IN THE HIGH COURT OF ZAMBIA **2008/HP/715**
AT THE PRINCIPAL REGISTRY
LUSAKA

BETWEEN:

ANTHONY MWANZA **PLAINTIFF**

V

KAGURUSU FARMING ENTERPRISES LIMITED 1ST DEFENDANT
KENANI MUSEBO 2ND DEFENDANT

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 14th day of December, 2012.

For the Plaintiff: *Y Kapelembi (Ms) of Messers Theotis Chalwe and Mataka.*
For the defendants: *R Mainza of Messrs Mainza and Company.*

JUDGMENT

Cases referred to:

English cases:

1. Blyth v Birmingham Waterworks Company [1856] 11 Ex 781.
2. Scott v London Dock [1865] 3 H. and C. 596
3. Castellain v Preston [1883] 11 4B.D.380.
4. The Schwan [1892] p. 419.
5. Prudential Insurance Company v Inland Revenue Commissioners [1904] 2.K.B. 658.
6. Molton v William Dixon Limited [1909] S.C. 807.
7. British Russian Gazette and Trade Outlook Limited v Associated Newspapers Limited [1933] 2. K.B. 616.
8. Browne v De Luxe Car Services [1941] K.B. 549.

9. Century Insurance Company Limited v Northern Ireland Road Transport Board [1942] A.C. 509.
10. Barkway v Southwales Transport Company Limited [1950] 1 ALL E.R. 392.
11. Emperial Chemical Industries Limited v Shatwell [1965] A.C. 656.
12. Henderson v H.E. Jenkins and Sons [1970] A.C. 282.
13. Callaghan v Dominion Insurance Company [1997] 2 Lloyds rep. 541.

Zambian cases:

1. Sankombe v The People (1977) Z.R. 127.
2. Zambia State Insurance Corporation Limited and Holmes Transport Limited v Chanda CT/A Link Express Motorways (1990-1992) Z.R. 175.
3. Sichula and Another v Chewe (2000) Z.R. 56.

Legislation referred to:

1. Roads and Road Traffic Act Number 11 of 2002. s. 88.
2. Fees and Fines Act, cap 45.s.3
3. Occupiers Liability Act, cap 70 ss. 2 and 3.

Works referred to:

1. Christopher Walton, Charlesworth Percy on Negligence, Twelveth Edition, (London,Sweet and Maxwell, 2010).

2. R.A. Percy, Charlesworth on Negligence, 6th Edition, (London, Sweet and Maxwell, 1997).

3. Michael A Jones, Clerk and Lindsell on Torts, Twentieth Edition, (London,Thomson Reuters (Legal) Limited, 2010.)

4. Blair, Brennan, Jacob, and Langstaff, Bullen and Leake, and Jacob's Precedents of Pleadings, Seventeen Edition, Volume 2, (Thomson Reuters (Professional) U.K Limited, 2012).

5. Robert Merkin, Colinvauxs Law of Insurance, Eighth Edition, (London, Sweet and Maxwell, 2006).

6. W.V.H. Rodgers, Winfield and Jolowicz on Tort, 16th Edition, (London, Sweet and Maxwell, 2002);

7. D A. Kemp, Kemp and Kemp, Quantum of Damages (London, Sweet and Maxwell, 1997).

8. Lord Hailsham, Halsbury Laws of England, 4th Edition, (London, Butterworths, 1915).

9. R. Cross, J.A. Gibbo, J.D, Heydon, and D Byrne, Cross on Evidence, 4th Edition (London, Butterworths, 1980).

This action was commenced on 21st July, 2008, by way of writ of summons.The plaintiff's claims is for the following:

1. damages for personal injuries and consequential losses;
2. refund of the amount of K11, 900=00 incurred by the plaintiff as special damages;
3. interest on (1) and (2) above;
4. any other relief the Court may deem fit; and
5. Costs.

In the statement of claim that accompanied the writ of summons, which is also dated 21st July, 2008, the plaintiff averred as follows: that on or about 11th August, 2007, the plaintiff was a passenger on one of the 1st defendant's truck registration number ABG 3422. The truck was hired by the plaintiff from the 1st defendant to transport his merchandise consisting of various fruits from Lusaka to Kasumbalesa in the Democratic Republic of Congo. The truck was being driven by the 2nd defendant.

On his way to Kasumbalesa, and as the truck approached Ndola, around Kolalangabo area, along Kabwe-Ndola road, the 2nd defendant lost control of the truck, and hit into an oncoming truck. The plaintiff attributes the accident to the 2nd defendant's negligence. The negligence is particularised as follows:

(a) driving very fast;

(b) failing to keep the vehicle under proper control;

(c) failing to take evasive action when the accident seemed imminent; and

(d) driving recklessly contrary to the Road Traffic Act Number 11 of 2002.

As a result of the accident, the plaintiff suffered serious injuries. And the injuries are described as follows:

(a) bilateral above knee amputations;

(b) fractured right femur; and

(c) ninety per centum (90%) permanent disability.

The plaintiff also claims special damages in respect of the following;

(a) medical expenses amounting to K 10, 000, 000=00; and

(b) above leg prosthesis (artificial legs) worth K 1, 900, 000=00.

The defendants on 13th August, 2008, filed into Court a memorandum of appearance and defence. In the defence, the defendants averred as follows: the defendants deny that the accident was caused by the negligence of the 2nd defendant. The defendants attribute the accident to a tyre burst. And maintain that the accident was inevitable despitethe exercise of all reasonable care and skill on the part of the 2nd defendant.

The defendants also deny that the 2nd defendant:

(a) was driving very fast and thereby failed to keep the vehicle under proper control as alleged in the particulars of negligence;

(b) failed to take evasive action when the accident seemed imminent as alleged by the plaintiff; and maintain that the accident was inevitable due to the tyre burst; and

(c) was driving recklessly contrary to the Road Traffic Act Number 11 of 2002 as alleged by the plaintiff.

Overall, the defendants deny that any injury, loss, or damage which the plaintiff may have suffered or sustained was caused by the 2nd defendant's negligence. Lastly, the defendants deny that they are liable to the plaintiff in general damages for personal injuries and the special damages itemised above.

The trial of this action commenced on 11th November, 2010, and Anthony Mwanza; the plaintiff testified. I will therefore continue to refer to him as the plaintiff. The plaintiff recalled that on 11th August, 2007, he hired a truck from the 1st defendant to transport his merchandise from Lusaka to Kasumbalesa. The plaintiff left Lusaka for Kasumbalesa at about 16:00 hours. By 20:00 hours, they had reached Kapiri-Mposhi. They left Kapiri Mposhi at about 20:20 hours.The plaintiff recalled that the 2nd defendant was cruising. And he (plaintiff) was dozing. Suddenly, the truck veered off the road. And rammed into another oncoming vehicle. The plaintiff found himself hanging in the head of the truck. After the Collision, the plaintiff was taken unconscious to Ndola Central Hospital, where he was hospitalised for a period of three months.As a result of the accident, the plaintiff testified that both legs were crushed below the knees. Yet prior to the accident, he was a very active and physically able person.

After the plaintiff was discharged from Ndola Central Hospital he used to attend the Italian hospitalin Lusaka every fortnight for physiotherapy. The plaintiff also confirmed during his testimony that he received the sum of K30 million as compensation for the injuries he sustained. The plaintiff however maintained that the compensation is not adequate. Hence, this action in which he is seeking a more meaningful compensation package. The plaintiff also testified that in addition to sustaining personal injuries, he also lost his goods for which he is seeking compensation.

The defendants called two witnesses. The first witness was Kennan Musebo; the 2nd defendant. I will continue refer to him as DW1. DW1 confirmed that he was employed by the 1st defendant as a driver. He further recalled that on 11th August, 2007, he was involved in a road traffic accident when he was travelling from Lusaka to Kasumbalesa.

DWI recalled specificallythat shortly after departing Kapiri Mposhi, the front right side tyre of the truck burst. After the tyre burst, DW1 lost control of the vehicle. And as he lost control of the vehicle, there was an oncoming vehicle in the opposite direction. DW1 made an attempt to swerve the vehicle away from the oncoming vehicle. But this was in vain. As a result, DW1 rammed onto the right side of the oncoming vehicle.After the impact, the front windscreen was completely shattered. And DW1, was thrown out of the car through the shattered wind screen. In the maze, DW1 heard the plaintiff call out for help. And he was not able to render any assistance. The plaintiff was however assisted by bystanders, who managed to disentangle the truck from the other vehicle that he collided with.

DW1 testified that during the course of the journey, he was driving at anaveragespeed of 60 to 65 kmh. DW1 also maintained that the tyres were in good condition.

The second defence was John Kabusu; the owner of the truck. I will continue to refer to him as DW2. DW2 recalls that on 10th August, 2007, he received a request from the plaintiff to hire his truck. The plaintiff intended to transport his merchandise to Kasumbalesa. DW2 acceded to the request, and charged the plaintiff a hire fee of K3 million.DW2 also confirmed that DW1 was in charge of the truck. However, he did not reach the contracted destination, because the truck was involved in an accident.

DW2,recalled that after the accident, he filed a claim for compensation with Madison Insurance Company Limited. Eventually, the plaintiff was compensated the sum of K30 million. In light of the compensation, DW2 contends that he is not obliged to pay any additional sums,because there is a limit as to the amount compensation that is payable under the insurance policy.

DW2 also contends that the merchandise belonging to the plaintiff was not destroyed. The goods were after the accident intact. DW2 recalled that after the accident, he dispatched a truck to the scene of the accident. And recovered the merchandise. With the assistance ofa relative of the plaintiff,the merchandise was transported to Kasumbalesa by DW2.

At the end of the trial, I directed counsel for the plaintiff that she should file the written submissions on or before 27th April, 2011. And I in turn requested counsel for the defendants to file their submissions on or before 17th May, 2011. Counsel for the plaintiff complied with the directive andfiled the submissions on 9th March, 2011. However, defendant's counsel has to date not complied with the directive.

Ms. Kapelembi; counsel for the plaintiff submitted as follows: that negligence is breach of a legal duty to take care which results in damage to the claimant. (See W.V.H. Rogers, Winfield and Jolowicz on Tort16th Edition (London, Sweet and Maxwell, 2002).Further, a person who undertakes either for reward or gratuitously, to carry another person in a vehicle is labile to that other if he causes him damage by negligence. His duty may be considered in connection with: (a) the carriage of the passenger; and (b) the provision of the vehicle. (See R.A. Percy,Charlesworth on Negligence, Sixth Edition, (London, Sweet and Maxwell, 1997). Thus,she contended that the defendants in this case owed the plaintiff a duty to care which they breached. And as a result of which the plaintiffsuffered damage.

As regards the particulars of negligence, Ms Kapelembi submitted as follows: that the plaintiff's evidence was that the 2nddefendant was at the time of the accident driving very fast; failed to keep the vehicle under proper control; and also failed to take evasive action. The plaintiff was able to attest to the preceding matters, because he had the window on his side of the truck open, and had to close it due to the force of the wind as a result of the speeding truck.

Under pain of cross-examination, Ms Kapelembi pointed out that the plaintiff maintained that at the point when he woke up to the scream of the 2nd defendant, he observed that the truck was speeding. She argued that although the plaintiff was unable to state the exact speed of the vehicle, he nonetheless perceived that the vehicle was driving fast.

Conversely, Ms Kapelembi impeached the testimony of DW1 that he was driving the truck at a modest speed of about 60 to 65 Km per hour from the commencement of the journey, up to the time the accident occurred at about 23:00 hours, having left Lusaka at 19:00 hours. Shenoted however that during cross-examination, the 2nd defendant

testified that they made several stops between Lusaka and the point of the accident. Amongst the stops; was stop to have supper at Chisamba. And another at Kapiri-Mposhi weigh bridge. DW1 could however not indicate how long each stop took.

Ms Kapelembi pointed out that according to the Police Report, the accident happened at about 23:40 hours. Therefore, if the parties left Lusaka at approximately 19:00 hours as stated by DW1, and the accident happened at approximately 23:40 hours, it took the truck approximately 4 and half hours to travel form Lusaka to Kalalangabo. If the stop for supper at Chisamba and another delay at the weigh in bridge were factored, the time for travel would be reduced, she argued.The net result was that she submitted that, it took DW1 less than 4 hours to travel from Lusaka to the point of the accident driving at 60 to 65 Km per hour.

Ms Kapelembi also invited me to take judicial notice of the fact that there are approximately three police checkpoints at the entrance or exit of each district as one heads towards the copperbelt from the city of Lusaka. In aid of this submission, she relied on Cross on Evidence 4th Edition, and the case of *Sankombe v The People (1977) Z.R. 127,* where the Supreme Court held that:

"…Within reasonable and proper limits a judge may make use of his personal knowledge of general matters. No formula has yet been evolved for describing those limits."

In this regard, I was invited to take judicial notice of the fact that the distance between Lusaka and the scene of the accident in Kalalangobo area is approximately 274 Km. That being the case, Ms Kapelembi argued that the 2nd defendant could not have covered a distance of 274 Km in less than 4 hours if he was driving at a speed of 60 to 65 Km an hour as he testified. Thus the only reasonable inference that can be drawn, sheargued, is that DW1 was driving at a higher speed. And his testimony must therefore be regarded as not being truthful or reliable.

Ms Kapelembi also recalled the testimony of the plaintiff that at the time he was awoken by the scream of DW1, he observed that the truck had veered off the road to the left. And the plaintiff observed DW1 attempt to swerve the vehicle backto the right. In the

process, the truck collided with the oncoming vehicleon the other lane. She submitted that the act of swerving the vehicle contributed to the collision that ensued. It is on that basis that she maintains that DW1 failed to exercise proper control of the vehicle he was driving.

Ms Kapelembi challenged the testimony of DW1 that the truck veered off the road because the right front tyre burst. The basis of the challenge is that the vehicle did not come to a stop after the collision. AndDW1 continued his effort to stall the vehicle.She also submitted that if DW1's testimony is to be relied upon, that the vehicle pulled to the right, then he clearly failed to take evasive action when the accident was imminent,since he eventually collided onto the right side of the oncoming vehicle. Further, she noted that the accident report indicates that the vehicle was extensively damaged.She wondered that if that was the case, it would have been practically impossible for DW1 to continue to be at the helm of the vehicle, control it, and eventually bring it to a stop.

In the course of the submissions, Ms Kapelembi drew my attention to section 155 of the Road Traffic Act Number 11 of 2002, which creates the offence of careless driving when it enacts:

"155 (1) Any person who drives a motor vehicle upon any road recklessly or at a speed or in a manner which is dangerous to the public, having regard to circumstances of the case, condition and use of the road and to the amount of traffic which is actually at the time, or which might reasonably be expected to be on the road, commits an offence and is liable upon conviction, to a fine not exceeding fifteen thousand penalty units or to imprisonment for a period not exceeding three years or to both."

Ms. Kapelembi submitted that in terms of section 155 referred to above, DW1 drove the truck recklessly, and could not have been driving the truck at a speed of 60 to 65 Km as testified. Shealso submitted that DW1's actions taken as a whole, clearly show that he failed to exercise proper control or take evasive action when the accident seemed imminent. And if he had, the resulting accident would not have happened, or alternatively would not have been that serious.

Ms Kapelembi observed that the defendants in their defence, pleaded that the accident in issue was inevitable because it was the result of a tyre burst which rendered it

impossible for DW1 to take any evasive action. However, she noted that it was the plaintiff's testimony in cross- examination that there was no tyre burst. And when the plaintiff was referred to page 14 of the plaintiff's bundle of documents showing that the accident was due to a tyre burst, the plaintiff maintained that the contents of the report were false because the report was in any case written in his absence, or any of his family members.

Further, the plaintiff contended that the officer who prepared the report was not available to attest to the report, and could therefore not be cross-examined on the same. Ms Kapelembi maintained that whether the tyre burst did in fact occur or not, DW1 should have in any event exercised sufficient skill and care to avoid the collision which resulted in the severe injuries suffered by the plaintiff. Evenassuming that the report indicating that the accident was due to a tyre burst was correct, sheargued that tyres do not burst without reason. Ironically, she observed that DW1 testified that tyres of the truck were in a good condition.

Further, Ms Kapelembi submitted that the 1st defendant being a transporter and DW1 also being a relatively experienced driver, should have ensured that the vehicle was fit to undertake a long distance trip. Thus she contended that if the truck had been checked prior to the trip, the defective type would be discovered or noticed. And if the tyre was not in a good condition, the accident may have been avoided altogether.

In advancing the preceding propostion, Ms Kapelembi, relied on the case of *Barkway v South Wales Transport Company Limited [1950] 1 ALL E.R. 392*, where, similarly, an accident was caused by a tyre burst. In the *Barkway case*, (supra), it was held that the cause of the accident was a defect in the tyre, and could have been discovered by the diligence on the part of the respondents. Further, she, drew my attention to R. A. Percy Charlesworth on Negligence 6th Edition (London, Sweet and Maxwell, 1997), where the learned author states in paragraph 190 regarding the duty of care of carriers to passengers as follows:

"The duty to exercise reasonable care involves the making of reasonable examination of the vehicle from time to time in accordance with the practice of reasonably careful

carriers. The breakdown of the vehicle is evidence of negligence on the part of the carrier throwing upon him the burden of showing that he exercised reasonable care and skill in detecting and remedying defects. The onus is a very heavy one placed on the defendants to discharge."

Thus Ms Kapelembi argued that if the accident was indeed caused by the tyre burst, the defendants have not discharged the burden of showing that the tyre burst could not have been avoided by proper inspection, and maintenance of tyres. Ms. Kapelembi also pointed out that in the *Barkway* case (supra), Lord Porter observed that: *"if there was no explanation, the mere happening of the accident would be fatal to the defence*." Thus on the authority of the *Barkway case* (supra), she submitted that the defendants have not provided any explanation for the purported tyre burst. She therefore urged that the defence should fail.

As regards the claim for compensation for personal injuries, Ms Kapelembi submitted that the plaintiff was paid a sum of K30 million by Madison Insurance company Limited under the 1st defendant's insurance policy. Ms Kapelembi pointed out that as can be seen at pages 7 and 9 of the plaintiff's bundle of documents, the plaintiff reserved his right to pursue the defendants for the balance of his claim. I will revert to these documents in the course of the judgment.

As regards the claim for compensation of the merchandise lost or destroyed in the accident, she submitted that the details are shown at pages 17 and 20 of the plaintiff's bundle of documents. Ms Kapelembi pointed out that during cross-examination, the plaintiff explained that the invoice at page 17 of the plaintiff's bundle of documents was issued by a company called Tropical Fruits and Transport. The document was simply stamped, because at the time they had run out of invoices. She submitted that the total amount of goods that were bought from the company is K30, 480, 000=00.

The plaintiff further explained in re-examination that he bought the cement from a small shop in Kanyama. And the shop did not issue any receipt. The plaintiff nonetheless testified that the total cost of the cement, and the milk was K700, 000=00, and K800, 000=00, respectively. She submitted that due to the impact of the accident, most of the goods were either crushed or looted at the scene of the accident. And a few that were

recovered were transported to their final destination at Kasumbalesa where only a sum of K 7million was realised.

Ms. Kapelembi, contends that the merchandise could not have been recovered in an intact condition after the accident, because the police report shows that the truck was extensively damaged after the accident. Further, she contends that since DW2 only arrived at the scene of the accident the following day, at about 10:00hours, and approximately 11 hours after the accident happened, he could not possibly have witnessed some of the merchandise that was looted.In the circumstances,Ms Kapelembi submitted that although the plaintiff was not allowed to lead evidence as to what the expected profit was, it is her submission that the plaintiff would have grossed the sum of K 45, 940, 000=00. Therefore, the insurance pay out of K 30 million fell short of that sum.

Furthermore, Ms Kapelembi submitted that the plaintiff incurred medical expenses amounting to K10 million for medical examination, operations, treatment, and physiotherapy. The plaintiff furtherincurred an additional sum of K1.9million for the prosthesis legs; as both legs were amputated above the knees. Thus, shemaintained that the plaintiff is entitled to damages over and above the sum of K30 million, he received under the 1st defendant's insurance policy for personal injuries he suffered.In this regard, she drew my attention to the case of *Sichula and Another v Chewe (2000) Z.R. 56*, where the Supreme Court affirmed the award to the respondent in the sum of K25 million as damages. In that case,the respondent, was a 36 year old marketeer at the time of the accident, and was left a paraplegic.

Ms Kapelembi submitted that the learned authors of Kemp and Kemp, The Quantum of Damages, volume 1 (London, Sweet and Maxwell, 1997), state in paragraph 5-009, on pecuniary loss as follows:

"There are two main categories of pecuniary loss suffered by a plaintiff as a result of his or her injuries. First, the injuries may create some need causing expenditure by the plaintiff which would not otherwise have arisen. Secondly, the injuries may deprive the plaintiff of some pecuniary benefits which would have been enjoyed."

The learned authors of Kemp and Kemp, The Quantum of Damages, (supra) go on to point out in paragraph 5-011/1 that:

"A plaintiff is entitled to recover damages in respect of all reasonable expenses incurred as a result of his or her injuries which may include care, rehabilitation, and in attempting to enable the injured plaintiff to overcome or mitigate his or her disabilities."

Further, the learned authors stale in paragraph 5 – 014 that:

"All reasonable medical expenses reasonably incurred as a result of the injures can be recovered."

Ms Kapelembi submitted that the plaintiff in this case suffered pecuniary loss. He was left severely injured;permanently disabled, with artificial legs; and walking with the aid of crutches at a tender age of 23 years. It is therefore the contention of Ms Kapelembi, that despite the insurance pay out, the plaintiff is entitled to a refund of special damages. The special damages claimed,she submitted, are reasonable, and would not have in any case arisen if it had not been for the accident caused by the negligence of DW1. Ms Kapelembi submitted that the plaintiff is also entitled to damages for personal injuries and consequential loss, as claimed. And which losses include the profit he would have made had all his goods worth K45, 840, 000=00 reached the final destination, and had been sold.

Ms. Kapelembi also drew my attention to the principle of vicarious liability. Relying on the learned author of Winfield and Jolowicz on Tort (supra) in paragraph 20 – at page 701, the principle is explained in these words:

"Vicarious liability signifies the liability which A may incur to C for damage caused to C by the negligence or other tort of B…. A should stand in a particular relationship to B and B's tort should be referable in a certain manner to that relationship. A's liability is truly strict though for it to arise, a case of negligence, there has to be fault on that part of B. The commonest instance of the modern law is the liability of an employer for the torts of his servants done in the course of their employment."

In this context, Ms Kapelembi submitted as follows: that DW1 was employed as a driver by the 1st defendant. And this fact is not in dispute. The accident in issue occurred during the course of DW1's employment. That is, when DW1 transported the plaintiff and his merchandise in a vehicle belonging to the 1st defendant.

Ms Kapelembi also drew my attention to the case of *Century Insurance CaseCompany Limited v Northen Ireland Road Transport Board [1942] A.C 509.* The facts of the case were that the driver of a petrol lorry was transferring petrol from the lorry into a tank at a garage. He lit a cigarette, and negligently threw down a lighted match which caused an explosion and fire. It was held that the defendants were liable because at the time of the act; even though the employee was plainly negligent, he was delivering petrol which was the very purpose for which he was employed.

In this case Ms Kapelembi submitted that accident occurred during the course of DW1's employment, since his principal duty was to drive the 1st defendant's vehicle. Thus, any liability on the part of DW1, was also liability on the part of the 1st defendant.

Ms Kapelembi also submitted that it is a long established principle that he who assets must prove. This principle is explained as follows in paragraph 19 of the Halsbury Laws of England, volume 19:

"To succeed in any issue the party bearing the legal burden of proof must: (1) satisfy a judge or jury of the likelihood of the truth of his case by adducing a greater weight of evidence, than his opponent, and (2) adduce evidence sufficient to satisfy them to the required standard or degree of proof... In civil cases, the standard of proof is satisfied on a balance of probabilities."

Ultimately, Ms. Kapelembi submitted that, on a balance of probabilities, the accident which resulted in the severe injuries sustained by the plaintiff, was caused by the negligence of DW1, while in the employ of the 1st defendant. Accordingly, she argued that, the plaintiff is entitled to damages for personal injuries, and consequential losses.

I am indebted to counsel for the plaintiff for the spirited arguments, and well researched submissions. In order to address the various issues raised by Ms Kapelembi, it is necessary to provide a context to number of subjects. These include the notion of negligence; duty of carriers; the doctrine of *res ipsa loquitur*; the defence of inevitable accident, contract of insurance; the Road Traffic Act; and lastly, the principle of vicarious liability.

NEGLIGENCE

In an early case of *Blyth v Birmingham Waterworks Company [1856] 11 Ex 781* Alderson, B, defined negligence at page 784 in the following terms:

"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."

The learned author of Charlesworth and Percy on Negligence (London, Sweet and Maxwell, 2010) observes in paragraph 1-01, at page 3, that in forensic speech the term negligence can have three meanings:

1. In referring to a state of mind when it is distinguished in particular from intention;

2. In describing conduct of a careless type; and

3. As a breach of a duty to take care imposed by either common law or statute.

In some circumstances, the three meanings can overlap. The learned author also observes quite poignantly in paragraph 1-06, at page 4, that:

"…careless conduct does not necessarily give rise to breach of a duty of care, the defining characteristic of the tort of negligence. The extent of a duty of care and the standard of care required in performance of that duty are both relevant in considering whether, on any given facts, conduct which can be characterised as careless is actionable in law…"

I will now move on to consider specifically the duty of carriers.

DUTY OF CARRIERS

A person who undertakes either for reward or gratuitously, to carry another person in a vehicle is liable to that other for damage caused by negligence. The carriers duty may be considered in connection with:

(i) the carriage of a passenger; and

(ii) the safety of the vehicle.

(See Charlesworth and Percy on Negligence (supra) paragraph 10-83, at page 739)

Thus the duty as to carriage is to use reasonable care and skill for the safety of passengers, during such carriage. The carrier is not an insurer of the safety of the passenger. It must also be noted that the duty extends to the luggage and belongings of the passenger and the duty is the same whether the carriage is undertaken for reward or gratuitously.In addition to the duty of carrier to exercise reasonable care and skill for the safety of passengers during such carriage, the carrier also has a duty to ensure the safety of the vehicle. The primary duty as to the safety of a vehicle arises under any relevant contract, such as for the vehicle hire, and for the carriage for reward of persons or goods or by virtue of any contract of bailment. The provisions of the contract, whether express or implied are construed by reference to the common law. In many instances there will be a concurrent duty to similar effect in tort.(See Charlesworth and Percy on Negligence (supra), paragraph 10-86, at page 739).

In the absence of express agreement, the duty implied will be to take reasonable care to provide a safe vehicle. Although carriers are not under an absolute obligation to provide a safe vehicle, they must take “a high degree of care,” and are under the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order.(See Charlesworth and Percy on Negligence (supra) paragraph 10-86, at page 739.)

But I must hasten to add that carriers are not liable for a disaster arising from a latent defect in the machinery which no human skill or care could either have prevented or detected. Thus to rely on a defence of latent defect, there must be proved:

(1) the nature of the defect; and

(2) that it could not have been detected with reasonable care and skill.

(See Charlesworth and Percy on Negligence (supra) paragraph 10 – 86, at 739).

It may however be asked: what does the duty to ensure the safety of a vehicle entail? The duty to exercise reasonable care involves the making of reasonable examination of the vehicle from time to time, in accordance with the practice of a reasonably careful driver. A breakdown of the vehicle is evidence of negligence on the part of the carrier, throwing upon him an evidential burden to show that he exercised reasonable care and skill in detecting and remedying defects. The onus is a heavy one and rests upon the defendant to discharge.(See Charlesworth and Percy on Negligence (supra) paragraph 10-87 page 740).It is therefore not a defence or answer to the charge that the defendant omitted precautions which are obviously called for. *In Molton v William Dixon Limited* [1909] S.C. *807, Lord* Dunedin, Lord President, dealt with this aspect of proof of negligence when he said at paid 809:

"Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds _____ either to show that the thing which was commonly done by other persons in like circumstances or to show that it was something which was so obviously wanted that it would be folly in anyone to neglect to provide it."

OCCUPIERS LIABILITY

I must also point out that the main common law duty to exercise care arises from the contract of carriage. However, the duty in tort is modified by the Occupiers Liability Act,chapter 70 of the laws of Zambia. Some of the major modifications include the following:

(a) Section 2(1) of the Act provides that the rules enacted by subsections (2) and (3) of section 2 take effect in place of the common law;

(b) Subsection (3) (a) of section 2 provides that the duty owed pursuant to this subsection is the common law duty of care and it is owed by persons occupying or having control over any fixed or moveable structure including any vessel, vehicle, or aircraft to his visitors;

(c) Section 3(2) goes on to enact that the duty is to take such care as in all the circumstances of the case is reasonable to see that the visitor will be

reasonablysafe in using the premises (in this context the vehicle) for the purposes of which he is invited or permitted to be there; and

(d) Section 3(1) of the Act provides that the duty is owed to all visitors except in so far as the occupier is free to and does extend, restrict, modify, or exclude his duty to any visitors by agreement or otherwise.

RES IPSA LOQUITUR

The doctrine of *res ipsa loquitur* is said to be a special application of the principle that there is evidence of negligence if the facts proved are more consistent with negligence on the part of the defendant. A classical exposition of the doctrine is to be found in the statement of Erle, C.J., in *Scott v London Dock [1865] 3 H and C 596*, at page 601, as follows.

"…Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants that the accident arose from want of care."

The application of the doctrine of is therefore dependant on the absence of an explanation. Thus the question whether to apply the doctrine has usually arisen where the plaintiff is able to prove the happening of an accident and nothing more. If a defendant desires to protect himself against the application of the doctrine, he must provide an adequate explanation of the cause of the accident. However, if the facts or cause of the accident are sufficiently known, then the question ceases to be one where the facts speak for themselves. And the solution is to be found by determining whether on the facts established, negligence is to be inferred or not.

The learned author of Charlesworth and Percy on Negligence (supra) elaborate the doctrine in paragraph 6-102, at page 446, as follows:

"The maxim is not a rule of law, it merely describes a state of the evidence from which it is possible to draw an inference of negligence. It is based on common sense, its purpose being to enable justice to be done when the facts bearing on causation and the standard of care exercised are unknown to the claimant but ought to be within the

knowledge of the defendant. It cannot assist where there is no evidence to support an inference of negligence and a possible non-negligent cause of the injury to exist."

A classical illustration of the application of the doctrine is the case of *Barkway v South Wales Transport Company Limited [1950] 1 ALL E.R. 392*; a decision of the House of Lords. The facts of the case were that, the appellant's husband was killed while travelling as a passenger in the respondent's omnibus, which at the time of the accident was being driven at a speed of some twenty-five miles per hour in a "black out".After the offside front tyre had burst, the omnibus veered across the road and fell over an embankment. Evidence was given that the cause of the bursting of the tyre was an impact fracture due to one or more heavy blows on the outside of the tyre leading to the disintegration of the inner parts. Such a fracture might occur without leaving any visible external mark, but a competent driver would be able to recognize the difference between a blow heavy enough to endanger the strength of the tyre and a lesser concussion.

The appellant contended that in the circumstances, the speed at which the omnibus was driven was excessive and caused it to be thrown off the road when the tyre burst; that the defect in the trye would have been revealed had adequate steps been taken regularly to inspect it, and that the respondents were negligent in not requiring their drivers to report occurrences which might result in impact fractures.The respondents contended in responsethat they had a satisfactory system of trye inspection, which took place twice weekly and that impact fractures were so rare as to be negligible risk which the public using their vehicles must take.

In delivering the lead judgment, Lord Normand observed at page 399 as follows:*"The fact that an omnibus leaves the roadway and so causes injury to a passenger or to someone on the pavement is evidence relevant to infer that the injury was caused by the negligence of the owner, so that, if nothing more were proved, it would be a sufficient foundation for a finding of liability against him. It can rarely happen when a road accident occurs that there is no other evidence, and, if the cause of the accident is proved, the maxim res ipsa loquitur is of little moment."*

In another case of *Henderson v H.E. Jenkins and Sons [1970] A.C. 282*, the defendant failed to discharge the evidential burden cast upon it by the happening of an accident as a result of a mechanical defect, because no evidence was called to show the

circumstances in which the vehicle had been used, with the object of establishing how the defect could have arisen consistent with the exercise of reasonable care.The facts in the *Henderson* case (supra) were that a lorry owned by the first respondents and driven by the second respondent was descending a hill when the brakes failed and the lorry struck and killed a post office driver who had just alighted from his van. The failure was due to the sudden escape of brake fluid from a hole in a pipe in the hydraulic braking system resulting from corrosion of that pipe. The pipe was fixed under the lorry's chassis and only 60 per cent of the pipe could be seen on visual inspection with the pipe in situ; only the unseen parthad been affected by corrosion.

The appellant, the widow, claimed damages against the respondents and alleged *interalia*, that they had been negligent in failing to keep the braking system in efficient repair. The respondents pleaded that the accident had been caused by a latent defect on their part and the existence of which was not discoverable by the exercise of reasonable care. The House of Lords held that the respondent could not rely on the defence of latent defect not discoverable by the exercise of reasonable care, unless they showed that they had taken all reasonable care in the circumstances in the past use of the vehicle to indicate that the lorry might have been subjected to a corrosive agent resulting in the corrosion of the pipe. Accordingly, since the respondents had not adduced evidence of the past history of the vehicle, they could not rely on the defence of a latent defect, and therefore they had not discharged the inference that they had been negligent.

The doctrine of *res ipsa loquitor* is therefore no more than a rule of evidence affecting onus. It is based on common sense and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff, and are or ought to be within the knowledge of the defendant.

INEVITABLE ACCIDENT

A question that might arise on the facts of this case is whether or not the accident was inevitable.The learned author of Charlesworth and Percy on Negligence (supra), state in

paragraph 1-08, at page 6, that "negligence" and "accident" are often used in close conjunction. Yet it cannot be assumed that all accidents are caused by negligence. For negligence liability to arise in tort, the learned author states, there has to be a duty of care to avoid whatever result has arisen.

Further, the learned author points out in paragraph 1 – 09, at page 6, that the word accident can be used to describe happenings which arise without anyone being guilty of careless conduct. The learned author notes that the phrase "pure accident" is often used to describe circumstances where no one can be regarded as having been to blame for what happened.How then does the defence of inevitable accident arise. The learned author of Charlesworth and Percy on Negligence (supra) describes inevitable accident in the following terms in paragraph 4 – 129, at p. 278: *"Inevitable accident arises where a person performs some action not in itself unlawful which causes damage without negligence or intent."*

In*Schwan* [1892] p 149, a maritime case, the defence of inevitable accident was explained in these words:

"Aninevitable accident in point of law is this: viz; that which the party charged with the offence could not possibly prevent by exercise of ordinary care, caution, and maritime skill."

It is interesting to note though that the ambit of such a defence has been called into question. To quote the words of Lord Greene in *Browne v De Luxe Car Services [1941] K.B. 549 at 552:*

"I do not feel myself assisted by considering the meaning of the phrase "inevitable accident." I prefer to put the problem in more simple way, namely, has it been established that the driver of the car was guilty of negligence?
In such a case, loss lies where it falls, unless it can be shown that it was caused by a breach on the part of some other person of a duty to take care or of some duty making it wrongful for him to have inflicted the loss upon the person who suffered it."

In concluding the discussion oninevitable accident, I will refer to the learned author of Charlesworth and Percy on Negligence (supra) observation in paragraph 4 – 131, at page 278, as follows:

"There can be no inevitable accident unless the Court concludes that something happened over which the defendant had no control and the effect of which could not

have been avoided by the exercise of care and skill and indeed the defence cannot be relied upon where the risk is reasonably foreseeable."

INSURANCE

This matter also raises some aspects of insurance law. Therefore, it is necessary to place in proper perspective the nature of a contract of insurance.Robert Merkin, in Colinvauxs Law of Insurance, Eighth Edition,(London, Sweet and Maxwell, 2006) states in paragraph 1 – 02, at page 4, that, the meaning of "insurance" has been defined in broad terms as " an agreement to confer upon the insured a contractual right which, *prima facie* comes into existence immediately when loss is suffered by the happening of an event insured against to be put by the insurer into the same position in which the insured would have been had the event not occurred, but in no better position.*(See Callaghan v Dominion Insurance Company [1997] 2 Lloyds Rep 541*, per sir Peter Webster).

In English law the most cited definition of insurance is derived from the judgment of Channel, J, in *Prudential Insurance Company v Inland Revenue commissioners [1904] 2 K.B. 658* at pages 663 – 664:

"*A contract of insurance is one whereby one party the insurer promises in return for a consideration the (premium) to pay to the other party the (insured) a sum of money or provide him with some corresponding benefit upon the occurrence of one or more specified events. There must be either uncertainty whether the event will happen or not if the event is one which must happen at sometime there be uncertainty as to the time at which it will happen. Generally, it is a necessary part of making a recovery under a contract of insurance to prove that what caused the loss was a fortuity."*

The learned authors of Bullen and Leake and Jacob's precedents of Pleadings, seventeenth Edition, Volume 2, (Thomson Reuters (Professional) U.K. Limited, 2012) observe in paragraph 67 – 03, at page 1075, that the indemnity principle underlies the whole of this area of the law of insurance. To this end, Brett L.J. in *Castellan v Preston [1883] 11 Q.B.D. 380,* said at page 386:

"The very foundation, in my opinion, of every rule which has been applied to insurance law is this, namely the contract of insurance contained in a marine or fire policy is a contract of indemnity, and of indemnity only, and that this contract means that the assured in case of a loss against which policy has been made, shall be fully

indemnified, but shall never be more than fully indemnified. That is the fundamental principle of insurance, and if ever a proposition is brought which is at variance with it, that is to say which either will prevent the accused from obtaining a full indemnity, that proposition must certainly be wrong."

The learned authors ofBullen and Leake, and Jacob's Precedents of Pleadings, (supra) conclude in paragraph 67 – 03, at page 1075, that:

"The insured's loss is limited by the sum insured but is not calculated by reference to that sum. The fact that an article is insured for a particular sum will only entitle the insured to that sum if he produces proof that the article was actually worth that sum, unless as is common in marine insurance, it is a valued policy entitling a claimant to recover the agreed value of the damaged property."

COMPULSORY THIRD PARTY INSURANCE

Although insurance is founded on the law of contract, the Road Traffic Act Number 11 of 2002, compels motorists to take out, compulsory third party insurance. The requirements in respect of third party insurance are set out in section 88(1) as follows:

"88 1 … a policy of insurance must be a policy which _____

(a) is issued by an insurance company registered by the registrar for the purpose of this part; and

(b) insures such person, persons, or classes of persons as may be specified in the policy in respect of any liability which may be incurred by that person or such persons in respect of the death of or bodily injury or arising out of the use of the motor vehicle or trailer on a road to an amount of at least _____

(i) One hundred and sixty thousand seven hundred fee units in respect of anyone person killed or injured; and

(ii) Three hundred and thirty-three thousand three hundred and fifty fee units in respect of anyone accident or series of accidents due to or arising out of the occurrence of any one event.

Provided that any policy in terms of this section shall not be required to cover _____

(A) Any liability in respect of the death of or bodily injury to, a person in the employment of any person insured by the policy, if such death or bodily injury arises out of and in the course of that person's employment; or

(B) Any contractual liability.

The Fees and Fines Act provides in section 3 that: "In any written law unless, the context otherwise requires, "the unit" means one hundred and eighty kwacha."

In view of the foregoing, the minimum insurance value of a third party policy in respect of anyone person killed or injured is K28,800,000; (in practice K30 million) and K59,940,000,(also in practice K60 million) in respect of anyone accident or series of accidents due to or arising out of the occurrence of one event.

The Act also provides in section 90 for the right of the injured party to proceed directly against the insurer when it stipulates as follows:

"90 (1) Any person having a claim against a person insured in respect of any liability in regard to which a policy of insurance has been issued for the purposes of this part shall be entitled in that person's own name to recover directly from the insurer any amount not exceeding the amount covered by the policy for which the person insured is liable to the person having the claim:

Provided that _____

(i) the rights of any person claiming directly against the insurer shall, except as provided in subsection (2), be not greater than the rights of the person insured against such insurer;

(ii) the right to recover directly from the insurer shall terminate upon the expiration of a period of three years from the date upon which the claimant's cause of action against the person insured arose;

(iii) the expiration of such periods as is mentioned in paragraph (ii) of this proviso shall not affect the validity of any legal proceedings commenced during such period for the purpose of enforcing a right given under this section.

(2) In respect of the claim of any such person claiming directly against the insurer, any condition in a policy purporting to restrict the insurance of the person insured thereby shall be of no effect:

Provided that nothing in this section shall require an insurer to pay any sum in respect of the liability of any person otherwise than in or towards the discharge of that liability, and any sum paid by an insurer in or towards the discharge of any liability of any person which is covered by the policy by virtue only of the operation of this subsection shall be recovered by the insurer from that person.

Section 92 goes on to provide that:

"*92 Any contract for the conveyance of a passenger in a public service vehicle, so far as it purports to negate or to restrict the liability of any person in respect of any claim which may be made against that person in respect of the death, or bodily injury to the passengers while being carried in entering or alighting from the vehicle or purports to impose any condition with respect to the enforcement of such liability shall be void."*

Lastly, section 93(1) provides that where an insurer makes any payment in respect of the death or bodily injury to any person who has received treatment in a hospital in respect of the fatal or other bodily injury is also required to pay to such hospital the expenses reasonably incurred in affording such treatment. Subsection (2) of section 93, goes on to provide that the Minister may by statutory instrument prescribe the amount of money to be paid by an insurer to the hospital for the expenses referred to above which are incurred in the treatment of each person so treated as an in _ patient or as an out-patient.

The following propositions may therefore distilled from the preceding provisions of the Road Traffic Act. Although insurance policies are founded on agreement of the parties, the law requires amongst others, carriers to take out third party policies. The policy is by definition restricted to third parties. The policydoes not cover any person killed or injured in the course of employment. The policy does also not extend to contractual liability.

The law also gives an injured party the right to have direct recourse to the insurer. However, the amount of money recoverable from the insurer cannot exceed the amount covered by policy. Where an insurer makes any payment in respect of the death or bodily injury to any person who has received treatment in a hospital, the insurer is also required to pay such hospital the expenses reasonably incurred in affording such treatment. It is not legally competent for a carrier, by a contract, to restrict his liability for any claim made against him for the death of or bodily injury to the passengers.

There is another matter related to insurance that I heed to address. And this is the practice of the insured discharging or releasing the insurer from contractual obligations under a contract of insurance.To illustrate this practice, I will refer to the case of *Zambia State Insurance Corporation Limited and Holmes Transport Limited v Chanda CT/A Link Express Motorway) (1990-1992) Z.R. 175*. The facts of the case were that the plaintiff's omnibus was damaged in a road traffic accident attributed to the negligence of the second defendant's servant or agent who drove the other vehicle which was in collision

with the plaintiff's omnibus. The matter was referred to the first defendant; the insurance company, which requested the plaintiff to obtain three quotations. The insurance company paid the repair costs based on the lowest quotations.Notwithstanding, the plaintiff asked to be compensated for the loss of the use of the omnibus. But this was resisted by the defendants on the basis that when the repair costs were paid to the plaintiff, he signed a form of release which included the following term:

"I /we hereby release and forever discharge and indemnify Helmos Transport and or the Zambia State Insurance Corporation impeded from all claims competent to me/us whether now or hereinafter to be manifest relating to personal injuries, damages, loss of use of my/our vehicle ACC 4405 or consequential loss of any nature and all actions suits at law of whatsoever kind or nature for or because of any matter or thing done, omitted or suffered to be done by Helmos Transport prior to and including the date hereof."

The trial judge heard evidence and accepted the plaintiff's averment that at the time of accepting the cheque for repair charges and signing the release form, the plaintiff had insisted that he would like to be compensated for the loss of the use and he was verbally assured he could still make such a claim.

There was also evidence from the plaintiff which the trial judge accepted that an official of the first defendant had told the plaintiff that while the first defendant would pay for the repairs, the plaintiff must look to the defendant for the loss of use. It was also common ground that the release form was signed by the plaintiff alone, and that it was marked without prejudice.The trial judge was not impressed by the defendant's case based on the release form and entered judgment for the loss of use to be assessed by the Deputy Registrar. It is against that judgment that the defendants appealed to the Supreme Court.

It was argued on appeal on behalf of the first defendant that a release will discharge the other party's right of action for any balance and that a document of this kind need only be signed by the party to be estopped from reneging on the agreement.In a judgment delivered by Ngulube Ag, C.J., the Supreme Court observed at page 177 that the propositions referred to above, valid as they were, were not the issue in themselves.

And the answer to the problem raised lay in considering in what circumstance, in law and equity a claimant may be prevented from resiling from a release agreement. The Supreme Court noted that this presupposes that there was a valid and enforceable release by accord and satisfaction.

The Supreme Court went on to observe that one of the best definitions of accord and satisfaction was that formulated by Scrutton, L,J., in *British Russian Gazette and Trade Outlook Limited v Associated Newspapers* Limited [1933] 2 K.B. 616, as follows:

"*Accord and satisfaction is the purchase of release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative."*

The Supreme Court observed that in the ordinary course and at common law, the plaintiff was clearly entitled to damages for the loss of use against the tortfeasor Furthermore, the Supreme Court observed that the position of the parties could be likened to that between a creditor and a debtor: in general a promise by the debtor to pay only part of the debt provides no consideration for the accord since it is merely a promise to perform part of an existing duty owed to the creditor. The part-payment would in the circumstances also not be satisfaction.

VICARIOUS LIABILITY

By vicarious liability is meant that a person is liable not only for the torts or wrongs committed by himself, but also classically for those torts he has authorised or subsequently ratified. Authorising a tort involves instigating or procuring another to commit a tort. While this classical understanding of vicarious liability tends to relate simply to the commission of a common law tort by an employee, it is firmly established that vicarious liability is not limited to the commission of common law torts.(See Michael A Jones, Clerk and Lindsell on Torts, Twentieth Edition, (Thomson Reuters (Legal) Limited, 2010).Simply stated, vicarious liability means that one person takes the place

of another so far as liability is concerned. *In Emperial Chemical Industries Limited v Shatwell [1965] A.C. 656*, Lord Pearce said laconically at page 685:

"The doctrine of vicarious liability has not grown from any very clear, logical, or legal principle, but from social convenience and rough justice."

The learned author of Charlesworth and Percy on Negligence (supra) explains in paragraph 3 – 98, at page 180, that the doctrine has its roots in the early common law but it was not until the time of Sir John Holt (1642 – 1710) that it began to assume something of its modern aspect being thereafter particularly advanced by the great judges of Queen Victorias reign. It came to be established that the liability of an employer for the tort of his employee was based, not on a fiction that he had impliedly commanded his employee to act as he did, but on the ground that the employee had acted within the scope of, or during the course of his employment or authority. Although the relationship of employer and employee is by far the most important, in terms of daily practice, of the various circumstances in which vicarious liability is recognized by the law; consideration must also be given to the rule as it applies in relation to agents, independent contractors, and children.

APPLICATION OF THE LAW TO THE FACTS

So much the law. I will now pass to apply the law to the facts of this case. Let me state at the outset that I accept the submissions by Ms Kapelembi that first, negligence is a breach of a legal duty to care which results in damage to the claimant. Second, that a person who undertakes for reward or gratuitously to carry another person in a vehicle is liable to that person if he causes him damage by negligence.To the preceding propositions, I would add that although carriers are not insurers, they have a dutyboth at common law and by the contracts with those who hire their vehicles or who in any way use their transport, to take all reasonable care that the vehicle(s) or transport, including the tyres, are in good order and safe to carry a full load of passengers, and goods on their journeys.

However, the specific question that falls to be determined in this case is whether or not DW 1 was negligent in the manner he drove the truck on the material date. The plaintiff

testified that shortly before the accident, the truck was cruising or driving at a high speed.The plaintiff was a passenger, and therefore was in a position to speak to the speed of the vehicle. Generally, the plaintiff testified in a more convincing manner than DW1. The plaintiff stood up well to a testing time in the witness box. I therefore accept his testimony that just prior to the accident, DW1 was driving very fast.If DW 1 had not been driving very fast, he would have been able to bring the truck to stand still, and thus have prevented the tragic accident. I therefore hold that the truck was negligently driven at an excessive speed at the material time. And further the excessive speed caused, or at least contributed to the accident.

The defendants in their defence attributed the accident to a tyre burst as shown in the accident report. I must state at once, that a carrier has a duty to take all reasonable precautions for the safety of their passengers and not to leave them in a danger of a risk against which some precautions at any rate can be taken.In this case, the defendants have not demonstrated that they have a system of inspecting the vehicle. In fact, no evidence was led as to the practice of inspection and overhaul of tyres. I therefore find that the defendants did not take the requisite steps to protect their passengers from risk. If these precautions were taken, it is reasonable to conclude that the risk of accident caused by a tyre burst would have been sensibly reduced, or avoided.In the circumstances, I therefore think that on the evidence adduced, it is has been proved that the accident may have been also caused by a defect in the tyre which might have been discovered by due diligence on the part of the defendants.

Alternatively, in the absence of an explanation from the defendants, the mere happening of the accident is fatal to the defence. Notably, after the accident, the tyre was not examined by experts in order to ascertain the cause of burst. And no one was even called to testify as to the condition of the tyre. Therefore, the happening of the accident is *prima facie* evidence of negligence.

Although DW 2 testified that he recovered the plaintiff's merchandise at the scene of the accident and handed it to the plaintiff's for sale in Kasumbalesa, I still accept the testimony of the plaintiff that in addition to sustaining personal injuries, he also lost some goods as result of the accident and thefts perpetrated by on lookers for which he is seeking compensation. The actual degree of loss, is in my opinion, subject to assessment by the Deputy Registrar.

I also accept the submission by Mr Kapelembi that although the plaintiff was paid the sum of K30 million by Madison Insurance Company Limited, the plaintiff reserved his right to pursue the defendants for the balance of the claim. The reservation was expressed in the letter dated 24th March 2008, in the following terms:

"24th March 2008.
The Deputy General Manager
Madison General Insurance Company (Z) Limited
Comesa Centre
Ben Bella Road
P. O. Box 37013
LUSAKA

Attention: Ms Edna Kalenga

Dear Sir/Madam

Third Party Claim by Anthony Mwanza with respect to RTA Involving Truck No. ABG 3422 belonging to Kagurusu Farming Enterprises Limited.

Refer to the above subject matter.

Kindly be advised that our client has agreed to accept the K30 million offered by Madison and has agreed to discharge Madison of all claims relating to injuries under the policy. Our client, however, reserves the right to pursue your insured for the balance of the claim. To this end, we made an amendment on the discharge form to specifically indicate that the discharge is only against Madison Insurance.

We will be obliged to receive the payment from yourselves promptly.

Yours faithfully

Theotis, Chalwe and Mataka, Brenda Mutale Chanda Mrs

The contract of insurance was presumably between the 1st defendant and Madison Insurance Company Zambia Limited. As I stated earlier on, a contract of insurance is in essence a contract of indemnity and of indemnity only.The implication of this is that in case of loss, the insured shall be fully indemnified but shall never be more than fully indemnified. And more importantly, the insured's loss is limited by the sum insured. There was no evidence led on the insurance policy in question. Assuming however that the sum insured was K30 million, being the minimum insurance value under a compulsory third party policy,the insurance company can pay no more. But that limitation and payment of the sum of K30 million does not prevent the plaintiff from demanding compensation for the losses and injuries suffered and in excess of K30 million compensation settled to date. Therefore, in the proceedings for assessment of damages before the Deputy Registrar, the sum of K30 million paid by Madison Insurance Company Limited will of course be credited to the plaintiff, and acknowledged as having been paid.

To sum up, the position is that the defendants failed to perform the duties of care incumbent on them, and as a result, they are responsible for the personal injuries, losses, and expenses suffered by the plaintiff. I have come to this conclusion because the defendants have failed to establish that they had observed an adequate standard of care. In the circumstances, the 1st defendant is therefore vicariously liable. This is a conclusion which entitles the plaintiff to damages; both general and special, to be assessed by the Deputy Registrar. Costs of this action follow the event. And leave to appeal is hereby granted.

_____

DR P MATIBINI, SC.

HIGH COURT JUDGE