LEE ODENDAAL
versus
INN ON THE RUPARARA

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 30 and 3 January 2006

Civil Trial

Mr *Anderson*, for the plaintiff
Mr *Paul*, for the defendant

BHUNU J: The plaintiff issued summons against the defendant claiming damages in the sum of $900 679 549.87 arising from a horse riding accident on the 5th of November 2000.

The plaintiff sustained serious injuries of the head and torso. She is now confined to a wheel chair.

The facts leading to the terrible accident are however not in dispute.

The undisputed facts are that the defendant runs a hotel in Juliasdale Nyanga. A separate company Rupurara Trout Farm (Private) Limited also runs a horse riding club in the vicinity and environs of the hotel.

The two entities and businesses are separate and distinct save that they are complementary in offering accommodation and recreational facilities to tourists.

The plaintiff and her husband checked in at the defendant's hotel on the 2nd of November 2000 and were due to depart on the 5th November 2000.

Upon checking in into the hotel the plaintiff's husband filed in a Standard form contract with a disclaimer clause which reads:-

"I AGREE TO THE FOLLOWING CONDITIONS:

> It is the express condition of your occupation of or visit to these premises that the proprietor is not responsible for loss or damage to property of any visitor which is or may be brought upon these premises arising from fire, theft or otherwise by whomsoever caused or arising negligence from or wrongful act of any person in employ of the proprietor. Money, or valuables may be handed in to the proprietor for custody when a special receipt will be issued accordingly.
>
> Any activity is potentially hazardous and it is essential that all lawful directions and advice of management be followed. The hotel accepts no responsibility for any illness,

accident or loss whatsoever incurred in the course of the above activities or for any expense from such illness, accident or loss."

On the date of departure being the 5th of November 2000 the plaintiff's husband as fate would have it went for trout fishing whereas the plaintiff proceeded for horse riding.

Within the vicinity of the stables there are prominent warning signs admonishing would be riders that horse riding is at own risk.

Although the plaintiff has no independent recollection of the signs she acknowledged that there must have been such signs as this is standard practice and she must have read them.

At the stables the plaintiff was assisted by Mr Soltau the Estate Manager Rupurara Trout Farm. Upon questioning she assured Mr Saltau that she was an experienced horse rider. She had gone to a horse riding school and had horses on her farm.

She chose a horse by the name Fleck. She mounted the horse with competent dexterity demonstrating that she had the necessary skill and experience in riding horses.

Mr Soltau escorted her riding a separate horse Merlin. The two then went out horse riding in an area which to her knowledge was infested with wild animals. She had previously been told during casual talk that a leopard had eaten a foal somewhere in the paddock where the horses were kept.

In her own words this is what she had to say:-

"The name of the horse was Fleck. The manager asked me if I had horse riding experience. We set off at about 9.30 – 9.45 a.m. It was a physical horse. It always wanted to run and be in the front. I was fine. I had to keep wide awake and hold the reigns. I was quite nervous. Prior to this I had had no problem in controlling a horse.

Mr Soltau was with me riding his own horse. He was the manager. A lot of the time was in front.

I was riding on a path. Mr Soltau was directly behind me. From a walking pace the horse suddenly galloped. It volted. I just could not control the horse. At full gallop it turned a corner and I nearly fell off. It was also going towards a tree at the right side of the path. It shyed to the left a little bit. I hit my head against the tree and I fell.

I think something must have frightened the horse. I didn't see anything myself. It was said after the accident Mr Soltau had seen a movement in the bushes. It was suggested it could have been a leopard though no animal was identified.

There was definitely something that frightened the horse to just bolt, but I did not see anything.

I had a spinal code injury. I broke 2 vertebrates.

I was never warned that it could be dangerous to go horse riding in that area where there were wild animals. I did not regard the mention of a leopard eating a foal as a warning. This was just mentioned in passing.

The manager's horse also bolted. My horse bolted first."

Under cross-examination the plaintiff agreed that she was familiar with the terrain. She was aware that the area was infested with all sorts of wild animals, birds and snakes. She was aware of the presence of dangerous wild animals in the vicinity such that she needed no warning of their presence.

The questioning progressed as follows:-

Q. You are familiar with the practice of hotels of disowning liability when you sign in.

A. Yes.

Q. You are familiar with the effect that guests take the risk.

A. Yes.

Q. Confirm this document was signed by your husband (reads)

A. Yes confirmed (produced and marked exhibit 1)

Q. You admitted you were at risk, why bring this case-

A. Does it also cover the farm?

Q. <u>You were an experienced horse rider, you knew all these things, you took it upon yourself.</u>

A. <u>I did</u>.

Q. Why are you suing you have admitted that you must have seen the signs and read them.

A. It was a traumatic experience.

Q. <u>Whom are you suing? The Inn Group which has nothing to do with the control of the farm.</u>

A. <u>Yes.</u>

Q. The horse was acquired from a farm in the area in 19988. It was so patient and gentle a 3-year-old could ride it. The groom was employed in 1988 he was therefore experienced.

A. Yes.

Q. Shows discipline.

A. Yes

Q. Quiet and disciplined on the part of the horses.

A. Yes.

Q. Can you suggest any fault or negligence.

No.

Q. Have you ever made any such suggestion.

A. No.

Q. you don't say they misled you.

A. No.

Q. You are saying the horse is very frisky.

A. Yes.

Q. Why should the horse have behaved differently with you.

A. Something definitely scared it.

Q. What spooks a horse.

A. When a log blocks its way. Something out of the ordinary.

Q. A horse does not do that out of perversity.

A. No.

Q. It might be the smell of an animal.

A. Yes it might be the scent of a dangerous animal.

Q. That is self preservation, a horse does not wait to find out.

A. Yes.

Q. You accept that the horse did not suffer from any perversity

A. Yes

Q. It was spooked or scared by some extreneous thing.

A. Yes."

I have attempted to quart the plaintiff's evidence extensively so as to put her evidence in its correct and accurate perspective.

The plaintiff admitted that she cited the wrong defendant. This has prompted her to seek an amendment correcting the citation of the defendant. It is an established fact beyond question that the defendant Inn on the Rupurara is a separate and distinct legal entity from Ruparara Trout Farm (Private) Limited. The cited defendant does not own the horse in question neither do they

have any control over the horse. That being the case they are not accountable for the horse's behaviour on the day in question.

Despite the plaintiff's acknowledgement that she has in error cited the wrong defendant she has not seen it fit to withdraw her claim against the defendant and proceed against the correct adversary.

In the circumstances of this case, I would agree with Mr Paul that what the plaintiff is seeking is a substitution of one defendant with another unrelated defendant and not an amendment. Such a procedure is incompetent. In my view the plaintiff should have sought jointer of the other defendant or withdrew the proceedings altogether and started afresh citing the correct defendant.

The proposed amendment is prejudicial to the alleged correct defendant Rupurara Farm (Private) Limited in that it took no part in the initial proceedings and pleadings. That being the case the application for an amendment cannot succeed.

Just in case I might be wrong in this regard, I proceed to determine the matter on the merits.

The plaintiff's claim is grounded in the pauparian action. That action is based on damage or harm done by a domesticated animal where noone is to blame. The nature and limits of the claim are summarized in the leading case of *O Callaghan v Chaplin 1927 A D 310.*

According to *Neethling Potgieter Visser, Law of Delict 2nd Edition pages 343-346* for the plaintiff to succeed she must establish:

1. That the defendant was the owner of the animal when damage was inflicted.
2. That the animal which inflicted the damage is a domestic animal.
3. That the plaintiff was lawfully present at the location where damage was inflicted.
4. That the animal acted *contra naturam sui generis,* that is to say contrary to its nature or class.

   From an objective point of view the animal must have acted contrary to what may be expected of a decent and well behaved animal of its kind.
5. The animal must have caused the damage spontaneously from an inward excitement or vice.

Having said that the learned author makes it clear that the animal does not act contrary to its nature if it is reacting to external stimuli.

The defences open to the defendant can be summarized as follows:

1. Vismajor
2. Culpable conduct on the part of the injured person or a third party
3. Provocation by another animal.

The above defences exclude liability because they establish that the animal did not act from inward excitement or vice and therefore did not act *contrta naturam sui generis*

The defence of voluntary assumption of risk is also available to the defendant.

Now applying the law to the uncontested facts of this case as given by the plaintiff

The facts established that Fleck, the horse allocated to her was a docile well behaved domesticated animal. Right from the onset she took a calculated risk. She appreciated and acknowledged that she was ridding the horse at her own risk.

The plaintiff knew that the area where she went ridding was infested with dangerous animals, birds and snakes such that she needed no warning. She was aware that a wild animal had previously killed and eaten a foal in the paddock where the horses are kept. She must therefore have appreciated that, that event could have unsettled the horses and made them extremely nervous.

Having noticed at some point that the horse was rather frisky and uncomfortable she negligently did not relent but persisted with the ride.

In her evidence she was certain and adamant that the horse was reacting to external stimuli either a wild animal or the scent of such animal. In her own words the horse only bolted because it was spooked.

She accepted that it was the nature of a horse to bolt when spooked for the sake of self preservation. Having said that she was unable to attribute any fault or negligence on the part of the horse owner.

It is therefore self evident that although the plaintiff was seriously injured her evidence falls far too short of establishing any liability on the part of the horse's owner based on the pauparian action or fault attributable to the owner. That being the case there is no point in putting the defendant on its defence.

In the result it is ordered:

1. That the application for amendment to incorporate Rupurara Trout Farm (Private) Limited as a party to these proceedings be and is hereby dismissed.
2. That the court hereby retains a verdict of absolution from the instance.

3. That the plaintiff shall bear the costs of suit.

Wintertons, the plaintiff's legal practitioners.

Atherstone and Cook, the respondent's legal practitioners.

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