Exploring the Frontiers of the Law of Damages under the Nigerian Legal System

Abstract

*Where there is a wrong, there is a remedy “ubi jus ibi remedium means”. This maxim underscores the necessity of evaluating award of damages. While, prima facie, it will appear that this is a question of nomenclature, contemporary studies have shown that the notion of damages has a pragmatic effect on the administration of justice. For example, we have seen cases in which justifiable plea of award of damages are rejected by the court based on technical defects in the application and couching of the pleadings, thereby, depriving the claimant of the remedy he deserves. It is against this background that this article analyses the award of damages under Nigerian Legal System. It clarifies the concept, typology, rationale and justification for the award of different species of damages and the rules regulating same. The article unknots the decision in Hadley v. Baxendale and its endorsement by the apex court in Nigeria in the case of Eagle**Super Pack (Nig.) Ltd. v. A.C.B Plc.**It distills the differences in award of damages made upon a breach of contract, general and special damages and damages simpliciter under the law of contract. The article also examines the circumstances in which damages can be obtained under a claim for tort: the underlying principle being the test of reasonable foreseeability, thereby, dictating the nebulous nature of award of damages under the law of torts as opposed to award of damages for breach of contract. Finally, a brief incursion into the public law area was also made through an examination of award of damages in fundamental rights cases. Areas highlighted in this regard are the principles guiding the award of damages in fundamental rights enforcement cases and the unsavoury reluctance of the bench to adequately compensate a victim of human rights violation. The article concludes by reiterating the pivotal role damages occupy in the Nigerian legal system and the need to demystify the underlying concept of damages.*

**Introduction**

It is the cornerstone of Nigerian law that a party does not suffer damage or loss in vain as the primary rule is *ubi jus ibi remedium*[[1]](#footnote-1). The absence of a clear remedial legal vehicle may compel members of society to self-help and anarchy. Damages or loss may arise as a result of a contractual breach or a tortious act of another. It is a remedy afforded by law when one has occasioned damage or loss as a consequence of another’s action.[[2]](#footnote-2) As would properly emerge there is some difference when the word is in singular and when in plural tense.

The purpose of this paper, therefore, is to shed light on the meaning, nature and purpose of damages; types of damages; the basis of and justification for award of damages and the rules regulating the award of damages in tort and contract. The paper also analyses damages in relation to fundamental human rights, an aspect of public law, in so far as contract and tort may be considered to be within the realm of private law.[[3]](#footnote-3) To achieve this purpose, the paper is divided into three parts. Part 1 clarifies the concepts relevant to this paper, which include damage, damages, liquidated and unliquidated damages *etc.* It clarifies misconceptions with respect to understanding and usage of core terms connected with the application for, award and enforcement of damages. Part 2 examines the application of damages to the specific areas of Contract and Tort actions, distilling the distinction normatively and in application. Part 3 examines the relevance of the general notion and tenor of damages to breaches of fundamental rights and their provisions as contained in the Constitution of the Federal Republic of Nigeria, 1999 (Cap C23, Laws of the Federation, 2004 as amended). The paper closes on the core role of damages in civil matters, the need for the court to reappraise its position on some aspects of received English Law on award of damages for pain and suffering. The paper also encourages the Courts to award exemplary damages on infringements of human rights even where this has not been specifically pleaded.

**Part 1: Conceptual Clarification**

The legal term ‘damages’ has been defined as: “a pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights through the unlawful act or omission or negligence of another….money compensation sought or awarded as a remedy for a breach of contract or for tortious acts.”[[4]](#footnote-4)

The lexical definition above has been adopted judicially in the case of *Shell Petroleum Development Company Nigeria Limited v. Tiebo VII & 4 Ors*[[5]](#footnote-5). This definition was reechoed in *Seven-Up Bottling Company Plc* v. *Abiola and Sons Bottling Company Ltd & Anor.*,[[6]](#footnote-6) where the Court explained damages to be the “pecuniary compensation, obtainable when successful in an action for a wrong done which is either a tort or a breach of contract, the compensation being in the form of a lump sum awarded at the time unconditionally and generally”. It has also been described as the monetary recompense that is given by the jury to the plaintiff or defendant, for the wrong the defendant has done to him.[[7]](#footnote-7)

The main aim of the award of damages is to financially compensate the victim of a tort or breach of contract for the harm done to him by the other. This was encapsulated in the decision of the Court of Appeal in the case of ***UBA Plc v. Ogundokun***[[8]](#footnote-8). According to the court, “the rationale for awarding damages is to compensate the aggrieved party for the loss or place him in a near as possible position as he would have been if he had not suffered damage or injury for which he is claiming compensation.[[9]](#footnote-9)

While ‘damages’ are awarded for ‘damage’ suffered, it is clear that the two words, though close in spelling, connote two different meanings and concepts. Thus, according to *Blacks’ Law Dictionary*[[10]](#footnote-10), damage means

Loss, injury, or deterioration , caused by the negligence, design, or accident of one person to another, in respect of the latter’s person or property. The word is to be distinguished from its plural, “damages”, which means a compensation in money for a loss or damage. An injury produces a right in them who have suffered any damage by it to demand reparation of such damage from the authors of the injury. By damage we understand every loss or diminution of what is a man’s own, occasioned by the fault of another. The harm, detriment, or loss sustained by reason of an injury.[[11]](#footnote-11)

It is, therefore, the case that damages flow out of a damage committed by one against another person. While it is the case that money cannot renew a shattered human frame or replace a life once lost,[[12]](#footnote-12) however, pecuniary compensation can be awarded so that the court would have done the best it can in the light of the circumstances of each case since the object of the award of damages is to compensate the plaintiff fairly and adequately[[13]](#footnote-13) but not necessarily punishing the defendant[[14]](#footnote-14) or cause the plaintiff to be unjustly enriched.[[15]](#footnote-15)

**1.1 Typology**

The law of damages recognises distinction among a number of types and headings. Thus, damages, may be general or special, liquidated or unliquidated, nominal or exemplary, punitive, *etc.* the effect of the award of each is quite important and the mode of pleading and proving same significant for a party claiming damages on any of the headings as explained below.

**1.2: *General and Special Damages***

The term ‘general damages’ has been used in opposite to its twin, but unidentical concept, ‘special damages’.

**1.2.1 General damages:**[[16]](#footnote-16) has been defined as “damages which the law implies or presumes to have accrued from the wrong complained of or as the immediate, direct and proximate result of or the necessary results of the wrong complained of”.[[17]](#footnote-17) It is awarded by the court where it cannot point at any measure to assess the loss caused by the wrong complained of except the opinion and judgment of a reasonable man.[[18]](#footnote-18) General damages are always made as a claim at large. Thus the Supreme Court stated in *Rockonoh Properties Co. Ltd. v. NITEL Plc*[[19]](#footnote-19)**:** “General damages are always made as a claim at large. The quantum need not be pleaded and proved. The award is quantified by what, in the opinion of a reasonable person, is considered adequate loss or inconvenience which flows naturally, as generally presumed by law, from the act of the defendant. It does not depend upon calculation made and figure arrived at from specific items”.[[20]](#footnote-20)

There is no requirement to plead the particulars of general damages or specifically plead the quantum of such damages and neither can it be deemed admitted by operation of law. The claim for general damages is always deemed to be in issue with or without traverse. In ***Iwueke v. I.B.C.***[[21]](#footnote-21), the Supreme Court clearly stipulated the rule as follows: “the law is that in an action, a claim for damages is always deemed to be in issue. That being the case any allegation in pleadings that a party has suffered damages (sic) and any allegation as to the amount of damages (sic) so suffered is deemed to be traversed unless of course, specifically admitted see – *Osuji v. Isiocha (1989) 3 NWLR (Pt. 111) 623; Produce Marketing Board v. Adewunmi (1972) 11 SC 111.*”

In fact, in such cases where the defendant did not enter appearance or file any defence, i.e. in cases of default of pleadings or appearance, while it may be said that the allegations forming the facts of the plaintiff’s pleadings may be said to have been admitted, no such admission applies to claim for general damages. According to His Lordship, Uwaifo JSC,[[22]](#footnote-22) “it follows therefore that though for the purpose of a proceeding for judgment in default of pleadings the defendant, as in this case, is deemed to have admitted the facts as pleaded in the statement of claim, such implied admission does not extend to averments in respect of damages. This clearly constitutes an exception to the general rule that for the purposes of application for judgment in default of pleadings the defendant is deemed to have admitted the facts as pleaded in the statement of claim”.

The implication is that it is still required in claim for general damages to lead evidence as to justify an award which is primarily to be calculated based on the circumstances of the case as same is basically unliquidated.,[[23]](#footnote-23) the threshold being the test of a reasonable man. The danger however at this point is the possibility of descending into the arena of special damages.

**1.2.2: Special Damages**

On the other hand is a claim for special damages. It consists of all items of loss which must be specified by a party claiming them before they may be proved and recovery granted.[[24]](#footnote-24) The term ‘Special damages’ has been defined as: “those damages which are given in respect of any consequences reasonably and probably arising from the breach complained of. They denote pecuniary losses which have crystallised in terms of cash and value before the trial”.[[25]](#footnote-25)

They are such that the law will not infer from the nature of the act. Special damages being exceptional in their character, must be claimed specifically and proved strictly.[[26]](#footnote-26) In *Shell BP Ltd.* v. *Cole & Ors*.[[27]](#footnote-27), the Supreme Court held that the claims of the respondents being in the nature of special damages, must be strictly proved. In addition, it said that for a proper assessment of the loss of income from fish, gravel and sand, there must be evidence of the respondents’ income from those commodities and in case of the jujus, there must be evidence of the costs of the repairs or, if they were damaged beyond repairs, of their value at the time of their destruction or the costs of replacement. It is, therefore, the law that the ‘term strict’ proof required in proof of special damages means no more than that the evidence must show the same particularity as is necessary for its pleading. It should, therefore, consist of evidence of particular losses which are known exactly or accurately, measured before the trial.[[28]](#footnote-28) Thus, where special damages are not specifically pleaded and proved, same cannot be granted. Of importance also is the fact that the pleading of such special damages cannot be by way of incorporation by way of annexures or reports. However, it is important to note that the incorporation of items of claim in an annexed document or a report that is pleaded will not suffice to ground proper pleading of such heads of claim.[[29]](#footnote-29)

**1.3. Liquidated and unliquidated Damages**: Flowing from the discussion of both general and special damages above, is the corollary understanding of what amounts to liquidated and unliquidated claims or damages. A liquidated *damages* is a specific sum of money usually due and payable and which amount is already ascertained or capable of being ascertained as a mere calculation without any other or further investigation. Such sum is already stated just like it is required to be pleaded in a claim for special damages.[[30]](#footnote-30)

In contrast to the liquidated damages is the unliquidated damages which relates to such claims that are not specific as to amount or sum.

One important point of distinction as between the two concepts is brought in Order 20 Rule 1 of the Lagos State High Court (Civil Procedure) Rules, 2012 which provides that: “If the claim is only for a debt or liquidated demand, and the defendant does not within the time allowed for the purpose, file a defence, the claimant may, at the expiration of such time, apply for final judgment for the amount claimed with costs”.

The above implies that in liquidated money demand or damages, the claimant can get final judgment in default of pleadings by the defendant and by Order 20 Rule 2, he can get such judgment against a defaulting defendant while trial goes on against other defendants who have filed their own defences in case of more than one defendant. However, in the case of unliquidated sums, the claimant shall only be entitled to interlocutory judgment against the defendant in default of pleading while the amount of damages payable shall be ascertained in any way which the Judge may order.[[31]](#footnote-31)

**1.4. Nominal and Substantial Damages**

Occasions do arise in law that there is recognition of invasion of the claimant’s rights but in which no injury or damage could be said to have been specifically suffered by the claimant. In such cases, as the court is not a Father Christmas, a meagre amount of money may be awarded to the claimant as damages for the wrong done which did not result in an injury. In such situations, the law works with nominal damages. The term was described in *Barau v. Cubitts (Nig.) Ltd.*[[32]](#footnote-32)where the Court of Appeal:

A technical phrase which means that you have negatived anything like real damage but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you the right to the verdict or judgment because your legal right has been infringed. But the term ‘nominal damages’ does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages, but may be also represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances, and it certainly does not in the smallest degree suggest that because they are small they are necessarily nominal damages.

In contrast to the above is the concept of substantial damages which means “[A] sum, assessed by way of damages, which is worth having; opposed to nominal damages, which are assessed to satisfy a bare legal right. Considerable in amount and intended as a real compensation for a real injury.”[[33]](#footnote-33) Substantial damages means a considerable sum awarded to compensate for a significant loss or injury.[[34]](#footnote-34)

**1.4.1. Exemplary damages**:

Exemplary damages are “Damages which are, in nature, awards made with a possible secondary object of punishing the defendant for his conduct in inflicting harm on the plaintiff. They are made in addition to the normal compensatory damages” and “should be awarded only in the following cases: “in cases of oppressive, arbitrary or unconstitutional acts by Government servants[[35]](#footnote-35) where the defendants’ conduct had been calculated by him to make a profit for himself which might well exceed the compensation payable to the plaintiff[[36]](#footnote-36) where expressly authorised by statute”.[[37]](#footnote-37)

Indeed with the exception of the anomalous case of breach of promise of marriage, exemplary damages are, as a rule, not recoverable in actions for breach of contract. In *Allied bank Nig Ltd* v***.*** *Akubueze*[[38]](#footnote-38), Ogwuegbu, JSC, postulated the rule as follows: “As a general rule, exemplary damages cannot be awarded in a purely contractual action. See *Addis v. Grammophone Co. Ltd. (1909) AC 488*. Where a plaintiff has a cause of action both in tort and for breach of contract, he may be able to recover exemplary damages by framing his claim in tort. If the court is particularly outraged by the defendant’s conduct, it can sometimes achieve the same result by awarding damages for injury to the plaintiff’s feelings”.

The rationale for the award of exemplary damages was stated by the apex court to be “that the action of the defendant is such that the damages awarded against him are intended to punish the defendant and to vindicate the strength of the law and not merely as compensation for the injured plaintiff.[[39]](#footnote-39)  The classes of damages known to law do not seem closed as quite a host of others though relatively less important classes of damages do exist[[40]](#footnote-40). It is considered, without any definite yardstick of consideration, that the above seem to be more important than others and quite do feature more in actions. It is necessary to look at how damages are awarded under the headings of contract, tort and public law now.

**Part 2: Damages in Contract and Torts Distinguished**

**2.1. Contract**: Whereas parties enter into contracts with a view to executing them[[41]](#footnote-41) in line with the general rule is *pacta sunt servanda*[[42]](#footnote-42). However, it often happens that there are breaches which make the expectations of parties no longer achievable within the confines of the agreement. In such situations, it is necessary for the innocent party to be compensated for his losses, hence, the need for award of damages.

Once a party to a contract establishes to the satisfaction of the court that the other party has committed a breach of a contract, the most common claim is that for damages, and certainly it is the most readily granted type of remedy by the Court.[[43]](#footnote-43) In *Robinson v. Harman*[[44]](#footnote-44), Parke B, laid down the underlying basis for the common law concept of damages where the court stated the law in general terms as follows: “The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed”.

However, a more refined formulation of the rule regulating the basis of damages in contract was laid down by Alderson, B. in the *locus classicus* case of *Hadley v Baxendale*[[45]](#footnote-45) thus….

where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such a breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e according to the natural course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. If special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances from such a breach of contract.

Thus, damages in contract are awardable if such damages (i) naturally flow or arise from the breach; or (ii) are within the contemplation of the parties at the time of the formation of the contract. Rule (ii) above does not merely appreciate actual contemplation by the parties but also recognises situations where such damages could reasonably be supposed to have been contemplated by the parties. The rule in *Hadley*v***.*** *Baxendale* has been of general application[[46]](#footnote-46) in Nigerian jurisprudence. In the case of *Eagle Super Pack (Nig.) Ltd.*v***.*** *A.C.B Plc****.***[[47]](#footnote-47), the Supreme Court had the opportunity to apply the rule and noted: “in the preparation of the claim for, as well as in the consideration of an award in consequence of a breach of contract, the measure of damages is the loss flowing naturally from the breach and incurred in direct consequence of the violation. The damages recoverable are the losses reasonably foreseeable by the parties and foreseen by them at the time of the contract as inevitably arising if one of them broke faith with the other”.

The rule in *Hadley v. Baxendale* is, therefore, divided into two parts or branches, the first dealing with the normal damage that occurs in the usual course of things and the second with abnormal damage that arises because of special or exceptional circumstances.[[48]](#footnote-48)

In *Victoria Laundry v**Newman Industries*[[49]](#footnote-49) Asquith L.J. stated the general principles governing damages as follows:

It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed. This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach. What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events by the party who later commits the breach. For this purpose, knowledge possesses is of two kinds, one imputed, the other actual”. Imputed knowledge arises where in the ordinary course of things, every reasonable person is taken to know what loss is likely to result from a breach. Where as a result of special circumstances which may cause more loss, such a situation attracts the operation of the second rule in *Hadley v. Baxendale* which makes additional loss recoverable. In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result. Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it as likely so to result.

The allowance of higher damages in cases of special circumstances has led to the question whether the use of the words ‘general and special damages’ are applicable in contract[[50]](#footnote-50). The nebulous use of words in this context has attracted strict re-statement of the law by the Nigerian apex court on a number of occasions and hence, in *Omonuwa v. Wahabi*[[51]](#footnote-51) the court took the opportunity to re-state the law:

In the contemplation of such a loss there can be no room for claims which are merely speculative or sentimental unless these are specially provided for by the terms of the contract. It is only in this connection that damages can be properly described as special' in the conception of contractual awards and it must be borne in mind that damages normally recoverable are based on the normal and presumed consequences of the breach complained of ... Thus the terms general' and special' damages are normally inept in the categorization of damages for the purpose of awards in cases of breach of contract. We have had to point out this before.... and we must make the point that apart from damages naturally resulting from the breach no other form of general damages can be contemplated ....'.

(See *Swiss-Nigeria Wood Industries Ltd. v. Danilo Sogo HSC. 14/70 of 3rd July, 1970, reported in (1970) 1 A.L.R. 423 at 430-431)*. And on the same subject, this court in the case of *Gregoire Agbale v. Naliona Motors Ltd.* observed as follows: ‘It is undesirable to refer in contract to general and special damages as normally the only damages, other than those arising naturally, flow from consequences specifically provided for by the parties which h would not otherwise naturally arise from a breach of the contract’ ...”.

Furthermore, in *G.K.F.I. (Nig.) Ltd.* ***v.*** *NITEL Plc*[[52]](#footnote-52), the Court had this to say: “It must be stressed that in the law of contract, there is no dichotomy between special and general damages as it is the position in tort. The narrow distinction often surmised is one without a difference. In contract, it is damages *simpliciter* for loss arising from breach. Such loss must be in contemplation of the parties. The loss must be real, not speculative or imagined”.

It is submitted that the above is the correct position of the law as in many cases one comes across lawyers making claims for general damages on behalf of their clients in cases bothering on breach of contract. The term ‘general damages’ should ordinarily be reserved for cases relating to tort as the distinction between general and special damages in contract is of no moment save as to the applicability of award of higher damages in circumstances of breach having some special character. This is however not a subject that can be fully dealt with in this paper as another school of thought considers that the consequential damages upon proof of special damages is in the nature of general damages.

The basis of compensation in contract may be for loss of bargain, reliance loss or restitution. In cases of loss of compensation for loss of bargain, the plaintiff is being compensated for the loss of his bargain so that his expectations arising out of the contract are protected.[[53]](#footnote-53) By this principle, it is possible for a person who has contracted to receive a commercial item to be able to receive compensation for failure to receive the goods and also for the loss of profit that would have been made had the goods being delivered as agreed[[54]](#footnote-54) provided such profits are not too remote.

With regards to reliance loss, the aim of compensation is to put the plaintiff back into the position he would have been if the contract had not been entered into in the first place. By this, the plaintiff is compensated for all the expenses incurred due to reliance on the contract. For a contractor to whom a contract was awarded to dredge a canal may be able to recover the expenses incurred while clearing the bush around the canal by which the canal could only be dredged if subsequently the contract for dredging the canal was terminated by the other party. The cost of clearing the bush was incurred in reliance on the contract to dredge the canal definitely[[55]](#footnote-55) or may be regarded as wasted expenditure incurred before the contract even though the plaintiff was not, under the contract, obliged to have incurred them. The ultimate thing is to show that the expenses were incurred while relying on the contract.[[56]](#footnote-56) Recovery of such pre-contractual expenses have been justified on the basis that such loss, after the breach of the contract, can no longer be avoided.[[57]](#footnote-57)

In claims for restitution, it has been argued that this does not, strictly speaking, qualify as one for damages as its purpose is not to compensate the plaintiff for loss but to deprive the defendant of a benefit. The simplest example, according to Treitel, is where a seller has been paid in advance to deliver goods but fails. Such a seller is bound to restore the price and the effect of this is to put both parties into the position in which they would have been if the contract had not been made.[[58]](#footnote-58) In most of such cases, the plaintiff is usually only entitled to the recovery of the amount paid in advance and no more thereby limiting his right in this regard.[[59]](#footnote-59)

A practical question is whether claims can be combined in a case under the three heads highlighted above. According to Treitel[[60]](#footnote-60), it has been said that there is an inconsistency between combining the various types of claim above discussed on the ground that an award which seeks to place the plaintiff in the position he would have been if the contract had been performed cannot be combined with one which seeks to restore the status quo. However, the courts have not subscribed to this view and in appropriate cases have awarded such claims. For instance, in *Millar’s Machinery Co. Ltd.* v. *David Way & Sons*[[61]](#footnote-61), as reported in Treitel, “machinery was bought, paid for and installed. The buyer rejected the machinery because it was not in accordance with the contract; and he recovered the price, (restitution), installation expenses (reliance loss) and his net loss of profits resulting from the breach (loss of bargain).[[62]](#footnote-62)

**2.2. Tort**

The principles for award of damages in tort and breach of contract are different.[[63]](#footnote-63) The object of damages for tort is to put the plaintiff in a position he would have been if the tort had not been committed, award of damages in contract is to place the injured party, so far as money can do it, in the same situation as if the contract had not been performed[[64]](#footnote-64) as already shown above. In the test for damages in tort, the defendant will be liable for any type of damage which is reasonably foreseeable as likely to happen in the most unusual case unless the risk is so small that a reasonable man would in the circumstance feel justified in neglecting it. The reason for the difference is in the fact that, in contract, if one party wishes to protect himself against a risk, he would have adverted the other party’s attention to it before the contract is made, but in tort, there is no opportunity for the injured party to protect himself in that way, and the tort-feasor cannot reasonably complain if he has to pay for some very unusual but nevertheless foreseeable damages from his wrong doing.

Assessment of damages in tort may take into consideration the nature of the tort committed that is sought to be remedied. In the Supreme Court case of *I.M.N.L.*v***.*** *Nwachukwu*[[65]](#footnote-65) Musdapher JSC (delivering the lead judgment) stated that it is the law that before a court begins a meaningful assessment of damages, it must be sure of the nature of the claim, that is to say, whether the claim is in contract or in tort; if in tort, the nature of the wrong alleged. Thus, the principles guiding the award of damages in tort are different.[[66]](#footnote-66)

In assessing or calculating damages awardable in a suit, a trial court must always have its mind fixed on the pecuniary consideration which will make good to the sufferer, as far as money can do, the loss which he has suffered as the natural result of the wrong done to him.[[67]](#footnote-67)

In the assessment of damages, a distinction is always drawn between two main heads of damages and these are pecuniary loss and non-pecuniary loss. According to the Supreme Court in *R.O. Iyere* v***.*** *Bendel Feed and Flour Mill Ltd.*[[68]](#footnote-68):

On the head of pecuniary loss, the principle of law which relates to it is that of RESTITUTIO IN INTEGRUM - so far as actual or prospective pecuniary loss is concerned the amount of compensation can be assessed with a degree of accuracy which will go towards putting the injured person in the same position as he would have been in had he not sustained the wrong. On the principle relating to non-pecuniary loss it is that of fair and reasonable compensation. Money, certainly, cannot renew a shattered human frame. However, monetary compensation can be awarded, so that the court must do the best it can in the light of the circumstances of each case as the object of the award be damages is to compensate the plaintiff fairly and adequately but not necessarily punishing the defendant. See: The Mediana (1900) AC. 18 at 116; West and Son Ltd. v. Shephard (1956) 1 W. L. R. 51 and McGregor, "Compensation versus Punishment in Damages Awards" (1965) 28 M. L. R. 629.

In tortious cases, therefore, the headings of damages may be considered on the nature of tort involved. For instance, where it is negligence, it may take a different dimension compared to where it is defamation or others.

In negligence, for instance, there are three main headings, namely, personal injuries, fatal accidents and damage to property. In all cases in tort, special damage may arise which may lead to claim in special damages.[[69]](#footnote-69) Special damage in actions for personal injuries includes loss and expenses incurred between the date of the accident and the date of judgment.[[70]](#footnote-70) Such special damage relates to things which costs can be specifically ascertained like the cost of clothing or other personal property, medical expenses, transportation fares from home to hospital *etc.* The unambiguous applicability of the strict proof rule to such claims and how such is done are again emphasised by the Supreme Court in ***Oshinjirin* v. *Elias***[[71]](#footnote-71)where it was noted as follows**:**

Undoubtedly the rule that special damages must be strictly proved applies to cases of tort. In effect the rule requires anyone asking for special damages to prove strictly that he did suffer such special damages as he claimed. This however does not mean that the law requires a minimum measure of evidence or that the law lays down a special category of evidence required to establish entitlement to special damages. What is required is that the person claiming should establish his entitlement to that type of damages by credible evidence of such a character as would suggest that he indeed is entitled to an award under that head, otherwise the general law of evidence as to proof by preponderance or weight usual in civil cases operates.

On the other hand there is general damages which may not be precisely quantified and may relate to all non-financial loss (past and future) and need not be specifically pleaded but must be proved to have been suffered. Heads of such damage may include pain and suffering, loss of amenities, loss of expectations of life, future loss of earnings capacity and future expenses. While claims in pain and suffering, loss of amenities, loss of future earnings *etc.* may be recoverable much more easily, loss of expectation of life has enjoyed relatively small conventional sum if any, save in cases where it has been proven that the injuries sustained have really diminished the plaintiff’s expectation of life.[[72]](#footnote-72)

General damages in personal injury cases are sums of money paid as compensation for the loss suffered by the injured person. In assessing it the injured person's station in life is not a determining factor, it is the degree of disability that counts and the court must not be too arbitrary. Awards made in similar cases within the same jurisdiction must be taken into consideration.[[73]](#footnote-73)

However, the measure of damages in tort causing death seems to be somewhat different as actual loss of life itself must be compensated once it is traceable to the defendant’s wrong. This has been considered in *Abu* v. *Abulime*[[74]](#footnote-74) where the Court of Appeal expressly stipulated the steps to be taken in calculating such damages that can be awarded. According to the Court of Appeal:

In assessing damages in tort causing death, there are three steps in the normal calculation namely: (a.) to estimate the lost earning, that is, the sum which the deceased properly would have earned but for the fatal accident. (b.) to establish the lost benefit that is, the pecuniary benefit which the dependants probably would have derived from the earnings and to express the lost benefit as an annual sum over the period of the loss of earnings; and (c.) to choose the appropriate multiplier which when applied to the lost benefit expressed as an annual sum, gives the amount of the damages, which is a lump sum.

It is submitted that in computing what the victim would have earned if he had not died, the station in life of the victim must be a paramount issue to consider, as his earnings ordinarily are not expected to be higher than his station in life barring unusual smiles of fortune. Thus, in determining the multiplicand, the court has often used the present earning of the deceased to calculate his entitlement as damages. Thus, where the victim earned as at the time of death the minimum wage of N18,000.00 per month, the multiplier approach requires the multiplication of N18,000 per month by a number of years’ purchase. The principle for calculating this was laid down by the House of Lords in the case of *Davies v. Powell Duffryn Associated Colleries Ltd.*,[[75]](#footnote-75) where the House laid down the following principles:

The general principle that the right of the individual defendant under these acts is for damages to be assessed on a balance of loss and gain, which is established by long standing authority, would prima facie seem to apply to this case... There is no question here of what may be called sentimental damage, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities. The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then, there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a datum or basic figure which will generally be turned into a lump sum by taking a certain number of year's purchase. That sum, however, has to be taxed down by having due regard to uncertainties. For instance, that the widow might have again married and thus ceased to be dependent, and other like matters of speculation and doubt.

The above principle was applied by the Supreme Court in the case of *Jenyo* v. *Akinreti*[[76]](#footnote-76) wherein the Court explained that there cannot be award of damages for loss of expectation of life in fatal accident cases resulting into death. The Supreme Court overruled the Court of Appeal in the same case which had earlier relied on the English decision in *Benham* v. *Gambling*[[77]](#footnote-77) in which award was made for loss of life expectancy, a case in which the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934 of UK was construed. It was pointed out in the *Jenyo* v. *Akinreti* case that the relevant provisions of the Fatal Accidents Law of Lagos State, 1961 which was applicable to the case was in *pari materia* with the provisions of the Fatal Accidents Act, 1846 (UK) which was interpreted in *Davies* v. *Duffry Powell Associated Collieries* case and ought to have been applied by the Court of Appeal. The Supreme Court then ruled, following the dictum in *Davies* case above, that:

…from the above passages from the speech of Lord Wright in *Davies v. Powell Duffryn Associated Collieries Ltd. (supra)* on measure of damages in a claim under the Fatal Accidents Act (1846) U.K. as amended by subsequent legislations that there can be no award for loss of expectation of life of the deceased simpliciter in the case. So a decision in a case like *Benham v. Gambling (supra)* dealing with the principles relating to award of damages for loss of expectation of life of a deceased person *simpliciter* is irrelevant when considering damages to be awarded under the enactment. Because of what I hitherto said I am satisfied the Court of Appeal was in, error not only to have said that the Fatal Accidents Law of Lagos State and the Law Reform (Miscellaneous Provisions) Act, 1934 U.K. are similar or in pari materia but also to have applied the decision in *Benham v. Gambling (supra)* as the principle governing the measure of damages in this case.

The implication from the above is that under the Lagos State Fatal Accidents Law[[78]](#footnote-78), there can be no damages for loss of life expectancy and the benefit of any award is to the family members of the deceased or his dependants and the basis of the award is on the actual loss of actual or prospective pecuniary benefits derived from the relationship with the deceased[[79]](#footnote-79). Thus, where no pecuniary benefits are derivable from the deceased, the implication is that no award may be made as the basis is not to compensate injured feelings but pecuniary loss actually proven.

According to Wali JSC in his contributory judgment[[80]](#footnote-80),

In the instant case, the girl whose death was caused by the negligent acts of the 1st defendant as the agent of the 2nd defendant was about 5 years old. At that age the plaintiffs could not be said to be deriving any benefit from her nor could it be speculated and conjectured that the deceased would live and even if she did live the plaintiff would derive any pecuniary benefits from her. At that tender age, the deceased was nothing more than an unavoidable burden and liability to them. The law is still as stated by Viscount Haldane, L.C. in *Tall Vale Railway* v. *Jenkins* (supra) that "The basis is not what has been called solatium, that is to say damages given for injured feelings or on the ground of sentiment, but damages based on compensation for a pecuniary loss.

It is submitted that the above statement of the law is somewhat harsh on a victim whose pecuniary earnings is probably zero. The law should be able to compensate injured feelings of the relatives. For instance, a youth corps member who was killed in an accident as a result of negligence of another person may not be able to attract any compensation to his parents who have provided financially and emotionally for the corps members. A very apt example is the case of the youth corps members killed in the post election violence in the North. The implication is that the state of our fatal accidents law is still at the 1846 level of English statutory provisions while in the United Kingdom where the provisions were borrowed, the law has progressed beyond mere compensation for pecuniary loss, hence the enactment of the Law Reform (Miscellaneous Provisions) Act, 1934 in the UK. There ought to be compensation to the estate of the deceased in such cases and it is high time the legislature made provisions in this regard.

**2.3. Damage to Property**

The aim of the law in cases of loss, destruction or damage to property is one of *restitutio in integrum* in favour of the person whose property is so damaged or destroyed or lost. It is aimed at restoring the victim back to his position as much as possible as if the loss, destruction or damage had not occurred. The applicable rule was considered in the case of *Soetan*v.*Ogunwo*[[81]](#footnote-81)

It is said that "damages are compensation in money." They are a sum of money given to a successful plaintiff as compensation for loss or harm of any kind. It seems to us that once a party has been fully compensated for the loss or harm suffered by him it should not be open to the court to proceed to award him any other kind of additional damages that may look like a bonus. In cases such as the present one, compensation is measured by the cost of repair or restoration of a party to his original position, if and so far as the original position can be restored. This rule holds good in cases which involve damage to property, in as much as property can generally be replaced, if destroyed, or repaired, if damaged"

In *Thomas Kerewi*v***.*** *Bisiriyu Odegbeson*[[82]](#footnote-82), it was stated that where the property in issue was totally lost or completely destroyed by the defendant’s negligence, the measure of damages is the value of the car at the time of the accident plus such further sum as would compensate the owner for loss of earnings and the inconvenience of being without a car during the period reasonably required for procuring another car. In *Liesboach Dredger* ***v.*** *Edison[[83]](#footnote-83)*, the law was succinctly laid down by Lord Wright as follows:

The substantial issue is what is the true measure of damage. It is not questioned that when a vessel is lost by collision due to the sole negligence of the wrong-doing vessel the owners of the former vessel are entitled to what is called restitutio in integrum, which means that they should recover such a sum as will replace them, so far as can be done by compensation in money, in the same position as if the loss had not been inflicted on them, subject to the rules of law as to remoteness of damage.

In cases of ordinary damage to property, the measure of damages is the cost of their repair, or the difference between the market value at the time of their damage and their value as damaged plus, in a proper case, loss of use or earnings during a reasonable period for repair or replacement.”[[84]](#footnote-84) Where the loss is in itself of a financial character, the assessment of damages is primarily a matter of arithmetic. Thus, in such cases, the plaintiff, subject to the rule that special damages should be strictly proved, is entitled in principle to full indemnity and no more. In other words, such plaintiff is not entitled to be doubly compensated under the guise of general damages. The amount that could be awarded is hence limited to what is particularly pleaded and proved as special damages. The rationale, according to the court, in *Soetan* **v.** *Ogunwo*[[85]](#footnote-85) is that “a court of law is not a donor of charities; it gives to either party only that which the justice of his case demands”.

This takes us to the consideration of double compensation in award of damages in both contract and tort.

**2.4. The Rule against Double Compensation**

It is a general rule of law that the court frowns at double compensation of a victim of an injury as the court is not a *santa claus* dishing out gifts out of enthusiasm. The court of law is not an award ground for the purpose of making overnight millionaires. Hence in *Tsokwa Motors (Nig.)**Ltd.* **v.** *U.B.A. Plc***[[86]](#footnote-86),** it was stated that “where a victim of an injury has been fully compensated under one head of damages, it is improper to award him damages in respect of the same injury under another head. In this case, the Court of Appeal was right in setting aside the award of nominal damages to the appellant, since it amounted to double compensation”.[[87]](#footnote-87)

However, the fact that the plaintiff would be entitled to special damages as a result of specific heads of items damaged or lost does not prevent award of general damages where appropriate. For instance, in *S.P.D.C., Nig.* **v.** *Okonedo***[[88]](#footnote-88)**, the Court of Appeal stated the law thus: “the law frowns at double compensation in award of damages to a successful litigant. In the instant case, the respondent's claim was for trespass and having established ownership and unlawful interference, the award of N2,000,000.00 Million Naira, general damages by the trial court in addition to the award of special damages did not amount to double compensation in the circumstances of the case”.

In the case of *Odinaka* **v.** *Moghalu*[[89]](#footnote-89), it was held that in a case of bailment where the plaintiff also leads evidence of the profit he would have made, the doctrine of double compensation does not apply as to prevent the plaintiff from being able to recover on both heads. According to the court; “in this appeal it is a case of bailment. The delivery of the goods, rightly expected by the plaintiff, was based on the contract. The respondent's evidence of profit was not controverted, nor could it be said it was false. Definitely the profit in this case is completely outside the rule against double compensation”.

The above is quite considered to be in order as a case of double compensation may run into unjust enrichment of a litigant which the instrument of the law should not be allowed to be used to achieve. Thus, by and large, the question as to whether an award will amount to double compensation depends on the peculiar circumstance of each case.

**Part 3: Damages in Fundamental Rights Cases**

One critical aspect of our law is the area of infringement of fundamental rights. This area is made more critical due to impunity of law enforcement officials and reckless subjugation of human rights by those who are required to protect them. Whereas, human rights are supposed to be imprescriptible and inalienable, it seems without a compensatory regime that is not tied to normal rules of pleadings and proof, very little might be achieved in the Nigerian society where there is very little regard for or respect for human rights. By Section 46(2) of the Constitution of the Federal Republic of Nigeria, 1999[[90]](#footnote-90) (as amended), a High Court has original jurisdiction to hear and determine any application made to it in pursuance of the provisions Chapter IV of the Constitution which contains what are otherwise referred to as fundamental rights. In exercising this power, the High Court has the power to issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the rights.

The importance of the fundamental rights as enshrined in the Constitution has been repeatedly emphasized by our superior courts as inalienable and only subject to such limitations as the Constitution itself recognizes. In *Odogu* ***v.*** *Attorney-General of the Federation*[[91]](#footnote-91), the Supreme Court, stated that: “This country has a written Constitution guaranteeing certain fundamental rights. A fundamental right is a right guaranteed in the Nigerian Constitution and it is a right which every person is entitled, when he is not subject to the disabilities enumerated in the Constitution, to enjoy by virtue of being a human being. They are so basic and fundamental that they are entrenched in a particular chapter of the Constitution.” (*per* Adio JSC)

The importance of the above decision is that the rights contained in Chapter IV of the Constitution stand above other rights protected by law for instance under contract or tort. They are special rights in their own class, which must be jealously guarded. Right to personal liberty and movement seems to be more infringed by law enforcement agents in many cases and which makes it to feature more in decided cases and for which police authorities have often been found wanting. It is in the light of the above that the law does require the authorities to give cogent explanations for their actions when they are in breach. In the case of *Jim-Jaja v. C.O.P.*[[92]](#footnote-92)***,*** Abdulahi JCA, stressed this important position as his lordship held thus: “Let me say at this stage that under the rule of law which this country now operates, it is the bounden duty of the police or the detaining authority to justify their action which infringe on the fundamental right of law abiding citizens. Arbitrary use of power is no longer the norm”.

The inalienability and imprescriptibility of these rights regarded as fundamental can be found in the pronouncement of Elias, CJN, (as he then was) in *Ajao v. Ashiru*[[93]](#footnote-93), wherein e stated:

It cannot be over-emphasized to both high and low that every person resident in this country has a right to go about his or her lawful business unmolested or unhampered by anyone else, be it a Government functionary or a private individual. The courts will frown upon any manifestation of arbitrary power assumed by anyone over the life or the property of another even if that other is suspected of having breached some law or regulation. People must never take the law into their own hands by attempting to enforce what they consider to be their right or entitlement… This kind of a show of power which is becoming too frequent in our society today must be discouraged by all those who set any store by civilized values.

The essential enforcement of the fundamental rights contained in the Constitution can only make meanings when the law courts set great values on them by subjecting the infringing authorities to heavy fines and substantial damages. It is submitted that it is in the light of the above that the draughtsman of the Constitution has instituted the award of compensation in Section 35(6) wherein it is provided that: “Any person who is unlawfully arrested or detained shall be entitled to compensation and public apology from the appropriate authority or person”.

While the payment of compensation and public apology may be argued to be limited to cases of unlawful arrest or detention, it is submitted that such should not be the case as every person whose rights have been infringed should be able to get redress which will be meaningless if all the court can do is to condemn the act without any financial obligation thereby imposed on the infringing authority or person. Cases of denial of right to fair hearing by administrative bodies, require particular mention, pursuant to which the plaintiff had been negatively affected should not just be condemned but be visited with some payment of damages by the infringing authorities as done in the case of *Dr. Raymond Osemenam* v. *Federal University of Technology, Akure*.[[94]](#footnote-94) In this case the Federal High Court, per Kafarati J, correctly ordered the respondent to pay N50,000.00 to the applicant for the infringement of his right to fair hearing.

It is submitted that in most cases of human rights violations, the amounts of damages awarded by the courts are often too paltry to serve as deterrence against the infringing authorities. In most cases, damages awarded are often so negligible that the purpose of instituting the action is rendered meaningless. In *Odogu* v. *A.G. Federation*[[95]](#footnote-95), it was held by the Supreme Court that the award of exemplary damages can only be made by the court where it is claimed by the applicant. The facts of the case, which are quite relevant to this paper, are:

The applicant… was arrested by the Police on 4th August 1980 at Festac Town and charged with the offence of armed robbery. He denied the charge. He was taken into custody. On 17th December 1980 he was arraigned before a magistrate's court where a formal charge of armed robbery was preferred against him. He was remanded in prison custody and taken to Ikoyi Prison. Between that date and 1983 he was taken a number of times to the Magistrate's court but was on each occasion further remanded because the prosecution told the court that the advice of the Director of Public Prosecutions was yet to be obtained. On 19th December 1983, the charge against him was withdrawn by the prosecution and the court struck out the charge and ordered his release. He was released from Ikoyi prisons on that date but was promptly re-arrested by the Police and detained at the Panti Street Police Station. On 27th March 1984 he was moved to the Kirikiri Maximum Security Prisons where he was held until 7th July 1986 when again he was taken back to the Panti Street Police Station and thereat detained. On 11th July 1986 he was arraigned yet again before the Magistrate's Court Yaba, Lagos on a charge of armed robbery and was again remanded in prison custody where he remained until the proceedings leading to this appeal commenced in 1987. In December 1987 the Civil Liberties Organisation commenced proceedings in the name and on behalf of the applicant at the High Court of Lagos where evidence of the impunity of the police was shown despite the advice of the Director of Public Prosecutions that there was no evidence pursuant to which the applicant could be further detained. The learned trial judge, at the end of the hearing, granted the enforcement of the applicant’s right to fair hearing and awarded him damages in the sum of N2,000.00. The applicant was not satisfied with this award and appealed against same wherein the Court of Appeal awarded him the sum of N75,000.00 due to the gross inhumanity visited on the applicant by the police. At the Supreme Court, while the award was increased to the sum of N200,000.00, the apex court still observed that the case was fit for the award of exemplary damages but since same was not claimed, the court could not award it.

According to the court,

Having regard to the circumstances of this case, I have no doubt in my mind that a case for the award of exemplary damages, if claimed, was made out. There was, however, no specific claim for exemplary damages. The applicant came to court by way of an application for the enforcement of his fundamental rights. His application was supported by a 36-paragraph affidavit sworn to by one Clement Nwankwo, legal practitioner. Nowhere in the application itself nor in the affidavit in support was any claim made for exemplary damages. Our attention was drawn at the oral hearing to the case of Shugaba Abdulrahman Darman v. Minister of Internal Affairs (1981) 2 NCLR 459 where the Court awarded exemplary damages.

It is submitted that the regular rules of pleadings as regards claim for damages should not be applied strictly to regulate award of damages in human rights cases. These are not ordinary contractual or tortious cases in which a party seeks to protect ordinary rights. The importance of these rights can only be made more meaningful when they are not merely accorded primal place on pages of the Constitution alone but elevated above other civil proceedings where ordinary rules of pleadings are apply to constrict the protection of these rights. For all the indignities that the applicant suffered in that case, exemplary damages having been made out from the facts of the case, nothing stopped their lordships of the Supreme Court from awarding same more so when the claim of the applicant was for N1,000,000.00 compensation, *inter alia*. A litigant in the position of the applicant or such human rights lawyers who are merely protecting the rights of such an applicant might not immediately realize the need to make claims for exemplary damages having been overwhelmed by the need to secure the immediate release of the applicant and, hence, the failure to claim exemplary damages for which, from the painstaking statement of the relevant facts, a case has been made out. It is, within the jurisdiction of the court to realize that the award of such exemplary damages in such circumstances would further elevate the need to observe human rights by law enforcement agents rather than emasculate it.

It is our further submission that a leaf can be borrowed from the Canadian jurisprudence as stated in the case of *Vancouver* v. *Ward*[[96]](#footnote-96). Here, the Supreme Court of Canada beautifully encapsulated the purposes and bases of monetary compensation in human rights cases:

In sum, the Charter breach significantly impacted on Mr. Ward calls for compensation. Combined with the police conduct, it also engages the objects of vindication of the right and deterrence of future breaches. It follows that compensation is required in this case to functionally fulfill the objects of public law damages. Generally speaking, the more egregious the conduct and the more serious the repercussions on the claimant, the higher the award for vindication or deterrence will be. Just as private law damages must be fair to both the plaintiff and the defendant, so s.24(1) damages must be fair - or "appropriate and just" - to both the claimant and the state. The court must arrive at a quantum that respects this. Large awards and the consequent diversion of public funds may serve little functional purpose in terms of the claimant's needs and may be inappropriate or unjust from the public perspective. In considering what is fair to the claimant and the state, the court may take into account the public interest in good governance, the danger of deterring governments from undertaking beneficial new policies and programs, and the need to avoid diverting large sums of funds from public programs to private interests.

Courts in other jurisdictions where an award of damages for breach of rights is available have generally been careful to avoid unduly high damage awards. This may reflect the difficulty of assessing what is required to vindicate the right and defer future breaches, as well as the fact that it is society as a whole that is asked to compensate the claimant. Nevertheless, to be "appropriate and just" an award for damages must represent a meaningful response to the seriousness of the breach and the objectives of compensation, upholding Charter values, and deterring future breaches. The private law measure of damages for similar wrongs will often be a useful guide. However, as Lord Nicholls warns in Ramanoop at para.18, "this measure is no more than a guide because...the violation of the constitutional right will not always be coterminous with the cause of action at law (*per* McLachlin CJ).

CONCLUSION

From the foregoing discussion, it is obvious that determining and awarding damages constitute a very important aspect of the judicial process. Thus, as important as it is in the nation’s jurisprudence, the rules of claim as well as award would appear to be more complex than can be appreciated. This paper has discussed the normative basis for the application and award of damages both in Contract and Tort Law. The paper has been demonstrated that while the object of damages for tort is to put the plaintiff in a position he would have been if the tort had not been committed, award of damages in contract is to place the injured party, so far as money can do it, in the same situation as if the contract had not been performed. The reason for the difference is in the fact that, in contract, if one party wishes to protect himself against a risk, he would have adverted the other party’s attention to it before the contract is made, but in tort, there is no opportunity for the injured party to protect himself in that way, and the *tort-feasor* cannot reasonably complain if he has to pay for some very unusual but nevertheless foreseeable damages from his wrong doing. The paper also examined the development of the rules on damages with respect to violation of human rights particularly where indigent members of society, on the fringes of society are involved and notes the compelling need for courts to award exemplary damages even when this has not been specifically pleaded if, the objectives of entrenching fundamental human rights as constitutional rights are to be realized. The paper recommends legislative intervention for award of damages in tort cases to cover pain and suffering in relation to tortuous actions leading to the death of a party who may not be an income earner.

Dr. Muiz Banire

1. See *Bello & 13 Ors.* v. *AG, Oyo State* [1986] 5 NWLR (Pt. 45) 828,878; *Nwankwo* v. *Nwankwo* [1992] 4 NWLR (Pt. 238) 693,710–711 (CA). [↑](#footnote-ref-1)
2. Aside from damages, the law allows a party to be entitled to specific performance of contract breached and injunction in appropriate cases. [↑](#footnote-ref-2)
3. Gordley, J. *Foundations of Private Law*- *Property, Tort, Contract, Unjust Enrichment* (OUP 2006) 3 [↑](#footnote-ref-3)
4. *Blacks Law Dictionary* 6th ed. (Centennial: 1891 – 1991) 389. [↑](#footnote-ref-4)
5. [1996] 4 NWLR (Pt. 445) 657,679-680 [↑](#footnote-ref-5)
6. See *Seven-Up Bottling Company Plc* v. *Abiola and Sons Bottling Company Ltd & Anor* [2002] 2 NWLR (Pt. 750) 40,68. [↑](#footnote-ref-6)
7. *National Electric Power Authority* v. *Akpata* [1991] 2 NWLR (Pt. 175) 536,564. [↑](#footnote-ref-7)
8. [2009] 31 WRN 21,58 lines 10-15; [2009] 6 NWLR (Pt.1138) p.450 [↑](#footnote-ref-8)
9. See also *Shell Petroleum Development Co.* v. *Tiebo VII* [1996] 4 NWLR (Pt. 445) 657; *Bamgbade* v. *Balogun* [1994] 1 NWLR (Pt. 323) 718; *Ifere* v. *Trufoods* (Nig) Ltd. [2000] 8 WRN 30 [↑](#footnote-ref-9)
10. Supra (note 4) [↑](#footnote-ref-10)
11. See also Hon. Justice R. N. Ukeje, OFR *Nigerian Judicial Lexicon* (Ecowatch Publications Limited 2006) 57 [↑](#footnote-ref-11)
12. In *Oliver* v. *Ashman* [1962] 2 QB 210, it was held that a plaintiff cannot recover damages representing loss of earnings for the actual number of years lost but could recover for the reduced number of years for which he was likely to live. Cf *Pickett* v. *British Rail Engineering Ltd*. [1979] 1 All ER 774, where the House of Lords overruled *Oliver* v. *Ashman* by holding that earnings during the lost years should be taken into account less taxation in awarding damages payable to the claimant. [↑](#footnote-ref-12)
13. *McConnel* v. *Wright* [1903] 1 Ch 546; *Indata Equipment Supplies Ltd* v. *ACL Ltd* [1998] 1 BCLC 412. [↑](#footnote-ref-13)
14. *Smith & Keenan’s English Law* Ed., by Denis Keenan (8th Edition) 300. [↑](#footnote-ref-14)
15. See *Gamboruma* v *Borno* (997) 3 NWLR (Pt 495) pg 530 at 547, para D-E See also *Tsokwa Motors (Nig) ltd* v *U. A. A Plc* (2008) 2 N W L R (Pt 10710, 347 at 350, para b-c. [↑](#footnote-ref-15)
16. Also referred to as ‘compensatory damages’. For this, see the decision of the Court of Appeal in *Gari* v. *Seirafina (Nig.) Ltd.* (2008) 2 NWLR (Pt. 1070) 1 at P.27, paras. A-C where the court described the concept in the following terms: "General damages are damages that the law presumes to follow from the type of wrong complained of. Also referred to as compensatory damages for harm that so frequently results from the tort for which a party has sued, that the harm is reasonably expected and need not be alleged or proved. [↑](#footnote-ref-16)
17. *UBA Plc.* v. *Ogundokun* [2009] 31 WRN 21,58, lines 20 – 25. [↑](#footnote-ref-17)
18. *Ibid; s*ee also *Mobil Oil Ltd.* v. *Akinfosile* (1969) NMLR 217; *Beecham Group (Nig.) Ltd.* v. *Esdee Food Products (Nig.) Ltd.* [1985] 3 NWLR (Pt. 11) 112; *A-G Oyo State* v. *Fairlakes Hotels Ltd.* (No. 2) [1989] 5 NWLR (Pt. 121) 255; *Consolidated Breweries Plc*. v. *Aisowieren* [2001] 15 NLWR (Pt. 756) 424. [↑](#footnote-ref-18)
19. [2001] 14 NWLR (Pt. 733) 468,493 para [↑](#footnote-ref-19)
20. See *Odulaja* v. *Haddad* (1973) 11 SC 357; *Lar* v. *Stirling Astaldi Ltd.* (1977) 11-12 SC 53; *Osuji* v. *Isiocha* [1989] 3 NWLR (Pt. 111) 623. [↑](#footnote-ref-20)
21. [2005] 17 NWLR (Pt. 995) page 447,474 para D. [↑](#footnote-ref-21)
22. Supra, para E – G. [↑](#footnote-ref-22)
23. See *Iwueke* v. *I.B.C.* [2005] 17 NWLR (Pt. 955) 447; *Odume* v. *Nnachi* (1964) 1 All NLR 329; *Oke* v. *Aiyedun* [1986] 2 NWLR (Pt. 23) 548,565. [↑](#footnote-ref-23)
24. *New Nigerian Bank* v. *Alhaji Musa Abubakar & Sons* [2004] 17 NWLR (Pt. 901) 66,82. [↑](#footnote-ref-24)
25. *Raymond Inyang and Anor.* v. *Engineer Dr. Maurice Ebong* [2002] 2 NWLR (Pt. 751) 284. [↑](#footnote-ref-25)
26. *Sufuyanu Momodu* v. *University of Benin* [1997] 7 NWLR (Pt. 512) 325,350; *Taofik John Khawam and Anor.* v. *Mojisola Akinkugbe* [2001] 13 NWLR (Pt. 729) 70,85; *Oceanic Bank International (Nig.) Ltd.* v. *Chitex Industries* Ltd. [2000] 6 NWLR (Pt. 661) 464,478. [↑](#footnote-ref-26)
27. [1978] NSCC 96 [↑](#footnote-ref-27)
28. *Imana* v. *Robinson* [1979] NSCC 1. [↑](#footnote-ref-28)
29. *N. M. A.* v. *M.M.A. Inc.* (2010) 4 N W L R (Pt 1185) 613 [↑](#footnote-ref-29)
30. *Maja* v. *Samouris* [2002] 7 NWLR (Pt. 765) 78; *Iron Products Ltd.* v. *Sentinel Assurance Co. Ltd.* [1992] 4 NWLR (Pt. 238) 734, 746 CA relying on *Black’s Law Dictionary*; *Akinnuli* v. *Ayo-Odugbesan* [1992] 8 NWLR (Pt. 258) 172, 188–189 CA; *Okeke* v. *NICON Hotels Ltd.* [1999] 1 NWLR (Pt. 586) 216,222 CA; *Maley* v. *Isah* [2000] 5 NWLR (Pt. 658) 651,667 CA; *Faro Bottling Co. Ltd*. v. *Osuji* [2002] 1 NWLR (Pt. 748) 311,324 CA; *AIB Ltd.* v. *Packoplast (Nig.) Ltd.* [2003] 1 NWLR (Pt. 802) 502,524 CA; *Vanguard Media Ltd.* v. *Ajoku* [2003] 11 NWLR (Pt. 831) 437,449 CA relying on *Eko Odume* v *Ume Nnachi* (1964) 1 All NLR page 329,333; *Iwueke* v. *IBC* [2005] 17 NWLR (Pt. 955) 447,484 -485 SC. [↑](#footnote-ref-30)
31. Order 20 Rule 3. See Banire, M. Basiru, S.R.J. & Adegoke, R.A. *The Blue Book – The Practical Approach to the High Court of Lagos State (Civil Procedure) Rules* (2nd Edition, 2008) 190 –191. [↑](#footnote-ref-31)
32. [1990] 5 NWLR (Pt. 152) 630,649 – 650 CA adopting *The Mediana* (1900) AC 113,116. [↑](#footnote-ref-32)
33. *Blacks Law Dictionary* 6th ed. (Centennial Edition) 392. [↑](#footnote-ref-33)
34. *Sinyeofori A. Umoetuf* v. *Union Bank of Nigeria Plc.* [2002] 3 NWLR (pt 755) 647,655 citing *Black’s Law Dictionary* (7th ed.) 397; [2002] 3 WRN 52 CA [↑](#footnote-ref-34)
35. *Rookes* v. *Barnard* (1964) A.C 1129,1223-1224. [↑](#footnote-ref-35)
36. *Rookes* v. *Barnard* (1964) A.C 1129,1226. [↑](#footnote-ref-36)
37. *Rookes* v. *Barnard* (1964) A.C 1129,1227; see also *Alele Williams* v. *Sagay* [1995] 5 NWLR (Pt. 396) 441,454 CA; *Chief F.R.A. Williams* v. *Daily Times of Nigeria* (1990) 1 NWLR (Pt.124) 1, 30–31; *Odiba* v. *Muemue* [1999] 10 NWLR (Pt. 622) 174,185 SC citing *Eliochin* v. *Mbadiwe* [1986] 1 NWLR (Pt. 14) 47. [↑](#footnote-ref-37)
38. [1997] 6 NWLR (Pt. 509) 374,411 para E - F. [↑](#footnote-ref-38)
39. *Cassell and Co. Ltd.* v. *Broome* (1972) 1 All E.R. 801 at 829 H.L. [↑](#footnote-ref-39)
40. Certain heads of damages recognised in a number of jurisdictions include: consequential damages, benefit-of-the-bargain damages, continuing damages, damages ultra, direct damages, excess liability damages, expectancy damages, fee damages, hedonic damages etc. For these and other heads of damages, see Black’s Law Dictionary, Centennial Edition, pages 390 – 393. [↑](#footnote-ref-40)
41. Basiru S.A. ‘The Propriety of ‘General’ and ‘Special’ Damages For Breach of Contract’, (1999) 24 The Lawyer (the Journal of the Law Society, University of Lagos) 15. [↑](#footnote-ref-41)
42. See *Chukuma* v. *Shell Petroleum* (1993) 4 N W L R (Pt 289) 512,560, para F. [↑](#footnote-ref-42)
43. Sagay, I. E. *Nigerian Law of Contract* 2nd ed. (Spectrum Law Publishing) 618. [↑](#footnote-ref-43)
44. (1843-60) All E.R. 383,385 [↑](#footnote-ref-44)
45. [1843-60] All E.R. 461 at 465. [↑](#footnote-ref-45)
46. Rules of common law, doctrines of equity and statutes in force in England on or before the 1st day of January, 1900 are of general application in Nigeria. See Section 2, Law (Miscellaneous Provisions) Law, Laws of Lagos State, 1973, Cap. 65. For further understanding of this, see generally Obilade, A.O. *The Nigerian Legal System* (Spectrum Publishing Limited). [↑](#footnote-ref-46)
47. (2006) 19 NWLR (Pt.1013) 20, 49 paragraphs F - [↑](#footnote-ref-47)
48. See Sagay, I. *Nigerian Law of Contract* **(n. 43)** 619. [↑](#footnote-ref-48)
49. [1949] 1 ALL ER 997,1002, Para G-H [↑](#footnote-ref-49)
50. Basiru S.A. ‘The Propriety of ‘General’ And ‘Special’ Damages For Breach of Contract’ Supra **(n.41)** 15. [↑](#footnote-ref-50)
51. (1976) 4 SC 37 at 47 – 48 *per* Idigbe, JSC. [↑](#footnote-ref-51)
52. (2009) 15 NWLR (Pt. 1164) 344,384 (S.C.); *Barau* v. *Cubitts (Nig.) Ltd.* [1990] 5 NWLR (Pt. 152) 630; *PZ Co. Ltd.* v. *Ogedengbe* (1972) 1 All NLR 202,210; *Onyiaorah* v. *Onyiaorah* (2008) ALL FWLR (Pt. 397) 152,160; para. A (CA); *Enilolobo* v. *Adegbesan* [2001] 2 NWLR (Pt. 698) 611; *Akinfosile* v. *Mobil* (1969) NCLR 253; *Usman* v. *Abubakar* [2001] 12 NWLR (Pt. 728) 685; *Nidogas (Nig) Ltd.* v. *Augusco* (Nig) Ltd [2001] 16 NWLR (Pt. 739) 268 [↑](#footnote-ref-52)
53. Treitel *The Law of Contract* (7th ed. Sweet & Maxwell) 723. [↑](#footnote-ref-53)
54. See also The “Ile aux Moines” [1974] 1 Lloyd’s Rep. 262. [↑](#footnote-ref-54)
55. See *McRae* v. *Commonwealth Disposals Commission* (1951) 84 CLR 377,411 [↑](#footnote-ref-55)
56. *Anglia Television Ltd.* v. *Reed* [1972] 1 QB 60. [↑](#footnote-ref-56)
57. *C.C.C. Films (London) Ltd.* v. *Impact Quadrant Films Ltd.* [1985] QB 16. [↑](#footnote-ref-57)
58. See Treitel *The Law of Contract*, (n.55), 724. [↑](#footnote-ref-58)
59. *Ibid.* [↑](#footnote-ref-59)
60. *Ibid* at 726. [↑](#footnote-ref-60)
61. (1935) 40 Com. Cas. 204. [↑](#footnote-ref-61)
62. See *Treitel* (n. 55), 726. [↑](#footnote-ref-62)
63. *Agbanelo* v. *U.B.N. Ltd.* (2000) 7 NWLR (Pt. 666) [↑](#footnote-ref-63)
64. *Ibid.* [↑](#footnote-ref-64)
65. (2004) 13 NWLR [pt. 891] 543,566 Para. B-C [↑](#footnote-ref-65)
66. See also the case of *James* v. *Mid Motors Nigeria Co. Ltd* (1978) 11 and 12 SC 31. [↑](#footnote-ref-66)
67. See *Total (Nig.) Plc* v. *V.I.I.R.A.* (2004) 7 NWLR [pt. 873] 446,461 para. D. [↑](#footnote-ref-67)
68. (2008) 7-12 SC 151; [2008] 18 NWLR (Pt. 1119) 300,347 para F – H. [↑](#footnote-ref-68)
69. See Kodilinye & Aluko *The Nigerian Law of Torts* (Spectrum, 2nd ed. 1999) 261. [↑](#footnote-ref-69)
70. *Ibid.* [↑](#footnote-ref-70)
71. (1970) 1 All NLR 158 [↑](#footnote-ref-71)
72. See *Benham* v. *Gambling* [1941] A.C. 157; *Olopade* v. *Komolafe* (1978) 1 LRN 303,305; *Kodilinye & Aluko*, 264 – 265. [↑](#footnote-ref-72)
73. *Julius B. Nig. Plc.* v. *Nwagwu* (2007) WRN (Vol. 9) 102,128 Lines 15-25, 129, Lines 30-45 (CA) [↑](#footnote-ref-73)
74. (2007) ALL FWLR (Pt. 396) 683,698 Paras. C - E (CA) [↑](#footnote-ref-74)
75. [1942] AC 601,617. [↑](#footnote-ref-75)
76. [1990] 2 NWLR (Pt. 335) 663,678-679 [↑](#footnote-ref-76)
77. (1941) AC 157. [↑](#footnote-ref-77)
78. Cap. F1, Laws of Lagos State, 2003. [↑](#footnote-ref-78)
79. *Jenyo* v. *Akinreti* [1990] 2 NWLR (Pt. 335) 663,686 para D – F. [↑](#footnote-ref-79)
80. *Ibid* at para F – H. [↑](#footnote-ref-80)
81. (1975) 1 All N.L.R 360; (1975) 6 S.C. 57 [↑](#footnote-ref-81)
82. [1965] 1 All NLR 95,99; see also *Livingstone* v. *Rawyards Coal Co.* [1880] 5 Appeal Cases 25,39; *Admiralty Commissioners* v. *S. S. Valeria* [1922] 2 A.C. 242,248 [↑](#footnote-ref-82)
83. (1933) A.C. 449,459 [↑](#footnote-ref-83)
84. See *Lagos City Council* v. *Unachukwu* (1978) 1 LRN 142. [↑](#footnote-ref-84)
85. (1975) 1 All N.L.R 360; (1975) 6 S.C. 57 [↑](#footnote-ref-85)
86. [2008] 2 NWLR (Pt. 1071) 347 at 366, paras. B-C; *Ezeani* v. *Ejidike* (1964) 1 All NLR 402. [↑](#footnote-ref-86)
87. *Onago* v. *Micho & Co.* (1961) ANLR 324 at 328; (1961) 2 SCNLR 101; *Artra Industries (Nig.) Ltd.* v. *N.B.C.I.* [1998] 4 NWLR (Pt. 546) 357,387. [↑](#footnote-ref-87)
88. [2008] 9 NWLR (Pt. 1091) 85,125, paras. B-C (CA) [↑](#footnote-ref-88)
89. [1992) NWLR (Pt. 233] 1. [↑](#footnote-ref-89)
90. Cap C23, Laws of the Federation of Nigeria, 2004. [↑](#footnote-ref-90)
91. [1996] 6 NWLR (Pt. 456) 508,522 paras E – F [↑](#footnote-ref-91)
92. [2011] 2 NWLR (Pt. 1231) 375,398, E-F [↑](#footnote-ref-92)
93. (1973) 8 NSCC 525,533; *Nkpa* v. *Nkume* [2001] 6 NWLR (Pt. 710) 543,560-561, para F–B. [↑](#footnote-ref-93)
94. Cited in Falana, F. *Fundamental Rights Enforcement in Nigeria* (2nd Edition, 2010) 177. [↑](#footnote-ref-94)
95. [1996] 6 NWLR (Pt. 456) 508 at 516 to [↑](#footnote-ref-95)
96. [2009-10]CHR p.222 at 230-231 [↑](#footnote-ref-96)