TINOS MUZEYA (in his capacity as father and
guardian of minor child Tapuwa Melissa Tasiyana)
versus
DONNA JAYNE MARAIS
and
AIG ZIMBABWE LIMITED (formerly Unity Insurance Co. Ltd)

HIGH COURT OF ZIMBABWE
CHINHENGO J
HARARE, 25 September, 27-28 November 2003
23-26 February and 31 March 2004

Civil Trial

Mr *T.D. Muskwe,* for the plaintiff
Mr *R. Phillips,* for the defendants

CHINHENGO J: This is a claim for personal injury and other consequential damages arising from a motor car accident in which the plaintiff's daughter, a minor called Tapuwa Melissa Tasiyana, ("Tapuwa") was severely injured on 20 May 1999. The plaintiff is suing in his capacity as father and natural guardian of Tapuwa. The defendants admit liability but do not admit the amount claimed. This is a claim which should have been brought to court much sooner and resolved but for the delays which I will indicate hereunder. The claim was amended three times and it is now for $754 064 402 of which $685 574 642 is claimed in Zimbabwe currency and the balance in United States currency in the sum of US$30 865.

The Injuries suffered by Tapuwa and treatment received

Tapuwa was a pupil at Avondale Primary School in Harare in 1999. She was in grade 2 and about 8 years old then. On 20 May that year she was on her way home on foot from school and was crossing Arberdeen Road in Avondale when she was knocked down by the first defendant's motor vehicle. That motor vehicle was comprehensively insured by the second defendant. Tapuwa was severely injured. The first defendant was later prosecuted in terms of the Road Traffic Act and was convicted and sentenced to a fine of $1 000 or in default of payment to imprisonment for three months.

Tapuwa was immediately taken to Parirenyatwa Hospital and spent a long time in the intensive care unit there. She was later transferred to the Avenues Clinic. Upon her release from hospital she was admitted to St Giles Rehabilitation Centre first as an in-patient and later as an out-patient. She

now "attends" school at St Giles and continues to receive rehabilitative treatment. She is 100% disabled and will remain so disabled for the rest of her natural life. She will also continue to require and hopefully receive rehabilitative treatment.

The injuries which Tapuwa sustained in the accident are summed up in a report compiled by Mr William Carol Auchtelonie, a neurological surgeon on 5 September 2001. He stated that:

> "The current problems are that tragically this child:
>
> 1 Cannot talk.
>
> 2 Cannot sit without support.
>
> 3 Cannot walk.
>
> 4 Cannot feed herself.
>
> 5 Cannot attend to or have control of her bowel or bladder.
>
> 6 cannot move or turn without assistance. She requires a full-time nurse during the day and is looked after by her parents at night.
>
> 7 She has difficulty in breathing and becomes chesty.
>
> 8 Secretions spill over from her constantly dribbling mouth.
>
> 9 She cannot chew, so only takes soft food and chokes easily.
>
> 10 She has dental problems with constant sores in her mouth and is prone to thrush.
>
> On examination I found an extremely tragic, pitiful picture of a severely impaired child in a wheel chair.
>
> The child's limps were held mainly in flexion, with increased plasticity. She was dribbling from the mouth constantly. She had obviously no understanding or awareness of her surroundings. All reflexes were brisk, there was no power in her limbs. Her eyes did not appear to focus or follow objects.
>
> I did not have access to any records or X-rays. I requested an updated CT scan, which showed atrophy and possible hydrocephalus developing.
>
> These scans, I understand, were sent to Professor Kalangu, her physician.
>
> In my opinion this child Tapuwa, has suffered a severe irreparable head injury with resultant permanent brain damage.
>
> 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.

> Medical expenses for he future will be high, as she will require constant nursing care, continuing rehabilitative therapy, drugs for possible recurrent and urinary tract infections.
>
> She will tend to develop limb contractures and pressure sores which may require surgery. Her wheelchair will have to be replaced from time to time."

In the same report Mr Auchtelonie said that in addition to the closed head injury, Tapuwa had bruises and cuts on her face and body; was bleeding from head and mouth. She had a bruised pelvis and fracture on the right hip. The surgeon was her referring to the injuries that were observed just after the accident. Except for his remarks concerning the irreparable nature of damage to her brain and reduction in life expectancy, Mr Auchtelonie's report is confirmed by Professor Kalangu in his reports and by his evidence in court.

Professor Kalangu's first report states in part as follows:

> "3. On 20th May 1999, I attended the person of Tapuwa Tasiyana, aged 7.
>
> 4. … on admission the patient was deeply unconscious with fracture of the right clavicle. CT Scan which was performed showed signs of cerebral contusions and also a subdural hygroma or collection of fluid between the brain and the dura. This child was treated for a long period of time in the Intensive Care Unit and she required intubation and ventilation followed by tracheotomy.
>
> 5. The treatment was successful following a lengthy battle and currently this child is able to interact with the environment and the people who are surrounding her.
>
> 6. However, Tapuwa Tasiyana is not yet independent. She is unable to walk on her own, and she is still mentally very disabled. This disability needs to be quantified by a neurophychologist.
>
> 7. This child would have certainly several problems in the future including learning difficulties, memory difficulties and also impossibility to be totally independent.
>
> 8. I consider the injuries to have been very very serious."

This report was compiled in year 2000. In another report of the same year Professor Kalangu stated that Tapuwa's disability was 100%. He also said that –

> "There is however some hope for her if she could be allowed to go overseas for a special treatment called Oxygen Hyperbaric Therapy. It has worked in some patient (*sic*) in the same situation as Tapuwa and I believe that a chance should be given to this child …."

At the trial Professor Kalangu gave evidence concerning the treatment which Tapuwa had received and the prospects for her condition improving even more if she received the Oxygen Hyperbaric Therapy ("HBOT"). I will sum up his evidence: Tapuwa still cannot talk, move or go to the toilet on her own. She cannot appreciate anything around her. Though she can hear she still cannot eat on her own or talk. Professor Kalangu tried to restore that part of the brain which could be useful. He identified that the brain stem and the mid brain are in working order hence Tapuwa can swallow and sleep and wake up. The cortex was however not functioning hence she has lost speech and appropriate motor action and control of sphincters. She can improve with HBOT treatment which is available overseas. Although success depended on the extent of the primary damage she could improve to the point where she can go to the toilet on her own, turn on her own and achieve some independence. The HBOT treatment involves the concentrated supply of oxygen to the brain. It is administered in sessions over a period not exceeding four months. First Tapuwa would have to be evaluated to establish whether HBOT treatment would be beneficial to her before treatment commenced. She would then require a minimum of 20 sessions of treatment but depending on her responses to it she may require up to 50 or 60 sessions or even 80 sessions. These treatments have to be done enblock and all within a period not exceeding four months. Although the evaluation can be done in Zimbabwe, it was the more appropriate thing that it be done in Florida, USA where Tapuwa would receive the HBOT treatment. Professor Kalangu expressed confidence and professional opinion that Tapuwa would benefit from the HBOT treatment. He did not agree with Mr Auchtelonie's assessment that Tapuwa had suffered irreparable brain damage. He said that she had already registered improvements such as that she now can flex and no longer dibbles from the mouth. There was, in his view definite scope for more improvement. He also differed from Mr Auchtelonie in regard to Tapuwa's life expectancy. He said that Tapuwa had a below average life expectancy if left alone but she will have a normal life expectancy if properly looked after. Her condition will improve and thereby reduce dependency on a nurse aid. Professor Kalangu said that whilst Tapuwa is receiving the HBOT treatment she would at the same time require and receive physiotherapy treatment. He said that she will need a hip operation because her hip is not mobilizing sufficiently, will freeze, and require an operation. She will also require a replacement wheel-chair. In regard to the HBOT treatment in Florida, Professor Kalangu said that

it was necessary for Tapuwa to be accompanied by one parent. He said that it was not necessary for both parents and another child in the family to accompany her.

The plaintiff gave evidence concerning the injuries sustained by his daughter, the treatment that he received and continues to require and to receive. He said that at the time of the accident he and his family were renting a dwelling place in Avondale. After the accident they were constrained to leave the rented accommodation and to live at their own house in Mufakose, a high density suburb west of the city of Harare. He and his wife made daily visits to the institutions where their daughter was receiving treatment Parirenyatwa Hospital, Avenues Clinic and St Giles Rehabilitation Centre. They made many other visits to the specialist medical practitioners who attended to Tapuwa. When Tapuwa became an outpatient at St Giles, they took her there frequently for physiotherapy and speech therapy. They continue to do so now because that is where she "attends" school of necessity. They also had to hire a nurse aid to look after Tapuwa both at St Giles and at home when they are away. They spent a lot of money on hospital fees, drugs, specialist treatment of Tapuwa both in Zimbabwe and in Florida. They will require money to pay a nurse aid and to take the child to St Giles. Their claim therefore encompasses these areas of expenditure, past and future, and loss of earnings capacity.

In regard to Tapuwa's treatment outside Zimbabwe, the plaintiff said that if it was necessary for both him and his wife and their other child to accompany Tapuwa. He said that Tapuwa was a girl approaching puberty. If he went with her alone it would cause problems when it comes to bathing her or changing her clothes. If the mother went alone she would have problems lifting her or generally moving her around. They had assisted each other throughout the years to look after the child especially during the night when she had to be turned over. In his view it was therefore necessary that both of them accompany her to Florida. He said that Tapuwa's brother, younger than her, should also go to Florida in order to provide a complete family environment which would enable Tapuwa to recover quickly. I shall deal with other aspects of the plaintiff's evidence in considering each of the heads of claim.

The pleadings and their amendment

The plaintiff's claims as contained in the declaration to the summons issued on 19th January 2001 was for the payment of medical and nurse aid

expenses in the total sum of $2 293 989-70 and general damages inclusive of future medical expenses, loss of future earnings, future nurse-aid expenses and transport cost in the total sum of $26 340 000. He therefore claimed the sum of $28 633 989-70 altogether plus interest at the prescribed rate of interest from the date of service of the summons to the date of final payment.

There was no progress in this matter for quite a while between 2000 and 2002. The plaintiff said that the parties were pursing a settlement out of court. On 17th June 2003 a pre-trial conference was held. The plaintiff indicated his intention to amend the claim. The presiding judge ordered him to file and serve on the defendant a comprehensive amendment of the claim within two days of the pre-trial conference. It was noted by the judge that liability was not in issue. On 18th August 2003, the defendant's legal practitioners complained in writing that the plaintiff had not compiled with the judge's direction at the pre-trial conference. It seems to me that the plaintiff had in fact amended his claim and may simply not have served it on the defendant's legal practitioners. When the trial commenced on 25th September 2003, the plaintiff moved an amendment to the declaration which had been filed on 17th June 2003. The amendment was not opposed. In terms of the amendment, of this plaintiff's claim was now for:

(a) $9 000 000 for general damages for pain and suffering and loss amenities of life.

(b) $10 000 000 for loss of future earnings capacity.

(c) $1 607 042-92 for wheelchair and its repairs in the future.

(d) $74 177 856 special damages covering past and future medical expenses, nurse aid and transport costs.

(e) US$320 000 for the HBOT treatment and other associated costs.

The trial commenced on the understanding that the plaintiff was to prove his entitlement to the amounts claimed in the amended declaration filed on 17th June 2003. This was not to be. The plaintiff again applied to further amend his claim. The trial had to be adjourned to allow the plaintiff to make a further amendment to his declaration. In February 2004 the trial resumed. The plaintiff moved an amendment fled of record on 16th February 2004 in which he claimed an increased amount overall. The claim for general damages for pain and suffering remained at $9 000 000, however, he now claimed $134 516 711 for what he termed "past liability". This amount was made up to the expenses claimed in respect of transport costs ($103 707 271), past medical operations

($26 490 155), nurse aid reimbursement ($4 687 134) and lumber brace (132 151). Future expenses were claimed as follows:-

1.	Medicals : St Giles	$ 69 858 134
2.	Transport	$233 308 400
3.	Loss of income (i.e. loss of earning capacity)	$ 96 910 232
4.	Nurse aid	$ 5 231 108
5.	Nurse aid transport	$ 7 299 220
6.	Doctors	$ 4 666 168
7.	Repair wheel chair	$ 2 42 744
	Total	**$419 898 005**
a)	Tickets (to Florida)	$ 58 350 240
b)	Medical (HBOT treatment in Florida)	$126 840 000
c)	Operations – St Annes	$ 5 614 000
d)	Wheel chair	$ 2 000 000
e)	Appliances	$ 3 045 446
	Total	**$195 849 686**
Grand total for future expenses		$615 547 691
Actuarial fees		$ 4 000 000
Total Claim excluding legal fees and reviews in Zim$		$754 064 402
Amount claimed in Zim$		$685 574 642
Amount claim in US$		US$ 30 865

In addition to these amounts the plaintiff claimed interest at the prescribed rate of interest on the sum of $9 million from the date of the accident to the date of payment. He did not claim any interest on the other amounts. He claimed costs on a legal practitioner and client scale. The plaintiff's claim as contained in this last amendment was compiled by an actuarial firm known as African Actuarial Consultants. A Mr Darlington Chamburuka of that firm gave evidence in support of the figures claimed. The plaintiff himself was unable to speak to his claim in so far as the figures were concerned. He deferred to the actuary.

I have to explain the basis on which the actuary calculated some of the amounts claimed by the plaintiff. For costs incurred in the past the actuary relied not on receipts or vouchers, but on figures or estimates given to him by the plaintiff and the plaintiff's legal practitioner. For future costs the actuary relied on quotations where available and other information provided by the plaintiff. The actuary said that he checked all the figures given to him by the plaintiff to establish that they were reasonable. The actuary determined the amounts of the plaintiff's claims for past expenses by calculating the figures in such a way as attempted to compensate the plaintiff for the fall in the value of money. In other words past expenses were calculated on their value in today's money so that for example where the lumber brace actually cost $37 000 in

April 2003, the actuary calculated the same amount for purposes of reimbursement to be $132 151, or where the cost of transport between 1999 and June 2003 was $4 745 794 the claim is for $103 207 271 or where it cost the plaintiff $319 500 to pay the maid from 1999 to June 2003, the claim is $4 687 134. The actuary calculated all the expenses incurred and paid in the past in this way in order to fully reimburse the plaintiff in today's money for those expenditures. This indeed is a novel approach and it is for this reason that the plaintiff did not claim interest on the amounts other than the amount for general damages for pain and suffering and loss of amenities of life.

The actuary calculated the amount in Zimbabwe currency of the cost of return air tickets to Florida and for the cost of HBOT treatment using the so called parallel exchange rate of 1US$ to Z$6 000. This is the reason why the cost of the air tickets in Zimbabwe currency is $58 350 240 and that of HBOT treatment is $126 840 000.

The actuary said that the future costs of providing a nurse aid, her transport and the costs of transporting the child to and from St Giles, future costs of rehabilitative treatment at St Giles, the costs of repairing the wheel chair and other such costs were calculated for a 10-15 year period over which it was assumed these expenses would be incurred. No explanation or satisfactory explanation was given as to why he used 10-15 years in view of Professor Kalangu's evidence that Tapuwa could have a normal life expectancy if properly looked after. The actuary said that he had discounted his figures by 5.75% except for the future costs of treatment at St Giles. I must say that the actuary's evidence and his calculations left a lot to be desired. He did not place before the court any source documents. He admitted that no receipts or other proof of expenditure were given to him to show what was actually paid by the plaintiff for transport. He relied on the plaintiff's estimation of costs. He did not take into account tax liability in respect of loss of future earnings.

The actuary's calculations of future loss of earnings was based on the salary which it was expected Tapuwa would earn in the future. It was taken to be at equal to the average net income of the parents in the sum of $701 500 per month. Whilst in respect of claim for future transport and nurse aid expenses, for example, the actuary used 10 – 15 years as Tapuwa's life expectancy, in regard to the loss of future earnings, he made some references to 65 years which is normal retirement age in Zimbabwe. The actuarial calculations did not provide a consistent and readily understandable and logical basis for making

them. It was therefore detrimental to the plaintiff's case that some of the calculations or claims were not supported by any receipts or other documentary proof of expenditure. The actuary did not, nor did the plaintiff provide any legal basis or authority for claiming past expenses, not in the amounts actually incurred or expended, but in amounts reflecting today's money value of those expenses.

Issues for determination

The overall issue for determination in this case is, of course, the amount which should be awarded to the plaintiff as damages. There are other subsidiary issues which I must determine first. These are:-

(a) Is the plaintiff entitled to claim in today's money terms the amount of expenses actually incurred i.e. is he entitled to convert an expenditure actually incurred and paid to a figure representing that amount in today's money after factoring in inflation and claim for example $37 000 paid for the lumber brace in April 2003 as being equivalent to $132 127 today?

(b) Has the claim for future expenses sufficiently taken into account all the necessary factors such as discounting the amount for various reasons?

(c) Is it permissible to use the unofficial (or parallel market) rate of exchange of 1US$ to Zim$6 000 in calculating the amount payable in Zim$ where the claim is in United States Dollars?

(d) Is it permissible in a claim in delict such as the present, to make an award in United States Dollars of any part of the claim?

(e) What is the correct approach to a claim for loss of future earning capacity in a claim by or on behalf of a minor?

(f) Is there a basis for awarding an amount in respect of the travel to Florida of the whole of the plaintiff's family or is it sufficient to award an amount in respect only of one parent and Tapuwa?

(g) Is the HBOT treatment sufficiently justified to warrant an award of damages for such treatment to be obtained?

(h) Is there a basis for the plaintiff's claim for interest at the prescribed rate of interest on the amount of general damages and for his claim for costs on a legal practitioner and client scale?

Mr *Phillips* has, in addition to his submissions at the end of the trial, made further and very helpful written submission to me. Mr *Muskwe* promised to do the same but did not do so.

Some of the issues I have identified above may be quickly disposed of. Issue (c) is disposed of by simply stating that the exchange rate of exchange 1 US$ to Zim$6 000 is an unofficial and illegal rate of exchange. This court cannot use or accept to. Issue (g) is disposed of on the basis of the evidence of Professor Kalangu that it was not necessary that the whole family should travel to Florida with Tapuwa for the HBOT treatment. The plaintiff and his wife will have to decide who between them should accompany Tapuwa on the trip. Whilst I am sympathetic to the plaintiff's wishes that the whole family should go to Florida I think those wishes are based on emotions and considerations of convenience. They are not supported by any expert evidence. I do not think that a court should make any award to cater for the convenience of the plaintiff or to satisfy him or his family's emotional needs. Any award must be reasonable and deserved depending on the evidence before the court. The amount of award must be necessary to meet the reasonable expenditures associated with the HBOT treatment.

Past expenditure in today's money

The plaintiff calculated the amount of past expenses and adjusted it upwards in order to compensate the plaintiff for the loss of purchasing power of the money since the dates upon which those expenses were paid. This was attempted in *SA Eagle Insurance Co Ltd v Hartley* 1990 (4) SA 833 (A) where in regard to the amount claimed for past earnings the lower court had agreed to add an amount in order to compensate the claimant for the loss of purchasing power of money since the dates upon which the past losses of earnings had been incurred. The appellate court disapproved of this approach and stated that such an approval was tantamount to altering the quantum of the debt according to when the plaintiff sought to exact it and that the result was in conflict with the principle of nominalism of currency which was entrenched in all aspects of South African Law including the law of obligations. As stated by

PJ Visser and JM Potgieter in *The Law of Damages Through the Cases,* 2nd ed. At page 321:

> "The essence of nominalism of currency, in the field of obligations, was that a debt sounding in money had to be paid in terms of its nominal value irrespective of any fluctuations in the purchasing power of currency."

This principle, the learned authors state, does not apply to loss of future earnings or future support or where a comparison has to be made of previous awards in quantifying non-patrimonial loss. The principle of nominalism is dealt with in detail in *Hartley's* case (*supra*) where the appellate court disapproved of the decision on this point in *Everson v Allianz Insurance Ltd* 1989 (2) SA 173 (C), EM GROSS KOPF in *Hartley supra* referred to many cases in South Africa and other jurisdiction which dealt with the principle of nominalism of currency such as – *Cosmopolitan National Bank of Chicago v Steinberg* 1973 (4) SA 579 (R) at 581F; *Voest Alpine Intertrading Gesellschaft MBH v Burwill & Co SA (Pty) Ltd* 1985 (2) SA 142 (T) at 151D; *Deutsche Bank Filliale Niirberg v Humphrey* (1926) 272 US 517 at 519; *Treseder-Griffin and Another v Cooperative Insurance Society Ltd* (1956) 2 QB 127 (CA) at 144. The learned JUDGE of APPEAL stated that "it would represent a revolutionary transformation of our legal system in Courts were to be called upon to determine the true economic value 'in terms of purchasing power' of all obligations sounding in money". He then went on to say:

> "The principle of nominalisn is in my view to be applied as follows in the present case. The respondent suffered a loss of income, expressed in rands, prior to the trial. That loss had to be made good by the appellant by paying to the respondent the number of rands which he has lost irrespective of whether the purchasing power of the rand has varied in the interim."

I think that it is correct to adopt the principle of nominalism in dealing with all obligations sounding in money. I appreciate that the rate of inflation in Zimbabwe had been high and as stated by Mr *Muskwe,* it is presently above 500%. But a departure from the principle of nominalism will create such uncertainty in the law that the whole system, will be unworkable. The monetary obligation to be discharged will then depend on when the plaintiff sought to exact it and, even more ominously, on when the court handed down its judgment. Therefore a debt sounding in money must be paid in terms of the nominal value of the currency irrespective of any fluctuations in its purchasing

power. In any event I think the principle of nominalism is even-handed because it places the risk of depreciation of the currency on the creditor an that of appreciation on the debtor. The problem can be resolved by the Minister of Justice, Legal and Parliamentary Affairs adjusting the prescribed rate of interest to take into account the effect of inflation on the purchasing power of our money. I therefore conclude that the actuary's calculations are not legally sustainable and the amounts claimed on behalf of the plaintiff for past expenditure cannot be awarded because they are not supported by any sound principle of law. The calculations and the resultants amounts cannot be justified at law. I will therefore award the amount actually paid or the expenditure actually incurred in the number of dollars so paid or incurred and proved to the satisfaction of the court. In the result therefore for past expenses there will be an award of $37 000 paid on 8 April for the spinal cord brace; the sum of $1 462 577 for past medical expenses and nurse-aid expenses as agreed between the parties. See letter by plaintiff's counsel dated 24th October 2003.

The plaintiff must have incurred some expenditure on transport for him and his wife and for Tapuwa and the nurse aid. They live in Mufakose and they obviously travelled into Harare and to St Giles in connection with the child's treatment. Unfortunately they did not keep a record of the expenditure nor did they maintain a schedule of the number of trips covered. As a result they did not place before court any proof of expenditure. There is no denying that Tapuwa's accident was a major tragedy for the plaintiff and his family. There is no denying that he and his wife incurred expenditure on transport to and from the hospital and to and from St Giles. His evidence, though unsupported by vouchers, was that they incurred such expenditure. The problem is simply one of lack of proof. I do not think that once I have accepted that such an expenditure was incurred, as indeed it was, it would be fair or just to deny the plaintiff any award at all. In his declaration before its amendment, the plaintiff claimed past transport expenses of $100 000 in respect of the nurse aid. In the amendment of 17 June 2003 transport costs claimed were in the total sum of $2 700 540. It seems to me that a claim of $100 000 for past transport costs in respect of each of plaintiff, his wife, the nurse aid and Tapuwa as and when such expenditure was incurred, would be reasonable. I would, for the reason that I am satisfied that such an expenditure was incurred award a globular figure of $400 000 for all transport cost incurred up to date of trial.

Future medical and other expenses

There is no doubt that the plaintiff will incur future expenditure on medical and rehabilitative treatment, transportation and nurse-aids. The plaintiff's evidence in regard to the cost of consultation fees charged by expert medical practitioners, therapy at St Giles, nurse-aid expenses and transportation was not very helpful to the court. Only the cost of future operations and adaptive appliances was supported by documentary evidence in the form of quotations. In this regard Mr *Phillips* agreed that the cost of future operations as per exhibit 6 should be allowed and so should the cost of adaptive appliances in exhibit 7. For the two operations therefore an award of $5 214 000 is made to cover the deposit required and the cost of the actual operation. The quotation of adaptive appliances in exhibit 7 is qualified which means that the cost thereof may increase. The evidence was that this quotation was given in 2001. There is no basis for me to deny that the cost of these appliances in 2004 have increased. The actuary's calculations show a huge increase. I can accept those figures. I will however deduct $235 935 being the estimated cost of the 560 lumber brace which was purchased in May 2003 and has not been shown to require replacement. I will award the plaintiff the sum of $808 330-40.

In regard to future visits to the doctors I agree with Mr *Phillips* that no evidence was led of any need to see Dr Pazvakavambwa nor was there satisfactory evidence as to the number of visits. Mr *Phillips*' helpful calculations were based on four visits to each of Mr Bowers and Professor Kalangu per year at a cost of $2 335 per visit over a period of 7 years. In his amended claim as at February 2004 the plaintiff stated that thee will be eight visits per year and consultation fees are $50 000 (Bowers) $20 000 (Pazvakavambwa) and $30 000 (Kalangu). No explanation is given for the difference. I will take the consultation fee charged by Professor Kalangu and not the figure as at 31 August 2003 used by Mr *Phillips*. There has been an increase in these costs. Using Mr *Phillips'* formula (the plaintiff's legal practitioner did not give me any such calculations) and discounting at a rate of 8% I will award the sum of $844 090. See *Minister of Defence v Jackson* 1990 (2) ZLR 1 (SC) for the discount factor of 8%.

For the future therapies at St Giles I will adopt the helpful calculation by plaintiff's counsel which had a discount factor of 4% and further deduction of 10% for contingencies. I will award the sum of $1 450 475. In regard to the cost

of nurse-aid in the future I will again adopt the calculations by counsel for the defendants. I, however, do not agree with him that the cost thereof should be as at December 2001 when we have the cost as at January 2003 of $7 000 per month. I will use this figure. The resultant figure on a discount of 4% is the sum of $603 630 which I will award to the plaintiff.

Claim in delict for award in foreign money i.e. US Dollars and whether whole family to travel to Florida

The plaintiff had claimed payment for the HBOT treatment in United States Dollars. Mr *Phillips* indicated that it was reasonable that an award if found due, can be made in United States dollars. There is authority to the effect that a court can grant a judgment in a foreign currency even where the claim arises in delict. This was stated in *Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (per CORBETT CJ at 744) and in *Makwindi Oil Procurement (Pvt) Ltd v National Oil Co. of Zimbabwe* 1989 (3) SA 191 (SC). In the present case the justification for awarding the claim for HBOT treatment in United States dollars likes in the fact that although the loss was basically felt in Zimbabwe because the delict occurred in Zimbabwe, the expenditure will be incurred in United States dollars. This is the currency in which the plaintiff's loss will be felt. Because of Mr *Phillips'* apparent concession in this regard I shall not consider the question, which it would normally be necessary to do, whether or not the loss in United States dollars was reasonably foreseeable in this case.

As to the merits of such an award I am satisfied that Professor Kalangu's evidence was cogent that the HBOT treatment was necessary. There is no doubt in my mind that the treatment will benefit Tapuwa. Mr *Phillips* submitted that the HBOT treatment and its benefits were in the realm of conjencture at this stage. I do not agree. Professor Kalangu's evidence was positive in this regard. Where there is room for doubt is whether Tapuwa will require more than minimum 20 sessions of HBOT treatment. It appeared to me that in essence Professor Kalangu was on the view that 20 sessions would be adequate. He did not anticipate any reviews or the need to go to Florida at a later stage. I think it will be fair in this case to award the plaintiff the cost of 20 sessions of HBOT treatment in Florida, USA. Tapuwa will be accompanied by one parent only unless the plaintiff can, on his own, bear the cost of sending the whole family. The award under this heading is the cost of a return air ticket for one adult and

one child to the USA (Florida) in the respective sums of US$2756-76 and US$2105-76; twenty sessions at US$200 per session (US$4000); cost of initial evaluation (US$140); cost of SPEC scanning (US$2400). The plaintiff claimed the cost of food and accommodation for a period of 6 weeks for two adults in the respective sums of US$8200 and US$8000. Having determined that only one parent should accompany Tapuwa an award of US$800 for food and accommodation over a period of six weeks is reasonable. The award for all expenses associated with the HBOT treatment is US$19402-52.

Claim for loss of future earning capacity

The plaintiff's claim for loss of future income is the sum of $96 910 232. The actuary stated that the calculation was based on what can be assumed to be Tapuwa's expected salary which was equal to the average net income of her parents currently $701 500 per month. It is quite unfortunate that the plaintiff or his legal practitioner or the actuary did not provide me with any calculations indicating how they arrived at the figure of $96 910 232. On the other hand in his written submissions Mr *Phillips* showed how he arrived at the figure of $31 840 575 which he urges the court to award under this head.

There are two main approaches to assessing damages for loss of future earning capacity. The one is to make a globular award in respect of general damages inclusive of loss of future earning capacity. The other is to assess the damages under separate headings – damages for pain and suffering and loss of amenities of life separately from damages for pain and suffering and loss of amenities of life separately from damages for loss of future earning capacity. The latter approach depends on the evidence placed before the court including actuarial evidence. In *Southern Insurance Association v Bailey NO* 1984 (1) SA 98 (A) the court expressed a preference for the second approach pointing out that damages for pain and suffering, etc. are concerned with a loss which cannot be measured in money whereas the loss of future earning capacity is concerned with patrimonial loss and a logical approach based on some calculation can be done in respect of the latter. This approach commends itself to me and it has generally been adopted in Zimbabwe. Mr *Phillips* has attempted to do this more so in this case because the plaintiff's claim for pain and suffering and loss of amenities of life was not disputed. In fact Mr *Phillips* pointed out that the sum claimed ($9 000 000) may have been excessive at the time that the claim was first made but not so now. He had regard to *Hokonya v*

Chinyani 1995 (1) ZLR 102 and opined that the sum claimed under this head is not outrageous having regard to the present value of money, the prevailing economic conditions and inflation.

In calculating the award in this case one major complication is the expected period of livelihood of Tapuwa. Calculations of damages for future medical treatment in Zimbabwe, costs of transportation and nurse-aid were based on a period of livelihood between 10–15 years by the plaintiff and of 7 years by the defendants. I adopted the latter in my assessment mainly because the plaintiff was not clear as to why he opted for 10-15 years and also because he did not settle on any specific number of years. Bit in relation to future loss of earning capacity I would have expected the parties to rely on the evidence of Professor Kalangu who said that Tapuwa can have a normal life expediency if properly looked after. The plaintiff rather surprisingly based his calculation on a period 10-15 years. I will for this reason adopt 7 years as a basis for the calculation of Tapuwa's loss of future earning capacity. I will also use the average income of her parents in the sum of $701 500 per month rounded off to $700 000 per month. In *Bailey NO (supra)* CORBETT CJ said the following at 116G:

> "Where the method of actuarial computation is adopted, it does not mean that the trial judge is 'tied inexorably by actuarial calculations'. He has 'a large discretion to award what he considers right' (per Homes JA in *Legal Assurance Co Ltd v Botes* 1963 (1) SA 608 (A) at 614F). One of the elements of exercising that discretion is the making of a discount for "contingencies" or the "vicissitudes" of life bearing in mind that the fortunes of life are not always adverse."

In making my calculations I shall bear in mind that inflation is like to continue to ravage the economic well-being of Zimbabweans, I shall also bear in mind the need to avoid duplication. Tapuwa was until the accident, a normal child attending a reasonably god school in Harare. Being their first child, her parents were keen, as the evidence reveals, to give her a good education and a good future. The likelihood of her having done reasonably well is good having regard to the family's general background. If I were not to be faulted for making a case for the plaintiff I would have calculated Tapuwa's loss of earning capacity over a period of 30 years and using a life expectancy of 53 years as stated by the actuary in is evidence. I say this because having accepted that Tapuwa would have worked and earned the average income of her parents then

it does not appear to me to be logical to give her a working life of 7 years as did Mr *Phillips* and as appears to have been accepted by the plaintiff who made a straight calculation over 11.5 years. I will discount the figure 4% and further reduce it by 15% to take into account the contingencies of life. I have not used 25% for the contingencies, as in *Barley NO (supra)* because it seems to me that the loss of earning capacity calculation should have been based on a much longer period. I have used 15% to underscore my view that a longer period should have been used. I will also further reduce the amount by 10% for the reason that Tapuwa is receiving the money now rather than in the future when it would have been earned. My calculation using Mr *Phillips'* formula results is an award of $39 332 475.

The cost of replacement of the wheelchair and its repairs over a period of 7 years will be the sum of $1 612 212. That is awarded.

Interest and legal costs

I do not think that whatever principle of law is adopted, the plaintiff is entitled to interest on any amount from a date earlier than the date of this judgment. This is so because the plaintiff amended his claim several times right up-to the date of the resumed trial in February 2004. His claim remained unliquidated and there would be no justification for ordering the defendants to pay interest from a date earlier than the date of judgment. Additionally the plaintiff's amendments meant that the defendants did not know the amount of the claim until the last amendment. The reduction in value of the Zimbabwe dollar adversely impacted on the plaintiff because of the delay in prosecuting his case between 2001 and 2003. It seems to me that at some point the plaintiff was unhappy with his legal practitioner's services. This is understandable having regard to the manner in which his legal practitioner handled this case. He failed to lead any useful evidence to prove the cost of transport incurred up to the date f the trial. He relied on the actuary's calculations. Some of those calculations were based on an illegal rate of exchange and some on a wrong principle of law, to wit that the loss of purchasing power of the Zimbabwe currency can be compensated thereby ignoring the principle of nominalism of a currency. He was generally either unprepared or did not fully understand how he would prove the various claims. He offered very little guidance to the plaintiff.

Coming to the issue of the costs of suit, I do not think that thee is any basis for awarding them against the defendants on the scale of legal practitioner and client. The shortcomings I have mentioned in respect of plaintiff's conduct of his case quite obviously do not entitle him to a high award of costs. In fact the plaintiff and his legal practitioner caused delays in this trial which must disentitle them to costs on the scale claimed. In this regard I will award the costs associated with the postponement of this matter on 28 November 2003 to the defendant.

The amount in United States dollars shall be paid by the defendants jointly and severally, the one paying the other to be absolved in the sum awarded i.e. in United States dollars or at the instance of the plaintiff, in the equivalent sum in Zimbabwe dollars at the legal rate of exchange prevailing on the date of such payment.

There is one other matter I need to mention. In a claim such as this the plaintiff should claim in his personal capacity for past expenses and in his capacity as father and natural guardian of Tapuwa for loss of future earning capacity, general damages and for other future expenses. The plaintiff has only sued in a representative capacity. I have not taken issue with this point because Mr *Phillips* was happy that I deal with the whole claim as if the plaintiff had claimed in the manner I have stated as being correct. The actuarial report and calculations has not been helpful to the court. If anything it caused confusion. It relied on a principle which has been rejected as a basis of calculating the amounts to be claimed. I will disallow the fees charged by the actuary.

In the result I order that –

1. the defendants, jointly and severally the one paying the other to be absolved, shall pay to the plaintiff:-

   a) $9 000 000 as damages for pain and suffering and loss of amenities of life;

   b) $4 000 000 for past transport costs;

   c) $37 000 000 for the wheel chair purchased in April 2003;

   d) $1 462 577 for past medical expenses inclusive of past nurse-aid expenses;

e) $5 214 000 for future operations in Zimbabwe;

f) $808 330-40 for adaptive appliances;

g) $884 090 for future consultations;

h) $1 450 475 for future therapies at St Giles;

i) $693 630 for future nurse-aid expenses;

j) $39 332 475 for loss of future earnings capacity;

k) $1 612 212 for wheel chairs replacement and repairs;

l) Interest at the prescribed rate of interest on the amount in (a) – (k) being $60 894 789-40 from the date that this judgment is handed down to the date of payment in full.

(2) The defendants shall pay to the plaintiff, jointly and severally the one paying the other to be absolved the sum of US$19 402-52 or at the instance of the plaintiff its equivalent in Zimbabwe dollars at the lawful exchange rate applicable at the time of the payment.

3. The defendant shall pay the costs of this action except for the costs occasioned by the postponement of the trial on the 28th November 2003 which shall be paid by the plaintiff to the defendants.

4. The claim for actuarial fees is dismissed with cost.

Muskwe & Associates, plaintiff's legal practitioners

Messrs Atherstone & Cook, defendants' legal practitioners.