**DR. OLADIPO KAJA**

**V.**

**ALHAJI SALAWU OKE**

IN THE SUPREME COURT OF NIGERIA

ON FRIDAY, THE 1ST DAY OF FEBRUARY, 2013

SC.34/2004

**LEX (2013) - SC.34/2004**

**OTHER CITATIONS**

3PLR/2013/51

(2013) LPELR-19908 (SC)

**BEFORE THEIR LORDSHIPS**

WALTER SAMUEL NKANU ONNOGHEN, J.S.C

CHRISTOPHER MITCHELL CHUKWUMA-ENEH, J.S.C

MUSA DATTIJO MUHAMMAD, J.S.C

CLARA BATA OGUNBIYI J.S.C

STANLEY SHENKO ALAGOA J.S.C

**BETWEEN**

DR. OLADIPO KAJA - (Trading under the name and style of Maja Hospital) Appellant (s)

**AND**

ALHAJI SALAWU OKE - Respondent(s)

**REPRESENTATION**

ROTIMI SERIKI, Esq. with OLADEJI OMOTOSHO Esq - For Appellant

**AND**

ADEMOLA BAKARE Esq., with A. I. SOREMI, Esq. and SEYI SOYEMI, (Miss) - For Respondent

**ORIGINATING STATE**

1. COURT OF APPEAL, LAGOS DIVISION

**2.** LAGOS STATE HIGH COURT

**ISSUES FROM THE CAUSE(S) OF ACTION**

TORT AND PERSONAL INJURY LAW – AWARD OF DAMAGES:- Two main factor taken into consideration in assessing damages in cases of liability - Financial loss resulting from the injury and the persona! injury, involving not only pain and suffering, but also the loss of the pleasures of life - Difficulty of qualification of the loss whether financial or personal – Need for court to proceed with the underlying assumption that damages are compensation for injury sustained and are not meant to be punitive – Duty to satisfy the requirement that damages are meant to be full and adequate – Relevant considerations

TORT AND PERSONAL INJURY – NEGLIGENCE - AWARD OF DAMAGES:- Duty of plaintiff to produce legally acceptable evidence to establish his entitlement for quantum of damages claimed - Effect of failure thereto

HEALTHCARE AND LAW:- Hospital acquired injury – Leg of a patient being wheeled out of surgery stuck in lift door occasioning a fracture – Whether ground for claim in negligence and damages – How treated

HEALTHCARE AND LAW – NEGLIGENCE – DUTY OWED IN-PATIENT:- Patient trapped between the doors of the lift in the defendant's hospital without attention and care after an eye operation resulting in severe fracture of the plaintiff's limbs and consequential pain and suffering – Liability of hospital in negligence – Heads of claim - Medical expenses, drugs, physiotherapy - Pain and suffering - Loss of earning capacity and loss of opportunity – Need to prove same strictly - Assessment of damages – Whether quantum of damages can be affected by pre-existing medical condition of patient/claimant – Relevant consideration

TORT AND PERSONAL INJURY LAW:- Personal injury claim – What claimants must prove – Need to prove strictly the nature and particulars of damages sought to be recovered - Heads of claim - Medical expenses, drugs, physiotherapy - Pain and suffering - Loss of earning capacity and loss of opportunity – Proof of age – Whether relevant - Heads of claim - Medical expenses, drugs, physiotherapy - Pain and suffering - Loss of earning capacity and loss of opportunity – Need to prove same strictly

ETHICS – LEGAL PRACTITIONER:- Appellate proceedings - Duty of counsel to respondent to support the judgment of the lower court - Attitude of court to attempt to attack portion of judgment by respondent’s counsel having neither cross-appealed nor filed a respondent's notice

ELDERS LAW – CLAIM FOR PERSONAL INJURY:- Negligent healthcare services occasioning personal injury – Assessment of quantum of damages - Whether advanced age is relevant consideration – How treated

CHILDREN AND WOMEN LAW:- *Young people/Women and Justice Administration -* Personal injury claims – Age of victim/claimant – Whether relevant consideration -Claimant's failure to plead and prove age – Effect

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - CROSS APPEAL:- Reply on points of law – Where a respondent has neither cross-appealed nor filed a respondent's notice – Whether not entitled to ask for the setting aside of an order of the court - Whether a respondent who does not cross-appeal must confine himself to the appellant's grounds of appeal in formulating his issues for the determination of the appeal – Whether such a respondent is restricted to either the adoption of the issues formulated by the appellant or the distillation of his own issues which must arise from or relate to the grounds filed by the appellant – Whether a respondent's notice is not the platform for challenging a proper order of a court

APPEAL - INTERFERENCE WITH AWARD OF DAMAGES:- Rule of law that an appellate court is empowered to interfere with the amount of damages awarded by the trial court where it is established that in making the award the court had proceeded on wrong principles or that the award is unjust – How treated

COURT - ASSESSMENT AND AWARD OF DAMAGES: Principles guiding assessment of damages in personal injury cases and factors to be considered in assessing damages - Where trial court made no assessment of damages – Whether an appellate court can make the assessment itself if there exists on the record enough evidence on which assessment can be based

**MAIN JUDGMENT**

**MUSA DATTIJO MUHAMMAD, J.S.C. (Delivering the Leading Judgment):**

This is an appeal against the judgment of the Lagos Division of the Court of Appeal, hereinafter referred to as the court below, allowing in part the appeal against the decision of the Lagos State High Court. The judgment being appealed against was delivered on 25th June 2002.

The facts of the case which brought about the appeal are brief and hereunder stated.

By his writ of summons and the accompanying statement of claim filed on 29th July, 1992, the appellant as plaintiff claimed the sum of N2 million naira against the respondent then being the defendant. The sum is damages for the injuries the appellant sustained on 23rd October 1990 arising from respondent's negligence. The appellant asserts that his legs were trapped in the lift in respondent's Hospital as he was being evacuated from the theatre after surgery to the ward on a lower floor. Appellant avers that he sustained severe fracture in his limbs as a result of the accident.

In denying appellant's claim, the respondent avers particularly in paragraph 5 of his amended statement of defence and counter-claim

"5 The defendant denies liability for negligence because the accident of 23rd day of October 1990 was an inevitable accident or an Act of God which occurred notwithstanding the exercise of all reasonable care and skill on the part of the defendant who was unable to avoid the said accident due to circumstances beyond his control."

Respondent's counter-claim of N9,000.00 is bill for the medical services rendered to the appellant by the respondent.

At the end of trial the trial court in its 19th October 1999 decision found for the appellant and awarded him N2 million.

Dissatisfied with the decision, the respondent appealed to the Court below, which in allowing the appeal in part, reduced the damages awarded the appellant by the trial court from N2 million naira to N250,000.00, Appellant's Notice of Appeal dated and filed on 2nd August 2000 contains four grounds.

In keeping with the rules of court, parties have filed and exchanged their briefs of arguments. These were adopted and relied upon as their arguments at the hearing of the appeal.

The two issues distilled from the four grounds of appeal in the appellant's briefs as having arisen for the determination of the appeal are as follows:-

"(a) Whether the lower court was right in basing its award on only compensation for pain and suffering and

(b) If the answer to issue number 1 is in the affirmative, whether the sum of N250,000.00 awarded was appropriate in the circumstances."

The respondent also formulated two issues in his brief. The issues are:-

"(1) Whether the court below was right in setting aside the award of damages for Medical expenses, loss of earning capacity and loss of opportunity made by the trial court for want of evidence;

(2) Whether having regard to the pleadings and evidence in this case, the court below was right in awarding the sum of N250,000.00 as damages for pain and suffering in favour of the appellant."

It is pertinent to recall that at the hearing of the appeal, following the withdrawal of the preliminary objection as to the competence of the appeal earlier filed by the respondent and argued in the respondent's brief by counsel, same was accordingly struck out by this Court.

Under their two issues, learned appellant's counsel concedes that the court below has in its judgment clearly demonstrated an understanding of the principles applicable in awarding damages in personal injury cases. He however contends that the court has erred in its application of the principles in the instant case. The age of the appellant the court is emphatic upon as not having been proved, learned counsel submits, is never the overriding factor the court decides it is. Granted age of the appellant has not been established, a fact that the appellant does not concede, loss of future earning, pain and suffering as well as loss of amenities of life, it is submitted, are equally relevant if not more important in the determination of the damages the negligent act of the respondent has occasioned. Learned counsel relies on the decisions of this Court in L.C.C. V Ogunbiyi (1969) 1 NSCC at page 283 and Ediagbonya v. Dumez Nig Ltd (1986) 3 NWLR (part 31) 753 to insist that a claimant's failure to plead and prove his age does not prevent a court from assessing the claimant's stage in life in relation to the injury he seeks reparation for. Furthermore, all the criteria courts apply to arrive at the correct damages to award in cases of negligence have been disregarded by the court below. Had the court applied its decision in Strabag Construction Nigeria Ltd v. Ogarekpe (1991) 1 NWLR (part 170) 733, learned appellant counsel argues, it would have avoided the errors it fell into against which the appellant now complains.

The lower court, learned counsel further submits, failed to show either the wrong principle of law which the trial court invoked in its award or that the award is excessive to justify its interference with the damages awarded to the appellant. This, more than any other lapse, renders the court's judgment liable to be set-aside. Relying on Onaga v. Micho (1961) 2 SCNLR 105; Ozigbu Eng Co. Ltd v. Lwuamai (2009) 16 NWLR (part 1166) 44 at 70 and 71; U.B.A v. Achoru (1990) 6 NWLR (part 156) 254. Obere v. Eku Baptist Hospital (1978) 6-7 SC 15 and C and C Construction Company Ltd & Anor v. Okhai (2003) 18 NWLR (part 851) 79, learned appellant's counsel prays that the two issues be resolved in their favour and the appeal allowed.

In arguing the appeal, learned respondent's counsel contends that learned appellant's counsel has misconceived the judgment of the court below. The judgment, learned counsel submits, does not limit damages recoverable by the appellant from the respondent to those which arise from the pain and suffering of the claimant consequent upon the personal injury the appellant sustained from respondent's negligent conduct. The decision of the lower court, learned respondent's counsel submits, is that no evidence was led by the appellant in proof of the categories of damages to entitle him to what the trial court granted him. The appellant whose claim includes reparation for medical expenses, loss of earnings and opportunities did not lead evidence in respect of any of the categories of his claim. The trial court's award of the N2 million naira damages is entirely on the basis of respondent's admission of appellant's allegation that respondent is negligent in allowing appellant's legs and thighs to be trapped by the lift at his hospital.

In an apparent somersault, learned respondent's counsel submits that the judgment of the lower court does not meet the basic tenet of adversarial practice. Indeed, learned counsel contends, even the N250,000.00 for pain and suffering the court below awarded the appellant after rightly disturbing the trial court's judgment has no legal basis. For damages to be recoverable under whatever head, the claimant must lead evidence in proof of his entitlement. Appellant's claims being in the realm of special damages though having been pleaded are not strictly proved. The trial court is wrong to have granted the appellant the N2 million naira award. Decisions which do not flow from the evidence before the court, being perverse, are to be set-aside on appeal.

Learned counsel relies interalia on Danjuma V Simon Dogari (1998) 6 NWLR (part 553) 234 at 237; Nwokorobia V Nwogu (2009) 10 NWLR (part 1150) 553 at 576; Nwanji V Coastal Services (Nig) Ltd (2004) 11 NWLR (part 885) 552; Salihu V Tin Associated Minerals Ltd (1958) NRNLR 99; FBN Plc V Associated Motors Co. Ltd (1998) 10 NWLR (part 570) 441 at 464; C & C Construction Co. Ltd V Okhai (Supra) and Samson Ediagbonya V Dumez (1986) 3 NWLR (part 31) 753 at 761 - 762 and urges the resolution of the issues raised against the appellant and the dismissal of the appeal.

On being served the respondent's brief, the appellant filed and served its reply brief. The brief is deemed filed on 7th May 2012. Paragraphs 1.01 to 1.06 of the reply brief is response to respondent's preliminary objection to the competence of the appeal that has been struck out following its withdrawal by the appellant's counsel. The paragraphs are hereby discountenanced.

In reply on points of law, learned appellant's counsel submits that the respondent is not entitled to ask for the setting aside of the sum of N250,000.00 awarded by the lower court since in practice, having neither cross-appealed nor filed a respondent's notice, he is to support the judgment of the lower court. In support of these submissions, learned appellant's counsel relies on Oshodi V Eyifunmi (2000) 7 SC (part 11) 145; Anyaduba V NRT Co. Ltd (1990) 1 NWLR (part 127) 397 at 407 and Oladipo v. Muba LGA (2010) 5 NWLR (part 1186) 166.

I cannot agree more with learned appellant's counsel. It is indeed the practice that a respondent who does not cross-appeal must confine himself to the appellant's grounds of appeal in formulating his issues for the determination of the appeal. Such a respondent either adopts the issues formulated by the appellant or distills his own issues which must arise from or relate to the grounds filed by the appellant. See Crownstar & Co Ltd v. The Vessel M. V Vali (2000) 1 NWLR (part 639) 37. It is a necessary practice, therefore, that the respondent herein who seeks a complete reversal of a crucial and fundamental finding of the judgment of the court below to do so by cross-appealing. He cannot even do so by a respondent's notice! See: Abu v. K Kuyambana (2001) 1 NWLR (part 695) 491; and Ajayi v. Mititary Administrator for Ondo State (1997) 5 NWLR (part 507) 237. It is for these principles that respondent's arguments and plea for the reversal of the lower court's award of N250,000.00 are hereby discountenanced. His traditional duty remains that of defending the lower court's judgment as it is. Now to the appeal.

It seems to me that from his two issues, appellant's cumulative complaint is whether the lower court has the right to interfere with the trial court's award of damages for which the respondent has by his own admission, been found liable.  
The trial court's assessment of damages is at pages 182 - 183 of the record of appeal hereunder reproduced:-

"In this case, the plaintiff claims the sum of N2 million (Two Million naira only) being damages for consequential pain and suffering ... In this case, negligence by the defendant for allowing the plaintiff to be trapped between the doors of the lift in the defendant's hospital on 23rd October, 1990 without attention and care after an eye operation resulting in severe fracture of the plaintiff's limbs and consequential pain and suffering... In this case, since the defendant in the Statement of defence admitted the facts as stated in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 11 of the statement of claim which set out the facts in support of the claim for damages in this case, these facts must be taken as established.

A trial court is entitled to accept and act upon such uncontradicted and unchallenged evidence establishing loss legally recoverable in such a given case; as the defendant did not join issues with the plaintiff on them...  
I therefore award the plaintiff damages in the sum of N2 million Naira."

The lower court's interference with the trial court's foregoing findings and award is at pages 183 - 184 hereunder reproduced as well.

"With respect to the trial judge, it is difficult to understand or justify his approach to the award of N2m as damages. He reasoned that because the defendant had not joined issue on the facts relied upon by the plaintiff to establish negligence, then the court must award the sum of N2m claimed as damages. That view of the trial judge does not represent the position of the law. Notwithstanding that a defendant had not contradicted the facts in proof of negligence, the plaintiff still had to prove by evidence his entitlement to the damages claimed. The plaintiff did not show by evidence the loss of income he suffered as a result of the injury he suffered. It was not even made clear the period of his inability to pursue his normal calling. There was no evidence as to the age of the plaintiff. There was no evidence of any residual disability or continuing effect of the injuries suffered. Although the plaintiff said he had an income of N200,000.00 per annum, he did not state the source of the income. Added to all these is the evidence from the defendant that the plaintiff had a disability of 80 – 85% even before the injuries. All these matters the trial judge did not consider or comment upon ...

... In this case, it was not only that the trial judge did not do any assessment of damages, the evidence by which to do so placed before him was infinitesimal. The said little evidence was not even evaluated. The award made in the circumstances would appear to be whimsical. It must be disturbed. On the evidence available the plaintiff was not entitled to any compensation other than for his pain and suffering. I think that a sum of N250,000.00 would be reasonable in the circumstances."

Is the court below empowered to interfere as it has done above with the damages awarded by the trial court? If the court is empowered has the court complied with the relevant principles? I answer both questions in the affirmative.  
The law is well settled that an appellate court is empowered to interfere with the amount of damages awarded by the trial court where it is established that in making the award the court had proceeded on wrong principles or that the award is unjust. See: Ejowhomu v. Edok-Eter Ltd (1986) 5 NWLR (part 39) 1 at 25; Overseas Construction Ltd v. Creek Ent. Ltd (19S6) 3 NWLR (part 13) 407 at 420; Osuji v. Isiocha (1989) 3 NWLR (part 111) 623 at 636-637.

In the instant case, the appellant has claimed for (i) Medical expenses, drugs, physiotherapy (ii) Pain and suffering (iii) Loss of earning capacity and loss of opportunity.

Learned respondent's counsel is right in his submission that while negligence is one thing, the damages recoverable therefrom is another. Again, he is on a firm terrain in his submission that for a plaintiff to recover the damages he claims he must lead evidence in proof of his entitlement. In the case at hand, the court below's examination of the evidence led at the trial court and its conclusion that appellant has not led the evidence to sustain the categories of his claim except the one for the pain and suffering arising from respondent's negligent act is unassailable. Award of damages depends on the facts which sustain the plea for the award. An award in the absence of these facts is one made on the basis of incorrect principle.

In Mbagwu v. Udor (1965) NSCC (vol 4) 216 at 219, the appellant was found liable for negligently causing injuries to the respondent by knocking him down with his car. Judgment was given in favour of the respondent to the tune of Ã½1,12'91919713s'91919796d. The trial judge awarded damages for travelling expenses, the plaintiff/respondent did not make and a further award for extra food and diet. Both awards were not supported by evidence before the trial judge. The issue raised then in the appeal before this Court was whether it was possible for a trial judge to award damages for an item that was not proved in evidence. In determining the appeal, this Court inter alia held at page 219 of the report thus:'919197

"The learned judge further awarded 30 pounds to the plaintiff for extra food and nourishment. This extra food and nourishment appears to consist of fresh fish; it seems that it was already part of the plaintiff's diet for according to him the doctor saw him eating fresh fish and recommended it. There is no evidence that he was required to eat any more of it than usual or how much any extra fresh fish had cost him; yet the learned judge was satisfied on the evidence of the plaintiff that he was taking special diet on the recommendation of the doctor and awarded 30 pounds; on what basis this sum was calculated does not appear, nor, as we have already pointed out, does it appear that the plaintiff took any special diet apart from fresh fish which was, already part of his food. The award under this head cannot be justified...

... In assessing what damages can be recovered by a victim of a motor accident caused by negligence it must be shown that he has suffered one or all of these ill-effects as a result of the accident. In this case this was not shown and the learned trial judge appears to have treated Dr. Adefope's statement of possible injuries as evidence of the injuries actually suffered by the plaintiff. This was a mistake of a nature to call for a reassessment of the amount awarded.

We think that the items of which there is clear evidence are pain and suffering and shock. The plaintiff an Old Man aged about 70 years, was as a result of the accident, in hospital for over a month and laid up in his house for a further nine month; he was knocked unconscious by the defendant's car and in the hospital he had to have skin grafted from his left thigh on to his right foot; one of his right toes was amputated. It cannot be doubted that he endured a good deal of pain and suffering. In the circumstances we consider that 400pounds would be adequate compensation." (underlining for emphasis).

From the foregoing, the lower court's interference with the trial court's perverse assessment and award of damages is beyond reproach See:. Shadipe & Co. Ltd v. Daily Times (1972) 11 SC 69 and Uwa Printers Nig. Ltd v. Investment Trust Co. Ltd (1988) 5 NWLR (part 92) 110.The trial court's award of N2 million naira cannot, on the basis of the evidence led by the appellant, be sustained. The appeal resultantly lacks merit. It is accordingly dismissed. The judgment of the court below is hereby affirmed. Parties should bear their respective costs.

**WALTER SAMUEL NKANU ONNOGHEN, J.S.C.:**

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

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

The facts of the case and relevant to the determination of the issues have been stated in detail in the lead judgment and I do not intend to repeat them here except as may be needed to emphasise the point(s) being made.

The issues for determination as identified by learned Counsel for appellant ROTIMI SERIKI ESQ in the amended appellant brief filed on 18/1/12 are, inter alia, as follows:-

"a. Whether the lower court was right in basing its award on only compensation for pain and suffering?

b. If the answer for issue number 1 is in the affirmative whether the sum of N250,000.00 awarded was appropriate in the circumstances..."

From the two issues, the contention between the parties centres on the award of damages with particular reference to the head of claims and quantum thereof.

Whereas the trial judge awarded the sum of N2,000,000= to cover all the various heads of claim because the respondent before this Court did not contest the issue of negligence, the lower court reduced the award to N250,000= because, according to the court, appellant was only entitled to be awarded damages for pain and suffering as he failed to prove the other heads of claim which would have entitled him to the award of more damages.

The claim of appellant in the Statement of Claim is as follows:

"WHEREOF the plaintiff claims the sum of N2 million (Two Million Naira Only) being damages for negligence by the defendant in allowing the plaintiff to be trapped between the doors of the lift in the defendant's hospital on 23rd October 1990 without attention and care after the eye operation resulting in severe fracture of the plaintiff's limbs and consequential pain and suffering.

PARTICULARS

(i) Medical Expenses - Drugs, Physiotherapy     N50,000.00

(ii) Pain and suffering                                   N750,000.00

(iii) Loss of earning capacity                          N600,000.00

TOTAL                                                     N2,000,000.00

In granting the above reliefs, the trial court stated as follows:

"In this case, since the Defendant in the statement of defence admitted the facts as stated in paragraphs 1, 2, 3, 4, 5, 6, 7, 8 and 11 of the statement of claim which set out the facts in support of the claim for damages in this case, those facts must be taken as established. A trial court is entitled to accept and act upon such uncontradicted and unchallenged evidence establishing as legally recoverable in such a given case, as the defendant did not join issues with the plaintiff on them. See Ellendo vs Ekwuoba (1998) 12 NWLR (Pt.518) 320; Meiden Trade Corp. Ltd vs M.C.C. (W.A) Ltd (1998) 4 NWLR (pt.544) 1; Kezie vs Iwusha (1998) 8 NWLR (Pt.563) 554; Ojini vs Ogo - Oluwa Motors Ltd (1998) 11 NWLR 313.

I therefore award the plaintiff damages in the sum of N2 Million Naira."

Upon appeal by the present respondent, the lower court rejected the above view of the trial judge and went on to hold as follows:-

"With respect to the trial judge it is difficult to understand or justify has approach to the award of N2m as damages. He reasoned that because the defendant had not joined issues on the facts relied upon by the plaintiff to establish negligence, the court must award the sum of N2m claimed as damages. This view of the trial judge does not represent the position of the law.

Notwithstanding that a defendant had not contradicted the facts in proof of negligence, the plaintiff, still had to prove by evidence his entitlement to the damages claimed. The plaintiff did not show by evidence the loss of income he suffered as a result of the injury he suffered. It was not even made clear the period of his inability to pursue his normal calling. There was no evidence as to the age of the plaintiff. There was no evidence of any residual disability or continuing effect of the injuries suffered. Although the plaintiff said he had an income of N200,000.00 per annum, he did not state the source of the income. Added to all these is the evidence from the Defendant that the plaintiff had a disability of 80 - 85% even before injuries. All these matters the trial judge did not even consider or comment upon." See pages 183 - 184 of the record.  
The lower court set aside the award of N2 million by the trial court and in its place awards the sum of N250,000.00.

I have carefully gone through the record of proceedings and the briefs of both Counsel and it is very clear that the lower court is right in its finding/holding reproduced above. There is very little evidence on record to support the award of N2,000,000.00 by the trial judge. The trial court did not even evaluate the little available evidence before making the award as the award was grounded not on evidence before the court, but on admission of the relevant paragraphs of the Statement of Claim by the defendant/respondent. Despite admissions in the pleadings the plaintiff still has the onus to prove his entitlement to the damages claimed for negligence, medical expenses etc. For there to be an award of damages for negligence etc, the plaintiff has to produce legally acceptable evidence to establish his entitlement for the said damages, otherwise he must fail - see FBN PLC vs Associated Motors Company Limited (1998) 10 NWLR (pt.570) 441 at 464.

In the case of C & C Construction Co. Ltd vs Okhai (2003) 18 NWLR (pt.851) 79 at 113, this Court restated the principles guiding assessment of damages in personal injury cases, inter alia, as follows:-

"Where, however, the trial court made no assessment of damages, an appellate court can make the assessment itself if there exists on the record enough evidence on which assessment can be based: Overseas Construction Company (Nig) Ltd vs Creek Enterprises (Nig) and Anor, (1985) 3 NWLR (pt.13) 407.

In discussing the principles that guide the court in the assessment of damages in personal injury case, this Court in the case of Samson Ediagbonya vs Dumez (1986) 3 NWLR (pt.31) 753 at pp- 761-762; (1986) 6 S.C. 145 at pp. 164 - 166 per Karibi-Whyte, JSC, commented thus:-

'It seems to have been established by judicial authority that in personal injury cases, two main factor have been taken into consideration in assessing damages in cases of liability. There are

(a) the financial loss resulting from the injury

(b) the persona! injury, involving not only pain and suffering, but also the loss of the pleasures of life...

The broad distinction personal loss and financial loss runs through all the cases. Perhaps one of the most difficult exercises in assessing damages is the qualification of the loss whether financial or personal. The court proceeds with the underlying assumption that damages are compensation for injury sustained and are not meant to be punitive - see British Transport Commission vs Gourley (1956) AC 185 at 208, Parry vs Cleaver (1970) AC 1 at p. 33.

Again damages are meant to be full and adequate ... It must be recognised and conceded that the fullness and adequacy of damages awarded as compensation will in each case depend on proven facts of the case and a just and fair assessment of the effect of the injury complained of".

From the facts it is very clear that the claim of N50,000 for medical expenses such as drugs, physiotherapy etc or otherwise called special damages was not proved as there is no evidences as to how much of the sum claimed was for drugs, physiotherapy etc and no receipt evidencing the expenditure was produced and tendered as exhibit before the court. The same defect affects the other heads of claim such as the N600,000 for loss of earning capacity.  
The case of appellant is made worst by the holding by the court to the effect that:

"Added to all these is the evidence from the defendant that the plaintiff had a disability of 80 - 85% even before the injuries".

Appellant did not call any medical evidence to contradict the pleadings and evidence of the defence on which the court made the above holding. In any event how can a plaintiff suffering such percentage of disability prior to the accident recover much damages, where there is no evidence in proof, for loss of earnings, or loss of amenities of life.

It is for the above reasons and the more detailed ones contained in the lead judgment of my learned brother, M. D. MUHAMMAD, JSC that I too dismiss the appeal and abide by the consequential orders made in the said lead judgment including the order as to costs.

Appeal dismissed.

**CLARA BATA OGUNBIYI, J.S.C.:**

The respondent in this appeal was the plaintiff in suit No. LD/2319/92 at the Lagos High Court and the appellant was the defendant.

The plaintiff claimed against the defendant the sum of N2 million Naira being "damages for negligence by the defendant in allowing the plaintiff to be trapped between the doors of the lift in the defendant's hospital on 23/10/1990 without attention and care after an eye operation resulting in severe fracture of the plaintiffs' limb and consequential pain and suffering." The defendant in this counter claim also asked for a sum of N9,000.00 "being balance of Medical bill payable by the plaintiff to the defendant as at the 3rd of June 1991."

On the 19/10/1999 the trial court in its judgment awarded the plaintiff the sum of N2m damages. The defendant was also awarded N9,000.00 as claimed in the counter claim. The defendant was dissatisfied and hence appealed to the lower court which on the 25th June, 2002 allowed the trial court's judgment in part.  
The respondent now appellant before us was dissatisfied with the said judgment and filed a notice of appeal on 2nd August 2000 wherein four grounds of appeal were raised.

On a corporate consideration of the issues in particular the 2nd that complains on the award of damages by the lower court, it is pertinent to restate that the claim sought for is in the nature of personal injury. The award of such is not a matter of course. In other words, it is expected that the court in the assessment should consider the nature of the injury suffered by the plaintiff\appellant, the earning capacity before the injury, the extent of diminution of earning capacity as a result of the injury, the duration of the incapacity suffered as well as the age of the plaintiff/appellant. The learned Justices of the court of Appeal were guided and took into consideration all the foregoing salient relevant factors in arriving of the assessment made. At page 180 of the record of appeal for instance the lower court said:-

"It is helpful to say that the attempt being made by the court in the award of damages is to compensate the plaintiff in so far as money can do it for the loss suffered or to be suffered by him following the injury suffered. It is therefore desirable that a plaintiff must provide the court the relevant information by which to do the assessment. The plaintiff in this case did not anywhere in his statement of claim give this needed information."

I cannot agree more with the learned justices. The burden lies on the plaintiff/appellant to assert specifically by his statement of claim and give all the necessary facts and information which will assist the court in arriving at the correct assessment. The award is not without basis and the court cannot act as a Father Christmas.

The trial court's reasoning and conclusion was predicated on the failure by the defendant/respondent to join issues on the facts relied upon by the plaintiff/appellant to establish negligence. The position of the law as rightly concluded by the lower court expects that the appellant must prove by evidence his, entitlement to the damages claimed.

The lower court could not therefore be faulted in the interference with the trial court's assessment.

My brother M. D. Muhammad, JSC has adequately considered the appeal and with the few words of mine for purpose of emphasis, I also affirm the judgment of the lower court and dismiss the appeal as lacking in merit. I further abide by the order made as to costs

**STANLEY SHENKO ALAGOA, J.S.C.:**

The brief facts of this case are that the present Appellant who was Plaintiff at the High Court had gone to the eye hospital of the Respondent an Ophthalmologist for treatment of his eye ailment and was placed under anesthesia while being attended to. He regained consciousness after the effect of the anesthesia had ceased to have any hold on him to discover that while being conveyed in a lift at the said hospital his legs had been trapped in a lift and he had sustained injuries. He took out a writ of summons against the Defendant (now Respondent) claiming the sum of N2,000,000.00 (Two Million Naira only) being damages for negligence by the Respondent. He gave the following breakdown as particulars.

Medical expenses - Drugs, Physiotherapy     -     N50,000.00

Pain and Suffering                                  -     N750,000.00

Loss of earning capacity                         -     N600,000.00  
                                                            -------------------------   
Total                                             =       N2,000/000.00  
                                                            ------------------------

The Respondent did not contest the issue of negligence.

The Respondent having thus admitted the facts stated by the Appellant in paragraphs 1, 2, 3, 4, 5, 6, 7 and 11 of the Statement of Claim which paragraphs constituted facts in support of the claim for damages, the learned trial Judge reasoned that the Appellant as Plaintiff was entitled to the sum of N2,000,000.00 as claimed and awarded same to the Appellant which amount covers all the heads as claimed by the Appellant in his Statement of Claim.  
On appeal by the present Respondent to the Court of Appeal, the lower court reduced the award to N250,000.00. The reasoning of the lower court was that the Respondent in the lower court (Alhaji Salawu Oke) was only entitled to be awarded damages for pain and suffering having failed to prove the other heads of claim. The lower court also considered the fact that the Respondent had an 80 - 85% disability even before the injuries he sustained. Aggrieved the Respondent (now as Appellant before the Supreme Court) has appealed against this finding of the lower court on this radically reduced award of damages as contemplated by him. Part of the findings of the lower court is reproduced hereunder:

"Notwithstanding that a Defendant had not contradicted the facts in proof of negligence, the Plaintiff still had to prove by evidence his entitlement to the damages claimed. The plaintiff did not show by evidence the loss of income he suffered as a result of the injury he suffered. It was not even made clear the period of his inability to pursue his normal calling. There was no evidence of any residual disability or continuing effect of the injuries suffered. Although the Plaintiff said he had an income of N200,000.00 per annum, he did not state the source of the income. Added to all these is the evidence from the Defendant that the plaintiff had a disability of 80 - 85% even before injuries. All these matters the trial judge did not even consider or comment upon."

I cannot agree more with the reasoning of the court below. If there was no evidence from the present Appellant on other heads of claim as itemized in his particulars of claim such as medical expenses and loss of earning capacity and if there was uncontroverted evidence that the present Appellant had 80 - 85% disability before sustained the injuries from the lift in the Respondent's hospital, upon what did the learned trial judge base his award of N2,000,000.00 (Two Million Naira) damages?

The court below in my estimation was right to have ignored the unproven claims for medical expenses and loss of earning capacity and to have focused its attention only on "Pain and suffering."

In **I.M.N.L. v. NWACHUKWU (2004) 13 NWLR (PART 891) 543** this court per Dahiru Musdapher, JSC (as he then was) held that,

"the assessment of damages should be based on the pleadings and the evidence adduced and where there is no evidence to support a claim for damages, the claim should be dismissed."

There certainly is no evidence to support the present Appellant's claim for medical expenses and loss of earning capacity and it was patently wrong for the trial judge to have made an award on these unproven heads of claim.

See also WAEC v. KOROYE (1977) 2 SC 45; DUMEZ V. OGBOLI (1972) 1 ALL NLR (PART 1) 241. The lower court was also in my estimation right to have made its own assessment of damages for "pain and suffering" as the trial court failed to do so, claiming to lump all the heads of claim together in the award of N2,000,000.00 (Two Million Naira) damages. See OVERSEAS CONSTRUCTION COMPANY (NIG) LTD v. CREEK ENTERPRISES (NIG) & ANOR (1985) 3 NWLR (PART 13) 407.

It is for these reasons and the fuller reasons given in the lead judgment of my learned brother Musa Dattijo Muhammad, JSC which I entirely agree with and which I had the privilege of reading before now that I too dismiss the appeal as lacking in merit. In so doing I abide by any order or orders contained in the said lead judgment including order on costs.

**"EDITOR'S NOTE- CONTRIBUTION FROM CHRISTOPHER MITCHELL CHUKWUMA-ENEH, J.S.C., WAS UNAVAILABLE AT TIME OF PUBLICVATION AND AN UPDATED JUDGMENT WILL BE PUBLISHED A WHEN OUTSTANDING RECEIVED"**