

**SUPREME COURT OF NIGERIA**  
2ND JULY, 1999. SC. 48/1993  
**CORAM:- A. B. WALI, I. L. KUTIGI, S. U. ONU, U. A.**  
**KALGO, S. O. UWAIFO, JJSC**

DR. JOSEPH AKHIGBE ..... PLAINTIFF/CROSS-APPELLANT  
AND  
1. IFEANYI CHUKWU OSUNDU CO LTD ..... DEFENDANTS/  
2. ANTHONY OGBOLU ..... APPELLANTS

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***APPEALS** - Concurrent Findings of fact - Supreme Court will not interfere with such findings - Unless the findings are perverse.*

***DAMAGES** - Admissible evidence - On the amount of damages - Which remains uncontroverted - Unless the evidence is palpably incredible - The Court has no reason not to accept it.*

***DAMAGES** - Appeals - General damages - Awarded by the trial court - When an appellate Court will interfere with such an award.*

***DAMAGES** - General damages - Fall in the value of money - How the Court is to deal with the situation - In the award of general damages.*

***DAMAGES** - General damages - Statistics - Of the depreciation of the naira - Where there is no direct evidence of such statistics - Although it is known to have occurred - The trial Court should take a mental account of it - But masking its effect in making a reasonable award.*

***DAMAGES** - General damages - Adequate compensation - For physical pains and accompanying distress - How to correctly assess.*

***DAMAGES** - Special damages - Prospective expenditure - Money actually spent before the time of hearing a claim for damages for injuries suffered - Comes under special damages - But any prospective Expendi-*

*ture is claimable as part of general damages.*

**DAMAGES** - *Special damages - Mitigation of loss - Contention that the Cross Appellant as a civil servant - Ought to have mitigated his loss - By receiving treatment in a government hospital as opposed to a private one - Lacks merit.*

**PLEADINGS** - *Defence - Vicarious liability - Material allegations in the statement of claim - The appellants ought to have reacted unambiguously to the allegations - In order to exhibit their defence to the vicarious liability alleged.*

**PLEADINGS** - *What it is - And how to properly frame.*

### **FACTS**

At the Benin High Court the Plaintiff/Cross-Appellant instituted an action for N500,000.00 special and general damages against the Defendants/Appellants for the injuries he sustained following a road accident which occurred along Agbor/Benin Road on 10 July, 1985. The plaintiff was travelling from Benin towards Agbor in a Passat car owned and driven by his junior brother. The 4th defendant/2nd appellant who was driving a bus owned by the 3rd defendant/1st appellant left his own side of the road to overtake other vehicles in his front. In the process he brushed the back of the vehicle driven by the 2nd defendant before colliding head-on with the vehicle in which the plaintiff was being driven. As a result of the crash, the plaintiff was seriously injured. At the conclusion of hearing the learned trial judge found the 3rd and 4th defendants liable. The 3rd defendant being vicariously liable for the negligent driving of his servant the 4th defendant. Special damages of N25,150.10 and general damages of N35,000.00 were awarded. There were appeal and cross-appeal against that decision.

The Court of Appeal taking the view that the value of the naira had fallen considerably set aside the N35,000.00 awarded the plaintiff/Cross-appellant as general damages and in its place awarded him the sum

of N150,000.00. The appeal of the appellants was unsuccessful. Still dissatisfied both parties have now appealed to the Supreme Court. The appellant submitted four issues while the cross-appellant raised one issue.

**ISSUES FOR DETERMINATION**

(i) *Was the Court of Appeal right in interfering with the award of N35,000.00 general damages by the learned trial judge when it was not shown that the trial judge acted on the wrong principle of law in arriving at the sum?*

(ii) *Was the Court of Appeal right in treating the respondent's claim of N45,000.00 as an item of general damages without considering the appellants' submission to the contrary?*

(iii) *Was the Court of Appeal right in upholding the finding of the learned trial judge that the 1st appellant was vicariously liable for the negligent act of the 2nd appellant on the stage of the pleading when there was no nexus between the two and without considering the appellants' submission that on the evidence before the court no negligence was established against the 2nd appellant?*

(iv) *Was there any evidence in support of the appellants' contention that the respondent under his contract of service was to have his medical expenses incurred underwritten by his employer and, if so, was the Court of Appeal right in failing to consider the fact that the respondent ought to have mitigated his loss by receiving treatment at a government hospital as opposed to a private one?"*

*"Was it right for the learned justices of the Court of Appeal to have awarded general damages to the (cross) appellant in the sum of N150,000.00 only out of the N474,841.90 claimed in 1986 in view of their finding that the damages caused to the (cross) appellant was foreseeable and due to the recklessness of the 2nd respondent and in view of the dwindling state of our money today as damages for pain and suffering and for prospective medical treatment abroad?"*

**HELD** (Unanimously dismissing the appeal and allowing the Cross-appeal per lead judgment of **UWAIFO JSC**)

***Pleadings - What it is***

1. It must be realized that pleading is a statement of candour as to what a party to a case relies on to prove or defend a cause. It ought to be made as clear as it possibly can, not evasive or misleading or ambiguous. Each party must endeavour to place, and must be presumed to have placed, all necessary pleadable facts on record the best way it can in order to achieve the best of its case. It must put the other party and the court on a firm understanding of what the issues joined or denied or issues admitted or not admitted, are. Pleadings are the guiding light by which all concerned trace the path to the justice of a case. That path should not be hampered by and littered with stumbling blocks of uncertainties, misrepresentations and ambushes embedded in the averments. That will be an effort to spring surprises and will not be proper pleading. As we said by Phillimore J., in *The Why Not* [1888] LR 2A. & E. 265 and quoted with approval in Enwezor v. Central Bank of Nigeria [1976] 3 S.C. 45 at 56 per Madarikan, J.S.C., pleadings,

*".... are not to be considered as constituting a game of skill between the advocates. They ought to be so framed as not only to assist the party in the statement of his case but the court in its investigation of the truth between the litigants".* (p. 2090 E)

***Pleadings - Defence***

2. The appellants here did not adequately plead in defence to the essential and material allegations contained in paragraph 5 of the statement of claim. Notwithstanding the general traverse or denial in the opening part of the statement of defence, the appellants should have reacted unambiguously to those material allegations in paragraph 5 in consonance with what was said in Messrs Lewis and Peat (NRI) Ltd v. Akhimien [1976] 7 S.C. 157 at p. 163 and ought to have made it clear, in specific denial, in order to exhibit their defence to vicarious liability, that the vehicle in question was not owned by the 1st appellant and that the 2nd appellant was either not the servant of the 1st appellant or that if he was, at the time he drove that vehicle, property of the 1st appellant, he did not do so in the course of his employment. The way their counsel pleaded in paragraph 4 of their

statement of defence appears as if to try his skill at ambiguity and ambushment. Even so, it did not help them and I think the two courts below were justified upon the pleadings and evidence on both sides to have come to the conclusion that the 1st appellant was vicariously liable for the negligence of the 2nd appellant in this case. (p. 2091 B) B

***Appeals - Concurrent findings***

3. I have had to go to some length on this issue because of the tenacious, and admittedly persuasive, manner in which learned counsel Mr. Esekody, has pursued it on behalf of the appellants. No matter his effort, he was certainly up against a settled principle that this court will not interfere with concurrent findings of fact of courts below unless there is a special reason shown why it should. This is almost invariably that the findings are perverse in the full meaning of the word: see Ayorinde v. Attorney-General Oyo State (1996) 3 N.W.L.R. (pt. 434) 20 at 33; Dieli v. Iwuno (1996) 4 N.W.L.R. (pt. 445) 622 at 630. The two findings in question are concurrent findings of fact of the lower courts which, as I have said, are not perverse but are indeed justified. (p.2093 D) D E

***Special damages - Prospective expenditure***

4. The claim for N500,000.00 was comprised of N25,158.10 special damages and N474,841.90 general damages. Out of the amount of general damages, was N45,000.00 which was said would be needed for further treatment overseas as per the medical report dated 12 January, 1987 (exhibit G) by Dr. F.J.E. Edobor, a surgeon in Osa Medical Services Clinic and Maternity of Benin City. The envisaged treatment was "vascular surgical reconstruction of the left lower arm and plastic surgical reconstruction of the face." That claim was rejected by the learned trial judge on the ground that it was too remote. I think the Court of Appeal rightly overruled the trial judge on that point. What he said as to remoteness is completely without justification. It is a settled principle that money actually spent before the time of hearing a claim for damages for injuries suffered comes under special damages. But any prospective expenditure is money which has not yet crystallized in actual disburse- F G H

ment. That being so, it does not qualify as special damages but is claimable as part of general damages: see Shearman v. Falland (1950) 2 K. B. 43; H. West & Sons Ltd v. Shephard (1964) AC. 326 at 368; Strabag Construction (Nig) Ltd. v. Ogarekpe (1991) 1 N.W.L.R. (pt. 170) 733 at 755. The appellants are clearly wrong to have argued that such claim, which is a future expenditure, should have been pleaded as an aspect of special damages. The cases of Adel Boshali v. Allied Commercial Exporters (1961) 1 ALL N.L.R. 917... relied on by the appellants lay down no such principle. (p. 2094 C)

***Admissible evidence - On the amount of damages***

5. I do not think the appellants can properly argue, as they have done, that the trial judge made no finding of fact on the amount of N45,000.00. Exhibit G was tendered through the doctor who issued it. Neither the said exhibit nor the witness was discredited. The doctor who treated the cross-appellant at the Central Hospital, Benin City said the hospital could not handle the physiotherapy aspect of his problem. The learned trial judge did not say the treatment overseas could not possibly cost N45,000.00 as claimed but that the "claim is too remote and was not foreseeable" by the appellants. It was on that erroneous basis, as already shown, that he disallowed it. There was no evidence in whatever form, not even by way of cross-examination, to controvert or challenge the claim that not less than N45,000.00 would be needed for the overseas treatment. When admissible evidence has been adduced which remains uncontroverted, it becomes part of what will lead to a decision in the case and, unless the evidence is palpably incredible, the court is not only entitled to, but has no reason not to, accept it: see Odulaja v. Haddad (1973) 8 N.S.C.C 614 at 618. (p. 2095 A)

***General damages - Fall in the value of money***

6. From experience, there can be no argument that the naira has been considerably devalued, causing a devastating effect in the purchasing power of the individuals and the worth of the naira as compared to what it was before the process of devaluation began. The question is: how is

this condition to be dealt with in the award of general damages in deserving circumstances? This must be seen to be a fairly complex problem requiring a full understanding of the basis for intervention. I think it is necessary to explain that, in the situation we are in, when awarding general damages we must bear in mind that there may be need to take the process from two perspectives in arriving at what may be considered a just figure. First, the judge ought to think of an award in comparison with other similar awards and be satisfied as to what he would have awarded, not too extravagant and not too mean, as if there had been no devaluation; second he ought to consider whether there is enough basis to signify and justify any increase in the figure so ordinarily arrived at, having regard to, and as being due to the fall in, the value of money. If there is such basis (i.e., there is evidence), then the normal award can be enhanced on the basis of that evidence. That is the first perspective. The second perspective is that, if there is no such basis, in the sense of absence of evidence upon which the court can rely, although there may be general impression, if not general knowledge, of the devaluation of the naira (or its low purchasing power), nothing precludes him, in my view, from making an appropriate award, by way of enhancement of the ordinary awards, that can be defended as not being extravagantly high or extremely low even without having to rely on any proved economic statistics. In that case, the court ought to be silent on whether it has taken the issue of devaluation into account although, tacitly, it would have indeed done so. What has been really suggested, as I shall show, is that the fact that the effect of devaluation is being taken into account in that circumstances should remain 'masked'. (p. 2097 F)

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### ***General damages - Statistics***

7. Where there is no direct evidence before the trial court on the statistics of the depreciation (or inflation in an appropriate case) although it is known to have occurred, as I said earlier, the trial court would be acting within what is fair, going by the second perspective of the approach, by taking a mental account of it but masking its effect in making a reasonable award. For this second perspective, I think this can be seen in the

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passages in paragraphs. 464 and 465 of McGregor on Damages (supra). It is in this regard I consider that the award of N150,000.00 made by the lower court, with due respect, was on a wrong principle in two ways. First, it started by saying that the N45,000.00 for further medical treatment might have become inadequate because of the fall in the value of the naira. As there was no evidence led before the trial court in that regard as to what the economic statistics or any like evidence revealed, the court could not justifiably come out openly to give what it thought was an appropriate award based on the devaluation of the naira. Second, it is difficult from what was done to say to what amount the N45,000.00 was raised as a result of taking the factor of devaluation into account and therefore what would have been left of the N150,000.00 to represent the general damages for the injuries and disabilities suffered by the cross-respondent in respect of which the cross-appellant says he did not receive a reasonable award. I shall therefore partially allow the appeal to the appellant and set aside the award of N150,000.00. (p. 2101 C)

**E *General damages - Adequate compensation***

8. I think I ought to say that it is not very easy to assess what is adequate for physical pain and the distress which usually accompanies it. The distress may arise from a collateral result of a disfigurement or loss of a limb or any other part of the body. Apart from the physical pain, the loss or disfigurement of part of the body and the actual inconveniences thereby suffered, there may be an inevitable and constant awareness of the deprivations which the loss or disfigurement symbolizes. Therefore, the plaintiff is entitled to be compensated with due regard to the different heads of damage represented in a claim to arrive at a single reasonable and balance award of damages: see Ediagbonya v. Dumez Nigeria Ltd. (1986) 3 N.W.L.R. (pt. 31) 753; United Bank for Africa Ltd. v. Achora (1990) 6 N.W.L.R. (pt. 156) 254. In the present case the learned trial judge awarded the sum of N35,000.00 on a global assessment. I think that award is disheartening when it is recognized that it is for pain and suffering; for rib bones, hip joints and ankle which have become very stiff; for the discomfort of having to do with a shortened leg; and for



distress of having to put up with an arm vascular surgical reconstruction and a face for plastic surgical reconstruction and more besides.  
(p. 2103 G)

***Damages - Appeals***

9. An appellate court does not make it tis business to interfere with general damages awarded by the trial court unless it is satisfied that the trial judge acted, in the award of such damages, upon some wrong principle or that the amount awarded was so large or so small as to make it completely erroneous assessment of the damages: See Onaga v. Micho & Co. (1961) 1 ALL N.L.R. 101 at 105-106. I am satisfied that an award of N35,000.00 was extremely low. In all the circumstances of this case, I do not think it would be fair and reasonable to award less than N250,000.00 to the cross-appellant as general damages for the injuries and disabilities suffered as a result of the accident. The sum of N45,000.00 for further medical treatment is also awarded. (p. 2104 D)

***Special damages - Mitigation of loss***

10. The appellant has argued that under the cross-appellant's contract of service, his medical expenses incurred by him were to be underwritten by his employer. It was therefore contended that the cross-appellant ought to have mitigated his loss by receiving treatment in a government hospital as opposed to a private one. It will be unkind to expect a civil servant battling for his life or good health caused by injuries received through someone else's negligence to bear the thought of 'mitigating his loss' and therefore avoid receiving appropriate treatment in a private hospital even when the type of treatment he needs is not available in a government hospital. It is more so exacerbating if the person who caused him that health condition is making that demand on him. I do not see any merit in the appellant's contention. This is not at all a case where the question of mitigating loss can be raised. The appellants caused the accident from which the cross-appellant suffered injuries. He was entitled to resort to the best available medical facilities to ensure that his health was properly restored. If he did that it would be at the expense of

the appellants. I therefore hold that the appellants are liable for the special damages which the two courts below have awarded. In the result, the cross-appeal succeeds and is allowed. The cross-appellant is entitled to a total of N320.158.10 damages against the appellants as already specified. (p. 2104 G)

## NOTABLE POINTS OF INTEREST

### UWAIFO JSC

*1. How to approach the effect of depreciation in the value of money in regard to award of damages*

The effect of depreciation in the value of money in regard to award of damages is hardly open to any simple approach and solution. The passage from the judgment of Tobi, J.C.A., in Ugo v. Okafor (supra) seems to suggest such an approach. That could not indeed be correct. The point to recognize is that the rate of inflation or fall in the value of the naira cannot be made a matter of easy speculation by the courts for the purpose of using it as a clear basis for enhancing an award no matter the sympathy and emotion for doing so this may attract. That may make such awards too subjectively deregulated outside what may be fair since each judge may have to project his own idea of 'the racing inflation in our local market economy' to base an award on. The effect of changes in the value of money is discussed at length in McGregor on Damages, 13th edition paragraphs 463-484. It takes a number of factors into account. One obvious factor is that if the fall in the value of money is to be used to justify an increased award of non-pecuniary damages, there must be evidence of the rate of devaluation or inflation. It is, I think, of very doubtful validity to propose that judicial notice can be taken of the inflationary trend of buying and selling in the local market and the court would then say it has made an award upon that criterion. (p. 2097 B)

*2. Courts to take only judicial notice of matters covered by s. 74 E A*

In our own situation, it is true that the depreciation of the naira is obvious to all. But I do not think that can be enough reason for a court of law to have recourse to, or opt for, taking judicial notice of that circumstance in

order to make specific calculations or evaluation or something to that effect for the purpose of increasing the worth of a normal award of general damages. It is not a matter covered by section 74 of the Evidence Act of which judicial notice can be taken. The courts do not, in my view, have the power to go beyond the statutory provisions creating circumstances in which judicial notice may be taken of facts and expand them to include where there appears to be a popular general knowledge of a fact. Any proposition which suggests the taking of judicial notice of matters outside those permitted by statutory provisions is, in my view, to be regarded clearly as per incuriam. I think Tobi, J.C.A., in that regard, may have gone too far in his proposition which, with due respect to the learned justice, everything taken into account, I cannot convince myself to accept as a correct guide. It will lead to a grave error to go by it. I will therefore advise caution in every possible way in the award of damages in which the fall in the value of money becomes a perspective of approach. (p. 2099 G)

*3. Enhancing an award of general damages taking into account the depreciation of the naira on the basis of evidence*

The right approach, based on the first perspective being now discussed, was taken, in my view, in the case of Amos Adenaike. v. Osobu (1980) OGN SLR 8 at 25. What was said and done there was recounted in Kalu v. Mbuko (1988) 3 N.W.L.R. (pt. 80) 86 at 102-103 per Kolawole, J.C.A., who was, incidentally, the trial judge in Amos Adenaike. Said the learned Justice:-

*"In that case [Odumosu v. A.C.B. (supra)] the award of N8,000.00 as general damages was said to be seemingly inordinate. That was in 1976, a period of about twelve years have elapsed. The value of the naira has depreciated very badly since that time and it continues to depreciate at every Foreign Exchange Market bidding session...."*

It is clear from the above that Kolawole, J.C.A., had some evidence before him on which he enhanced his award of general damages which took account of the depreciation of the naira, and he clearly said so. That is a perfectly defensible exercise of judicial conclusion based on

**2086** Akhigbe v. Ifeanyi Chukwu Osundu (1999) 7 KLR Uwaifo JSC  
evidence. (p. 2100 C)

**REPRESENTATION**

T. Esekody Esq., with him A. Nwaiwu Esq. for the appellants

B Miss J. Aburime for the Cross-appellant

**CASES REFERRED TO**

Enwezor v. Central Bank of Nigeria [1976] 3 S.C. 45 at 56

C Ayorinde v. Attorney-General Oyo State (1996) 3 N.W.L.R. (pt. 434) 20

Dieli v. Iwuno (1996) 4 N.W.L.R. (pt. 445) 622 at 630

Ojah v. Ogboni (1996) 6 N.W.L.R. (pt. 454) 272 at 297

Ebevuhe v. Ukpakara (1996) 7 N.W.L.R. (pt. 460) 254 at 272

Ume v. Okoronkwo (1996) 10 N.W.L.R. (pt. 477) 133 at 144.

D Shearman v. Falland (1950) 2 K. B. 43

H. West & Sons Ltd v. Shephard (1964) AC. 326 at 368

Boshali v. Allied Commercial Exporters (1961) 1 ALL N.L.R. 917

Odumosu v. African Continental Bank Ltd. (1976) 11 S.C. 55

E Ediagbonya v. Dumez Nigeria Ltd. (1986) 3 N.W.L.R. (pt. 31) 753

United Bank for Africa Ltd. v. Achora (1990) 6 N.W.L.R. (pt. 156) 254

Onaga v. Micho & Co. (1961) 1 ALL N.L.R. 101 at 105-106

Adenaike v. Osobu (1980) OGN SLR 8 at 25.

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**STATUTE REFERRED TO**

Evidence Act s.74

**BOOK REFERRED TO**

G McGregor on Damages, 13th edition paras. 463-484

**LEAD JUDGMENT BY UWAIFO JSC**

Following a road accident which occurred along Agbor/Benin  
H Road on 10 July, 1985, the plaintiff (now Cross-appellant) was severely  
injured. He instituted an action for N500,000.00 special and general dam-  
ages at the Benin High Court. On July 1, 1988, the learned trial judge,  
Akpomudjere, J., held the defendants (who were then 3rd and 4th defen-

dants, but now 1st and 2nd appellants) liable- the 1st appellant being vicarious liable for the negligent driving of his servant, the 2nd appellant. The learned trial judge awarded N25,158.10 as special damages and N35,000.00 as general damages. There were appeal and cross-appeal against that decision.

The appellant contested the decision at the Court of Appeal on issues (a) whether the 2nd appellant was the servant of the 1st appellant and whether the vehicle in question was owned by the 1st appellant; (b) whether the 2nd appellant was negligent in the course of driving the vehicle; and (c) whether the trial judge was right to have awarded the cross-appellant medical expenses incurred in a private hospital instead of taking advantage of receiving free medical services in a government-owned hospital. The cross-appellant's grievance was on whether general damages were assessed on the correct principle and whether N35,000.00 was not grossly inadequate.

In pressing the argument before the Court of Appeal that the award was grossly inadequate, the cross-appellant in its brief contended that the value of the naira had fallen considerably both from the point of view of inflation and the devaluation of the naira. As at April, 1991, it was argued (without evidence) that one U.S. dollar was equal to N10 and 1 pound sterling (£1), N20. I think this was what influenced the lower court, per Ejigunmi, J.C.A., in his leading judgment, with which the other two learned justices concurred, to observe and find as follows:-

*"..... I must now consider whether the sum of N45,000.00 claimed in 1985 is now valid or reasonable having regard to the state of our money today. In my view cognisance ought to be taken of the prevailing state of our money and for that reason that sum ought to be enhanced. After due consideration at (sic) the relevant factors discussed above, an award in the sum of N150,000.00 is reasonable compensation as general damages for all his claims, apart from the sum of N25,158.10 already awarded to him as special damages. The sum of N35,000.00 awarded to him by the lower court as general damages is therefore set aside. In its place the respondent is awarded as general damages the sum of N150,000.00."*

The appellants in their complaint against that judgment have raised four issues for the determination of this court as follows:-

(i) *Was the Court of Appeal right in interfering with the award of N35,000.00 general damages by the learned trial judge when it was not shown that the trial judge acted on the wrong principle of law in arriving at the sum?*

(ii) *Was the Court of Appeal right in treating the respondent's claim of N45,000.00 as an item of general damages without considering the appellants' submission to the contrary?*

(iii) *Was the Court of Appeal right in upholding the finding of the learned trial judge that the 1st appellant was vicariously liable for the negligent act of the 2nd appellant on the stage of the pleading when there was no nexus between the two and without considering the appellants' submission that on the evidence before the court no negligence was established against the 2nd appellant?*

(iv) *Was there any evidence in support of the appellants' contention that the respondent under his contract of service was to have his medical expenses incurred underwritten by his employer and, if so, was the Court of Appeal right in failing to consider the fact that the respondent ought to have mitigated his loss by receiving treatment at a government hospital as opposed to a private one?"*

The cross-appellant submitted one issue for determination, namely:

*"Was it right for the learned justices of the Court of Appeal to have awarded general damages to the (cross) appellant in the sum of N150,000.00 only out of the N474,841.90 claimed in 1986 in view of their finding that the damages caused to the (cross) appellant was foreseeable and due to the recklessness of the 2nd respondent and in view of the dwindling state of our money today as damages for pain and suffering and for prospective medical treatment abroad?"*

The appellants' argument in respect of issue (iii) which I intend to consider first, is that the averment of the cross-appellant that the 2nd appellant drove the vehicle No. IM 3488 G belonging to the 1st appellant having been denied, the cross-appellant had the burden to prove that the said vehicle belonged to the 1st appellant. They submitted that the only

proof of ownership being evidence of the registered ownership of the vehicle, the cross-appellant therefore failed to establish, prima facie, that the 2nd appellant was the servant or agent of the 1st appellant. What the cross-appellant pleaded in paragraph 5 of his statement of claim was that the 2nd appellant drove the 1st appellant's vehicle registered as No, IM3488 G as the 1st appellant's servant or agent. Perhaps, I ought to reproduce the averment as it is crucial as related to paragraph 4 of the statement of defence. As already indicated, the 1st appellant was the 3rd defendant and the 2nd appellant the 4th defendant at the trial. In paragraph 5 of the statement of claim, it was averred:-

*"(5) The fourth defendant is an agent/servant of the third defendant and was the driver of the third defendant's bus with registration number IM 3488 G at all material time. (sic)"*

The defence to this averment was pleaded in paragraph 4 of the amended statement of defence as follows:-

*"4. The defendant admit paragraph 5 to the extent that the fourth defendant was the driver of the vehicle registration number IM 3488 G."*

Paragraph 5 of the statement of claim contains the following material facts: (a) the fourth defendant drove vehicle No. IM 3488 G (b) he drove it as an agent/servant of the third defendant and (c) the third defendant is the owner of the said vehicle. The admission in paragraph 4 of the Statement of defence is simply that the 4th defendant drove that vehicle. So it was left to be proved that he was the 3rd defendant's driver (as agent/servant) and that the vehicle in question belonged to the 3rd defendant. In his oral evidence, the cross-appellant said: "The bus owned by the 3rd defendant crashed into the passat car in which I was travelling." Perhaps, one should concede that that did not go far enough in the circumstances of the case to prove that the said bus belonged to the 3rd defendant from that mere ipsi dixit.

However, there is the letter dated 15th July, 1986 (exhibit C) written by the cross-appellant's solicitors to the 3rd defendant reporting the negligent manner in which the 4th defendant drove the 3rd defendant's bus No. IM 3488 G on the occasion in question and caused injuries to the cross-appellant and damaged the vehicle in which he was travelling .

The 3rd defendant referred the said letter to their insurance company. In an effort to deny liability, the insurance company in a letter dated 30 July, 1986 (exhibit D) addressed to the cross-appellant's solicitors, said:-

"We have received copy of your letter of 15th July, which was addressed to our insured and have noted your comments. We regret the plight of your clients, but information available to us is that three vehicles were involved in the said incident. From the circumstances of occurrence as described by our insured's driver, he cannot be blamed for the cause of the accident. Either of the drivers of the other vehicles could have been the cause of the accident and we therefore, find it difficult to accept liability for and on behalf of our insured."

These two letters (exhibits C and D) obviously establish that the fourth defendant, Anthony Ogbolu, whose name was specifically mentioned in exhibit C drove the vehicle No. IM 3488 G, that he did so as the servant/agent of the third defendant and that the third defendant is the owner of the said vehicle. The argument that the last two facts of paragraph 5 of the statement of claim, as already analyzed, were not proved in the course of the proceedings cannot be maintained. These exhibits C and D form part of the body of evidence before the court and provide adequate proof.

**It must be realized that pleading is a statement of candour as to what a party to a case relies on to prove or defend a cause. It ought to be made as clear as it possibly can, not evasive or misleading or ambiguous. Each party must endeavour to place, and must be presumed to have placed, all necessary pleadable facts, on record the best way it can in order to achieve the best of its case. It must put the other party and the court on a firm understanding of what the issues joined or denied or issues admitted or not admitted, are. Pleadings are the guiding light by which all concerned trace the path to the justice of a case. That path should not be hampered by and littered with stumbling blocks of uncertainties, misrepresentations and ambushes embedded in the averments. That will be an effort to spring surprises and will not be proper pleading. As we said by Phillimore J., in The Why Not [1888] LR 2A. & E. 265 and**



quoted with approval in Enwezor v. Central Bank of Nigeria [1976] 3 S.C. 45 at 56 per Madarikan, J.S.C., pleadings,

*".... are not to be considered as constituting a game of skill between the advocates. They ought to be so framed as not only to assist the party in the statement of his case but the court in its investigation of the truth between the litigants".* B

The appellants here did not adequately plead in defence to the essential and material allegations contained in paragraph 5 of the statement of claim. Notwithstanding the general traverse or denial in the opening part of the statement of defence, the appellants should have reacted unambiguously to those material allegations in paragraph 5 in consonance with what was said in Messrs Lewis and Peat (NRI) Ltd v. Akhimien [1976] 7 S.C. 157 at p. 163 and ought to have made it clear, in specific denial, in order to exhibit their defence to vicarious liability, that the vehicle in question was not owned by the 1st appellant and that the 2nd appellant was either not the servant of the 1st appellant or that if he was, at the time he drove that vehicle, property of the 1st appellant, he did not do so in the course of his employment. The way their counsel pleaded in paragraph 4 of their statement of defence appears as if to try his skill at ambiguity and ambushment. Even so, it did not help them and I think the two courts below were justified upon the pleadings and evidence on both sides to have come to the conclusion that the 1st appellant was vicariously liable for the negligence of the 2nd appellant in this case. C D E F

It was further argued that the cross-appellant did not give evidence to support the particulars of negligence averred in his statement of claim. The particulars are simply that the fourth defendant drove at an excessive and unreasonable speed while descending a hill during rainfall; overtook other vehicles on a hill while not safe to be so and crashed into other vehicles; failed to keep any proper look-out and failed to stop or slow down or swerve in order to avoid the said collisions. I think the cross-appellant gave sufficient evidence in proof of these particulars. He said as to what happened on that occasion:- G H

"I was travelling from Benin towards Agbor in a Passat Car BD 8219 BD. The car was owned and driven by my junior brother Gabriel Akhigbe. At a point near Okhuaihe, we had a number of vehicles in front and also behind. The passat car was directly behind the 1st defendant. Suddenly I observed that the 2nd defendant swerved to the extreme edge of the right hand side of the road. Before I know what was happening a bus came from the direction of Agbor, in full speed with head lights on and overtaking every vehicle. The bus owned by the 3rd defendant crashed into the passat car in which I was travelling. The car was severely damaged. My car was on the right side of the road as I was travelling towards Agbor. The 3rd defendant's bus brushed the 1st appellant and crashed on us. As a result of the crash, I was seriously injured ..... we were ascending the hill."

D The 2nd defendant, Christopher Onoh, gave similar evidence as follows:-

"I remember the 10th day of July, 1985; on that day I was travelling from Lagos-Enugu and on the Benin/Agbor Road we came to Okhuaihe area of the road there were a lot of vehicles behind me and one of such vehicles was a passat car No. BD 8219 BD and another one was Toyota Selica and other cars were following. There was rain falling on that day. I got to a place where tipper was carrying sand, I saw another luxurious bus, which put on its headlights and blowing his horn, and overtaking in a bend. The bus was coming from the opposite direction. As soon as I saw the bus, I cleared for him out of the way, because of the danger posed by the said bus. The bus hit my own on the left side, killed one person inside my vehicle by name Benedict Ibute and crashed on the passat car No. BD 8219 BD and carried the passat car to collide with the Toyota Selica."

The evidence of the plaintiff and the 2nd defendant as above was believed by the learned trial judge. He disbelieved the 4th defendant's account of the accident. He said inter alia:-

H "The 2nd defendant gave evidence which substantially confirmed what the plaintiff has stated in his evidence ..... I find as a fact, from the showing of the 4th defendant that he was a liar and I reject his evidence as to how the accident happened on the day in question. I believe and I

*accept the evidence of the plaintiff and that of the 2nd defendant "true to type" was overtaking a line of vehicles on that day and in the process crashed onto the passat car and caused the accident that made the plaintiff to sustain serious injuries."*

There is no doubt that this is a reasonable finding upon the evidence. It cannot in any way be considered perverse. The Court of Appeal in the leading judgment of Ejiwunmi, J.C.A., upheld that finding as follows:-

*"The facts as found by the learned trial judge is (sic) that the 2nd appellant left his own side of the road to overtake other vehicles in his front. In the process he brushed the back of the vehicle driven by the 2nd defendant in the lower court before colliding head-on with the vehicle in which the respondent was being driven by his younger brother. In my humble view the conclusion reached by the lower court that the 2nd appellant was negligent in the driving of the 1st appellant's vehicle is inescapable and it is upheld by me."*

**I have had to go to some length on this issue because of the tenacious, and admittedly persuasive, manner in which learned counsel Mr. Esekody, has pursued it on behalf of the appellants. No matter his effort, he was certainly up against a settled principle that this court will not interfere with concurrent findings of fact of courts below unless there is a special reason shown why it should. This is almost invariably that the findings are perverse in the full meaning of the word: see Ayorinde v. Attorney-General Oyo State (1996) 3 N.W.L.R. (pt. 434) 20 at 33; Dieli v. Iwuno (1996) 4 N.W.L.R. (pt. 445) 622 at 630; Ojah v. Ogboni (1996) 6 N.W.L.R. (pt. 454) 272 at 297; Ebevuhe v. Ukpakara (1996) 7 N.W.L.R. (pt. 460) 254 at 272; Ume v. Okoronkwo (1996) 10 N.W.L.R. (pt. 477) 133 at 144. The two findings in question are concurrent findings of fact of the lower courts which, as I have said, are not perverse but are indeed justified. Issue (iii) must therefore be answered in the affirmative.**

I think issues (i), (ii) and (iv) of the appellants and the sole issue of the cross-appellant can be conveniently considered together as they relate to the matter of damages awarded in this case. The evidence shows that the cross-appellant suffered multiple injuries and disabilities

as a result of the accident. The evidence of particulars of injuries accepted by the learned trial judge was: fractured left femur bone (leg), fractured left radius bone (arm), fractured left ulna bone (arm), loss of a molar tooth (mouth), compressed facial bones (head), sprained left ankle  
B (leg), multiple bruises all over the body, laceration of the face and head, laceration of the arm, laceration of the scalp and severe blood loss. That of disabilities was: shortening of the left femur, facial bones and muscles require reconstruction, loss of upper molar tooth, sow and poor union of the fractured left ultra-radius bones.

C The claim for N500,000.00 was comprised of N25,158.10 special damages and N474,841.90 general damages. Out of the amount of general damages, was N45,000.00 which was said would be needed for further treatment overseas as per the medical report dated 12  
D January, 1987 (exhibit G) by Dr. F.J.E. Edozor, a surgeon in Osa Medical Services Clinic and Maternity of Benin City. The envisaged treatment was "vascular surgical reconstruction of the left lower arm and plastic surgical reconstruction of the face." That  
E claim was rejected by the learned trial judge on the ground that it was too remote. I think the Court of Appeal rightly overruled the trial judge on that point. What he said as to remoteness is completely without justification. It is a settled principle that money  
F actually spent before the time of hearing a claim for damages for injuries suffered comes under special damages. But any prospective expenditure is money which has not yet crystallized in actual disbursement. That being so, it does not qualify as special damages but is claimable as part of general damages: see Shearman v. Falland  
G (1950) 2 K. B. 43; H. West & Sons Ltd v. Shephard (1964) AC. 326 at 368; Strabag Construction (Nig) Ltd. v. Ogarekpe (1991) 1 N.W.L.R. (pt. 170) 733 at 755. The appellants are clearly wrong to have argued that such claim, which is a future expenditure, should  
H have been pleaded as an aspect of special damages. The cases of Adel Boshali v. Allied Commercial Exporters (1961) 1 ALL N.L.R. 917. Odumosu v. African Continental Bank Ltd. (1976) 11 S.C. 55 and Uwa Printers Ltd. v. Investment Trust Ltd (1988) 5 N.W.L.R.

(pt. 92) 110 relied on by the appellants lay down no such principle.

I do not think the appellants can properly argue, as they have done, that the trial judge made no finding of fact on the amount of N45,000.00. Exhibit G was tendered through the doctor who issued it. Neither the said exhibit nor the witness was discredited. B The doctor who treated the cross-appellant at the Central Hospital, Benin City said the hospital could not handle the physiotherapy aspect of his problem. The learned trial judge did not say the treatment overseas could not possibly cost N45,000.00 as claimed but C that the "claim is too remote and was not foreseeable" by the appellants. It was on that erroneous basis, as already shown, that he disallowed it. There was no evidence in whatever form, not even by way of cross-examination, to controvert or challenge the claim that D not less than N45,000.00 would be needed for the overseas treatment. When admissible evidence has been adduced which remains uncontroverted, it becomes part of what will lead to a decision in the case and, unless the evidence is palpably incredible, the court is not only entitled to, but has no reason not to, accept it: see Odulaja E v. Haddad (1973) 8 N.S.C.C 614 at 618.

The lower court was perfectly right to have accepted that there was a need for further medical treatment overseas. But what was not satisfactory, in my opinion, was the way the fall in the value of our naira F was introduced which seemed to have created a doubt as to what purpose it served in the assessment of the general damages and whether this did not lead to a complete oversight of the other relevant factors which would have determined what was proper to be awarded as general damages G to cover the cross-appellant's injuries and disabilities enumerated earlier on. Having held that the N45,000.00 for medical expenses could not be regarded as too remote to the consequences of the tort committed by the appellants, the court below then said:-

"..... I must now consider whether the sum of N45,000.00 claimed H in 1985 is now valid or reasonable having regard to the state of our money today. In my view cognisance ought to be taken of the prevailing state of our money and for that reason that sum ought to be enhanced."

Thereafter, without showing by what measure it was enhanced, the court made an award of N150,000.00 in place of all the general damages of N474,841.90 claimed by the cross-appellant.

The appellants complain that the amount was made on wrong principle which had led to the cross-appellant being awarded extravagant damages. The cross-appellant complains, on the other hand, that the award was too low having been made on wrong principle which did not take account of the relevant heads, of claims. It is true that it is quite legitimate to take into account, in appropriate cases and in a proper manner, in the award of general damages, the change in the value of money. The point was made by Iguh, J.S.C. in his supporting judgment in Eseigbe v. Agholor (1993) 9 N.W.L.R. (pt. 316) 128 at 158. Earlier on, Kolawole, J.C.A., made relevant observations in Kalu v. Mbuko (1988) 3 N.W.L.R. (pt. 80) 86 at 102-103 to which I shall later refer, and thereafter Orah J.C.A., in Mayange v. Punch (Nig) Ltd (1994) 7 N.W.L.R. (pt. 358) 570 at 582. Learned counsel for the cross-appellant has cited and relied on the observations of Tobi JCA in Onagoruwa v. Inspector-General of Police (1991) 3 N.W.L.R. (pt. 193) 593 at 650. The learned Justice in a more recent case of Ugo v. Okafor (1996) 3 N.W.L.R. (pt. 438) 542 at 569-570 similarly expressed rather generalized but strong statements about the fall in the purchasing power of the naira and how the trial court should approach its effect as follows:-

*"In the award of damages, a trial judge should take into serious consideration, the purchasing or buying power of the naira on the day of the judgment. That, to me, is the eventful day obviously not in the context of the date the damaging event took place, but eventful in the sense of the real bargaining power of the naira on the day of judgment. Unless so, the courts will be theorising and therefore not realistic. The victim is the plaintiff .....*

*The learned trial judge awarded the sum of N50,000.00 in the alternative. The action was filed way back in 1985. That is ten years now. The judgment was delivered on 30th October, 1989. That is six years now. N50,000.00 was good money in 1989. In 1995, it does not have the same purchasing or buying strength. And here, I think I can*

*take judicial notice of the racing inflation in our local market economy of buying and selling. I do not think I am wrong when I say that since 1985 when the appellant filed the action, prices of goods have skyrocketed to the extent that they have in certain situations doubled and even trippled, if not quadrupled."*

The effect of depreciation in the value of money in regard to award of damages is hardly open to any simple approach and solution. The passage from the judgment of Tobi, J.C.A., in Ugo v. Okafor (supra) seems to suggest such an approach. That could not indeed be correct. The point to recognize is that the rate of inflation or fall in the value of the naira cannot be made a matter of easy speculation by the courts for the purpose of using it as a clear basis for enhancing an award no matter the sympathy and emotion for doing so this may attract. That may make such awards too subjectively deregulated outside what may be fair since each judge may have to project his own idea of "the racing inflation in our local market economy" to base an award on. The effect of changes in the value of money is discussed at length in McGregor on Damages, 13th edition paragraphs 463-484. It takes a number of factors into account. One obvious factor is that if the fall in the value of money is to be used to justify an increased award of non-pecuniary damages, there must be evidence of the rate of devaluation or inflation. It is, I think, of very doubtful validity to propose that judicial notice can be taken of the inflationary trend of buying and selling in the local market and the court would then say it has made an award upon that criterion.

**From experience, there can be no argument that the naira has been considerably devalued, causing a devastating effect in the purchasing power of the individuals and the worth of the naira as compared to what it was before the process of devaluation began. The question is: how is this condition to be dealt with in the award of general damages in deserving circumstances? This must be seen to be a fairly complex problem requiring a full understanding of the basis for intervention. I think it is necessary to explain that, in the situation we are in, when awarding general damages we must bear in mind that there may be need to take the process from two per-**

spectives in arriving at what may be considered a just figure. First, the judge ought to think of an award in comparison with other similar awards and be satisfied as to what he would have awarded, not too extravagant and not too mean, as if there had been no devaluation; B second he ought to consider whether there is enough basis to signify and justify any increase in the figure so ordinarily arrived at, having regard to, and as being due to the fall in, the value of money. If there is such basis (i.e., there is evidence), then the normal award can be enhanced on the basis of that evidence. That is the first C perspective. The second perspective is that, if there is no such basis, in the sense of absence of evidence upon which the court can rely, although there may be general impression, if not general knowledge, of the devaluation of the naira (or its low purchasing D power), nothing precludes him, in my view, from making an appropriate award, by way of enhancement of the ordinary awards, that can be defended as not being extravagantly high or extremely low even without having to rely on any proved economic statistics. In E that case, the court ought to be silent on whether it has taken the issue of devaluation into account although, tacitly, it would have indeed done so. What has been really suggested, as I shall show, is that the fact that the effect of devaluation is being taken into account in that circumstances should remain 'masked'. F

I shall illustrate the approach in regard to the two perspectives. For the first one, reference may be made to the case of Yorkshire Electricity Board v. Naylor (1967) 2 ALL E.R. 1, a decision of the House of Lords. In that case, a young man, aged twenty years, died instantaneously as a result of an electric shock suffered in the course of his employment by the appellant who admitted liability. His mother as G administratrix brought an action for damages. In similar cases, going by the decision of the House of Lords in Benham v. Gambling (1941) 1 All H ER 7, awards had hardly been more than #200 (200 pounds sterling). The trial judge awarded #500 (500 pounds) damages. On appeal eventually to the House of Lords, Lord Guest said at page 9:

*"ASHWORTH, J., took all relevant factors affecting the de-*



*ceased into account. He was twenty years and four months at the date of his death; his working prospects were favourable; he was in good health, living at home, and had become engaged to be married seven days before his death. Having considered all these facts the judge, bearing in mind what had been said by VISCOUNT SIMON, L.C., in Benham v. Gambling, fixed what he regarded as a reasonable sum for the loss of expectation of life at 500 pounds sterling (#500). Having done so, he proceeded to cross check his figure in relation to the figure of 200 pounds sterling (#200) awarded by the House of Lords in Benham v. Gambling and then to make allowance for the fall in the value of money to the extent of about two and a half times since 1941. He also checked his estimate by reference to similar awards made by himself and other judges over the period since 1941. I have been unable to see that there was anything which might be criticised in his approach to the problem."*

The Lord Chancellor and all the other three Law Lords approved this approach. I do wish to emphasize that there was evidence of the depreciation in the value of the pound sterling. It has lost its purchasing power. That evidence was given by an expert in economics, statistics and mathematical economics who produced a table (the accuracy of which was not challenged), which showed that since the decision in Benham v. Gambling the value of the pound (#1) in purchasing power had fallen by about two and one-half times. Also in Mallet v. McMonagle (1969) 1 All E.R. 178 at 190, there was definite evidence of the rate of inflation of 3% to 3<sup>1/2</sup>% per annum by which the purchasing power of the sterling had fallen over a period of 20 years. In such a situation it would be unrealistic not to take such figure into account.

In our own situation, it is true that the depreciation of the naira is obvious to all. But I do not think that can be enough reason for a court of law to have recourse to, or opt for, taking judicial notice of that circumstance in order to make specific calculations or evaluation or something to that effect for the purpose of increasing the worth of a normal award of general damages. It is not a matter covered by section 74 of the Evidence Act of which judicial notice can be taken. The courts do not, in my view, have the power to go beyond the statutory provisions creating

circumstances in which judicial notice may be taken of facts and expand them to include where there appears to be a popular general knowledge of a fact. Any proposition which suggests the taking of judicial notice of matters outside those permitted by statutory provisions is, in my view, to be regarded clearly as per incuriam. I think Tobi, J.C.A., in that regard, may have gone too far in his proposition which, with due respect to the learned justice, everything taken into account, I cannot convince myself to accept as a correct guide. It will lead to a grave error to go by it. I will therefore advise caution in every possible way in the award of damages in which the fall in the value of money becomes a perspective of approach.

The right approach, based on the first perspective being now discussed, was taken, in my view, in the case of Amos Adenaike. v. Osobu (1980) OGN SLR 8 at 25. What was said and done there was recounted in Kalu v. Mbuko (1988) 3 N.W.L.R. (pt. 80) 86 at 102-103 per Kolawole, J.C.A, who was, incidentally, the trial judge in Amos Adenaike. Said the learned Justice:-

*"In that case [Odumosu v. A.C.B. (supra)] the award of N8,000.00 as general damages was said to be seemingly inordinate. That was in 1976, a period of about twelve years have elapsed. The value of the naira has depreciated very badly since that time and it continues to depreciate at every Foreign Exchange Market bidding session.*

*In the Amos Adenaike case which I have earlier referred to, I had occasion to consider the general pattern of the decline in the purchasing power of the naira. At page 25 of the report, I observed as follow:-*

*"I am of the firm conviction that judges as members of the society must keep up with the times and in particular with the decline in the purchasing power of the naira [see L.O. Ejisun v. M. Ajao & Ors. (1975) 1 N.M.L.R. 4 at page 7]. The general pattern of the decline in the purchasing power of the naira is best illustrated by the composite consumer price index 1970-1977 as published by the Central Bank of Nigeria Research Department monthly report June 1978 which I take to be authoritative on the country's economic position.'*

*I made those remarks on 27, March, 1979.*

*In that case, after I had set out the annual consumer price indices between 1970 and 1977, the price indices showed that what you would buy for N150.00 in 1970 would cost N422.00 in 1977, a decline of about 300% in the purchasing power of the naira."*

It is clear from the above that Kolawole, J.C.A., had some evidence before him on which he enhanced his award of general damages which took account of the depreciation of the naira, and he clearly said so. That is a perfectly defensible exercise of judicial conclusion based on evidence.

**But where there is no direct evidence before the trial court on the statistics of the depreciation (or inflation in an appropriate case) although it is known to have occurred, as I said earlier, the trial court would be acting within what is fair, going by the second perspective of the approach, by taking a mental account of it but masking its effect in making a reasonable award. For this second perspective, I think this can be seen in the passages in paragraphs. 464 and 465 of McGregor on Damages (supra), page 337 as follows:-**

*"464. The spectacular decline in the purchasing power of sterling over the last quarter-century is normally reflected in awards of damages without any special consideration of this factor, because the cost of property and of services rises correspondingly and any award of damages in respect of property or services is based upon their present-day market value. Similarly where damages are awarded for a failure to pay money, the amount of the money which will be awarded against the defendant will be the same nominal sum as he has promised and failed to pay.*

*465. If, however, the damages are given as compensation for a non-pecuniary loss the decline in the purchasing power of sterling cannot in the same way be automatically reflected in the award. In such cases the courts have expressly said that permanent changes in the value of sterling must be taken into account. Very frequently, it is true, damages for non-pecuniary loss are at large or at least give, in the nature of things, scope for ample variations in the assessment as between one case and another; so that any direct consideration of change in the value of*

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*sterling tends to be avoided and its effect to be masked."* (Emphasis mine)

The first passage is para. 464 which talks about pecuniary awards, i.e. awards of already known figures in the form of special damages.

B What the second passage in para. 465 is understood to say is that (a) it may be known that there is a decline in the purchasing power of money but this does not, without more, mean it should be reflected in the award of general damages; (b) where, however, there is known to be a permanent change in the value of money (i.e. as a matter of firm evidence to that effect), this must be taken into account; and (c) generally, as general damages awarded in one case may legitimately vary from another, appropriate award can be made without revealing any direct consideration of change in the value of money; that consideration should be masked.

D **It is in this regard I consider that the award of N150,000.00 made by the lower court, with due respect, was on a wrong principle in two ways. First, it started by saying that the N45,000.00 for further medical treatment might have become inadequate because**  
E **of the fall in the value of the naira. As there was no evidence led before the trial court in that regard as to what the economic statistics or any like evidence revealed, the court could not justifiably come out openly to give what it thought was an appropriate award**  
F **based on the devaluation of the naira. Second, it is difficult from what was done to say to what amount the N45,000.00 was raised as a result of taking the factor of devaluation into account and therefore what would have been left of the N150,000.00 to represent the general damages for the injuries and disabilities suffered by the**  
G **cross-respondent in respect of which the cross-appellant says he did not receive a reasonable award.**

**I shall therefore partially allow the appeal to the appellant and set aside the award of N150,000.00.** As for the cross-appeal, it is  
H clear that the lower court rightly overruled the trial court on the issue that the N45,000.00 for further medical treatment was too remote which led the learned trial judge to disallow that claim. Accordingly, that claim of N45,000.00 which the lower court allowed is affirmed.

The cross-appellant stated particulars of injuries and disabilities he suffered as a result of the accident. These have not been controverted. It is on these particulars he claimed general damages. I earlier set out those particulars but I shall do so here again as a reminder:

"Particulars of injuries

B

(a) *Fractured left femur bone (leg)*

(b) *Fractured left radius bone (arm)*

(c) *Fractured left ulna bone (arm)*

(d) *Loss of molar tooth (mouth)*

C

(e) *Compressed facial bones (head)*

(f) *Sprained left ankle (leg)*

(g) *Multiple bruises all over the body*

(h) *Laceration of the face and head*

(i) *Laceration of the arm*

D

(j) *Laceration of the scalp*

(K) *Severe blood loss*

Particulars of Disability

(a) *Shortening of the left femur*

E

(b) *Facial bones and muscles require reconstruction*

(c) *Loss of upper molar tooth*

(d) *Slow and poor union of the fractured left ulna-radius bones."*

In addition, there is evidence that the cross-appellant can no longer do sports, do his gardening and drive effectively. The femur was fixed with a 'K-Nail, and, on the radius and ulna, plates and screws were fixed. As noted by the learned trial judge, the rib bones, the hip joints and the ankle of the cross-appellant have become very stiff. **I think I ought to say that it is not very easy to assess what is adequate for physical pain and the distress which usually accompanies it. The distress may arise from a collateral result of a disfigurement or loss of a limb or any other part of the body. Apart from the physical pain, the loss or disfigurement of part of the body and the actual inconveniences thereby suffered, there may be an inevitable and constant awareness of the deprivations which the loss or disfigurement symbolizes. Therefore, the plaintiff is entitled to be compen-**

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G

H

sated with due regard to the different heads of damage represented in a claim to arrive at a single reasonable and balance award of damages: see Ediaghonya v. Dumez Nigeria Ltd. (1986) 3 N.W.L.R. (pt. 31) 753; United Bank for Africa Ltd. v. Achora (1990) 6 N.W.L.R.

B (pt. 156) 254.

In the present case the learned trial judge awarded the sum of N35,000.00 on a global assessment. I think that award is disheartening when it is recognized that it is for pain and suffering; for rib bones, hip joints and ankle which have become very stiff; for the discomfort of having to do with a shortened leg; and for distress of having to put up with an arm vascular surgical reconstruction and a face for plastic surgical reconstruction and more besides.

D An appellate court does not make it tis business to interfere with general damages awarded by the trial court unless it is satisfied that the trial judge acted, in the award of such damages, upon some wrong principle or that the amount awarded was so large or so small as to make it completely erroneous assessment of the damages: See Onaga v. Micho & Co. (1961) 1 ALL N.L.R. 101 at 105-106. I am satisfied that an award of N35,000.00 was extremely low. In all the circumstances of this case, I do not think it would be fair and reasonable to award less than N250,000.00 to the cross-appellant as general damages for the injuries and disabilities suffered as a result of the accident. The sum of N45,000.00 for further medical treatment is also awarded.

G The learned trial judge awarded N25,158.10 as special damages. The appellant has argued that under the cross-appellant's contract of service, his medical expenses incurred by him were to be underwritten by his employer. It was therefore contended that the cross-appellant ought to have mitigated his loss by receiving treatment in a government hospital as opposed to a private one. The trial court rejected this contention and so did the Court of appeal on the ground that there was no evidence that the cross-appellant's employer is contractually bound to reimburse him for medical expenses incurred to treat him-

self outside what was provided for him free at the Central Hospital, Benin City.

In paragraph 15 of their amended statement of defence, the appellant averred as follows:

*"..... the defendants say the medical expenses incurred (if any) were reasonable and that plaintiff is not entitled to the amount claimed in that as a civil servant there is in existence a contract between the plaintiff and his employer that the latter shall underwriter medical expenses so incurred. The defendants will rely on the conditions of service for civil servants in the Bendel State Public Service."*

It was the appellants who pleaded the existence of such a contract whereby the Government accepts to underwrite medical expenses incurred by civil servants. They even pleaded that they would rely on the conditions of service of civil servants. No such contract or evidence of such conditions was produced by them. The burden is on them to do so. That should have been enough to dispose of that issue.

It is however fair to point out that in his evidence in cross-examination, the cross-appellant said:

*"It is true that I am employee of the Bendel State Government. The government reimburses someone if he undergoes medical treatment in a government owned hospital. The reimbursement is only in respect of treatments undertaken in the government hospital. If the prescription is (in) a government hospital the drugs purchased will be reimbursed."*

There is nothing in this evidence to suggest that an employee may not, at his expenses, have himself treated in a private hospital. **It will be unkind to expect a civil servant battling for his life or good health caused by injuries received through someone else's negligence to bear the thought of 'mitigating his loss' and therefore avoid receiving appropriate treatment in a private hospital even when the type of treatment he needs is not available in a government hospital. It is more so exacerbating if the person who caused him that health condition is making that demand on him. I do not see any merit in the appellant's contention. This is not at all a case where the question of mitigating loss can be raised. The appellants**

caused the accident from which the cross-appellant suffered injuries. He was entitled to resort to the best available medical facilities to ensure that his health was properly restored. If he did that it would be at the expense of the appellants.

B I therefore hold that the appellants are liable for the special damages which the two courts below have awarded. In the result, the cross-appeal succeeds and is allowed. The cross-appellant is entitled to a total of N320.158.10 damages against the appellants as already specified. I award the sum of N10,000.00 as costs to  
C the cross-appellant against the appellants.

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### WALI JSC

D I have had the advantage of reading before now the lead judgment of my learned brother Uwaifo, J.S.C. and I agree with his reasoning and conclusion for allowing the appeal in part.

For the same reason set out in the lead judgment, I also hereby  
E partially allow the appeal.

I agree with the observation made in the lead judgment with regard to the sum of N45,000.00 being specifically claimed as special damage. The amount was based on Exhibit G which was tendered through  
F P. W. 2. This evidence remained unchallenged. It could have been totally correct to award the N45,000.00 being prospective expenses, as part of general damages. Paragraphs 5-10 Clerk and Lindsell on Tort, [15th Edition] and Shearman v. Folland (1950) 2 K.B. 43 (1950) 1 All E.R. 976. The Court of Appeal however expressed the view that it considered the  
G sum of N45,000.00 as inadequate having regard to the inflationary trend in the country today. Said the learned Justice of the Court of Appeal, Ejiwunmi, J.C.A. (as he then was)-

*"Having so held I must now consider whether the sum of  
H N45,000.00 claimed in 1985 is now valid or reasonable having regard to the state of our money today. In my view cognisance ought to be taken of the prevailing state of our money and for that reason that sum ought to be enhanced."*



The learned Justice, after expressing the view above awarded as general damages, the sum of N150,000.00. The Court of Appeal cannot enhance the award as regards the sum of N45,000.00 on ground of Naira depreciation, since such evidence was neither before the trial court nor was it adduced before it as additional evidence. Likewise it was not shown that the enhancement was based on similar previous awards. I therefore hold the view that the amount of N45,000.00 as claimed should have been awarded by the Court of Appeal when it allowed the appeal on this head of claim.

On the question of general damage, I agree that the amount of N150,000.00 (inclusive of N45,000.00 prospective damages) is grossly inadequate. The sum of N250,000.00 awarded as general damages, exclusive of the N45,000.00 prospective damages in the lead judgment is fair and adequate. The total amount of general damages, inclusive of the sum claimed and awarded as prospective damages is now N395,000.

It is for this and the fuller reasons contained in the lead judgment that I also allow the main appeal partially and the cross-appeal in toto and make the award to the respondents/cross-appeal against the appellant as follows:-

1. N295,000 general damages (inclusive of N45,000.00 prospective damages).

2. N25,158.10 special damage incurred as medical expenses. I endorse the order of costs made in the lead judgment.

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### **KUTIGIJSC**

I read before now the judgment just rendered by my learned brother Uwaifo, J.S.C., I agree with his reasoning and conclusions to dismiss the appeal. I also agree with his conclusion to allow the cross-appeal, simple because I am satisfied as shown by the record that the Court of Appeal made an entirely erroneous estimate of the damages to which the plaintiff is entitled by failing to take into consideration all the injuries and consequent disabilities suffered by the plaintiff/cross-appellant. I endorse the consequential orders made in the judgment.

**ONU JSC**

I had the opportunity before now to read in draft the judgment of my learned brother Uwaifo, J.S.C. just delivered. I am in complete agreement with his reasoning and conclusion and have nothing further to add thereto.

**KALGO JSC**

I have had a preview of the judgment of my learned brother Uwaifo, J.S.C in this appeal which has just been delivered. I entirely agree with his reasoning and conclusions contained therein. It seems to me that he has painstakingly and fully dealt with the issues which arose for determination in the appeal and I do not intend to add anything thereon. I also agree with him that in the special circumstances of this case, there is need for this court to interfere with the award of general damages made by the Court of Appeal in favour of the respondent. I also agreed that the N45,000.00 claim for medical expenses overseas, could properly be treated as general damages in this case. I find no merit in the main appeal.

Accordingly, I dismiss the appeal of the appellant and allow the cross-appeal of the respondent. I abide by the consequential orders made in the leading judgment including the order as to costs.

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