

# **Project to Devise Guidelines on the Award of Damages in Rwanda**

## **Report of HHJ Nic Madge**

At the request of the Chief Justice of Rwanda, Sam Rugege, and through the auspices of the Legal and Constitutional Affairs Division of the Commonwealth and the Judicial College for England and Wales, I was asked to prepare Draft Guidelines on the Award of Damages in Rwanda.

In an email dated 13<sup>th</sup> May 2014, the Chief Justice asked me to prepare a draft which covered

- The different types of damages
- The discussion on differences and similarities (if any) on the issue of damages between the common law and civil law system
- The best practices in determination of damages
- Elaborate rules that should guide Rwandan Judges to determine and allocate damages

On June 4<sup>th</sup> I forwarded to the Chief Justice a paper which I had prepared which was intended to form the basis for discussion at a Working Group of Rwandan Judges, led by the Chief Justice, in Kigali between 11<sup>th</sup> and 13<sup>th</sup> June 2014. It is self-evident that I know little about Rwandan Law. It is also vital that any Rwandan Guidelines are devised by the Rwandan Chief Justice, with the help of the Rwandan judges, and that they take ownership of the Guidelines. Accordingly the paper which I prepared contained more questions than answers. In fact it posed over sixty questions which resulted in a wide ranging and fruitful discussion in the Workshop in Kigali.

In preparing my paper, I started with the Rwandan Law N° 45/2011 of 25/11/2011 which contains the law in respect of damages for breach of contract. Onto that, and using my experience as an English judge, I added possible rules which could be used by Rwandan judges when determining damages. Although I incorporated some of the common law rules which we use in England and Wales, my paper was based on the Rwandan Law.

Following discussions in the Workshop in Kigali between June 11<sup>th</sup> and June 13<sup>th</sup> 2014, I have amended my original draft to reflect the views and opinions of the twenty-five Rwandan judges who took part in the discussions. Much of the time was spent divided into two groups, with report-backs in plenary. The discussions were lively, informed and constructive.

In preparing this draft, I have borne in mind that my role was to facilitate discussion and what matters is the views and experience of the Rwandan judges, not my knowledge of English and French laws. I hope that this paper accurately reflects the views of the judges, but I am also forwarding the extremely helpful notes of discussion made by Juvens Ntampuhwe.

There was remarkably close agreement about general issues of principle – the first half of the paper. In view of that, the first half of the draft Guidelines, in which these general principles are set out, could, if they meet with the approval of the Chief Justice, be implemented relatively quickly.

The only issues of general principle on which there was not agreement were:

#### Claims for loss of wages

Should they be awarded gross, or net of tax and other deductions? There appears to be a difference of practice in Rwanda as to whether loss of wages is awarded gross or net. There was disagreement between judges about this. This needs to be resolved. Article 14 of the Presidential Order No 31/01 of 25/08/2003 on Compensation for Personal Injury due to Accidents Caused by Motor Vehicles provides that “The total income used to calculate the compensation to be granted shall be net of tax, various legal fees and social security contributions” and it may be that that principle should apply to all claims.

#### Interest on damages

There was no agreement in the groups as to whether the award of interest is mandatory or discretionary. This needs to be determined.

There was agreement that these general principles should be binding. (It may be that the position should be different if guidelines setting out ranges of awards for different injuries are agreed. Consideration should perhaps be given to whether judges should be able to depart from such ranges of figures if (alternatively) either it is in the interest of justice to do so, or if there is good reason or if there are exceptional circumstances.)

The discussion about ranges or figures for damages on death and for personal injury resulting in particular disabilities was predictably far more difficult and agreement on this was not reached. I deal with each of these areas in turn.

#### Death

Both groups agreed in principle that the courts ought to have power to award a fixed sum on death, without proof of financial loss and in addition to any material damages.

One group suggested the following sums;

- A spouse who was living with the deceased the sum of RWF 5 million;
- Any parent or child of the deceased RWF 3 million; and
- A brother or sister RWF 3 million.

It was not clear whether they thought there should be one award, (e.g. just to a spouse if there was one) or awards to a spouse and all other relatives. The other group did not suggest any sums. This needs to be considered further.

#### Personal Injury

*In the first draft, I stated:*

*I have envisaged something similar to the English and Welsh Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases – please see copy provided as a separate document.*

- *Are these helpful?*
- *Can they be used in a Rwandan context or are they too complex?*
- *If they can be used, how should they be adapted to Rwanda?*  
*Theoretically, it would be possible simply to adjust each bracket in the Judicial College Guidelines which is expressed in £s Sterling to a figure in Rwandan Francs.*
- *Alternatively should this Workshop devise its own Guidelines for the Assessment of General Damages in Personal Injury Cases, perhaps based upon the effect of the injury, rather than a description of the injury? Please see the Schedule to this document for a possible starting point.*
- *How should monetary figures for the award of damages be expressed? In England and Wales, the Guidelines generally provide a range of figures. What are the appropriate sums? [£1GBP = \$US1.67 = RWF 1,140. Statistics on differences between the value of money in the U.K. and Rwanda are difficult. Average annual incomes in the U.K., are currently around £26,000. I have read that income per capita in Rwanda is around US\$600 per annum.]*
- *What effect should the age of the claimant have upon the award of general damages? On the one hand a younger claimant may recover more quickly. But a younger claimant will have to live with a permanent disability longer than an older claimant.*
- *Should judges be able to depart from them? If so, in what circumstances? Do you agree with my statement that Judges should only depart from those guidelines if there is compelling evidence of truly exceptional facts?*

The views expressed in both discussion groups were

- (i) There are difficulties with the Presidential Order No. 31/01 Of 25/08/2003 on compensation for personal injury due to accidents caused by motor vehicles. It should not be extended to other personal injury cases. (There was a small minority of dissent on this point.);
- (ii) The English Judicial College Guidelines were helpful, but are too complicated for Rwanda – and the figures and ranges would need to be adapted to take into account the difference in monetary values in England and Rwanda;
- (iii) At one point I suggested that Rwandan judges pool their experience of awards of damages made and attempt to agree averages for particular categories of disability – but this suggestion did not find favour;
- (iv) The categories in the Schedule to my first draft paper could (and did) form a basis for discussion but there was very considerable disagreement about figures – in some categories, one group would award five times more than the other group. One group took the English figures and divided them by 70 to reflect the difference between English average wages and Rwandan average wages;

- (v) It was agreed that more research was needed. It may also be necessary to consult with Rwandan stakeholders such as the Public Service and the insurance industry.

The extent to which the English and Welsh Judicial College Guidelines could be used as a basis may require further thought. They are mature guidelines which are now in their twelfth edition. They are detailed and are well regarded in England and Wales. On the other hand they reflect English and Welsh society and forensic practice. They are also presaged upon a degree of sophistication on the part of forensic medical experts which may be peculiar to the Anglo-Saxon world. One option might be to use them as a basis, but to simplify them and to adjust the ranges/figures to take into account the difference between the value of money in England and Wales and Rwanda.

### Conclusion

I attach the revised draft Guidelines which are the result of the views expressed by the Rwandan judges at the Workshop in Kigali.

I have divided them into two parts;

- Part 1 General Principles; and
- Part 2 Death and Personal Injury.

Those passages which were agreed in the Workshop are in black font. Those passages on which agreement was not reached are in **blue font**. Relevant Articles of the Rwandan Law N° 45/2011 of 25/11/2011 which contains the law in respect of damages for breach of contract are reproduced in **grey background text**.

HHJ Nic Madge  
Kigali, 15<sup>th</sup> June 2014

# **Guidelines on the Award of Damages in Rwanda**

## **DRAFT REFLECTING DISCUSSION IN KIGALI BETWEEN 11.6.2014 AND 13.6.2014**

### **Part 1 General Principles**

#### **Introduction**

These Guidelines are issued by the Chief Justice of Rwanda pursuant to Organic Law 03/2012 of 13 June 2012 determining the organisation and functioning and jurisdiction of the Supreme Court. They are designed to harmonise and clarify the award of damages in Rwanda.

They are intended to be used by

- Judges
- Lawyers
- Litigants

These Guidelines should be read in conjunction with existing laws, such as

- CODE CIVIL - LIVRE III OF 30 JUILLET 1888
- LAW N° 45/2011 OF 25/11/2011 GOVERNING CONTRACTS
- LOI N° 41/2001 DU 19/09/2001 RELATIVE A L'INDEMNISATION DES VICTIMES D'ACCIDENTS CORPORELS CAUSES PAR DES VEHICULES AUTOMOTEURS.
- PRESIDENTIAL ORDER NO 31/01 OF 25/08/2003 ON COMPENSATION FOR PERSONAL INJURY DUE TO ACCIDENTS CAUSED BY MOTOR VEHICLES

Unless they conflict with existing law, they are binding and must be followed by judges.

Damages are compensation awarded by a court.

These guidelines apply to all awards of damages, including damages for

- Breach of contract;
- Tortious acts (i.e. general civil wrongs);
- Breach of statutory duty; and
- Commission of criminal offences.

They apply with immediate effect after their publication in the Official Gazette of the Republic of Rwanda and apply to all awards of damages made after that date. They do not in any way affect awards of damages which were made by judges prior to that date.

Damages should be awarded on the basis of the value of money at the time of the assessment of damages. Judges should not try to take into account future inflation. However, general levels of awards of damages should be

increased to take into account inflation since the issue of this Guidance. The official statistics stating inflation rates issued by the National Bank may be used for this purpose.

These Guidelines do not replace former guidance and practice. They are intended to be interpreted with reference to any former guidance and practice.

### **Law No. 45/2011**

Law N° 45/2011 of 25/11/2011 provides in respect of contracts

#### Article 137: Lawful damages

The aggrieved party has right to damages from the party failing to perform his/her contractual obligations, unless the claim for damages has been suspended or withdrawn.

#### Article 138: General criteria for calculating damages

The aggrieved party has right to damages based on his/her expected interests calculated in accordance with:

1° the loss in the value by the aggrieved party, based on the other party's obligations caused by non performance or inadequacy;

2° any other loss caused by the breach of the contract, including any other incidental loss;

3° any cost or other loss that the breaching party has avoided by the non performance of his/her obligations.

#### Article 139: Damages based on reliance on the expected contract

The aggrieved party has right to damages on his/her reliance on the expected contract, including expenditures made in preparation and performance of the contract, deducting any loss that the party in breach can prove that the aggrieved party would have suffered even if the contract had been performed.

#### Article 143: Moral loss

Damages for moral loss shall not be granted unless if and only if the breach of the contract caused bodily harm or when the nature of the contract or the breach thereof was the cause of that moral loss.

#### Article 144: Granting interests in lieu of damages

If the breach of the contract consists of a failure to pay a sum of money or to render a performance with fixed or ascertainable monetary value, interests are calculated from the time for performance was due less all deductions to which the party in breach is entitled.

#### Article 146: Damages provided for in the contract

Damages for breach of the contract may be provided for in the contract but at a reasonable amount based on the actual loss or potential loss to occur in case of breach of the contract or in case of difficulty in providing evidence of the loss.

A clause of the contract fixing excessive damages shall be unenforceable because of public order it is considered as a penalty.

Law N° 45/2011 of 25/11/2011 only specifically refers to damages for breach of contract. Contracts may specifically provide a mechanism by which damages are to be assessed. However, in the absence of such a provision, the same principles apply to all awards of damages, whether arising out of breach of contract or otherwise.

Courts may award “moral damages” (non-pecuniary damages such as damages for pain and suffering which are not capable of precise quantification in monetary terms) and “material damages” (the extent to which a claimant is ‘out of pocket’ – e.g. the cost of repairing damage to a car).

The basic principle to be applied in deciding the amount of damages is that they should, so far as money can, place the person to whom they are awarded (“the claimant”) in the same position as if the event giving rise to the award of damages had not happened.

Any damages awarded should provide reasonable compensation to the claimant. They should not be excessive.

If something belonging to the claimant is damaged and it can be repaired, the claimant should be awarded the reasonable cost of repairing that item. If something belonging to the claimant is damaged and it cannot be repaired, the claimant should be awarded the reasonable cost of replacing that item with something similar. For example, if a ten-year old car is written off in a road traffic collision which was the result of the defendant’s negligence, the claimant is entitled to the cost of buying a similar ten-year old car. S/he is not entitled to be awarded the cost of buying a new car. However, the claimant may be awarded the reasonable cost of replacing an item with something new if it is not possible to buy a second hand replacement. The claimant is entitled to such costs of repair or replacement even if s/he has not repaired or replaced the item, subject to proof of the amount of such costs.

If it is not possible or reasonable to repair or replace an item, the claimant is entitled to the reduction in value of the item.

Damages should not be awarded where the tort or breach of duty arises out of an illegal transaction or other unlawful act or activity. Similarly, damages should not be awarded for breach of a contract which was either illegal at the time of its formation, or became tainted with illegality in its performance.

The loss claimed must be the claimant’s own loss. So, a husband or wife cannot claim damages for the effect on him or her of any loss or injury to a spouse who is not a claimant. A father or mother cannot claim damages for the effect on him or her of any loss or injury to a child who is not a claimant. (The only exception to this rule is where there is a claim for damages arising from death – see below.)

Damages for loss of earnings should be assessed net of tax and any other deductions.

The cost of private medical treatment needed as a result of any incident giving rise to liability should be awarded provided that it is reasonable. Such costs may include the cost of hospitalization, medicines, transport in ambulances, kinestherapy, physiotherapy, medical equipment, prosthesis and transport charges to the place of treatment, as priced in Rwanda.

If an injured claimant needs to be nursed or cared for at home, the reasonable cost of employing a professional nurse or carer is recoverable. If, rather than employ an outsider, a wife or other family member spends time looking after the injured claimant, s/he may recover any loss of earnings on the part of that family member, or, if s/he was not working a sum calculated according to the number of hours spent caring for the injured person, paid at the minimum wage.

If an injured claimant has to employ a tradesman to carry out jobs around the house that s/he would normally have carried out, but which s/he can no longer perform as a result of injury, such costs are recoverable.

### **Loss of Profit**

If a claimant's business is affected adversely by the wrongful act of the defendant, the claimant is entitled to any resulting loss of profit. For example, if the defendant burns down the claimant's shop, the claimant is entitled not only to the cost of rebuilding the shop and the value of the stock inside the shop which was destroyed, but s/he is also entitled to be compensated for the profit which s/he would have made during the period between the fire and the completed rebuilding of the shop. It is for the claimant to prove, on the evidence, any such loss of profit, for example, by showing the profit made over previous years.

### **Insurance**

It is irrelevant for the award of damages whether the claimant or defendant is covered by a relevant insurance policy. Damages should be assessed in the same manner whether or not either party is insured, but there should be no double recovery and no double liability.

### **Foreseeability**

#### Article 141: Unforeseen events cancelling or limiting damages

Damages shall not be granted for loss that the party in breach did not have reason to foresee as a probable result of such breach when the contract was made.

Loss may be foreseeable as a result of breach of the contract because it originates from the breach in the ordinary course of events; or as a result of based special circumstances that the party in breach should have known.

Defendants are only responsible for loss which should have been foreseen by a reasonable person as being something of which there was a real risk, unless the risk was so small that the reasonable person would feel justified in neglecting it or brushing it aside as far-fetched. The magnitude of such risk (likelihood and gravity) should be weighed against the expense of eliminating it.



## **Certainty**

### Article 142: Certainty on damages

Damages shall not be granted for loss greater than what the aggrieved party can establish with certainty.

It is for the claimant to prove loss.

However in some circumstances the burden of proof may shift to the defendant. See Article 9 of the Code of Civil Procedure.

In determining what is certain in civil claims, the court decides on the balance of probabilities. Anything that is more probable than not is certain.

## **Future loss**

Damages for loss resulting from a single cause of action may include compensation not only for the damage accruing between the time the cause of action arises and assessment of damages, but also for the future and prospective damage reasonably anticipated as the result of the defendant's wrong. For example, a woman was injured in a road traffic accident which was the defendant's fault. She has been unable to work since the accident. She is entitled to damages for loss of earnings up to the date of assessment. However, a doctor also gives evidence that she will not be able to return to work for another year after the assessment of damages. She is also entitled to damages for a further year's loss of earnings.

When the court is assessing damages for future pain and suffering, it must evaluate all the evidence as to what is likely to happen in the future and in particular consider:

- (i) the risk of future deterioration or improvement in the claimant's condition;
- (ii) how long any pain is likely to endure;
- (iii) how long the claimant is likely to live;
- (iv) whether any future treatment is likely to be necessary and, if so, the nature of such treatment.

Damages for loss of a chance are recoverable in accordance with the Supreme Court judgment in *Kampire v Banque de Kigali*, subject to proof on the balance of probabilities.

Damages for future loss of earnings

- (a) should be assessed at current rates of pay. Any likely increase in wages due to inflation should be ignored; and
- (b) should be limited by taking into account the claimant's likely life expectancy and likely retirement age.

## **Contribution**

Where a claimant sues two or more persons who are liable in respect of the same damage, the court may award his or her total damages against each defendant. Alternatively, the court has power to apportion damages as

between the defendants. However the claimant may not recover more than his or her actual loss.

### **Contributory negligence**

If the claimant was partially responsible for the loss, his or her damages should be reduced by the percentage to which s/he has contributed to the loss. (For example, a road traffic collision was primarily caused by the defendant who was driving on the wrong side of the road and not paying proper attention to other road users, but it was partially caused by the claimant driving too fast, in excess of the speed limit. On the evidence, the judge decides that the defendant was 70% responsible for the collision and the claimant was 30% responsible for the collision. The judge should award the claimant 70% of his loss.)

Similarly there may be a reduction in the damages awarded if a claimant's injuries were more serious because s/he was not wearing a seat-belt.

### **Mitigation of loss**

Article 140: Cancellation of damages in case the loss may be avoided

Damages shall not be granted for loss that the aggrieved party could have avoided without undue risk, burden or humiliation.

Provisions of the preceding paragraph shall not preclude the aggrieved party from receiving damages in case he/she has made reasonable efforts to avoid loss.

Claimants should take reasonable steps to mitigate their loss. Failure to mitigate results in claimants recovering only what would have been the mitigated loss. It is for the defendant to prove that the claimant has failed to mitigate his loss.

An impecunious claimant may be excused from taking action which would otherwise mitigate his loss if s/he cannot afford to do so.

### **Interest**

The court **may/should** award interest on financial loss to reflect any period that a claimant has had to wait for payment of damages.

The court may award a fixed sum for interest up to the date of judgment and thereafter a daily sum until payment. Unless a contract specifies otherwise, the rate of interest is that published by the National Bank.

### **Interim damages**

The court may award interim damages prior to trial if

- The defendant has admitted liability;
- The defendant is subject to a judgment for damages to be assessed; or
- The court is satisfied that the claimant will obtain judgment for a substantial sum of money.

## **Best practice for determining damages**

Claimants should attach to their Particulars of Claim a Schedule containing full details of any past and future losses and expenses which they claim. Defendants should file and serve Counter-Schedules.

The first task of the judge is to determine liability. There can be no award of damages unless the claimant has established that the defendant is legally liable, whether for breach of contract, in tort or otherwise.

So, judges should answer the following questions.

- Did the claimant breach the contract, or, is the claimant liable in tort or for a civil wrong?
- Did the claimant suffer the losses or injuries claimed?
- Were they the result of the breach of contract or tort?
- Are the sums claimed reasonable and not excessive?

If so, they are recoverable, unless the claimant has unreasonably failed to mitigate his or her loss.

All this involves the judge, finding the facts, either on the basis of facts agreed by the parties or after hearing evidence.

The parties should always try to agree the medical prognosis.

Medical evidence should always be in the form of written reports. Oral evidence from doctors should only be required if there is a significant difference of opinion between doctors instructed by the claimant and the defendant.

Judges should give full and careful reasons based upon the evidence which should be set out in their judgment.

## **Part 2 Death and Personal Injury.**

### ***Death and Personal Injury Damages***

#### **Death**

Where a man or a woman is killed as a result of the defendant's tort or breach of duty, the court may award

(a) without proof of financial loss (and in addition to any material damages)

A spouse who was living with the deceased the sum of RWF 5 million;

Any parent of child of the deceased RWF 3 million; and

A brother or sister RWF 3 million.

(b) the cost of reasonable funeral expenses, hospitalization fees presented before death, and if need be, transport of the body expenses to any person who has paid them;

(c) a sum equivalent to his or her likely loss of earnings.

#### **Personal Injury**

Personal injury damages include damages for Pain and Suffering and Loss of Amenity

- "pain" refers to the physical pain caused by or resulting from an injury;
- "suffering" refers to the mental element of anxiety, fear, embarrassment to which the injury gave rise to in the particular claimant;
- "loss of amenities" embraces everything which reduces the claimant's enjoyment of life or impairs any of the five senses. It includes both physical and psychiatric injury.

There is no need for judges when awarding damages for Pain and Suffering and Loss of Amenity to award separate sums in relation to each of the three aspects. It is generally impossible and unnecessary to state how much of any award relates to "pain and suffering" and how much to "loss of amenities".

Judges should award one total sum reflecting the claimant's Pain and Suffering and Loss of Amenity.

When awarding damages for Pain and Suffering and Loss of Amenity, judges should consider the nature and severity of the injury and its impact upon the individual claimant.

There are cases in which a claimant has suffered multiple injuries. Judges assessing the overall award of damages should not itemise each separate injury, placing a value upon it and calculating the overall award on the basis of the sum of those parts. Almost inevitably, such a process would produce too high an overall figure. Instead, judges should evaluate the overall disability and impact upon the claimant.

Moral damages may include damages for traumatism and psychological injury.

The Schedule to this Guidance sets out Guidelines for the award of damages based upon particular injuries. Judges should only depart from those guidelines if there is compelling evidence of truly exceptional facts. If judges do depart from those guidelines, they should give reasons in their judgment for doing so.

### ***Punitive damages***

#### **Article 145: Punitive damages**

Punitive damages shall not be granted for a breach of the contract unless if and only if the conduct constituting the breach is an offence for which the plaintiff may request damages as sanction.

*It was agreed that it would be helpful to give guidance on how punitive damages should be assessed when they are awarded, but it appeared that this is rare on Rwanda.*

Nic Madge,  
Kigali, 15<sup>th</sup> June 2014

## SCHEDULE

### THE ASSESSMENT OF GENERAL DAMAGES IN PERSONAL INJURY CASES

(All figures in Rwandan francs. m=million, k=thousand)

<u>Paralysis</u>	<u>Group A</u>	<u>Group B</u>
Tetraplegia (loss of use of all limbs and torso)	3.4m-4.2m	15m-20m
Paraplegia (paralysis of the lower part of the body)	2.3m-3m	10m-15m
<u>Head injury</u>		
Brain damage (total)	3m-4.2m	15m-30m
(partial)	1.5m-2.3m	
Epilepsy	680k-770k	
<u>Blindness</u>		
Total	2.8m-3.1m	15m-20m
Partial	680k-770k	5m-10m
<u>Deafness</u>		
Total	1.1m-1.2m	3m-5m
Partial	487k-520k	1m-3m
<u>Legs, ankles and feet</u>		
Amputation of both legs	2.9m-3.2m	10m-15m
Amputation of one leg	1.4m-1.5m	7m-10m
Loss of ability to walk		10m-15m
Impairment of ability to walk		3m-5m
<u>Arms, hands and shoulders</u>		
Amputation of both arms	3.1m-3.46m	10m-15m
Amputation of one arm	1.4m-1.58m	5m-7m
Loss of ability to use both arms and hands		10m-15m
Impairment of ability to use arm and hand		2m-5m
<u>Scarring</u>		
To face – severe		2m-10m
Female	1m-1.1m	
Male	700k-768k	
To face – less severe		
Female	508k-559k	
Male	315k-347k	
To other parts of body	1.1m-1.2m	3m-5m
<u>Rape</u>		

Victim under 12 yrs  
Victim 12 to 18 yrs  
Victim over 18 yrs

10m-12m  
5m-7m  
3m-5m