

ABEL MKHWANANZI

Versus

TIRIVAVI TOTAMIREPI

And

MINISTRY OF SOCIAL WELFARE

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 19 MAY 2016

Damages: Bodily injuries

S. Sauramba for the plaintiff
Defendants in default

MAKONESE J: On the 12th February 2012, plaintiff was a passenger in a commuter omnibus bearing registration number ABZ 0276. At the 24km peg along the Bulawayo-Beitbridge road there was a motor vehicle collision involving a Mahindra motor vehicle registration number G – LL6641 and the commuter omnibus. The vehicle belongs to the second defendant and was being driven by 1st defendant during and in the course of his employment. According to the police report the accident was caused by the negligence of 1st defendant, who was charged with and convicted of culpable homicide in consequence thereof. The 1st defendant was fined US\$400 and his driver's licence was cancelled and he was prohibited from driving for a period of six months.

The plaintiff was seriously injured in the collision. The particulars concerning his injuries and their *sequelae*, will be canvassed in more detail in this judgment. At the time of the accident the plaintiff was aged 67 years. He was no longer employed having been retired at 65 years. As a result of the collision plaintiff sustained severe injuries being a fracture of the right hip and tibia and had a permanent disability of 37%. Plaintiff had to undergo surgery and in subsequent years had to seek constant medical attention within and outside Zimbabwe. Plaintiff instituted proceedings for damages for bodily injuries. The defendants entered appearance to

defend. Defendants were barred for failing to file their plea timeously. The matter was placed on the unopposed roll. I directed the plaintiff to file detailed Heads of Argument in support of the claims which was done. Plaintiff's prayer is for default judgment for payment of the sum of US\$79 561,00 broken down as follows:

- (a) Special damages for medical expenses in the sum of US\$53 961,00
- (b) General damages being:-
 - (i) Disfigurement in the sum of US\$7 500,00
 - (ii) Loss of amenities of life in the sum of US\$13 600
 - (iii) Pain and suffering in the sum of US\$4 500
- (c) Interest at the prescribed rate from the date of service of summons to date of full payment
- (d) Costs of suit

I should point out at the outset that after summons were served on the defendants they proposed an out of court settlement to discuss the quantum of damages. Meetings between plaintiff's legal practitioners and the defendants were scheduled but never took off for reasons that are not entirely clear. Vicarious liability was however admitted by the 2nd defendant in a letter dated 1 July 2013. The letter authored by the Civil Division of the Attorney General's Office is in the following terms:

"Abel Mkhwananzi vs Tirivavi Totamirepi & Ministry of Labour and Social Services

The above matter refers.

Having received your notice of Intention to Bar and Bar dated 27th day of June 2013.

We kindly inform you that the Minister of Labour and Social Services admits vicarious liability subject to an out of court settlement with the plaintiff to quantify the damages caused him.

Yours faithfully

C. Karinga

For DIRECTOR
CIVIL DIVISION”

I now turn to consider the quantum of damages suffered by the plaintiff. The plaintiff clearly suffered serious injuries in the accident. In brief he sustained a right hip and right tibia plateau fractures. Surgery was performed at United Bulawayo Hospitals. He has a permanent disability of 37%. According to the clinical notes of a specialist orthopaedic surgeon Mr C. Msasanure, the plaintiff had a dynamic hip screw fixation on the right hip. He also had a debridement and external fixation of the right tibia plateau fracture. In July 2013, the plaintiff travelled to South Africa for further treatment. Dr Z. A Peer of the Department of Orthopaedics at the Tambo Memorial Hospital prepared a report where he confirms that plaintiff was treated at Charlottee Maxeke Hospital. The report notes that plaintiff had a fracture on his right femur. He also had multiple other problems from an Orthopaedic point of management in that he required an extensive operation on his right thigh. There was need for the removal of the hardware with realignment osteotomies of the femur and a possible knee replacement to get him back to walking again. He would need rehabilitation. A further report by Dr D. Moyo a specialist Orthopaedic Surgeon indicates that plaintiff had established MMI (Maximum Medical Improvement). MMI is defined as the point at which the injured person's condition had stabilized and further functional improvement is unlikely, despite continued medical treatment or physical rehabilitation. A treatment plateau in the patient's recovery is reached and that is as good as the patient is going to get. In some instances it may mean that the patient has fully recovered from the injury. At MMI, no further healing or improvement is expected and the degree of permanent or partial impairment can now be determined. In the instant case, Dr D. Moyo ascertained that the overall whole person impairment rating was 37%. (Degree of permanent disability) In a supplementary affidavit filed on 22 March 2016 the plaintiff states that his right knee is not fully functional. His mobility is now restricted. He can no longer walk upright as he used to do before the accident. He now walks with the aid of a walker. Plaintiff further states that he can no longer perform the simple task of bathing and dressing up unaided. He can no longer embark and alight from vehicles without assistance. In essence, the plaintiff

has difficulty in using public transport. He has to hire vehicles for the purposes of moving from one point to another, which is very costly.

For the purposes of assessing the quantum of damages I will have to rely to a large degree on the medical report by Dr D. Moyo which is fairly detailed. The full report is set out in the following terms:-

“Impairment Evaluation: Mr Abel Mkhwananzi

He was involved in a road traffic accident in February 2012.

He has now established MMI (Maximum Medical Improvement). He has an ankylosed right knee and a painful right hip with an internally rotated right lower limb.

Right knee

1. Class Diagnosis 4 with a default rating of 75% of the lower extremity i.e ankylosis of right knee with flexion limited to about 5 degrees. Also there is poor alignment.
2. Grade Modifier Functional History = 3 Antalgic unstable transfers with routine use of gait aids.
3. Grade Modifier Physical Examination = 4 Range of motion – very severe
4. Grande Modifier Clinical Studies = 4 Severe deformity

Right Hip

1. Class diagnosis 3 with a default rating of 30% of lower limb. Had a right intertrochanteric fracture and comminuted fracture of the mid shaft.
2. Grade Modifier Functional History = 3
3. Grade Modifier Physical Examination = 4

Knee rating shifts – 1 to 71% while the hip rating shifts by + 1 to 32% translating to 28% and 13% whole Person Impairment.

The overall whole person Impairment rating is 37% (degree of permanent disability)”

The doctrine of vicarious liability is well established in our law. In *A Guide to Zimbabwean Law of Delict*, G. Feltoe at page 97 states that the doctrine is justified on the basis that:

- “(i) By instructing employees to engage in activities, he creates the risk that the employees may cause harm to others ...
- (ii) the employer is usually in a far better financial position to compensate the injured party than the employee who will often not have the financial resources to pay compensation and as between employer and the employee, it is therefore, unfair to expect the employee to pay for compensation for a delict arising out of performing work on behalf of the employer ...”

In the case of *Mungofa v Muderere & Ors* HH-129-03 the court held that the doctrine of vicarious liability of employers for the delicts of employees is based on social policy. The doctrine of vicarious liability applies in the instant case. The plaintiff who was a passenger in a commuter omnibus sustained injuries caused by the negligence of the driver of a Mahindra motor vehicle belonging to second defendant. The liability of the second defendant is not in dispute and as pointed out second defendant assumed responsibility in writing to plaintiff’s lawyers. What I must determine is the quantum of damages that should be awarded to the plaintiff.

Special Damages

Special damages relate to damages that have already occurred and are capable of precise mathematical calculation. These are the damages associated with costs of medical bills that should be proved by placing before the courts, the amounts incurred by the plaintiff in seeking and obtaining medical treatment. Plaintiff was hospitalized and underwent surgical procedures, namely:-

- (i) dynamic hip screw fixation of the right hip;
- (ii) debridement and external fixation of the tibia plateau fracture at a cost of US\$3 961,00
- (iii) plaintiff has to undergo further surgical procedures for a total knee replacement and rehabilitation at a cost of ZAR500 000 (which equates at the prevailing exchange rate to US\$33 348.

The cost for the total knee replacement is broken down as follows:

Ward fees	R150 000
Theatre	R150 000
Implant	R100 000
Dispensary drugs	<u>R100 000</u>

R500 000

I have no difficulty at all in accepting the claim for future medical treatment as sufficient evidence has been placed before the court detailing the exact nature of treatment to be rendered to the plaintiff as well as the precise costs thereof.

General Damages

The plaintiff has claimed general damages for disfigurement, pain and suffering as well as loss of amenities of life.

In the case of *Minister of Defence & Another v Jackson* 1990 (2) ZLR 1 (SC), the court indicated that there are certain broad principles which govern such awards, some of which are:

1. General damages are not a penalty but compensation. The award is designed to compensate the victim and not punish the wrongdoer.
2. Compensation must be assessed as to place the injured party, as far as possible, in the position he would have occupied if the wrongful act causing him the injury had not been committed.
3. Since no scales exist by which pain and suffering can be measured, the quantum of compensation to be awarded can only be determined by the broadest considerations.
4. No regard is to be had to the subject value of money to the injured person, for the award of damages for pain and suffering cannot depend upon, or vary, according to whether he be a millionaire or a pauper.

Pain and suffering

Plaintiff has claimed an amount of US\$4 500 for pain and suffering. In assessing damages for pain and suffering the prime considerations are the duration and intensity of the pain. Plaintiff has undergone surgery and this process entailed the painful procedures of screw fixation and debridement. Plaintiff is yet to undergo further surgery for total knee replacement and rehabilitation and this procedure will no doubt cause pain and suffering. I find that the sum of US\$2 500 is reasonable in the circumstances. In arriving at this figure I have considered the case of *Gwiriri v Highfield Bag (Pvt) Ltd* 2010 (1) ZLR 160 (H). In this case CHITAKUNYE J awarded the plaintiff, who had effectively lost the use of his right hand during an accident at work the sum of \$3 000 for pain and suffering and \$6 000 for permanent disfigurement and loss of amenities of life. (See also *Mafusire v Greyling & Anor* 2010 (2) ZLR 198).

Loss of amenities of life and disfigurement

Plaintiff claimed US\$13 600 in respect of loss of amenities of life and US\$7 500 in respect of disfigurement.

I observe that the plaintiff was aged 67 years at the time of the accident. He had reached retirement age and was no longer formally employed. He now has to walk with the aid of a walker. He has suffered loss of amenities of life and ordinary pleasures of life have been diminished. Plaintiff's injuries have resulted in a disability rated at 37% (whole person impairment ratio). Plaintiff can no longer do the ordinary chores without the need for assistance. The allowance for future contingencies can never be determined with accuracy. This was well put by MARGO J in *Goodall v President Insurance Co Ltd* 1978 (1) SA 389 (h) at 392H – 393A when he said:-

“In the assessment of a proper allowance for contingencies arbitrary considerations must inevitably play a part, for the art of science or foretelling the future, so confidently practiced by ancient prophets and soothsayers and by modern authors of a certain type of almanack is not so numbered among the qualifications for judicial service.”

I am satisfied that an award of US\$5 000 in respect of loss of amenities of life and US\$2 500 in respect of disfigurement is appropriate regard being had to the particular circumstances of the plaintiff and to decided cases I have referred to.

In the result, it is ordered as follows:-

1. Default judgment be and is hereby entered in favour of the plaintiff in the sum of US\$47 309 broken down as follows:
 - (a) Special Damages being medical expenses in the sum of US\$37 309
 - (b) General damages being:
 - (i) Loss of amenities of life in the sum of US\$5 000
 - (ii) Disfigurement in the sum of US\$2 500
 - (iii) Pain and suffering in the sum of US\$2 500
2. Interest at the prescribed rate from date of service of summons to date of full payment.
3. Costs of suit.

Majoko & Majoko plaintiff's legal practitioners
Civil Division of the Attorney General's Office, defendant's legal practitioners