



**REPUBLIC OF MALAWI
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY**

Civil Cause Number 269 of 2019

BETWEEN:

**LAUDON KANYONI.....CLAIMANT
AND**

**DUNCAN NAMILAZA.....1ST DEFENDANT
PRIME INSURANCE COMPANY LIMITED2ND DEFENDANT**

CORAM: CM MANDALA: ASSISTANT REGISTRAR

Ndolo: Counsel for Claimant of YD Attorneys
Defendants: Wilkinson & Associates
C Zude: Court Clerk

ASSESSMENT OF DAMAGES

INTRODUCTION AND BACKGROUND

This is an order for assessment of damages pursuant to an agreed order entered on 16th January 2020. The Defendants are liable for: damages for pain and suffering, damages for loss of amenities of life, damages for disfigurement, special damages and costs of the action. The liability against the 2nd Defendant is subject to the policy limit of K5,000,000.00. The hearing on Assessment of Damages was conducted on 25th March 2020. This matter arose from a road accident that occurred on 23rd November 2018 when the 1st Defendant was driving from Lilongwe to Dedza. Upon arrival at/near Kakhoma village, the 1st Defendant hit the Claimant who was walking on the dirty verge.

EVIDENCE

Claimant's Evidence

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

5. *The injuries that I suffered are:*
 - i. *Fracture on the left hand;*
 - ii. *Brachial plexus injury;*
 - iii. *Minor head injury;*
 - iv. *Soft tissue injuries.*

Pain and Suffering

6. *I felt an unbearable pain on my left hand upon occurrence of the accident.*
7. *Due to extreme pain, the left side of my body felt numb and I didn't know what was happening to me.*
8. *I only realized that I was in hospital and I was advised that I lost consciousness for about 1 hour.*
9. *Due to the loss of consciousness, I would say I did not feel pain for an hour, but when I regained consciousness, I continue feeling excruciating pain on my left hand and my head.*
10. *I was taken to Nkhoma CCAP Hospital for treatment and got admitted for a period of 3 days. During this period, I was in total pain as I could neither lift nor fold my hand.*
11. *As the doctors were attending to my injuries, I cried, since it was very painful, and the doctors insisted that they still had to do their work.*
12. *As such, I was only given antibiotics to ease the pain, which eventually stopped for some hours, but I believe I will be in pain until my death.*
13. *The pain has eased a bit now, but the left hand lost some power, as such, I struggle carrying heavy objects. Sleeping on the left side of my body is also a big problem.*
14. *Again, I am not being treated as an outpatient, as I visit my Physiotherapist for some physical exercises.*

Disfigurement

15. I am now disfigured as I no longer use my left hand in carrying physical objects. Further, my left part of the body feels weak, so I feel pain when sleeping on it.
16. I used to enjoy sex with my wife with whom I have several children together. Inability to have sex is so distressing to me. I feel so incomplete and I am afraid of losing my wife.
17. I attach and exhibit hereto a copy of the medical report marked "LK 1".
18. I am therefore claiming damages for the injuries and loss that I suffered.
19. However, for proper commencement of this matter, I procured a police report at K3,000.00. I hereby attach and exhibit the police report marked "LK 2".

In his oral evidence, the Claimant told the court that he still isn't feeling very well. He was injured quite badly on his leg as well; he sustained a wound on his stomach that had to be sutured and the arm was broken. The Claimant's arm is still very painful, and he has trouble sleeping because of that.

The Claimant tendered a medical report documenting his injuries. It states:

The above-named person was involved in Road Traffic Accident. (Hit by moving vehicle while walking).

- Had Brachial plexus injury after sustain a clavicle bone fracture
- Had also mild head injury

Final Diagnosis

1. Brachial plexus injury
2. Minor head injury

Outcome

- Loss of power, sensation of whole left arm (permanent disability)
- Needs physiotherapy
- Brufen 400mg

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 K8,000,000.00 for the Claimant as compensation. Counsel for the Claimant cited awards in support of his arguments but all the comparable awards made reference to fractures of the leg so they will not be considered herein.

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.

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.

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 clavicle bone fracture, head injuries, soft tissue injuries and was hospitalized for three days.

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).

The Claimant’s medical report states that he sustained a brachial plexus injury after sustaining a clavicle bone fracture. He also had a mild head injury. The brachial plexus injury causes weakness, loss of feeling, and/or loss of movement in the shoulder, arm, or hand. The Claimant’s arm is still very painful, and he has trouble sleeping because of that. The Claimant was hospitalized for 3 days during which time he could not use his hand. He continues to feel excruciating pain in both his hand and head to date. 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 K2,500,000.00 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.

Although the pain has eased a bit now, the Claimant’s left hand has lost some sensation and power. He struggles to carry heavy objects and cannot sleep on the left side of his body. Additionally, he has trouble having sex and this causes him great anguish as he fails to have intercourse with his wife. The Claimant continues to see a Physiotherapist for physical exercise to regain full use of his hand. Based on this, this court awards the sum of K1,000,000.00 as damages for loss of amenities of life.

⁴ [1996] MLR 486.

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

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 arm is better than it was, he is permanently disfigured now and has lost full use of his injured arm. Further he cannot have sexual intercourse with his wife. The 1st Defendant's actions have caused him a lifelong impairment. Based on this, the Claimant is hereby awarded K1,000,000.00 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 special damages. However, no evidence was provided by the Claimant to prove what those special damages were. Special damages ought to be specifically pleaded and proved. The Claimant did not meet this threshold. For these reasons, no award will be made under this head.

DISPOSAL

The Claimant is therefore awarded K2,500,000.00 for pain and suffering; K1,000,000.00 for loss of amenities of life; K1,000,000.00 for disfigurement and; K0 as special damages and costs of the action (to be taxed). A total of K4,500,000.00 (four million five hundred thousand 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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