EDWIN CHINYEMBA
versus
FAITH MACHIKITI
and
OUTWARD BOUND ZIMBABWE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUNANGATI-MANONGWA J
HARARE, 11, 12, 18, and 21 June 2018 & 29 August 2018 & 6 September 2018

Trial

V.H Tongoona, for the plaintiff
R. Jambo, for the defendant

MUNANGATI-MANONGWA J: What was supposed to be a memorable excursion for Harare International School pupils and their teacher, the plaintiff, turned out to be a nightmare when the plaintiff was severely burnt in an accident involving a burner on 19 September 2013. The plaintiff approached this court seeking damages to the tune of US$ 206 298.00 allegedly arising from negligent conduct of the first defendant a learner instructor in the employ of the second defendant, and the second defendant itself on the basis of vicarious liability.

Both the defendants denied liability and stated in their plea that the plaintiff voluntarily assumed risk by taking part in the activities and therefore cannot impute liability on the defendants. The defendants further challenged the particulars of negligence.

The following facts are common cause: The plaintiff was part of a contingent involving 40 students from Harare International School who took part in an overnight expedition in Chimanimani Mountains. During the expedition they went up a mountain and upon coming down, they set up camp at a place called Crossroads. The first defendant whilst in the course of her duties as a learner instructor duly employed by the second defendant was in charge of the plaintiff's group, the groups having been split into 3 (three). Whilst in camp as cooking was going on, the plaintiff brought the first defendant's attention to the fact that one of the burners had gone out. The first defendant discovered that fuel had run out. In the process of refilling the burner with methylated spirit which is the fuel used in the burner concerned. there was an

explosion and the plaintiff who was sitting nearby got engulfed in flames. He suffered extensive burns and had to be hospitalised. The plaintiff seeks damages from the two defendants arising from the injuries.

The damages sought are broken down as follows:

- US$8 798.00 for actual pecuniary loss in medical expenses.
- US$190 000.00 for pain and suffering
- US$7 500.00 for future medical expenses

This court is called upon to decide on the following issues which were agreed upon at a pre-trial conference before a judge.

1. Whether the first and second defendants are liable for the plaintiff's claim.
2. If so, what is the quantum of damages

Plaintiff's case

The plaintiff led the following evidence. He is a teacher at Harare International School and together with students from his school took part in an overnight expedition conducted by the second defendant. His role was that of teacher/observer attached to the first defendant's group as the students were split into 3 groups. On 18 September 2013 whilst in camp as he sat on a rock about $1^{1/2}$ metres from where cooking was being done he noticed that one of the burners had died out. He brought this to the attention of first defendant. The first defendant took a 5 litre container of methylated spirit which was ¾ full started refilling the burner whilst in a standing position. There was a big ball of fire and he was drenched in methylated spirit and engulfed by fire. He tried to dive and roll on soil nearby but the fire could not go out he ultimately stuck his head in sand. The head instructor from the second defendant came over and removed his long sleeved sweater that is when he fire went out.

The plaintiff stated that as a result he suffered burns, on both his wrists, across the chest and his whole face. The plaintiff produced photographs that show the injuries that he suffered and same appear on pages 28-32 of the plaintiff's bundle of documents. The plaintiff narrated that he had to walk with the second defendant's instructors for more than two (2) hours to get to the base camp whilst in intense pain without having been given anything for pain. The instructors were only able to dress him in paraffin gause to soothe the pain. Ultimately medical attention was sought at Chimanimani Clinic where he was given a tetanus injection and some paracetamol. He was carried to Mushumbi Gardens in Mutare by ambulance where the blisters which had formed were opened and he was given a pethidine injection. He was ultimately

transferred to Parirenyatwa Hospital in Harare where he occupied a private ward. His treatment involved attendance by both nurses and doctors.

The plaintiff stated that he went through a procedure called debridement which entailed scrubbing of the wounds with warm water, coarse salt and betadine until the wounds bled. Pethidine was administered before the procedure for pain but it was not effective in reducing the pain. The procedure was done whilst he was fully awake. The procedure was necessary for the removal of dead skin to allow fresh skin to grow. The neck area would not heal and they had to work on it. His right hand required grafting which involved harvesting skin from his thigh and putting it on his hand in little sections. He stated that the doctor had indicated that the debridement procedure had not produced effective results on the hand, hence the need for grafting. During cross examination it was put to the plaintiff that, this pointed to negligence on the part of the nurse doing debridement to which he indicated that there was no conclusive evidence on the issue. It could have been that the burns on that hand were more severe or that the nurse had not performed the procedure well.

Due to the pain the plaintiff had to be given pethidine four (4) times a day and antibiotics which were intravenously administered. The witness stated that both his hands were bandaged and he could not feed himself, he could only sleep on his back with his hands in a dome as any contact with blankets would bruise him. A physiotherapist had to help him exercise his hands whilst in hospital.

Afterwards he had to continue to see Dr Maunganidze who was overseeing the healing process as the grafting had not totally set.

Due to his prolonged stay in hospital which he put at 21 days he discovered that he could not sit for long periods. It was diagnosed that his hips were out of alignment because of prolonged bed rest due to the burn injuries. A report from Boddy & Makunga Physiotherapists was tendered in evidence and it states that the lower back pain experienced by the plaintiff was due to Sacroiliac Joint Dysfunction due to extended period of hospitalisation. The plaintiff was also attended to by a plastic surgeon Dr Brone who prescribed special lotions and creams which the plaintiff has to use all the time.

As a result of his injuries the plaintiff claims he incurred costs to the tune of US$8 798.00 which sum includes hospital fees, drugs, materials used in dressing him and physiotherapist fees. The total sum adequately proven through receipts and invoices running from pages 1-11 and 13-21 of the plaintiff's bundle of documents is $7 794-00. It was put to

him that the receipts and documents only came to the figure of $7 794.00 and the plaintiff could not challenge this.

The plaintiff indicated that the National Social Authority had rated his disability at 5% and a medical report to that effect was tendered. He was compensated as per the degree of his disability, however, the plaintiff did not indicate the amount paid to him.

The plaintiff indicated that his ears have got no lining and thus he will continue to use creams and lotions. He reacts to extreme whether temperatures be it too hot or too cold. He is an outdoor person. He plays and coaches basketball and now the sport is no longer enjoyable as he cannot be exposed to the sun for long. He has to wear a hat all the time when going out in the sun. Medical expenses for the future will constitute the sunscreen he uses and special cream he has to use for this hands and face. After being discharged from hospital he has consulted an Orthopaedic Surgeon, a Biochemist, had two Magnetic Resonance Images (RMI) taken. The last MRI was for $1 500.00, further, he 8 physio and biochemist appointments at $80 each, with doctors' visits amounting to $600.00. On average per month he spends $20.00 on creams. Apart from the amount for the creams the above figures were challenged by the defendants for want of receipts.

The plaintiff indicated that his claim for $190 000.00 for pain and suffering is premised on the 21 days stay in hospital, the daily debridement procedure which was painful, sleepless nights, nightmares and the continued trauma he experienced. Four years after the accident he still experiences pain from the prolonged bed rest and the misaligned spine which causes pain on the opposite knee (left knee) and he will continue to incur medical expenses.

The plaintiff maintained that the first defendant is liable in so far as she was negligent in refuelling the burner when it was still hot thereby exposing the plaintiff to danger by not following safety precautions or protocols. He indicated that if he was out of order the first defendant should have told her if where he was sitting was not safe and she never did that. The plaintiff insisted that the liability of the second defendant arises from the fact that it employs the first defendant whose negligence caused his injuries.

During cross examination it was put to the plaintiff that he was sitting in a cooking area which was not safe to which he disagreed. It was further put to him that methylated spirit is a hazardous substance and he should not have sat in the vicinity to which he answered that it was not close. He further denied that he refused to dive and roll which increased the risk of being burnt. The defendant's counsel further sought to say his costs and pain were exacerbated

by the negligence of the nurse leading to grafting. The plaintiff maintained that the cause for the complication was not clear.

The defendant's case

The defendant's first witness Faith Machikiti stated that she is an administrator at Outward Bound Zimbabwe although at the time of the accident in issue she was a learner instructor attached to one Lena Mubiya. Whilst at Cross Roads camp where the group was to settle for the night she was in the cooking area together with the plaintiff who was administering medicine to students. As per her evidence the plaintiff was seated on a stone 50cm high whilst the trench stove was next to him. The plaintiff brought to her attention that the burner had gone out hence no cooking was going on. She used a pot clip to remove the pot as it was hot and checked the burner and saw that there was no methylated spirit inside. She proceeded to take a 5l container which was stored away from the cooking area containing 1 litre of methylated spirit. She opened the stove, and as she was crouching and pouring the spirit there was an explosion which she likened to one that occurs when a spray is put in a fire. She was not burnt but noticed that the plastic container lay on the side with very little fuel. It seems she passed out.

On being asked by her legal representative whether she caused the fire the witness' answer was that "it was caused by pouring of the spirit into the stove." She denied being negligent. Further, she had on several occasions done the refuelling without any incident happening.

During cross examination the first defendant admitted that she was an inexperienced learner instructor who at the time of the accident was unsupervised although her lead instructor was within camp. She also indicated that the position where the plaintiff was, was unsafe but she did not warn him of the dangers as she assumed he knew of the danger involved. She said she did not do anything about it and felt it was not proper to reprimand the plaintiff in front of the children.

On being asked during cross examination on the safety protocols, the witness indicated that she was taught to adopt a crouching position when refuelling and how to turn the stove off, place a lid on top of the flame. She denied that she had been taught not to refuel the stove whilst the burner is still not. She indicated that this precaution was only introduced after it was discovered that the burner can explode if refuelled when hot. In her words she stated that

> "It became a lesson not only to me but to everyone."

She admitted that the cause of the explosion was that fuel was poured when the burner was hot. She admitted that she and the second defendant had not taken safety measures.

The defendant called a 2nd witness one Munyaradzi Mabiya an instructor in the employ of the second defendant since 2004. On the day in question he was leading one of the three teams being assisted by the first defendant his junior. He explained that on reaching camp a safety talk was delivered by one Calvin as regards how to live in camp, assemble stoves and how to use fuel.

He stated that when the incident happened he was a distance of about 15 metres from the cooking area busy putting up the tents when he heard an explosion. He rushed towards the explosion and saw the plaintiff in flames. He indicated that him and one Calvin shouted to the plaintiff to "drop and roll" but the plaintiff ran around and one Calvin tripped him so he could drop. The plaintiff dropped 4-5metres from the cooking area. He was not sure whether the plaintiff had heard the instruction. Together with his colleague they used bottled water to put out the fire. The parties took of the plaintiff's clothes and did first aid.

He confirmed that the plaintiff was in pain.

The witness explained that the procedure of refuelling required that one ensures that there is no fuel in the receptor and ensures that the burner is cold, one then has to kneel down and pour fuel. However the witness could not confirm whether the first defendant had followed the safety protocols and procedures in refuelling the stove as he was not present. Equally he could not dispute that the first defendant poured fuel whilst standing content to state that it would be hard to aim the opening of the receptor and it would also be against protocol.

On being asked whether an investigation as to the cause of the fire was done he indicated that "as staff" they did an investigation and did not find the cause of the fire. However the second defendant ended up coming up with policies to prevent similar occurrences.

As regards the plaintiff's position, the witness indicate that the plaintiff had been sitting on a rock behind the cooking area about 2 ½ metres away from the stove. This position he considered to be safe.

The witness indicated to court that this was not the first time an accident had happened as there was an incident involving Peterhouse Boys School involving a stove. The policies that were put in place after the accident were that the only person to refuel is the instructor and the refuelling was to be done away from the burners, away from the cooking areas. The fuel was not to be moved from its storage place.

In his evidence the witness as an instructor confirmed that part of his duties are to provide a safe and memorable camp.

Clearly this witness' evidence cannot exonerate the first and second defendants on the issue of negligence and ultimately liability. This is because the witness only arrived after the incident. He only found the plaintiff already on fire and could not confirm whether the first defendant followed the set procedures when refuelling.

Also, this witness' evidence on the safety talk that was supposedly done by Calvin contradicts the evidence of the first defendant. The witness indicated that it was stated during the safety talk that those refuelling had to make sure that the burner is cold and the burner had to be carried to the fuelling point, however if it was one burner it could be filled from its position. The first defendant categorically stated that she had not been taught that she had to check that the burner was cold before refuelling. They were only taught that the burner had to be "dismantled after it was discovered that it can explode if refuelled when hot." this was after the incident. In that regard the court is bound to believe the first defendant. The issue of ensuring that the burner was cold only came afterwards and the court is not convinced that it was one of the precautions before this occurrence as the second witness would like the court to believe.

Whether the first and second defendants are liable for the plaintiff's claim.

The plaintiff's claim herein falls under delict. The claim for damages is based on negligence. The question to be answered therefore becomes whether or not the first defendant was negligent in the manner in which she acted.

As the first defendant was acting within the course and scope of her duties, if she is found to have been negligent then incidentally liability attaches to the second defendant by reason of vicarious liability.

It is common cause that the explosion that resulted in the plaintiff suffering burns occurred when the first defendant was pouring fuel into the burner. The defendant admitted that she did not check whether the burner was cold or not. The fuel that was used being methylated spirit was highly inflammable. From the facts the court finds that the first defendant could not have been crouching when she poured the spirit into the burner. This finding is supported by the fact that the plaintiff was about 50 cm from the ground sitting on a stone. He got drenched in methylated spirit. The first defendant says the wind could have carried the fuel. If the plaintiff was crouching it is difficult to fathom how the plaintiff who was above her could have been drenched in methylated spirit. The plaintiff's version that she was standing is thus

more probable. Taking that version as correct, the plaintiff went against protocol and instructions which both first defendant and a witness confirmed where not only part of the safety talks but standing orders as well, regarding the position one had to assume when refuelling that is , crouching. The first defendant as *per* her evidence had been on several of these expeditions and refuelling trench stoves. First respondent thus knew the importance of following the safety precautions and she did not follow same when she poured fuel whilst in a standing position.

The first defendant's conduct is also found wanting where she indicated that she could tell that the position that plaintiff occupied was unsafe. She realised that it could result in danger but as *per* her evidence she thought it was not polite to reprimand the plaintiff in the presence of school children. Also she thought that as plaintiff had been on such excursions before he knew the dangers associated with sitting close to the trench stoves. The court finds that the first defendant was aware or conscious of the attended dangers but chose to remain quiet.

Equally, the second witness Munyaradzi Blessed Mubiya who was supposed to supervise the first defendant was not with her. He knew that the first defendant was a learner instructor and allowed her to lead a group of girls who were about to do the cooking. Knowing that there had been a previous accident involving Peterhouse Boys High School involving a stove, it was certainly not diligent to leave first defendant unsupervised. This is buttressed by the fact that he could thus not confirm whether first defendant followed the safety procedures. As a lead instructor Munyaradzi Blessed Mubiya should have foreseen that the learner instructor in the process of preparing stoves to cook super might not properly take precautions. By leaving her to proceed that constituted an omission which had fatal consequences. I therefore find that first defendant was negligent and due to her negligence the plaintiff ended up being injured. Equally the instructor failed in his duties to ensure the safety of the participants in providing adequate supervision of the first defendant.

The other question which arises pertains to whether there was contributory negligence. The defendants seek to say that the plaintiff was instructed to dive and roll which he failed to do. By failing to dive and roll the plaintiff exacerbated the fire and in the process increased the burns which could have been minimized. Firstly the issue of contributory negligence was not specifically pleaded which omission was/is fatal. Further, no evidence was presented as regards how such failure if at all, exacerbated the burns. In any case, the plaintiff indicated that he tried to dive and roll on some nearby soil. That inspective, the damage had already occurred as the

plaintiff was on fire by the time second defendant arrived at the scene. From the evidence the court is not convinced that there was contributory negligence on the part of the plaintiff.

In their submissions, the defendants submitted that by remaining in the vicinity of the cooking area when the first defendant was not following proper fuelling procedures, when he knew or ought to have known the likelihood of harm amounts to contributory negligence on his part. It is argued that as the burner had just been out for 3 minutes the plaintiff knew or ought to have known that it was hot. These submissions are incidentally applicable to the first defendant. She was not following proper refuelling procedures, she had just removed the pot using a pot clipper as it was hot, she ought to have known that the burner was still hot. Thus handling a combustible substance in such circumstances when a participant was in the vicinity was dangerous. She nonetheless proceeded with the refuelling exercise, which in fact was negligence

The defendants further pleaded that the plaintiff voluntarily assumed risk by taking part on the expedition. The defendants argue that plaintiff voluntarily assumed risk by

a) participating in an expedition which is known to carry inherent risks of harm.
b) sitting close to an area where cooking was taking place thereby exposing himself to the risk of fire.
c) looking down on the stove as it was being lit hence exposing himself to the risk of a fire.

This is covered by the maxim "*volenti non fit injuria"* loosely translated as "an injury is not done to one who consents." The requirements for this defence are threefold being:
Knowledge, and appreciation of the risk involved, and consent to run the risk. Thus for the defence to stand

a) the plaintiff must have had knowledge of the harm or risk involved in the defendant's conduct, as well as the nature and full extent thereof. This is referred to as "informed consent"

   This includes being informed of the "seriousness" or "likely risks attendant upon the exercise"
b) Apart from the knowledge of the harm involved, the plaintiff must also have appreciated the nature and extent of the harm and risk involved.[1]

[1] The Law of Defamation Vol 1 Juta 1984 p 724

c) in addition the plaintiff must also have consented to the infliction of the harm or assumed the risk implicit in the defendant's conduct

Consent and assumption of risk imply that the plaintiff intended his or her rights to be limited for the purpose of infliction of the specific harm or exposure to the hazardous conduct of the defendant, which translates to assumption of legal risk of injury.

The consent must have been freely given and the risk voluntarily assumed. The consent must extend to all the consequences which may arise out of the conduct but where the conduct violates the terms of the consent the defence immediately falls away.

In essence the defence of consent or voluntary assumption of risk is a defence in respect of injuries and harm caused by the materialization of a risk which is subjectively foreseen, appreciated and assumed by plaintiff. See *Principles of Delict* Jonathan Burchell Juta Publication p 70-71.

The evidence before the court does not sustain a conclusion that the plaintiff voluntarily assumed risk in the harm that occurred to him. Certainly going on an expedition in the mountains has its own risks like snake bites, falling off cliffs but here it is the conduct of first defendant which is in issue. It cannot be said the plaintiff had knowledge and appreciation of the risk involved and consented to the risk. He did not foresee an accident occurring due to human error resulting from failure by the first defendant or defendants to follow safety precautions or procedures in lighting the burner. In that regard he could not have consented to infliction of harm by factors he did not foresee.

The plaintiff's role as a teacher/observer did not even expose him to the risk that materialized. The plaintiff lacked the knowledge, appreciation of the extent and nature of the risk involved and neither did he consent to infliction of harm. The defence is not applicable herein.

Having found that the first defendant was negligent and additionally the instructor Munyaradzi, consequently the second defendant becomes vicariously liable for the negligent act of its employees in the circumstances.

The issue of damages comes to the fore. The special damages pertaining to pecuniary loss were duly proven at US$7 794.97 thus reducing the claim from $8 798.00. Thus no issue arises as regards special damages hence plaintiff is entitled to that amount.

The plaintiff seeks $7 500.00 as future medical expenses. The plaintiff indicated that he requires creams for his face and hands. Due to the injuries he reacts to different temperatures or to exposure of extreme weather conditions. Also the lining of his ears was damaged. The

evidence that he requires the creams has not been challenged although he has no medical report to back the same. He indicated that such creams cost him $20.00 *per* month and he still uses the creams. This was upon the advice of his doctor. The plaintiff did not state for how long he has to use these creams whether it is for several years or for life. The amount was not challenged and the court is satisfied that plaintiff will require or requires the creams. In that regard, in the absence of the duration, the court finds it just and equitable in the circumstances to grant an award for four (4) years at the rate of $20 *per* month.

The plaintiff gave evidence that due to prolonged bed rest arising from his hospitalization he suffered misalignment of his spine which causes pain on his knee. He has been to an orthopaedic surgeon, has had MRIs taken and visited doctors. He outlined the expenses incurred for the two (2) MRIs he has undergone since his discharge and doctor's visits. However, whilst the court does not doubt that he has continued to seek and receive treatment no receipts or invoices or reports have been furnished to prove same or indicate what procedures he will undergo in future and the cost thereof. It is incumbent upon the plaintiff to satisfy the court on a balance of probabilities that he stands to incur further expenses to cater for his condition as future medical expenses. Without such evidence the plaintiff cannot be awarded same and apparently the plaintiff has failed to discharge the requisite onus.

Damages for pain and suffering

The defendants raised issue regarding the costs incurred by the plaintiff for skin grafting and the pain associated with it. Relying on evidence by the plaintiff that the nurse who did the debridement procedure on the right hand did not do it well, the defendants argued that the pain associated with the skin grafting on the hand was a direct result of the negligence of the nurse. There was thus *novus actus interveniens* or an intervening cause which warranted reduction of damages as the defendants could not be held liable for the conduct of a third party.

Suffice that this issue only arose during trial and was never specifically pleaded. It is a defence which arises out of a statement coming from the plaintiff but without further substantiation. No medical evidence was presented to show that the debridement procedure on the right hand exacerbated the injuries or to what extend the alleged failure of the nurse worsened the situation. In any case no medical evidence to substantiate this allegation was led by the defendants.

J van der Walt in *Principles of Delict* cited *supra* defines *Novus actus Interveniens* thus:

> "an intervening cause is an independent unconnected and extraneous factor or event which is not foreseeable and which actively contributes to the occurrence of harm after the defendant's

> original conduct has occurred. Such an independent force can take the form of an intervening natural phenomenon, conduct by a third party or even the plaintiff's own conduct…"

The court does not find that the alleged actions of the nurse amount to an intervening cause which is independent and unconnected factor which actively contributed to the plaintiff's injuries. This is more so in the absence of medical evidence to that effect. Further, were it not for the first defendant's conduct, debridement would not have been necessary and ultimately the skin grafting procedure. The nature of the burns could still have required grafting. That fact was not sufficiently, if at all, disputed by defendants through evidence. Thus, the defence has no merit and was not properly placed before the court as it is not in the pleadings.

Equally, that the plaintiff received some form of compensation from the National Social Security Authority based on 5% disability has no bearing on his claim. The defendants sought to argue that compensation from (NSSA) has to be taken into consideration and deducted from the claim for general damages to avoid double benefits. Section 10 of the National Social Security Authority (Accident Prevention and Worker's Compensation Scheme) Notice, 1990 (SI 68 of 1990) provides remedies against both employer and third party.

> "10. (1) Where an accident in respect of which compensation is payable was caused in circumstances creating a legal liability in some person other than the employer (hereinafter referred to as the third party) to pay damages to the worker in respect thereof – a) the worker may both claim compensation under this scheme and take proceedings against the third party in a court of law to recover damages."

The proviso to this section deals with instances where the employer or the general manager may want to pursue the third party for recovery of compensation paid hence is not applicable. There is thus no provision requiring reduction of the plaintiff's damages by virtue of having received a payment from NSSA. Also, it must be noted that the plaintiff was not even questioned as regards how much he received as compensation from NSSA.

It is never easy for a court to assess damages for pain and suffering as there exist no scales by which pain and suffering can be measured. In *Minister of Defence and another* v *Jackson* 1990 (2) ZLR (1) (S) the Supreme Court clearly set out considerations to be taken into account in determining awards for pain and suffering inter alia mentioning that;

> "The principles are that general damages are not a penalty but compensation. The award is designed to compensate the victim and not to punish the wrong doer. 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…"

The Supreme Court proceeded to aptly state that the court needs not overly rely on awards from other jurisdictions given the political and economic differences prevailing in the foreign

jurisdictions as compared to the Zimbabwean situation. In canvassing what entails in an award for pain and suffering PQR Boberg in the *Law of Delict* Vol 1 (1984) at p 516 states as follows;

> "Compensation may be awarded not only for actual physical pain but also shock, discomfort and mental suffering, disfigurement, loss of amenities of life and disability and loss of expectations of life. For convenience we speak simply of "pain and suffering" but the concept embraces all these non-pecuniary misfortunes past and future of an injured person. Nor is the list a closed one."

In giving evidence the plaintiff may thus refer to any or all of those aspects which will then be cumulatively considered in determining the appropriate damages to be awarded. In *casu*, the plaintiff sustained extensive burns to the whole face both wrists and on his chest. The produced photographs show the extent of the burns. He suffered extreme pain upon being burnt as he was literally on fire and had to walk a few hours to the point where he got minimum help. The defendant's witnesses attested to the fact that he was visibly in pain after the explosion. The process of debridement as his burns where cleaned was painful despite administering of strong pain killers. His stay in hospital for 21 days where his hands were caged coupled with the process of skin grafting and physiotherapy are processes which were not only painful but caused discomfort. He also developed a back problem as explained, earlier which incidentally affects his leg and four years later he experiences pain. It is common cause that his face shows the brands of the burns, he cannot be in the sun for long and he had to rely on lotions. As an active sports person he can no longer actively participate due to reactions to extreme weather temperatures. The plaintiff gave evidence that he had sleepless nights due to pain, suffers from nightmares and continued trauma. The plaintiff seeks $190 000.00 as damages for pain and suffering.

In assessing damages the court is alive to PATEL J's sentiments in *Nyandoro* v *Minister of Home Affairs and Anor* 2010 (2) ZLR 332 at 338F-G where he stated;

> "The court is entitled and has a duty to heed the effect its decision may have upon the course of awards in the future. Moreover, awards generally must reflect the state of economic development and current economic conditions of the country. Consequently, they should tend towards conservatism lest some injustice be done to the defendant. See *Sigournay v Gillbanks* 1960 (2) SA 552 (A); *Bay Passenger Transport Ltd v Franzen* 1975 (1) SA 269 (A) at 274-275; *Sadomba v Unity Insurance Co Ltd & Another* 1978 (3) SA 1094 (R) at 1097; *Minister of Defence & Another v Jackson* 1991 (4) SA 23 (ZSC) at 27-28."

Further this court takes note of the *Chinembire & Ors* v *Ncube & Ors* HH 55/14 where MATANDA-MOYO J opined.

> "The pain and suffering by a person varies. No two individuals can experience the same level of pain and suffering. Hence it is difficult to rely on past cases except as general guidelines.

> Whilst this statement holds true this court needs be sensitive to current trends *viz* awards being granted."

In the *Chinembiri* case cited *supra* the court awarded the first plaintiff whose arm was amputated due to electrical burns US$6 000.00 for pain and suffering. The court proceeded to award the first plaintiff the amount of US$8 000.00 for permanent disfigurement and loss of amenities of life. In *Chamangira* v *Tsabara* HH 151/17 this court sitting as an appellate court confirmed an award of $3 000.00 for pain and suffering where the respondent suffered multiple bruising on the back and back ache, 2 laceration 4cm in diameter and injury to the left eye. Cognisance is taken of the fact that the two cases supra, are 2014 cases although the latter case of *Chamangira* was heard on appeal in 2017. The passage of four years since these decisions were made and the current economic conditions demand a slight departure when considering the amount of damages.

In the circumstances I find that damages in the sum of $10000.00 for pain and suffering are appropriate in the circumstances. Apart from experiencing pain from the burns and the grafting procedure, he also suffered back pain from prolonged bed rest and the back pain has created health problems for the plaintiff as indicated in his evidence. Having successfully prosecuted his claim the plaintiff is entitled to his costs.

Accordingly judgment is hereby entered for the plaintiff as against the defendants jointly and severally the one paying the other to be absolved, as follows;

1. US$7 267.97 for medical expenses being special damages
2. US$10000.00 as damages for pain and suffering.
3. Costs of suit.

Mapondera & Company, plaintiff's legal practitioners
Jambo Legal Practice, 1st & 2nd defendants' legal practitioners