24/84

No. 17 of 1983

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF THE GAMBIA

B E T W E E N :

GEORGE AKL — Appellant

- and -

JOHN AZIZ — Respondent

RECORD OF PROCEEDINGS

CHARLES RUSSELL & CO.,
Hale Court,
Lincoln's Inn,
London, WC2A 3UL.

Solicitors for the Appellant

PHILIP CONWAY THOMAS & CO,
61 Catherine Place,
London SW1E 6HB.

Solicitors for the Respondent

No. 17 of 1983

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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RECORD OF PROCEEDINGS

INDEX OF REFERENCE

Documents transmitted to the Judicial Committee but not reproduced

Item	Description of Document	Date
Exhibit A.	Exhibit to A.A. Muhammad Drameh's Affidavit	20th March 1980
Exhibit C.1.-15	Hospital bills.	
Exhibit D.1.-2.	Hospital Bills.	
Exhibit E.-H.	Hospital Bills.	
Exhibit J.	Certificate certifying that the Appellant was an employee of a Mr. Georges Najjar	
Exhibit K.	Medical Report by Mr. Sheriff Ceesay	3rd November 1977
Exhibit L.	Medical Report by Dr. K.J. Owusu Ansak	26th January 1981
Exhibit N.	Certificate of the Central Bank	30th January 1981
Exhibit 1.	Medical Report by Mr. W.T. Baldeh	5th February 1981
	Application to abandon grounds I & III	13th/14th May 1981

IN THE PRIVY COUNCIL No. 17 of 1983

ON APPEAL

FROM THE COURT OF APPEAL OF THE GAMBIA

BETWEEN:

GEORGE AKL Appellant

- and -

JOHN AZIZ Respondent

RECORD OF PROCEEDINGS

In the Supreme Court

No. 1

Writ of Summons - 23rd March 1977

No. 1
Writ of Summons - 23rd March 1977

Civil Suit No. 1977-A-74

BETWEEN:

GEORGE AKL PLAINTIFF

AND

JOHN AZIZ DEFENDANT

TO: John Aziz
Wellington Street,
Banjul.

You are hereby commanded in the name of the Republic of The Gambia to attend this Court at Banjul on Monday the 4th day of April, 1977 at 9 o' clock in the forenoon to answer a suit by George Akl of Leman Street, Banjul against you.

The plaintiff's claim is for damages for personal injuries and loss occasioned to the plaintiff while a passenger in the Defendant's motor car registration number GO 717 by the negligence of the Defendant along the Banjul/Kombo Road on the 31st day of October 1975.

Issued at Banjul this 23rd day of March 1977.

(Sgd.) Philip Bridges
CHIEF JUSTICE

In the Supreme Court

No. 1
Writ of Summons - 23rd March 1977 (cont'd)

Take Notice:- that if you fail to attend at the hearing of the suite or at any continuation or adjournment thereof, the Court may allow the plaintiff to proceed to judgment and execution.

CERTIFICATE OF SERVICE BY BAILIFF

Upon the day of 19 this summons was served by me defendant. This I did by serving a copy of the above summons (and the particulars of claim on the particulars of claim) on the said defendant personally at

Bailiff or Officer of Supreme Court.

No. 2

Statement of Claim - 29th November 1977

STATEMENT OF CLAIM

1. The plaintiff is of Lebanese nationality and was at the material time on holidays in The Gambia.

2. The Plaintiff was at the material time a Saleman employed by a firm Etabs. Machel Najjar and earning a monthly salary of 1,000 Lebanese pounds equivalent to D900 per month together with a commission of 5% on sales made by him.

3. The defendant is a Merchant having place of business at 4 Russel Street, Banjul.

4. On the 31st day of October 1975 the plaintiff at the request of the defendant joined the defendant from the Casurina Club, Fajara on board motor vehicle registration number GO 717 driven by the defendant from Fajara to Banjul.

5. Along the Kombo Banjul Road and on approaching Mile 5 the defendant was driving very fast and negligently. As the said vehicle approached a bend near Mile 5 there was an oncoming vehicle from the opposite direction. The defendant who was still driving very fast swerved to the right, left the road tried to regain the road and lost control of his vehicle.

6. The said vehicle landed in the mud nearby a distance from the road.

7. The plaintiff sustained extensive injuries to his spine a fractured vertebra and sustained a broken arm.

8. The plaintiff was admitted at the Royal Victoria Hospital and was later removed to Hospital Principal in Dakar where he stayed for six months as a patient.

9. After his discharge from hospital the plaintiff was able to move about for short intervals with aid of crutches.

10. The plaintiff is now able to move about without the aid of crutches but continues to suffer constant pain.

In the Supreme Court

No. 2
Statement of Claim 29th November 1977.
(cont'd)

11. The plaintiff is twenty two years old.

12. Because of his inability to return to Lebanon when he was so required by his employers Ets. Michel Najjar have since dismissed the plaintiff from their employment.

13. PARTICULARS OF NEGLIGENCE

1. The defendant drove the said motor vehicle GO 717 too fast.

2. The defendant failed to slow down or stop or control his vehicle in such a way as to avoid the accident.

3. The defendant failed to keep any or any proper look out.

14. The plaintiff claims Special Damages as follows:-

1. Medical expenses, air tickets etc.

1,693,582.75 francs CFA
equivalent to D15,215.00

2. Loss of earnings D20,600.00

15. The plaintiff claims General Damages.

Dated the 29th day of November 1977.

(Sgd.) Sol. F. N'Jie
Counsel

No. 3

Amended Statement of Claim - 26th February 1980

AMENDED STATEMENT OF CLAIM

1. The plaintiff is of Lebanese nationality and was at the material time on holidays in The Gambia.

2. The plaintiff was at the material time a Salesman employed by a firm Etabs, Michel Najjar and earning a monthly salary of 1.000 Lebanese pounds equivalent to D900 per month together with commission of 5% on sales made by him.

3. The defendant is a merchant having his place of business at 4 Russel Street, Banjul.

4. On the 31st day of October 1975 the plaintiff at the request of the defendant joined the defendant from the Casurina Club, Fajara on board motor vehicle registration number GO 717 driven by the defendant from Fajara to Banjul.

5. Along the Kombo Banjul road and on approaching Mile 5 the defendant was driving very fast and negligently. As the said vehicle approached a bend near Mile 5 there was an oncoming vehicle from the opposite direction. The defendant who was still driving very fast swerved to the right, left the road, tried to regain the road and lost control of his vehicle.

6. The said vehicle landed in the mud nearby a distance from the road.

7. The plaintiff sustained extensive injuries to his spine a fractured vertebra and sustained a broken arm.

8. The plaintiff was admitted at the Royal Victoria Hospital and was later removed to Hospital Principal in Dakar where he stayed for six months as a patient.

9. After his discharge from hospital the plaintiff was able to move about for short intervals with the aid of crutches.

10. The plaintiff is now able to move without the aid of crutches but continues to suffer constant pain.

In the Supreme Court

No. 3
Amended Statement of Claim - 26th February 1980 (cont'd)

11. The plaintiff is twenty two years old.

12. Because of his inability to return to Lebanon when he was so required by his employers Ets. Michel Najarr have since dismissed the plaintiff from their employment.

13. PARTICULARS OF NEGLIGENCE

1. The defendant drove the said motor vehicle GO 717 too fast.

2. The defendant failed to slow down or stop or control his vehicle in such a way as to avoid the accident.

3. The defendant failed to keep any or any proper look out.

14. The plaintiff claims Special Damages as follows:-

1. Medical expenses, air tickets etc.

1,693,582.75 francs CFA
equivalent to D15,215.00

2. Loss of earnings D20,600.00.

15. The plaintiff claims General Damages.

16. The Plaintiff claims damages for pain and suffering.

17. The plaintiff claims damages for loss of amenities.

Dated the 26th day of February, 1980

(Sgd.) Sol. F. N'Jie
Counsel

No. 4

Defence - 17th March 1980

D E F E N C E

1. The defendant cannot admit or deny paragraphs 1, 2 and 11 of the plaintiff's Statement of Claim.

2. The defendant admits paragraph 3 of the plaintiff's Statement of Claim.

3. The defendant denies paragraphs 4 to 10 and 12 to 17 of the plaintiff's Statement of Claim.

4. Coming down from Bakau and arriving before Denton Bridge, the defendant was completely blinded by the high lights of a car coming on the opposite direction and the defendant's lane and it was while the defendant was avoiding this car coming on the opposite direction that the accident the subject matter of these proceedings happened.

5. The defendant attaches Motor Accident Report Form which contains a rough plan of the area where the accident happened and a description of how the accident happened.

6. The defendant denies that he is responsible for the accident or was in any way negligent. He further avers that the plaintiff's remedy lies elsewhere.

7. The defendant denies that he owes the plaintiff the sums claim or any sum or sums at all. He therefore claims that the suit be dismissed with costs.

8. Save as is hereinbefore expressly admitted, the defendant denies each and every allegation contained in the Statement of Claim as if the same were traversed seriatim.

Dated at Banjul, this 17th day of March, 1980

(Sgd.) Alh. A.M. Drameh,
1A Albion Place, Banjul,
The Gambia.
Solicitor for the Defendant.

1. Master,
Supreme Court,
Banjul.

2. Mr. S.F. N'Jie,
4 Wellington Street,
Banjul.

3. Alh. A.M. Drameh,
1A, Albion Place, Banjul.
Solicitor for the Defendant.

In the Supreme Court

No. 5
Motion - 14th March 1980

No. 5

Motion - 14th March 1980

M O T I O N

TAKE NOTICE that the court will be moved on Wednesday the 26th day of March, 1980 at 9.30 o' clock in the forenoon or so soon thereafter as counsel can be heard by ALHAJI ABDALLAH MUHAMMAD DRAMEH, counsel for the applicant/plaintiff that this honourable court may make an order that the respondent pays into court the sum of D40,000.00 to cover any costs that may be awarded against the respondent in the main suit which the respondent has specially asked to be re-listed for hearing before the said suit can be heard in accordance with the attached affidavit.

DATED AT BANJUL, this 14th day of March 1980

(Sgd.) Alh. A.M. Drameh,
1A Albion Place,
Banjul, The Gambia
Solicitor for the Applicant/
Plaintiff

1. Master, Supreme Court,
Banjul.

2. Mr. S.F. N'Jie,
Wellington Street,
Banjul.

3. Alh. A.M. Drameh
1A, Albion Place,
Banjul.

Solicitor for the Applicant/Plaintiff.

No. 6

Affidavit of Mr. A.A.M. Drameh - 20th March 1980

A F F I D A V I T

I, ALHAJI ABDALLAH MUHAMMAD DRAMEH, No. 8, MaCarthy Square, Banjul, The Gambia, Gambian, Solicitor for the applicant herein, make oath and say as follows:-

1. That on the 21st December 1977, the Manager, Northern Assurance Company Limited received the attached letter marked Exh. 'A' from the Respondent's Solicitor claiming D385,815.00.

2. That the applicant filed an appeal in The Gambia Court of Appeal (G.C.A. No. 3/1978) and at the hearing of the appeal, the said judgment of the Supreme Court was set aside and a retrial ordered.

3. That in the course of the hearing in The Gambia Court of Appeal, it was remarked that no reasonable tribunal would give judgment to the respondent if such a tribunal saw the Motor Accident Report Form submitted by the applicant on the 1st November, 1975, that piece of evidence having been presented to The Gambia Court of Appeal during the hearing of the appeal; it was not presented to the Supreme Court when the judgment referred to in the attached letter was delivered. A photo copy of the said Motor Accident Report Form is attached hereto and marked Exh. 'B'.

4. That the respondent is a Lebanese who does not normally a resident in this jurisdiction. He was here on holidays when the accident the subject matter of these proceedings happened.

5. That the respondent shortly after obtaining the judgment referred to in the attached letter returned to Lebanon and was not in this jurisdiction when the Gambia Court of Appeal set aside the judgment given in his favour.

6. He has just come back to this jurisdiction for the sole purpose of prosecuting this action and would return to Lebanon as soon as judgment has been delivered.

7. He has no visible means of supporting himself, a job or any visible assets in the Gambia on which execution may be levied if costs are awarded in the case against him.

8. The applicant's costs in the Gambia Court of Appeal in the said civil appeal No. 3/1978 to the tune of over D38,550 was paid and was not recovered from the respondent as the Gambia Court of Appeal made an order that parties to the appeal should bear their own costs.

9. It is therefore necessary that the court makes an order that before it hears the main suit, the respondent shall deposit at least D40,000 to cover any costs that may be awarded against him in the main suit.

10. That I make these statements to the best of my information, knowledge and belief.

(Sgd.) Alh. A.M. Drameh
D E P O N E N T

SWORN AT BANJUL
this 20th day of March 1980
BEFORE ME
(Sgd.) M.M. Secka
A COMMISSIONER FOR OATHS.

No. 7

Affidavit of Mr. Solomon Francis N'Jie
27th May 1980

AFFIDAVIT IN REPLY

I, SOLOMON FRANCIS N'JIE of counsel of 4 Wellington Street Banjul of Gambian nationality make oath and say as follows:-

1. I had and still have the conduct of this suit on behalf of the plaintiff.

2. I have read the Affidavit of Alhaji Abdallah Drameh of counsel sworn on the 20th day of March 1980 in support of his application for security to be given by the plaintiff.

3. As to paragraph 1 of the said Affidavit it is not true that the document referred to as Exh 'A' was sent by me to the Manager Northern Assurance.

4. As to paragraph 2 of the said Affidavit it is not true that John Aziz the applicant herein filed an Appeal in The Gambia Court of Appeal in that the Appeal was filed by the said Alhaji Drameh without any instructions from, the said John Aziz. I was so told by the said John Aziz.

5. Alhaji Drameh is defending this suit, not at the request of the said John Aziz, but to protect the interest of the Northern Assurance Company Ltd. the assurers of the said John Aziz.

6. If any fees were paid in respect of this suit by way of costs or otherwise they were not paid by the applicant himself.

7. I verily believe that it would defeat the ends of justice if this plaintiff is not allowed to prosecute his claim simply because he cannot give the required security for costs.

(Sgd.) Sol. F. N'Jie
Deponent

SWORN AT BANJUL
this 27th day of May 1980
BEFORE ME

(Sgd.) P.H. Ceesay
COMMISSIONER FOR OATHS

In the Supreme Court

No. 8
Proceedings on Motion 12th November 1980

No. 8

Proceedings on Motion - 12th November 1980

Wednesday the 12th day of November, 1980
Before the Hon. Mr. Justice I.R. Aboagye.

S.F. N'Jie for the Plaintiff
Drameh for the Defendant.

Drameh: This is a motion for an order that plaintiff do deposit with this Court the sum of D40,000 against any possible costs against him. There is a supporting affidavit which was sworn to by me on the instructions of the Northern Assurance Company Ltd., insurers of the defendant's vehicle. I refer to paragraphs 1 and 4 of the affidavit. Respondent is a Lebanese who does not normally reside within the jurisdiction. Respondent has no visible means of support in this country. It is not even known where he lives. The affidavit in reply is silent on that. Alternatively my Lord may order the plaintiff to provide a guarantee from a Gambian bank.

S.F. N'Jie: I concede that the defendant is justified in making such application but since costs are discretionary my Lord will have to decide whether to grant it or not. Since the plaintiff is not ordinarily resident here the imposition of any stringent conditions on him will defeat the purpose of justice. A personal guarantee should be alright in this case since it will be difficult to get the money or bank guarantee.

Drameh: The person guaranteeing must be acceptable to my client.

N'Jie: I suggest Mrs. Eid.

Drameh: I prefer Mrs. Eid.

N'Jie:Agreed:

No. 9
Order - 12th November 1980

No. 9

Order - 12th November 1980

By Court: The application is granted. Mrs. Eid is to sign a guarantee in the sum of D10,000 as security for any possible costs to be awarded to the defendant. Adjourned to 25/11/80 for hearing. The guarantee is to be signed before the hearing date.

(Sgd.) I.R. Aboagye

No. 10

Proceedings - 25th November 1980

Tuesday the 25th day of November 1980
Before the Hon. Mr. Justice I.R. Aboagye

S.F. N'Jie for the Plaintiff

A.M. Drameh for the Defendant

By Court: Adjourned to 3/12/80

(Sgd.) I.R. Aboagye

Wednesday the 3rd day of November (sic) 1980.
Before the Hon. Mr. Justice I.R. Aboagye.

Same representation.

No. 11

George Akl - 3rd December 1980

Examination

Plaintiff: S.O.B. in Arabic through interpreter, Mr. Ghanin Ghanim, himself having been sworn on the Koran in English as an interpreter. My name is George Akl. I live at 60 Wellington Street, I am unemployed. I live in Beirut, The Lebanon but I am here temporarily because of this case. My address in The Lebanon is Joseph Najjar Building, Mar Yusuf Hospital Street, Beirut. I first came to Banjul, The Gambia, on 19/6/75. I came on a holiday. I spent the evening of 31/10/75 at the Casurina Night Club, Fajara. I left the night club at about midnight for Banjul where I lived. I left in a car belonging to, and driven by one John Aziz. The car, a Hillman Avenger bearing Reg. No. GO 717, was about a month and a half old. On our way home John Aziz drove so fast that I felt the car was running at a speed. I looked at the Speedometer and saw that he was driving 80 m.p.h. After passing Milestone 5 we came to a bend. A car was then approaching us from the opposite direction. The bend was to our right. Because of the speed at which John Aziz was driving the two right tyres of his car went off the road. John Aziz is the defendant in this suit. The defendant tried to drive the car back to the road and in doing so he lost control over it and the car sommersaulted. It landed on its canopy in a swamp. I was thrown out of the car into the swamp in the course of the sommersaulting. I felt dazed and

heard a voice call "George, George!" The voice was that of the defendant. I tried to get up from the ground but I could not. I felt my body had been smashed up and got swollen. The defendant kept calling me and I answered him. It was then that he found me since it was dark. He picked me up on to the road. He stopped a taxi and put me on the back seat. He asked the taxi driver to drive straight to the hospital saying he would follow up in another taxicab. Instead of driving me straight to the hospital the driver drove me to the Police Headquarters in Banjul. The Police later drove me in their Land Rover to the Royal Victoria Hospital. I lost consciousness as soon as I arrived at the hospital. I regained consciousness the following day. I then felt pain in my nexk and left arm. Both the neck and the left arm were broken. My legs were paralysed. The doctor pricked me with needles but I did not feel them. He then advised me to go to the Dakar hospital immediately as my injury was dangerous. It was on a Saturday and the next day I was flown in a special aeroplane which was hired by my uncle Halim Eid to Dakar. I was taken by a hospital ambulance from the airport to the Hospital Principal or the Principal Hospital. I was X-rayed at the hospital. My whole body was first X-rayed and then my neck was put in a traction. I have with me 6 X-ray films taken at the Principal Hospital. I was on admission at the Dakar hospital for 6 months and on my discharge I was given my file together with all documents and the films.

(6 X-rays films tendered).

Drameh: I object to the admission of the films on the following grounds - the films must be produced by the person who took them unless it is impossible to do so.

N'Jie: The witness has said that the X-ray films were given to him. He is therefore the proper person to tender them.

Ruling: The witness has said that on his discharge from the hospital he was given the file on him together with the X-rays films tendered. The films have therefore been with him since his discharge and he is a proper person to tender them. Objection is overruled. X-ray films admitted and marked Exhibits A, A1 - A5.

Evidence continued: I lay on my back in bed at the Dakar hospital for 2 months with my neck in the traction. After two months the traction was removed. My head right down to the middle of my body was then put in the plaster of Paris (P.O.P.). I was in the P.O.P. for about 3 months. It was very

painful being in the P.O.P. especially after meals. When the P.O.P. was removed from me my neck was put in a support collar. I wore the collar for about seven months. On the advice of the doctor who treated me in Dakar I still wear the support collar any time I feel pains in the neck. My left arm was also put in the P.O.P. It is in fact put in the P.O.P. at the Royal Victoria Hospital and I took it to Dakar. It was removed at the Hospital Principal after 50 days. The arm was then X-rayed. It was found that the bones were not in allignment so my left arm was fractured and put back in the P.O.P. for 3 months. I have with me 4 X-ray films of my left arm taken at the Principal Hospital in Dakar.
(4 X-ray films tendered).

Drameh: I object on the same ground as before.

By Court: Objection is overruled on the same ground as before. Accepted and marked Exhibits B, B1-B3..

Evidence continues: I could not do anything to help myself all the time I was in hospital since I had been confined to bed and I felt pains. I was discharged from the Hospital Principal on 2/4/76. I left the hospital with a pair of crutches after I had undergone some orthopaedic exercises. My neck was still in the support collar when I was leaving the hospital. I used the crutches for 7 months. I lived in Dakar with friends during the 7 months and I kept going to the hospital for orthopaedic exercises. At the end of the 7 months I could walk with only one crutch. I attended 20 physiotherapy exercises at the hospital after my discharge. I was on the one crutch for about 6 or 7 months before I put it down. I sometimes use it, even now. I get tired quite easily and after walking about 100 metres I feel some heavy weight on my right leg. I then feel very tired. The doctors who attended to me at the hospital in Dakar are no longer in Dakar. They were on military contract for about a year or two. I got to know that they were no longer at the hospital when I went there for a check-up.

By Court: Adjourned to 4/12/80 for further hearing.

(Sgd.) I.R. Aboagye

Thursday the 4th day of December 1980 — 4th December 1980
Before the Hon. Mr. Justice I.R. Aboagye.

Same representation.

N'Jie: I am to be on the international plane to Dakar in connection with a fifa case against a bank. I am therefore asking for an adjournment.

By Court: Adjourned to 17/12/80 for further hearing.

(Sgd.) I.R. Aboagye.

In the Supreme Court

Plaintiffs Evidence

No. 11
George Akl
Examination
(cont'd)
17th December 1980
*28th January 1981

Wednesday the 17th day of December, 1980
Before the Hon. Justice I.R. Aboagye.

Same representation.

By Court: Adjourned to 28/1/81 for further hearing.

(Sgd.) I.R. Aboagye

*Wednesday the 28th day of January, 1981
Before the Hon. Mr. Justice I.R. Aboagye.

Same representation.
Mr. George Madi S.O.B. as interpreter.

Plaintiff is reminded of his oath.

Evidence continued: Before the accident I was a travelling salesman. My salary was 1,000 Lebanese pounds per month and I was paid 5% commission on sales effected by me. I earned, on the average, between 1,500 and 2,000 Lebanese pounds a month as commission. Before the accident I used to play basket ball and volley ball. I also did swimming, skiing and horse-riding. I cannot do any of those sports now except swimming for a very short time. I get tired after swimming. I have been to the Lebanon once after the accident. I could no longer work as a travelling salesman, the only work for which I have been trained. I cannot walk comfortably for more that 150 - 200 metres nor can I drive. I cannot therefore be a travelling salesman. I incurred a lot of expenses at the hospital. I have with me photostat copies of 16 bills from the hospital in Dakar. The originals have been burnt or destroyed in bomb attacks in The Lebanon. My house was bombed and the bills together with other documents including X-ray bills in The Lebanon were burnt. Before I left Banjul for the Lebanon I had made the photostat copies and left them with my uncle in Banjul. I however, took the originals with me. Attached to the bills are their translations into English by an official of the Ministry of External Affairs in Banjul. (16 photostat copies of bills with their translations tendered.)

Drameh: I object to the tendering of photstat copies. No satisfactory explanation has been given why the originals are not being tendered.

S.F. N'Jie: I rely on the evidence

RULING: There is evidence from the plaintiff that the originals of the bills have been burnt or destroyed in a bomb attack on his premises in the

Lebanon. I take judicial notice of the war situation in the Lebanon and I have no reason to reject that aspect of the plaintiff's evidence. Once there is evidence that the original bills have been destroyed copies thereof are receivable in evidence. I therefore overrule the objection. (Photostat copies accepted and marked Exhibits C, C1 - C15).

I have also with me X-ray bills which I paid in Dakar. Attached to the bills are translations by an official of the Ministry of Foreign Affairs Banjul. (3 bills from Hospital Principal de Dakar tendered. No objections; accepted and marked Exhibits D, D1 and D2). I have with me bills in respect of medical consultations in Dakar which I settled. (Two bills from Hospital Principal De Dakar tendered. No objection. Accepted and marked Exhibits E, E1.) There is also a settled bill in respect of physiotherapic exercised in Dakar. (Bill tendered. No objection. Accepted and marked Exhibit F). I have with me a bill for cost of drugs. (Bills (prescription) tendered. No objection. Accepted and marked Exhibit G). I purchased a bicycle and weight lifting equipment for the physiotherapy exercises and I have the receipt with me. (Receipt tendered. No objection. Accepted and marked Exhibit H). Receipts and medical bills including X-ray and Physiotherapy bills in The Lebanon were burnt in the bomb attack. I cannot remember exactly how much I spent on medical treatment in The Lebanon but it would be around 9,000 Lebanese pounds. One Dr. Ceesay examined me after the accident. A week ago I was examined at the Royal Victoria Hospital by One Dr. Owusu-Ansah when I went there for a check-up. My neck was X-rayed. I will return to my country, The Lebanon, after this suit. I have no hope of getting employed when I go back. I cannot sit for long hours neither can I stand for long hours.

XXD by Drameh:

Q. On 13/12/77 you gave evidence in this suit before another judge?
A. Yes.
Q. You then told the court that you wanted to go back home to study Business Administration at a night school?
A. I had hoped to be able to do that but I later realised I could not since I cannot sit for long hours. I feel pains when I sit for about 15 minutes.
Q. You have said before that you cannot sit comfortably for over 30 minutes.
A. That is correct.

Q. So which is correct?
A. It all depends. I will say I feel the pains after 30 minutes.
Q. The accident occurred on 31/10/75?
A. Yes.
Q. So that when you consulted Dr. Ceesay in 1977 you wanted his report in connection with this suit?
A. My lawyer Mr. N'Jie asked me to go the doctor for examination. I cannot tell whether he needed the examination for this suit.
Q. In your previous evidence you said you were in the Lebanese army?
A I was not a regular soldier in the army but I was in the reserves.
Q. Did you say you were in the army for 3 months?
A. I said I was in the reserves for 3 months. That was compulsory. I had another 9 months to do after my studies.
Q. Did you do the remaining 9 months?
A. No.
Q. When did you do your 3 months reserves?
A. That was in August 1974. I ended the training in August 1974.
Q. When did you arrive in The Gambia before the accident?
A. I arrived on 19/6/75.
Q. So you did nothing after your 3 months military service?
A. I started working a week after the service.
Q. For whom did you work?
A. I worked for a company called Michel Najjar & Son as a travelling salesman.
Q. You were a trainee salesman at the time of the accident?
A. I was a trainee for the first two months and then gained the necessary experience. I was however employed from August 1974.
Q. Did you come down here on leave or you had resigned?
A. I came on leave.
Q. I put it to you that you were never a salesman. That is why you told the court that you wanted to go back home to study Business Administration.
A. That is not correct. I wanted to do further studies to qualify for the post of Sales-manager or Managing Director one day.
Q. Have you any evidence that you were employed by the firm you named at the salary you have told the court?
A. Yes, I have some papers on my appointment with my lawyer. (Certificate from Ets. Michel Najjar dated 20/4/75 shown to counsel and tendered. Accepted and marked Exhibit J).
Q. Have you any documents to show that you received commission?

A. I have none here.
Q. Why did you not stop the defendant or call his attention to the speed at which he was driving?
A. He was in charge of the car and I did not have time to communicate with him before the accident.
Q. I put it to you that the defendant was not driving fast. He was driving at about 50 m.p.h. when the other driver came at a speed and blinded him with his high lights this causing the accident.
A. That is not correct. There were no high lights from the other car.
Q. Your purpose of going to the Royal Victoria Hospital some time last week was to get a report for this suit?
A. My lawyer sent me to the hospital so I know it is in connection with this suit.
Q. That was the case with your examination by Dr. Ceesay?
A. That is correct.
Q. In 1977 Dr. Ceesay gave you a report on you?
A. That is correct.
Q. You were, of course, better at the time Dr. Ceesay examined you than at the time of the accident?
A. That is correct.
Q. Your wounds had healed?
A. Yes.
Q. You could sit?
A. Yes.
Q. There was no plaster on your body?
A. That is correct.
Q. You had then been discharged from the Dakar hospital?
A. Yes.
Q. With the passage of time your condition is now almost normal?
A. My condition has improved a bit but I am not what I used to be.
Q. You and the defendant went to the Night Club to enjoy yourselves?
A. The defendant and I sat at different tables. We did not go together to the club. I however went to the club to enjoy myself.
Q. You drank beer?
A. No, I took in soft drink.
Q. The accident occured after mid-night?
A. That is correct.
Q. Did you make a statement to the police after the accident?
A. I was unconscious so I did not made a statement to the police.
Q. You have stated that you became unconscious when you arrived at the hospital?

In the Supreme Court

Plaintiffs Evidence

No. 11
George Akl
Cross-Examination
(cont'd)

A. I was not in a position to make a statement when I was taken to the Police Station and the Police did not ask me to make a statement.

No re-examination.

By Court: Adjourned to 29/1/81 for further hearing.

(Sgd.) I.R. Aboagye

No. 12
Sheriff Ceesay

No. 12

Sheriff Ceesay - 29th January 1981

29th January 1981

Thursday the 29th day of January, 1981
Before the Hon. Mr. Justice I.R. Aboagye.

S.F. N'Jie for the plaintiff
Miss Ida Drameh for the defendant.

P.W.1. S.O.K. in English. My name is SHERIFF CEESAY. I live at Atlantic Road, Fajara. I am a Surgeon in private practice. I know the plaintiff herein. Some time in 1977 I examined him in my private clinic at the request of his solicitor, Mr. N'Jie. I issued a report on the plaintiff after my examination. (Report dated 3/11/77 identified as the report issued on the plaintiff. Report tendered. No objection. Accepted and marked Exhibit 'K'. Report read out.) There are seven bones in the neck which are called cervical vertebrae. There was a fracture of the 7th neck bone of the plaintiff. The plaintiff came to me with papers from the Hospital Principal in Dakar and my report was based on the medical history from the hospital and my own interview with him and my examination. When a patient has a skull traction in his head he has to lie down for the whole duration of the traction which is normally between six weeks and three months. During that period the patient needs total nursing i.e. he is fed, washed and cared for by nurses. During the period of traction the patient feels pain from the injury itself, in this case the neck, and from the pressure of the calippers on the skull. The tenderness between the 6th and 7th neck bones (C6/C7) was indicative of persistent pains in the region. When I said the spinal reflexes were exaggerated what I meant was that there was an injury to the spinal cord. That

injury was caused by the fracture of the neck bone. "Positive Right Babinsky Sign" also means an injury to the spinal cord. A spinal injury is a serious one which limits the patients physical activities like walking, running, driving and taking part in sports. Injuries to the spinal cord do not recover and that is what I meant by "neurological deficit". By 50% permanent disability I mean that the plaintiff then aged 22 years was to suffer 50% of all his capabilities. All the injuries were caused by the fracture dislocation of the C6/ C7 cervical vertebra. (Exhibits A1 - A6 shown to witness). I am not sure whether the X-rays shown to me are those I saw but the plaintiff brought along with him some X-rays films on Exhibits A1-A6 show fracture dislocation of C7 fraction dislocations of the neck showing the C7./ Exhibits B, B1- B3 show fracture of the 2 bones of the left forearm. I cannot tell if I saw these very films at the time I examined the plaintiff but he brought similar X-ray films with him which I saw.

A.M. Drameh appears for the defendant.

Cross-examination:

Cross-Examination

Q. Had the fractured arm bones healed at the time of your examination?
A. Yes.
Q. Was the plaintiff's condition at the time of your examination likely to improve with time.
A. Yes, the pain in the neck may improve with time. adaptability to his disabilities may improve. But the neurological deficit would be permanent.
Q. Can the plaintiff be a clerk?
A. Yes.
Q. Can he go back to school and learn business administration?
A. He can do almost all types of sedentary jobs.
Q. Would your findings on the plaintiff be different if you had examined him today?
A. I doubt it.
Q. Would it not be possible that your findings could differ?
A. It is possible but I doubt it.
Q. Is it not correct that the best doctor to give a report on an injured person is the one who saw him as soon as possible after the accident?
A. I do not agree with that. For the purpose of small police cases where there is the need to enumerate the nature of the injuries the first medical officer to see the patient is in better position to give an accurate report. But in cases where the emphasis is on permanent disability it is preferable not to provide a report until a certain minimum period has elapsed to eliminate the insignificant symptoms.

Re-examination: NIL.

By Court:

Q. The plaintiff has told the court that he cannot stand or sit for long without pains, what do you say about that?

A. I agree with the standing but I am not sure about the sitting. when you stand the body is more subject to stress than when sitting. But since the neck still carries the head whilst sitting the plaintiff may still have pains in the neck when sitting down. The most comfortable position would be when he lies down.

Q. So that the plaintiff can do clerical work but may be with some discomfort?

A. That is so. Even the movements of the head and neck would cause him discomfort.

Q. Would the injury affect the plaintiff's walking?

A. Yes.

Q. In what way?

A. The leg is weak and therefore unstable. He would therefore have to take care with every step he takes. He would be very slow in walking.

Q. What about the plaintiff's hip movements?

A. I did not find anything wrong with his hip movement.

XXd by Drameh, with leave of Court:

Q. Can the plaintiff be a travelling salesman i.e. moving from place to place to promote sales?

A. He cannot drive or ride a bicyle but he can walk very slowly.

No. 13
John Kwaku
Owosu-Ansah
29th January
1981.

No. 13

John Kwaku Owosu-Ansah - 29th January 1981

Examination

P.W.2: S.O.B. in English. My name is JOHN KWAKU OWUSU-ANSAH. I live at the Leman Street Clinic, Banjul. I am a Surgeon at the Royal Victoria Hospital, Banjul. I know the plaintiff. I examined him at the Royal Victoria Hospital on 23/1/81. I prepared a report on him after my examination. (Report dated 26/1/81 tendered. No objection. Accepted and marked Exhibit 'L'. Report read out). When I say that the Palpebral fissure of the right eye is slightly narrower what

I mean is that the left eye opens wider than the right one. This is so because the nerves that supply the upper eye lids with movement travel in the area of the neck where the fracture is. As a result of the paralysis one of the thighs, the right thigh is narrower because the paralysis affected the muscles and the bones and joints. The plaintiff did not obtain equal physiotherapy treatment for both thighs that is why one thigh is bigger. The tenderness in the neck is due to the fracture of the C7 vertebra. The fact that there is a fibrous union and not bony union (sic) means that the vertebra is not rigid. This causes the tenderness in the neck. The tenderness will be permanent. Due to the fact that the bony union is partial and also because of the roughness of the fractured bone rotation in the neck is limited. Bending of hip and other joints is measured in degrees. When the beding of the left hip joint was compared with that of the right, there was a limitation of about 20 degrees. This affects the plaintiff's walking - he cannot walk normally. "Right knee and ankle clomus" means that the muscles of the knee and ankle begin to shake when they are stimulated. This is a medical test for the extent to which the brain is controlling the muscles. If the muscles are in complete control of the brain there must be no clomus. The same applies to the "bilateral Bakinski response". The Babinski response relates to control of the sole of the foot by the brain. I found the fibrous union and the non-bony union of the C7 vertebra from X-ray films taken at the Royal Victoria Hospital on 23rd January, 1981 at my request. (Exhibits A, A1 - A5 given to witness to examine). Exhibit A is the only one which shows the fracture properly because it was taken from a lateral position. It is a recognised clinical fact that when someone gets a fracture of the type suffered by the plaintiff the fracture tends to cause wear and tear in the neck. This causes more pains and stiffness in the neck. It can even affect the plaintiff's arms in the future. The plaintiff may begin to feel that when he is about 40-45 years old. I have with me two X-ray films taken at the R.V.H. on 23/1/81. Tendered. No objection. Accepted and marked Exhibits M and M1"). Exhibit M shows a lateral view of the neck and shows the fracture of the C7 vertebra. The film also shows that the C6 vertebra was also affected. Exhibit 'M1' shows the neck from the antero-posterior position i.e. the neck facing the camera. That film does not show the fracture. A comparison of Exhibits 'A' and 'M' shows that the fracture has healed to some extent.

XXD by Drameh:

Q. Does it not follow that the fracture will continue to heal?

A. No, bone formation in fractures does not usually continue after one year. In exceptional cases where there is infection in the bone the period may extend to 2 years but not more.

Q. Physiotherapy can improve the flexion or stiffness of the neck?

A. That is correct; but one has to judge by duration. Once a fracture has completely healed stiffness can improve by physiotherapy but the improvement is short-lived meaning that the improvement can go on for a short period and then relapse.

Q. Can the plaintiff be a travelling salesman now?

A. He cannot go round on his own but he can go round when driven about.

Q. Can he be a clerk?

A. Yes, but because of the weakness in the right hand he may have pains in long use of the hand.

Q. But he can do sedentary jobs.

A. Yes.

Q. He can go back to school and train for sedentary jobs?

A. Yes, quite possible.

Q. What do you mean by the 60% permanent disability?

A. Assessments in such cases is arbitrary. They are based on past experience of the effect of certain injuries on a person. The assessment is based on the extent to which his capabilities in the past have been reduced.

Q. Another doctor would have assessed it at 45%.

A. Yes, it is a matter of opinion.

Q. The plaintiff's eyesight is alright?

A. That is correct. It is very unlikely to be effected after such a long time after the accident.

Q. What do you mean by "objective permanent disability"?

A. It means that the disability is one which can be substantiated.

No re-examination.

By Court:

Q. Is it possible for the plaintiff to suffer pains when he stands or sits down for long time?

A. Yes, due to the fracture of the vertebra and the paralysis.

No. 14

Alkali Kinteh - 29th January 1981

P.W.3: S.O.K. in English. My name is ALKALI KINTEH. I live at Brikama. I am a translator/ Interpreter from French to English at the Ministry of External Affairs. (Exhibits 'C', C1 - C6 shown to witness). The English translation attached to the exhibits were done by me. My signature is on all the exhibits except C15 and C16. I did the English translations attached to Exhibits D, D1 and D2. I also did the English translations attached to Exhibits E, and E1, F, G and H. I charged D700.00 for the translations.

No cross-examination.

By the Court: Adjourned to 30/1/81 for further hearing.

(Sgd.) I.R. Aboagye.

No. 15

Proceedings - 30th January 1981

Friday the 30th day of January, 1981
Before the Hon Mr. Justice I.R. Aboagye.

Same representation.

N'JIE: By consent I tender a certificate of the Central Bank as to the relationship between the Lebanese Pound and the Dalasi.

Miss Drameh: No objection.

(Accepted and marked Exhibit 'N').

N'Jie: I apply to amend paragraph 14 of the Statement of Claim. D15,215 in paragraph 14(1) should read D11,843.00. D20,600.00 in paragraph 14(2) should read D80,000.00. The application is made under Order 24 of Schedule II of the Supreme Court Rules, Cap. 36.

Drameh: I do not oppose the application.

By Court: Application is granted. Paragraph 14 of the Statement of claim is to be amended accordingly.

N'Jie: This is the case for the plaintiff.

In the Supreme Court

Defendants Evidence

No. 16
John Aziz
30th January 1981
Examination

No..16

John Aziz - 30th January 1981

Defendant: S.O.B. in English. My name is JOHN AZIZ. I live at 36, Wellington Street, Banjul. I am a businessman. I keep a wholesale shop at 6A Wellington Street, Banjul. I know the plaintiff. On 31/10/75 I gave him a lift in my car from Fajara to Banjul. We were from the Casuarina Night Club. We left the Club at about midnight and I was driving my car, Hillman Avenger No. GO 717. When we reached a place near Milestone 5 I met an oncoming vehicle. It had its high lights on and it was in the middle of the road. I tried to avoid a collision by keeping close to my nearside of the road. As I got to the edge of the road my car got on some gravel and one of my rear tyres - I am not sure but I think it was the right one - got burst. I then swerved to the left and my car fell in a rice farm about 5 metres from the road. My head hit the door and I became unconscious for a few minutes. When I recovered consciousness I could not find the plaintiff in the car. I therefore began to call his name. He answered me from the bush and said he could not walk. I went to him and carried him to the road. I put him on a taxicab which had stopped on the road and it brought him to Banjul. The taxi was facing Banjul when I saw it. I later followed up in another taxi. I had asked the first taxi to take the plaintiff to the Royal Victoria Hospital. So I went straight there in the second taxi. The plaintiff was not at the hospital when I arrived there. He was later brought there in an ambulance and carried on a stretcher to one of the rooms. He could not breathe properly and he asked for oxygen. The plaintiff was later given an injection and a tablet. We were both given some sleeping tablets but they did not work on us. We kept asking each other "how are you?" The plaintiff and I spent Friday and Saturday nights at the Royal Victoria Hospital and the following Sunday we were taken to the Hospital Principal in Dakar where we were admitted. I am not sure if I made a statement to the police in connection with the accident but I think I made one. I was driving fast at the time of the accident but I do not I was doing 80 m.p.h. I cannot remember the speed at which I was driving. It could be between 50 and 60 m.p.h.

Cross-Examination

Cross-examination by N'Jie:

Q. You were doing at least 70 m.p.h.?
A. I cannot remember that.

Q. You made a statement to your Insurance Company in connection with the accident?
A. That is correct.
Q. You said in that statement that you were travelling at 70 m.p.h.
A. I said I was travelling at 70 m.p.h. before the accident but that I had reduced it to 50 m.p.h. at the time of the accident.
Q. You made that statement on 23/12/75?
A. That is correct.
Q. Was that statement correct?
A. Yes.
Q. When were you discharged from the Dakar hospital?
A. I was on admission there for about 10 days. I stayed in Dakar for a few more days visiting the plaintiff at the hospital. I must have come back some time in November 1975, but I kept going to Dakar to visit the plaintiff.
Q. Who told you that you had a tyre burst?
A. I saw that on my way to the Airport on the Sunday to take the plane to Dakar.
Q. Was that the first time you got to know you had a tyre burst?
A. I had been told that by somebody I cannot remember when I was on admission at the Royal Victoria Hospital.
Q. Your car was still in the swamp?
A. That is correct.
Q. I put it to you that if you had driven the car at a slower speed the accident would not have happened.
A. It would not have happened if my speed had been about 30 m.p.h.
Q. It is correct that you lost control of your car?
A. That is so.
Q. You would not have lost control if you had been driving at 40 - 50 m.p.h.
A. I do not know.
Q. Why did you not stop your car when you saw the other vehicle approach with its highlights on and you could not see ahead?
A. I could not stop because I was speeding. My car would have sommersaulted if I had braked at the speed at which I was driving.
Q. What was the vehicle from the opposite direction?
A. It was a Renault 4. It was a white one.
Q. Did you subsequently find out the one who was driving that car?
A. I did not see the registration number so I could not trace the driver. I had been blinded by the high lights.
Q. You were approaching a bend at the time of accident?
A. There was a slight bend ahead of me.

Q. You could have slowed down when approaching the bend. It was your duty to slow down.
A. I did not see the bend before the accident.
Q. How far were you from the oncoming car when you first saw it?
A. It is a long time so I cannot tell.
Q. Is it correct that the plaintiff was seriously injured?
A. Yes.

By Court: Adjourned to 2/2/81 for further hearing.

(Sgd.) I.R. Aboagye

2nd February 1981

Monday the 2nd day of February, 1981
Before the Hon. Mr. Justice I.R. Aboagye

Same representation.

Defendant is reminded of his oath.
Cross-examination continued:

Q. The plaintiff had a fractured neck?
A. I would not say that the 7th cervical vertebra of his neck was dislocated.
Q. He had a fractured arm?
A. That is correct.
Q. The plaintiff was in severe pain when he was at the Hospital Principal?
A. Yes, he appeared to me to be in pain.
Q. He was on admission for 6 months?
A. That is correct.
Q. By Court:
Q. Did you feel or notice in any way that you had had a tyre burst before the accident?
A. No.
Q. How far was the oncoming car from you when you saw that it had its full high lights on?
A. It was about 30 metres away.
Q. How far was it from you when you saw that it had occupied the middle of the road?
A. It was between 15 and 20 metres away.

No re-examination.

Drameh: I would like the plaintiff to be examined by Dr. Willie Baldeh of Royal Victoria Hospital before he can give evidence.

By Court: The plaintiff is to subject himself to medical examination by Dr. Baldeh of the Royal Victoria Hospital, Banjul.

Drameh: My next two witnesses, policemen, say they need time to go the archives for the file on the accident.

By Court: Adjourned to 6/2/81 for further hearing.

(Sgd.) I.R. Aboagye.

No. 17

Willie Thomas Baldeh - 6th February 1981

Friday the 6th day of February, 1981
Before the Hon. Mr. Justice I.R. Aboagye.

Same representation.

D.W.1: S.O.B. in English. My name is WILLIE THOMAS BALDEH. I live at Dippakunda. I am a Doctor of Medicine at the Royal Victoria Hospital, Banjul. I am M.D. (Doctor of Medicine) of Kiev State Medical Institute, U.S.S.R. I qualified as a doctor in 1973 and did my housemanship in Freetown from 1974 - 1976. I have been with the Royal Victoria Hospital since 1976. I examined the plaintiff on 3/2/81. I have prepared a report on him. (Report dated 5/2/81 tendered. No objection. Accepted and marked Exhibit 1. Report read out. Exhibit K and L given to witness). I endorse the findings but I do not agree with Mr. Ceesay that the injury occurred to the left of the spinal cord. It rather occurred to the right part of it. With regard to Exhibit L I do not agree that the right thigh is slightly smaller than the left. (Plaintiff shows both thighs to court. No obvious difference). I also disagree that rotation of the neck to the left is limited. When I examined the plaintiff I found no limitation in rotations to the left or right. There was only pain when he bends the neck. I do not agree with Mr. Owusu-Ansah's opinion that the plaintiff is paralysed now, if that is what he means in his conclusion if the plaintiff had spinal cord oedema after the accident he would have paralysis. The paralysis would however disappear after the oedema has subsided. I also consider 60% disability a bit too much. Subject to my comments I agree with Mr. Owusu-Ansah's report, Exhibit L. I do not agree with Mr. Owsu-Ansah's opinion that the fracture of the C7 could cause any injury to the right leg because the portion of the spinal cord at the level of C7 and the spinal nerves leaving that area innervate only a certain portion of the body; they do not reach down to the right leg. The fracture of the C7 has however caused injury to the right eye; the eye-lid droops or does not open properly. That is a cosmetic problem but it does not affect the eyesight. An injury to the brain would have affected the whole body including the lower limbs. I found a small erosion on the head of the femur and I associate the plaintiff's limping with that. The erosion could not have been caused by the fracture of the C7. It must have been caused by an impact on the right hip joint. With continued physiotherapy the plaintiff's physical condition including the functions of the neck and

right hip joints can improve considerably. The permanent disability could diminish to about 20%. The plaintiff could then be a salesman. At the moment he cannot be a salesman. He can sit down and work as a clerk. He can go back to school and learn to be an administrator.

By Court:

Examination (cont'd)

Q. What do you mean by "permanent disability?"
A. I mean disability at the time I examined the plaintiff.
Q. Can you then tell us what the permanent (in the sense of "life") disability would be?
A. It depends on subsequent treatment. It could be about 20%.
Q. Was the plaintiff's case one of surgical or medical?
A. It was surgical.

Cross-Examination

XXD by N'Jie:

Q. You are not a surgeon?
A. That is correct. I am not trained as a surgeon but I did surgery as a discipline.
Q. The surgeon must be more competent that you in matters of the nature of the plaintiff's injuries?
A. That is relative. It depends on the competence of the particular surgeon.
Q. Do you agree that Mr. Sheriff Ceesay is a highly qualified surgeon?
A. Yes, I have worked with him.
Q. Do you agree he is better qualified than you in surgery?
A. Yes.
Q. Do you agree that he has much more experience in surgical matters like the plaintiff's case than you?
A. I believe he has.
Q. Do you know Mr. Owusu-Ansah?
A. I have met him.
Q. Is he the head of the surgical Department at the Royal Victoria Hospital?
A. I believe Dr. Kim is the head.
Q. Is it correct that the Registrar of Medical Practitioners in The Gambia was not happy with your qualification and advised you to go for further medical education?
A. That is not correct.
Q. You are in charge of the Children's Out-patient?
A. That is correct; I have been in charge since last Monday (2/2/81). Before then I had relieved someone at the Surgical Department for 2 months.

Q. Apart from those 2 months what is your experience in surgery?

A. I spent 6 months in Freetown doing only surgery. I also spent 9 months in obstetric and Gynee surgery at the Royal Victoria Hospital.

Q. So that you have a total of 8 months of surgical experience?

A. I would say 8 months plus or minus.

Q. Have you ever had experience with skull tractions?

A. Yes, in Sierra Leone.

Q. Is it correct that you asked the plaintiff whether the accident was caused by the full lights of an oncoming vehicle?

A. I asked him how the accident occurred and he told me that.

By Court:

Q. What had that got to do with your examination?

A. I was only interested in how the accident occurred.

Cross-Examination Cont:

Q. I put it to you that you asked him whether the accident was caused by the full lights of an oncoming vehicle and he told you that was not the case.
What were you asked to find about the plaintiff?

A. I was asked to find out his physical condition or his general condition following the accident and to estimate what in my opinion is his present degree of disability if any.

Q. Do you find any difference between the findings of Mr. Ceesay and your own?

A. I think there has been an improvement in the neck.

Q. I put it to you that you are not competent to report on the plaintiff's condition.

(No answer)

Re-examination:

Q. Is it correct that you cannot give an opinion on the plaintiff's condition because you are not a surgeon?

A. No.

By Court: Adjourned to 9/2/81 for further hearing.

(Sgd.) I.R. Aboagye

No. 18

Badara Fye - 9th February 1981

No. 18
Badara Fye
9th February
1981
Examination

Monday the 9th day of February, 1981
Before the Hon. Mr. Justice I.R. Aboagye.

Same representation.

D.W.2: S.O.K. in English. My name is BADARA FYE. I live at Police Lines, Banjul. I am a Sergeant in The Gambian police Force with Regimental No. 58. I know the plaintiff and the defendant herein. In the night of 31/10/75 I was in charge of the Bakau Police Station. My boys came and reported to me that one Mr. Madis had reported a case of motor accident. I then left with my Station Scribe P.C. 33 Sarr for the scene of accident between Milestone 4 and 5 on the Serrekunda/Banjul Road. At the scene I saw skid marks on the right side of the road when facing Banjul. The marks continued to the edge of the road on the grass. From there I saw tyre-marks across the road to the left side. It was mid-night so I had to use my torchlight. I saw a Hillman Avenger car lying in the grass off the left side of the road not too far from the road. The car belonged to one Aziz but I cannot remember the number. There was nobody in or around the car. The car was lying on its side when I saw it. I cannot remember on which side it was lying. Where the car was lying was not very soft. I removed from the car things I thought could be easily stolen and put them in my Landrover. From the scene I continued to the Royal Victoria Hospital where I saw the plaintiff and the defendant on admission. I was not permitted by the medical staff to speak to them. I returned to my station but went again to the scene the next day with P.C. 33 Sarr. We then took measurements of the scene and I built up a case file for my senior officer. I went to the Royal Victoria Hospital from the scene. I saw the plaintiff and the defendant at the hospital and collected statements from them. I have not been able to trace the case file since I was served with subpoena summons. The plaintiff told me that he joined the defendant in his car from Bakau to Banjul and when they reached the place of accident. They met an oncoming vehicle which gave them full high lights at a short distance. He said, as a result, the defendant lost control over the vehicle and it sommersaulted on the left side. The defendant told me that the other driver gave him the full highlights when they were so close. He therefore applied his brakes and lost control over the vehicle. The condition of the road was good on the night of the accident. There was no speed limit

sign at the scene of accident. The defendant told me that the other car was a white Renault but he could not give me the registration number. The accident happened just after a bend.

Cross-examination by N'Jie:

Q. Have you seen the defendant recently?
A. No.
Q. When did you last seem him?
A. I last saw him about the middle of last year in a shop from which I bought a battery.
Q. I have instructions that you went to the defendant a few days ago for him to refresh your mind about the accident.
A. That is not correct.
Q. Did the defendant tell you the speed at which he had been driving at the time of the accident?
A. He told me but I cannot remember it.
Q. Was the plaintiff sitting down when you took the statement from him?
A. They were both lying down covered with blankets.
Q. I put it to you that the plaintiff never made any statement to you as he was not in a position to do so.
A. He made a statement to me.
Q. You saw the defendant's car in the swamp?
A. Yes.
Q. I put it to you that it was lying on its top and not on its side.
A. That is not correct.
Q. You took measurements?
A. Yes, I measured the width of the road, and the distance between the left edge of the road and the position of the car.
Q. Did you notice any of the tyres burst?
A. I cannot remember.
Q. Did the defendant mention a tyre burst to you?
A. I cannot remember.
Q. Did you not see the defendant last week?
A. No.
Q. The defendant's car was at quite a distance from the road?
A. That is not correct.
Q. What was the distance?
A. It was like from the witness-box to the red vehicle across the road.
(Witness points at a red tipper truck)
Q. Did the defendant tell you where the other vehicle was when they were meeting?

A. He said it was nearly in the middle of the road at the time he applied his brakes.
Q. Did the defendant tell you that he applied his brakes?
A. Yes.
Q. Did you ever take the defendant to the scene?
A. No.
Q. Did you measure the skid marks?
A. No.
Q. Was the plaintiff ever taken to the scene of accident?
A. No.

(Distance from the witness-box to the tipper truck measured. It is 103 ft.)

Drameh: This is the case for the Defendant.

No. 19
Defendant's Counsel's Address - 9th February 1981

No. 19

Defendant's Counsel's Address - 9th February 1981

Drameh addresses: The plaintiff's case should be dismissed for the following reasons: Insufficient proof. Plaintiff agreed that there was an oncoming vehicle. Plaintiff failed to prove that the accident was caused by the defendant. Speed did not matter. There was no speed limit at the scene. The road was good. There were no pedestrians and defendant could travel at any speed. Defendant did what a reasonable driver would have done. He had the full lights from the other vehicle in his face. He therefore had 2 options - to stop or to swerve off the road. There would have been a collision if he had stopped. He therefore had to swerve as the other vehicle was in the middle of the road. The one to blame for the accident was the driver of the other vehicle.

See Tidy v Bateman (1934) 1 K.B. 319. Defendant cannot be held liable since he did the only reasonable thing in the circumstances, namely, swerving. See also Halsbury, 3rd Edition paragraph 63 at p.64 and the case of Parkinson v Liverpool Corporation (1950) 1 All ER 367.

See Wilkinson's Road Traffic Offence 10th Edition under Inconsiderate Driving p.235 and the case of Saville v Bache (1969) Times 28th February. See Steward v Hancock 1940 2 All ER 427.

No. 19
Defendant's Counsel's Address - 9th February 1981 (cont'd)

It is obvious that the defendant did not apply his brakes. The question is, "Did the defendant do what a prudent and reasonable driver would do in the circumstances" See pp.98/9 of the English and Empire Digests Vol. 36 paragraph 629. The plaintiff has failed to establish his claim and he must fail. In the alternative I wish to address my Lord on damages. Submit damages must be one which would have been awarded to a Gambian plaintiff in this circumstances. The permanent disability, according to Dr. Baldeh is not 50% or 60% but 20. There is no present paralysis. There is no brain injury and the plaintiff is not completely incapacitated. He can do sedentary work. There is evidence that he can be a sales man if he is driven around. Plaintiff is young and he can adapt himself to his new circumstances. There is not much difference between Dr. Baldeh and those who gave evidence for the plaintiff. He gave evidence of his experience . On damages see (i) Samba Wang; (ii) Bojang v Sillah.

Plaintiff has made remarkable recovery. Plaintiff should be awarded less than what was awarded to Bojang. On loss of earnings there is no evidence that the plaintiff tried to mitigate the loss. He has not done any work since the accident. Salesmanship is not a specialised profession. See Shields v Jones November 1973 at p.6401 of Kemp & Kemp on Quantum of Damages Vol. 2 where general damages of £5,000 were awarded to a plaintiff in the circumstances of the plaintiff.

By Court: Adjourned to 10/2/81 for further address.

10th February 1981

Tuesday the 10th day of February, 1981
Before the Hon. Mr. Justice I.R. Aboagye

Same representation.

No. 20

Plaintiff's Counsel's Address - 10th February 1981

No. 20
Plaintiff's Counsel's Address - 10th February 1981

S.F. N'Jie addresses: The defence is a complete denial of all the allegations in the Statement of Claim. The gist of the defence is contained in paragraph 4 of the Statement of Defence a very reference to tyre burst must therefore be ignored. Defendant said he did not feel any tyreburst. He only saw the tyreburst some time after the accident. The plaintiff never admitted the defence. What is clear is that the defendant drove so fast and failed

to apply his brakes. Submit it is an act of negligence to drive on the road in such a manner. See Clerk & Lindsell on Torts, 13th Edition paragraph 852. The defendant created a situation which he could not control by his driving too fast. There is no doubt that the plaintiff suffered injuries. The medical reports and the defendant confirm that. With regard to the evidence of Dr. Baldeh disagreeing with the 2 surgeons I would only remark that "fools rush in where angels fear to treat". There is evidence that the plaintiff suffered pain, was in hospital for 6 months and he still suffers pain. The surgeons agree that the plaintiff's permanent disability is 50 - 60%. The special damages are itemised in the Statement of Claim. There is evidence that the plaintiff has not been able to take up any employment since the accident. In the application by the Defendant for security for costs it was stated that the plaintiff was in this country just for this suit. It is very much doubted what kind of work the plaintiff will be able to do in the future. But it is almost certain that he will not be able to do the work he has been trained to do, namely, travelling salesman. The award of damages must be based on the particular situation. See Mayne & McGregor on Damages 12th Edition paragraph 5 at p.6 under "Object of Award of Damages", see paragraph 6/011 of Kemp & Kemp - Hall v Lord Halsbury, a case similar to that of the plaintiff where £15,000 was given for pain and suffering alone. That was in 1974.

If the defendant's evidence that he had been blinded by the lights from the other vehicle was true he could not have seen the location of that vehicle. That vehicle did not emerge out of the blue. Defendant must therefore have noticed its approach. It was therefore a negligent act on the part of the defendant to have continued driving at the fast speed of 70 m.p.h. There was a bend and the defendant should have slowed down. If he did not see it then he was negligent. The defendant was not limited to stopping and swerving. He could have slowed down and driven to his offside, if necessary, to avoid the accident. The defendant from the evidence was not sure of the cause of the accident. He blames it on headlights and later on tyre bursts. It is a negligent act to drive a vehicle at a speed which one cannot control.

By Court: Adjourned to 4/3/81 for judgment.

(Sgd.) I.R. Aboagye

No . 21

Proceedings - 4th and 6th March 1981

Thursday the 4th day of March, 1981.

Before the Hon. Mr. Justice I.R. Aboagye

Same representation.

Judgment not ready.

By Court: Adjourned to 6/3/81.

(Sgd.) I.R. Aboagye

6th March 1981

Friday the 6th day of March, 1981

Before the Hon. Mr. Justice I.R. Aboagye

Same representation.

Judgment: Written delivered. Judgment for the plaintiff against the defendant for D250,000 with D10,000 costs.

No. 22

Judgment - 6th March 1981

IN THE SUPREME COURT OF THE GAMBIA

Civil Suit No. 1977-A-74

BETWEEN:

GEORGE AKL — PLAINTIFF

AND

JOHN AZIZ — DEFENDANT

Friday the 6th day of March, 1981.
Before the Hon. Mr. Justice I.R. Aboagye.

Mr. S.F. N'Jie for Plaintiff
Alh. A.M. Drameh for Defendant.

J U D G M E N T

At about midnight on 31st October, 1975, the defendant gave the plaintiff a lift in his Hillman Avenger Car. No. GO 717 from the Casuarina Night Club, Bakau to Banjul. The plaintiff, a Lebanese national, had arrived in the country on holidays and like the defendant had gone to the night club earlier in the night to enjoy himself. On their way to Banjul the defendant drove his car at a speed which the plaintiff gave as 80 m.p.h. but which the defendant stated to be 70 m.p.h. When they were somehwere between milestones 4 and 5 and were approaching a bend they met an oncoming motor vehicle. On meeting the other vehicle the defendant swerved to his right or nearside and subsequently lost control over his car which travelled across the road and crashed into a field off the left side of the road.

The plaintiff, then aged 20 years, was injured in the accident. He suffered fractures to his left arm and the C7 vertebra (one of the bones in the neck). He also got paralysed from the waist. He was carried by the defendant from the bush to the road and was later driven in another car to the Royal Victoria Hospital, Banjul where he was admitted for two nights. The defendant was himself injured in the accident and was also admitted at the same hospital. The plaintiff's fractured arm was put in a plaster of Paris at the Royal Victoria Hospital.

On the third day after the accident, upon the advice of the medical authorities, the plaintiff

and the defendant were flown to Dakar where they were admitted at the Hospital Principal. There the plaintiff's neck was immediately put in a skull traction and he lay on his back with the neck in the traction for two months. At the end of the second month the traction was removed and his body, from the neck down to the middle of the body, was put in a plaster of Paris for another three months. When the plaster of Paris was removed the neck was again put in the support collar for seven months. The plaintiff still wears the collar whenever he feels pain in the neck.

It is the plaintiff's case that the accident occurred as a result of negligence on the part of the defendant. Particulars of the alleged negligence were stated in paragraph 13 of the amended statement of claim as follows:-

"1. The Defendant drove the said Motor vehicle GO 717 too fast.

2. The defendant failed to slow down or stop or control his vehicle in such a way as to avoid the accident.

3. The defendant failed to keep any or any proper look out."

In paragraph 5 of the same Statement of Claim, the cause of the accident was stated thus:-

"Along the Kombo Banjul Road and on approaching Mile 5 the defendant was driving very fast and negligently. As the said vehicle approached a bend near Mile 5 there was an oncoming vehicle from the opposite direction. The defendant who was still driving very fast swerved to the right, left the road, tried to regain the road and lost control of his vehicle".

The evidence of the plaintiff as to the cause of the accident is not materially different from what is contained in his pleading. The plaintiff, however, stated that the speed at which the defendant had been driving before the accident was 80 m.p.h. and explained that it was the high speed at which he was driving in the night when he was meeting a vehicle near a bend which made the defendant lose control over his car after meeting the oncoming vehicle.

The defendant denies that the accident occurred as a result of his negligent driving. Paragraph 4 of his statement of defence reads,

"Coming down from Bakau and arriving before Denton Bridge, the defendant was completely

blinded by the high lights of a car coming on the opposite direction and the defendant's lane and it was while defendant was avoiding this car coming on the opposite direction that the accident the subject matter of these proceedings happened".

The defendant amplified his averment quoted above and explained that he was blinded by the lights from the oncoming vehicle when the two vehicles were about 30 metres apart. To avoid a collision between the two vehicles he drove close to his nearside and in the process he lost control over his car which crossed the road and crashed into the field.

It must be pointed out that, in his evidence, the defendant stated that when he was forced to drive too close to his nearside his car got on some gravel and that a gravel punctured one of his rear tyres and made him lose control over the car. It was not pleaded on behalf of the defendant that his loss of control which led to the accident was due to a tyre burst and counsel for the plaintiff should have objected to the evidence of the tyre burst and that evidence should not have been admitted as a party is bound by his pleading and cannot at the trial set up a case different from what he has pleaded. See Appiah v Akers Trading Co. (1972) 1 G.L.R. 28 at page 34. It was held in the Ghanian case of Wilkinson v. Edusei (1963) 1 G.L.R. 393 that where evidence is by oversight admitted on a matter which has not been pleaded such evidence should be completely ignored. See page 396 of the judgment where it is stated.

"The respondent did not plead deceit or misrepresentation; therefore evidence should not have been admitted by the court on those matters; and where by oversight such evidence slipped in, the court should have ignored it completely in the consideration of its decisions: see Wallingford v. Mutual Society (1880) 5 App Cas. 685, and Phillip v Phillips (1878) 4 Q.B.D. 127. The Learned Judge therefore erred in admitting evidence of such matters, and further erred in acting upon them when fraud and deceit were not in issue before her". See also Lloyde v. West Midland Gas Board (1971) 2 ALL E.R. 1240. I would therefore ignore the defence of tyre burst. The defence is therefore limited to what is contained in paragraph 4 of the statement of defence, namely, that the accident was caused as a result of the defendant being completely blinded by the high lights from the oncoming vehicle which had occupied his lane.

It is agreed by both parties that the accident occurred late in the night and at a time when the defendant was meeting an oncoming vehicle. It is also agreed that the defendant lost control over his car when he drove close to his nearside and that the defendant had been driving fast before the accident.

The plaintiff's evidence is that the defendant was driving at 80 mph at the time of the accident but the defendant give his speed at the material time as 50 m.p.h. According to him he had been driving all along at about 70 m.p.h. at the time of the accident. The plaintiff denies that the defendant was blinded by the high lights of the oncoming vehicle but the defendants version is supported by the evidence of Police Sergeant Badara Fye and Dr. Baldeh both of whom claim to have been told so by the plaintiff. Accepting the defendant's version can he still be blamed for causing the accident through his negligence?

It has been held in a number of cases that "negligence consists in doing something which a reasonable man would not have done in that situation, or omitting to do something which a reasonable man would have done in that situation": See Hazell v. British Transport Commission & Anor. (1958) 1 W.L.R. 169 at page 171 for Pearsin, J.

Mr. Drameh for the defendant cited a series of cases including Tidy v. Battman (1934 1 K.B. 319 and Parkinson V. Liverpool Corporation (1950) 1 All E.R. 367 and submitted that the defendant was placed in an emergency situation in which he either had to stop or swerve to avoid a collision with the oncoming vehicle. It was the submission of learned counsel that as the oncoming vehicle had occupied the middle of the road and the defendant saw its actual position on the road when they were only about 30 metres apart the most prudent thing the defendant should have done us to swerve to his nearside and having done so he should not be blamed for anything which occurred thereafter.

As Lord Wright stated in Tidy v. Battman (Supra) at p.322, "The cases .....show that no one case is exactly like another and no principle of law can ..... be extracted from those cases". It is a question of fact to be determined from the facts and circumstances of each particular case whether a driver has been negligent or not. "But, of course, one can look at decisions in other cases, especially Court of Appeal decisions, to see how that basic rule can properly be applied to situations of a particular class": per Pearson J in Hazell v. British Transport Commission (Supra) at page 171.

The plaintiff's denial of the suggestion that the defendant was blinded by the high lights of the oncoming vehicle is supported by common sense and the defendant's own evidence. The defendant said in answer to a question from me that he was blinded by the lights of the oncoming vehicle when they were about thirty metres apart and saw that the oncoming vehicle had occupied the middle of the road when they were between fifteen and twenty metres apart. He was also able to see the type of vehicle he met and its colour.

In Baiden v. Ansah (Ansah (1974) 2 G.L.R. 407, a case arising out of collision of two motor vehicles at night, Sowah J.A. (as he then was) had this to say at pages 413 and 414 about witnesses who professed to have seen the positions of the vehicles even though they stated that they had been dazzled by the high lights from one of the vehicles:
"..... it is a common experience if their story is correct that with the lights of the other vehicle dazzling them,no one could possibly tell the distance at which the vehicle was first sighted..."

Common driving experience shows that if indeed the defendant had been completely blinded by the high lights of the oncoming vehicle when he was about 30 metres away from that vehicle he would not have been able to see anything until that vehicle had passed him. He would therefore not have seen the position of the oncoming vehicle when they were between 15 and 20 metres apart nor would he have seen the type of vehicle and its colour. The defendant further stated that he was driving at a speed of about 50 m.p.h. when he was meeting the other vehicle and that he did not apply his brakes to stop when he was blinded by the lights from that vehicle. His explanation for not braking was that because of the speed at which he was driving his car would have sommersaulted if he had done so. Again, if the defendant's story was true, common driving experience shows that he would not have had time to think of what would happen to his car if he braked. He would instinctively have applied his brakes. His failure to apply his brakes confirms the plaintiff's case that he was not put into any sudden dangerous situation by the oncoming vehicle. On the evidence I accept the plaintiff's version that the defendant was not blinded by any high lights from the oncoming vehicle.

The plaintiff's evidence was that the defendant was driving too fast in the night when he was approaching a bend and that they met the oncoming vehicle when they were in the bend. Because of the speed at which he was driving, which he gave as 80 m.p.h., the defendant lost control

over his car when he turned to his nearside to give room for the oncoming vehicle to pass. The defendant had observed the approach of the oncoming vehicle before the accident and his own evidence was that the accident could have been avoided if he had been driving at about 30 m.p.h., he admitted that he was approaching a bend (which he described as slight) when the accident occurred but said he did not see the bend before the accident.

On the totality of the evidence I find that the accident was caused by the defendant driving too fast in the night when he was meeting another vehicle and when he was either in the bend or approaching it.

Although I have ignored the story of the tyre burst, I must state that if even I had considered it I would have rejected it as it was most unconvincing. Sgd. Badara Fye who visited the scene of accident said he did not observe any burst tyre on the defendant's car when he saw it and the defendant himself stated that before the accident he did not feel anything which suggested a tyre burst. He did not plead it neither did he tell Sgt. Fye that he had a tyre burst before the accident. His car landed in the bush, and if he later saw one of the tyres burst it could have been caused by a stump in the bush rather than a gravel on the road.

I must also state that I would still have found the defendant liable in negligence even if I had accepted his story that he was blinded by high lights from the oncoming vehicle. The fact that he did not fall into any ditch or bush on his nearside of the road when he was passing the oncoming vehicle shows that had he swerved to his right and stopped the accident would not have occurred. It was held in the Canadian case of McGibbon v Mooers (1931) 4 M.P.R. 209 (digested in Vol. 36 of the English and Empire Digest page 98) that it was negligence to drive a car when the driver was so blinded by the headlights of an oncoming vehicle that he could not see anything in front of him. It would surelybe an act of gross negligence for the defendant to continue to drive at 50 m.p.h. when he could not see anything on the road.

I now come to the difficult task of assessing the damages to be awarded the plaintiff; that is, damages which so far as money can compensate, will give the plaintiff reparation for the defendant's wrongful act of driving negligently and for all the natural and direct consequences of the wrongful act. See per Lord Morris in H. West and Sons Ltd. v. Stepherd (1964) A.C. 327 at page 345.

The plaintiff claims both special and general damages. Particulars of the special damages are contained in paragraph 14 of the statement of claim. They are "(1) Medical expenses, air tickets etc" and (2) Loss of earnings. On his claim for refund of medical expenses the plaintiff tendered in evidence Exhs. C, C1 - C15, Exhs. D, D1 and D2, Exhs. E and E1, Exh. F and Exh. G. He explained in his evidence how those medical expenses were incurred in Dakar. He also tendered in evidence Exh. H to prove the cost of a bicycle and its accessory which he purchased for physiotherapy exercises. The total of the amounts on the receipts is 1,551,300 C.F.A. When converted at the rate of 143 C.F.A. to D1.00 it comes to 10,841.26. The plaintiff's evidence that he spent about 9,000 L.L. (Lebanese pounds) on medical expenses when he returned to the Lebanon was not supported by any documents. He explained that receipts given to him for payments made in connection with his medical treatment were destroyed in a bomb attack on his house in the Lebanon. Bearing in mind the incessant Israeli attacks on the Lebanon I find the plaintiff's explanation reasonable. In any case that piece of evidence from him was not challenged. When calculated at 2.25 L.L. to one dalasi the 9,000 L.L. amount to D4,000 which I consider reasonable and therefore accept.

Even though there is evidence that the plaintiff was flown from Banjul to Dakar after the accident and has since his discharge from the hospital in Dakar travelled to the Lebanon and back to Banjul no evidence was led as to the amount spent on airfares. I therefore find the claim for the cost of airtickets not proved.

As regards the claim for loss of earnings the plaintiff gave evidence that he was employed by Michel Najjar, a firm based in the Lebanon, as a travelling salesman at a monthly salary of 1,000 L.L. In addition to that slarary he was paid five per centum commission on sales effected through him. He said he earned between 1,500 and 2,000 L.L. per month as commission. When asked if he had any written evidence of his employment and salary he tendered Exh. J, a certificate from his employers. The authenticity of the certificate was not question and I must accept it. The plaintiff's claim that he earned between 1,500 L.L. and 2,000 L.L. as commission a month is not supported by any document. The practice whereby salesmen are paid or guaranteed some minimum salary in addition to commission on sales effected by them as an inducement is common in the business world. The plaintiff impressed me as a truthful witness and I have no doubt that he earned sales commissions. I would however accept the lower figure he gave as his average monthly commission.

The plaintiff's evidence is that he has not been able to do any work since the accident and that is to a great extent supported by Mr. Sheriff Ceesay and Mr. John K. Owusu-Ansah, both surgeons, who gave evidence on his condition. Both of them said under cross-examination that the plaintiff cannot move about on his own - he cannot drive or ride a bicycle. He can only now walk slowly. Dr. Balden for the defendant was emphatic in his evidence in chief that until the plaintiff's physical condition improves he cannot be a salesman. It must therefore be accepted that as of now the plaintiff cannot be a salesman. All three medical men are however, of the opinion that the plaintiff can do sedentary work. But here too Mr. Ceesay and Mr. Owusu-Ansah are of the opinion that he can only work with discomfort as he cannot stand or sit for long without pains. The opinions of the two surgeons was shared by Dr. Baldeh when he said in his evidence in chief that the plaintiff felt pain when he bent his head. No one can do sedentary work without bending his head nor can a person be reasonably expected to work in discomfort. I do therefore accept the plaintiff's story that he has not been able to any work since the accident. This means that the plaintiff has not done any work for the past five years and four months as a result of the accident. Allowing him 2,500 L.L. a month as his salary and commission it means that the plaintiff has lost a total of 160,000 L.L. or D71,110. He is therefore entitled to recover that amount from the defendant as damages.

I now turn to the rather troublesome problem of assessing general damages. "Where personal injury results from a negligent act, general damages are given for bodily pain and suffering, past and future, injury to health, and for personal inconvenience, loss for the enjoyment of life, and earning power together with a moderate sum for any loss of expectation of life". See Halsbury's Laws of England, 3rd ed. Vol. 28 Paragraph 104.

The plaintiff was aged 20 years at the time of the accident. All three medical officers who gave evidence in the case agreed that the plaintiff suffered a spinal cord injury which, according to Mr. Ceesay and Mr. Owusu-Ansah, is permanent. The injury has limited the plaintiff's physical activities like walking, running, driving and sporting generally. The plaintiff has suffered and still suffers, pain in the neck due to the fracture of the C7 vertebra. The opinions of Mr. Ceesay and Mr. Owusu-Ansah, which, on Baldeh's own evidence, may be preferred to his own are that the pain in the neck will be permanent. The opinion of Mr. Owusu-Ansah is that the plaintiff is

very likely to develop more pains and stiffness in the neck in the future. There is limitation in rotation of the neck which is somewhat still. The plaintiff's neck was in a support collar for months after the accident and he told the Court that he still wears it any time he gets neck pains. The plaintiff cannot stand or sit for long without pain, neither can he walk with ease and comfort. Whereas Mr. Ceesay and Mr. Owusu-Ansah attribute his limitation in walking to the spinal injury Dr. Baldeh's finding was that it was due to a hip jointly injury. The defendant confirmed the plaintiff's evidence that he suffered severe bodily pain when he was on admission both at the Royal Victoria Hospital and Principal Hospital in Dakar. At the latter hospital the plaintiff was absolutely confined to bed for more than five months. After his discharge from hospital the plaintiff had to stay in Dakar for about seven months during which time he received physiotherapy treatment. He walked with the aid of crutches for about 7 months. The plaintiff also suffered fracture of the left forearm. The fracture has however properly healed.

From the medical evidence it is clear that the plaintiff can no longer do any hard work. In any case he can no longer be a travelling salesman. Mr. Ceesay assessed the plaintiff's permanent disability at 50 per cent whilst Mr. Owusu-Ansah put it at not less than 60 per cent. Dr. Baldeh assessed it at 50 per cent in his written report, Exh. 1, but in his evidence he curiously defined "permanent disability" as "disability at the time of examination". In his opinion, which is contrary to those of the surgeons, the plaintiff's condition will greatly improve with intensive physiotherapy and he would therefore assess his permanent disability in the normal sense of the word "permanent" at about 20 per cent. Dr. Baldeh is well-educated and he must know the difference between "permanent disability" and "disability at the time of examination" which may be termed "current". I have no doubt that he assessed the plaintiff's permanent disability at 50 per cent with full understanding of what he wrote down. In the medical evidence, therefore, the plaintiff's capabilities, including his earning capacity, have been halved.

There is evidence from Mr. Owusu-Ansah, supported by Dr. Baldeh, that the plaintiff's right eye does not open properly as a result of the neck injury. This is a cosmetic disfigurement rather than a functional defect. The plaintiff has also a scar on his left elbow, no doubt as a result of the injury to his left arm. This is also cosmetic disfigurement.

To assist me in my assessment of general damages Mr. S.F. N'Jie, learned Counsel for the Plaintiff, referred me to the case of Hall v. Lord Halsbury decided by O'Connor J on November, 6, 1973, the judgment of which is reported at page 6201 of Kemp and Kemp - the Quantum of Damages - Vol. 2. In that case the plaintiff a 40 year old lady, who had in 1962 suffered injury to her C6 and C7 vertebrae in an accident was involved in another accident in September, 1967. In the later accident she sustained severe ligamental sprain to her neck which aggravated her previous neck injury, a jarring sprain of the lumbar sacral region of the spine, and shock. After the accident she had stiffness and pain in her back and arms. She received physiotherapy and heat treatment for some months and had to wear a collar permanently. In spite of a series of treatment she was left with a painful still neck which she could not move and a collar which she had to wear day and night. Exertion gave her feelings of giddiness and nausea. There was no prospect of any real improvement. Before the accident she earned a net of £18 a week or £936 per annum. She was awarded £15,000 damages for pain and suffering and loss of amenities. The Judge multiplied her annual income of £936 by 8 and awarded her the resultant which he rounded to be £7,500 as damages for loss of future earnings. The awards were confirmed on appeal to the Court of Appeal on June, 21, 1974.

Mr. Dramé also referred me to the case of Shields v. Jones decided on November 19, 1973, by Judge Norman Richards Q.C. which is digested in the same volume of Kemp and Kemp at page 6401. There, the plaintiff, a 26 year old woman, suffered fractures of her first, third, fourth and sixth lumbar vertebrae. She also had fracture of her right patella, lacerations of the chin and bruises of the face, left arm, chest and both legs. She spent nine weeks in hospital during which period she wore a brace. The fracture of the spine healed but with some deformity. The plaintiff suffered persistent aching, discomfort and low backache from time to time. She could not sit for longer than about one and a quarter hours without some discomfort. There was the probability of her backache increasing as a result of extra strains of the spinal deformity. She suffered constant aching, some discomfort and malfunctioning of the right knee. She walked with slight limp and was unable to undertake any sporting activity since the accident. She was awarded D5,000 as general damages.

Reference was also made to the local case of Famara Camara & Anor v. Samba Wang Civ. App. Nos. 6/79 and 6A/79 decided on 22nd November, 1979. In that case the plaintiff aged 43 years had his right arm amputated. He was in hospital for only 21 days and was back to his business just two months after the accident. The Court of Appeal reduced an award of general damages of D20,000 to D14,000 of which D12,000 was for pain and suffering and D2,000 for future loss of earnings.

I have considered the case of the plaintiff in this suit in the light of the authorities I have referred to and borne in mind the general principles to be followed in the award of general damages. I also bear in mind the fact that the cases of Hall v. Lord Halsbury and Shields v. Jones were decided in 1973, that is over seven years ago. Taking into account inflation which has affected the value of money since 1973 and also the fact that inflation now appears to be almost uncontrollable universally I consider the sum of D60,000 reasonable compensation for pain and suffering (past, present and future) and for loss of amenities in life. On the evidence, especially that from the medical men, I take it that the plaintiff is to suffer 50 per cent of his earning capacity for life. His future occupation and income is uncertain and I take it that he is going to lose half of what he used to earn as salary and commission before the accident, that is half of 30,000 L.L. or D13,333.20 per annum. This makes him lose D6,666.67 per annum. The plaintiff is now aged 25 years and I give him 15 years purchase taking into account uncertainties in life. I therefore award him D100,000 for loss of future earnings. The cosmetic disfigurement is not too serious and I award him D5,000 for that.

In conclusion I give judgment for the plaintiff and award him special damages of D85,951 representing medical expenses and actual loss of earnings, and D165,000 general damages.

On costs there is unchallenged evidence that Mr. Alkali Kinteh who translated the plaintiff's documents from French into English charged him D700. The plaintiff has travelled from Banjul to Dakar and from the Lebanon to The Gambia in connection with his injuries and this trial. Taking into account the cost of the abortive trial before O'Brien Coker J., (as he then was), I consider the sum of D10,000 reasonable costs to award to the plaintiff and I award him that amount as costs inclusive of Counsel's Costs.

(Sgd) I.R.Aboagye.

J U D G E

No. 23

Notice of Appeal - Undated

IN THE GAMBIA COURT OF APPEAL

Civil Appeal No. 4/81

BETWEEN:

JOHN AZIZ — APPELLANT

AND

GEORGE AKL — RESPONDENT

NOTICE OF APPEAL

TAKE NOTICE that the appellant being dissatisfied with the judgment of the Puisne Judge dated the 6th March 1981, doth hereby appeal to The Gambia Court of Appeal upon the grounds set out in paragraph 3 herein and will at the hearing of the appeal seek the relief set out in paragraph 4.

AND the appellant further states that the names and addresses of the persons directly affected by the appeal are those set out in paragraph 5.

2. The whole judgment of the court dated 6th March, 1981.

3. GROUNDS OF APPEAL:

i. That the learned Puisne Judge failed to address his mind to the legal arguments submitted by counsel for the appellant.

ii. That the decision is (sic) the evidence before the court.

iii. That the said judgment is wrong or otherwise erroneous having regard to all the circumstances of the case.

4. RELIEF SOUGHT FROM THE GAMBIA COURT OF APPEAL:

That the judgment of the learned Puisne Judge be set aside and judgment and costs be entered for the appellant.

5. PERSONS DIRECTLY AFFECTED BY THE APPEAL:

i. John Aziz,
36 Wellington Street, Banjul.

ii. George Akl,
60 Wellington Street, Banjul.

(Sgd.) I. Drameh
SOLICITOR FOR THE APPELLANT.

NOTE:- The appellant may crave leave to amend the grounds of appeal after receipt of copy of the records.

In the Court of Appeal

No. 24
Notice of Contention that the Judgment should be varied 14th April 1981

No. 24

Notice of Contention that the Judgment should be varied - 14th April 1981

NOTICE OF CONTENTION THAT THE JUDGMENT SHOULD BE VARIED

Take notice that the Respondent herein intends upon the hearing of this Appeal to contend that the sums awarded as items of general damages should be increased upon the following grounds:-

1. The learned trial Judge in his assessment of damages for pain and suffering erred in law when he failed to make any or any adequate provision for the possibility of higher future earnings bearing in mind that the Respondent's income was likely to rise.

2. The learned trial Judge having relied on the case of Hall vs. Lord Halsbury decided in 1973 where there was an award of £15,000 (the equivalent of D60,000) in respect of pain and suffering and the learned trial Judge intending to take inflation into consideration erred in law and in fact when he limited his award on this item to D60,000.

3. The learned trial Judge erred in law when he failed to provide for interest on the sums awarded.

PERSONS WHO MAY BE AFFECTED BY THIS CONTENTION

1. John Aziz c/o Alhaji A.M. Drameh, Solicitor.

2. Northern Assurance Co., 7 Buckle Street, Banjul.

Dated the 14th day of April, 1981.

(Sgd.) Sol. F. N'Jie
COUNSEL

No. 25

Judgment - 25th May 1981

IN THE GAMBIA COURT OF APPEAL

Civil Appeal No. 4/81

CORAM:

Mr. Justice S.J. Forster - Acting President
Mr. Justice E. Livesey Luke - Justice of Appeal
Mr. Justice P.D. Anin - Justice of Appeal

BETWEEN:

JOHN AZIZ APPELLANT

AND

GEORGE AKL RESPONDENT

B.M. Macauley with him Miss
Ida Drameh for Appellant/Respondent

S.F. N'Jie for Respondent/Appellant

J U D G M E N T

Judgment delivered on the 25th day of May, 1981, by S.J. Forster - Acting President

The plaintiff had issued on the 23rd day of March, 1977, a writ of summons against the defendant claiming:

> "damages for personal injuries and loss occasioned to the plaintiff while a passenger in the defendant's motor car registration number GO 717 by the negligence of the defendant along the Banjul/Kombo road on the 31st day of October, 1975."

The plaintiff's original Statement of Claim was dated the 23rd November, 1977, but an amended one was filed on the 26th February, 1980, and the Defence dated the 17th March, 1980. The record does not disclose how the pleadings came into being, but the suit was heard between the 3rd. December, 1980 and the 9th February, 1981. Judgment was delivered on the 6th March, 1981 for the plaintiff awarding him D250,951 damages and D10,000 costs.

The amended statement of claim reads:

1. The plaintiff is of Lebanese nationality and was at the material time on holidays in The Gambia.

2. The plaintiff was at the material time a salesman employed by a firm Etabs. Michel Najjar and earning a monthly salary of 1,000 Lebanese Pounds equivalent to D900 per month together with commission of 5% on sales made by him.

3. The Defendant is a merchant having his place of business at 4 Russel Street, Banjul.

4. On the 31st day of October, 1975 the Plaintiff, at the request of the Defendant joined the defendant from the Casurina Club, Fajara on board motor vehicle registration number GO 717 driven by the defendant from Fajara to Banjul.

5. Along the Kombo Banjul road and on approaching Mile 5 the defendant was driving very fast and negligently. As the said vehicle approached a bend near Mile 5 there was an oncoming vehicle from the opposite direction. The defendant who was still driving very fast swerved to the right, left the road, tried to regain the road and lost control of his vehicle.

6. The said vehicle landed in the mud nearby a distance from the road.

7. The plaintiff sustained extensive injuries to his spine a fractured vertebra and sustained a broken arm.

8. The plaintiff was admitted in the Royal Victoria Hospital and was later removed to Hospital Principal in Dakar where he stayed for six months as a patient.

9. After his discharge from hospital the plaintiff was able to move about for short intervals with the aid of crutches.

10. The plaintiff is now able to move without the aid of crutches but continues to suffer constant pain.

11. The plaintiff is twenty-two years old.

12. Because of his inability to return to Lebanon when he was so required by his employers Ets. Michel Najjar have since dismissed the plaintiff from their employment.

PARTICULARS OF NEGLIGENCE

13. 1. The defendant drove the said motor vehicle GO 717 too fast.

2. The defendant failed to slow down or stop or control his vehicle in such a way as to avoid the accident.

3. The defendant failed to keep any or any proper look out.

14. The plaintiff claims Special Damages as follows:-

1. Medical expenses, air tickets etc.

1,693,582.75 francs C.F.A.
equivalent to D15,215.00

2. Loss of earnings D20,600.00

15. The plaintiff claims General Damages.

16. The plaintiff claims damages for pain and suffering.

17. The plaintiff claims damages for loss of amenities.

The Defence reads:

1. The defendant cannot admit or deny paragraphs 1, 2 and 11 of the plaintiff's Statement of Claim.

2. The defendant admits paragraph 3 of the plaintiff's Statement of Claim.

3. The defendant denies paragraphs 4 to 10 and 12 to 17 of the plaintiff's Statement of Claim.

4. Coming down from Bakau and arriving before Denton Bridge, the defendant was completely blinded by the high lights of a car coming on the opposite direction and the defendant's lane and it was while the defendant was avoiding this car coming in the opposite direction that the accident the subject matter of these proceedings happened.

5. The defendant attaches Motor Accident Report Form which contains a rough plan of the area where the accident happened and a description of how the accident happened.

6. The defendant denies that he is responsible for the accident or was in any way negligent. He further avers that the plaintiff's remedy lies elsewhere.

7. The defendant denies that he owes the plaintiff the sums claimed or any sum or sums at all. He therefore claims that the suit be dismissed with costs.

8. Save as is hereinbefore expressly admitted, the defendant denies each and every allegation contained in the Statement of Claim as if the same were traversed seriatim.

The defendant being dissatisfied with the judgment of the learned trial judge has appealed to this court argued on the following sole ground:

"That the decision is against the weight of evidence before the court."

Counsel for the respondent (the plaintiff in the suit filed a Notice of Contention that the judgment should be varied on the ground that "the Learned Trial Judge erred in law when he failed to provide for interest on the sums awarded."

It would at this stage, be appropriate to give an outline of the story of the parties respectively. The story of the plaintif is that he had arrived in Banjul on the 19th June, 1975 on a holiday from Lebanon where he was employed by the firm of Michel Najjar & Sons as a Travelling salesman, and was then about 17 years. He had spent the evening of the 31st October, 1975 at the Casurina Night Club, Fajara, leaving there about mid-night, in company of the defendant who he encountered by chance at that Club. They travelled in a relatively new Hillman Avenger car registered No. 717, belonging to and driven by the defendant. The car was driven fast, at a speed of 80 m.p.h. After Milestone 5 on the journey to Banjul, they approached a right hand bend and he saw a car approaching from the direction of Banjul; at this juncture their speeding Hillman's nearside wheels went off the road, and defendant, trying to get the car back on to the road, lost control of the car which somersaulted and landed on its canopy on swampland, the plaintiff being thrown out of the car as it sommersaulted and he sustained serious personal injuries. He was put in a passing taxi by the defendant who directed the driver to take plaintiff to the Banjul Hospital, but the taxi driver took him straight to the Police Station in Banjul instead. The Police, however, took him to the Banjul Hospital,

where, on arrival, he lost consciousness. A day later, a Sunday, he was flown to and admitted in the Hospital Principal, Dakar. Here, he spent six months and after his discharge, had to attend there for physiotherapic treatment for some seven months. The plaintiff is now able to walk without the aid of a crutch albeit slowly, and finds it painful to sit up for periods longer than 15 minutes.

The defendant's story was that on the night of the 31st October, 1975, he had given the plaintiff a lift from the Casurina Night Club in his car, to come to Banjul; they left the Club about mid-night, he driving. On the way and near Milestone 5, he saw an oncoming vehicle travelling in the middle of the road with its headlights full on; in trying to avoid a collision, he drove close to his nearside and, in so doing, his car got on to some gravel and one of his rear tyres got burst, the car swerved to the left and fell in a rice farm some 5 metres from the road. In the car's process of sommersaulting and falling into the rice farm, defendant's head had hit a door of the car and he had become dazed for a short while. On recovering the could not see the plaintiff and so called out to him; the plaintiff answered from the surrounding bush adding that he could walk. Defendant then went to his aid and brought him to the road where a passing taxi driver was asked to take plaintiff to the hospital in Banjul. Following no later, the defendant went directly to the Banjul hospital but did not find plaintiff there. Later, however, plaintiff was brought there by the police and was carried into the hospital on a stretcher, and breathing with difficulty. They were both admitted and given treatment. After two nights at the Royal Victoria Hospital, they flown to Dakar and admitted at the Hospital Principal. Defendant said he was driving fast on that night of the accident but didn't think he was driving as much as 80 m.p.h. he estimates that his speed at the time of the accident was then 50 to 60 m.p.h.

The plaintiff in his evidence in chief had not given any details of the vehicle he saw coming from the direction of Banjul, near Milestone 5, but in his cross-examination he said that that vehicle hadn't its high lights full on. The defendant had said in cross-examination that he had been driving at 70 m.p.h. before the accident, but had reduced speed to about 50 m.p.h. at the time of the accident as he had told his insurers on the 23rd December, 1975; he said further in cross-examination that could not have applied his brakes about the time of the accident as he would have sommersaulted at that speed if he had tried to stop his car.

He was able to see though blinded by the high lights of the oncoming vehicle, that it was white in colour and a Renault 4, but could not make out its registration number and consequently unable to trace its driver. Defendant also admitted in cross-examination that he did not feel nor had he noticed that he had a burst tyre before the accident, and the first time he knew that he had was when somebody told him that at the Royal Victoria Hospital, but that when he was he was being taken to the airport to be flown to Dakar, he had observed the burst tyre on his car which was still in the swamp. In further cross-examination defendant said he estimated his distance from the oncoming vehicle when he first saw it as about 30 metres away, with its head lights full on and that at between 15 and 20 metres distance he noticed it in the middle of the road.

Learned senior counsel for the appellant's main argument in support of his sole ground of appeal was to the effect that the learned trial judge mis-appreciated the evidence adduced by the parties and that led him to an erroneous evaluation, inconsistent with the evidence. One such error was that considering the case for the defendant, it was crucial for it that the learned trial judge express his finding on the position on the road of the on-coming vehicle whose factual presence was attested to by both parties in their respective evidence, and this he failed to do. Perhaps if he the learned trial judge had made a finding, and on a true resolve of the evidence, he may well have found negligence established on the part of the driver of the oncoming vehicle.

Another such error, equally crucial to the defendant's case was the finding by the learned trial judge that defendant was driving too fast that night and that that caused the accident. But, with respect to the learned trial judge, fast driving on a freeway does not, of itself, amount to negligence. See Quinn v. Scott (1965) 2 ALL E.R. 588 at 590.

Yet a third example of these errors cited by learned senior counsel is of the learned trial judge's acceptance of the evidence of the plaintiff "that the defendant was not blinded by any high lights from the oncoming vehicle." Assuredly seeing the situation from the passenger seat cannot be the same as seeing that situation from the driving seat, especially in the light of the evidence of the instant case on appeal before this court.

Learned senior counsel pointed out several other examples of what he called misappreciation of

the evidence by the learned trial judge, as for example, the evidence of the plaintiff which negatived the fact that the oncoming vehicle had its head lights full on at the material time, and that of the defendant, supported by his consistent story, to his insurers, to the interrogating police, two days after the accident, and much later to an examining medical officer at the Royal Victoria Hospital, and also to the learned trial judge, who, in his judgment said, inter alia:

> "The plaintiff's evidence is that the defendant was driving at 80 m.p.h. at the time of the accident, but the defendant gave his speed at the material time as 50 m.p.h. According to him, he had been driving at about 70 m.p.h. at the time of the accident. The plaintiff denied that the defendant was blinded by the high lights of the oncoming vehicle but the defendant's version is supported by the evidence of the police sergeant Badara Fye and Dr. Baldeh both of whom claim to have been told so by the plaintiff .....
> The plaintiff's denial of the suggestion that the defendant was blinded by the high lights of the oncoming vehicle is supported by common sense and the defendant's own evidence .....
> "Common driving experience shows that if indeed the defendant had been completely blinded by the high lights of the oncoming vehicle when he was about 30 metres away of that vehicle, he could not have been able to see anything until that vehicle had passed him .....
> The defendant further stated that he was driving at a speed of about 50 m.p.h. when he was meeting the other vehicle and that he did not apply his brakes to stop when he was blinded by the lights from that vehicle. His explanation for not braking was that because of the speed at which he was driving his car would have sommersaulted if he had done so... Again, if defendant's story was true, common driving experience shows that he would not have had time to think of what would happen to his car if he braked. He would instinctively have applied his brakes. His failure to apply his brakes confirms the plaintiff's case that he was not put into any sudden dangerous situation by the oncoming vehicle. On the evidence I accept the plaintiff's version that the defendant was not blinded by any high lights from the oncoming vehicle."

Learned senior counsel also referred the court to the judgment of the learned trial judge and pointed out that the latter relied on the case of Hazell v. British Transport Commission (1958) 1 WL.R. 169 at 171 where Pearson J. said:

> "The basic rule is that negligence consists in doing something which a reasonable man would not have done in that situation or omitting to do something which a reasonable man would have done in that situation."

Learned senior counsel stressed that by adhering to the objective principle thus stated by Pearson J. the learned trial judge caused himself to be let into yet another erroneous conclusion, because, he submitted, the correct test is as stated in the case of Donoghue v. Stevens on (1932) All E.R. (Reprint) p.1 per Lord Atkins:

> "The rule that you are to love your neighbour becomes in law: You must not injure your neighbour; and the lawyer's question; Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or ommissions which are called in question."

Learned senior counsel also stressed that the learned trial judge omitted to refer to the evidence of Dr. Baldeh who said that being interested in how the accident occured, he had asked the plaintiff when examining him whether the accident was caused by the full lights of the oncoming vehicle and that the plaintiff replied that that was so. Learned senior counsel urged that it was wrong for the trial judge to accept what the plaintiff said he saw from his seat as more accurate than what the defendant, as driver, said he himself saw as he drove his car towards the oncoming car that night, adding that there was an inconsistent statement by a material witness, the plaintiff, on a material particular when such evidence is subject to the test normally applied by judges who consider the witness' evidence in the light of the witness' previous inconsistent statement, and this was not done in this case as is revealed in the judgment of the learned trial judge.

The learned senior counsel pointed out what he termed further errors made by the learned trial judge in evaluating the evidence, for example, the plaintiff's evidence on the 'burst tyre' was not contradicted he was being cross-examined, nor was any objection taken to it, but the learned trial judge held in his judgment that because it was not pleaded, he would ignore it. The learned senior counsel cited the case of Domsalla & Anor v. Barr & Ors (1969) 3 All E.R. 487 at 493 per Edmund Davies L.J.:

> "By adverting to the plaintiff's intention to set up in business on his own account, there was being introduced into the case an entirely new element which had received no adumbration at all in the statement of claim. For that reason, in my judgment, the plaintiff was going outside his pleading, and objection might properly have been taken to the leading of such evidence. The objection, however, was not made, and accordingly it is not right, in my judgment, for this court to say now it will not have regard to such evidence as was called in support of this new, unpleaded matter; but that in no way relieves that court from the duty of carefully assessing such evidence as was adduced in support of this entirely novel allegation."

Learned senior counsel also referred the court to the case of Parkinson v. Liverpool Corporation (1950) 1 All E.R. 367, and submitted finally, that if there is prima facie evidence of driving at a speed shown to be dangerous, and an accident is caused, then there is prima facie evidence of negligence if in such circumstances there is no explanation of the accident offered by the driver, a judge will be quite right in finding against him; on the other hand, if an explanation is given, then the judge must consider it on the basis of all the evidence and if he ignores part of the evidence or misappreciates other parts, then a finding adverse to the defendant is to be set right by the court of appeal, either by entering judgment for the defendant or remitting the case for retrial, but further submited that the prior inconsistent statements of the plaintif were such as would affect any conclusion and no new trial, he averred, could alter that.

Counsel for the respondent contended that failure to cross-examine does not always mean admission of that evidence referring to Phipson on Evidence 6th ed at p.1544, reading from the paragraph following on that which learned senior counsel had earlier read to the court on this point, that is on

'omission to cross-examine.' He was emphatic that failure to cross-examine would not always amount to an acceptance of the witness 'testimony; he said that the evidence of the 'burst tyre' given by the defendant was hearsay because the defendant admitted in cross-examination that he was first told by someone who visited him in the Banjul hospital, that his car had a burst tyre. Respondent's counsel laid great emphasis on the liability of the appellant for the negligent driving of his car at the material time, blaming the appellant for putting himself in a position where he could not avoid the accident. Counsel then referred the court to the case of Bourhill v. Young (1942) 2 All E.R. 396 at 399 and urged the court to the view that there was prima facie evidence that appellant drove at a high speed before the accident and that he did not know he had a burst tyre till told about it while he was in hospital; he said, however, that no issue was made of the fact or otherwise of the oncoming vehicle being in the middle of the road at the material time, and conceded that the learned trial judge did not make any finding on this. Learned senior counsel made a brief reply to the contention of respondent's counsel that the appellant was negligent before the accident and was not able to control his car at the material time. Senior counsel stressed that driving fast on a freeway was not indicative of negligence, perse, nor was it so because of losing control of his car by the defendant at the material time.

The principles on which an appellate court can set aside crucial findings of fact by a trial judge are sufficiently well known. In Watt or Thomas v. Thomas (1947) A.C. 484, at 487, Lord Thankerton said:-

"(i) When a question of fact has been tried by a judge without a jury, and there is no question of mis-direction of himself by the judge, an appellate court which is disposed to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion;

(ii) The appellate court may take the view that without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;

(iii) The appellate court, either because the reasons given by the learned trial judge are not satisfactory or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

In the case of Benmax v. Austin Motor Company Ltd (1955) 1 All E.R. 326 at 330, Lord Summervell said, inter alia:

> "I would wish to add a few sentences on the point dealt with by my noble and learned friend, Lord Simonds. I would, as does he, respectfully differ from those who have suggested that an appeal on fact from a judge sitting alone is the same as, or should be assimilated to, an appeal from a jury. Apart from the fact that, in the former case, the appeal is a rehearing, juries do not, and judges in varying degrees do, give reasons for their conclusions. In a negligence action, it may be clear on an appeal from a judge alone how he has found what has been conveniently called the primary facts. An appellate court must be free to consider whether the judge who has, I will assume, found for the plaintiff, applied the standard of the reasonable man, as our law prescribed or the standard of a man of exceptional care and prescience."

See also the case of Shyben A. Madi v. C.L. Carayol (1979) P.C. Appeal No. 12, an appeal from this court where the foregoing principles were recently discussed and applied.

In the instant appeal I find that the learned trial judge failed to evaluate the primary facts correctly and misled himself further in applying the objective principle on which the case of Hazell v. British Transport Commission (Supra) was decided and which, in my opinion, is a wrong proposition of the test of liability so clearly defined in Donoghue v. Stevenson (also supra).

Counsel for the respondent did not address himself to these issues, but rather to the matter of damages arising from the negligence which he attributed to the appellant, and which I find was not established by the evidence before the court below. See Note on the case of Woods. v. Duncan & Ors (1946) 1 All E.R. 420, H.L.

In view of the decision I have arrived at to allow the appeal, it would be fruitless to go into the matter of learned counsel for the respondent's contention for a variation of the judgment of the learned trial judge's judgment and order for an order for interest to be paid on certain of the awards he made in respect of damages.

I would therefore allow the appeal, set aside the judgment and order for costs of the learned trial judge, and enter judgment for the appellant with costs in this court and in the court below. I would fix costs in the court below at D2,000 and assess costs in this court at D2,500, and order accordingly.

(Sgd) S.J. Forster
ACTING PRESIDENT.

(Sgd) P.D. Anin
JUSTICE OF APPEAL

(Sgd) E. Livesey Luke
JUSTICE OF APPEAL

No. 26

Order granting Special Leave to Appeal to Judicial Committee - 9th December 1982

L.S.

At the Council Chamber Whitehall

The 9th day of December 1982

BY THE RIGHT HONOURABLE THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

WHEREAS by virtue of The Gambia Appeals to Judicial Committee Order 1970 there was referred unto this Committee a humble Petition of George Akl in the matter of an Appeal from the Court of Appeal of The Gambia between the Petitioner and John Aziz Respondent setting forth that the Petitioner prays for special leave to appeal from a Judgment of the Court of Appeal of The Gambia dated 25th May 1981 allowing an Appeal by the Respondent from a Judgment of the Supreme Court of The Gambia dated 6th March 1981 by which the Petitioner was awarded D 250,000 damages for personal injuries: And humbly praying the Lords of the Judicial Committee of the Privy Council to grant the Petitioner special leave to appeal against the Judgment of the Court of Appeal of The Gambia dated 25th May 1981 or for further or other relief:

THE LORDS OF THE COMMITTEE in obedience to The Gambia Appeals to Judicial Committee Order 1970 have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do grant special leave to the Petitioner to enter and prosecute his Appeal against the Judgment of the Court of Appeal of The Gambia dated 25th May 1981 upon depositing in the Registry of the Privy Council the sum of £5,000 as security for costs.

AND THeir Lordships do further order that the proper officer of the said Court of Appeal be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy of the Record proper to be laid before the Judicial Committee on the hearing of the appeal.

E. R. MILLS

Registrar of the Privy Council

No. 17 of 1983

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF THE GAMBIA

B E T W E E N :

GEORGE AKL — Appellant

- and -

JOHN AZIZ — Respondent

RECORD OF PROCEEDINGS

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