

MISHECK KWARAMBA
versus
ELLIOT DAVID CROUGH

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 20 March and 13 March, 2013

UNOPPOSED APPLICATION

F. Rudolph , for the plaintiff
Defendant in default

MAKONI J. The plaintiff instituted action proceedings against the defendant claiming delictual damages. The back ground to the matter is as follows. On 30 January 2010, the plaintiff and the defendant were driving their motor vehicles along Borrowdale Road. The motor vehicles were involved in a collision near Celebration Centre. The collision was caused by the negligence of the defendant in that he drove his motor vehicle without due care and attention to other road users. The defendant paid a fine as an admission of guilty.

As a result of the collision the plaintiff sustained an open fracture dislocation of his left ankle. He underwent surgery on the left ankle for the removal of the talus bone, in order to stabilize the ankle. He was hospitalized for two months. In the first two weeks of his hospitalization, he suffered extreme pain whilst recovering from the surgery. As a result of the surgery, his left foot is now shortened and will most probably have to be amputated. He suffers severe intermittent pain also involving his lower back. His disability was assessed at 35% by an orthopedic surgeon. He claims the sum of USD30.000.00 as damages for pain and suffering.

The defendant's insurer paid for all medical expenses up to the date of instituting the action. He was advised by the surgeon that he will need further surgery to fuse his ankle with bone graft. He will require anesthetics, medication and rehabilitation for the surgery. He will

necessarily have to pay hospital fees for the duration of the surgery. He claims the sum of US\$5 000.00 for future medical expenses.

The plaintiff is now permanently disfigured. He can no longer run or play sport. He can only do sedentary duties. As a result, he claims the sum of \$5 000.00 for damages for loss of amenities of life and disfigurement.

Pain and suffering

In making an assessment for damages for pain and suffering, the prime considerations are the duration and intensity of pain. These factors will turn upon the nature of the injuries, the medical evidence and the general circumstances of the case. The test is a substantive one. See *G. Feltoe: A Guide to the Zimbabwean Law of Delict*, 3rd Edition page 93.

The other guidelines to consider in assessing such damages were enunciated in *Minister of Defence & Anor. v Jackson* 1990 (2) ZLR 1 (SC) at 8 A – G. These include:

- (i) that since there is no scale to measure pain and suffering, the quantum of compensation can only be determined by the broadest considerations;
- (ii) that the court has a duty to heed the effect the decision may have upon the course of awards in future
- (iii) that no regard is to be paid to the subjective value of money to the injured person;
- (iv) considerations of awards in other jurisdictions such as Britain and South Africa might not be an appropriate guide since conditions in those jurisdictions, both political and economic, are so different.

See also *Gwiriri v Highheld Bef (Pvt) Ltd* 2010 (1) ZLR. It also examined the principles to be considered in assessing damages. The case will also assist in the assessment of the quantum *in casu* as it is one of those cases decided after the introduction of the multi-currency regime. In that case, the plaintiff, an employee, was injured on his right hand during an accident at work. The plaintiff went through excruciating pain as his hand was crushed by the rollers. He was hospitalized from 20 April to 4 September. He suffered pain when in hospital. The pain and discomfort continued after his discharge. He was awarded \$3 000.00.

In *Trevor Simbanegavi v Officer Jari* HH 40/13. I had occasion to deal with an unopposed motion where the plaintiff was claiming delictual damages. The plaintiff was shot several times at his legs by the defendant. He sustained numerous injuries which resulted in the above the knee amputation of his left leg. He endured and still endures excruciating pain. He was taken to hospital several times after the shooting. I made an award of \$10 000.00 for pain, shock, and suffering.

In casu, the plaintiff sustained an open fracture dislocation of his left ankle. He underwent surgery to correct it. He was hospitalized for 2 months. According to the evidence by an Orthopaedic Surgeon, he suffered extreme pain in the first 2 weeks of his hospitalization. As a result of the fact that his foot is shortened, he suffered severe intermittent pain also involving his lower back. He takes regular pain killers. Without further surgery he will need pain killers for the rest of his life. He will suffer the pain again when he undergoes future surgery.

It is not in dispute that the plaintiff sustained very serious injuries. He underwent surgery to correct the fracture to his foot. He will require future surgery. He suffered extreme pain and continues to suffer pain. Looking at the above cited cases my view is that an award of \$15 000.00 is fair compensation to the plaintiff.

Special damages

The medical expenses that the plaintiff incurred to date of issuance of the summons were met by the defendant's insurers. He will need further surgery costs in the form of surgery, anesthetic, rehabilitation, medication and hospitalization. His surgeon estimated that he might require approximately \$6 000.000. The plaintiff claims \$5 000.00 for future medical expenses.

Disfigurement and loss of amenities

Disfigurement includes bodily disfigurement such as scars, loss of legs, facial and bodily distortions, limitations of amenities of life by permanent or temporary disabilities include impairment of loss of ability or desire to engage in sport, recreation, social commitments or other normal amenities. It would include such things as sexual impotence, sterility, loss of marriage opportunities, loss of general health, change of personality and the general handicap of a disability. See *Feltoe supra* at page 94.

In *Gwiriri supra* CHITAKUNYE J. stated;

“The concept of loss of amenities is not an exact concept. In *Administrator General, South West Africa and Others v Knel* 1988 (3) SA 275 A at 288 D – G HOEXTER JA had this to say about this concept;

“The concept of loss of amenities of life has been tersely but aptly defined by Lord Divon in *H West & Son Ltd v Shepherd* (1963) 2 ALL ER 625 (HL) at 636 G – H as
“a diminution in the full pleasure of living

In casu the plaintiff is 33 years old. Hitherto, he was a fit and able bodied male adult. Now he is permanently disfigured. His disability has been assessed at 35%. He will never

walk comfortably again. His leg is scared, shorter, turned inwards and pointing downwards. He cannot run or play casual soccer which he used to enjoy. He can only engage in sedimentary duties.

It is my view that the figure of \$5 000.00 that he claims will be fair compensation for the disfigurement and loss of amenities.

In the result I will make the following order:

- (1) the defendant is ordered to pay the plaintiff the sum of –
 - (a) \$15 000 being general damages, for pain and suffering
 - (b) \$5 000 being special damages
 - (c) \$5 000 being damages for disfigurement and loss of amenities
- (2) The defendant to pay plaintiff's costs.

Scanlen and Holderness, plaintiff's legal practitioners