

JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
PERSONAL INJURY CAUSE NO. 512 OF 2014

BETWEEN:

AUSTIN YOHANE.....PLAINTIFF

AND

FELIX KANTHALO.....1ST DEFENDANT

PRIME INSURANCE COMPANY LIMITED2ND DEFENDANT

CORAM: K. BANDA, ASSISTANT REGISTRAR

Mr. Ngoma, Counsel for the plaintiff

Mr. Ngwata, Counsel for the defendants

Mr. Chitsulo, Court Clerk

ORDER ON ASSESSMENT

INTRODUCTION

This is this court's order on assessment of damages had on 25th May,2017 resulting from the consent order dated 19th August,2016 in which liability was conceded by the second defendant and agreed by the parties that assessment be done subject to the 2nd defendants maximum policy limit of MK 5 million. The claim in the main is for damages for pain and suffering, loss of amenities of life, disfigurement and special damages as pleaded.

EVIDENCE

The plaintiff gave oral evidence under oath, and in the course of the proceedings also adopted his witness statement with its accompanying exhibits that included the medical report and the same were later tendered in evidence at the hearing. The medical report was assessed at 25 % as the degree of permanent incapacity. In evidence during the assessment, he told the court that he had a fracture on the elbow joint. He informed the

court that he also suffered a displaced hip at the back and had a dislocation on the right ankle joint and had lacerations from above to the lower side of the same. Further it was his evidence that he had a cut on the right thumb. And he went on to inform the court that currently he struggles to work for long with his right hand and that the same scenario is occurring with his back part of the hip such that he cannot stand for long. It was his evidence that previously he was a builder but cannot do as he used because of the pain due to the injury.

A look at the medical report indicates that he suffered a fractured left distal Humerus, deep cut wound on the right distal leg, multiple bruises on the right leg and a sprained right thumb. The report further indicated that he was healed but had chance of developing arthritis on the left elbow. And that further he would perform his previous job but with difficulty. The same applied to manual work.

APPLICABLE PRINCIPLES OF LAW ON ASSESSMENT OF DAMAGES

The policy of the law on damages generally is, if money can do it, to afford the victim fullest compensation so as to bring the victim to the position before the wrong. See. *Chidule v Medi* (1993) M.S.C.A. And as per Lord Blackburn in *Livingstone v Rawyards Coal Co.* (1880) 5 App. Cas. 25 at 3.

In essence compensation for damages in this instance is not meant to be punitive. According to Holmes J statement in *Pitt v Economic Insurance Company Ltd* (3) SA 284(D) 287E-F compensation;

“...must be fair to both sides-it must give compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendants expense”

The test should be what a particular society would deem fair and in the words of Lord Devlin, in *West v Shephard*[1964] A.C.326 at 357, this would be such as would allow a wrong doer

“to hold up his head among his neighbours and say with their approval that he has done the fair thing”

Again the awards must show a measure of some level of internal consistency within a particular society such as our country Malawi. However I am mindful that it is not easy to maintain consistency and achieve fairness to both the victim and the defendant unless the court awards damages on the basis of comparable awards in cases of similar nature. Lord Diplock in *Wright v British Railway Board* (1938) AC.1173, 1177, states the law this way:

“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."

It must be noted however that this the court will do without losing site of the fact that even though money can compensate to an extent, the truth remains that it cannot exact the experience to remain as it was before the event giving rise to the action. According to Lord Morris(as he then) in *West v Sheppard*[1964] AC 326:

"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."

Maintenance of the value of money is a factor to be considered to ensure that the wrongdoer does not gain an advantage over the victim. Mwaungulu J (as he then was) in *George Sakonda v S R Nicholas*, Civil Appeal Number 67 of 2013(HC) (PR) (unrep) commented on this need to maintain value of money on assessment so that the plaintiff does not lose out. This is what the learned judge stated:

"Moreover, conventional awards must factor inflation and value of money changes. Awards made at a higher value of the 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."

This far I now deal with the plaintiffs claims one by one:

1. Damages for pain and suffering and loss of amenities of life.

As to defining pain, it is suggested that "pain" is the immediately felt effect on the nerves and brain of some lesion or injury to a part of the body and "suffering" is distress which is not felt as being directly connected with any bodily condition. See. *Mc. GREGOR ON DAMAGES* at. 1289 paras. 35-213.

As such for purpose of damages, pain encompasses any pain caused by medical treatment or surgical operation carried out due to the injury caused by the defendant whilst "suffering" may include fright at the time of incident, fear of future incapacity as to health or indeed the ability to make a living. It also includes humiliation, sadness and embarrassment caused by disfigurement. *Mc. GREGOR ON DAMAGES* (supra).

The fundamental factor in assessing damages for pain and suffering was aptly put by the Supreme Court of Appeal in *Chidule v Medi*, to say:

“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”

The implication of the above statement is that, in principle and practice, each case must be dealt according to its peculiar circumstances.

As to loss of amenities of life, the same concentrates on the curtailment of the plaintiff's enjoyment of life by his inability to pursue the activities he pursued before the injury. See ***Manley v. Rugby Portland Cement Co.***(1951)C.A. per Brickett L.J reported in Kemp and Kemp, *The Quantum of damages*, Vol .1 (2nd Ed)., 1961,p.624.2 And see also Mwaungulu J in ***Mtika v US Chagomerana t/a Trans Usher(Zebra Transport)***[1997] MLR 123,126.

It must also be stated that the amount to be awarded for this head of damages cannot be quantified in monetary terms by use of mathematical formula but as per Lord Morris in ***Wright v British Railway Board*** (supra), by use of experience and guidance affordable by awards made in decided cases of a broadly similar nature.

In the matter before us here, it is not in contention that the plaintiff was in pain and continues to do so. As such I am minded that the award I must give should not only cover the present pain but also other conditions whatsoever that may arise later. On this I have in mind the arthritis and the back pain. And therefore the fact that compensation is done once and in a form of a lump sum, I take considerable caution to ensure that I do not under compensate or over compensate.

In that regard, before proceeding I address my mind to what counsel gave to me. Counsel cited several authorities of comparable nature which included: ***Nellie Manda v Prime Insurance Company Limited***, Civil Cause No. 619 of 2009 where the plaintiff was awarded the sum of MK 6,500,000.00 as damages for pain and suffering and loss of amenities of life. This award was made on 25th April, 2012. In this case the plaintiff had sustained a fractured humerus.

Counsel then went on to cite the case of ***Duncan Mussa v Judith Chimaliro and Prime Insurance Company Limited***, Personal Injury Cause No. 97 of 2014 delivered on 18th August,2015. In that case the plaintiff was awarded MK2, 400,000.00 being damages for pain and suffering and loss of amenities of life and disfigurement. In this case the plaintiff suffered a pain ful back, painful chest, painful left knee and painful ankle.

Counsel also cited the case of ***Peter Maganga v prime Insurance Company Limited***, Personal Injury Cause No. 458 of 2013 where the plaintiff sustained multiple bruises on the

right elbow and on the lower joint and was awarded MK2,505, 500.00 for pain and suffering and loss of amenities of life. The same was pronounced on 13th November, 2015.

Having gone through these cases and other various authorities comparable in nature to the facts of the case herein, I am mindful that these are all judgments of officers who share the same jurisdiction with me and that as such none is binding on me. In my view I find the seriousness of the injuries and the extent of the damages herein more less at par with the above two cases out of the rest of the cases as cited by the plaintiff. Considering also the issues of inflation, and that awards must be realistic, I award the sum of **MK 4,500,000.00** as damages for pain and suffering and loss of amenities of life.

2. Damages for disfigurement

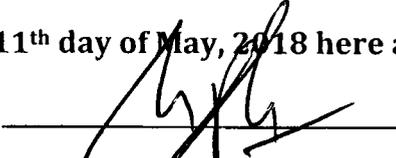
It is trite law that where any part of the body is disfigured as a result of tortious act, the court is entitled to award damages for disfigurement: *Mwasinga v Stagecoach*(1993)16(1) MLR 363.

The plaintiff was aged 26 at the time of the accident. This is quite not an old age but surely in which ones recovery from disfigurement want be easy. At trial he did demonstrate the scars emanating from the injuries he suffered. He led a normal happy life like any person but cannot now with scars. I therefore award the sum of **MK 400,000.0** to take care of this.

In conclusion and for the avoidance of doubt, the plaintiff is awarded the total sum of **MK4,905,500.00**. as damages for pain and suffering and loss of amenities of life plus damages for disfigurement and further costs of police and medical report as special damages that were specifically pleaded.

The defendant is condemned in costs of this action.

Ordered in chambers this 11th day of May, 2018 here at Blantyre in the Republic.


KONDWANI BANDA

ASSISTANT REGISTRAR