



**JUDICIARY**  
**IN THE HIGH COURT OF MALAWI**  
**PRINCIPAL REGISTRY**  
**PERSONAL INJURY CAUSE NO. 159 OF 2017**

**BETWEEN:**

**FYSON REUBEN.....PLAINTIFF**

**AND**

**MOTHERS FOOD LIMITED.....DEFENDANT**

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

Mr. Kazembe, Counsel for the plaintiff

Defendant absent /not represented

Ms. D. Nkangala, Court Clerk

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**ORDER ON ASSESSMENT**

**Introduction**

This is an order on assessment of damages resulting from the default judgment dated 1<sup>st</sup> June, 2017. The plaintiff claimed damages for pain and suffering, disfigurement (deformity), loss of amenities of life, special damages and costs of this action. I must indicate right here that despite notice of the proceedings herein to the defendants, they never appeared nor give reasons as to why they were not present. The said notice is evidenced by an affidavit of service on court record dated 23<sup>rd</sup> May, 2017 deposed by Mr. William Chithumba, a process server in the firm of Messrs Mackenzie and Patricks Associates. The assessment therefore went on without any objections.

**Brief facts**

The plaintiff was at the time of the accident an employee of the defendant. On 28<sup>th</sup> December, 2016 he was fixing a faulty machine when the jaws of the machine moved and amputated his second left figure. He was treated at Queen Elizabeth Central Hospital and then Chiradzulu District Hospital respectively.

### **Preliminary observation**

I must however indicate that suits of this nature are double edged. On one side they fall under the Workers Compensation Act where the workers compensation commissioner has powers to determine on rights of the parties and even an award payable. *See. ss. 29 and 42* of the **Workers Compensation Act**. This order is enforceable through the magistracy. *See. s. 43*. That however does not restrict the plaintiff if not satisfied with the adequacy of the award in regard to the injury now subject matter of these proceedings, to pursue the matter further in court by way of civil proceedings. By s. 51 of the said Act, he or she is allowed to seek further compensation with the court provided the award made by Commissioner should be brought to the attention of the court or vice versa so as to be taken into consideration when making the subsequent award. In the case herein, the plaintiff who owes this court such a duty did not do as required. He left the court to speculate and in the process creating a potential chaos as to what he should get if it transpires that the award herein equals what was already paid. I will revert to this puzzle later in the ruling.

### **Evidence**

In evidence, the plaintiff who was the only witness, testified that on 28<sup>th</sup> December, 2016 whilst on night duty as a machine operator, the machine he was operating on broke down. He stated that it continued having problems and that he went to his supervisor (of Indian origin) and informed him of the problem but was told to go back and continue work. He averred that the machine constantly throughout production had problems but the supervisor emphasized that he proceed to work on the same.

He then said that as a precaution, he told the supervisor to provide gloves and other protective materials but that he was adamant and never provided the protective materials and further forced him to work on the machine. It was his evidence that he accepted reluctantly since he was his senior. He went on to state that just as he tried to work on it, that is just as it started functioning and as he went to pull soya placed in it, the machine moved with force and hit his figure on the left, next to the thumb and the figure was partly cut. It was his evidence that he rushed to the supervisor and told him of the incident and then he as well called his manager and they took him by car to Queen Elizabeth Central Hospital. After treatment as he still found that it was not healing, he went to Chiradzulu District Hospital for further treatment.

It was in evidence contained in his witness statement adopted in its entirety and tendered in evidence at trial that he sustained an open fracture of the index figure, cut wound on the same and in the process lost the distal phalanx and sustained a deformed and painful index figure. According to the medical report, the injury was assessed at 20% as the degree of permanent incapacity.

## **The applicable legal principles on assessment of damages**

That said, the policy of the law on damages generally is no different, in short it is to the effect that if money can do it, to afford the victim fullest compensation so as to bring the victim to the position before the wrong. See. *Livingstone v Rawyards Coal Co.* (1880) 5 App. Cas. 25 at 3 per Lord Blackburn J.

In essence compensation for damages is not meant to be punitive. It must be fair to both sides and it must give compensation to the plaintiff, but must not pour out largesse from the horn of plenty at the defendants expense. See. *Pitt v Economic Insurance Company Ltd* (3) SA 284(D) 287E-.,per Holmes J.

The test should be what a particular society would deem fair. Lord Devlin, in *West v Sheppard*[1964] A.C.326 at 357, said 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. 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. In *Wright v British Railway Board* (1938) AC.1173, 1177, Lord Diplock had it 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 that though money can compensate to an extent, it still cannot exact the experience to remain as it was before the event giving rise to the action. In *West v Sheppard*[1964] AC 326 Lord Morris(as he then) captioned it this way:

*"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."*

That said, 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 as follows:

*"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."*

## **Disposal**

Based on the evidence the plaintiff sustained an open fracture of the index finger, cut wound on the same and in the process lost the distal phalanx and sustained a deformed and painful index finger. According to the medical report, the injury was assessed at 20% as the degree of permanent incapacity.

## **Damages for pain and suffering and loss of amenities of life**

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.

And 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.

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.

## **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.

As earlier alluded the plaintiff was in pains both at the time of the accident and during medical procedures done to the injured figure. This was not and is not in contention. And he therefore deserves an award for pain and suffering. Equally it is clear that he will be able to perform other functions but not to the extent he used to. This justifies an award for loss of amenities of life. And in addition is the deformity or disfigurement this has caused to him. This is also not contested.

In his submissions on quantum counsel cited several authorities. I must indicate that it is my observation that Counsel did not indicate in which court these awards were made. We are mindful that the court in which a matter is pursued has effect on the quantum of damages to the extent that a subordinate has its limit on how much to award clearly defined unlike the high court.

That said, in **Alex Maunde v Hua Feng Co. Ltd**, Civil Cause No.194 of 2008(unrep), the plaintiff a machine operator was awarded MK1,250,000.00 on 18<sup>th</sup> April,2012 as damages for the three crushed fingers that were later amputated. He equally had a dislocation of the shoulder. On comparable basis this seem to be a more serious case than the one before me. This effectively signals that the award I must make in the matter before me should take the downward spiral.

Counsel also cited **Kamwendo v Central Africa Drilling Company**, Civil Cause No. 228 of 2011(unrep). In this case it was stated that the plaintiff suffered crushed fingernails and was unable to use the hands properly. As I was never supplied with a copy of the said assessment, I very much register my reservations over its comparability. The statement seem a bit vague or put it other way, too general as it does not specifically show anything that can be used as a standard to measure the level of injury on a comparative basis. And if anything, the injury as depicted does not indicate a substantial level of seriousness as to the one herein. I therefore decline to take it on board and this applies to the other cited case of **Austine Isile v F.A.Lambat Transport**, Civil Cause No.56 of 2009(unrep).

In that regard therefore considering that the award one can take in consideration is the one in the **Maunde** case, which again was made way back in 2012, and again being a case whose facts indicate that it was more serious than the injury herein, and factoring inflation over the period, and of course not forgetting that I still retain the discretion, I am of the view that an award of MK2,100,000.00 for pain and suffering and loss of amenities of life and MK400,000.00 for disfigurement will do and I do so order.

Though specifically pleaded, no evidence of special damages was given and as such I decline. In this I remind counsel that the presence of the medical report or whatever does of itself qualify as proof that payment was made and neither do I as a court have to presume.

For the avoidance of doubt the plaintiff is awarded the total sum of **MK2, 500,000.00**. Reverting to the earlier puzzle, I clarify that this is in addition to the sum awarded by the workers compensation commissioner if any and if not it is to be taken into consideration when the same comes before him for assessment.

The plaintiff is also awarded costs of this action.

**Ordered in Chambers this 11<sup>th</sup> day of May, 2018 here at Blantyre**



**KONDWANI BANDA**

**ASSISTANT REGISTRAR**