



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL DIVISION

INJURY CAUSE NO. 108 OF 2017

**BETWEEN**

ANDREA GIFT .....CLAIMANT

**-AND-**

MADALITSO MWANIKHA .....1<sup>ST</sup> DEFENDANT

PRIME INSURANCE COMPANY LIMITED .....2<sup>ND</sup> DEFENDANT

**CORAM: THE HON. JUSTICE D.T.K. MADISE**  
Counsel for the Plaintiff  
Defendant/Absent  
Official Interpreter

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Madise, J

**JUDGMENT**

## **1.0 Introduction**

- 1.1 The claimant in this matter took out a writ of summons on 14<sup>th</sup> February, 2017 against the defendant's seeking damages for injuries he suffered after a road accident involving a minibus Reg. No MJ 7793 Nissan Caravan which was being driven by the 1<sup>st</sup> defendant and insured by the 2<sup>nd</sup> defendant. The defendants have denied the claim for damages and have called on the claimant to proof his case.
- 1.2 The particulars of the alleged negligence, the damage and loss suffered and the claims for damages are well spelt out in the statement of claim.

## **2.0 The Facts**

- 2.1 The claimant told the court that on 26<sup>th</sup> July, 2016 he was a passenger in a motor vehicle with Reg number MJ 7793 Nissan Caravan minibus from BCA to Limbe. At around 18:00 hours and upon arrival at Chisombezi bridge, the driver of the minibus Madalitso Mwanika, the 1<sup>st</sup> defendant herein lost control of the vehicle and served to the extreme offside where the minibus overturned and rolled over. The claimant stated that the accident occurred due to over speeding.
- 2.2 As a result of the accident he suffered, fractures on the left humerus, left radius, ulna, degrowing wounds on the left hand and a cut on the head. He lost consciousness and he wake up at Mulanje District Hospital. He was admitted up to 31 August, 2016 and he was then transferred to Queen Elizabeth Central Hospital where was admitted up to 2 September, 2016. The claimant tendered his medical report (AG1) which particularized the injuries he sustained.
- 2.3 The claimant further tendered in evidence the police report (AG3) which put blame on the 1<sup>st</sup> defendant for causing the accident due to over speeding. The claimant seeks damages for the loss and damage suffered



due to the accident. That marked the end of the claimant's case. The defendant did not attend the trial despite due service. No reasons were given for their nonattendance. I now proceed to give my views on the merits.

### **3.0     The Issues**

3.1     There are three main issues for determinations before me.

- 1) Whether the 1<sup>st</sup> defendant was negligent
- 2) Whether the 2<sup>nd</sup> defendant is liable in damages as an insurer.
- 3) Whether damages are payable.

### **4.0     The Law**

4.1     The burden and standard of proof in civil matters is this. He/she who alleges must prove and the standard required by the civil law is on a balance/scales of probabilities. The principle is that he who invokes the aid of the law should be the first to prove his case as in the nature of things, a negative is more difficult to establish than an affirmative.

4.2     As Denning J, stated in Miler vs. Minister of Pensions [1947] 2 A II E.R. 372.

*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*

4.3     Similarly the degree of probabilities will depend upon the subject matter. When a civil court is deciding on a charge of fraud, it naturally follows that a higher degree of probability is required than when deciding an issue of negligence. However the standard does not reach as high as that required in a criminal court which is beyond a reasonable doubt. The general principle is that the court must require a degree of probability which suits the occasion and is commensurate with the law and facts

#### 4.4 What is Negligence?

The law on negligence was well settled by Lord Alderson who gave perhaps the best description of the definition of negligence in the case of Blyth vs. Birmingham Water Works Company (1856) Ex. 781 at 784.

*Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinary regulate the conduct of human affairs would do or doing something which a prudent and reasonable man would not do.*

#### 4.5 Negligence as a tort has four requirements namely:

1. The existence in law of a duty of care which the law attaches liability to carelessness.
2. Breach of the duty of care by the defendant.
3. A casual connection between the defendant's careless conduct and the damage.
4. That the particular kind of damage to the particular claimant is not so unforeseeable as to be too remote.

#### 4.6 Once this is established the next question is to consider whether the defendant is liable in damages and for how much.

#### 4.7 Lord Atkins LJ when he decided Donoghue vs. Stevenson (1932) AL 562. Stated as follows



*Who then in law is my neighbor? Neighbors are people who are so closely and directly affected by any act that I ought reasonably to have them in contemplation as being so affected when I'm directing my mind to the acts or omission which are called in question*

- 4.8 Looking at the evidence before me, can it be said that the defendant was negligent and caused the claimant's injuries? Did the defendant owe the claimant a duty of care? Can it be said boldly and without hesitation that the defendant breached that duty of care which resulted in the injuries the claimant sustained? Lastly can it be said that as a result of that breach the claimant suffered pain and damage to her lower leg and amenities of life? Lastly are damages payable in this matter?

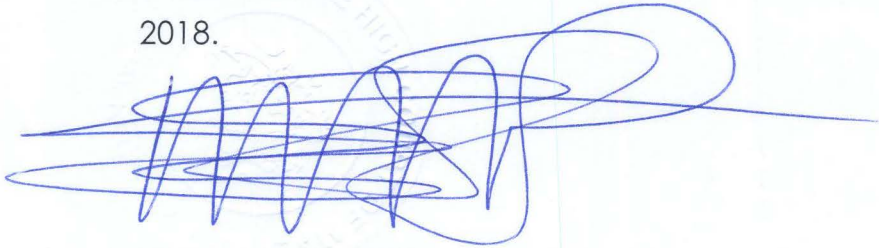
## **5.0 The Finding**

- 5.1 The defendants and their legal representatives did not defend despite due service and they gave no reasons why they failed to attend court for the hearing of the case. I now proceed to give my judgement on the merits.
- 5.2 There is no dispute that the claimant was a passenger in a minibus Reg. No MJ 7793 which was involved in an accident on 26<sup>th</sup> July, 2016. There is no dispute that the said vehicle was driven by the 1<sup>st</sup> defendant. There is no dispute that's the said vehicle was injured by the 2<sup>nd</sup> defendant. There is no dispute that as a result of the accident the claimant suffered serious injuries and had to be admitted at Mulanje Hospital and Queen Elizabeth Central Hospital from 26<sup>th</sup> July to 2<sup>nd</sup> September, 2016.
- 5.3 The medical report described the injuries the claimant suffered in perfect detail. The defendants have not challenged this piece of evidence. The police report which was tendered has put blame on the 1<sup>st</sup> defendant for causing the accident due to over speeding.

... considered view and on a balance of probabilities, I find in favor of the claimant and he must carry the day in this Court. The 1<sup>st</sup> defendant is liable in damages for negligence. The 2<sup>nd</sup> defendant is liable as an insurer of the said vehicle. I therefore grant the claimant all the reliefs sought in the summons and the statement of claim. Costs are the exclusive preserve of the court. I ward the claimant the costs of this action.

- 5.5 The plaintiff must take out summons for assessment of damages before the Registrar within 14 days.

**Pronounced** in Open Court at Blantyre in the Republic on 27th November, 2018.



Dingiswayo Madise  
**JUDGE**