IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CASE NO. 232 OF 1997

BETWEEN

S.M.G CHIMALIRO……PLAINTIFF

-AND-

SOUTHERN BOTTLERS LTD……DEFENDANT

CORAM: MANDA**, SENIOR DEPUTY REGISTRAR**

Chimaliro (in person)

Kapezi for the defendant

ORDER ON ASSESSMENT OF DAMAGES

This matter came for assessment of damages on the 13th day of December 2006, following the judgement of Hon. Justice I.C. Kamanga, dated 6th October 2006, in which the judge found the defendants liable for negligently causing the plaintiff personal injury. The Judge also awarded the plaintiff the costs of the action.

The simple facts of this case are that on or about the 13th day of March 1997, the plaintiff bought and drank a fanta, manufactured by the defendant company. Upon drinking some of the fanta, the plaintiff felt pain on both her tongue and throat which made her examine the contents of the bottle and noting that it was contaminated with some black substances, whose chemical composition was never ascertained. Nevertheless, after the taking the fanta the plaintiff was taken ill and had to go to the casualty ward at the Kamuzu Central Hospital for treatment. The treatment involved a washout of the plaintiff's stomach (a procedure described as gastric

ravage) and providing her with drugs to stop the stomach aches and diarrhea that the plaintiff was experiencing. During the assessment hearing, it was the plaintiff's evidence that to this day she has to take medication for her stomach aches and diarrhea. Indeed it is in this regard that the medical personnel assessed her permanent incapacitation to be at 8%. Indeed it is in this regard that this court shall proceed with the assessment of damages.

At the time of proceeding with this ruling, the defence had not filed their written submissions as promised as such the court proceeded to consider the plaintiff's submission as well as the law on the subject. Further, due to the fact that the plaintiff appeared in person, I thought that the ruling should be as detailed as possible as I did set out my riling as follows:

It has been stated that in all but a few exceptional cases, the victim of personal injury suffers two distinct kinds of damage which may be classified as pecuniary and non-pecuniary. By pecuniary damage is meant that which is susceptible to direct translation into money terms and includes such matters as loss of earnings, actual and prospective, and out-of-pocket expenses, while non-pecuniary damage includes such immeasurable elements as pain and suffering and loss of amenity or enjoyment of life. In respect of the former, the court usually seeks to achieve *restitution in integrum,* (see ***Livingstone v Raywards Coal Co.*** (1880) 5 App. Cas. 25, 39), while for the latter courts do award fair compensation or as per Harman L.J, provide the plaintiff with some solace for his/ her misfortunes (see ***Warren v King*** [1964] 1 W.L.R 1, 10).

Whilst noting the principles under which, damages are awarded, the issue arises as to the extent to which losses pleaded by the plaintiff must be certain and how account is taken of future contingencies. In this regard a distinction is first drawn between the question of degree of proof required in relation to the losses pleaded in the statement of claim and the question whether losses which depend on future contingencies may be pleaded and how they are to be assessed. As regards

the former the general principle was stated by Bowen L.J. in ***Ratcliffe v Evans*** [1892] 2 Q.B. 524, 532-533, in the following terms:

> "the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on….as is reasonable, having regard to the circumstances and that nature of the acts themselves by which the damage is done."

In this regard it has been held that special damages such as expenses must be pleaded and proved exactly, and indeed where special damages have not been pleaded and proved the claim is deemed not to have been proved and the same is dismissed (see ***Likaku v Mponda*** 11 MLR 411 and ***Cheeseman v Bowaters United Kingdom Paper Mills Ltd.*** [1971] 1 W.L.R. 1773). On the other hand, non-pecuniary losses such as pain and suffering are inferred or presumed and little is required by way of evidence. However financial elements in general damages, such as loss of earning capacity, will not be presumed, and thus should be supported by evidence (see ***Domsalla v Barr*** [1969] 1. W.L.R. 630).

In the present instance the court did award the plaintiff damages for the trauma that she had suffered and this was based on her claim for damages for pain and suffering. In her submissions however, the plaintiff asked this court to consider awarding her damages for pecuniary loss, pain and suffering, personal injuries, medical expenses and what she referred to as bills as disbursements. The latter category apparently include a deposit paid to Messrs Likongwe and Company, payment for an interim Bill of Costs, filing fees, transport and accommodation costs and other expenses that she incurred during this trial. In this regard, it was the observation of the court that apart from the claim for damages for personal injuries (which are awarded in terms of pain and suffering),

the other claims submitted by the plaintiff were never pleaded as such this court does not have any jurisdiction to make a finding on those issues (see ***Likaku v Mponda*** (supra)). Indeed on this note alone, this court was of the view that the claims should be dismissed. Nevertheless, and in view of the circumstances surrounding the case, the court proceeded to address each of the items pleaded by the plaintiff in the same order that she presented them.

The first issue that the plaintiff presented was regarding her claim for pecuniary loss. In this regard, it was the plaintiff's submission that her life expectancy was reduced after taking the contaminated fanta, such that it was her belief that she should be compensated for the 21 years that she has left until she retires. The plaintiff's argument in this regard was based on the fact of her 8% incapacitation, which I must add was assessed in 1998. During her testimony, there was no evidence from the plaintiff as to whether there has been any progression (over the past 9 years or so) in her level of incapacitation to such an extent that it had now become life threatening. Indeed there was no medical evidence as to how long the plaintiff has to live; in fact all what the plaintiff did was to express her anxieties, which I must say does not constitute evidence of her loss of earning capacity to warrant her to be awarded pecuniary damages. At the same time, it was the considered opinion of this court that incapacitation of 8% can not be constituted as life threatening and this is of course also demonstrated by the fact that for the past 9 years, the plaintiff has not lost her job and that she still continues to earn a living. Then there is also the issue of certainty regarding the point at which the plaintiff can be medically deemed to be no longer able to perform her functions as a magistrate. From the plaintiff's submissions, there seems to be a suggestion the court should award her pecuniary damages so that she can then proceed on retirement, so in essence it becomes the plaintiff's choice to retire and not because she has been medically declared unfit to work. Indeed I am inclined to hold this view because whilst as the medical report (Exp9), stated on 24th April 1997, that the plaintiff could no

longer perform her job as a senior court reporter, the plaintiff continued to work and was appointed a magistrate. I would want to believe that if the plaintiff's incapacitation was so severe, then she should have retired in 1997 on medical grounds, which act I would also like to believe would have us the claim for loss of earning capacity some certainty. As the situation is however, it is the finding of this court that the plaintiff still has her earning capacity and hence the claim for pecuniary loss herby fails.

Of course I should state that a court may properly award damages in respect of anxiety about a reduction in a plaintiff's expectation of life following injuries received as a result of negligence, provided the anxiety is not unreasonable and does not result from the plaintiff's own lack of fortitude or resolution (see ***Gunde v Msiska*** 1961-63 ALR Mal. 465, 475). However, as per the case of ***Davies v Smith*** (1958) Kemp & Kemp, 1 (referred in the ***Gunde v Msiska*** case) it is a requirement that there must be evidence that the plaintiff's expectation of life has in some way been affected by the injury. As already noted, in this instance the plaintiff never proffered such evidence.

Having made the above observations I now turn to the plaintiff's claim for "personal injuries at 8 percent incapacity." Indeed I must say that in this respect that in an action based on the tort of negligence resulting in physical injury, as in the present case, damages awarded in such actions are for pain, suffering, and loss of amenities of life and also, at times, loss of earning capacity and life expectation (as per in **McGregor on Damages, 15th Edition, p. 855,**). Damages are not awarded separately for the personal injury and then separately for pain and suffering. Indeed it is in view of this that I will address the claim for personal injury in the same context as the claims for pain and suffering. In this regard, it is the finding of this court, having regard to the facts of this case that the plaintiff should be awarded damages for pain and suffering.

In addressing the damages for pain and suffering, it should always be borne in mind that as these aspects have no monetary value, the awards made have generally been described as being conventional. That however does not mean that the awards made should be at the whims of the assessor. Indeed courts try to achieve general uniformity and consistency by making awards within a wide spectrum in broadly similar cases. (See **Wright v British Railway Board [1938] A.C. 1173 AT 1177).** In essence then, the purpose of awarding damages is to compensate the injured party as nearly as possible in monetary terms. Regarding the present circumstances, there has been any recent decisions made by the courts, however looking at the broad spectrum the awards made in the recent personal injury claims, and bearing in mind the plaintiff's level of permanent incapacity and the inconvenience that the plaintiff continues to suffer, as well as the duty of care that the defendants owed the plaintiff, I thought that an award of K700 000 would be fair compensation.

Finally, there is the plaintiff's claim for medical expenses. It was held In ***Shearman v Folland*** [1950] 2 K.B. 43, that a plaintiff may recover, as part of his special damages, any medical or similar expenses, which he has reasonably incurred as a result of his injury, and that his prospective expenses should be estimated as accurately as possible and awarded as part of his general damages. However, the expenses must be reasonable in the sense that the goods or services paid for are reasonably necessary to ameliorate the plaintiff's condition and that the cost should not be excessive (see ***Cunningham v Harrison*** [1973] 1 Q.B. 942 as compared with ***Pitt v Jackson*** [1939] 1 All E.R. 129). Of course it is noted that medical expenses per se have to be specifically pleaded, without which an award can not be made by a court. In this instance there were no pleadings regarding the medical expenses. However, considering the fact that the plaintiff continues (and shall continue for the rest of her life) to buy medication to alleviate her discomfort, it would have been difficult for her to predict how much she would have had to spend on medication, at the

time of filing the statement of claim. Indeed I would want to believe that the purchase of the drugs would have to be considered as prospective expenses and that should be awarded as part of general damages for pain and suffering. In this regard, it was the plaintiff's evidence that she has been spending an average of K1 000 per month to buy milk and magnesium trisilicate to alleviate her stomach problems, which translates to K108, 000, which I would believe is reasonable and I would award her the same. At the same time the plaintiff also informed the court that she will still need to continue to buy the medication for the remainder of her natural life and that the current cost of the medication is now at K1 640 per month (as per Exp2). Since this involves the plaintiff's future incapacity, the damages would have to be calculated based on the multiplier method, with regard indeed being had to inflation (see ***Cookson v Knowles*** [1979] A.C. 556).

The starting point for the multiplier is the number of years during which the loss, represented by a multiplicand, is likely to endure, and thus typically, the remaining period of the plaintiff's working life. Indeed, it was held by the House of Lords in ***Pickett v British Rail Engineering Ltd*** [1980] A.C. 136 that damages are to be awarded for the whole period of the plaintiff's pre-accident expectancy of working life expectancy, with a deduction only for the living expenses which the plaintiff would have incurred during the "lost" years. The figure derived for the working life expectancy is reduced to account not only for the elements of uncertainty contained in the prediction (for example normal sickness, redundancy and unemployment), but more importantly also for the fact that the plaintiff a lump sum which she/he is expected to invest (as per ***Taylor v O'Connor*** [1971] A.C. 115). In the present instance the plaintiff told the court that she has 21 years until she retires and asked the court to award her damages to make which will make provision for her medication for those years. However, it must be noted that the plaintiff is currently 49 years old and that just like everyone she faces life's uncertainties. At the same time, the court did also take into

account the fact that the plaintiff will get a lump sum. Thus having taken into account all these factors, the court adopts a multiplicand of 12. In this regard then the plaintiff's prospective expenses will be calculated at K1640X12X12, which comes up to K236, 160, taking into account inflation, which is currently at 12%, the total sum comes to K264 499. 20, the court awards to the plaintiff.

In the final analysis then the plaintiff is awarded the total sum of K1, 072, 499. 00, as general damages for her pain and suffering, incurred expenses and prospective expenses. The plaintiff is also awarded costs for the assessment hearing. The issue of costs and disbursements, which the plaintiff also raised in her submissions for the assessment of damages, will be referred to a taxing master for taxation, if not agreed.

Made in Chambers this……day of……2007

K.T. MANDA
SENIOR DEPUTY REGISTRAR