IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1243 OF 2004

BETWEEN:

FELIX CHILINDA……....PLAINTIFF

- and –

SECURICOR (MALAWI) LIMITED…….. DEFENDANT

CORAM: CHIMASULA PHIRI J

Mhango/Kamunga of counsel for the plaintiff

Khondiwa of counsel for the defendant

Nsomba – official interpreter.

Mrs Chingota – court reporter

JUDGMENT

Chimasula Phiri J,

The plaintiff's claim is for damages for personal injuries sustained due to dog bites from the defendant's security dog at Mobil Filling Station at Chinseu – Ndirande in the City of Blantyre on 17th April 2004. The plaintiff alleges that the incident occurred due to the negligence of the defendant's servant and/or servant in the handling of the said security dog. The plaintiff also claims costs for this action. The defendant denies that they were owners of the dog and if the dog was theirs, the dog was not of a fierce or mischievous nature or accustomed to attack or bite

mankind. The defendant, in the alternative alleges that the plaintiff brought on himself the injuries by irritating the dog.

PLEADINGS

In the Statement of Claim the plaintiff pleaded as follows:

1. *The defendant is and was at all material times a company registered under the laws of Malawi and carrying on the business of private security services in Malawi.*

2. *At all material times the defendant owned a security dog , which at the material time, had been stationed at Chinseu Mobile Filling Station in Ndirande.*

3. *The said dog was of a fierce and mischievous nature, and accustomed to attack and bite mankind, and as a result thereof, the said dog was required to be under the constant care of a dog handler.*

4. *On or about the 17th April 2004, the plaintiff was lawfully walking along Chinseu road when at or near the said Mobil Filling Station the said dog got loose, charged at and attacked and severely bit the plaintiff.*

5. *The plaintiff avers and will contend that he was so attacked and bitten by the said dog due to the negligence of the defendant's dog handler aforesaid.*

Particulars of negligence

Leaving the dog unattended whilst on duty well knowing that it was of such fierce and mischievous nature and accustomed to attacking mankind.

6. *In consequence of the matters aforesaid, the plaintiff sustained severe injuries and has suffered loss and damage.*

Particulars of injuries

Two deep dog bites on both feet.

7. *AND the plaintiff claims:*

   a. *Damages for personal injuries.*
   b. *Damages for deformity.*
   c. *Damages for loss of amenities.*
   d. *Damages for nervous shock.*
   e. *Costs of this action.*

The defendant's defence is pleaded as follows:-

1. *The defendants admit paragraph 1 of Statement of Claim.*

2. *The defendants deny that they are the owners of or kept or had control of the dog mentioned in the Statement of Claim.*

3. *If the defendants owned the said dog, which is denied, the said dog was not of a fierce or mischievous nature or accustomed to attack or bite mankind. They deny that they knew it was of such nature or so accustomed.*

4. *The defendants deny that the said dog attacked or bit the plaintiff.*

5. *The alleged damage or injuries are denied.*

6. *In the alternative, the defendants say that the plaintiff brought the said injuries on himself by irritating the said dog by moving vigorously close to the said dog, hence threatening it.*

Save as hereinbefore admitted, the defendants deny each and every allegation of fact as if each were specifically set out and traversed seriatim

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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 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] AC 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 ER 372; 373; 374.*

ISSUES FOR DETERMINATION

The main issue for determination in this matter is whether the plaintiff suffered damage for which the defendant is liable.?

THE EVIDENCE

The first plaintiff's witness was the plaintiff himself. He adopted his witness statement, which states as follows:

1. He is a Police Officer in the Malawi Police Service working as a Criminal Investigator (CID) and is currently based at Zomba Police Station.

2. Towards the Presidential and Parliamentary General Elections of 20th May 2004, on or about 16th April 2004, some disgruntled party followers set ablaze a UDF Blantyre Central Constituency Office at Goliyo in Ndirande Township in Blantyre. This prompted us, as the Police, to go and examine the situation.

3. During that time, he was stationed at Ndirande Police Sub-Station as a Station Criminal Investigations Officer.

4. On or about 17th April 2004, he was advised by Detective Sub-Inspector Evance Mtete of Southern Region Headquarters to go and escort Mr Paul Chifisi, the current Officer in Charge of Nkhata Bay Police Station, then the Deputy Director of CID to the scene of the arson at Goliyo.

5. Mr Mtete told him that he was to meet Mr Chifisi at Chinseu.

6. When he was coming from Ndirande Police Sub-Station, as he was approaching the Mobil Filling Station at Chinseu, at around 6 p.m., he was shocked to see a dog charging at him. The dog was later let loose and immediately thereafter, it leapt at him and severely bit him leaving him with two deep bites on both of his feet. He later learnt that the dog belonged to Securicor Malawi Limited.

7. The dog's handler only came to the scene some minutes later after the vicious dog had maimed him severely. The dog only stopped biting him when the dog handler came and pulled him away. In addressing the dog, the handler was calling it by the name Josh.

8. Following the matters above, he was rushed to Queen Elizabeth Central Hospital where he was treated as an outpatient and advised to go to Mlambe Hospital for further

treatment because the hospital had no medicine for his wounds. At Mlambe Hospital, he was admitted for 3 days. During this period, he experienced excruciating pain.

9. Whilst in hospital at Mlambe, some offices from Securicor paid him a visit. The names of the said officers were Mr Phiri and Mr Mlewa.

10. After being discharged from the hospital, the officers mentioned above paid him a visit again at his home in Ndirande.

11. After being discharged from hospital on or about 20th April 2004, he was advised by the hospital personnel to go to Securicor and report the incident so that Securicor should arrange for vaccination of the dog which had bitten him if it was not yet vaccinated.

12. Despite the fact that he was still experiencing great pain, he still forced himself to go to Securicor offices at Ginnery Corner in Blantyre District where he met their Veterinary Officer responsible for dogs, a Mr Mndala.

13. He told Mr Mndala that the name of the dog that had bitten him was Josh and when Mr Mndala checked in his register, he found out that they had a dog by that name. However, Mr Mndala told him that all their dogs had been vaccinated in January 2004.

14. After the matters above, he proceeded to the Veterinary Department in the Ministry of Agriculture at Ginnery Corner to verify if what Mr Mndala had told him that all their dogs were vaccinated, was true.

15. At the Veterinary Department, he was given the form in exhibit “P1” to deliver to Securicor which asked them to deliver to the Veterinary their dogs” vaccination documents.

16. He took the form and delivered it to Securicor but they never did as requested in the form.

17. As a result of the matters above, it dawned on him that Securicor was not going to pay him any compensation for the injuries. He therefore consulted his lawyers, Messrs Mhango and Company, who on 29th April 2004 wrote a letter asking Securicor to pay him compensation for the injuries herein. A copy of the said demand letter is exhibited hereto marked "P2".

18. When Securicor failed to comply with the demand made by his lawyers, he commenced the present action.

19. **CLAIM**

He therefore claims the following:

a. Damages for personal injuries.

b. Damages for deformity.

c. Damages for loss of amenities.

d. Damages for nervous shock.

e. Costs of this action.

He makes this Statement conscientiously believing the same to be true to the best of his knowledge and belief.

In cross-examination he stated that at this filling station there were some security lights. He was not sure if the sun had already set down. However, he was sure that there were lights and was able to see the dog charging at him. He said he was able to see everything clearly as stated in his Statement. He stated that he never said in his Statement that he was coming from Iponga Bottle

Store. He repeated his story that he was coming from Ndirande Police Station and was going to meet his friend at Chinseu. He said he might have been talking on a mobile phone but did not indicate in his Statement because he did not think it was necessary. He repeated his assertion that he was coming from Ndirande Police Station and going to Chinseu to meet his colleagues and proceed to Goliyo. His colleagues were Mr Paul Chifisi and were being drive by Sub-Inspector Mtete. He said there was no particular place where they were to meet at Chinseu. He stated that the dog was loose and charging at him. It was not tied to any particular spot. The dog handler was not anywhere to be seen. He stated that he has had no hearing problems before. He refuted that he was warned by the dog handler not go anywhere near the dog. Otherwise he would have refrained. The first thing he saw was a dog charging at him. He said that the dog handler was not available at that time and that if he had seen the dog being let loose he would not have proceeded. The witness said the dog was coming from the eastern direction.

There was no re-examination at that juncture. At the instance of the court the plaintiff showed scars on both feet alleging that this is where he was bitten by the dog.

In cross-examination, in relation to these scars, the witness said these were the two deep wounds he referred to in his Statement and that the others were minor.

There was not further re-examination. Counsel had indicated that they would apply that the court should visit the scene.

The second witness for the plaintiff was Detective Sub-Inspector Evans Mtete. He adopted his witness Statement as evidence in chief. It reads as follows:

1. He is a member of the Malawi Police Force based at the Southern Regional Headquarters and employed as an Investigator under the CID Branch of the Force.

2. He first knew Mr Chilinda in 2000 when he was working at Ndirande Police Sub-Station as a Station Criminal Investigation Officer.

3. On 17th April 2004, they received a report that supporters of the members of the Mgwirizano Coalition had set ablaze a UDF office at Goliyo in Ndirande Township.

4. Following incident above, the then Deputy Director of CID, Mr Paul Chifisi from the National Police Headquarters in Lilongwe instructed him to tell Mr Chilinda that he (Mr Chifisi) wanted to see Chilinda on the issue.

5. On this particular day, he was driving a police vehicle and was advised by Mr Chifisi to go and fetch Mr Chilinda from the Station.

6. He packed the vehicle at Chinseu Mobil Filling Station and went to call Mr Chilinda who was then chatting with some friends at one of the shops nearby.

7. When he and Mr Chilinda were at the filling station, they saw a Securicor dog, which was charging at Mr Chilinda.

8. Instead of restraining the dog, the dog handler set it (the dog) loose, which immediately viciously attacked Chilinda.

9. As a result of the matters above, being scared, they all ran away.

10. A few minutes later, the dog handler came and pulled the dog away.

11. When he asked the dog handler why he had allowed the dog to maim Mr Chilinda he failed to answer.

12. After the matters above, they rushed to Ndirande Police Sub-Station where they obtained a Police Report before rushing to hospital with Mr Chilinda where he received treatment as an outpatient.

13. On the night of the same day, he went back to the Filling Station to have the particulars of the dog handler who had let loose the dog that maimed Mr Chilinda and his particulars were as follows:

Name: Alfred Makwana
Tribe: Lomwe
Village: Bwanali
T/A: Kumtumanji
District: Zomba.

14. The following day, he escorted Mr Chilinda to Mlambe Hospital where he was admitted for 3 days.

He makes this sentence conscientiously believing the same to be true to the best of his knowledge and belief.

In cross-examination PW2 stated that he arrived at Chinseu Mobile Filling Station around 6.00 o'clock in the evening. He said that opposite filling station are several shops and bottle stores. He stated that the people who were chatting with the plaintiff are unknown to the witness but immediately the plaintiff saw the witness he pulled out of the group and the two then met. He denied that he had gone as far as Iponga Bottle Store. He informed the court that by then Mr Chifisi was at Ndirande Police Station. He also stated that the dog handler was within the filling station and was coming towards to where the police vehicle was parked. The dog handler was following the dog. He said he saw the dog handler set the dog loose and attack the plaintiff. The witness stated that when he was sent to look for the plaintiff he did not know exactly where he was but at the time they met he was on the other side of the road. As they were crossing the road towards their vehicle it is when the dog bit the plaintiff. His estimation of distance is that they were 20 feet away from the vehicle.

There was no re-examination and the court was set to visit the scene.

Upon reaching the scene the plaintiff was reminded that he was still under oath. He showed the court the place where the vehicle was parked – namely on the western side of the fuel pumps. He stated that as he was coming towards the vehicle to board it, the dog came from the eastern direction (direction of the pumps). He stated that he did not notice the direction from which the dog handler came from because at that time the plaintiff was leaning towards the vehicle. The plaintiff felt that dog handler was pulling the dog.

There was no cross-examination.

The second witness for the plaintiff was recalled at the scene and reminded that he was still under oath. He pointed the direction of the shops across the road opposite the filling station. He showed the court the same sport as the plaintiff did as the place where he had parked the vehicle. He said that he was the driver of the vehicle. He stated that he saw the plaintiff being attacked by a dog. He pointed the same direction as the plaintiff did as the direction where the dog came from. He denied that he did reach as far as Iponga Bottle Store. But that he was coming from that direction. He told the court that the dog handler came from the direction of the pumps. He stated that the dog handler came within 5 minutes to rescue the plaintiff.

In cross-examination PW2 stated that the plaintiff welcomed him in the middle of the road. He pointed the area. He stated that the two of them were walking towards the parked vehicle. He said that he did not manage to get into the vehicle at the same time as it is when the plaintiff was attacked by the dog. The witness stated that he ran towards a wire fence. At that time it is when the dog handler controlled the dog.

On the next rescheduled date of hearing the defendant called Alfred Makwana as the first witness for the defendant (DW1). He adopted his witness Statement in evidence in chief. He stated as follows:-

6.1 He is an employee of Securicor Malawi Limited, the defendant in this matter.

6.2 He has been working with the defendant as a dog handler since 2000.

6.3 He recalls that on the night of 17th April 2004, he was stationed at Ndirande Mobil Filling Station with a dog called Josh to provide security at the station.

6.4 He was standing on 'kapinga' grass yard about 20 meters from the station's fuel pumps so as to keep a watch at the station while keeping a safe distance.

6.5 The dog was fastened with a lead chain, which he constantly held in his hand to control it.

6.6 Just next to the filling station is a Southern Bottlers Plant, which is surrounded by a wire fence.

6.7 In the wire fence was a guard by the name of Mr Lazau Fanizani who had been assigned to guard the Plant during the night.

6.8 The two of them begun to chat whilst keeping watch of their respective premises.

6.9 There were lights from both the filling station and the Southern Bottlers Plant so that he was able to easily watch the filling station and any activity in the surroundings.

6.10 At around 11 or 12 midnight, whilst chatting with Mr Fanizani, he saw the plaintiff coming from Iponga Bottle Store, talking on a mobile phone.

6.11 The bottle store directly faces the Mobil Filling Station and in between the two runs Ndirande ring road.

6.12 The plaintiff crossed the road whilst talking on the phone and headed towards a stationary police car a Land Rover 110, which was parked at the Mobil Filling Station but with no one inside.

6.13 The plaintiff went past the police car and steadily headed to where he was standing with the dog.

6.14 There is a small drainage path that separates the concrete where the fuel pumps are and the “kapinga” grass yard where he was.

6.15 The plaintiff jumped this drainage and kept approaching him while still talking on the mobile phone.

6.16 Sensing that the plaintiff was in danger of being attacked by Josh, he warned him loud enough to keep his distance away from the dog.

6.17 He repeated the warnings for about three times but the plaintiff did not listen.

6.18 Suddenly Josh, being irritated leapt towards the plaintiff, breaking the lead chain fastened to its neck. It did not bite the plaintiff.

6.19 He immediately went to rescue the plaintiff from Josh but he was helpless because the plaintiff was panicking and had grabbed DW1 on the neck.

6.20 He eventually managed to control Josh and rescued the plaintiff, whereupon the plaintiff went back to Iponga Bottle Store.

6.21 Moments later, the plaintiff came out of the bottle store with a friend and they both left on the police car that had been parked at the filling station.

6.22 Later on during the same night he was visited by two police officers, a man and a woman, in civilian armed with a rifle.

6.23 The two officers asked for his particulars, which he gave them.

6.24 Josh had been duly vaccinated against rabies and attached hereto is a copy of the Veterinary Vaccination Certificate marked “AM 1”.

6.25 He verily believes that the Statement herein given by him is true to the best of his knowledge.

In cross-examination he explained the way he executes his duties. He stated that he goes to a place of duty with a dog and puts a lead on the dog. He stated that normally he handles the lead in the hands and upon reaching the place of duty he sits. Thereafter he ensures that he handles the dog in such a manner that he it cannot leave the place. He stated that if it is during day time he covers the dog’s mouth with a muzzle. Equally whenever he is going to a place of duty the dog’s mouth is covered with a muzzle. He stated that whenever any person is passing near the dog, the dog handler restrains it from charging. He said that was all he does.

He said that he warned the plaintiff that the dog would bite him. He implored the court to believe what he said that he held the dog and that he was supposed to hold the lead tightly whenever someone was passing by. He told the court that it is not true that the plaintiff came to the filling station at 6.00 o’clock in the evening. He said that the plaintiff and his witness told a lie on time. He said that the plaintiff was not on patrol duties. He said that he was standing 20 metres on the eastern direction of the pumps. He was not on the concrete ground. He disputed that the vehicle was not parked at the spot where the plaintiff and his witness pointed. DW1 said that the plaintiff was coming towards the witness and following the dog. He stated that the plaintiff was talking on a mobile phone. The witness conceded that there is no through-way at the place but that the plaintiff was just coming aimlessly. The witness said he has been a dog handler since 2000. The witness also admitted that is was not possible for someone just to be following a dog if there is no through-way. He confirmed that the dog was vaccinated on 19th January 2004.

In providing clarity to the court the witness said he warned the plaintiff three times. He also said that he is not the one who took the dog for vaccination and he does not keep vaccination records.

However, he confirmed that he was familiar with the Veterinary Vaccination Certificate for the dog.

The second witness for the defendant was Lazau Fanizani (DW2). He adopted his witness Statement in evidence in chief after identifying his thumb-print. DW2 stated as follows:

6.1 He is an employee of Mr Chisesele who operates a Southern Bottlers Plant at Chinseu, Ndirande Township in the city of Blantyre.

6.2 He has been working at the said Southern Bottlers Plant as a guard since July 2003.

6.3 The said Plant is next to Mobil Filling Station.

6.4 A wire fence separates the Plant and the filling station.

6.5 On 17th April 2004, he was assigned to work during the night shift.

6.6 In the course of his duty he was chatting with Mr Alfred Makwana, an employee of Securicor Malawi Limited, who had a dog with him to provide security to the filling station.

6.7 Mr Alfred Makwana and himself were standing close to each other but were separated by the wire fence between them.

6.8 At around 11 or 12 midnight, whilst chatting with Mr Makwana, he saw a man coming from Iponga Bottle Store, talking on a mobile phone.

6.9 Iponga Bottle Store is on the opposite side of Mobil Filling Station separated by Ndirande ring road.

6.10 He later learnt that the name of the man was Mr Felix Chilinda, the plaintiff in this case.

6.11 The plaintiff kept talking on the mobile phone and was heading towards a stationary Police Land Rover 110, which was parked at the Mobil Filling Station. There was no one in the car.

6.12 The plaintiff did not stop at the car but kept approaching to where Mr Makwana and himself were standing.

6.13 There is a small drainage path separating the concrete at the filling station and a "kapinga" grass yard where Mr Makwana was standing with a dog. The distance between where the Land Rover was and where they were is not less than 20 metres.

6.14 The plaintiff jumped this drainage and kept approaching him while still talking on the mobile phone.

6.15 When the plaintiff got closer, Mr Makwana warned him to kept to keep a distance because there was a dog.

6.16 Mr Makwana repeated the warnings several times but the plaintiff did not listen.

6.17 Suddenly the dog leapt towards the plaintiff causing the lead chain to break.

6.18 At this time Mr Makwana went to rescue the plaintiff from the dog but could not immediately do so as plaintiff had grabbed DW1 on the neck and the chain was broken.

6.19 In the end Mr Makwana managed to separate the dog from the plaintiff, upon the plaintiff went back to Iponga Bottle Store.

6.20 He later saw the plaintiff come out of the bottle store with a friend and they both left in the police car that had been parked at the filling station.

6.21 He verily believes that the Statement herein given by him is true to the best of his knowledge.

In cross-examination DW2 stated that before this incident he did now know the plaintiff and had no grudges against him. He stated that he had not committed any offence and there was no probable reason for the plaintiff to be following this witness. He stated that, yet the plaintiff jumped a drain and was following in the direction of DW2 and DW1. He said there is no passage to where DW2 was. He said that his belief was that the plaintiff was drunk. However, he was unable to explain why the plaintiff did not fall in the drain if he was drunk. He said he has never seen a person just following a security dog aimlessly. He stated that he witnessed the contact between the dog and the plaintiff. He said DW1 and DW2 were on the 'kapinga' landscape while the dog was about 20 metres away with the plaintiff at the time of the incident. It took 5 minutes for DW1 to leave where he was with DW2 to where the dog was. During that time the dog was with the plaintiff. In re-examination DW2 said he did not see the plaintiff fall in the drain.

The court moved to the scene of the incident again. DW1 was recalled and was reminded that he was still under oath. He showed the court where he was standing near Southern Bottlers Plant fence. He said that DW2 was inside the fence. DW1 pointed a place where he was with a dog. He pointed the area of Iponga Bottle Store. He also showed the court a drainage near the road, which is about 2-3 metres wide and 2-3 metres deep. He said the plaintiff did not jump over the drain but used the drive-way to the filling station. He stated that he warned the plaintiff 3 times that there was a dog. He pointed a spot in the eastern direction of the pumps as spot where the vehicle was parked. It should be noted that it was different from the spot pointed out to the court by PW1 and PW2. DW1 showed a spot where the dog is alleged to have charged and leapt towards the plaintiff.

In cross-examination DW1 said that the plaintiff did not jump over the drain but went round and used the drive-way. When cornered in cross-examination he said he did not wish to change his statement in paragraph 6.15 above. He said he was guarding the filling station. He said Iponga

Bottle Store is behind the Southern Bottlers Plant. He alleged that he believed he was coming from Iponga Bottle Store because he was coming from that direction. He finally said that the plaintiff came right to where DW1 was with the dog.

There was no re-examination of DW1. DW2 was recalled and reminded that he was still under oath. He pointed to the court that he stood behind the wire fence. He stated that the plaintiff jumped over the small drain at the corner. This is not a large drain along the road. He stated that the vehicle was parked at the entrance to the filling station. He said the dog jumped on the plaintiff near the fence.

In cross-examination DW2 said he was near DW1 but that DW2 was inside his Southern Bottlers Plant fence. He confessed that DW1 was the one who was nearer to the plaintiff than DW2. He said that he was a watchman for Southern Bottlers and his attention was on his employer's property. DW2 demonstrated by walking over the small drain. When he was referred to paragraph 6.14 of his Statement, he changed his Statement and said that the plaintiff walked over the small drain.

DW2 clarified to the court that the plaintiff went past the vehicle, jumped the drain and was going in the direction where DW1 and DW2 were.

This marked the end of the *viva voce* evidence of both parties. They were requested to make written submissions. Both counsel have alluded to the evidence, issues for determination and the law with slight variation. The court is grateful to counsel for these submissions.

ASSESSMENT OF THE EVIDENCE AND THE LAW

For the defendant to be held liable in negligence, three things must be proved namely duty to take care, breach of that duty and injury to the plaintiff resulting from the failure to take that duty of care.

The principle of duty to take care was properly defined in **Donoughue vs Stevenson** (1932) AC 562 as follows –

"A person's neighbour are those persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question", **Donoughue vs Stevenson** at 580, per Lord Atkin.

Secondly, breach of duty to take care will have occurred if the defendant fails 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 Company** (1856)11 EX. 781 at 784.

Finally, on negligence, if the damage or injury suffered is as a result of the breach of duty, then the defendant is liable in negligence. **The Lady Gwendolen** (1965) p.294.

ASSESSEMNT OF THE ISSUE OF LIABILITY IN NEGLIGENCE

That the defendant owed a duty of care to the plaintiff is beyond question since by the mere fact that the defendants or their servant(s) were supposed to hold their dog firmly and under control (testimony of DW1 and DW2) is reason enough to defendants to show that the defendants were under a duty to see to it that any person who was coming near the filling station which they were guarding was not bitten by the dog, unless the person was a thief which was not the case with the plaintiff.

Evidence has clearly shown that the dog had spent about five minutes biting the plaintiff (see testimony of PW1, PW2 and DW2) while the dog handler was about some 20 metres away not at all concerned even after letting the dog loose and unattended to. By not having the under their control in such circumstances the defendants were in breach of their duty of care more so if one considers the fact that the plaintiff was bitten by the dog right away at the filling station (see

testimonies of PW1, PW2, DW1 and DW 2 though each pair differs on the exact place at the filling station) which is the place that was being guarded by the defendants.

That it was as a result of the breach of duty to take care by the defendants which led to the injuries and damage suffered by the plaintiff is also not at all in doubt. Evidence was given in court that the plaintiff was bitten by the dog (testimonies of PW1 and PW2). The plaintiff himself showed scars on both of his feet to court emanating from the biting of the dog.

DW2 also clearly answered in cross-examination that the dog spent five minutes while in contact with the plaintiff while PW2 and the dog handler, DW1 were some 20 metres away on the 'kapinga' grass. Added to that the dog handler himself, DW1 when the court went to the scene of the incident, told the court that the plaintiff was bitten by the dog though he showed that he was bitten on the 'kapinga' grass where the dog used to be stationed.

NEGLIGENCE IN RESPECT OF ANIMALS SUCH AS DOGS

Courts have held that holding dogs or other dangerous animals loose so that they might easily escape and harm people is clearly negligence for which the keeper of the animal is to be held liable.

In **Pitcher vs Martin** (1937) 3 ALL ER 919, the defendant was walking with a dog on a long lead which he held so loosely that the dog escaped from her control and chased a cat. In doing so, the lead became entangled with the plaintiff's legs and she, a woman of 73 years of age was thrown and injured. The court held that the defendant was liable in negligence.

Atkinson J, at page 919 stated as follows –

"Her duty was to hold the dog sufficiently firmly to guard against those contingencies which might reasonably be anticipated surely one of those contingencies was that the dog would make a sudden dart after another or a cat. To say that it darted swiftly is not sufficient excuse for letting it go. She might have twisted the lead round her wrist in such a way that the dog could

not get away. The hold which she had on the dog got away such that as soon as the dog gave a sharp pull it sot away. The evidence satisfied me that Mrs Martin [the defendant] was negligent".

Similarly in **Aldham vs United Dairies** (1930) ALL ER at 524, Greene MR had the following to say on leaving dangerous animals unattended.

"To leave a horse and a cart unattended on a high-way is not without more, an act of negligence. On the other hand, to leave a horse and a cart upon a highway in circumstances in which the driver knows, or as a reasonable man ought to know that the horse is likely to injure a member of the public in unquestionably negligence".

The evidence is very clear to the effect that the defendant's servant let the dog loose and unattended in circumstances in which it was plain that a member of the public such as the plaintiff would be bitten and left injured by the dog which was at large. This was unquestionably negligence.

The plaintiff, therefore, suffered damage as a result of the defendant's negligence for which they should be held clearly liable.

The court will further consider whether the defendants are still liable under strict liability even if they can successfully contend that they were not negligent.

Case authorities are plain on the issue of strict liability for animals even if negligence may be proved to have been absent on the part of the defendant.

In **Behrens vs Bertram Mills** (1957) 1 ALL ER 583, the court was faced with the issue regarding liability for dangerous animals. In the case an elephant under the control of the defendant was frightened by a dog belonging to another person and then the elephant injured the plaintiff. Though the defendants denied liability for negligence, the court still found them liable under strict or absolute liability.

Devlin J, at 587 had the following to say on harmful animals and liability of its keepers :-

*"A person who keeps an animal with knowledge (**scienter retinuit**) of its tendency to do harm is strictly liable for damage that it does if it escapes; he is under absolute duty to confine or control it so that it shall not do injury to others. All animals **ferae naturae**, that is all animals which are by nature not harmless, such as a rabbit, or have not been tamed by man and domesticated, such as a horse, are conclusively presumed to have such a tendency, so that the **scienter** rule need not in their case be proved. All animals in the second class, **mansuetae naturae**, are conclusively presumed to be harmless until they have manifested a savage or vicious propensity. Proof of a manifestation is proof of **scienter** and serves to transfer the animal, so to speak, out of its natural class into the class of **ferae naturae**.*

At page 588 Devlin J, states that the knowledge of what kind of animals are tame and what are savage is common knowledge and that it is a matter for which judicial notice has to be taken.

The defendant has contended that the above common law position of strict liability has been modified by Section 19 of the Control and Diseases of Animals Act – Cap. 66:02 of the Laws of Malawi which reads:-

> *In any action against the owner of a dog for damages in respect of injury done to any person or to any domestic animal or bird by the dog, it shall not be necessary for the person seeking such damages to show a previous propensity in the dog, or the owner's knowledge of such propensity or to show that the injury was attributable to neglect on the part of the owner.*

I am unable to agree with the defendant's submission on this point because according to Section 19 above, the plaintiff only needed to show to the court that the defendant's dog caused him an injury. He did not need to prove the elements of neglect or negligence. I do not agree with the defendant that the plaintiff failed to show that he suffered injuries caused by the defendant's dog.

Turning to the case involving the defendants, Securicor Malawi Limited and the plaintiff, Mr Felix Chilinda, it is not in dispute at all that the plaintiff was bitten by the dog. The defendants have not even disputed that the dog belonged to them and have not denied the fact that their dogs are dangerous in that they can easily attack a person once let loose. That is the reason why they are always supposed to be held tightly by their handlers and their mouth covered. DW1 properly explained this in cross-examination.

The fact that the plaintiff was bitten by the dog belonging to and under the control of the defendants is reason enough to hold the defendants strictly liable even if negligence can successfully be contended to have been absent. This brings us to another point stated by Devlin J, in **Behrens vs Bertram Mills Circus Ltd** (1957) 1 ALL ER 587 at 589 –

> *"The reason for imposing a specially stringent degree of liability on the keeper of a savage animal is that such an animal has a propensity to attack mankind and if left unrestrained, would be likely to do so. The keeper has, therefore, in the words of Lord Macmillan in* ***Read vs J Lyons & co Ltd*** *(1946) 2 ALL ER 471 at 476 "an absolute duty to confine or control it so that it shall not do injury".*

So the issues of strict liability is well entrenched. Even if the defendants can bring forward an argument that their dogs are not dangerous, it cannot hold because the question as to whether an animal is dangerous or not is common knowledge that the dogs of the defendants are dangerous.

STRICT LIABILITY IN MALAWI

Be as it may, in Malawi liability for dangerous animals is strict and the plaintiff need not prove negligence on the part of the defendant. **Ribeiro vs Martin** (1968 – 70) ALR (Mal) 151.

Justice Smith at page 155 of the case had the following to say on strict liability in respect of dangerous animals in Malawi.

> *"Dogs in Malawi are regarded as animals **ferae naturae** so as to render the owner strictly liable for such injury that may result therefrom. Therefore a person who keeps such animals is under absolute duty to confine or control it that it shall not do injury to others"* .

Similarly in **Kabombo vs Yalenga** 11 MLR 311, the court stated that it is just sufficient to merely show that the dog caused injury and nothing much.

In that case the appellant had been attacked by the respondent's dog along a highway. The respondent, in their defence, alleged that the appellant was drunk and he provoked the dog. The appellant denied this saying that he had been in a club playing darts.

Mbalame J, held that according to Section 19 of Control of Diseases of Animals Act (Cap 66;02) of the Laws of Malawi it is just sufficient to merely show that the dog caused injury, nothing much – **Kabombo vs Yalenga** 11 MLR 311 at 314.

The defendants have argued that the plaintiff provoked the dog. Whether this is true or not, it does not matter since the above case settles it all i.e. it is sufficient for the plaintiff to show that the dog caused injury.

The defendant has challenged the plaintiff as having failed to prove personal injuries, damages for deformity, damages for loss of amenities, damages for shock and costs of the action. The defendant has contended that the plaintiff did not lead evidence under any of the mentioned heads. Counsel has argued that Order 18 Rule 12(1A) of the Rules of the Supreme Court requires a plaintiff in an action for personal injuries to serve with his Statement of Claim, a medical report and a statement of special damages claimed. As a rule of the court it must always be complied with. The plaintiff failed to either serve or produce in court a medical report to

support that the defendant's dog bit him or show a hospital receipt to support that he was treated at Queen Elizabeth Central Hospital or Mlambe Private Hospital.

Similarly, the plaintiff made no statement of special damages in court. He led no evidence of deformity, loss of amenities and shock. In **Matenje vs Beams** (supra) Mwaungulu (R), as he then was, stated as follows on page 254 paragraphs (h) to (i):

> *The plaintiff cannot recover for shock. The evidence does not raise circumstances in which damages can be recovered. For shock, even in legal parlance, denotes shock in the medical sense. There must be physical or mental harm.*

While agreeing with the defendants on the procedure to be followed under Order 18 Rule 12(1A), they did not raise it in their defence or during the trial. I would believe the evidence of PW1, PW2 and DW2 that the plaintiff was bitten by the defendant's dog. In my view the trial was for purposes of establishing liability and did not include the assessment of damages. I order that such documents be produced for assessment.

CONCLUSION

Considering the law outlined above and taking into account the evidence, I find that the defendant is liable for the plaintiff's injury occasioned by the defendant's dog. The Registrar should assess damages.

The issue of costs is in the discretion of the court. Normally costs follow the event. The plaintiff is entitled to costs in this case.

PRONOUNCED in open court at Blantyre this 18th day of December 2006.

Chimasula Phiri

JUDGE