IN THE HIGH COURT OF MALAWI

CIVIL CAUSE NO. 243 OF 1979

BETWEEN:

BAZUKA M.K. MHANGO ..... PLAINTIFF

and

LEVER BROTHERS (MALAWI) LIMITED ..... 1ST DEFENDANT

and

WISKEY J. SADIKI ..... 2ND DEFENDANT

Coram: Skinner, Chief Justice
For the Plaintiff: Nyirenda of Counsel
For the 1st Defendant: Makhalira of Counsel
For the 2nd Defendant: Munyenyembe/Chanthunya, Legal Aid Advocates
Official Interpreter: Mpalika
Court Reporter: Brown

JUDGMENT

On the 13th October 1978, the first defendant's motor vehicle Registration No. BC 8144 was being driven along the Limbe/Thyolo road in the direction of Thyolo. It was driven by the first defendant's servant and there is no dispute about that. It was followed by another motor car, Registration No. BC 9432, owned and driven by the plaintiff. The second defendant was driving his motor vehicle behind the plaintiff. It is not to be thought that all three vehicles were at all times immediately following one another. They all came together at a point beyond the turn-off to Newlands when a collision occurred in which all three cars were damaged. The plaintiff claims for the damage to his vehicle and for the cost of the hire of a vehicle while it was being repaired. He sues the defendants jointly and severally and alleges that they are jointly and severally liable to him. The first defendant denies negligence and alleges that the accident was caused by the negligence of either the plaintiff or the second defendant, and claims K75, being the cost of repairs of its vehicle. This sum is claimed both against the plaintiff and the second defendant.

I now turn to the evidence. The plaintiff, in examination-in-chief, said that on the 13th October 1978, at about 7 o'clock in the evening, he was driving his motor car from Limbe along the Limbe/Thyolo road, in the direction of Thyolo. His brother, P.W.2, was sitting beside him, and a Mr. Mbisa was in the rear seat. After he turned the corner near the turn-off to Newlands Home, he noticed a car in front, that was the vehicle owned by the first defendant and driven by Mr. Vumbwe. The car was about 50 yards from him when he came round the corner. He travelled behind it and it suddenly stopped in the middle of the left-hand lane of the tarmacadamised part of the road, that is, the part of the road where a car driving

from Limbe to Thyolo would normally drive. The witness immediately applied his brakes and stopped about 10 feet behind the other vehicle. He then saw the driver of that vehicle leaning over towards a lady passenger, and he formed the impression that the driver wished to kiss her.

Another vehicle, driven by the second defendant, then hit the rear of the plaintiff's car and forced it forward so that it hit the car in front. This all happened in a matter of seconds.

The plaintiff said that his lights were in order; his front lights were on dim and he had his foot on the brake. He could not see much ahead of the first defendant's car; after the accident, however, he saw that the road was clear in front. The lady passenger in the first defendant's car got out and disappeared. There were some pedestrians nearby and he asked one of them for the loan of a pencil in order to take the particulars of the other drivers. According to the witness the driver of the first defendant's car said that the police should not be informed but that he would be responsible and report to his employers who would pay the damages. The witness thought that this man was smelling of liquor. He said that the second defendant complained about the first car having suddenly stopped. In the opinion of the witness the second defendant had been driving too fast and could not control his vehicle. There were no skid marks on the road other than the plaintiff's own, and the second defendant had said that his brakes failed. Again, the force of the impact suggested to the plaintiff that the second defendant had been driving fast. He did not see any vehicle coming from the opposite direction but after the accident there were pedestrians and cyclists around. The width of the tar at the scene of accident was 18 feet. He himself had avoided running into the first defendant's vehicle by applying his brakes. It was about 300 yards from the bend to where his car had stopped. The major damage to his vehicle was to the rear and there was little damage to the front of it or to the first defendant's vehicle.

In cross-examination, the plaintiff said he was travelling at about 25 miles per hour and that the accident took place about 300 yards from the bend. The first defendant's vehicle was about 30 yards away from him when he started to stop and he was able to apply his brakes in order to stop his own vehicle. He could see the tail lights of the vehicle in front and from that he knew it was stopping.

I thought the essence of the plaintiff's story was summed up by a piece of evidence in his cross-examination in which he said that the vehicle in front stopped, he stopped also and the other car came and hit him; and there was a very short period between the time he stopped and the time he was hit. He described it as a fraction of a second although clearly it was a little longer than that. He said that he stopped rather than swerving to the left or right because he was in an emergency situation and did not know what the car in front was going to do. He thought it might turn to the left or to the right.

P.W.2, Christopher Mhango, was the passenger in the front seat of the plaintiff's vehicle. He again described how the vehicle in front suddenly stopped and how the plaintiff also stopped. The vehicles were inside the tarmacadamised part of the road where there are road marks. The first defendant's car was on the tar and the driver had stopped all of a sudden. Two people on bicycles were coming from the opposite direction. The driver of the first defendant's vehicle had a woman sitting beside him and when he stopped he started to talk to her. After a little time the second defendant's car came and ran into the plaintiff's car. The

plaintiff's car skidded and hit the right side of the first defendant's car which was damaged on its right rear side. It swerved, still on the tar. From the bend to where the accident occurred was a considerable distance, and in the opinion of the witness the second defendant could easily have braked. The witness saw the lights of the second defendant's car when it came round the corner. After the accident the woman ran away. Most of the damage to the plaintiff's car was at the rear, and there was only slight damage to the front. The windscreen was damaged on the second defendant's car, and the only damage to the first defendant's car was that the tail light was broken.

In cross-examination the witness said that the plaintiff was travelling at 20 m.p.h., and that the first defendant's car was some distance in front - 300 yards or so; he was able to see the red lights as the car braked. He did not agree that the plaintiff hit the car in front because he was speeding. He said it was because of the impact of the second defendant's car on the plaintiff's car which threw it forward on to the first defendant's car. The indicator lights on the first defendant's car were not on, only the brake lights. He estimated that the speed at which the second defendant was travelling was 45 miles per hour.

In re-examination the witness said that the distance between the plaintiff's car and the first defendant's car was about 16 feet at the time the cars were stationary.

P.W.3, Harrison Kunga, was coming home from work and was on the right-hand verge of the road near where the accident occurred. He saw the first defendant's car suddenly stop and then the plaintiff's car came "braking and squealing" and stopped. Then the second defendant's car came almost immediately and crashed into the plaintiff's car which, in turn, crashed into the first defendant's car. The witness said he was the man who gave the writing material to the plaintiff. He heard the driver of the first defendant's car say that he did not want the police called. In his opinion, the second defendant's car was driven at a greater speed than either of the other cars; it did not stop but came straight and crashed into the plaintiff's car. There was no sound of braking before the second defendant's car crashed into the plaintiff's car. He saw cyclists on the road coming from the direction of Thyolo.

In cross-examination, the witness was asked about times and speeds, and I am satisfied that no reliance should be placed on his estimates of actual speeds or indeed times, other than that he knew when a car was going fast and when a car was going slow, and that something happened in a very short time. Apart from this reservation I was impressed by the evidence of the witness. He appeared to me to be disinterested, his opportunity to observe the accident was good, and in my opinion he was truthful.

P.W.4, Traffic Constable Mvula, was the police officer who visited the scene of accident. He said that the plaintiff's vehicle Registration No. BC 9432 was on the tarmacadamised road and was the nearest car in the Bvumbwe direction. Next came the first defendant's vehicle Registration No. BD 8544 which was facing into the bush; half of the vehicle was on the tarmac and the front part was on the verge. The second defendant's vehicle Registration No. BC 8144 was nearest to Limbe. The plaintiff's vehicle was damaged both at the front and the rear. The first defendant's vehicle was damaged at the rear only, and the second defendant's vehicle at the front only. The accident had been reported by Mr. Mhango by telephone.

Two witnesses were called for the first defendant. The first of these, Petersen Julius Vumbwe, was the driver of the first defendant's motor car. He said that he was driving to Bvumbwe from Limbe in the defendant's vehicle which he is allowed to use to go to his house. When he came to a point near Newlands, he decided to stop because he wanted to urinate. Before he stopped, he looked in his mirror and saw the plaintiff's car travelling very fast behind him. He went down the gears and put out his left indicator and also made a hand signal. He then stopped; just when he stopped, he heard a bang, the plaintiff's vehicle had hit him. There was another vehicle behind it. He was not carrying a passenger because he is forbidden to do so and he would be dismissed if he did so. Mr. Kawombe came to the scene of the accident and he was the person who reported it to the police. The witness said that the plaintiff wanted to overtake him and then went on to say that his car was still moving a little when it was hit. This would appear to contradict or partially contradict the earlier part of his evidence. He said that his vehicle was entirely off the tar and all its wheels were on the dirt verge.

In cross-examination, the witness said that after the accident his car was nearest to Thyolo and that the police constable was wrong when he said that the plaintiff's car was nearest to Thyolo. The witness said that after the accident his four wheels were still on the dirt verge and that the police constable was wrong when he said that half of the car was on the tar. He did not see the other car. Prior to the accident the road was clear and it would have been possible for the plaintiff to pass him. He did not check the damage to the motor vehicles after the accident because he was confused. The witness said that he finished work at 6.55 p.m. and that the accident took place at about 7.15 - 7.20 p.m. He does not drink. He denied saying that the matter should be settled without reference to the police. In answer to counsel for the second defendant, the witness said he was consistently travelling at about 25 m.p.h. and then that it was about two miles from his place of work to the scene of the accident. He explained the length of time which passed from his leaving work to the time of the accident by saying that he was buying things in town. The plaintiff's car was doing about 45 m.p.h.

Mr. Robert James Kamwambi was the second witness for the first defendant. He is also its employee. He was going to Blantyre from Chigumula and he stopped at the scene of the accident. He saw that the plaintiff's car was the nearest to Thyolo and it was damaged on the front left side. Next came the first defendant's car which was damaged on the right rear side. He talked to both the plaintiff and his brother and both of them knew him very well and there was a connection between his family and their family. He reported the accident to the police in Limbe.

The second defendant gave evidence. He said that on the evening in question he was going to Chigumula, there were three cars in front of him. He met the cars at I.T.G. in Limbe and they all went out on the Thyolo road. At a point near Newlands he heard a noise. He applied his brakes because he saw that the plaintiff had stopped. No signal had been given. His brakes worked, his car slowed down and his passenger was thrown forward. He saw the driver of the first defendant's vehicle after the accident and he was alone. He was unable to express an opinion whether the driver was sober or not.

In cross-examination the witness said that he had been driving for six years and on the evening in question he was driving at a speed of 30 m.p.h. or less. Before the accident he was 10 feet behind the plaintiff. The plaintiff gave no signal that he was to

stop and stopped because he hit the car in front of him. The plaintiff had not applied his brakes and if he had done so the witness would also have stopped. He did not tell the plaintiff that his brakes had failed. The witness agreed that he had written Exhibit P1. He said he wrote it because he was called to the plaintiff's office and that the plaintiff had suggested to him that he should write such a letter saying that the driver of the first defendant's car was to blame for the accident. He wrote the letter at his own house. The plaintiff was at his office when he told him to write it. He said the contents of the letter were true. He repeated that the accident was caused by the plaintiff hitting the first defendant's vehicle. After the accident the plaintiff's vehicle was in front nearest to Thyolo. The first defendant's was next and the witness's behind it. He did not see clearly whether half of the first defendant's car was standing on the tarmac. Prior to the accident he did not see the first defendant's car, he saw only the plaintiff's car. He would not have heard the sound unless the plaintiff's vehicle had struck something and that something was the first defendant's vehicle. The sound he heard was not the sound of braking. It was after the accident that he came to know that the plaintiff's car first hit the first defendant's car. He went on to say that the contents of the Exhibit P1 were the truth because in it he explained why the accident happened and when the contents of the exhibit were put to him paragraph by paragraph he agreed that they were true. The bonnet, windscreen, bumper and headlamps of his car were damaged. Finally he said in re-examination that he could not give complete details of the accident. He remembered the emergency and applying his brakes.

One witness was called for the second defendant, a Mr. Manyozo. He is the second defendant's partner in an ivory-carving business and they have been together for fifteen years. He was a passenger in the second defendant's car on the 13th October 1978 when it was going from Limbe to Chigumula. There were cars ahead. When the accident took place, the second defendant's car hit the vehicle in front because that vehicle stopped suddenly and gave no indication that it was about to stop. He heard a bang between the vehicle in front and the vehicle in front of that vehicle. The second defendant applied his brakes. Exhibit P1 was in the second defendant's handwriting and also the style of the letter is his. The second defendant was travelling at 25 m.p.h. and the plaintiff's car stopped after it was hit. The two vehicles in front were in an accident; there was nothing coming from the opposite direction.

I shall now evaluate the testimony. As I have said earlier, I was impressed by the evidence of P.W.3 and I think that he gave an accurate account of what happened. There were some differences between his evidence and that of the plaintiff but it seems to me that the importance to be attached to such differences is very limited indeed and in essence the plaintiff's version of what happened was corroborated by the witness. Again, I saw no reason to doubt the testimony of the plaintiff. He gave his evidence clearly and concisely and seemed to me to have a good recollection of what happened. I did not find P.W.2 as good a witness as P.W.1 and P.W.3.

I was not impressed by the evidence of Petersen Julius Vumbwe. His demeanour in the witness box was poor. He was dogmatic about the position of the cars and that his four wheels were on the dirt verge after the accident, and both of these pieces of evidence are clearly in contradiction to the constable's evidence. Again it seems to me highly improbable that he would wish to urinate a short while after he had finished work and commenced the drive home. The story about stopping was clearly an afterthought. Again there were many times that he seemed to me uncertain in his evidence.

The evidence of the second defendant was both evasive and lacking in certainty and he emerged shaken from cross-examination. He was generally uncomfortable under examination and he was not consistent in his evidence. His account of the accident appeared to ebb and flow in different directions. The kernel of his evidence was the account of hearing the plaintiff's car bang into the car in front of it. This is contradicted by Exhibit P1. When the contents of the exhibit were put to him he was highly uncomfortable; he had agreed that its contents were true and they were of course incompatible with his evidence. At this stage of his evidence it was difficult to know what he was saying. It was suggested to him by his counsel that this letter emanated from Mr. Mhango but the witness did not really agree with this and in any event he mentioned a number of times that its contents were the truth.

I accept the plaintiff's version. I find that the first defendant's car was being driven by its servant Mr. Vumbwe along the Limbe/Thyolo road in the direction of Thyolo when at about 7.20 p.m. and at a point near the Newlands turn-off it stopped suddenly without the driver indicating that he wished to do so. I am satisfied that it came to a stop on the left lane of the tarmacadamised part of the road. I find that the plaintiff with difficulty managed to bring his car to a halt and did so about 10 feet behind the first defendant's car. I further find that the three motor vehicles were being driven close to one another and that the second defendant was travelling fairly close behind the plaintiff and ran into his car. The plaintiff's car was then thrown forward and struck the first defendant's car. The plaintiff's car was damaged both at the front and rear. I also find that the whole affair happened very quickly and that there was a concurrence in point of time of the acts of both defendants. Indeed, there is no real dispute that whatever happened happened very quickly.

In my view the driver of the first defendant's car and the second defendant were both negligent. The driver of the first vehicle owed a duty to other road users not to stop in the middle of a busy road, particularly so when other vehicles were travelling very closely behind him. If he were going to stop, he should have ensured that it was safe to do so. He also owed a duty to indicate that he was going to stop. In my judgment, the driver of the first defendant's car was clearly in breach of the duty he owed to others and I find that he was negligent.

The second defendant similarly owed a duty to users of the road and I think he was in breach of his duty in that he failed to keep a proper lookout. I think he kept some lookout but he did not pay sufficient attention to be able to take evading action. He was travelling fairly closely behind the plaintiff and in those circumstances he should have kept a vigilant lookout - so close behind that he was unable to apply his brakes; if he had applied his brakes I would expect skid marks and the only skid marks were those of the plaintiff. I would agree with his counsel that like the plaintiff he was put into a dangerous situation, but he was negligent in failing to keep a proper lookout prior to the dangerous situation arising and so the facts are to be distinguished from those in Jones v. Boyce (1816) 1 Starkie 493 and other cases dealing with a dilemma created by another's negligence. I also find that he was travelling over-close to the plaintiff's car but such has not been pleaded as a particular of negligence.

In the instant case causation is of importance, and I remind myself of the words of Lord Reid in Stapley v. Gypsum Mines Ltd. (1953) 2 All E.R. 478 at 485 and 486:-

> "The question must be determined by applying common sense to the facts of each particular case. One may find that, as a matter of history, several people have been at fault and that if any one of them had acted properly the accident would not have happened, but that does not mean that the accident must be regarded as having been caused by the faults of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and to regard that one as the sole cause, but in other cases it is proper to regard two or more as having jointly caused the accident. I doubt whether any test can be applied generally."

Smith v. Harris (1939) 3 All E.R. 960 is again a useful case, a decision of the Court of Appeal in England in which it was held that where there had been a concurrence in point of time of the negligence of both defendants they were both responsible for the damage.

I have borne in mind that each case of negligence falls to be decided on its own facts. I also bear in mind that while what used to be known as the doctrine of last opportunity is no longer a rule of law it can prove a useful test to apply when deciding, as a matter of fact, whether an accident was caused by the fault of one or more of the defendants. In the instant case it appears to me that the negligence of both defendants was so concurrent in time that the test is of little use. I have no doubt but that the negligence of the driver of the leading vehicle was the principal factor in causation, and that the negligence of the second defendant was an approximate cause also albeit to a lesser degree. All I have to decide at this stage is whether the accident was caused by the fault of one or both, and I am fully satisfied for the reasons which I have given that it was caused by the fault of both and both were responsible for the accident.

I now turn to the question of damages. I have had evidence from the plaintiff, from an employee of the garage which carried out the repairs, and from the manager of the car hire firm. I accept it. The plaintiff sought estimates from two firms and had the car repaired by the garage which submitted the lower estimate. That estimate was for K865.57, but the garage, due to not having spare parts, was able to do part of the repairs only and at a cost of K479.94. The plaintiff hired a motor car for use while his car was being actually repaired at a cost of K519.45. I find that the special damage is K999.39. He also claims general damages. I will allow him as general damages what it will cost him to have his car fully repaired, and I can best assess this by deducting the cost of the repairs done from the amount estimated for repairs. I find a figure of K479.94 and I award him this amount as general damages.

I award the plaintiff K1,479.33 against both defendants.

There is a counterclaim by the first defendant against both the plaintiff and the second defendant for K75 for damage suffered to its car. In so far as the counterclaim against the plaintiff is concerned it is dismissed with costs against the first defendant. The counterclaim in so far as it concerns the second defendant is not denied, there is no pleading back. Consequently the first defendant is entitled to judgment for K75 and I award it against the second defendant. I asked counsel for the first defendant why he had not applied for judgment against the second defendant at an earlier stage, and he told me he had not done so because he did not want to antagonize the second defendant. I will give the first defendant

its costs of the counterclaim against the second defendant but only to the date upon which it was served with the defence of the second defendant.

There will accordingly be judgment for the plaintiff for the sum of K1,479.33 and costs against both defendants and judgment for the first defendant against the second defendant for K75 and limited costs as above stated.

Pronounced in open court this 20th day of February, 1980, at Blantyre.

J. J. SKINNER
CHIEF JUSTICE