MARTIN GONDOKONDO
(in his capacity as the guardian of Leobah Gondokondo)
versus
TAKROSE BUSES (PVT) LTD
and
GORDON NGONIDZASHE MOYO

HIGH COURT OF ZIMBABWE
KUDYA J
HARARE, 20, 21, 24 and 29 July 2009

Civil Trial

C. Mutandwa, for the plaintiff
H. Mukonoweshuro, for the defendants

KUDYA J: On 22 August 2007 on the Tafara Highway in Mabvuku Harare, the 6 year old daughter of the plaintiff was hit by a bus driven by the second defendant, which belonged to the first defendant, during the scope and course of his employment. The plaintiff issued summons on 6 June 2008, on the girl's behalf, claiming special damages and general damages denominated in local currency and costs of suit. In line with the new currency regime operating in Zimbabwe at the time of trial, an application to amend the amounts sought was granted by consent. The plaintiff seeks special damages in the sum of US$530.00 and general damages in the sum of US$10 000.00. The defendants denied both liability and the claim for damages.

The plaintiff testified and called the evidence of his wife and the girl and Dr. Arnold Tawanda Vhumisai. In addition he produced three documentary exhibits. The second defendant was the sole witness for the defendants.

At the pre-trial conference that was held on 24 June 2009, the following two issues were referred to trial:

1. Whether or not the second defendant was negligent

2. If the second defendant was negligent, what was the quantum of damages suffered by the plaintiff as a result of the accident

The plaintiff's evidence established that the girl was born on 21 January 2001. On the day of the accident she was doing grade 1 at Simudzai primary school in Mabvuku. It was during the school holidays. Her mother, Florence Chidakwa left her at home in the company of her 12 year old sister while she proceeded to her market stall, situated in the locality. The elder sister left the girl at home while she went to the nearby shops to purchase a packet of maputi. Unbeknown to the elder sister, the girl followed her. She saw the bus driven by the second defendant stationary. The girl proceeded to cross the road at this busy spot close to Kamunhu shops. She was hit by the bus near a road hump and fell underneath it. Her left arm was crushed. She was retrieved by an unnamed man from underneath the bus. She was crying in pain. Her mother arrived at the scene and took her to the local clinic from where she took her to Parirenyatwa hospital where she was admitted form 22 August until her release on 8 November 2008.

The plaintiff produced exhibit 2, the photocopied two page hand written notes of the trial magistrate of the criminal trial of the second defendant. The first page is a record of the plea of guilty that was entered. The second page contains the mitigation taken, which was followed by special circumstances in which he suggested that he was confronted by a sudden emergency. Underneath each page is an unsigned date stamp of the Harare Magistrates Clerk of Court of 3 June 2007. The plaintiff did not produce the charge sheet, statement of agreed facts or the verdict and sentence.

The girl was attended to by doctors who included Dr. Vhumisai. The doctor compiled a medical affidavit, exhibit 3 on 14 November 2008. The child suffered injury of the left hand. It was severe and would result in permanent disability. The wound constituted 5% of her total body surface. A skin graft was carried out and betadine and glycerin were constantly applied on the hand to speed up healing of the wound. The wound healed and the girl was discharged. He recommended that the child undergo physiotherapy to prevent the hand from contractures, that is, from stiffening. In his oral testimony he stated that unaesthetic scars were left by the skin grafting. He was unable to estimate the future physiotherapy expenses that the plaintiff would incur. The plaintiff did not lead any evidence on past or future medical expenses.

The defendant applied for absolution from the instance. The test was set out in *Lourenco v Raja Dry Cleaners & Steam Laundry (Pvt) Ltd* 1984 (2) ZLR 151 (S) AT 158C-D and *Munhuwa v Mhukahuru Bus Service (Pvt) Ltd* 1994 (2) ZLR 382 (H) at 383 G. it is whether on

the evidence led by the plaintiff the court might or could and not should or ought to give judgment for him. Mr *Mukonoweshuro,* for the defendants contended that in the absence of independent evidence from the police or on lookers, the plaintiff had failed to establish negligence. He also contended that exhibit 2, the handwritten notes of the trial magistrate in the criminal conviction, was insufficient to establish that the second defendant had been convicted of negligent driving. Mr *Mutandwa,* for the plaintiff, relied on the provisions of s 31 of the Civil Evidence Act *[Cap 8:01*] and the sentiments expressed by GUBBAY CJ in *S v Ferreira* 1992 (1) ZLR 93 (S).

Subsections (2), (3) and (5) of section 31 of the Civil Evidence Act state:

> (2) Subject to this section, where it is relevant in civil proceedings to prove that a person committed a criminal offence or did or omitted to do anything referred to in subsection (3), the fact that he has been convicted of that offence by any court in Zimbabwe or by a military court in Zimbabwe or elsewhere shall be admissible in evidence for the purpose of such proof.
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> (3) Where it is proved in any civil proceedings that a person has been convicted of a criminal offence, it shall be presumed unless the contrary is shown—
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> (*a*) that he did all acts necessary to constitute the offence; or
> (*b*) where the offence is constituted by an omission to do anything, that he omitted to do that thing; as the case may be.
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> (5) For the purposes of proving in civil proceedings that a person was convicted of a criminal offence, a document which—
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> (*a*) purports to be a copy of the record of the criminal proceedings concerned or a copy of any part of the record which shows that the person was convicted of the offence; and
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> (*b*) is proved to be a true copy of the original record or part thereof or purports to be signed and certified as a true copy by the official having custody of the original record;
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> shall be admissible on its production by any person as *prima facie* proof that the person concerned was convicted of that offence:
> Provided that this subsection shall not preclude the admission of any other evidence to prove that the person committed the offence.

Exhibit 2 is not certified and is insufficient to show that the second defendant was convicted. The second defendant appeared to have raised the defence of sudden emergency which obliged the trial magistrate to alter his plea to one of not guilty. The absence of an extract of the conviction and sentence from the Court Record Book kept by the Clerk of Court

or of the charge sheet or any record of the verdict militated against acceptance of exhibit 2 as *prima facie* evidence of a criminal conviction for negligent driving. The provisions of s 31 did not assist the plaintiff in the present matter.

In *S v Ferreira, supra,* the appellant knocked down and killed a seven year old boy who had dashed out in front of the vehicle driven by the appellant from the side of the road where he had been standing. He was convicted of culpable homicide and sentenced. In dismissing his appeal against conviction, the learned CHIEF JUSTICE stated at 95D-G thus:

> "There is a very definite duty upon a motorist who knows himself to be in the near vicinity of young children, for they have a propensity for impulsive and sometimes irrational action. Children should not be credited with the same mature intelligence and presence of mind as grown-up people. A motorist must anticipate that a child on or just next to the road may unexpectedly decide to run across oblivious of danger. He must keep his vehicle under such control as to be able to suddenly pull-up if a child starts to cross the line of his route. He must prepare himself for such an eventuality. It has been aptly remarked that young children are "as wide as the road" and are liable to get into the way of a motorist without any overt warning. Thus greater care is demanded towards children than is necessary for the safety of adults.
> This doctrine has been applied in many cases. See, for example, *South British In Co Ltd v Smit* 1962 (3) SA 826 (A) at 837A-B; *Neahaus NO v Bastion Ins Co Ltd* 1968 (1) SA 398 (A) at 406A-D; *S v Phyffers* 1970 (4) SA 104 (A) at 109F-G; *Ndlovu v AA Mutual Ins Assn Ltd* 1991 (3) SA 655 (E) at 661C-E. G However this is not to suggest that precautions must be taken against every possible manoeuvre which a child might imaginably perform, and not merely against such conduct as would fall within common experience. To place such a burden upon a motorist would be totally unrealistic and impracticable of fulfillment."

In the present case a six year old girl who was on her own was involved. Dashing into the road in front of on coming traffic by such a girl would fall within the common experience of drivers. I was satisfied that the second defendant was legally bound to explain his conduct. I thus dismissed the application for absolution from the instance.

The second defendant thus gave evidence for the defendants. He was driving the bus which belonged to the first defendant in the course of his employment. He had been driving buses along that route for a period of 10 years before the day in question. He was familiar with the crowded nature of the area around Kamunhu shops. The bus was in perfect condition and the weather was sunny and his visibility clear. As he approached the shops, he reduced the speed of his bus to about 10 kilometers per hour because he was approaching a road hump and some passengers intended to alight at Kamunhu bus stop. Before he reached the hump he saw

the girl some 3 meters away from the bus. She then dashed "like a rabbit" into the line of travel of his bus. He immediately applied brakes. The child was hit by the front part of the bus and fell underneath it. Her left arm was crushed. He believed that he acted swiftly to avert mortal danger to the girl. He stated under cross examination that he was never convicted nor sentenced of the offence of negligent driving at Harare Magistrates Court.

I am satisfied that the plaintiff discharged the onus on him to show on a balance of probabilities that the second defendant drove his bus negligently on the day in question. He did not notice the young girl until she was 3 meters away yet by his own admission he was at a busy intersection. He did not disclose why he failed to see her before she was just 3 meters away. It seems to me that his failure to see her earlier demonstrated that he was not keeping a proper look out. The fact that he only braked after the child had dashed like a rabbit in front of him also showed that he had not prepared himself for the possibility that the child would impulsively cross the road in the manner she did. He thus failed to keep his vehicle under control in that had he only reacted when it was too late. A prudent driver driving past a crowded area would drive slowly with his foot on the brakes in anticipation that he may be required by the exigencies of the situation to stop. I answer the first issue referred to trial in the plaintiff's favour.

The next issue for determination revolves around the measure of damages due to the plaintiff. The plaintiff did not lead evidence on the actual amount expended in treating the girl or for future medical expenses. In argument, Mr *Mutandwa* abandoned the plaintiff's claims for past and future medical expenses. He prayed for general damages of pain and suffering in the sum of US$10 000.00. In *Sandler v Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199 WATERMEYER JA recognised that the task of estimating the compensation which should be paid for the pain and suffering and permanent disability in consequence of an accident was a difficult one. He proceeded to recognize that:

> "though the law attempts to repair the wrong done to a sufferer who has received personal injuries in an accident by compensating him in money, yet there is no scale 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 of the case."

The measure of damages is an estimate of what the judicial officer determining the issue arrives at after considering all the circumstances of the case.

I was not referred nor was I able from my research to find any comparable cases which involved a young child. *Muzeya v Marais & Anor* HH 80/2004 involved injury caused to an 8 year old girl in a road traffic accident. On 31 March 2004 CHINHENGO J set out at pages 2 and 3 of the cyclostyled judgment the nature and extent of the girls' injuries. He observed at page 2 of the cyclostyled judgment that:

> "This child is 100% disabled and the prognosis for her future extremely poor. She will be uneducatable and never be employable. Her life expectancy will be limited."

He awarded the plaintiff $9 million for pain and suffering and the loss of amenities. At the time the cross rate between the Zimbabwean dollar and the United States dollar was $5 730.00 to US$1.00. The award was equivalent to US$1 570.00. The plaintiff's daughter in the present matter suffered a disability which approximates to one- twentieth of the girl in the Muzeya case which would amount to US$80.00 were a mathematical formula to be used. I however note that the Muzeya was awarded a total of $61 million and US19 000.00 for the claims he made, which would amount to approximately US$29 000. 00.

Mr *Mukonoweshuro*, for the defendants, argued that US$10 000.00 was an outrageous figure and contended that the sum of US$2 000.00 would be fair and just in the circumstances of this case. The six year old girl was maimed for life with a 5 % disability. She is not able to use the left hand. The plaintiff failed to raise money for physiotherapy. The hand has suffered contractures. She is not able to carry out simple tasks like bathing and laundering her school socks or helping her parents with the dishes. The scarring is visible and ugly. She suffered excruciating pain and though the wound has healed, she occasionally experiences pain in cold weather.

While decided case law seems to show that the figure of US$2 000.00 is on the high side for pain and suffering for a 5% disability on a 6 year old girl, it is fair and just that I order the defendants to pay that amount in deference to their legal practitioners' contention.
Accordingly, it is ordered that:

The defendants shall pay to the plaintiff jointly and severally, the one paying the other to be absolved US$2 000.00 being general damages for pain and suffering and costs of suit.

Justice for Children Trust, plaintiff's legal practitioners
Mukonoweshuro & Partners, defendants' legal practitioners