

EVELYN MUCHABAIWA
vs
JOSEPH CHINHAMO
and
MAXWELL NCUBE

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 15 October, 2003

Mr *S P Mandizha* for plaintiff
Mr *S Karuwa* for defendants

SMITH J: On 12 May, 2001 the plaintiff (hereinafter referred to as "Muchabaiwa") was standing at the side of the road opposite Kuwadzana 4 shops when she was hit by a commuter minibus that was being driven by the first defendant (hereinafter referred to as "Chinhamo"). The minibus was owned by the second defendant (hereinafter referred to as "Ncube") who employed Chinhamo to drive the minibus and, at the time of the accident, Chinhamo was driving the minibus in the course of his duties. The defendants admit that Chinhamo drove negligently and that his negligence caused the accident. They pleaded, however, that Muchabaiwa was guilty of contributory negligence in that she did not try to jump out of the way or take any other avoiding action when the accident was imminent. Muchabaiwa was admitted to hospital. The injuries she sustained were a deep laceration about 6 cm long on the right side of her forehead above the eye and a depressed fracture of the frontal bone of the skull. A scan of the brain showed that there were blood clots under the fracture. The injuries left her with poor vision in the left eye. Muchabaiwa issued summons claiming from the defendants, jointly and severally -

- (a) special damages in the sum of \$41 855,90 for medical expenses incurred, with interest thereon at 30% per annum from 12 May 2001 to the date of payment; and

- (b) general damages in the sum of \$900 000, being \$800 000 for pain, suffering, disablement, disfigurement and shortened life expectancy and \$100 000 for future medical expenses, with interest thereon at 30% per annum from the date of judgment to the date of payment; and
- (c) costs of suit.

She also filed a report from a neurosurgeon which described the injuries sustained and stated as follows. All the injuries are permanent and/or have permanent effects. They may compromise life expectancy. Her general and physical health has been severely affected. When she was last seen by him on 29 January 2002 she could hardly walk without support and was incapacitated by chorea-like abnormal limb movement and titubations. She cannot take part in any recreational activities. Her pain and suffering has been severe and is likely to continue for an indeterminate period. Her future medical treatment will include pain killers, anti-depressants, muscle relaxants, drugs for abnormal body movements, tranquilizers and, if post-traumatic epilepsy sets in, anti-epileptic drugs. She may also need an operation to elevate the fractured frontal bone that is depressed. He assessed her percentage disability as being 15% for facial disfigurement and 50% for damage to the brain.

In her supporting affidavit Muchabaiwa said that she now spends most of her time in bed because she can hardly walk. She is of unsteady gait and can only walk very slowly with the aid of a walking stick, and then only for very short distances. She has tremors of the upper and lower limbs, particularly on exertion. She is having epileptic seizures, especially during the night. Her speech is slurred, slow and jerky. She was a keen gardener and used to till a small piece of land in Kuwadzana but now she no longer has the strength to walk for a distance of more than 6 metres without feeling pain.

Mr *Mandizha* submitted that the amounts claimed by Muchabaiwa as general and special damages are reasonable and in line with previous awards in analogous cases. As regards liability he submitted that at the pre-trial conference counsel for both parties agreed that the issue of liability was not in dispute since Chinghamo, who was an employee of Ncube at the time, had been convicted, after trial, of negligent driving. Mr *Karuwa* argued that the amount claimed as general damages was excessive. As was stated in *Minister of Defence & Anor v Jackson* 1990(2) ZLR 1 (S), general damages for personal injuries are not, and never will be, a penalty. They are compensation whereby the courts attempt to place the injured in the position he would have occupied had the wrongful act causing his injury not been committed, by awarding him a sum of money that will go towards alleviating his plight. Finally, he submitted that there was contributory negligence on the part of Muchabaiwa, in that she did not try to jump out of the way, and therefore her damages must be reduced accordingly.

At the pre-trial conference counsel for both parties agreed that the question of liability was not in issue. The question was merely one of quantum. Therefore it was agreed that both counsel would submit heads of argument and a determination made, based on the stated case. There is no evidence as to the actual accident. It was accepted, however, that it was the negligent driving of Chinghamo that caused the accident. In order to avoid a collision with another vehicle, he had to swerve to his left, encroaching over the broken yellow line at the side of the road where Muchabaiwa was standing, and knocking her down. Obviously the minibus he was driving was travelling at some speed, because he was unable to stop and had to swerve to avoid the car in front of him. Given those circumstances, it would be unrealistic to hold that Muchabaiwa was negligent because she did not try to jump out

of the way. Obviously everything happened very quickly and she had no chance to move before she was hit by the minibus. As Chinhawo is no longer employed by Ncube, and presumably cannot be traced, there would be no witness to support his statement that Muchabaiwa had acted negligently.

The injuries suffered by Muchabaiwa have been clearly described by the neurosurgeon, as has the degree of her pain and suffering. Her disabilities and loss of amenities have also been clearly set out. In *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199 WATERMEYER JA said -

"there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The amount to be awarded as compensation can only be determined by the broadest general considerations and the figure arrived at must necessarily be uncertain, depending upon the judge's view of what is fair in all the circumstances".

In cases seeking compensation for damages for pain, suffering, disablement, disfigurement and shortened life expectancy, comparable cases, when available, should be used to afford some guidance to assist the Court in arriving at an award which is not substantially out of accord with previous awards in broadly similar cases, regard being had to all factors which are considered to be relevant in the assessment of general damage - see *Protea Assurance Co v Lamb* 1971(1) SA 530 (AD).

However, in Zimbabwe at present, account need be taken of the horrific rise in the rate of inflation which is eroding the value of Zimbabwe currency. An award made a year ago for the same level of disability as the present one would not represent a true reflection of the award that should be made today - see *Mtewa v Tenda Transport (Pvt) Ltd & Ors* HH 89-2000. In *Mavela v Makoni & Ors* HH 119-01 a 53 year old lady was involved in an accident. She sustained a fracture of the left tibial plateau, damage to her knee ligaments and neck and chest injuries. Her degree of disability was estimated at 30%. The Court awarded general damages in the sum of \$180 000

for permanent disability, shock, pain and suffering. In *Chimutepe v Gwenzi* HH 161-01 an old lady suffered injuries to the head, multiple fractured ribs and deep abrasions to her right hand and to her back and buttocks. Her estimated disability was 16%. She was awarded \$60 000 as general damages for pain, suffering, loss of amenities and disability. In *Dimiyano v Masiyviva & Anor* HH 41-01 the plaintiff had lost the sight in one eye, which constituted a 30% disability, and was permanently disfigured in that she had paralysis of the left side of her face, her total disability and disfigurement was assessed at 50% by a neurosurgeon. The Court awarded general damages in the sum of \$120 000 for pain and suffering, loss of amenities of life and permanent disfigurement and disability. Finally, in the *Mtetwa* case, *supra*, where the plaintiff suffered two fractures of the right femur and compression of the fourth lumbar vertebra, together with severe pain, the Court awarded general damages in the sum of \$120 000 for pain, suffering, disfigurement and loss of amenities of life.

In this case, the level of disability of Muchabaiwa is very high. She is in almost continual pain and she is virtually bed-ridden. Her life expectancy has been reduced. She is unable to take part in any recreational activities. She is likely to need medication such as pain killers, tranquilizers and anti-depressants for the rest of her life. Her disfigurement and disability are much greater than is the case in the other cases I have cited and it appears that her pain and suffering still continues. As regards future medical expenses, the cost of medication at present is very high. The rate of inflation is expected to increase dramatically over the next six months and so medication is likely to be unaffordable for ordinary members of the public. Having regard to all the circumstances of this case, I consider that the claim for general damages is reasonable. As the cost of medical treatment supplied has been proved, the claim for special damages must be granted.

It is ordered that the defendants jointly and severally, the one paying the other to be absolved, pay the plaintiff -

1. special damages in the sum of \$41 855,90, with interest thereon at the rate of 30% per annum from 12 May 2001 to date of payment; and
2. general damages in the sum of \$900 000 with interest thereon at the rate of 30% per annum from 15 October, 2003 to date of payment; and
3. costs of suit.

Mandizha & Co, legal practitioners for plaintiff

Karuwa & Associates, legal practitioners for defendants