NGONI KABASA
versus
NHAMO GWANDI
and
STEWART MAZITHULELA
t/a MAZITHULELA TRANSPORT
and
JUPITER INSURANCE CO. LT

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE, 29 September, 2003 and 5 May 2004

Mr Muchengeti, for the plaintiff
Mr Musemburi, for the defendant

CHITAKUNYE J: On the 20th December 2001, the plaintiff was a fare-paying passenger on an omnibus driven by the first defendant enroute to Norton.

The first defendant was employed by the second defendant as a driver. The second defendant is a transport operator trading as Mazithulela transport. He is the registered owner of a Toyota Hiace registration No. 737-819B omnibus. On the 20th December 2001 and at the 27-km peg along the Harare-Norton road, the omnibus overturned injuring a number of people including the plaintiff. The plaintiff sustained serious injuries as a result of which he spent a considerable period in hospital and at rehabilitation centres. As a result of those injuries plaintiff could not continue with his working life. He has lost the ability to do most of the activities he used to do as an able bodied adult.

The plaintiff was reduced to what he, in his summary of evidence, termed 'a vegetative state or what is called, in colloquial language a cabbage'.

The plaintiff therefore sued the first and second defendants for:

1. Payment of the sum of $20 000 000.00 as general damages.
2. Payment of the sum of $1 195 205.91 as loss of earning capacity being special damages.
3. Payment of the sum of $560 094.70 as hospital and medical bills being special damages.

4. Interest at the rate of 30% per annum from the date of the accident to the date of full payment.

5. Costs of suit.

The plaintiffs claim against the third defendant was for a sum of $120 000.00. The amount has since been paid. It is thus not in issue anymore.

The plaintiff alleged that the accident was a result of first and second defendant's negligence in that first defendant was negligent in that:

a) He drove without due care and attention.

b) He was not keeping a proper look out.

c) He was driving at an excessive speed.

The second defendant was negligent in that he failed to maintain his vehicle/omnibus in a roadworthy condition resulting in a tyre burst.

The two defendants denied that they were negligent in anyway. The first defendant contended that he was travelling at a normal speed when unexpectedly a tyre of the omnibus burst resulting in the omnibus overturning. The second defendant contended that he did not fail to maintain his vehicle in a roadworthy condition. He also denied that the first defendant was acting within the scope and course of his employment with the second defendant. He contended that first defendant was on a frolic of his own.

The issues as determined at the pre-trial conference comprised:

1) Whether or not first and second defendants were negligent in causing the accident.

2) Whether or not second defendant is liable for the negligence of the first defendant.

3) Whether or not plaintiff is entitled to the general damages in the sum of $20 000 000.00.

4) Whether or not plaintiff is entitled to the sum of $1 195 205.91 being special damages for loss of earning capacity.

5) Whether or not plaintiff is entitled to special damages for hospital fees and bills in the sum of $560 094.70.

The question of onus of proof and burden of proof will be discussed as each issue is dealt with.

LIABILITY

The first two issues are on the question of liability.

The plaintiff gave evidence and tendered some documentary exhibits in support of

his claims. The defendants gave evidence and produced documentary evidence in support of their case as well.

Some of the facts are common cause.

It is common cause that on the 20th December 2001 the plaintiff boarded a commuter omnibus owned by the second defendant and being driven by the first defendant. The omnibus was bound for Norton. At the 27 kilometre peg along the Harare/Norton road one of the rear tyres burst resulting in the first defendant losing control of the omnibus. The omnibus overturned. A number of passengers aboard sustained injuries. The plaintiff was one of those passengers seriously injured. The seriousness of the injuries sustained by the plaintiff was not challenged.

From the evidence adduced in court it would appear that whilst in the pleadings the second defendant contended that the first defendant was on a frolic of his own, he abandoned that defence in his evidence in court. If the first defendant was acting in the course of his employment on the day and time of the accident it follows that the issue of vicarious liability is resolved. Issue number two is thus resolved.

In resolving the first issue it is necessary to look at the law pertaining to negligence.

It must be borne in mind that operators of vehicles owe a duty to users of their vehicles. There is a duty to ensure that the vehicle is in a good state for the purpose for which it is to be used. In the present case the defendants contended that the omnibus in question had a certificate of fitness obtained in July 2001. They seemed to say that that was adequate to show that they had discharged their duty as driver and operator of the omnibus. Unfortunately the defendants did not seem to realise that the nature of the occurrence shifted the burden of proof to them. It has been stated that in cases such as this one, the *res ipsa loquitur maxim* applies.

Thus:

> "Where a person against whom a claim is made is not content with a mere denial, but set up a special defence or raises a fresh issue (when he confesses and avoids), then he is regarded in respect of that defence as being the claimant for his defence to be upheld he bears the onus of satisfying the court that he is entitled to succeed."

See *Nyahondo v Hokonya and others* 1997(2)ZRL 457(S) at page 459.

In *Keavney and Another v Msabaeka* 1996(1) ZLR 605 court indicated that where a

party raises a defence of mechanical failure/sudden emergence the burden of proof is on that party to show the veracity of its defence. Once it is accepted that the *maxim res ipsa loquitur* applies, it falls upon the defendant to rebut that maxim.

In his book Motor Law volume two published in 1987 Cooper EW states that:

> "Mere theories or hypothetical suggestions will not avail the defendant. A defendant must do more than merely show his explanation may reasonably be true. His explanation must be supported by a substantial foundation of fact and be sufficient to destroy the probability of negligence presumed to be present prior to the testimony adduced by him." (at page 104)

The author referred to Barkway v South Wales Transport Co. (1948)2ALL ER 460 at page 471 wherein Asquith L J held that:

i) "If the defendants omnibus leaves the road and falls down an embarkment, and this without more is proved, then *res ipsa loquitur*, there is a presumption that the event is caused by negligence on the part of the defendants, and the plaintiff succeeds unless the defendant can rebutt this presumption.

ii) It is no rebutal for the defendants to show, again without more, that the immediate cause of the omnibus leaving the road is a tyre burst since a tyre burst *per se* is a neutral event consistent and equally consistent, with negligence or due negligence on the part of the defendants. When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale. The depressed scale will remain down.

iii) To displace the presumption, the defendants must go further and prove (or it must emerge from the evidence as a whole) either:

   a) that either the burst itself was due to a specific cause which does not connote negligence on their part but points to its absence as more probable, or

   b) if they can point to no such specific cause, that they used all reasonable care in and about the management of their tyres…"

I am in full agreement with the above.

The position is simply that the defendants have full control of the omnibus. They have a duty to ensure that the omnibus is managed well. It is their duty to ensure that the tyres fitted on to the omnibus are roadworthy. If any defect is noted it is for them to rectify it. The condition or state of the tyres being something within their knowledge and control, it is for them to show that the tyre was in good condition and that the cause of the tyre burst had nothing to do with poor or lack of management.

The presumption of negligence cannot be discharged by merely alleging tyre burst without more. The defendants ought to have gone further to show that that tyre burst was

not a result of their own negligence. They ought to have shown that they at least took the necessary precautions which a reasonable man with the necessary skill or experience in operating a commuter omnibus would take to ensure the safety of passengers.

As is evident from the record of proceedings the defendants proffered no evidence of what steps they took in this regard. They seemed content with the fact that there was a valid certificate of fitness obtained in July 2001. To suggest that because the tyres were inspected and found to be in a good state in July 2001 therefore the tyres were in that good state on the 20th December 2001 is clearly not being serious. Anything could have happened to the tyres, including wear and tear. It was upon the defendants to show that as of the 20th December 2001 the tyre in question was in a good state. That, they did not do.

The defendants sought to say that as the first defendant was not charged for negligence driving by the police, it means he was not negligent. That reasoning is erroneous. As is common cause the standard of proof in criminal cases is higher than in civil cases. (see *ZESA v Dera* 1998(1) ZLR 500)

That being the case it was upon the police to ascertain whether there was enough evidence to prove beyond a reasonable doubt that the first defendant was negligent. It was also a question of police using their own discretion. Whether police discretion was exercised properly or not is not before this court.

In the present case the plaintiff chose to sue. On the issue of liability I am of the view that the defendants lamentably failed to discharge the onus on them. They were clearly negligent in not ensuring that the tyre was in a good state.

QUANTUM OF DAMAGES

General Damages

The plaintiff's claimed a sum of $20 000 000.00 for pain suffering and loss of amenities.

The assessment of such damages is not an easy task.

In *Minister of Defence and Another v Jackson* 1990(2)ZLR1 (S.C) at page 7 GUBBAY J.A.(as he then was) recognised this difficulty when he said that:

> "It must be recognised that translating personal injuries into money is equating the incommensurable; money cannot replace a physical frame that has been permanently injured. The task of assessing damages for personal injury is one of the most perplexing a court has to discharge…"

The judge went on to outline eight broad principles that should guide court in assessing such damages. These principles include that:

1) "General damages are not a penalty but compensation. The award is designed to compensate the victim and not to punish the wrong doer.
2) Compensation must be so 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. See *Union Government v Warneoke* 1911 AD651 at 665.
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 general considerations. (see *Sandler v Wholesale Coal Suppliers Ltd.* 1941 AD 194 at 199).
4) The court is entitled, and it has the duty, to heed the effect its decision may have upon the course of awards in the future. (see *Sigourney v Gill Banks* 1960(2) SA 552(A) at 555 (H)
5) The fall in the value of money is a factor which should be taken into account in terms of purchasing power, but not with such an adherence to mathematics as may lead to an unreasonable result, per *Schreiner J A* in *Sigourney's case, Supra*, at 556C (see also *Southern Insurance Association Ltd v Bailey N.O*. 1984(1) SA 98(A) at 116B-D, *Ngwenya v Mafuka* S-18-89. (not reported) at pages 8 of the Cyclostyled copy.
6) No regard is to be had to the subjective 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. (see Radebe v Hough 1949(1) SA 380(A) at 386.
7) Awards must reflect the state of economic development and current economic conditions of the country. (see *Mairs case supra* at 294; *Sadomba v Unity Insurance Co. Ltd & Anor*. 1978 RLR 262(G) at 270F; 1978(3) SA 1094(R) at 1097C.
   Minister of Home Affairs v Allan S-76-86 (not yet reported) at page 12 of the cyclostyled copy.
   They should tend towards conservatism lest some injustice be done to the defendant.
   (see *Bay Passenger Transport Ltd. V Franzem* 1975(1)SA 269(A) at 274H.
8) For that reason, reference to awards made by the English and South African courts may be an inappropriate guide since conditions in those jurisdictions, both political and economic are so different."

The above principles are very broad. The present economic situation in the country makes the task even more difficulty.

Our money has depreciated so much that what used to be annual gross incomes for middle management personnel is now the monthly net income for that same class, if not for the lower class. The last two years have seen marked erosion of our money's purchasing power.

Statistical figures obtained from the Central Statistics Office confirm the above.

The Consumer Price Index (CPI) figures from 1990 were as follows (with 1995 equally 100 Consumer Price Index (CPI).

Year	All Items Index
1990	29.8
1991	36.8
1992	52.3
1993	66.7
1994	81.6
1995	100.0
1996	121.4
1997	144.3
1998	190.1
1999	301.3
2000	469.6
2001	807.5
2002	1 888.1
2003	8 757.1

Using the above C.P.I. figures one notes that a dollar in 1990 was equivalent to $293.86 in 2003. Calculated at $8\ 757.1 \div 29.8 \times 1 = 293.86$
A dollar in 201 was equivalent to $10.85 in 2003.
Calculated as $8\ 757.1 \div 807.5 \times 1 = 10.85$
Also a dollar in 1990 was equivalent to $63.10 in 2002.
A dollar in 1996 was equivalent to $15.51 in 2002

With such a high rate of depreciation it is not easy to arrive at a fair sum. It is nevertheless important that whilst taking cognisance of the factor of depreciation, court ensures that the award is fair in the eyes of society. The award must not invoke a sense of hopelessness due to its pittance or a sense of unjust enrichment.

In arriving at such an award it is necessary to look at what the plaintiff has gone through including the nature and extent of the injuries and their effect on him and his family.

The evidence led showed that after the omnibus overturned the plaintiff was trapped underneath the vehicle. He was rescued by ambulance personnel and taken to Parirenyatwa hospital. He was detained at that hospital from the 20th December 2001 to the 24th December 2001. He was then transferred to the Avenues Clinic on the 24th December 2001. He was discharged from the Avenues Clinic on the 12th January 202. Thereafter he was admitted at Ruwa Rehabilitation Centre.

For the months of February, March and April 2002 he was admitted at St Giles Rehabilitation Centre. The documentary evidence tendered to court confirmed this sequence and the fact that at each of the centres he was receiving medical treatment.

The injuries sustained by the plaintiff were succinctly put by Professor levy as "totally paralysed together with loss of sensation from the upper thoracic region downward and an x-ray showed that he had fractured the fifth thoracic vertebra.

- Damage to the spinal cord of a permanent nature
- No sensation whatsoever and virtually no movement of the left side of the body from the upper chest downwards and no movement of the right side from the top of the chest downwards.
- Loss of control over bladder or bowel function and
- Loss of normal sexual function.

The doctor concluded that the plaintiff is now wheel chair bound. He now has to learn to do with his arms alone what he previously did with his arms and legs. He will only be able to do sedentary work from his wheelchair. The plaintiff will virtually have to learn new ways of getting around and functioning in his cabbage state. The plaintiff will require continuing medical care including surgical treatment.

The doctor further indicated that the plaintiff will remain 100% disabled on the workers compensation physical disability assessment scale.

It must be obvious that the accident had a devastating effect on the plaintiff and his family. The pain and suffering he has gone through is simply indescribable.

The consequences thereof have had a telling effect on his family. His wife now has to constantly be with him as he needs her regular care. She can no longer freely go about her other duties to raise income for the family or socialise. Both of them can no longer enjoy their conjugal rights.

The social outings plaintiff enjoyed prior to the accident are now impossible. He has had to reorientate his family and social life to suit his new state. In looking at the question of pain suffering and loss of amenities I am of the view that plaintiff is entitled to a substantial sum. As alluded to above, it is not possible to compensate for lost limbs but something to sooth the pain and anguish of being reduced to a cabbage maybe provided. It

may be provided not as punishment to the defendant but as compensation to the plaintiff.

In assessing a fair amount I have made use of the Consumer Price Index (CPI) supplied by the Central Statistics Office. I have looked at awards in other cases of varying degrees of disability and tried to come up with the appropriate sum bearing in mind the depreciation of our money as is evident from the CPI.

Some of the cases looked at are:

1. *Minister of Defence and another v Jackson* 1990 (2)ZLR1(S). In that case the respondent was injured in a road traffic accident. General damages were awarded in the sum of $35 000.00 for pain, suffering and loss of earning. Using C.P.I. rate referred to above that figure would be about $10 288 184 in 2003. In December 2002 this would be about $4 098 640.70.
2. In *Marufu v Mawona and others* 1996(1) ZLR 493, the plaintiff suffered 40% disability. The award for pain suffering and loss of amenities was a sum of $50 000.00. Using the above yearly C.P.I. that would translate to about 8 757.1 ÷ 121.4 × 50000

   = $3 606 713.3 in 2003. In December 2002 when the plaintiff issued sums the monthly CPI was 3 489.7. A dollar was then worth about $28.75 of what it was in 1996. That 50 000 would thus have been about $1 437 273.4 (i.e. 3 489.7 ÷ 121.4 × 50 000).

In both cases the plaintiff did not suffer 100% disability. In the present case where the degree of disability is greater, a large sum is naturally expected. That sum must not however be arrived at as a purely mathematical calculation. There is need to take account of the circumstances of each case and determine an appropriate award. The awards in the above cases are only a guide. The CPI used are also a guide. It must not be a situation of a dollar for a dollar.

The plaintiff's circumstances as noted during the trial and as highlighted in this judgment are quite bad. He has suffered a lot. That suffering will continue probably for the rest of his life.

I am of the view that an appropriate award is the sum of $8 000 000.00.

Loss of Earning Capacity

There is no doubt that as a result of the injuries sustained by the plaintiff he was discharged from formal employment in June 2002. At the time of the accident the plaintiff

was in formal employment earning a monthly net salary of $8 189.83 as per his payslip tendered in court. He lost that income as result of the accident.

There is therefore no dispute that there has been loss of earning capacity. The main issue is on the calculation of that loss.

In Rusike v Tenda Transport (Pvt) Ltd and Another 1997(1) ZLR 495, Bartlett J. after considering a number of case authorities held that:

> "Whenever possible the loss of future earning capacity should be assessed on the `basis of an arithmetical acturial basis and not on the basis of a 'gut feeling' basis. However, whilst the court should be guided by acturial calculations, it is not completely bound by them and must arrive at an award that is fair and just in the particular circumstances of the case."

In *Minister of Defence and Another v Jackson* Supra court held that:

> "The approach of the courts in Zimbabwe to loss of earnings, both past and future must be based on earnings after deducting any tax payable on those earnings."

In the present case at the time of the accident the plaintiff was in formal employment earning a fixed salary. His payslip, exhibit 1, shows that his gross monthly salary was $6 475.35. His regular allowances totalled $4 324.76. Total deductions were $2 611.28. This left him with a net monthly income of $8 189.83. As his employment was terminated in June 2002, he lost that income as from that time. I did not find it denied that the allowances were regular. A 13th cheque termed bonus was also a yearly payment.

I am of the opinion that the allowances and bonus be considered in the calculations. They have infact become a permanent feature of civil servants remuneration package.

For 21 years the plaintiff's net income based on exhibit (March 2002 payslip) would be 8 189.83 × 12 = 98 277.95 + bonus at 6 476.35 = 104 754.31 per annum.

104 754.31 × 21 = 21 998 40.50

It is however necessary to discount for contingencies. The rate at which to discount for contingencies is within court's discretion. Courts have made allowances for contingencies at varying rates.

It is a fact of life that it is not every one who reaches retirement age. Thus even if plaintiff had continued working there is always a possibility of leaving employment for various reasons. Such reasons include ill health, retrenchment and discharge by employer.

Other factors to be considered in determining discount for contingencies include:

a) The Income the plaintiff would probably have been able to earn had he not been injured.
b) The frequency and amount of any increments to his wages.
c) The pattern of future interest rates and the future rate of inflation.
d) Possible deficiencies in the acturial calcualations.
e) The likelihood of periods of unemployment caused either by illness, accident or adverse economic factors.

(see Car*stens N.O. v Southern Insurance Association Ltd*. 1985(3) SA 101.

After assessing the circumstances of this case I am of the view that an allowance for contingencies at 25% would be appropriate.

The award under this heading would have been a sum of 2 199 840.5 less 25% = 1 649 880.40. The plaintiff's claim under this heading was a sum of $1 195 205.91. That is the sum to be awarded.

Hospital Bills

There is not much to debate under this heading serve for a proper calculation. The hospital bills made available were there for anyone to scrutinise. The defendants did not challenge these bills. The hospital bills were incurred as a result of the injuries sustained by the plaintiff. Though no challenge was made at the figures claimed it is necessary to ascertain the correct figure from the evidence adduced in court. This is so because upon scrutiny of the documents I was of the view that there were some double calculations. A careful analysis of the documents tendered shows that the total bill for the Avenues Clinic is about $250 249.7 whilst for St. Giles rehabilitation centre it is $304 116.00. The total medical bill from documents filed is therefore $554 365.7. There were however no figures or documents on medical expenses at Parirenyatwa hospital and Ruwa rehabilitation centre. The award under this heading will be granted in the sum proved that is $554 365.7.

INTEREST

The plaintiff prayed for interest of the rate of 30% per annum or at the prescribed rate to run from the 20th December 2001 to the date of payment. I am however of the view that the various heads of awards require varying dates.

In *Rusike v Tenda Transport (Pvt) Ltd & another* 1997(1) ZLR 495 Bartlett J discussed this issue at great length. He echoed SMITH J's remarks in *Marufu v Mawona & others* Supra. At page 503, the Honourable judge said that:

> "court has a discretion but it is ordinarily appropriate to order interest to run from the date of service of summons. This is so because if interest is ordered to run from the date of injury was suffered a court should really apply its mind to assessing the appropriate amount of damages as at that date… If however, there is a substantial time gap between the date of service of the summons and the trial date, a court would need to consider ordering interest to run from a date closer to the trial date."

In *Marufu v Mawona* supra the date of summons was October 1994. The trial began in May 1997. The court opted for October 1 1994 as the date from which interest should run. I fully agree with the learned judge reasoning in this regard. In the present case the accident occurred on the 20th December 2001. Summons was issued in November 2002 and served on the defendants on the 6th January 2003. Trial began on the 29th September 2003. It would thus be quite in order for interest to run from the 1st January 2003. Thus interest on general damages shall run from the 1st January 2003.

Interest on loss of earnings capacity should run from the date of judgment. This is the date of judgment. This is the time defendant is told of his liability in this regard.

As for the interest on medical bills I believe it would be appropriate to run from when the total bill became due. This is when the last invoice is sent out for payment.

BARTLETT J expressed similar views in *Rusike v Tenda Transport (Pvt) Ltd (supra).* He indicated that such interest run from the date of the last invoice.

The documents on medical bills are not clear as to which was the last date of invoice. This is so because what was filed were not the actual invoices but statements of accounts. Amongst the statement is one from the Avenues Clinic dated 13 November 2002. That cannot be taken as the date of last invoice as it is clearly a final demand on an amount that was long overdue.

There is also a letter demanding payment of a shortfall of $67 696.00 dated 18

August 2002 in respect of the St Giles bill. That again cannot be appropriate. The document clearly shows that it was over a medical bill that was overdue. An invoice was sent out demanding payment. Payment was made leaving a shortfall of $67 696.00.

A document that maybe appropriates is the statement of account from St Giles Medical Rehabilitation Centre dated 9 April 2002. The document marked 'D' shows clearly it was over an amount that was current.

It would thus be in order that interest on the medical bill run from the April 1 2002. The plaintiff therefore succeeds in his claim.

It is ordered that:

Judgement be and is hereby entered for the plaintiff and against the defendants jointly and severally with one paying the other to be observed as follows:

1. $8 000 000.00 for general damages for pain suffering and loss of amenities with interest to run from 1st January 2003 to date of full payment.
2. $ 1 195 205.91 for loss of earning capacity with interest to run from the date of judgment to date of full payment.
3. $554 365.70 for hospital and medical expenses and with interest to run from 1st April 2002 to date of full payment.
4. Interest to be at the rate of 30% per annum from the respective dates in respect of each award.
5. Costs of suit.

L.M. Kabote & Company, plaintiff legal practitioners

Madanhi & Associates, defendant's legal practitioner