



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

Civil Cause Number 631 of 2020

BETWEEN:

**HURLY MATEWERE.....CLAIMANT
AND
JAMES LIDAMLENDI.....1ST DEFENDANT
PRIME INSURANCE COMPANY LIMITED.....2ND DEFENDANT**

CORAM:	CM MANDALA:	ASSISTANT REGISTRAR
	D Silungwe:	Counsel for Claimant of Silungwe Law Consultants
	L Kapinda:	Counsel for Defendant of Wilkinson and Associates
	Mauzauza:	Court Clerk

ASSESSMENT OF DAMAGES

CM MANDALA, AR:

INTRODUCTION AND BACKGROUND

This is an order for assessment of damages pursuant to a Default Judgment entered on 14th August 2020. The Defendants are liable for: damages for pain and suffering, damages for loss of amenities of life, damages for disfigurement, damages for loss of earnings and earning capacity, damages for future nursing care, K10,000.00 as damages costs of obtaining police and medical reports, and costs of the action. The hearing on Assessment of Damages was conducted on 5th July 2021.

This matter arose from a road accident that occurred on 29th January 2020 when the 1st Defendant was driving along Presidential Way in Lilongwe and hit a motorcycle that the Claimant was riding due to excessive speed and attending to his mobile phone.

EVIDENCE

The Claimant adopted their witness statement as their evidence in chief. The relevant parts are reproduced below:

6. *I am Hurly Matewere of Chalingana Village, Traditional Authority Changata in Thyolo district.*
7. *I am 32 years old.*
8. *I am the Claimant in this action.*
9. *On or around 29th January 2020 around 13:15 hours I was a motor cyclist riding from the direction of BICC Robots going towards Reserve Bank of Malawi. Upon arrival at Conventional Robots, a car coming from the direction of Parliament round about just turned right going towards reserve bank of Malawi when the lights were red while he was attending to his mobile phone that he hit me when he was coming from behind going the same direction.*

10. *For further details of the accident, I produce a copy of the police report that I obtained and mark it "HM 1".*
11. *I sustained traumatic brain injury, deep wound around the neck, bruises on both hands, sprained left arm, and bruises on the right ear.*
12. *I was taken to Kamuzu Central Hospital where I was admitted at Intensive Care Unit from the 29th of January 2020 up to 19th February 2020.*
13. *Then I was admitted at the ward from the 19th of February, 2020 up to the 21st February, 2020.*
14. *Thereafter, I was treated as an outpatient for 4 months.*
15. *I was on oxygen for 2 weeks.*
16. *I was using feeding tubes/pipes for about 5 days.*
17. *I have scars around my neck, right ear, and hands.*
18. *I still feel pain on my left chest side.*
19. *I normally get lost whenever I take a walk by myself.*
20. *I cannot use my left hand to lift any heavy object.*
21. *I feel pain on my left arm and neck when doing physiotherapy.*
22. *I can no longer do any manual work.*
23. *I can no longer do household chores.*
24. *I used to work as a Security Guard at Mr. Mkandawire's residence in Area 47. My salary was MK25, 000.00 per month. I can no longer work as a guard because of the injuries.*
25. *I also used to work as a motorcycle Taxi operator in the afternoon. I used to ply my trade at Total filling station rank in City Centre. I used to make between MK 2, 000.00-MK5, 000.00 per day. I can no longer ride a motorcycle because of the injuries.*
26. *I used to be a farmer. I was growing maize and beans. I to make around MK30, 000.00 after selling my produce.*
27. *I can no longer work in the garden due to the injuries.*
28. *My permanent incapacity was assessed at 35%.*
29. *For further details of the injuries, I produce a copy of the medical report marked "HM 2".*

In viva voce, the Claimant showed the court the scars – there was visible scarring on the neck, raised scars on the neck, and a raised scar where the Claimant stated the feeding tube was placed.

In cross examination, the Claimant confirmed that the injuries were sustained on 29 January 2020. The Claimant confirmed that they were in the Intensive Care Unit and was unconscious during that period. The Claimant was informed of this when consciousness was regained. The doctor who explained this to the Claimant also wrote the medical report and explained what was contained in the medical report. The 35% incapacity was attributed to the Claimant's inability to ride a bike or to farm. The Claimant can no longer ride a bike because an arm is too weak to manage the handles. The Claimant attended one physiotherapy session that lasted one hour upon the doctor's recommendation. The Claimant attended court with their spouse for her to ensure that he doesn't lose his way. The Claimant was open to the spouse testifying on the same. The Claimant's loss of memory started after the accident, its characterized by the Claimant's inability to remember many things. The Claimant had not been to the hospital to have the memory issues addressed. The Claimant moved back to their home village and therefore could no longer attend the hospital. Before the accident, the Claimant was working as a guard in Area 47. The Claimant's employment was terminated due to the injuries sustained after the accident. The Claimant had not sought alternative employment. The Claimant was currently being supported by his partner. The Claimant can no longer do household chores and at times his wife feeds him. The Claimant has use of their right hand, but the left hand is very weak.

The Claimant also operated motorcycle taxi before the accident. The Motorcycle belonged to Mr Tembo who lived in the house close to the one where he worked as a guard in Area 47. The money made from the motorcycle taxi

was remitted to Mr Tembo. The Claimant has a license for riding a motorcycle. The Claimant was not asked for a license by the police on the day of the accident and did not pay a fine at the police station. The Claimant confirmed that the police report contained some false information but denied that their evidence was false or contradictory. Prior to the accident, the Claimant was a farmer and can no longer farm due to the weakness in the arm. The Claimant went to the farm once a week and conducted the farming business alone. The Claimant did not operate the motorcycle taxi every day.

The Claimant confirmed their injuries as follows: the helmet broke causing injuries to the neck, three fingers on the left hand were injured and no longer function, and head injuries that disturbed their thoughts as they constantly forget things.

In re-examination, the Claimant confirmed that the motorcycle belonged to Mr Mayamiko Tembo. The Claimant further confirmed that they received K40,000.00 per week for riding the motorcycle.

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 considering 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.*'

SUBMISSIONS BY COUNSEL FOR THE CLAIMANT

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.

Counsel for the Claimant filed written submissions in support of the application. Counsel avers that the extremity of the Claimant's loss and the devaluation of the Kwacha would attract awards totalling K43,738,800.00 for pain and suffering, loss of amenities of life, disfigurement, future nursing care, loss of earning capacity, and police and medical reports. Counsel cited the following comparable awards to support their argument:

- ***Emma Muniya v Prime Insurance Company Limited, Personal Injury cause number 344 of 2018 (unrep)*** the Claimant sustained spinal injuries, muscle spasms to the Thoraco Lumbar spine and a fracture of the lateral malleolus on the left ankle with the result that the claimant has severe back ache, walking difficulties, slurred speech, loss of memory and that she cannot do her normal duties like farming or cooking. The claimant was awarded a total sum of K2, 850,000.00 for pain and suffering, K1, 800,000 for loss of amenities of life and K1, 500,000.00 for disfigurement. on 21st January, 2019. See copy attached.
- ***Chifundo Semba (suing through next of kin Francis Semba) v Chinsinsi Chaluluka, Thengo and Prime Insurance Company Limited, Personal Injury Cause Number 886 of 2016 (unrep)*** the Claimant sustained severe head injury with lacerations. The motor function of the right side was affected and he had a right sided body weakness. He developed scars, problem with talking and walking, he forgets a lot. He has problems with his vision as he has cerebral visual impairment. He requires special attention and to be examined regularly by medical personnel. The court awarded K10, 000,000.00 for pain and suffering, loss of amenities of life, disfigurement and MK2, 500, 000.00 for future medical care on 16th January 2019. See copy attached.
- ***Chifundo Phalewa v Liberty General Insurance Company Limited, Personal Injury Case No. 359 of 2018 (unrep)*** the Claimant sustained fracture of the left femur and severe head injuries. She was treated at Queen Elizabeth Central Hospital for 4 months. She could not walk properly, visit friends and family, attend prayers, and stopped going to school because of mobility problem. She had her brain scanned and had problems with her memory. The claimant was awarded a total sum of K7, 000, 000.00 for the personal injuries. pain and suffering, loss of amenities of life and disfigurement on 12th December 2019. See copy attached.
- ***Alefa Mkwate v Kunje Suwedi and Prime Insurance Company Limited [2019] MWHC 120*** the Claimant sustained severe head injuries, fracture of tibia and fibula on the right leg leading to deformed and shortened leg, bruises, and multiple cuts on the left leg. The Claimant was failing to do normal household chores and had difficulties in walking. The claimant was awarded a total sum of K6, 000, 000.00 for pain and suffering, loss of amenities of life and disfigurement on 25th March 2019. See copy attached.
- ***Kayange v Chita One Investment and another*** Personal Injury Cause No. 278 of 2013 (unrep) the claimant sustained head injuries, multiple injuries, and partial blindness to left eye. He was awarded MK4, 500, 000.00 for pain and suffering and loss of amenities of life on 9th January 2014.

SUBMISSIONS BY COUNSEL FOR THE DEFENDANT

Counsel for the Defendant filed written submissions in support of the application. Counsel avers that the extremity of the Claimant's loss and the devaluation of the Kwacha would attract awards totalling K2,650,000.00 for pain and suffering, loss of amenities of life, disfigurement, future nursing care, loss of earning capacity, and police and medical reports. Counsel cited the following comparable awards to support their argument:

- ***Chikumbutso Paul (suing through his father and litigation guardian Francis Paul) v Prime Insurance Company Limited*** Personal Injury Cause Number 747 of 2015 where the Claimant was awarded K2,503,000.00 for an occipital fracture on the head, two deep cut wounds on the head and blood oozing from the ear. The award was made on 31st May 2018.

- ***Alick Manyamba v McDonald Bengo & Prime Insurance Company Limited*** Personal Injury Cause Number 566 of 2018 where the Claimant was awarded K1,150,000.00 for a deep cut on the forehead, cuts on the back, head and nose, and multiple bruises. The award was made on 12th June 2018.

COMPENSATION

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 injuries were explained thus: ‘polytrauma patient with Traumatic Brain Injury (TBI), deep wounds around the neck’ as per the medical report. The medical report further states that the Claimant received the following treatment: ‘suturing of wounds, and insertion of feeding tube.’ The Claimant was hospitalized between 21st February 2020 and 2nd March 2020. The Claimant was informed that he was in the Intensive Care Unit and lost consciousness during his hospitalization.

The Claimant’s Counsel cited an award of K2,850,000.00 as adequate under this head – see ***Emma Muniya v Prime Insurance Company Limited*** (cited above). The other wards cited by both Counsel were total awards. Based on the extent of the Claimant’s injuries and previous awards, this court awards the sum of **K3,000,000.00 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.

The Claimant tendered a medical report that stated that the Claimant currently experiences: ‘forgetfulness, scars on the neck and both arms/hands, weakness of the arm, chest pains and neck.’ Further, the Claimant stated in viva voce, that their life has been significantly altered because of the accident. The 35% incapacity was attributed to the Claimant’s inability to ride a bike or to farm. The Claimant can no longer ride a bike because an arm is too weak to manage the handles. The Claimant can no longer do household chores and at times his wife feeds him. The Claimant can use the right hand, but the left hand is very weak. The Claimant confirmed their injuries as follows: the helmet broke causing injuries to the neck, three fingers on the left hand were injured and no longer function, and head injuries that disturbed their thoughts as they constantly forget things.

The Claimant’s Counsel cited an award of K1,800,000.00 as adequate under this head – see ***Emma Muniya v Prime Insurance Company Limited*** (cited above). The other wards cited by both Counsel were total awards. Based on the foregoing discussion, this court awards the sum of **K2,000,000.00 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 other***, the claimant was awarded the sum of K500,000.00 as damages for disfigurement in 2018.

The Claimant has visible scarring on the areas where the injuries were sustained. The most visible scars are those on the neck, head, as well as the loss of use of three fingers on the left hand and loss of use of the entire left arm. The Claimant's Counsel cited an award of K1,500,000.00 as an adequate award under this head – see *Emma Muniya v Prime Insurance Company Limited* (cited above). The other awards cited by both Counsel were total awards.

Following the sentiments made in the *James Chaika Case*, and the *Emma Muniya Case* and considering the devaluation of the Kwacha since 2018, the Claimant is hereby awarded **K1,500,000.00 as damages for disfigurement.**

Loss of Earnings and Earning Capacity

Courts award loss of earnings for future income where they find that the Claimant can no longer earn their pre-accident rate of earnings. Calculations are made based on the annual figure, the age of the Claimant, their working lifespan, and prospects of losing employment or reduced earnings in the future: *Tembo v City of Blantyre* – Civil Cause Number 67 of 2013. In the matter of *Namate.v Mr Latif & Prime Insurance Company Limited* – [2018] MWHC 663 the Claimant was awarded the sum of K5,040,000 for loss of future earnings. The Claimant in that case was aged 33 and could have potentially worked for the next 22 years. The court adopted a multiplier of 6 years while taking into consideration that the Claimant would be receiving a lump sum and might not have worked for 22 years longer.

Counsel for the Claimant herein submits that the Claimant earned an average income of K44,000.00 per month and is aged 32 years. Counsel further submitted that a multiplier of 31 be used based on the life expectancy for males as published in the **Population and Housing Census 2008, Analytical Report Vol. 2 (Mortality) published by National Statistical Office, August 2010**. The computations were therefore, K44,000.00 x 12 x 31 x 35% (permanent incapacity) = K5,728,800.00.

Counsel for the Claimant did not submit evidence of the Claimant's earnings. The Claimant was engaged in gainful employment as a guard in Area 47 where he made K25,000.00 per month. The Claimant also had income from a motorcycle taxi business that he operated, but did not own, and all proceeds were transmitted to the owner of the motorcycle. Further, the Claimant also averred that he was a farmer and would make around K30,000.00 after selling the produce. It is unclear whether the K30,000.00 was received monthly, or annually. Although judicial notice is taken that most of farming is conducted annually as produce has seasons that rotate annually unless artificial means, such as irrigation, are employed. Based on this, this court adopts an average income of K30,000.00 per month.

The computations for loss of earnings and earning capacity are thus:

$$(K30,000.00 \times 12(\text{annual income}) \times 31 (\text{multiplier})) \times 35\% \\ = \underline{\underline{K3,906,000.00}}$$

The Claimant is hereby awarded the sum of **K3,906,000.00 for loss of earnings and earning capacity.**

Special Damages for Future Nursing Care

Counsel for the Claimant made the following submission under this head:

4.4.1.1. *'The Claimant cannot do anything on his own. He depends on people to around him to help him with anything. He gets lost when he goes for a walk on his own. He will need someone to be with every time he is going for a walk. Furthermore, he needs regular and continuous*

medical and physical care. He will have to depend on medical care and the help of others for the rest of his life.

4.4.1.2. *We submit that the Claimant be awarded the sum of MK5, 000, 000.00 for future nursing care.* ‘

In the case of **Charity Luhanga v Attorney General** Personal Injury Cause Number 146 of 2020, the Claimant therein had paraplegia because of an accident caused by the Defendant’s agents. The Claimant was ‘*confined to a wheelchair and had stool and urine incontinence. She requires someone to help her with the wheelchair, household tasks, changing diapers and catheters and a range of other tasks. In addition, the Claimant is hoping to get further treatment in Cape Town, South Africa where her brother lives since the hospitals might be better there.*’ The Claimant, on 16th October 2020, was awarded K20 million for future treatment and nursing care.

Due to these considerations, the Claimant is awarded the sum of **K2,500,000.00 for future nursing care.**

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. A Claimant 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 Claimant do not meet this strict proof then special damages are not awarded – **Wood Industries Corporation Ltd v Malawi Railways Ltd** [1991] 14 MLR 516 and **Govati v Manica Freight Services (Mal) Limited** [1993] 16(2) MLR 521 (HC).

The Claimant herein was awarded K10,000.00 as the cost of medical and police reports. Though the Claimant specifically claimed special damages, they were not proved during trial and/or submissions. However, there is a specific amount contained in the judgment that didn’t require assessment by the Court. For these reasons, **the Claimant is awarded K10,000.00 under this head.**

DISPOSAL

The Claimant is therefore awarded K3,000,000.00 for pain and suffering; K2,000,000.00 for loss of amenities of life, K1,500,000 as damages for disfigurement, K3,906,000.00 for loss of earnings and earning capacity, and K10,000.00 as damages for cost of medical and police reports. **The Claimant’s total award is therefore K10,416,000.00 (ten million four hundred and sixteen thousand kwacha).**

Costs of the action will be assessed by the Registrar if not agreed upon by the parties.

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

Ordered in Chambers on the 4th day of August 2021 at the High Court, Civil Division, Lilongwe.

CM Mandala

ASSISTANT REGISTRAR