



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

Civil Cause Number 601 of 2019

**BETWEEN:**

**BERNARD POLEPOLE**

(suing on behalf of Alicia Noah, minor).....**CLAIMANT**

**AND**

**LAWRENCE CHIKWATI**.....**1<sup>ST</sup> DEFENDANT**

**PRIME INSURANCE COMPANY LIMITED**.....**2<sup>ND</sup> DEFENDANT**

<b>CORAM:</b>	<b>C MANDALA:</b>	<b>ASSISTANT REGISTRAR</b>
	I Maluza:	Counsel for Claimant of Chris & Legal
	A Kaonga:	Counsel for Defendants of Wilkinson & Associates
	Kumwenda:	Court Clerk

**ASSESSMENT OF DAMAGES**

**CM MANDALA, AR:**

**INTRODUCTION AND BACKGROUND**

This is an order for assessment of damages pursuant to a Consent Order on Liability entered on 30<sup>th</sup> March 2020. The Defendants are liable for: damages for pain and suffering, damages for loss of amenities of life, damages for deformity/disfigurement, general damages for incapacitation of body parts, special damages on medical and police reports, and costs of the action. The hearing on Assessment of Damages was conducted on 11<sup>th</sup> May 2021.

This matter arose from a road accident that occurred on 4<sup>th</sup> April 2019 when the 1<sup>st</sup> Defendant was driving from Salima to Lilongwe and upon arrival at Chankhungu FP School campus, hit the Claimant (a minor) who was crossing the road along the pedestrian crossing.

**EVIDENCE**

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

1. My name is **BERNARD POLEPOLE**.
2. I am the Claimant in this matter; suing on behalf of my granddaughter Alicia Noah (a minor) and of full age, as such I am competent to make this statement. See attached copy of my Identity Card.
3. I verily recall on the 4<sup>th</sup> of April, 2019 I received a call that my granddaughter was involved in a road accident near Chankhungu FP School campus.
4. She was taken to Chankhungu Clinic, she was unconscious, she had some head injuries, her shoulders were not in place and leg looked broken
5. She was referred to Dowa District Hospital where she was admitted for three weeks.
6. Details of her treatment are indicated in the medical report marked **BPI**.

7. Some costs were incurred when the minor was admitted, the costs were about K55,000 (fifty-five thousand kwacha).
8. Due to the accident the minor was crying at night, she could not play as she used to and she was not able to move her neck properly.
9. Further, medical assessment proved that the degree of deformity was at 8%.
10. It is in light of the foregoing, and it is only just and fair that the minor should be compensated for pain and suffering, deformity, loss of amenities of life, reimbursement of costs incurred in obtaining medical and police reports and the costs of the within action.
11. I make this statement knowing that it will be used as evidence in the within matter and verify believing the contents to be true to the best of my knowledge.

In viva voce, the Claimant told the Court that his granddaughter had serious head injuries but also had hand injuries. Although she has healed physically, the Claimant notes that her behaviour has changed. At times, she cries uncontrollably without explanation as to why she is crying and has become disobedient.

In cross examination, the Claimant told the Court that he lives with his granddaughter. Her parents live in the Bunda area, so she lives with the Claimant. She has lived with the Claimant for a long time now. The Claimant confirmed that his granddaughter sustained head injuries and a bruise on the arm. He confirmed that the child cries sometimes. He further confirmed that he used K55,000.00 when the child was hospitalized but didn't have a receipt to prove the amount he spent. He confirmed that his granddaughter lost consciousness. When they went to the hospital, the child had a health passport. He concluded with confirmation that his granddaughter is now able to go to school.

#### 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.<sup>1</sup>

Perfect compensation for a Claimant is unlikely. The Claimant, however, is entitled to fair and adequate compensation.<sup>2</sup> 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*<sup>3</sup> 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*<sup>4</sup>, 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)*

<sup>1</sup> 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).

<sup>2</sup> *British Commission v Gourley* (1956) AC 185.

<sup>3</sup> *West v Shepherd* (1964) AC 326 at 346.

<sup>4</sup> [1996] MLR 486.

*v Mrs Hilda Chingwalu*,<sup>5</sup> 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

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 K8,015,000.00 for pain and suffering, loss of amenities of life, and disfigurement and incapacitation of body parts. Counsel cited the following comparable awards to support their argument:

- **Paul Matsimbe v Patricia Kapachira and another** Civil Cause Number 585 of 2009 where the Claimant was awarded K2,000,000.00 for a wound on the left leg, cuts on the finger and lower lip. The award was made on 26<sup>th</sup> June 2010.
- **Muhammad Mpulula et al v B Ali et al** Personal Injury Cause Number 351 of 2013 where the Claimants was awarded K3,000,000.00 each for multiple cuts on the chest, ribs, right arm, bruises and swollen thigh. The award was made on 12<sup>th</sup> February 2014.
- **Mauzu v Batson et al** Personal Injury Cause Number 77 of 2014 where the Claimant was awarded K800,000.00 as damages for disfigurement. The award was made on 16<sup>th</sup> June, 2017.
- **Chikumbutso Kamowa v Jimmy Chuiku & General Alliance Insurance Company Limited** Civil Cause Number 699 of 2018 where the Claimant was awarded K2,000,000.00 as damages for deformity. The award was made on 27<sup>th</sup> September 2019.

#### 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 attracts awards totalling K1,500,000.00 for pain and suffering, loss of amenities of life and disfigurement. Counsel cited the following comparable awards to support their argument:

- **Wyson Mapira v Prime Insurance Company Limited** Personal Injury Cause Number 820 of 2015 where the Claimant was awarded K1,000,000.00 for pain and suffering, loss of amenities of life and disfigurement for a fractured left clavicle, chest pains and soft tissue injuries. The award was made on 21<sup>st</sup> November 2017.
- **Blessings Mpando (Minor suing through his mother and litigation guardian, Rhoda Makwiti) v Deborah Ngalande and Reunion Insurance Company Limited** Personal Injury Cause Number 64 of 2018 where the Claimant was awarded K2,413,346.00 for a fracture of the clavicle, cut wound on the right eye, laceration on the forehead and chin, multiple bruises on the elbow joints and lowerlegs and blunt chest injury. The Claimant was admitted for 4 days. The award was made on 24<sup>th</sup> October 2018.
- **Thomas Panjira v Prime Insurance Company Limited** Civil Cause Number 1165 of 2010 where the Claimant was awarded K700,000.00 for multiple deep cut wounds and lacerations; one on the head and others on the knee joint and right hand; and scars. The award was made on 29<sup>th</sup> May 2015.

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<sup>5</sup> Quoting from *HQ Chidule v Medi MSCA* 12 of 1993.

## COMPENSATION

The Claimant's granddaughter lost consciousness upon impact, sustained head, and hand injuries, and was admitted at Dowa District Hospital for three weeks.

### *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 witness statement recounts the injuries as follows:

*'She was taken to Chankhungu Clinic, she was unconscious, she had some head injuries, her shoulders were not in place and leg looked broken*

*She was referred to Dowa District Hospital where she was admitted for three weeks.'*

The Claimant further confirmed in viva voce and cross examination that his granddaughter sustained head injuries and bruises on the arm.

The court had recourse to comparable awards cited by both Counsel of K2,000,000.00, K3,000,000.00, K2,000,000.00, K1,000,000.00, K2,413,346.00, and K700,000.00– these were awards made in 2010, 2014, 2019, 2017, 2018, and 2015 respectively. See: ***Paul Matsimbe v Patricia Kapachira and another, Muhammad Mpulula et al v B Ali et al, Mauzu v Batson et al, Chikumbutso Kamowa v Jimmy Chuiku & General Alliance Insurance Company Limited, Wyson Mapira v Prime Insurance Company Limited, Blessings Mpando (Minor suing through his mother and litigation guardian, Rhoda Makwiti) v Deborah Ngalande and Reunion Insurance Company Limited, and Thomas Panjira v Prime Insurance Company Limited*** (cited above).

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.

As a result of the accident, the Claimant notes that his granddaughter's behaviour has changed. At times, she cries uncontrollably without explanation as to why she is crying and has become disobedient.

The court had recourse to comparable awards cited by both Counsel of K2,000,000.00, K3,000,000.00, K2,000,000.00, K1,000,000.00, K2,413,346.00, and K700,000.00– these were awards made in 2010, 2014, 2019, 2017, 2018, and 2015 respectively. See: ***Paul Matsimbe v Patricia Kapachira and another, Muhammad Mpulula et al v B Ali et al, Mauzu v Batson et al, Chikumbutso Kamowa v Jimmy Chuiku & General Alliance Insurance Company Limited, Wyson Mapira v Prime Insurance Company Limited, Blessings Mpando (Minor suing through his mother and litigation guardian, Rhoda Makwiti) v Deborah Ngalande and Reunion Insurance Company Limited, and Thomas Panjira v Prime Insurance Company Limited*** (cited above).

Based on the foregoing discussion, this court awards the sum of K1,500,000.00 as damages for loss of amenities of life.

#### *Disfigurement/Deformity and Incapacitation of Body Parts*

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’s granddaughter is young and will have to live with her impediments for a very long time. Following the sentiments made in the **James Chaika Case** and considering the devaluation of the Kwacha since 2018, the Claimant is hereby awarded K750,000.00 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. 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 special damages as reimbursement of the cost of obtaining medical and police reports. Though the Claimant specifically claimed special damages, they were not proved during trial and/or submissions. 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; K1,500,000.00 for loss of amenities of life; K750,000.00 for disfigurement, and K0 as special damages and costs of the action (to be taxed by the court). **The Claimant’s total award is therefore K4,750,000.00 (four million seven hundred fifty thousand kwacha).**

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 28<sup>th</sup> day of May 2021 at the High Court, Civil Division, Lilongwe.



C Mandala

**ASSISTANT REGISTRAR**