



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY**

Personal Injury Cause Number 889 of 2014

BETWEEN:

ONESTER

MSAKAMBEWA.....PLAINTIFF

AND

CHRISSEY KAYIRA.....1ST DEFENDANT

SOUTHERN BOTTLERS LIMITED.....2ND DEFENDANT

NICO GENERAL INSURANCE CO. LTD.....3RD DEFENDANT

CORAM: ANNELINE KANTHAMI ASSISTANT REGISTRAR

Mr. Ching'ande

Counsel for Plaintiff

Mr. G. Kambale

Counsel for Defendants:

Mrs. J. Chilimampunga

Court Clerk

ORDER ON ASSESSMENT OF DAMAGES

The Background

This is an order for assessment of damages pursuant to a consent judgment entered by the parties on 23rd of June 2015. By the consent of both parties, it was adjudged that:

- a) Judgment on liability be entered for the plaintiff with costs
- b) Damages are to be assessed by the court;
- c) The 3rd defendant's liability in damages be subject to the policy limit of MK5, 000, 000.00
- d) Costs thereafter to be taxed by the court if not agreed by the parties.

The Plaintiff had commenced the present action on 9th September 2014 claiming damages for pain and suffering, damages for loss of amenities of life, damages for disfigurement, K13, 3460.00 being cost for procuring a police and medical report, damages in respect of further and mitigatory future treatments such as physiotherapy and analgesics, any other founded reliefs the court may deem fit, proper and just and costs of the action. The claim arose from a road accident which the plaintiff alleges occurred on or about the 9th of July 2014 when a car that the 1st defendant was driving, a Toyota Land cruiser Prado registration number BQ 2161 violently struck the Plaintiff thereby causing bodily injuries.

The Evidence

The Plaintiff by her own sworn testimony viva voce (before she was stopped and told that she had submitted a witness statement for that purpose), stated as follows:

- a. *I am Onester Msakambewa from Neno, Chiomba village, T/A Dambe.*

- b. I stay in Machinjili Area 1
- c. This is the testimony I gave to the lawyer. I signed for the document; yes I want it to be part of my evidence.
- d. I am here because I was hit by a car and I want the court to assist me
- e. I was injured a lot: on my head I was sutured with 6 stitches; I have scars under my breast/rib area
- f. My hip used to hurt me
- g. I was hurt on the fingers on the left hand.
- h. I have scars on my left shoulder where I was bruised
- i. I was bruised on my two buttocks
- j. I have scars on both legs(calf)
- k. I went to the hospital at Queen Elizabeth Central Hospital. The leg was swollen for 4 or 5 months
- l. When I went to the hospital the second time, I was operated on. Up to now my leg hurts me
- m. My head used to hurt for 2 weeks and tears would come each time the head hurt
- n. It took me a long time to stretch my left arm
- o. At the time of the accident I was coming from school.

The witness statement contains similar assertions with the addition of the effects of the injuries sustained on her social and family life as well as her academic life.

The following is the reproduction of the applicant's testimony as found in her witness statement.

I ONESTER MSAKAMBEWA, of Chiomba Village in the local jurisdiction of Traditional Authority Dambe in the District of Neno formerly Mwanza in the Republic of Malawi and resident in the township of Machinjiri in the City and District of Blantyre in the Republic of the aforesaid STATE as follows:

I am a Malawian national as above, now aged 23 years and of school of school going space. For my identification produce hereto and marked "OM1" hereto is copy of my Electoral Certificate. My ID has the name Onester Blazio in place of the Family name Msakambewa. This is because way back when I was in standard 4 I was staying with my grandfather, Blazio Msakambewa in Mwanza then. There were about twelve of us grandchildren staying with our grandparents and attending one school. In my class there were four Msakambewas and we were all staying on one side. The teacher would use sir name only and this created confusion and difficulty for both the teacher and us, Msakambewewa kids. On this my cousin Oliver decided to be using my father's first name. Blazio as our sir name and that has stayed on for school use when it came to registering for the 2014 elections the centre was at the school and I registered as Onester Blazio. I am otherwise rightly Onester (Blazio) Msakambewa and the Msakambewa name is one that my friend who was with me on the trip to my aunt on a fateful day (I shall speak about later) and who came with me to the hospital knew and gave to the police. Later after the hospital police continued in their investigation which culminated in a police report on 17th July, 2014 marked "OM2" hereto.

At all relevant times I have been a student attending Form 4 class and a Malawi School Certificate of Education sitter at Chilaweni Day Secondary School in the said district and republic.

On or about the 9th day of 2014 late day I was going on (foot) to my aunt's place in Chirimba Township and at Dennis Bus Stop spot whilst awfully and properly crossing the Old Chileka or Magalasi Road from the direction of Kameza-Blantyre driveway I was ferociously struck and felled by motor vehicle Toyota Land cruiser Prado Station wagon indexed BQ2161 driven by the 1st defendant owned by the 2nd defendant and insured by the 3rd defendant.

The said vehicle had approached at sinister speed, violently struck me at an angular hitting on the left side of my body, it is a high suspension vehicle so there was a general smash impact on my body from the foot right through the leg t the waistline, the arm, left ribbal abdomen to the shoulder. I fell over by my right on the tarmac and then bounced off onto the tarmac over and over by my left and this involved, among other things, the ramming of my head on the surface by the left side face and back forth by my right. As a result I sustained multiple trauma injuries.

I sustained injuries of varying character, degree and consequence. I was then picked in the car that hit me to Queen Elizabeth Central Hospital at Blantyre for medical attention. The injuries I sustained are elaborately placed from my account provided at instruction in the amended Statement of Claim(in Paragraph 7 a to cc) filed on my behalf with this honourable court by my solicitors- and which I herein wholly adopt)thus:

- a. Deep laceration around the left ankle area
- b. Wide laceration on the left buttock;
- c. Multiple lacerations around left finger joints survived by scars and pain
- d. Lateral broad 5cm plus abrasion on the left arm shoulder joint area with ugly scarring and traumatic pain
- e. Flashing pain from shoulder joint to elbow on the left arm
- f. Deep laceration around the right ankle
- g. Abrasion on the right thigh and scarring
- h. Swelling on the right thigh and trauma
- i. Finger joint abrasion and scarring on the right hand
- j. Left side deep lacerations of the face
- k. Facial scar
- l. Abrasion of the left cheek near the eye and scarring
- m. 3 long lateral scars on the abdomen
- n. Pain in the frontal abdominal ribs below the breast(below the abdominal wounds and scars) especially when taking a deep breath or talking
- o. Pain in the side ribs below the arm pits especially when talking or taking deep breaths
- p. Cannot run, brisk walk
- q. Cannot perform sporting activities
- r. Cannot lift heavy objects
- s. Cannot do gardening
- t. Post traumatic arthritis
- u. Reduced range of motion on the left shoulder
- v. Regards both hands she cannot hold with her fingers an item larger than a pen or a spoon
- w. Cannot cook or do household chores

- x. Owing to the injured and traumatized fingers, the victim cannot competently handle the activity of writing during the Malawi School Certificate of Education examinations.
- y. The injury in (h) hereof led to
- z. Degree of permanent incapacity rated at 20%.

The Plaintiff since the accident been of a disoriented mind, is of a state of mental disorder or malfunction, has lost her general grip of mind and academic potency and miserably performed in her 2014 Malawi School Certificate of Education Examinations with statement results.

The Plaintiff who consequently has been a fourth form repeater student and candidate of 2015 MSCE Examinations, has ill-performed in the year's academics and vulnerable to being an academic, career and living failure.

Injury has reduced her life expectancy and has affected the quality of (her) living.

They are summed up in the medical reports made by Queen Elizabeth Central Hospital issued on 6th August 2014 and 1st April, 2015 whose copies I attach hereto respectively mark "OM3" and "OM4".

I was conscious though the occurrence of the accident and got so terrified that the memory lives to this day whenever I pass through the place of accident. At the point I was placed in the car to the hospital I started noticing a feeling of intense pain over the head, arms, chest, legs, all over.

And when I reached Queens after people had lifted me from the car I failed to walk. Noticing this I was placed and moved into the hospital bay on a stretcher.

In Queens Elizabeth Central Hospital immediate treatment that I recall they administered on me was drugs and pain killer injections. They did some suturing procedure for my facial open wound injury. They applied iodine on the left face side abrasion (which procedure was burning and painful) and pasted a plaster thereon. There is now a residual scarring on the face.

They repeated the iodine procedure on the finger joint blooded abrasion on both hands. There are now residual scars all over my finger joints on both hands.

They repeated the iodine procedure on the left shoulder pad edge wider abrasion. There is now a wider scar running.

Abdominal pain

Pain of the type like a hot flashing current was stubbornly continuous and lasted for 3 months of the happening. For the first 2 months I could not eat proper food like nsima. I could only just a bit of porridge. I actually lost a lot of weight. In the third month I could eat light nsima only.

From the fourth month I resumed normal eating. From the fourth month of the accident happening the hot flashing current pain recurs every two months or so and when it does, lasts 5 to 6 hours. When it so recurs the nature and intensity of the pain is as used to be the case in the first 3 months of injury, sordid. For those 5 to 6 hours I cannot and do not take food.

Head/facial pain

Upon injury there was experienced pain which is like the flashing from the eyes and was accompanied with tearing for the first week after the accident. This was continuous pain. Afterwards pain could break for days and recur for a couple of days too and this stayed the case well up through August 2014. From September, 2014 this pain has ceased.

Left shoulder pain injury pain

Upon injury there was pain experienced from the neck joint with the shoulder way down the whole left arm lasting one to two hours non-stop. And for the month of the accident (July 2015) this was experienced on a daily basis.

For August 2014 there were intervals of pain except during one week when I got pushed to assist in light household chores the pain stayed for a week non-stop.

The pain was managed by my abstinence from work. Thus I could not cook, could not draw water until sometime in December 2014. From May 2015 this pain has vanished.

Right Arm Pain

As I have earlier indicated my right was fazed with pain especially if I was to bend it. And so for a period of two weeks of the accident happening I had no flexion of the right arm literally. I am right handed writing and generally.

Finger Joint Abrasion (both hands)

They remained in pain for 3 months in the months of July, August and September 2014. Pain was exacerbated if I handled or held stuff like a pen (which was a mandatory for a student sitting examinations) or a spoon or working.

Waist Band pain

Upon injury I endured pain – as indicated – all over including the waistline area. This persisted through hospital and at home, with the pain spiking when in lying position. This pain lasted well up to 8 months of the accident to February 2015.

This was the king of pain lasting 3 hours daily for 8 months. For this period of 3 hours when there is a pain insert, flexion of the waistline either in bending downwards or rearwards or sideways was a problem and posture did not matter more or less. I am a girl of mature age and kept a relationship. This also affected in how I related with my boyfriend. I would, on account of this, not relate sexually, for all that period.

Ankle Area (both legs)

Pain emitted from the ankle deep abrasion injuries I sustained persisted up to the end of the month of the accident (July 2014). Since then there are now scars surviving.

Left buttock

Pain on my left buttock that was originated by the tearing laceration of the buttock stayed on for a month until the end of the month of July 2014. This pain sat with me

through the examinations as I negotiated sitting on one buttock as I attempted writing the examination. From August, 2014 the pain left and there is now left a scar.

Right Thigh

This is one of the many parts of my body that got the shock of the strike by the defendants' car. It instantly swelled up. The medics at Queens on the day of the accident stated that there was little they could do to the thigh because of the swelling and they would wait until the swelling had let up. From 9th July to November 2014 severe swelling of the right leg and thigh particularly stuck up with me and getting worse with time. At times it could marginally deflate then inflate again.

In November the swelling grew from up from the thigh to the foot. It is at this point that Queens Elizabeth conducted an operation to draw the swelling as can be informed from "**OM4**" draining 40cc of discharge from the thigh – see relevant copy of my health passport entry marked hereto as "**OM5**".

The swelling then stayed on up to a month after the operation. The ancillary or pain extended swelling of the foot stayed on and cleared after 3 weeks of the operation.

Now if I walk to distance of up to 6 kilometers the right thigh swells and naturally, pains. The hospital said they had removed three nerves from the thigh and walking shall be a difficulty.

My Social/family Life

After the accident my interactions with society, friends and family is not normal. Many times when I am chatting with my friends, even my been good friends I get irritated or nauseated or annoyed thoroughly, for no cause. When this happens, I shut off and leave the company. For friends that are of the old time they somehow understand me and just say "**mwina zaayambira tasiyeni**". For people that have just come to know me (after the incident) they possibly think I am unstable mind, I think, to this extent I am.

This applies to interacting with family members at home or would be suitors (of the opposite sex).

My School/Career Life

Since the accident my state of memory and ability to learn got adversely affected. Coupled with the fact that I was sitting my MSCE exams whilst in trauma I have been thereby academically damaged. This is manifested in the absolutely unexpected poor show in my MSCE exams as seen from my 2014 MSCE Notification of Results marked hereto as "**OM6**" – where in I achieved statement (9 points results for all subjects) results

In my forth form before the MSCE exams I had a taster mock examinations wherein I passed with 6 passes out of which 5 were passes. A copy of the examinations results are now marked hereto as "**OM7**".

Hoping that things may turn out for the better in future, after passage of time upon the accident injuries, I set to repeat my fourth form at the same Chilaweni Day Secondary school for the year 2015. My academic disaster clearly had since set in. I had the poorest show ever in the school examinations for terms one and the taster/mock term (two) examinations whose results are now marked hereto "OM8" and "OM9".

For purpose of establishing the seat of this problem and the extent thereof so I can, most importantly, be assisted to recover, I have undergone, over a period, tests and examination by Clinical Psychologist Associate Professor Chioza Bandaawe of the College of Medicine of the University of Malawi and now marked hereto as "OM10" is a Psycho-analysis Report presented by him the 30th September, 2015.

To obtain the police report, the first and second Queens Elizabeth Central Hospital Medical Report and the Psychologist Assessment Report there were expended there for respectively the sum of MWK3, 000.00, MWK2, 500.00 MWK2, 500 and MWK25, 000.00 as can be seen from the face page of "OM2", "OM3" and "OM4". And mark hereto as "OM11" is copy for the receipt issued by Professor Bandaawe for fees for his Assessment Report.

I therefore now claim from the defendants severally and jointly compensations sums representing general damages and MWK33, 000.00 special damages as claimed in the amended writ of summons and my amended Statement of Claim before court in this case.

In cross examination the plaintiff stated that she was treated as an outpatient and returned home the same day. That she did not spend a night at the hospital. She also said that she had a boyfriend. That she has had the same boyfriend since the accident. She also stated that she was not doing anything at the time because she could not afford to walk long distances. That when she walks long distances her right leg hurts a lot and it swells. She stated that she had not been to the hospital to explain about the leg. She also said she could not manage manual work contrary to the medical report stating that she was fit for manual work. She insisted that she could not manage manual work and the report was not true. That she is the one who obtained the medical report but what was written in it was completely different to what she was feeling. She further informed the court that she had travelled by car- minibus that day to come to court. She said that she did not perform very well academically because of the accident. She also informed the court that the report marked **OM 7** was prepared at her school and that she was warned to be serious because of her performance. She also stated that what the psychological report says about her, that she does not have a mental disorder was not true. She stated that she knew that she could not perform better because of the accident because she could not recall the stuff she had read as compared to her ability to do the same prior to the accident. She also stated that she has evidence that she was not well because of the way she reacts, because she easily gets angered. She also maintained that she still has the same boyfriend. That he notices the mood swings/ change of behavior but cannot leave her. That was the end of cross examination.

In re-examination she stated that she could not walk a distance of 2 kilometers without feeling pain. That she has to use a vehicle if she has to travel long distances. That at the time of the accident she had just written one paper. She stated that as regards the psychological report she said out of the 10 questions asked she would answer 3 or 4 and could not answer

the rest. That when she was asked to read numbers in reverse, she also managed 3 and could not manage to complete the rest as it was confusing and she would have forgotten. She also stated that she was required to draw a square, a triangle, a quadrilateral and she could not remember how to draw a quadrilateral. She also said she was told to draw 3 parallels and she only managed to draw one. She then said that she had nothing else to add because she had forgotten the rest. She then stated that her boyfriend stays in Machinjiri and that they see each other once or twice a week.

Upon being cross examined by the court, she stated that she had just sat for agriculture practicals before the accident

I chose to rely on the plaintiff's viva voce evidence and disregard her psychosocial analysis report, the police and medical reports simply for the reason that they were not tendered by their makers.

The Respondent's Submission:

The respondent submits that it is clear from the evidence that was before the court that the plaintiff sustained some injuries which were reflected in the two medical reports tendered in court. They also aver that it is clear from the said medical reports that there is no evidence as to the effect that the plaintiff sustained head injuries to the extent of damaging the brain. That although the plaintiff insists that she sustained serious injuries and she cannot do any work, the evidence before the court could not support the assertion. The respondent also notes that both her medical reports issued at Queen Elizabeth Central Hospital which she tendered in court as exhibits marked OM3 and OM4 to prove her claim suggest that she only sustained multiple lacerations on her forehead, left leg, left buttock, left shoulder and left forearm; multiple bruises on her face and right hand and a swollen right leg. These injuries, the respondent avers, were treated by suturing of the wounds and analgesics. The respondent also avers that the medical report which was issued a year after the accident, on 1st April 2015 on paragraph 14(e) confirms that the plaintiff is fit for manual work.

It is also the respondent's contention that the fact that the plaintiff admitted to have been warned to work hard in some subjects before the accident dispels her assertions that she was brilliant in class. The respondent also argues that the progress report which was prepared by her school cannot be measured against the performance in the national examinations.

The respondent also contends that the psycho analysis assessment report exhibited as OM 10 does not confirm the plaintiff's assertions of mental problems. The report states that during the assessment, there was no evidence of a psychological disorder on the plaintiff. The respondent also argues that the report does not provide any link on the plaintiff's low IQ and the injuries she sustained. That there is no evidence to link the plaintiff's low IQ and the accident. The respondent also argues that the plaintiff was accurate in her explanations for example she recalled perfectly well what happened at the psycho assessment test.

The respondent further argues that the plaintiff's claim for the sum of K30, 000,000.00 in damages for loss of amenities of life is quite excessive and exorbitant for the plaintiff who

only sustained lacerations, soft tissue injuries and bruises. That the plaintiff has not even stated what amenities she has lost.

The respondent also argues that the plaintiff has not, in her skeletal arguments, stated any case of similar injuries on which to base her claim. The respondent called on the court not to lose sight of the principle laid out in *George Sakonda v S.R Nicholas*, and that it is important that cases compared should be of similar injuries. He argues that the figure of K38, 000, 000.00 submitted by the plaintiff herein as total damages is excessive and unreasonable, and that an award of K2, 800,000.00 in general damages would be reasonable.

The Law on Assessment of Damages

The High Court in *Ngosi t/a Mzumbamzumba Enterprises v H Amosi Transport Co Ltd* [1992] 15 MLR 370 (HC) set the basis for assessment of damages:

'Assessment of damages.....presupposes that damages have been proved. The only matter that remains is the amount or value of the damages.'

The rule is that prior to assessment, the injured party has to provide proof of the damage sustained – *Yanu-Yanu Co Ltd v Mbewe* (SCA) 11 MLR 405. Even in the face of difficulties in assessing damages, the Plaintiff is not disentitled to compensation – *Mkumuka v Mphande* (HC) 7 MLR 425.

The cardinal principle in awarding damages is '*restitutio in integrum*' which means, in so far as money can do it, the law will endeavour to place the injured person in the same situation as he was before the injury was sustained – *Halsbury's Laws of England* 3rd Ed. Vol. II p.233 para 400.

This principle was further enunciated in *Livingstone v Raywards Coal Co* (1880) 5 App CAS 25 at 39, where Lord Blackburn said:

'...where any injury is to be compensated by damages, in settling the sum to be given for reparation you should as nearly as possible get at the sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been in had he not sustained the wrong for which he is now getting his compensation or reparation.'

It is to be noted that at law general damages and special damages are distinguished. General damages are such as the law will presume to be the direct natural or probable consequence of the action complained of. Special damages, on the other hand, are such as the law will not infer from the nature of the course - *Stros Bucks Aktie Bolag v Hutchinson* (1905) AC 515. In determining the natural consequences, the court considers if the loss is one which any other claimant in a like situation will suffer – *McGregor on Damages* p23 para 1-036.

Special damages must be specifically pleaded and must also be strictly proved - *Govati v Manica Freight Services (Mal) Limited* [1993] 16(2) MLR 521 (HC). A Plaintiff who claims special damages must therefore adduce evidence or facts which give satisfactory proof of the actual loss he or she alleges to have incurred. Where documents filed by the Plaintiff fail to

meet this strict proof then special damages are not awarded – **Wood Industries Corporation Ltd v Malawi Railways Ltd** [1991] 14 MLR 516.

Although perfect compensation is impossible, what the plaintiff should get is fair and adequate compensation - **British Commission v Gourley** (1956) AC 185. Since it is difficult to assess damages involving monetary loss, courts resort to awarding conventional figures guided by awards made in similar cases and also taking into account the money value. Lord Morris buttresses this contention in **West v Shepherd** (1964) AC 326 at 346 where he states: '*money cannot renew a physical frame that has been battered and shattered. All judges and courts can do is to award a sum which must be regarded as giving reasonable compensation.*'

The court also bears in mind the sentiments laid out in **Steve Kasambwe v SRK Consulting (BT) Limited** Personal Injury Cause Number 322 of 2014 (unreported):

'At times, the court is faced with situations where the comparative cases have been rendered obsolete because of the devaluation of currency and inflation. It would not achieve justice if the court insisted on the same level of award as was obtaining in the previous cases. In such situation, when deciding the new cases, the court must take into account the life index, i.e. cost of living and the rate of inflation and the drop-in value of the currency. The court must therefore not necessarily follow the previous awards but award a higher sum than the previous cases.'

The Compensation

Taking into consideration the respondent's arguments as well as the applicant's submissions as regards the nature of injuries sustained, it can be summarised that the plaintiff suffered multiple abrasions and soft tissue injuries in divers places. She also sustained a cut on the forehead and had to be sutured. Obviously she experienced pain as a result of the impact that led to the injuries.

Pain and Suffering

The word 'pain' connotes that which is immediately felt upon the nerves and brain, be it directly related to the accident or resulting from medical treatment necessitated by the accident while 'suffering' includes fright, fear of future disability, humiliation, embarrassment and sickness. See: **Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents** (Butterworths, 1985) 8 and **City of Blantyre v Sagawa** [1993] 16(1) MLR 67 (SCA).

To say the least the applicant herein definitely must have experienced pain during the accident and even after, as she wrote exams. She sure must have suffered fright as well, as pointed out in **Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents** supra, that 'suffering' includes fright, fear of future disability, humiliation, embarrassment and sickness. I cannot imagine the discomfort and embarrassment of having to sit on one buttock, not to mention the pain she felt. She did state that she experienced headaches for 2 weeks and that she could not for some time, move her left arm properly.

In **Alice Kachisi and another v United General Insurance Company Limited, Personal Injury Cause Number 87 of 2017**, the Plaintiff suffered fractures of the 5th metatarsal, chest injuries, multiple bruises, disfigurement and severe chest pains. He was awarded K1,

500, 000.00 on 14th July 2017. The plaintiff's injuries in the present matter were less severe than those in the Kachisi case above. Ms. Msakambewa, frightening and painful as her experience was, luckily did not sustain any fracture, but only multiple bruises and some cuts.

In the case of **Rodrick Dumbo v Kennedy Mdala and Prime Insurance Company Limited, Personal Injury Cause Number 719 of 2011**, the plaintiff suffered soft tissue injuries and bruises on the arm, leg. The court awarded MK850, 000.00 on 16th June 2016.

In **Paul Chamaza, Elaon Dzuwa and Chifundo Mnenela v Edward Nyirenda and Prime Insurance Company, Personal INJURY Cause Number 383 of 2013**, the plaintiff sustained soft tissue injuries, deep cut wounds on shoulder and multiple bruises on the left arm and cut wound on the left leg. The court awarded MK650, 000.00 on 22nd April 2016. This case is much closer to the present one. For the reasons aforesaid, this court awards the Plaintiff the sum of MK900, 000.00 as compensation for pain and suffering.

Loss of Amenities

The expression 'loss of amenities of life' simply means loss of faculties of pleasures of life resulting from one's injuries. Damages for loss of amenities of life are awarded for the fact that the plaintiff is simply deprived of the pleasures of life, which amounts to a substantial loss, whether the plaintiff is aware of the loss or not. See: **Poh Choo v Camden and Islington Area Health Authority** [1979] 2 All ER 910 and **City of Blantyre v Sagawa** [1993] 16(1) MLR 67 (SCA) at 72.

I am unable to accept her own testimony that she just stays at home and is unable to do anything because her leg hurts a lot. She travelled to court without any assistance and in court she did not display any signs of distress having travelled some distance to get to the court from the stage. Besides she states that she has not been to the hospital to explain about the leg. She did not even indicate that she is always taking pain killers.

I also do not accept that she cannot manage manual work at the time of the assessment. As indicated before while it is true that such manual work was difficult during the period immediately after the accident, the same cannot be said to be true now because she did indicate in her testimony that it was difficult for her to stretch her arm full length for a while. Which means she is now back to normal.

There is therefore no proof before this court of any negative long term effects the accident has had upon his ability to enjoy the pleasures she used to enjoy. Even the scar that she sustained on her forehead or calf did not cause her relationship to end. She maintained in cross examination that she still has the same boyfriend that she had before the accident. Therefore the court is not able to find that there was loss of amenities in the present matter. As such the court will not make an award under this head.

Loss of Amenities of Life vs. Permanent Psychological suffering?

It was submitted before the court that she suffered psychologically such that it effectively has brought about a behavioural change in her. That she is more irritable than before. He submitted what purports to be a psychosocial report from psychologist Dr. Chioza Bandawe

of College of Medicine. I must commend Counsel Ching'ande for exercising such due diligence in prosecuting this matter.

However, from the available evidence, am unable to find that she suffered any long term psychological damage as alleged. In the first place, the documents which purported to support the allegation were not tendered by their makers. These documents were the school reports, purportedly showing performance before and after the accident, as well as the psychological report.

First, the reliefs sought based on this report are rarely sought before the courts. In my research, I have not been able to find any Malawian case where such an award was made on account of psychological damage. It would have been helpful if counsel had assisted the court with precedence from within or without on this. I sure was more than willing to make such an award despite its rarity, only that I found that there were not enough grounds for so doing. The basis of the claim being a strictly medical one and not easily visible and so assessable by simple observation, would have been best proved if the maker of the document was brought to court to testify so that we can easily appreciate the matters alleged herein. I cannot comfortably accept irritability as an aftermath of the accident as we do not have before us evidence of the plaintiff's temperament before the accident.

Further, the purported school reports do not adequately support the contention that the poor grades are as a result of the psychological damage. In the first place, for such a serious allegation it would have been best to bring in the makers of the report to come in and testify so as to give the court a full picture of the plaintiff's academic performance as well as her disposition in general before the accident as well as after. I firmly believe that one's academic performance can be affected by other factors apart from one's mental state as represented in one's ability to recall information. Where one is of a sound mind, and is able to learn properly, academic performance could also be a function of preparation. If one did not adequately pay attention during classes or did not give more hours to study the material already learnt, they would not have much to recall during exams and so would not perform well. But if one has problems learning and recalling the material learnt, this too would affect performance. Further, one could do very well in exams after cheating and not so well in another when deprived of that opportunity to cheat.

Having the foregoing in mind, the school reports alone may not suffice to give us a good indication of whether or not the accident contributed to the plaintiff's academic performance, or if it did how much. Be that as it may, the most important thing is that the maker of the said 'school reports' was not brought to court to tender them. The maker of these documents would have assisted us in understanding the plaintiff's ability to recall information before the accident as well as how industrious she is as a student, how she performs in continuous assessments of different kinds and how she performs in final exams.

Foregoing notwithstanding, as rightly submitted by counsel for the respondent, performance in school tests cannot be a measure of performance of national exams. The school tests may give a good indication of how the student is likely to perform during national exams, if the assessors at that school endeavoured to set exams as close to the national exams as possible. However it must be borne in mind that normally end of term exams only take into

account what has been learnt in that term where as national exams are usually not that limited in scope.

The court had opportunity to see the witness. At this point she appeared well recovered. As she testified in court she did not appear to be one suffering from any mental disorder as submitted. She was able to answer questions put to her properly. Meaning she is able to comprehend the questions put to her and formulate logical answers to them. No sign of confusion, lack of understanding, misunderstanding or even limited understanding was displayed to point to her alleged inability to function mentally so as to impede her academics or any mental exercise. Be that as it may, just as the respondent's counsel noticed, I also noticed that the applicant was able to recall a lot of detail where the accident was concerned, as well as quite substantial detail about her visit to the psychologist, the questions asked and how many out of those asked she was able to get correctly. We therefore needed more than just a paper to explain to us how at this point she is able to remember that much while at the same time stating that she cannot remember anymore, and we did not have the privilege of understanding this because there were no witnesses present to help us understand such a phenomenon.

Secondly I do not think there was anything to suffice as proof of the applicant's state of mind before the accident in order to allow us to attribute any permanent psychological injury and its resultant effects to the accident. And finally the fact that the psychological, medical and school reports have been disregarded by this court simply means we do not have any proof before us of the matters alleged herein in order to assist us effectively quantify the compensation payable as regards those injuries. Regarding the foregoing, the psychological injury that will be taken into account will be the usual one considered under the rubric of 'pain and suffering'.

I am, therefore, unable to find the psychological long term effect of the accident on the plaintiff as alleged from any of the evidence tendered before me. For such a case, it would be imperative to do more than what is normally (and irregularly) done in personal injury matters- submit documents without their makers testifying and being subject to cross examination. It still is a requirement that matters alleged ought to be proved. It would have been best to prove these matters by bringing the makers of the documents unless there was an order to the contrary. Finally, the claims made for the alleged psychological damage should be adequately covered under 'pain and suffering'.

For these reasons, I will not make any award for loss of amenities of life as none have been proven.

Disfigurement

In the matter of **James Chaika v NICO General Insurance Co Ltd** - the Honourable Justice Potani stated that '*Disfigurement is not a matter to be taken lightly and casually as it is something that one has to permanently live with. In this case, the plaintiff will most likely walk with a limp for the rest of his life which is not a pleasant thing.*' In this case, the Plaintiff was awarded the sum of MK300, 000.00 for disfigurement.

The court had occasion to inspect the Plaintiff's scars during the time of hearing and noted there were some visible visible scarring on the face of the plaintiff about 10 cm long.

By the plaintiff's own testimony, it took her a while to be able to recover and stretch her arm. I am of the view that at the time of the accident and some time immediately thereafter, the Plaintiff was severely prevented from doing most of the things she normally would do following the impact and the resultant pain from the bruises and soft tissue injuries. However at the time the matter came for hearing, the plaintiff could move her arm and sit properly meaning she had fully recovered physically. Mind you the accident occurred on the 9th of July 2014 and the assessment of damages took place on the 2 day of February in 2017, almost 3 years after the accident. There being no recent medical report to the contrary, other than the scars mentioned above, there is no proof that the plaintiff has been disfigured.

This court had recourse to the court's assessment in **Ronaldo Likoloma v Iqbal Mahomed** Civil Cause Number 870 of 2013 where the Plaintiff on 4th May 2017 was awarded the sum of MK350, 000.00 being damages for disfigurement for dog bites that left very visible scarring. In the case of **Braidon Mayaka v Nico General Insurance Company Limited** Personal Injury Cause Number 882 of 2012 on 27th April 2017 the court awarded the sum of MK300, 000.00 as damages for disfigurement to a Plaintiff who sustained scarring on the face and darkening of the chest. In the case of **Matthews Marko Satewani v Prime Insurance Company Limited** Personal Injury Cause Number 628 of 2013 this court awarded the sum of MK300, 000 to a Plaintiff that had a scar on the right leg as well as an indenture where the scar is.

With foregoing in mind, I hereby award the sum of MK450, 000.00 as damages for disfigurement.

Special Damages

Cost of police and medical reports are special damages and must be specifically pleaded and proved as required by law – **Govati v Manica Freight Services (Mal) Limited** [1993] 16(2) MLR 521 (HC). A Plaintiff who claims special damages must therefore adduce evidence or facts which give satisfactory proof of the actual loss he or she alleges to have incurred. It is common knowledge that in Government institutions, government receipts, commonly known as 'GRs' are issued for every monetary transaction. The Plaintiff herein provided evidence of the special damages so no award will be made under this head. The purported documents supporting the claim for special damages are on the court record. The Police Report referenced under BT/TAR/1161/2014 indicates that MK3, 000.00 was paid and receipted under GR NO. 167065. However, no such receipts were produced before this court to prove the procurement of the medical report. As such no award will be made as regards the medical report.

There is however evidence of the cost incurred for the procurement of the 'Psychometric Assessment Report for Onester Msakambewa' from Practical uMunthu Psychology, receipted under receipt number 021. The amount receipted for is MK25, 000.00. It is a Photostat copy not an original. I will however allow it in so far as it is evidence that a report was made and not as to the truth of the content of the report in question.

On this head, I therefore award the sum of MK28, 000.00.

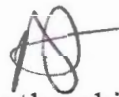
Disposal

In total, the Plaintiff is therefore awarded MK1, 378,000.00 being damages for pain and suffering, damages for disfigurement and for special damages.

Costs to be taxed.

Each party is at liberty to appeal within the requisite time frames.

Ordered in Chambers on the 8th day of March 2018 at Chichiri, Blantyre



A. Kanthambi

ASSISTANT REGISTRAR