RODRIGO ALMEIDA LEIGHTON
versus
EAGLE INSURANCE COMPANY LIMITED
and
BRYAN JEREMY WILLIAMS
and
TINTO AGRIQUIP INDUSTRIES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
SMITH J,
HARARE, 6 November, 2002

Mr *F Girach* for plaintiff
Mr *R Harvey* for lst defendant

SMITH J: The second defendant, whilst driving a vehicle belonging to the third defendant and in the course of his employment, collided with a motor cycle belonging to, and being ridden by, the plaintiff. The accident occurred on 27 July 1996. The second defendant was at fault and liability is not disputed. The plaintiff issued summons on 31 January 1997 claiming damages for personal injuries and for repairs to his motor cycle. The claim for personal injuries has been settled but the parties cannot agree on the quantum for the repairs to the plaintiff's motor cycle. At the pre-trial conference it was agreed that the parties would prepare heads of argument.

Initially the plaintiff claimed $149 223 for the cost of repairs. Thereafter, negotiations ensued which resulted in an agreement that the motor-cycle would be repaired by a particular firm using second-hand parts. It was agreed that the first defendant, as insurer of the third defendant, would pay for the repairs in an attempt to restore the motor-cycle to its original condition to the plaintiff's satisfaction, failing which the first defendant would pay the market value of the motor-cycle and keep the salvage. The motor-cycle was repaired at a cost of $50 000 but the plaintiff was not satisfied as to the condition of the motor-cycle. He has returned the motor-cycle and

has amended his summons to claim $864 429 as being the cost of new parts for repairs.

In its plea, which as filed on 14 March 2002, the first defendant averred that the pre-accident value of the motor-cycle was less than $95 000.

Mr *Girach* accepted that delictual damage is ordinarily calculated as at the date of the delict, as is laid down in *Parish* v *King* 1992 (1) ZLR 216 (S), but submitted that the objective of the court should be to assess an amount which is fair to the plaintiff and to the defendant. He argued that the underlying principle behind damages in delict is to place the plaintiff in the position he would have been in had the delict not occurred. It would be grossly inequitable to fix blindly in every case, that the date for assessing damages is the date of the delict. The court can take judicial notice of the rampant inflation in the country. It is officially said to be in excess of 110%, but economists put the figure closer to 160%. The prescribed rate of interest is 30% , which is nowhere near the rate of inflation. It would be most unfair to the plaintiff to award him damages assessed at the costs prevailing in 1996 with interest at the prescribed rate from that date. It would be much fairer, and more realistic, to fix damages at today's costs.

Mr *Harvey* submitted that the pre-accident value of the motor-cycle is the yardstick. If the repairs to the motor-cycle cost more than the market value of the motor-cycle, then the motor-cycle is beyond economic repair and all the plaintiff would be entitled to as compensation is the 1996 market value of the motor-cycle - see **Visser and Potgieter** Law of Damages, p 333; *Philip Robinson Motors (Pty) Ltd* v *M M Dada (Pty) Ltd* 1973 (2) SA 420 (A) at 428 F-G and *Parish's* case, *supra.* The reasonable cost of repairs is usually used as a means of estimating damages, provided

they do not exceed the pre-accident market value of the property or the diminution in value which is due to the delict - see *Erasmus* v *Davis* 1968 (2) SA 1 (A) at 18.

In **Visser and Potgieter** *op cit* the learned authors deal with the question of quantum of damages for patrimonial loss caused by certain forms of delict at p 329 *et seq.* They say that the basic principle is that the general measure of damage caused by injury to property is usually the diminution in its market value. The criterion of market value is employed to estimate loss, and this is measured by a comparison of the market value before and after the damage-causing event. The plaintiff should prove both these values but, in practice, that method is not often used because it is simpler and more realistic to rely on the reasonable cost of necessary repairs as a measure of damages. However, the learned authors go on to say at p 330-331 -

> "There are, however, three instances where the cost of repairs cannot serve as a measure of damage and damages:
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> (a) Where the cost of repairs exceeds the pre-accident (market-) value of the property. Here the cost of repairs is more than what the plaintiff should reasonably obtain (because it is non-economical) and the basic method of comparison of values should be used.
> (b) Where the cost of repairs exceeds the diminution in value of the property. Here, too, the cost of repairs is more than what the plaintiff is entitled to.
> (c) Where the repairs, though restoring the property to its pre-accident condition, do not also restore its pre-accident market value. In this situation the cost of repairs is too low to serve as a yardstick for full compensation.
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> In *Erasmus* v *Davis* the majority of the court held that evidence of the reasonable costs of repairs constitutes *prima facie* proof of the diminution in value of property and that it is for the defendant to cast doubt on the validity of this measure of loss."

In *Enslin* v *Meyer* 1960 (4) SA 520 (7), in dealing with the quantum of damages, GALGUT J at p 522H-523D said -

> "McKerron in his *Law of Delict*, 5th ed. at p. 108, says:

'So if a thing has been wrongfully damaged, the ordinary measure of damages will be the difference between the market value of the thing immediately before the wrong was committed and the market value of the thing after the commission of the wrong. But it is to be observed that there is no objection to taking as the measure the cost of restoring the thing to its original condition, provided such cost does not exceed the diminution in value of the thing'.

This statement of the law by the learned author is supported by authority - see *Trotman and Another* v *Edwick*, 1951 (1) SA 443 (AD) at p 449, where VAN DEN HEEVER, JA, says -

'The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him.'

In *G & M Builders Supplies (Pty) Ltd* v *South African Railways and Harbours*, 1942 TPD 120, GREENBURG JP at p 121 says -

'I think it is clear from the authorities, some of which are referred to in *Scrooby* v *Engelbrecht* 1940 TPD, too, that in cases of this kind it is not necessary for a plaintiff to have any repairs effected at all, he is entitled to claim from the party who has negligently injured his property the difference in value between that property before and after the injury. But a very common method of arriving at this difference is to prove the amount that it would cost to reinstate the article, and it has been held in the case to which I have referred that what the plaintiff is entitled to is a reasonable amount for the repairs. He need not have the repairs effected at all, and his damages are assessed as at the time when the tort was committed'.

There is no need to quote further authority. In delict the true measure of damage is as stated by *McKerron*. In many cases in practice a convenient way of assessing this damage is to accept the necessary and reasonable costs of repairs. A very old car worth say £50 may well cost, because of its age, £200 to repair. It could never be suggested that a court could award the owner of the car more than £50 - a moment's reflection will show that if the cost of repairs was regarded as the basis on which damage should be assessed in all cases, the results could often be ruinous to the defendant".

MULLER AJA in *Erasmus* v *Davis* 1969 (2) SA 1 (AD) at 21 D said -

"It is, of course, correct to say, as I have already stated, that cost of repairs is often used as a yardstick to measure damages but, as I have also shown, it cannot be used as a yardstick in circumstances in which it would not be an appropriate method of assessing damages. It cannot be a proper yardstick in a case where it is not economical to repair the vehicle and the plaintiff claims the estimated cost of repairs without bringing into account the salvage value of the vehicle. Thus, in the circumstances of the present case, an award of damages in a sum of R771,01 as being the cost of repairs would be excessive if the salvage value of the vehicle was in excess of R429; because the total of

> the two amounts would then exceed the pre-collision value of the car, which would mean in effect that plaintiff would then receive more than her loss."

Clearly, a delay in instituting proceedings may affect the amount of damages awarded. In *Parish's* case, *supra*, at 227 C-D MCNALLY JA said -

> "The English cases have made the point that it is not equitable for a plaintiff to delay the institution of proceedings and then seek to benefit from the fact that the value of the disputed property has been considerably enhanced by the passage of time. In this case it seems that Mrs Parish first learnt of Mr Harding's claim to ownership in May 1986. Yet her claim for damages in the sum of $80 000 was filed only in February 1988, and as based on a valuation as at 15 February 1988. Following the principle in *Sachs* case *supra*, I would consider that there has been an inordinate delay in instituting proceedings, resulting in the excessive inflation of the claim to the disadvantage of Mr King".

The date of the accident in which the plaintiff's motor-cycle was damaged was 27 July 1996. He issued summons on 31 January 1997. The first defendant's plea was filed on 14 March 2002, more than 5 years after the summons was served on it. In its plea it averred that the pre-accident value of the motor-cycle was less than $95 000. However, it tendered $150 000 for the replacement value of the motor-cycle. Having regard to the erosion in the value of the Zimbabwe dollar since July 1996, and in particular the very steep erosion in the last two years, I consider that it would be inequitable to fix the diminution in value of the motor-cycle at $150 000. If one accepted that the value of the motor-cycle in July 1996 was $75 000, that would mean that the first defendant is now offering double that amount. Had this matter come to Court reasonably soon after summons was issued, the court would have fixed the damages due to the plaintiff as being $75 000 or thereabouts. Had the first defendant made the offer of $150 000 within a year or two after summons was issued the Court would have accepted that as reasonable. However, in the light of the high levels of inflation in this country over the last two years, such an offer could not be accepted as reasonable. Since the lst defendant only filed its plea on 14 March 2002, more than 5

years after the summons was issued, I consider that a departure from the normal yardstick is required. The present day values of goods such as motor-cycles have escalated tremendously since 1996. I consider that in all the circumstances, the claim by the plaintiff is reasonable, having regard to the value of things today.

It is ordered that the defendants jointly and severally, the one paying the other to be absolved, pay the plaintiff -

1. $864 429 with interest thereon at 30% per annum from the date of this order to the date of payment;
2. costs of suit.

Gill, Godlonton & Gerrans, legal practitioners for plaintiff
Granger & Harvey, legal practitioners for defendants