JUDICIARY
IN THE HIGH COURT OF MALAWI
LILONGWE DISTRICT REGISTRY
JUDICIAL CAUSE NO. 682 OF 2017

BETWEEN:

LEONARD YANKHO PHIRI & OTHERS ……..……... CLAIMANTS

-AND-

LILONGWE CITY COUNCIL …..……...……..…… 1ST DEFENDANT

LILONGWE WATER BOARD ……..……..…..…..… 2ND DEFENDANT

MALAWI HOUSING CORPORATION ……...……..…… 3RD DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA
Messrs. Nankhuni, Kita and Katundu, Counsel for the Claimants
1st Defendant, absent and unrepresented
Messrs. Mbeta and Dossi, Counsel for the 2nd Defendant
3rd Defendant, absent and unrepresented
Mr. Henry Kachingwe, Court Clerk

JUDGEMENT

Kenyatta Nyirenda, J.

This case was commenced on 5th September 2017. The Claimants claim damages for breach of their statutory consumer rights. The statement of claim is couched in the following terms:

> *"1. The plaintiffs are residents of Area 18 A in the city of Lilongwe who under s.3(a) of the Consumer Protection Act have the right to the protection of their economic interests, health and safety in the consumption of technology, goods and services.*
>
> *2. The Plaintiffs under section 3(d) of the Consumer Protection Act also have the right to full, timely, adequate and prompt compensation for damage suffered as a result of the their violation of consumer rights provided for under the Consumer Protection Act and any other written law.*

3. *The Plaintiffs whose particular names appear in the schedule attached hereto bring this action as a class or collective action under section 48 of the Consumer Protection Act.*

4. *The 1st Defendant is a local authority established under the First Schedule to the Local Government Act and is by virtue of section 2(1)(a) of the Second Schedule to the Local Government Act mandated to establish, maintain and manage services for the collection and removal and treatment of solid and liquid waste, and disposal thereof within its area. The same responsibility is vested on the 1st Defendant by virtue of Section 79(1)(a) of the Public Health Act.*

5. *The 1st Defendant is also by virtue of Section 105 of the Public Health Act under a statutory duty to take all lawful, necessary and reasonably practicable measures for preventing any pollution dangerous to health of any supply of water which the public within its area have the right to use and do use for drinking or domestic purposes.*

6. *The 1st Defendant is also by virtue of Section 5(1) of the Consumer Protection Act placed and a specific duty to plan measures paralleling those of the Government as well as plan and execute measures concerning consumer protection according to the social and economic condition of the area under its jurisdiction.*

7. *The 2nd Defendant is a statutory corporation established under the Schedule to the Waterworks Act and is by virtue of Section 11 of the Waterworks Act mandated to construct and maintain all such works as are necessary an convenient for the purpose of creating, maintaining and extending waterworks for supplying water for domestic, public and business purposes, for he extinction of destructive fires, for cleansing streets, lanes, gutters and sewers, and for all other purposes to which water and waterworks are supplied or are applicable.*

8. *The 2nd Defendant is also by virtue of Section 26(1)(a)(i) of the Waterworks under a parallel duty to construct and maintain a public sewer in, under or over any street within its area of operation.*

9. *The 3rd Defendant is a statutory corporation, and Lessor of all the houses being occupied by the Plaintiffs and is the one who constructed the sewage manhole in issue and jointly responsible for its maintenance with the 1st and 2nd Defendants.*

10. *Early the month of July, 2017, the 3rd Defendant's sewage manhole situated at Salima Street in Area 18A blocked and started spilling into the open drain along the said Salima Street.*

11. *Around the same time, the 2nd Defendant's water pipe along the same Salima Street, lying next to the drain that was carrying the sewage from the blocked manhole burst.*

12. *It is said the water pipe that was supplying water to all the Plaintiffs herein.*

13. *The 2nd Defendant was on the 18th of July, 2017 informed about the burst pipe and closed off the water supply to the whole Area 18 A in order to work on the reported fault.*

14. *However, instead of repairing the broken pipe that was lying next to the sewage, the 2nd Defendant ended repairing another broken pipe altogether.*

15. *By reason of the closure of the water supply, and there being no pressure in the pipe, the sewage from the drain found its way into the 2nd Defendant water pipe through the burst area.*

16. *On the morning of 18th of July, 2017, the Plaintiffs water supply had been restored to the area and the Plaintiff started using it for drinking, cooking and other domestic chores.*

17. *In the course of the day, it became apparent that the water was smelling feces and was all sewage.*

18. *On contacting the Defendant, 1st and 2nd Defendant both confirmed that the water the Plaintiffs were using in their homes was contaminated with sewage and advised them to stop using it.*

19. *At the time the Defendants advised the Plaintiffs to stop using it, they had made use of it by drinking, cooking bathing and other domestic chores.*

20. *By reason of the matters aforesaid, the Defendants, jointly or severally breached their statutory duties of maintaining the sewage and water systems by reason which the Plaintiff's right to the Protection of their health and safety in the consumption of water was violated.*

21. *The 1st Defendant and 3rd Defendants are severally and /or jointly guilty of negligence in failing to repair or maintain the blocked manhole where the spallation of the sewage occurred.*

22. *Despite claims by the 1st and the 2nd Defendants that the sewage system had been repaired and that the water was safe for domestic use, reports by independent water experts reveal that the water is still contaminated with sewage.*

23. *The 2nd Defendant is guilty of negligence in failing to repair or maintain the burst water pipe which ended up absorbing the sewage from the drain.*

24. *The misconduct of the Defendants left the Plaintiff with no option but to be buying bottled water for their domestic use.*

25. *By reason of the above statutory breaches and negligence, the Plaintiffs have suffered damage to their physical and psychological health as well as financial expenses in buying bottled water for their use."*

The Defendants filed their respective defences. The main thrust of the defence of the 1st Defendant is that it is not liable because the responsibility or mandate for the establishment, maintenance and management of services for the collection and removal and treatment of solid and liquid waste, and disposal in Area 18A does not lie with the 1st Defendant. The defence by the 1st Defendant is worded as follows:

"1. *The 1st Defendant refers to paragraphs 1 to 6 of the Claimants Statement of Case and is neither able to admit nor deny the contents therein and puts the Claimants to strict proof thereof.*

2. *The 1st Defendant refers to Paragraphs 7 to 17 of the Claimants Statement of Case denies its contents and puts the Claimants to strict proof thereof.*

3. *The 1st Defendant refers to paragraphs 18 to 19 of the Claimants Statement of Case and is neither able to admit nor deny the same, and puts the Claimants to strict proof thereof.*

4. *The 1st Defendant contends that it is not mandated to establish, maintain and manage services for the collection and removal and treatment of solid and liquid waste, and disposal in Area 18A. It therefore does not have jurisdiction in this area.*

5. *The 1st Defendant refers to paragraphs 20 to 26 of the Claimants Statement of Case, denies its contents and puts the Claimants to strict proof thereof.*

6. *In all circumstances, the 1st Defendant contends that Area 18A does not fall within its jurisdiction and denies any liability arising therein*

7. *Save as hereinbefore specifically admitted, the 1st Defendant denies each and every allegation of fact contained in the Claimants Statement of Claim as if the same were set out and traversed seriatim, and puts the Claimants to strict proof thereof."*

The 2nd Defendant also filed its defence which was subsequently amended and then re-amended. The 2nd Defendant's Re-Amended Defence was in the following terms:

"1. The 2nd Defendant makes no comment on the contents of paragraphs 1 and 2 of the Statement of Case.

2. *The 2nd Defendant refers to paragraph 3 of the Statement of Case and to the Schedule of Claimants and states that only 83 households, whose particulars appear in the Schedule attached hereto marked Annex 7, were affected by the contamination and that only residents of the affected households are entitled to bring these proceedings.*

3. *The 2nd Defendant makes no comment on the matters alleged in paragraphs 4, 5 and 6 of the Statement of Case.*

4. *The 2nd Defendant admits the contents of paragraphs 7 and 8 of the Statement of Case.*

5. *The 2nd Defendant refers to paragraph 9 of the Statement of Case and denies being responsible whether jointly or otherwise for the maintenance of the sewerage manhole in issue.*

6. *The 2nd Defendant admits paragraphs 10 and 11 of the Statement of Case.*

7. *The 2nd Defendant refers to paragraph 12 of the Statement of Case, denies it and repeats the averments in paragraph 2 above.*

8. *The 2nd Defendant refers to paragraph 13 of the Statement of Case and denies closing water supply to the whole of Area 18A and puts the Claimants to strict proof thereof.*

9. *The 2nd Defendant refers to paragraphs 14 of the Statement of Case, denies it and puts the Claimants to strict proof thereof.*

10. The 2nd Defendant refers to paragraphs 10 to 19 of the Statement of Case and states as follows:

10.1 On 18th July 2017 at 4a.m, the 2nd Defendant's Northern Zone Office received a burst pipe report from a customer from Plot Number 18/A/298 on Salima Street.

10.2 The normal approach to handling pipe bursts is to isolate the affected pipe to stop further water loss and the pipe was closed by 4:30 a.m. At that time it was still dark and tracing of the exact location of the water pipe burst and related repairs were planned for the morning of the same day.

10.3 The exact location of the water pipe burst was identified as House Number 18/A/317 at around 8 a.m. the same day.

10.4 At around the same time, the 2nd Defendant was notified of contamination on Plot Number 18/A/118.

10.5 Immediately upon receipt of these reports, a water quality team was deployed to the site to verify the complaint and the team verified it. Subsequently sampling was conducted in all houses and surrounding areas to trace the extent of the contamination. The limit of the contamination was established by 8:30 a.m. at which time all affected households were cordoned off and an instruction was issued to all affected households not to use tap water.

10.6 About 83 households were identified as affected and they were immediately issued with written instructions not to use the tap water until further communication and they were provided with alternative water supply source in the name of water bowsers.

10.7 The affected area has a history of perpetual sewerage overflows in gullies, road side drains and other channels and in general has a dysfunctional sewer system.

10.8 In his particular incident the source of the sewerage was a blocked sewer line that resulted in an overflowing manhole. The sewerage had been flowing in a roadside drain along Salima Road where there was a broken water pipe and the sewerage infiltrated into the burst pipe due to the low pressure after isolation.

10.9 The manhole had been overflowing for a considerable time prior to the incident.

10.10 Immediately after the source of the sewerage had been identified, the 2nd Defendant redirected the flow of the sewerage away from the burst pipe and maintenance of the pipe was completed on the same day, 18th July 2018 by 1 p.m.

10.11 Following the repairs of the burst pipe, flushing and disinfecting commenced on the same day to ensure through cleasing. This was carried out in three sessions at 24 hour intervals.

10.12 The pipe burst was not as a result of any negligence by the 2nd Defendant at all whatsoever.

10.13 The sewerage system in the affected area was installed by the 3rd Defendant and it is operated and maintained by the 3rd Defendant and the 1st Defendant and had the sewerage system been in good order, the 2nd Defendant's water supply could not have been contaminated.

10.14 The 2nd Defendant thus denies being negligent and states that the contamination of the water supply was a direct result of the negligence of the 3rd Defendant and the 1st Defendant in failing to properly operate, maintain and repair the sewerage system in the affected area.

11. The 2nd Defendant refers to paragraph 20 of the Statement of Case, restate paragraph 10 above and states that the 2nd Defendant's failure to supply potable water to the affected households, as well as any damage or any violation of rights that may thereby have been caused was occasioned solely by the acts and omissions of the 1st and 3rd Defendants in failing to properly operate, maintain and repair the sewerage system in the affected area.

12. Further, the 2nd Defendant states that in light of paragraphs 10.2 – 10-6 hereof, the Claimants, with the full knowledge of the risk of injury or damage to themselves and their wards posed by the contaminated water, of which they were expressly warned, the Claimants voluntarily consented to accept such risk despite being warned and despite being provided with safe water through water bowsers, and to waive any claim in respect of any injury or damage that may be occasioned to them by reason of the water contamination that was occasioned by the negligence of the 1st and 3rd Defendants in failing to timeously repair the sewerage system or at all.

13. The 2nd Defendant admits contents of paragraph 21 of the Statement of Case.

14. The 2nd Defendant denies the contents of paragraphs 22 of the Statement of Case and states that the water is safe for domestic use.

15. The 2nd Defendant refers to paragraph 23 of the Statement of Case, denies being negligent and avers that the 2nd Defendant took all reasonable and necessary steps that a reasonable water board would have taken in the circumstances to contain the contamination and acted with dispatch in addressing it as particularized in paragraph 10 above.

16. The 2nd Defendant refers to paragraph 24 of the Statement of Case, denies it and puts the Claimants to strict proof thereof and states that the 2nd Defendant was providing free potable water to the affected houses through water bowsers during the period when repair and disinfecting works were still ongoing, and that any purchase of bottled water for domestic use on the part of the Claimants was done

merely out of their own free will and choice, not because there was no alternative source of water provided by the 2nd Defendant.

17. *The 2nd Defendant denies paragraphs 25 of the Statement of Case and puts the Claimants to strict proof thereof.*

18. *Save as hereinbefore specifically admitted, the 2nd Defendant denies each and every allegation of fact contained in the Statement of Case as if the same were herein set out and traversed seriatim and prays that the Claimants' claims be dismissed with costs."*

The Defence of the 3rd Defendant stated thus:

"1. The 3rd Defendant refers to Paragraphs 1, 2, 3, 4, 5, 6, 7 and 8 of the Statement of Claim and makes no comments thereof.

2. *The 3rd Defendant refers to paragraph 9 and admits being a Statutory Corporation and the landlord which initially constructed the sewer manhole in issue. Save as herein admitted, every allegation of fact therein is denied and the Plaintiffs are put to strict proof thereof.*

3. *The 3rd Defendant denies paragraph 10 of the Statement of Claim and pleads that after construction of a sewer system in its housing estates like Area 18, the managing or maintenance of the main sewer lines becomes the responsibility of the 1st Defendant hence at the time the said manhole had blocked, it was the responsibility of the 3rd Defendant to repair it.*

4. *The 3rd Defendant refers to paragraphs 11, 12, 13, 14, 15, 16, 17, 18 and 19 of the Statement of Claim and makes no comments thereof.*

5. *The 3rd Defendant denies paragraphs 20 of the Statement of Claim and contends that it did not breach any statutory duty as the said manhole was part of the main sewer line for which it is not responsible for.*

6. *The 3rd Defendant refers to paragraph 21 of the Statement of Claim and avers that if at all there was any negligence on its part (Which is denied) in not repairing the blocked sewer manhole, the leaving open of a water pipe without pressure by the 2nd Defendant was a **'nova causa interveniens'** hence the 3rd Defendant is not liable for any damage suffered by the Plaintiffs.*

7. *The 3rd Defendant refers to paragraphs 22 and 23 of the Statement of Claim and makes no comments thereof.*

8. *The 3rd Defendant denies paragraphs 24 and 25 of the Statement of Claim and makes no comments thereof.*

9. *Save as hereinbefore specifically admitted, the 3rd Defendant denies each and every allegation of fact contained in the Statement of Claim as if the same were herein set out and traversed **seriatim**."*

I pause to mention that at some point the 2nd Defendant raised a preliminary objection to the effect that the jurisdiction to handle consumer protection claims is vested in subordinate courts and not this Court. The preliminary objection was raised and determined before trial. The Court Ruling is dated 7th day of October 2019.

Trial was initially set for 16th June 2020 but it could not take place because a number of required steps had not been taken by the said date. The case was then adjourned to 7th July 2020 but hearing on this day failed because Counsel for the 2nd Defendant was indisposed. The Court then set new dates of hearing, namely, 17th and 18th August 2020.

On the set hearing date of 17th August 2020, only the Claimants and the 2nd Defendant were present. The 1st and 3rd Defendants were in default of appearance, both in person and by counsel.

Order 16, rules 2, of the CPR provides that where there are two or more parties to the proceeding, evidence is to be presented, and addresses made, in the following order:

(a) the claimant may make an address opening the proceeding not exceeding 10 minutes and, where evidence is to be given orally, bring evidence in support of his claim;

(b) the defendant and other party may cross-examine the claimant or his witness, if any;

(c) the defendant and other party may make an address opening his case not exceeding 10 minutes and, where evidence is to be given orally, bring evidence in support of his defence;

(d) the claimant may cross-examine the defendant or the other party or their witnesses, if any;

(e) the claimant or the defendant may re-examine their witnesses, if need be; and

(f) the parties may make closing addresses respectively not exceeding 60 minutes.

Order 16, rule 7(1), of the CPR deals with a situation where a party or parties fail to attend trial and it reads as follows:

"The Court may proceed with a trial in the absence of a party but–

> *(a) where a party does not attend the trial, it may strike out the whole of the proceeding;*
>
> *(b) where a claimant does not attend, it may strike out his claim and any defence to a counterclaim; and*
>
> *(c) where a defendant does not attend, it may strike out his defence and dismiss his counterclaim."* [Emphasis by underlining supplied]

At this stage, the Claimants opted to discontinue the case against the 2nd Defendant. Thereafter, Counsel Kita moved the Court to have the defences by the 1st and 3rd Defendants struck out. The Court, acting pursuant to Order 16, rule 7(1)(c), of the CPR, struck out the respective defences by the 1st and 3rd Defendants. Thereafter, the Court gave permission to the Claimants to present their case, as provided for in Order 16, rule 2, of the CPR, with necessary changes thereto in view of the absence of the 1st Defendant and the 3rd Defendant.

It is trite that a claimant has the burden of proving the elements of his or her lawsuit. In a civil case, like the present one, a claimant has to prove his or her case on a balance of probabilities. In the case of **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)**, the Court observed as follows:

> *"Ordinarily, the law is that the burden of proof lies on a party who substantially asserts the affirmative of the issue. The principle was stated in the case of **Robins v National Trust Co [1927] AC 515** that the burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule is Ei qui affirmat non qui negat incumbit probatio which means the burden of proof lies on him who alleges, and not him who denies. Lord Megham, again, in **Constantine Line v Imperial Smelting Corporation [1943] AC 154**, 174 stated that it is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. The judge said that the rule is adopted principally because it is but just that he who invokes the aid of the law should be the first to prove his case because in the nature of things, a negative is more difficult to establish than an affirmative. However, in a civil action the burden of proof may be varied by the agreement of the parties – see **Bond Air Services Ltd v Hill [1955] 2 QB 417**."*

It, therefore, follows that in the present case the burden of proof is on the Claimants to prove on a balance of probabilities that they suffered damage to their physical and psychological health and financial expenses as a result of statutory breaches and negligence on the part of the 1st and 3rd Defendants, as pleaded in the Claimants' Statement of Case. If the Claimants adduce sufficient evidence to raise a presumption that what is claimed is true, the burden shifts to the 1st Defendant and 3rd Defendant, who will fail unless sufficient evidence is adduced by them to rebut the presumption. The Court makes its decision on the "balance of probabilities", and this is the standard of proof required in civil cases. This point was put by Lord

Denning in **Miller v. Minister of Pensions [1947] 2 ALL ER 794** in the following terms:

> *"the degree is well settled. It must carry a reasonable degree of probability, not so high as in a criminal case, but if the evidence is such that a tribunal can say 'we think that it is more probable than not' the burden is discharged, but if the probabilities are equal, it is not."*

Eight witnesses testified, to wit, Leonard Yanko Phiri (CW1), Salome Kayesa (CW2), Robin Karonde (CW3), Elizabeth Janet Mangani (CW4), Charles Bezai Kayesa (CW5), Zione Kamoto Barry (CW6), Nelly Moyo (CW7) and Lizibeth Mponda (CW8).

CW1 adopted his witness statement and this formed his evidence in chief in this case. The material part of CW1's witness statement is couched in the following terms:

> *"2. I stay in Area 18 on house Number 18/285 which I rent from the Malawi Housing Corporation and all the other Claimants herein are also tenants of Malawi Housing Corporation and I say with my wife Yamikani and our daughters Esther and Tinashe.*
>
> *3. The sewage for the affected area is controlled and managed by the Lilongwe City Council.*
>
> *4. In our households, all the Claimants use water provided by Lilongwe Water Board for drinking, cooking and all other household chores that require water which water is provided at a fee.*
>
> *5. I live with the following people Yamikani Phiri, Esther Phiri and Tinashe Phiri.*
>
> *6. It was on the **18th July 2017** when l woke up to adhere to my daily routine one of which is jogging. I returned home at around about 6AM. Traditionally l give myself 10 to 15 minutes to cool down before jumping into the shower. I took two glasses of water during the cooling period to resuscitate my body after the jog.*
>
> *7. On this day, the weather was a bit chilly and l decided to collect water in a Bucket which coincidentally turned out to be a good idea because water pressure was low, hence the shower wouldn't have been the right choice.*
>
> *8. While bathing for some few minutes, l came across a bad smell which I ignored because it sometimes happens that our Bathrooms smell bad. But then l realized it was too much and established that it was coming from the Bucket.*
>
> *9. I immediately stopped bathing and shouted to my maid to confirm to me if she came across the same smell, she simply replied **"ndinamva koma ndinawamvabe koma poti ndimati akuchokera ku mpopi ndi abwinobwino." (I noticed the smell but I still drunk the water since it was coming from the tap)***

10. *I got out of the bathroom and narrated to my wife the experience that I had in the bathroom. My wife then communicated to her fellow women around the area through WhatsApp group called Makhukafe. This is an informative forum women created to communicate to each other within the area.*

11. *The sewage for the affected area is controlled and managed by the Lilongwe City Council.*

12. *Around and about 8am, the same day of **18th July 2017,** Lilongwe water Board deployed its staff members to do a door to door verbal awareness, stopping people from drinking tap water because it was not safe to drink. Water Bowsers were now deployed to the affected area to start distributing water.*

13. *On **20th July 2017,** I started experiencing abdominal pains and visited the hospital on, **23rd July, 2017** and later on **2nd August 2017** where l was finally treated and got better. I now produce and exhibit hereto my medical report marked **'LP 1"**.*

14. *In our household before this event we were all using the water provided by Lilongwe Water Board for drinking and all other purposes.*

15. *We formed a group of concerned citizens and I was elected its Chairperson.*

16. *I later on attended a Public Hearing instituted by the Malawi Human Rights Commission on the 4th of July 2018. Later on the Commission also conducted its investigations and came up with its recommendations. The same is now produced and exhibited hereto marked **"LP 2"**.*

17. *Coincidentally on the same day Lilongwe Water Board issued a written document without date, informing the customers not to use the water because it was not safe to do so. The same is now produced and exhibited hereto marked **"LP 3".***

18. *By this time the Lilongwe Water Board had started changing the pipes from the old ones to new ones in all the affected areas and on **28th July 2017**, Lilongwe Water Board issued another letter informing its customers within the affected area that the water was now safe to drink**.** The same is now produced and exhibited hereto marked **"LP 4"***

19. *Though the water was declared safe, **on 3rd August 2017**, another Organization Malawi Environmental Health Association, MEHA which conducted its investigations issued a statement alerting the people of Area 18 not use the tap water until Scientific verification was done. The same is now produced and exhibited hereto marked **"LP 5".** Investigations were carried out because traces of feces were still found in the water.*

20. *The Lilongwe Water Board at one point, on its own volition gave us a map of the affected area which is now produced and exhibited hereto marked **"LP6".***

21. *The People within the affected area are still in a shock and cannot trust tap water anymore. Those that can afford are now relying on bottled water which is too*

expensive. People have suffered mentally, physically and of course socially. It is embarrassing nowadays, because whenever people visit our homes, they must always be sure that the water they drinking is safe and not from the taps and its now rare that people will accept to eat food that is cooked from our homes.

22. I therefore claim the damages as pleaded in the statement of claim"

The witness statements of CW2 to CW8 more or less mirror in material particulars the witness statement of CW1. I, therefore, deem it not necessary to quote these witness statements in full but just to give a summary thereof.

The Claimants were at all material times residents of the 3rd Defendant's housing estate in Area 18A in the City of Lilongwe. In the month of July, 2017, the 3rd Defendant's sewer manhole situated at Salima Street in Area 18A blocked and started spilling into the open drain along the said Salima Street for a notable period of time (approximately for a week) without being attended to by the 1st and 3rd Defendants.

On the 18th of July, the 2nd Defendant's pipe (situated down the drain carrying the spilling sewerage) burst. This pipe was carrying water to the Claimants. The 2nd Defendant was informed of this and it duly responded in the morning of the said day upon which it closed the pipe and left the area in question. Due to the lowering of pressure in the water pipe, the sewer spillage from the drain found its way into the pipe of the 2nd Defendant through the burst pipe area. By morning hours of 18th July 2017, the water was contaminated and it was smelling feces. Upon the residents contacting the 2nd Defendant, it confirmed that that was indeed the case and it advised the residents to stop using the water.

By the time the advice was being given, the Claimants had already made use of the water supplied by the 2nd Defendant. The 2nd Defendant later on issued letters (on the 20th of July 2017) to the residents not to use the water and it also supplied to some of the residents water from mobile water bowsers. The water was still contaminated with organisms up to the 2nd August 2017 being the last day recorded by the Malawi Environmental Health Association.

There are five main issues for the determination of the Court, namely, whether or not:

(a) the 1st Defendant and the 3rd Defendants acted negligently in their various capacities in their duty towards the Claimants?

(b) the 1st Defendant and 3rd Defendants were singularly and or jointly under legal and statutory duty towards the Claimants to establish, maintain, manage and repair sewerage system in Area 18A in the City of Lilongwe?

(c) the 1st and 3rd Defendants singularly and or jointly breached their above duties by failing to maintain the sewerage manhole leading into the spillage of fecal matter into the 2nd Defendant's water supply pipe?

(d) the Claimants suffered physical, mental and emotional harm by being supplied and using water contaminated with fecal matter?

(e) the actions of the defendants' amount to consumer and human rights violations?

Looking at the issues for determination, it is clear that the Claimants largely base their case on the law of negligence and breach of statutory duty.

The Law of Negligence

The case of **Blyth v. Birmingham Waterworks Company (1856) 11 Ex Ch 781** is famous for its classic statement of what negligence is and the standard of care to be met. Baron Alderson made the following famous definition of negligence:

> *"Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. The defendants might have been liable for negligence, if, unintentionally, they omitted to do that which a reasonable person would have done, or did that which a person taking reasonable precautions would not have done"*

The essential elements of actionable negligence are (a) a duty to take care owed to the claimant by the defendant, (b) a breach of that duty, and (c) damage suffered by the claimant resulting from the breach of duty: see **Donoghue v. Stevenson [1932] AC 562** quoted with approval by Ndovi, J, as he then was, in **Kadawire v. Ziligone and Another [1997] 2 MLR 139** at 144.

The test to be applied to ascertain whether a duty of care arises has been comprehensively set out in **Caparo v. Dickman (1989) QB 653 at 679** (the **Caparo Case** Test**)**. The **Caparo Case** Test comprises a threshold question of (a) factual foreseeability, (b) proximity, and (c) policy considerations. The **Caparo Case Test** is now accepted as the basic test to be applied when a court is presented with a new factual situation in which it needs to decide whether a duty of care exists.

The Claimants submit that the **Caparo Case Test** has been met in the present case. The submissions are lengthy but it is necessary that they be quoted. The submissions start by discussing factual foreseeability as follows:

> *"3.10 In the present circumstances some of the questions to be asked are whether it was reasonably foreseeable that if the 1st and 3rd defendants did not maintain the sewerage manhole and the 2nd defendant did not maintain the water pipes the claimants would be harmed. Essentially, the courts have to ask whether a reasonable person in the defendant's position would have foreseen the risk of damage.*
>
> *3.11 It was held in **Langley v Dray (1998)** that in order for a duty to exist, it must be reasonably foreseeable that damage or injury would be caused to the particular defendant in the case, or to a class of people to which he or she belongs, rather than just to people in general.*
>
> *3.12 The crucial question that arises therefore is whether the defendants discharged their duty to take reasonable care in relation to the Claimants. Was it reasonably foreseeable that by their acts, it was possible for inhabitants on Salima Street, Area 18 A, in the City of Lilongwe to be harmed other than just all other people in Lilongwe. Would any other inhabitant of the City of Lilongwe be prone to the same dangers posed by the spilling sewer and contaminated water as those on Salima Street?*
>
> *3.13 The Claimants are of the view that it was reasonably foreseeable that the inhabitants of the said Salima Street would be harmed by the omissions of the defendants other than the inhabitants from elsewhere the jurisdiction of the Defendants. No prudent man would allow sewer to be spilling openly in a place at which he resides. It is common knowledge that sewer is disgusting to say the least, a danger to public health and a source of many diseases causing organisms. Campaigns are rampant against open defecation which essentially means sewer in open places.*
>
> *3.14 It is therefore very disturbing that the 1st and 3rd Defendant's had no prudence in managing the spillage of sewer with due regard to the dangers posed by sewer as a source of various health hazards. Even if the test of reasonableness was lowered, the actions and omissions exhibited by the Defendants are grossly inexcusable.*
>
> *3.15 As **Catherine Elliott and Frances Quinn, Contract law (10th edn, Pearson Education 2015)** argue, the requirement of factual foreseeability does not mean that the defendant has to be able to identify a particular individual who might foreseeably be affected by their actions or omissions; it is enough that the claimant is part of a category of people who might foreseeably be affected. As argued above, this category of people were the inhabitants of the 3rd Defendant's housing estate in Area 18A, Salima Street in the City of Lilongwe. In all undertakings, the defendants should have contemplated harm being occasioned to the Claimants herein.*

*3.16 In **Haley v London Electricity Board** (1965) the following facts happened;*

The defendants dug a trench in the street in order to do repairs. Their workmen laid a shovel across the hole to draw pedestrians' attention to it, but the claimant was blind, and fell into the hole, seriously injuring himself. It was agreed in court that the precautions taken would have been sufficient to protect a sighted person from injury, so the question was whether it was reasonably foreseeable that a blind person might walk by and be at risk of falling in. The Court of Appeal said that the number of blind people who lived in London meant that the defendants owed a duty to this category of people.

*3.17 The general idea as seen above therefore is that the defendant only has to have people in contemplation who might be injured by his or her actions. A general precaution is not sufficient without due regard as to contemplation of people who may be foreseeable as prone to the harm. As contrasted from the **Haley case** above where the Defendant took precautions; the Defendants in the present case did not take any precaution at all! They simply left things to the fate of nature. This was an act of willful lack of contemplation. A reasonable man ought to have foreseen the harm to the Claimants.*

*3.18 Further, where a defendant actually creates a dangerous situation, even if this risk is created through no fault of the defendant, the courts may impose a positive duty to deal with the danger. This issue was explored in **Capital and Counties plc. v Hampshire County Council (1997)**. The 2nd Defendant should have taken responsibility to deal with the sewer from spilling into his pipe.*

3.19 Having seen that there was sewer spillage in the drain where the 2nd Defendant's pipe had burst, the courts must look at what the 2nd Defendant actually did to take care of the situation. Is it normal practice to deal with consumables next to feces? Did the 2nd Defendant simply say "this is none of my business?" The court is at liberty to impose a positive duty on the 2nd defendant to have done something about the situation other than continue with business as usual.

3.20 It is submitted that the people who ought to have been in contemplation of the defendants are the Claimants herein.

*3.21 In **BNJ (Suing by her lawful father and Litigation guardian) v SMRT Trains Ltd and Another (2014) SLR 7 at 55** Vinodh J stated that the question of whether a defendant has breached the standard of care expected of him cannot be analysed in a vacuum. It is thus trite that the question of breach must be analysed in light of the nature of the specific risk that has eventuated.*

3.22 The Claimants are of the view that the standard of care generally expected of the 2nd Defendant is the supply of clean portable water. With regards to the 1st and 3rd Defendants, their standard of care was to prevent and manage the spillage of sewer which has brought about these proceedings in the first place.

*3.23 On the authority of the **BNJ case Supra**, the defendants' omissions and actions must be analysed based on the danger and risk of people consuming their own human excreta. Is it too high a standard to demand the 2nd defendants to provide*

clean portable water and the 1st and 3rd Defendants to manage sewer systems? What is the actual risk of not doing so?

*3.24 In answering the above questions, it is important as the **BNJ case** directs us, to have due regard to the dangers of the acts or omissions of the defendants.*

*3.25 In **Walker v Northumberland County Council (1995) ICR 702 at 711,** the court provided guidance on the yardstick;*

"It is reasonably clear from the authorities that once a duty of care has been established, the standard of care required for the performance of that duty must be measured against the yardstick of reasonable conduct on the part of the person in the position of the person who owes that duty. The law does not impose on him the duty of an insurer against all injury or damage caused by him however unlikely and expected and whatever the practical difficulties of guarding against it. It calls for no more than a practical response."

3.26 The risk in the present case is this; an inhabitant of the 3rd Defendant's house in Area 18 would be in the danger of consuming unhealthy and contaminated water if a pipe carrying water, and another sewerage came into contact with each other

*3.27 The threshold for factual foreseeability and reasonable conduct is not a high one. All that is needed is that it is foreseeable that the defendants' negligence might result in persons such as the claimants suffering harm. This is a factual inquiry and a matter of common sense. See **BNJ Case Supra**.*

*3.28 Indeed, in conclusion, it is important to be directed by the **Walker Case** above, what was reasonable on the part of the Defendants? Is the conduct exhibited by the Defendant's that of a reasonable man? Are the omissions of the Defendants likely to be done by a reasonable man? We answer the foregoing in the negative."*

Regarding proximity, the submissions by the Claimants are couched in the following terms:

*"3.29 The concept of proximity focusses on the closeness and directness of the Defendants' relationship with the claimant, and inquires whether it is sufficiently proximate to give rise to a duty of care. **Caparo Industries Plc. v Dickman (1989) QB 653 at 679**.*

*3.30 More clarification is expounded in the Australian High Court in **Sutherland Shire Council v Heyman (1985) 60 ALR 1 at 55-56;***

"The requirement of proximity is directed to the relationship between the parties in so far as it is relevant to the allegedly negligent act or omission of the defendant and the loss of injury sustained by the plaintiff. It involves the notion of nearness or closeness and embraces physical proximity (in the sense of space and time) between the person or property of the defendant, circumstantial proximity such as an overriding relationship between employer and employee or of a professional man and his client and what may (perhaps loosely) be referred to as causal proximity in the sense of closeness of or directness of the causal connection or relationship between the particular act or course of conduct and the loss or injury

sustained…both the identity and relative importance of the factors which are determinate of an issue of proximity are likely to vary in different categories of case".

3.31 *In **Muirhead v Industrial Tank Specialities (1985)**, Goff LJ pointed out that proximity does not mean that the defendant and claimant have to know each other, but that the situations they were both in meant that the defendant could reasonably be expected to foresee that his or her actions could cause damage to the claimant.*

3.32 *As tenants of the 3rd Defendant's housing estate, customers of the 2nd Defendant and residents of the city of Lilongwe which is the jurisdiction of the 1st Defendant, it was reasonably foreseeable that the omissions by the Water Board, City Council and the Housing Corporation would harm the claimants. Additionally, it was reasonably foreseeable that failing to maintain a sewer spillage on a drain with a water pipe carrying water for domestic use would harm the claimants. The foregoing creates a sufficient proximate relationship between the Claimants and Defendants herein.*

3.33 *Is it a normal occurrence for sewer to generally be spilling down drains? Is it generally accepted that sewer is dangerous to human health? Isn't it then generally accepted that sewer must be taken care of to avoid contamination of water and the environment? If so, whose responsibility was it to maintain the sewer? What is the responsibility of the 2nd Defendant with regards to water supply? Our answer is **NO** to the first three questions and, to the fourth; it was the responsibility of the 1st and 3rd Defendants! And to the last question, our answer is as below;*

*LWB's mandate is to **manage** the source of raw water, abstract and **treat water** in full compliance with regulatory bodies such as World Health Organization (WHO) and Malawi Bureau of Standards (MBS); and **provide adequate and reliable water supply to the residents of the City of Lilongwe that meets customer needs**. https://www.lwb.mw/background-information/*

3.34 *It would not be a careless summary to say proximity seeks to answer the following question; is there sufficient connection between the actual act or thing causing the damage and the defendant as there is a connection between that thing and the injury suffered by the claimant.*

3.35 *In cases such as the current one, one has to establish a nexus between the act or the omission and the injury. See Mbvundula J in **Thom Saizi Lihoma v Anchor Industries (Soap Division) Personal Injury Case Number 254 of 2014.***

3.36 *It cannot be denied that the 2nd Defendant is responsible for the supply of clean water to the claimants. We also put forward that the responsibility of taking care of sewer falls in the hands of the 1st and 3rd Defendants jointly. The actions are as follows; the former supplied water which is not in dispute…. the latter failed to control the spillage of sewer on Salima street. The two acts combined birthed the Claimants' damage.*

*3.37 As defined by Lord Brennan in **Sutradhar v Natural Environment Research Council (2004)** proximity may also be defined as 'proximity in the sense of a measure of control over and responsibility for the potentially dangerous situation'. The present facts do not only present us with proximity in the sense of the relationship between the claimants and the defendants as already argued above, they also provide us with a sense of measure of control over the intervening acts of water supply and sewer control by the defendants.*

*3.38 In **Sutradhar** case above, the claimant was a resident of Bangladesh, who had been made ill by drinking water contaminated with arsenic. The water came from wells near his home, and his reason for suing the defendants was that, some years earlier, they had carried out a survey of the local water system, and had neither tested for, nor revealed the presence of arsenic. The House of Lords said this could not be the case: the defendants had no connection with the project that had provided the wells. Proximity required a degree of control of the source of Mr. Sutradhar's injury, namely the drinking water supply of Bangladesh, and the defendants had no such control.*

3.39 On a close reading of the facts above, one may conclude that if the defendants were in control of the wells, they could have been made tortuously liable. Suffice to say that that was the only puzzle missing.

3.40 That puzzle is solved by the present facts. The 2nd Defendant was completely in control of a water system that supplied water contaminated with feces.

*3.41 In **Watson v British Boxing Board of Control (2000**):*

the claimant was a famous professional boxer Michael Watson, who suffered severe brain damage after being injured during a match. He sued the Board, on the basis that they were in charge of safety arrangements at professional boxing matches, and evidence showed that if they had made immediate medical attention available at the ringside, his injuries would have been less severe. The Court of Appeal held that there was sufficient proximity between Mr. Watson and the Board to give rise to a duty of care, because they were the only body in the UK which could license professional boxing matches, and therefore had complete control of and responsibility for a situation which could clearly result in harm to Mr. Watson if the Board did not exercise reasonable care.

3.42 The following points may be isolated from the Watson case above. Firstly, that the act injuring the claimant was under the jurisdiction of the defendants. Secondly, that it was the responsibility of the defendants to take reasonable action to avoid injury to the claimant. They did not do this and the claimant suffered injury. The defendants were found liable.

3.43 Applying the same facts to the ones at hand, the defendants were in charge of the supply of water and maintenance of the water supply system in the case of the 2nd defendant. In the case of the 1st and 3rd defendants, that they were in charge of maintaining and monitoring the sewer system along Salima Street, Area 18 A in the

City of Lilongwe. Further applying the facts that all the defendants failed to take reasonable action to avoid injury to the claimants.

3.44 A question that may be asked is with regards as to what this reasonable action may have been. In the case of the 1st and 3rd defendants, such action should have been repairing the sewer manhole when it blocked as and when such notification was sent to them. With regards to the 2nd defendant, such action would include maintaining the pipe when it burst promptly and informing the residents there and then of the potential danger associated with the water supply."

On policy considerations, the Claimants submit thus:

*"3.45 Policy considerations are adapted from the second stage of the test expounded by Lord Wilberforce in **Anns v Merton London Borough Council (1978) 1 AC 728** at **752**. The question that one seeks to answer is whether it is just and reasonable to expect the defendants to supply clean water and manage sewer spillage and that failure to do so should attract liability.*

*3.46 Policy considerations involve as stated by Lord Browne-Wilkinson in **Barrett v Enfield London Borough Council (2001) 2 AC 550 at 558;***

"…weighing in the balance the total detriment to the public interest in all cases from holding such class liable in negligence as against the total loss to all would be plaintiffs if they are not to have a cause of action in respect of the loss they have individually 'suffered."

*3.47 There is no specific presumption that applies to public utilities in terms of policy considerations: **Atkinson v Newcastle Waterworks Co (1877) 2 ExD 441 Clegg Parkinson & Co v Earby Gas Co [1896] 1 QB 592, 594.***

3.48 The court must weigh its opinion. Is it just and equitable that tenants of Malawi Housing Corporation houses must not be taken care of by the Corporation knowing very well that there are no consequences to acts as gross as the current one. Is it right that the Water Board should act so carelessly as to the point of supplying water with fecal matter to its customers, the Board knowing that it can get away with anything even for an act as gross as the current one? Is it right that the City Council must neglect its duty in the provision of services to the residents of the city knowing that they have nowhere to get redress? The Claimants implore the Court to put an end to this laissez faire way of handling public duty and office.

3.49 The court may wish to take judicial notice that service delivery in our local councils and statutory corporations has been far from satisfactory. The City Council has for a long time neglected its duties such as waste collection. The Water Board has and continues to provide dirty water to customers as well as closures when it wishes. All this, citizens have learnt to live with. Going further to supply them with water contaminated with fecal matter was a step too far, a standard too low. Going further to let sewer spillage go on for a week without attendance, was a low standard unacceptable even for the lowest of standards acceptable. A standard that would be generally acceptable even by a minor as to pose serious health challenges either in that state or as a consequence such as the cause of the current litigation.

> *3.50 The question therefore arises; are the current facts ones that may lead to extensive liability on the part of the defendants? In answering this question, it is important to dig into our modern history and find out the occurrence of such events. If the answer is in the negative, then it shows that there was something grossly wrong with the actions of the defendants. If the current event is one that can be equated to the often dirty water supplied in our taps, the Claimants would implore a no finding of liability. Under this head as this would lead to extensive litigation, it is submitted that the current events should be looked at in isolation."*

I have considered the issue of negligence. Breach of a duty of care essentially means that a defendant has fallen below the standard of behaviour expected in his or her undertaking of the activity concerned: See **Catherine Elliott and Frances Quinn, Contract law (10th edn, Pearson Education 2015)**. The duty is only to do whatever is reasonable in the circumstances as was held in **Simmonds v. Isle of Wight Council 2003 QBD TLR 9 October** (2003).

In the present case, it goes without saying that it was reasonable for the Claimants to expect to be supplied with clean potable water, free from contamination. It, therefore, comes as surprising that the 1st Defendant and 3rd Defendant allowed sewer to spill around for such a long time. As was aptly submitted by the Claimants:

> *"Sewer and feces are not a public friend. Sewer is disgusting to say the least. Sewer is a public health risk. Neglecting sewer and allowing it to be in the open is very unreasonable behaviour even inexcusable for the average reasonable man. The defendants utterly failed to conduct themselves in a reasonable manner."*

I cannot agree more with the Claimants. From the facts as discussed above, one can safely conclude that the damage occasioned to the Claimants was very likely to happen, that the damage was likely to be serious if one neglected his or her duties, that given the facts, it would not have been difficult to remedy the risk, and that it would generally be accepted as common practice to take precautions against the risk as the one in the present case.

The Court also takes the view that the 1st Defendant and the 3rd Defendant were under a strict duty on the principle of **Rylands v. Fletcher (1868) L. R. 3 H. L. 330** to see that the sewage in their sewer, jointly or individually, did not escape to the injury of others. In the circumstances, the mere neglect of their respective duties by the 1st Defendant and 3rd Defendant give the Claimants a good cause of action. The Court is fortified by the following dicta in in **Jones v. Llanrwst Urban District Council 1910 J. 286:**

> *"anyone who turns fecal matter collected by him or under his control to escape, in such a manner or under such conditions that it is carried, whether by current or wind, to his*

neighbor's land, is on the principle of ***Rylands v Fletcher (1868) L. R. 3 H. L. 330*** *held liable."*

I, therefore, find that the Defendants breached their duty of care having fallen below the standard of care generally expected of them.

Breach of duty, by itself, is not enough. It is trite that in order to establish negligence, it must be proved that the defendant's breach of duty actually caused the damage suffered by the claimant, and that the damage caused was not too 'remote' from the breach. It must thus be proved that the defendant's breach of duty caused the

damage. In the present case, the Claimants' evidence included various reports and medical evidence which showed that the Claimants suffered damage as a result of consuming contaminated water supplied by the Defendants whose occasioning was the action of the Defendants either jointly or singularly.

Based on the foregoing, I am satisfied that the Claimants have managed to discharge the burden of proving that the 1st Defendant and the 3rd Defendants acted negligently in their various capacities in their duty towards the Claimants and the Claimants suffered physical, mental and emotional harm as well as financial loss as a result of the said negligence. As the evidence of the Claimants is unchallenged, the Claimants have, on a balance of probabilities, succeeded in their claim against the 1st Defendant and the 3rd Defendant for damages based on negligence.

Breach of Statutory Duty

It is the case of the Claimants that both the 1st Defendant and the 3rd Defendant were in breach of statutory duties under several Acts of Parliament. The statutory provisions in questions are covered in paragraphs 3.68.1 and 3.68.1relevant part of the Claimants Skeleton Arguments are:

"3.68.1The 1st Defendant is a local authority established under the first schedule to the ***Local Government Act*** *and is by virtue of* ***Section 2 (1) (a) of the Second Schedule to the Local Government Act*** *mandated to establish, maintain and manage services for the collection and removal and treatment of solid and liquid waste, and disposal thereof within its area. The same Authority is vested on the 1st Defendant by virtue of* ***Section 79 (1) (a) of the Public Health Act.***

The 1st Defendant is also by virtue of ***Section 5 (1) of the Consumer Protection Act*** *placed under a specific duty to plan measures paralleling those of the government as well as plan and execute measures concerning consumer protection according to the social and economic condition under its jurisdiction*

Section 60 of the Public Health Act (Cap 34:01) *is in the following terms. "It shall be the duty of every local authority to take all lawful, necessary and reasonably practicable measures for maintaining its area at all times in clean and sanitary condition, and for preventing the occurrence therein of, or for remedying or causing to be remedied, any nuisance or condition liable to be injurious or dangerous to health and to take proceedings at law against any person causing or responsible for the continuance of any such nuisance or condition".*

Section 62 of the Public Health Act *lists out the types of nuisances that the 1st Defendant ought to have dealt with:*

The following shall be deemed to be nuisances liable to be dealt with in the manner provided in this Part—

> *(3) any street, road or any part thereof, stream, pool, ditch, gutter, watercourse, sink, water tank, cistern, latrine, cesspool, soak-away pit, septic tank, cesspit, soil-pipe, waste-pipe, drain, sewer, garbage receptacle, dust bin, dung pit, refuse pit, slop tank or manure heap so foul or in such a state or so situated or constructed as to be offensive or to be likely to be injurious or dangerous to health;*
>
> *(6) any collection of water, sewage, rubbish, refuse, ordure, or other fluid or solid substances which are offensive or which are dangerous or injurious to health or which permit or facilitate the breeding or multiplication of animal or vegetable parasites of men or domestic animals, or of insects or of other agents which are known to carry such parasites or which may otherwise cause or facilitate the infection of men or domestic animals by such parasites;*

Instead of dealing with the above nuisances as required and per the duty under the Public Health Act, the 1st Defendant was actually the author of the nuisance itself. This is not only a gross breach of its duty, but gross incompetence in the discharge of its duties. The author of a nuisance means the person by whose act, default or sufferance the nuisance is caused, exists or is continued, whether he be the owner or occupier or both owner and occupier or any other person ***(Section 63 of the Public Health Act).***

Section 105 of the Public Health Act *places the following duty on the 1st Defendant;*

It shall be the duty of every local authority to take all lawful, necessary and reasonably practicable measures—

> *(a) for preventing any pollution dangerous to health of any supply of water which the public within its district has a right to use and does use for drinking or domestic purposes (whether such supply is derived from sources within or beyond its district);*

The 1st Defendant grossly failed in discharging its duty under the provisions of ***Section 105 of the Public Health Act****. Not only did the 1st Defendant fail to take reasonable steps, but it also caused the pollution itself.*

Under the ***2nd Schedule of the Local Government Act, Section 2, (1) (b) A*** *Council may;*

(a) compel and regulate the provision, construction, use, maintenance and repair of drains, latrines and receptacles for solid and liquid waste and the connexion of any premises with any public sewer or drain;

The 1st Defendant failed to manage and repair its manholes in accordance with the above provision which calls it to be the referee in this area of service delivery. In all essence, the actions of the 1st Defendant were prejudicial to the health of

residents of Salima Street in Area 18A of the City of Lilongwe. Prejudicial to health" means injurious or likely to cause injury to health; ***Section 78 of the Public Health Act.***

3.68.2 ...

3.68.3 ***The 3rd Defendant (Malawi Housing Corporation)***
The 3rd Defendant is a statutory corporation established under the ***Malawi Housing Corporation Act, Cap 32:02*** *and lessor of all the houses being occupied by the Claimants. The sewer manhole referred to in this case was constructed by the 3rd Defendant. The 3rd defendant is jointly responsible for the maintenance of the said manhole with the 1st and 2nd Defendants."*

It is settled law that the tort of breach of statutory duty is a separate and independent tort from that of negligence. See **Gary Chan, The Law of Torts in Singapore (Academy Publishing 2nd Edition 2016).** The elements of the tort of breach of statutory duty are breach of duty and damages.

In order to decide whether there has been a breach of duty, the Court must decide precisely what the duty imposed by the statute consists of, and whether the situation complained of conforms to it or not. This is done by looking closely at the words of the statute. In **R v. East Sussex County Council, ex parte T (1998),** it was held that it is not up to the council to decide what this duty is but rather to strictly pay attention to the wording of the statute as to what this duty is.

Under the element of damages, the reasoning is that a claimant can recover for damage intended to be prevented by statute. Any other damage is irrelevant to the cause under breach of statutory duty. The case of **Gorris v. Scott (1874**) is instructive. The facts, in a nutshell, were that the defendant was a ship-owner, who

was transporting some of the claimant's sheep. The Contagious Diseases (Animals) Act 1869 required that cattle or sheep being transported by ship to Great Britain from abroad had to be kept in special pens on board. The defendant failed to do this, and the claimant's sheep were washed overboard. The court held that the claimant could not succeed in his action for breach of the duty, because the statute had been passed to prevent disease spreading between different groups of animals on the ship, and not to prevent the animals from being washed overboard and drowning. The defendant had been in breach of the duty, but the damage caused as a result was not the kind for which the statute could allow a remedy.

To my mind, the important question to ask in the present case at this juncture is whether the statutory provisions quoted herein were designed to prevent the damage that has been occasioned. The Claimants submit that the answer is in the affirmative:

> *"3.75 In **Groves v Wimbourne (1898),** it was held that where parliament intended damages and compensation, its intention was that this should be possible.*
>
> *3.76 Lord Tenterden CJ in **Doe d Bishop of Rochester v Bridges (1831) 1 B & Ad 847, 859** laid down the general rule that 'where an Act creates an obligation, and enforces the performance in a specified manner … that performance cannot be enforced in any other manner'.*
>
> *3.77 Lord Diplock in **Lonrho Ltd v Shell Petroleum Co** held that where an obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, and where the statute creates a public right and an individual member of the public suffers 'particular damage', performance of statutory obligation is not strict to the statute itself.*
>
> *3.78 Flowing from the above indeed, it is trite that the damage suffered by the claimant must be of the kind that the statute was intended to prevent. See: **Gorris v Scott (1874) LR 9 Ex 125 Nicholls v F. Austin Ltd [1946] AC 493**.*
>
> *3.79 The preceding two cases held that Provided the damage is of the type that the statute was meant to prevent, it is irrelevant that the precise manner in which it occurred was not envisaged: **Donaghey v Boulton & Paul Ltd [1968] AC 1***
>
> *3.80 In **Donoghue v Stevenson (1932) AC 502**, Lord Atkin did a great service by attempting to free the law of 'particularism'. He defined negligence in terms of 'duty'.*
>
> *3.81 It is not always important that the plaintiff must establish a duty relationship before he can succeed, but doing so is even better.*
>
> *3.82 **Phillip S. James** writes; "The court must not fall into the trap of insisting on a precedent duty, doing so will have the effect of atomizing negligence into a series*

> *of primative nominate torts, dependent upon specific relationships, and will thus destroy one of the maturest inventions of the common law".* ***Phillip S. James, Negligence, Legal and Social Duty, The Modern Law Review Vol 12 No 2 April 1949 pp 236-238.***
>
> *3.83 It is submitted that the statutory provisions above were actually designed to create individual rights against the party supposed to provide the benefit being the defendants. It is further submitted that the Defendants failed in their various capacities in discharging these duties."*

I have considered the facts of this case and I am very much persuaded by the submissions by Counsel. I am satisfied that the 1st Defendant and 3rd Defendant breached the statutory duties placed upon them under the Consumer Protection Act, the Public Health Act, Local Government Act and Malawi Housing Corporation Act and that the Claimants suffered damage as a result of the said breach.

Further, there can be no doubt that the damage suffered by the Claimants is the one that was meant to be prevented under the statutory framework discussed hereinbefore. It is, therefore, my holding that the 1st Defendant and 3rd Defendant breached their statutory duty owed to the Claimants. In this regard, section 3 (d) of the Consumer Protection Act is relevant. The provision confers on consumers an entitlement to a full, timely, adequate and prompt compensation for damages suffered by them which, pursuant to the provisions of the Consumer Protection Act or any other written law or other special or general contractual obligations are attributed to a supplier as is the case in the present matter.

All in all, the Claimants have succeeded in their claim against the 1st Defendant and the 3rd Defendant for damages and costs of this action. I, accordingly, enter judgment in favour of the Claimants and order that the collateral issue of assessment of damages be dealt with by the Registrar.

Pronounced in Chambers this 9th day of September 2020 at Lilongwe in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE