IN THE HIGH COURT OF JUSTICE, WESTERN REGION, HELD AT SEKONDI ON THE 11TH DAY OF JULY, 2023, BEFORE HER LADYSHIP AFIA N. ADU-AMANKWA (MRS.) J.

SUIT NO. E2/20/22

ISAAC YEBOAH **PLAINTIFF**

VRS.

1. JOHNSON SENYO KWAO **1ST DEFENDANT**
2. RELIANCE LOGISTICS AND CONSTRUCTION LTD. **2ND DEFENDANT**

JUDGMENT

On 31st October 2021, on the Tarkwa-Takoradi road, Isaac Yeboah, the plaintiff, was driving a Toyota AX10 vehicle with registration No. WR 1092-21 from Tarkwa towards Takoradi. Upon reaching a spot near Diamond Cement junction, Bokro, in the Ahanta West District, this vehicle was involved in an accident with a Sino Howa Tipper Truck loaded with stone chippings with registration No. GS 3212-18 owned by the second defendant. The Toyota AX10 vehicle was damaged beyond repair. The plaintiff claiming to be the owner of the Toyota vehicle, took out the instant writ against the driver and owner of the Sino Howo Tipper Truck for:

> "a. Recovery of the sum of GHS 37,000.00 being the pre-accident or replacement value of his Toyota AX10 with Registration Number WR 1092-21 which was extensively damaged at the Diamond Cement Junction, Bokro as a result of the 1st Defendant's negligent and reckless driving.
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> b. Recovery of GHS 100.00 being loss of use of the said commercial vehicle per day from 31/10/2021 till the date of judgment.

c. Any other equitable relief as shall be deemed by the Court in the circumstance.

d. Cost"

The basis of the plaintiff's claims is that the accident arose from the negligence of the 1st defendant, the driver of the Sino Howo Tipper Truck. The details of the alleged negligence were pleaded in paragraph 5 of his statement of claim as follows:

"PARTICULARS OF NEGLIGENCE

a. *That the 1st Defendant was speeding with his vehicle and thereby failed to apply his brakes on reaching the branch road.*
b. *That the 1st Defendant failed to stop at the junction although Plaintiff's car was close to Defendant's vehicle.*
c. *The 1st Defendant who was coming from the opposite direction failed to stop and look out for an oncoming car before branching onto a minor road".*

According to the plaintiff, upon reaching a spot near Diamond Cement junction, Bokro, in the Ahanta West District, the 1st defendant, who was in charge of a Sino Howa Tipper Truck loaded with stones chippings and coming from the opposite direction without due care and attention crashed into his vehicle whilst turning unto a minor road. The plaintiff claims that he purchased his vehicle through a loan he sourced from HFC Bank. The accident had occasioned serious financial damage to him, resulting in his inability to settle his loan payments.

In their defence, the defendants denied the allegation of negligence and instead accused the plaintiff and his passengers of being extremely intoxicated on that day. According to them, the plaintiff had several bottles of alcohol in his car, which he quickly hid in bags and disposed of in the bush immediately after the incident. They averred that in initiating the curve at the entrance of the Diamond

Cement Road, the 1st defendant slowed down, signalled and checked for oncoming vehicles before making the turn. The plaintiff, who came from the curve at an extremely high speed with no headlights on, drove carelessly into the side of the truck due to his level of intoxication. They have counterclaimed for the following reliefs:

> "i. An order for the recovery of loss of income for the period of two weeks that the truck was in police custody at a daily rate of GHS 5000 and at a total of GHs70,000.
>
> ii. An order for the replacement and repairs of the damaged headlamps, bumper, passenger side steps and minor spraying at a total cost of GHS15,000.
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> iii. Any other reliefs that this Honourable Court may deem fit.
>
> iv. Costs including legal expenses".

The issues which the parties settled and which they invite me to decide on are:

i. Whether or not the 1st defendant, who was in charge of Tipper Truck with registration number GS 3212-18 exercised due care and attention before turning into the minor road at Diamond Cement Junction, Bokro.
ii. Whether or not the 1st defendant was negligent when he failed to stop and look out for plaintiff's oncoming car before branching into the minor road.
iii. Any other issues arising from the pleadings and evidence.

BURDEN OF PROOF

Now, since the defendants have counterclaimed on the ground that the plaintiff was rather negligent, all the parties have the equal burden of establishing the negligence of the other party. In spite of the opportunity given to the defendants to prosecute their claim, they failed to do so. Having failed to attend court on 31st

May 2023, despite the notice to them, the court had no choice but to close their case. Thus, this case is one-sided, consisting only of the plaintiff's evidence.

Despite the uncontested nature of the case, it is the plaintiff's call to prove his case. In civil cases, the general rule is that the party who, in his pleadings, raises issues essential to the success of his case assumes the onus of proof and proves his case on the preponderance of probabilities as per sections 10, 11 and 12 of the Evidence Act, 1975, NRCD 323. On the burden of proof in civil matters, Ansah JSC, in the case of **Takoradi Flour Mills vrs. Samir Faris [2005-2006] SCGLR 882 at 900**, held that:

> *To sum up this point, it is sufficient to state that this being a civil suit, the rules of evidence require that the plaintiff produces sufficient evidence to make out his claim on a preponderance of probabilities, as defined in section 12(2) of the Evidence Decree, 1975 (NRCD 323). Our understanding of the rules in Evidence Decree, 1975 on the burden of proof is that in assessing the balance of probabilities, all the evidence, be it that of the plaintiff or the defendant, must be considered, and the party in whose favour the balance tilts is the person whose case is more probable of the rival versions and is deserving of a favourable verdict.*

Therefore, the law is settled that the party who bears the burden of proof must produce the required evidence of the facts in issue that has the quality of credibility for his claim to succeed. See the case of **Ackah vrs. Pergah Transport Limited and Others [2010] SCGLR 728.** Thus, for the plaintiff to succeed on his claims against the defendants, he must produce sufficient evidence to lead the court to conclude that the defendants' negligence was more probable than not.

MERITS

In proof of the negligence, the plaintiff testified that on 31st October 2021, he was in charge of his car with four other passengers on board from Tarkwa towards

Takoradi. Upon reaching a spot near Diamond Cement Junction at Bokro in the Ahanta West District, the 1st defendant, who was in charge of a Sino Howa Tipper Truck loaded with stone chippings and coming from the opposite direction without due care and attention, crashed into his car while turning unto a minor road. In explaining the 1st defendant's lack of care and attention, the plaintiff testified that the 1st defendant was speeding with his vehicle and failed to apply his brakes on reaching the branch road. Again, the 1st defendant failed to stop at the junction, although his vehicle was close to the 1st defendant's vehicle. The 1st defendant, who was coming from the opposite direction, failed to stop and look out for any oncoming car before branching onto the minor road. According to the plaintiff, his car was completely damaged beyond repair. The following day the police came to tow the two vehicles to the police station after they had done some measurements at the accident scene and questioned them on how the accident happened. The police investigated the incident and gave them a report on the accident, stating that the 1st defendant, without due care and attention, crushed his truck into his car while turning into a minor road.

The evidence of the plaintiff went unchallenged. It is trite that where evidence led by a party is not challenged by his opponent in cross-examination, and the opponent does not tender evidence to the contrary, the fact deposed to in the evidence is deemed to have been admitted by the opponent and must be accepted by the trial court. See the case of **Takoradi Flour Mills Limited vrs. Samir Faris, supra**. By their failure to cross-examine the plaintiff, the defendants are deemed to have accepted his testimony that the 1st defendant, who was speeding, failed to stop to look out for oncoming vehicles before branching unto the minor road.

The plaintiff's evidence was corroborated by Francis Eshun, one of the passengers on board the plaintiff's vehicle. He testified that he was travelling from Agona Junction to Takoradi on the date of the incident. He was seated in the front seat

near the driver. On reaching Diamond Cement Junction, he saw a truck loaded with stone chippings from the opposite side. At the junction, the truck driver who was speeding with the vehicle failed to stop or look out for any on-coming cars and turned into the branch road. In the process, the truck crushed into their vehicle, damaging it beyond repair. He and two other passengers in the car sustained injuries and were taken to Kwesimintsim Hospital for treatment.

From the evidence of the plaintiff and his witness, the 1st defendant was speeding and, upon reaching the Diamond Cement junction to turn unto the branch or minor road, failed to slow down to observe the presence of the plaintiff resulting in the collision. It is the duty of all road users at all times to keep a lookout to avoid collisions with other road users. See **Owusu vrs. Commissioner of Police[1963] 1 GLR 113**. Thus, the 1st defendant, who was driving on the main road and who intended to join a minor road, owed a duty of care to other road users regarding traffic approaching from a minor road. His approach to the junction should have been cautious, having slowed down considerably to deal with traffic on the minor road if necessary. This he failed to do, resulting in the collision between the two vehicles. I am satisfied that the defendants are liable for negligence to the plaintiff.

Since the success of the defendants' counterclaim hinged on their proof of negligence against the plaintiff, and having found that the accident arose out of the defendants' negligence, their counterclaim cannot be sustained, and I accordingly dismiss it.

The plaintiff claims, among other reliefs, the recovery of the sum of GHS 37,000.00, being the pre-accident or replacement value of his Toyota vehicle. In essence, the plaintiff claims special damages of GHc37,000.00 as the replacement value of his damaged car. A successful proof of this claim would entail proof of the subject matter and the value of the subject matter being claimed. Thus, the plaintiff would have to prove that the defendants damaged his vehicle and that the value of the damaged vehicle is GHc37,000.00. Where the plaintiff succeeds

in proving both the subject matter and the value, he is entitled to his claim. However, where he fails to prove the subject matter but proves the value of the subject matter, his claim should fail as he should not be entitled to damages for property which is not damaged in the first place. Where he is able to prove the subject matter but not the value of the subject matter, he would not be entitled to the value claimed. However, he would be entitled to an award of some value for the subject matter. In the case of **Norgbey vrs. Asante [1992] 1 GLR 506**, Acquah J regarding proof of special damages, opined thus:

> *"The legal position therefore is that in a claim for special damages where the claimant succeeds in proving both subject matter and the value, he is entitled to be awarded the value he claims. But where he succeeds in proving only the subject matter but fails to prove the value of the subject matter, the claimant is not to be denied any compensation. In such a situation the claimant is entitled to be awarded some value for the damaged subject matter*".

The plaintiff claims that his Toyota vehicle was damaged beyond repair. Describing the extent of damage, the plaintiff testified that the front bumper was mangled, both headlamps smashed, both front fenders deeply grazed and dented, the bonnet crumpled, the bonnet lock mangled, the grille broken, the front screen smashed, the air condition system damaged, the radiator mangled, the cooling fan broken, the engine components damaged, the battery damaged and the driver airbag deployed. The defendants did not challenge or contradict his evidence and are deemed to have admitted that fact. The police report, exhibit "C", confirms the vehicle's damage and adds that the vehicle could not be road tested due to the extent of damage. The defendants did not challenge PW1's testimony to the effect that the car was damaged beyond repair. I am satisfied that the plaintiff's Toyota vehicle was damaged beyond repair. He is entitled to the pre-accident or replacement value of the vehicle.

Acquah J in **Norgbey vrs. Asante, supra**, explained what the market or replacement value of a vehicle is in the following words:

> *"In Kpedator v. Korli, High Court, Ho, 13th November 1991, unreported, I said that the relevant date in determining the market or replacement value of a damaged vehicle is the date of the accident and not any other subsequent date. I proceeded to explain further as follows:*
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> *"However I think it is vital to point out that the market value of the chattel at the time of the accident does not mean the value of a brand new type of that chattel. It means the value of that chattel in the condition in which it was before the accident. That is, the pre-accident value of that very vehicle which was damaged and not the pre-accident value of a brand new type of that vehicle. For the law has never been that an owner of a ten year old vehicle totally damaged in an accident is entitled to the value of a brand new vehicle of the type involved in the accident."*

Therefore, claimants for the market or replacement value of their damaged vehicles have the burden of establishing by admissible evidence the pre-accident value of their damaged vehicles.

The plaintiff testified that he purchased his vehicle for GHc37,000.00 and therefore seeks the car's replacement value at that amount. He tendered the receipt of the purchase as exhibit "A". Per exhibit "A", the plaintiff bought the vehicle, a 2010 model, on 7th March 2021. The accident occurred on 31st October 2021 after the plaintiff had used the car for about seven months. Certainly, the pre-accident or market value of the car cannot be GHc37,000.00, which represents the car's value at the time of its purchase in March 2021. All things being equal, given the car's usage for seven months, its value would have depreciated by October 2021 unless the plaintiff can prove to the contrary that as of the date of the accident, he had completely overhauled the car to enhance its value. The plaintiff did not

lead evidence regarding the vehicle's value as of the date of the incident, 31st October. Thus, the plaintiff has failed to prove to the court that the pre-accident value of his damaged car is GHc37,000.00. However, given my satisfaction with the vehicle's damage, the plaintiff should be entitled to nominal damages. In **Yirenkyi v. Tarzan International Transport [1962] 1 G.L.R. 75** at 78, Ollennu J. (as he then was) explained it thus:

> *"The plaintiff completely failed to prove the special damages as claimed. But that failure does not disentitle him to some damages. There is no doubt that he suffered some loss. The fact that the evidence he led has not made it possible for the court to assess damages is not completely fatal. It has been held that in such cases he should be awarded nominal damage [sic]. . ."*

Nominal damages here would not necessarily mean that the plaintiff is awarded a trivial sum. The plaintiff would not be awarded the sum which he thinks he deserves by virtue of his claim made. He would be awarded damages at the court's discretion. Nominal damages were explained in the **Norgbey case, supra,** to mean:

> *"The nominal damages referred to by Ollennu J. (as he then was) does not mean that the claimant should be awarded just a trivial sum. It is called nominal because on the face of it the claim is being made under the heading special damages, while in reality he is being awarded damages at the court's own discretion. For in making some award on failure to prove the value, the court is expected to have regard to the pre- and post-accident value of the property, and the figure to be awarded must be a reasonably fair approximation of the pre-damaged value of the property".*

As the car was used for seven months before the accident, GHc27,000.00 as the pre-accident value is reasonable under the circumstances.

The plaintiff claims recovery of GHc100.00 per day for the loss of use of his vehicle from 31st October 2021 till the date of judgment. On this relief, the plaintiff testified that prior to the accident, he used his car for Bolt services and earned an income of GHc100.00 a day. He worked six days a week, bringing his total monthly income from using the car to GHc2,400.00. After the accident, he reported to the police at Agona Ahanta. The plaintiff further testified that his vehicle was extensively damaged due to the accident, and he could not work with it. By virtue of this, he could not repay the loan he took from HFC Bank. Also, he had to hire a car to take his children to and from school at a cost of GHc25.00 a day. Presently, he was unemployed and found it challenging to have another person's car to drive. The plaintiff's evidence was uncontroverted; therefore, I accept that he earned GHc100.00 daily from using his vehicle. Even though he is entitled to GHc100.00 a day for the loss of use of his vehicle, the question is whether he is entitled to this amount from the date of the accident till the date of judgment as he claims. His sense of entitlement to that amount may stem from his claim that he is unemployed and cannot repay the loan from HFC bank, which he used to purchase the vehicle. Again, he has found it difficult to secure a car to work with. In essence, his financial woes, which the defendants caused, hindered him from getting a substitute vehicle by reason of which the defendants should be made to pay him what he would have earned had his car been operational. However, the fact that the plaintiff may not have had the funds to secure a replacement vehicle all this while is not a factor for the consideration of the assessment of damages. After all, the plaintiff's poverty cannot be allowed to increase damages for loss of property. On this issue, the Court of Appeal in the case of **West African Bakery vrs. Miezah [1972] 1 GLR 78** stated thus:

> *"The fact that the injured owner was unable to procure a substitute within reasonable time due to his impecuniosity or even the failure of the tortfeasor to offer replacement should be no consideration in assessing damages. The law may not expect an injured person to expend money in*

minimising damages but it does not equally allow damages to be increased by reason only that the injured person is impecunious."

The question then is not whether the plaintiff had obtained a substitute vehicle at the date of trial but what would have been a reasonable time for him to obtain the substitute vehicle. What reasonable time is would depend on the circumstances of the case and within the court's discretion. Azu Crabbe JSC in the case of **West African Bakery vrs. Miezah, supra** defined "reasonable time" as:

"In my judgment, 'reasonable time' is the period which the court considers to be fair and just in 'the peculiar circumstances of each case.' The law (the common law) is the embodiment of the common sense of the community, and the determination of a length of time must accord with that common sense. In the ultimate analysis, therefore, the question what is a reasonable time is one for the discretion of the court."

The fact that he is unemployed and finds it difficult to get another man's car to drive is not a compelling reason to grant him the loss of the use of his vehicle from the date of the accident till the date of judgment. The plaintiff's right to compensation is qualified by the equally well-settled rule of law that the plaintiff is himself under a duty to take all reasonable steps to mitigate the loss. He cannot claim any part of the damage due to his neglect to take such steps. The vehicle in question is a Toyota AX10 vehicle. Given the plaintiff's failure to tender photographs of the vehicle, I do not have a mental picture of this car. However, the Toyota vehicle is a very common brand in this country, and securing a replacement should not be difficult. Assuming the plaintiff had the means, it should not take him more than three weeks to acquire a substitute and another two weeks to register and insure the car. Factoring in delays, the plaintiff should not take more than eight weeks to purchase the substitute vehicle. In the circumstances, I will allow him eight weeks as loss of use at GHc600.00 weekly. Regarding the cost of transporting his children via alternative transportation,

GHc125.00 a week for eight weeks is reasonable compensation under the circumstances.

Accordingly, I will enter judgment for the plaintiff against the defendants for GHc32, 800.00.

(SGD.)
H/L AFIA N. ADU-AMANKWA (MRS.)
JUSTICE OF THE HIGH COURT.

COUNSELS
Samuel Adinkrah appears for the Plaintiff.
Charles Ofori (holding Nkrabea Effah-Dartey's brief) appears for the Defendants.