



**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**PERSONAL INJURY CAUSE NUMBER 299 OF 2014**

**BETWEEN:**

**HAROLD BAULENI AND 16 OTHERS**

**PLAINTIFFS**

**AND**

**SIKU TRANSPORT**

**1<sup>st</sup> DEFENDANT**

**REAL INSURANCE COMPANY LIMITED**

**2<sup>nd</sup> DEFENDANT**

**Coram: JUSTICE M.A. TEMBO,**

Mwangulube, Counsel for the Plaintiffs

Mapemba, Munthali and Chatepa, Counsel for the Defendants

Kakhobwe, Official Court Interpreter

**JUDGMENT**

This is this court's judgment following a trial of this matter. The plaintiffs' claim is for damages for personal injuries suffered by the plaintiffs as a result of the alleged negligence of the 1<sup>st</sup> defendant's driver, the 2<sup>nd</sup> defendant's insured, in driving a truck and causing the bus in which the plaintiffs were travelling to veer off the road and overturn on its side at Nsipe along the Blantyre-Lilongwe road. The defendants denied the allegation of negligence.

The plaintiffs claim that on 4<sup>th</sup> January 2014, they were travelling as passengers from Balaka towards Ntcheu in a Scania bus registered as BP 5894. Further, that upon arrival at Nsipe, the driver of the 1<sup>st</sup> defendant's truck, a Mercedes Benz registered as SA 6292, was negligently overtaking a two tonne lorry and in the process he faced the oncoming bus herein at very close range. Further, that in order to avoid a head on collision, the bus driver drove the bus slightly to the nearside dirt verge of the road where the bus overturned sideways. The defendants admit that indeed the bus herein overturned as claimed by the plaintiffs but denied that the same was caused by the negligence of the 1<sup>st</sup> defendant's driver. The defendants claim that the bus overturned due to the negligence of the bus driver or that the bus driver's negligence contributed to the said bus overturning. The defendants claim that the bus driver failed to keep any proper look-out or to have regard for the safety of his passengers, that the bus driver failed to pay any or sufficient heed to the presence of the 1<sup>st</sup> defendant's vehicle on the road, that the bus driver drove at excessive speed and failed to control the bus so as to avoid the accident.

The crucial issue for determination in this case is whether the plaintiffs have proved on a balance of probabilities that the 1<sup>st</sup> defendant's driver overtook the two tonne lorry very close to the bus at the rumble surface and caused the bus driver to swerve off the road and cause the bus to overturn.

At the trial the plaintiffs brought three witnesses who gave somewhat contradictory evidence as to what caused the bus to overturn herein. The first plaintiffs' witness, Harold Bauleni, gave evidence that he was travelling in the bus herein on 4<sup>th</sup> January 2014. He further testified that as the bus was at Nsipe area along the Blantyre-Lilongwe road, as it had just passed the rumble surface going down the slope he saw the 1<sup>st</sup> defendant's truck overtake another vehicle. He further stated that in the process the 1<sup>st</sup> defendant truck collided with the bus in which he was travelling. He however said that he only heard that this was what actually happened because he did not see what happened because of where he was seated in the middle of the bus. He further stated that he actually lost consciousness when the bus overturned and was told of what happened whilst he was at the hospital. He also stated that at the time of the events herein there was a rain drizzle or showers.

The second plaintiffs' witness Josephine Chiganda then testified that she was also travelling in the same bus herein on 4<sup>th</sup> January 2014. She stated that this bus was full and she was standing in the aisle. In front of her were two or three people also standing. She stated that the bus went past the weigh bridge at Balaka but was called back to be weighed. After weighing, the bus went on its way and as it approached within a few metres of the rumble surface the 1<sup>st</sup> defendant's truck was overtaking another small lorry. She did not state the tonnage of the small lorry. She stated that the 1<sup>st</sup> defendant's truck driver did not know that the bus was approaching as he was overtaking the small lorry. Further, that in the circumstances, the bus driver took some evasive action to avoid a collision with the 1<sup>st</sup> defendant's truck. It was as a result of this evasive action that the bus went on the dirt verge of the road and overturned on its side. She also stated that when all this was happening it was foggy and raining. Further that, the fog and rain was not too much to impede her vision down the slope on which the bus was travelling. She also stated that although she could not see the speedometer of the bus the bus was not travelling at an excessive speed. She dispelled the fact that the bus and the 1<sup>st</sup> defendant's truck actually collided. She also said although the bus was full she cannot say that the bus overturned because of overloading. She insisted that overloading did not cause the bus to overturn since the bus travelled with the same passengers without incident from the weigh bridge at Balaka to Nsipe where the incident herein occurred. She however admitted that some passengers were taken off the bus before the bus went back to be weighed at the weigh bridge on being called to do so. After the weighing at the weighbridge the bus went to pick up passengers that were dropped off and then proceeded on its way. She however dispelled the allegation that the driver of the bus knew that the bus was overloaded and that is why some passengers were dropped from the bus before it went back to be weighed. She however admitted that it is not normal for passengers to be dropped off and picked up as it happened in this case.

The third plaintiffs' witness, Madelena Chimbalanga, also testified that she was travelling in the bus herein on 4<sup>th</sup> January 2014. She stated that she was standing in the aisle in front of the bus. Further that, there were three to four people in front of her. She stated that as they reached Chingeni rain had started to fall. And as the bus reached Nsipe there was a lot of rain. Suddenly, she saw that a vehicle driving in the opposite direction was overtaking another vehicle very close to the bus. She

stated that the bus driver was disturbed by the overtaking vehicle and the bus overturned. She however said that she did not see the vehicle that was doing the overtaking due to the fog and rain. She stated that the vehicle that was doing the overtaking just went on without stopping but the one overtaken remained. Further, that a two tonne lorry and a minibus assisted with carrying her and other wounded people to the hospital at Ntcheu. She did not say that the overtaking vehicle belonged to the 1<sup>st</sup> defendant.

The defendants then brought the driver of the 1<sup>st</sup> defendant's truck to testify as a defence witness. The driver's name is Stanton Banda. He stated that he had been in the 1<sup>st</sup> defendant's employment as a driver for four years by the 4<sup>th</sup> January 2014. He stated that on 4<sup>th</sup> January 2014 he drove the 1<sup>st</sup> defendant's truck from Balaka to Ntcheu. At noon he drove back from Ntcheu to the 1<sup>st</sup> defendant's Balaka office. He was to proceed further to Liwonde. He stated that before arriving at Balaka, on his way from Ntcheu, he stopped at Nsipe. He stated that as he was about to start off onto the road he saw a two tonne lorry to which he gave way. After the two tonne lorry passed he entered the road. The two tonne lorry and the defence witness were all going in the direction of Balaka from Nsipe. The defence witness stated further that he decided to overtake the two tonne lorry which he did without incident. He further said that he overtook the two tonne lorry at a flat surface and not the rumble surface. And further, that there was no on-coming vehicle at the time he overtook the two tonne lorry. He stated that he later went past the bus herein which was going in the opposite direction and he flicked lights at the bus driver who did the same too. He said no incident happened between his truck and the bus herein. He however pointed out that he saw the bus and that it was driving at speed. He stated that where he went past the bus driving in opposite direction it was a good distance after he had passed the rumble surface.

The defence witness stated that he reached the 1<sup>st</sup> defendant's office at Balaka. He later started off for Liwonde and on his way he was stopped by police at Chingeni who wanted to see where the lorry he was driving had been damaged as it was said to have collided with the bus herein at Nsipe. The police took the defence witness to Ntcheu police station where he gave a statement. He said the driver of the bus was also present. The defence witness was charged with a traffic offence of reckless driving. He was in police custody between 4<sup>th</sup> and 11<sup>th</sup> January 2014. The defence witness said his relatives paid a fine for his offence. He said that he paid

the fine because the police told him that he would not be released unless he agreed to pay the fine. The fine was paid at the Court at Ntcheu. In cross-examination, the defence witness stated that there was some rain on the 4<sup>th</sup> January 2014. But that he never saw any fog and the condition was such that he could see clearly as he drove. He insisted that where he passed the bus herein there was no fog. And that this applied to where he was coming from and where he had overtaken the two tonne lorry.

The defence witness stated that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs' witnesses were lying that he caused the bus to overturn near the rumble surface. He however stated that he admitted the road traffic offence at the Magistrate Court for a reason not in line with what the police and the two plaintiffs' witnesses claimed that he caused the bus to overturn. He insisted that he was compelled to admit the traffic offence at the police so that he be released. In re-examination, the defence witness insisted that he did not drive his truck recklessly. He said he had been driving the truck herein for several years properly. He reiterated that his relatives paid the fine after he had been in custody for seven days and because the police said he would not be released until he paid. He repeated that he passed the two tonne lorry on a flat surface after passing the rumble surface. He said there was no fog but some rain and he could see in front of him to decide to overtake.

As stated at the outset, the crucial issue for determination is whether the plaintiffs have proved on a balance of probabilities that the 1<sup>st</sup> defendant's driver overtook the two tonne lorry very close to the bus at the rumble surface and caused the bus driver to swerve off the road and cause the bus to overturn.

In written submissions, on the subject of overtaking vehicles on the road, the plaintiffs cited section 98 of the Road Traffic Act which is in the following terms

(1) Subject to the provisions of subsections (2) and (4) and section 96, the driver of a vehicle intending to pass any other vehicle proceeding in the same direction on a public road shall pass to the right thereof at a safe distance and shall not again drive on the left side of the roadway until safely clear of the vehicle so passed:

Provided that, in the circumstances as aforesaid, passing on the left of such vehicle shall be permissible if the person driving the passing vehicle can do so with safety to himself and other traffic or property which is or may be on such road and—

(a) the vehicle being passed is turning to its right or the driver thereof has signalled his intention of turning to his right;

(b) such road is a public road in an urban area and—

(i) is restricted to vehicles moving in one direction; and

(ii) the roadway is of sufficient width for two or more lines of moving vehicles;

(c) such road is a public road in an urban area and the roadway is of sufficient width for two or more lines of moving vehicles moving in each direction;

(d) the roadway of such road is restricted to vehicles moving in one direction and is divided into traffic lanes by appropriate road traffic signs; or

(e) he is driving in compliance with the directions of a traffic police officer or is driving in traffic which is under the general direction of such officer, and in accordance with such direction.

(2) The driver of a vehicle shall not pass other traffic proceeding in the same direction on a public road when approaching—

(a) the summit of a rise;

(b) a curve; or

(c) any other place where his view is so restricted that any such passing could create a hazard in relation to other traffic which might approach from the opposite direction, unless—

(i) he can do so without encroaching on the right-hand side of the roadway; or

(ii) the roadway of such road is restricted to vehicles moving in one direction.

(3) The driver of a vehicle on a public road shall, except in the circumstances referred to in the first proviso to subsection (1), upon becoming aware of other traffic proceeding in the same direction and wishing to pass his vehicle, cause his vehicle to travel as near to the left edge of the roadway as is possible, without endangering himself or other traffic or property on the roadway, and shall not accelerate the speed of his vehicle until the other vehicle has passed.

(4) When about to pass oncoming traffic, the driver of a vehicle on a public road shall ensure that the vehicle driven by him does not encroach on the roadway to his right in such manner as may obstruct or endanger oncoming traffic.

(5) The driver of a vehicle intending to pass a stationary bus on a public road shall do so with due care for the safety to persons who are approaching or leaving or may approach or leave such bus.

(6) Any person who contravenes subsection (2) shall be guilty of an offence and upon conviction shall be liable to a fine not exceeding K10,000 or to imprisonment for a period not exceeding three years or both such fine and imprisonment.

The plaintiffs also referred to section 126 of the Road Traffic Act on the offence of reckless driving which is in the following terms

1) No person shall drive a vehicle on a public road recklessly or negligently.

(2) Without restricting the ordinary meaning of the word “reckless” any person who drives a vehicle in wilful or want on disregard for the safety of persons or property shall be deemed to drive that vehicle recklessly.

(3) In considering whether an offence has been committed under subsection (1), the court shall have regard to all circumstances of the case, including, but without prejudice to the generality of the foregoing provisions of this section, the nature, condition and use of the public road upon which the offence is alleged to have been committed, the amount of traffic which at the time actually was or which could reasonably have been expected to be upon that road and the speed at and manner in which the vehicle was driven.

(4) Any person who contravenes subsection (1) shall be guilty of an offence and upon conviction shall be liable—

(a) in the case where the court finds that the offence was committed by driving recklessly, to a fine not exceeding K10,000 or to imprisonment for a period not exceeding three years or to both such fine and imprisonment;

(b) in the case where the court finds that the offence was committed by driving negligently, to a fine not exceeding K5,000 or to imprisonment for a period not exceeding two years or to both such fine and imprisonment; or

(c) in the case where death results from reckless or negligent driving, to a fine not exceeding K30,000 or to imprisonment for a period not exceeding three years or to both such fine and imprisonment and for subsequent offence to imprisonment for three years with no option of a fine and permanent revocation of a driver’s licence.

The plaintiffs' view is that, in view of the evidence of their witnesses, they have proved on a balance of probabilities that the 1<sup>st</sup> defendant's driver was negligent herein by overtaking improperly. The plaintiff's pointed out that the 1<sup>st</sup> defendant's driver, the defence witness, admitted overtaking a lorry at the rumble surface at Nsipe but claimed that his vehicle only passed by the bus herein 60 metres from the rumble surface. They pointed out further that during cross-examination the defence witness admitted that he had pleaded guilty before the Ntcheu Magistrate Court to the offence of reckless driving by overtaking improperly at the rumble surface. The plaintiffs point out further that although the defence witness claimed that he was under duress from the police to admit the offence and pay a fine, the defence witness failed to explain why he or his employer the 1<sup>st</sup> defendant could not hire a lawyer to defend him if he was innocent in the circumstances. The plaintiffs also point out that the defence witness agreed with the 2<sup>nd</sup> plaintiffs' witness that there was not much fog at Nsipe around the rumble surface area of the road.

In written submissions the defendants pointed out that in civil cases, like the instant one, the burden of proof is borne by the plaintiff on the facts pleaded and not admitted by the defendant and they cited the case of *In re KK Millers Ltd and in re Companies Act* [1995] 2 MLR 458, 467.

The defendants further pointed out that negligence, a legal concept arising from a breach of duty and an allegation on the face of it, requires the plaintiff to prove the same to the required standard on preponderance of evidence. Further, that it is trite in the law of tort that to maintain an action for negligence, it must be shown that there was a duty of care on the part of the defendant towards the person injured and that the said defendant negligently performed or omitted to perform his duty such that the alleged negligence was the effective cause of the injury or damage to the plaintiff. *Kalolo v National Bank of Malawi* [1997] 1 MLR 421, 428.

The defendants further submitted that where a material witness is available and is not called, it may be presumed that his evidence would be contrary to the case or interest of the party who failed to call him. Further, that the unexplained failure to call a material witness to prove a fact may raise suspicion and reduce the weight of evidence of the party concerned in the circumstances. On this point the defendants cited the cases of *Sabot Hauliers (pty) Ltd v Freight Handlers (A Firm)* [1993]



16(2) MLR 760 and *Maonga Others v Blantyre Print and Publishing Company Ltd* [1991] 14 MLR 240.

The defendants also submitted that Order 18 rule 7A (1) Rules of the Supreme Court provides that

If in any action which is to be tried with pleadings any party intends, in reliance on section 11 of the Civil Evidence Act 1968 (convictions as evidence in civil proceedings) to adduce evidence that a person was convicted of an offence by or before a Court in the United Kingdom or by a Court-Martial there or elsewhere, he must include in his pleading a statement of his intention with particulars of -

- (a) the conviction and the date thereof,
- (b) the Court or Court-Martial which made the conviction, and
- (c) the issue in the proceedings to which the conviction is relevant.

The defendants position is that the plaintiffs have failed to prove their claim of negligence against the 1<sup>st</sup> defendant's driver herein on a balance of probabilities. The defendants state that the 1<sup>st</sup> defendant's driver of the truck did owe a duty of care to other road users, including the plaintiffs herein, to use reasonable care which is expected of an ordinary skilled driver under all the circumstances. The defendants however deny that the 1<sup>st</sup> defendant's driver breached that duty of care.

The defendants submit that from the evidence of the defence witness he complied with the dictates of section 98 (2) of the Road Traffic Act when he overtook the two tonne lorry. They rely on the evidence by the said defence witness who stated that he overtook the two tonne lorry herein on a flat surface, and not the rumble surface as alleged by the plaintiffs, before he went back to his lane and later passed the bus that was going in the opposite direction. The defendants attack the credibility of the plaintiffs' witnesses in terms of their observation of the events leading to the overturning of the bus herein. The defendants pointed out that the 1<sup>st</sup> plaintiffs' witness did not see what caused the bus to overturn due to where he was seating in the middle of the bus and due to the fact that there were rain showers outside. The 1<sup>st</sup> plaintiff actually admitted that he only heard what actually caused the bus to overturn. The defendants submit that the 3<sup>rd</sup> plaintiffs' witness admitted that despite what she said she did not see through the front of the bus, the 1<sup>st</sup> defendant's truck overtaking the two tonne lorry, due to fog and rains. The

defendants submitted that, in the foregoing circumstances, the 2<sup>nd</sup> plaintiffs' witness was not being truthful when she insisted that she saw the 1<sup>st</sup> defendant's lorry overtake the two tonne lorry at close range thereby causing the bus to veer off the road. This is because of the fact that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs' witnesses observed what they claim to have happened from a similar position whilst standing in the bus with a few people standing in front of them impeding their front view. The defendants submit further that the 2<sup>nd</sup> plaintiffs' witness could not have a better front view since she boarded the bus earlier than the 3<sup>rd</sup> plaintiffs' witness and must have had more people standing in front of her impeding her view.

Whilst agreeing with the relevant law as cited by both parties, this Court wishes to point out that the law on negligence in what are commonly known as road traffic cases is summarized in the case decided by the Supreme Court of Appeal which is reported as *Southern Bottlers Limited and another v Commercial Union Assurance Company plc* [2004] MLR 364 (SCA). In that case the Supreme Court of Appeal said, at page 370-371, that

It is indeed trite law that an action founded upon negligence is based on the conception of a duty of care which one person owes to the other person. Respecting a driver of a motor vehicle, in *Banda and others v ADMARC and another* [1990] 13 MLR 59 and 63, Banda J as he then was, put that duty as follows:

“A driver of a motor vehicle owes a duty of care to other road users not to cause damage to persons, vehicles and property of anyone on or adjoining the road. He must use reasonable care which an ordinary skilful driver would have exercised under all the circumstances. A reasonably skilful driver has been defined as one who avoids excessive speed, keeps a good look – out, observes traffic signs and signals.”

On his part, Mtegha J, as he then was, in *Kachingwe v Mangwiro Transport Motorways Company Limited* 11 MLR 362 and 367, put it as follows:

“Perhaps it would be prudent here to state briefly the duty of care which a driver of a motor vehicle owes to property adjacent to the road and to other road users. I cannot do better than to Quote the words of Lord Macmillan in *Hay [or Bourhill] v Young* [1943] AC 92 when he said at 104

‘What duty then was incumbent on him? . . . The duty of a driver is to use proper care not to cause injury to persons on the highway or in premises adjoining the highway . . . Proper care connotes avoidance of excessive speed, keeping a good look – out, observing

traffic rules and signals and so on . . . There is no absolute standard of what is reasonable and probable. It must depend on circumstances and must always be a question of degree.’

It is a duty of a person who drives a motor vehicle on a highway to use reasonable care to avoid causing damage to persons and other vehicles or property on or adjoining the road. It has been further stated that reasonable care means care which an ordinary skilful driver could have exercised under all the circumstances.”

Lastly, but not least, we would like to refer to the applicable law, on the point, as was enunciated by this Court in *Yanu Yanu Company Limited v Mbewe [PB] and Mbewe [MM]* 11 MLR 405, 408–410:

“We feel that learned Counsel has misunderstood the law. It is accurately stated in *Nance v British Columbia Elec Ry Co Limited* [2] per Viscount Simon. He states [1951] AC at 611:

‘ . . . The statement that when negligence is alleged as the basis of an actionable wrong, a necessary ingredient in the conception is the existence of a duty owed by the defendant to the plaintiff to take care, is, of course, indubitably correct. But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as shield against the obligation to satisfy the whole of the plaintiff’s claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.’

If one followed the duty of care as explained in the above quote then one must be driving on our roads in line with the Road Traffic Act.

From the evidence of both the plaintiffs and the defendants it is clear to this Court that the bus and the 1<sup>st</sup> defendant’s truck passed each other going in the opposite direction on the Blantyre-Lilongwe road around Nsipe. What is also clear from that evidence is that at the time there was some rain and fog. What is in dispute in the evidence of the witnesses is how much this rain and fog impaired visibility as to what was happening on the road in front of the bus herein. The defendants argue that the plaintiffs’ witnesses did not actually see what they claim happened herein concerning the overtaking and veering off the road of the bus. From the evidence this Court finds that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs’ witnesses indicated that they were in about roughly the same standing position in the isle of the bus. These two witnesses can therefore be taken to have had observed what happened from

roughly the same point or position. Despite being roughly in the same point of observation the 2<sup>nd</sup> plaintiffs' witness said that she saw clearly that the 1<sup>st</sup> defendant's driver was overtaking another vehicle and caused the bus driver to swerve off the road. But in contradiction to this, the 3<sup>rd</sup> plaintiffs' witness, who as noted by the defendants also appeared to be very truthful to this court, stated that she never saw the overtaking vehicle due to fog and the rains.

As rightly noted by the defendants, it is surprising that the plaintiffs did not call the driver of the bus to testify as he would be best placed to state what really happened herein given that his passengers only told this Court contradictory versions of what happened. And such failure to call the driver of the bus without any explanation on the part of the plaintiffs might reinforce the view that the plaintiffs' claim as to the cause of the overturning of the bus would be damaged or discredited by the evidence of the bus driver where he to be called to testify.

This Court agrees with the defendants that evidence of the plaintiffs is therefore contradictory on a crucial issue that is central to the determination of this matter namely that the 1<sup>st</sup> defendant's driver overtook the two tonne lorry very close to the bus and caused the bus to veer off the road.

Consequently, it is therefore impossible for this Court to find on such evidence that the plaintiffs have discharged their burden of proving that their version of what happened is more probable than not.

However, there is the issue of the conviction of the 1<sup>st</sup> defendant's driver who admitted to reckless driving and upon a conviction paid a fine in relation to overtaking the two tonne lorry improperly herein and causing the bus to veer off the road as claimed by the plaintiffs herein.

The defendants argue that since the plaintiffs did not alert the defendants by pleadings about their intention to rely on the criminal conviction of the 1<sup>st</sup> defendant's driver in support of this case then the plaintiffs are precluded from relying on the conviction. The defendants contend that allowing the plaintiffs to rely on the 1<sup>st</sup> defendant's driver's conviction in the circumstances will be a contravention of Rule 18 (7)(A) Rules of the Supreme Court. Although the plaintiffs did not respond to this argument, this Court notes that, in fact, there is a legal issue whether the defendants can actually rely on procedure that is premised

on section 11 (2) (a) of the Civil Evidence Act of 1968 in challenging the production of evidence of the previous conviction as sought herein. Is the procedure premised on the Civil Evidence Act of 1968 applicable to Malawi? The answer is in the negative. This is because proviso (b) to section 29 of the Courts Act is very clear and it prohibits application of any of the Rules of the Supreme Court which refer solely to procedure under Acts of the United Kingdom Parliament other than statutes of general application in force in England on the 11<sup>th</sup> August, 1902. See *National Bank of Malawi v Jumbe* [2005] MLR 315 and *Malawi Electoral Commission v Banda and another* [2005] MLR 185. The 1968 Act came way after the 1902 cut off point. On that ground, the defendants' objection to the plaintiffs' reliance on the 1<sup>st</sup> defendant's driver's conviction for reckless driving herein as premised on the Rule 18 (7)(A) Rules of Supreme Court cannot be sustained.

It is important to note however that in England, the effect of a conviction, if properly pleaded in cases such as the instant one under Rule 18 (7)(A) Rules of Supreme Court in reliance on section 11 of the Civil Evidence Act 1968, is to put upon the party against whom a criminal conviction is proved the burden of disproving the offence to which the conviction relates, but such burden may be discharged on a balance of probability. See *Wauchope v. Mordecai* [1970] 1 W.L.R. 317; [1970] 1 All E.R. 417 and *Stupple v. Royal Insurance Co. Ltd* [1971] 1 Q.B. 50. Taper in *Cross and Taper on Evidence* (2010) 12<sup>th</sup> edition at 111 discusses the different views taken by Lord Denning and Buckley LJ in *Stupple v. Royal Insurance Co. Ltd* [1971] 1 Q.B. 50 on the weight to be attached to a previous conviction on a matter arising in subsequent civil proceedings. Lord Denning stated at 72 that

I think that the conviction does not merely shift the burden of proof. It is a weighty piece of evidence of itself. For instance, if a man is convicted of careless driving on the evidence of a witness, but that witness dies before the civil action is heard (as in *Hollingworth v Hewthorn & Co Ltd* [1943] KB 587) then the conviction itself tells in the scale in the civil action. It speaks as clearly as the witness would have done, had he lived. It does not merely reverse the burden of proof. If that was all it did, the defendant might well give his own evidence, negating want of care and say: 'I have discharged the burden. I have given my evidence and it has not been contradicted.' In answer to the defendant's evidence the plaintiff can say: 'But your evidence is contradicted by the convictions.'

And Buckley LJ said at 76 that

In my judgment, proof of conviction under this section gives rise to the statutory presumption laid down in s 11 (2)(a) which, like any other presumption, will give way to evidence establishing the contrary on a balance of probability without itself affording any evidential weight to be taken into account in determining whether that onus had been discharged.

Tapper argues that the approach of Buckley LJ is to be preferred. He notes that the assessment of the weight of the conviction would be a difficult task. He further notes that as Buckley LJ pointed out, the propriety of the conviction is irrelevant in the civil action: the claimant would not discharge the onus cast upon him by s 11 (2)(a) Civil Evidence Act 1968 by proving that every witness who had given evidence against him at the criminal trial was guilty of perjury. Further that the claimant has to adduce sufficient evidence to satisfy the civil court that he was not negligent and, in spite of Lord Denning's suggestion to the contrary, his own testimony without more will generally not suffice. Tapper further points out that the House of Lords has affirmed that the burden is the ordinary civil one, but nonetheless characterized as 'uphill' the task of the defendant to persuade the court of a verdict beyond reasonable doubt. See *Hunter v Chief Constable of West Midlands* 554, 735,736. Tapper also observes that the view of Lord Denning might itself attach too much weight to an unsupported plea of guilty for the purposes of a substantial consequential civil claim for example in *Jacobsen v Suncorp Insurance and Finance(No 2)* [1992] 1 Qd.R. 385.

It must be noted further that section 11 of the Civil Evidence Act of 1968 on which Rule 18 (7)(A) Rules of the Supreme Court is solely based actually was a statutory intervention in England that abolished the common law position that precluded the admission of criminal convictions in civil proceedings as is sought by the plaintiffs herein. As noted in the case of *Calyon v Michailaidis & Ors (Gilbratar)* [2009] UKPC 34, this followed the recommendations in the 15<sup>th</sup> Report of the Law Reform Committee on the Rule in *Hollington v Hewthorn & Co Ltd* (1967, Cmnd 3391). The common law position is represented in the decision in the case of *Hollingworth v Hewthorn & Co Ltd* [1943] KB 587. In that case, the defendant's car, when being driven by an employee, collided with the plaintiff's car driven by his son. The son was injured and the car was damaged. The driver of the defendant's car was convicted of careless driving. The owner of the other car and

his son sued the defendant for damages on the basis of the defendant's driver's negligent driving. The son then died and the father continued the action on his behalf as administrator of his estate. Due to his son's death, the plaintiff was forced to rely on the driver's conviction to provide prima facie evidence of his negligent driving. The Court of Appeal held that, both on principle and on authority, the evidence of the conviction was inadmissible for that purpose and the action failed. Giving judgment for the Court of Appeal Lord Goddard pointed out, at pp594-595, that

The court which has to try the claim for damages knows nothing of the evidence that was before the criminal court. It cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision.

Even assuming that the plaintiff could show that the conviction referred to the particular incident giving rise to the claim, Lord Goddard continued at p 595 that

It is admitted that the conviction is in no sense an estoppel, but only evidence to which the court or a jury can attach such weight as they think proper, but it is obvious that once the defendant challenges the propriety of the conviction the court, on the subsequent trial, would have to retry the criminal case to find out what weight ought to be attached to the result. It frequently happens that a bystander has a complete and full view of the accident. It is beyond question that, while he may inform the court of everything he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide, but, in truth, it is because his opinion is not relevant. And the fact that he can prove is relevant, but his opinion is not. The well recognized exception in the case of scientific or expert witnesses depends on considerations which, for present purposes, are immaterial. So, on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant.

Lord Goddard went on to refer to the statement of Sir William Grey, Lord Chief Justice of the Common Pleas, giving the view of the consulted judges in the *Duchess of Kingston's Case* (1776) 2 Sm L C, 13<sup>th</sup> edn, 644. The passage at, at pp 644-645 is worth quoting in full

What has been said at the bar is certainly true, as a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment he might think erroneous; and therefore the depositions of witnesses in another cause in proof of fact, the verdict of a jury finding

the fact, and the judgment of the court upon the facts found, although evidence against the parties, and all claiming under them, are not, in general, to be used to the prejudice of strangers. There are some exceptions to this general rule, founded upon particular reasons, but, not being applicable in the present subject, it is unnecessary to state them.

Having referred to the last part of the foregoing passage Lord Goddard went on to say

This is true, not only of convictions, but also judgments in civil actions. If given between the same parties they are conclusive, but not against anyone who was not a party. If the judgment is not conclusive we have already given our reasons for holding that it ought not to be admitted as some evidence of fact which must have been found owing mainly to the impossibility of determining what weight should be given to it without retrying the former case.

It is noted in *Calyon v Michailaidis & Ors (Gilbratar)* that the actual decision in *Hollingworth v Hewthorn & Co Ltd* has, of course, been criticized for example by Lord Diplock in *Hunter v Chief Constable of West Midlands* [1982] 1 AC 529, 543 and by Lord Hoffman in *Arthur JS Hall v Simons* [2002] 1 AC 615, 702D-F. Further, that there is a well established exception to the rule in the case of facts found in the reports of company inspectors acting under statute as per authorities analyzed by Thomas LJ in *Secretary of State for Business Enterprises and Regulatory Reform v Aaron* [2008] EWCA Civ 1146. But that *Hollington* continues to embody the common law as to the effect of previous decisions: ‘in principle the judgment, verdict or award of another tribunal is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties’ see *Land Securities v Westminster City Council* [1993] 1 WLR 286, 288E-F per Hoffman J.

A search by this Court shows that the common law position has not been abolished in Malawi and remains so. The parties in this matter therefore have to contend with the common law position as contained in *Hollingworth v Hewthorn & Co Ltd* which embodies the common law position by which the relevant principles were fully settled by the time of the case of *Duchess of Kingston’s Case* that was cited with approval in *Hollingworth v Hewthorn & Co Ltd*. Consequently, in the circumstances of this case and in view of the foregoing the criminal conviction against the 1<sup>st</sup> defendant’s driver cannot be admitted in evidence in the present



matter. It is inadmissible for the reasons stated at common law in the decision in *Hollingworth v Hewthorn & Co Ltd* .

By the way, of course, this court is aware that the High Court in the case of *Jimu v Nico General Insurance Company Limited* civil cause number 984 of 2007 (High Court) (unreported) decided that a police report indicating that the driver of a vehicle had admitted the traffic offence of reckless driving is exempted from the hearsay rule and is admissible in a subsequent civil case on a claim of negligence. The Judge in the *Jimu case* did not consider the common law position as contained in the *Hollingworth v Hewthorn & Co Ltd* as to previous findings between different parties. So that the *Jimu case* was wrongly decided having not addressed the relevant prevailing common law position. If a verdict of a criminal court in a road traffic case is not admissible in subsequent civil proceedings on a claim of negligence, a police officer's finding/recording of guilt in a road traffic incident cannot be admissible. The Judge in the *Jimu case* reasoned as follows

...I must of course point out that medical reports and police reports, as those being tendered in personal injury cases, are public documents. This is my view because these documents are made by public officers acting in discharge of a strict duty to inquire into, and satisfy themselves as to the truth of the facts contained in those documents. (see *White v Taylor* [1969] 1 Ch 150). In this regard, it must also be noted that there is no strict requirement for one to have personal knowledge of the facts recorded, this is on account of the fact that there is a duty on the part of public officers to record facts which are true. (see *R v Harpin* [1975] QB 907). What is recorded in the medical and police reports, are supposed to be findings which are done by a medical officer upon examining the injured person or a police officer upon investigating the circumstances surrounding an accident. Both the medical officer and the police officer record their findings in reports, which reports are made under the public authority of the Malawi Police Service and Ministry of Health. In view of this I must find that these reports are exempt from the rule against hearsay and that they fall within the common law exceptions to the rule against hearsay. Further it is the view of this Court that within the context of Malawi these documents may be justified on the grounds of reliability and convenience see for instance *Hill v Clifford* [1907] 2 Ch 236 a case which involved the findings of misconduct by the General Medical Council in the United Kingdom.

Indeed the onus must be placed on a party objecting to the tendering of medical and police reports to show the court as to why they are not reliable. In this regard, there have of course been suggestions that policemen do not go to the scene of the accident to investigate the causes of some accidents. However, I believe that where the driver admits

to have been in the wrong, is charged under the Road Traffic Act, admits to the charge and duly pays the fine, there will be no need for the police officer to conduct a full investigation. Indeed it is only in cases where the driver denies being negligent that an issue may arise. In this case the issue will of course be whether the plaintiff should wait until the conclusion of the trial for the road traffic offence for him to sue or indeed have the civil court examine the evidence regarding the accident, on a balance of probabilities, and then making a determination as to whether there was negligence or not. This is of course not the position in this case as the driver of the minibus admitted to the charge of inconsiderate driving.

As for the medical reports, I would want to believe that it must be shown that the medical officer breached his strict duty and falsified the extent of the plaintiff's injuries. This can be done by obtaining what is known in medical parlance, as a second opinion. It is only in this regard that the reliability of a medical report can be questioned. Without which I do not see why courts should not accept medical reports in evidence. This is also in view that oft times it has proven problematic to get medical officers to come to court to testify in such matters and thus convenience demands that the plaintiff should just tender the medical report.

This Court wishes to point out that with regard to police reports it is actually very prejudicial to allow them in evidence as to the truth of their contents precisely because lived experience shows that they are actually opinions and precludes the testing of the author thereof if so accepted. Recently, this court decided a matter in which a police report from the same area as the place in issue herein indicated that the driver of the defendant's vehicle, in that case the Government, was sleeping behind the wheel and therefore caused the vehicle to overturn. However, the plaintiff's testimony at trial was that as a passenger in the defendant's vehicle she did not see the driver sleep behind the wheel but rather that the road accident was actually caused by an on-coming truck that had no headlights and was driving in the middle of the road which prompted the defendant's driver to swerve off the road. Clearly the police report was, at the least, a wrong opinion. But the police man could not be questioned as he never appeared in court. If the plaintiff was also not truthful in that case, as the policeman was, injustice would have ensued.

With regard to admission of medical reports as to the truth of their contents without the authors of the same this court is of the view that there are practical problems that could cause prejudice to the defendant as he does not have a chance to get a second opinion until he is served with a claim which may well be long

after the plaintiff has recuperated and the true nature of the injury may be hard to uncover other than by cross-examining the author of the medical report that was made at the time the plaintiff was attended to.

But more importantly, as a matter of law, for a document to be classified as an admissible public record it must satisfy four requirements namely; the document must be available for public inspection (*Larry v Pettit* (1946) KB 401), the person compiling the document must be under a public duty to satisfy himself of the truth of the statement (*Doe d France v Andrews* [1850] 15 QB 756), it must concern a public matter e.g. a company's statutory returns (*Rv Harpin* [1975] QB 907) and the document must have been created to be permanent not temporary (*White v Taylor* [1969] 1 Ch. 150). It appears very doubtful that a medical report satisfies all the four requirements to qualify as a public record and to be exempted from the hearsay rule. Perhaps, a police report may qualify.

The common law rules on hearsay in civil and criminal proceedings in England, from which Malawi received the common law, have been heavily amended by legislative intervention in the Civil Evidence Acts, 1968, 1972 and 1995 and by the Criminal Justice Act 1988 and 2003 respectively. For example section 1 of the Civil Evidence Act, 1995 is to the effect that in civil proceedings evidence shall not be excluded on the ground that it is hearsay. However, the foregoing Acts do not apply to Malawi for not being part of the received law.

In the foregoing circumstances, with regard to the common law rules against hearsay vis a vis use of criminal convictions in subsequent civil matters or use of 'public' documents such as police reports and medical reports in civil proceedings without calling the authors of the same to testify, it is best that such rules of common law be considered for modification from a legislative angle so that as Lord Reid stated, in a similar context in England in *Myers v DPP* [1965] AC 1001 at 1021,

If we are to extend the law it must be by development and application of fundamental principles. We cannot introduce arbitrary conditions or limitations; that must be left to the legislation: and if we do in effect change the law, we ought in my opinion only to do that in cases where our decision will produce some finality or certainty. If we disregard technicalities in this case and seek to apply principle and common sense, there are a number of parts of the existing law of hearsay susceptible of similar treatment...the only

satisfactory solution is by legislation following on a wide survey of the whole field....A policy of make do and mend is not appropriate.

This suggested legislative consideration of common law rules on hearsay has been undertaken before in Malawi, for example, with regard to proof of contents of documents in criminal matters, resulting in modified rules on documentary evidence in criminal matters which are contained in subsidiary legislation, namely, Criminal Procedure and Evidence (Documentary Evidence) Rules made under section 245 of the Criminal Procedure and Evidence Code (Government Notice Number 7/1968).

In the foregoing circumstances, this Court finds that the plaintiffs have failed to prove their allegation of negligence herein to the requisite standard, which is on a balance of probabilities. The plaintiffs' claim therefore fails.

Costs normally follow the event and shall therefore be for the successful defendants.

Made in open court at Blantyre this 2<sup>nd</sup> June 2015.

M.A. Tembo  
**JUDGE**