

SUPREME COURT OF NIGERIA
10TH DECEMBER, 1993, SC. 267/1991.
CORAM: S. M. A. BELGORE, O. OLATAWURA,
E. O. OGWUEGBU, S. U. ONU, A. I. IGUH, JJSC.

FRANCIS OSAWE ESEIGBE APPELLANT
(Substituted For Chief)
Madam Dora Esigbe)

AND

1. FRIDAY AGHOLOR
2. KENTUS TECHNICAL & SUPPLY) RESPONDENTS
COMPANY LIMITED)

DAMAGES - Claim for general damages - Without any itemised claim for special damages - Where there is evidence of injury, pain & discomfort - Whether plaintiff is entitled to reasonable general damages - How such award of damages is legally determined

PLEADINGS - Plaintiffs plea of negligence - Supported by evidence - No specific traverse and evidence by defendant - Whether the pleading will be held against the defendant

TORTS - Vicarious liability - Whether a Company owner of vehicle is vicariously liable - For the negligent driving of its employee

FACTS

The Plaintiff/Appellant, a prominent woman and a Chief at Ekpoma was being carried in a car along a straight road, the weather being very clear when suddenly a tipper lorry hit the said car from the rear. The car tumbled and caught fire. Upon her rescue, she had sustained second degree burn on her right hand and several lesser burns on her body. She could no longer pick anything or write with the said hand and she spent N30,000.00 on medical treatment alone. By the time the Plaintiff was discharged keloid had developed. The

doctor that gave evidence was of the opinion that the keloid could be cured only by plastic surgery.

Plaintiffs claim against the 1st Respondent, an employed driver and the 2nd Respondent Company owner of the lorry tipper for N250,000.00 general damages was dismissed by the trial High Court. This dismissal was in spite of the fact that apart from the general traverse, the defendant/Respondents did not specifically deny plaintiffs material averments nor did they give evidence in rebuttal of the claim. Plaintiffs appeal to the Court of Appeal succeeded in part as that Court found only the 1st Respondent liable and awarded a very inadequate sum of 1410,000.00 as general damages. On further appeal to the Supreme Court, Appellant sought to know whether 2nd Respondent should not have been found vicariously liable for the negligent driving of 1st Respondent and whether the awarded 1410,000.00 general damages was adequate compensation.

HELD (Unanimously allowing the appeal)

1. Where the Plaintiffs plea of negligence is not specifically traversed and that plaintiff goes on to prove the averment by evidence in court and the defendant offers no evidence whatsoever, that pleading remains uncontradicted and must be held against the defendant (P76 L27)
2. The Court of Appeal was wrong to have ignored that the facts on record remain uncontradicted and to have found only the First Respondent responsible in negligence. The second Respondent as owners of the truck were vicariously liable for the First Respondent's negligence who was presumed to have acted in course of his employment. (P77 L36)
3. Although the Appellant never itemised any special damage but claimed only general damages, once there is evidence of injury, pain, discomfort and permanent scarring and pain without those items being quantified in money, the Plaintiff is entitled to reasonable general damages. (P78 L 3)
4. Justice of the award of damages in a case of this nature must be based on certain relevant circumstances such as similar awards made by courts, what is reasonable in the circumstance of the particular case considering the pain, status of the injured person and whether the injury is merely transient or permanent. (P78 LI7)
5. The award of N10,000.00 damages was on the very low side in view of Appellant's unchallenged evidence. As there is no cross appeal by the Respondents, the sum of N50,000.00 is more appropriate.

(P78 L29)

REPRESENTATIVE:

H. I. R. Odiase for the Appellant.

S.B. Ajayi with U. Akalugo for the Respondents.

CASES REFERRED TO

1. Sanusi v. The State (1985)1 NWLR (PT. 3) 523
2. Umar v. Bayero University (1988) 4 NWLR (Pt. 86) 85, 86, 87).
3. Obere v. Board of Management, Eku Baptist Hospital (1978) 6-7 SC. 15, 24:
4. Agaba v. Otubusin (1961)1 ALL NLR 299
5. Amu v. Atame & Anor. (1974) N.S.C.C. 446.
6. Osawaru v. Ezeiruke (1978) 6-7 S.C. 135.
7. Nigerian Meritime Services Ltd. v. Afolabi (1978) N.S.C.C. 80.
8. Manuel v. Edevu (1968) N.S.C.C. 300
9. Balogun v. Labiran (1988)1 N.S.C.C. 1056
10. Okafor & Anor. v. Okitiakpe (1975) N.S.C.C. 70.
11. Dumez (Nig.) Ltd Ogboli (1972) ALL N.L.R. 244/253.
12. Oshunjinrin & 5 Ors. v. Elias & Ors. (1970) N.S.C.C 95,
13. Kuti & Anor. v. Jibowu & Anor. (1972) 6 S.C. 147 at 167.
14. Kuti v. Balogun (1978) 1. S.C. 53 at 58.
15. Hewitt v. Bonvin (1940) 1 KB, 188 at 194.
16. Ormal v. Crosville Motor Services Ltd. (1953) 2 ALL EX. 753
17. Bernard v. Sully 47 T.L.R. 558
18. Ogunmuyiwa v. Solanke (1956) 1 FSC 53.
19. Ziks Press Ltd. v. Alvan Ikoku (1951) 13 W.A.C.A. 153.
20. H.H. Uyo v. Felix Egware (1974) ALL N.L.R. 264 (1990 ed.)
21. Watson v. Powles (1968) 1 Q.B. 596 at 603.
22. Akintola & Anor. v. Solano (1986) 2 NWLR (Part 2) 598.
23. Alao V. Inaolali Builders Ltd. (1990) 7 NWLR (Pt 160) 36.
24. Strabag Const (Nigeria) Ltd. v. Ogarekpe (1991) 1 NLWR (Part 170) 733.
25. F.C.D.A. v. Naibi (1990) 3 NWLR (Pt. 138) 270 at 281.
26. Ojikutu v. Felix (1954) 14 WACA 659.
27. Uwa Printers (Nig.) Ltd. v. Investment Trust Co. Ltd. (1988) 5 NWLR (Pt. 92) 110.
28. Yesufu Maduga v. Hamza Mohammed BOI (1987)3 N.W.L.R. (Pt. 62) 535 at 641.

29. Hibbs v. Ross (1866) L.R. 1 Q.B. 543.

30. Rambarran v. Gumicharan (1970) 1 W.L.R. 556

31. Morgans v. Launchbury (1973) A.C. 127 at 139

32. Flint v. Level (1935)1 K.B. 354 at 360.

33. Owen v. Sykes (156) 1K.B. 192

34. Idahosa v. Oronsaye (1959) 4 F.S.C. 166 at 173 5

35. Bala v. Bankole (1986) 3 N.W.L.R. (Pt. 27) 141.

36. Onaga & Ors. vs. Micho & Co. (1961) 1 ALL N.L.R. 358 at 342.

37. Ijebu Ode Local Government v. Balogun and Co. Ltd. (1991)1 N.W.L.R (Pt. 166)136.

38. Amos Adenaike v. Osobu & Anor. (1980) Ogun S.L.R. 8 at 25

39. Dr. 6.O. Kalu v. Dr. S. Wibuker (1988) 3 N.W.L.R. (Pt 807) 86 at 105

LEAD JUDGMENT BY BELGORE JSC

The appellant was the plaintiff at trial court in this action based on negligence causing injuries to the appellant. Appellant, a prominent woman and a Chief at Ekpoma was in a car registration number BD 2913 K driven by the local traditional Chief, the Onogie of Egoro. That was on 3rd day of February, 1986, and they were on Ebelle-Agbor road. The vehicle belonged to the Onogie. Thomas Osobaghase Ogbebor. It was a straight road and the weather was very clear. Suddenly a vehicle with registration number BD 9846A hit the vehicle in which the appellant was from the rear, whereby it tumbled and caught fire. The Onogie and the appellant were rescued by passersby but the appellant had in the process sustained second degree burn on her right hand, and several lesser burns on her body. She was on admission at lruokpen General Hospital receiving treatment for about ten days; thereafter she was an out-patient in several other hospitals in Benin, lruokpen and Lagos and spent Thirty Thousand Naira on treatment. She could not use the right hand again. At the time she was taken to the hospital immediately after the accident, she was, according to medical evidence, in a state of shock and confusion. The burns extended from the forearm to the tip of her fingers and by the time she was discharged. Keloids had developed. The hand could not thereafter be used to pick anything or to write. The doctor that gave this evidence also was of the opinion that the Keloids could be cured only by plastic surgery. He was not cross-examined by the defence on this all important evidence that was clearly pleaded. The appellant also testified that on medical treatment alone she spent Thirty Thousand Naira.

The plaintiff amended her Statement of Claim after given her own

evidence but before closing her case. Her further witnesses gave evidence e.g. a police constable who tendered Exhibit B the sketch of the scene of the accident signed by first respondent and the Onogie. The Statement of Defence was not amended even after the Statement of Claim was amended. The Statement of claim specifically avers in its paragraph 1 and 2 that (1) the plaintiff was a prominent woman and a chief at Ekpoma and that she was a prominent business woman as well as a farmer; and (2) that the first defendant was a professional driver and was at the material time in the employment of the second defendant, limited liability company, as a driver of the vehicle registration No. BD 9846 A, a tipper lorry. The defendant in the statement of defence admitted the lorry belonged to the company but never specifically denied the clear and unambiguous pleading. All the statement of defence did was a general traverse by saying "The 2nd defendant admits ownership of the vehicle but denies other averments in paragraphs 2 and 3 of the Statement of Claim" and also "the defendants deny paragraphs 1, 4, 5, 6, 7, 8, 10 and 11 of the Statement of Claim and puts her to the strictest proof thereof". The plaintiff testified to prove her averments but the defendants never testified. What remained as evidence before the Court was the evidence proffered by the plaintiff based on her pleadings. In a curious judgment, trial judge held as follows:

"Paragraph 6 of the amended statement of claim reads as follows:
 "The plaintiff further avers that as a result of 1st defendant's negligent act of hitting the vehicle from behind, vehicle registration No. BD 2913 K was caused to tumble and overturn, bursting into flames in the process." There is no other paragraph of the amended statement of claim in which the negligence of the 1st defendant or any of the defendants was pleaded, and no particulars of the negligence in paragraph 6 of the amended statement was pleaded. Besides, paragraph 6 of the amended statement of claim as formulated does not disclose a cause of action in tort because the mere act of hitting the vehicle from behind per se does not amount to negligence on the part of the person so hitting the vehicle from behind. The hitting of the vehicle from behind could result from the negligence of the driver of the vehicle hit from behind."

For the foregoing reasons trial judge dismissed the claim. There was an appeal to Court of Appeal, Benin Branch, where Uche Omo, J.C.A (as he then was) held as follows in respect to the aforementioned quoted passage in trial court's judgment:

"There is clearly no evidence to support this speculation {in the trial Judge's finding}. What is apposite here is the case of Abdullahi v. The State (1985) 1 NWLR (Pt.3) 523 Where it was held in a running down case resulting from a motor accident that:

"To leave one's lane for another when another vehicle is approaching from the opposite direction and thereby causing one's vehicle to hit that other in the process is a dangerous piece of driving.'
 'Such an act was also found to be sufficient evidence of negligence."

Learned appellate judge (as he then was) went on to find

"There is however in addition before the trial Judge evidence from the appellant which was substantiated (not being challenged), and which is strongly suggestive of negligence on the part of the respondents. In addition to the hitting of the Peugeot car from the rear by the tipper lorry, there are the following pieces of evidence (1) that the car was travelling slowly and carefully on a straight road, on a dry clear day on its right hand side of the road (2) that it was travelling in the same direction with the tipper lorry (3) that as a result of this hit at the back by the lorry the car somersaulted and caught fire (4) that the tipper lorry, which belonged to the 2nd respondent was driven by the respondent, on that day and at the time of the accident. What is more, although not specifically pleaded, the learned trial Judge should have considered if the appellant in the circumstances was not entitled to rely on the doctrine of *res ipsa loquitur*".

Court of Appeal went ahead to consider "cause of action" and other matters raised in the appeal before them. The appeal was then allowed in part and an award of N10,000.00 general damage was made. The reason for this was that though heads of injuries were mentioned there was no evidence of plaintiff's earnings nor was there itemised costs of the injuries and sufferings and pains. It was also held that vicarious liability of 2nd respondent had not been established. Thus the appeal to this court; but it must be mentioned that the appellant died before her appeal was heard by the Court of Appeal and she was substituted by Francis Osawe Eseigbe on 10th September, 1990.

The appellant formulated the following issues for determination;
 "ISSUES FOR DETERMINATION

1. Whether the Court of Appeal was right in holding that the plaintiff/appellant did not prove that the 2nd respondent was vicariously liable for the negligent driving of the 1st respondent.

2. Whether the Court of Appeal correctly considered the heads of

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damage in the case of personal injuries which the court found were grave and serious as set out in the judgment?

3. Whether the award of N10,000.00 general damages was adequate compensation for the injuries suffered by the plaintiff/appellant in accordance with established principles."

5 The pleadings and evidence before trial court have been referred to earlier, none the less it is pertinent to refer to what was pleaded by the appellant. In paragraph 2 of her statement of claim she averred as follows:

"The first defendant is a professional driver and was at all material times the servant of and driver of the 2nd defendant's vehicle Registration No. BD 9846 A, a Mercedes Benz tipper lorry

10and in paragraph 3 thereof it is averred that

"The second defendant is a limited liability company registered in Nigeria and were (sic) at all material times master of 1st defendant and owner of vehicle Reg. No. BD 9846 A driven by the 1st defendant.....

15 The defendants defence in this pleadings is a general pleading, generally denying averments in paragraphs 2 and 3 of Statement of Claim; also in paragraph 4 of Statement of Defence it was averred:

"The defendants deny paragraph 1,4,5,6,7,8,9,10 and 11 of the Statement of Claim and puts her to the strictest proof thereof."

20 Rather than specifically traverse the averments in the statement of claim, the defendants averred in their paragraph 5 that the accident was solely caused or contributed to by the plaintiffs and gave extensive particulars of negligence on the part of the driver of the car in which plaintiff was.

25 In civil matters the fate of every case depends on the pleadings and the evidence in support. A matter that is pleaded but not traversed remains a fact against the other side. Thus, where the plaintiff pleads negligence and it is not specifically traversed and that plaintiff goes on to prove the averment by evidence in court and the defendant offers no evidence whatsoever, that pleading remains uncontradicted and thus must be held against the defendant. The averment in the appellant's statement of claim pointed to the 1st respondent as the driver of the lorry that crashed into the moving car in which the appellant was riding on the highway. He was averred as an employee of the second defendant and second defendant as the owner of the lorry. There are two strong presumptions which could only be rebutted by the evidence of the defendant.

1. When two vehicles are going in the same direction on the highway, one after the other, and the one at the rear hits the one in front of it, the presumption is that the driver of the rear vehicle drove negligently. This presumption is based on the reasonable supposition that a driver observes all the time the road leading to his destination and only occasionally looks at the rear-view mirror to know the traffic situation at his rear. 5

2. When an employee of another drives the vehicle of his employer on the highway he is presumed to be driving that vehicle in course of his employment and the employer will be vicariously liable for the negligent driving leading to injury to a person this is more so when the facts of the case indicate the employee was driving the employer's vehicle at the time of the accident. 10

In the instant case the Court of Appeal had to disturb, albeit partly, the findings of fact by the trial court. I believe the Court of Appeal, on the facts on the record, ought to have gone further. What was before the trial courts were the uncontradicted evidence of the accident as given by the plaintiff both in the pleadings and in the testimonies of witnesses. 15 It is not always right for the appellate court to disturb the findings of fact by trial court but this is a rule with exceptions. If the findings of the trial court, on the plain facts before it is unsound either because the findings have no bearing on the facts or the facts as admitted in evidence at the trial are inadmissible under the law [Balogun v. Labiran (1988) 3 NWLR (pt.80) 66 at 68; Ebba v. Ogodo & Anor (1984) 1 SCNLR 392; (1984) 20 4 S.C. 84,98]. When the evidence is incompetent, or legally inadmissible the appellate court shall set aside any decision based on that evidence by the trial court. [Umar v. Bayero University (1988) 4 NWLR (pt.86) 85 at 86, 87].

Learned trial Judge dismissed the case in toto in the face of overwhelming evidence based on the pleadings before him. The defendants, now respondents, never gave evidence and the averments in their statement of defence never conclusively traversed the facts pleaded in the statement of claim. The averment that first defendant was a servant of the second defendant was pleaded and given in evidence; similarly the averment that he drove the vehicle belonging to second defendant. All these stand uncontroverted and the presumption that first defendant was negligent in driving the tipper lorry into the car in which the appellant was travelling remains unrebutted. As such it was wrong of the Court of Appeal to have ignored or overlooked that the facts on record remain uncontradicted, and to have found only the 30

first respondent responsible in negligence. The second respondents as owners of the truck were vicariously liable for the negligence of the first respondent who was presumed to have acted in course of his employment.

As for damages, it is true the appellant never itemised any special damage but claimed only general damages. Once there is evidence of injury, pain, discomfort and permanent scarring and pain, even though those items are not quantified in money, the plaintiff is entitled to reasonable general damages. She claimed N250,000.00 as "damages for injuries received, pains and suffering and loss of earning power". Her evidence on this pleading was clear. She could not write with her right hand which was her natural habit, she could not lift anything with the same right hand. But the worst was that keloids developed in the hand necessitating her constant visit to the hospital. The medical evidence was very clear and the doctor was not even cross-examined. She (appellant) had, by the time she gave evidence spent N30,000.00 on medical treatment as a result of the injuries, a fact not contradicted.

In a case of this nature, justice of the award of damages must be based on certain circumstances. Relevant are similar awards made by courts, what is reasonable in the circumstance of the particular case considering the pain, status of the injured person, the office or call, whether the injury is merely transient or permanent, the pain - will it be permanent so that the injured will live with it for life? It is not possible to standardise the award of general damages in cases of this nature but one must adhere to what is reasonable. [Ijisun v. M. Ajao & Ors. (1975) 1 NMLR 5, 7; Shuaibu v. Maiduguri (1967) NMLR 204 at 207; Obere v. Board of Management, Eku Baptist Hospital (1978) 6-7 S.C. 15, 24; Agaba v. Otobusin (1961) 2 SCNLR 13; (1961) 1 All NLR 299]. The plaintiff was the only female Chief in her town, she lost the use of her right hand, she had to live with the pain to her hand for the rest of her life as she died just before her appeal was heard by the Court of Appeal. I believe the award of N10,000.00 was on the very low side in view of her unchallenged evidence. There is no cross-appeal by the respondents and I find that the sum of N50,000.00 is more appropriate.

For the foregoing reasons, I allow this appeal. I find the second respondent vicariously liable for the negligence of the first respondent. I set aside the award of N10,000.00 general damages against the first appellant alone. I award N50,000.00 as damages to the appellant jointly and

severally against the respondents. I award N300.00 as cost in the Court of Appeal, N200.00 as costs in the High Court and N1,000.00 as costs in this court all jointly and severally against the respondents.

OLATAWURA JSC

The issues seriously contested before us are the vicarious liability of the 2nd defendant and damages awarded by the Court of Appeal. The facts have neatly been set out in the lead judgment of my learned brother Belgore, J.S.C. I agree with his reasoning and conclusions. It will be repetitive to set the facts down fully but may be referred to briefly when considering these two issues. These two issues are formulated by the appellant thus:

"1. Whether the Court of Appeal was right in holding that the plaintiff/appellant did not prove that the 2nd respondent was vicariously liable for the negligent driving of the 1st respondent.

2. X X X X X X

3. Whether the award of N10,000.00 general damages was adequate compensation for the injuries suffered by the plaintiff/appellant in accordance with established principles."

The respondents raised these two relevant issues as follows:

"1. Whether vicarious liability is a question of fact on which evidence must be led or one which could be presumed.

2. X X X X X

3. Whether awards of general damages can be interfered with by an appellate court on the mere allegation that same is either too excessive or too paltry without showing that wrong principles have been applied in this computation."

The appellant's contention in the appellant's brief is that once there is an averment in the pleading that the 1st defendant was, at that material time, the servant of the 2nd defendant, there is no further need to aver that the 1st defendant was in the course of his duty when the accident occurred. He relied not only on the presumption of law in on the burden of proof and the shift of the burden of proof. Learned counsel cited sections 136 and 141 of the Evidence Act.

The respondent's reply is to the effect that sections 136 and 141 of the Evidence Act are inapplicable and that bare pleading that the 2nd defendant was the owner of the vehicle and also master of the 1st defendant was not enough, furthermore the relationship of master and servant between the first and second defendant had been denied as shown in paragraph 2 of the statement of defence. It will not, not be

necessary to go into the details whether the pleading by the appellant has sufficiently shown that the first defendant was at the material time the servant of the second defendant in view of the concession made by Mr. Ajayi, the learned counsel for the respondents during his oral submission that the first defendant was employed by the second defendant. Having 5 conceded that much, the presumption of law that he was in the course of duty should be rebutted by evidence. The onus is on the respondents to adduce evidence that at the time of the accident the first defendant was on a frolic of his own. See S. 137(2) of the Evidence Act (Cap. 112) Laws of the Federation of Nigeria 1990. Having failed to offer any evidence in rebuttal, the respondents have failed to discharge the onus of proof: *Amu v. Atame & Anor* (1974) N.S.C.C. 446; *Osawaru v. Ezeiruka* (1978) 6-7 10 S.C. 135. A party in a civil case, where the proof is on the preponderance of evidence, cannot safely decline to offer evidence where on the evidence led a rebuttal of such evidence is required. The onus of proof is not static, it shifts depending on the nature of the case and the evidence offered by either party. However the onus of adducing further evidence is always on 15 the party who would fail if such evidence were not produced: *Nigerian Maritime Services Ltd. v. Afolabi* (1978) NSCC 80.

It is worth of note that the respondents did not offer evidence in the case.

It is not for the appellant to lead evidence that the first defendant was not driving with the authority of the respondents, that onus rests 20 squarely on the shoulders of the respondents. It appears to me that the Court of Appeal misdirected itself in law that the mere fact that there was no evidence that the first respondent was driving the vehicle on that day in the course of his employment when the second respondent admitted that the first respondent was his employee. As pointed out earlier in this judgment, the concession made by the learned counsel 25 for the respondent that the first respondent was employed by the second respondent has rendered unnecessary further evidence by the appellant. The onus to rebut the presumption that he was driving while in the course of his duty was on the second respondent and has not been discharged. I will therefore hold that the second respondent was vicariously liable in the tort of negligence committed by the first respondent: *Manuel v. Edevu* 30 (1968) NSCC 300.

I now come to the issue of damages. The principle is that normally an appellate court will not normally interfere with the award of damages by the trial court on the ground that it would have awarded a lesser amount if it had tried the Case: *Balogun v. Labiran* (1988) 3 NWLR (Pt.80) 66;

(1988) 1 NSCC 1056. To succeed in reversing the award of damages, the appellant must show that what was awarded was an erroneous estimate of the damages claimed and proved, that it was manifestly too high or too low: *Okafar & Anor v. Okitiakpe* (1973) NSCC 70; *Dumez (Nig) Ltd. v. Ogboli* (1972) All NLR 244/253. I will at this stage remind myself of the claim for damages. In the amended statement of claim the plaintiff "claims 5 the sum of N250,000.00 (Two hundred and fifty thousand Naira) being damages for injuries received, pains and suffering and lass .of earning power". There is a clear difference between special and, general damages. In the former, to succeed on the items of special damages, these items must be proved strictly. *Oshinjirin and 5 ors. v. Elias and Ors.* (1970) 1 All NLR 153; (1970) NSCC 95. General damages are in the main the assessment 10 by the trial Judge where the plaintiff succeeds in proving that he is entitled to them. In this regard the trial Judge must base his assessment, on the evidence led in establishing the claim. With this background, I will now consider the issue of general damages which the appellant claimed to be "most inadequate and cannot compensate for the physical injuries...." It 15 was the contention of the respondents that the award made by the Court of Appeal was generous. It is now necessary to examine the basis .of the award by the lower court. This is stated as follows:

"(a) that as a result of the accident the saloon car BD2913K tumbled and was set on fire;

(b) that the appellant was dragged out of the car, and rushed to the hospital in a state of shock, in pains and with second degree burns on 20 her right hand;

(c) that she was hospitalised and treated for 10 days and had been on out-patient treatment since then;

(d) that massive keloids developed after healing, which was being treated;

(e) that the keloids could respond to plastic surgery; 25

(f) that as a result of these injuries;

(i) the appellant's right hand was scarred from mid-arm to fingertips;

(ii) she spent over N30,000 for treatment in various hospital;

(iii) that she can neither write nor lift anything with her injured right arm.

(g) that she is the only woman Chief in Ekpoma.

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All these pieces of evidence were established by the appellant. Taken together there can be no doubt that they (sic) more than justify an award of damages in favour of the appellant. What I will now proceed to consider is the quantum of such damages."

Since the respondents have not appealed against the finding of negligence, the award of damages, and since the basis for the award has not been attacked by way of cross-appeal, it is now too late to question these findings.

5 The evidence of the appellant and that of 2nd defendant/witness Dr. Udeagbe who treated the appellant when she was rushed to the hospital provide adequate basis for an upward review of the award of damages. The evidence of the doctor is to this effect and remains uncontradicted:

10 "When she was brought to the hospital she had severe burns on her right hand, she was in a state of shock, she was in pains and in a confused state;

Since about three months ago I have not been treating the plaintiff for her burns but I am still treating her for massive keloids which she later developed. From the state of the right hand of the plaintiff now it has lost some functions in that she cannot pick things or write
15 with the hand."

There was no attempt, even if feeble, made to suggest that these facts did not occur. Since the appellant has not claimed different amount for specific claim which could have been tagged special damages, and in respect of which a strict proof is required, I think the lower court's award of N10,000.00 has been too low. I will, in view
20 of the evidence which stands uncontradicted set aside the sum of N10,000.00 and in its place award N50,000.00 as general damages.

In the circumstances, the appeal succeeds. There will be judgment in favour of the appellant against the respondents jointly and severally for the sum of N50,000.00 as damages suffered as a result of the negligent driving of the 1st respondent while in the course
25 of his duty. I abide by the order for costs in the lead judgment of my learned brother Belgore, J.S.C.

OGWUEGBU JSC

30 The learned appellant's counsel formulated three issues for determination in his brief of argument, namely:

"1. Whether the Court of Appeal was right in holding that the plaintiff/appellant did not prove that the 2nd respondent was vicariously liable for the negligent driving of the 1st respondent.

2. Whether the Court of Appeal correctly considered the heads of damages in the case of personal injuries which the court found were grave and serious as set out in the judgment?

3. Whether the award of N10,000.00 general damages were adequate compensation for the injuries suffered by the plaintiff/appellant in accordance with established principles." 5

Issues one and three were however argued by the learned counsel for the appellant during oral submission before us.

In considering the first issue for determination recourse has to be made to the pleadings and the evidence. Paragraphs 2 and 3 of the amended statement of claim and paragraph 2 of the statement of defence are relevant. They read: 10

Amended Statement of Claim:

"2. The 1st defendant is a professional driver and was at all material times the servant of and driver of the 2nd defendant's vehicle Registration No. BD 9846 A, a Mercedes Benz 911 tipper lorry. His known residence at the time of accident was 12, Sakpoba Road, Agbor.

3. The 2nd defendant is a limited liability company registered in Nigeria and were (sic) at all material times master of the 1st defendant and owner of vehicle Registration No. BD9846 A driven by the 1st defendant. Their known office of operation was at 118B, Imejei Road, Ibusa." 15

Statement of Defence:

"2. The defendant admits ownership of the vehicle No. BD 9846 A but denies all other averments in paragraphs 2 and 3 of the statement of claim." 20

At the close of the plaintiff/appellant's case in the trial court, Mr. Ajayi, learned counsel for the defendants/respondents informed the court that he was relying on the case of the plaintiffs. Thereafter, the learned trial judge took the address of both counsel and later delivered judgment.

I must however mention that throughout the proceedings from the High Court to this court, the 1st defendant/respondent did not put up 25 personal appearance. Both defendant however filed a joint statement of defence and have been represented by one counsel from the High Court to this court.

Coming to the first issue, the appellant averred in his amended statement of claim that the second respondent was at all material times the master of the 1st respondent and the owner of vehicle No. BD 9846 A driven by 30 the 1st respondent.

The learned counsel for the respondents in his oral submission conceded that the 1st respondent was the servant of the 2nd respondent but contended that there was no evidence that the former was driving with

the authority of the 2nd respondent or in the course of his employment.

In law, ownership of a vehicle cannot of itself impose any liability on the owner. The owner without further information, as in this case, is, however, prima facie liable because the court is entitled to draw the inference that the vehicle was being driven by the owner, his servant or agent. See Kuti & Anor. v. Jibowu & Anor. (1972) 6 S.C.147 at 167; Kuti v. Balogun (1978) 1 S.C.53 at 58; Hewitt v. Bonvin (1940) 1 K.B. 188 at 194 and Ormrod v. Crossville Motor Services Ltd. (1953) 2 All E.R.753.

In the instant case, all the facts were not given in evidence and not ascertained. When a plaintiff proves that a vehicle was negligently driven and the defendant was its owner and the court is left without further information. It is legitimate to draw the inference that the negligent driver was either the owner himself or some servant or agent of his. In Barnard v. Sully 47 T.L.R. 558. Scrutton L.J. observed:

"..... apart from authority, the more usual fact was that a motor was driven by the owner or the servant or agent of the owner and therefore, the fact of ownership was some evidence to go to the jury that at the material time the molar car was being driven by the owner of it or by his servant or agent and that it was evidence liable to be rebutted by proof of actual facts."

In the present case, the relationship of master and servant as well as the ownership of the vehicle having been admitted, there seems an irresistible presumption that the vehicle was in fact being driven by the 1st respondent in the course of his employment with the 2nd respondent. Ogunmuyiwa v. Solanke (1956) SCNLR 143; (1956) 1 FSC 53.

The respondents did nothing to rebut the presumption. Their failure to go into the witness box may well be appreciated.

I have therefore come to the conclusion that the 2nd respondent is vicariously liable for the negligent act of his servant - the 1st respondent and both of them are jointly and severally liable.

As to the damages awarded by the court below i.e. N10,000.00 general damages against the 1st respondent, learned counsel for the appellant submitted that it is grossly inadequate and cannot compensate for the physical injuries received by the appellant; that the court below failed to apply the correct principles in assessing general damages. We were urged to award enhanced general damages against both respondents.

Learned counsel for the respondents submitted that the appellant did not supply the necessary particulars to assist the court in awarding a higher sum. Therefore, the appellant will not be entitled to an award of more than N10,000.00 which the court below awarded.

This court is invited to interfere with the quantum of damages awarded

by the court below. Appellate courts are very reluctant to exercise this power. They will not do so unless it can be established that the court below proceeded upon a wrong principle of law or that its award was clearly an erroneous estimate since the amount is manifestly too large or too small. See Ziks Press Ltd v. Alvan Ikoku (1951) 13 WACA 188; H.H. Uyo v. Felix Egbare (1974) All NLR 264 (1990 ed.).

In paragraph II of her amended statement of claim, the appellant claimed as follows:-

"Wherefore the plaintiff claims the sum of N250,000.00 (Two hundred and fifty thousand Naira) being damages for injuries received, pains and suffering and loss of earning power."

The court below found as follows at page 118 lines 14- 36 and page 119 lines 1 - 8:-

"On the other hand, there appear to be piece of evidence on the basis of which damages can be held payable and the quantum thereof measured. These are:

- (a) that as a result of the accident the saloon car BD 2913K tumbled and was set on fire;
- (b) that the appellant was dragged out of the car, and rushed to the hospital in a state of shock. In pains and with second degree burns on her right hand;
- (c) that she was hospitalised and treated for 10 days and had been on out-patient treatment since then;
- (d) that massive keloids developed after healing, which was being treated;
- (e) that the keloids could respond to plastic surgery;
- (f) that as a result of these injuries
- (i) the appellant's right hand was scarred from mid-arm to finger tips.
- (ii) she spent over N30,000.00 for treatment in various hospitals; .
- (iii) that she can neither write nor lift anything with her injured arm;
- (g) that she is the only woman Chief in Ekpoma,"

All these pieces of evidence were established by the appellant. Taken together there can be no doubt that they more than justify an award in favour of the appellant."

The court below rightly held that there is no evidence of any earnings by the appellant in respect of loss of earning power. The said court held that general damages could be awarded for injuries received as well as pain and suffering. The court below did not have to look for relevant and specific evidence in support of the claims for injuries received as well as pain and suffering. They are not items of special damage.

In the absence of a cross-appeal against the award of general damages of N10,000.00, the appellant is entitled to compensation for the pain and suffering both actual and prospective which is attributable to his injury. The court below agreed that the appellant had serious disability by not being able to write or lift anything with the right hand after the accident.

5 The court was also satisfied that massive keloids developed after healing and would require surgery.

Damages are awarded for the injury itself and the consequences of the injury such as pain and suffering. The damages awarded in my view, should be such that the ordinary sensible man would consider to be sensible and fair in all the circumstances.

10 Having regard to the findings of the court below of the massive keloids which are stubborn and likely to respond to surgery, the inability of the appellant to write or lift anything with the right arm, the fact that the appellant was dragged out of the car after the accident in a state of shock, the fact that she was hospitalized for ten days and had been on out-patient treatment coupled with the evidence
15 of P.W.2 (Dr. Udeagbe), I am satisfied that an award of N10,000.00 is not a fair compensation for the injuries she sustained. See *Watson v. Powles* (1968) 1 Q.B. 596 at 603.

For the reasons above indicated and the further reasons contained in the lead judgment of my learned brother Belgore, J.S.C., I think the appeal ought to succeed.

20 The appeal is allowed by me. The award of N10,000.00 general damages made against the 1st respondent by the court below is set aside. It is substituted by an award of N50,000.00 general damages against both respondents jointly and severally. I abide by the order as to costs contained in the lead judgment of my learned brother Belgore, J.S.C.

25 _____

ONU JSC

The two main issues which in my view call for determination in this appeal whose facts are not in dispute, and so invoke no restatement other than as lucidly contained in the lead judgment of
30 my learned brother Belgore, J.S.C., a preview of which I have had and with which I entirely agree, are:-

1. Whether the Court of Appeal was right in holding that the plaintiff/appellant did not prove that the 2nd respondent was vicariously liable for the negligent driving of the 1st respondent.

2. Whether the Court of Appeal correctly considered the heads of damage respecting the personal injuries which the court found were grave and serious and whether the award of N10,000.00 general damages was adequate for those injuries in accordance with established principles.

I will first of all deal with issue one by making a cursory reference 5 to the pleadings. In paragraphs 2 and 3 of the statement of claim the appellant pleaded thus:-

"2. The 1st defendant is a professional driver and was at all material times the servant of and driver of the 2nd defendant's vehicle Registration No. BD 9846 A, a Mercedes Benz 911 tipper lorry. His known residence at the time of accident was 12, Sakpoba Road Agbor. 10

3. The 2nd defendant is a limited liability company registered in Nigeria and were at all material times master of 1st defendant and owner of vehicle Registration No. BD 9846 A driven by the 1st defendant. Their known office of operation was at 118 B, Imejei Road, Ibusa."

It is noteworthy to point out from the onset that the statement of claim is a badly drafted piece of pleading which if care and expertise 15 were brought to bear upon it could have been better done. Be that as it may, in joining issues with the appellant on the above pleading among others, the respondents pleaded in paragraph 2 of their joint statement of defence as follows:-

"The 2nd defendant admits ownership of the vehicle No. BD 9846 A but denies all other averments in paragraphs 2 and 3 of the 20 statement of claim."

As later transpired, the appellant whose death was brought to the notice of this court before this appeal came up for hearing, had upon the application of a relation (Francis Eseigbe) been substituted, testified and called two witnesses in support of her claim at the trial. Suffice it to say that after appellant had closed her case, learned counsel for the respondents, Mr. Ajayi, remarked with an air of clarity and finality 25 thus: "the defendants are relying on the case of the plaintiff". Hence, despite what one may describe as a precipitate step amounting to a capitulation or total acceptance of the appellant's case unchallenged and uncontroverted, the learned trial Judge proceeded to dismiss the appellant's case in its entirety. 30

Aggrieved by that decision the appellant appealed to the court below, which in turn also dismissed her case in respect of her claim in vicarious liability against the 2nd respondent but awarding in her favour the sum of N10,000.00 for her injuries, pain and suffering,

though it would seem, for loss of earning power. Being further dissatisfied with the lower court's decision, appellant appealed to this court premised on two grounds from which the two issues hereinbefore set out are natural off-shoots.

At the hearing of this appeal on 25th October, 1993, learned counsel for the respondents' S.B. Ajayi Esq., conceded before us that the 1st respondent was their employee but that there was no evidence that he was driving with their authority, for their purpose or performing their business:

I wish at this juncture to advert once again to the pleadings, more particularly to paragraphs 4, 5 and 6 of the statement of claim wherein appellant pleaded and paragraph 5 of the statement of defence in which the respondents jointly joined issue thereto thus:-

PARAGRAPHS 4, 5 AND 6 OF THE STATEMENT OF CLAIM.

"4. On the 3rd of February, 1986 the plaintiff was an occupant in vehicle registration No, BD 2913 K, a 504 saloon car, owned and driven by His Highness T.O. Oghebor, Onojie of Egoro, along Ebelle-Agbor Road:

5. The plaintiff avers that the car in which she was travelling was being driven with due care on the right hand side of the road when at a point near Ebelle Grammar School, near the said Ebelle-Agbor Road the vehicle driven by the 1st defendant suddenly and without reasonable cause hit the vehicle in which the plaintiff was travelling, that is, vehicle Registration No. BD 2913 K, from the rear. In this connection the plaintiff shall lead evidence that at the time the vehicle driven by the 1st defendant hit the car in which she was traveling from the rear the road was straight and the weather was dry and visibility clear.

5(i) The plaintiff at the trial of this action shall lead evidence of police investigation which led to the 1st defendant being arraigned before the Area Customary Court, Ekpoma, from where the 1st defendant later jumped bail. The plaintiff shall rely on the sketch plan of the scene of accident drawn by the investigating police officer."

6. The plaintiff further avers that as a result of 1st defendant's negligent act of hitting the vehicle from behind, vehicle Registration No.BD2913 K was caused to tumble and overturn, bursting into flame in the process."

PARAGRAPH 5 OF THE STATEMENT OF DEFENCE

"5. With regard to paragraphs 4, 5 and 6 of the statement of claim, the defendants aver that the accident referred to therein was solely caused or contributed to by the negligence of the driver of vehicle registration No. BD 2913 K.

PARTICULARS OF NEGLIGENCE

(i) Swerving to the left when being overtaken by the 1st defendant when there was no justification for such a manner of driving;

(ii) Swerving into the path of the 1st defendant who was in the process of overtaking vehicle No. BD 2913 K without any warning whatsoever.

(iii) Driving in a ziz-zag manner;

(iv) Not using the rear view mirror through which, if it has been used, the driver of the vehicle No. BD 2913 K would have remained on his own lane; and

(v) Failing to heed horn, traffication, flashing of head light warnings given by the 1st defendant."

(Italics above mine for emphasis)

At the trial, only the appellant and her witnesses gave evidence in support of her pleadings setout above to the hilt. The respondents failed to testify in support of their pleading, more especially, the 1st respondent on the lines of paragraph 5 of the statement of defence above. I need remark here that in order to rebut the burden of liability for negligence which the appellant pleaded in her statement of claim, evidence in support of which she gave, the respondents ought to have rendered some evidence in support of their own pleading. This is because, one of the essential rules of pleading is that the defendant's pleading shall deny all material averments in the statement of claim as the defendant intends to deny at the hearing. Every allegation of fact which is not specifically denied or stated not to be admitted shall be taken as established at the hearing. See *Akintola & Anor. v. Solano* (1986) 2 NWLR (Pt.24) 598. Indeed, evidence is necessary to prove or disprove an issue of fact. Hence, by the respondent's failure to adduce credible evidence in support of their pleading in paragraph 5 of the statement of defence above to tilt the blame for negligence of the accident on the appellant, they are jointly taken to have admitted the appellant's case. And this the moreso that the appellant neither raised nor relied on the maxim *res ipsa loquitur*. See *Alao v. Inaolaji*

Builders Ltd. (1990) 7 NWLR (Pt.160) 36; and Strabag Construction (Nigeria) Ltd. v. Ogarekpe (1991) 1 NWLR (Pt. 170) 733.

Indeed, it is an established principle of law that pleadings cannot constitute evidence. See *F.C.D.A. v. Naibi* (1990) 3 NWLR (Pt.138) 270 at page 281. Thus, pleadings not alluded to in evidence, as happened in the instant case, must be deemed to have been abandoned. See *Ojikutu v. Fella* (1954) 14 WACA 659. The appellant in the case in hand having by his pleading and evidence raised the rebuttable presumption of negligence against the respondents who have neither rebutted same by adducing evidence but rather relied on appellant's case as made are taken to have accepted her case lock, stock and barrel. Vicarious liability on the part of 2nd respondent for the negligence of 1st respondent would accordingly be inferable from the circumstances. Similarly, the provisions of section 149(d) (former section 148(d) Cap. 62) of the Evidence Act, Cap. 112 Laws of the Federation, 1990 would have sway. The section provides:-

"149. The court may presume the existence of any fact which it thinks likely to have happened regard being had to the common cause of natural events, human conduct and public and private business in their relation to the facts of the particular case, and in particular the court may presume

(d) That evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it.....
....."

Consequently, I am of the view that the 2nd respondent having conceded that it was the employer of the 1st respondent, its failure to tender evidence as to how 1st respondent performed his duty in relation to it and why the accident occurred in line with the pleading proffered, is fatal to the defence. In the result, I hold the 2nd respondent vicariously liable for the negligence of 1st respondent. The court below was therefore wrong in confirming the decision of the trial court in 2nd respondent's favour in that respect.

On the general damages awarded (for which see paragraph II of the amended statement of claim) it is sufficient here to say that an award became justified based on the unchallenged and incontrovertible evidence of Doctor Enahoro Festus Odinmo Udegbe (P.W.2). Said he in examination-in-chief at pages 15 and 16 of the record:-

"On 3/2/86 I was on duty at the General Hospital, Irukep, when the plaintiff was brought to the hospital. When she was brought to the hospital she has severe burns on her right hand. She was in a state of

shock, she was in pains and in a confused state. I then admitted her and examined her. I made note of the examination. On examination I observed that apart from the general effect of the accident the right hand of the plaintiff was severely scarred from the mid-arm to the tip of the fingers and had an impression of second degree burns. There were no burns anywhere else on the body of the plaintiff apart from the ones on the right hand. I therefore commenced treatment of the plaintiff. She was later discharged from the hospital after 10 days in the hospital and she was to be coming to the hospital as an out-patient for treatment. By the time the plaintiff was discharged from hospital as an out-patient she had recovered from her shock but her burns were still septic. Since about three months ago I have not been treating the plaintiff for her burns but I am still treating her for massive keloids which she later developed. The plaintiff can undergo plastic surgery for keloids. From the state of the right hand of the plaintiff now it has lost some functions in that she cannot pick things or write with that hand." (Italics is mine for emphasis)

As there was nothing elicited from the cross-examination of this witness to diminish the seriousness of the appellant's condition both before and after the accident, the refusal firstly by the trial court to award any general damages to the appellant and secondly that of the court below in awarding N10,000.00 only to the appellant constitutes, in my view, a misdirection and an erroneous estimate respectively. In that regard, this court sitting on appeal is entitled appropriately to interfere with the award made by the court below, being too low an award. See *Obere v. Board of Management, Eku Baptist Hospital* (1978) 6-7 S.C. 15; *Ziks Press Limited v. Ikoku* (1951) 13 WACA 188 at 189; and *Uwa Printers (Nig.) Ltd. v. Investment Trust Co. Ltd.* (1988) 5 NWLR (Pt.92) 110. While it is pertinent to emphasise that the basis on which the court below made its award of general damages of N10,000.00 for injuries, pain and suffering has not been challenged by way of a cross-appeal by the respondent, the question left for one to answer however is whether in the circumstances of the case in hand the appellant's complaint is justified for an upward review of the award. It is my firm view that the award being a low estimate of the quantum of general damages, both 1st and 2nd respondents be and are hereby damnified to pay to the appellant jointly and severally the sum of N50,000.00, the same being an amount I consider reasonable in the circumstances.

It is for the above and the fuller reasons, set out in the lead judg-

ment of my learned brother Belgore, J.S.C. that I too would allow the appeal. I make the same consequential orders inclusive of those as to costs contained in the lead judgment.

IGUH JSC

I have had the advantage of a preview of the judgment of my learned brother, Belgore, J.S.C., just delivered. I entirely agree with his reasoning and conclusions that this appeal be allowed. I wish, however, to add a few words of my own on the issues raised in this appeal.

The plaintiff, Chief (Madam) Dora Eseigbe, had in the High Court of the Ekpoma Judicial Division in the then Bendel State, now Edo State, instituted an action jointly and severally against the 1st and 2nd defendants, hereinafter called the respondents, for N250,000.00 being general damages for negligence. The claim is in respect of personal injuries, pain and suffering and loss of earning power sustained by the plaintiff as a result of a road accident which was caused by the negligent driving of the 1st defendant/respondent of a vehicle belonging to the 2nd defendant/respondent.

The trial court in a considered judgment dismissed the plaintiff's claim whereupon she appealed to the Court of Appeal. Before the appeal could be heard, the plaintiff died and one Francis Osawe Eseigbe, hereinafter called the appellant, was on the 10th September, 1990 and by the order of the court below substituted (Iguh, J.S.C. for the deceased plaintiff.

In its judgment, the Court of Appeal partially allowed the appeal, holding that the vicarious liability of the 2nd respondent had not been established and awarded N10,000.00 as damages to the appellant against the 1st respondent only. The appellant, being dissatisfied with that judgment, has now appealed to this court.

Briefs were filed in this court in compliance with the rules of court. Both parties also formulated three identical issues for the determination of this court. Before us, learned counsel for the appellant resolved the said three issues into two.

These are:-

- (1) Whether the 2nd defendant/respondent can be vacuously liable for the negligence of the 1st defendant/respondent; and
- (2) Whether there are reasons to disturb the award of damages made by the Court of Appeal.

In my view, the above are the only pertinent issues which are sufficient for the determination of this appeal.

When the appeal came up for hearing, the learned counsel for the parties made oral submissions to us in amplification of the arguments in their respective briefs. The main complaint of the appellant in his brief and in the oral argument of his learned counsel in respect of the first issue is that the respondents having admitted that the 2nd respondent was the owner of the accidented vehicle which at all material times was driven by the 1st respondent, the onus was on the said 2nd respondent to establish how the vehicle came into the control of the 1st respondent pursuant to the operation of sections 138 and 141 of the Evidence, Act.

He submitted that the onus is on the owner of a vehicle to rebut the presumption that a vehicle is being driven by his servant or agent. He referred in this regard, to the decisions in *Yesufu Maduga v. Hamza Mohammed Bai* (1987) 3 NWLR (Pt.62) 635 at 641; and *Hewitt v. Bonvin* (1940) 1 K.B. 188.

For the respondent, it was conceded during the hearing of this appeal that the 1st respondent was the agent or servant of the 2nd respondent at all material times. It was also admitted in paragraph 2 of the respondents' statement of defence that the accidented vehicle No. BD 9846 A was at all material times in the ownership of the 2nd respondent. Learned respondents' counsel, however, submitted with some force that there was no evidence that the 1st respondent was at all material times driving in the course of his employment. He argued that the proof of vicarious liability is an issue of fact and not a matter of presumption and that the presumption raised on behalf of the appellant was misconceived as the appellant tendered no evidence to implicate the 2nd respondent on the issue of vicarious liability.

In dealing with this issue which was also raised before, it, the

Court of Appeal *inter alia* stated as follows:-

"The fact that the vehicle belonged to the 2nd respondent, though not testified to, was admitted in the pleading of the respondents, and so needed no further proof. What was however not established by evidence in court was:-

- (a) that the 1st respondent was an employee of the 2nd respondent on the day of the accident; and

(b) that he was driving that vehicle on that day in the course of his aforesaid employment with 2nd respondent. In fact no witness so testified..... In the circumstances, the conclusion must be that vicarious liability has not been established against the

2nd respondent. Liability for negligence proved remains only that of the 1st respondent.

It seems to me convenient at this stage to examine very briefly the presumption that attaches to ownership of a vehicle where the facts of the relationship between the owner and the driver of a vehicle are not fully known or disclosed.

I think it plain that one's ownership of a vehicle does not and cannot per se impose any liability upon the owner in respect of any damage caused by such a vehicle. This is because it has long been settled law that where the owner of a carriage confides it to another person who is neither his servant nor his agent, he is not responsible merely by reason of his ownership for any damage which it may cause on that other's hand. But the law has equally long been settled since well over a century ago that if a plaintiff proves that a vehicle was negligently driven and that the defendant was its owner, and the court is left without further facts, it is legitimate to draw the inference that the negligent driver was either the owner himself, or some servant or agent of the owner. See *Benard v. Sully* (1931) 47 TLR 557 where the decision in *Hibbs v. Ross* (1866) L.R. 1 Q.B. 534 was applied with approval. In other words, where the facts of the relationship between the owner and driver of a vehicle are not fully known, proof of ownership of the vehicle may give rise to a presumption that the driver was driving the vehicle at all material times as the servant or agent of the owner. See *Hewitt v. Bonvin* (1940) 1 K.B. 188; *Rambarran v. Gurrucharan* (1970) 1 WLR 556; and *Morgans v. Launchbury* (1973) A.C. 127 at 139.

The above presumption in accident cases is a presumption of law and has been widely and repeatedly applied by this court and various other courts in this country. So, in *Yesufu Maduga v. Bai* (1987) 3 NWLR (Pt.62) 635 at 641, it was held as follows:-

"The presumption of law in accident cases, though rebuttable with regard to the liability of owners without further information is that the owner is prima facie liable because the court is entitled to draw the inference that the vehicle was being driven by the owner, his servant or agent at the material time."

See too *Kuti v. Balogun* (1978) J S.C. 53 at 58; *Okeowa v. Sanyaolu* (1986) 2 NWLR (Pt.23) 471; and *Onuchukwu v. Williams* 12 NLR 19.

It must also be emphasized that although the presumption is one of law, it is clearly rebuttable and not irrebuttable. See *Lasisi Ogunmuyiwa v.*

Solanke (1956) SCNLR 143; (1956) 1 FSC 53.

In the instant case, there is evidence that the relationship between the 2nd and the 1st respondents at all material times was that of owner and driver in respect of the vehicle in question. No further information on the details of this relationship was made available to the court. Indeed, the respondents led no evidence whatsoever before the court in their defence. I entertain no doubt that this is a proper case where the presumption may in law be invoked that the 1st respondent was at all material times driving the 2nd respondent's vehicle as the latter's servant and/or agent. Under the circumstance, there was in law no necessity on the part of the appellant to lead further evidence that the 1st respondent was at all material times the servant or agent of the 2nd respondent or that the 1st respondent was driving the 2nd respondent's vehicle in the course of his employment. I must, with the utmost respect, disagree with decision of the Court of Appeal to the effect that although ownership of the vehicle on the 2nd respondent was established, it was further necessary for the appellant to prove by evidence that the 1st respondent was the agent or servant of the 2nd respondent or that he was driving the vehicle in issue in the course of his employment. This is because in the circumstances of this case, the onus was on the 2nd respondent to dislodge the presumption of law that operated against him to the effect that the 1st respondent drove the vehicle in issue as the servant or agent of the said 2nd respondent. This onus, the 2nd respondent failed to discharge as he offered no evidence whatsoever in his defence at the trial. It therefore seems to me clear that the Court of Appeal was in error when it wrongly held that the appellant had failed to prove that the 2nd respondent was vicariously liable for the negligent driving of the 1st respondent. Accordingly the answer to the first issue must be in the affirmative.

The second issue for determination concerns the basis for the award of damages in personal injury cases and the quantum of award as they relate to the present case. The Court of Appeal in the instant case had rightly found negligence established by the appellant but only awarded N10,000.00 to her as damages. The appellant has appealed against this award which he described as "grossly inadequate."

Learned counsel for the respondents in his own submission considered that the Court of Appeal was generous in its award of N10,000.00 to the appellant as there was no evidence of any losses sustained by the appellant in respect of her injuries.

It must be observed that the appellant only claimed general damages in this case for the injuries she sustained in the accident, pain and suffering and loss of earning power. It is trite that general damages is implied by the law and need not be specially pleaded. Matters for consideration in the assessment of general damages in personal injury cases have been held to include:-

- (i) The bodily pain and suffering that the plaintiff underwent and that which may occur in the future;
- (ii) Whether or not such a plaintiff sustained permanent disability or disfigurement;
- (iii) The loss of earnings caused by any such disability or disfigurement as aforesaid;
- (iv) The length of time the plaintiff spent in the hospital receiving treatment;
- (v) The loss of amenities of life, if any, and
- (vi) The age, status and expectation of life of the plaintiff.

See *Ejisun v. Ajao and Others* (1975) 1 NMLR 4; *British Transport Commission v. Gourtey* (1956) A.C. 185 at 206; *Nigerian Bottling Co. Ltd. v. Ngonadi* (1985) 1 NWLR (Pt.4) 739 at 746; and *U.B.A. v. Achoru* (1990) 6 NWLR (Pt.156) 254. Once a plaintiff has successfully shown that he suffered personal injury as a result of a breach of duty of care owed him by the defendant, the court must proceed to assess damages claimed on the available facts. See *Strabag Construction (Nig.) Ltd. v. Ogarekpe* (1991) 1 NWLR (Pt.170) 733.

It must however be borne in mind that damages for personal injuries, pain and suffering, worry or anxiety for the future or limitation felt by reason of disfigurement cannot strictly speaking, be measured in terms of money. The law nonetheless requires adequate compensation to be assessed on a fair and reasonable basis. Having made these observations, I will now consider the award of N10,000.00 made by the Court of Appeal to the appellant.

The law is well settled that in order to justify the reversal of an award of damages by a Court, it will generally be necessary that the appellate court should be satisfied either that:-

- (i) the Judge acted upon some wrong principle of law; or
- (ii) that the amount awarded was so extremely high or so very small as to make it, in the judgment of the appellate court an entirely erroneous estimate of the damage to which the plaintiff is entitled.

See *Flint v. Lovell* (1935) 1 K.B. 354 at 360; *Owen v. Sykes* (1936) 1 K.B.192; *Zik's Press Ltd. v. Ikoku* (1951) 13 WACA 188 at 189; *Idailo-*

sa v. Oronsaye (1959) SCNLR 407; (1959) 4 FSC 166 at 173; *Bala v. Bankole* (1986) 3 NWLR (Pt.27) 141; *Onaga and Others v. Micho & Co.* (1961) 2 SCNLR 101; (1961) 1 All NLR 338 at 342; and *Ijebu Ode Local Government v. Balogun and Co. Ltd.* (1991) 1 NWLR (Pt.166) 136. The Court of Appeal in measuring the award of damages to the appellant in this case stated as follows:-

"On the other hand, there appear to be pieces of evidence on the basis of which damages can be held payable and the quantum thereof measured. These are:-

- (a) that as a result of the accident the saloon car BD 2913 K tumbled and was set on fire.
- (b) that the appellant was dragged out of the car, and rushed to the hospital in a state of shock, in pains and with second degree burns on her right hand.
- (c) that she was hospitalised and treated for 10 days and had been on out-patient treatment since then.
- (d) that massive keloids developed after healing which was being treated.
- (e) that the keloids could respond to plastic surgery.
- (f) that as a result of these injuries
- (i) the appellant's right hand was scarred from mid-arm to finger tips;
- (ii) she spent over N30,000 for treatment in various hospitals;
- (c) that she can neither write nor lift anything with her injured right arm.
- (g) that she is the only woman Chief in Ekpoma.

All these pieces of evidence were established by the appellant. Taken together there can be no doubt that they more than justify an award of damages in favour of the appellant. What I will now proceed to consider is the quantum of such damages."

A little later in its judgment, the Court of Appeal on the same issue of the quantum of damages to which the appellant was entitled to observed as follows:"

"In assessing damages, I take into account the testimony of P.W.2 that the appellant could not, after treatment, either write or lift anything with her right arm. This is a serious disability. I am satisfied that "massive keloids" developed following the healing process. If the keloids had not disappeared over a year after the accident, then they must be stubborn and likely to respond only to plastic surgery....."

I think it right to emphasize that the above findings of the Court of Appeal are fully justified from the unchallenged evidence of Dr. Enahoro Udegbe who treated the plaintiff at the General Hospital, Irukepen after the accident.

I have given a most careful and close examination to all the
5 above relevant facts which the Court of Appeal rightly took into consideration in its award of general damages to the appellant and must confess, with regret, but with profound respect, that I found its award of N10,000.00 as grossly inadequate and so very small as to make it an entirely erroneous estimate of the damage to which the appellant is entitled. I am therefore satisfied that the
10 answer to issue number two under consideration must again be in the affirmative.

In arriving at the above conclusion, I have taken into consideration the steady decline in the purchasing power of the naira at all material times. See *Amos Adenaike v. Osobu and Another* (1980) Ogun SLR 8 at 25; and *Dr. O.O. Kalu v. Dr. S. Mbuka*
15 (1988) 3 NWLR (Pt.80) 86 at 105. I have given a most anxious

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