PHILLIP MURAPIRO
(In his personal capacity as well as guardian of
minor child Odium Murapiro)
and
JESTINA GWENUKWENU
versus
ONISMO NYABANGA
and
T MADANIRE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 12-13 May 2016 and 31 August 2016

Civil trial

S Simango, for the plaintiffs
S Mugadza, for the defendants

MUREMBA J: The plaintiffs are married and have a minor child by the name of Odium Murapiro who was aged 4 years on 3 November 2009 when all the three of them were involved in a road traffic accident along Simon Mazorodze and Hobbs Road in Harare. They were passengers in a commuter omnibus, namely a Toyota Hiace registration number ABB 9923 which was being driven by the first defendant who was employed by the second defendant as a driver.

The plaintiffs are claiming damages arising from the injuries they sustained in the accident. The defendants have not disputed that the accident happened as a result of the first defendant's negligence. They have also admitted that the second defendant is vicariously liable for the accident happened whilst the first defendant was driving the commuter omnibus during the course and scope of his employment. The only issue that was referred to trial is the issue of the quantum of damages the plaintiffs are entitled to.

In their summons the plaintiffs are claiming US$29 420.00 which they broke down in the declaration as follows:

Phillip Murapiro (first plaintiff)

Hospital expenses US$1 028.00

General damages inclusive of pain and suffering loss of amenities

of life and 20% permanent disability	US$12 000.00

Jestina Gwenukwenu (second plaintiff)

Hospital expenses	US$2 392.00
Future medical expenses	US$1 500.00
General damages 20% permanent disability	US$12 000.00

Odium Murapiro

General damages for pain shock and suffering	US$500. 00

The evidence of the plaintiffs

When Jestina Gwenukwenu, the second plaintiff testified she said that in the accident she suffered a fractured left leg (tibia) and fractured right forearm. She went on to produce a medical report which was compiled by Dr Zhou Tafara on 6 August 2010 at Harare Central Hospital. The report is consistent with the injuries that she said she suffered. It says severe force was used to inflict the injuries and that there was a possibility of permanent injuries. By consent, she also produced a letter which was written by Mr. G. A. N. Vera an orthopaedic surgeon on 9 September 2010 at West End Clinic. It is addressed "to whom it may concern." The letter also describes the injuries that the second plaintiff sustained in the accident. It states that she was admitted to hospital suffering from severe pain and shock. She was given painkillers, antibiotics and anti-tetanus toxoid. The forearm and leg were surgically fixed with metal plates and pins. The wounds were said to have healed but she was said to be having moderate pain in the leg and arm after usage. It was further stated that she could not lift heavy objects, run or play sport. It was said that she would need to have the metal plates removed after one year at a cost of US$ 1500.00. It was further said that she may remain with pain after the removal of the plates. It was said that she has 20% permanent disability.

The second plaintiff said that she used up to US$2 392.00 for the insertion of metal plates in both the arm and the leg, all the treatment that she received and the other expenses that she incurred less transport expenses. She gave a detailed breakdown of that money and produced receipts as proof. She said that when she was discharged from hospital she left a balance of US$437.00 which has not yet been paid. She said that she had since received a letter from the debt collectors demanding this money. However, she did not produce any proof of the said debt. She said that she was admitted at Harare Central Hospital for a month

from 3 November 2009 to 4 December 2009. She said that the metal plates that were inserted should have been removed after 1 year on 17 February 2011 at Parirenyatwa Hospital but to date that has not been done because she failed to raise the US$1 500.00 that Mr. Vera initially charged for their removal. She said that on 7 December 2015 she went back to Mr. Vera and was advised that it now costs US$ 5 000.00 to remove the metal plates. The defendants objected to the production of the quotation of US$ 5 000.00 by Mr. Vera on the ground that they wanted it produced through Mr. Vera who would explain the huge increase of the cost from US$1 500.00.

The second plaintiff said that she will therefore need US$5 500.00 for future medical expenses including costs for transport and fees for check-up. On the 20% permanent disability she suffered she said the following. She can no longer do most activities that she used to do before the accident. She can no longer carry heavy things, for instance a 20litre bucket of water. She can no longer wash blankets, walk for a long distance, kneel, crouch, and run. She now needs the services of a maid to do the household chores that she used to do by herself since she had always been a housewife. She said that she used to grow vegetables and sell them at Mbare Musika but she cannot do that anymore. She said that they have one child and with her new condition she cannot have more children. Her leg and hand are always swelling so she will not be able to carry the pregnancy through. She said that she cannot be seated for the whole duration of the pregnancy as she needs to walk around. She said that assuming that she gives birth, she will not be able to look after the baby like a mother is expected to, e.g. washing the diapers and carrying the child on the back. She said that she cannot bank on a maid because a maid can quit anytime. She said that it is on the basis of the 20% permanent disability that she is claiming general damages in the sum of US$12 000.00.

The second plaintiff said that the child, Odium Murapiro was injured on the jaws and 4 of her milk teeth shook. At hospital the teeth were secured with a wire but that did not work. In January of 2010 the teeth fell off. The medical report which was produced shows that she sustained injuries on the mandible (jaw) and was bleeding from the mouth. The medical report states that a moderate amount of force was used to inflict those injuries. The second plaintiff said that since the child was below 5 years old she was treated for free at hospital and as such no medical expenses were incurred. She further said that there is no future medical treatment that the child needs as her permanent teeth have grown. However, she said that the accident left the child very shocked. For some time she was afraid of boarding commuter omnibuses. Psychologically, the child was traumatised, she appeared

unsettled as reflected in her behaviour which can be termed aftershocks. Out of nowhere she would act as if something had rattled her. For the pain, shock and suffering the child endured, the plaintiffs said that they are claiming US$ 500.00.

During cross examination the second plaintiff said that she was admitted to hospital for the second time at Parirenyatwa hospital and was discharged on 19 February 2010. She did not say when she was admitted. As she testified she was in her 6th year with the metal plates which should have been removed after only one year. She said the whole of this year she never went for a medical check-up because they do not have money. She said that she can no longer use the blair toilet because she can no longer squat. If she is in the rural areas she now uses the bush to relieve herself.

The evidence of Phillip Murapiro, the first plaintiff was as follows. He suffered a fractured right leg and a laceration on the scalp in the accident. The medical report that he produced states that severe force was used to inflict the injury. A plaster which was later removed in February of 2010 was put on the leg. A letter which was written by Mr. Vera who also treated him states that after the plaster had been removed the first plaintiff underwent physiotherapy. The letter states that the wound had since healed but the first plaintiff was suffering from effort pains and was taking painkillers. The letter further stated that the first plaintiff could not run or play sport. He has a permanent 20% disability.

The first plaintiff stated that he incurred medical expenses to the tune of US$1080.00. He produced receipts to prove this amount. He said that he still owes Harare Central Hospital US$650.00. He said that he had even received a letter from the debt collectors for the payment of this amount. However, he said that he had not brought any proof of this amount. He said that this amount only came to his attention when the debt collectors wrote demanding payment. He said that he does not anticipate any future medical expenses.

The first plaintiff said that he is a qualified motor mechanic by profession and at the time the accident occurred he was employed by Surrey Abattoir, a meat delivery company in Marondera. He said that after the accident, because of the injury, the company made him work on light vehicles as he could no longer work on the heavy vehicles yet the bulk of its vehicles are heavy vehicles. He said that he can no longer lift heavy things like gearboxes and engines by himself as he used to do before the accident. He said that after the accident each time he was working on these he would ask for assistance from another person. He said that because of this he realised that he could not continue working as a motor mechanic and ended up quitting his job on 9 November 2015. He has now ventured into the timber industry

whereby he assigns somebody to go and buy timber for him and he then sells it. The first plaintiff said that for the 20% disability he suffered he wants to be paid US$12 000.00. He said that he can no longer walk long distances or run.

The first plaintiff said that because of the injuries his wife suffered he feels that carrying a pregnancy will be too burdensome on her as her leg and arm constantly swell. He said that she is now totally reliant on the maids. He said that he cannot be with her all the time as he has to fend for the family.

The plaintiffs were unable to call the doctor, Mr Vera because he was totally evasive. They ended up closing their case without leading evidence from him.

The evidence of the defendants

The second defendant, Tawira Madanhire testified as follows. He said that the amounts that are being claimed by the plaintiffs are exorbitant and too high for his affordability. He said that currently he is not formally employed. He said that after the accident his business suffered a lot because all those that had been injured in the accident had to be taken care of including the plaintiffs and the first defendant, the driver. He said that he personally paid US$45.00 towards the first plaintiff's Harare Central Hospital bill. However, he could not produce the receipt thereof as the plaintiffs' counsel objected to its production on the grounds that it had not been discovered. Of interest also is the fact that this payment was never mentioned to the plaintiffs and the receipt which is the proof thereof was never shown to them when they were being cross examined. The second defendant said that the court should award to all the plaintiffs a total of US$2 000.00 in damages. He said that the US$5000.00 which is being claimed for the removal of the metal plates is too much as there are other institutions like Karanda Mission Hospital in Mount Darwin which can render the service for far less than that amount. He said that he once made enquiries and learnt that it costs approximately US$160 to remove the plates at this hospital. However, he did not produce any quotation to substantiate this, it was just his word.

The second defendant said that when the second plaintiff was admitted in hospital she once asked for money for a scan and his wife gave her US$50.00. He further said that he once met the first plaintiff in town and gave him US$120.00 to cushion them in their expenses. The problem is that all this was never put to the plaintiffs during their cross examination by the defendants' counsel. So the veracity of these averments was not tested. This is in light of the fact that the plaintiffs said that they never received any financial assistance from the

defendants. I cannot therefore accept that the second defendant made these payments to the plaintiffs.

The second defendant further said that his driver, the first defendant who was initially hospitalised at Harare Central Hospital and two other accident victims received very cheap treatment at Karanda Mission Hospital in Mount Darwin. He said that after the accident his commuter omnibus business closed shop.

The first defendant, Onismo Tawanda Nyabanga testified as follows. He said that he now runs a car wash and earns US$200-250.00 per month. He said that the court should give an award of US$1 500.00 to each plaintiff, minus the child. He said that this should be enough because of all the people who were injured he was the most injured, but he only used up to US$2 500.00 for his treatment. He now walks with the aid of crutches. He said that each of the plaintiffs must have used less than that. When asked about his offer to the child, he said that he did not understand why he was being asked to pay these monies. The first defendant could not have been sincere in his statement given that he is the one who negligently caused the accident which caused the injuries upon the child.

The law and its application to the facts

The plaintiffs' counsel correctly captured the law in respect to the award of general damages as follows. General damages are not a penalty but compensation. They are meant to compensate the victim by trying to place him in a position he would have been had the wrongful act causing the injury not been committed[1]. 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 consideration[2]. The award must reflect the state of the economic development and current economic conditions of the country[3]. In awarding such damages the courts must also consider the fall in the value of the money[4]. The above principles are elegantly captured in the leading case of *Minister of Defence & Anor* v *Jackson* 1990 (2) ZLR 1 (SC).

In *casu* the second defendant said that I should not award damages that the plaintiffs are claiming because they are too high. He said that his financial position will not enable him to pay them as he is no longer in the commuter omnibus business. G Feltoe in his book *A*

[1] *Union Government v Warnecke* 1911 AD 651@ 665.
[2] *Sandler v Wholesale Coal Suppliers Ltd 1941* AD 194 @ 199.
[3] *Sadomba v Unity Insurance Co. Ltd & Anor* 1978 RLR 262(G) @ 270 F; Biti v The Minister of State Security 1991 (1) ZLR 655.
[4] Sigournay v Gillbanks 1960 (2) SA 552 @ 555H.

Guide to the Zimbabwean Law of Delict 3rd ed @ p 21 states that in deciding upon liability the financial means of the defendant is not considered. The fact that the defendant is poor does not affect his liability or serve to reduce the amount of damages to be awarded to the plaintiff. The amount of damages is assessed on the basis of the loss or damage caused to the plaintiff. Therefore the fact that the second defendant in the present matter is no longer in business is no reason for this court to reduce the amount of damages the plaintiffs are entitled to. In assessing the amount of damages I will be guided by the principles that I have outlined above.

From the damages being claimed by the plaintiffs, it is clear that the first and second plaintiffs are claiming special damages for the medical treatment they received. They incurred expenses in the sum of US$1, 028.00 and US$2 392.00 respectively. I grant them these damages because they managed to prove them.

In respect of the general damages, the defendants were not able to dispute or challenge the plaintiffs on the evidence that they led. Although Doctor Vera who treated them did not attend court there are letters that he wrote detailing the injuries the plaintiffs suffered in the accident; the treatment they received and the condition of the plaintiffs as at 9 September 2010. It is in those letters that he stated that each of them had suffered 20% permanent disability as a result of the injuries. The two letters were produced by the consent of the defendants' counsel. In consenting to their production he never mentioned that the defendants were challenging the contents thereof. In the letter which was produced in respect of the second defendant the doctor said that it cost US$1 500.00 to remove the metal plates. However, the second defendant went on to testify that in December of 2015 the doctor had given her a new quotation of US$5 000.00 for the removal of the plates. When the second plaintiff attempted to produce that new quotation as an exhibit, the defendants' counsel objected stating that he wanted that quotation produced through Dr Vera as he explained how the costs escalated from US$1 500.00 to US$5 000.00.

Mr *Mugadza's* approach in consenting to the production of the letters that were written by Dr Vera explaining the injuries the plaintiffs had suffered gave the impression that for those documents whose contents the defendants were not disputing he was consenting to their production. For the documents whose contents were disputed he was not consenting to their production, he objected to the production of the quotation of US$5 000.00 saying that he wanted the doctor to lead evidence explaining the increased cost. It was only during cross examination of the plaintiffs that the defendants started challenging the 20% permanent

disability they each suffered. The challenge was premised on the fact that the two plaintiffs suffered different injuries and as such it was not possible for them to sustain the same degree of permanent disability. Mr *Mugadza* was asking the complainants to explain. That was not proper because this could only have been explained by the doctor who attended to them and pegged their disability at 20% each. How the doctor arrived at that percentage was for him to explain and not for the plaintiffs who were just patients. The plaintiffs are not qualified in medicine, therefore they do not know how doctors arrive at these percentages. Mr *Mugadza* should have made it clear to the plaintiffs' counsel and to the court that he was challenging the plaintiffs' degrees of permanent disability. That way the plaintiffs would have made more effort to secure the attendance of the doctor to testify on that aspect. By not telling the plaintiffs' counsel that the defendants were challenging this issue Mr. *Mugadza* made the plaintiff's counsel believe that the issue of permanent disability was not under challenge. Clearly, this was an ambush. The ambush that Mr. *Mugadza* tried to make by raising the issue for the first time in cross-examination did not work. He should have made his intentions clear from the onset so that the plaintiffs would have known that there was need to call the doctor to testify on the issue of permanent disability. After being warned any failure to call the doctor would have been weakened the plaintiffs' case on that issue. In any case for such a challenge to succeed it was necessary for the defence to lead evidence from a medical expert. It takes a medical expert to tell the court that it is not possible for two people who have suffered different injuries to suffer the same degree of permanent disability. It is not enough for a legal practitioner to simply say simply because the two plaintiffs suffered different injuries it is therefore not possible for them to have the same degree of permanent disability. This is medical expert evidence which can only be rebutted by another expert in the medical field. In the absence of a proper challenge to the findings of Dr Vera I thus take it that the two plaintiffs suffered the same degree of permanent disability which is 20%.

The damages for pain, shock and suffering are determined by, among other things, the duration and intensity of the pain experienced by the plaintiff[5].The first plaintiff did not lead evidence on the duration of his admission to hospital. However, his leg was in plaster for 3 months. After that he went for physiotherapy, but again it was not stated for how long he did that. Other than producing the medical report and the letter which describe the nature of the injuries, Mr *Simango* made no efforts to lead evidence from the first plaintiff for him to

[5] G Feltoe *A guide to the Zimbabwean Law of Delict* 3rd ed @ p130.

explain in his own words the pain he endured. It is not known whether he is still experiencing the pain now and how he copes with it if any. It is in the medical report that it is stated that severe force was used to inflict the injury. In the letter it is stated that he was suffering from effort pain and was taking painkillers. This letter was written on 9 September 2010, it is now 6 years down the line, but Mr *Simango* did not see it necessary to lead evidence on whether or not the first plaintiff was still experiencing any pain. This manner of leading evidence puts the plaintiff at a disadvantage because if the court is not given the full picture of the pain the plaintiff experienced it might award less damages than what it would have awarded if a detailed description had been given. *Viva voce* evidence on this aspect is very necessary because the test for pain, shock and suffering is subjective[6]. Be that as it may, in light of the medical report and the letter by the doctor, it cannot be disputed that the first plaintiff experienced pain, shock and suffering. It is the intensity or severity of the pain which was not fully explained.

As for the second plaintiff, Mr *Simango* fell into the same error again of not leading evidence from her so that she explains the pain, shock and suffering that she endured from the date of the accident in November 2009 up to the time she gave evidence in May 2016. All that she said was that she was in hospital for a month at Harare Central Hospital from 3 November 2009 to 4 December 2009. No explanation was given about why she was detained for that long, what treatment she was receiving and the pain that she experienced. The second plaintiff stated that she was admitted again at Parirenyatwa Hospital where she was discharged on 19 February 2010. We were not told what necessitated this second admission and we do not know what she experienced. The doctor's letter however states that the second plaintiff had her forearm and leg surgically fixed with metal plates and pins. This means that this plaintiff underwent surgical operation. Mr *Simango* made no effort to lead evidence from this plaintiff on the pain, shock and suffering that she experienced that is associated with this surgical operation. That the second plaintiff suffered pain cannot be doubted because she fractured her forearm and leg. Severe force was used to inflict these injuries as per the medical report. The doctor's letter states that she was admitted to hospital suffering from severe pain and shock. It further states that even after the removal of the plates she may remain with pain. The plates should have been removed after one year, but to date the plates have not been removed due to lack of money. 5 years later she still has the metal plates. Mr

[6] G Feltoe *A guide to the Zimbabwean Law of Delict* 3rd ed @ p130.

Simango did not ask her to explain how she is feeling with those metal plates. She was not asked to explain whether or not there is any pain associated with those metal plates. In short Mr *Simango* did a very poor job in leading *viva voce* evidence on the pain, shock and suffering the plaintiffs endured. All that is there is what the doctors who examined and treated them wrote in the medical reports and in the letters.

If a person loses the ability to engage in sport, recreation, social commitments and other normal activities they are entitled to general damages for loss of amenities[7]. It is clear from the evidence of the plaintiffs that they have lost amenities of life. They have both experienced loss of general health. The first plaintiff having fractured his leg and the second plaintiff having fractured her forearm and leg, they no longer enjoy sound limbs. They have lost the ability to walk long distances. They can no longer run and do sport. The first plaintiff can no longer lift heavy objects and this actually resulted in him quitting his job as a motor mechanic. The second plaintiff who used to be a full time housewife and would do her household chores unaided can no longer do so without the assistance of a maid. She can no longer do heavy tasks such as washing blankets and carrying a 20 Litre container of water. She can no longer use a blair toilet as she cannot crouch and kneel anymore.

In view of the foregoing I am persuaded to award general damages in the sum of US$ 4 000.00 to the first plaintiff and US$5 000.00 to the second plaintiff. The disparity has been necessitated by the fact that although they have the same degree of permanent disability, from the nature of the second plaintiff's injuries, it appears that she suffered more pain. She was in hospital twice and on the first occasion it was for a month. She underwent surgical operation for the insertion of the plates. She is yet to undergo another one for their removal.

As for future medical expenses for the removal of the plates I will award to the second plaintiff US$1 500.00 which is the amount that she claimed in her declaration. Future medical expenses are special damages because they can be precisely calculated. A quotation from the doctor will suffice. In this case in her declaration the second plaintiff claimed US$1 500.00. The letter from Doctor Vera states this figure as the cost for having the plates removed. It is on the basis of this letter that the plaintiff made her claim in respect of future medical expenses. It was not proper for the second plaintiff to try and claim US$5 000.00 for the removal of the plates during trial. The fact that she had obtained a new quotation from the doctor in December 2015, well after summons had been issued in July 2014, did not justify

[7] G Feltoe *A guide to the Zimbabwean Law of Delict* 3rd ed @ p131; *Administrator-General SWA v Kriel* 1988 (3) SA 275 (A) @288; *Christopher Gwiriri v Star Africa Corporation (Pvt) Ltd t/a Highfield Bag (Pvt) Ltd* HH 20/2010.

raising the claim during trial without first making an application to amend the amount in the pleading, that is, in the declaration. So even if Doctor Vera had testified justifying the new amount, without an amendment to the declaration, I would not have granted the amount of US$5 000.00. In the same breadth I will not award damages for the outstanding hospital bills of US$437.00 and US$650.00 for the two plaintiffs because they were not claimed in the summons and declaration. No application was made to amend the pleadings in order to include them. These monies were only mentioned for the first time by the plaintiffs during trial.

As for the child Odium Murapiro, I will grant her the amount of US$500.00 for the pain shock and suffering that she endured. Her jaws were injured, she bled from the mouth, and 4 of her teeth shook. Efforts to secure the teeth with a wire were futile and eventually the teeth fell off after 2 months. The child was traumatised psychologically. For some time she was afraid of boarding commuter omnibuses. For a 4 year old child the experience was horrific. She deserves the damages claimed as they are reasonable.

Conclusion

The defendants be and are hereby ordered to pay jointly and severally, the one paying the other to be absolved,

1. US$1 028.00 being damages for hospital expenses to the first plaintiff.
2. US$2 392.00 being damages for hospital expenses to the second plaintiff.
3. US$1 500.00 being damages for future medical expenses to the first plaintiff.
4. US$4 000.00 being general damages for pain, shock and suffering, loss of amenities of life and disability to the first plaintiff.
5. US$5 000.00 being general damages for pain, shock and suffering, loss of amenities of life and disability to the second plaintiff.
6. US$500.00 being general damages for pain, shock and suffering, to Odium Murapiro.
7. Interest on the total sum at the prescribed rate from date of judgment to date of full payment.

Nyikadzino, Simango & Associates, plaintiffs' legal practitioners

Uriri Attorneys-at-Law, defendants' legal practitioners