MATTHEW MBUNDIRE

versus

TYRONE SIM BUTTRESS

HIGH COURT OF ZIMBABWE

CHATUKUTA J

HARARE 7-10 & 15 October 2008 & 16 April 2009

Civil Trial

Mr Pasirayi, for the plaintiff

Mr Mehta, for the defendant

CHATUKUTA J: At the conclusion of the trial, I directed that the parties file closing submissions by close of business on 31 October 2008. The plaintiff filed his submissions timeously. Despite numerous reminders to the defendant's counsel, the defendant did not file his submissions. I have therefore proceeded to prepare my judgment without the benefit of his submissions.

Background

The following is the background to the matter. The plaintiff issued summons on 10 July 2007. The summons were amended on two occasions. The last amendment was by consent at the commencement of the trial. The plaintiff was claiming damages in the sum of:

(a) $1 billion for pain and suffering, disability, bodily disfigurement, shock, discomfort, loss of amenities of life and shortened life expectancy;

(b) US$8 000 for pecuniary loss of a motor vehicle, a Nissan Sunny and interest thereon at the prescribed rate from the date of summons to the date of payment;

(c) $1billion and US$5 000 in respect of estimated future medical expenses and interest thereon at the prescribed rate from the date of summons to the date of payment;

(d) $700 576 793.45 and US$4 104 in respect of medical expenses incurred by the plaintiff and interest thereon at the prescribed rate from 6 May 2008.

(e) $10 trillion (old currency) being travelling expenses to and from physiotherapy sessions.

The claim arose from the accident which happened at the intersection of Breach Road and Kingsmead Road, Borrowdale, Harare on 23 July 2006. Both parties were driving. The plaintiff was severely injured. The plaintiff attributed the cause of the accident to the sole negligence of the defendant which the defendant in turn totally denied. The plaintiff alleged that the defendant drove at an excessive speed, a vehicle with faulty brakes and without his lights on. He failed to give way at an intersection controlled by a give way sign and failed to stop or act reasonably when an accident seemed imminent. On the other hand, the defendant attributed the accident to a sudden brake failure.

Issues for determination

Two issues were referred to trial. The first issue is whether or not the cause of accident was a sudden brake failure. If the court were to find that it was not, the second issue is whether or not the plaintiff is entitled the quantum of damages claimed.

As the defendant had pleaded that the accident was as a result of a sudden brake failure, there was a presumption of negligence. Although the burden of proving negligence remains with the plaintiff, the defendant was expected to give an explanation which negatives the probability of negligence on his part. As stated in *South African Motor Law,* Cooper and Bamford 1st Edition, at p 649,

> "In many cases where a mechanical defect is advanced as a defence the circumstances of the collision raise an inference of negligence *–res ipsa loquitur*- which calls for an explanation from the defendant."

The defendant, in addition to showing that the collision resulted from a mechanical defect in his vehicle, was required to show that the defect in question was unknown to him and that through the exercise of reasonable care the defect would not have been discovered. (See Cooper & Bamford, *supra*, at p650).

Defendant's case

Defendant's evidence

The defendant testified first. The following is his evidence. Prior to the accident he was at home. He lived in the vicinity of the scene of the accident. At about 2210hours, he got into his vehicle to go and drop off his cousin, Dexter, near Sam Levy Village, Borrowdale. He was accompanied by his friend Michael Snape.

The vehicle had been purchased for him two years before the accident for his 16th birthday. He however only got it a year later. He had used it for eight months and it was sent to Fasfit for service. The service included a new gear box, panel beating and re-spraying. He had used the vehicle for ten days before the accident and had not noticed any problems with the brakes. The person who had repaired the vehicle had relocated to Australia and he could not get a report of the repairs that had been effected on the vehicle during servicing.

There were a lot of potholes on the road and as a result he was driving slowly at a speed of 70km/h. He was driving along Kingsmead Road. The street was not lit. Therefore as he proceeded towards the intersection with Breach Road he put the gear into neutral and started freewheeling when he was between 125 and 150m from the intersection. He was travelling at about 65km/hr. As he saw the intersection, he knew that he was obliged to give way. He was about 60 to 50 meters from the intersection when he applied his brakes. He then realized that he was not slowing down. He stamped on the brakes. He thought there might be a leak of the brake fluid. He therefore pumped the brakes in the hope that they would work. The car did not slow down. He saw the plaintiff's vehicle also entering the intersection. They entered the intersection at the same time. He could not stop as his brakes were no longer working. He then collided with the plaintiff.

Following the impact, the plaintiff's vehicle did a 180º spin. His vehicle hit a lamp pole, which was 12 to 15 meters from the intersection and faced where he was coming from. His headlights were on. He explained that his vehicle has what are called flat lights. These are lights that fold in when the engine stops running. When the engine is on, the lights open up. The defendant testified that his lights were still facing up after the accident. Both the plaintiff's vehicle and his were extensively damaged.

He testified that he paid a fine for driving a vehicle without brakes. This was at the instance of his aunt and father. However, under cross examination he testified that he did not have a clear mind at the time when he paid the fine.

I found the defendant did not fare well both in his evidence-in chief and under cross examination. He contradicted himself in material respects. He testified in his evidence that he knew that the intersection was controlled by a give way sign against him and he was obliged to give way. He said:

> "I tried to put on brakes and I saw that they were not working about 50 to 60m before the intersection. I knew that a state of emergency had occurred as I had an obligation to give right of way. ……
>
> As I came closer to the intersection, at about 150m, I took my car out of gear and freewheeled towards the give way as I could not identify where the intersection was. 60m from the give way, I started applying brakes. I noticed that they were not working."

After a lunch break, the defendant came back with a changed story. He testified that the plaintiff is the one who was supposed to have given him way. However under cross examination he reverted to the original testimony that he knew that there was a give way sign. When he was asked under cross examination whether or not he was familiar with the road signs at the intersection, he stated that:

> "I knew that there was a give way but there were no road markings and the road sign was across the road."

It is clear from the evidence that the new story after the lunch break was a fabrication intended to evade the truth and mislead the court. It is my view that the defendant was therefore not a credible witness.

Michael Mukombami's evidence

The defendant called two witnesses. The first witness was Michael Mukombami. At the time of hearing he was the Acting Senior Vehicle Inspector. He had been in the employment of the Vehicle Inspection Department for 13 years since 1985. One of his duties was to examine vehicles involved in road accidents. He examined the defendant's vehicle following the accident and issued the notice prohibiting use of vehicle in the plaintiff's bundle of documents marked as Exhibit G. He examined all the systems and the body of the defendant's vehicle to assess the damage and the cause of the accident. It was his finding that the front of the car was extensively damaged. He could not state whether or not the lights were on prior to the accident because of the extent of the damage and because the headlights were crushed. He found that there was no brake fluid in the master cylinder. The right front brake hose had separated leading to fluid leaking. He concluded that the hose separated as a result of the impact of the accident. This conclusion was based on the fact that the hose was still wet from the leaking oil. The inspector disputed the assertion by the defendant that the brakes had failed before the accident. He testified under cross examination that the nature of the damage to the defendant's vehicle showed that the vehicle had been travelling at a very high speed.

The witness gave his evidence well. The plaintiff's counsel did not need to cross examine the witness to great lengths. He was an independent and credible witness who corroborated the plaintiff's case as will appear later in the judgment. I preferred his evidence to that of the defendant. I am guided by the decision in *Motor Vehicle Assurance Fund v Kenny* 1984 (4) SA 432 (E) where it was held that expert evidence can be preferred where the direct evidence of eyewitness of a collision is not credible.

Michael Snape's evidence

The second witness was Michael Snape. He was seated in the front passenger seat when the accident occurred. He was talking to Dexter who was seated at the back. He had not been paying attention to what was happening in front as he was leaning over taking to Dexter. He however at one stage noticed that the defendant was "stressing and was stamping his foot". It was apparent to him that the brakes had failed. By the time he turned his head from Dexter who was seated in the back, the accident had already

happened. He assumed that vehicle was in neutral because it was not accelerating. He could not confirm if the defendant was indeed in neutral. He confirmed under cross examination that he could not conclusively say that the brakes failed.

This witness's evidence was full of assumptions. He had not been paying attention to the defendant's manner of driving as his attention was directed at Dexter who was seated in the back. He could not conclusively state that the brakes had failed. He testified that he noticed that the defendant was having problems with his brakes when they were 200m from the intersection. The defendant put it at 60m. It was not clear how he would have estimated the distance when he was concentrating on Dexter. Not much credence can therefore be given to most of his evidence. However, he was conclusive that the plaintiff was already in the intersection when the accident occurred. This contradicted the defendant's evidence that the parties entered the intersection at the same time.

Plaintiff's case

The plaintiff's version of the accident was as follows. He testified that he had lived in the neighbourhood of the scene of accident for 12 years. He was familiar with the intersection where the accident occurred. He had been travelling along Breach Road in an easterly direction. The road had not been repaired for over five years and was full of potholes. He was therefore driving slowly. When he got into the intersection with Kingsmead Road, he was suddenly hit on the right driver's side by the defendant's vehicle. The defendant had been driving along Kingsmead in a northerly direction. The impact caused the front wheels of his vehicle to get off the ground. His vehicle rolled twice. He was thrown out of the window. He hit against a durawall. His vehicle hit a ZESA pole some distance away and across Kingsmead Road. The accident happened so suddenly that he could not react. The defendant did not have his lights on otherwise he would have noticed him and taken corrective measures. There was a give way sign against the defendant. It was his evidence that the defendant must have been moving very fast to cause his vehicle to roll over as it did and for him to be thrown out of the vehicle. He testified that even if the defendant's vehicle had working brakes, he could

still not have stopped the vehicle from hitting into him because of the high speed he was travelling at.

The plaintiff sustained severe injuries. He was taken to Parirenyatwa Hospital. He was in a coma for a week. Thereafter he was in the High Dependency Unit for another seventeen days. He spent seven and a half months in St Giles Rehabilitation Centre. The total period of hospitalization was about one and a half years. He was placed under Professor Kalangu's care. He produced a report by the Professor on the extent of his injuries. The following is the full text of the report by the Professor dated 12 November 2007:

> "This is to certify that the above named is under my care since 24-07-06. Patient was apparently involved in a Road Traffic Accident on 06/05/2006 in which he sustained complete paralysis of the left and complete paralysis both lower limbs. This motor impairment to upper limb due to major destruction of the brachial plexus (Brachial plexus is a structure made by the nerves which supplies power and sensation to the upper limb) and by compression of the spinal cord for the lower limbs. Patient's conscious level was normal (15/15). Radiological investigations revealed: fracture of the left clavicle, fracture of the spine in C5 and C6 and MRI revealed a dislocation of the vertebra in C5-6 associated to spinal cord compression.
>
> Patient was taken to the operating theatre on 29/07/2006 and spinal cord decompression + fusion were carried out. Post operatively, patient made slow but significant recovery. Currently, he still has weakness of the forearm and arm on the left side. Moreover, patient suffers now from pain which we call in neurosurgery phantom pain and is typical of this type of lesion.
>
> This patient will unfortunately have pain for a long time and another operation for this purpose is not excluded. In the meantime, patient requires a lot of physiotherapy. Mr. Mbundire is walking now on his own.
>
> His percentage of disability is 60%.
>
> If you require any further information please do not hesitate to contact me.
>
> Yours truly,
>
> Prof. K. K. N. KALANGU
> Neurosurgeon."

(The plaintiff produced a report dated 20 June 2008 whose contents are identical to the above except that it was signed by someone else on behalf of the Professor.)

The plaintiff produced another report by Professor Mielke of the Clinical Neurophysiology Laboratory, Parirenyatwa Hospital, Harare, dated 11 December 2006. The report reads:

> "Clinically he has weakness of all the muscle groups in the left arm, with no movement in shoulder and elbow muscles.
>
> There is no sensory loss.
>
> EMG today shows active denervation as low at T1, which is much more consistent with a brachial plexus lesion than a spinal injury: the upper plexus is seriously injured with no sign of recovery at present, but the lower plexus should show good improvement.
>
> I would recommend repeat studies in six months."

Before the accident, he was in charge of sport and discipline at St Johns College, Borrowdale. He used to jog a lot. He used to referee rugby matches. He was responsible for rugby, swimming, hockey and athletics and all these activities required that he be fit at all times. He could play social soccer, rugby, and cricket. He cannot participate in all these activities any more. Of particular concern was the adverse effect of his injuries on his relationship with his daughter who does not understand why her father can no longer do the activities he used to do before the accident.

The plaintiff gave his evidence in a clear manner. He withstood cross examination well. He was a credible witness.

LIABILITY

Faulty brakes

The Acting Chief Vehicle Inspector contradicted the defendant's assertion that the accident was as a result of a sudden brake failure. The defendant had testified that at about 150m from the intersection, he began freewheeling by putting his vehicle into neutral so as to slow it down to a gradual halt. He denied under cross examination that he adopted this manner of driving because he knew that his brakes were defective. The defendant did not proffer any other explanation as to why he was freewheeling in order to slow down his vehicle instead of using his brakes. Had his brakes been working, there would not have been any need for him to slow down or bring his vehicle to a halt by freewheeling. It appears to me that the only reasonable explanation that can be inferred

from his conduct is that he was aware that his brakes were defective and therefore had to find other ways of slowing down his vehicle. In any event, it appears that the evidence that he was freewheeling cannot be sustained as, rather than reduce speed, freewheeling is generally engaged in order to maintain speed. Speed would have been reduced with engaging in lower gears.

This is supported by his admission of guilt to driving a vehicle with faulty brakes. The admission of guilty, duly signed by him, raises the presumption that the defendant was aware at the time of accident that his brakes were defective. The defendant contradicted himself on why he signed the admission of guilt form. In his evidence-in-chief he testified that he signed because he was advised to do so by his father and aunt. However, under cross examination, he testified that he was fully aware of his actions when he appended his signature. However, he changed his story and stated that he thought that he was signing to acknowledge that the brakes had failed at the time of accident. He, however, turned round and testified that he did not have a clear mind of what he was doing. He signed the admission of guilt seven days after the accident. Had he signed immediately after the accident, then his explanation could have been reasonable. Further, he had counsel from two adults with his interest at heart, his father and aunt.

It was the defendant's evidence that his vehicle had undergone repairs in mid July, just before the accident happened. The vehicle was repaired by Fasfit. The defendant did not produce any evidence of the repairs that were undertaken. This would have assisted him in showing that he would not have been aware that the brakes were defective. The defendant did not give any explanation why he did not have any documents from the garage. He did not indicate that the garage had closed down when the person who repaired his vehicle relocated to Australia such that he could no longer have access to the records of the garage on the repairs that had been effected.

It is my view that the defendant failed to show to the court that his brakes suddenly failed and that he was not aware of the faulty breaks before the accident happened. In fact, the evidence of the Acting Chief Vehicle Inspector and his own evidence appear to show that the accident was not caused by a sudden brake failure. It

appears that the defendant was aware of the defective brakes and proceeded to drive the vehicle in that state. He was negligent to have done so.

Failure to give way

The defendant did not impress me as being truthful when he testified that the plaintiff was supposed to give way to him. As appears from the analysis of the defendant's evidence above, the defendant was aware that there was a give way sign at the intersection. He was well familiar with the intersection as the intersection was in the vicinity of his home and he had passed the intersection frequently.

It appears to me that the "after lunch" story was clearly an afterthought. This is supported by the fact that the issue had not been pleaded. The issue was not even raised during the Pre-trial Conference. As alluded to earlier, only two issues were referred to trial, whether or not there was a sudden brake failure and the quantum of damages. The defendant conceded that he had not raised the issue earlier but recalled it as he testified. It is astonishing that the defendant could not recall immediately after the accident, during the period pleadings were filed and when the PTC was held what had happened in July 2006. The defendant's recollection was sharper fifteen months after the accident. The change in the defendant's story gives the impression that the defendant was fabricating his defence as the trial progressed.

The defendant had in fact stated in his statement to the police contained in the Plaintiff's Bundle of Documents that he was aware that there was a give way sign. He stated that:

> "I was on my way to drop my friend off down the road and when I was approaching the give way, (unable to see it because it was dark) I tried to apply brakes to slow down for the give way and noticed they were not working so I slammed on brakes and swerved to the right to try and avoid the car"

This statement was made nine days after the accident when his recollection of the events should have been fresh. The new evidence that the plaintiff did not give way is clearly a fabrication.

It is my view that the defendant failed to give way to the plaintiff as he was required to do. In *S v Nyamandi* 1998 (2) ZLR 205 at 208 D-E, SANDURA JA confirmed the finding of the trial magistrate that the appellant in that case was grossly negligent for failing to give way at a 'T' Junction controlled by a give way sign. He cited with approval the words of MCNALLY J (as he then was) in *S v Dzvatu* 1984 (1) ZLR 136 (H) at 138 F that:

> " To my mind, anyone who drives straight through a "Give Way" sign at a T-junction and hits a lighted vehicle travelling in the main road, killing two people, is *prima facie* grossly negligent."

The fact that the plaintiff in the present case did not die was fortuitous. The give way sign is a regulatory sign which controlled the defendant and obliged him to only proceed when it was safe to do so. He did not obey the sign resulting in the accident.

Speeding

The evidence of the Acting Chief Vehicle Inspector contradicted the defendant's evidence on the speed the defendant was travelling at when the accident occurred. It was his evidence that the damage to the defendant's vehicle was consistent with the defendant having been travelling at a very high speed. This tallies with the plaintiff's evidence, more particularly the positioning of the vehicles after the accident. The impact of the accident was such that the plaintiff was thrown out of the vehicle and hit a durawall well off the road. The plaintiff's vehicle rolled twice and uprooted a ZESA pole. It is not in issue that both the plaintiff and defendant's vehicles were extensively damages. This proves that the impact of the collision was heavy indicating that high speed was involved.

Further, it appears to me that one cannot be said to be driving at a slow speed when driving at 70km/h, in a built up area, at night, on an unlit road full of potholes. 70km/h can only be said to have been excess speed given those conditions. It is therefore my view that the defendant was at a very high speed under the circumstances.

Driving without lights on

The evidence of the Acting Senior Vehicle Inspector was also inconsistent with the defendant's evidence that his lights were still on immediately after the accident. The Acting Senior Vehicle Inspector testified that the headlights were crushed as a result of the accident and as a result he could not determine their state before the accident. The defendant could not have seen that his lights were on soon after the accident when they had been so crushed that the Inspector could not establish their condition before the accident. The impression given is that the defendant was not being candid with the court. I therefore find that the defendant failed to dispel the inference of negligence that the defendant's headlights were not on when the accident occurred.

Conclusion on liability

In the result, it is my view that the plaintiff established on a balance of probability that the defendant was not only negligent, but grossly negligent. He is therefore liable for the damages that the plaintiff suffered.

QUANTUM OF DAMAGES

There is no denying that the accident was a major tragedy for the plaintiff and his family which was also costly for them. The defendant sought to dispute the nature of the injuries suffered by the plaintiff by putting into issue the report by Professor Kalangu. The defendant contended that the report states that the plaintiff had been under the care of the Professor since 24 July 2006 as a result of injuries suffered from an accident which happened on 6 May 2006. This gave the impression that the plaintiff was suffering from pre-existing injuries on 23 July 2006 when the accident occurred.

There is no dispute that plaintiff was involved in the accident with the defendant on 23 July 2006. The report by Professor Kalangu demonstrated that the plaintiff sustained complete paralysis of the left and both lower limbs, fracture of the left clavicle, fracture of the spine and C5 and C6 and a dislocation of the vertebra in C5 to C6 associated with the spinal compression. The nature of the injuries described by the Professor is such that the plaintiff would not have been driving any vehicle, at all on 23 July 2006 if he had sustained those injuries on 6 May 2006. To imply that the applicant

sustained the above injuries from an accident prior to 23 July 2006 and be able to still drive on 23 July 2006 borders on absurdity and in my view an insult to the plaintiff. The injuries to the plaintiff were apparent when he testified. He had difficulties walking to the witness stand. He could not stand for a long time and had to request to sit down during the hearing. Both the defendant and his counsel had to assist the plaintiff by flipping the pages of the plaintiff's bundle of documents as he was testifying.

It appears to me that the date is a genuine error. The doctor does not make any reference to the accident of 23 July 2006 at all. In my view it was not even necessary for the doctor to be called to clarify the apparent error.

General damages

It was not seriously disputed that the plaintiff will for the rest of his life require medical attention, including operations, regular physiotherapy and medication. He has a weakness of the forearm and arm on the left side and suffers from pain for a very long time. The upper plexus is seriously injured with no sign of recovery at the time the plaintiff was examined. The term "plexus" is defined in Butterworths Medical Dictionary to mean an interwoven network of nerves or blood vessels. His disability is estimated at 60%.

The plaintiff was a sportsperson. This was confirmed by the defendant. Therefore the injuries from the accident have resulted in a greatly reduced quality of life. The injuries have affected his relationship with his daughter which was previously very close. The plaintiff claimed the sum of $1 billion dollars for the pain and suffering, disfigurement, loss of amenities of life and short life expectancy.

The plaintiff would ordinarily be entitled to the damages had his disability been final and stationary at 60%. It should be noted that except for the dates and the signatures, the two reports from Professor Kalangu, dated 12 November 2007 and 20 June 2008 are identical. This is despite the fact that a period of seven months had lapsed after the first report. One would have expected the later report to have indicated any changes that may have occurred during that period. It appears that whoever signed on the later report merely printed the report of 12 November 2007.

The report by Professor Mielke dated 23 July 2006 stated that there "lower plexus should show good improvement." It is not clear to what extent the improvement will affect the rate of disability as assessed by Professor Kalangu. The report further states that there should be a repeat study in six months time from the 23 July 2006. The plaintiff did not advise the court whether or not he had gone for the repeat study and if so the results thereof. However the impression given by both Professor Kalangu and Mielke is that the plaintiff may improve with rehabilitation and treatment. The disability is therefore debatable. The debate could have been resolved had the plaintiff led evidence from any of the two doctors.

In the case of *Ebrahim v Pittman N O* 1995(1) ZLR 176 (H) at 187H-188A BARTLET J commented on the approach in assessing damages and at p 187G-H to 188D said:-

> "It is not competent for a court to embark upon conjecture in assessing damages where there is no factual basis in evidence, or inadequate factual basis, for an assessment, and it is not competent to award an arbitrary approximation of damages to a plaintiff who has failed to produce available evidence upon which a proper assessment of loss could have been made."

It is my view that the plaintiff has not placed before the court adequate evidence to enable it to assess the degree of disability and hence the general damages that the plaintiff is likely to suffer. In the result the defendant should be absolved from the instance.

Past Expenses

The plaintiff claimed the medical and allied expenses that he incurred. These included the shortfall from CIMAS in relation to his hospitalization, physiotherapy and fees for nursing aides. The claim amounted to a total of $704 576 798.45. The defendant queried a number of duplication that appeared on the statement from CIMAS.

The following claims were alleged to have been duplicated:

	CLAIM No.	DATE OF TREATMENT	SHORTFALL $
(a)	0014751577	27/07/06	60 282.60
(b)	0014271878	23/07/06	56 126.70
(c)	14271956	25/07/06	19 483.20
(d)	0028277109	09/01/07	11 000.00
(e)	0028277154	11/01/07	11 000.00
(f)	28277154	17/01/07	2 292. 00
(g)	0028277131	09/01/07	11 000.00
(h)	28277131	10/01/2007	2 292. 00

From an analysis of the statement, it is clear that only the first four were duplicated. The last four were not. The claim numbers are different. A removal of the first two zeros in (e) and (g) would give one the same numbers in (f) and (h) respectively. However, the dates for treatment are different. The shortfall being claimed is also different.

The plaintiff properly conceded in the closing submissions that there some duplications. The disputed amount is $146 892.50. It is my view that the amount should be deducted from the total being claimed. The plaintiff is therefore entitled to judgment in the sum of $704 429 905.95.

The plaintiff further claimed an amount of US$4 104 as past expenses. That amount consists of payment in the sum of US$1 187 to Professor Chinyange on 28 May 2008. US$2 802 was paid to Professor Kalangu on the same date. A total of US$ 115 was paid to one Jacquie Simpson Bowen for rehabilitation therapy for the period between 22 June 2007 and 29 May 2008.

The defendant sought to challenge this claim on the basis that the fees were illegal in that the medical practitioners did not have the foreign exchange authority to levy fees in foreign currency. However the facts still stands that the plaintiff suffered loss in foreign currency. There is authority to the effect that a court can grant a judgment in a foreign currency even where the claim arises in delict. (See *Makwindi Oil Procurement (Pvt) Ltd v National Oil Co. of Zimbabwe* 1988 (2) ZLR 482 (SC) and *Standard*

Chartered Bank of Canada v Nedperm Bank Ltd 1994 (4) SA 747 at 774F-H)). The plaintiff suffered the loss in foreign currency as a result of the defendant's negligence. It is my view that the plaintiff has laid a basis for payment in foreign currency and it is only proper that the plaintiff be compensated in the same currency.

Future Medical Expenses and Transport Costs

The claim for future expenses was $1 billion and US$5 000. The expenses are for physiotherapy which the plaintiff has to attend once a week and for drugs that he is required to take. The plaintiff also claimed transportation expenses in the sum of $10 trillion dollars in respect of the physiotherapy sessions. The expenses must be proved to the satisfaction of the court.

The plaintiff relied on the a quotation from Helensvale Pharmacy to prove that he will be required to spend at least US$55 per month for medication for the pain and to help him sleep. He also appears to have relied on the report from Jacquie Simpson that he still requires rehabilitation therapy at the rate of US$ 5 per session. It is not in issue that the plaintiff will require transport to attend physiotherapy and rehabilitation. However, the plaintiff did not indicate how he arrived at the amounts claimed. It is not clear how many sessions he will be required to undertake. It should be noted that the report from Professor Mielke, however, does not detract from the fact the plaintiff will require future attention and therefore incur expenses. The documents that he has produced give a fair idea of the expenses that the plaintiff is likely to incur.

It is my view again, that the plaintiff has not placed before the court adequate evidence to enable it to assess the future expenses that he is likely to suffer. In the result defendant again should be absolved from the instance.

Replacement Value of Motor vehicle

The last claim is for the replacement value of his vehicle in the sum of US$8 000. The claim was supported by two quotations from Borrowdale Auto and Tandem Motors Pvt Ltd. Both are dated 24 September 2008. The defendant put into issue these damages. The defendant contended during the cross examination of the plaintiff that the

claim for US$8 000 was incompetent because the quotations were only obtained over two years after the accident.

It is trite that delictual damages are calculated as at the time of the delict. (See *Muzeya NO* v *Marais & Anor* HH-80-04, *Monica Komichi v David Edwin Tanner & Anor* HH 104/05, *Edward Marume & Anor v Todd Muranganwa* HH 27/07 and *SA Eagle Insurance Co Ltd v Hartley 1990 (4) SA 833 (A)*). One of the exceptions is where the plaintiff can justify the delay in coming up with the damages at the time of or soon after the accident. (See *Cargo Carriers (Pvt) Ltd & Anor v Nettleford & Anor* 1991 (2) ZLR 139 (SC)).

The plaintiff explained that he had been hospitalised for a period of almost one and a half years. During that period he could not have obtained the quotations because he was incapacitated. His family was also concentrating on his welfare. It appears to me that the explanation would have been plausible had the quotations been obtained at the time when summons were issued. Summons were issued on 27 October 2007. The plaintiff was then claiming $500 000 000 (old currency). Under cross examination, the plaintiff explained that that amount reflected the replacement value of the vehicle at the time. He explained that as a result of inflation he had to obtain new figures.

It is my view that the plaintiff failed to explain satisfactorily the delay between the issuance of the summons and the obtaining of the quotations. The explanation that the new quotations were obtained because the original amount had been eroded by inflation cannot be sustained. It has been stated in a number of cases that consideration of factors such as inflation in the calculation of delictual damages would amount to altering the quantum of the debt according to when the plaintiff sought to exact it. The result would be in conflict with the principle of nominalism. (See *Muzeya NO* v *Marais & Anor* (*supra*), *Monica Komichi v David Edwin Tanner & Anor* (*supra*), *Edward Marume & Anor v Todd Muranganwa* (*supra*) and *SA Eagle Insurance Co Ltd v Hartley* (*supra*)).

It is my view that the plaintiff has therefore failed to establish the damages of US$8 000. As in the other claims, the defendant must be absolved from the instance.

Interest

The plaintiff had claimed interest of the damages for past expenses at the prescribed rate. It is my view that the award in foreign currency should accrue interest at a different rate. It has been held interest rate should be at the rate appropriate to that currency. (See *AMI Zimbabwe (Pvt) Ltd v Caselee Holdings (Successors) (Pvt) Ltd* 1997 (2) ZLR 77 at 86C-87-E.)

Costs

When a defendant is absolved from the instance he should be regarded as being the successful party, and the plaintiff should be ordered to pay the defendant's costs unless there are good reasons for ordering otherwise. (See *General Wholesale Suppliers (Pvt) Ltd v Aims Distributors* 1975 (1) SA 600 (RA) at 601 A and "*The Civil Practice of the Supreme Court of South Africa*" (*supra*) at page 465C). The plaintiff partially succeeded in that I have found the defendant to have been liable for the damages. He has also succeeded with the award for past expenses. In my view, the plaintiff has been overally been the successful party. He is therefore entitled to his costs.

In the closing submissions, the plaintiff conceded that the claim of $704 576 798.45 is now academic as it meaningless in real terms. He conceded that an award would be for no practical consequences as far as its purpose to compensate the plaintiff is concerned. Following the removal of zeros by the Reserve Bank of Zimbabwe between the date of amendment of the summons and date of judgment, the amount is indeed insignificant and serves no purpose in compensating the plaintiff. Whilst acknowledging that that the claim for damages denominated in the local currency is academic, the plaintiff submitted that it is entitled to the order in principle. The plaintiff's wish is my command.

In the result, it is ordered that:-

1. The defendant be and is hereby ordered to pay the sum of -
   (a) $704 429 905.95 being past medical expenses and interest on that amount at the prescribed rate from 6 May 2008 to the date of payment.

(b) US$4 104 being past medical expenses and interest on that amount at the prescribed rate prevailing in the United States of America.

2. The defendant be and is hereby granted absolution from the instance with respect to the claim for general damages, future expenses and the replacement value for his vehicle.

3. The defendant be and is hereby ordered to pay the plaintiff's costs.

Gill, Godlonton & Gerrans, plaintiff's legal practitioners

Messrs Atherstone & Cook, defendant's legal practitioners