IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 3256 OF 2002

BETWEEN:

SHIRE BUSLINES LIMITED.....PLAINTIFF

- and –

FARGO LIMITED.....1ST DEFENDANT

UNITED GENERAL

INSURANCE LTD.....2ND DEFENDANT

CORAM: CHIMASULA PHIRI J.

Tukula of Counsel for the plaintiff.

Nkhono of Counsel for the defendants

Mdala - 0fficial Interpreter.

JUDGMENT

Chimasula Phiri J,

The plaintiff's claim is for special damages totalling K7,968,399.14 arising from an accident which occurred allegedly due to negligent driving by the 1st defendant's agent or servant involving the plaintiff's double decker bus. The 1st defendant's vehicle was insured by the 2nd defendant. The plaintiff also claims costs for this action.

PLEADINGS

On the part of the plaintiff its pleadings are contained in a Re-amended Statement of Claim of 31st July 2003 as follows:-

1. The plaintiff is a limited liability whose business is the provision of passenger bus services and owns a fleet of buses.

2. At all times the plaintiff has been the owner of a double decker bus Leyland registration number BJ 4397 ("BJ 4397") used for carrying fee paying passengers whilst the 1st defendant was at all material times the owner of motor vehicle registration number BH 9053 (BH 9053") Toyota Hilux.

3. The 2nd defendant has been sued by virtue of being the insurer of BH 9053 against third party liabilities.

4. On or about the 25th day of May 2003 BJ 4397 was lawfully parked, following a breakdown along Dalton Road opposite the new Limbe Bus Depot facing the Kanjedza direction when the 1st defendant's servant or agent so negligently drove from the opposite direction, managed and controlled BH 9053 along the same road that he caused or permitted the same violently to collide with BJ 4397 damaging it and killing the plaintiff's employee in the process.

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 have any or any sufficient regard for traffic that was or might reasonably be expected to be on the road.

d) Causing or permitting BH 9053 to go on the wrong side of the road and there to collide with BJ 4397.

e) Causing or permitting BH 9053 to skid on the said road and/or failing to take any or any special care on a busy road.

f) Failing to see BJ 4397 in sufficient time to avoid the collision.

g) Failing to stop, to slow down or in any other way so to manage or control BH 9053 as to avoid the collision.

5. In consequence of the matters aforesaid, the plaintiff herein had suffered loss and damage.

	Particulars	**MK**
a)	repairs to the bus	496,825.11
b)	police report	2,000.00
c)	payment of compensation to an employee who died due to the accident	281,983.80
d)	loss of revenue at the rate MK63,166,40 per day for a period of 117 days i.e. from the date of the accident to the 18th day of September, 2002 when the bus was finally Repaired.	7,390,468.80

	TOTAL	7,968,399.14
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The defendants amended defence and pleaded as follows: -

1. The defendants admit that its insured motor vehicle registration number BH 9053 did on or about the 25th May 2002 collide with the plaintiff's Leyland bus registration number BJ 4397 but deny that such collision occurred by reason of any negligence on the part of the servant or agent of the insured as alleged in the statement of claim or at all.

2. The defendants aver that the said collision occurred at night and it was caused by or contributed to by the negligence of servants or agents of the plaintiff.

Particulars

(a) Leaving the plaintiff's broken down bus registration number BJ 4397 in the middle of the public road at night without any or any sufficient lighting to warn other road users of its presence.

(b) Parking the said bus in such a way as to create a public nuisance and hazard on a public highway.

(c) Parking a break-down recovery truck abreast or near the broken down unlit bus and putting the head lights thereon at full beam thereby creating a hazard to other road users, including the insured's driver, from dazzling.

(d) Leaving headlights on the said breakdown truck on at full beam thereby distracting the attention of other road users, including the insured's driver from the presence or dangerous presence of the said bus on the road.

3. Further or alternatively, the plaintiff's claims against the defendant as insurer are only in respect of risks compulsory insurable under the Road Traffic Act and are to that extent limited.

4. The 2nd defendant avers that their insurance of the 1st defendant's said motor vehicle was limited to the extent of K50,000.00 for third party loss of use, K1,000,000.00 for third party property damage and K5,000,000.00 for third party death or bodily injury.

5. The defendants aver that the plaintiff failed or neglected to mitigate their loss or damage and to that extent, they are not entitled to sums claimed.

Particulars

(a) Failing or neglecting to attend to the repair of the bus registration number BJ 4397 with reasonable or any diligence.

(b) Failing to allocate an alternative bus to the route hitherto used by the said bus number BJ 4397 while it underwent repairs.

6. The defendants deny that the plaintiff suffered the loss or damage claimed in the statement of claim or at all.

7. In the premises, the plaintiff is not entitled to the relief claimed or at all.

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

The 1st witness for the plaintiff was Redgson Nchoma whose occupation is bus driver in the employment of the plaintiff and stationed at Makata Bus Depot. On 25th May 2002 he was driving the plaintiff's double decker bus from Chiradzulu to the new Limbe bus depot, which is located near Limbe Market along Dalton road. After crossing the bridge on Limbe stream, the engine of the bus went into neutral and as a result the bus lost momentum. He tried in vain to force it but only managed to reach slightly beyond the bus stage that is located opposite Limbe Market on Dalton road. Since the bus could not go any further, he rolled it downhill and parked it at the bus stage when passengers were requested to disembark. He placed 2 reflective triangles, one in front and the other at the rear of the bus to warn other drivers that there was a broken down vehicle. The time was around 3.45 in the afternoon. He sent the conductor to report about the breakdown at Makata depot. At about 6.30 o'clock in the evening an auto-electrician came and examined the bus. His findings revealed that the gearbox had jammed and the only course of action was to tow the bus to Makata Depot. The driver waited in the bus for the towing vehicle until 8.00 o'clock in the evening when he was told to go and drive another bus to Chiradzulu because there were a lot of people who were travelling there. The time he left the scene, the accident had not yet occurred. There was no cross examination and the witness was released.

The 2nd witness for the plaintiff was Elias Chitseko, another bus driver in the employment of the plaintiff and stationed at Makata bus depot. He stated that on 25th May 2002 he was instructed by his bosses to go and tow a broken down bus from Limbe. He left for Limbe

in another bus in company of a mechanic. When he arrived at the place where the broken down bus was i.e. on Dalton road almost adjacent to the new Limbe bus depot he parked the bus on the dirty verge on the same side of the road as the broken down bus. At the scene he found that there were reflective triangles which were placed in front and the rear of the broken down bus. He arrived on the scene when it was already dark. He stated that immediately after their arrival at the scene, the mechanic went straight to fixing the towing bar on to the broken down bus. In order for the mechanic to see properly what he was doing, the parking lights of the broken down bus were switched on. The lights of the bus which was intended to tow the broken down bus were completely switched off as there was no reason to keep them on. Whilst the mechanic was still working on the towing bar, the driver left for the new Limbe bus depot. As he was about to enter the depot he heard a braking sound of tyres, as if a speeding vehicle was attempting to stop. Next he heard a sound of a collision. Immediately this witness rushed back to the road and found that a pick-up had crashed into the broken down bus and crushing the mechanic as well. The pick up was being driven towards Limbe and its driver had left his proper left lane and veered to the extreme right where he hit the stationary bus together with the mechanic. The mechanic was pulled out of the collision scene. He was badly injured and taken to the hospital where he was pronounced dead on arrival. The witness stated that immediately after the accident, the people who were in the pick up started throwing bottles of beer out of their vehicle. In cross-examination he stated that the broken down bus was parked on the lay bay which has tarmac. The towing bus was parked on the lay bay too just behind the broken bus. He parked like that to enable the mechanic to fix the towing bar to the broken down bus first. At the time of the accident the mechanic was in the process of fixing the towing bar. The towing bar had been brought by another vehicle. He confirmed that parking lights of the broken down bus were on. He also said that he also saw the skid marks of the pick although it was night. He stated that by making reference to the beer bottles he is suggesting that the driver of the pick up was drunk. He stated attempts to reason with the pick up driver were fruitless as he was unco-operative (meaning doggy). He confirmed the position of the bus before the accident.

The 3rd witness for the plaintiff was Mwamadi Fazili, technical manager for the plaintiff. He is an engineer by profession. He stated that on 25th May 2002 he was informed that plaintiff's bus registration number BJ 4397 had been hit by the 1st defendant's Toyota Hilux

registration number BH 9053 and that one of the plaintiff's employees had died on the spot. He stated that earlier that day the bus had been reported to have developed an electrical problem by its driver. One of the plaintiff's auto-electrician examined it and it became necessary to tow the bus to the plaintiff's repair centre at Makata depot. Another bus had been sent to tow the broken down bus. The accident occurred when arrangements were being made to tow the bus. Upon hearing of the accident, the witness rushed to the scene where he found the broken down bus, the defendant's vehicle and the towing bus. He observed that the two buses were parked on the dirty verge of the road and the defendant's vehicle veered off its lane to hit the stationary bus. He further observed that the bus had been extensively damaged. The witness was in charge of the repairing work of the bus. Among the things he did were to procure a police report of the accident at a fee of K2,000.00. He proceeded to get an independent assessor to evaluate the extent of damage to the bus. The plaintiff was invoiced by the assessor K12,000.00. He tendered the petty cash voucher for K2,000.00, the police report and invoice for K12,000.00 in respect of inspection of accident damaged double decker – BJ 4397. He also sent the bus for repairs at PEW (Malawi) Limited and that the bus was off the road for 117 days. PEW (Malawi) Limited submitted a detailed quotation dated 29th May 2002 as follows: -

Repair Accident Damaged Double Decker BJ 4397 Fleet no. 2005

Following our inspection of the above, we wish to submit our quotation for consideration as follows:

- Strip and straighten front face
- Replace middle windscreen RHS support
- Supply and fit windscreens
- Repair and align dash c/w cover
- Supply and fit handrail on the dash
- Supply and fit n/s headlamp
- Repair front part of floor ie 1m from front
- Fit radiator to be supplied by you
- Fit wiper blades to be supplied by you

- Check condition of chassis. A separate quote to be submitted if chassis is bent
- Fit front bumper
- Replace/straighten bent radiator support cross-member
- Align doors
- Mechanical work to be carried out by you
- Carry out touch-up spray painting.

Price: MK 180,000 surtax inclusive

Delivery: 10 working days

Terms of payment: Net monthly account

We trust the above meets your approval and look forward to receiving further instructions.

The plaintiff tendered invoice for K180,000.00 from PEW (Malawi) Limited dated 30th September 2002 and delivery note of 18th September 2002. Another quotation is from Bestobell dated 6th June 2002 for radiator core-block, material and labour totalling K41,675.11. There is evidence of payment of this sum through the delivery note dated 30th October 2002.

He stated that it is the plaintiff's policy and practice that each and every bus goes for monthly intensive maintenance and everyday after arriving from a trip the bus is routinely checked before it is assigned on another trip. He stated that at the time of the accident there were only 2 double decker buses which were used for the night service route from Blantyre to Lilongwe. He concluded that as a result of the accident the plaintiff was only able to use one bus on this route thereby losing revenue which the damaged bus could have generated.

In cross examination he stated that the assessor's invoice has no relevance to the quotation submitted by PEW (Malawi) limited and that it is not a substitute of PEW's own assessment. He explained that it was necessary to obtain the assessors report for purposes of insurance claim by the plaintiff from its own insurer. He explained that the quotation from PEW (Malawi) Limited bears a date which is 4 days after the accident and that delivery required 10 working days. From 29th May 2002 that period would end on 12th June 2002. He could not

recall exactly when the bus was delivered to PEW (Malawi) Limited. He confirmed that accident occurred on 25th May 2002 and the PEW technical manager saw the bus on 28th May 2002 and that the quotation from PEW (Malawi) Limited was given after delivery to PEW (Malawi) Limited. He stated that PEW (Malawi) Limited was given verbal authorisation to repair the bus. PEW (Malawi) Limited was not expressly told the commercial use of the bus. PEW (Malawi) Limited delivered the bus on 18th September 2002 i.e. it took about 4 months which is far out of the quoted 10 working days. During that period the route continued to be serviced. The witness confessed that he did not know when the radiator was obtained. In re-examination he indicated that the procurement or repair of radiator took a long time. However, the invoice from Bestobell was issued after the radiator had already been delivered. He indicated that although the Lilongwe – Blantyre route continued to be served the capacity had been reduced to ½. Normally the route was serviced by 2 double decker buses. He said that PEW (Malawi) Limited was not told the commercial nature on which the bus was deployed because that was obvious. He claimed that the plaintiff was a big customer for PEW (Malawi) Limited.

The 4th witness for the plaintiff was Cuthbert Ephraim Chinguwo, Assistant Traffic Manager who has been with the plaintiff since 1989. His duties are, *inter alia :-*

- Ensuring that buses are running profitably, reliably and efficiently
- Ensuring that revenue is realised in line with set targets for each route
- Verifying how much money buses make on different routes.

He stated that he is familiar with the systems used in recording revenue from buses which is recorded on a waybill for each trip. He stated that the bus that was damaged during the accident on 25th May 2002 was making an average of K63,166.40 per day. He tendered waybills from similar bus. He claimed that since the bus was off the road for 117 days, the total revenue that was lost amounts to K7,390,468.80. He tendered the waybills for another double decker for the period from 4th June 2002 to 29th June 2002. The amount of revenue varies from K56,651.00 to K74,630.00 per trip. The average has been worked out at K63,166.40 per day. He stated that each bus is allocated to a particular route and taking it away or diverting a bus to another route would cripple the service. Further, the plaintiff is a social service provider to the

rural populace and if a bus was taken from a marginal route, that would amount to a denial or deprivation of a social service on that marginal route.

Furthermore, special buses are designated to ply on certain routes. Therefore buses which operate on the rural routes would not captivate markets on the highly competitive route of Lilongwe – Blantyre in the same way like a double decker bus. Furthermore, the plaintiff's revenue budget target individual buses. Therefore, for the time the bus was off the road it would reflect a loss in any event.

He also tendered a waybill for Blantyre - Chikwawa – Nsanje route on 28th May 2002. A bus was withdrawn from normal assignment and ferried mourners to attend the funeral ceremony of the mechanic. If the bus had not gone with mourners, it could have generated K35,000.35. Therefore this is submitted as a loss of revenue.

The witness confirmed that the amounts on the waybills do not represent profits because profit is income minus expenses. The only expenditure that is reflected is on fuel. However, expenditure can be direct or indirect. The company also pays tax on profits. He told the court that in the fiscal year that ended on 31st March 2002 the plaintiff made a profit of K36.6 million. For the period up to 31st December 2003 the plaintiff was expecting a profit of K90 million even 3 months before the end of the fiscal year.

On the funeral of the mechanic, he stated that the plaintiff as an employer was under a duty to provide transport to the mourners due to the socio-cultural obligation. H stated that mode of transport is not specified in the conditions of service for the plaintiff's employees.

He also indicated that double-decker buses would operate on the Lilongwe – Blantyre; Blantyre – Mulanje; and Lilongwe – Mchinji routes because of terrain and good road conditions. However, these buses are not operated on all these routes because of lack of adequate buses. He indicated that another double decker bus caught fire in Dedza but that was before the current accident occurred. The witness stated that single deck buses can operate on routes where double decker buses operate. Single deck buses have capacity of 88 passengers while double decker

carries 127 passengers. He stated that night buses are very popular and among the most profitable for the plaintiff. He stated that buses are taken for certificate of fitness test every 6 months. He explained that the return trip shown on the waybill is for a complete return journey. The claim for 117 days is on the premise that the vehicle would not go for certificate of fitness test during that period and that there would be no breakdown for the bus. In re-examination he stressed that the plaintiff is claiming for loss of use of vehicle and by direct implication, claiming loss of revenue. He stressed that due to improved road infrastructure, buses do not breakdown often.

The 5th witness for the plaintiff was Joseph K. Mhone, Senior Human Resources Officer for the plaintiff. He stated that following the accident involving the plaintiff's bus registration number BJ 4397 on 25th May 2002 one of the plaintiff's employees, Willie Andrew Limula died and the plaintiff processed all logistics and payments relating to funeral and other expenses. He tendered petty cash vouchers of K1,000.00 for embalming deceased body; invoice for K5,200.00 for deceased's coffin; petty cash voucher of K150.00 for Personnel Officer who was assigned to escort dead body and K2,000.00 which was paid as condolence to the bereaved family. He stated that the plaintiff withdrew a bus from its normal route to Nsanje in order to escort the dead body and members of staff to attend the funeral thereby losing revenue for one day of K35,000.35 Subsequent to the burial of the deceased the plaintiff filed a report under the Workers' Compensation Act to the Ministry of Labour and at the moment the plaintiff is awaiting to disburse death benefits in respect of the deceased totalling K281,933.80. It is calculated based on statutory formula on the last salary of deceased of K6,713.90 per month. Both the death report and average wage list were tendered in evidence. In cross-examination he stated that the plaintiff wishes to claim K2,000.00 paid to the bereaved family as condolence. The witness did not have any copy of conditions of service which stipulated about condolence.

The defendants called Grant Mwenechanya as their only witness. He stated that he is employed by the 2nd defendant as a Claims Manager. He is conversant with the circumstances of the 2nd defendant's issuance of insurance cover of the 1st defendant's motor vehicle Toyota Hilux registration number BH 9053. By letter of instructions dated 5th September 2000, the 2nd defendant received letter from insurance brokers on behalf of 1st defendant to effect commercial

motor vehicle insurance in respect of various vehicles belonging to the 1st defendant including motor vehicle registration number BH 9053. Pursuant to such instructions the 2nd defendants duly insured various motor vehicles aforesaid under insurance policy number BTDMC 10050560000 initially for the period from 1st September 2000 to 31st August 2001. By the said insurance, the 1st defendant became entitled to be indemnified by the 2nd defendant against insurance risks and/or losses arising from their use of the various motor vehicles subject to policy limits of: -

(a) K50,000.00 for third party loss of use

(b) K1 million third party property damage

(c) K5 million third party death or bodily injury.

The 1st defendant by policy number BTDMC 10050560101 duly effected a renewal of their insurance for the motor vehicles including the subject motor vehicle for the period of insurance from 1st September 2001 to 31st August 2002 during which period the accident occurred in respect of which the proceedings in this action were instituted. The witness tendered Exhibits D1 to D4 relating to his evidence captured above in this judgment. In cross examination the witness explained that if there is excess in terms of maximum liability, that excess goes to the insured, like in the present case, it would be directed against the 1st defendant. This marked the end of the evidence in this matter.

ANALYSIS OF THE LAW AND THE EVIDENCE

The defendants failed to bring the driver of motor vehicle registration number BH 9053 a Toyota Hilux. At the time of the trial of this mater, this driver, Mr Munyika who was a Zimbabwean was no longer in Malawi and unable to come to court to challenge the evidence of the plaintiff on the occurrence of the accident. It is only fair to proceed on the basis that the defendant's liability for negligence is not in dispute. The court will proceed on the basis that there was no contributory negligence on the part of the plaintiff.

Be that as it may, the court still needs to decide whether the plaintiff's claim for special damages at K7,968,399.41 (as the writ describes it) was made out at the trial.

By their amended defence, the defendants contend that the plaintiff failed to mitigate its loss by

(i) failing to attend to the repair of the bus with diligence and

(ii) failing to allocate an alternative bus on the route hitherto served by the damaged bus.

The 2nd defendant also contends in defence (duly supported by evidence) that if liability is found against the defendants, the 2nd defendant's liability to indemnify the 1st defendant against liability to third parties (such as the plaintiff) was restricted by the relevant insurance contract entered into between the 1st and 2nd defendants to K50,000 for third party loss of use, K1,000,000 for third party property damage and K5,000,000 for third party death or bodily injury. The plaintiff is not claiming, nor could it do so, loss of dependency on behalf of its employee who died in the accident. There is, however, a claim for K281,983.00 paid by the plaintiff to the estate of the deceased employee as worker's compensation.

McGregor on Damages 14th edition paragraph 213 has something to say about the concept of mitigation of damage thus:

"The extent of the damage resulting from a wrongful act, whether tort or breach of contract, can often be considerably lessened by well-advised action on the part of the person wronged. In such circumstances the law requires him to take all reasonable steps to mitigate the loss consequent on the defendant's wrong, and refuses to allow him damages in respect of any part of the loss which is due to his neglect to take such steps. Even persons against whom wrongs have been committed are not entitled to sit back and suffer loss which could be avoided by reasonable efforts or to continue an activity unreasonably so as to increase the loss."

FACTS AND ANALYSIS

Before a review of case authority on the point is made, we would like to review the facts as relevant to the issues at hand. The principal witness for the plaintiff in the relevant regard were Messrs Mwamadi Fazili and Cuthbert Chinguwo. Mr Fazili said that the plaintiff obtained a quotation for repairs from PEW (Malawi) Limited on 29th May 2002, within 4 days after the accident. The quotation from PEW (Malawi) Limited was produced in evidence as Exhibit P4. The quotation was for a total of K180,000.00 and it outlines the various works which PEW (Malawi) Limited were to undertake on the plaintiff's damaged bus. The quotation, importantly, also includes an item rendered "*fit radiator to be supplied by you"*. From the evidence, it was clear that right from the outset PEW (Malawi) Limited indicated that the plaintiff would supply the radiator necessary for the repairs to the bus.

Also noteworthy from the quotation is that not only would PEW (Malawi) Limited commence work on the bus as soon as they received further instructions from the plaintiff to start repair, but also that delivery of the bus would be within "10 working days". Mr Fazili told the court that the statement meant that the work on the bus would be completed and the bus delivered to the plaintiff within 10 working days from the plaintiff's instructions to PEW to start the repair works.

Mr Fazili said that the bus had been delivered to PEW Limited for repairs on the 28th May 2002 and that when the quotation (EXP4) was issued on 29th May 2002, the bus had already been delivered to PEW. Mr Fazili further said that the plaintiff gave PEW instructions on 30th May 2002 to undertake the repairs to the bus. Mr Fazili was given a calendar for 2002 and asked to count off ten working days from the 30th May 2002. He did so and informed the court that ten working days expired on the 12th June 2002.

Mr Fazili, though, informed the court that the bus was delivered back to the plaintiff by PEW only on the 18th September 2002, evidence the delivery note produced by the plaintiff as exhibit P6. A delivery on the 18th September instead of 12th June 2002 constitutes delay in delivery by 3 months and 6 days. The plaintiff reckons that such a delayed delivery by PEW to them must be counted against the defendants. Why should the defendants be liable for loss incurred during those 3 months 6 days when such loss is directly attributable to what seems to be

breach by PEW of contractual obligations owed to the plaintiff or the plaintiff's own lack of diligence.

The defendants generally deny by their defence that they are liable to the plaintiff in any way whatsoever. The burden of proof lies squarely on the plaintiff to prove fact and quantum of the loss claimed against the defendants. If the intervening acts of PEW and the loss consequently occasioned to the plaintiff are not explained, the plaintiff cannot have discharged that burden.

An inference can properly be drawn from the fact that PEW contracted themselves to deliver the bus to the plaintiff within 10 working days, that it is unreasonable to lay up the bus for such damage for up to 117 days as the plaintiff claims. If the repairs could reasonably have been completed within 10 working days (and therefore the bus be back in service within that time) is it acceptable that the plaintiff should seek to claim damages from the defendants for more than those 10 working days, let alone for 117 days? Th plaintiff is guilty of failure to mitigate loss. The court cannot reasonably allow the plaintiff to claim for such a lengthy unreasonable time.

Mr Fazili could not explain why there was such a delay, and therefore could not explain whether there were circumstances which rendered such a lengthy delay reasonable. If such a long delay was unreasonable, it bears no casual connection to the tortuous act of the 1st defendant's driver. The casual connection is broken by wrongful act of a third party. That cannot be visited upon the defendants. The wrongful acts of PEW constitute a *novus actus interveniens* and breaks the chain of causation.

Some interesting thing that came out from the evidence of Mr Fazili as well. Mr Fazili in his testimony expressed failure to fully explain the unreasonableness of the delayed delivery of the bus but suggested that there were delays faced over the procurement of the radiator for the bus. The need to procure a radiator was made clear to the plaintiff as early as the 29th May 2002 when PEW by the quotation (Exhibit P4), informed the plaintiff in writing that PEW would "fit radiator to be supplied by [plaintiff]". The first time that the evidence shows the plaintiff attending to the procurement of the radiator is a quotation from Bestobell dated 6th June 2002 –

Exhibit P7. The only other document in that respect produced by the plaintiff is an invoice from Bestobell produced in evidence as Exhibit P8. Interestingly, however, the Exhibit P8 is not only an invoice for K41,675.11 but is also a delivery note and it is dated 30th October, 2002 after the bus had already been delivered by PEW to the plaintiff. Strange because how is the radiator collected by the plaintiff from Bestobell only after the bus had been delivered to the plaintiff with repairs been completed? Is Exhibit 8 really in respect of the radiator for the particular bus? The amount of the invoice/delivery note suggests that it is because it is the same as that on the quotation (Exhibit P7), but surely something simply does not add up.

Mr Fazili said he could not tell at all exactly when the radiator was taken delivery of from Bestobell. Exhibit P8 suggests that took place on the 30th October 2002. The plaintiff was not able to explain these glaring inconsistencies in evidence. All in all Mr Fazili could not really explain why 10 working days became 117 days. The plaintiff did not go about procuring the repair of the bus with diligence. The earlier statement by Mr Fazili that delays were for non-availability of the radiator from Bestobell was taken back when he later said actually Bestobell only repaired the same radiator, not supplied a replacement. No question of Bestobell procuring the radiator then.

To all intents and purposes, for any loss or damage beyond the 10 working days, the plaintiff should claim from PEW in respect of that apparent breach of contract. Mr Fazili insisted in cross-examination (and this point was hammered home further in his re-examination) that PEW Limited understood the purpose to which the plaintiff put their bus to. In fact, Mr Fazili explained that PEW actually constructed the bus for the plaintiff with a view that the plaintiff would use the bus (and all the plaintiff's other buses) to generate income for themselves. He said for that reason the plaintiff did not see the need to explain to PEW what the bus would be used for when the repairs were complete. He said the plaintiff was PEW's biggest customer.

PEW are not a party to this action and no findings of fact can usefully be made against them. However, just from the evidence of the plaintiff in this action through Mr Fazili, there is a good cause of action by the plaintiff against PEW in damages for breach of contract on the time – tested principles of *Hadley v Baxendale (1854) 9 Ex. 341*. It is the plaintiff's right to choose

who to sue but, with due respect, the decision to claim damages from the defendants beyond the reasonable lay-up period of the 10 working days, is misguided. In any case, the plaintiff may still bring such action against PEW, if they have not already done so.

The facts of PEW constitute a *novus actus interveniens*, in any case, apart from showing the plaintiff's failure to mitigate damage. The authorities are clear that when an effective intervening act occurs it makes no difference that it has been done or perpetrated by the plaintiff himself or by a third party. *"The grand rule on the subject of damages is that none can be claimed except such as naturally and directly arise out of the wrong done; and such therefore as may reasonably be supposed to have been in the view of the wrongdoer "*said Lord Kinloch in *Allan v Barlay (1863), 2 Macph (ct of Sess) 873 at 874.* Lord Wright said in *Lord v Pacific Steam Navigation Co Ltd, The Oropesa (1943) 1 ALL ER at page 215* that if, on the other hand, the action which resulted in the injury was "*.....something unwarrantable, a new cause coming in disturbing the sequence of events, something can be described as either unreasonable or extraneous or extrinsic [the chain of causation is broken]".*

An illustration of the proposition that the plaintiff's own unreasonable intervening action may effectually break the chain of causation is provided by the case *McKew v Holland & Hannen & Cubits (Scotland) Ltd (1969) 3 ALL ER. 1621.* The appellant has sustained injury in the course of his employment and the respondents (his employers) were decidedly liable. As a result, on occasions, he unexpectedly lost control of his left leg which gave way beneath him. He would have recovered within a week or two but for a second injury which he suffered. On leaving a flat, accompanied by his wife and child and brother in-law his leg collapsed as he made to descend some steep stairs where there was no handrail (his wife and brother-in-law were at the time securing the door). The appellant pushed his daughter aside to avoid pulling her down the stairs and himself tried to jump so that he would land in a standing position rather than falling down the stairs. On landing he suffered a severe fracture of the ankle. On the question whether the respondents were liable for the injuries caused by the second accident, the court held that the act of the appellant in attempting to descend a steep staircase without a handrail in the normal manner and without adult assistance when his leg had previously given way on occasions was unreasonable; accordingly the chain of causation was broken and the respondents were not liable

for his second injury. Alternatively, the court held, that the appellant's act of jumping did not amount to reasonable human conduct. Very illuminating are the analyses of the law made by Lord Reid at pages 1622 and 1623 of that judgment and Lord Guest at page 1624.

Illustration of the effect on the chain of causation of a third party's intervening act is provided by, among much other authority, the case of *Hogan v Bentinck West Hartley Collenies (owners) Ltd (1949) 1 ALL ER 588.* A workman, a miner suffered from a congenital defect viz, two top joints to his right thumb, in addition to his normal thumb. On 19th June 1946, he met with an accident at his work and fractured the false thumb. The thumb was treated by splinting, and on 19 August he returned to work. The thumb, however, continued to be painful and the workman was sent by his doctor to hospital where it was discovered that the fracture had not united and an operation was advised and performed for the removal, not merely of the false thumb, but also of the top joint of the normal thumb. On application by the workman for compensation on the ground of pain the stump, the county court judge accepted the view of the medical witnesses that the operation was a proper one to cure the congenital deformity but not to cure the pain consequential on the accident, and he refused compensation on the ground that the incapacity then existing was due, not to the accident, but to the operation, which "appeared to have been ill-advised." On appeal eventually, the House of Lords held that on the facts and the finding that the operation to remove the deformed as well as the normal thumb was ill-advised, the appeal could not succeed and therefore the ill-advised surgery was a *novus actus interveniens* breaking the chain of causation. The employer was consequently not liable for the pain and suffering and loss of amenities resulting from the wrongful operation.

The bottom line, is that in the present case the unreasonably delayed repair of the bus occasioned by PEW and the plaintiff is a *novus actus interveniens* and the defendants cannot be held liable for the loss resulting therefrom. The loss suffered by the plaintiff beyond the 10 working days is not the natural or direct result of the wrongful act of the 1st defendant's driver on the 25th May, 2002.

The evidence of Mr Chinguwo was interesting in several aspects. For one thing, Mr Chinguwo conceded that the figures of revenue reeled off by him and thus claimed did not represent profit. He conceded that profit was revenue less all expenses. To that end he indicated

that the average daily revenue of K63,166.40 was grossed up and that it included expenses such as fuel costs, lubricants, maintenance and repair costs. Also included will have been salaries drawn by the plaintiff's staff operating the bus. Income tax will also not have been taken account.

The plaintiff cannot be entitled to be paid the gross sums because in order to make any profit, which is properly the plaintiff's to claim, the plaintiff must necessarily spend money. A loss of profit by the plaintiff would have been more appropriate. The plaintiff wrongly conceived of no need to prove the profit. The proper course is for an order for damages representing lost profit for the 10 working days to be properly proved by an assessment of damages. A strict approach would be to dismiss the entire claim on the basis of failure by the plaintiff to prove lost profit. However, from the evidence the plaintiff did prove that it lost some profit during the 10 working days.

From the evidence of Mr Chinguwo, it is also difficult to accept that the plaintiff conducted himself reasonably by failing or neglecting to deploy a different bus on the route during the 10 working days or any period, once it is accepted that the particular route was a very lucrative one for the plaintiff. Even if the plaintiff did not exactly have another double decker bus deployment of a single deck bus would have mitigated the loss by half. Sending a whole bus on a funeral errand when there was no duty to do so when a less commercially important vehicle would have done, was unreasonable. It has been held that *"The fundamental basis is thus preliminary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take steps. In the words of James L.J. in Dunkirk Colliery Co. v Lever [(1878) 9 ch D. 20 at page 25], the person who has broken the contract is not to be exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiff not being under any obligation to do anything otherwise than in the ordinary course of business" British Westinghouse Electric and Manufacturing Ltd v Underground Railways Co. of London Ltd (1912) Ac 673 at 689.*

The reference to contract is only on the facts, but the general application of the principle to tort is undoubted. The question what is reasonable for a person to do in mitigation of his damages is a question of fact in each particular case. (see *Payzu Ltd v Saunders (1919) 2 KB 581.*

CONCLUSION

The plaintiff's claim for reimbursement of the sum of K281,933.80 paid to the estate of the employee who died in the accident is proper. I would also allow for funeral expenses such as payment for embalming, coffin but not condolence money paid to the bereaved family. Whether or not the mechanic would have died from other cause, the plaintiff would have paid this K2,000.00 as matter of social welfare gesture – why should they claim from the defendants? For transport of the dead body and staff I would only allow for equivalent reasonable hire charges. On the basis of general award of damages I would consider K10,000.00 to be a fair and reasonable award for transport costs. The allowance paid to member of staff of K150.00 who escorted the dead the body home is payable.

For loss of revenue I would consider a figure of K32,500.00 per day to be fair and reasonable. Although the defendants would like to pin down the plaintiff to 10 days only, the court feels that a loss for 20 working days is more realistic and reasonable taking into account all bureaucratic channels. The amount of K180,000.00 payable to PEW (Malawi) Limited has been proved. So too is the K41,675.11 for the radiator. Again K16,671.43 paid for extra panel beating and upholstery is payable to the plaintiff despite wrong quoting of the plaintiff's registration number. The plaintiff is entitled to claim K2,000.00 for the police report as well as the K12,000.00 for assessors report. This is a normal routine procedure before claims are processed. I allow the plaintiff's claim as specifically indicated in this judgment. The defendants are condemned in costs for these proceedings.

PRONOUNCED in open court this 26th day of August 2004 at Blantyre.

Chimasula Phiri

JUDGE