CASES ADJUDGED

IN THE

SUPREME COURT OF THE REPUBLIC OF LIBERIA

AT THE

MARCH TERM, 1989

THE MANAGEMENT OF BONG MINING COMPANY, Appellant, *v.* AMOS BAH and THE BOARD OF GENERAL APPEALS, Ministry of Labour, thru its Chairman, Appellees.

MOTION FOR REARGUMENT

Heard: March 14, 1989. Decided: July 4, 1989

1. A rehearing will not be granted when there is no showing that the court has inadvertently overlooked some fact or point of law or that a palpable mistake has been made.
2. A motion for re-hearing made in contravention of the statute or the Rule of Court will be denied.

Amos Bah, an employee of Bong Mining Company, filed a complaint before the Ministry of Labour, growing out of an accident in which he was involved while in the appellant's vehicle. The basis of Mr. Bah's complaint was that the compensation given by the employer was not reflective of the injuries sustained by him. According to the hospital report, the appellee was injured to his fifth and eighth ribs and right testicle. The hearing officer dismissed the appellee's claim. The Board of General

Appeals affirmed the hearing officer's ruling, noting that the appellee had failed to show that the permanent injuries alleged by him was the result of the accident, especially as the doctor's certificate upon which he relied was not issued by a doctor possessing the qualification to decide whether the injuries claimed was due to the accident. Whereupon plaintiff/appellee appealed to the National Labour Court for judicial review. A further appeal was taken from the judgment of the National Labour Court which reversed the ruling of the Board of General Appeals and held that the appellant was liable to the appellee. After a unanimous decision was rendered in favor of the appellee, Amos Bah, the management of Bong Mining Company filed a motion for re-argument. The case was re-docketed for argument during the March 1989 Term of Court, during which time the Court noted that a rehearing cannot be granted in the absence of a showing that the Court had inadvertently overlooked some fact or point of law. Accordingly, the Court *confirmed* its previous decision, rendered during its October 1988 Term, on the grounds that (a) the appellant had failed to state clearly and specifically the material fact or point of law that the Court had overlooked in its earlier decision, and (b) that the Supreme Court had judicially dealt with all of the points raised in the case.

James D. Gordon appeared for the petitioner/appellant. *Roland Barnes* appeared for the respondent/appellee.

MR. JUSTICE JUNIUS delivered the opinion of the Court.

Co-appellee Amos Bah, who at the time was employed by movant/appellant, was on November 23, 1980, while on the job, involved in an accident in one of the movant/appellant's vehicles. According to the records of the BMC Hospital, on September 9, 1983, co-appellee was injured in said accident and sustained fracture of the 5th and 8th right ribs, right acromion and pelvic fracture without dislocation. Consequently, co-appellee instituted an action against defendant/appellant at the Ministry of Labour, which eventually came to the National Labour Court on

a petition for judicial review, claims for damages to ribs 5th and 8th and right testicle. Judgment was rendered in favour of co-appellee at the National Labour Court, to which judgment appellant excepted and announced an appeal to this Honourable Court. The appeal was heard by this Honourable Court and during its adjournment for the October Term A. D. 1988, an opinion was delivered and judgment handed down in favor of co-appellee.

Appellant thereafter, within the legally specified time, filed a five-count motion for re-argument, in which it alleged:

1. Because movant says that during the October 1988 Term of this Honorable Court, the above-mentioned case was argued *pro et con* before Your Honours. Movant submits that Your Honours inadvertently overlooked major issues, that is to say, major legal issues as well as those of mixed law and facts which, had it not been due to such inadvertency, the ruling of Your Honours would have been otherwise. Hence movant respectfully moves this Honourable Court to grant this motion for reargument so as to enable this Honourable Court to rectify the inadvertency herein referred to.

2. Movant further moves this Honourable Court and says that the motion for re-argument should be granted where the Supreme Court inadvertently overlooked major issues such as in the instant case. Movant submits that the court below awarded co-respondent Amos Bah 48 months wages which, under the law, is awarded in case of loss of total man and this is not the case in point. Consequently, movant strenuously contended that in keeping with the appeal records, there is no medical percentage of disability that was assigned to the co-respondent Amos Bah, supported by expert testimony; hence the case should be dismissed. This contention, being supported by our statute, should have been given credence. Your Honours inadvertently overlooked this point, coupled with others as contained in the motion; and so movant requests this Honourable Court to grant the motion for re-argument.

3. Movant further moves this Court to grant this motion for re-argument in that, under the law, allegations, when laid in

the complaint, must be proven, especially when expert testimony is required like in the instant case. Movant says that co-respondent Amos Bah averred that he became impotent as a result of the removal of his right testicle, but all of the medical certificates in the records, being of expert testimony, failed to substantiate that any testicle, be it right or left, was removed, even though removal of the right testicle was stressed by co-respondent Amos Bah.

4. And also because movant says that in keeping with the testimony and complaint of co-respondent Bah, he alleged impotency because of the purported removal of his testicle. On the contrary, the medical reports as argued before Your Honours, which were inadvertently overlooked, are clear on the point to the effect that had there been any removal of the right testicle, this medically would not have caused impotency as under medical science one can normally function with one testicle. But Your Honours inadvertently did not deal with the point as it was presented. Movant therefore requests this Honourable Court to correct the inadvertency herein complained of, especially so when there has been no total man loss to have warranted the 48 months award granted by the lower court. Therefore this motion should be granted.

5. Movant further moves this Honourable Court to grant the motion for re-argument in that Your Honours inadvertently awarded a ten percentage (10%) disability that was never awarded by doctors for the alleged removal of the testicle, which allegedly led to impotency. Movant submits that the 10% awarded to co-respondent was paid for in the amount of $950.00 for which a release was issued and no rate of percentage was ever concluded by any of the doctors for the case in point. Your Honours inadvertently overlooked this fact and therefore, a re-argument should be granted.

To this motion for re-argument, co-appellee filed a five-count resistance, quoted hereunder:

"1. Co-appellee says the Supreme Court did not inadvertently overlook any mayor issue of mixed law and facts in its opinion handed down at its October, A. D. 1988 Term in the above entitled cause, as contended in count one of the

motion, to warrant the granting of a motion for re-argument. The motion failed to show the mixed issue of law and facts that were inadvertently overlooked by Your Honours, which is a mandatory requirement for the granting of a motion for reargument. This Court cannot act upon mere speculation in the exercise of its judicial power. Co-appellee therefore prays for the denial of count one of the motion.

2. Co-appellee respectfully contends that count two of the motion for re-argument should be denied because the Supreme Court did not overlook the issue raised in this count, even though it was not raised in movant's bill of exceptions. In ruling on this issue, the Court said: "Finally, we will determine how much of a male's earning power is permanently affected by impotence; and how does such consideration justify the award by the lower court. Labor matters are equitable matters. To return this matter to medics at this juncture in order to determine the degree of disability in appellee will be too much...."

The Court further said on this point that:

"The BMC medical report said that appellee could no longer operate heavy duty automobile for which he was trained and with which he had earlier operated for the Company. . ." Co-appellee's own doctor said his loss was about 10% disability, on the basis of which he was compensated the sum of $950.00. On this issue, the Court said, at page 11 of the opinion: "Hence, we have seen it fit to class co-appellee under schedule A (8) of the workmen's compensation scheme provided by our Labor Law for compensating him." The Court based its ruling on this issue on the case *Williams and Williams v. Tubman*, 14 LLR 109 (1960). The Court further elaborated on this issue as is found on page 12 of the Opinion (See opinion). As it is clear that the intention of movant is to undermine the powers of this Honourable Court in exercising it functions and powers granted by law, said count should be denied.

3. Co-appellee further says that the Supreme Court did not overlook the issue raised in count three of the motion for re-argument. On pages 7 and 8 of its opinion, the Court

extensively treated the issue. In addition, the records of the Court show that Dr. R. J. de Siebenthal's report indicated the removal of the right testicle. The Supreme Court has held that the Court's Rule for reargument makes the showing of good cause the basis for favorably considering the application. In this case, no good cause is shown because in its opinion in this case, the Supreme Court has judicially treated the points presented in the motion for re-argument. Movant is bent on misleading this Court and bringing it into disrepute. Therefore, the motion in its entirety should be denied.

4. Co-appellee says that the Supreme Court did not overlook the point raised in count four of the motion in the above entitled case as to the testimony of the removal of the testicle to warrant the 48 months award of the lower court. *See* pages 11 and 12 of the Opinion.

5. Co-appellee further says that the Supreme Court did not overlook the issue raised in count five of the motion for reargument. On pages 5-10 of the Opinion, the Court treated this issue as was presented in the original argument. In fact, the issue of $950.00 alleged to have been paid to co-appellee, upon which a release was issue, was never raised in the original argument. Hence, movant is barred from raising this new issue for re-argument. The rule for re-argument is that only issues which were raised in the original argument can be made subject for re-argument, which issues were inadvertently omitted or overlooked by the Court."

During the argument before us and in support of the five-count motion for re-argument, counsel for appellant strongly maintained that this Honourable Court, having inadvertently overlooked several major legal as well as mixed issues of law and facts, the motion for re-argument should be granted in the interest of justice and fair play. On the other hand, counsel for co-appellee, in support of their five-count resistance, strongly argued and maintained in substance that this Honourable Court did not inadvertently overlook any issue of mixed law and facts to warrant the granting of the motion for reargument.

A careful perusal of the judicial history of this Honourable Court, backed by *Rule 14, Part 1, of the Revised Rules* of the

Supreme Court, which is in consonance with the common law, reveals that any application for re-hearing must be made strictly in keeping with the statute or rule of court; and if the application fails to conform to the rule or statute, the same should be denied. Movant/appellant's motion, as well as the argument before us, did not convince us that this Honourable Court overlooked any issue of mixed law and facts. Further, the motion, in its entirety, is a vague one. As a Court of last resort, we are bound to circumscribe our opinion in accordance with the law (statute) as well as previous opinions of this Court. In *Daniel* v. *Daniel*, 17 LLR 53 (1965), this Court held that re-argument or rehearing will be denied where the movant fails to show that any material question or issue was overlooked by the Court on a prior hearing.

Wherefore and in view of the foregoing, this Court says that the entire five counts of movant's motion are vague and make no specific reference to any issue that was overlooked; instead, they merely allege that the Court overlooked material issues of both law and facts. This Court holds that since the motion was not clear and specific as to what law and facts were overlooked in the prior opinion and how that would have materially changed the final judgment, the motion should be denied. The motion is therefore hereby denied in its entirety, with costs against the movant. And it is hereby so ordered.

Motion for reargument denied.

MR. JUSTICE KPOMAKPOR *dissenting.*

This case was first heard by this Court during its October Term, A. D. 1988. A unanimous decision was rendered in favour of co-appellee, Amos Bah, with Mr. Chief Justice Gbalazeh speaking for the Court. Following the closure of the Court for that term, the management of Bong Mining Company, appellant, filed a motion for re-argument of the case. The salient points are embedded in counts two and three of the motion, as follows:

"2.... Movant submits that the court below awarded co-respondent Amos Bah 48 months wages which, under the law, is awarded in case of loss of total man, and this is not the

case in point. Consequently, movant strenuously contended that in keeping with the appeal records, there is no medical percentage of disability that was assigned to the co-respondent Amos Bah, supported by expert testimony; hence the case should be dismissed. This contention, being supported by our statute, should have been given credence. Your Honours inadvertently overlooked this point, coupled with others as contained in the motion, and so, movant requests this Honourable Court to grant the motion for reargument.

"3. Movant further moves this Court to grant this motion for re-argument in that, under the law, allegations, when laid in the complaint, must be proven, especially when expert testimony is required, as in the instant case. Movant says that co-respondent Amos Bah averred that he became impotent as a result of the removal of his right testicle, but all of the medical certificates in the records, being of expert testimony, failed to substantiate that any testicle, be it right or left, was removed, even though removal of the right testicle was stressed by co-respondent Amos Bah."

According to *Rule IX, Part 1*, of the Revised Rules of the Supreme Court, re-argument of a cause may be allowed when some palpable error or errors are made by the court inadvertently overlooking some fact or point of law. Although a scant of our previous opinion and the records of this case will tend to indicate that we did not really overlook any point, however, a careful reading of the said opinion and the records, including the motion for re-argument, will readily reveal that we in fact inadvertently overlooked some very pertinent points obviously favorable to the movant/appellant. Consequently, I ordered the Clerk of this Court to re-docket this cause for re-argument.

After the re-argument, the majority of my colleagues still feel that our first decision was correct. I disagree, and it is my opinion that the motion for re-argument filed by appellant is meritorious and should be granted and our decision of the October Term reversed.

I have therefore withheld my signature from the judgment of the majority of the Court and have filed this dissent.

This dissent deals primarily with the Court's previous

decision which is comprehensive, since the Court's present decision has simply confirmed, without more, our decision of the October Term, 1988.

Mr. Amos Bah, co-appellee herein, filed a general complaint of unfair labor practice on November 7, 1983 against his former employer, the Management of the Bong Mining Company (BMC), now appellant. Mr. Bah alleged that on November 23, 1980, he had an accident while in the course of his employment, which resulted into injury of his right side and right testicle. Bah's complaint further stated that while Bong Mining Company was willing to compensate him with severance pay for ten years and 10% disability as a result of the accident he sustained, he however refused to sign for the checks on the ground that his doctor had declared him unfit for any work during the rest of his life.

Co-appellee Bah, according to the resident labor inspector, John Tarpeh, relied on a medical certificate issued in his favour by Dr. Roger de Siebenthal, M.D., an associate professor of surgery at the College of Medicine at the J. F. Kennedy Medical Center. This certificate confirmed other hospital records that, as a result of the accident, Bah sustained fractures of the 5th and 8th ribs on the right side; and fractures of the right acromion (part of shoulder bone) and pelvis fracture without dislocation.

According to the medical certificate, the hospital records also indicated that "the patient was treated only with bed rest. No operation was performed on either of his testicles following the accident . . . . " (Emphasis added.)

Moreover, a specimen of biopsy from Bah's right testis, the certificate said, was sent to West Germany for examination and the report sent back confirmed a diagnosis of tuberculosis of the right testis. Finally, Dr. Addae Mensah's report said that neither tuberculosis of one testis nor its removal will lead to impotence as long as the other testis remains normal; and, that whether partial or complete, co-appellee Bah's impotence is more likely to be psychological rather than organic. The report concludes that the alleged impotence of co-appellee Bah can certainly not be attributed to the accident since there was no injury to the testis following the accident.

Co-appellee Bah's primary contention is that he was not adequately compensated for the injury he sustained as a result of the accident in which he was involved. He maintained that the $950.00 represented 10% disability awarded him by the medical experts and did not cover the alleged injury done to his testicle.

The crucial question which the Court had to decide during the October Term and now is, whether Mr. Bah's alleged injury of his testis is the direct result of the accident or whether it resulted from an operation performed upon him. The follow-up question to the one just stated is, assuming for a moment that the alleged injury to his testis or his impotence was traceable to the accident of November 23, 1980, how much is he entitled to as compensation for such injury?

The Board of General Appeals saw this as the basic issue, and, as far as I am concerned, its approach is more in line with those of the authorities than that of my colleagues. The Board reasoned that courts have always relied on the expert knowledge of physicians in determining, firstly, whether an injury has occurred, and secondly, the corresponding compensation to be awarded.

Here is how the Board put it: "According to our practice, hoary of age, we have always relied on expert medical opinions to determine whether or not a certain disease is job related. Accordingly, the hearing officer requested the appellant to consult a physician and present him the doctor's assessment of appellant's condition. This was done. . . . Unfortunately, this medical certificate did not solve the problem. Instead, it left the hearing officer still in doubt since, at the end of the medical report, the doctor stated as follows: 'I am not qualified to establish the disability resulting from the hemecastration performed after the accident neither to elaborate on the reason of this operation,' referring to the operation done on the testicle of the Appellant." This medical certificate, not being helpful, the hearing officer requested and received, in keeping with the practice and the notion of fair play, a third medical report on co-appellee Bah.

The third and final certificate contains the following:

"Mr. Bah's impotence, whether partial or complete is more

likely to be psychological than organic. It can certainly not be attributed to the surgical manipulation, nor can it be attributed to the accident since there was no injury to the testis following the accident."

Of course, with this evidence, the hearing officer had no choice but to dismiss the claim on the ground that the evidence relied upon by Mr. Bah did not support the claim. As can be clearly seen, the claim of Mr. Bah has not been established and therefore was correctly disallowed by the hearing officer and the Board of General Appeals.

In short, the first medical report states that the biopsy done on Co-appellee Bah's testicle revealed that his medical condition was the result of tuberculosis; the second report failed to show that the operation done on co-appellee Bah's testicle had any connection with the accident mentioned herein; and the third report, the one obtained by the Ministry of Labour, since the first and second reports offered no aid in the solution of the matter, stated categorically that the impotence of Co-appellee Bah, if it at all existed, was due to neither the operation performed on him nor to the accident in which he was involved. It is my opinion that, given the facts and circumstances of this case, this Court had no alternative but to reject the claim of Co-appellee Bah, especially where none of the three reports indicated in the slightest terms that the injury complained of was job-related, or that he should be awarded a percentage of disability for possible compensation.

In his petition for judicial review, co-appellee Bah did not attempt to even show or allege, let alone produce, any evidence in the entire records of the case, that his alleged impotency was job-related or that the injury complained of was traceable to any assignments from his employer during the course of his employment. It was incumbent upon him to both make the allegation and then prove it.

As for the National Labour Court Judge, His Honour Arthur K. Williams, he merely said that a "careful scrutiny of the records, including the evidence of the complainant and defendant before the hearing officer, the documents from the N. S. A., the medical certificate, and the petition and returns," convinced him

that co-appellee Bah did establish a *prima facie* case and was therefore entitled to recover. Judge Williams quoted from the Labor Practices Law the following:

> "When an employee suffers permanent compensable occupational injuries the compensation shall be an amount equal to 48 months average earning." Labor Practices Law 18-A:3554

While I agree that the learned Judge quoted correctly the law under compensation for permanent total disability, he however jumped at certain conclusions which have no basis. For instance, he alleged that the removal of Bah's right testicle rendered him completely impotent, a condition tantamount to permanent compensable or occupational injuries. "Hence Mr. Bah is entitled to such compensation above cited. Petitioner's petition is sustained as against respondents' returns. Therefore both the ruling of the hearing officer and the decision of the Board of General Appeals are hereby reversed. Petitioner Amos Bah should be reinstated by the management and be reassigned to a light car; or in case of Management's refusal, petitioner should be compensated with the sum of $14,600.00 in keeping with the law cited above."

As we stated earlier, the learned judge reached several conclusions not supported by the records of this case. Some of these conclusions are:

1. Bah's right testicle was removed;
2. Bah was impotent as a result of the operation;
3. Bah suffered permanent occupational injuries as a result of the operation; and
4. Bah is entitled to compensation equal to an amount of 48 months, representing average earning for four years, or a total of $14,600.00.

Reverting to our previous opinion, we stressed the fact that because Co-appellee Bah signed the release with reservation, and made a "protest for the balance," the said release could not be interpreted as an unconditional release or as one absolving appellant from further liabilities. The Court construed the phrase "protest for the balance," to indicate that "appellee agreed to append his signature to the said release only under protest or with

reservation, for additional claims to be made on the company in the future, for additional compensation for the effects of the accident on him." (Emphasis added.) While I agree with the majority of my colleagues that the phrase "protest for the balance" intended to convey the message that appellee thought that he was entitled to more compensation than was shown on the face of the release, however, I have a problem with the Court's suggestion that co-appellee Bah, by signing as he did, was claiming additional compensation for the effects of the accident. Whatever Bah had in mind, when he signed the release with the phrase herein mentioned, could not refer to compensation for the effects of the accident, because he was awarded 10% compensation for the loss of full function of his shoulder bone, occasioned as a result of the accident. Consequently, the suggestion by the Court that "protest for the balance" meant additional compensation for the accident is erroneous and not supported by the records. In my opinion, the additional compensation which Bah alluded to was for the alleged operation and not for the accident. Of course, his claim for compensation for the operation cannot be maintained since the medical certificates said that the said operation was not job-related and therefore did not award him any percentage therefor.

In my view, the hearing officer and the Board of General Appeals were justified in rejecting the claim of co-appellee Bah, not necessarily on the basis of the release, but because the three medical reports denied that the injury complained of was occupational, and hence refused to award him any compensation. This Court should affirm the decision of the Board and not that of the National Labour Court, which is not supported by either the facts and law or the circumstances of the case.

The Court has identified and traversed three issues:

"1. Whether or not the release issued under 'protest for the balance' or with reservation by the releasee, absolving Management from further claims, bars the maker of the instrument from making such a claim in the future.

2. Whether or not the impotency alleged by co-appellee is by any means a consequence of the occupational injury earlier sustained by him.

3. How much of a male's earning power is permanently affected by impotence; and how does that justify the award made in this matter by the National Labour Court."

The Court has answered the first question, i.e., whether the release issued by co-appellee in favour of appellant as described herein barred further claims, in the negative; and the Court's ground is that the parties never intended by the instrument to absolutely absolve appellant from claims other than those that were specifically mentioned on the face of the instrument; not with the inclusion of the phrase, "protest for the balance," without any objection from appellant. The appellant was given true notice that the co-appellee would possibly come for a subsequent claim. I am therefore in agreement with the Court that the release did not bar further claims, especially when the appellant was represented by one of the prestigious law firms in this country when this instrument was issued.

The Court concluded that the impotency complained of by the co-appellee was brought about as a result of the removal of a testicle of co-appellee's while he was being treated for the injuries he had sustained in the accident. Indeed the evidence available to the Court from which it arrived at this conclusion must be different from that in the case file. For example, the only evidence submitted to us on this issue are the three medical reports from the experts. The first report says that a biopsy done to co-appellee's testicle was necessitated by tuberculosis and not as a result of the accident of November 23, 1980, as alleged by the appellee and sustained by this Court. This report concluded: "I am not qualified to establish the disability resulting from heme-castration, performed after the accident; neither [competent] to elaborate on the reasons for this operation." The second report, like the first, failed to share any light as to whether the operation done to the co-appellee's testicle was necessitated by the injuries sustained by co-appellee as a result of the accident. If the first and second reports failed to help prove co-appellee's case, the third and final report was clearly against the co-appellee, to say the least. This report, submitted at the request of the Ministry of Labour, is referred to by the Board of

General Appeals as a neutral medical report from the government's hospital, John F. Kennedy Memorial Hospital. It ended with the concluding paragraph: "Mr. Bah's impotence, whether partial or complete, is more likely to be psychological than organic. It can certainly not be attributed to the surgical manipulation; nor can it be attributed to the accident, since there was no injury to the testes following the accident."

In my opinion, the rulings of the hearing officer, John T. Tarpeh and that of the Board of General Appeals of the Ministry of Labor, in dismissing this unmeritorious claim of Mr. Bah, are supported by our laws and practice, and this Court should have affirmed them. I agree with the Board of General Appeals when it states: "In the interest of justice and fair play, we would like to reiterate here that this Ministry has always relied on the opinions of medical experts in cases of this nature for, as laymen, we have no means of determining whether or not a certain disease is job-related." In the absence of evidence, including the necessary percentage showing the degree of disability which the courts, including this one, use to ascertain the amount of awards we, not being medical doctors, cannot make awards motivated solely by sentiment and not supported by the law of the land or the records in the case.

Contrary to the conclusion reached by the Court that there is nothing in the records to show that the tuberculosis was an earlier case before the accident, the medical certificates or reports are clear and unequivocal, the first stating that the biopsy done to co-appellee's testicle revealed that his condition was caused by tuberculosis, the second failing to show that the operation to the testicle resulted from injury sustained as a result of the accident, and the third indicating that the impotence, if it existed at all, was neither due to the operation performed nor to the accident. The Court said that the medical reports intentionally avoided admitting that the operation on the testicle was necessitated by the treatment following the accident. In other words, the Court has cast doubts on the truthfulness and accuracy of the medical reports.

While co-appellee claimed that a testicle was removed during an operation performed on him, the three medical reports

conclusively denied this story. The Court said that it was convinced that the alleged removal of the testicle was not the direct result of the accident, but that it was the direct consequence of the injury co-appellee sustained as a result of the accident. In view of what I have already stated on this point, I believe that the conclusion of the Court is without foundation. However, even accepting, *arguendo*, that the majority's position that the alleged removal of the testicle was a consequence of the accident, my question is, how does this justify the $14,600.00, which the Labour Court awarded co-appellee and which was sustained by this Court?

In support of the award made in favour of Mr. Bah, the majority has quoted from 81 AM. JUR. 2d, *Torts*, § 229, one of the general rules of torts. This rule is that in order for an injury to be compensable the act of the defendant must be established to be the proximate cause of the injury. Stated in other words, the general rule is that compensation is and must be upheld in all cases where the injuries are the consequences flowing from the original injury or act of the defendant, although there may be an intervening cause or causes. After citing these general principles of the law governing the doctrine of proximate cause, the Court, as an afterthought, added that this doctrine is not applicable to cases of workmen's compensation. While I agree with the Court that want of negligence on the part of management is not generally a defense to be cited against his employee, yet in reaching its decision in the case at bar that co-appellee Bah is entitled to the award, the majority has overlooked the well known rule that, as a prerequisite to granting recovery in workmen's compensation cases, the employee or his beneficiaries must establish that the injury or death was job related or that such injury or death arose out and in the course of his employment. The Labor Practices Law, 18-A: 3500(b), provides "that an employee who suffers injury or disease as a consequence of his employment shall be entitled to compensation during his disability and to the extent of his disability as a right arising out of his employment."

In the instant case, the medical certificates, which formed the basis of recovery for the alleged injury, neither held management

liable for the alleged injury, i.e., impotency, nor assigned any percentage of loss representing the disability of the affected area or member or limb. In the absence of this vital information, compensation cannot be awarded by the courts. The Labor Practices Law, 18-A: 3655, provides that in the event the employee refuses to submit to an examination at the request of the employer, compensation need not be made. The reason behind this important requirement is that without this examination and a percentage disability or loss of whole man assigned by doctors, the courts are not competent to make any award.

In addition, the Labor Practices Law, 18-A: 3656(8)(f), provides that claims for compensation should be denied unless the contents of the medical and surgical reports introduced into evidence by claimants for compensation constitute *prima facie* evidence of facts as to the matter contained therein. From the records certified to this Court, Mr. Bah has not sustained this burden imposed upon him by the provision of the law just cited; yet, the majority of the Court has arbitrarily awarded him compensation, in utter disregard of the facts and law applicable. *See* the Labor Practices Law, 18-A: 3501, 3552 & 3553.

The arbitrary award of $14,600.00 by the trial court, in violation of the Labor Practices Law, 18-A:3552(2), and after co-appellee Bah had been awarded 10% disability, should have been overturned by this Court. Section 3553(1) of the Labor Practices Law provides that an employee who suffers permanent partial disability as a result of occupational injury, "compensation shall be paid on the basis of loss of earning capacity. . . ." (Emphasis added.) In other words, loss of earning capacity shall be treated as proportional to loss of physical capacity, and such loss is determined and recorded as either a percentage of the total bodily capacity, or as percentage loss to an affected member or limb as determined by the examining physician.

In the case at bar, the only percentage given to Mr. Bah is 10% for the accident for which an amount of $950.00 was awarded him. He was also paid $2,226.17 as redundancy for his ten consecutive years of service to the company. In this regard, the Board of General Appeals' position is in line with the law,

practice and opinions of this Court. The medical certificates offered into evidence in favour of co-appellee Bah did not only fail to confirm that co-appellee Bah was suffering from a job-related disease, or that he was impotent as he claimed, but they also failed to award him any percentage loss or loss of earning, without which the courts, including this Court, are powerless to award him any compensation. This has been the rule in this jurisdiction over the years, and until the Legislature decides otherwise, we have no choice but to apply the law as it is.

The Court, by this opinion, is attempting to legislate, a role the organic law of this land, the Constitution, has allocated and assigned to the law-making branch of government, the Legislature. In most instances, when courts are asked by party litigants to make laws, they will decline to do so. In the instant case, the Court did not beat around the bush; it says emphatically that it will legislate. This is how the Court put it: "Finally, we will determine how much of a male earning power is permanently affected by impotence and how does such a consideration justify the award by the lower court.." Can this Court do this independent of medical experts? I say no. The opinion continues: "Labor matters are equitable matters. To return this matter to medics at this juncture in order to determine the degree of disability in co-appellee will be too much after all these years of litigation; so that as long as we have established a basis for liability for additional compensation, it is only equitable that we determine the level of such compensation from the record and circumstances of this case." (Emphasis added.) The Court is saying that in all cases such as this, the only thing that an employee needs to be established is that he was injured and it will then, without the aid of medical experts, determine the award to be made. This Court cannot do so under the pretext that the litigation has or will drag on for a long time, even if the Court had independently determined that co-appellee Bah had sustained an injury.

The Court says that because co-appellee Bah maintained that he is impotent, that allegation alone is sufficient and has placed him within a higher category of compensation than the injury he suffered as a result of the accident, for which he was given a

10% disability. Is the Court competent to do this? Again, I say no. Even if we assume that one of Co-appellee Bah's testicles was removed and that as a result of its removal he became impotent, in my opinion, this Court would still be incompetent to award compensation on those grounds alone, independent of a medical report.

This Court of *dernier resort* should only decide cases on legal grounds and not on sentimental grounds. The Court said that after the removal of co-appellee's testicle, he became impotent and sterile: he will no longer have the essential fun and sexual relations and will be incapable of producing. The Court goes on, ". . . we now class him under total permanent disability, not merely to work but also to have sex and to produce his kind, both of which are frustrating circumstances for any young man." This broad statement of the Court confirms my contention and fear that the award has no basis in law but, rather, that it is motivated by sentiments.

In awarding co-appellee $14,600.00, the Court said that it relied on the Labor Practices Laws, Schedule "A" - *Permanent Partial Disability*, Sub-section 8, with reference to "any other injury resulting in total permanent disability", where 1460 is multiplied by the daily rate to arrive at a LUMP SUM PAYMENT. For me, the question that is begging for an answer is by what means did the Court decide that co-appellee had suffered a permanent partial disability? While it is true that the Labor Practices Law, Schedule A(8), provides that where the injury does result in the loss of (1) two limbs; (2) loss of both hands or all fingers and both thumbs; (3) both feet; (4) sight in both eyes; (5) total paralysis; or (6) injuries resulting in being permanently bedridden; and (7) injuries resulting in loss of mental-competence, 1460 should be used in ascertaining the amount of the award. It is my opinion that even in such a case, it is only the medical experts who are clothed with the authority or who possess the expertise to decide whether or not the employee has in fact suffered a total or partial disability.

The Court has reached the conclusion that co-appellee Bah is entitled to recover simply by defining such terms as "total incapacity or disability" and “daily rate". The Court recognized

its incompetence in awarding co-appellee Bah compensation independent of the medical doctors, but it decided to deviate from the law and practice by awarding the said co-appellee $14,600.00 from the clear blue sky, on the sole ground that "To return this matter to medics at this juncture will be too much after all these years of litigation". This is not a sufficient consideration to justify this award, or any award for that matter. Decisions of this kind, coming from the Supreme Court of the nation, the tribunal of *dernier resort* and tabernacle of ultimate justice, does no one any good.

As can be clearly seen, the Legislature has placed *subsection 8 of schedule "A"* (any other injury resulting in total permanent disability) in the same category as those of *sub-section 1-7* listed above. Does impotency have the same effect in terms of loss of earnings, as those injuries listed in 1-7? I think not.

The Court has awarded co-appellee Bah $14,600.00 which it says represents payment for 48 months. The Court did exactly the same thing with which it has charged the trial judge. For example, the Court held that: 'Therefore, <u>the trial judge was correct</u> when he made an award of $14,600.00 to co-appellee <u>Bah even though he had neglected to give convincing reason for the award</u>, or to say under which schedule appellee was allocated in his award." (Emphasis supplied.)

The trial judge held that co-appellee Bah suffered occupational injuries as a result of the loss of one of his testicles, thereby becoming completely impotent and for which he was entitled to the award of $14,600.00. The Court, while rejecting the judge's reasons for the award because it could not be supported by the evidence and the law, a fact with which I am in complete agreement, made the same error by giving or confirming an award which it could not, and failed to, justify. Assuming, firstly, that co-appellee Bah did lose a testicle as a result of the accident or a subsequent operation, did that render him impotent? Assuming, secondly, that co-appellee Bah became impotent because he lost a testicle, is it, given the facts of this case, the result of an occupational injury? Finally, is $14,600.00 the proper measurement of the loss of a testicle or complete impotency? Both Judge Williams and this Court avoided these

questions because they are not competent to answer them without the aid of a medical expert. The hearing officer and the Board of General Appeals were in agreement on these points. This decision of the Court, based upon guessing at what entitlement an employee should receive when the physicians have not made one, will surely open another Pandora Box, call it a floodgate if you will, for fraudulent claims.

Apparently, the majority of the Court fear that the case will drag on for a long time, if it should be remanded. But, if anybody will be responsible for such dilatoriness, it would be, to a larger degree, the legal counsel of Mr. Bah. In my opinion, if Mr. Bah's lawyers had been vigilant with their client's interests, this case would not have reached up here from the Ministry of Labor with what appears to be conflicting medical reports, which are void of any percentage of disability or loss of earning power for the purpose of compensation.

In the case *Tozoe* v. *Republic,* 22 LLR 113 (1973), at page 116, this Court held: "It is the duty of litigants for their own interest, to so surround their causes with the safeguards of the law as to secure them against any serious miscarriage and thereby pave the way to the securing of the great benefits which they seek to obtain under the law. Litigants must not expect courts to do for them that which it is their duty to do for themselves." See also; *Gaiguae v. Jallah et. al.,* 20 LLR 163 (1971) and *Wesley v. Tyler et al*, 20 LLR 477 (1971).

These are the reasons why I have not found it possible to affix my signature to the order of the Court affirming the judgment of the court below.

It is therefore my opinion that the motion for re-argument be granted and the judgment of the lower court reversed with costs disallowed. Consequently, I am withholding my signature from the judgment of this Court.