TIMOTHY MUKANDI
versus
ELVIS NYAMWEDA (1)
and
SYLVESTER TAWANDA (2)
and
MARSHALL NYASHA CHAKUCHICHI (3)

HIGH COURT OF ZIMBABWE
**DEMBURE J**
HARARE: 27 November 2024, 4 & 5 February & 7 March 2025

**Civil trial**

*E Dondo* for the plaintiff
*A Masango*, for the 1st defendant

[1] DEMBURE J: This is a civil trial matter. The trial commenced on 27 November 2024. The defendants lodged applications for absolution from the instance at the close of the plaintiff's case. On 2 January 2025, the court issued a judgment whose operative part was that the application for absolution from the instance was granted in favour of the second and third defendants. As for the first defendant, the application only partially succeeded in relation to the claim for damages for permanent disability. The trial proceeded to the defence case in respect of the first defendant for the plaintiff's other claims.

**BACKGROUND**

[2] It is common cause that the first defendant while driving one Robert Mukondo's motor vehicle, a Toyota Runx registration number AEA 7540 was involved in an accident along Harare-Bulawayo Road. The accident occurred at night. The plaintiff, Robert Mukondo *("the plaintiff's witness"),* along with his wife, child, and another male adult, were passengers in that vehicle. The first defendant hit a stray black cow and the vehicle rolled two or three times and eventually landed on its side on the right side of the road. The plaintiff sustained serious injuries to his right leg which got fractured.

[3] The plaintiff's remaining claims against the first defendant are for payment of US$10,000.00 or its equivalent in local currency for pain and suffering; US$2,020.00 or its equivalent in local currency for medical expenses already incurred and US$791.00 or its equivalent in local currency for future medical expenses.

[4] In his declaration, the plaintiff pleaded that the first defendant caused the accident. It was alleged that the first defendant's conduct was wrongful and negligent in that he was overspeeding, he failed to exercise caution given that it was already at night and to keep a proper lookout and act reasonably in the circumstances. The first defendant was jointly sued with the second and third defendants whom the plaintiff alleged were the owners of the stray cow and that they failed to tend for their bovine.

[5] The first defendant contested the claim contending in his plea that while he assisted the plaintiff in driving the motor vehicle upon his request as he was tired, he was not overspeeding or negligent in any way. He also averred that had the second and third defendants tended their stray cow the accident would not have occurred. He completely denied being delictually liable to the plaintiff as alleged or at all.

[6] At the trial, the issues for determination were as follows:

1. Whether or not the defendants' conduct was negligent, wrongful and caused the accident? If so, are they jointly liable?
2. Whether or not the quantum of damages being claimed by the plaintiff are justified?

Given the judgment granting absolution from the instance in favour of the second and third defendants, the issues will herein be determined as against the first defendant as he remains the sole defendant in this case.

## 1. WHETHER OR NOT THE FIRST DEFENDANT'S CONDUCT WAS NEGLIGENT, WRONGFUL AND CAUSED THE ACCIDENT

[7] The main issue that falls for determination in this trial is whether or not the first defendant's conduct was culpable under the *lex Aquilia*. If so, then the second issue is what damages did the plaintiff suffer. It is settled law that in order to succeed under *lex Aquilia* it must be established that the defendant's conduct was wrongful or unlawful; that the defendant's conduct caused loss or harm to the person or his property or caused patrimonial loss; the defendant was negligent or intentionally caused the loss and there is a casual link

between the defendant's conduct and the loss. See G. Feltoe, *A Guide to the Zimbabwean Law of Delict*, 2012 at p 9; *Ritenote Printers (Pvt) Ltd & Anor v Adam & Company (Pvt) Ltd* SC 26/16 at pp 13-14. The only requirements in contention were whether the defendant's conduct was wrongful or unlawful and whether he negligently caused the harm in question. It was not in dispute that the plaintiff was injured in the accident and that the first defendant was the one driving the motor vehicle in question.

[8] It is common cause that on 30 November 2022, the first defendant was convicted by the Magistrates Court held at Norton for contravening s 52(2) of the Road Traffic Act [*Chapter* 13:11] (that is "negligent driving"). The criminal charges arose from the same accident which resulted in this civil suit. He was convicted after a full trial and sentenced to pay a fine of ZWL40,000.00. In the event of default of payment, he would serve a three-month imprisonment term. In addition, a three-month imprisonment term was wholly suspended for five years on the usual condition of good behaviour.

[9] The defendant admitted that he did not appeal against this conviction under cross-examination. As of the date of the hearing, there was no appeal pending although the first defendant claimed he still intends to appeal against the decision. This conviction, is not, as was argued for the plaintiff conclusive evidence that the defendant is liable for the delict in question. The law rather provides for a presumption which can be rebutted. Accordingly, there is a presumption that he did all the acts necessary to constitute the offence meaning that there is a presumption that he was negligent and his negligent conduct caused the accident. This is the clear import of s 31(3) of the Civil Evidence Act [*Chapter* 8:01] which reads as follows:

> "31. Proof of previous criminal conviction
> (1) …
> (2) …
> (3) **Where it is proved in any civil proceedings that a person has been convicted of a criminal offence, it shall be presumed unless the contrary is shown—**
> (a) **that he did all acts necessary to constitute the offence;** or
> (b) where the offence is constituted by an omission to do anything, that he omitted to do that thing; as the case may be. [Emphasis added]

[10] The provisions of s 31(3) were also interpreted by this court in *Chimangira v Tsabora* HH 151/17 where it was stated that:

> "In *casu*, it is common cause that the appellant and his co-defendant were convicted of the offence of assaulting the respondent, they did not appeal against that conviction. **In terms**

> **of the above section 31(3) of the Civil Evidence Act] 'it shall be presumed, unless the contrary is shown that he did all the acts constituting the offence' of assault on the person of the respondent. It was thus upon the defendant to rebut that presumption."** [Emphasis added]

See also *French and Smith T/A Customs Services v Inebriant Cache and Anor* HH 603/23.

[11] Applying the above legal principles, once it was accepted that the first defendant had been convicted of negligent driving which conviction was not challenged on appeal, there was a presumption that he was negligent and his wrongful conduct caused the accident in question. That being a presumption, it had to be rebutted by the first defendant through clear and satisfactory evidence. In other words, he had the onus to prove that he was not negligent. In my view, the first defendant failed to rebut the presumption. I found the first defendant not to be a credible witness. His testimony in some instances would differ materially from what he had pleaded. It is a settled principle of the law that a party is bound by what he has pleaded. See *Medlog Zimbabwe (Pvt) Ltd v Cost Benefit Holdings (Pvt) Ltd* SC 24/18. In *Jowell v Bramwell-Jones* 1998 (1) SA 836 at 898 the court cited Jacob and Goldrein, *Pleadings: Principles and Practice* at p 8-9 where it was stated:

> "As the parties are adversaries, it is left to each of them to formulate his case in his own way, subject to the basic rules of pleadings … **For the sake of certainty and finality, each party is bound by his own pleading and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as much bound by the pleadings of the parties as they are themselves.**" [Emphasis added]

[12] In particular, in para 3 of his plea, the first defendant averred that it was "the plaintiff who requested the first defendant to drive his vehicle as he was tired and would request to be assisted in finishing the journey." This position was repeated under cross-examination of the plaintiff by the first defendant's counsel. It was put to the plaintiff that it was the plaintiff who had requested the defendant to drive the vehicle and that he was tired. The plaintiff denied this position and maintained that it was not him who asked him to drive but the owner of the vehicle. This is the same position pleaded in para 4 of the first defendant's summary of evidence. The first defendant completely shifted from this pleaded position in his evidence-in-chief as he said it was the owner of the vehicle who asked if he had a licence and could drive the vehicle from Chegutu. He said at the time he was given the authority to drive the plaintiff was not present and when he came back, he did not take it well when he was informed that the first defendant was now the one who would be

driving. The other material fact related to whether the plaintiff wore any seat belt. The first defendant's pleadings did not make such critical averment that the plaintiff was not wearing a seat belt but that was necessary to establish contributory negligence. He only said this in his evidence-in-chief. The issue was also not put to the plaintiff or his witness during their cross-examination. This, in my view, betrays the first defendant's defence as fabricated. It was incredible.

[13] The other equally important fact not pleaded was what he alleged in his evidence-in-chief that the cow he encountered had been hit by a haulage truck forcing it into his lane. In his plea, in particular, para 5, he pleaded that had the second and third defendants tended to their stray cow, the accident would not have occurred. There was no mention of the intervening event of the cow being hit by a haulage truck and thrown into his lane anywhere in his pleadings, that is, the plea and summary of evidence. This only came out in his evidence-in-chief when he claimed that he saw a haulage truck hit the cow and throw it into his lane and that in the attempt to avoid it, he swerved to the right, the same direction it was coming from. He could not explain why this critical or material fact could not be stated anywhere in his defence. I can only conclude that the first defendant clearly attempted to tailor his defence as the trial progressed. What happened to this "mysterious haulage truck" was never disclosed. Many questions were left hanging; did the truck stop after hitting the cow; what happened to it and why is this truck not mentioned at all in the pleadings? All these unanswered questions made his testimony in seeking to exonerate himself that he was not travelling at an excessive speed and failed to exercise reasonable caution and attention in the circumstances entirely unreliable.

[14] The first defendant also accepted that the motor vehicle rolled two or three times. At one time he said was travelling at around 80 km per hour but under cross-examination he changed to say about 90 km per hour when questioned whether the vehicle could have rolled three times if he was not speeding. He also stated that his speed was not constant. It was common cause that this was at night and there was a curve. Considering that he was approaching a curve and at night, the speed at which he alleged was travelling would still be excessive in the circumstances. The totality of the evidence shows that he failed to act like a reasonable person in the circumstances. The plaintiff's version that the first defendant

was speeding and failed to act reasonably in the circumstances coupled with the criminal conviction for negligent driving was more probable than his concocted version. His attempts to create a story about a haulage truck which was never brought up in his pleadings and not even raised during the cross-examination of the plaintiff exposed the first defendant's desperate attempt to create a story to avoid a clear case of negligence. With the conviction hanging over his head, he failed to rebut the presumption created by the provisions of s 31(3) of the Civil Evidence Act.

[15] I am not persuaded that the doctrine of sudden emergency was applicable in his favour. The first defendant failed to establish facts that would justify the application of this doctrine. As stated by W E Cooper, *Delictual Liability in Motor Law* (Juta & Co. Ltd, 1996) at p 274:

> "The effect of the doctrine is that a driver acting in the best way to avoid danger in a sudden emergency is not negligent."

The same principle was set out in *Ntsala & Ors v Mutual & Federal Insurance Co Ltd* 1996 (2) SA 184 (T) where ELS J said:

> "Where a driver of a vehicle finds himself in a situation of imminent danger **not of his own doing,** and reacts thereto and possibly took the wrong option, it cannot be said that he is negligent unless it can be shown that no reasonable man would have so acted. It must be remembered that with a sudden confrontation of danger, a driver only has a split second or a second to consider the pros and cons before he acts and surely cannot be blamed for exercising the option which resulted in a collision." [Emphasis added]

[16] The first defendant's actions or neglect are the reason or cause of the situation he found himself in. Had he exercised caution and used the speed commensurate with driving at night when visibility is reduced and when approaching a curve, the accident, reasonably, could have been avoided. The first defendant cannot seek to rely on the opinion of the plaintiff's witness who opined that there was a sudden emergency. It was merely his opinion which in any event, was not factually grounded. This is so as it was clear from his testimony that he said he was asleep and was awoken by the first defendant shouting that there was a bovine. He also said that when he heard the defendant shouting, they immediately hit the bovine. His testimony could not, therefore, be relied upon to buttress the defendant's defence. He was asleep at the material time and this was not even challenged during his cross-examination.

[17] The first defendant also sought to rely on the accident evaluator's affidavit as part of expert evidence. In terms of s 22(3) of the Civil Evidence Act, a court shall not be bound by an expert opinion but may have regard to the opinion in reaching its decision. The court must consider if it has any probative value. In *casu*, the alleged evaluation or reconstruction of the accident scene was done in the absence of the plaintiff and close to a year later. The accident happened on 30 April 2021 and it was stated in the affidavit that the scene reconstruction was conducted on 22 April 2022.

[18] The lengthy time it took before the accident scene reconstruction was carried out casts serious doubts as to the correctness of the opinion expressed by the said evaluator. The necessary pointers to what reasonably might have happened could have ceased to exist at the scene by the time it was allegedly carried out. It would simply make the conclusions drawn thereto mere speculation. To compound matters on this evaluation, the first defendant himself challenged the date it was purportedly carried out. The court may not, in these circumstances, safely accept the alleged opinion expressed by the said evaluator.

[19] The questions as to when was it carried out and whether the conclusions drawn would still be reasonably acceptable given the significant lapse of time since the accident occurred remained unanswered. They could not be answered since the first defendant confirmed that the evaluator was deceased at the time of the hearing. I also agree with Mr *Dondo* that the evaluation was largely based on what the first defendant told him. Since he is now deceased there is nothing that can be done to salvage his evaluation. I find the alleged expert opinion unreliable to exonerate the first defendant or rebut the presumption created by s 31(3) of the Civil Evidence Act. Having failed to rebut the presumption, it is inescapable to conclude that the first defendant's conduct was wrongful, and negligent and caused the accident. He is accordingly liable to the plaintiff under the *lex Aquilia*.

[20] It was submitted for the first defendant that the claim was unlawful as the plaintiff violated s 7 of the Road Motor Transportation Act [Chapter 13:10]. It was argued that he could not benefit from his own wrong as he had no operator's licence to carry passengers in the motor vehicle in question. The argument was that the *ex turpi causa non oritur actio* and the *in pari delicto* principles apply. Reference was made to the case of *Dube v Khumalo* 1986 (2) ZLR 103 (SC). I do not agree that these principles apply to defeat the plaintiff's

claim. It was established from the evidence that the plaintiff was not the owner of the motor vehicle in question. It was not in dispute that the plaintiff's witness was the owner of the motor vehicle. He is the one who picked up passengers in his motor vehicle and authorised the defendant to drive the vehicle. The claim before the court was brought by the plaintiff who was only a passenger when the delict was committed. The alleged illegality in carrying passengers does not apply to the plaintiff but is only legally sustainable against the owner of the motor vehicle. It was not the plaintiff who breached the law or the said statute but a third party not before the court. There is no legal basis to punish the plaintiff for someone's wrong. The argument by the defendant about the legality of the claim for damages is, therefore, devoid of any merit.

[21] There was also the argument made for the first defendant that the plaintiff voluntarily assumed the risk and is not entitled to claim damages. I do not accept that the principle of voluntary assumption of risk is applicable in this case. Firstly, this defence was never pleaded by the first defendant. It must be pleaded to assist him. Secondly, it is trite that the defence of consent or voluntary assumption of risk is a defence in respect of injuries and harm caused by the materialisation of a risk which is subjectively foreseen, appreciated and assumed by the plaintiff. See J. Burchell, *Principles of Delict*, Juta & Co. at p 70-71.

[22] In this case, the first defendant admitted that the motor vehicle was owned not by the plaintiff but by the plaintiff's witness and that it was that witness who permitted him to drive. He even stated that the plaintiff did not take the issue that he was given the authority to drive lightly and remonstrated his displeasure during the journey. He also said that there was a heated discussion over the issue of his driving between the owner and the plaintiff. Clearly, in these circumstances, it cannot be said that the plaintiff consented or voluntarily assumed the reasonable risk of injury from an accident. The plaintiff was powerless, did not consent to the first defendant driving the vehicle and could not stop the first defendant's assumption of the driving duties. In these circumstances, there is no basis to allege and claim that the plaintiff voluntarily assumed risk. I, therefore, reject this argument by the first defendant which was half-hearted and an afterthought.

[23] I find that the plaintiff proved his case on a balance of probabilities. His evidence of the criminal conviction for negligent driving was not refuted. That created the

presumption in his favour in terms of s 31(3) of the Civil Evidence Act which the first defendant failed to rebut.

**2. WHETHER OR NOT THE PLAINTIFF SUFFERED DAMAGES AND THE QUANTUM THEREOF**

[24] Since I have found the first defendant liable to the plaintiff, the next issue to be determined is whether he suffered damages and the quantum thereof. The remaining claims for damages are the special damages for medical expenses already incurred and future medical expenses as well as the general damages for pain and suffering. Damages are deemed to be put in issue in all cases unless expressly admitted. See rule 37(8) of the High Court Rules, 2021.

**SPECIAL DAMAGES**

[25] It is a settled principle of the law that special damages must be strictly proved as they are capable of assessment with mathematical precision. In *Mayisva v Commercial Union Fire & General Insurance Co. Ltd and Anor* 1984(2) ZLR 181, at 191 the court stated that:

> "It is an elementary proposition of law that a claim for special damages must not only be specially alleged and claimed, but also be strictly proved."

See also *Ebrahim v Pittman N.O.* 1995 (1) ZLR 176H, 187C-D. In *NRZ v Stuart* SC 70/21 at p 14 the court restated the law as follows:

> "Special damages are those damages that have occurred or have been incurred and can be calculated with precision. One way in which special damages are proved is by the production of invoices or receipts showing the expenses that were incurred. These are damages capable of precise proof as they are what the plaintiff will have incurred which is calculable." [My emphasis]

[26] To prove the special damages in the total sum of US$2,020.00 for medical expenses already incurred the plaintiff in his evidence-in-chief tendered receipts at pp 44-65 of the plaintiff's bundle of documents. These documents were admitted as evidence as a bundle and marked as exhibit number $2^{1-22}$. The documents are twenty-two in total. He stated that the sum is the amount of money he spent on medication. I went through each of the said receipts and noted that the majority of them from pp 51-64 reflect amounts not recorded in United States dollars but in Zimbabwe dollars.

[27] There is also a statement of account at p 64 where the sum of $79,786.00 is recorded. At p 65 there is a document inscribed removal of implant but does not state any

sum. When questioned under cross-examination as to how he arrived at the sum of US$2,020.00 since some of the receipts are in Zimbabwe dollars the plaintiff said that he only factored in the receipts in United States dollars. He remained adamant that the amount is for receipts in United States dollars only. But a look at the documents he tendered revealed that the majority of them were in Zimbabwe dollars and he did not speak to any foreign currency exchange conversion rate for the equivalent United States dollars. The receipts in United States dollars from the part of the bundle of documents tendered at the trial only add up to a total of US$381.68. He could only prove this amount at the trial. That is what the court can award. The first defendant only acceded to a moral obligation to help the plaintiff with the payment of part of the medical expenses already incurred. That admission would not suffice for liability in law.

[28] As for future medical expenses, the plaintiff sought damages in the sum of US$791.00. These are special damages which must be strictly proved as well as they were not expressly admitted. The plaintiff testified that the amount is the quotation for the removal of the metal plate inserted in his leg. Unfortunately, there was no quotation that the plaintiff tendered in his evidence at the trial to prove these medical expenses. Unsubstantiated allegations are insufficient to prove special damages. The plaintiff should have tendered the documentary proof to establish that the medical procedure of removing the inserted metal plate would cost US$791.00. In the absence of evidence to prove these damages, I have no option but to dismiss the claim for damages for future medical expenses.

**GENERAL DAMAGES FOR PAIN AND SUFFERING**

[29] It is trite that general damages are not capable of being assessed with any mathematical precision, unlike special damages. These were explained in *NRZ v Stuart supra* where the court remarked as follows:

> "General damages … are those damages that naturally flow from the wrong and are of a non-pecuniary nature such as pain and suffering, duration and intensity of pain caused by the intentional infliction of harm. A court when determining the quantum for general damages is exercising a broad general discretion when considering what fair and adequate compensation would be.
> In considering such damages the court considers the facts and circumstances of the case and the injuries suffered by the plaintiff, including their nature, permanence, severity and impact on the plaintiff's life. In the process, the court considers the trend of awards in similar cases including the economic environment affecting such awards. Though these

> damages are not capable of precise calculation a plaintiff is still expected to speak to the quantum of the claim. The court is not expected to speculate on the quantum of damages to award where no quantum has been testified to".

[30] The assessment of general damages is, therefore, not a matter of guesswork. The quantification of such damages is not an easy task. Thus, "the task of assessing damages for personal injury is one of the most perplexing a court has to discharge" per GUBBAY JA (as he then was) in *Minister of Defence & Anor v Jackson* 1990 (2) ZLR 1 at 7. At pp 7-8, GUBBAY JA (as he then was) remarked as follows:

> "This notwithstanding, certain broad principles have been laid down which govern the obligation. These are:
> (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 Government v Warnecke* 1911 AD 651 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 *Sigournay v Gillbanks* 1960 (2) SA 552 (A) at 555H.
> (5) The fall in the value of money is a factor 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 SCHREINER JA in *Sigournay's* case, supra, at 556C. See also *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A) at 116B-D; *Ngwenya v Mafuka* S-18-89 (not reported) at p 8 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 E.
> (7) Awards must reflect the state of economic development and current economic conditions of the country. See *Mair's* case, *supra*, at 29H; Sadomba v Unity Insurance Co Ltd & Anor 1978 RLR 262 (G) at 270F; 1978 (3) SA 1094 (R) at 1097C. *Minister of Home Affairs v Allan* S-76-86 (not yet reported) at p12 of the cyclostyled copy. They should tend towards conservatism lest some injustice be done to the defendant. See *Bay Passenger Transport Ltd v Franzen* 1975 (1) SA 269 (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."

[31] In *casu,* the only general damages which survived the application for absolution from the instance are damages for pain and suffering. The plaintiff claimed the sum of US$10,000.00. He testified at length about the pain and suffering he went through right

from the scene of the accident and the surgical operations he had gone through. He is still walking with the aid of clutches. It was not disputed that he suffered very serious injuries on his right leg. Following the accident, he was left with a badly injured leg such that it was dangling with some protruding bones. The people who pulled him out of the wreckage did not consider the serious injury he had suffered as they roughly pulled him out of the vehicle wreckage to save his life since he was trapped. The plaintiff had to endure excruciating pain as he was being pulled out.

[32] He was taken to Norton Hospital and did not receive any medical attention. He was only attended to by a doctor the next day around 11 am who advised that he had to go to Harare Hospital for treatment. He narrated the painful ordeal he went through. When he arrived at Harare Hospital, he was not attended to by a doctor the same day. A student doctor only prescribed for him some pain-relieving drugs the next day. He was taken into theatre for surgery around 3 pm on a Monday where they put a metal plate into his leg to align the bones. He was in the hospital for three weeks.

[33] After his discharge, he had to undergo medical reviews every two weeks and puss started oozing out of his leg. Another metal plate was later inserted at Karanda Hospital. He also testified that he has been undergoing vacuum dressing. As he described this painful pus-extraction process he failed to comfort himself and broke down into tears. He wished his leg had been amputated after the accident. The metal plate was still in his leg and he developed a permanent bone infection. The only solution the doctors advised him would be to amputate his leg. It was clear that the accident affected him both mentally and physically. He could no longer walk normally and must have pus drained from his leg on a regular basis. The pus has affected his relationship with his wife who no longer wash his clothes.

[34] The injury has indeed tormented him. I refuse to accept that he was exaggerating the pain he had endured. He is also mentally shattered. The accident has completely changed his life. He produced medical records detailing the medical treatments he received and the operations he went through. The ordeal he had been going through following the injury was not seriously challenged under cross-examination. It has been more than four

years since the accident but the events of this accident have remained vivid and stuck in his mind. Pain and suffering have become part of his life as his leg has failed to heal.

[35] I have also looked at the previous awards made by this court. While these previous cases assist the court, each case must be dealt with on its own merit. I should endeavour to assess an amount that is fair towards all the parties concerned. In *Muchechesi v Musimwa* HH 64/24 the court awarded US$10,000.00 for pain and suffering to the plaintiff who had sustained a broken femur leading to permanent disability and was to undergo a hip replacement and knee operations. In *Chinembiri & Ors v ZETDC & Ors HH 55/*14, Pride Chinembiri suffered deep electrical burns and had the burnt forearm amputated. He was awarded US$6,000.00 for pain and suffering and US$8,000 for permanent disfigurement and loss of amenities.

[36] Further, in *Mugadzaweta* v *The Co-Ministers of Home Affairs & Ors* 2012 (2) ZLR 423 (H) the plaintiff received US$5,000 for wounds sustained and arising from having been tortured by the defendants. He also received a separate amount of US$4,000.00 to compensate him for the shock. Also, in *Mashiri v Ming Chang Sino-Africa Mining Investments* HH 823/16 the court awarded damages for pain and suffering in the sum of US$7,500.00 which the court considered justifiable in the circumstances of that case and which is also what the plaintiff had demanded.

[37] I accept that it is difficult to equate the pain with a specific amount. However, having looked at the various previous awards above, the peculiar circumstances of this case stated above, the relevant economic situation and the need to place the plaintiff in a position he would have been in if the injury had not occurred, I am of the view that in the circumstances of this case, damages in the sum of US$7,000.00 would meet the justices of this case. The amount also falls within the range of what has been awarded by this court in similar cases stated above. While, the failure to call a medical expert, in my view, resulted in him not establishing permanent disability, his evidence was, however, substantiated by medical records placed before the court. His evidence established that he suffered damages for pain and suffering. However, I wish to point out that the closing submissions from the plaintiff could not be of much assistance in the assessment of the damages as they contained no analysis of previous awards in similar cases.

[38] On the other hand, the first defendant relied on several judgments including *Kaplin v Naison & Ors* HCC 37/24. That decision is, however, distinguishable from this case as in that case, the plaintiff had conceded that no documentary evidence was produced to show the degree of pain and suffering. In that case, there was no medical evidence produced by the plaintiff. This case is different as the exhibits admitted with the consent of the first defendant contained the medical records of the several medical treatments received by the plaintiff after the accident. His testimony about the painful process he had to go through from the time he was involved in the accident to the date of the hearing including the excruciating pain he had been enduring during the pus-draining process on his leg was largely unchallenged. I admit some of the documents are illegible. However, there are sufficient other records therein which confirm the medical treatment he received including the surgical operations carried out on his leg. To this extent, the *Kaplin* decision could not sway me to dismiss the plaintiff's claim.

[39] I have also considered the case of *Gondokondo v Takrose Buses (Pvt) Ltd & Anor* HH 85/09 cited by the first defendant in which the sum of US$2,000.00 was awarded for a girl who was maimed for life. In *Muzvidzwa v Chirongwe & Anor* HH 88/17 another authority relied upon by the first defendant, the liability was shared because of contributory negligence as the first defendant in that case was ordered to pay only 25% of the loss being US$2,722.22. I observed that the economic conditions obtaining then are not the same as in the present case and the circumstances therein are also sharply different from this matter. Accordingly, the US$1,000.00 the first defendant suggested as compensatory would be utterly unfair. The said amount cannot compensate the plaintiff. While the amount should not be punitive it must be compensation that aims to place him as far as possible in a position he would have occupied if the wrongful act in this case had not been committed.

**DISPOSITION**

[40] As already alluded to above, I found an award of damages for pain and suffering in sum of US$7,000.00 to be fair and proper in the circumstances. Concerning costs, the general rule is that costs follow the cause. However, in this case, the plaintiff did not seek costs against the first defendant. In the summons and even in his closing submissions the plaintiff only sought payment of the damages without seeking an order for costs. In line

with the plaintiff's pleadings, I had to depart from the general rule and order that there shall be no order as costs.

[41] In the result, **it is ordered that**:

1. The first defendant shall pay the plaintiff the following:
   a) US$7,000.00 or its equivalent in local currency at the interbank rate prevailing at the date of payment being damages for pain and suffering, and
   b) US$381.68 or its equivalent in local currency at the interbank rate prevailing at the date of payment being damages for medical expenses already incurred.
2. The claim for future medical expenses in the sum of US$791.00 is hereby dismissed for lack of evidence.
3. There is no order as to costs.

**DEMBURE J** ……

*Saunyama Dondo,* plaintiff's legal practitioners
*Malinga Masango Legal Practice,* 1st defendant's legal practitioners