THE TORT OF NEGLIGENCE UNDER NIGERIA LAW

BY

S. M. G. KANAM

D E C L A R A T I O N

I hereby declare that this work is original. It has not been presented or published anywhere at any time by anybody, institution or organisation. All published and unpublished works cited have been acknowledged.

S.M.G. KANEM

DATE.....

C E R T I F I C A T I O N

The Thesis entitled "THE TORTS OF NEGLIGENCE UNDER NIGERIAN LAW" by Saleh Mohammed meets regulations governing the award of the Degree of Master of Laws of Ahmadu Bello University, and is approved for its contribution to knowledge and literary presentation.

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D E D I C A T I O N

TO

My wife, Lubabatu Abdullahi Baba
and my children, Safinat and Sakinat.

A C K N O W L E D G E M E N T S

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A B S T R A C T

In Nigeria, the period immediately after independence to date has witnessed tremendous upsurge in commercial and industrial developments. The number of traffics on our Roads also kept increasing day in day out. All these achievements are not without their negative aspects. For example, in the industrial rector, there are the hazards of people getting maimed or incapacitated for life if care is not taken in ensuring the safety of their places of work because of the dangercue nature of the machines normally installed for used in such places and atimes even the nature of the place Itself.

In the area of business transsctioncspecially between companies and companies, between companies and individuals or between individuals intense the exercise of duetcare and deligence is also very relevant otherwise financial or economic loss may be sustained by one of the parties to such transactions. Thus, for example where two parties sffree that all documents, drafts, bills of lidding turn invoices in connection to a certain business transaction between them are to be drawn in favour of one of them but the other party negligently and in breach of the agreement directed that such documents should be drawn in favour of a different person,then the affected party is entitle to institute an

action to claim damages for the loss suffered as a result of the negligent act of the other party. Again there are instances when some one will, before embarking on any business transaction or before concluding any agreement with any one with regsrd to any business, first of all aeek the advise of people whom he believe have enough experience in such business or are professionals (such as lawyers) on haw to go about the business or on what needed to be done before the agreement la concluded. Here too, proper care must be exercised in offering such advise inorder that the seeker of the advise does not sustain loss. Similarly, large number of cars that ply our orads day end night entail great danger to human life if proper care is not taken in their management on the roads. Infect there la hardly any human activity today that does not require the exercise of care and dellgence in its performance.

The choice of this topic i.e. 'the tort of negligence under Nigerian Law[1] la therefore predicated upon the above brief analysis, since negligence is the product of lack of the exercise of care or dellgence in the performance of % certain thing. And the objective of the research is that of making it's resders aware of their rights concerning any harm or loss they may sustained as a result of someones lack of the exercise of care and also for them to know the possible defences their opponents amy raise in denial of their claims so that they will know how to take care of them. The research alao seta out to investigate the applicability or otherwise of the imported English Common Laws in Nigeria.

The work is divided into five chapters. In chapter one, we shall discuss the duty of care. Here, we shall strive towards revealing when someone is under a duty to exercise due care and deligence towards others and the consequences of ones failure to exercise such duty. Sub-topics such resenable foreseability, duty of care and financial and economic loss, negligent misstatement and financial or economic loss and nervous shock.

In chapter two we shall be discussing by way of illustrations certain persons and organisations that owe duty of care to others in the conduct of their affairs or in the course of their operations. We shall in particular-discuss Lawyers, Doctors and Bankers as our illustrations. We shall end the discussion in the chapter by discussing the standard of care to be exhibited by persons especially with regard to the kind of activity undertaken, the type of person involved, the difficulty or otherwise in bringing the situation under control and whether the person fi;om whom the duty is required to be exercised is a professional or not.

Chapter three of the work shall deal with remoteness of damages. Under this chapter we shall be discussing instances when even though a person is negligent with regard to performance or non performance of a certain duty or function, yet his inability is not the fundamental cause of loss or injury sustained by the complinant. Two principal test of remoteness of damages viz the direct consequences

test and the foresenbility test shall be our main sub-topics in this chapter. Under them we shall also discuss the egg-shell skull rule, extent of harm rule, to the extraneous matters rule, manner of occurrence of damage and the type of harm respectively.

Chapter four of the work shall be aentred on the principal defences to liability in negligence. This include contributory negligence, volenti non fit injuria, inevitable accident and limitation of action.

Finally, in the concluding chapter, i.e. chapter five, a summary of the whole work shall be made, observations concerning the adequacy or otherwise of the law or it's implementation shall also be made and based on our observation Appropriate suggestions or recommendations shall be made on how to improve the law or how best to implement it.

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CHAPTER ONE

1.0 THE DUTY OF CARE

1.1 INTRODUCTION:

If not in practice, at least in theory basically all aspects of human activity is today likely to be rested for social adequacy by one or the other of the principles of law of negligence. It is for this reason that for any indepth research in modern law of torts to be successful, mention must be not only be made, but a detailed survey of this area of the law is expedient.

However, the tort of negligence became recognised in law as a seperate and independent group of liability only in the nineteenth century. Before this period it was only treated as a mental element in the commission of other torts.

It is however, not any act of carelessness that is actionable under the law of negligence. To this end, the tort of negligence has been defined as a the breach of a legal duty to take care which results in damage undersired by the defendant, to the plaintiff. Therefore, for one to succeed in an action for negligence, he must prove the following:

a) the existence of a duty to take care owing to the complainant by the defendant.

b) breach of that duty by the defendant and

c) damage suffered by the plaintiff as a result of the defendant's breach of the duty to take care

1.2 NATURE OF THE DUTY OF CARE:

It is not in all cases that negligence brings about liability for damage caused as a result. Liability can only occur where there is a legal duty on the part of the person concern to take care. Indeed it has been submitted that negligence cannot be committed in the air.[1] Therefore, a person may be as negligent as he likes provided he does not owe any one a duty to take care. It may be argued that the word 'duty' is not limited to the tort of negligence but a feature of all torts. For example there is a legal duty not to commit assault or battery, not to commit defamation or misance e.t.c. However, it has been submitted that all that 'duty' implies in these other torts is that you must not commit them.[2] It does not shade light on their essential constitutents. For example, it did not say what the plaintiff must prove in order to be successful in a case of assult. Breach of a duty is the most important element of the tort seconded obly by damage to the plaintiff.

The existence of the duty of care is therefore very essential and crucial for the purpose of determining liability in the tort of negligence. The need for this duty of care has been expressed by Lord Whrit where he said:-

> All that is necessary as a step to establish the tort of actionable negligence is to define the precise relationship from which the duty to take care is to be deduced. It is, however, essential in English law that the duty should be established: the mere fact that a man is injured by anothers act gives in itself no cause of action if the act is deliberate, the party injured will have no claim in law even though the injury is intentional, so long as the other party is merely exercising a legal right; if the act involves lack of due care, again no case of actionable negligence will arise unless the duty to be carefu exists[3]

Thus, a person is entitled to be as negligent as he pleases towards the whole world provided that he did not owe them a duty to take care.[4] And unless it is established (i.e. the duty to take care) any action in negligence is bound to fail. What then is the criteria for determining when a person owes a duty to take care?

The principal criterion for this (especially where there is no precedent) is said to be that of 'foreseability' of injury.[5] In otherwords the defendant must be proved to owe a duty to the injured plaintiff to act or not to act the way he acted. Therefore one can rightly say that some one who is suppose to foresee that his conduct may cause injury to another if he does not take reasonable care is thus under a duty to take care.

The circumstances under which a duty to take care exists have been gradually developed by the courts via their decisions that in certain cases there was a duty and in others there was none. There have however been difficulty in laying down a general principle for determining the existence of the duty to take care.

The first attempt in this regard was made by Lord Eisher (then known as Brett M.R.) in the case of Heaven v. Pender[6] who stated as follows:

> Whenever one person who is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.'

This principle was said to have been stated too wide.[7a] It appears that even Lord Eisher himself realised this fact because he later restricted the formulation in Le Leivre v. Gould[7b] by stating that "if one man is near to another or is near to the property of another a duty lies upon him not to do that which may cause personal injury to that other, or may injure his property".

However, the most popular generalisation of the rule determining liability is to be found in Lord Atkin's neighbour principle. He stated the rule in his Obiter dictum in the case of Donoghue v. Stevenson[8] thus:

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

In that case, (Donoghue v. Stevenson) a manufacturer of ginger - beer had sold to a retailer ginger-beer in an opaque bottle. The retailer in turn sold it to 'A' who entertain a friend of hers with it's contents among which was the decomposed remains of a snail which has entered the bottle at the factory. The friend sued the manufacturer for negligence alleging that she became seriously ill as a result of drinking the ginger-beer manufactured by the defendant which contained decomposed remains of a snail. No contract existed between the plaintiff and the defendant which means that going by the doctrine of privity of contract, the defendant owed her no any contractual duty of care. However, the House of Lords by a majority decision hold the defendant liable in tort because according to their Lordships, he has a duty to ensure that the bottle did not contain any noxious matter which will be harmful to the consumers of his product and that duty has not from all indications been discharged. By this decision it is now abundantly clear that one doesn't need to have a contractual relationship with another before he can sue him for damages he suffered as a result of his acts or ommissions if he can prove to the court that he is of the class of persons the defendant aught to have them in contemplation when directing his mind to the acts or omission which gave rise to the case.

It is important to know also at this juncture that neighbour in this case does not necessarily mean physical proximity alone but it means both physical and legal proximity. This is because there may be instances when one may be physically close to another but yet his acts or omissions may not come within the ambit of this principle. For example one may have a plot adjoining that on which the other has just erected a house, and the second man may build a house which shuts out the view of the first house and depreciates its value. He owes no legal duty not to do this but he has caused injury to the man near him. On the other hand one may be miles away from another but yet his act may come within the ambit of the principle. A good illustration is the case of Donoghue v. Stevenson already explained.

The rule has been applied to manufacturers of cars[9], builders[10], makers of wearing apparels[11], suppliers of food stuff[12] e.t.c.

The dictum was not itself the ratio decidendi of the case but it proved very useful and important for the simple reason that through it, there emerged for the first time a new category of duties viz: the duties of manufacturers of goods to ultimate consumers, independent of contract. This has led to rest all doubts about whether the tort of negligence was capable of further expansion or not. The court's verdict clearly shows that judges are now

focusing their attentions on new development especially that of mass production and complex marketing of good involving so many intermediaries between the manufacturers of goods on the one hand and the consumers on the other. And have by delibrate and conscious work of judicial law making, decided to impose on manufacturers certain minimum standards of care. However, Lord Atkins neighbour principle have been criticised as having been stated too wide[13]. It's critics allude to it's limitations[14] and the lack of precedence[15] as their grounds for such criticisms.

It is therefore the view of some of the critics that each case should (especially where there is no precedence) be decided on it's own merits through careful examination to establish the existence or none existence of the duty to take care.[16] One of the frontline critics of the neighbour principle in the person of du Parca L. J. aired his own views in the case of Deyong v. Shenburn[17] as follows:

> There are well-known words of Lord Atkin in Donoghue v. Stevenson as to the duty towards one's neighbour. It has been pointed out (and this only shows the difficulty of stating a general proposition which is not too wide) that unless one somewhat narrows the terms of the proposition as it has been stated, one would be including in it some thing which the law cannot support. It is not true to say that wherever a man finds himself in such a position that unless he does a certain act, another person may suffer, or that if he does something another person will suffer, then it is his duty in the one case to be careful to do the act and in the other case to be careful not to do the act. Any such proposition is too wide. There has to be a breach of a duty which the law recognises, and to ascertain what

the law recognises regard must be had to the decisions of the courts.

It appeared Lord Atkin himself later modified his wide proposition and make it restrictive when he said "everybody whether discharging a public duty or not is under a common law duty to some persons in some circumstances to conduct himself with reasonable care so as not to injure those persons likely to be affected by his want of care"[18] Since the use of the phrases 'some persons' and 'some circumstances' clearly shows that it is not to all classes of people or in all circumstances that one bears the duty to take care. This is in contradistinction to the principle he formulated earlier in Donoghue v. Stevenson (Supra) which tend to suggest so. It is hereby submitted that this leter modification represents a better postulation of the law since as we have already seen it is not in all cases that proximity (whether legal or physical) goes along with it a duty to take care. In otherwords it is not in all cases where harm is foreseable that the duty to take care is owed. Policy issues are a times also taken into account in deciding a case. This have nothing to do with the issue of proximity and so neighbour principle does not apply to it.

One question which one may be tempted to ask is whether the neighbour principle is extensible to purely physical harm and purely financial harm? One may answer the above question in the affirmative because of the following

judgements of the courts:

(a) Junior Books Ltd V. Veitchi Co. Ltd:[19] Here, it was held that a nominated specialist subcontractor might be liable for economic loss caused to the building owner by negligent performance of the sub-contracted work, in circumstances where the building owner had, to the sub-contractors knowledge, relied on his skill and experience.

(b) McLaugwin v. O'Brian.[20] In this case, one of the children of the plaintiff was killed and the other two plus her husband were seriously injured. The plaintiff herself was at home miles away from the scene of the accident but when the news of the accident reached her and was taken to the hospital where she wes shown the injured members of her family and told that her youngest child was dead, she suffered severe shock, organic depression and a change of personality. The House of Lords extended the doctrine of nervous shock and held that her injury was foreseable by the defendant and was thus liable.

(c) Attia v. British Gas PLC:[21] The defendant's men had been installing central heating/machine in the plaintiff's house. When she came home that afternoon she found smoke coming out of the loft, and by the time the fire brigade arrived the house was full alight and burnt for four hours. The court of Appeal held the defendant liable. Thus once again the neighbour principle has been extended

to the shock suffered as a result of seeing damaged done to one's property.

We have seen that in Donoghue v. Stevenson (supra), that the act of the defendant was the direct cause of the harm. In otherm words he caused the harm himself, he did not just allow it to occur. The next question then is, is the principle extensible to those who simply let the damage to take place? Here too the answer is positive going by the following decisions of the House of Lords:

(a) Dorset Yacht Co. Ltd. v. Home Office:[22] Some boys escaped from a borstal institution one night when the three officers in charge of them were contrary to instructions, all in bed. They boarded one of the many vessels in the harbour, started it and collided with the plaintiff's Yacht, which they then boarded and caused further damage to it. The owners of the company sued the Home Office as the Government Department responsible for prisons and boarstal homes. It was held that the home office was liable in damages to the plaintiff.

(b) Anns v. L. B. of Merton:[23] In this case, the plaintiffs who were lease holders of flats in a block built by one Walcroft brought an action against him (Walcroft) claiming damage for breach of Contract and of the undertaking implicit in section 6 of the Housing Act of 1957, because barely 8 years after the completion of the building, it started developing some cracks on the wall and the floors started to tilt. This, according to

the plaintiffs, was as a result of poor foundations. They also issued a writ against the Local authority, claiming damages for negligent failure to inspect the foundations or to detect, on inspection, that they were shallower than was required by bye-laws or as indicated on the approved plans. It was held (concerning the position of the local authority) that it has a duty of care in the application of it's bye-laws to owners and occupiers who might suffer injury as a result of it's negligence.

However, the above case[15] distinguishable from the more recent case of Investors I.C.P. Ltd. v. South Beds D.C.[24] where it was held that the local authority was not liable for the approval of plans for ware houses and design for their foundations which were later found to be faulty. This is because in the earlier case (i.e. Anns case) focus was on the protection of occupiers of buildings which are faulty for damages to their persons or properties not on the building developer himself against economic loss in carrying out a building project as was the case in the later case (i.e. investors I.C.P.S Ltd. v. South Bed D.C.). This distinction was drawn by Shade L.J. when he said:

> The purpose for which the legislature has confered the supervisory powers over building operations on local authorities is to protect the occupiers of buildings built in the local authority's area and also members of the public generally, against dangers to health or personal safety. It is not to safeguard the building developer himself against economic loss incurred in the course of a building project, or indeed anyone else against purely economic loss.[25]

One may finally say that Lord Atkins dictum has brought a lot of succour to those who in the past suffered harm as a result of the heedless acts of others and yet go uncompensated because the position of the law now is that if someone is harmed either physically or economically by the act of another he can claim damages from that other even if he is a complete stranger to him as far as the Commission of the act itself is concern, provided he is within the range of legal proximity. An example of a situation where damages was claimed as a result of pure economic loss can be seen in the case of Junior Books v. Veitchi Co. Ltd.[26] However, there appeared to be a contradiction between the decision, between this case and an earlier one in Spartan Steel Ltd. v. Martin and Co.[27] In this case, the defendant negligently cut off the plaintiffs power supply and damaged metal being processed. The plaintiff recovered the depreciation in value of that metal but was denied the loss of profit which he would have had from further operations during the power cut. The contradiction stems from the fact that the second arm of the plaintiff's claim was on purely economic loss just as in the case of junior books where the plaintiff successfully claimed for expenses in re-laying the floor and loss of profit occassioned because of the specialist sub-contractors negligent laying of the floor in the plaintiffs factory but while junior books was successful, Spartan Steel was not.

One may say here that since Spartan Steel's case was decbded before that of Junior Books, the House of Lords decision may be taken to mean a breakaway from their former decision having, may be, discovered later that it was decided per incurium and adopted the dissenting judgement of Edmund Davies in that case (Spartan Steel v. Martin & Co.) which was to the effect that because the loss of profit on abandoned further operations was the foreseable and direct consequences of the negligence, the reasoning which made the loss of profit on the interrupted operation recoverable applied to make the further loss of profit likewise recoverable.

1.2 REASONABLE FORESEABILITY

This is one of the dominant concepts in the law of negligence. By it, a person can only be under a duty to take care if he can foresee or ought to forsee that his conduct may cause injury to some one if he do not exercise due care. Forseability is essentially a question of fact and hence can only be determine expost factor (i.e. objectively) by taking into account the facts or circumstances that gave rise to the case under consideration. Thus in order to determine whether or not an act is negligent, one should also determine whether any reasonable person would forsee that the act in question is the type that can cause damage.[28]

The victim of the acts or omissions of the defendant must therefore be a forseable victim, in order to succeed in his case. This does not mean that he must be someone who is indentifiable by the defendant. All that it means is that he should be one who fall in one of the classes of circumstances that injury is foreseable. Thus, where defendants with statutory authority, excavated a trench in the street after taking precautions for the protection of passers-by which were sufficient for normal sighted persons but the plaintiff, who was blind, suffered injury because the precautions were inadequate for him, it was held that the number of blind persons who go about the street alone was sufficient to require the defendants to have them in contemplation and to take precautions appropriate to their condition.[29]

However, the concept of the reasonable foreseability is not applicable to all cases where there is foreseability of injury. For example if after noticing some damage to his crop on his farm, someone decided to set a trap at the place where the damage occur so as to catch the thing that has been causing the damage, if someone goes into the farm and is caught by the trap, he cannot claim any damage because entering into the farm is an act of tresspass and he can ultimately not be allowed by the law to benefit from his wrong.[30] The limitation of the concept of reasonable foreseability stems from the fact that the neighbour principle which laid down the general duty propounded by Lord Atkin is itself limited in application as we have already seen.

A better approach have however been found for this problem now through the judgment of Lord Wilberforce in Anns's case,[31] where he stated that:

> Through the trilogy of cases in this House - Donoghue v. Stevenson (1932) A. C. 562, Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd (1964) A. C. 469 and Dorset Yacht Co. Ltd. V. Home Office (1970) A. C. 1004, the position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrong doer and the person who has suffered damage there is a sufficient relationship of proximity or neighbour hood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter - in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty, the class of person to whom it is owed or the damages to which a breach of it may give rise.

Examples are cases where the class of potential plaintiffs was limited to those persons who showed that they have relied on the correctness of statements made.[32] Another example are cases involving economic Loss where a duty, having been held to exist, the nature of the recoverable damages was limited.[33]

1.3 DUTY OF CARE AND FINANCIAL OR ECONOMIC LOSS.

Formerly, the general rule was no doubt that the legal duty to take care to avoid causing injury to others which exists at common law is restricted to physical injury either to the person or his property.[34] Lord Denning M. R. commenting on the earlier stand of the law has the following to say:

> I think the question of recovering economic loss is one of policy. Whenever the courts draw a line to mark out the bounds of 'duty' they do it as a matter of policy so as to limit the responsibility of the defendant. Whenever the courts set bounds to the 'damages' recoverable - saying that they are, or are not, too remote - they do it as a matter of policy so as to limit the liability of the defendant.[35]

The above statement shows that the former stand of the law was essentially based on policy - limiting the liability of the defendant, but not actual legal considerations. This former stand of the law can best be illustrated with the case of Cattle V. Waterworks Co.[36]. The defendants had laid a water main which was defective, under a turn pike road. The resulting leakage of the water seriously hampered the contractor's work of tunnelling underneath the road causing him to suffer a loss of profit on his contract with the road owners. The court express regret for deciding that the plaintiff had no cause of action because in the words of Blackburn J:

> If we did so we shall establish an authority for saying that, in such a case as that of Fletcher v. Rylands, the defendant would be liable, not only to an action by the owner of the drowned mine, and by such of his workmen as had their tools or clothes

> destroyed but also to an action by every workman and person employed in the mine, who in consequence of its stoppage made less wages than he would otherwise have done. And many similar cases to which this would apply ~~might~~ might be suggested. It may be said that it is just all such persons should have ~~as~~ compensation for such loss, and that, if the law does not give them redress, it is imperfect, perhaps it may be so. 37

A similar conclusion was reached in the case of Brandon Electrical Engineering Co. (Leeds) Ltd. v. William Press & Son Ltd[38]. Here, the defendants negligently damaged a water main causing it to burst and the escaping water damaging an electrical cable, whereby the power at the plaintiffs factory was cut off and work was brought to a stand still for some hours, resulting in wasted wages and loss of production. The defendants were held not liable on the ground that they owed no duty to the plaintiffs. Lord Denning M. R. has advocated a different approach to this issue of economic loss and the question whether or not a duty is owed by a defendant to a particular plaintiff. He said:

> The more I think ..... the more difficult I find it to put each into it's proper pigeon-hole. Sometimes I say there was no duty. In others I say the damage was too remote. So much so that I think the time has come to discard those tests which have proved elusive. It seems to me better to consider the particular relationship in hand, and whether or not, as a matter of policy, economic loss should be recoverable or not. 39

In 1969, the former rigid judicial attitudes towards recognising liability with respect to purely economic interest started relaxing and wind of change started blowing in the direction of their recognition. So in the

case of Celanese v. A.H. Hurt (capacitors) Ltd[40] where strips of metal foil blew across from one factory on a trading estate and short circuited the bus-bars of the electricity sub-station, thereby bringing another factory's production to a grinding halt, as a result of the ensuing power failure, it was held that the defendnant's did, indeed owed the plaintiffs a duty to take reasonable care to prevent the foil from escaping from the plaintiffs' factory premises in such away as to foul the exposed conductors of their electricity supply.

The decision in Celanese's case was held to have been decided correctly in the case of S.C.M. (United Kingdom) Ltd V. W. J. Whittal and son Ltd[41]. In that case, the defendant contractors were preparing to build a boundary wall when they negligently pierced and damaged an 11,000 volt cable running alongside the road and thereby cut off the electric power to the plaintiffs factory as well as to many other factories. The plaintiffs have suffered severely especially from the power failure which lasted over seven hours, because they had molten metals in their machines which solidified owing to lack of heat. It was held that the contractors were liable for the material damage done to the plaintiffs and the loss of profit actually caused by it but that it does not extend to any other economic Loss, which was too remote and therefore irrecoverable.

This decision was also followed and applied in the case of Spartan Steel and Alloys Ltd V. Martin and Co. (Contractors) Ltd.[42] Here, the defendants employees negligently damaged an underground electricity cable, whilst digging up a road so that the power supply to the plaintiffs factory was unexpectedly interrupted for more than half a day. During the time it took to restore the power, the plaintiffs had to pour the molten metal out of their furnace to prevent the metal solidifying and getting damaged. Thereafter the plaintiffs could not keep the metal hot enough to complete the melt so that it deteriorated in value by £368 and they lost a profit from the sale of such metal from that melt amounting to £400. Again, they could have completed another four melts in the ordinary course of production, during the time that the power cut had lasted. Had it not been for the consequences of the defendant's negligence the plaintiffs would have made a profit of £1,767 in respect of those four melts lost to them. At the trial it was conceded by the defendants that the plaintiffs were entitled to judgement in respect of £368 Loss but denied liability in respect of the economic loss suffered, that is the anticipated profits. When the case went on appeal, it was held by majority decision, that the plaintiffs were entitled to recover the £400 claimed in damages, since the loss of profit from the melt was foreseable financial loss immediately consequential on the foreseable physical damage to metal but that they were not entitled to recover the economic loss of £1,767, which was independent of the physical damage.

This position is however unstable now in view of the decision in Junior books Ltd. V. Veitch & Co.[43] In that case, after arriving at the conclusion that the plaintiffs are entitled to the damages they sought, Lord Roskill then said:

> If my conclusion be correct, certain of the can no longer be regarded as good law and others may have to be considered afresh hereafter, for example whether the decision of the majority of the court of Appeal in Spartan Steel (1973) Q. B. 27, is correct or whether the reasoning of Edmund - Davies L. J. in his dissenting judgment is to be preferred.[44]

In a recent decision of the Supreme Court in the case of Chief Patrick A. Abusomwan V. Merchantile bank of Nigeria Ltd[45] claim in respect of pure economic loss was upheld and the 19th century view that a tort cannot arise from a breach of contract was dropped. The fact of the case was as follows: The appellant (Chief Patrick A. .. Abusomwan) entered into an agreement for the importation of Cement from time international corporation New York through one Mr. Bassey and Mr. E. R. Tucker (i.e. Managing Director of Heilit Nig. Ltd. In line with the terms of the agreement, the appellant obtained a guarantee from his bankers, the New Nigerian Bank Ltd in favour of Mr. Bassey. A clause in the guarantee provided that all documents, drafts, bills of lading and invoices consequent upon the latter of credit should be drawn in favour of Chief P. A. Abusomwan (the appellant) and should be endorsed to New Nigerian Bank Limited, Head Office Mission Road Benin-City.

Contrary to the above clause, the defendant/respondent Bank (i.e. Merchantile Bank of Nigeria Ltd) directed that the documents be drawn in favour of Heilit Nigeria Ltd and endorsed to the bank. As a result of this non-compliance the defendant/respondent did not inform New Nigeria Bank Ltd about the arrival of the cement but instead they informed Heilit Nigeria Ltd, Mr. Tucker took delivery the Cement consignment before the appellant, Mr. P. A. Abusomwan became aware of its arrival and sold 45,200 bags out of the total consignment of 84,000 bags shipped to him (Mr. P. A. Abusomwan). The learned trial judge o found the defendant/respondent liable for negligence as sued. The defendant/respondent appealed against the judgement of the High Court Judge to the Court of Appeal which allowed their appeal on the ground that the defendant/respondent was not a party to the contract of guarantee.

Being dissatisfied with the decision of the Court of Appeal, the appellant then finally appealed to the Supreme Court where it was held among others that the 19th Century view that a tort cannot arise from the breach of contract has now been discarded and the law now is that an action in tort for negligence can arise from a contract and that where a person is injured from a transaction arising from the contract of two persons, the third party is not precluded from beginning an action on the ground that he was not a party to the contract or non-performance of which has resulted in the damage towards the contracting party extended to all such persons who were likely to be injured

by the acts or omissions of the defendant; these are the neighbours in contemplation or who ought to be contemplated by the defendant. Appeal was consequently allowed.

This case (i.e. Abusomwan v. Merchantile Banks of Nig. Ltd.) laid down some requirements for the establishment of the tortoof negligence which bring about economic loss viz: proximity of the parties to one another and in cases where the case arise out of contract, the claimant should show (even if he is a third party to the agreement) that he suffered damage as a result of the misperformance or non-performance of the defendant's part of the agreement. With regard to the former (i.e the notion of proximity) the sense in which it is used here refers to legal proximity. Therefore it is not necessary that one should stand in physical proximity to the defendant before becoming successful in his case, but all that is required is whether the loss suffered by the claimant is the result of the direct and uninterrupted act of the defendant or not. Once the question is answered in the affirmative then the plaintiff will succeed in his case even if they are miles away from each other.

With regard to claim arising out of contract however, what is important to be considered here is the scope of the contractural defendant's liability. In otherwords to what extent can a defendant whose liability is a product of breach of contractual agreement be made liable in negligence to the plaintiff? As far as the decision in Abusomwan's case is concerned, it can be said that the liability of the contractual defendant extend to all those persons who

are likely to be injured by the acts or omissions of the defendant because going by Lord Atkins neighbour principle, they are the neighbours in contemplation or who ought to be in contemplation by the defendant.

It is however dangerous for the Supreme Court to merely lay down a general principle without making any specification on the nature of the transaction that will justify the contractual plaintiffs claim in negligence. This is because the situations in which economic loss can occur is so great that the enunciation of general rules dealing with such loss ought to be avoided.

Again in view of the fact that Ann's case have been criticise by text writters, it may seem improper for the Supreme Court to rely wholly on the case in arriving at a decision as they did.[46]

1.4 NEGLIGENT MISSTATEMENT AND ECONOMIC OR FINANCIAL LOSS.

The reluctance of the courts in holding that a duty exist in tort to avoid causing pecuniary loss also applies in relation to careless statements. It is remarkable that even Lord Fisher and Lord Atkin in their often-cited statements on this matter did not lay the duty in a wider term so as to include pure financial or economic loss. For example Lord Fisher.[47] spoke of "injury to the person or property of the other."[48] While Lord Atkin referred only to personal injury in this regard. This means that

no action is maintainable in respect of pecuniary damage from negligent misrepresentation.

This however, does not mean that the law refuses to protect some one's financial or pecuniary interests. The existence of the whole law of contract and such torts as intimidation, deceit, injurious falsehood, conversion and conspiracy adequately show the high level of protection given, and in addition someone can further protect these interests by express contract. For example one who suffers pecuniary loss as a result of an inaccurate or false statement made either to himself (i.e. deceit) or to others (i.e. injurious falsehood) may have a remedy; but in each case the law will require that one should prove dishonesty and not merely carelessness. Also, it is a fundamental principle of the law of contract that damages are not recoverable for an innocent misrepresentation.[49]

In the case of Candler V. Crane, Christmas & Co[50] it was held that there is a distinction between the negligent circulation of Chattels and the issue of negligent misrepresentations. There was liability in the former but not in the later, and the distinction was not affected by the case of Donoghue V. Stevenson.[51] Therefore, the position of the law remains that unless there was fiduciary relationship between the defendant and plaintiff (e.g. as between solicitor and client) there was no duty of care to avoid causing purely economic loss through negligent mis-statements.

In 1963, the House of Lords unanimously decided in the case of Hedley Brye & Co. Ltd V. Heller & Partners Ltd [52] that in principle there was no distinction between financial loss and physical loss, so that whenever there was a special relationship in existence, there was a duty to take care in making statements, a breach of which would found liability for either type of loss suffered, unless there was a disclaimer of responsibility.

In that case, the plaintiffs who were advertising agents, had booked space and time on behalf of a customer, Easipower Ltd, under a contract which makes them personally liable. Because of the doubts they were entertaining about Easipower's financial standing, they asked their bankers to obtain from the defendants, merchant bankers with whom Easipower Ltd had their account, a statement on it's financial standing. This was done first of all by telephone when the defendant's said. We believe that the company would not undertake any commitments they were unable to fulfil." Three month's later, the plaintiffs through their bankers, asked whether Easipower were trustworthy to the extent of £100,000 per year. The defendants replied in a letter headed. "For your private use and without responsibility on the part of this bank or it's officials" that Easipower Ltd. were a "....respectably constituted company considered good for ordinary business engagements" and that your figures are larger than we are accustomed to see." Relying on the meaning of this statement the plaintiffs refrained from councelling the advertising contract, and when Easipower Ltd. went into liquidation loss the sum of £17,661 18s. 6d.

The plaintiffs abandoned an allegation of fraud, but maintained that the defendant's reply were given in breach of their duty of care. The trial court held that the defendants were careless but that they owed no duty of care. The court of Appeal affirm this judgement. But upon a further Appeal to the House of Lords, the judgment was affirmed but on a different ground namely disclaimer of responsibility. From this decision, the following points were clear:

(i) A duty of care will exist only where there is a special relationship between the parties. In Hedley Bryne's case, majority of the judges were of the view that a special relationship exist whenever, in the circumstances: (a) it was reasonable for the plaintiff to have relied upon the care and skill of the defendant who made the statement (b) the defendant knew or ought to have known that the plaintiff was relying on him. Therefore professional advisers such as accountants and auditors, bankers, commission agents and surveyors will owe a duty of care to their customers in respect of any professional advise given.

(ii) No duty of care will arise where the advice is given on purely social occassion, since it would be neither foreseable by the defendant that the plaintiff would rely on the advice, nor reasonable for the plaintiff to do so.

(iii) A non professional person who gives information or advice on a 'business occassion' (e.g. one trader advising another as to the credit worthiness of a potential buyer) owes a duty of care, atleast if he has a financial interest in the transaction in question.[53]

The case of Imarsel Chemical Co. Ltd. V. National Bank of Nigeria Ltd.[54] provide a good illustration of the application of the Hedley Bryne principle in Nigeria. In that case 'A', a pharmaceutical company applied to the plaintiffs for credit facilities. The plaintiffs were prepared to give the credit, but insisted upon a reference from 'A' Company's bankers. 'A' Company produced a letter from the manager of the Enugu branch of the defendant bank which stated that 'A' Company was a good customer of the bank and was credit worthy to the amount of ₦3,000. This statement turned out to be untrue, and the plaintiff incurred loss of about ₦3,000 in respect of money lent to 'A' Company and not repaid. Delivering judgment on the case, Okagbue said in ter alia that: "In the instant case, there can be no doubt that the defendant's manager knew that the plaintiff s would place reliance on his statement. I find as a fact that they did, and that the statements were negligent. On the authority of Hedley Bryne, I hold that the plaintiff's claim succeed."

The decision in Agbonmagbe Bank Ltd. V. C. F. A. O.[55] Ltd marks a significant extension by the Nigerian Courts of the Hedley Bryne principle. The facts of the case are

briefly as follows: During a period from August 7 to October 5, a trader, who had an account at the Shagamu branch of the defendant bank, gave the plaintiffs a number of Cheques for goods supplied to her. The plaintiffs handed each cheque as soon as it was received to their bankers, the Bank of West Africa, for collection and the latter duly sent each cheque to the defendant bank's headquarters. at Ebute-Metta, Lagos. The cheques were returned to the bank on October 10th in a bunch all dishonoured. Having failed to recover from the trader the amount represented by the cheques, the plaintiffs brought an action for negligence against the defendant bank alleging that, according to banking practice, there had been undue delay on the defendants part in returning the cheques, and that this had misled the plaintiffs into believing that the cheques had been paid. The plaintiffs contended that if the earlier cheques had been returned dishonoured within a reasonable time, the plaintiffs would have stopped delivering more goods to the trader, and therefore would not have lost the amount represented by the subsequent cheques.

Adedipe J. in the Lagos High Court was of the view that cheques sent from Lagos to Shagamu should, if not paid, have been returned within a week and that Agbonmagbe Bank had failed to fulfil it's duty to return them in the ordinary cause of business to the bank of West Africa within a reasonable time with an intimation that they would not be paid. The learned judge held that

the defendant bank was in a breach of it's duty of care owed to the plaintiffs in negligence. The decision of Adedipe J. was uphold by the Supreme Court. Delivering the judgment of the court, Brairamian J. S. C. said:

> Hedley Bryne and Co. Ltd V. Heller and Partners Ltd. shows that bankers normally owe a duty of care to persons whose bank is making ..... an inquiry on their behalf. There is a business practice among bankers in regard to cheques, and we think that the defendant bank ought to have followed it, to avoid it being thought, as it would reasonably have been thought by the C.F.A.O., that (the traders) cheques were being paid. On the limited evidence in the case, we do not think the learned-judge erred in deciding that the bank had a duty of care towards the C.F.A.O., and was liable for negligence caused by it's negligence. 56

This decision no doubt goes further than the Hedley Bryne principle because there was no actual mis-statement by the defendant bank made in return for any inquiry by the plaintiffs on their bankers. It is not suprising therefore that a differently constituted Supreme Court refused to press the Hedley Bryne Principle further in the case of African Continental Bank Ltd v. A. G. of Northern Nigeria.[57] Here, the Supreme Court overrulled the decision of the trial judge and stated through Brett J.S.C. inter alia that:

> The plaintiffs/respondents submission in this court amounts to saying that if a banker allows an account to be opened in any particular name, and persons with whom the holder of the account has dealings learn through him of the existence of the account, the banker may be treated as having made some implied representation to those persons as to the holders integrity or true identity. We unhestatingly reject that submission. 58

Since the House of Lords decision in Hedley Bryne, whenever there is a case boardering on pecuniary loss, litigants have always tried to bring defendant's action under misrepresentation instead of invoking the neighbour principle in Donoghue V. Stevenson.[59] This, may be is because of the fact that the neighbour principle as we have already seen does not provide for purely pecuniary loss. However, after the decision of the court in Junior books V. Veitchi & Co.[60] it seems that Hedley Bryne is no longer important as an authority for establishing negligence causing pecuniary loss except where the defendant did nothing but only speak. This is because the case of Junior books was decided on the neighbour principle propounded by Lord Atkin in Donoghue v. Stevenson.[61]

Another case which is even older than Junior books but which was also decided by applying the neighbour principle is the case of Ross v. Counters[62] in which a solicitor was held liable in negligence by Megarry V. C. for causing the plaintiff (a legatee) to lose the bequest left to her under a will by the testator by allowing her husband to witness it. The decision was not based on Hedley Bryne but on Donoghue's case. One may therefore say that Hedley

Brynes importance for now is limited to the fact that it is through it that liability for causing pure pecuniary or financial loss was first established but with the extension of the neighbour principle beyond it's former bounds it will now adequately take care of it.

Professionals such as Lawyers, arbitrators,valuers and architects, can now be sued by a party who did not employ them. This is for the simple reason that they decide on how much people are to pay or be paid and as such are very likely to cause financial loss by their decisions [63]. But judges are however immune from liability, when prosecuting a case in court [64].

The notion of reliance was sounded in Headley Brynes case but no further effort was made to define what it means. However, Stephenson L. J. in J.E.B. Fasteners Ltd. v. Marks Bloom & Co.[65](a firm) has thrown light on the issue. He said:

> The terms 'relaince' and 'relied on' were capable of bearing either a narrow and precise meaning of 'induced' or 'wholly dependent on' or a wider meaning of 'being encouraged or supported in' taking a decision by subsidiary factors which if untrue would be a matter of disappointment but would not affect the taking of the decision ....."[66]

It appeared the case of Hedley Bryne was decided in the narrow and precise sense. This was also the view of Lord Denning in the case of Dutton v. Bognor Regis U.D.C.[67]

He said:

> Nowadays since Hedley Bryne & Co. Ltd V. Heller & Partners Ltd. (1964) .A.C. 465 it is clear that a professional man who gives guidance to others owes a duty of care, not only to the client who employs him, but also to another who he knows is relying on his skill to save him from harm. It is certain that a banker or accountant is under such a duty. And I see no reason why a solicitor is not likewise. The essence of this proposition, however, , is the reliance. Hedley Bryne V. Heller, it was stressed by Lord Reid at p. 486, by Lord Morris of Borth v. Gest at p. 502 - 503, and by Lord Hodson at p. 514. The Professional man must know that the other is relying on his skill and the other must infact rely on it.

Is a professional liable to even those who did not rely on his advice but suffer harm or only to those who he knew would rely on his advice and who actually rely on it? To answer this question, it would appear that distinction have to be drawn between the several categories of professionals that we have. Thus, a professional man who gives advice on financial or property matters such as a banker, a lawyer or an accountant, can only be liable to those who rely on him and suffer financial loss as a result.[68] But in the case of a professional man who gives advice on the safety of buildings, or machines, or material his duty is to all those who may suffer injury as a result of his wrong advice.[69]

1.5 NERVOUS SHOCK.

The word 'Nervous shock' may be used in two senses. Firstly, it may mean where a person suffers adversely in physical health as a result of the Nervous Shock experienced by any given occurance. Secondly, it may mean where a person becomes startled or frightened and so is 'Shocked' momentarilly whereby he does some thing which resulted to personal injury.

However, if nervous shock is used in this (second) sense, it may mean that the plaintiff may be awarded damages solely on the ground that he/she has suffered the sensations of fear or mental distress or grief and acceptance of such claims would not only put a very strong brake on all fields of human activity but would open the door to exaggerated claims and face the courts with unsurmontable problems of assessment even though where there is a valid claim under some other head, the law will take account of such matters as part of the assessment of 'pain and suffering.'[70] Therefore, in this work, nervous shock is going to be discussed in the first sense (that is where a person suffers adversely in physical health) either as a result of physical injuries or mental suffering because this produce some recognisable medical condition both physical, like heart failure or abortion or mental, like neurosis.

Just like in cases of pure financial or economic loss, the law was reluctant at first to allow plaintiffs to recover damages for mental suffering alone unaccompanied by physical injury. This was the decision of the Judicial Committee of the privy council in Victorian Rly Commissioners V. Coultas.[71] This decision have however been criticised as being incorrectly decided by basing the decision on ideas about pathology and was never applied in subsequent cases because :-

> The crude view that the law should take cognisance only of physical injury resulting from actual impact has been discarded, and it is now well recognised that an action will lie for injury by shock sustained through the medium of the eye, or the ear without direct contact. The distinction between mental shock and bodily injury was never a Scientific one, for mental shock is presumably in all cases the result of, or atleast accompanied by, some physical disturbance in the sufferer's system. And mental shock may have consequences more serious than those resulting from physical impact. But in the case of mental shock there are elements of greater subtlety than in the case of an ordinary physical injury and these elements may give rise to debate as to the precise scope of legal liability.[72]

The first attempt at recognising the right of the plaintiffs to recover damages for shock unaccompanied by physical injury was in the case of Dulieu V. White and Sons.[73] The plaintiff was held to be within the area of foreseable impact. The defendant had as a result of negligently driving a pair of horses into a public house where the plaintiff was serving behind the bar, caused her to suffer nervours shock which led to her giving birth prematurely to an idiot. It was therefore held that her claim for damages as a result of the nervous shock she sustained leading to her premature delivery

succeeds. Kennedy J. who decided the case introduced a limitation on the scope of liability, namely, that shock to the plaintiff must be due to fear for her own personal safety. "A has I conceive, no legal duty not to shock B's nerves by the exhibition of negligence towards C, towards the property of B or C."

However, this limitation was thrown away by the court of Appeal in the case of Hambrook V. Stooks.[74] In this case, S had left a lorry with it's engine running at the top of a hill, T's pregnant wife, Z had left her three children on a steep street, watched them climed it and then pass out of his sight round a bend. Shortly afterwards, Z saw the lorry (with no driver in it) come rapidly round the bend in her direction. Z herself was not in dnager; the lorry stopped before reaching her. Z's children were however knocked down and by slanders immediately afterwards told Z that a child answering the description of one of her children was injured. Z sustained a nervours shock as a result of which she died. T. sued S under the fatal accident Act to recover damages for Z's death. The trial judge declared that no action lay unless Z feared for her own safety as distinct from that of her children. The court of Appeal by a majority directed a new trial holding that T has a good cause of action if the Shock to Z resulted from her fear of immedidate personal injury to herself or her children from what she saw or realised by her own senses but not if the shock was caused

by what she have been told by bystanders of her children's perils Witnessing an accident and getting a shock is different from hearing about the accident from a third party and only having grief.

Lord Bankes and Lord Atkin who decided the Hambrook's case felt that fear for personal safety is not a good principle to make the resulting shock a valid ground for recovery. Their Lordships thought that the case for a courageous woman who is holding her child and who gets terrified for the safety of the child on seeing a lorry moving towards them is difficult to distinguish from the case of a timid woman who is also holding her child but who get terrified for her own personal safety on seeing the lorry coming towards them; the law cannot say that the defendant ought reasonably to have anticipated the natural feeling of the timid mother and not the natural feeling of the Courageous mother. Their Lordships rejected the limitation upon liability proposed by Kennedy J. in Dulieu's case but proposed a new limitation having the effect of restricting liability for shock to persons in the general vicinity of the accident. By this decision, it means that one can recover damages for 'nervous shock' caused by an injury not to him or herself but to a near relative or by the fear of such injury.

In McLoughlin V. O'brian[75] Lord Wilberforce said:

> While damages cannot, at common law, be awarded for grief and sorrow, a claim for damages for 'nervous shock' caused by negligence can be made without the necessity of showing direct impact or fear of immediate personal injuries for oneself. The reservation made by Kennedy J. Dulieu V. White and Sons (1901) K.B. 669, though taken by Sagrant L. J. in Hambrook V. Stokes Bros (1925) 1 K.B. 141, has not gained acceptance, and although the respondents, in the courts below, reserved their right to rive it, they did not do so in arguements on this issue which were fully and admirably stated by the Supreme Court of California in Dillon V. Legg (1968) 29 A.L.R. 3rd 1316.[76]

It has now been extended to cases where some one developed nervous shock as a result of watching his property damaged or destroyed.[77]

Once one is within the vicinity of the place where the accident or damage occured, he need not be an eye witness before succeeding in his case. Thus in Boardman V. Sanderson[78] where Y. and his son Z were travelling in the car of Y's friend, G., G. stopped for petrol, Y and Z got off the car. G. sent Y to pay into the office. G. negligently reversed his car into Z. Hearing Z Screams, Y rushed from the office to help him. Y latter sued G. to recover damages for nervous shock. The Court of Appeal held that Y must succeed basing their decision on the fact that G knew of the presence of Y, the father of the child, having rejected the arguement that only eye witness to an accident can recover damaged for injury by nervous shock.

Again, it could be said that once there is a sufficient degree of proximity between the claimant and the victim, then the claimant need not show that there exist between him and the victim any special relationship such as that of a father or mother before he can succeed in his case. This was the decision in Dooley V. Cammel Laird & Co.[79] where some men were working in a ship while C's servant who was operating a crane with a rope which was not strong enough to hold the load negligently provided by C as a result of which it broke and the load fell into the hold of the ship, causing D to suffer shock as a result of witnessing the danger to the workmates below, who is not himself in any personal danger, it was held that C must pay for the damages incurred as a result of the shock D suffered because C must have had D in contemplation as likely to be affected (i.e. shocked) if the rope broke and thus owe him a duty of care which have been violated.

One who suffers nervous shock as a result of a rescue operation can also recover damages. Thus in Chadwick V. British transport Commission[80] where a grievous train accident was caused by B's negligence and the plaintiff, C run immediately to the scene of accident to help. He spent many hours in the rescue operation as a result of which he became Psyco-neurotic due to the horrow of the whole experience. C claimed damages for nervous shock from B. It was held that C must succeed because (a) it was foreseable that somebody would suffer nervous shock as a result of B's negligence, (b) a duty is owed to rescuers and (c) liability for nervous shock is extensible to

shock caused by fear for the safety of others.

The question now is if the rescuer can sue A who negligently endangers B (regardless of whether B himself was negligent), can the rescuer equally sue B who negligently puts himself in apparent need of rescue? It was held in 1980 in the case of Harrison V. British Railways Board [81] that where a person put himself in danger through carelessness and could foresee that another might endanger himself by attempting to rescue him he will be liable in negligence for any harm sufferred by the rescuer. But those who got injured in the process of rescuing some one who has not negligently and foreseably invited his rescue will remain uncompensated, unless they have personal liability insurance cover [82].

On the whole it could be said that the presence of the duty of care is what will enable some one to be successful in his case as far as the tort of negligence is concern otherwise no matter the gravity of the harm or loss one will not recover anything since one is entitle to be as negligent as he likes provided he owe no one the duty to take care. For an action in negligence to succeed Nigeria today, the plaintiff must prove:

(a) the existence of a duty of care owed to the complainant by the defendant

(b) breach of that duty of care by the defendant and

(c) damage sufferred by the plaintiff as a result of the breach by the defendant of that duty of care[83].

In addition to the above three conditions, the damage sufferred must be causally connected with the breach of duty.[84]

1. See Bottomley V. Bannister (1932) 1 K.B. 456 - 476.

2. See Windfield and Jolowicz on Torts 11th edition by W.V.H.R. Rogers pg. 66.

3. See the case of Grant V. Australian Knitting Mills Ltd. (1936) A.C. 85 - 103.

4. See the statement of Lord Eisher M.R. in the case of Le Lievre V. Gould (1893) Q. B. 491 at 497. However, this decision was not followed but explained by the House of Lords in the case of Hedley Bryne & Co. Ltd. V. Heller and Partners (1964) Q.A.C. 465 that the law will imply a duty of care, when a party seeking information from another possessed of special skill, trust him to exercise all dure care and that party knew or ought to have known that reliance was being placed on his skill and judgment.

5. See the statement of Scrutton L.J. in the case of Re Polemis & Furness, Witly & Co. (1921) 3 KB 560 - 677.

6. (1883) Q.B.D. 503 at 509.

7[a] Ibid. The judgments of Cotton and Bowen L.J.J. at PG. 515 - 517.

7[b] See the case of Lelievre V. Gould (supra).

8. (1932) A. C. 562.

9. See the case of Herschtal V. Stewart and Ardern Ltd. (1940) K. B. 155.

10. Dutton V. Bogner Regis Urban district Council (1972) 1 Q. B. 373

11. Grant v. Australian Knitting Mills (supra)

12. Lambert v. Lewis (1982) A. C. 225.

13. See the statements of Du Parcq J. in Deyong v. Shenburn (1946) K. B. 227 at 233, Scrutton L. J. in Farr v. Butters (1932) 2 K. B. 606 at 613 - 614, Rodhe L. J. in Haynes v. Harwood (1935) 1 K.B. 146 at 167 - 168, Singleton J. in Barnett v. packer (H & J) Co. Ltd. (1940) 3 All E. R. 575, Lord Thankerton in Bourhill v. Young (1943) A.C. 92 and Pollock on Torts, 15th edition at pg. 100.

14. See the judgement of Scrutton L. J. in Farr V. Bulters (Supra).

15. See the Statment of Du Parcq J. in Deyong v. Shenburn (Supra).

16. See the judgement of Singleton J. in Barnelt v. Packer (supra)

17. Supra.

18. See the case of East Suffolk Rivers Catchemant Board V. Kent (1941) A.C. 74 at 89.

19. (1982) ALL E. R. 201, (1982) 3 W.L.R. 477.

20. (1982) A.C. 100, (1982) 2 ALL E.R. 298.

21. (1987) 3 ALL E. R. 455

22. (1970) A.C. 1004 at 1027.

23. (1978) A.C. 728 at 751, 2,(1977) 2 ALL E.R. 492.

24. (1986) 1 ALL E.R. 787

25. Ibid at p; 805

26. Supra, See also the case of Abusomwan v. Mercantile Bank Ltd. (1987) 3 N.W.L.R. part 60 at p. 196.

27. Supra

28. See the statement of Scrutton L.J. in Re Polemis and Furness Witly & Co. (Supra).

29. See Halley V. London Electricity Board (1965) A.C. 778, (1964) 3 W.L.R. 479, (1964) 3 ALL E.R. 185.

30. For more illustrations and explanations see Charlesworth on negligence 6th edition pp. 407 - 420. Also Windfield and Jolowicz 13th edition W.V.H. Rogers p. 359 - 366.

31. Supra at p. 751 - 2.

32. For example the case of Hedley Bryne & Co. V. Heller and Partners Ltd (supra) and Weller & Co V. Foot and mouth disease research institute (1966) 1 Q.B. 569.

33. See for example S.C.M. (United Kingdom) Ltd V. W. J. Whittal & Son Ltd (1971) 1 Q.B. 337 and Spartan Steel & Alleys Ltd v. Martin & Co. (Supra).

34.

34. See the case of Levi V. Colgate - Palmlive (1941) S.R.N. (N.S.W.) 46 at 50.
35. See the case of Spartan Steel & Allovs Ltd V. Martin. (Supra).
36. (1875) L.R. 10 Q.B. 453.
37. Ibid at p.502
38. (1956) 106 L.J. 332
39. Op. cit at p.37.
40. (1969) W.R.R. 959.
41. Supra
42. Supra
43. Supra
44. Ibid: See also Governor of P.D. Fund V. Sir Lindsav (1985) A. C. 210; D & F Estates V. Church Commissioner (1988) 1 W.L.R. 210.
45. (1986) S.C. 196.
46. See Economic Loss in Tort: is the pendulum out of Control (1989) M.L.R. 52 No.2 200 at p.216, also Tony Weird: A case book on Tort 6th Edition at p.65. Conceptual Basis of Product Liability (1985) 48 No.3 M.B.R. 325.
47. See the case of Heaven v. Pender (Supra)
48. See the case of Donogue v. Stevenson Op. cit.
49. See the case of Heilbut, Simonds & Co. v. Buckleton (1913) A. C. 30 also Salmond on the law of Torts 14th edition p. 279.
50. (1951) 2 K.B. 164.
51. See the case of Donoghue v. Stevenson op.cit.
52. See the case of Hedley & Co. Ltd v. Heller & Partners Ltd. (Supra).
53. See Kodlinye: The Nigerian Law of Torts pp.66-67
54. (1974) 4 S.C.L.R. 355
55. (1966) 1 ALL N.L.R. 140: (1967) N.M.L.R. 173.
56. Supra.

57. (1967) N.M.L.R. 231: (1967) ALL N.L.R. 76.

58. Ibid at p.231.

59. Supra.

60. Op. cit.

61. op. cit.

62. (1980) Ch. 297.

63. See the cases of Ross v. Counters (Supra), Arenson v. Case, Backman, Pulley & Co. (1977) A. C. 405, Sulclife v. Ihackrah (1974) A.C. 727.

64. See the case of Siros v. Moore (1975) Q. B. 118.

65. (1983) 1 All E.R. 583

66. Ibid at p.600

67. (1972) 1 Q. B. 394 - 5.

68. See the case of Ross v. Caunter Op. cit, Hedley Bryne & Co. Ltd. c. Heller & Partners Ltd. op.cit.

69. See Junior Books v. Veitchi & Co. on. cit; J.E.B. Fastaners v. Marks Bloom & Co. (Supra); Dutton v. Bognor Regis U.D.C. (Supra).

70. See Windfield and Jolowicz on Tort 4th edition p. 146.

71. (1888) 13 A.C. 222, See also the statement of Lord Coleridge in the case of Lumley v. Gye (1853) 2 E & B. 216 at 252.

72. Per Lord Macmillan in the case of Bourhill v. Young (1943) A. C. 92 at 103.

73. (1901) 2 K.B. 669.

74. (1925) 1 K.B. 141 See also the case of Kings v. Phillips (1953) 1 Q.B. 347.

75. (1982) 2 ALL E.R. 298.

76. Ibid of p.305.

77. See Attia v. British Gas PLC (Supra)

78. (1964) 1 W.L.R. 1317.

79. (1951) Lloyds Report 271

80. (1967) 1 W.L.R. 912.

81. (1981) 3 All E.R. 679.

82. See Street on Torts 7th Edition p. 107.

83. See the case of Taiwo Okeowo V. Chief E. O. Sanyaolu (1986) 2 N.W.L.R. (Part 23) at p. 472.

84. Ibid; See also the case of Electronic Ltd v. Welsh Plastics Ltd. (1968) 2 A.E.R. 265.

CHAPTER TWO

2.0. RECOGNISED DUTIES

2.1 INTRODUCTION/MEANING.

By recognised duties in the law of negligence, it means those situations or circumstances in which the law has established or recognised the existence of the duty to take care. Therefore the duty to take care can only exist if the kind of harm, the careless infliction of it and the types of persons upon whom it is inflicted are all recognised by law.[1]

However, since liability for negligent acts are apart from being determined by law, are largely regulated by 'policy' considerations, recognition or non-recognition of certain duty situations also depends on 'policy'. Consequently there are certain cases in which the plaintiff has suffered damage as a result of the defendants behaviour but yet the court's are not willing to impose liability on the defendant not because the plaintiff does not fall withinnthe class of people to whom the defendant owe duty of care but simply on grounds of 'policy.' Thus, there are lot of cases which are either lost or won not because the law does not recognised them but it is better not to either allow them or disallow them because of state policy. For example a times certain

cases fail because to allow them to succeed will mean opening the 'floodgates' of litigations to cases of similar nature.[2] While in certain cases where it is considered that to disallow the plaintiff's claim it will appear that the court's decision is too hard on him, the case is allowed to succeed.[3]

The influence of policy on negligence cases is so immense that Lord Denning once remarked that "It is, I think, at bottom a matter of public policy which we, as judges, must resolved. This task of 'duty' or no 'duty' is simply a way of limiting the range of liability for negligence"[4]

In this chapter, effort will be made to discuss recognised duties with regard to certain professionals or organisations who owe others the duty of care in the practice of their professions or in the cause of their operations respectively. We shall also discuss the standard of care required in certain situations or conditions.

2.2 PERSONS AND ORGANISATIONS OWING DUTIES OF CARE.

This pertains to persons professing some special skill or knowledge in certain fields/profession or to organizations that engage the services of experts in the conduct of an undertaking which involve expert scientific or professional skill or knowledge which the proprietors themselves do not possess.

The position of the law concerning people who hold out themselves as possessing special skill and knowledge in a certain field or profession is that they are bound to exercise the skill and competence of an ordinarily competent - practitioner in that profession. It is in this regard that Tindal C. J. said in the case of Lamphier v. Phipos[5] that:

> "Every person who enters into a learned profession under takes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of advantages than he has, but he undertakes to bring a fair, reasonable and competent degree of skill"

With regard to organisations, they will be vicariously liable to outsiders who got injured as a result of the negligence of those whom they employed to work for them.

This is a relatively new development which is based not on fault but considerations of social policy.[6] It may be argued that it is unfair and legally unjustifiable that a person who himself has committed no wrong should be made liable for the wrong doing of another. However, it may equally be argued that a person who employ others to advance his own economic interest should be held responsible for any harm caused by the activities of such employees[7] and that the innocent victim of the employees tort should be able to sue a financially responsible defendant[8] who can always take out an insurance policy against liability. To strike a balance between these two opposing views, it has been submitted that a master should only be made liable for the torts which his servant comit in the course of his employment[9] and this at present is the position of the law.

There are a lot of persons or organizations who owe duty of care to those with whom they have dealings or who otherwise become affected by their acts of commission or ommission. In this work however, we shall only discuss a few of them to serve as illustrations. Those we shall discuss are Lawyers, Doctors and Bankers.

2.2.1 LAWYERS.

There was a long standing view that barristers cannot be sued for breach of duty to their clients which resulted to a loss. The basis for this view was that they (Barristers) are not under any contractual obligations towards their clients.[10] The fees which they collect from their clients were considered as mere 'honorarium' but not as actual payment for the job they do which will go along with it a legal responsibility to take care not to cause loss or damage. The only exception then, was where there was an express agreement to that effect in which case they will be held liable in assumpsit. It was in this regard that Pollock C. B. said:

> We are all of the opinion that an advocate at the English bar, accepting a brief does not enter into any contract or promise, express or implied case, may, indeed, occur where, on an express promise (if he had made one) he would be liable in assumpsit; but we think a barrister is to be considered not as taking upon himself an office or duty, in the proper discharge of which not merely the client, but the court in which the duty is to be performed, and the public at large have an interest.[11]

From the above statement, it is clear that what influenced a barrister to perform his duty properly was not the fear of litigation by a 'disappointed and angry client[12] but the desire to see to it that justice was not only done but

appeared manifestly to have been done in a case or suit and the reason for this is the fact that a barrister is a minister in the temple of justice and as such is required to lay such facts before the judge and thejury which he thought was in the best interest of justice. It does not make any difference whether he is prosecuting or defending. A barrister was consequently not liable in negligence for refusing or neglecting to call a particular witness who in the perception of the plaintiff would be instrumental to their winning the case. Similarly, he can not be sued for calling a witness who turns out to be hostile to his client's case or gave adverse evidence against him leading to their not winning the case.[13]

This extend to any action he may take in connection with his clients case or interest either in the court or outside the court. Thus in the case of Fell v. Brown[14] where an action was instituted against a barrister for unskillfully and negligently settling a bill filed by the plaintiff in the court, while holding that the action could not succeed Lord Kenyon said:

> If this action could be supported, it would equally lie against a counsel for inserting a count in a declaration, or putting matter in a plea which ought not to be there, and which the court should think improper and impertinent.

Again, while discussing the liability of a law agent in Scotland for negligence, Lord Campbell said: 'against the barrister in England, and the advocates in Scotland, luckily, no action can be maintained'[15].

However, after the decision of the court in the case of Hedley Bryne & Co. Ltd. v. Heller and Partners Ltd.[16] some doubts were casted on the continuity of the blanket immunity given to barristers since a special relationship was established between barristers and their clients.[17] In that case, the plaintiffs, advertising agents, had booked space and time on behalf of a customer, Easipower Ltd under contract making them personally liable. They then intertain some doubts about Easipowers Financial position, and asked their bankers to obtain from the defendants, Merchant Bankers with whom Easipower Ltd had their account, a statement of their (Easipower) financial position. This information was first supplied through the telephone, when the defendants said 'we believe that the company would not undertake any commitments they were unable to fulfil! Three months later the plaintiffs, through their bankers, asked whether Easipower were trustworthy to the tune of £100,000 per year. The defendants replied in a letter

headed 'For yourprivate use and without responsibility' that Easipower Ltd. were a 'respectifully constituted company, considered good for it's ordinary business engagements and that 'your figures are large than we are accustomed to see'. In reliance upon their view of what 'this statement, meant, the plaintiffs refrained from cancelling the advertisement contracts and when Easipower went into liquidation lost sums totalling £17,661 18s. 6d.

The plaintiffs in instituting action against the defendant Merchant bank, dropped an allegation of fraud and instead maintained that the defendants replies were given in breach of their duty of care. McNair held that the defendants were careless but that they owed no duty. His decision was affirmed by the court of appeal on the same ground (i.e. no duty of care was owed). The House of Lords also affirmed the decision but this time around on a different ground, namely, disclaimer of responsibility.

The decision of the House of Lords in Hedley Bryne leaves no one in doubt that had the defendants Merchant bank not given the information on the condition that they should not be held responsible if it turns out to be incorrect or misleading, they would have been held liable even though there was no any agreement between them and

the plaintiffs to that effect. The decision therefore represented a twist in the thinking of the courts with regard to information or advice given by professionals to their clients. It shook an earlier decision reached in the case of Candler v. Crane, Christmas & Co[18] to its foundation and paved the way for holding professionals (including barristers) liable in negligence where a 'special' relationship could be established between them and those who suffered damage or loss as a result of relying on their advise or the information they gave them.

The position that all professionals are liable in negligence for causing loss or damage to those whom they stand in special relationship was fully attained in 1969. And the occassion for this was the popular case of Rondel v. Worsley.[19] The facts of the case are as follows: In May, 1959, the appellant was tried on charges of causing bodily harm to one M. with intent to do so. He pleaded that the acts (which he did not deny) were justified. His defence was undertaken on a dock by the respondent, a barrister-at-law; but he was convicted and sentenced to imprisonment, and his application for

leave to appeal, which included complains against his counsel was refused.

Nearly six years later, in February, (1965) he issued a writ claiming 'damages for professional negligence' against his counsel, followed by a statement of claim drawn by himself which was in all respects defective and which was consequently ordered to be struck out. The appellant appealed from that order to a judge in chambers, who after hearing argument on behalf of the judge official solicitor as amiscus Curiae on the question whether an action for negligence could lie against a barrister, and after giving the appellant full opportunity to amend his statement of claim dismissed the action, expressing the opinion that, for reasons of public policy, an advocate, whether a barrister or solicitor, was immune from actions for negligence in and about the conduct of a client's case in court.

On appeal, it was held dismissing the appeal that, a barrister was immune from an action for negligence at the suit of a client in respect of his conduct and management of a cause in court and preliminary work connected there with such as the drawing of pleadings. That immunity it was further held was not based on the absence of contract

between a barrister and his client but on public policy and long usage because (a) the administration of justice required that a barrister should be able to carry out his duty to the court fearlessly and independently;
(b) actions for negligence against barristers would make the retrying of the original actions insuitable and so prolong litigation, contrary to the public insterest; and
(c) a barrister was obliged to accept any cleint, however difficult , who sought his services.

Going by the above judgment one will not mince words in saying that the immunity of Barristers against litigation for negligence have (unlike the case before Hedley Bryné's case) been accordingly narrowed down to the actual conduct of the case in court or matter closely related there to such as the drafting of pleadings. Apart from these a barrister would henceforth definately be held liable in negligence with respect to dealings unconnected with the conduct of cases in courts. This was also the views of their Lordshipps (i.e. Lord Reid, Lord Moris and Lord Upjohn whom they said:

> Public policy does not require that a barrister shall be immune from action for negligence in relation to matters connected with cases in court, for if he fails to exercise the ordinary care and skill that can reasonably be expected of him, he should be and is in no better position than any other professional man.[20]

The judgment of the court in the above case has therefore confirmed the House of Lords decision in Hedley Bryne that persons who are experts in certain fields will be held liable in negligence upon proved of the existence of a special relationship between them and those who suffered loss or damage as a result of their negligence and the former contrary position exemplified by the case of Candler v. Graine, Christmas & Co.[21] and others[22] have finally given way.

It appears the common law position have almost completely been retained in Nigeria via the legal practitioners Act of 1975.[23] The Act provides as follows:

S. 8 (1) Subject to the provisions of this section, a person shall not be immune from liability for damage attributable to his negligence while acting in his capacity as a legal practitioner, and any provision purporting to exclude or limit that liability in any contract shall be void.

(2) Nothing in the foregoing sub-section shall be construed as preventing the exclusion of the liability aforesaid in any case where a legal practitioner gives his services without

reward either by way of fees, disbursements, or otherwise.

(3) Nothing in subsection (1) of this section shall affect the application to a legal practitioner of the rule of law exempting barristers from the liability aforesaid in so far as that rule applies to the conduct of proceedings in the face of any court, tribunal or other body.

The Supreme court rules also provides that;

> Where the dismissal or an appeal is held by the Court to be due to the fault of the legal practitioner representing the appellant in failing to file the necessary Brief, the court may, in addition to dismissing the appeal as stated in sub-rule (1) of this rule, award costs of the proceedings against such legal pratitioner personally.[24]

The combine effect of the provisions of the legal practitioners Act and the Supreme Court rules is that once someone engage the services of a barrister, he must just like any other professional perform his job with reasonable care and deligence so as not to cause any loss or damage to his client else an action may be instituted against him for negligence or be made to indemnity the client for the loss. Thus in the case of Lawanson v. Siffre[25] the facts of which are as follows: The first defendant, was a practising solicitor and the plaintiff was his friend and the first defendant had acted as the plaintiff's solicitor on previous occassions for remuneration The plaintiff invested £100 on a mortgage and the first

defendant acted as his solicitor in carrying through the transaction. He however failed to investigate the mortgagor's title and this caused the plaintiff to lose his capital, interests and expenses. The defendant x admitted that such failure on his part was professional negligence but pleaded that as he was acting as a friend of the plaintiff without professional remuneration he was not liable in damages for his negligence. It was however, discovered that the plaintiff had relied upon the defendant's professional skill and knowledge in the transaction. It was therefore held among others, that the defendant was liable in damages for his professional negligence in the transaction.

In another case, Bello Raji v. X[26], in November 1944 the defendant, a legal practitioner had agreed to undertake the defence of the plaintiff in a suit, which was instituted against him for a fee. The agreement was not in writing but the amount of the fee was paid by the plaintiff and the defendant issued a receipt for it. Pleadings were ordered and filed but before the action came up for trial, a notice of discontinuance was filed and it was subsequently dismissed with costs.

In December 1944, the plaintiff instructed the defendant to institute an action against the Lagos Town Council for damages alleged to have been suffered as the result of a cause of action which had arisen on

on about the 15th November, 1943. The defendant agreed to act for the plaintiff in this suit for a fee. This agreement was also not in writing but as in the former (agreement) fee was paid and a receipt issued.

The defendant then advised the plaintiff that he had a good cause of action but did not advise him that the Lagos Town Council were public officers against whom an action became barred after three months from the date of the alleged cause of action by virtue of the public officers protection ordinance, Cap. 25. The action was instituted and pleadings were ordered and filed and the council pleaded the public officers protection ordinance. The defendant all the same again advise the plaintiff that he has a good cause of action even after the filing of the council's defence and after a conference with a senior counsel whose opinion was that the plaintiff has no case and should withdraw the action. The action finally came up for hearing, but the defendant did not show up in the courts. The Senior counsel who happened to be in the court then asked the court for permission to discontinue the action. The case was consequently struck out with costs. The defendant at last appeared before the court after the case have been struck on the invitation of the plaintiff.

The plaintiff subsequently instituted an action against the defendant claiming the return of the amounts of fees paid on two different occassions on the ground that they were amounts 'had and received' by the defendant on 'void' agreements because the agreements had not been put into writing as in Rule 15 of Order 16 of the Supreme Court (Civil Procedure rules) 1945 and also claiming special and general damages for 'negligent and reckless conduct .. ..culmunating in the loss of the plaintiffs claim against the Lagos Town Council.'

It was held that as regards the claims for the return of the two fees paid, that the defendant had filed pleadings and so on and had acted for the plaintiff until final judgement and thus the money might properly be considered to have been appropriated to the purpose for which it was given.

But with regard to the latter part of the claim concerning the negligent conduct of the practitioner, it was held that in the circimstances, the defendant had acted with gross carelessness and that the plaintiff was accordingly entitled to damages which were assessed at £100.

Another important case in this regard is that of Cocoktopoulos v. P. Z. & Co. Ltd[27]. In that case, a solicitor instituted an action on the instructions of his client for wrongful dismissal when the clients contract of service expressly gave the employer the option of terminating the contract at any time by payment of two month's salary in lieu of notice, which was paid to and receipted by the client. The solicitor included other claim. Such as superannuation benefits which from the correspondence available to the solicitor were not maintainable against his client's employer. The case was dismissed and the judge observed that 'a solicitor showing reasonable professional deligence and caution would advised his client against the prosecution of a claim such as the present - one a claim which in my opinion, is totally speculative and devoid of any merit'[28] and the solicitor was consequently ordered to refund to his client the total court fees he paid for prosecuting the claim. The court was of the view that the client was at liberty to demand from the solicitor the payment in full of all professional fees he paid to the solicitor on account of the case.

From the illustrations given with the cases above, one can see that just as their counterparts in other common law countries, barristers in Nigeria fully owed duties of care to their clients in the practice of their profession and a breach of that duty will be met with serious consequences in negligence. They however, just like their counterparts in other common law countries still enjoy some protection under the law. Thus where they render free or gratuitous services with disclaimer of responsibility, they will not be held liable for any loss or damage that their clients will suffer thereafter.[29]

They also have full protection with regard to the prosecution of a case before a court or tribunal. No action can therefore lie against them for anything they do pertaining to the case in the face of the court. This extend to even where their actions shows ignorance of the law. This is because -

> No attorney of bound to know all the law; God forbid that it should be immagined that an attorney or a counsel, or even a judge is bound to know all the law; that an attorney is to lose his fair recompense on account of an error, being such an error as a cautioms man might fall into.[30]

2.2.2. DOCTORS:

According to Halbury's laws of England[31]

> A person who holds himself out as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person, whether he is a registered practitioner or not who is consulted by a patient, owes him certain duties, namely, a duty of care in deciding whether to undertake the case, a duty of care in deciding what treatment to give; and a duty of care in the administration of that treatment. The practitioner must bring to his task a reabonable degree of care. Neither the very highest, nor very low degree of care and competence judged, in the light of the particular circumstances of each case is what the law requires; a person is not liable in negligence because someone else of greater skill and knowledge would have prescribed different way; nor is he guilty of negligence if he has acted in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular art, although a body of adverse opinion also existed among medical men.

The above represent a succint summary of the essentials of negligence with regard to doctors. This clearly shows that a doctor is in risk of paying damages any time his standard falls below that of a competent practitioner of his class, experience and circumstance.[32] Thus if a doctor holds out himself as a good surgeon, he must measure up to the standard generally approved or acceptable in the field of surgery and where he only holds out himself as a general practitioner (not a specialist in particular

area of medical practice) then he is accordingly expected to measure up to the generally acceptable standard for general practitioners. This means that the standards is not constant; it changes in accordance with the area of specialisation of each doctor* Differences in circumstances and facilities at the place of work may also affect the standard required in each case. Thus a more efficient medical services may be expected in a modern weii-equiped hospital than in a village medical centre*[33]

Under this head, our discussion is going to be further divided into the following sub-headings: doctors civil liability, doctors criminal liability and the liability of the Hospital management. This is for the purposes of convenience, clarity and easier understanding.

2.2.2. ($_a$) Civil Liabilities of Doctors

If a doctor performs medical treatment to a patient in a way or manner which is negligent and thereby causing harm to the patient, he ^patient; may institute an action against such a doctor to recover damages for the h a m suffered. Liability for negligence can however, only arise where there is a legal duty to take* care either in contract or in tort."[3k] This means that for the plaintiff to succeed in his case, he must prove that the doctor was negligent and this Onus stands discharge once he can show

that:

(a) the doctor owed him a duty to use reasonable care in treating him

(b) that the doctor had failed to exercise such care (i.e. was in breach of that duty) and

(c) that he had suffered damage as a result of the breach.[35]

He need not show that there was an agreement between him and the doctor to avoid causing damage or harm before succeeding in his case. The authority for this is the case of R v. Bateman.[36] In that case, the appellant, a Pannel doctor practising in one Town called Deptford, was convicted of the manslaughter of a patient called Mary Ann Harding and was sentenced to six months imprisonment by the trial court for criminal negligence. He had actually been called into attend to the patient on her confinement. After finding that her case is a difficult one, he first attempted unsuccessfully to make her deliver by the use of instruments, after administering chloroform; he then tried to perform manually an operation called "version", after an hour the child was born dead. Five days after the delivery of the child the patient, who was then very seriously sick, was removed to infirmary, where she died

two days after. The charges proferred against him and for which he was convicted were (as that in performing the operation of 'version' he had occassioned an internal rupture; (b) that with the placenta he had removed part of the uterus and (c) that he had unduly delayed in sending the patient to the infirmary.

On appeal, his conviction for criminal negligence was quashed and was instead convicted for a civil negligence. The court then observed with regard to the civil liabilities of doctors as follows:

> If a person helds himself out as possessing special skill and knowledge, and he is consulted as possessing such skill and knowledge by, or on behalf of a patient, he owes a duty to the patient to use due caution in undertaking the treatment. If he accepts the responsibility and undertakes the treatment and the patient submits to his direction and treatment accordingly, he owes a duty to the patient to use diligence, care, knowledge, skill and caution in administering the treatment. No contractual relation is necessary, nor is it necessary that the service be rendered for reward....37

Our main concern here is with the last part of the statement i.e. No contractual relation is necessary nor is it necessary that the service be rendered for reward . This shows clearly that that one need not prove the existence of a contract or that the service was rendered in expectation of a certain reward promised before he can

succeed. The reason for not making contract a condition precedent for doctors liability in negligence is not unconnected with the fact that there are two ways in which a doctor may be held liable in negligence to his patient; one is through contract and the other way is through tort. This means that if there is an agreement between him and the patient as to how to go about the treatment his liability may be based on the breach of that contract. But where there is no contract then his liability will be in tort and here the simple creterion it has been submitted is that since he is engaged in a kind of work that envolves endangering some ones life, he is then automatically under a duty of care not to do anything that will cause some one his life.[38]

The civil liability of a doctor may arise in a variety of ways. It may be as result of improper diagnosis treatment or advice or even communication with those who are taking care of the patients welfare. Let us for proper comprehension illustrate some of these points with decided cases. The first care in this regard and which relates to improper diagnosis is the case of Pudney V. Union - Castle Mail S.S. Co. Ltd. & Anor.[39] In that case the plaintiff, a member of crew of the first defendants'

Steamship called Llaustephan Castle fell Sic, complaining of rheumatic while they were on voyage from London to the east coast of Africa via Cape Town. He was then examined by the ship's doctor, the second defendant, who prescribed treatment for him and also recommended that he be repatriated from Cape Town to his own country. After the repatriation, the plaintiff's health further deteriorated. He was again examined by a specialist who discovered that the plaintiff was suffering from acute anthritis. The plaintiff then brought an action against the the 1st and 2nd defendants claiming damages on the ground that the second defendant was negligent in his diagnosis and treatment. Evidence of similar symptoms of rheumatic by other doctor's who examined him before his repatriation were however adduced.

The court held that the plaintiff had not only failed to prove that the second defendant was guilty of any lack of care in his diagnosis or treatment, but that, taking into account the symptoms then observed by him and his fellow doctors, the medical evidence confirmed that he had infact prescribed the correct treatment. Even though the decision of the court in the case cited above was in favour of the defendants, it still serve to show that where a doctor is found to be negligent he can be made to pay

damages upon the suit of the plaintiff for the harm caused as a result. The doctor in the above case escape liability because there were evidences from other doctors who examined the plaintiff showing similar symptoms otherwise he would'nt have been free from liability.

Concerning the liability of a doctor in negligence with regard to treatment, a good illustration will be the case Chin Keow v. Government of Malaysia[40]. In that case, a doctor administered an injection of procaine penicillin to a woman as a result of which she died within an hour. Her mother sued in negligence alleging that the doctor had failed to inquire or conduct any tests to ascertain whether the woman was allergic to penicillin or not before injecting her with it. And that if he had conducted the test or made the inquiry, he would have found out that the woman had previously reacted badly to penicillin as the result of which her out-patient card was endorsed with the warning 'Allergic to penicillin'. The trial judge then held that the defendant was negligent in failing to make the enquiry or cunduct the tests. On appeal to the Federal Court of Malaysia, the finding of negligence was rejected. On further appeal to the privy council however the decision of the trial court was restored. The privy council while disagreeing with the Federal Court of

Malaysia's view that evidence should have been brought from a medical witness of the highest professional standing or that the evidence presented should have been supported by references to the writings of distinguish medical men, said; 'The test is the standard of the ordinary competent practitioner exercising ordinary professional skill, and on this the evidence was all one way'[41]

On the other hand, in the Nigerian case of Kanu Okoro Ajegbu v. Dr. E. S. Etuk[42] the facts of which are that: The deceased was admitted into the Onitsha General Hospital on the 16th of August 1961 by the defendant doctor who diagnosed a niptured appendix. He treated the deceased with antibiotics to localise the infection and performed an appadecestomy on the 17th of August (i.e. the next day). Only one incision was made but it had to be extended to expose the appenddix properly. On the 20th of August, the deceased was given an enema because his stomach was slightly distended. As it did not work, the nurse who gave it reported this fact to the defendant who instructed that a little more enema be given to him and that if it failed, a flatus tube should be used. The second enema again proved ineffective upon the doctors further directive that flatus should be used if the second enema did not prove

successful, flatus was then resorted to and a flatus tube was accordingly inserted and all the enema and air were discharged. The deceased later died on the 21 August. There was some evidence that the death might have been due to delayed chloroform poisoning. However no postmortem examination was conducted to establish the actual cause of death.

A dependant of the deceased sued the defendant under the Fatal Accident's law claiming damages for the death which the dependant attributed to the negligence of the defendant. The particulars of negligence were that:

(1) there was gross negligence in the actual performance of the operation which was said to have lasted for about three and a half hours and that there were incisions.

(2) the defendant refused to attend to the deceased after the operation because he did not come into the hospital as the defendant's private patient

(3) That the deceased was overdosed with chloroform thereby setting on chloroform poisoning.

On the first allegation, the court found that the operation actually lasted for about one hour only and that only one incision was made. The court also held that although the

adminstration of the first enema was a negligent act it was not the doctor that ordered it and thus cannot be held liable for it's consequences and that in any event the enema and gus were later discharged.

On the question of neglest raised in ground two the court found that it was not true and in addition there was the fact that there were only two doctors attached to the General Hospital which was by far inadiquate.

On the allegation of poisoning through over-dorsed chloroform the court found that even though there was medical evidence that the symptoms before death were consistent with delayed chloroform poinsoning, the witness was not categorical on this because no post mortem examination was conducted in order to ascertain whether or not it was the actual cause of death. it was finally decided that the plaintiff have failed to prove his allegations where upon his claim failed as well.

It appears there was actually a strong case against the doctor in respect of the third allegation relating to poisoning by the application of overdose chloroform on the deceased but he escapes liability on the technical ground of lack of postmortem examination to ascertain the real cause of death. But the question which may be ask here is:

Whose responsibility was it to organize for the post mortem examination between the doctor and the plaintiff in the case? Except it can be shown that the doctor advise the plaintiff to submit the body of the deceased for post mortem examination and the plaintiff refused, this cannot be a good defence because the plaintiff may be ignorant about such thing as post mortem examination and the doctor might have deliberately kept mute about it so as to raise it as a defence later. The doctor should therefore not have been allowed to use this as a defence since that may amount to allowing him to benefit from the consequences of his abdication of responsibility.

The decision may however be supported on 'policy' grounds. This is because since ours is a developing country with no enough doctors to take care of our health problems adequately, allowing the plaintiff's case will encourage litigations in negligence against doctors and this will entail serious negative consequences as people will be reluctant to go into medical practice.

2.2,2(b) The Criminal Liability of Doctors

The decision of the court in the case of R v. Bataman[43] also gave us a guide on when a doctor's negligence could amount to a criminal act. In that case, Lord Hewart while delivering the court's judgement said:

> In explaining to injuries the test which they should apply to determine whether the negligence, in the particular case amounted or did not amount to a crime, the judges have used many epithets, such as 'culpable' 'criminal', 'gross' 'wicked', 'clear' 'complete'. But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts be such that, in the opinion of the jury, the negligence of the accussed went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment.[44]

Therefore, for a doctor to be held criminally liable for his negligence, the plaintiff must in addition to proving the issues required to establish a civil liability,[45] also satisfy the court that the negligence or incompetence of the doctor is beyond the mere issue of compensation and show such disregard for life and safety of others to amount to a crime against the state which is punishable. This forms the basis of criminal liability of doctors for professional negligence under the common law.

In Nigeria, however, apart from the established Common law position, our penal laws (i.e. penal code and criminal code) have provisions under which a doctor could be held criminally liable for his professional negligence. For example, section 220 (b) of the penal code[46] provides that "whoever causes death by doing an act with the knowledge that he is likely by such act to cause death comits the offence of culpable humicide". Section 24 define the word 'act' to include ommission. When this is applied to doctors, it will mean where a doctor refused or neglects to attend to a patient who is seriously sick as a result of which he died. The action of the doctor here will amount to gross negligence and he may be convicted of manslaughter. An equivalent provision is to be found under section 303 of the criminal code[47] where it is provided that -

> It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any person, or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act; and such a person is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or to perform that duty.

From the provision of this section one can say that apart from the liability imposed for omission to perform treatment or operation one can still be held criminally liable

where he did not used reasonable care and skill in the course of his treatment or operation if his future to do so amounts to gross negligence or a waton disregard to human life or safety of others. In the case of Akerele v. R.[48] The accussed, a medical practioner administered injection of a drug called Sabita which he has prepared himself to about fifty seven children as a cure for yaws during his tour of the then Oweri province in 1940. The drug requires the greatest care because and overdose of it will cause a disease called Somatitis which may be followed by distressing symptoms in the mouth and finally leading to someone's death. After administering the injection on the children, ten of them died. An action was then brought against the doctor in respect of one of the children that died for manslaughter. The grounds of the action were that (a) the prepared drug were too strong (b) he administered an over dose of it to the deceased and that this amounted to gross negligence. The high court accepted this contention, found the accussed guilty of murder and sentenced him to three years imprisonment. On appeal to the West African Court of Appeal the decision of the

trial Court was affirmed only that the sentence of three years imprisonment was substituted with a fine of £500.

On further appeal to the privy council it was held allowing his appeal that:

i) that there was no evidence to show how strong the Sobita was;

ii) that in a charge of negligence -

a) the prosecution must state and prove the particulars of negligence i.e. the act or omission amounting to the negligence.

b) the probable and not the actual result is what matters;

iii) that the evidence that some other children died as a result of their being injected with the same Sobita preparation is receivable to destroy any special defence by the accused that the deceased was over sensitive to the drug called Sobita.

The claim in this case was therefore defeated on technical ground of failure by the prosecution to prove the particulars of the alleged gross negligence of the defendant doctor. If they had done so it appears their case wouldn't have failed. It was on a similar ground that the claim of the prosecutions case in R v. Bateman [49] failed.

Again from the provision of the two codes Penal Code and Criminal Code it appears one could upon prove of criminal negligence against him be convicted of a lesser offence which is not up to Manslaughter; the offence may amount to a misdomeaneur only. This is deducible from the provisions of Section 220 (c) of the Penal Code and Section 343 (1) of the Criminal Code. The penal code in it's section 220 (c) provide that "whoever causes death by a rash or negligent act commits the offence of culpable humicide." In explaining the import of this section the draftsmen said:

> There is no intention on the part of the accused to cause death and no knowledge that the act done in all probability will cause death. A rash act is done over - hastily and without fore thought. Committing a rash act is criminal because an accused, knowing the act to be dangerous and that he may cause injury, nevertheless has done it.50

Here the defendant might have acted with all honesty in the performance of his work with not even an iota of immagination that what he is doing may cause injury or harm to somebody but unfortunately injury is thereby caused. Here, his action will be compared with that of an ordinary competent medical practitioner to see if he measured up to that standard. If the standard exhibited by him fall below

that of the ordinary competent medical practitioner then even though he acted with the greatest care and honesty he may still be held liable for criminal negligence. But then his action is not the same with that of the doctor who abandon completely a seriously sick patient. Therefore even though both of them are guilty of negligence their punishment may not be the same under the law since the degree of the criminal negligence also differs. Section 343 (1)(e) of the criminal code did not leave us in doubt about this. It provides: "Any person who in a manner so rash or negligent as to endanger human life or to be likely to cause harm to any person given medical or surgical treatment to any person whom he has undertaken to treat is guilty of a misdemeanour, and is liable to imprisonment for one year". This clearly shows that a negligent act committed by a doctor in this kind of circumstance will only amount to a misdemeanour and not manslaughter.

In the East African case of Dabholkar v. The King[51] the accused who was a doctor was charged with giving surgical treatment negligently and in a manner likely to endanger life or to cause harm contrary to Section 222 of the Tanga-anyika (now Tanzania) penal code which is similar to section 343 (1)(e) cited above. He was convicted

and he appealed to the privy council contending that the prosecution must prove gross negligence in order to succeed. Their Lordships however dismissed his appeal on the ground that although the negligence which amounts to an offence must be of a higher degree than the negligence which only result in the payment of compensation, it is not of a high degree as that which is necessary to give rise to the offence of manslaughter. The principle in this case is no doubt applicable also to the Nigerian situation.

It is however, doubtful if a charge of murder can be instituted against a negligent doctor, but where the treatment or operation embark upon by the doctor is itself illegal, such as commiting an illegal abortion, and death is thereby caused, it is submitted that the doctor should be charged with murder. Again a doctor who with an alleged consent of the patient terminates his life out of pity may be guilty of murder.[52]

2.2.2. (c) Hospital Management Liability

Since most of our doctors are resident doctors working in hospitals owned either by government or wealthy individuals or groups it becomes expedient for us to discuss as well the liability of the hospital management for two reasons: First there is a relationship of master and servant between the hospital management and the doctors working in the hospital and by the doctrine of respondent superior the hospital management will become vicariously liable for the negligent acts of the doctors. Secondly the hospital management itself as an organisation that undertakes the performance of function requiring skill is under a duty to take care and it is a settled principle of the law that whoever is under a duty to take care cannot escape that responsibility by shifting it on to someone else. [53]

The position of the law at first however, was that the hospital management duty was that of ensuring that is gets qualified doctors to come and work in the hospital and that once this duty is satisfactorily discharged, the management will not later be held liable for the negligence of any of it's doctors. The argument then was that as professionals their contract is for services and not of services. Thus in the case of Hillyer v. The

Governors of St. Bartholomew's Hospital[54] the the court was of the view that the only duty undertaken by the Governors of a public hospital towards a patient who is treated in the hospital was to use due care and skill in selecting t their medical staff. The relationship of master and servant does not exist between the governors and the physicians and other attendants assisting at an operation also cease at that time to be the servants of the g governor[55]. What happened in that case was that the plaintiff, on March 28, 1907 entered St. Bartholomews hospital so as to obtain a medical examination from an anaesthetic. The examination was conducted by one Charles Barret Lockwood, a consulting Surgeon attached to the hpspital. He was for the purpose of the examination put on an operating table in such a way that his arms hang over its side. His left arm touched a hot water tin projecting from beneath the table as a result of which the inner upper part of it was burnt and the inner part of his right arm was bruised by the operator pressing against it during the operation. The injuries he sustained caused him to experience traumatic neuritis and paralysis of both arm thereby depriving him of the ability to practice his profession as a medical man.

Upon bringing an action claiming damages for the harm suffered against the St. Bartholomews hospital management, the court held that the action was not maintainable against them on the ground that there was no relationship of master and servant between the hospital management and the doctor and also between the hospital management and the nurses who were assisting the doctor in the operation room because at that time they were completely at the disposal of the doctor and not the hospital management.[56] This then was the first position of the law with regard to the liability of the hospital management for the negligence of their doctors and other staff. While commenting on it, Lord Denning said;

> I cannot help thinking that this error - for it was undoubtedly an error - was due to a desire to relief the charitable hospitals from liabilities which they could not afford. They are dependent on voluntary contributions and their work could be seriously impeded if they were exposed to heavy cla claims of this sort.[57]

Going by Lord Dennings statement, one could then say that the actual ratio of the decision in Hillyers case was not in law but in policy viz to obsolve charitable hospital from liability for the negligence of their doctors so that they could not be grounded by payments of huge amounts as damages to claimants. There was however a judicial

rethink later which culminates in the decision of the court in the case of Gold v. Essex Caunty Council,[58] which slightly changed the position of the law with respect to nurses and radiographers. In that case, an infant was treated by a radiographer, an employee of the respondent, at one of their county hospitals. As a result of his failure to provide adequate screening material while giving Grenz-ray treatment, the infant suffered injury to her face. In an action against the respondents, the trial court, basing their decision on that of Bartholomew's case held that the respondents were not liable for the negligence of the respondent. On appeal however, it was held that the radiographer was under a contract of service with the respondents and therefore responsible for this negligence under the doctrine of respondent superior.

As stated earlier, the decision in the above case changed the position of the law only slightly. They limited themselves only to nurses and radiographers living the position of doctors still unclear. And again by the decision it means for the hospital management to be held liable it must be shown that the employee's contract of employment was one of services and not for services. This position was viewed as unsatisfactory and there was therefore the

need for a more adequate protection of the doctors and nurses working in public hospitals against actions for negligence. The opportunity for that presented itself in the case of Cassidy v. The Ministry of Health.[59] In that case, the plaintiff who was suffering from a contraction of the third and fourth fingers of his left hand was operated upon at the defendant's hospital by Dr. F. a whole time assistant medical officer of the hospital. After the operation, the plaintiff's hand and forearm were bandaged to a split and they remain like that for about 14 days. During this time, the plaintiff complained of pain, but, apart from ordering the administration of sedatives no further action was taken by Dr. F. or the house Surgeon who attended to the plaintiff in the absence of Dr. F. Both Dr. F and the house surgeon were employed by the hospital authorities under contract of service. When the bandages were removed it was found that the hand was practically useless. In an action by the plaintiff against the defendants for negligence in the post operational treatment which he received, it was held that there was evidence showing a prima facie case of negligence on the part of the persons in whose care the plaintiff was which had not been rebutted and that in view of the terms of employment

of Dr. F and the house Surgeon the hospital management were liable to the plaintiff whether the negligence was that of Dr. F or the house surgeon or of a members of the nursing staff. In his own judgment, Lord Denning laid down the law that the liability of the hospital authorities for the negligence of a doctor on the parmanent staff of the hospital does not depend on whether he is employed under a contract of service or under a contract for services, but rather on he who employs him. So, if it is the patient himself who selects his doctor and employ him to treat him, the hospital authorities will not be held liable for his negligence but if on the other hand the doctor whether or not he is a consultant is employed and paid by the hospital authorities they are the ones to be held liable for the doctors negligence while treating the patient. He said:

> It has however been said - that the liability for doctors on the parmanent staff depends 'on whether there was a contract of service.....' I venture to take a different view, I think it depends on this; Who employs the doctor or surgeon, is it the patient himself or the hospital authorities?
> If the patient himself selects and employs the doctor or surgeon,.... the hospital authorities are of course not liable for his negligence because he is not employed by them. Where however, the doctor or surgeon be he a consultant or not is employed and paid, not by the patient but by the hospital authorities, I am of the view that the hospital authorities are liable for his negligence in treating the patient. It does not depend on

> whether the contract under which he was employed was a contract of service or a contract for services.[60]

In Hillyers case, the plaintiff came purposely to be operated by the particular amaesthetic who actually operated him and suffered harm later. If the decision of the court in that case had been based on the fact that it was the p patient who employs him, the decision would have been a good precedence. Unfortunately however, it was based on different ground, namely, that hospital authorities are not liable for the negligence of doctors employed by him once it can be shown that reasonable care was exercised by the authorities to ensure that only qualified doctors are employed to work in the hospital.

After the courts decision in Cassidy's case, hospital management or authorities became fully liable for the negligence of their doctors whether or not the terms of t their contract is that of service. In the case of Dickson Egbokwe V. University College hospital board of management[61]. The deceased was admitted in to a fouth floor maternity ward of the defendant Hospiyal board where she gave birth to a baby on the 23rd of December 1958. After the birth, she was suspected of being mentally deranged and was put on sedative drugs. A nurse was asked to take care of her.

On two sides of the ward where she was admitted, there was an open verandah about seventy feet from the ground protected by railings four and half feet high. In the morning of 29th December, 1958, the deceased was not seen on her bed and was later found dead as a result of injuries she sustained when she fell from the fourth floor.

Her dependants then brought an action against the hospital board of management claiming damages for the death of the deceased on the ground that the circumstances of her death pointed to negligence on the part of the hospital authority relying on res ipsa loquitur. The hospital authority agreed under cross examination that if someone had been specially assigned to watch the deceased, the incident would probably not have occured. No medical expert was called to show that given the case history, all reasonable precautions had been taken to prevent the occurence. The court held that the plaintiff's case was successful since the hospital management had failed to rebut the inference of negligence which arose from the facts of the case. The court further held that hospital authorities are responsible for the negligence of the whole of their staff be they surgeons, physicians or nurses other employees of the hospital.

Thus, from the discussion and the illustration given it is clear that it is now settled law that hospital management are liable not only for the negligence of their doctors or nurses but indeed all other employees of the hospital. And the management of the hospitals cannot escape this liability by showing that the terms of contract of the doctor was for services and not of services.[61]

2.2.2(d) The Liability of Quacks and Native Doctors.

An unqualified or unlicensed person who undertakes medical treatment is required by law to exercise the same degree of skill knowledge and deligence as a person qualified to practice the profession is required to exercise. He is not guilty merely because is unqualified or unlicensed to practice but only if his standard fall short of the required standard of care for the qualified practitioners.[62]

In the case of R v. Chigbata Olise[63] the accused was indicted before the Wari-High-Court on three counts viz: manslaughter of one Justina Onwuzulike Contrary to Section 325 C.C. Cap 42; being in possession of poisonous matter without lawful authority contrary to Section 59 of the Pharmacy Ordinance Cap. 69 and giving injection of a drug into the skin of

the said Justina Onwuzulike the accused not being a qualified person to whom licence had been given for that purpose contrary to Section 34 (1) of the medical practitioners and Dentists Ordinance Cap 130.

The facts of the case is as follows: The deceased and her husband approached the accused on the 29 August 1959 and ask if he could treat the deceased who has earlier complain of chest and heart problems. The accused agreed to treat the deceased for a fee of £9, 17, 3d; £6 of which was paid in advance. After the husnabd had left the deceased with the accused, the latter attempted to give the deceased an injection at the back of her hand using a hypodermic syringe and needle. When this was not possible, he gave her the injection in the shoulder area. The deceased died later that evening. When he was later asked by a councilor in the area whether he treated the deceased, he (accused) admitted giving her injection and said that he was a doctor. The report of the doctor who performed post mortem examination of the deceased showed that she died of accute poisoning from a drug injected into her body. When the house of the accused was searched, poisons in Part III of the first schedule of the pharmacy Ordinance were found. The accused admitted that the poisons were

found in his house but said they were put there by the relations of the deceased and denied giving the deceased any injection. He did not give any evidence that he was a licensed doctor under the medical practitioners and Dentist ordinance or that he had any lawful authority to be in possession of the poisons.

The Court held:-

(1) that since the accused had not shown that he had lawful authority to be in possession of the poisonous materials he was guilty of being in possession of them for unlawful purpose,

(2) that if a person without medical training takes on himself to administer a medicine that have dangerous effect and such medicine destroy the life of another person, he is guilty of manslaughter and reckiessness.

The accused was accordingly convicted of all the two courts of charges.

In another case, R v. Samuel Abengowe[64]. The deceased was taken to the appellant for treatment. She was then suffering from sores on her back and breast which has lasted for about three years. The appellant, an unqualified doctor, filled a syringe with a red looking liquid and pushed the

nozzle of the syringe into the right buttock of the deceased and pumped the liquid into her. The deceased fainted immediately. A day after that, her husband found that her right leg and buttock were swollen and the buttock were peeling, looking red. She died the next day. The incident was not reported to the police untill about three weeks thereafter. After conducting post-mortem examination, the doctor reported that the deceased has been suffering from syphilis for some years and according to him this would render her susceptible to poison. He then removed some part of her liver and kidney and send them to government analyst who examine them and made a report.

At the trial, the report of the government analyst was rejected by the trial court as in admissible. No reasons were given for their inadmissibility. Judgment was passed against the appellant. The appellant's appeal succeeded on the ground that although it is obvious from the record that the accused was tried for the manslaughter by negligence, it was not clear what particular form of negligence was relied on by the prosecution. It was obviously the duty of the prosecution to disclose with certainty and precision and without inconsistency the particular form of negligence alleged. The prosecution therefore failed on appeal for want of prove.

It appears from the decisions of the Court that native doctors are placed on the same level with quacks with regard to their liability in negligence. A case in point which illustrate this is the case of R v. Ezeoca.[65] In that case, the appellant who was a native doctor, was charged in the Supreme Court of the then Abba Judicial division with manslaughter. The prosecutions case was that the appellant gave the woman 3 injection at intervals of seven days for which he charged 3s. a time. Shortly after the last injection, the deceased became very ill. She died eight days later. The appellant asked her sister not to report the matter. After his arrest he made the following statement (which he later denied in his defence);

> I did give injection to One Owerri-Aba woman in the year 1943, as I was passing by the road. The woman was very sick. She asked me to inject her with my injection. She said she has tried many other injections. I did not agree at first, but she commpelled me. I warned her very seriously, still yet she said I would not be responsible for whatever might be the result. I told her that she would pay 25.5 when she got better, or leave paying anything if she did not recover. I did it by favour.

In his defence during trial he denied injecting her as mentioned in his statement to the police above and instead claimed that action was instituted against him by the family of the deceased out of revenge as a result of another matter

unconnected with the death of the deceased. An analyst report which indicated that death was caused by loxaemia due to a bismuth injection was accepted by the court. Then the court after coming to the conclusion that the prosecutions case has been substantially established convicted the defendant for the offence of manslaughter.

On appeal, it was held that there cannot be the slightest doubt that it has been established that the accused was guilty of criminal negligence and rightly convicted of manslaughter. His appeal was therefore dismissed.

In a related case, R v. Yaro Paki and Another[66], the first accused was charged with manslaughter for operating on the tonsils of his patient who subsequently died. The Second accused who was charged with aiding and abetting by holding the patient's head during the operation, was discharged and acquitted on the ground that the operation on the tousils by the first accused was not itself an unlawful act like an operation to bring about abortion, and that since the 2nd defendant did nothing apart from holding the head of the deceased during the operation, he is not guilty of any offence.

The deceased died six days after the operation. There was evidence which showed that the deceased was fit on Saturday but on Sunday he became sick; he was washing his mouth and what he was spitting contain a lot of blood in it. On Monday he did not look worse but his manner of speaking showed that all was not well. On Tuesday his neck was swollen and his speaking was difficult; On Wednesday and Thursday he seemed much better but in the evening he became worse. He died on Friday.

Post morten examination showed that both sides of the neck were swollen and that the notrils was congested meaning that at one time there had been bleeding. These, accroding to the doctors are indications that the cause of the death was haemorrhage from the bed of the tonsils and sepsis from there.

The first accused gave evidence to the effect that he as a native barber inherited the trade of performing operation on tonsils from his ancestors and that he had been doing such operations for about 27 years and on about 2,000 people without any known case of death resulting convicting the accussed as charged the trial court held that he was liable because his instruments were crude

and unsterilised and further that he was grossly ignorant and grossly incompetent.

From the illustrations given on both quacks and native doctors it appears native doctors and quacks are normally charged with criminal negligence. This may not be unconnected with the fact that the law frowns at recklessness.[67] And to undertake medical treatment or to perform an operation on somebody when someone doesn't have the requisite qualification and knowing fully well that such undertaken is the type that endangers life is recklessness of the highest order. This may be the reason why a higher degree of punishment is awarded in order to serve as a deterrance to others. However, with regard to native doctors, one will add that to hold some body liably in negligence only on the ground that the tools used were crude is not in the writters view proper. A clear case of negligence must be shown to have existed to ground liability.

2.2.2(e) Informed Consent:

By informed consent, it means a patient who is matured or who has the ability of understanding and taking decision on a matters based on sound reasoning must be sufficiently informed about the nature and purpose of a medical treatment which is about to be administered on him including the risks and consequences involved before consenting to it.
If this is not done, the doctor concern may be embarking on a treatment for which he will be guarantor for its success so that he will be held liable for any post

treatment harm regardless of whether he was negligent in treating the patient or not.[68] About two reasons have been advanced for this stand of the law. First is that consent itself entails an opportunity to evaluate knowleageably the options available and the risks inherent in each of those options or alternatives before opting for one or the other alternatives.[69] The second reason is that every humanbeing of adult years and sound mind has right to determine what should be done with his body. This means that once he gave his consent based on full understanding of the risks and the dangers involved in a particular operation or treatment he cannot later complain; the doctrine of volunti non fit injuria will be applicable to his case. But where no sufficient explanation is made to him then the doctor may be liable in battery where no harm is caused but where harm is caused he may be liable in negligence or both in battery and in negligence.[70]

For an informed consent to be validly obtained, the following must be complied with:

(a) The person who gave the consent must have the requisite capacity to do so.

(b) The consent must be given based on knowledge of what is to be done and the consequences involved.

(c) where a new operation or treatment which is different from the one for which consent was originally obtained is to be embark upon, a fresh consent must be obtained.

(d) There must not be fraud in obtaining the consent.

With regard to capacity, the patient must be of age in order to be able to give a valid consent if not such consent can only be obtain from his parents or guardians. There is no certainty as to what the actual age at which a patient could give a valid consent should be. However it appears if someone has attained the age of 18 he may give a valid consent or if he has attained such age which it could be presumed that his mind and brain are developed enough to have general understanding of matters and be able to take decisions on them.[71]

If the operation to be performed on a patient below 18 years is not directly for his own benefit but for the benefit of some one who is related to him in which case it is of emotional benefit to him his consent and that of his parent must be obtained and such consent should not be given where the operation is totally of no benefit at all to the patient.[72] Where the patient is of age and therefore can give valid consent, then the consent of his parent is not enough for the doctor to start treating

him or to withhold treating him, but the parent himself must consent otherwise the doctor may be liable either in battery or negligence as the case may be.[73]

The ability of mentally ill patient to give a valid consent depends on the degree or extend of the mental problem. If the illness is of such a degree that could impair someone's ability of proper perception then the consent of his parent or guardian is necessary but if it is not upto that level he may then give his personal consent for admission and treatment in the mental hospital[74].

If a patient is married then the spouse may give consent on his behalf if his/her condition is such that He/she cannot him/her self give a valid consent.[75]

On the issue of giving consent based on knowledge, it means just as we have already stated earlier that the patient must have been fully informed about the kind of treatment or operation to be performed, the risks involved the benefit of such treatment or operation to him and the alternatives open to that particular kind of treatment. This means that getting what is called 'bal 'blank Cheque' consent from the patient is not enough. 'Blank Cheque' consent here means a consent given for

treatment without knowing in advance of such consent the risks involved in the treatment or operation to be performed. This contradicts the doctrine of informed consent and thus unacceptible. The patient in this regard have the option of instituting an action against the doctor either in the tort of battery or in negligence. If he brings his action in battery, then prove of damage is not necessary, all he need to prove is that the doctor treat him without his consent and he will succeed even thought the amount to be paid may very meagre, which is called contemptous damages, If however he elects to bring his action in negligence he he must prove the existence of all the elements needed to be proved in order that an action in negligence will be successful. In OneAAmerican case, Bowers v. Talmage and Von Storch,[76] a nine year old boy who was suffering from hallucinations was taken to the defendants neurologist who being in doubt whether the Duids trouble was emotional or organic, recommended an artenogram, an exploratory process in which three percent of cases are known to result in serious injury. There was no emergency that would warrant the performance of the operation. The defendant did not explain the dangers of the treatment to the chil

parents and they gave their consent. The plaintiff was paralysed as a result of the treatment. In an action, it was held that 'unless a person who gives consent to an operation knows its dangers and the degree of danger, his consent does not represent a choice and is ineffectual."

There however, appear to be a conflict between American Court and English Courts about the issue of liability where a doctor did not properly inform a patient about risks and alternatives before starting an operation or administering treatment. English Courts appear to be in favour of the doctors. Thus in England if a doctor is of the view that informing a patient is not important, then unless that opinion of his is against the generally acceptable practice in the medical profession, he may not be liable unless if the patient himself can prove that if he were properly informed he would not have submitted himself to that treatment or pperation. In the case of Hatcher v. Black,[77] the plaintiff, a singer, suffered from a diseased thyroid gland. She then underwent a thyroidoctomy after being assured by the surgeon that there was no risks to her voice. A nerve was so badly injured in the operation that the plaintiff's voice was damaged. The doctor knew there was slight risk to the plaintiff's voice but refused to inform her about it in order that she should not get worried. The doctor was held not negligent because his action did not fall short of the standard of a reasonably skillfull surgeon.

The American Courts however tend to favour the plaintiff's right of choice and are therefore always of the view that a patient must be fully informed in order to enable him take a decision based on knowledge of what he is consenting to. And it has been submitted in this regard that the court should not force the patient to prove affirmatively that he would not have undergone the operation with full knowledge but should assume that a reasonable man would hesitate in undertaking hazardous treatment.[78]

However, it is important to note that informed consent is not necessary in emergency situations like where the patient's situation is so critical that the doctor is expected to go into operation immediately in order to safe his life. Again consent may not be required where the patient himself doesn't have the capacity to give same due to either tender age of mental incapacity and his guardians or parents are not near enough so that they can consent on his behalf and the doctor is of the view that waiting for a longer time to get the guardians or parents consent will worsened the situation of the patient.

But if a patient's consent is given with respect to a treatment and in the course of the treatment a new case requiring treatment is found, the doctor should seek fresh consent from the patient before going into the treatment of the new case. In one case, Mohr v. Williams[79] where a doctor was employed to perform an operation on the plaintiffs right ear but after anaethetising her and examining her and finding that the condition was not serious in the right ear as he supposed but found a more serious condition in

the left ear and want a head to operate, he was held liable in battery despite the fact that the operation was successfully and skillfully performed since it was not in emergency situation. It is submitted that if this aspect of informed consent is to be followed strictly, doctors will find themselves in serious difficulties and their work may be hampared on the same grounds. For example what will happen where a patient's relations are not around when the doctor is performing a very serious operation on the patient and he happen to come across a problem which he need to tackle immediately and the patient himself could not even communicate to the doctor or even if he could communicate his condition is such that no any valid consent could be obtained from him? Must he wait for as long as the patients relations will come so that he will get the go ahead from them to deal with the new case?

Even though the doctrine of informed consent itself is subject to emergency situation, it is submitted that in addition to that once a patient has given his consent in the first place then unless if the new case the doctor comes across is highly dangerous, then the patient consent is not necessary. In this regard, one will prefer the practice in England where a doctor is allowed a times to dispense with the consent of the patient where he is of the view that the risks involved in the operation is not very serious or where he is of the view that telling the patient will make him to be unnecessary scared and emotionally disturb[80].

Even the doctors in America, it appears, have started seeing the folly in giving a patient complete freedom of choice and have therefore embark on a technique which tend to extend the rule of emergency to cases where a doctor come across a new situation in the course of treatment or operation. What they now resort to is to draft the consent form in such a way that the patient consent's to the initial treatment and any subsequent one which may be discovered later.[81]

Fraud vitiate consent ab-initio and therefore a doctor should not misrepresent the facts of a particular operation or treatment to his patient or his guardians so that he will get their consent. He should take his time and explain to them in full all the issues involved and their consequences. Thus a doctor should not for example under the pretext of treating a woman for one illness perform an operation on her to cause abortion[82].

Finally, it can be said that doctors and the hospital management that employ them to work for them are constantly at risk of being liable in negligence any time their standard fall short of the generally recognized and acceptable standard in the medical profession. However, the liability is limited to such of their actions which a reasonable person will be of the view that it is done without enough care or caution otherwise they will be exposed to situation where they are always liable to patients for any little mistakes or miscalculation on their

part. It is in this regard that Lord Denning stated as follows:-

> It would be wrong, and, indeed, bad law, to say that simply because a misadventure or misharp occurred, the hospital and the doctors are thereby liable. It would be disastrous to the community if it were so. It would mean that a doctor examining a patient, or a surgeon operating at a table, instead of getting on with his work, would be forever looking over his shoulder to see if someone was coming up with a dagger-for an action for negligence against doctor is for him like into a dagger. His professional reputation is dear to him as his body, perhaps moreso, and an action for negligence can wound his reputation as severely as a dagger can his body. You must not, therefore, find him negligent simply because something happens to go wrong; if, for instance, one of the risk inherent in an operation actually takes place or some complication ensues which lessens or takes away the benefit that were hoped for, or if in a matter of opinion he makes an error of judgment, you should only find him guilty of negligence when he falls short of the standard of a reasonably skillful medical men, in short when he is deserving of censure - for negligence in a medical man is deservingly censure.[83]

By this it means that the allegation of negligence against a doctor must be a glaring one which any qualified person of his standing could not have committed otherwise a case of negligence against him may not succeed.

2.2.3. BANKERS:

Just like their counterparts in the Medical and legal fields, bankers are by virtue of the doctrine of special relationship established in the case of Hedley Bryne & Co. v. Heller and Partners Ltd[84] owe a duty of care to their customers a breach of which will render them liable to them in a civil action for negligence. Apart from the

existence of a special relationship, the banker and custmer relationship is also a fiduciary one and this makes it the more important for bankers to treat the case of their customers with utmost care and skill since a fiduciary relationship calls for trust and confidence by one of the parties on the others capability, trustworthiness and fairness.[85] The liability of a banker in negligence is not limited to cases of actual negligence or lack of the exercise of proper care and skill in the actual performance of the bankers job but it arise also as a result of the extension of the doctrine of 'neighbour" which involve cases where the loss sustained or incured arise out of contract.[86] However, for the purpose of this work, bankers liability is going to be discussed under the following subheading :

(a) bankers liability at the time of opening an account for a customer.

(b) Liability in dishonouring of cheques

(c) Liability in payment of cheques

(d) Liability in giving a status view on a customer

(e) liability in making disclosures about customers accounts.

2.2.3(a) Bankers liability at the time of Opening an Account for a Customer:

Despite the fact that one cannot be said to be a customer of a bank unless he has opened an account with it,[87] it is still of utmost importance that initial precautionary measures be taken by the bankers when the customer comes to open an account with them in order to safeguard against sharp practices by dishonest persons. Therefore, when a prospective customer comes to the bank for the purpose of opening an account, the banker must first ensure that he obtain the names and addresses plus the occupation of the prospective customers referees. If he is not satisfied with what the intended customer give him he should verify himself in order to be certain.[88] The banker should also in addition to obtaining the names, addresses and occupation of referees also require the prospective customer to supply him with informations concerning his previous or existing banking account which he had earlier operated or which he is currently operating, if at all there is one, if there is none both before and at the time of opening the account then that information should also be made known to the banker.[89] Where a bank neglects or fails to take the above precautionary steps before opening an account, it may be exposing itself to the risk of

liability in negligence if it collects a fraudulent cheque from a customer. In the case of Ladbrove & Co. V. Todd[89], an account was opened by a banker for X, a stranger, who presented himself as the payee of the cheque he produced but which was actually stolen by him from a letter box through which a letter containing the cheque was posted. He did not make any introduction at the time of opening the account, and neither did he give the names of his referees as required. After opening the account, he immediately have the cheque cleared, withdrew the amount on the cheque and disappeared. In an action against the bankers, it was held that they were negligent in not taking reasonable precautions in order to safeguard the interest of the owner of the cheque. If the bankers had asked for the names of the thief's referees and also certain information concerning his previous banking or ask for an introduction of himself by one of their customers or respectable member of the public and such other preliminary things, he would have been scared and may run away. And if he did not run but met those demands and have the account opened for him, then that would have been a defence for them. In a related case, United Nigerian Insurance Co. v. Muslim bank of West Africa Ltd[91], the defendant, who was a banker, opened a savings account for one Olatunde Odubiyi, a new customer. Barely two days after

opening the account, the new customer paid in a cheque of ₦550.00 crossed and endorsed 'not negotiable - A/C payee only' which belong to the plaintiff/appellant. The plaintiff had actually sent the cheque to the defendant bank but it had refused to receive it. The defendant credited the new customers savings account with the amount on the cheque. Five days later, he withdrew ₦550.00 the plaintiff then brought an action against the bank for damages for negligence in opening the account, collecting the cheque and parting with the proceeds of the cheque. The plaintiff's grounds for instituting the action was that the defendant's failure to obtain necessary references and to follow the usual banking practice in opening the savings account was a negligent act and that that has caused him the loss of his ₦550.00. No evidence was called to prove the custom or practice of bankers generally concerning the opening of an account for new customers. The defendant on his part denied that he was negligent and claimed protection under Section 2 (2) of the bills of exchange Act, 1964,[92] The trial court held that the allegation of negligence was not prove and therefore the defendant was not liable to the plaintiff to the tune of ₦550.00 as claimed instead the defendant was ordered to refund the balance standing to the credit of the savings Accounts to the plaintiff. The plaintiff then

appealed to the supreme court where it was held that the bank was liable because it was negligent in not obtaining satisfactory references when opening an account for a new customer or when the customer came to deposit the cheque for ₦550.00 two days later since this was not done initially. This in the view of the Supreme Court amounted to failure by the bank to observe the standard expected of a reasonable banker. Concerning the defendant/respondent claim to protection under 2(2) of the bills of exchange Act, the court held that where a banker fails to make an inquiry about a prospective customers identity and character before collecting a cheque for his account, the banker will be liable in negligence, and the section cannot afford him any protection.

The decision in the above case have clearly shown that obtaining the names and addresses is not enough for a banker where such is done. The banker should in addition verify the identity of the referees before extending any banking facilities to the customer. If the referee named is a well known and reputable customer of the bank there may be no much problem since he is already known by the bank but if on the other hand the referee is not a customer of the bank then simply forwarding his name, address and passport may not be enough to protect the bank against liability. The reason given for this is that bankers have all the rights to accept or reject

a referee. Therefore if they negligently fail to verify the claims of a referee and a true owner of a cheque suffers financial loss as a result of the fraudulent act of a new customer the bankers will not be absolve from liability in negligence[93]. In the case of Hampstead Guardians v. Barclays Bank Ltd,[94] a person who posed as Donald Steward opened an account with the defendant bank after getting a very good reference. It was discovered that it was the customer himself who wrote the reference and not his referee even though he had given the name of one in the person of Mr. Wolfe Instruments paying to D. Stewart account were instead paid into his account because he had already said that that is his business name. The instruments were however unknown to the bank was actually stolen from the plaintiffs by one of their employees. In an action against the bank, it was held that the bank had been negligent for failing to verify whether the person who posed as Donald Stewart was actually Donald Stewart or not.

It would appear as if bankers are being over tasked in their bids to escape liability in negligence as a result of the activities of some trick stars but then upon proper analysis one will not but still hold the bankers in the above case liable since they have abandoned a responsibility or duty which if performed, will help them greatly in detecting fraud.

The issue here is simple, if the bank had undertaken to verify the reference submitted to them by the intended customer they would have discovered that the reference did not actually come from the intended customers referee and they would'nt have fallen victims of his fraudulent machinations. Thus in the case of Marfani & Co. Ltd. v. Midland Bank [95] the court refused to hold the banker liable in negligence when the proceeds of a cheque was collected and misappropriated by a new customer to the bank since the bank had in that case complied with generally approved practice of bankersby contacting the referee of the new customer and obtaining a reference from him on the new customer.

Bankers should also ensure that they obtain the name of their prospective customers employers and the type or business or work they do. This offers a good cross-check on the customers claim. Thus where a new customer was accepted in a bank merely upon reliance on the new customers information that she was married, the bankers were held liable in negligence when the informations turns out to be false [96]. Therefore unless the bankers received a reference from a reputable customer of theirs concerning the marital status of a woman, they should make further enquiries about the nature and the address of the husband's employer.

2.2.3 (b) Liability in Dishonouring of Customers Cheques

Dishonouring of customers cheques is another area in which a banker in the discharge of his duties may be held liable in negligence. A paying banker is duty bound to honour and pay a cheque properly drawn if their is enough money in the customers account to cover the amount stated in the cheque. Therefore where a banker negligently dishonour a cheque which should otherwise have been honoured he may be sued by the affected customer to recover damages for the loss of reputation he suffered as a result of that dishonour. In the case of Balogun V the National bank of Nigeria Ltd[97], the plaintiff, who was a trader with credit facilities with a company had an account with the defendant bank. Two cheques issued by him in favour of the company were dishonoured by the defendant bank. As a result of the dishonour, the credit facilities granted him by the Company were consequently stopped. He then instituted an action against the defendant bank. From evidence presented before the court, it was clear that at the material time of presentation of the said cheques, the plaintiff had sufficient money with the defendant bank to cover the amount on the cheques. The court held that the moment a bank places money to its customers credit the customer is entitled to draw upon it, unless something occur. to deprive him of that right. And that since the customer in that case had sufficient money in his credit he was entitled to draw upon it.

The defendant bank was therefore liable to the plaintiff for wrongfully dishonouring the cheques.

A customers account is, for the purpose of sustaining an action for dishonour of cheques with sufficient amount even if the amount, in the account have been secured through a credit facility or an overdraft granted to the customer by the bank.[98] However, if the banker can established the occurrence of a certain event or state of affairs which necessitated the deprivation of the plaintiff from this right such as that the cheque have not yet been cleared it may be absolved from liability. In the case of Union Bank of Nigeria Ltd V Nwoye.[99] The plaintiff/respondent paid into his account with the defendant/appellant a bank draft for ₦8,000.00 drawn on the African Continental Bank, Benin. The same day he drew a cheque for ₦15,000.00 on the account in favour of a third party. The amount in his account can only pay the cheque if the cheque for ₦8,000.00 is cleared and credited to his account. On three occassions, the cheque was presented and represented for payments but it was not paid by the bank. On the date of the third presentation of the cheque for payment the draft was cleared and his account credited but still the cheque was not paid. The plaintiff then sued the defendant bank claiming damages for wrongful dishonour of cheque or in the alternative damages in negligence. The trial court found the defendants liable in damages to the plaintiff. The defendant bank thenappealed against the judgment

of the trial court, it was held dismissing the appeal that on the first and second occassions when the cheque was presented for payment and the plaintiffs lodgement was not cleared the bank was not liable but when the lodgment by the plaintiff was cleared later and his account credited the defendant appellant Bank was liable in damages for wrongful dishonour of the appellant's cheque.

The court then laid down the following rules:

(a) if cash is paid into an account, the bank required reasonable time to adjust it's account by entering the credit. Before the affluxion of a reasonable time to enable the bank effect necessary book keeping operations, a customer whose cheque is dishonoured on account of insufficiency of funds in in the account cannot maintain a successful action against the bank.

(b) if a cheque is paid into an account, the bank requires reasonable time necessary to clear the cheque and effect its book keeping operations. In this case, the reasonable time will take into account the clearing period delay. Before this time, a dishonour of a cheque on account of insufficiency of fund cannot ground liability of the bank[100] if the plaintiffs case in respect of a wrongful dishonour of his cheque bedomes successful, the amount

to be awarded to him by the court as damages may either be substantial or nominal depending on whether he is in business or not. In the case of Bank of America V Edward Alexander,[101] the plaintiff, a company director, had a current account with the defendant Bank. He requested his bankers in London to transfer a sum of £1,500 to his account with the dependant Bank. Two days after he was told by the manager of the defendant bank that the money had arrived. He then issued a cheque for £250 in favour of one Mr. Swanmick for a business transaction. The cheque was dishonoured by the defendant bank. In an action by the plaintiff against the defendant bank the trial magistrate pass judgement in favour of the plaintiff and awarded a substantial amount of £200 in damages for the plaintiff. The defendant bank then appealed contending among others that the trial magistrate was wrong in law in holding that the plaintiff/respondent was entitled to substantial damages since the occupation of the plaintiff/respondent did not come within the term trade. It was held dismissing the appeal that the word trade is defined 'as business especially mechanical or merchantile employment as opposed to a profession carried on as a means of livelihood or profit. And that applying this

defination to the occupation of the plaintiff/ respondent as described in the evidence before the trial magistrate, he comes within the defination of the word'trade'.

If a cheque is dishonoured as a result of the a delay by a collecting bank to present the cheque collected from or on behalf of a client to the paying bank within a reasonable time the banker will a gain be liable in damages to the customer. In the case of Forman V. The Bank of England,[102], the plaintiff, a customer of the defendant bank in the city of london, paid into his account before 3.pm on May 21 a cheque for £500 drawn in the following maner:- Norwich, may 20 1901, Barclay and Company (ltd.), which has been incorporated Gurneys, Birk beeks, Barclay and Buxton, Bank plain, Norwich, or head office, 54, Lombard street London. Pay to Thomas W. Forman or order five hundred pounds' At the time the cheque was paid in the plaintiff had a balance of £103, 6s. 10d. standing to his credit. It was a rule of the defendant bank that, if cheque drawn on city banks were paid in before 3 p.m. they would be drawn against the next day. On may 22 the plaintiff drew a cheque upon the defendant Bank for £239 in favour of a third party which was presented on may 23 and dishonoured. The defendant Bank treated the Norwich Union cheque as being payment in Norwich, and presented it through

the country clearing house, and as a result the amount was not collected when the cheque for £239, which was dishonoured was presented on May 23. In an action against the defendant the jury upon the evidence presented before the court found that the Norwich Union cheque was a cheque on a city bank, there being a recognised and general custom amongst London bankers that cheques in that form should be treated as London cheques and judgment was therefore passed in favour of the plaintiff, and damages of £75 pounds awarded.

Where a banker has a good reason for dishonouring a cheque, notice of such dishonour must immediately be communicated to the customer or to the collecting banker who will inturn notify the customers. Failure by either the paying banker or the collecting banker to discharge this responsibility will also expose it to liability. Thus in the case of Agbonmagbe Bank Ltd V. C.F.A.O. Ltd.,[103] the respondents who were the payee of a number of cheques paid them into their account with the bank of West Africa for collection by the latter, The bank of West Africa promptly sent the cheques to the appellant banker at Shagamu. The cheques were however not yet cleared and the appellant bank as a result refused to honour the cheque. It however did not communicate the dishonour to the collecting banker in time. It was held that the respondents were entitled

to assume that the cheques had been honoured in view of the fact that the appellant had remained silent for an unreasonably long time. It was therefore held that the appellant was guilty in negligence in not notifying the respondents bankers of the dishonour.

2.2.3 (c) Liability In payment of Cheques

The bankers liability with regard to payment of cheques may arise as result of where payment is made when the authority to do so have been revocked or withdrawn by the customer, where the customer is dead and a notice to that effect have been given to the banker and where payment is made on a cheque with unanthorised endorsement or forged signature.[104] Thus in the case of Nwandu V Barclays Bank[105] the plaintiff who was a businessman drew a post dated cheque for the sum of £660 in favour of X, a company engaged in a certain contract job for him. But before the maturing date of the cheque the plaintiff wrote a letter to the defendant bank instructing it not to pay the cheque, However when the cheque was letter presented, the defendant in contravention of the plaintiffs instruction negligently paid the cheque and debit the plaintiffs account. The plaintiff then brought an action against the defendant seeking a declaration that the defendant bank have no right to debit his account. It was held that the plaintiff's case must succeed and also that he was entitled to recover the sum negligently debited to his account.

of the fact that the appellant had remained silent for an unreasonably long time. It was further held that the appellant was guilty of negligence in not notifying the respondents bankers of the dishonour.

In another case, Union Bank Nigeria ltd V Adediran [106] the facts of which are as follows: The respondent was the peoples Warden of the Church, Bethel Kaduna and customer of the appellant. According to the mandate given to the appellant, the signitories to the account of the respondent were three one of whom was one brother F. A. Onatola. He was later replaced by one Mr. J. Kolawole and the appellant was notified of such change on 7th June, 1982. On or about 14th June, 1982 a cheque for the sum of ₦6,800.00 drawn on the respondents account was presented for cashment. The cheque leaf was one from the cheque book duly issued to the respondent by the appellant. The cheque contained the signature of brother F.A. Onatola who as at that date was no longer a signatory to the respondent's account. The cheque was paid to the presenter and the respondent's account was debited with the amount. The respondent then sued the appellant for wrongfully debiting the account of the church. The trial court in it's judgment held the defendant liable and entered judgment in favour of the plaintiff. The defendant/appelant then

appealed against the judgment of the trial judge.

The court of appeal **uanimously dismissed the** appellants appeal and held inter alia that a banker who honours a document porporting to be a cheque but on which the customer's signature as drawer has been forged is not entitled, in the absence of estoppel, to debit the customer with the money that has been paid away. And further, that by virtue of section 24 of the bills of exchange Act 1917 where a signature on a bill is forged or placed without authority of the person whose signature it porports to be, the forged unauthorised signature is wholly in operative.

The above illustrations are clear indications that where a cheque is paid without authority or if the authority was given but later withdrawn and the banker still went a head and paid the cheque, he will incur liability for his negligence. However if the banker can adducefacts which can create an estoppel against the customer, he may escape liability [107]

2.2.3 (d) Liability in giving status view about a customer

Bankers may be required a times to state the financial standing or credit worthiness of their customer. Bankers are in this regard required to exercise proper care otherwise they will incur liability in negligence. The fact that the banker was honest in giving the credit reference will not afford him a defence if it is established that he did not exercise the requisite care in giving the credit reference. The liability of the banker is

based on the extention of the neighbour principle to persons standing in special relationship to each other as examplified by the case of Hedley Bryne & Co. Ltd. V Heller and Partners.[108] Thus since the relationship between a banker and a customer is among the classes of special relationship for which the tort of negligence is applicable, where a customer of the bank, Suffer loss as the result of the negligence of the banker in giving credit reference about him, the bank will be held liable for the loss suffered.

However, where there is a disclaimer of responsibility, the liability of the banker will depend on whether the person to whom they gave the credit reference is their customer or not. If he is their customer and they happened to give him a wrong status view about one of their customer through negligence it appears disclaimer of responsibility will not afford them a defence since there exist a special relationship between them and by virtue of which they are bound to exercise reasonable care not to cause him harm in their dealings with him. But if he is not their customer and the information given was gratuitous then as was the case in Hedley Bryne, disclaimer of responsibility could be a defence.[109]

2.2.3.(e) : Liability in Making Disclosures About Customer's Account.

Bankers are under a duty to take proper care to ensure that no information about their customers account or other affairs of theirs is made known to

any one otherwise they will become liable to their customer for breach of their duty of secrecy. The lus clasicus here is the case of Tournier V National Provincial and Union Bank of England.[110] In that case, the plaintiff's account with the defendant bank had been continually overdrawn and he undertook to pay the overdraft in instalmments. When he failed to meet the schedule, the bank manager obtained his personal address through his employer. In the course of their discussion, the bank manager disclosed that the plaintiff's account was over drawn and that the running of the account indicated that the plaintiff was betting heavily and dealing with book makers. As a result of this information the plaintiff's employer refused to renew the plaintiff's employment agreement. The plaintiff then sued the defendant bank for slander and breach of duty not to disclose to third parties the state of his account or any transactions concerning the account. The action was tried by jury and dismissed. On appeal a re-trial was ordered on the grounds that the trial judge did not properly direct the jury with regard to the defendant bank's duty of secrecy. It was unanimously held by the court of Appeal that there is an implied term of a banker's contract with it's customer that the banker shall not disclose any information relating to the customer's

account or transaction concerning the account.

The duty of secrecy extend to when the customer closed his account with the bank[111] and it covers all information however obtained by the banker in his capacity as a banker in the course of the banking relations between him and his customer.[112]

Disclosure may however be made about the account of any affairs of the customer where(a) the disclosure is made under compulsion of law (e.g. where the banker is required to give evidence in legal proceedings)[113]

(b) the disclosure is made in the interest of the general public such as where he trade with the enemy of the country during war or where there is a report of suspected fraud by the customer.

(c) the disclosure is in the interest of the bank such as where legal proceedings are required to enforce payment of an overdarft or where a customer ask to know the extend to which his guarantee is being relied upon by the bank.

(d) the disclosure is made with the consent of the customer authorise third parties to obtain status report from his banker he will be deemed to have consented to such disclosure as may be reasonable in the circumstances.

2.3. STANDARD OF CARE.

2.3.1. THE MEANING AND NATURE OF STANDARD OF CARE.

As soon as it has been established that a duty to take care exist in a given situation, it immediately becomes important to determine the degree or extend of care required by law to be exercised. This view is shared by Lord Wilberforce when he said: "So far it has been possible to consider the existence of a duty, in general terms. But the matter cannot be left without some definition of the scope of his duty. How far does it go? What is the standard of the effort required?[114] This infact lead us to the topic under discussion, namely, the standard of care. It is difficult to give a straight forward definition of the term 'standard of care' since almost all standard works on torts and negligence did not deal with the matter. Suffice however, to say that it may be regarded as the standard of conduct laid down by the courts for the protection of people against unreasonable and unjustifiable risk of harm. Atimes the standard are laid down by statutes.[115]

However, apart from statutory duties of care which are normally provided by statutes, before a court or tribunal comes to a conclusion as to whether or not a defendant's action measured up to the standard of behaviour required by a reasonable man or not, there are certain issues which must first of all be considered. These issues have been laid down by Lord Reid in the case of Moris v. West Hartke Pool Steam Navigation Co. Ltd.[116]

Where he said:

> it is the duty (of an employer) in considering whether some precaution should be taken against a foreseable risk, to weigh, on the one hand, the magnitude of the risk, the livelihood of an accident happening, and the possible seriousness of the consequences if an accident does happen, and, on the other hand, the difficulty and expense and any other disadvantage of taking the precaution.

For further understanding of the above statement let us discuss in detail all the issues raised therein:

2.3.1 (a) Magnitude of the risk: The amount of care required is to a large extend dependent upon the magnitude of the risk involved. Therefore where the risk is high, it certainly means that more care should be taken to avoid the risk. Thus the concept of reasonableness is examplified by it's flexibility because:

> "The degree of care for the safety of others which the law require human beings to observe in the conduct of their affairs varies according to the circumstances. There is no absolute standard, but it may be said generally that the degree of care required varies directly with the risk involved. Those who engage in operations inherently dangerous must take precautions which are not required of persons engage in ordinary routine of life"[117]

Therefore where some one is in posession of dangerous objects, such as explosives the degree of care required of him by law is so high that it may even be regarded as a guarantee for safety[118]. On the other hand the degree of care may be so low such that it could even be neglected where the object in one's possession is not dangerous or where the circumstances of the case is such that a reasonable man would not have foreseen that damage is likely to be caused as a result of the conduct of the defendant. Two cases will be discussed here to serve as illustrations to what have just been said. First, is the case of Ward v. HertfordShire County Council.[119] In this case, Mrs. Ward took her two small children to the Junior Primary School at Sarrat in Hertfordshire. Timothy (the infant plaintiff) was about eight years and Surah was five. She left them at the school at about 8.50a.m. The School started at about 8.55a.m. After she left them there, the infant plaintiff played with the other boys in the playground until school was ready. They decided to have a race up and down the play ground. As the infant plaintiff was running, he stumbled. He slipped and fell against a wall at one side of the play ground.

The wall was of a common type, it was built about 100 years back. It had brick pillars and in between flints set in mortar, It was just an ordinary flint wall and quite low, about 3 feet to 3 feet 6 inches high. The flints only came up to about 2 feet 3 inches above the ground, and there was a brick coping above. The infant plaintiff fell headlong, almost as if he were diving into the wall. His head hit one of the flints which has a sharp edge. He was as a result seriously injured. The trial judge found the local education authority liable on the ground that "with its flint walls and sharp and jagged flints "protruding, was inherently dangerous" and that the local education authority was wrong in allowing it to be in that condition.

The local education authority appealed against the judgment of the trial judge to the court of appeal. There it was decided after careful analysis that the local education authority was not liable for the injuries sustained by the infant plaintiff because in the view of the justice of the court of appeal the wall of the playing ground was not dangerous. Lord Denning who delivered the lead judgment said;

> "I must say, reviewing all the evidence, that I do not think that this wall was dangerous. One has only to look at the pictures to see that

> it is a wall of the commonest type. It is an ordinary flint wall. It was built in the days when flints were picked off the ground and used to make walls. One-third of this Hertfordshire village has flint walls like this; 16 of the schools in Hertfordshire have; and goodness knows how many in the country at large. At that time all the Church Schools were made in this way. These flints walls have, of course, their angles and sharp edges. But that does not mean that they are dangerous ---". 120

The local education authority's appeal was therefore upheld while the decision of the lower court was set aside. However, it is instructive to note that if the court of appeal had found that the wall of the playing ground was actually dangerous as was the case with the lower court, their appeal would not have succeeded. This therefore means that the magnitude of the risk was negligible.

Secondly, is the case of Glasgow Corp. v. Muir,[121] the facts of which are as follows:- One Saturday afternoon in June 1940 a party of 30 to 40 members of the Milton Free Church were to have a picnic in the King's Park Glasgow. It came on to rain, so their leader, Mc.Donald, went to the defender's tea-rooms and asked the manageress, Mrs. Alexander, if they might eat their food there. Mrs. Alexander agreed, and charged them 12s. 6d. She then went back to serving a group of children at the sweet counter in the hall. Mc.Donald and a boy of his party

accordingly brought the arm of tea down to the building. As they entered the hall, the children at the counter were about five feet away from the Freezer. Mc.Donald suddenly lost his grip on the back handle of the urn and the six children, including the pursuer, were scalded by it's contents. No one knew why McDonald lost grip on the Urn, since the pursuer did not call him as a witness. They urn itself was a perfectly ordinary metal one with a lid, about 16 inches high, 15 inches in diameter, and weighing, when full not more than 100 pounds.

The question for determination in the House of Lords in respect of this case was: Whether when Mrs. Alexander was asked to allow a tea urn to be brought into the premises under her charge, she ought to have had in mind that it would require to be carried through a narrow passage in which there were a number of children and that there would be a risk of the contents of the urn being spilt and scalding some of the children? In answering this question Lord Mc.Millan who delivered the lead judgement was of the view that Mrs. Alexander hard no reason to anticipate that such an event would happen as a consequence of granting permission for a tea urn to be carried through the passage way where the children were congregated, and, consequently there was no duty on her to take precautions against the occurence of such an event. He was therefore of the view that to say that she owe a duty to take care in the circumstances was to impose on her a degree of care higher than the law requires.[122] The appeal was consequently allowed.

From the facts of this case one will not hesitate to say that the activity which was allowed by Mrs. Alexander was innocuous; one that no any reasonable person could foresee the occurence of any damage as a result. Mrs. Alexander wouldn't have therefore been put under any legal obligation to supervise what was going on in order to avoid the occurence of damage to any one.

2.3.1.(b) Cost And Practicability:

Even though the general rule as have already been seen is that the degree of care to be exercised in a given situation should be equal to degree of risk involved if the duty is not exercised, the law also require that the difficulty, expense and advantages or disadvantages of eliminating that risk should be taken into account. Thus in the case of Latimer v. A.E.C. Ltd[123] the floor of the defendant's factory became slippery with water and oil as a result of a flood caused by a heavy rainfall. They took all necessary measures they could to overcome it but their efforts could not yield much fruits. Consequently, the plaintiff, a workan in the factory slipped on the floor and got injured. The trial judge held the defendants liable for failing to close down the factory. The House of Lords agreed that this might be necessary if the risk to the employers was grave, but that that not being the position

in the present case, the defendants will not be required to close down their factory. The question for determination then was: Remedial steps not being possible, would a reasonably prudent employer have closed down the factory rather than allow his employers to run the risk's involved in continuing work? I think one will not but agree with the House of Lords decision for the simple reason that if the factory is closed because of the slippery condition of the floor it will result into a very big loss to the company. Therefore since the risk involved in continuing work in the factory is not so grave as to demand for the closing of the company the defendants are circumstancially right in taking the risk of continuing work in the factory in that condition. At-least there is the hope that no one will be harm or injured as a result of the slippery nature of the floor while it is certain that if they close they will sustain a heavy financial loss as a result of lack of production for the periods for which the factory will remain close.

Reasonableness in this regard may also be considered as a means of striking a balance between two competing interests; the interest of the plaintiff in getting monetary compensation in terms of damages for the harm or injury he sustain and the interest of the defendant in trying to avoid

or atleast reduce the amount payable in that regard. The practical way out therefore is to determine what weight will be placed on the respective competing interest. Thus, if a large reduction of risk could be done without spending or losing much financially, the defendant may rightly be said to have acted unreasonably if he fails to take such remedial steps. However, if the expense involved is huge while the risk to be taken care of is small or negligible, doing nothing may not be unreasonable. It may also be unreasonable to ignore a danger or risk simply because it is not significant if it could be avoided at virtually no cost.[124]

2.3.1.(c) Severity of Consequences

The more serious the anticipated consequences of a failure to take reasonable care, the higher also is the precaution or care that must be exercised. Thus in the case of Paris v. Stepney Borough Council,[125] the defendants were quite aware that the plaintiff employee was blind in one eye but did not provide him with goggles. In the course of his work a chip metal entered his good eye and as a result he became totally blind. The House of Lords held the defendants liable even though the type of work the employee was doing does not necessarily require goggles.

The reason for holding the defendant liable was that the duty of an employer was owed each particular employee and that in determining the requisite degree of care an employer must have regard to the gravity of the consequences of the potential injury to each employee. In this case therefore, the injury caused to the plaintiff's good eye was graver in consequences than if it were done to a fully sighted man.

2.3.2. COMMON PRACTICE AS STANDARD OF CARE

Common practice by persons habitually engaged in a particular operation is strong evidence of what is reasonable care in the performance of that operation. Therefore if a defendant is charged with negligence, it will be a defence to show that he has acted in accordance with general and approved practice,. In the case of General Cleaning Contractors Ltd. v. Chrismas,[126] it was held that a plaintiff who seeks to have condemned as unsafe a system of work which has been generally used for a long time in an important trade undertakes a heavy onus, but if he is right it means that all, practically all, the numerous employers in the trade have been habitually neglecting their duty to their workers.

It has also been held that the evidence as to trade practice alone should not be treated as conclusive in favour of an employer even though where the employer has adopted a widely used system about which no one has ever complaint he can rely on it as a prima facie defence that he has exercise the requisite reasonable care but that is not conclusive since "no one can claim to be excused for want of care because others are careless as himself"[127]. This means that it is within the discretion of the court to hold that common practice does not make proper provision for known risk. For example in the case of Manchester Corporation v. Markland,[128] where a local authority who were the water undertakers for the district, topk the normal precaution taken by similar undertakens to discover escapes of water from their pipes, it was held that the fact that the precautions taken were usual did not prevent them from being below the required legal standard of care. This shows that simply because a neglect of duty has been practiced for a long time does not mean that it has ceased to be regarded as such.[129]

However, simply because a defendant has failed to act in accordance with the common practice is not always a conclusive evidence of negligence. Thus in the case of Brown v. Rolls - Royce Ltd,[130] where the employers failed to supply the pursuer, a machine oiler, with a barrier cream, which was commonly supplied by other employers to their workmen doing

the same type of work, as a result of which he contracted dermatitis, it was held that in the circumstances they had not failed in their duty since the importance of the barrier cream as a precaution against the disease or that it would probably have prevented him from contracting it have not been established. Therefore the employer's omission satisfied the test of "Conduct and judgment of a reasonable and prudent man".

Common practice plays its most critical role in medical negligence cases. Being very well aware of the laymans ignorance of medical science and worried about the effect of jury bias, courts have adopted the safeguard of insisting that negligence in diagnosis and treatment cannot be established without the assistance of expert evidence or total incomformity with approved medical practice.[131]

× This is however not a water light rule, and as such accepted practice can be censured by a jury in matters not having any relationship with diagnostic or clinical skills on which an ordinary person may rely to pass judgment sensibly, such as failure to remove a sponge, an explosion set off by a mixture of either vapour or oxygen or injury to a patient's body outside the area of treatment.[132]

2.3.3. STANDARD LAID DOWN BY STATUTES.

Recognised standards of conduct formulated by expert professional or administrative bodies may be contained in some statutory codes. These are normally directed to common activities like driving (high way code) or to highly specialised matters such as the location of high voltage cables or the design of machinery and equipment. For example Section 18 of the Road Traffic Ordinance[133] provides among others that:-

> Any person who derives a motor vehicle on a highway - recklessly or negligently - having regard to all the circumstances of the case including the nature, condition, and use of the highway, and to the amount of traffic which actually at the time or which might reasonably be expected to be on the highway, shall be liable on conviction to a fine of £100 or to imprisonment for 6 months or **20** both such fine or imprisonment.

Such standards are binding and non-compliance is treated as negligence perse.[134]

However, no matter how detail a code may appear to be there will always be a space left for discerning the common law duty of care. Where there is compliance with a statutory regulation, it could constitute good evidence that one is not guilty of negligence but there cannot be a presumption that such is sufficient since statutory codes cannot be expected to cover every known occurrance and possible kind of danger. This means that it is still left to the courts to determine what is required to make a reasonably safe system of work,

which may perhaps include answering the poser whether or not an employer's common law duty of care should extend to instructing, persuading or even insisting on the employee's use of protective equipment provided.[135]

2.3.4. STANDARD OF CARE FOR ACTS REQUIRING SPECIAL SKILL:

Those who engage themselves in work calling for special skill must not only exercise reasonable care but must also measure up to the standard of proficiency that can be expected from persons of such profession[136]. Therefore if something which may result in danger to somebody or his property is to be done, only a person who has the necessary skill and ability can undertake the performance of such a thing. A reasonable man cannot attempt doing such a thing unless he has the requisite skill to do it. - Mc Nair J. in the case of Bolam v. Friern Hospital Management Committee[137] draw the distinction between acts requiring special skill and those not requiring special skill where he said:

> "In the ordinary case which does not involve any special skill, negligence in law means a failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and if that - failure or doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said you judge it by the action of the

> man in the street. He is the ordinary man. In one case it has been said you judge it by the conduct of the man on the top of a Clapham Omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham Omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art".

Thus the law requires that a person who does such an act shall exercise the skill of a competent man in doing it. The standard of care is of course that he should do all that skillful person could reasonably be expected to do in such

a case. Thus in the case of Jones v. Bird where contractors did work on some sewers and in the process caused the fall of some dimneys which damaged the plaintiff's house, it was contended that they were -

> "protected if they acted bonafide and to the best of their skill and judgment. But that is not enough; they are bound to conduct themselves in a skilful manner, and the question is properly left to the jury to say whether the defendants had done all that any skilful person could reasonably be required to do in such a case".

In deciding whether or not a person has demonstrated the requisite skill in doing the particular work, his physical capabilities and experience are not important. For instance in driving profession the law does not set two distinct standards for beginners and those who are old in the

profession or for men and women. The standard is the same i.e. reasonably competent motorist. Therefore, a person driving a motor car on the high way is bound to exercise the skill of a reasonably careful driver and it will not be a defence for him to say that is using such care and skill as he possessed. The standard of care is not affected or reduced by the simple reason that the driver is a learner since he must comply with the same objective and impersonal standard required of every driver.[140] Under the traffic law of this country, a learner driver or one who has not passed his driving test must be careful whenever he drives on the highway in addition to displaying an 'L' plate at the front and rear of his vehicle, be accompanied by a licensed driver (but no over passenger) sitting besides him and supervising him. It is the responsibility of such supervisor to make up for the learner's lack of skill at driving.[141] If the learner drives alone it will appear based on the provision of the law that he becomes fully responsible just like any qualified or licensed driver and the fact that he is a learner may not be a defence to him.[142]

The principle stated above does not necessarily depend on the fact that a person hold himself out as having any special skill; but it is simply based on the actual performance of an act which can only be safely done by a skilled

person. A Surgical Operation for instance must be done in such a way that the skilled surgeon, who is used to performing such operation would perform it and with the exception of a possible sudden emergency, it will not be a defende if damage is caused as a result of its being unskilfully performed to show that the unskilfulness is the result of the operators lack of a surgical qualification or other cause.[143] In the case of Phillips v. Whiteley ltd;[144] where the plaintiff had her ears pierced for earrings by a jeweller, with the result that her ears became inflamed, it was found that the surgeon did not sterilise his instrument as expected fof him and that the operation was performed with the skill to be expected from jeweller but not with the skill to be expected from a surgeon. It was held that in tort, the degree of care to be expected from any one who performs a particular operation is the same for all. In contract a different standard can be exacted from different persons, depending on the terms of the contract, but in tort of negligence the same standard of care is exacted from all. It may be that in the operation of piercing ears for earnings the jeweller's standard of care is enough; but if that is so, a surgeon who complied with it, though falling short of the standard which might be exacted from him in contract would not be liable in tort.

Going by this decision, one may say that the standard of care required from a jeweller is not the same with that of a surgeon in tort but it may be the same in contract depending on the nature of the agreement between the parties concern. Similarly where a Surgeon performs the job of piecing ears it is enough if the standard of care exhibited by him is the same with that required from a jeweller even though below that which is required for a surgeon. He will therefore not be laible in tort except in contract where there is one.

2.3.5. STANDARD OF CARE FOR DISABLED PERSONS

The standard of care in any given situation is based on the fact that the situation is normal. But in cases where any of the persons involved in the occurrence are maimed, halt, or blind, or from age or youth or from deafness or any other cause are not within the description of normal persons, and that condition is known to the actor, a different standard of care is exacted from him.[145] Thus a degree of care equal to the inability or disability of those who are immature or feable in mind or body is required from those who know of or ought to anticipate the presence of such persons and the additional amount of care they should take should be equal to the level of disability they know. Thus in the case of Haley v. London electricity Board[146] where the defendants had excavated a trench along a pavement, which they had guarded by placing a punner- hammer across the path, but the plaintiff, a blindman, walking along failed to locate it with his stick, tripped up and fell, it was held that it was the duty of the defendants to take reasonable not to act in a way likely to endanger other persons who might reasonably be expected to walk along the pavement and that the duty was also owed to blind persons too if the defendants ought to have foreseen that such disabled persons might walk along the path and that the duty was not different from the one owed to persons with normal sight, but the standard of care i.e. the carrying out of the duty, involves extra precaution in the case of blind pedestrians.

A person who knows that he suffers from some infirmity or disability is also subjected to the same standard of care. For instance if such a person cause damage as a result of having a block out while driving if he is quite aware of the fact that he is susceptible to such sudden attacks, he may be liable in negligence. His liability has nothing to do with the fact that he had suffered a block out but it has to do with fact that he had failed to take adequate measures against such occurrence when driving in that condition.[147]

Thus as we have already seen, the standard of care required in each case is dependent upon the nature of the case, parties involved and the circumstances giving rise to the case.

1. See Clerk and Lindsell on Torts 14th edition p. 474.

2. For example after the decision of the Court in Anns v. London Borough of Merton (supra) it was later realised that the decision will let loose the gate of litigation against government (especially local authorities) because that decision led to the extension of governmental liability in the field of private law, and thus a special procedure was made for bringing actions of such nature with wide powers of control and exercise of jurisdiction given to the courts. See also the case of Ashton v. Turner (1890) 3 ALL ER 870, Sparta Steel & Adoys Ltd. v. Martin & Co. (op. cit) etc.

3. See for example the case of Hambroove v. Stookes (supra) Boardman v. Sanderson (Supra) and Dooley v. Cammel (Supra).

4. See the case of Dorset Yacht Co. Ltd. v. Home Office Ltd. (Supra).

5. (1832) 2 C X P. 474.

6. See I.C.I. Ltd v. Shartwell (1969) A. C. 656 at 686.

7. See the case of Duncan v. Finnater (1839) 7 E.R. 934 at 940.

8. This is supported by the fact that in most cases the employees doesn't have the money to settle the claims of the plaintiff and it therefore amount to an effort in futility suing them.

9. See the case of Chukwu v. Uhegbu (1963) 2 ALL EQ2 N.L.R. 209.

10. See the case of Kenedy V. Brown (1863) 13 E.B. (N.S) 677.

11. See the case of Swinfer v. Lord Chelmford (1860) 5 H & N 890.

12. Ibid.

13. Ibid at p. 920

14. (1791) Peake 131.

15. See the case of Purvs v. Landell (1845) 12 CL & F 91 at 103.

16. (1963) 1 W.L.R. 101.

17. The Special relationship does not necessarily mean a contractual relationship or fiduciary relationship.

All that is necessary to establish a special relationship is that as between the plaintiff and the defendant, one (i.e. the defendant) who has a skill or knowledge in a certain field has given an advise or supplied an information to the other (i.e. the plaintiff). On a certain issue or matter in that field on a business occassion and the other have relied on the advice given or the information supplied in acting one way or the other; See the judgements of Lord Reid and Lord Moris in the case of Hedley Bryne & Co. V. Heller and Partners Ltd. (Op. cit) at pp. 231 and 244 respectively for further explanation.

18. (1991) 1 ALL E.R. 574. In that case, the defendant was found to have been actually careless but the trial judge still dismiss the case on the ground that since the carelessness does not amount to fraud he cannot be convicted unless there was in existence a contractual or fiduciary relationship between the plaintiff and defendant.

19. (1969) 1 A.C. 191.

20. Ibid at pp. 231, 244 and 293 respectively

21. Supra

22. Such as the case of Swinfer v. Lord Chelmsford (op. cit); Purves v. Landell (supra) etc.

23. No. 15

24. Order 6 Rule 9(2)

25. (1932) 11 N.L.R. 113.

26. (1946) 18 N.L.R. 74.

27. (1965) L.L.R. 170.

28. Ibid at 172 - 173.

29. See Section 8(2) of the Legal Practitioners Act Supra.

30. See the case of Montriou V. Jeffery's (1872) ER 21 at 53

31. 3rd edition (Simond's edition) Vol. 26, article 22 at p. 17.

32. J. Leahy Taylor: The Doctor and the Law p. 105; also B. C. Umerah: Medical practice and the law in Nigeria p. 124.

33. See B. C. Umerah Supra at p. 124.

34. See Charlesworth op. cit pp. 578 - 580.

35. See the case of Okeowo v. Cheif E. O. Sanyaolu (supra)

36. (1925) 94 L.J. KB 791

37. Ibid.

38. See Charlesworth op.cit at p. 579; the case of Pippin v. Sheppard (1822) Price 400.

39. (1953) 1 Lloyds Rep. 73

40. (1967) 1 W.L.R. 813.

41. Ibid

42. (1962) 6 ENCR 196.

43. Supra

44. Ibid.

45. See ante p. 17.

46. Cap 83 Laws of Northern Nigeria 1963.

47. Cap 42 Laws of Southern Nigeria

48. (1941) 7 WACA 56

49. Op. cit.

50. See P. 147 of the Penal Code (Supra)

51. (1948) AC 221.

52. See B.C. Umerah op. cit p. 120.

53. See the statement of Lord Denning in the case of Cassidy v. Ministry of Health (1951) 2 K.B 574 at 583

54. (1907) 2 KB P. 820.

55. Ibid.

56. See the case of Cassidy v. Ministry of Health (Supra)

57. (1942) 2 ALL ER 237 or (1942) 2 KB 293.

58. Op. cit.

59. Ibid at 585.

60. 1961 W.N.L.R. 173.

61. See the statement of Lord Dening the case of Cassidy v. The Ministry of Health op. cit.

62. See B. C. Umerah op. cit at p. 122.

63. (1961) W. N. L. R. 1

64. (1936) 3 WACA 85.

65. (1946) 2 WACA 56.

66. (1955) 2 N.L.R. 63.

67. See Justice E. O. Fakayode: The Criminal Code Companion at P.62.

68. See the Journal of Medicine Science and the Law Vol.14 p.69.

69. See George I. Anna, Leonard H. Glantz and Barbara F. Katz: Informed Consent to Human Experimentation; the subjects dilema p.10.

70. Liability in battery doesn't require the prove of the existence of a duty to take care. What needed to be proved is only that an operation or treatment which you wouldn't have agreed to be done to you have been done either through deceit or misrepresentation of facts. As for negligence the existence of duty, it breached and damage caused as a result may all be proved.

71. See the Journal of Medicine Science and the law Vol. 5 p.94.

72. Ibid at p.95.

73. Ibid.

74. Ibid at p. 94.

75. Ibid at p. 96 - 97.

76. (1963) 50 2d

77. (1954) Times, 2nd July

78. See the Journal of Medicine Science & Law op.cit p.96.

79. (1905) 104 N. W. 12.

80. See The case of Hatcher v. Black, Bolam v. Frion Hospital Management Supra.

81. See Journal of Medicine Science & the Law op.cit 100.

82. See the case of Hobbs v. Kizer (1916) 236 F. 681

83. See the case of Casidy v The Ministry of Health op.cit.

84. Op. cit.

85. See the Banking Law Journal (1986) Jan - Feb. p.80.

86. e.g. the case of Abusomwan v. Mercantile Banking Nigeria (Supra).

87. See Nkiru-Nzegwu Danjuma: the bankers liability p.194.

88. See Current Legal Problems in Nigeria (1986) at p.121.

89. (1951) 2 K.B. 164 Ibid at p.120.

90. (1951) 2 K.B. 164

91. (1972) SC 67. See also the case of Atrib v. U.B.A. (1968) 1 A.L.R. Comm. 56.

92. This Section have now been incorporated into Section 76 of the bills of Exchange Act Cap. 35 LFN 1990.

93. See Current Legal Problems in Nigeria op.cit. p.121.

94. (1963) 2 ALL ER 575.

95. (1974) 4 ECLR 355.

96. See the case of E. B. Sarowy & Co. v. Lloyds Bank Ltd (1914) 30 T.L.R. 433.

97. (1973) 3 SC 155.

98. See the case of Ashubiojo v. A.C.B. Ltd (1966) 2 ALL NLR 258.

99. (1990) 2 NWLR (Pt. 130) p.69.

100. Ibid

101. (1969) 2 ALL N.L.R. 2, See also Balogun v. National Bank of Nigeria (supra).

102. (1902) 18 T.L.R. 339

103. (1967) N.N.L.R. 173.

104. See Current Legal Problems op. cit. p. 123. Nkiru Danjuma op.cit. at p. 197.

105. (1962) 6 ENLR 191.

106. (1987) 1 NWLR (Pt. 47) 52.

107. See the case of Ligget (Liverpool) Ltd v. Barcklay's Bank Ltd (1928) 1 KB 48.

108. op. cit.

109. See ante.

110. (1924) 1 KB 461.

111. See Tourier v. The National Provincial and Union Bank of England (supra).

112. See Nkiru Danjuma op.cit at p.198 also the case of Guertin v. Royal Bank (1984) 47 O.R. (2nd) 799.

113 See Sec. 318 C.A.M.A. 1990, Sec. 33(2) N.D.L.E.A. Act.

114. See the case of Goldman v. Hargrave (1967) 1 A.C. 645 at 663.

115. See Infra. p.141

116. (1958) A. C. 557 at 524.

117. Per Lord McMillan in the case of Glasgow Corp v. Muir (1943) A. C. 448 at 456.

118. See the statement of Lord McMillan in the case of Donoghue v. Stevenson op. cit.

119. (1954) 2 ALL E.R. 368.

120. Ibid at 395

121. Supra.

122. Ibid at 456.

123. (1952) 2 QB 701.

124. See Micheel A. Jones: A Text Book on Torts p.66.

125. (1951) A. C. 448

126. (1952) 2 ALL ER 1110.

127. Per Cockburn C. J. in the case of Bleakiron v. Great Central Gas Consumer Co. (1860) 2 F & F 437.

128. (1930) 46 T.L.R. 85.

129. See the case of Carpenter v. British Mutual Banking Co. (1937) 3 ALL ER 811 at 820.

130. (1960) 1 WLR 120.

131. See the cases of Marshall b. Lindsay C. C. (1935) 1 KB 516, Bolam v. Friern Hospital Management Committee Supra, Bucks v. Cole (1968) 11 New L.J. 469.

132. Charlesworth op. cit.

133. S. 18(1)

134. See for example Section 18 of the Road Traffic Ordinance Ibid. also J. . Fleming The Law of Torts p. 122. Supra

135. See Charlesworth op. cit at p.140 para 204.

136. See the statement of Lord McNair J. in Bolan V. Friern Hospital Management Committee op. cit.

137. Ibid. at p. 588.

138. See the Statement of Barley J. in the case of Jones V. Bird (1822) 5 B & Ald. 837.

139. Ibid.

140. See Charlesworth op. cit at p. 141 para 206.

141. See Ademola Ogunleye: The Motorist and the Law p.7

142. See the case of Nettleship v. Weston (1971) 2 QB 691.

143. Ibid

144. (1938) 1 ALL ER 566.

145. See Charlesworth op. cit p. 142 para 208.

146. (1965) A. C. 778.

147. See the case of Hill v. Baxter (1958) 1 Q.B. 277.

CHAPTER THREE

3.0 REMOTENESS OF DAMAGE

3.1 INTRODUCTION

The phrase remoteness of damage is capable of being used in three senses. First, it may be used to mean a no duty situation. For example where proof of damage is necessary for the purpose of determining liability, the plaintiff may not succeed in his case if the only damage he can show is too remote in the sense that it is not recognised at law.[1]

The second sense in which remoteness of damage may be used is with regard to foreseability. Thus, damage may be rejected as being too remote because it is not the kind of harm that is foreseable[2]. And the third sense in which the phrase could be used is in relation to the measure of damages. This means that the defendant should not be made to compensate the plaintiff adinifitum (ie for all consequences) but only for such consequences of his negligent acts which are proximate and direct.[3] More ever 'the law cannot take account of every thing that follows a wrongful act; it regards some subsequent matters as outside the scope of it's selection because it is infinite to trace the cause of causes or the consequences of consequences'[4].

This clearly shows that a line has to be drawn between those items of damage for which the defendant is answerable and those for which he is not. This help in limiting the extent of the defendant's liability and also help the plaintiff to know what amount he is likely to recover in damages if his case becomes successful.[5]

Thus, where for example 'A' carelessly pushed 'B' into a pond, unknown to 'A' the Pond has been polluted by some harmful acid and B sustained burns!B' is then rushed to the hospital. In the hospital, an explosive set by a certain rogue explodes, 'B' was so checked that he jumped from his bed and rushed down to the street where he is run over by a car, One of 'B's legs is so damaged that it has to be amputated , it is the duty of the court to decide through the application of rules of remoteness of damage as to which of these consequences is 'A' to be liable since he cannot be made liable for all of them. In the course of our discussion in this chapter, the last two senses in which remoteness of damage is used will be of frequent occurrence. We have already discussed the first sense in the second chapter of this work.

However, to determine whether a damage is remote or not, two rules/tests have been evolved by the courts

for that purpose. The first is that once damage could be established as a foreseable consequences of some ones act, then he will be liable for all the direct consequences of such an act no matter how unusual or unexpected they may be. This is based primarilly on causation. The second rule is that a person should be held liable only in respect of consequences that could reasonably be anticipated as the result of his conduct or act. This is based on the fact that in negligence one can only be held liable for the foreseable consequences of his breach of duty. These rules are known as the 'direct consequences' rule and the 'foreseability' rule respectively.

Our discussion in this chapter is thus going to be centered on these two rules and the other subsidiary rules under them.

3.2. DIRECT CONSEQUENCES RULE

This is the first rule adopted by the courts for the purpose of determining whether the damage caused is the proximate or direct consequences of the defendant's negligence or not. It is therefore known as the 'old test'. By this rule, what determines remoteness is basically causation. This means that once it is established that one is responsible for a negligent act, then he will be held responsible for all the consequences that follow; foreseable or not foreseable. The justification for this stand of the law is aptly stated by J.G. Fleming as follows:

> One who sets the whole thing in motion has a lesser claim to sympathy than his innoccent victim, and once his conduct has been branded as negligent because fraught with unreasonable risk of some injury (to the plaintiff) the relevance of foreseability falls to be decided on other criteria.

The direct consequences rule was the product of the decision of the English Court of Appeal in the case of Re Polemis, Furness, Withy & Co. Ltd.[7] The facts of the case are as follows: Stevedors employed by the charterers of a ship negligently caused a plank to fall in to the hold of a ship, which contained a cargo of petrol in tins. There was a spark as a result of the falling of the plank into the hold which caused the vapour to ignite. The ensuing fire destroyed the ship. Arbitrators found that a spark caused by the planks coming into contact with some thing in the hold ignited the petrol vapour and caused the fire, and that the causing of the spark could not reasonably have been anticipated from the falling of the plank despite the fact that some damage to the ship might reasonably have been anticipated. The court of Appeal unanimously held that the charterers were liable for the loss of the ship because it was a direct, although not a foreseable consequences of the negligent act of their employees. Bankes L.J. said that 'because the damage was a direct consequences of the negligence the anticipation of the person whose negligent act has produced the damage appears to me to be irrelevant'.[8]

Similarly Scrutton L.J. observed that 'once the act is negligent, the fact that its exact operation was not foreseen is immaterial'[9]

Thus, as far as the direct consequences rule is concern, foreseability is only important for the purpose of determining culpability and not compensation. This is re inforced by the statement of Lord Summer in the case of Weld-Blundel V Stephens[10] where he said '...what a defendant ought to have anticipated as a reasonable man is material when the question is whether or not he was guilty of negligence .....this, however goes to culpability and not compensation'[10]

3.2.1. THE EXTENT OF HARM

Once the damage itself is foreseable, it is irrelevant that the physical extent of the damage is unforeseable. This position was not altered by the rule known as the foreseability rule.[11] Thus in the dase of Hughes V Lord Advocate,[12] Lord Reid stated that:

> No doubt, it was not to be expected that the injuries would be as serious as those which the appellant infact sustained. But a defendant is liable, although the damage may be a good deal greater in extent than was foreseable. He can only escape liability if the damage can be regarded as differing in kind from what was foreseable.

This principle equally applies to injury by a nervous shock as it does to other type of personal injury and this is regardless of any predisposition.

on the plaintiffs part which, unknown to the defendant, increases the likelihood of more extensive harm. Thus in the case of Brice V. Brown[13], the plaintiff, a 42 year-old woman who has a hysterical personality disorder right from child hood but who was still able to lead a happy and socially acceptable life because the signs and symptoms of the disorder manifested themselves only at infrequent internals and at a relatively moderate level, was able to recover damages due to nervous shock sustained as a result of the serious injuries her daughter sustained when the taxi in which they were travelling collided with an on coming bus and which made her condition to further deteriorate. The court specifically held that in a case of tortious liability, once the plaintiff has established

(a) that the circumstances of the tort caused or materially contributed to the nervous shock and

(b) that the nervous shock suffered by the plaintiff had been reasonably foreseable by the tort feasor as a natural and probable consequence of the breach of his duty of care, the plaintiff is entitled to damages for nervous shock and such of its direct consequences as were not dissimilar in type or kind, whether initially reasonably foreseable or not. It was further held that it is immaterial that the tortfeasor could not have foreseen the precise mental or psychological process that led to the kind or type of injury sustained by the plaintiff and likewise where the plaintiff had an underlying personality disorder, it is immaterial that a completely normal person would not have suffered the consequences suffered by the plaintiff.

It is also applicable to damage to property. An illustration of this can be found in the case of Vacwell Engineering Co. ltd V B.D.H. chemicals ltd[14] In that case, it was known that a chemical distributed by the defendants reacted with water to produce toxic vapour. Some of the chemical came into contact with water and the reaction led to an explosion of unforeseable violence causing extensive damage. Rees J. held that it was irrelevant that the magnitude of the explosion and the resulting damage.was unforeseable.[15]

However, liability for the unforeseable physical extent of an otherwise foreseable harm is distinquishable from the measure of damages in financial terms required to compensate the plaintiff. Thus if a man fires a gun across the road where he may reasonably anticipate that people will be crossing, and hits some one, he will be guilty of negligence and be liable for the injury thereby caused, but if he fires in the bush where he cannot reasonably anticipate that any one will be present, he will not be liable to anyone whom he shoots. But if he fires across a road when it is dangerous to do so and as a result kills some one who is a large income earner he will be liable for the whole damage, however great it may be and it cannot be a defence to him to say he did not anticipate that his victim was a high income earner.[16] This is also called the shabby millionaire appearance.[17] This principle is some times expressed in the maxim 'the tortfeasor must take his victim as he finds him.'

3.2.2 THE EGG SHELL SKULL RULE

The maxim 'the tortfeasor must take his victim as he finds him is also used to mean where the plaintiff is suffering from a latent physical or psychological predisposition to a particular injury or illness which the harm caused by the defendant triggers off, the defendant will be liable for the additional unforeseable damage that his negligent act has caused. This is usually called the 'thin skull' or the 'eggshell skull' rule.

The rule is applicable to almost and kinds of weakness or predisposition such as fragile skull[18] a weak heart[19] or a haemophilia[20] etc provided that some harm or damage was foreseable to establish breach of duty.[21]

The egg shell-skull rule overlaps, but it is not co-extensive with the general rule that the extent of harm need not be foreseable. Thus where the plaintiff's predisposition merely intensify the foreseable type of harm the general rules is applicable.[22] However, the egg shell-skull rule goes beyond this; it as well recognised claim in respect of a harm which is entirely different from the foreseable one. Thus in the case of Smith V Leech Brain & Co. Ltd.[23] Where the plaintiff's husband was burnt and was treated but because of a premalignant condition, the burn

promoted a cancerous growth which resulted to his death, the defendants were held liable for the death. Lord 'Parker C. J. while delivering the court's Judgment said:

> The test is not whether these (defendants) could reasonably have foreseen that a burn would cause cancer and that (Mr Smith) would die. The question is whether they (defendants) could reasonably foresee the type of injury he suffered, namely, the burn. What, in the particular case, is the amount of damages which he suffers as a result of that burn, depends upon the characteristics and constitution of the victim[24].

Another important case decided on the basis of this rule is the case of Robinson V Post Office.[25] In this case, the plaintiff, a technician employed by the post office, slipped as he was descending a ladder from one of the post office tower wagons because of the presence of oil on the ladder due to leakage of a pump. He was injured on his left chin. He then went to see his Doctor eight hours after the accident for treatment. He was given an injection of anti-tetanus serum (A.T.S). The plaintiff had, to the Doctors knowledge, been given a dose of A.T.S. Some years back, and where a patient had been previously given a dose of A.TS., it is important because of risk of reaction, to give a test dose before administering a full dose. This entails waiting for half an hour after injecting a small quantity of A.T.S. to see whether the patient will show some reaction.

The Doctor, however, did not follow this procedure but instead waited for only a minute for the reaction after which he injected the balance of the full dose The plaintiff did not suffer any reaction untill about 10 days after the injection. He was then admitted to hospital suffering from encephalitis. It was known that encephalitis was a possible, though rare, consequence of the administration of A.T.S. The plaintiff suffered brain damage as a result of the encephalitis. He then brought action for damages against the post office and the Doctor. The trial judge held the post office wholly liable for the plaintiffs injury and absolved the Doctor from liability on the ground that, even though the Doctor had been negligent in failing to administer a test dose, a proper test dose would have made no difference since it would have not produced a reaction within half an hour.

On, appeal, it was held inter alia that since it was foreseable that if oil were negligently allowed to escape on to a ladder, a workman would be likely to slip and sustain the type of wound in question and that such injury might well require medical treatment, it follows that the post office was liable for the encephalitis suffered by the plaintiff in consequence of that injury. The post office, it was further held was bound to take the plaintiff as it found him (ie with the allergy to second dose of A.T.S.) and that if it

were foreseable that as a result of their wrongful act he might require medical treatment, they were in the absence of a **novus actus** interveniens liable for the consequences **of the** treatment administered even though they could not have reasonably foreseen those consequences or that they could be serious. Appeal was consequently dismissed.

It is however important to note that the Doctor was absolved from liability for negligence on the ground that even if he had observed the proper procedure of administering the A.T.S. injection, that wouldn't have altered the position of things since the reaction was not seen within the prescribed period of half an hour. This means that if it were possible to see the result within that period, the Doctor and not the post office would have been held liable because his negligence would have constituted a novus Actus interveniens thereby breaking the chain of **causation.**[26]

The rule is applicable as well to eggshell-skull personalities. Thus in the case of Malcom V Broadhurst,[27] where both the husband and wife were injured by the negligent driving of the defendant. The husband sustained head injuries which resulted in intellectual deterioration and serious diminution of learning power, and changed personality and behaviour to the extent that he became irritable in the house, easily provoked to bad temper and on certain occassions violent to the

wife. The wife on her part was fit for work as far as her own physical injuries were concern in about four months after the accident and a pre-existing nervours disturbance which had been intensified by the accident had also improved. But her husbands condition showed no sign of improvement. The wifewas as a result incapacited from work due principally to the effect on the vulnerable personality of her husbands condition. She resumed full time office work a year and some months after the accident but medical report showed that she was likely to develop nervous symptoms from time to time due to the effect on her personality of the husband's changed behaviour.

Before the accident, the wife in addition to her full time work had been employed on part-time by her husband as his secretary but she cannot now continue with this part-time work since her husband's injuries have incapacitated him from his self employed work. She could not obtain a similar part-time work some where either because of time constraint on her from her full-time work and house work. Her claim in respect of her nervous disability for work and in respect of compensation for loss of wages from her full-time work from the time the accident took place up to when she fully resumes work and in respect of her nervous disability for those periods and slight risk of future nervous disturbance were allowed. The reason being that the aggrevation of her nervous condition was a foreseable consequence of

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of injuring her.

> Since the defendant must take the plaintiff as he found him and there was no difference in principle between an eggshell-skull and an eggshell-personality, and it was reasonably foreseable that if the husband was severely injured when the wife was temperamentally unstable, her instability might be adversely affected by the injuries sustained by the husband.28

However, her claim in respect of compensation for the loss of her part-time secreterial wages after the accident was not allowed on the ground that the loss was not foreseable and that

> It could be an unwarrantable extension of the defendant to take his victims as he found them not only in relation to their physical infirmities but also in relation to their infirmities of employment and to make him liable for the unforeseable effects of the accident on the special and unforese-able circumstances of the wifes employment.29

This is no doubt an attempt to deal fairly with both parties in this suit, the plaintiff has been well compensated for the loss she suffered as a result of the direct consequences of the defendants act while the defendant has not been made liable for all the consequences that followed his action since to do so will be tantamount to making him liable 'adinfinitum' and that will be against the objective of remoteness of damage itself. But there is also a strong indication of policy consideration in the decision especially with regard to the claim in respect of loss of wages from secretarial work. This is because if the diredt consequences rule is to be strictly

followed, the defendant would have no doubt been made liable for that loss as well because as we have already seen, in direct consequences rule once it is established that damages is foreseable from a defendant's action, then he will be made liable for all the direct consequences that followed his action[30].

With regard to property, it has been submitted that the eggshell-skull rule is applicable where the damage is of the same type as the foreseable harm, but is unforeseable in it's extent.[31] The rule does not however extend to the plaintiff's family. Thus in Mclaren & ors V Bradstreet,[32] where the plaintiffs, two brothers and their sister were injured in a road accident due to the negligence of the driver of the car in which they were travelling, it was discovered that the injuries which they suffered were minor but they developed symptoms of an unpleasant kind. They instituted an action against the defendants, the drivers executors for damages suffered because they were of the view that the symptoms which they developed arose from the accident and that these symptoms have prevented the elder boy and his sister from working for two years and the younger boy for seven years. The defendants however contended that the symptoms would have cleared up quickly if they had not been exaggerated and kept alive by the plaintiffs, with the active support of their mother, whom in the unguided belief

that she was acting in their interests, had created a morbid atmosphere in which they were constantly encouraged to discuss the consequences of the accident, so that their natural recovery was prevented. They however admitted liability. The trial judge then awarded damages of £712 to the elder boy, £613 to the younger boy and £808 to the sister. The plaintiffs were disatisfied with this judgment on the ground that it was against the weight of medical evidence and erroneous in law. They therefore appealed against the decision of the trial judge.

In the Court of Appeal, it was held inter alia dismissing the appeal that the plaintiffs contention that "the fact that they would return to a home presided over by a neurotic mother who would induce them to perpetuate symptoms which would otherwise have vanished entitled them to compensation cannot be allowed"[30]. And that "Although a tort feasor must take the victim of an accident as he found him, the possibility that the victim would be influenced by a neurotic mother in a way, detrimental to his health was not reasonably foreseable and therefore not a matter on which compensation could be claimed"[33].

One cannot but agree with the decision reached in this case because no any reasonable man would have it in his contemplation that the result of his action is capable of being compounded or aggravated by

the influence of a member of the victims family, Foreseability in this wise is therefore very far fetched. A decision in it's favour would have been very dengerous as some cunning and crafty individuals will catch on it and subject others to unecessary hardship for an act which can hardly be linked with them. Indeed this should even be regarded as an extraneous matter having nothing to do with the cause of action[34]

3.2.3 HARM CAUSED BY EXTRANEOUS MATTERS

By the direct consequences rule, the defendant's liability will come to an end if the harm caused can be connected to some cause which is outside his act. Thus, damage as a result of the defendants negligence would be regarded as a remote possibility, and the plaintiff's claim is therefore likely to be unsucessful. A good illustration of this is the case of Liesbosch Dredger V. S.S. Edison[35]. In that case, the plaintiffs who had bought the dredger for £4,000 and had taken her out to patras for another £2,000, making £6,000 in all, and insured her for £5,500, discovered that by her loss, they have consequently loss £23,500. They therefore instituted an action to recover this amount. The reason they gave for claiming this amount

was that they could not afford to buy a new dredger because they were poor and as such they were forced to hire one at a very high rate. This made the performance of their contract for which they brought the dredger very expensive. The house of Lords held that they were not entitle to claim this additional expenses because it was not an immediate physical consequences of the negligence, but was the result of their own want of means which was an extraneous matter. Lord Wright in his judgment then made the following statement:-

> The respondents' tortious act involved the physical loss of the dredger; that loss must somehow be reduced to terms of money. But the appellants' actual loss in so far as it was due to their impecuniosity arose from that impeconiosity as a separate and concurrent cause, extraneous to and distinct in character from the torti the impecuniosity was not traceable to the respondents acts, and in my opinion was outside the legal purview of the consequences of these acts. The court cannot take account of everything that follows a wrong-ful act; it regards some subsequent matters as outside the scope of its selection, because it were infinite for the Law to Judge the cause of causes or consequence of consequences.36
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> the

It is however difficult to reconcile the decision of the House Lords in the above case (i.e Liegbosch) with either the eggshell-skull rule or the doctrine of 'Shaby millionaire. Indeed the decision reached in the case run counter to both eggshell skull rule and the doctrine of 'shabby millionaira' because what matters under those rules is foreseabiltiy of damage; once that is established then it will not be a defence for the defendant to say later, that he did not foresee

the kind 'or 'type' of harm that occured. The decision of the court in this case therefore tend to tilt in favour of foreseability rule. But then even if it was based on foreseability rule, there is still a problem; the decision was based on causation instead of remoteness and this is more akin to Re polemis case than Wagon mound.

The only justification which can be advanced for the court decision on the case is probably that for pure financial loss, only the foreseable extent of the damage is recoverable[37] But the distinction drawn between physical and financial loss in the case is unfashionable because going by recent courts decisions (some of which we have already seen in the preceding chapters), the distinction is no longer important[38]

Because of the controversy surrounding liesbosch case it's value as a precedent have seriously been undermined by more recent court judgments. Some judges dodge it by distinguishing it from the case before them while in some of the cases it was outrightly rejected.
One or two examples will suffice for our purpose here.
One of such examples is the case of martindale V Duncan[40]. In that case, the plaintiff's car was damaged in a collision with the defendant's car. Consequently, the plaintiff's solicitor informed the defendants insurers about the accident and asked them to admit liability. The letter was not replied by the defendant's insurers.

The plaintiff who was impecunious then delayed authorisation of repairs to his car pending when the defendant's insurers and his own insurers approve of such repairs. Four months later, the defendant's insurers wrote that in view of the estimate submitted, they would instruct independent engineers to inspect the plaintiff's vehicle. After the inspection the defendants insurers wrote to the plaintiff saying that their engineers had agreed to make the repairs and had amended the estimate for the repairs and had authorise repairs in accordance with the amended estimate. A few days later, the plaintiff's insurers approved the repairs. Repairs work on the vehicle then commenced a week after the approval by the plaintiff's insurers and was completed within three weeks thereafter. Judgment was sign by the plaintiff in default of defence for damages to be assessed. On the assessment of damages by the district registrar, the plaintiff claimed inter alia loss of the use of his vehicle for ten weeks at the rate of £22 per week being cost of hiring a substitute car, to cover the period during which he delayed his car.having put in hand pending approval of the repairs by the defendant's and his own insurers. The district registrar awarded the plaintiff £594 damages including £220 in respect of the loss of the use of the vehicle.

The defendant's then appealed against the inclusion in the damages of the £220 for the loss of the use of the vehicle on the ground that the

plaintiff should have had his car repaired sooner. It was held in the court of Appeal that there had been no breach by the plaintiff of his duty to mitigate loss since he was required only to act reasonably in the circumstances and that in the circumstances he has so acted by delaying authorisation of repairs to his damaged vehicle pending the approval of both the defendant's and his own insurers of the estimate of the repairs. Davies L.J. then said "Mr price (defendant counsel) of course has refered as to the well known case of the Lieshosch which is an authority for the proposition that impecuniosity is no excuse for not mitigating damage. But I agree that this case is entirely different from that case.[40a] Thus this case has been distinguished from the Liesbosch decision on the ground that impecuniosity is not the actual reason for delay but the fact that the plaintiff have to wait for the approval of the estimate for the repairs by both his own insurers and the insurers of the defendant is what led to the delay and this was considered not to be in violation of his duty to mitigate his loss since he acted reasonably in the circumstances.

It has been held not applicable where the reason for not effecting early repairs to damaged property is not due to impecuniosity but is based on 'financial prudence' Thus in the case of Dodd properties (Kent) ltd V Canterbury city council[40 (b)] the plaintiffs, who were the owners and lessors of a building in which the

second plaintiff operated a garage and car sales business instituted an action against the defendants who were contractors for the construction of a car park and the sub contractors for it's foundations claiming damages for loss arising out of the prospective interruption of their business if and when repairs where carried by the defendants on the structural damage caused to the building during the construction of the car park which was very close to the plaintiffs building. Liability was first denied by the defendants,but was admitted shortly before the hearing of the case, but the issue of quantum remained unsettled. The first plaintiff had not carried out any repairs at the date of hearing, because according to them,to have done so would have caused them a degree of financial stringence and that in any event it would not have made commercial sense for them to have repaired the building before they were sure of recovering the expenditure from the defendants because that expenditure was not going to produce a corresponding increase in income. They then contended that the damages be assessed as at the time when it was physically possible to have carried out the repairs (i.e 1970) but were not able to do so for fear of financial stringency. The trial judge held that the damages were to be assessed as at 1970 as contended by the plaintiffs because that was the date when it was reasonable for the plaintiffs to have commenced carrying out repairs

but in so holding, the judge decided that any financial stringency caused to the first plaintiffs by carrying out the repairs in 1970 was an extrinsic factor and irrelevant.

It was held (inter alia) allowing the appeal that the decision in Liesbosh cannot be applicable to Dodd's case because Dodd's case was not based on financial stringency let alone impecuniosity. It was rather based on commercial prudence.

The rule of Lieshosch as an authority is therefore unsettled and doubtful in view of objections to its application in subsequent cases. It however help to illustrate the problem which arises when there is a great discrepancy between the value of property and the loss caused by its destruction. For example the dredger in that case was 'worth' £6,000 yet the plaintiff claimed that its destruction had cost them £23,500. As a basic principle, it seems right that the person whose capital good has been destroyed should receive the cost of replacement plus an indemnity for incidental outgoing and temporary lost profits, ie its value as a going concern.[41]

3:3 FORESEABILITY RULE

This is the new rule for determining remoteness of damage. It replaces the old rule which we have already discussed. It was thought that the foreseability rule is more inkeeping with logic than the direct consequences

rule because it is in accord with the theoretical foundations of negligence liability, this is because

> negligence (like intent) is an attitude to a consequence of a particular act or omission; We call an inattentive driver negligent because of the risk that he might hit a pedestrian and since that consequence must at least be foreseable (as one that a reasonable man would have guarded against), it is claimed that a person cannot be held liable on a footing of negligence save for foreseable consequences.42.

It was also thought that the foreseability rule would subsume remoteness to the same test as negligence or breach of duty. This is because it was assumed that there is nothing more to the notion of negligence than foreseability of injury. Thus from the coming into effect of this rule, it is no longer sufficient that some injury to the plaintiff was foreseable for, the particular injury for which a claim is made must satisfy the same test, standing on it's own footing.[43]

The case that gave rise to this rule was the well known case of Overseas Tankship (U.K) ltd V Morts Dock and Engineering Co. ltd, the Wagon mound (No[1]) [44] the defendants in that case were charterers of the ship, Wagon Mound, which was moved for bunkering in Sydney Harbour. Their ship's engineer carelessly permitted bunkering oil to spill onto the water and it drifted towards sheerlegs wharf some two hundred yards away, which was owned by the plaintiffs. The oil engulfed the piers of the wharf and fouled the plaintiff's Shipways. Ships were refilling at the wharf and oxyacetylene equipment was in use.

After hesitation the plaintiff's employees carried on their work, and eventually molten metal produced by the oxy-acetylene drills fell from the wharf and set alight some waste material floating beneath. The fire thus started set the oily sea alight. The ships which were being refitted were damaged. The plaintiffs sued in respect of the later loss. It was held that because both expert and seafaring opinion at the time regarded it as impossible to set furnace oil on water alight, though the defendants could have foreseen some damage to the plaintiff's plant by fouling oil, they could not reasonably have foreseen the fire. They were therefore not liable by virtue of the foreseability rule.

In that case, the privy councul described the preposition in Re polmemis as fundamentally false. Viscount Simonds was of the view that although an action in negligence can be analysed in terms of duty, breach and consequent damage, there can be no liability untill the damage has been done. He said:-

> It is not the act but the consequences on which tortious liability is founded. Just as...there is no such thing as negligence in the air, so there is no such thing as liability in the air....The only liability that is in question is the liability for damage by fire. It is vain to isolate the liability from it's context and to say that the defendant is or is not liable, and then ask for what damage he is liable. For his liability is in respect of that damage and no other, if as admittedly the defendants liability (culpability) depends on the reasonable foreseability of the consequent damage, how is that to be determined except by the foreseability of the damage which infact happened - the damage in suit? And, if that damage is unforseable so as to displace liability at large, how can the liability be restored so as to make compensation payable?45

Reasonable foreseeability according to his Lordship corresponds with common conscience of mankind whereas direct consequences rule 'lead to no where but the never ending and insoluble problems of causation.' Thus, even though the decision in Wagon Mound (No. 1) case is only of persuasive authority(being a privy council decision), the strong objection of the Re polemis direct consequences rule had made the courts to adopt foreseability as the test of remoteness in subsequent cases.

3.3.1 MANNER OF OCCURRENCE OF THE DAMAGE.

Going by courts decision, it appears the foreseability rule does not require foreseability of the manner in which the original injury caused harm to the plaintiff. One example of such courts decisions is the one arrived at in the case of Hughues V Lord Advocate.[46] In that case employees of the post office negligently left a manwhole open in the street. This was covered by a canvas tent and surrounded by parafin warning lamps. Out of curiousity, two young boys entered the tent, taking one of the lamps with them. The lamp was knocked into the whole and there was a violent explosion as a result of which one of the boys suffered severe burns Evidence adduced showed that an explosion was unforeseable in the circumstances, even though burns from a configurations could have been anticipated. The House of Lords nonetheless held the defendants liable.

Lord Guest was of the view that the precise details leading up to the accident need not necessarilly be foreseable, it is sufficient if the accident which occurred is of a type which should have been foreseable by a reasonably careful person'[32]. Lord pearce on the other hand said the accident was simply a variant of the foreseable![47] While Lord Reid opined that after causing the harm by a known source of danger, it was no defence to say that the harm was caused in an unforeseable way'[48] This no doubt, shows that the test for remoteness as far as the foreseability rule is concern, has been placed on the same level with the test for negligence or breach of duty (as earlier mentioned) Thus, for one to be liable it must first be established that it is foreseable that his act will produce the type of result which it produced, but once this is established by the court from the reasonable man point of view, then it matters not that he himself does not foresee the occurrence of that result from his act.

Again the complex nature of events giving rise to the damage need not be foreseable provided it is within the bounds of what is generally believed to be reasonably foreseable. In the case of stewart V West African Terminals ltd,[49] the plaintiff was employed by the ship repairers on board steamship Lokoja palm being unloaded by the defendant stevedors. The plaintiff while walking along deck of Lokoja palm, lifted, with right hand, a

stock preventer wire looped across passage way, steadying himself by placing his left hand on a stationary running wire. The movement of the running wire then trapped the hand of the plainttiff in a block as a result of which he sustained personal injuries. The plaintiff then instituted an action against the defendant claiming damages for the injuries sustained on the ground that the injuries were due to the negligence of the steve dores in failing to give warning that cargo was about to be worked and in failing to shackle wires. The stevedores on their part contended that the plaintiff was himself negligent in placing his hand on the running wires and also because of his failure to comply with an instruction given by the Stevedores that preventer shackles should be shacked to running wires.

The trial court held that the plaintiff was not negligent in placing his hand on the running wire and also that the stevedores were under a duty when working hold to keep a reasonably clear passage way along dock of ship, and that their failure to shackle preventer wires was a breach of that duty but that they were not negligent in failing to keep a block out.

On appeal, it was held inter alia that plaintiffs act was within general range of contemplation and therefore within) the consequences of negligence for which the stevedores were liable. Their appeal was consequently dismissed but damages payable was reduced.

Again in the case of Weiland V Cyeril Lord Carpets Ltd;[50] which the plaintiff suffered injury as a result of the defendants negligence and after being treated in the hospital she felt shaken and the movement of her head became constricted due to the fitting of collar to her neck. This resulted in her in ability to use her bi-focal spectacles with her usual skill and consequently fell while descending stairs, sustaining injuries. In an action for damages in respect of the injuries sustained, it was held that the injury and damage suffered because of the second fall were attributable to the original negligence of the defendants so as to attract compensation from them. Eveleigh J. who delivered the court's judgment then said:

> It can be said that it is foreseable that one injury may affect and thereby be a cause of another injury and if foreability is required .... foreseability of this general nature will suffice[51].

There are however, certain judgments that tend to contradict the reasoning in the two cases stated above. One of such judgments is the one made in the case of Doughty V. Turner manifacturing Co. ltd.[52] In that case, the defendant's had two couldrons in their factory hall room in which they heat metal parts by immersing them in the molten liquid. They (defendants) placed an asbestors cement cover which they purchased from reputable manufacturers on top of each couldron in order to conserve the heat in

the couldrons. Nobody thought if the covers were immersed into the couldron any serious consequences would follow. One of the defendant's employees inadvertently knocked one of the covers into the couldron and it slid beneath the molten liquid but no one considered that as dangerous and hence non withdrew from the vicinity of the couldron. The plaintiff who was employed by the defendants and who had been sent to the heat treatment room to deliver a message was injured when the molten liquid in the couldron which he was standing near it erupted.

In an action by the plaintiff against the defendants for damages with regard to the injuries he sustained on the ground that the eruption occurred due to the negligence of the defendants, it was held that the defendants must have known that there were substances which if dropped into the couldron would cause an explosion and therefore they were under aduty to see that nothing fell in which that could have result.

On appeal, it was held allowing the appeal that even if inadvertent immersion of the asbestors cement cover into the couldron was a negligent act, the defendants were not liable for the damage resulting from the explosion because it was not a damage that can reasonably be foreseen and that it was again different from a foreseable splash of the liquid in the couldron.

The court of appeal distinguished this case from that of Hughes V Lord Advocate[53] by holding that burning

by an unforeseable chemical eruption was not the same as burning by splashing which was with the foreseable risk created by knocking the cover into the liquid. It is however difficult to see any difference between these two cases. This illustration therefore, only served to show that the framing of the question determines the answer in deciding a case on remoteness. In Doughty V Tumer manufacturing Company ltd,[54] the question that was asked was; Was burning by eruption foreseable? While in Hughes V Lord Advocate[55], the question asked was; Was burning foreseable? This means that if the House of Lords has asked: Was burning by explosion foreseable? the answer would have been different. Clark and Lind sell are however of the opinion that Doughty V Turner manufacturing Co ltd[56] might be justified on other grounds, for example that, on the facts of the case, burning by splashing was unforeseable and hence there was no negligence[57].

Another judgment which run counter to the decision in Hughus V Lord Advocate[58] was the one made in the case of CROSSLEY V Rawlinson[59]. In that case, the defendant was driving his lorry along a main road when a tarpaulin on the lorry caught fire. He then pulled in and stopped the lorry at the side of the road about 100 yards away from an A.A. post where the plaintiff, an A.A. patrolman, was on duty. He saw the fire, grabbed a fire extinguisher and ran along a rough path alongside the road towards the lorry with the intention of putting out the fire. As he was running he tripped in

a hole which was just off the path and obscured by grass, and was injured. He brought an action against the defendant for damages for personal injuries contending (1) that the fire was a result of the defendant's negligence (ii) that the defendant's negligence had caused the plaintiffs accident and (iii) that the defendant was liable to a rescuer in the plaintiff's position even though the rescuer was injured not while actually engaged in the rescue at the scene of the danger but while attempting to reach the scene.

It was held that although it was reasonably foreseable that a person such as the plaintiff might attempt to come to the defendant's aid and might run along the path towards the fire, it was not reasonably foreseable that such a rescuer would suffer any injury while running along the path towards the scene of danger, and accordingly, even though the defendant's negligence had caused the fire, it has not caused the plaintiffs accident. It is submitted that the destinction between rescuers at the scene of the scene of the danger and those attempting to get to the scene is arbitrary and in consistent with Hughues V. Lord Advocate[60] since the injury is within the risk created by the defendant's negligence. The trial judge himself confessed to the arbitral nature of the judgement when he said:

> I reach this conclusion with reluctance because on any view the plaintiff acted with great presence of mind and with best possible motives. I think it is unfortunate that such a man should not recover damages for an injury which was not his fault.[61]

Moreover there are some cases in which it has been held that rescurers who got injured in an attempt to get to the scene of an accident could claim damages. For example in the Canadian case of Jones V. Wabigwan[62] where the plaintiff in abid to come to the aid of the defendant, whose car went off the road, struck a power pole causing the wires to fall to the ground and got injured by live electric wires; the court of appeal held reversing the decision of the trial judge that a reasonable man in the position of the defendant should have anticipated that if he negligently collided with the hydro electric pole it was probable that the pole and the life electric wire would fall to the ground and persons travelling along the Highway near that point might be attracted to the place where the damaged vehicle with it's lights still on was visible and that they might reasonably be expected to come in contact with the live wires attached to the broken electric pole and sustain personal injury. It is therefore submitted that the decision in Crossley V Rawlinson[63] does not represent the true position of the law and should therefore not be followed in subsequent cases.

3.3.2. THE TYTE OF HARM

Under this head, unless it can be proved that the harm caused is the same with the foreseable one, then it will be taken that the damage is remote (i.e not foreseable) and the plaintiff's claim will not be successful. The problem normally encountered by the courts in applying this rule is that of how to categorise or classify types or kinds of the foreseable harm. The general method of categorisation of harm, which is to divide damage into basically three clases viz; personal injury, damage to property and financial loss cannot solve this problem. The reason for this is that while the general method deals with harm in general terms, here one is confronted with the problem of identifying a specific type of harm. Thus, for example if the damage relates to property, then apart from the fact that damage to the property is foreseable one must still prove whether the damage that actually occurred is the foreseable type or not: if the foreseable damage is damage by 'fire' then it has to be shown that the damage that occured is by 'fire' and not by 'impact'.

In Hughues V. Lord Advocate[64] it was unequivocably stated that 'burning by explosion' is the same type of harm as 'burning by conflagration.

This may as well be extended to damage to property so that where the foreseable type of harm to the property is by explosion, if the harm that actually occured turns out to be Conflagration it will be taken to be the same. Again, it has been submitted that if the manner of occurence of the harm and the type of harm are both foreseable, then their degree or extent should not be divorced from them so as to make them unforeseable.[65] But the danger here is that if that is allowed, it will lead to wide extension of the rule such that the direct consequences rule may in the end be revived especially with regard to damage to property and personal injuries.

A time[5] the decision concerning the foreseability of the type of harm depends upon the framing of the question by the court. Thus in the case of Bradford V Robinson Rentals, Ltd[66] where the defendant employers exposed the plaintiff van drive to extreme cold in the course of his duties and as a result of which he suffered frostbite, the question asked was whether injury to the plaintiff's health through exposure to excessive cold was reasonably foreseable and the question was answered in the affirmative thereby making the defendants liable. But in Tremain V Pike[67] where the plaintiff headman who was working for the defendants contracted veil disease, (a rare disease) through coming into contact

with rats urine, it was held that Wield disease was unforseable, though other diseases arising from the presence of rats were foreseable and the defendants were accordingly held not liable.

It is submitted that if the question in the later case has been: Was illness from rat-transmitted disease foreseable? the answer would have been yes.

Therefore the decision in Wagon mound (No1) case, even though it represented an attempt to solve the problem created by the decision in the Polemis, namely, to narrow down defendants liability to what is actually foreseable as the natural consequences of their acts, it itself creates a problem specially with regard to the yardstick for determining what a foreseable type of harm is. And as a result of the failure of the courts to resolve this problem, conflicting decisions are being pronounced by the courts: Some strictly following the foreseability rule while others tending to brake away from it[68].

The problem created by Wagon mound (No1) seem to be aggravated by the Wagon Mound (No2) case.[69] The facts of the case itself arose from that of wagon mound (No1) but there were some differences between this. Firstly, the plaintiffs (appellants) were owners of the ships being repaired and not the owners of wharf. The second differences is that the evidence at the trial was also different. In the case of Wagon Mound (No1) the igniting of the water has been regarded as less than a freak while in Wagon Mound (No2) the evidence

was that the risk that furnace oil would ignite on water was a 'possibility' but one 'would could become an actuality only in very exceptional circumstances'. It was therefore neither the kind of probability that the juryman might be expected to anticipate nor yet has it grossly improbable. Therefore, upon the assumption that a ship's engineer ought to have been aware of the nature of the risk, the defendant's engineer was not justified in disregarding it because it was in the view of their Lordships a 'real' risk which could not be brush aside as far fetch. The defendants were therefore held liable.

Wagon Mound (No[2]) 'new' foreseability rule itself sprang from the decision of Lord parker in the case of Smith V Leech Brain,[70] a case which was decided on the principles of the old (direct consequences) test even though the Wagon Mound (No.1) was then in operation. Lord Parker then felt that something important have been over looked in the Wagon Mound (No.1) ruling i.e. the 'thin skull' rule.[71] And this warrants his choice of the old test and dropping the foresight test. He did not however stop at just 'resurrecting' the dead old test but went further to propound a general rule which was followed and applied in the case of Hughues V Lord Advocate[72] and was finally applied in the Wagon Mound (No.2) case three years later.[73]

However, the Wagon Mound (No.2) in the process of finding solution to the problem created by Wagon Mound (No.1), ended up aggravating it. The problem created by the Wagon Mound (No.2) arose from the fact that it enlarges the scope of the defendants 'expectations' beyond that of the reasonable man and it also embraces circumstances which are unconnected such as the 'thin skull' which is connected to the personal idiosn crasies of the plaintiff.[74] Where, therefore, the defendant's behaviour is such that it is likely to result in an explosion causing minor damage, the defendant will be liable if there is an explosion causing major damage, which, though a 'possible' consequence could not have been expected.[75] This seems to take us back to the old (direct consequences) test laid down in Re Polemus because if one drops a plank against the side of a hold i.e. full of petrol vapour it is not improbable that there may be a nial or some grit on the plank, that a spark will be generated and that an explosion will follow.[76]

The question now is, with this seeming "resurrection" of the old test as a result of the extension of the foreseability test in Wagon Mound (No.2), which of the tests is to govern a case under remoteness of damage? Is it the Repolemis or the Wagon Mound test. It appears there are differing views on this. One view is that the direct consequences rule should apply because it is consistent with the House of Lords decisions on the matter.[77] The other view is that either

can be applied because according to that view the difference between the two is only theoritical and not practical. Two reasons were given in support of this stand. The first is that what man ought to 'foresee' is a matter for the court to decide and that in tort people are some times, by technical fiction expected to possess a power of anticipation almost akin to prophecy. The second reason being that what may be called the rule in smith V Leech Brain has done much to neutralise the effect of Wagon Mound (No1).[78] Suffice however to say here that the courts should come up with a lasting solution to the problems created by these tests otherwise conflicting decisions will continue to emerge.[79]

One issue which need to be discussed here is the applicability of remoteness of damage to cases which are purely founded on contracts. The matter was considered in the case of C. Czarmikou ltd V Konfos [80] otherwise known as the Heron II case. The facts of the case were that by a charter party for the consignment of sugar from constaiza to Basrah, it was agreed between the charterers and the ship owner that the ship, which was then in piraeus, was expected ready to load in constanza a round October 25-27, 1960, all going well, and that it would proceed therefrom with all convenient speed to Basrah. Lay days for Loading were not to

commence before October 27 and if the ship was not ready to load by November 10 the charterers had the option of cancelling the charter party. They also had the option of discharging the cargo at Jeddah.

The ship arrived at constaza, pursuant to the charter party, on October 27 and left after loading the sugar, on November 1. The reasonably accurate prediction of the length of the voyage was 20 days. The shipowner also knew that the charterers were sugar merchants and that there was a sugar market in Basrah but had no actual knowledge that the charterers intended to sell the sugar promptly after arrival. In breach of the charter party the ship deviated from the voyage by calling at Berbera, Bahrein and Abadan. And owing to those deviations the voyage was delayed by nine or ten days where upon it arrived at Basrah on December 2 instead of November 22. This made the charterers to incure loss because the sugar market in Basrah had fallen to a low point in that time i.e from £32. 10s. per ton between November 22 and 28 to £31 25.9d per ton between December 2 and 4, a difference of £1 7s.3d per ton. In a claim by the charteres to recover that difference as damage before an arbitration as provided by the chater party, the umpire awarded the charterers the difference between the price of the sugar when it should have been delivered and the price when it was actually delivered as damages.

The shipowner appealed against the decision of the arbitration on the ground that the charterers were only entitled to interest on the value of the sugar during the period of delay as damage. The trial judge, Mc Nair, held that the charterers were only entitled to recover as damages interest on the value of the cargo during the period of delay plus cable expenses and accordingly awarded them £172. The charterers appealed to the court of appeal. The court of appeal by a majority decision, restored the umpires award and the shipowner finally appeal to the House of Lords where the appeal was dismissed.

The importance of the case for our own purpose however, is the fact that it involves consideration of what the correct rule for remoteness of damage in contract is. A difference in this regard was made between damage in contract and torts. In contract the damage claimed must be the natural consequences of the breach or it must be in the contemplation of both parties while in torts following the decisions in Wagon Mound cases the tortfeasor is liable for any damage which he can reasonably forese may happen as a result of the breach however likely it may be unless it can be brushed aside as far fetch.[81]

The difference, according to Lordup John is logical because.

> Once an examination of the facts establishes a breach of duty on the part of the tortfeasor, the acts and omissions of the innoccent party are irrelevant untill the question of contributory negligence comes to be considered. A tortfeasor may and frequently is a complete stranger to the innocent party but he is, however fleetingly in many cases, his neighbour for the purpose of the Law and bound to act with due regard to his neigbour rights whom ever he may be. If he fails in such a duty the law has rightly laid down a more stringent test for the assessment of damages. But in contract the parties have only to consider the consequences of a breach to the other; it is fair that the assessment of damages should depend on their assumed common knowledge and contemplation and not on foreseable but most unlikely consequence.82

Thus unless a breach of contract amount to a tortious act, the test of remoteness of damage is to be based on the assumed common knowledge or contemplation of the parties and not on the intricate and complex foreseability rule or even the resurected direct consequences rule.

On the whole, from the discussions so far in this chapter, it is clear that there is uptill now no settled rule or test for the determination of remoteness of damage. It behoves our judges therefore to try and come up with a solution to the problem which is devoid of the complexities and intricasis of the direct consequences test and the foreseability test.

1. See the case of Cattle ' Stocıaton water works Co
2. See the Wagon Mouna (No 1) (1961) Ac 388
3. See Clerk and Lindsell on Torts 14th Edition Parra 304.
4. See the statement of Lord Wright in the case of Liesbosch dredger V S.S. Edison (1933)A.C. 499 at 460
5. See clerk and Lindsell supra
6. See J.G. Fleming An Introduction to the law of torts PP. 119-120
7. (1921) 3 K.B. 560
8. Ibid at P. 571-2
9. Ibid at P. 577
10. (1920) AC 956 at 984
11. See Michael A. Jones text book on torts P. 100
12. (1963) AC 837 at 845
13. (1984)1 All ER 997
14. (1971) 1 QB 88
15. Ibid at P.100
16. See Michael Jones (opcit) P.98
17. See the statement of Scrutton J in the Arpod . (1934) 189 at 202
18. See the case of Owens V Liver pool corporation (1939) 1 K.B. 394
19. See the case of Love V. Port of London (1959) 2 Loyds Rep. 541.
20. See the case of Bishop V Arts & letters chebs Tornonto (1978) 83 DLR (3d)
21. See the case of Bourhil v young (Supra)
22. See Michael Jones (Op cit.) P. 101
23. (1962) 2 Q.B. 405

24. Ibid at P.

25. (1974) 2 All ER 737

26. See Michael Jones Op.cit) PP.101-102

27. (1970) 3 All E.R. 508.

28. Ibid

29. Ibid

30. See the case of Weld-Blindel v. Stephens (supra); also Philips James with D.J.L Brown: General Principles of the law of torts 4th edition P.34.

31. See clerk and Lindsell on Torts 15th edition para. 11-31.

32. (1969) 119 N.L.J. 484

33. Ibid

34. See the case of Liesbosch dredger v S.S. Edison (1933) AC 449

35. Ibid

36. Ibid ap. 460

37. See Michael Jones, (Op.cit) P.103

38. See for example Junior books v Veitchi & Co (Supra)

34 (1973) I.W.L.R. 574

40. (1980) 1 All ER 928 See also pery V Sidney Philips & Son (1982) 3 All ER 705.

41. See Tony Weir: A case book on Tort 6th edition P. 565

42. See J.G. Fleming (Supra) P. 120-121

43. Ibid.

44. Supra

45. Ibid at P. 425

46. Supra

47. Ibid at P. 859

48. Ibid at P. 847

49. (1964) Lloyd's Rep. 371
50. (1969) 3 All ER 1006
51. Ibid ap. 1010-1011
52. (1964) 1 Q.B. 518
53. Op Cit
54. Supra
55. Op cit.
56. Op.cit
57. See Clark and Lindsell (op.cit) para 11.34
58. Op. cit
59. (1981) 3 All ER 674
60. Op. Cit
61. Ibid at P 678
62. (1968) I D.L.R. (3d) 404 (CA)
63. Supra
64. OP.Cit
65. See the statement of Rees J. in Vacwell Engineering Co. Ltd V. B.D.H. chemicals Ltd (1971)1 Q.B. 88 at P.100
66. (1967) 1 All ER 267
67. See Michael Jones op cit P. 99
68. See for example the case of Tremain v Pike (supra) where 'foreseability was strictly followed to the extend that it was criticised as requiring too pricise a degree of foresight' and the contrasting decision in Draper V Hodder (1972) 2 Q.B. 556 at 573 where Edimund Davies said that the proper test in negligence is not whether the particular type of physical harm actually suffered ought reasonably to have been anticipated but whether broadly speaking it was within the range of likely consequence'

69. (1967) AC

70. Supra

71. See ante at p. 162

72. Supra

73. Supra

74. See Hepple and Mattlhews. Tort cases and materials at P.199 Note 1. Also the statement of Hiemstra J. in the south African case of Alston v Marine and trade Insurance Co ltd (1964) 4. S.A. 112 The Wagon Mound (No.2) rule was rejected in that case.

75. See the case of vacwell Engineering co Ltd V. B.D.H. chemicals ltd (supra).

76. See Janes Op.cit at P.41

77. Such as Bourhill v. yong op.cit. Glasgow Corporation v. Muir (1943) A.C. 449 and Woods V Dunean (1946) A.C. 401.

This arrangement is put forward by Charles Worth. See Charlesworth on negligence op.cit. P. 204-205.

78. This view is put forward by Philip James See Phipli Janes: Op.cit at P.38.

79. There are already such decisions some based on foreseability rule while others prefering the direct consequences rule. See for example the cases of Tremaine V. Pike (Supra) and Prapper v. Hodder (1972) Q.B. 556. The ealier was based on the foreseability rule while the later tend to power the direct consequences rule.

80. (1969) 1 A.C. 356.

81. Ibid at P. 422

82. Ibid.

CHAPTER FOUR

4.0 DEFENCES TO LIABILITY IN NEGLIGENCE

4.1 INTRODUCTION:

Failure on the plaintiff's part to prove all the essential elements of an actionable negligence will as we have already seen[1] always offer a complete defence to the defendant against the claim of the plaintiff. Consequently, failure on the part of the plaintiff to prove that the defendant owed him a duty of care or that there was a breach of the duty of care owed him or that he has suffered damage as a result of that breach and also that the damage suffered is not remote, but that it was the direct and foreseable consequences of the defendant act, then the claim must certainly be dismissed.[2]

In this chapter our discussion is going to be centered on the following defences to liability in negligence:-

(i) Contributory negligence
(ii) Assumption of risk
(iii) Inevitable accident
iv) Limitation of action[3]

4.2 CONTRIBUTORY NEGLIGENCE:

The term 'contributory negligence' have been defined by both text-book writters and judges. For example W.L. Prosser defines it as "Conduct on the part of the plaintiff contributing as a legal cause to the harm he suffered which fall below the standard to which he is required to conform

for his own protection."[4] J.G. Fleming on the other hand defines it thus: "Contributory negligence is a plaintiff's failure to meet the standard of care to which he is required to conform for his own protection, and which is a legally contributing cause, together with the defendant's default in bringing about his injury."[5] While Koditinye defines it as the "negligence of the plaintiff himself which combines with the defendant's negligence in bringing about the injury to the plaintiff."[6] On the judges side, Coker J.S.C. (as he then was) define it thus: "Contributory negligence means that the party charged is primarilly liable but that the party charging him has contributed by his own negligence to what has eventually happened."[7]

All the definitions given above seem to be saying the same thing in different ways namely, the defendant is solely liable for the damage or injury caused but that the plaintiff aggravated the situation by not taking steps to avoid the damage or injury through the exercise of reasonable care.

The difference between the legal position of the plaintiff and that of the defendant here is that the plaintiff's duty of care is not required to be exercise to any one else but to himself (in order to avoid the consequences of the defendant's breach of his duty to take care). Failure to exercise it therefore, does not affect the duty of care required by law to be exercised towards him by any

one. On the other hand, the defendant who is required to exercise due care and deligence in a given condition cannot rely on the want of care of the plaintiff to avoid liability because the duty to be exercised by him still remain intact even with the want of care on the part of the plaintiff unless of course he can show that he doesn't owe the plaintiff the duty of care in the circumstances. Therefore the defendant will be held liable in negligence even though the plaintiff contributed also in the causing of the damage by his own negligence. In awarding damages however, the role of the plaintiff will be taken into account so as to divide the amount to be paid by the parties proportionately with each one's blameworthiness [8] and thereby reducing the claim of the plaintiff.

4.2.1 CONTRIBUTORY NEGLIGENCE AT COMMON LAW:

The above brief analysis given with respect to the liability of the defendant where the plaintiff is also contributorilly responsible to the damage or injuries sustained by him speaks more of the position of the law under statutes[9] than at common law. The position at common law was that contributory negligence gives the defendant complete or total freedom from liability. The yardstick for determining liability, which was somewhat connected to rule of causation,

was to determine if the defendant's act was the sole cause of the accident or not. If it is, then he was held liable for the consequences but if there is an interfering cause e.g. the conduct of the plaintiff himself leading to ultimate results that follows, then the defendant is not liable for the consequences. According to Lord Black— burn[10] "The rule of Law is that if there is blame causing the accident on both sides, however small that blame may be on one side, the loss lies where it falls".

The above assertion by Lord Black burn no doubt clearly depicts the position of Common Law on contributory negligence. The case which is regarded as the foundation of the doctrine of contributary negligence is that of Butterfield v. Forrester[11]. In that case, the defendant wrongfully obstructed a street in Derby by placing a pole across it, and the plaintiff rode along the street 'at eight O'clock in the evening of August, when they were just begining to light candles' but even though there was still enough light to notice the obstruction, the plaintiff all the same collided with the pole as the result of which he was thrown off from his horse and injured. It was held that the plaintiff have no cause of action, because he could not— withstanding the defendant's negligence, have avoided the accident by the use of due care. Lord Ellenbrough C. J. then said:

> A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use

> common and ordinary caution to be in the right ... One person being in fault will not dispense with another's losing ordinary care for himself. Two things must occur to support this action, , an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.[12]

Before the enactment of statutory laws on contributory negligence in Nigeria the common law position was applied here in virtually the same way and magnitude as it was applied in England. Thus in the case of Okoli v. Nwagu[13] (which relates to an accident which took place before the coming into force of the Eastern region's Fatal Accident Laws of 1956). The deceased alighted from a bus, walked on the Kerb beside the bus onto the front of the bus and, as he was crossing what was a busy road, at a short distance from the bus, a lorry coming along, from the direction leading to the back of the bus collided with him and dragged him a short distance before the lorry stopped. He died as a result of the wounds. The trial judge dismissed the case. On appeal, held, the respondent driver could not have averted the collision as there was not sufficient seperation of time, place and space for him to do so: It was the dedeased own negligence that caused the accident.

The position of the common law as illustrated by the above cases was therefore no doubt particularly harsh on the plaintiff as any want of care on his part regardless of the degree will automatically make him to fail in his case. Because of the harshness of the common law, the courts in England introduced the doctrine of last opportunity as a way

out. The doctrine itself is said to have originated from the case of Davis v. Mann.[14] The facts of the case are briefly that the plaintiff negligently left his donkey, with it's legs tied, in the high way. The defendant, driving his Waggon and horses 'at a smartish pace' crashed into the animal and killed it. It was held that the defendant was liable even though the accident would not have happened but for the negligence of the plaintiff, on the ground that the defendant had sufficient opportunity of avoiding by the use of reasonable care the danger so created by the plaintiff's negligence. Parke B. said:

> Although the ass may have been wrongly there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public high-way, or even over a man lying asleep there, or the purposely running a carriage going on the wrong side of the road.[15]

The doctrine of last opportunity therefore served as a saviour to the plaintiff's plight of recovering nothing in damages where there is evidence of want of care on his part because it allow the plaintiff to recover damages even though he too is guilty of contributory negligence if at the time of the accident, the defendant could have avoided it while the plaintiff could not[16].

However, the doctrine of last opportunity, instead of solving the problems (i.e. taking the plaintiff out of the absurd condition of losing his case because of want of care on his part to himself), it created another problem to the courts/judges. The problem stems out from the courts confusion concerning the precise and appropriate rules to be applied in determining some-ones liability under the doctrine: Is it to be based on the rules of causation and remoteness of damage?[17] or is to be based on some other considerations such as intention, foresight, negligence or the purpose of a particular statute?[18] The whole confusion it appears, is the result of the courts inability (especially in collusion cases) to distinguish the doctrine of last opportunity on the one hand from causation and remoteness of damages on the other hand.[19]

The confusion created by the application of the doctrine of last opportunity became worst when the courts sought to extend it to cases of constructive last opportunity. The case which gave birth to this extension was the British Colombia Electric Karl Co V. Loach[20]. The facts of the case were briefly as follows: An action was instituted against Railway Company by the administrator of a man who, while being driven in a Waggon across a level crossing, was run down and killed by an electric car. The judicial committee of the privy Council found the plaintiff guilty of negligence for failing to look out for the care before entering the line. The company was on the other hand found guilty of negligence on two counts. One

is that the driver of the electric car was driving it at a very high speed. And the second count being that the car's brakes were defective. They (Judicial Committee of the privy council) held the Railway Company liable notwithstanding the negligence of the deceased. The ratio decidendi of their judgment was that even though the plaintiff was negligent in going on to the Railway line without keeping a proper look out, the defendant would have avoided the accident if the brakes of his car were in good order since he applied the brakes when he was 400 feet away from the crossing which was an enough distance for him to stopped the car and thus avoid the accident if the brakes were in good condition. Therefore this last opportunity which the plaintiff would have had if not for his negligence was equated to one which he actually had[21].

The decision in this case no doubt represent an attempt by the courts to over protect the interest of the plaintiff under the harsh common law position at the expense of the defendant. Application of the rule is also not easy because the confusion which bedevilled the application of the doctrine of last opportunity also affects it. The rule have as rightly stated only serve to compound the problem created by the doctrine of last opportunity instead of offering any useful solution to it.[22] Happily, both the doctrine and its hybride constructive last opportunity were

both abandoned after the coming into force of the contributory negligence Act[23] thereby saving the courts from the pains of the confusion created by them.

The courts in America[24] also tried what is called comparative negligence as a way out after trying the doctrine of last opportunity but without achieving any suc success. By the rule of comparative negligence, negligence were classified according to 'degrees'. Thus if the plaintiff's negligence was 'ordinary' while that of the defendant was 'gross' the plaintiff will recover and vice-versa. However, this was also found to be defective as soon as it started operation because it merely shifted the whole loss from the plaintiff to the defendant, when both parties were actually at fault. Again it was not easy to define precisely what 'gross' negligence was or to furnish a satisfactory yardstick for determining the differences between 'ordinary' and 'gross' negligence. The end result was therefore to fill the courts with appeals and thus to struggle with the creature to which they had given birth.[25] Because of this difficulty, the comparative negligence rule was discarded and in it's place the practice of appertioning damages between parties in civil cases was adopted. No much difficulty was faced with this practice and therefore it continued up to the time it started getting statutory backing.[26]

On the whole it can be said that the application of contributory negligence at common law is full of irreconcilable and imprecise rules with attendant hardship on the parties and the only way out is to have statutory provision which will clearly apportion damages between the parties equal to their blame worthiness.

4.2.2 CONTRIBUTORY NEGLIGENCE UNDER THE STATUTES

When it became clear that the common law position on contributory negligence cannot provide a lasting solution to the problem at hand, i.e. how to deal fairly and justly with each of the parties involved (even with the introduction of the sub-rules under it), the next line of action was for the legislature to enact laws that will deal with the matter. The first of such statutes was the Maritime Conventions Act of 1911. However, before this Act, what obtains in England after the failure of the common law rule on contributory negligence to bring solace to the parties was that the courts as (a last resort) adopted the admiralty rule whereby damages were equally divided between the negligent parties. But in 1911 following the adoption by England, of the Brussels Maritime Convention, enacted the Maritime Conventions Act providing for a division of damages in proportion to the degree in which each vessel was at fault[27]. The act was primipally made to deal with

admiralty cases but the common law courts adopted and applied it also to cases of collision on land.[28]

In 1945, however, there was a law made which deal with the issue of contributory negligence directly. The law in question was the law Reform (contributory negligence) Act of 1945. It provides as follows:-

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damage recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.[29]

By the provision of this Act, a solution have no doubt been found to hershness of the common law position on contributory negligence. Also the confusion created as a result of attempts by the courts to water down the hershness of the law have no doubt been cleared. Plaintiff will henceforth not entertain any fear of losing his case totally because of his own role in the occurence of a damage. The defendant is also free from being witch-hunted by liability through last opportunity and it's hybride , the constructive last opportunity rules all that is required to be done now where an accident which occassioned damage is caused through the negligence of both parties, is to take in to account the blame worthiness of the parties as well as the causative potency

of their actions in order to determine the proportion by which the plaintiff damages are to be reduced to a 'just and equitable' level.[30]

A case which will serve as a good illustration of the application of the Act, is the case of Jones v. Livox Quaries, Ltd.[31] In that case, Workmen and slow-moving vehicles were proceeding down the base of a quarry to the canteen at lunch hour. The way to the Canteen was round a stationery excavator vehicle, turning almost at a right angle. A traxcavator, a tracked vehicle with a speed of 2½ miles an hour turned this corner and stopped or nearly stopped to change gear. The plaintiff had jumped on this vehicle and then stood on the towher at the back of it holding on to its two uprights very much in the position is which a footman stood at the back of an eighteenth century carriage, so that some part of his body was behind the traxcavator. The workmen at the quarry, including the plaintiff had been instructed not to ride on the quarry vehicles and, in doing so, the plaintiff acted in defiance of his orders. A dumper, a vehicle with a speed of 4½ to 5 miles an hour driven by a servant of the defendants, the quarry owners, with a load of stone, followed the traxcavator a few seconds later round the stationary excavator and vanished into the back of the traxcavator

and the plaintiff was severely injured. The trial judge held that the plaintiff had suffered damage as the result partly of his own fault within the meaning of SS 1(1) and 4 of the law reform (contributory negligence) Act of 1945 and therefore reduced the damages claimable by the plaintiff by one-fifth.

There was an appeal by the plaintiff, and a cross-appeal by the defendants (i.e. the employers of the driver) to the court of appeal. Both the appeal and cross-appeal were however dismissed by the court of appeal. Denning L. J., in his judgement, said among others that:-

> The present case is of a good illustration of the practical effect of the Act of 1945. In the course of the arguement my Lord suggested that before the Act of 1945 he would have regarded this case as one where the plaintiff should recover in full. That would be because the negligence of the dumper driver would then have been regarded as the predominant cause. Now, since the Act, we have regard to all the causes, and one of them undoubtedly was the plaintiff's negligence in riding on to the towbar of the traxcavator. His share in the responsibility was not great - but, nevertheless, it was his share, and he must bear it himself...[32]

Our own statutory laws on contributory negligence appeared to be a verbatim reproduction of that of England.[33] This means that they are the same in all material respects. Thus in the case of Apah v. Costain[34], the plaintiffs who were passengers in a motor-car, claimed against the defendant as owner and driver respectively of a tipper lorry for the personal injuries they had suffered as the result of the collision between the

two vehicle on the Lagos - Ibadan Road. The plaintiffs claimed for special and general damages. The accident occured at a F junction where Ogunmakin Road, a side road from Abeokuta entered the Lagos-Ibadan road. The tipper lorry furned into the side road without warning and without being able to ascertain whether there was any on coming traffic from the opposite direction. The learned trial judge dedided that the plaintiffs driver was the only person who could have avoided the accident and that as he had failed to do so, the plaintiffs claims must be dismissed. On appeal the Supreme ... court held among others that the learned trial judge was wrong in applying the so called 'last opportunity' rule which has ceased to apply in the law of negligence since the civil liability (miscelleneous provisions) Act of 1961.

Again, in the case of Oyalowo v. M. De Bank Transport Ltd,[35] the plaintiff's tanker was driven along the main Abeokuta-Lagos road when the defendant's trailer, which had been stationary by the side of the road and near a narrow bridge, suddenly and without warning pulled out into the road, causing the plaintiff's driver to swerve to the right and the tanker to somersault into a ditch. The Western State Court of Appeal upheld the judgement of the trial judge that the defendants driver had been negligent in pulling out suddenly and without warning from a stationary position into the main road, but that the plaintiff's driver had been contributorily negligent since -

> no reasonably deligent driver would attempt to overtake another vehicle when that other vehicle is seen to have come into the road suddenly and when both vehicles are approaching a bridge nearby. The learned trial judge was therefore right in holding that the plaintiffs driver was guilty of contributory negligence in failing to stop the trailer and in attempting to overtake it having regard to all the attendant circumstances. It must be remembered that the act or omission amounting to contributory negligence on the part of the plaintiff could take place before, at or after the collision, provided there is evidence that such act or omission materially contributed to or had a causal connection with the damage or injury about which he [36].

The trial judge's assessment that the defendants and plaintiff were to divide the damages between them at 60 and 40 percent respectively was accordingly upheld by the court of appeal.

From the statutory provisions and the case cited as illustrations of their application the following conclusions could be drawn as to the present position of contributory negligence.

(a) Contributory negligence of the plaintiff, unlike the negligence of the defendant need not be a breach of a duty to take care. Thus in the already cited case of Apah v. Costain [37], One of the grounds for the holding the appeal of the plaintiff was that the trial judge's interpretation of the plaintiffs contributory negligence which plays the plaintiff's action on the same level with that of breaking a duty to take care. This in the view of the court of

appeal was a manifest erro in law as the judgment make the defendant only contributorily negligent instead of being the actual negligent person as required by law. Coker J.S.C. then said - " -----even though the principles of contributory negligence have undergone various modifications, the essential characteristics remain the same, i.e. the party charged must be primarily liable for the negligence that caused the damage or injury"[38].

(b) Damage claimed for loss of support by dependants of a person killed by the defendant could be reduced by the amount of carelessness of a parent or guardian, but the parent or guardian, may at a point be brought in as a third party by the tortfeasor and be held liable to pay contribution.[39]

(c) Since the act is made for the purpose of spliting the loss between plaintiff and defendant, where there is more than one defendant the loss may be apportioned between them under Section 19 of the Kaduna State torts edict[40]. And where the plaintiff as well as the defendants are all at fault, it appears section 19 of the Edict will still apply and the extend to which each one contributed to the damage complained by the plaintiff must be established[41]. A question which may be asked at this stage is supposing the plaintiff is 40% to blame while the defendants are 40% and 20% percent respectively to blame, can the

plaintiff recover from one of the defendants the amount payable by each of them in damage or each is to pay his own separately? There is a rule in English jurisdictions except in collision cases, (which is based on the presumption of the solvency of all parties) that a person liable for a loss is liable for the whole of that loss even though some third party or parties were just as a much or more at fault than him.[42] This rule will no doubt create difficulties where the plaintiff as in the present example is also at fault because if the rule is to apply in accordance with the contributory negligence Edict, one of the defendants would be forced to pay 60 percent of the plaintiff's loss and then proceed to recover from the other defendant what he was suppose to pay. The best solution in the writer's view therefore, is that each should be made to pay his own portion of the damages directly in order to avoid a situation whereby one party is made to suffer unnecessarily because of a fault for which not he alone is responsible.

(d) Lastly, the edict can only apply where the conduct of the defendant is tortious. This means that if the defendant only breached a contractual agreement which does not give rise to any tort then a plaintiff whose fault has contributed to the harm will recover nothing. In the case of Lambert v. Lewis[43] the plaintiff was engaged in carrying out certain works as a sub-contractor of the defendants, it was an implied term of the contract between them that the

defendants should supply any equipment reasonably necessary for the work within a reasonable time of being requested to do so. The defendants were in breach of that in that they failed to provide a step-later which the plaintiff had requested. To prevent loss of time the plaintiff used a trestle, which he knew to be unsuitable unless it was footed by another man. The trestle was not footed by another workman; it slipped while the plaintiff was on it and suffered injury. If the plaintiff had had a cause of action in tort, there would have been contributory negligence on his part. In an action brought by him for damage for breach of contract, held:

i) The plaintiff's failure to have the trestle footed was negligence which broke the chain of causation, with the consequence that this injury was damage that arose from his own negligence and not the defendant's breach of contract.

ii) The Law Reform (contributory negligence) Act 1945 did not enable the plaintiff to recover damages not withstanding his negligence, since the fact that there had been an avoidable breach of contract by the defendants did not itself constitute a fault on their part within the definition of 'fault' in Section 4 of the Act and accordingly S. 1(1) did not apply.

Paul J. said in his judgment that:

> There is a provisor (a) to that sub-section which read: 'this sub-section shall not operate to defeat any defence arising under a contract'. I first consider the provisor. The provisor d does not in my judgment apply to a case such as this. The words are not 'under any law related to contract'; the words are 'any defence arising under a contract' and that phrase in my judgment can only relate to some express clause here ----[44].

However, as we have already seen,[45] where contractual relations gave rise to torts, contributory negligence as provided under the Kaduna State torts edict[46] and the civil liabilities (miscellaneous provisions) Act[47] will apply unless of course where the parties by express agreement excluded apportionment.

Finally, contributory negligence as a defence could therefore be said to serve as a mitigating factor to a defendant's liability in negligence and not a complete defence to the plaintiff's claim.

4.2.3 APPLICATION OF CONTRIBUTORY NEGLIGENCE TO CERTAIN CATEGORIES OF PERSONS AND SITUATIONS.

Even though no mention is made by the statute already considered[49] about the standard of care required to be exercised by the plaintiff for his own safety, courts decisions (as we have already seen)[50] clearly showed that the standard is that of a reasonably prudent man. However, the standard is atimes lowered with regard to certain categories of persons and situations in order to take care of the peculiarities of such persons and

situations. We shall under this sub-heading therefore deal with some of those persons and situations.

4.2.3(a) Children:

When a child is contributorily negligent to the occurence of a damage or injury, he cannot just like an adult person recover full compensation but would have his own claim reduced in proportion to the degree of his own negligence[51]. The most important thing to consider in determining whether or not a child is contributorily negligent in the occurrence of a damage or injury to himself, it appears are the age, intelligence, physical disabilities, experience, instruction and the thing or act neglected.[52] The standard is normally very low. Thus in the case of Lynch v. Nurdin[53], the defendant negligently left his horse and cart unattended in the street. The plaintiff, aged seven, mounted the cart in a play, while another child led the horse on. The plaintiff was thrown down and injured. The defendant was held liable for the injuries sustained by the seven year old boy. It was argued on behalf of the defendant that the plaintiff was guilty of contributory negligence on the ground that he could have avoided the accident, if he had exercise ordinary care. To this, Lord Denman C. J. said 'Ordinary care must mean that degree of care which may reasonably be expected in the plaintiff's situation; and this would evidently be very small indeed in so young a child'.

The principle laid down in Lunch v. Nurdin[54] appeared to have been followed in Yachuck V. Oliver Blais Co. Ltd[55] In that case, a boy who was nine years in company of his brother who was seven years obtained by telling . lies as to the reason for which he wanted kit, petrol from the defendants. He set fire to it and got injured. The trial judge found the boy guilty of contributory negligence but his finding was set aside on appeal on the principle that:

> if one gives to a child an explosive substance and the child, with a limited knowledge in respect of the likely effect of the explosion, is tempted to meddle with it to it's injury, it cannot be said in answer to a claim on behalf of the child that he did not meddle to his own injury, or that he was tempted to do that which a child of his years might be reasonably expected to do[56].

The judgment in this case however, seem to represent an attempt by the courts to over protect children from their own negligence. This writter strongly believe children of nowadays are very intelligent and thus know what is dangerous and what is not, Moreso as the child in this case is up to nine years. If it were a child of between five - six yearsthen it would have been understandable but a child of nine years in this writter's view is in our contemporary world of today possessed of enough knowledge and experience to know that petrol is highly inflamable and should therefore not be played with and thus be made contributorily negligent for the consequences of playing with it. The decision in this case cannot therefore in the writters view be considered as a good precedence on the contributory negligence by children. It is not a surprise therefore

that the courts attitude (especially in the English Jurisdictions)[57] towards contributory negligence by children have been criticise by text-book writers[58].

4.2.3 (b) Workmen:

The standard of care exacted from workmen for their own safety in the course of performing their duties where they sustained injuries as the result of their employers breach of their statutory or common law duties of providing a safe system of work is also lowered by the fact that 'the court has to take into account all the circumstances of work in a factory, and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence'[59]. This means that the court will take into account the fact that the senses of workmen in the factories are normally dulled by the noise, repetition, confusion, fatique and preoccupation with work that in such conditions it would be unreasonable to take scrupulous care for their own safety.[60] In the case of Flower v. Ebbw Vale Steel Co.[61] the facts of which were as follows: The plaintiff, Mr. Flower, was employed by the defendants in working a sheet rolling machine and in cleaning it from time to time.

The machine consisted of seven upper and six lower rollers. The two sets of rollers were less than an inch apart at their nearest points, and they revolved in opposite directions, turning towards each other at the front of the

machine. When a sheet of metal was introduced between the front rollers it was drawn between the two sets of rollers, and having been thus levelled, was expected at the back of the machine. The two sides of the machine were held together in front at the top by a black iron bar parallel to the rollers, the upper side of that bar being slightly above the level of the upper rollers. As a protection to the workmen a copper bar was placed across the fromt of the machine below the level of the fromt top roller. The height of the machine was three feet 0½ inches from the ground to the upper side of the black bar. The distance between the top of the copper bar and the bottom of the black bar was 2½ ooinches.

On February 27, 1933, while the machine was in motion, the plaintiff was cleaning it from the front with cotton waste. After cleaning the top rollers from above, he put his left hand with waste upon it under the copper bar and against the front top roller, in order partly to see better and partly to exact greater pressure upon the roller. In these circumstances his hand was drawn into the 'site' between the front rollers and was seriously crushed that it was found necessary to amputate it.

The plaintiff sued the defendant claiming damages for injury to himself from the negligence of and breach of statutory duty by the defendants in not securely fencing and in not making safe certain machinery at their factory.

Evidence was given at the trial by the manager of the mill, the foreman of the plant, the foreman of the machine in question and three workmen at the mill to the effect that the roller could be properly cleaned from above, that there was no necessity to clean the front roller from under the copper bar, also that no workman had been seen or known by any of them to clean in that way and finally that the method adopted by the plaintiff was dangerous.

The question for determination then was, whether the plaintiff by the exercise of a degree of care which an ordinary prudent workman would have shown in the circumstances could have avoided the result of the defendants breach of duty? The trial judge was of the view that the plaintiff could and that the proximate cause of the accident was his own disobedience of orders in putting his hand and arm under the copper bar in such a way as to make the fence, which had been provided ulterly useless. Judgement was consequently given in favour of the defendants.

The plaintiff appealed against the decision of the trial judge raising as on of his grounds of appeal the fact that, even though breach of instructions were not alleged in the pleadings, yet he was found guilty of contributory negligence on that ground. The court of appeal held

dismissing the appeal that it is true that in the pleadings at a time, when it is obvious nobody had a very clear idea as to how the plaintiff get into the place where he was injured, disobedience to orders or instructions was not alleged that that aarguement cannot stand since no objection was raised on it when it was first mention at the trial.

There are two things about this case which are worthy of taking note of. First is the fact that the case was a pre 1945 case i.e. when the Law Reform (contributory negligence) Act was not yet enacted. That was therefore the reason why the plaintiff failed in his case because of his own negligence. Secondly, it appears the plaintiff also fail on the technical ground of not raising objection to the fact that he disobeyed the instruction of his employers by putting his hand and arm under the copper bar in such a way as to make the fence, which had been provided utterly useless. This means that if an objection had been raised against the defence of disobeying orders, the plaintiff would have succeeded in his case and thereby claiming full damages.

4.2.3 (c) Rescuers:

The standard of care required by rescuers for their own safety while on rescue mission is also low in consideration of the fact that they are 'frequently' and 'nobly' indifferent to their own safety because of the desire to

save someones life. The courts are therefore "very reluctant to find such a stalwart person guilty of contributory negligence who has suffered loss or damage himself whilst attempting to save the life of another from a position of peril of a kind which had invited rescue and had been created by the defendant's negligence"[62].

However, where the rescuer acted in such a wanton and unreasonable disregard for his own safety and life and thereby contributing to an emergency which calls for his own rescue, then loss or injuries sustained as the result may be taken as the consequences of his own negligence and will have the damages claimable by him reduced in proportion to his own negligence. In the case of Harrison v. British Railway Board,[63] the plaintiff was a guard on a passenger train which thedefendant attempted to board while it was moving out of the station. Under the rules regulating the conduct of train guards, the plaintiff was required, in the event of an emergency, to signal the driver to stop or to apply the emergency brakes himself or both. The plaintiff attempted to signal the driver to stop but gave an incorrect signal and the train continued to accelerate away from the station. The plaintiff then tried to grab hold of the defendant who fell off the train, pulling the plaintiff with him. The

4.2.3 (d) The Dilemma Rule:

Where the defendant's negligence put's the plaintiff in a situation of imminent peril, and the plaintiff, in the agony of the moment, choose a course of action to save himself which turns out to have been the wrong one, the defendant cannot plead that the plaintiff was guilty of contributory negligence, provided that the plaintiff's action was reasonable in the circumstances[65]. Thus in the case of Jones v. Boyce[66]. An action was instituted against the defendant, a coach proprietor, for so negligently conducting the coach that the plaintiff, an outside passenger was obliged to jump off the coach, in consequences of which his leg was broken. Lord Ellenborough C. J. while delivering judgment in favour of the plaintiff said:

> To enable the plaintiff to sustain the action it is not necessary that he should have been thrown off the coach; it is sufficient if he were placed by the misconduct of the defendant in such a situation as obliged him to adopt the alternative of a dangerous leap, or to remain at certain peril.[67]

Again in the case of Sayers V. Harlow U.D.C.[68], the plaintiff visited a public lavatory owned by the defendants, and having put a penny in the slot, she went in. The door having closed behind her she, later realized that she could not get out, and for ten to fifteen minutes she tried to attract attention.

She then thought that she could get out by climbing over the door and she stood with her right foot on the seat of the lavatory, holding with one hand a pipe and the other top of the door, and put her left foot on the toilet roll and it's attachment. Having got into this position she realized that she could not infact get over the door, and in trying to get down she put some weight into the toilet roll which revolved causing her to slip, fall and sustain injury. The county court judge found that the defendant had been negligent but dismissed plaintiff's claim on the ground that the damage was too remote. On appeal, however, it was held that the plaintiff's case must succeed only that the damage claimable was reduced by one-quarter because of her own contributory negligence.

Finally, it could be said that even though the general rule on contributory negligence (especially after t the coming into operation civil liability (miscellaneous provisions) Act and the Kaduna State tort edict) is that plaintiff will have the damage claimable by him reduced in proportion to his own level of negligence in bringing about the loss or injury, and the standard in each case being

that of a reasonably prudent person, it is however all the same clear from the discussion under this topic that the standard of care with regard to certain categories of people is lowered by the courts in order to take care of the peculiarities and the special situations in which they found themselves. Their actions even in those situations however, have still to be measured against that of a reasonably prudent person to see whether or not he would have acted the way they acted if he were the person in their position. The lowering of the standard therefore is meant only to take care of the nature of the persons concern or the situation under which they found themselves and not to excempt them from the duty of taking care for their own safety.

4.3 ASSUMPTION OF RISK (VOLUNTI NON FIT INJURIA)

Voluntary assumption of risk (Volunti non fit injuria) as a defence to liability in negligence means someone who agree (either expressly or impliedly) to run the risk of injury, cannot recover damages for any of the risk he had agreed to run.[69] The position of the law here, it has been submitted (and this writter is in total agreement with that submission) is on the philosophy of individualism, that no wrong is done to one who consents.[70]

Prior to the enactment of the Law Reform (Contributory negligence) Act[71] the difference between contributory negligence and consent was merely academic because it serves no any practical purposes. They both afford complete defence to the defendant against the plaintiff's claim.[72] However, with the coming into force of the Act, it becomes essential to differentiate between the two because while prove of consent still afford a complete defence to the defendant, contributory negligence does not. It only reduce the damages claimable by the plaintiff in proportion to his own degree of fault. Under this topic, our discussion will be centred on cases where the plaintiff could be taken to have assump the risk by express or implied agreement, and it's effect on third parties and cases where even though the plaintiff is aware of the risk when he embark on the

activity that cause the damage, yet he cannot be taken to have consented to it's occurrence.

4.3.1. CASES WHERE THE PLAINTIFF CONSENTED TO THE RISK:

The consent of the plaintiff to the running of a risk could be obtain in two ways viz: express and implied agreement.

4.3.1 (a) Express Agreement

Where a plaintiff through an express agreement waves the duty of care owed to him by the defendant then no legal consequences will flow from his negligence. However, this type of agreements are atimes prohibited by statutes. Thus for example under the legal practitioners Act[73] a legal practitioner is not allowed to enter into any agreement with his client for the purpose of exempting him from liability for his negligence. Again under the unfair contract terms Act[74] it is provided that a person cannot by reference to any contract term or to a notice given to persons generally or to particular persons exclude or restrict his liability for death or personal injury resulting from negligence and further that in the case of other loss or damage, a person cannot exclude or restrict his liability for negligence except in so far as the term or notice satisfied the requirement of reasonableness and lastly that where a contract term or notice purports to exclude or

restrict liability for negligence a person's agreement to or awareness of it is not of itself to be taken as indicating his voluntary acceptance of the risk.

It appears however that, there is no equivalent law in our own statutory books in this country, but as a Commonwealth country decisions handed down by English Courts based on the Act could also be adopted and applied by our courts in similar cases since the decisions of the courts in England are still regarded as part of our judicial precedence albeit at persuasive level.

However, where there is agreement (express or implied) it need not be supported by any consideration or even be enforceable at Law before it becomes binding on the party at whose detriment it was made. Thus in the case of Buckpit v. Oats,[75] the plaintiff and the defendant, both of whom were seventeen years old, were in the habit of riding from time to time in each others cars. Neither of them had insurance cover against risk of injury to passengers. Evidence showed that the plaintiff knew that the defendant was not so insured. A notice affixed to the facia part of the defendants car immediately infront of the passenger seat gave warning to passengers that they rode in the care at their own risk, not being insured by the insurance company and the defendant said that the plaintiff was present when he fixed the notice to the car. Two or three weeks

later, and when the defendant was persuaded by the plaintiff to drive him in his car, and while the defendant was driving the plaintiff, who was sitting in the passengers seat, the car struck a wall as the result of his negligence and the plaintiff was injured. The plaintiff had paid the defendant 10^{s} towards the cost of petrol which did not actually cost much. The plaintiff then sued the defendant claiming damage for the injury sustained. On the question whether the defence of volunti non fit injuria was an answer to the plaintiff claim for damages, held,

(1) On the facts, the plaintiff agreed to be carried at his own risk and to exempt the defendant from liability for the negligence which caursed the accident; the plaintiff though an infant in law could not enforce a contract which he had voluntarily waived or abandoned and

(2) there was no legal contract of carriage, the arrangement between the parties to the journey being one not intended to create legal relationship.

Thus even though the contract itself is not and enforceable one yet the agreement to risk of not getting any compensation or by entering a car which is not insured against accident was held to be binding and thereby

disentitling the plaintiff from recovering damages.

4.3.1 (b) Implied Agreement:

This is where even though there is no any express agreement by the parties, it could be iferred from the circumstances of the case that the plaintiff have consented to the running of the risk. For example, where 'A' want's to enter B's bus to go to Samaru, but B informs A about the poor condition of the bus, and that it will be dangerous to travel in it, but because A so much want's to go to Samaru and since there was no any available car, he insisted that B should take him there in his Bus. If because of this insistence by A, B agree to take him, A cannot succeed in a case against B for damages where accident occurs because he will be met with the defence of volunti non fit injuria.[76]

In the case of Woodridge v. Summer,[77] the plaintiff sought to claim damages against the defendants because of an injury which he sustained when the first defendant horse which was taking part in a competition for heavy weight hunters organized by second defendants in which horses were required to walk, trot, canter and gallop. Both the horse and the defendant (it's owner) were experienced in this kind of competition. There was, a line of tubs and benches two

feet from the edge of the competition arena, which was surrounded by a cinder running track The plaintiff, a professional photographer, was standing at the end of one of those benches. The defendant's horse was kept close into the corner of the bandstand end of the arena so as to give the horse the best chance to show of its gallop in the straight. However, having rounded the corner, the horse apparently jumped two of the tubs, knocked over a third, and then moved from the line of tubs onto a course taking it several feet behind the bench at the end of which the plaintiff was standing. The plaintiff was frightened by the horses' approach, tried to pull some one away from the bench, but stepped or fell back and was knocked down by the horse and sustained injury. The trial judge dismissed the action against the second defendants (organizers of the competition) but found the first defendant guilty of negligence on the ground that the conduct and control of the horse by it's rider (Mr. Holladay) was unreasonable in the circumstances. That if he had allowed it, the horse would have gone safely on the cindertrack but because of the attempt by Mr. Holladay to get the horse back on to the course, it carried along the line of tubs, and that Mr. Holladay knew or ought to know that people sitting or

standing along the line of tubs and benches were highly likely to be endangered by this efforts.

The second defendant appealed against this judgement. It was held on appeal that his appeal must succeed on the ground that a spectator of a competition which involves the risk of injury to spectators would be taken to have consented to the risk of that injury because such an act does not involve any breach of duty of care owed by the participant to the spectator. Diplock L. J. in his judgment said the practical result of the analysis of the application of the common law negligence to participant and spectator would be expressed by the common man as follows:

> A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purposes of the game or competition, notwithstanding that such act may involve an error of judgment or a lapse of skill, unless the participants' conduct is such as to evince a reckless disregard of the spectator's safety[78].

There have, however, been criticisms against this judgment in the sense that it tends to remove from the shoulders of the participant in a competition the duty of care towards his pectators which is a violation of an important ingredient of negligence.[79] However, if the duty of care to be exacted from participants in competition of the type in this case should be the same as in all other cases people will be

scared away from taking part in such competition because it tend to encourage spectators to bring action against the competitors : for any slight mistake or error of judgment on their part which results in an injury to some one. Thus in the case of Wilks V. Chilten hem Home Guard Motor-Cycle and Light Car Club[80] Edmund Davies L. J. adopted the view of Dr. W. H. Goodhart that the proper test should be whether injury to a spectator has been caused 'by an error of judgment that a reasonable competitor, being the reasonable men of the sporting world would not have made and not (as was the case in wood ridge case) whether the participants conduct amounted to a reckless disregard of the spectators safety.[81] This is no doubt the more favoured test by this writer because it is flexible enough to cater for the special situations which may arise in the process of a competition.

4.3.2 THE EFFECTS OF THE AGREEMENT ON THIRD PARTIES.

An agreement to run a risk given by Y to D on behalf of P but without P's authority cannot affect P. In such a case therefore Y must indemnify D against a claim by P. This seems to be in line with the rule of contract that some one who is not a party to an agreement cannot derive any benefit from that agreement or suffer any loss or

detriment therefrom. Thus in the case of Kruger & Co. Ltd V. Moel Tryfan Ship Co Ltd,[82] a Charter party contained a clause exempting the shipowner from liability for stranding and other accidents of navigation, even when occasioned by the negligence of the master; the master to sigh clean bill of lading without prejudice to the charter. In mistake the signed bills of lading presented by Chaterers did not give the shipowner the exemption given by the charter party. owing to the negligent navigation of the master, there was a total loss of cargo, and the holders of the bills of lading recovered damages against the shipowner.

It was held by the House of Lords that since the contract between the Shipowner and the Charterers was that the Shipowner was not to be liable for the masters negligence, the charterers were bound to indemnify the ship owner against the claims of the holders of the bills of lading.

Also, where X gives Y a contractual licence for himself and his guest to come into X property but inserts an exemption clause in the contract, Z a guest of Y who comes into the property under the contract is bound by the clause.[83] Another way through which a plaintiff may become bound by an exemption clause is where there is an assignment of contract which was hitherto entered into between some other

people. This may not be unconnected with the fact that whoever takes an assignment of a contract it means he has accepted as well to abide by all conditions governing the performance of that contract[84].

One important thing to note, is that the fact that X has agreed to run the risk of Y1 negligence, does not prevent him from instituting an action in respect of a negligent act committed by Y^2. Therefore an agreement to exempt an employer from liability for future negligence will not avail the servant who actually commits the act of negligence. In the case of Cosgrove V. Horsfall[85], the plaintiff, an employee of a transport company, was travelling in one of their omnibuses on a free pass when a collision occurred with another omnibus of the company and the plaintiff sustained injuries. One of the conditions for the grant of the free pass was that neither the company nor their servants were to be liable to the holder of the pass for, inter alia, personal injuries, however caused. In the plaintiff's action against the driver of the omnibus in which he was travelling, the county court held the defendant liable and awarded damages to the plaintiff accordingly.

The defendant appeal was also dismissed on the ground that since the condition on the pass afforded no protection

to the defendant, who was no party to the contract between the plaintiff and the company, the condition having not been imposed by the company as agents for the defendant, his appeal cannot succeed.

4.3.3 CASES WHERE THE PLAINTIFF DOES NOT CONSENT TO RUNNING OF THE RISK.

The issue here is, does the mere fact that a plaintiff have knowledge of an impending danger in the doing of a certain thing preclude of him from claiming damage later if injury is caused to him in the process of doing that thing even if the defendant is guilty of not exercising his statutory or common law duty of care towards the plaintiff? The earlier attitudes of the courts was to answer the above question in the affirmative i.e. that that plaintiff will be precluded from claiming damages. Thus in the case of Woodley V. Mtropolitan District Rly,[86] the plaintiff, a workman in the employ of a contractor engaged by the defendants, had to work in a dark tunnel which he knew has been rendered dangerous by passing trains. The jury found the company negligent in not stationing a person to warn the workmen of the approach of the trains, and also three of the five judges of the court of Appeal (including one who was in majority in the result reached) were also of the same view, but still the court by a majority held that the plaintiff could not recover for his injuries,

on the ground that he had voluntarily assumed the work.

The attitudes of the courts as examplified by this case was no doubt unfair to affected parties especially in cases where the relationship is that of a master and servant. The master may ask the servant to undertake a work which is very dangerous or to work in a certain place (e.g. an industry) in which he will be exposed to a lot of dangers but without any provision on the part of the master to take care of his safety or where there is, it is not adequate. In this kind of situation the servant have two options; either to refuse undertaking the assignment (with the attendant consequences of losing his source of livelihood) or to undertake it and risk whatever injury that he may suffer (because of his ardent desire to keep body and soul together especially if he could not get another work some where). In most cases the servants undertake to do the jobs (even though they are aware of the dangers involved) not because they consent to risk of injury to themselves but because of the fact that they cannot do otherwise. It is therefore unfair to say that because of the special condition which the servants found themselves which makes it expedient for them to undertake such jobs

they are thereby precluded from cliaming damages.

There was however, a shift in the earlier thinking later. A sign in this direction occurred in the case of Thomas v. Quatermaine[87] where even though the court held that the Volens maxim applied, the Dictum of Bowen L. J. that 'the maxim is not scienti non fit injuria but volenti' actually help to bring a change of attitude in the judicial thinking towards holding the defendant liable for negligence even though the plaintiff himself was aware of the danger unless his behaviour in the circumstances clearly suggest consent such as where after being informed about poor condition of a car the plaintiff still insist on travelling in the car.•

The heaviest blow to the authority of Thomas V. Quatermaine is to be found in the case of Smith v. Baker[88]. The facts of the case were as follow:• The plaintiff was a workman employed by the defendants to drill holes in a rock. Some cravemen, also in the defendants employ were in the negligent habit of jibbing stones directly over the plaintiff'shead. This practice continued, and one day a stone dropped on the plaintiff. In a claim under the employers liability act the jury found that there was no consent, and the house of lords upheld their

consent. The Lord Herschell in the case made the following opposing remarks -

> I find myself unable to concur in the view that this could properly be held under the circumstances as a matter of law ..... The danger to the plaintiff did not arise from the circumstance that he had to pass from one part to the premises to the other, in proximity to the rate, even if this would have justified the conclusion arrived at. The accident arose from an operation being performed by him in the neighbourhood of the vats, namely, getting a board which served as a lid from under one of them. As far as appears, this was amongst the ordinary duties of his employment, and if it was assumed that there was a breach of duty on the part of the employer in not having the vats fenced, as it obviously was, since if there had been no breach of duty it would not have been necessary to enquire whether the maxim volenti non fit injuria afforded a defence, it seems to me that it must have been a question of fact, and not law, whether the plaintiff undertook the employment with an appreciation of the risk which arose on the occassion in question from the particular nature of the work he had to perform. If the effect of the judgment be that the mere fact that the plaintiff after he knew the condition of the premises continued to work and did not quit his employment, afforded his employer an answer to the action even though a breach of duty on his part was made out, I am unable to concur in the decision. [89]

From the decision in this case, it is thus clear that knowledge of a danger perse is not enough to warrant the application of the volens maxim to a plaintiff's claim so as to defeat it. There must be evidence of a positive act showing consent on the part of the plaintiff.

In the Nigerian case of Chief Ikomi V. Cole,[90] the plaintiff, with a view to obtain a share for his business, obtained from the defendant who held the land under a

crown lease, an annual sub-lease; and the local authority gave the defendant, to the plaintiff knowledge, a permit for store and an office to be put up on the condition that the structure would be removed on notice and in any case not more than two years after erection.

The defendant wrote to the plaintiff less than six months before the third year would be up, a letter terminating the sublease at the end of the third year. Shortly after the Local Authority called on the defendant to pull down the structures, and he again asked the plaintiff to quit. The defendant then demolished the structures.

Because of the demolition, the plaintiff had to pay more rent else where, and thus sued the defendant.. The trial judge awarded him special and general damages. There was a cross appeal by the defendant to the effect that the plaintiff could not recover damages because the defendant obviously wished to get rid of him.

It was held that the special damages would be disallowed because the plaintiff knew of the condition in the permit and could not have damages flowing from the demolition of the structure. However, on general damages it was held that the claim in the absence of arguement from the defendant stand but that the defendant's wish to get rid of the plaintiff is not a circumstance of aggravation.

In another case, Fasbro v. Abdullah,[91] the appellant a land lord of a certain premises situate in Ibadan, sub-let part of it to the respondent under an agreement which provided that the tenant should not make alterations and additions to the demised premises without the express permission of the appellant. The respondent replied to the appellant in writing for permission to build some additional structures, including a fence to demarcate his own holding, which permission the appellant gave. The respondent proceeded to built the fence. Later the appellant sued the respondent in the Ibadan High Court claiming possession, damages and an injunction on the ground inter alia that the parties did not agree on the line of demarcation.

The trial judge after hearing evidence from both sides dismissed the appellants claim holding that the appellant's claim that he did not agree on the line of demarcation was false. The appellant unsuccessfully appealed to the court of Appeal, where it was held that as the issues arising from the ground of appeal before it were issues of fact, it could not disregard the finding of the trial judge who saw, heard and believed. The appellant then finally appealed to the Supreme Court where it was held among others that the latin maxim Volenti non fit injuria is applicable where a party knowing and comprehending a given set of facts consents to them and is deemed to have assumed the consequence of his consent.

Such a party according to the Supreme Court will be precluded from bringing a successful action in damages for an injury resulting therefrom. And that since the appellant has in this case given his consent to the respondent to built some additional structures on the demised premises as required by law, he cannot successfully maintain an action for any damages caused as a result. The appeal was therefore dismissed.

It appears, however, that except in cases of express agreement as the ones we have just discussed the court's prefer to based their decisions on the provisions of the civil liabilities (Miscellaneous provisions) Act and the various States laws on contributory negligence. This may not be unconnected with the fact that the defence of volunti non fit injuria is still maintaining it common law posture; a successful plea if it will afford the defendant a complete defence against the claim of the plaintiff. But a decision which is based on the provision of statutes on contributory negligence will not absolve the defendant totally from liability only that the role of the plaintiff in the occurence of the damage or injury will be taken into account so as to serve as a mitigating factor in awarding damages.[92] This way the defendant is not

allowed to get away with his rash or negligent conduct while the plaintiff is also made to pay for his own unreasonable conduct in the circumstances. The attitude of the **courts** may therefore be justified on the grounds that apart from the fact that contributing negligence is a statutory law (and by which it have more force than volenti no fit injuria) it is also fairer to both parties; the defendant is not allowed to scape liability by showing that the plaintiff too was negligent while at the same time the plaintiff is not allowed to succeed hundred percent for just proving that he has sustain injury or suffered damage as a result of the defendant's negligent conduct where he too have not discharge his own duty of taking care to avoid the damage or injury.

Infact, there are divided views about the continued existence of volenti non fit injuria as a defence since the coming into effect of the Law Reform (contributory Negligence Act). Some are of the views that since cases which came under Volenti non fit injuria can now be effectively dealt with by the contributory negligence under the apportionment of damages clause, it is therefore no longer useful and should be dropped.[93] Some are however in support of its continued existence on the ground that respect for the self determination of an individual also require that the law should make him to suffer the consequences of voluntarilly exposing himself to physical risk.[94] In supporting the

second line of arguement one would add here that since express agreements to run risks also come under the armbit of Volenti non fit injuria, it is only logical that it be allowed to continue to govern this kind of agreement because the situations contemplated under the contributory negligence are these that can only come under implied agreement to run a risk and not express.

Lastly, it is important to know that the defence of volenti non fit injuria does not apply to statutory duty. Therefore a person who fails to perform his statutory duty and thereby causing loss or damage to another cannot invoke it as a defence.[95] Similarly a person who is involved in a rescue operation cannot be said to be volens with regard to the risk involved in such operation[96] unless of course where there is a total disregard to his own safety which is unreasonable in the circumstances.[97]

In conclusion, one will say that the importance of volenti non fit injuria as a defence to liability in negligence have no doubt been reduced with the coming into force of statutory laws on contributory negligence. This is because even though the law does not directly apply to the defence of volenti non fit injuria, the closeness of the two[98] makes the effect of the statutory provisions on contributory negligence (especially apportionment of damages clause) to spill into the defence of volenti non fit injuria. The position now, therefore, is that in cases where

the consent of the plaintiff is only implied then it is not volunti fit injuria but contributory negligence that will govern the case so that the claim of the plaintiff will only be reduced instead being completely defeated. But in cases where the consent is an express one the volenti non fit injury is still the proper defence to be made.

4.4 INEVITABLE ACCIDENT

In evitable accident has been defined as where a person, in doing an act which he lawfully may, causes damage without either negligence or intention on his part.[99]

The basis for inevitable accident being a defence was stated by Blackburn J. as follows:

> "Traffic on the highway, whether by land or sea, cannot be conducted without exposing those whose persons or property are near it to some inevitable risk, and that being so, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger; and persons who by the licence of the owner pass near to warehouses where goods are being raised or lowered, certainly do so subject to the inevitable risk of accident. In neither case, therefore, can they recover without proof of want of care or skill, occasioning the accident; and it is believed that all the cases in which inevitable accident has been held an excuse for what prima facie was a trespass, can be explained on the same principle, viz, that the circumstances were such as to show that the plaintiff had taken that risk upon himself."[100]

The reasons given by Blackburn J. however don't seem to be convincing. The accidents which occur on our highways are in most cases due to the negligence of the drivers and other highway users. Only in extremely rare cares do inevitable accidents occur. A person may be compelled to run the risk of damage caused by inevitable accident, this does not mean that he has agree to run the risk, he is only being pushed into it by necessity. The correct view therefore may be that expressed by Charlesworth[101] that:

> Loss must lie where it falls, unless it can be shown that it was caused by a breach on the part by some other person of a duty to take care, or of some duty making it wrongful for him to have inflicted the loss upon the person who has suffered.

In the case of Fawkes V Poulson & Son,[102] there was an application by the defendants for a new trial or judgement in their favour. The action itself was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendants.

The plaintiff who was a boiler maker was working, by the directions of Mrs. Allan Brothers, at the ballast tank in the hold of their steamship, the Tower hill. The defendants, who were Stevesors, were employed in letting down bals into the hold of the ship by means of a crane. One of these bales shipped out of the chain by which it was secured

and struck the plaintiff and caused him injury. The defendants defence was inter-alia that they had taken all reasonable precautions in lowering the bale; that it was known to be dangerous work; and that the accident was not due to any negligence on their part. The plaintiffs on the otherhand, contended that the accident might have been avoided if the defendant men had steadied the bale as it approached the deck, so as to prevent it going down the hold with a swing upon it. The jury found for the plaintiff and the judge entered judgement accordingly but granted stay of execution.

The defendants then moved for a new trial or judgement on the ground that the verdict was against the weight of evidence.

A new judgement was given in favour of the defendants on the ground that even though a prima-facie case was made out against the defendants, they have displaced it by the evidence adduced at the trial and that that was an accident which could not have been prevented by the exercise of reasonable care. Lord justice Lopes while concuring with the judgement said:

> The best test of what is an inevitable accident is that given by Dr. Lushington who said 'In my opinion, inevitable accident in point of law is that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution and skill.' Applying that test, this case was an inevitable accident. 103

The decision in this case clearly shows that inevitable accident is a well stablished defence in negligence.

For example in the case of Grifiths V. Liverpool Corporation[104] the facts of the case which were that in January 1961 when a highway authority inspected the pavement of a busy road, all the flag stone were in good, sound level condition. On June 9, 1965, the plaintiff fell over a bridge if a flagstone which projected half an inch above adjoining flagstone. The time when the defect occured and it's cause were unknown. The plaintiff brought an action against authority for damages for personal injuries, alleging, inter alia non-feasance. There was evidence that the flagstone was potentially dangerous, the three monthly inspections of the high way were desirable but that no such systematic inspection was carried out because, although the authority could employ more labourers who might be trained to carry out such inspections, thus could not obtain the necessary skilled tradesmen to do the repairs and that a labourer could have repaired the flagstone.

The County count judge found that the flagstone was a potential danger and that, although a system of inspection have been devised, it would infact have resulted in no practical improvement of the condition of the roads in the area. That it was pure speculation whether the defect

existed in March 1965 and therefore whether a systematic inspection would have disclosed its. He considered that in order to establish their defence under Section 1(2) of the highway (Miscelleneous provision) Act of 1961 the authority had to prove that they had employed the standard of care reasonably required of all high way authority and since that had merely proved that they could not comply with the standard, their defence failed. On appeal on the ground inter-alia that the judge has misdirected himself in law in that he held that he would not take into account their inability to obtain an adequate labour force, their appeal was dismissed by majority decision in the Court of Appeal. It is thus clear from the facts of the case that the defendants case failed because of their inability to prove inevitable accident since their defence was merely on the ground that they could not get the required labour force to ensure proper maintainance of the highway and not that the accident occured inspit of the fact that they have discharge all the obligations required of them in ensuring that the road is in good condition and therefore not dangerous.

However, apart from admiralty cases, the defence hardly succeed in other cases. The reason for this is not unconnected with the fact that the question whether or not an accident is an inevitable one is one of fact taking into account the interplay of factors or circumstances that caused the accident. However, since the tort of negligence

is one which depends squarely on the breach of a duty of care, it appears it will be enough if in deciding the liability of somebody the judge based his decision on whether or not the defendant has breached a duty of care which he owe to the plaintiff instead of basing it on the term inevitable accident. The reason for this arguement is that if an injury occur through inevitable accident, it means it is not as a result of any want of care, deligence or skill on the part of the defendant. It simply occur because it have to occur. Lord Green[105] is of the same view. He said "I do not feel myself assisted by considering the meaning of the phrase 'inevitable accident.' I prefer to put the problem in a more simple way, namely, has it been established that the driver of the car was guilty of negligence.?"

Not much advantage is therefore gained by the existence of the defence of inevitable accident. One may therefore say that instead of allowing it to stand as an independent defence, it should be brought under the general principles of negligence so that all a judge have to do is to establish whether or not a particular defendant owe a duty of care towards the victime of his acts or ommissions or not.

Finally, inevitable accident should be distinguish from act of God because act of God is "due to natural causes directly and exclusively without human intervention while inevitable accident is not restricted in such a way."[106]

4.5 LIMITATION OF ACTION.

Limitation of action is defined in the Black's Law dictionary[107] as a certain time allowed by statute for bringing litigation. This means that once the time allowed by law for the purpose of instituting an action in respect of a particular act expires the person intending to institute that action is debarred by law from doing so and where such action is instituted it will be declared as statute barred and consequently be dismissed by the court. In with regard to negligence, this will mean the period within which a party who sustain injury or damage as a result of the negligent act of another is entitle to maintain an action in court to recover damages. The laws governing this in Nigeria are the limitation of action Act of 1966[108] Public Officers Protection Act[109] and the various states laws on limitation of actions.[110] The topic will be discuss in relation to cases where personal injury or death occur as the result of the negligence of someone and the running of time.

4.5.1 LIMITATION OF ACTION IN CASES WHERE PERSONAL INJURY OR DEATH OCCUR.

Under the Kaduna State Limitation of Action Edict[111] the limitation period for actions to recover damages for for personal injury is five years. And where the person stated died before the effluction of the period stated above the period allowed with regard to the cause of

action surving for the benefit of his state is five years. Again where the accident results in an instant death the time allowed dependents or personal representative of the deceased to institute an action for the benefit of his state is five years.[112]

As earlier stated, any attempt to institute an action outside the limitation period will fail. Thus in the case of Letang V. Cooper[113] where the plaintiff institute an action based on tresspass to the person, when the defendant can accidently run over her leggs when she was sun bathing on the grass, it was held that her proper cause of action is in negligence and not tresspass to the person and that since the case was brought outside the 3 years period allowed under the limitation of period Act,[114] for bringing such an action, it was statute barred.

There are also a number of courts decisions in Nigeria on this topic. One of such decisions could be found in the case of Ogunsan V Iwuagwu.[115] In that case, the plaintiff brought an action against the defendants jointly and severally for the sum of £5,000 being special and general damages for the negligence of 1st defendant in that on the 16th of May 1965 the 1st defendant in the course of his employment as servant of the 2nd defendant drove and managed the 2nd defendant bus so negligently that he knocked down the plaintiff and caused him serious injuries.

Before the hearing of the case Counsel for the defendants applied that the question of whether the action was already statute barred or not be determined first. He submitted that in view of section 2 of the public officers protection Act, the action should have been brought within 3 months from the date of the accident when the cause of action arose. He further contended that the 2nd defendants could also take advantage of the protection afforded by the Act in view of the fact that Section 2 gives the protection to any person for any act done in pursuance or execution or intended execution of any Act or law or of any public duty or authority.

The 2nd defendant was running the transport service in pursuance of a power given to it by Section 141(8) of the Lagos Local Government Act and by Section 18 of the interpretation Act, the Counsel further contended, that the defendant came within the meaning of the words "any person" in Section 2 of the public officers protection Act. The 1st defendant was an employee of the 2nd defendants. Instead of bringing the action within 3 months as provided, the plaintiff brought it 26 months after the accident. The Counsel further averred that even if only the first defendant was held to be covered by the Act, than the action against the 2nd defendants must also be dismissed.

It was held inter alia that the first defendant came within the protection afforded by section 2 of the Act and that the action not having been taken within 3 months of the accident could not lie against him. And that since the 2nd defendants were sued as joint-tortfeasors, the rule is that where there is a joint cause of action against two or more persons, a discharge as against one of them operates as a discharge against all. The action was therefore dismissed.

Another important case in this regard is that of Adigun V. Ayinde.[116] Again, in this case the plaintiff sued the defendants jointly and severally for ₦700,000 being special and general damages for the injury sustained by him as the result of the negligent driving of the first defendant. The injury was sustained on the 10th February, 1978 while the suit commenced on 17th August 1991.

The defendants raised an objection to the suit on the grounds that the suit being founded on tort cannot be brought against the 3rd defendant which is an organ of the federal government because of the doctrine of state immunity from tortious liability; that the 2nd defendant, Permanent Secretary, Federal Ministry of Agriculture and Natural Resources, is not a juristic person and as such cannot be sued; and thirdly that the action being against public officers (1st and 2nd defendants) is statute barred as it

was not commenced within 3 months from the date the cause of action arose in compliance with Section 2(a) of the Public Officers Protection Laws Cap.111 Laws of Niger State. Counsel to the plaintiff on the other hand contended that the action is not statute barred in that negligence occured on the 10th February 1978 but the injury suffered by the plaintiff was continous.

It was held on the issue of limitation of action that continuance of injury or damage means continuance of the legal injury and not merely the injurious effects of the legal injury. Therefore the plaintiff should commenced action 3 months after the date of the accident and not after the date of his final discharge from hospital.

4.5.2 WHEN TIME BEGINS TO RUN

Under the Kaduna State Limitation of Action Edict[117] it appears time begins to run for the purpose of determining whether or not an action is within time, on the particular day the cause of action acrued.[118] However, there are certain cases in which this can be extended. One of such cases is where the injuries sustained by the victim of the defendant's negligence led to his death. Here the position of the law is that the computation of time shall begin from either the date on which the deceased died or on the date on which the personal representative of the deceased became aware.[119] So if the death occured on the 30th of August

1994 but the personal representative became aware on the 1st of September 1994, time begins to run for the purpose of instituting action for the benefit of the deceased state by the personal representatives on that 1st September 1994.

Another area in which the time is extended is that of fatal accident. Here time begins to run on the date of the death of the person involved in the accident or on the date the person for whose benefit the action was instituted became knowledgeable about it.[120] This means that if the person for whose benefit the action is instituted is not aware of the death of the deceased or the reason for his death until after one year of the occurence of the accident then time being to run after that one year and not the date on which the accident actually took place.

Another situation that will lead to the extension of time will be where the person entitled to institute the action was under disability at the time the cause of action acrue. This particularly relates to infants or persons who are of unsound mind.[121] Such persons are allowed to bring actions anytime before the expiration of five years from the date when they ceased to be under such disability or dies.[122] By this it means that if an infant sustain injuries as the result of someones negligence the computation

of time for the purpose of determining whether or not his action is statute barred begin on the date he attain majority. And if he is someone who is a lunatic or crazy or mad person it is on the date the lunacy or madness ceases. However it is submitted that an alternative way out to this seemingly long delay before bringing action is for such persons to sue by their guardian ad litem or committee in lunancy.

Again another situation that may lead to the extension of the limitation period is where the person who has the right of action is under confinement.[123] The law here is that if on the date the action acrue the person in whose favour it accrues is under confinement, then such an action can be brought at anytime before the expiration of five years after the date when the person cease to be under confinement.[124]

Similarly, where the negligent act was committed when the person against whose interest it is committed is abroad, the law is that the period of limitation can only begin to run when such a person returns to Nigeria. This provisions seems to relate to loss of property (tangible or intangible) and not personal injuries since one cannot be injured physically at a place where he is not there.[125]

One other thing which the Kaduna State Limitation of Action Edict provide for is where the acrual of the cause

of action is concealed by the defendant so that the time elapse before the person entitle to sue becomes aware. The position under the Edict is that the period of limitation will not begin to run until the plaintif has discovered the fraud or could with reasonable diligence have discovered it.[126] Finally once time has started to run there will be no suspending it for any reason.[127]

In conclusion, it could be said for one to maintain a successful action he must not only have a strong case against the dependant i.e. that the defendant owe him a duty a care, and a breach of that duty has occured and that the plaintiff have suffered damage as a result, but he must as the first step towards stablishing all this ensure that where a time limit is provided within which to bring such action (as we have just seen under the Kaduna State Limitation of Action Edict) then he must comply with that provision otherwise his case will be dismissed as statute barred.

1. See Chapters one and two ante

2. See Charlesworth op.cit p.716 para. 1180.

3. There are other defences such as contracting out of liability and notice, illegality, act of God, necessity and statutory authority. We are however restricting ourselves to the ones listed above because they the ones that are mostly pleaded in courts. Some of the defences mentioned here can conveniently under one or the other of the ones listed. For example contracting out of liability can come under Volenti non fit injuria. While some do not actually deal with negligence but other tortious act such as trespass and nuisance. Example of these are the defence of necessity and statutory authority.

4. See W. L. Prosser: A Handbook on the Law of Torts 4th edition at p.417

5. See J. G. Fleming: Law of Torts 4th edition p.215

6. See Kodilinye op. cit p.83

7. See the case of Evans V Bakare (1973)SC p.80

8. See Section 17 Kaduna State Torts Edict Nos 1990 also Section 11 of Civil Liabilities (Miscelleneous provisions) Act No.33 1961 and S 1 of the Law Reform (contributory negligence) Act, 1945.

9. Ibid

10. See the case of Cayzer, Irvine & Co V Carron Co (1884) 9AC 873 at 881.

11. (1809) 11 East 60

12. Ibid at P. 116

13. (1960) 5 Fsc at P.16 see also the case of Oyalowo M. De Bank Transport Ltd (1973) 2 W.S.C.A. 35.

14. (1842) LO M&W at p.546.

15. Ibid at P.549

16. See Gl il Williams: Joint Tortfeasors and Contributory negligence pp.230-255.

17. Windfied & Jolowicz op.cit at p.133

18. See Glanvil Williams (Supra) at 230-255

19. Ibid

20. (1916)1AC at p.719. Indeed this case attracted alots of criticisms. Glanvile Williams expressed the feelings of Scholars thus, "the truth is that no one knows precisely what it settled" See Glanvile Williams op.cit. at p. 234.

21. See Salmond op.cit. p.328.

22. See the judgement of Lord Denning in Westwood V Post Office (1973) 3 All ER 184 at 91.

23. Of 1945

24. See W.L. Prosser (Supra) at p.345

25. Ibid at p.434.

26. See ante p.202

27. See Section 1 of the Act

28. See the judgement of Lord Tucker in the case of Marrin Sigurdson V British Columbia Electric Ry. Co. Ltd (1953) A.C. 291.

29. See Section 1 of the Act

30. See Weir op.cit at p.213

31. (1952) 2 Q.B. 608

32. Ibid at p.617

33. See SS 17 and 11 Kaduna State Torts Edict No.8 1990 and the Civil Liabilities (Miscelleneous provisions) Act 1961 respectively.

34. (1974) 3 S.C. 77

35. (1973) 2 W.S.C.A. at p.35

36. Ibid op.cit p.40

37. Supra

38. Ibid at p.128.

39. See Weir op.cit at p.214

40. Supra

41. See Weir op.cit at p.214; also the case of The Miraflores and The Adesa (1967) 1 A.C. 826.

42. Ibid

43. Supra

44. Ibid at P.806

45. See the case of Abusomwan V Merchantile Bank of Nigeria Ltd. op.cit. See also the case of Sole V W. J. Halt (1973) Q.B. 574.

46. Supra

47. Supra

48. See for example the case of forsikring Vesta V Butcher (1986) 2 ALL E.R. 488, 507 - 510.

49. i.e. Kaduna State Torts Edict op.cit, Civil Liabilities (Miscelleneous provisions) Act op.cit and the Law Reform Contributory Negligence) Act op.cit.

50. See for example the cases of Jones V Livox Quaries Ltd (Supra) and Oyalowo V M.De Bank transport Ltd Supra.

51. See Charlesworth op.cit p.732 para 1211

52. See the case of Speirs V Gorman (1966) NZLR 8 97 at 906

53. (1841) 1 Q.B. 29

54. Supra

55. (1949) A.C. 386.

56. Ibid at p.400

57. See Charlesworth op.cit. p.732 para 1211, also the cases of Jones V Lawrence (1969) 3 All ER 267 Gough V Thorne (1966)1 W.L.R. 1387.

58. See Weif op.cit at P.214

59. Per Lawrence J. in the case of Flower V Ebbw Vale Steel Co. (1934) 2 K.B. 132 at P.139.

60. Kodilinye op.cit. at P.84

61. Supra

62. See Charlesworth op.cit at p.737 para 1221.

63. (1981) 3 All E.R. 679.

64. See for example the case of Baker V T.E. Hopkins & Son Ltd (1959) 1 W.L.R. 966 - 977.

65. See Kodilinye op.cit.

66. (1816) 17 All. E.R. 570.

67. Ibid at P.571

68. (1958) 1 W.L.R. 623.

69. See Charlesworth op.cit ap. 755 para. 1230.

70. See Fleming op.cit. at p. 239

71. Op.cit.

72. See Glanvile op.cit at P.295, also Charlesworth op.cit at p.745 - 6 para 1231

73. op.cit Section 9(1)

74. (1977) See Sections 2 (1-2)

75. (1968) 1 All E.R. 1145. See also Glanvile op.cit at p.312 . The only limitation here is where the contract offend against public policy - See the case of Wheeler V New Merton Board Mills (933) 2 K.B. 669.

76. See further Glanvile op.cit at p.309

77. (1962) 2 All E.R. 978.

78. Ibid.

79. See A.L. Good hart: The defendant Charter (1962) 78 L.Q.R. at p.490 - 503

80. (1971) 2 All E.R. at p.369.

81. See Goodhart (Supra)

82. (1907) A.C. 272

83. See the judgement of Goddard J. in the case of fosbroke - Hobbes V Airwork Ltd (1937)1 All E.R. 108. The decision in this case however tend to conflict with the rule of contract that a third party to the contract can neither drive any benefit from it directly nor suffer any loss from it.

84. See the case of H.M.F. Humphrey Ltd V Baxter, Hoare & Co Ltd (1933) 149 Q.L.T. at p. 603.

85. (1946)175 L.T. at 334.

86. (1877)2 EX.D. 384.

87. (1887) 18 Q.B.D. 685 at 696

88. (1891)A.C. 325. The first case to be decided on this new line of thinking is that of YamOuth V France (1887)11 Q.B.D. 647. See also the case of Dann V Hamilton (1939)1 K.B. 509 and the statement of Melhish J. in the case of Wooley V Metropolitan District Rly Supra

89. Ibid at p.366-7

90. (1960) F.S.C.W 63.

91. (1987) 2 N.S.S.C 857.

92. See for example the Kaduna State Torts Edit op.cit. The position is also the same in England after the coming into force of the Law Reform (Contributory Negligence) Act of 1945 see the case of Nettleship V Weston (1971)2 QB at P.6011.

93. See for example the views of Professor Janes expressed in an article titled 'Assumption of Risk (1961)61 Yale L.J. pp.149 - 169.

94. See Weir op.cit at p.215 Note 11

95. See the case of Baddeley V Gramick (1818)19 Q.B.D. 423, Davies V Thomas Owen & Co. (1919) 2 K.B. 39 and Wheeler V New Merton Board Mills (Supra).

96. See the case of Chadwick V British Rly Co. (1967)1 W.L.R. 912.

97. See the case of Horsley V Maclaren: The Ogopogo (1971)2 Lloyds rep. 410.

98. They even used to be pleaded in the alternative. See the case of Cutler V United Dairies (1933)2 K.B. 509. Also see the judgment of Lord Denning in the case of Wettleship V Weston (Supra)

99. See Charlesworth op.cit p.763 para 1256.

100. See the case of Rylands V Fletcher L.R 1 Ex.265 at 286.

101. See Charlesworth op.cit p.766 para 1262

102. (1892)8 T.L.R. 725

103. Ibid, at p.726

104. (1967)1 QB 374 see also Jacob V Bandoe (1955)16 WACA 3 and N.C.B. V Evans (1951)2 K.B. 816.

105. In the case of Browne V De Luxe Or Services (1941) K.B. 549 at 552.

106. See Charlesworth op.cit p. 764 para 1258

107. See Henry Campbell Black: Blacks Law Dictionary p.835.

108. No. 88

109. Cap. 379 Laws of the Fed. 1990.

110. See for example Kaduna State Limitation of Action Edict 1990.

111. Ibid Section 19(2-3) with regard to personal injury, the limitation period under the limitation Act is 3 years while under the public officers protection Act it is 3 months See Sections 8 and 2 of the Acts respectively.

112. Ibid. Section 20. The same time limit apply to the state, public authorities and officers.

113. (1964)2 Q.B 53. See also the case of Long V. Hepworth (1968)1 W.L.R. 1299.

114. of 1939 see Section 2(1)

115. (1968)1 ANLR 124

116. (1985) H.C.N.L. 1123

117. op.cit. The Interpretation Act of 1964 excludes it. See S.15(2)

118. Ibid Section 19(2)(a)

119. Ibid Section 19(2)(b)

120. Ibid Section 20

121. For the meaning of infants and persons of unsound mind see S.25(1) Ibid

122. Ibid S.25(2)

123. For the meaning of confinement see Section 27 Ibid.

124. Ibid Section 28

125. Ibid Section 33. See also the case of Beaman V A.R.T.S. Ltd (1949)1 K.B. 556 and Kitchen V Royal Air Force Association (1958)1 WLR 568

126. See Charlesworth op.cit at pp807 para 1333.

126. See Section 33 of the Kaduna State Limitation of Action Edict op.cit. See also the case of G.L.Baker Ltd. V Medway Building & Supplies Ltd (1958)1 W.L.R. 1216.

127. See the cases of Smith V Hill (1746)1 W.L.S. 34, Humsfray V Scroope (1849) 13 QB. 509, Rhods V Smithurst (1838)4 M&W 42 e.t.c.

CHAPTER FIVE

5.0 SUMMARY, OBSERVATIONS AND RECOMMENDATIONS

5.1 SUMMARY:

In the preceding chapters attempt have been made to discuss the various aspects of the tort of negligence beginning first with a general introduction to the whole work which deal with issues such as the duty of care, persons or organisations owing duty of care, remoteness of damage caused as a result of the failure to carry out the duty of care and finally the defences available to the defendant whose activity caused damage to the plaintiff.

In chapter one which deals with the duty of care, we were able to show by use of credible authorities that in order to establish the tort of negligence, the presence of a duty to take care must first of all be established.[1] We were also able to show how the rule for the determination of the duty of care through courts decisions leading to the well known case of Donoghue V. Stevenson,[2] a case which is responsible for the extension of the former position of the law on the duty of care to it's present position has evolved.

The concept of reasonable foreseability was also discussed under this head. Here, we were able, based on the extension of the rule for determining the duty of cafe in Donoghue's case to show that to be a foreseable victim of

one's act the affected party need not necessarilly be very close to the dependant, it is enough if he can show that he is in such a circumstance that unless care is exercised by the defendant, his act is likely to cause damage or injury to him. The kind of proximity contemplated here therefore is a legal proximity and not a physical one.

We also discussed the application of the duty of care to purely financial or economic loss. Here, we were able to show how at first the courts by relying on the earlier position of the common law were adverse to claims that were based purely on financial or economic loss and how this earlier position of the law started giving way up to the stage when full recognition of purely financial or economic loss was achieved. The former position then was that only actions based on physical injury to the plaintiff were maintainable before a court of Law.[3]

The application of the duty of care to statements such as advice given by professionals was also discussed. Thus we were able to show that when some one who is a professional in a certain field gives advice to someone and the advise turns out to be incorrect thereby causing loss or damage to him as a result of his reliance on such an advise in doing or forebearing to do a certain act, he

can sue such a professional to recover his loss or damages.[4] Here too, we were able to show how at first the courts were reluctant to entertain actions which were founded upon this type of act. One could then, only succeed in his case if it is based on either deceit or injurious falsehood in which case he is required to prove dishonesty and not negligence.

Finally, the duty to take care to avoid causing nervous shock to others is also discussed. Here also, we were able to reveal that recognition of claims based on this type of cause of action in negligence was gradual,[5] the position of the law having at first been that damages for mental suffering alone unaccompanied by physical injury was not recoverable.

In chapter two of the work, our discussion was centred on certain persons or organisations who by the nature of their professions or operations owe duty of care to others. This was illustrated by certain professionals and organisations such as Lawyers, doctors and Bankers. While in chapter three we dealt with remoteness of damages. The two principal test for remoteness of damage viz: direct consequences test and the foreseability test were discussed bringing out the differences between the two, their complexities and the difficulties involved in their application.

four

Our discussion in chapter four was centred on the principal defences to liability in negligence. These are contributory negligence, consent or volunti non fit injuria, inevitable accident and limitation. Under the defence of contributory negligence, we were able to show how the harsh stand of the common law against claimants cases was watered down by statutory provisions such as the English Law Reform (Contributory negligence) Act,[6] the civil liability/miscellineous provisions) Act[7] and the Kaduna State Torts Edict.[8] Thus the position now is that where a plaintiff is guilty of contributory negligence he does not lose his case completely (as was the case prior to the enactment of statutory laws on the matter) but would rather have his claim reduced to the proportion of his own negligence. We were also able to show that volenti non fit injuria or consent is no longer important as a defence since the coming into force of statutory provisions on the contributory because cases which would have been treated under volenti non fit injuria are now mostly treated under the statutory provisions by contributory negligence. This attitude by the courts we pointed out may not be unconnected with the fact that since volenti non fit injuria unlike contributory negligence is still mantaining its common law position, a successful plea of it will afford the defendant a complete defence against the plaintiff's claim.

Still in chapter four while discussing inevitable accident we were able to show that in certain cases the

defendant will not be held liable because the accident was due to something which was beyond his control even though due care and deligence was exercised. While in discussing limitation of action as a defence efforts were made to show that it deals with a situation whereby even though the plaintiff have strong case against the defendant yet his case is regarded as unmaintainable because it is not brought within the time limit within which such a case is suppose to be brought to court.

5.2 OBSERVATIONS.

In the course of conducting this research the following observations were made:-

(a) Policy considerations are so much taken into account by judges while deciding cases that come under the law of negligence that the application of the law is thereby made imprecise and uncertain. This is because a decision arrived at by a court today may not be followed in a subsequent case if it is later realised that following the decision will encourage litigation on such issue and certain human or governmental activity may be seriously hampered thereby. It may also not be applied if it is found to be too harsh on the plaintiffs.[9] These kinds of attitudes by the judges are not actually based on the law but rather on policy considerations i.e. whether it is in the interest of the state to allow such cases to succeed or not. And where there have been a precedence on the matter, then following the precedence will

also be dependent on state policy so that if it is in conflict with it, it may hardly be allowed. This state of affairs have even led to a writter asking the question, "Is the pendulum out of control."?[10]

(b) We also noted in our discussion under chapter two of this work that with the exception of the legal profession there is no any statutory law which specifically makes provision on negligence for virtually all professionals in this country. This has force our courts to rely on foreign statutory provisions or the common law in deciding a case against such professionals.

(c) In chapter four of the work we observed that there is a debate on whether or not volenti non fit injuria should continue to exist as a defence inview of the fact that even though the statutory laws on contributory negligence are not directly applicable to it, they have made its relevant very insignificant.

(d) In the same chapter, our attention was also attracted by the existence of ineivtable accident as a defence. This is because of the fact that liability in negligence is always the consequences of the breach of the duty of care by the dependant towards the plaintiff and no more. This means that where the defendant have taken all necessary measures to safeguard the safety of the plaintiff and still the accident causing the injury or damage occurred, then the decision should simply be that the defendant is not liable

in negligence since he is not in any way negligent. The defence of inevitable accident is therefore of no use.

(e) Finally, it was observed that there is a near complete dearth if cases in this part of the country on this area of tort. This may be attributable to ignorance and custom.

5.3 RECOMMENDATIONS:

Based on the observations made, the following recommendations or suggestions are hereby made:-

(a) Even though it is difficult if not impossible to do away with 'Policy' as one of the reasons for reaching a decisions in one way or the other in negligence cases because of the fact that this aspect of the law of torts touches and concern almost all aspects of human activity, so that whichever way a decision is reached on a case boardering on negligence it will have a direct impact on human conduct, it is still suggested or recommended that policy considerations in reaching a decisions on a case should be used where it is absolutely necessary to do so and it should also be restricted to cases of first impression so that once there is a previous decision on a case then a subsequent case which is brought before the court should, where they are on all fours with the earlier case be decided by using the ratio applied in the earlier case to the new one except where the judgement of the court in the earlier case was wrongly passed or where there are some distinguishing factors between the earlier case and the new one.If

this is not done it will not only make the application of the law uncertain and imprecise but it will also make nonsense of the long standing principle of judicial precedence and the ugly situation where by courts passed different judgments on the same point of law brought before them in different cases may also continue. There is also the tendency that our judges may use such grounds for selfish reasons and not necessarilly in order to meet the justice of a case.

(b) Our law makers should make laws on all cases of professional negligence. If this is done our courts will be relieved of the ignominable situation of having always to rely on foreign statutory provisions or the common law in deciding cases boardering on professional negligence. Of great concern in this regard are such professionals as doctors, bankers, surveyors, achitects and nurses because their activities have direct affect on people.

(c) We have already seen that there have been debates about the continued existence of the defence of volenti non fit injuria in view of the statutory provisions on contributory negligence[11] which also takes care of cases that would have come under the defence of volenti non fit injuria.

We are however in support of the views of those who advocated for its continued existence because if for nothing else, it is a recognition of the right of individuals to independently take a decision as to whether or not to seek for redress for a wrong which have been done to them or not

to agree to abandon such a right even before the wrong occured. Again it is a fundamental principle of the law of contract that parties are free to agree on whatever they want and on whatever terms provided such and agreement is not illegal and provided also that non of the parties to the agreement is suffering from any disability to enter such an agreement.

(d) It is also hereby suggested that since inevitable accident is an occurrence which is normally beyond the control of the defendant and not due to any want of care on his part, having it as a defence does not serve any useful purpose. All that the court is required to do in a case of this nature is to study the circumstances leading to the occurrence of the accident and see if the defendant is negligent. If the court is convince that the defendant is not negligent then the case should be dismissed as having not satisfied the requirements for liability in negligence. In effect what we are suggesting here is that instead of the defence of inevitable accident standing on its own as a defence, it should be brought under the general rule for determining liability in negligence.

Finally our recommendation with regard to the scarcity of cases in this area of the law of tort is that people should be enlightened about their rights to institute actions in the law courts to claim damages where they suffer injury or loss as a result of some one's act. On the customary or

religious believe that whatever happened to some one is a decree from God, this should also be discouraged not because such believe is wrong but because of the fact that our religions (especially Islamic religion which is the religion with overwhelming majority in the North) does not prohibit someone from seeking redress for any wrong done to him it only make it a meritorious act for some one to waive such a right. Therefore it is not proper to discourage people from claiming damages for any loss occassion to them through some one's negligence or to interpret their action as unislamic. Infact Islamic law very well recognised the rights of individuals to claim damages for any tortious act committed against them. To this end the Quran provides that:-

> • And it does not behove a belier to kill a believer except by mistake, and whoever kills a believer by mistake, he should free a believing slave, and blood money should be paid to his people unless they remit as alms but if he be from a tribe hostile to you and he is a believer, the freeing of believing slave.

This Quranic provision has no doubt laid down the foundation for the claiming of damages in tortious acts. The verse first of all totally prohibits the killing of a believer by a fellow believer but go ahead to provide an exception where the killing is by mistake. In such a case, the dependant is to pay a blood money in addition to freeing a believing slave. The relations of the victim are however at liberty to waive this right by remiting the blood money

as alms to the dependant. In addition to the above Quranic provision there is also a hadith of the prophet (SAW) which says "there should be neither harming nor a reciprocating harm." This means that one should not cause harm to any one and he too should not be harm by anyone. Therefore where such harm is caused one is fully entitled to claim damages in return.

1. See the statement of Lord White ante p. 5-6
2. Op.cit.
3. See for example the case of Hambrook V Stookes op cit.
4. See ante pp. 26-35
5. See Ante P. 37-38.
6. Op.cit
7. Op.cit
8. Op.cit
9. See ante specially chapters one and three.
10. See the topic: Economic Loss: is the pendulum out of control (Supra).
11. See ante pp. 247-248
12. See Q. 4:92
13. See Sahih Al-Bukhari Vol.9, the book of blood money p.3.

B I B L I O G R A P H Y

A. TEXT BOOKS

(1) Ademola Ogunleye: The Motorist and the Law, 1975, Ethiope Publishing Corporation, Ring Road, Benin City, Nigeria.

(2) B. C. Umerah: Medical Practice and the Law in Nigeria, 1989, Longman Nig. Ltd.

(3) Charlesworth On Negligence 1977, 6th Edition, Sweet and Maxwell, London.

(4) Clerk and Lindsell: On Torts, 15th Edition, 1982, Sweet and Maxwell, London.

(5) George I, Anna, Leonard H. Kantz and Barbara F.Katz: Informed Consent to Medical Experiementation, the Subject Dilemma.

(6) Glanvile Williams: Joint Torfeasors and Contributory Negligence, 1951, Stevens and Sons Ltd, London.

(7) Hepple and Mathiews: Torts Cases and Materials, 1974, Butterworths, London.

(8) J. G. Flemming: Introduction to the Law of Torts, 1967, Oxford, At Clarendon Press.

(9) J. G. Fleming: Law of Torts 1971, 4th Edition 1971, The Law Book Company Ltd., Australia.

(10) Kodilinye: The Nigerian Law of Torts, 1990, Spectrum Law Publishing Kaduna, Nigeria.

(11) Moritz and Morris: Handbook of Legal Medicine 1970, 3rd Edition, The C.V. Mosby Company.

(12) Nkiru Danjuma The Bankers Liability, 1993, Heinmann Educational Books (Nigeria) PLC.

(13) Philip S. James: General Principles of The Law of Torts, 4th edition, 1978 Butterworths, London.

(14) Salmond: On The Law of Torts, 14th Edition, 1965, Sweet and Maxwell, London.

(15) Street: On Torts, 7th Edition, 1983 Butterworths, London.

(16) Winfield and Jolwicz: On Torts; 13th Edition 1990, Sweet & Maxwell, London.

(17) Ladan M.T.: Fundamentals of Modern Nigerian law of T
December, 1992 (unpublished).

B. ARTICLES AND CONFERENCE PAPERS

(1) A.B.C. Iketuonye: Professional Negligence; the Medical Profession Published in Current Legal Problems in Nigeria 1986 at p.99.

(2) A. N. Anyamene: Professional Negligence; the Legal Profession Published in Current Legal Problems in Nigeria 1956 at p.91.

(3) A. Z. Goodhart: The Defendent Charter, (1962) 78 L.Q.R. p.101.

(4) Diana M. Woss: Consent to Medical, Experiementation, Published in the Journal of Medicine, Science and the Law 1965 at p.89.

(5) Gostomzyr: Informing the Patient: A Conference Report on Third World Congress on Medical Law Published in the Journal of Medicine, Science and the Law 1994 at p.68.

(6) Hon. Justice Okey Achike: Professional Negligence; The Banking Profession. Published in Current Legal Problems in Nigeria 1986 at p.113.

(7) Professor James: Assumption of Risk; (1961) 61 Yale L.J. at p.116.

(8) Peter Ome: Economic Loss in Tort; Is the Pendulum Out of Contro? Published in Modern Law Review Vol.52 No.2 1989 at p.200.

(9) Warren, Gorham and Lamount: Emerging Theories of Bank Liability; the Breach of Covenant of Good Faith and Fair Dealing Published in the Banking Journal of Jan-Feb. 1986 at p.80.