IN THE SUPERIOR COURT OF JUDICATURE

IN THE GENERAL JURISDICTION DIVISION OF THE HIGH COURT OF JUSTICE ACCRA, HELD ON THE 12TH DAY OF OCTOBER 2017 BEFORE HER LADYSHIP NAA ADOLEY AZU, HIGH COURT JUDGE

SUIT NO: AD/94/2014

[redacted] **PLAINTIFF**

VRS

[redacted] **DEFENDANT**

BY COURT JUDGMENT

In the case of ***Aboagye v. Kumasi Brewery Limited [1964] GLR,*** Djabanor J. made the following pronouncements which are relevant to the case before this court:

> *"I am satisfied from what I have seen and heard in this case that the defendants' plant is the best possible plant. I am satisfied that no possible attack can be made on their implements, their machinery or the general way in which their business is carried on; and indeed this is a very substantial and modern place of business. The whole system of work should really be described as fool-proof, but for the fact, as*

admitted by Mr. Horstman himself, that when these machines and processes are being operated by human beings, one cannot always be certain. However the defendants are saying following the case of ***Daniels & Daniels v. R White & Sons ltd 3*** *that by adopting a fool – proof process and by carrying out that process under proper supervision, they had taken reasonable care to see that the beer going out of their factory was free from contamination of any kind, and that they had discharged the burden on them. But the plaintiff in effect is saying; I have no doubt that your machinery may be up to date or that your processes are also of the best. But they are manned by human beings who may negligently, deliberately or even absent-mindedly falter. The sighters could have missed that one bottle containing that nut just as some few bottles have been known to have passed through all these processes and come out still smelling of kerosene…"*

These pronouncements are relevant to the current suit before the court because, this is a case in which the plaintiff has brought the defendant to court alleging that the Defendant has breached the duty of care owed to its customers by manufacturing and distributing a non-alcoholic beverage contaminated with particles. After closely reviewing the facts and the evidence before the court, the court determined that the Defendants are indeed liable for the claim on the basis of the rule in ***Donoghue v Stevenson*** [1932] AC 562. In that case a manufacturer of beverages, was found to owe a duty of care to the consumers of its product, especially due to the fact that the said consumers had no reasonable opportunities to examine the contents prior to the consumption of same. The facts of the current case before the court and the circumstances leading to the initiation of this law suit are sufficiently similar to the situation presented in the case of ***Donoghue v. Stevenson*** supra, to warrant a similar outcome.

These are the facts of the case, as presented to the court: Per the writ of summons and statement of claim filed on the 4th day of July 2014, the

plaintiff is a business systems analyst employed by the National Health Insurance Authority, whilst the Defendant is a limited liability company, incorporated under the laws of the Republic of Ghana and engaged in the manufacturing and sale of beverages. The plaintiff avers that on the 17th of February 2014, he purchased a bottle of [redacted] drink, being one of the Defendant's products from the [redacted] After consuming about half the contents of the bottle, the Plaintiff noticed some particles floating in the said bottle. It is the Plaintiff's case that this discovery made him nauseous to the knowledge and attention of other parties present at the Guest House. It is also the Plaintiffs case that he purchased another bottle of the said drink from the Guest House, which to his utter shock and disbelief also contained foreign particles. It is worthy to note that the Plaintiff asserted that both bottles of beverage were found not to have expired at the time of the incident in question. The Plaintiff averred that he was psychologically traumatized, experienced abdominal pains, nausea, headaches and general weakness during the night on which he consumed the [redacted] drink. As a result of this state of affairs, the Plaintiff went to the hospital, was treated and then subsequently discharged. Following this incident, the Plaintiff instructed his solicitors to demand compensation from the Defendant owing to the pain and suffering that the Plaintiff had endured because of the Defendant's negligence in production. (Exhibit B). More particularly the Plaintiff alleged that the Defendant breached the duty of care owed to its consumers, to produce and market wholesome and healthy products for consumption:

1. That the Defendant did not act with the proper skill, care diligence and competence expected of an experienced manufacturer of beverages.
2. That the breach of the said duty owed to the Plaintiff by the Defendant led to the contamination of the [redacted] drink with foreign particles.

3. That the said contamination rendered the drink unwholesome for consumption.
4. That the Plaintiff's consumption of the said drink led to pain and suffering.

The Defendant responded to the Plaintiffs complaint and demand for compensation with a letter dated 14th March 2014,(Exhibit C) in which the Defendant simply offered to replace the alleged defective product with another on the provision of proof of purchase. It is the Plaintiff's assertion that he found this response highly disingenuous. The Defendant further requested that the bottle of [redacted] be returned to the Defendant to enable the Defendant determine its genuineness via a full and specific investigation. The Plaintiff rejected this proposition and wrote another letter to the Defendant dated 27th March 2014, in which he demanded compensation in the amount of GHC 50,000 as damages. The Plaintiff further offered to provide a sample of the alleged contaminated product to the Defendant herein for the investigations as suggested by the Defendant; a request which did not receive any response from the Defendant. (Exhibit D) The Plaintiff concluded therefore that the Defendant's actions had evinced a clear intent not to compensate the Plaintiff for the pain and suffering that resulted from his consumption of the Defendant's unwholesome product. The plaintiff ended by stating that the Defendant would persist in its failure, refusal or neglect to compensate the Plaintiff, unless compelled by the court to do so. For the above reasons, the Plaintiff claimed the following reliefs against the Defendant:

a. A Declaration that the Defendant was negligent
b. Damages of GHC 50,000 for the Plaintiff's pain and suffering as a result of the consumption of the unwholesome [redacted] drink
c. Further or other reliefs
d. Costs including Costs of Counsel.

In the Statement of Defence filed on the 5th day of August 2014, the Defendant insisted that the averments contained in the Plaintiffs Statement of claim were concocted, adding that upon demand, the Plaintiff failed to produce the alleged contaminated bottle of [redacted] to the Defendant for analysis. The Defendant further suggested that the Plaintiff's discharge from the hospital on the same day that he reported therein, with complaints is further proof of the fact that he neither consumed a contaminated product nor suffer any actionable injury or damage. The Defendant dismissed the Plaintiff's claims as baseless adding that until a proper investigation was conducted to ascertain the presence of foreign materials in the Defendant's products, no proof of negligence can be said to have been established by the Defendant. The Defendant then expressed its committal to high manufacturing and quality standards to ensure that its products are suitable for consumption. The Defendant stated categorically that there were no foregin materials in the alleged bottle of [redacted] purchased by the Plaintiff . The Defendant also added that the unopened bottle of [redacted] in the Plaintiff's possession which was alleged to also contain foreign particles, did not give rise to any action founded on negligence against the Defendant. The Defendant concluded by stating that the Plaintiff herein was not entitled to his claims.

In the Plaintiff's reply filed on the 21st day of August 2014, the Plaintiff maintained his claims as filed, and denied concocting the story as alleged by the Defendant. The Plaintiff further denied the Defendant's allegation that he had refused to produce the bottle of [redacted] for laboratory analysis, adding that by a letter dated 27th March, the Plaintiff proposed that the parties should meet at the Plaintiff's solicitor's office to enable the Defendant take a sample of the alleged contaminated beverage for investigative purposes, which request the Defendant failed to heed to. The Plaintiff then provided that he obtained a medical report (Exhibit A) from the Muncipal Hospital of Saltpond, Mfantseman, signed by [redacted], the Medical Superintendent, the hospital where he was treated after the

incident in question. The Plaintiff ended by stating that the unopened bottle of [redacted] containing foreign particles, does give rise to an action founded on negligence against the Defendant due to the fact that the Defendant owes a duty to act with proper skill, care, diligence and competence expected of an experienced manufacturer of Defendant's stature to produce an market wholesome products for consumption.

At the Application for Directions stage, the following issues were adopted for hearing:

(i) *Whether or not the* [redacted] *drink purchased by the Plaintiff was contaminated and unwholesome*
(ii) *Whether or not the Defendant was negligent for the contamination of the* [redacted] *purchased by the Plaintiff*
(iii) *Whether or not the plaintiff was entitled to Damages for the Defendant's negligence*
(iv) *Whether or not the Plaintiff is entitled to his claim*
(v) *Any other issues arising out of the pleadings.*

Analysis and Determination

The matter before this court, being a civil suit, the Plaintiff who bears the evidentiary burden, must establish on the preponderance of probabilities that his case as presented to the court, should be accepted as credible. Failure on the part of the Plaintiff to meet this burden of persuasion will result in a failure of his claim.

The first issue before the court is *Whether or not the* [redacted] *drink purchased by the Plaintiff was contaminated and unwholesome.* The Plaintiff led evidence that sufficiently convinced the court that the [redacted] drink he purchased was contaminated and unwholesome. Even though the Plaintiff did not produce the half – empty bottle of [redacted] that he allegedly drank from, he produced another bottle of [redacted] marked Exhibit G to the court, which on a visual inspection or examination was

found to contain particles. The Plaintiff also produced a Medical Report from the hospital that he visited after he consumed the said contaminated beverage. The Hospital report narrated the events as set out by the Plaintiff, and established that he was treated for the conditions presented to the doctor. The Plaintiff also brought a witness before the court, who attested to the fact that the incidents as narrated by the Plaintiff did indeed occur. It is important to point out that all of these pieces of evidence constitute circumstantial evidence and were treated as such by the court. However it is also worthy of note that there was no direct evidence available to the court. In this case, direct evidence would be the rest of the beverage that the Plaintiff did not consume. The Plaintiff informed the court that his housekeeper had disposed off the rest of the beverage which he had left in his fridge for an extended period of time. This proposition was accepted by the court as being credible. Indeed the reasonable man does not keep an opened bottle of beverage in his fridge for an indefinite period of time. It was therefore not surprising to this court that a third party emptied the said bottle after a while. The Defendant on the other hand produced a number of witnesses before the court who attested to the rigorous and well controlled manufacturing process at the Defendan'ts facility. This court does not have any doubts about the said process or its efficacy, however as established in the case of ***Aboagye v. Kumasi Brewery Limited,*** the existence of a full-proof or automated process in a manufacturing plant does not guarantee the absence of errors and contamination, caused either deliberately, by negligence or inadvertently. This court after reviewing the facts of the case concluded that the Plaintiff who was ordinarily resident in Accra, and who was on an assignment on behalf of his employer in the Central would not have rushed to a hospital in Saltpond for no real reason. Apart from this fact, the Medical Professional who examined the Plaintiff, in tehperson of [redacted], diagnosed that the plaintiff had Gastro-enteritis, (Exhibit A), gave him medication for same and then subsequently discharged him. This court has

concluded on the basis of the evidence adduced by the parties that the [redacted] drink purchased by the Plaintiff was indeed contaminated. We must however also determine whether the beverage was also unwholesome. Indeed the facts of the case as presented have established that there were particles in the drink which is not the typical situation expected by a consumer when he purchases a bottle of liquid beverage. The presence of the particles therefore constituted a contamination of the said beverage.

The second issue before the court is *Whether or not the Defendant was negligent for the contamination of the* [redacted] *purchased by the Plaintiff?* The evidence before this court has established unequivocally that the Defendant was a dutiful manufacturer whose facilities were well organized and adequately supervised. Inspite of this state of affairs, the defendant released a contaminated product to its ultimate consumers. In the case of ***Overseas Breweries v. Acheamong [1973] 1 GLR,*** the Court of Appeal was faced with a case in which the plaintiff had alleged that he had purchased a bottle of the defendant's beer, contaminated with kerosene. The Plaintiff further argued that the presence of the kerosene was due to the negligence of the defendant. The court of Appeal held in that caes that the fact that the defendants had a fool proof system of manufacturing, did not negative negligence. The principle that was established by the ***Overseas Breweries*** case supra is that once a plaintiff proves want of reasonable care by the presence of an external material in the product, it is not a defence that the defendant had a fool proof system or a very high standard of operations. In the current case before the court, the presence of the particles in the [redacted] beverage have established that the Defendant herein failed to exercise due care. Indeed if the Defendant had exercised due care, there would be no contaminants in the beverage. As a matter of fact, the nature of the Defendant's processes and its manufacturing plant all point to the fact that in the absence of negligence its product cannot be contaminated. The Defendant herein

was not able to roved that the defect in its product was as a result of causes for which it could not be held responsible. Consequently, the inference here is that there must have been negligence on the part of the Defendant. It is this court's conclusion therefore that the contamination of the [redacted] beverage was caused by negligence on the part of the Defendant herein.

The court must also determine *Whether or not the plaintiff was entitled to Damages for the Defendant's negligence.* The legal principle is that the manufacturer of goods who fails to exercise due care, thereby causing injury to the consumer of the goods, becomes liable for the injuries suffered. In this case the Plaintiff drank a bottle of [redacted] contaminated with particles, he fell ill, went to the hospital, was treated and discharged. The Plaintiff has also alleged some degree of psychological trauma and suffering caused by this incident for whih reason he is demanding damages in the amount of GHC 50,000 from the Defendant. The use to which the Plaintiff put the drink was reasonably forseeable, its intended use. It is this court's view therefore that there are no intervening circumstances that will release the Defendant herein from his duty as a manufacturer. In this case, the product did not come with any warnings to the ultimate consumers. The Plaintiff having suffered injury is indeed entitled to reasonable compensation for his pain and suffereing as a result of the crisis.

The final issue before this court is *Whether or not the Plaintiff is entitled to his claim?* The Plaintiff herein, has established that he purchased a product manufactured by the Defendant which he consumed believing same to be wholsesome. The product was contaminate with particles, he suffered some injury as a result of this set of facts and is seeking damages from the court. This court has concluded that the drink was contaminated as a result of negligence conduct on the Defendant's part. The court will fall back once again on the case of

Aboagye v. Kumasi Brewery Limited, supra in which the Plaintiff sued the Defendant after consuming beer manufactured by the defendant and contaminated by a nut, it was held at page 247 that:

> *"…Somebody in the defendants' employment failed to do his duty on this occasion and allowed the beer with the nut in it to pass out of the factory. In my view (as was the view of Lord Dundedin in Ballard v. North British Railway co) the defendants had to show cause how the nut could have got into the bottle and remained there, inspite of their system of work, if somebody had not been negligent. It is my view that they failed to do that . it is my further view that the plaintiff has proved that the nut was in the beer when he drank it, and that it could not have been there if the defendants were not negligent…"*

Under tort law, damages do lie in favor of the successful claimant. The Plaintiff herein, has sucesfuly proven his case and is indeed entitled to his claim. On the basis of the above the court hereby declares as follows:

1. *That the Defendant did not act with the proper skill, care diligence and competence expected of an experienced manufacturer of beverages.*
2. *That the breach of the duty of care owed to the Plaintiff by the Defendant led to the contamination of the* [redacted] *drink with foreign particles.*
3. *That the said contamination rendered the drink unwholesome for consumption.*
4. *That the Plaintiff's consumption of the said drink led to pain and suffering.*
5. *That the Plaintiff is on the basis of the above entitled to damages in the amount of GHC 50,000*
6. *Costs of GHC 5000 awarded in favour of the plaintiff herein.*

NAA ADOLEY AZU J.
JUSTICE OF THE HIGH COURT
GENERAL JURISDICTION HIGH COURT 5