



The Judiciary

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CAUSE NUMBER 809 OF 2011

Between

ANITA NANCHINGACLAIMANT

-and-

REUNION INSURANCE COMPANY LIMITED..... DEFENDANT

CORAM: A.J. Banda, Assistant Registrar

Mr. C. Kalua, for the Claimant

Mr. M M'meta, for the Defendant

Ms. Madalitso Galafa, Clerk/ Official Interpreter

Banda

ORDER ON ASSESSMENT OF DAMAGES

Introduction

The claimant was involved in a road accident on 27th March, 2011. The motor vehicle she had boarded, registration number SA 4911 Toyota Camry Saloon, hit another motor vehicle. The

claimant sustained injuries. She commenced an action against the defendant, an insurer of motor vehicle registration number SA 4911 Toyota Camry Saloon. The Supreme Court of Appeal entered judgment on liability in favour of the claimant and remitted the matter to the Registrar for assessment of damages. This is an order on the assessment of damages.

Evidence

I heard evidence from both parties and went through the written submissions by counsel for both parties. The claimant testified on her own behalf and tendered two medical reports. One from Queen Elizabeth Central Hospital (marked **AN1**) and another one from Beit Cure International Hospital (marked **AN2**). The claimant stated that she sustained a fracture of the left femur, head injury and bruises on the face. As a result of these injuries, the claimant was admitted at Queen Elizabeth Central Hospital from 27th March, 2011 to 7th April, 2011. After her discharge, she attended Queen Elizabeth Central Hospital as an outpatient. Claimant's **AN1** put degree of permanent incapacity at 30% while **AN2** puts at 5%.

Analysis

It is clear from the evidence that the claimant sustained injuries. However, it is the degree of the injury that seems to be in dispute. Mr. M'meta, counsel for the defendant is submits that the injuries were not as serious as put by the claimant. In written submission, counsel has submitted that the evidence of the author of **AN1**, Mr. Frank Chilingulo who was called by the defence should be treated with caution as he could not remember the graphic details of the facts surrounding **AN1**. Counsel for the defendant also submitted that **AN1** is unreliable and that this court should not attach weight to its contents. I agree with counsel on the point that the witness called as a medical expert who produced the medical report gave evidence that is wholly unreliable.

There are many pointers to the unreliability of the evidence of the medical expert. I doubt whether the so-called medical practitioner saw Anita Nanchinga, the claimant here-in at all. He told the court when brought by a subpoena that he saw a male Anita Nanchinga. Our claimant is female. The medical report has further evidence that was manifestly discredited by cross examination. This is the issue of the leg of the claimant shortening by 10 cm. this cannot be true at all. I saw the claimant. Even though I had not seen her gait before the accident, she walks fairly well balanced on both legs after recovery from the accident injuries such that she cannot have one leg shorter by 10 cm. I am very doubtful the medical practitioner who produced Exhibit AN 1 saw the patient at all. This is a serious ethical issue in the medical profession. It is bad for the insurance industries

that has honesty and trust as its oil such that anything to the contrary would cause the industry to crumble and deserving claimants would face hurdles to be compensated.

There is more evidence though that I am convinced that the claimant suffered a broken femur and that she had a metal inserted to aid the healing. I am also convinced that she had bruises on the face. Counsel for the claimant submits exhibit AN2, a report by an expert of Beit Cure does not cover all the pain and suffering that the claimant endured. On the other hand, counsel for the defendant submits that AN2 vindicates that the fracture was less severe. I agree with counsel for the claimant on the degree of the pain and suffering on proper analysis of the claimant's testimony and AN2 given below. What is important now is, is no doubt, that both parties are in agreement that the claimant sustained bold injuries as a result of an accident caused by the defendant's insured. The claimant sued the defendant based on an insurance policy which was tendered by the defendant as part of its evidence on the amount payable to the claimant.

Damages are the remedy that is open to a victim of the wrongful act of another. Courts do award damages not to punish the defendant but to fully compensate the claimant of all the losses she has suffered. In the case of **George Kankhuni v. Shire Buslines Ltd, Civil Case Number 1905 of 2002**, Katsala, J stated as follows:

“The law demands that the plaintiff [now called the Claimant], as far as money can do it, be put in the same position as if he has not suffered the loss. This is what is referred to as *restitution in intergrum*.”

It is not easy to quantify damages for losses that are not monetary in nature such as personal injuries. Courts as such use comparable cases as a guide to the quantification of applicable damages, without losing sight of particularities in the individual case that the court is dealing with. See **Chipeta v. Dwangwa Sugar Corporation, Civil Cause No. 345 of 1998, High Court, Principal Registry (unreported)**. The court will also consider factors such as passage of time since a particular comparable award was made, as well as currency fluctuations within the period between the case at hand and the comparable one- **Hon. Kennedy Kuntenga v. Attorney General, Civil Cause No. 2002 of 2002, High Court, Principal Registry, (unreported)**.

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- Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents (Butterworths, 1985) p8.

Loss of Amenities of Life

Damages are paid under the head of loss of amenities of life to compensate the claimant's deprivation of the pleasures of life, which amounts to substantial loss, whether the claimant is aware or not of that loss. See **City of Blantyre v. Sagawa [1993] 16(1) MLR 67 (SCA)**; Kemp and Kemp, The Quantum of damages, Vol .1(2nd Ed)., 1961, p.624.2

Disfigurement

Damages are paid under the head of disfigurement for the change in the physical form of a person injured either as a result of the impact of the injury or its treatment, such as a scar coming in as a result of surgical operation necessitated by the injury. It is a change in appearance but it is capable of limiting a person from doing certain things as was observed by the court in the case of **Austin Julius v. Rasika Gunawardena and General Alliance Limited, Personal Injury Cause Number 316 of 2014.**

This Case and Comparable Cases

I have looked at both the cases cited by the claimant and the defendant for purposes of guiding quantum. It is clear that under all heads as pleaded the damages would well go beyond the K5,000,000.00 policy limit. I reproduce the relevant part of the policy below:

The policy of insurance begins with this statement:

'For the sections of the policy applicable to this insurance refer to "insurance provided" in the policy schedule as amended by any endorsement'

In the schedule under insurance provided is '**Comp**' for Comprehensive, which mean all sections of the policy are operative. It also indicates endorsements 13 and 14. Therefore, all endorsements from 1 to 12, which include provisions on passengers, are not applicable. When I follow the policy to its last page where endorsements 13 and 14 are, it shows that endorsements 13 and 14 are not relevant to this action in general and assessment of damages in particular.

Section 11

LIABILITY TO THIRD PARTIES

1. The company will subject to the limits of liability and the jurisdiction clause indemnify the insured against all sums including claimant's costs and expenses which the insured shall become legally liable to pay in respect of:
 - a) Death of or bodily injury to any person where such death or injury arises out of an accident caused by or in connection with
 - (i) the motor vehicle.

LIMITS OF LIABILITY

2. Section 11-1(a) and 2(a) Liability to third parties
-death or bodily injury in respect of any one claim- K5,000,000.

In relation to insurance under the **Road Traffic Act**, Tembo A.J in **Chikwatu v Pearl Assurance Co. Ltd [1994] MLR 31** at 34 stated that:

“...the plaintiff would only be allowed to recover from the insurer **any amount, not exceeding the amount covered by the policy** (emphasis supplied by me), for which the person insured is liable to the plaintiff”

It is clear from the claimant's testimony and **AN2** that the claimant suffered bodily injury as provided in the insurance policy. Therefore, she is entitled to compensation for the bodily injury of an amount not exceeding K5,000,000.00. As to the actual amount, I have to consider the pain and suffering caused by the bodily injury. I have studied all the cases cited by both counsel in their skeleton arguments. In the present case, it is clear from the testimony of the claimant that she endured severe pain soon after the accident and she still have to live with slight pain for the rest of her life. **AN2** also indicates that the symptoms of the injury are still there. It is stated in **AN2** that current symptoms can be relieved with physiotherapy. I have observed from **AN2** that symptoms of the bodily injury are still persisting seven years after the bodily injury. That is why I stated above that the claimant's injury was severe as submitted by counsel for the claimant. In fact, she was subjected to a surgery during which the metal ware was inserted mentioned in **AN2**. This is evidenced by surgical scars on her left thigh. Moreover, she was in hospital for a period of 11 days and she continued attending to hospital as outpatient for a considerable period of time.

In the present case, I find the bodily injury severe and therefore, make an award of **K5,000,000.00** to the claimant for the bodily injury (under all heads) she suffered in accordance with the

defendant's limit of liability under the policy. The defendant is also ordered to pay costs of the proceedings.

Made on this 3rd day of December, 2018.



Austin Jesse Banda

ASSISTANT REGISTRAR