CIV/T/209/89

IN THE HIGH COURT OF LESOTHO.

In the Matter of:

SAM KHETHENG Plaintiff

and

LESOTHO NATIONAL INSURANCE COMPANY Defendant

J U D G M E N T

Delivered by the Hon. Mr. Justice B.K. Molai
on the 9th day of December, 1991.

On 30th May, 1989 Plaintiff herein filed, with the Registrar of the High Court, summons commencing an action in which he sued the defendant for:

"(a) Payment of the sum of Thirty-five Thousand, One Hundred and Ninety-One Maluti (M35,191-00) as damages and/or compensation;

(b) Costs of suit;

(c) Further and/or alternative relief."

Defendant intimated intention to defend the action. Plaintiff's declarations to the summons amplified by further particulars alleged, inter alia, that at about 14.30 hrs on 26th August, 1987 his minor child, born on 20th March, 1980

was crossing the public road next to Roma Primary School when a vehicle with registration numbers A 8101 driven by one Kelibuajoang Makhakhe collided with him. The collision occurred as a result of Kelibuajoang Makhakhe's negligent driving in one or more of the following respects: He failed to keep a proper look-out for other traffic on the road, more particularly for Plaintiff's said minor child; he drove at an excessive speed and failed to stop when by so doing he could have avoided the collision.

By reason of the collision, the minor child suffered injuries and damages for which defendant was held liable to the tune of M35,191-00 being M30,000-00 for pain and suffering, M191-00 for medical expenses and M5,000-00 as estimated future medical expenses.

At the time of the aforesaid collision vehicle registration numbers A 8101 was insured in terms of the Motor Vehicle Insurance Order, 1972. As the father and guardian of the minor child, Plaintiff complied with the provisions of section 14 of the Order.

In its plea the defendant company denied that through the negligent driving of Kelibuajoang Makhakhe the vehicle with registration numbers A 8101 had collided with any minor child who consequently suffered injuries and damages to the tune of

M35,000-00 for which it was liable as alleged by the Plaintiff, who was therefore, put to proof thereof. The defendant company conceded, however, Plaintiff's allegations that at the time of the alleged collision it had insured vehicle A 8101 and that Plaintiff did comply with the provisions of section 14 of the Motor Vehicle Insurance Order, 1972.

Alternatively the defendant company pleaded that in the event of the court finding that the driver of vehicle A 8101 was negligent as alleged by Plaintiff, such negligence did not cause or contribute to the accident or injuries suffered by the latter's child. Further, alternatively, in the event of the court finding that the driver of vehicle A 8101 was negligent and such negligence caused or contributed to the accident or the injuries suffered by Plaintiff's child the defendant company pleaded that the child was also negligent and contributed to the accident. Plaintiff's claim, therefore, fell to be reduced in accordance with the provisions of the Apportionment of damages Order.

Consequently the defendant company prayed for the dismissal of Plaintiff's claim with costs.

Three witnesses were called to testify in support of Plaintiff's case. After the Plaintiff had closed his case,

the defendant company decided to remain silent and closed its case without leading any evidence at all in its defence. The court has, therefore, only the evidence adduced on behalf of the Plaintiff to rely upon for the decision in this matter.

In as far as it is relevant, the court heard the evidence of 15 years old Moabi Ralijo and 11 years old Toka Khetheng who were P.W.2 and P.W.1, respectively. They and a certain Simon were at the material time attending school at Roma Primary School. After school hours on the afternoon of the day in question, 26th August, 1987, the trio left school on their way home.

According to P.W.2 as he and his two friends proceeded on their way home, they were following other school children. When they were about to cross the public road at Roma, P.W.2 noticed a vehicle travelling from left to right on the road. After that vehicle had passed, they started crossing the road. As they walked into the road, P.W.2 noticed another vehicle travelling in the same direction, as the first one on the road. He and Simon being older than P.W.1 could safely run across the road. P.W.2, therefore, advised P.W.1 to wait on the side of the road for the second vehicle to pass whilst he (P.W.2) and Simon quickly ran to the other side of the road. P.W.1 did wait on the side of the road until the second

vehicle had passed, as advised by P.W.2.

After the second vehicle had passed, P.W.1 also started walking across the road. He was in the middle of the road when a truck with yellow and black colours appeared at a high speed from a corner some 60 paces (indicated) away from him. Unlike the first two vehicles, the truck was travelling from the right to the left direction on the road. When it was about 15 paces (indication) away from P.W.1, the truck swerved from the left to the right lane apparently in order to avoid colliding with a tree whose branches were bending into the road. In the process, the truck knocked down P.W.1 who had already walked across the white line in the middle, and was approaching the yellow line at the end, of the road. As he was thus knocked down P.W.1 fell some distance away from the point of impact. The truck also stopped some distance away from the point of impact. The driver of the truck and another man who was travelling with him conveyed P.W.1 to Roma hospital in the same vehicle whilst P.W.2 and Simon returned to school to report the accident to their school teacher.

Although he is only 11 years old, P.W.1 told the court that he was a pupil at Roma Primary School where he was doing Std IV. He knew the difference between telling the truth and a lie. He knew it was a bad thing to tell a lie and a good thing to tell the truth. He wanted to tell the truth before

the court.

He testified on oath and told the court that on the day in question he and two other pupils who were older than him were returning from school. According to P.W.1, he and his companions were walking ahead of other school children. When they came to a point, where they had to cross the public road, which was about 300 paces (indicated) away from their school building, a vehicle came along the public road. After that vehicle had passed, his two companions ran across the road. He remained on the side of the road because he could not run as quickly as they did. He then looked on either side of the road and did not see any other vehicle on the road. He started walking across the road. After he had crossed the white line in the middle of the road and was about to reach the yellow line on the other side, he was knocked down by a vehicle which was travelling from the right to the left direction. He believed the vehicle had swerved from its lane to the lane on which he was walking in order to avoid colliding with a tree that was in the road at the time.

As a result of the accident he sustained injuries on the head, arm and thigh. The driver of the vehicle conveyed him to Roma hospital where he was admitted for a long time. According to him, P.W.1 did not see the truck coming on the road because there was a curve about 35 paces (indicated) away

from the spot where he and other pupils were crossing the road.

As it has already been pointed out earlier, the ages of P.W.1 and P.W.2 are only 11 years and 15 years, respectively. Because of their tender ages, it is of utmost importance to approach their evidence with great caution. The need for such caution is succinctly put at P. 416 of South African Law of Evidence (2nd Ed) by Hoffmann where the learned Author has this to say on the issue.

> "The danger is not only that children are highly imaginative but also that their story may be the product of suggestion by others."

Notwithstanding their tender ages, I must say I observed carefully the two children as they testified from the witness box before this court. P.W.2 impressed me as a remarkably intelligent boy, who gave his evidence in a straightforward manner. He was subjected to a rather lengthy and searching cross-examination but in my opinion he acquitted himself very well for a boy of his age. I am prepared to accept as the truth his evidence which has not been challenged by the defence.

There were some minor discrepancies between the evidence of P.W.1 and that of P.W.2 e.g. whilst P.W.1 says as he and his two companions were approaching the point where they were

to cross the public road, other school children were following them, P.W.2 says the other children were in front of them. Again whilst P.W.2 says at the time he and Simon crossed the road, he told P.W.1 to wait on the other side of the road, the latter makes no mention of it. I shall accept the evidence of P.W.1 only to the extent that it is confirmed by that of P.W.2.

In his testimony P.W.3, Sam Khethang, told the court that he was the father and guardian of P.W.1, who was born in 1980. On his return home from work on the evening of the day in question 26th August, 1987 he received a certain report following which he immediately proceeded to Roma hospital. He found P.W.1 admitted at the hospital with multiple injuries viz. a laceration on the head, a fractured upper right arm, a fractured left thigh and some minor scratches on the hands. He was discharged from the hospital only on 15th November, 1987.

It may be mentioned that P.W.3's evidence was, under cross-examination, subjected to some criticism on the ground that whilst he said it was P.W.1's right arm and left thigh that were fractured, according to the medical report, the left arm and the right thigh were fractured. It is important to bear in mind that the doctor has not been subjected to any cross-examination as he is not a witness in this case. I am

not prepared, therefore, to accept the version ofthe doctor, who was neither called as a witness nor subjected to cross-examination and reject the evidence of P.W.3 who testified on oath before this court. In any event, whether it was the right arm and the left thigh or vice versa that were fractured, it does not advance the case for the defendant company. What is important is that one of the upper limbs and one of the lower limbs of P.W.1 were fractured as a result of his being knocked down by a vehicle, as he crossed the public road at Roma.

According to P.W.3, he paid a fee of M191-59 for the hospitalization of P.W.1 at Roma hospital. As proof therefore, he produced and handed in Exhibit "A" being an acknowledgement receipt apparently issued on 16th November, 1987 by Roma hospital. Whilst P.W.1 was still in hospital a man by the name of Kelibuajoang Makhakhe, travelling in a yellow and black vehicle with registration numbers A 8101 which had allegedly collided with him, used to call on P.W.3 at his place of work and inquire about the condition of the child (P.W.1).

I was told in argument that this evidence is inadmissible hearsay. I do not agree. The man told P.W.3 that he himself was Kelibuajoang. He did not say another person said he was Kelibuajoang. Again P.W.3 actually saw the yellow and black

vehicle A 8101 in which the man was travelling when he came to him and inquired about how P.W.1 was progressing in hospital. In my view, P.W.3's evidence was direct evidence of what he saw and heard. It was not hearsay evidence.

It is significant to bear in mind that P.W.2 had told the court that the vehicle that had knocked down P.W.1 was yellow and black in colour. The question that immediately arises is what business had Kelibuajoang Makhakhe in the condition of P.W.1 if he were not the driver of the yellow and black vehicle at the time of the accident. I consider it reasonable to infer from all this that Kelibuajoang Makhakhe was the driver of the yellow and black vehicle that knocked down P.W.1 along Roma public road on the day in question, 26th August, 1987.

According to P.W.3, since his discharge from the hospital there were occasions when P.W.1 complained of pains from the injuries on his arm and thigh. On such occasions P.W.3 had had to take P.W.1 to a doctor for medical attention. One such occasion was Friday, 22nd November, 1991, when P.W.3 took P.W.1 to a medical Doctor at Ficksburg in the Republic of South Africa.

It is worth noting that although he claims to have taken P.W. 1 to medical doctors for treatment on several occasions

since his discharge from the hospital, P.W.3 had not bothered to produce even a single medical report or payment receipt as proof that P.W.1 had, indeed, been examined by a medical doctor or that he (P.W.3) had paid any amount of money for the treatment administered to his child. In my view P.W.3 is not being honest with the court on this point and I have no hesitation in rejecting as false his evidence. I am fortified in this view by the fact that P.W.1 himself never told the court that since his discharge from the hospital there were occasions when he ever complained of, or felt, any pains from his injuries.

Be that as it may, P.W.3 told the court that apart from the M191-59, he had already paid for P.W.1's hospitalization at Roma hospital, he estimated that he would incur future medical expenses on the child in the amount of M5,000-00. I have already rejected as false P.W.3's evidence that since his discharge from the hospital P.W.1 had ever complained of any pains from his injuries when he had to be referred to a doctor for medical treatment. There is simply no basis for P.W.3's claim under this heading.

P.W.3 also estimated the amount of M30,000, as damages for P.W.1's pain and suffering. He testified that, as admittedly the insurer of vehicle A 8101 at the material time, the defendant company was liable to him, as the father and

guardian of P.W.1, for damages in total amount claimed in the summons together with the costs of this action. When he admittedly submitted it, to the defendant company in terms of the provisions of the Motor Vehicle Insurance Order, 1972, his claim was, however, turned down. Hence the institution of these proceedings.

Regard being had to the fact that as a result of the accident P.W.1 had sustained a laceration on the head, a fractured arm and a fractured thigh and had had to remain in hospital from 26th August, 1987 to 15th November, 1987, a period of 81 days, he must, in my finding have suffered a great deal of pains. It must, however, be taken into account that as soon as the accident had occurred P.W.1 was rushed to a nearby Roma hospital where he was in all probabilities able to receive quick medical attention. In those circumstances pain killers must have been administered to him and P.W.1 could not have suffered severe pain for a long time. The claim for M30,000 under this heading is, in my view, crossly inflated and must be reduced.

On the only available evidence before me I accept that on 26th august, 1987, P.W.1 was crossing the public road at Roma when he was knocked down by Kelibuajoang Makhakhe's vehicle A 8101 which was, at the time, admittedly insured by the defendant company.

This court takes judicial notice of the fact that Roma is a densely populated place with a number of high schools, a National University of this country, a large hospital and Primary school. Drivers travelling through this place simply cannot fail to be aware of many school children milling about. There is, therefore, the need to keep a proper look out especially for young children like P.W.1 who was only about 7 years at the time of his accident. Children of that age will always behave like children and can never be expected to behave like mature people. I am not, however, suggesting/implying that in the present case there is evidence indicating that P.W.1 was in any way negligent.

I find, on the evidence that in trying to avoid a tree that was obstructing his way Kelibuajoang Makhakhe, the driver of vehicle A 8101, had to swerve from his correct lane into the wrong lane of the road where he knocked down P.W.1.

Assuming the correctness of my finding, it seems to me that, for one reason or another, the driver was not keeping a proper look out as he passed in the vicinity of where the accident occurred along the Roma public road and for that reason negligent in his driving. Had he kept a proper look-out, the driver would have seen the tree that was obstructing his way in time to avoid swerving his vehicle to the wrong lane and knocking down the little boy who had just crossed the

white line in the middle of the road.

In my judgment, the negligent driving of the driver of the vehicle admittedly insured by the defendant company was the sole cause of this accident. The question of apportionment of damages simply does not arise.

For the reasons I have already stated, the amount of damages under the heading pain and suffering is reduced. Plaintiff is awarded damages in the amount of M5,000 together with M191-00 medical expenses and costs as prayed in the summons.

B.K. MOLAI

JUDGE

9th December, 1991.

For Plaintiff : Mr. Pheko

For Defendant : Mr. Molyneanx