

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 31/10/2017

**Before :**

**MR JUSTICE STEWART**

**Between :**

<b>Kimathi &amp; ors</b>	<b><u>Claimant</u></b>
<b>- and -</b>	
<b>Foreign and Commonwealth Office</b>	<b><u>Defendant</u></b>

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**Mary Ruck & Sophie Mitchell** (instructed by **Tandem Law**) for the **Claimants**  
**Niazi Fetto, Mathew Gullick & Stephen Kosmin** (instructed by **Government Legal**  
**Department**) for the **Defendant**

Hearing dates: 18 & 19 October 2017

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**Judgment Approved**

**Mr Justice Stewart :**

1. This is the third judgment in respect of amendments to the individual Particulars of Claim (IPOC) in this litigation. Previous judgments were handed down on 27 April 2017 ([2017] EWHC 938 (QB)), in particular at paragraphs 26-32, and on 18 August 2017 ([2017] EWHC 2145 (QB)). The Order made following the August 2017 judgment was, so far as material:

“4. The Claimants do file and serve final Amended (or Re-Amended) Individual Particulars of Claim in respect of the Test Claimants identified in paragraph 1 of this Order by 4pm on 15 September 2017.

5. In respect of any amendment not contained within the draft Amended (or Re-Amended) Individual Particulars of Claim already served, there be liberty to the Defendant to apply in respect of the final draft served in accordance with paragraph 4 of this Order, such an application to be made by 4pm on Tuesday 3 October 2017. Any such application may be made by notifying the Court and the Claimants, and will be considered in the week commencing 2 October 2017.”

2. Pursuant to paragraph 4 the Claimants filed and served Amended (or Re-amended) IPOCs. The Defendant has applied, pursuant to paragraph 5 of the Order, for the Court to disallow certain amendments. It is that application upon which I now rule.
3. The majority of the objections are in relation to amendments to the Particulars of Injury in the IPOCs which were served on 14 September 2017. A few proposed amendments are matters which have been overlooked on the previous applications. There is attached to this judgment a Scott Schedule which sets out in full the amendments to which the Defendant objects, the Claimants' response and my ruling.
4. I do not propose to repeat matters in the judgments of April 2017 and August 2017 save, in respect of injury amendments, a brief extract from the April 2017 judgment, namely:
  - “28. The Claimants state that the proposed amendments provide clarification of the particular claims in the light of the medical evidence and remove claims no longer pursued. They say the amendments are only to deal with issues established by the medical evidence which are consistent with what is already pleaded. In other words, despite the apparent generalisation of the whole of the medical evidence of the doctors, whether written or oral, the Claimants do not seek to amend so as to rely upon any specific injuries not already pleaded in the Particulars of Injury. There were a number of examples of these in the medical evidence.
  29. The main issue in respect of injuries was the general statement that the Claimant will refer to and rely upon the written and/or medical evidence of the doctors. On analysis there is little if anything between the parties on this. The Claimants say it is there only to deal with issues established by the medical evidence consistent with what is already pleaded. This necessitates that there be no amendment allowed of the particulars of injuries save to that limited extent. During the hearing a redraft was provided to add the words “insofar as it refers to matters already pleaded”. On that basis permission is granted to amend to include this general statement and (a) it is clearly understood that reliance on the medical evidence will not allow the Claimants to allege anything beyond what has been specifically pleaded (b) as the drafts of the other IPOCs become available, these will be carefully scrutinised by the Defendant. Any unresolved issues will have to be the subject of a ruling by the Court.”
5. There is a witness statement from Steven Martin, dated 10 October 2017. Amongst other things he makes the following points:
  - (i) (Paragraph 7) “The medical experts gave evidence between 9 January and 1 March 2017. They were cross examined by both sides. Evidence

regarding some injuries were maintained and others were not. Evidence from the experts clarified some of the symptoms complained of by the Test Case Claimants and in some instances clarified or revised the expert's diagnosis."

- (ii) (Paragraph 9) "The Claimants' Application to amend IPOCs was made on 9 March 2017, approximately one week after the evidence from the medical experts was completed." He says it would not have been practicable or proportionate to make this application earlier or prior to the joint experts giving evidence.

It must be remembered that the medical evidence was complete by late 2015. The Test Claimants' evidence was given in the summer of 2016. Therefore matters contained in the medical evidence which had not been pleaded could have and should have been pleaded prior to the Test Claimants giving evidence. Indeed in a letter from the Government Legal Department to the Lead Solicitors dated 6 October 2015, the Defendant specifically raised the fact that a number of the Claimants were raising entirely new allegations during medical examination and that those allegations were not included in their Particulars of Claim or witness statements. The Defendant raised CPR Part 35 questions of the Experts but said, "This has been done out of an abundance of caution. By raising such questions the GLD does not accept that the Claimants may advance any allegations which are not expressly pleaded within their Statement of Case." The Claimants' solicitors responded on the same day saying they were reserving their position at this stage and continuing "It may be the case that an application is necessary to amend the Particulars of Claim. The amendments would obviously be as a result of the further information that has come by way of the joint instructed medical experts seeing the test case clients and the Part 35 questions and responses. We suggest to deal further with this issue at this stage is a little premature."

The Claimants submit that it was reasonable to await the outcome of cross-examination of the medical experts (in January/February 2017) before applying to amend "so as to avoid the risk of two amendments". I do not accept this. Where new matters were raised in the medical evidence and supported by the Claimants (not all are supported by the Claimants in their written/oral evidence) then amendments should have been applied for prior to the Claimants giving evidence. I must take account of this in deciding which amendments I allow. These are very late applications to amend as I made clear in the April 2017 judgment when I set out the "Legal Outline" at paragraphs 6-8. I do not repeat that legal outline. This point undermines the Claimants' submission that they could not plead specific diagnoses (either physical or psychological) without the medical evidence. They had a number of months after the medical evidence had been crystallised on paper and prior to the Test Claimants giving their oral evidence. They did not avail themselves of that window of opportunity.

- (iii) (Paragraphs 13, 16 & 17) At the hearing on 7 April 2017 it was agreed that liability amendments to the IPOCs would be supplied first and injury amendments later.

This is reflected in the Order of 19 May 2017, paragraph 4, whereby liability amendments were to be served by 16 June 2017 (the date slipped somewhat) and the final draft IPOCs showing both the amendments on liability and amendments on all other issues were to be served no later than 15 September 2017 and earlier, if and to the extent practicable. Nevertheless, this separating of liability and quantum amendments was permitted on a specific basis, following the April 2017 judgment. In case managing this matter on 27 April 2017, I said:

“They (the Claimants) are very severely constrained. They can’t go outside their present pleadings. There is obviously a bit of sort of wiggle room, like the one where there’s specific evidence about scrotum but he said he had been beaten all over his body, but subject to that very bit of wiggle room, they are limited by the present pleadings. They can’t expand it. So you know that. It doesn’t seem to me that anything that’s going to be in Mr Mansfield’s July submissions is really going to be affected by that tidying up process....”

### Psychiatric Injuries

6. It can be seen from paragraphs 9 and 10 of the Defendant’s preamble to the Scott Schedule that there is an objection in principle in relation to certain psychological symptoms. The Defendant breaks down the amendments into two categories.
7. The first category is exemplified by the amendment proposed to paragraph 40 of TC9’s IPOC. This proposed amendment is as follows:

“The Claimant has suffered psychological ~~injury~~ symptoms related to her experiences in the Emergency and the trauma she was exposed to; she still experiences ~~flashbacks~~ reminders of the beatings she endured as well as fear and anxiety regarding her experiences. The Claimant suffers intermittent headaches and ~~is~~ feels psychologically disturbed. She has not suffered a recognised psychiatric or psychological disorder<sup>1</sup> but experiences distressing memories and images of events at the camp<sup>2</sup>, prompted by specific reminders such as passing near the site of the camp. The legal effect of this is a matter for submission.”

The Defendant’s objection is that a generalised pleading of “psychological injury” is sought to be replaced with an unclear and inchoate averment to the effect that the Test Claimants did not suffer a recognised psychological/psychiatric injury, but that the effect of such symptoms as are maintained is a matter for legal submissions. It is objected that the formulation is wholly embarrassing in its lack of particularity and open endedness and the amended wording cannot be permitted. The Defendant submits that the averment to psychological injury must be deleted. It says that this was done in April 2017 for TC27 where the “pleading of psychological injury and flashbacks was deleted in its entirety and not replaced by this new formulation.”

8. Dealing briefly with the legal principles, generally speaking, torts that require proof of damage do not permit recovery of damages purely for distress, injury to feelings etc. In those torts there is a need for actual physical or psychiatric injury. Thus in Nicholls v Rushton (The Times June 19, 1992) Parker LJ said:

“Unless there is a physical injury no question of damages for mental suffering, fear, anxiety and the like arises.”

However where a Claimant suffers physical injury, distress and anguish associated with coming to terms with the resulting disability are compensatable. In Nicholls Parker LJ referred to the speech of Lord Bridge in Hicks v Chief Constable of the South Yorkshire Police [1992] PIQR p433 and said that:

“If there be such injury then...difficult questions of causation may arise. In some cases it may be possible that anxiety may be the subject of compensation; in others not. But unless there is some physical injury...there is no possibility of recovery.”

A general discussion of these problems is to be found in Clerk & Lindsell on Torts 21<sup>st</sup> Edition, paragraphs 1-30 to 1-31 and Kemp & Kemp Quantum of Damages Volume I, paragraphs 3-003 to 3-006.

Further, paragraph 1-31 of Clerk and Lindsell points out:

“In the case of the deliberate infliction of distress, it is arguable that in principle a defendant *ought* to be held liable for the claimant’s emotional reactions.”

There is further discussion of this in Charlesworth & Percy on Negligence (13<sup>th</sup> Edition) at paragraph 2-130.

In those circumstances, where previously pleaded psychological injury has been “downgraded” to psychological symptoms consequent upon physical injury I have allowed the amendments because each case will need to be dealt with on its merits during final submissions. These amendments fall within the scope of the April 2017 judgment where, in the context of a physical injury allegation which was reduced, the amendment was permitted – see paragraph 30 in respect of TC30. Also see

- (i) TC27’s permitted amendment which was “The Claimant ~~has suffered psychological injury; but still experiences flashbacks~~ recalls the physical assaults and details of his ordeal and ruminates on the abuse he suffered.” In this way the emotional effects of TC27’s suffering physical injury were permitted by way of amendment.
- (ii) TC31’s permitted amendment: “He experiences what he describes as flashbacks.”

It should be noted that the Defendant did state that it may raise in final submissions in this category of case an argument that, because the allegation was not pleaded as it will now be, the Defendant did not previously explore whether these TCs did suffer such emotional reactions and, if they did, their causation.

9. The further broad category is where the Claimants have sought to amend to rely for the first time upon a specific named psychiatric injury/condition. In some, the amendment is without any prior pleading of psychological injury or symptoms. This is outwith the scope of permissible amendments having regard to the April 2017 judgment. The Claimants' arguments based on lack of knowledge of psychiatric injury are dealt with by (a) it is the legal representatives' duty to elicit the broad outline of any potential psychiatric injury, and (b) the psychiatric evidence was finalised on paper in 2015. It would be wrong having regard to the principles relating to late amendment to allow such amendments at this stage.

Where there has been a prior pleading of psychological injury together with the symptoms, the Defendant objects to proposed amendments which seek to advance a condition which goes beyond such generalised pleading and/or symptoms. It is said that the general term "psychological injury" cannot, if already pleaded, justify an amendment to allege any psychiatric condition, any more than a generalised pleading of "physical injury" could justify an amendment to allege something specific. In respect of this, the Claimants submit that the generalised psychological injury pleaded by a lawyer prior to receipt of the medical evidence has been further particularised to provide the diagnosis of the psychiatric experts. This is correct, so far as it goes. However the diagnosis was available, as I have previously stated, for a number of months prior to the Test Claimants giving evidence. The amendments should have been made prior to that evidence. I have dealt with these cases in the schedule. Generally, these amendments also have been disallowed.

10. In a speaking note prepared on the second morning of the hearing, the Claimants made the following points in relation to TCs 20, 22, 23, 29 and 39:-

- (i) These TCs alleged psychological symptoms in their particulars of injury

e.g. TC20 alleges "distress"

TC22 alleges "flashbacks and intrusive thoughts. She takes medicine to sleep most nights".

- (ii) Therefore the pleading of a diagnosis is not a new injury.

11. I do not accept proposition (ii). Such symptoms as are pleaded fall well short of making a diagnosis of psychiatric injury. There is a clear distinction between some symptoms and a diagnosis of psychiatric injury, which can only be diagnosed if a number of criteria are satisfied in accordance with DSMV and/or ICD10. The psychiatric injuries now sought to be pleaded are not mere labelling of the symptoms already pleaded. So:

- TC20: Professor Mezey diagnosed PTSD based on descriptions (to her) of re-experiencing symptoms (including nightmares) and avoidance (16-218). These additional symptoms were neither pleaded [nor were in her witness statement]. This is why it was incumbent on the Claimant to plead the psychiatric case properly once the medical evidence was available in 2015. Belatedly, the Claimants relied on the "catch-all" in the Particulars of Injury, namely "Further particulars of the Claimant's injuries will be set out in the medical evidence that will follow. Medical evidence is being sought in

accordance with the Order of the Court.” This is a hopeless submission as can be seen from paragraphs 28 and 29 of the April 2017 judgment which are repeated at paragraph 4 above.

- TC22: In making her diagnosis, Professor Mezey’s report (paragraphs 78-81) relied on more symptoms than TC22 had pleaded or alleged. [Those were the subject of cross-examination]. However, they include:
  - (a) for PTSD: recurrent nightmares, avoidance of people or situations reminiscent of the trauma and increased levels of arousal when faced with reminders of what happened;
  - (b) for lifetime Depressive Disorder: pervasive sadness, tearfulness and suicidal ideation, associated in the past with loss of appetite and weight loss.

The same points can be made therefore in this case as in TC20’s case.

12. Thus, the fundamental premise of the Claimants’ supplemental argument is wrong. The psychiatrist did not just attach to the pleaded symptoms (or witness statement evidence) an appropriate diagnosis. Therefore the Defendant’s letter of 6 October 2015 was a clear warning to the Claimants. In none of the cases TC20, 22, 23, 29 and 39 was a psychiatric “injury” pleaded, only some psychological symptoms.
13. Finally, it is insufficient that a Claimant alleges additional material symptoms only in a medical report. The proper course was, after receipt of the medical evidence, for a TC to have provided a short supplemental statement and for the pleading to have been amended to plead psychiatric injury. The Counter Schedules all contained the pleading “This Counter-Schedule responds to the personal injuries specifically pleaded by the Claimant in the Individual Particulars of Claim and Schedule of Loss. Except where there is ambiguity about the nature of those injuries, it does not address additional or alternative injuries that the Claimant has disclosed for the first time in construction with the single joint medical experts. Unless and until such injuries form part of the Claimant’s pleaded case, they fall to be disregarded by the Court”.

This warning, further to the letter of 6 October 2015, and repeated by Mr Skelton Q.C. on 14 June 2016, prior to the TCs giving evidence, and by Mr Block Q.C. prior to cross-examining the medical experts, went totally unheeded. Test Claimants were not cross-examined about symptoms appearing only in the medical evidence and which were not pleaded. It would be wholly contrary to the overriding objective to allow such amendment, especially in the light of the potential prejudice to the Defendant who expressly did not ask the TCs about the additional symptoms.

14. I have taken account of the above matters and of the legal principles previously set out in the earlier two judgments in permitting/refusing amendments as set out in the schedule. Further details appear in the judge’s column on that schedule. I would add only this. On a number of occasions the Claimants refer to lack of prejudice to the Defendant. The authorities referred to in my previous judgments make it abundantly clear that this is not a determining factor. It is the overriding objective which is of the utmost importance. I have always accepted that this case is an extraordinarily complex piece of litigation. I have, therefore, where possible and where I have

believed it to be consistent with the overriding objective, taken that into account so far as possible. However, there has to be some discipline. The case is not now expected to finish in Court until the end of 2018 and the Court and parties have already spent a massive amount of time dealing with amendments. More time will have to be spent as a consequence of these amendments. Many of them, certainly many of those in the present schedule, could and should have been made prior to the Test Claimants giving evidence. If that had been done I believe that substantial time would have been saved and many problems avoided.

IN THE HIGH COURT OF JUSTICE

Claim No. HQ13X02162

QUEEN'S BENCH DIVISION

KENYAN EMERGENCY GROUP LITIGATION

BEFORE THE HONOURABLE MR JUSTICE STEWART

B E T W E E N

ELOISE MUKAMI KIMATHI  
JAMES KARANJA NYORO AND  
OTHERS

Claimants

-and-

FOREIGN AND COMMONWEALTH OFFICE

Defendant



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**SCOTT SCHEDULE RELATING TO  
OUTSTANDING AMENDMENTS AS AT 6 OCTOBER 2017 PART 1**

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## DEFENDANT'S INTRODUCTION

### **C'S RESPONSE INDICATED IN BLUE.**

#### *Suggested reading*

1. D suggests that the court reads the following ahead of considering this schedule:
  - a. The judgments dated 27 April 2017 [2-317] **wrong reference – the judgment is at 2-325** and 18 August 2017 [**2-389**] (main judgment only).
  - b. The attached letter from GLD to Tandem Law dated 6 October 2015.
  - c. GLD's letter to the court dated 3 October 2017 and the attached letter dated 29 September 2017.

#### *Scope of schedule*

2. This schedule principally addresses draft 'injury' amendments set out by Cs in IPOCs served on 14 September 2017. However, it also addresses errors/discrepancies in transcription of amendments already agreed or permitted, together with previously disputed amendments not yet addressed due to oversight by the parties and/or the court.

C agrees that all outstanding matters (including errors/ outstanding matters identified in correspondence) should be dealt with in this Schedule and, where necessary, has added in those which appear to have been missed out by D.

In their letter 3.10.17 (page 2), D raised two further points:

1. "... the Defendant has noticed that, apart from the transposition of amendments into the draft (RE-) amended IPOCs, a number of other changes have been made, apparently to correct typographical errors and the like. By way of example:  
TC 24 at [6] of the IPOC and [2] of the Schedule of Loss, 'supervisor' becomes 'supervisor'.  
TC 25 at [26], the word 'to' appears as an insertion in the phrase 'mats were provided to sleep on'.  
The Defendant does not object in principle to corrections of that nature and has not noticed at this stage any such changes to which it would object. However, the Defendant is not certain of having identified all such changes and would appreciate a list thereof from the Claimants so that it may check that it has not overlooked any".

The typographical changes identified by D were picked up in proofreading. C has checked and no other changes to typographical errors have been identified.

2. "... Similarly in relation to the colours that the Claimants have used for amendments, while the Defendant has identified instances (set out above) where the correct colour has been used, the Defendant is not certain of having

identified every such instance. It is for the Claimants to ensure that the correct colours are used in accordance with CPR Practice Direction 17].

The Claimants are grateful for this being pointed out and have undertaken a further check.

One further instance have been identified: TC26 Njuguna Munjaro, the medical amendments are in green whereas they should be red.

3. D has sought, subject to general points made in this introduction and in its skeleton argument in due course, to give a reasonably thorough summary of its objections to each amendment. It may however require to supplement points made in relation to certain draft amendments by reference to points made for other, similar draft amendments.

D's have confirmed by letter dated 10.10.17 that where an amendment is not cited in the Schedule it is not disputed.

4. Some of the draft 'injury' amendments carry footnotes which apparently seek to justify them for the purposes of Cs' application to amend. D has prepared this schedule on the basis that all such footnotes will be deleted in the final versions of the IPOCs insofar as such amendments may be permitted. The content of the footnotes is not agreed.

The footnote references were provided to assist in identifying the source of the amendment. They are not intended to be part of the pleading and will be removed in the final versions.

#### *'Injury' amendments*

5. The 'injury' amendments are wide-ranging and go beyond the scope of those contained in the four 'sample' cases considered by the court in April.
6. Cs made representations at the hearing on 6 April 2017 in which they undertook to limit their 'injury' amendments so as not to rely upon injuries unless already pleaded in the Particulars of Injury. The court ruled accordingly. §28 of the April judgment reads:

*'The Claimants state that the proposed amendments provide clarification of the particular claims in the light of the medical evidence and remove claims no longer pursued. They say the amendments are only to deal with issues established by the medical evidence which are consistent with what is already pleaded. In other words, despite the apparent generalisation of the whole of the medical evidence of the doctors, whether written or oral, **the Claimants do not seek to amend so as to rely upon any specific injuries not already pleaded in the Particulars of Injury.** There were a number of examples of these in the medical evidence.'* [Emphasis added.]

Addressed on case by case basis in the table.

Insofar as reference to an “undertaking” is a term of art, C’s do not accept they gave any such ‘undertaking’.

The scope and approach to amendments was dealt with at [33-12751] of the transcript 6.4.17: D: “Our concern with the individual particulars has been partly met by the offer to limit the reference to the expert evidence to injuries that are already pleaded. We accept that offer”.

We do not recall that to mean that the scope of liability amendments were to be fettered by the medical injuries already pleaded; the reason that liability amendments were to be completed and determined first was that the medical amendments would follow.

Mr Myerson did say that, so far as injuries were concerned, as at para 6 of the skeleton served 22 March 2017, under the heading “Injuries” that: “C’s claims arise from beatings. The proposed amendments provide clarification of the particular claims in the light of the evidence and to remove claims no longer pursued. Moreover, C’s only amend to deal with issues established by the medical evidence, which are consistent with issues established by the medical evidence, which are consistent with what is already pleaded”.

Therefore, where a permitted/agreed liability amendment clarifies beating/ injury at a particular place (e.g. TC 13 at Langata), the ability to plead the injury under particulars of injury should follow.

Our understanding of the judgment is that it permitted:

Amendments to clarify/refine allegations to a lesser allegation (e.g. TC1 – reduction of flashbacks from “still experiences” to “suffered” in past tense); TC 30 – reduction of permanent scarring to faded scarring);

Amendments to clarify/refer to symptoms: (e.g. TC 27: removal of psychological injury where not supported by medical evidence, particularisation of what he recalls and ruminates on, in line with the medical evidence);

Amendment to particularise injury where it is consistent with an already pleaded allegation (e.g. TC 31: particularisation and inclusion of “including to the scrotal area” because it is consistent with “being beaten ferociously all over his body”.

Amendment to particularise/clarify where TC refers to flashbacks, but which are not justified as such as a term of art on the medical evidence (e.g. TC 31 “what he describes as flashbacks”). In their skeleton argument dated 30 March 2017 (§50) D did not object and so no ruling was necessary. D should take the same approach.

Save where acknowledged in the table, it is not accepted that the amendments go beyond the permitted scope.

However, it was not guaranteed, nor could it be, that those four samples would represent the position in all of the individual TC cases. The court and the Defendant were aware that the process of review was not complete and this is reflected in Para 26 of the judgment 27.4.17 [2-338] which states that four sample IPOCs had been provided and “the reason for the limited number is that the review of the medical evidence and pleadings takes some time”.

Where there is any extension of scope, the justification is addressed in the table and prejudice to the D is limited.

7. Any amendments which seek to assert new injuries by name or by nature must therefore be refused.

Addressed on case by case basis in the table; the court allowed allegations that were supported by medical evidence and were lesser allegations (2-240) and where the amendment was consistent with an already pleaded allegation (2-340).

8. Without prejudice to the above:
  - a. The aforementioned approach is necessary to avoid prejudice to D in light of the central role properly played by the test case pleadings in D's handling of its defence, as evident from, among other things, the attached letter dated 6 October 2015, D's approach to cross-examination of the Test Claimants (see §25 of the August judgment), and D's approach to cross-examination of the medical experts.
  - b. In some instances D contends that Cs have sought to include within the Particulars of Injury what are in fact 'liability' amendments which ought to have been served by 16 June 2017 and/or 21 July 2017 and may not be advanced now.

Addressed on a case by case basis in the table.

- c. Insofar as the draft amendments would amount to new causes of action, D observes that Cs have taken no steps to satisfy the court in relation to the conditions in CPR 17.4.

See above.

#### *Psychiatric injuries*

9. In several of the test cases, a generalised pleading of 'psychological injury' is sought to be replaced with an unclear and inchoate averment to the effect that the Test Claimant did not suffer a recognised psychological/psychiatric injury, but that the effect of such symptoms as are maintained is 'a matter for legal submissions'. This form of words differs markedly from the way in which Cs approached the 'sample' IPOCs in March/April 2017, in that TC27's pleading of psychological injury and flashbacks was deleted in its entirety and not replaced by this new formulation. In any event, such formulation is wholly embarrassing in its lack of particularity and open-endedness. The amended wording cannot therefore be permitted. The original wording cannot stand, as Cs have accepted. The averment of psychological injury must in the circumstances be deleted as per TC27.

The Claimants are entitled to make a submission as to the legal effect of the evidence. The pleading simply reflects that intention and puts the Defendant on notice. Detailed consideration as to *how* the court should treat the evidence or what effect that has in law is a matter for submission.

These amendments are consistent with the amendment to TC 27 that the court permitted [2-340] in that they make clear that there is no diagnosed psychological injury being alleged and to assert what is being alleged in line with the doctor's evidence. As per TC 27: he suffered no recognised psychological disorder [medical report; 23-374] albeit in his case, no psychological symptoms were elicited on examination [XX; 33-10877], so it was sufficient to plead his recollection of events and rumination. In other cases where psychological symptoms were elicited and are in the medical evidence, *brief* particulars are given.

10. In other cases, Cs have sought to amend to rely upon a specific-named psychiatric injury/condition. In some, this amendment is sought without any prior pleading of 'psychological injury' within the Particulars of Injury. These are plainly outwith the scope of permissible amendments having regard to Cs' aforementioned undertaking and the April judgment. In cases where there is a prior generalised pleading of 'psychological injury' together with named symptoms, D objects to proposed amendments which seek to advance a condition that goes beyond any such generalised pleading and/or symptoms. *A fortiori* where certain symptoms alone have been pleaded. The general term 'psychological injury' cannot if already pleaded justify an amendment to allege any psychiatric condition, any more than a generalised pleading of 'physical injury' could justify an amendment to allege, e.g. mesothelioma.

Para 26 of the judgment 27.4.17 [2-338] states that four sample IPOCs had been provided and "the reason for the limited number is that the review of the medical evidence and pleadings takes some time".

The type of amendment where a psychological injury has been diagnosed, but not mentioned before (i.e. TC5) had not been identified when the sample 4 were provided. The amendment is pleaded where it is supported by the medical evidence.

An unsophisticated Claimant will not necessarily complain, it takes a professional to elicit injury.

The prejudice to the Claimants in this situation is that they will not recover for the entirety of their injury.

The prejudice to the Defendant is that they had the opportunity to cross examine the medical witness whether they did in fact do so (identified on a cases by case basis in the table whether they in fact did so).

If this is "amendment creep" and unfair/ prejudicial to the Defendant, then this has to be balanced against the prejudice to the unsophisticated Claimant.

As to : "The general term 'psychological injury' cannot if already pleaded justify an amendment to allege any psychiatric condition, any more than a generalised pleading of 'physical injury' could justify an amendment to allege, e.g. mesothelioma". This is not understood. The generalised psychological injury (pleaded by a lawyer prior to the receipt of medical evidence) has been further particularised to provide the diagnosis provided by the jointly instructed expert after an expert examination.

*Lack of explanation for very late 'injury' amendments*

11. As with the 'liability' amendments addressed in the court's previous judgments, Cs have failed altogether to explain why they did not provide draft amended IPOCs in respect of 'injury' amendments in these cases prior to 14 September 2017, or why they did not apply to amend their pleaded cases prior to March 2017.

It was not proportionate to make the application to amend the medical particulars until the jointly instructed medical experts had given evidence. The aim was to avoid the necessity for repeated re-pleading of injuries. The application was made [9 March 2017] shortly after expert evidence finished [last expert was Professor Abel on 1.3.17; 33-10796].

## TEST CLAIMANT 5 - NYAMBURA KANUTHU KANG'ANG'IRA

**The draft amended Particulars of Injury are at §44, as follows:**

'The Claimant is aged about ~~83~~ 86 years of age having been born in around 1931.

At the dates of the events complained of she was in her 20s.

### *Assault*

The Claimant was assaulted on multiple occasions.

In particular, she was hit on the right side of her face with a gun butt which knocked out six of her teeth and damaged her hearing. She was hit on her back with a gun butt. She was hit on her back with sticks while being forced to work. She was put in fear.

The Claimant suffered pain as a result of each assault and, specifically unbearable pain to the right side of her face, her mouth, her ears and her back. Her mouth bled profusely. She lost six of her teeth which have not been replaced and so has no front teeth. The Claimant's back was extremely sore and bruised. She continues to suffer from frequent back pain and has done since she was assaulted. She attends Nyeri General Hospital for monthly check-ups and is prescribed painkillers.

The Claimant suffered a psychological injury, namely a mild Chronic Adjustment disorder, with symptoms persisting for approximately two years, remitting spontaneously thereafter.

The Claimant has suffered considerable distress and trauma following her son's death, and continues to feel a pervasive sadness at his loss.

Further particulars of the Claimant's injuries ~~will be~~ are set out in the medical evidence ~~that will follow~~.

~~Medical evidence is being sought in accordance with the Order of the Court.~~

The Claimant will refer to and rely upon the written and oral medical evidence provided to the court by Ms McGuinness, Consultant physician and Professor Fahy, Consultant psychiatrist.

1 Amendment source: TC evid trans p.9 [33-2455]; she thinks she is older than her ID.

2 Part of the liability amendments (therefore already seen by D and ruled upon) - simply clarification in the light of her own evidence; see transcript 33-2482 - 33-2843.

3 Amendment source: Fahy report 4-175; D cross examined on it and expert confirmed the injury. D was able to cross examine on timing [33-9758]'

Test Claimant	Paragraph amended	Amendment	Agreed?	Claimants' response	Judge
5 - Nyambura Kanuthu Kang'ang'ira	36	<del>And/or</del> <u>alternatively the Claimant has:</u>	This arises from transposition of the	<u>It is not an error - it is related to the following sentence and</u>	Amendment permitted as intended and not objected to.



			amendments, and is not an injury amendment. D does not object to the additional deletion, but wishes to draw it to the attention of the Cs and the Court in case it is an error.	should have been deleted. Tidying up.	
	44	Particulars of Injury.	No. See further below.	Pursued.	Amendment refused.
	44	<u>'The Claimant suffered a psychological injury, namely a mild Chronic Adjustment disorder, with symptoms persisting for approximately two years, remitting spontaneously thereafter.</u>	Not agreed. 1) The terms of §§28-30 of the judgment dated 27 April 2017 provided that the amendments may not allege <i>'any specific injuries not already pleaded in the Particulars of Injury'</i> . D further relies upon C's undertaking and the court's ruling in April relating to injuries not already	1) This type of amendment was not envisaged in March (see Response to D's introduction at para 6 above). The original pleading describes distress and trauma and pervasive sadness following her son's death, and states that further particulars will be set out in the medical evidence "that will follow" [4-14]; the medical evidence then did reveal relevant psychiatric disorder and made a	(i) This falls within paragraphs 9-13 of the main judgment. (ii) Although some distress and sadness effects were pleaded, no psychiatric injury was pleaded. (iii) If this type of amendment was not envisaged by the Claimants in April 2017, it should have been envisaged. They had had the medical evidence for over a year by then. (iv) The fact

			<p>falling within the Particulars of Injury.</p> <p>2) The amendment pleads a specific named psychiatric injury that had not previously been pleaded by TC5. TC5 has at no prior stage alleged that she suffered from any compensable psychiatric/psychological injury. TC5 has failed to identify symptoms satisfying the DSM or ICD criteria for a Chronic Adjustment Disorder.</p> <p>3) <i>A fortiori</i> and in any event, the original pleading did not contain even a general</p>	<p>diagnosis [4-175 – 176]. D was aware of this at the time of XX of the medical expert and did undertake XX on the disorder, specifically its timing and duration [33-9757 to 9758]. In particular, at line 20 – 22, D attempts to undermine the conclusion of a chronic adj disorder.</p> <p>2) TC 5 is unsophisticated. It takes an expert to elicit injury as Professor Fahy did and which lead to his diagnosis at 4-175; whether he is correct and TC 5 satisfies the relevant criteria is a matter for submission. At 33-9759], expert agrees with J that someone taking a statement would be more general.</p> <p>3) as above.</p> <p>4) the application to amend was made as soon as reasonably</p>	<p>that the Defendant asked questions of the psychiatrist, without prejudice to its primary contention that the matter was not pleaded, is not something the Claimants can pray in aid.</p> <p>(v) The Defendant did not cross-examine TC5 about the psychological injury. The Defendant cannot be disadvantaged by having cross-examined the doctor.</p> <p>(vi) The Particulars of Injury state that “the Claimant has suffered considerable distress and trauma following her son’s death.” This is (a) specifically not linked to physical injury to</p>
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			<p>pleading of 'psychological injury'.</p> <p>4) The delay in amending the pleading to include this specific named psychiatric injury is egregious.</p> <p><b>Accordingly:</b></p> <p>5) The amendment falls outside the scope of permission given in respect of the IPOCs considered in the April judgment.</p>	<p>practicable after the expert had given evidence; it was a proportionate decision to amend at that time rather than prior to the experts giving evidence.</p> <p>5) As above, the scope of the samples provided were necessarily limited; overall, the prejudice to the Claimant is that she will not recover for a psychiatric injury that she has in fact suffered; the prejudice to the Defendant is that they may have to compensate her if ultimately found liable.</p>	<p>herself and (b) not a pleading of psychiatric injury.</p> <p>(vii) It has not been explained by the Claimants why no psychological injury was pleaded at the outset.</p>
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## TEST CLAIMANT 9 - ANONYMISED

**The draft amended Particulars of Injury are at §40, as follows:**

'The Claimant is aged about ~~83~~ 86 years of age having been born around 1931.

At the dates of the events complained of she was in her 20s.

### *Assault*

The Claimant was assaulted on multiple occasions. The Claimant suffered pain as a result of each assault and was in constant fear. The Claimant was assaulted through being slapped on the head; caned on her back and kicked with a boot(s) near her kidneys.

The Claimant was struck from behind on her back, right hand shoulder and right ear for no particular reason. The Claimant was hit so hard she fell over and suffered a momentary loss of consciousness. This assault caused immediate pain and permanent damage to the Claimant's hearing.

The Claimant was stripped naked and forced to lie on her stomach on a trail of safari ants. One Home Guard separated her legs and the other separated her hands so as to enable the ants to crawl upon her entire body including her private parts, head and armpits. The said ants bit the Claimant causing immense pain. The Claimant bled from the bites

The Claimant has suffered psychological ~~injury~~ symptoms related to her experiences in the Emergency and the traumas she was exposed to; she still experiences ~~flashbacks~~ reminders of the beatings she endured as well as fear and anxiety regarding her experiences. The Claimant suffers intermittent headaches and ~~is~~ feels psychologically disturbed. She has not suffered a recognised psychiatric or psychological disorder<sup>1</sup> but experiences distressing memories and images of events at the camp<sup>2</sup>, prompted by specific reminders such as passing near the site of the camp. The legal effect of this is a matter for submission.

Further particulars of the Claimant's injuries ~~will be~~ are set out in the medical evidence ~~that will follow~~.

~~Medical evidence is being sought in accordance with the Order of the Court.~~

The Claimant will refer to and rely upon the written and oral medical evidence provided to the court by Dr White, Consultant physician and Professor Fahy, Consultant psychiatrist.

1 Amendment based on medical evidence: medical report 6-209; also med oral evidence [33-9805]

2 Amendment based on cross examination of Prof Fahy: 33-9797 onwards to 9799.'

Test Claimant	Paragraph amended	Amendment	Agreed?	Claimants' response	Judge
9 - Anonymised	40	Particulars of Injury (as above)	No. See further below.	Pursued.	Amendment permitted.
		The Claimant has suffered psychological <u>injury symptoms related to her experiences in the Emergency and the traumas she was exposed to</u> ; she still experiences <u>flashbacks reminders</u> of the beatings she endured as well as fear and anxiety regarding her experiences.	Not agreed. 1) Save that it is understood that TC9 is no longer seeking to advance a claim in respect of a compensable psychiatric/psychological injury, the relevance of this amendments is unclear. 2) The relevance of the deletion of 'flashbacks' and its replacement by 'reminders' is unclear in the context of TC9 no longer seeking to advance a claim in respect of a compensable psychiatric/psychological injury. 3) Without prejudice, to the extent that this averment is sought to be added to raise such an allegation (which is unclear for the reasons already	1) D was on notice from the initial pleading that reliance would be placed on medical evidence which necessarily was "to follow". In this case, a relevant concession has been made: pleading of a diagnosable psychological injury is not justified on the evidence [6-209] and [33-9805]; However, the medical evidence identifies psychological symptoms on examination; per written and oral evidence of the doctor [6-209] and [33-9805]. How the court treats this situation as a matter of law is for	See paragraphs 7-8 of the main judgment. This is a claim for emotional symptoms caused by physical injury. 'Reminders' come within the same category <i>c.f.</i> also TC27 and 31.

			<p>given), then such an allegation is one not already pleaded in the Particulars of Injury. The amendment would therefore fall outside the scope of permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs' undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p>	<p>submission.                  2) as above; this is the type of amendment permitted in TC1 and TC 30                  3) It is not outside the scope of what was pleaded; rather, it is an accurate description based on the evidence. It is prejudicial not to permit the TC to rely on the medical evidence which identifies the extent of her loss to the extent that it does sound in damages (e.g. as general damages or loss of amenity). The prejudice to D is that they may ultimately have to compensate her for that loss if found liable to her.</p>	
		<p>The Claimant suffers intermittent headaches and <del>is</del> <u>feels</u> psychologically disturbed.</p>	<p>Not agreed.                  1) The relevance of the allegation that TC9 subjectively 'feels psychologically disturbed' (as a</p>	<p>1) as above. A relevant concession has been made as regards whether what TC 9 describes</p>	<p>Permitted for the reasons set out above.</p>

			<p>non-medically-qualified non-English speaker) for an aspect of her psychological experience is unclear in the context of TC9 no longer seeking to advance a claim in respect of a compensable psychiatric/psychological injury.</p> <p>2) Without prejudice, to the extent that this averment is sought to be added to raise such an allegation (which is unclear for the reasons already given), then such an allegation is one not already pleaded in the Particulars of Injury. The amendment would therefore fall outside the scope of permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs' undertaking and the court's ruling in April relating to injuries not already falling within the</p>	<p>amounts to a recognised psychiatric injury; but that does not preclude a submission that how she feels can sound in damages.</p> <p>2) Psychological disturbance is already pleaded; the issue is how the court should treat what TC 9 describes.</p> <p>3) subclinical symptoms are not irrelevant in law; the court can hear the submission and rule on the extent to which it sounds damages.</p>	
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			<p>Particulars of Injury.</p> <p>3) Upon the amendment pleading a sub-clinical injury/clinically irrelevant symptom, the original text cannot stand and the amendment should not be permitted. The material assertion should now be deleted.</p>		
		<p><u>She has not suffered a recognised psychiatric or psychological disorder<sup>1</sup> but experiences distressing memories and images of events at the camp<sup>2</sup>, prompted by specific reminders such as passing near the site of the camp. The legal effect of this is a matter for submission.</u></p> <p><u>1 Amendment based on medical evidence: medical report</u></p>	<p>Not agreed.</p> <p>1) This amendment amounts to a pleading that TC9 has <u>not</u> suffered psychiatric / psychological injury. Accordingly, TC9 is no longer seeking to advance a claim in respect of a compensable psychiatric/psychological injury.</p> <p>2) However, the amendment goes on to assert that ‘the legal effect’ of TC9’s <u>distressing memories and images of events at the camp ...</u> is <i>a matter for submission</i>. That</p>	<p>1) as above; the fact that symptoms do not amount to a recognised psychological or psychiatric injury does not make them irrelevant nor unable to give rise to an award of compensation;</p> <p>2) The description of her distress was set out in the medical evidence [6-204: when she walks past the camp it awakens suffering] and recorded her distress, fear and anger [6-209]; it was elicited in XX of</p>	<p>Permitted for the reasons set out above, save that, by concession, “such as passing near the site of the camp” is permitted as “namely passing near the site of the camp.”</p>



		<p><u>6-209; also med oral evidence [33-9805]</u> <u>2 Amendment based on cross examination of Prof Fahy: 33-9797 onwards to 9799.'</u></p>	<p>is at best inchoate and at worst wholly unclear. 3) In any event, TC9 is no longer seeking to advance a claim in respect of a compensable psychiatric/psychological injury. To the extent that this averment is sought to be added to raise such an allegation (which is unclear for the reasons already given), then such an allegation is one not already pleaded in the Particulars of Injury. The amendment therefore would fall outside the scope of permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs' undertaking and the court's ruling in April relating to injuries not already falling</p>	<p>medical evidence by C: [33-9797 - 9799] [33-9804: events at the camp i.e. the safari ants incident] and [33-9805: distressing memories ] D was able to XX though chose not to once it was established that although she remains very angry and has distressing memories, it did not amount to a psychiatric disorder. D has ignored how what she has been recorded as suffering might otherwise sound damages. 3) It is not outside the scope of what was pleaded; rather, it is an accurate description based on the evidence. It is prejudicial not to permit the TC to rely on an amendment based on the medical</p>	
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			<p>within the Particulars of Injury.</p> <p>4) In view of the aforesaid, the relevance of the footnotes is denied, without prejudice to the Defendant later making submissions as to the substance of the expert reports.</p> <p><b>Accordingly:</b></p> <p>5) The amendment falls outside the scope of permission given in respect of the IPOCs considered in the April judgment.</p>	<p>evidence which identifies the extent of her loss to the extent that it does sound in general damages and loss of amenity. The prejudice to D is that they may ultimately have to compensate her for that loss if found liable to her.</p> <p>4) The Defendants envisage that they will make submissions on the expert evidence; the C has simply identified the scope: on the evidence a submission of a recognised psychiatric disorder is not permissible, but submission as to the effect of the evidence is. The amendment reflects this.</p> <p>5) as above</p>	
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## TEST CLAIMANT 10 - JAMES MUGO KIBANDE

**The draft amended Particulars of Injury are at §25, as follows:**

'The Claimant is aged about ~~79~~ 82 years of age having been born around 1935.

At the dates of the events complained of he was in his late teens.

### *Assault*

The Claimant was assaulted on multiple occasions. In particular the Claimant was caned indiscriminately across his entire body (including a blow to his torso and a blow to his left knee<sup>1</sup>) at the camp and during forced labour<sup>2</sup>. He was put in fear for his life.

The Claimant has suffered psychological injury; he still recalls the traumatic death of his father and fear of being assaulted or killed.

Further particulars of the Claimant's injuries ~~will be~~ are set out in the medical evidence ~~that will follow.~~

~~Medical evidence is being sought in accordance with the Order of the Court.~~

The Claimant will refer to and rely upon the written and oral medical evidence provided to the court by Ms McGuinness, Consultant in Emergency Medicine and Professor Fahy, Consultant psychiatrist.

*Being held in servitude and subjected to forced labour;*

The Claimant was detained and forced to work without pay.

*An interference with his right to a private and family life;*

The Claimant was a minor at the commencement of the Emergency and achieved adulthood during the Emergency; in any event, he ~~who~~ was separated from his family and his treatment violated his moral integrity.

*An interference with his freedom of thought, conscience and religion; freedom of expression/ right to freedom of assembly and association; discrimination*

The Claimant was regarded as a subversive by virtue of having taken the MauMau oath and, as such, he was treated as though he were a criminal, he was subjected to maltreatment, and forced to work.

*The right not to be discriminated against on grounds of race and/or national or social origin and/or other status;*

By reason of his race, ethnicity or status he was presumed to have taken the Mau Mau oath and treated as a criminal.

*An interference with his peaceful enjoyment of property and possessions.*

He was forced from his home and had to live in the forest in hiding.

*Right to education*

~~The Claimant was a minor who was unable to continue his education as a result of the closure of schools, the State of Emergency and the killing of his father.~~

fn1 Beaten all over the body includes blow to torso and left knee; Dr elicits detail through more detailed examination [7-114- 115] but widespread beating is already pleaded. D was able to cross examine on these injuries despite making point that they were not pleaded [33-10185]

fn2 Ref for amendment; TC oral evidence 33-2550 - 2551 - no - one escaped beatings in the camp; D did not establish that it was *not* during the labour, so there is no contradiction to his w/st [7 - 93 para 12].'

Test Claimant	Paragraph amended	Amendment	Agreed?	Claimants' response	Judge
10 - James Mugo Kibande	25	Particulars of Injury (as above).	No.		
		'during forced labour <sup>2</sup>	Footnote number should be coloured red.	Noted. Footnotes not intended to be permanent.	
		'...at the camp and...'	<ol style="list-style-type: none"> <li>1) The allegations of injury are pleaded at §25 to have occurred 'during forced labour'.</li> <li>2) Any amendment alleging injury outside that context is impermissible.</li> <li>3) No labour is alleged to have occurred 'at the camp'. On the contrary, §13 says that TC10 had to</li> </ol>	On reflection, this amendment is unnecessary. Not pursued. The effect of the evidence is for submission.	Now withdrawn therefore not permitted.

			<p>'go' to work [i.e. it was outside the camp], §15 says that the work entailed diverting water from a river, and §12 has been amended so as <u>not</u> to allege that the work happened at the camp.</p> <p>4) The amendment therefore adds fresh claims for assaults and consequential injuries at a new location - the camp - where no forced labour is alleged to have taken place, and quite apart from whether such labour is alleged or proven.</p> <p><b>Accordingly:</b></p> <p>5) The amendment falls outside the scope of permission given in respect of the</p>		
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			<p>IPOCs considered in the April judgment. D relies upon Cs' undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p> <p>6) It is a 'liability' amendment and there is no jurisdiction now to permit it. It should have been served by 16 June/21 July (§4.a of the 19 May 2017 order) and ruled upon in July/August.</p>		
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## TEST CLAIMANT 12 - KAMAU MUNGAI GAKUYA

**The draft amended Particulars of Injury are at §73, as follows:**

'The Claimant is aged about ~~76~~ 86 years of age having been born around 1938~~31~~.

At the dates of the events complained of he was ~~in his early to late teens.~~ around 21 years of age.

*Assault*

The Claimant was assaulted on multiple occasions. The Claimant was specifically struck on his back and shoulders with clubs and struck indiscriminately on his hips. The Claimant's eyes and throat were ~~damaged~~ irritated by sand and dust. The Claimant has extremely poor eye sight which he attributes to sand and dust. The Claimant was beaten indiscriminately on a regular basis. He was regularly hit ~~the Claimant with clubs his heads.~~ on his head when being told to "cover". This caused the Claimant great pain. The Claimant was whipped with canes and beaten. ~~The Claimant was beaten across his shoulder and back and shouted.~~ The Claimant has scars on his head from being required to carry buckets of soil on his head.

The Claimant is now partially blind and suffers frequent headaches.

The Claimant has not suffered psychological injury; but he suffers from what he describes as flashbacks ~~when.~~ They amount to distressing memories where he recalls the impact of detention upon his life and his belief it had led to a life in poverty.

Further particulars of the Claimant's injuries ~~will be~~ are set out in the medical evidence ~~that will follow.~~

~~Medical evidence is being sought in accordance with the Order of the Court. The Claimant will refer to and rely on the written and oral medical evidence provided to the court by Dr McGuinness, Consultant physician, and Professor Fahy, consultant psychiatrist.~~

[fn] 1 Clarification added; from w/st para 60 and 62 [9-184]

[fn] 2 Oral evidence 33-2710 regarding orders to "cover".

[fn] 3 Oral evidence cross examination 33-2642; counsel and judge inspected the Claimant's head.'

With reference to the age calculated at §73: a further amendment is sought. There is no issue with this TC regarding his ID card.

The TC's age was incorrectly calculated at the time of original pleading: the pleading reads "At the date of the events complained of he was in his early to late teens". This is incorrect. The words "early to late teens" should be struck through and altered to "around 21 years of age". The Defendant is invited to consent.

Test Claimant	Paragraph amended	Amendment	Agreed?	Claimants' response	Judge
12 – Kamau Mungai Gakuya	73	Particulars of Injury (as above)	No.		
		'...which he attributes to sand and dust'	1) This pleads TC12's opinion about the attribution of his loss of eyesight. It is not a pleading of injury or (for that matter) causation. It is at best superfluous.	1) This pleads the fact [9-184; §60 and 62]. This is a matter of submission: whether what the TC thinks and feels about his injury and its cause is part of his injury.	Amendment refused. It is not arguable that TC12's erroneous attribution of loss of eyesight to sand and dust can sound in damages.
			2) Further and in any event, there is no support in the medical evidence for any eye injury due to sand and dust. Ms McGuinness found vision and acuity in TC12's left eye to be normal [9-206], and that it was 'not possible to comment on when he lost the vision in his right eye or why' [9-207]. TC12	2) as above. The evidence is that he thinks he is partially blind due to being exposed to sand and dust §62; [9-184]. The extent to which this sounds in damages is a matter of submission.	



			did not mention any eye injury to Ms McGuinness.		
		'...when being told to "cover"':	<p>1) This is not a pleading of injury, but rather seeks to amend TC12's 'liability' case, to attribute a pleaded assault/battery (being hit on the head) to circumstances in which it had not previously been pleaded to have taken place. The originally pleaded allegation of being ordered to 'cover' is at §35 of the IPOC, relates to TC12's alleged treatment at Embakasi, and makes no assertion that TC12 was hit on the head.</p> <p>2) As such there is no jurisdiction</p>	<p>1) There is a grammatical error in the original drafting of the Particulars of Injury which the amendment sought to rectify. The words "when being told to "cover" are not pursued. The amendment sought is: "He was regularly hit <del>the Claimant with clubs his heads on his head with clubs</del>".</p> <p>For the avoidance of doubt, this refers to §25 and §30 of the IPOC where he refers being hit on his head with clubs during roll call/ head count at Nakuru Prison and "in the same way" at Gilgil Prison.</p> <p>The TC does also refer in his evidence [33-2710] to being hit "to hurry up" during the roll call that he calls "being told to cover" in Embakasi (as referred to at §35 IPOC). This is not</p>	<p>The Claimants do not seek this amendment but seek the amendment "He was regularly hit, <del>the Claimant his clubs his head on his head with clubs</del>." This is permitted for the reasons given by the Claimants, namely tidying up of a grammatical error.</p>

			<p>now to permit this amendment, which should have been served by 16 June/21 July (§4.a of the 19 May 2017 order) and ruled upon in July/August.</p> <p>3) It falls outside the scope of permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs' undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p>	<p>being pursued as an amendment and Cs apologise for any confusion by conflating "being told to cover" and the "rollcall/headcount".</p> <p>2) as above.</p> <p>3) as above and as per response to D's introduction at para 6 above.</p>	
		<p>'The Claimant has scars on his head from being required to carry buckets of soil on his</p>	<p>1) This asserts a previously unpleaded injury (scarring to the head due to carrying buckets).</p> <p>2) The</p>	<p>1) Accepted that scarring has not been referred to as a specific injury before, but the amendment should be permitted nonetheless because D was aware that the Claimant was</p>	<p>Amendment refused:          (i) Scarring or any injury to the head has not been pleaded before. Neither has the allegation of being required to carry buckets on</p>

		head.’	amendment therefore falls outside the scope of permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs’ undertaking and the court’s ruling in April relating to injuries not already falling within the Particulars of Injury. 3) It is a ‘liability’ amendment and there is no jurisdiction now to permit it. It should have been served by 16 June/21 July (§4.a of the 19 May 2017 order) and ruled upon in July/August. The originally pleaded allegation of carrying buckets is at	complaining of scarring, from the time of the medical evidence and cross examined the Claimant on his injury: [33- 2642 to 33-2643]. 2) see above. 3) The injury is from the carrying of buckets. The carrying of buckets is pleaded. §73 states that “as a result” of what happened, he suffered injury and the injury is then set out. The amendment should be permitted. There is no prejudice: both counsel and J inspected the C’s head when he pointed to the area where he said scars existed [33-2643]. The court will ultimately hear submissions on whether they were visible or not. It is fair to say that although D alluded to this injury, they did not specifically XX on it [33-10224]. The prejudice to the Claimant is that he will not recover for the full	the head. (ii) This is a physical injury which could and should have been pleaded. It is an additional (not a lesser) pleading. It falls squarely within paragraph 28 of the April 2017 judgment. (iii) The Defendant did not cross-examine Ms. McGuinness in relation to the scarring and was, in the light of the pleading then before them, entitled not to do so. There is, therefore, prejudice though lack of prejudice does not, on the authorities, mean that a very late amendment will be permitted. (iv) The fact that the Claimant gave evidence as to this is insufficient.
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			<p>§34 of the IPOC and makes no assertion about TC12 using his head, let alone any adverse effects to his head.</p>	<p>extent of his injury; the prejudice to the Defendant is that they may ultimately be found liable for an injury of which they were fully aware.</p>	
		<p><u>'...but</u> he suffers from <u>what he describes as</u> flashbacks <u>when.</u> <u>They amount to distressing memories where</u> he recalls the impact of detention upon his life and his belief it had led to a life in poverty.'</p>	<p>1) The allegation that TC12 experiences 'what he describes as flashbacks' merely pleads TC12's alleged terminology (as a non-medically-qualified non-English speaker) for an aspect of his psychological experience. There is no support for the assertion that the word 'flashbacks' at §50 of TC12's statement [9-183] should be taken to 'amount to distressing memories'.</p>	<p>1) The evidence from the TC is that he suffers "flashbacks" [9-183] although he also says he does not [9-129], which may well reflect the difficulty in interpreter – mediated evidence in an elderly vulnerable witness; in any event, the amendment is in accordance with the agreed amendment to TC 31.</p> <p>Further, the amendment is to a lesser allegation: it makes clear that "flashbacks" cannot be sustained as a term of art as Prof Fahy does not support any psychiatric diagnosis [33-9839 – 33-9840]. Prof Fahy does, however, agree that he described witnessing terrible</p>	<p>Amendment refused.          (i) Notwithstanding that generally a lesser allegation is permitted by way of amendment, (paras 7-8 of main judgment) this one is refused.          (ii) The Court accepts the Defendant's submissions (1) and (2). The evidence does not support the amendment. As the Defendant says there is no support for the assertion that the word "flashbacks" should be taken to "amount to distressing memories"; this is particularly the case when one takes account of Professor Fahy's report as quoted</p>

				events, including seeing a man commit suicide [33-9837]. In the absence of a formal diagnosis, what he saw and any effect on him that the court finds on submission, can sound in damages.	in the Defendant's submission number 2 and the fact that TC12 himself (9-129) said he did not suffer flashbacks. The only mention is in his witness statement which pre-dates 9-129 and the detailed medical evidence.
			2) The psychiatric evidence is anyway to the clear effect that TC12 does not suffer from flashbacks or distressing memories. Prof Fahy's report at [9-236] states: <i>'I asked Mr Gakuya about any disturbing memories, flashback experiences or other disturbed thoughts. He said that it had never disturbed him as such. What would be gained by it? He said that he had not experienced bad dreams. He was a strong man. He never allowed his mind to go back. He looked forward. He coped well.'</i> See	2) the effect of the evidence is a matter of submission. The court is ruling on the permissibility of the amendment, not on whether any damages are ultimately recoverable or how much.	

			also <b>9-237</b> : <i>‘He denied any history of intrusive memories of events at the prisons, flashback-type experiences or recurring dreams.</i>		
			3) If, despite the disavowal of psychiatric injury, these amendments seek to assert or support some form of allegedly compensable injury, such an allegation is not already pleaded in the Particulars of Injury. The amendments therefore fall outside the scope of permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs’ undertaking and the court’s ruling in April relating to injuries not already falling within the Particulars of Injury.	3) PD Part 16.4 requires “brief details of the claimants personal injuries” with medical evidence attached. The order of 14.3.14 §15 [2-16] did not require C’s to attach medical reports to the IPOCs. It has always been clear that the evidence of the jointly instructed experts will be referred to. The amendment gives brief details of those factors suffered by the TC that will found a submission.	

## TEST CLAIMANT 13 - NDOGO GATUTU

**The draft amended Particulars of Injury are at §56, as follows:**

‘The Claimant is aged about ~~83~~ 86 years of age having been born around 1931.

At the dates of the events complained of he was in his 20s. He was working man and worked as a technician for Kenyan Power.

The Claimant will refer and rely on the facts set out above which describe the maltreatment to which he was subjected, summarised as follows:

### *Assault*

The Claimant was assaulted on multiple occasions. He was hit with canes and whipped and other implements, as pleaded herein. He was hit in multiple areas of his body. He was injured on his elbow, stabbed on his thigh with a spear, cut on his left arm with a sword, beaten on his right hip with a gun butt and hit in his eye socket with a whip. He was put in fear.

The Claimant suffered pain as a result of each assault and, specifically unbearable pain in his left eye, his left thigh, right elbow, left arm, left lower leg, hip, back and shoulders. His thigh bled profusely. His eye was extremely sore and bruised.

He bears the permanent scars of these assaults.

The Claimant felt like he was beaten like an animal.

Further particulars of the Claimant’s injuries ~~will be~~ are set out in the medical evidence ~~that will follow~~.

It is likely that the history of repeated beatings, assault and injury has aggravated the effects of natural ageing so that the Claimant is more infirm than would otherwise have been the case.

~~Medical evidence is being sought in accordance with the Order of the Court.~~

The Claimant will refer to and rely upon the written and oral medical evidence provided to the court by Dr Payne-James, forensic physician and Professor Abel, Consultant psychiatrist.’

Test Claimant	Paragraph amended	Amendment	Agreed?	Claimants’ response	Judge
13 - Ndogo Gatutu	56	Particulars of Injury (see above)	No		
		‘He was hit with canes and whipped <u>and other implements, as pleaded herein.</u> ’	1) The new text does not make sense in the context of the sentence as	1) “herein” means as pleaded in the IPOC ( perhaps “hereinabove” might have been better insofar as	Amendment permitted for the reasons given in the Claimants’ response. The amendment

			a whole.	<p>“herein” has been taken only to refer to §56). Source of “other implements”:          §14: refers to gun butt;          §15: refers to whip or cane, sword and spear; this was an agreed liability amendment (as per the Revised Annex to Sixth WS of Andrew Robertson- Table of Disputed IPOC amendments (as served, revised) at p.23).</p>	<p>should be “...and hit with other implements...”.</p>
			<p>2) It is anyway at best superfluous; at worst impermissible (because outside the scope of the April ruling and/or introducing fresh injuries). To the extent that the particulars of injury already refer to</p>	<p>2) This provides further particularisation and clarification. The other implements are pleaded in the agreed liability amendment at §15 of the amended IPOC.</p>	<p>See above.</p>



			<p>injuries and the implements that caused them (e.g. ‘stabbed on his thigh with a spear’) there is no need for the amendment; to the extent that Cs now seek to introduce injuries caused by implements that were previously not pleaded permission must be refused.</p>		
		<p>‘injured on his elbow,’ and ‘...right elbow, ...’</p>	<p>1) TC13 told Mr Payne-James that he did not know what had caused the scar to his right elbow (see §6.f of the Pt35 responses at [10-217]). There is no account in</p>	<p>1) C alleges regular beatings i.e. §14: “regularly beaten” at Langata; “beatings happened on a daily basis”; “vicious assaults”; §16: Indiscriminate beatings”;  He alleges beatings at Manyani: §19; §24: regularly</p>	<p>a) Amendment allowed. Although there are slight distinctions as referred to by the Defendant in oral submissions this comes within the type of amendment permitted in</p>

			<p>TC13's pleadings or evidence of tortious injury to the right elbow.</p>	<p>beaten at Manyani; §56 Partics injury: C states he was "assaulted on multiple occasions" says he was "beaten like an animal"; He was ""hit in multiple areas of his body".</p> <p>A scar on the right elbow was identified on medical examination [10-202]; it is non – recent trauma; it is not in a site of typical accidental injury [10-217].</p> <p>The amendment is consistent with existing pleading of multiple beatings and is within the scope of the permitted medical amendments; it amounts to particularisation based on medical evidence. His absence of knowledge about how the scar to his elbow happened is not determinative</p>	<p>respect of TC31 in the April 2017 judgment i.e. it would have been consistent with being beaten ferociously. TC13 did give evidence of this injury at 33-1836 as Mr Fetto helpfully pointed out.</p>
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				of causation issue where he was ubiquitously assaulted.	
			2) D was entitled to rely upon what TC13 said to Mr Payne-James about the right elbow, together with the absence of any account in TC13's pleadings or evidence of such injury.	2) as above and further, D XX on this injury at [33-9345]; C was not aware of the injury identified by the doctor on his right elbow. That being the case, he could not have mentioned it before, and it took the expertise of the doctor to identify it and recognise it as a non – recent, non – accidental – type injury.	
			3) The amendments have been made without TC13's instructions, in spite of what TC13 said to Mr Payne-James and without any opportunity for D to cross-	3) D did have the opportunity to XX; see XX at 33-9345 where causation was addressed by D and confirmation of photographic evidence.	

			examine TC13. D is prejudiced.		
			4) Neither party questioned Mr Payne-James about TC13's right elbow. D is prejudiced in that regard also.	4) not correct: see XX at 33-9345 where D refers to the right elbow scar, causation was addressed by D and confirmation obtained of photographic evidence.	
			5) Further and in any event the amendments are wholly unclear - there is no account of how TC13's elbow was allegedly 'injured'.	5) the submission will be that this was probably during an episode of the vicious and ubiquitous beating that TC 13 describes and, having been viciously and ubiquitously beaten up, he didn't identify or remember that his right elbow had been cut. The judge can rule in due course.	
		'cut on his left arm with a sword' and '...left arm, ...'	1) These assert an injury not already pleaded within the Particulars of Injury and should not be permitted. The	1) See §15 of the Amended IPOC; this was an agreed liability amendment. In their schedule in this respect, D simply said "yes" to the amendment and	This is permitted as, although not replicated originally in the Particulars of Injury, the full allegation was in the body of the pleading

			<p>Particulars of Injury make no reference to cutting injuries.</p> <p>2) D relied upon Cs' undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury when it agreed the amendment to move text (referring to this alleged incident) to §15 of the IPOC. It continues to rely upon them.</p>	<p>did not say it was on the basis of any "undertaking";</p> <p>See: the Revised Annex to Sixth WS of Andrew Robertson-Table of Disputed IPOC amendments (as served, revised) at p.23.</p> <p>2) As above and see general response at para .</p>	<p>(originally IPOC paragraphs 25 and 26, now IPOC paragraph 15).</p>
		<p>'beaten on his right hip with a gun butt' and '...hip, ...'</p>	<p>1) These assert an injury not already pleaded within the Particulars of Injury and should not be permitted. TC13's Particulars of Injury make no reference to being struck with any</p>	<p>1) This refers to the allegation at §14 of the IPOC as originally pleaded; that paragraph refers to being hit with a gun butt and being beaten on his right hip with a gun butt.</p> <p>2) as above.</p>	<p>Permitted as above.</p>

			<p>implement other than a cane or whip.</p> <p>2) D relies upon Cs' undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p>		
		'...left lower leg, ...'	<p>1) This asserts an injury not already pleaded within the Particulars of Injury and should not be permitted. The Particulars of Injury make no reference to an injury to the left lower leg.</p> <p>2) D relies upon Cs' undertaking and the court's ruling in April relating to injuries not</p>	<p>1) C alleges regular beatings i.e. §14: "regularly beaten" at Langata; "beatings happened on a daily basis"; "vicious assaults"; §16: Indiscriminate beatings";</p> <p>He alleges beatings at Manyani: §19; §24: regularly beaten at Manyani;</p> <p>§56 Partics injury: C states he was "assaulted on multiple occasions" says he was "beaten like an animal";</p> <p>The amendment is in line with</p>	<p>Amendment refused. Had there been any evidence from the Claimant as to being assaulted on the lower leg, this would have been within the type of amendment permitted for TC31 in April 2017. However it is conceded that there is no such evidence.</p>

			already falling within the Particulars of Injury.	TC 31 already ruled upon (“beaten ferociously all over his body, <u>including to the scrotal area</u> ”.)  2) see above and under response to Ds introduction para 6.	
			3) Further or alternatively , there is no allegation anywhere in the IPOC of an incident in which TC13’s left lower leg was injured (as accepted by Mr Payne-James – see §2.a of his Pt35 responses [10-214]). This is a ‘liability’ amendment and there is no jurisdiction now to permit it. It should have been served by 16 June/21 July (§4.a of the 19 May 2017 order) and ruled upon in July/August.	3) as above.	

			4) Further and in any event the amendment is wholly unclear – there is no pleaded account of how TC13’s left lower leg was allegedly injured.	4) as above. Amendment should be permitted and will liability for injury be a matter for submissions.	
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#### TEST CLAIMANT 14 - JAMES MWAURA

The draft amended Particulars of Injury are at §54, as follows:

‘The Claimant is aged about ~~79~~ 76 years of age having been born around 1938. At the dates of the events complained of he was around 14 years of age, and the events continued until he was in his late teens/ early 20s.

##### *Assault*

The Claimant was assaulted on multiple occasions. He was beaten and hit with canes and whips.

The Claimant suffered pain as a result of each assault. As set out in the medical evidence<sup>1</sup>, he was caused scarring and he developed a mass on his left forearm after it was struck during an assault.

The Claimant has suffered psychological symptoms as set out in the medical evidence but which do not satisfy the criteria for a recognized psychological injury, the legal effect of which is a matter of submission; he still experiences what he describes as flashbacks of his ordeal and ruminates on the abuse he suffered. He feels helpless. When he sees a gun, he is immediately transported back in time to the maltreatment he suffered and that he witnessed others suffering during the Emergency.

Further particulars of the Claimant’s injuries ~~will be~~ are set out in the medical evidence ~~that will follow~~.

~~Medical evidence is being sought in accordance with the Order of the Court.~~

The Claimant will refer to and rely upon the written and oral medical



evidence provided to the court by Dr Payne-James, Consultant physician, and Dr Davidsson, Consultant psychiatrist.

*Detention/interference with Security*

Forced to live in a Village Post and then a Village Camp under conditions of detention and deprivation of liberty;

*Interference with private and family life/ peaceful enjoyment of property and possessions*

He was removed from his homestead ~~and was separated from his father;~~

He was required to leave the family livestock.

[fn 1] The mass is referred to at 11-138 line 110; scars are set out 11-140 onwards; D dealt with this in cross examination at 33-9392 – 9395.’

Test Claimant	Paragraph amended	Amendment	Agreed?	Claimants’ response	Judge
14 – James Mwaura	54	Particulars of Injury (see above)	No.		
		<u>‘As set out in the medical evidence<sup>1</sup>, he was caused scarring and he developed a mass on his left forearm after it was struck during an assault.’</u>	1) This asserts injuries not already pleaded within the Particulars of Injury and should not be permitted. The Particulars of Injury make no reference to any physical consequence of the alleged assaults other than ‘pain’. 2) D relies upon Cs’ undertaking and the court’s ruling in April relating to injuries not already falling within the Particulars of	1) TC 14 describes intense beating during interrogation §17; repeated indiscriminate beating at §24 and §34; beating beaten “at will”; His Partics of Injury accordingly plead - § 54 “beaten on multiple occasions”.  The scarring/mass is supported by the medical evidence: [11-138]; scars [11-140]	Amendment refused. This is not in line with the amendment permitted for TC31 in the judgment of April 2017. The Court accepts the Defendant’s response comments. Also, the Claimant himself gave no evidence of these injuries. Specific injuries of scarring and

			<p>Injury.</p>	<p>onwards] and D had opportunity to XX and did XX – 33-9392 – 9395.</p> <p>The amendment is in line with TC 31 already ruled upon (“beaten ferociously all over his body, <u>including to the scrotal area</u>”.</p> <p>2) as above; response to D’s introduction para 6.</p>	<p>a mass on the left forearm have never been pleaded before and the Defendant was entitled not to cross-examine on them.</p>
			<p>3) Without prejudice to the above: a) The allegation of ‘scarring’ is wholly unparticularised and unclear. It fails to specify which scars are sought to be made the subject of the claim, and which are alleged to have resulted from which assaults. b) The allegation regarding a mass on</p>	<p>3) as above and: a) C is required to give “brief” details of injury as per PD 16PD 4(2) and is entitled to refer and rely on jointly instructed medical examination and experts, upon which the J will hear submissions. b) as above. c) as above. There are no new</p>	

			<p>TC14's left forearm is also unparticularised and unclear in that it gives no details about the 'assault' by which it was allegedly caused.</p> <p>c) It is too late for those important matters concerning the circumstances, including time (not least whether pre- or post-June 1954) and place, in which specific injuries were caused, to be pleaded. They would amount to 'liability' amendments which there is no jurisdiction now to permit. Such particulars ought to have been served by 16 June/21 July (§4.a of the 19 May 2017 order) and ruled upon in July/August.</p> <p>d) It would moreover be</p>	<p>allegations – the injury arises out of the multiple beatings he has already described in his IPOC.</p> <p>d) This is permitted amendment for TC 31; in any event, no prejudice: D was aware of the allegations of multiple beatings and could have addressed them both with TC and expert.</p> <p>Prejudice to TC is that would not recover for the full extent of his injury.</p>	
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			unfairly prejudicial to permit such amendments now. D has no opportunity to cross-examine TC14 further, and there was no such specific pleading to inform the cross-examination of Mr Payne-James.		
		<p>‘The Claimant has suffered psychological <u>symptoms as set out in the medical evidence but which do not satisfy the criteria for a recognized psychological injury, the legal effect of which is a matter of submission;</u> he still experiences <u>what he describes as</u> flashbacks of his ordeal and ruminates on the abuse he suffered.’</p>	<p>1) This amendment amounts to a pleading that TC14 has <u>not</u> suffered psychiatric / psychological injury. However, it goes on to assert that ‘the legal effect’ of TC14’s (unspecified) ‘psychological symptoms’ is ‘a matter of submission’. That is at best inchoate and at worst wholly unclear.</p>	<p>1) This is an amendment to a lesser allegation and removes an allegation of recognised psych injury; the insertion of “what he describes as” is as per the same amendment to TC 31 which was not objected to by D;</p> <p>Further, in any event, he does refer to what he describes as flashbacks in his evidence [11-117 §47], being particularly triggered when he sees</p>	<p>Amendment permitted for the reasons given in the main judgment at paragraphs 7-8. See also TC9 above.</p>

				a gun, and the experience he describes can sound in damages.	
			2) As noted above, the symptoms are unspecified; the pleading simply directs the reader to 'the medical evidence'. That is grossly insufficient and prejudicial.	2) PD 16 4.2 requires "brief" details of injury; the pleading refers to the medical evidence. This is sufficient. The court will hear submissions in due course.	
			3) The allegation that TC14 experiences 'what he describes as flashbacks' merely pleads TC14's alleged terminology (as a non-medically-qualified non-English speaker) for an aspect of his psychological experience, again without any particulars of the intended meaning. (TC14 did not mention 'flashbacks' to Dr Davidsson, whose opinion is that he has none [11-185].)	3) as above. The fact that Dr Davidsson did not consider he had flashbacks has led to the amendment to make the concession. However, the TC has given evidence on his experience of flashbacks, as indicated above [11-117; §47].	

			<p>4) If, despite volunteering that TC14 has not suffered 'recognised psychological injury', these amendments seek to assert or support some form of compensable injury, such an allegation is not already pleaded in the Particulars of Injury. The amendments therefore fall outside the scope of permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs' undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p>	<p>4) A proper concession has been made on the evidence; this amendment is in line with TC 27 and TC 31.</p>	
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## TEST CLAIMANT 16 - MARION NKIROTE M'ICHORO

The draft amended Particulars of Injury are at §33, as follows:

'The Claimant is aged about ~~83~~86 years of age having been born around 1931. At the dates of the events complained of she was in her 20s.

Assault

The Claimant was seriously assaulted. The Home Guard grabbed the Claimant and kicked her in her back whilst she still had hold of her baby. The Claimant was then struck across her face, head and neck with a panga for screaming. As a result of this assault the Claimant's face was cut at an angle from the side of her right eye to her cheek bone causing her right eye to hang from its socket and she lost two teeth.

The Claimant was further hit and slashed on her neck and hit on her head. There is a permanent indentation on her head and ~~a scar~~s from the wound to on her neck and behind her right ear<sup>1</sup>.

Her right eye ~~has not healed properly since the assault by the Home Guards during removal. Her vision in her right eye is impaired and is visibly damaged had to be removed following the assault. Her right eye socket remains empty, which constitutes a cosmetic deformity~~<sup>2</sup>. The Claimant has scarring on her neck and two missing teeth The Claimant's right cheek bone and eye socket are visibly damaged.

The Claimant has suffered psychological injury; she suffers from chronic post-traumatic stress disorder<sup>3</sup>; she experiences frequent flashbacks of her ordeal and ruminates daily about the injuries she suffered and the entire experience including the traumatic loss of her daughter. The Claimant has a raised scar on her face which upsets her and has lost sight in one eye

Further particulars of the Claimant's injuries will be are set out in the medical evidence that will follow.

~~Medical evidence is being sought in accordance with the Order of the Court.~~

The Claimant will refer to and rely upon the written and oral medical evidence provided to the court by Ms McGuinness, Consultant in Emergency Medicine and Professor Abel, Consultant psychiatrist.

<sup>1</sup>Found on examination by Prof McGuinness; para 48 and 49; [12-120 -12-121]. The scar behind the ear is on the same line as the scar to the neck with a gap of intact skin between them, so Prof McGuinness has identified them as two scars;

<sup>2</sup>Ref medical report at 12-120; para 46;

<sup>3</sup>Ref medical report at 12 -124; para 43 (i).D cross examined Prof Abel on extent and duration of psych injury -line 17 onwards; [33-10790]; also on extent of current symptoms -line 21 [33-10791] onwards.'

Test Claimant	Paragraph amended	Amendment	Agreed?	Claimants' response	Judge
16 - Marion Nkirote M'Ichoro	33	Particulars of Injury (see above)	No.		
		'There is a permanent indentation on her head and <del>a scar</del> s <del>from the wound to</del> <u>on her neck and behind her right ear<sup>1</sup>.</u> '	1) This asserts an injury not already pleaded within the Particulars of Injury and should not be permitted. The Particulars of Injury refer to an indentation to the head and a (non-specific) scar to the neck. The proposed amendment remains unspecific about the neck scar and refers to a further scar behind the right ear.	1) It is <u>pleaded that she had scarring to her neck; the scar is found on medical examination [12-120 – 12-121]; behind her right ear is in line with the scar on her neck. Scarring is already pleaded, it clarifies the position of the scarring as per the medical evidence. It is a permitted amendment as per TC 31.</u>  2) as above under response to D's introduction at para 6.	Amendment permitted. These injuries arise from the allegation in paragraph 12 of the IPOC. The medical evidence is sufficiently clear to provide a basis for the amendment. The Defendant's allegations about lack of specificity are not accepted. As clarified in submissions, the Claimant seeks to add the scarring described at paragraphs



			<p>2) D relies upon Cs' undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p> <p>3) The text in the footnote apparently seeks to justify this addition by asserting that the two scars should be seen as (equivalent to) one. That assertion has no real prospect of success. The footnote clearly refers to two separate scars (it avers that there is a 'gap of intact skin' - of unspecified length - between them). The</p>	<p>3) The success of any assertion on submission does not denote the permissibility of the amendment. This type of amendment falls within those permitted by the court's ruling.</p>	<p>48 and 50 of Ms McGuinness' report to the scarring (already pleaded) at paragraph 49 of that report. Although the impression from the Claimant's witness statement and photographs is that there is one scar, the totality of the scarring now sought to be pleaded is all very proximate. It is, in conceptual terms, a minor extension to the present pleading. The Defendant's points about the provenance of the scarring as now pleaded are a matter for submissions.</p>
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			<p>scars are said to be 'on the same line', but there is no pleading or evidence to indicate that they might, let alone probably were, both caused by a single blow.</p>		<p>There is no real prejudice to the Defendant and the overriding objective is in favour of allowing this amendment.</p>
		<p><u>'she suffers from chronic post-traumatic stress disorder'</u></p>	<p>1) The Particulars of Injury originally described TC16 as having suffered 'psychological injury' which was particularised as comprising flashbacks and ruminations on past events.</p> <p>2) The amendment now seeks to allege that TC16's injury is PTSD. The original pleading was confined to an injury with symptoms of flashbacks and</p>		<p>Amendment refused. A psychological injury was pleaded but (a) it was not specified; (b) the symptoms pleaded do not amount to what would be a diagnosis of PTSD. Professor Abel, from paragraph 28 onwards of her expert report, relies on more symptoms for the diagnosis <i>c.f.</i> TC5 (and 20 below); (c) See paragraphs 9-13 of main judgment.</p>

			<p>ruminations, together with mentioning upset due to a raised facial scar, i.e. well short of the components of PTSD under the DSM or ICD criteria.</p> <p>3) The amendment accordingly seeks to introduce a new injury into the Particulars of Injury, and so falls outside the scope of permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs' undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p> <p>4) The delay in amending the pleading to include this specific</p>		
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			named psychiatric injury is egregious.		
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## TEST CLAIMANT 17 - MWANGI MATHERI

The draft amended Particulars of Injury are at §75, as follows:

'The Claimant is aged about ~~78~~ 81 years of age having been born around 1936 although the Claimant believes that he is probably a few years older than this<sup>1</sup>.

At the dates of the events complained of he was a young adult of about 18years of age, and the events continued throughout his 20s.

The Claimant suffered the injury and abuses as set out above and summarised herein:

### *Assault*

The Claimant was assaulted on multiple occasions. He was beaten and hit with canes and whips with impunity. He was beaten during forced labour if he did not work hard or fast enough, or if he tried to rest. He sustained assaults on multiple areas of his body. He has scarring to his back as a consequence.<sup>2</sup>

The Claimant suffered pain and apprehended fear as a result of each assault. He was seriously wounded by while in Kandongu Works Camp when he was slashed on his arm by a Kenyan Policeman. He has a permanent scar to his right forearm as a consequence.<sup>3</sup>

He was hit on his ~~høp~~ hip with a gun butt and he still suffers pain and difficulty walking as a result.

The Claimant has suffered symptoms as set out in the medical evidence but which do not satisfy the criteria for a recognized psychological injury<sup>4</sup>; he still experiences what he perceives as flashbacks to being slashed on the arm and ruminates on the abuse he suffered. The legal effect of this is a matter for submission.

Further particulars of the Claimant's injuries ~~will be~~ are set out in the medical evidence ~~that will follow.~~

~~Medical evidence is being sought in accordance with the Order of the Court.~~

The Claimant will refer to and rely upon the written and oral medical evidence provided to the court by Mr Heyworth, Consultant in Emergency Medicine and Dr Davidsson, Consultant Psychiatrist.

[fn1] First statement paragraph 2 [13-186]

[fn2] Mr Heyworth [13-222]. D raised PT35 Q's on this point [13-232] & cross examined [from 33-7965]

[fn3] Mr Heyworth [13-221]. D Raised PT35 Q's on this point [13-232] & cross-examined [from 13-7965]

[fn4] See cross examination of Davidsson at [33-8917] & [33-8930]'

Test Claimant	Paragraph amended	Amendment	Agreed?	Claimants' response	Judge
17 - Mwangi Matheri	75	Particulars of Injury (see above)	No.		
		'...although the Claimant believes that he is probably a few years older than this.'	<p>1) The IPOC should set out TC17's case.</p> <p>2) This amendment is self-contradictory and confusing. By it, Cs' lawyers seek to continue asserting, on TC17's behalf and without his instructions, a date of birth that TC17 believes is wrong, but at the same time to assert that TC17 believes his pleaded date of</p>	<p>1) The pleading does set out his case. The pleading has always been that he is "about" [age]; the amendments clarifies his case in accordance with his evidence [13-186] and D's XX [33-1873; submission on the effect of any lack of clarity (which is not accepted exists) can be made by D in due course.</p>	<p>Amendment permitted. The pleading does set out the case. The case is that he is aged about 78 years having been born around 1936 although the Claimant (himself) believes that he is probably a few years older than this. The Claimant's representatives are entitled to plead in this manner.</p>

			<p>birth is wrong.</p> <p>3) The amendment should either clarify TC17's case or should not be permitted.</p>		
		<p>'The Claimant has suffered <u>symptoms as set out in the medical evidence but which do not satisfy the criteria for a recognized psychological injury</u><sup>4</sup>; he still experiences <u>what he perceives as flashbacks</u> to being slashed on the arm and ruminates on the abuse he suffered. <u>The legal effect of this is a matter for submission.</u>'</p>	<p>1) This amendment amounts to a pleading that TC17 has <u>not</u> suffered psychiatric / psychological injury. However, it goes on to assert that 'the legal effect' of TC17's 'symptoms' is 'a matter of submission'. That is at best inchoate and at worst wholly unclear.</p>	<p>1) This is an amendment to a lesser allegation and removes an allegation of recognised psych injury; the insertion of "what he describes as" is as per amendments to TC 31 which was not objected to by D;</p> <p>Further in any event, he does refer to what he describes as flashbacks in his evidence [13-198] which feature the torture he experienced at Manyani and how he sustained the cut on his arm. A concession has been</p>	<p>Amendment permitted. See paragraphs 7-8 of the main judgment. As to the "flashbacks" amendment, see the comments on TC9 and TC14 above.</p>

				made to remove a recognised psychological injury, but what he experiences can still sound in damages and will be the subject of submission.	
			2) The allegation that TC17 experiences 'what he describes as flashbacks' merely pleads TC17's alleged terminology (as a non-medically-qualified Kikuyu speaker) for an aspect of his psychological experience, without any particulars of the intended meaning. (TC17 did not report	2) as above. An appropriate concession is made but D has ignored how what he says he suffered might otherwise sound damages.	

			any flashbacks to Dr Davidsson, who concluded that there was 'no evidence of flashbacks or avoidance behaviour' [13-254].)		
			3) If, despite volunteering that TC17 has not suffered 'recognised psychological injury', these amendments seek to assert or support some form of compensable injury, such an allegation is not already pleaded in the Particulars of Injury. The amendments therefore fall outside the scope of permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs'	3) as above. This is as per the permitted amendments for TC 27 and 31.	



			undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.		
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**TEST CLAIMANT 18 - MWANGI MACHARIA**

Test Claimant	Paragraph amended	Amendment	Agreed?	Claimants' response	Judge
18 - Mwangi Macharia					
	34 (new 37)	<del>And/or alternatively the Claimant has:</del> <del>b. An action for breach of statutory regulation giving rise to a civil right of action;</del>	No. the text struck through, coloured in red, should be coloured green.	Agreed; will change to green in final version.  Note general points above: a review has found some additional errors of this nature and they will be rectified.	Permitted on the agreed basis of changing to green in final version.

## TEST CLAIMANT 19 - JAMES IRUNGU GATHUNGA

**The draft amended Particulars of Injury are at §54, as follows:**

'The Claimant is aged about ~~76~~ 82 years of age having been born around ~~1938~~ 1935.<sup>1</sup>

At the dates of the events complained of he was in his early to late teens.

*Assault*

The Claimant was assaulted on multiple occasions as set out above herein and in particular:

The Claimant was slapped very hard across his face at Langata camp causing him to fall to the ground and lose consciousness.<sup>2</sup>

In Manyani camp the Claimant was randomly assaulted and beaten. British males assaulted him with wooden batons, whilst the black guards used canes and pangas [machetes]. The Claimant suffered severe dehydration, hunger. The Claimant was beaten as part of collective punishment.

In Murang'a post, ~~¶~~<sup>3</sup>the Claimant was beaten during the interrogation causing the skin above his left eye to split. The Claimant was hit so hard with a 'jembe' that one of the handles broke, became jagged and cut his left leg. The Claimant was taken to Muranga hospital for treatment. The Claimant took approximately one month to recover.

In Kamaguta chief's camp<sup>4</sup>, ~~¶~~<sup>4</sup>the Claimant was forced to produce gravel for the roads by beating stone on stone. The stone dust scratched and irritated the Claimant's eyes and he has continued eye problems.

In Kiyu Village, ~~¶~~<sup>5</sup>the Claimant was hit on the right hip joint with nozzle of a rifle by a Home Guard. This resulted in an acceleration of osteoarthritis changes in the hip by approximately 10 years.<sup>5</sup>

The Claimant continues to suffer leg pains especially as at the hip joint and arm pains because one of his finger thumb<sup>6</sup> bones was damaged the day his hand was cut at Kamagutu chief's camp as stated at paragraph 38 above. The Claimant is unable to walk properly.

The Claimant has suffered symptoms as set out in the medical evidence but which do not satisfy the criteria for a recognized<sup>7</sup> psychological injury; he suffers from what he describes as flashbacks and which Dr Davidsson recorded as nightmares<sup>8</sup> and ruminates about events that he feels have changed the course of his life. The legal effect of this is a matter for submission.

Further particulars of the Claimant's injuries ~~will be~~ are set out in the medical evidence ~~that will follow~~.

~~Medical evidence is being sought in accordance with the Order of the Court.~~

The Claimant will refer to and rely upon the written and oral medical evidence provided to the court by Mr Heyworth, Consultant in Emergency Medicine and Dr Davidsson, Consultant Psychiatrist.

[1 TC confirms correct date in cross examination \[33-2796\]](#)

[2 Heyworth \[15-201\] & TC first statement \[15-179\]. D cross examined on this \[33-8023\]](#)

[3 TC's first statement \[15-183\] & Heyworth \[15-203\]](#)

[4 TC's first statement \[15-183\] & Heyworth \[15-204\]](#)

[5 Heyworth PT35 \[15-234\]; D was able to cross examine \[33-8063 - 8065\]](#)

[6 Heyworth \[15-205\]](#)

[7 Cross examination of Davidsson at \[33-8941\]](#)

[8 Davidsson report at 15-245'](#)

Test Claimant	Paragraph amended	Amendment	Agreed?	Claimants' response	Judge
19 – James Irungu Gathunga	54	Particulars of Injury (see above)	No.		
		'The Claimant was assaulted on multiple occasions <a href="#">as set out above herein and in particular:</a> '	1) D objects to the words '...as set out above herein and...'. That wording seeks to add to the Particulars of Injury any assaults not already alleged within them but 'set out above' within the IPOC. 2) It therefore asserts injuries not already pleaded	1) yes, herein is intended to refer to the assaults pleaded in the IPOC;  Part 16 PD4.3 only requires "brief" pleading of personal injuries.  The need to serve a medical report with the IPOC was dispensed with by order [2-19 §15], so no further detail by reference to medical evidence was required.  The reference	Amendment refused. The Particulars of Injury, although required to be "brief", do require the relevant injuries to be pleaded. This could be construed as change of case in that it now purports to claim for unspecified injuries by general reference to the body of the Particulars of Claim.

			<p>within the Particulars of Injury and should not be permitted.</p> <p>3) D relies upon Cs' undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p>	<p>to the body of the IPOC in the Particulars of Injury regularises the pleading.</p> <p>There can be no prejudice where the assaults are already pleaded within the IPOC.</p> <p>2) as above.</p> <p>3) as above and as per response to D's Introduction at para 6.</p>	
		<p>'The Claimant was slapped very hard across his face at Langata camp <u>causing him to fall to the ground and lose consciousness.</u>'</p>	<p>1) The fall to the ground and (possibly consequential) loss of consciousness amount to an injury or injuries not already pleaded within the Particulars of Injury and should not be permitted. No injury due to falling nor any head injury has been pleaded. At</p>	<p>1) this is as per the permitted amendment for TC 31. To be slapped very hard across the face is consistent with being caused to fall down and lose consciousness. It clarifies the effect of the very hard slap.</p> <p>It was reported in the medical evidence: Mr Heyworth [15-201] and TC 17's first statement [15-179]; addressed by</p>	<p>Amendment permitted. This is within the permitted amendment for TC31. Paragraph 16 IPOC refers to the TC being "knocked unconscious" and see his witness statement paragraph 14. The Claimant specifically puts this amendment as a momentary loss of consciousness.</p>

			<p>most the relevant Particulars of Injury assert a mechanism of potential (unspecified) injury.</p> <p>2) D relies upon Cs' undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p>	<p>D in cross examination [33-8023]</p> <p>2) as above and per response to D's Introduction at para 6.</p>	
			<p>3) It is anyway incorrect that D cross-examined Mr Heyworth 'on' the fall and head injury. The transcript passage referenced in fn2 entailed a mere recital of history set out in Mr Heyworth's report with a view to</p>	<p>3) D had opportunity to cross examine and themselves raised the issue without qualification in that instance; D can ask further Part 35 questions of Mr Heyworth if necessary.</p>	

			<p>confirming its source. D would be prejudiced in not having further opportunity to cross-examine Mr Heyworth if this amendment were permitted.</p>		
		<p>'...one of his <u>finger thumb</u><sup>6</sup> bones was damaged the day his hand was cut <u>at Kamagutu chief's camp as stated at paragraph 38 above.</u>'</p>	<p>1) This asserts an injury to the thumb, which has not already been pleaded within the Particulars of Injury and should not be permitted.                  2) D relies upon Cs' undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p>	<p>1) This is in line with the permitted amendment to TC 31; His hand was injured (cut) during a beating; he raised his hand to protect himself – a digit was damaged, the clarification is that it is the thumb rather than the finger.                   Clarification has been provided by examination by the medical expert.                   2) As above per response to D's Introduction para 6.</p>	<p>Amendment refused. This is not an amendment in line with that permitted to TC31. The Claimant has alleged that his hand was cut. His pleaded case and evidence was that a finger bone was damaged. Importantly TC19 has never given any evidence whether written or oral saying that his thumb had been injured. If this was a possible error then it should have been clarified and</p>

					amended prior to TC19 giving evidence.
			<p>3) Further and in any event, TC19 gave no written or oral evidence asserting that his thumb had been injured. D is prejudiced in having no opportunity to cross-examine him further.</p>	<p>3) D had the opportunity to XX on his hand injury as TC himself raised the issue of his hand injury [33-2811]; they chose not to do so.</p> <p>Further, D did XX the medical witness extensively on this injury and did so in order to undermine the injury: [33-8030 – 33-8035].</p> <p>D also asked questions about the thumb injury in Pt 35 questions: [15-222] relating the injury to the hand to the injury to the thumb (not the finger). This indicates D was prepared to accept that an injury to the thumb was sustained during the incident that cut the hand.</p>	



				<p>i.e. no distinction was drawn by D.</p> <p>That is sufficient to mitigate any prejudice.</p>	
		<p>‘The Claimant has suffered <u>symptoms as set out in the medical evidence but which do not satisfy the criteria for a recognized</u><sup>7</sup> psychological injury; he suffers from <u>what he describes as flashbacks and which Dr Davidsson recorded as nightmares</u><sup>8</sup> and ruminates about events that he feels have changed the course of his life. <u>The legal effect of this is a matter for submission.</u>’</p>	<p>1) This amendment amounts to a pleading that TC19 has <u>not</u> suffered psychiatric / psychological injury. However, it goes on to assert that ‘the legal effect’ of TC19’s ‘symptoms’ is ‘a matter of submission’. That is at best inchoate and at worst wholly unclear.</p>	<p>1) This is an amendment to a lesser allegation and removes an allegation of recognised psych injury; the insertion of “what he describes as” is as per amendments to TC 31 which was not objected to by D;</p>	<p>Amendment permitted, save for the words “and which Dr Davidsson recorded as nightmares”. In general this amendment is permitted for the reasons given in paragraphs 7-8 of the judgment. (Re: “flashbacks” see the comments on TC9 and TC14). However the Court accepts the Defendant’s point 3 that there is no support for the assertion that word “flashbacks” at paragraph 45 of TC19’s statement should be equated with what Dr Davidsson recorded as nightmares. Indeed, as Ms Ruck helpfully assisted, ICD10</p>

					Diagnostic Criteria for Research F43.1B are suggestive of nightmares being distinct from flashbacks.
			<p>2) The allegation that TC19 experiences ‘what he describes as flashbacks’ merely pleads TC19’s alleged terminology (as a non-medically-qualified Kikuyu speaker) for an aspect of his psychological experience, without any particulars of the intended meaning.</p> <p>3) There is no support for the assertion that the word ‘flashbacks’ at §45 of TC19’s statement [15-185] should be equated with</p>	<p>2) He refers to what he describes as flashbacks in his evidence [15-185 §45] and that he feels bad when he remembers the suffering he underwent. A concession has been made to remove a recognised psychological injury, but what he experiences can still sound in damages and will be the subject of submission.</p> <p>Dr Davidsson’s evidence supports the amendment [15-245 to 246]; D was able to cross examine [33-8941 – 33-8949].</p> <p>3) This is accepted. The</p>	

			what Dr Davidsson recorded as 'nightmares'. The text of §45 makes no reference to nightmares or dreams.	amendment is not pursued.	
			4) If, despite volunteering that TC19 has not suffered 'recognised psychological injury', these amendments seek to assert or support some form of compensable injury, such an allegation is not already pleaded in the Particulars of Injury. The amendments therefore fall outside the scope of permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs'	4) what the TC experiences can still sound in damages and will be the subject of submission.  RE undertaking: See under response to Ds introduction para 6.	

			undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.		
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## **TEST CLAIMANT 20 - ELIZABETH WANGUI WAITHAKA**

**The draft amended Particulars of Injury are at §42, as follows:**

'As a result of the Defendant's alleged actions, the Claimant has suffered pain and injury, incarceration, breaches of her human rights, loss and damage.

### **PARTICULARS OF INJURY/ BREACHES OF HUMAN RIGHTS**

The Claimant is aged about ~~86~~ 89 years of age having been born around 1928.

At the dates of the events complained of she was in her 20s.

#### *Assault*

Home Guards, Kenyan policemen and British soldiers stormed the Claimant's home, armed with batons, canes and rifles, causing her immense distress. Policemen and Home Guards beat the Claimant, causing her pain, suffering and bruising;

During an interrogation, the Claimant was physically assaulted by policemen such that she fell unconscious<sup>2</sup>, in the presence of British officers. She was hit on her back, legs and hands. She was caused bruising, which resolved after around 2 months, as set out at paragraph 21 herein. She was not given access to medical treatment and instead, subjected to further forced labour, aggravating her injuries;

The Claimant was subjected to repeated physical assaults whilst she was working, causing her pain, suffering and distress;

As pleaded at Paragraph 6 herein, the Claimant suffered joint pain from the beatings and continues to do so; for the avoidance of doubt, she says that such pain was from the time of the beatings onwards and she has not had a pain-free day since<sup>3</sup>.

The Claimant suffered post-traumatic stress disorder<sup>4</sup>;

Further particulars of the Claimant's injuries ~~will be~~ are set out in the medical evidence ~~that will follow~~;

It is likely that the history of assault and injury has aggravated the effects of natural ageing so as to make the Claimant more infirm than would otherwise be the case;

~~Medical evidence is being sought in accordance with the Order of the Court.~~

The Claimant will refer to and rely upon the written and oral medical evidence provided to the court by Ms McGuinness, Consultant physician, and Professor Mezey.

2 Ref med report at [16-160] and evid in cross examination by C's counsel [33-10262]

3 Ongoing pain: elicited at p.20 oral evid of Ms McGuinness [33-10251 - 10252]; D was able to cross examine on arthritis and pain and did so for virtually all of the XX. [33-10263; 33-10276 to 33-10289]

4 Professor Mezey, Answers to Part 35 Questions [16-215].'

Test Claimant	Paragraph amended	Amendment	Agreed?	Claimants' response	Judge
20 – Elizabeth Wangui Waithaka	6	<p>The Claimant suffers poor health. The Claimant still experiences pain to her hands, knees, shoulders, <u>legs<sup>1</sup></u> and back, caused by the beatings she suffered during detention, interrogation and forced labour, detailed herein. <u>She took the oath twice [33-1953], the first time before Emergency was declared.</u></p> <p><u>1 Ref Ms McGuinness at para 36 and 43 of med report [16-160].</u></p>	<p>Not agreed as to the addition of 'legs' and the associated footnote.</p> <p>1) The terms of §§28-30 of the judgment dated 27 April 2017 provided that the amendments may not allege <i>'any specific injuries not already pleaded in the Particulars of Injury'</i>. D further relies upon C's undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p> <p>2) The amendment pleads an injury to the legs of TC20 that had not previously been pleaded. At no prior stage had TC20 alleged that she suffered from any compensable physical injury in respect of her legs.</p> <p>3) The delay in</p>	<p>1) §42 refers to being his on back, legs and hands when being assaulted by policemen. §6 is a general statement of her injury under "Background details". The reference to "legs" appears to have been missed out of §6. It is not a new amendment and was also dealt with in the medical evidence [16-160].</p> <p>2) as above. It was pleaded.</p> <p>3) no delay; as above.</p> <p>4) as above.</p>	<p>Amendment refused.</p> <p>(i) Paragraph 42 of TC20's IPOC does allege that she was hit on her back, legs and hands. However there is no allegation at present in paragraph 6 to the effect that the Claimant continues to suffer pain in her legs.</p> <p>(ii) Therefore it is not correct to say that anything other than suffering bruising on her legs has been pleaded so far (in paragraph 42).</p> <p>(iii) Also TC20 has never given evidence of</p>

			<p>amending the pleading to include this specific named physical injury is egregious.</p> <p><b>Accordingly:</b></p> <p>4) The amendment falls outside the scope of permission given in respect of the IPOCs considered in the April judgment.</p>		<p>continuing leg pain.</p>
	42	Particulars of Injury	Not agreed. See further below.		
	42	<p>During an interrogation, the Claimant was physically assaulted by policemen <u>such that she fell unconscious<sup>2</sup></u>, in the presence of British officers.</p> <p><u>2. Ref med report at [16-160] and evid in cross examination by C's counsel [33-10262]</u></p>	<p>Not agreed.</p> <p>1) The terms of §§28-30 of the judgment dated 27 April 2017 provided that the amendments may not allege <i>'any specific injuries not already pleaded in the Particulars of Injury'</i>. D further relies upon C's undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p> <p>2) On any sensible understanding,</p>	<p>1) This amendment is within the scope of the permitted amendment to TC 31; she alleges a physical assault, with beating to various areas of her body (as pleaded and described).</p> <p>2) She does not allege a head injury. The pleading is not that she was knocked unconscious. It is that the beating was such that she fell unconscious. This is dealt</p>	<p>Amendment refused. There is no previous pleading of loss of consciousness nor anything in TC20's witness evidence to support it.</p>

			<p>the amendment pleads a new head injury to TC20 that had not previously been pleaded. The amendment is therefore a liability amendment asserting the existence of a new cause of action.</p> <p>3) At no prior stage had TC20 alleged that she suffered from any compensable physical injury in respect of being rendered unconscious through physical assaults as described. Indeed, the new allegation of having been rendered unconscious is conspicuously absent from §§20-22 IPOC.</p> <p>4) The delay in amending the pleading to include this specific named physical injury is egregious.</p> <p><b>Accordingly:</b></p> <p>5) The amendment</p>	<p>with in XX by the medical witness: 33-10261.</p> <p>3) as above.</p> <p>4) no delay .</p> <p>5) as above.</p>	
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			falls outside the scope of permission given in respect of the IPOCs considered in the April judgment.		
	42	<u>As pleaded at Paragraph 6 herein, the Claimant suffered joint pain from the beatings and continues to do so; for the avoidance of doubt, she says that such pain was from the time of the beatings onwards and she has not had a pain-free day since<sup>3</sup>.</u>	<p>Not agreed.</p> <p>1) The submissions in respect of the amendment to §6 above are repeated, with the effect that no particulars of injury ought properly to be permitted in respect of the new allegation of TC20's experience of pain in her legs.</p> <p>2) Further and in any event, the passage of the oral evidence of Ms McGuinness cited does not support the amendment that "for the avoidance of doubt, she says that such pain was from the time of the beatings onwards and she has not had a pain-free day since".</p>	<p>1) Permitted amendment as per TC 31; she describes beatings "during detention, interrogation and forced labour" (§6); these were vicious beatings e.g. §20: so many blows she could not tell who was beating her; it was so extensive a beating, she thought she was going to be killed. At §18: huge amount of physically demanding forced labour during which time she was repeated to repeated physical assaults. Etc. To allege that she suffered joint pain from these beatings without a pain-free day since them, is clarification in</p>	<p>(i)The first part of the amendment (omitting the word "joint" as the parties agree) i.e. "As pleaded at paragraph 6 herein, the Claimant suffered pain from the beatings and continues to do so" will be permitted, save that it is clear that the amendment to the legs has not been allowed and therefore this continuing pain does not apply to the legs.</p>

				<p>accordance with the permitted amendment to TC 31.</p> <p>2) the effect of Ms McGuinness' evidence is a matter for submission.</p>	<p>(ii) The remainder of the amendment is refused. TC20 gave no evidence to support this.</p>
	42	<p><u>The Claimant suffered post-traumatic stress disorder<sup>4</sup>;</u></p> <p><u>4 Professor Mezey, Answers to Part 35 Questions [16-215].</u></p>	<p>Not agreed.</p> <p>1) The terms of §§28-30 of the judgment dated 27 April 2017 provided that the amendments may not allege '<i>any specific injuries not already pleaded in the Particulars of Injury</i>'. D further relies upon C's undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p> <p>2) The amendment pleads a specific named psychiatric injury that had not previously been pleaded by TC20. TC20 has at no prior stage alleged that she suffered from any compensable psychiatric/psychological injury. The</p>	<p>The submission in relation to TC 5 is repeated.</p> <p>1) This type of amendment was not envisaged in March (see Response to D's introduction at para 6 above).</p> <p>2) TC 5 is unsophisticated . It takes an expert to elicit injury as Professor Mezey did and which lead to her diagnosis at 16-215; whether she is correct and TC 20 satisfies the relevant criteria is a matter for submission.</p> <p>3) as above.</p> <p>4) the application to amend was made as soon as reasonably practicable after the expert had given evidence;</p>	<p>Amendment refused.</p> <p>(i) See the Court's response in relation to TC5 and paragraphs 9-13 of the main judgment. Also the Test Claimant gave no evidence of psychological symptoms, save about difficulty in waking up in the morning and memories coming back (oral evidence).</p> <p>(ii) As regards the Defendant's point 6, namely that there is no</p>

			<p>symptoms described fall well short of the components of PTSD under the DSM or ICD criteria.</p> <p>3) <i>A fortiori</i> and in any event, the original pleading did not contain even a general pleading of ‘psychological injury’.</p> <p>4) The delay in amending the pleading to include this specific named psychiatric injury is egregious.</p> <p><b>Accordingly:</b>  5)The amendment falls outside the scope of permission given in respect of the IPOCs considered in the April judgment.</p>	<p>it was a proportionate decision to amend at that time rather than prior to the experts giving evidence.</p> <p>5) As above, the scope of the samples provided were necessarily limited; overall, the prejudice to the Claimant is that she will not recover for a psychiatric injury that she has in fact suffered; the prejudice to the Defendant is that they may have to compensate her if ultimately found liable.</p>	<p>“stable basis” for pleading the alleged injury, whatever the criticism of Professor Mezey’s response in the Part 35 questions, nevertheless she did diagnose PTSD. Therefore whether or not the Claimant suffered from this psychiatric injury would, had the amendment been permitted, have been a matter for final submissions.</p>
			<p>6) For the reasons pleaded at §62.c. of the Amended Individual Defence [16-43], there is no stable basis for pleading the alleged injury. In her expert report, Professor</p>	<p>6) the effect of the evidence, if the amendment is permitted, is a matter for submission.</p> <p>Overall, the prejudice to the Claimant is that she will not recover for a psychiatric injury that she</p>	

			<p>Mezey concluded that there is no evidence that the Claimant is currently suffering from Post-traumatic Stress Disorder, a Depressive Disorder, or any other mental illness or disorder [16-206, §81]. She further concluded that there was ‘no evidence’ for a lifetime diagnosis of Post-traumatic Stress Disorder, Depressive Disorder, or any other mental illness or disorder [16-206, §820. The conclusion in the Part 35 Response referred to in footnote 4 of the amendment was reached in the absence of any further evidence or examination of the Claimant.</p>	<p>has in fact suffered; the prejudice to the Defendant is that they may have to compensate her if ultimately found liable. D was able to (and did) cross examine in detail on the criteria and the diagnosis reached [33-8533 – 33-8540].</p>	
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IN THE HIGH COURT OF JUSTICE

Claim No. HQ13X02162

QUEEN'S BENCH DIVISION

KENYAN EMERGENCY GROUP LITIGATION

BEFORE THE HONOURABLE MR JUSTICE STEWART

B E T W E E N

ELOISE MUKAMI KIMATHI  
JAMES KARANJA NYORO AND  
OTHERS

Claimants

-and-

FOREIGN AND COMMONWEALTH OFFICE

Defendant

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SCOTT SCHEDULE RELATING TO  
OUTSTANDING AMENDMENTS AS AT 6 OCTOBER 2017  
PART 2: TCs 21, 22, 23, 24, 25, 26, 29, 33, 34 and 39

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## TEST CLAIMANT 21 - NELSON NJAO MUNYOIKE

**The draft amended Particulars of Injury are at §39, as follows:**

The Claimant is aged about ~~92~~ 95 years of age having been born around 1922.

At the dates of the events complained of he was in his 30s.

### *Assault*

The claimant was assaulted on multiple occasions. When the Home Guards found the Claimant one of them pierced his right leg with a sharp cane. The Claimant has a scar where the cane entered his leg. The assaults would often take the form of being canned or beaten across his shoulders, hands, back, buttocks and legs and caused bruising to various degrees. On several occasions the Home Guards assaulted the Claimant randomly on his back, buttocks, hands, arms and legs with sticks as they guarded him and whilst he was undertaking forced labour. The Claimant was beaten to the ground. The Claimant's suffers from numbness and pain in his right leg.

The Claimant has suffered psychological symptoms related to his experiences in the Emergency and the traumas he was exposed to<sup>1</sup> but has not suffered a recognised psychological injury, the effect of which in law is a matter for submission; ~~¶~~the Claimant was consistently verbally abused by the Home Guards. He was called a 'dog' or 'donkey' in the presence of others. The Claimant suffers what he perceives as<sup>2</sup> flashbacks and ruminates about how he was physically assaulted during the State of Emergency.

Further particulars of the Claimant's injuries ~~will be~~ are set out in the medical evidence ~~that will follow.~~

~~Medical evidence is being sought in accordance with the Order of the Court.~~

The Claimant will refer to and rely upon the written and oral medical evidence provided to the court by Mr Heyworth, Consultant in Emergency Medicine and Professor Mezey, Professor of Forensic Psychiatry.

1 Source page 146 of XX of Mezey [33-8636]

2 TC in PT18 replies @ 191 [17-89] refers to 'flashbacks' but Mezey at [33-8666] states that in her opinion and on examination these would not satisfy the medical definition of flashbacks.

Test Claimant	Paragraph amended	Amendment	Agreed?	Claimants' response	Judge
21 - Nelson Njao Munyoike	39	Particulars of Injury (see above)	No.		
		'The Claimant has <u>suffered</u>	1) This amendment amounts	1) Not pursued as to: The Claimant	Amendment pursued as claimed and

		<p><u>psychological symptoms related to his experiences in the Emergency and the traumas he was exposed to<sup>1</sup> but has not suffered a recognised psychological injury, the effect of which in law is a matter for submission...</u></p> <p>The Claimant suffers <u>what he perceives as<sup>2</sup></u> flashbacks and ruminates about how he was physically assaulted during the State of Emergency.'</p>	<p>to a pleading that TC21 has not suffered psychiatric / psychological injury. However, it goes on to assert that 'the effect in law' of TC21's 'symptoms' is 'a matter for submission'. That is at best inchoate and at worst wholly unclear.</p>	<p>has <u>suffered psychological symptoms related to his experiences in the Emergency and the traumas he was exposed to<sup>1</sup> but has not suffered a recognised psychological injury, the effect of which in law is a matter for submission...</u></p> <p>The Claimant will reinstate the original wording and whether the diagnosis is made out will be a matter for submission.</p>	<p>permitted. See main judgment paragraphs 7-8. See TC9. As to the perception of "flashbacks" see the response to TC14.</p>
			<p>2) The allegation that TC21 experiences 'what he perceives as flashbacks' merely pleads TC21's alleged</p>	<p>2) The Claimant suffers <u>what he perceives as<sup>2</sup></u> flashbacks  This is pursued; it is as per the amendment to TC 31 which D agreed. D</p>	

			<p>terminology (as a non-medically-qualified Kikuyu speaker) for an aspect of his psychological experience, without any particulars of the intended meaning. Prof Mezey's opinion is that TC21 has not suffered flashbacks [17-175].</p>	<p>has given no good reason for a different approach. The issue will be how the court should treat what TC 21 describes as "flashbacks" but which do not meet the criteria for a such in medical terms. This experience is not irrelevant and can sound in damages: the basis upon which it does so and the extent to which it does is a matter for submissions.</p>	
			<p>3) If, despite volunteering that TC21 has not suffered 'recognised psychological injury', these amendments seek to assert or support some form of compensable injury, such an allegation is not</p>	<p>3) as above and as per response to D's Introduction at para 6.</p>	



			<p>already pleaded in the Particulars of Injury. The amendments therefore fall outside the scope of permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs' undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p>		
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## **TEST CLAIMANT 22 - MARGARET WANJIRU KIMANI**

**The draft re-amended Particulars of Injury are at §45, as follows:**

‘As a result of the Defendant’s alleged actions, the Claimant has suffered pain and injury, incarceration, breaches of her human rights, loss and damage.

### **PARTICULARS OF INJURY/ BREACHES OF HUMAN RIGHTS**

The Claimant is aged about ~~74~~ 77 years of age having been born around 1940.

At the dates of the events complained of she was a teenager.

#### *Assault*

In total, the Claimant was assaulted on at least 10 distinct occasions. She was hit with clubs and sticks during forced removal, detention and forced labour. She was assaulted on her back, arms and legs with a stick until her body was swollen. She was whipped mercilessly all over her body. She suffered long term damage to her back and legs; she cannot walk properly to date. She cannot lift anything with her arms. She is unable to cook or clean. She was refused medical treatment. She was treated by massages with hot salty water. She has suffered considerable permanent scarring over various injury sites, including her legs and back;

In one particular incident, the Claimant was tied up, left hanging from poles and beaten indiscriminately, all over her body, until all her clothes tore away and she lost consciousness was unable to continue screaming and became mute from the severity of the pain. She was untied and taken away after around 5 hours of this treatment. Her body was covered in wounds: deep lacerations from where her skin had torn away, bruises, swelling, profuse bleeding. The Claimant’s body was so sore she could not move or wear clothes until the wounds had healed. She had to be provided with 24-hour care initially;

The Claimant suffers from flashbacks about the suffering she endured during the Emergency. She remembers vividly how difficult it was. Each time she exerts herself in a physical task, she struggles, and is reminded that she has been debilitated as a result of her abhorrent treatment;

The Home-Guards police assaulted her on numerous occasions during forced labour. She suffers leg and arm pains to date as a result;

The Claimant cannot sleep without the light on only sleeps with medication because she is traumatised by the events that she experienced, suffering flashbacks and intrusive thoughts. She takes medicine to help her sleep most nights; this amounts to a recognised psychological injury, namely current and lifetime Post Traumatic Stress Disorder together with lifetime Depressive Disorder.<sup>1</sup>

The Claimant was refused medical treatment for her injuries, aggravating her symptoms;

Further particulars of the Claimant’s injuries will be set out in the medical

evidence that will follow;

It is likely that the history of assault and injury has aggravated the effects of natural ageing so as to make the Claimant more infirm than would otherwise be the case;

~~Medical evidence is being sought in accordance with the Order of the Court.~~

The Claimant will refer to and rely upon the written and oral medical evidence provided to the court by Ms McGuinness, Consultant in Emergency Medicine and Professor Mezey, Professor of Forensic Psychiatry.

1 Source: TC w/st confirms she suffered from flashbacks under heading psychological injury [18-145] and in the IPOC says flashbacks and intrusive thoughts without stating that this is claimed as a psychological disorder. Mezey’s opinion (received after the original IPOC served) is that TC is suffering from Current & Lifetime PTSD and Depressive Disorder [18-218] & [18-219], so the diagnosis is provided.’

Test Claimant	Paragraph amended	Amendment	Agreed?	Claimants’ response	Judge
22 - Margaret Wanjiru Kimani	11	This was to prevent people from leaving or entering the camp; those who tried would suffer serious injury. <u>She was removed to and detained in one place in Karirau.</u>	Agreed. Issue was taken with this amendment as a matter of caution in correspondence copied to the judge. It is now agreed, without prejudice to D later making submissions as to the substance of the amendment.	Noted.	Amendment permitted as agreed.
	17, 28, 33, 34, 41(3), and 45	<u>village</u> camp	Agreed. Issue was taken with this amendment as a matter of caution in correspondence copied to the judge. It is now agreed, without prejudice to D later making	Noted.	Amendment permitted as agreed.

			submissions as to the substance of the amendment.		
	18, 21 and 34	village <u>camp</u>	Agreed. Issue was taken with this amendment as a matter of caution in correspondence copied to the judge. It is now agreed, without prejudice to D later making submissions as to the substance of the amendment.	Noted.	Amendment permitted as agreed.
		<del>And/or alternatively the Claimant has:</del>	This arises from transposition of the amendments, and is not an injury amendment. D does not object to the additional deletion, but wishes to draw it to the attention of the Cs and the Court in case it is an error.	As per TC 5 [36]. It is not an error – it is related to the following sentence and should have been deleted. Tidying up.	Amendment permitted as agreed.
	45	Particulars of Injury	Not agreed. See further below.		
	45	The Claimant <del>cannot—sleep without—the light—on only sleeps with medication</del> because she is traumatised by the events that she experienced, suffering	Not agreed. 1) The terms of §§28-30 of the judgment dated 27 April 2017 provided that the amendments may not allege ‘any specific injuries not already pleaded	1) it was already pleaded that she was traumatised and was experiencing flashbacks and intrusive thoughts, needing medicine to	Amendment in green refused. See paragraphs 9-13 of the main judgment and the responses to TC5. Although some psychological

		<p>flashbacks and intrusive thoughts. She takes medicine to help her sleep most nights; <u>this amounts to a recognised psychological injury, namely current and lifetime Post Traumatic Stress Disorder together with lifetime Depressive Disorder.</u><sup>1</sup></p> <p><u>1 Source: TC w/st confirms she suffered from flashbacks under heading psychological injury [18-145] and in the IPOC says flashbacks and intrusive thoughts without stating that this is claimed as a psychological disorder. Mezey’s opinion (received after the original IPOC served) is that TC is</u></p>	<p><i>in the Particulars of Injury’.</i> D further relies upon C’s undertaking and the court’s ruling in April relating to injuries not already falling within the Particulars of Injury.</p> <p>2) The re-amendment now seeks to allege that TC22’s sleeping with medication, flashbacks and intrusive thoughts “<i>amounts to a recognised psychological injury, namely current and lifetime Post Traumatic Stress Disorder together with lifetime Depressive Disorder</i>”. Plainly, that is inaccurate: the symptoms described fell well short of the components of PTSD under the DSM or ICD criteria or</p>	<p>sleep, §28 WS refers [18-145]. The amendment clarifies that those symptoms pleaded give rise to a formal diagnosis. See above response to D’s introduction at para 6. 2) It is acknowledged that on this occasion the words “psychological injury” in general terms are not pleaded, but the symptoms she describes are so pleaded and are in her WS §29 [18-145]; PD 16 4.2 requires a brief description of personal injuries; those symptoms describe mental trauma. The TC has pleaded the</p>	<p>symptoms were pleaded, it was incumbent on the Claimants once the medical evidence was available in 2015, to make a clear allegation of psychiatric injury. The symptoms pleaded did not amount to a diagnosis of such. This is far more than the type of amendment permitted in April 2017. The overriding objective does not permit exercising discretion to allow this amendment.</p>
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		<p><u>suffering from Current &amp; Lifetime PTSD and Depressive Disorder [18-218] &amp; [18-219], so the diagnosis is provided.</u></p>	<p>a Depressive Disorder.</p> <p>3) As such , the re-amendment pleads specific named psychiatric injuries that had not previously been pleaded by TC22. TC22 has at no prior stage alleged that she suffered from any compensable psychiatric/psychological injury.</p> <p>4) <i>A fortiori</i> and in any event, the original pleading did not contain even a general pleading of ‘psychological injury’.</p> <p>5) The delay in amending the pleading to include this specific named psychiatric injury is egregious.</p> <p><b>Accordingly:</b></p> <p>6) The amendment falls outside the scope of</p>	<p>basis of what has been now identified as a formal diagnosis; neither TC nor her representatives are psychologically or psychiatrically qualified; the need for medical evidence attached to the IPOCs was dispensed with and the parties jointly instructed medical experts. D was able to XX on the diagnosis and the “building blocks” for it at length, as well as the interaction between the various components of the diagnosis: 33-8690 – 8715. The accuracy of the diagnosis will be a matter for</p>	
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			<p>permission given in respect of the IPOCs considered in the April judgment.</p>	<p>submission. 3) As above. 4) As above. 5) dealt with in response to D's Introduction, para 11. The amendment application was made at an appropriate and proportionate time. 6) as above. In any event, no prejudice to D, as opposed to the prejudice to C who absent the amendment will not recover for her full loss.</p>	
	<p>Schedule of Loss, §1</p>	<p>The monetary equivalent, valued at the time by reference to the East African Shilling, of the Claimant's home / possessions / lost livestock (including 4 cows and <u>at least 2 goats and many chickens</u>) / crops / land</p>	<p>This is an amendment that was overlooked previously. The Revised Annex to Andrew Robertson's 6<sup>th</sup> statement made it clear that the Defendant disputed this amendment. Unfortunately, the challenge to the amendment was omitted from the version of the schedule the Claimants supplied when setting out their position on the</p>	<p>Yes, it was overlooked by the parties. It does not alter the case that she lost possessions. It clarifies the ownership of those possessions and what was lost. The amendment is in</p>	<p>Amendment permitted. This is almost de minimis. To meet the Defendant's objection, the amendment will be allowed save "3 goats" instead of "at least 2 goats". The court can take a view over the objection to the proposed</p>

		<p><u>belonging to herself and her husband</u> that were set alight and/or otherwise destroyed or stolen by Home Guards during the Claimant's forced removal from her home.</p>	<p>Defendant's objections. Hence it was neither discussed at the hearing on 19 July 2017 nor did it appear in the schedule to the Court's judgment of 18 August 2017. Whilst not an injury amendment, the parties have agreed that it be addressed by the Court at this stage in the proceedings.</p> <p>Not agreed. The amendment is inappropriate for an Individual Schedule of Loss, in that it rather than properly particularising the claim and narrowing the Individual Schedule of Loss, it reduces the level of particularity as to the number of animals in respect of which a claim is made by reason of its reference to "<u>at least 2 goats and many chickens</u>". The amendment is such that the Court and the Defendant are no longer able to ascertain with any measure of certainty the animals in respect of which the claim is made.</p>	<p>accordance with the TC's evidence [33-2801:belonged "to her and her husband"; "4 cows, 3 goats and many chicken"]; the extent of the loss is something the court will rule on in due course having heard submissions .</p>	<p>amendment (in line with the evidence of TC22) that she lost "many chickens".</p>
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## **TEST CLAIMANT 23 - WAGICHUGU NJUKI**

**The draft re-amended Particulars of Injury are at §49, as follows:**

'As a result of the Defendant's alleged actions, the Claimant has suffered pain and injury, incarceration, breaches of her human rights, loss and damage.

### **PARTICULARS OF INJURY/ BREACHES OF HUMAN RIGHTS**

The Claimant is about ~~88~~ 91 years of age having been born around 1926.

At the dates of the events complained of she was in her mid-20s.

#### *Assault*

The Claimant was struck several times on the top of her back with a stick;

She was hit violently on her left forearm, whilst attempting to defend herself. The Claimant was struck with such force that she was caused permanent pain and suffering in her left arm;

The Claimant was refused medical treatment for her back and arm injury, rather, she was forced to build another house with one arm immediately afterwards, causing her to experience such pain and suffering that she has remained permanently debilitated;

The Claimant was regularly assaulted as part of a communal punishment. She was beaten with sticks, canes and the side of a panga, causing immense pain, suffering and permanent scarring on her forehead;

The Claimant experienced the trauma of witnessing her fellow detainees being hacked to death;

The Claimant was ordered to carry dead bodies onto a military lorry, causing an immense amount of distress and psychological injury;

She was beaten severely with a cane, causing bruising, bleeding and swelling all over her body. Her back was particularly sore. The Claimant's neck became stiff; she could not move it. She has a permanent scar on her left shoulder. The Claimant was refused medical treatment. She was forced to continue physical labour immediately afterwards, aggravating her injuries. The Claimant's wounds took approximately 2 months to heal. The Claimant's neck pains and her limitation of movement has never fully resolved. She has been unable to carry weights on her back since;

The Claimant is tormented by the memories of her painful ordeal. She has never recovered from the announcement that her husband had been killed. She experiences what she perceives as flashbacks of the trauma she was subjected to; she suffered a lifetime depressive disorder during her detention, currently in remission<sup>1</sup>. The legal effect of this is a matter for submission.

Further particulars of the Claimant's injuries ~~will be~~ are set out in the medical evidence ~~that will follow~~;

It is likely that the history of assault and injury has aggravated the effects of natural

ageing so as to make the Claimant more infirm than would otherwise be the case;

~~Medical evidence is being sought in accordance with the Order of the Court.~~

The Claimant will rely on the evidence of Ms McGuinness, Consultant physician and Professor Mezey, Consultant psychiatrist.

1 Ref Prof Mezey [33-8741 – 8743]; [33-8752 – 8753].'

Test Claimant	Paragraph amended	Amendment	Agreed?	Claimants' response	Judge
23 - Wagichugu Njuki	7.e.	<u>Fifth oath: at home in Kiamwathi, Gatuu</u>	Whilst not an injury amendment, the parties have agreed that this re-amendment to §7.e. be addressed by the Court at this stage in the proceedings.  Not agreed. The amendment to 7(e) was objected to by the Defendant. The re-amendment to TC23 was refused by the Court following submissions. It should be deleted accordingly.	See Schedule attached to Jt 18.8.17. p.105; D objection to 7e was "in part". That part of the amendment re change of location that was not permitted (from a Chief's camp to a punitive village) has been removed; all that has remained is the pleading of the 5 <sup>th</sup> oath and where it took place. D did not object to 7a, b, c and d which deals with oaths 1 to 4, nor f and g which deals with oaths 6 and 7, including where they took place. Albeit not made clear by D, it was assumed	Allowed for the reasons given by the Claimants.

				<p>that the “part” of 7e that was not objected to was the part that referred to the fact of the oath taking place and where.</p> <p>To remove reference to the 5<sup>th</sup> oath makes the paragraph lack comprehension, when the TC was clear in her evidence that she had taken 7 oaths [33-2176] and the pleading makes reference to all but number 5.</p>	
	8	<p>In or around 1955, the Claimant - _was removed from her home in <u>Gatuu</u>, Kiamwathi</p>	<p>Whilst not an injury amendment, the parties have agreed that this re-amendment to §8 be addressed by the Court at this stage in the proceedings.</p> <p>The Claimants have failed to identify as a re-amendment the inclusion of ‘Gatuu’, but for ease it is correctly set out in this Table.</p> <p>Not agreed:</p> <p>The express basis of consent</p>	<p>Agreed that §8 needs to be consistent with §5, and the remedy is to strike through “Gatuu” in green.</p> <p>The original §8 was pleaded “Gatuu, Kiamwathi”;</p> <p>The proposed amendment (that the court was asked to rule on) was to strike through “Gatuu” in order to be consistent with §5 (D’s rehearsal of the para in this schedule does not show the strike through,</p>	<p>Allowed as “Kiamwathi in Gatuu.”</p>

			<p>to the re-amendment of paragraph 8 at the amendment hearing was that it be consistent with the re-amendment at paragraph 5 that Kiamwathi was within Gatuu: "<u>Kiamwathi, in Gatuu</u>" [33-16582]. The effect of this re-amendment is, however, to maintain the confusion as to the relative sizes of Kiamwathi and Gatuu.</p>	<p>it shows "Gatuu" in green). See [33-16582] line 8 – 20. J raises point that §8 needs to be consistent with §5. So: it is agreed that §8 should be amended consistently with §5, therefore it follows that "Gatuu" should be struck through, in green.</p>	
	12	<p><b><u>Detention &amp; Forced Labour: Kianyaga Chief's Camp</u></b></p>	<p>This is a re-amendment that was overlooked previously. The Revised Annex to Andrew Robertson's 6<sup>th</sup> statement made it clear that the Defendant disputed this amendment. Unfortunately, the challenge to the re-amendment was omitted from the version of the schedule the Claimants supplied when setting out their position on the</p>	<p>Yes, this was overlooked. Para 12 was not ruled upon. 1)The J did not permit any disputed amendments and, in his reasoning, refers specifically to amendments relating to place of detention in Kianyaga (see p.102 of Schedule to Jt 18.8.17); it follows that the reference to Kianyaga Chief's Camp should be reinstated as per</p>	<p>Refused, as the Claimants now accept.</p>

			<p>Defendant's objections. Hence it was neither discussed at the hearing on 19 July 2017 nor did it appear in the schedule to the Court's judgment of 18 August 2017. Whilst not an injury amendment, the parties have agreed that it be addressed by the Court at this stage in the proceedings.</p> <p>Not agreed.</p> <p>1) The Court has refused all contested amendments to TC23. This re-amendment to TC23's IPOC was objected to by the Defendant. The re-amendment should have been refused.</p> <p>2) The effect of the re-amendment would be to leave certain key allegations,</p>	<p>the original pleading. 2) as above 3) as above; As per D, sub is repeated for §45 below.</p>	
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			<p>which are clearly intended to give rise to causes of action, materially unparticularised as to location.</p> <p>3) The re-amendment is hopeless, and/or visits prejudice on the Defendant who will be unable to research and then respond to the substance of the allegation accordingly.</p> <p>The Defendant repeats these submissions in respect of the corresponding re-amendment to §45(2).</p>		
	45(2)	(2) Caused, permitted, allowed or suffered the detention of the Claimant in intolerable conditions, that included extremes of temperature, hunger/starvation, thirst,	Not agreed. As immediately above.	As immediately above. Para 45(2) was not ruled upon. However, the J's ruling did not permit any disputed amendments relating to place of detention. It follows that the reference to "at Kianyaga"	Refused, as the Claimants now accept.

		<p>sickness, gross overcrowding, a lack of sanitation and a pervasive atmosphere of violence, which put her health and safety in danger. In particular, but without prejudice to the generality of the foregoing, the detention facility at Kianyaga had not been built when the Claimant arrived. The Claimant was forced to sleep in open air, exposed to the elements, wearing only the clothes that she had been forcibly removed from her home in. The Claimant was exposed to temperature extremes, with no shade by day and no</p>		<p>should be reinstated as per the original pleading.</p>	
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		shelter by night. Sanitation facilities were woefully inadequate. Detainees were forced to scavenge for food and water, none being provided to them. Detainees were not even provided with any or any adequate cultivable land to produce food, causing malnutrition and starvation. The Claimant had the added fear of looking after her young children in these circumstances.			
	49	Particulars of Injury	Not agreed. See further below.		
	49	The Claimant is tormented by the memories of her painful ordeal. She has never	Not agreed. 1) The relevance of the allegation as to TC23's subjective perception of	1) this is in accordance with the agreed amendment to TC 31. D has given no good reason why	This amendment would have been permitted (i.e. as to 'flashback



		<p>recovered from the announcement that her husband had been killed. She experiences <u>what she perceives as</u> flashbacks of the trauma she was subjected to;</p>	<p>flashbacks for an aspect of her psychological experience is unclear. TC23 is a non-medically-qualified non-English speaker, and her own perceptions of flashbacks are clinically irrelevant accordingly. The re-amendment should not be permitted accordingly.</p> <p>2) Without prejudice, to the extent that this averment is sought to be added to raise such an allegation (which is unclear for the reasons already given), then such an allegation is one not already pleaded in the Particulars of Injury. The amendment</p>	<p>their approach is different. The issue will be how the court should treat what TC 23 describes as “flashbacks” but which are not so identified upon expert medical examination [§95 and §96; 19-252]; what she describes is not irrelevant and can sound in damages; the basis on which it does so and the extent to which it does so are matters for submission; 2) her mental torment and the symptoms of psychological disturbance are already pleaded; see response to D’s Introduction para 6.</p>	<p>s’) – see TC14 above. However, there is no evidence from the Claimant, whether in her witness statement or oral evidence which supports flashbacks. Cf paras 9-13 of the main judgment and TC16 above.</p>
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			<p>would therefore fall outside the scope of permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs' undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p>		
		<p><a href="#">she suffered a lifetime depressive disorder during her detention, currently in remission<sup>1</sup>. The legal effect of this is a matter for submission.</a></p> <p><a href="#">1 Ref Prof Mezey [33-8741 - 8743]; [33-8752 - 8753].</a></p>	<p>Not agreed.          1) The terms of §§28-30 of the judgment dated 27 April 2017 provided that the amendments may not allege 'any specific injuries not already pleaded in the Particulars of Injury'. D further relies upon C's undertaking and the court's ruling</p>	<p>1) mental distress was pleaded i.e. that she was tormented by memories and was experiencing flashbacks to trauma; the amendment clarifies that those symptoms pleaded give rise to a formal diagnosis. See above response to D's introduction at para 6. The formal diagnosis is consistent with the symptoms</p>	<p>This amendment refused. See main judgment at paragraph 9-13 and comments on TC5 and TC22.</p>

			<p>in April relating to injuries not already falling within the Particulars of Injury.</p> <p>2) The re-amendment pleads a specific named psychiatric injury that had not previously been pleaded by TC23. TC23 has at no prior stage alleged that she suffered from any compensable named psychiatric/psychological injury. TC23 had failed to identify symptoms satisfying the DSM or ICD criteria for a lifetime Depressive Disorder.</p> <p>3) The delay in amending the pleading to include this specific named psychiatric injury is</p>	<p>that are already pleaded, so within the scope of the judgment.</p> <p>2) It is acknowledged that on this occasion the words “psychological injury” in general terms are not pleaded; PD 16 4.2 requires a brief description of personal injuries; the symptoms pleaded describe mental trauma. The TC has pleaded the basis of what has been now identified as a formal diagnosis; neither TC nor her representatives are psychologically or psychiatrically qualified; the need for medical evidence attached to the IPOCs was dispensed with and the parties jointly instructed medical experts. D was able to XX on the issue including causation and</p>	
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			<p>egregious.</p> <p><b>Accordingly:</b></p> <p>4) The amendment falls outside the scope of permission given in respect of the IPOCs considered in the April judgment.</p>	<p>did so at length [33-8726 33-8741];</p> <p>The accuracy of the diagnosis will be a matter for submission.</p> <p>3) no delay; dealt with in response to D’s Introduction, para 11. The amendment application was made at an appropriate and proportionate time.</p> <p>4) as above.</p> <p>In any event, no prejudice to D, as opposed to the prejudice to C who absent the amendment will not recover for her full loss.</p>	
			<p>5) The re-amendment asserts that ‘the legal effect’ of TC23’s <u>‘lifetime depressive disorder during her detention, currently in remission’</u> is ‘a matter for submission’.</p> <p>That is at best inchoate and at worst wholly unclear. It should be refused</p>	<p>5) Consistently with other pleadings, the “legal effect” refers to the amendment “She experiences <u>what she perceives as</u> flashbacks of the trauma she was subjected to”.</p> <p>As per responses above, the court’s approach flashbacks where they are described, but</p>	

			accordingly.	they do not amount on expert examination to a psychiatric symptom per se, is a matter for submission. They are not irrelevant.	
			6) Cross examination of the medical experts in respect test claimants' injuries was expressly without prejudice to the submission that in the absence of a pleaded injury in the then IPOC, any physical and/or psychological injuries identified in the expert report/s formed no part of the test claimants' claims. 7) The evidential basis pleaded for the re-amendment to include an injury of 'lifetime depressive disorder' is passages of	6) any prejudice relied on by D is, necessarily, limited by their ability to cross examine. 7) the evidential basis is not limited to passages of XX, although it is correct that D was able to XX extensively; the diagnosis was made in the medical evidence [19-249 §86 and 87], upon examination by a jointly instructed medical expert.  Overall, no prejudice to D, as opposed to the prejudice to C who absent the amendment will not recover for her full loss.	

			<p>cross-examination. Without prejudice to the Defendant's submission that those passages do not support the re-amendment as asserted, they properly cannot form the basis for the re-amendment to include a new named psychiatric/psychological injury in view of the paragraph immediately above.</p>		
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## TEST CLAIMANT 24 - MAGONDU MUTHUMBA

The draft amended Particulars of Injury are at §39, as follows:

The Claimant is about 95 97 years of age.

The Claimant suffered the injury and abuses as set out above and summarised herein:

*Assault/battery*

The Claimant was in fear of assaulted on multiple occasions. He witnessed beatings of others and apprehended fear as a result of each assault. This placed him in a stressful situation; he experienced a biological response to each stressful situation which resulted in a transient rise in his blood pressure. His heart rate increased and blood pressure increased. He has not suffered a diagnosed recognised psychological disorder but described feelings of resentment and anxiety, and that his time in the camps was wasted, in common with other test claimants who had suffered symptoms of psychological disorder<sup>1</sup>. The legal significance of this is a matter for submission.

Further particulars of the Claimant's injuries ~~will be~~ are set out in the medical evidence ~~that will follow~~.

~~Medical evidence is being sought in accordance with the Order of the Court.~~

The Claimant will refer to and rely upon the written and oral medical evidence provided to the court by Mr Heyworth, Consultant in Emergency Medicine and Dr Davidsson, Consultant Psychiatrist.

1 Dr Heyworth cross examination page 2 onwards; ref 33-8961

Test Claimant	Paragraph amended	Amendment	Agreed?	Claimant's response	Judge
24 - Magondu Muthumba	39	Particulars of Injury	No.		
		'This placed him in a stressful situation... blood pressure increased.'	The relevance of this amendment is unclear. Insofar as it is alleged that TC24's heart rate and/or blood pressure experienced a transient	The amendment is under the heading "Particulars of Injury", §39 stating: "As a result of D's alleged actions, the Claimant has suffered pain and injury ..." so it is clear that this is being asserted as	Refused. The proposed amendment is no more than the Claimants' exposition of what they say is 'fear'. "Fear" is already pleaded.

			<p>increase as a result of the alleged events, there is no averment of any physical injury to TC24. If and to the extent that this amendment is alleged to be relevant to the later reference to "<i>symptoms of psychological disorder</i>" then it is resisted for the further reasons given below.</p>	<p>part of TC 24's injury. Fear of personal assault and fear as a result of witnessing the beatings of others is already pleaded: the effect of that on him physiologically was dealt with in the written medical evidence of Mr Heyworth [20-129 §2] where he said stress during the emergency would have contributed to hypertension; D asked Part 35 questions of the expert related to this conclusion [20-137 §11] and it was further elicited and explored during the medical evidence by both parties: [33-8083 – 33 -8116]. The D was on notice at the time that an amendment may be sought in relation to TC 24. Mr Heyworth did not maintain his evidence so far as early onset of hypertension was concerned, but that does not mean that what TC24 suffered in terms of the physiological</p>	<p>Therefore nothing is gained by the proposed amendment. It is in the circumstances evidence not pleading.</p>
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				<p>effects of fear was irrelevant. The issue of whether this amounts to injury and is recognised in law, is a matter of law and submission. The Cs are not required to rehearse submissions. The issue is whether the amendment is permissible, being in accordance with the judgment 27.4.17. C's assert that it is permissible and in accordance with the judgment:</p> <ol style="list-style-type: none"><li>1) It is asserted as part of injury under the heading "Particulars of Injury" and "Assault/battery", where it is alleged he has suffered pain and injury;</li><li>2) it is pleaded that he was in fear repeatedly;</li><li>3) the medical evidence indicates fear as a response to stress results in a biological response;</li><li>4) this response is well – recognised and results in a transient rising of blood pressure</li></ol>	
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				<p>and heart rate;          4) TC 24 was aware of the biological effects: he describes living his life in in fear.          This amendment is analogous to that permitted by the amendment to TC 31. Being kicked in the scrotum is consistent with being beaten all over the body; being subject to a biological fear response (“fight or flight”) is consistent with being put in fear repeatedly.</p>	
		<p><u>He has not suffered a diagnosed recognised psychological disorder but described feelings of resentment and anxiety, and that his time in the camps was wasted, in common with other test claimants who had suffered symptoms of psychological disorder<sup>1</sup>. The legal significance</u></p>	<p>1) This amendment amounts to a pleading that TC24 has <u>not</u> suffered psychiatric / psychological injury. However, it goes on to assert that ‘the legal effect’ of TC24’s ‘<i>symptoms of psychological disorder</i>’ is ‘<i>a matter for submission</i>’. That is at best inchoate and at worst wholly unclear.</p>	<p>1) The assertion is clear and based on Dr Davidsson’s conclusions [20-166]. What he experienced is not irrelevant and can sound in damages. The extent to which it does so is a matter of submission. The amendment is within what is already pleaded: the TC pleads his response to being put in fear in a village on multiple occasions; the amendment clarifies that experience.</p>	

		<p><u>of this is a matter for submission.</u></p>	<p>2) The reference to TC24's "<i>time in the camps</i>" is not understood. TC24 alleges that he was detained at '<i>Kabare Post</i>' and then at a village (see §§14-30 of the IPOC).</p>	<p>2) Yes, this should be "<u>time in the village</u>". It is requested that the amendment be permitted in this form.</p>	
			<p>3) In any event, TC24 has at no stage alleged that he suffered from any compensable psychiatric / psychological injury. To the extent that this averment is sought to be added to raise such an allegation (which is unclear for the reasons already given), then such an allegation is one not already pleaded in the Particulars of Injury. The amendment therefore falls</p>	<p>3) It is clearly not being alleged that he has suffered psychiatric psychological injury. But the extent to which the law should recognise what he describes as his injury is in issue. What he experienced is not irrelevant and can sound in damages.  RE undertaking:  Cs refer to response to D's introduction para 6.</p>	

			<p>outside the scope of permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs' undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p>		
			<p>4) The allegation that TC24 '<i>described feelings of ... anxiety</i>' is in any event unsupported by the evidence. The footnoted reference given is to the cross-examination of Dr Davidsson (not that of Mr Heyworth). Dr Davidsson did not however state that TC24</p>	<p>4) A footnote is missing. It should indeed be referenced to Dr Davidsson at [33-8961 – 33-8962]. Dr Davidsson's evidence is clear that TC 24 suffered no recognised psychological injury; but that he was in fear of being "beaten or tortured" if he refused to labour [20-158] and the reason he did not get beaten because he was "very obedient" [20-159]. To the extent that the court finds he did suffer, it can</p>	

			<p>described “feelings of... anxiety”. That TC24 may have suffered from anxiety was a proposition suggested to him by Counsel for the Claimants as a result of TC24 having been prescribed Diazepam in 2013. Dr Davidsson agreed that it was possible that TC24 had been prescribed that drug in 2013 for anxiety, but said that there were also other possible reasons for that prescription being given. For the exchange, see 33-8959, line 8 to 33-8961, line 16.</p> <p>5) TC24 was himself unable to assist Dr Davidsson with why he had been</p>	<p>sound in damages.</p> <p>5) Submissions will be made on the evidence in due course.</p> <p>6) as above. Submissions should not be rehearsed: the issue is whether this is included in what is already pleaded. TC 24 says he suffered injury and felt fear on multiple occasions. The effects of that fear are a permissible pleading and based on the medical and psychiatric evidence.</p> <p>The prejudice to TC is that he risks being unable to recover for the full extent of any loss; the prejudice to D is absent: how the court treats TC’s injury is always going to be an issue of law.</p>	
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			<p>prescribed this drug (see report at 20-156). When interviewed by Dr Davidsson in 2015, TC24 denied having any psychiatric symptoms (see 33-8961, lines 6-7).</p> <p>6) Nowhere in Dr Davidsson's written or oral evidence, or for that matter the evidence of TC24 himself, is there any reference to TC24 experiencing or describing "<i>feelings of... anxiety</i>" or any attribution of such feelings to TC24's experiences during the Emergency. Further Dr Davidsson's answer at 33-8963, lines 13-15, in which he noted that in contrast to TC24, other Claimants he</p>		
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			had seen “ <i>had some other things too, like... anxiety symptoms...</i> ” directly contradicts the proposition that TC24 had symptoms of anxiety.		
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## TEST CLAIMANT 25 - MUNYI NJOKI

The draft amended Particulars of injury are at §60 [proposed §63], as follows:

The deceased Claimant was aged about 92 94 years of age when he died having been born around 1922.

At the dates of the events complained of he was in his 30s.

### *Assault*

The deceased Claimant was assaulted on multiple occasions.

He was shot in the left ankle. The deceased Claimant was an in-patient in hospital for around one month; the gunshot wound was cleaned, closed with stitches and bandaged. His mobility was impaired; he remained in pain and required the use of a mobility aid for around one year<sup>1</sup>.

During forced labour the deceased Claimant was physically assaulted daily by the Kenyan Police.

He was forced to carry a basin of murrum [mixture of sand and stones] or stones on his head and to walk down two lines of Kenyan Policemen whilst each of them assaulted him as he passed them.

The deceased Claimant avers he was assaulted over ten times and lost consciousness on a number of occasions. The assaults were carried out by different and multiple guards who would hit the deceased Claimant on his hands, shoulders, head, back and legs with canes and sticks.

The deceased Claimant was assaulted by a camp guard named 'Njore'. The deceased Claimant was beaten on his head, hand, shoulder, back and legs with posts used to make 'jembe' handles. The deceased Claimant lost consciousness and awoke some time later.

The deceased Claimant was hit with a stick across the fingers of his left hand whilst trying to block a blow which had been directed at his head, causing pain, swelling and restriction of movement for a period of around one year<sup>2</sup>.

The deceased Claimant has permanent scars on his left hand and left leg caused by the various assaults as described herein.

The deceased Claimant has suffered symptoms as set out in the medical evidence but which do not satisfy the criteria for a recognised psychological injury. He has current subclinical symptoms of post traumatic stress disorder and intermittent depression<sup>3</sup>. The deceased Claimant suffers flashbacks and ruminates about his experiences and in particular the interference with his family life and the severe treatment and punishment/assaults he suffered. The legal effect of this is a matter for submission.

Further particulars of the deceased Claimant's injuries ~~will be~~ are set out in the medical evidence ~~that will follow~~.

~~Medical evidence is being sought in accordance with the Order of the Court.~~

The deceased Claimant will refer to and rely upon the written and oral medical evidence provided to the court by Mr Heyworth, Consultant physician, and Dr



Davidsson, psychiatrist.

1 Heyworth report, page 7, para 2 (21-200). Heyworth, Part 35 Answer 13 (21-212). Heyworth’s cross examination, page 47 (33-8129).

2 Heyworth report, page 7, para 3 (21-200).

3 Davidsson cross examination; D cross examines from [33-8970 - 8985].

Note: there is a further issue relating to this TC re the colour of amendments, as identified by D in their letter 3.10.17 where they state: “The IPOC contains further amendments to change it into an estate claim, i.e. the insertion of three new paragraphs at the beginning and the replacement throughout of “Claimant” with “deceased Claimant”/“Estate”. The Defendant does not object to these amendments, on condition that it is supplied with copies of the associated formal documentation (probate, grants, orders, etc). Furthermore, the “Estate claim amendments should be coloured red, not green, as they are being made with the other amendments in the draft IPOC served in July 2017”.

Response: The necessary documentation regarding the estate was provided on 2 Feb 2017 and the documents are on caselines: 21-267 (death certificate); 21-268 (resealed grant) ; we agree it makes sense to regard this as one set of amendments and we will change from green to red as suggested.

Test Claimant	Paragraph amended	Amendment	Agreed?	Claimant’s response	Judges Comments
25	60 (proposed 63)	Particulars of Injury (see above)	No		
		‘His mobility was impaired; he remained in pain and required the use of a mobility aid for around one year’:	1) This asserts a previously un-pleaded injury in the form of impairment, long-term pain and duration of injury arising from the incident in which TC25 alleged that he was shot in the ankle. TC25 gave no evidence	1) this is further particularisation of the claim based on the medical evidence and XX of a jointly instructed medical witness. The ankle gunshot injury was pleaded, as D accepts. The information was available to the parties, as D accepts via the Part 35 questions. D	Amendment refused. The Claimant can rely on the details in paragraph 18 of his witness statement. Other than that: (i) TC25 gave no evidence of such an impairment/ duration of impairment to the Court. (ii) If the

			<p>of such an impairment / duration of impairment to the Court, despite this being entirely within his own knowledge. Despite the Claimants having been put on notice in 2015 by the Defendant's Part 35 Questions to Mr Heyworth and Mr Heyworth's answers (see at 21-208 and 21-212), no amendment to the pleaded case was sought prior to TC25 giving evidence and nothing was said in TC25's supplemental witness statement about this.</p> <p>2) The amendment therefore falls outside the scope of</p>	<p>XX on the gunshot wound [33-8121 – 33-8132]. It was reasonable and proportionate to amend once the expert had been cross examined.</p> <p>2) as above, the gunshot injury was pleaded; response to Ds' introduction at para 6.</p>	<p>Claimant wished to rely upon this then the amendment should have been notified prior to TC25 giving evidence. The Defendant is prejudiced that it is now not able to cross-examine TC25 as he died in August 2016.</p>
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			<p>permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs' undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p>		
			<p>3) Irrespective of that, the Defendant is prejudiced by not being able to cross-examine TC25 on this new allegation, as he died in August 2016.</p>	<p>3) D's prejudice is limited, having had the opportunity to ask Part 35 questions and XX the jointly instructed medical witness who has taken a medical history.</p>	
<p>25 - 63 Munyi Njoki</p>		<p>"causing pain, swelling and restriction of movement for a period of around one year"</p>	<p>1) This asserts a previously unpleaded injury in the form of impairment, swelling and pain arising from the incident in</p>	<p>1) as above. This is further particularisation of an existing injury already pleaded, based on the medical evidence. 2) as above.</p>	<p>Amendment refused for the same reasons as preceding amendment. It is not merely "further particularisation of an existing injury already</p>

			<p>which TC25 alleged that he was hit on the hand. TC25 gave no evidence of such an impairment / duration of impairment to the Court, despite this being entirely within his own knowledge (see §52 of his Witness Statement at 21-174, which refers to scarring only). No amendment to the IPOC was sought prior to TC25 giving evidence and nothing was said in TC25's supplemental witness statement about this.</p> <p>2) The amendment therefore falls outside the scope of permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs' undertaking</p>	<p>pleaded". The Claimant can rely on the details in paragraph 52 of his witness statement.</p>
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			and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.		
			3) Irrespective of that, the Defendant is prejudiced by not being able to cross-examine TC25 on this new allegation, as he died in August 2016.	3) as above.	
			4) The averment as to the time over which pain, swelling and restriction of movement persisted (" <i>a period of around one year</i> ") is in any event not supported by the evidence relied on in the footnote to this amendment. Mr Heyworth at page 7 of his report (21-200) gave no such timescale in relation to the alleged injury to the left hand.  5) The averment as to	4) Correct. The words " <u>a period of around one year</u> " are not pursued. 5) This is irrelevant to this application. The pleading as originally pleaded refers to "fingers" rather than "finger" and is not the subject of amendment.	

			<p>the area of pain, swelling and restriction of movement is not supported by the evidence relied on. The amendment refers to “<i>the fingers of his left hand</i>” (plural) whereas Mr Heyworth’s report refers only to the middle finger (see at 21-199: “<i>The injured finger was subsequently painful...</i>”)</p>		
25 – 60 (new Munyi Njoki 63)		<p>The <u>deceased</u> Claimant has <u>suffered symptoms as set out in the medical evidence but which do not satisfy the criteria for a recognised psychological injury. He has current subclinical symptoms of post traumatic stress disorder and intermittent depression<sup>3</sup>.</u> The <u>deceased</u> Claimant</p>	<p>This amendment amounts to a pleading that TC25 has <u>not</u> suffered psychiatric / psychological injury. However, it goes on to assert that ‘the legal effect’ of TC25’s symptoms is ‘<i>a matter for submission</i>’. That is at best inchoate and at worst wholly unclear.</p>	<p>The TC pleaded a psychological injury; the fact that symptoms do not, on examination by a jointly instructed medical expert, amount to a recognised psychological or psychiatric injury does not make them irrelevant nor unable to give rise to an award of compensation; the description of his symptoms was set out in the medical</p>	<p>Amendment permitted in part. This is a “hybrid” between TC5/TC16 and TC9. Following the same principles and those set out in paragraphs 7-13 of the main judgment, the Amended pleading permitted is “The <u>deceased</u> Claimant has <u>suffered symptoms which do not satisfy the criteria for a recognised</u></p>

		<p>suffers flashbacks and ruminates about his experiences and in particular the interference with his family life and the severe treatment and punishment/assaults he suffered. <u>The legal effect of this is a matter for submission.</u></p>		<p>evidence [ 21-225 – 21-226]; D XX at 33-8971 – 33-8983] on the relevance of his activities as Mau Mau to his mental state, the nature of the diagnosis and his symptoms. The amendment is not outside the scope of the pleading: it is an accurate description based on evidence and can sound in damages.</p>	<p>psychological injury. The <u>deceased</u> Claimant <del>suffers</del> <u>suffered</u> flashbacks and <del>ruminates</del> ruminated about his experiences and in particular the interference with his family life and the severe treatment and punishment/assaults he suffered. <u>The legal effect of this is a matter for submission.”</u></p>
		<p><u>He has current subclinical symptoms of post traumatic stress disorder and intermittent depression<sup>3</sup></u></p>	<p>Insofar as the amendment refers to subclinical symptoms of PTSD and/or depression, it may (depending on how the amendment is properly to be understood, see above) seek to introduce a new injury and fall outside the scope of permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs’</p>	<p>As above and per response to D’s Introduction para 6.</p>	

			undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.		
		<u>He has current subclinical symptoms of post traumatic stress disorder and intermittent depression<sup>3</sup>.</u>	The amendment refers to TC25 as suffering from current / ongoing symptoms. TC25 died in August 2016.	<u>This should be in the past tense and refer to the time of Dr Davidsson's examination [in 2015]. Also, "The deceased Claimant suffers flashbacks" should be in the past tense. If the amendment overall is permitted.</u>	Refused.



## **TEST CLAIMANT 26 - NJUGUNA MUNJARO**

### **The draft amended Particulars of injury are at §67 as follows:**

The Claimant was born in 1934 and was aged 18 to his late 20s over the period complained of. He is now aged around ~~80~~ 83 years of age.

The Claimant suffered the injury and abuses as set out above and summarised herein:

#### *Assault*

The Claimant was hit on the buttocks severely to propel him into an army truck. This has caused long lasting damage to his back.

He was whipped repeatedly on arrival at Manyani Camp which caused him acute pain.

He was punished by a guard for dropping a bucket of human waste that he was carrying. He was slapped on his face and beaten with a club. This caused him acute pain and bruising.

The injuries caused by the assaults described above have exacerbated the natural process of ageing and the Claimant is more infirm than would otherwise have been the case. He struggles to walk and still suffers with back and hip pain from when he was forced into the truck.

The Claimant has also suffered symptoms as set out in the medical evidence but which do not satisfy the criteria for a recognised<sup>1</sup> psychological injury ~~and~~ but he suffers from symptoms and signs of mental distress, namely nightmares about his detention<sup>2</sup> and what he believes to be flashbacks. He remembers everything that he

went through and is bitter about his experiences. The legal effect of this is a matter for submission.

Further particulars of the Claimant's injuries ~~will be~~ are set out in the medical evidence ~~that will follow.~~

~~Medical evidence is being sought in accordance with the Order of the Court.~~

The Claimant will refer to and rely upon the written and oral medical evidence provided to the court by Mr Payne-James, Forensic Physician and Dr Davidsson, Consultant Psychiatrist.

1 Cross examination of Davidsson at [33-9003]

2 Source ref: Davidsson cross examination [33-8990]; and [33-8993]

Test Claimant	Paragraph Amended	Amendment	Agreed?	Claimant's Response	Judge
26 - Njuguna Munjaro	67	Particulars of injury - see above	No.		

<p>26 – 67 Njuguna Munjaro</p>		<p>The Claimant has also suffered <u>symptoms as set out in the medical evidence but which do not satisfy the criteria for a recognised<sup>1</sup> psychological injury</u> <del>and</del> <u>but he</u> suffers from <u>symptoms and signs of mental distress, namely nightmares about his detention<sup>2</sup> and what he believes to be flashbacks.</u> He remembers everything that he went through and is bitter about his experiences. <u>The legal effect of this is a matter for submission.</u></p>	<p>This amendment amounts to a pleading that TC26 has <u>not</u> suffered psychiatric / psychological injury. However, it goes on to assert that ‘the legal effect’ of TC26’s symptoms is <i>‘a matter for submission’</i>. That is at best inchoate and at worst wholly unclear.</p>	<p>The TC pleaded a psychological injury; the fact that symptoms do not, on examination by a jointly instructed medical expert, amount to a recognised psychological or psychiatric injury [per XX Mr Davidsson at 33-8890 and 33-8993] does not make them irrelevant nor unable to give rise to an award of compensation; the description of his symptoms was set out in the medical evidence [22-193] and XX by C [33-8994 - 8895]; The amendment is not outside the scope of the pleading: it is an accurate description based on evidence and can sound in damages</p>	<p>Amendment permitted in part. i) See paragraphs 7-13 of the main judgment. ii) “Psychological injury” was pleaded. iii) “Flashbacks” are already pleaded. Whether there can be recovery for what TC26 believes to be flashbacks is a matter for submission. See TC14. iv) TC26 gave no evidence of nightmares nor were they pleaded. Therefore this aspect is disallowed. v) Taking into account the Claimants’ point 3, the allowed amendment is “The Claimant has also suffered <u>symptoms</u></p>
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					<p><u>which do not satisfy the criteria for a recognised psychological injury but he suffers from symptoms and signs of mental distress, namely what he believes to be flashbacks."</u></p>
		<p><u>but he</u> suffers from <u>symptoms and signs of mental distress, namely nightmares about his detention<sup>2</sup> and what he believes to be flashbacks.</u></p> <p>He remembers everything that he went through and is bitter about his experiences.</p>	<p>1) The amendment refers to TC26 suffering from 'nightmares'. TC26 gave no evidence about suffering from nightmares. TC26's pleaded case and evidence were that he suffered from 'flashbacks'. He told Dr Davidsson that he suffered from nightmares and did not</p>	<p>1) As above. 2) As above.</p>	

			<p>mention flashbacks (see Pt 35 Response to Q12 at 22-203 to 204). No application to amend was made prior to TC26 giving evidence and this issue was not referred to in his supplemental witness statement. The amended pleading rather than adopting one of these differing accounts seeks to advance them both, without explanation.</p> <p>2) The amendment therefore falls outside the scope of permission given in respect of</p>		
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			<p>the IPOCs considered in the April judgment. D relies upon Cs' undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p>		
			<p>3) The amendment refers to TC26 continuing to suffer from nightmares (<i>"he suffers from... nightmares"</i>), and is not supported by Dr Davidsson's evidence which was that nightmares were not reported by TC26 as continuing at the time of interview in 2015 (see</p>	<p>3) Should the amendment be permitted, C is content to put "suffers" in the past tense and add "<u>resolving over time</u>" as an accurate reflection of the evidence.</p>	

			33-8991, lines 23-25) and had resolved over 'a couple of years', i.e. several decades ago (see 33-8997, lines 4-5).		
			4) The relevance of the allegation as to TC26's belief of flashbacks for an aspect of his psychological experience is unclear. TC26 is not medically qualified, a non-English speaker and his own perceptions of flashbacks are clinically irrelevant accordingl y.	4) not irrelevant and can sound in damages. This issue is a matter of law and submission.	

## **TEST CLAIMANT 29 - ANONYMISED**

**The draft re-amended Particulars of Injury are at §44, as follows:**

'As a result of the Defendant's alleged actions, the Claimant has suffered pain and injury, incarceration, breaches of her human rights, loss and damage.

### **PARTICULARS OF INJURY/ BREACHES OF HUMAN RIGHTS**

The Claimant is aged 94 97 having been born in around<sup>2</sup> 1920. At the date of the events complained of she was aged between around 32 and 38.

#### *Assault*

The Claimant suffered pain as a result of each assault and specifically unbearable pain in her back, shoulders and face.

The Claimant's back (including her low back/buttocks area<sup>3</sup>), and shoulders, arms and ribs, as pleaded above<sup>4</sup> were extremely sore and bruised.

The Claimant suffered emotionally and physically by being gang raped by 4 Guards, including pain and discomfort in her genital area and lower stomach for around 1 month. She has been psychologically traumatised, as pleaded at paragraph 32 herein, in particular, she suffered an episode of post-traumatic stress disorder for a period of around 2 to 5 years.

It is likely that the history of assault and injury has aggravated the effects of natural ageing so as to make the Claimant more infirm than would otherwise be the case.

Further particulars of the Claimant's injuries will be are set out in the medical evidence that will follow.

~~Medical evidence is being sought in accordance with the Order of the Court.~~

The Claimant will refer to and rely upon the written and oral medical evidence provided to the court by Dr Payne-James, Consultant physician, and Professor Fahy, psychiatrist.

2 As per TC witness statement [24-121].

3 As per TC witness statement [24-126] and included in D's cross examination of Dr Payne-James at [33-9425].

4 As pleaded at paragraphs 22, 23, 27 and 28 above. Also D covered beatings D's cross examination of Dr Payne-James at [33-9425].'

<b>Test Claimant</b>	<b>Paragraph amended</b>	<b>Amendment</b>	<b>Agreed?</b>	<b>Claimants' response</b>	<b>Judge</b>
29 - Anonymised	44	Particulars of Injury	Not agreed. See further below.		
	44	The Claimant's back	Agreed only as to "her low back".	<b>This objection is not understood.</b>	Amendment permitted. (i) There

		<p>(including her low back/buttocks area<sup>3</sup>)</p>	<p>Not agreed as to “/ buttocks area<sup>3</sup>”.</p> <p>1) The terms of §§28-30 of the judgment dated 27 April 2017 provided that the amendments may not allege ‘any specific injuries not already pleaded in the Particulars of Injury’. D further relies upon C’s undertaking and the court’s ruling in April relating to injuries not already falling within the Particulars of Injury.</p> <p>2) The amendment pleads a novel physical injury to a location lower than the back of TC29. This injury had not previously been pleaded</p>	<p>The buttocks cover the sacral area of the back. The TC identified the back and buttocks in her WS §30 [24-126]. D XX on causation and extent of injury [33-9425 – 33-9426]. The effect of the evidence overall is a matter for submission.</p> <p>1) as above; this is within the injury already pleaded;</p> <p>2) not a novel physical injury;</p> <p>3) the amendment was sought at an appropriate and proportionate time;</p>	<p>is no objection to the pleading of injury to the “low back”.</p> <p>(ii) The buttocks and low back are extremely proximate.</p> <p>iii) The Claimant referred to bruising to her buttocks in her witness statement (paragraph 30).</p> <p>iv) Any increase in damages based on injury to the buttocks as distinct from the lower back will be minor and therefore any possible prejudice would be extremely small.</p>
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			<p>by TC29. TC29 has at no prior stage alleged that she suffered from any compensable physical injury in respect of injuries to her 'buttock area'.</p> <p>3) The delay in amending the pleading to include this physical injury is egregious.</p>		
			<p><b>Accordingly:</b></p> <p>4) The amendment falls outside the scope of permission given in respect of the IPOCs considered in the April judgment.</p>	<p>4) as above and per response to D's Introduction at para 6.</p>	
	44	<p><u>She has been psychologically traumatised, as pleaded at paragraph 32 herein, in particular, she suffered an episode of</u></p>	<p>Not agreed.</p> <p>1) The terms of §§28-30 of the judgment dated 27 April 2017 provided that the amendments may not</p>	<p>1) The pleading refers to emotional injury in the form of emotional suffering. 2) and 3) It is acknowledged that on this occasion the</p>	<p>Amendment refused.</p> <p>(i) The Claimant referred in her Particulars of Injury to having "suffered</p>

		<p><u>post-traumatic stress disorder for a period of around 2 to 5 years.</u></p>	<p>allege ‘any specific injuries not already pleaded in the Particulars of Injury’. D further relies upon C’s undertaking and the court’s ruling in April relating to injuries not already falling within the Particulars of Injury.</p> <p>2) The amendment pleads a specific named psychiatric injury that had not previously been pleaded by TC29. TC29 has at no prior stage alleged that she suffered from any compensable psychiatric/psychological injury, the reference in §32 to TC29 being “psychologically</p>	<p>words “psychological injury” in general terms are not pleaded; PD 16 4.2 requires a brief description of personal injuries; the symptoms pleaded describe emotional suffering. The TC has pleaded the basis of what has been now identified as a formal diagnosis by Prof Fahy [24-176 – 24-177; neither TC nor her representatives are psychologically or psychiatrically qualified; the need for medical evidence attached to the IPOCs was dispensed with and the parties jointly instructed medical experts. D said that on the basis of an acceptance that the gang rape happened, they did not question the</p>	<p>emotionally ...”</p> <p>(ii) Further, in paragraph 32 of IPOC she pleaded “she has been psychologically traumatised by the event.”</p> <p>iii) See paragraphs 9-13 of the main judgment and TC22.</p> <p>(iv) The fact that the Defendant, in cross-examination of Professor Fahy (33-9859), did at one point say “I do not wish, on the basis of an acceptance that the gang rape happened, to question your diagnosis” is insufficient to distinguish this case from similar</p>
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			<p><i>traumatised</i>" falling short of the same. Indeed, TC29 had failed to identify symptoms satisfying the DSM or ICD criteria for PTSD.</p> <p>3) <i>A fortiori</i> and in any event, the original pleading did not contain even a general pleading of 'psychological injury'.</p> <p>4) The delay in amending the pleading to include this specific named psychiatric injury is egregious.</p> <p><b>Accordingly:</b></p> <p>5) The amendment falls outside the scope of permission given in respect of the IPOCs considered in the April judgment.</p>	<p>diagnosis; Further, that if the court finds it happened, it would properly be described as a self-limiting psych illness [33-9859]; in those circumstances, it is unfair for C not to be permitted to plead it (subject to issue of it being late, dealt with below) there is no prejudice.</p> <p>4) no delay; dealt with in response to D's Introduction, para 11. The amendment application was made at an appropriate and proportionate time.</p> <p>5) as above. In any event, no prejudice to D, as opposed to the prejudice to C who absent the amendment will not recover for her full loss.</p>	<p>cases. It could not properly, in the context of all the markers the Defendant had put down in the case as a whole and in the context of this cross-examination of Professor Fahy, be read as departing from the position that matters not pleaded (and not in the witness statement) would not be accepted.</p>
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## TEST CLAIMANT 33 - DAVID THURUGU GUCHU

The draft amended Particulars of injury are at §42 as follows:

The Claimant is aged about ~~68~~ 74 years of age having been born around ~~1946~~ 1943<sup>1</sup>.

At the dates of the events complained of he was aged between 7 and 14.

### *Assault*

The Claimant was assaulted whilst undergoing forced labour. He was hit on his back with a cane. He was put in fear.

The Claimant suffered pain as a result of ~~each~~ this assault and, specifically unbearable pain in his back. The Claimant's back was extremely sore and bruised.

The Claimant contracted Malaria<sup>2</sup>. Despite being gravely ill he was not provided with any medical treatment.

The Claimant has not suffered a recognised psychological injury; but<sup>3</sup> he still experiences what he describes as flashbacks of his ordeal and ruminates on the abuse he suffered. The legal effect of this is a matter for submission.

It is likely that the history of assault and injury has aggravated the effects of natural ageing so as to make the Claimant more infirm than would otherwise be the case.

Further particulars of the Claimant's injuries ~~will be~~ are set out in the medical evidence ~~that will follow~~.

~~Medical evidence is being sought in accordance with the Order of the Court.~~

The Claimant will refer to and rely upon the written and oral medical evidence provided to the court by Ms McGuinness, Consultant in Emergency Medicine and Professor Fahy, Professor of Forensic Mental Health.

1 TC confirmed in oral evidence correct DOB was 1943 [33-3145]

2 TC confirmed in his oral evidence that did contract Malaria in camp despite contrary report to McGuinness [33-3181]

3 Fahy report [27-154]

Test Claimant	Paragraph Amended	Amendment	Agreed?	Claimants' Response	Judge
33 - David Thurugu Guchu	42	Particulars of Injury	No		
33 - David Thurugu Guchu	42	The Claimant has <u>not</u> suffered <u>a recognised</u> psychological	1) This amendment amounts to a pleading that TC33	1) It is <u>appropriate to make a relevant concession.</u> <u>That symptoms</u>	Amendment permitted. See paragraphs 7-8 of the main

		<p>injury; <u>but</u><sup>3</sup> he still experiences <u>what he describes as</u> flashbacks of his ordeal and ruminates on the abuse he suffered. <u>The legal effect of this is a matter for submission.</u></p>	<p>has <u>not</u> suffered psychiatric / psychological injury. However, it goes on to assert that ‘the legal effect’ of TC33’s symptoms is ‘<i>a matter for submission</i>’. That is at best inchoate and at worst wholly unclear.</p> <p>2) The relevance of the allegation as to TC33’s description of flashbacks for an aspect of his psychological experience is unclear. TC33 is not medically qualified, a non-English speaker and his own description of flashbacks is clinically irrelevant accordingly.</p>	<p><u>do not amount to a recognised psychological or psychiatric injury does not make them irrelevant nor unable to give rise to an award of compensation; it sounds in damages.</u></p> <p>2) This is a permissible amendment in line with what was agreed in respect of TC 31. There is no reason for D to take a different approach. D addressed the extent of symptoms currently and the extent to which it amounted to psychiatric illness in the past [33-9912]. No prejudice to D.</p>	<p>judgment. Also see TC9 and TC14 above. (The Defendant reserves its position as to whether the pleading of ‘flashbacks’ is sufficiently evidenced by the Claimant.)</p>
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## TEST CLAIMANT 34 - ANONYMISED

**The draft amended Particulars of injury are at §49 as follows:**

The Claimant is aged about ~~87~~ 89 years of age having been born around ~~1931~~ 1928<sup>1</sup>.

At the dates of the events complained of he was in his 20s.

### *Assault*

The Claimant was assaulted on multiple occasions. He was hit with batons. He was hit with the butt of a gun on his hip, ankle and knee. He was slapped in the face. He was hit with a wooden frame on his knee, hip, right shoulder and ankle. He has ~~sd~~ soil inserted into his anus. He was threatened with castration. He was put in fear; he suffered pain from scorpion bites (as set out at paragraph 20 herein) and was whipped during forced labour (as set out at paragraph 37 herein).

The Claimant suffered pain as a result of each assault as described by him and as detailed in the medical evidence and, specifically unbearable pain in his right eye, knees, shoulders, ankles, back and anus. He experienced ~~permanent~~ blurring of vision, particularly in his right eye. He is unable to walk without the use of a stick.

Impairment of vision from assault lasted about 2 months<sup>2</sup> or up to a few months<sup>3</sup>.

Assault to the anus caused extensive bleeding and pain reliving himself for about a week, with full recovery within 6 months and no long term consequences;

Symptoms from beatings to various parts of his body as alleged probably resulted in pain for approximately three or four months<sup>4</sup>.

It is likely that the history of assault and injury has aggravated the effects of natural ageing so as to make the Claimant more infirm than would otherwise be the case.

The Claimant has suffered psychological injury, diagnosed as historic and current posttraumatic stress disorder; he still experiences flashbacks of his ordeal and ruminates on the abuse he suffered. The flashbacks involve the incidents where he was shown severed heads during interrogation and when he was forced to carry dead bodies and their guts spilled out onto him<sup>5</sup>. The prognosis is poor absent treatment and he will remain symptomatic<sup>6</sup>.

Further particulars of the Claimant's injuries ~~will be~~ are set out in the medical evidence ~~that will follow~~.

~~Medical evidence is being sought in accordance with the Order of the Court.~~

The Claimant will refer to and rely upon the written and oral medical evidence provided to the court by Mr Heyworth, Consultant physician, and Professor Mezey, psychiatrist.

1 Transcript of TC's evidence [33-3215c].

2 Ref: Mr Heyworth cross examination by D [33-8136]

3 Ref: Mr Heyworth cross examination by D [33-8143]; [33-8147]

4 Ref Mr Heyworth cross examination [33-8144- 33-8145]

5 See Mezey evidence [33-8768 – 8768 and 33-8783 onwards in its entirety]

6 Mezey evidence in cross examination [33-8767]

Note: there is a further issue regarding TC34 at [45(14)] identified by D in their letter 3.10.17 as follows: “The words “in the knowledge that the Claimant constituted a class of person likely to be injured thereby” are not deleted from this standard pleading in other cases. This may be a deletion made in error. The Defendant does not object to the additional deletion, but wishes to draw it to the attention of the Claimants and the court in case the deletion of the additional words is an error”.

Response: Yes, this is an error and the words will be reinstated in the final version.

Test Claimant	Paragraph Amended	Amendment	Agreed?	Claimants' Response	Judge
34 - Anonymised	49	Particulars of injury - see above	No		
34 - Anonymised	49	<u>he suffered pain from scorpion bites (as set out at paragraph 20 herein) and</u>	1) This is not an allegation of injury sustained as a consequence of an assault. 2) In any event, the amendment seeks to introduce a new injury into the Particulars of Injury, and so falls outside the scope of permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs'	1) Agreed. 2) Not a new injury in the claim, as is made clear – the fact that he was bitten is set out §20 of the IPOC and it comes within being kept in poor conditions is part of his injury [under “during detention” - 28-14]. On reflection, if the amendment is permitted, reference to scorpions is more appropriately made under this section.	Amendment permitted save that “paragraph 20” should be “paragraph 19”. (i) As the Claimants concede this amendment should be later in the Particulars of Injury after “he was incarcerated in successive camps in poor conditions”. (ii) In

			<p>undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p>		<p>paragraph 19, dealing with conditions in Camp 30 (Compound 30) it is specifically alleged that the camp was infested with scorpions and that the Claimant was stung by them enduring pain for some 24 hours.</p> <p>(iii) There is no prejudice as a result of this amendment.</p>
		<p><u>was whipped during forced labour (as set out at paragraph 37 herein).</u></p>	<p>It is not clear what (if any) injury is alleged to have occurred as a result of this allegation.</p>	<p>As above; not a new injury; it has always been part of his claim. It is pleaded at §37 of the original IPOC; §49 (partics</p>	<p>Amendment permitted. The Court accepts the Claimants' response.</p>



			<p>To the extent that any injury is alleged, the amendment seeks to introduce a new injury into the Particulars of Injury, and so falls outside the scope of permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs' undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p>	<p>injury) states he was "assaulted on multiple occasions". This is clarification, so it is within the scope of the judgment and is a permissible amendment as per TC 31. Re undertaking: see response to D's Introduction at para 6.</p>	
34 - Anonymised	49	<p>He experienced <b>permanent</b> blurring of vision, <b>particularly</b> in his right eye.</p>	<p>1) The insertion of 'particularly' appears to widen the site of the alleged injury from one to the right eye only to an</p>	<p>1) It is pleaded that the TC suffered assaults on multiple occasions, he was hit with various implements in various parts of his</p>	<p>Amendment refused. (i) In the Particulars of Injury the only allegation of any visual deficit is</p>

			<p>injury affecting both eyes. The only pleaded allegation of assault resulting in an injury to one of the Claimant's eyes is that at paragraph 12, which relates to the right eye only, as does the existing pleading in the Particulars of Injury</p> <p>2) Insofar as this is an allegation of injury to the left eye, the amendment falls outside the scope of permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs' undertaking and the court's</p>	<p>anatomy, including blurring of vision. The amendment clarifies the injury to his vision in accordance with the medical evidence [33-8136 – 33-8140]: it was not permanent (a concession) but there was blurring to both eyes. This is clarification of the injury to the eye on the basis of the medical evidence and D was able to and did XX on it to establish the extent of the injury: [33-8143 – 33-8144].</p> <p>2) Injury to eyes arises out of multiple assaults, including being slapped to the face; it is a permissible clarification in line with TC 31.</p>	<p>in respect of the right eye.</p> <p>(ii) In the body of the IPOC the only reference to visual injury is in paragraph 12 at Ngong Forest where it states "The impact caused him to start to lose the sight in his right eye."</p> <p>(iii) Based on the medical evidence it is now alleged:</p> <p>(a) that as a result of the incident at paragraph 12 the Claimant suffered visual deficit in both eyes;</p> <p>(b) that he</p>
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			<p>ruling in April relating to injuries not already falling within the Particulars of Injury. See further below in relation to the unpleaded allegation of a further injury to both eyes, made to Mr Heyworth.</p>		<p>further suffered visual deficit in both eyes as a result of being assaulted at McKinnon Road and referring to paragraph 25 IPOC.</p> <p>(iv) This is clearly beyond what was permitted in the April 2017 judgment.</p> <p>(v) The fact that the Defendant cross-examined in relation to both incidents based on the medical evidence does not permit the amendment. Any cross-examination was without prejudice to the pleading point which the Defendant</p>
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					<p>took generally.</p> <p>(vi) At paragraph 19 of this Claimant's witness statement, referring to the Ngong Forest incident, he said: "I was slapped on my face and hit violently on <u>my eye</u>. This was so severe I started to suffer from eye problems from that time. I suffered an injury that led to me losing my good sight on right eye. My vision is blurred." (My underlining). Although this may be regarded as ambiguous, it is not a clear allegation of blurring of vision in both eyes.</p>
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					(vii) As regards the MacKinnon Road incident, paragraph 38 of the witness statement makes no reference to any eye injury. This Test Claimant was not asked about eye injury when he gave evidence. Therefore there is no evidence from him to support the amendment.
34 - Anonymised	49	Symptoms from beatings to various parts of his body as alleged probably resulted in pain for approximately three to four months	1) The amendment is not limited or otherwise obviously referable to any particular pleaded incident of assault. The footnoted reference is to evidence given by Mr	1) PD 16 4.1(2) requires brief details of the personal injuries to be pleaded. He was assaulted on multiple occasions on various parts of his anatomy. D addresses the evidence on the basis of multiple assaults: 33-8144 "So you are again	The amendment is allowed on the basis that it states "Symptoms from beatings from the various parts of his body as alleged resulted in pain for up to 3 to 4 months." There is merit in the

			<p>Heyworth in respect of the specific assault at Mackinnon Road pleaded at paragraph 25 of the IPOC.</p> <p>2) D will agree to this amendment if the words “<i>at paragraph 25 above</i>” are inserted after the word “<i>alleged</i>”.</p>	<p>describing time-limited consequences of the assaults?”. 2) As above; the TC alleges multiple beatings as set out; they all resulted in soft tissue injuries for 3 – 4 months.</p>	<p>Defendant’s responses. However there are more beatings alleged than those at MacKinnon Road in paragraph 25 IPOC. The period of 3-4 months puts the upper limit on the soft tissue injury symptoms.</p>
34 – Anonymised	49	<p>Impairment of vision from assault lasted about 2 months or up to a few months</p>	<p>1) This allegation is not only unclear as to what “<i>a few months</i>” is said to mean (or why it is averred in the alternative to “<i>about 2 months</i>”), but is contrary to the evidence relied on as given by Mr</p>	<p>1) At 33-8136 Mr Heyworth describes 2 months’ visual impairment associated with a blow; at 33-8143, line 10 – 13, in answer to D’s question, he agrees that, “similar to the earlier eye problems, that they were self-limiting and had resolved within a number of months?” – D</p>	<p>Amendment allowed to read “Impairment of vision from assault lasted about 2 months”. The evidence in respect of the eye injury sustained at Ngong Forest is from Mr Heyworth who said (33-8136) “So I think the</p>

			<p>Heyworth, which is that impairment of vision lasted “about two months” (33-8147, lines 11-13). Mr Heyworth did not give contrary or additional evidence.</p>	<p>elicits the range of 2 – months to a number of months for assaults involving the eyes.</p>	<p>duration of symptoms resulting from the slap was probably reasonable to consider that that was that two month period there.” Later, in respect of the (disallowed) incident at MacKinnon Road Mr Heyworth said (33-8143) in response to a question from Mr Block QC that the eye problem was “self limiting and had resolved within a number of months”; later referring to both incidents Mr Heyworth agreed with Mr Block’s suggestion “on each occasion that was self</p>
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					limiting and there was a recovery within about two months.” (33-8147).
			<p>2) Further, the amendment is insufficiently precise and might without further precision be taken to refer to an injury not already pleaded. The pleaded assault resulting in loss of vision, specifically in the right eye, is that set out at paragraph 12 of the IPOC. The Claimant however recounted a further occasion of assault to the head causing impairment of vision</p>	<p>2) Assaults on multiple occasions and being slapped in the face is pleaded. Mr Heyworth has confirmed the extent of injury for the times that the court finds that he was slapped on the face.</p> <p>3) TC 34 reported to Mr Heyworth that he was violently slapped while at MacKinnon Road (ref IPOC §25) and that this included a slap affecting both eyes with blurred vision for several months when he was taken to hospital and given eye ointment [28-213]. As per IPOC at §25 - already pleaded that he was</p>	



			<p>in both eyes to Mr Heyworth (see report at 28-213). Whilst that incident appears to be that averred at paragraph 25 of the IPOC, the existing pleading in relation to that assault does not refer to an assault to the head taking place on that occasion (as recounted to Mr Heyworth), nor do paragraph 25 or the Particulars of Injury refer to any loss of vision in the left eye.</p> <p>3) If and to the extent that the Claimant seeks to rely on that alleged injury in</p>	<p>slapped; clarified in medical evidence that this was to the face.</p> <p>D XX on the assault to the face at Ngong Forest (IPOC §12) at 33-8135; also XX on the assault at Mackinnon Road (IPOC §25) at 33-8142; Both incidents are pleaded.</p> <p>4) The incidents relied on have been pleaded.</p>	
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			<p>respect of impairment of vision as well, by his reliance on the oral evidence of Mr Heyworth that is cited, such an amendment is for the reasons already given above outside the scope of permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs' undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p> <p>4) D would, as with the earlier amendment, not object</p>		
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			were there a limitation to this averment referring back to the assault and consequent injury to the right eye alleged at paragraph 12.		
34 - Anonymised	49	<u>“diagnosed as historic and current posttraumatic stress disorder;”</u>	<p>5) The Particulars of Injury originally described TC34 as having suffered ‘psychological injury’ which was particularised as comprising flashbacks and ruminations on past events.</p> <p>6) The amendment now seeks to allege that TC34’s injury is PTSD. The original pleading was confined to an injury</p>	<p>1) The Cs and D have the jointly instructed medical evidence identifying his illness. It comes within the injury already pleaded (psychological injury) and is clarification based on that medical evidence [28-279; §126]. D cross examined at length on the flashbacks which formed part of the diagnosis; further at 33-8783 line 13, XX on causation, while accepting the diagnosis: “I’ve</p>	<p>Amendment refused. See paragraphs 9-13 of the main judgment. The alleged diagnosis requires more than flashbacks and ruminations. It is not merely putting a medical label on those symptoms which are pleaded. If this diagnosis was to be relied on, it should have been pleaded after the medical</p>

			<p>with symptoms of flashbacks and ruminations only, i.e. well short of the components of PTSD under the DSM or ICD criteria.</p> <p>7) The amendment accordingly seeks to introduce a new injury into the Particulars of Injury, and so falls outside the scope of permission given in respect of the IPOCs considered in the April judgment. D relies upon Cs' undertaking and the court's ruling in April relating to injuries not already falling</p>	<p>indicated to you that I'm not cross examining on that. I accept that on the basis of the history that you were given, if you take it at face value, you were fully entitled to reach the conclusion that there was historical PTSD. What I am examining with you ..... is that there could be other events that would wholly support a diagnosis of PTSD".</p> <p>4) with all the psychiatric injuries, it was appropriate to conclude XX of the jointly instructed medical experts before making an application to amend. No prejudice to D.</p>	<p>evidence was available in 2015 and not, after the Claimant and the doctors had given evidence, in late 2017. cf TC16 and TC22 above.</p>
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			<p>within the Particulars of Injury.</p> <p>8) The delay in amending the pleading to include this specific named psychiatric injury is egregious.</p>		
34 - Anonymised	49	<p>The flashbacks involve the incidents where... he was forced to carry dead bodies and their guts spilled out onto him</p>	<p>The use of plural forms for “bodies” and “their” is not supported by the evidence. Prof. Mezey’s evidence was that the flashbacks related to “<i>the allegation of carrying a dead man and his intestines spilling over the claimant</i>” (33-8792, lines 9-12)</p>	<p>He was forced to carry dead bodies (plural) but it is agreed that only one instance of the guts spilling out, giving rise to the flashback to that incident, is described. Should the amendment be permitted, this will be made clear i.e. “<u>where the guts of a dead man he was forced to carry spilled out onto him</u>”.</p>	<p>Amendment as revised by the Claimants allowed.</p>

### TEST CLAIMANT 39 - ANN WATETU NDUHIU

**The draft amended Particulars of Injury are at §38, as follows:**

'As a result of the Defendant's alleged actions, the Claimant has suffered pain and injury, incarceration, breaches of her human rights, loss and damage.

#### **PARTICULARS OF INJURY/ BREACHES OF HUMAN RIGHTS**

The Claimant is around aged 85 88 having been born in or around<sup>1</sup> 1929. At the date of the events complained of she was aged between 25 and 31.

##### *Assault*

The Claimant was assaulted on multiple occasions, as set out at paragraphs 21 to 24 herein. Inter alia, the Claimant was beaten with a stick on her right, upper arm and her back<sup>2</sup>. She was slapped in the face, causing swelling. She was hit on her back forcing her to the ground, causing pain and suffering; she was hit on the back when getting food. She was put in fear of being raped.

It is likely that the history of assault and injury has aggravated the effects of natural ageing so as to make the Claimant more infirm than would otherwise be the case.

The Claimant suffered post-traumatic stress disorder for a period of around two years<sup>3</sup>.

Further particulars of the Claimant's injuries ~~will be~~ are set out in the medical evidence ~~that will follow~~.

The Claimant will refer to and rely upon the written and oral medical evidence provided to the court by Dr White, Consultant physician and Professor Abel, Consultant psychiatrist.

1 Dealt with in witness statement at 29-105

2 Med report at 29-142; also identified by Mr Block QC at White cross examination [33-7863] and TC XX'd on her "assault" of her evidence [33-

1587].

3 Prof Abel report at 29-188 and 189; and cross examination of Prof Abel by D [33-10946].'

Test Claimant	Para amended	Amendment	Agreed?	Claimants' response	Judge
39 - Ann Watetu Nduhiu	11	<u>The house in which the Claimant lived was not burnt down, but that of her sister was burnt.</u>	This is an amendment that was overlooked previously. The Revised Annex to Andrew Robertson's 6 <sup>th</sup> statement made it clear that the Defendant disputed this amendment. Unfortunately, the challenge to the amendment was omitted from the version of the schedule the Claimants supplied when setting out their position on the Defendant's objections. Hence it was neither discussed at the hearing on 19 July 2017 nor did it appear in the schedule to the Court's judgment of 18 August 2017. Whilst not an injury amendment, the parties have agreed that it be addressed by the Court at this stage in the proceedings. Not agreed. D maintains its objection to the	Yes, it was overlooked. It is clarification in accordance with TC evidence [33 – 1583] and this is sufficient to permit the amendment. In addition, what she witnessed goes to the generic issue of assaults and batteries during forced removal as pleaded generically at para 8(b)(i) [1-8] and addressed during Opening (as revised)(paras 19, 121, 83, 121, 333, 348, 678, 681)	Amendment permitted. To the extent that it clarifies that the Claimant's house was not burned down, it restricts the pleadings. To the extent that it refers to the sister's house being burned, it merely reflects the evidence and is part of the background and may be relevant on generic matters, but not to any tort or injury sustained by TC39. The Claimants accept that, consequentially, the words "she was forced to watch as her home was burnt down" should be deleted from IPOC paragraph 34(1).

			addition of this allegation. The amendment is irrelevant to the causes of action pleaded, as it pleads trespass and/or damage to the property of a third party.		
	38	Particulars of Injury	Not agreed. See further below.		
		<u>Inter alia, the Claimant was beaten with a stick on her right, upper arm and her back?</u>	<p>Not agreed, save as to the reference to “her back”.</p> <p>1)The terms of §§28-30 of the judgment dated 27 April 2017 provided that the amendments may not allege ‘any specific injuries not already pleaded in the Particulars of Injury’. D further relies upon C’s undertaking and the court’s ruling in April relating to injuries not already falling within the Particulars of Injury.</p> <p>2)The amendment pleads an injury to “<u>her right, upper</u></p>	<p>1) Being grabbed by the shoulder (§21) during an assault is pleaded; during the medical evidence she disclosed the beating of a stick to her upper arm [29-134]; this is an injury to her upper limb. D did not XX on this injury. On reflection, it is a not pursued.</p>	Amendment refused as not pursued by the Claimants.



			<p><u>arm</u>” that had not previously been pleaded. At no prior stage had TC39 alleged that she suffered from any compensable physical injury in respect of her right upper arm.</p> <p>3)The delay in amending the pleading to include this specific named physical injury is egregious.</p> <p><b>Accordingly:</b></p> <p>4)The amendment falls outside the scope of permission given in respect of the IPOCs considered in the April judgment.</p>		
		<p><u>The Claimant suffered post-traumatic stress disorder for a period of around two years</u><sup>3</sup>.</p>	<p>Not agreed.</p> <p>1) The terms of §§28-30 of the judgment dated 27 April 2017 provided that the amendments may not allege ‘any specific injuries not already pleaded in the Particulars of Injury’. D further</p>	<p>1) In her WS she describes the grief at losing Muthoni [29-112] under the heading “psychological injury”. However, normal grief would not be a compensable loss; it is only once the jointly</p>	<p>Amendment refused.</p> <p>(i) There is no pleading at all of psychological injury.</p> <p>(ii) Therefore this proposed amendment goes beyond that which should be permitted and which was</p>

			<p>relies upon C's undertaking and the court's ruling in April relating to injuries not already falling within the Particulars of Injury.</p> <p>2) The amendment pleads a specific named psychiatric injury that had not previously been pleaded by TC39. TC39 has at no prior stage alleged that she suffered from any compensable psychiatric/psychological injury. TC39 had failed to identify symptoms satisfying the DSM or ICD criteria for PTSD.</p> <p>3) <i>A fortiori</i> and in any event, the original pleading did not contain even a general pleading of 'psychological injury'.</p> <p>4) The delay in amending the pleading to include this specific named psychiatric injury is egregious.</p> <p><b>Accordingly:</b></p> <p>5) The amendment</p>	<p>instructed medical expert reports that a recognised psychological disorder is diagnosed. 2) and 3) TC 39 is unsophisticated ; It takes an expert to elicit her injury and diagnose it; It is acknowledged that on this occasion the words "psychological injury" in general terms are not pleaded; neither the TC nor her representatives are psychologically or psychiatrically qualified; the need for medical evidence attached to the IPOCs was dispensed with and the parties jointly instructed medical experts. The expert elicits symptoms of and identifies a recognised psychological disorder [29-189]; D was able to</p>	<p>permitted in the judgment of April 2017.</p> <p>iii) The jointly instructed medical report was in 2015. The Claimant was not cross-examined until 2016. Therefore an amendment to Particulars of Injury could have been pleaded prior to her giving evidence.</p> <p>iv) The only evidence as to psychological injury given by the Claimant herself is in paragraph 35 of her witness statement and relates to her daughter's death. She said "The loss of my daughter was very painful and sad. When I think about it my blood pressure rises." In the absence of a pleading of psychological injury, that statement could properly be treated by the Defendant as a grief reaction (despite the sub heading in the statement).</p>
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			falls outside the scope of permission given in respect of the IPOCs considered in the April judgment.	XX on the diagnosis, the criteria and the symptoms [33-10943 – 33-10947] 4) dealt with in response to D’s Introduction, para 11. The amendment application was made at an appropriate and proportionate time 5) The amendment is similar to TC 27 and TC 31; in any event, there is no prejudice to D.	v) See paragraph 9 of the main judgment. vi) The medical evidence of psychological injury refers to the death of the child, houses burning and beatings. This goes beyond that which the Test Claimant has supported in her own evidence.
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