

AWARD OF DAMAGES TO PART-SUBSISTENCE VILLAGERS IN PAPUA NEW GUINEA

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One of the great challenges to Courts in civil claims is to award damages in an appropriate manner which as far as possible places the plaintiff in the position that he or she would be in but for the injury. The awarding of appropriate damages to a person leading a part-subsistence village lifestyle presents the Courts with a special challenge.

This article considers the attempts that the Courts in Papua New Guinea have made to award appropriate damages to people living this lifestyle. The article attempts to bring together the common principles that emerge through the cases. It also outlines some of the important issues that still need to be addressed by the Courts to ensure that the actual needs of plaintiffs living in a village lifestyle are addressed.

I. NATURE OF DAMAGES

The award of damages by civil Courts in common law jurisdictions is the most frequently used remedy imposed in civil actions, once civil liability has been established against the civil wrongdoer. The defendant through the payment of damages is required to compensate the plaintiff for the loss and suffering that has occurred because of the civil wrong. Through the payment of damages the defendant indemnifies himself or herself from the responsibility for that wrong which is the result of his or her negligent actions.

With the exception of exemplary damages the primary purpose of damages is to compensate the plaintiff.¹ Damages are not a compassionate payment. The basic purpose of awarding damages is expressed in the Latin phrase *restitutio in integrum*. Basically this means to restore to the former position. The relevant application of this principle to the Papua New Guinea situation was aptly expressed Miles J in the *Kaka Kopun* case, when he stated that the purpose of damages is to place the plaintiff (as far as money can) in the position that he or she would have been in but for the injury.² What are the implications of this? Basically, when a person suffers a serious personal injury or the loss of a partner a major gap is created in the person's life. This

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¹ *Kerr v Motor Vehicle Insurance Trust* [1979] PNGLR 251, 268.

² *Kaka Kopun v Independent State of Papua New Guinea* [1980] PNGLR 557.

gap is significant because the person loses vital resources which allow that person to function adequately and obtain a reasonable standard of living. In the case of personal injury, if the plaintiff becomes paralysed he or she loses mobility and independence, and life expectancy is greatly reduced. If the plaintiff loses the use of an arm, then he or she is very limited in the different manual tasks that are to be performed. If the plaintiff loses the use of a leg, then his or her mobility and agility are greatly affected. If the plaintiff loses the use of an eye, then the ability to perform certain tasks that require reading and writing is greatly reduced. If, as the result of an accident, the members of a family lose a husband and father they lose not only the principal provider (this is especially the case in a village situation) but also the person who gives important support, guidance and encouragement. Clearly a gap is created in the plaintiff's life, a gap which makes the performance of essential life tasks very difficult. The gap has been created by a civil wrong caused by the defendant. If justice is to be achieved then this gap has to be filled. The method developed by the common law to fill this gap is the award of monetary damages. Money will not restore lost mobility, nor will it restore lost sight. Further, it will not bring to life a person killed as the result of an accident. But it will give the plaintiff resources to enable him or her to deal with the loss of mobility or sight. Damages in the form of money will provide the surviving members of the family of a husband and father killed in an accident with resources to continue to live their life in a reasonable manner.

Damages form a part of the common law, which has been adopted in Papua New Guinea by virtue of Schedule 2.2 of the Constitution. If damages are to be an effective remedy to compensate the victim of a civil wrong, they must be flexible and adapt to changing social and economic circumstances. As Lord Denning has stated, the common law principles (which include damages) need to be moulded and shaped to meet the social necessities and social opinions of the present day.³ Kapi DCJ supports these observations of Lord Denning when he states that the common law must be fluid and progressive.⁴ The fluidity, adaptability and effectiveness of the common law are especially tested in the efforts of the Courts to award damages in Papua New Guinea to people living a traditional village part-subsistence lifestyle. Such damages are claimed by people who receive an injury which greatly inhibits their ability to function effectively in this life situation or who lose a relative, husband, wife, father, mother, son or daughter whose contribution to the village lifestyle was essential for the family.

³ Lord Denning, *The Discipline of Law* (1979).

⁴ *The State v Bisket Uranquae Pokia* [1980] PNGLR 97, 100.

If the Courts are to achieve the goal of damages, which is to place the plaintiff in the same position but for the accident, they must try to understand the realities and hardships of living a traditional part-subsistence lifestyle. The Courts must also appreciate the impact of a permanent injury, with differing degrees of seriousness, on a person living in this situation, or the impact of the death of a father, husband, mother, son or daughter on the surviving family members in the village.

II. DAMAGES FOR PERSONAL INJURY

The effects of personal injury caused by an accident for which another party is responsible are very serious. The true effect can only be determined by analysing the plaintiff's life-style and situation and how the permanent injury of the hand arm, leg, spine or eye affects this. Once this has been established, the common law is flexible and can award appropriate damages. In personal injury cases damages are awarded under two broad headings. These are damages for pain and suffering and the negative impact that the injury has on the plaintiff's lifestyle, and the economic loss which has come about as a result of the injury.⁵

1. Damages for Pain and Suffering and Negative Impact on Lifestyle

How is it best to describe the real-life situation of people living in a village? Miles J provides a clear explanation in the *Kaka Kopun* case.⁶ According to Miles J, people living a village lifestyle (in the 1980s) follow a part-subsistence lifestyle. Part-subsistence means that people produce their own food and collect firewood and other items to enable them to live a basic lifestyle. Over and above this, there is the cash income gained from the sale of vegetables and coffee, which are surplus to the subsistence needs of the family. The cash obtained from the sale of these items is sufficient to satisfy the minimum needs for clothing, transport and sundry items. Also, a family has to fulfil its traditional obligations by contributing to bride-price payments, compensation and moka exchanges.⁷ To be able effectively to carry out a village lifestyle it is essential that a person is fit, has the full use of hands, arms and legs, and is fully agile. Village life is very difficult. All work is done manually on what is difficult terrain to manage and there are

⁵ Under these two headings fall interest, costs and the assessment of past and future economic loss.

⁶ *Supra* note 2, at 560.

⁷ A moka exchange refers to a traditional exchange of pigs and other valued commodities in the Western Highlands between clans which have certain traditional relationships and obligations. The purpose of this exchange is to create and cement good relationships.

also the uncertainties of flood, drought and frost. Further, there is the need to respond to significant traditional obligations often without any warning. It is for this reason that Miles J noted in the case of *Kaka Kopun* that the impact of an injury on a person who depends upon his own labours to derive a living from the land can be very severe indeed.⁸ This point iwa also acknowledged by Prentice J in the *Raquel* case. He noted that a person who is used to a full range of village activities, including hunting, gardening, fishing, carrying of timbe, and house construction, would find that the loss of the use of an arm or a leg could cause a more severe invasion of his life than a similar loss to an urban dweller. This is because he would be less able to cope with the hazards of nature, fire and flood and perform the activities which are essential when living in a village.⁹

A survey of the cases would suggest that there are three types of negative effects that a permanent personal injury can have on a person leading a traditional village lifestyle. First, the loss of the use of limbs makes physical work very difficult if not impossible depending on the seriousness of the injury. A person living a part-subsistence traditional village lifestyle is dependent upon the full use of his or her limbs. Through an injury a person can partially or completely lose the use of the limbs. The effects that the differing severity of injury has on a person's lifestyle is revealed through the different cases which deal with injuries of differing degrees of severity. In the *Kokonas Kandapak* case, the plaintiff as the result of an accident lost the use of his hand by 50 percent. The Judge took this as meaning that he would be totally incapacitated for the first year of his injury but that over the next four years he would be able to adapt his manual activities in a manner which would enable him to function in a way which would not result in any economic loss.¹⁰ More serious was the case of *Kaka Kopun*. As a result of an injury to his left forearm and wrist the plaintiff was no longer able to grip the handles of a spade or hold an axe. The person's situation was aggravated by the fact that as a boy he received an injury to his other hand as a result of which he was not able to obtain its full use. This made manual work in the village virtually impossible for him.¹¹ The effect was even more severe in the *Seke Opa* case. In this case a fit young village person with coffee gardens and a young family to support received a severe head injury, an eye infection resulting in blindness, total paralysis in one arm, partial paralysis of one leg, and loss of ability to eat caused by decreased muscle power. The plaintiff

⁸ *Supra* note 2, at 559.

⁹ *Tali Kaipeng Raquel v Smerdon*, unreported, National Court Judgement, 1972/706.

¹⁰ *Kokonas Kandapak v The Independent State of Papua New Guinea* [1980] PNGLR 573.

¹¹ *Supra* note 2.

had become a virtual invalid.¹² More tragic still was the *Andak Kupil* case. As a result of a car accident the plaintiff was paralysed from the lumbar curvature down. The result of this was that he lost the complete use of his legs, was unable to control his urine or his faeces, and was bed-ridden even finding it difficult to sit up.¹³

These four cases illustrate the differing degrees of severity of impact that an injury has upon a person's physical functioning. From not being able to hold a spade to being completely bed-ridden, these injuries in differing degrees all have a very negative effect upon a person's life functioning and make it very difficult, if not impossible, for a person to perform work obligations. The victims are not able to clear the bush, turn the ground, dig the drains, build and repair the house, manage the coffee gardens, or do any casual work, and as a result would find it difficult to contribute to moka exchanges, compensation and bride price payments. As Miles J noted, the effect is devastating.¹⁴

A second negative effect of permanent personal injury is the loss of social status and standing in the community. In accordance with custom, a village person (especially in the Highlands) gains his or her identity from two activities. The first is being able to work the soil and use the natural materials in the surroundings to secure an adequate standard of living for one's family. Secondly, identity is gained through being able to fulfil one's traditional obligations to the clan. This includes contributing to moka, bride price and compensation payments, and taking an active part in traditional ceremonies.

What is the effect of this inability to perform the two activities for the plaintiff? Miles J in the *Kaka Kopun* case best describes this. The injury to the plaintiff's hand, aggravated by a pre-existing disability to his other hand, meant that the plaintiff could not work in the gardens, do any work on his house or even be able to cook for himself. This reduced the plaintiff to a person of no standing in the community. This was because he was unable to respond to community demands of brideprice, compensation payments and moka exchange.¹⁵ Such failure gives a person a sense of shame. A village person's sense of identity is undermined. Identity comes from being able to work the ground and from feeling a part of one's community. To feel a part

¹² *Seke Opa v The Independent State of Papua New Guinea* [1987] PNGLR 469.

¹³ *Aundak Kupil and Kauke Kensi v The Independent State of Papua New Guinea* [1983] PNGLR 350.

¹⁴ *Supra* note 2, at 559.

¹⁵ *Ibid*, 561.

of a community one must be able to contribute to it. One of the implications of this loss of sense of identity is that village people tend to sit around the village feeling very depressed and having no motivation.¹⁶ This is quite understandable in that they have lost their sense of identity and fear that any further activity will only aggravate the injury. They lack will-power, motivation and initiative. There is a lack of rehabilitation facilities and programmes in the villages and in the country generally which are enjoyed by people in the same position in other countries. This means that the award of damages must aim to fill a larger gap in these circumstances than in comparative situations overseas or even in urban situations in Papua New Guinea.

A third negative effect of permanent personal injury is that a plaintiff's marriage prospects can be significantly undermined. A crucial quality that a woman is looking for in a marriage partner is a person who is able to do all of the work in the village situation. In the *Kaka Kopun* case, the Court acknowledged that the plaintiff's marriage prospects were greatly undermined because of the injury suffered.¹⁷ In the *Seke Opa* case, the plaintiff was an energetic young village person with a young family and became a virtual invalid because of the injury. His wife had to assume a great many extra activities, virtually doing the work of two people. She complained about being overworked and having to work around a husband who was always depressed with no motivation made life very difficult for her.¹⁸ In the *Pangia Toea* case, the female plaintiff had as the result of an accident lost the full use of her left arm and 70 percent of the use of her left leg, with the leg also being vulnerable to infection. One of the unfortunate consequences of this accident was the break-up of the plaintiff's marriage. Los J noted that as a result of the injuries inflicted by the accident the husband did not like her. The reason for this was that she could no longer be a wife and mother as expected in the tough village life where she was required to garden, carry heavy loads and feed many close and distant relatives of her own and her husband. In short, she was no longer able to fulfil her traditional obligations.¹⁹

The reactions of the spouses to their partners' injuries certainly appear harsh and extreme. However, when one considers the difficulty of village life and the need for the husband and wife to perform complementary work roles, the

¹⁶ *Anis Wambia v The Independent State of Papua New Guinea* [1980] PNGLR 567.

¹⁷ *Supra* note 2, at 565.

¹⁸ *Supra* note 12.

¹⁹ *Pangis Toea v Motor Vehicles Insurance (PNG) Trust and The Independent State of Papua New Guinea* [1986] PNGLR 294, 299.

reaction can be understood. The co-operative performance of complementary work-roles in accordance with custom is the key to a successful highlands' marriage.²⁰ The performance of complementary roles enables the couple to obtain an adequate subsistence existence for themselves and their families as well as being able to contribute to their traditional obligations. The failure or inability on the part of one of the parties to perform his or her role places unexpected and unreasonable demands upon the other party. What is already a hard and demanding lifestyle becomes even more so. Practicality and survival by necessity must be given priority. While traditionally the extended family is supposed to assist, in reality this often does not occur.²¹

Thus, the effects of an injury upon a village person performing a traditional lifestyle can be very severe indeed. It is evident that, in some cases, the impact of the injury to a person living a traditional part-subsistence village lifestyle is more severe than a person living in an urban or some other situation in which he or she is able to enjoy the modern amenities of life. The Courts need to take this added severity experienced by a village person into account when determining the assessment of damages. This is not being patronistic but rather acknowledges the point made by Miles J in the *Koko Kopun* case that methods of awarding damages in industrialised countries may not be appropriate for Papua New Guinea.²² Further, the Courts need to be careful when using the damages awarded to injured expatriates as a guide to determining the appropriate amount of damages for the pain and suffering and negative impact of lifestyle on a traditional village person. Damages must be fair and have full regard to the living standards and situation of such people.

The danger of using damages awarded to an expatriate as a guide to those which are awarded to a village person is revealed in the *Andak Kupil* case. The plaintiff was totally and permanently paralysed. In determining the appropriate damages for pain and suffering, Bredmeyer J was strongly influenced by the *Kerr* case.²³ Allowing for inflation, Bredmeyer J was of the opinion that the award of damages for pain and suffering for Kerr would have been K75,000. While Kerr was paralysed, he was able to return to

²⁰ This point has been strongly emphasised by writers such as Strathern. Feelings of affection come about as the result of the couple working together co-operatively over a number of years.

²¹ This is because the extended use family is continually having to cope with many other demands on its resources and services.

²² Supra note 2, at 561.

²³ *Kerr v Motor Vehicle Insurance (PNG) Trust Ltd* (1979) PNGLR 251.

Australia. Here, through the assistance of an effective rehabilitation programme, he was able to shower and dress himself, take responsibility for his own evacuations, use a wheel chair, drive a vehicle, and maintain a clerical job. In comparing Kupil's situation with that of Kerr's, Bredmeyer J noted that Kupil's situation was far more serious because Kupil was permanently bedridden, could not use a wheelchair and had continual bed sores. For that reason Bredmeyer J made an award of damages for pain and suffering of K90,000.00. The significant point here is that in comparing the situation of Kupil with that of Kerr, Bredmeyer J took into account only physical pain and discomfort. He did not acknowledge nor take into account the added severity that paralysis would have on Kupil as a villager and the fact that he would no longer be able to do any kind of work and that his identity had been undermined.²⁴

The *Kupil* case needs to be compared with that of *Kaka Kopun*, where Miles J did acknowledge the severity of a serious injury on a villager's life and social status in the village. In acknowledging the impact of this injury both physically and socially, Miles J decided that it was necessary to award a substantial sum of damages for pain and suffering and the negative impact of the injury on a plaintiff's lifestyle. He saw this award of a considerable sum as providing the plaintiff with some working capital to rehabilitate his coffee garden and buy himself back into the favour of his people within the village. The villagers would then see that he was tending to his coffee garden through paid labour which he supervised and was therefore once again able to respond to community obligations.²⁵

Thus, the award of damages for pain and suffering to a person living a traditional village lifestyle should focus on two factors. These are, first, the severe impact of an injury upon a village person who relies upon the use of his or her hands and legs for manual work, and, secondly, the fact that damages should provide the plaintiff with some working capital to buy his or her way back into favour with the community. Through acknowledging these two factors in the assessment of damages, the Courts would show a genuine understanding of the reality of the life situation of a village person.

2. Damages for Economic Loss

Under this head the Court includes damages relating to loss of income which is the direct result of the injury, medical expenses (past and future), and costs relating to any items which have to be purchased because of the injury.

²⁴ Supra note 13, at 373.

²⁵ Supra note 2.

When considering the question of economic loss to a village person, the issue which creates difficulty is that of income. How can this be determined? Here we are referring to a person who gains some income from the sale of vegetables and coffee over and above what that person and his or her family need to retain for their subsistence needs.

In determining the loss of income derived from coffee in the *Kaka Kopun* and *Seke Opa* cases, counsel for the plaintiffs called coffee experts as witnesses. In the *Seke Opa* case, which was heard a number of years after the accident had occurred, the expert witness was able to indicate how much the coffee income had been reduced as the result of the plaintiff's inability to tend and maintain the garden.²⁶ In the *Kaka Kopun* case, the Court considered both the loss of coffee income and food production (for consumption and sale). The combined loss was assessed at K30.00 per week (in 1980). Here Miles J took into account the full impact of the loss of income resulting from the plaintiff being unable to work in the garden. If because of an injury a person cannot produce food for his or her consumption, it is necessary to purchase the food, hence the importance of damages being assessed appropriately.²⁷

In the *Pangis Toea* case, Los J considered every aspect of the plaintiff's pre-accident economic situation. The plaintiff had assisted her husband in the coffee garden. Because of this, whenever the husband sold the coffee he would give the plaintiff K20.00. After carefully considering the evidence, Los J decided that this should be taken into account as loss of income and valued the loss at K80.00 per year.²⁸

These cases reveal the lengths to which Judges have gone to ensure that all assessable lost income, being the result of the injury, is acknowledged and provided for in the award of damages. However, to ensure that every relevant factor is taken into account with regard to economic loss suffered by the plaintiff, Miles J and Bredmeyer J developed in their assessment of the award of damages three principles. These are to ensure not only that every relevant factor is provided for in the award, but that the award is tailored in such a manner as to ensure that the needs of the plaintiff are provided for in the most appropriate manner.

The first principle is the acknowledgment of the loss of earning capacity which comes about as the result of the injury. According to Miles J, once a

²⁶ Supra note 12, at 471.

²⁷ Supra note 2, at 563.

²⁸ Supra note 19, at 479.

loss of earning capacity is established, even if there is no evidence as to pre- and post-accident potential earnings, a trial Judge must in general assess and award some compensation in this regard.²⁹ How is earning capacity to be assessed? In the *Kokonas Kandapak* case, Miles J again said that the Court has to do its best to quantify the loss even if the evidence does not enable it to be satisfied as to an exact figure. A Judge may use local knowledge, imperfect as it may be, of things such as wage rates market prices.³⁰

Woods J adopted Miles J's reasoning in the *Make Kewe* case.³¹ In this case the plaintiff was injured in a car accident. The injuries were spinal and affected both his back and his legs. These injuries had a significant effect on his ability to perform his normal village work and activities. In determining the award of damages for economic loss, Woods J following the precedent set by Miles J was prepared to take account of two factors. First, he was prepared to place some value on the plaintiffs' role and work as a villager. Secondly, he was prepared to take account of the fact that because of the injury the plaintiff could no longer get a casual labourer's job.³² In other words, Woods J was noting the earning capacity which had been lost as a result of injury.

Why should Courts take into account the loss of earning capacity? Careful consideration of the matter reveals that this is completely in line with the underlying principle of the award of damages which is to place the plaintiff in the situation that the plaintiff would have been in but for the injury. Before the accident giving rise to the injury, a plaintiff would have been able to take advantage of the part-time labouring opportunities as they arise. Because of the injury he is no longer able to take advantage of this. It is just and proper that this should be taken into account in the award of damages. I suggest that this principle of earning capacity should be applied when determining the economic loss resulting from the loss of production of a plaintiff's coffee garden. The Judge should consider if the garden can be extended and developed and the production improved. If so, this would no longer be possible because of the injury incurred by the plaintiff.

In the *Seke Opa* case, where the accident made the plaintiff into a virtual invalid, the plaintiff was no longer able to maintain or develop the coffee garden. The expert evidence called to assess the economic loss determined that the production would gradually decrease and that after 10 years'

²⁹ Supra note 2.

³⁰ Supra note 10, at 472.

³¹ *Make Kewe v Kudip Independent State of Papua New Guinea* [1986] PNGLR 279.

³² *Ibid*, 281.

production would cease. The Court followed this evidence in determining damages for economic loss. No account was taken of earning capacity. Yet, in another section of the judgment, the point was made that prior to the accident the plaintiff was a healthy, hardworking young person in his early twenties with a good opportunity to extend what appeared to be a prosperous coffee garden.³³ The key phrase here was “opportunity to extend”. Is this not earning capacity? Should this not be taken into account in the award of damages? Given the picture painted of the plaintiff as a keen energetic young villager could not it be inferred that but for the accident he would have extended and developed the garden? Is the Court not supposed to take the plaintiff as it finds the plaintiff? It can be argued therefore that there remains scope for the Courts to develop the extent of the principle of earning capacity further.

The second principle or tool was developed by Bredmeyer J in the *Kupil* case. Both of the plaintiffs had been paralysed and bed-ridden as the result of the accident. After awarding considerable damages for pain and suffering and the negative impact of the injury on the plaintiffs’ lifestyle, Bredmeyer J then proceeded to determine appropriate damages for economic loss. One important factor which Bredmeyer J saw to be relevant was that neither plaintiff could contribute to the manual tasks in the village which were traditionally the work of the male. Bredmeyer J was of the opinion that there needed to be compensation for this loss of labour. The method of providing this compensation was both innovative and appropriate. He chose to allow for funds in the award of damages to employ a labourer to do the manual work which the plaintiffs could no longer do. This allowance was assessed at K15.00 per week which was at the time of the judgement the current rate for the hiring of a labourer.

It would be good to use this method of award in the situations of people who are injured and who are no longer able to tend to their gardens. To village people, their coffee and other gardens are central to their being. They have put much time, energy and resources into developing these gardens. This method if used properly is able to compensate for not only the loss of production and income but also of earning capacity. Provision for the hiring of a labourer would enable the gardens which the plaintiff has worked so hard to develop to be maintained and even extended, and the injured plaintiff would be able to see the fruits of his labour and be able to respond in some way to traditional obligations through money earned from produce.

³³ Supra note 12, at 472.

The third principle which has been developed to assist in the assessment for the award of damages in injury cases is to allow for gradual improvement of a plaintiff's functioning if it is appropriate to do so. Obviously this would only be appropriate in cases where a plaintiff has received partial loss in one arm, hand or leg. Miles J developed this idea in the *Kokonas Kandpak* case. Here the plaintiff lost the use of his right hand to the extent of 50 percent. The other limbs were functioning normally. Miles J decided that the injury would have an effect on earning capacity in the following way. For the first year after the injury the plaintiff would be totally incapacitated. For the second year the plaintiff would regain his earning capacity by a third. In the next three years the earning capacity would be a half. No further allowance was made for loss. The reasoning behind Miles J's award here was that, if the loss of the use of the hand was only partial and the other hand was functioning normally, over time the plaintiff would be able to adapt his work methods to cope with this partial loss. As this adaptation occurred he would also gain more confidence. The award ordered by Miles J gave the plaintiff plenty of time to do this.³⁴

Thus, the Courts have been prepared to place an economic value on the plaintiff's work as a villager; take into account the loss of earning capacity; and make provision for the hiring of a labourer to do the manual work which the plaintiff is no longer able to undertake (especially in the gardens). In this way, the Courts have made significant efforts to award damages which can best place the plaintiff in the same position that the plaintiff would have been in but for the accident leading to the injury.

III. DAMAGES FOR DEATH

The death of a person as the result of an accident has a severe impact on the deceased's surviving family members. The surviving spouse becomes the plaintiff and the Court has the very difficult task of assessing and awarding damages in a way that can place the plaintiff and her children, as far as money can, in the same position as they would have been had the death not occurred. The death of a person with surviving dependants living a traditional village lifestyle faces the court with a real challenge to determine appropriate damages.

When considering damages awarded for death arising out of a civil wrong it is again important to emphasise the point that the purpose of damages is

³⁴ Supra note 10, at 577.

compensatory and is not a compassionate payment.³⁵ The compensatory emphasis of damages even in the case of death is emphasised by Bredmeyer J in the *Mave Koko* case.³⁶ In this case, damages had to be assessed for two children for the loss of their mother in a motor vehicle accident.³⁷ Bredmeyer J started his judgment by saying that, in a dependency claim for the loss of a mother, no damages are payable for the loss of their mother's love and affection nor for the grief that they suffered.³⁸ He said that damages are awarded for the pecuniary benefit that the children might have expected to enjoy had their mother not been killed. This may seem to be harsh but those people who have contributed to the development of principles governing the awards of damages over the years have not felt it necessary to allow damages for grief in the case of death. However, it could be argued that this forms a definite contrast with the damages that are awarded in personal injury cases for pain and suffering and the negative impact of the injury on a plaintiff's lifestyle. There is also a direct contrast with damages that are awarded for breach of contract, which may include distress and frustration.

1. Domestic Support Claims

The Courts in Papua New Guinea, when awarding damages for the death of a father and husband living a traditional village lifestyle, have developed the principle of domestic paternal support. This principle, while not departing from the general principle of damages, allows the Court to take into account the loss of the emotional support of a husband and father to a family which comes about as the result of a death. This principle was developed by Amet J (as he was then) in the *Pike Dambe* case.³⁹ In this case the plaintiff's husband had been shot by a policeman during a police operation in the deceased's area. Amet J found the killing to be unjustified and the State liable for damages. The plaintiff claimed general damages, damages for economic loss, exemplary damages and interest thereon, plus the cost of the proceedings. For the purpose of this article, the award of general damages and damages for economic loss and the method of award are of interest.

³⁵ The one exception to this is the payment of *solatium* to the parents for the loss of a child (provided for in the Wrongs (Miscellaneous Provisions) Act, Chapter 297, s 29).

³⁶ *Mave Koko v Motor Vehicles Insurance Trust* [1983] PNGLR 167.

³⁷ The father was not able to bring a claim because it was his negligent driving which was responsible for the accident.

³⁸ As to the award of damages in breach of contract for mental distress, frustration or upset, see *Harding v Teeroi Timbers Pty Ltd* [1988] PNGLR 128.

³⁹ *Pike Dambe v Augustine Peri and The Independent State of Papua New Guinea* [1993] PNGLR 4, 12.

In the *Dambe* case, the lifestyle followed by the deceased and his family fell into Miles J's description of a part-subsistence villager. He and the plaintiff planted kaukau and vegetable plus a reasonably sized coffee garden, which provided them with a shared income of K800.00 per year. The Judge acknowledged that the deceased had performed all of the manly physical work and that the fact that he could no longer provide this would significantly reduce the production of the gardens and the subsequent income. Having acknowledged this, the Judge awarded damages for economic loss of only K300.00 per year, which was less than half of the total income. The assessment of economic loss here was difficult because the surviving wife would still gain some income albeit a substantially reduced income. How big was the reduction? An expert witness who was from the Hagen area made the observation that, in a traditional village situation where the husband and wife co-operatively performed their complementary roles in the garden, the production would be more than double that which the individual partners could produce themselves. The fact that the joint work of the partners would be more than double that of an individual contribution should mean that the award of damages for economic loss in a situation such as this where the husband is killed should be just over a half of the amount that was earned jointly by the husband and wife.

As already noted, in his award of damages in the *Dambe* case, Amet J went further than just acknowledging economic loss. He gave recognition that the loss of the family through the death of a husband and father was a loss of both the tangible and the intangible. He brought all of this under the heading of domestic paternal support. This included three forms of support given by a husband and a father to his family in a traditional village situation. First, there were the heavy manual tasks. These included clearing the ground and turning the earth in preparation for both subsistence and cash cropping, digging of drains, and building and maintaining the family house. Secondly, there was the physical, practical and emotional support that a husband and father gave to a family living a traditional lifestyle. Thirdly, the man ensured that the family fulfilled the traditional obligations to its clan and community in exchanges which included bride price, compensation and moka exchange. In so doing the man ensured that the family felt part of the community.⁴⁰

It was only proper that the Court acknowledged the significant loss of the husband and father. The Court was not awarding damages for grief or consolation but was compensating for the loss of practical and emotional support. How was this acknowledged? The Court made an award of K14.00

⁴⁰ Ibid, 11.

per week. K5.00 went to the mother and this was awarded until she reached the age of 55. The remainder was divided evenly amongst the children (K3.00 per week) up until each child reached the age of 18. While this might not seem to be a large amount it needs to be remembered that in this case exemplary damages were awarded to the value of K30,000. It is true that the award of exemplary damages should not influence the amounts of other damages. However, the Court does have to ensure that the plaintiff is not unjustly enriched. The award of exemplary damages would therefore have had an indirect influence on the amount of damages for domestic paternal support. In this case the usual award of K1,500.00 was made for the loss of expectation of life.⁴¹

Woods J gave support to the principle developed by Amet J in the *Seni Eli* case. The plaintiff was the widow of a person killed in a motor vehicle accident. At the time of the death the couple had a child aged five. The deceased was a village person. He cultivated traditional crops and some coffee and was the sole supporter of the plaintiff and the child. The yearly income from the coffee was estimated to be K350.00 and that from vegetables was K50.00. Amet J, noting that this was a co-operative effort, made an allowance for the reduction of coffee and income brought about through the death of the deceased. He also made an allowance for the other work which the deceased did for the family and which could not be given an exact cash figure, namely, the construction of gardens and fences and the construction and maintenance of the family home. In converting all of this into a cash figure, Woods J allowed K5.50 per week for the plaintiff until she reached the age of 55 and K5.50 per week for the daughter until she reached the age of 18.⁴²

The principle of domestic paternal support is an innovative development in the principles governing the award of damages and is a principle which accords well with the support given by a husband and father in a traditional village situation.

Bredmeyer J addressed the issue of domestic *maternal* support in relation to an urban situation in the *Koko* case. In this case he provided a clear framework which would allow sufficient latitude for the Court to award damages for the loss of domestic maternal support in an appropriate case. In

⁴¹ In common law jurisdictions it is usual for the Courts to set a fixed amount for the loss of expectation of life. Up until 1994, the amount that was established and followed was K1,500. However, in 1994, the Supreme Court in the case of *Wallbank v Papua New Guinea* [1994] PNGLR 88 increased the amount to K3,000.00.

⁴² *Seni Eli v The Independent State of Papua New Guinea* [1988-89] PNGLR 653.

the *Koko* case, two children lost their mother in a motor vehicle accident. Bredmeyer J, after a careful survey of relevant cases, decided that it was possible to award damages for the cost of replacing the services of a mother by a housekeeper, the extra services provided by a mother (such as essential matters to do with upbringing and help with homework), and the increased risk of orphanhood. This approach acknowledged the special vulnerability of a child when losing his or her mother. This was because there was the risk that the father might not be able to perform fully the parenting duties. This might occur because of the premature death of the father or the lack of money due to illness or unemployment.⁴³

Woods J, in the *Nolnga* case, applied the principles established in the *Koko* case to a village lifestyle situation. A mother from the Jimi valley in the Western Highlands was killed in an accident. Surviving her was the husband and three children aged 10, 9 and 4 years of age. While at the time of the Court decision the oldest child was 19, she was only 14 at the time of the accident and therefore a dependent. The younger children since the accident were being looked after by the plaintiff's mother (their grandmother) in the village. She was fulfilling the housekeeping-type work as well as trying to be a mother to them. Following the precedent established in the *Koko* case, Woods J allowed for a payment to each child of K3.50 per week, to be calculated from the time of the accident causing the mother's death until they reached the age of 18. As the two older children were 19 and 16 respectively at the time of the judgment, Woods J saw no justification for making any further award to them under the head of the increased risk of orphanhood. However for the youngest child who was only four at the time of the accident he held that an award under this head was proper. He therefore proceeded to award K1,000 to the youngest child, which was the same amount that was awarded to the oldest child in the *Koko* case. The *Nolnga* case was a start but the principle could be developed further so that the head of damages can properly called domestic maternal support. This would include the total support given by a wife and mother to the whole family in a traditional village situation.⁴⁴

The co-operative work of the partners has been discussed. The loss of one partner creates a gap. Amet J, in the *Dambe* case, made the point that, while by custom the deceased relatives should help the surviving widow, they are reluctant as they have their own families and gardens to nurture.⁴⁵ People are quick to criticise this lack of help. In reality, immediately after the death of

⁴³ Supra note 36, at 168.

⁴⁴ *Nolnga v Motor Vehicles Insurance (PNG) Trust* (1991) PNGLR ?.

⁴⁵ Supra note 39, at 12.

the deceased, the relatives or extended family are very supportive. However, as time passes, there are new events, situations and obligations which arise requiring immediate attention and diverting the focus away from the needs of the widow. There may be tribal fights or tensions, compensation demands, bride price and moka exchanges to contribute to, unexpected floods, droughts or raids by the police destroying large parts of people's livelihood. In a village situation people have many conflicting demands for their time and resources. The most immediate demands tend to take precedence. The widow with three children does not receive priority attention. However because of the reasons outlined it is unfair to be critical of relatives.

2. Dependency Claims on Death of Child

Three cases illustrate claims for damages arising out of the death of a child in traditional village situations. In each case a claim was brought by a parent whose child was killed through a civil wrong and who provided support to the parents or, had they not been killed, would have provided significant economic support. In the *Mina Uokare* case, a claim was made by the parents of an 18-year-old son who was killed in a motor vehicle accident. The parents maintained that they relied on their son for support. The son was living a traditional village lifestyle and at the same time of his death was giving significant support to the plaintiffs. While there were other children, the deceased was the main support-giver. The parents were 45 at the time of the death. The Judge acknowledged that the loss of support was significant and that the parents would have increasingly relied on the son's support as they grew older. He made a K2.00 per week allowance for the loss of support for the next 20 years which he took to be their life expectancy.⁴⁶ A similar claim was made in the *Helen* case. In this case the deceased was shot dead by the Station Commander of the Wabag police station without any apparent reason. The plaintiff, who was the step-mother of the deceased claimed damages for loss of support. Again the Court acknowledged this loss and that the need for support would increase as the plaintiff and her husband grew older.⁴⁷ In this case the Judge awarded damages for the loss of support to the value of K5.00 per week for twenty years which the court took to be their life expectancy.⁴⁸ In the *Simin Dingi* case, the Court went so far as to take into account under the head of loss of earning capacity the loss of potential bride-price to the parents of a teenage daughter who was killed

⁴⁶ *Mina Uokare v The Independent State of Papua New Guinea* [1988-89] PNGLR 655, 656.

⁴⁷ *Ibid*, 394.

⁴⁸ *Helen v Jack Marius Karani and The State* [1992] PNGLR 391.

in a road accident in the Chimbu. But for the death resulting from an accident which was brought about by a negligent act, the plaintiff could have expected the bride-price payment for his daughter. Woods J therefore saw that it was proper to take the bride-price into account for the award of damages. He was guided in his assessment of damages by the average bride-price paid in the Gumine area of Chimbu.⁴⁹

The willingness of the Court to award damages for the loss of support of a child acknowledges the importance given to family obligations in Melanesian Society. As parents grow older they rely upon their child more for support. The death of a child brought about through a civil wrong means that the parents are unable to rely upon that support. It is only fair and just that the defendant should have to compensate for this loss of support for which he or she is responsible.

3. *Claims for Reasonable Funeral Costs*

Under the Wrongs (Miscellaneous Provisions) Act, the Court is able to award costs in favour of the plaintiff for reasonable funeral costs in cases where the death of a person has been the result of a civil wrong.⁵⁰ In Papua New Guinea, when a death occurs there are many traditional obligations which must be fulfilled in accordance with the custom of a particular area. In the *Inabari* case, the issue of awarding funeral costs was considered and whether or not this could include traditional obligations. Salika J noted that in Papua New Guinea generally the event of a death is regarded as a major occasion. The length of the period of mourning and the number of mourners often depends upon the status of the person who has died. It is the task of the deceased's immediate relatives to provide for the mourners for as long as the mourning period extends. This in practical terms can be an expensive exercise. The costs also include ceremonies and other gatherings which occur after the funeral. In this particular case the deceased was a child from Dagua in the East Sepik. There the mourning period usually extends for two weeks. The deceased's parents had to provide food for the mourners for this period of time. The issue that the Judge had to consider was whether reasonable funeral costs could include traditional obligations associated directly with the death, and costs which were incurred after the burial but still related to the mourning. The Judge decided that they could and was prepared to include as reasonable funeral expenses the cost of the food for

⁴⁹ *Simin Dingi v Motor Vehicles Insurance Trust* [1994] PNGLR 385.

⁵⁰ Wrongs (Miscellaneous Provisions) Act, chapter 297, s 28 (2).

feeding the mourners for two weeks, telephone calls to inform people about the death, and the cost of a vehicle to take the deceased body to the village.⁵¹

IV. PERIODIC PAYMENT AWARDS

Under the present common law principles regarding the awarding of damages, once the amount of damages has been assessed and determined, they are awarded to the plaintiff in a lump sum and (barring appeal) this is the end of the matter so far as the court is concerned. The Court is not concerned with how the damage money is spent and there is no safeguard to ensure that it will be spent on rehabilitating the plaintiff and supporting his family.⁵² In a way this undermines the central purpose of damages which is to place the plaintiff in the same position that he or she would have been in but for the injury or but for the death of the spouse. There are other difficulties that may arise. After the judgment it may be realised that there was a mistake in the assessment of damages and the medical costs were greater than anticipated. Similarly, while damages might be awarded on the basis (following medical opinion and evidence) that the plaintiff would live another three years, he might live another ten years and this extra seven years is not provided for in the damages. However, the original award of damages stands.

In the *Kupil* case, the difficulties surrounding the award of damages were considered in some detail by Bredmeyer J.⁵³ He quoted a report written by a Commission in Australia on this very matter. Amongst other points, it suggested that damage awards for future economic loss and medical needs should be awarded on a periodic basis. It was this suggestion that clearly influenced Bredmeyer J to decide to initiate an innovative idea for the award of damages. The award of damages for pain and suffering, loss of expectation of life, past economic loss and the associated interest were by way of the traditional lump-sum. However, for the awards of damages relating to future economic loss and medical needs, Bredmeyer J chose to order these to be paid at a set amount each fortnight. His authority to make such an order came from section 155 (4) of the Constitution. This section reads:

⁵¹ *Inabari v Sapat and the Independent State of Papua New Guinea* [1991] PNGLR 427.

⁵² Bredmeyer J made this point strongly in the *Kupil* case, supra note 13.

⁵³ *Ibid*, 383.

Both the Supreme Court and National Court have an inherent power to make, in such circumstances as seem to them proper, orders in the nature of prerogative writs and such other orders as are necessary to do justice to a particular case.⁵⁴

According to Bredmeyer J, the purpose of this section was to enable the Courts to tailor their remedies to meet the circumstances of the particular case and so ensure that justice was done. Bredmeyer J felt that in this particular case it was in the interests of justice to order damages for future economic loss and medical expenses to be paid on a fortnightly basis. The reason for this was that both of the plaintiffs had been seriously paralysed. Their life expectancy was estimated to be only five years.⁵⁵ However it was possible that they might live longer. Should the Court award damages for future economic loss in a lump sum assessed on a life expectancy of five years, and then the plaintiffs lived for ten years, there would be no provision for that extra five years. The fortnightly order would, however, ensure that the plaintiffs received a regular payment for the duration of their remaining life.

Woods J adopted the approach of Bredmeyer J in the *John Taka* case. Again the plaintiff was a village person who had been permanently paralysed and so required the continual assistance of others for all of his needs. Woods J was of the opinion that the Court had a responsibility to consider the future needs of the plaintiff and to make an appropriate order to ensure that he was guaranteed a regular payment to cover his difficulties and need for continual care. It was noted that for most people in Papua New Guinea (including the plaintiff) there was no effective system in place to manage large sums of money in a way that fully protected their future interests. Because of this, Woods J followed the precedent set by Bredmeyer J and used the authority given to him under section 155 (4) of the Constitution. He ordered that the plaintiff's damages for future economic loss and need for future care should be awarded in a fortnightly amount which was assessed at K70.00 per week and was to be paid for the duration of the plaintiff's natural life.⁵⁶

⁵⁴ Constitution of Papua New Guinea, s 155(4).

⁵⁵ *Supra* note 13, at 384-385.

⁵⁶ *John Taka v Leo Kipi and The State* [1995] PNGLR 254, 257. Neither Woods J nor Bredmeyer J saw any difficulty in giving effect to the order. Woods J was of the opinion that the fortnightly payments could be incorporated through the Department of the Attorney-General onto the Government pay-roll system and paid through a bank account in the name of the plaintiff. It would then be up to the Solicitor-General to track the life of the plaintiff and be advised of his eventual demise in the future.

This method of awarding damages for future economic loss and medical needs is appropriate for the Papua New Guinea village situation, for two reasons. First, the criticisms made regarding the awards paid in lump sums are acknowledged. Secondly, in a Papua New Guinea village situation, when a person receives in one payment a large amount of money there is pressure from a person's relatives to distribute that money to acknowledge the different assistance given or to acknowledge certain relationships. In reality the plaintiff may receive very little of the amount that was awarded to him or her. However, relatives seeing the ongoing needs of the plaintiff would more readily be able to appreciate that the payment of the modest but regular sum of money is for the purpose of tending to the plaintiff's ongoing needs. The use of the periodic payment for future economic loss and medical needs is another development made by the Courts to ensure that the award of damages to a person living a traditional lifestyle is effective and appropriate. The damages for pain and suffering and the negative impact of the injury on the plaintiff's lifestyle would still be awarded in a lump sum. This would still enable the plaintiff to use this lump sum as working capital to rehabilitate coffee gardens and regain respect in the community.

It is unfortunate that the principle of periodic payments has not been developed further by other members of the judiciary. Given the continual traditional demands on people who receive large amounts of money by their relatives, it is necessary to provide some protection to the injured party or surviving family members of the deceased by using the power given to the courts under section 155(4) of the Constitution. The use of this section could be extended even further to create a trust whereby trustees would be responsible for administering the money for the best interests of the beneficiary. Respected members of the community, such as a priest, a pastor and an educated community leader, could be appointed as trustees. They would have the responsibility of dealing with the demands from relatives and, while acknowledging these, would also ensure that the money was used to support the plaintiff in the way that it was intended. It would be necessary to gain the approval of the plaintiff, for such a proposal to be given effect. He or she might not be interested in the proposal. It is however a possible further development in ensuring that damages are awarded appropriately.

V. RELATIONSHIP BETWEEN COMMON LAW DAMAGES AND CUSTOMARY COMPENSATION

Occasionally the Courts are required to consider what should be done in a situation where, prior to the award of damages, the plaintiff also received some compensation from the clan of the person responsible for the civil wrong. This happened in the *Kupil* case. The vehicle in which the accident

occurred was owned by the State. The driver was an employee of the State. However, the driver was also a member of a clan having a close relationship with both plaintiffs and the accident occurred in that area. The result of this was that the clan of the driver made a compensation payment to the clan of the plaintiffs. To each of the two plaintiffs a separate compensation payment was made of K2, 400.00, forty pigs and two muruks. Each plaintiff then distributed a considerable amount of this compensation to their clan members in accordance with local custom. They kept for themselves and their families the cash of K2, 400.00.⁵⁷

Bredmeyer J had to determine what effect the compensation payment should have on the damages. To assist him in this, expert witnesses were called to explain the purpose of compensation in the Wahgi area. He was also guided by schedule 2.1 of the Constitution and sections 3 and 5 of the Customs Recognition Act (chapter 19). Schedule 2.1 of the Constitution provides for the recognition of custom unless it is inconsistent with a constitutional law or statute or repugnant to the principles of humanity. Under section 3 of the Customs Recognition Act, a custom is recognised provided that its practice would not result in some injustice or would not be in the public interest. Under section 5 of the same Act, the Courts are permitted to take custom into account where justice requires it or where the failure to take it into account would create an injustice. Thus, Bredmeyer J was able to acknowledge the custom of compensation provided that its practice was in the public interest, was not repugnant to the principles of humanity and was in the general interests of justice.

The evidence given concerning custom in the Wahgi area revealed that it had two purposes. First, it aimed at easing the tensions created by the injury to the plaintiffs and to restore peace, harmony and good relationships between the two clans. The second purpose was to avoid retribution or “payback” from the victim’s clan. Bredmeyer J was of the view that the aim of restoring harmony and good relationships between the two clans was in accordance with the general principles of humanity. The purpose of avoiding payback was not. He was prepared to emphasise the purpose of restoring good relationships and therefore recognise the custom of compensation. The next step was to determine how the Court should decide the damages to be awarded less the compensation paid directly to them. In other words the Court only took account of the compensation that the plaintiffs held themselves and not that which was distributed to the wider clan. The

⁵⁷ *Supra* note 17, at 355.

purpose of this was to discourage customary payments in situations where common law damages could be obtained.⁵⁸

While Bredmeyer J was trying to avoid unjust enrichment his reasoning evokes two responses and observations. First, compensation is central to Highlands custom and it is one of the most important methods of avoiding tribal fights when tensions emerge between clans. A custom fulfilling that role should not be discouraged. Secondly, it could be argued that common law damages and customary compensation perform two different yet complementary roles. Traditional compensation focuses on inter-tribal dynamics and tensions which arise as the result of an injury or death. The purpose is to restore harmony and good relationships. The focus is therefore on the group and not the individual. The focus of common law damages is however on the individual plaintiff and aims at providing him or her with the means of being in the same living situation that he or she would have been in had the injury or death of a spouse not occurred. The focus on group dynamics on the one hand and the needs of the individual on the other, if applied properly, can combine and address the tensions, sufferings and disabilities created by the civil wrong. Why not allow the awards of compensation and damages to do this and complement each other without reducing the common law damages by the amount of compensation paid directly to the plaintiff? Since the largest amount of compensation is distributed to the wider clan members, this could hardly be said to amount to unjust enrichment.

VI. CONCLUSION

Considering the approach of the Courts as a whole it is safe to say that the courts have achieved two things. First, they have moulded the award of damages to meet the local circumstances and lifestyles of the plaintiffs directly affected. Secondly, the Courts have broken new ground in the manner in which damages ought to be awarded. While this approach needs to be developed further, it can be said that the Papua New Guinea Courts have made a significant contribution to the award of damages in Papua New Guinea. Some of the unique sections of the Constitution of Papua New Guinea has helped the Courts to do this.

In conclusion, five matters are raised to which the Courts need to give greater attention. First, more attention needs to be given to the additional severity that an injury can have upon a person who is dependent upon the use of his hands or legs to obtain a subsistence living, and this needs to be

⁵⁸ *Supra* note 17, at 362-363.

recognised in the award of damages. Secondly, the Courts need to reconsider the life expectancy of village people. At the moment they have set it at 55. Given the increased life expectancy in the country generally, it is suggested that this should be increased to 60 years of age. Thirdly, if an award of solatium can be made to parents for the loss of a child, a similar award could be made to a child under a certain age for the loss of a parent. Fourthly, the Courts need to consider the extension of the use of section 155 (4) of the Constitution when determining the appropriate method of the payment of damages. One of the possible extensions of this section would be to order the ongoing supervision of a village person who is fully paralysed as the result of an accident to ensure that the orders of the court are achieving what they are supposed to achieve. Finally, the Courts need to consider the establishment of a trust in certain circumstances to ensure that money provided as damages is protected from excessive and unreasonable demands of relatives.

It is only through making such orders that Woods J's claim, that the Courts have a responsibility to consider the future needs and interests of the plaintiff and ensure that he or she is properly cared for, can be fully realised. The goal of appropriate awards of damages to people living a part-subsistence village lifestyle in Papua New Guinea will continue to rely upon the shared contribution of counsel and the judiciary in Papua New Guinea.