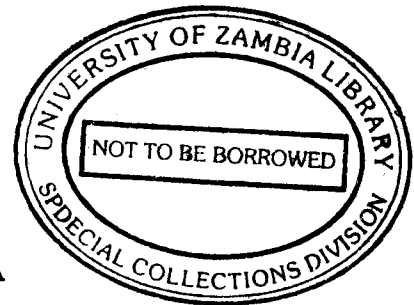


**THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW**

**AN EXAMINATION OF THE LAW OF NEGLIGENCE IN ZAMBIA WITH
EMPHASIS ON THE NEIGHBOUR PRINCIPLE, TO WHAT EXTENT IS IT
BEING APPLIED?**

By

**KAHUMBU NACHIBANGA
(20030321)**



A dissertation submitted to the school of law of the university of Zambia in partial fulfillment of the requirements for the award of the Bachelor Degree of Laws (LLB).

School of Law
University of Zambia
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December, 2005

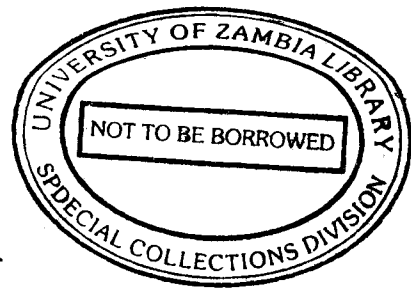


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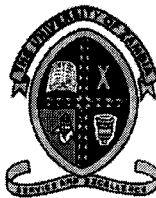
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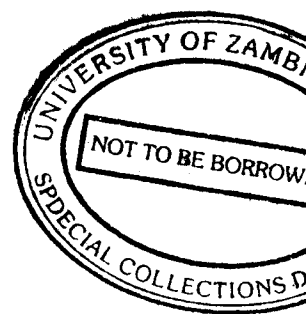


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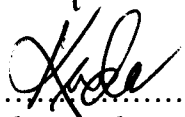


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Supervisor..........
Judge Kabazo Chanda

DECLARATION

I, **Kahumbu Nachibanga**, do hereby declare that the this dissertation is my authentic work

and that to the extent of my knowledge, information and belief, no similar piece of work

has previously been produced at the University of Zambia or any other institution for the

award of Bachelor of Laws Degree. All other works referred to in this dissertation have

been duly acknowledged.

Made thisth12.....day of December 2005 by
the said

KAHUMBU NACHIBANGA, at Lusaka.



DEDICATION

To my mum and dad, this is for you for shaping me into the person I am today and giving me the courage to go on even when things seemed so tough. Thank you for all your prayers and your love, I am very grateful.

To my brother Ian and my sister Chimuka for everything you have done for me especially the financial assistance you rendered in all my years at UNZA.

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To the rest of my family. Thank you for believing in me, I appreciate your being there.

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December, 2005

Kahumbu Nachibanga

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It would be a grave mistake on my part if I did not first and foremost thank my God. Thank you Lord for sustaining me up to this level of my education. There were times when things were so tough but I still had the courage to go on because I know you can never give me more than I can handle. Thank you Lord.

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I would like to thank all the people I interviewed for the information they gave and everyone else who offered information in one way or another.

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To Muntinta Syulikwa for being a good friend and finally the entire LL.B IV 2005 for being such a good classmates, we had such good times together both academically and socially, **I WILL NEVER FORGET YOU!**

***Success is not a place at which one
arrives, but rather the spirit with which
one undertakes and continues the
journey.***

- Alex Noble -

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TABLE OF CONTENTS

Title Page.....	i
Supervisor's Recommendation.....	ii
Declaration.....	iii
Dedication.....	iv
Acknowledgments.....	v
Table of Cases.....	vi
Table of Contents.....	viii
Preface.....	x

Chapter One

Who is my Neighbour?

1.0	Introduction.....	1
1.1	Who is my Neighbour.....	2
1.2	Duty of Care.....	5
1.3	Standard of Care.....	8
	References.....	12

Chapter Two

Liability in Negligence

2.1	Employers' Liability.....	13
2.1 (i)	Safe Place of Work.....	16
2.1 (ii)	Competent Servants and Supervision.....	18
2.1 (iii)	Adequate Plant and Appliances.....	19
2.1 (iv)	Safe System of Work.....	19
2.2	Liability of Manufacturers, Retailers and Wholesalers to Consumers for Defects in Products.....	21
2.3	Liability of Motorists.....	23
	References.....	29

Chapter Three

3.1	Dangerous Premises.....	30
3.2	Liability for Damage Caused by Animals.....	33
3.3	Persons Professing Some Special Skill.....	34
3.3 (i)	Accountants and Auditors.....	35
3.3 (ii)	Achitects, Quantity Surveyers, Engineers and Building Contractors.....	36
3.3 (iii)	Medical Practitioners.....	37
3.3 (iv)	Legal Practitioners.....	40
	References.....	42

Chapter Four

4.1	The Response of The Zambian Courts to Negligence.....	43
4.2	Reasons Why Negligence is Prevalent.....	51
	References.....	56

Chapter Five

Conclusion and Recommendations

5.1	Conclusion.....	57
5.2	Recommendations.....	59

Bibliography.....	63
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PREFACE

Duty is owed to anyone who is your neighbour. 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 acts or omissions that are called in question. (Per Lord Atkin in Donoghue V Stevenson. (1932 Ac. 562).

The quotation above is what formulates the law of negligence. This is called the "Neighbour Principle." This principle highlights the importance of avoiding injuring your neighbour and explains who a neighbour in law is. From this principle it is clear that a neighbour can be anyone who is likely to be injured by your actions. It is therefore important that people became aware of the circumstances under which they may owe a duty to a neighbour in order to avoid liability. This shall be the main focus of this essay.

Chapter one of this essay shall discuss the law of negligence in general, that is the ingredients that make up the tort of negligence. This chapter will discuss who a neighbour is, the duty of care and the standard of care.

Chapter two shall discuss the ways in which liability in negligence may arise. In this chapter what will be focused on is employer's liability, liability of manufacturers, retailers and wholesalers to consumers for defects in products and liability of motorists.

Chapter three will discuss liability in negligence further. What will be discussed is liability for dangerous processes, liability for damage caused by animals and liability of persons professing some special skill.

Chapter four discusses the response of the Zambian courts to negligence in Zambia.

Lastly chapter five gives a conclusion to the whole essay and further makes recommendations in light of making people more aware of the neighbour principle in order for them to perform the duties they may owe in various circumstances.

December, 2005

Kahumbu Nachibanga

CHAPTER ONE

WHO IS MY NEIGHBOUR?

1.0 INTRODUCTION

Negligence is the omission to do something which a reasonable man, guided upon those considerations that ordinarily regulate the conduct of human affairs would do or doing something that a prudent and reasonable man would not do. ¹ There are many times that people suffer loss or damage due to the negligence of someone, someone who did not do his duty and many are the times that people are found liable in the tort of negligence simply because they did not know that they owe a duty to someone and not performing their duty would open them up to civil liability in the tort of negligence.

The law of negligence is present in Zambia, however what is questionable is whether the general public is aware of the existence of this tort. There have been a lot of accidents in Zambia, which have been caused by alleged negligence. Perhaps if people were sensitised about this tort of negligence these unfortunate events could be avoided. This is why this obligatory essay will aim to sensitise the Zambians on the law of negligence paying particular attention to the neighbour principle as this

is basically what the law of negligence lies on. However, before this is done, it is important that the elements that make up the tort of negligence be discussed.

The neighbour principle which is the main focus of this paper was well articulated by Lord Atkin in the landmark case of **DONOGHUE V. STEVENSON** ² when, he stated that duty is owed to anyone who is 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 foresee are 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 when I am directing my mind to acts or omissions that are called in question. It is upon this statement that the law of negligence lies.

1.1 WHO IS MY NEIGHBOUR?

The question who is my neighbour was answered by Lord Atkin in the case of **DONOGHUE V. STEVENSON** ³ as anyone who I can reasonably foresee is likely to be injured by my acts or omissions. This means that it is not all times that a person will have a duty to take care, it is only foreseeable injury that can lead to liability. Negligence is the failure to use the requisite amount of care where a duty to use care exists.⁴

Accordingly when one comes to consider whether there is a breach of some duty owed to another, it is legally irrelevant to inquire into a person's actual state of mind since it is his conduct that needs to be judged. To determine whether an act was negligent it is relevant to determine whether any reasonable person would have anticipated the act could cause damage. Foreseeability is what determines to whom a duty may be owed and the consequences for which an actor may be held liable⁵. Foreseeability is a question of fact since it is only by a reference to the circumstance of each case under consideration that it can be determined.

Where then do we get obligation? Posed Du Parq LJ in **DEYONG V. SHENBURN** ⁶ before proceeding to answer his rhetorical question thus:

“There are well known words of Lord Atkin in *Donoghue V. Stevenson* as to the duty towards one's neighbour. It has been pointed out that unless one somewhat narrows the term of the proposition they will be including in it something, which the law does not support. It is not true to say that wherever a man finds himself in such a position that unless he does a certain act another person may suffer or that if he does something another person will suffer, then, it is his duty in the one case to be careful to do the act. Any such proposition is much too wide. There has

to be breach of a duty, which the law recognizes regard must be had to the decisions of the court”.

According to the courts the defendant is liable for all the consequences which a prudent and experienced man fully acquainted led with all the facts and circumstances which infer that whether they could have been ascertained by reasonable diligence or not would have thought at the time of the negligent act as reasonably possible to follow, if they had been suggested to his mind. ⁷ In **GLASGOW CORPORATION V. MUIR** ⁸ a party of children on a picnic was allowed by the manageress of a public tea room to have tea in the tea room, access to which was gained through a small front shop. Whilst a tea urn was being carried through the shop one of the persons carrying it slipped somehow and the urn fell, scalding some of the children when the boiling hot tea escaped. The House of Lords held that since a reasonable person would not have foreseen such a danger, the occupiers were not liable.

The neighbour principle is in essence a limitation on liability in the tort of negligence. This mean that duty can only be inferred where the law will recognize the kind of wrongful act causing harm, the kind of harm and the kind of persons both on whom and by whom harm is ignited. There is no liability on law unless the wrong complained of can be attributed to the conduct of the defendant where a duty of care is owed. What then is a duty of care?

1.2 DUTY OF CARE

Duty is a prescriptive pattern of behaviour on what one can or cannot do to the other. The question is, "Do I owe a duty to everyone in the world?" The answer is no, you only owe a duty to your neighbour. This duty is owed by various classes of people, amongst them are employers to employees, drivers of automobiles to other road users, manufacturers, retailers and wholesalers to consumers for defects in products, medical practitioners and other professionals to their clients. As has earlier been alluded to the duty to take care is based on the neighbour principle. In **BOURHILL V. YOUNG** ⁹ Lord Russell expressed the view that “ *in considering whether a person owes to another a duty, a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man*”. The reasonable man can only foresee the natural and probable consequences of his act and in estimating these he is entitled to assume that the conditions governing those consequences will be normal unless he has actual notice to the contrary. “*One who suffers from the horrible tendency to bleed on slight contact which is denoted by the word “a bleeder” cannot complain if he mixes with the crowd and suffers perhaps fatally from being merely brushed against. There is no wrong*

done there. A blind or deaf man who comes and is trapped on a busy street cannot complain if he is run over by a careful driver who does not know of, and could not be expected to guard against the man's infirmity.¹¹ foreseeable is key in determining the duty of care. Following the decision in **WAGON MOUND (NO 1)**¹² and **WAGON MOUND (NO 2)**¹³, it is now accepted that foresight is the test to be applied.

The duty of care as explained in **HEAVEN V. PENDER** is enunciated on the following principle “ *Whenever one person is by circumstances placed in such a position with regard to another that one recognizes that if he did not use ordinary care and skill in his own conduct with regard to the those circumstances which would cause injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger*”. If one man is near to another a duty lies upon him not to do that which may cause a personal injury to that other, or may injure his property.¹⁵

The following are examples of the wide range of human activities in which a duty of care may or may not arise. An occupier of premises owes a duty to all lawful visitors on his premises. A motorist owes a duty of care to all other road users, even to those who may be driving without due care but not to those who may be guilty of recklessness¹⁶. In **HEDLEY BYRNE AND HELLER AND PARTNERS LTD**,¹⁷ the House of Lords expressed the opinion that the law will imply a duty of care when a

party is seeking information from another who is possessed of a special skill and trusts him to exercise all due care in circumstances in which that latter party knows or ought to have known that reliance was being placed on his skill and judgement.

In **ANNS V. MERTON LONDON BOROUGH COUNCIL**¹⁸, it was held that a builder of defective premises may be liable in negligence to persons who thereby suffer injury.

When it comes to sports and recreation, it was held in **SAUDI BANQUE V. CLARKE PIXLEY**¹⁹ that where a participant in a game or other sporting pass time was injured by the act or omission of another participant whether or not there exists a duty of care and if so to what extent, are both questions that are to be determined in the light of circumstances. These must include consideration of the risks, which may reasonably be inferred to have been accepted by the very fact of participation in the particular activity.

Another situation where a duty of care may be owed is where a person is being rescued. Initially, there is no duty imposed by law on any person to attempt to rescue another who has got himself into difficulties, ²⁰ but once a would be rescuer has taken active steps in a rescue bid, he has assumed a duty of care, therefore that the duty of care arises in many

different circumstances even where one might think that there is no duty at all. The test as earlier alluded to is foreseeability. Having discussed what the duty of care is, the standard of care shall now be discussed.

1.3 STANDARD OF CARE

Once the duty of care has been established, it becomes necessary to inquire how much care the law requires to be exercised. The ordinary standard of care which is adopted is what is called reasonable care that is to say that of a reasonable man²¹. As was stated by Alderson B. in **BLYTH V. BIRMINGHAM WATER WORKS**, “ *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 do*”. The reasonable man is presumed to be free from both over apprehension and from over confidence²². The standard of care in any given situation is derived from the particular circumstances of the situation. For instance if previously a person had acted in a particular way and that had been considered reasonable, the same would be applied as the standard of care in a situation that has similar circumstances.

The degree of care to be used depends firstly on the magnitude of the risk, the greater the risk, the more care that should be taken as per Lord Macmillan in the case of **GLASGOW CORPORATION V. MUIR** ²³ "The degree of care for the safety of others which the law requires human beings to observe in the conduct of their affairs varies according to the circumstances. There is no absolute standard but it may be said generally that the degree of care required varies directly with the risk involved. Those who engage in operations inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life.

Another case that illustrates the standard of care is **BOLTON V. STONE** ²⁴, where a cricket ball that was driven out of a cricket ground injured a person walking on the high way. The occupiers of the cricket ground clearly owed a duty to take care for the safety of persons on grounds. On the facts of the case however, it was held that they were not liable for the improbable accident and injury suffered by the plaintiff. The degree of care they were bound to exercise was to take care to prevent probable accidents, they were not bound to guard against improbable but possible accidents. "It is therefore not enough for the plaintiff to say that the occupiers of the cricket ground could have foreseen the possibility that a ball might be hit out of the ground by a batsman and might injure people on the road, she must go further to say that they ought as reasonable man to have foreseen the probability of such an occurrence.

The second element to be considered in the standard of care is the likelihood of injury. ²⁵ The likelihood of injury has to be taken into consideration in determining if any degree of care needs to be taken in any given circumstances when a duty to take care exists. *“People must guard against reasonable probabilities but they are not bound to guard against fantastic possibilities”* ²⁶ so that if the chance of injury is small, little or no precautions should be taken to prevent or avoid it.

The third element is the gravity of the consequences. The greater the consequences will be of a failure to take due care, the greater is the degree of care that should be taken for instance where gas has been brought in containers onto a ship under construction, the degree of care to be exercised by those bringing it on board must be measured by the danger involved. ²⁷

The fourth element is the cost and practicability of overcoming the risk. It is true to say that very few activities can be done without a risk, even simple things like crossing the street. There are some cases where the risk can be reduced or eliminated only at a great cost. In the case of

OVERSEAS TANKSHIP (UK) LTD V. THE MILLER STEAMSHIP CO, ²⁸

Lord Reid said that “It does not follow that no matter what the circumstances may be it is justifiable to neglect a risk of such small magnitude. A reasonable man would only reflect such a risk if he had

some valid reason for doing so, for instance that it would involve great expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it.

The standard of care can also be determined by common practice. Common practice by persons habitually engaged in a particular operation is strong evidence of what is reasonable care in the performance of that operation.²⁹ If someone is accused of negligence, he can clear himself by saying that he has acted in accord with general and approved practice. "A plaintiff who seeks to have condemned the usage of a system of work which has been generally used for a long time in an important trade undertakes a heavy onus; if he is right it means that all the numerous employees in the trade have been habitually neglecting their duty to their men."³⁰ This is why common practice may sometimes be used to determine the standard of care.

This is basically what the standard of care is. As has earlier been alluded to, the whole law of negligence is based on the neighbour principle which encompasses the duty of care and the standard of care. The different ways in which liability may arise in the tort of negligence will be discussed in the following chapter.

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CHAPTER TWO

LIABILITY IN NEGLIGENCE

This chapter shall evaluate the various ways in which liability in the tort of negligence may arise. Uncertainty is one of the fundamental facts of life and out of it springs many things such as dispute, fear, defensive actions, failure and retrogression. It is very common for people to live in uncertainty and it is the possibility of all these things that should modify the conduct of rational beings. This is why this chapter will focus mainly on liability in negligence which in most cases arises out of uncertainty.

2.1 EMPLOYERS' LIABILITY

A great number of people throughout the world go to work into the mines, the mills, the factories, the shops, the offices, the stores, the farms, the stockyards, the railways, the airways, the construction sites and so fourth. The accidents and occupational diseases in pursuit of these activities are frightening. The mechanisation and chemicalisation of industry have increased these hazards. The physical, psychological, financial and social costs of industrial accidents to the victims and their

families, to industry and to society as a whole are tremendous. This is very unfortunate because a country's source of wealth is in its workers.

If a worker is injured at his place of work during the course of his work then his employer will be liable for that injury. A master at common law may incur liability in two ways to pay damages to his servant who has sustained injuries in the course of his employment. First where the worker is injured as a result of other employees' negligent acts in the course of their employment, he is responsible vicariously for such negligence. Secondly, he is personally liable when the accident has occurred because of his own act or default such as where he has failed to devise or thereafter maintain a safe system of work, which involves risks. In addition to the position at common law, a master owes a duty to his servant under various special statutes such as the factories Act.

At common law, the duty of an employer to his servants is to take reasonable care for their safety. In **WILSONS AND CLYDE COAL CO LTD. V. ENGLISH**¹, the general nature of the duty owed by a master to a servant was described by Lord Wright as follows, *"I think the whole course of authority constantly recognize a duty which rests on the employer and which is personal to the employer to take reasonable care for the safety of his workmen, whether the employer be an individual, a*

firm, a company and whether or not the employer takes any share in the conduct of the operations.” ¹

The duty is owed to each servant as an individual.² This involves the master's having to take into account any peculiarity, weakness or special susceptibility of his servant about which he knew or ought to have known. Therefore where a workman known by his employers to be one eyed was employed in a garage, it was held that it was the duty of the employers to provide him with goggles while he was employed on work which involved the risk of a fragment of metal entering his remaining eye.² The liability of a master towards his servant arises from his failure to take care in regard to that particular servant and it is clear that if so all the relevant circumstances relevant to that employee must be taken into consideration. ³

As has earlier been alluded to, a workman who is known to have a particular weakness exacts a higher duty of care from his employer. Similarly a higher duty of care is owed where a workman has insufficient experience of the job in hand and is unfamiliar with its dangers since he requires adequate supervision and guidance in order to protect him from his own incompetence.⁴ In addition to this, where a job involves certain risks to health and safety which are not common knowledge but of which an employer knows or ought to know and against which he cannot guard

by taking any precautions, he is under a duty to inform the prospective employee of the risks if knowledge of the risk would be likely to affect the decision of a sensible level headed workman on whether or not to accept the job in question. ⁵

The employer's duty may be considered under five different heads; (i) to provide a safe place of work including a safe means of access; (ii) to employ competent servants; (iii) to provide and maintain adequate appliances; (iv) to provide a safe system of work, and (v) other cases.

(i) **Safe Place of Work**

Goddard L.J. explained "*that duty of employers to provide a safe place of work is not merely to warn against dangers unusual to them, but also to make the place of work as safe as the exercise of reasonable skill and care would permit*".⁶ Generally, for duty to be fulfilled the work place must have such protective devices as experience has shown to be desirable in other working places of the same or similar kind. Even where those other working places do not have such devices provided that will not necessarily absolve the employers from liability. In the case of **BATH V. BRITISH TRANSPORT COMMISSION** ⁷, the deceased was involved in constructing the side of a dry dock working from a ledge some two feet, six inches wide which was unfenced and approximately 40 feet above the

bottom of the dock when he slipped and fell to his death. Despite the fact that the work had been going on for three years previously with neither compliant nor mishap, the employers were held liable because the place was so dangerous that some protection such as guard-rail ought to have been provided.⁸ Regard must be had to the nature of the work when considering whether it is safe or not. The duty of the employer to provide a safe working place is one that cannot be delegated. As Goddard L.J. stated in **RIVERSTONE MEAT CO. PROPRIETARY LTD. V. LANCASHIRE SHIPPING CO LTD** ⁹, it is no answer to say... “*We employed competent contractors to provide a safe place or plant.*”

In cases where a place of work becomes unsafe owing to some temporary conditions or some obstruction being created on it, the test to be applied is whether or not a reasonably prudent employer would have caused or permitted the existence of that state of affairs for which the complaint is made¹⁰. Where a place becomes unsafe because of some temporary or occupational danger and the only knowledge of the danger was that of fellow servants who were neither foremen nor charge hands, it has been held that the employees were not in breach of their duty to provide a safe place of work because such knowledge could not be imputed to them.¹¹

(ii) Competent Servants and Supervision

The employer is under a duty to take reasonable care to employ competent servants. This is based on the reasoning that “The servant when he engages to run the risks of his service including those arising from the negligence of fellow servants has a right to understand that the master has taken reasonable care to protect him from such risk by associating him only with persons of ordinary skill and care”.¹² If an employer has reason to anticipate his servant’s misconduct which is likely to be dangerous to fellow employees, the employer is under a duty to those other servants to take reasonable steps to avoid harm arising from it for example by reprimanding him. If such reprimands or repetitions of them are disregarded, the duty could require employers having to dismiss such a worker. An employer can be held liable in a case where he employs a workman who was known to be vicious and dangerous if a fellow servant be injured in an attack.¹³

In addition to this the employer owes a duty to give adequate supervision.¹⁴ Where it is necessary the employer must give proper instructions. It is insufficient especially where young unskilled workmen are involved to merely supply adequate plant or appliances and then leave them on their own with the devices to find out how they work and how to use them properly.

iii) Adequate Plant and Appliances

The employer's duty as to appliances used by the servant has been stated as "*taking reasonable care to provide proper appliances and maintain them in good condition*".¹⁵ This obligation however, is not absolute, it is limited to reasonable exercise of care and skill to guard against danger, which as reasonable people, the employers ought to have anticipated.¹⁶ This duty may include carrying out of regular inspections of and all necessary maintenance and repairs to the plant and appliances provided by him as are reasonable in the circumstances. The employer also has the duty to provide protective clothing for employees where necessary. Where the employer supplies the necessary protective clothing and instructs his workmen on how to use it the employer is not liable.¹⁷

(iv) Safe System of Work

The employer has a duty to provide a safe system of work for his employees. A system of work is the term used to describe (i) the organization of the work, (ii) the way in which it is intended the work will be carried out (iii) the giving of adequate instructions (iv) the sequence of events (v) the number of such persons required to do the job (vi) the taking of precautions for the safety of the workers and at what stages

(viii) the part to be taken by each of the employees involved and (Viii) the moment at which they shall perform their respective tasks.¹⁸ The duty to prescribe a safe system of work is a question of fact on whether there is need for a system of work to be prescribed in any given circumstances. In such cases regard ought to be had to the nature of the work, that is to say whether it requires careful organization and supervision, in the interest of safety of all those persons carrying it out or it can be left by a prudent employer confidently to the care of the particular man on the spot to do it reasonably safely.¹⁹ This duty to prescribe a safe system of work however is not absolute. As per Lord Tucker in **GENERAL CLEANING CONTRACTORS LTD V. CHRISTMAS** ²⁰ the duty is described as “*to take reasonable steps to provide a system which will be reasonably safe, having regard to the dangers necessarily inherent in the operation.*” In deciding what is reasonable, long established practice in the trade although not necessarily conclusive is generally regarded as strong evidence in support of reasonableness.

These are the duties that the employer owes to his employees breach of which would make him liable in the tort of negligence. Although the duties may not be known to either the employer or the employee upon breach of any of them the employer will still be liable.

2.2 LIABILITY OF MANUFACTURERS, RETAILERS AND WHOLESALEERS TO CONSUMERS FOR DEFECTS IN PRODUCTS

The consumers suffer losses in life, limb, health or property and are under constant risk of such injuries as a result of defective products that reach the market. The defects may be many and of varied types, defects in the design, plan, structure and specifications of the product.²¹ In holding a manufacturer liable for negligence the following must be taken into consideration:

(i) the obviousness of the danger (ii) the uses to which the article is likely to be put (iii) the necessity and adequacy of warning and other precautions, (iv) the number of people likely to be exposed to injury (v) the degree of danger (vi) reliance by maker on intervening handler. Product liability in short refers to the liability as regards the damage and loss suffered or the injury sustained or both, which has been caused by a defect or defects in the products consumed. The decision in **DONOGHUE V. STEVENSON** ²² provided a crucial advance in the law of negligence as it was held that where the ultimate consumer has sustained personal injury and has suffered loss and damage that was attributed to a defect in the thing an action lies in tort against its negligent manufacturer. Defects as earlier stated, can exist in different guises. The product by its very nature may be highly dangerous or if misused may then become

dangerous in either case the failure to give adequate clear instructions as to its careful use or abuse of it will cause it to be defective.²³ The product may become defective because it contains some foreign matter accidentally introduced to it at some stage in the manufacturing process which includes the packaging in its sealed container. There may be defects in the product design which cause the product to breakdown or otherwise to fail in its generation when put to the intended use.

The test of safety must be interpreted in terms of the expectations of consumers that is to say what person's generally are entitled reasonably to expect of a product. Liability for defects in products is on the product's manufacturer or processor. Persons like the retailer or those who carry out works of repair to or the installation of products are outside this liability. A person who by putting his name on the product or using a trademark or other distinguishing mark in relation to the product has held himself out as the producer of the product.²⁴ When a victim of a product defect finds himself in a position to use more than one producer and decides to do so, their liability shall be joint and several. Damage must have been occasioned before liability to pay the victim any damage arises. Product liability has a category of persons who may be determined to be ultimate consumers and these include the user of the product as well as the person who comes into contact with it whether accidentally or deliberate.²⁵ Indeed anyone who sustains personal injury

thereby will have a cause of action in negligence against the manufacturer.

The manufacturer's duty in relation to the product consists of a number of matters which include the following, (i) the design and construction of the product; (ii) the component parts used in it's manufacturer; (iii) it's container; (iv) the need to label the product and; (v) the need to give instructions for it's safe of use products may be dangerous when used for a particular purpose unless certain precautions are taken.

In the light of the above matters, the duty of the manufacturer may be said to be to take reasonable care in the manufacture of his product and failure to take such care will render him liable to any consumer or user whose person or property is injured by his product. Negligence on the part of the producer must be proved before liability can be established and the method of proof is the same as in any other case of negligence.

2.3. LIABILITY OF MOTORISTS

Automotive accidents have taken a far higher toll of life and limb and have caused greater economic loss than accidents in industry. This is a consequence of the operation of a vast number of vehicles whose number and use is increasing all over the world at a tremendous rate. Amongst

the factors responsible for accidents are, the increased power and speed of automobiles, unsatisfactory conditions of roads and bridges, improved roads extending the operation of an automobile, increased mileage and accident proneness of the driver.

Although all these accidents occur, there are duties, which highway users owe to each other. It is a public nuisance to do any act on a highway, which hinders or obstructs the free passage of the public along the highway and an action will lie for any damage, suffered by an individual in consequence of such act over and above the damage occasioned to the public at large.²⁶

As Lord Du Parq pointed out "*an underlying principle of the law of the highway is that all those using the highway lawfully must show natural respect and forbearance*".²⁷ The duty of a person who either drives or rides a vehicle on the highway is to use reasonable care to avoid causing damage to persons, vehicles or property of any kind on or adjoining the highway. Reasonable care in this sense means the care which an ordinary skilful driver or rider would have exercised under all the circumstances and connotes an avoidance of excessive speed, keeping a good look out, observing traffic rules and signals so on.²⁸ This also includes keeping reasonable control over his passengers. A passenger in a motor vehicle and a pedestrian each owes a duty to other users of the

highway. A highway authority also owes a duty of care to road users for example to take reasonable care in the siting of its road signs.

The duty of care is owed to persons so placed that they may reasonably be expected to be injured by the omission to take such care. The rule of the road is that when two vehicles are approaching each other from opposite directions each must go on the left or near side of the road for the purpose of allowing the other to pass. Failure to observe this rule is prima facie evidence of negligence.²⁹ If a driver is driving else where on the road other than on his side, should traffic approach and he is put in a position of having to act quickly in an emergency as a result of which a collision occurs, he will be liable. This is because of his negligence in driving on the wrong side of the road. However, the fact that collision occurs on a driver's wrong side of the road is not conclusive evidence of negligence against him. This is because the circumstances may be such as to make it reasonable for him to depart from the ordinary rule of the road.³⁰ This however, throws upon him the burden of proving the circumstances, which made it reasonable for him to depart from the ordinary rule.

It is the duty of a driver to travel at a speed, which is reasonable under the circumstances. In determining what is reasonable the nature, condition and use of the road in question and the amount of traffic which is actually at the time or which might be reasonably expected to be on it

are all important matters to be taken into consideration. There are speed limits that are set for certain roads and if that speed is exceeded it is most probable that a case of negligence will be established against the driver. This is because other traffic and persons in the area may be assumed to regulate their conduct in the expectation that the law will be obeyed. Where a plaintiff was injured by the negligent driving of a policeman who was riding a motorcycle in pursuance of his police duties and he exceeds the speed limit for that road. MC Nair J. held that a policeman like any other driver of a motor vehicle owes a duty to drive with due care and attention without exposing members of the public to unnecessary danger.³¹ Further where a police constable in the execution of his duty must necessarily exceed the speed limit, he must exercise a degree of care and skill proportionate to his speed and remember the ordinary road user in a built-up area will not expect a motor vehicle to be driven along at such a speed. It is desirable in such circumstances that particular care would be given to audible or other warning of approach.³²

The driver of a vehicle following another ought to allow sufficient space between the vehicles in which to deal with the ordinary exigencies of traffic. If he keeps too close to the rear of the vehicle ahead and so fails to pull in time, should that other vehicle come to a sudden halt he may be found liable in negligence. In broad day light a collision with a stationary vehicle on the highway is *prima facie* evidence of negligence.

Pedestrian crossings should be approached with care. It is the duty of persons who are driving over a crossing for foot passengers which is at the entrance of a street to drive slowly, cautiously and carefully, but it is also the duty of foot passengers to use due care and caution in going upon a crossing at the entrance of a street so as not to get among the carriages and thus receive injury.”³³

Crossing a road in disobedience to traffic lights will amount to negligence. A driver who is crossing when the traffic lights are in his favour is under no duty to look out for traffic, which is crossing in disobedience to the lights. Despite this however, if he sees such traffic, then he must use reasonable care to avoid a collision.³⁴ It is negligence to open the door of a vehicle so as to strike a pedestrian or cyclist on the highway without first taking reasonable care to see that it is safe to open the door.

Sounding a horn or bell may be useful to warn other traffic of the approach of a vehicle but it does not absolve the driver or rider of his duty to take care or give him the right of way.

Basically, all road users owe a duty to each other. However the drivers of automobiles have a greater duty, as they have to obey all the traffic rules and contravening any of these rules is in itself negligence.

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CHAPTER THREE

This chapter shall endeavour to discuss further, the ways in which liability in the tort of negligence may arise.

3.1 **DANGEROUS PREMISES**

An occupier of premises may be held liable for injury caused to someone due to dangers on his premises. The premises to which this refers does not only include land but also all movable structures and conveyances in or on which human beings are invited and permitted to entrust their safety.¹

Liability for dangerous premises lies on the occupier whether or not he is the owner of the premises. This is based on the fact that the occupier is the one who has immediate control and supervision and has given an invitation or licence to come onto the premises. An occupier is any person who is in actual occupation for the time being or having possession or physical control the degree of which need not neither be entire or exclusively his.² There are cases where there can be more than

one occupier and in this event each is under a duty of care to a visitor dependant upon the degree of control exercisable by him.

A question now arises, who is a visitor? A visitor is a person who has been invited or licensed to enter the premises by the occupier. This invitation or license may be either express or implied. Therefore where members of the public habitually visit the occupier's premises about which he knows but does not take any steps to prevent them, a license will be inferred on the circumstances³ however, where the occupier frequently had warned people to get off his premises whenever he had seen them there and where the occupier had fenced off his premises which although broken from time to time, he continually replaced and kept in repair, an invitation cannot be inferred⁴.

In **HERRINGTON V. BRITISH RAILWAYS BOARD**⁵ it was held that a trespasser could sue in respect of injuries sustained as a result of negligence. This is where there is inferred permission.

There however is a limitation as to the area of invitation or license. The area of invitation extends only to the places which a visitor may reasonably be expected to go and where the visitor reasonably believes that he can go with the purpose and scope of the visit.⁶ An Invitation may also be limited to a specific period of time. Whether expressly or

impliedly. Accordingly, where permission which was subsequently revoked had been given to a visitor to enter premises, he must be given a reasonable time to comply and leave by the most appropriate route. Provided that the visitor did so with reasonable expectation he would not become a trespasser whilst he was in the process of leaving the premises.⁷

An occupier must also be prepared for children to be less careful than adults. If a child is too young to understand danger, the license ought not to be held to extend to such a child unless accompanied by a competent guardian. ⁸ Where an occupier has an allurement on this premises that might attract the attention of a child, he will be liable for injury sustained by the child by meddling with that allurement if it is of such a nature that he ought to have anticipated that the child would meddle with it.⁹

In addition to the occupier being liable in all these circumstances the non occupier who actually created the danger will be liable if he had reason to expect that people will be on the premises lawfully during the existence of the danger he has created.¹⁰ An occupier of premises owes a duty of care to persons who are on adjoining premises. The duty is for the occupier to maintain his premises in such a way that they do not become a nuisance.¹¹ If an owner of property causes work to be done on

his premises either by way of repairs or rebuilding he is under a duty to use reasonable care to see that the work does not cause damage to adjoining property.

3.2 LIABILITY FOR DAMAGE CAUSED BY ANIMALS

Any person who is a keeper of an animal of a dangerous species is liable for the damage it causes. The owner of such an animal must keep it secure at his peril. It is not necessary to show that it had escaped from his land or from his control. A dangerous animal kept in a cage imposes liability on the owner if it causes damage even by putting its paw or teeth through the cage.¹² If an animal belongs to a dangerous species its keeper is liable for any damage done without proof being necessary that it had a tendency to do damage. This is regardless of whether the keeper did not know it was dangerous or he believed that the individual animal was tame. ***“people must not be wiser than the experience of mankind. If from the experience of mankind, a particular class of animal is dangerous though individuals may be tamed, a person who keeps one of the classes takes the risk of any damage it may do.”***¹³

If an animal is of a non-dangerous species, the injured plaintiff must prove that it had certain abnormal characteristics and that its keeper had knowledge whether actual or constructive of such. The knowledge

required to impose liability is the actual knowledge of the keeper or that may be imposed on him through a particular servant or agent. It is not sufficient to prove that he ought to have known of the propensity.¹⁴ The knowledge of the abnormal characteristics of the animal need not be personal knowledge of the keeper himself. It will suffice if such knowledge is possessed by his servant who has the care and control of the animal such as by the manager or agent of the keeper's business in connection with which the animal is kept.

3.3 PERSONS PROFESSING SOME SPECIAL SKILL

Persons who profess a special skill have a duty to perform that skill with care. Where a special skill is required for the work to be done, a reasonable man would not be expected to attempt it unless he is capable of performing such skill.¹⁵ In the latter event, he is bound to exercise the skill and competence of an ordinarily competent practitioner in that calling. ***“Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure, nor does he undertake to use the highest degree of skill. There may be persons who have higher education and greater advantages than he has but he undertakes to bring a fair, reasonable and competent degree of skill.”***¹⁶ If a

person holds himself out of to be competent to do some special kind of job an action for negligence will lie for damage which has been caused by the failure to exercise due care and skill, either by showing that the defendant did not possess the requisite skill or by showing that although he possessed it, he did not exercise it at that particular case. Among the people who have such a duty are; lawyers, Medical practitioners, accountants and auditors, Bankers, and finance companies, architects and school teachers. Basically all professionals have a duty to perform their duties competently.

(i) ACCOUNTANTS AND AUDITORS

Accountants and auditors are liable for failing to use that skill and diligence which a reasonably competent accountant or auditor would exercise. They are bound to have knowledge of the particular rules of law which affect them in the exercise of their profession. Their duty to their client arises i) out of contract, (ii) the fiduciary relationship (iii) under statute and (iv) in tort.

The duty that is of concern here is that which arises out of tort. Auditors who prepare company accounts have been held to owe a duty of care to any person whom they ought reasonably to have foreseen would rely on these accounts, for instance a person seeking to take over the company.

Third parties in reading accounts are entitled to assume that they have been drawn up in accordance with the approved practice unless there is some indication in the accounts which provide otherwise. A minority shareholder's action failed when the company had appointed an auditor to value its shares so as to have the job done quickly and cheaply to enable the plaintiff to leave the company. It was held that the standards of a specialist value could not be applied to the auditor who had fallen short of the standard required of a reasonably competent accountant acting as an auditor.¹⁷ Liquidators and receivers are also under a duty to act competently in the discharge of their statutory duties. If a liquidator breaks this duty this renders him liable in damages to an injured auditor and to the auditors in general.¹⁸ They must not make a secret personal profit in the course of performing their duties.

(ii) ARCHITECTS, QUANTITY SURVEYERS, ENGINEERS AND BUILDING CONTRACTORS.

The duty of architects, surveyors, engineers and building contractors is to use the reasonable care and skill of such persons of ordinary competence measured by the professional standard of the time. Engineering contractors can be held liable if they fail to design a building fit for the purpose for which they knew it would be required. An engineer and architect of a bridge may be held liable in negligence for not properly

examining the foundation on which the bridge was to be built.¹⁹ Where an architect employed to prepare plans of a building to be erected on a specified site acted on information as to the size of the site that had been supplied by a person who was not authorized by the building owner to supply any such information did not himself measure or survey the site, as a result of which he prepared plans for a site much smaller than the actual site he was held to be negligent.²⁰ The extent of the builders' duty to investigate and examine the land before they build on it is to be determined by what a careful and competent builder would have done in the circumstances.

(iii) MEDICAL PRACTITIONERS

Medical practitioners like all other professionals owe a duty to their clients to use due care in administering treatment. The liability of medical men was stated in *RV BATERMAN* ²¹, as, ***“ If a person holds himself out as possessing special skill and knowledge and he is consulted as possessing such skill and knowledge by or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, skill and caution in administering the treatment.*”**

No contractual relation is necessary nor is it necessary that the service be rendered for reward. The law requires a fair and unreasonable standard of care and competence.”

The doctor's relationship with his patient that gives rise to the normal duty of care of exercising his skill and judgment to improve the latter's health in any particular respect in which the patient has consulted him is to be treated as a single comprehensive duty. It covers all the ways in which a doctor is called upon to exercise his skill and judgment in the improvement of the patient's physical or mental condition and in respect of which his services were engaged.²²

A medical man cannot examine, treat or operate on a patient without his consent because doing this would amount to an assault or trespass on his body. Even after the patient has given his consent the doctor has a duty to explain to the patient what he intends to do and the implications of that action in a way in which a careful and responsible doctor would do, so that the consent given by the patient was indeed a real consent.²³

Negligence may consist of failure to warn the patient of the dangers of certain treatment. A doctor may also be negligent in failing to isolate a patient with a contagious disease from other patients. Negligence can also be where a medical practitioner performs a sterilization on a female

client but she subsequently becomes pregnant.²⁴ Negligence may consist of a medical practitioner's failure to make adequate arrangements for a patient, failing to give proper instruction, failing to write a prescription in a standard readable way which would reduce the possibility of it being misread by a busy or careless pharmacist, failing to communicate his findings to others responsible for continuing a patient's treatment, failing to make proper inquiries on what treatment the patient might possibly have previously taken elsewhere and many more situations.

A medical practitioner is not only liable for his own actions but also for those of his assistant but not of the nurses at a hospital who are not employed by him.

Hospitals in general also have a duty of care to persons who present themselves there complaining of illness. The duty of the hospital as to patients and persons coming to visit them as far as the condition of the premises is concerned is that of an occupier to a visitor.

From what has earlier been alluded to it is clear that the duty owed by medical practitioners to patients is very wide and general. This is inevitable as they deal with matters of life and death and these must not be compromised.

(iv) LEGAL PRACTITIONERS

Legal practitioners are bound to exercise a reasonable degree of care, skill and knowledge. The standard of skill required of a legal practitioner is that of a reasonable competent and diligent legal practitioner. To sustain an action for negligence against a legal practitioner, he must be guilty of some misconduct, some fraudulent proceeding or should be chargeable with gross ignorance. It is only upon one or other of these professional grounds that the client can maintain an action against the practitioner.²⁵ Although a legal practitioner has the duty to inform, advise the client and ensure that the client has understood what he is advising, it is not his duty to go further to compel the client to accept his advise.²⁶

A defendant who is charged with negligence can however clear himself if he shows that he acted in accordance with general and approved practice. On the contrary however, where a legal practitioner has failed to adhere to the rules of the general practice and a mistake has occurred, a finding of negligence may be inevitable.

Although it may be negligent for a legal practitioner to be ignorant of the law he is not required to have knowledge of all the law. In the words of

Abbot C J “***no attorney is bound to know all the law. God forbid that it should be imagined that an attorney or counsel or even a judge is bound to know all the law.***²⁷ They may be liable for want of care in preparation of the cause for trial, or of attendance of witness and for the misconduct of the cause. Although a legal practitioner is not bound to know the contents of every statute, there are some statutes which it is his duty to know.

It is the duty of a legal practitioner on taking his client's instructions to ascertain the relevant facts in order that he can form an opinion as to whether or not there is a right of action.²⁸ This is the general duty that legal practitioners owe to their clients.

This chapter endeavoured to discuss further the ways in which liability is negligence may arise. The next chapter shall analyse the attitude of the Zambian courts towards negligence.

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CHAPTER FOUR

4.1 THE RESPONSE OF THE ZAMBIAN COURTS TO NEGLIGENCE

In Zambia the law of negligence is recognized. This is clear from the number of negligence cases that have been adjudicated upon by the courts. There is no statute in Zambia that regulates the tort of negligence. Therefore the principles that are applied in cases of negligence are drawn from the common law as it has developed over the years.

In the field of medical negligence in particular there has been a lot of adjudication. In the case of **THE PEOPLE V. ZULU**¹, the court elaborated on how medical negligence can also amount to manslaughter. The facts of this case were that a twenty-eight year old was accused and charged under section 179 of the penal code with manslaughter the particulars being that on 14th January, 1968 at Lusaka, he unlawfully killed Emily Shawa a sixteen months old child. It was a case of manslaughter by negligence in that the defendant had administered medical treatment to the deceased without reasonable skill. The court

held that he was under a duty in law to have reasonable skill and to use reasonable care in administering it. It was found that he possessed no skill and used no care except in the pure mechanics of giving the injection. He had no medical training and no knowledge of the properties and usage of chloroquine or of its correct dosage. Accordingly, he was in breach of the said duty which is a duty tending to be preservation of life or health. What the defendant did amounted to culpable negligence which caused the deceased's death and was therefore unlawful.

Although the courts recognize the prevalence of negligence they do not only seek to serve the interests of the plaintiff but the defendant as well. For instance in the case of medical negligence, it is a common law principle that a medical practitioner must not be necessarily liable in negligence by a wrong diagnosis. A wrong diagnosis is not necessarily a negligent diagnosis. In the case of **CICUTO V DAVIDSON AND OLIVER**,² it was stated that a medical man is not guilty of negligence if he has acted in accordance with the practice accepted as proper by a reasonable body of medical men skilled in that particular act, mainly because there is a body of opinion who would take a contrary view; a wrong diagnosis is not necessarily an unskilled or negligent diagnosis. In his judgment Magnus J. followed the position summed up by **Donning LJ in ROE V. MINISTRY OF HEALTH**³. The learned justice said, "*These two men have suffered such great consequences that there is a natural*

feeling that they should be compensated. But we should be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point but we must not condemn as negligent that which is only a misadventure.” The judgement was therefore for the defendants.

This position has been taken by the courts in order to help medical practitioners perform their functions without any worries of attracting tortious liability at the slightest instance. There is however a limit to this as those who are found to have been truly negligent for instance those who administer medication without any skill are held liable.

In issues of liability for damage caused by animals the Zambian courts have taken the same view as the English courts that is to say that for the owner of the animal to be held liable the plaintiff must prove that it had the propensity to act dangerously and that the owner or his servant was fully aware of the dog’s ferocious habit. In the case of a dog for instance, scienter is proved by showing that the dog has a mischievous propensity

to bite mankind. One bite known to the owner is enough but it is not necessary to prove on one bite if it can be proved that the owner knew that the dog was a ferocious dog that is to say a dog likely to bite without provocation.⁴

Occupiers' duty to people on adjoining land has also been addressed by the courts. In the case of **RUSSELL V. ATTORNEY GENERAL**,⁵ the issue of duty not to permit escape of fire to adjoining land was well articulated. The facts of this case were that the plaintiff brought an action in the high court against the defendant to recover damages in respect of loss sustained as a result of a bush fire which spread from the ranch of the defendant to the farm of the plaintiff. The defendant, the Government of the Republic of Zambia was running a state ranch east and adjacent to the plaintiff's farm. The plaintiff alleged that the defendant was negligent because he (i) omitted to maintain adequate fire breakers on their common boundary (ii) caused or permitted the fire to spread from the ranch to the farm and take adequate precautions to prevent it doing so (iii) neglected to take any adequate measures to contain or extinguish the fire on the farm (iv) failed to maintain any adequate fire fighting force and (v) neglected to warn the plaintiff of the spread of fire. The defendants alleged that they did not know of the existence of the fire and that it was not started by trespassers. It was held that there is no legal duty on an occupier to prevent an accidental

fire from spreading to adjoining land which was not at the time the occupier had knowledge of the fire controllable. From this it is clear that liability for fire that escapes falls on the occupier if he caused the fire and had knowledge of it but did not take adequate measures to prevent it from spreading. **SCOTT J.** stated that if the defendants had had knowledge of the fire and failed to take reasonable steps, then they would be liable.⁶

In the case of **BOTHA V. ZAMBIA RAILWAYS BOARD** ⁷ the defendant claimed damages against the defendant Zambia railways board by reason of the negligence and or breach of statutory duty on the part of the defendant in that the defendant railway board failed to prevent sparks, coals or other inflammable material escaping from the defendant's steam locomotive which was being driven along the permanent railway as the defendant was required by law to do as a result of which the plaintiff sustained loss or damage. It was held that although the plaintiff had not established any negligence in the operation of the said locomotive on adjoining agricultural land in the dry season which danger was fully appreciated by the defendant board and in view of the fact that the evidence disclosed negligence on the part of the defendant board in this regard, the defendant was liable for the consequential loss to the plaintiff. In this case unlike the latter one, the defendant knew the danger of the locomotive, therefore they were held liable. Knowledge is a

very important aspect in establishing liability in cases of occupier's liability, the Zambian courts have taken this view as regards such cases and from the cases that have been decided it is clear that knowledge of the occupier of the danger is critical to establishing liability.

The duty of motorists to other motorists was addressed in the case of **CENTRAL REGRIGATION CO. Ltd V. THE ATTORNEY GENERAL**⁸, it was held that there is a mutuality of duties of care of all road users towards other road users. The facts of this case were that a claim arose out of an accident between a cortina pick-up and an Austin tipper truck. The driver of the cortina alleged that he had seen the break lights of the truck come on and the truck swerved to the left which made him think the truck was about to be parked and so he indicated in order to overtake and when he was abreast with the truck, he heard a bang. Baron DCJ in passing judgment stated "**where two drivers have each contributed significantly to an accident it is always difficult to assess the percentage culpability of each of these drivers because they both could have avoided the accident, the defendant if he had seen the overtaking vehicle and had made sure that his signal, if he gave one had been seen and the plaintiff having been put on this inquiry by the brake lights by following down and making certain that it was safe for him to overtake before attempting to do so. Nor can I see that the opportunity of either of the drivers to**

avoid the accident was later in time than that of the other. For these reasons both drivers must in my view be held to be substantially equally to blame". The duty of road users is well articulated here and brings to the fore what was stated by lord Du parq, that "an underlying principle of the law of the highway is that all those using the highway lawfully must show natural respect and forbearance. This means that the duty is mutual and does not fall wholly only on one party. Everyone must take responsibility for their actions when they are on the highway.

In **KENMUIR V. HATTINGH**,¹⁰ the plaintiff claimed damages in respect of damages to his motor vehicle which was involved in a collision with that of the defendant. The defendant counter claimed in respect of damage to his vehicle. It was held that in such a case what applies to the defendant that is that he must keep a proper lookout at all times and must be in a position to take reasonable evasive action even where others are negligent. However the plaintiff in driving at an excessively high speed was unable to slow down and avoid a vehicle at least some 205 meters distant travelling slowly preparatory to turning was clearly negligent abinitio. In light of this it can be said that although the duty of care is mutual among all road users, if one is unquestionably negligent, he will bear the liability wholly. Cullinar J stated "the drivers must keep a proper lookout at all times and must be in a position to take

reasonable evasive action even where others are negligent. He cannot merely carry on regardless of other drivers because he has the right of way. The question whether one or both of the parties were negligent and the extent of any such negligence would depend on the distance between the vehicles at the time. The greater the speed the shorter the distance, the greater becomes the risk. A vehicle which without warning turns sharply in front of a vehicle which is approaching at speed and is only a short distance away is clearly guilty of a very high degree of negligence and may be at fault for an accident caused by such a manoeuvre. In between the perfectly safe and the suicide there is an infinite variation of negligence which can be assessed on the facts found. Such facts refer to the speeds, distances, the opportunities for either driver to anticipate what the other driver is going to do etc.” This drives the point of mutual liability further and also illustrates how to determine the negligent party in any particular set of circumstances.

Employers have a duty to provide a safe working environment for their workers. If they breach the duty and a worker gets injured in the process of doing his work, they will be liable in damages. The worker will have to be compensated for the injury he has suffered. In the case of **UNITED BUS COMPANY OF ZAMBIA LIMITED V. JABISA SHANZI**, the plaintiff was in the course of his employment. The employee was entitled to compensation under the workman's compensation act and was also

entitled to damages from the defendant. From this it is clear that the
Zambian courts do recognize that employees have a duty of care to their
employees.

From the decisions of the courts that have been discussed above, it is
clear that the Zambian courts do recognize the tort of negligence just as
the English courts do. The duty owed by one to his neighbour cannot be
dispensed with and it is important that everyone be aware of this duty
and also identify who in law is their neighbour.

4.2 REASONS WHY NEGLIGENCE IS PREVAILANT

The reasons for the occurrence or prevalence of negligence in Zambia are
many and most of them are due to the attitude of the Zambians. From
research the reasons for the prevalence of negligence are due to an
inefficient police force, corruption, none supervision of investment
projects and local industries, the law itself and the poor economic
situation in Zambia.

When we talk of the police force in Zambia and their operations, the
general view of the Zambians is that is very inefficient. The policemen
themselves are so unreliable that they are often susceptible to bribes as
if they are not law enforcement officers. Because of the casual attitude of

the police force, people do not care whether they act negligently or not. The police will not do anything to them as long as they give them bribes. Jumping traffic lights for instance is negligent as it is a breach of the duty a motorist owes to other motorists but apart from this it is also a criminal offence. However, because of the inefficiency of the police force people are very comfortable to act negligently as then the only person who can bring an action against them is the injured person and very rarely does this occur.

In the accident which occurred in April, 2005 involving pupils from Kawambwa secondary school for instance, the cause of the accident was said to have been overloading. If there was an effective police force such a truck would not be allowed to travel and such an accident would not have occurred. The main problem is that corruption in Zambia has become so rife to the extent that people think that it can get them out of any kind of trouble they can find themselves in.

In Zambia a lot of industries are controlled and run by foreign investors. When these foreign investors come into the country their investment projects are screened and approved by the Zambia Investment centre which is the supervisory body of foreign investment in Zambia. Apart from approving investment projects the investment centre is also supposed to supervise these investment projects to ensure that the

investors adhere to the conditions in the investment agreements they sign. However, due to lack of funds this supervision does not take place. This in essence gives the investors an opportunity to do whatever they want to do, even illegal things. They do not adhere to safety regulations in relation to their employees and are very negligent in the way they maintain the place of work. In the accident that occurred in a Chambeshi explosive factory in 2005, it was found that the people that were employed to manufacture explosives in the plant were not trained and experienced this means that the employers had breached their duty to employ skilled persons. This is because they had knowingly employed people who did not have skills and knowledge to deal with such a dangerous thing as explosives. Such a situation would not exist if there was a strict supervisory body to ensure that regulations, especially these relating to safety of workers are implemented.

Law as it is known is an instrument of social order. It maintains order and creates security in society. However the law itself if abused may lead to people being negligent. Although this may sound contradictory as one would ask that if law maintains order how then can the same law lead people to be negligent. As has earlier been stated, the law can only lead one to be negligent if it is abused. The law of contract for instance, when it talks of exclusion clauses that exempt people from liability can be abused. Simply because a person has put an exclusion clause on their

liability may lead him to act carelessly because then he knows he will not held liable for negligence. A car park for instance that says “***park at owner’s risk***” will not be even take care to at least provide some reliable security to protect the cars that are parked there simply because they have an exclusion clause. They in this way abuse the law and thereby cause negligence.

Another aspect of the law that may be abused and lead to negligence is the issue of discretionary power. When one is vested with discretionary power they are given the privilege to perform their functions according to their own determination. This power may sometimes be abused as one would act negligently simply because they have the power to decide in which way they will perform their functions.

This is how the law itself can be abused and in the end cause negligence.

The poor economic situation in Zambia is also a contributing factor to the prevalence of negligence. As has earlier been alluded to, corruption gives rise to negligence and it is because of poverty that people resort to corruption.

Due to the poor economy most of the professionals in Zambia especially medical practitioners and technicians have left the country for greener pasture in other countries. Due to this, it is now common for non

professionals who are not adequately trained to do work that is supposed to be done by professionals. In hospitals and clinics today it is common to find clinical officers performing the duties of doctors when they are not adequately trained for this purpose. This may lead to a higher prevalence of medical negligence cases. Some nurses complain that due to lack of drugs in hospitals they are forced to improvise almost all the time and give medicines that are not meant specifically for that kind of ailment but will nevertheless render some help. However in some cases a patient may react negatively to that improvised medicine and suffer injury. All this is due to the hash economic situation.

These are the reasons for the occurrence of negligence. There may be more but in a nutshell it can be said that the way the society is shaped both economically and culturally is what determines how people relate to each other in terms of the performance of duties owed.

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CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

This thesis had set out to examine the law of negligence in Zambia with emphasis on the neighbour principle and to what extent it is being applied.

5.1 CONCLUSION

From the analysis of the law of negligence first of all in general and also what has been adjudicated upon it is clear that there are a lot of breach of duty cases in Zambia. Although the courts do recognize and understand the law of negligence the general populace does not understand this. In occupier's liability for instance people think that they cannot be liable for any injury caused to someone on their premises simply because they own that property. This shows that there is a lot of ignorance amongst the Zambians about the tort of negligence as a whole. There are some aspects of negligence which are common and are known by a vast majority of people, however there are also other aspects that are over looked for instance liability for action of one's animals and also the duty owed by those owning dangerous premises.

The neighbour principle which as articulated by Lord Atkin is that you must take reasonable care to avoid acts or omissions which you can reasonably foresee are likely to injure your neighbour has not been observed to a high degree by people in Zambia. This could be because they do not understand who in law is their neighbour. Lord Atkin had gone further to state that your neighbour is anyone who is directly or closely affected when you are directing your mind to acts or omissions which are called in question.² This is what people seem not to know, perhaps they look at the word "neighbour" in its literal sense. This is why people do not know which duties they owe according to their station in life. Some employers do not know of the duties they owe to their employees and they think that paying them is enough even if there is no safe place of work.

Professionals likewise do not know that as professionals there is a certain degree of care that is expected of them. They may be aware of the law of negligence in general but not the way it relates to them.

There have been instances of having substandard products produced in Zambia. This can be attributed to manufacturers not knowing or having regard to the duty of care they owe to the consumers.

From the vast number of negligence cases that have been adjudicated upon, it is clear that it is very prevalent in Zambia in most cases it is because people do not understand the neighbour principle. There is therefore need for everyone to at least have some basic knowledge about negligence so that they can take it into consideration when ever they direct their mind to certain acts or omissions.

The Zambian courts are very knowledgeable on the law relating to negligence and make people who breach their duty of care pay damages. However the court does not only support the plaintiff because there are instances when both the plaintiff and defendant are equally responsible for the negligence. In such cases there is mutual liability. This is very common in cases of negligence on the highway.

In a nutshell it is important that everyone becomes aware of their duty to take care in whatever circumstances they may find themselves in.

5.2 RECOMMENDATIONS

Having discussed what the general law of negligence is, the response of the Zambian courts to negligence and also the reasons why negligence is prevalent, it is imperative that recommendations be made in order to

make the general populace be aware of the tort of negligence in order for them to perform the duties they may owe in various situations.

The fight against corruption that is currently being spearheaded by the Zambian head of state Mr. Levy Mwanawasa through the task force must be more general. The fight against corruption as it is today can be said to focus mainly on large scale corruption especially that which involves politicians. There is need however to narrow down the this fight even to smaller institutions and individuals, for instance, the police force to ensure that even as they are manning road blocks and performing other functions none of them receives bribes and whoever contravenes any traffic rules must face the consequences. In this way motorists will be more careful not to act negligently because then they will know they will not get away just paying a bribe. This will be so not only in road traffic situations but in all other situations that may give rise to both criminal liability and tortious liability in the tort of negligence.

Industries and factories must adhere to the standards that have been laid down as regards safety of workers. There must be strict supervision to ensure that such regulations are adhered to. This will reduce on the number of accidents that will occur out of negligence. The same goes for manufacturers as they must also produce goods that are fit and not

harmful to consumers. There is also need here to inspect what goes on in industries when they are manufacturing their goods.

Professionals like doctors, accountants, auditors, architects, engineers must be made aware of the duties they owe in their particular fields. When they are being trained to be professionals they must also be taught about the duties that will arise when they become professionals. Some professionals do not act negligently simply because they want to but because they do not know the duties that arise due to their profession. If they become aware they may be more careful in their dealings to avoid situations that may give rise to tortious liability in the tort of negligence.

When it comes to foreign investors, the *Zambian investment centre* has been mandated to regulate foreign investment. The purpose of the agency is to ensure that the proposed investment projects are screened and approved before the investment is undertaken. In addition to screening project proposals the investment agency is supposed to promote and encourage foreign investment. Once the investment project has been approved the investment centre has to monitor its development and once it begins operations making sure that it meets the obligations and conditions specified in the investment approval or other documents. However due to problems of inadequate manpower, insufficient resources the *Zambia Centre of Investment* does not effectively supervise the investment projects once they have been approved to make sure that all

of the conditions and restrictions are respected. There is therefore need to make the supervisory agency of investment that is, the investment centre more effective by giving it adequate funding and manpower. In this way the investors will not readily disregard the conditions of the investment approval safety standards would be adhered to because there would be frequent inspections. Due to fear of having their investments stopped, investors will be more careful not to breach the duties they are owe to their employees especially that of providing a safe place of work. This will greatly reduce on the negligence of investors.

Finally, it must be said that even though there are a lot of reasons for the prevalence of negligence, people must also change their attitude as regards their behaviour towards their "neighbour", where a duty is owed they must try by all means to perform it.

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