IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 2726 OF 1999

BETWEEN:

BESTON MIKEYASI.....PLAINTIFF

and

AARON W. CHING'AMBA.....1ST DEFENDANT

and

SURFACING ENTERPRISES.....2ND DEFENDANT

and

NATIONAL INSURANCE COMPANY.....3RD DEFENDANT

CORAM: **HON. JUSTICE F.E. KAPANDA**
Mr Msungama, of Counsel for the Plaintiff
Mr Ching'ande, of Counsel for the Defendants
Mrs Chaika, Official Interpreter
Mrs Pindani, Court Reporter

Kapanda,

JUDGMENT

Introduction

The Plaintiff, Beston Mikeyasi, is a former employee of

the second Defendant. He is claiming, against the Defendants, damages for personal injuries, loss of amenities of life and loss of earning capacity. It is the further prayer of the Plaintiff that he should be awarded costs of this action.

It is on record that the Defendants are contesting the Plaintiff's claim for it is observed that on the 14th of October 1999 the firm of Messrs Ching'ande and Law filed a notice of intention to contest these proceedings, commenced by the Plaintiff, on behalf of all the Defendants. I wish to note, though, that at the commencement of trial Mr Mwala of Counsel, who was standing in place of Mr Ching'ande, purported to discharge the firm of Messrs Ching'ande and Law from representing the first and second Defendants. The method that was purportedly being employed to discharge the said firm of M/s Ching'ande and Law was improper and of no legal effect. Consequently, this court takes it that for all intents and purposes the Defendants in this matter are being represented by Counsel on record. *Viz* Messrs Ching'ande and Law.

It is clear from the pleadings that were exchanged between the parties herein, through their learned Counsels, that the Defendants have joined issues with the Plaintiff on the later's legal suit. In view of this it is necessary that the apposite parts of the said pleadings should be set out in this judgment.

Pleadings

The Plaintiff, pursuant to the order of the court made on 19th October 2000, has made the following averments of fact in his amended statement of claim:-

> **"1. The plaintiff was at all material times employed by the 2nd Defendant as an assistant grader driver at a salary of**

MK1,200.00 a month.

2. **The 1st Defendant was at all material times employed by the 2nd Defendant as a driver.**

3. **The 2nd Defendant was at all material times the registered owner of motor vehicle Registration Number BJ 6117**

   Mercedes Benz tipper (henceforth referred to as "the Tipper").

4. **The 3rd Defendant was at all material times the insurer of the Tipper against third party liability and has been joined as a party virtue thereof.**

5. **On or about the 3rd day of October 1998, the plaintiff in the course of his employment was travelling on a public road in the Tipper which was being driven by the 1st Defendant in the cause of his employment in the direction of Mdala Village, in the District of Blantyre when, near the said Mdala Village the Tipper overturned injuring the Plaintiff in the process.**

   6. The accident was solely caused by the negligent driving of the Tipper by the Defendant.

Particulars of Negligence

(a) **driving at a speed which was excessive in the circumstances.**

(b) **failing to keep any or any proper look out.**

(c) **failing to exercise or maintain any or any**

proper or effective control to the Tipper.

(d) mounting the left side road pavement resulting in the overturning of the Tipper.

(e) failing to stop, to slow down, to serve on in any other way to so manage or control the said Tipper as to avoid mounting the said pavement.

(f) so far as may be necessary the Plaintiff will rely on the doctrine of '*res ipsa loquitur*'.

7. By reason of the matters aforesaid, the Plaintiff suffered loss and damage.

And the Plaintiff claims:-

2. damages for loss of amenities of life.

3. damages for loss of earning capacity."

There is an amended statement of defence to the Plaintiff's amended statement of claim. In paragraph 4 of the said amended defence the third Defendant has admitted, that it was at all material times the insurer of motor vehicle Registration Number BJ 6117 and that it insured the said motor vehicle against third party liability. In particular the pertinent parts of the Amended Statement of Defence are as follows:-

"1. The 3rd Defendant makes no admission as to the allegations of negligence on the part of the 2nd Defendant and/or the 1st Defendant as alleged in the amended Statement of Claim or at all---

3. The 3rd Defendant refers to paragraphs 1 and 5 of the amended Statement of Claim and pleads that even in the event that the 2nd Defendant is adjudged liable in negligence

to the plaintiff, the 3rd Defendant would not be liable to the Plaintiff by virtue of the motor policy of insurance in respect

of the said 2nd Defendant's motor vehicle operative at all material times between the 2nd Defendant and the 3rd Defendant which covers not the employee passenger risks and the Plaintiff was at all material times an employee of the 2nd Defendant (the Insured) and the alleged injuries on the part of the Plaintiff allegedly arose or were sustained in the course on his employment."

In light of the admission in paragraph 2 of the Amended Statement of Defence there is no dispute as regards the fact that the third Defendant insured the Second Defendant's motor vehicle against third party liability. In view of the amended statement of defence the parties joined issues on the legal action, commenced by the Plaintiff on 9th September 1999, and it accordingly became necessary for the parties to cause the matter to be set down for trial so that the parties could offer evidence in support of the allegations of fact made in their respective pleadings. In this regard both parties called witnesses to testify in these proceedings. Let me now move on to review, in a narrative form, the evidence that was adduced by both parties.

Evidence

It is on record that the Plaintiff testified and also called another person to testify on his behalf. On the other hand, the first and second Defendants did not offer any evidence but the third Defendant called a witness to testify on its behalf. I will start with the evidence that has been offered by the Plaintiff in support of his claim.

The Plaintiff has told this court that he is 47 years old. It is his further testimony that he was employed by the second Defendant and was working, as an Assistant D6 driver, at salary of K2,000.00 per month. It must pointed out though that in his amended statement of claim the Plaintiff has alleged that he was on a salary of K1,200.00 per month. But this is not a radical departure from the pleadings. Consequently, his testimony will still be accepted to prove the salary he was earning at the time he was injured (**Zgambo -vs- KFCTA** 12 MLR 311). The Plaintiff has further testified that on the day he got injured, in a road accident, he was not working as an Assistant D6 driver. He has admitted that his employers told him that, notwithstanding the fact that he was working as an Assistant D6 driver, he would be working in some other capacity other than as an Assistant D6 driver.

It is the further sworn testimony of the Plaintiff that on the 3rd day of October 1998 he was instructed by his employers to accompany the second Defendant's motor vehicle, being driven by the first Defendant, that was going to collect bricks at Ngumbe in the City of Blantyre of the Republic of

Malawi. The Plaintiff has further told this court that on the way to Ngumbe he, together with other employees, sat at the back of the said motor vehicle. It is his further testimony that the driver was over-speeding.

The Plaintiff has further testified that on their way to Ngumbe he fell unconscious but realised later, after he

regained consciousness, that he was injured and admitted in hospital. It has further been given in evidence, by the Plaintiff, that he was admitted in hospital for one month. The Plaintiff further testified that he suffered injuries in the head and the right leg. A medical report was tendered in evidence to show the nature of injuries he sustained. The said medical report has been marked as exhibit P1. It is indicated in the medical report that the Plaintiff had his right leg amputated below the knee and that he suffered head injuries. Further, it is stated in the medical report that as a result of the injury that the Plaintiff sustained - he has suffered permanent incapacity of 65% (sixty-five percent). The Plaintiff further demonstrated before this court that he uses two clutches as a result of the amputation of his right leg.

It is the further testimony of the Plaintiff that at the time he was hospitalised he was feeling a lot of pain in the leg. Moreover, it is the evidence of the Plaintiff that he still had these pains even after discharge from hospital. Further, it is in the evidence of the Plaintiff that he can no longer
do what he was capable of doing before the injury. Furthermore, the Plaintiff
has told this court that he subsequently lost his job, and
can not get any employment, due to the injury that he
sustained.

The other person to testify in support of the Plaintiff's case was Mr Felix Ngalande, herein after referred to as PW2. It was his testimony that at the material time this matter arose he was an employee of the Second Defendant. In point of fact he told this court that he was the Assistant driver of the motor vehicle Registration No. BJ 6117, the subject matter of this action.

PW2 further testified that on the said 3rd day of October 1998 their Supervisor, a Mr Nkhata, gave instructions that the Plaintiff should accompany the other employees of the second Defendant who were going to

collect bricks at Ngumbe. It was his further testimony that he was one of the employees who were sent on this errand and that they used motor vehicle Registration No. BJ 6117 which was being driven by the first Defendant. PW2 further told this court that he sat on the passenger's seat in the cab of the vehicle and that the Plaintiff was sitting at the back of the Tipper.

It was further given in evidence by PW2 that on their way to Ngumbe the first Defendant was over-speeding whereupon PW2 warned him of this but the first Defendant did not take heed of the caution. Indeed PW2 has testified that on one of those occasions the first Defendant told PW2 that he was going very fast because he was in a hurry. PW2 continued to testify that as they were approaching the Chileka Round About there was another vehicle coming from the opposite direction. Since the road was narrow, and there was an embankment at this point, he asked the driver to stop and give way to the other vehicle that was coming from the opposite direction but the First Defendant continued to go on at a high speed. Whilst doing so, PW2 testified, the vehicle they were travelling in went over the embankment, and proceeded to hit an ant-hill, and subsequently overturned. It is the further testimony of PW2 that all the passengers, except the Plaintiff who was trapped under the body of the vehicle, came out. PW2 further put it in his evidence that they had to use a jack to lift the said body of the vehicle to rescue the Plaintiff. It is the testimony of PW2 that they managed to rescue the Plaintiff but it was observed that the Plaintiff had been severely injured in the leg and they thereafter rushed him to hospital.

I wish to note that PW2 was not cross-examined on his evidence. It therefore follows that the testimony of PW2, as regards how and why the accident occurred, was not contradicted. As a matter of fact the testimony of PW2

corroborated that of the Plaintiff when the latter testified to the effect that the first Defendant had been over speeding on the way to Ngumbe.

As alluded to earlier in this judgment, of the three Defendants in this matter, it is only the third Defendant who called a witness to testify in this matter. The third Defendant called Mr James Yasin Makwinja, DW1, to testify on its behalf.

It was the testimony of DW1 that he is an insurance Superintendent in the underwriting Department of the third Defendant. He further told this court that the third Defendant issued a policy of insurance to the second Defendant in respect of a motor vehicle. It was his further testimony that the said policy did not, *inter alia*, cover risks in respect of injury to or death of the employees of the second Defendant if such death or injury arose in the course of employment. He has tendered in evidence a standard policy document and it has been marked as exhibit D1. It was further testified, indeed it was conceded by DW1, that the actual policy document that was issued in respect of the second Defendant's motor vehicle is not the one that has been tendered in evidence. That notwithstanding DW1 purported to say that the terms of the policy issued to the Third Defendant are similar to the standard policy tendered in this court.

It must be observed that DW1 further conceded that he is not in fact the one who issued the said policy in respect of the second Defendant's motor vehicle. Furthermore, it was confessed by DW1 that he did not get the real
copy of the policy document that was issued to the second Defendant. The actual policy which ought to have been tendered in evidence is Policy No. D57/1441659.

The aforesaid is a synopsis of the evidence that was

adduced by the parties in this action. Let me now isolate the issues for determination in this matter.

Issues for Determination

In my opinion the facts in issue that require this court's decision are as follows:-

(a) Whether or not negligence has been established against the first Defendant.

(b) Whether or not, if such negligence has been proved against the first Defendant, the second Defendant is vicariously liable for the negligence of the first Defendant.

(c) Whether or not, if negligence has been substantiated against the first and second Defendant, the third Defendant, as an insurer, is liable to indemnify the first and/or second Defendant, against the claim by the Plaintiff in respect of the injuries that he sustained.

(d) If the Plaintiff's case is made out what quantum of damages, if any, would adequately compensate him for his injury.

I wish to observe that, notwithstanding the fact that I have spelt out the issues for determination in this action, I will not expressly refer to them when I am making my findings of fact. Further, my decision on these questions will be based on the evidence on record. Moreover, it must be pointed out that the said issues that must be decided in this matter will be so decided in the light of the construction to be given to the terms of the policy, and the provision of the Road Traffic Act.

Before proceeding to make my findings on the said issues I wish to note that both learned Counsel for the Plaintiff and the Defendants made *viva voce* submissions.

I found their arguments to be illuminating and they will be borne in mind when I am adjudicating upon the issues herein.

I will now move on to decide on the issues for determination in this action. It is trusted that at the end of this judgment all the issues shall have
been determined even though, as earlier stated, I will not specifically refer to them.

Law and Findings of Fact

The burden and standard of proof

It is trite law, and I need not cite an authority for it, that he who alleges must bear the burden of proving what he is alleging. Moreover, it is a settled principle of law, and I have reminded myself of same, that in a civil action, like the present case, the standard of proof is on the balance of probabilities.

These maxims of the law will, therefore, be borne in mind when I am deciding on the facts in dispute in this matter.

Negligence of the First and Second Defendant

It is a well established principle of law, and there is no need to cite a case authority for it, that in an action for negligence the Plaintiff would require to prove the following elements if he is to succeed in such an action: (a) that there was a duty of care owed to him by the Defendant; (b) that the duty of care has been breached by the Defendant and (c) that as a result of that breach of duty of care, the Plaintiff has suffered loss and/or damage.

The Plaintiff, through Counsel, has urged this court to find that a case of negligence has been made out against

both the first and second Defendants. As a matter of fact it has been submitted by learned Counsel for the Plaintiff that the second Defendant should be held vicariously liable for
the negligence of the first Defendant (the driver of the vehicle the subject matter of the action). Learned Counsel for the Defendants has not submitted anything on the question of negligence on the part of either the first or second Defendants. The fact that Mr Ching'ande of Counsel did not so submit, on this issue of negligence, did not come as a surprise in view of the fact that there was no evidence offered to dispute the Plaintiff's testimony regarding
how the Plaintiff sustained the injuries he is complaining about in this action. Indeed, as correctly submitted by Counsel for the Plaintiff the evidence of the Plaintiff is largely undisputed.

On the uncontradicted evidence on record this court finds it as a fact that the first Defendant negligently drove motor vehicle Registration No. BJ 6117 resulting in the said motor vehicle overturning. This is borne by the testimony of the Plaintiff, and also the evidence of PW2, to the effect that the first Defendant had been over-speeding on the way to the place where they were to collect the bricks. Further, the first Defendant's failure to stop, slow down or give way to the approaching vehicle, as testified by PW2 who was sitting in the cab of the vehicle together with the first Defendant, clearly show that the first Defendant was negligent in his manner of driving of the said motor vehicle. In point of fact there is overwhelming evidence to prove that

the first Defendant's negligent driving of motor vehicle Registration No. BJ 6117 was the sole cause of the accident. The testimony of PW2 is pertinent in this regard. It is my judgment that the doctrine of *res ipsa loquitur* obviously applies to the facts of this case.

It is the further finding by this court that, on the uncontroverted evidence on record, the Plaintiff sustained the injuries he described to this court as a result of the accident that was caused by the negligence of the First Defendant. There was no attempt by either of the Defendants to show, by evidence, that the Plaintiff suffered the injuries through some other means other than the accident of 3rd October 1998 which was caused by the negligent driving of motor vehicle Registration No. BJ 6117 driven by the first Defendant.

In view of the fact that the second Defendant had the authority to drive motor vehicle Registration No. BJ 6117, there being no evidence to the contrary, and, further, due regard being had to the fact that the second Defendant had an interest in this particular journey, it goes without saying that the first Defendant was driving this vehicle in the course of his employment and as an agent of the second Defendant. Thus the acts and/or omissions of the first Defendant will, at law, be deemed to be the acts and/or omissions of the second Defendant. In the premises this court finds that the second Defendant is vicariously liable for the negligent driving of the said motor vehicle Registration No. BJ 6117 and the injuries sustained by the Plaintiff as a result of the first Defendant's negligence.

This court finds that negligence has been established against the first Defendant. Moreover, having so found that a case of negligence has been made out against the first Defendant it is the further finding of this court that the second Defendant is vicariously liable for the negligence of the first Defendant.

The effect of the policy of insurance: is the third Defendant liable to compensate the Plaintiff?

As noted earlier one of the issues that this court must adjudicate upon is whether or not, after establishing

negligence on the part of the first and

second Defendant, the third Defendant, as an insurer, is liable to indemnify the first and/or second Defendant against the claim by the Plaintiff. Put in another way this court must decide on the question whether or not the third Defendant is liable to compensate the Plaintiff for the injuries that he sustained.

It is the contention of the third Defendant, through Counsel, that it is not liable to compensate the Plaintiff, for his injury or indemnify the first and second Defendants against the claim by the Plaintiff, because the policy of insurance which it issued to the second Defendant contained a clause which excluded liability in respect of employees of the second Defendant if they got injured in the course of their employment. Learned Counsel for the third Defendant has further submitted that the said exclusion clause, in the said policy of insurance, is pursuant to **Section 144(a)** of the Road Traffic Act. Pausing here I wish to point out that the said **Section 144(a)** of the said Road
Traffic Act means, in my judgment, no more than that a compulsory (third party) insurance need not cover liability in respect of death of, or bodily injury to, an employed person arising out of, or in the course of, employment for it is trite that liability insurance excludes contractual as opposed to tortious liability. Put in another way it is my understanding that this section means that it is not obligatory for an insurance policy to issue, *inter alia,* against contractual liability for death or injury sustained by persons employed, in the employment of the person insured where injury arises out of, and in the course of that employment. But in respect of tortious liability, like in the instant case, it is obligatory if an owner wants to put his vehicle on the road. (**Halsburlys Laws of England Vol 25 para 760 pp 387**). It is the further submission of Counsel for the third Defendant that a third party does not include a person killed or injured during the course of his employment with the insured. Thus the third party

insurance cover that the third Defendant issued to the second Defendant did not provide cover to the Plaintiff since he was injured in the course of his employment with the second Defendant. The Plaintiff has, on the other hand, argued that the said exclusion clause is analogous to clauses which exclude liability when a motor vehicle is driven by an unauthorised driver thus same is of no effect *vis-a-vis* the Plaintiff although same is effective as between the second and third Defendant. It has further been submitted by learned Counsel for the Plaintiff, that since the third Defendant

did not tender the actual policy issued to the second Defendant, or a copy thereof, to prove that there was such an exclusion clause, this court should not allow the terms of the standard policy tendered as proof of the conditions of the policy of insurance issued to the second Defendant in respect of motor vehicle Registration No. BJ 6117.

I have already observed that, in view of its admission in paragraph 2 of the amended statement of defence, there is no dispute regarding the fact that the third Defendant insured the second Defendant's vehicle against third party liability. But it is contended by learned Counsel for the third Defendant that the third party does not include the Plaintiff because he was an employee of the second Defendant. In support this argument Counsel cited to me paragraph 1063 of **Chitty on Contracts** 23rd Edition Vol II. With respect, I found it impossible to derive any significant assistance from the paragraph
cited in view of the fact that the learned authors of **Chitty on Contract** were referring to an English statute that is not in *pari materia* with our Road Traffic Act. In any event, it is evident that the meaning of a third party which the learned authors have referred to is actually the one contained in the Road Traffic Act of England (See the relevant footnote in the book cited by learned Counsel for the Defendants). The English Road Traffic Act of 1960 is not a statute of

general application and is therefore not part of the received law of Malawi.

It must be noted that our own **Road Traffic Act** has not defined what "third party" means. In the absence of the statutory definition of "third party" resort must be had to the natural and primary meaning of this word. An instructive dictum on the meaning of this word, which I adopt in this matter, is found in the case of **Digby -vs- General Accident Fire and Life Assurance Corporation Ltd** [1940]1 All ER 514 at 520F, 521A-F where Atkinson, J. put it this way:-

> "---There is one case which I think throws light upon the meaning of the words "third party" and that is **Royal London Mutual Insurance Society -vs- Barret [1928]Ch. 411--- The relevant part of the judgment of Tomlin, J. is at pp 414, 415:-**
>
> 'Now taking the question of the natural and primary meaning of the words it seems to me that the third party is the third party by reference to those who are concerned with the contract of insurance. In other words, I think the phrase means a third party with reference to the assurer and the policy holder, and possibly the assured, because the policy holder and the assured may conceivably be different persons---' **That is a decision to the effect that at any rate in that policy - and I do not see why the principle should not apply to this policy - a third party means anybody other than the two contracting parties**." (emphasis supplied by me)

Consequently, Mr Ching'ande's argument that the Plaintiff's claim against the third Defendant ought to be dismissed on the ground that a third party does not include a person injured in the course of his employment is misplaced. As seen above a third party includes any person other than the two contracting parties. If the Plaintiff's claim is to be dismissed, if at all, then the dismissal must be on another premise and not on the basis of interpretation of third party as put forward by learned Counsel for the third Defendant.

The Plaintiff would, therefore at law, qualify to be treated as a third party, unless there is an effective exclusion clause disqualifying him from being regarded as such third party.

I wish to observe that at trial the third Defendant, through DW1, put in evidence, and it was not opposed by the Plaintiff, the standard policy in order to show that there was such an exclusion clause. Indeed, DW1 attempted to prove, by introducing the said standard policy, that the usual terms of the policy of insurance issued by the third Defendant contained a provision to the effect that the insurer would not indemnify the insured against claims by the employees of the second Defendant if the claim is in respect of injury sustained by the employee in the course of his employment. It must be noted though that it is a fact that DW1 did not produce, before this court, the actual Policy No. D57/1441659 in order for this court to see for itself if such an exclusion clause was provided for in the policy that was in fact issued to the second Defendant. Now, it is a settled rule of evidence that if a party relies upon a document, or terms in a document, he must produce and prove it otherwise such party will not be allowed to give evidence of the contents of

the document, or any term thereof, where such document, is not produced (**H.R. Makawa -vs- Indefund Limited and Nico** (H.C) Civil Cause No. 1778 of 1994 [unreported]; **F.A. Magnay -vs- Knight** 133 English Reports 615). This principle, if it is to be understood properly, should be read together with the time honoured principle of law that he who alleges must prove what he is alleging. Turning to the instant case it is noted that the third Defendant is alleging that the policy it issued, in respect of the Second Defendant's motor vehicle, excluded liability to compensate an employee injured in the course of his employment. It was, therefore, incumbent upon the third Defendant to produce, at the trial of this action, the Policy of Insurance No. D57/1441659, or a copy of same, that was actually issued to the second Defendant in order to prove

the existence of such an exclusion clause. It was not enough for the third Defendant, who is relying on the alleged exclusion clause in its defence to this action, to offer in evidence a standard policy as proof of the so-called exclusion clause.

It is my view, and I so find as a fact, that the third Defendant can not avail itself of the exception clause, in the standard policy tendered and marked as exhibit D1, to avoid liability to pay for the injury sustained by the employee of the second Defendant due regard being had to the fact that the third Defendant did not tender and/or produce, before this court, policy No. D57/1441659. In the absence of the actual policy document itself or a copy thereof, the third Defendant has no evidence to show that it was a term of the policy issued, being Policy No. D57/1441659, that liability will be excluded if an employee of the second Defendant were to be injured in the course of employment. This finding, in my opinion, would be sufficient to dispose of this matter in favour of the Plaintiff without necessarily going to consider whether an injury to the Plaintiff (a third party) was in fact covered by the Policy Insurance No. D57/1441659 that was admittedly issued in respect of motor vehicle No. BJ 6117 to cover third party liability.

Notwithstanding the above finding I will go on in case I am wrong in making this finding without looking at the purport and effect of the supposed exclusion clause being relied upon by the third Defendant. In the premises I will assume that Policy No. D57/1441659 had, in fact, the exception clauses

as stipulated in the standard policy - exhibit D1, and proceed to make a finding on the effect of such a clause, if applied to the situation presented by the facts of this case, on the Plaintiff's claim against the third Defendant. It must be stated, at the outset, that the type of insurance

policy in the instant case is a comprehensive insurance in respect of a business vehicle. I shall now set out those parts of the standard policy of insurance, exhibit D1, which appear to me to be material to the present case. The following are the parts which are relevant to this matter:-

"---Section II - Liability to Third parties

2. Indemnity to other persons

The company [the insurer] will subject to the Limits of Liability and the Jurisdiction Clause indemnify any Authorised Driver against all sums including claimant's cost and expenses which he shall become legally liable to pay in respect of;

(a) death of or bodily injury to any person--- where such death or injury--- arises out of an accident by or in connection with the motor vehicle or the loading or unloading of the motor vehicle.

Exceptions to Section II

The company shall not be liable---

(b) in respect of death of or bodily injury to any person arising out of and in the course of such person's employment by the person claiming to be indemnified under this section---" (emphasis supplied)

Pausing here the question that arises and fall to be decided is: what is the purport and effect of this clause, if it existed in the policy of insurance issued to the second Defendant, in the light of the facts of this case? I must confess

that there is no decided authority, from within the jurisdiction, on the issue raised above. Be that as it may,

there is an English decision which I have found to be useful. It is the case of **Richards -vs- Cox** [1942]2 All ER 624 where the court was of the view that, while the policy purports to exclude the case of injury to an employee of the insured, that is not the case where the policy contains a permitted driver clause and the authorised driver is substituted for the insured, and if that is the case then the exception applies only to an employee of the authorised driver and not the person taking out the insurance. (See also the case of **Digby -vs- General Accident Fire and Life Assurance Corporation Ltd** [1940]1 All ER 514 at 523C-H and 524B-C).

It is my judgment that there is no reason why the views of the court in **Richards -vs- Cox** should not be applied to the present case where the first
Defendant, an authorised driver, who was covered by the policy, in place of the second Defendant, at the time he was driving motor vehicle Registration No. BJ 6117 which vehicle was, at the material time, insured by the third Defendant. Accordingly, the exception clause, if it was there at all, could only apply to an employee of the first Defendant. But it is an undeniable fact that the Plaintiff is not, and was not at the material time the accident occurred, an employee of the first Defendant. For this reason, and the other reasons given above, the so-called exclusion clause does not exonerate the third Defendant from liability to compensate the Plaintiff for the injuries he sustained as a result of the negligence of the authorised driver of motor vehicle Registration No. BJ 6117 which was insured by the third Defendant against risk of injury or death to third parties like the Plaintiff. It is so found.

Finally, let me observe that in view of the foregoing findings the Plaintiff was, therefore, right in proceeding to sue, *inter alia*, the third Defendant in order to recover compensation for the injury that he suffered -**Commercial Union Assurance -vs- Alfred Waters** MSCA CA. No. 46 of 1995 [unreported]. The third Defendant will, therefore, equally be liable to pay the Plaintiff damages that are

found to be payable for the injury sustained by the claimant herein.

Damages

The Plaintiff is claiming damages for pain and suffering, loss of amenities of life and loss of earning capacity. There is a medical report tendered in evidence which shows the Plaintiff suffered a traumatic amputation of his right leg below the knee. It is further indicated, in the said medical report, that arising from the injury sustained the Plaintiff has suffered a permanent incapacity of 65% (Sixty-five percent) due to the fact that he has one short limb. Further, the Plaintiff told this court that he was admitted in hospital for treatment for one month. It is also in evidence that the Plaintiff is no longer able to do things that he was doing before the injury. Moreover,
the Plaintiff has told this court, and it has not been contradicted by any evidence, that he can no longer get employment after he was dismissed from employment by the Second Defendant.

What then are damages that will nearly as possible compensate the Plaintiff? In coming up with the quantum of damages in the instant case I will do so by seeking guidance from previously decided cases. It is only by doing so that uniformity can be achieved as regards the quantum of damages for similar injuries. In this regard I found the case of **Austin Shaba -vs- Malawi Railways Limited** Civil Cause No. 1187 of 1993 [unreported] to be relevant to the case now under consideration where the Plaintiff also suffered, among other things, an amputation of his right leg above the knee. I wish to point out that at the time the awards were made in **Shaba's** case, that is to say in 1998, the value of the Malawi Kwacha was not the same as it is today. It is trite that the value of the Malawi

Kwacha has gone low since that time. I will therefore take into account the inflation element in coming up with my award of damages in the case before me.

In my judgment, bearing in mind the observations made above, and considering the awards made in **Shaba's** case and the case of **Feston Makala -vs- Attorney General** Civil Cause No. 301 of 1994 (unreported), the following awards of damages would be adequate to compensate the Plaintiff:-

(a) K150,000.00 for the amputation of his right leg above the knee

(b) K137,000.00 for pain, suffering and loss of amenities of life

(c) K240,000.00 for loss of future earning capacity.

It is so ordered.

Costs

The Plaintiff has wholly succeeded in establishing his case against the Defendants. The basic rule is that costs must follow the event in order to ensure that the assets of a successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful party. The unsuccessful party should pay the costs borne by the successful party. I will therefore exercise my discretion in favour of the Plaintiff and award the costs of this action to the Plaintiff. The costs awarded to the Plaintiff are to be taxed by the Registrar if not agreed.

Pronounced in open Court this 15th day of June 2001 at the Principal Registry, Blantyre.

F.E. Kapanda

JUDGE