



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO.359 OF 2016**

BETWEEN

CHRISSY CHIOKO.....CLAIMANT

AND

PRIME INSURANCE CO. LTD.....DEFENDANT

CORAM

Mrs T. Soko	: Assistant Registrar
Mr Kalua	: Counsel for the claimant
Mr Theu	: Counsel for the defendant
Ms Munthali	: Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

BACKGROUND

This is an order on assessment of damages pursuant to a judgment on liability entered against the defendant on 11th April 2018. The claimant is claiming damages for pain and suffering, loss of amenities of life, damages for disfigurement and costs of the action. The facts herein are that on 6th August 2015, the defendants insured servant who was driving a motor vehicle registration number CK129 hit the motor vehicle registration number NB2355 Toyota Hiace Minibus which was coming from the opposite direction. As a result of the accident, the claimant sustained acetabular fracture of the right hip, Bimalleolar fracture of the left ankle, deep scalp laceration and the leg was shorted by 3cm.

EVIDENCE

On the date of hearing the claimant was the sole witness. She adopted her witness statement where she stated that it was on 6th August 2015 when she was involved in a road accident that occurred at Lunzu Secondary School junction along Blantyre/ Zalewa road. The accident occurred around 15:30 hours. The claimant further stated that on this particular day, she was a passenger in a motor vehicle registration number

NB 2335 Toyota Hiace travelling from Blantyre going to Salima. Upon arrival at Lunzu Secondary School road junction, the motor vehicle she was travelling in collided head on with a motor vehicle registration number CK 129 Nissan Vannete minibus which was coming from opposite direction. The minibus overturned on the extreme nearside dirty verge and subsequently caught fire. The claimant said that she sustained acetabular fracture of the right hip, Bimalleolar fracture of the left ankle, deep scalp laceration and the left leg was shortened by 3cm. The claimant stated that she was taken to Mlambe Hospital where the scalp lacerations were sutured and then she was referred to Queen Elizabeth Central Hospital where she was x-rayed and discovered that she had fractures of the right hip and left ankle. The claimant was put a plaster of Paris then she bought crutches at the price of K3, 500.00. Thereafter she was referred to Salima District where she was admitted for five days. The claimant stated that she still experience pain on both legs when she takes a walk.

The defence paraded one witness by the name Tamika Mhone. In his witness statement, he stated that the defendant was the insurer for the motor vehicle Nissan Vanette Registration Number CK129. He stated that the said accident gave rise to several claims and the defendant so far made payments on several of these claims for damages. The witness stated further that the policy limit accruing under the insurance policy issued on the said motor vehicle was K5, 000,000.00 and K395, 000.00 is the one that remained unspent. The witness tendered a copy of the defendant's loss/claim facing sheet detailing payments so far made on the insurance contract for the usage of motor vehicle. The witness concluded that in the circumstances the defendant cannot be liable to pay any excess damages in any claim relating to the accident.

In cross examination, the witness stated that there was a contract between prime insurance Co. Ltd but the contract was not brought before the Court. The claimant stated that the Court cannot appreciate the terms of that contract and the figures indicated in that contract since it was not in the Court. The witness stated that there were some payments that were made and the payees were JB Suzi & Co. and KPMJ & Associates. The witness stated that the payees were the victim's lawyers. The witness stated that the document that he tendered had no names of the victims.

SUBMISSIONS

In submissions, Counsel for the claimant stated that the contract document showing that the limit liability between the insurer and the insured was K5, 000,000.00 was not produced before this Court. The claimant submitted that the defendant deliberately concealed the contract document and hence no evidence to confirm that the policy limit was K5, 000,000.00. Counsel further argued that the defendant testified that some payments were made on the policy to show that KPMJ Associates and JB Suzi and Associates but the evidence does not show the name of the claimants. Counsel added that the defendant did not adduce evidence of any judgments or settlement agreements for the Court to believe that the payments were indeed made on policy. Counsel also stated that the defendant has not explained whether the payments were for damages or costs and the defendant has not given any explanation for the absence of the documents to support the alleged payments.

On the other hand, Counsel for the claimant stated that the accident gave rise to several claims against the defendant including the present claim and the defendant cannot be condemned to an infinite amount in relation to the use of the motor vehicle registration CK 129 Nissan Vannette Minibus that caused the accident. Counsel further stated that the insurance policy limit was K5, 000,000.00 and only K395, 000.00 remains

payable under the policy limit. The defendant added that the defendant thus only be condemned to pay damages equivalent to the remaining sum. Counsel for the defendant concluded that the claimant can claim the remaining amount direct from the owner of the minibus.

In the present matter my task is to assess damages to be recovered by the claimant. Assessment of damages is basically a process of ascertaining the compensation that the claimant should receive in respect of the injuries that she sustained. It means my duty is to determine how much the claimant deserves to receive. It means the question of limits of liability does not arise at this point. This is the issues that in my view must arise at execution. I will therefore not consider that issue and proceed to assess damages. **Also see Black Luwayo vs Adam Msimuko and 2 others Civil Cause No. 1262 of 2009.**

GENERAL LAW ON DAMAGES

In assessing damages for personal injuries, the intention of the court is to compensate the injured party as nearly as possible as money can do. The principle is to put the plaintiff at the position he would have been if it would have not been for the tort committed. **See Namwiyo v Semu (1993) 16 (1) MLR 369.**

In calculating damages , therefore, the Courts consider, in monetary terms, the sum which will make good to the sufferer, as far as money can do, the loss he has suffered as a result of the wrong done. **See Admiralty Commisioners vs S.S Valeria (1992) 1 A.C. 242 at 248.**

In Christina Mande vs Charter Insurance Co. Ltd Personal Injury Cause No. 329of 2016 the Court quoting Wright vs British Railway Board 1938 AC 1173, 1177 stated that:

'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 litigation 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.'

In the case of **City of Blantyre vs Sagawa** the court said the following:

'It would appear to us that if the award is to be conventional, an award for a similar injury should be comparable and should, to some extent, be influenced by amounts awarded in the previous case, either in the same or neighbouring jurisdictions. In citing previous awards the court should not lose sight of factors like devaluation of the currency since the awards were made.'

PAIN AND SUFFERING

In damages for pain and suffering, the court considers the physical experience of the nerves and mental anguish which comes as a result of the injury. See Lemon Banda and 19 others V Mota Engil Limited and General Alliance Insurance Limited, personal injury cause number 178 of 2012 (unreported).

In the City of Blantyre vs Sagawa 1993 16 (1) MLR 67 the court quoted Kemp and Kemp volume II paragraph 1007 where it was stated that;

Pain is, it is suggested, used to describe the physical pain caused by or consequent upon the injury, while suffering relates to the mental element of anxiety, fear, embarrassment and the like.

Page 831 of Mc Gregor on damages defines pain as the immediately felt effect on the nerves and brain of some lesion or injury to a part of the body, while suffering has been defined as the distress which is not felt as being directly connected with any bodily condition. Pain includes any pain caused by medical treatment or surgical operations rendered necessary by the injury inflicted by the defendant. Suffering includes fright at the time of the injury and fright reaction, fear of future incapacity, either as to health, sanity or the ability to make a living, and humiliation, sadness and embarrassment caused by disfigurement. Also see Gedion Mhango vs Nico General Insurance Co. Ltd Personal Injury Cause No. 703 of 2016 (unreported).

LOSS OF AMENITIES OF LIFE

Loss of amenities is concerned with loss of enjoyment of life. This follows from the fact that human beings enjoy certain activities which may as a result of the injury be curtailed. See Lemon Banda and 19 others V Mota Engil Limited and General Alliance Insurance Limited, personal injury cause number 178 of 2012 (unreported).

Birkett L.J in Manley vs Rugby Portland Cement Co. (1951) C.A No. 286 stated that there is a head of damage which is sometimes called loss of amenities, the man made blind by the accident will no longer be able to see familiar things he has seen all his life, the man who had both legs removed and will never again go upon his walking excursions- things of that kind- loss of amenities. Mc Gregor on damages at Page 834 explains that loss of impairment of any one or more of the five senses is compensated under this head. Besides loss resulting from interference with the plaintiff's sexual life.

DISFIGUREMENT

Disfigurement is concerned with change of looks of the individual. This may be scars, amputations and postures. See Lemon Banda and 19 others V Mota Engil Limited and General Alliance Insurance

Limited, personal injury cause number 178 of 2012 (unreported.) Damages for disfigurement are normally awarded as part of pain and suffering. They are awarded separately if the plaintiff has been ridiculed, lost his social status, or that his is in need of plastic surgery. See Mary Kamwendo vs Stage coach Malawi Limited Civil Cause No. 840 of 1995.

SPECIAL DAMAGES

The rule is well settled that special damages have to be specifically pleaded and strictly proved. See Phiri V Daudi 15 MLR 404. This means the plaintiff must produce evidence to prove the amount of special damages.

DETERMINATION

In the present matter the claimant sustained acetabular fracture of the right hip, Bimalleolar fracture of the left ankle and deep scalp laceration. She was put a Plaster of Paris slab for 1 week then full below knee cast. She was put on bed rest for 6 weeks afterwards she started using crutches for 3 months. The scalp was sutured and she was also given analgesics. The medical report indicates that she has got a shorter right leg resulting from her hip injury. The estimated shortening being 3 cm. The report also shows that she has got intermittent pain on both the right hip and left ankle. Counsel for the claimant in submissions prayed for a sum of K12, 000,000.00 damages for pain and suffering and loss of amenities of life and K2, 000,000.00 damages for disfigurement. I have considered comparable cases cited by counsel for the claimant in his submissions. I have considered the nature of the injuries and the devaluation of kwacha. In my view a sum of K 5,000,000.00 would compensate the claimant in all heads of damages.

Costs are for the claimant.

Pronounced in chambers on this 6th day of November 2018.



T. SOKO
ASSISTANT REGISTRAR