THE ATTORNEY-GENERAL (1983) Z.R. 66 (S.C.)

SUPREME COURT
NGULUBE, D.C.J., MUWO, J.S. AND BWEUPE, AG. J.S.
4TH NOVEMBER 1982 AND 5TH JANUARY, 1983
(S.C.Z. JUDGMENT NO.1 OF 1983)
APPEAL NO.11 OF 1981

Flynote
Civil Procedure - Appeal - Fresh evidence - Ground for interference with lower courts' finding.
Damages - Legitimate head of claim - Future care.
Damages - Legitimate head of claim - Future medical expenses.

p67

Damages - Legitimate head of claim - Pain and suffering, and lose of amenities - Wife's earnings - Consideration of.
Damages - Legitimate head of claim - Loss of future earnings - Multiplicand and multiplier to be used - Manner of computation.
Damages - Interest - Rate of - Principles applicable.
Damages - Assessment of - Size of award - Principles applicable - Merits of case.

Headnote
The appellant, an expatriate, was employed on a contractual basis by RDC. He was involved in a car accident, arising from the negligence of the defendant's servant, and sustained severe injuries which rendered him permanently disabled to a degree of seventy-five per cent. On appeal against the damages awarded by the deputy registrar:

Held:
(i) The introduction, by consent, of fresh evidence is a valid reason for interfering, although normally the appeal court will not interfere with the lower courts finding even if that is the wish of both parties.
(ii) The cost of future care is a legitimate head of claim which can only be assessed when cogent evidence is submitted accordingly.
(iii) An award of K3,000 for future medical expenses is a reasonable sum.
(iv) In assessing pain, suffering and loss of amenities the adopting of a modest figure should strike a reasonable balance between a too low and a too high figure; and the wife's pre-trial loss of earnings, is a loss of amenity to be taken into account in assessing the damages.
(v) In assessing loss of future earnings, the correct multiplicand is that which accommodates future prospects on the basis of the degree of disability and taking in to account tax deductions.
(vi) Where there is no evidence adduced as to the tax laws applicable in the appellant's country of residence then Zambian tax law may be applicable.
(vii) In computing a multiplier, the final award must fully compensate the plaintiff while taking into account all the relevant considerations and reasonable contingencies.
(viii) In calculating interest the court should take each case on its merits.

Cases cited:
(1) Flint v Lovell [1935] 1 K.B. 354.
(2) Kawimbe v Attorney-General (1974) Z.R. 244.

(3) Zambia Publishing Co. Ltd. v Kakungu (1982) Z.R. 167.
(4) Lim Poh Choo v Camden Islington Area Health Authority [1980]A.C. 174.
(5) Daly v General Steam Navigation Co. Ltd. [1981] 1 W.L.R. 120.
(6) Corrigan v Tiger Ltd. and Anor (1981) Z.R 60.
(7) H. West and Son v Shephard [1964] A.C. 326.
(8) Wise v Kaye [1962] 1 Q.B. 638.
(9) Mulholland v Mitchell [1971] A.C .666.
(10) Burke v Attorney-General 1970/HP/44 (unreported).
(11) Mulenga v Rucom Industries Ltd. (1978) Z.R. 21.
(12) United Bus Co. of Zambia Ltd. v Shanzi (1977) Z.R .397. 10
(13) Jefford v Gee [1970] 1 All E.R. 1202; 2 Q.B. 130.
(14) Pickett v British Rail Engineering Ltd. [1980] A.C. 136.
(15) Birkett v Hayes, Times, 19th March, 1982.
(16) Cookson v Knowles [1977] Q.B. 913.

Legislation referred to:
Law Reform (Miscellaneous Provisions) Act, Cap. 74, s. 4.

For the appellant: A.O.R. Mitchley, Sooly Patel, Hamir and Lawrence.
For the respondent: A.M. Kasonde, Principal State Advocate.

Judgment
NGULUBE, DC.J.:

For convenience I will continue to refer to the appellant, the plaintiff in the action, as the plaintiff, and to the respondent as the defendant. The plaintiff: was born in 1940. He is an Australian and has a degree in agriculture. In 1974 the Rural Development Corporation offered the plaintiff a second contract to work for them from 1st January, 1974, to 31st December, 1976, as Head of Planning and Development Division at a salary of K8,000 per annum. He was receiving car allowance of K720. He was provided with furnished accommodation at a nominal rental of K38.50 per month. Had his employers not so accommodated him the plaintiff would have received, under clause 9 of the contract, K1,600 per annum as housing allowance. The plaintiff is married and has two young daughters who must now be aged eight and a half years and seven years approximately. They were two and a half years and one year old in November, 1976, according to the evidence on record. Prior to the accident which has given rise to this case, the plaintiff enjoyed a variety of hobbies such as athletics, cricket, soccer, sailing, tennis, swimming and dancing. He was also a lay preacher in his church.

On 22nd March, 1974, the plaintiff was injured in a road traffic accident caused by the negligence

of the defendant's servant or agent. He sustained serious injuries. A medical report dated 23rd January, 1975, summarised his position as follows:

> "The above-named was admitted to this hospital under my care on 22nd March, 1974, following a road accident in which he sustained the following injuries:
>
> (1) Fracture of the base of the skull with associated injury of the 1st, 7th, 8th, 9th, 11th and 12th cranial nerves. As a consequence of the nerve injuries he suffers from;

p69

> (a) Complete absence of the sense of smell;
> (b) Immobile facial expression and impairment of the sense of taste;
> (c) Marked impairment of hearing and dizziness;
> (d) Difficulty with speech, eating and swallowing.
>
> Brain injury has been followed by some loss of memory.
>
> (2) Compression of the cervical spine. Whilst there is no evidence of fracture, he suffers some constant pain due to nerve root compression and muscle injury.
> (3) Fracture of the right 10th, 11th and 12th ribs.
> (4) Fracture of the proximal phalanx of the right little finger.
> (5) Fracture of the right side of the pelvis.
> (6) Contusion of the right shoulder.
> (7) Loss of two molar teeth in the right upper jaw.
> (8) Laceration of the right elbow, 7 cm requiring six (6) sutures.
> (9) Laceration right ear, 4 cm long, requiring five (5) sutures.
> (10) Laceration left cheek, 5 cm long, requiring seven (7) sutures.
>
> Following the injury he was deeply shocked and gravely ill. He slowly recovered consciousness but has improved only slowly. He complains of constant severe pain in the neck, where movement is restricted to one-quarter of normal range. He is now able to walk with a stick but has a residual limp. His memory problems have not improved, and it is also unlikely that there will be much improvement in his loss of smell or taste, his impairment of hearing, or his difficulties with speech, eating and swallowing. The lacerations have healed, but he has some stiffness of the right little finger.
>
> As a further consequence of his injuries it is most unlikely that he will be able to resume his full duties in Agriculture. Travelling on rough roads will further damage his spine, and it is therefore almost certain that he will have to change his occupation and undertake different work within his physical capabilities."

The plaintiff's degree of permanent disability was later estimated to be seventy-five per cent, but there was no diminution of his life expectancy. He was practically unemployable. He could no longer continue in his job though his employers kept him on compassionate grounds. It was for this reason that there was no claim for pre-trial loss of earnings. From the medical reports and other evidence which was placed before the court below, it was established that the plaintiff continued to

suffer constant severe pain in the neck where movement was restricted to one-quarter of normal range. He had to consume an extraordinarily large quantity of drugs each month in order to dull the pain. He had a residual limp but could walk with a stick. His memory continued to be

p70

unreliable. There was no prospect of improvement in his loss of the sense of smell or taste. He became totally deaf in one ear and required a hearing aid in the other. He could no longer pursue his hobbies. The learned Deputy Registrar did observe, however, and as he was perfectly entitled to do, that the plaintiff was able to swallow and was able to exercise reasonable control over his facial expression.

The learned Deputy Registrar assessed the damages in this matter in November, 1976, and made the following awards:

		K
(1)	Cost of future care -	
	(a) For nursing	___
	(b) For medical attention	3,000.00
	(2) Pain and suffering and loss of amenities	8,000.00
	(3) Loss of future earnings	18,000.00
	(4) Special damages	660.75
	(5) Interest	2,050.00

With the exception of the amount for special damages about which we heard no complaints, both sides have appealed against the award in respect of each head of claim, including interest.

On behalf of the plaintiff, Mr Mitchley has advanced number of powerful arguments in favour of increasing the awards. On the opposite side Mr Kasonde has argued forcefully for reduction. Indeed, Mr Kasonde makes somewhat superflous observation that both he and his learned colleague are agreed that this court should interfere, but to totally different ends. Even though it be the wish of both sides that we interfere, this court normally calls to mind the principle that we will not reverse the court below on its findings as to the amount of damages unless it shown that the trial court has applied wrong principle or has misapprehended the facts or that the award was so high or so low as to be utterly unreasonable or an entirely erroneous estimate of the damages to which the plaintiff is entitled (*see*, for example, *Flint v Lovell* (1), *Kawimbe v The Attorney-General* (2) and *Zambia Publishing Co. Ltd v Kakungu* (3)). Quite apart from certain electors of principle and of arithmetic to which reference will shortly be made, we have in this case one additional ground for interfering, namely the introduction, by consent, of fresh evidence in the form of a medical report dated 5th March, 1982, on the plaintiff's latest situation. Whenever fresh evidence is allowed in by an appellate court which was not available to the court below, it follows that the appellate court itself must necessarily re-examine de novo the assessment made belong under the heads affected by such fresh evidence (*see* for instance, *Lim Poh Choo v Camden and Islington Area Health Authority* (4), here successive appellate courts revised the damages on this ground).

Cost of future care:

I propose to start with the claim for the cost of :future care. The evidence on this point showed that the plaintiff's wife had decided to

give up her K300 per month nursing job in order to look after the plaintiff. The evidence of the doctor was to the effect that the plaintiff would require some home nursing for the foreseeable future rather than forever but that while home nursing of a qualified nature would be better, it was not, so I apprehend, an absolute necessity. The latest medical report reveals that the plaintiff did not return to Australia as originally intimated to the court below. He is in fact in the United Kingdom where, to borrow some phrases from the latest medical report, he potters around with a stick, undertaking a little unpaid therapeutic activity for his own emotional and therapeutic benefit. His wife continues to provide some nursing help but has since undertaken considerable additional responsibilities due to her husband's disablement. I apprehend this to mean that our Mrs Miller is now the bread-winner and has, therefore, not continued to suffer the loss of her salary. I apprehend also that the plaintiff is no longer in need of constant home nursing.

It is accepted that the cost of future care is a legitimate head of claim (*see Lim Poh Choo* (4)), and that proper sum of damages falls to be estimated upon the basis that plaintiff in need of future care will resort to both the capital represented by the damages awarded, as well as the income therefrom in such a way that a plaintiff does not thereby receive more than he is fairly and properly entitled to *Lim Poh Choo* (4) suggests that the award be calculated on an annuity basis. Such calculation necessarily involves facts and figures. There was no evidence before the learned Deputy Registrar and none before this court upon which the nursing element in the cost of future care could be assessed. The evidence as it stands does not, in my opinion, support the submission made on behalf of the plaintiff that the wife's loss of salary at the rates payable in Australia could be evidence upon which to make an award under this head. Despite the lapse of five or six years after the assessment by the learned Deputy Registrar, there is still no evidence on the cost of care. Even the latest medical report is silent on this point. For the foregoing reasons I would uphold the conclusion reached by the learned Deputy Registrar, albeit on different grounds, and hold that there has been no cogent evidence upon which the cost of care could be assessed. It follows from this conclusion that I would not award any amount for home nursing under this head. I would, however, not disturb the award to the extent that it represented future medical expenses in the sum of K3,000, which the court below estimated to be reasonable sum with which the plaintiff can buy the large quantities of pain-killing drugs he has to take.

Mr Mitchley submits in the alternative that the financial sacrifice made by the plaintiff's wife while in Zambia should be considered as a proper factor to be taken into account for the purpose of re-assessing the award for pain and suffering, and loss of amenities. He relies on *Daly v General Steam Navigation Co. Ltd* (5). In that case a husband gave up his part-time earnings in order to devote the time that would have been spent on the part-time job to help his injured wife. The Court of Appeal in England adopted an approach whereby the husband's lost earnings were applied to increase the sum awarded to the wife for pain and suffering,

p72

and loss of amenities. The husband's loss was considered to be a relevant factor in assessing the plaintiff's damages for her future, as well as pre-trial partial loss of housekeeping capacity. The principle in the *Daly* case (5) commends itself to me and I would accordingly make an allowance for Mrs Miller's pre-trial loss of earnings as a loss by the plaintiff of the amenity and pleasure of having one's working wife contribute to the matrimonial treasury. I must stress, however, that the proposed adjustment can only relate to the earnings lost up to the date of the judgment in the court below .

Pain and suffering, and loss of amenities:

I now turn to the award for pain and suffering, and loss of amenities. Mr Mitchley submits that the sum of K8,000 is totally inadequate having regard to all the circumstances of this ease. The plaintiff's injuries were serious and their permanent effect devastating. He submits that this particular plaintiff's personal circumstances and standard of living entitled him to a substantial sum and that K8,000 is not a substantial sum. He has referred us to a number of authorities, including *Norman Albert Corrigan v Tiger Limited and Another* (6), in which this court upheld an award of K35,000 under their head. He has also referred us to a number of English decisions, notably the case of Lim Poh Choo (4) already referred to, *H.West Son v Shepherd* (7), *Wise v Kaye* (8) and *Mulholland v Mitchell* (9). The plaintiffs in those cases, I think, suffered more serious injuries than the plaintiff in this case. The English cases, in particular, concerned severe brain damage which rendered the plaintiffs utterly catatonic. Most of them were barely sentient and totally dependent on others. I do not believe that the awards in those "total wreck" cases can be a proper guide on the quantum in this case. Mr Miller continues to suffer pain though his loss of amenities and pleasures of life is not as complete as that suffered by the plaintiffs in the catatonic cases. It is nevertheless considerable. Mr Kasonde has argued that the K8,000 should in fact be further reduced. He has cited in support paragraph 1215 of McGregor on Damages. I do not see how that paragraph can assist when the learned authors are there dealing with pain and suffering only without loss of amenities. Mr Kasonde submits also, notwithstanding that he had just relied on McGregor, that English and other foreign awards should not be followed and that awards in Zambia should generally be lower as suggested by Doyle, C.J., in *Burke v Attorney-General* (10). While I accept that our courts should generally adopt more moderate figures, nevertheless, it is also still necessary to do justice to each case on its own merits having regard to current money-values. I believe that justice in this case will be done by striking a balance between what would be too low and what would be too high as to be unreasonable. There is also the adjustment in respect of the wife's loss of earnings to which I have already referred, subject to an allowance for tax and other costs of earning the salary which were saved. I believe also that the overall figure produced should be both fair and just. It follows from these sentiments that I would uphold the submission that the sum of

p73

K8,000 was too low a figure in the circumstances of this case. I would accordingly set aside that award and, in its place, I would award a sum of K20,000.

Loss of future earnings:

I turn to consider the award in respect of loss of earnings. It is to be observed that the plaintiff had suffered no loss in respect of the period before the hearing below, and, indeed, up to 31st December, 1976, since his employers had retained him in their employ on compassionate grounds. The evidence before the court below was that after the accident the plaintiff became virtually unemployable. From the latest medical report it transpires that he has in fact not been able to obtain employment and is still, for all practical purposes, unemployable. In the light of this fresh evidence and in the light of an obvious error of calculation when the learned Deputy Registrar found a sum of K18,000 after multiplying K8,000 by ten years, it is necessary for us to look at this item de novo. It is also necessary for us to review this matter having regard to the arguments that have been advanced by both sides. There was evidence that had the plaintiff not been injured he could have looked forward to a brought career in the agricultural field. There was evidence that though he was in receipt of a basic salary of K8,000 in Zambia, it was likely that he would have commanded a salary in the region of K23,000 upon his return to Australia. Both sides submit that the multiplicand and the multiplier selected by the court below appear to find no support from the evidence and applicable principles. Mr Mitchley submits that the proper starting point for the multiplicand should be K23,000 which the plaintiff would have earned in Australia. Mr Kasonde naturally disagrees and argues that the evidence of earnings was far from conclusive and that the starting point should be, if not zero, then K8,000 with appropriate deductions. The case of *Corrigan* (6) is in fact authority in support of Mr Mitchley's submission. The figure that is to be taken as the starting point must be that which accommodates future prospects. Mr Mitchley suggests, as was suggested in *Lim Poh Choo* (4), that since the degree of disability was seventy-five per cent, a twenty-five per cent deduction falls to be made. I would respectfully agree. In the premises round figure of K15,000, as suggested by Mr Mitchley in his heads of argument, would be the appropriate sum to represent the plaintiff's prospective annual loss. In rounding off the figure from K23,000 to K20,000 to produce a seventy-five per cent gross of K15,000, I believe that the contingencies or the chances of life have been taken care of. Mr Kasonde was right, however, to suggest that deduction ought to be made in respect of income tax. That was precisely what this court did in *Corrigan* (6). In the event, the gross sum will be scaled down to allow for tax. It has been suggested that tax be considered at the rates applicable in Australia. This preposition finds support from the learned authors of Kemp and Kemp on the Quantum of Damages, 4th Edition, Vol. 1, where they suggest, from the last paragraph at p. 141 (omitting the irrelevant):

p74

> "If the plaintiff is not resident the United Kingdom and suffers loss of foreign earnings as a result of his injuries, it would seem that the incidence of foreign tax upon those earnings should be taken into account.... The relevant provisions of foreign law will have to be proved as a question of fact by an expert in that foreign law."

In our case, through the record showed that Mr Mitchley had, in his submissions to the court below, recited some extracts from Australian tax law, there was in fact no evidence properly before either this court or the court below on the Australian tax law. I believe that the parties could have saved expenses by agreeing on what the relevant provisions of the Australian tax law are. In the absence

of any evidence, however, I would decline to take the harsh and extreme view that the court thereby prevented from assessing the loss of earnings. Unsatisfactory though my approach might he, I believe that in the final analysis the ends of justice will be met by deducting tax under our laws, the only laws that are available to this court on this point. I have ascertained from the relevant Zambian tax laws and tax tables that a man in the plaintiff's personal circumstances and who claims only a married allowance and children's allowance in respect of two young daughters would, in all probability, receive a tax code which would attract income tax at the rate of approximately twenty-three per cent. In round figures on a salary of K15,000 per annum the plaintiff's tax would be in the region of K3,500. The round figure on K3,500 from the round figure of K15,000 leaves K11 500, which I would adopt as the multiplicand in this case.

Having established a multiplicand of K11,500 it now remains to be considered what the multiplier should be. The plaintiff was thirty-six years old at the time of the hearing below and he is now about forty-two years old. He has in fact not earned any income since he left Zambia. Mr Mitchley has submitted that this court should use a multiplier which is closer to the one used in *Lim Poh Choo* (4) which was fourteen years, or that applied to *Corrigan* (6) which was seventeen. The plaintiff in *Corrigan* (6) was, of course, a much younger person and consequently had, prospectively, a much longer working life expectancy. We were also referred to Kemp and Kemp where various examples are given for various age groups and factors, and where multipliers ranged from seven to sixteen years. Mr Kasonde submits that the multiplier of ten which the learned Deputy Registrar had applied should in fact be reduced further. In the *Corrigan* case (6) this court had occasion to consider malting a choice between the traditional approach and the actuarial method of computing a multiplier A compromise figure was adopted. While significant differences result in the case of persons aged thirty years and below, the same cannot be said about those above thirty. The multipliers that the various courts have used in the various cases that I perused do undoubtedly provide a useful guideline. Ultimately, however, it is the award which is arrived at which matters. It must be an award which fully compensates the plaintiff while taking into account all the relevant considerations including reasonable contingencies such as the contingency that, given a bleak medical outlook, there are chances that

death may occur earlier than expected. The precedents that I have perused indicate that the lower range of multipliers is usually applied to elderly plaintiffs or to those whose expectation of life has been considerably shortened. It applies also to those whose disability, though permanent, is not serious. I am bound to observe, with regret, that plaintiffs in serious injury cases have not seen fit to adduce actuarial evidence which I believe, could he obtained locally. Such evidence would have been useful in this type of situation which involves a calculation on an annuity basis to secure a plaintiff's financial future. However, in the absence of such evidence I can see no harm in following what this court did in the case of *Corrigan* (6). By looking at the examples given in Kemp and Kemp it transpires that the lowest multiplier used in a comparable case was seven years. In *Corrigan* (6) the multiplier was seventeen. Cullinan, J.S., in *Corrigan* (6), found a middle point between the multiplier obtained by the conventional method, and a multiplier obtained by the actuarial method. In the absence of cogent evidence and having regard to all the uncertainties and other matters which ought, properly to be taken into account, I find, as did Cullinan J.S., that the middle point looks the more attractive. This I find to be twelve and, accordingly, I would take this

figure to be the multiplier.

Using the aforesaid multiplicand and multiplier the amount would award for loss of future earnings is K138,000.

Interest:

I now turn to interest for the period before judgment. There can of course be no interest on the awards for future loss of earnings and for future medical attention. The learned Deputy Registrar had awarded a lump sum of K2,050 on the total of all the heads of claim at rate unstated and for an unspecified period. Both parties agreed that this item falls to be looked at de novo by this court so that the interest awarded should agree with proper principles as set out in the various authorities to which reference will shortly be made. Mr Mitchley has submitted that interest be proper and realistic and he suggests twelve per cent or alternatively the rates applied in *Corrigan* (6), or in *Mulenga Rucom Industries Ltd* (11). Mr Kasonde relies on the decision of this court in *United Bus Company of Zambia Ltd. v Shanzi* (12), which was followed and applied in the later decision referred to by Mr Mitchley. We are here concerned with the interest that should be awarded on the amount for pain, suffering, an loss of amenities and on the amount for special damages. The authorities are all agreed that some interest should be awarded in terms of section 4 of the Law Reform (Miscellaneous Provisions) Act, Cap. 74.

In *Corrigan* (6) this court gave interest on the award for pain, suffering, and loss of amenities at the rate of seven per cent from the date of service of the writ to the date of the assessment in the court below. Interest at three-and-a-half per cent was there awarded under special damages from the date of the accident to the date of assessment. *Corrigan* (6), as already stated, followed *United Bus Company Ltd. v Shanzi* (12), which applied the principles laid down in the English decision

of *Jefford v Gee* (13). *Jefford v Gee* (13) has since been overtaken by more recent cases. In England, rates of interest at nine per cent or ten per cent have been applied in cases such as *Pickett v British Rail Engineering Ltd.* (14) and *Lim Poh Choo* (4). However, those rates of interest on general damages have not found universal favour. In *Birkett v Hayes* (15) the English Court of Appeal found that they could no longer support the guideline they had given in *Jefford v Gee* (13), and, accordingly, reversed it. They considered their decision in *Cooksn v Knowles* (16) to the effect that no interest should be awarded which the House of Lords over-ruled, slot when that case was taken before them (see 1979 AC 556) but in *Pickett* (14). The Court of Appeal in *Birkett* (15) quite properly pointed out that pain, suffering, and loss of amenities cannot ifs treated as accruing due at the date of service of the writ. It was there observed that the trial judge had assessed the damages on the value of money at he date of trial and on the plaintiff's condition at that late. The judge, so it was pointed out, had to award compensation for the past and also for future pain, suffering and loss of amenities. That being the case, their Lordships saw no justification in awarding a rate of interest higher than two per cent on an award which had already taken into account the current value of money and the fact that compensation covered both the past and the future. Even that lower rate of interest was suggested in deference to the House of Lord's decision in Pickett (14), since it is quite apparent that the court in *Birkett* (15) would have preferred to award no interest whatsoever.

The decisions of the courts in England are of course only of persuasive value. The previous decisions of this court, however, did follow the English cases. Indeed, more often than not decisions of other courts applying the common law have provided invaluable assistance and guidance. They will continue to assist us for some time yet. Nevertheless, while there is no harm in receiving such assistance I believe that it is open to us to introduce such local variations and modifications as we think necessary to meet, our ends of justice. In the premises, while the decisions of this court in cases such as *Corrigan* (6) were correct on the question of interest nevertheless to the extent that basically they stemmed from the decision in *Jefford v Gee* (13) which has since been reversed. I believe that it will be necessary to re-examine at the earliest opportunity the question of pre-trial or pre-judgment interest on general damages. I believe that the intention of the legislature in section 4 of Cap. 74 (which does not specify any rates of interest) was to leave unfettered the discretion of the courts as to the giving or the rate and the period of interest. Quite clearly it would be inadvisable, in my view, for this court to give guidelines which would suggest or be understood to mean that there will be fixed from time to time, ruling rate of interest which must be rigidly adhered to regardless of the facts and circumstances of any given case. While therefore, the decisions of this court in previous cases, which have more or less applied the current rates of interest given by banking institutions on customer's savings or similar account, do provide useful

p77

guideline, there may be circumstances when a strict adherence to such rate of interest may in fact result in a party ultimately receiving a combined sum of damages and interest which goes far beyond proper compensation, result that can only be unfair and unjust to the opponent. As to what these circumstances are would depend on the facts for each cause. While I do not believe that examples are necessary, giving a few can do no harm. Thus it would be unfair and unjust, in my view, to award interest at current bank rates for the full period from the service of a writ to trial where the plaintiff was guilty of inordinate delay in bringing the case to trial. It would equally be unfair and unjust, in my opinion, where the trial court has already taken into account factors such as those mentioned in *Birkett* (15). On the other hand, where the award relates to, say, special damages or losses or sums of money due and accruing before trial, it seems to me that there is no good reason why interest at current bank rates for depositors should not be given. I stress that it is not necessary to give examples and that I only do so in order to illustrate my reasoning. I believe that it is for the court in each case to look out for any features which it would be defensible, just and fair to take into consideration.

Turning back to this case, we have had to reassess the award for pain, suffering, and loss of amenities. We have had to take into consideration that the compensation is at current monkey values on the plaintiff's latest position as disclosed by the medical report which was introduced, and also that the compensation will cover pain, suffering, and loss of amities during the past eight years or so, as well as for the future. For the foregoing reasons I am of the opinion that the rate of interest under this Head should be fairly low. I would have been prepared to follow the rates in cases like *Corrigan* (6), from the date of service of the writ to the date of assessment below, if in fact we did not have to reassess the damages as we have done. In these circumstances I would propose interest for similar period, namely from the date of service of the writ to the date of judgment in the High Court, but at a lower rate, namely two per cent. With regard to the interest on the special damages, and as I have already indicated, I can see no good reason why the rate of interest should invariably

be set at half the rate applied to the general damages. I would depart, in this case, from this practice and award interest on the special damages at seven per cent from the date of the accident to the date of the assessment below.

It follows from the foregoing that the cross-appeal would fail and I would accordingly dismiss it. Since the appeal of the plaintiff has succeeded on the majority of the points raised, I would award costs of the proceedings both here and in the court below to the plaintiff save that I would not award him the costs of an abortive appeal which he had made from the Deputy Registrar to judge in chambers in the court below. I would award the costs of that abortive appeal to the defendant. I would also take this opportunity to draw the attention of practitioners to Practice Direction No.1 of 1979 to the effect that all appeals from assessments of damages by a Registrar or Deputy Registrar shall lie direct to this court.

p78

Judgment
MUWO, J.S.
I have had the advantage of reading the learned Deputy Chief Justice's judgment, and I agree with it.

Judgment
BWEUPE , AG. J.S.
I, too, have had the advantage of reading the learned Deputy Chief Justice's judgment, and I also agree with it.

Appeal allowed in part
