20 Jan 1992

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.29 OF 1990

BETWEEN:

C.E. MKWENDE ..... PLAINTIFF

AND

MOTOTECH ..... DEFENDANT

CORAM: UNYOLO, J.
Nakanga, Counsel for the Plaintiff
Likongwe, Counsel for the Defendant
Kadyakale, Official Interpreter
Phiri, Senior Court Reporter

JUDGMENT

The plaintiff in this action claims damages from the defendant for negligence.

The plaintiff was at all material times the owner of a motor vehicle Registration Number CA 8705, Peugeot 504 Saloon. He works for the National Insurance Company Limited, shortened NICO, in Lilongwe as an accountant. The defendant is a firm carrying on the business of a garage in Lilongwe. Formerly the garage was known as Nunes Panel Beating Services Limited.

The action arises from the following facts. On 18th July, 1989 the plaintiff went to Likuni Hospital in his car above mentioned to see a relation who was hospitalised there. His journey back turned out to be ill-fated. He had an accident. He ran into a road sign. The car was damaged and could not move. This was after dark. The plaintiff then simply pushed the car to a nearby house so it would be kept there overnight. The next morning he reported the accident to his insurers, the very company he works for and told them he wanted the car to be repaired at the defendant's garage. The insurers accepted this and communicated with the defendant who then caused the car to be towed to the garage. It appears

that it was actually on 20th July, 1989 that the car was towed to the garage. The plaintiff was however not present at that time nor was anybody from NICO. As the adage goes, "it never rains but it pours" meaning often times troubles do not come singly but in numbers. This was to be true of the plaintiff. The garage went up in flames in the morning on 25th July, 1989 and several customers' motor vehicles including the plaintiff's car were damaged beyond economic repair. The plaintiff contends in this action that the fire was caused by the negligence of the defendant, its servants and/or agents. The particulars of the alleged negligence are set out in the statement of claim. The plaintiff further and in the alternative relies on the doctrine of res ipsa loquitur. On its part the defendant denies being negligent or at all. Further the defendant denies liability relying first on the Fires Prevention (Metropolis) Act, 1774 (an English statute but generally applicable to Malawi); secondly on a standard exemption clause said to be applicable to all motor vehicles brought to the garage for repairs. Finally the defendant pleads that the plaintiff has already been fully recompensed for the loss by his insurers who paid him the sum of K8,000.00.

I must now examine the evidence to determine whether the defendant was guilty of negligence as contended by the plaintiff. As was observed by Bowen, L.J. In Thomas v. Quartermane (1887) 18 QBD 685 at 694:

> "....there is no such thing as negligence in the abstract; negligence is simply neglect of some care which we are bound by law to exercise towards somebody."

Lord Porter in Riddell v. Reid (1943) A.C. summed it as follows at 31:

> "negligence is the failure to use the requisite amount of care required by law in the case where a duty to use care exists."

And Lord MacMillan in the celebrated case of Donoghue v. Stevenson (1932) A.C. 562 put it thus at page 618-619:

> "the law takes no cognisance of careless-ness in the abstract; it concerns itself with carelessness only where there is a duty to take care and where failure in that duty has caused damage. In such circumstances

> carelessness assumes the legal quality of negligence and entails the consequences in law of negligence. ...The cardinal principle of liability is that the party complained of should owe the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty."

Referring to the present case there can be no doubt that the defendant had a duty to take care of the plaintiff's car. The car was brought in for repairs and the defendant accepted it on that basis. There was therefore a contractual obligation to take care of the car. And even where there is no contractual relationship the "neighbour principle" exploded in the Donoghue v. Stevenson case may be brought into play. On this aspect Lord MacMillan observed -

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour... persons who are so closely and directly affected by my act that I ought reasonably to have them in my contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".

In short the defendant in the present case clearly had a duty to take care of the plaintiff's car. See also Hollier v. Rambler Motors (AMC) Ltd. (1972) 1 All E.R. 399. Now the crucial question is whether the fire was the result of negligence i.e. a failure or neglect on the part of the defendant to take care as prescribed by law; thus committing a breach of duty.

There were two watchmen on duty at the garage on the material day. One of them, Alufeyo Morris, gave evidence. He was DW1. He said that at dawn he saw smoke in an upstairs room, directly above the workshop. He then went closer to see what was the cause. He said that all he saw was smoke and before long he noticed that the smoke was getting dense. He decided to report the matter to the foreman of the garage. So he left, at about 6.00 a.m., and ran to the foreman's house, some two kilometres or so, and reported the matter. Without much ado the foreman asked the witness to join him in the car and the two drove to the garage. Flames were then visible. It was the evidence of this witness that he and the foreman filled two tins with water and tried to extinguish the fire. He said that they did this three times without avail; fire

raged instead. The foreman was not called. It however appears that having seen the situation was bad the foreman sent an sos message to the Lilongwe City Fire Brigade through the Post Office.

The plaintiff called a witness from the Lilongwe City Fire Brigade. The witness, PW2, was actually one of the men who went to the garage to extinguish the fire. PW2 said that it was at 6.47 a.m. when a telephone call came through from the Lilongwe Post Office informing them about the fire. Quickly they set out and were at the garage within three minutes. The witness said that on arrival he saw the garage was engulfed in thick smoke and further saw that a number of cars were burning. The team then set out its gear to extinguish the fire and as a matter of prudence they also sent for the fire brigade at KIA. PW2 said that it took almost two hours to extinguish the fire completely.

Now, the question is: what, for goodness sake, was the cause of the fire? This question has given me most anxious moments.

The defendant firm's manager, one Manuel Pinto, gave evidence in this case. He told the Court that the upstairs room where the fire apparently started was actually a store-room. It was used at the time for keeping seats, rubbers, lights, bumpers, and other items removed from customers' motor vehicles as they underwent panel-beating, spray-painting and/or general repairs. The witness said that there were no lights in there. He said that he did not know how the fire started. Answering one of the questions put to him in examination in chief the witness said that it was possible for someone from outside to throw a fire into the storeroom through the window. Finally I did not think the witness was serious on this point. To start with if he suspected any foul play one would expect him to report the matter to the police. There is no evidence that he did so. Secondly the watchman, DW1, flatly denied the possibility of foul play. On the facts the question of foul play must be ruled out. Indeed the defendant did not raise this issue in its pleadings.

PW2, the Fire Officer from the Lilongwe City Fire Brigade, told the Court that on return to his office after the fire was extinguished he dutifully compiled a report. The witness tendered the report in question, Exhibit P8. The report has a section headed "Particulars of Fire" and there the witness wrote -

> "The cause of the fire is not well-known but we suspect the cause to be an electrical short circuit and as a result fire engulfed trimmer and electrical workshops and later the fire spread to vehicles parked outside the workshop".

The witness repeated this observation in his concluding remarks in the report where he said -

> "The cause of the fire is not known but technically we suspect the fire started due to an electrical short circuit."

The defendant's insurers, Commercial Union, caused an investigation to be made as to the cause of the fire. The investigation was carried out by Messrs Dennis Cook, Insurance Loss Adjusters from South Africa. The actual report they submitted was not produced. In response to a request made directly by the defendant on 8th November, 1991 as the trial of this action was already well underway, the said Adjusters sent a fax, Exhibit D3, which appears to be a resume of the formal report. Paragraphs 3, 4 and 5 of the fax read as follows:

> "As you know we carried out detailed enquiries into the cause of the fire, but unfortunately, we were unable to ascertain precise details.
>
> The fire appears to have broken out at one end of the workshop adjacent to the stores area and it is possible that an electrical short circuit may have been the initial cause. Alternatively we also looked at the possibility of malicious damage, i.e. that the fire may have been caused by person or persons breaking a window and throwing inflamable material, but this was not proven.
>
> To conclude therefore, we advised our Principals, Commercial Union, that we were unable to ascertain the precise cause of the fire but that the most probable cause was an electrical short circuit leading to ignition of surrounding material."

On the same issue of the cause of the fire the plaintiff tendered in evidence Exhibit P6 viz a newspaper cutting of the Malawi News for the week July 29 - August 4, 1989. The Paper carried a front-page report on the fire at the defendant's garage. Having learnt of the fire the paper immediately sent a reporter to the garage and he had an interview on the incident with no other than the manager himself. The first three paragraphs and the last paragraph of the report read:

> "OVER K1 million Kwacha worth of property was destroyed by a raging fire at Lilongwe Mototech company premises recently.

> The fire, which is said to have been caused by an exploding electric bulk in the Mototech workshop, burnt out customers' and the company's cars and spare parts, besides the workshop building itself.
>
> Speaking to the Malawi News Agency, on Thursday, the manager of Mototech (formerly known as "Nunes Panel Beating Services Limited), Mr. Manuel A.B. Pinto, said the fire started raging at 6.00 a.m. last Sunday when there were only two watchmen on guard.
>
> The Mototech manager said he had no idea what caused the fire but quoted the guards as telling him that the bulbs had exploded in the workshop, after which vehicles caught fire".

I have said that according to the defendant's own witnesses the fire started in an upstairs room which was used as a storeroom at the time. Such, as I have indicated, was the evidence of both the watchman and Mr. Pinto, the Manager. I have said further that according to Mr. Pinto there were no lights in that room. I have further shown that the experts from South Africa who had been appointed on behalf of the defendant to investigate the accident herein gave "electrical short circuit" as the most probable cause of the fire. I have shown too that the Lilongwe City Fire Brigade also came to the same conclusion. It will then be recalled that I have ruled out foul play in this matter.

PW3 mentioned several situations which would result in or cause a short circuit. Put briefly a short circuit will invariably occur whenever and wherever the electrical wires otherwise known as conductors i.e. the positive and negative wires, come into contact. The Court was told that in most cases these are insulated with the result that the wires can move together without touching each other. It was however observed that the insulator can nevertheless get damaged, for example eaten up by rats thus exposing the wires. If this did happen and the wires came into contact that would bring about a short circuit. It was also said that water or moisture at those places where conductors pass and also aging of conductors could cause a short circuit. Further the witness said that when a short circuit occurs usually there is a spark which could cause a fire if there happens to be inflamable or combustible stuff around. Finally PW3 told the Court that there is always installed a circuit breaker namely a device which is supposed to switch off or interrupt the abnormal electric current whenever a short circuit arises. If all is in order the device is supposed to switch off automatically

and instantaneously thus averting a hazard. But if the circuit breaker fails the electric wires burn as a result of the excessive heat they are carrying at the material time. This may result in a whole building getting burnt. Such was the undisputed evidence of PW3.

Learned counsel for the defendant submitted that the plaintiff had failed to prove that the fire was caused by a short circuit. He said that the evidence relied upon by the plaintiff was mere conjecture. Frankly there is some force in learned counsel's submission. Put briefly what PW2 said in his report on the fire in Exhibit P8 was that the "suspected cause" of the fire was a short circuit. The report from South Africa used the words "probable cause". It must, however, be appreciated that both the storeroom and the workshop were extensively damaged in the fire. So too were the electrical installations and appliances themselves. To my mind it was almost impossible in these circumstances for anybody to give the cause of the fire with scientific certainty. In considering the reports it must also be appreciated that the reports in both Exhibit P8 and Exhibit D3 were submitted by people who are not "laymen" in matters of fire accidents. Further it must be appreciated that this is a civil case and the plaintiff need prove his case merely on the balance of probability. Considering all the facts I am satisfied that there is ample evidence establishing that the fire was caused by a short circuit.

In the statement of claim the plaintiff sets out the particulars of negligence wherein he accuses the defendant, inter alia, of, I quote:

"1. using unsafe electrical installations or appliances

2. failing to repair electrical installations or appliances

3. installing defective electrical installations or appliances

4. failing to check the safety of electrical installations or appliances."

In other words, the plaintiff attributes the short circuit to these matters. All these matters were put to Mr. Pinto during cross-examination. First it was suggested that the roof of the workshop was leaking and that this damaged the wiring system. Mr. Pinto's reply was that he did not know the roof was leaking. Further it was suggested that there were rats in the storeroom and that these caused damage to the wires. Mr. Pinto conceded that there were indeed rats in the storeroom. He went on to say that management however

did its best to try and eradicate the rats by using the drug known as rattex. Concerning the electrical installations at the garage Mr. Pinto told the Court that this was carried out by an engineering company called B & C some 12 years ago. He said that the defendant has its own electrician who checks the plugs etc. It was Mr. Pinto's evidence further that the storeroom was only done about 5 years ago. The witness said that throughout this long period there were no problems with the wiring system. Mr. Pinto conceded that apart from the minor jobs the internal electrician carried out e.g. checking plugs there B & C have not come back over the years to check the wiring system and/or the appliances. The building itself appears to be old. The defendant bought it in 1976. As I have indicated earlier PW3 emerged unshaken in his evidence that if the electrical installation (wiring system) and appliances were in order the circuit breaker, which must have been one of the appliances, should have tripped in the event of a short circuit and thus prevent the fire from breaking out. This did not happen in the present case. This to my mind is evidence that there was something amiss about the electrical installations and/or appliances. For about 12 years these were not checked by those who had installed them or any professionally qualified people. This was too long a period. The defendant had a duty to check such installations and apparatus thoroughly and regularly. An ordinary electrician was not enough and indeed according to Mr. Pinto the electrician the defendant employed simply checked plugs and kindred appliances. The other matters must have been beyond his competence. In short I find it has been proved that the defendant failed to check the safety of the electrical installations and appliances. I also find that the defendant used defective and unsafe electrical installations and appliances.

It was contended in the alternative that the defendant was negligent in that the defendant left lights on in the storeroom when it was not safe to do so and that he used defective bulbs. As I understand it, these averments are based on the newspaper story I have alluded to above. As I have indicated, Mr. Pinto, the defendant garage's manager, was quoted there as having said he had been told by the guards on duty that bulbs had exploded in the workshop after which the building caught fire. Mr. Pinto admitted in his evidence having been interviewed by a newspaper concerning the fire. He however denied having made the statement just mentioned. Mr. Pinto admitted having read the report when it came out in the newspaper. He was asked whether he did anything to refute the story if the same did not reflect the correct statement he made to the news reporter. In reply Mr. Pinto said he did not refute or attempt to refute the story. The reason he gave for this was that he was very busy doing other things at the time. This to my mind is a lame excuse. My conclusion is that Mr. Pinto made this statement and that was why he did not refute it when it appeared in the newspaper. Significantly,

even DW1, the guard, did not in his evidence refute the story. The picture which then emerges is that the lights were on in the storeroom throughout the night. The Court was told that the storeroom was locked up the previous day. The lights must therefore have been on until at dawn when the guards heard the explosion. The only inference to be made on those facts is that it was bulbs in the said storeroom, and nowhere else, which exploded, for according to the evidence, the smoke and the fire started in there. Mr. Pinto's own evidence was that the storeroom was used to keep miscellaneous parts removed from customers motor vehicles as they underwent panel beating, spray-painting and repair. These parts included seats, padding, mats, engines, batteries and tires, to mention only some. Mr. Pinto said that the storeroom was always full of these items. To my mind it was reckless to leave the lights on through the night in those circumstances. The risk of a fire, as the room got hotter and hotter, was great. So that even if one looks at the matter from this angle the inference to be drawn is that the defendant was negligent.

Learned counsel for the defendant addressed the Court at length on the application of the Fires Prevention (Metropolis) Act, 1774 and the protection it provides to the owners of premises in the event of a fire. But as was correctly pointed out by learned counsel the Act only applies where a fire starts accidentally. It does not apply where a fire is caused by negligence. See Filliter v. Phippard (1847) 11 QB 347 and Balfour v. Barty-King (1957) 1 All E.R. 156. The Act therefore does not apply to the present case having held that the fire was caused by negligence.

Next the defendant relies on a notice which is allegedly posted at the entrance to the garage. The defendant tendered in evidence a photo, Exhibit D1, which is said to be a photograph of the notice. Specifically the defendant relies on paragraph (a) of the notice which reads:

> "Please remove from your vehicle all personal belongings and any other valuable items. Mototech will not be responsible for loss, theft or any other cause whatsoever beyond the company's reasonable powers of control. Vehicles left in our premises are left at owner's risk".

Mr. Likongwe contended that the defendant was entitled to rely on this exclusion clause in the light of the contract the defendant made with the plaintiff for the repair of the car. Mr. Nakanga, on the other hand, contended that exemption clauses only apply in cases of contract, not tort cases as in the present case. With respect Mr. Nakanga is not quite right, in my view. Exemption clauses are applicable in

certain tort cases viz torts connected with a contract. The present case falls in this category and therefore an exemption clause may be relied on. See Chitty on Contracts, 23rd Edition, paragraph 721, page 323.

There is an avalanche of cases for the principle that liability for negligence may be effectively excluded if words are used which show that all damage howsoever caused, is to be understood within an exclusion clause or which place risk upon a plaintiff. See for example Gibaud v. G.E. Railways (1921) 2 KB 426, 437. It was held there that words like "any cause whatsoever" or "at own risk" will normally exclude liability for negligence. The normal rule is that the party affected by the exclusion clause will be bound if the other party has given him notice of the clause or what may reasonably be considered sufficient notice. See Richardson Spence & Co. v. Rowntree (1894) AC 217. Most of such notices appear in documents forming the contract between the parties or documents connected therewith. But some such notices may be printed and fixed on business premises. In such cases again it is sufficient if the party to be bound has had his attention drawn to the notice before or at the time of making the contract. See Watkins v. Rymill (1883) 10 QBD 178 and Olley v. Marborough Court Ltd. (1949) 1 K.B. 532, 549.

Referring to the pressent case it is common case that the plaintiff was not present the time his car was towed to the garage. As earlier indicated the plaintiff's insurers simply sent word to the defendant to go and tow the car to its garage and the defendant did so. There can therefore be no doubt that the plaintiff did not see the notice in question on that particular occasion, nor did his agents, the insurers. The defendant's case was that the plaintiff saw or must have seen the notice on two previous occasions when he brought this very car to the garage for repairs. The defendant relies, in other words on what has come to be known as "course of dealing" a phrase on which an inference of notice of conditions may be made based on previous course of dealing between the parties concerned. The plaintiff admitted having taken the car to the garage on a previous occasion. He said it was only once and not on two occasions. The plaintiff went on to say that he did not see the notice on that occasion. He denied it was there at that time. The learned authors of Cheshire & Fifoot Law of Contract have observed that the phrase "course of dealing" is not easily defined. But it is clear it must be a consistent course. See 9th Edition, page 150. The inference was made in Spurling v. Bradshaw (1956) 2 All E.R. 121 where a defendant had dealt with the plaintiffs who were warehousemen for many years. So too in McCutcheon v. David MacBrayne Ltd. (1946) 1 All E.R. 430 where the plaintiff's agent had dealt with the defendants on a number of occasions.

I wish to pause here and say something about the Notice relied upon by the defendant as containing an exemption clause

exempting it from liability in this case. The first observation I wish to make is that I thought that a visit to the garage would have been of some usefulness to the Court. Counsel for the plaintiff resisted this on the ground, first, that the plaintiff did not agree the notice existed on the occasion he took his car to the garage and, secondly, that the building has gone through repair and renovations more than once both before and after the fire; so that it is not quite the same building as it used to be at the time material to this case. The second observation is that the notice as it appears in the photograph (Exhibit D1) is confusing. It starts off in tiny and faint writing on top and then Extra Large, deep PRINTED words at the bottom, as follows:

NOTICE

NO ENTRY.
PLEASE USE RECEPTION
ENTRANCE.

And then there is a big, thick arrow pointing to the right, apparently where the reception entrance is. Be that as it may what, therefore, is clearly conspicuous and drawing everybody's attention is the notice barring entry and advising customers to turn to the right, and use the entrance to the reception. And I think it is common sense that the place where customers bringing in their motor vehicles for repairs are attended to is there at the reception. By and large it is there at the reception that contracts are concluded. One would therefore expect the notice containing any exemption clause(s) to be posted there. That would in my view give customers an opportunity to see such Notice and time to be able to read it. In other words I do not think that the notice relied upon by the defendant could be said to have been drawn to the plaintiff's attention in these circumstances. And indeed as I have pointed out earlier in order for a party to rely on a course of dealing as confirming notice of conditions it must be a consistent course, not an isolated case as in the present case. The defendant's contention on this aspect therefore fails.

Next it was contended that even if the defendant was found liable (as indeed I have just found) the plaintiff has suffered no loss in that he has been paid the sum of K8,000.00 by his insurers. It was contended that by this payment the plaintiff has been fully recompensed for his loss. Mr. Likongwe submitted that being liable the defendant's duty simply is to put the plaintiff back to his original position, restitutio in integrum, but not to enrich him. Learned counsel cited the case of Admiralty Commissioners v. S.S. Valeria (1922) 2 AC 242 in support of his submission. Pausing here it is to be noted that the plaintiff was indeed paid the

said sum of K8,000.00 by his insurers arising from the total loss of the car. He had insured the car comprehensively for this sum. I have read the Valeria case and I think that it can be distinguished. The facts were substantially different from those obtaining in the present case and no insurance monies or benefits were involved there. The issue whether or not monies received under a contract of insurance were to be taken into account in awarding damages came up in Parry v. Cleaver (1970) A.C. 1 and the court answered the question in the negative. Lord Reid said (at page 14):

> "As regards moneys coming to the plaintiff under a contract of insurace, I think that the real and substantial reason for disregarding them is that the plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the tortfeasor."

And Lord Denning, M.R. in Browning v. War Office (1963) 1 QB 750, a case also involving insurance benefits, at page 759 put it this way:

> "It would obviously not be fair to reduce his (the plaintff's) damages by reason of charitable gifts made to him ..... or by reason of insurance benefits which he has bought with his own money."

This was also the view of Banda, J. in Sharma v. National Bank of Malawi: Civil Cause No.874 of 1980 a decision I myself agreed with in Geddes v. Osman: Civil Cause No.283 of 1988 (both unreported). In the result, I find no basis for taking into account the K8,000.00 the plaintiff has received from his insurers.

The plaintiff claims special damages in the sum of K35,000.00 which he said represents the market price of the car. He bought the car second hand in 1985 for K12,000.00. It was a 1980 model; a Peugeot 504, as I have earlier indicated. The plaintiff said that the value of the car appreciated in that he had the engine overhauled towards the end of 1988. He contended that this gave the car a punch and additional life. Further the plaintiff told the Court that he installed a radio cassette in the car and had the seats and upholstery reconditioned. He said that all these things increased the value of the car substantially, hence his claim of K35,000.00. The plaintiff tendered in evidence Exhibit P9 viz a catalogue of selling prices of second hand motor vehicles prepared routinely by NICO's Claims Department for

the period May 1989 to May 1990. A total of four second hand Peugeot 504s, 1980 model were sold for between K22,500.00 and K27,000.00. On the same issue there was tendered in evidence on behalf of the defendant Exhibit D8 namely two newspaper cuttings of the Daily Times of 28th July, 1989 and 5th October, 1989. Two Peugeot 504s 1980 model were offered for sale there for K18,000.00 and K16,000.00 respectively. Also tendered was Exhibit D8A a valuation made by DW3, an Insurance Assessor, after allegedly inspecting the plaintiff's car after the fire. The document however contains obvious errors and I find it most unsafe to place any reliance upon it. I will ignore it in its entirety. Finally there was tendered an exhibit, Exhibit D3, given by Stansfield Motors who are the dealers of Peugeots in this country. In this document, dated 12th November, 1991 Stansfield Motors estimate the value of a Peugeot 504 Saloon, 1980 model as between K9,000.00 to K12,000.00, depending on overall general condition.

Pausing here, it is to be noted that special damages must as a rule be proved strictly. From the available evidence there can be no doubt the K35,000.00 claimed by the plaintiff is just an estimate or a guestimate, to use a modern colloquial term. I however accept his evidence that he had the engine of the car overhauled. I also accept that the seats and upholstery were reconditioned and that he fitted a radio cassette. I agree with the plaintiff that all these things, singly and corporately, enhanced the value of the car. It was disclosed in the cross-examination of the plaintiff that he spent a total sum of K11,400.00 to recondition the car and for the radio cassette. The plaintiff conceded that when this figure is added to the K12,000.00 he paid for the car the aggregate is K23,400.00. I have looked at the other estimates given in the various documents tendered in evidence and overall I think the figure of K23,400.00, above-mentioned, is just about the average of the divers figures before the Court. I indicated much earlier in this judgment that the car was brought to the defendant's garage because it had been involved in an accident. In fact it had to be towed. In Exhibit P3 the plaintiff's insurer's motor engineer who inspected and examined the car as it stood at the garage before the fire estimated the cost of repairs at between K3000.00 - K3500.00. Mr. Pinto on the other hand estimated the cost to be between K4,000.00 - K5,000.00. I will take the average of the lower figures and this comes to K3,725.00. This must be deducted from the sum of K23,400.00 abovementioned which represents the value of the car before the first accident. The net figure is K19,675.00. I award the plaintiff this sum for special damages.

I now turn to the claim for loss of use of the car. The evidence adduced by the plaintiff in support of his claim on this aspect was that soon after the car perished in the fire he was compelled to hire another car from one B. Kapito, now deceased. He said that he used the hired car up to the 24th

of May, 1990. The plaintiff did not however indicate how much he paid for the alleged hire nor did he produce any documents in support. I have my doubts about this being true. Observably if indeed the plaintiff incurred any expenses in hire charges such charges would in my view be claimable as special damages, not general damages. See Strathfillan v. S.S. Ikala (1929) A.C. 196. All the same there can be no doubt that the plaintiff has been deprived and has suffered loss of use of the car, for which he is entitled to recover damages. See Admiralty Commissioners v. SS Susquehanna (1926) A.C. 661. He has given convincing reasons why he has not up till now attempted to get another car advance. I bear in mind that even without the accident the plaintiff would have been deprived of the use of the car for several weeks as it underwent repairs at the garage. I further bear in mind the fact that the plaintiff used the car for personal as opposed to commercial purposes. Having regard to all the facts of this case I would, doing the best I can, award the plaintiff the sum of K2,000.00 as general damages for the loss of use of the car.

To conclude I find that the plaintiff has proved his case against the defendant and I enter judgment for him for the sum of K21,675.00 and costs.

PRONOUNCED in open Court this 20th day of January, 1992 at Blantyre.

L.E. Unyolo
JUDGE