ROSS CONLON
versus
JUMP TRAMPOLINE PARK

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 30 September, 1,2,3,4 October 2024 & 11 November 2024

Ruling on Application for Absolution from the Instance

Mr *T Mpofu*, for the plaintiff
Mr *T Zhuwarara*, for the defendant

MUSITHU J: This judgement is rendered pursuant to an application for absolution from the instance made by the defendant at the close of the plaintiff's case in terms of rule 56 (6) of the High Court rules, 2021 (the Rules). The plaintiff is the father and natural guardian of Rebecca Nezuru Conlon (hereafter referred to as Rebecca or the child). The plaintiff issued summons against the defendant for the payment of the sum of USD$ 6 370 000 (six million Three Hundred and Seventy Thousand United states dollars) being damages arising from injuries sustained by Rebbecca (a minor at the material time) on 6 January 2023 at the defendant's Jump Trampoline Park (the Park). The plaintiff contends that the accident which led to those injuries was caused by the defendant's negligence. The plaintiff caused summons to be issued against the defendant claiming the following:

> "1. THAT Defendant be and is hereby ordered to pay to Plaintiff the sum of USD$ 800,000 (Eight Hundred Thousand United States Dollars) being damages for loss of current and future amenities that Plaintiff suffered as a result of Defendant's gross negligence.
> 2. THAT Defendant be and is hereby ordered to pay to Plaintiff the sum of US$ 500, 000 (Five Hundred Thousand Dollars) being damages for loss of professional earnings.
> 3. THAT Defendant be and is hereby ordered to pay to Plaintiff the sum of US$ 600,000 (Six Hundred Thousand United States Dollars as damages for the Plaintiff's loss of earning capacity.
> 4. THAT Defendant be and is hereby ordered to pay to Plaintiff the sum of US$ 170,000 (One Hundred and Seventy Thousand United States Dollars) as damages for Plaintiff's current medical and hospital expenses.

5. THAT Defendant pays to Plaintiff USD$ 1,800,000 (One Million Eight Hundred Thousand United States Dollars) as damages for Plaintiff's future medical and hospital expenses.
6. THAT Defendant pays to Plaintiff US$ 1,000,000 (One Million United States Dollars) being damages for pain and suffering.
7. THAT Defendant pays to Plaintiff USD$ 500,000 (Five Hundred Thousand United States Dollars) Being Damages for disfigurement.
8. THAT Defendant pays to Plaintiff USD$ 1,000,000 (One Million United States Dollars) being damages for plaintiff's shortened expectation of life.
9. THAT Defendant be and is hereby ordered to pay Plaintiff's costs of suit on the legal practitioner and client scale."

Background to the plaintiff's claim

The brief background to the claims is as follows. The defendant owns and operates a trampoline park for the entertainment of children and adults. On or about the 6th of January 2023, and in the company of her mother, Rebecca, visited the Park to enjoy the use of the trampoline facilities. Whilst enjoying the use of the said facilities, Rebecca fell from a height of about 3 metres through an unprotected open area adjacent to a series of trampolines, against a brick wall and then down onto a concrete floor, suffering severe injuries in the process. As a result of the mishap, Rebecca broke her neck and fractured her spinal cord.

The plaintiff contended that the mishap was caused by the defendant's breach of its duty of care towards his child and the defendant was negligent for the following reasons: It failed to inspect, repair and keep its equipment in good working order; it failed to ensure that its equipment had adequate safety measures which would protect children from and against any form of harm; the defendant failed to ensure the observance of general safety precautions that would have removed the plaintiff's child from harm's way; and that the defendant failed to fully and properly explain to the plaintiff or any of his representative and or the plaintiff's child the risks associated with partaking in its business activities.

After the accident, the plaintiff's child underwent an extensive operation at a local hospital and was eventually Medi-air-evacuated from Harare to Johannesburg for further treatment and rehabilitation. It was averred that as a direct result of the accident and the defendant's gross negligence in causing the same: the child was paralyzed and her injury was categorized as a severe C4 quadriplegic injury which affected her hands, trunk, legs and normal bodily function; the child required permanent care for twenty-four (24) hours a day and assistance with her daily living activities; the plaintiff's child required a powered wheelchair with specific controls to enable her

to move around on her own; the child also struggled to breathe on her own as she had suffered from a collapsed lung and required regular suctioning; the child could not control her bowel and bladder movements on her own and required permanent assistance in that regard.

It was also averred that the child was a gymnast who had suffered loss of current and future amenities estimated at US$800,000.00. As a national gymnast, she had also lost professional earnings estimated at US$500,000.00. At the time of the accident, the child was pursuing an academic career, an opportunity that was now lost. She was no longer able to undertake productive work and had therefore suffered loss of general capacity estimated at US$600,000.00. The plaintiff also incurred extensive medical expenses estimated at US$170,000.00. The child was required to undergo continuous international specialist rehabilitation and was likely to be in permanent need of a specialist doctor, physician, physiotherapist, a bio kineticist, as well as extensive rehabilitation, permanent catheters and constant medication. For that reason, she had suffered damages for future medical and hospital expenses estimated at US$1, 800,000.00.

<u>The Defendant's Plea</u>

In its plea, the defendant denied that it failed to inspect, repair and keep its equipment in good working order. It also denied that it failed to ensure that its equipment had adequate safety measures which would protect children from any form of harm. It further denied that it failed to ensure the observance of general safety precautions that would remove the plaintiff's child from harm. The defendant averred that the plaintiff's child had been warned against performing dangerous backflips prior to the accident on the day in question. The defendant denied that it failed to fully and properly explain to the plaintiff or any of his representative and to plaintiff's child the risks associated with partaking in its business activities.

The defendant admitted that the plaintiff's child had an accident at its facility and indeed suffered injuries. It, however denied having knowledge of the nature and extent of the injuries sustained. The defendant further denied having knowledge of the severity of the injuries, medical procedures that the child underwent and the kind of care that the child required now and in future because of the accident. The defendant denied liability and the resultant claims for damages and prayed for the dismissal of the claims with costs.

The agreed issues for trial were recorded in the amended joint pre-trial conference minute as follows:

- Whether the accident was as a result of the defendant's failure to ensure that its business equipment had adequate safety measures for children?
- What is the nature and extend of the plaintiff's daughter's injuries?
- What is the quantum of damages to be paid?
- What is the appropriate level of costs to be paid?

The Trial

At the commencement of the trial, a preliminary issue arose about whether the plaintiff's claim was founded on negligence or gross negligence. Mr *Zhuwarara* for the defendant observed that in his opening address, Mr *Mpofu* for the plaintiff had submitted that the claim was based on negligence. Mr *Zhuwarara* submitted that the plaintiff's prayer was predicated on a claim based on gross negligence. The defendant's plea was in response to a claim based on gross negligence. According to Mr *Zhuwarara*, the defendant reserved its rights to amend its defence to plead indemnity to the claim based on negligence.

In his response, Mr *Mpofu* submitted that the claim was based on negligence as was clear from the amended pre-trial conference minute. Further, paragraph 4 of the declaration pleaded the requirements of wrongfulness, while paragraph 8 made specific reference to negligence. Counsel further submitted that there was no need for the plaintiff to amend his claim to make specific reference to negligence when it was clear that the cause of action was based on negligence. At any rate, gross negligence did not constitute a cause of action under the Aquilian action.

Both counsels agreed that the matter should proceed as pleaded with the defendant reserving its rights to seek an amendment to its plea should that need arise.

The Plaintiff's Case

The plaintiff's case was based on the evidence of four witnesses. These were the plaintiff himself, Sharon Conlon, the plaintiff's wife, Doctor Nathaniel Zimani, a neurosurgeon and finally Rebecca Conlon the victim of the accident. The witnesses' evidence is summarized hereunder as follows.

Ross Conlon

He was the first witness, and his evidence was as follows. He and Sharon Conlon have been the child's legal parents after she lost her biological mother just ten days after her birth. The child showed signs of a great sports person from a very tender age. At 2 years of age, she was already practicing gymnastics as well as playing tennis. At 4 years she was already engaged in high level gymnastics. At the age of eight years, she had made it into the Zimbabwe gymnastics team and was able to compete with athletes two years her senior at the Zone 6 competitions, together with other competitors from Namibia, Botswana, Zambia and South Africa. At the age of 9 years, she became a national champion after winning a gold medal at the Kwazulu Natal championships. At the age of 10 years, she was scouted to join the South African gymnastics team. At the age of 11 years, she was considered one of the top gymnasts in Africa, and that recognition earned her a selection to train in Europe as part of preparations for the Olympics. The child was also described as an avid academic who excelled in school.

The witness described a Jump Trampoline Park as an enclosed space made up of multiple trampoline pits filled with form, which enabled one to jump from one trampoline to the next in a controlled environment. The trampolines were elevated at between 1.2 to 1.5 metres above the ground. From a stationary position, one could jump to a height of between 3 to 5 metres. From one trampoline to the next in a horizontal movement, one could attain a height of approximately 3 metres. The witness stated that the jump trampoline facility posed an inherent danger which required that safety precautions be in place to avoid any form of danger to participants. For that reason, there were safety nets that held the jumpers back to avoid a dangerous fall.

The witness was shown several photographs from the plaintiff's bundle of documents which depicted the setup of the trampoline park and the exact location of the accident scene. The child was performing horizontal flips when she flew through an opening where the safety net had been lowered, onto a concrete floor thereby breaking her neck and spinal cord. The witness stated that when he visited the park about 6 days after the accident, the safety net that was lowered at the time of the accident had been raised. He managed to record a video which captured some of the defendant's staff members explaining to him what transpired on the day of the accident. The two ladies that he spoke to expressed gratitude that the safety net had since been raised in order to avoid a similar mishap.

The witness averred that during his investigation, he noticed that there were some hooks along the wall which secured some harnesses. When the child flew through the empty space, she hit her head against the hooks before landing on the concrete floor. There was some blood on the floor which showed that the child was injured by the hooks before landing on the floor.

According to the witness, the park was a place of recreation and honing of skills by aspiring gymnasts. The park was therefore patronized a lot by children. As a parent, he released his children to take part at the facility knowing there would be protective measures in place to guarantee their safety. From his assessment, 95% of the trampoline was secured by high nets which guaranteed the safety of the children. The other 5% was not secured by high nets and this is the area that had metal hooks on the walls that were designed to secure harnesses. The hooks were not covered, and the walls were not padded leaving the children exposed to danger if they flew out through the unsecured area.

The unsecured area where the child flew through was made up of a concrete floor. This meant that the child fell from a height of about 2, 1 meters, which made her to break here neck and the spinal cord. The area covered in concrete could have been secured by a 25mm compressible cushion. The lowered nets compromised the safety of the children. According to the witness, from his experience with trampolines in other countries, there were always extra safety measures that were designed to protect the children from harm.

When the accident happened, the plaintiff was at home in Christon Bank. He immediately drove to the park, which is situated in the Pomona/Vainona area of Harare, after being informed of the accident. He found the child lying on the floor where she had fallen with a bandage to her head. The ambulance that had been summoned by the defendant's staff arrived at the park some 45 minutes later. According to the witnesses, there were CCTV cameras within the facility, and their legal team sought permission from the defendant's officials to view the CCTV footage. Instead of viewing the footage of the day of the accident, they were only shown footage which was a year-old judging by the clothes the child was wearing. The defendant's officials therefore deliberately concealed the CCTV footage for the day of the accident. That evidence would have revealed the position of the nets and how the accident happened.

The witness went on to narrate the events that unfolded after the child was referred to the Health Point where she was attended to by Dr Zimani, they also went to the Avenues Clinic for

purposes of having an MRI scan done on the child to assess the extent of the injuries. That procedure required about US$5, 000.00, which they had to run around to raise before the procedure could be done. That process took them about five hours before they returned to the Health Point Medical facility. Having noted the severity of the injuries, Dr Zimani recommended an immediate operation to decompress the child's spinal cord, as well as reconstruct the neck whose bones had been broken. For the operation to succeed about US$29, 000. 00 was required to cater for all the expenses related to the operation (US$17, 000.00 for Dr Zimani, US$8, 000.00 for the anesthetist and US$4, 000.00 for the extra medicals in the form of screws and plates required in the reconstruction of the neck). The operation itself took more than 8 hours complete.

The witness also told the court that the post operation rehabilitation services required the child to be evacuated to South Africa where she could receive further treatment and care that was not available locally. In South Africa they went to the Nedcare Rehabilitation Centre in Johannesburg where the child was detained for about 3 months. They also had to contend with a medical bill of about R 98, 000.00 per week.

The witness further narrated the further trips that they undertook to South Africa to get expert medical procedures and facilities to improve the welfare of the child as well as expedite her rehabilitation. The child was now in need of special care and attention and for that reason they also had to customize the home environment to take care of her special needs. The witness concluded his examination in chief by giving a rundown on the various amounts recorded on hospital invoices placed before the court. To enhance the child's life expectancy, there was need for the child to be relocated to another country where she could easily access medical facilities that were required to deal with her condition. Such facilities were not available locally. The witness professed ignorance about the contents of the indemnity form that they were required to sign at the trampoline park. He had also not seen the various notices placed on walls which set out the indemnity terms that supposedly protected the defendant from any liability arising out of its negligence.

Sharon Barbara Conlon

The second witness was Sharon Barbara Conlon, the child's mother. She is the one who accompanied the child to the park, together with her other two daughters on the day of the accident. Though she did not herself witness the accident, she was at the facility when it occurred. Her

account of the events that took place on the day in question was similar to that of the plaintiff. She was still at the reception completing the attendance register and waiting for the other group of kids to arrive, when the accident happened. The witness claimed to have signed a document containing some information, but she never had the chance to read through, and neither did anyone explain the contents to her. According to her own observations, the absence of a padding and the lowered safety net caused the accident that resulted in the injuries sustained by her daughter.

Dr Nathaniel Hamundigone Zimani

The third witness was Doctor Nathaniel Hamundigone Zimani, a neurosurgeon who has been in medical practice for 20 years. He gave his evidence as an expert witness. He was the first doctor who attended to Rebecca at Health Point Hospital in Harare following the accident. He explained his involvement in diagnosing the injuries suffered by the child, the nature of the operation to be carried out, and the post operation medical procedures, rehabilitation and the costs involved. The witness corroborated the evidence given by the plaintiff with reference to the injuries sustained and the nature of the future medical care required, and the likely costs involved.

Rebecca Conlon

The fourth witness was Rebecca Conlon, the plaintiff's child. Her evidence did not differ much from that of the first and second witnesses as regards the nature of her injuries, her lifestyle before the accident and after the accident. She also explained how the accident had completely shattered her dreams as an aspiring top gymnast. Apart from gymnastics she also had a hand in other sporting disciplines such as swimming, tennis, hockey, soccer and cricket, before the accident. She also had dreams to excel in academia, apart from honing a career in gymnastics. She was hoping to secure a scholarship to university to pursue a career in gymnastics or physiotherapy. The plaintiff's case was closed with the conclusion of her testimony.

The application for absolution from the instance

Mr *Zhuwarara* rose to apply for absolution from the instance at the close of the plaintiff's case in terms of rule 56 (6) of the Rules. That provision states as follows:

> "At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event his or her counsel on his or her behalf may address the court and the plaintiff or his or her counsel on his or her behalf may reply. The defendant or his or her counsel may thereupon reply on any matter arising out of the address of the plaintiff or his or her counsel."

Mr *Zhuwarara* submitted that the determining factor in an application of this nature was whether based on the evidence placed before the court at the close of the plaintiff's case, the court could or might find for the plaintiff. In so doing, the court was required to consider the plaintiff's evidence in the context of the pleadings before the court. Assuming that the plaintiff's case was founded on negligence as set out in para 8 of the declaration, counsel submitted that the plaintiff failed to lead evidence as regards the alleged failure to inspect the equipment. There was no evidence that the equipment was in a state of disrepair.

As regards the adequacy of the safety measures it was averred that the plaintiff's own testimony confirmed that the facility was 95% safe. There were cushions between the trampolines, and nets around the trampolines. The witness did not explain in what ways the safety measures were inadequate. Mr *Zhuwarara* submitted that the court ought to have been referred to the precise measurements of the height of the netting. What was presented to the court was laymen's evidence with no empirical backing on which no reasonable court could safely act upon. The circumstances could only be assessed based on measurements and not guesswork.

It was also submitted that the plaintiff failed to demonstrate that the defendant had not explained to the plaintiff's child and wife the risks attendant on partaking in the trampoline activities. The second witness had confirmed the existence of signs which she did not read. The first and second witnesses had also confirmed signing a document containing some terms and conditions. The two witnesses had also confirmed that there was always a person at the reception who could have explained the defendant's terms and conditions in case they had not seen them.

Mr *Zhuwarara* submitted that the plaintiff's claim was based on gross negligence as it appeared *ex facie* the summons and declaration. The evidence led for the plaintiff was concerned with negligence, yet the greater part of the claim related to gross negligence. No amendment had been made to the claim. It was further submitted that the court acting on the evidence led could not grant the greater part of the claim as it was predicated on gross negligence. The court could not ignore what had been pleaded as compared to what was claimed.

Counsel also submitted that most of the documents submitted on behalf of the plaintiff were from a foreign source and in need of authentication in terms of r 85 of the High Court rules, 2021, as read with s 13(2) of the Civil Evidence Act.[1] Some of the documents were computer generated, and their origin was doubted. All the documents that the plaintiff sought to advance its cause on were deficient, as there was no proof of how they were produced.

In reply Mr *Mpofu* submitted that the defendant's defence was simply that it was not negligent. The defendant had not pleaded contributory negligence nor *volenti non-fit injuria* nor indemnity. He further submitted that in view of the evidence pleaded and having regard to the adequacy of the claim, the evidence led ought to relate to the claim. The court did not assess the probability or evidence at the end of the plaintiff's case. The assessment of evidence occurred at the close of the entire case. According to counsel, the question to be answered was whether something had been said in support of the claim. He further submitted that the plaintiff's position was that the CCTV footage would help clarify what had transpired. The court therefore had to hear the defendant's explanation on the CCTV footage.

Counsel further submitted that the plaintiff's claim was founded under the Aquilian action. The plaintiff was required to establish and satisfy the requirements of a claim under this head which were: wrongful or unlawful conduct (based on an act or omission on the part of the defendant; financial loss occasioned by the said wrongful or unlawful conduct; such financial loss must have been inflicted intentionally or negligently; a causal link between the defendant's conduct and the loss. It was submitted that the defendant had a duty of care towards its patrons, as a matter of public policy. For the duty of care to be breached, the plaintiff was required to establish fault which could be based on negligence or intention. There was nothing in the fault requirement that was referred to as gross negligence. Gross negligence did not arise under the Aquilian action.

Mr *Mpofu* further submitted that what was pleaded by the plaintiff was the breach of the duty of care. If the allegations of evidence made by the plaintiff remained unanswered then the court might surely find for the plaintiff. For instance, there was the averment that had the defendant's officials inspected the facility, then they would have discovered that the lowered net posed a danger to the patrons. It was through the lowered net that the child fell and sustained injuries. Counsel further submitted that the reference to the 95% as the portion that was properly

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[1] [*Chapter 8:01*]

secured did not necessarily mean that the unsecured 5% portion absolved the defendant from blame.

Counsel further submitted that even if the unsecured portion was only 1%, still the exposure to danger remained unalleviated. The defendant was therefore required to come and explain why the nets was lowered in the first place. This was particularly so considering that: the height of the net was allegedly raised after the accident; there was video evidence showing the plaintiff speaking to the defendant's staff who confirmed that the net had indeed been raised; there were also allegations that there was no padding on the floor where the child fell.

Further, there was also evidence that the metal hooks were not padded. The child was impelled on the metal hooks suffering injuries to the head. Mr *Mpofu* argued that the averment that the child ought to have seen the lowered net was not a defence at this stage. The alleged failure to see an open net could best be tantamount to contributory negligence. It was not a defence that had been pleaded by the defendant. It did not defeat a claim under the Aquilian action. Damages were only lowered to the extent of the contributory negligence. Further, the court needed to hear the defendant's version of events before it could make its own assessment.

Counsel submitted that the alleged signs which stated the defendant's terms and conditions were of no consequence if at all they existed. Such signs did not warn of the lowered net, the unpadded hooks and the exposed concrete floor. The defendant was expected to come and speak to these issues. At any rate, the existence of the indemnity was not an essential requirement of the plaintiff's cause of action. It was not even the pleaded defence. The defendant had to prove that the plaintiff was aware of the indemnity clause.

Counsel also submitted that the assessment of damages was not a mathematical exercise that relied exclusively on documentary evidence. Without documentary evidence, the courts could still assess those damages. Concerning the documents that were allegedly not authenticated, Mr *Mpofu* argued that the documents did not need authentication. The defendant's counsel had used the documents and cross examined the plaintiff's witnesses on the same documents. One did not use the documents to make a point only to jettison them latter.

In conclusion, Mr *Mpofu* argued that this was not the kind of matter susceptible of absolution. The defendant had to come and rebut the material averments made against it by the plaintiff.

The Analysis

The courts in this jurisdiction and beyond have exhaustively pronounced time without number the test to be applied in applications of this nature. The test is whether there is evidence upon which a court, when applying its mind reasonably, could or might find for the plaintiff. In the old South African case of *Gascoyne* v *Paul and Hunter* 1917 TPD 170 at page 73 the test was laid down as follows;

> "The question therefore is, at the close of the case . . . was there a *prima facie case* against the defendant Hunter; in other words, was there such evidence before the Court upon which a reasonable man might, not should, give judgment against Hunter?"

In *Mazibuko* v *Santam Insurance Co Ltd and Anor* 1982 (3) SA 125 (AD) at 133, the court weighed in and held as follows at p 132H of the judgment:

> "In an application for absolution made by the defendant at the close of the plaintiff's case the question to which the Court must address itself is whether the plaintiff has adduced evidence upon which a court, applying its mind reasonably, could or might find for the plaintiff; in other words whether plaintiff has made out a *prima facie* case".[2]

The South African position of the law was cited with approval locally in the cases of *Lourenco* v *Raja Dry Cleaners & Steam Laundry Private Limited*[3] and *MC Plumbing (Pvt) Ltd v Hualong Construction (Pvt) Ltd*[4]. An application of this nature invites the court to decide on questions of fact without having heard all the evidence in the dispute between the parties. Such an approach places the court in an invidious position of having to make conclusions on disputed factual proportions having heard only half the story. It is for that reason that courts are slow to grant an application for absolution from the instance, being mindful of the need to preserve the right of a litigant to be heard before an adverse decision affecting their right is pronounced.

I need to dispose of an issue that arose at the commencement of the trial concerning the nature of the plaintiff's claim herein. Mr *Mpofu* submitted that the plaintiff's claim was based on negligence despite the allusion to gross negligence in the declaration. At any rate, under the Aquilian action no distinction was made between gross and ordinary negligence, with gross negligence being just negligence in an aggravated form. Mr *Zhuwarara* on the other hand argued

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[2] See also *Claude Neon Lights (SA)* v *Daniel* 1976 (4) SA 405.
[3] 1984 (2) ZLR 151 (S) @ pp156-158
[4] HH 88/15

that the claim was clearly based on gross negligence and the defendant had in fact pleaded to the claim as if it was based on that head. That submission also constituted part of the reason for seeking absolution by the defendant.

The plaintiff's claim was without doubt inelegantly made in the declaration especially considering the use of the words 'negligent' and 'gross negligence' interchangeably in the summons and declaration. That, however, does not detract from the fact that what is in substance before the court is an Aquilian action in which the plaintiff was required to plead negligence on the part of the defendant, as well as set out the particulars of such negligence in its claim. While paragraph 1 of the particulars of claim refers to gross negligence, the summons must in my view be read in harmony with the declaration for it is in the declaration that the particulars of such negligence are set out. Paragraph 4 of the declaration refers to the duty of care reposed on the defendant towards children that patronize the premises.

Paragraph 8 of the declaration sets out the material respects in which the defendant allegedly breached its duty of care and was consequently negligent. In my view, it is the breach of duty of care and the particulars of such negligence that founds the plaintiff's claim. I am also fortified in holding this view after a consideration of the defendant's plea. The nub of the defendant's plea, as captured in para 4 thereof, is a complete denial of the particulars of negligence as set out in para 8 of the declaration. It is in that paragraph that the defendant explains in greater detail its denial of the allegations of negligence as pleaded in the declaration. Nowhere in the plea does the defendant make any reference to the allegations of gross negligence. The averment that the defendant may have been prejudiced in its defence to the claim as it pleaded to gross negligence is without merit in the court's view. The substance of the plea is clearly a response to allegations of negligence.

The field of non-economic loss or non-patrimonial loss is without doubt one of the areas of the law that presents a legal conundrum for courts and practitioners of law alike, especially where a claim arises from bodily injuries arising from an accident such as the one in *casu*. Under the Aquilian action, the courts are required to find a convergence between law and medicine. This is because bodily injuries, pain and suffering, disfigurement and loss of amenities of life are terms that identify with the medical field. It is only those schooled in medicine that can define the extent of the impairment to which monetary value must be attached by the courts. The courts are

invariably required to stray into the field of actuarial science and economics. The focus of an Aquilian action is to compensate an injured party by restoring them to their pre-damaged state to the extent that this can be achieved through some monetary compensation.

For a plaintiff to succeed under the Aquilian action, they must be able to establish that: the defendant's conduct was wrongful or unlawful (in the form of an act or omission); such conduct must have led to financial loss; the defendant's conduct caused the loss intentionally or negligently; and that there is a causal link between the defendant's conduct and the plaintiff's loss.[5] From the evidence placed before the court, this court is satisfied that the plaintiff has established a *prima facie* case against the defendant. Granted, they may have been some imperfections for instance in the measurements concerning the height of the safety nets which were based on estimates. The mere fact that estimates were used cannot disable the court from interrogating the adequacy of the safety measures.

It is also instructive to note that part of the documents discovered by the defendant for trial purposes is the CCTV footage of 6 January 2023, being the date of the accident. The plaintiff claims that the defendant refused to avail the footage when a request was made before the institution of these proceedings. That evidence is obviously crucial for purposes of determining what exactly transpired on that day. It will assist in resolving the issue of the adequacy or otherwise of the safety precautions in place on the day of the accident. The defendant must therefore be given an opportunity to place that evidence before the court, which the plaintiff was denied.

The defendant created a potentially unsafe environment, and it owed its patrons a duty of care which required it to make certain that any foreseeable harm was minimized if not completely eliminated. The defendant must therefore be given an opportunity to explain the safety precautions that it put in place to eliminate accidents of the nature that befell the child. It must be recalled that at this juncture, the plaintiff is not expected to have proved his case on a balance of probabilities to succeed. All that is expected of a plaintiff is to make out a *prima facie* case, on the basis of which a court, applying its mind reasonably, might give judgment in his favour.

It was also submitted for the defendant that the plaintiff's first witness had confirmed that the facility was 95% secure, which attested to the satisfactoriness of the safety measures. However

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[5] *Nyaguse v Skinners Auto Body Specialists & Anor* 2007 (1) ZLR p 297: *Matewa v Zimbabwe Electricity & Distribution Company* HH 435/18

as correctly observed by Mr *Mpofu* in my view, that submission ignores the residual 5% which in the witness' view paused some danger. The court is not persuaded to accept that the admission that the facility was 95% safe necessarily translate to the adequacy of safety measures that would have removed the patrons from harm's way. The court must interrogate the defendant's conduct in the context of the dangers paused by that portion of the facility that was 5% insecure.

Mr *Zhuwarara* also pointed to some signs posted on the walls which warned participants of the dangers of partaking in the various activities at the facility. He also referred to the forms that the second witness admitted to signing. That form contained the terms and conditions of using the jump trampoline, as well as the clause that served to exclude the defendant's liability for injuries or loss caused by the defendant's negligence. The witnesses claimed to have been unaware of the said signs on the walls. They also denied that such warnings signs were ever brought to their attention at any stage before the accident.

While admitting having signed some forms each time she went to the facility with her children, the second witness professed ignorance about the exclusion of liability clause insisting the forms she signed had no such clause. In my respectful view, those averments require rebuttal by the defendant through evidence which demonstrates that it had done everything that was reasonably possible to inform its patrons of the dangers that were associated with the use of the jump trampoline. The court has also not lost sight of the fact that the defendant did not plead the existence of indemnity or exclusionary clauses in its defence. It simply denied being negligent. It has not amended its plea to plead indemnity in the main or as an alternative to the pleaded defence. The existence of the indemnity clauses arose during the cross examination of the plaintiff's witnesses

The other leg of the defendant's submission in support of the application for absolution concerned documentary evidence which was relied upon by the plaintiff. The argument was that the documents, being of a foreign source, were not authenticated in terms of the law pertaining to the adducing of foreign documents in evidence. During the trial, counsel agreed that because of the voluminous nature of the documents, they be globally admitted into evidence with their relevance being determined by the court at the conclusion of the trial and after counsels respective closing addresses. It was on that understanding that counsel for the defendant cross examined the witnesses on the same documents during the plaintiff's case. It is for that reason that I will defer

my ruling on the fate of the impugned documents to the main judgment after the conclusion of the trial.

In conclusion, it is the court's view that this is not the kind of matter that is susceptible of absolution. Once the plaintiff sets out a *prima facie* case which substantially satisfies the requirements of the Aquilian action, then the court must be slow in closing the door in the face of the plaintiff based on absolution. The courts have accepted that claims of this nature are prone to innumerable imponderables which require the court to assume so many roles for it meticulously deliver justice to the parties. I find the sentiments of the court in the case of *Griffiths v Mutual & Federal Insurance Company Limited*[6] very apposite in that regard. The court said:

> "In a case where there is no evidence upon which a mathematical or actuarially based assessment can be made, the Court will nevertheless, once it is clear that pecuniary damage has been suffered, make an award of an arbitrary, globular amount of what seems to it to be fair and reasonable, even though the result may be no more than an informed guess."

I am persuaded by the above dictum, and I find it befitting to the circumstances of the present case. While such an approach places the court in the unenviable position of being an expert in actuarial science or statistics, it is an approach which nevertheless commends itself as being desirable and necessary in such cases where the court is not concerned with a monetary debt, but the valuation of a non-economic loss.

It is for the foregoing reasons that the court determines that there is no merit in the application for absolution from the instance at the close of the plaintiff's case. The application must therefore be dismissed.

Resultantly it is ordered that:

1. The defendant's application for absolution from the instance at the close of the plaintiff's case is hereby dismissed.
2. The trial shall resume on dates to be agreed upon by the parties in consultation with the Registrar
3. Costs shall be in the cause.

[6] 1994 (1) SA 535 at p 546 para F-G

MUSITHU J: ………………………………………………

DLS Attorneys, plaintiff's legal practitioners
Atherstone & Cook, defendant's legal practitioners