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I. DAMAGES

A. Plaintiffs' Proposed Jury Instruction No. 8.1: Compensatory damages generally

My charge to you on the law of damages must not be taken as a suggestion that you should find for the plaintiffs. It is for you to decide on the evidence presented and the rules of law I have given you whether any plaintiff is entitled to recover from any defendant. If you decide that the plaintiffs are not entitled to recover from any defendant, you need not consider damages. Only if you decide that any plaintiff is entitled to recover will you consider the measure of damages.

If you find that any plaintiff is entitled to recover from any defendant, you must render a verdict in a sum of money that will justly and fairly compensate that plaintiff for all losses resulting from the injuries he or she sustained.

Sources:

New York Pattern Jury Instructions--Civil 2:277 ("My charge to you on the law of damages must not be taken as a suggestion that you should find for the plaintiff. It is for you to decide on the evidence presented and the rules of law I have given you whether the plaintiff is entitled to recover from the defendant. If you decide that the plaintiff is not entitled to recover from the defendant, you need not consider damages. Only if you decide that the plaintiff is entitled to recover will you consider the measure of damages. If you find that the plaintiff is entitled to recover from the defendant, you must render a verdict in a sum of money that will justly and fairly compensate the plaintiff for all losses resulting from the injuries (he, she) sustained.")

DEFENDANTS' OBJECTIONS TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 8.1: COMPENSATORY DAMAGES GENERALLY

Defendants object to plaintiffs' proposed instruction as incomplete and misleading. Plaintiffs' proposed instruction does not give the jury adequate instructions on how to determine whether or not plaintiffs should be awarded compensatory damages. The proposed instruction fails to even give a proper definition of what compensatory damages are. That is because plaintiffs' proposed instruction is based on a New York pattern jury instruction related to damages generally—not compensatory damages—for negligence actions.

Defendants' "Proposed Jury Instruction No. 8.1 – Compensatory Damages Generally", is much more comprehensive, and this Court should adopt that instruction so that the jury has a clear understanding of what compensatory damages are. Plaintiffs' proposed instructions on damages generally does not give the jury that proper guidance.

B. Defendants Proposed Instruction: Compensatory Damages Generally

If you find that plaintiffs have carried their burden of proving, by a preponderance of the evidence, or by proof beyond a reasonable doubt for plaintiffs' claims for assault and battery under Nigerian law, that defendants violated their rights, then, and only then, may you consider the amount of damages which will fairly and reasonably compensate plaintiffs for any alleged injury sustained as a result of defendants' conduct.

The fact that I am giving you instructions on the subject of damages should not be construed by you as indicating that I believe you should find for plaintiffs. That's entirely up to you. As a judge, I am required to instruct all juries on damages in all cases whether or not there is merit to plaintiffs' claims.

The purpose of the law of damages is to award, as far as possible, just and fair compensation for the loss, if any, which resulted from defendants' violation of plaintiffs' rights. If you find that defendants are liable on the claims, as I have explained them, then you must award plaintiffs sufficient damages to compensate them for any injury proximately caused by defendants' conduct. An injury or damage is proximately caused by an act or a failure to act whenever it appears from the evidence that the act or failure to act played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

These are known as "compensatory damages". Compensatory damages serve to make plaintiffs, as far as possible, whole again. That is, they serve to compensate them for the damage, if any, suffered. Compensatory damages are not

limited to expenses that plaintiffs paid out of their pocket. A prevailing plaintiff is entitled to compensatory damages for the physical injury, pain and suffering, mental anguish, shock and discomfort that he or she suffered because of a defendant's conduct.

I remind you that you may award compensatory damages only for injuries that a plaintiff proves were proximately caused by a defendant's allegedly wrongful conduct. Your calculation of damages, should you award any, must be fair and reasonable, neither inadequate nor excessive. You may not speculate on injuries. You may only award damages for injuries that a plaintiff has actually suffered or which he or she is reasonably likely to suffer in the near future.

In awarding compensatory damages, if you decide to award them, you must be guided by good judgment and dispassionate common sense. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require a plaintiff to prove the amount of his or her losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

In all instances, you are to use sound discretion in fixing an award of damages, drawing reasonable inferences where you deem appropriate from the facts and circumstances in evidence. Again, your award must be based upon the evidence presented at trial and not upon speculation, guesswork or conjecture. Plaintiffs have an obligation to show by a preponderance of the evidence sufficient facts and circumstances to permit you to make a reasonable estimate of each item of damages. If a plaintiff fails to do that, then the plaintiff cannot recover for that item of damages.

It is the court's duty to decide the award of attorneys' fees and costs, and this should play no part in your calculation of any damages.

SOURCES: Sand et al., *Modern Federal Jury Instructions*, Vol. 4, ch. 77, Instr. 77-3; O'Malley et al., *Federal Jury Practice and Instructions* §§ 120.60, 128.01; *Deravin v. Kerik*, 00 Civ. 7487 (KMW) (KNF), 2007 Jury Instr. LEXIS 212, 2000 U.S. Dist. Ct. Jury Instr. 7487B, at *27-29, 37-38 (S.D.N.Y. May 11, 2007); *Redhead v. Conference of Seventh-Day Adventists*, No. 03-CV-6187 (DLI) (AKT), 2008 Jury Instr. LEXIS 609; 2003 U.S. Dist. Ct. Jury Instr. 578380, at *6 (E.D.N.Y. July 23, 2008); *Javornick v. UPS*, Civ. No. 07-0195, 2007 U.S. Dist. Ct. Jury Instr. 334433, at *28 (W.D. Pa. Sept. 23, 2008).

PLAINTIFFS' OBJECTIONS:

Plaintiffs object that one of the sources relied upon, *Deravin v. Kerik*, 00 Civ. 7487 (KMW) (KNF), 2007 Jury Instr. LEXIS 212, 2000 U.S. Dist. Ct. Jury Instr. 7487B, at *27-29, are not instructions adopted by the Court, but rather the defendants' proposed instructions in a case that settled before trial. Proposed instructions from another case are not a proper source.

Plaintiffs object to the reference to a beyond a reasonable doubt burden in the first paragraph, for the reasons discussed above and laid out in the choice of law argument.

Plaintiffs object to the references to, and definition of, proximate causation. Proximate causation is not an element of many of the theories of liability at issue here. The jury should simply be instructed that they can award damages for the injuries for which defendants are liable, since they have already been instructed on liability. This would effectively add a new element to many of plaintiffs' theories of liability. While this language is taken from the model instruction, it is not appropriate here.

Plaintiffs do not object to the definition of compensatory damages in the fourth paragraph.

Plaintiffs object to the language, "Plaintiffs have an obligation to show by a preponderance of the evidence sufficient facts and circumstances to permit you to make a reasonable estimate of each item of damages. If a plaintiff fails to do that, then the plaintiff cannot recover for that item of damages." By contrast, the model federal instruction notes, "No evidence of the value of such intangible things as mental or physical pain and suffering has been or need be introduced." O'Malley et al., *Federal Jury Practice and Instructions* § 128.02. (The Fifth Circuit pattern instruction includes the identical language. *See* Pattern Jury Instructions of the District Judges Association of the Fifth Circuit, Civil Cases, Instruction No. 15.4 (1999).) *See also Acevedo-Luis v. Pagan*, 478 F.3d 35, 39 (1st Cir. 2007) ("The district court was also correct in concluding that the elements of compensatory damages, including emotional distress damages, were adequately covered by other instructions on the manner in which damages were to be considered and determined. **As to pain and suffering, the court instructed the jury**

that no evidence of monetary value of such intangible things needed to be introduced into evidence.”). Although most of defendants’ instruction is taken from Sand et al., Modern Federal Jury Instructions, Vol. 4, ch. 77, Instr. 77-3, this language does not appear there.

C. Plaintiffs' Proposed Jury Instruction No. 8.2: Compensatory damages (injuries to surviving plaintiffs)

If you find for any of plaintiff Ken Wiwa, Owens Wiwa, Blessing Kpuinen, Karololo Korgbara, Michael Vizer, Lucky Doobee, Friday Nuate, Monday Gbokoo, David Kiobel, or James N-Nah, for the injuries to these plaintiffs themselves, you must determine that plaintiff's damages. In determining the measure of damages, you should consider the following:

1. The nature and extent of the injuries;
2. The disability, disfigurement, and/or loss of enjoyment of life experienced and which with reasonable probability will be experienced in the future;
3. The mental, physical, and emotional pain and suffering experienced and which with reasonable probability will be experienced in the future;
4. The reasonable value of necessary medical care, treatment, and services received to the present time;
5. The reasonable value of necessary medical care, treatment, and services which with reasonable probability will be required in the future;
6. The reasonable value of wages, earnings, and earning capacity lost to the present time;
7. The reasonable value of wages, earnings, and earning capacity which with reasonable probability will be lost in the future;
8. The reasonable value of necessary repairs to any property which was damaged plus the difference between the fair market value of the property immediately before the occurrence and its fair market value after it is repaired.

Sources

Ninth Circuit Model Instruction No. 5.1 ("If you find for the plaintiff [on the plaintiff's ____ claim], you must determine the plaintiff's damages. The plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant. You should consider the following:")

Ninth Circuit Model Instruction No. 5.2 ("In determining the measure of damages, you should consider: [The nature and extent of the injuries;] [The [disability] [disfigurement] [loss of enjoyment of life] experienced [and which with reasonable probability will be experienced in the future];] [The [mental,] [physical,] [emotional] pain and suffering experienced [and which with reasonable probability will be experienced in the future];] [The reasonable value of necessary medical care, treatment, and services received to the present time;] [The reasonable value of necessary medical care, treatment, and services which with reasonable probability will be required in the future;] [The reasonable value of [wages] [earnings] [earning capacity] [salaries] [employment] [business opportunities]

[employment opportunities] lost to the present time;] [The reasonable value of [wages] [earnings] [earning capacity] [salaries] [employment] [business opportunities] [employment opportunities] which with reasonable probability will be lost in the future;] [The reasonable value of necessary [household help] [services other than medical] [and] [expenses] [_____] required to the present time;] [The reasonable value of necessary [household help] [services other than medical] [and] [expenses] [_____] which with reasonable probability will be required in the future;] [The reasonable value of necessary repairs to any property which was damaged;] [The difference between the fair market value of any damaged property immediately before the occurrence and its fair market value immediately thereafter;] [and] [The reasonable value of necessary repairs to any property which was damaged plus the difference between the fair market value of the property immediately before the occurrence and its fair market value after it is repaired.] [The lesser of the following: 1. the reasonable cost of necessary repairs to any property which was damaged plus the difference between the fair market value of the property immediately before the occurrence and its fair market value after it is repaired; or 2. the difference between the fair market value of the property immediately before the occurrence and the fair market value of the unrepaired property immediately after the occurrence.] [Such sum as will reasonably compensate for any loss of use of any damaged property during the time reasonably required for its [repair] [replacement].]”)

DEFENDANTS’ OBJECTIONS TO PLAINTIFFS’ PROPOSED JURY INSTRUCTION NO. 8.2: COMPENSATORY DAMAGES (INJURIES TO SURVIVING PLAINTIFFS)

Under a choice of law analysis, Nigerian law provides the applicable substantive law for this instruction. *See* Restatement (Second) of Conflict of Laws § 145.

Defendants object to plaintiffs’ proposed instruction because under Nigerian law, in determining the measure of damages, if any, that plaintiffs may recover, there are different burdens of proof that plaintiffs must satisfy depending on the types of damages sought. Thus, the instruction should separate “general” and “special” damages because each has a different burden of proof under Nigerian law. (*See* Defendants’ Proposed Jury Instruction No. 8.2: Compensatory Damages for Individual Claims.)

Defendants further object to item (8) as it relates to property damages and plaintiffs have not brought an ATS claim for property damage. Furthermore, in *Kiobel v. Royal Dutch Petroleum Co.*, 456 F. Supp. 2d 457, 464 (S.D.N.Y. 2006), this Court dismissed plaintiffs’ ATS claim for property destruction.

D. Defendants' Proposed Instruction: Compensatory Damages for Individual Claims

If you find for any of plaintiffs Ken Wiwa, Owens Wiwa, Blessing Kpuinen, Karololo Kogbara, Michael Tema Vzor, Lucky Doobee, Friday Nuate, Monday Gbokoo, David Kiobel, or James N-nah, you must determine each of their compensatory damages as I have defined that term. These include both general and special damages under Nigerian law. Plaintiffs must prove these two types of compensatory damages under different burdens of proof.

1. General Damages

General damages are such damages as the law will presume to have resulted from defendants' conduct. Plaintiffs must prove these damages by a preponderance of the evidence. You should consider only the following elements of general damages, to the extent that you find them proved by a preponderance of the evidence:

1. The nature and extent of the injuries;
2. The disability, disfigurement, and/or loss of enjoyment of life experienced and which with reasonable probability will be experienced in the future;
3. The mental, physical, and emotional pain and suffering experienced and which with reasonable probability will be experienced in the future.

2. Special Damages

Special damages are exceptional damages which the law does not presume, and which must therefore be specifically pleaded and proved. In other words, special damages are damages that result from the particular circumstances of the case and that are capable of precise calculation. Plaintiffs must strictly prove special damages.

You should consider only the following elements of special damages, to the extent that you find them strictly proven:

1. The reasonable value of necessary medical care, treatment, and services received to the present time;
2. The reasonable value of necessary medical care, treatment, and services which with reasonable probability will be required in the future;
3. The reasonable value of wages, earnings, and earning capacity lost to the present time;
4. The reasonable value of wages, earnings, and earning capacity which with reasonable probability will be lost in the future.

SOURCES: *Odiba v Azege* (1998) 9 N.W.L.R. (Pt. 566) 370, 385; Kodilinye, Nigerian Law of Torts 255 (1982); Chaudry, Nigerian Law of Torts 223-24 (1978); Federal Jury Practice and Instructions § 128.02.

PLAINTIFFS' OBJECTIONS:

Plaintiffs object to the application of Nigerian law to determine damages for the ATS claims; these claims are governed by federal common law and general federal damages instructions are appropriate. Plaintiffs further object to the application of Nigerian law to determine damages for the state law claims, as set forth in the choice of law argument, because New York law applies to these claims.

Regardless of whether Nigerian law applies, plaintiffs make the following additional objections.

The instructions do not specify whose injuries are being compensated, except to state the plaintiffs who are recovering. It should be specified that this instruction applies to injuries that these plaintiffs suffered themselves.

The jury does not need to be instructed that this issue is being determined under Nigerian law, as this could be confusing.

The terms “general damages” and “special damages” need not be defined; instead the categories of damages should simply be specified. These legalistic terms may be confusing, and the definitions of these terms—“damages as the law will presume to have resulted from defendants’ conduct” and “exceptional damages which the law does not presume, and which must therefore be specifically pleaded and proved”—are more

confusing than helpful. The only difference between the two, according to this instruction, is that special damages allegedly must be “strictly proven.” This comes from Nigerian caselaw, but no source cited indicates that this is an issue on which the jury should be instructed, rather than a gatekeeping function of the Court. In fact, in Nigeria it is the court, not the jury, that awards damages. See *Odiba v Azege* (1998) 9 N.W.L.R. (Pt. 566) 370, 385 (“[S]pecial damages will be awarded if strictly proved; invariably, the plaintiff ought to sufficiently particularise it **to enable the court to decide whether all or part of it can be granted.**”).

No definition of “strictly proven” is given by defendants or the sources cited. But the notion that “strictly proven” is actually a “different burden of proof” from the general preponderance of the evidence standard has no support in any source cited. This is highly misleading and an erroneous statement of the law. Under Nigerian law, this requirement means only that the plaintiff needs to submit prima facie evidence of such damages. “All that the rule requires is that the person making the claim in special damages should establish his entitlement to that type or class of damages by credible evidence of such character as would satisfy the court that he is indeed entitled to an award under that head, otherwise the general law of evidence as to proof on the balance of probabilities by preponderance of weight or evidence which ordinarily applies in civil cases operates. . . . **Strict proof does not mean unusual proof**, but simply implies that the plaintiff who has the advantage of basing his claim upon a precise calculation must give the defendant access to the facts which to make such a calculation possible. . . . **[T]he fact that the amount of such loss cannot be precisely ascertained does not also deprive a plaintiff of all remedy.**” *Ebe v. Nnamani* [1997] 7 NWLR 479, 503 (Nig. Ct. Appeal) (quoting *Shell Petroleum Dev. Co. (Nig.) Ltd. v. High Chief G.B.A. Tiebo VII* [1996] 4 NWLR 657, 683, 687 (Nig. Ct. Appeal)). This is no different from the general rule that the plaintiff has the burden of proving damages by a preponderance of the evidence, and thus there is no need for confusing instructions specific to Nigerian law. Indeed, if the Court is to instruct the jury on “strict proof” for special damages, it must also explain what “strict proof” means:

“Strict proof” means only sufficient evidence to establish the amount of damages awarded. The fact that the amount of damages cannot be precisely determined, however, should not deprive the plaintiff of a damages award.

In *Bowoto v. Chevron Corp.*, although Nigerian law did apply to non-federal claims there, the Court declined to give a similar instruction proposed by defendants regarding “strict proof” of special damages. See *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, Instructions to Jury (Final as Amended – 11/25/08) at 49-50 (N.D. Cal. Nov. 25, 2008).

Finally, even if Nigerian law did apply a different burden of proof, as noted above New York burdens of proof apply here.

Plaintiffs’ instruction is based on a standard Ninth Circuit instruction, which does not differ in any substantive way from New York law, and does not include unnecessary and confusing legal terms.

E. Plaintiffs' Proposed Jury Instruction No. 8.3: Compensatory damages (injuries to decedents)

If you find for any of plaintiff Ken Wiwa on any claim for the injuries to his father Ken Saro-Wiwa, plaintiff Blessing Kpuinen on any claim for the injuries to her husband John Kpuinen, plaintiff Lucky Doobee on any claim for the injuries to his brother Saturday Doobee, plaintiff Friday Nuate on any claim for the injuries to her husband Felix Nuate, plaintiff Monday Gbokoo on any claim for the injuries to his brother Daniel Gbokoo, plaintiff David Kiobel on any claim for the injuries to his father Dr. Barinem Kiobel, or plaintiff James N-Nah on any claim for the injuries to his brother Uebari N-Nah, you must determine that plaintiff's damages. In determining the measure of damages, you should consider the following:

1. The nature and extent of the injuries to the deceased person;
2. The disability, disfigurement, and/or loss of enjoyment of life experienced by the deceased person before death;
3. The mental, physical, and emotional pain and suffering experienced by the deceased person before death;
4. The reasonable value of necessary medical care, treatment, and services received by the deceased person before death;
5. The reasonable value of wages, earnings, and earning capacity lost by the deceased person before death.

Sources:

Ninth Circuit Model Instruction No. 5.1 ("If you find for the plaintiff [on the plaintiff's ____ claim], you must determine the plaintiff's damages. The plaintiff has the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate the plaintiff for any injury you find was caused by the defendant. You should consider the following:")

Ninth Circuit Model Instruction No. 5.2 ("In determining the measure of damages, you should consider: [The nature and extent of the injuries;] [The [disability] [disfigurement] [loss of enjoyment of life] experienced [and which with reasonable probability will be experienced in the future];] [The [mental,] [physical,] [emotional] pain and suffering experienced [and which with reasonable probability will be experienced in the future];] [The reasonable value of necessary medical care, treatment, and services received to the present time;] [The reasonable value of necessary medical care, treatment, and services which with reasonable probability will be required in the future;] [The reasonable value of [wages] [earnings] [earning capacity] [salaries] [employment] [business opportunities] [employment opportunities] lost to the present time;] [The reasonable value of [wages] [earnings] [earning capacity] [salaries] [employment] [business opportunities] [employment opportunities] which with reasonable probability will be lost in the future;] [The reasonable value of necessary [household help] [services other than medical] [and] [expenses] [_____] required to the present time;] [The reasonable value of necessary [household help] [services other than medical] [and] [expenses] [_____] which with reasonable probability will be required in the future;] [The reasonable value of necessary repairs to any property which was damaged;] [The difference between the fair market

value of any damaged property immediately before the occurrence and its fair market value immediately thereafter;] [and] [The reasonable value of necessary repairs to any property which was damaged plus the difference between the fair market value of the property immediately before the occurrence and its fair market value after it is repaired.] [The lesser of the following: 1. the reasonable cost of necessary repairs to any property which was damaged plus the difference between the fair market value of the property immediately before the occurrence and its fair market value after it is repaired; or 2. the difference between the fair market value of the property immediately before the occurrence and the fair market value of the unrepaired property immediately after the occurrence.] [Such sum as will reasonably compensate for any loss of use of any damaged property during the time reasonably required for its [repair] [replacement].]”)

DEFENDANTS’ OBJECTIONS TO PLAINTIFFS’ PROPOSED JURY INSTRUCTION NO. 8.3: COMPENSATORY DAMAGES (INJURIES TO DECEDENTS)

Under a choice of law analysis, Nigerian law provides the applicable substantive law for this instruction. *See* Restatement (Second) of Conflict of Laws § 145.

Defendants object to plaintiffs’ proposed instruction because under Nigerian law, in determining the measure of damages, if any, that plaintiffs may recover, there are different burdens of proof that plaintiffs must satisfy depending on the types of damages sought. Thus, the instruction should separate “general” and “special” damages because each has a different burden of proof under Nigerian law. (*See* Defendants’ Proposed Jury Instruction No. 8.3: Compensatory Damages for Representative Claims.)

F. Defendants' Proposed Instruction: Compensatory Damages for Representative Claims

If you find for any of plaintiffs, Ken Wiwa, on any claim for the injuries to his father Ken Saro-Wiwa; Blessing Kpuinen on any claim for the injuries to her husband John Kpuinen; Lucky Doobee on any claim for the injuries to his brother Saturday Doobee; Friday Nuate on any claim for the injuries to her husband Felix Nuate; Monday Gbokoo on any claim for the injuries to his brother Daniel Gbokoo; or James N-nah on any claim for the injuries to his brother Uebari N-nah, you must determine that plaintiff's compensatory damages as I have defined that term. These include both general and special damages under Nigerian law. Plaintiffs must prove these two types of compensatory damages under different burdens of proof.

1. General Damages

General damages are such damages as the law will presume to have resulted from defendants' conduct. Plaintiffs must prove these damages by a preponderance of the evidence. You should consider only the following elements of general damages, to the extent that you find them proved by a preponderance of the evidence:

1. The nature and extent of the injuries to the deceased person;
2. The disability, disfigurement, and/or loss of enjoyment of life experienced by the deceased person during the period between injury and death;
3. The mental, physical, and emotional pain and suffering experienced by the deceased person during the period between injury and death.

2. Special Damages

Special damages are exceptional damages which the law does not presume, and which must therefore be specifically pleaded and proved. In other words, special damages are damages that result from the particular circumstances of the case and that are capable of precise calculation. Plaintiffs must strictly prove special damages. You should consider only the following elements of special damages, to the extent that you find them strictly proven:

1. The reasonable value of necessary medical care, treatment, and services received by the deceased person during the period between injury and death;
2. The reasonable value of wages, earnings, and earning capacity lost by the deceased person between the injury and death.

SOURCES: *Odiba v Azege* (1998) 9 N.W.L.R. (Pt. 566) 370, 385; Kodilinye, Nigerian Law of Torts 255 (1982); Chaudry, Nigerian Law of Torts 223-24 (1978); Federal Jury Practice and Instructions § 128.02.

PLAINTIFFS' OBJECTIONS:

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Regardless of whether Nigerian law applies, plaintiffs make the following additional objections.

The jury does not need to be instructed that this issue is being determined under Nigerian law, as this could be confusing.

The terms “general damages” and “special damages” need not be defined; instead the categories of damages should simply be specified. These legalistic terms may be confusing, and the definitions of these terms—“damages as the law will presume to have resulted from defendants’ conduct” and “exceptional damages which the law does not presume, and which must therefore be specifically pleaded and proved”—are more confusing than helpful. The only difference between the two, according to this instruction, is that special damages allegedly must be “strictly proven.” This comes from Nigerian caselaw, but no source cited indicates that this is an issue on which the jury

should be instructed, rather than a gatekeeping function of the Court. In fact, in Nigeria it is the court, not the jury, that awards damages. See *Odiba v Azege* (1998) 9 N.W.L.R. (Pt. 566) 370, 385 (“[S]pecial damages will be awarded if strictly proved; invariably, the plaintiff ought to sufficiently particularise it **to enable the court to decide whether all or part of it can be granted.**”).

No definition of “strictly proven” is given by defendants or the sources cited. But the notion that “strictly proven” is actually a “different burden of proof” from the general preponderance of the evidence standard has no support in any source cited. This is highly misleading and an erroneous statement of the law. Under Nigerian law, this requirement means only that the plaintiff needs to submit prima facie evidence of such damages. “All that the rule requires is that the person making the claim in special damages should establish his entitlement to that type or class of damages by credible evidence of such character as would satisfy the court that he is indeed entitled to an award under that head, otherwise the general law of evidence as to proof on the balance of probabilities by preponderance of weight or evidence which ordinarily applies in civil cases operates. . . . **Strict proof does not mean unusual proof**, but simply implies that the plaintiff who has the advantage of basing his claim upon a precise calculation must give the defendant access to the facts which to make such a calculation possible. . . . **[T]he fact that the amount of such loss cannot be precisely ascertained does not also deprive a plaintiff of all remedy.**” *Ebe v. Nnamani* [1997] 7 NWLR 479, 503 (Nig. Ct. Appeal) (quoting *Shell Petroleum Dev. Co. (Nig.) Ltd. v. High Chief G.B.A. Tiebo VII* [1996] 4 NWLR 657, 683, 687 (Nig. Ct. Appeal)). This is no different from the general rule that the plaintiff has the burden of proving damages by a preponderance of the evidence, and thus there is no need for confusing instructions specific to Nigerian law. Indeed, if the Court is to instruct the jury on “strict proof” for special damages, it must also explain what “strict proof” means:

“Strict proof” means only sufficient evidence to establish the amount of damages awarded. The fact that the amount of damages cannot be precisely determined, however, should not deprive the plaintiff of a damages award.

In *Bowoto v. Chevron Corp.*, although Nigerian law did apply to non-federal claims there, the Court declined to give a similar instruction proposed by defendants regarding “strict proof” of special damages. See *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, Instructions to Jury (Final as Amended – 11/25/08) at 49-50 (N.D. Cal. Nov. 25, 2008).

Finally, even if Nigerian law did apply a different burden of proof, as noted above New York burdens of proof apply here.

Plaintiffs’ instruction is based on a standard Ninth Circuit instruction, which does not differ in any substantive way from New York law, and does not include unnecessary and confusing legal terms.

G. Plaintiffs' Proposed Jury Instruction No. 8.4: Compensatory damages due to death (extrajudicial execution)

If you find in favor of plaintiff Ken Wiwa on his claim for the extrajudicial execution of his father Ken Saro-Wiwa, or for plaintiff Blessing Kpuinen on her claim for the extrajudicial execution of her husband John Kpuinen, or for plaintiff Lucky Doobee on his claim for the extrajudicial execution of his brother Saturday Doobee, or for plaintiff Friday Nuate on her claim for the extrajudicial execution of her husband Felix Nuate, or for plaintiff Monday Gbokoo on his claim for the extrajudicial execution of his brother Daniel Gbokoo, or for plaintiff David Kiobel on his claim for the extrajudicial execution of his father Dr. Barinem Kiobel, or for plaintiff James N-Nah on his claim for the extrajudicial execution of his brother Uebari N-Nah, then you should award each plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained as a direct result of the death. You should consider only the following elements of damage, to the extent that you find them proved by a preponderance of the evidence:

- (1) The pain and suffering actually endured by each deceased person during such time as they were conscious from the moment of injury to the moment of death.
- (2) The estate's loss of net accumulations: "Net accumulations" is the part of the deceased person's net income after taxes, including pension benefits, which the deceased person, after paying deceased person's personal expenses and monies for the support of deceased person's survivors, would have left as part of the deceased person's estate if the deceased person had lived a normal life expectancy.
- (3) Lost support and services: The loss by each survivor, by reason of deceased person's injury and death, of the deceased person's support and services. In determining the duration of any future loss, you shall consider the joint life expectancy of the survivor and the deceased person. In evaluating past and future loss of support and services, you shall consider the survivor's relationship to the deceased person, the amount of the deceased person's probable net income available for distribution to the survivor and the replacement value of the deceased person's services to the survivor. "Support" includes contributions in kind as well as sums of money. "Services" means tasks regularly performed by the deceased person for a survivor that will be a necessary expense to the survivor because of the deceased person's death.
- (4) Funeral expenses paid by survivor: Funeral expenses due to the deceased person's death paid by any survivor.
- (5) Damages of surviving spouse: The wife or husband's loss of the deceased person's companionship, and protection, and his or her mental pain and suffering as a result of the deceased person's death. In determining the duration of such losses, you shall consider the joint life expectancy of the deceased person and the surviving spouse.

(6) Damages of surviving child and/or grandchild: The loss by the deceased person's children of parental companionship, instruction and guidance, and their mental pain and suffering as a result of the deceased person's death. In determining the duration of such losses, you shall consider the joint life expectancy of the deceased person and the surviving children.

(7) Damages of surviving parents, grandparents, and/or siblings: The loss by the deceased person's relatives of companionship and their mental pain and suffering as a result of the deceased person's death. In determining the duration of such losses, you shall consider the joint life expectancy of the deceased person and the surviving relatives.

The survivors in this case include the following individuals:

- For Ken Saro-Wiwa: [LIST ALL SURVIVORS]
- For John Kpuinen: [LIST ALL SURVIVORS]
- For Saturday Doobee: [LIST ALL SURVIVORS]
- For Felix Nuate: [LIST ALL SURVIVORS]
- For Daniel Gbokoo: [LIST ALL SURVIVORS]
- For Dr. Barinem Kiobel: [LIST ALL SURVIVORS]
- For Uebari N-Nah: [LIST ALL SURVIVORS]

Your verdict will include answers to the following questions which will be submitted to you in writing:

1. (a) State the total amount of damages, if any, to each of [LIST ALL SURVIVORS] resulting from Ken Saro-Wiwa's death.
(b) State the total amount of damages, if any, to each of [LIST ALL SURVIVORS] resulting from John Kpuinen's death.
(b) State the total amount of damages, if any, to each of [LIST ALL SURVIVORS] resulting from Saturday Doobee's death.
(b) State the total amount of damages, if any, to each of [LIST ALL SURVIVORS] resulting from Felix Nuate's death.
(b) State the total amount of damages, if any, to each of [LIST ALL SURVIVORS] resulting from Daniel Gbokoo's death.
(b) State the total amount of damages, if any, to each of [LIST ALL SURVIVORS] resulting from Dr. Barinem Kiobel's death.
(b) State the total amount of damages, if any, to each of [LIST ALL SURVIVORS] resulting from Uebari N-Nah's death.

2. For each person for whom an award is made in your answer to Question No. 1, state the period of years over which the amount awarded for such economic loss is intended to provide compensation.

Sources:

Federal Jury Practice and Instructions § 128.01 (“If you find in favor of plaintiff, then you should award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained *[and is reasonably certain to sustain in the future]* as a direct result of the event mentioned in the evidence. You should consider only the following elements of damage, to the extent that you find them proved by a preponderance of the evidence:”)

Federal Jury Practice and Instructions § 128.30 (“Elements of wrongful death claim: A. Elements for Estate: . . . (2) Lost accumulations: The estate's loss of net accumulations: “Net accumulations” is the part of the decedent's net income *[from salary or business]* after taxes, including pension benefits *[but excluding income from investments continuing beyond death]*, which the decedent, after paying decedent's personal expenses and monies for the support of decedent's survivors, would have left as part of the decedent's estate if the decedent had lived a normal life expectancy. . . . B. Elements for Survivors: (1) Lost support and services: The survivor's loss, by reason of decedent's injury and death, of the decedent's support and services *[including interest at the legal rate on any amount awarded for such loss from the date of injury to the date of death]*. In determining the duration of any future loss, you shall consider the joint life expectancy of the survivor and the decedent *[and the period of minority of a healthy minor child]*. In evaluating past and future loss of support and services, you shall consider the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the survivor and the replacement value of the decedent's services to the survivor. *[“Support” includes contributions in kind as well as sums of money. “Services” means tasks regularly performed by the decedent for a survivor that will be a necessary expense to the survivor because of the decedent's death.]* (2) Medical and funeral expenses paid by survivor: *[Medical] [or] [funeral]* expenses due to the decedent's *[injury] [or] [death]* paid by any survivor. C. Additional Elements for Surviving Spouse, Minor Child or Parents of Minor Child: (1) Damages of surviving spouse: The *[wife's] [husband's]* loss of the decedent's companionship, and protection, and *[her] [his]* mental pain and suffering as a result of the decedent's death. In determining the duration of such losses, you shall consider the joint life expectancy of the decedent and the surviving spouse. (2) Damages of surviving minor child: The loss by *[name all minor children]* of parental companionship, instruction and guidance, and *[his] [her] [their]* mental pain and suffering as a result of the decedent's death. In determining the duration of such losses, you shall consider the joint life expectancy of the decedent and *[the surviving children]*. . . .”)

New York Pattern Jury Instructions--Civil 2:320A (“Plaintiff is the (executor, administrator) of the estate of AB. Plaintiff makes two claims: the first claim seeks damages resulting from the death of AB and the second claim seeks damages for the injuries and losses that were sustained by AB before (he, she) died. You must separately consider each of these claims. As to the first claim, damages are the amount that you find to be fair and just compensation for the pecuniary injuries, that is economic losses, resulting from AB's death to each of the persons for whom this claim is brought. Those persons are: *[list the distributees by name and state their relationship to decedent]*. Plaintiff claims that these individuals have sustained economic loss as a result of AB's

death in that *[state items of pecuniary loss claimed by plaintiff]*. Defendant CD claims *[state defendant's claims in relation to distributees' alleged pecuniary loss]*. The law limits damages resulting from AB's death to pecuniary injuries, which means economic losses. You may not consider or make any award for sorrow, mental anguish, injury to feelings, or for loss of companionship. You must determine the economic value of AB to *[list the distributees by name]* on *[give date of death]*, when AB died. In determining that economic value, you should consider the character, habits and ability of AB; the circumstances and condition of *[list the distributees by name]*; the services that AB would have performed for (him, her, them); the portion of (his, her) earnings that AB would have spent in the future for the care and support of *[list the distributees by name]*; the age and life expectancy of AB; the ages and life expectancies of *[list the distributees by name]*; and *[where the distributees include dependent children]*; and the intellectual, moral, and physical training, guidance and assistance that AB would have given the children had (he, she) lived. You should also consider the amount, if any, by which AB, if (he, she) had lived, would have increased (his, her) estate from (his, her) earnings and thus added to the amount that would have been inherited from (him, her), provided that you find that at least one of *[list the distributees by name]* would have been alive to inherit from (him, her) had AB not died on, 19 *[state date of death]*. . . . As I stated before, it is the economic value of AB to *[list the distributees by name]* that you must decide. That value is incapable of exact proof. Taking into account all the factors I have discussed, you must use your own common sense and sound judgment based on the evidence in determining the amount of the economic loss suffered by: *[list the distributees by name]*. . . . You will make a separate award for those reasonable expenses that were (paid by the spouse, for which the spouse is responsible) for medical aid, nursing and other care required to treat AB's injuries, and for AB's funeral and burial lot. As to the claim for damages sustained by AB before (he, she) died, which is the second claim I mentioned to you earlier, plaintiff is entitled to recover such sum as you find will fairly and justly compensate for the pain and suffering actually endured by AB during such time as (he, she) was conscious from the moment of injury to the moment of death. . . . *[In actions subject to CPLR 4111(d, e, f), state:]* Your verdict will include answers to the following questions which will be submitted to you in writing: 1 State the total amount of economic loss, if any, to each of *[list the distributees by name]* resulting from AB's death. *[In cases tried in the Second Department, state: State the total amount of economic loss, if any, to (list the distributees by name) resulting from AB's death, without specifying the amount of economic loss for each individual];* 2 For each person for whom an award is made in your answer to Question No. 1, state the period of years over which the amount awarded for such economic loss is intended to provide compensation. . . .”)

Xuncax v. Gramajo, 886 F. Supp. 162, 190-92, 197-98 (D. Mass. 1995) (awarding compensatory damages for summary execution “on behalf of” the decedents, and looking to Guatemalan law to determine whether a sibling could recover when local law provided no remedy)

Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1357-58 (2001) (looking to Chilean law to determine whether a sibling may recover for summary execution when local law provided no remedy)

Laws of Eastern Nigeria cap. 52 (Fatal Accidents Law) (applicable to Rivers State) § 4(1) (specifying that wrongful death actions shall be brought “for the benefit of the members of the immediate of the” decedent); § 2 (defining “immediate family” to include “(a) wife or wives; (b) husband; (c) parent, which shall include father and mother, grandfather and grandmother, and step-father and step-mother; (d) child, which shall include son and daughter, grandson and grand-daughter and step-son and step-daughter, of a deceased person; (e) brother and sister, which expressions shall include half-brother and half-sister; (f) nephew and niece of a deceased person who were under the age of sixteen years at the time of the death of the deceased and who were being maintained by him”)

DEFENDANTS’ OBJECTIONS TO PLAINTIFFS’ PROPOSED JURY INSTRUCTION NO. 8.4: COMPENSATORY DAMAGES DUE TO DEATH (EXTRAJUDICIAL EXECUTION)

Defendants object to plaintiffs’ proposed instruction in its entirety. Plaintiffs are attempting through this instruction to turn their summary execution claim under the ATS into a wrongful death claim. Indeed, plaintiffs’ proposed instruction is modeled almost entirely from Federal Jury Practice and Instructions § 128.30 (“Elements of Wrongful Death Claim”). There is no wrongful death statute under international law, and plaintiffs do not set forth any precedent for such an instruction for an ATS claim.

Defendants further object to this instruction as duplicative. Plaintiffs have proposed jury instructions for all of their ATS claims, including summary execution, for both individual and representative claims (*i.e.*, Plaintiffs’ Proposed Jury Instructions 8.2 & 8.3). Plaintiffs are not entitled to an additional instruction simply for their summary execution claim. Plaintiffs also have proposed a wrongful death instruction under New York law (*i.e.*, Plaintiffs’ Proposed Jury Instruction No. 8.5).

Defendants also object to this instruction because any claim for wrongful death is governed by Nigerian law, and as such, the Fatal Accidents Act. (*See* Defs’ R&O Stmt. Part II.A.); *see also* *Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 72 (1993); *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 642 N.E.2d 1065 (1994); *James v. Powell*, 19 N.Y.2d 249, 225 N.E.2d 741 (1967); Restatement (Second) of Conflict of Laws § 145. Under Nigerian law, plaintiffs are only entitled to seek pecuniary losses for a wrongful death claim. Chaudry, *Nigerian Law of Torts* 211-12 (1978) (quoting *Nwafor v. Nduka*, [1972] 4 S.C. 59).

Defendants object to the inclusion of proposed language from plaintiffs’ jury verdict form.

H. Plaintiffs' Proposed Jury Instruction No. 8.5: Compensatory damages due to death (wrongful death)

If you find in favor of plaintiff Ken Wiwa on his claim for the wrongful death of his father Ken Saro-Wiwa, or for plaintiff Blessing Kpuinen on her claim for the wrongful death of her husband John Kpuinen, then you should award each plaintiff damages resulting from the death of the deceased person and damages for the injuries and losses that were sustained by the decedent before he died. You should consider only the following elements of damage, to the extent that you find them proved by a preponderance of the evidence:

(1) The pecuniary injuries, that is economic losses, resulting from the death to each of the persons for whom this claim is brought. Plaintiff Ken Wiwa, administrator of the estate of Ken Saro-Wiwa, brings this claim on behalf of Ken Saro-Wiwa's children, including himself, Gian, Zina, and Noo, Ken Saro-Wiwa's widow, Maria. Plaintiff Blessing Kpuinen, administrator of the estate of John Kpuinen, brings this claim on behalf of herself as the widow of John Kpuinen, as well as on behalf of John Kpuinen's mother, Mathilde. The law limits damages resulting from the deaths of Ken Saro-Wiwa and John Kpuinen to pecuniary injuries, which means economic losses. You may not consider or make any award for sorrow, mental anguish, injury to feelings, or for loss of companionship. You must determine the economic value of Ken Saro-Wiwa to Ken, Gian, Zina, Noo, and Maria Saro-Wiwa, when Ken Saro-Wiwa died. You must determine the economic value of John Kpuinen to Blessing Kpuinen and Mathilde Kpuinen when John Kpuinen died. In determining that economic value, you should consider the character, habits and ability of Ken Saro-Wiwa and John Kpuinen; the circumstances and condition of each beneficiary; the services that Ken Saro-Wiwa and John Kpuinen would have performed for them; the portion of his earnings that Ken Saro-Wiwa and John Kpuinen would have spent in the future for the care and support of Ken, Gian, Zina, Noo, and Maria Saro-Wiwa, and of Blessing Kpuinen and Mathilde Kpuinen; the age and life expectancy of Ken Saro-Wiwa and John Kpuinen; the ages and life expectancies of the beneficiaries; and the intellectual, moral, and physical training, guidance and assistance that Ken Saro-Wiwa would have given his children had he lived. You should also consider the amount, if any, by which Ken Saro-Wiwa and John Kpuinen, if they had lived, would have increased their estates from their earnings and thus added to the amount that would have been inherited from them, provided that you find that at least one of the beneficiaries would have been alive to inherit from them, had Ken Saro-Wiwa and John Kpuinen not died on November 10, 1995. As I stated before, it is the economic value of Ken Saro-Wiwa and John Kpuinen to Ken, Gian, Zina, Noo, and Maria Saro-Wiwa, and to Blessing Kpuinen and Mathilde Kpuinen, that you must decide. That value is incapable of exact proof. Taking into account all the factors I have discussed, you must use your own common sense and sound judgment based on the evidence in determining the amount of the economic loss suffered by: Ken, Gian, Zina, Noo, and Maria Saro-Wiwa, and Blessing and Mathilde Kpuinen. You will make a separate award for

those reasonable expenses that were paid by the spouse for Ken Saro-Wiwa's and John Kpuinen's funeral and burial lot.

(2) As to the claim for damages sustained by Ken-Saro Wiwa and John Kpuinen, Ken Wiwa, as administrator of the estate of Ken Saro-Wiwa, and Blessing Kpuinen, as administrator of the estate of John Kpuinen, are entitled to recover such sum as you find will fairly and justly compensate for the pain and suffering actually endured by Ken Saro-Wiwa and John Kpuinen during such time as they were conscious from the moment of injury to the moment of death.

Your verdict will include answers to the following questions which will be submitted to you in writing:

1. (a) State the total amount of economic loss, if any, to each of Ken, Gian, Zina, Noo, and Maria Saro-Wiwa resulting from Ken Saro-Wiwa's death.
(b) State the total amount of economic loss, if any, to each of Blessing Kpuinen and Mathilde Kpuinen resulting from John Kpuinen's death.
2. For each person for whom an award is made in your answer to Question No. 1, state the period of years over which the amount awarded for such economic loss is intended to provide compensation.

Sources:

Federal Jury Practice and Instructions § 128.01 ("If you find in favor of plaintiff, then you should award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [*and is reasonably certain to sustain in the future*] as a direct result of the event mentioned in the evidence. You should consider only the following elements of damage, to the extent that you find them proved by a preponderance of the evidence:")

New York Pattern Jury Instructions--Civil 2:320A ("Plaintiff is the (executor, administrator) of the estate of AB. Plaintiff makes two claims: the first claim seeks damages resulting from the death of AB and the second claim seeks damages for the injuries and losses that were sustained by AB before (he, she) died. You must separately consider each of these claims. As to the first claim, damages are the amount that you find to be fair and just compensation for the pecuniary injuries, that is economic losses, resulting from AB's death to each of the persons for whom this claim is brought. Those persons are: [*list the distributees by name and state their relationship to decedent*]. Plaintiff claims that these individuals have sustained economic loss as a result of AB's death in that [*state items of pecuniary loss claimed by plaintiff*]. Defendant CD claims [*state defendant's claims in relation to distributees' alleged pecuniary loss*]. The law limits damages resulting from AB's death to pecuniary injuries, which means economic losses. You may not consider or make any award for sorrow, mental anguish, injury to feelings, or for loss of companionship. You must determine the economic value of AB to [*list the distributees by name*] on [*give date of death*], when AB died. In determining that economic value, you should consider the character, habits and ability of AB; the

circumstances and condition of *[list the distributees by name]*; the services that AB would have performed for (him, her, them); the portion of (his, her) earnings that AB would have spent in the future for the care and support of *[list the distributees by name]*; the age and life expectancy of AB; the ages and life expectancies of *[list the distributees by name]*; and *[where the distributees include dependent children]*; and the intellectual, moral, and physical training, guidance and assistance that AB would have given the children had (he, she) lived. You should also consider the amount, if any, by which AB, if (he, she) had lived, would have increased (his, her) estate from (his, her) earnings and thus added to the amount that would have been inherited from (him, her), provided that you find that at least one of *[list the distributees by name]* would have been alive to inherit from (him, her) had AB not died on, 19 *[state date of death]*. . . . As I stated before, it is the economic value of AB to *[list the distributees by name]* that you must decide. That value is incapable of exact proof. Taking into account all the factors I have discussed, you must use your own common sense and sound judgment based on the evidence in determining the amount of the economic loss suffered by: *[list the distributees by name]*. . . . You will make a separate award for those reasonable expenses that were (paid by the spouse, for which the spouse is responsible) for medical aid, nursing and other care required to treat AB's injuries, and for AB's funeral and burial lot. As to the claim for damages sustained by AB before (he, she) died, which is the second claim I mentioned to you earlier, plaintiff is entitled to recover such sum as you find will fairly and justly compensate for the pain and suffering actually endured by AB during such time as (he, she) was conscious from the moment of injury to the moment of death. . . . *[In actions subject to CPLR 4111(d, e, f), state:]* Your verdict will include answers to the following questions which will be submitted to you in writing: 1 State the total amount of economic loss, if any, to each of *[list the distributees by name]* resulting from AB's death. *[In cases tried in the Second Department, state:* State the total amount of economic loss, if any, to *(list the distributees by name)* resulting from AB's death, without specifying the amount of economic loss for each individual]; 2 For each person for whom an award is made in your answer to Question No. 1, state the period of years over which the amount awarded for such economic loss is intended to provide compensation. . . .”)

NY CLS EPTL § 5-4.4(a) (damages in wrongful death action “shall be distributed to the persons entitled thereto under 4-1.1 and 5-4.5, except that where the decedent is survived by a parent or parents and a spouse and no issue, the parent or parents will be deemed to be distributees for purposes of this section”); NY CLS EPTL § 4-1.1(a) (“If a decedent is survived by . . . A spouse and issue,” they take the entire estate, and if survived by “A spouse and no issue, the whole [is distributed] to the spouse.”)

DEFENDANTS’ OBJECTIONS TO PLAINTIFFS’ PROPOSED JURY INSTRUCTION NO. 8.5: COMPENSATORY DAMAGES DUE TO DEATH (WRONGFUL DEATH)

Defendants object to this instruction because any claim for wrongful death is governed by Nigerian law, and as such, the Fatal Accidents Act. (*See* Defs’ R&O Stmt. Part II.A.); *see also Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 72 (1993);

Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 84 N.Y.2d 309, 642 N.E.2d 1065 (1994); *James v. Powell*, 19 N.Y.2d 249, 225 N.E.2d 741 (1967); Restatement (Second) of Conflict of Laws § 145.

Defendants further object to this instruction as duplicative to the extent the Court finds that a separate wrongful death instruction is proper for plaintiffs' summary execution claim under the ATS.

Defendants also object to the inclusion of proposed language from plaintiffs' jury verdict form.

I. Defendants' Proposed Instruction: Compensatory Damages for Wrongful Death

If you find in favor of plaintiff Ken Wiwa on his claim for the wrongful death of his father Ken Saro-Wiwa, or for plaintiff Blessing Kpuinen on her claim for the wrongful death of her husband John Kpuinen, then you should award each plaintiff damages resulting from the death of the deceased person and damages only for the injuries and losses that were sustained by the decedent before he died. The amount of any damages awarded must be proportionate to any injury suffered. You should consider only the following elements of damage, to the extent that you find them proved by plaintiffs by a preponderance of the evidence:

1. Estate Damages

i. Lost Earnings: The estate's loss of earnings of the decedent from the date of the injury to the date of death, less any amount you award for a survivor's loss of monetary support during that period.

ii. Lost Accumulations: The estate's loss of net accumulations, that is, that part of the decedent's net income from salary or business after taxes, including pension benefits but excluding income from investments continuing beyond death that the decedent, after paying decedent's personal expenses and monies for the support of the decedent's survivors, would have remaining as part of the estate if the decedent had lived his normal life expectancy.

iii. Funeral Expenses: Funeral expenses resulting from the decedent's death that have become a charge against the decedent's estate or were paid by or on behalf of the decedent by one other than a survivor. Funeral expenses include the reasonable expenses of the burial of a deceased person but do not include the cost of the

mourning of any person, or of a tombstone or memorial or of any celebrations or customary presents.

You may not consider or award any money for sorrow, mental pain and suffering, injury to feelings, or for loss of companionship in calculating the estate's damages.

2. Survivors' Damages

i. Lost Support and Services: The survivor's loss, by reason of decedent's injury and death, of the decedent's support and services. In determining the duration of any future loss, you shall consider the joint life expectancy of the survivor and the decedent and the period of minority of a healthy minor child.

In evaluating past and future loss of support and services, you shall consider the survivor's relationship to the decedent, the amount of the decedent's probable net income available for distribution to the survivor and the replacement value of the decedent's services to the survivor. Support includes contributions in kind as well as sums of money. Services mean tasks regularly performed by the decedent for a survivor that will be a necessary expense to the survivor because of the decedent's death.

It is the duty of the plaintiff to put forth evidence establishing how much support he used to get from the deceased and how much he reasonably expected would have continued.

ii. Funeral expenses paid by the survivor: Funeral expenses due to the decedent's injury or death paid by any survivor.

You may not consider or award any money for sorrow, mental pain and suffering, injury to feelings, or for loss of companionship in calculating the survivors' damages.

In determining how long the decedent would have lived, you may consider evidence in the case bearing on the decedent's health, age and physical condition, before the decedent's death, in determining the probable life expectancy of the decedent.

In determining the duration of any future loss by a survivor because of the death of the decedent, you shall consider the joint life expectancy of the survivor and the decedent.

SOURCES: Fatal Accidents Law, (1961) Cap. 52, 1337 (Nigeria); Chaudry, Nigerian Law of Torts 211-12 (1978) (quoting *Nwafor v. Nduka*, [1972] 4 S.C. 59); Federal Jury Practice and Instructions § 128.30

PLAINTIFFS' OBJECTIONS:

While plaintiffs' and defendants' instructions are written quite differently, there are only a few major differences. Plaintiffs generally object to the application of Nigerian law to this claim, for the reasons stated previously. The standard New York instructions, on which plaintiffs' instruction is based, include damages to the decedent under the heading of wrongful death damages, and that is not reflected here.

Furthermore, under New York law, a separate award must be made for each survivor, because each survivor's damages are distinct. That should be the case for Nigerian law as well. At the very least, each survivor should be mentioned here because the instruction as written could give the misimpression that the jury is only to consider the losses of the named administrators, not of all the wrongful death beneficiaries. Each beneficiary must be named.

Plaintiffs object that this instruction includes no head of damages for "the intellectual, moral, and physical training, guidance and assistance" that a deceased parent would give his children, and similar elements. This is a standard element under New York law, *see* New York Pattern Jury Instructions--Civil 2:320A, and it is also available under Nigerian law. Although defendants cite Nigerian sources limiting recovery to "pecuniary" losses, this is also the case under New York law, and they cite no sources rejecting the notion that pecuniary losses may include these types of damages. Indeed, English courts, construing similar fatal accidents provisions, have concluded that parental services are compensable. Thus, "pecuniary" loss is "not limited to the value of money lost." *Feay v. Barnwell*, [1938] 1 All E.R. 31. Indeed, in recent cases "there is a clear trend . . . towards the inclusion in pecuniary loss rather than in solatium of the [parental] element of the lost care," *Lewis v. Osbourne*, Q.B. (July 4, 1995). In *Hay v. Hughes* [1975] 1 Q.B. 790, Lord Edmund-Davies quoted from *McGregor on Damages* ¶ 1232 (13th ed. 1972), which suggested that "it may be argued that the benefit of a [parent's] personal attention to a child's upbringing, morals, education and psychology, which the services of a housekeeper, nurse or governess could never provide, has in the long run a financial value for the child, difficult as it is to assess." Lord Edmund-Davies noted that this

passage supported the notion that children are entitled “to damages for the quantified loss of their mother’s services.”

A later unpublished case, *Gould v. Official Solicitor*, Q.B. (June 14, 1982), further discussed the value of “maternal services”:

The second head under the Fatal Accidents Acts is for the loss of maternal services. The case of *Hay v. Hughes*, [1975] 1 QB 790, [1975] 1 All ER 257, has been pressed upon me, and one or two citations from that case are appropriate. Lord Justice Buckley said at [1977] 1 QB page 811 of the report: “Although damages cannot be recovered for the loss of their mother's love, they can be recovered for the loss of those services capable of being valued in terms of money which she would have rendered to them as their mother had she survived.”

Lord Edmund-Davies said: “While it is undoubtedly established that damages can be awarded under the Fatal Accidents Acts only in respect of pecuniary loss and not as a solatium for injured feelings... so that these two children could recover nothing for the deprivation of their mother's love, yet it may sometime have to be considered whether Mr. McGregor is not right in saying” in his book on Damages: “... it may be argued that the benefit of a mother's personal attention to a child's upbringing, morals, education and psychology, which the services of a housekeeper, nurse or governess could never provide, has in the long run a financial value for the child, difficult as it is to assess.”

Lord Justice Ormrod said: “It seems to me... to follow from this that the court should be careful in cases such as this to avoid putting an inflated value on the pecuniary loss sustained by the children. Loss of the services of a wife and mother is a grievous loss on any view, but I am not convinced that the current cost of a notional housekeeper is necessarily a reliable guide in this most difficult exercise.”

I bear in mind these cautionary words, that I have not to be giving under this head anything by way of solatium, but endeavouring to evaluate that which has been lost and which it is difficult to express in terms of pounds, shillings and pence.

Id. Other cases have also recognized the value of parental services. In *Regan v. Williamson*, [1976] 2 All ER 241 (Eng. Ct. App.), the Court of Appeal held that “the word ‘services’ has been too narrowly construed. It should, at least, include an acknowledgment that a wife and mother does not work to set hours and, still less, to rule. She is in constant attendance, save for those hours when she is, if that is the fact, at work. During some of those hours she may well give the children instruction on essential matters to do with their upbringing and, possibly, with such things as their homework. This sort of attention seems to be as much of a service, and probably more valuable to them, than the other kinds of service conventionally so regarded.” *See also Mehmet v. Perry*, [1977] 2 All ER 529 (Q.B.) (“[I]n assessing the value of the lost services I think that a jury would pay some regard to the fact that the children have lost

the personal attention of their mother and that they now have only one parent to look after them instead of two. I propose therefore to award an additional sum under this heading but to keep it within modest limits. . . . I have come to the conclusion that the total damages should include an acknowledgment of the fact that the husband has lost the services of his wife”).

Thus, even under Nigerian law, pecuniary loss is broader than defendants’ instruction reflects.

If the Court is inclined to apply Nigerian law to wrongful death damages, plaintiffs propose the following instruction, adopted in *Bowoto v. Chevron Corp.*:

Plaintiffs’ Alternative Proposed Jury Instruction No. 8.5 – Compensatory damages due to death (wrongful death) (Nigerian law)

If you find that plaintiffs have proved a claim against any defendant for the wrongful death of Ken Saro-Wiwa or John Kpuinen, you must determine their damages.

Ken Wiwa, on behalf of Ken Saro-Wiwa’s widow, Maria, claims the following damages:

1. The loss of Ken Saro-Wiwa’s love, companionship, comfort, care, assistance, protection, affection, society, moral support; and
2. The loss of the enjoyment of sexual relations.

In calculating these damages, you must calculate the monetary value of these injuries; you should not consider grief, sorrow, or mental anguish.

Ken Wiwa, on behalf of Ken Saro-Wiwa’s children, including himself, Gian, Zina, and Noo,

also claims the following damages:

1. The loss of Ken Saro-Wiwa’s love, companionship, comfort, care, assistance, protection, affection, society, moral support; and
2. The loss of Ken Saro-Wiwa’s training and guidance.

In calculating these damages, you must calculate the monetary value of these injuries; you should not consider grief, sorrow, or mental anguish.

Blessing Kpuinen, on behalf of herself as John Kpuinen’s widow, claims the following damages:

1. The loss of John Kpuinen’s love, companionship, comfort, care, assistance, protection, affection, society, moral support; and
2. The loss of the enjoyment of sexual relations.

In calculating these damages, you must calculate the monetary value of these injuries; you should not consider grief, sorrow, or mental anguish.

Blessing Kpuinen, on behalf of John Kpuinen's mother, Mathilde, also claims the following damages:

1. The loss of Ken Saro-Wiwa's love, companionship, comfort, care, assistance, protection, affection, society, and moral support.

In calculating these damages, you must calculate the monetary value of these injuries; you should not consider grief, sorrow, or mental anguish.

In determining each family's loss, do not consider:

1. Ken Saro-Wiwa's or John Kpuinen's pain and suffering; or
2. The poverty or wealth of each family.

In computing these damages, consider the losses suffered by all plaintiffs in each family and return a verdict of a single amount for each family. I will divide the amount among the plaintiffs in each family.

Source:

Bowoto v. Chevron Corp., No. C 99-02506 SI, Instructions to Jury (Final as Amended – 11/25/08) at 38-39 (N.D. Cal. Nov. 25, 2008) (“If you find that the Irowarinun family has proved their claim against any defendant for the wrongful death of Arolika Irowarinun, you must determine their damages. Roseline Irowarinun, Mary Irowarinun, and Margaret Irowarinun claim the following damages:

1. The loss of Arolika Irowarinun's love, companionship, comfort, care, assistance, protection, affection, society, moral support; and
2. The loss of the enjoyment of sexual relations.

In calculating these damages, you must calculate the monetary value of these injuries; you should not consider grief, sorrow, or mental anguish. Bosuwo Sebi Irowarinun, Caleb Irowarinun, Orioye Laltu Irowarinun, Temilola Irowarinun, Adegorye Oloruntimjehum Irowarinun, Aminora James Irowarinun, Eniesoro Irowarinun, Gbenga Irowarinun, Ibimisan Irowarinun, Monotutegha Irowarinun, and Olamisbode Irowarinun also claim the following damages:

1. The loss of Arolika Irowarinun's love, companionship, comfort, care, assistance, protection, affection, society, moral support; and
2. The loss of Arolika Irowarinun's training and guidance.

In calculating these damages, you must calculate the monetary value of these injuries; you should not consider grief, sorrow, or mental anguish.

In determining the Irowarinun family's loss, do not consider:

1. Arolika Irowarinun's pain and suffering; or
2. The poverty or wealth of the Irowarinun family.

In computing these damages, consider the losses suffered by all plaintiffs in the Irowarinun family and return a verdict of a single amount for the Irowarinun family. I will divide the amount among the plaintiffs in the Irowarinun family.”)

DEFENDANTS' OBJECTIONS TO PLAINTIFFS' PROPOSED ALTERNATIVE INSTRUCTION NO. 8.5 (WRONGFUL DEATH)

Defendants object to the first sentence in that it is vague and misleading. It does not specify that this claim is only brought by Ken Wiwa and Blessing Kpuinen. It reads as though any plaintiff can prove this claim for wrongful death, which is not the case.

Plaintiffs' proposed alternative instruction is an inaccurate articulation of Nigerian law:

First, plaintiffs' proposed alternative instruction does not specify that any damages that may be recovered under the Fatal Accidents Act must be proportionate to the injury resulting from death. *See* Chaudry, Nigerian Law of Torts 211 (1978).

Second, plaintiffs' proposed alternative instruction does not focus on the main indicium in calculating allowable damages under the Fatal Accidents Act: pecuniary damages for the decedent's lost and future earnings. To the contrary, it does not mention earnings at all. Plaintiffs' proposed alternative instruction does not clearly articulate that under Nigerian law, only pecuniary losses are recoverable for a wrongful death claim under the Fatal Accidents Act. Plaintiffs' instruction simply states that the jury must calculate the "monetary value" of "love, companionship, comfort, care, assistance, protection, affection, society, [and/or] moral support", "loss of enjoyment of sexual relations" or "training and guidance", not *actual* monetary losses.

Third, plaintiffs have not cited to a single case under Nigerian law, nor can they, where a court has granted special damages for "love, companionship, comfort, care, assistance, protection, affection, society, [and/or] moral support". Nor can plaintiffs cite to a case under Nigerian law where damages were granted under the Fatal Accidents Act for "loss of enjoyment of sexual relations" or "training and guidance". As the Supreme Court of Nigeria stated in *Nwafor v. Nduka*, [1972] 4 S.C. 59 (quoting a British case), "[i]t is a hard matter of pounds, shillings and pence 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. . . . That sum, however, has to be taxed down by having regard to uncertainties, for instance, that the widow might have again remarried and thus ceased to be dependant; and other like matters of speculation and doubt". Chaudry 211-12 (quoting *Nwafor*).

Fourth, plaintiffs' proposed alternative instruction is confusing in that it does not clearly draw the line between pecuniary damages, which are recoverable under the Fatal Accidents Act, and sentimental damages, which are *not* recoverable under the Fatal Accidents Act. Chaudry 211-12.

Fifth, plaintiffs' instruction does not state that "funeral expenses" are recoverable under the Fatal Accidents Act, which is one of the only allowable additions to earnings in calculating damages.

J. Joint Proposed Instruction: Compensatory Damages for RICO Claim

In considering the issue of Plaintiffs Karalolo Kogbara's and Owens Wiwa's damages, if any, with respect to the RICO claim, you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the damages to plaintiffs in plaintiffs' business or property, no more and no less. Damages may not be based on speculation because it is only actual damages—what the law calls compensatory damages—that you are to determine.

Under Section 1964(c), plaintiffs may recover only for injury to plaintiffs' business or property. Injury to business may include lost profits and expenses incurred in connection with defendants' RICO violation and decrease in the value or worth of the business or property itself. Injury to property includes the value of any personal or real property that has been diminished in value by the defendants' actions.

Because Section 1964(c) limits plaintiffs' recovery to business or property injuries, you may not compensate plaintiffs for other losses, such as personal injuries or emotional harm.

You should consider the amount of damages, if any, as to each defendant with respect to each RICO claim separately and independently from the amount of damages, if any, with respect to the other, non-RICO claims. For example, and by way of example only, if you determine that damages should be awarded to either Karalolo Kogbara or Owens Wiwa under that plaintiff's RICO claim, you should award full, just and reasonable compensation for damages under the RICO claim, without regard to the damages, if any, you might award under any other claim brought by that plaintiff.

SOURCE: O'Malley et al., Federal Jury Practice and Instructions, § 161.90.

K. Plaintiffs' Proposed Jury Instruction No. 8.7: Punitive damages generally

In addition to actual damages, the law permits a jury, under certain circumstances, to award the injured person punitive and exemplary damages in order to punish the wrongdoer for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.

The specific guidelines for these punitive damages depend on the claims at issue.

Sources:

Federal Jury Practice and Instructions § 128.81 (“In addition to actual damages, the law permits a jury, under certain circumstances, to award the injured person punitive and exemplary damages in order to punish the wrongdoer for some extraordinary misconduct and to serve as an example or warning to others not to engage in such conduct.”)

DEFENDANTS' OBJECTIONS TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 8.7: PUNITIVE DAMAGES GENERALLY

Defendants object to this instruction as unnecessary and superfluous. Only one instruction for punitive damages is necessary.

International law does not recognize punitive damages so an instruction on plaintiffs' ATS claims is unnecessary. *Velásquez Rodríguez Case*, Inter-Am. C.H.R., Report No. 7/89, ¶ 38 (July 21, 1989); International Law Commission, Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 53rd Sess. 235, 245-46 & n.549, 279, (2001) (“[T]he award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms.”); *Re Letelier and Moffitt*, (1992) I.L.R., vol. 88, 727, at 741 (“It should firstly be reiterated that international law has not accepted as one of its principles the concept of punitive damages.”). And international law governs the substantive principles in this case. *See Sosa*, 542 U.S. at 732 n.20.

Therefore, only one punitive damages instruction should be given for plaintiffs' state law claims under Nigerian law.

L. Plaintiffs' Proposed Jury Instruction No. 8.8: Punitive damages (federal claims)

If you find from a preponderance of the evidence that any plaintiff is entitled to a verdict for actual or compensatory damages on their claims of extrajudicial execution, crimes against humanity, torture, cruel, inhuman, or degrading treatment, arbitrary arrest and detention, violations of the rights to life, liberty, and security of person and peaceful assembly and association, or RICO claims, and you further find that the act or omission of Brian Anderson, or of Shell Transport, or Royal Dutch Petroleum, acting through Shell Nigeria, proximately causing actual injury or damage to any plaintiff, was maliciously, or wantonly, or oppressively done, then you may add to the award of actual damages such amount as you shall unanimously agree to be proper, as punitive and exemplary damages.

An act or a failure to act is "maliciously" done, if prompted or accompanied by ill will, or spite, or grudge, either toward the injured person individually, or toward all persons in one or more groups or categories of which the injured person is a member.

An act or a failure to act is "wantonly" done, if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

An act or a failure to act is "oppressively" done, if done in a way or manner that injures, or damages, or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, or disability, or misfortune of another person.

You may also award punitive damages against Shell Transport and Royal Dutch Petroleum if you find that any plaintiff is entitled to a verdict for actual or compensatory damages on their claims of extrajudicial execution, crimes against humanity, torture, cruel, inhuman, or degrading treatment, arbitrary arrest and detention, or violations of the rights to life, liberty, and security of person and peaceful assembly and association, and that the Nigerian military or government agents who harmed the plaintiffs were acting as the agents of Shell Nigeria and:

- (a) Shell Nigeria or one or more of its managers authorized the doing and the manner of the acts that harmed the plaintiffs, or
- (b) the Nigerian military or government agents were unfit and Shell Nigeria or one or more of its managers was reckless in employing or retaining them, or
- (c) the Nigerian military or government agents were employed by Shell Nigeria in a managerial capacity and were acting in the scope of employment, or
- (d) Shell Nigeria or one or more of its managers ratified or approved the acts of the Nigerian military or government agents that harmed the plaintiffs.

While you may consider evidence of actual harm to nonparties as part of your determination of reprehensibility, you may not use it to punish a defendant for injury the defendant may have inflicted upon nonparties or those whom they directly represent.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering punitive damages, you may consider the degree of reprehensibility of the defendant's conduct and the relationship of any award of punitive damages to any actual harm inflicted on the plaintiff.

If you find that punitive damages should be assessed against any defendant, you may consider the financial resources of that defendant in fixing the amount of such damages, and you may assess punitive damages against one or more of the defendants, and not others, or against more than one defendant in different amounts.

Sources:

Filartiga v. Pena-Irala, 577 F. Supp. 860, 865 (E.D.N.Y. 1984) (“This court concludes that it is essential and proper to grant the remedy of punitive damages in order to give effect to the manifest objectives of the international prohibition against torture.”); *Todd v. Panjaitan*, No. CV-92-12255, 1994 WL 827111 (D. Mass. Oct. 26, 1994); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Doe v. Constant*, 04 Civ. 10108 (S.D.N.Y. 2006); *Martinez-Baca v. Suarez-Mason*, No. C-87-2057 (N.D. Cal. Apr. 22, 1988); *Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3627, 1996 U.S. Dist. LEXIS 4409 (S.D.N.Y. Apr. 9, 1996); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 441 (S.D.N.Y. 2002), *overruled on other grounds*, 386 F.3d 205 (2d Cir. 2004).

Rodriguez-Licea v. Curacao Drydock Co., 584 F. Supp. 2d 1355 (S.D. Fla. 2008) (awarding a total of \$50 million compensatory and \$30 million punitive damages against a corporation for ATS claims).

Doe v. Karadzic, No. 93 Civ. 0878 (PKL), 2001 U.S. Dist. LEXIS 12928 (S.D.N.Y. August 28, 2001) (noting jury award of “approximately \$ 4.5 billion in compensatory and punitive damages” against Radovan Karadzic for ATS violations under a theory of command responsibility).

Restatement (Second) of Torts § 909 (“Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if, (a) the principal or a managerial agent authorized the doing and the manner of the act, or (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or (d) the principal or a managerial agent of the principal ratified or approved the act.”)

Ninth Circuit Model Instruction No. 5.5 (“If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering punitive damages, you may consider the degree of reprehensibility of the defendant's conduct and the relationship of any award of punitive damages to any actual harm inflicted on the plaintiff.”)

Eleventh Circuit Pattern Jury Instructions (Civil Cases) Supplemental Damages Instruction No. 2.1 (“If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].”)

DEFENDANTS’ OBJECTIONS TO PLAINTIFFS’ PROPOSED JURY INSTRUCTION NO. 8.8: PUNITIVE DAMAGES (FEDERAL CLAIMS)

Defendants object to this instruction in its entirety because the jury should not be given a punitive damages instruction for plaintiffs’ ATS claims.

International law does not recognize punitive damages. *Velásquez Rodríguez Case*, Inter-Am. C.H.R., Report No. 7/89, ¶ 38 (July 21, 1989); International Law Commission, Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, 53rd Sess. 235, 245-46 & n.549, 279, (2001) (“[T]he award of punitive damages is not recognized in international law even in relation to serious breaches of obligations arising under peremptory norms.”); *Re Letelier and Moffitt*, (1992) I.L.R., vol. 88, 727, at 741 (“It should firstly be reiterated that international law has not accepted as one of its principles the concept of punitive damages.”). And international law governs the substantive principles in this case. *See Sosa*, 542 U.S. at 732 n.20. Moreover, an instruction on punitive damages is improper in this case because no U.S. court that has awarded punitive damages to a plaintiff under the ATS has done so against a private actor or corporation based on theories of indirect liability.

Even if an instruction for punitive damages were proper based on federal common law, which it is not, plaintiffs’ instruction is flawed. Plaintiffs’ own cited sources, model instructions from the Ninth Circuit and Eleventh Circuit, both make clear that it is *defendants’ conduct* that must be malicious, oppressive or in complete disregard of plaintiffs’ rights. Neither model instruction states that a defendant may be held liable for punitive damages for the conduct of another party. Additionally, plaintiffs’ second test for the recovery of punitive damages is confined to an indirect theory of liability based on agency. Thus, plaintiffs would not be able to recover punitive damages if, for example, they proved the elements of aiding and abetting a substantive ATS claim, or that defendants were engaged in a joint venture to violate one of plaintiffs’ ATS claims.

M. Plaintiffs' Proposed Jury Instruction No. 8.9: Punitive damages (New York claims)

If you find from a preponderance of the evidence that any plaintiff is entitled to a verdict for actual or compensatory damages on their claims of assault, battery, negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, or wrongful death, and you further find that the acts or omissions of Brian Anderson, or of Shell Transport, or Royal Dutch Petroleum, acting through Shell Nigeria, that caused the injury complained of were wanton and reckless or malicious, you may, but are not required to, award that plaintiff punitive damages.

Punitive damages may be awarded for conduct that represents a high degree of immorality and shows such wanton dishonesty as to imply a criminal indifference to civil obligations. The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant for wanton and reckless or malicious acts and thereby to discourage the defendant and other people or companies from acting in a similar way in the future.

An act is malicious when it is done deliberately with knowledge of the plaintiff's rights, and with the intent to interfere with those rights.

An act is wanton and reckless when it demonstrates conscious indifference and utter disregard of its effect upon the health, safety and rights of others.

If you find that the acts or omissions of Brian Anderson, or of Shell Transport, or Royal Dutch Petroleum, acting through Shell Nigeria, were not wanton and reckless or malicious, you need proceed no further in your deliberations on this issue. On the other hand, if you find that these acts or omissions were wanton and reckless or malicious, you may award AB punitive damages.

In arriving at your decision as to the amount of punitive damages you should consider the nature and reprehensibility of what the defendants and Shell Nigeria did. That would include the character of the wrongdoing, such as whether the conduct demonstrated an indifference to, or a reckless disregard of, the health, safety or rights of others, whether the acts were done with an improper motive or vindictiveness, whether the acts constituted outrageous or oppressive intentional misconduct, how long the conduct went on, the defendants' and Shell Nigeria's awareness of what harm the conduct caused or was likely to cause, any concealment or covering up of the wrongdoing, how often the defendants and Shell Nigeria had committed similar acts of this type in the past and the actual and potential harm created by the conduct, including the harm to individuals or entities other than the plaintiffs. However, although you may consider the harm to individuals or entities other than the plaintiffs in determining the extent to which the conduct was reprehensible, you may not add a specific amount to your punitive damages award to punish the defendants for the harm caused to others.

The amount of punitive damages that you award must be both reasonable and proportionate to the actual and potential harm suffered by the plaintiffs, and to the

compensatory damages you awarded to the plaintiffs. The reprehensibility of the conduct is an important factor in deciding the amount of punitive damages that would be reasonable and proportionate in view of the harm suffered by the plaintiffs and the compensatory damages you have awarded to the plaintiffs.

You may also consider the defendants' financial condition and the impact your punitive damages award will have on the defendants.

Sources:

New York Pattern Jury Instructions--Civil 2:278 ("In addition to awarding damages to compensate the plaintiff AB for (his, her) injuries, you may, but you are not required to, award AB punitive damages if you find that the act(s) of the defendant CD that caused the injury complained of (was, were) [*use applicable phrase or term:*] (wanton and reckless, malicious). Punitive damages may be awarded for conduct that represents a high degree of immorality [*add where applicable:*] (and shows such wanton dishonesty as to imply a criminal indifference to civil obligations). The purpose of punitive damages is not to compensate the plaintiff but to punish the defendant for (wanton and reckless, malicious) acts and thereby to discourage the defendant and other (people, companies) from acting in a similar way in the futureAn act is malicious when it is done deliberately with knowledge of the plaintiff's rights, and with the intent to interfere with those rights. An act is wanton and reckless when it demonstrates conscious indifference and utter disregard of its effect upon the health, safety and rights of others. If you find that CD's act(s) (was, were) not wanton and reckless or malicious, you need proceed no further in your deliberations on this issue. On the other hand, if you find that CD's act(s) (was, were) wanton and reckless or malicious, you may award AB punitive damages. . . . In arriving at your decision as to the amount of punitive damages you should consider the nature and reprehensibility of what CD did. That would include the character of the wrongdoing, [*state the factors that are applicable, such as:*] whether CD's conduct demonstrated an indifference to, or a reckless disregard of, the health, safety or rights of others, whether the act(s) (was, were) done with an improper motive or vindictiveness, whether the act or acts constituted outrageous or oppressive intentional misconduct, how long the conduct went on, CD's awareness of what harm the conduct caused or was likely to cause, any concealment or covering up of the wrongdoing, how often CD had committed similar acts of this type in the past and the actual and potential harm created by CD's conduct [*add where appropriate:*] (including the harm to individuals or entities other than plaintiff AB. However, although you may consider the harm to individuals or entities other than plaintiff AB in determining the extent to which CD's conduct was reprehensible, you may not add a specific amount to your punitive damages award to punish CD for the harm CD caused to others.) The amount of punitive damages that you award must be both reasonable and proportionate to the actual and potential harm suffered by AB, and to the compensatory damages you awarded AB. The reprehensibility of CD's conduct is an important factor in deciding the amount of punitive damages that would be reasonable and proportionate in view of the harm suffered by AB and the compensatory damages you have awarded AB. You may also consider the defendant CD's financial condition and the impact your punitive damages award will have on CD.")

DEFENDANTS' OBJECTIONS TO PLAINTIFFS' PROPOSED JURY INSTRUCTION NO. 8.9: PUNITIVE DAMAGES (NEW YORK CLAIMS)

Defendants object to plaintiffs' proposed instruction for punitive damages under New York law in its entirety because under a New York choice of law analysis, Nigerian law provides the applicable substantive law for any punitive damages instruction for plaintiffs' state law claims because (1) the alleged injuries occurred in Nigeria, (2) the alleged conduct that caused the alleged injuries occurred in Nigeria, (3) the plaintiffs are Nigerian citizens, and (4) Nigeria has the most significant relationship to plaintiffs and the alleged injuries. (*See* Defs'. R&O Stmt. Part I.A.); *see also Cooney v. Osgood Mach., Inc.*, 81 N.Y.2d 66, 72 (1993); *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 84 N.Y.2d 309, 642 N.E.2d 1065 (1994); *James v. Powell*, 19 N.Y.2d 249, 225 N.E.2d 741 (1967); Restatement (Second) of Conflict of Laws § 145.

Even assuming that New York law provides the substantive law for plaintiffs' proposed punitive damages instruction, which it does not, plaintiffs' instruction is both incorrect and incomplete. An instruction for punitive damages is improper in this case even under New York law because a state does not have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside the state's jurisdiction. *State Farm Mut. Ins. Co. v. Campbell*, 538 U.S. 408, 421-22 (2003).

Defendants further object to plaintiffs' proposed instruction because the only source of law that plaintiffs rely on for their instruction, New York Pattern Jury Instructions--Civil 2:278, does not state that a defendant can be liable for punitive damages under an indirect theory of liability. And plaintiffs fail to cite any source of New York law in support of that proposition.

Defendants also object because plaintiffs' proposed instruction also does not set forth plaintiffs' burden of proof to prove punitive damages. Under New York law, plaintiffs must prove punitive damages by "clear and convincing evidence". *See Randi A.J. v. Long Island Surgi-Center*, 46 A.D.3d 74, 842 N.Y.S.2d 558 (App. Div. 2007).

N. Defendants' Proposed Instruction: Punitive Damages¹

In addition to actual damages, the law permits a jury, under certain circumstances, to award the injured person punitive, or exemplary, damages, in order to punish the wrongdoer for some extraordinary misconduct, and to serve as an example or warning to others not to engage in such conduct. If no exceptional circumstances exist, then you cannot award punitive damages.

Customary international law does not recognize or permit punitive damages against private actors for claims of indirect liability. Therefore, you may not consider any of the ATS claims in determining whether to award punitive damages. With respect to the other claims under state law, Nigerian law applies and I will now instruct you on what that law requires to be proven in order to justify an award of punitive damages.

If you find from a preponderance of the evidence in the case that plaintiffs are entitled to a verdict for actual or compensatory damages, then you may add to the award of actual damages only under limited circumstances. Plaintiffs must specifically plead and claim punitive damages, and they must strictly prove them.

To add punitive, or exemplary, damages to plaintiffs' actual damages, it is not sufficient to simply show that defendants' conduct proximately caused actual injury or damage to plaintiffs. Punitive damages can only be awarded if the conduct of defendants was high-handed, outrageous, insolent, vindictive, oppressive or malicious, and defendants' conduct demonstrated contempt for plaintiffs' rights, or a complete

¹ Defendants object to any punitive damages instruction in its entirety. (*See* Defs.' R&O Stmt. Part IV.)

disregard of every principle that defines the conduct of civilized people. That is, defendants' conduct must have been so outrageous that it disclosed malice, fraud, cruelty, insolence, and a flagrant disregard of the law in order for you to award punitive damages.

If you find that defendants' conduct was high-handed, outrageous, insolent, vindictive, oppressive or malicious, and that it demonstrated a complete disregard for the principles of civilized people, then you may add to the award of actual damages such amount as you shall unanimously agree to be proper as punitive and exemplary damages.

Whether or not to make any award of punitive damages on plaintiffs' state law claims, in addition to actual damages, is a matter exclusively within the province of the jury, if you unanimously find, beyond a reasonable doubt with respect to the Nigerian law claims, that defendants' conduct, which proximately caused actual damage to plaintiffs, was high-handed, outrageous, insolent, vindictive, oppressive or malicious, and that it demonstrated a complete disregard for the principles of civilized people. You should always bear in mind that such extraordinary damages may be allowed only if you should first unanimously award plaintiffs a verdict for actual or compensatory damages.

You should also bear in mind, not only the conditions under which and the purposes for which the law permits an award of punitive and exemplary damages to be made, but also the requirement of the law that the amount of such extraordinary damages, when awarded, must be fixed with calm discretion and sound reason, and must never be either awarded, or fixed in amount because of any sympathy, or bias, or prejudice with respect to any party to the case.

SOURCES: *Odiba v Azege* (1998) 9 N.W.L.R. (Pt. 566) 370, 382, 386; *A.G. Federation v. Ajayi*, [2000] 12 N.W.L.R. (Pt. 682) 509, 536 (citing *Eliochin (Nig.) Ltd. v. Mbadiwe*,

[1986] 1 N.W.L.R. (Pt. 14) 47; *Williams v. Daily Times of (Nig.) Ltd.*, [1990] 1 N.W.L.R. (Pt. 124) 1; O'Malley et al., Federal Jury Practice and Instructions § 128.81.

PLAINTIFFS' OBJECTIONS:

Plaintiffs object to the application of Nigerian law to determine punitive damages for the ATS claims; these claims are governed by federal common law and general federal damages instructions are appropriate. Plaintiffs further object to the application of Nigerian law to determine punitive damages for the state law claims, as set forth in the choice of law argument, because New York law applies to these claims.

With respect to the ATS claims, plaintiffs object to the statement that no punitive damages are allowed for such claims. This statement has no support whatsoever in defendants' sources. In fact, numerous ATS cases have awarded punitive damages. *See, e.g., Filartiga v. Pena-Irala*, 577 F. Supp. 860, 867 (E.D.N.Y. 1984); *Todd v. Panjaitan*, No. CV-92-12255, 1994 WL 827111 (D. Mass. Oct. 26, 1994); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995); *Doe v. Constant*, 04 Civ. 10108 (S.D.N.Y. 2006); *Martinez-Baca v. Suarez-Mason*, No. C-87-2057 (N.D. Cal. Apr. 22, 1988); *Mushikiwabo v. Barayagwiza*, No. 94 Civ. 3627, 1996 U.S. Dist. LEXIS 4409 (S.D.N.Y. Apr. 9, 1996); *Tachiona v. Mugabe*, 234 F. Supp. 2d 401, 441 (S.D.N.Y. 2002), *overruled on other grounds*, 386 F.3d 205 (2d Cir. 2004). It would not matter if no case had awarded "punitive damages against private actors for claims of indirect liability," because no case has rejected such damages and defendants put forth no reason why they would be precluded. But this statement is not, in fact, true. In *Doe v. Karadzic*, No. 93 Civ. 0878 (PKL), 2001 U.S. Dist. LEXIS 12928 (S.D.N.Y. August 28, 2001), the court noted that the jury had awarded "approximately \$ 4.5 billion in compensatory and punitive damages" against Radovan Karadzic, the Bosnian Serb leader, "for acts of genocide, including murder, rape, torture, and other torts, committed in Bosnia-Herzegovina by individuals under [his] command and control." *Id.* at*1-2. Command responsibility is, of course a theory of indirect liability; Karadzic did not pull the trigger himself. Nor was Karadzic a public official; as the court noted, "Plaintiffs alleged that Karadzic acted in an official capacity as either the titular head of Srpska or in collaboration with the government of Bosnia-Herzegovina and its dominant constituent republic, Serbia." *Id.* at *2. Indeed, *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), was the seminal case in which the Second Circuit confirmed that Karadzic "may be found liable for genocide, war crimes, and crimes against humanity in his private capacity," and may be found liable "for other violations in his capacity as a state actor," *id.* at 236, based in part on the theory that he "act[ed] in concert with Yugoslav officials or with significant Yugoslavian aid." *Id.* at 245. Thus, courts have awarded punitive damages under the ATS against private actors based on indirect liability. *See also See, e.g. Chavez v. Carranza*, No. 06-6234, ___ F.3d ___, 2009 U.S. App. LEXIS 5556, *26-27 (6th Cir. Mar. 17, 2009) (affirming command responsibility instructions after jury award of \$1 million in punitive damages).

Regardless of whether Nigerian law applies, plaintiffs make the following additional objections.

There is no support for the notion that punitive damages must be “strictly proved.” This makes no sense; punitive damages are not compensatory, so there is no way in which they could be proved. Nor does it make any sense to instruct the jury that plaintiffs must “plead” punitive damages, as the jury has no way of knowing what the plaintiffs’ pleadings are, nor is this even a question for the jury. (As noted above, in Nigeria damages awards are made by judges.)

Plaintiffs object to the reference to proximate causation. As noted above, proximate causation is not an element of many of plaintiffs’ theories of liability. Indeed, it is not an element of the command responsibility doctrine under which Radovan Karadzic was held liable. *See, e.g. Chavez v. Carranza*, No. 06-6234, ___ F.3d ___, 2009 U.S. App. LEXIS 5556, *26 (6th Cir. Mar. 17, 2009) (“The law of command responsibility does not require proof that a commander’s behavior proximately caused the victim’s injuries.”) (affirming ; *see also Hilao v. Estate of Marcos*, 103 F.3d 767, 776-79 (9th Cir. 1996) (same).

Plaintiffs object to the notion that only defendants’ own conduct, and not conduct attributable to defendants under the theories of liability, may be considered. There is no support for this in the sources cited.

Plaintiffs object to the instruction that defendants’ conduct must have “disclosed malice, fraud, cruelty, insolence, **and** a flagrant disregard of the law in order for you to award punitive damages.” This should be disjunctive at the very least; the sources cited do not indicate that *all* of these must be shown. In fact, a Nigerian treatise indicates that any of these is sufficient: “[E]xemplary damages are awarded whenever the defendant’s conduct is sufficiently outrageous to merit punishment, as where it discloses malice, fraud, cruelty, insolence, flagrant disregard of the law etc.” L.P. Enemo, 2 Notes on the Law of Tort 196 (1998). Plaintiffs also object to the purported requirement that defendants’ conduct demonstrate “a complete disregard for the principles of civilized people.” The first time this phrase is used, it is disjunctive to the alternative that defendants’ conduct “demonstrated contempt for plaintiffs’ rights.” This is in accord with the source, *Odiba v. Azege*, (1998) 9 N.W.L.R. (Pt. 566) 370, 386. The second time, this alternative is missing. In both cases, the language should be, “**either** demonstrated contempt for plaintiffs’ rights, **or** demonstrated a complete disregard for the principles of civilized people.”

If the Court is inclined to apply Nigerian law to punitive damages for federal claims, state law claims, or both, plaintiffs propose the following instruction, adopted in *Bowoto v. Chevron Corp.*:

Plaintiffs’ Alternative Proposed Jury Instruction No. 8.7-8.9 - Punitive Damages (Nigerian law)

If you find from a preponderance of the evidence that any plaintiff is entitled to a verdict for actual or compensatory damages on their claims of [*extrajudicial execution, crimes against humanity, torture, cruel, inhuman, or degrading treatment, arbitrary arrest and*

detention, violations of the rights to life, liberty, and security of person and peaceful assembly and association, RICO claims], assault, battery, negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, or wrongful death, you may, but are not required to, award that plaintiff punitive damages.

You may award punitive damages only if you find that:

- (a) defendants are liable for oppressive, arbitrary or unconstitutional actions of servants of the government, OR
- (b) defendants' conduct, or Shell Nigeria's conduct that is attributable to one or more defendants, was calculated by defendants or Shell Nigeria to make a profit for them which may well exceed the compensation payable to the plaintiffs, OR
- (c) defendants' conduct, or Shell Nigeria's conduct that is attributable to one or more defendants, was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering punitive damages, you may consider the degree of reprehensibility of the defendant's conduct and the relationship of any award of punitive damages to any actual harm inflicted on the plaintiff.

If you find that punitive damages should be assessed against any defendant, you may consider the financial resources of that defendant in fixing the amount of such damages, and you may assess punitive damages against one or more of the defendants, and not others, or against more than one defendant in different amounts.

Sources:

Rookes v. Barnard [1964] AC 1136, 1129 (“The first category [of cases in which punitive damages are appropriate] is oppressive, arbitrary or unconstitutional action by the servants of the government. . . . Cases in the second category are those in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff.”)

Williams v. Daily Times of Nigeria, Ltd., SC 21 (1987) (relying on *Rookes v. Barnard* and stating that exemplary damages may be awarded where there are “oppressive, arbitrary or unconstitutional action by servants of the Government,” as well as “where the defendant's act which has been held to be tortious was done with a guilty knowledge, the motive being that the chances of economic advantage outweigh the chances of economic or even (perhaps) physical penalty”).

First Bank of Nigeria Plc v. Ibennah [1996] 5 NWLR (pt. 451) 724, 742 (relying on *Rookes v. Barnard*, and stating, “Exemplary damages are damages on an increased scale awarded to the plaintiff . . . where the wrong done to him was aggravated by circumstances of violence, oppression, malice, fraud, or wanton and wicked conduct”); L.P. Enemo, 2 Notes on the Law of Tort 196 (1998) (“[E]xemplary damages are

awarded whenever the defendant's conduct is sufficiently outrageous to merit punishment, as where it discloses malice, fraud, cruelty, insolence, flagrant disregard of the law etc."); *Mosley v. News Group Newspapers Ltd.* [2008] All ER (D) 322 (Q.B. July 24, 2008) (acknowledging that "vicarious liability in the context of exemplary damages . . . extend[s] . . . [to] cases where there has been oppressive or arbitrary conduct on the part of a public official," but concluding, in a case involving the second *Rookes v. Barnard* category of acts calculated to profit the defendant, that exemplary damages were also available: "I do not believe it would be right for me . . . to conclude that exemplary damages (if otherwise appropriate) could not be awarded merely because this Defendant's liability would be on a purely vicarious basis.").

Ninth Circuit Model Instruction No. 5.5 ("If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering punitive damages, you may consider the degree of reprehensibility of the defendant's conduct and the relationship of any award of punitive damages to any actual harm inflicted on the plaintiff.")

Eleventh Circuit Pattern Jury Instructions (Civil Cases) Supplemental Damages Instruction No. 2.1 ("If you find that punitive damages should be assessed against the Defendant, you may consider the financial resources of the Defendant in fixing the amount of such damages [and you may assess punitive damages against one or more of the Defendants, and not others, or against more than one Defendant in different amounts].")

DEFENDANTS' OBJECTION TO PLAINTIFFS' PROPOSED ALTERNATIVE INSTRUCTION (PUNITIVE DAMAGES)

Defendants object to the first paragraph of plaintiffs' proposed alternative instruction because it is an inaccurate articulation of Nigerian law and it is confusing to the jury. The jury may confuse the burden of proof required to prove plaintiffs' claims for assault and battery, which is proof beyond a reasonable doubt under Nigerian law, and the burden of proof in proving damages. Furthermore, there are no causes of action for intentional infliction of emotional distress or negligent infliction of emotional distress under Nigerian law. Thus, they should not be included in the instruction. Finally, plaintiffs do not cite to a single case under Nigerian law where a court has awarded punitive damages under the Fatal Accidents Act.

Defendants object to the second paragraph of plaintiffs' proposed alternative instruction as there are not three alternative tests under Nigerian law to determine punitive damages. The jury must determine whether *defendants' conduct*, not that of SPDC or the Nigerian Government, was "high-handed, outrageous, insolent, vindictive, oppressive or malicious", and whether that conduct demonstrated "contempt for plaintiffs' rights, or a complete disregard of every principle that defines the conduct of civilized people". *Odiba v Azege* (1998) 9 N.W.L.R. (Pt. 566) 370, 382, 386; *A.G. Federation v. Ajayi*, [2000] 12 N.W.L.R. (Pt. 682) 509, 536 (citing *Eliochin (Nig.) Ltd. v.*

Mbadiwe, [1986] 1 N.W.L.R. (Pt. 14) 47; *Williams v. Daily Times of (Nig.) Ltd.*, [1990] 1 N.W.L.R. (Pt. 124) 1.

Plaintiffs' first test in the second paragraph is flawed in that it is vague and overbroad, and it relies on terminology that has no basis in Nigerian law. Whether a person's conduct is "arbitrary or unconstitutional" is not a measure as to whether a plaintiff is entitled to recover punitive damages under Nigerian law. And the terms "arbitrary and unconstitutional" are overbroad because even if "arbitrary and unconstitutional" were the test for punitive damages under Nigerian law, which it is not, not all "arbitrary and unconstitutional" conduct is subject to punitive damages.

Plaintiffs' second test in the second paragraph has no basis in Nigerian law. Measuring a defendant's profits against what a plaintiff may recover as compensatory damages has no basis under Nigerian law. Plaintiffs' reliance on an English case is misplaced.

Defendants object to plaintiffs' third test for the reasons already articulated above, that is, the jury must look at *defendants' conduct*, not that of SPDC or the Nigerian Government, in determining whether punitive damages are warranted.

Defendants object to the third paragraph of plaintiffs' proposed alternative instruction as it is based on a Ninth Circuit model instruction.

Defendants object to the fourth and final paragraph of plaintiffs' proposed alternative instruction as it is based on an Eleventh Circuit model instruction. There is no basis in Nigerian law to consider a defendant's "financial resources" in determining a punitive damages amount.