



IN THE HIGH MALAWI

PRINCIPAL REGISTRY

PERSONAL INJURY CASE NO 932 OF 2011

Between

WILLIAM KANJIRA

CLAIMANT

And

CARLSBERG (MW) LTD

1<sup>ST</sup> DEFENDANT

And

NICO GENERAL INSURANCE CO LTD

2<sup>ND</sup> DEFENDANT

**CORAM: JUSTICE D.F. MWAUNGULU**

Ndhlovu, for the Plaintiff

Kauka, for the Defendant

Chilimampunga, Official Court Interpreter

## **Mwaungulu J**

### **JUDGMENT**

#### *Précis*

Except for a small, yet consequential detail, this case is all four walls with the case of *Donoghue v Stevenson* [1932] AC 532, the *cause célèbre* on the law of negligence. In this case, Mr Kanjira, the applicant, contends that Carlesberg (Mw) Limited, the defendant, owing him duty of care breach of which caused foreseeable injury, not in the nature of *se minimis*, for which Carlesberg (Mw) Limited must compensate him. Carlesberg (Mw) Limited, the applicant sets out to prove, with disregard to the duty it owed the applicant, manufactured and put in circulation, a contaminated beverage which, after the applicant took, caused the applicant abdominal pains resulting in 20% incapacity. Carlesberg (Mw) Limited, naturally, disputes this through and through and, the burden of proof being on the applicant, wants the applicant to prove his case on balance of probabilities. The contention by Carlesberg (Mw) Limited, if I understand it correctly, is that if there was contamination, which there was, it was not caused by them as manufacturers or distributors of their product. The second defendant is joined in the action as general insurers for Carlesberg (Mw) Limited

#### *Background*

Mr Kanjira, is, like many of us, a consumer of beverages Carlesberg (Mw) Limited produces. On 5 October 2011 Mr Kanjira, during a school committee meeting, drunk a beverage manufactured and distributed by Carlesberg (Mw) Limited. There was a crate of drinks. Everybody took a bottle from it. He was gulping the contents when he

saw something strange in the bottle. He took the bottle, with half its contents, to Carlesberg (Mw) Limited. Carlesberg (Mw) Limited made tests and the results, discussed in detail later, are before the court. He then started having abdominal pains later in the day. He went to the hospital for treatment. The medical report states that the applicant drunk something poisonous and suffered 20% incapacity.

### *The law on negligence*

I do not think, in the view of more and better statements on the tort of negligence mine can be any better. I would, however say, apart from case where there is strict liability, in the affairs of men and women, there are many situations where in specific, quite many, relationships a dependency or expectation arises that one would not by conduct or otherwise act in a way that would not injure the person or property of another in any way. In such a case, and many like it, a duty of care based on what a reasonable person can do arises not to act or omit to act in a manner that causes harm to another directly connected to the conduct. The connection is inferential based on whether, as between the wrongdoer and the victim, the wrongdoer can foresee that the victim may be affected by the wrongdoer's actions, commission or omissions – the neighbour principle. Where the wrongdoer breaches that duty and causes injury to another which cannot be dismissed on the de minimis principle, the court will compensate the foreseeable injury. There cannot be an action in negligence where there is no damage (*Donoghue v Stevenson* [1932] AC 532; *Caparo Industries plc v Dickman* [1990] 2 AC 605; *Boston v Stone* [1951] AC 850; *Roe v Ministry of Health* [1954] 2 All ER 131; *Wetter v Foot and Mouth Disease Research Institute* [1966] 1 QB 569; *The Wagon Mound (No1)* [1966] 2 All ER 709; *Tennet & Sons Ltd v Mawindo* [10] MLR 366; *Mikeyasi v Chinga'mba and Another* (1999) Civil Cause No 2726 (HC) (unreported); *Daniels*

*and another v White & Sons Ltd and another* [1938] All ER 258; *Hambrook v Stokes Brothers* [1925] 1 KB 141; *Read v J Lyons & Company* [1947] AC 156; *Grant v Australian Knitting Mills Ltd* [1936] AC 85; *Carrol v Fearon* (1998) PIQR 416; *Mason v Williams Ltd* [1955] WLR 549; *Elias v Attorney General* [1973-74] 7 MLR 9; *Yanu Yanu Bus Co v Mbewe* [...] 11 MLR 410; *Juma v Mandala Motors Ltd* [...] 16 (1) MLR 410; *ESCOM v Malawi Railways Ltd* [...] 12 MLR 268; *Mataka v Chibuku Products Ltd* (2005) Civil Cause No 725 (HC) (PR) (unreported); *Kunje v Southern Bottlers Co Ltd* (1996) MLR 145; *Chigwe v Southern Bottlers Ltd* (1988) Civil Cause No 31 (HC) (PR) (unreported).

#### *Duty of care: manufacturer of a product*

The first question, therefore, is whether on the facts, Carlesberg (Mw) Limited owed the applicant a duty of care. The test is whether Carlesberg (Mw) Limited, as a manufacturer of the product, owed a duty to the applicant, the ultimate consumer. Carlesberg (Mw) Limited is in many ones than one the same position as the manufacturer in *Donoghue v Stevenson* and, no doubt, from the statements of their lordships in *Donoghue v Stevenson*, Carlesberg (Mw) Limited owed such a duty. There are decisions beyond our jurisdiction and within the jurisdiction where it is almost uncontroverted truth that a manufacturer of a product ultimately owes a duty of care to the end users like the applicant, so much so that, the next question is whether, if the rice ultimately found in the bottle, emanated from the manufacturer, there was a breach of duty. In *Donoghue v Stevenson* Lord Atkin said:

A manufacturer of products, which he sells in such a from as to show that he intends to reach the ultimate consumer in the form in which they left him with

no reasonable possibility of immediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in injury to the customer's life or property owes a duty to the customer to take that reasonable care.

In *Daniels and another v White & Sons Ltd and another*, Lord Lewis said:

I have to remember that the duty owed to the consumer, or to the ultimate purchaser, by the manufacturer is not to ensure that his goods are perfect. All he has to do is to take reasonable care to see that no injury is done to the consumer or ultimate purchaser. In other words, his duty is to take reasonable care to see that there exists no defect that is likely to cause such injury.

If, as it really should be the case, Carlesberg (Mw) Limited, during preparation, packing and transportation of the beverage, contaminated it, in every way, there was a breach of duty of care to the applicant who, foreseeable to Carlesberg (Mw) Limited, was ultimately to be the user of the beverage. Injury, if Carlesberg (Mw) Limited contaminated the contents, to the end user was, most certainly, foreseeable. It was not, in any sense, remote, therefore. In this regard, the injury suffered, even

though, in my judgment, exaggerated was serious enough as not to be dismissed on the *de minimis* principle.

### *Reasoning*

The case, therefore, hinges on whether, Carlesberg (Mw) Limited was in breach of duty and whether their actions, omissions or commissions caused the injuries Mr Kanjira rues. This essentially turns on determining whether Mr Kanjira, on a balance of probabilities, has established that the contamination occurred anywhere during manufacture, packing, storage or transporting of the contents that actually harmed him. It must, per force, be established that Carlesberg (Mw) Limited breached the duty of care and that breach caused the injuries now preoccupying us.

I listened to Mr. Kanjira and his witnesses read over and over their statement on the version of events. The more I did the more I was convinced that there is doubt about what actually happened when opening the bottle. There is no difference or alteration in Mr. Kanjira's supplementary witness statement to the earlier one. This is Mr. Kanjira's statement:

I remember that it was on 5<sup>th</sup> Day of September, 2011 when there was a Parents and Teachers Association meeting at Mbayani Full Primary School in the city of Blantyre which I attended. At the meeting we happened to have bought a crate of coca cola from a nearby grocery for refreshments during the meeting. As I was taking my drink halfway, I discovered that

there was something strange in the bottle and showed my fellow committee members who were present.

The statement of the plaintiff's only witness is not any different on the detail:

On the 5<sup>th</sup> day of October, 2011, there was a joint meeting at the school with the school management committee which I attended. After the meeting we had some refreshments. In the course of taking the drinks, Mr. Kanjira reported to those of us who were present that he had seen a strange substance floating in the bottle he was taking.”

One would have thought that given the allegation and that it is the manufacturer, Carlesberg (Mw) Limited, not the seller, who Mr Kanjira ultimately ascribes responsibility, there would be evidence on which the court could infer negligence by demonstrating that, from manufacture to consumption of the contents, there was no possibility of intervening actions that absolve the manufacturer of a product who intends that the product should be in the state that it does not, by defects at manufacture or during distribution, cause injury to the ultimate user. Mr. Kanjira leads no evidence on who opened the bottle. Consequently, there is doubt whether the bottle was sealed when it was opened. This is important. As Lord Atkins states in the portion earlier quoted, the duty arises only where the manufacturer intends the product to end at the ultimate consumer in the form it left the manufacturer's premises. That

liability, in my judgment, endures throughout the distribution chain as long as the manufacturer can be said to be in control of the product.

As a practical and initial consideration, the claimant must show that the defect occurred before or when leaving the manufacturer (*Carrol v Fearon* (1998) PIQR 416. The manufacturer would be liable, however, for defects after leaving the place of manufacture where those occur during the manufacturer's own distribution for, technically, the goods will not have left the manufacturer's control. In Winfield and Jolowicz on Torts, 17<sup>th</sup> ed, Sweet & Maxwell, London, the author's state:

The question in each case is whether the claimant has given sufficient evidence to justify the inference of negligence against the defendant and he is not necessarily required to specify what the defendant did wrong ... for normally it will be impossible for a claimant to bring evidence of particular negligent acts or omissions occurring in the defendant's premises.

Where the product is out of control of the manufacturer as, for example, where it is consumed through other distributors of the product, evidence of the manufacturer's acts or omissions is demonstrated by establishing that at the point of consumption the product was defective at the point of manufacture or when the manufacturer was in control of the product. The claimant must demonstrate that there was no intervening actions or omissions that could have caused the defect. There need not be demonstration of specific acts or omissions. Where the contents, like here, were in a container, a court will infer defects at manufacture or



during the manufacturer's control where it is demonstrated that at the time of consumption or use the container was properly sealed or was improperly sealed by the manufacturer. The evidence is circumstantial and, therefore, as is the nature with such evidence, there must be a connection among the proven facts on which the only inference is that the negligence was by the manufacturer. If the evidence shows a break in the chain or leads to other possible inferences, the court may not infer negligence. In cases like the present one, where the product is distributed through retail outlets, it must be demonstrated that the defect could not have been caused at the point of distribution where the manufacturer has no control. This is achieved by evidence that the container was intact or sealed at the point of consumption.

Whatever scintilla of evidence there was for the plaintiff and against the defendant it is undermined by stolid evidence from Carlesberg (Mw) Limited. Carlesberg (Mw) Limited confirmed, to my satisfaction, and the burden of proof was not on them, that rice is not one of the ingredients used in manufacturing the beverage that Mr Kanjira consumed. Moreover, Carlesberg (Mw) Limited stated, there is an elaborate standard regime that is religiously and meticulously followed before contents enter the sealed containers, making it almost impossible for foreign elements to enter the sealed bottle. This coupled with that rice is not an ingredient of the beverage, the prospect of rice getting into the sealed container is improbable.

Mr. Kanjira set out to establish that the rice must have entered the bottle because Carlesberg (Mw) Limited, on its own admission, never conducted a microbe test. First, the explanation by Carlesberg (Mw) Limited is, in my judgment, plausible as to undermine that Mr. Kanjira discharged the onus to the requisite standard, to wit, proof on a balance of probabilities. Carlesberg (Mw) Limited were adamant that they did

not conduct the test because Mr. Kanjira brought an open bottle and, therefore, microbes were inevitably in the contents. Such a test would have proved the obvious, namely, that there were microbes in the drink. Carlesberg (Mw) Limited, in my judgment cannot dispute that because, apart from microbes in the air, there was rice in the bottle and microbes could form a culture. The existence of microbes in the bottle does not show that the rice or the microbes entered during manufacture.

It is important on a claim in negligence to show that the wrongdoer's omissions, commissions or actions caused the injury complained of. As already observed, the contamination could have occurred any time after the manufacture during packing, storage or transportation. One, however, has to show by some evidence, on a balance of probabilities, that the contamination could not have occurred at a later stage when the beverages were not in the manufacturer's control, custody or possession. That cannot be left to speculation or assumption. That is not to suggest that it cannot be proved; it just shows how difficult. Indeed, the inference can, on appropriate circumstances be made. The evidence will be circumstantial but, as is the case with such inference, the circumstances must be as linked and uninterrupted as to make the inference the only possible or probable inference. Any suggestion of a possible break in the chain makes the inference improbable. The grocer should have been called to show that the bottle was sealed all along and was never interfered with in the shop to allow rice to enter the bottle. The claimant could have shown that when, whoever did, opening the bottle, it was sealed and, therefore, there could not have been interventions at the point of distribution. Mr. Kanjira's and his own witnesses evidence in the witness statement or on oath are sparse and unreliable on whether the bottle was sealed or defective at the time of consumption. Of course, the court can rely on the evidence of one or more witnesses, like the applicant. In such a case, it is a

credibility question. Normally, if the witness is found credible causation will, on balance of probabilities, been proved. The court assesses the credibility, not necessarily the sincerity, of a witness and considers whether, ordinarily, the story as told is credible and incontrovertible. I think that Mr Kanjira is sincere, but the evidence given is by no means incontrovertible. As long as there is no evidence of whether the bottle was sealed, it is difficult to infer whether the rice entered the chain at the point of manufacture or distribution by the manufacturer or another person. The evidence is capable of many inferences or reveals breaks in the chain of events that the inference cannot be made that the defects were by the manufacturer. In this regard, therefore, the cases of *Mataka v Chibuku Products Ltd*, *Kunje v Southern Bottlers Co Ltd*, and *Chigwe v Southern Bottlers Ltd* can be distinguished.

In relation to NICO General Insurance Co Ltd, it is unclear why they are parties to the action. The claimant is not privy to a contract between the insurers and insured.

I, therefore, dismiss the action with costs.

Made this 26<sup>th</sup> Day of November 2015

D.F. Mwaungulu

**JUDGE**

