IN THE SUPERIOR COURT OF JUDICATURE

IN THE SUPREME COURT

ACCRA - A.D. 2023

CORAM: BAFFOE-BONNIE JSC (PRESIDING)

OWUSU (MS.) JSC

TORKORNOO (MRS.) JSC

ACKAH-YENSU (MS.) JSC

ASIEDU JSC

CIVIL APPEAL

NO. J4/71/2022

26TH APRIL, 2023

JAMES ACKON …… PLAINTIFF/RESPONDENT/APPELLANT

VS

ABOSSO GOLDFIELDS LTD. …… DEFENDANT/APPELLANT/RESPONDENT

JUDGMENT

TORKORNOO (MRS) JSC:-

Background

The plaintiff/respondent/appellant (hereafter referred to as Plaintiff) worked for the defendant/appellant/respondent (defendant) from November 2010 to March 2014. On 4th March 2014, he was diagnosed with chronic glaucoma, with the evaluation that it is not likely that his vision would improve. The records show that in October 2013, a clinic that attended to the defendant's employees had recommended that the plaintiff should be taken off night shifts and placed on day shifts, as a result of the ailing condition of his eyes.

Following the termination of his employment as a result of a redundancy exercise in March 2014, he commenced the present action in September 2014 for the following relief:

'The plaintiff's claim against the Defendant is for damages for loss sustained by him as a result of the negligent and/or breach of statutory duty of the defendant whilst employed by the defendant as a dozer operator in the mining department.'

Pleadings

In his Statement of Claim, he averred that the diagnosis of his ailment stated that he had developed *'reduced acuities in both eyes*' and '*optic nerve head damage due to exposure to toxic chemicals*'. He alleged the following '**Particulars of negligence and or Breach of statutory duty**' against the defendant:

a. Exposing the plaintiff to risks of damage or injury of which the defendant knew or ought to have known.

b. Failing to secure the safety of the plaintiff.

c. Failing to take any or any adequate precautions for the safety of the plaintiff while he has engaged on his duties.

d. Failing to provide or maintain any or any proper or safe system of working at the mines.

e. Failing to provide the plaintiff with adequate and suitable appliances and in particular with any or any suitable protective gadgets to enable him to carry out the said work in safety or to protect the eyes of the plaintiff while he was carrying out the said work.

f. Failure to provide adequate supervision for the plaintiff.

In its Statement of Defence, the defendant denied every material allegation of fact and proposition of law in the Plaintiff's Statement of Claim. It averred that it was clear that the Plaintiff had not been in any accident while working, and that medical examination indicated that the chronic glaucoma suffered by plaintiff was a non-occupational illness. Further, at all times during the course of his employment, plaintiff was provided with the necessary personal protective equipment including eye-wear which the plaintiff was obliged to wear to prevent any impairment to his eyes

In his Reply, the plaintiff insisted that his visual impairment was '*occupational*'. He pleaded that the eyewear provided by the defendant '*was of inferior quality which caused severe itching of the eye and in spite of several complaints, the defendant refused to replace them with the black type which was of a higher grade*'.

In the issues for trial, plaintiff included the following issue: '*whether or not the injury or damage arose out of the plaintiff's work with the defendant*' and '*whether or not the defendant provided adequate protective clothing and or googles (sic) (eyewear) to plaintiff*' and '*whether or not the defendant was negligent*'

Defendant set down as part of its issues for trial '*whether or not the Plaintiff's illness is a non-occupational illness*'.

Evidence from Plaintiff

In the trial, plaintiff continued to assert that *'defendant failed to provide adequate protective gear and was negligent*' towards him. He tendered a letter from his solicitors claiming compensation for his loss of sight and insisting that the defendant failed to '*provide any or any adequate precautions for the safety of the plaintiff while he was engaged in his work and exposing him to a risk of damage or injury which (defendant) knew or ought to have known of*.'

Under cross examination, it was clarified with the plaintiff that it was during his exit medical examinations as part of the redundancy exercise which led to the termination of his employment that he was referred to one Dr Sagoe's Solar Eye Clinic and the report on his medical condition was issued. Plaintiff insisted that contrary to the evidence in chief presented by the said Dr Sagoe, who was defendant's second witness, Dr Sagoe had not directly examined plaintiff.

Plaintiff also insisted that the goggles provided for his work had holes by the side and dust passed through into his eyes, and that he had no family history of glaucoma. He admitted having gone to work for another mining company as a dozer operator after the termination of his employment with defendant, and also after a pre-employment medical examination was done by them.

The plaintiff's only witness was one Dr Osei Akoto, who testified that he is an optometrist who had examined the plaintiff and found that the plaintiff's nerve fibre analysis showed optic nerve head damage, though his eye pressures were within normal.

It was also his testimony that the plaintiff's optic nerve head damage could have occurred from exposure to toxic chemicals at the mine since miners are at risk of optic nerve head damage.

Paragraphs 11 and 12 of his witness statement/evidence in chief are particularly relevant and they are quoted herein:

11. Miners are at risk of visual problems including optic nerve head damage particularly those who work directly with toxic chemicals either through accidental spillage or through chronic inhalation. Dozer operators can inhale chemically polluted dust in the course of their operation. The dangerous chemicals are usually ammonia and nitroglycerine in dynamites. Once there has been an exposure by James Ackon and that he has developed optic nerve head damage, the work as a risk factor cannot be ruled out entirely since I believe he was declared visually fit before employment

12. The work therefore has an involvement in the onset of the condition

He also said that because the plaintiff's intraocular pressure was normal, the normotensive optic nerve head damage he suffered had *'to be precipitated unlike the high tension form of optic nerve damage*'. He went on to say that '*normotensive optic nerve head damage occurs as a result of vasospasm of the retinal vessels which vasospasm can be precipitated by toxic chemicals*'.

By reason of the above, including his opinion that '*dozer operators can inhale chemically polluted dust with ammonia and nitroglycerine in dynamites in the course of their operation*' Dr. Osei-Akoto testified that the plaintiff's occupation was a risk factor especially because he *'was declared visually fit before employment'*.

Under cross examination, Dr Osei Akoto admitted that as an optometrist, he was not qualified as a medical officer or doctor and he was not registered with the Medical and Dental Council. Dr. Osei Akoto denied that plaintiff was diagnosed with chronic glaucoma, but admitted that chronic glaucoma is usually suffered by people who have a family history of it and people with diabetes, and people outside the mines can also get chronic glaucoma.

He also admitted and clarified that normal glaucoma causes optic neurophathy or optic nerve damage due to reduction in blood supply to a structure.

Evidence from Defendant

The response from defendant's witnesses was to deny this trajectory of evidence regarding how the plaintiff could have contracted the eye impairment from the defendant's work environment. In his evidence in chief, the defendant's human resource manager and principal witness testified that '*all work areas are designed and run to prevent employees from coming into contact with any harmful or hazardous substance in the environment including toxic chemicals. Also, the nature of (plaintiff) work did not, under any circumstances or at any material time, expose him to any toxic substance harmful to the eyes*.'

He drew attention to the fact that plaintiff had been working as a dozer operator in various mine sites for 9 years altogether and worked with defendant for 3 years out of those 9 years. He further testified that it arranged for the plaintiff to undergo medical examination to determine if he had any occupational diseases for which compensation would be required and that the examination confirmed that chronic glaucoma was not likely to have been caused by his employment. Further, the plaintiff's work as a dozer operator did not expose him to toxic substances harmful to his eyes.

Under cross examination, he admitted that at the time plaintiff entered the defendant's employment, he was medically fit. He however disagreed that dozer operators are exposed to heavy dust and toxic gases or chemicals such as ammonium in the course of their work. He also reiterated the pleading that the defendant provides all employees with personal protective equipment and said that it is the responsibility of the employee to use the equipment.

The defendant's second witness was Dr Sagoe, an opthamologist who testified in paragraph 8 of his witness statement and evidence in chief that the plaintiff *was 'referred*

to (him) by the Tarkwa Mines Hospital for an assessment and evaluation of his eye condition, and to determine whether or not his eye condition could have been as a result of his work as a truck driver in the mines'. According to his testimony, he examined the plaintiff *'and conducted various eye tests, including Visual Acuity Test, Fundoscopy, Intra Ocular Pressure measurements and Visual Field Test.'* After the eye examination, he '*came to the conclusion that* (the plaintiff) *was suffering from Chronic Glaucoma and that it was unlikely to have been caused by his work at the mines as a truck driver.'*

Dr Sagoe attached a copy of his report dated 4th march 2014 in respect of plaintiff's eye condition in which he had concluded in the closing lines that '*it is also not likely that the glaucoma was caused by his work as a truck driver at the mines*'. The said report was tendered without contest, and admitted as exhibit 1 for the evaluation of the court and determination.

Dr Sagoe went on to testify that he knew that most truck drivers like the plaintiff work in open pit mining where there is dust, but he was not aware if there were any gaseous chemicals in the plaintiff's work environment. He admitted that ammonium can affect the eye but said where people operate in open mines, ammonium can only cause eye irritation and itching.

He was adamant that there are different types of glaucoma, but in chronic glaucoma, there is no possibility of any external chemical causing it. He testified that he had personally examined the plaintiff and asked the plaintiff about his family history but the plaintiff could not recollect any link of eye disease to his parents. He had referred the plaintiff to another eye center to do tests that could not be done in his facility. He insisted that the main factor involved in the cause of chronic glaucoma is genetic, and there is no evidence that open air toxic materials could cause chronic glaucoma. He testified that glaucoma is a very common eye disease in Ghana with no permanent cure. On the

possibility of plaintiff's eye problems being caused by his work at the mine as a truck driver, his answer was that it is '*absolutely impossible*'.

Judgment

At the end of the trial, the judgment of the trial judge noted that '*before the plaintiff joined the defendant he successfully went through a medical examination and given the clean health bill to work with the defendant company even though he had worked with some mining companies before seeking to join the defendant company*'. This settled the position that the plaintiff developed the disease in the course of his employment with the defendant. It was his determination that if the pre-employment medical exams of the plaintiff were not thorough enough to detect any harm to plaintiff's eyes before his employment, then the plaintiff cannot be made to bear the brunt of this lapse with a reference to the other places that plaintiff worked at prior to being engaged by the defendant.

The trial judge further recognized that by **Section 15 (2) the Evidence Act 1975 NRCD 323**, the burden of persuasion regarding breach of a duty of care is placed on a person alleging that breach. It reads

15 (2) *Unless and until it is shifted, the party claiming that a person did not exercise a requisite degree of care has the burden of persuasion on that issue*.

That duty requires that such a plaintiff provides evidence with the quality of credibility to prove all matters in issue, as articulated in **Ackah v Pergah Transport Ltd [2010] SCGLR 728 @ 736**

On the basis of the principle that allows a burden of persuasion to shift, the trial judge noted that since the plaintiff had denied having been attended to personally by Dr Sagoe, this shifted the burden on defendant to prove that Dr Sagoe examined the plaintiff as he had testified in both evidence in chief and cross examination.

The trial judge noted that Dr Sagoe's conclusion that the plaintiff's condition is not related to his work is not absolute. The trial judge mis-quoted the last line of Dr Sagoe's report and took the 'not' out of the 'not likely' in these words: '*Quite remarkably the defendant's exhibit 1 concludes in lame terms that: '**It is also likely** that the glaucoma was caused by his work as a truck driver at the mines*' (emphasis ours)

He went on to note that **section 118 (2)** of the **Labour Act, Act 651** imposes a specific duty on the employer to *'take steps to prevent contamination of the work place by and protect workers from toxic gases, noxious substances, vapours, dust fumes, mists and other substances or materials likely to cause risk to safety or health*.' While acknowledging the evidence of the defendant's principal witness that the defendant provided protective materials to its work to prevent contamination with the dusty work environment, he evaluated that '*apparently these protective materials are not adequate resulting in conditions like those of the plaintiff presently*'.

And on the basis of '*all the pieces of evidence available*', pointing '*to one and only one direction that the plaintiff's condition resulted from his work with defendant company'*, he concluded that the plaintiff was entitled to damages for his health condition. He entered judgment for the plaintiff and ordered the defendant to pay damages of 20,000GhC to the plaintiff, and costs of 5000 Ghc

The defendant appealed against the high court judgment to the court of appeal on two grounds and later amended them by adding five more grounds of appeal.

Grounds of Appeal to Court of Appeal

i) The judgment is against the weight of evidence adduced at the trial;

ii) The learned judge erred in holding that the eye disease suffered by the Plaintiff, namely glaucoma was occasioned by conditions at his work place, notwithstanding credible medical evidence to the contrary regarding the cause of glaucoma.

iii) The learned judge erred in holding that the parties were ad idem on the fact that the Plaintiff-Respondent had suffered damage or injury to the eye when they were not.

iv) The learned judge misapplied the law on the burden of proof with regard to inter alia the Plaintiff-Respondent's claim that he was not examined by DW1, Dr. Sagoe

v) The learned judge erred in holding that Dr. Sagoe's conclusion that the Plaintiff-Respondent's condition is not related to his work with the Defendant-Appellant is not absolute when his evidence as a whole indicates otherwise

vi) The learned judge erred in finding that the personal protective equipment provided by the Defendant-Appellant was not adequate and that this resulted in the Plainitff-Respondent's eye condition when there was no credible evidence on the record to support that conclusion

vii) The learned judge erred in awarding damages against the defendant-appellant in the absence of any credible evidence of a breach of duty on its part on the basis of which the award of damages against it can be supported.

The plaintiff cross appealed on the following ground:

'The quantum of damages given by the learned trial judge after having found as a fact that the cross-appellant would go blind permanently, is woefully inadequate, having regard to the cross appellant's age and circumstances of life'

Judgment of Court of Appeal

The court of appeal disagreed with the trial court's evaluation of the evidence and the law regarding the claims of the plaintiff and reversed the judgment, thus triggering the

current appeal on the sole ground that '**The decision is against the weight of evidence adduced at the trial'**

The reliefs sought from Supreme Court are;

1. Reversal of the whole decision of the Court of Appeal and reinstatement of judgment of the High Court.

2. Upgrade of the judgment sum.

Submissions to the Supreme Court

The submissions of counsel for the plaintiff to this court rest on two main grounds – attacks against the credibility of Dr Sagoe, and submissions to uphold the opinion of Dr Osei Akoto.

The primary contention is that the court of appeal placed undue weight on the testimony and evidence of Dr. Sagoe. Counsel for plaintiff attacked the credibility of the report issued by Dr. Sagoe on the premise that the plaintiff denied having been examined by Dr Sagoe, while Dr. Sagoe insisted that he personally examined plaintiff. He drew attention to Dr. Sagoe's answer under cross examination to the effect that the first day he examined plaintiff was on 4th March 2014, the same day he issued his report tendered as exhibit 1. And yet Dr Sagoe had also testified that he had referred plaintiff to another eye center to conduct tests before 4th march 2014. In the analysis of counsel for plaintiff therefore, the testimony under cross examination that before 4th March 2014, Dr. Sagoe had referred plaintiff for tests, contradicted the position that the first time he examined plaintiff was on 4th March 2014, the date that he wrote his report.

Second, counsel for plaintiff pointed out that there was a disparity between Dr. Sagoe's witness statement that he had conducted tests on the plaintiff and his later clarification to the effect that he referred the plaintiff for various tests.

Third, counsel for plaintiff pointed out the firmness with which Dr. Sagoe had testified that though two major causes of chronic glaucoma are the genetics of the patient, and diabetes as a contributing factor, the 'underlying cause of glaucoma is still unknown'. His submission is that if the plaintiff did not have diabetes and has no hereditary link to glaucoma, then '*one would want to know if conditions that pertain to the appellant's work environment can on the other hand be ruled out as the culprit for his glaucoma. To answer this, the appellant pleads res ipsa loquitur as there is no other explanation on record than the appellant's glaucoma being caused by his work with the Respondent*'. He cited **Asafo v Catholic Hospital of Apam [1973] 1 GLR 282** as authority on the application for the doctrine of res ipsa loquitur. He pointed out that Dr. Sagoe had *'clearly corroborated the conclusion made by PW1 that the underlying cause of glaucoma is still unknown*.'

Counsel for plaintiff further attacked the credibility of Dr Sagoe in his testimony that the presence of ammonium in an open mine can only cause eye irritation and itching. According to counsel, this gave the impression that Dr Sagoe knew the conditions of work in the mine, though he did not because he had denied not knowing that the plaintiff's work environment had a lot of gaseous chemicals and had mistakenly described the plaintiff as a truck driver, instead of dozer driver. His submission was that Dr. Sagoe's testimony was rife with inconsistencies.

Contrary to the stance on Dr. Sagoe's testimony, counsel for plaintiff described the evidence of Dr Osei Akoto as '*unwavering*' and '*consistent*'. He described the testimony that Dr Osei Akoto had personally examined the plaintiff as unshaken, as well as the position that the plaintiff had optic nerve head damage '*and could have had it from exposure to toxic chemicals at the mine since miners are at risk of optic nerve head damage*'.

Citing from **The Law of Tort in Ghana Text, Cases and Materials (2014)** Counsel for plaintiff appreciated that to establish the tort of negligence, the three elements of duty of care from defendant to plaintiff, breach of the duty of care by defendant, and damage to plaintiff resulting from defendant's breach of duty must exist.

In relation to the work place, counsel for plaintiff relied on **Wilson and Clyde Coal Ltd v English [1938] AC 57** to distill the three elements expected in the discharge of the duty of care in the work place which are also echoed in **section 118** of the **Labour Act, Act 651 of 2003** as: the duty to provide competent staff, to provide adequate plant and material, and a proper system of work and effective supervision.

He submitted specifically that **section 118 (2)** (d) of Act 651 provides for the duty to '*take steps to prevent contamination of the work place from toxic gases, noxious substances etc that are likely to cause risk to safety or health*'

He presented that it was and remains the case of the plaintiff that he worked in a very dusty environment containing toxic gaseous and harmful chemicals such as ammonium and fumes which contaminated his work environment in the mine as a dozer operator. He submitted further that the defendant failed to provide a proper system of work and effective supervision of the plaintiff by giving him the necessary information, instructions, training on health and safety at the mine that was commensurate to the literacy level of the plaintiff. He submitted that the indication from plaintiff's testimony that his redundancy letter had not been explained to him was that he was illiterate and had not been properly instructed on the personal protection equipment had been supplied with.

As should be expected, counsel for defendant contested all of these submissions. We believe that setting out the counter submissions would burden our decision, because in

the main, we do not in the least find the position of counsel for plaintiff capable of dislodging the cogent evaluation of the court of appeal.

Consideration

To begin with, we do not find the controversy around whether or not Dr Sagoe personally examined the plaintiff to be dispositive of the issues in contention in any way. The plaintiff never challenged Dr Sagoe's report, and it remains part of the exhibits in the record of appeal before us. Our view is that this appeal is disposed off in the context of plaintiff's case, and not on the strength of defendant's defence.

As is appreciated, the ground of appeal that **a decision is against the weight of evidence adduced at the trial** allows this court to conduct a full rehearing of the matters on record and independently evaluate them to determine whether the judgment of the court of appeal reversing the high court decision is supported in fact and law by the pleadings, evidence and exhibits on record. See **Attorney-General v Faroe Atlantic Co Ltd [2005-2006] SCGLR 271.** On a review of the law on negligence and the evidence available, we can only affirm the determinations of the court of appeal.

Expert Evidence

The court of appeal declared itself satisfied that the gravamen of the Respondent's claim was not one related to an accidental injury that was occasioned by a traumatic event but on the '*more general case of an occupational disease arising from exposure to injurious conditions over a period of time, whilst working as a dozer operator at the mines*' of the defendant.

It identified that all the medical experts were satisfied that the plaintiff suffered some form of glaucoma, whether '*chronic glaucoma*' as described Dr Sagoe, or '*normotensive glaucoma*' as described by Dr Osei-Akoto. Where the experts diverged was how this glaucoma was caused. While Dr Sagoe was satisfied that it was unlikely and impossible that glaucoma was caused by work in the mines as a dozer operator, Dr Osei-Akoto was

assertive that the optic nerve head damage that led to the plaintiff suffering glaucoma could have been caused by exposure to toxic chemicals at the mines.

In the evaluation of the court of appeal therefore, the trial court was first bound to consider the premise on which it placed weight on the differing opinions regarding the cause of plaintiff's disease. Mindful of the position articulated in **Feneku v John Teye [2001-2002] SCGLR 985** that expert evidence ought not to be taken as a substitute for what the court has to decide, the court of appeal also drew attention to the direction of **section 67 (1) of the Evidence Act** which states that a person is qualified to testify as an expert if he satisfies the court that he is an expert on the subject matter of his testimony by reason of '**special skill, experience or training**'.

They agreed with the learned jurist **S A Brobbey** in his book **'Practice and Procedure in the Trial Courts and Tribunals of Ghana' 2nd Edition** that the competence of an expert is relevant in considering the weight to be attached to such expert opinion

They pointed out that it was therefore important for the trial court to have critically evaluated '*the issue of the training, qualifications, credentials and skills of the expert witnesses for the purpose of determining which of the testimonies was entitled to greater weight*'. The court of appeal considered that the trial judge had failed to take this prior step because had he done so, he would have appreciated that while Dr Sagoe was an expert in eye diseases and an opthamologist, Dr Sagoe specialized in a narrow area of optometry, providing supporting services within the eye-care spectrum, and he was not a medical doctor. There was therefore what the court considered to be '*a vast chasm existing between the training, professional competence and skills*' of the two experts and that should have affected the heavier weight that the trial court put on the testimony of Dr Osei Akoto, as against the lesser weight it placed on the testimony of Dr. Sagoe. We agree with this evaluation as due statements on the law in general and facts of this case in particular.

Quality and sufficiency of evidence

The court of appeal described Dr Osei-Akoto's attempts to link the Respondent's eye condition to possible exposure to toxic chemicals to be '*generalized and speculative, coming nowhere near the requisite degree of proof necessary to assist any tribunal of fact in resolving relevant contentious issues*'.

On a rehearing of the suit and records available, the court found no evidence adduced to support the position that the working conditions or environment in which the plaintiff performed his duties were either the sole cause or material contributory causative factor in the onset or progression of the condition. Neither was there any credible evidence to convince it that glaucoma was a disease that could only be caused by conditions that are characteristic of and specific to the defendant's work environment. Neither was there evidence on the record to suggest that glaucoma was anything but an ordinary disease of life to which the general public was equally exposed or susceptible.

Their conclusion was that Dr Osei-Akoto's prognosis of the possible causes of the Plaintiff's eye disease was made without the benefit of any concrete scientific data or evidence. And coming from an optometrist, the court evaluated that the trial judge should have received this prognosis with a lot of caution. On the other hand, Dr Sagoe, as an opthamologist was clear that glaucoma was a genetic disease which had nothing to do with noxious substances.

The opinion of the court of appeal was that the trial judge put too much weight on the simple fact that the plaintiff's medical condition manifested itself during the course of his employment with the defendant company. Without any real evidentiary basis for making a finding of fact that the plaintiff's eye condition was the product of his duties in the course of his employment, the court of appeal found the approach taken by the trial court in resolving the legal issues before him a '*trifle too simplistic*'.

We agree. The contentions of plaintiff placed a general statutory obligation on him to produce sufficient evidence for the purpose of discharging the burden of persuasion on a party who alleges wrong and entitlement to relief when the claims are strenuously denied as defendant did in the present case under section 15 (1) of NRCD 323. Beyond the general burden imposed by section 15 (1), section 15 (2) singles out allegations of negligence and directs that *'Unless and until it is shifted, the party claiming that a person did not exercise a requisite degree of care has the burden of persuasion on that issue*.'

Then there are the gamut of provisions that distribute evidential burdens in civil cases in our jurisdiction and the quality of evidence required to sustain any contention in our courts.

Sections 10 (1) and (2); 11 (1) and (4); 12 (1) and (2) and 14 of the Evidence Act 1975, NRCD 323 provide:

10 (1)*For the purposes of this Decree, the burden of persuasion means the obligation of a party to establish a requisite degree of belief concerning a fact in the mind of the tribunal or the court*

(2) *The burden of persuasion may require a party to raise a reasonable doubt concerning the existence or non-existence of a fact by a preponderance of the probabilities or by proof beyond a reasonable doubt*

11 (1) *For the purposes of this Decree, the burden of producing evidence means the obligation of a party to introduce sufficient evidence to avoid a ruling against him on the issue*

(4) *In other circumstances the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence*

12 (1) *Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of probabilities*

(2) *Preponderance of the probabilities' means that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence*

14. *Except as otherwise provided by law, unless and until it is shifted a party has the burden of persuasion as to each fact the existence or non-existence of which is essential to the claim or defence he is asserting*

Negligence

Sufficiency of evidence to prove that on a preponderance of probabilities, a fact in issue is true is critical to the sustenance of any case. In the present case, despite the particulars of negligence asserted by the plaintiff, (and submissions by his counsel), there is an absolute paucity of evidence to link the plaintiff's health challenges with the conditions of work in the defendant's mine.

The particulars of negligence are heavy allegations made against a mining company by a plaintiff in a dire situation that occurred during the period of time that he worked for the defendant. But they stand or fall in the face of the long held jurisprudential notation reiterated by Azu Crabbe JA in **Fibre Bag Manufacturing Co v Sarpong [1967] GLR 657** that, in principle, there is no distinction between actions for common law negligence and actions for breach of statutory duty, for a plaintiff must prove not only negligence or breach of duty, but also that the fault of the defendant caused or substantially contributed to his injury.

As pointed out in **Donoghue v Stevenson [1932] AC 562** at 619, an undoubted seminal case in the development of the pillars of the law on negligence and liability arising out of negligence, '*the cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered damage* ***in consequence of a breach of that duty***' (emphasis supplied)

The complex concept of duty, breach, and damage from the breach suffered by the person to whom the duty is owed remain the critical pillars that must support any finding and holding of the tort of negligence. See **Lochgelly Iron & Coal Co v M'Mullan [1934] AC 25** and evaluation of Edusei J in the unreported case of **Allasan Kotokoli v Moro Hausa (4th May 1967) in Suit No 474/64**.

To quote the words of the learned author Kofi Kumado in his **Introduction to the Law of Torts in Ghana, Second Edition, Black Mask Ltd 2019 at page 119**, '*a person cannot be held negligent in torts law, unless he owed some duty to the plaintiff and that duty is breached*' (emphasis supplied again). And we add that, the breach is shown to be what has led to the damage complained of to the court.

From the clear threads of the law in context therefore, when a plaintiff alleges negligence leading to injury, a statutory burden from **sections 10, 11, 12, 14 and 15** of the **Evidence Act** is placed on such a party to provide sufficient evidence to prove that the defendant indeed breached a duty of care to the plaintiff and this breach of care was the proximate cause for the plaintiff's injury.

In view of the differing expert opinions and contentions by the parties regarding the source of the plaintiff's medical condition, the determinations of this suit lay squarely and unequivocally on the nature and quality of evidence to prove not only that the medical condition arose in the course of plaintiff executing his work, but also that the defendant breached its statutory duty to provide a safe working environment for the plaintiff and it is this breach that caused the medical condition.

Breach of duty of care, causation, and liability

There can be, and there is no dispute in the contentions before us that the defendant owed the plaintiff a statutory duty under **section 118 (2)(d)** of the **Labour Act, Act 651** to *'take steps to prevent contamination of the work place by, and protect workers from toxic gases, noxious*

substances, vapours, dust, fumes, mists and other substances or materials likely to cause risk to safety or health.'

Within the same law, **section 118 (3)** goes on to direct that:

118 (3) *It is the obligation of every worker to use the safety appliances, fire-fighting equipment and personal protective equipment provided by the employer in compliance with the employer's instructions.*

And **section 118 (4)** directs that '*An employer shall not be liable for injury suffered by a worker who contravenes subsection (3) where the injury is caused solely by non-compliance by the worker*'

So what was the plaintiff's evidence in support of the allegation of breach of duty of care? First that the environment in which he worked contained dust and toxic substances. Defendant countered the possibility of breach of the duty of care with the evidence of its principal witness – Mr William Chicka – Morgan who stated that '*the nature of the plaintiff's work as a dozer operator did not expose him to toxic substances harmful to the eye*'. Its second witness, Dr Sagoe was positive that even if there is ammonium in an open mine it can only cause eye irritation and itching. He was also positive that in chronic glaucoma, '*there is no possibility of any external chemical causing it*'.

If the above were untrue, what is the truth? Which part of the mine exactly did plaintiff work in? Could dust in an open mine cause any form of glaucoma? Is there any record on the recurrence of eye diseases in the defendant's mine? What data or records exist on eye diseases in dozer operators in open mines? What is the nature of toxic substances in those locations? What specifically is the effect of ammonium in an open mine where glaucoma or other eye diseases are concerned?

Surely, the nature and density of the toxic substances in those locations would have been available as scientific data and such records could have been brought to court if compelled? The record shows that the plaintiff failed to call or compel the submission of

one single record of the conditions under which he worked, despite his particulars of negligence and the counter assertions of the defendant.

Beyond contentions that the plaintiff was not exposed to toxic substances in the course of his work, defendant also contended that it adequately catered for protection from any pollutants in the environment by providing eye wear and other gear and that the wearing of the personal protective gear was strictly enforced at the company's mine.

The plaintiff did not disprove the provision of protective gear. His response was that the goggles provided were porous, had holes at the side and were not adequate protection. If this so, then the burden of persuasion shifted on to the plaintiff to persuade the court on the inadequacy of the said goggles or PPE, because he had corroborated the defendant's position that it had provided protective gear. It is trite law that though the burden of persuasion lies on a party who first articulates a case or defence, the burden shifts when they present sufficient evidence to establish that basic position. Again, where the evidence of a party on a point in a suit is corroborated by his opponent and witnesses of the opponent as in this case, whilst that of his opponent on the same issue stands uncorroborated even by his own witnesses, a court ought not to accept the uncorroborated version in preference to the corroborated one unless for some good and apparent reason, the court finds the corroborated version incredible, impossible or unacceptable. See inter alia, **Duah v Yorkwa [1993-94] 1 GLR 217** and **Manu v Nsiah [2005-2006] SCGLR 25**

We noted with great sinking, the total lack of evidence of the alleged inadequate eye wear. After alleging that the eye wear had holes in it, the plaintiff did not even make an effort to bring as evidence to the court, a sample of the defendant's eyewear, or even pictures of the said inadequate eyewear, and a sample of what could have been the appropriate adequate protection for comparison by the court.

In his evidence, the plaintiff's expert witness stated that '*once there has been an exposure by James Ackon and that he has developed optic nerve head damage, the work as a risk factor cannot be ruled out entirely since I believe he was declared visually fit before employment* (emphasis ours).

This is conjectural. Apart from presenting a presumption that the work was a risk factor which could not be ruled out, the expert witness was unable to say when the exposure that would have precipitated the optic nerve head damage occurred, and how it occurred.

Hear also counsel for plaintiff on the fourth page of his submissions:

'*This piece of evidence simply tells the court that the good doctor and other experts in his field as at present do not know the actual cause of glaucoma. It also came out clear that the Appellant does not have hereditary link nor diabetes to cause glaucoma. One would want to know if conditions that pertain to the appellant's work environment can on the other hand be ruled out as the culprit for his glaucoma. To answer this, the appellant pleads res ipsa loquitur as there is no other explanation on record than the appellant's glaucoma being caused by his work with the Respondent*'.

Before dealing with this introduction of the legal doctrine of res ipsa loquitor, we will like to point out that the above submission clarifies what can only be concluded to be a lack of negligence on the part of the defendant in the matters in issue. The testimonies of both medical experts were agreed on one factor regarding glaucoma. That the cause of glaucoma is unknown. And this was recognized by plaintiff's counsel.

Now this, without more, shows that the court was not presented with any proximate causative factor for the plaintiff's medical condition arising out of his conditions of work. Because if the cause of glaucoma is unknown, it can only mean that no work place, no matter how sophisticated, can protect its employees from this disease. Again, when the

cause of disease is unknown, it cannot be legitimate to insist that it came out of a work place at all costs.

On page 8 of their book **TORT LAW, Responsibilities and Redress, (Second Edition, Wolters Kluwer 2008)** the learned authors Goldberg Sebok Zipursky put the necessity of always linking alleged negligence to the causation of injury or harm in this way: '*In order to establish liability a plaintiff in any negligence action must show that the defendant's negligence was the cause of the plaintiff's harm*'. '*Causation means that there is some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered*.'

Black's Law Dictionary defines proximate cause as *'a cause that is legally sufficient to result in liability; an act or omission that is considered in law to result in a consequence, so that liability can be imposed on the actor.* ***A cause that directly produces an event and without which the event would not have occurred***.' (emphasis ours).

This direct linkage between breach of duty and injury requires factual and positive evidence to establish the link between the defendant's breach of the duty of care and plaintiff's injury that plaintiff is seeking damages for. The breach of a duty of care is identified from facts, and not as a matter of law. To establish the causal connection, the Plaintiff has to show that, on a balance of probabilities arising from the facts in evidence, the Defendant's breach was the proximate cause of the injury he has suffered.

In **Lydford v Skinner [2021] EWHC 3783 (QB)** the evidence was that several possible factors could have caused the collapse of a wall on the plaintiff. The plaintiff urged liability on the home owner with the duty of care to persons who moved along the wall. The collapse occurred during a storm, with no precipitate factor found in a failure to keep the wall in a state of repair.

The learned judge had this to say: *'The claimant has not been able to identify a case which says, in terms, that the defective condition (and thus nuisance) is simply presumed from the fact of the*

collapse of a structure adjoining the highway which the defendant has responsibility for and which injures the claimant ……the authorities plainly proceed on a different basis, namely, that it is integral to the cause of action that causative disrepair exists and is shown to exist.'

As already evaluated, the evidence from both the plaintiff and the expert witnesses admitted to an inability to establish this direct causal link between any type of glaucoma and the plaintiff's conditions of work in the defendant's mine. They were simply unable to prove any causative elements for any form of glaucoma in the defendant's work place

In discharging the burden of persuasion of injury arising from negligence in the work place, the plaintiff carried the burden of producing evidence to satisfy the 'but for' test that is critical for a finding of proximate cause between the acts (or non-actions) of a defendant and the injury of a plaintiff in an action for negligence.

The 'but for' test is articulated as: would the result not have occurred but for the act or omission of the defendant? If the injury would not have occurred but for the defendant's act or omission, it is then that the defendant can be fixed with liability.

In **Barnett v Chelsea and Kensington Hospital Management Committee [1969] 1 QB 428**, one Mr Barnett went to hospital complaining of severe stomach pains and vomiting. He drank tea which unknown to him contained arsenic poison. He was seen by a nurse who telephoned the doctor on duty. The doctor told her to send him home and contact his GP in the morning. Mr Barnett died five hours later from arsenic poisoning. Had the doctor examined Mr Barnett at the time there would have been nothing the doctor could have done to save him. It was held that the hospital was not liable as the doctor's failure to examine the patient did not cause his death. He would have died with or without the hospital's intervention. Factual causation between the breach and injury must be established before a defendant is liable in negligence.

As in all civil cases, in applying the 'but for' test, the standard of persuasion need only be on a preponderance of probabilities. But as directed by sections 11(4) and 12 (1) and (2) of the Evidence Act '*the burden of producing evidence requires a party to produce sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the fact was more probable than its non-existence*

12 (1) *Except as otherwise provided by law, the burden of persuasion requires proof by a preponderance of probabilities*

(2) *Preponderance of the probabilities' means that degree of certainty of belief in the mind of the tribunal of fact or the court by which it is convinced that the existence of a fact is more probable than its non-existence*

We are satisfied, as was the court of appeal, that there is no credible evidence in the record to establish any degree of certainty of belief in the mind of a trier of fact that the plaintiff's medical condition could not have occurred but for failure to provide him with adequate eye protection while working in the defendant's mine.

In **Fibre Bag Manufacturing Company v Sarpong [1967] G.L.R. 657**, a young man experienced severe injuries to his fingers while cleaning an industrial machine in the way that he had been directed to clean them at work. There was no equivocation in the fact that 'but for' the cleaning he was doing in the way he had been directed to do it, he would not have met with the accident.

The Supreme Court agreed with the trial court that the applicable provision of the relevant law – section 28 of the Factories Ordinance of 1952 - required inter alia that a person employed at any machine liable to cause bodily injury should be fully instructed as to the dangers likely to arise in connection there with. It went on to state that the question whether the defendants in a liability for negligence suit had discharged both their common law and statutory duties was primarily one of fact. On the fact of the case,

the duty to provide a safe system of work, including training and supervision had clearly been breached, leading to the accident.

The distinction between the facts of the **Fibre Bag Manufacturing Company** case and the present case is that there is no evidence to prove a causal connection between the alleged breach of inappropriate protective gear and the injury suffered by the plaintiff, and the evidence made no effort to prove how the goggles were even inadequate or inappropriate for protection against dust or toxic gases such as ammonium, and how any form of glaucoma, the cause of which was accepted by both experts to be unknown, was caused by dust, and ammonium from the mines.

Even more difficult to appreciate is Dr Osei Akoto's opinion that because the plaintiff's intraocular pressure was normal, the *normotensive optic nerve head damage he had experienced had to be precipitated'.* And when it came to the expected precipitation, his opinion that 'v*asospasm of the retinal vessels <u>can be</u> precipitated by toxic chemicals*'.

This opinion is in the realm of conjecture, providing no evidence of proximate causation, as required by law.

Res Ipsa Loquitur

After citing **Asafo v Catholic Hospital of Apam [1973] 1 GLR 282** as authority on the application for the doctrine of res ipsa loquitur, counsel for plaintiff went on to say that Dr. Sagoe had *'clearly corroborated the conclusion made by PW1 that the underlying cause of glaucoma is still unknown*.'

It is not clear why counsel for plaintiff is submitting that the ratio in **Asafo v Catholic Hospital of Apam [1973] 1 GLR 282** regarding the application of the principle of res ipsa loquitur is relevant to the instant case. The essence of the doctrine of res ipsa loquitur (the thing speaks for itself) is that where an event occurs such as would not **in the ordinary**

course of things have occurred without breach of a duty of care, negligence can be implied.

The **Asafo** case involved a child who disappeared while in the custody of a hospital. There could be no explanation for the disappearance of a six week old baby except that the hospital authorities had breached their duty of care for the baby and had been negligent in their duty to ensure the baby's safety and security and ultimate delivery up to the parents at the end of the hospital stay.

In the present case, because the experts were ad idem that the cause of glaucoma as a disease, is not known, it cannot be said by any stretch of imagination that that there could be no explanation for the plaintiff contracting glaucoma unless the defendant had been negligent in its duty of care to the plaintiff. The appeal is dismissed and the decision of the court of appeal affirmed

G. TORKORNOO (MRS.)

(JUSTICE OF THE SUPREME COURT)

P. BAFFOE-BONNIE

(JUSTICE OF THE SUPREME COURT)

M. OWUSU (MS.)

(JUSTICE OF THE SUPREME COURT)

B. F. ACKAH-YENSU (MS.)

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