IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.440 OF 1987

BETWEEN:

S.B. ZIDANA.....PLAINTIFF

- and -

PROFESSOR B.B. CHIMPHAMBA.....DEFENDANT

Coram: MTEGHA, J.

Makhalira of counsel for the plaintiff
Msiska of counsel for the defendant
Manondo (Mrs), Official Interpreter
Longwe, Court Reporter

JUDGMENT

On 17th November 1984 there was a road accident along Ntcheu-Kasinje road when a motor vehicle, registration number BE 5855, driven by the plaintiff was in collision with a vehicle, registration number BE 2471, driven by the defendant.

As a result of the accident the plaintiff suffered severe injuries to his leg which has been shortened by about 3/4 of an inch. The plaintiff is therefore claiming damages against the defendant for negligence. The defendant denies negligence and pleads that the accident occurred because of the plaintiff's negligence or contributory negligence.

It was the plaintiff's evidence that on the material day he was driving his company car BE 5855 going home to see his father. He had with him, in his car, three brothers and one Brown Jiya. After Mphepozinayi there was a bend and as he was approaching the bend he saw a vehicle coming from Kasinje side going towards Ntcheu. It was a pick-up. As the pick-up was fast, he reduced his speed and drove to his far left. He was doing about 30 - 40 Kmph. Suddenly, the pick-up swerved to his side and collided with his vehicle. The time was about 5.15 p.m. It was his evidence that he could not avoid the pick-up because he was already on his side, but the pick-up could have moved to its left because there was room on that side. It was his evidence in chief that as he was going towards Kasinje, the road was ascending, but going towards Ntcheu, the road was descending.

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I will now revert to the evidence of the defendant, Professor Chimphamba. He told the Court that on 17th November 1984 his vehicle was involved in a road accident at Mphepozinayi. He was driving it himself. It was a pick-up, Datsun BE 2471. He had two passengers in the cab - his servants. The pick-up had carried bags of maize and mangoes. The load was heavy. He was doing a speed of about 40 kmph. It was his evidence that as he was approaching the bend, he was doing about 30 kmph and he approached the bend cautiously as usual. It was his evidence that he saw a saloon car screeching, he swerved to his left and stopped, but the saloon car hit him on the right side and the saloon was pushed back. He said that at that juncture, the road was narrow and that there was tall grass on either side of the road. He further went on to say that he had travelled on that road on numerous occasions. It was further his evidence that as he was entering the bend one of his servants screamed at the speed of the other vehicle, and it was too close to avoid the accident. He denied to have driven on the wrong side of the road. It was further his evidence that at the moment the road has been improved and that the tall grass and trees have been cut on both sides of the road. It was his evidence that after the accident the plaintiff's vehicle was pushed back because it was lighter than his vehicle.

I will now return to the plaintiff's evidence. It was the plaintiff's evidence that after the impact the plaintiff's leg was broken on two places on the femur and his brother had to pull him out. He was then taken to Ntcheu District Hospital and the following morning he was transferred to Blantyre.

It might be pertinent here to look at the evidence of PW3, Brown Lewis Jiya, whose evidence seems to have some bearing. He informed the Court that on 17th November 1984 he was a passenger in a vehicle driven by the plaintiff going to Kasinje from Ntcheu. In the vehicle there were four people: the plaintiff, his brother Frazer, another brother Kelly and himself. At Mphepozinayi there was a corner and the driver was slow. Then he saw another vehicle from the opposite direction coming fast and was fully loaded. It then suddenly left its side and hit the vehicle in which he was, damaging it extensively. All the passengers in the vehicle were injured except himself. After the impact he helped the plaintiff to go to the hospital. It was his evidence that it was he who took sprinters and tied the plaintiff's leg, and at that time the defendant was complaining about the damage to his car. In his evidence in chief, on this aspect, the defendant said that after the impact, he did not see the plaintiff but PW4, whom he had known during school days. By then the plaintiff was pulled out and he complained about his leg. PW4 then said "please Professor, help us", at which he asked "where were you rushing to?" He asked this question because no prudent driver could have driven in such a manner as the plaintiff did. Anyway, he borrowed a bicycle and rode to the trading centre where he hired a vehicle and collected everybody who was injured to go to the hospital, except Jiya, PW3. After dropping the injured at the hospital, he went to report to the Police at Ntcheu Boma. He then went to the scene where he found two Traffic Police Officers. They

did not ask for any statement because they did not have paper; he was, however, requested to give a statement at Lilongwe Police, which he did.

PW4 was Frazer Zidana, a brother to the plaintiff. He told the Court that on this particular day he was in a motor vehicle driven by his brother. They were four in the vehicle. At Mphepozinayi, as they were driving, there was a vehicle which was coming from the opposite direction. This vehicle hit them on their front right hand side and they were squeezed inside. He and his friends managed to get out, but the plaintiff was inside, crying "my leg, my leg". It was his evidence that the other vehicle from the opposite direction took their side and was driving fast. This witness further went on to say that after they came out of the wreck and his brother had been pulled out, he noticed that the defendant, whom he had known for years, was the driver and he said to him, "Professor, you have injured us", to which remark the defendant said "sorry", and he went on to check his vehicle. He went on to say that he could not recognise the vehicle which took them to the hospital because blood was oozing from his face. It was further his evidence that he met the defendant once after the accident and the defendant wrote him a letter dated 29th January 1987. This letter was produced as Exh.P5. It might be prudent if I reproduce out this letter. It states:

> "This is a follow-up of the telephone conversation I had with you concerning your brother Sanderam Bisani Zidana... The line was faint and it was impossible for us to continue the conversation. I was saying that I heard from some sources that your brother's health is not good as a result of the accident on November 17, 1984, in which you and I were involved.
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> I am surprised to learn about this now because I met with you in Ntcheu early last year you told me that your brother had recovered from the injuries he sustained on November 17, but that, unfortunately, he was involved in yet another car accident and sustained injuries, apparently on the same leg. I was, as you may recall, shocked to learn that he had within a short period of time sustained injuries arising from two separate incidents.
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> Perhaps you will be kind enough to explain to me to what extent your brother's second car accident contributes to his present poor health."

It was PW4's evidence that this source of information was not given by him since they only met once after the accident.

The first defence witness was Mr. John Bernet, an employee of the defendant. It was his evidence that on this fateful day he was in the front of a pick-up with another employee, Martin Roderic, driven by the defendant. The vehicle was loaded with bags of maize and mangoes and the defendant was not driving fast. It was his evidence that at the scene of the accident the road was curving and there was bush on either

side of the road. He did not therefore see the other vehicle, but soon before the accident, he saw the other vehicle coming very fast and hit them on the right front light. It was his evidence that after the accident, they got out of the vehicle and the defendant went to assist the occupants of the other vehicle. He tied the leg of the plaintiff and went to fetch a vehicle which took them to the hospital at Ntcheu Boma. It was his evidence in cross-examination that he could not see the other vehicle because it was at a curve. However, after being pressed in cross-examination, he said that he saw the on-coming vehicle, but that his boss, that is the defendant, was fast and could not avoid the accident. He denied that a vehicle had passed the two vehicles after the accident going towards Ntcheu.

This then is the evidence before me as far as the cause of the accident is concerned.

As far as damage is concerned, there is no dispute that all the passengers in both vehicles had some minor injuries except the plaintiff who had severe injuries. He told the Court that he broke his leg in the accident and was taken to Ntcheu Hospital. The following day, he was taken to Queen Elizabeth Central Hospital in Blantyre where Dr. Ngwira attended to him. He was in hospital up to February 1985, a period of over three months. He went on to say that after he was discharged he was sent to Harare for special treatment. Dr. J.A. McLean sent him there. In Harare he was attended by Dr. Bhagat. To substantiate his story Dr. Joan McLean was called as PW2. It was her evidence that in February 1985 the plaintiff went to see her because he had pain in his leg following a road accident in which he broke his right femur. He had already been treated at Q.E.C.H. As a result, she referred him to Dr. Bhagat in Harare because his leg was short. She got a report from Harare, dated 3rd April 1985. This report, inter alia, states:

> "Local examination of the right leg: The leg is kept in an external rotation of approximately thirty degrees. There is about one and a half inch shortening in this leg. The true shortening is approximately just about one inch. Clinically, the fracture is firm and the knee function is reasonably satisfactory. Xray taken at Harare shows that the fracture is in its advanced healing stage but not consolidated enough to permit weight bearing without any form of support. I have advised him that one should not, at this stage, do anything to interfere with the fracture healing and that he should accept the shortening which can be compensated by shoe raise eventually.
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> I have also advised him to have ischial weight caliper which he should wear and take weight through the right leg which will gradually make his leg more functional. He should be advised to wear the caliper for at least four months."

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She went on to say that in July 1985 he went back to Harare and he was seen by Dr. Bhagat again. She got a report, dated 23rd July 1985. This letter states:

> "I send him on 23rd July for a review of his right comminuted fractured femur. Clinically and radiologically the fracture has now very well united with unfortunate loss of leg length of approximately three quarters of and inch. The latter was to be expected in view of his comminuted nature of the fracture. It appears that he has been walking without the aid of caliper recently.
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> Now that the fracture is consolidated, he may gradually discard the caliper and use one walking stick.
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> For his shortening, I think a suitable raise is necessary on that side."

She went on to say that his disability is moderate.

This then is the evidence concerning the injury.

There is no dispute at all that on this material day the vehicles driven by both the plaintiff and the defendant collided. As a result of this collision, the passengers, especially the plaintiff, suffered severe injuries, resulting in his leg being shortened by three quarters of an inch. Both parties contend that it was the other party that took the other side of the road. This is a civil case and the plaintiff is only required to prove his case on a preponderance of probability.

The Court visited the scene.

It is a fact that when one is driving from Ntcheu Boma towards Kasinje, the road descends and there is a bend curving to the left. When one is driving from Kasinje direction, the road initially descends, but ascends immediately at the beginning of the bend which curves to the right. It is also a fact that the road at the spot is not flat, but is at a gradient so that a person driving from Kasinje direction will be on slightly higher ground than the one driving from Ntcheu direction. In other words, if both vehicles parked side by side, the one from Kasinje direction would be slightly on higher ground than the one from Ntcheu direction.

It has been submitted by both counsel and, in my view, rightly so, that this case depends purely on the facts. Both parties allege that it was the other who was in the wrong. Mr. Msisha, however, has submitted that the plaintiff's evidence is dented by inconsistencies. He submits that the plaintiff contended that he was driving uphill, while in actual fact he was descending. The plaintiff contended that the defendant did not render any assistance to the plaintiff, but was more concerned with the damage to his vehicle. But in actual

fact it was the defendant who tended the plaintiff's leg and went to hire a vehicle which took the plaintiff to the hospital at Ntcheu. Mr. Msisha therefore contends that the plaintiff's evidence, and that of his witnesses, was grossly exaggerated. It was his submission that the evidence of the defendant was emphatic and without any exaggerations.

On the other hand, Mr. Makhalira has submitted that despite the fact that the plaintiff said he was ascending while in actual fact he was descending, his evidence is impeccable. It was Mr. Makhalira's contention that all the plaintiff's witnesses were consistent that it was the defendant who was driving fast and that he took their side of the road, and hit them on their correct side.

My observations on these submissions are these. It does not follow that if a person has told a lie in a matter relating to one thing, that person must necessarily be disbelieved in his testimony in respect of all other matters - Kamlangila v. Kamlangila (1966-68) ALR (M) 301 at 313. Likewise, the fact that a witness is emphatic in the way he delivers his evidence does not necessarily mean that he cannot tell a lie in his evidence on one aspect of the matter to which he is testifying. Therefore, what the plaintiff said, that he was ascending while in actual fact he was descending, does not mean that he told a lie on all other issues. Similarly, the fact that the defendant was emphatic in his evidence does not mean he told the truth all along. In fact, in cross examination, he said that the Police did not record a statement from him on the scene because they did not have paper. This is clearly not correct. Am I entitled to disbelieve all his testimony? The answer is clearly in the negative.

Perhaps I should state the law here on this type of negligence. The rule of the road is that when two vehicles are approaching each other from the opposite direction, each must go on the left or near side of the road in order to allow the other to pass. Failure to do so, i.e. to go on the left, is prima facie negligence - Chaplin v. Hawes (1828) 3C & P.554. If one does drive on his off side or on the middle of the road, he must keep a better lookout and take more care than he would ordinarily do were he to drive on the near side.

Again, the duty of each person who drives a vehicle on a road is to use reasonable care so as to avoid causing damage to property which is on or adjoining the road. As Lord du Parch said in Searle v. Wallbank (1947) AC 341 at 361:

> "The truth is that at least on country roads and in market towns, users of the highway, including cyclists and motorists, must be prepared to meet from time to time a stray horse or cow.... The underlying principle of the law of the highway is that all those lawfully using the highway ....must show mutual respect and forebearance. The motorist must put up with the farmer's cattle: the farmer must endure the motorist."

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The duty of a motorist is to take reasonable care, such as keeping a good lookout, avoiding excessive speed, proper control of his vehicle and observing road signals.

What was the position in relation to the drivers in this case? There is no doubt that the road at this point was curving. Having visited the scene of the accident the road is wide enough for vehicles to cross each other properly. But as I stated earlier on, the road at this place is slanting. The result is that vehicles coming from Ntcheu going towards Kasinje tend to keep to the correct side on this curve; but vehicles coming from Kasinje going towards Ntcheu, because of the inclination, also tend to move on the same side, i.e. to their right. The result is that if the drivers are not careful, an accident could easily occur because vehicles tend to move on that side of the road irrespective of where they are coming from.

It is the evidence of both parties and their witnesses that it was the other vehicle that was fast and took the other side. From the evidence which is before me I come to the conclusion that taking the conditions of the road at this place, both drivers were driving at a speed which was fast having regard to the condition of the road. Both of them were therefore negligent in this respect.

I now come to the question which is very important in deciding this case, and thus to decide who was in the wrong. The evidence before me is this. The plaintiff states that the defendant took his side; while that of the defendant is that the plaintiff took his side. I have pointed out earlier on that the rule of the road is that on-coming vehicles must keep to the left in order to avoid a collision. In the present case I am inclined to believe the evidence of the plaintiff for a number of reasons. Firstly, the plaintiff's witnesses, especially the evidence of Mr. Jiya, was clear and unambiguous and, on the totality of the evidence, I prefer the evidence of the plaintiff. Secondly, after the accident, the plaintiff's vehicle was on its correct side and I do not accept the evidence of the defendant when he stated that the plaintiff's vehicle was pushed to its correct side by his vehicle. The point of impact must have been on the plaintiff's correct side. Thirdly, as I pointed out earlier on, vehicles coming from Kasinje side tend to move on the right hand side at this corner because of the inclination. I am of the view that that is exactly what the defendant did - he took the plaintiff's side of the road. In my considered opinion the defendant was 75% to blame and the plaintiff was 25% to blame for the accident and I enter judgment accordingly.

I now turn to the question of damages. I will first of all deal with liquidated damages. The plaintiff claims, firstly, the sum of K147.60 as cost of transport expenses incurred by his wife in travelling to hospital from Bangwe, three times a day for 82 days. He is also claiming K5.00 cost of Police Report. These are special damages. As such, the rule is that they must strictly be proved by congent evidence.

In case of transport costs, apart from the fact that there is an arithmetical error, the figure being inflated by 100%, there was no evidence to support this claim. The wife did not come to give evidence and neither were there any documents to support the claim. The same applies to the Police Report. There is no receipt and the report itself was not tendered and neither did the maker of the report come to give evidence. These claims cannot therefore succeed.

I will not turn to the question of general damages. The plaintiff who was born on 24th October 1954 suffered, as a result of the accident, double fracture of the right femur and his leg is shortened by about 3/4 of an inch. He certainly has permanent disability, but to what extent is not clear in the evidence which is before me.

In relation to general damages, it was pointed out in the case of British Transport Commission v. Gourley (1956) AC 185 at 206 that:

> "Secondly, there is general damages which the law implies and is not specifically pleaded. This includeds compensation for pain and suffering and the like and if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future."

In assessing damages of this kind one has to take into account the type of injury and all the surrounding circumstances. As Singleton L.J. said in Waldon v. War Office (1956) 1 WLR at 54-55:

> "A judge in assessing damages draws upon his own experience. Where does he get that experience? From knowledge of other judges' decisions as to amount; from knowledge of what is said in this Court and the House of Lords and from his ordinary experience in life. It would not be wrong for counsel appearing in such a case to say to a judge: 'I have here the report of a decision of the Court of Appeal on an appeal on damages in a case very like this one'; and I have another case ....."

I have looked at some cases cited by counsel and I have also looked at some cases which have not been cited by counsel. I am also mindful that I have found the plaintiff to be 25% in the wrong. In the case of Magombo v. Attorney General, Civil Cause No.332 of 1982, I awarded a sum of K1,000 for paid and suffering. In Ellen Nakanga v. Automotive Products and Wilson Pillane, Civil Cause No.880 of 1980, Skinner, C.J., as he was then, awarded a sum of K3,000 for pain and suffering and loss of amenities - she had a scar on the face as a result of a road accident. In the case of Sagawa v. City of Blantyre, Civil Cause No. 147 of 1985, I awarded a sum of K6,000 for pain and suffering. In that case the plaintiff's leg was

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shortened by 1 cm. In the case of Chavura v. Chibisa and Halls Garage, Civil Cause No. 84 of 1985, Mbalame, J. awarded a sum of K4,500 for pain and suffering, dislocation of ankle and shortening of the leg with a 15% disablement. I am aware that these cases are just a guide of the thinking of the Courts in this country. Each case has to be assessed on its own merit. In the present case, I consider a sum of K5,000 to be adequate compensation for pain and suffering and loss of amenities. I accordingly enter judgment in the sum of K5,000 for the plaintiff. He will also have costs for this action.

Pronounced in open Court on this 16th day of January, 1991 at Blantyre.

H.M. Mtegha
JUDGE