

SHAMISO KASVOSVE
versus
BEKITHEMBA MASUKU
and
PATHFINDER LUXURY COACHES (PVT) LTD
and
CBZ INSURANCE COMPANY (PVT) LTD

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 24, 27, 30 & 31 January 2017 and 7 February 2018

Civil Trial

L. Madhuku, for the plaintiff
K. Kachambwa, for the defendants

ZHOU J: This is a claim for damages arising out of a road traffic accident which took place along the Harare-Bulawayo highway on 7 December 2013. The accident involved a head-on collision between a bus belonging to the second defendant and a haulage truck. The first defendant was the driver of the bus. The plaintiff's husband who was a passenger on the bus died as a consequence of injuries sustained in the accident. The instant claim which the defendants contest, was instituted by the plaintiff on her own behalf and on behalf of her three minor children. The claim is for funeral expenses and loss of support for the plaintiff and her children. In the declaration the plaintiff had also made for loss of companionship, shock, emotional trauma, pain and loss of parental care.

Some of the claims are startling and unprecedented in our law of delict, and would clearly be unfounded at law. These include loss of companionship, loss of paternal care, "children's shock (and) emotional trauma". However, the need to relate the quantum to the different heads has been obviated by the agreement reached by the parties that should the court find that the defendants are liable to pay damages then the quantum agreed upon would be in the sum of US\$60 000-00. It is not in dispute that at all material times the first defendant was acting in the course and within the scope of his employment with the second defendant. The

only issue for determination is therefore whether the accident was caused by the negligence of the first defendant as alleged.

Three witnesses testified on behalf of the plaintiff. These are Jeter Gwainda, Bernard Chirandu and Desiree Virginia Phillips. Jeter Gwainda is an Assistant Inspector in the Zimbabwe Republic Police, and has eighteen years experience as a police officer. His work involves reconstruction of accident scenes. He underwent specialised training in accident investigation in the Zimbabwe Republic Police. From his inspection of the scene he noticed that the bus which was being driven by the first defendant had been involved in a head-on collision with a lorry. The collision took place on the side of the lorry, which meant that the bus had encroached onto the lane of oncoming traffic. He drew a sketch plan based on his observations. He noted that the stretch of the road where the collision took place is unfenced. He also stated that the area in question has cattle crossing signs. The accident, according to him, would have been avoided if the first defendant had reduced speed or had swerved to the left side of the road after hitting the cow instead of swerving to the right-hand side. The damage to the bus and lorry, according to the witness, pointed to excessive speed on the part of the first defendant. He also observed that there was no sign of hardbraking to show that the first defendant had applied brakes.

Bernard Chirandu was a motorist who arrived at the scene of the accident after the collision. He observed that the bus had encroached onto the land of the oncoming truck leading to the head-on collision.

The last witness for the plaintiff, Desiree Virginia Phillips, was a passenger on the Pathfinder bus that was involved in the accident relevant to this matter. The bus was moving at a very high speed before there was the sound of an impact, after which the bus swerved to the right side of the road.

The defendant relied on the evidence of four witnesses, namely, the first defendant Bekithemba Masuku, Fungai Makoni, Jefferey Kamoyo and Gift Karonga. Bekithemba Masuku's evidence was that he was the driver of the bus. Just before the collision he had negotiated a curve and had reduced speed to sixty kilometres per hour. He then saw the lights of an oncoming motor vehicle which were on full beam. At that moment he further reduced speed to 50 kilometres per hour. When he had reduced the bus's speed to 50 kilometres per hour he saw a cow which was less than two metres from the bus. The cow was on the road. He applied brakes but still hit the cow. The steering wheel became stiff. He failed to control the bus which swerved to the right hand side of the road. According to him the bus had developed

a mechanical fault as a result of the impact with the cow. He put on hazard lights when he realised that he could not control the bus. The oncoming truck did not stop, hence the collision took place.

Fungai Makoni was the Managing Director of the second defendant as at the date of the accident. He testified that the bus in question had a tachochart which is a device which monitors the speed of the motor vehicle. The third witness for the defendants, Jeffrey Kamoyo is employed by Scanlink who are the dealers in Scania buses in Zimbabwe. He is a qualified motor mechanic. At the time of the accident he was employed as a Service Advisor. He had knowledge of the bus that was involved in the accident. He described the steering system of the bus as hydraulic power steering and the braking system as “Air-Assisted Braking System.” He opined that the metal pipes which conveyed hydraulic fluid to the steering box could be affected by the impact of the bus, thereby causing the steering wheel to be stiff. He stated that ordinarily hitting a cow would not affect the braking system of the bus. Later during re-examination he stated that on the facts presented the braking and steering systems could have been affected.

The defendants’ last witness, Gift Karonga, is a police officer. At the relevant time he was at Imbembesi Police Station, and was attached to the traffic section. He received a report of the accident on 7 December 2013 and proceeded to the scene in the company of another police officer. After securing the scene he and his colleague took steps to control traffic at the scene. He also arranged for Fire Brigade Officers to be called in to assist victims who were still trapped in the vehicles. He disputed the evidence of Jeter Gwainda and stated that the sketch plan attributed to Gwainda was not correctly prepared.

From the evidence led the following facts are common cause or are not in dispute. On 7 December 2013, at night a road traffic accident took place along the Harare-Bulawayo highway. The collision involved the second defendant’s bus and a haulage truck. The bus was being driven by the first defendant acting in the course and scope of his employment with the second defendant. The plaintiff’s husband who was a passenger on the bus died as a consequence of injuries sustained in the accident. The deceased husband of the plaintiff was the breadwinner for his family.

It is also common ground that the collision took place on the left lane for traffic coming from the direction of Bulawayo. The second defendant’s bus was travelling towards Bulawayo, which means that it encroached onto the lane of on-coming traffic. Prior to the defendants’ bus moving to the lane of on-coming traffic it had hit a cow.

What has to be determined, as pointed out earlier on, is whether the first defendant was negligent as alleged. If he was not negligent then that should be the end of the matter. If, however it is found that the first defendant was negligent then his conduct is imputable to the second defendant by operation of the doctrine of vicarious liability. The issue of quantum has been settled by agreement of the parties. The particulars of negligence alleged are set out in para 6 of the plaintiff's declaration. The defendant's denied all the particulars of negligence alleged.

In their plea as amended the defendants alleged that the accident "was solely caused by the negligence of the owners of the cow that (*sic*) drove it on the road and the speeding haulage truck that was involved in the collision." The defendants allege that the driver of the haulage truck "was speeding, failed to keep a proper look out, and failed to stop or act as any reasonable person would have acted". In the evidence led on behalf of the defendants nothing was said about the owners of the cow driving it onto the road. The first defendant's evidence suggested that this was a stray cow. There was also no evidence led as to the speed of the haulage truck or in support of the allegation that the driver of it failed to keep a proper look out or failed to stop or act reasonably in the circumstances. Given that the first defendant is the one who drove the bus on the wrong side of the road it was necessary to lead evidence of how a person in the position of the haulage driver would have avoided colliding with a bus that had encroached on his lane of travel. In the summary of evidence it was stated that the first defendant was suddenly confronted by a cow and that forced him to swerve to the left (right?) side of the road in order to avoid hitting trees on the other side of the road".

The evidence of the first defendant was a complete abandonment of the defence pleaded and the summary of evidence. In his evidence the first defendant alleged a mechanical fault which he and his witness sought to attribute to the impact with the cow. The first defendant stated that the steering mechanism became stiff and brakes ceased working. These material facts are not pleaded and represent the setting up of a new defence which is inconsistent with what is pleaded in the plea and alleged in the summary of evidence.

The principles applicable to an inquiry into the existence or absence of negligence are settled. Jonathan Burchell in *Principles of Delict* (Cape Town, Juta & Co Ltd) at p 86, summarises them as follows:

"the test for determining negligence is as follows:

- a) Would a reasonable person, in the same circumstances as the defendant, have foreseen the possibility of harm to the plaintiff;
- b) Would a reasonable person have taken steps to guard against that possibility;

- c) Did the defendant fail to take the steps which he or she should reasonably have taken to guard against it?
If all three parts of this test receive an affirmative answer, then the defendant has failed to measure up to the standard of the reasonable person and will be adjudged negligent.”

See also *Kruger v Coetzee* 1966 (2) SA 428(A) at 430.

The first two stages of the above test *viz* (a) and (b) are known respectively, as the reasonable foreseeability and reasonable preventability stages of the inquiry. In respect of these two stages the court directs its mind to how a reasonable person would have related to the facts. The third stage measures the conduct of the defendant against that of the reasonable person. *In casu* a reasonable person would have foreseen the possibility of the accident and its consequences first from the curve, secondly from the lights of the oncoming truck, and thirdly from the cow which appeared in front of him. The first defendant failed the reasonable foreseeability test. His failure is testified to by not seeing the lights of oncoming traffic from a curve which from the evidence led was not sharp. This was at night. The presence of trees on the side of the road could not make him fail to see oncoming lights at night. His evidence that he only saw the lights after emerging from the curve shows inattention on his part. If indeed he was blinded by the oncoming lights then he should have foreseen that his vision to see objects on the road would be impaired and he ought to have stopped. His failure to foresee the possible consequences of the oncoming lights explains why he would only see the cow when it was only two metres away. Even with dipped lights he ought to have foreseen the possibility of cows on the road. He was aware that there were villages within the vicinity of the road, and that the road had no fence on its sides. He did not need a cattle crossing sign for him to foresee the possibility that there would be cows on the road. He said he is very familiar with that road. When he took the decision to swerve to the right he would have foreseen, as a reasonable person would do, the possibility that the oncoming truck might not stop.

A reasonable person faced by a cow on the road would have swerved to the left hand side of the road. The culverts could not be more dangerous than a head on collision which he opted for. Also, at a speed of 50km/h he would have safely stopped the bus even if he had kept its wheels straight. The first defendant had options at his disposal which a reasonable person would have embraced to prevent the accident. Swerving to the left hand side of the road, or keeping the wheels straight when the bus hit the cow were options available to any reasonable driver. The first defendant failed to choose those safer options to prevent the head on collision.

His failure to control a whole bus after hitting a mere cow is itself an act of negligence. His swerving to the right lane was equally an act of negligence.

In all the circumstances, the evidence on record shows that the first defendant negligently caused the accident by failing to keep a proper look out, failing to act reasonably to stop the bus or keep it under control by either swerving to the left side of the road after hitting the cow or stopping the bus, and by swerving to the right land thereby encroaching on the way of oncoming traffic. The negligence caused the death of the plaintiff's husband.

In the result, it is ordered that

1. Judgment be and is hereby granted in favour of the plaintiff against the defendants jointly and severally the one paying the others to be absolved for payment of the sum of US\$60 000.00 together with interest thereon at the prescribed rate from the date of summons to the date of payment.
2. Defendants shall pay the costs of suit jointly and severally the one paying the others to be absolved.

Mundia & Mudhara, plaintiff's legal practitioners

Dube-Banda, Nzarayapenga & Partners, 1st and 2nd defendants' legal practitioners