



**REPUBLIC OF MALAWI**  
**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**PERSONAL INJURY CAUSE NO.295 OF 2017**

**BETWEEN:**

**ESTERE CHITIMBE .....CLAIMANT**

**AND**

**HENDSONMALAMBA..... 1<sup>ST</sup> DEFENDANT**

**PRIME INSURANCE CO. LTD.....2<sup>ND</sup> DEFENDANT**

**OCEAN CAR HIRE.....3<sup>RD</sup> DEFENDANT**

**CORAM**

<b>Mrs T. Soko</b>	<b>: Assistant Registrar</b>
Mr Kusiwa	: Counsel for the claimant
Mr Chikaonda	: Counsel for the defendant
Ms Munthali	: Court Clerk

**ORDER ON ASSESSMENT OF DAMAGES**

**BACKGROUND**

This is an order on assessment of damages following a consent judgment dated 3<sup>rd</sup> May 2018. The claimant Estery Chitimbe claims for damages for pain and suffering, damages for loss of amenities of life, damages for disfigurement and costs of the action.

The facts derived from the statement of claim avow that on 15<sup>th</sup> May 2016, the 1<sup>st</sup> defendant was driving a motor vehicle registration number KK 5525 Toyota Prado from the direction of Kachulu heading towards Zomba. Upon reaching Chabwere Village, the 1<sup>st</sup> defendant lost control of the motor vehicle and hit the claimant who was walking on the dirt verge of the left side of the road in the opposite direction. As a result, the claimant sustained a fracture of the ankle.

## ISSUE

Quantum of damages to be payable to the claimant.

## EVIDENCE

The claimant was the sole witness. She adopted her witness statement. The evidence from her statement avers that on 15<sup>th</sup> May 2016, she was walking alongside Matawale – Kachulu road when she was hit by a motor vehicle registration number Kk 5525. The claimant explained that she sustained a fracture of the ankle. She explained that she underwent surgery where the fractures were fixed with plate and screens and tension bind wing. The claimant stated that she is at the risk of developing arthritis because of the lodged fragment. The claimant stated that she was hospitalized twice for a total period of 41 days. The claimant further stated that upon admission at the hospital on 15<sup>th</sup> May 2016, a Plaster of Paris (POP) was applied on her injured leg and was discharged from the hospital on 27<sup>th</sup> May 2016. The claimant added that she stayed in POP until 20<sup>th</sup> June 2016 and second one was put when the medical personnel saw that she was not improving. The claimant said the POP was removed on 21<sup>st</sup> July 2016. The claimant said that after the POP was removed, she kept on going to the hospital for reviews. On 27<sup>th</sup> September 2017, a third POP was applied which was removed on 27<sup>th</sup> October 2017. The claimant stated that after the POP was removed she was told to go for operation as there was no improvement. She was admitted again on 1<sup>st</sup> November 2016 and got discharged on 29<sup>th</sup> November 2016. The claimant stated that she feels numbness of the injured leg and she has been going to Zomba Central Hospital for a check-up since she got discharged from the hospital.

## SUBMISSIONS

Counsel for the claimant submitted that a sum of K4, 500,000.00 would adequately compensate the claimant. Counsel cited a case of **Hector Thom vs Blantyre City Council and Charter Insurance Co. Ltd Civil Cause No. 949 of 2016** where the claimant was awarded a sum of K3, 000,000.00 for a fracture of the right ankle. He was hospitalized for 4 days and his leg was put in plaster of Paris for a month. The award was made on 9<sup>th</sup> May 2018. Counsel also cited a case of **Enelesi Kaponda vs Emmanuel Chimanya and Prime Insurance Co. Ltd Personal Injury Cause No. 187 of 2015** where the claimant was awarded a sum of K3,000,000.00 for a fracture of the right ankle. The award was made on 19<sup>th</sup> May 2016 on the other hand Counsel for the claimant submitted that the claimant must be compensated with a total sum of K2, 200, 00.00. Counsel drew the Court to consider a case **of George Sakonda vs S.R Nicholas Limited Civil Cause No. 67 of 2013** where the plaintiff in that case suffered a paraplegia following a fracture of the spine described



as a weakness of the lower extremities due to fracture of spine and other injuries. The plaintiff lost permanent and complete control of lower limbs and could not stool, urinate or walk. The plaintiff suffered 100% incapacity. The court awarded the claimant a total sum of K2, 400,000.00 in all heads of damages. Furthermore Counsel cited a case of **Peter Mkandawire vs Prime Insurance Co. Ltd Personal Injury Cause No. 180 of 2014**, where the claimant sustained a fracture of the left knee, multiple bruises on the face and three teeth on the upper side were loosened. The plaintiff was hospitalized for 10 days and his incapacity was put at 30%. The Court awarded the claimant a sum of K2, 500,000.00 on 4<sup>th</sup> August 2015. Counsel further cited a case of **Martha Chipelera vs Prime Insurance Co. Ltd Personal Injury Cause No. 331 of 2013**, where the plaintiff suffered injuries to her spinal cord and was on palliative case. She was hospitalized for 8 months and had to undergo physiotherapy for some time. On 18<sup>th</sup> April 2017, the High Court awarded the plaintiff a sum of K1, 000,000.00 as damages for pain and suffering.

### **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. 329 of 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.

## DETERMINATION

In the present matter, it is clear from the medical report and evidence of the claimant that the claimant sustained serious injuries. I had the opportunity to see the claimant who had difficulties to walk and she was still using clutches. The claimant was applied POP several times and she underwent surgical operations. The claimant through the treatment she received was also subjected to pain and suffering. The claimant will no longer be able to perform manual work. It means her business has been affected similarly her means of income. Besides, she will be unable to participate in sporting activities and will do limited chores. In the light of the above and considering comparable authorities cited by both counsel and deflation of currency the Court awards the claimant a sum of K3, 500,000.00 in all heads of damages.

Costs are for the claimant.

Pronounced in chambers on this <sup>25<sup>th</sup></sup> day of October 2018.



T. SOKO

ASSISTANT REGISTRAR