

SUPREME COURT OF NIGERIA
FRIDAY 12TH APRIL, 2013. SC. 11/2004
CORAM:- W. S. N. ONNOGHEN, J. A. FABIYI,
N. S. NGWUTA, O. ARIWOOLA,
M. D. MUHAMMAD, JJSC

MRS. ESTHER IGHREINIOVO APPELLANT
AND
1. S.C.C. NIGERIA LIMITED
2. SANMI MUMONI
3. LUCKY UKUSEMUYA RESPONDENTS

TORTS - Negligence - Proof - To succeed in such action - Plaintiff must show that defendant owes him duty of care - And that he has suffered damage - In consequence of the breach of the duty towards him (H1)

EVIDENCE - Unchallenged evidence - As respondents did not deny the facts giving rise to the accident - Evidence given for appellant is credible - And should be accepted and acted upon by the court (H2)

DAMAGES - Award - Purpose - The intention is to compensate plaintiff for financial loss and suffering caused by injury - And a Judge should consider the purchasing power of naira - At the time of judgment (H3)

DAMAGES - Award - Interference - Appellate court does not interfere with award made by trial court - Unless the latter acted on wrong principle of law - Or that the amount awarded is extremely high or ridiculously small (H4)

FACTS

On the 3rd November 1994, a heavy pipe rolled from the truck of defendants/respondents and crushed the right leg of plaintiff/appellant. As a result of the severity of the injury, the said leg was amputated. Consequently, appellant filed this action at the High Court of Delta State Warri, claiming for the sum of N20 million as general damages or compensation for the loss of the leg and for pain and

1854 Ighreriniovo v. S.C.C. Nig. Ltd. (2013) 4 KLR (pt. 328)

hardship suffered. The matter thus went to trial. Appellant pleaded the particulars of negligence by respondents. Appellant testified in person and called three witnesses. Several exhibits including the medical report of the doctor that treated appellant were tendered in evidence.

Respondents did not proffer any evidence in support of their pleadings. They rather rested their case on that of appellant. In its judgment, the court found that the accident was caused by the negligent act of respondents. The court therefore awarded the sum of N15 million as general damages and compensation. Respondents were unhappy, hence they appealed to the Court of Appeal, Benin City Division. The court found negligence duly established against respondents. However, it found the amount awarded by trial court as high. The court allowed the appeal on quantum of damages and substituted the award made by trial court with N2 million in favour of appellant. Aggrieved, appellant appealed to Supreme Court, while respondents cross appealed.

ISSUES FOR DETERMINATION

“Whether on the proper appraisal of the facts, evidence and circumstances of this case, the Court of Appeal was right in law when it interfered with the award of damages made by the learned trial judge.”

“i. Whether the Court of Appeal was right in holding that the plea of Contributory Negligence in paragraph 20 of the Amended Statement of Defence was a tacit admission of responsibility for negligence and/or amounted to negligence on the part of the 2nd and 3rd cross-appellants and that the cross-respondent was under no duty to prove that the 2nd and 3rd cross-appellants were negligent.

ii. Whether having regard to the pleadings and evidence in this case, the Court of Appeal was justified in holding that the learned trial judge was right to accept the evidence for the plaintiff and act on it to enter judgment for the plaintiff.”

HELD (Unanimously allowing the appeal in part and dismissing the cross appeal per **FABIYI JSC**)
TORTS - Negligence - Proof

1. To succeed in an action for negligence, the plaintiff must show that the defendant owes him a duty of care and that he has suffered damage in consequence of the defendant's breach of duty of care towards him. In law, the proximate and not the remote cause, is what should be considered.

To prove negligence, a plaintiff must establish that the defendant owes him a duty of care; that he is in breach of such a duty of care and that the plaintiff suffered damages as a result of the defendant's failure or breach of that duty of care. In short, the cross-respondent established that the cross-appellants owed her a duty of care and were in breach of such a duty. No doubt, the cross-respondent, as a result of the negligent conduct of the cross-appellants, suffered damages. The cross-appellants' failure or breach of their duty of care is quite palpable. The cross-appellants must be told that they failed to extricate themselves from the web of the inglorious action perpetrated by them on 3-11-94 which culminated in a permanent impairment of the cross-respondent. (p. 1861 B)

Unchallenged evidence

2. It appears from the contents of Exhibit D, one of their memos to their Doctor, the defendants did not seriously contend or deny the facts giving rise to the accident. In Exhibit D the defendants stated thus:-

"The above Mrs. Esther Ighreriniovo was involved in an accident with one of our equipment in Deco Road and was hit by a pipe rolling over her leg according to our filed (sic) report."

The Doctor to whom the cross-appellants referred the cross-respondent issued Exhibit F and reported therein as follows:-

"Medical Disability Compensation Report

This patient was seen here on 5/1/94 with severe injury to her right leg which resulted from an accident in which a pipe rolled off a trailer and hit her on 3/11/94. In spite of intensive treatment, the leg became gangrenous and the patient eventually ended up with an above-knee amputation."

The above depicted solid evidence by, and on behalf of

the cross-respondent is a one sided affair. The cross-appellants did not adduce any vica voce evidence to prop their defence. It is the law that unchallenged evidence which is credible stands and should be accepted and acted upon by the court. (p. 1862 G)

B

DAMAGES - Award - Purpose

3. Generally, award of damages is intended to compensate the plaintiff for financial loss, both present and future, suffered by her. As well, she must also be compensated for non-financial loss for pains and suffering caused by the injury and for loss of amenities of life occasioned by the deformity or impairment caused by the accident.

Indeed, the basic pecuniary entitlement of the plaintiff who suffers permanent disability as a result of fatal accident is the adequate sum representing his loss of earnings and loss of consortium.

And under financial loss, loss of future earning capacity should be taken into consideration.

In making an award of damages, it is relevant to bear in mind galloping inflation and consistent depreciation of the value of the Naira which is obvious to all. A judge should bear in mind the purchasing power of the naira at the material time of judgment.

While I am at one with the Court of Appeal that the award of the sum N15.5 Million as general damages to the appellant is 'rather quite high', the drastic reduction of same to N2 Million appears unrealistic in the whole circumstance of this matter. I am of the considered view that the sum of N5 Million Naira as general damages is realistic and down to earth in assuaging the feelings and plight of the appellant for the mishap caused her as a result of the ill-fated accident of 3/11/94.

(p. 1864 C)

H

DAMAGES - Award - Interference

4. Generally, an appellate court does not make a practice of interfering with the award made by the trial court unless it is convinced that:-

(a) the trial court acted upon some wrong principle of law or;

(b) the amount of damages awarded was so extremely high or ridiculously small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. (p. 1864 H)

B

NOTABLE POINT OF INTEREST

FABIYI JSC

1. Negligence – Meaning of

C

I wish to state it here in passing that negligence has been defined as the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do. It is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm; it is a departure from the conduct expectable of a reasonably prudent person under like circumstances.

D

Perhaps I should still add it that negligence is a breach of duty of care which causes a loss. It is strictly a question of fact which must be decided in the light of its own facts. (p. 1860 G)

E

REPRESENTATION

Chief V. E. Otomiewo with O. Unangue, for the Appellant/Cross-Respondent

F

L. A. O. Nylander, for the Respondents/Cross-Appellants

CASES REFERRED TO

C & C Construction Co. Ltd. v. Okai (2003) 18 NWLR (pt. 851) 79

G

Ogugua v. Armels Transport Ltd. (1974) 3 SC 139

Odinaka v. Moghalu (1992) 4 NWLR (pt. 233) 1

Seismograph Nig. Ltd. v. Mark (1993) 7 NWLR (pt. 304) 203

UBN Plc v. Eskol Paints Ltd. (1997) 8 NWLR (pt. 515) 157

UBA Ltd. v. Achoru (1990) 6 NWLR (pt. 156) 254

H

Adeoshun v. Adeisa (1986) 5 NWLR (pt. 40) 225

Okeke v. Obidife (1965) 1 All NLR 50

Omoregbe v. Lawani (1980) 3 - 4 SC 108

Fasoro v. Beyioku (1988) 2 NWLR (pt. 76) 263

Magaji v. Cadbury Nig. Ltd. (1972) 297

Okerie v. Ejiofor (1996) 3 NWLR (pt. 434) 90

Afribank Nig. Plc v. Nwanze (1998) 6 NWLR (pt. 553) 283

H. West & Sons Ltd. v. Shepherd (1963) 3 AER 625

B Eze v. Lawal (1997) 2 NWLR (pt. 481) 333

BOOK REFERRED TO

Black's Law Dictionary 6th Ed. p. 1032, 9th Ed. p. 446

C

LEAD JUDGMENT BY FABIYI JSC

The appellant as plaintiff initiated her action in the High Court of Justice, Delta State against the respondents jointly and severally for the sum of N20,000,000.00 (Twenty Million Naira) as general damages or compensation for the loss of the appellant's right leg which was amputated and for pain and other hardships suffered by her as a result of an accident which was caused by the action of the respondents on the 3rd November, 1994.

E The trial of the matter was conducted by Narebor, J. The plaintiff testified and called three other witnesses. The defendants did not proffer any evidence in support of their pleadings. In short, they rested their case on that of the plaintiff.

F The learned trial judge was duly addressed by counsel on both sides on the evidence garnered by him. In his judgment, he reasoned as follows:-

G *"In paragraph 36 (1)-(3) plaintiff pleaded particulars of negligence and gave evidence. PW.1 also testified. On their part, there is no evidence by defendants to give breath of life to their pleadings in the statement of defence on the issues canvassed by the counsel. The available uncontroverted and credible evidence shows clearly that plaintiff was hospitalized as a result of her leg injury which was caused by defendants' negligence in failing to secure the pipes properly and thus caused the pipes to fall off 1st defendant's trailer. I so find. I also*

H *find that plaintiff's right leg was amputated.*

Accordingly, having regard to the totality of uncontroverted evidence, N15,500,000.00 (Fifteen Million, Five Hundred Thousand Naira) be, is hereby awarded in favour of plaintiff against the defendant jointly and severally being general damages or compensation

for the loss of plaintiff's right leg which was amputated, and for other loss or hardships suffered by plaintiff namely, pain and suffering and loss of amenities of life."

The defendants felt unhappy with the stance of the trial judge and appealed to the Court of Appeal which found negligence duly established against the defendant. However, it found the sum of N15.5 Million damages awarded by the trial court as 'rather quite high'. The Court of Appeal allowed the appeal on quantum of damages and substituted the award made by the trial judge with the sum of N2,000,000.00 (Two Million Naira) in favour of the plaintiff.

The plaintiff felt dissatisfied with the position taken by the Court of Appeal and appealed to this court by a Notice of Appeal dated 28th March, 2003 which contains three grounds of appeal complaining against the drastic reduction of damages awarded by the learned trial judge.

The defendants, with the leave of this court granted on 15th December, 2004, have cross-appealed to this court by their Notice of Cross-Appeal dated 28th January, 2005.

On 5th February, 2013 when the appeal was heard, learned counsel for the appellant/cross-respondent urged that the appeal be allowed and the award of damages made by the trial court should be restored. He urged that the cross-appeal be dismissed. He observed that the cross-appellants did not testify at the trial court.

Learned counsel for the respondents/cross-appellants urged the court to dismiss the appeal on quantum of damages. He further cited the case of C & C Construction Co. Ltd. v. S. Okai (2003) 18 NWLR (pt. 851) 79 where an award of N1.1 Million was made. Finally, he urged that the cross-appeal be allowed.

Learned counsel for appellant/cross-respondent in reply on point of law observed that pain and loss were not proved in S. Okai's case unlike in this case wherein pain and loss have been proved.

On page 5 of the appellant's brief of argument the sole issue couched for determination of this appeal read as follows:-

"Whether on the proper appraisal of the facts, evidence and circumstances of this case, the Court of Appeal was right in law when it interfered with the award of damages made by the learned trial judge."

Let me observe it here that the above reproduced sole issue

couched by the appellant was adopted by the respondents on page 2 of their joint brief of argument filed on 21st September, 2004.

With respect to the cross-appeal, the two issues decoded by the cross-appellants read as follows:-

B *"i. Whether the Court of Appeal was right in holding that the plea of Contributory Negligence in paragraph 20 of the Amended Statement of Defence was a tacit admission of responsibility for negligence and/or amounted to negligence on the part of the 2nd and 3rd cross-appellants and that the cross-respondent was under no duty to prove that the 2nd and 3rd cross-appellants were negligent.*

C *ii. Whether having regard to the pleadings and evidence in this case, the Court of Appeal was justified in holding that the learned trial judge was right to accept the evidence for the plaintiff and act on it to enter judgment for the plaintiff."*

D With respect to the cross-appeal, two issues that were decoded by the cross-respondent read as follows:-

E *"1. Whether having regards to the state of the pleadings and evidence (unchallenged) lead (sic) at the trial, the Court of Appeal was right to have affirmed the finding of facts made by the learned trial judge on the negligence of the cross-appellants.*

2. Whether the cross-appeal raised such special circumstances as to warrant the Supreme Court to reverse the concurrent findings of fact of the lower courts."

F It is apt to note it here that since the cross-appeal relates to proof of negligence by the cross-respondent, it should be treated first. The outcome of the issues raised in the cross-appeal will dictate the desirability or otherwise of considering the sole issue touching on quantum of damages in the main appeal.

G Let me now take the two issues formulated by the cross-appellants together as they touch on proof of negligence.

H I wish to state it here in passing that negligence has been defined as the omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do. It is conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm; it is a departure from the conduct expectable of a reasonably prudent person under like circumstances. U. S.

v. Ohio Bargo Lines, Inc; 607 F.2d 624, 632 (Black's Law Dictionary Sixth Edition page 1032).

Perhaps I should still add it that negligence is a breach of duty of care which causes a loss. It is strictly a question of fact which must be decided in the light of its own facts.

To succeed in an action for negligence, the plaintiff must show that the defendant owes him a duty of care and that he has suffered damage in consequence of the defendant's breach of duty of care towards him. In law, the proximate and not the remote cause, is what should be considered. See: Ougua v. Armels Transport Ltd. (1974) 3 SC 139; Odinaka v. Moghalu (1992) 4 NWLR (pt.233) 1, Seismograph (Nig.) Ltd. v. Mark (1993) 7 NWLR (pt.304) 203; UBN Plc v Eskol Paints Ltd. (1997) 8 NWLR (pt. 515) 157.

To prove negligence, a plaintiff must establish that the defendant owes him a duty of care; that he is in breach of such a duty of care and that the plaintiff suffered damages as a result of the defendant's failure or breach of that duty of care. See: UBA Ltd. v. Achoru (1990) 6 NWLR (pt. 156) 254; Adeosun v. Adeisa (1986) 5 NWLR (pt.40) 225; Okeke v. Obidife (1965) 1 All NLR 50.

The cross-respondent as plaintiff at the trial court in her final amended statement of claim made graphic pleadings as to how the accident of 3rd November, 1994 which led to the amputation of her right leg above the knee occurred. She gave Particulars of Negligence as follows

"1. Neglect/failure by the defendants to observe customary safety regulations which enjoin defendants to temporarily barricade the road, and in this case that of Okumagba Avenue/Deco Road, where the pipes were to be discharged in order to warn and to prevent people from going into the affected area until after the pipes have been discharged.

2. Failure/neglect by the defendants to provide a crane on the spot to facilitate the prompt discharge of the pipes, and which failure resulted in the delay in removing the pipes from plaintiffs trapped leg and its consequent amputation.

3. The deliberate act of the 2nd and 3rd defendants in untying the chain with which the pipes were bound in the trailer Reg. No.

In paragraph 3 of the reply to the statement of Defence, she denied that she in any way contributed to the accident. She testified in support of her pleadings that there were no warning signs on the road on the fateful day when a pipe rolled off the cross-appellants’ trailer which pressed her right leg to the gutter and she cried in pain without help for about one hour before the defendants fetched a crane to remove the pipe from her leg which was later amputated. She testified that she did not in any way contribute in causing the accident.

P.W.4, the Investigating Police Officer (IPO) said when he got to the scene on 3-11-94, “the trailer was loaded with heavy pipes three of which were on ground while others were still on the trailer. One among the three pipes on the ground had already rolled into the gutter.” He further stated thus:-

“...At the time I visited the scene of accident, I did not see any chain binding the pipes on the trailer. I however saw a loose chain on the ground besides the trailer. I am conversant with traffic procedure. The pipes were heavy pipes. I did not see any warning sign at the scene of accident relating to the trailer with the pipes. Such warning signs usually warned the public of danger in respect of the trailer and the pipes.”

The IPO was not cross-examined by the cross-appellants. He tendered without any objection the extract of the record of accident as Exhibit ‘H’. Item 12 therein reads as follows:-

“Result of any Police action taken: Police investigation revealed that the accident occurred as a result of the negligence of the Driver Mr. Sanni Mumuni, William Samuel and Lucky Ukusemuya who are pipe line helpers that loose the hook of the pipe without consideration for pedestrians on the road.”

It appears from the contents of Exhibit D, one of their memos to their Doctor, the defendants did not seriously contend or deny the facts giving rise to the accident. In Exhibit D the defendants stated thus:-

“The above Mrs. Esther Ighreriniovo was involved in an accident with one of our equipment in Deco Road and was hit by a pipe rolling over her leg according to our field report.”

The Doctor to whom the cross-appellants referred the cross-respondent issued Exhibit F and reported therein as follows:-

“Medical Disability Compensation Report

This patient was seen here on 5/1/94 with severe injury to her right leg which resulted from an accident in which a pipe rolled off a trailer and hit her on 3/11/94. In spite of intensive treatment, the leg became gangrenous and the patient eventually ended up with an above-knee amputation.”

The above depicted solid evidence by, and on behalf of the cross-respondent is a one sided affair. The cross-appellants did not adduce any vica voce evidence to prop their defence. It is the law that unchallenged evidence which is credible stands and should be accepted and acted upon by the court. See: Omoregbe v. Lawani (1980) 3-4 SC 108, 117; Fasoro v. Beyioku & Ors. (1988) 2 NWLR (Pt.76) 263, 271; Magaji v. Cadbury Nig. Ltd. (1972) 297; Okerie v. Ejiofor (1996) 3 NWLR (pt. 434) 90 at 104; Afribank Nig. Plc v. Nwanze (1998) 6 NWLR (pt.553) 283.

The trial court, no doubt, rightly acted on the evidence adduced by the cross-respondent in finding that negligence was proved against the cross-appellants in the prevailing circumstance. From the pleadings and evidence led, it would have been preposterous if the court of appeal had found otherwise. It should now dawn on the cross-appellants that the tacit admission of contributory negligence referred to by the court below is merely an addendum under which the cross-appellants cannot, in all conscience, take refuge.

In short, the cross-respondent established that the cross-appellants owed her a duty of care and were in breach of such a duty. No doubt, the cross-respondent, as a result of the negligent conduct of the cross-appellants, suffered damages. The cross-appellants’ failure or breach of their duty of care is quite palpable. The cross-appellants must be told that they failed to extricate themselves from the web of the inglorious action perpetrated by them on 3-11-94 which culminated in a permanent impairment of the cross-respondent.

The two issues are resolved against the cross-appellants and in favour of the cross-respondent. The cross-appeal is hereby dismissed for lack of merit.

I now move to the main appeal wherein the appellant is seriously contesting the quantum of damages which was drastically reduced from N15.5 Million awarded by the trial court to N2 Million by the Court of Appeal. Same is a big deal in our mundane society of cash.

B Such an award is in the form of general damages which are those 'that the law presume flow from the type of wrong complained of - compensatory damages for harm that so frequently results from the tort for which a party has sued that the harm is reasonably expected and need not be alleged or proved. It does not need to be specifically claimed. It is also termed direct damages or necessary damages'. (Black's Law Dictionary, Ninth Edition page 446).

Generally, award of damages is intended to compensate the plaintiff for financial loss, both present and future, suffered by her. As well, she must also be compensated for non-financial loss for pains and suffering caused by the injury and for loss of amenities of life occasioned by the deformity or impairment caused by the accident. See: H. West and Sons Ltd. v. Shepherd (1963) 3 AER 625. ***Indeed, the basic pecuniary entitlement of the plaintiff who suffers permanent disability as a result of fatal accident is the adequate sum representing his loss of earnings and loss of consortium.*** See: Obere v. The Board of Management, Eku Baptist Hospital (1978) 6 & 7 SC 15; Eze v. Lawal (1997) 2 NWLR (Pt.481) 333. ***And under financial loss, loss of future earning capacity should be taken into consideration.*** See: the case of Ogu v. Ihejirika (1991) 4 NWLR (pt.185) 388.

In making an award of damages, it is relevant to bear in mind galloping inflation and consistent depreciation of the value of the Naira which is obvious to all. A judge should bear in mind the purchasing power of the naira at the material time of judgment. See Eze v. Lawal (supra); Ifeanyi Chukwu Osondu C. Ltd. v. Akhigbe (1999) 11 NWLR (Pt. 625); Ugo v. Okafor (1996) 3 NWLR (pt. 438) 542 and Kalu v. Mbuko (1988) 3 NWLR (Pt.80) 86 at 102.

Generally, an appellate court does not make a practice of interfering with the award made by the trial court unless it is convinced that:-

(a) the trial court acted upon some wrong principle of law or;

(b) the amount of damages awarded was so extremely high or ridiculously small as to make it, in the judgment of the court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. See *Agbu v. Otubusin* (1961) 1 All NLR B 299 and *Eze v. Lawal* (supra).

It should be stated that no hard and fast principle can be laid down for award of damages for pains and suffering. Each case should be determined based on its own peculiar facts and circumstance of the injury complained about emanating from breach of duty of care C by the defendant.

Learned counsel for the appellant maintained that the interference by the Court of Appeal with the quantum of damages awarded by the learned trial judge cannot be supported in fact and unjustifiable in law. He maintained that the Court of Appeal failed to consider the depreciation rate of the naira, hyper inflation and the high cost of living.

On the other hand, learned counsel for the respondents maintained that the Court of Appeal was justified in interfering with the award made by the trial Judge as the Court of Appeal stated that the award is 'rather quite high' and should not reach N15.5 Million. He felt that the award of the trial judge was not based on available facts and similar awards made in comparable cases.

The Court of Appeal in its judgment on the issue observed as follows:- F

"The established facts in the case which the learned trial judge accepted, the plaintiff/respondent lost her right leg which was amputated due to the accident. According to Dr. Emmanuel Urunetseyi G Sagay who testified as P.W.2, he gave the plaintiff 85% disability compensation as a result of the accident."

It seems as if the court below did not adequately take into consideration appreciable loss of future earnings and consortium by the plaintiff. Similarly, the impairment caused to the appellant as a result of the accident is a life baggage which she will have to contend with in her life time with utmost fortitude. As well, it is glaring that the court below did not take into consideration galloping inflation and the depreciation of the naira which is obvious to every one; the par- H

ties inclusive. She was rendered a social misfit and virtually made bereft of any earning power as a result of the accident.

While I am at one with the Court of Appeal that the award of the sum N15.5 Million as general damages to the appellant is ‘rather quite high’, the drastic reduction of same to N2 Million appears unrealistic in the whole circumstance of this matter. I am of the considered view that the sum of N5 Million Naira as general damages is realistic and down to earth in assuaging the feelings and plight of the appellant for the mishap caused her as a result of the ill-fated accident of 3/11/94.

In short, I allow the appeal in part as the damages awarded to the appellant is hereby increased from N2 Million ordered by the Court of Appeal to N5 Million Naira.

In conclusion, the main appeal is allowed in part while the cross-appeal is hereby dismissed. The respondents/cross-appellants shall pay N100, 000.00 as costs to the appellant/cross-respondent.

ONNOGHEN JSC

I have had the benefit of reading in draft the lead judgment of my learned brother, FABIYI, JSC just delivered.

I agree with his reasoning and conclusion that the appeal has merit and should be allowed while the cross appeal is without merit and should be dismissed.

I agree that the reduction of the damages awarded by the trial court from N15,500,000.00 to N2,000,000.00 is rather drastic and not supported by the facts and relevant principles of law relating to damages for personal injury cases.

In the circumstance the sum of N5,000,000.00 is a reasonable award and I consequently order accordingly.

I also abide by other consequential orders made in the said lead judgment including the order as to costs. Appeal allowed and cross appeal dismissed.

NGWUTA JSC

I have had the benefit of reading in draft the lead judgment of

My Lord, Fabiyi, JSC, and based on the reasoning and conclusion therein, I also allow the appeal in part and dismiss the cross-appeal for want of merit.

ARIWOOLA JSC

I had a preview of the lead judgment of my learned brother, Fabiyi, JSC just delivered.

The facts of the case that led to this appeal are not in dispute. It is clearly stated in the lead judgment and need not be repeated. The main fact that the appellant lost her right knee as a result of the negligence of the respondents was no longer being contested by the respondents. Indeed, the disagreement is on the quantum of damages awarded by the court below by way of reduction from the award made by the trial court, from N15.5 Million to N2 Million. My learned brother has beautifully dealt with the principles and issues involved and properly and justifiably increased the award of damages entitled by the appellant from N2 Miilion to N5 Million.

It has been held by this court that once a plaintiff has successfully shown and proved that he suffered personal injury resulting from the breach of duty of care owed him or her by the defendant, the claim for pain and suffering must be considered by the court, and no principle can be laid down upon which damages for pain and suffering can be awarded in terms of the quantum. When the totality of evidence is considered with the peculiar circumstance of each case, the award is said to be usually generous yet should not be excessively high or grossly low. See *C & C Construction Co. Ltd. vs. Samuel Tunde Okhai* (2003) 18 NWLR (pt. 51) 79; (2003) 12 SCM 65; (2003) 16 NSCQR 328.

There is no doubt that, even though the plaintiff did not claim it under the specific head as such, and the award of damages is ordinarily not to be based on what has been described as sentimental damages, I am of the firm view that in the peculiar circumstances of the instant case, future damages must be considered in the quantum to be awarded. See; *Jenvo & Anor Vs Akinreti* (1990) NWLR (pt.135) 663, (1990) 4 SC 196.

Future damages is money awarded to an injured person for an injury's residual or projected effects such as those that reduce the

person's ability to function. See; Black's Law Dictionary, Ninth Edition, page 446. The appellant is a woman who had her right knee amputated through the negligent act of and total failure in their duty of care by the respondent, she is certainly entitled to more than the court below reduced the damages awarded by the trial court too.

B In the final analysis, for the above short contributions, I am in complete agreement with the reasoning therein and the conclusion arrived thereat in the lead judgment that the appeal must be allowed on the reduction of the damages awarded by the trial court.
C The cross appeal is lacking in merit and liable to dismissal. I also dismiss same.

I abide by the consequential orders in the said lead judgment including that on costs.

D

MUHAMMAD JSC

I had a preview of the lead judgment of my learned brother Fabiyi, JSC, and agree entirely with his reasoning and conclusion that while the appeal succeeds in part the cross appeal being completely lacking in merit fails. I need emphasize in my own concurring words why the two appeals are so determined. I rely on the facts of the case that brought about the two appeals as narrated in the lead judgment. I shall restate these facts only to facilitate a better understanding of the relevant facts vis-à-vis the law on the issues the two
F appeals raise.

The main appeal questions the lower court's interference with the damages awarded by the trial court. The latter had found the defendants, the appellants at the former but the respondents/cross
G appellants in this court, liable in negligence and awarded the plaintiff, the Appellant/Cross respondent herein, the sum of N15,500,000.00k general damages. The lower court's reduction of this sum to N2,000,000.00k (Two Million) constitutes the complaint in the main appeal.

H It is argued in the main appeal that a proper appraisal of the facts and circumstances of the case at hand reveals the lower court's error in its interference with the award of damages made by the learned trial judge. Learned appellant counsel insists that the interference by the lower court is without basis in Law.

Not surprisingly, learned Respondent/Cross appellant counsel submits otherwise. He contends that the awarded sum is rather high and not based on the facts at hand in the case.

In the resolution of the lone issue the appeal raises, the question to answer is when does an appellate court interfere with a trial court's award of damages against a defendant in a proven case of negligence? It is now trite that an appellate court does not ordinarily alter or interfere with an award of damages made by the lower court except where the award is shown to be either manifestly too high or manifestly too low or where it was based on a wrong principle. The award of damages is at the discretion of the trial court. An appellate court will not interfere with an award of damages by a trial court only because it is inclined to make a different award. In order to justify interference with the trial court's award of damages, the appellate invariably must be satisfied that:-

(a) The trial court had acted upon wrong principle of law or under a mistake of law.

(b) The award is arbitrary or perverse.

(c) There has been an element of wrong exercise of discretion in the award or

(d) Injustice could occur if the appeal court does not interfere. See *A.S.E. SA v. Ekwenem* (2009) 13 NWLR (Pt 1158) 410 SC; *Adogu v. Federation* (1996) 6 NWLR (Pt 456) 508 and *The Shell Petroleum Development Company of Nigeria Ltd v. Chief G.B.A. Teibo VII and 4 Others* NSCQLR volume 22 (2005) 69.

In the case at hand learned appellant counsel is right in his submission that the sum awarded the respondent by the lower court, is rather low. The lower court is right to have adjudged the award made by the trial court excessive.

The court, by the award it made in place of the trial court's excessive award, however failed to maintain the "golden mean." Its award is rather low. I abide by the award made in the lead judgment as being most appropriate in the circumstances of the case at hand.

The cross appeal questions the evaluation of evidence by the trial court and its decision therefrom that the respondent's negligence informs appellant injuries and thus the former's liability. It is often a difficult task to have the concurrent findings of facts by the lower courts and all the more so where the trial court's findings which the

lower court affirmed involves the credibility of the witnesses that testified before the trial court. In the case at hand evidence of the cross-appellant's liability is overwhelming leaving no room whatsoever for interference by an appellate court. The Cross appeal for that reason fails.

B For the foregoing and more so the fuller and more succinct reasons marshaled in the lead judgment, I allow the appeal in part and dismiss the totally unmeritorious cross-appeal. I abide by the consequential orders decreed in the lead judgment including those
C on costs.

D

E

F

G

H