

**IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 2269 OF 2002**

**BETWEEN:**

RASHY GAFFAR (male).....PLAINTIFF

- and -

PRESS BAKERIES LIMITED.....1<sup>ST</sup> DEFENDANT

NATIONAL INSURANCE CO. LTD.....2<sup>ND</sup> DEFENDANT

**CORAM: CHIMASULA PHIRI J.**

Kasambara of Counsel for the plaintiff

Ching'ande of Counsel for the defendants

Mr Mankhanamba – court official

Mrs L. Kasasi - typesetter

**JUDGMENT**

***Chimasula Phiri J,***

The plaintiff's claim is for damages for loss of property and personal injury arising from a road accident allegedly due to the negligence of the defendants. The defendants deny the plaintiff's claim.

**PLEADINGS**

The plaintiff commenced this action by Writ and Statement of Claim in which he pleaded as follows:

*Statement of Claim*

1. *The 1<sup>st</sup> defendant was at all material times the owner of Hino Van Truck registration number BJ 2763 insured by the 2<sup>nd</sup> defendant.*

2. *The 2<sup>nd</sup> defendant is sued as the insurer of the 1<sup>st</sup> defendant's motor vehicle.*
3. *On 20<sup>th</sup> June 2002 the plaintiff was driving his motor vehicle registration number ZA 7863 towards Chichiri round-about when the 1<sup>st</sup> defendant's agent or servant so negligently drove their Hino Van Truck when going into the Chipembere Highway from Johnstone Avenue, that it collided with the plaintiff's motor vehicle.*

#### *Particulars of Negligence*

- a) *Emerging onto the main road without first ascertaining or ensuring that it was safe to do so.*
  - b) *Failing to stop, to slow down, to swerve or in any other way so to manage or control his motor vehicle as to avoid the collision.*
  - c) *Failing to keep any or any proper look-out or to have any or any sufficient regard for other traffic that was or might reasonably be expected to be on the main road.*
4. *By reason of these matters, the plaintiff sustained injuries and suffered loss and damage.*

#### *Particulars of Damage*

*Fractures of ribs on the left side.*

*Fracture to the lower left leg.*

*Fracture of the left femur.*

*Dislocation of the right ankle.*

*Soft tissue injuries and bruises all over the body.*

*Extensive damage to the plaintiff's motor vehicle*

5. *The plaintiff therefore claims –*

*Damages for pain and suffering and loss of amenities.  
Damages for loss of earnings and earning capacity.*

*Cost of repairs or replacement of motor vehicle ZA 7863.*

*Costs.*

The defendants' denial of liability is contained in their Defence which is pleaded as follows –

*First Defendant*

1. *The 1<sup>st</sup> defendant refers to paragraph 1 of the Statement of Claim and admits it as far as it relates to ownership of the said motor vehicle.*
2. *The 1<sup>st</sup> defendant refers to paragraph 2 of the Statement of Claim and makes no admission as to the accident therein mentioned. Further without prejudice to the generality of the foregoing pleading, the 1<sup>st</sup> defendant denies that the accident (which is denied) was caused by the negligence of the alleged or any of its servants or agents as alleged therein or at all.*
3. *Further, and in the alternative and without prejudice to the foregoing defences, the 1<sup>st</sup> defendant pleads that the said accident (which is denied) was wholly caused or contributed to by the negligence of the plaintiff.*

*Particulars*

- a. *Driving at a high speed and not in keeping with the traffic condition at the material time.*
- b. *Failure to have any or any proper look-out.*
- c. *Failing to heed the presence of the 1<sup>st</sup> defendant's motor vehicle on the road.*
- d. *Failing to have due care and attention.*

- e. *Driving on the road dangerously and/or without consideration of safety in the circumstances.*
  - f. *Driving into the way of the 1<sup>st</sup> defendant's said motor vehicle.*
  - g. *Ramming into the 1<sup>st</sup> defendant's motor vehicle.*
  - h. *Failing to stop, slow down, swerve or in any other way so to manage or control his motor vehicle as to avoid hitting the 1<sup>st</sup> defendant's motor vehicle.*
- 4. *The alleged loss or any loss, damage and injuries are not admitted.*
  - 5. *WHEREFORE the 1<sup>st</sup> defendant prays that the plaintiff's claims be dismissed with costs.*
  - 6. *Save as hereinbefore specifically admitted, if at all, the 1<sup>st</sup> defendant denies each and every allegation contained in the Statement of Claim as though the same were herein set forth seriatim and specifically traversed.*

#### 2<sup>nd</sup> DEFENDANT

- 7. *Paragraphs 1 and 2 of the Statement of Claim, as far as they relate to the 2<sup>nd</sup> defendant being insurer of the said motor vehicle index number BJ 2763 are admitted.*
- 8. *The 2<sup>nd</sup> defendant adopts as far as is material the defences of the 1<sup>st</sup> defendant.*
- 9. *The 2<sup>nd</sup> defendant pleads that its liability, if any, under the Road Traffic Act is liability only to indemnify its insured in the event of the latter's liability having been established.*

### **ISSUES FOR DETERMINATION**

Who is to blame for the accident?

If it is the 1<sup>st</sup> defendant, was the plaintiff guilty of contributory negligence

## BURDEN AND STANDARD OF PROOF

### Burden of Proof

*The burden of proof rests upon the party (the plaintiff or the defendant), who substantially asserts the affirmative of the issue. It is fixed at the beginning of trial by the state of the pleadings, and it is settled as a question of law remaining unchanged throughout the trial exactly where the pleadings place it, and never shifts in any circumstances whatever. See Joseph Constantine Steamship Line vs Imperial Smelting Corporation Limited [1942] A.C. 154, 174.*

### Standard of Proof

*The standard required in civil cases is generally expressed as proof on a balance of probabilities. "If the evidence is such that the tribunal can say: We think it more probable than not, the burden is discharged, but if the probabilities are equal it is not." Denning J in Miller vs Minister of Pensions [1947] ALL E.R. 372; 373, 374.*

## THE EVIDENCE

Both parties in this action submitted written witness statements in the court trial bundle as evidence in chief. The first witness was the plaintiff who adopted his statement which reads as follows: -

*I, Rashid Abdul Gaffar, a businessman of P O. Box 241, Blantyre and stated as follows: -*

*I have been driving since 1983 when I got my driving licence.*

*I have never been involved in a serious road traffic accident.*

*On the material day I was sober and in fact it was during week day.*

*It was on June 29<sup>th</sup>, 2002 at 8.30 in the evening when I was driving my Toyota Land cruiser registration No. ZA 7863 from Blantyre towards Limbe along Masauko Chipembere Highway.*

*At the turn off to ESCOM Power House near Queen Elizabeth Central Hospital along the said road the traffic lights were not working.*

*I proceeded driving at about 50 – 60 km/hr.*

*All of a sudden as I was driving I saw a truck emerging from the side road entering the main road.*

*I tried to brake but it was too close as the place is a blind corner and that the said truck did not have indicators let alone reflectors.*

*I tried to swerve but ended hitting the offside rear tyres of the truck registration No BJ 2763 Hino Van Truck.*

*Aslam Sabadia was driving right behind me i.e. about 100 metres behind.*

*As a result of the accident, I suffered the following personal injuries*

–

- *Fracture of the left femur.*
- *Fractured right foot*
- *Fractured hip*
- *Fractured right arm*
- *Bruised chest affecting the ribs.*
- *Facial and bodily bruises and abrasions.*

*Consequently, I was unconscious and only regained my conscious when I was being pulled out of the car by my friends, Aslam Sabadia and later on Brian Coombes, Ken Govati and Wilfred Chiponde.*

*I was experiencing excruciating pain and could not walk or move on my own.*

*They lifted me and put me in Aslam Sabadia's Range Rover and took me to Mwaiwathu Private Hospital in Blantyre.*

*My Toyota land cruiser was heavily damaged to the extent that it has been declared a write off.*

*The pre-accident market value of the said motor vehicle is K4,956,725.00. This is supported by a letter of certificate from the car dealers, Toyota Malawi Limited.*

*At Mwaiwathu Hospital, I was quickly rushed to the operating theatre where they dressed all my fractured ribs in plaster of paris.*

*Looking at the extent and gravity of the injuries, it was recommended that I be flown to South Africa immediately for expert treatment lest I loose my right leg.*

*The following day, June 21<sup>st</sup>, 2002 a hired flying ambulance place took me and my wife Shakila Gaffar to Milpark Hospital in Johannesburg, Republic of South Africa.*

*The air ambulance charges were US\$12,300.00. The air ambulance operators insisted on being paid in US dollars. This we did. There is a receipt for the payment.*

*I was admitted to Milpark Hospital. I spent twenty four (24) days in hospital and asked to be discharged because bills were becoming too heavy for me to bear.*

*I paid the hospital the sum of SAR 410,000.00. A copy of the receipt and supporting documents are attached.*

*Whilst in hospital I had my wife with me as a guardian and later on my two (2) sisters flew in from United Kingdom and Malawi.*

*My sisters were there for seven (7) days. They had come in to relieve my wife who was seriously traumatized because of the accident and the nature of injuries.*

*Due to the gravity of the injuries, I had to go through two (2) life threatening operations which were spaced seven (7) days apart. The first operation was done immediately on my arrival on 21<sup>st</sup> June 2002 and the following one was on 29<sup>th</sup> June 2002.*

*The first operation took about 8 – 10 hours. They had to put plates in my arm and legs. The second one took about five (5) hours; and the doctors had to put plates in my hip. Copies of the X-ray film are available for inspection.*

*Since my discharge from hospital, I have been flying back to South Africa for medical assessment and general check up.*

*On the first two (2) trips I had to travel with my wife as I was confined to a wheel chair; and therefore needed a helper. Ticket stubs or invoices for the four (4) trips and my initial return ticket together with my wife's are attached.*

*Whilst I was hospitalized, my guardians were not allowed to put up at the hospital. They had to stay in a hotel. The total costs and expenses for the hotel bills and taxi expenses was SAR 48,000.00.*

*Back at home, my three (3) children namely Romana (5 years), Talitha (12 years) and Abdul (10 years) were very traumatized by the news that I had been involved in an accident.*

*They feared that I was dead on pestering my wife that they wanted to see their dad.*

*I had no choice but to arrange for their travel to see me at the hospital. They flew in during my second week of stay in hospital. They stayed in Johannesburg for about five (5) days. Copies of the air tickets/invoices are attached. The total cost for the air ticket and hotel bills is MK60,000.00 and SAR 10,000.00 respectively.*

*I was confined to a wheel chair up to mid December 2002. It was then at that time I started reporting for duties at my business place.*

### Loss of Business

*During the whole period, I was not going to work, my business income sharply fell down. Much of my transportation business is*



*generally through personal contacts. I lost much business because of the accident.*

### *Loss of Amenities*

*Before the accident I used to play social football and used to enjoy weekend keep-fit walks. This I can no longer do as my legs are very weak. In fact my right foot has no control over the nerves. I have to go for another operation for this. These days I can no longer walk a distance of more than 200 metres.*

### *Life Expectancy*

*The injuries have seriously affected my life expectancy.*

### *Further Medical Examination and Treatment*

*I am required to go for a further medical examination in June 2003; and then in December 2006 to have the plates removed in the right arm and left femur.*

The witness tendered a police report in relation to the occurrence of the accident. It reads as follows:-

*On 20<sup>th</sup> June 2002, at about 20.30 Mr Rashy Gaffar was driving a motor vehicle registration number ZA 7863 VX Toyota Land cruiser from the direction of Clock Tower round-about heading towards Chichiri round-about. On arrival at the junction of Johnstone Avenue/Chipembere Highway he hit the offside rear tyres of motor vehicle registration No. BJ 2763 Hino Van Truck which was joining Chipembere Highway from Johnstone Avenue. Due to the impact of motor vehicle registration number ZA 7863 VX Toyota Land cruiser he sustained fracture of left ribs, lower left leg, left femur, dislocation on the right ankle and multiple bruises all over the body.*

### *Damages/Documents*

*Motor vehicle registration number ZA 7863 VX Toyota Land cruiser got extensively damaged and the driver produced driving licence No. 23446/1/1/2 issued on 1<sup>st</sup> October 2001 to 1<sup>st</sup> October /2003 for Codes C, EB only and a certificate of insurance No 17116 from 1<sup>st</sup> August 2001 to 31<sup>st</sup> July 2002 by United General Insurance.*

*Motor vehicle registration No. BJ 2763 Hino Van Truck had its offside tyres and bodywork damaged, the driver produced driving licence No 22197/I/I/2 issued on 19<sup>th</sup> September 2001 to 19<sup>th</sup> September 2003 for classes C, EB only and certificate of insurance number 164107, Policy Number K56/1319047 issued on 5<sup>th</sup> September 2001 to 30<sup>th</sup> September 2002 by National Insurance Company Ltd.*

*Police investigations revealed that the accident was influenced by the driver of motor vehicle registration No. BJ 2763 Hino Van Truck, Mr Joseph Mkwapatira in the sense that he failed to stop at the junction before joining the Highway as it was required of him, therefore he is answerable to the Traffic offence of inconsiderate driving contrary to Section 127 of Road Traffic Act. However, this awaits the discharge of the victim who is currently admitted at a certain hospital in the Republic of South Africa.*

The plaintiff continued in his evidence in chief to state that he was badly injured. His right foot straightened and his leg had a closed fracture. His right hand was broken. He was bleeding from the forehead. He had big wounds in his limbs and ribs and he was soaked in blood.

In cross-examination he stated that the police report was obtained by someone else because by then he had been flown to the Republic of South Africa for treatment. He could not recall if he spoke with the Police before the preparation of the report. He stated that at the time of the accident the doors of his vehicle were locked and windows were closed as that was his practice generally when travelling at night.

He stated that prior to the accident of 20<sup>th</sup> June 2002 he had other two prior accidents. He stated that he drinks alcohol. At the material time he was driving along the Masauko Chipembere Highway in the Limbe direction. He was coming from Namiwawa and that the traffic control lights at Ginnery Corner were not functioning normally – they were flashing at amber only. He stated that in that situation, his understanding was that the traffic on the highway had right of way, hence his continued driving on. He stated that even the traffic control lights on the Highway approaching Johnstone Road were flashing at amber and so too those controlling traffic from Johnstone Road adjoining the Highway. The plaintiff confirmed that he had right of way. Suddenly he saw a truck emerging from the side road joining the Highway. This truck was about to enter the Highway. This place has a slight blind corner. The plaintiff tried to avoid hitting the truck as soon as he noticed its presence but

nonetheless hit its back tyres. He saw the truck when it was about 20 metres from his vehicle. He stated that his speed was in between 50 and 60 kilometres per hour and was unable to stop before the impact, although he had tried to. He stated that the distance was too close. He denied that his manner of driving was influenced by his having right of way. His having right of way did not contribute to his failure to stop and avoid the collision. He stated that the truck did not have reflectors on its sides. He stated that when he regained his conscious, he was able to recall about the occurrence of the accident. He stated that his vehicle, a Toyota Land cruiser VX was damaged beyond economic repair. The entire front was badly damaged as a result of the force of impact. He could not know the damage to the truck and does not recall talking to the driver of that truck as the plaintiff was in and out of conscious at the material time.

In re-examination he stated that the Police report was addressed to Rashy Motors which is a company owned by the plaintiff. He also stated that his two prior accidents were in 1992 and 1995/96 and he was not to blame for both. He insisted that at the material time he swerved to avoid collision and that if he had continued in a straight path he could have hit the truck near the front.

The second witness for the plaintiff was Aslam Mahomed Sabadia. He adopted his witness statement as evidence in chief. It reads as follows –

*I, Aslam Sabadia, a businessman of c/o City Motors Limited, P. O. Box 30012, Chichiri, Blantyre 3 and state as follows –*

*I am the Operations Director for City Motors Limited.*

*I have been with City Motors Limited since 1984.*

*I first obtained my driving licence in 1984. My driving licence is ID No. 1/1966012516094.*

*City Motors does panel beating, spray painting, general mechanics and sales of spares of motor vehicles.*

*On the 20<sup>th</sup> June 2002, I was driving from Namiwawa in Blantyre to Limbe along Chipembere Highway together with Rashy Gaffar who was driving a Toyota Land cruiser registration No ZA 7863 ahead*

*of me. I was driving a Land Rover Discovery, a demonstration car, with no number plates.*

*It was about 8.30 p.m. and the street lights were functional on the Highway.*

*The moon was on and it was clear night.*

*On reaching the traffic lights at Queen Elizabeth Central Hospital the robot lights were not working.*

*Rashy Gaffar ahead was driving on when all of a sudden a Hino Truck owned by Press Bakeries suddenly pulled from Johnstone road into the Highway at a great speed.*

*I was about 100 metres behind Rashy Gaffar when he failed to completely stop the car as a result he ran into the rear tyres of the truck.*

*The truck could not be seen as it had no reflectors on the sides.*

*Rashy Gaffar's motor vehicle was extensively damaged and he was extensively injured.*

*I got out and immediately ran to check on Rashy Gaffar.*

*With the help of by passers, I took him into my motor vehicle and immediately took him to Mwaiwathu Private Hospital. I also phoned members of his family about the accident.*

*The injuries that he suffered related to his legs, ribs and abrasions all over the body.*

*The accident was primarily caused by the said truck that joined the main road and had no reflectors and did not indicate that it was joining the main road and more over it did so when the lights were not working.*

*The truck had no lights and no reflectors.*

*The truck was a seven (7) toner i.e. about 7 metres long and there was no space on the highway to manoeuvre.*

*In any event Rashy Gaffar had the right of way.*

*The same evening I towed Rashy Gaffar's motor vehicle to City Motors Limited.*

*The following day, Rashy Gaffar was flown to Milpark Clinic in the Republic of South Africa.*

*I assessed the motor vehicle to be damaged beyond economic repair.*

In his additional evidence in court the witness said that he was driving behind the plaintiff's vehicle at a speed of about 80 kph. It was about 8.30 o'clock in the evening and both of them were driving from Namiwawa and going to Limbe to the house of the witness. At the material time there were only the two vehicles on the Highway when the truck suddenly started joining the Highway from the side road. The witness was just about 100 metres away. Upon noticing the accident, he went past the plaintiff's vehicle and stopped and was the first person to get to the vehicle. He asked the plaintiff to open the windows and door on the left side because those were the only ones which could open. The plaintiff had sustained very bad injuries in his hands and forehead and his body was full of blood.

In cross-examination the witness stuck to his evidence. He stated that he had gone to Namiwawa with the plaintiff to inspect a house for rent or sale. He said that when he reached City Motors he slowed down and it is when the distance between his vehicle and that of the plaintiff increased to about 100 metres – otherwise they were driving close to each other. When the accident had just occurred the plaintiff was semi-conscious and that is why he was able to press a button to open the left door of the vehicle. The witness is the one who took the plaintiff to Mwaiwathu Private Hospital. On that night the street lights were functional and the moonlight was available and the sky was clear. He confirmed that the traffic control lights at HTD offices were flashing amber and that this accident occurred on the Highway/Johstone Road T junction. He was adamant that he told the court what he saw at the material time and not what he was told. He said the plaintiff was driving his left lane and hit the rear axle of the defendant's truck as the plaintiff swerved to avoid collision. The plaintiff's vehicle was badly damaged in the front. The witness said that he did not know the driver of the truck and if at all he came to assist the plaintiff, the truck driver did not introduce himself to the witness. The truck was a van and the witness could not see if it was

loaded or empty. The witness said that he is the one who assessed the plaintiff's vehicle to be beyond economic repair. He stated that the engine and gear-box were also affected. He stated that when the 7 toner truck was joining the Highway it was at great speed.

The matter then proceeded with defence evidence. The first defence witness was the driver of the defendant's vehicle which was involved in this accident. Parts of his lengthy statements read as follows

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2. *I am employed by Super Bake Limited formerly known as Press Bakeries Limited (the 1<sup>st</sup> defendant herein) as a driver.*
3. *On Friday, early evening of the 20<sup>th</sup> June 2002 I was driving my employers' 15 tonne Toyota truck registration number BJ 2763 with full load of bakery raw materials for delivery in Mzuzu when at the junction of Johnstone Road/Masauko Chipembere Highway – with traffic lights at amber – I met an accident wherein the plaintiff's motor vehicle Toyota Land cruiser VX station wagon driven by the plaintiff at what shook me as a terrific speed hit the truck I was driving at the rear tyre area whilst I had already cautiously joined the Highway and I was, because my vehicle had a full 15 tonne load on, slowly turning into the direction of Blantyre on the Highway.*
4. *In my whole life since 1995 to the present day I have never gotten involved in any accident except the one in this present case.*
5. *Then at about 16.50 hours I started off from the Super Bake Limited Head Office premises in Ginnery Corner on the delivery trip to Mzuzu – driving up Johnstone road towards the Masauko Chipembere Highway.*
6. *I started off as I said progressing towards and to join the Highway and take the Blantyre direction. I was carrying a full 15 tonne load. I had just started off on the trip and probably the very maximum that I had done on the Johnstone Road was 20 kilometres per hour. I drove at that maximum speed until I pulled to the Johnstone Road/Masauko Chipembere Highway junction. Here I found that the traffic control lights were on amber. This is a situation where the other lights, that is red and green do not come on. It is only amber that flickers*

on. This in traffic discipline signifies that traffic at the particular point in time is not heavy or ought not to be or is normally not expected to be heavy. When this happens like it did happen on that particular evening/occasion it is a GIVE WAY SITUATION where each of the drivers, both on the main road (like the Chipembere Highway) as well as on the enjoining road (like Johnstone road) are supposed to stop, give way, watch traffic on the other road and safely proceed. At the junction when I noticed that it was amber only situation, I stopped, at least two minutes – to give way in the amber only scenario. I checked on both sides of the highway for oncoming traffic. I noticed there was no oncoming traffic on both (Limbe-Blantyre and Blantyre-Limbe) sides of the highway. I never noticed the approach of any vehicular traffic, either by physically sighting one nor hearing the sound thereof or sighting the lights thereof on the said both sides of the highway. And so I accordingly rest assured of very safe clearance on the highway for me to safely join the highway.

So I joined the Highway taking the direction of Blantyre, moving at a very slow pace, carrying a heavy (15 tonne) load. At joining and since I had stopped to observe the amber only, I did join the Highway at a speed lower than 20km per hour – probably at 2 – 5 km per hour. When I was just about to finish my joining or turning in the Highway (to fully get in my Limbe-Blantyre lane, I saw a car terribly cruising on the Highway in the Blantyre-Limbe direction. I first saw this so cruising at the Universal Industries robots point. When I saw it and in view of its lightning speed – in a flash of a time – I could not make out what sort of car it was. I only surmised that it was a small car, otherwise if it was a big car it would not have been travelling at such space rocket speed. At that point I even told the Muronya brothers whom I had given a lift that “**that one is moving at a very terrible speed**”. In my assessment that car was at a speed not less than 150 – 160 km per hour.

No sooner had I finished saying that than I heard a loud bang at the rear of my vehicle. This driver just stopped on my vehicle. When this was happening – when I realized he was not going to be able to stop, I had tried to create way for him by further manoeuvring in the Limbe-QECH lane – to pass the Blantyre-Highway direction. I imagined that having appreciated the precarious situation he had thereby created,

*he was going to turn in the option of settling in the Blantyre-Ginnery Corner/Ndirande (Johnstone Road) lane to avoid hitting into the trailing rear part of my truck. But because of his speed this option did not come to mind and was not deployed. His terrible speed cut very short the time period within which that could be achieved I suppose. I also have suspicion that the driver must have been drunk and his conception and judgment must have been impaired. He did not even attempt braking. There was no squeaking of his brakes whatsoever. This I believe was on account of his cruise speed and impaired judgment.*

*His vehicle, after hitting my truck, stopped at the point of impact but my 15 tonne fully loaded truck was pushed for some 10 metres along the Limbe-QECH lane. I stopped the engine of my truck and jumped out to reckon what had happened. I noticed that the driver of this car (the plaintiff) had been trapped in his car. The whole of his front compartment was badly damaged. I could speak with him. He was alive. I asked him "achimwene simunandiwona? And he answered in English: "Don't worry my brother, it is an accident". I could not open his doors. Then I called for the help of the Muronya brothers. They came to try to help me lift the plaintiff from his car trapped. We could not. Several cars stopped by and one of those passers by asked me if I had a chain with which we could tie to the door to force-open the plaintiff's car door. I told him I had a chain. So he suggested we use the chain as suggested to force-open the door. At this suggestion I queried whether by just chaining the door and pulling it open we would not end up pulling the vehicle. It is at this point that it was suggested by one of the passer-by sympathizers that he had a rope with which we tied up to the other side's door the traffic light pole and the chain to the other door and to a towing or pulling pick-up so that by pulling the doors in opposite directions one of the doors opened and we managed to take the plaintiff out of his car and his cousin, whom I only remember as Abdul, who had come to the scene of the accident and took the plaintiff to Mwaiwathu Private Hospital. Abdul also took with him some personal effects of the plaintiff like cell phones and documents from the plaintiff's car.*



*I did not notice any injuries on him. The only thing I observed was that when I together with the other helpers were carrying him out of the car to Abdul's car, he kind of screamed "Guys mukundipweteka". The whole exercise of force-opening the car and taking the plaintiff into Abdul's car took some 30 minutes.*

*I did not go to Mwaiwathu Private Hospital myself as I had to wait for traffic police at the scene of the accident. I am not very sure who notified the police about the accident.*

*From my observation the front of the plaintiff's vehicle was excessively damaged. All the head lamps were damaged. The radiator and the engine I suspect were also damaged. The plaintiff's vehicle which is Toyota Land cruiser VX which is designed a long-nose vehicle was, by the accident and impact, transformed into a flat-nose vehicle.*

*The only damage to my vehicle BJ 2763 was a dent (90% bend) of the axle holder. This is a strong metal rod built holding the axle and it is situated at the point of the plaintiff's vehicle's centre impact with my vehicle.*

*Whilst still at the scene of the accident waiting that the police be alerted of the accident, Mr Aslam Gaffar (ZAGAF) came onto the scene, found me and asked what had happened. I explained to him what had happened and he advised "ndingozi". And whilst arranging that Mr Aslam Gaffar and myself do report the accident at the police, I had gone to my truck to collect red triangles to be placed on the road to warn traffic of the two obstacles on the road (my truck and Rashy's car). When I had picked the triangles from my truck, there came a car, a Daihatsu Rocky followed by another vehicle a Land Cruiser pick up, each one of them parking at the accident scene and from each of them alighting 4 coloured guys. They asked who the driver was thus "A driver ndi ati". And I said I was the driver. Then two of them descended on me – one of them holding my hands and the other holding me by the neck and banging my head by the hind head against my truck. Then another two of the coloureds joined in and they started beating me severely in the head and I lost consciousness. And they left me for dead by the truck. I only realized the next morning that I was at hospital at Queen*

*Elizabeth Central Hospital with my mind very destabilized. I was admitted at the hospital for head injuries and related mental disturbance. – from the night of 20 June 2002 to 29 June 2002.*

*On my discharge from hospital I was still having persistent pains in the jaw area and my employers took me to Adventist Hospital in Blantyre where they X-rayed me and discovered that I had a broken jaw bone which I sustained from beating and I was referred to a dentist, Dr Chimimba. Dr Chimimba treated the fracture and whole medical case.*

*The police report was made and unjustifiably heaping blame for the accident on me. This is not surprising in view of the overall conduct of the police in their investigating and reporting on the accident*

*The sure fact of the matter is that the accident was wholly caused by the negligent driving and management of his motor vehicle Land cruiser station wagon VX registration number ZA 7863 by the plaintiff himself. In my lay assessment I am in no trace to blame for the accident. I had tried everything humanly possible in the circumstances to try help the plaintiff not to kill himself in the circumstances.*

The witness further stated that the vehicle had reflectors on both driver and passenger doors. He challenged the evidence that he had just joined the road but that he had stopped twice. Upon stopping he checked for traffic on the Highway and there was none and it is when he started entering the Highway. He said that the plaintiff's vehicle was over-speeding but his vehicle was slow because it was loaded.

The witness also challenged the police report and stated that he was never interviewed by the traffic police.

In cross-examination, the witness said the lights were flashing amber. He stated that he was driving a long vehicle and was taking the Blantyre direction. He admitted that he saw lights of a vehicle coming towards his vehicle. He further admitted that the plaintiff was driving in his rightful lane and that the impact occurred in that lane. He stated that it was Mr Sabadia who took the plaintiff to hospital.

Finally, after the witness was discharged from Queen Elizabeth Central Hospital, he went to Chichiri Police where he wrote his statement concerning the accident.

There was a re-examination which was a typical repetition of what had been stated in evidence in chief and cross-examination. May be of relevance is the admission by the witness that his vehicle had not completely taken a turn to be on the Highway facing Blantyre direction.

The second witness for the defendants adopted his witness statement after giving his personal details. It reads as follows: -

*I am employed by the Government of the Republic of Malawi in the Directorate of Road Traffic currently serving as Chief Motor Examiner based at the Directorate's headquarters in Blantyre.*

*I have served as motor vehicle examiner from 1987 to 1998 and as Senior Motor Examiner from 1998 to 2002 and as Chief Motor Examiner from 2002 to date.*

*As motor examiner my duties involve examining and/or assessing proficiency or qualification of drivers of motor vehicle in the knowledge and skills of motor vehicle driving and compliance by motor vehicles in terms of roadworthiness and other traffic requirements and certifying same the in accordance with the Road Traffic Act of the Laws of Malawi, the Highway Code and the law of the Highway generally.*

*In terms of traffic control lights at controlled crossing points on our roads in Malawi, we have the AMBER light (which cautions of or signifies 'GET READY TO STOP OR TO DRIVE ON', the GREEN light which means 'NOW PROCEED THROUGH OR DRIVE ON' and the RED light which means 'STOP'. The AMBER light is a CAUTION light (as one may not have seen the lights changing and not know whether before it was the GO (green) light or STOP (red) light cautioning the motorist to be ready either to stop at or proceed through the traffic control lights point.*

*In Malawi our traffic control lights sometimes (especially in the evening and through night hours – when traffic volume is naturally low) operate on a programme that the RED or GREEN lights will not come on and only the AMBER light alone is continuously on flashing.*

*In such instance it is “GIVE WAY AND PROCEED TO ENTER OR DRIVE ON WITH CAUTION”. A motorist on the adjoining or branch road who is faced with the AMBER ONLY situation at the traffic control lights on his road – seeking to join the main road is supposed to GIVE WAY., that is to stop at the lights, watch the main road and give precedence to traffic IN VIEW or SEEN APPROACHING on the main road. If no traffic is in view or seen approaching on the main road he definitely cannot give way forever; he has the right of way to drive through the AMBER light with caution onto the main road.*

*On the other hand a motorist on the main road who is faced with or approaches the AMBER light scenario at traffic control lights on – seeking to drive on, although would have had absolute right of way if the other two lights were also coming on and GREEN had come on for him, would also have to GIVE WAY to traffic on his and the adjoining roads, approaching the traffic control lights with caution.*

*This is so because if the traffic control lights have been functioning like during day or normally, they would not be continuously GREEN for the motorists on the main road. At some point after the GREEN it would have to be AMBER in readiness for STOPPING TO GIVE WAY when RED immediately sets in thereafter. So at some point the motorist on the main road, proceeding on the road, would have to give way to traffic coming off the adjoining and turning into the main road. These are times when it is RED – “No Right of Way” or AMBER – “GIVE WAY/CAUTION’ for those on the main road and GREEN for those on the adjoining road.*

*Now the AMBER is neither RED nor GREEN the motorist on the main road although would at UNCONTROLLED crossing points have precedence or right of way over those on adjoining or branch roads, would have to approach the light **cautiously observing if no other traffic in the circumstances from the other road has – owing to the fact that he** (the motorist on the main road) **had not yet pulled into view noticeable approach, after having given way and ensured clearance) taken drive through precedence and right of way onto the main road, and if none – proceed through the AMBER light. Otherwise he would have to “pull down” safely to give way to that other traffic and after it clears off, drive on.** The traffic procedures would be the same if the*

*traffic control lights are completely out of order (no lights are coming on) at the controlled crossing point. That is the applicable rule of the Highway.*

*And if it happens, like I understand happened in the present case, two vehicles collided, one driving through AMBER on the Masauko Chipembere Highway and the other driving through AMBER up from Johnstone Road into the Highway, the areas of collision or contact on the vehicles are the ones that would determine who did not observe the AMBER traffic rule and therefore the one in the wrong.*

*As I understand the plaintiff's Toyota Land cruiser hit the 1<sup>st</sup> defendant's truck at the latter's rear tyre when the rest of the latter's body was in the Limbe/Blantyre lane of the Highway heading in the opposite direction.*

*In my view the truck already had precedence (over and before the Land cruiser) to enter the Highway and Land cruiser ought, in the current circumstances, to have been driven in reasonable speed on the Highway to be able to approach the truck and pulled to a halt to allow it fully clear. This I reckon the Land cruiser driver was not able to do on account of none other than excessive speed and the folly assumption of absolute right of way through the traffic control lights and especially that the lights were not GREEN but AMBER – which was a serious omission on his part. If the collision had occurred just upon entry of the truck onto the main road and it was hit say on the front tyre area, the case would have been different – that the understanding would be that the Land cruiser had probably been in drive view and had precedence on the main road and the truck driver had not given appropriate GIVE WAY at the AMBER (which in the circumstances does not add up).*

*I am not a party to these proceedings and state that the contents of this statement are true and correct to the best of my knowledge and belief.*

In cross-examination he admitted that he did not see the vehicles which were involved in this accident but that he is familiar with the scene. He stated that the driver from Johnstone Road has to give precedent to the driver on the Highway if he sees lights of that other vehicle. He admitted that certain positions of his evidence are mere opinion because he did not witness the occurrence of the accident.

There was re-examination. He confirmed that the amber light on traffic control lights is for caution.

## THE LAW AND LEGAL ANALYSIS OF THE EVIDENCE

The plaintiff's claim against the defendants is based on alleged negligence of the defendants.

### Negligence

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do – *Blyth vs Birmingham Waterworks Co.*, (1856), 11Ex. 781.

Liability in negligence arises when the act or omission referred to above results in damage to a person whether in form of personal injury or property damage.

The **tort of negligence** is said to have three ingredients:

- (a) a legal duty on the part of the defendant towards the plaintiff to exercise care in such conduct of the defendant as falls within the scope of the duty.
- (b) a breach of the duty.
- (c) consequential damage to the plaintiff. *Winfield & Jolowicz on Tort 14th Edition page 78.*
  - (a) Duty of Care

It is a principle of common law that one must take reasonable care to avoid acts or omissions which one can reasonably foresee would likely injure persons who are so closely and directly affected by one's act that one

ought reasonably to have them in contemplation as having been so affected when doing the act. *Donoghue vs Stevenson* [1932] AC 562 .

(b) Breach of the Duty

A person is said to have breached the duty of care or to have been negligent when he is guilty of the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. – *Blyth vs Birmingham Water Works Co.*

(c) Damage

In order to succeed in an action for damages against his employer a workman must show that his injuries were caused by the employers breach of duty the onus being upon the employee to establish both the breach and that the breach caused injury.

## **APPLICABLE LAW**

### **Highway Code**

The duties incidental to the exercise of due care on the highway are in part determined by reference to detailed directions for the guidance of road users and known as a Highway Code.

The Highway Code was made as part of subsidiary legislation under Section 164(1) of the Road Traffic Act.

By virtue of Section 184(2) of the Road Traffic Act, 1997 they are still in force as part of the laws of Malawi.

A failure on the part of any person to observe any provision of the Highway Code may in any civil proceedings be relied upon as tending to establish or negative any liability which may be in question.

The Road Traffic Act provides for the regulation of traffic by means of traffic signs, including signals, and it is not negligent to rely upon drivers to observe them: **Joseph Eva Ltd vs Reeves** (1938) 2KB. 393; (1938) 2 ALL ER 115 **Ward vs London County Council** (1938) 2 ALL ER 341.

The speed at which a vehicle is driven is material to the question of liability.

The rate of speed that will be considered negligent varies with the nature, conditions and use of the particular highway and the amount of traffic that actually is, or may be expected to be on it; **Laurie vs Raglan Building Company Ltd** (1942) 1 KB 152 at 154 – 155 per Lord Greene, M.R.

The driver of a motor vehicle should usually drive at a speed that will permit him to stop or deflect his course with the distance he can see is clear, though it is not conclusive evidence of negligence to exceed that speed - **Morris vs Luton Corp** (1946) KB 114; (1946) 1 ALL ER 1.

The question is always on the fact: **Tidy vs Battman** (1934) 1 KB 319 and (1933) ALL ER Rep. 259 appeared in **Stewart vs Hancock** (1940) 2 ALL ER 427 P.C.

The driver of a vehicle that approaches a major road from a side road has to give way to traffic on the major road, see **Macanrew vs Tillard** (1909) S.C. 78; **M'ollester vs.....Corp**n (1917) S.C. 430.

High speed alone is not negligence: **Quinn vs Scott** [1965] 2 ALL ER 558; (1965) 1 W.L.R. 1004.

Similarly, exceeding speed limit is not in itself negligence imposing civil liability; **Barna vs Hudes Merchandising Corp**n (1962) Sol. 194, CA

Traffic entering a major road from a minor road ought to give way to traffic on the major road; see **Brown vs Castral Scottish Motor Traction** (1948) 98 LJ 671 Court of Sess. Scot.

It is well recognized and conventional practice that where there is a doubt as to priority, the vehicle that has the other on its right hand side is



the give-way vehicle; **Mac Intyre vs Coles** (1966) 1 ALL ER 723; (1966) W.L.R. 831.

Major road drivers are not to blame for collision with the motor vehicle from a minor road; see **Watkins vs Moffat** (1967) Sol, j o 719.

Some of the **Highway Code Rules** provide as follows: -

**Rule 20:** Do not exceed the speed limit

**Rule 21:** Never drive so fast that you cannot pull up well within the distance you can see to be clear, particularly having regard to the weather, the state of the road and to whether your vision is spoiled by dust or heavy rain.

**Rule 27** (a) Never drive at such a speed that you cannot pull up well within the distance you can see to be clear. Always leave yourself enough room in which to stop.

(b) At night always drive well within slow down to stop.

(c) If you are dazzled slow down or stop

(d) Slow down before a sharp bend.

Drive slowly when the road is muddy.

**Rule 50** When approaching a junction with a major road, slow down gradually and if in doubt give way to traffic on the major road. Where there is a "Stop" or "Give Way" sign, you must stop at the major road or give way to traffic on it, in obedience to the sign.

**Rule 51** At a junction look right, then left, then right again. DO NOT GO ON UNTIL YOU ARE SURE THAT IT IS SAFE TO DO SO.

**The Road Traffic Act – Subsidiary Legislation**

- 39 The directions given by the lights of any traffic light shall be as follows -
- (a) red means that no vehicle facing the signal shall cross the stop line.
  - (b) green means that all vehicles facing the signal may proceed straight ahead or to the left or right subject to due precaution being taken and subject further to such movement not being contrary to any specific regulatory sign;
  - (d) amber (when operating in a colour sequence) means no vehicle facing the signal shall cross the stop line unless, when the amber light first appears after the green light, the vehicle is so close to the stop line in which case the vehicle shall proceed subject to due precaution being taken;
  - (e) amber (**when not operating in colour sequence**) means that all vehicles entering the intersection or junction shall do so subject to precaution being taken.

The Road Traffic Act, 1997 has provisions which make it imperative on any driver to drive with care. Some of the provisions state as follows: -

### **Section 99(2)**

The driver of a vehicle shall not enter a public road unless he can do so with safety to himself and other traffic.

### **Section 101**

The driver of a vehicle on a public road shall, when he intends to enter any portion of a public road which constitutes a junction of two or more public roads where vehicular traffic is required to move around a traffic island with such junction, yield the right of way to all vehicular traffic approaching from his right within such junction, unless his entry into such junction is controlled by instruction given

by a traffic police officer or a direction conveyed by a road traffic sign requiring him to act differently.

### **Section 102(2)**

The driver of a vehicle on a public road who desires to turn to the right shall, having due regard to the provisions of Section 101, before reaching the point at which he desires to turn, indicate his intention to turn and shall not effect such turning unless he can do so without obstructing or endangering other traffic and

If he is driving a vehicle on the roadway of a public road which roadway is intended for traffic in both directions –

- (i) He shall steer such vehicle as near as circumstances permit to the immediate left of the middle of the roadway on which he is travelling; and
- (ii) Where the turn is at an intersection, he shall not encroach on the right half of the roadway into which he intends to turn, except in the intersection itself, but shall in any event pass to the left of any traffic island in such intersection or comply with the direction conveyed by an appropriate road traffic sign.

I followed the evidence of the witnesses clearly and assessed the demeanour of the witnesses in the process.

It is not in dispute that the plaintiff was on the main road and 1<sup>st</sup> defendant employee was on the minor road.

Again, it is not in dispute that the accident took place at a junction between a major road and a minor road.

It is agreed that traffic lights were not working.

The accident took place at about 250 metres away from another junction where there were traffic lights.

It is again agreed that the place of the accident (i.e. junction) is a blind spot.

It is not in dispute that the 1<sup>st</sup> defendant's driver was turning to his right into the main road and the plaintiff was coming from the right hand side of 1<sup>st</sup> defendant's driver. Thus plaintiff had a right of way and 1<sup>st</sup> defendant's driver was under a duty to give way.

The fact that he failed to give way to the plaintiff is evidence of negligence.

It is agreed that there was not much traffic on the Highway and that the weather condition was fine and the street lights were on. Hence the argument of over speeding is wholly misplaced.

The police report prepared by an independent witness puts the blame of the accident on the defendant's driver.

In fact testimony of plaintiff is supported by Sabadia who was driving 100 metres behind the plaintiff.

Had the driver of the 1<sup>st</sup> defendant stopped at the T-junction he would have noticed two (2) cars coming from his right hand side.

According to the place of the accident, the driver of the 1<sup>st</sup> defendant was supposed to stop at the middle of the minor road and from that place he could easily have noticed traffic on the road.

Realizing that traffic lights were not working and that he was emerging from a minor road, he could easily have blown the horn to warn other road users.

It is not true to say that 1<sup>st</sup> defendant's driver did talk to the plaintiff as the plaintiff fell unconscious immediately after the accident.

The 1<sup>st</sup> defendant's driver failed to keep a proper look out as stated by the then Chief Justice Skinner in **Somani vs Ngwira** 10 MLR 196 at 199.

*The duty of a driver to keep a proper lookout is well stated in **Charlesworth on Negligence**, 6<sup>th</sup> ec., at 878 (1977). The passage is as follows:*

*"It is the duty of the driver or rider of a vehicle to keep a good lookout. He must look out for other traffic which is or may be expected to be on the road, whether in front of him, behind him or*

*alongside of him, especially at crossroads, junctions and bends, and for traffic light signals and traffic signs including lines marked on the highway”.*

The driver of the 1<sup>st</sup> defendant principally caused the accident.

Again in **Somani vs Ngwira** (ante) Skinner CJ observed at p 200 that:

*“What the causes of an accident were is a question of fact, there is no general test which has been formulated to enable the question to be decided. We have to examine all the relevant factors which are shown on the evidence available to us and decide what cause or combination of causes was most probably responsible for the collision. We remind ourselves of the words used by Lord Wright in **Yorkshire Dale S S Co. Limited vs Minister of War Transp.** (1942) AC at 706.*

**“Causation is to be understood as the man in the street, and not as either the scientist or the metaphysician, would understand it. Cause here means what a.....man would take to be the cause without too microscopic analysis but on a broad view”**

The 1<sup>st</sup> defendant’s driver was certainly not driving at a proper speed otherwise he would have stopped on noticing the plaintiff’s “speeding” vehicle as he puts it.

Proper speed was said in **Republic vs Sinambale** (1966-68) 4 ALL Mal. 191 at 196 as such speed that would allow a driver to stop in sudden emergency.

I wish to consider specifically the evidence of Mr Zintambila, who I believe the defendants called as an expert witness. He was calm and cool when testifying. He admitted that he never saw the vehicles which were involved in the accident. He stated that his opinion was based on his personal experiences and his familiarity of the scene of the accident. He admitted that he did not get any statements from the drivers who were involved in this accident. I find it difficult to accept his opinion that the accident was caused by the plaintiff through over speeding. I have already stated in this judgment that each and every accident has its own peculiar circumstances and it is only persons who witness occurrence of such accident who would assist greatly in bringing out the relevant factual matters. In the present case it is the plaintiff, Sabadia and Mkwapatira

whose evidence is of much help to the court. The evidence of Mkwapatira who was the defendant's witness number 1 did not strike me as revealing the truth. His estimation of the plaintiff's speed as 150 – 160 kph is a total exaggeration. He could do so to underplay his own sudden emergence into the Highway which caused the collision.

### **Expert Evidence**

Halsbury Laws of England (3<sup>rd</sup> ed) Vo. 15 at paragraph 588 observes as follows:

*In an action, of whatever nature, arising out of an accident on land due to a collision or apprehended collision, unless at or before the trial the court or Judge otherwise orders or directs, the oral expert evidence of an engineer sought to be called on account of his skill and knowledge as respects motor vehicles must not be received unless a copy of a report from him containing the substance of his evidence has been made available to all parties for inspection before the hearing of the Summons for Direction and an Order made on the Summons or an application thereunder authorises the admission of the evidence.*

The evidence of Mr Zintambila was meant to be that of an expert and should have been in a report form of what he did to come up with his opinion. Otherwise it would be like any hearsay evidence or evidence that is inadmissible under strict rules of evidence.

### **CONCLUSION**

On the evidence before this court and in my consideration of the law, I find the defendant's fully liable for the occurrence of this accident. I do not find any contributory negligence on the part of the plaintiff. I order that the Registrar should assess damages.

The issue of costs is in the discretion of the court. The plaintiff has fully succeeded in his claim. Therefore, I condemn the defendant's to pay costs for and incidental to these proceedings.

**PRONOUNCED** in open court this 14<sup>th</sup> day of February 2008 at Blantyre.

Chimasula Phiri  
**JUDGE**