

SUPREME COURT OF NIGERIA
FRIDAY 12TH DECEMBER, 2003. SC. 8/1999
CORAM:- S. M. A. BELGORE, A. I. KATSINA-ALU,
S. O. UWAIFO, I. C. PATS-ACHOLONU, JJSC

1. C. & C. CONSTRUCTION CO. LTD
2. AUGUSTINE OFUMADE APPELLANTS
AND
SAMUEL TUNDE OKHAI RESPONDENT

EVIDENCE - Contradictions - Evidence of 2nd appellant is rife with contradictions - As the switch was hastily put off when the crushing damage was done (H1)

EVIDENCE - Averment - Onus of proof - Averment of equipment energizing itself was made by appellants - Hence they must prove that such situation could occur (H2)

PLEADINGS - Accident - Defence of - How Sustainable - Defence of inevitable accident is of no moment - Since appellants failed to specifically plead same - So as to leave no doubt (H3)

TORTS - Words & phrases - Inevitable incident - Meaning - The phrase postulates an occurrence which no one could have foreseen - Or satisfactorily explained (H4)

APPEALS - Evidence - Damages - Award - Unless issue of credibility of witnesses as to damages arise - Appellate court can assess and award damages (H5)

TORTS - Personal injury - Proof - Whether dependent on medical evidence - Prove of such injury is not dependent on any such evidence - As there is no method of medically assessing pain (H6)

TORTS - Personal injury - Damages - Quantum - Damages to be awarded must be based on sound judgment of the court - Taking into account the circumstances of the case (H7)

FACTS

Plaintiff's/respondent's case is that while he was in the employ of defendants/appellants, he sustained a personal injury due to negligent act of 2nd appellant. Respondent alleged that 2nd appellant had negligently failed to switch off a crane that crushed appellant's leg, which eventually led to its amputation. Appellant therefore instituted this action at the High Court of Federal Capital Territory, Abuja, claiming damages for injury he suffered. In their defence, appellants relied on the defence of "inevitable accident". Appellants alleged that what happened was that the crane "energized itself".

However, 2nd appellant had contradictorily testified that upon the occurrence of the accident, he had immediately switched off the power from the mains. At the end of trial, the learned trial Judge dismissed the claims of respondent as it held that the defence of "inevitable accident" availed appellants. Aggrieved, respondent appealed to Court of Appeal which court allowed the appeal and held inter alia that the defence of "inevitable accident" was not pleaded. Consequently, it gave judgment to respondent, awarding him a total sum of N700,000.00 in damages. Dissatisfied, appellants filed main appeal at Supreme Court, while respondent cross-appealed on the issue of quantum of damages.

ISSUES FOR DETERMINATION

MAIN APPEAL:

1. Whether the Court of Appeal was right in setting aside the findings of the trial Court which held that the appellants were not negligent as the defence of inevitable accident succeeded.

2. Whether the Court of Appeal was not in error in holding that inevitable accident was neither pleaded nor established by facts at the trial court.

3. Whether the Court of Appeal was right when it held that *res ipsa loquitur* applied in the circumstances of this case.

4. Whether the Court of Appeal was right to have awarded N700,000.00 as general damages in view of the facts and circumstances of this case.

CROSS APPEAL:

"Whether the learned Justices of the Court of Appeal were right to dismiss the claim for damages resulting from pain and suffering on the ground that evidence was not led in support of that head

of claim.”

HELD (Unanimously dismissing the appeal but allowing the cross-appeal per **PATS-ACHOLONU JSC**)

EVIDENCE - Contradictions

1. A proper examination of the evidence of the 2nd appellant portrays him as speaking in double or triple tongues characterized by his equivocation and quibbling testimony, to wit, “the machine energized itself, the machine cannot energize itself if the switch is off.” It must be observed that this piece of evidence is against the background of what the 2nd appellant did after the incident which was to immediately switch off the power. The testimony of the appellants is full of patently clear contradictions laced with hyperboles and exaggerations. It is manifestly evident that it was when the crushing damage was done that it occurred to the appellants that the switch was still on hence the haste to switch it off. (p. 2648 H)

Averment - Onus of proof

2. The averment of the equipment energizing itself was made by the appellants. It is therefore their onerous responsibility to prove that such a situation could occur or has occurred before and they had in the course of their work and experiences witnessed this sort of phenomenon. It is invidious and I dare say quizzical for the appellants to indulge in this type of reasoning and expect the court to take them seriously when they mired their argument by shifting the onus of proof of a particular assertion which they raised, to the respondent. That frame of mind appears to me as an affront to reason, intelligence and of course law. (p. 2649 E)

Accident - Defence of - How Sustainable

3. In one of the paragraphs of the appellants’ pleading (as defendants) they averred as follows:-

“The defendants aver that the events of 6th July, 1993, which culminated in the injury sustained by the plaintiff, were

purely an accident as no human diligence or ingenuity would reasonably have foreseen or prevented same."

A careful reading of this averment does not necessarily show that what happened was an inevitable accident - a situation if there was one which should have been specifically pleaded with clarity. It was not so pleaded as to leave no doubt. The expression inevitable accident is not the same thing as "An Act of God." (p. 2650 C)

C *Words & phrases - Inevitable incident - Meaning*

4. The inevitability of an act or incident postulates the occurrence or happening of a thing over which no one could have foreseen or satisfactorily explained the occurrence which in the circumstances is so inexplicable that no blame can be attributed to the act or omission of any one. Is that the situation here? I see it differently just as the respondent stated. The blame lies squarely at the feet of the appellants who apparently were not foresighted enough to reckon with the probable damage an unsecured crane could cause. (p. 2650 F)

E *Evidence - Damages - Award*

5. Also, in *Linus Onwuka v. Omogui supra*, which was based on the negligent driving of the defendants, the trial court dismissed the suit on the ground that there was failure to prove negligence and did not make any assessment. The Court of Appeal allowed the appeal but remitted the case to be tried on the issue of damages. On further appeal to the Supreme Court, *Nnaemeka Agu, JSC.*, in his concurring judgment held as follows:-

H The question whether the Court of Appeal itself had the power to have assessed and awarded the damages claimed ought also to have been answered in the affirmative. Section 16 of the Court of Appeal Act, 1976, as indeed Section 22 of the Supreme Court Act 1960, has given to the court full jurisdiction and powers over such matters as if it were a court of trial.

The correct approach ought to be that unless an issue of credibility of witnesses as to damages arises in the pro-

ceedings, the appellate court ought, on entering or affirming a judgment in favour of the plaintiff, to assess and award damages to which he is entitled.

I do not subscribe to the vaunted view that the court should or ought to have sent back the case for retrial. (pp. 2652 A/2653A)

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TORTS - Personal injury - Proof

6. In their judgments, the learned Justices of the Court of Appeal have commented as follows per, Coomassie, JCA.,

“I could have awarded damages for pain and suffering but for the fact that nowhere did the appellant produce the medical evidence to support his pleadings.”

C

I must confess that I am at a loss to understand what sort of medical evidence would demonstrably show proof of pain and suffering. Beyond seeing a sufferer wince by the contorted nature of his face in agony, I do not know the type of evidence being sought for. Any one who had his leg crushed by a machine and stayed many months in the hospital in great pain and suffering and had his crushed leg amputated has definitely suffered pain and suffering. Pain is an intangible agonizing traumatic experience deeply internalized in the sufferer. To the best of my knowledge there has not been devised, invented or developed a method of medically or scientifically assessing the pain of a sufferer in such a way that the device can be tendered in evidence. (p. 2653 E)

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TORTS - Personal injury - Damages - Quantum

7. Damages for pain and suffering can only be susceptible to approximated monetary evaluation by the court. The measure of such damages can only be determined by what an enlightened conscience of tribunal of justices can reasonably determine as the amount that would compensate for pain and suffering of the plaintiff. It should be based or premised on a sound judgment of the court taking into consideration the circumstances of the case and the dynamics of the social milieu prevailing at the time.

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It is my view that the sum of N50,000.00 described as “damages for negligence” in the judgment of the lower court

is based on no known head of claim. It is therefore disallowed. In response to the cross appeal I award N500,000.00 as general damages for the pain and suffering the respondent went through. (p. 2655 B)

^B NOTABLE POINTS OF INTEREST

UWAIFO JSC

1. The defence of inevitable accident was a sham

It is unreasonable to accept that a machine in the nature of a crane can simply energize itself and start moving. The defence of inevitable accident based on such a scenario must be seen not only to be a sham but also clearly dishonest. It is clear from the above that someone was negligent to have left the switch on while the crane was being serviced. It also seems that the motion gear was negligently put and left in a mobilizing position. Without those conditions there was no possibility that the crane would energize itself and go into motion. There can be no question of inevitable accident in the present case as a defence. (p. 2658 A)

^E *2. Once there is injury there is pain and suffering*

Once a plaintiff has successfully shown that he suffered personal injury as a result of a breach of duty owed him by the defendant, the claim for pain and suffering must be considered. No principle can be laid down upon which damages for pain and suffering can be awarded in terms of the quantum. There is, however, no doubt that pain and suffering is a recognised head of award that sounds in general damages. The court must consider what the compensation should be going by the evidence that gives an insight into the intensity of the pain and suffering. The award is usually generous although it should not be excessively high or grossly low. It must be such as reasonably tends to reflect the intensity of the pain and suffering. (p. 2660 C)

EDOZIE JSC

^H *3. Inevitable accident should be pleaded with particulars*

The better practice, however, is for the defendant who intends to rely on inevitable accident as a defence to plead such defence specifically and to give all necessary particulars relied on. He should plead

that the said accident or matters complained of arose from inevitable accident and notwithstanding the exercise of all reasonable care and skill on the part of the defendant, he was unable to avoid the same. This is followed by full particulars of the facts and matters relied on as constituting inevitable accident. (p. 2661 F)

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4. Trial court should assess damages even if a case fails

On the question of damages, the trial court failed to assess damages apparently because it did not find the appellant liable in negligence. But the practice in such a situation is for it to endeavour to assess the damages provisionally. In this connection, this court in the case of English Exporters (London) Ltd v. Ayande (1973) NSCC 123 at 126 per Coker, JSC, observed thus:-

“We notice that the learned trial Judge did not make any assessment of the damages payable. This court has pointed out numbers of times that a court of trial in dealing with case involving damages should endeavour to assess such damages payable even if that court is not in agreement with the plaintiffs’ claims and the extent of such claims. Such a step obviates the necessity of sending the case back for re-trial and the necessity for this is even more obvious where, as in this case, the Judge who tried the case does not any longer exercise jurisdiction in that court.” (p. 2662 B)

REPRESENTATION

Akin Adewale, Esq., for the Appellants

M. I. Igbokwe, Esq. for the Respondent/Cross-Appellant

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CASES REFERRED TO

Parry v. Cleaver (1970) AC 1

The Mediana (1900) AC 113

Warren v. King (1963) 3 All ER 521

Obot v. C.B.N. (1983) 8 NWLR (Pt.310) 140

Okupe v. Ifemembi (1974) NSCC 164

Sylvester Ifeanyi v. Sylvester Ike (1993) 7 SCNJ 50

Fair v. London & North Western Rail Co. (1869) 21 LT 326

British Transport Commission v. Gourley (1956) AC 185

Ibeanu v. Ogbeide (1998) 9-10 S.C.57, (1998) 9 SCNJ 77

Yakassani v. Messers Incar Motors (1975) 5 S.C. 107

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Mgt. Enterprises Ltd. v. Otusanya (1987) 2 NWLR 2 (Pt.55) 179

Strabag Constr. Nig Ltd v. Ogarekpe (1991) 1 NWLR (Pt.170) 733

English Exporters (London) Ltd v. Ayande (1973) NSCC 123

STATUTE REFERRED TO

^B Court of Appeal Act, Cap 75, L. F. N. 1990, s. 16

BOOK REFERRED TO

Black's Law Dictionary, 6th Edition, p. 766

^C

LEAD JUDGMENT BY PATS-ACHOLONU JSC

This is an appeal against the judgment of the Court of Appeal in respect of the claim by the respondent against the appellants for the injury he suffered as an employee in the course of his work and for which the trial court had refused or failed to find in the respondent's favour. For this, he appealed to the Court of Appeal which gave him judgment.

The synopsis of the case is that the respondent while on duty which involved the servicing of the respondents' crane sustained grievous injuries out of the 2nd appellants' failure as switch operator to use due care as the respondent alleged in his working unit in that the switch operator caused the crane being serviced to be connected to the electricity from which it derives its power of mobility and functionality. Arising out of the negligent act of the appellants the crane became agitated and caused a drum of the crane to roll over violently over the respondents' left foot and crushed that leg below the knee. For this he was under great pain and suffering for which he was hospitalized and this eventually led to the amputation of that leg. He issued a writ of summons claiming a considerable sum of money in the lower court. The appellants denied any liability insisting that what happened was an inevitable accident in that the crane energized itself. That court dismissed his claim whereupon he appealed to the Court of Appeal which found favour and merit in his appeal but appeared not to have considered he proved the claim in respect of pain and suffering even though it made an award for damages for negligence. The appellant appealed to this court and the respondent cross-appealed on the issue of damages.

The appellants in their appeal in this case are convinced that

the respondent is not entitled to any award at all. They formulated four issues in their main brief for determination which are hereby set out as follows :-

1. Whether the Court of Appeal was right in setting aside the findings of the trial Court which held that the appellants were not negligent as the defence of inevitable accident succeeded. B

2. Whether the Court of Appeal was not in error in holding that inevitable accident was neither pleaded nor facts established same at the trial court.

3. Whether the Court of Appeal was right when it held that *res ipsa loquitur* applied in the circumstances of this case. C

4. Whether the Court of Appeal was right to have awarded N700,000.00 as general damages in view of the facts and circumstances of this case.

The respondent who also filed a cross appeal, in relation to the quantum of damages awarded to him, framed just two issues. These are as follows: D

1. Whether the respondent established a case of negligence against the appellants.

2. Whether the award of N700.000.00 as general damages was justified. E

The respondent in his cross appellant's brief distilled only one issue (which to my mind is intended to elaborate and expatiate on the 2nd issue in his Respondent's brief) and it is thus:

"Whether the learned Justices of the Court of Appeal were right to dismiss the claim for damages resulting from pain and suffering on the ground that evidence was not led in support of that head of claim." F

The learned counsel for the appellants in his argument on issue 3 which I take first wondered how procedurally correct was the respondent's pleadings by which he sought to combine the allegation of negligence and the principle of *res ipsa loquitur* without the respondent pleading the two in the alternative. The appellants tried to make a heavy weather of the claim on the question of *res ipsa loquitur* and cited some cases which I regard as elementary along this line. These include *Sylvester Ifeanyi v. Sylvester Ike* (1993) 7 SCNJ 50 at 59; *Management Enterprises Ltd. v. Otusanya* (1987) 2 NWLR 2 (Pt.55) 179 at 191 and *Ibeanu v. Ogbeide* (1998) 9-10 S.C.57, G H

2648 C&C Constr. Co Ltd v. Okhai (2003) 12 KLR Pats-Acholonu JSC
(1998) 9 SCNJ 77 at P88.

It should be said straight away that the kernel of the respondent's case is built on negligence simpliciter and he in no way in his brief as well as in the evidence adduced, alluded even in the slightest manner that the accident was not the direct result of the
B explicable and therefore culpable of the 2nd respondent who should have switched off the crane from the switch board. To my mind it will be idle to harp or dwell at length on the question of *res ipsa loquitur* when that does not form the fulcrum or the crux of the respondent's
C case.

On Issues 1 and 2, the appellants' case is built on the premise that the crane energized itself even when it was no longer connected to the switch board and for this they relied on their averments in the pleadings that the crane energized itself. The impression being given
D is that what the crane did was beyond human comprehension and flies against all scientific or technological analysis and explanation. With the greatest respect, this argument being canvassed sounds otiose, barren and I would equally add effete. It is even against the evidence of DW1. Let me recapitulate what he said in his testimony
E in court:

“.....*When I heard the coil of a contactor energize, and drum roled (sic) and we all fell from our various positions, myself, Ibrahim, Akpan and Samuel, I stood up and ran quickly to switch off the main panel*”.

F Later below he testified thus:

“*As we were positioned, and no one was in control of the panel when it energized itself.... If the main switch is off it will never energize I was climbing out of the cabin to its top where Ibrahim was when I heard the Coil of the Contactor energizing itself.*”

G Now was there a continuous and therefore partial contact caused by bridging. The appellants who raised this point did not give evidence along the line. The 2nd appellant in his testimony said:

H “*I came to know of bridging wire only after the incident when I discovered we have avometer to detect bridging. I did not use avometer to detect bridging. The machine was working before the problem.*”

A proper examination of the evidence of the 2nd appellant portrays him as speaking in double or triple tongues char-

acterized by his equivocation and quibbling testimony, to wit, “the machine energized itself, the machine cannot energize itself if the switch is off.” It must be observed that this piece of evidence is against the background of what the 2nd appellant did after the incident which was to immediately switch off the power. The testimony of the appellants is full of patently clear contradictions laced with hyperboles and exaggerations. B

To my mind, when the testimony of a witness has reached or attained the height of insipid or impotent exaggerations, it should be disregarded as mere petulance and treated with ignominy. **It is manifestly evident that it was when the crushing damage was done that it occurred to the appellants that the switch was still on hence the haste to switch it off.** C

The appellants had equally stated that the respondent having averred that: D

“It was mechanically and scientifically impossible for the crane to energize itself.”

did not adduce any mechanical or scientific evidence to prove his averment.

With respect to this uncanny type of submission, it is mind boggling to expect the respondent to prove this. **The averment of the equipment energizing itself was made by the appellants. It is therefore their onerous responsibility to prove that such a situation could occur or has occurred before and they had in the course of their work and experiences witnessed this sort of phenomenon. It is invidious and I dare say quizzical for the appellants to indulge in this type of reasoning and expect the court to take them seriously when they mired their argument by shifting the onus of proof of a particular assertion which they raised, to the respondent. That frame of mind appears to me as an affront to reason, intelligence and of course law.** E F G

It is instructive at this juncture to refer to a portion of the judgment of the court below in respect of what the appellants as respondents in the court below have been harping on in regarding what happened as inevitable accident. Coomassic, JCA., said in the leading judgment: H

“It was contended by the learned counsel for the Appellant in the 2nd issue that parties are bound by their pleadings and conse-

quently a defence can only avail when properly raised in the pleadings. He further contended that throughout the length and breath of the joint Statement of Defence, there is no where the defence of “inevitable accident” was specifically pleaded or raised at all. Again he argued that no evidence was given as to the inevitability of the accident. I agree that the defence of inevitable accident was neither specifically pleaded nor proved. The facts and defence of the Respondents did not tally with any inevitable accident. The learned trial Chief Judge, with tremendous respect, was wrong when he made a finding of fact that “I hold this to be proper case for success of doctrine of inevitability of accident.”

In one of the paragraphs of the appellants’ pleading (as defendants) they averred as follows:-

“The defendants aver that the events of 6th July, 1993, which culminated to the injury sustained by the plaintiff were purely an accident as no human diligence or ingenuity would reasonably have foreseen or prevented same.”

A careful reading of this averment does not necessarily show that what happened was an inevitable accident - a situation if there was one which should have been specifically pleaded with clarity. It was not so pleaded as to leave no doubt. The expression inevitable accident is not the same thing as “An Act of God.”

The appellants have sought to explain that what happened was an inevitable accident. **The inevitability of an act or incident postulates the occurrence or happening of a thing over which no one could have foreseen or satisfactorily explained the occurrence which in the circumstances is so inexplicable that no blame can be attributable to the act or omission of any one. Is that the situation here?** The respondent in his brief argued against this nature of defence and referred to the meaning of “inevitable accident” at 766 of the 6th Edition of Black’s Law Dictionary and cited Lord Esher M.R. Albano (1983) P. 419. The respondent submitted that it has been shown conclusively that it was the negligent act of 2nd appellant who owed a duty of care to his fellow workers but who did not do what he should do that caused the havoc. No one should therefore rely on the hackneyed defence of inevitable accident. The appellants’ counsel had posited that in the circumstances

of what happened, all precautionary measures were taken. ***I see it differently just as the respondent stated. The blame lies squarely at the feet of the appellants who apparently were not foresighted enough to reckon with the probable damage an unsecured crane could cause.*** Issues 1, 2 and 3 have therefore fallen on their face. B

I now consider the 4th issue of the appellants' brief. The court below found the defendant liable and strove to consider the issue of damages, which ought generally to follow on the finding of liability. After the computation done by the lower court it awarded a total sum of N700,000.00 made up as follows :- C

Negligence N50,000.00

Loss of Earning Capacity N150,000.00

Future loss N500,000.00

The appellants submitted that as the court below did not make any assessment of the damages, the only course the appeal court should have taken was to remit the case for retrial. Attractive as this argument being canvassed may sound on the surface, it fails to take cognizance of the fact that by Section 16 of the Court of Appeal Act, Cap 75 Vol. V. of the Laws of the Federation of Nigeria, analogous to Section 22 of the Supreme Court Act, 1960, that court exercised the power which it undoubtedly has, and which obliges it or gives in the same power to do or exercise a function that would or should have primarily been exercised by the trial court. Advancing their arguments further, the appellants' counsel in his brief referred us to this court's judgments in Okedare v. Adebare (1994) 6 SCNJ 254 at 288-9 and Linus Onwuka v. Omogui (1992) 3 SCNJ 98 at 127, where he stated that this court has held in these cases that where an appeal is allowed because of the failure of the trial court to make findings on material issues and the determination of the material issues depends on the credibility of witnesses the proper order to make is an order for retrial. The Okedare v. Adebare. supra, case was a land dispute in which there was evidence that other people apart from the combatants had land there, but the trial court made no finding. That case cannot support the appellants' submissions. D E F G H

In this case, the evidence before the trial court was glaringly clear so much so that even the weird nature of the evidence of the appellants as defendants was, as so bizarre in its contents that it even

inferentially tended to support the case of the respondent. That case cannot apply.

Also, in Linus Onwuka v. Omogui supra, which was based on the negligent driving of the defendants, the trial court dismissed the suit on the ground that there was failure to prove negligence and did not make any assessment. The Court of Appeal allowed the appeal but remitted the case to be tried on the issue of damages. On further appeal to the Supreme Court, Nnaemeka Agu, JSC., in his concurring judgment held as follows:-

“The question whether the Court of Appeal itself had the power to have assessed and awarded the damages claimed ought also to have been answered in the affirmative. Section 16 of the Court of Appeal Act, 1976, as indeed Section 22 of the Supreme Court Act 1960, has given to the court full jurisdiction and powers over such matters as if it were a court of trial. See on this Edigbonyia v. Dumez Nig. Ltd. (1986) 3 NWLR 753 and Soleh Bonneh Nig. Ltd, v. Ayodele & Anor. (1989) 2 S.C. (Pt.1)108, (1989) 1 NWLR 549, P.559. As such is the position, there is now no need for this court or the Court of Appeal to look at an issue of damages as if it were a sacred cow reserved for the court of trial. The correct approach ought to be that unless an issue of credibility of witnesses as to damages arises in the proceedings, the appellate court ought, on entering or affirming a judgment in favour of the plaintiff, to assess and award damages to which he is entitled. This was in fact the attitude adopted by Court of Appeal in England, per Denning, U. in Ward v. James (1966) 1 QB 273, PP.301 - 303.”

In the case of Maersk line 2 An v. Addide Investment Ltd. & Anor. (2002) 4 S.C. (Pt.II) 157, (2002) 11 NWLR (pt. 778) 317 at 383, Ayoola, JSC., stated as follows in the leading judgment on the nagging issue of over reliance on technicality or being seemingly weighed down with such a consideration:

“The judicial process malfunctions and is discredited when it is bogged down by technicalities and is manipulated to go from technicality to technicality and thrive on technicalities That is why at all times the tendency towards technicality should be eschewed and the determination to do substantial justice should remain the preferred

option and the hallmark of our judicial system.”

I do not subscribe to the vaunted view that the court should or ought to have sent back the case for retrial. The purpose of trials in the court is essentially to establish the justice of a case based primarily on the weight and substantiality of the matter as soon as possible. I fail to see how a court imbued with all responsibility to administer justice should assume a toga of reactionary attitude in respect of a matter that was instituted in 1984 - i.e, 19 years ago and to seek refuge or solace in the situational premise that presented itself by wringing its hand in desperation and laconically send such a case for trial anew to the High Court. What if the “aggrieved person is to die before then during the 2nd journey of the case. I believe that such recourse would amount to justice being hoisted on its head and thereby causing a blight in the course of the development of progressive jurisprudence. The Court of Appeal did the right thing in the circumstance.

In its award of damages, the court below had given a sum of N50,000.00 which the respondent feels is paltry hence the cross appeal that it is too small having regard to the pain and suffering of the respondent. It is not in doubt that the respondent cross/appellant has laid great emphasis on the pain and suffering he endured and this was more or less a thread that runs through the whole gamut of his case. ***In their judgments, the learned Justices of the Court of Appeal have commented as follows per, Coomassie, JCA.,***

“I could have awarded damages for pain and suffering but for the fact that nowhere did the appellant produce the medical evidence to support his pleadings.”

I must confess that I am at a loss to understand what sort of medical evidence would demonstrably show proof of pain and suffering. Beyond seeing a sufferer wince by the contorted nature of his face in agony, I do know the type of evidence being sought for. Any one who had his leg crushed by a machine and stayed many months in the hospital in great pain and suffering and had his crushed leg amputated has definitely suffered pain and suffering. Pain is an intangible agonizing traumatic experience deeply internalized in the sufferer. To the best of my knowledge there has not been devised, invented or developed a method of medically or scientifically assessing

the pain of a sufferer in such a way that the device can be tendered in evidence. The word “Pains” along with the twin term of “suffering” is a malaise which could be debilitating in its ferociousness if the pain is excruciating as in someone whose leg is crushed and had to have the leg amputated, or it could be a mild pain which
 B the victim may bear with fortitude; but, the common characteristic is discomfort and sometimes misery leading to depression and anguish of the body and even of the mind leading even to a state of unhappiness and distress. The respondent is not happy that no award was
 C made for pains and suffering. There was evidence that is easily discernible of great pain and suffering. In their submission, the appellants stated “pain and suffering cannot just be proved by the ipse dixit of the witness of the cross appellant in this case but was to be proved through judicial evidence such as expert evidence of the
 D Medical Doctor who treated the patient”. I wonder how the Doctor would be able to give such evidence. Two people suffering the same kind of injury may exhibit different and divergent behavioral patterns in their response to the pains. How can a Doctor or anybody for that matter make assessment of pain scientifically?

E In the American case of *Warfield Natural Gas Co. v. Wright* 54 S.W. 2nd, it was held that where pain is claimed as an element of damages the impossibility of definitely measuring the damages by a money standard is no ground for denying pecuniary relief. In response to the argument of the appellants, the respondent cited the
 F case of *Strabag Construction (Nig.) Ltd, v. Ogarekpe* (1991) 1 NWLR (Pt. 170) 733. In that case, Uwaifo, JCA., (as he was then), referred to the observation of Sellers LJ, in *Wise v. Kaye* (1962) 1 All ER 257, and which states thus:

G *“It has always been accepted that physical injury and the personal experience of pain, and also of suffering, including worry and anxiety for the future and apprehension of an operation, or of nursing or deprivation of activity owing to disablement or embarrassment or limitation felt by reason of disfigurement, cannot in any true sense*
 H *be measured in money... Damages for such injuries, originally almost invariably assessed by juries, were said to be ‘at large’, and had to be assessed on a reasonable and fair basis between party and party. There can be no restitution for the loss of a limb or loss of faculty but the law requires adequate compensation to be assessed.”*

The respondent's counsel argued that the greater the injury the greater the pain and suffering. It should be assumed or inferred or deduced that damages under pain and suffering would be subsumed in the claim for general damages for the bodily injury suffered. It cannot be independently claimed. ***Damages for pain and suffering can only be susceptible to approximated monetary evaluation by the court. The measure of such damages can only be determined by what an enlightened conscience of tribunal of justices can reasonably determine as the amount that would compensate for pain and suffering of the plaintiff. It should be based or premised on a sound judgment of the court taking into consideration the circumstances of the case and the dynamics of the social melieu prevailing at the time.***

It is my view that the sum of N50,000.00 described as "damages for negligence" in the judgment of the lower court is based on no known head of claim. It is therefore disallowed. In response to the cross appeal I award N500,000.00 as general damages for the pain and suffering the respondent went through.

In the final result, the appeal succeeds in part as regards the N50,000.00 erroneously awarded as "damages for negligence." The cross appeal succeeds with the award of N500,000.00 as general damages for pain and suffering. The award the respondent is entitled to is as follows:-

1. Loss of earning capacity N150,000.00
 2. Future loss N500,000.00
 3. Damages for pain and suffering N500,000.00 Total
- N1,150,000.00

BELGORE JSC

I read in advance the judgment of my learned brother, Pats-Acholonu, JSC., which I dismissed in conference before its writing and I agree with his conclusions. I make the same consequential orders as to costs.

KATSINA-ALU JSC

I have had the advantage of reading in draft the judgment of my learned brother, Pats-Acholonu, JSC. I agree with his reasoning and conclusion. There is nothing I can usefully add.

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UWAIFO JSC

I had the opportunity to read in advance the judgment of my learned brother, Pats-Acholonu, JSC., and agree with it both in regard to the appeal and the cross-appeal. I do not need to go over the facts of the case as they have been stated in that judgment except as may be necessary for the brief contribution I intend to make.

The second appellant is (or was) at all material times an employee of the first appellant, a construction company. So was the respondent. Both the second appellant and the respondent are industrial electricians, the respondent being under the supervision of the second appellant in the employment of the first appellant (also hereinafter referred to as the company).

On 6th July, 1993, at the company's premises at Abuja, the respondent, the second appellant and four other co-employees of the company were servicing the company's crane. The sling wire of the lift was faulty and needed to be corrected. As the respondent was doing this, the second appellant, according to the respondent, pressed the starter button of the crane without warning. The crane was suddenly mobilized and the drum rolled over and crushed the left foot and ankle of the respondent. He fell down and fainted. He was taken from hospital to hospital: first, the Garki General Hospital; then the University of Benin Teaching Hospital; and finally the National Orthopaedic Hospital, Kano. His left leg was ultimately amputated below the knee.

He sued the company and the employee (2nd appellant) responsible for the injury he sustained and the condition he found himself. The defence to the claim was based on the fact that when the defendants were servicing the cranes,

“that to the utmost charging (sic) of all the employees of the 1st defendant thereat working on the said Alimark lift/tower crane including the plaintiff himself, the control switch and indeed the Alimark left/tower crane as a mechanic (sic) device energised itself setting the

motor in motion with the drum injuring the plaintiff's left foot and/or part of the leg below the knee."

This patently dishonest averment was accepted by the learned trial Chief Judge as well founded to exculpate the defendants. In a thoroughly discredited judgment in perversion of justice, he said inter alia: B

"I accept that energising which had been pleaded could not have been foreseen or be forestalled DW 1 the man on the spot only 2 meters (sic) away could not stop it because before he even got to the switch the damage had been done there was nothing he could stop. I do not find defendant (sic) negligent and in the circumstances of the case the doctrine of repipsa (sic) loquitor is applicable and enforceable and that I hold this to be a proper case for success of doctrine of inevitability of the accident." C

The claim of the plaintiff (now respondent) was dismissed. D

The Court of Appeal, Abuja Division, had no difficulty in setting aside the judgment on 19th January, 1998. But the said court below observed as follows in the leading judgment of Muntaka-Coomassie, JCA.,:

"It was also claimed and pleaded that due to the constant severe pains the appellant was forced to purchase pain relieving drugs. This (sic) pieces of evidence have been denied. I could have awarded damages for pain and suffering but for the fact that no where the appellant produced the medical evidence to support his pleadings. This is rather painful. Was it his fault? Or that of his counsel or was he telling lies? Be that as it may, I cannot award a kobo for that claim in the absence of medical evidence." E

The court therefore failed to award any damages for pain and suffering. What it did was to award damages as follows: G

- (a) Damages for negligence N50,000.00
- (b) Loss of earning capacity 150,000.00
- (c) Future loss 500,000.00

Total N700,000.00

The defendants appealed while the plaintiff cross-appealed to this court. The cross-appeal is on the failure of the court below to consider to award damages for pain and suffering upon evidence available other than medical evidence. The appeal itself complains essentially that what happened was inevitable accident which the Court H

of Appeal erroneously rejected and that the award of N700,000.00 was not justified by the facts and circumstances.

It is unreasonable to accept that a machine in the nature of a crane can simply energize itself and start moving. If that were to happen the danger it would constitute to life and property can hardly be imagined. It means it could have the automatic momentum to go into mobility and, without being guided, could run down people or run into their houses and do as much damage as possible. The defence of inevitable accident based on such a scenario must be seen not only to be a sham but also clearly dishonest. From the evidence of Augustine Ofunmade, defence witness 1, that defence collapsed easily. He and others, including the plaintiff, were servicing the crane in question. He said inter alia in evidence-in-chief:

"I climbed the cabin 1 was about climbing the step of the cabin when I heard the coil of a contractor energize and the drum rolled and we all fell down from various positions: myself, Akpan and Samuel. I stood up and ran quickly to switch off the main panel. Machine draws its power from electric panel and electric motor that drives the machine was getting its power from electrical contactor." (Emphasis mine)

When cross-examined, he said:

"Whenever the contactor is on the electric motor that roles the drum will work. The switch from NEPA was on. Bridging of wire happens in electric appliances and it happened after this incident. If the main switch is off it will never energize." (Emphasis mine)

It is clear from the above that someone was negligent to have left the switch on while the crane was being serviced. It also seems that the motion gear was negligently put and left in a mobilizing position. Without those conditions there was no possibility that the crane would energize itself and go into motion. There can be no question of inevitable accident in the present case as a defence.

The court below rightly overruled the trial court for accepting that defence, but itself went wrong in its view that medical evidence was needed to prove pain and suffering before an award of general damages could be made. As far as I am aware, there is no known means of medically assessing the intensity or otherwise of the pain a person is going through. When related to injury, medical evidence can only describe the nature of the injury but not the pain that goes

with it. The more severe the injury the more likely the severity of the pain. Such pain can merely be imagined by a person who has seen when and how the injury occurred or who sees the nature of the injury later and was told how it happened including the medical doctor who may have treated the victim and noticed the agony he expressed by words or action or through groaning; or to whom the nature of the injury is described and the circumstances which it occurred. For instance, a person who saw how any person's limb, e.g. leg, was crushed by a heavy object would literally feel, pathologically, some reflexes which tend to register in him that the victim has undergone severe pain. When told about it he will likely imagine the severity of the pain. But the real nature of the pain can best be experienced or described by the victim.

These matters can be considered at times in different extremes as they concern individuals, with a rather more or less consequence, depending on the victims affected. It is in this regard, I think, that sellers, LJ., observed in *Wise v. Kaye* (1962) 1 All ER 257 at 262 *inter alia*:

"There is, I think, no common denominator for pain which is a bodily hurt, such as toothache, which can be acute with some people and vary in degrees of intensity down to those who are immune from pain although subject to an injury which would inflict pain on others. In modern medicine, pain, it must be recognised, can be subject of control or modification by drugs. Pain of that sort can often be described in evidence as to its extent and duration, and its intensity can, perhaps, be assessed and compared." (Emphasis mine)

Such evidence that will best describe the extent and duration of pain will necessarily come from the victim. He will express in words and emotion the extent and intensity of the pain and for how long he has undergone it either continuously or from time to time at its most painful onset. As I said already, others might either sense it or imagine it depending in what circumstance they came to know about the injury causing the pain.

Again, pain may end while suffering may continue. A good example is when a person who initially went through pain as a result of injury may reach a point due perhaps to some development, such as stroke, in which he experiences numbness in the limb affected instead of pain. His suffering may continue despite the cessation of

pain. The suffering may be a result of the handicap the victim now goes through or the psychological or mental coming in the aftermath of the injury. I will here refer to the further observation of Sellers LJ.. in *Wise v. Kaje* (supra) at page 262:

“If suffering is to be regarded as distinct from a bodily hurt and is used to describe mental anguish and distress it is, in my view, generally regarded as much more difficult to assess, depending as it does so much on the nature, character and outlook of an individual.”

All these are matters that a court must bear in mind, from available evidence, in awarding general damages for pain and suffering. Once a plaintiff has successfully shown that he suffered personal injury as a result of a breach of duty owed him by the defendant, the claim for pain and suffering must be considered. No principle can be laid down upon which damages for pain and suffering can be awarded in terms of the quantum. There is, however, no doubt that pain and suffering is a recognised head of award that sounds in general damages. The court must consider what the compensation should be going by the evidence that gives an insight into the intensity of the pain and suffering. The award is usually generous although it should not be excessively high or grossly low. It must be such as reasonably tends to reflect the intensity of the pain and suffering: See *The Mediana* (1900) AC 113 at 116-117; *Warren v. King* (1963) 3 All ER 521 at 526; *United Bank for Africa Ltd. v. Achoru* (1990) 6 NWLR (pt.156) 254 at, 280-281, 288; *Strabag Construction (Nig.) Ltd. v. Ogarekpe* (1991) 1 NWLR (Pt.170) 733 at 753-755.

The court below failed to realise the implication of pain and suffering as an element in the award of general damages by wishing to found such award on medical evidence. It was in grave error. The court below was also in error by awarding N50,000.00 which it simply tagged “for negligence.” There is no such head of claim in the award of damages for injury. Negligence is a cause of action not a head of claim. I will, therefore, also disallow that award. On the award for pain and suffering, I agree that N500,000.00 is fairly reasonable and I too award it. In the end the award to the plaintiff shall be N1,150,000.00 as detailed out by my learned brother, Pats-Acholonu, JSC. The appeal and cross-appeal partially succeed. I make no order for costs.

EDOZIE JSC

I had a preview of the lead judgment just delivered by my learned brother, Pats-Acholonu, JSC. I agree with his reasoning and the conclusion arrived thereat. The facts of the case are not much in dispute and have been so well articulated in the lead judgment that it serves no useful purpose narrating them again. B

With respect to the controversy over pleading and proof of inevitable accident, the appellants had in one of the paragraphs of their joint statement of defence pleaded thus:-

“The defendants aver that to the utmost chargin (sic) of all employees of the 1st defendant thereat working on the said Alimark lift/owner crane including the plaintiff himself, the control-switch and indeed the Alimark lift/tower crane as a mechanic device energised itself setting the motor in motion with the drum injuring the plaintiff’s left foot and/or part of the leg below the knee” C
D

And in the penultimate paragraph of the said Statement of Defence, it was further alleged: -

“The defendants aver that the events of 6th July, 1993, which culminated to the injury sustained by the plaintiff were purely accident as no human diligence or ingenuity would reasonably have foreseen or prevented same” E

No doubt, the appellants by the above averments though inelegantly couched intended to raise and rely on the defence of inevitable accident. Strictly speaking, if a defendant denies negligence, he may give evidence of inevitable accident although he has not specifically pleaded it, per Devlin, J.f in *Southport Corporation v. Csso Petroleum Co. Ltd.* (1956) AC 218 at 231. The better practice, however, is for the defendant who intends to rely on inevitable accident as a defence to plead such defence specifically and to give all necessary particulars relied on. He should plead that the said accident or matters complained of arose from inevitable accident and notwithstanding the exercise of all reasonable care and skill on the part of the defendant, he was unable to avoid the same. This is followed by full particulars of the facts and matters relied on as constituting inevitable accident. See Bullen and Leak and Jacobs, *Precedents of Pleadings*, 13th Edition, page 1318. F
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Pleading inevitable accident is one thing but proof thereof is a different matter. The onus is on the party who raises that defence to

lead evidence to substantiate same. In this regard the evidence of the 2nd appellant (D.W.2) was most unsatisfactory. Indeed, his testimony demonstrably established that the accident was due to his own negligence in failing to switch off power supply to the crane before the respondent and other workers commenced work. The court below
B was justified in holding the appellants liable in negligence.

On the question of damages, the trial court failed to assess damages apparently because it did not find the appellant liable in negligence. But the practice in such a situation is for it to endeavour to assess the damages provisionally. In this connection, this court in
C the case of English Exporters (London) Ltd, v. Ayande (1973) NSCC 123 at 126 per Coker, JSC, observed thus:-

*“We notice that the learned trial Judge did not make any assessment of the damages payable. This court has pointed out numbers of time that a court of trial in dealing with case involving damages should endeavour to assess such damages payable even if that court is not in agreement with the plaintiffs’ claims and the extent of such claims. Such a step obviates the necessity of sending the case back for re-trial and the necessity for this is even more obvious where,
D as in this case, the Judge who tried the case does not any longer exercise jurisdiction in that court.”*
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See also Obot v. C.B.N. (1983) 8 NWLR (Pt.310) 140 at 162, Okupe v. Ifemembi (1974) NSCC 164 at pp. 178-180, Yakassani v. Messers Incar Motors (1975) 5 S.C. 107 at pp. 115-116.
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Where, however, the trial court made no assessment of damages, an appellate court can make the assessment itself if there exists on the record enough evidence on which assessment can be based: Overseas Construction Company (Nig.) Ltd, v. Creek Enterprises (Nig.)
G and Anor (1985) 3 NWLR (Pt.13) 407.

In discussing the principles that guide the court in the assessment of damages in personal injury cases, this court in the case of Samson Ediagbonya v. Dumex (1986) 6 S.C. 145 at pp 164 to 166, per Karibi-Whyte, JSC., commented thus:-

“It seems to have been established by judicial authority that in personal injury cases, two main factors have to be taken into consideration in assessing damages in cases of liability. These are (a) the financial loss resulting from injury (b) the personal injury, involving not only pain and suffering, but also the loss of the pleasures of life.
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See Salihu v. Tim Associated Minerals Ltd (1958) NRNL 99, Shaibu v. Maiduguri (1967) NMLR 56, Mauche v. Duria & Anor. (1930) NNML 62. The broad distinction between personal loss and financial loss runs through all the cases.

Perhaps one of the most difficult exercises in assessing damages is the quantification of the loss whether financial or personal. The court proceeds with the underlying assumption that damages are compensation for injury sustained and are not meant to be punitive - see *British Transport Commission v. Gourley* (1956) AC 185 at 208, *Parry v. Cleaver* (1970) AC 1 at p. 33. Again damages are meant to be full and adequate - see *Fair v. London & North Western Rail Co.* (1869) 21 LT 326.

It must be recognised and conceded that the fullness and the adequacy of damages awarded as compensation will in each case depend on proved solid facts of the case and a just and fair assessment of the effect of the injury complained of. Damages are assessed as a lump sum and once for all not only in respect of loss accrued before the trial but also in respect of prospective loss - see *British Transport Corporation v. Gourley*, supra. It is the duty of the court to award as perfect a sum as was within its power based on established facts; accuracy and certainty are often unattainable. Hence in *The Ceramic (Owners) v. The Textbook (Owners)* (1942). All CR 281, Goddard LJ., said,

"..... In an accident case, there is no yardstick by which the court can measure the amount to be awarded for pain and suffering or ensuing disability."

Although it has been regarded unsafe to quantify each head of injury separately, it would seem to have been accepted that each head of injury in respect of which damage has been assessed ought to be indicated....."

In the case in hand, the Court of Appeal, based on the materials before it, assessed damages as it was entitled to do, and made monetary awards to the respondent under various heads. It awarded the sum of (a) N50,000 as damages for negligence, (b) N 150,000 for loss of earning capacity and (c) N500,000.00 for future loss. The Court of Appeal declined to make any award on pain and suffering on the rather curious reason that there was no medical evidence in support of the averment in the pleadings in respect of the pain and

suffering the respondent went through as a result of the accident. In my view, there was overwhelming evidence from the testimony of the respondent to establish pain and suffering. A person whose leg is crushed by a heavy drum and was in consequence amputated below the knee is presumed to have been under severe pain and suffering.

B I am of the view that the court below was in grave error to have declined to make an award for pain and suffering. For the avoidance of doubt the respondent is awarded to a total sum of N1,150,000 (One Million, One Hundred and Fifty Thousand naira) only, with
C costs assessed at N 10,000.00 (Ten Thousand Naira Only).

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