

SUPREME COURT OF NIGERIA
5TH DECEMBER, 2008. SC. 309/2002
CORAM:- N. TOBI, S. A. AKINTAN, W. S. N. ONNOGHEN,
I. T. MUHAMMAD, J. O. OGBE, JJSC

R.O. IYERE APPELLANT
AND
BENDEL FEED AND FLOUR RESPONDENT
MILL LTD.

TORTS - Liability - Employment relationship - Status - An employee is not merely an agent but a joint tort-feasor - With his employer for purposes of liability (H1)

TORTS - Vicarious liability - Extent - An employer can not escape liability on ground that he did not authorize the injurious manner - In which his employee did an otherwise lawful work (H2)

NEGLIGENCE - Vicarious liability - Ingredients - It is necessary to prove that the servant has been guilty of a breach of duty - Towards the person injured - To make the master liable (H3)

TORTS - Vicarious liability - Limits of - Where the act of an employee is such that even if lawful - It would not have been within the scope of his employment - The employer is not bound - Unless he ratifies the act (H4)

PRACTICE & PROCEDURE - Parties - Joint tort-feasors - Where several persons are jointly liable - The plaintiff is at liberty to select and sue anyone for the full claim - Issue of contribution is their internal affairs (H5)

TORTS - Negligence - Proof - Ingredients - Plaintiff must prove some breach of duty owed to him by the defendant - And a resultant damage to him (H6)

DAMAGES - Quantum - Nonpecuniary loss - Principles of - It is assessed with a view to a fair and reasonable compensation - Depend-

ing on the nature of injury and circumstance of the plaintiff (H7)

FACTS

The plaintiff/appellant sued the defendant/respondent at the High Court of Edo State claiming damages for negligence. Appellant's case was that the duty operator, a fellow employee of the respondent, under whose supervision and direction the appellant worked, was negligent in starting the silo while the appellant's hand was in the operational part thereof, thereby causing grave injury to the hand, resulting in deformity.

Appellant sued the respondent on the basis of vicarious liability. He did not join the duty operator as a codefendant. After hearing, the learned trial judge found the suit "incompetent ab initio" by reason of the nonjoinder of the duty operator. Accordingly, he dismissed the case. Aggrieved, the appellant appealed to the Court of Appeal which dismissed the appeal. Appellant has brought this further appeal to the Supreme Court.

ISSUES FOR DETERMINATION

1. *"Whether failure to join the respondent's duty operator, one D. Agbator, as a defendant in the action against his master is fatal to the appellant's claim.*

2. *Whether the Court of Appeal was right to dismiss the appellant's claim founded on negligence.*

HELD (Unanimously allowing the appeal per **MUHAMMAD JSC**)
TORTS - Liability - Employment relationship

1. Could Mr. D. Agbator as an employee be "a principal tortfeasor" or an "agent" of the respondent as variously described in the judgments of the two courts below?

In the law of agency, the relationship which arises when a person called 'agent', acts on behalf of another called 'principal', whereby the latter undertakes to be answerable for the lawful acts the former does within the scope of his authority, *is* what amounts to agency. Liability falls on the principal where he gives his agent express authority to do a tortious act or that which results in a tort. He may also be liable for a tort committed by his agent while acting within the scope of his implied authority. But where the tort by the agent falls entirely outside the scope of his authority, the principal is not liable.

In case of a tortfeasor each of two or more joint tortfeasors is liable for the entire damage resulting from the tort.

The present appeal falls within the first category of joint tortfeasor, i.e. employer and employee. (P. 3850 B/H)

Vicarious liability - Extent

2. The common law principles which govern the relationship of an employer and his employee in respect of torts committed by the latter is well stated in the Halsbury's Laws of England; vol. 45(2) fourth edition, paragraph 817:

"Where an employer expressly authorises his employee to do a particular act which is in itself a tort or which necessarily results in a tort, the employer is liable to an action in tort at the suit of the person injured. His liability is equally clear where he ratifies a tort committed by his employee without his authority.

Where the act which the employee is expressly authorised to do is lawful, the employer does the act in such a manner as to occasion injury to a third person, the employer cannot escape liability on the ground that he did not actually authorise the particular manner in which the act was done, or even on the ground that the employee was acting on his own behalf and not on that of his employer."

(p. 3850 H)

Vicarious liability - Ingredients

3. For the employer (master) to be vicariously liable it is necessary to prove that his employee (servant) has been guilty of a breach of duty towards the person injured.

The averments set out above and the evidence of the appellant as shown earlier, established that Mr. D. Agbator, an employee of the respondent was the cause of the appellant's injuries, pains, shock, suffering, loss and damage.

In spite of the appellant's evidence and that of the medical doctor who testified in his favour, I was dismayed to have read from the judgment of the court below that the appellant was unable to establish his claim against the defendant company. There are situations where the facts speak for themselves (*Res ipsa loquitur*) and raise a *prima facie* presumption against the employer of a breach of duty on the part of his employee. I think the facts of this case, in the

absence of any eye witness (even where that is the case) are strong, cogent and convincing to establish a breach of duty of care.
(pp. 3851 F/3852 G)

Vicarious liability - Limits of

- B 4. The general disposition of the law is that an employer is liable for the wrongful acts of his employee authorised by him or for wrongful modes of doing authorised acts if the act is one which, if lawful, would have fallen within the scope of the employee's employment, as being
C reasonably necessary for the discharge of his duties or the preservation of the employer's interests or property, or otherwise incidental to the purposes of his employment, the employer must accept responsibility in as much as he has authorised the employee to do that particular class of act and is therefore precluded from denying the
D employee's authority to do the act complained of. If on the other hand, the act is one which, even if lawful, would not have fallen within the scope of the employee's employment, the employer is not bound unless the act is capable of being ratified and is in fact ratified by him. (p. 3853 C)

E

Parties - Joint tort-feasors

5. Although the doctrine of joint tortfeasors in law of negligence postulates, in appropriate cases, that the commission of the same tort or
F wrongful act by the servant binds his master, this does not by all means impute that both must fall, sink or rise together. The law is that where several persons are jointly liable the plaintiff is at liberty to select and sue anyone or any number of them as he can recover his claim in full from those he sued. The issue of contribution among
G such persons to meet the claim is their internal affair. I therefore find it difficult to agree with both the trial court and the court below that the non -joinder of Mr. D. Agbator is fatal to the appellant's claim. In general, the correct position of the law is that ordinarily, non-joinder of a party, except where there are statutory provisions to the contrary,
H cannot by itself, defeat an action such as the one on hand.
(p. 3857 C)

Negligence - Proof - Ingredients

6. I think I should start examining this issue by stating the basic prin-

ciple of the law of negligence. It is that there can be no action in negligence unless there is damage. Negligence is only actionable if actual damage is proved. The gist of the action is damage and there is even no right of action for nominal damages. Lord Reading, CJ. observed in *Munday v. London County Council* (supra) that

“Negligence alone does not give a cause of action; damage alone does not give a cause of action, the two must co-exist.” ^B

The burden of proof in an action for damages for negligence, certainly, rests primarily on the plaintiff, who, to maintain the action, must show that he was injured by the negligent act or omission for which the defendant is in law responsible. This involves ^C

- i. the proof of some duty owed by the defendant to the plaintiff
- ii. some breach of that duty and
- iii. an injury to the plaintiff between which and the breach of ^D duty a casual connection must be established.

It is my view, having considered the totality of the evidence placed before the trial court and the circumstances of the case as contained in the printed Record of Proceedings before this court, that the appellant proved his case before the trial court. ^E
(pp. 3859 B/E 3865 D)

DAMAGES - Quantum - Nonpecuniary loss

7. On the head of pecuniary loss, the principle of law which relates ^F to it is that of RESTITUTION IN INTEGRUM - so far as actual or prospective pecuniary loss is concerned the amount of compensation can be assessed with a degree of accuracy which will go towards putting the injured person in the same position as he would have been in had he not sustained the wrong. On the principle relating to ^G non-pecuniary loss, it is that of fair and reasonable compensation. Money, certainly, cannot renew a shattered human frame.

But these damages can only be fair and adequate compensation; no sum could be perfect compensation for a grave injury. Thus, everything must depend upon the nature of the injury and the ^H circumstances of the particular plaintiff. (p. 3868 A/G)

NOTABLE POINT OF INTEREST ***AKINTAN JSC***

1. No matter shall be defeated by reason of misjoinder or nonjoinder of parties

It may be mentioned that both the trial High Court and the Court below relied on the authority of the Court of Appeal decision in Ifeanyi Chukwu (Osondu) Co. Ltd. v. Soleh Boneh Nig. Ltd., (1993) 3 NWLR (Pt. 280) 246 as authority for the stand taken by the two courts in this case. But happily that case went on appeal to this court in Ifeanyi Chukwu (Osondu) Co. Ltd. v. Soleh Boneh Nig Ltd., (2000) 5 NWLR (Pt. 656) 322 and this court clearly over ruled the principle of law relied on by the Court of Appeal in the case. The position of the law on the matter as clearly stated by this court in that case is that no cause or matter shall be defeated by reason of misjoinder or non-joinder of parties. (p. 3877 B)

D REPRESENTATION

S. Larry Esq., with him, Chief C.O Ihensekhien, F.T. Otukuefor (Miss.) and Ehinon Okoh, for the appellant.
Chief A.B. Thomas for the respondent.

E CASES REFERRED TO

- Nwokedi v. Egbe (2000) 9 NWLR (pt. 930) 293 at pages 306-307
H-C
Royal Ade (Nig.) Ltd. v. NOCM Co. Plc. [2004] 8 N.W.L.R, (pt. 874) 206 at page 226 C-D, 227 E-F
F Ifeanyi Chukwu (Osondu) Co. Ltd. v. Soleh Boneh (Nig.) Ltd. (2000) 5 NWLR (pt. 656) 366 at 367
Odunsi v. Bamigbola (1995) 7 NWLR (Pt. 374) 641
Bajoden v. Iromwanimu (1995) 7 NWLR (Pt.410) 655
G Jones v. Manchester Corporation (1952) 2 QB 852 at page 870
De Bodreugam v. Arcedekere (1302) YO 30 Edw 1 (Rolls Series) 106
James v. Mid-Motors (Nig.) Co. Ltd. (1978) 11 - 12 SC 31 at page 68
H Management Enterprises Ltd. V. Jonathan Otusanya (1987) 4 S.C. 367 at 395; (1987) 2 NWLR (Pt, 55) 179
Onayemi v. Okunubui & Another (1965) All N.L.R. 362
Peenok Investment Ltd. v. Hotel Presidential (1982) 12 S.C. 1 at 21 - 27 & 30-40

Tropical Agriculture v. Armani (1994) 3 NWLR (Pt.332) 291 at page 315 G

Duruji v. Azie (1992) 7 NWLR (pt.256) 688 at 698 D - E.

Munday Ltd. v. L.C.C. (1916) 2 KB 331

Hambrook v. Stokes Bros (1925) 1 KB 141 at page 156

B

BOOK REFERRED TO

Halsbury's Laws of England; Vol. 45(2), Fourth Edition, Para 817

LEAD JUDGMENT BY MUHAMMAD JSC

C

The appellant herein, as plaintiff at the High Court of Edo State, holden at Ekpoma in Ekpoma judicial division, was employed by the defendant (respondent in this appeal) as SILO attendant at the defendants Feed and Flour Mill at Ewu. The plaintiff claimed that on the 7th of August, 1991, he was in the course of his said employment assigned by the Duty Operator in the absence of the production manager and the silo superintendent to discharge a truck of fish mill along with his colleagues. The plaintiff was aware of the problem. The Duty Operator was one D. Agbator who, as usual, assigned the plaintiff to clear the conveyor or running machine to check the constant stoppage of intake of materials by the running machine. Plaintiff said that he obeyed the switch operator. Plaintiff left the switch operator at the switch room and went down the Mill below to clear the blockage on the instructions of the operator (employee of the defendant). While the plaintiff was down stairs clearing the blockage with his right hand, the defendant's switch operator started running the machine without waiting for a feedback or clearance from the plaintiff and the running machine caught the plaintiff's right arm and damaged it. The plaintiff furnished particulars of the damage as follows:-

(a) The right upper limb or hand suffered a fracture of the radius and transverse fracture of the ulna

(b) A deep punctured wound at the dorsal aspect of the forearm

H

(c) Bruises at anterior limb and

(d) Deformity of the forearm.

As a result, plaintiff was operated upon on 8th August, 1991.

The plaintiff averred that the said injuries, loss and damages

were occasioned to him by reason of the negligence and or breach of duty on the part of the defendant, its servant, agents or employees. Plaintiff gave particulars of such negligence which caused him permanent deformity as he can no longer use his right hand to do any hard labour or carry a brief case or object. Plaintiff's appointment
B with the defendant was later terminated on the 14th of February, 1994. Plaintiff averred that the purported termination of his employment is illegal, wrongful, unreasonable, unconstitutional and of no legal consequence. The plaintiff claims against the defendant the sum
C of N5,000,000. 00 (Five Million Naira) being special and general damages.

The defendant, in its amended statement of defence denied every material allegations contained in the plaintiff's statement of claim save and except those facts which have been expressly and specifically
D admitted by it and put the plaintiff to the strictest proof of those facts denied.

The defendant went further to aver that it did not assign the plaintiff to clear the conveyor or the running machine since there was no fault whatsoever and that the plaintiff was never sent by the defendant or by any of its agents to clear the alleged blockage. The
E plaintiff's going down the stairs was not known to the operator of the mill and it was a sole decision taken by the plaintiff which was not authorized by the defendant and its agents. The defendant averred further that after the alleged industrial accident the plaintiff was im-
F mediately taken to Nazareth Hospital, Furgar on the same day, i.e. August 7th 1991. He was given intensive medical treatment on the account of the defendant and that by 23rd August, 1991, he was discharged from the Hospital after the operation. He was however
G advised to be coming to Nazareth Hospital at regular intervals. He was responding to treatment. However, to the dismay of the defendant and the management of Nazareth Hospital, the plaintiff abandoned the medical treatment and opted for native treatment as a result of which the Hospital was unable to write a final medical report
H on him. This made it impossible for the defendant's insurance company to pay any compensation. The defendant placed reliance on several documents. The defendant averred in relation to the termination of plaintiff's employment that it terminated his employment in accordance with plaintiff's contract of service. The defendant urged

the trial court to dismiss the suit as being vexatious and an abuse of process. The defendant contended that it was not liable to the plaintiff in the sum of N5,000,000.00 or any sum at all.

The suit proceeded to trial stage with both parties calling witnesses. After full hearing the learned trial judge found the suit “incompetent ab initio”. He dismissed the case. B

Dissatisfied with the trial court’s decision, the appellant appealed to the Court of Appeal Benin Division (court below). After having reviewed the proceedings at the trial court and submissions by respective counsel, the court below dismissed the appeal. C

Aggrieved further by the decision of the court below, the appellant filed his appeal to this court.

In this court, parties filed and exchanged their respective briefs of argument.

Learned counsel for the appellant formulated two issues viz: D

1. *“Whether failure to join the respondent’s duty operator, one D. Agbator, as a defendant in the action against his master is fatal to the appellant’s claim see grounds 1, 2.*

2. *Whether the Court of Appeal was right to dismiss the appellant’s claim founded on negligence see grounds 2.* E

Learned counsel for the respondent formulated one issue which reads as follows: -

“Whether the Court of Appeal was right in its decision that the appellant had failed to prove his claim against the respondent at the trial court.” F

In treating this appeal, I prefer the issues formulated by the appellant. In his submission on issue 1, learned counsel for the appellant argued that the appellant was an employee of the respondent. He testified to the effect that the respondent owed him a duty of care and in breach, its servant, one D. Agbator (appellant’s boss) on duty recklessly set the machine on after sending appellant underground to clear the blockage on the running conveyor and did so without waiting to get clearance from the appellant. Learned counsel submitted further that failure to join the respondent’s agent who caused the injuries to the appellant is not fatal to appellant’s claim for he is at liberty to pick and choose who, between the employer and its servants, he was to sue. He cited and relied on the case of Ifeanyi Chukwu (Osondu) Co. Ltd. v. Soleh Boneh (Nig.) Ltd. (2000) 5 G H

NWLR (pt. 656) 366 at 367.

Learned counsel for the respondent submitted that the appellant has urged this court to reverse the judgment of the lower court on the ground that “non-joinder” of A.D. Agbator is no longer necessary in the proof of negligence. This, he argued, is a wrong proposition. He buttressed his argument with two grounds [i] Judgment of court below was not based on “non-joinder” alone. The court below was properly invited and it rightly pronounced on all issues raised including the non-joinder of D.A. Agbator.

Learned counsel cited and relied on *Nwokedi v. Egbe* (2000) 9 NWLR (pt. 930) 293 at pages 306-307 H-C; *Royal Ade (Nig.) Ltd. v. NOCM Co. Plc.* [2004] 8 N.W.L.R, (pt. 874) 206 at page 226 C-D, 227 E-F [ii] that in the case of *Ifeanyi Chukwu (Osondu) Co. Ltd. v. Soleh Boneh (Nig.) Ltd.* (supra) cited by the appellant, it was stated clearly therein that in the absence of proof of negligence by the appellant against the respondent, no question of liability can arise. The fact that D. Agbator was not called as a witness by the appellant was fatal to his case.

In resolving this issue, I find it pertinent to revisit the facts giving rise to this appeal. There is no dispute that the appellant from his appointment up till the 14th of February, 1994 had been an employee of the respondent. The fact of the appointment was averred to by the appellant in paragraph 3 of his statement of claim. The respondent admitted that fact in paragraph one of its amended statement of Defence. It is trite law that facts admitted require no further proof. See: *Odunsi v. Bamigbola* (1995) 7 NWLR (Pt. 374) 641; *Bajoden v. Iromwanimu* (1995) 7 NWLR (Pt.410) 655.

Appellant was appointed as a SILO ATTENDANT with the respondent. As the trial court did not consider the merit of the case, there is no finding of that court on the issue of employment and or its termination. “ The court below, however, made the following findings:

“there is no doubt from the facts of this case as borne by the records that the respondent owed the appellant a duty of care on 7th August, 1991 when the appellant with some other workers of the respondent were discharging a truck load of fish mill for the respondent-”

Consequent upon the above averment, admission and subse-

quent findings by the court below, it is important to state that although much of modern employment law is contained in statutes and statutory instruments, the legal basis of employment (by whatever means) remains the contract of employment between the employer and the employee. The contract of employment is important in itself in that it may give rise to a common law action for its enforcement or for damages for its breach. I should add that an employee, except where a different meaning is given in the context of the employment, means an individual who has entered or where the employment has ceased, worked under a contract of employment. A contract of employment connotes a contract of service or apprenticeship, whether express or implied, and if it is express, whether it is oral or in writing. B C

The general requirement of the law where there exists a service relationship between employer and employee is that the former is under a duty to take reasonable care for the safety of the latter in all the circumstances of the case so as not to expose him to an unnecessary risk. See *Latimer v. AEC Ltd.* (1953) AC 643. The level of this duty is the same as that of the employer's common law duty of care in the law of negligence. D E

Thus, in relation to his averments in paragraphs 4 to 17 of the statement of claim, the appellant averred as follows:

"4. The plaintiff says that it was the duty of the Defendant to take all reasonable prevention either by itself or through his (sic) agents, servants or employees for the safety of the plaintiff while he was engaged upon his work as a Silo Attendant assigned to the mill and not to expose the plaintiff to risk of damage or injury, and to provide and maintain adequate and suitable plants and appliances to enable the plaintiff to carry out his work in safety. F G

5. The plaintiff says that on 7th August, 1991 he was in the course of his said employment assigned to the Duty Operator in the absence of the production manager and the silo superintendent, to discharge a truck of fish mill along with his colleagues,

6. The plaintiff says that during the process of discharge there was a frequent stoppage of intake of materials, H

7. The Plaintiff says that he came to report the stoppage of the running machine to the Duty Operator who confirmed that he was aware of the problem.

8. *The Plaintiff says that the duty operator was one D. Agbator and as usual he assigned me to clear the conveyor or running machine to check the constant stoppage or intake of materials by the running machine.*

B 9. *That plaintiff says he obeyed the Defendant's switch operator and left him at the switch room and went down the Mill below to clear the blockage on the instructions of the employee of the Defendant.*

C 10. *The plaintiff says that while he was down stairs clearing the blockage with his right hand and while still clearing the blockage the Defendant an operator at the switch room upstairs started running the machine without waiting for a feedback or clearance from him and the running machine caught the plaintiffs right arm and damaged it.*

D 11. *The plaintiff says that in consequence of the Defendant's operator's act of starting the machine while he was still in the process of clearing the blockage on Agbator's own instruction, he sustained injuries and has suffered pains, shock suffering, loss and damage.*

E 14. *The plaintiff says that the said injuries and loss and damage were occasioned to the plaintiff by reason of the negligence and/or breach of duty on the part of the Defendant its servants or agents or employee.*

F 15. *The plaintiff says that the Defendant company's negligence has "caused him permanent deformity as he can no longer use his right hand to do any hard labour or even to carry a heavy brief case or object.*

G 16. *The plaintiff says that the Defendant having rendered him useless for life purportedly terminated his appointment on 14th February, 1994. This letter shall be relied upon at the hearing.*

17. *The plaintiff says that the purported termination is illegal, wrongful, unreasonable,, unconstitutional and of no legal consequence."*

H Although most of the averments above were denied by the respondent and put the appellant to the strictest proof, the appellant testified and called one witness to establish his claim. The learned trial judge refused to give any probative value to the evidence placed before him. He determined the case on the premise that there was non-joinder of a necessary party, Mr. D. Agbator. The learned trial

judge stated, inter alia:

“In the instant case, the plaintiff (sic) (defendant) is a juristic person and not a biological person and it can only be liable in negligence when such officer is joined in the action and his liability established. D. Agbator is a necessary party to be joined in this suit as he is the principal tortfeasor. This the plaintiff has failed to do, The non-joinder of D. Agbator in these proceedings is fatal to the claim. In as much as this action is incompetent ab initio, I should not waste my time going into the merits of this case. The case is hereby dismissed accordingly with N500 00 costs to the defendant.”

The court below based its affirmation of the trial court’s judgment partly on this reason and on failure of the appellant to establish case of negligence against the respondent. On the issue of non-joinder of Mr. D. Agbator, there is a finding by the learned trial judge that Mr. D. Agbator, “*is the principal tortfeasor*” “a servant of the defendant company and a necessary party to be joined in the suit for the appellant to succeed. The court below affirmed so. It slated among other things, per Rowland, JCA; as follows:

“Thus, quite apart from the failure of the appellant to sufficiently prove his case against the respondent, the non joinder of D. Agbator as a defendant by the appellant to the proceedings at the court below is fatal to his claim. I therefore need say no more.”

Now, what was the position and assignment of Mr. D. Agbator with the respondent and in relation to the appellant? From the averments and evidence of the appellant, Mr. D Agbator was a duty operator/switch operator. He was a “boss” to the appellant. In his evidence in chief, the appellant stated:

“I was in my place of work. As we were discharging truck of fish meal (sic) to the silo and there was a blockage by the conveyor I now went to the operator one D. Agbator. He told me that he was aware of the fault and that I should go into the underground to clear the blockage. I went underground. As I was clearing the blockage, Agbator started the machine. He did not let me come to tell him that I had finished the clearing before he started the machine. As a result my hand twisted in the machine and I started to shout which attracted my colleagues who now came to meet me underground, My right hand was broken. I was rushed to the clinic in our company,”

While being cross-examined by learned counsel for the re-

spondent, the appellant stated:

"I resumed work with the company in April, 1992. I was working in the silo as silo attendant. I was a labourer who could be sent to work anywhere. On that day Agbator send (sic) me underground to clear the blockage." Agbator was the most senior that night and ... was my boss. I took orders from him."

So, irrespective of their different status, both the appellant and Mr. D. Agbator were employees of the respondent. **Could Mr. D, Agbator as an employee be "a principal tortfeasor" or an "agent" of the respondent as variously described in the judgments of the two courts below?**

In the law of agency, the relationship which arises when a person called 'agent' acts on behalf of another called 'principal', whereby the latter undertakes to be answerable for the lawful acts the former does within the scope of his authority, is what amounts to agency. Liability falls on the principal where he gives his agent express authority to do a tortious act or that which results in a tort. He may also be liable for a tort committed by his agent while acting within the scope of his implied authority. But where the tort by the agent falls entirely outside the scope of his authority, the principal is not liable.

In case of a tort-feasor each of two or more joint tortfeasors is liable for the entire damage resulting from the tort. See: *De Bodreugam v. Arcedekere* (1302) YO 30 Edw 1 (Rolls Series) 106. The following for instance, are joint tortfeasors:

1. Employer and employee where the employer is vicariously liable for the tort of the employee.
2. Principal and agent where the principal is liable for the tort of the agent.
3. Employer and independent contractor where the employer is liable for the tort of his independent contractor.
4. A person who instigates another to commit a tort and the person who then commits the tort.
5. Persons who take concerted action to a common end and in the course of executing that joint purpose commit a tort.

The present appeal falls within the first category of joint tortfeasor, i.e. employer and employee. The common law principles which govern the relationship of an employer and his

employee in respect of torts committed by the latter is well stated in the Halsbury's Laws of England; vol. 45(2) fourth edition, paragraph 817:

"Where an employer expressly authorises his employee to do a particular act which is in itself a tort or which necessarily results in a tort, the employer is liable to an action in tort at the suit of the person injured. His liability is equally clear where he ratifies a tort committed by his employee without his authority."

"Where the act which the employee is expressly authorised to do is lawful, the employer does the act in such a manner as to occasion injury to a third person, the employer cannot escape liability on the ground that he did not actually authorise the particular manner in which the act was done, or even on the ground that the employee was acting on his own behalf and not on that of his employer."

In 1952, Denning L. J: (as he then was), stated the law as follows: *"In all these cases it is of importance to remember that when a master employs a servant to do something for him, he is responsible for the servant's conduct as if it were his own, If the servant commits a tort in the course of his employment, then the master is a tortfeasor as well as the servant"*

See the case of Jones v. Manchester Corporation (1952) 2 QB 852 at page 870.

For the employer (master) to be vicariously liable it is necessary to prove that his employee (servant) has been guilty of a breach of duty towards the person injured. The appellant in the appeal on hand had averred as follows:- .

"4. The plaintiff says that it was the duty of the Defendant to take all reasonable prevention either by itself or through his (sic) agents, servants or employees for the safety of the plaintiff while he was engaged upon his work as a Silo Attendant assigned to the Mill and not to expose the plaintiff to risk of damage or injury, adequate and suitable plant and appliances to enable the plaintiff to carry out his work in safety."

5. The plaintiff says that on 7th August, 1991 he was in the course of his said employment assigned to the Duty Operator in the absence of the production manager and the silo superintendent, to

discharge a truck of fish mill along with his colleagues.

6. *The plaintiff says that during the process of discharge there was a frequent stoppage of intake of materials.*

7. *The Plaintiff says that he came to report the stoppage of the running machine to the Duty Operator who confirmed that he was aware of the problem.*

8. *The Plaintiff says that the duty operator was one D. Agbator and as usual he assigned me to clear the conveyor or running machine to check the constant stoppage or intake of materials by the running machine.*

9. *That plaintiff says he obeyed the Defendant's switch operator and left him at the switch room and went down the Mill below to clear the blockage on the instructions of the employee of the Defendant.*

10. *The plaintiff says that while he was down stairs clearing the blockage with his right hand and while still clearing the blockage the Defendant an operator at the switch room upstairs started running the machine without waiting for a feedback or clearance from him and the running machine caught the plaintiffs right arm and damaged it.*

11. *The plaintiff says that in consequence of the Defendant's operator's act of starting the machine while he was still in the process of clearing the blockage on Agbator's own instruction, he sustained injuries and has suffered pains, shock suffering, loss and damage.*

The court below, which evaluated the evidence found as follows:

'There is no doubt from the facts of this case as borne by the record that the respondent owed the appellant a duty of care on 11th August, 1991 when the appellant with some other workers of the respondent were discharging a truck load of Fish Mill for the respondent. It is the claim of the appellant that the respondent was negligent in its duty of care to him.'

The averments set out above and the evidence of the appellant as shown earlier, established that Mr. D. Agbator, an employee of the respondent was the cause of the appellant's injuries, pains, shock, suffering, loss and damage.

In spite of the appellant's evidence and that of the medical doctor who testified in his favour, I was dismayed to have

read from the judgment of the court below that the appellant was unable to establish his claim against the defendant company. There are situations where the facts speak for themselves (*Res ipsa loquitur*) and raise a *prima facie* presumption against the employer of a breach of duty on the part of his employee. I think the facts of this case, in the absence of any eye witness (even where that is the case) are strong, cogent and convincing to establish a breach of duty of care. (I shall come back to the issue in the course of this judgment).

On the principle of the law held by the trial court and affirmed by the court below that the non-joinder of Mr. D. Agbator to the proceedings was fatal to the claim. This was affirmed by the court below. ***The general disposition of the law is that an employer is liable for the wrongful acts of his employee authorised by him or for wrongful modes of doing authorised acts if the act is one which, if lawful, would have fallen within the scope of the employee's employment, as being reasonably necessary for the discharge of his duties or the preservation of the employer's interests or property, or otherwise incidental to the purposes of his employment. The employer must accept responsibility in as much as he has authorised the employee to do that particular class of act and is therefore precluded from denying the employee's authority to do the act complained of. If, on the other hand, the act is one which, even if lawful, would not have fallen within the scope of the employee's employment, the employer is not bound unless the act is capable of being ratified and is in fact ratified by him.*** This, in fact, is what this court said in *James v. Mid-Motors (Nig.) Co. Ltd.* (1978) 11 - 12 SC 31 at page 68:

"Where a company is said to have done an act, by the very fact of a company not being a human being, it can only do the act through its human agents or servants. Where the said agent or servant has committed an act, the company may rightly be said to have committed the act since in law pursuant to the principle of vicarious responsibility, the act of the agent or servant is the act of the company. The evidence by which the act is to be proved against the company will be the conduct of the agent or servant."

This dictum was cited and relied upon by the trial court. The

court below as well, cited and relied on the same case. In a complete summersault however, both the trial court and the court below relied heavily on a Court of Appeal decision in the case of *Ifeanyi Chukwu Osondu Co. v. Soleh Boneh (Nig.)* (1993) 3 N.W.L.R. (pt. 280) at page 246, to say that in an action for negligence, if the principal actor, the offending servant is not joined as a party to that his liability may be established the question of finding the master vicariously liable can never arise and that once a servant is not joined in the action, the action is incompetent ab initio. Judgment on the above case was delivered by the Benin Division of the Court of Appeal on Friday the 20th of November, 1992. On further appeal to this court, the court relied on different grounds and affirmed the Court of Appeal's decision. The judgment of this court is now reported in *Ifeanyichukwu (Osondu) Co. Ltd. v. Soleh Boneh (Nig.) Ltd.* (2000) 5 NWLR (Pt.656) 322. The unanimous decision of this court in that case is a complete reversal of the logical reasoning of how the Court of Appeal arrived at its decision. It is of interest to quote some portions of this court's decision:

Ogundare, J.S.C., who delivered the lead judgment stated among other things, as follows

"I now turn to Management Enterprises v. Otusanya (supra) where Oputa JSC is reported to have said:

'The liability of the 1st defendant is not direct but consequential and vicarious. It rests on the successful action against the 2nd defendant ... hold that the Ijebu-Ode High Court lacked the necessary competence to carry on this case against the 2nd defendant. If then the trial court could not validly deliver any judgment against the 2nd defendant, and since the liability or otherwise of the 1st defendant depended wholly on a verdict against the 2nd defendant then the Court of Appeal was wrong in its judgment against the 1st defendant/appellant.'

It is this passage that the two courts below relied on in holding that the plaintiff's failure to join the defendant's driver in the present proceeding was fatal to his case. With profound respect to their Lordships of the two courts below, I think they misconceived the true purport or meaning of the expressions - 'successful action', 'any judgment against the 2nd defendant', 'a verdict against the 2nd defendant' used by the learned Justice of the Supreme Court in the pas-

sage. From the welter of authorities on the point - statutory, judicial and academic - some of which I have cited in this judgment - it is a finding of liability against the servant that results in the master's liability. In other words, in an action against the master the plaintiff to succeed must produce sufficient evidence from which the court makes a finding of fact to the effect that the servant is liable to the tort complained of. That is, the plaintiff must establish the liability of the servant in order to succeed against the master in action. I believe that when Oputa JSC used those expressions in the passage in his judgment he meant findings of fact of liability against the servant (the purported 2nd defendant in the case) must be made before there could be a successful action against the master (the 1st defendant in the case). To suggest otherwise, would mean that this court, per Oputa JSC, was laying it down that in every case of vicarious liability, the servant must first be successfully sued before the action against the master or that both must be jointly sued and a verdict entered against the servant before the master could be held accountable for his servant's tort. Such would not only be absurd and lead to injustice but would also run against the grain of all authorities both Nigerian and foreign - on the point. A person who has suffered damage as a result of the tort of the servant of a master would not be able to recover simply because the servant is dead or has absconded and disappeared into thin air. Such a situation would undoubtedly encourage a master to keep his servant out of the reach of the injured person. I do not think this court meant to create such a state of injustice by its judgment in Management Enterprises v. Otusanya, or alter the existing state of the law. It is interesting to note that the trial court in that case found that the accident was not established.

The conclusion I reach is that Management Enterprises v. Otusanya is no authority for the finding of law made by the two courts below. And as that finding is inconsistent with the existing law, I find no hesitation in concluding that it is wrong." (underlining supplied for emphasis)

Iguh, J.S.C; observed as follows:

'The Court of Appeal in coming to its erroneous decision reasoned that the liability of the driver can only be established if he is made a party to the action and that where, as in the present case, the driver is not joined in the suit, no liability may be ascribed to him thus

rendering the action incompetent. Again, with profound respect, I cannot accept this proposition of law as well founded. It is plain to me that the question of the liability of the servant is purely an evidential issue which can easily be established by cogent and acceptable evidence before the court and it would make no difference whether or not the driver of the offending vehicle is joined in the suit. Indeed, to suggest otherwise would mean that in all motor accident cases, where an offending driver dies in the collision, no action in negligence based on vicarious liability of the owner of the vehicle may ever arise. This, with respect, is not and cannot be the state of the law.

So in *Benson v. Lawrence Otubor* (1975) N.S.C.C. 49 at 54, Elias CJN in a motor accident case before this court had cause to observe as follows:

'we think that the learned trial judge was right in his finding that negligence had been established against the driver and that the appellant was vicariously liable for the driver's tort committed against the respondent in the course of his employment.'

The significance of this observation lies in the fact that the offending driver in that case was not sued or joined as a party in that proceeding. None-the-less the liability if the appellant, in that case, the master of the driver, was accordingly upheld by this court. Reliance was also placed by the Court of Appeal on the decision of this court in *Management Enterprises Ltd. V. Jonathan Otusanya* (1987) 4 S.C. 367 at 395; (1987) 2 NWLR (Pt, 55) 179. I need only state that I entirely agree with the analysis and treatment of that case in the leading judgment of my learned brother, Ogundare, JSC and I do not propose to add anything thereto. There is one final point I desire to make in connection with the question under consideration. This concerns the issue of joint tortfeasors.

It is beyond dispute that an agent who commits a tort on behalf of or on the instruction of his principal is along with the said principal joint tortfeasors in law.

The same is true where a servant commits a tort in the course of his employment. He and his master are in law equally joint tortfeasors as the law, in appropriate cases, imputes the commission of the same tort or wrongful act to both of them jointly.

Where several persons are jointly liable, the plaintiff is at liberty to select and sue anyone or any number of them and he can recover

his claim in full from those he sued: the issue of contribution among such persons to meet the claim is their internal affair.”

Mohammed Bello, CJN; observed that:

“No cause or matter shall be defeated by reason of misjoinder or non - joinder of parties and the parties may in every cause or matter deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

In further analysis, I may go on to say that it can hardly stand to reason to suggest, say, in case of accident of a commercial vehicle that Notice the offending driver is not joined along with the owner, the action automatically becomes incompetent, improperly constituted and unmaintainable. ***Although the doctrine of joint tortfeasors in law of negligence postulates, in appropriate cases, that the commission of the same tort or wrongful act by the servant binds his master, this does not by all means impute that both must fall, sink or rise together. The law is that where several persons are jointly liable the plaintiff is at liberty to select and sue anyone or any number of them as he can recover his claim in full from those he sued. The issue of contribution among such persons to meet the claim is their internal affair.*** See: Ifeanyichukwu (Osondu) Ltd. v. Soleh Boneh Ltd. (supra). ***I therefore find it difficult to agree with both the trial court and the court below that the non -joinder of Mr. D. Agbator is fatal to the appellant’s claim. In general, the correct position of the law is that ordinarily, non-joinder of a party, except where there are statutory provisions to the contrary, cannot by itself, defeat an action such as the one on hand.*** See: Ifeanyichukwu (Osondu) Ltd. v. Soleh Boneh Ltd. (supra); Onayemi v. Okunubui & Another (1965) All N.L.R. 362, Peenok Investment Ltd. v. Hotel Presidential (1982) 12 S.C. 1 at 21 - 27 & 30-40.

Further, in a case involving tortfeasors, the plaintiff is at liberty to choose his victim; he may decide to sue either of the master and servant separately or both of them jointly. See: Salmond on the law of torts, page 443. Where he sues one of them separately and succeeds, this is not a bar to an action against the other who would, if sued, have been liable as a joint tortfeasor in respect of the same damage.

Appellant’s issue No. 1 succeeds.

Issue No. 2 is on the propriety of court below's dismissal of the appellant's claim for his inability to prove his claim against the respondent. This is the same issue formulated by the respondent.

Learned counsel for the appellant submitted that it is true that the respondent called four witnesses but their evidence did not rebut the appellant's claim as none of them saw the incident. This is against the holding of the court below that the respondent called four witnesses to rebut the claim of the appellant. Learned counsel added that the only evidence as to how the damage was caused by the negligent act of the respondent is that of the appellant himself. He argued further that the appellant testified in support of the pleadings and called a Medical Doctor who highlighted the extent of his injuries. Learned counsel challenged the respondent that he failed to call the Duty Manager to rebut the evidence of the appellant. The court below, he argued, was bound to act on the unchallenged evidence of the plaintiff. He cited and relied on the case of *Omoregbee v. V.D.P. Lawani* (1980) 314 S.C. 108 at 117. He urged this court to hold that the findings of the court below that the appellant had not proved negligence is perverse when synchronized with the evidence on record.

Learned counsel for the respondent submitted that from the totality of the evidence adduced by the appellant and his sole witness at the trial court, the appellant failed to prove a case of negligence against the respondent. He cited sections 135(i) and 136 of the Evidence Act. He further stated that in a case of negligence, the onus does not shift to the defendant until and unless the plaintiff has proved the negligence of the defendant. He cited the cases of *International Institute of Tropical Agriculture v. Armani* (1994) 3 NWLR (Pt.332) 291 at page 315 G; *Duruji v. Azie* (1992) 7 NWLR (pt.256) 688 at 698 D - E.

Learned counsel submitted that the Court of Appeal was invited by the respondent under section 16 of its Act to evaluate the entire evidence given at the trial court. He extends the same invitation to this court and arrived at same decision as that of the lower court. He supported his submission with the case of *Ogolo v. Ogolo* (2006) 5 NWLR (Pt.972) 163 at page 190 F - G. Learned counsel added that the lower court had rightly held that the respondent is not liable to the appellant's claim based on the pleadings and evidence adduced before the trial court. Learned counsel also raised an issue

on Exhibit 'D' which the appellant signed exonerating the respondent from any liability shortly after the accident that the appellant continued to work for the respondent with the same hand from 1991 till his employment was terminated in 1994. He argued that the appellant's sole evidence was challenged and rebutted by the respondent's entire oral and documentary evidence from the four witnesses who testified on behalf of the respondent company. B

I think I should start examining this issue by stating the basic principle of the law of negligence. It is that there can be no action in negligence unless there is damage. Negligence is only actionable if actual damage is proved. The gist of the action is damage and there is even no right of action for nominal damages. See: *Munday Ltd. v. L.C.C.* (1916) 2 KB 331, *Hambrook v. Stokes Bros* (1925) 1 KB 141 at page 156. ***Lord Reading, C.J. observed in Munday v. London County Council (supra) that*** D
"Negligence alone does not give a cause of action; damage alone does not give a cause of action, the two must co-exist."

This statement of law received approval of the judgment of Her Majesty's Privy Council - Per Viscount Simon, L. C. in *E. Suffolk Rivers Catchment Board v. Kent* (1941) AC. 76 at page 86. E

The burden of proof in an action for damages for negligence, certainly, rests primarily on the plaintiff who, to maintain the action, must show that he was injured by the negligent act or omission for which the defendant is in law responsible. This involves F

i. the proof of some duty owed by the defendant to the plaintiff

ii. some breach of that duty and G

iii. an injury to the plaintiff between which and the breach of duty a casual connection must be established. See: *Robinson v. Post Office* (1974) 2 NI ER 737; *Me Ghee v. National Coal Board* (1972) 3 All ER 1008; *Keay v. British Nuclear Fuels Plc* (1994) PIQR. 171. In the case of *Makwe v. Nwuko* (2001) 32 WRN at page 12 - 13 (2001) 14 N.W.L.R. (pt. 733) 356 at 374 - 375, (2001) 7 S.C.N.J. 87 at page 99, Iguh, J.S.C. summarized the ingredients necessary for the proof of negligence in the following words: H

"In the second place, the essential ingredients of actionable

negligence are:

(i) *The existence of a duty to take care owed to the complainant by the defendant.*

(ii) *Failure to attain that standard of care prescribed by the law;*

(iii) *Damage suffered by the complainant which must be connected with the breach of duty of care.*

Once those requirements are satisfied, the defendant in law will be held liable in negligence."

As a result of the failure of the trial court to give any probative value to the evidence laid before it, the respondent invited the court below to evaluate the evidence pursuant to section 16 of that court's Act. The court below did so and made the following findings:

"I have taken a hard look at the evidence adduced by the appellant before the trial court vis-a-vis the germane averments in his statement of claim and I am satisfied that the appellant was unable to establish his claim before the trial court. He was unable to establish a case of negligence against the defendant company. It is manifest from the pleadings that D. Agbator who is the alleged principal tortfeasor was never called as a witness by the appellant. He was not also joined as a defendant to the case. It seems to me that in a case of negligence the onus does not shift to the defendant. See: International Institute of Tropical Agriculture v. Armani (1994) 3 NWLR (pt.332) 296; Duruji v. Azie (1992) 7 NWLR (Pt.256) 688."

The appeal was accordingly dismissed by the court below.

Learned counsel for the respondent invited this court to re-evaluate the evidence placed before the trial court. Although this court does not ordinarily involve itself in re-evaluation of evidence taken by a trial court, it seldom finds it necessary to do so in order to ensure that no principle of law is flouted or subverted through adherence to technicalities or for failure to comply or apply known or established principles of the law and practice. Section 22 of the Supreme Court Act, empowers this court to assume all the powers, exercisable by the court below including power to evaluate evidence. I find it necessary to rely on this section to re-examine the depositions made by the parties before the trial court and as evaluated by the court below.

Starting from the first ingredient in proof of negligence i.e. existence of duty of care owed to the plaintiff by the defendant. This, the

lower court has already made a finding as follows:

“There is no doubt from the facts of this case as borne by the records that the respondent owed the appellant a duty of care on 7th August, 1991 when the appellant with some other workers of the respondent were discharging a truck load of Fish Mill for the respondent.”

B

By this finding, the court below could not be heard to say anything to the contrary as it cannot approbate and reprobate.

Ingredient (ii) is failure by the defendant to attain the standard of care prescribed by the law. Paragraphs 4 and 10 of the appellants statement of claim state as follows:

C

“4. The plaintiff says that it was the duty of the Defendant to take all reasonable prevention either by itself or through his (sic) agents, servants or employees for the safety of the plaintiff while he was engaged upon his work as a Silo Attendant assigned to the Mill and not to expose the plaintiff to risk of damage or injury, adequate and suitable plant and appliances to enable the plaintiff to carry out his work in safety,

10. The plaintiff says that while he was down stairs clearing the blockage with his right hand and while still clearing the blockage the Defendant’s operator at the switch room upstairs started running the machine without waiting for a feedback or clearance from him and the running machine caught the plaintiffs right arm and damaged it.

D

In his evidence in chief, the plaintiff testified as follows:

F

“I was employed by the defendant as a Silo Assistant. I know the defendant and co: they were my employer. On 7th August, 1991. I was in my place of work. As we were discharging a truck of fish meal to the silo and there was a blockage by the conveyor I now went to the operator one D. Agbator. He told me that he was aware of the fault and that I should go into the underground to clear the blockage. I went underground. As I was clearing the blockage, Agbator started the machine. He did not let me come to tell him that I had finished the clearing before he started the machine. As a result my hand twisted in the machine and I started to shout which attracted my colleagues who now came to meet me underground. My right hand was broken. I was rushed to the clinic in our company. This accident happened at about 10:45pm when the nurse came to see

G

H

(sic) they said that only two veins were holding my hand that I should be sent to Nazareth Hospital Fugar. I was then taken to that hospital. I was operated and in bed from 7th August, to 23rd August. I was discharged on 23rd August. A letter was written by the doctor to the company that I should not do any work until after six months."

B On cross-examination, the plaintiff stated:

"My hand injury happened on 7th August, 1991. I resumed work with the company in April, 1992. I was working in the Silo as Silo Attendant. I was a labourer who could be sent to work anywhere. On that day Agbator send me underground to clear the blockage. Agbator was the most senior that night and was my boss. I took orders from him. . When I resumed in April, 1992, I continued to work for the defendant. It was the operator that sent me to the underground to clear the blockage."

D The respondent called four witnesses: DW1 M.B. Bosede Odigie who was a Principal Nursing Officer with the defendant's Clinic; D.W.2 James Otokunrin who was the Assistant General Manager of the defendant's company. DW3 Benard Ekhaton who was defendant Company's Insurance Officer and DW4 - Dr. Alfered Esiemoghie of
E the Nazareth Hospital Fugar. I have carefully examined the testimonies of the defence witnesses and I failed to see where any of the witnesses contradicted what the plaintiff said in his evidence. The position of the law is that where evidence given by a party is unchallenged or uncontroverted, a court of law must accept it and act on it
F unless it is palpably incredible. See: International Bank of West Africa Ltd. v. Imano (Nig.) Ltd. and Anor (2001) 6 S.C.N.J. 470. Dr. Joseph Akhigbe v. Ifeanyi Chukwu Osundu Co. Ltd. & Anor (1999) 7 S.C.N.J. 1. Thus, as the respondent in this appeal has failed to attain
G the standard of care placed upon it by law vis-a-vis the appellant while performing his authorised job which led to the injuries he sustained, the respondent must be held liable for such injuries.

The third requirement is on damages suffered by the complainant. It is beyond "Dispute that the plaintiff/appellant suffered
H damages. He pleaded the damages in paragraph 11 of his statement of claim which reads as follows:

11. The plaintiff says that in consequence of the Defendant's operator's act of starting the machine while he was still in the process of clearing the blockage on Agbator's own instruction; he sustained

injuries and has suffered pains, shock suffering, loss and damage.

In his evidence in chief, the appellant stated inter alia:

"I went underground. As I was clearing the blockage Agbator started the machine. He did not let me come to tell him that I had finished the clearing before he started the machine. As a result my hand twisted in the machine and I started to shout which attracted my colleagues who now came to meet me underground. My right hand was broken. I was rushed to the clinic in our company."

P.W.1, who was the Doctor in charge of Uromi General Hospital, where appellant went after receiving treatment from the Nazareth Hospital, testified as follows:

"I did a medical examination found out he had Multiple Surtare Scare on the right forearm with fitiated forth finger and reduced measure power on the side of the distal aspect. An X-ray was done which revealed marked calous formanon on both the radius and colar bones at the mid point indicating previous fracture and bold healing also indicated on the radius bone was a large scale with fibror diamanice compression plate with four screws. On the ulna bone was a strick nail. Radius bone showed multi million healing. While the ulna bone showed no healing. He was then put on thermotrphy and physioteraphy on out patient basis. On 20th September, 1994, a repeat X-ray was done, which show nails and screws still in with marked soft tissue fibrosis and early sign of fracture and discise fracture dimoris. Deformity was 60%."

The defendant did not discredit the evidence. The court below was bound to act on it. See: *International Bank of West Africa Ltd. v. Imano (Nig.) Ltd. and Anor* (supra); *Sunmonu Ololunde & Anor v. Osundo Co. Ltd. & Anor* (supra). Furthermore, even the witnesses called by the defendant especially DW1 - a Principal Nursing Officer with the defendant's Clinic stated that she discovered that the appellant had a fracture on the right hand. She rushed him to Nazareth Hospital Furgar for further treatment. D.W.2 -Assistant General Manager Personnel and Administration of the respondent testified:

"It was reported that he had some injuries during work. The Company Clinic informed me that during the night a case of accident was reported and the person was sent for treatment at Nazareth Hospital Furgar. I approved money for his treatment in Hospital."

A medical report was tendered through DW2 and was admit-

ted in evidence as Exhibit 'A', Exhibit 'A' reads as follows:

"NAZARETH HOSPITAL College Road. P. O. Box 614, Auchi, Furgar, Bendel State

MEDICAL REPORT

Re: Mr. Iyere R.O.

B *The above named person was involved in an industrial accident on 7th August, 1991. His Rt. Upper limb was said to have been Caught in a running machine. He was brought to this Hospital on the same day. On admission, he was found to be conscious, well-oriented. His general condition was fair.*

C *In the Rt. Upper limb, there was a deep punctured wound at the dorsal aspect of the Forearm. There were superficial bruises at the anterior aspect. There was deformity of the Forearm, but no neuro-vascular involvement was evident.*

D *x-ray showed comminuted Fracture of the Radius and Transverse Fracture of the ulna.*

On 8th August, 1991, he was operated upon. Radius: comminuted piece was fixed with a lag screw and then the Fracture was reduced and held with a 5-hole Dynamic Compression Plate, with 4 screws,

E *Ulna; Fracture was reduced and was held by a street nail, Post operative recovery was uneventful, On 2nd August, 1991, he was discharged from Hospital.*

F *As advised, he was coming for follow-up regularly. On 26th November, 1991, x-ray on 25th April, 1992, showed union is quite advanced.*

He has been advised not to carry anything with his Rt. Hand. Light-duty certificate has been given. He has been asked to come for follow-up every four weeks.

G *The percentage of his disability which is Temporary is estimated to be 10%, Signed,*

Dr. M. H, Choudhury, Ag. Managing Director,"

H DW4 - was a doctor from Nasareth Hospital, He testified that from records Iyere (plaintiff) had a fractured hand which was treated. At the end of the treatment he was asked to go back for follow up. Appellant went for follow up four times. DW4 said appellant was 10% deformed and it was temporary. Although these pieces of evidence were called by the respondent/defendant, they turned out to

favour the appellant/plaintiff's case. It is trite law that the plaintiff is entitled in law to rely on defendant's evidence which supports plaintiff's case. See: Anyaeze Chukwueke & Anor v. Okorie Okoronkwo and Ors. (1999) 1 S.C.N.J. 441. It is my finding that the evidence was overwhelming which established the damages suffered by the appellant and which was effectively connected with the respondent's/ B defendant's breach of duty of care. The respondent must here also shoulder responsibility.

The appellant has in my view effectively proved his case. I think I should draw attention that except where a statute prescribes otherwise, it is not the number of witnesses a party calls that entitles it to C what it claims. It is quality of the evidence that is given by the witness or witnesses that matters. One witness may be enough to prove a case. See: Dr. Segun Oduneye v. The State (2000) 1 S.C.N.J. 7.

I also had a look at Exhibit 'D' which DW 2 said that the plaintiff signed it as a guarantee letter. Exhibit D1 does not absolve the defendants from liability in case of torts committed by the defendant as argued by learned counsel for the respondent. It can hardly be of any help to the defendant/respondent in this case. ***It is my view, having considered the totality of the evidence placed before E the trial court and the circumstances of the case as contained in the printed Record of Proceedings before this court, that the appellant proved his case before the trial court.*** Accordingly, the decisions of both the trial court and the court below are perverse. Having held that I will proceed to determine the issue of F damages claimed by the appellant.

The plaintiff/appellant has claimed as follows:

"WHEREOF the plaintiff claims against the Defendant the sum of N5,000,000. 00 (Five Million Naira) being special and General Damages for negligence,"

In Shell Petroleum Development Company (Nigeria) Ltd. v. Teibo & Ors. (1964) (pt, 445) 57 at p. 680, the word "damages" has been defined to mean:

"a sum of money awarded to a person Injured by the tort of H another"

Generally pecuniary compensation which the law awards to a person for the injury he has sustained by reason of the act or default of another whether that act or default is a breach of contract or tort.

Umuje & Anor v. Shell Petroleum Development Company of Nigeria (1975) 9-11 S.C. 155 at 162. Where the claim of a plaintiff before a trial court is premised on damages, this court has stated in several decisions, that it is the duty of that court to assess damages even if its decision goes against a plaintiff. Where the trial court fails to do, this court, and indeed any appellate court, by virtue of the general power conferred upon it by the enabling law which created it, is in a position to assess the damages. See: English Exporters (London) Ltd. v. Ayanda (1973) 3 SC 51; Okupe v. Ifemembi (1974) 3 SC 97; Yakassai v. Incar Motors (1975) 5 SC 107 at 115- 116; Dumbo v. Idugboe (1983) 1 S.C.N.L.R. 29, Soleh Boneh Overseas (Nig.) Ltd. v. Ayodele (1989) 1 N.W.L.R. (pt. 99) 549 at 559; Onwuka v. Omogai (1992) 3 N.W.L.R. (pt. 230) 393 at 417 and Obot v C.B.N. (1993) 8 N.W.L.R. (pt. 310) 140 at 162 B -D.

As the trial court did not consider the merit of the case, it did not make pronouncement on the plaintiff's claim of damages. The court below, too, failed to give any consideration to the plaintiff's issue of damages as that court dismissed the appeal and affirmed the trial court's decision. The learned counsel for the appellant made a submission that the findings of the court below that the appellant had not proved negligence is perverse when synchronized with the evidence on record. The lower court, he argued, failed to consider this issue of damages due to the aforestated erroneous findings and failed to consider some relevant cases such as Ediagbaya v. Dumez (Nig.) Ltd. (1986) 3 N.W.L.R. (pt. 31) 753; U.B.A. Ltd. v. Achoro (1990) 6 N.W.L.R, (pt. 156) 254. Learned counsel urged this court to uphold the appellant's claim for damages for pain and suffering in line with the decision in the case of C & C Construction Co. Ltd. v. Okha (2003) 18 N.W.L.R. (pt. 851) 79.

In his submissions on the issue of damages, learned counsel for the respondent argued that the lower court had rightly held that the respondent is not liable to the appellant's claim based on the pleadings and evidence adduced before the trial court, Learned counsel submitted further that since the claim of the appellant was for damages and the evidence of the respondent's D.W.3 was to the effect that the appellant discontinued his treatment at Nazareth Hospital, Fargar, and that no final medical report was issued and hence the Insurance Company did not pay the appellant his entitlements,

was not controverted or denied by the appellant. Appellant's action, he argued, was unmeritorious and unmaintainable.

The particulars given by the plaintiff/appellant under paragraph 18 of his statement of claim are as follows:

"Particulars of Claim

(a) Permanent loss of his right hand -	N1,000,000. 00	B
(b) Shock, pain and suffering -	N3,000,000. 00	
(c) General Damages -	<u>N1.000.000.00</u>	
Total	<u>N5.000.000.00"</u>	

By looking at the above sub-heads or particulars of damages C suffered by the appellant, I already made a finding that the appellant indeed suffered loss of his right hand which certainly renders him to become a disabled person which, I think, no amount of compensation will restore him back to normalcy. This is a personal injury case. There is in law no specific and fixed quantum of evidence that must D be adduced in support. It is evident from decided cases that evidence of physical disability arising from the damage is sufficient. See: UBA Ltd. v. Achoro (1990) 6 NWLR (Pt. 156) 254 at pages 282 - 283 H - A.

On the sub-head on shock, pain etc.; it is trite that a person E injured by another's wrong, such as in this case, is entitled to general damages for non-pecuniary loss such as pain and suffering and loss of amenity and enjoyment of life. See: Metropolitan Rly Co. v. Jackson (1877) 3 App. Cas. 193 HL. Further, in the assessment of dam- F ages, a distinction is always drawn between two main heads of damages. One classification distinguishes pecuniary loss from non-pecuniary loss. Another classification is between special damages and general damages. Special damages can be defined, according to Salmond, as those pecuniary losses actually suffered up to the date of the trial - G e.g. loss of earnings. General damages, on the other hand, are those other heads of loss - e.g. pain and suffering. (See: Salmond on Torts 16 ed; Sweet and Maxwell London, Chapter 23, page 575 particularly page 585 para 213). The requirement of the law is that where H the damage is based on special damages, it must be pleaded and proved. See: Domsalla v. Barr (1969) 1 W. L. R. 630; A. G Leventis (Nig.) Plc v. Akpu (2007) 17 NWLR (Pt.1063) 416; Nwobosi v. A. C. B. Ltd. (1995) 6 NWLR (Pt.404) 658.

General damage is implied. See: British Transport Commis-

sion v. Gourley (1956) A. C. 185 at page 206; UBN Ltd. v. Odusote Book stores Ltd. (1995) 9 NWLR (Pt.421) 558.

On the head of pecuniary loss, the principle of law which relates to it is that of RESTITUTION IN INTEGRUM. So far as actual or prospective pecuniary loss is concerned the amount of compensation can be assessed with a degree of accuracy which will go towards putting the injured person in the same position as he would have been in had he not sustained the wrong. On the principle relating to non-pecuniary loss, it is that of fair and reasonable compensation. Money, certainly, cannot renew a shattered human frame. However, monetary compensation can be awarded so that the court must do the best it can in the light of the circumstances of each case as the object of the award of damages is to compensate the plaintiff fairly and adequately but not necessarily punishing the defendant See; The Mediana (1900) AC. IB at 116; West and Son Ltd. v. Shephard (1956) 1 W. L. R. 51 and MCGregor, “Compensation verses Punishment in Damages Awards” (1965) 28 M. L. R. 629.

The facts of the appeal on hand and the heads of damages as set out earlier, can only fall within the second classification i.e. non - pecuniary’ loss (General damages). It is the law that general damages may be awarded for the pain and suffering and nervous shock which the plaintiff has undergone in the past and is likely to undergo in the future. See: Heaps v. Perrite Ltd. (1937) 2 AH E. R. 60. This may include a substantial sum for the mental agony due to the plaintiff’s appreciation of the fact that his life has been shortened. Oliver v. Ashman (1962) 2 Q.B. 210. Secondly, the court may award substantial damages for loss of amenity or loss of faculty. See: Andrew v. Freeborough (1967) 1 Q, B. I. **But these damages can only be fair and adequate compensation; no sum could be perfect compensation for a grave injury. Thus, everything must depend upon the nature of the injury and the circumstances of the particular plaintiff.** For instance, a young and active man who has been blinded or crippled might recover substantial damages under this head as the “joy of life,” will have gone from him. He cannot ride a bicycle, cannot kick a football.

Perhaps this was what made Field, J: in addressing the Jury on what to consider in respect of a plaintiff, in the case of Philips v. Lon-

don and South J Western Railway (1879) 4 QBD 406 affirmed (1895) 5 QBD 78 that:

‘There is another matter, which has been discussed a good deal, and it is one of consideration (sic: considerable) difficulty, viz: how far you are to take into account the plaintiffs position. In the case of a poor man, who lost his leg or arm, by which he earned his living you would probably in considering what sum you would give him take into account that he was deprived of the power of earning a livelihood. On the other hand, my Brother Ballantine asks you to take into account that the plaintiff and his wife are in receipt of an income of something like #3,500.00 a year, so that he will be above all want, and will be able to live comfortably and with all the reasonable enjoyment of life. I must confess for myself I have very great difficulty in seeing how you can say that because a person who is injured is very well off, therefore, a person who injures him is not to pay reasonable or proper compensation. The damages to which a man is entitled are the consequences of a wrongful act by which he suffers. The consequences of a wrongful act here are undoubtedly that Dr. Philips has been likely to earn if “this accident had not happened. That has been taken from him, and I am at a loss to see how the fact that he enjoys considerable income from other sources can alter the amount which you ought to give him.”

This direction to the jury was adopted and applied by Ademola, C.J.F. in the case of Anamali v. Ijirigho (1960) 1 N.S.C.C. 65 at page 67-68, or, as reported in (1960) 5 F.S.C. 97 at page 99 - 100.

Now, all I have been trying to say is that here is a man who was full of vigour and vitality. The respondent engaged him, put him in use on payment of appropriate wages at appropriate times. In course of carrying “an assignment given to him by his ‘boss’ he sustained the injury complained of. The respondent has an Insurance Scheme meant to assuage this kind of sufferings undergone by any of its staff. Yet, the defendant/ respondent denied him the benefit of that scheme simply because he opted for another clinic or form of medication. This, in my view, is not enough to deny him a reasonable compensation. The appellant, forever, has lost the use of his right hand. He is certainly deformed and disabled!! No compensation, in my view, will be too high for him. I do not enter into his heart, neither do I use telepathy, but I know he would prefer the restoration of his hand if

possible, than any other compensation.

I am therefore in favour of granting a fair compensation to the appellant to reduce the rigour of life for him and in order not to render him to be a street beggar. Nigeria has so many of street beggars. We must not facilitate in increasing their number. i. I allow this appeal and:

(a) I hereby set aside the decision of the court below which affirms the decision of the trial court,

ii. I enter judgment in favour of the plaintiff/appellant. The plaintiff/appellant is entitled to be compensated on the following damages:

(a) permanent loss of his right hand	- N1,000,000.00
(b) shock, pain and suffering	- N2.000.000.00
Total	<u>N3.000.000.00</u>

There is nothing to warrant the grant of special damages.

The plaintiff/appellant is also entitled to cost as follows:

a) at the trial court	- N10.000.00
b) at the court below	- N20.000.00
c) in this court	<u>N50.000.00</u>

Total	-	N80.000.00
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The appellant is entitled to a total sum of N3,080,000.00 payable by the respondent.

TOBI JSC.

The appellant, the plaintiff in the High Court, was employed by the respondent's mill at Ewu. The servant of the respondent sent the appellant underground to clear the blockings in the plant. The servant switched on the plant without notifying the appellant he sent to clear the fault. The appellant was injured in the process. Appellant's right hand was fractured and twisted. His permanent disability was assessed at 60%. He sued; claiming the sum of N5,000,000.00 for special and general damages.

The learned trial Judge dismissed the claim mainly on the ground that the appellant did not join the duty operator, an employee of the respondent, who was responsible for the injury. The Court of Appeal affirmed the decision. This is a further appeal to this court.

As usual, briefs were filed and duly exchanged. Appellant

formulated two issues for determination:

1. *Whether failure to join the respondent's duty operator, one D. Agbator, as a defendant in the action against his master is fatal to the appellant's claim.*

2. *Whether the Court of Appeal was right to dismiss the appellant's claim founded on negligence.*" B

The respondent formulated one issue for determination;

"Whether the Court of Appeal was right in its decision that the appellant had failed to prove his claim against the respondent at the trial court." C

Learned counsel for the appellant, Mrs. D. O. Okoh, submitted on Issue 1 that failure to join the agent of the respondent who caused the injury is not fatal to the claim as the appellant is at liberty to pick and choose when, between the employer and its servant, he is to sue. He cited Ifeanyi Chukwu (Osondu) Co Limited v. Soleh Boneh (Nig.) Limited (2000) 5 N.W.L.R. (pt. 656) 366 at 367. D

Counsel submitted on Issue 2 that the Court of Appeal was wrong in dismissing the appellant's case on negligence. He contended that the finding of the Court of Appeal that the evidence of the respondent rebutted the evidence of the appellant is not borne out from the Record. He examined the evidence and came to the conclusion that the only evidence of negligence before the court is that of the appellant and the Court of Appeal was bound to act on the unchallenged evidence. He cited Omoregbe v. Lawani (1980) 3-4 SC 108 at 117; Ediagboye v. Dumex (Nig.) Limited (1986) 3 NWLR (Pt. 31) 753; UBA Limited v. Acholo (1993) 8 NWLR (Pt. 316) 128; Salako v. Dosumu (1997) 8 NWLR (Pt. 517) 317 and C and C Construction Co. Ltd. v. Okha (2003) 18 NWLR (Pt. 851) 79. He urged the court to allow the appeal. E F G

Learned counsel for the respondent. Chief A.B. Thomas, submitted that the appellant failed to prove a case of negligence against the respondent, as the principal tortfeasor, Mr. Agbator, was not called by the appellant as a witness. He cited the case of International Institute of Tropical Agriculture v. Amrani (1994) 3 NWLR (Pt. 332) 296 at 315; Duruji v. Azie (1992) 7 NWLR (Pt. 256) 688; Benson v. Otubor (1975) 3 SC 9; Ogolo v. Ogolo (2006) 5 NWLR (Pt. 972) 163; Nwokedi v. Egbe (2005) 9 NWLR (Pt. 930) 293; Royal Ade (Nig.) Ltd. v. N.D.C.M. Co. Plc (2004) 8 NWLR (Pt. 874) 206; SBN Plc v. Opanubi H

(2004) 15 NWLR (Pt. 896) 437.

Counsel pointed out that the abandonment of the appellant the treatment at Nazareth Hospital, Fugar, made it impossible for that hospital to give a final medical report on the appellant, a report that should have enabled the respondent's insurers to pay compensation to the appellant. Citing the case of SCC (Nig.) Ltd. v. Elemadu (2005) 7 NWLR (Pt. 923) 28; Ikuomola v. Oniwaya (1990) 4 NWLR (Pt. 146) 617 and Ezeanya v. Okeke (1995) 4 NWLR (Pt. 388) 142, counsel submitted that the silence of the appellant on the issue amounted to an admission. Counsel urged the court to dismiss the appeal.

A plaintiff has the option in law to sue either the company or the servant of the company who committed the tort of negligence resulting in the injury to him. It is elementary law that a company is vicariously liable to the tort of the servant or employee. That justified the appellant suing the respondent. The Court of Appeal correctly made the point when it said at page 116 of the Record:

"There is no doubt from the facts of this case as borne out by the records that the Respondent owed the Appellant a duty of care on 7th August, 1991 when the Appellant with some other workers of the Respondent were discharging a truck load of fish mill for the Respondent. "

That is the correct position of the law and the Court of Appeal cannot be faulted. A plaintiff can also sue both the company and the servant who committed the tort. An action cannot be defeated in law merely because the plaintiff did not join the servant who committed the tort; as in this case, the duty operator.

Learned counsel for the appellant cited most relevant cases. I should take some of them here. In James v. Mid-Western Motors (Nig.) Limited (1978) 11 SC 31, this court said at page 68:

"Where a company is said to have done an act by the very fact of a company not being a human being, it can only do the act through its agents or servants where the said agents or servants had committed an act, since in law, the principle of vicarious responsibility for the act of the agent or servant is the act of the company the evidence by which the act is to be proved against the company will be the conduct of the agent or servant. "

In Ifeanyi Chukwu (Osondu) Co. Limited v. Soleh Boneh (Nig.)

Limited, supra, this court also said at page 366:

“The Court of Appeal in coming to its erroneous decision reasoned that the liability of the driver can only be established if he is made a party to the action and that where, as in the present case, the driver is not joined in the suit, no liability may be ascribed to him thus rendering the action incompetent. Again, with profound respect, I cannot accept this proposition of law as well founded. It is plain to me that the question of the liability of the servant is purely an evidential issue which can easily be established by cogent and acceptable evidence before the court and it would make no difference whether or not the driver of the offending vehicle is joined in the suit. Indeed, to suggest otherwise would mean that in all motor accident cases, where an offending driver dies in the collision, no action in negligence based on vicarious liability of the owner of the vehicle may ever arise. This, with respect, is not and cannot be the state of the law.”

In *Benson v. Otubor (1975) N.S.C.C. 49*, Elias, C.J.N. said at page 54:

“We think that the learned judge was right in his finding that negligence had been established against the driver and that the appellant was vicariously liable for the driver’s tort committed against the respondent.”

It is clear from the above decisions of this court that the Court of Appeal was in serious error in dismissing the appeal on the ground that the duty operator was not joined. That is not the law.

The second issue is whether the appellant proved negligence. The Court of Appeal found that the appellant testified and called one witness, while the respondent called four witnesses to rebut the evidence of the appellant. With respect, I do not agree with the court. A case is not necessarily proved by the quantity of witnesses. A case is proved by the quality of the witnesses in the light of either inculpatory or exculpatory evidence, as the case may be. And so, it does not necessarily follow that because the respondent called four witnesses, they rebutted the evidence of the two witnesses of the appellant. Learned counsel for the respondent raised a point which is not related to the issue before the court. It is the alleged abandonment of the treatment at Nazareth Hospital, Fugar. If he had raised the point to mitigate damages, one can somehow understand it. But he raised the point in relation to the Final Medical Report vis-a-vis the Insur-

ance Company of the Respondent. What has that got to do with the tort of negligence, I ask? I do not agree with learned counsel for the respondent that silence on the part of the appellant on the point amounted to admission. Admission of what, I ask again?

In my view, the appellant proved his case of negligence against the duty operator, and for which the respondent is vicariously liable. The appellant lost his right hand. In view of the fact that most human beings are right-handed, it is a bigger loss than the left hand. He claimed the sum of N5,000,000.00. I award him N1,000,000.00. I also award him N2,000,00.00 for shock, pain and suffering. I abide by the order as to costs in the judgment of my learned brother, I. T. Muhammad, J.S.C.

D

AKINTAN JSC

The appellant was the plaintiff in this case instituted at Ekpoma High Court in Edo State as Suit No. HEK/14/94 while the respondent was the defendant. The plaintiff's claim before the court was for N5.000.00 (Five million naira) being special and general damages in that the plaintiff, while working in the defendant's Feed and Flour Mill at Ewu, had his right upper hand caught in the defendant's running machine in circumstances entitling the plaintiff to call in aid the maxim of *res ipsa loquitur* in establishing the claim in negligence against the defendant.

Pleadings were filed and exchanged and the trial took place before Hayble, J. The plaintiff led evidence in support of his pleadings. His case was that he was employed by the defendant as Silo assistant in its factory at Ewu in Edo State. While on duty in the factory on 7th August, 1991, he along with his co-workers, were discharging a truck load of fish meal into the company's silo through a conveyor. There was a blockage on the conveyor and the operator, one Agbator, told the plaintiff to go into the underground to clear the blockage. He went down as directed and as he was clearing the blockage, Agbator the operator, started the machine without ensuring that the plaintiff had completed the clearing work and come out of the underground. As a result, the plaintiff's hand was twisted in the machine and he started to shout to attract the attention of his co-workers to his plight. He was eventually rescued. As a result of the inci-

dent, his right hand was twisted and broken. He was first rushed to the factory clinic for treatment and then moved to a hospital for further treatment.

The plaintiff said he was hospitalized at Nazareth Hospital, Fugar from the date of the incident on 7th August to 23rd August when he was discharged from that hospital. The hospital wrote to the defendant that the plaintiff should not be allowed to do any job for six months and that he should be coming for check-ups in the hospital every two weeks as his injuries were not fully healed when he was discharged. The defendant is said to have refused to pay for the cost of the check-ups in the hospital. The plaintiff therefore had to change to the General Hospital, Uromi where he continued to receive treatment.

The plaintiff said he could not use his right hand as a result of the accident. He also said that the defendant failed to give him any financial assistance. Rather than giving him any assistance, his appointment with the company was terminated with effect from 14th February, 1994,

Particulars of his claim in the trial court are:

(1) Damages for permanent loss of use of his right hand	N1,000,000
(2) Shock, pain and suffering	N3,000,000
(3) General damages	<u>N1,000,000</u>
Total amount claimed:	<u>N5,000,000</u>

The only witness called by the plaintiff was Dr. Enahoro Idegbe (PW 1). The witness told the trial court that he was the medical director in charge of Uromi General Hospital. He said further that he attended to the plaintiff in the hospital and gave the extent of deformity to the right hand of the plaintiff as 60 percent.

The respondent, as defendant did not deny that the incident occurred to the plaintiff. It also did not deny that the plaintiff suffered the injuries to his right hand. The case for the defence was that the plaintiff was not sent to clear any blockage on the conveyor as he alleged. It was, however, admitted that the plaintiff was employed to work as silo assistant. None of the four witnesses that testified for the company was an eye-witness to the incident. The evidence of the plaintiff as to how he sustained the injuries to his right hand was not

controverted. The allegation that it was one Agbator, the Silo Operator, that sent him to go and clear the blockage was not controverted. Similarly the said Agbator was 20 never called as a witness to come and deny the vital allegation and no reason for the failure to call the man was given. The learned trial Judge in his reserved judgment
 B delivered on 13th March, 1998, dismissed the plaintiff's claim in its entirety on the ground that the plaintiff failed to join Agbator as a party. The learned Judge said, *inter alia*, as follows in the concluding paragraph of his judgment:

C *"In the instant case, the defendant is a juristic person not a biological person and it can only be liable in negligence when such officer is joined in the case and his liability established. D. Agbator is a necessary party to be joined in this suit as he is the principal tortfeasor. This the plaintiff has failed to do. The nonjoinder of D. Agbator to this*
 D *proceedings is fatal to the claim. In as much as this action is incompetent ab-initio, I should not waste my time going into the merits of this case. The case is hereby dismissed accordingly with N500 costs to the defendant."*

The plaintiff was dissatisfied with the judgment and his appeal
 E to the Court of Appeal, Benin Division, was also dismissed. The same reason of failure to join D. Agbator who is said to be a principal actor, was given as the reason for the dismissal of the appeal. The present appeal is from the judgment of that court. The parties filed their respective briefs of argument in this court. The appellant formulated
 F the following two issues as arising for determination in the appeal;

- "1. Whether failure to join the respondent's duty operator, one D. Agbator, as a defendant in the action against his master is fatal to the appellant's claim.*
- G *2. Whether the Court of Appeal was right to dismiss the appellant's claim founded on negligence."*

The respondent, on the other hand, formulated only one issue as arising for determination in the appeal. It is as follows:

H *"Whether the Court of Appeal was right in its decision that the appellant had failed to prove his claim against the respondent at the trial court."*

It is not in doubt that the main questions to be resolved in the appeal are whether failure to join the silo operator, D. Agbator, as a defendant is fatal to the success of the plaintiff's claim; and whether

the plaintiff actually proved his claim. The main reason given for refusing the appellant's claim was his failure to join the silo operator, Agbator. The reason is totally untenable in that both the appellant and Agbator were employees of the respondent. The act of Agbator that led to the injury to the appellant was done in the course of performing his official duty for the respondent company. As there is no statutory provision making it mandatory that such person must be joined before an action could be competent, there is therefore totally no basis for such conclusion. B

It may be mentioned that both the trial High Court and the Court below relied on the authority of the Court of Appeal decision in *Ifeanyi Chukwu (Osondu) Co. Ltd. v. Soleh Boneh Nig. Ltd.*, (1993) 3 NWLR (Pt. 280) 246 as authority for the stand taken by the two courts in this case. But happily that case went on appeal to this court in *Ifeanyi Chukwu (Osondu) Co. Ltd. v. Soleh Boneh Nig Ltd.*, (2000) 5 NWLR (Pt. 656) 322 and this court clearly overruled the principle of law relied on by the Court of Appeal in the case. The position of the law on the matter as clearly stated by this court in that case is that no cause or matter shall be defeated by reason of misjoinder or non-joinder of parties. The failure of the plaintiff/appellant to join Agbator, the Silo Operator, in the instant case could therefore not be a ground for dismissing the case. If such a situation is allowed, then it would be difficult for most claims for damages for injuries suffered in cases of claim based on vicarious liabilities to be successfully prosecuted since all that the principals need to do would be to ensure that the servants involved are made unavailable for the purpose of being joined in a contemplated action. For the above reasons and the fuller reasons given in the lead judgment written by my learned brother I. T. Muhammad, J.S.C., the draft of which I have read and adopted, I also allow the appeal and make similar consequential orders as are made in the lead judgment, including those on damages awarded and on costs. C D E F G

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ONNOGHEN JSC

This is an appeal against the judgment of the Court of Appeal, holden at Benin City in Appeal No.CA/3/226/98 delivered on the 13th day of April, 2000 in which the appellant's claim in negligence

was dismissed on the ground that appellant failed to join the respondent's employee who caused the accident.

The appellant was employed as a silo attendant in the respondent's mill at Ewu Town. In breach of the duty to the appellant to provide competent work mates, safety equipment and plants, the appellant had his right hand fractured and twisted by a defective plant when a servant of the respondent sent him under-ground to clear the blockage while negligently switching on the faulty plant without notifying the appellant. The resultant permanent deformity of the appellant is assessed at 60%. The respondent later terminated the appointment of the appellant. The appellant subsequently sued the respondent claiming the sum of N5,000,000.00 (five million Naira) as special and general damages for negligence. The action was dismissed by the trial court resulting in an appeal to the Court of Appeal which was also dismissed. The instant appeal is against that judgment of the lower court.

In the appellant's brief of argument filed on 13th day of December, 2004 the learned counsel for the appellant, D. O. Okoh Esq. formulated two issues for the determination of the appeal. The issues are as follows:

"1. Whether failure to join the respondent's duty operator, one D. Agbator, as a defendant in the action against his master is fatal to the appellants' claim (see grounds 1,2)

2. Whether the Court of Appeal, was right to dismiss the appellants' claim founded on negligence see ground 3."

In arguing the first issue, learned counsel for the appellant submitted that the failure to join the respondent's agent who caused the injuries to the appellant is not fatal to his claim for he is at liberty to pick and choose who, between the employer and its servant, he is to sue, relying on *Ifeanyi Chukwu (Osondu) Co. Ltd. vs Soleh Boneh (Nig) Ltd. (2000) 5 NWLR (Pt. 656) 366*; that the appellant's evidence that it was D. Agbator, the respondent's agent who negligently set the respondents' faulty machine in motion when it was not safe to do so was not challenged by the respondent neither was the said Agbator called by the respondent to deny the facts. Learned counsel then urged the court to resolve the issue in favour of the appellant.

On his part, learned counsel for the respondent Chief A. B Thomas in the respondent's brief of argument filed on 13/10/06 sub-

mitted that the appellant failed to prove the case of negligence against the respondent; that the appellant failed to call D. Agbator, the principal tortfeasor to give evidence and urged the court to resolve the issue in favour of the respondent.

The lower court did find, rightly in my view, at page 116 of the record that the respondent owed the appellant a duty of care on 7th August, 1991 when the appellant with some other workers of the respondent were discharging a truck load of fish mill for the respondent. However, the lower court went further at page 118 of the record to hold that the appellant was unable to establish his claim before the trial court; because D. Agbator who was the principal tortfeasor was never called by the appellant as a witness neither was he joined as defendant in the action and consequently dismissed the case.

I hold the considered view that the lower court was in error when it held the above. To hold as the court did, that the non-joinder of D. Agbator as co-defendant in the action in which his employer, the respondent, has been sued, is fatal to the action of the appellant for negligence arising from the acts of the said D. Agbator, is to turn the principle of vicarious liability on its head as it still remains good law that the acts of an agent/servant of a company remains the acts of the said company for which the company remains liable in appropriate cases. - In the case of Ifeanyi Chukwu (Osondu) Co. Ltd. vs Soleh Boneh (Nig) Ltd. (2000) 5 NWLR (Pt. 656) 322 at 366 - 367 this court stated the position of the law in similar circumstance as follows:

“The Court of Appeal in coming to its erroneous decision reasoned that the liability of the driver can only be established if he is made a party to the action and that where, as in the present case, the driver is not joined in the suit no liability may be ascribed to him thus rendering the action incompetent. “Again with profound respect, I cannot accept this proposition of law as over founded. It is plain to me that the question of the liability of the servants purely an evidential issue which can easily be established by cogent and acceptable evidence before the court and it would make no difference whether or not the driver of the vehicle is joined in the suit. Indeed, to suggest otherwise would mean that in all motor accident cases, where an offending driver dies in the collision, no action in negligence based on vicarious liability of the owner of the vehicle may

ever arise. Where several persons are jointly liable, the plaintiff is at liberty to select and sue anyone or any member of them and he can recover his claim in full from those he sued. . .”

It is therefore clear that the holding by the lower court reproduced earlier in this judgment has no foundation in law, consequently
B the issue is resolved against the respondent.

It is for the above and the more detailed reasons contained in the lead judgment that I allow the appeal and award the same amount of damages and costs as contained in the lead judgment of my learned
C brother, Muhammad, J.S.C.

The judgments of the lower courts are hereby set aside and in their place there shall be judgment for the appellant as contained in the lead judgment.

Appeal allowed.

D _____

OGEBE JSC

I read in advance the lead judgment of my learned brother, Tanko Muhammad, J.S.C, just delivered and I agree entirely with his
E reasoning and conclusion. He has resolved thoroughly the issues raised in this appeal and I have nothing useful to add. Accordingly, I also allow the appeal and endorse all the consequential orders including the order of costs made in the lead judgment.

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