



REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
Civil Cause Number 422 of 2019

BETWEEN:
HENRY JAMES NAKHAPE.....CLAIMANT
AND
ELECTRICITY SUPPLY CORPORATION OF MALAWI LTD.....1ST DEFENDANT
NICO GENERAL INSURANCE COMPANY LIMITED.....2ND DEFENDANT

CORAM:	CM MANDALA:	ASSISTANT REGISTRAR
	W Namasala	Counsel for Claimant of Wilberforce Attorneys
	K Soko:	Counsel for Defendants of Soko & Company
	C Zude:	Court Clerk

ASSESSMENT OF DAMAGES

INTRODUCTION AND BACKGROUND

This is an order for assessment of damages pursuant to default judgment issued on 24 July 2019. The Defendants are liable for: damages for pain and suffering, damages for loss of amenities of life, damages for disfigurement, the sum of MK6,000.00 being special damages and costs of the action. The hearing on Assessment of Damages was conducted on 16th January 2020.

This matter arose from a road accident that occurred on 25th June 2018 when the 1st Defendant's driver was driving from Domasi to Zomba City along the M3 road. As he was driving through Jokala location he hit the Claimant who was lawfully crossing the road from left to right.

EVIDENCE

Claimant's Evidence

The Claimant adopted his witness statement as their evidence in chief. It states:

1. *THAT I am the Claimant in this matter.*
2. *THAT I was at the material time a pedestrian.*
3. *THAT the 1st Defendant was at the material time the owner of motor vehicle registration number BM 9580 Toyota Hilux Double Cabin while the 2nd Defendant is an insurance company of the said motor vehicle.*
4. *THAT on or about 25th June 2018 the 1st Defendant's driver Mr Bazilio Mark. Kadam'manja was driving the said motor vehicle from the direction of Domasi heading towards Zmba City along M3 road. As he was driving the said motor vehicle through Jokala location he hit me while I was lawfully crossing the road from the left to the right side of the road.*
5. *THAT I vehemently believe that the accident was caused by the 1st Defendant's driver's negligence by driving the said motor vehicle without due care and attention to other users.*
6. *THAT as a direct consequence of the accident I sustained a fracture on the right femur, I was taken to Zomba Central Hospital in the city of Zomba for medical attention. Now shown and exhibited tome is a copy of medical report marked "HJN1".*

7. *THAT since the occurrence of the accident my life is not the same as I still experience intermittent pains.*
8. *THAT at assessment I will present myself to court to testify as to how much pain and suffering I have gone through since the occurrence of the accident.*
9. *THAT I further aver that I am entitled to costs of this action.*

In his oral evidence, the Claimant told the court that his right knee was broken. The leg was swollen and had to be pulled with a stone. He received intravenous painkillers and a weight was attached to the leg for the bone to re-align. He was hospitalized for four months. Although his leg is better than it was, his right leg is now shorter than his left leg.

In cross examination the Claimant told the court that he is looking for compensation for the injuries sustained. He also stated that his witness statement does not mention an injury to the ribs.

SUBMISSIONS BY COUNSEL FOR THE CLAIMANT

Counsel for the Claimant filed written submissions in support of the application. Counsel avers that the extremity of the Claimants' injuries and the devaluation of the Kwacha would attract a global award of K15,000,000.00 for the Claimant as compensation. Counsel for the Claimant cited the following comparable awards in support:

- ***Davie Owen v Jacob Chikoya, O Daudi & Prime Insurance Company Limited*** – Personal Injury Cause Number 380 of 2015 where the Claimant sustained a fracture of the left distal femur, fracture of the right tibia and fibula. The Claimant was hospitalised from 6th August 2014 to 23rd September 2014. On 25th May 2018 the Claimant was awarded K4,500,000.00 for pain and suffering, and K1,000,000.00 for loss of amenities of life.
- ***Virginia Makiyi v Tawina Chatchuka & Reunion Insurance Company Limited*** – Civil Cause Number 395 of 2015 where the Claimant sustained a fracture leg and chest bruises. On 6th May 2016 the Claimant was awarded K5,000,000.00 for pain and suffering, and loss of amenities of life.
- ***Agness Phiri (suing through her mother and next friend Joyce Lyson Phiri) v Amad Ndagea*** – Personal Injury Cause Number 406 of 2017 where the Claimant sustained a fractured right distal femur and general body pains. She was hospitalised from 16th August 2016 to 20th September 2016. A metal rod was inserted in her leg to support it. On 21st August 2018, the Claimant was awarded K4,500,000.00 for pain and suffering and loss of amenities of life, and disfigurement.

SUBMISSIONS BY COUNSEL FOR THE DEFENDANTS

Counsel for the Defendant filed written submissions in support of the application. Counsel avers that the Claimant failed to prove his claim for special damages for the costs of police and medical reports and ought not be awarded damages for his claims.

Counsel further claims that the Claimant ought not be awarded damages for loss of amenities of life as no evidence was proffered by the Claimant to prove loss of amenities as his 'witness statement was sketchy and short on important details.'

On pain and suffering and disfigurement, Counsel suggests an award of K1,800,000.00 as compensation. Counsel contends that that the award for disfigurement be included in the award for pain and suffering. Counsel for the Defendants cited the following comparable awards in support:

- ***Shafilu Allih and Rizo Lambert T/A Lambert Transport*** – Personal Injury Cause Number 458 of 2012 where the Claimant sustained fractures on the left arm, a head injury and was hospitalised for close to three weeks. On 11th March 2013 the Claimant was awarded K3,000,000.00 for pain and suffering.

- **Chilembwe Phiri v General. Alliance Insurance Company Limited** – Personal Injury Cause Number 350 of 2012 where the Claimant sustained fractures on both legs and was hospitalised for close to a month. In April 2013 the Claimant was awarded K4,000,000.00 for pain and suffering, loss of amenities of life and disfigurement.

ASSESSMENT GUIDELINES

Damages for personal injuries are awarded for a Claimant's pecuniary and non-pecuniary losses. The pecuniary losses include the loss of earnings and other gains, which the Claimant would have made had they not been injured, and the medical and other expenses which accrue from care and after-care of the injury. The non-pecuniary losses include pain and suffering, loss of amenities of life and loss of expectation of life. The principle underlining the award of damages is to compensate the injured party as nearly as possible as money can do it.¹

Perfect compensation for a Claimant is unlikely. The Claimant, however, is entitled to fair and adequate compensation.² 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*³ by stating: '*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 mode of assessment of damages requires the court to consider comparative awards of a similar nature. In doing so, regard must be had for fluctuations in the value of the currency. The court should make an award that is commensurate with the value of the currency at the time the award is made. In *Malamulo Hospital (The Registered Trustees) v Mangani*⁴, the Supreme Court states: "*It is, therefore, recognised by the courts that awards of comparable injuries should be comparable. This is done by looking at previous awards of similar cases and adjusting the award according to the fall of the value of the money.*" In *Tionge Zuze (a minor, through A.S. Zuze) v Mrs Hilda Chingwalu*,⁵ the Court states: "*Where a claim relates to non-monetary loss in respect of which general damages are recoverable it is not possible to quantify the loss in monetary terms with mathematical precision. In such cases courts use decided cases of a comparable nature to arrive at an award.*" In *Steve Kasambwe v SRK Consulting (BT) Limited* Personal Injury Cause Number 322 of 2014 (unreported), the High Court states thus: '*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.*'

COMPENSATION

The Claimant sustained a fractured right femur. He had to undergo skeletal traction and was hospitalized from 25th June 2018 to 4th September 2018 – about four months.

Pain and Suffering

¹ See *Cassel and Co v Broom* [1972] AC 1027. See also *Tembo v City of Blantyre and The National Insurance Co Ltd* – Civil Cause No. 1355 of 1994 (unreported).

² *British Commission v Gourley* (1956) AC 185.

³ *West v Shepherd* (1964) AC 326 at 346.

⁴ [1996] MLR 486.

⁵ Quoting from *HQ Chidule v Medi MSCA* 12 of 1993.

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).

The Claimant’s medical report states that he was hospitalized from 26/6/18 to 4/9/18 having sustained a fracture right femur. The Claimant underwent skeletal traction and his permanent incapacity was pegged at 38%. In his oral evidence, the Claimant told the court that the leg was swollen and had to be pulled with a stone. He received intravenous painkillers and a weight was attached to the leg for the bone to re-align. He was hospitalized for four months. It is clear that the Claimant endured pain and suffering through both the injury itself and the treatment. Based on this, this court awards the sum of K3,500,000.00 as damages for pain and suffering.

Loss of Amenities of Life

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.

As a result of the accident, the Claimant experiences intermittent pain on the injured areas. Based on this, this court awards the sum of K1,000,000.00 as damages for loss of amenities of life.

Disfigurement

In the matter of *James Chaika v NICO General Insurance Co Ltd* the High Court 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 *Nyirenda v Moyo and others*, the claimant was awarded the sum of K500,000.00 as damages for disfigurement in 2018.

Although the Claimant’s leg is better than it was, his right leg is now shorter than his left leg. The medical report pegs the Claimant’s permanent incapacity at 38%. The Claimant’s appearance has been permanently affected by the accident. Based on this, the Claimant is hereby awarded K1,500,000.00 as damages for disfigurement.

Special Damages

The law distinguishes general damages and special damages as follows – 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.

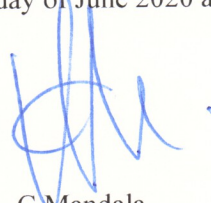
The Claimant herein was awarded damages the sum of MK6,000.00 as special damages which are costs of obtaining the police and medical reports. This court agrees with Counsel for the Defendant's contention that no evidence was proffered to show that the Claimant spent K6,000 to procure the medical and police reports. No Ministry of Health receipt was tendered for the medical report nor was a government receipt provided for police report. As stated above, special damages ought to be specifically claimed and proven. The Claimant herein failed to do either. For these reasons, no award will be made under this head.

DISPOSAL

The Claimant is therefore awarded K3,500,000.00 for pain and suffering; K1,000,000.00 for loss of amenities of life; K1,500,000.00 for disfigurement and; K0 as special damages and costs of the action (to be taxed). A total of K6,000,000.00 (six million kwacha).

Each party is at liberty to appeal to the Supreme Court of Appeal within the requisite time frames.

Ordered in Chambers on the 1st day of June 2020 at the High Court, Lilongwe.



C Mandala

ASSISTANT REGISTRAR

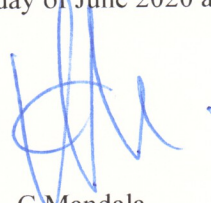
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