NIGEL CHAKANYUKA

Versus

ANDISENI MASHINGAIDZE DESIRE ARUMANDO

And

INNSCOR AFRICA LIMITED
t/a LENNARD BREAD (PVT) LTD

and

ROBERT MLOYI

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 31ST OCTOBER 2018; 15, 16 & 24 OCTOBER 2019;
30 JULY; 24 SEPTEMBER; 3 & 13 NOVEMBER 2020; 19 & 20 OCTOBER 2021; 9 & 30 NOVEMBER 2021; 22 FEBRUARY 2022 & 13 APRIL 2023

Civil Trial

M. Mahaso for the plaintiff
S. Chamunorwa for the defendants

TAKUVA J: This is an Acquillian action arising from a sordid story of an innocent 12 year old by-stander whose foot was crashed by a falling robot pole. Plaintiff instituted proceedings against all defendants claiming an order for:

(i) Medical and hospital expenses (past) US$6 887,00.
(ii) Future medical expenses US$567 700,00.
(iii) Pain and suffering (past and prospective) US$70 000,00.
(iv) Permanent bodily disfigurement US$80 000,00.
(v) Loss of amenities US$70 000,00 and
(vi) Interest at the prescribed rate from 17 November 2011; and
(vii) Costs on an attorney and client scale.

Plaintiff's claim arose from a road traffic accident that occurred on 17 October 2011 at the traffic lights intersection of 23rd Avenue and Hillside Road where 3rd defendant's Toyota Hilux truck registration number AAB 4542 collided with the 2nd defendant's truck driven by the 1st defendant. The traffic lights at that intersection were not functional. As a result, the 2nd

defendant's vehicle veered off the road and crashed plaintiff's right ankle resulting in its amputation. At all material times the 1st defendant was acting in the course and scope of his employment with the 2nd defendant. Plaintiff alleged that the accident was caused by the negligence of the 1st and 3rd defendants while the 2nd defendant was vicariously liable.

As a result of the accident, plaintiff suffered severe injuries, extensive bruising both internal and external, his right foot has had to be amputated at the ankle. Plaintiff spent one month in hospital undergoing extensive surgery.

All three defendants entered appearance to defend and filed their plea to the plaintiff's claim. The 1st and 2nd defendants denied causing the collision and blamed the 3rd defendant in that;

(a) He was travelling at a reckless and excessive speed of 60km/h when he hit the rear axle of the vehicle that was being driven by 1st defendant;
(b) He failed to avoid an accident when it seemed imminent;
(c) He failed to exercise due care and attention;
(d) The collision occurred when the vehicle driven by the 1st defendant had crossed the intersection or alternatively when the vehicle was about "to complete the intersection" resulting in the vehicle being hit by the 3rd defendant's vehicle at the back; and
(e) He failed to stop and/or give way to a vehicle that was already in the intersection.

First and 2nd defendants averred that the injuries sustained by the plaintiff were caused solely by the negligence of the 3rd defendant. Further, they admitted that they have no knowledge of the damage suffered by the plaintiff, do not admit this and put the plaintiff to the strict proof thereof.

The 3rd defendant denied liability in his plea and contented that the accident was caused by the sole negligence of the 1st defendant who was driving at a terrific speed coming from the other side and failed to check or exercise caution when he approached the intersection. He alleged that he approached the said intersection with caution as the traffic lights were not working and he checked on the right side of the road and when he was convinced that it was clear he proceeded to move forward. As he approached the middle of the intersection he noticed the 1st defendant's motor vehicle approaching from the other side moving very fast and

to avoid a collision he swerved to the right and was hit at the end of his vehicle by 1st defendant's car. Finally he denied driving at a speed of 60km/h and he also stated that since he was not responsible for the accident, he was not liable for plaintiff's claims which should be directed to the 1st and 2nd defendants.

At a pre-trial-conference before a judge, the following issues were referred for trial;

1. Whether or not the accident was caused by the sole negligence of either the first defendant or the 3rd defendant.
2. Alternatively whether or not the accident was caused by the negligence of both the first and third defendants;
3. If so, what is the proportion of each defendant's negligence?
4. Whether or not the plaintiff is entitled to claim damages?
5. If so, in what amount?

The onus of proof was placed on the plaintiff in respect of all the issues.

Plaintiff gave evidence to the effect that on the 19th day of November 2011 he was standing at the intersection of 23rd Avenue and Hillside Road. It is a robot controlled intersection but the robots were not working. Plaintiff waited for the road to be clear since he intended to cross it. Whilst standing two vehicles collided and he was hit by a robot pole that had been hit causing him to lose consciousness. He regained consciousness in a ward at United Bulawayo Hospitals but could not stand up. The crushed foot caused him excruciating pain until his doctor was compelled to amputate the foot at ankle joint due to severe infection which was extremely difficult to control.

After surgery plaintiff spent approximately three months in hospital during which period the police recorded a statement from him. In that statement plaintiff indicated that he was not sure of how he was injured. Specifically he could not remember which car entered the intersection first. However in his *viva voce* evidence he said it was 3rd defendant's vehicle that first entered the intersection. When asked under cross examination why he was now so sure, he said at the time he was detained at United Bulawayo Hospitals he was in a confused state due to the trauma and pain.

Later plaintiff's parents bought him an artificial limb in the form of a prosthetic foot which required replacement every two (2) years. His parents paid all the hospital and doctors'

fees together with costs related to post amputation in the form of drugs and ancillary issues. Prior to the accident plaintiff was in his school 1st team in respect of the following disciplines,

(a) Soccer
(b) Athletics
(c) Swimming. He was in the 2nd rugby team.

Plaintiff's performance post the accident has been adversely affected due to the fact that he can no longer run as fast as he used to. According to him the amputation has also changed his character in that he now suffers from anger which he fails to manage. Further, plaintiff's academic performance has drastically gone down after the amputation in that he wrote Mathematics, Geography and Bible Studies and got 3Fs. The witness confirmed that his mother would buy him brufen tablets, a specialized sock and cream to use on his leg. As regards the various claims listed on the summons, he said he had no clue on how they are calculated as he left everything to his parents, doctors and other experts who examined and assessed his condition.

The bulk of this witness' testimony is common cause. The only portion of his evidence in dispute relates to whose negligence caused the accident. In my view, the witness is ill-equipped to answer that question in that all he could remember was "the truck travelling towards town entered the intersection first." The answer to the legal question depends on a careful consideration of various facts proved by the evidence *in casu*. This witness' evidence is of little help to provide answers to questions raised by issues 1, 2 and 3 as they are legal in nature. As regards the other issue the plaintiff has provided the factual basis upon which he believes he is entitled to claim damages. His evidence has shown facts upon which the court can assess the quantum of damages in order to deal with issue number 5.

In terms of the summons the plaintiff is described as "Nigel Chakanyuka a minor child who sues through his natural guardian and mother Fungayi Magande". Accordingly plaintiff's mother was his next witness. Her testimony was that plaintiff is her 1st born child who was 12 years old at the time of the accident. She has three (3) other children. She was at work at Lobels Biscuits when she received a phone call from United Bulawayo Hospitals informing her that plaintiff had been involved in a road traffic accident and she was advised to come to the hospital immediately. Upon arrival at the hospital she found her son in the theatre room with a serious injury on the leg. The skin under the foot had peeled off and a plank was used

to support the foot. Plaintiff was bleeding profusely from the injury. An X-ray was done and it confirmed that plaintiff had suffered a crushed left foot.

After cleaning and bandaging the wound, plaintiff was admitted and the witness was advised that plaintiff was to be taken to theatre for amputation. After a four (4) day delay the witness decided to take plaintiff to Dr Musasanure who eventually had him admitted at Bulawayo Surgical Hospital where his foot was amputated and he remained in hospital for three (3) weeks before he was returned to theatre for further treatment. After the second visit to the theatre, he remained in hospital for one (1) week. In between 1st and 2nd treatment or management he was released for 3 days. The witness said overall the plaintiff stayed in hospital for 2 months after which he was discharged but could not walk forcing the witness to buy a prosthetic foot for $750,00 in Harare in February 2012. The artificial foot lasted two (2) years and was replaced in 2014 with one bought in Cassims Prosthetics and Orthetics for $1 890,00 as shown by a receipt on page 28 of the plaintiff's bundle of documents.

At United Bulawayo Hospitals this witness paid $154,00 towards hospital fees while amounts shown on pages 3 – 6 of the plaintiff's bundle of documents were paid to Bulawayo Surgical Hospital for Debridement and Foot Amputation. At the time of giving evidence the prosthetic foot had not been replaced due to lack of funds. The foot comes with a special sock that costs $50,00. The witness settled at repairing the foot every 3 – 4 months at $20,00 per session. After amputation plaintiff developed behavioural changes in that he projected anger issues and became temperamental. This worried her and she hired a psychologist for 6 months resulting in an improvement. It was this witness' evidence that the amputation affected him negatively in his academic studies in that although he passed seven (7) subjects at 'O' level, he got zero points are 'A' level. The parents again consulted a psychologist for a short period due to insufficient funds. Faced with the predicament the witness consulted their Roman Catholic priest who continued to counsel the plaintiff up to the time of her testimony.

In the realm of sporting activities the witness averred that prior to the accident plaintiff was a "brilliant" athlete. He played soccer at Young Flying Stars Academy was to be selected to the Matabeleland Schools 1st swimming team and would participate in marathons where he won medals with his team. All his participation in these disciplines ended as he could not run using an artificial leg. As regards how the accident affected the plaintiff's amenity, the witness said bathing became a challenge as there was no bath tub at the house they were living in.

According to this witness there was a sudden change in plaintiff's character in that socializing with his friends and siblings stopped as plaintiff would always remain indoors due to the discomfort he experienced in his leg. He walks with a limp causing the shoes to split and sores to develop. She would buy plaintiff especial type of shoe and at times during the hot season she would use strings to tie the shoe.

At the time of the accident the witness was employed as a teller by the Reserve Bank of Zimbabwe. However she was retrenched in 2012 shortly after the accident and at the time she testified, she had found employment as a dispatch clerk at Lobels Biscuits in Belmont. Plaintiff's father left her when the plaintiff was one year 9 months old in 2000 and she became a sole parent. When asked about her sources of income, she said she had to sell her twin cab vehicle, put together a bit of servings to pay for the expenses associated with the accident. She also benefited from the $100,00 given to her at UBH by Mr Dube from Bakers Inn.

Under cross-examination on dates on documents appearing on page 28, the witness denied that either the evidence is incorrect or documents are not authentic. She said there is something wrong with the 2012 date which should read "2014". Further, in answer to a question why she did not attach a diagnosis from a professional psychologist, the witness said she could not afford one. According to her since the summons was issued she incurred a further $5 100,00 in medical expenses. As regards future medical expenses, she based her calculations on life expectancy of seventy years. When it was put to her that life expectancy varies depending on when that claimant was born she professed total ignorance of that fact.

In my view, this witness' testimony is largely supported by expert witnesses who are medical practitioners. Her evidence on medical and hospital expenses is corroborated by receipts officially issued by the various service providers. All in all I find her to be a credible witness.

Plaintiff's 3rd witness was Dr Musasanure. I will defer the analysis of his evidence to the end to enable me to consider the evidence of how the accident happened. This is the evidence of Philip Magari an Inspector in The Zimbabwe Republic Police. In 2011 he was a Sergeant based at Bulawayo Central Traffic section. On the 17th of November 2011 he attended a road traffic accident scene, at a robot controlled intersection of Hillside Road and 23rd Avenue, Bulawayo. At the time of the accident the robots were not working. While at the scene, the witness completed Form 76 which is the Accident Summary together with the Sketch

Plan and the respective parties' versions of how the accident happened. These comments appear on page 19, 21 and 22 of the plaintiff's bundle of documents.

His observations at the scene were that there had been a collision between a Mitsubishi Fuso truck travelling due north-east along 23rd Avenue and a Toyota Hilux traveling due west along Hillside road. The Mitsubishi was lying on its passenger side facing the direction it was coming from. He also observed that the "robot pole" was down and that a young boy had been injured. The witness drew a sketch plan from 1st party's indications. He visited 2nd party at UBH where he obtained indications similar to the 1st party. According to this witness he also saw plaintiff in hospital. The plaintiff's injuries included a deep laceration on the right leg. The sketch plan is on page 22 of the plaintiff's bundle of documents.

The 1st party's version was captured as follows:

> "I was travelling due north-east along 23rd Avenue at about 30km/h and approached Hillside Road intersection and robots were not working. As I had already gone through the intersection and I heard any (*sic*) impact from the back and only saw the truck lying on its side."

The 2nd party said;

> "I was travelling due west along Hillside Road at about 60km/h when I approached 23rd Avenue, the robots were not working. I had the right of way and as I was crossing the intersection, I saw a truck that was fast approaching and realized it was not going to stop and tried to avoid it by swerving to my right but I collided with it."

From the facts the witness gathered, he concluded that the accident occurred because the "1st party failed to give way". In other words the 1st defendant was supposed to give way to the 3rd defendant. It was also his opinion that the 1st party was supposed to reduce speed and made sure the intersection was clear before entering. He disagreed with 1st defendant's view that since he entered the intersection 1st he had the right of way. Under cross-examination when asked whether the point of impact suggests that 1st defendant entered intersection 1st, he said, "I do not think so. First defendant should have 1st seen that the robot was not working and should have approached the intersection cautiously … if 1st defendant had given way there would not have been a collision". The witness was extensively questioned about the different sketch plans on page 21 and 22 of the plaintiff's bundle of documents and pages 12 and 13 of the 1st and 2nd defendants' bundle of documents.

In addition, the witness said since the accident occurred in broad daylight, and visibility was good since it was not raining the 1st defendant should have noticed 3rd defendant's car approaching on his right. In that regard, he said 1st defendant failed to keep a proper lookout. He disagreed with suggestions that the 1st defendant was the "wrong accused" in that the report on page 25 of the plaintiff's bundle of documents shows that he 3rd defendant failed to give way resulting in the accident. The witness explained that this document was compiled by Sergeant Mangwiro who assisted him at the scene. According to the witness they decided that the 1st defendant was to be charged but an Assistant Inspector Mpofu who was the I/C crime gave instructions that 3rd defendant be charged.

This was done and the papers were submitted to the National Prosecuting Authority. Subsequently the docket was returned with instructions that the 1st defendant be charged and he was indeed charged and his case remains outstanding in the Magistrates' Court. The witness denied preparing the document or sketch plan on page 25 of the plaintiff's bundle of documents. He does not know the author of that sketch plan although he strongly suspects it was Sergeant Mangwiro. The witness also disowned a sketch plan on page 12 of the 1st defendant's bundle of documents.

According to this witness when he arrived at the scene he found Chief Superintendent Mashingaudze who is 1st defendant's father present. He explained to him what had happened although he based his sketch plan on the three parties' indications at the scene. He disputed 1st defendant's version that he was travelling at 30km per hour because of the damages sustained on the 30 tonne truck i.e. detached right rear axle and a shattered windscreen. Also, the fact that the 30 tonne truck was down after colliding with a 1 tonne truck suggests the truck driven by the 1st defendant was travelling at a much higher speed.

When asked what obligation a driver has when approaching a non-functional robot the witness said such a robot intersection is a hazard area which is to be approached cautiously ascertaining who has the right of way by checking on his right and stop if need be. He was adamant that 1st defendant failed to keep a proper look out in that despite the fact that the accident occurred in broad daylight the 1st defendant failed to reduce speed and allow 2nd defendant who was approaching from a straight stretch of the road i.e. Hillside Road, to pass.

Finally, the witness denied that his evidence was biased against the 1st defendant. In my view the witness gave his testimony well. He answered all questions put to him in a

satisfactory manner. Also he performed well under cross-examination. I therefore find him to be a credible witness.

I now return to the evidence of Dr Collen Musasanure an Othopaedic Surgeon with thirteen (13) years' experience. His qualifications are:

(1) Bachelor of Medicine (UZ)
(2) Bachelor of Surgery and Fellow of the College of Surgeons of East Central and Southern Africa

He is a specialist dealing with bones, muscles and ligaments. He 1st met plaintiff on 22nd November 2011 after being requested by a colleague at UBH. The plaintiff's mother gave him the history of the matter. Upon examination he observed a severe crush injury on plaintiff's right foot which was heavily contaminated with a bit of dirt from the scene of the road traffic accident. Since there was need to clean the wound, he took plaintiff to the Operation Room on two occasions for cleaning. He realized that plaintiff had lost the right and second toes. On the next day, i.e. the 23rd November 2011 he transferred plaintiff to his private clinic for further management. The plaintiff was once again taken to the operation room where more cleaning was done. During surgery the witness noted severe infection and poor blood circulation requiring a foot amputation.

Plaintiff remained in hospital for purposes of nursing the wound until 30 November 2011. When it was discovered that infection was difficult to control plaintiff was taken to theatre where a Synes Amputation through the ankle joint was carried out. Skin grafting on the wound which had not completely healed was done on 24th November 2011 and was discharged on 26 November 2011 with a follow up as an out-patient. Thereafter, the witness said recovery was uneventful and he recommended to the mother that she secures the services of a psychologist for counselling due to trauma. He also recommended that plaintiff sees an Orthotic Specialist for purposes of acquiring an artificial limb to enable him to wear a shoe. Further he recommended that plaintiff be examined by an Occupational Health Specialist for an assessment of his impairment. The plaintiff continued to visit the witness' surgery for cleaning and treatment of the wound.

The witness produced his report dated 4 February 2014 as exhibit 3. He also produced exhibit 4 which he did on 14 February 2014. Under cross-examination, the witness was asked

whether the plaintiff would require any future medical treatment and his answer was in the positive saying there would be need for psychological assessment, the services of an orthopedic specialist, occupational health assessment and medical treatment as he keeps on growing.

It was the doctor's further testimony that plaintiff will suffer pain on and off depending on how much he uses that foot and weather conditions. Plaintiff will require pain killers depending on the severity of pain – severe pain requires very strong pain killers. The pain killers will be required for an indefinite period. The same applies to the artificial limb which will be affected by wear and tear requiring replacement during his entire life-time.

In answer to a question about future expenses at life expectancy of 70 years, the doctor said he was not qualified to give such evidence. However, when asked about the meaning of disability at 25%, the doctor said when one has no disability, he is on 100% and when one loses a certain part of his body there is a way of calculating the percentage of function that will have been lost. Two things determine the percentage lost namely impairment and disability.

Dr Dingani Moyo was the plaintiff's next witness. His qualifications are:

(1) Bachelor of Medicine
(2) Masters in Occupational Health and Safety
(3) Masters in Health Services Management
(4) Fellowship of the Faculty of Occupational Safety
(5) Membership of the Faculty of Occupational Medicine
(6) Certified Medical Examiner and Disability Medicine

His duties as a certified Examiner entail assessment and evaluation of impairment resulting from injury, accidents and general diseases. The aim is to apportion the relevant impairment resulting from the above.

The plaintiff became the witness' client in 2014 after being referred by Dr Musasanure and Orthopedic Surgeon for assessment of an injury on plaintiff's right foot. He carried out the required assessment and compiled a report that was produced as exhibit number 4. The degree of severity of the injury is severe and the plaintiff suffered a whole person impairment of 25% which means that the plaintiff's anatomical functioning is 75% instead of 100%. For his findings he relied on NSSA guidelines and Impairment Valuation Guide that is

internationally recognized. In light of a limb amputation, he found the disability to be of a permanent nature and of an extreme degree.

Under cross examination, the witness explained that impairment relates to functional or anatomical loss and that it is based on three aspects;

Firstly, there is what is known as the Grade Modified Functional History which is what the client presents as the mediate complaint. Secondly, there is the Physical Examination and thirdly investigations, studies etc, including X-rays or other tests. *In casu*, the key determinant factor that guides the result is the physical examination that showed the amputation of the leg.

The plaintiff closed its case after the evidence of this witness on 24 September 2020. Due to the non-availability of the 1st defendant, *Mr Chamunorwa* applied for a postponement to the 2nd and 3rd November to enable 1st and 2nd defendants to attend. However, on 2nd November 2020 the 1st defendant was not in attendance and *Mr Chamunorwa* applied for a further postponement on the grounds that 1st defendant could not enter Zimbabwe because he did not have a Covid 19 negative certificate due to lack of funds. The 2nd defendant offered to pay for all of 1st defendant's expenses. The application was not opposed and the matter was postponed to the 12th of November 2020.

Again *Mr Chamunorwa* applied for the matter to be postponed for the 1st term of 2021. It appears that the matter was eventually set down for continuation on the 19th of October 2021. On that date *Mr Chamunorwa* informed the court that the 1st defendant was stuck at the border and requested to lead evidence from another witness pending his arrival. His request was granted and he opened the 2nd defendant's case by calling Tamuka Maphosa who was to represent J. Karuru's testimony.

His evidence was that between 2005 and 2015 he was employed as a driver – salesman by the 2nd defendant. The 1st defendant was his workmate who had been recently hired and required to be shown the routes. On the day in question he said he had been assigned to monitor 1st defendant's driving. As they approached the intersection of 23rd Avenue and Hillside Road he noticed that the robots were not working and 1st defendant reduced his speed to about 15km/hour. On their right was a Toyota Hilux at about 200m away approaching the intersection. As they were about to complete the intersection they heard a "bang from behind" and their motor vehicle swerved and fell on its left side rolling for about 10m. Both were

trapped inside until passers-by smashed the windscreen to free them. Nearby was an injured child.

Upon being asked whether it was safe to enter the intersection his answer was "it was a little bit safe because the car on the right was a distance away and at the same time we were passing each other with a car from Mater Dei. This car was our cover because whoever was coming from the other direction was supposed to give way to this car". He maintained that their vehicle entered the intersection fast. However he conceded that since the robots were not working their vehicle was supposed to give way to the motor vehicle on their right that is the Toyota Hilux. As regards the point of impact which was indicated as being in the middle of the road, he said he thought their car was out of the intersection when it was hit.

After the evidence of this witness *Mr Chamunorwa* for the 1st and 2nd defendants advised the court that the 1st defendant was not in attendance as he was stuck at the border. He requested that the matter be rolled over to the following day namely the 20th of October 2021. On that date, counsel for 1st and 2nd defendants submitted that the 1st defendant was not in attendance while the 2nd defendant was present. Counsel then renounced agency in respect of the 1st defendant. The matter was postponed to the 9th of November 2021 with an order that plaintiff's legal practitioner to serve the 1st defendant with a notice of set down in terms of r15 of the rules of this court. On the 9th day of November, the court was informed that a certificate of service of the notice of set down was available proving that service was effected on the 2nd November 2021. Counsel for the 2nd defendant also submitted that he advised 1st defendant of the date of hearing and he acknowledged. Despite the 1st defendant's name being called three times, he failed to appear and the court made a ruling that 1st defendant was in wilful default. Counsel for the 2nd defendant then closed the 2nd defendant's case. The court directed the plaintiff's counsel to file closing submission on or before the 19th of November 2021 while the 2nd defendant was to file its submissions on or before the 30th of September 2021. Only the later filed closing submissions while the former's counsel could not, as he had lost his employment.

Analysis

Plaintiff and 1st defendant did not file closing submissions for different reasons. The 2nd defendant filed closing submissions. Before dealing with the main issues, I need to attend to two points that were raised by the 1st defendant. The 1st point which was raised for the 1st

time in closing submissions is a legal one relating to the effect on the plaintiff's claim of the statutory compulsory third party compensation scheme under Par IV of the Road Traffic Act [Chapter 13:11]. The 2nd defendant's argument being that the provisions of sections 22 and 25 of that At render the plaintiff's claim against the 2nd defendant wholly incompetent for the following reasons;

(a) The 2nd defendant was insured by NICOZ Diamond Insurance Co.
(b) Section 25 (i) of the Road Traffic Act provides as follows:
    (i) A person who has a claim against a person insured or indemnified in respect of any liability in relation to which a statutory policy has been issued shall be entitled –
        (a) in his own name to recover from the insurer any amount, not regarding the amount insured by the statutory policy for which the person insured or indemnified is liable; and
        (b) to claim and recover from a person insured or indemnified only so much of the claim as exceeds the amount recovered by him from the insurer.

The 2nd defendant's argument is that the effect of section 25 (i) *supra* is that the plaintiff was not entitled to sue the 2nd defendant for any amount he thought of. They were entitled to sue the 2nd defendant only for the excess amount, after recovering from the compulsory third party policy insurer and that the plaintiff's failure to plead the claim that way, coupled with the failure to lead any evidence on whether he recovered any compensation under the statutory compulsory third party policy scheme is fatal to the plaintiff's claim against the 2nd defendant on the basis of vicarious liability. Second defendant prayed that on that basis alone, the plaintiff's claim against the 2nd defendant ought to fail with costs.

As I indicated above, this point was raised for the 1st time in closing submissions by 2nd defendant. It is trite that a point of law may be raised at any stage of the proceedings. However, it is also settled law that such a point should not be allowed where it causes serious prejudice to the other party.

In casu, the raising of this point of law at this stage is highly prejudicial to the plaintiff's case in that he version on the point is not on record. He was not afforded an opportunity to be heard and or adduce evidence on it. At this stage the plaintiff was now a self-actor. To then

allow 2nd defendant to succeed on such grounds results in an unfair trial with an unjust result. I will therefore disallow the 2nd defendant from raising this point at the eleventh hour.

The second point raised by the 2nd defendant is that plaintiff is not the proper party to make a claim for past medical expenses since it is his mother who shouldered the responsibility of paying all medical expenses. The argument is that the proper plaintiff should have been his mother, one Fungai Magande. It is common cause that plaintiff was aged 12 years at the time. In my view, this argument has no merit for two reasons. Firstly, the plaintiff was a minor at the time of the accident. He had no resources of his own. Secondly in the summons the plaintiff is cited and described as "Nigel Chakanyuka a minor child who sues through his maternal guardian and mother Fungayi Magande."

Also in the plaintiff's declaration in paragraph 1, it is stated that:

> "The plaintiff is a minor child who sues through the assistance of his natural guardian and mother Fungayi Magande, whose address of service is care of his undersigned legal practitioners."

> In such circumstances, the argument that the mother should have ceded her claim in respect of past medical expenses has no merit because the mother has a legal duty to ensure that her son receives adequate and proper treatment. This duty does not arise out of cession but from her status as the biological mother of the plaintiff. Put differently, it was not necessary for the mother to first cede her claim to the plaintiff who was her minor child. The plaintiff was the beneficiary of the payments made by his mother and since plaintiff is suing through the benefactor, he is in my view entitled to receive those expenses. The plaintiff is the proper party to claim past medical expenses. See *Guardian National Insurance Co. Ltd* vs *Van Goot* 1992 (4) SA 61 (A) where it was held that "a minor is entitled to claim compensation for future medical and hospital expenses as prospective patrimonial loss in respect of her body injuries. Of course, since a minor has no *locus standi in judicio* to appear on his own in all proceedings, the assistance of a guardian or curator *ad liam* is required. A minor has both the right to claim support from his or her parents according to their means and such support includes prospective medical and hospital expenses. <u>But, in addition to this right, the child as the victim of a delict has the right to claim compensation from the wrongdoer for general damages relating to non-patrimonial loss as well as prospective patrimonial loss such as future medical and hospital expenses</u> and future loss of earnings (at 66D-E) …"

Quite clearly, a minor need not personally pay the past medical expenses before being entitled to claim compensation from the wrongdoer.

Accordingly, the point raised by the 2nd defendant regarding plaintiff's *locus standi in judicio* is without merit and is hereby dismissed.

I now turn to the issues that arose during the trial. The 1st issue is whether or not the accident was caused by the sole negligence of either the 1st or the 3rd defendant. The second defendant maintained that the 1st defendant was not negligent at all. Rather it argued that it was the 3rd defendant's negligence that caused the accident. The court was urged to reject plaintiff's evidence as patently unreliable since he was not sure as to who entered the intersection 1st. As regards the evidence of Phillip Mugare (Phillip). 2nd defendant argued that his evidence regarding the fault of the 1st defendant was purely opinion evidence that is excluded from admissibility on the grounds that it is irrelevant in terms of section 20 of the Civil Evidence Act [Chapter 8:01].

It was also argued on 2nd defendant's behalf that Phillip did not have an intimate knowledge of the matter as he purported to have since he was not the investigating officer. The other grounds upon which this witness's credibility was impeached are as follows:

(a) he did not measure the 1st defendant's point of perception of the traffic lights;
(b) he did not measure the 3rd defendant's point of perception of traffic lights when travelling along Hillside Road towards the Central Business District;
(c) he gave his evidence purely from a perspective of criminal law liability;
(d) his evidence did not show that the 1st defendant was the cause of the accident in that it is simply inadequate to attribute the accident solely to the 1st defendant simply because he allegedly did not give way.
(e) He was not an impartial witness and he appeared biased against the 1st defendant and too eager to impute liability against him;
(f) He made unsubstantiated assertions that the 1st defendant's father had interfered with investigations.

In an effort to further discredit the plaintiff's case, 2nd defendant led evidence from Tamuka Maphosa a passenger in 2nd defendant's mother vehicle. The crux of his evidence is that the 1st defendant's had a right of way as there was a motor vehicle coming from the right of the 3rd defendant. He also contended that 1st defendant had a "right way" since he entered or "arrived at the intersection first.

The law

The modern Aquilian action has six elements;

(i) Voluntary conduct which is

(ii) Unlawful/or wrongful;

(iii) Capacity;

(iv) Fault (intention or negligence)

(v) Causation; and

(vi) Loss

For a plaintiff to succeed in recovering damages under the Aquilian action, a plaintiff has to prove the facts necessary for a court to decide on a preponderance of probabilities, that the defendant's conduct satisfies each of these elements.

See Jonathan Burchell *Principles of Delict*, Juta & Co Cape Town at p23.

G. Feltoe *A Guide to the Zimbabwean Law of Delict* 2nd edition LRF 1990 at page 1 describes the Aquillian action as the cornerstone of our law of delict whose requirements are:

"(1) There must have been some conduct on the defendant's part (i.e. an act on omission) which the law of delict recognizes as being wrongful on unlawful. (The wrongfulness requirements).

(ii) The conduct must have led either to physical harm to person or property and, thereby to financial loss, or have caused purely financial loss which does not stem from any physical harm to person or property. (The so called patrimonial loss requirement, one's patrimony being one's property and finances);

(iii) The defendant must have inflicted the patrimonial loss intentionally or negligently. (The fault requirement)

(iv) There must be a casual link between the defendant's conduct and the loss (the causation requirement).

The sole troublesome issue *in casu* is the fault element. The question being whether or not the accident was caused by the sole negligence of either the 1st or the 3rd defendant?

It is trite law that the fault element for liability under the Aquillian action is either intention (*dolus)* or negligence (culpa). The test for determining negligence is as follows:

(i) Would a reasonable person in the same circumstances as the defendant have foreseen the possibility of harm to the plaintiff;

(ii) Would a reasonable person have taken steps to guard against that possibility;

(iii) Did the defendant fail to take the steps which he or she should reasonably have taken to guard against it?

The test of negligence is objective and is anchored on the standard of a reasonable man. The criterion of a reasonable person/or (*diligens paterfamilias*) was described by HOLMES JA in S v Burger 1975 (4) SA 877 (A) at 879D-E in the following colourful terms;

> "One does not expect of a *diligeus paterfamilias* any extremes such as Solomonic wisdom, prophetic foresight, chameleonic caution, headlong haste, nervous timidity, or the trained reflexes of a racing driver. In short a *deligens paterfamilias* treads life's path way with moderation and prudent common sense."

Van der Heever JA in *Herschel* v *Mrupe* 1954 (3) SA 464 (A) at 190F saw the reasonable person as "not … a timorous faint heart always in trepidation lest he or others suffer some injury; on the contrary, he ventures out in the world, engages in affairs and takes reasonable chances."

Applying these principles to the facts *in casu*, I find that the 1st defendant drove his vehicle negligently and caused the accident. He was negligent in that he failed to keep a proper lookout and failed to give way to the car driven by 3rd defendant. It is true that the rule of the road is that at a robot controlled intersection if the traffic lights are not working, a driver should concede the right of way to a motor vehicle on his right. This, the 1st defendant did not do. He admitted not doing so because the car driven by 3rd defendant was "far away" and that there was another can approaching the intersection on the right side of the 3rd defendant. His argument as advanced by the passenger in his car was that he "assumed" that the 3rd defendant was going to give way to that car. As it turned out, this was a very dangerous assumption that a reasonable prudent driver would not have made. In any event, the 1st defendant's failure to explain how this other car passed through the intersection without colliding with the motor vehicle driven by the 3rd defendant. The version by the 1st defendant in his pleadings is highly improbable. In the result, I find that it is false. The so-called 'other' car is the figment of 1st defendant's imagination.

In my view once it has been established that the 1st defendant failed to give way, that particular of negligence is proved. It is not necessary to prove any other particular of negligence because it is not a question of numbers. In this case the failure to give way is the *sine qua non* of harm suffered by the plaintiff. This conduct is clearly unlawful and objectively assessed negligent in that a reasonable driver in the same external circumstances as the defendant would have foreseen harm to the plaintiff. The 1st defendant ought to have foreseen

such harm. Further a reasonable driver would have taken steps to guard against such harm to the plaintiff occurring. The 1st defendant's failure to take such steps constitutes negligence *in casu*.

The evidence has not shown that the 3rd defendant was negligent in any manner. It is the 1st defendant's sole negligence that caused the accident. There is no question of contributory negligence. It is neither here nor there that the vehicle driven by the 1st defendant was hit on its rear axle. What is critical is the point of impact which is in the centre of the intersection. The credible evidence of Phillip is accepted by the court. First defendant's criticism is without merit in that it is inconsistent with the evidence and the law. For example, the criticism that Phillip "gave evidence purely from a perspective of criminal law liability and did not reconcile it to the plaintiff's claim that the 3rd defendant was negligent or that the 3rd defendant contributed to the accident …"

At law the objective test of negligence applies to both criminal cases and to the field of delict – see *S* v *Borchris Investments (Pty) Ltd* 1988 (1) SA 905 (A) at 916G-J. See also section 16 of the Criminal Law Codification and Reform Act Chapter 9:23.

In my view Phillip was an impartial witness who gave his evidence well. As regards the alleged bias against 1st defendant it is actually counsel who suggested that simply by mentioning that the 1st defendant's father who is a senior police officer arrived at the scene he was casting aspersions on him. It has to be noted that the witness told the truth about 1st defendant's father. He was there. The witness never alleged that the 1st defendant's father interfered with investigations.

In the circumstances the answer to the 1st issue is that the accident was caused by the sole negligence of the 1st defendant. The 3rd defendant did not contribute to the accident. This conclusion disposes issues 2 and 3 thus bringing me to issue number 4 which is whether or not the plaintiff is entitled to claim damages.

Damages

The action to recover damages for patrimonial loss under the modern Aquillian action is regulated by two rules of general application namely;

(i) The 'once and for all and (ii) the mitigation of loss' rules.

The once and for all rule in the assessment of damages is that damages are awarded once in a lump sum for both past and future loss, and as a general rule, the plaintiff cannot approach the court for a periodic review of the quantum of damages.

On the other hand, the mitigation of loss rule requires the plaintiff to take reasonable steps to mitigate his or her loss or run the risk of the extent of his compensation being reduced. If the plaintiff has taken reasonable steps to mitigate his loss such as hiring a substitute vehicle while the damaged one is being repaired, she can recover the expense incurred in so doing.

Damages can be divided into three broad categories namely;

(a) Damages for impairment of corporeal property and damages for personal (or bodily) injury;
(b) Special and general damages, and
(c) Patrimonial (or percuniary) and non-patrimonial (non percuniary) damages.

It is trite that the basic measure of damages is that the plaintiff is entitled to be put in as good a position as if the wrong has not been done. Further, a plaintiff can recover damages for bodily injury and for certain harm attendant on bodily injury – disfigurement, pain and suffering, loss of amenities of life, loss of expectation of life, loss of earning capacity and medical expenses.

It is common cause that the plaintiff was injured in the accident. That act entitles plaintiff to claim delictual damages.

The currency issue

The 2nd defendant contended that since it is trite that damages are reckoned from the date of occurrence of the act complained of the plaintiff's claim exercised in United States of America dollars should be converted to the local currency at the rate of 1:1 on 22 February 2019 by "operation of the law". Reliance was placed on the following authorities; *Munhuwa* v *Mhukahuru Bus Services P/L* 1994 (2) ZLR 382 (H) at 388E; *Komichi* v *Tanner & Anor* 2005 (2) ZLR 358 (H); *Mbundire* v *Buttress* 2011 (1) ZLR 501 (S); and *Zambezi Gas Zimbabwe P/L* v *N. R. Barber P/L & Anr* SC-3-20; *ZIFA* v *Custen Pidlwell & Ors* HH-12-21.

The argument is that by operation of the law the "claim" was amended from USA dollars to Zimbabwean dollars and the court is requested to make the pronouncement in its judgment to avoid disputes relating to the enforcement of the judgment.

I am not persuaded by this contention simply because it does not represent the correct legal position.

KUDYA JA in (1) *Ngalulu Inv (Pvt) Ltd* (2) *Mark Masinyazana Mbayiwa* v (1) *NRZ* (2) *Moffat Banda* SC-42-22 has now resolved the matter authoritatively by concluding that;

> "It is also axiomatic that a delict unlike a financial or contractual obligation, cannot be categorized as an asset or liability until it is voluntarily accepted as such by the wrongdoer until such acceptance is fosted upon the wrongdoer by a court of competent jurisdiction. This is because a delict is committed and does not accrue like an asset nor is it incurred like a liability. In accounting terms, an asset or a liability has an ascertainable monetary value, which is recorded in the relevant books or statements of account. This is the position that pertains to a judgment debt. It constitutes an asset in the books of the judgment creditor and, conversely, a liability in the hands of a judgment debtor. Neither of these parties can treat a delictual claim as an asset or a liability. They commonly do so after a competent court of law has made a determination on whether the claim establishes a liability and thereafter assesses the measure of such liability. In any event, only a judgment debt and not a delictual claim can be executed in the manner contemplated in s20 of the Act."

Accordingly, the 2nd defendant's contention that the plaintiff's claim was amended from US dollars to Zimbabwean dollars at the rate of 1:1 on 22 February 2019 by operation of law is incorrect.

I now turn to the assessment of damages as claimed in the summons. Plaintiff's claim is that for medical and hospital expenses (past) in the sum of US$6 887,00. Plaintiff is entitled to receive such damages where they are reasonably incurred and are fairly attributed to the plaintiff's bodily injuries sustained in the accident. Further expenses under this head were proved during the trial as shown below. From Dr Musasanure's evidence, it became clear that plaintiff was treated over a long period. The evidence reveals a narration of events that transpired from day 1 to the date of discharge. Various medical procedures were conducted. These were not done for free. They were paid for by the plaintiff's mother. The plaintiff claimed a figure of US$10 874,00 backed by receipts filed in plaintiff's bundle of documents. The receipts were produced by consent. According to the plaintiff's mother, they also incurred expenses relating to "incidentals". In my view, the plaintiff was not able to quantify these

expenses will therefore be difficult for the court to arrive at a figure. However, plaintiff proved that a total of US$10 814,57 was actually expended towards hospital bills. I find no reason not to award this amount to the plaintiff.

Plaintiff also claimed a sum of US$56 700,00 as future medical expenses. At law plaintiff is entitled to claim anticipated future medical and hospital expenses. However, the plaintiff must establish that as a matter of probability, these expenses will need to be incurred. *In casu,* plaintiff's evidence supported by Dr Musasanure and his mother Fungayi Magande is that he would require to use a prosthetic foot, special socks and detergents for the rest of his life. Plaintiff indicated that the artificial foot will have to be replaced every two years. His mother said the same but added that in 2018 the foot was replaced at a cost of approximately US$2 000,00. She said although the 1st prosthetic foot was purchased for US$750,00 in 2012, the next one was to be bought at US$890,00. This is confirmed by a quotation from Cassims Prosthetics and Orthotics (Pvt) Ltd dated 5 May 2013 – see page 28 of the plaintiff's bundle of documents. However, under cross examination plaintiff's mother said the correct year of purchase should be 2014 not 2012. According to plaintiff's mother plaintiff would require a "special shoe" and socks. The cost of the sock was put at US$50,00 and the frequency of its replacement was stated as twice per year. Although the plaintiff was referred to a psychologist, the mother was unable to indicate the approximate cost for such consultations which she said lasted for 6 months. Accordingly this court is unable to quantify damages for the psychologist's future services. However, what the evidence reveals *in casu* is that the bulk of the claim under future medical expenses arise from the replacement of the prosthetic foot and ancillary issues. It becomes necessary to calculate the figure using the life expectancy rate in Zimbabwe. When plaintiff testified she justified the figure of U$56 700,00 on 60 years as the life expectancy.

Plaintiff was 18 years when he testified. The last time he had a replacement was in 2014. He said the artificial foot was causing pain on his leg especially while walking. Plaintiff did not lead evidence from the supplier Cassims Prosthetic and Orthotics (Pvt) Ltd on the longevity of the artificial foot. Rather, plaintiff's mother relied on what she was told by the supplier. She further said plaintiff was experiencing a lot of discomfort in his leg, that it had developed sores, the shoe had split and she used a string to tie it up.

On this evidence, it is clear that the durability or longevity of the prosthetic foot is certainty not four years. Since the plaintiff's mother's evidence is that the foot can also be repaired 3 – 4 times a year. I am of the view that the frequency of replacing the prosthetic foot is once every two years. On this finding, the formular will be 60years -12 years = 48 years ÷ 2 = 24 years x $1 890,00= $45 360,00. The $1 890,00 is the cost for repairing the foot every two years. The price of the shoe was put at US$50,00 and it would need to be replaced after 6 months. This meant that the total cost will be US$100,00 per year. Therefore the total cost here will be 60 years x US$100,00 giving a total of US$6 000,00. I am aware that a purely mathematical approach may not produce the desired results Including the incidentals like the cost of replacing of the shoe and sock will be a fair assessment of the future medical expenses. This figure might appear huge but if one considers the economic, financial and currency situation, one comes to the conclusion that this is a fair amount. I say so because the law requires this court to order that defendant pays in United States dollars or its equivalent in RTGS at the bank rate. It is no secret that inflation is high and keeps on rising over the years.

As regards pain and suffering plaintiff claimed US$70 000,00. It is trite law that a plaintiff can claim for all pain, suffering and discomfort suffered or to be suffered by him as a result of the defendant's wrongful act. Both pain occurring as a direct consequence of the infliction of injuries and indirect pain and suffering associated with surgical operations and other curative treatment reasonably undergone by the plaintiff in respect of such injuries. What is extremely difficult to assess however, is the quantum of such damages. It has been said that particular regard should be had to comparable past cases as a guide.

In making such an assessment, the "prime considerations are the duration and intensity of the 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 subjective one" See G. Feltoe *A Guide to the Zimbabwean Law of Delict,* Legal Resources Foundation at page 107.

The same sentiments were echoed by Jonathan Burchell in his book titled *Principles of Delict,* Juta and Co. Ltd at page 136 as follows;

> "By their very nature the various forms of non-patrimonial loss are difficult to translate into monetary damages with any degree of precision but some guiding principles particularly on the computation of damages for pain and suffering have emerged through the case law. … The physical and mental make-up of the individual claimant provides the crucial test and so a person who is for instance, more sensitive to pain than

the ordinary person will be able to recover damages for the full extent of any pain that is actually suffered."
Applying these principles to the present case, it is instructive to note that;

(a) It is common cause that the plaintiff's foot was amputated at the ankle;
(b) Also common cause that the medical evidence proved that plaintiff had to survive on pain killers;
(c) That the plaintiff was a 12 year old school boy whose foot was crushed by a falling robot pole is also common cause.
(d) It is common cause that the plaintiff was detained in hospital for a period of 60 days.

The plaintiff's mother said when she 1st saw the plaintiff in hospital he was bleeding profusely from the wound. She also noted that the whole skin under his foot had peeled off. Although a decision was made that plaintiff had suffered a left crushed foot, he was not immediately taken for amputation. A period of 4 days lapsed before plaintiff's mother took him to a private hospital where he was attended to by Dr Musasanure.

According to the medical evidence by Dr Musasanure the plaintiff will continue to suffer pain indefinitely and would require pain killers. This would depend on how much he uses the leg and weather conditions. The pain would be mild and severe. The latter would require very strong pain killers. The doctor categorically stated that the plaintiff would require pain killers for an indefinite period and the same applies to the artificial limb which will be affected by wear and tear requiring replacement during his entire life time.

From the above evidence, it is indisputable that plaintiff suffered a lot of pain and continues to suffer pain as a result of 1st and 2nd defendants unlawful conduct.

Comparative cases

The general principles in assessing general damages were set out by the Supreme Court in *Minister of Defence & Anor* vs *Jackson* 1990 (2) ZLR 1 (SC) at page 8A-(A as follows;

(1) General damages are not a penalty but compensation. The award is designed to compensate the victim and not to punish the wrongdoer.
(2) Compensation must be so assessed as to place the injured party, as far as possible, in the position he would have occupied if the wrongful act causing him the injury, had not been committed. See *Union Govt* v *Watneoke* 1911A-D 657 at 665.

(3) Since no scales exist by which pain and suffering can be measured, the quantum of compensation to be awarded can only be determined by the broadest general considerations see *Sandler* v *Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199.

(4) The court is entitled, and it has the duty, to heed the effect its decision may have upon the course of awards in the future. See *Sigouranay* v *Gillbanks* 1960 (2) SA 552 (A) at 555H.

(5) The fall in the value of money is a factor for which should be taken into account in terms of purchasing power, "but not with such an adherence to mathematics as may lead to an unreasonable result", per Schrener JA in *Sigournday's* case, *supra* at 556C see also *Southern Insurance Assoc. Ltd* v *Barley NO* 1984 (1) SA 98 (A) at 116B-D; *Ngwenya* v *Masuka* 5-18-89 (not reported) at p8 of the cyclostyled copy.

(6) No regard is to be had to the subjective value of money to the injured person for the award of damages for pain and suffering cannot depend upon or vary, according to whether he be a millionaire or a pauper. See *Radebe* v *Hough* 1949 (1) SA 380 (A) at 386.

(7) Awards must reflect the state of economic development and current economic condition of the country See *Sadomba* v *Unity Insurance Co. Ltd & Anor* 1978 RLR 262 (G) at 270F; 1978 (3) SA 1094 ® at 1097C. *Minister of Home Affairs* v *Allan* S-76-86 (not yet reported) at p 12 of the cyclostyled copy. They should tend towards conservatism lest some injustice be done to the defendant. See *Bay Passenger Transport Ltd* v *Frangen* 1975 (1) SA 267 (A) at 274H.

(8) For that reason reference to awards made by the English and South African Courts may be an inappropriate guide since conditions in those jurisdictions, both political and economic, are so different. The formulation of further principles in the assessment of damages for personal injury is no easy matter. Overall what is to be sought is a compensation which is fair in the eyes of society. Munkman: *Damages for Personal Injuries and Death* 16tth Ed at p 18 puts it this way;

> "(The courts) are not concerned with the probably erroneous value that a person would put on his own life and limb, <u>but with the dispassionate and neutral value which society at large, on the basis of prevailing money value in that society would give it.</u>"

Counsel for the 2nd defendant cited a number of cases in a bid to assist the court in arriving at a fair amount. The following are some of them;

(a) *Dlamini* v *Mawona & Ors* 1996 (1) ZLR 593 (H) wherein the plaintiff had suffered 40% disability and spent 6 months in hospital and continued to suffer pain and discomfort thereafter. The court awarded damages in the sum of ZWL$50 000,00. I must quickly point out that due to inflation ZWL$50 000,00 in 1996 and the same sum in 2023 is different in that the value has drastically fallen to an extent where the two are not comparable. Accordingly this case provides no useful guidance to the court.

(b) *M & Another* v *Nyabanga & Anor* 2016 (2) ZLR 287 (H). In this case, plaintiff had suffered 20% disability, had spent 3 weeks in a plaster and subsequently undergone physiotherapy was awarded US$5 000,00 for pain and suffering, loss of amenities of life and disability.

In my view this case provides little guidance because the court combined claims which should have been assessed separately.

(c) *Gwiriri* v *Highfield Byo (Pvt) Ltd* 2010 (1) ZLR 160 (H). The plaintiff had lost his right hand and was assessed at 65% disability, spent more than 4 months in hospital was awarded damages for pain and suffering in the sum of US$3 000,00.

According to these cases, the maximum damages awarded for pain and suffering is US$5 000,00. During this period i.e. 2010 to 2016 Zimbabwe was using the United States dollar as the sole currency. The situation is vastly different now where the value of the ZWL$ continuously drops against the US$.

In *Chinembiri & 5 Ors* v *ZETDC* HH-155-14 six employees were injured whilst erecting a power line pole. Four employees who suffered disabilities ranging from 40-90% were awarded US$6 000,00 each for pain and suffering. The last two whose disability was 14% and 18% got $2 000,00 and US$3 000,00 respectively.

In casu, as I pointed out supra, that even *Mr Chamunorwa* for the 2nd defendant agreed that the evidence before the court shows that plaintiff suffered a lot of pain in the immediate aftermath of the accident. Plaintiff spent approximately 8 weeks in hospital, underwent surgery

and had to use crutches for about 3 – 4 months. In my view and having taken all the relevant factors into account a figure of US$8 000,00 is fair. Plaintiff is therefore awarded US$8 000,00 for pain and suffering.

Permanent body disfigurement

Plaintiff is now disabled due to the 1st and 2nd defendants' negligence. The plaintiff's claim under this head is US$80 000,00. While it has been stated that this claim ought to be combined with that of loss of amenities, there is nothing irregular or improper in treating it as separate from that of loss of amenities. See *A Guide to the Zimbabwean Law of Delict*, Third Edition, 2001 by Prof G. Feltoe at p 94.

Disfigurement was defined in *Mugadzaweta & Co – Ministers of Home Affairs & Ors* 2012 (2) ZLR 423 (H) at p 427G-428B as follows;

> "Disfigurement which is also referred to as deformity, refers to any deforming or mutilation of the plaintiff's body or any part thereof. It includes scars, loss of limb, a limp caused by an injury to the leg (s) and distortions of the body. The loss involves the restrictive value of the body or a part thereof and not functional performance. Visser and Potgieter op cit at 101 state that the extent of the loss under this heard depends upon plaintiff's sex, age, the visibility of the disfigurement, its influence on the plaintiff's life and the plaintiff's appearance before the injuries. Having considered the plaintiff, being permanent scars on his body, the court awarded damages in the sum of US$3 000,00."

In casu, the plaintiff lost a foot through amputation. He walks with a distinct limp and the amputation caused an ugly scar that scares away his younger siblings. Plaintiff is a young man who was amputated at 12 years old. There is no doubt that plaintiff is heavily disfigured. Taking into account previous awards and our currency regime a figure of US$10 000,00 is a fair and just amount.

Accordingly, plaintiff is awarded damages in the sum of US$10 000,00 for permanent bodily disfigurement.

Plaintiff's final claim is one of loss of amenities of life which he pegged at US$70 000,00. I agree with counsel for the 2nd defendant that this figure is excessive. It is accepted that plaintiff had a promising sporting future including athletics. He was performing well in school teams in respect of soccer, rugby, hockey and athletics until he was injured. He suffered a whole person impairment of 25% according to Dr Dingani Moyo. The disability was found

to be of a high degree. In my view the plaintiff's ability to enjoy amenities of life has been seriously impeded by the amputation. For these reasons I will award an amount of US$12 000,00 for loss of amenities of life.

Disposition

In the result judgment is hereby entered for the plaintiff and against the 1st and 2nd defendants jointly and severally, the one paying the other to be absolved as follows;

1. Medical hospital expenses (past) - US$10 814,57 or its equivalent in RTGS at the bank rate on the date of payment.
2. Future medical expenses - US$45 360,00 or its equivalent in RTGS at the bank rate on the date of payment.
3. Pain and suffering (past and prospective) - US$8 000,00 or its equivalent in RTGS at the bank rate on the date of payment.
4. Permanent bodily disfigurement - US$10 000,00 or its equivalent in RTGS at the bank rate on the date of payment.
5. Loss of amenities of life - US$ 12 000,00 or its equivalent in RTGS at the bank rate on the date of payment.
6. Costs of suit.

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Calderwood, Bryce Hendrie & Partners, 1st & 2nd defendant's legal practitioners