IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
CIVIL CAUSE NO. 115 OF 1992

BETWEEN:

HAROLD KASANGU (MALE) ..... 1ST PLAINTIFF

IVNESS KASANGU (MRS) .....2ND PLAINTIFF
TAWINA KASANGU an infant by the 1st Plaintiff
(his father) and next friend .....3RD PLAINTIFF

THOKOZANI KASANGU an infant by the 1st Plaintiff
(his father) and ext friend .....4TH PLAINTIFF

FRANCIS KASANGU " " .....5TH PLAINTIFF

CHARLES KASANGU " ".....6TH PLAINTIFF

VINCENT KASANGU " " .....7TH PLAINTIFF

GERALD KANSALU an infant by the plaintiff
(his uncle) and next friend .....8TH PLAINTIFF

LENIA KALEMBALEMBA an infant by the 1st Plaintiff
(his uncle) and next friend .....9TH PLAINTIFF

AND

LEVER BROTHERS LIMITED .....DEFENDANT

CORAM: MTAMBO, J
For the Plaintiff, Msungama, Msungama & Co
For the Defendant, Nkhono, Wilson & Morgan
Official Interpreter, Gomani
Machine Operator, Mtunduwatha

JUDGMENT

The plaintiffs allege negligence against the defendants as manufacturers of an article of food, namely, stork margarine, and claim damages arising therefrom in respect of personal injuries, pain and suffering. They also claim costs of the action. The defendants deny negligence and aver that even if that were to be so the plaintiffs would still not be entitled to judgment because the negligence alleged did not cause the injuries of which they complain.

Before I refer to the evidence, let me quickly say a word about the law on this subject. In order to succeed in an action for damages for negligence, the plaintiff has to show that

the defendant has breached a duty owed to him to take reasonable care to avoid injuring him and that by reason of the breach he has suffered injury. That is the general principle of law. With reference to the instant case, a manufacturer of a product which he intends to reach the consumer in the form in which he sells it with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the product will result in an injury to the consumer's life, owes a duty to the consumer to take reasonable care: see Donoghue V. Stevenson (1932) A.C. 562; (1932) All E.R.1.

I think it is now necessary that I refer to the facts. The plaintiffs are members of a family. The first and second plaintiffs are the parents of the third, fourth, fifth, sixth and seventh plaintiffs and the eighth and nineth plaintiffs are their nephew and niece, respectively. They aver that the first plaintiff purchased four tubs of stork margarine from a shop where he was the supervisor; that on December 12, 1991, after their breakfast which comprised tea with milk and bread to which margarine was applied, they became unwell and suffered from various ailments which included dizziness, heart palpitations, sweating, abdominal pains and vomiting; that the first and second plaintiffs had noticed foreign matter on the surface of the margarine upon opening the third tub which had been sealed with a lid and foil; that they had seen similar substance on the surface of the margarine in the first and second tubs; that like the first and the second tubs, they scraped off the foreign matter and applied the margarine to the bread which they ate and subsequently became unwell, as I have already said; that they think the ailments were caused by the foreign matter on the margarine. They further aver that the product was manufactured and sealed by the defendants, which is not denied, and that it was their duty to ensure that their product was free from contamination and that the failure to do so was a breach of the duty which they owed towards them, and plead the

doctrine of RES IPSA LOQUITUR in aid. They also aver that the third tub, the contents of which were partly consumed, and the fourth tub were collected by the defendants for laboratory investigations. But when the two tubs were shown to the first plaintiff in court, he said that they were not those which were collected from him. He said they were of a different design. He said that the ones that were collected from him were not shaped into folds or corrugations along the bottom circumference - they were plain, he said.

The defendants led evidence from two witnesses. The first witness was Mr Smith Lance Chakachaka Nthindwa, a senior quality control technician, and perhaps the kingpin in the defendants' manufacture of eddible and personal care products. He gave a very elaborate account of the procedure involved in the manufacture of stork margarine. He said that the ingredients are first thoroughly tested and that a snap sample is taken both at the beginning and at the end of the production to ensure that the middle products are free from contamination. In addition, six samples are taken at radom from every batch of 25 cartons for laboratory tests against all food poisoning and food spoilage organisms and that the product is tasted by a cross-section of people before it is released. He also said that the tub would have a lid and a foil, to use his words, to be double sure that nothing is introduced into the product.

He said that after the plaintiffs' complaint, he first received two tubs and later a carton of tubs from which it was alleged the two tubs had been taken. He said that he was startled by the difference in the designs of the tubs - the two were differently designed from those in the carton which as it later became known contained tubs of margarine which were released in August 1991. (I

have already referred to the difference in the designs). He said that the margarine in one of the two tubs was partly consumed and the other was full. He said that he carried out laboratory tests and his findings were communicated to the plaintiffs in their letter of January 27th, 1992, whose relevant part reads as follows:

> "All the samples of margarine that we got from you and the ones we kept in our Laboratory with the same date code have been microbiologically analysed and the results have shown that there was no bacteriological infection at all in the margarine samples. There was however a black bread mould 'Rhizopus Nigricans' on the surface of the product in the tub which your family had started consuming. While this is not dangerous, it is known to cause some ill feeling in people if consumed. There was no trace of the mould in the other samples with the same date code, and I would stress that the mould in the tub which you returned was only on the surface; samples of the margarine drawn from the depth of the sample showed no trace of mould. Our conclusion is that mould spores were received onto the margarine after the tub had been opened. The fact that it was a bread mould leads us to suspect that the spores may have been introduced by means of a knife which had been in contact with bread, but of this we cannot be certain".

The letter was tendered in evidence by the plaintiffs and marked as Exh. P 4. With further reference to the difference in the designs of the tubs, he said that the type of the two tubs had been phased out in March 1991 and, therefore, that they must have contained margarine which was produced or manufactured earlier

than that month. He also said that every carton contains tubs of the same design. He further said that the margarine could not merely have been transferred into the two tubs because it is not possible to do so smoothly - it would have been noticeable, he said. Finally, he said that stork margarine has a shelf-life of up to nine months if it is properly stored.

The evidence of the second defence witness, Alfred Samu Kasiya, was simply that he is the one who collected the two tubs and the carton from the first plaintiff at Mitundu in the district of Lilongwe. He, however, could not remember the designs of the tubs.

Such is the material evidence which I must now evaluate and decide on bearing in mind that the burden of proof is on the preponderance of probability.

I think I must first resolve the question relating to the two tubs, namely, whether they are those that were collected from the first plaintiff, which he disputes. It must be observed here that the first plaintiff did this even without examination of the tubs. Mr Nthindwa on the other hand said that those were the tubs which he received from his colleagues in Lilongwe. I saw both witnesses and I would confidently say that Mr Nthindwa emerged a better witness than the other on this point. He persuaded me quite a great deal when he said that the margarine could not have been transferred as it would have been noticeable, and by his description of the contents of the tub which the plaintiffs had partly used which kind of agreed with what the evidence of the plaintiffs showed. The first plaintiff, I must say surprised me by the velocity with which he denied that the tubs were the ones which were collected from him; he did not suggest any

reason, and I cannot see one, why the defendants should have wished to conduct their tests on different samples of margarine, or to cheat, as he appeared to imply. Besides the possibility of a mistake is rather remote, according to the evidence. The conclusion I reach, therefore, is that the tubs of margarine which Mr Mthindwa received and tested were those that were collected from the first plaintiff by the second defence witness (Mr Kasiya).

I have already said that in order to succeed the plaintiff has to show that he has been injured by the breach of a duty owed to him by the defendant to take reasonable care to avoid such injury. It is obvious in the present case, I think, that the duty to take reasonable care existed between the defendants as manufacturers of the product in question and the plaintiffs as the ultimate consumers as I think it has been established that the product was released and sold in such a form as to show that they (the defendants) intended it to reach the consumer in the form in which it left them with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the product will result in an injury to the consumer's life.

The question which I must now ask myself is whether negligence has been proved. The plaintiffs aver that after taking breakfast of tea with milk and bread to which stork margarine had been applied, they suffered from various ailments and say that they think that these were caused by the margarine because it had a bitter taste which they associate with the foreign matter which had earlier been seen on it, and was scraped off. And they say no more than that. They, therefore, plead the doctrine of RES IPSA LOQUITUR in aid on which topic W.V.H. Rogers in Winfield and Jolowicz on Tort (Twelfth Edition) at page 108 writes:

> "In order to discharge the burden of proof placed upon him it is usually necessary for the plaintiff to prove specific acts or omissions on the part of the defendant which will qualify as negligent conduct. Sometimes, however, the circumstances are such that the court will be prepared to draw an inference of negligence against the defendant without hearing detailed evidence of what he did or did not do".

That is a correct exposition of the law. And the weight of the burden placed on the defendant to rebut the inference will depend on the standard of care required of him. In some circumstances the inference will be rebutted more easily than in others.

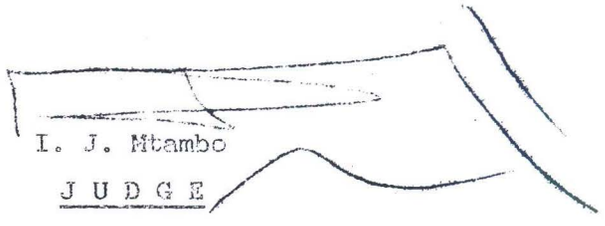
In the instant case, it is obvious that the plaintiffs have not proved the specific acts or omissions on the part of the defendants which would qualify as negligent conduct. The defendants on the other hand have given a very elaborate account of the procedure involved in the manufacture of the product. And they say that they detected nothing dangerous in the samples which they received from the first plaintiff. In the circumstances, I find it hard to draw the inference of negligence against the defendants.

Even if negligence were to have been proved, it cannot still be said on the evidence that the injuries of which the plaintiffs complain were caused by such negligence for how can it be when it appears to have been due to that (the negligence) of the first and second plaintiffs who saw the foreign matter on the surface of the margarine but still ate it and gave it to the other plaintiffs to eat too, assuming, of course, that that was the cause of the ailments. It was a result of their deliberate act for which the defendants cannot be held liable, I am sure.

If the result of the earlier decisions were to the contrary I should consider it bad law and would hesitate long before following any such decision.

All in all, the action must fail and it is dismissed with costs.

PRONOUNCED in open court this 13th day of May, 1994 at Lilongwe.



I. J. Mtambo

JUDGE