IN THE HIGH COURT FOR ZAMBIA **2022/HP/0944**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

MWICHE MUDALA	**PLAINTIFF**
AND	
DANIEL MWEBELA	**1ST DEFENDANT**
INNOVATE GENERAL INSURANCE	**2ND DEFENDANT**

Before the Honourable Lady Justice S. Chocho, on 26th day of March, 2025.

For the Plaintiff: *Mr. M.M Moono of Messers L.J Michaels Legal Practitioners*

For the 1st Defendant: *Mrs. C. Banda-Kainga of Messers Legal Aid Board.*
For the 2nd Defendant: *Mrs. L.J Simukoko of Messer Fraser Associates.*

J U D G M E N T

Cases referred to:

1. ***Blyth V. Birmingham Waterworks Co. (1856).***
2. ***Faindani Daka (suing as Administrator of the estate of the late Fackson Daka Deceased) V. The Attorney General (1990-1992) ZR 131.***
3. ***Donoghue V Stevenson (1932) AC 562.***
4. ***Brown V. Royal Insurance Co. Limited (1999) 1 WLR 1025.***
5. ***Livingstone V Rawyards Coal (1880) 5 App Cas 25.***

6. ***Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd (1943) AC 326.***
7. ***Gemstar Holdings Limited v Afrigi Corporations Limited SCZ Appeal No 183 of 20147.***
8. ***Zambia State Insurance v Serios Farm (1987) ZR 938.***
9. ***Madison General Insurance Limited v Avrill Cornhill and Another Appeal No. 19/2017.***
10. ***Priscilla Namukonda v Geoffrey Kalomo Mudenda Appeal No. 144 of 2021.***
11. ***Bridget Mtonga (Suing as Administrator for the late Ellen Banda) v Zambia Wildlife Authority CAZ Appeal No. 171 of 2022.***

Legislation and other authorities referred to:

1. ***Winfield and Jolowiz 13th Edition at page 102***
2. ***Charlesworth and Percy on negligence 12th Edition at page 19-20***
3. ***Halsbury's Laws of England Vol. 34 4th Edition at page 8 Paragraph 5.***

1. INTRODUCTION

1.1. This Judgment is in respect of the Plaintiff's claim against the Defendant. The Plaintiff by way of Writ of Summons and Statement of Claim dated June 21st, 2022 claimed the following:

i) The replacement of Toyota Noah Bus registration number BAJ 4374 whose estimated value is between ZMW 135,000.00 to ZMW 145,000.00;

ii) Damages for negligence;

iii) Payment of the sum of ZMW 4,500.00 as compensation for the cost of towing the vehicle;

iv) Payment of the sum of ZMW 170,000.00 as compensation for the cost of hiring other vehicles;

v) Interest on any sums found due;

vi) Costs incidental to this action; and

vii) Any other relief the Court may deem fit.

1.2. The 1st Defendant entered Appearance and filed a Defence on February 3rd, 2023.

1.3. The 2nd Defendant Entered Appearance and filed a Defence on August 3rd, 2022 and Counter-Claimed the following:

i) A declaration that the Plaintiff is not entitled to any claims against the 2nd Defendant above the limit under Third-Party policy in the sum of ZMW 30,000.00 less 10% excess, ZMW 27,000.00 already paid.

ii) An Order that the Plaintiff pays to the 2nd Defendant the sum of ZMW 18,900.00 being monies paid to the two garages, namely Jazz Auto and Team General engaged to conduct repair works on the Plaintiffs motor vehicle;

iii) Interest on the monies paid in b above;

iv) Costs of the action herein; and

v) Any other relief as the Court may deem fit and appropriate in the circumstances.

1.4. The Plaintiff field a Reply and Defence to Counter-Claim on September 30th, 2022.

2. **EVIDENCE/TESTIMONY**

2.1. Trial was scheduled and heard on March 25th and September 16th, 2024.

2.2. The Plaintiff called two witnesses in aid of his case. PW1 was the Plaintiff himself who filed a witness statement dated October 21st, 2022.

2.3. The Plaintiff testified in chief that on October 5th, 2019, he received a call from PW2 informing him the she was in a road accident.

2.4. PW1 testified that when he arrived at the scene, he saw two motor vehicles off road facing the north direction.

2.5. PW1 testified that the fender of the vehicle was completely eaten off, the screen was shattered, the left tyre was ripped off and the left passenger door was ajar.

2.6. PW1 testified that he found PW2 and the 1st Defendant trying to resolve the matter between themselves and in the beginning, the 1st Defendant was not corporative but when the police arrived, he accepted that he was in the wrong.

2.7. PW1 testified that the officers instructed them to follow them to Kasanda police station and it was at that point that he asked the 1st Defendant if

he was insured and the 1st Defendant in response confirmed that he was insured.

2.8. PW1 further testified that he called the 2nd Defendant Company and spoke to one Michael who checked the system, and advised that the 1st Defendant had a third-party policy and towing services were not available under the third-party policy.

2.9. PW1 testified that he hired a towing company and was charged the sum of ZMW 4,500.00 for towing the vehicle to Kasanda police.

2.10. PW1 testified that when the car was towed, he contacted Michael who asked PW1 to avail him with quotations from three different garages and provided a checklist of what had to be prepared for the vehicle to go into the garage.

2.11. PW1 testified that Michael sent him a list of preferred garages and Jazz Auto was one of the garages.

2.12. PW1 further testified that the mechanics from Jazz Auto arrived the following day and prepared the quotation which PW1 took to the 2nd Defendant together with all the other required documentation.

2.13. PW1 testified that after taking the documentation to the 2nd Defendant, Michael issued an order for Jazz Auto to commence work.

2.14. PW1 testified that the vehicle was taken to Jazz Auto garage on October 12th, 2019 and they started working on it.

2.15. PW1 testified that he made follow ups with Jazz Auto who asked him the state in which the vehicle was before the accident and he advised that the vehicle was almost new and had no problems.

2.16. PW1 testified that he was advised that they had to remove several parts from the vehicle as they were damaged and that the computer box and battery were completely damaged. Further, they advised that it would take 3 months for them to complete the works.

2.17. PW1 testified that three months later, he returned to Jazz Auto and found the vehicle covered in a plastic halfway.

2.18. PW1 testified that after 19 months, the vehicle was still with Jazz Auto and in the same state it was in after the accident; the only work they did was paint the vehicle and some panel beating on the left fender but the propellent was not there hence the vehicle could not move.

2.19. PW1 further testified that during the 19 months, he did have correspondence with the 2nd Defendant and Jazz Auto and did express his concern regarding the inordinate delay.

2.20. PW1 testified that he also informed the 2nd Defendant the he was losing money as he had to hire a vehicle as a result of not having his vehicle and the 2nd Defendant in response said there is nothing they could do as it was Jazz Auto in charge of the repairs.

2.21. PW1 testified that a mechanic from Jazz Auto called that he was returning the vehicle and confirmed that it could not move and was towed from Kabwe to his house and this caused PW1's refusal to take possession of the vehicle.

2.22. PW1 testified that the vehicle was taken to the 2nd Defendant who kept it in their custody for several months and it was later taken to a garage called Team General Limited.

2.23. PW1 testified that months later after the vehicle had been taken to Team General, they still failed to fix the vehicle and it was at this point that said they have failed to fix the vehicle and proposed a settlement.

2.24. PW1 testified that he was informed by the 2nd Defendant that the 1st Defendant had a third-party policy and the cover only went up to ZMW 30,000.00 and that the other claims lie with the 1st Defendant.

2.25. PW1 testified that when Team General Limited returned the vehicle, it was in a worse condition than it was when Jazz Auto returned it; the vehicle was just a shell.

2.26. PW1 testified under cross examination that the accident happened due to the 1st Defendants failure to keep his lane.

2.27. PW1 testified under cross examination that the damage caused to his motor vehicle as a result of the accident were; a shattered windscreen, the entire left fender was ripped off from the bonnet, damage to the left tyre and damage to the left rear door.

2.28. PW1 testified under cross examination that the damages indicated on the police report are; damage to the front left door, cracked windscreen, bonnet and lights.

2.29. PW1 testified under cross examination that the he imported the vehicle sometime in 2018 at the cost of ZMW 132,000.00 and conceded that repair/replacement value cannot be the same price as a new vehicle.

2.30. PW1 testified under cross examination that at the time the vehicle was under repair, he hired motor vehicles but did not engage the 1st Defendant before hiring the car with a view of mitigating the loss.

2.31. PW1 testified under cross examination that he did not engage the 1st Defendant because the 1st Defendant was uncooperative at the accident scene and at the police station at the time of the accident.

2.32. PW1 denied having choosen Jazz Auto as a preferred garage under cross examination.

2.33. PW1 testified under cross examination that he was paid the sum of ZMW 27,000.00 under the policy of the 1st Defendant by the 2nd Defendant.

2.34. PW1 testified under cross examination that towing services did not form part of the third-party policy.

2.35. PW1 testified that he is aware of the limits of a third-party insurance cover and that the 2nd Defendant paid him the maximum limit under the insurance.

2.36. PW1 testified under cross examination that before payment, the 2nd Defendant attempted to repair the vehicle and that the vehicle was not fully functional when it was returned to him.

2.37. PW1 testified under cross examination that he was not present at the occurrence of the accident and he was relying on the statements of those who were present.

2.38. PW1 testified under cross examination that the damage to the bonnet and fender affected half of the engine making the vehicle unable to function.

2.39. PW1 testified under cross examination that the vehicle was towed to his house with an axle, only two rear tyres were moving and the car came back in a worse state from Team General Limited.

2.40. PW1 testified under cross examination that all the seats were ripped and bundled in the in the motor vehicle and the two front tyres were flat and with an un identifiable ignition.

2.41. PW2 was one Veejay Kabwe Mudala who filed a witness statement on October 21st, 2022.

2.42. PW2 testified in chief that on October 5th, 2019, she was travelling from Kafue to Ndola; as she was approaching Mulungushi University, she noticed another vehicle from the opposite direction moving at a high speed coming into her lane and hit into the vehicle she was driving.

2.43. PW2 testified that the car stopped immediately and when she came out of the vehicle, she was not sure where the car that hit into the vehicle she was driving was.

2.44. PW2 testified that the car was in a bad state as the windscreen was broken, the left light came out, the left tyre was busted and the vehicle could not even move.

2.45. PW2 testified that he had a conversation with the 1st Defendant who blamed her for causing the accident but when the police came and investigated further, the 1st Defendant was found to be at fault and he admitted.

2.46. PW2 testified that the vehicle was taken to a garage in Kabwe which took really long and when the vehicle was brought, it was in a bad state and could not even move.

2.47. PW2 testified that during the period the car was being fixed, they had to hire a vehicle for purposes of school runs and personal use for more than a year.

2.48. PW2 testified under cross examination that she was the driver of the Toyota Noah involved in the accident.

2.49. PW2 testified under cross examination that she does not remember seeing a white corolla turning into King George College and neither did she see a cyclist.

2.50. PW2 under cross examination denied hitting into the 1st Defendant's car.

2.51. PW2 testified under cross examination that the damage caused to the Plaintiffs' car was; a cracked windscreen on the passenger's side, a damaged tyre, damage to the lights and bumper on the left side.

2.52. PW2 testified under cross examination that after the accident, she used a taxi to do school runs which was arranged by the Plaintiff.

2.53. PW2 testified that the taxis were different cars and different colours but she cannot remember the make.

2.54. PW2 under cross examination denied being the owner of Taku car hire.

2.55. PW2 was not subjected to re-examination.

2.56. At the commencement of trial, the 1st Defendant's witness was not before Court but joined at a later stage. In light of this, the 2nd Defendant's witness testified first.

2.57. The 2nd Defendant called one witness in aid of its case. DW1 was one Robert Kondwani Musukwa who filed a witness statement on May 27th, 2024.

2.58. DW1 testified in chief that the 2nd Defendant did not tow the Plaintiff's vehicle as the 1st Defendants Third- Party policy did not cover towing fees.

2.59. DW1 testified under cross examination that the Plaintiff submitted documents which included quotations from three different garages which included Jazz Auto Spares which was picked.

2.60. DW1 testified that the 2nd Defendant took the vehicle to Jazz Auto at the repair cost of ZMW 8,900.00.

2.61. DW1 testified that after the repair works, the Plaintiff refused to collect the vehicle which prompted the 2nd Defendant to engage Team General to work on the Plaintiffs vehicle at a total cost of ZMW 10,000.00.

2.62. DW1 further testified that Team General took long to work on the Plaintiffs vehicle due to the unavailability of auto electric spares.

2.63. DW1 testified that the 2nd Defendant paid the amount of ZMW 27,000.00 to the Plaintiff under the 1st Defendant Third Party policy.

2.64. DW1 testified under cross examination that between October 2019 to July 2021, he worked in a different role and that the incidents in that period did not concern him.

2.65. DW1 testified under cross examination that facts he spoke to in his witness statement were not perceived by him.

2.66. DW1 testified under cross examination the 2nd Defendant engaged Jazz Auto to carry out repair works on the Plaintiff's vehicle and the Plaintiff was not satisfied with the works done.

2.67. DW1 testified under cross examination that as at a May, 2020, the Plaintiff vehicle was still at Jazz Auto.

2.68. DW1 testified further under cross examination that the 2nd Defendant did not provide the Plaintiff with an alternative vehicle because the policy did not provide for an alternative vehicle to be given.

2.69. DW1 testified under cross examination the from October 2019 to July 2021, the Plaintiff had not received a motor vehicle repaired to his satisfaction.

2.70. DW1 further testified that the Plaintiff's vehicle was during the period October 2019 to July 2021 in the custody of garages engaged by the 2nd Defendant.

2.71. DW1 testified under cross examination that an insured had no control over the time within which a garage engaged by the 2nd Defendant completes its works.

2.72. DW1 testified under cross examination that the Third-Party policy had a limit of ZMW 30,000.00 and the Plaintiff was paid ZMW 27,000.00 by the 2nd Defendant.

2.73. DW1 testified under cross examination that the 1st Defendant paid the sum of ZMW 3000.00 to the 2nd Defendant which was his obligation.

2.74. DW1 was not subjected to re-examination.

2.75. The 1st Defendant called one witness in aid of his case. DW2 was one Boston Daniel Mwebela who is the 1st Defendant in this case and filed a witness statement on February, 19th 2024.

2.76. The 1st Defendant testified second because he was not present at the commencement of trial, but joined proceedings later on.

2.77. The 1st Defendant testified in chief that there was a car driving ahead of him which indicated and started turning right then suddenly joined back in the main road and continued straight on.

2.78. The 1st Defendant testified that due to the above, the distance between the vehicles reduced and there was a cyclist on the left. In an attempt to avoid hitting into the vehicle ahead and the cyclist, he swerved his car and u turned joining the other lane and started going in the opposite direction.

2.79. The 1st Defendant testified that he drove for about 20 to 30 meters when PW2 hit into the right rear end of his vehicle as she was trying to overtake.

2.80. The 1st Defendant testified that together with PW2, they asked a good Samaritan to call the police from Kapiri Mposhi at the nearest check point and when the Police Officers arrived, they started taking statements and while they were taking statements, a gentleman who identified himself as PW2's brother in law requested that the case be moved to Kasanda Police Station in Kabwe.

2.81. The 1st Defendant testified that the Police Officers asked him to drive his vehicle to Kasanda police station and when he arrived at the police station, he requested that the vehicle be released due to his health condition but was advised that it would only be released upon payment of an admission of guilt fine.

2.82. The 1st Defendant testified that on October 6th, 2019 he paid the admission of guilt fine and the vehicle was released then he drove back to the accident scene and realized that he did not cause the accident.

2.83. The 1st Defendant testified that he went back to Kasanda Police and requested that the guilty plea be withdrawn and the fine be paid back to him but was advised by the Officer in charge that it would be difficult and the process would take long.

2.84. The 1st Defendant testified that the Officer in charge Traffic Section advised him that the investigations were not thorough and that he did not cause the accident.

2.85. The 1st Defendant testified under cross examination that he did not cause the accident.

2.86. The 1st Defendant testified under cross examination that he was charged with an offence of careless driving and that he admitted the charge and paid the fine.

2.87. The 1st Defendant testified under cross examination that the 2nd Defendant did not pay towing fees.

2.88. The 1st Defendant testified under cross examination that he was not aware that the 2nd Defendant returned a vehicle to the Plaintiff sometime in July 2021 which he did not accept.

2.89. The 1st Defendant testified under cross examination that he was not aware that the Plaintiff's vehicle remained in the custody and control of the 2nd Defendant up until July 2021.

2.90. The 1st Defendant testified under cross examination that he did not pay the towing fees and neither has he provided the Plaintiff with alternative transport since the occurrence of the accident.

2.91. The 1st Defendant testified further under cross examination that he had a Third-Party motor policy cover with the 1st Defendant and the cover limit was ZMW 30,000.00.

2.92. The 1st Defendant testified under cross examination that he was advisd by the 2nd Defendant that immediately an accident happens, he was supposed to report to them the same day which he did and he paid the 10% obligation towards the repairing of the Plaintiff's vehicle.

3. **LAW AND SUBMISSIONS.**

3.1. All Parties filed their written submissions. The Plaintiff filed on October 11th 2024, the 1st Defendant filed on November 1st, 2024 and the 2nd Defendant on November 7th, 2024.

3.2. The Plaintiff submits that the 1st Defendant was negligent and he owed a duty of care to other road users as per **Blyth V. Birmingham**

Waterworks Co. (1856)[1] in which negligence was defined as the omission of doing something which a reasonable man, guided upon consideration which ordinarily regulate the conduct of human affairs.

3.3. The Plaintiff submits that the case of **Faindani Daka (suing as Administrator of the estate of the late Fackson Daka Deceased) V. The Attorney General (1990-1992) ZR 131**[2] provides that in order to establish negligence, the following elements must be proven:

i) Duty of care;
ii) A breach by the defendant of this duty;
iii) Damage to the Plaintiff; and
iv) Which was caused by the breach of duty.

3.4. The Plaintiff submits that he 1st Defendant being a road user owed a duty of care to other road users, including the Plaintiff, and ought to have had in foresight that moving at an excessive speed would cause a Road Traffic Accident.

3.5. The Plaintiff further submits that Lord Atkin in the case of **Donoghue V Stevenson (1932) AC 562**[3] defined a "neighbour" as anyone who could be affected by your conduct and that the House of Lords in the **Donoghue**[3] case stated that the neighbour principle is the relation among individuals and entities that one owes a duty of care to those who are closely and directly affected by their action.

3.6. The Plaintiff submits that there existed a relation of 'neighbourhood' between the 1st Defendant and the Plaintiff as there is a foreseeability that one road user's actions will affect other road users and that the 1st

Defendant failed to meet the standard of care expected of a reasonable driver to other road users.

3.7. The Plaintiff submits that the 1st Defendant acted negligently contrary to that duty and as a result of that breach the Plaintiff suffered damage to his vehicle and that the 1st Defendant should be found liable for negligence.

3.8. The Plaintiff submits further that the 2nd Defendant was negligent in the way it handled the matter.

3.9. The Plaintiff submits that 2nd Defendant being the 1st Defendant's insurer owes a duty to the Plaintiff to act in good faith in claims handling and customer service. In making this submission, the Plaintiff relied on the case of **Brown V. Royal Insurance Co. Limited (1999) 1 WLR 1025**[4] in which the House of Lords ruled that insurance companies have an implied duty to act in good faith when handling claims and that the insurer must deal with claims promptly and with a fair and reasonable attitude.

3.10. The Plaintiff submits that in addition to the evidence on record, DW1 confirmed in cross examination that indeed there was a delay in repairing the Plaintiff's motor vehicle which clearly demonstrated the negligence in the manner the 2nd Defendant handled the repairs of the motor vehicle and that the 2nd Defendant did not handle this claim in a fair and reasonable manner nor did they act in good faith.

3.11. The Plaintiff further submits that the Plaintiff ought to be restored to his original position as per the doctrine of *'Restitution in integrum'* which is aimed at restoring a party to its original position before a particular event. The Plaintiff placed reliance on the case of **Livingstone V Rawyards Coal (1880) 5 App Cas 25**[5] as land mark case that brings out the Legal Principle of *'Restitution in integrum'*. This case laid down the general rule that the appropriate measure of damages is the amount necessary to place the claimant in the position they would have been if they had not sustained the wrong.

3.12. The Plaintiff submits that had it not been for the 1st Defendant's negligence, and breach of duty owed to other road users, the damage suffered by the Plaintiff could not have occurred.

3.13. The Plaintiff further submits that the Plaintiff should be indemnified of the amount spent to tow the vehicle to Kasanda police station in order to put the Plaintiff in the position he would have been if the accident had not been caused by the 1st Defendant.

3.14. The Plaintiff submits that had it not been for the 1st Defendant's negligence, there could not have been need to repair the Plaintiff's vehicle and that had the 2nd Defendant processed the claim within reasonable time, there would not be unreasonable and inordinate delay by the garages prompting the Plaintiff to incur expenses by hiring vehicles.

3.15. In response, the 1st Defendant submits that after the accident happened, the 1st Defendant took reasonable care and steps in facilitating an

insurance claim from the 2nd Defendant in order for the Plaintiff's vehicle to be repaired. The Plaintiff placed reliance on **Section 90 of the Road Traffic Act No. 11 of 2002**.

3.16. The 1st Defendant further submits that the Plaintiff's motor vehicle was not written off and that it was taken at Jazz Auto which was the Plaintiff's choice of garage and how long repairs take is not within the control of the 1st Defendant.

3.17. The 1st Defendant submits that were a vehicle is not written off, the Insurer indemnifies the Insured by having repairs performed and paying for those repairs.

3.18. The 1st Defendant submits that he does not dispute the Plaintiff's claim relating to expenses incurred on towing the vehicle to Kasanda Police and does not oppose paying the same to the Plaintiff.

3.19. The 1st Defendant submits that the receipts produced by the Plaintiff as proof that they hired vehicles are doctored receipts meant to take advantage of the fact that the accident happened.

3.20. The 1st Defendant further submits that hiring a motor vehicle for 21 months is not attainable and a pure act of unjust enrichment and placed reliance on the cases of **Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd (1943) AC 32**[6] and **Gemstar Holdings Limited v Afrigi Corporations Limited SCZ Appeal No 183 of 2014**[7] which I will not reproduce as the relevant portions of the decisions are on record.

3.21. The 2nd Defendant submits that the policy did not provide for replacement of the motor vehicle and the limit under the policy is clearly stated as ZMW 30,000.00 which was fully discharged.

3.22. The 2nd Defendant submits that Jazz Auto Spares was picked from the quotations submitted by the Plaintiff and that Jazz Auto as an independent contractor specialised in the provisions of auto services and that the 2nd Defendant had no control over the manner in which Jazz Auto carried out its work as it was an independent contractor – employer relationship and that the employer of an independent contractor is not liable for negligence or other torts committed by the independent contractor.

3.23. The 2nd Defendant submits that it did all it reasonably could to repair the vehicle and even when the works were not satisfactory, it paid the Plaintiff the sum of ZMW, 30,000.00.

3.24. The 2nd Defendant submits that the Plaintiff is not entitled to the money claimed as the law is clear that a third party cannot claim more that the amount covered by the policy and placed reliance on the case of **Zambia State Insurance v Serios Farm (1987) ZR 93**[8].

4. **COURTS ANALYSIS/DECISION**

4.1. I have had occasion to consider the parties arguments for which I am grateful.

4.2. The following facts are not in dispute.

i) The Plaintiff paid towing fees in the sum of ZMW 4,500.00 which should have been paid by the 1st Defendant;

ii) The 1st Defendant had a third-party policy cover with the 2nd Defendant which only covered a maximum of ZMW 30,000.00;

iii) The 2nd Defendant was responsible for payment for the repairs to be done to the Plaintiff vehicle; and

iv) From the occurrence of the accident to date, the Plaintiff's vehicle has not been repaired/ put back in the state it was prior to the occurrence of the accident.

4.3. The following are the main issues for determination.

i) Whether the Defendants are liable in negligence;

ii) Whether the Plaintiff is entitled to the reliefs sought; and

iii) Whether the 2nd Defendant is entitled to the reliefs sought in its counter claim.

4.4. The learned authors of **Winfield and Jolowiz 13th Edition at page 102** define negligence as:

> ***"Breach of legal duty to take care which results in damage or injury to the Plaintiff".***

4.5. Furthermore, In the case of **BLYTH V BIRMINGHAM WATERWORKS COMPANY (1856) 11 EX 781**[1] negligence is defined as:

> ***"An 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."***

4.6. In order to prove negligence, the following elements must be proved:

i) That the Plaintiff was owed a duty of care;

ii) The Defendant breached its duty of care; and

iii) As a result of the Defendants breach, the Plaintiff has suffered damage/injury.

4.7. The learned authors of **Charlesworth and Percy on negligence 12th Edition at page 19-20** state as follows:

> ***"the word duty connotes a relationship by which an obligation is imposed upon one person for the benefit of another to take reasonable care in all circumstances. Whether or not a duty exists on given facts is a question of law. Unless the existence of such duty can be established, an action in negligence must fail".***

4.8. Where duty of care exists, reasonable care must be taken to avoid acts or omissions which can be reasonably foreseen as likely to cause injury/damage to persons to whom the duty of care is owed.

4.9. The learned authors of the **Halsbury's Laws of England Vol. 34 4th Edition at page 8 Paragraph 5** state that:

> ***"Prima facie a duty of care is owed to those whom the Defendant could reasonably contemplate may be harmed by his action..."***

4.10. The case of **DONOGHUE V STEVENSON 1932 A.C 562**[3] established the neighbour principle. Lord Atkin realised that there had to be a general criterion of relation giving rise to duty and stated as follows:

> ***"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour: and the lawyer's question,***

Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question".

4.11. In light of the above authorities, it can be concluded that the general criterion in determining whether a duty of care is owed is reasonable foresight.

4.12. It is not in dispute that the 1st Defendant owed the Plaintiff a duty of care; that is to say, he had a duty to act in a way that does not cause other road users to suffer injury/loss.

4.13. Page 26 of the 2nd Defendant's bundle of documents contains an admission of guilt form which shows that the 1st Defendant admitted to the charge of careless driving. Further, the 1st Defendant in his testimony stated he did not cause the accident. I am of the considered opinion that the 1st Defendant has not provided any proof to rebut the evidence on record or prove that he indeed did not cause the accident and his claim appears to be an afterthought. The 1st Defendant therefore, breached the duty of care owed to the Plaintiff which caused the Plaintiff to suffer loss/damage.

4.14. Although the 1st Defendant acted negligently, the 1st Defendant was not responsible for the repairs to be done on the Plaintiff's vehicle reason being that he was under a third-party motor policy cover by the 2nd Defendant; under which the 1st Defendant was to be indemnified. That is to say, the 2nd Defendant ought to have compensated the Plaintiff for the loss caused by the 1st Defendant as an insured of the 2nd Defendant. Further, it can be seen from pages 12 and 16 of the Defendants Bundle of Documents, that the estimated cost of repair was rightly within the policy cover limit and the 1st Defendant fulfilled its obligation by paying the 10% contribution. This alone imputes a duty on the 2nd Defendant to ensure that the Plaintiff's vehicle was repaired.

4.15. I am of the considered view that the Plaintiff's claim stems from the 2nd Defendant's failure to ensure his vehicle was fixed/repaired subsequent to the accident.

4.16. The 2nd Defendant contends that Jazz Auto is an independent contactor and therefore, the 2nd Defendant cannot be liable for Jazz Auto's failure to execute their work. I find that the 2nd Defendant engaged Jazz Auto to carry out repairs. Payment came from the second Defendant.

4.17. I must state that the Plaintiff is in no way trying to attach the liability of Jazz Auto on the 2nd Defendant, but rather making a claim against the 2nd Defendant for its failure to ensure timely and satisfactory repairs on the Plaintiff's vehicle.

4.18. I am of the view that it was the duty of the 2nd Defendant to ensure that satisfactory repairs are done on the Plaintiff's motor vehicle. On perusal

of the Court record, there is nothing to show that the 2nd Defendant made follows ups on the garages or took any precautions to avoid delays and ensure that satisfactory works were done on the Plaintiff's vehicle. The 2nd Defendant only exercised its option of taking the car to a different mechanic after the Plaintiff expressed his dissatisfaction with the repairs done. By reason of the 2nd Defendant's failure to ensure that satisfactory works were done on the Plaintiff's vehicle, the 2nd Defendant breached its duty of care owed to the Plaintiff which resulted into the Plaintiff suffering loss/ damage.

4.19. I find that the 2nd Defendant did not act in good faith nor did they deal with the claim promptly. I have taken judicial notice of the fact that an Insurer only pays out to the garage after the customer signs off the release order signifying satisfaction with the repairs. In casu, twice the 2nd Defendant paid out monies without acceptance of repairs/car by the Plaintiff. Eventually the 2nd Defendant paid out full amounts under the policy to the Plaintiff, after close to 2 years.

4.20. Having established that the 2nd Defendant is liable in negligence, I shall now determine whether the Plaintiff is entitled to its claims as relates to replacement of the vehicle with the estimated value of ZMW 135,000.00, to ZMW 145,000.000 compensation of the sum of ZMW 4,500.00 being the cost of towing the vehicle and payment of the sum of ZMW 170.000.00 being the cost of hiring other vehicles.

4.21. I am of the considered view that the claims in 4.19 above fall under special damages. It is settled law that a Claimant must prove special

damages. The Supreme Court in the case of **Madison General Insurance Limited v Avrill Cornhill and Another Appeal No. 19/2017**[9] stated as follows.

> ***"We agree with Mr. Chiteba that special damages must be proved strictly. The point is that special damages are damages that have already crystallised before the matter is dealt with in court, and the claimant of such damages must be able to prove such damages strictly. This does not mean that such damages must be proved beyond reasonable doubt. The usual standard of proof applicable in civil matters, that is to say, on a preponderance of evidence, applies. What the requirement does mean though is that special damages cannot be presumed as may be the case with general damages.***

4.22. Furthermore, the Court of Appeal in the case of **Priscilla Namukonda v Geoffrey Kalomo Mudenda Appeal No. 144 of 2021**[10] in relation to a claim for special damages had the following to say:

> ***We take note that the 1st respondent failed to prove his claim for K500 per day as transport refund as the receipts produced before the trial court were found to be unreliable. He also failed to show that he travelled by taxi from Luanshya to Kitwe and back six days a week, and that sometimes he booked a taxi from the Copperbelt to Lusaka for business. Since he had claimed special damages, he had the onus of adducing sufficient evidence to enable the Court determine the value of***

that loss with a fair amount of certainty; See Mhango v Ngulube and Others12l and the case of J.Z Car Hire Limited v Malvin Chala and Others15l- In the absence of such evidence, a plaintiff would be entitled to nominal damages.

In the J.Z Car Hire case, which involved a claim for loss of business which was not proved, the Supreme Court awarded the appellant a token figure of K250,000.00 plus costs. Of relevance to the case before us is what the court had to say that: "If left alone, the court is at large and it may award intelligent awards if any." Following the above authority, we uphold the award of K200 per day for alternative transport as it was an intelligent award which was reasonable. Our understanding is that the award was not for a refund but for loss of use of the Toyota Corolla. We find it expedient to clarify our position that K200 per day for return trips from Luanshya where the respondent lives to Kitwe where his office is situated translates to only K100 one way which is nominal. We take judicial notice of the high taxi hire costs in this country. We hold that the damages for loss of use of the Toyota Corolla were real. Further, we uphold the lower court's holding that the respondent was entitled to hire a car comparable to the one which was damaged in the accident as this is fortified by the case of Moore v D.E.R Limited[5]".

4.23. In light of the foregoing I shall first deal with the Plaintiff's claim for payment of the sum of ZMW 4,500.00 being the cost of towing the car to the Police station. The 1st Defendant does not dispute this claim and I therefore Order that the sum of ZMW 4,500.00 be paid to the Plaintiff by the 1st Defendant.

4.24. The Plaintiff claims for replacement of the vehicle with estimated value of ZMW 135,000.00 to 145,000.00. In relation to this claim, the Plaintiff has not provided evidence before this Court to prove the special damage. The Plaintiff ought to have shown/proved the value of the motor vehicle prior to the accident and value of the motor vehicle at the commencement of this trial in order to determine/prove the damage suffered. Due to the Plaintiffs failure to prove the special damage, the claim for replacement of the value of the motor vehicle fails.

4.25. With reference to the Plaintiff's claim as relates to the cost of hiring other vehicles, I note that the Plaintiff has produced car hire receipts on pages 26 to 29 of the Plaintiff's Supplementary Bundle of Documents. The 1st Defendant claims that the car hire receipts are doctored but has not adduced any evidence to prove the allegation. The Plaintiff having produced car hire receipts to prove its claim, I am inclined to go by the decision in the **Priscilla Namukonda** case that a Plaintiff is entitled to hire a car comparable to the one which was damaged in the accident. I however take issue with the sum of ZMW 170,000.00 claimed by the Plaintiff as cost of car hire, from the computation of the receipts produced

as evidence, the receipts total to the sum of ZMW 129,150.00. I therefore award the Plaintiff the sum of ZMW 129,150.00 as compensation for the cost of car hire.

4.26. Further, the Plaintiff also has a claim for general damages. Damages place a monetary value on the harm done, this is in order to restore the Plaintiff to the position he could have been if the accident had not occurred. There is a duty placed on the Plaintiff to prove the extent of damage in order to be entitled to damages. The Court in the case of **Bridget Mtonga (Suing as Administrator for the late Ellen Banda) v Zambia Wildlife Authority CAZ Appeal No. 171 of 2022**[11] had the following to say regarding the need to prove damages:

> ***"Each element must be proved and compensation or damages arising from the breach of duty are generally only payable where there has been damage or injury. Damages in negligence are not assessed on the mere fact that there has been a breach of duty. However, where a party clearly shows a breach of a duty of care such as a statutory duty owed to it, but fails to prove damage or injury, such a party could be paid nominal damages purely on account of the breach.***

4.27. I am fortified by the Court of Appeal decision in the of **Bridget Mtonga (Suing as Administrator for the late Ellen Banda) v Zambia Wildlife Authority**[11], the Plaintiff having failed to prove the damage suffered, I therefore award to the Plaintiff nominal damages in the sum of ZMW 3,000.00 on account of the breach.

4.28. I have also taken note of the 2nd Defendant's Counter-Claim. In light of the third-party policy, it is correct that maximum amount payable under

the policy is ZMW 30,000.00. I must however state that the circumstances of this case are that the Plaintiff has suffered damage/loss as a result of the 2nd Defendants failure to ensure that the repairs on the Plaintiff's vehicle were done in a satisfactory and timely manner. It is by the 2nd Defendant's default that the Plaintiff has suffered damage.

4.29. In light of the above, the 2nd Defendant's claim for refund of the monies paid to the two garages fails as it is by no fault of the Plaintiff that the two garages failed to repair the vehicle. One wonders why the 2nd Defendant would deem it appropriate to pay the garages when it determined that the car was not fixed/repaired.

4.30. It is not in dispute that the Plaintiff was paid the sum of ZMW 27,000.00 by the 2nd Defendant. In view of this, I find that this satisfies the 2nd Defendants obligations obigations under the policy. The Plaintiff has not adduced evidence to prove that it would cost to fix/repair the motor vehicle. I see no need for the replacement, as the Plaintiff has not adduced evidence to show that the car is not repairable nor the cost of replacing it with a similar car make, year, etc. Moreover, the Plaintiff accepted both the car and the cash.

5. **CONCLUSION**

5.1. In light of the foregoing, I Order as follows:

i) The 1st Defendant pays the sum of ZMW 4,500.00 to the Plaintiff as compensation for the cost of towing the vehicle.

ii) The 2nd Defendant pays the Plaintiff the sum of ZMW 129,150.00 as compensation for the cost of car hire.

iii) The 2nd Defendant pays the Plaintiff nominal damages in the sum of ZMW 3,000.00

iv) Interest to be paid on the sums found due at the short-term deposit rate from the date of the Writ to the date of Judgment and thereafter the lending rate determined by the Bank of Zambia up to the date of payment.

5.2. The 2nd Defendant's counter-claim fails.

5.3. Each party shall bear its own costs.

5.4. Leave to appeal is granted.

Delivered at Lusaka on the 26th of March, 2025.

S. CHOCHO

HIGH COURT JUDGE

REPUBLIC OF ZAMBIA
HIGH COURT OF ZAMBIA
26 MAR 2025
S. CHOCHO J
P. O. BOX 50067, LUSAKA