

SUPREME COURT OF NIGERIA

9TH JULY, 1999. SC. 219/1991

**CORAM:- S. M. A. BELGORE, S. U. ONU, U. A. KALGO,
S. O. UWAIFO, A. O. EJIWUNMI, JJSC.**

1. GANIYU BADMUS DEFENDANTS/APPELLANTS
2. DANTATA TRANSPORT LIMITED
AND
A. O. ABEGUNDE PLAINTIFF/RESPONDENT

***APPEALS** - Damages - Substitution - Of an award of general damages for special damages not proved - By the Court of Appeal - When the respondent did not cross-appeal - Is erroneous.*

***APPEALS** - Fair hearing - Order made suo motu - A Court has no power to make an order - Which has not been asked for - And which the person against whom it is made - Had no opportunity of resisting.*

***DAMAGES** - Appeals - General damages - Where there was no pleading in support of general damages - And there was no appeal on the issue - There is nothing upon which general damages of any sort can be based.*

***DAMAGES** - Distinction - Special damages - And general damages - The distinction between them.*

***DAMAGES** - General damages - Negligence - The general damages must depend on some collateral consequence - Of the negligent act of the appellants in the present case.*

***DAMAGES** - Special damages - Proof - Standard of - Special damages have to be strictly proved - The trial judge is not entitled to embark upon his own assessment - Using conceived parameter in place of evidence.*

***DAMAGES** - Nominal damages - The meaning thereof.*

FACTS

At the High Court Ibadan, the plaintiff/respondent claimed against the defendants/appellants compensation of N77,020.00 being special and general damages arising from the negligence of the defendants in causing damage to his shop and main building together with some items of property therein. The plaintiff had his building and shop (as an annex in Iroko village near Ibadan along Ibadan Uyo Road. He carried on petty trading in beer, soft drinks, detergent, etc. in the shop. On or about 26th November, 1978, the 1st defendant, in the course of driving a commercial vehicle on behalf of and owned by the 2nd defendant, swerved off the road and collided with the said building and shop, causing extensive damage.

The learned trial judge found the 1st defendant to have been negligent on the doctrine of *res ipsa loquitur* in causing the damage in question. He found that damage was caused to the plaintiff's property, including that the entire shop and about one-third of the main house would have to be rebuilt. He appeared however, not to have been satisfied with the evidence on the special damages claimed. After stating his view about the evidence which he was unable to accept to make an appropriate award, he then proceeded to make his own assessment of the damages he thought the respondent might be entitled to. On the whole he entered judgment for the plaintiff for a total amount of N20,000.00 as special damages. Upon an appeal by the defendants the Court of Appeal, Ibadan Division found there was evidence to support only N3,0000.00 special damages out of the said N20,000.00. It set aside the award as it concerned N17,000.00 but went on to turn that award (N17,000.00) into general damages. Aggrieved by that aspect of the decision the defendants have further appealed to the Supreme Court raising one issue.

ISSUE FOR DETERMINATION

Whether the Court of Appeal was right in awarding, by way of substitution, N17,000.00 as general damages for the value of the shop and cost of repairing the main building having disallowed it under the claim for special damages although the plaintiff did not cross-appeal nor file respondent's notice to affirm the judgment on other grounds.

HELD (Unanimously allowing the appeal per lead judgment of **UWAIFO JSC**)

Special damages - Proof

1. What the learned trial judge did was, of course, contrary to the principle of award of special damages. Special damages have to be strictly proved. If various items are claimed for, the plaintiff is entitled to be awarded any of those items of which sufficient evidence is available even if he is not able to prove all the items. But where a plaintiff sets out to adduced evidence in proof of the special damages claimed by him and the evidence, being deficient or unsatisfactory, is rejected by the court, that should put an end to that claim. The trial judge is not entitled to embark upon his own assessment of the special damages, using his conceived parameter in place of evidence. See also Souji v. Isiocha (1989) 3 NWLR (pt. 111) 623 at p. 633 per Wail JSC; Sommer v. Federal Housing Authority (1993) 1 NWLR (pt. 219) 548 at p. 561 per Omo JSC. (p. 2119 C)

Damages - Distinction

2. There is a distinction between special damages and general damages. That distinction was drawn by this court in Ijebu-Ode Local Govt. v. Adediji Balogun & Co (1991) 1 NWLR (pt. 166) 136 at p. 158; Eseigbe v. Agholor (1993) 9 NWLR (pt. 316) 128 at 145 and other cases. It is usually a question of pleading and proof, and the mode of assessment. One is specially pleaded and strictly proved because it is exceptional in its character such as the law will not infer from the nature of the act which gave rise to the claim. Hence the claim is known as special damages. The other is general damages which, when averred as having been suffered, the law will presume to be the direct natural or probable consequence of the act complained of, but the award is a jury question as the judge cannot point out any measure by which the damages are to be assessed, except the opinion and judgment of a reasonable man: see Stroms Bruks Aktie Bolag v. Hutchison (1905) A. C. 515 at 525-526. Both arms of damages must be averred, although the award is made in different ways. As Viscount Dunedin said: "If there be any special damage which is attributable to the wrongful act that special damage must be averred

and proved, and, if proved, will be awarded. If the damage be general, then it must be averred that such damage has been suffered, but the quantification is a jury question": see The Susquehanna (1926) AC 655 at p. 661, the principle of which was approved by this Court in Nwobosi v. African Continental Bank Ltd. (1995) 6 NWLR (pt. 404) 658 at 680 per Onu JSC. So, in no circumstances can general damages be properly substituted for special damages which a plaintiff has failed to prove, or even if he has led evidence on it, did not in fact make any claim for it: see West African Shipping Agency v. Kalla (1978) 3 SC 21 at 32; (1978) 11 NSCC 114 at 120 per Eso JSC. (p. 2120 B)

Damages - Substitution

3. The second reason why the lower court was wrong in substituting the award of N17,000.00 as general damages in place of the award of that amount made by the trial court as special damages is that the respondent did not cross-appeal against the trial court's award nor file a respondent's notice for its affirmation on other grounds. The appellant had appealed against the learned trial judge's award on the ground that the special damages claimed were not proved. That appeal was found to have merit. There was no issue before the lower court as to whether the respondent was entitled to general damages which the trial court did not award, let alone any issue of the propriety of substituting an award of general damages for special damages not proved. (p. 2121 A)

Appeals - Fair hearing

4. The appellant was not given a hearing on that before the lower court decided that issue suo motu. It is well established that a court has no power to make an order which has not been asked for and which the person against whom it is made had no opportunity of resisting: see Obajinmi v. Attorney-General Western Nigeria (1967) 1 All NLR 31 at 34. Such an order is wrong and will be annulled on appeal: see Usikaro v. Itsekiri Land Trustees (1991) 2 NWLR (pt. 172) 150. Before a court decides an issue which it took suo motu it must invite the parties to address it on that issue. That is an aspect of fair hearing: see Kuti v.

Jibowu (1972) NMLR 18; and also Kuti v. Balogun (1978) 11 NSCC 21 at 25 where this court per Eso JSC observed:

"..... it is not open to a court of appeal to raise issues which the parties did not raise for themselves either at the trial or during the hearing of the appeal. There could be instances however when a point which has not been raised is material to the determination of the appeal. When a Court of Appeal feels inclined to raise such point, parties must be given an opportunity to make their comments thereupon before the court takes a decision on the point."

In the present case, not only were the parties not given an opportunity to address on the issue but, in fact, what was done in the end was not what the law would allow even if that opportunity had been offered. (p. 2121 D)

General damages - Negligence

5. The general damages in this case cannot stem from the mere fact of the very loss occasioned by the destruction of the house and store which by their nature readily lend themselves to quantification or assessment going by evidence of the cost of repairs or replacement as the case may be: see Shell-BP Petroleum Development Co. of Nigeria Ltd v His Highness Pere Cole (1978) 3 SC 183 at 192. The general damages being at large must depend on some collateral consequence of the negligent act of the present appellants. That would need to be founded on a head or heads of claim as usual with general damages. (p. 2122 C)

Appeals - General damages

6. The respondent did not plead at all in support of general damages. The chance of having reasonable damages was not created. However, if there had been an appeal by the respondent on the issue of his entitlement to general damages, even in spite of the failure to plead in enhancement of them, the possibility of his being entitled, at least, to nominal damages for trespass through negligence to his premises would have been examined as that trespass is actionable per se: see Eliochim (Nig) Ltd. v. Mbadiwe (1986) 1 NSCC 42 at 52. It is unfortunate that in the present

case, there is nothing upon which general damages of any sort can be based. The damage suffered by the respondent remains largely without remedy owing to procedural errors at every stage of the proceedings and the appeals. I have no alternative but to allow this appeal. (pp. 2123 D/B 2124 B)

Damages - Nominal damages

7. That might have been of some comfort to the respondent if the court then decided to be liberal with the so-called nominal damages. I do not mean to suggest that an occasion which warrants only nominal damages can legitimately be turned into a mere benevolent award disproportionate to the real purpose of nominal damages award. I suppose an award of nominal damages could be made liberal if not conceived that such damages are necessarily to be in small figures. As observed by Lord Halsbury L.C. in The Mediana (1900) AC 113 at 116; (1900-1903) All ER Rep. 126 at 129:

"Damages are not necessarily nominal because they are small in amount. The term 'nominal damages' is a technical one which negatives any real damage, and means nothing more than that a legal right has been infringed in respect of which a man is entitled to judgment. But the term 'nominal damages' does not mean small damages. The whole region of inquiry into damages is one of extreme difficulty, and you cannot lay down any fixed principle to a jury as to the amount of compensation which ought to be given." (p. 2123 F)

NOTABLE POINTS OF INTEREST

G UWAIFO JSC

1. How to properly plead and prove head of damages in order to avoid the rule against double compensation

Such heads of claim that may have been pleaded in this case could well be the Shock and agony suffered by the respondent, arising from the violent way the vehicle ran into his properties and the sight of them going into ruins. It could be the inconveniences occasioned by his having to be without shelter and the effort to find one somehow. It could even be, in

the circumstances of his native environment, the local odium of being regarded as someone without an abode. It is recognised that where tort has resulted in some interference with the plaintiff's person short of physical injury yet has caused him physical inconvenience, the latter must necessarily appear as a separate head of damages.: see McGregor on Damages, 13th edition, para. 59. Also, in trespass to property (as in the present case) there can be an award for injury to feelings: see Owen and Smith v Reo Motors (1934) 151 L.T. 274. But all these matters should be properly averred in the pleading, and evidence of a sort given in order not to fall foul of the rule against double compensation. As was observed by this court in Ezeani v. Ejidike (1964) 3 NSCC 306 at 307 per Brett JSC: "Where a plaintiff asking for damages begins by setting out specific items of damages and then adds a claim under the heading of general damages for a sum which will bring the total claimed to a round figure, his claim should always be carefully scrutinised both by the defendant and by the court in order to see whether he is in fact asking to receive compensation more than once for the same cause of action." If such general damages are seen to be claimable, it then becomes a question of a jury-type of assessment of damages which will be at large, having nothing directly to do with the items of special damages claimed for. In a proper case, this could possibly give a large measure of compensation provided what is taken into consideration in awarding such general damages is not too remote. (p. 2122 E)

ONU JSC

2. The place of sentiments in the adjudication process

In the instant case on appeal, it is apparent that the court below finding itself in difficulties to enhance the damages awardable to the respondent for what in its opinion was some loss, acted on compassionate grounds to award the N17,000.00, now the subject of appellants' justifiable complaint. Compassion, I must herein stress, like "sentiments commands no place in the judicial deliberations;" indeed it has "no place in the courts' adjudication process." (per Obaseki, JSC in Loius Oniah & Ors. v. Chief Obi J.I.G. Onyiah (1989) 1 NWLR (part 99) 514 at 537) and Adigwu v.

2116 Badmus v. Abegunde (1999) 7 KLR Uwaifo JSC

Ayinde (1993) 8 NWLR (part 313) 512 at 516. (p. 2129 C)

REPRESENTATION

C. Uwensuyi-Edosomwan Esq. for the appellants

R. A. Ogunwole Esq. for the respondents

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CASES REFERRED TO

Souji v. Isiocha (1989) 3 NWLR (pt. 111) 623 at p. 633 per Wail JSC

Sommer v. Federal Housing Authority (1993) 1 NWLR (pt. 219) 548 at p. 561 per Omo JSC.

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Ijebu-Ode Local Govt. v. Adedeji Balogun & Co (1991) 1 NWLR (pt. 166) 136 at p. 158

Eseigbe v. Agholor (1993) 9 NWLR (pt. 316) 128 at 145

Stroms Bruks Aktie Bolag v. Hutchison (1905) A. C. 515 at 525-526

D Obajinmi v. Attorney-General Western Nigeria (1967) 1 All NLR 31 at 34

Usikaro v. Itsekiri Land Trustees (1991) 2 NWLR (pt. 172) 150

Kuti v. Jibowu (1972) NMLR 18

Kuti v. Balogun (1978) 11 NSCC 21 at 25

E Ezeani v. Ejidike (1964) 3 NSCC 306 at 307

Loius Oniah & Ors. v. Chief Obi J.I.G. Onyiah (1989) 1 NWLR (part 99) 514 at 537)

Adigwu v. Ayinde (1993) 8 NWLR (part 313) 512 at 516

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BOOK REFERRED TO

McGregor on Damages, 13th edition para. 59

LEAD JUDGMENT BY UWAIFO JSC

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This is an appeal against a judgment of the Court of Appeal, Ibadan Division, given on 8 December, 1988. The judgment is being contested on a very narrow issue. The trial judge (J.D. Ogundere, J) sitting at the High Court, Ibadan, gave judgment on 9 March, 1983 for the plaintiff for a total amount of N20,000.00 as special damages arising from the negligence of the defendants in causing damage to his shop and main building, together with some items of property therein although the learned trial judge thought the evidence led by the plaintiff to support the

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special damages claimed by him was at variance with what was pleaded, or was unsatisfactory. Upon an appeal by the defendants, the Court of Appeal found there was evidence to support only N3,000.00 special damages out of the said N20,000.00. That court then went on to hold, per the judgment of Ogwuegbu JCA (concurrent in by Omololu-Thomas JCA, B but dissented from the Kutigi JCA), as follows:

"The awards of N12,000.00 for repairing the house and N5,000.00 as the value of the shop made by the learned trial judge were not strictly proved as special damages. I therefore set them aside. Since the plaintiff/respondent suffered damage which is quantifiable, I will therefore substitute the award of N17,000.00 as general damages." C

It was from that aspect of the judgment that the defendants further appealed to this court and have asked that the appeal be decided on one issue. The plaintiff relied on that same issue although he states it slightly differently from how the defendants have framed it. I shall combine what both parties have stated to put the issue thus: whether the Court of Appeal was right in awarding, by way of substitution, N17,000.00 as general damages for the value of the shop and cost of repairing the main building having disallowed it under the claim for special damages although the plaintiff did not cross-appeal nor file respondent's notice to affirm the judgment on other grounds. D E

The issue as so stated must make the appeal look quite straightforward, and indeed it is, placed against the background of the facts before the court which may now be given in a nutshell. The plaintiff (to whom I shall hereafter refer as the respondent) had his building and shop (as an annex) in Iroko Village near Ibadan along Ibadan-Oyo road. He carried on petty trading in beer, soft drinks, detergent etc in the shop. On or about 26 November, 1978, the 1st appellant, in the course of driving a commercial vehicle registered as No. LAD 3639 A on behalf of and owned by the 2nd appellant, swerved off the road and collided with the said building and shop, causing extensive damage. The learned trial judge found the 1st appellant to have been negligent on the doctrine of res ipsa loquitur in causing the damage in question. The respondent asked in his statement of claim for compensation of N77,020.00, being special and F G H

general damages, as follows:

Particulars of special damages

	1. Cost of the said building	N50,000.00
	2. Cost of the goods kept	
B	in the shop - 25 cartons of beer at N10.00	
	each 15 crates of soft drinks at N5.00 each,	
	soap, perfumes, surf, eggs etc	1,000.00
	3. Cost of 6 vono beds at N20.00 each	120.00
	Cost of plates and pots	200.00
C	Cost of clothes	<u>700.00</u>
		N52,020.00
	<u>General Damages</u>	<u>25,000.00</u>
		N77,020.00
D		=====

The learned trial judge found that damage was caused to the respondent's property, concluding that the entire shop and about one-third of the main house would have to be rebuilt. He appeared, however, not to have been satisfied with the evidence on the special damages claimed, although he expressed this, with due respect to him, in a language which was not altogether clear. After stating his view about the evidence which he was unable to accept to make an appropriate award, he then proceeded to make his own assessment of the damages he thought the respondent might be entitled to. I shall quote the relevant portion of his judgment as follows:

"As no precise evidence was led by either party on the principles of assessment of damages set out in the above passage [para. 1417 of Charlesworth on Negligence, 6th edition], it is the duty of the court to assess and award damages as best as it can. There is also uncontradicted evidence that cartons of beer, soft drinks and other merchandise were destroyed in the shop. As the old shop is a total wreck, no evidence could be led of what materials lay under it. Also evidence was led on furniture, soft and hard as well as clothing and kitchen and other utensils which were destroyed in the house. The evidence of the plaintiff on this varied, and the court also could only do its best to assess what is fair and just as

to the value of the property destroyed. In the circumstance, I hereby make the following award to the plaintiffs:

<i>Cost of repairing the house</i>	<i>N12,000.00</i>	
<i>Value of the shop destroyed</i>	<i>5,000.00</i>	
<i>Drinks and other merchandise</i>		
<i>destroyed in the shop</i>	<i>500.00</i>	B
<i>Beds, clothes, pots, chairs, plates, cooking utensils,</i>		
<i>tables and other household goods destroyed</i>	<i>2,500.00</i>	
<i>Total</i>	<i>N20,000.00</i>	
	<i>=====</i>	C

(Parenthesis added by me)

What the learned trial judge did was, of course, contrary to the principle of award of special damages. Special damages have to be strictly proved. If various items are claimed for, the plaintiff is entitled to be awarded any of those items of which sufficient evidence is available even if he is not able to prove all the items. But where a plaintiff sets out to adduced evidence in proof of the special damages claimed by him and the evidence, being deficient or unsatisfactory, is rejected by the court, that should put an end to that claim. The trial judge is not entitled to embark upon his own assessment of the special damages, using his conceived parameter in place of evidence. In Jaber v. Basma (1952) 14 WACA 140, Foster-Sutton, P., observed at p. 142:

"I feel bound to say that I regard the #250 (250 pounds sterling) awarded for loss of goods and personal effects as being unsatisfactory. As counsel for the appellant has submitted it is clear from the learned trial Judge's judgment that he substantially rejected the respondent's evidence regarding his losses. That being so, in my view remembering that special damages have to be strictly proved, the learned trial Judge was not justified in endeavouring to assess the amount of loss since he was obviously unable to indicate which of the articles he believed to have been lost." (Words in parenthesis added by me).

See also Souji v. Isiocha (1989) 3 NWLR (pt. 111) 623 at p. 633 per Wail JSC; Sommer v. Federal Housing Authority (1993) 1 NWLR

(pt. 219) 548 at p. 561 per Omo JSC.

The lower court realized that the learned trial judge made a wrong award of special damages in regard to the sum of N17,000.00 out of the N20,000.00. It set aside the award as it concerned the N17,000.00.

B That was certainly inevitable and was, in my view, a right approach. But it went on itself to commit a further error by turning that award into general damages. That was wrong, in my respectful opinion, in two respects which I consider should be fairly set out.

C First, there is a distinction between special damages and general damages. That distinction was drawn by this court in Ijebu-Ode Local Govt. v. Adedeji Balogun & Co (1991) 1 NWLR (pt. 166) 136 at p. 158; Eseigbe v. Agholor (1993) 9 NWLR (pt. 316) 128 at 145 and other cases. It is usually a question of pleading and proof,
D and the mode of assessment. One is specially pleaded and strictly proved because it is exceptional in its character such as the law will not infer from the nature of the act which gave rise to the claim. Hence the claim is known as special damages. The other is general
E damages which, when averred as having been suffered, the law will presume to be the direct natural or probable consequence of the act complained of, but the award is a jury question as the judge cannot point out any measure by which the damages are to be assessed,
F except the opinion and judgment of a reasonable man: see Stroms Bruks Aktie Bolag v. Hutchison (1905) A. C. 515 at 525-526. Both arms of damages must be averred, although the award is made in different ways. As Viscount Dunedin said: "If there be any special
G damage which is attributable to the wrongful act that special damage must be averred and proved, and, if proved, will be awarded. If the damage be general, then it must be averred that such damage has been suffered, but the quantification is a jury question": see The Susquehanna (1926) AC 655 at p. 661, the principle of which
H was approved by this Court in Nwobosi v. African Continental Bank Ltd. (1995) 6 NWLR (pt. 404) 658 at 680 per Onu JSC. So, in no circumstances can general damages be properly substituted for special damages which a plaintiff has failed to prove, or even if he has

led evidence on it, did not in fact make any claim for it: see West African Shipping Agency v. Kalla (1978) 3 SC 21 at 32; (1978) 11 NSCC 114 at 120 per Eso JSC.

The second reason why the lower court was wrong in substituting the award of N17,000.00 as general damages in place of the award of that amount made by the trial court as special damages is that the respondent did not cross-appeal against the trial court's award nor file a respondent's notice for its affirmation on other grounds. The appellant had appealed against the learned trial judge's award on the ground that the special damages claimed were not proved. That appeal was found to have merit. There was no issue before the lower court as to whether the respondent was entitled to general damages which the trial court did not award, let alone any issue of the propriety of substituting an award of general damages for special damages not proved. The appellant was not given a hearing on that before the lower court decided that issue suo motu. It is well established that a court has no power to make an order which has not been asked for and which the person against whom it is made had no opportunity of resisting: see Obajinmi v. Attorney-General Western Nigeria (1967) 1 All NLR 31 at 34. Such an order is wrong and will be annulled on appeal: see Usikaro v. Itsekiri Land Trustees (1991) 2 NWLR (pt. 172) 150. Before a court decides an issue which it took suo motu it must invite the parties to address it on that issue. That is an aspect of fair hearing: see Kuti v. Jibowu (1972) NMLR 18; and also Kuti v. Balogun (1978) 11 NSCC 21 at 25 where this court per Eso JSC observed:

"..... it is not open to a court of appeal to raise issues which the parties did not raise for themselves either at the trial or during the hearing of the appeal. There could be instances however when a point which has not been raised is material to the determination of the appeal. When a Court of Appeal feels inclined to raise such point, parties must be given an opportunity to make their comments thereupon before the court takes a decision on the point."

In the present case, not only were the parties not given an

opportunity to address on the issue but, in fact, what was done in the end was not what the law would allow even if that opportunity had been offered. If the parties had been invited to address on the point, or better still, if there had been an appeal against the trial court's failure to award general damages, perhaps it might have been possible to advert to the distinction between special and general damages. It could then have been necessary, if feasible, to look for other features of the case, apart from the very items of the special damages, upon which a jury might have considered that an award at large would have been appropriate and deserved.

The general damages in this case cannot stem from the mere fact of the very loss occasioned by the destruction of the house and store which by their nature readily lend themselves to quantification or assessment going by evidence of the cost of repairs or replacement as the case may be: see Shell-BP Petroleum Development Co. of Nigeria Ltd v His Highness Pere Cole (1978) 3 SC 183 at 192. The general damages being at large must depend on some collateral consequence of the negligent act of the present appellants. That would need to be founded on a head or heads of claim as usual with general damages. Such heads of claim that may have been pleaded in this case could well be the Shock and agony suffered by the respondent, arising from the violent way the vehicle ran into his properties and the sight of them going into ruins. It could be the inconveniences occasioned by his having to be without shelter and the effort to find one somehow. It could even be, in the circumstances of his native environment, the local odium of being regarded as someone without an abode.

It is recognised that where tort has resulted in some interference with the plaintiff's person short of physical injury yet has caused him physical inconvenience, the latter must necessarily appear as a separate head of damages.: see McGregor on Damages, 13th edition, para. 59. Also, in trespass to property (as in the present case) there can be an award for injury to feelings: see Owen and Smith v Reo Motors (1934) 151 L.T. 274. But all these matters should be properly averred in the

pleading, and evidence of a sort given in order not to fall foul of the rule against double compensation. As was observed by this court in Ezeani v. Ejidike (1964) 3 NSCC 306 at 307 per Brett JSC: "Where a plaintiff asking for damages begins by setting out specific items of damages and then adds a claim under the heading of general damages for a sum which will bring the total claimed to a round figure, his claim should always be carefully scrutinised both by the defendant and by the court in order to see whether he is in fact asking to receive compensation more than once for the same cause of action." If such general damages are seen to be claimable, it then becomes a question of a jury-type of assessment of damages which will be at large, having nothing directly to do with the items of special damages claimed for. In a proper case, this could possibly give a large measure of compensation provided what is taken into consideration in awarding such general damages is not too remote.

The respondent did not plead at all in support of general damages. The chance of having reasonable damages was not created. However, if there had been an appeal by the respondent on the issue of his entitlement to general damages, even in spite of the failure to plead in enhancement of them, the possibility of his being entitled, at least, to nominal damages for trespass through negligence to his premises would have been examined as that trespass is actionable per se; see Eliochim (Nig) Ltd. v. Mbadiwe (1986) 1 NSCC 42 at 52. That might have been of some comfort to the respondent if the court then decided to be liberal with the so-called nominal damages. I do not mean to suggest that an occasion which warrants only nominal damages can legitimately be turned into a mere benevolent award disproportionate to the real purpose of nominal damages award. I suppose an award of nominal damages could be made liberal if not conceived that such damages are necessarily to be in small figures. As observed by Lord Halsbury L.C. in The Mediana (1900) AC 113 at 116; (1900-1903) All ER Rep. 126 at 129: H

"Damages are not necessarily nominal because they are small in amount. The term 'nominal damages' is a technical one which negatives any real damage, and means nothing more than that a legal

right has been infringed in respect of which a man is entitled to judgment. But the term 'nominal damages' does not mean small damages. The whole region of inquiry into damages is one of extreme difficulty, and you cannot lay down any fixed principle to a jury as to the amount of compensation which ought to be given."

It is unfortunate that in the present case, there is nothing upon which general damages of any sort can be based. The damage suffered by the respondent remains largely without remedy owing to procedural errors at every stage of the proceedings and the appeals. I have no alternative but to allow this appeal. The judgment of the Court of Appeal delivered on 8 December, 1988 as it relates to the award of N17,000.00 as general damages is set aside. I make no order for costs.

BELGORE JSC

I agree with the judgment of my learned brother, Uwaifo, JSC., that this case was riddled with technical inadequacies throughout its journey to this Court. The principle of "when there is right there is remedy" does not even seem to avail the respondent in this matter. For the reasons fully set out by Uwaifo, JSC., I also allow this appeal but I shall not award any costs.

ONU JSC

I had before now read the draft judgment of my learned brother Uwaifo, JSC just delivered. I am in entire agreement therewith that the appeal be allowed and that in so far as it relates to the award of N17,000.00 as general damages be and is accordingly set aside.

Of the line issue proffered by each of learned counsel for the appellants and respondent respectively on which I wish to elaborate briefly, I prefer the respondent's for its brevity and conciseness. It states:

"Whether the Court of appeal was right in awarding N17,000.00 (Seventeen Thousand Naira) as general damages for the value of the

Respondent's shop and cost of repairing the main building having disallowed it under the claim for special damages."

Of the total sum of N20,000.00 awarded by the trial court under the particulars of special damage claimed by the respondent as set out in paragraph 6(i), (ii) and (iii) of the Statement of Claim, the appellants' acceptance of the trial court's award of N3,000.00 representing his (respondent's) loss for drinks and other merchandise destroyed in the shop sequel to the accident and also for beds, clothes, pots and other household goods and which the Court of Appeal upheld on appeal when it said:-

"As to these heads of award, the plaintiff and his witnesses gave evidence of the various items in the shop and in the house with their values....."

I will decline to disturb, the same having been accepted as being realistic namely that with the (N3,000.00) award they (appellants) have no quarrel. It is not the function of this Court as an appellate (indeed the ultimate) Court to disturb findings of fact such as these, moreso that they are concurrent and indeed emanate from a judgment that is reasonable having regard to the evidence adduced at the trial. See Sule Lengbe v. Rufai Imale & Anor. (1959) WRNLR 325 at 328.

The complaint of the appellants which, in my view, appears justifiable hinges on the following extract from the Court of Appeal's judgment, to wit:-

"The awards of N12,000.00 for repairing the house and N5,000.00 as the value of the shop made by the learned trial Judge were not strictly proved as special damages. I therefore set them aside. Since the plaintiff/respondent suffered damage which is quantifiable, I will therefore substitute the award of N17,000.00 as general damages. It is the direct and natural consequence of the act of the appellant. This is an attempt to meet the overall interest of justice. See Ziks Press Ltd. v. Alvan Ikoku 13 WACA 188 and Overseas Construction Ltd. v. Creek Enterprises Ltd. (1985) 3 NWLR (part 13) 407 at 521."

Before I proceed further to examine the appellants' complaint, it is pertinent for me to pause here and to note that the above observation was not

made without a crack in the ranks of the members of lower court's panel for, Kutigi, J.C.A. (as he then was) dissented therefrom when in his dissenting opinion he said, inter alia, as follows:-

"I agree that the plaintiff/respondent failed to prove strictly the awards of N12,000.00 and N5,000.00 being cost of repairing the house and value of the shop respectively. These were items of special damages which required strict proof. The learned trial Judge was wrong when he made the award thereof. But I am unable to agree with the fresh award of N17,000.00 general damages to the respondent" (Underlining is also mine for emphasis).

I think he (Kutigi, J.C.A. as he then was) was right because earlier on in the majority judgment of the Court of Appeal (Omololu-Thomas and Ogwuegbu, JJ.C.A.) set aside the award (of N17,000.00) as "not strictly proved as special damages" (Vide page 153 of the Record, lines 16-18) after having earlier found:

(i) that there was "No evidence as to the cost of repairs by anyone"

(ii) that there was no cross-appeal by the respondent (page 138, lines 28-30 of the Record) and

(iii) that "the learned trial Judge should not have proceeded to assess and award those heads of special damage" (page 153 lines 1-4 of the Record).

It is my firm view that the conclusion arrived at by the Court of Appeal above should have ended its duty as far as the appeal before it was concerned - its duty of adjudicating between the parties before it in accordance with the issues in contention, in accordance with the evidence on the record and with prayers and reliefs sought from it by the appellants and the respondent asking for anything, and above all in accordance with its duty of ensuring even-handed justice by seeking to give to each party his due. See Attorney-General of Oyo State v. Fairlakes Hotel Ltd. (1989) 5 NWLR (Part 121) 255; (1990) IBMLR 1 at 19 & 20 and Oro v. Falade (1995) 5 NWLR (part 396) 385. For the court below to have gone out of its way and outside the issues in the appeal to formulate a new issue thereon by stating erroneously "the plaintiff/respondent suffered damage

which is justifiable" and then proceeded on the same premise to "substitute the award of N17,000.00 as general damages" without any prompting by or at the instance of the parties therein, is to say the least, a serious error in law. See Atuyeye v. Ashamu (1987) 1 NWLR (part 49) 267; Oje v. Babalola (1991) 4 NWLR (part 185) 267 at 282 and Azuekonma v. Ike B (1993) 6 NWLR (part 301) 539 at 556. What the court below did, amounted to a wrong exercise of judicial discretion especially in an adversary system of civil adjudication such as ours. See Overseas Construction Ltd. v. Creek Enterprises (Nig.) Ltd. (1985) 12 SC. 158 at 164- C 165, 179-180 and 193-194.

In making the award of N17,000.00 suo motu and as it were, gratuitously and against the grain of justice, the Court of Appeal, in my view, was not only making a case for the respondent, but it was also denying fair hearing to the appellants. (See Ntukidem v. Oko (1986) D NWLR (part 45) 700 at 733). It was in addition, giving to the respondent what he never asked for without hearing the appellant who neither expected nor prepared for the new role (as an impartial arbiter) which the court took upon itself to play in the appeal. See Overseas Construction E (Nig.) Ltd. v. Creek Enterprises Ltd. (supra) at pages 193-194. Even if the court below had deemed it fit to base its decision on a new issue, it should have followed the time honoured judicial procedure of inviting the parties to address it on the propriety or otherwise of the court's consideration of the new issue. See Kuti v. Balogun (1978) 1 SC. 53 at 59. F

In the absence of affording the parties the opportunity of addressing it, by the court below itself claiming to have spotted the error without a complaint from either side and proceeding on its own without an appellants' appeal or the respondent's cross-appeal or entertaining the respondent's notice for variation or affirmation of the judgment on other G grounds, the decision arrived at cannot be allowed to stand. Indeed, in the absence of all these steps having been taken, the taking upon itself by the court below to make the said award of general damages was a mis- H trial amounting to a miscarriage and denial of justice to the appellants. See Ajayi v. Olu Fisher (1956) 1 FSC 90 and Dantumbu v. Adene (1987) 4 NWLR (part 65) 314. The act of the court below in this case is to be

likened to court granting a relief which was not asked for. See Ekpanya v. Akpan (1989) 2 NWLR 86 at 98; Obajinmi v. Attorney-General of Western Nigeria (1968) NWLR 96 and Awijo & ors. v. B. Olunlade (1975) NWLR 82. Besides, appellate jurisdiction is confined only to the issues raised in the grounds of appeal filed. It therefore exceeded its jurisdiction to have awarded the general damages not asked for. See Aseimo & ors. v. Amos & Ors. (1975) 2 SC. 57 at pages 61-62; Onibudo & Ors. v. Akibu (1982) 7 SC. 60 at page 62. See also Ekpenyong & Ors. v. Nyong & Ors. (1975) 2. SC. 71 where Ibekwe, JSC at pages 80-81 stated categorically that "it is trite law that the court is without the power to award to a claimant that which he did not claim. This principle of law has time and again, been stated and re-stated by this Court that it seems to me that there is no longer any need to cite authorities in support of it. We take the view that this proposition of the law is not only good law, but good sense. A court of law may award less, and not more than what the parties have claimed. A fortiori, the court should never award that which was never claimed or pleaded by either party. It should always be borne in mind that a court of law is not a charitable institution, its duty in civil cases, is to render unto every one according to his proven claim."

In Jaber v. Basma 14 WACA 140 at 142, a case in which the plaintiff/respondent claimed the sum of #933 5s 10d which he alleged was the value of his stock in trade, personal effects and money and lost as the outcome of the wrongful execution of a writ of possession which the defendant/appellant caused to be issued in connection with the premises occupied by the respondent; he also claimed general damages for the trespass.

It was held, allowing the appeal only as to the special damages (per Foster-Sutton, p.) as follows:-

"In my view the learned trial Judge was justified in taking a serious view of this case. The respondent's goods, as I have already pointed out, were removed, not only his stock in trade but also his personal effects, and put on the pavement in the public highway and he must have suffered grave inconvenience as a result. That being so I am of the opinion that the award of #100 general damages should stand."

See also Hon. Nze Herbert Osuji & Anor. v. Anthony Isiocha (1989) 3 NWLR (part 111) 623 at 636 wherein this Court held:-

"On the other hand the quantum of general damages need not be pleaded and proved; for it is the loss which flows naturally from the defendant's act and it is generally presumed by law. The manner, therefore, in which general damages is quantified is by relying on what would be the opinion and judgment of a reasonable person. See Odulaja v. Haddad (1973) 11 SC. 357 at 360; Incar (Nig.) Ltd. v. Benson Transport Ltd. (1975) 3 SC. 117; Omonuwa v. Wahabi (1976) 4 SC. 37; Lar v. Stirling Astaldi Ltd (1977) 11 - 12 SC. 53 at 62 and Odumosu's case (supra)." See also Sommer v. F.H.A. (1992) 1 NWLR (part 219) 548 at 561.

In the instant case on appeal, it is apparent that the court below finding itself in difficulties to enhance the damages awardable to the respondent for what in its opinion was some loss, acted on compassionate grounds to award the N17,000.00, now the subject of appellants' justifiable complaint. Compassion, I must herein stress, like "sentiments commands no place in the judicial deliberations;" indeed it has "no place in the courts' adjudication process." (per Obaseki, JSC in Loius Oniah & Ors. v. Chief Obi J.I.G. Onyiah (1989) 1 NWLR (part 99) 514 at 537) and Adigwu v. Ayinde (1993) 8 NWLR (part 313) 512 at 516. See once again the judgment of Kutigi, J.C.A. (as he then was) at pages 154 - 155 of the Record from which there can be no wriggling out. The stark reality was that the respondent did not ask for N17,000.00 as general damages in place of the special damages of that amount that was not strictly proved save the N3,000.00 he claimed for the loss of his destroyed property etc which he was rightly awarded. See Jaber v. Basma (supra); Messrs Dumez (Nig) Ltd. v. Patrick Nwaka Ogboli (1972) 1 All NLR (part 1) 241 and Oladehin v. Continental Textiles Mills Ltd. (1978) 1 LRN 60 at 64-65.

It is for the above reasons and those more elaborately set out in the leading judgment of my learned brother Uwaifo, JSC that I too allow this appeal and make the same consequential orders as set out therein.

KALGO JSC

I have read in advance the leading judgment of my learned brother Uwaifo JSC in this appeal and I agree with the reasoning and conclusions reached therein. It appears to me very clearly that the Court of Appeal, having set aside the award of N17,000.00 as special damages made by the trial court for lack of sufficient evidence, cannot in my view turn round and award the same amount as general damages by the way of substitution, in the absence of any appeal or cross-appeal thereon. That is the main issue of contention in this appeal and I decide it in favour of the appellant.

I therefore allow this appeal in part and set aside the majority decision of the Court of Appeal in respect of the award of N17,000.00 as general damages to the respondent. I also abide by the consequential orders made in the leading judgment including that of costs.

EJIWUNMI JSC

I have had the privilege of reading in draft the judgment delivered by my learned brother, Uwaifo, JSC. Being in agreement with the reasons he gives for allowing this appeal as it relates to the award of N17,000.00 as general damages to the respondent. It is hereby set aside. I award the appellants N10,000.00 as costs.

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