

**IN THE HIGH COURT OF MALAWI**

**PRINCIPAL REGISTRY**

**PERSONAL INJURY CAUSE NUMBER 286 OF 2016**

**BETWEEN:**

**ELLIA TEMBO**

**PLAINTIFF**

**AND**

**AUBREY MWANGONDE**

**1<sup>st</sup> DEFENDANT**

**ILLOVO SUGAR (MW) LIMITED**

**2<sup>nd</sup> DEFENDANT**

**NICO GENERAL INSURANCE COMPANY**

**3<sup>rd</sup> DEFENDANT**

**CORAM: JUSTICE M.A. TEMBO,**

Tandwe, Counsel for the Plaintiff

Mwakhwawa, Counsel for the Defendants

Mpasu, Official Court Interpreter

**JUDGMENT**

The plaintiffs' claim is for damages for personal injuries suffered by him as a result of the alleged negligence of the 1<sup>st</sup> defendant, in driving a motor vehicle owned by the 2<sup>nd</sup> defendant and insured by the 3<sup>rd</sup> defendant, causing the vehicle to hit him when he was a pillion passenger near Siku offices at Nchalo Trading Centre.

The plaintiff claims that the 1<sup>st</sup> defendant was negligent in that he drove without due regard to other road users, that he drove at excessive speed, that he failed to stop or otherwise control his motor vehicle to avoid the accident, that he failed to take sufficient steps to brake or steer or otherwise maneuver his vehicle to avoid hitting the plaintiff and that he failed to keep or maintain a proper look out.

The defendants accept being the driver, owner and insurer of the vehicle herein respectively. They also accept that there was a collision as claimed but they deny the allegation of negligence.

The defendants claim that the collision was solely caused by or contributed to by the negligence of the pedal cyclist who was carrying the plaintiff as a pillion passenger.

The defendants allege that the pedal cyclist was negligent in that he failed to keep any proper look out, that he failed to heed the presence of the presence of a motor vehicle on the road, that he failed to have any regard for his own safety and the safety of his passenger, that he suddenly and without warning swerved and emerged into the path of the motor vehicle, that he failed to give way to the motor vehicle and failed to stop, slow down swerve or in any way manage the bicycle to avoid the collision.

The defendants also deny the injuries and any loss allegedly suffered by the plaintiff. The 3<sup>rd</sup> defendant claimed that its liability if any is subject to the insurance policy limit.

The main issue for determination is whether the 1<sup>st</sup> defendant negligently caused the collision between the vehicle he was driving and the plaintiff who was a pillion passenger herein. And whether the pedal cyclist caused or contributed to the collision.

This Court wishes to note, in agreement with the parties, that the standard of proof in a civil matter, like the instant one, is on a balance of probabilities. And that, the burden of proof lies on he who asserts the affirmative, in this case the claimant on his claim of negligence and the defendants with regard to contributory negligence. See *Nkuluzado v Malawi Housing Corporation* [1999] MLR 302 and *Miller v Minister of Pensions* [1947] All ER 372.

This Court heard the evidence of both parties in this matter. That evidence is set out here before this Court considers the submissions of the parties on the same.

The plaintiff brought two witnesses. He testified first as follows.

He stated that he works as a Pan Boiler at Illovo Sugar Malawi Limited.

He then stated that on or around 12<sup>th</sup> December 2015, he was a pillion passenger traveling from Sekeni Village to Nchalo Trading Centre along M1 road.

He stated that, upon arrival at Siku Transport Offices, the 1<sup>st</sup> defendant driver of a motor vehicle registration number ZA 882 Ford Ranger travelling in the same direction hit him from behind.

He added that the 1<sup>st</sup> defendant was driving at an excessive speed and he failed to control the motor vehicle and hit the plaintiff. The plaintiff produced a copy of the police report which he tendered in evidence and was marked ET 1.

He then stated that after the 1<sup>st</sup> defendant driver had hit him, he did not stop but instead kept on driving fleeing the accident scene. And that after the 1<sup>st</sup> defendant had travelled for a distance, he came back and took the plaintiff to Illovo Factory Clinic before he reported the accident to the police station.

The plaintiff stated that he spent a day at Illovo Factory Clinic where he was treated. He produced a copy of the Medical Report and it is marked ET 2.

During cross-examination, he stated as follows. That he does not know the cyclist who carried him on the bicycle as it was in the evening.

He stated that the 1<sup>st</sup> defendant only picked him and told the rest of the people at the scene of the collision that they would meet at the police. He stated that however, they did not go to the police and so they did not meet the cyclist at the police.

He stated that he does not know why the 1<sup>st</sup> defendant did not pick up the cyclist too.

He then stated that the 1<sup>st</sup> defendant picked up the plaintiff and the plaintiff's wife who was a passenger on another bicycle.

He then stated that they did not go to the police with the 1<sup>st</sup> defendant. But that he went to the police alone the following day. He then stated that the police got his statement at the hospital where he spent the night after the collision herein.

He then stated that the 1<sup>st</sup> defendant came to pick him up at his home to go to the police so that they could go to the scene of the collision. And so they went to the collision scene. And that he got the police report.

The plaintiff noted that the police said that the cyclist caused the collision herein. And that he contradicted the police report.

He reiterated that he was a passenger in the direction of Nchalo. And that he was properly saddled on the bicycle and was facing the direction of Nchalo.

He stated that he saw the vehicle herein coming near and he was on the proper side of the road. He added that he saw the 1<sup>st</sup> defendant's vehicle coming after another vehicle may be 20 metres away which was about ten minutes away after the first vehicle.

He stated that this was around 7. 00 p.m. and it was not dark.

He then stated that the 1<sup>st</sup> defendant saw him on the bicycle. He stated that the 1<sup>st</sup> defendant's vehicle hit him and not the bicycle or cyclist.

He added that the vehicle swerved to the bicycle side and hit the plaintiff on the thigh and shoulder but the back of the bicycle was not hit.

He stated that at the time he was hit he was looking in front where he was going. And that the left view mirror of the 1<sup>st</sup> defendant's vehicle is the one that hit him.

He stated that then the bicycle was in motion and he was holding the handle. He added that he turned to look back and saw the 1<sup>st</sup> defendant's vehicle.

He then stated that after turning he saw the 1<sup>st</sup> defendant's vehicle coming then it came and hit him whilst the cyclist was still cycling. He added that he also heard a sound.

He clarified that by the time he turned to look back the 1<sup>st</sup> defendant's vehicle was 20 metres away and that as they cycled on the vehicle came and hit him. He added that the vehicle that hit him is the same he saw at 20 metres away. He added further that this vehicle did not overtake another one.

He then stated that he was not paying too much attention to what was happening at the back of the road. He however stated that he could estimate the 20 metre distance in view of how he turned to look back. He added that the vehicle was speeding.

During re-examination, he stated as follows. That he did not know the cyclist in this matter. And that he normally uses cyclists for transportation.

The second witness for the plaintiff was Mr Lapozo. He stated that he works at Illovo Sugar Malawi Limited.

He then stated that on 12<sup>th</sup> December 2015, he was coming from Sekani Village going towards Nchalo Trading Centre along the M1 road. And that upon arrival at Siku Transport Offices at Nchalo, the driver of a motor vehicle registration number ZA 882 Ford Ranger travelling from Sekani Village heading towards Nchalo Trading Centre hit the plaintiff who was a pillion passenger travelling in the same direction.

He stated that the driver was travelling at an excessive speed that he failed to control the motor vehicle and hit the plaintiff. He referred to the police report herein.

He then stated that after the driver had hit the plaintiff; he did not stop but instead kept on driving fleeing the accident scene. And that after the driver had travelled for a distance, he came back and took the plaintiff to Illovo Factory Clinic before he reported the accident to the police station.

He stated that the plaintiff sustained injuries to the right leg and right shoulder as a result of the said accident. And that the plaintiff was then taken to Illovo Factory Clinic where he was treated.

During cross-examination, he stated as follows. That he does not stay close to the plaintiff. He added that he lives at Sekeni village and the plaintiff stays at the 2<sup>nd</sup> defendant's factory.

He then stated that the collision herein happened in the evening and that there were no other people at the scene. He added that he was going onto the road to Nchalo.

He stated that when the collision happened the plaintiff was on the bicycle and they had just passed him and the speeding vehicle hit the plaintiff.

He stated that he does not know the 1<sup>st</sup> defendant's wife.

He then stated that the cyclist was behind the white line and did not swerve into the road.

He stated that when the plaintiff was being taken to the hospital there was only him and the cyclist at the scene. He added that the plaintiff's wife was not on the scene of the collision. He emphasized that there was no woman at the scene.

He then stated that the 1<sup>st</sup> defendant's vehicle was speeding but he cannot tell the exact speed.

He stated that the 1<sup>st</sup> defendant did not stop after hitting the plaintiff but drove on for a long distance. He added that the 1<sup>st</sup> defendant would not have been attacked if he had stopped.

He then stated that he never gave a statement to the police in this matter. He added that he went to the police together with the cyclist since they were not picked up by the 1<sup>st</sup> defendant but they did not find the plaintiff and the 1<sup>st</sup> defendant at the police.

He stated that he went to the factory the following day to check how the plaintiff fared after the accident and he wondered why the plaintiff did not go to the police.

He stated that he knew the plaintiff after the collision herein. He added that he was a good Samaritan. And that he was interviewed in this matter since he witnessed the collision.

He then stated that at the police station he asked if the 1<sup>st</sup> defendant came to the police.

He stated that the police did not take a statement from him. He added that the police did not want to give a police report to the plaintiff and that there was a disagreement. He added further that he went to the police to explain the matter.

He then stated that his address is not at the 2<sup>nd</sup> defendant.

He stated that his English witness statement was translated to him.

Then the 1<sup>st</sup> defendant testified on behalf of the defendants. He stated as follows. That he is a resident of Nchalo and is an accountant by profession working with the 2<sup>nd</sup> defendant.

He stated that on 12<sup>th</sup> December 2015 he was driving motor vehicle registration number ZA 882 Ford Ranger from the direction of Sekeni Village towards Nchalo Trading Centre.

And that when he was at or near SIKU Transport offices, he was exchanging directions with another vehicle coming in the opposite direction when a cyclist with a pillion passenger suddenly, without warning and negligently swerved into the path of the motor vehicle and the passenger was hit by the left rear view mirror before falling to the ground.

He stated that at the time he was travelling at about 55 km/hr.

He also stated that the pedal cyclist run away from the scene of the accident.

During cross-examination, he stated as follows. That he confirmed hitting the pillion passenger. He also confirmed that the rear view mirror was the point of impact.

He then stated that both the plaintiff and the cyclist fell to the ground. He clarified that on the left side of the road there is a ditch and both the cyclist and passenger fell into the said ditch.

He then stated that the road is a tarmac one with a white line in the middle and vehicles travel in the opposite direction.

He stated that at the time of the collision he was driving on the left side of the road and the cyclist was on the same side going in the same direction. He added that he was driving between the white line and yellow line on the road.

He then stated that he cannot clearly say where the cyclist was going towards as it was dark. He added that he just saw the cyclist come into the road.

He clarified that he was not driving on the white line but on its left side. He added that at the time of the collision, the cyclist moved from the left. He added that the cyclist was cycling to his left and came in the road.

He then stated that the collision happened because the cyclist swerved into the path of his vehicle by swerving to the right. And that the rear view mirror of his vehicle hit the plaintiff.

He reiterated that his vehicle is a Ford Ranger and he knows its design. He agreed that the rear view mirror comes after the car bonnet. He added that the bonnet was already past the plaintiff and the cyclist at the point of impact. And that at the point of impact he was in the process of driving past the plaintiff and the cyclist.

He stated that at the point of impact he was not overtaking the cyclist. But that the cyclist came inside the road. He however agreed that by that time the bonnet of the vehicle had already passed the cyclist and the plaintiff and that this was passing.

He stated that he knows that passing of another vehicle must be at a safe distance.

He then stated that at the point of impact there was another vehicle going in the opposite direction occupying the right lane of the road. And that the cyclist also swerved to the right.

He then stated that the speed of the vehicle will determine where the cyclist will be hit and not the front tyre of the bicycle. He added that the front tyre of the bicycle will not be hit first in the circumstances.

He then clarified that by saying the cyclist swerved he meant that the cyclist swerved into the car mirror and wanted to get back to the left and that is when there was impact.

He then stated that the cyclist's point of impact was the bicycle handles.

He then stated that the whole thing happened very fast and was sudden and without a warning.

He stated that he however warned the cyclist by sounding the car horn.

He then stated that he did not find the cyclist on the scene of the collision but there were more than ten people on the scene.



He then stated that he did not know the people at the scene but only recognized the plaintiff. He added that he asked for the cyclist but people said he was not there. He added that he went to the police but did not find the cyclist there.

During re-examination, he stated as follows. That as he was driving towards Nchalo, suddenly, his thinking was that the cyclist was avoiding people moving in his way. And that at the point of impact, the cyclist was trying to move back into his lane.

He stated that there were a lot of cyclists and people moving so he believes the cyclist was cycling on the other side of the yellow line.

He then stated that he cannot recall what exactly happened. But that he however heard a sound and then people swarmed his car. And he cannot remember how the passenger was hit. But that the vehicle rear view mirror was crammed into the car due to the impact.

He stated that it was dark but his vehicle lights were on. He also stated that at the point of impact there was no one in front of his vehicle.

He then stated that soon after dropping the plaintiff at the hospital he went to the police and he was with his colleague Kabichi.

He also stated that he went to police the following day and the police wanted to inspect the scene of the collision again. And so he was with his wife, the plaintiff and the police on that day.

He reiterated that at the point of impact the cyclist was trying to get back in his lane and that this is why the vehicle did not hit the front tyre of the bicycle.

Both parties submitted on the relevant law and the factual matters.

The plaintiff submitted on whether or not the 1<sup>st</sup> defendant was negligent in his driving of his motor vehicle as a result of which the accident happened.

The plaintiff submitted that, to begin with, it is important to consider what negligence is. He submitted that negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do or doing something which a prudent and reasonable man would not do. See *Blyth vs Birmingham Waterworks Co*, (1856), 11Ex. 781.

He submitted further that, in an action for negligence, the plaintiff must prove first (a) that there was a duty of care owed to him; (b) that the said duty has been breached and (c) that as a result of that breach he has suffered loss and damage.

He submitted additionally that, in order to determine the question whether or not the 1<sup>st</sup> defendant was negligent, it is important to understand the obligation of a motor vehicle driver driving on the public roads.

The plaintiff observed that in the case of *Banda and others v ADMARC and another* 13 MLR 59 Banda CJ stated clearly the driver's duty of care to other road users as follows:

A driver of a motor vehicle owes a duty of care to other road users not to cause damage to persons, vehicles and property of anyone on or adjoining the road. He must use reasonable care which an ordinary skilful driver would have exercised under all the circumstances. A reasonably skilful driver has been defined as one who avoids excessive speed, keeps a good look-out, and observes traffic signs and signals.

The plaintiff submitted that a driver has a further obligation under section 98 of the Road Traffic Act as follows:

.... the driver of a vehicle intending to pass any other vehicle proceeding in the same direction on a public road shall pass the right thereof at a safe distance and shall not again drive on the left hand side of the roadway until safely clear of the vehicle so passed.

The plaintiff then observed that the Highway Code in section 41 commands that, never overtake unless you know that you can do so without danger to yourself or others....

He further observed that the Highway Code in section 46 also states that when passing or overtaking cyclists do not drive too close: leave them enough room.

He then observed that section 96 (3) of the Road Traffic Act states that:

The driver of a motor vehicle on a public road shall ... upon becoming aware of other traffic proceeding in the same direction and wishing to pass his vehicle, cause his vehicle to travel as near to the left edge of the roadway as is possible, without endangering himself or other traffic or property on the roadway, and shall not accelerate the speed of his vehicle until the other vehicle has passed.

And further that in section 111 the Road Traffic Act provides that:

No person shall on a public road use the audible warning device or hooter of a vehicle except when such use is necessary in order to comply with the provisions of this Act or on the grounds of safety.

And that section 112 (4) of the Road Traffic Act requires that no person riding a pedal cycle on a public road shall deliberately cause such pedal cycle to swerve from side to side.

He also noted that section 112 (7) of the Road Traffic Act is to the effect that whenever a portion of a public road has been set aside for use by persons riding pedal cycles, no person shall ride a pedal cycle on any other portion of such road.

The plaintiff then asserted that the South African case of *Ngcongo v Road Accident Fund* (10516/2013) [2014] ZAGPPHC 883 (7 November 2014) made a very pertinent statement as follows:

"*Klopper* postulates the following general principles in respect of cyclists:

‘A driver is expected to keep a proper lookout for cyclists. It is difficult to ride a bicycle in such a manner that it remains precisely and securely on a fixed course. There is always a degree of sideways movement. If a cyclist is a young child and in addition there is a strong wind blowing, the possibility that a bicycle may deviate considerably more than normal from its course is greater. For the aforementioned reasons a driver in such a case is expected to give a cyclist timeous warning of his or her approach and in his or her judgment will in addition leave sufficient space between him/her and the bicycle in order to overtake with reasonable safety.’

The duty to allow for lateral movement is particularly important in overtaking an inherently unstable vehicle such as a bicycle.”

The plaintiff observed that, in another South African case, *Oosthuizen v Standard General Versekerings Maatskappy Bpk* 1981 (1) SA 1032 Trengrove JA pointed out what was expected of a reasonable approaching driver when approaching a cyclist. That the driver must ensure that there is sufficient space between the cyclists and the passing vehicle and cognizance taken of the possibility that a cyclist could be pushed off course with resultant lateral movement.

The plaintiff then submitted that a cyclist has as much right to be on the road as does a motorist. And that a motor vehicle coming up behind a cyclist has a responsibility not to pass unless and until it is safe to do so. Further, that the

motorist may need to slow down and wait until there is enough space, or change lanes. He added that, except for moving to the far left of the lane, it is not the cyclist's duty to stop or otherwise get out of the motorist's way. See *Ngcongo v Road Accident Fund* (10516/2013) [2014] ZAGPPHC 883 (7 November 2014)

The plaintiff then submitted that in *Thompson v. Spedding* [1973] RTR 312 it was held that a driver of a vehicle following another should allow a sufficient space between the vehicles in which to deal with the ordinary exigencies of traffic but if he keeps too close to the rear of the vehicle ahead and so fails to pull up in time, should that other vehicle come to a sudden halt, he may be found liable in negligence.

The plaintiff's then considered his own evidence and submitted an analysis of the same.

He observed that it his evidence that he was carried on a pillion of a bicycle which was driving from the direction of Sekeni Village towards Nchalo Trading Centre along the M1 road. And that the bicycle was driving near the left end of the left lane of the said road.

He observed further that, according to his evidence, it was while the bicycle was driving there that the 1<sup>st</sup> defendant's motor vehicle or rather the left handside mirror of the said motor vehicle hit him, knocking him and the bicycle to the ground.

The plaintiff asserted that his position is that the accident happened because the 1<sup>st</sup> defendant drove too close to the bicycle. Further, that the 1<sup>st</sup> defendant did not leave enough room when passing or overtaking the bicycle.

The plaintiff submitted that the driver's obligation to overtake or pass another vehicle at a safe distance is well articulated in both the Act and the Highway Code as well as in decided cases. And that this obligation is more onerous in the case of passing or overtaking a bicycle.

The plaintiff submitted that the 1<sup>st</sup> defendant did not therefore maintain a proper look-out and ended up hitting him on the left side of the road where the bicycle was driving.

The plaintiff submitted that the 1<sup>st</sup> defendant failed to exercise reasonable skill expected from an ordinary skillful driver. And that this failure therefore solely caused the accident in which the plaintiff sustained injuries.

The plaintiff submitted that, from the foregoing, it will be noted that he has demonstrated that the 1<sup>st</sup> defendant breached his duty of care to him and as a result of which breach the plaintiff sustained injuries for which he ought to be compensated.

The plaintiff then considered the defendants' evidence and submitted his analysis of the same.

He observed that, on the other hand, it is the evidence of the defendants that the accident indeed took place at the time and place stated by the plaintiff. And that the defendants however alleges that the accident happened because as the 1<sup>st</sup> defendant "was exchanging directions with another motor vehicle coming from the opposite direction ... a cyclist with a pillion passenger suddenly, without warning and negligently swerved into the path of the motor vehicle and the passenger was hit by the left rear view mirror before falling to the ground".

The plaintiff further observed that, in his oral evidence, the 1<sup>st</sup> defendant stated that the cyclist swerved to his right into the path of the motor vehicle and that upon noting this the 1<sup>st</sup> defendant hooted and the cyclist swerved back to the left and as he was swerving back to the left the left rear view mirror of the 1<sup>st</sup> defendant's motor vehicle hit the pillion passenger and the bicycle fell into the left roadside drain.

The plaintiff submitted that he vehemently denied the 1<sup>st</sup> defendant's assertion that the cyclist swerved to the right into the path of the 1<sup>st</sup> defendant's motor vehicle. And that he and his witness maintained that the bicycle was driving in a straight course and never swerved moments before the plaintiff was hit as alleged by the 1<sup>st</sup> defendant.

The plaintiff then submitted that, even if we were to go by the 1<sup>st</sup> defendant version of events, it will still be noted that the 1<sup>st</sup> defendant was negligent or was the sole cause of the accident.

The plaintiff submitted that the 1<sup>st</sup> defendant admitted in cross-examination that the accident happened as he was passing or overtaking the cyclist.

The plaintiff then submitted that, generally, when overtaking a cyclist a driver is obliged to do so only when it is safe to do so, in other words when he can do so without danger to himself or others. And that after ascertaining that it is safe to overtake a cyclist, the driver is obliged to overtake at a safe distance.

He added that, put differently, the driver is obliged to leave “sufficient space” or “enough room” between his vehicle and the cyclist as he overtakes him. And that the rationale behind this obligation is to “allow for lateral movement ... particularly important in overtaking an inherently unstable vehicle such as a bicycle.”

The plaintiff submitted that the 1<sup>st</sup> defendant’s own evidence shows that he did not leave enough room or sufficient space between his vehicle and the bicycle. He added that the 1<sup>st</sup> defendant decided to overtake or pass the bicycle when he was exchanging directions with an oncoming motor vehicle. And that this means it was not possible for him to leave “enough room” or “sufficient space” between his vehicle and the bicycle because he could only do so by shifting towards or onto the right lane of the road which at the time was however occupied by the said oncoming motor vehicle. Further, that had the 1<sup>st</sup> defendant left such enough space, he would have been able to overtake or pass the cyclist without incident even if the cyclist swerved as alleged by the defence.

The plaintiff also submitted that, apart from passing or overtaking the plaintiff’s bicycle too close, the 1<sup>st</sup> defendant seems to have been driving at an unreasonable speed. He asserted that a driver is always under an obligation to drive at a reasonable speed and reasonable speed has been defined as a speed which allows a driver to stop or to take evasive action in an eventuality to avert an accident. He asserted further that, in the present case, had the driver been driving at a reasonable speed, he would have been able to stop when the cyclist allegedly swerved.

The plaintiff then submitted that, in any case, the obligation on the 1<sup>st</sup> defendant to drive at a reasonable speed could not be greater. There was a motor vehicle coming from the opposite direction and there was the cyclist along his lane and other cyclists and pedestrians on that side of the road.

The plaintiff noted that, in the 1<sup>st</sup> defendant’s own admission, there were also several pedestrians on the road at the material time who he thought the cyclist was trying to avoid. His submission is that the 1<sup>st</sup> defendant ought not to have passed or overtaken the cyclist at that point because the fact that there was an oncoming vehicle on the right lane meant he did not have enough room in which to safely overtake or pass the cyclist.

The plaintiff observed that the 1<sup>st</sup> defendant instead needlessly hooted at the cyclist when he was too close. He added that, according to the 1<sup>st</sup> defendant's oral evidence, when the cyclist allegedly swerved to the right, he hooted and as the cyclist was swerving back to the left the two [the 1<sup>st</sup> defendant and the plaintiff] collided.

The plaintiff noted that the Highway Code in section 67 states that:

Every person has a right to use the roads. Use the horn to inform someone of your presence and not to blast him out of your way. Use your horn in plenty of time. A sudden late warning might well scare pedestrians and other traffic, especially cyclists, into endangering themselves and you. Sound your horn when about to overtake a cyclist who has just been overtaken by a vehicle ahead of you; after being overtaken by one vehicle cyclists often swing back into the middle of the road.

The plaintiff then submitted that what the 1<sup>st</sup> defendant did was precisely what the Highway Code proscribes in section 67, "to blast the cyclist out of the 1<sup>st</sup> defendant's way". And that this obviously had the effect of scaring the cyclist into "endangering" himself and his passenger.

The plaintiff also observed what the 1<sup>st</sup> defendant said in re-examination. He noted that the 1<sup>st</sup> defendant stated that he did not remember what happened at the material time but just heard a noise; he could not remember how the passenger [plaintiff] was hit. The plaintiff submitted that this statement suggests that the 1<sup>st</sup> defendant was not paying attention to the other road users who were also on the road. And that the 1<sup>st</sup> defendant thus failed to keep and maintain proper lookout. And that this is evidence of negligence for which the 1<sup>st</sup> defendant ought to be held liable.

The plaintiff therefore submits that the 1<sup>st</sup> defendant failed to observe his obligation as a driver. That the 1<sup>st</sup> defendant failed to drive as a reasonable driver would. And that it is these failures on the 1<sup>st</sup> defendant's part which solely caused the accident because as already stated had he observed his obligation as a reasonable driver the accident would not have happened.

The plaintiff then submitted that he has through his evidence and his submissions demonstrated that the 1<sup>st</sup> defendant was negligent and that it was this negligence which solely caused the accident which resulted in him sustaining injuries.

He therefore submitted that this Court finds the defendants liable in negligence.

On their part, the defendants submitted as follows. The defendants first commented on the plaintiff's testimony.

They noted that, after adopting his witness statement the plaintiff admitted that police took statements from him and the driver and visited the scene of the accident.

They observed that the plaintiff has not challenged the police report, which puts blame on the cyclist. And that the contents of the police report were admitted in cross-examination without qualification.

The defendants then observed that the plaintiff called a Mr Lapozo as an eyewitness but the said Mr Lapozo denied ever going to police to give statement. The defendants asked why did the plaintiff not take Mr Lapozo to police for a statement and why does the police report not list Mr Lapozo as a witness to the accident.

The defendants then noted that the plaintiff testified in cross-examination that he turned to look behind him before the vehicle hit him and that he was at pains to demonstrate just how he could turn his neck to look at the vehicle coming from behind.

The defendants also noted that the plaintiff admitted that the vehicle did not hit the bicycle and that it did not hit the cyclist.

The defendants observed that, interestingly, the plaintiff testified that his wife was following behind on another bicycle taxi but decided not to call her as a witness. They note that this was a material witness. And that it would later transpire that he was lying to the Court by his own witness and the evidence of the driver.

The defendants then commented on the evidence of Mr Lapozo.

The defendants submitted that they found this witness not trustworthy and he showed every attempt to sugar coat his story in favour of the plaintiff. They believe this Court formed its own impression of the usefulness of this witness.



The defendants noted firstly that he stated that he does not have an address yet his witness statement gave an address of Illovo. And that he disowned the address even without amending the witness statement.

The defendants submitted that, on that ground alone, his witness statement can be disregarded, as not being his but that of a Lapozo whose address is Illovo Sugar Limited Private Bag 50 Blantyre. And that the Lapozo who testified admitted in cross-examination that he was not of that address.

The defendants observed further that Mr Lapozo contradicts the plaintiff by emphatically stating that he was the only one on the road at the time of the accident up to the time the plaintiff was taken to the Hospital. And that he further contradicts the plaintiff by denying that there was a woman whom the plaintiff had testified to be his wife who was following behind on another bicycle taxi.

The defendants noted that neither the plaintiff nor his witness could estimate the speed at which the vehicle was travelling.

They also submitted that this witness did not appear to know the contents of his own witness statement.

The defendants then commented on the police report. They observed that the plaintiff tendered a police report in support of his claim.

They noted that, in summary, the police report is against the plaintiff's claim. The police report states that the findings of the police and evidence gathered at the scene established that the cyclist who was carrying the plaintiff left his lane and swerved to the right side where there was a vehicle in motion and he influenced the accident.

The defendants then commented on their own evidence.

They noted that they called 1<sup>st</sup> defendant who was the driver of the motor vehicle at the time of the accident.

They noted that the 1<sup>st</sup> defendant driver adopted his witness statement in which he states that he was exchanging direction with another vehicle coming in the

opposite direction when a cyclist with a pillion passenger suddenly, without warning and negligently swerved into the path of the motor vehicle and the passenger was hit by the left rear view mirror before falling to the ground.

They submitted that, during cross-examination, the driver of the vehicle was emphatic that he was driving within his lane and was in his lane even at impact.

They observed that the driver explained that the cyclist left his lane that was demarcated with a yellow line when he swerved into the path of the vehicle, the front part, and bonnet having already passed the cyclist. And that the plaintiff was not hit by the front of the vehicle.

They observed further that it was the driver's evidence in cross examination that the cyclist had swerved into the driver's lane suddenly and as he was serving back to his lane in that sudden moment is when the plaintiff was hit by the rear view mirror.

The defendants submitted that, unlike the evidence of Mr Lapozo, the driver testified that there were lots of people at the time of the accident and again unlike the evidence of the plaintiff, the driver testified that took the plaintiff to the Illovo Clinic and there was no wife as claimed by the plaintiff. And that he did not take cyclist because cyclist had run away from the scene.

The defendants observed that, crucially, the driver testified in re-examination that the cyclist was not cycling in front of the vehicle but on side within the yellow line. And that this explains why the vehicle did not hit the bicycle

The defendants submitted that the issue is whether or not the defendant was negligent and whether a third party solely caused or contributed to the occurrence of the accident.

The defendants then submitted on the relevant law. The defendants stated in agreement with the plaintiff that, before the liability of a defendants to pay damages for the tort of negligence can be established in an action brought by or on behalf of an injured man, three things have to be proved.

The three things are, namely, that the defendant failed to exercise due care; that the defendant owed to the injured man a duty to exercise due care and that the defendant's failure was the "cause" of the injury in the proper sense of that term. *Woods v Duncan*, [1946] A.C. 401; [1946] 1 All E.R. 420 n.; [1947] L.J.R. 120; 174 L.T. 296; 62 T.L.R. 283 (H.L.) (Viscount Simon).

The defendants stated, in agreement with the plaintiff, that negligence is the omission to do something which a reasonable man guided upon those considering which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. *Blyth v Birmingham Waterworks Co.* (1943) A.C. 92, at P. 107.

The defendants added that negligence may be said to consist in a failure to exercise due care in a case in which a duty to take care exists.

The defendants submitted that the general concept of reasonable foresight is the criterion of negligence and is fluid in its application and that it has to be fitted to the facts of the particular case. See Lord Wright in *Bourhill v Young*, [1943] A.C. 92, at p. 107; [1942] All E.R. 396, at p. 404.

The defendants submitted further that negligence is not established by proving that the loss might possibly and with extraordinary foresight and prudence have been avoided. *Rothschild v Royal Mail Steam Packet Co.* (19851), 18 L.T. (o.s.) 334 and *Hart v Langs and Yorks Rail Co.* (1969), 21 L.T. 261.

They added that, if the possibility of danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taking extraordinary precautions. Per Lord Dunedin in *Fardon v Harcourt-Rivington* (1932), L.T. 391; 48 T.L.R. 215; 76 S. J. 81.

The defendants quoted Lord du Parc in *Grant v Sun Shipping Co.*, [1948] A.C. 549 where he said

I am far from saying everyone is entitled to assume, in all circumstances, that other persons will be careful. On the contrary a prudent man will guard against the possible negligence of others when experience shows such negligence to be common.

They also noted that the legal fiction of a “reasonable man” is intended to eliminate the personal factor and strike a fair balance between those who are “unduly timorous” and those who “nonchalantly disregard” obvious dangers. *Per* Lord Macmillan in *Glasgow Corporation v Muir* at p. 560.

The defendants asserted that an underlying principal of the law of the Highway is that all those lawfully using the highway must show mutual respect and forbearance hence the duty of a person who drives or rides a vehicle on the highway is to use reasonable care to avoid causing damage. See *Searle v WallBank* [1947] A.C. 341 at 361

They also asserted that a driver is not, of course, bound to anticipate folly in all its forms, but he is not, entitled to put out of consideration the teachings of experience as to the form these follies commonly take. See *L.P.T.B v UPSON* [1949] A.C. 155, 173

The defendants then asserted that sounding a horn or bell may be useful to warn other traffic of the approach of a vehicle but it does not absolve the driver or rider of his duty to take care or give him a right of way. The omission to sound a horn or bell is a collateral fact only and not an independent act of negligence; by itself it is not evidence of negligence, but it may be taken into account, with other circumstances in determining whether the driver or rider was negligent. See Charlesworth on Negligence, Sweet & Maxwell, London, 1977, 6<sup>th</sup> ed. P.338 pp 894

The defendants then referred to section 112 of the Road Traffic Act which provides as follows on riding on pedal cycles

- (1) No person shall ride a pedal cycle on a public road unless he is seated astride on the saddle of such pedal cycle.
- (2) Persons riding pedal cycles on a public road shall ride in single file except in the course of overtaking another pedal cycle, and two or more persons riding pedal cycles shall not overtake another vehicle at the same time.

- (3) No person riding or seated on a pedal cycle on a public road shall take hold of any other vehicle in motion.
- (4) No person riding a pedal cycle on a public road shall deliberately cause such pedal cycle to swerve from side to side.
- (5) No person riding a pedal cycle on a public road shall carry thereon any person, animal or object which obstructs his view or which prevents him from exercising complete control over the movements of such pedal cycle.
- (6) A person riding a pedal cycle on a public road shall do so with at least one hand on the handle-bars of such pedal cycle.
- (7) Whenever a portion of a public road has been set aside for use by persons riding pedal cycles, no person shall ride a pedal cycle on any other portion of such road.
- (8) A person riding a pedal cycle on a public road or a portion of a public road set aside for use by persons riding pedal cycles shall do so in such manner that all the wheels of such pedal cycle are in contact with the surface of the road at all times.

They also submitted on contributory negligence and apportionment of liability in case of contributory negligence. They referred to section 12 (1) of the Statute Law (Miscellaneous Provisions) Act which provides as follows

Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

The defendants then submitted that this is a simple case in which the pedal cyclist caused the accident by swerving suddenly and without warning into the path of the motor vehicle permitting the passenger to hit or be hit by the rear view mirror of the motor vehicle. And that the vehicle did not hit the bicycle.

The defendants submitted further that the accident was caused by the negligence of the pedal cyclist carrying the plaintiff in breach of a duty as a pedal cyclist to ride his pedal cycle in manner that he would not cause danger to himself or those carried thereon, swerving side to side without proper control.

They submitted that the pedal cyclist run away from the scene and was never called to testify as a material witness. And that no explanation was offered on what efforts were made to trace him. And further that neither did the plaintiff call his wife to testify as a material witness when in cross-examination he alleged that his wife was right behind him on another bicycle taxi, without fear of perjury.

The defendants noted that, instead, the plaintiff called a Mr Lapozo as his witness who blatantly lied to this Court that he was alone on the road when the accident happened. In fact exposing the plaintiff as a liar too that there was no woman or wife to the plaintiff at the scene of the accident.

The defendants submitted that, put together, the inconsistencies in the evidence of the plaintiff and his witness the case is rested on perjury upon perjury and must be dismissed with costs.

The defendants submitted that the pedal cyclist was under a duty to ride within the area demarcated for cyclist within the section of the road marked with a yellow line and to ride with due care and attention as required by law that whenever a portion of a public road has been set aside for use by persons riding pedal cycles, no person shall ride a pedal cycle on any other portion of such road.

They added that the pedal cyclist was under a duty not to permit the bicycle to dangerously swerve as provided by law that no person riding a pedal cycle on a public road shall deliberately cause such pedal cycle to swerve from side to side.

They also submitted that if not for the reckless negligent and dangerous swerving of the bicycle, the pedal cyclist or the handles of the bicycle would normally have been hit first by the rear view mirror before hitting the passenger.

They then submitted that, only in the alternative and in the unlikely event that this Court finds that the driver influenced the accident, the pedal cyclist cannot escape liability in contribution. And that such contribution would in their view be 90 percent blame on the pedal cyclist.

They submitted that the pedal cyclist has himself not sued the defendants because he is certain of his blame solely and that he wholly negligently caused the accident. They asked that the plaintiff's action be dismissed with costs.

This Court agrees with the parties on the definition of negligence and on the duty of care that a driver of a motor vehicle owes other road users as eruditely explained in the case of *Banda and others v ADMARC and another* 13 MLR 59.

This Court also observes that a pedal cyclist has a duty not to deliberately swerve from side to side when he is riding along the road. Section 112 (4) Road Traffic Act.

This Court also agrees with the persuasive authority cited by the plaintiff that the cyclist has every right to be on the road and that there is therefore no duty on the cyclist to give way to a motorist except to proceed in single file on the extreme left hand side of the road. See *Ngcongong v Road Accident Fund* (10516/2013) [2014] ZAGPPHC 883 (7 November 2014)

The Supreme Court of Appeal here has held as much.

Additionally, this Court agrees with the plaintiff that motorists must exercise reasonable care by overtaking cyclists only when it is safe to do so and whilst giving enough room to allow for the inherent nature of cycling which involves an element of instability of the bicycle. See *Thompson v. Spedding* [1973] RTR 312.

This Court notes that the only issue for determination is whether the 1<sup>st</sup> defendant caused the collision herein.

This Court agrees with the defendants that Mr Lapozo was not a credible witness in view of the inconsistencies in his evidence as pointed out by the defendants.

However, this Court notes that despite the 1<sup>st</sup> defendant's insistence that the cyclist suddenly and without warning swerved to the right from the extreme left of the road and into the path of his motor vehicle, the 1<sup>st</sup> defendant importantly stated that he cannot recall what exactly happened in the circumstances. He says things happened so fast.

As correctly submitted by the plaintiff, this may entail that the 1<sup>st</sup> defendant was not keeping a proper look out as to what was going on when the area he was driving in had a lot of cyclists and many pedestrians.

The 1<sup>st</sup> defendant was going at 55 km/hr which is a high speed considering the conditions that he himself described, namely, involving many pedestrians and cyclists. This Court wonders if he would have been in a position to take evasive action in the situation where he had to pass a motor vehicle driving in the opposite direction while at the same time giving way to the cyclist who at the same time was avoiding pedestrians and was forced to move to the right and return to the left side of the road.

In circumstances where there were many pedestrians and cyclists and an on-coming vehicle the 1<sup>st</sup> defendant should have exercised more care and not have driven at the speed of 55 km/hr.

The plaintiff is right in submitting that the fact that the 1<sup>st</sup> defendant sounded the horn is not sufficient to exculpate him from negligence in the circumstances.

It matters not, in the view of this Court, that the plaintiff and his witness cannot say how fast the 1<sup>st</sup> defendant was going. Or that the plaintiff saw the vehicle approaching only at a glance. The 1<sup>st</sup> defendant himself indicated how fast he was driving.

The 1<sup>st</sup> defendant was therefore negligent in the circumstances.

The issue that remains to be determined is whether the cyclist had deliberately swerved contrary to section 112 (4) of the Road Traffic Act to make him negligent in the circumstances.

According to the evidence of the 1<sup>st</sup> defendant, the cyclist was trying to avoid the pedestrians that were also using that part of the road beyond the yellow line. It cannot therefore be said that the cyclist was negligent or deliberately swerved and left that side beyond the yellow line.



Another point raised by the defendants was that the cyclist was not called as a witness. There appears to be an explanation for that fact being that the cyclist was a random one whom the plaintiff used for transportation among many others in the area. And so the plaintiff did not know this specific cyclist.

This Court also agrees with the defendants that indeed section 112 (7) of the Road Traffic Act provides that whenever a portion of a public road has been set aside for use by persons riding pedal cycles, no person shall ride a pedal cycle on any other portion of such road.

However, in the present case, it has not been proved by the defendants that the area beyond the yellow line on the left side of the road is the portion of the road that was reserved for cyclists. A cyclist path is normally marked with the sign of a cycle.

In the circumstances, it cannot be said that the cyclist unlawfully left the portion of the road that was reserved for his use. In any event, the 1<sup>st</sup> defendant stated that there were a lot of pedestrians beyond the yellow line and the cyclist avoided them and was in the process of getting back to that portion of the road when there was the impact herein.

In the final analysis, this Court agrees with the plaintiff that the 1<sup>st</sup> defendant negligently drove his motor vehicle herein and did not take reasonable care properly to look out for cyclists intermingling with pedestrians.

Instead, the 1<sup>st</sup> defendant kept driving at 55 km/hr and could not control his vehicle in such a way that he could pass the vehicle going in the opposite direction and then safely pass or give way to the cyclist carrying the plaintiff which cyclist was avoiding pedestrians and was forced to move to the right and returned to the extreme left side of the road.

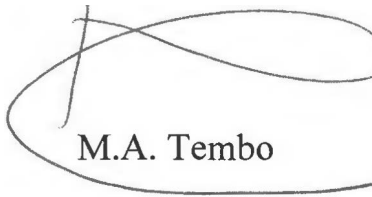
The end result was that the 1<sup>st</sup> defendant hit the plaintiff who was a passenger on the bicycle.

The defendants' submission that the pedal cyclist has himself not sued the defendants because he is certain of his blame solely and that he wholly negligently caused the accident is speculative in the circumstances and not much weight can be attached to it. He may actually not have sued because he was not injured given that the impact was between the plaintiff and the mirror of the 1<sup>st</sup> defendant's vehicle.

On the evidence before this Court, the plaintiff has proved his claim and the defendants are liable for the injuries and loss that he suffered herein. The liability of the 3<sup>rd</sup> defendant is subject to the policy limit as a matter of law.

Damages shall be assessed by the Registrar. Costs are also for the plaintiff and shall be assessed by the Registrar. Both aspects are to be assessed if not agreed by the parties within 14 days.

Made in open court at Blantyre this 18<sup>th</sup> October 2018.



M.A. Tembo  
**JUDGE**