

**JUDICIARY**  
**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**PERSONAL INJURY CAUSE NO. 72 OF 2016**

**BETWEEN:**

**DENZIO NAMBAZO** ..... **PLAINTIFF**  
**AND**  
**GENTLY CHANDUZI** ..... **1<sup>ST</sup> DEFENDANT**  
**PRIME INSURANCE COMPANY LIMITED** ..... **2<sup>ND</sup> DEFENDANT**

**CORAM:**      **K. BANDA, ASSISTANT REGISTRAR**

Mr. Naphambo, Counsel for the plaintiff

Defendants not represented

Mr. Chitsulo, Court Clerk

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**ORDER ON ASSESSMENT**

**INTRODUCTION**

This is this court's order on assessment of damages resulting from a default judgment dated 3<sup>rd</sup> August, 2016. Though the statement of claim previously indicated Prime Insurance Company Limited as 2<sup>nd</sup> defendant and an insurer for the 1<sup>st</sup> defendant, the same was denied in the defence filed with the court by the 2<sup>nd</sup> defendant on 2<sup>nd</sup> February, 2016. Essentially the second defendant denied the whole claim in its entirety as having never been an insurer of the first defendant at the time of the accident. I maintain the names of the parties however as there is no indication on the court record that Prime Insurance Company Limited applied to be discharged from the proceedings.

Equally the first defendant never countered the denial by the second defendant and it therefore came not as surprise when subsequent service was done on the first defendant alone. That said, the plaintiff claimed: damages for pain and suffering, loss of amenities of life, damages for incapacity and costs of the action.

## BRIEF FACTS OF THE CASE

Briefly the facts were that on 5<sup>th</sup> June, 2014 the plaintiff with a work colleague travelled to Lilongwe on a hired Mitsubishi Canter, Registration Number **KU 3789**. The same was hired from the 1<sup>st</sup> defendant who again happened to be the driver at the time of the accident. The accident happened on their return trip at Mtunduwatha Village in Kasungu. At the scene was a stationary vehicle, a Freightliner Truck, parked by the side by the rear part protruding a little into the road. According to his evidence the accident was caused by failure by the 1<sup>st</sup> defendant to slow down and enable another oncoming vehicle to pass first. And this ended in the vehicle they were travelling in colliding with stationary truck and hence the damages being claimed herein.

## EVIDENCE

At trial the plaintiff, an electrician by profession, aged 32 at the material time, stated in evidence given under oath that due to the accident he suffered a broken left leg (broken proximal femur), a cut on the forehead, again a cut on the left leg, cut on the upper lip joining the nose and on the frontal head (forehead had also a deep cut). According to him all these were sutured. As to the treatment of the leg, he averred that a metal cap was placed inside the leg and that due to the same he is restricted to movement over short distances only. That he was further advised not to carry heavy things as they could damage the metal cap placed inside the bone. It was further his evidence that during cold season, the leg pains so much that he rarely makes it to work.

And as to the cut on the forehead, which affected sight he was told to go and buy glasses and that currently when there is sunshine he has his eyes producing tears due to pain. That notwithstanding he is still unable to operate without putting on eye glasses.

Apart these injuries, he also lost one upper teeth. And suffered a protrusion of a bone on the left hand side close to the temporal mandibular joint. He then at last tendered a medical report, marked **Exhibit PW1** as part of his evidence.

An examination of the medical report supports the averments about the injuries explained above.

## 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 (2<sup>nd</sup> 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. And in **Lim Poh Choo v Camden and Islington Area Health Authority**,[1979]2All ER 910 @919, in this case, it was stated that damages for loss of amenities of life are awarded for the fact of deprivation which amounts to substantial loss, whether the plaintiff is aware of it or not. I am mindful however that comparable cases will have to be taken into consideration.

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 stated in evidence, each time he is on the sun, the eyes produces pain accompanied by tears. As if that is not enough, the metal cap placed inside the body to hold the bones is another source of agony every cold season. As such I am minded that the award I must give should not only cover the present pain suffered at that time but also what he continues to experience in his body in line with the story of pain or indeed other conditions whatsoever that may arise later. 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 but that the plaintiff is compensated fully.

In that regard, before proceeding to make my award, I pay attention to counsels address to me. Counsel cited several authorities of comparable nature but I must admit that most went off track serve for one that came closer, and that is the case of ***Black Lwayo v Adam Msimuko, Panganani Sambo and Prime Insurance Company***, Civil cause No 1262 of 2009. In that case the plaintiff suffered a fracture of the left leg, crushed nose, cut on the left hand and a dislocation on the right elbow. The court made an award of MK4,000,000.00 for pain and suffering. The said award was made on 31<sup>st</sup> January, 2014. Much as I appreciate the closeness of the facts in this case to the one before me, I cannot entirely rely on it as I did not have a privilege of being supplied with a copy of the judgment. Comparatively however put on a scale, I am still of the view that the case before me is a little bit more serious in nature. Again I do not expect that the quantum would be the same as the award in that case was only for pain and suffering. Herein, I have included amenities of life. In my view therefore the award of **MK 5,000,000.00** suffices for pain and suffering and loss of amenities of life and I do so order.

## **2. Damages for disfigurement(deformity)**

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.

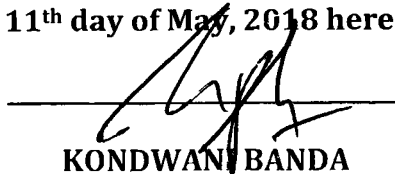
I must indicate that this was not part of the pleadings. However compensation is supposed to cover everything provided it is proved by evidence during assessment and is not in contention. The plaintiff showed and demonstrated to the court and having examined cases of comparable nature, it was this court observation that the awards ranges between MK200,000.00 to MK1,200,000.00. I therefore on the facts of this case, award the sum of **MK 500,000.0** to take care of this.

The plaintiff also claimed incapacity but the same was not proved. I must also state that I was left to wander as to whether he meant incapacity in terms of ability to earn. In that regard I cannot formulate a question on my own and without evidence and hearing the

party raising concern proceed to award the same. It has never occurred and I dare say it will never. I therefore decline to grant this.

In conclusion and for the avoidance of doubt, the plaintiff is awarded the total sum of **MK5,513, 500.00** as damages for pain and suffering and loss of amenities of life plus damages for disfigurement and costs of police and medical report.

**Ordered in chambers this 11<sup>th</sup> day of May, 2018 here at Blantyre in the Republic.**

A handwritten signature in black ink, appearing to be 'Kondwan Banda', is written over a horizontal line.

**KONDWANI BANDA**

**ASSISTANT REGISTRAR**