**UNITED BANK FOR AFRICA LTD AND ANOR.**

**AND**

**MRS NGOZI ACHORU**

**IN THE SUPREME COURT OF NIGERIA**

5TH DAY OF OCTOBER 1990

SC 33/1988

**LEX (1998) - SC 33/1988**

**OTHER CITATIONS**

3PLR/1990/135 (SC)

(1990) NWLR (Pt.156)254

9-10 S.C 115

**BEFORE THEIR LORDSHIPS**

ANDREW OTUTU OBASEKI, JSC

AUGUSTINE NNAMANI, JSC

ADOLPHUS GODWIN KARIBI-WHYTE, JSC

PHILIP NNAEMEKA-AGU

OLAJIDE OLATAWURA

**BETWEEN**

UNITED BANK FOR AFRICA LTD

ALI ISMAILA - APPELLANTS/CROSS-RESPONDENTS

AND

MRS NGOZI ACHORU – RESPONDENT/CROSS-APPELLANT

**ORIGINATING COURT(S)**

COURT OF APPEAL, JOS JUDICIAL DIVISION (*Coram* Agbaje, Jacks and Macaulay, JJ.C.A.)

HIGH COURT AT JOS (Emefo, J., Presiding)

**REPRESENTATION**

C. OBISHAI – FOR THE APPELLANT/CROSS-RESPONDENT

A. B. C. IKETUONYE. S. A. N. WITH  A. NWAIWU – FOR THE APPELLANT/CROSS-RESPONDENT

**MAIN ISSUES**

TORT AND PERSONAL INJURY – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE:- Meaning of negligence – Duty of care necessary to ground negligence – Basis of in proceedings relating to negligent use of road and operation of motor vehicle

TORT AND PERSONAL INJURY LAW – NEGLIGENCE:– Negligent driving of vehicle causing damages to other road users – Where there had been no direct contact or collision – How proved

TORT AND PERSONAL INJURY LAW:- Negligence – Award of damages for arising from negligent operation of a vehicle – Heads of damages for injury to the person

TORT AND PERSONAL INJURY - NEGLIGENCE:– Onus of proof – On whom lies - Contributory negligence - Meaning – Duty of court to distinguish between evidence of manner of driving and negligent in the manner of driving thereby contributing to the accident

TORT AND PERSONAL INJURIES – PERSONAL INJURY:- Award of damages for injury to the person occasioned by negligent act of defendant – What must necessarily be proved - Rule that the heads of claim for “pain and suffering” and for “loss of amenities of life” are two distinct and separate claims arising from the same damage and injury – Assessment of – Duty of court thereto

TORT AND PERSONAL INJURIES – PERSONAL INJURY:- Award of damages based on loss of amenities of loss – Character and nature of – Once disability has been established – Whether there is in law no specific and fixed quantum of evidence that must be adduced in support of a claim for loss of amenities of life - Duty of court to treat same as an objective matter, to be awarded on the extent of loss – Relevant considerations

INSURANCE AND REINSURANCE:- Application for joinder of Insurance company in tort proceedings as a co-defendant – Where brought under a rule of court that admits of joinder as an interested third party – Whether sufficient to satisfy rule that insurance company cannot be joined as a party to tort proceedings committed by a policy holder except on the satisfaction of statutory conditions precedent

TRANSPORTATION AND MOTOR VEHICLE LAW:- User of the public highway – Right to assume that in the normal course of events, other like users of the public highway will obey the law and to have regard for the lives and safety of other users – Rule that where a careful, reasonable, and law abiding user of the public highway successfully avoids collision with a negligent or reckless user but still suffers damage from a collision with another object, as a result of the avoidance, the damage so suffered is the direct result of the negligence or recklessness of the other road user – Implication for proof of negligence, contributory negligence and proximate causation in tort proceedings

CHILDREN AND WOMEN’S LAW:– Women in employment/Justice Administration – Young school-teacher forced to drive her car into a tree in a bid to avoid collision with another negligent driver – Injury and disability arising therefrom – Award of damages relating thereto – Relative youth of teacher, pain and suffering, loss of enjoyment of basic amenities like dancing, sports, etc - How treated by court

CONSTITUTIONAL LAW AND HUMAN RIGHTS – FAIR HEARING:- Observance of the rules of natural justice in judicial proceedings - Fundamental nature of – Essentials of – True test of - Whether evidence that issue raised might have been poorly presented by counsel, or misunderstood by the Court cannot go to the question of fair hearing

HEALTHCARE AND LAW – DISABILITIES:– Disabilities and injury occasioned by negligent act of another – Remedies available towards access to proper healthcare and post-treatment life – Nature of proof required – Heads of damages recognised by court – Distinction between “pain and suffering” and “loss of enjoyment of amenities life” – Legal implications thereof

LEISURE, SPORTS, ENTERTAINMENT AND LAW:-  Capacity to engage in sporting, hobby and leisurely activities – Recognition of by court - Loss or diminution of through negligent act of another – Attitude of court in award of damages thereto

LEISURE, SPORTS, ENTERTAINMENT AND LAW:- Ability to play games or to take part in any physical exercises or to dance – Importance of - Interconnectedness with health of any person – Court’s distinction between a person who engages such abilities professionally and one who doesn’t – Legal implication - Right to damages in terms of "loss of earnings from occupation" when interfered with due to negligent act of another – When arises - Whether a person with no professional engagement in sports or other physical activities is disentitled to claim for damages under ‘loss of amenities of life’

**PRACTICE AND PROCEDRUE ISSUES**

EVIDENCE- Unchallenged evidence – When deemed admitted – Duty of court thereto

APPEAL:- Ground of appeal – Particulars of error – Need for particulars of error complained of to be stated separately from the grounds of appeal - Where the grounds of appeal relied upon in itself discloses the error or errors of law alleged – Whether sufficient

COURT - APPEAL:- Court of Appeal - Exercise of appellate jurisdiction – Right to make any findings of fact which the Court below could have made – Basis and extent of – Whether appellate court can substitute its own views of the evidence for those of the trial Court

COURT:- Averments in statement of claim, oral testimony before the Court and argument of Counsel – Duty of Court to examine and analyse same as the totality of the case before the court

COURT – ISSUES RAISED SUO MOTU:- Sacred duty of Court to decide all the issues raised by parties relevant to the determinations of the case before it – When Court raises issue *suo motu* – Need to hear parties and their counsel on such issues before deciding the issue – Failure thereto – Whether fatal in all cases - Whether does not apply where reasons given in support of issues have been those argued by the parties

EVIDENCE:- Proof of particulars that will found general damages under tort - Principle that evidence which goes one way is sufficient to satisfy the requisite standard on a minimal of proof – Duty of court where defendant furnishes no evidence on the other side of the balance

JUDGMENT AND ORDER –DAMAGES:- General damages – Whether ‘loss of amenities of life’ qualifies thereunder – Attitude of appellate court to invitation to interfere with an award of damages made by trial court

**MAIN JUDGMENT**

**ADOLPHUS GODWIN KARIBI-WHYTE. J.S.C.DELIVERING THE JUDGEMENT OF THE COURT**

The two parties in this case, namely, the appellants who were the appellants in the Court below, and defendants in the Court of first instance; and the respondent who was the respondent in the Court below and plaintiff in the Court of first instance have appealed against the judgment of the Court below. Appellants are appealing against the judgment as a whole. Respondents are appealing against the reduction by the Court of Appeal of the damages awarded in the High Court. It is obvious that both parties are dissatisfied with the judgment of the Court below.

The facts of the case are very simple and straightforward. The injuries to the plaintiff, which gave rise to this action, resulted from a motor accident on the 10th September, 1984, on Ibrahim Taiwo Road, Jos. The evidence was that the respondent/plaintiff, a schoolteacher, was driving her car, a Peugeot 504 Saloon, Registration No.PL.486 RY along Ibrahim Taiwo Road towards the direction of Bukuru. She stated in her statement of claim and oral evidence that she was on a speed of 40 kilometres per hour, when she suddenly saw an Isuzu Trooper Van Registration No.PL.5679 JD, driven by the 2nd appellant coming towards her from Niven Road, which is a minor road, into Ibrahim Taiwo Road. Plaintiff/respondent alleged that 2nd appellant was driving with speed and so negligently that when he reached Ilbrahim Taiwo Road, on which plaintiff/respondent was, he failed to look out properly to ensure that there was no on-coming vehicle before entering the Road. In order to avoid collision and being hit by the 2nd appellant's vehicle, plaintiff/respondent swerved to the right and consequently collided with a Mango Tree.

Plaintiff/respondent sustained very severe injuries to her person. The vehicle was very badly damaged. The 2nd appellant managed to control his vehicle, which came to a stop within 24 feet of plaintiff's vehicle. 2nd appellant did not suffer any injuries, his vehicle was not damaged.

In May, 1985, plaintiff/respondent commenced this action in the High Court at Jos; claiming jointly and severally from the appellants, the sum of **~~N~~**200,000.00, being general and special Damages for Negligence. Pleadings having been filed and exchanged, the case was heard and judgment was delivered on the 9th December, 1985.

Plaintiff/respondent called evidence and tendered exhibits. Defendants/appellants relied on the case of the 2nd defendants. In the course of the hearing, defendants applied by Motion *ex parte* for leave to join their Insurance Company. The learned trial Judge refused the application in a ruling delivered on 25/10/85. On the 9th December, 1985, judgment was given in favour of the plaintiff/respondent. The learned Judge awarded **~~N~~**73,210.05, as special and general damages and **~~N~~**1,500.00 as costs.

Defendants/appellants claim that plaintiff/respondent was guilty of contributory negligence with regard to the accident, was dismissed. Not satisfied with the judgment, defendants appealed against the decision to the Court of Appeal. Plaintiff/respondent also appealed against part of the decision but subsequently withdrew the appeal.

The Court of Appeal after hearing the appeal dismissed it. The Cross-Appeal of the respondents was also dismissed. However, the Court of Appeal reduced the damages awarded by the High Court by **~~N~~**25,000.00. The Court of Appeal also found that there was no evidence of contributory negligence on the part of the respondent/plaintiff. It was also held that appellant/defendants did not discharge the burden of proof on them by law to prove that respondent's negligence contributed to the injury in respect of which action was brought.

Appellants/defendants have further appealed against the judgment of the Court of Appeal to this Court. Respondent was granted leave to appeal against that part of the judgment reducing the damages awarded to the plaintiff by the trial Judge, and the overruling of the objection raised against grounds 5 & 6 of the additional grounds of appeal in the Court below.

The grounds of appeal of the appellants, excluding particulars are as follows:

1. The learned Justices of the Court of Appeal erred in law in holding that the appellants' application before the lower court was to join N.E.M. Insurance Company in the suit as a co-defendant rather than a third party, and this error occasioned a miscarriage of justice.

2. The learned Justices of the Court of Appeal misdirected themselves on the facts and the law, when, having agreed with appellants that there was evidence of the manner of driving by the respondent, contrary to the finding of the lower court, then proceeded to find on the established facts that the respondent had not contributed to the accident.

3. The learned Justices of the Court of Appeal again erred in law in basing part of their decision on points on which Counsel, particularly the Appellants' Counsel, did not have the opportunity of addressing them and this error occasioned miscarriage of justice.

The respondent has relied on the grounds excluding particulars reproduced hereunder:-

1. The Learned Justices of the Court of Appeal erred in law in reducing the award made by the Court of trial in respect of loss of amenities of life from N30,000.00 on the ground that there was an element of double compensation in the award when in actual fact there was none.

2.      The Learned Justices of the Court of Appeal erred in law in reducing the award made by the Court of trial in respect of loss of amenities of life on the ground that that award was tantamount to double compensation was not raised either in the brief or in oral argument.

3.      The Court of Appeal erred in law when it held that the evidence of the plaintiff on the aspect of loss of amenities of life appeared scanty and consequently proceeded to re-assess the award made by the Court of trial.

4.     The Court of Appeal erred in law in over-ruling the objection raised against grounds 5 and 6 of the additional grounds of appeal filed by the defendants when the grounds of appeal did not give particulars of errors in law alleged in each case.

The briefs of argument are quite comprehensive.

It seems to me however, that there has been no agreement on issues for determination in the appeal which have been differently formulated by counsel. I reproduce the issues as formulated to accentuate the differences. For instance, learned Counsel to the Appellant on the question of contributory negligence states as follows:

(i) whether the Court of Appeal was right when it held that having regard to the peculiar circumstances of this case, there was no evidence of contributory negligence on the part of the respondent.

On the same issue, learned Counsel to the respondents states:

(i) whether the lower courts were right in holding that the burden of proving contributory negligence was on the appellants and that the appellants had failed to discharge that burden.

Whereas appellants are herein complaining that the Courts have failed to find any evidence of contributory negligence against respondent, the issue raised by the respondent is on who lay the burden to prove contributory negligence where it is alleged.

I think it will be necessary in the determination of this appeal to consider the two issues raised. Though, differently they are complementary and will elucidate the issues raised.

The second issue raised by learned counsel to the appellants, has been split into two by learned counsel to the respondents. The formulation of this issue by Counsel to the appellants is consistent with his contention that he was not given a fair hearing. It does not in my view challenge the correctness or not of the decision of the refusal of the application to join NEM Insurance Company Ltd. as a third party. As against the above, learned Counsel to the respondent's third formulation of the issues relates to the exercise of the Court's discretion to refuse the application to join the N.E.M. Insurance Co. Ltd. as a third party to the action. It reads:

(iii) whether the Court of Appeal was right in holding that the Court of trial properly exercised its discretion in refusing appellants' belated application to join N.E.M. Insurance Company.

The issue of fair hearing is clearly distinct from whether there was a proper exercise of discretion to grant or refuse the application. The second issue formulated by learned Counsel to the respondent, which was taken as a ground for the want of fair hearing is as follows:

(ii) whether the Court of Appeal was right in up-holding the award of **~~N~~**8,000.00 made by the Court of trial on the evidence tendered before it for the damage done to the respondents' vehicle.

This seems to me a misunderstanding of the issue raised by learned Counsel to the appellant. Counsel's contention as I understand it, is that the Court below in affirming the trial Judge, and awarding **~~N~~**8,000.00 in respect of damage to the vehicle, relied on its own reasons which are different from that given by the trial Judge and learned Counsel to the respondent. This, the learned Justices of the Court of Appeal did without first hearing arguments on the new issue on which they relied. This is different from the second issue formulated by the respondent. Learned Counsel to the appellant was not challenging the ground on which the court below affirmed the award, but the method through which they arrived at their decision.

There is no doubt that if the Court based its decision on a ground not argued before it, and on a reason not relied upon by the Court below, the Court would be making a case for the parties. It is well settled that the Court would be wrong to do this. - See *Ochonma v. Unosi* (1969) N.M.L.R.325. It is on this principle that learned counsel to the appellants has founded his arguments in respect of his second issue for determination.

Starting with the main appeal, I have already set out the grounds of appeal of the appellants and the issues for determination as formulated. It is clear that the second issue contemplates consideration of the issues raised in grounds 1 and 3, whereas the first issue is concerned with the first ground of appeal.

It is necessary at this point to consider the issues raised in the second issue for determination which concerns the important principle of fair-hearing.

In his brief of argument learned counsel to the appellant challenged the reasons relied upon by the Court below in affirming the judgment of the trial Court in respect of the **~~N~~**8000.00 special damages awarded for repairs to Respondent's vehicle. It was also submitted that the dismissal of appellant's application to join N.E.M. Insurance Co. Ltd., as a third party in the suit, amounted to a denial of fair hearing.

In support of this contention learned Counsel to the appellants referred to the submissions of Counsel to both parties in the Court below and submitted that the Court did not rely on the reasons adduced by, but decided the issue on its own reasons, and without calling upon counsel to present arguments on the issue.

I think it is pertinent to restate the issue before the Court below before considering the complaint of the appellant. The contention of the appellants against the award of **~~N~~**8,000.00 special damages in respect of the repairs to respondent's vehicle was that where a chattel is completely destroyed, the only reasonable and permissible compensation is its pre-accident value less the value of the scrap. It was contended that there was evidence in the instant case that Respondents vehicle was a total write-off-(Exh.2). Accordingly, since there was no evidence of the pre-accident value of the car, the trial Judge was wrong to have made an award under this head. Learned Counsel relied on *Ubani-Ukoma v. Nicol*(1962)1 All N.L.R.105; [1962] 1 S.C.N.L.R.176; *Kerewi v. Adegbesan* (1965) 1 All N.L.R.95; *Annel's Transport v. Martins* (1970)1 All N.L.R.27. Counsel referring to the observation of the trial Judge that "...the plaintiff minimised costs by not asking for a new car which she is entitled to. In view of the V.I.O.'s Report, the plaintiff had the option of either asking for a new car or repairing the damaged car in-spite of the fact that the V.I.O. had written it off the car due to the accident; probably if she asked for a new car it might have cost more than **~~N~~**8,000.00."

It was submitted that it was evident from the above observation that the learned trial Judge applied wrong legal principles and relied on sentiments in his determination of the award under this head. It was therefore concluded that this view was contrary to *Ubani-Ukoma v. Nicol* (supra) and the judicial authorities. Learned counsel argued that there was no evidence that respondent was minimising costs by repairing the car.

Respondent in reply, conceded that if their claim was for the cost of replacing their car which is a write-off, then the principles in *Ubani-Ukoma v. Nicol* (supra) and *Kerewi v. Adegbesan* (supra) would have applied. But that was not their claim. The claim was for the cost of repair of a damaged car, in which case the question of the pre-accident value of the damaged car and its scrap value would not be in consideration since they are not relevant. It was submitted that respondent was by the claim mitigating her loss.

In the judgment of the Court of Appeal, now challenged by the appellants on the grounds that they had given reasons not relied upon it by either party, the Court, conceding correctness of the principles in *Ubani-Ukoma v. Nicol* (supra) and pointed out that in the instant case it was not the plaintiff's case that her vehicle was a total loss as a result of the accident in question. The Court referred to the evidence of the plaintiff that her car was badly damaged, There was also evidence of the damage to the vehicle and the cost of repairs. The cost of repairs and relevant receipts totalling **~~N~~**8,000.00 were tendered. The Court observed that there was no cross-examination on the issue, or that it was uneconomical to repair the car. The Court of Appeal pointed out that the evidence of V.I.O. (i.e. Vehicle Inspection Officer) that the vehicle was a total write-off was contrary to the plaintiffs Statement of Claim and was not relevant to any of the issues raised. It is for these grounds that the Court below came to the conclusion-that,

...there is no legal basis for saying in this case that the plaintiff's vehicle was damaged beyond repairs as a result of the accident giving rise to this case. Because of this there is equally no basis for the application of the principle as to measure of damages stated above in consideration of what the plaintiff was entitled to for damages to her vehicle. Her case as I have said earlier in this judgment was that her vehicle was badly damaged and that it was repaired and she was claiming the cost of the repairs. There was before the learned trial judge ample evidence in support of these contentions of hers.

These are the reasons relied upon by the Court below in affirming the claim for damages for the repair of the car. The contention that the Court discarded respondent's view and substituted its own is completely erroneous.

The case of the respondent is as averred in his statement of claim, the oral testimony before the Court and argument of Counsel. In considering the claim before the Court, the totality of the case is examined and analysed for a determination of the justice of the issues joined before the Court.

Learned Counsel has submitted, and correctly too that where the Court is likely in its consideration of the case to rely on a point not argued before it, counsel should be invited to address it on such issues See *Saude v. Abdullahi*(1989)4 N.W.L.R. (Pt. 116) 387. This is well settled and is the invariable practice. However, in the instant case, the issue is a fundamental one and the crux of the claim and the issues joined before the Court. The appellant would seem to have misunderstood the case of the respondent, Appellants have regarded a claim for repairs to damaged vehicle, as one of a claim for total loss. If the claim is for the latter, the appellant would have been on strong grounds. Since it is for the former, the Court below has not in it's reasoning introduced anything new. It merely stated more explicitly what the trial Judge stated obscurely.

Learned Counsel to the appellant has submitted that the learned trial Judge applied wrong principles in determining the damages to be awarded in this case. A careful analysis of the judgment of the trial Judge does not suggest that he relied on wrong principles.

The Court below in the exercise of its appellate jurisdiction is entitled to make any findings of fact which the Court below could have made. But it has no right to substitute its own views of the evidence for those of the trial Court.- See *Egri v. Uperi* (1973)1 N.M.L.R.22. In this case it found that:

In line with her pleadings, the plaintiff gave evidence that her car was badly damaged in the accident. The plaintiff also called one Linus Ayaka who described himself as a panel beater and who also gave evidence as to the damage to the vehicle and cost of the repairs to it. He also put in evidence the receipt for the sum of **~~N~~**8,000.00 he was paid for the repairs he did to the vehicle. There was no cross-examination suggesting that the vehicle was a [total write-off] although the trial Judge has referred to the principle of the total loss of the car, it was clear that he did not rely on that principle in determining the damages of **~~N~~**8,000.00 he awarded. This sum was based on the repairs to the damaged vehicle. It was undoubtedly right to have awarded the damages of **~~N~~**8,000.00 for the repairs to the car, which was the claim before him, even if the opinion expressed would seem to have betrayed the principle the learned Judge had relied upon. This is because judgment must be confined to a decision of the issues raised on the pleadings. - See *Adeniji v. Adeniji* (1972)1 All N.L.R. (Pt.1) 298.

The Court below was right in not setting aside the decision which is clearly right. It is well settled that an appellate court will not set aside the decision of a lower court which is right and just merely because the learned Judge gave wrong reasons for the decision - See *Ayeni v. Sowemimo* (1982)5 SC.60 at p.74. The paramount consideration for the appellate court is whether the decision is right, not necessarily whether the reasons are. In the instant case the Court of Appeal was right. The issue of fair hearing did not arise.

The other issue relied upon by learned Counsel to the appellant was that of absence of fair hearing in the refusal of the application of the appellant by the learned trial Judge to join N.E.M. Insurance Company as a defendant; and the affirmation of that refusal by the Court below.

Learned Counsel to the appellants contended that the Court below relied on grounds not put forward by counsel to the parties or the learned trial Judge, and that counsel were not invited to address the Court on these issues.

In his brief of argument, learned Counsel to the appellant reproduced the submissions in the Court below by learned Counsel to the respondent. He pointed out that although the learned trial Judge reproduced the rule of Court under which the application was brought, which related to the joinder of third party, he erroneously referred to the application as one to join a codefendant. Learned Counsel submitted that it was this misconception as to the nature of the application that led the learned trial Judge to refuse the application. Counsel pointed out that the case of *Ajufo v. Ajarbor* 1 L.R.N.295 cited and relied upon by the trial Judge is not applicable to the instant case.

As against the above it was submitted that the Respondent relied on the fact that the trial Judge refused the application because the respondent had no business with Insurance Company. Joinder of the Insurance Company was the exclusive concern of the appellants and should not be at the expense of the respondents. It was submitted that the application was refused on the ground of delay.

In their consideration of the issue, the Court below referred to the application before the Court and found that it was an application to join the N.E.M. Insurance Company as a co-defendant. Although Order 6 rule 8 of the High Court Civil Procedure Rules, under which the application was made provides for joinder of third parties. What was refused was an application seeking leave to join the N.E.M. Insurance Co. as a co-defendant, and not one seeking leave of Court to join the Insurance Company as a third party in the case. It seems clear that the Court below affirmed the refusal of the trial Judge to grant leave to the defendant to join the N.E.M. Insurance A Co., because as the Court said,

...the plaintiff in an action of this nature can have no claim against the insurers of the defendants. So the Insurance Company could not have been joined by the plaintiff as a co-defendant to this action. Nor can it be said that its presence before the court is necessary to ensure that all matters in dispute in the case or matter may be effectually and completely determined or adjudicated upon.

These were the reasons adduced by the Court below for affirming the decision of the trial Judge. It seems to me that learned counsel to the appellant founded his contention of absence of fair hearing on the additional reasons given by the Court below for affirming the trial Judge refusing to join the N.E.M. Insurance Co. as a co-defendant.

Learned Counsel to the appellant has not suggested the question whether or not the trial Judge was right in refusing the application to join the N.E.M. Insurance Co. The grievance seems to lie in the fact that the Court below gave additional reasons not adduced by counsel to the respondent why the refusal of the application by the trial Judge ought to be affirmed. It is the sacred duty of the Court to decide all the issues raised relevant to the determinations of the case before it. Whereas the Court is ordinarily precluded from raising issues *suo motu*; and where it does so to hear parties and their counsel on such issues before reasons on the issues so raised can form the basis for deciding the case; this is not the case where reasons given in support of issues have been those argued by the parties.

The issue before the Court was the dismissal of an application to join the N.E.M. Insurance Company as a co-defendant/third-party to the action. The Court of Appeal was concerned with the reasons given by the Court of first instance why the application was refused. The Court gave additional reasons. No new issues were raised. I have not found it easy to comprehend how in such a situation the appellant could be said not to have had a fair hearing. There is no doubt appellant has been heard in respect of the issue F whether the N.E.M. Insurance Co. could be joined as a co-defendant. The fact that the Court relied on his presentation of his application and did not consider the application as one of a joinder for a third party does not in my opinion remove the hearing from the established category of fairness.

One of the cardinal principles of our administration of justice is the observance of the rules of natural justice, by hearing the party aggrieved and the untrammelled opportunity afforded him to present his case and argue the issues involved. The fact that the issue raised might have been poorly presented by counsel, or misunderstood by the Court cannot and does not in my view affect the fact that the hearing was otherwise fair. Fair hearing does not in my view lie on the correctness of the decision handed down by the Court. It lies entirely in the procedure followed in the determination of the case. Hence the true test of fair hearing is ...." the impression of a reasonable person who was present at the trial whether, from his observation, justice has been done in the case ..." See *Mohammed v. Kano N.A*. (1968)1 All N.L.R.426.

It cannot be disputed in the instant case that the hearing was fair. There is therefore no merit whatsoever in the contention that because the Court of Appeal gave additional reasons for affirming the refusal of the trial Judge to join the N.E.M. Insurance Co. as a Co-defendant; there was no fair hearing. This concludes the second issue which concerns the 1st and 3rd grounds of appeal.

I now turn to the first issue which dealt with the finding of the Court below that owing to the peculiar circumstances of this case, there was evidence of contributory negligence on the part of the respondent.

It will be more appropriate to set out again the ground of appeal which reads -

The learned Justices of the Court of Appeal misdirected themselves on the facts and on the law, when, having agreed with appellants that there was evidence of the manner of driving by the respondent, contrary to the finding of the lower court, then proceeded to find on the established facts that the respondent had not contributed to the accident.

It is pertinent to mention that appellant is trying under this ground to establish that the respondent contributed to the accident by her manner of driving, and was therefore negligent. The issue is whether the fact that the court below having found, contrary to the court of trial, the manner of driving of the respondent, and that the respondent's car collided with the Mango tree and not with the 2nd appellant's car, the inference of negligence on the part of the respondent contributory to the accident resulting in the damage and injuries was irresistible?

The issue raised is whether the respondent was negligent in the manner of driving thereby contributing to the accident; it is not whether there was evidence of the manner of driving. Both the court of trial which made no finding on the manner of driving and the Court below which did, have not found that respondent was negligent. The issue is not the manner of driving simpliciter, but whether it was negligent and contributed to the accident. There are concurrent findings of facts in the two Courts that respondent was not negligent in the manner of driving and had not contributed to the accident.

Learned counsel to the appellant seems to be relying on a kind of res ipsa Joquitur. That is, that respondent having collided with a Mango tree, it is self-explanatory of negligence. Learned counsel to the respondent has submitted and correctly that the onus is on the person alleging negligence to lead evidence and give particulars of the negligence - See *Nigerian Bottlling Company Ltd. v. Ngonadi* (1985)1 N.W.L.R. (Pt.4) 739. It was also submitted that the evidence of the manner of driving given by the respondent was uncontradicted. I am satisfied and the Court below was right that since appellants did not give any evidence in proof of the alleged negligence of the respondent, they were amply justified in holding that contributory negligence by the respondent had not been made out.

I think the law is well settled that where appellant seeks to challenge concurrent findings of facts, cogent reason must be given why this Court should accede to the challenge and set them aside. - See *Motanwase v. Sorungbe* (1988)5 N.W.L.R. (Pt.92)90. The only point raised and which borders on res ipsa loquitur had been considered in the two courts and cannot now be reasons why the findings should be interfered with and set aside by this Court. On the facts of this case the fact that respondent collided with a Mango tree is not evidence of negligence on her part. Paragraph 3 of the statement of claim of the plaintiff which pleaded the manner in which the accident occurred avers that -

On or about the 10th of September, 1984, the plaintiff was driving her Peugeot 504 saloon car No.PL.486 RY along Ibrahim Taiwo Road towards Plateau Hospital. In the car with the plaintiff was her son, Obi Achoru. Ibrahim Taiwo is a major public highway. As the plaintiff was driving past the junction of Niven Road and Ibrahim Taiwo Road, the 2nd defendant who was driving a van called Isuzu Trooper with registration No.PL.5679 JD belonging to the 1st defendant under whose employment the 2nd defendant was at the material time, so negligently drove and managed the said van with reckless speed and without due caution that the plaintiff was thrown out of Ibrahim Taiwo major road with the result that the plaintiff's car hit a nearby tree. The [) 2nd defendant who failed to stop before entering Ibrahim Taiwo major road from Niven Road did so with reckless speed and without due caution, that the plaintiff in order to avoid a collision swerved off the road and hit a nearby mango tree.

Paragraph 4 of the statement of defence, in reply to the above averred as follows:-

In further answer to paragraph 3 of the statement of claim, it would be the defendant's case that the 2nd defendant was neither negligent nor reckless in the driving management and control of Isuzu motor vehicle with registration number PL 5679 JD on 10/9/84 and that he did not collide with the plaintiff's vehicle or another vehicle on the said date.

The defendants then went on at paragraphs of the statement of defence to allege that the accident was as a result of the negligent manner in which the plaintiff drove, managed and controlled the said vehicle on the fateful day. They further averred at paragraph 6 as follows:-

The defendants further deny that they were guilty of any acts of negligence or omission with regard to the plaintiff's accident and that the injuries sustained by the plaintiff in the said accident were occasioned by her own negligence in the driving of the motor vehicle aforesaid in a dangerous manner on the public highway which resulted in her running into a tree.

Plaintiff/respondent in her evidence-in-chief gave evidence in support of her pleading. She said she was on a speed of 40 kilometres per hour on lbrahim Taiwo Road, which is the major road. Under cross-examination respondent said 2nd defendant came from Niven Road into Ibrahim Taiwo Road when she saw him. To avoid being hit by the defendant she swerved to the right and collided with the mango tree. She said that 2nd defendant's car would have collided with her car, and probably killed her in the ensuing collision, if she did not swerve to the right as she did.

The oral evidence and answers to cross-examination were substantially corroborated by PW6 who was an eye-witness of the accident. Neither of these witnesses was shaken under cross-examination. Thus, having established the manner in which respondent was driving and the circumstances resulting in the accident, I think the Court of trial, and indeed the Court of Appeal was right that respondent was not in any way to blame for the accident which gave rise to this action.

I think it is fair to postulate that every user of the public highway is entitled to assume that in the normal course of events, other like users of the public highway will obey the law and to have regard for the lives and safety of other users. Thus, where a careful, reasonable, and law abiding user of the public highway successfully avoids collision with a negligent or reckless user, such as a motor car driver on the public highway, but still suffers damage from a collision with another object, as a result of the avoidance the damage so suffered is the direct result of the negligence or recklessness of the other road user. Thus, there is a direct nexus between the negligence and the damage.

It will not only be preposterous, but will defeat the object of the law to hold that the damage caused to a person so avoiding collision by swerving has not been caused by the negligent user of the highway whose negligence or recklessness caused the swerving. Negligence being the failure to take reasonable care, where there is a duty, is attributed to the person whose failure to take such reasonable care has resulted in damage to another.

There is no evidence before the Court of trial that the conduct of the respondent fell below that expected of a driver on a major road driving at a reasonable speed. The Court of trial was right that respondent was not guilty of contributory negligence, and the Court below was right in affirming that finding.

I now turn to the cross-appeal of the respondent. It is concerned with the reduction in the damages awarded to the respondent, and whether the Court of Appeal was right to allow appellant in the main appeal to argue grounds 5 and 6 of the grounds of appeal without particulars of the errors alleged in the grounds of appeal. Four issues for determination arising out of five grounds of appeal, have been formulated as follows.:

(i)  Whether the learned Justices of the Court of Appeal were right in reducing the award of compensation made by the Court of trial in respect of loss of amenities of life when what they took into consideration in reducing the award was the evidence of the respondent and not the evidence upon which the Court of trial based its ward?

(ii) Whether the Court of Appeal was correct in holding that there was an element of double compensation in the award made by the Court of trial in respect of loss of amenities of life?

(iii) The issue of double compensation was not raised by the appellants in their grounds of appeal, in their brief and in their oral argument before the Court of Appeal. Whether the Court of Appeal was right in taking that crucial point suo moto and reaching a decision on it without inviting Counsels' address?

(iv) Whether the Court of Appeal was right in law to have allowed, inspite of objection, the appellants to argue the grounds of appeal alleging errors in law for which no particulars were given?

The issues 1-3 relate to the question of reduction of damages as a result of double compensation. It is convenient to consider the three issues together.

In the cross-appellant's brief in support of the cross-appeal, it was submitted that the Court below reduced the award of **~~N~~**30,000.00 made in respect of loss of amenities of life to **~~N~~**5000.00; on the ground that the award in respect of pain and suffering also involves loss of amenities of life.

Learned Counsel submitted that the reduction of the award was not justifiable. It was contended that an element of double compensation can only be found in the reasons given by the Court of trial for making the award. It was argued that the court below was wrong to have held that there was an element of double compensation for pain and suffering in the award. It was submitted that it was erroneous in law for the Court below to hold that there is an element of double compensation merely because the trial Judge referred to pain and suffering under the head of claim for amenities of life. It was submitted that there can only be double compensation or award where the two awards were made for substantially the same matters. The two heads of claim, that is,

(a)    pain and suffering,

(b) loss of amenities of life

are separate.

The cases of *Odulaja v. Haddad* (1973)11 S.C.357 at p.361 *British Transport Commission v. Gourby* (1955)3 All E.R.796 were cited and relied upon. It was further argued that the issue of double compensation was not one of the grounds of appeal before the Court. The issue was never raised before the Court below.

Counsel submitted relying on *Armels Transport Ltd. v. Transco (Nig.) Ltd.* (1974)11 S .C.237 at p.240 that the issue of double compensation ought to be raised as a ground of appeal. However, the Court may suo motu take the point, but is obliged to invite address of counsel before it can base its judgment on the point. - See *Saude v. Abdullahi* (1 989)4 N. W. L. R. (Pt.116)387, *Shitta-Bey v. Federal Public Service Commission* (1981)1 S.C. 40, *Ejowhomu v. Edok-Enter Mandilas* (1986)5 N.W.L.R. (Pt.39)1. It was submitted that in this case, Counsel had not been heard on the issue.

Finally, it was submitted that the Court below was in error to have removed the sum of **~~N~~**25,000.00 from the award made by the trial court for loss of amenities of life on the ground that evidence in support of that item was very scanty.

Learned Counsel to the cross-appellant submitted that there is in law no specific and fixed quantum of evidence required to sustain an award under the head loss of amenities of life. Learned Counsel referred to the evidence by the PW3, the doctor, and of Respondent that

(a) she could no longer play tennis or participate in school games or dance.

(b) she would walk with a walking stick and cannot climb a staircase, cross gutters.

None of this evidence was challenged. They are therefore admitted -*Omeregbee v. Lawani* (1980)3-4 S.C.108, 117.

Learned Counsel to the appellant, who is the respondent to the cross-appeal, has submitted that the Court of Appeal has jurisdiction to raise and determine the issue of double compensation suo motu. This has been conceded by learned Counsel to the cross-appellant. But the more fundamental issue that the parties had not been heard, an issue raised suo motu by the Court remains unanswered.

In *Shitta-Bey v. Federal Public Service Commission* (1981)1 S.C. 40 at p.59, this Court said,

This Court has on a number of occasions warned against decisions of Courts being founded on any ground in respect of which it has neither received argument from or on behalf of the litigants before them, nor even raised by or for the parties or either of them.

See also *Saude v. Abdullahi* (1989)4 N.W.L.R.(Pt.116)387. The rationale for this principle is the avoidance of the circumstance where the Court suo motu makes a case for either of the parties, thereby resulting in a situation amounting to lack of fair hearing. In this case there was no basis for interfering with the award, the parties having not been heard on the issue.

I now turn to the question of the reduction by the Court of Appeal of the amount awarded by the trial Judge in respect of loss of amenities of life.

It seem to me clear from the approach of the Court below that the cornplaint is that the award of **~~N~~**60,000.00 for both pain and suffering and for loss of amenities of life was excessive. The Court of Appeal stated the correct principle that an appellate court should not interfere with the finding of the trial Judge as to the quantum of damages unless it can be established that the trial Judge proceeded on a wrong principle of law, or that the award was a clearly erroneous estimate. See *Soleh Boneh Overseas (Nig.) Ltd. v. Ayodele* (1989)1 N.W.L.R. (Pt.99)549 S.C. The Court of Appeal relied on Macgregor on Damages 14th Ed. page 831 paragraphs 1212 and 1213 on pain and suffering, and p.833, paragraphs 1218, 1219 on loss of amenities of life.

The Court of Appeal considered the principles applied by the trial Judge in determining damages for pain and suffering and came to the conclusion that it would not interfere with the sum of **~~N~~**30,000 awarded. The Court was not however satisfied that the learned trial Judge applied the right principles in awarding damages for loss of amenities of life.

In reducing the sum awarded for damages on this head, the Court of Appeal observed that the learned trial Judge took into consideration the mental pain which the plaintiff will suffer. In the view of the Court there is an element of double compensation since the factor of mental pain was taken into consideration in awarding damages for pain and suffering.

In addition the Court of Appeal referred to the nature of the evidence in support of the claim for loss of amenities of life as follows-

The evidence of the plaintiff on the aspect of loss of amenities of life appears scanty. It tends to show a superficial loss of ability to play games or to take part in any physical exercise or to dance. There is nothing in the evidence to show her devotion to any of these occupations, which she said she could no longer now pursue. In other words, there was no evidence of how in the past prior to the accident she had enjoyed these occupations and how much time she had devoted to them.

For the above reasons the Court of Appeal held that to award **~~N~~**30,000 for loss of amenities of life was compensating the Respondent twice for the same Injury, pain and suffering. The cases of *Armel's Transport v. Transco* (1974) 11 S.C.237 and *Agaba v. Otobusin* (1961) All N.L.R. 299; [1961] 2 S.C.N.L.R. 13 were cited and relied upon. Finally it was held that on the evidence, respondent/cross-appellant was not entitled to anything substantial on this head of claim.

The Court of Appeal concluded as follows -

The conclusion I reach therefore on the award of **~~N~~**30,000 as damages for loss of amenities of life is that the learned trial Judge in making the award has proceeded in part on wrong principle and even on the evidence properly before him in this regard the award is a clearly erroneous estimate of the damage the plaintiff had suffered. So, I will interfere with the award. Accordingly I reduce the award of N30,00 for damages for loss of amenities of life from that amount to **~~N~~**5,000.

Learned Counsel to the cross-appellant has challenged this reasoning. Whilst conceding that the Court is in appropriate cases entitled to interfere where there is a double award of damages in respect of the same head of claim, it was submitted that there was no double compensation in the award made by the Court of trial. For there to be double award the court of trial must be clearly seen to have made a double award for substantially the same matters. It was submitted that the claims for pain and suffering and for loss of amenities, in the instant case as in claims in tort generally are separate and distinct. The cases of *British Transport Commission v. Gourley*(1955) All E.R.796, at p.804 *Odulaja v. Haddad* (1973)11 S.C.357 at p.361 were relied upon.

Learned Counsel submitted that there is no specific quantum of evidence requisite to establish a claim under the head, loss of amenities of life Learned Counsel referred to the evidence of the plaintiff and that of her Medical Doctor to establish the extent of her disability which remained unchallenged and submitted that the evidence before the trial Judge was adequate.

It is well settled that the heads of claim for pain and suffering, and for loss of amenities of life are two distinct and separate claims arising from the same damage and injury.

The phrase 'pain and suffering" has now become a term of art employed to describe the pain associated with the injury resulting from the damage suffered. The worse the injury the greater the pain and suffering of a plaintiff who is aware that his expectation of life has been greatly affected and reduced by the injury. Hence when the plaintiff makes a full recovery from his injuries, almost all his general damages will come under the head of pain and suffering.

As against the head of claim of pain and suffering, loss of amenities of life, embraces all the claims which result from the injury and by reason of which the plaintiff's enjoyment of the ordinary pleasures of life have been impaired. Thus the head of damages arises whenever the plaintiff, because of the injury is unable to enjoy the ordinary facilities of life as before.

The condition was put tersely by Birken, L.J. in *Manley v. Rugby Port-land Cement Co. Ltd.* (1952) C.A. No.286 when he said;

There is a head of damage which is sometimes called loss of amenities; the man made blind by accident will no longer be able to see the familiar things he has seen all his life; the man who has both legs removed and will never again go upon his walking excursions - things of that kind - loss of amenities.

Thus this is a head of damage based on the loss resulting from the extent of disability due to the injury subject matter of the action. The claim is an objective matter, and will be awarded on the extent of loss, as long as the disability has been established.

In. *West v. Shephard* (1964) A.C.326, it was held that the claim, unlike pain and suffering will not be lost because the plaintiff is unconscious of his loss. It was said,

An unconscious person will be spared pain and suffering, and will not experience the mental anguish which may result from knowledge of what has in life been lost or from knowledge that life has been shortened. The fact of unconsciousness is therefore relevant in respect of and will eliminate those heads of elements of damage, which can only exist by being felt or thought or experienced. The fact of unconsciousness does not, however, eliminate the actuality of the deprivations of the ordinary experiences and amenities of life which may be the inevitable result of physical injury.

Since the enjoyment of life's amenities has a direct correlation with physical deprivation and the expectation of life of the plaintiff, the length of the period of life during which the deprivations will continue will be a relevant factor in the determination of the damages to be awarded - In *Bird v. Cocking* (1951) 2 T.L.R.1260, Singleton, L.J. said,

... just as the consideration of age must be remembered, when arriving at the loss of earnings, in the case of a plaintiff who can never work again, so it appears to me, must that element be remembered, when damages are being assessed for loss of amenities of life....

The expression "loss of amenities of life" which is exemplified in the physical disability of the plaintiff is hardly quantifiable in terms of money. This is generally because apart from the fact that every person is entitled to enjoy the amenities of life, the natural and ordinary activity and age of the plaintiff, may determine the nature of the deprivation suffered by the physical injury. The value depends on the assessment of the trial Judge based on the evidence, guided by awards made in respect of earlier similar disabilities. The Court of Appeal has interfered with the award by the trial Court on the ground that the wrong principle was upheld, and that the evidence of disability was scanty. I think both reasons are wrong, and seem to me an imperfect comprehension of the principles.

The Court of Appeal was of the view that the trial Judge took the mental pain of the plaintiff into consideration in making the award. A careful examination and analysis of the factors considered by the learned Judge discloses that the reference to mental pain by the trial Judge in the award was merely descriptive of the condition. For instance 'this was done after describing her disabilities, that"... she could no longer play tennis or take part in any school game. She cannot jump over a gutter; neither can she dance. She has to walk with a walking-stick; she cannot climb any steps etc. all because of the accident ... it is certainly most pathetic for a young lady of her age and status in life of the plaintiff, to be deprived from enjoying these amenities of life at her prime of life. It is important to observe that Plaintiff was 28 years of age at the time of giving evidence. The trial Judge took this factor into consideration. It is obvious that the dominant consideration consisted in the deprivations catalogued. It is naive to assume that the element of emotional pain for the loss of the ability to enjoy the amenities of life will never come into consideration. This is natural but not a factor to be categorised.

It is well settled that the primary responsibility for finding of facts in a matter is entirely that of the Court of trial. - See *Balogun v. Agboola* (1974) 1 All N.L.R. (Pt.2) 66. Where such facts have not been challenged they are conclusive. See *Omeregbee v. Lawani* (supra). It is true that the Court of Appeal is in as good a position in the evaluation of the facts found where the trial Court has failed to evaluate such facts.

In the instant case, the trial Court has properly evaluated the facts on the evidence before it and it was unnecessary and wrong for the Court of Appeal to question the facts relating to the loss of amenities of life. For instance the Court of Appeal has observed, (See p.96 lines 9-20)

The evidence of the plaintiff on the aspect of loss of amenities of life appears scanty. It tends to show a superficial loss of ability to play games or to take part in any physical exercises or to dance. There is nothing in the evidence to show her devotion to any of these occupations which she said she could no longer pursue. In other words, there was no evidence of how in the past prior to the accident she had enjoyed these occupations and how much time she had devoted to them.

This seems to be a demonstrably wrong approach to the determination of the quantum of damages in claims for loss of amenities of life. The Court of Appeal has not found that the trial Judge has not taken advantage of the opportunity he had of seeing, hearing and observing the witness before him. It has not even suggested that he did not correctly evaluate the evidence before him. Plaintiff was being compensated for the physical deprivations attendant on the injury. The basis of the determination of the quantum of damage is the deprivation suffered by a person because of the injury not necessarily in a professional capacity, but merely in his enjoyment of the ordinary amenities of life. Hence to search for evidence of devotion to games, or dancing or history of such preoccupations as the Court of Appeal had set out to do, is applying the wrong principles.

I agree with learned counsel to the cross-appellant that there is in law no specific and fixed quantum of evidence that must be adduced in support of a claim for loss of amenities of life. It is however evident from the decided cases on claims on loss of amenities of life, that evidence of physical disability arising from the damage have always been considered sufficient, See *Wise v. Kaye* (1962) 1 Q.B.638; *Bird v. Cocking* (1951)2 T.L.R.1260. There was in the instant case such evidence which remained unchallenged. The Court of Appeal having admitted the existence of such evidence should not have been concerned with the volume. They were wrong in law to have done so.

I am satisfied the Court of Appeal was wrong to have interfered with the award by the trial Court. For the reasons I have given above, the cross-appeal succeeds. The judgment of the Court of Appeal reducing the damages awarded in respect of the loss of amenities of life by the Court of trial from **~~N~~**30,000 to **~~N~~**5,000 is hereby set aside. The judgment of the trial court is restored in its entirety to **~~N~~**30,000 for the claim of loss of amenities of life.

Learned counsel to the cross-appellants finally argued the ground that his objection at the Court below that the Court below was wrong to have overruled the objection that grounds 5 and 6 of the appellant's grounds of appeal lacked particulars of error as required by Order 8 rule 2(2) of the Supreme Court Rules, 1985. Counsel has cited the relevant rules of the Supreme Court rather than the rule of the Court of Appeal applicable. It has been argued that the Court below ought to have struck out the grounds of appeal. I have myself read the grounds 5 and 6 of the grounds of appeal challenged. I agree entirely with the submission of learned counsel to the respondents in his brief that the particulars of error alleged are not merely implicit in the grounds, but are clearly stated in both grounds of appeal. For instance, ground 5 alleging excessive damages in respect of loss of amenities of life, and ground 6 complains about fair hearing have indicated that they were denied the opportunity to have their obligations properly determined, disclose sufficient particulars of the nature of the error alleged.

There is no doubt that where the particulars of error complained of are not stated separately from the grounds of appeal, and cannot be discovered from the ground of appeal relied upon, this is a contravention of the provisions of Order 3 rule 2(2) Court of Appeal Rules 1981 and is liable to be struck out - See *Anyaoke 6 Ors. v. Adi & Ors.* (No.2) (1986) 3 N.W.L.R. (Pt.31) 731, 741. However, where the grounds of appeal relied upon in itself discloses the error or errors of law alleged, this will satisfy the provision and the separate particulars of error will not be necessary. The purpose of Order 3 r.2(2) is to inform the court and the respondent of the particulars of error alleged to enable the respondent meet the case of the appellant on the Court to determine the nature of the error complained about. - See *Atuyeye v. Ashamu* (1987)1 N.W.L.R. (Pt.49) 267, at p.282.

This ground of appeal fails and is accordingly dismissed. From the reasons I have given in this judgment, the appeal of the appellant fails in its entirety and is hereby dismissed.

The appeal of the Cross-appellant succeeds. The judgment of the Court of Appeal reducing the damages awarded by the trial Judge in respect of the loss of amenities of life is hereby set aside. The judgment of the trial Judge is restored. Respondent shall have the costs of this appeal assessed at **~~N~~**500 in this Court and **~~N~~**300 in the Court of Appeal. There shall be costs assessed at **~~N~~**500 to the respondent in respect of the Cross-appeal.

**OBASEKI. J.S.C.**

I have had the privilege of reading in advance the judgment just delivered by my learned brother, Karibi-Whyte, J.S.C. His opinions on all the issues raised in this appeal for determination accord with mine and I adopt them as my own. Accordingly, the appeal of the appellants fails and is hereby dismissed.

The respondent's cross-appeal succeeds and is hereby allowed. The judgment of the Court of Appeal reducing the damages awarded to the respondent/cross-appellant from **~~N~~**30,000.00 (Thirty thousand naira) to **~~N~~**5,000.00 (Five thousand naira) is hereby set aside and the judgment of the High Court awarding **~~N~~**30,000.00 (Thirty thousand naira) for the claim of loss of amenities of life is restored.

The respondent cross-appellant who was plaintiff in the High Court was involved in a serious car accident at Ibrahim Taiwo Road, Jos on l0th September, 1984. She was driving peugeot car registration No.PL.486 RY when she saw an Isuzu Trooper van registration No.PL.5679 JD driven by the 2nd appellant coming towards her from Niven Road which was a minor road to Ibrahim Taiwo Road. He drove with such excessive speed and so negligently that when he reached Ibrahim Taiwo Road, he failed to keep a proper look out to ensure that there was no on-coming vehicle on the road before entering. The sudden entry onto Ibrahim Taiwo Road made the respondent swerve to avoid a collision with his vehicle and in the process ran into and collided with a mango tree. The respondent's vehicle was badly damaged and in addition, she sustained very severe injuries to her person. The 2nd appellant careered to a stop without damage. The 2nd appellant also was unhurt. The respondent therefore, in 1985 commenced proceedings in Jos High Court claiming **~~N~~**200,000.00 general and special damages for negligence. The appellants' claim that the respondent was guilty of contributory negligence did not avail them. The learned trial Judge then gave judgment in favour of the respondent awarding her a total of **~~N~~**73,2l0.05 as special and general damages with **~~N~~**1,500.00 on 9th December, 1985.

The appellants took the matter on appeal to the Court of Appeal being dissatisfied with the decision. The respondent also appealed against part of the judgment, but later withdrew the appeal. The Court of Appeal dismissed the appeal against liability, but reduced the damages awarded by **~~N~~**25000.00 This was as a result of the reduction in the amount of special damage awarded on the claim of "loss of amenities of life" from **~~N~~**30,000.00 to **~~N~~**5,000.00. The Court of Appeal agreed with the High Court that there was no proof of contributory negligence.

Dissatisfied with the decision of the Court of Appeal, the appellants have brought this appeal on three grounds which have been set out in the judgment of my learned brother, Karibi-Whyte, J.S.C. The respondent was not satisfied with the reduction of the damages awarded to her by **~~N~~**25,000.00 and has also appealed to this Court on four grounds set out in H the judgment of my learned brother.

I find no merit in appellants' contention that the Court of Appeal was wrong in holding that there was no evidence of contributory negligence on the part of the respondent. The burden of proving contributory negligence lies on the appellant and he failed to discharge the burden.

With regard to loss of amenities of life, it appears to me that the Court of Appeal took a very narrow view of amenities of life. It minimised the value of loss of ability to play games or to take part in any physical exercises or to dance. This is borne out by the comment of the Court to wit:

The evidence of the plaintiff on the aspect of loss of amenities of life appears scanty. It tends to show a superficial loss of ability to play games or to take part in any physical exercises or to dance. There is nothing in the evidence to show her devotion to any of these occupations which she said she could no longer pursue. In other words, there was no evidence of how in the past prior to the accident, she had enjoyed these occupations and how much time she had devoted to them.

Ability to play games or to take part in any physical exercises or to dance is the spice of life. Man or woman is an active animal whose ability to play games or take part in any physical exercise or to dance is evidence of life and in the Nigerian society, a necessary criterion of a useful member of any community or ethnic group. The value of these qualities cannot be adequately estimated. To the individual, they constitute life itself; to the community to which the individual belongs, they enhance the cultural asset of the community and to Nigeria, they constitute the power of the fighting and defence forces. It was therefore a grave error on the part of the Court of Appeal to have come to conclusion to wit:

The conclusion I reach therefore on the award of **~~N~~**30,000.00 as damages for loss of amenities of life is that the learned trial Judge in making the award has proceeded in part on wrong principle and even on the evidence properly before him in this regard the award is a clearly erroneous estimate of the damage the plaintiff had suffered. So, I will interfere with award. Accordingly, I reduce the award of **~~N~~**30,000.00 for damages for loss of amenities of life (from that amount) to **~~N~~**5,000.00.

There is no doubt that and it is universally known that the health of the body of a human being depends in a large measure on the individual's ability to play games, to take part in physical exercise and dance. The fact that the individual is not engaged by Entertainment Houses does not deprive these faculties of these proper values. Such engagement will properly constitute a head of damage in terms of "loss of earnings from occupation."

I therefore find myself in entire agreement with my learned brother, Karibi-Whyte, J.S.C. to restore the amount awarded under the head of Loss of Amenities of life' by the High Court.

The cross-appeal succeeds and is hereby allowed.

The appeal fails and is hereby dismissed. The respondent cross-appellant is entitled to costs fixed at **~~N~~**500.00.

**NNAMANI. J.S.C.**

Honourable Justice Augustine Nnamani, J.S.C. (Deceased) indicated his concurrence with the unanimous judgment of the court. He died on Saturday, 22nd September, 1990 before the reasons for judgment were given on 5th October, 1990.

**NNAEMEKA-AGU. J.S.C**

The main appeal in this case is by the defendants. The 1st defendant is a bank, whose employee, a motor driver, was sued by the plaintiff for damages for negligence.

It was the case for the plaintiff that the 2nd defendant driving negligently Izuzu Trooper No.PL.5679JD, belonging to the 1st defendant and in the course of his employment by the 1st defendant, caused the plaintiff to collide with a tree whereby she suffered severe personal injuries for which she was treated at the Teaching Hospital, Jos, and the Orthopaedic Hospital, Enugu. Also, her Peugeot 504 Saloon Car was extensively damaged. Particulars of the negligence were given in the statement of claim and proved in evidence. The concurrent findings of both Emefo, J., sitting in a Jos High Court and the Court of Appeal, Jos, *Coram* Agbaje, J.C.A. (as he then was) and Jacks and Macaulay, JJ.C.A. that the 2nd defendant was negligent is not being disputed in this appeal. Both courts also found that the 1st defendant was vicariously liable for the negligence of the 2nd defendant.

The defendants, however, pleaded contributory negligence on the part of the plaintiff. The courts below again found this not proved.

After trial, the learned trial Judge found both defendants liable and awarded the plaintiff a total of **~~N~~**73,210.05 made up as follow:

(i)    **~~N~~**4,718.05 for cost of drugs;

(ii)    **~~N~~**8,000.00 for cost of repair of the plaintiff's car

(iii)   **~~N~~**30,000.00 for pains and suffering;

(iv)   **~~N~~**30,000.00 for loss of amenities of life;

(v)    **~~N~~**492.00 being the amount spent to employ extra domestic hands.

On appeal, the Court of Appeal also confirmed each of the above awards, save that it reduced the award under loss of amenities of life to **~~N~~**5,000.00

The plaintiffs (hereinafter called the appellants) have appealed to this Court against the Court of Appeal judgment. Two issues have been raised as to:

(a)    whether the court below was right in holding that contributory negligence by the plaintiff was not proved; and

(b)    whether the court below was right to have confirmed the award of N8,000.00 to the plaintiff (hereinafter called the respondent) for the repair of her car.

Counsel on both sides filed their clients' briefs and addressed us orally. Having read in draft the judgment of my learned brother, Karibi-Whyte, J.S.C., just delivered, I agree with him that the appeal has no substance and ought to be dismissed.

But the respondent also cross-appealed against the reduction by the Court of Appeal of the award of the respondent of **~~N~~**30,000.00 under loss of amenities of life to **~~N~~**5,000.00. Dealing with this head of claim in his lead judgment, Aghaje, J.C.A. (as he then was) said:

As to the award of **~~N~~**30,000.00 for loss of amenities of life, it will be seen from the passage from the judgment of the learned trial Judge relating to this award that the learned trial Judge took into consideration in making the award the mental pain, which according to him, the plaintiff will suffer if she had to walk with a walking-stick.

As regard loss of amenities of life, the evidence of the plaintiff is as follows:-

I am still in pains as a result of the accident. I still need to walk with a waking-stick. I was 28 years at the time of the accident. I am claiming **~~N~~**50,000.00 for loss of amenities i.e. I no longer play games like tennis or even jump. I cannot take part in any physical exercise. I cannot even dance.

By talking of pains again under the head of claim for loss of amenities of life, there is an element of double compensation for pain and suffering. The evidence of the plaintiff on the aspect of loss of amenities of life appears scanty. It tends to show a superficial loss of ability to play games or to take part in any physical exercises or to dance. There is nothing in the evidence to show her devotion to any of these occupations which she said she could no longer now pursue. In other words, there was no evidence of how in the past prior to the accident she had enjoyed these occupations and how much time she had devoted to them.

I am therefore satisfied that the learned trial Judge by bringing in the element of pain, even mental pain, in his award to the plaintiff for damages for loss of amenities of life was compensating the plaintiff twice over for the same thing, pain and suffering. That would be double compensation which clearly on the authorities is not permissible. See *Armel's Transport v. Transco* (1974)11 S.C.237 and *Agaba v. Otobusin* (1961) All N.L.R.299; [1961] 2 S.C.N.L.R. 13. And on the evidence of the plaintiff herself on loss of amenities of life which I have analysed above, I am satisfied that she is not entitled to anything substantial on this point.

Thus the Court of Appeal proceeded to reduce the award on the following grounds:

(i)  That the trial court took into account mental pain. This amount to double compensation, as an award had been made for pain and suffering under the previous bead;

(ii) That respondent's evidence on the point appears scanty;

(iii) That there was no evidence as to her past devotion to dancing, sports, and games of tennis and jumping so as to substantiate a claim for loss of amenities by her being no longer able to take part in them.

He therefore concluded that she was not entitled to anything substantial under that head.

The learned counsel for the respondent (cross-appellant) has severely criticised the reduction of the award under that head from **~~N~~**30,000.00 to **~~N~~**5,000.00. In his submission:

(i) the learned Justices of Appeal were wrong to have gone into the particular issue of damages for loss of amenities of life for the reasons they gave in that there was no ground of appeal to support the course; there was no complaint of double counting;

(ii) even though the word "pain" was used in evidence in support of that head of claim, it is different from the "pain and suffering" covered by the immediately proceeding head of claim, and so there is no question of double counting;

(iii)  the reduction and the quantum, i.e. the sum of ~5,000.00 A awarded were arbitrary

I wish to begin my consideration of this all-important issue in the cross-appeal by noting that loss of amenities of life is an item of general damages. Indeed it belongs to a class of general for personal injury which is categorized as non-pecuniary loss. Now loss of amenities of life relates to the curtailment of a plaintiff's enjoyment of life: any injury which prevents the B plaintiff from pursuing the activities, such as leisure, sports and pastimes, or natural function, which he was pursuing before or prevents or impairs the use of his natural faculties or senses or any part of his body - can all be compensated for as loss of amenities. It also includes inability to pursue an enjoyment occupation. See on this - *Manley v. Rugby* Portland Co. (1951) C.A. No.286; *Cook v. J.L. Kier & Co.* (1970)1 W.L.R.774 and *Morris v. Johnson Mauhey & Co.*(1968)112 S.J. 32.

The next question is whether there was before the trial Judge evidence relating to some of the above constituents of that head of claim. It is clear from the evidence of the respondent that, as a result of the accident, she could no longer play the game of tennis or jump or take part in physical exercise. The medical doctor who testified as p.w.3 confirmed all these and added that she had to walk with a walking-stick for sometime in order to gain support on the other leg. She could not also climb any steps and could therefore only teach in classes downstairs, and not upstairs, due to her inability to climb steps. The learned trial Judge who listened to the testimonies of the cross-appellant and p.w.3 in court, and not only watched her demeanour but also obviously saw her physical condition in court awarded to her the sum of **~~N~~**30,000.00 under this head. The Court of Appeal which had not these advantages, for the reasons stated above, reduced the award to **~~N~~**5,000.00 after concluding that she was not entitled to anything substantial under that head of claim. It is noteworthy that the learned trial Justices of Appeal did not find that there was no evidence in support of the award. Nor did they impugn any of the pieces of evidence outlined above.

The question, therefore, is whether in the circumstances they were entitled to have interfered and reduced the award, as they did, bearing in mind that it was an item of general damages. It is useful in this respect to reiterate the governing principle which has been stated in many English and Nigerian cases. It is this: that an appellate court ought not reverse the finding and verdict of a trial Judge as to the amount of damages merely because it thinks that if it had tried the case at first instance it might have awarded a lesser sum. In order to justify reversal of a trial Judge on the question of quantum of an amount of general damages awarded, the appellate court ought to satisfy itself either that the trial Judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very low as to make it, in the opinion of the appellate court, an entirely erroneous estimate of the damage to which the plaintiff is entitled. See on this: Flint v. Lovell H (1935) 1 K.B. 354, C.A.; *Davies v. Powell Dufflyn Collieries* (1942) A.C.601, H.L.; *Nance v. British Columbia Electric Rly.* (1951) A.C. 601, p.613, P.C.; *George Onaga & Ors. v. Micho & Co.* (1961) 1 AIl N. L.R.324, 105 - 106; [1961]2 S. C. N. L. R. 101.

Now, the only ground of appeal before the lower court on damages was ground 5 of the additional grounds of appeal. It complains that the award of **~~N~~**60,000.00 as general damages (that is **~~N~~**30,000.00 for pain and suffering and **~~N~~**30,000.00 for loss of amenities of life) was "so manifestly excessive and so extravagant that it is an entirely erroneous estimate of the damages suffered by the respondent

So there was no complaint about double counting. Nor was there any complaint that the award was in breach of any principle of law. As the Federal Supreme Court stated in *Onaga & Ors. v. Micho & Co.* (supra) at page 105:

The Court does not intervene on a question of damages unless the trial Judge acted upon some wrong principle or the amount awarded was so extravagant or so small as to make it an entirely erroneous estimate of the damages. In these circumstances a party appealing against damages should specify with particularity the wrong principle of law alleged, if he wishes to argue that the Judge acted on a wrong principle.

This sums up the error in this appeal. No wrong principle of law - be it double counting, or that future cannot be taken into account under amenities, or insufficiency of evidence in support, was alleged or particularized in the ground of appeal. The only ground was that it was excessive - a different kettle of fish. The learned Senior Advocate for the cross-appellant was, therefore, right when he submitted that the Court of Appeal was in error when they took up points under a ground of appeal which merely alleged that the damages awarded were excessive. This disposes of this appeal.

But I must add that considering the fact that this was a matter of general damages and there was nothing on the other side of the balance, there was sufficient evidence in support of the award. For the well-known principle that evidence which goes one way is sufficient to satisfy the requisite standard on a minimal of proof (for which see *Nwabuoku v. Ottih* (1961)1 All N.L. R. (Pt.2) 489; 1961) 2 S.C.N.L.R.232; also *Faseun v. Pharco (Nig.) Ltd.* (1965) 2 All E.R. 216, p.220) also applies to evidence relating to general damages. Also it does appear that the award under pain and suffering in this case relates to the physical pain and suffering which the respondent had suffered as a result of the extensive personal injuries she received as a result of the accident, of which there was indisputably abundant evident, whereas the claim for loss of amenities, on the evidence and findings, relates to physical, mental and psychological pain for the future to be suffered by the respondent by her deprivation of those activities enumerated above which she was used to doing before the accident and which she could no longer pursue. I do not see how these could be double counting. Also, in my view, the learned Justices of Court of Appeal imported a new but erroneous standard of proof into the issue of "loss of amenities of life" by suggesting that the respondent ought to have proved that she was devoted to the games of tennis and jumping as well as to dancing before she could succeed or be awarded a reasonable compensation for their loss. Admittedly this head of claim which was part and parcel of pain and suffering until about 1950 is still in its formative stages as a separate head of claim, yet, from all the decided cases from *Shearman v. Folland* (1950) 2 K.B. 43 C.A., it appears clear that whereas loss of the opportunity to continue pursuit of one's enjoyable occupation comes under the head of claim (See *Morris v. Johnson Maahey & Co.* (supra), entitlement to compensation therefore is not necessarily predicated on or limited to devotion, or addiction, of frequency in the pursuit of such an amenity to devotion, or addiction, or frequency in the pursuit of such an amenity in the past. It is sufficient B if the plaintiff shows that the amenity was open to, or enjoyed by, him in the past; but that because of the accident he can no longer enjoy it.

For the above reasons and the fuller reasons contained in the judgment of my learned brother, Karibi-Whyte, J.S.C. I am satisfied that the Court of Appeal was in error to have reversed the learned trial Judge on the point.

The appeal fails and the cross-appeal is allowed. The judgment of the High Court is restored.

I award **~~N~~**500.00 costs to the respondent/cross-appellant in this appeal and subscribe to all the other orders made in the lead judgment.

**OLATAWURA. J.S.C.**

I had a preview of the judgment of my learned brother, Karibi-Whyte, J.S.C. just delivered. I agree with his reasoning and conclusions. Having set out in great details the facts and the law, there is nothing more I can add to the lucid judgment. I will also dismiss the appeal filed by the appellant. The appeal filed by the cross-appellant succeeds. The judgment of the lower Court is hereby set aside, and the judgment of the High Court dated 9/12/85 by Emefo, J. is hereby restored. I abide by the order of costs made in the lead judgment.

*Appeal dismissed.*

*Cross-Appeal allowed.*