**JULIUS BERGER NIGERIA PLC & ANOR**

**V.**

**MRS. DOLAPO OGUNDEHIN**

IN THE COURT OF APPEAL OF NIGERIA

THE 26TH DAY OF FEBRUARY, 2013

CA/C/86/2011

**LEX (2013) - CA/C/86/2011**

OTHER CITATIONS

3PLR/2013/93

(2013) LPELR-20421(CA)

**BEFORE THEIR LORDSHIPS**

MOHAMMED LAWAL GARBA, J.C.A.

UZO I. NDUKWE ANYANWU, J.C.A.

JOSEPH TINE TUR, J.C.A.

**BETWEEN**

1. JULIUS BERGER (NIG.) PLC.

2. IDRIS UMAI KASIMU - Appellant(s)

AND

MRS. DOLAPO OGUNDEHIN - Respondent(s)

**ORIGINATING STATE**

CROSS RIVER STATE: HIGH COURT

**REPRESENTATION**

A. A. OSARA - For Appellant

AND

BANKOLE FALADE - For Respondent

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

TORT AND PERSONAL INJURIES: - Motor Accident – Injury arising from accident – Claim for damages based on negligence and breach of duty arising therefrom - Vicarious liability – Res Ipsa loquitor - Relevant considerations

TRANSPORTATION AND LOGISTIC LAW - MOTOR VEHICLE:- Motor vehicle accident occasioning bodily injury and deaths – Plea of negligence – Breach of duty and vicarious liability - Claim based thereon

HEALTHCARE AND LAW: - Injury arising from motor vehicle accident – Cost of medical treatment in local and foreign hospitals – Action for damages to recoup same – Relevant considerations

CRIMINAL LAW AND PROCEDURE - CONFESSIONAL STATEMENT: - Nature of a confessional statement - A confessional statement freely and voluntarily made while testifying before a court or tribunal – Whether a direct and positive assertion which alone is sufficient to sustain a conviction – Whether as a matter of fact, confession made in judicial proceedings is of greater force or value than all other proofs

CHILDREN AND WOMEN LAW: - *Women and Security* – Transportation and Highway security – Woman as victim of road traffic accident – Ingredients of a successful claim for damages

**PRACTICE AND PROCEDURE ISSUES**

ACTION - PLEADINGS**:-** General rule of pleadings - Parties are bound by their pleadings - Effect of rule – Whether it is not open for a party to depart from his pleadings in order to put up an entirely new case at the hearing – Whether learned trial Judge can depart from the deposition and pleadings of the parties – Whether the Court and the parties are bound by the facts set out in their respective pleadings – Whether a party will be allowed at the trial to call evidence to support his pleadings - Evidence which deliberately or through inadvertence was allowed contrary to a party's pleading – Whether must be expunged by the learned trial Judge when considering the case of both parties

EVIDENCE - BURDEN OF PROOF: - Civil cases - the onus of proving an allegation - whether on the plaintiff and does not shift until he has proved his claim on the preponderance of evidence and balance of probability – Need for a party to prove its case on credible evidence of its witnesses and make a case or rely on the weakness of its opposite party in order to succeed

EVIDENCE - BURDEN OF PROOF: **-** Action for negligence – Whether the burden of proof fails upon the plaintiff alleging it - Whether proved on a preponderance of probabilities - Whether person alleging negligence has the onus to give the particulars of negligence and lead evidence in support thereof

EVIDENCE - CONTRADICTION IN EVIDENCE:- Whether evidence on unpleaded matters goes to any issue - Where the pleadings conflict with the oral evidence in Court – Legal effect – Whether it does not matter that the learned Counsel on the opposite side did not raise objection when the contradictory evidence was tendered – Relevant considerations

JUDGMENT AND ORDER - DAMAGES - GENERAL DAMAGES**:-** General principle for assessment of general damages - Matters for consideration in the assessment of general damages in personal injury cases - Bodily pain and suffering that the plaintiff underwent and that which may occur in the future - Whether or not such a plaintiff sustained permanent disability or disfigurement - Loss of earning caused by any such disability or disfigurement - Length of time the plaintiff spent in the hospital receiving treatment - Age, status and expectation of life of the plaintiff

JUDGMENT AND ORDER **-** DAMAGES - SPECIAL DAMAGES: **-** Meaning - As quantifiable pecuniary losses up to the date of trial – Need to assess special damages separately from other awards since they must be pleaded and proved – Examples – Timebound nature of its quantity

WORDS AND PHRASES - "ACCIDENT", “GENERAL DAMAGES”, “SPECIAL DAMAGES”: - Meaning thereof

**MAIN JUDGMENT**

**UZO I. NDUKWE-ANYANWU, J.C.A., (Delivering the Leading Judgment):**

This is on appeal from the decision of the High Court of Cross River State sitting in Calabar delivered on 21st October, 2010.

The Respondent was travelling on 7th day of February, 2006 in a chartered Toyota Corolla Saloon car with Reg. No. AE441KMM. The 2nd Appellant was driving a Mercedes Benz Haib Tipper lorry with Reg. No. XC571RBC belonging to the 1st Appellant. The 2nd Appellant was travelling from Calabar to Ikom when his vehicle hit, the Respondent's vehicle and another Volvo Saloon with Reg. No. QA215CA travelling in the opposite direction. There was an accident involving the three vehicles as a result of which (6) six people lost theirlives. The Respondent was injured and treated in various hospitals including General Hospital Ugep, UNICAL Teaching Hospital, National Hospital Abuja and South Tees University Hospital Marton Road Middlesborough England. As a result of this accident, the Respondent filed this suit in the High Court of Cross River State.  
The Respondent as plaintiff sued the Appellants herein as defendants and claimed as follows from the Amended Statement of Claim:

"(1) a. Plaintiff claims against the 1st and 2nd Defendants jointly and severally for negligence and breach of duty on the part of the 2nd Defendant and for which 1st Defendant is vicariously liable.

b. Alternatively, Plaintiff Res Ipsa loquitor.

(2) And the Plaintiff claims as follows:

a. Special Damages       - N7,270,792.00

b. General and Exemplary Damages     - N92,729,208.00

Total               - N100,000,000.00."

See PP.152-160 of the record of appeal.

The Appellant filed their Statement of Defence and denied the claim. Thereafter on amended statement of Defence was filed.

The case proceeded to trial. The Respondent called three witnesses testifying herself as Pw3. She tendered several exhibits in proof of her claim. The 2nd Appellant testified as Dw1 and closed their case.

The trial Judge delivered its considered judgment in favour of the Respondent and awarded a total of N67,178,844.00 as special and general damages against the Appellants.

The Appellants being dissatisfied filed their amended notice with seven grounds of appeal on 19th April, 2012. The Appellants also filed their Appellants' brief on 1st August, 2012 and articulated four issues for determination as follows:

"1. Whether the learned trial Judge was right to rely on the police report tendered by the plaintiff/respondent to find the defendant/appellants liable in negligence when the police officer who allegedly made the report was not called to give evidence and was not cross examined on the report (Ground 1).

2. Whether the learned trial Judge was right to award the sum of N6,978,844.00 as special damages in favour of the Respondent when the Respondent did not establish special damages in the manner required  by law (Ground 2).

3. Whether the sum of N60,000,000.00 awarded by the learned trial Judge as general damages was not excessive and too high having regard to the fact that the respondent did not adduce the proper evidence to support the specific nature, degree, effect of the injuries and alleged disability (Grounds 3 and 5).

4. Whether the learned trial Judge was right to hold that the 2nd defendant caused the accident (Ground 6)."

The Respondent filed her brief on 28th August, 2012 and articulated three issues for determination as follows:

"1. Whether the learned trial Judge was not in error when he held that the 2nd Defendant was negligent in causing accident and that the 1st Defendant is vicariously liable. (This issue is formulated from grounds 1, 6, and 7 of the appeal).

2. Whether the learned trial Judge was wrong in the award of the sum of N7,978,844.00 to the plaintiff as special damages. (This issue formulated from issue 2 (sic) of the appeal).

3. Whether the learned trial Judge was wrong in awarding the sum of N60 million as general damages having regard the circumstances of this case for the negligence of the 2nd Appellant in respect of which the 1st Appellant is vicariously liable. (This issue is formulated from grounds 3 and 5 of the appeal)."

The issues articulated by both parties are basically the same, but I intend to use that as articulated by the Appellants for ease of reference.

The Appellant did not formulate any issues from grounds four and seven. These two grounds are hereby struck out they being abandoned.

ISSUES 1 & 4

The learned counsel for the Appellant sought to argue issues 1 & 4 together to avoid unnecessary repetitions. I will determine the two issues as argued together as well.

Learned counsel submitted that the learned trial Judge relied so much on Exhibit "6" the Police Investigation Report which was tendered through the Respondent as the IPO was not called as a witness.  The Exhibit "6" was tendered and the Appellants could not cross examine the Respondent on it. The trial Judge also relied on Exhibit "2" and "3A1" - "18" tendered by Pw2 the Respondent's husband.

These exhibits were tendered by people who did not make them. The police Report was tendered by the Respondent - Pw3 whilst the photographs were taken by Pw2. Appellants' counsel argued that even though the photographs were taken by Pw2 it ought to be tendered by the lab man who processed the photographs and the negatives. See Flash Fixed Odds Ltd. vs. Akatugba (2001) 9 NWLR Pt.717 page 46. In this case, the High Court acted on a police extract tendered by the victim's father. Niki Tobi, JCA as he then was had this to say:

"It is the law that the maker of a document is the proper person to tender it. If a person who is not the maker tenders it, (and he can) the trial Judge should not attach much probative value to it because that person cannot be cross examined on the document since he is not the maker and therefore not in a position to answer any question arising therefrom. I am therefore in entire agreement with learned counsel for the appellant that Exhibit "C" is documentary hearsay."

Counsel urged the Court to hold that the Police Investigation Report and the photographs taken by Pw2 and processed by someone else are documentary hearsay. The trial Judge ought not to have attached any weight on these exhibits in reaching his decision that the Appellants were negligent. See Awuse vs. Odili (2005) 16 NWLR Pt.952 page 16: Haruna vs. Modibo (2004) 16 NWLR Pt.900 page 487 where the Court of Appeal held as follows:

"The above evaluation of the lower tribunal overlooks the conditionality's that must be fulfilled or satisfied before any evidential value can be accorded to a document sought to be tendered by a person other than the maker which document tends to establish a fact, the oral evidence by which would be admissible in any civil proceedings. There is no evidence before the lower tribunal in conformity with the proviso to Section 91(b) to excuse the absence of the makers of form EC8A from coming to give evidence before the tribunal. No evidence that they were ever put on subpoena. Not having satisfied the above provisions of the Evidence Act which to me authenticate the principles of fair hearing I make bold to say that the testimonies of these witnesses relating to forms EC8A and such other documents which came under the provision of Section 91 are very much lacking in evidential value. "

Counsel submitted that the Respondent did not discharge the onus on her to prove that the Appellants were negligent. Counsel urged the court to resolve issue 1 and 4 in favour of the Appellants.

The learned counsel for the Respondent submitted that the trial Judge held the 2nd Appellant liable for causing the accident in the following words:

"On this issue Pw1, Pw3 and Dw1 are the only known eye witnesses of how the accident and injuries were counsel on the date and place of accident. Both Pw1 and Pw3 stated that they were passengers in 2 different vehicles travelling one behind the other on the same lane. Both also stated that the truck driven by 2nd Defendant was over speeding and veered and left the road, he tried to bring the truck back to the road and in the process come to their own lane and hit their vehicle in a head on collusion. The Pw3's car coming behind their own hit their own car behind and the truck fell on both vehicles; killing 6 people and injuring Pw1 and 3 and they were later rushed to hospital, etc. The evidence of Pw1 and Pw3 is similar in all material particulars. It was never challenged or contradicted in cross-examination. No attempt was even made to do so. I accept their evidence as rational, reasonable, true and accepted."

The learned counsel urged the court to hold that the finding of the trial Judge was consistent with the evidence of Pw1 and Pw3. The evidence of Pw1 and Pw3 were not challenged by the Appellants which evidence was independent of the Police Investigation Report Exhibit "6" and the photographs Exhibit "3A1"-"3A18". Also evidence of Dw1 - 2nd Appellant supported the case of the Respondent. Dw1 gave in evidence inter alia:

"My vehicle went to the other side of the lane, as a result of overtaking." (See page 300 record of appeal). "I do not know which of the two cars I hit first." (page 301 record of appeal)."

Counsel argued that the evidence of Pw1, Pw3 and even Dw1 attest to the negligence of the 2nd Appellant and the trial Judge found this as a fact. Counsel urged the court not to dismiss this finding. See Okonkwo vs. Okonkwo (2010) 14 NWLR Pt. 1213 page 228; Idiok vs. State (2008) 13 NWLR Pt. 1104 page 225: Usman vs. Garke (2003) 14 NWLR Pt.638 page 204.

Counsel argued that Exhibit "6" and "3A1-3A18" were legally admitted by the trial Judge in this case. Exhibit "3A1-3A18" were photographs taken by Pw2 and tendered by him. He was the maker of these photographs and was the right person to tender them. Exhibit 6 - the Police Investigation Report was certified and tendered as a public document. The law is that the trial court ought to consider all exhibits and evidence tendered before it on the merit. See Ogunfemila vs. Ajibade (2010) 11 NWLR Pt.1206 page 559.

The trial Judge held that Exhibit "3A1-3A18" were consistent with the evidence of Pw1 and Pw3 who were eye witnesses to the accident. The trial Judge found as a fact from the evidence of Pw1, Pw3 and Dw1 that the 2nd appellant was liable for the accident. Exhibit "6" and "3A1-3A18" were not the basis for his findings. Even if the trial Judge admitted evidence wrongfully it would not be a basis of the decision being reversed if the wrongfully admitted evidence did not affect the finding of the trial Judge. See Mower Construction Co. Ltd. vs. Azubuike (1990) 3 NWLR Pt. 136 page 74 where Karibi Whyte held as follows:

"It is true as contend by counsel for the Defendant that the evidence of the plaintiff that his son told him that it was the Defendant who collected the stone chippings from the plaintiff's land was hearsay evidence. It is inadmissible per se. It cannot form the basis of any decision in this case. So it cannot be said on the basis of that evidence that the Defendant removed the stone chippings in question. However, besides this hearsay evidence, there is the Statement of Defence of the Defendant which admitted the removal of the chippings from the plaintiff's land, although it was asserted that the removal was carried out under a claim of right. The claim of right was rejected by the trial court and the Court of Appeal and rightly in my view. There is also the oral evidence of Pw3 Ephraim Ejiofor, a police sergeant, as to the removal of the chippings from the Plaintiff's land by the servants of the Defendant at the instance of the latter.

It is evident that the admission of the hearsay could not have caused a miscarriage of justice. Without it the decision would still have been the same."

In this case likewise, without the Exhibits "3A1-3A18" and "6", the 2nd Appellant would have still been found liable or negligent for causing the accident.

Counsel submitted finally that there is no miscarriage of justice and that these two issues should be resolved against the Appellants.

In civil cases the onus of proving an allegation is on the plaintiff and the onus does not shift until he has proved his claim on the preponderance of evidence and balance of probability. A party must prove its case on credible evidence of its witnesses and is not of liberty in law to make a case or rely on the weakness of its opposite party in order to succeed. Imam vs. Sheriff (2005) 4 NWLR Pt.914 page 80; Ehas vs. Omo-Bara (1982) 5 SC page 25: Agbi vs. Ogboh (2006) 11 NWLR Pt.990 page 65.

In an action for negligence as in every other action, the burden of proof fails upon the plaintiff alleging it. It is proved on a preponderance of probabilities. The person alleging negligence has the onus to give the particulars of negligence and lead evidence in support thereof. NBC Plc vs. Borgundu (1999) 2 NWLR Pt.591 page 408.

The Respondent pleaded in her amended statement of claim filed on 13th November, 2007 paragraph 8 and 9 the negligent manner, the 2nd Appellant drove his vehicle resulting in the death of six people and injuring Pw1 and Pw3 seriously. In proof of this pleading, the Respondent testified as Pw3 and called two other witnesses. Pw1 gave an eye witness account of how negligently the 2nd Appellant drove his vehicle on that day. The Respondent also gave an eye witness account of the way and manner, the 2nd Appellant drove on that day. The evidence of Pw1 and P3 were neither challenged or controverted during cross examination. The 2nd Appellant in cross examination admitted to the woa he drove in the following manner:

"I have seen the photographs Exhibits "3A - 3A18". I hove seen my vehicle. My vehicle went to the other side of the lane, as a result of overtaking. I do not know that police also went there to do sketch map. I do not know which of the two cars I hit first. After the accident I did not see anything or people scattered on the scene of accident. No I had a driving licence of the time I was driving and the accident occurred. I gave the police my driving licence, but a photocopy."

From the 2nd Appellant's admission, his vehicle

"went to the other side of the lane as a result of overtaking"

2nd Appellant confessed to the mode he drove the vehicle on that day that caused the fatal accident.

The law is that

"a confessional statement freely and voluntarily made while testifying before a court or tribunal is a direct and positive assertion and it is alone sufficient to sustain a conviction."

As a matter of fact, confession made in judicial proceedings is of greater force or value than all other proofs. Oche vs. State (2007) 5 NWLR Pt.1027 page 214: Nwosu vs. State (2004) 15 NWLR Pt.897 page 440. This is what the law is in criminal cases were the burden of proof is higher. In civil cases, it is on the preponderance of probability. In the present case, the 2nd Appellant admitted that his vehicle went to the other side of the lane because of overtaking. The accident was therefore as a result of his reckless driving. The 2nd Appellant hit the other two vehicles and caused the death of six people and seriously injuring, the Respondent and Pw1.

In the evaluation of evidence, the trial courts are guided by the following principles, namely,

(a) Whether the evidence is admissible;

(b) Whether the evidence is relevant;

(c) Whether the evidence is credible;

(d) Whether the evidence is conclusive; and

(e) Whether the evidence is more probable than that given by the other party.

See Mogaji vs. Odofin (1978) 4 SC 91; Akad Industries Ltd. vs. Olubode (2004) 4 NWLR Pt. 862 page 1.

The trial Judge evaluated, the statement on oath, the testimony of the Pw1 and Pw3 in cross examination. Both of them were eye witnesses to the accident of 7th day of February, 2006. The trial Judge found as a fact that the 2nd Appellant drove his vehicle negligently, thereby causing the accident that killed six persons and injuring Pw1 and Pw3. This was enough to prove that the 2nd Appellant was negligent coupled with his own admission. Exhibit "6" and Exhibit "3A1-3A18" were admitted in evidence. They were consistent with the evidence of Pw1, Pw3 and Dw1 - 2nd Appellant and the case of negligence was proved without those exhibits. The Pw1, Pw3 and 2nd Appellant himself testified as to the mode of driving. The damage done was grievous and fatal as six people died on the spot. What else can explain the way the 2nd Appellant drove his vehicle.

The trial Judge was right in his finding that:

"On this issue Pw1, Pw3 and Dw1 are the only known eye witnesses of how the accident and injuries were caused on the date and place of accident. Both Pw1 and Pw3 stated that they were passengers in 2 different vehicles traveling one behind the other on the same lane. Both also stated that the truck driven by 2nd Defendant was over speeding and veered and left the road, he tried to bring the truck back to the road and in the process came to their own lane and hit their vehicle in a head on collusion. The Pw3's car coming behind their own hit their own car behind and the truck fell on both vehicles; killing 6 people and injuring Pw1 and 3 and they were later rushed to hospital, etc. The evidence of Pw1 and Pw3 is similar in all material particulars. It was never challenged or contradicted in cross-examination. No attempt was even made to do so. I accept their evidence as rational, reasonable, true and accepted."

I am of the firm belief that the 2nd Appellant on the 7th day of February, 2006 drove his vehicle No. XC571RCC negligently. The 1st appellant was also vicariously liable for the negligent acts of the 2nd Appellant. Issues 1 and 4 are therefore resolved against the Appellants.

ISSUE 2:

The Appellants' learned counsel referred to paragraph 18(i) and (ii) of the further amended statement of claim where the Respondent pleaded that she was treated of the General Hospital, Ugep, University of Calabar Teaching Hospital and National Hospital, Abuja where she incurred huge medical expenses:

"(i) Expenses of University of Calabar Teaching Hospital (UCTH):

(a) Dental           -   N50.000.00  
(b) X-Rays         -   N8,300.00  
(c) Feeding         -    N10,000.00  
(d) Crutche         -    N7,000.00  
(e) Surgery         -    N143,000.00  
(f) Admission 8/2/2006 to 27/2/2006  -    N72.000.00  
(g) Blood (4 pints)           -    N28,000.00  
(h) Ophthalmology           -    N22,000.00  
(i) Drugs             -    N141,250.00

Sub-total:           -    N482,930.00

(ii) Expenses at National Hospital

(a) Admission fee from 4/3/06 to 27/3/06     - N419,195.00  
(b) Dressing of wounds         -    N5,400.00  
(c) Drugs               -    N2,700.00  
(d) Consultation           -    N2,700.00  
(e) X-Rays           -    N2,000.00  
(f) Chemical Pathology       -    N1,500.00  
(g) Hemotology           -    N1,200.00  
(h) Admission 12/6/06 to 24/6/08     -    N353,260.00  
(i) Admission 17/9/07 to 28/9/07     -    N332,060.00

Sub total:             -    N1,120,015.00

The respondent also gave the particulars of the medical expenses in England and loss of earnings in paragraphs 18(iii) and (v) of the further amended statement of claim as follows:

"(iii) South Tees Hospital i.e University Hospital Marton Road, Middlesborough, England       -    N2,731,597.00

(v) Loss of earnings salary from February to July, 2006 at      N353,000.00 per month        -    N2,118,000.00.

The learned trial Judge in his judgment held that the plaintiff/respondent has established special damages and therefore awarded special damages in favour of the respondent as follows:

"(a) N714,000.00 being the cost of personal items and cash lost on the day and place of accident.

(b) N118,800.00 being the costs of items purchased for treatment whilst of the UCTH, Calabar as per exhibits "9A", "9B", "9C" and "9D".

(c) N1,296,447.00 being her inpatient admission payments of the National Hospital, Abuja as per Exhibits "10A1", "10A2", "10A3" and "10A4".

(d) N2,731,597.00 being naira equivalent of E7,500.00 expended of South Tees Hospital Middlesborough, England for operations as per Exhibit "11A1".

(e) N2,118,000.00 being loss of earnings during hospitalization for 6 months of N353,000.00 per month as per Exhibit "4"."

Counsel submitted that the Respondent must specifically or expressly plead the particulars of his claim for special damages in his statement of claim and she must lead evidence in proving the claim for special damages strictly. See N.M.A. vs. M.M.A. Ins. (2010) 4 NWLR Pt.1185 page 613; Harka Air Services Ltd. vs. Keazor (2006) 1 NWLR Pt.960 page 160; Imana vs. Robinson (1979) 3-4 SC page 1: X.S. (Nig.) Ltd. vs. Taisel (W.A) Ltd. (2000) 15 NWLR Pt.1003 page 533.  
Counsel submitted that the evidence offered by the Respondent in proof of her claim for medical expenses allegedly incurred of UNICAL Teaching Hospital Calabar was not consistent with the particulars of claim listed in paragraph 18(i) of the further amended statement of claim. The learned trial Judge ought to have rejected this head of claim as the Respondent did not prove this head. The learned trial Judge ought not to have relied on Exhibits "9A", "9B", "9C" and "9D" as they were not pleaded. Counsel urged the court to set aside the award of the sum of N118,800.00 made by the trial Judge in favour of the Respondent being the alleged cost of items purchased for treatment whilst of the UCTH, Calabar. See Haway vs. Medinwa (Nig.) Ltd. (2000) 13 NWLR Pt.683 page 77.

Counsel also submitted that the trial Judge relied on Exhibit "10A4" as a basis to award the sum of N1,296,447.00 in favour of the Respondent. However, the amount of money contained in Exhibit "10A4" is not listed in the particulars contained in paragraph 18(ii). Moreover, the Respondent claimed the sum of N1,120,015.00 but the trial Judge awarded N1,296,447.00. Counsel also urged the court to set aside this claim under this sub-head.

The learned trial Judge awarded N2,731,597.00 being the alleged naira equivalent of E7,500.00 expended in South Tees Hospital, Middlesborough, England. Counsel argued that the exchange rate is a matter of facts to be proved. Counsel urged the court to set aside this award on the authority of Harka Air Services vs. Keazor (supra).

The trial Judge awarded N2,118,000.00 in favour of the Respondent being the alleged loss of earnings during her 6 months hospitalization of N353,000.00 per month Exhibit "4".Counsel argued that the basis of that figure was not properly and adequately pleaded in the manner required by law.

Finally, learned counsel to the Appellants submitted that special and general damages are deemed to have been traversed unless specifically admitted. See Ngilari vs. Mothercat (1999) 13 NWLR Pt.636 page 626. The Respondent did not specify how she came about her monthly salary as it does not tally with her basic or gross annual salary. The essence of special damage is to determine with exactitude the amount claimed with documentation. This requirement was lacking in this sub-head and therefore should fail.

The trial Judge awarded the Respondent a total of N714,000.00 for personal items lost on the day of the accident. Counsel argued that special damages must be particularly pleaded and specifically proved for the award to be made. See A.T.E. Co. Ltd. vs. M.U. Gov. of Ogun State (2009) 15 NWLR Pt.1165 page 26: Spring Bank Plc vs. Adekunle (2011) 1 NWLR Pt.1229 page 581. Counsel urged the Court to set aside these awards and resolve this issue in favour of the Appellants.

In reply the Respondent's learned counsel challenged all the various arguments to the various awards made by the trial Judge. Learned counsel to the Respondent's submitted that the trial Judge was right in awarding those sums claimed by the Respondent and referred the court to Ijebu-Ode LGC vs. Adedeji Balogun & Co. Ltd. (1991) 1 NWLR Pt.166 page 136 per Karibi-Whyte, JSC:

"Special damages denote those pecuniary loses which have crystallized in terms of cash and value before trial."

Counsel contended that, the Respondent in paragraphs 18 and 19 of her statement of claim itemized and specifically particularized the special damages and loses under sub-headings in paragraph 18(i), (ii), (iii) and (iv).

In UCTH, the Respondent pleaded the particulars of the special damages, gave oral testimony and tendered documents and receipts to prove her claims. The Respondent paid for all her medical bills, expenses and purchase of drugs and materials necessary for the operation and treatment carried out on her at UCTH from 7th day of February, 2006 to 28th February, 2006. She also deposed to the fact that she lost the original of some of her receipts when transferring to National Hospital, Abuja. During her oral testimony on pages 293-300 Respondent was not cross examined by the Appellants. She also tendered Exhibits "9A", "9B", "9C" and "9D" and was not cross examined on them. See Duruji vs. Azie (1992) 7 NWLR Pt.256 page 688 where Jacks, JCA held as follows:

"Now the award of N6,055.00 as funeral expenses are comply supported by evidence and some receipts. The Respondent was not cross-examined on the specific items constituting the total award. They are items of special damages which in my view have been proved. I agree with the submission of learned counsel for the respondent. Indeed strict proof of special damages simply means proof as can be readily quantifiable. See Imana vs. Robinson (1979) 3-4 SC 1. In the award of N6,055.00 for funeral expenses, etc incurred by the respondent was justified and sustained by me."

Ordia vs. Piedmint (Nig.) held (1995) 2 NWLR Pt.379 page 516 per Belgore, JSC (as he then was) held:

"The exhibit put the value of a similar barge of N315,530.00 that evidence remains uncontradicted. That was the value of the time of the action and of the time of the judgment... Since the trial court admitted Exhibit "P1" the defendant never made attempt to contradict its contents and the value placed by plaintiff on each barge has remained unchallenged. Obi Obembe vs. Wemabod Estates Ltd. (1977) 5 SC 115 at 140."

Counsel urged the court to affirm the award of N118,800.00 by the trial Judge proved by Exhibit "9A"-"9D". See again West African Shipping Agency vs. Kalla (1978) 11 NSCC page 114 per Eso, JSC:

"In this case, the plaintiff's evidence in regard to the purchase price of the beans is uncontroverted. He paid for them and he would know what they cost him. He has the peculiar knowledge. His evidence or what he paid for the beans, uncontroverted as it were, he sufficient proved of his claim for special damages and the learned trial Judge is perfectly justified in this award."

The Respondent's claim as regards National Hospital, Abuja is contained in paragraph 18(ii) of the further Amended Statement of claim for the sum of N1,120,015.00. The Respondent in her statement on oath gave the details of her expenditure in the National Hospital. She also tendered Exhibits "10A1 - 10A38".

Counsel conceded that N191,932.00 on Exhibit "10A4" was not pleaded and ought not to be awarded. See Attorney-General of Federation vs. A.I.C. Ltd. (2000) 10 NWLR Pt.675 page 293: Amadi vs. Chunda (2009) 10 NWLR Pt. 1148 page 107.

Counsel contended that where a plaintiff gives evidence of loss and there is nothing to suggest that he is lying and nothing contradicts his averment the court should accept his evidence. See Maduga vs. Bai (1987) 3 NWLR Pt.62 page 635; W.A. Shipping Agency vs. Kalla (supra). Counsel urged the court to accept that plaintiff proved the sum of N1,120,015.00 expended at the National Hospital, Abuja.

In South Tees Hospital, England the Respondent paid a total of E7,500.00 which came to N2,731,597.00. The Appellants did not cross-examine on this subhead neither was the amount controverted nor contradicted. The claim was not challenged and is therefore deemed proved. See Kurubo vs. Zach Motison (Nig.) Ltd. (1992) 5 NWLR Pt.239 page 102 per Tobi, JCA (as he then was) held:

"Strict proof does not also mean that the law lays down a special category of evidence required to establish the plaintiff's entitlement to special damages. What is required is that the person claiming should establish his entitlement to that type of damages by credible evidence of such a character as would suggest that he indeed is entitled to an award under that head, otherwise, the general law of evidence as to proof by preponderance or weight usual in civil cases operates. See Oshinjinrin vs. Elias (1970) 1 All NLR 153.

Although the word "strict" strictly says what it means, it does not invariably mean in the context of strict proof of special damages that the plaintiff is under an evidential burden to prove the damages to a mathematical accuracy, exactness or exactitude. It does not of ways mean that the figure and numbers must as a matter of compulsion, relate accurately to the minutes detail. The burden is discharged when there is such a proof from the totality of the evidence that would readily lend itself to quantification or assessment without the trial Judge straining himself in search of more acceptable figures."

For loss of earnings, the trial Judge awarded the sum of N2,118,000.00. The Respondent claimed loss of earnings at N353,000.00 per month. The Respondent pleaded this sub-head in paragraph 18(v) and in her reply to the statement of defence. She lost her job as she was hopping from hospital to hospital Exhibit "5" is a letter from her employers showing her annual income et al. She in her oral testimony broke all these items down. What the Respondent earned per annum is in Exhibit "5". See Kurubo vs.Zach-Motison (Nig.) Ltd. (supra) W.A. Shipping Agency vs. Kalla (supra).

For loss of personal items totaling N714,000.00 counsel submitted that even though this fall under the sub-head for special damages to be proved strictly. G.F.K. Investment Nig. Ltd. vs. Nig. Telecoms Plc (2009) 15 NWLR Pt. 1164 page 344 where Tobi, JSC held:

"It is elementary law that special damages, unlike general damages must be proved to the hilt. Damages being special must be specially proved to the satisfaction of the court. Although it is most desirable to prove special damages by the production of receipts and the like, failure on the part of the plaintiff to do so in certain circumstances will not defeat the claim of special damages. This is because there are certain trades or transactions that do not readily give rise to the issuance of receipts and courts of law should not insist on receipts in such cases. Where the law insists on the production of receipts in all claims of special damages, the law will be unwittingly promoting the offence of forgery because a party who has no receipt will be tempted to forge one. This is not good in the administration of justice."

Obasuyi vs. Business Venture Ltd. (1995) 7 NWLR Pt.406 page 184 per Ubaezonu, JCA:

"This appeal, once again, brings into focus the problem which confronts practitioners over the question of pleading and proving special damages. In Rodcliffe vs. Evans (1892) 2 Q.B. 524 or (1881'971894) All E.R. Reprint 699: Bowen L.J., points out that such damage is called variously in old authorities as "express loss", "particular loss", "damage in fact," "special or particular cause of loss." The law requires such damages to be specially or specifically pleaded and strictly proved. Having pleaded it, what amounts to a strict proof depends on the facts and circumstances of each case. No general rule can be laid down as to what amounts to a strict proof. An item of special damages need not be proved with mathematical exactitude nor must a receipt be tendered in every case in order to satisfy a strict proof. In Anglo'97Cyprian Trade Agencies Ltd. vs. Pophos Wine Industries Ltd. (1951) 1 All E.R. 873 at 875: Devlin J. observed as follows: "I do not mean that one must scrutinize each set of particulars of special damages as a matter of figures. If for example, a market price is pleaded as being E5. That figure may be justify by evidence of a market price of E4:10 to E5:10. No one expects minute accuracy, but, in my view, the special damage which is pleaded should make quite clear to the other side what measure of damage is being relied on." If therefore a plaintiff pleads a specific amount as his loss or, as in this case, as the estimated amount for the repair of his vehicle and gives evidence thereon but the evidence is not challenged nor contrary evidence produced by the defence, the plaintiff shall be entitled to the award of such amount as a special damage. If the defence challenges the evidence or produce contrary evidence to show that the figure given in evidence by the plaintiff is not correct then it is for the trial court to decide whether the quantum of proof given in evidence by the plaintiff is a sufficient proof of the special damage claimed."  
Audu vs. Okeke (1998) 3 NWLR Pt.542 page 373: W.A. Shipping Agency vs. Kalla (supra).

Counsel submitted that the Respondent listed her lost items with the cost on the items totaling N714,250.00. The Respondent was not cross-examined on any of the items neither did the Appellants produce any contrary evidence to counter the evidence before the court.

Counsel urged the court to reject all the arguments proffered by the Appellants and affirm the award by the trial Judge and resolve this issue in favour of the Respondent.

This issue is majorly on the special damages awarded by the trial Judge. The object of tort damages is to put the plaintiff in that position he would have been in, if the tort has not been committed. All these awards were made as compensation for the negligent acts of the 2nd Appellant who drove his vehicle recklessly thereby killing six people and injuring the Respondent.

The Respondent's claims on special damages are for the expenses incurred as a direct result of the accident. In the sub-head of the UCTH, the Respondent pleaded the expenditure, gave oral evidence and tendered the receipts obtained from the hospital and outside for other medical services and drugs. The Respondent also stated that some of the original receipts were misplaced in transit. This is understandable considering the state of health of the Respondent. The Appellants denied this sub-head in their pleadings putting the Respondent to the strictest proof. She has pleaded and tendered the receipts and were received in evidence and marked "9A", "9B", "9C" and "9D". The Appellants neither cross examined the Respondent nor objected to the tendering of these exhibits. The court was therefore right in awarding the Respondent with the amount of - N482,930.00.

The Respondent in paragraph 18(ii) pleaded her expenditure in the National Hospital Abuja and all other medical expenditure including drugs and materials. She also gave oral testimony and tendered Exhibits "10A1-10A38" a total of N1,311,977.00. Learned counsel to the Respondent conceded not pleading Exhibit "10A4" for the sum of N191,932.00. This amount ought to be subtracted. The Appellants did not challenge the other exhibits and as such it would be taken as proved. In sum the total of N1,120,015.00 expended in the National Hospital, Abuja proved is affirmed.

The Respondent also moved to South'97Tees Hospital, England where she continued her treatment. The Respondent pleaded this sub'97head and gave oral evidence as well as tendering the receipt for her treatment which amounted to E7,500.00. The Respondent also gave a figure of N2,731,597.00 as the naira equivalent. Learned counsel for the Appellants objected to the conversion. He argued that the Respondent did not indicate the rate of the pound to the naira, on the authority of Harka Air Services vs. Keazor (supra). The Respondent has already pleaded the sum of E7,500.00 as medical expenses incurred in England. The Appellants did not challenge this sum. What they challenged is the conversion. It is correct that the Respondent did not show the exchange rate that got her to the naira equivalent. The Respondent proved the E7,500.00 since the Appellants are quarrelling about the conversion, I will remove the conversion. The Respondent has proved she expended this sum and would be awarded, the amount as it appears on the receipt tendered Exhibit "11A1". The Respondent is therefore awarded special damage of E7,500.00.

The Respondent also pleaded in paragraph 18(v) for loss of earnings. She tendered a letter from her employer stating her emolument per annum Exhibit "5". The Respondent only claimed for loss of earnings for only six months she was hospitalized and no more. Musdapher, JSC (as he then was) in Adim vs. NBC Ltd. (supra) held:

"But where there has been proper and adequate pleading, the unchallenged evidence, without more can constitute sufficient proof of special damage."

Every detail of the Respondent's annual emolument was on Exhibit "5". The Appellants neither challenged the exhibit, testimony or the figures during the trial. It would therefore require minimal proof which the Respondent has achieved on this sub-head. The trial Judge was right in awarding the total sum of N2,118,000.00 for loss of earnings for six months.

The Respondent in paragraph 18(iv) pleaded and itemized the items she lost during the accident. These figures were not challenged during her oral evidence. The law, is, if the Appellants are challenging the cost per item, they should give evidence of a contrary cost. If not it would be taken that it is not challenged and therefore the Respondent shall be entitled to the award of such amount as special damage. See Obasuyi vs. Business Venture Ltd. (supra):

"This appeal, once again, brings into focus the problem which confronts practitioners over the question of pleading and proving special damages. In Rodcliffe vs. Evans (1892) 2 Q.B. 524 or (1881'971894) All E.R. Reprint 699; Bowen L.J., points out that such damage is called variously in old authorities as "express loss", "particular loss", "damage in fact," "special or particular cause of loss. "The law requires such damages to be specially or specifically pleaded and strictly proved. Having pleaded it, what amounts to a strict proof depends on the facts and circumstances of each case. No general rule can be laid down as to what amounts to a strict proof. An item of special damages need not be proved with mathematical exactitude nor must a receipt be tendered in every case in order to satisfy a strict proof. In Anglo'97Cyprian Trade Agencies Ltd. vs. Paphos Wine Industries Ltd. (1951) 1 All E.R. 873 at 875: Devlin J. observed as follows:

"I do not mean that one must scrutinize each set of particulars of special damages as a matter of figures. If for example, a market price is pleaded as being E5. That figure may be justify by evidence of a market price of E4:10 to E5:10. No one expects minute accuracy, but, in my view, the special damage which is pleaded should make quite clear to the other side what measure of damage is being relied on." If therefore a plaintiff pleads a specific amount as his loss or, as in this case, as the estimated amount for the repair of his vehicle and gives evidence thereon but the evidence is not challenged nor contrary evidence produced by the defence, the plaintiff shall be entitled to the award of such amount as a special damage. If the defence challenges the evidence or produce contrary evidence to show that the figure given in evidence by the plaintiff is not correct then it is for the trial court to decide whether the quantum of proof given in evidence by the Plaintiff is a sufficient proof of the special damage claimed."

This subhead was again proved and ought to be awarded.

Special damages are quantifiable pecuniary losses up to the date of trial. They are assessed separately from other awards since they must be pleaded and proved. The exact amount to be claimed is known of the time of the trial. Special damage includes medical expenses, nursing fees, drugs, taxi fares to and fro hospital and loss of earnings during the period. Okuneye vs. Lagos City Council (1973) 2 CCHCJ page 38.

In totality, the various subheads were proved per the pleading, oral evidence and the unchallenged evidence during cross examination. This issue is therefore resolved against the Appellants.

ISSUE 3:

Counsel submitted that in a claim for negligence, the onus is on the plaintiff to prove negligence. In the instant case, the Respondent was unable to prove negligence against the Appellants. However, counsel stated that if the court found otherwise, that the award of N60m was excessive and should be set aside. To justify award of a high sum, as damages for personal injury, it is necessary to establish the specific nature, degree of the seriousness of injuries and the effect of the injuries on the Respondent. To award such an amount one may need medical evidence especially as not clearly visible. In the absence of medical evidence only a small amount may be awarded. See Edigbanya vs. Dumez (1986) 3 NWLR Pt.31 page 753: Omorejie vs. Omigie (1990) 2 NWLR Pt.130 page 29: Bello vs. Pateji (2000) 8 NWLR Pt.667 page 21: Ozigbo Eng. Co. Ltd. vs. Iwuamodi (2009) 16 NWLR Pt.1166 page 42.

Counsel referred the court to Exhibit "2" medical report from UCTH of 28th February, 2006 signed by one Dr. G. Osakwe and Exhibit "8" medical report signed by one Dr. S.A. Salawu dated 31st October, 2007. Both Exhibit "7" and "8" show that:

"She improved clinically over subsequent months and the wound healed while the fractures united completely. She became ambulant with full weight bearing.... She is expected at our follow up clinic about mid-November and we estimate that she could return to her duty post by the end of November, 2007."

Counsel submitted that from these reports the Respondent's treatment was successful. The trial Judge should not have relied only on the Respondent's pleading and oral testimony to gauge her physical state and award the general damages. Counsel urged the court to hold that the Respondent was treated successfully and does not have any permanent pain or injury that will be compensated for by the huge award. See Omoregie vs. Omigie (supra).

In response, the learned Respondent's counsel submitted that the learned trial Judge in awarding N60m as general damages gave his reasons of page 317 of the Record of Appeal as follows:

"I think that from the evidence on the record it is beyond dispute that the plaintiff has suffered much unquantifiable pains, and suffering, stress and trauma, physical and psychological shocks, anxiety, etc. She may be lucky to have managed to survive an avoidable accident in which six people, including her driver all died on the spot; but the damage and memory may live till the end of time.

It is noteworthy that several years after that accident she is still undergoing treatment and needs to work, walk and live with the support of others. Her evidence and that of her husband (Pw3 and 2) as to the effect of the accident on her and her family is sad tale.

Taking the above and all the circumstances of the case into consideration, I think she is entitled and ought to be awarded such general damages as will at least enable her carry on with her life bearing also in mind that the treatment is still ongoing and the end is only known to the Supreme Judge and decider of mortal life and fate."

The plaintiff in her further amended statement of claim paragraph 26 claimed N92,729,208.00 as general and exemplary damages. The term general damage is used to classify damages which the law presumes flow from the wrong complained by the Respondent. See Olugbo vs. Umeh (2004) 6 NWLR Pt. 870 page 621. General damages need not be specifically claimed and proved. Once an injury is proved to have resulted from a wrong committed by the Appellants. The Respondent in paragraphs 13, 14, 15 (a-g), 20, 21, 22 and 23 pleaded the injuries she sustained, her pains, emotional trauma and shock, her apprehension or fear for the future and prospect of work.

The general principle of assessment of general damages was re-emphasized in the case of Hanseatic International Ltd. vs. Usang (2002) 13 NWLR Pt.784 page 376 as follows:

"Matters for consideration in the assessment of general damages in personal injury cases have been held to include:

(i) The bodily pain and suffering that the plaintiff underwent and that which may occur in the future;

(ii) Whether or not such a plaintiff sustained permanent disability or disfigurement;

(iii) The loss of earning caused by any such disability or disfigurement;

(iv) The length of time the plaintiff spent in the hospital receiving treatment;

(v) The age, status and expectation of life of the plaintiff."

Ejisun vs. Ajao (1975) 1 N.W.L.R page 4: Eziegbe vs. Agholo (1993) 9 NWLR Pt.316 page 128.

Apart from the Respondent's pleading, she called two prosecution witness and testified as Pw3, Pw1 an eye witness to the accident gave evidence as to the seriousness of the injuries they sustained especially the Respondent - Pw1 and stated:

"After the accident the police of the check-point nearby took the plaintiff, myself and the 2nd Defendant/driver to the Ugep General Hospital. Because of the severity of our condition, we were transferred immediately to UCTH, Calabar, i.e. both of us, myself and the plaintiff. I was in intensive case (sic). At a point in time, the doctors said they could not manage the plaintiff's case and asked the husband to take her away which he did..."

Under cross examination he continued:

"On 3 occasions I and plaintiff were driven to the Naval Hospital, Calabar, for X-Ray. At a point the doctors suggested amputation of the plaintiff's leg but the husband would not hear of that. That's how I know of her condition."

Pw2 the Respondent's husband gave evidence as follows stating the seriousness of the injuries sustained and her quality of life after the accident:

"That I met her at the Emergency Unit at the University of Calabar Teaching Hospital, Calabar on a danger list as she was intermittently moving from state of unconsciousness to consciousness. That I know that my wife was a very active personality but that since the accident she has been severely restricted and cannot get about as she used to before."

Counsel contended that no report is required to prove pain and suffering as a head of claim in personal injury case like the present case. C & C Construction Co. Ltd. vs. Okhai (2003) 18 NWLR Pt. 851 page 79 per Pats Acholonu, JSC (of blessed memory) held:

"In their judgment, the learned Justices of the Court of Appeal have commented as follows per Coomassie, JCA:

"I could have awarded damages per pain and suffering but for fact that nowhere the Appellants produced the medical evidence to support his pleadings"

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

Strapay Construction Nig. Ltd. vs. Ogarekpe (1991) 1 NWLR Pt.170 page 733; Wise vs. Kaye (1962) 1 All E.R. page 257: UBA Ltd. vs. Achonu (1990) 6 NWLR Pt.156 page 254. As per Garba, JCA in Ozaigbu Eng. Co. Ltd. vs. Iwuamadi (2009) 16 NWLR Pt. 1166 page 44:

"Another settled principle of law is that the court is entitled to accept (and in some situations bound to) credible evidence that was not challenged and controverted on any issue calling for decision before it."

See Omeregbe vs. Lawn (1980) 3-4 SC page 108; Odebunmi vs. Abdullahi (1997) 2 NWLR Pt.489 page 526: Otuedun vs. Olughor (1997) 9 NWLR Pt.521 page 355; Durosaro vs. Ayorude (2005) 8 NWLR Pt.927 page 407.  
Counsel submitted further that the evidence of the Pw1, Pw2 and Pw3 was credible and unchallenged and accepted by the trial Judge in awarding the general damages of N60m. Counsel urged the court to accept same and not disturb the award and resolve this issue in favour of the Respondent. The law is replete with case that state that.

"General damage covers losses which are not capable of exact quantification. It includes all non-financial loss (past and future) and future financial loss. Items of general damages need not and should not be specifically pleaded, but some evidence of such damages is required. Heads of general damages are (a) pain and suffering: (b) Loss of amenities; (c) Loss of expectation of life: (d) future loss of earnings or earning capacity; and (f) future expenses."  
Okuneye vs. Lagos City Council (1973) 2 CCHCJ page 38.

There is really no fixed rule of assessing damages done to a man. It is difficult to ascertain, the pain and suffering of an injured man. What type of compensation will suffice for a man who has lost his limb, disfigured, lost the amenity, the ability to enjoy his life and shortened expectation of life. Since these issues are difficult to ascertain the matter is therefore left to the discretion of the court to award a fair and reasonable compensation having regard to the circumstances of the particular loss. Okuneye vs. Lagos City Council (supra).

In this case, the trial Judge had found that the 2nd Appellant was negligent and that the 1st Appellant was vicariously liable. For the 1st Appellant to be liable for the acts of the 2nd Appellant, it must be established that the servant was of the material time in the employment of the 1st Appellant, and that the negligence occurred whilst the servant was acting in the course of his employment. UBN (Nig.) Ltd. vs. Ajagu (1990) 1 NWLR Pt.126 page 326; Eseigbe vs. Agholor (supra).

In the present case, the Respondent proved that the 2nd Appellant was negligent in his manner of driving, with the evidence of the Respondent and Pw1. It was established and proved that on the 7th day of February, 2006 the 2nd Appellant drove the vehicle of the 1st Appellant in a negligent way. The 2nd Appellant left his lane to the other side, hitting the Volvo and thereafter fell on top of the Toyota and the Volvo. Pw1 was traveling in the Volvo with four other people who died. The driver of the Toyota died and so also, the conductor of the 2nd Appellant. A total of six people died on the spot due to the negligent manner, the 2nd Appellant drove his vehicle. Looking at the photographs of the vehicle it is a miracle that Pw1 and Pw3 including the 2nd Appellant came out of the wreckage alive.

The question of negligence was also proved by the admission of the 2nd Appellant that he drove on the other lane due to overtaking. What is admitted needs minimal proof. I therefore find and hold that the trial Judge was right when he held that the 2nd Appellant was negligent in his manner of driving and therefore caused the accident that injured the Respondent.

Management Enterprises Ltd. vs. Otusanya (1987) 2 NWLR Pt.55 page 179. A servant's wrongful act is deemed to be in the course of his employment if it is a wrongful and unauthorized mode of doing some act authorized by the master. NBN vs. TASA Ltd. (1996) 8 NWLR Pt.468 page 511.

The Respondent in this case established that the 2nd Appellant was in the employment of the 1st Appellant which was never denied. Chukwu vs. Solel Bonah (Nig.) Ltd. 1993 3 NWLR Pt.280 page 246; Obi vs. Biwater Shellabear (Nig.) Ltd. (1997) 1 NWLR Pt.484 page 722.

Having proved that the 2nd Appellant was negligent in his manner of driving and that he did so as a servant of 1st Appellant, they are therefore both liable in negligence.

Learned trial Judge in his judgment held as follows:

"I think that from the evidence on the record it is beyond dispute that the plaintiff has suffered much unquantifiable pains, and suffering, stress and trauma, physical and psychological shocks, anxiety, etc. She may be lucky to have managed to survive an avoidable accident in which six people, including her driver all died on the spot; but the damage and memory may live till the end of time.

It is noteworthy that several years after that accident she is still undergoing treatment and needs to work, walk and live with the support of others. Her evidence and that of her husband (Pw3 and 2) as to the effect of the accident on her and her family is sad tale.

Taking the above and all the circumstances of the case into consideration, I think she is entitled and ought to be awarded such general damages as will of least enable her carry on with her life bearing also in mind that the treatment is still ongoing and the end is only known to the Supreme Judge and decider of mortal life and fate.

I consider the sum of Sixty Million Naira a fair and reasonable award as general damages. I hereby award same accordingly against the defendants."

I cannot fault this assessment. The learned trial Judge had the rare opportunity of seeing and assessing the Respondent. He observed her emotional and physical well being before getting to that conclusion and subsequent award of N60m general damages against the Appellants in favour of the Respondent.

The Respondent was injured as a result of the accident on 7th day of February, 2006. From that day she was admitted to General Hospital, Ugep and later transferred to UCTH Calabar. From there to National Hospital, Abuja before going to South-Tees Hospital, England. It has not been a joy ride but a painful journey of treatments, operations and what have you. It cannot be imagined what pain and trauma she had been through for all these months. Her treatment as of the time of this suit in the lower court was still ongoing. The award of N60m was given at the discretion of the trial Judge who saw the Respondent first hand and observed her pain. In questions of discretion, the only rider is that it must be exercised judiciously and judicially. I have not seen anything perverse about this amount and I hold it to be commensurate to the pain and suffering of the Respondent and her dependants.

As an aside I must make my personal comments on the way and manner big trucks drive their vehicles on our very poorly maintained roads. Probably because of the sizes of these vehicles they are reckless to say the least and have no respect for other road user driving smaller vehicles. What can aptly describe their attitude is "they bestride the world like a Colossus". Their employers should in no uncertain terms castigate them and maintain a zero tolerance for reckless driving. Refresher courses must be encouraged to inculcate in these drivers the act of defensive driving.

Throughout the statement of defence, the Appellants denied all the paragraphs of the statement of claim and really showed no remorse for the number of people killed in this accident. More importantly they have not even shown an iota of remorse to the Respondent who has suffered the pain of being hospitalized all these months. No compensation can be adequate for this pain and agony, loss of normalcy and hope for the future and life expectancy. I say no more.

I also resolve the third issued against the appellants. In the final analysis all the four issues articulated by the Appellants have all been resolved against them. This appeal is therefore unmeritorious and deserves to be dismissed. It is dismissed.

It is hereby ordered as follows: The Respondent is entitled to:

(a) N482,930.00 awarded for her treatment in UCTH.

(b) N1,120,015.00 being amount spent in National Hospital, Abuja.

(c) E7,500.00 amount spent in SouthTees Hospital, England.

(d) N2,118,000.00 loss of earning for 6 months at N353,000.00 per month.

(e) N714,000.00 for loss of her personal items.

Items (a)-(e) are special damages awarded.

2. N60m general damages.

3. N200,000.00 costs of the suit in the trial court.

4. N50,000.00 cost of this appeal in favour of Respondent against the Appellants.

**MOHAMMED LAWAL GARBA, J.C.A.:**

I have read a draft of the lead judgment written by my learned brother, U. I. Ndukwe-Anyanwu, JCA, in this appeal. The four (4) issues submitted by the learned counsel for the Appellants have been fully considered and resolved in line with the extant principles of law on them in such a straight forward way that requires no interpolations. Because I do not want to merely repeat the cogent reasons set out in the lead judgment for the conclusions on the issues, my decision is to adopt same for dismissing the appeal and making the orders set out therein.

**JOSEPH TINE TUR, J.C.A.:**

I had the advantage of reading an advance copy of the judgment delivered by my Lord, Uzo I. Ndukwe-Anyanwu, JCA and I concur. I shall make the following general comments of mine in support of the lead judgment. From the pleadings it is clear that the car in which the Respondent was traveling from Ikom to Calabar when the collision occurred was being driven by the late Francis Malife, while the 2nd appellant was driving from the Calabar axis and heading towards lkom. Both vehicles were coming from the opposite direction. When two or more moving vessels or vehicles come into contact, it is said a collision or an accident has occurred.

An "accident" is an unintended and unforeseen injurious occurrence; something that does not occur in the usual course of events or that could not be reasonably anticipated. See Black's Law Dictionary, 9th edition, page 16. In the event of such a situation occurring, the onus is on the driver or person controlling or driving the vessel, motor car, or lorry, for example in this appeal, veered into the opposite lane of the road or highway when injury and damage has occurred, to explain how and why the accident or collision did happen. This was succinctly put by Erle C.J., in Scott vs. London and St. Catherine's Dock company (1865), 5 H & C. 596 at 601 (1865) 159 E.R. 665 as follows:

"...There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

In Lloyds vs. West Midlands Gas Board (1971) 2 All E.R. 1240 at 1246 Megaw, L.J., said that:

"I doubt whether it is right to describe res ipsa loquitur as a 'doctrine' I think that it is no more than an exotic, although convenient, phrase describe what is in essence no more than a commonsense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It means that a plaintiff prima facie establishes negligence where: (i) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident, but fill on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety."

This common sense approach propounded by Erie C.J., in Scott vs. London and St. Katherine's Dock Coy. (supra) has been applied by various Courts in and outside Nigeria, for example, Ude vs. Bonjut (1954) 14 WACA 533 at 534. In Faloye vs. Olaniyan (1954) 14 WACA 608 per Coussey J.A, at page 609; Anichebe vs. Onyekwe (1965) NMLR 108; Okeke vs. Obidefe (1965) NMLR 113; Ejisun vs. Ajao (1975) NMLR 4 and Ifeagwu vs. Tabanji Motors Ltd. (1972) ECSLR 790.

Pw1 testified under examination in-chief as follows:

"PW1: (Sworn, Bible, English).

Obeten Desmond Edet, No.15 Mbora Street, Akim, Calabar, student of Political Science, Unical. Remember 7/2/2006. I was coming to Calabar from my village, Nko, when I boarded a commercial car Reg. No. AQ215 CAL. I was a front seat passenger and we were 6 in the vehicle. As we were approaching Ekori junction a Julius Berger Truck was coming from the opposite direction. It was over speeding and veered and left the road. The next thing I observed was that the defendants' driver tried to bring back the truck and in the process went into our own lane and hit our vehicle in a head on collusion. At this time, another Toyota Corolla that was coming behind us hit our vehicle from behind and the truck fell on both vehicles i.e. our vehicle and the Toyota Corolla. Everybody in my vehicle died and I was the only surviving passenger.

I know the plaintiff as the only surviving passenger in the vehicle behind us. The driver of that car also died. I know the 2nd defendant as the driver of the truck. He survived but his conductor or boy died.

After the accident, the police at the check point nearby took the plaintiff, myself and the 2nd defendant/driver to the Ugep General Hospital. Because of the severity of our condition we were referred immediately to UCTH, Calabar, i.e. both of us, myself and the Plaintiff. I was in intensive case. At a point in time, the doctors said they could not manage the plaintiff's case and asked the husband to take her away which he did. That's all I know about the case."

The only questions that learned Counsel to the appellants put to Pw1 were as follows:

"Akinwale cross exams:

Yes it is true that the vehicle coming behind us hit us from behind and the Truck fell on both vehicles. That is the truth of the matter. I will be surprised if the plaintiff pleads otherwise.

On 3 occasions I and plaintiff were driven to the Naval Hospital, Calabar, for X-ray. At a point the doctors suggested amputation of the plaintiff's leg but the husband would not hear of that. That's how I know of her condition, etc. I cannot remember the particulars of the 2nd defendant's vehicle.

Re-exam by Falade - Nil."

Learned counsel tendered Exhibits "1", "2", and "3A1-

3A18" through Pw2. Exhibits "4-120A" were tendered through Pw3 who testified and was also cross-examined by learned counsel to the appellants as follows:

'DW1 Affirms. English)

Idris Umai Kasimu. I work with 1st defendant as a driver. On 6th October, 2009 I deposed to a statement on oath in respect of this case. I am the 2nd defendant on record. I do not know the plaintiff in this matter. This is the statement on oath. I adopt it as my evidence in this case. Admitted as Exhibit "12". That is all.

Cross examination by Falade:

Yes, I was the driver of vehicle No. XC571 RBC.  Yes I was involved with that vehicle in an accident on 7th February 2006 close to Ekori junction along Ikom Highway. Yes, I had the accident with 2 vehicles - a Volvo car and a Toyota Corolla car. It's not correct to say that my vehicle fell on the 2 vehicles. No, I did not hit the Volvo car 1st before the Toyota. Six (6) people died in the accident. I do not know how many people died in each vehicle. I do not know that 5 died in the Volvo. I do not know that only the driver of the Toyota car died. After the accident I was arrested by police. I did not make statement to police. Police wrote the statement but I signed.

I have seen the photographs Exhibits "3A" - "31A". I have seen my vehicle. My vehicle went to the other side of the lane, as a result of overtaking. I do not know that police also went there to do sketch map. I do not know which of the two cars I hit first. After the accident I did not see anything or people scattered on the scene of accident. No I had a driving licence at the time I was driving and the accident occurred. I gave the police my driving licence, but a photocopy.  
Re-examination by Akinwale: Nil. I am done with this witness. That is also the case for the defence. By the rules we shall exchange written addresses pursuant to Order 33 and 30 rules 14-16 of the new rules i.e. 14x14x7 days."

The 2nd appellant adopted his written deposition which was admitted and marked Exhibit "12".In paragraph 6-9(i)'(vi) of the written deposition the 2nd appellant explained how the collision occurred:

"6. That the accident occurred when the Toyota Corolla with Registration No.AE441KMM was overtaking the Volvo car with Registration No. AQ215CAL on the road that could not accommodate 5 vehicles at the same time and the Toyota Corolla ran into the 1st Defendant's Haib Tipper lorry with Registration No. XC571RBC thereby causing serious collision resulting in the accident.

7. I state that the 1st defendant was not vicariously liable since I was not negligent in driving the said vehicle.

8. I state that I did not leave my lane to the lane of the Volvo car with Registration No. AQ215CAL or Toyota Corolla with Registration No. AE441KMM and repeat that the accident occurred as a result of overtaking by the Corolla Car.

9. I hereby state as follows that:

(i) I was not driving at a speed which was excessive in the circumstance.

(ii) I did not fail to stow down at a bend, neither did I disregard other road users.

(iii) I did not fail to keep proper lookout, neither did I ignore or disregard other road users on the road.

(iv) I did not cause or permit the said Tipper Lorry or vehicle to skid any accident.

(v) I did not fail to exercise or maintain any or any sufficient or adequate control of the Tipper motor lorry or vehicle.

(vi) I did not fail to stop, to slow down and/or in any other way fail to manage or control the said motor - lorry as to cause the accident or any collision."

One does not need a magnifying glass to see that the facts deposed in paragraphs 6-9(i)-(vi) of Exhibit "12", are at variance with the pleadings in paragraphs 8-11 of the Amended Statement of Defence of 6th October, 2009. In the court the 2nd appellant however admitted that his vehicle veered to the other side of the lane as a result of overtaking contrary to the depositions (Exhibit "12") and the pleadings.

Parties are bound by their pleadings. The effect is that the 2nd appellant departed from his case set out in his deposition (Exhibit "12"1 and the Amended Statement of Defence. In one breath it was the car in which the respondent was travelling from Ikom to Calabar that veered into the 2nd appellant's lane. But in the oral testimony on oath the 2nd appellant admitted that it was his vehicle that veered into the Respondent's lane. It is not open for a party to depart from his pleadings in order to put up an entirely new case at the hearing. Neither can a learned trial Judge depart from the deposition and pleadings of the parties. See Obazee Ogiamien & Anor vs. Obahan Ogiamien (1967) NMLR 245. The Court and the parties are bound by the facts set out in their respective pleadings. See African Continental Seaway Ltd. vs. Nigeria Dredging Road and General Works Ltd. (1977) 5 SC 235 at 250; Temco Engineering & Co. Ltd. vs. S.B.N. Ltd. (1995) 5 NWLR (Pt.397) 607. A party will be allowed at the trial to call evidence to support his pleadings. But evidence which deliberately or through inadvertence was allowed contrary to a party's pleading must be expunged by the learned trial Judge when considering the case of both parties. See The National Investment & Properties Co. Ltd. vs. The Thompson Organization Ltd. & Ors. (1969) NMLR 99; Shell BP vs. Abedi (1974) 1 NMLR 202 and Emegokwe vs. Okadigbo (1973) SC 113.

Evidence on unpleaded matters goes to no issue. Where the pleadings conflict with the oral evidence in Court the Supreme Court held in Adebayo vs. Ighodalo (1996) 5 SCNJ 1 at 31 lines 26-85 per Onu, JSC that:

"Such conflicting statements that the plaintiff allowed to be perpetuated in this case cannot be both true but could both be false."

It does not matter that the learned Counsel on the opposite side did not raise objection when the contradictory evidence was tendered. The effect is that when the facts in the written deposition of the 2nd appellant are put side by side with the pleadings and his oral testimony in Court, both are unreliable and should have been disregarded by the learned trial Judge. The further effect is that the evidence of the Respondent and Pw1 as to how the collision occurred remained unchallenged. The learned trial Judge had no option than to believe the Respondent and her witness (PW1) as to what and how the accident occurred or was caused. See Akinbiyi vs. Anike (1959) WRNLR 16; Nwankwere vs. Adewunmi (1963) WRNLR 298 at 302; Amadi vs. Nwosu (1992) 6 SCNJ 59 at 71; Ajao vs. Alao (1986) 5 NWLR (Pt.45) 802; Obembe vs. Wemabod Estate Ltd. (1977) 5 SC 115 at 139; Boshali vs. Allied Commercial Exporters Ltd. (1961) 1 All NLR 97; Incar Nigeria Ltd. vs. Adeboye (1985) 2 NWLR (Pt.---) 453; Odulaja vs. Haddah (1973) 11 SC 357.

In Owosho vs. Dada (1984) 7 SC 149, Aniagolu, JSC held at page 167 of the judgment that:

"I now deal with (ii) above, namely, the failure the defence to adduce evidence being one of the factors in this case which I said should be constantly borne in mind. It is an elementary principle in civil proceedings that civil cases are decided on a balance of probabilities based on preponderance of evidence. Where the plaintiff has given evidence and called his witnesses as in this case (the plaintiff called three witnesses) a trial judge would certainly be left with little choice on the issue of the acceptance of the facts adduced in evidence by the plaintiff. Except in a case where the defence has, by vigorous and pin-pointed cross-examination of the plaintiff and his witnesses, manifestly demolished the case of the plaintiff, a defendant obviously takes enormous risk in proceeding on a course of not adducing evidence to counterbalance the evidence of the plaintiff. Otherwise, on what material is the trial judge to balance his probabilities?"

See also Chief M.A. Okupe vs. B.O. Ifemembi (1974) 1 All NLR 375.

My humble view is that at the close of the case of both parties there was no evidence on the side of the appellants to weigh against the evidence of the Respondent and Pw1. The vicarious liability of the 1st appellant is borne out of the fact that the evidence that the 2nd appellant was driving the Haib Tipper vehicle No. XC571RBC ABUJA in the course of his employment with the 1sr appellant on 7th February, 2006 when the collision/accident occurred remained unchallenged and not discredited. Having established negligence and vicarious liability the next issue was for the learned trial Judge to consider the nature and severity of the injuries, pains, sufferings and consequent damages to be awarded to the Respondent. Section 13 of the Evidence Act, 1945 (now section 10 of the Evidence Act, 2011) under which the trial was conducted reads as follows:

"13. In proceedings in which damages are claimed any fact which will enable the Court to determine the amount of damages which ought to be awarded is relevant."

In this case receipts from various hospitals within and outside Nigeria showing the expenses the Respondent incurred as medical bills were specifically pleaded in the Amended Statement of Claim and tendered at the trial. In MacGregor on Damages, 14th edition, page 15 paragraph 19 the learned authors stated the law to be as follows:

"Thus in a personal injury case, toss of future earning capacity and future expenses are general damage in pleading but the plaintiff must clearly give evidence of amount on the other hand, general damage in pleading tends to be narrower than its first meaning. Thus in a personal injury case again, the loss of earnings and the expenses incurred between injury and trial must be pleaded as special damage; yet they are ordinary foreseeable consequences. The present distinction is set out in regard to personal injury cases by Lord Goddard in British Transport Commission vs. Gourley where he said:

"In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, ant if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future."

In the Susquehanna (1926) A.C 655 Lord Dunedin held at page 661 that:

"If there be any special damage which at attributable to the wrongful act that special damage must he averred and proved, and if proved, will be awarded. If the damage he general, then it must be averred that such damage has been suffered, but the quantification is a jury question."

Trial by jury is unknown or abolished in Nigeria. The quantification of general damages is usually the responsibility of the learned trial Judge. In collision or accident cases, the learned authors of McGregor On Damages (supra) page 41-42 paragraph 58 again stated that:

"Where a tort results in physical injury to the plaintiff, one of the basic heads of damage is in respect of the pain and suffering incurred. "Pain and suffering" is now a term of art, so constantly has it been used by the Courts, and there appears to be no exact difference between pain on the one hand and suffering on the other. It has been suggested that "pain" is the immediately felt effect on the nerves and brain of some lesion or injury to a part of the body, while "suffering" is distress which is not felt as being directly connected with any bodily condition. On this analysis "pain" needs no further elucidation; suffering would include fright at the time of the injury, fear of future incapacity, either as to health or possible death, to sanity or to the ability to make a living, and humiliation, sadness and embarrassment caused by disfigurement

Furthermore, if the injury so disables the plaintiff as to lessen more negatively his enjoyment of life by impeding or preventing the pursuit of his former activities, he may recover damages for what is now generally termed "loss of amenities." This element could probably have been subsumed under "suffering" but the Courts are today tending to erect it into a separate head of damage, although in practice it turns out to be little more than a verbal distinction whenever, as is common, a single assessment is made to cover both matters..."

Generally speaking monetary damages awarded under the heading of "pains" and "sufferings" by the Courts are no longer to be as in the past. The Courts have moved from being misery or economical like Shylock Holmes to make awards that take cognizance of spiraling inflation and the depreciating value of the Naira. See McGregor On Damages (supra) paragraph 58 page 41 footnote 3.

Exhibit "6" constituted hearsay evidence in a document as the maker was not called by the Respondent to testify. See seismograph Services Ltd. vs. Eyuafe (1976) 9-10 SC 135 at 151-155 and Bosah vs. British American Insurance Company (1972) 1 NMLR 298. In Agwuneme vs. Eze (1990) 3 NWLR (Pt.137) 242 Onu, JCA (as he then was) held at page 250 that:

"It is settled law that documentary evidence can only be tendered through its maker. See Opolo vs. The State (1977) SC 6; Okpara vs. Federal Republic of Nigeria (1977) 4 SC 53. See also Section 90(1)(a) of the Evidence Act"  
Again in Ojukwu vs. Governor of Lagos State (1985) 2 NWLR (Pt.10) 806 at 818 Nnaemeka-Agu, JCA (as he then was) held that:

"Now as the writer of the above letter never testified or swore to the correctness of the contents it was inadmissible in evidence in view of section 90(1)(a) and (b) of the Evidence Act."

See also Omega Bank Nig. Plc vs. OBC Ltd (2005) All FWIR (Pt.249) 1964 at 1994. But from the findings and holdings of the learned trial Judge, even if the police report (Exhibit "6") is held by this court to have been wrongly admitted in evidence and is expunged (see Section 227(1) of the Evidence Act, 1945 now section 251(1) of the Evidence Act, 2011) that per se shall not be a sufficient ground for the reversal of the judgment of the lower Court. Exhibit "6" cannot be held to have reasonably affected the decision of the learned trial Judge. The appellants' learned Counsel has not shown before this Court that the judgment of the learned trial Judge would not be the same if Exhibit "6" had been rejected in evidence. I hold that expunging Exhibit "6" does not better the case of the appellants.

For these and the fuller reasons given by my Lord I also dismiss this appeal. I abide by me orders made by my Lord.