MAUD KAPFUNDE

and

COMPASSION DIFALA

and

RUTH BENI

and

GLADYS DIFALA

versus

WITNESS NYAMUTOVA

and

ALLIANCE INSURANCE COMPANY

HIGH COURT OF ZIMBABWE

KUDYA J

HARARE 24, 25 and 27 September 2012

Ms *F Chagadama,* for the first, third and fourth plaintiff

*A Muchandiona,* for the first defendant

KUDYA J: On 28 March 2009, the first defendant who purported to be insured by the second defendant was involved in a road traffic accident that caused injuries to the plaintiffs and death to a teenage girl Sharon Beni. The plaintiffs issued summons out of this court on 31 October 2011 claiming delictual special and general damages against the defendants. The defendants contested the action.

The matter was referred to trial at the pre-trial conference held on 21 February 2012. On 12 March 2012, the plaintiffs withdrew their action against the second defendant. At the commencement of trial on 24 September 2012, with the remaining defendant’s consent, the second plaintiff withdrew his claim against the defendant with no order as to costs. This judgment concerns the first, third and fourth plaintiffs and the first defendant only.

Each of the plaintiffs testified in turn. In addition they all produced a total of eight documentary exhibits. The defendant testified and produced six documentary exhibits.

The 56 year old first plaintiff Maud Kapfunde produced four exhibits and testified to the following effect. She was standing at a bus stop along the Marondera Harare Highway with eight of her family members. She had accompanied a child who was going to Harare. They were standing on the left side of the highway for Harare bound traffic. On the opposite side of the road, off the Marondera bound lane was a Diggleford School information sign. She saw a white vehicle driving towards Harare coming at high speed leave its lane of travel for the lane of on coming traffic and commence to overtake the haulage horse in front. The driver lost control of his vehicle and hit the Diggleford School sign post. The impact caused the vehicle to career back to its correct lane of travel. It bumped into the back wheels of the horse it had sought to overtake and veered off the road to where she and her family members were standing. Her attempts to run out of its way were futile. She was hit on her left leg by the vehicle. She fell down. When she came to she was in pain. She sustained two fractures on her left leg and a deep cut on the calf of her right leg. She was taken together with other injured members of her family first to Borradaile Hospital in Marondera before their transfer to Marondera General Hospital. She was later transferred to Chitungwiza Hospital for treatment. Even as she testified she walked with a pronounced limp.

In addition to her own claim for both special damages and damages for pain and suffering, she also claimed for special damages for the cost of treatment and funeral expenses of her daughter Sharon Beni, born 25 September 1992. Her daughter sustained spinal injuries that paralysed her from the waist down. She was taken to Borradaile Hospital, Marondera Hospital, Parirenyatwa Hospital, Ruwa Rehabilitation Centre and Bokamoso Hospital in Botswana for treatment, physiotherapy and rehabilitation. She eventually succumbed to her injuries and died on 23 March 2010. She was buried at Paradise Park in Marondera two days later.

She was cross examined. She intimated that the defendant commenced to overtake against the prohibition of double continuous lines marked in the middle of the road. She disputed the presence of two light vehicles between the defendant and the horse. She maintained her evidence in chief on how the accident occurred and the injuries she sustained.She conceded that the defendant paid for the transfer costs of the deceased from Parirenyatwa to Ruwa rehabilitation. He purchased the wheelchair used by the deceased. Whenever he visited her in hospital he would bring her fruits and sweets. He provided money for both the deceased and first plaintiff to obtain travel documents to Botswana and transport from Marondera to the Plumtree border post.

The 29 year old third plaintiff gave evidence similar to that of the first plaintiff. She stated that the defendant lost control as he tried to overtake the horse. He hit the Diggleford school sign post, hit the back wheels of the horse and came for her family members who were at the bus stop. She was sent flying by the impact into a field by the side of the bus stop. She sustained a cut above her left eye, fractured her right ulna and torn ligaments on the heel of her left foot. She left the defendant at the scene when she was taken to Borradaile Hospital and then Marondera hospital where she was discharged on 5 April 2009.

She was adamant under cross examination that he was travelling behind the horse of a haulage truck. She attributed the accident to over speeding. She disputed testifying at the criminal trial that he firsthit the wheels of the horse before hitting the sign post.

The last witness for the plaintiffs was the 26 year old fourth plaintiff. She was by the bus stop with the other plaintiffs and was strapping a baby on her back.She observed the vehicle driven by the accused approach at high speed. He was in the process of overtaking a horse when he saw an on coming vehicle, lost control and hit the school sign post off the road on his right side, veered to his correct lane and hit the back wheels of the horse before careering into the plaintiffs. The impact dislodged the baby from her back and both flew into the nearby hedge. The vehicle stopped with its wheels on her 16 year old sister’s stomach. Her left foot was injured and it was skin grafted. She still experiences pain in cold weather. She continues to experience chest pains arising from the manner she landed on the ground after the vehicle hit her. She spent one week in hospital. She produced exhibit 7, her medical report by Dr Madimutsa of 25 January 2010. She was discharged from hospital on 1 April 2009. The report confirmed that she sustained abrasions and swellings on her left ankle. The doctor estimated that she would suffer pain for approximately 10 months from the date of accident. Exhibit 8 shows that she incurred charges of US$50-00 at Borradaile hospital on the day of the accident.

The defendant gave evidence and produced four exhibits. He is a Chief Inspector in the Zimbabwe Republic Police based at the Chikurubi Transport Workshop. He was driving a white BMW motor vehicle registration number AAI 2666 from Marondera to Harare at 120km/hr. On approaching the 64 kilometre peg he noticed three slow moving vehicles in front travelling at 70km/hr. led by a horse, followed by a green Toyota Corolla with a white pick up truck right in front of him. He slowed down to 80 km/hr, satisfied himself that it was clear, hooted, increased speed to 120 km/hr and commenced to overtake the white pick up truck. As he was overtaking the green Toyota, without prior warning, it suddenly moved into his line of travel. The defendant moved to his extreme right and travelled abreast the Toyota with his right side wheels on the gravel and his left wheels on the tarmac intent on overtaking it. The uneven gravel on the verge of the road and differences in traction caused his vehicle to jump uncontrollably. He hit the school sign post off the road, lost control, veered back to the tarmac, narrowly missed the back of the Toyota that together with him had already overtaken the horse, careered off to his correct lane of travel and off the road to hit pedestrians waiting by the bus stop. He helped fourth plaintiff find her missing baby and observed Sharon in front of the vehicle in severe pain. The first plaintiff sustained a broken leg. They were ferried to hospital by Assistant Commissioner Mtabeni who arrived at the scene soon after the accident. Thereafter Sergeant Dzinyoro arrived and took his statement.

The rear windscreen of the vehicle was shattered; the right rear fender and rear tail light were dented and damaged. The front bumper and headlamps were damaged. He towed the vehicle to Eastlea VID in Harare. He produced exh 9, the vehicle inspection report of 9 April 2009. The following damages were noted on the motor vehicle. The right side fender was dented; the right front door had curved in; both windscreens were shattered; the front bumper was broken on the right side; the rear bumper was torn on the right side; the right side rear of the body was dented and the right side rear lens was broken.

He was called to Marondera police station by Sergeant Makwanya on 4 April 2009. She took him for indications.

He was tried in the Marondera magistrates criminal court firstly of negligent driving on 11 January 2010. He produced the transcript of the trial as exh 10. He pleaded guilty to the charge. He admitted that a reasonable driver would not have attempted to overtake three vehicles at once. He was found guilty. After mitigation, the trial magistrate altered the plea to not guilty. In mitigation, which was confirmed on oath by the second plaintiff he stated that he assisted Sharon by paying her mother US$50-00 for consultation with Mr Makoni, US$50-00 at Parirenyatwa to facilitate her transfer to Ruwa; US$200-00 for her admission at Ruwa; paid US$70-00 for her X-rays, and provided the first plaintiff with transport from Chitungwiza to Marondera on her discharge; paid US$30-00 to Mr Difala and US$50-00 for a cosset for Sharon; provided her with transport between Ruwa and Marondera in preparation for her discharge and on discharge; purchased a wheelchair for her; paid US$80-00 for her and first plaintiff’s ETDs to Botswana, provided transport to the Plumtree border post and sent US$100-00 to her brother in Botswana.

On 29 June 2010 he was tried before a different magistrate for culpable homicide. He proffered a defence outline. The record of proceedings exh 11 shows that the State called the evidence of Gladys Difala, Compassion Difala, John Buto and Dr Mashoko before the proceedings were set aside by the High Court on 19 January 2011, in exh 12, with a direction that the trial commence afresh before a different magistrate. Exhibit 13 is the transcript of the trial for culpable homicide that commenced thereafter. It consists of odd number pages only from p 49 to p 101. The sketch plan that was produced at the trial was not attached to exh 13. The defendant produced exh 13 to support his averment that Ruth Beni and Maud Kapfunde gave inconsistent evidence in this court and in the criminal trial. Ruth is alleged to have stated that the defendant first hit the wheels of the horse, then the sign post before hitting the plaintiffs. In the transcript, in her evidence in chief Maud said that the defendant was overtaking the horse in the face of oncoming traffic at high speed. He lost control and hit the sign post and careered to where she was. Under cross examination she disputed that the defendant was overtaking a Corolla but did mention at some point that he was trying to overtake three cars.

Ruth stated in chief that the defendant’s vehicle hit the sign post as he tried to overtake the horse and veered towards them and hit them. She attributed the veering to the post to an oncoming vehicle and over speeding. The transcript does not bear the allegation that she stated at the criminal trial that the defendant hit the horse, then the sign post and thereafter the plaintiffs.

The police woman who took him for indications Irene Makwanya produced a sketch plan as exhibit 1 by consent. She noticed that the sign post was destroyed and brake marks were still visible. She averred that the defendant “said he tried to overtake but failed to control the vehicle since there was oncoming traffic so he could not control the vehicle to go back to his lane.” She also conceded that the defendant stated that there was also another vehicle ahead that tried to overtake which caused him to lose control and hit the sign post. She indicated that the accused ignored the double continuous lines running for 500m-600m, overtaking prohibition sign between 100m and 200m from the bus stop where the plaintiffs were and a slow down sign before he attempted to overtake. She further stated that some 200-300m from the school sign post towards Harare is a depression running 200-300m that would have prevented the defendant sight of on coming traffic.

The other witnesses called at the criminal trial were Catherine Ben and Compassion Difala. Catherine is the one who outlined the sequence of events the defendant attributed before me to Ruth. He was overtaking the truck 15 m in front of him. He saw an on coming vehicle and went back to his lane but hit the back wheels of the horse, lost control and veered to the right where he hit the sign post and came back to the left and went off his lane and hit the plaintiffs. She saw a green pulsar and a white sunny in front of the horse that the defendant tried to overtake.

Compassion Difala said the defendant tried to overtake three vehicles in an area where overtaking was prohibited. Immediately in front of the defendant was the horse and in front of the horse were two light vehicles. He saw an on coming vehicle, slowed down and went back to his lane where he hit the back wheels of the horse, swerved to his right where he hit the school sign post, careered back to his correct lane of travel and went off the road where he hit the seven people one of whom died a year later.

The defendant further told this court that he visited Sharon and first plaintiff and assisted them financially. He paid US$50-00 to enable her to consult the bone specialist Mr Makoni. He provided her with transport on her release from Chitungwiza hospital to Marondera. He paid US$38-00 for treatment of second plaintiff’s child. He paid US$50-00 for the release of Sharon from Parirenyatwa and the deposit of US$200 at Ruwa Rehabilitation. He paid visits during the 2-3 months she was at Ruwa. He paid US$70-00 for fresh X-rays at Ruwa. In preparation for her integration back to her home environment, he ferried her over four weekends to and from Ruwa and Marondera. He purchased a wheel chair for her at the cost of US$300-00. He continued to make home visits in Marondera. She developed pressure sores and was taken to Botswana for further treatment. He paid US$80-00 for travel documents for both Sharon and her mother. He provided transport to the Plumtree border post and paid US$100-00 to help defray Botswana costs. He provided fuel for her return to Marondera. She died. He paid US$40-00 to assist with the funeral expenses. At the father’s request, he paid into his Barclays bank account US$150-00 for the coffin and grave. He paid a further US$35-00 for an outstanding arrear of US$55-00 with Doves Funeral services. He promised to help pay the outstanding BWP2 600-00 bill in Botswana. He alleged that he made all these payments out of sympathy and not in admission of liability.

He maintained under cross examination that it was reasonable to overtake three vehicles at once. He was 20m behind the vehicle immediately in front of him when he commenced overtaking. He had reduced speed from 120 km/hr to 70km/hr before he increased it again to 120km/hr. He admitted that he only noticed the continuous double lines prohibiting overtaking after the accident. He disputed the presence of a slow down sign even though Sergeant Makwanya’s evidence during the culpable homicide trial to that effect was not challenged.

He stated that he rendered assistance in the sum of US$3 000-00 but could not prove it as he did not keep any records.

It seems to me that the plaintiffs were all truthful witnesses. The first and third plaintiffs stuck to the versions they gave during the culpable homicide trial produced as exh 13. The fourth defendant maintained the version she gave in the aborted culpable homicide trial, exh 11. The defendant confirmed the evidence of the plaintiffs that he was travelling at an excessive speed when the mishap occurred. The plaintiffs could not say his actual speed but the defendant said it was 120km/hr. The defendant confirmed the general sequence of events as testified by the plaintiffs. He attempted to overtake three cars at once, failed to successfully do so, moved off the road to his extreme right, hit a Diggleford School sign post, lost control, veered back to his correct lane and went off the road to hit seven pedestrians waiting at a bus stop before his vehicle stopped in a near by field with the deceased underneath it. The plaintiffs said on his way back to his lane he hit the back wheels of the horse before he struck the seven pedestrians down. The defendant disputed ever hitting the back wheels of the horse. In my view, the broken front right side bumper and shattered front windscreen of the defendant’s car noted in exhibit 9 prove the truthfulness of the plaintiff’s version that the defendant hit the back wheels of the horse. These damages were inconsistent with his version that he only hit the sign post with the back of his vehicle.

I believed the version of the plaintiffs on how the collision happened. I did not believe the defendant’s version on the sequence of the vehicles travelling in front of him. In the criminal trial, even Catherine Beni and Compassion Difala who agreed with him that he wanted to overtake three vehicles in front of him maintained that the two light vehicles were in front of the horse. His version that he successfully went past a white pick up truck in front of him and was impeded in overtaking the horse by a green Corolla was false. In his testimony before the magistrates’ court and in this court he did not explain what became of the white pick up truck from the time he went past it until he narrowly missed the Corolla after hitting the sign post. If his version were correct, he ought to have hit the white pick up when he veered back into his lane of travel after hitting the sign post. That he did not demonstrably points to the falsity of his version. I am satisfied that the probabilities confirm the plaintiffs’ version that the vehicle immediately in front of the defendant was the horse. In my view whether he hit the wheels of the horse before or after he struck the sign post or whether he never struck the wheels at all would not absolve him from liability arising from his manner of driving.

He stated that it was safe for him to overtake because he could see 2 km in front of him. He however did not observe the double continuous lines stretching for 500m -600m as he commenced to overtake nor the prohibition from overtaking sign some 100-200m before the bus stop where the injured were. These shortcomings are synonymous with the absence of due care and attention on his part. It was not safe for him to overtake against these prohibitions. In any event his version that he reduced speed to 70km/hr before increasing it back to 120km/hrcould not reasonably possibly be true. Had he initially reduced his speed before overtaking, he would have been able to return to his lane of travel when he observed the on coming vehicle. The fact that he took the risk of moving out of the lane of on coming traffic off the road shows that he had no time to return to his correct lane due to his excessive speed. Evidence of excessive speed is demonstrated by his failure to safely return to his correct lane, his choice to get off the road on his wrong side of the road, his failure to stop before hitting the sign post and his veering back to his correct side of the road and failure to stop before hitting the plaintiffs.

He admitted that he lost control of his vehicle. He attributed the failure to traction between tarmac and gravel. In my view he failed to control his motor vehicle when in the face of on coming traffic he failed to safely return to his lane of travel because of the excessive speed he was travelling at. His initial speed also incapacitated him from avoiding the accident when it seemed imminent.

I find that he drove his vehicle in a reckless manner on this day. I am satisfied that the plaintiffs have established all the four particulars of negligence pleaded in their declaration.

The last issue for determination is the extent of his liability to each of the plaintiffs.

The first plaintiff claimed special damages she incurred for herself and for her 16 year old daughter before she sadly passed on. These were in the form of medical expenses that she incurred in Zimbabwe and Botswana. The defendant did not question their necessity. He only sought proof thereof. The medical expenses claimed were US$ 2 625-00 for the plaintiff; US$ 2 464-20 for Sharon Beni and BWP 1 881-56 for Sharon and BWP242.85 for the first plaintiff. In addition she sought US$777-00 funeral expenses for Sharon.

Exhibit 3 was a compilation of 30 receipts of the payments she made at the hospitals she was treated both in Zimbabwe and Botswana. The receipts showed that the first plaintiff was admitted at Borradaile Hospital on 28 March 2009 at 1730 hours and discharged on the same day at 2100 hours. She incurred costs of US$60-00. She was taken to Marondera hospital. By 27 October 2009 she had incurred treatment costs of US$113-00 of which she paid US$15 on 27 October 2009 (see p 11, 13 to 17 and 25 of exhibit 3). Between 31 March 2009 and 8 April 2009 she incurred costs for treatment at Chitungwiza hospital and to Mr AS Makoni, an orthopaedic specialist in the sum of US$1 837-00 (receipt number9, 10,18 and 20 of exh 3). Between 19 October 2011 and 19 January 2010 she incurred costs for consultation and drug purchases and extension of her visa of BWP275-05 (p 1 to 8, 20, 21, 22, 23 and 30 of exh 3). At the back of page 14 is indicated that the amount of US$10-00 of 9 April 2009 on the face of the receipt was paid by the defendant.

The first plaintiff failed to establish the amount she incurred in funeral expenses. She did not even state a figure in her oral evidence or attempt to justify the figure she claimed of US$777.00. The defendant is absolved from the instance in regards to special damages for funeral expenses. See *Mbundure* v *Buttress* SC 13/11 at p 4-5 of the cyclostyled judgment.

The plaintiff established that she incurred a total of US$ 2 010-00 and not US$ 2 625-00 that she claimed and BWP275-05 against BWP242-85 that she claimed for her personal treatment. The defendant conceded that he did not contribute to any of the medical expenses personally incurred by the first plaintiff. I will award her the proved claim of US$ 2 010-00 and the lesser amount she claimed of BWP242-85 for her own treatment.

Exhibit 4 was a record of 24 receipts of the money she paid for the treatment and management of Sharon Beni in Zimbabwe and Botswana. She suffered paraplegia secondary to a road traffic accident. She was admitted at Borradaile on 28 March 2009 at 1730 hours and discharged at 2100 hours on the same day. She incurred costs of US$ 130-00 [p 23] of which US$70-00 for X-rays (p 3) was paid on that day. She was taken to Marondera Hospital where she incurred costs in the sum of US$22-00 (p 2, 4 and 15). She was taken to Parirenyatwa where by 20 April 2010 she incurred costs in the sum of US$500-00 of which US$50-00 was paid on that day. Thereafter she was at Ruwa Rehabilitation Hospital where she was attended to from 21 April until 26 October 2009. The receipts from the rehabilitation hospital on p 7 to 13 show that she incurred costs in the sum of US$1 545-20 of which a deposit of US$200-00 was paid on admission. There is a report dated 8 December 2009 indicating that she was suffering from bed sores. The Botswana receipts show that she incurred costs of treatment in that country from 19 December 2009 until 6 February 2010 of BWP1 097-08.

The first plaintiff established that she incurred medical expenses for the treatment of Sharon of US$2 265-00 and not US$2 464.20 that she claimed and BWP 1 097-08 and not BWP 1 881-56 that she claimed. The defendant contributed US$ 370-00 of the medical expenses claimed. He paid US$50-00 for the consultation to Mr Makoni, US$50-00 of the Parirenyatwa expenses, US$200-00 deposit at Ruwa, US$70-00 for the X-rays at Ruwa and US$10-00 indicated at the back of receipt 14 in exh 3. In addition, exh 10 shows that Compassion Difala conceded that the defendant paid US$100-00 to the deceased’s brother Peter to defray some of her expenses in Botswana. The defendant established that he paid a total sum of US$480-00 of the medical expenses claimed in United States dollars. The amount due to the first plaintiff for the treatment of Sharon Ben is in the sum of US$ 1 785-00 and BWP 1 097-08.

I award special damages incurred by the first plaintiff for her own and Sharon’s account in the sum of US$ 3 805-00 and BWP 1 340-83.

The first plaintiff also claimed for general damages for pain, suffering, disability and loss of amenities of US$10 000-00. The approach to an assessment of these damages is set out in *Hokonya & Anor* v *Chinyani & Ors* 1995 (1) ZLR 102(H) at 127B-130D;*Marufu* v *Mawona & Ors* 1996 (1) ZLR 593(H) and *Ndawana* v *Nasho & Ors* 2000 (1) ZLR 23 (H)and *Gwiriri* v *Highfield Bag(Pvt) Ltd* 2010 (1) ZLR 160 (H) at 171D-172H. In the *Hokonya* case, *supra*, BARTLETT J stated:

The basic principles I must follow in assessing the appropriate amount for general damages for pain, suffering, loss of amenities, disfigurement and loss of expectation of life are as laid down by GUBBAY JA (as he then was) in *Min of Defence & Anor* v *Jackson*(1990 (2) ZLR 1 (S)) at 7G to 8G:

"It must be recognised that translating personal injuries into money is equating the incommensurable; money cannot replace a physical frame that has been permanently injured. The task therefore of assessing damages for personal injury is one of the most perplexing a court has to discharge. 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 *Warneke* 1911 AD 657 at 665.
3. Since no scales exist by which pain and suffering can be measured, the *quantum* of compensation to be awarded can only be determined by the broadest general considerations. See *Sandler* v *Wholesale Coal Suppliers Ltd* 1941 AD 194 at 199.
4. The court is entitled, and it has the duty, to heed the effect its decision may have upon the course of awards in the future. See *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: *pe*r SCHREINER JA in *Sigournay's* case *supra* at 556C. See also *Southern InsAssn 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 is a millionaire or a pauper. See *Radebe* v *Hough* 1949 (1) SA 380 (A) at 386.

(7) Awards must reflect the state of economic development and current economic conditions of the country: *Sadomba* v *Unity Ins Co Ltd & Anor* 1978 RLR 262 (G) at 270F; 1978 (3) SA 1094 (R) at 1097C; *Min of Home Affairs v Allan* 1986 (1) ZLR 263 (S) at 272B.

They should tend towards conservatism lest some injustice be done to the defendant. See *Bay passenger Tpt 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."

The case of *Marufu* v *Mawona &Ors supra* was closer on the facts to the present matter than the *Hokonya* case. The plaintiff in that case suffered broken tibia and fibula in both legs and fracture of the right femur. Pins were fitted and removed after 5 months. The consultant orthopaedic surgeon testified that he was in severe pain, and would continue to experience pain from time to time and suffer discomfort for life. He had a 40% disability. Marufu was awarded general damages of ZW$50 000-00 on 29 May 1996. The amount was equivalent to US$5 476-45 at the prevailing official exchange rate of ZW$9-13 to US$1.

At 595E-596A SMITH J referred to decided cases involving bone fractures and the amount of general damages awarded under the head claimed by the first plaintiff in the present matter. He stated that:

“Mr *Biti* referred to a number of cases to support the claim for $80 000. In *Mabvoro & Anor* v *Muza* HH 199-85 the two plaintiffs had been injured in a motor accident. The husband, who was about 30 years old, had a fracture of the left leg below the knee and of the right wrist. He sustained serious cuts and bruises and was unconscious for some hours. He was in hospital for over two weeks. He was awarded damages in the sum of $15 000 for pain and suffering, loss of amenities and disfigurement. His wife, who was 24 years old, had fractures in both legs above the knees. There was malunion of the bone in the right leg which was three-quarters of an inch shorter than the left. She needed assistance in household chores and would have recurrent pains in her leg for the rest of her life. She was awarded damages in the sum of $20 000 for pain and suffering, loss of amenities and disfigurement. In *Chamunorwa* v *Soweto & Anor* HH-212-93 a 50 year old man who was injured in a bus accident and sustained a 40% degree of disability was awarded damages in the sum of $15 000 for shock, pain and suffering and loss of amenities. In *Mkhiza* v *Gumede* HB-110-91 the plaintiff had been assaulted. He sustained severe pain and shock, paralysis of the left arm and fingers and disability of his left leg and was unable to work. He was awarded damages in the sum of $20 000. In *Bhebhe & Anor* v *Mukhomi & Anor* HB-9-93, where the plaintiffs had been injured in an accident and sustained permanent disabilities with an estimated degree of 7.5% and 6% respectively, they were awarded damages in the sum of $13 500 and $14 000.”

The equivalent amounts in US$ for each case referred to by SMITH J were US$10 000-00 for the husband and US$13 000-00 for the wife in *Mabvoro’s* case; US$2 200-00 in *Chamunorwa’s* case and US$2 000-00 in *Bhebhe’s* case.

In *Ndawana* v *Nasho & Ors, supra*, the plaintiff, a 70 year old man was hit by a motor vehicle while walking along the road. He sustained fractures on his femur, tibia and fibula. He was in severe pain and was in plaster for 5 months. He was in pain for a year and still experienced pain of the leg when he testified 5 years later. On 13 October 1999, he was awarded *inter alia* general damages in the sum of ZW$30 000 with interest at 25% from the date of judgment to the date of payment in full. At the then prevailing rate of ZW$36-23 to US$1, the amount was equivalent to US$ 784-72.

In *Gondokondo* v *Takrose Buses (Pvt) Ltd & Anor* HH 85/2009 I awarded special damages of US$2 000-00 to the guardian of a six year old girl. She was hit by a bus and fell underneath it. Her left arm was crushed. She spent two months in hospital. The medical report indicated that she would be permanently disabled and described the pain and treatment she underwent including skin grafting. In my view the injuries suffered by the six year old girl were far more serious than those suffered by the plaintiffs in the present matter. In G*wiriri’s* case, *supra,* CHITAKUNYE J awarded the plaintiff whose arm had been crushed by rollers at his workplace and assessed disability of 65% and hospitalised for 5 months US$3 000-00 for pain and suffering. Lastly, in *Mafusire* v *Greyling & Anor* HH 173/10 CHATUKUTA J awarded the plaintiff who sustained serious injuries to and underwent surgery of the knee and ankle both of which were assessed at 20% disability damages for pain and suffering in the sum of US$1 000.00.

The medical report, exh 2, dated 25 January 2010, established that the first plaintiff sustained a swollen and fractured left leg and that she was a diabetic. The injuries were permanent and deformity was for life. She would be in constant pain made worse by the chronic condition of diabetes. She would constantly resort to pain killers. The doctor ruled out future operations. He concluded that she would not be able to carry out normal duties. In addition, she sustained a cut on her right calf that left an unsightly scar. She momentarily fell unconscious at the scene. She was hospitalised in Borradaile, Marondera and Chitungwiza hospitals for two weeks from 28 March until 8 April 2009. She still feels pain in her leg and walks with a limp.

Mr *Muchandiona*, for the defendant, submitted that the amount claimed by the first plaintiff was too high and on the basis of the *Gwiriri, Gondokondo* and  *Mafusire* cases,*supra,* suggested an amount not exceeding US$1 500-00.I have had regard to the eight criteria set out in *Jackson’s* case *supra* and decided cases in this jurisdiction in estimating a fair and just award of general damages due to the first plaintiff. I underscore that general damages are not a penalty against the wrongdoer but compensation for the victim. The award will also reflect the state of our country’s economic development and the current economic conditions in the country. I estimate general damages for her in the sum of US$1 500-00.

The third plaintiff claimed special damages of US$246-00 and general damages for pain, suffering and disability of US$3 000-00. She sustained a cut above her left eye, fractured her right ulna and torn ligaments on the heel of her left foot. She is not able to lift heavy objects with her hand and when she walks long distances, her heel bleeds. She produced exh 5, her medical report compiled by Dr Madimutsa on 25 January 2010. The report confirmed the injuries she outlined in her testimony. He recorded that she suffered post traumatic arthritis pain due to the accident and would continue to experience such pain and permanent deformity of the ulna. She would require pain killers but no further operations. She would be able to carry out light duties. In addition she produced 5 receipts as exh 6. She incurred US$60-00 at Borradaile hospital of which she paid X-ray fees of US$50-00 on 2 April 2009. She also incurred ward fees and medication of US$22-00 at Marondera hospital of which she paid US$10-00 on 31 March 20009.

The third plaintiff proved special damages of US$82-00. She was in hospital for one week. She suffered pain and will continue to do so from time to time. In my view, she sustained injuries that were almost similar to those sustained by the first plaintiff. I see no basis for differentiating their awards for general damages. I estimate her general damages in the sum of US$ 1 500-00.

The fourth defendant claimed special damages of US$221-00 and general damages of US$1 000-00. She proved special damages in exh 8 in the sum of US$50-00. In regards to general damages she underwent skin grafting to repair her damaged foot. She was in hospital for one week. The medical report indicated that she was in pain for 10 months. She periodically experiences pain during the cold season. She did not sustain any broken bones. I estimate general damages for pain and suffering in the sum of US$500-00 for the fourth defendant.

Accordingly, it is ordered that:

1. The defendant shall pay to the first plaintiff the sum of:
2. US$ 3 805-00 and BWP 1 340-83 special damages;
3. US$ 1 500-00 general damages for pain, suffering and disability
4. Interest on all the amounts referred to above at the prescribed rate from the date of judgment to the date of payment in full.
5. The defendant shall pay the third plaintiff the sum of:
6. US$82-00 special damages
7. US$1 500-00 general damages for pain, suffering, and disability
8. Interest on the above amounts at the prescribed rate from the date of judgment to the date of payment in full.
9. The defendant shall pay the fourth defendant the sum of :
10. US$ 50-00 special damages
11. US$500-00 general damages for pain, suffering and disability
12. Interest at the prescribed rate from the date of judgment to the date of payment in full.
13. The defendant shall pay the plaintiffs’ costs of suit.

*Legal Resources Foundation,* first, third and fourth plaintiff’s legal practitioners

*Danziger and Partners,* the first defendant’s legal practitioners