

DAMAGES IN NEGLIGENCE CASES IN ZAMBIA



CHIBWE, FANWELL. F.

26009099

A directed research essay submitted to the University of Zambia Law Faculty in Partial fulfillment of the requirements for the Award of the Bachelor of Laws (LLB) Degree.

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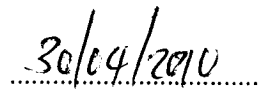
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Abstract

This dissertation was tasked to examine the award of damages in negligence cases in Zambia. In this regard, it endeavoured to establish whether there is consistency in the award of damages in negligence cases in Zambia. It then examined the principles that courts follow in the quantification of damages in negligence cases.

Through research, the dissertation found that that the plaintiff has a duty to adduce credible evidence of consequential illness to uphold the award of damages in negligence cases. This is because negligence is not actionable per se and there is no right of action for nominal damages. The dissertation also found that courts in Zambia have adjudicated many cases bordering on negligence and have followed the principles of law that have developed through case law. However, the incidences of inconsistency in the award of damages on negligence were common at the High Court level.

Bearing in mind the fact that the law of negligence is still growing and new areas are being discovered, the dissertation recommends that organised workshops for the Judges would not only help the courts of law to keep abreast of the new developments but it would also ultimately foster consistency in the in the award of damages in negligence cases in Zambia

Acknowledgements

The successful completion of this Directed Research would not have been possible without the valuable contributions of certain individuals. It is for this reason that I feel duty bound to acknowledge the support they rendered to me through out the period of my research.

Firstly, I would like to point out that without the power of the Holy Spirit of God, I would not have had the strength to soldier on this life (**Zechariah 4:6-7**). I want to sincerely thank my supervisor, Mrs. Chanda, Nkoloma Tembo, for her guidance, patience, and steadfast support in the way she guided me through the research. To her I say: 'May God continue to increase the levels of knowledge and wisdom that is desperately needed in this starving world, and it was, and still is, an honour to have been taught and supervised by you. May God richly bless you.'

I thank my Pastor and Mentor Bishop Chikunjiko and Pastor Florence Chikunjiko who supported me spiritually, financially and morally; through them God turned my life upside down in Lundazi, am also greatly indebted to Pastor Hara and Mrs. Hara who made me realise that God truly loves me and am greatly inspired and challenged by their hospitality and compassion towards me. Am equally thankful to my lovely friends Noel Mataka; a General in the word of God, Maurice Lubasi; a man after God's own heart, Kennedy Banda; a man on fire for God, Jacqueline Mpala; a woman full of great inspiration, Grace.Y. Namwali; a stable and focused young lady, full of wisdom and with a strong passion for God. Great thanks also go to Kebby Wishimanga, Gilbert Mwamba, Ismail Siame and Glory Chipoya, thanks for the sound and timely advice you have always given me. You have been there for me when I needed you the most. Thanks.....

Dedication

First and foremost, I would like to express my deep and profound gratitude to my family for all the sacrifice, compassion, support, and care you have given me just to ensure that I had an education. The road may have been stiff and the challenges may have been many, but still, you have always believed in me. For this cause, I shall forever be indebted to you and this work is dedicated to you all. To my dear and beloved Mum Timalizge Nyirenda, my wonderful and caring aunt Elizabeth Nyirenda (Mrs. Mvalo) and my uncle Mr. John Mvalo whose moral and financial support has been incredible and am forever grateful, my elder sister Joyce and my most cherished and only young sister Zizwani.

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CHAPTER ONE

1.0 TITLE: DAMAGES IN NEGLIGENCE CASES IN ZAMBIA

2.0 INTRODUCTION

Zambia like any other country has witnessed a number of civil claims in which plaintiffs allege that they have suffered injury as a result of the negligent conduct of another. In these cases, it is traditionally the case that the courts have to determine the quantum of damages payable to the injured party. The law relating to the award of damages arising from Negligent conduct has been discussed in a number of cases by the Zambian Courts and in foreign jurisdictions. The principles governing the Tort of Negligence are common law based and Zambia being a common law jurisdiction also relies on these principles.

The core principle of the law of Negligence is that once the plaintiff has successfully established the ingredients of the tort of Negligence, recovery of damages should follow¹. It must be mentioned that this Essay seeks to explore the principles governing the award of damages in negligence cases.

3.0 OPERATIONAL DEFINITION OF TERMS

Damage: includes loss of life and personal injury². It also implies harm or injury done to a person by the wrongful act of the defendant.³

Damages: The compensation or indemnity for a loss suffered by a person following a tort, breach of contract or breach of some statutory duty⁴.

¹ W.V.H. Rogers, Winfield and Jolowicz on Tort, 11th Edition. (London: Sweet and Maxwell, 1979). p66.

² The Law Reform (Miscellaneous Provisions) Act Chapter 74 of the Laws of Zambia, Section 11.

³ J. N Pandey. Law of Torts With Consumer Protection Act, 1986 and Motor Vehicle Act, 1988. (Central Law Publications, 107, Darbanga Colony, Allahabad, 2002). p14.

Fault: This basically means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this act, give rise to the defence of contributory negligence⁵.

Inter alia: This Latin phrase means among other things.

Negligence: This is the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff.⁶

Res Ipsa Loquitur: The Latin phrase means “the thing speaks for itself”, so that in certain cases it is sufficient for the plaintiff to prove the accident and nothing more. In such cases the proof of accident is *prima facie* evidence of negligence.⁷

Contributory Negligence: This term is used to describe a situation where the plaintiff’s injury is partly caused by the negligence of the defendant and partly by his own negligence. It is a partial defence to a claim in tort.⁸

Restitutio in Integrum: This a Latin phrase for “restoration to the original”. This principle is invoked more predominantly in the law of contract where it is applied to restore the parties to their original position following rescission of the contract between them.⁹

Volenti non fit injuria This is a Latin maxim which is translated to mean; “to one who is willing no harm is done”. It also means that to which man consents cannot be considered an injury. It is a defence to a claim in tort, particularly in respect to the defendant’s negligence¹⁰.

⁴M. Woodley. *Osborne’s Concise Law Dictionary*. 10th Ed. (London: Sweet & Maxwell, 2005). p129.

⁵ The Law Reform (Miscellaneous Provisions) Act. Chapter 74 of the Laws of Zambia, Section 11

⁶M. Woodley. *Osborne’s Concise Law Dictionary*. 10th Ed. (London: Sweet & Maxwell, 2005). p274.

⁷ Dr. J.N Pandey. *Law of Torts With Consumer Protection Act, 1986 and Motor Vehicle Act, 1988*. (Central Law Publications, 107, Darbanga Colony, Allahabad, 2002). p251

⁸ Rogers,. *Winfield and Jolowicz on Tort*. 11th Edition. (London: Sweet and Maxwell, 1979). p132

⁹ M.Woodley. *Osborne’s Concise Law Dictionary*. 10th Ed. (London: Sweet & Maxwell, 2005). p352.

4.0 STATEMENT OF THE PROBLEM

The need to have a consistent approach in dealing with cases of the award of damages in negligence cases cannot be over emphasized. Indeed the call to having a consistent approach in resolving cases of negligence goes to the very root of the characteristics of a good legal system, and a good legal system in this sense, is one which manifests the virtues of certainty, predictability and regularity in its approach towards solving legal problems of the same nature. The problem is compounded further by the lack of legislation to deal specifically with the issue of quantum of damages recoverable from negligence cases.

However, it is conceded that even with legislation in place to deal with specific issues of damages arising from negligence cases, the issue cannot be easily put to rest because each case that comes before the courts will have to be determined in the light of circumstances involved and on its own merits.

5.0 SIGNIFICANCE AND PURPOSE OF THE STUDY

The inconsistency in awarding damages in negligence cases raises a number of issues namely, whether the Zambian population possesses the minimum knowledge surrounding the law of negligence. Again, one of the pertinent questions that need to be addressed is whether the courts do take into account public policy considerations in awarding damages to plaintiffs in certain cases like medical negligence to justify the departure from the general rule that once the essential ingredients of the tort of negligence are proved the plaintiff is entitled to recover damages. Another question tied to the preceding issue is the question namely, whether it is prudent for the courts to take into account public policy considerations in these cases. It is

¹⁰ M. Woodley. Osborne's Concise Law Dictionary. 10th Ed. (London: Sweet & Maxwell, 2005). p422.

hoped that the study will highlight the practical difficulties faced by the courts associated with the award of damages in negligence cases and clarify the core principles underpinning the tort of negligence, the principles developed in the award of damages in negligence cases and the role of public policy in the tort of negligence with special regard to medical negligence.

6.0 RATIONALE AND JUSTIFICATION

The study is pertinent and timely in view of the serious inconsistencies practiced by the courts in the award of damages in negligence cases which has raised concerns among legal practitioners, academicians and lay men. Simply put, the inconsistency is undesirable and a candid explanation of the matter is important in this regard.

7.0 RESEARCH QUESTIONS

- 1 What is negligence?
2. Is negligence actionable per se?
3. What are the core principles underpinning the tort of negligence?
4. What principles have the courts developed in the award of damages in negligence cases?
5. What are the practical difficulties faced by the claimants in trying to recover damages in negligence cases in Zambia?
6. What are the possible defences to a negligence claim?
7. How crucial is the issue of quantum of damages in negligence cases?

8. Have the Zambian courts shown an appreciation in the manner of quantification of damages in negligence cases?

9. What is the cause of the inconsistency in the award of damages in negligence cases?

10. What is the link between public policy and the Tort of Negligence with special reference to medical malpractice?

11. Is it morally prudent for the courts to take into account public policy considerations when determining the quantum of damages in negligence cases?

12. What should be done to foster consistency in the award of damages by the courts in negligence cases in Zambia?

8.0 RESEARCH OBJECTIVES

1. To highlight the principles developed by the courts in assessing the quantum of damages in negligence cases.

2. To find out if the courts in Zambia are consistent in awarding damages in negligence cases.

3. To bring to the fore the practical difficulties faced by the claimants in trying to recover damages in negligence cases.

4. To establish the role and influence of public policy in the award of damages negligence cases with special reference to medical malpractice.

9.0 SCOPE OF THE STUDY

The research will be confined to cases of negligence as adjudicated upon by the Zambian courts in which the quantum or the award of damages was an issue, recourse will also be had to the cases decided by foreign courts just for purposes of comparison or as a source of law. The research will also critically evaluate the role and influence of public policy in the award of damages in negligence cases with special reference to medical malpractice cases.

10.0 METHODOLOGY

This research is a qualitative one. It shall embrace both desk research and occasionally field investigations. In this regard the desk research will be through the collection of secondary data in the form of Law Reports, books, journals dissertations and as well as the internet.

11.0 RESEARCH DESIGN (PROPOSED CHAPTERS)

The research shall be broken down into chapters as follows:

Chapter 1

I.0 General Introduction

1.1 Introduction

1.2 Operational Definition of terms

1.3 Statement of the problem

1.4 Objectives of the study

1.5 Methodology

Chapter 2

0.0 What is negligence

1.0 What are the core principles underpinning the law of negligence

2.0 The rule of foreseeability

3.0 The Doctrine of *Res Ipsa Loquitur*

Chapter 3

1.0 The crucial issue of Quantum of damages in negligence cases

2.0 What principles have been developed by the courts in the quantification of damages in negligence cases?

3.0 What are the practical difficulties faced by the plaintiffs in their action to recover damages in negligence cases

4.0 Defences to the claim of negligence

Chapter 4

1.0 .Medical malpractice

2.0 Judicial response towards claims of medical malpractice

3.0 Arguments in favour for the recovery of damages for rearing or raising the child in medical negligence cases.

4.0 Moral justification for the denial of the plaintiff's recovery of damages for rearing the child in medical negligence cases.

CHAPTER 5

1.0 Conclusion

2.0 Recommendations

3.0 Bibliography

CHAPTER TWO

12.0 THE CORE PRINCIPLES UNDERPINNING THE LAW OF NEGLIGENCE

Chapter one defined key concepts in relation to the award of damages in negligence cases. This chapter will concern itself with the discussion of the definition of negligence and the core principles underpinning the law of negligence. It will also highlight the operation and applicability of the rule of foreseeability and the doctrine of *Res Ipsa Loquitur* in negligence cases.

“It is a principle of civil liability that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilized order requires the observance of a minimum standard of behaviour”.¹¹

Implicit in the foregoing statement is the notion of “duty of care” which is the cornerstone of the law of negligence. It is imperative to mention that the concept of negligence developed under English Law. Although English Common Law had long imposed liability for the wrongful acts of others; negligence did not emerge as an independent cause of action until the eighteenth century. Originally, liability for failing to act was imposed on those who undertook to perform some service and breached a promise to exercise care or skill in performing that service¹². Gradually, the law began to imply a promise to exercise care or skill in the performance of certain services. This promise to exercise care, whether express or implied, formed the genesis of the modern concept of “duty.”

¹¹ Per Lord Viscount Simonds in **Overseas Tankship (U.K.) Limited v. Morts Docks & Engineering Co. (The Wagon Mound Rule No. 1** [1961] All ER 404 at Page 413.

¹² V. Harpwood. **Principles of Tort Law**. 4th Ed. (London: Cavendish Publishing House, 2000). p23.

A classical exposition of the concept of negligence was given by Baron Alderson in Blyth v Birmingham Waterworks Co¹³ in which he stated thus;

“Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.” It can be argued from the definition given above that the standard criteria for determining whether an individual has acted negligently or not is an objective one in which all the surrounding circumstances of the case are taken into consideration.

1.0 ELEMENTS OF NEGLIGENCE

The learned authors of Winfield and Jolowicz¹⁴ have pointed out that negligence as a tort is defined as a breach of a legal duty to take care which results in damage or injury to the plaintiff. As a prelude to the discussion on the requirements of the tort of negligence, it is cardinal to mention that it is universally accepted that negligence does not exist in a vacuum. Nor is there an all embracing duty owed to the whole world in all circumstances. It should be noted that negligence liability may also overlap with non-tortious grounds of liability under contractual, equitable or public law principles. This potential overlap may give rise to difficulties where negligence principles point to a different direction from those of, for example, contract law¹⁵. On occasion, the courts have found it necessary to limit the scope of negligence liability by reference to other non-tortious principles in order to maintain the harmony and coherence of the law. Subject to these qualifications, negligence has a wide scope.

¹³ [1856] 11 Ex 781

¹⁴ W.V.H. Rogers Winfield and Jolowicz on Tort. 13th Ed. (London: Sweet and Maxwell Ltd, 1979). p102

¹⁵ J. Charlesworth. Negligence. 6th Ed. (London: Sweet & Maxwell, 1997). p218-219.

It is precisely this potential width of interests protected and situations to which the law of negligence may be applicable that has led the courts to use their ingenuity to develop a complex series of requirements for negligence liability. Stated summarily, there are six requirements, namely: firstly, the existence in law of a duty of care situation, that is to say, one in which the law attaches liability to carelessness. There has to be recognition by law that the infliction of the kind of damage in suit on the type of person to which the plaintiff belongs by the type of person to which the defendant belongs is actionable; this requirement is in consonance with the principle espoused by the concept of jural relations in jurisprudence which state that the presence of a right in one person (x) implies the existence of a correlative duty in (y) not to interfere with the enjoyment of that right. More importantly, the concept also establishes that a right can only be enforced if it has been recognized and protected by the law¹⁶.

Secondly, Careless behaviour by the defendant; that it failed to measure up to the standard and scope set by law; thirdly, a causal link or connection between the defendant's careless conduct and the damage; fourthly, foreseeability that such conduct would have inflicted on the particular plaintiff the particular kind of damage of which he complains. The third and fourth requirements perform different functions and are determined by applying different tests. Requirement three ascribes causal responsibility to the defendant, whereas the function of requirement four is to limit actionability by the plaintiff by determining whether he should have an action against the defendant. When these four requirements are satisfied the defendant is liable in negligence. Then and only then do the next two considerations arise, namely: the fifth point which deals with the extent of the responsibility for the damage to be

¹⁶R.W.M Dias. Jurisprudence. 5th Ed. (London: Butterworths, 1985). p25

apportioned to the defendant where others are also held responsible; and the sixth point that comes into play concerns the monetary estimate of the extent of damage¹⁷. It deserves to mention that there is no magic in the order as set out, nor should it be supposed that courts proceed from points one to six to in sequence. Rarely, if ever, does a dispute involve all six. The above, therefore, is only a presentation of the ingredients of liability for the purpose of exposition.

1.1 DUTY OF CARE: THE GENERAL CRITERIA

The tort of negligence is committed when damage is sustained. The period of limitation begins to run from the date of that damage¹⁸. It can be argued that the concept of duty of care serves at least two vital purposes. The first is to provide an overall framework for the huge variety of situations in which liability may arise. The second purpose is one of limitation; setting the boundaries within which one person could be liable to another for the consequences of careless behaviour. Thus, negligence connotes conduct that falls below the standards of behavior established by law for the protection of others against unreasonable risk of harm¹⁹. A person has acted negligently if he or she has departed from the conduct expected of a reasonably prudent person acting under similar circumstances.

The duty in negligence, therefore, is not simply a duty not to act carelessly; but a duty not to inflict damage carelessly. Since damage is the gist of the action, what is meant by 'duty of care situation' is that it has to be shown that the courts recognize as actionable the careless infliction of the kind of damage of which the plaintiff complains, on the type of person to

¹⁷ J. Charlesworth. Negligence. 6th Ed. (London: Sweet & Maxwell, 1997). p218-219.

¹⁸ Ibid

¹⁹ W.V.H Rogers,. Winfield and Jolowicz on Tort. 11th Edition. (London: Sweet and Maxwell, 1979). p73

which he belongs, and by the type of person to which the defendant belongs. It is a preliminary consideration whether liability is even capable of attaching to the defendant in the given type of situation. The words of Lord Wright in Grant v. Australian Knitting Mills Ltd²⁰ are instructive in this regard. His Lordship opined thus;

It is essential in English law that the duty should be established: the mere fact that a man is injured by another's act gives in itself no cause of action: if the act is deliberate, the party injured will have no claim in law even though the injury is intentional so long as the other party is merely exercising a legal right: if the act involves a lack of due care, again no case of negligence will arise unless the duty to be careful exists.

*The sentiments expressed above were also echoed in the case of Bradford Corporation v Pickles*²¹. In this case the Corporation had statutory power to take water from certain springs. Water reached the springs by percolating (but not in a defined channel) through neighboring land belonging to Pickles. In order to induce the Corporation to buy his land at a high price, Pickles sank a shaft on it, with the result that the water reaching the Corporation's reservoir was discoloured and its flow diminished. The Corporation asked for an injunction to restrain Pickles from collecting the subterranean water. It was held that an injunction could not be granted on the ground that Pickles being a landowner, he had a right to drain from subterranean water not running in a defined channel.

The modern test for determining the existence of a duty of care in a given type of relationship was derived from the celebrated judgment of Lord Atkin in Donoghue v Stevenson²². The principle enunciated in this case has now become known as the neighbor principle. In this

²⁰ [1936] A.C 85; 103

²¹ [1895] AC 587

²² [1932] AC 562

case the appellant brought an action against the manufacturer of ginger beer bought by a friend. She drank some of the ginger beer and when the rest was poured into her glass she noticed the remains of what appeared to be a decomposed snail floating out of the opaque bottle into her tumbler. The appellant suffered gastro-enteritis and nervous shock as a result of having drunk some of the ginger beer, and the nauseating sight of the foreign body in her drink. The case proceeded to the House of Lords on the preliminary point as to whether an action existed for the tort of negligence irrespective of the fact there was no contract between the appellant and the manufacturer of the ginger beer. The basis of the case was that the manufacturer owed a duty to the consumer to take care that there was no harmful substance in his product, that he had breached this duty and that she had been injured as a result²³. The House of Lords ruled in the affirmative and referred the case back for decision. Lord Atkin's conclusion on the duty issue was as follows:

The rule that you are to love your neighbor becomes in law, you must not injure your neighbor; 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 question²⁴.

As can be noted, Lord Atkin introduced two important elements in the law of negligence in his speech. The first was the test of reasonable foresight. Duty would exist only where injury was reasonably foreseeable. The second was the neighbour principle, namely that the duty was limited to "persons so closely and directly affected by the defendant's acts that they should be in his contemplation. It is submitted that this second requirement is the equivalence

²³ V. Harpwood, *Principles of Tort Law*, 4th Ed. (London: Cavendish Publishing House, 2000). p22.

²⁴ *Donoghue v Stevenson* [1932] AC 562

of the concept of proximity understood, not in the narrow sense of physical proximity, but in the “close and direct relations” between the parties. The application of the two elements of foreseeability and proximity to the facts of the case had a profound effect of the outcome of the case. His Lordship was compelled to arrive at the following conclusion:

..... a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him, with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in injury to the consumer’s life or property, owes a duty to the consumer to take that reasonable care²⁵.

It must be mentioned that the case of Donoghue v Stevenson²⁶ only provides a remedy to consumers in the case of products which are likely to cause injury to health. It does not offer a remedy for shoddy or unmerchantable goods. That is the province of contract.

However, in Anns v Merton London Borough Council²⁷ Lord Wilberforce extended the neighbour principle and developed what popularly became known as the “two tier principle” or the “two stage test”. He applied this test to justify imposing a notional duty on the Council authority in the following words:

The position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or reduce

²⁵[1932] AC 562

²⁶Ibid

²⁷ [1987] AC 728 at 751-752

or limit the scope of the duty or the class of persons to whom it is owed or the damages to which a breach of it may give rise.

The above exposition had a liberating effect on the law of negligence. It must be emphasised that stage one essentially involved the simple application of the neighbour test, based on proximity, treating the neighbour principle as a principle of general application. Stage two was the crucial policy stage at which the court could legitimately discuss any reasons of public, social, economic or other policy reasons for denying a remedy. The two stage test formulated by Lord Wilberforce for determining the existence of a duty of care was criticized for having been elevated to a degree of a statutory definition and perhaps to a degree greater than its author intended.

The present approach which has gained wider acceptance in determining the existence of a notional duty has emerged from a series of decisions of the Privy Council and House of Lords in the 1980s. This is commonly referred to as the three stage test or the incremental approach.

It was Lord Bridge who succinctly summarised the outcome in **Caparo Industries Plc v**

Dickman²⁸ to be thus:

What emerges is that, in addition to foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the party for the benefit of the other.

²⁸[1990] 2 W.L.R. 605; 617-618

It must be pointed out that the incremental approach encompasses the rules of foreseeability and proximity and also the policy considerations of whether the courts should impose a duty. It focuses on the relationship between the parties and, in particular, the proportionality, or the weight of the burden of liability in relation to the nature of the conduct. By necessary implication, this involves such matters as to whether it was reasonably practicable to avoid the harm'

1.2 BREACH OF DUTY

Once it has been successfully established that the defendant owed a duty of care to the plaintiff, the question of whether or not that duty was breached must be settled. The test is both subjective and objective²⁹. In essence, it is a matter of resolving the thorny issue of whether or not the defendant has or had actually been negligent.

It is submitted that two matters are involved in deciding whether there has been a breach of duty. The first centres on the question, 'how should a person in the position of the defendant have acted in the circumstances? This is a question of law, which sets the standard of care that the defendant was expected to meet. The second question concerns the factual matter as to whether or not the defendant met that standard³⁰. It is a question of fact to be determined within a structure of legal rules in each case by taking into account all the surrounding circumstances of the case.

²⁹ J. Charlesworth. Negligence. 6th Ed. (London: Sweet & Maxwell, 1997). p332.

³⁰ V. Harpwood. Principles of Tort Law. 4th Ed. (London Cavendish Publishing House, 2000). p123.

1.2.1 The Reasonableness test

A defendant will be regarded as being in breach of a duty of care if his conduct falls below the standard required by the law. The standard normally set is that of a reasonable and prudent man. This formulation traces its roots from the often cited words of Baron Alderson in **Blyth v Birmingham Waterworks Co**³¹ who pointed out that Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do; or doing something which a prudent and reasonable man would not do”³². It has been strenuously argued that the key notion of “reasonableness” is to be preferred since it provides the law with a flexible test capable of being adapted to the circumstances of each case. For example, a motorist should drive with reasonable care, but the speed at which it would be reasonable for him to travel when driving through a crowded town is slower than along an open and deserted country road³³. In short the standard of care required is what would be reasonable in the circumstances.

The objective standard required by the law is one which is related to the type of activity in which the defendant is engaged rather than to the category of actor to which the defendant belongs. The significance of this distinction is illustrated by the case of **Wilsher v Essex Area Health Authority**³⁴. A trainee hospital doctor had made a mistake when undertaking specialist work in a special care unit to which he was attached. On his behalf it was argued that no more could be expected of him than could be reasonably required of a person having his formal qualifications and practical experience. This argument was rejected by the majority of the court and Mustill L.J in enunciating the standard required, had this to say:

³¹ [1856] 11 Ex. 781 ; 784

³² Ibid

³³ J. Charlesworth. Negligence. 6th Ed. (London: Sweet & Maxwell, 1997). p330.

³⁴ [1988] A.C. 174

.....this notion of a duty tailored to the actor, rather than to the act which he elects to perform, has no place in the law of tort.I prefer (the proposition which) relates the duty of care not to the individual, but to the post which he occupies.In a case such as the present, the standard is not just that of the averagely competent and well informed junior houseman.... But of such a person who fills a post in a unit offering a highly specialised service.

It follows therefore that the standard of care expected is directly related to the type of activity in which the defendant belongs. Where an individual elects to perform an act and another person relies on their representation, there is a duty to perform according that skill professed and it is immaterial that they are not highly specialised in that field.

1.3 CAUSATION AND REMOTENESS

1.3.1 Factual Causation

It is imperative to mention that for a defendant to be held liable it must be shown that the particular acts or omissions were the cause of the loss or damage sustained. As a starting point, the court will normally ask whether the injury would have occurred but for, or without, the defendant's breach of duty³⁵. It is not enough that a defendant breached the duty of care; the plaintiff must also prove that the breach of duty of care complained of was the cause of the damage suffered. Under this principle, if a breaching party materially increases the risk of harm to another, then the breaching party can be sued to the value of harm that he caused.

The preceding point may be augmented by citing the case of **Barnett v Chelsea and Kensington Hospital Management Committee**.³⁶ In this case a night watchman was taken to hospital vomiting and suffering from severe stomach pains, but the casualty doctor on duty

³⁵ V. Harpwood. Principles of Tort Law. 4th Ed. (London Cavendish Publishing House, 2000). p27.

³⁶ [1969] 1Q.B. 428

sent him away to see his own General Practitioner. He died soon afterwards of arsenic poisoning, and it was discovered that unknown person had put arsenic in the tea of the watchman on a particular site. There was no dispute about the fact that the doctor had been negligent. What was in issue here was whether that negligent act had caused the man's death. It was held that it had not. The man would have died anyway. Much of the evidence turned upon the question of whether he would have survived if he had been given an antidote as soon as possible after arriving at the hospital, and it was proved that he would not. Consequently, the defendants were not liable.

1.3.2 Legal causation or Remoteness (rule of foreseeability)

The modern common law rule on remoteness of damage or legal causation was firmly established in Overseas Tankship (U.K.) Ltd v Motors Dock & Engineering Co. (The Wagon Mound No.1)³⁷. Viscount Simonds expressed himself in the following words:

It does not seem consonant with current ideas of justice or morality, that for an act of negligence, however slight or venial, which results in some trivial foreseeable damage, the actor should be liable for all the consequences, however unforeseeable and grave, so long as they can be said to be 'direct'. It is a principle of civil liability.....that a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilised order requires the observance of a minimum standard of behaviour. For, if it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or any other similar description of them), the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged, by the standard of the reasonable man, that he ought to have foreseen them.

It can thus be deduced from the foregoing that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen. It has also

³⁷ [1961] 1 ALL E.R. 404

been said that even in cases where liability based upon negligence, foreseeability as a test of remoteness is heavily qualified by the fact that neither the precise extent of the damage nor the precise manner of its infliction need be foreseeable. The test has been succinctly framed by the 19th century legal legendary, Lord Denning M.R, to be as follows:

It is not necessary that the precise concatenation of circumstances should be envisaged. If the consequence was one which was within the general range which any reasonable person might foresee (and was not of an entirely different kind which no one would anticipate) then it is within the rule that a person who has been guilty of negligence is liable for the consequences.

Sometimes factual causation is distinguished from 'legal causation'. The reason for this distinction was made clear by Cardozo, C. J in Ultramares Corporation. v. Touche³⁸. namely, to “avert the danger of defendants being exposed to “liability in an indeterminate amount for an indeterminate time to an indeterminate class. It is said that a new question arises of how remote a consequence a person's harm is from another's negligence. A person, who engages in activities that pose an unreasonable risk toward others and their property that actually results in harm, breaches their duty of reasonable care.

The proposition stated above is somewhat similar with the sentiments expressed by the court in the case of Bolton v. Stone³⁹. This was a case decided by the House of Lords which established that a defendant is not negligent if the damage to the plaintiff was not a reasonably foreseeable consequence of his conduct. In this case, a Miss Stone was struck on the head by a cricket ball while standing outside her house. Cricket balls were not normally hit a far enough distance to pose a danger to people standing as far away as was Miss Stone. Although she was

³⁸ [1931] 255 N.Y. 170, 174 N.E. 441

³⁹ , [1951] A.C. 850

injured, the court held that she did not have a legitimate claim because the danger was not sufficiently foreseeable. As stated in the opinion, 'reasonable risk' cannot be judged with the benefit of hindsight.

Lord Denning in **Roe v. Minister of Health**⁴⁰ expressed a similar view when he stated that “the past should not be viewed through rose coloured spectacles”. Therefore, there was no negligence on the part of the medical professionals in a case faulting them for using contaminated medical jars because the scientific standards of the time indicated a low possibility of medical jar contamination. Notwithstanding the fact that the plaintiffs suffered terrible harm, the professionals took reasonable care for risk to their patients. The idea of legal causation is that if no one can foresee something bad happening, and therefore take care to avoid it, how could anyone be responsible?

This too was the position taken by Chief Justice Cardozo in the famous American case of **Palsgraf v Long Island Railroad**⁴¹. The facts as presented to the New York Court of Appeals were that the defendant’s servants negligently pushed X, who was attempting to board a moving train, and caused him to drop a package containing “fireworks.” The resulting explosion knocked over some scales, many feet away, which struck the plaintiff, injuring her. By a majority the court reversed a decision for the plaintiff. It might well have been that the defendants ‘ servants were negligent with regard to the man carrying the package, at least as far as his property was concerned, but there was nothing in the appearance of the package to suggest even to the most cautious mind that it would cause violent explosion. In the words of Cardozo C.J.:

⁴⁰ [1954] 2 All E.R. 131

⁴¹ 248 N.Y. 339

If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to the outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to someone else.... The orbit of the danger as disclosed to the eye of reasonable vigilance would be the orbit of the duty.

Similarly, in **Bourhill v Young**⁴² the court declared that a duty only arises towards those individuals of whom it may be reasonably anticipated that they will be affected by the act which constitutes the alleged breach.

1.3.3 *Novus Actus Interveniens*

Intervening acts or events are usually subsumed under the Latin phrase *Novus Actus Interveniens* which has assumed the nature of a legal term. It may sometimes be possible to establish that a *Novus Actus Interveniens* or intervening act has caused the damage and that the original defendant is not liable. Such an event is said to 'break the chain of causation'. This is most likely to be the case when two possible causes are separate in time⁴³. However, the mere fact that an intervening cause exists, does not mean that the defendant's negligent conduct is not the proximate cause of the plaintiff's injury.

The defendant remains liable if he should have foreseen the intervening cause and taken it into account in his conduct. The doctrine of *Novus Actus Interveniens* has also featured prominently in the sphere of criminal law. As regards the province of criminal law, the doctrine was canvassed more extensively in the case of **R v Pagett**⁴⁴. In this case Lord Goff unequivocally stated that the Latin phrase means that the intervening act was so independent

⁴²[1942] 2 All E.R. 401

⁴³V. Harpwood. *Principles of Tort Law*. 4th Ed. (London Cavendish Publishing House, 2000). p151.

⁴⁴[1983] 76 CR App. R. 279

of the act of the accused that it should be regarded in law as the cause of the victim's death to the exclusion of the act of the accused.

1.4 CONSEQUENT DAMAGE

The third ingredient of the tort of negligence's that the plaintiff's damage must have been caused by the defendant's breach of duty and must not be too remote a consequence of it⁴⁵. Indeed it is necessary for the plaintiff to show that he has suffered some loss, since negligence is not actionable *per se* (in itself). As a general rule, a plaintiff can only rely on a legal remedy to the point that he proves that he suffered a loss. A breach of contract with no loss will at least give an action for nominal damages but not so in tort⁴⁶. A discussion of this ingredient involves considerations of remoteness of damage which has already been dealt with in the preceding discussion.

1.5 *Res Ipsa Loquitur*

Although the burden of proof in negligence normally lies on the plaintiff, there is a principle known as *res ipsa loquitur* which is translated to mean, "the thing speaks for itself", and where the principle applies the court is prepared to lighten his burden⁴⁷. The principle requirement is that the mere fact of the accident having happened should tell its own story and raise the inference of negligence so as to establish a *prima facie* case against the defendant. The story must be clear and unambiguous; if it may tell one of half dozen stories the maxim is

⁴⁵ W.V.H. Rogers, *Winfield and Jolowicz on Tort*, 11th Edition. (London: Sweet and Maxwell, (1979). p130.

⁴⁶ K. Smith. *English Law: Text & Cases*. 15th Edition. (London: Pearson Education Ltd. (2007). p559.

⁴⁷ *Ibid* p559

inapplicable. In **Scott v London and St. Katherine Docks Co.**⁴⁸, Earle C. J. gave a famous statement which is said to be the foundation for all subsequent authorities. His Lordship opined thus:

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

In conclusion it can safely be said that the core principles underpinning the law of negligence must be satisfied in order to successfully establish liability based on negligence. This chapter has also demonstrated that various tests have been suggested for the existence of a duty of care, the motivating factor being the nature of the particular situation involved. In these instances courts are largely influenced by the desire to strike a balance between providing effective justice as well as the need to uphold public policy considerations. It is also evident that there are no hard and fast rules cast in the concrete. Each case is decided on its own merit.

⁴⁸ [1865] 3 H. & C. 596

CHAPTER THREE

13.0 QUANTIFICATION OF DAMAGES IN NEGLIGENCE CASES

The preceding chapter discussed the core principles underpinning the law of negligence and other related concepts that come into play when the courts are seized with a matter involving negligence. This chapter will now discuss how the Zambian Courts have approached the problem of quantification of damages in negligence cases. The overall objective is to demonstrate the practical problems faced by litigants in their negligence claims and to establish whether or not the Zambian Courts have consistently followed the principles established in the award of damages in negligence cases.

1.0 CONCEPTUAL CONSIDERATIONS

When a person causes harm of any kind to another person- whether it is personal injury, damage to property, or financial loss, the normal remedy which the law gives (if, in the circumstances of the case, it gives a right of action) is a right to recover damages. Damages are simply a sum of money given as compensation for loss or harm of any kind⁴⁹. The law on the nature of damages has been stated from time to time in somewhat varying terms by eminent judges, for example by Viscount Dunedin, in Admiralty Commissioners v SS Valeria⁵⁰ when he opined thus:

The true method of expression, I think, is that in calculating damages you are to consider what the pecuniary consideration which will make good to the sufferer, as far as money can do so, the loss which he has suffered as the natural result of the wrong done to him.

⁴⁹ J. Munkman. Damages for Personal Injuries and Death. 20th Ed.(London: Butterworths,)p.1

⁵⁰ [1922] AC 242 ;248

The proposition stated above can be interpreted to mean that the court must give compensation which is estimated to be the equivalent of that which has been lost. In this regard, Lord Blackburn in Livingstone v Rawyards Coal Co⁵¹ gave the following useful statement:

Where any injury is to be compensated by damages in settling the sum of money to be given..... You should as nearly as possible get at the sum of money which will put the person who has been injured in the same position as he would have been in if he had not sustained the wrong.

1.1 Damages must be full and adequate

The main principles of the law on compensation for injuries were worked out in the 19th century in England, when railway accidents were becoming common, and all actions were tried by jury. So the law was set in directions to the jury, which was clear and simple. Although these cases have an antiquated air, it is still useful to refer to them.

The necessity that damages should be 'full' and 'adequate' was stressed by the Court of Queen's Bench in Fair v London and North Western Railway Co⁵². In this case the Plaintiff was a clergyman aged 27, earning £250 a year and with good prospects. He was involved in a railway accident and sustained a spinal injury which resulted in paralysis of the lower limbs and impairment of the senses. The jury awarded to him £5,000 general damages. £5,000 would represent a very large sum in 1869, more than £100,000. Nevertheless the court declined to order a new trial on the ground that the damages were excessive.

⁵¹ [1880] 5 App. Ca. 25 ; 39

⁵² [1869] 21 L.T. 326

In a more modern case, **Rushton v National Coal Board**,⁵³ Singleton L. J. said:

Every member of this court is anxious to do all he can to ensure that the damages are adequate for the injury suffered, so far as they can be compensation for an injury, and to help the parties and others to arrive at a fair and just figure.

1.2 Damages must be assessed once and for all

It must be pointed out that in cases of personal injuries loss of earnings and future profits must be estimated and any risk that the plaintiff's condition might deteriorate must also be taken into account at the time of assessment because serious injuries supervened unexpectedly, a second action cannot be brought. Thus in **Fitter v Veal**⁵⁴ the Plaintiff recovered a small sum of money for an assault. Subsequently a portion of his skull had to be removed, as a consequence of the assault. However, he was not allowed to bring a second action. It follows therefore that where damages resulted from one and the same cause of action, they have to be assessed once and for all. Similarly, in **British Transport Commission v Gourley**⁵⁵ Lord Reid said that damages must be assessed as a lump sum once and for all, not only in respect of loss accrued before the trial but also in respect of prospective loss.

1.3 Difficulties and uncertainty of assessment does not preclude an award of damages

There are many losses apart from personal injury which cannot easily be expressed in terms of money. For example, if an arm is lost or a person is deprived of the sense of smell, there is no market value for the personal asset which has been taken away, and there is no easy means of expressing its equivalent in terms of money. Nevertheless a valuation in terms of money must

⁵³ [1953] 1 All E.R. 314; 316

⁵⁴ [1701] 12 Mod. Re. 542

⁵⁵ [1956] AC 158 ; 213

be made, because otherwise the law would not be able to give any remedy at all. This may be illustrated by the case of The Ceramic (Owners) v The Testbank (Owners)⁵⁶ which concerned the apportionment of blame between two ships involved in a collision. Goddard L. J. said:

It is no doubt true that one cannot apportion blame with anything approaching mathematical accuracy; but that is a familiar difficulty in cases where the damages are at large. In an ordinary accident case, there is no yardstick by which the court can measure the amount to be awarded for pain and suffering or ensuring disability.

It has been held in numerous cases that uncertainty in the quantification of damages does not prevent an assessment, provided that some broad estimate can be made.

2.0. TYPES OF DAMAGES

In the vast majority of tort actions, the claimant is seeking compensation for personal injuries or damage to his property which arise out of accidents⁵⁷. Damages place a monetary value on the harm done; following the principle of *restitutio in integrum*. The Latin phrase means restoration to the original condition. Assessment of damages involves a prediction of what would have happened if the accident had not occurred. The object of awarding damages in tort is to put the claimant in the position he would have been if the accident had never happened, and this, of course, is impossible to achieve. The award should be sufficient so as to put the plaintiff or claimant back in the position he or she was before the tort was committed and no more, otherwise the plaintiff or claimant would actually profit from the tort.

⁵⁶ [1942] P 75, [1942] All E.R. 281

⁵⁷ V. Harpwood, Principles of Tort Law, 4th Ed. (London. Cavendish Publishing House, 2000). p409

While it is possible to calculate almost exactly the award of special damages, that is, actual financial loss to the date of trial (for example, the lost earnings, the cost of private medical care and so on), it is impossible to predict exactly what the claimant has lost for future, or to translate intangible losses such as pain and suffering into money, and it is in this area, namely, the assessment of general damages, that most of the problems arise, and most of the injustice or unfairness is seen to exist⁵⁸. The various kinds of damages which are payable, may be, for this purpose classified as follows:

2.1 Nominal damages

Nominal damages are awarded when the plaintiff's legal right has been infringed but he has suffered no actual damage, as can readily occur in the case of torts which are actionable *per se*, for example, trespass to land. However, negligence is different in that the plaintiff must prove his loss, and a particular kind of loss, to recover.

In other words negligence is not actionable *per se*. This proposition may be concretised by citing the case of **Constantine v Imperial Hotels Ltd**⁵⁹. In this case the defendants were guilty of a breach of their duty as common innkeepers when they unjustifiably refused accommodation in one of their hotel to the plaintiff the well known West Indian cricketer. Although he was given accommodation elsewhere, he was awarded nominal damages of five guineas. An award of nominal damages does not, therefore connote any moral obliquity on the plaintiff's part. The fact of receiving a small sum of money merely demonstrates to the world that the claimant has won the case.

⁵⁸ Ibid p.410

⁵⁹ [1944] K.B. 693

2.3 Compensatory damages

Most damages are intended to compensate the claimant for the loss which has been suffered. Under this category is to be found the following heads of damages: Special damages are awarded for losses suffered from the date of the tort up until the date of trial and which can be precisely quantified in monetary terms. Secondly, general damages are those awarded for losses that cannot be quantified exactly in monetary terms (the actual pain, suffering, and loss of amenity caused by the negligent act, as well as expected future losses from the date of trial for instance, continuing pain and suffering, and loss of earnings). Where the plaintiff or claimant proves only negligible loss or damage, or the court is unable to quantify the losses, the court may award nominal damages⁶⁰.

2.4 Punitive or exemplary damages

These are awards of amounts greater than those needed to compensate the victim and are intended to deter intentional, usually malicious, wrongdoing. They are not available where only negligence has been proved⁶¹.

The question of assessment of damages and apportionment of liability in cases of negligence in Zambia has been addressed by the Law Reform (Miscellaneous Provisions Act) Cap 74 of the Laws of Zambia. The Act also provides for the recovery of damages for loss of life and for personal injuries.

⁶⁰ V. Harpwood. Principles of Tort Law. 4th Ed. (London: Cavendish Publishing House, 2000). p414.

⁶¹ W.V.H. Rogers. Winfield and Jolowicz on Tort. 11th Edition. (London: Sweet and Maxwell, 1979). pP600.

3.0 THE NEED TO PROVE ACTUAL DAMAGE IN NEGLIGENCE

Once a duty of care and a negligent act or omission have been proved, the burden of proof is on the plaintiff or claimant to establish that the negligent act caused, or substantially contributed to, the damage or injury which he or she suffered⁶². Here the plaintiff must prove the causal connection between the breach of duty and the damage. It is now settled that for a plaintiff who alleges negligence on the part of the defendant, in order to succeed under the principles of tortious liability laid down in **Donoghue v Stevenson**⁶³ needs to show that they have suffered injury or damage.

In **Michael Chilufya Sata Mp v Zambia Bottlers Limited**,⁶⁴ the appellant had purchased a case of soft drink sprite from a retailer. The drink was manufactured and bottled by the Respondent Company. The Appellant and his children drunk some of the drink. In one of the bottles containing drink, before it was opened, the Appellant and his children noticed a dead cockroach. The bottle was not opened and thus the drink was not consumed. Subsequently, the Appellant took action against the Respondent Company in the High Court arguing that he and his children had suffered personal injury and nausea as a result of the dead cockroach in the bottle. In his action, the Appellant was claiming damages for personal injuries, damages for breach of statutory duty by the Respondent under paragraph (b) of section 3 of the Food and Drugs Act, Cap. 303 and other reliefs.

The High Court found in favour of the Respondent Company. The Appellant being dissatisfied with that decision of the court, he appealed. On appeal, the Supreme Court

⁶² V. Harpwood. Principles of Tort Law. 4th Ed. (London: Cavendish Publishing House, 2000). p27

⁶³ [1932] A.C. 562

⁶⁴ SCZ Judgment No. 1 of 2003.

affirmed with approval the learned trial Judge's ruling when he held that for the Plaintiff to succeed under the principle of Donoghue v Stevenson⁶⁵ he must actually consume the adulterated drink or food wholly or partially and in consequence of which the Plaintiff must suffer injury. It was vigorously argued by counsel for the respondent that negligence is only actionable if actual damage is proved. Furthermore, that there is no right of action for nominal damages. Negligence alone does not give a cause of action, damage alone does not give a cause of action, the two must co-exist.

The Food and Drugs Act⁶⁶ is silent as regards the availability of any remedy in civil law for damages arising out of any penalties imposed for breach of its provisions. Paragraph (b) of Section 3 of the Food and Drugs Act makes it a criminal offence to sell any food or drink which is contaminated with any foreign matter. The penalties for a breach of this section are contained in Subsection (2) of Section 31 of the Act and these are, in the case of a first offence, a fine not exceeding one thousand penalty points or to imprisonment for a term not exceeding three months, or to both.

Thus, it will be observed that the only remedies for a breach of paragraph (b) of Section 3 of the Food and Drugs Act⁶⁷ are criminal sanctions and there is no provision for the recovery of damages in a civil suit. The Supreme Court also referred to the learned authors of Charlesworth on Negligence⁶⁸ who observed the following; "it would seem that if the Statute has imposed a penalty for its breach but was silent as regards any remedy in civil law for damages there may be a presumption initially that the remedy prescribed by the criminal law

⁶⁵ [1932] A.C. 562

⁶⁶ Chapter 303 of the Laws of Zambia

⁶⁷ Ibid

⁶⁸ J. Charlesworth. Negligence. 6th Ed. (London: Sweet & Maxwell, 1997). p1104

is the only remedy.” Furthermore, the learned authors go on to point out that unless the Statute or regulations provide to the contrary, the burden rests on the Plaintiff to prove on a balance of probabilities that the breach of duty caused or materially contributed to his damage. Consequently, the appeal was dismissed.

It can be deduced from the foregoing that one of practical problems faced by the plaintiffs in negligence cases is when it comes to adducing evidence of consequential damage or loss either in the form of an illness or any recognisable legal injury. The Supreme Court in Zambia has insisted on the need to assemble credible evidence to prove consequential illness to uphold the award of damages.

The preceding point can also be illustrated by the case **Continental Restaurant and Casino Limited v Arida Mercy Chulu**⁶⁹. The Respondent, who was a magistrate, was invited for lunch by the Chief Administrator of Polo Grill, a restaurant owned by the defendant Company. The Respondent was served with some mushroom soup which contained a cockroach. The Respondent only realised that it was a cockroach after it was already in her mouth. Thereafter, she spat it out and was unable to complete her meal. The Respondent suffered from nausea and stomach pains thereafter. The High Court made an award of damages in the sum of K85, 000,000.00 upon establishing a duty of care and a breach of that duty of care by the Appellant. The Appellant appealed against this award claiming that there was no evidence of medical attention and that the damage, if any, was merely nausea.

The Appellant also argued that the condition suffered by the plaintiff did not warrant an award of colossal damages. The Supreme Court was concerned with the fact that exemplary

⁶⁹ S.C.Z. Judgment No. 28 of 2000

damages were awarded in this case when they were not specifically pleaded. The Supreme Court stressed an important point that in cases of this nature, the basis of awarding damages is to vindicate the injury suffered by the Plaintiff. The money was to be awarded in the instant case not because there was a cockroach in the soup, but on account of the harm or injury done to the health, mental or physical of the Plaintiff. Thus in the Donoghue case⁷⁰ the Plaintiff was hospitalised.

The Supreme Court pointed out that mild condition is generally not enough a basis for awarding damages but that the Plaintiff has a duty to bring credible evidence of illness. The Supreme Court took advantage of the case to point out that in future, nothing will be awarded if no proper evidence of a medical nature is adduced. Accordingly, the award of K85 million was set aside and in its place, a sum of K2 million was awarded.

It is clear from the case cited above that the Plaintiff must assemble competent evidence pointing to an illness of a medical nature in order to uphold an award of damages. The case of Zambia Breweries Plc v Reuben Mwanza⁷¹ also needs to be considered. The learned trial judge found as a fact that the Appellants were negligent in the manufacture of the castle beer with a dead lizard in it and awarded the Respondent K50, 000,000 as damages. It is against the finding of liability and the award of K50, 000,000-00 that the Appellants appealed. On appeal, the Supreme Court was satisfied that the learned trial judge was on firm ground in finding negligence on the part of the Appellant. The Supreme Court observed that it is not normal to find lizards in beer bottles and also to find people carrying dead lizards in order to throw them in beer bottles would require strong evidence.

⁷⁰ [1932] AC 562

⁷¹ S.C.Z. No. 39 of 2000

On the question of damages, it was fairly conceded by counsel for the Respondent that the K50, 000,000-00 awarded was on the higher side and the Supreme Court commended him for this. On behalf of the Appellant it was argued that whereas in the Donoghue v. Stevenson⁷² case there was medical evidence of the victim being hospitalised, there was no such evidence in the present case. The Respondent was said to have visited Chilenje clinic but he never revealed what had happened to him and no evidence of what treatment he received was adduced. In the final analysis, the Supreme Court set aside the award of K50,000,000-00 and the Chulu case⁷³ was followed and the Respondent was therefore awarded K2,000,000-00 (two million kwacha) as damages.

In conclusion it can be said that the plaintiff has a duty to adduce credible evidence of consequential illness to uphold the award of damages in negligence cases. This is because negligence is not actionable per se and there is no right of action for nominal damages.

4.0 DEFENCES TO NEGLIGENCE LIABILITY

As is the case in many branches of the law in which the defendant does not suffer in silence, the same is true for negligence suits. It follows therefore, that even if a plaintiff has established that the defendant owed a duty to the plaintiff, breached that duty, and proximately caused the defendant's injury, the defendant is not precluded from raising defences that reduce or eliminate his liability.

⁷² [1932] A.C 562

⁷³ S.C.Z. Judgment No. 28 of 2000

4.1 Contributory Negligence

Sometimes when an accident occurs, both parties have been negligent and this raises the doctrine of contributory negligence. At one time a claimant guilty of contributory negligence could not recover any damages unless the defendant could, with reasonable care, have avoided the consequences of the claimant's contributory want of care. Thus, the courts were often concerned with the question of whether the person who contributed to their own injury had the last chance of avoiding the accident, and this led to some unsatisfactory results⁷⁴. However, under the Law Reform (Contributory Negligence) Act 1945, liability is apportionable between claimant and defendant. The aim is not defeated but damages are reduced according to the degree of fault of the claimant. A person may contribute to the damage he suffers although he is not to blame for the accident. As regards contributory negligence, the Law Reform (Contributory Negligence) Act of 1945 provides as follows:

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or, a claim in respect of that damage shall not be defeated by reason of the person suffering that damage, but the damages recoverable in respect thereof shall be reduced to such extent the court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage⁷⁵.

However, this Act may only be cited for persuasive value since Zambia has its own Act which contains similar provisions as those of the above cited Act. In this regard the Law Reform (Miscellaneous Provisions) Act provides that:

Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage⁷⁶:

⁷⁴ K, Smith, et. al. English Law: Text & Cases. 15th edition. (London: Pearson Education Ltd. 2007) p. 560

⁷⁵ The Law Reform (Contributory Negligence) Act of 1945, section 1(1)

⁷⁶ Chapter 74 of the Laws of Zambia, section 10

In enunciating what constitutes contributory negligence, Lord Denning, in Jones Livox Quarries⁷⁷ held that “a person is guilty of contributory negligence if he did not act as reasonable man would have acted in similar circumstances.”

4.2 *Volenti non fit injuria*

The above Latin maxim is translated to mean; “to one who is willing no harm is done”. This is alternatively called the doctrine of assumption of risk. There are two main two aspects of this defence:

- (a) deliberate harm;
- (b) accidental harm.

In the first case the claimant’s assent may prevent his complaining of some deliberate conduct of the defendant which would normally be actionable. If A takes part in a game of rugby football, he must be presumed to accept the rough tactics which are a characteristics and normal part of the game, and any damage caused would not give rise to an action, although if the same tactics were employed in the street, an action could be sustained⁷⁸. In the second place, the claimant may impliedly consent to run the risk of accidental harm being inflicted upon him Thus one of the risks incidental to watching an ice-hockey match is that the puck may strike and injure a spectator or, in attendance at a motor race, that cars may run off the track for carious reasons, injuring spectators. These are possible hazards unless spectators are to be so fenced or walled in that they cannot see the sport and the maxim *Volenti non fit injuria* would apply.

⁷⁷ [1952] 2 Q.B. 608

⁷⁸ K, Smith, English Law: Text & Cases. 15th Edition. (London: Pearson Education Ltd, 2007) p510.

It is worthy noting that the case of **Eagle Charalambous Transport Limited v Gideon Phiri**⁷⁹ extended the principle yet further. The supreme Court held that the doctrine of *Volenti non fit injuria* is a rule of law and not evidence and as such it must be applied whether or not it is specifically pleaded whenever any given facts disclose such a defence and regardless of the relationship between the parties. The Plaintiff (respondent) and one Ellington Simbeye who were both employed by the defendant as lorry mate and driver respectively, left Mufulira to deliver Copper cathodes, laden in the defendant's (appellant) Mercedes Benz truck and trailer registration number Ev 8030, to Tazara Depot at Kapiri Mposhi. On the way, at Kashitu near the destination, a tyre burst and the truck overturned and the plaintiff sustained severe injuries in his left leg and arm. The Plaintiff claimed and was granted damages by the High Court where it was found that the defendant had been negligent. The Defendant appealed.

It was contended with much force and conviction that this was a proper case for the application of the doctrine of *volenti non fit injuria* because the plaintiff knew from the start that the tyre was worn out and yet he voluntarily and knowingly assumed the risk by travelling on a truck with defective tyres. The Supreme Court accepted this argument since it was a finding of fact and stated that the Plaintiff therefore must have foreseen an accident occurring and being injured in the process, but nevertheless jumped on the truck. In so doing, he voluntarily and freely accepted the risk. The appeal was allowed and the award set aside.

⁷⁹ SCZ Judgment No. 52 of [1994]

CHAPTER FOUR

14.0 JUDICIAL RESPONSE TOWARDS CLAIMS OF MEDICAL NEGLIGENCE IN STERILISATION OPERATIONS

Whereas Chapter three laid its emphasis on the principles governing the quantification of damages in negligence cases and the concomitant practical problems faced by litigants in negligence cases, this Chapter will specifically address the issue of medical negligence with special reference to Doctors' negligence in performing sterilisation operations. It will further discuss the judicial response towards claims of medical negligence. This Chapter is primarily intended to critically analyse the contentious issue of recovery of damages for wrongful birth or conception in medical negligence cases. Thus, the pivotal role played by Public policy or indeed moral considerations in such cases will also be analysed. Economic and health problems have induced the families to adopt measures that would cushion these challenges.

In an attempt to overcome these hardships, many Zambians are limiting the size of the family by undergoing sterilisation operations with the hope that they would not go back to their original position of being able to conceive or cause to conceive. The operation is the best alternative that could medically render them irreversibly sterile and incapable of parenthood and avoid health complications. The courts of law have witnessed a number of cases in which Surgeon Doctors have performed the operation negligently resulting in the patient conceiving, thereby defeating the very object of undergoing the operation. The Doctors' breach of their legal duty towards patients eventually results in a claim for damages for unwanted pregnancy, and for economic loss, stemming from the cost of rearing the child.

The law relating to the award of damages arising from Doctors' Negligence in Sterilisation operations has been discussed in a number of cases the majority being in foreign jurisdictions and the Zambian Courts has had occasions to consider few cases. However, in many of these cases the thorny issue being addressed is the extent to which the plaintiff should recover damages arising from the failed sterilisation operation. To award the plaintiff damages for the cost of raising the child appears to stand in sharp contrast with public policy and to deny the plaintiff the full recovery of damages in these cases assaults the principle of elementary justice espoused by the law of Torts, which demand that once the ingredients of the tort of Negligence are proved, the plaintiff should recover damages.

1.0 LIABILITY OF MEDICAL PRACTITIONERS

It is important to mention from the onset in no uncertain terms that a medical practitioner owes a duty in tort to his patient irrespective of any contact between them. Once a person has been accepted as a patient, the medical practitioners must exercise reasonable care and skill in his treatment of that patient. Any negligent error in carrying out treatment and any negligent omission to provide treatment will be actionable⁸⁰. It is now beyond challenge that whenever a medical practitioner elects to provide treatment, albeit that he is not under a duty to do so, he is liable if he fails to exercise proper care and skill.

However, attempts so far to enforce a legal duty to provide treatment to sick persons not yet admitted as patients have failed. From this it would seem to follow that no action in negligence would lie where all that could be shown against the doctor was a mere omission to provide treatment to someone who was not his patient.

⁸⁰ J. Charlesworth. *Negligence*. 6th Ed. (London: Sweet & Maxwell. 1997). p423.

To the average physician the word malpractice is almost synonymous with “quack”, and its very mention will cause the physician to be wary. Undoubtedly, his reputation, livelihood, his social profession are threatened when any suspicion of malpractice is aired. In this regard, malpractice charges are to a physician, what disbarment proceedings are to a lawyer. That this represents the feeling of the medical profession cannot be ignored. Thus, an examination of medical negligence in an objective fashion is imperative.

1.1 JUDICIAL RESPONSE TOWARDS CLAIMS OF MEDICAL MALPRACTICE

Doctors just like other experts and professionals are required to exercise the same standard of care and skill as reasonably competent persons trained in that particular trade or profession. The standard of care demanded of medical practitioners is that required of any professional person and is succinctly stated by McNair .J. in **Bolam v Frien Hospital Management Committee**⁸¹. The test can be divided into two parts: In this connection, the learned authors of clerk and Lindsell on Tort, 16th edition, have observed thus:

Firstly, the test is the standard of the ordinary skilled man exercising and professing to have that specialised skill. A man need not profess the highest expert skill, it is well established law that it is sufficient if he exercises the ordinary skill of a competent man exercising that particular art.” The art is judged in the light of the practitioner’s specialty and the post that he holds. Thus a general practitioner is not expected to attain the standard of a consultant obstetrician delivering a baby. However, if to practice obstetrics he must attain the skill of a general practitioner undertaking obstetric care of his own patients, and in all cases general practitioners and other doctors must exercise care in determining when to refer patient for a consultant’s or other second option.

Secondly, in determining whether a defendant practitioner has fallen below the required standard of care, the Bolam test looks to responsible medical opinion. A practitioner who acts in conformity with an accepted, approved and current practice is not

⁸¹ [1957] 2 All E.R. 129

negligent.....merely because there is a body of opinion which would take a contrary view”

It deserves to mention that the Bolam test is the standard used to assess professional liability. However, it becomes a crucial issue when the test has been satisfied and the plaintiff claims for damages for unwanted pregnancy and for the cost of bringing up a normal child. In other words should the courts entertain a claim for “rearing costs” when the result of the unwanted pregnancy is a healthy child? From the line of cases on Damages for the Birth of a Child, it is abundantly clear that that this subject is controversial and at any rate, the law is still developing and that there is no universal and clear approach. Two theories have competed for mastery over the years on this subject. As is the case in many branches of the law where there are conflicting theories over a single issue, the answer is not that one is right and the other wrong, but that neither is a complete exposition of the matter.

1.2 ARGUMENTS IN FAVOUR OF THE AWARD

The first case to be considered in this regard is **Emeh v Kensington and Chelsea and Westminster Area Health Authority**⁸². In this case a sterilisation operation had failed and the Plaintiff conceived. She then decided that she because she did not want any more operations she would not have another abortion but would continue with the pregnancy. She later gave birth to a child which was congenitally abnormal which required constant medical and parental supervision. On a claim in contract the court held that there was no rule of public policy which precluded recovery of damages for pain and suffering and for maintaining the child. The Court declared that since the avoidance of a further pregnancy and birth was the object of the sterilisation operation undergone by the plaintiff, the compensatable loss

⁸² [1984] 3 All E.R. 1044

suffered by the plaintiff as a result of the negligence in performing that operation extended to any reasonably foreseeable financial loss directly caused by her unexpected pregnancy. The Court pointed out that the Plaintiff's refusal to have an abortion was not a *novus actus interveniens* or a failure to mitigate damage, because the health authority, by the negligence for which it was itself responsible, had confronted the Plaintiff with the very dilemma of whether to have the child or an abortion which she had sought to avoid by having herself sterilised. Additionally, the Court emphasised that the Health Authority had no right to expect that, if its doctors did not perform the operation properly, the Plaintiff would undergo an abortion with its attendant risks, pain and discomfort. Instead, it was reasonably foreseeable that if, as a consequence of the negligent performance of the sterilisation operation, the Plaintiff found herself pregnant she might decide to keep the child, and the fact that she exercised that particular option did not mean that she wished to have the baby. The court took a multiplier of eight for a child five years old at the time of the appeal.

In **Thake v Maurice**⁸³ a vasectomy was performed, the husband was told that contraception precautions were not necessary but a child was born. The claim was brought in contract and in tort. Peter Pain J. found that there was no reason why public policy prevented the recovery of expenses arising from the birth of a healthy child. He awarded damages in respect of the expenses of the birth and the mother's loss of wages but refused damages for the pain and distress of labour, holding that these were offset by the joy occasioned by the birth. He did, however, award damages in an agreed sum for the child's upkeep to its seventeenth birthday.

⁸³ [1984] 2 All ER 513

The principle stated above was given a further stamp of approval in **Rees v Darlington Memorial Hospital NHS Trust**⁸⁴ whose facts were as follows: The claimant, a woman with a genetic condition which left her severely visually disabled, wished to be sterilised. The consultant who carried out the operation had been informed of her disability, and knew that her reasons for wanting the operation included her belief that her eyesight would bar her from looking after a child. The sterilisation operation was performed negligently, and the claimant subsequently gave birth to a son. Although there was a risk that he had inherited his mother's genetic condition, that risk was low. In proceedings for negligence against the defendant hospital trust, the claimant sought damages for the full costs of bringing up her child. The judge ruled against the claimant on the determination of a preliminary issue, and she appealed.

On the appeal, the Court of Appeal considered whether recovery was precluded by a House of Lords authority that established that able-bodied parents could not recover damages for the costs of bringing up a healthy child born as a result of medical negligence or whether an analogy could be drawn with a Court of Appeal authority which established that able-bodied parents of a disabled child, born as a result of such negligence, could recover those costs of rearing the child that were attributed to his disabilities.

In this case it was held that where, to the knowledge of the surgeon, a disabled woman wished to be sterilised because of her disabilities but subsequently gave birth to a healthy child as a result of the sterilisation being negligently performed, she was entitled to recover as damages those extra costs of bringing up the child that were attributable to her disability. There was a

⁸⁴ 2002] EWCA Civ 88

crucial difference between such a parent and an able-bodied parent of a healthy child. Although able-bodied parents would benefit from a nanny or other help in looking after the child, they did not need such help in order to be able to discharge the basic parental responsibility of looking after the child properly and safely, and to avoid the risk that the child might have to be taken away to be looked after by social services or others, to the detriment of the child as well as the parent. There was nothing unfair, unjust, unreasonable, unacceptable or morally repugnant in permitting such recovery, at least where the surgeon knew of the woman's disability and was aware that it was the reason why she wished to avoid having a child.

Furthermore, it is argued that a cause of action is simply a factual situation the existence of which entitles one person to obtain a remedy from the court against another person. In this regard, public policy should not be invoked to deny recovery to parents of an unplanned, health child of all of damages proximately caused by a negligently performed sterilisation operation. Indeed in **Benarr v Kettering Health Authority**⁸⁵ Hodgson J. allowed damages in respect of the future private education of a child following a negligently performed vasectomy since private education was what the child could expect to have in that particular family. Similarly, in the Scottish case of **Allan v Greater Glasgow Health Board**⁸⁶ Lord Cameron of Lochbroom rejected contentions that public policy considerations prevented a claim for pain and distress of pregnancy and birth, and he awarded damages. He could see no reason why the cost of rearing a child should not in principle be provided for.

⁸⁵ 1988) 138 NLJ 179

⁸⁶ (1993) 1998 SLT 580

The speech of Lord Scarman in McLoughlin v O'Brian⁸⁷ is instructive on whether or not policy considerations ought to be given precedence over legal principles in these matters:

The distinguishing feature of the common law is this judicial development and formulation of principle. Policy considerations will have to be weighed but the objective of the judges is the formulation of principle. And, if principle inexorably requires a decision which entails a degree of policy risk, the court's function is to adjudicate according to principle, leaving policy curtailment to the judgment of Parliament. Here lies the true role of the two law-making institutions in our constitution. By concentrating on principle the judges can keep the common law alive, flexible and consistent, and can keep the legal system clear of policy problems which neither they, nor the forensic process which it is their duty to operate, are equipped to resolve. If principle leads to results which are thought to be socially unacceptable, Parliament can legislate to draw a line or map out a new path.

The above case demonstrates that courts sometimes prefer to give effect to the principles of law as enunciated by case law as opposed to paying unnecessary attention to issues of public policy in order to keep the legal system and the principles of law more consistent and avoid contradictions.

Thus, in Sherlock v Stillwater Clinic⁸⁸, the Supreme Court of Minnesota made a profound statement which has far reaching implications as regards the issue of application of public policy. The Court observed thus:

Where the purpose of the physician's action is to prevent conception or birth, elementary justice requires that he be held legally responsible for the consequences which have in fact occurred". The allowance of these damages is wholly consistent with the elementary principle of compensatory damages which seeks to place injured plaintiffs in the position they would have been had no wrong been done.

⁸⁷ [1982] 2 All ER 298

⁸⁸ [1977] 260 NW 2d 169

1.3 ARGUMENTS AGAINST THE AWARD

At the other end of the spectrum there is a school of thought pioneered by the moralists which strongly oppose the award of damages for maintenance of an unplanned child in failed sterilisation operations. It is a persuasive and convincing argument by the moralists that the parents' claim is repugnant to ideas of the sanctity and value of human life.

In the controversial case of McFarlane v Tayside Health Board⁸⁹ the House of Lords was were called upon to consider for the first time the extent to which damages are recoverable for the birth of an unintended child following a wrongful pregnancy. By this is meant a pregnancy which is consequent upon a failed sterilisation, whether it has been performed negligently or the parents have been negligently informed that it has been successful. The House of Lords held that the parents could not recover the costs of bringing up a normal, healthy child. They were persuaded that principles of distributive justice provided a more just solution to the problem than an approach founded solely on principles of corrective justice. The former theory focuses on the just distribution of burdens and losses among the society.

A similar view was taken in the case of Public Health Trust v Brown⁹⁰ in which the Supreme Court of Florida, in refusing a claim for the cost of rearing a child to a woman alleging a negligently performed sterilisation operation, followed what they saw as the majority of courts in refusing such costs. They said (at 1085–1086):

In our view, however, its basic soundness lies in the simple proposition that a parent cannot be said to have been damaged by the birth and rearing of a normal, healthy child ... it is a matter of universally-shared emotion and sentiment that the intangible but all-

⁸⁹ [1999] 4 All ER 961, [2000] 2 AC 59

⁹⁰ (1980) 388 So 2d 1084

important, incalculable but invaluable “benefits” of parenthood far outweigh any of the mere monetary burdens involved ... Speaking legally, this may be deemed conclusively presumed by the fact that a prospective parent does not abort or subsequently place the “unwanted” child for adoption ... On a more practical level, the validity of the principle may be tested simply by asking any parent the purchase price for that particular youngster. Since this is the rule of experience, it should be, and we therefore hold that it is, the appropriate rule of law.

It has been vehemently argued that the doctor undertakes a duty of care in regard to the prevention of pregnancy: it does not follow that the duty includes also avoiding the costs of rearing the child if born and accepted into the family. The case of McKernan v Aasheim⁹¹ in the State of Washington is illustrative of this principle. It was held in this case, that the costs of rearing an unplanned child were not recoverable on the ground that it was impossible to establish with reasonable certainty whether the birth of a particularly healthy, normal child damaged its parents.

It must be emphasised that Doctors are not insurers. They are not guarantors of absolute safety. In this connection, in Roe v Ministry of Health and Others⁹² Lord Denning had this to say:

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 negligence that which is only a misadventure.

⁹¹ [1984] 687 P 2d 850 at 855

⁹² [1954]2 ALL ER 131

The High Court in Zambia had an occasion to consider a medical negligence case in **Cicuto v Davidson and Oliver**⁹³. In this case the Court stated that a medical man is not guilty of negligence, if he has acted in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular act, merely because there is a body of opinion who would take a contrary view. Additionally, the Court pointed out that a wrong diagnosis is not necessarily an unskilled or negligent diagnosis.

It is cardinal to mention that issues of public policy which are driven by moral considerations have also permeated the field of criminal law. In **Shaw v DPP**⁹⁴, the appellant had published a ladies directory which was in fact a list of prostitutes and their addresses including telephone numbers. He was convicted of the offence of “conspiring to corrupt public morals”. Lord Viscount Simonds expressed himself in the following words:

In the sphere of criminal law, I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the state, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for. And that the Kings Bench was the *custos morum* of the people and had the superintendency of offences *contra bonos mores*.

It can be deduced from the sentiments expressed in the above case that law and morality are intertwined. The inner morality is not something superimposed on the power of law, but it is an essential condition of that power itself. It is, in other words, a precondition of good law

⁹³ [1968] Z.R. 149 (H.C.)

⁹⁴ [1961] 1 ALL E.R. 446

CHAPTER FIVE

15.0 CONCLUSION

1.0 Research findings

This research revealed that the courts in Zambia have preserved the concept of duty of care as the cornerstone of the law of negligence. Consequently, there is an insistence on the need to prove all the core principles underpinning the law of negligence in order to successfully establish liability. There is a misconception that once an individual has breached his or her duty of care then it automatically follows that he or she is liable in negligence. However, the correct position of the law is that negligence is only actionable if actual damage is proved. Therefore, in order to succeed under the principles of tortious liability laid down in **Donoghue v Stevenson**⁹⁵ one needs to show that they have suffered injury or damage. To this end, it is cardinal for the plaintiff to assemble competent evidence pointing to an illness of a medical nature in order to uphold an award of damages. The cases of **Continental Restaurant and Casino Limited v Arida Mercy Chulu**⁹⁶ and **Zambia Breweries Plc v Reuben Mwanza**⁹⁷ illustrate the practical difficulties that plaintiffs face in proving injury of a medical nature in negligence suits.

The need to prove actual damage comes from a realisation that there is no right of action for nominal damages. Negligence alone does not give a cause of action, damage alone does not give a cause of action, the two must co-exist. Thus, in the former case the court settled for the conclusion that there was no injury or damage caused to an Appellant by the adulterated drink

⁹⁵ [1932] A.C 562

⁹⁶ S.C.Z. Judgment No. 28 of 2000

⁹⁷ S.C.Z. No. 39 of 2000

as he did not consume any part of it. In the later case the Appellant claimed that he had consumed the beer which contained a dead lizard in it. However, he failed to demonstrate any injury in the form of any medical illness as a result of consuming the adulterated beer. It can be seen that this misconception was not only on the part of the lawyers who argued the case, but also the High Court in both cases seem to have misdirected themselves that once there is evidence of negligence, then an award of damages ought to follow. It is therefore not surprising that on appeal to the Supreme Court, in both cases, the awards by the lower courts were set aside.

Again, if the plaintiff has contributed to their own injury the damages would normally be reduced and the measure of damages recoverable will take into account the plaintiff's share in the contribution to the damage sustained. However, where the plaintiff voluntarily took the risk and suffered damage in consequence, the court will not award any damages to because according to the case of **Eagle Charalambous Transport Limited v Gideon Phiri**⁹⁸ the doctrine of *Volenti non fit injuria* will apply in such a case. It must be mentioned that the object of awarding damages in tort particularly in negligence cases is to put the claimant in the position he would have been if the accident had never happened, and this, of course, is not always possible to achieve. Nonetheless, the award should be sufficient so as to put the plaintiff or claimant back in the position he or she was before the tort was committed and no more. On the other hand, it is argued that it is morally objectionable to award damages for rearing cost in sterilisation operations on the ground that it is impossible to establish with reasonable certainty whether the birth of a particularly healthy, normal child damaged its parents.

⁹⁸ SCZ Judgment No. 52 of [1994]

It is also patently clear that courts tend to protect the doctors by requiring a particularly high degree of deviation from the standard practice in order for a particular act or omission to constitute medical negligence. This is evident from the remarks of judges in these cases. For instance, in the *Zambian case of Cicuto v Davidson and Oliver*⁹⁹ the Court stated that a medical man is not guilty of negligence, if he has acted in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular act, merely because there is a body of opinion who would take a contrary view. Such remarks may be viewed as a shelter of protection to doctors and consequently discourages litigants to pursue their claims against medical practitioners on the simple reason that taking such a course may be an exercise in futility.

On the other hand, it is acknowledged that legal phenomena cannot be divorced from the social and cultural milieu. The law does not exist in a vacuum. Undoubtedly, it is intended to serve the needs of the society and in order to achieve this noble purpose it must conform to the social realities on the ground by identifying itself with the general feeling, aspirations, cultural values and ideals of that society. Therefore, where the strict application of the principle of law would manifestly offend public policy or is morally offensive, it is always desirable that public policy or moral considerations should take precedence.

⁹⁹ [1968] Z.R. 149 (H.C.)

2.0 RECOMMENDATIONS

2.1 Awareness Campaigns

In view of the fact that there is little litigation in the sphere of medical negligence in Zambia because a lot of people are unaware of their rights, it is recommended that sensitisation campaigns would help enlighten the society of their right to receive due diligence from doctors. Of course the high illiteracy levels account for the little litigation in this area. In this regard, the Law Association of Zambia may play a pivotal role in this area as it has a duty to identify itself with the citizenry and avail its skills and training to the society in the quest to foster social justice.

2.2 Trainings/ Workshops

The law of negligence is still growing and new area is being discovered. Therefore, organised workshops for the Judges would not only help the courts of law to keep abreast of the new developments but it would also foster consistency in the award of damages in negligence cases in Zambia.

2.3 Update the Library

The University main Library is in a bad shape because it is rarely updated with latest books. I had serious difficulties finding any latest book on negligence in the library. The library is full of very old books. The University must embark on a deliberate attempt to update the library from time to time.

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