

**CIV/T/158/2006**

**IN THE HIGH COURT OF LESOTHO**

In the matter between:

**MOTLAMISI KALAKA**

**Plaintiff**

**vs**

**LESOTHO NATIONAL GENERAL  
INSURANCE COMPANY LIMITED**

**Defendant**

**JUDGMENT**

**Coram:** **Hon. Hlajoane J**

**Dates of Hearing:** **18<sup>th</sup> September, 2008, 10<sup>th</sup> December,  
2010, 21<sup>st</sup> May, 2012.**

**Date of Judgment:** **11<sup>th</sup> September, 2012.**

**Summary**

*General damages for shock, pain and suffering and loss of amenities of life – Plaintiff having developed epileptic fits resulting from the car accident – The medical report confirming the evidence by plaintiff - Defendant calling no evidence in rebuttal as the driver concerned has passed on – Plaintiff's claim succeeds with costs.*

- [1] Plaintiff has sued the defendant as the insurer for third party purposes of a certain motor vehicle with registration number E4397 in terms of the **Motor Vehicle Insurance Order No.26 of 1989** as amended.
- [2] Plaintiff has alleged that it was on or about the 28<sup>th</sup> February 2004 when he was injured as the above mentioned vehicle knocked him down. The accident occurred along the Main South 1 Road at or near Morija Road Side at around 4:00 p.m.
- [3] Plaintiff has claimed for an amount of M300,000 as general damages for shock, pain and suffering and loss of amenities of life, and M885.00 for medical expenses.
- [4] In his evidence plaintiff showed that he was knocked down by a vehicle bearing registration numbers E4397 on the 28<sup>th</sup> February 2004 whilst crossing the road from the right to the left hand side when travelling from Maseru to Mafeteng direction. The accident occurred along the Main South 1 Public Road near Morija Roadside business area near the T junction to Morija.
- [5] It was the plaintiff's evidence that he had seen the taxi coming from Maseru direction following a red car. He saw it from a distance that was why he felt it was safe for him to cross the road as he had just looked on both sides of the road to check for traffic. He had just crossed the middle of the road when the vehicle hit

him. He had seen that the vehicle that knocked him down was travelling at a very high speed.

- [6] Plaintiff had estimated the distance between him and the car that came in front of the taxi at 145 metres. The taxi overtook the car whilst plaintiff was already in the road and had already crossed to the other lane. Plaintiff was hit by the said taxi and he lost consciousness and when he came to the next day he was in hospital.
- [7] It has been the plaintiff's case that the accident occurred as a result of the sole negligence of the driver of the taxi E4397, in that he drove at an excessive speed and overtook the car where he ought not to have done so thereby knocking him down when he had already crossed the white line to the other lane.
- [8] P.W.2 Mosala Makakole confirmed what plaintiff has said in his evidence. This witness saw the accident happen as he too was standing there near the road. He too confirmed that the accident took place near the T junction. He showed the place is a built up area where there are shops and bars on the sides of the road. He said he saw plaintiff look on both sides of the road before crossing as they were standing on the same side of the road. He said plaintiff was not running as he crossed the road but was only walking fast.

- [9] It was P.W.2 who showed the police the point of impact. The police even drew their plan in his presence, but he was not the only one at the scene but there were other people including the taxi driver.
- [10] P.W.2 saw the accident clearly and was witness to the taxi throwing plaintiff some two metres away after knocking him down. According to P.W.2 the accident took place where the road has a straight line in the middle but not a dotted line which indicated that no driver was permitted to overtake at that area.
- [11] The last witness, a police officer, showed that he attended the scene of crime. He confirmed what was said by P.W.2 that at that area where the accident took place the road signs did not allow the drivers to overtake other vehicles particularly as it is at a T junction. He confirmed also that the taxi must have been coming at a very high speed considering the point of impact and where the vehicle stopped after the accident which was estimated at 10 metres. Also considering the distance of where the pedestrian landed after the accident.
- [12] P.W.3 further showed there was no sign that the driver of the taxi applied brakes in order to avoid the accident as there were no skit marks at the scene. There were pieces of glass and some soil at the

point of impact. His map showed that the pedestrian had fallen some nine to ten paces away.

[13] The map was prepared in the presence of the driver of the taxi and was in agreement with the findings that were eventually filled in on the sketch map. The police officer also showed that the taxi driver ought not to have overtaken at that area as the law did not allow such a move. He also showed in evidence and on the map that the point of impact was on the other lane to Maseru showing that plaintiff had already crossed the middle of the road.

[14] It was at the close of the plaintiff's case that the defendant's counsel showed that he was not going to call any evidence as the driver of the taxi has since passed on.

[15] Since there was no evidence adduced for the defendant's the evidence by the plaintiff remained unchallenged. Plaintiff had spent three weeks in hospital and had sustained severe injuries as reflected by the doctor.

[16] The medical report has confirmed what plaintiff said in evidence that he had a head injury and lost consciousness after he was knocked down. Also that he had a compound fracture of the right tibia and the doctor also anticipated permanent disability of the shortening of the right lower limb. The doctor also confirmed that the patient was going to have constant headache and post traumatic

episodes of seizures (convulsions). So that plaintiff has to be believed when he said in evidence that he had developed fits that occurred once or twice in a month.

[17] Plaintiff had lodged a claim for compensation with the respondent in terms of **Motor Vehicle Insurance Order 26 of 1989** as amended. He claimed the same amount as in his summons before this Court, but the defendant repudiated liability on the basis that according to them there was no negligence on the part of the driver of vehicle E4397 which knocked him down. Plaintiff had no option but to institute these proceedings.

[18] As shown above, plaintiff's evidence was not controverted in anyway. It could not be true that the evidence of the police officer who attended the scene of crime attacked plaintiff's evidence as shown in defendant's heads of argument. The sketch map that he prepared confirms that the accident was at a T junction and that the area is a built up area.

[19] The evidence of the police officer also showed that the area where the accident took place was where in law drivers are not allowed to overtake or travel at a high speed. He even saw no skit marks as a sign that the driver ever sought to avoid the accident by applying brakes. Instead the taxi stood some distance away from the point of impact and plaintiff was also thrown some distance away from

the point of impact, thus showing that the taxi was travelling at a very high speed. That's negligence.

[20] It is also not the correct statement by defendant's counsel to say that the witness who testified for the plaintiff had said plaintiff crossed the road in front of a red vehicle. Plaintiff said he had checked for traffic on both sides and could see from Maseru direction that a red car was coming followed by a taxi. He then said because the car was still some distance away and was not speeding he then crossed the road. The driver overtook the red car when plaintiff was already in the road and had just crossed the middle of the road. This has been confirmed by the police map; and that's exactly what plaintiff's witness also said.

[21] The police officer would not have said for certain that plaintiff crossed the road when he was not supposed to have crossed because it was not safe for him. That could only be said by the person who witnesses the accident, Mr Makakole.

[22] The defendant's counsel has asked the Court to apportion the damages between the plaintiff and the taxi driver. He felt that both were to blame. But on the evidence presented before this Court by the plaintiff it would not be proper to take that route.

[23] Plaintiff's witness confirmed what plaintiff himself said in evidence that plaintiff had looked on both sides of the road before

crossing. Also that the red car which was in front of the taxi was still some distance away.

[24] The police officer in evidence has shown that being the person who visited the scene, he observed that the driver of the taxi was not supposed to have overtaken another vehicle at that spot as the road signs prohibited such driving. Again the place being a built up area, drivers are not expected to travel at a high speed. It is also a place at a T junction where the driver of the taxi was not supposed to have overtaken the red car.

[25] The evidence which has not been controverted points at the taxi driver as the person who was negligence at all costs. The Court in **Manderson vs Century Insurance Co. Ltd**<sup>1</sup> stated the general principle of law as being;

*“that a person must take precautions against harm happening to another if the likelihood of such harm would be realized by the reasonably prudent person. He need not take precautions against a mere possibility of harm not amounting to such a likelihood as would be realized by the reasonably prudent person.”*

[26] The above case involved a driver who had stopped his car at night in the road without lights, as the car had mechanical problems. Another car approaching from same direction had put on dim lights as there was traffic from opposite direction. He could not notice

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<sup>1</sup> 1951 (1) S.A 533



the car in front only to notice a black object very close to it. He tried to apply brakes but could not swerve to the right because of on coming traffic. Plaintiff's stationary car was hit from behind. The Court held that though the driver who hit plaintiff's car was negligent in that he failed to travel at a speed that did not permit of his pulling up before colliding with the object in front of him the possible presence of which he should have foreseen, the plaintiff could not recover as his negligence was continuous and his omission to remove his car from its dangerous position by pushing it aside, was a cause of the accident which operated right to the moment of the impact.

[27] Negligence having been defined in **Cooper and Bamfort**<sup>2</sup> as;

*“Failure to exercise care and skill which would be observed by a reasonable man in order to prevent harm to others as a result of his acts or omissions.”*

[28] Plaintiff has claimed an amount of M300,000.00 as general damages and M885.00 for medical expenses. He has shown the extent of the injuries he sustained and that was confirmed by medical report. He has developed epileptic fits as a result of that accident, which condition has limited his movement. He could no longer continue with his studies at Quadrant, neither could he still

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<sup>2</sup> South African Motor Law, Juta & Co at 245

do his piece jobs for him to earn a living. The condition has caused him embarrassment.

[29] The rule is that a negligent defendant must take his victim as he finds him<sup>3</sup>. In view of the difficulty and uncertainty necessarily involved in the assessment of general damages, particularly in bodily injury, it is always instructive to have regard to awards of damages made by the courts in comparable cases.

[30] Whilst the above for purposes of comparison may be helpful, but the variations of fact and circumstance in individual cases make it impossible to standardize damages. Such comparison can only be usefully undertaken where circumstances of the cases are clearly shown to be broadly similar in all material respects.

[31] In the circumstances of this case I find that plaintiff, though there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty, is entitled to damages in the amount of M80,000.00 (eighty thousand maluti) for general damages and M885.00 (eight hundred and eighty five maluti) for medical expenses as the amount is borne out by the receipts attached with costs.

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<sup>3</sup> (1964) 81 S.A. L. J 18

[32] It is important to note that plaintiff has since passed on but it was after he had closed his case. So the amount awarded will be received by his beneficiary.

**A. M. HLAJOANE**  
**JUDGE**

For Plaintiff:            Mrs Mapetja

For Defendant:        Adv. Loubser