IN THE HIGH COURT OF MALAWI AT BLANTYRE

CIVIL CAUSE NO. 685 OF 1979

BETWEEN: ABRAHAM ARON PENDAME .. .. .. PLAINTIFF

- and -

BILLY POWDER .. .. 1ST DEFENDANT

- and -

A. S. A. BHIMANI .. .. 2ND DEFENDANT

- and -

ABDUL HAMID DAUDI .. .. THIRD PARTY

Coram:

Banda, J.
For the Plaintiff : Mbalame, Chief Legal Aid Advocate
First defendant, not present : Unrepresented
For the 2nd Defendant : Msiska of Counsel
For the Third Party : Mutuwawira of Counsel
Official Interpreter : Sonani
Court Reporter : Mazibuko

J U D G M E N T

This action arises from a motor accident in which the plaintiff's car was damaged as a result, it is alleged, of the first defendant's negligent driving of a car belonging to the second defendant.

The facts relating to the accident are not greatly disputed and they are as follows: The plaintiff was on the material day, lawfully driving his motor car, Peugeot BC 6163 along Kamuzu Highway in Limbe when near the market street the first defendant hit his car from behind. It is conceded that at the material time the first defendant was in the employment of the third party. While the latter has conceded this fact he has, however, stated that the first defendant was not engaged in course of his employment when he negligently drove the second defendant's car.

It seems to me that there is no dispute about the issue of negligence and neither defendant nor the third party sought to deny it. The only issue I have to determine, therefore, is whether on the principle of respondeat superior, the responsibility for the negligence of the first defendant lies with the second defendant or the third party. Prima facie, where a relationship of master and servant exists the master is vicariously liable for the torts of his servant if they are committed in the course of employment or when they are committed within the scope of his authority. Clearly, therefore, the third party who was the employer of the first defendant at the material time, has the burden of proof of shifting his prima facie responsibility for the negligence of his servant, the first defendant.

The third party gave evidence and he stated that although the first defendant was his servant, he did not report for duties on the day of the accident and that he did not authorise the first defendant to drive the second defendant's car. The third party also conceded that the second defendant was his regular customer at his garage but he denied that the second defendant brought his car for repairs on the 4th December, 1978. The third party further stated that even if the second defendant had brought his car for repairs it was unlikely that he would have asked the first defendant to drive the car because the latter had no driving licence and that there was always a driver whose duty it was to drive customers' cars. This evidence was substantially supported by the evidence of D.W. 2 who is the mechanic foreman at the third party's garage. It is true that there are differences in their evidence but it seems to me that such differences as there are do not, in my view, affect the tenor of their evidence: that the first defendant did not report for duties on the 4th December, 1978; that the first defendant was not authorised to drive customers' cars and that the second defendant did not take his car for repairs to the third party's garage on the 4th December, 1978.

The second defendant, although present in court throughout, did not give evidence and his counsel informed the court that he was not calling any evidence and that he would rely on his submission of 'no case to answer' which he had earlier made at the close of the plaintiff's case. There is, therefore, no other evidence other than the third party's on how the first defendant came to drive the second defendant's car. The first defendant did not appear at the trial nor, it would appear, were any pleadings served on him. The third party has suggested that the first defendant drove the second defendant's car in

pursuance of a purely private arrangement between themselves unconnected with the first defendant's employment with him. The total evidence of the third party and his foreman remain uncontradicted.

Mr Msiska who appeared for the second defendant has forcefully submitted that the first defendant was at the material time, engaged in course of his employment and he submitted that were this not the case, the third party would not have accepted responsibility to repair the plaintiff's car. Mr Msiska also referred to the correspondence between the plaintiff's insurance company and the third party and he has urged this court to infer from this correspondence that the third party accepted full responsibility and that he could not have done so if the first defendant was not engaged in course of his employment. In my judgment and with due respect to Mr Msiska, his submission reflects a superficial review of the evidence on the issue. Both the plaintiff and the third party were in agreement on the question of repair of the plaintiff's car. The third party stated that he had accepted to repair the plaintiff's car in course of his business as a garage owner and that he could not refuse work from any customer. He made it clear, however, that the first defendant would be responsible for the costs of the repairs. The plaintiff's evidence on this issue was to the same effect. He stated that the third party had told him that the first defendant would pay for the costs of the repairs by deducting from his salary. That evidence, in my judgment, cannot be held to amount to an acceptance of liability. On the contrary, it is clear evidence of repudiation of any liability.

I direct myself to the burden of proof in civil cases which is proof on a balance of probabilities. I am satisfied that the third party and his foreman told the truth when they said that the first defendant did not report for duties on the 4th December, 1978, and I accept their evidence. Consequently I find that the first defendant did not report for duties on the 4th December, 1978. I also find that the third party and his foreman told the truth when they said that the second defendant did not take his car for repairs to the third party's garage on the 4th December, 1978.

I cannot see, in my judgment, how liability can attach to the third party in the absence of any evidence to show that the first defendant was driving the second defendant's car as a servant of the third party. I am satisfied that the third party has discharged his burden of proof of shifting his prima facie responsibility for the negligence of his servant. The owner of a vehicle is not only liable

if the driver is his servant acting in course of his employment but he is also liable if the driver is his agent. The driver will be the owner's agent if he drives the car on owner's business or purpose. In my view, the negligent driving by the first defendant occurred when he was acting for his own purposes and his own benefit unconnected with the third party's business. He drove the car purely as a result of a private arrangement between himself and the second defendant. I am satisfied that the act of negligence did not occur in course of his employment or within the scope of his authority. It was neither a wrongful act authorised by his employer nor was it a wrongful and unauthorised method of doing some act authorised by his employer. He was, as far as the third party was concerned, indulging in a floric of his own: London County Council v Cattermoles (Garage) Ltd., (1953) 1 W.L.R. 997.

I am satisfied that the first defendant was, when he drove the second defendant's car, the latter's agent and consequently the second defendant is liable for the negligence of his agent, the first defendant. The claim against the third party is dismissed with costs to be paid by the second defendant. I am, therefore, satisfied that the plaintiff has established his claim against both the first and second defendants.

On the question of damages, Mr Msiska, for the second defendant has submitted that the plaintiff cannot obtain special damages unless they have been quantified and that it is the general rule that particulars of special damages must be clearly pleaded. While what Mr Msiska says is true, one has got to consider the facts of each case and to see whether the facts relating to special damages have been pleaded with sufficient particularity. The function of pleadings is to make it clear to the opposite party what case he has to meet. In the present case, there are on the pleadings two quotations from two different garages and they were included in the affidavit of documents and were presumably inspected by the second defendant or his counsel. Mr Mbalame who appeared for the plaintiff submitted that damages could not have been pleaded with more particularity because no bill to pay was ever presented to the plaintiff. In my judgment, looking at the whole of the plaintiff's pleadings, I cannot help feeling that anyone looking at them must be aware that special damages were being claimed. The fact that damages cannot be assessed with certainty should not relieve the wrongdoer of the necessity of paying damages.

There is no evidence of the value of the plaintiff's car before and after the accident and how far its value has depreciated as a result of the accident. Equally, there is no evidence of whether as a result of the accident the plaintiff was put to any extra expense. In the circumstances, the only basis of any damage must be the costs of the repairs to the plaintiff's car. It is the plaintiff's evidence that although the third party attempted to repair the car, the repairs were not satisfactory and this is supported by the third party who stated that the plaintiff complained to him about the repairs done to his car. The purpose of an award of damages is to restore the injured party to the position in which he was before the damage occurred; it is to give him compensation for the damage, loss or injury he has suffered. As I have already indicated earlier in this judgment, there are two quotations about the estimated costs of repairs to the plaintiff's car. One is for K801 and the other is for K1,332.95. In my judgment, I would assess the plaintiff's damages at K1,200. There will, therefore, be judgment for the plaintiff in the sum of K1,200 with costs.

PRONOUNCED in open court this 30th day of May, 1981, at Blantyre.

R.A. BANDA
JUDGE