IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 435 OF 1998

BETWEEN:

ZAINA CHIPALA (FEMALE).....PLAINTIFF

AND

DWANGWA SUGAR CORPORATION.....DEFENDANT

CORAM CHIMASULA PHIRI, J
C Mhango, of Counsel for the Plaintiff
M Chisanga, of Counsel for the Defendant
D Kaundama, Official Interpreter
Z Maore, Court Reporter

JUDGMENT

By a writ of summons and statement of claim the plaintiff is claiming damages for personal injuries and consequential loss allegedly caused by negligent driving of the servant or agent of the defendant. This accident occurred on 7th November 1995 near Chombo School along the M5 Road in Nkhotakota-kota district.

The statement of claim avers that on 7th November 1995 the plaintiff was walking along the M5 Road going towards the direction of Nkhotakota Town when she was struck and knocked down by the defendant's bus registration No. BJ 8563 driven by the defendant's driver. It has been alleged that the matters complained of were caused by the negligence and/or breach of statutory duty of the driver of the defendant. The usual particulars of negligence have been listed in the statement of claim as follows:-

a. Failing to keep any or any proper look out or to observe or heed the plaintiff
b. Driving too fast
c. Failing to give any or any proper warning of his approach
d. Failing to apply brakes in time or at all or so to steer or control the said bus.

The particulars of injuries listed in the statement are as follows:-

a. Compound complicated communicated fracture of the radius ulnar
b. Fractured humerous
c. The right hand is no longer usable due to multiple fracture of the lower arm.

A copy of the plaintiff's medical report is annexed to the statement of claim.

The plaintiff has also claimed special damages in the form of bus fares, food and accommodation expenses in relation to further treatment at Lilongwe Central Hospital. The plaintiff further claims

that she was hospitalized at Nkhotakota District Hospital and Lilongwe Central Hospital for about 2 years hence her inability to cultivate and provide for her household which became impoverished and famished.

The plaintiff also claims costs of this action. The defendant denies being guilty of negligence as alleged and avers that the accident was caused or contributed to by the negligence of the plaintiff. The defendant admits the occurrence of the accident but blames the plaintiff for it. The defendant has pleaded that the negligence of the plaintiff constituted in the failure to keep any or any proper look out or to have any or any sufficient regard for her own safety when walking along the said road; stepping into the road in the path of the defendant without giving any reasonable opportunity of avoiding the collision and failing to pay any or any sufficient heed to the presence of the defendant's bus on the road. The defendant further denies the alleged or any injuries, loss or damage to have been suffered by the plaintiff.

The issues for determination as presented in the pleadings are as follows:-

a. Whether or not the defendant's servant or agent was guilty of negligence in the manner of his driving of the defendant's bus at the material time.
b. Whether or not the plaintiff is the one who was guilty of negligence or further whether the plaintiff was guilty of contributory negligence at the material time.
c. Whether or not/the plaintiff sustained any injuries and/or damage due to the alleged negligence of the defendant.

In civil cases the legal position is clearly settled that the burden of proof rests on the party who asserts the affirmative of the issues throughout the proceedings – see Joseph Constantine Steamship Line Ltd vs Imperial Smelting Corporation Ltd (1942) AC 154 at page 174. The standard of proof in discharging the said burden is generally expressed to be on the balance of probabilities namely if the evidence is such that the Court can say: "we think it is more probable than not, then the burden is discharged, but if the probabilities are equal it is not discharged – see Miller v Minister of Pensions [1947] 1 All ER 372 at pages 373 – 374 per Denning J (as he then was).

This Court was privileged that the sitting was in NKHOTAKOTA on 12th June 2000. We were able to visit the scene of the accident and obtained evidence from the witnesses right at the area where the accident occurred.

EVIDENCE FOR THE PLAINTIFF

In her evidence the Plaintiff told this Court that some time in November 1995 she left her home at Selemani Village to go to Nkhotakota. At Chazulo or Malange soon after Chombo School she was walking on the left-hand side of the road when she saw a Tuwiche Bus going in the same direction to Nkhotakota being followed by the Defendant's bus which was moving very fast and attempting to overtake the Tuwiche Bus. She also saw an oncoming truck. She told the Court that at the point she moved away from the tarmac into the dirty verge. The next thing she realised was that she was in Hospital at Nkhotokota District Hospital and she was in great pain

especially in her right arm and right thigh. She went further to tell the Court that after two weeks she was transferred from Nkhotakota Hospital to Lilongwe Central Hospital where she was admitted for six months. Upon discharge she was referred to Malawi Against Polio for further treatment and physiotherapy. The plaintiff produced in her evidence Medical Reports from Nkhotakota District Hospital as part of her evidence which was marked as Exhibit p1, from Lilongwe Central Hospital marked Exhibit p2, and from Malawi Against Polio marked as Exhibit p3. The plaintiff told the court that after a year she went to Nkhotakota Police for a report of the accident and she was given a report which she tendered as Exhibit p4 in her evidence. However she told the Court that at the Police Station she was not asked any questions but she was told the officer who visited the scene assisted any way with the Police Report.

The plaintiff told the Court that due to the injuries she sustained she is no longer able to do any chores as she cannot use her hand. She also told the Court that she is still required to visit the hospital because she still feels pain.

In cross-examination the plaintiff maintained that she was hit while in the dirty verge. She said that she moved away from the tarmac when she saw the two buses coming behind her. She denied that she stepped into the tarmac.

Pw2 was Manuel Chiwanda of Musa Village, Traditional Authority Mphonde in Nkhotakota district. He told the Court that on 7th November 1995 he left his village for Nkhotakota Trading Centre where he operates a Tailoring Business. He boarded a Tuwiche Bus at Mphangano Bus Station at about 5.45 a m. He told the Court

that he sat in the front seat and he could see clearly what was happening in front. Pw2 told the court that after Chombo School he saw another bus approaching from behind and overtaking the Tuwiche Bus. This was the Defendant's Bus. But at that time there was another motor vehicle coming from the direction of Nkhotakota heading towards Dwangwa. Then he saw the Bus which was overtaking the Tuwiche Bus hit the plaintiff who was walking on the left-side of the road. He said that both buses stopped and when he came out he saw the plaintiff in a very serious condition. He told the Court that he assisted in carrying the plaintiff into the defendant's bus. In cross-examination PW2 maintained that he saw the plaintiff walk in the dirty verge.

The Court had the opportunity to visit the scene of the accident where the plaintiff repeated her testimony. PW2 also repeated his evidence. Both the plaintiff and PW2 specifically identified the scene of the accident at Malange the area known as Chazulo. The road is fairly straight for about two kilometers where the accident took place.

EVIDENCE FOR THE DEFENDANT

DW1 Mrs Jane Zobo testified that she was an employee of the defendant company. She testified that she was a passenger in the Dwangwa bus on the day of the accident. She sat on the second seat from the front and she saw how the accident occurred. She testified that the Dwangwa bus overtook the Tuwiche bus at Chombo School bus stage and driving slowly when the Dwangwa bus overtook it. She was emphatic that the two buses did not overtake each other near the scene of the accident. She testified that before the collision, she saw

the plaintiff walking on the tarmac road ahead of the Dwangwa bus at the time there was a truck coming from the opposite direction. In view of the truck coming from the opposite direction, the Dwangwa driver hooted. When the plaintiff heard the honk, she turned and looked behind and decided to step off the tarmac. Before the plaintiff completely left the tarmac, the Dwangwa bus hit the plaintiff. She testified that the plaintiff was hit by the door handle of the bus. The plaintiff fell completely off the tarmac after the collision. The bus stopped about 70 paces after the collision.

In cross-examination she conceded that the driver of the Dwangwa bus did not slow down when he saw the plaintiff walking ahead. She was, however, adamant that the Dwangwa bus driver was not over speeding.

DW2 Emmanuel Nkanda was also an employee of Dwangwa Sugar Corporation. He was a passenger in the Dwangwa bus that carried a lot of other employees going to Lilongwe for shopping. He testified that the two buses did not overtake at the scene of the accident. His version was that the Dwangwa bus overtook the Tuwiche bus when the Tuwiche bus was leaving Chombo School stage. He saw the plaintiff was walking almost on the middle of the tarmac road. When the driver of the Dwangwa bus honked, the plaintiff walked off the road but the collusion occurred before the plaintiff left the tarmac road completely. He confirmed that the Dwangwa bus stopped about 70 paces from the place of collision. He also confirmed that there was a truck coming from the opposite direction when the accident occurred. The driver of the Dwangwa bus left employment with Dwangwa Sugar Corporation but he was bed-ridden at the time trial took place, the witness testified.

LAW

The following provision from the Road Traffic Act is relevant:-

SECTION 164 (4)

Failure on the part of any person to observe any provision of the Highway code shall not of itself render that person liable to criminal proceedings of any kind but any such failure may in any proceedings (whether civil or criminal and including proceedings for an offence against the Act) be relied upon by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings.

The following rules from the Highway code are relevant.

On the road users on foot:-

RULE 1

"Where there is a pavement or foot path use it."

RULE 2

"On a pavement or footpath, do not walk next to the kerb with your back to the traffic. Do not step into the road without first looking right, left and then right again to see if the road is clear."

RULE 3

"Where there is no footpath, walk on the right side of the road to face oncoming traffic , and allow traffic coming up from behind to pass safely on your left."

On road users on wheels:-

RULE 19

"Keep well to the left, except when you intend to overtake or turn right. Do not drive along the middle of the road."

RULE 20

"Do not exceed the speed limits."

RULE 27 (a)

Never drive at such a speed that you cannot pull well within the distance you can see to be clear. Always leave yourself enough room in which to stop."

Generally negligence is doing something that a reasonable man would not do in the circumstances or omitting to do something that a reasonable man would do in the circumstances.

If the plaintiff is to succeed she must prove the existence of a duty to take care on the part of the defendant and a breach of that duty followed by consequential loss or damage to the plaintiff. In the case

of Lochgelly Iron & Coal Co vs M'Mullan [1934] AC1 Lord Wright said:

> "In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission" it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owed."

It has been submitted by the plaintiff's counsel that the defendant's driver owed a duty to take care to the plaintiff. In the case of Lameck Macheso vs Punch Construction Equipment Suppliers Company Ltd. & Rex Vinyo Civil Cause No. 288 of 1984 (unreported) Makuta CJ said that 'the essential ingredients of actionable negligence are (a) the existence of a legal duty of care to the plaintiff by the defendant, (b) breach of that duty; and (c) consequential damage or injury to the plaintiff .' His Lordship went further and held that so far as (a) is concerned a driver of a vehicle on highway has a duty to use reasonable care to avoid causing damage to property or injury to persons. The driver also has a duty to keep a proper look-out for traffic which is or may be expected to be on the road, whether in front of him or behind him or alongside especially at crossroads, junctions and bends. His Lordship quoted the case of Bourhill vs Young (1943) AC in support of this application.

Again in the case of Zidana vs Professor Chimphamba Civil cause No. 440 of 1987 (unreported) Mtegha J, said that the duty of a motorist is to take reasonable care such as keeping a proper look out, avoiding excessive speed, taking proper control of his vehicle and observing road signs.

From the evidence before this Court I find as a proven fact that the defendant's driver owed a duty of care to the plaintiff. The next issue is whether the driver discharged that duty. The evidence in this case shows that the defendant's driver did not discharge the duty cast on drivers on the road. Even if this Court were to believe that the Defendant's Bus overtook the Tuwiche Bus at Chombo and not at the scene of the accident the evidence from the Defendant's witnesses nevertheless shows that the defendant's driver was guilty of negligence in failing to slow down and failing to stop or swerve to avoid colliding with the plaintiff. Dw1 told the court that the driver hooted about 30 paces away from the plaintiff and that the plaintiff was in the tarmac at the point in time a reasonable driver who has a clear view of the road ahead of him would not hoot only 30 paces away from a pedestrian who is in the middle of the road ahead. This aspect is further supported by the fact that the road at the scene of the accident is fairly straight and in my view a driver could have a clear view of the road ahead. If the Court were to go by the Defendant's own evidence it is still clear that the driver of the Defendant's Bus was travelling at a fast speed (see the evidence of DW2). The court finds that there was no obstruction between the Defendant's Bus and the Plaintiff and that the said driver did not slow down or stop to avoid colliding with the plaintiff. The Court would also find that the said driver underestimated the distance between the Bus and the Plaintiff as such he collided with the plaintiff. These facts were clearly conceded by the Defendant's witnesses who said that the driver did not exercise reasonable care while on the said road.

In direct response to the issues for determination under (a) above I find that the defendants' servant or agent was guilty of negligence in the manner of his driving of the defendant's bus at the material time.

The driver was acting in the course of his employment according to the evidence of DW1 and DW2 and thus the defendant is liable for the negligence of its servant. See the case of Ignazio Ngirazi vs M M Chimbende tla Tithokoze Transport Civil Cause No. 124 of 1982 in which Skinner CJ held that an employer is liable for the negligence of his servant if committed in the course of his employment. See also the case of Rambarran vs Gurrcharran [1970] All ER 749.

On the other hand it is equally true that the law also casts a duty on a pedestrian to take care towards other road users. Rule 3 above placed a duty on the plaintiff to walk on the right side of the road to face oncoming traffic and allow traffic coming up from behind to pass safely on her left. From the evidence from both parties, it is clear that plaintiff was walking on the left side of the road. However I would not accept the allegation that she remained on the tarmac road until up to the time she was hit by the defendant's bus. It might be true that at some time she was on the tarmac road but when she realised the potential danger from the vehicles she moved to the dirty verge on the left side of the road where she was hit. I would apportion her contributory negligence to be 20%.

The last issue raised by the pleadings relates to the injuries and/or damage suffered by the plaintiff due to the negligence of the defendant. The medical reports and her oral testimony in this court clearly show that the plaintiff suffered very serious injuries. The defendant's denial about these injuries is the pleadings in not real. It is clear from the defendant's own submissions that a concession is made about these injuries to the extent that the right hand of the plaintiff is still in a sling and cannot usefully aid her.

I am indebted to both counsel for the many local and foreign cases which have been cited for guidance on awards of damages for similar injuries.

The fundamental principle which underlies the law of damages is that of compensation and this means that damages to be recovered must be in money terms not be more or less what the plaintiff has lost. In the case of Livingstone vs Rawards Coal Company (1880) 5 AC 25 (HL) Lord Blackburn said at page 39 that where any injury is to be compensated, in setting the sum of money to be given the court should as near as possible get a sum of money which will put the party who has been injured or who suffered in the same position as he would have been if he had not sustained the injury for which he is getting his compensation. The most important principle to bear in mind is that damages in personal injuries cases cannot give a perfect compensation in money terms for physical injury, as bodily injury pain and suffering and loss of amenities cannot be calculated in terms of money. Therefore the plaintiff can only get what is a fair and adequate compensation. In the case of Linnie Sikwese vs Stagecoach (Malawi) Limited Civil Cause Number 1375 of 1993 (unreported) the plaintiff sustained degrovement injury to her right leg and she was operated on for four times. She was treated as an out-patient up to 1994. her degree of incapacity was assessed at 9%. Msosa J awarded the plaintiff the sum of K40,000.00 general damages. This case was decided on 29th August 1995. In the case of Nkhulindachi Chisala and Others vs Tennet Transport Limited Civil Case 882 of 1991 (unreported) the plaintiff suffered dislocation and fracture of the 4th and 5th vertebrae. She was treated in Malawi and South Africa and after the treatment she was rendered

useless as she could not lift heavy objects let alone cook. Tambala J. awarded the plaintiff the sum of K40,000.00 for pain and suffering and loss of amenities. This case was decided on 19th August, 1996.

In Gertrude Chapweteka vs William Kona – Civil Cause number 1753 of 1995, the plaintiff suffered a crushed wrist and three fractures on the upper arm. She can not use the injured arm any more. The incapacity was assessed at 80%. On 5th March, 1996, the court awarded her K30,000 for pain and suffering and loss of amenities. In Feston Makala vs The Attorney General civil cause number 301 of 1994, the plaintiff who was twenty two years old was shot. He was severely injured on the left wrist and in the hip. He was operated on to remove the bullets. The left arm was amputated. On 25th February, 1998 he was awarded K100,000 for pain and suffering and loss of amenities and K225,000 for loss of earning capacity. In Luckson Mpingasa vs The Attorney General, civil cause number 525 of 1995 the plaintiff was shot in the left arm above the elbow. He was operated on to remove the pellets. He suffered total loss of the use of the left arm. On 22nd June, 1997, he was awarded K55,00 damages for pain and suffering and loss of amenities. In Epifania Mponda vs Air Malawi Ltd & Commercial Union Assurance civil cause number 1397 of 1994 the plaintiff suffered compound fracture of the right femur. A nail was inserted in the leg. She was unconscious after the collision. Her incapacity was assessed at 40%. On 25th June, 1997, she was awarded K50,000 for pain and suffering and loss of amenities. In Bright Mwachuwambo vs Antony Osman & Prime Insurance Co. Ltd Civil Cause number 1 of 1998, the plaintiff aged 21 suffered a fracture of the right leg with multiple bruises. The fracture healed well with a slight deformity. On 23rd April 1998, the plaintiff

was awarded K25,000 damages for pain and suffering.

Counsel for the plaintiff urged this Court to award the plaintiff K150,000.00 while counsel for the defendant proposes K60,000.00. I have anxiously considered these proposals. I find the plaintiff's proposal quite high in view of the contributory negligence. Equally I find the defendant's proposal extremely low in the light of the extent of injury. It is obvious the plaintiff has undergone and continues to undergo serious pain and suffering. Her right arm is now non-functional and she no longer can fend for her family. I would consider K125,000.00 to be a relatively fair award for such injury. However, due to contributory negligence she would only be entitled to receive K100,000.00 as damages for pain and suffering and loss of amenities. The issue of special damages has not been specifically proven as required by law. I am sure that I have taken the issues raised under that claim in my award for general damages.

Lastly the issue of costs is discretionary and in general terms costs follow the event. In this case I consider that the plaintiff has succeeded to a large extent and deserves to be awarded costs of and incidental to these proceedings, to be taxed if not mutually agreed.

I thank both counsel for their mature way in the manner they professionally handled this matter. Equally the Court Reporter needs

special mention for the efficient manner in which he transcribed the record of these proceedings. It is such a rare achievement in our Courts.

PRONOUNCED in open Court this 13th day of November, 2000 at Blantyre.

CHIMASULA PHIRI
JUDGE