore, that just multiplies the periodic annual payment by the remaining years results, without even need for analysis, in overcompensation. It ignores the fact that such awards would actually result in payments from interest increase the annual periodic payment.

Where death is determinant, this Court decided that loss of earnings must follow life expectancy, generally at 55 until recently when Courts, the National Statistics Office, chiefly because of Human Immunodeficiency Virus (HIV) infections and the Acquired Immunity Deficiency Syndrome (AIDS), having revised life expectancy, reduced it to between 52 and 53 years. I do not, as is the habit of some, think that Courts, if life expectation is considered the determining event, should reduce awards based on the prospect of Human Immunodeficiency Virus infection or the Acquired Immunity Deficiency Syndrome status.

First, such an approach paints everybody with a broad brush and, therefore, reducing awards for the Human Immunodeficiency Virus and the Acquired Immunity Deficiency Syndrome would be unfair to a majority who, even on current statistics, do not have the Human Immunodeficiency Virus or the Acquired Immunity Deficiency Syndrome. Secondly, a law that reduces the award for those proved to have the Human Immunodeficiency Virus or the Acquired Immunity Deficiency Syndrome *per se* would be unconstitutional under section 20 of the Constitution as discriminatory on account of status. In my judgment the Human Immunodeficiency Virus or the Acquired Immunity Deficiency Syndrome must not be used as a basis of affecting the life expectancy which, until recently, has been at 55. Rather, the Human Immunodeficiency Virus or the Acquired Immunity Deficiency Syndrome, like any other matter, must be established and demonstrated to affect life expectancy and, where, it occurs, the award should be based on that fact. Consequently, Courts, if the determining event is death, should use 55 years when awarding compensation for lost earnings unless, of course, where it is demonstrated that there is an AIDS infection and that it has in fact shortened life.

Exhaustion Principle

The exhaustion concept is the insurance against perpetual annuity. The award must be such that it leaves no balance at the determining event. An award that has unpaid time before the determining event is, without explanation, under compensation. Conversely, an award that leaves a balance at the end of the determining event, without explanation, is overcompensation.

Discounting Rate

Sitting at *nius prius* as Registrar and Judge I used inflationary free interests of 3% instead of 4-5% which, until *Wells v Wells,* were approved by the House of Lords (*Cookson v Knowles* [1978] 2 All E.R. 604 at 611, per Lord Diplock; *Mallet v McMonagle* [1979] 2 ALL. E.R. 910; and *Lim Poh Choo v Camden and Islington Area Health Authority* [1979] 2 All E.R. 910), before the Government there introduced index-linked government stocks which have total protection against inflation. This is for two reasons. First, because using inflationary rates may not be a correct reflection of the applicant's damages. Secondly, after the award, it is the duty, if it is one, of the applicant to insure against inflation by properly investing the annuity. The House of Lords in *Wells v Wells* decided that awards on future losses base on returns on index-linked government stocks and in that case approved based on the rate then of 3%. The Lord Chancellor has set this at 2.5% and South Africa also uses 2.5% (R.J Koch in 'Damages for Personal Injury and Death: Legal Aspects Relevant to Actuarial Assessments').

Simple Interest

Awards base on simple interest rather than compound interest. The assumption is that what goes into people's personal incomes is usually earned and not borrowed. If, however, the money is borrowed, as in where the victim is a business man whose income comes from a business operation, the working of capital in the business cannot be a matter for compensation. The victim is entitled to the income that is lost through the other's wrong; that income is invested into the business as a matter of choice, much like for an ordinary person can use earnings to invest.

Multiplier Stipulation

Generally though, it is the habit of some in the Malawi Common law, to state the multiplier used. Courts do not have to disclose the multiplier, more especially where there was no reason to award more than is actually due based on the multiplicand. Reading *Wells v Wells,* the multiplier must be stated because, among other things, it will be important based on the interest rate used for the determining the award for pecuniary losses. Where more is awarded, courts may have to explain why an award for financial losses was more than that which is calculable normally and courts will invariably explain why this was the matter. Most of these reasons will relate to factors that affect the multiplicand, not the multiplier. In particular, while courts will award damages for loss of earnings based on given earnings, usually a salary, where the evidence shows a possible increase in earnings, for example an eminent promotion, the court may affect the multiplicand, namely, assess the new increase in earnings. That will often be difficult to assess; the court may then have to scale on the multiplier, as long as that does not exceed the multiplier of 20.

Multiplier

Generally, depending on the interest rate used, a multiplier should not exceed 20. It should exceed 20 where because of the interest rate chosen, the plaintiff will be left without funds for some time before the determining event. Some registrars arrive at a multiplier by subtracting from the accepted time of the determining event, usually death, so much so that some Registrars achieved multipliers of 20 and 39. Both these awards were overcompensations. It is extremely rare to achieve a multiplier of 20, let alone a 20+. A wrong multiplier leads to overcompensation or under compensation. As a rule of thumb, multipliers, unless there are good reasons, should be worked out based as not exceed 20.

Multiplicand

In using the multiplicand/multiplier method, it turns out that the real determinant of the award is the multiplicand. The multiplicand therefore must be clearly established. The multiplicand will, therefore, determine the multiplier. Consequently, where the proper method of determining the award is used, the multiplier can and is usually determined by, so to speak, working backwards. It is therefore, important to achieve a proper method of determining the award. I am mindful that it should be possible from other disciplines, notably mathematics, economics, financial accounting e.t.c. to arrive at a capital sum once an appropriate annuity and interest are determined or provided.

My earlier awards actually included a worked out sheet which, I guess, confounded and confounds lawyers and judges alike. I suspect that Counsel Chisanga, who probably accessed and appreciated the exercise, brought such works before the Assistant Registrar in *Mhone v Illovo Sugar (Malawi) Ltd* (2008) Civil Cause No 1201 (HC) (PR) (unreported) and, for all his efforts, Counsel Chisanga got this from the Assistant Registrar:

> *"It is only in the case of Chizola v Stagecoach (Mal) Ltd. [1993] 16(1) MLR 57 (HC) where, by twist of fate, Mr. Chisanga was also representing the defendant, that the Court attempted to do some arithmetical calculations which with due respect this Court could not decode."*

The Assistant Registrar's anxieties are deduced from his earlier remarks and such sentiments arise precisely because courts decide on the multiplier first. This is precisely why courts must master and appreciate the method that, to some, looks higgledy-piggledy, in order to make fair and accurate awards for applicants and wrongdoers. The method is now in EXCEL and can be accessed on our judicial website.

First, it is difficult to haphazard an appropriate and accurate award uncertainty in the duration of the determining event. One must start from somewhere. A multiplier usually does not exceed 20. The best starting point is where the multiplier is 20. Consequently, multipliers of 39 for somebody aged 14 in *Didimu v Attorney General* (2011) Civil Cause No 832 (HC) (PR) (unreported); 20 for someone aged 33 in *Minofu v Mkwanda* (2011) Civil Cause No 336 (HC) (PR) (unreported); 14 for someone aged 39 in *Waili v Prime Insurance* (2011) Civil Cause No 997 (HC) (PR) (unreported); 27 for someone aged 26 in *Kumitete v Matiyasi* (2011) Civil Cause No 243 (HC) (PR) (unreported); and 26 for someone aged 27 in *Chipeto v Nyirenda et al* (2010) Civil Cause No 2135 (HC) (PR) (unreported) resulted in overcompensation.

Secondly determine the multiplicand, the periodic annual payment to be paid annually until the determining event. For wages, multiply the daily wage by 260 working days, that is 52 five day week. There will be over compensation if, as happened in *Kalua v Mkumbwe et al* (2011) Civil Cause No 96 (HC) (PR) (unreported), daily wages are multiplied by 365/366 days. For weekly payments, multiply the weekly wage by 52. For monthly earnings, multiply the monthly wage by 12 months.

Thirdly, multiply the annual payment by the multiplier of 20 to determine the starting point.

Fourthly, in the second row of the first column in the excel workbook enter the principal obtained by multiplying the annuity with the maximum multiplier of 20.

Fifthly, in the second column, EXCEL automatically determines income at 3% interest.

Sixthly, in the third column, EXCEL automatically determines the principal + interest.

Seventhly, in the fourth column, select the entire column rows by clicking once at the top of the column.

Eighthly, type the annuity in the fourth column;

Ninthly, apply the annuity to the whole column by pressing 'cntrl' and 'enter' at the same time.

Tenthly, EXCEL automatically prepares the NET, the annuity and income for the year less the annual periodic payment, in the fifth column.

Eleventh, the Net becomes the starting principal in the next row of the first column.

Twelfth, the process regenerates itself to the rest of the columns and rows of the workbook.

To determine the correct loss of earnings award, follow these steps:

First decide the determining event. Secondly, consider the victim's age. Thirdly, determine how many years remain up to the determining event. Fourthly, locate on the EXCEL sheet where the annuity is less than the annual periodical payment. Fifthly, counting upwards, count remaining years. Sixthly, this is the accurate award. Seventhly, to determine the multiplier, divide the award determined by the annual periodical sum. Eighthly, consider if factors necessitate increase or decrease of the award by increasing the multiplier or multiplicand. Notice that the multiplier is always less than 20.

The distinction between pecuniary and non-pecuniary injury is important not only because it leads to a more systematic and pervasive compensation but also because it underlines the approach to be taken in the umbra of injuries that fall in between what, for lack of better terms, one can call pure non-pecuniary and pecuniary injury. In between these injuries are loss of amenities as described and loss of earnings. Courts can achieve quite some measure of accuracy for loss of earnings. They cannot achieve that measure of certainty for loss of earning capacity, which is closer to pecuniary losses. Loss of amenities are closer to the actual injury in that the greater the injury the greater the number and degree one can enjoy amenities. Enjoyment, like pain, cannot be measured and were it possible to do so, it is difficult to assign monetary value to it. The proximity of loss of earning capacity to loss of earnings and loss of amenities to pain and suffering are reason enough to create a relationship between the two ends of damages to the ones in the umbra. Since Courts have always set conventional awards for these two heads of damages.

The Supreme Court of Appeal was not in *Chidule v Medi* deliberately setting the conventional award for loss of amenities. In *Tabbord v David Whitehead & Sons (Malawi) Ltd* the Supreme Court of Appeal never awarded for loss of amenities at all. This Court in *Tembo v City of Blantyre* awarded loss of amenities in a global award for pain and suffering and amenities. Moreover, the Supreme Court of Appeal in *Chidule v Medi* and *Tabbord v David Whitehead & Sons (Malawi) Ltd* did not, in making the awards for loss of earning capacity, satisfactorily distinguish loss of earning capacity from loss of earnings and ended in the earlier case awarding huge sums for loss of earning capacity and in the case of the latter awarded nothing for the head. This Court in *Tembo v City of Blantyre*, aware that courts more or less fix a conventional sum for loss of earning capacity, proposed a dual approach, setting two awards depending on the seriousness of the injury. This approach, however, entails that awards may have to be reviewed almost periodically by superior courts with the consequence that in a majority of cases, subject to money value adjustment, inferior courts have no manouvre or flexibility to respond to differences in the degree and type of injury. In my judgment, the award for loss of amenities and loss of earning capacity should in a kind of rough and shoddy way relate to the basic losses closest to them, namely, pain and suffering on the one hand and loss of earnings on the other, respectively.

I would put an award for loss of amenities and loss of earnings capacity, depending on the degree of injury at between 25 to 33%, respectively, of the pain and suffering and loss of earnings award. 25-33% is as good guess-estimate like the conventional awards for the losses. The low percentage is justified for the same reasons, I guess, that the conventional awards on both heads are low, namely, that loss of amenities

can be part of suffering in the pain and suffering award. Equally, there is a sense in which loss of earning capacity for one who is still employed with no loss to or reduced earnings has not really or fully lost the capacity to earn. The awards are low, therefore, to avoid overlapping of damages. This approach implies that a court must start with determining an appropriate award for pain and suffering based on comparative award and loss of earnings by the method discussed later.

Award in this Case

I use the Sterling Kwacha analysis for two reasons. First, this Court from the Supreme Court downwards relies probably rather unduly heavily on Kemp & Kemp, The Quantum of Damages where Sterling is the legal tender or *lingua franca*. Secondly, the Supreme Court in *v David Whitehead & Sons (Malawi) Ltd* used Sterling awards from Kemp & Kemp, The Quantum of Damages.

There are reported cases of damages awards for paraplegia in Kemp & Kemp, The Quantum of Damages for the United Kingdom. Here damages for pain and suffering and loss of amenities vary between £70 – 135,000 (*Burrows v Crawford,* £90,000 (18 January 1989); (*Thornton v Kingston Upon Hull City Council,* £135,000 and total award was £1,882,890 (23 February 2000); *Hunt v Severs*, [1994] 2 A.C. 350, £90,000 and total award was £504,720 (15 April 1992); *Re McCarthy,* £135,000 and total award was £1,527,880 (5 September 2000); *Tate v West Cornwall and Isles of Scilly Ha,* £85,000 and total award was £484,400 (7 January 1994); *Woodrup v Nicol* [1993] P.I.Q.R. Q104, £77,000 (21 April 1991); *Fitzgerald v Ford* [1996] P.I.Q.R. Q72, £100,000 (20 October 1995); In *Fitzgerald v Ford, Hunt v Severs* and *Re McCarthy,* where the awards were higher than £100,000 the injuries and their consequences were more severe even compared to *Chidule v Medi* which, as we see shortly, was a case of paraplegia, albeit of the upper body. One strand, however, that follows through these awards is that rather modest awards compared to loss of earnings or loss of earning capacity and care are awarded for pain and suffering.

The South African economy, smaller than the English, is closer although, bigger than our economy. In *Fortuin v The Minister of Safety and Security* case number 2728/02 in the Supreme Court of South Africa (Cape of Good Hope Provincial Division), in a judgment delivered on 25 January 2007, the plaintiff was among other things a paraplegic following injuries he sustained gunshot wounds. The total award ran in several millions of Rands. The appellant was in the court below awarded general damages in the sum of R1, 200, 000 in respect of pain, suffering, shock, discomfort, loss of amenities of life, permanent disfigurement and permanent disability. The Supreme Court of South Africa reduced the award to R350,000. Previously the High Court in Witwatersrand in 1996 awarded R24,000 in similar circumstances in the case of *Motloung v South African Eagle Insurance Co. Ltd., reported at A3-120.* In an economy, probably a little closer to ours, Zimbabwe, in *Chaza v Commissioner of Police and Another* reported at A3-10, the High Court of Zimbabwe awarded $50,000 of course for injuries more pronounced than the ones in *Chidule v Medi.* The Supreme Court of South Africa (Cape of Good Hope Provincial Division) was persuaded, like I am for the same reasons, not to follow the award albeit the Supreme Court of South Africa (Cape of Good Hope Provincial Division) was able to convert the € award into the South African Rand. Thring, J., said:

> *"That case was decided in 1988 in the Zimbabwe High Court. The plaintiff had been permanently paralyzed from the waist down by a gunshot wound. Her condition was more serious than that of the present plaintiff. The award of general damages in that case was Zimbabwe €50,000, the present-day equivalent of which is approximatelyR223, 000. I do not find this decision of very much assistance, mainly because it was handed down 18 years ago in another country, before the upward trend in awards for general damages had commenced or, at any rate, really gathered momentum in South Africa."*

The upshot of these is that, while a jurisdiction may have to look at conventional awards in its jurisdiction or jurisdictions at the same level of economic development, there are bound to be situations where , and this case could be such an instance, a court may have to recourse awards in foreign jurisdictions at a disparate level of economic development. It is based on this, I suppose, that, apart from the reasons given, the Supreme Court of South Africa (Cape of Good Hope Provincial Division) referred to the Zimbabwean award. One such circumstance is where there has been no equivalent and relevant award on a usual or unusual award within the jurisdiction and the jurisdiction at the same or equivalent level of economic development.

Where there has been no equivalent award within the jurisdiction or a jurisdiction at the same level of economic development, awards in jurisdictions at disparate level are a useful and necessary starting point or guide to awards that one jurisdiction has to make in novel cases provided, of course, where there is a way of accounting for the differences. There are many ways, I suppose, of comparing economies. The gross domestic product per a capita is one such way. My own assessment is that this may not be very helpful. For example the gross domestic product per capita is $1.2 compared to $ 20,000 + of the United Kingdom whose laws affect us in many ways because of our shared history and the Common law Tradition. Awards of let us say £100,000 would make our awards infinitesimally small. The second method is comparing consumer price indices. The Malawi Revenue Authority uses this for purposes of Capital Gains Tax (Consumer Price Indices (CPIS) or Conversion Factors Adjusting Basis of an Asset for Disposals Occurring from January 2013 TO December. I do not have any reason for using these tables for purposes of assets, houses, for damages. The Consumer Price Index approach yields very different figures based on averaging. The third possibility is comparing purchasing power parity using the strength of a currency and its purchasing power. The problem, here is that stronger currencies would purchase more. The fourth method is using money value biased on a stable currency. In this method, the various awards for pain and suffering are worked based on the dollar value at the time of the award. K15,000 , K50,000 and K60,000 using average annual exchange rates of 1994, 1995, and 1996, respectively, yield US$1,704 , US$3,271 and US$3916, respectively. The inflation rate of 64% from 1994 to August 2014 is applied to give US$2,727, US$5,093 and US$ 5,918. Using the mid exchange rate of MK/US dollar of K406.7206/US$ to the figures and they yielded the figures of K1,109,001 for theK15,000 of 1994 (*Chidule v Medi*), K2,071,304 for theK50,000 of 1995 (*Tabord v David Whitehead & Sons (Malawi) Ltd*) and K2,407,106 for the K60,000 of 1996 (*Tembo v City of Blantyre*). The best would be to use actual awards and relate them to wage structures.

When using wages for comparison, the court will first have to determine the value of an earlier award currently. Consequently, where there has not been any significant change in the value of money, there is no need to recalibrate. Conversely, if money value changes a court has first to find the current value. Whatever it is, the current value is expressed, to create a constant, in terms of wages. The constant is then applied to the current wages in the compared country. For example, the minimum wage in the United Kingdom is currently £6.50 per hour and, therefore, on an 8 hours day, £52.00 per day. For paraplegics, English courts award £135, 000. The constant is 2596. This constant is multiplied with the Malawi daily wage of MK551 to result in an award of MK 1430481. This, in my judgment, would be a good starting point where there are no awards from the jurisdiction or a jurisdiction with comparable level of the economy. Based on it, since the injuries in the present case do not compare with the injury in *Fitzgerald v Ford*, *Hunt v Severs* and *Re McCarthy*, the award has to be less than MK1, 500, 000. We arrive at the same result if we use the South African awards. According to the Domestic Workers Act, the maximum minimum wage is R11.27 per hour compared to K70 (R1.75) in Malawi. R300, 000 divided by R11.27 gives a constant of 26619. Multiply this by K70 gives K1, 863, 354.

These calculations are coherent with the awards in *Chidule v Medi* which, as mentioned earlier, involved a victim of paraplegic conditions. The record does not actually use the word 'paraplegia,' all in there is about a victim paralyzed, not a quadriplegic, but certainly a paraplegic in the upper body. In such circumstances, the duty of this court is stated clearly in *Alsfold v British Telecommunications Plc* [1986] C.A. No 979 where Lloyd L.J. said:

> *"…£15,000 for pain and suffering in this case is out of line with … awards upheld by this court.*
> … *The judge himself recognised as much. He said that he regarded the awards in those cases as being 'unacceptably low'. … But that would be to introduce into this branch of the law an element of uncertainty which I, for one, would regard as undesirable. Apart from any sense of injustice which it might create between one claimant and another, it would make it even more difficult for counsel to advise on the correct figure for settlement.*
>
> *Everybody accepts that awards of damages in this field are necessarily conventional, and that they are based on a scale of comparative seriousness which is also conventional. I do not suggest that the scale is immutable. It may change gradually over time, as indeed may the level of damages generally. If judges consistently award damages for a particular type of injury at the top of the range, then that type of injury may gradually move up the scale of relative seriousness. But in my judgment it should not be open to a judge to award damages outside the range because he regards the range as being too low. That is what, as I read his judgment, the judge has done here".*

Balcombe L.J. said:

> *"As Lord Justice Lloyd has said, if that were not the rule, no one would safely be able to advise litigants in personal injury cases to settle claims, or know what to pay into court. There is also, it seems to me, a need to maintain the balance between these conventional awards for damages for pain, suffering and loss of amenity for different types of injury. If one judge at first instance decides to increase the level in one type of case, that balance will be disturbed."*

In this case, the injuries the applicant suffered are different and more serious and consequential than ones the applicants in *Chidule v Medi* and *Tembo v City of Blantyre* suffered. At current values of money, the Supreme Court and the High Court awards for severe injuries in *Chidule v Medi* v *Medi* and *Tembo v City of Blantyre* are £2265 and $3371.468 and MK1523439] and MK1393246 for pain and suffering and £755 = MK 507813; $1123.823 = MK 464415.40 for loss of amenities. The exchange rates yesterday were £1 = MK 672.6 and [$1 = MK 413.246.

I am bound by the decision of the Supreme Court in *Chidule v Medi.* I think for the injuries in *Tabbord v David Whitehead & Sons (Malawi) Ltd*, the injuries being less severe than in *Chidule v Medi*, the award is on the very high side. The result would have been different, I guess, had the Supreme Court considered the *Chidule v Medi* award. As between the two applicants, no doubt, there was a grievance on the earlier applicant that for injury less serious and consequential the Supreme Court would have made such an award. In this case, the City of Blantyre award, for injuries more serious and probably consequential, the award, is a good source and guidance for injuries probably different. I have examined Registrar's awards generally and I think that on whatever method used for arriving at the awards, the awards compare badly with the Supreme Court and High Court awards. The awards never refereed to actual awards of the Supreme Court or the High Court Judges. Consequently, even in the light of quite some guidance from the Supreme Court and the High Court, awards have been based on Registrar's awards. The Registrars' awards have, therefore been, even considering changes in the value of money and inflation very high, in certain respects by anything from 50 to 100%. As we have seen, based on Supreme Court of

Appeal and High Court Judges' awards, factoring changes in value of money using the consumer price index, value of the Kwacha viz-a-viz stable currencies or wage value, the correct awards are in the range of K2, 500, 000 for loss of pain and suffering and loss of amenities. These awards are correct even by comparing our economy to economies at a closer or further level of development. I am not bound by Registrar's awards; they need not necessarily be a source or a guide where, like here, they based on incongruous principles.

As I have said, this case, much like *Chidule v Medi* in the Supreme Court of Appeal, is a case of paraplegia. The distinction really being that the paraplegia in this case involved the lower limbs not the upper limbs. On balance, the injuries are more pronounced and meriting a higher award than … the current value of the *Chidule v Medi.* The Registrar's awards for pain and suffering on similar injuries have been very high and oblivious to Superior Court awards. The *Kusowa v United General Insurance Company Ltd* award of K10, 287, 500, cited by the applicant's Counsel, was not a case of paraplegia. It was, however a case of multiple injuries. Of the K10, 287, 500 only K 5, 000, 000 went to pain and suffering. The rest covered pecuniary losses. That decision cannot be a basis of the K 30, 000, 000 the applicant claims.

The defendant's Counsel submits that the right award here is K6, 000, 000. He relies on the *Kondowe v Bula et al* and *Smith v Prime Insurance Co. Ltd* awards of K5, 000,000. Again this was a global award. The defendant's Counsel submits that the latter case is much like the present. I do not think, however, that this is the worst kind of paraplegia. I award the applicant on current values of money the sum of MK MK1, 800, 000 for pain and suffering. At 33%, I, therefore, award the applicant MK 600,000 for loss of amenities. I award the applicant MK 2,400,000 for pain and suffering and loss of amenities.

On pecuniary losses, the applicant is no longer employed and he has suffered total incapacity that he will not be able to work again. There can, therefore, be no damages for loss of earning capacity because the applicant will be compensated fully by an award for loss of earnings. He is aged 38. He was earning MK7, 500 a month, the minimum wage at the time of the accident that was tax free. As I have understood, these wages were probably the minimum wage at the time of the accident, not at the time of the trial or judgment. The court cannot overlook this circumstance, given that the Court must take judicial notice of changes in legislation. The minimum wage has increased to MK 551 per a day.

The EXCEL worksheet is as follows.

PRINCIPAL	INCOME AT 3% INTEREST	PRINCIPAL + INTEREST	ANNUITY	NET
1,800,000	54000	1,854,000	90,000	1,764,000
1,764,000	52920	1,816,920	90,000	1,726,920
1,726,920	51807.6	1,778,728	90,000	1,688,728
1,688,728	50661.828	1,739,389	90,000	1,649,389
1,649,389	49481.68284	1,698,871	90,000	1,608,871
1,608,871	48266.13333	1,657,137	90,000	1,567,137
1,567,137	47014.11732	1,614,151	90,000	1,524,151
1,524,151	45724.54084	1,569,876	90,000	1,479,876
1,479,876	44396.27707	1,524,272	90,000	1,434,272
1,434,272	**43028.16538**	**1,477,300**	**90,000**	**1,387,300**
1,387,300	41619.01034	1,428,919	90,000	1,338,919
1,338,919	40167.58065	1,379,087	90,000	1,289,087
1,289,087	38672.60807	1,327,760	90,000	1,237,760
1,237,760	37132.78632	1,274,892	90,000	1,184,892

1,184,892	35546.76991	1,220,439	90,000	1,130,439
1,130,439	33913.173	1,164,352	90,000	1,074,352
1,074,352	32230.56819	1,106,583	90,000	1,016,583
1,016,583	30497.48524	1,047,080	90,000	957,080
957,080	28712.4098	985,793	90,000	895,793
895,793	26873.78209	922,667	90,000	832,667
832,667	24979.99555	857,647	90,000	767,647
767,647	23029.39542	790,676	90,000	700,676
700,676	21020.27728	721,696	90,000	631,696
631,696	18950.8856	650,647	90,000	560,647
560,647	16819.41217	577,466	90,000	487,466
487,466	14623.99453	502,090	90,000	412,090
412,090	12362.71437	424,453	90,000	334,453
334,453	10033.5958	344,487	90,000	254,487
254,487	7634.603673	262,121	90,000	172,121
172,121	5163.641784	177,285	90,000	87,285
87,285	2618.551037	89,904	90,000	-96
-96	-2.892431713	-99	90,000	-90,099
-90,099	-2702.979205	-92,802	90,000	-182,802
-182,802	-5484.068581	-188,286	90,000	-278,286

The applicant in this case claims, as is the Common law of England and Wales, the losses from the date of the accident to the date of judgment as special damages and the ones after judgment to be subjected to the multiplier and multiplicand approach. The splitting of rewards in England and Wales are based on an Act of Parliament, not of general application before 1902 that does not apply to Malawi, under which courts can award interest on damages (*Jefford v Gee* [1970] 2 Q.B. 130. The Supreme Court of Appeal has persistently held that courts in Malawi have no power to order interest on damages. Under the Courts, courts can only order interest on debts, including judgment debts. It is not necessary, therefore, to split the awards as suggested. In Malawi, therefore, the date for assessment of financial loss, much like for death, occurs from the date of the accident. The applicant was 38 years at the time of the accident. He has 17 years before reaching 55 years. Working backwards twelve years from where the annuity is almost equal to the one year annual periodic payment, the appropriate award for loss of earnings is MK 1,184,892. The multiplier is 13.1. Taking into account the change in the minimum wage, I adjust the multiplier to 18. I award the applicant the sum of MK 1,620, 000 for loss of earning.

The applicant will require nursing. There is no real evidence of earnings for a nurse. Rather than use a global award, I will use the minimum wage of a daily worker. The minimum wage is now at MK551 per a day. The EXCEL sheet is as follows:

PRINCIPAL	INCOME AT 3% INTEREST	PRINCIPAL + INTEREST	ANNUITY	NET
2,865,200	85956	2,951,156	143,260	2,807,896
2,807,896	84236.88	2,892,133	143,260	2,748,873
2,748,873	82466.1864	2,831,339	143,260	2,688,079
2,688,079	80642.37199	2,768,721	143,260	2,625,461

2,625,461	78763.84315	2,704,225	143,260	2,560,965
2,560,965	76828.95845	2,637,794	143,260	2,494,534
2,494,534	74836.0272	2,569,370	143,260	2,426,110
2,426,110	72783.30802	2,498,894	143,260	2,355,634
2,355,634	70669.00726	2,426,303	143,260	2,283,043
2,283,043	68491.27747	2,351,534	143,260	2,208,274
2,208,274	66248.2158	2,274,522	143,260	2,131,262
2,131,262	63937.86227	2,195,200	143,260	2,051,940
2,051,940	61558.19814	2,113,498	143,260	1,970,238
1,970,238	59107.14408	2,029,345	143,260	1,886,085
1,886,085	56582.55841	1,942,668	143,260	1,799,408
1,799,408	53982.23516	1,853,390	143,260	1,710,130
1,710,130	51303.90221	1,761,434	143,260	1,618,174
1,618,174	48545.21928	1,666,719	143,260	1,523,459
1,523,459	45703.77586	1,569,163	143,260	1,425,903
1,425,903	42777.08913	1,468,680	143,260	1,325,420
1,325,420	39762.60181	1,365,183	143,260	1,221,923
1,221,923	36657.67986	1,258,580	143,260	1,115,320
1,115,320	33459.61026	1,148,780	143,260	1,005,520
1,005,520	30165.59857	1,035,686	143,260	892,426
892,426	26772.76652	919,198	143,260	775,938
775,938	23278.14952	799,216	143,260	655,956
655,956	19678.694	675,635	143,260	532,375
532,375	15971.25482	548,346	143,260	405,086
405,086	12152.59247	417,239	143,260	273,979
273,979	8219.370244	282,198	143,260	138,938
138,938	4168.151351	143,107	143,260	-153
-153	-4.604108524	-158	143,260	-143,418
-143,418	-4302.542232	-147,721	143,260	-290,981

The appropriate award is 1,618,174 for nursing care.

I award the applicant the sum of MK 500, 000 for disfigurement.

There will be judgment for the applicant for MK 6,228, 174 with costs to the applicant which is reduced by the award the applicant obtained under the Workers Compensation Act.

Made this 26th Day of September 2014

D.F. Mwaungulu