IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 64/2019**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

CHINA STATE CONSTRUCTION AND ENGINEERING CORPORATION ZAMBIA LIMITED **APPELLANT**

AND

MWAPE KAIMBA **RESPONDENT**

CORAM: ***CHISANGA, JP, SICHINGA AND NGULUBE, JJA.***
On 18th February and 26th February, 2020.

For the Appellant: *C. Sianondo & M. Siansumo, Messrs Malambo & Co.*

For the Respondent: *C. Chilekwa, Messrs C.C Gabriel Co.*

J U D G M E N T

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to:

1. *ZESCO Limited v Elijah Nyondo (suing in his capacity as an administrator of the Estate of the late Wilson Sinyiza), Appeal Number 144 of 2017*
2. *McKew v Holland and Hannen and Cubitts (Scotland) Limited (1969) 3 All ER1621*
3. *Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa, The ECZ and The Attorney General (2005) Z.R.138*
4. *The Attorney General v Marcus Kapumba Achiume (1983) Z.R.1*
5. *Roland Leon Norton v Nicholas Lastrom (2010) Z.R. 358 Vol 1*
6. *Kalusha Bwalya v Chadore Properties and Ian Chamunora Nyalugwe Haruperi Selected Judgment Number 20 of 2015*
7. *Canadian Pacific Railway Company v Loknart (1942) 1 All ER 462*
8. *Nkhata and others v Attorney General (1966) Z.R. 164*
9. *Foster v Tyne and Wear County Council (1986) 1 All ER 567*
10. *Livingstone v Rawyards Coal Company (1880) 5 App Cas 25*

11. Andrew Tony Mutale v Crushed Stones Sales Limited (1994) SJ 98
12. United Bus Company of Zambia Limited v Jabisa Shanzi (1977) ZR 397
13. Continental Restaurant and Casino Limited v Arida Mercy Chulu (2000) ZR 128.
14. Eaton v Concrete (Northern) Limited 1979 C.A No 30

Legislation referred to:

1. *Occupational Health and Safety Act, Number 36 of 2016*
2. *The Rules of the Supreme Court, 1999 edition*
3. *The Workers' Compensation Act No 10 of 1999*

Books referred to:

1. *Ian Goldrein et al. Personal Injury Litigation. Practice and Precedents (Butterworths. 1985)*
2. *Harvey McGregor 'McGregor on Damages' 13th edition, Sweet & Maxwell, London 1972.*
3. *Kemp & Kemp 'The Quantum of Damages' Vol 1, Sweet & Maxwell, London*

Introduction

1. This appeal is against a Judgment of the High Court delivered by Mapani- Kawimbe J, which awarded the respondent damages for pain and suffering and loss of prospective earnings, to be assessed by the learned deputy registrar.

Background to the dispute in this appeal

2. The respondent was involved in an industrial accident on 14th December, 2017 at the appellant's construction site along Alick Nkhata Road, Lusaka. He instituted an action by way of writ of summons against the appellant, (the defendant in the court below,) seeking the following reliefs-

   (i) Damages for pain and suffering, loss of amenities and loss of prospective earnings arising from personal injuries suffered at

the appellant's construction site due to the appellant's negligent striking of the respondent with a tower crane hook on 14th December, 2014.

(ii) Interest

(iii) Costs

3. According to the pleadings, the respondent was struck on his head by a tower crane hook on 14th December, 2017, whilst working at the appellant's construction site. The said crane was driven by the appellant's employee. The respondent contended that the appellant failed or neglected to ensure his safety and that the erroneous navigation provided to the tower crane operator caused the accident.

4. After he was struck, the respondent became unconscious and suffered convulsions, dizziness and high blood pressure. He also developed severe headaches and difficulties in locomotion. The quality of his eyesight and life generally deteriorated because he was unable to walk to various destinations. He stated that the appellant refused to pay him reasonable compensation for his injury.

5. In its defence, the appellant averred that the respondent was employed as a tower crane operator and stated that the accident resulted from the respondent's negligence as he breached his duty, when he went to work in another area without instruction or

permission. The appellant averred that the respondent did not wear head protection on the day when he encountered the accident and failed to check his surroundings.

6. The appellant denied liability and stated that the Workers Compensation Fund Control Board would compensate the respondent as it had paid him all the salaries and outgoings that were due.

Consideration of the dispute by the court below

7. At trial, the respondent testified that he was employed by the appellant as a tower crane operator at the appellant's construction site on Alick Nkhata Road. On 14th December, 2017, he was assigned the duty of instructing the tower crane operator using a radio. He went down to see if the load of steel on the tower crane was secured and was suddenly struck by the hook of the tower crane on his forehead. He fell down to the ground and was unconscious. He was subsequently taken to Levy Mwanawasa hospital where he was admitted for a few days. The physician told him that he had suffered a head injury. He felt dizzy all the time and had to wear a cap in sunny weather.

8. The appellant's only witness, Friday Siwale, the safety representative testified that the respondent was hit by the tower crane hook while on duty at the appellant's construction site. He was taken to Levy

Mwanawasa hospital for treatment. He witnessed the respondent's accident.

9. After hearing the parties, the court made the following findings of fact-

   (i) That the respondent was employed by the appellant as a tower crane operator on a fixed contract of one year from 16th September, 2017.

   (ii) On 14th December, 2017, the respondent was assigned to operate the tower crane and worked from the station all morning.

   (iii) In the afternoon, the appellant's general foreman, Mr. Mo assigned the respondent to work from the steel channel area. He supervised the loading of steel on the lower crane and after the steel was loaded, the respondent bent down to see if the steel was properly propped. In the process of arching up, he was struck on the head with the hook of the tower crane.

10. The court found that the appellant owed the respondent a duty of care as he was instructed to work in the steel channel area by the general foreman, Mr. Mo. The court further found that the appellant breached its duty of care, which resulted in the respondent suffering serious injuries at the work site that afternoon. He developed severe headaches, dizziness and difficulties in locomotion.

11. The court awarded the respondent damages for pain and suffering but stated that it could not determine his claim for loss of amenities because he did not provide evidence from a physician on what he can do or cannot do as a result of the injuries that he suffered. The court found that the respondent is entitled to damages for loss of prospective earnings and held that he had proved his case against the appellant, save for his claim for loss of amenities.

The appeal before this Court

12. Dissatisfied with the Judgment of the lower court, the appellant lodged an appeal to this court, advancing the following grounds-

(1) That the court erred in law and fact in finding the appellant liable when all the protective equipment were provided.

(2) The lower court erred both in law and fact by not considering the contributory negligence on the part of the respondent and more so the duty the respondent had.

(3) The lower court erred both in law and fact in declining to hold that the respondent was negligent.

(4) The trial court erred both in law and fact in not considering the evidence of the respondent that he could do work and that no physical harm was suffered and more.

(5) The court erred both in law and fact in granting the loss of prospective earning when the court found that there is no evidence of what the respondent can or cannot do in the future as a result of injuries.

(6) The court erred both in law and fact in not limiting the period of damages awarded.

(7) The court erred both in law and fact in not considering that the appellant was covered under the Workers Compensation Control Board.

13. The appellant's advocates filed heads of argument and in arguing grounds one and three, it was submitting that there is no contest that when the respondent reported on duty on the fateful day, he was provided with full protective equipment and he with other employees were called to a safety meeting. We were referred to **Section 17(1)(a) of the Occupational Health and Safety Act**[1] which provides that-

> ***17. (1) A employer shall, at a workplace-***
>
> ***(a) take reasonable care of the employee's own health and safety and that of other persons who may be affected by the employee's acts or omissions at the work place.***

14. It was submitted that the employer provided the protective equipment and that the respondent had the duty to take care of himself, being aware of the environment he was working in. We were referred to the case of **ZESCO Limited v Elijah Nyondo (suing in his capacity as an administrator of the Estate of the late Wilson Sinyiza)[1],** a matter in which the employer successfully established its defence of *volenti non-fit injuria.* It was contended that when an employer has met the obligation to provide protective equipment, the employer must also be absolved of any breach of duty.

15. We were referred to the case of ***McKew vs Holland and Hannen and Cubitts (Scotland) Limited***[2] where Lord Reed said that-

> ***"but if the injured man acts unreasonably, he cannot hold the defendant liable for injury caused by his unreasonable conduct. The claim for causation has been broken and what follows must be regarded as caused by his own conduct and not by Defendant's fault or the disability caused by it."***

16. In arguing ground two, it was submitted that the parties filed pleadings which they are bound to adhere to. We were referred to the case of **Anderson Kambela Mazoka and others v Levy Patrick Mwanawasa, The ECZ and The Attorney General[3],** where the

Supreme Court guided that parties are bound by their pleadings and the court has to take them as such.

17. Counsel contended that the respondent did not file a reply to dispute the negligence attributed to him by the appellant. It was accordingly argued that the respondent should have been taken to have conceded and admitted that he was in fact negligent. It was argued that at worst, the court should have given nominal damages to the respondent.

18. Grounds four, five and six are intertwined and they were accordingly argued together. In arguing these grounds of appeal, it was contended that the court selectively considered the medical evidence as the record shows that the two head scans which were taken of the respondent were normal and that the respondent did not suffer any physical injuries nor did he suffer permanent injury and could do light work.

19. It was contended that there was an unbalanced consideration of the evidence, and we were referred to the case of ***The Attorney General v Marcus Kapumba Achiume***[4] in this regard. Counsel submitted that the court awarded damages for loss of future earnings without evidence from a physician on what the respondent was able to do or was unable to do after the accident. It was submitted that the court

did not draw a line regarding the appellant's responsibility which, it was contended, is not perpetual.

20. Regarding ground seven it was contended that there is an agreement on who should pay the respondent in case of an industrial accident. We were referred to the contract of employment between the appellant and the respondent, specifically the clause on Workers Compensation which states that-

> ***"In accordance with the Workers Compensation Act, Number 10 of 1999, each employer is mandated to register its employees with Workers Compensation and the employer will ensure that all employees are under the Workers Compensation Fund to cover industrial accidents and illness incurred by the employee whilst on duty."***

21. We were referred to the case of **Roland Leon Norton vs Nicholas Lastrom**[5] where the Supreme Court stated that a party to a contract is bound by it even though it may not have been in the interest of the party entering into the contract.

22. Counsel also referred to the case of **Kalusha Bwalya v Chadore Properties and Ian Chamunora Nyalugwe Haruperi**[6] where the court stated that-

"The parties entered into those agreements freely and voluntarily, and those agreements should therefore be enforced by the court."

23. It was contended that the appellant was compliant with the Workers Compensation Fund Control Board and even lodged a claim on behalf the respondent. It is therefore the Board which should pay the respondent. We were urged to allow the appeal in its entirety and set aside the lower court's findings as they were not supported by the evidence.

24. The respondent's advocates filed heads of argument in opposition. Responding to grounds one and three, it was submitted that the court's findings of fact and the exposition of the law was unimpeachable and well-reasoned. It was submitted that the particulars of negligence were that the appellant failed to or neglected to ensure the safety of the respondent and provided erroneous navigation to the tower crane operator in control at the time which led to the respondent being struck with the tower crane's hook.

25. It was argued that the respondent did not breach his duty of care but the appellant was in breach of section 6 (1) and (2) (a) of the **Occupational Health and Safety Act**[1], which provides that-

> ***"an employer shall ensure the health, safety and welfare of the employees of the employer at a workplace and provide plan and systems of work that are, so far as is reasonably practicable, safe and without any risks to human health and maintain them in that condition."***

26. It was submitted that the respondent was instructed to work where he worked that afternoon. Counsel referred to the case of ***Canadian Pacific Railway Company v Loknart***[7] where Lord Thankerton stated that-

> ***"... It is clear that the master is responsible for acts actually authorized by him. ... master is responsible not merely for what he authorized his servant to do, but also for the way in which he does it."***

27. Counsel submitted that grounds one and three attack findings of fact that were made by the lower court. It was argued that the Judge assessed and evaluated the evidence correctly. We were referred to the case of **Nkhata and others v Attorney General**[8] and were urged to dismiss grounds one and three for lack of merit.

28. Regarding ground two, that the respondent sustained serious injury due to his contributory negligence as he went to another work station without instructions or permission, Counsel contended that the appellant failed to prove the particulars of negligence as alleged and that the court below was on firm ground when it found as it did, based on the evidence on record.

29. On whether the respondent should have filed a reply to the appellant's defence in the court below, we were referred to **Order 18 rule 14(1) of the Rules of the Supreme Court, 1999 edition**[2], which provides that-

> ***"If there is no reply to a defence there is an implied joinder of issue on that defence."***

30. It was argued that the respondent was not required to file a reply and that the court below considered the allegations of contributory negligence and rejected them. We were urged to dismiss ground two of the appeal for lack of merit.

31. On grounds four and five, it was submitted that the respondent, after the CT scans and the treatment he received at Levy Mwanawasa hospital was condemned to light duties which meant that he could not be a tower crane operator anymore and that his earnings dropped from K4, 880.50 to K1, 200.00 per month, until

the appellant stopped paying him completely in June 2018. We were referred to the case of **Foster v Tyne and Wear County Council**[9], where the court stated that-

> ***"when it comes to estimating loss of earning capacity, there is no such a thing as a conventional approach; there is no rule of thumb which can be applied....the trial Judge has to do his best to assess the plaintiff's handicap as an existing disability by reference to what might happen in the future."***

32. It was submitted that the court acquitted itself on the facts and the law regarding the issues raised in grounds four and five. We were urged to dismiss both grounds for lack of merit. Regarding ground 6, it is contended that the basic principle governing the assessment of compensatory damages is that there should be *'restitutio in integrum'*. To this effect, we were referred to the case of **Livingstone v Rawyards Coal Company**[10] in which Lord Blackburn stated that-

> ***"Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get that sum of money which will put the***

party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

33. It was contended that the court in any such case is required to compare the pre-tort and post-tort conditions of the injured party. The court must also consider the facts obtaining in each case, including, the severity of the injury, length of injury and continuing nature of the injury. It was contended that the correct approach in assessing damages in cases as this one was laid down in the case of **Andrew Tony Mutale v Crushed Stones Sales Limited**[11] where it was held that-

"with regard to the award for general damages, we comment at once that the awarding of pain and suffering damages, over a fixed period, when there is continuing disability and pain and suffering is not the correct method of dealing with such a case...however in cases such as the present one, where there is continuing pain and suffering and disability, no definite calculation of damages for pain and suffering can be made over any period...."

34. It was submitted that given the authorities cited, the Court below was on firm ground and we were urged to dismiss ground 6 for lack of merit. Regarding ground 7 of the appeal, that the court did not consider that the appellant was covered under the Workers Compensation Control Board, it was contended that the issue is not whether or not there was a contract between the respondent and the appellant with a term of who should pay the respondent and indeed any employee in case of an industrial accident. The issue is whether the Court below was wrong to find the appellant liable for negligence, the appellant having been compliant with the Workers Fund Control Board.

35. It was submitted that even more pertinent is a consideration of whether an action lies against an employer, notwithstanding the compliant status of such employer under the Workers Compensation Act. It was submitted that an action does lie at the instance of an employee notwithstanding the compliant status of an employer. We were urged to consider section 6 of the Workers' Compensation Act which provides that-

(1) Where any injury is caused or disease contracted by a worker by the negligence, breach of statutory duty or other wrongful act or omission of the employer, or of

any person for whose act or default the employer is responsible, nothing in this Act shall limit or in any way affect any civil liability of the employer independently of this Act.

(2) Any damages awarded to a worker in an action at common law or under any law in respect of any negligence, breach of statutory duty, wrongful act or omission, under subsection (1), shall be reduced by the value, as decided by the Court, of any compensation which has been paid or is payable to the Fund under this Act in respect of injury sustained or disease contracted by the worker.

36. It was submitted that section 6 cited above recognises that an employee may be awarded damages under common law or under any law relating to negligence and prescribes how much award interacts with award of compensation under the Act.

37. We were referred to the case of **United Bus Company Zambia Limited V Jabisa Shanzi**[12] which, while interpreting section 8(1) of the repealed Workers Compensation Act Chapter 509 which is equivalent to the current section 6(1) held that-

Under section 6 of the Workmen's Compensation Ordinance, 1944, an employer could not be sued by the workman for damages in respect of injury due to accident resulting in his death or disablement; but by virtue of section 7, if the accident was due to the negligence of the employer or of certain other specified persons for whom the employer was regarded as being responsible the workman could apply to the commissioner for increased compensation beyond the compensation ordinarily payable.

By the Workmen's Compensation (Amendment) (No. 2) Ordinance, 1956 (No. 45 of 1956), a major change of principle was effected; sections 6 and 7 of the 1944 Ordinance were repealed and replaced by a new section, corresponding to our present section 8, granting to a workman for the first time the right to sue his employer at common law In addition to claiming compensation. For our present purposes this structure remains to the present day.

38. It was contended that since 1977, the meaning of statutory provision has been that an employee has a right to sue his employer for

damages and at the same time claim pecuniary compensation under the Workers' Compensation Legislation applicable. We were also urged to dismiss this ground as well as the whole appeal for lack of merit.

39. At the hearing, Mr. Sianondo, Counsel for the appellant informed the court that he was relying on the heads of argument filed into court. He submitted that the appellant had discharged its obligation by providing the respondent with protective clothing and that there is nothing else the appellant could have done to prevent the accident. Counsel pointed out that the Occupational Health and Safety Act imposes equal duties on an employee and an employer. Much as the employer is required to exercise precaution, the same duty is required of an employee.

40. In response, Counsel for the respondent, Mr. Chilekwa, relied on the heads of argument and submitted that the injuries sustained by the respondent happened notwithstanding the wearing of the protective equipment. According to Counsel, the need for protective equipment underscores the need to be careful.

41. In reply, Mr. Sianondo submitted that according to the medical report on record, the respondent did not sustain any physical injury nor did he suffer any permanent disability. He stated that the doctor

who attended to the respondent at Levy Mwanawasa Hospital referred him for further assessment by a neurologist at the University Teaching Hospital and that there is no medical report regarding the result of the assessment by the neurologist on record. He submitted that the Court below awarded damages without a limit to the respondent as loss of earnings or prospective earnings. According to Mr. Sianondo, the finding of the court below is not supported by any evidence and that at page 36 of the record of appeal the court below conceded in its assessment of evidence that there is no evidence on the loss of amenities from a physician as to what the respondent can or cannot do in his field as a result of the injuries sustained. He stated that armed with that analysis, the only award which the court below would have awarded should have been nominal damages and an award that each party should have to take care of their respective costs. We were urged to examine the award of damages which was given to the respondent in relation to the evidence on record.

Decision of the Court

42. We have considered the appeal before us, oral and written arguments by the parties. With the first and third issue raised, the appellant contended that having provided protective clothing to the

respondent, he was duty bound to take care of himself given the surroundings he was working in. The respondent submitted that the particulars of negligence were that the appellant failed to or neglected to ensure the safety of the respondent and provided erroneous navigation to the tower crane operator in control at the time which led to the respondent being struck with the tower crane's hook. It was the respondent's further contention that the appellant was in breach of section 6 of the Occupational Health and Safety Act[1], which requires an employer to ensure the health, safety and welfare of all its employees at a workplace.

43. In ground one of the appeal, the appellant contends that the trial Court erred in finding that the appellant was liable despite having provided protective clothing for the respondent. On the other hand, the respondent submitted that the appellant was in breach of section 6(1) and (2) (a) of the Occupation Health Act. We are of the view that providing protective clothing for employees cannot excuse the appellant from non-compliance with legal requirement. We do not find merit in ground one.

44. With regards to ground two, that the court below erred in law and in fact when it failed to consider the contributory negligence on the part of the respondent, the appellant submitted that the parties are

bound by their pleadings and the fact that the respondent failed to file an affidavit in reply to the appellant's defence, the respondent admitted what was contained in the defence.

45. In response, the respondent contended that he was not required to file a reply and that the court below considered the allegations of contributory negligence and rejected it. In our view, the respondent was instructed by the foreman Mr. Mo to work with him that fateful afternoon. Mr. Mo was an authorised agent of the appellant and whatever instructions he gave were binding on the appellant. It is trite that he who alleges must prove. The burden of proving that the respondent contributed to his suffering of the injuries rested wholly on the appellant. We agree with Mr. Chilekwa's sentiments that the need for protective clothing underscores the need to be careful. There is no evidence on record that the respondent instructed the crane operator to lower the crane, as the operator was not called as a witness. In as much as the law imposes equal duties on an employee and an employer, it is the employer's duty to ensure that the working environment for its employees is secure and safe.

46. Regarding contributory negligence, we were referred to the case of **ZESCO Limited v Elijah Nyondo (suing in his capacity as an**

administrator of the Estate of the late Wilson Sinyiza) in which Zesco successfully established the defence of *volenti non-fit injuria.* Simply defined, *volenti non-fit injuria* is a common law doctrine which states that if someone willingly places themselves in a position where harm might result, knowing that some degree of harm might result, they are not able to bring a claim against the other party. On the other hand, contributory negligence is where the claimant's fault has contributed to their damage and the damages awarded are reduced in proportion to their fault.

47. We have not come across any evidence on the record to indicate that the respondent contributed to the occurrence of the accident. Further while *volenti non-fit injuria* is a defence to negligence, it was never tabled before the court below and we cannot consider it on appeal. Equally we find no merit in this ground of appeal.

48. Ground fours, five and six were argued together. The gist of the appellant's argument was that the court below awarded damages for loss of future earnings without evidence from a physician on what the respondent was able to do or was unable to do after the accident. In reply, the respondent argued that after undergoing his treatment he was condemned to light duty jobs and he demonstrated how his salary scale drastically reduced. We agree with the holding in the

cases of **Livingstone v Rawyards Coal Company** and **Andrew Tony Mutale v Crushed Stones Sales Limited** all cited above.

49. The learned Authors of Guide to Damages' notes that "**pain and suffering damages are awarded for pain which the claimant feels consequent to an injury, both in the past and into the future. The level of damages will always depend upon the duration and intensity of the pain and suffering.**"

50. In the case of **Reba Industrial Corporation Limited v Nicholas Mubonde**[14] we held that it is settled law therefore, that in assessing a claim for damages for personal injuries, the awards should be classified under the following heads, (i) pain and suffering, (ii) loss of amenities (iii) permanent disability and (iv) loss of future prospective earnings. It is immaterial whether they are specifically pleaded or not.

51. In his book entitled Personal Injury Litigation, Practice and Precedents[1], Ian Goldrein observes that "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". It is obvious that the respondent felt pain and suffering on that fateful

day and the days which followed. We cannot fault the trial court for awarding the respondent damages under this head.

52. Loss of amenity describes the non-financial impact an injury has on the victim's work, family and social life. Loss of amenity takes into account all the lifestyle limitations that the injuries have forced upon the victim through no fault of theirs. It attributes a financial value to the non-financial things they have lost, such as your hobbies or the ability to socialise with friends. Compensation for the impact an injury has on their quality of life is a deeply personal issue. As such, it is difficult to quantify through the usual channels, for example, medical reports, receipts and salary calculations. Usually, the Court reviews video or photographic evidence that clearly shows a person's quality of life has diminished. Family, friends and colleagues may also be called upon to substantiate the victim's claim. Based on this, the court will then assess their situation. The judge in the court below was on firm ground when she refused to award damages for loss of amenities as no evidence to support the said claim was brought before court.

53. Damages are paid under the head of permanent disability 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. In **Continental Restaurant and Casino Limited v Arida Mercy Chulu**[14] the Supreme Court held that

> ***"The basis of awarding damages is to vindicate the injury suffered by the Plaintiff and no damage will be awarded if no proper evidence of Medical nature is adduced."***

In casu, we have evidence pointing to the fact that the respondent suffered no permanent disability, but his earning capacity was impaired. He is entitled to damages on this account as his earning capacity was shown to have reduced and the extent and duration for the said reduction falls to be assessed.

54. McGregor On Damages[2] observes that claims for loss of prospective earnings arise every day in personal injuries cases, and two factors militate against any exactness in the assessment of the loss, *vis* the uncertainty as to the precise length of time that the plaintiff's disability will last, and the uncertainty as to the precise pattern that the plaintiff's future earnings would, but for the injury have taken. Neither of these uncertainties prevents the court from making an assessment of the probable loss.

55. In addition, In Kemp & Kemp "the Quantum of Damages"[2] it is observed that

> ***"in most of the reported cases dealing with loss under this head, the court has assessed a lump sum by way of damages. Usually, as Megaw L. J said in Eaton v Concrete (Northern) Limited[15], "the assessment of damages under this head is nothing more than a guess to be made."***

In *casu,* the respondent did demonstrate how his salary scale drastically reduced after his fateful accident and we are of the view that he is entitled to damages under this head.

56. Given the position of the law as espoused above, grounds four and five succeed. As for ground six of the appeal we are of the view that the period of the damages to be awarded will be determined by the deputy registrar on assessment as he will be possessed of the necessary evidence as led by the parties before him.

57. Coming to ground 7 of the appeal, we agree with the respondent that the issue for determination before us, is whether the Court below was wrong to find the appellant liable for negligence, the appellant having been compliant with the Workers Fund Control Board. It is the view of

this court that section 6 of the Workers' Compensation Act reproduced above is clear in that it does not proscribe a claimant from bringing a civil action against the employer independently. We find no merit in this ground of appeal as well. The upshot therefore is that this appeal substantially fails. Accordingly, the matter is referred to the Deputy Registrar for assessment. We award costs to the respondent, to be taxed in default of agreement.

F. M. CHISANGA
JUDGE PRESIDENT - COURT OF APPEAL

D.L.Y. SICHINGA
COURT OF APPEAL JUDGE

P.C.M. NGULUBE
COURT OF APPEAL JUDGE