

**AN APPRAISAL OF THE DEVELOPMENT OF THE
TORT OF NEGLIGENCE IN NIGERIA.**

BY:

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DECLARATION

I hereby declare that this thesis entitled An Appraisal of the Development of the Tort of Negligence in Nigeria. Has been written by me, it is a record of my research work. It has not to my knowledge, been presented previously for any degree or diploma. Information derived from literatures are duly acknowledged by means of references.

Isaac Mundi EBIKWO

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CERTIFICATION

This thesis entitled An Appraisal of the Development of the Tort of Negligence in Nigeria by Isaac Mundi EBIKWO meets the regulations governing the award of the degree of master of laws (LLM) of Ahmadu Bello University Zaria, and is approved for its contribution to knowledge and literary presentation.

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DEDICATION

This thesis is dedicated to my father and my mother who is no more in this world.

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Grateful acknowledgement to my God most high who throughout the course of my study protected me and provided all that I needed. He never failed me.

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ABSTRACT

*It has been established that the development of the Tort of negligence has been gradual. The tort of negligence in its formative stage was treated merely as a mode of committing other torts and not as an independent tort itself. It was increase in population, increase in mechanization and industrialization of society and consequent multiplication of personal injury caused by negligence; have all led to the idea of negligence as a separate tort. The law of tort like those other branches of the law, is concerned with the question of liability. The cardinal principle of liability is that the party complained of should owe to the party complaining, a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty. The first attempt to formulate a general principle was made in 1883 by Brett M. R. in *Heaven v. Pender*. After the first attempt to formulate a general principle, there were a lot of uncertainties which slowed the growth of the tort of negligence until 1932. When Lord Atkin came out with the most famous and important creative generalization 'the neighbour principle' in *Donoghue v. Stevenson* which has been largely responsible for the radical development of the tort negligence. Nigerian Courts have followed all the epochal decision, applied and expanded to the Nigeria situations. This research examines the development of the tort of negligence in Nigeria within the general framework of negligence as a tortious liability and its applicability to our industries and society. It educates its readers how the wider field of torts of negligence affects a citizen of all sides, his physical safety, his property, domestic affairs, his reputation, privacy and liberty. It was observed that the problem of religious beliefs and lack of education were responsible more than any other factors for the slow development of the tort of negligence in Nigeria.*

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A.E.L.R.	All English Law Report
A.N.L.R.	All Nigerian Law Report
C.C.H.C.J.	Certified Copy of the High Court Judgment
N.W.L.R.	Nigerian weekly Law Report
T.L.R.	Times Law Report
N.B.N.	National Bank of Nigeria
A.C.B.	African Continental Bank
U.B.A.	United Bank for Africa
C.B.N.	Central Bank of Nigeria
A.G.	Attorney General
S.C.	Supreme Court Nigeria
B.T.C.	British Transport Corporation
W.L.R.	Weekly Law Reports

LIST OF STATUTES

1. Legal Practitioners ACT 1975 LFN 2004.
2. Supreme Court (Civil Procedure) Rules, 2009.
3. Public Officers Protection ACT Cap. 379 LFN 2004.
4. Kaduna State Torts Law, Cap 151, Laws of Kaduna State, 1990.
5. Civil liabilities (miscellaneous provision) ACT No: 33 1961.
6. Law Reform Contributory Negligence ACT, 1961.
7. Limitation of Action ACT, No. 88, 1966.
8. Penal CODE Law, Cap 89, Laws of Northern Nigeria,1963.
9. Eastern Regions Fatal Accident Laws 1956.
10. Consumer protection ACT LFN 2004.
11. Kaduna State Sales of Good Law, No. 15, 1990.
12. Banks and other Financial Institution Act, 1990.
13. Bill of Exchange ACT cap: 35 LFN, 2004.

SELECTED BIBLIOGRAPHY

1. Kondiliye G.: (1990) Nigeria Law of Torts, Sweet and Maxwell, London.
2. Omotesho Aboaba: (2009) The Law of Tort in Nigeria Malthouse press limited.
3. Gandhi B.M: (1978) Law of Torts, sweet and Maxwell London.
4. Clerk And Lindsell: (1982) On Torts, Sweet and Maxwell, London.
5. Winfield AndJolowicz: (1989) On Law of Tort, Sweet and Maxwell, London.
6. Holden Milness J: (1993) The Law and Practice of Banking, Pitman Publishing London.
7. Buckley R. A.: (1993) The Modern Law of Negligence, Butterworth's London's.

8. Salmond and Heuston :(1987) The Law of Torts,
Sweet and Maxwell
London.
9. Mohammed Sale :(1996) The Tort of
Negligence under
Nigeria Law, LLM
Thesis, Faculty of
Law A.B.U Zaria.
10. Ebikwo I.M.: (1998) An Appraisal of the
Application of the
Tort of Negligence
on Professionals: A
Case Study of
Bankers,
Unpublished
Faculty of Law
A.B.U Zaria.

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CHAPTER ONE

GENERAL INTRODUCTION

1.1

Introduction

As social organization developed from a predominantly agricultural to a predominantly technological and urban system, as the relations of men became more and more intimate, the greater was the need, the need of Law. A basic force at work here is change which necessarily has its effects upon the law, habits, manners, modes of thought, the production of goods and distribution of goods. The very sizes of the population are far different today than they were a century and half ago. As the society develops law too develop, along, in fact law is one of the greatest instrument for changes and developments¹

These changes and developments brought about the tort of negligence as a separate and independent tort (Though it is of a recent origin)². It is necessary to emphasize that the law of tort, like those other branches of the law, is concerned with the question of liability; an action founded upon tort is an action between persons, either natural or artificial (i.e. corporation) and the outcome can only be that one of them, the defendant is or is not liable to do or refrain from doing something at the suit of the other. If there is no defendant whose liability can be established according to the principles of the law then the plaintiff is left without redress.

The tort of negligence, in its formative stages, was treated merely as a mode of committing other torts and not as an independent tort itself until 1825.

1. Gordon Post, (1945) An Introduction to Law, Sweet and Maxwell London p 1

2. Winfield and Jolowicz,(1989) Law of Tort, Sweet and Maxwell, London p 75

Consequent upon frequency of actions in which negligence was the substance of the action, the increase in mechanization and industrialization of society and the consequent multiplication of personal injury caused by negligence have all led to the idea of negligence as a separate tort itself and not simply as a mode of committing trespass or other torts.

Then came the view that liability for negligence can only exist if the case is covered by a duty which has already been recognized³. It was put most forcibly in Landon's case⁴ that "Negligence is not actionable unless the duty to be careful exists. And the duty to be careful only exists where the wisdom of our ancestors has decided that it shall exist". Certainly, it is true that in denying the existence of a duty in some cases the judges have done so on the ostensible ground that no authority for such a duty exists, but recently, they have not hesitated to produce a new duty when it has seemed right to them to do so. That is why Lord Denning L.J. has said, "If we never do anything which has never been done before, we shall never get anywhere. The law will stand still while the rest of the world goes on; and this will be bad for both"⁵.

The most important thing that has ever happened to the tort of negligence; is the decision in *Donoghue v. Stevenson*⁶, a manufacturer of a ginger beer sold to a retailer ginger beer in an opaque bottle. The retailer resold it to A, who treated a young woman of her acquaintance with its contents.

3. *Ibid* p.75.

4. In Landon's case (1941) 57 L.O.R 183.

5. *Packer v. packer* (1954) A.C 15 at 22

6. (1932) A.C 562

These included the decomposed remains of a snail which had found its way into the bottle at the factory. The young woman alleged that she became seriously ill in consequence and sued the manufacturer for negligence. The doctrine of privity of contract prevented her bringing a claim founded upon breach of a warranty in a contract of sale but a majority of the House of Lords held that the manufacturer owed her a duty to take care that the bottle did not contain noxious matter and that he would be liable in tort if that duty was broken.

Lord Atkin said;

The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa' is no doubt based upon a general public sentiment of moral wrongdoing for which the offender must pay. The rule that you are to love your neighbor becomes, in law, you must not injure your neighbor; and the lawyer's question, who is my neighbor? receives a restricted reply; *you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor: 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 omissions which are called in question*⁷

Out of the above the "neighbor principle" evolved long after the first attempt to formulate a general principle was made by Brett M.R.⁸ Lord Atkin's test thus got rid of the law of contract fallacy of

7. Emphasis added.

8. In *Heaven v. Pender* (1883) 11 Q.B.D 503 at 509

privity of contract and provided authority for the proposition that notional duty is owed independent of contract by a manufacturer to the ultimate consumer of his product. This principle thus overthrows the privity of contract fallacy that has inhibited the growth of the law. In this connection and in addition, it is certain that Lord Atkin's statement of principle (neighbourhood principle) has been largely responsible for the radical development of the tort of negligence since 1932.

Similarly, what the decision in *Donoghue* did to the tort of negligence generally has become more effective, followed and adopted in *Hedley Byrne v Heller Partner*⁹ particularly negligent misstatement by Bankers. Before *Hedley Byrne* there was no remedy for non fraudulent misstatement on the basis that there were no common law duty for care and no contract. The plaintiff could not succeed in negligent misstatement that was the decision in *Derry v. Peek*¹⁰. It was not until *Hedley Byrne* that the trend redressing this view began. The House of Lords held that the only reason why liability could not attach was because the defendant made reference without responsibility, without which they would have been liable for negligence for the misstatement.

Nigerian Courts have followed and adopted all the leading authorities in the development of the tort of negligence in Nigeria. The Courts have referred to and relied on those English authorities eg *Donoghue v.*

9. Hedley Byrne V. Heller and Partner (1964) A.C 465
10. (1899) 14 AC 337

Stevenson¹¹ and Hedley Byrne v. Heller and Partners¹², in deciding matters that are brought before them. Thus rarely one finds in decided cases the absence of at least one “inspirational” English decision. And to compound the problem, they are applied without any modification to suit our local exigencies. Nigerian courts and Judges are slow to expand the tort of negligence to new areas or field beyond what the English courts have done.

1.2 **STATEMENT OF THE RESEARCH PROBLEM**

Negligence is the product of lack of exercise of care or diligence in the performance of certain things. This research has examine the problems of liability and the challenges associated with the establishment of the liability of the defendant, whether professional (skill) or a manufacturer (product liability). It also consider the question of duty of care and the breach of it without which there cannot be liability or the tort of negligence i.e when is a duty said to be imposed on the defendant; when is the defendant said to be negligent and what are consequences of his negligent acts or omissions?

1.3 **AIM AND OBJECTIVES OF THE RESEARCH**

This research has examined the development of the tort of negligence in Nigeria within the general frame work of Negligence as a tortuous liability and its applicability to our industries and society. It identify the various methods or

theories of establishing liability which hinges on duty of care and breach of it (The very pivot on which the tort of negligence revolves). The research also examines the defences that are opened to the defendant and the applicability or otherwise of the imported English common law in Nigeria.

11. supra

12. Supra

1.4

JUSTIFICATION OF THE RESEARCH

The main thrust of this research as stated in paragraphs 1.2 and 1.3 above is to identify problems associated with the establishment of negligent liability and proffer solutions that will help shape the already existing and recognized categories and establishment of negligent liability. It is hoped that the recommendation if recognized will be of a considerable advantage to the Nigerian policy makers for the advancement of trade, industries and society at large. And this work will generally assist any researcher wishing to make further research in this field of study.

1.5

SCOPE OF THE RESEARCH

This research covers the origin and development of the tort of negligence in Nigeria, before independence, after independence and how the advancement in trade, industries and society have accelerated the development of negligence in Nigeria.

1.6

RESEARCH METHODOLOGY

The research adopted a combination of doctrinal and empirical result methods. Doctrinal based on decisions arising out of case law (which is the core of this research) and the various views by erudite jurists, as well as expression of relevant opinions and

analysis of issues, by scholars in text books, journals, magazines and newspapers are relevant. And empirical result based on focus group discussion carried out within the academic environment.

1.7 LITERATURE REVIEW

There are literature on Torts and negligence generally, both foreign and local Authors, but no particular one centered on this topic. The focal point on this research is particularly on negligence, its origin and development in Nigeria. However, the following notable Authors and thesis are relevant to this work as follows:

Gandhi¹³, this book is relevant in the sense that it deals with the fast – developing law of tort in general. It explains philosophical and social background, leading Indian decisions and other Common wealth jurisdiction where the Nigerian law emanated from. This writer will use the social and philosophical background in this book to examine how religion and lack of education have affected negatively the development of the Tort of Negligence in Nigeria.

Kodilinye¹⁴ the book is very relevant because, its focal point is Nigeria. It discussed and explained how the wider field of torts affects a citizen from all sides; his physical safety, his property domestic affairs, his reputation, privacy and his liberty. The Author dwells mainly on leading Nigerian cases on the subject matter as at the time. However, a lot newer leading Nigerian cases have come up since then e.g the rigid position of the Court of Appeal in *Kalu Anya v. Imo Concord Hotel* has now been watered down in *Harka Air Services Nig Ltd v. Emeka Keazor*¹⁵.

Winfield and Jolwicz¹⁶. This book is also of immense value to this work, mainly because it is a revised edition which brings out development and decisions in the English jurisdiction where the Nigerian tort of negligence originated from.

Holden Milness J¹⁷. The book discussed the law and practice of Banking, it adumbrated the position or condition under which bank becomes negligent and liable to its customer and its defences.

13. Gandhi B.M (1987) law of Tort, Eastern Book Company 34
lalabaghlucknow

14. Kodilinye.G (1990) The Nigerian Law of Torts Spectrum Law
Publishing Ibadan

15. (1992) 4 NWLR (Pt 234) 210: (2011) 13 NWLR (Pt. 1264)
320

16. Winfield and jolowicz, (1989) on Law of Tort, Sweet and Maxwell London

17. Holden Milness J.(1993)The law and practice of Banking, pitman publishing 128 long
Aere, London

Kanyipb.b¹⁸. This thesis is relevant to this research mainly in the area of product liability and the many laws which are enacted to protect product users or consumers. It attempts to explain the general protection a consumer has under the law.

Mohammed Sale¹⁹ this writer discussed mainly the Tort of negligence under the Nigerian law after independence. The writer discussed and tries to inform his readers of their rights. The present research intends to trace the origin of development before independence, after independence and current developments.

This thesis is organized into 5 chapters as follows, chapter one deals with general introduction, historical development of the tort of negligent in Nigeria, statement of the research problem, objectives of the research, justification, scope of the research, research methodology, literature review and organizational layout. Chapter two discussed the general grounds for liability in negligence, it highlights the development of the tort of negligence through the fundamentals of negligence which is duty of care and breach of it. The concept of reasonable man, foreseeability rule and remote possibility. Chapter three brings out the nature and scope of categories of negligence which includes product liability, negligent misstatement and economic loss, nervous shock, liability of bankers, solicitors/lawyer and Hospital management.

Chapter four comprises of defences opened to the defendant which remove liability despite breach of duty. These include contributory negligence, *volentia non fit in juri* inevitable accident, statutory defence and necessity. Chapter five includes summary, findings and Recommendation.

18. Kanyip.b.b(1997)Consumer Protection Laws in Nigeria Phd thesis faculty of law A.B.U Zaria
October 19. Mohammed Sale, (1996) The Tort of Negligence Under Nigerian law LLM thesis
faculty of law A.B.U
Zaria

CHAPTER TWO

FOUNDATIONS FOR LIABILITY IN NEGLIGENCE

2.1 Introduction:

At the early stage of the common law, the initial basis of liability was predicated on causation¹. The Courts at that time were not concerned with fault element. The relevant issue under causation is to identify who is responsible for bringing into existence a condemnable state of affairs or to whom a particular conduct may be ascribed, as soon as the Court is able to identify a person to whom the forbidden act is traceable, responsibility attaches forthwith. This state of the common law was found not only to be highly immoral, but also very dehumanizing which led to agitation for reform².

As social organization developed from a predominantly agricultural to a predominantly technological and urban system, and as relations of men became more and more intimate, then came sophisticated notions of fault, such as intentions and negligence, emerged as the necessary prerequisites for determining responsibility under the tort systems.

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1. Winfield and Jolowicz, (1990) on Tort, Sweet and Maxwell London p73
 2. Omotosho Aboaba, (2009) The Law of Tort in Nigeria, Malthouse Law Books, Lagos, p4

Intention is generally regarded as a state of mind. An act is said to be done intentionally, when it is done with full awareness of the consequences. It must be accompanied with a desire to produce the ensuing result while negligence is that, the defendant does not desire the consequences of his conduct but is careless or indifferent to the consequence of his action³.

The very size of the population are far different today than they were a century and a half ago. As the society developed law too developed along; in fact law is one of the greatest instruments for changes and developments⁴. These changes and developments brought about the tort of negligence as a separate and independent tort (though it is of a recent origin). It is necessary to emphasize that the law of tort, like those other branches of the law, is concerned with the question of liability; an action founded upon tort is an action between persons either natural or artificial (i.e. corporation) and the outcome can only be that one of them, the defendant is or is not liable to do or refrain from doing something at the suit of the other. If there is no defendant whose liability can be established according to the principles of the law then the plaintiff is left without redress.

3. Ibid p73, 74

4. opp. cit p4

The increase in mechanization and industrialization of society and the consequent multiplication of personal injury caused by negligence have all led to the idea of negligence as a separate tort itself and not simply as a mode of committing trespass or other torts. The cardinal principle of liability is that the party complained of should owe to the party complaining, a duty to take care, and that the party complaining should be able to prove that he has suffered damage in consequence of a breach of that duty⁵

The first attempt to formulate a general principle was made by Brett M.R in *Heaven v. Pender*⁶. Where it was stated that a duty of care arises where a person is placed in such position that any ordinary person will foresee that if he did not use ordinary care in his conduct he will cause damage to another.

The most famous and important creative generalization is that of Lord Atkin in *Donoghue v Stevenson*⁷ where it was held that a manufacturer of an article owes a duty of care to the ultimate consumer to see that the article is free from any defect that is likely to cause harm.

Before this time (i.e. the decision in *Donoghue's Case*) privity of contract stood in the way of the plaintiff to recover damages for any harm suffered by the ultimate consumer. This principle has been adopted and followed in many of Nigerian situations and cases.

5. *Chukwu v. Uhegbu* (1963) All NLR 642. It was held no liability in the absence of damage.

6. (1883) 11 Q.B.D 503

7. (1932) AC 562

These will be discussed later in this work⁸. Duty of care is the 'magna cater', is the life wire and the pivot on which the establishment of liability revolves. It is the life wire in every case of negligence because in any claim for damages the plaintiff must establish or prove that there was a duty owed to him by the defendant and the defendant has breached that duty which has caused injury or damage to the plaintiff. Where there is no duty owed by the defendant to the plaintiff it then means that he, the plaintiff has no claim against the defendant. Perhaps the plaintiff may look out somewhere else not negligence.

2.2 DEFINITION OF NEGLIGENCE

In every day usage, negligence denotes, carelessness or inattentiveness. In legal sense negligence means more than carelessness or being inattentive. According to B.M. Gandhi⁹, the word negligence carries two senses in the law of Torts. It may mean,

- i. Either a mental element which is to be inferred from one of the modes tort may be committed or it may mean;

8. Osemobor v. Niger Biscuit (1973) 7 CCHJ. Also, Imarsel Chemical v. N.B.N (1974) ECSR 355 and Agbonmagbe Bank v. CFAO. (1966) ANLR 130

9. Gandhi, B.M.(1987) Law of Tort, Eastern Book Company Lucknow p.683.

ii. An independent tort which consist of a breach of legal duty to take care which result in damage undesired by the defendant to the plaintiff. The later gives more meaning than the former¹⁰.

Winfield defined negligence¹¹as; a tort is the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff: Thus its ingredients are:

- a. A legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of the duty.
- b. Breach of that duty.
- c. Consequential damage to B

The black's law dictionary ¹² has the same definition with the often cited and popular definition given by Alderson B. in Blyth v. Birmingham water works Co.¹³ where he stated "Negligence is the omission to do something which a reasonable man, guided upon those consideration which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do".

10. Italic is mine.

11. opp.cit p 72

12. Black law Dictionary p 1032

13. (1856) 11 Ex. 781

Lord Wright, in 1934 laid down yet another authoritative definition of negligence, where he said, negligence means more than heedless or careless conduct, whether in omission or commission it properly connotes the complex concept of duty, breach and damage undesired by the defendant to the plaintiff ¹⁴

In 1936, ¹⁵ the Privy Council extended the neighbor principle to products such as undergarments and to other manufactured goods making the idea a modern concept.

Nigerian courts have followed, expanded and adopted the earlier decisions to this present day. Only few current definition will be mentioned here.

Mika'ilu, JCA¹⁶ stated that negligence is a question of fact not law and that each case must depend upon its particular facts and circumstances.

Similarly, in 2008, S.U. Onu J.S.C. (As he then was) in the case of Abubakar v. Joseph¹⁷, adopted the definition given earlier by Alderson

B¹⁸ in Blyth v. Birmingham water works Co.

14. Lonhelly Iron & Coal Co.v. McMullan (1934) AC 1 HL 25.

15. Grant v. Australian Knitting Mills (1936)AC 85. privy Council : 54 CLR 49.

16. Shell Pet. Dev. Co. v. Ikontia (2010) 45 WRN 137

17. (2008) 13 NWLR (Part 1104) 307 at 316 also Okwejiminor v. Gbakeji (2008) 5 NWLR (Part 1079)172 at 176. And, NBC v. Oresanya (2009) 16 NWLR (Part 1168) 564 at 567.

18. Supra

where he defined negligence; as the omission or failure to do something which reasonable man under similar circumstances would do, or the doing of something which a reasonable man would not do.

Worthy of note is the classical definition given by Ogbuagu J.S.C recently in *Diamond Bank Ltd. v. Partnership Investment Co*¹⁹. where he said;

Negligence is generally defined as a failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect the other against unreasonable risk of harm, except for conduct that is intentionally wantonly or willfully disregards others' rights.

It is important to note that the march of law however did not stop at this, and naturally it cannot, because, law cannot afford to remain static; it has to march with the time and changing public opinion.

From all the above therefore, it can be deduced that negligence means failure to use such care as a reasonably prudent and careful person would use under similar circumstance, it is the doing of some act which

19. (2010) 13 WRN 35 at 42

a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have done under similar circumstances; which result in injury or damage to the plaintiff.

2.3

DUTY OF CARE

2.3.1

Nature and Scope

In the daily conduct of social and business life human beings are thrown into, or place themselves in an infinite variety of relations with their fellows, and the law can refer only to the standard of the reasonable man in order to determine whether any particular relation gives rise to a duty to take care as between those who stand in that relation to each other. "The grounds of action may be as various and manifold as human errancy; and the conception of legal responsibility may develop in adaptation to altering social conditions and standards.

The criterion of judgment must adjust and adapt itself to the changing circumstances of life”²⁰.

It is settled that negligence, is a question of fact and not of law. So each case must be decided in the light of the facts pleaded and proved²¹. However, duty to take care is of law. There must be a legal duty to take care; in its absence negligence in the popular sense has no legal consequence. It is common knowledge that; it is not for every careless act that a man maybe held responsible in law, nor even for every careless act that causes damage.

He will only be liable in negligence if he is under a legal duty to take care. It maybe objected that that duty is not confined to the law of negligence and that it is an element in every Tort, because there is a legal duty not to commit assault or battery, not to commit defamation, all that duty signifies in these other torts is that you must not commit them. They have their own, detailed, internal rules which define the circumstances in which they are committed and duty adds nothing to those.

20. Per Lord Macmillan, in *Donoghue v. Stevenson* (1932) AC 562

21. *Dare v. Fagbamila* (2009) 14 NWIR (part 1160) 177 at 181

But in the tort of negligence, breach of duty is the chief ingredient of the tort; in fact there is no other except damage to the plaintiff²².

In *Dare v. Fagbamila*²³ the Ilorin Division of the Court of Appeal held that:

The tort of negligence arises when a legal duty owed by the defendant to the plaintiff is breach. To succeed in an action for negligence, the plaintiff must prove by preponderance of evidence or on the balance of probabilities that:

- a. The defendant owed him a duty of care;
- b. The defendant breached the duty of care; and
- c. The plaintiff suffered damage arising from the breach.

If a duty does exist in this general sense then there may be an issue on the facts of the particular case whether in all the circumstances, it was owed to the particular plaintiff. Before this time,²⁴ the view was that liability for negligence can only exist if the case is covered by a duty which has already been recognized.

22. *Opp.cit* p72.

23. *Supra*, Also, *Agbonmagbe Bank Ltd v. C.F.A.O* (1966) 1SCNLR 367

24. *Before Donoghue's Case* (i.e. 1932)

It was put most forcibly in Landon's case,²⁵ that "Negligence is not actionable unless the duty to be careful exists.

And the duty to be careful only exists where the wisdom of our ancestors has decided that it shall exist" it has been stated against this view that in denying the existence of duty in some cases the judges have done so on the ostensible ground that no authority for such a duty exists, but they have not hesitated to produce a new duty when it has seemed right to them to do so.

Lord Macmillan has said that the categories of negligence are never closed and the argument to the contrary has been rejected in terms.²⁶ The first attempt to formulate a principle was made by Brett M.R. in *Heaven v. Pender*.²⁷ Where it was stated that "a duty of care arises where a person is placed in such a position that any ordinary person will foresee that if he did not use ordinary care in his conduct he will cause damage to another".

In that case the plaintiff, employee of an independent contractor engaged by the defendant was painting a ship in the dock of the defendant when he was injured because a rope supplied by the defendant slinging the staging on which he was standing, was defective. The Court observed that; actionable negligence consists

25. In *Landon* case (1883) 11 G.B.D. 503, 509

26. *Donoghue v. Stevenson* (Supra.)

27. (1883) 11 Q.B.D 503 at 509

in the neglect of the use of ordinary care and skill towards a person to whom the defendant owes the duty of observing ordinary care and skill by which neglect the plaintiff without contributory negligence on his part, has suffered injury to his person or property.

The question in this case was whether the defendant owed such a duty to the plaintiff.

The Court observed further – if a person contracts with another to use ordinary care and skill towards him or his property the obligation need not be considered in the light of a duty: it is an obligation of contract. It is undoubted, however, that there may be obligation of such duty from one person to another although there is no contract between them with regard to such duty. Two drivers meeting have no contracts with each other, but under certain circumstances they have a reciprocal duty towards each other, thus the existence of a contract between two persons does not prevent the existence of the suggested duty between them also being raised by law independently of the contract. Such a duty arises on account of relation which is established under circumstances above. Moreover the universally recognized rule of

right and wrong recognize and enforce this duty. This case stands as a landmark in the field of negligence as it is the first case attempting and rationalizing the cases wherein a duty existed.

The most famous and most important creative generalization is that of Lord Atkins in *Donoghue v. Stevenson*²⁸ in that case;

A manufacturer of ginger beer sold to a retailer ginger beer in an opaque bottle. The retailer resold it to A, who treated a young woman of her acquaintance with its contents. These included the decomposed remains of a snail which had found its way into the bottle at the factory. The young woman alleged that she became seriously ill in consequence and sued the manufacturer for negligence.

The doctrine of privity of contract prevented her bringing a claim founded upon breach of a warranty in a contract of sale but a majority of the House of Lord held that the manufacturer owed her a duty to take care that the bottle did not contain noxious matter and that he would be liable in tort if that duty was broken.

28. (1932) AC 562

Lord Atkin further said:

In English law there must be, and is, some general concept of relations giving rise to a duty of care, of which the particular cases found in the books are instances. The liability for negligence whether you style it such or treat it as in other systems as a species of 'culpa' is no doubt based upon a general public sentiment of moral wrong doing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way rules of law which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbor becomes, in law, you must not injure your neighbor; and the lawyer's question, who is my neighbor? Receives a restricted reply you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. who, then, in law is my neighbor? 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 omissions.

It has been said that there could be no denying that Donoghue's case established that manufactures owed a duty to ultimate consumers of their wares but for a longtime there was a marked judicial reluctance to accept that what may be called the "Neighbour principle" had much relevance to determine whether a duty of care might exists in other areas of activity,

though it might determine in spatial and temporal limits of such duties as were held to exist²⁹. Still less did it have any impact where, before 1932 duties had been specifically rejected. There continued to be no duty of care in making statements or disposing of tumbled own houses – words were not like deeds and a dwelling was inherently different from a ginger bottle. Certainly new duty situations continued to be recognized, as Lord Macmillan³⁰ had said “The categories of negligence are never closed.

2.3.2 Limitation to the Scope of Duty of Care

By the beginning of the 1970’s it was said³¹ that *Donoghue v. Stevenson* was an authority for opening up new categories of liability with caution, not disregarding existing categories, or treating the law of negligence as entirely “open – ended”. But by the end of the 1970’s the law Lords had moved so far as to hold that public policy primarily required other and secondary policy demanding a total or partial immunity from suit.³²

Lord Wilberforce, in May 1977, in *Anns v. Merton London Borough Council*³³ gave a classical judgment and analogy which has been constantly cited with approval in England and elsewhere³⁴ he said: -

29. *Home Office v. Dorset Yacht Co.* (1969) 2 Q.B 412

30. *Supra*

31. *Dorset yacht v. Home Office* (1970) A.C 1004

32. *Supra*

33. (1978) A C 728

34. Other commonwealth Countries, Nigeria, India, Australia etc.

Through the trilogy of cases in this House – *Donoghue v. Stevenson* (1932) AC 562, *Hedley Byrne & Co Ltd v. Heller & Partners Ltd* (1964) AC 465, and *Home Office v. Dorset Yacht Co. Ltd* (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 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 neighbourhood such that, on 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 negate, or reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise.

The judgment of Lord Atkin and Wilberforce are alike, in that each not only introduces a new head of liability (duty of care) into the law of torts, in 1932, defective goods; in 1977, failure to inspect defective houses but also provides a general theory which justifies the creation of that tort, and (perhaps) all other torts. (In 1932 the neighbor principle) in 1977 the two – stage principle.

The Nigerian Courts have followed, adopted and cited with approval these classical and epochal decisions in numerous cases; few will be mentioned here while others will be discussed in details in chapter three of this work. One of the most notable decisions in Nigeria is *Agbonmagbe Bank Ltd v. C.F.A.O*³⁵.

35.(1966)1ANLR130

The C.F.A.O had a customer by the name of Esther Abiola Amushan who gave the company a number of cheques on the Agbonmegbe Bank's branch at Shagamu between the 7th of August, 1957 and the 5th October, 1957 amounting to 10,197 - 8s. - 4d; the company handed the cheques to the Bank of West African Ltd, for collection, and this Bank sent them to the headquarters of the Agbonmagbe Bank at Ebute Metta, which returned the cheques dishonoured on the 10th October, 1957 in a bunch.

The C.F.A.O wrote to Agbonmagbe Bank headquarters to complain that the delay of their Shagamu Branch in returning the cheques caused them loss for which the company held the Bank responsible, but received no reply. The C.F.A.O sued Mrs. Amushan and obtained judgment against her for what she owed the company - 13,829 - 05 - 10d, which included the amount of the cheques: the company managed to collect 250 from her and could collect no more; so they sued the Agbonmagbe Bank for the amount of the cheques in question. The company's manager testified as follows: when the cheques were not returned within reasonable time, my company assumed that they must have been paid. If the cheques had been returned within a week or so we

would have stopped delivering further goods to Mrs. Amushan and our loss would have been minimized. We lost the value of the cheques as a result of the delay occasioned by the defendant. The learned trial judge, Adedipe J. held that, cheques sent from Lagos to Shagamu should, if not paid, have been return within a week, and in his opinion the Agbonmagbe Bank had failed to fulfill its duty of returning them in the ordinary course of business to the bank of West African within a reasonable time with an intimation that they were not paid.

The learned judge recognized that there was no privity of contract between the C.F.A.O and the Agbonmagbe Bank; he relied on *Donogbue v. Stevenson*, for his view that the Bank was liable for negligence. He quoted Lord Atkins test and stated in his judgment that it was clear on the cheques that the Bank of West Africa was the agent of the C.F.A.O for the purpose of collection, and that the Agbonmagbe Bank had a duty to take care in dealing with the cheques which were sent to it for collection, but it was negligent and the C.F.A.O suffered damage owing to its negligence.

The Supreme Court upheld the above decision and stated thus: "it is true that a banker is ordinarily not liable to the payee of a

cheque, for a cheque is not an assignment of debt in English law but that case is on there being no privity of contract between the payee and the banker on whom a cheque is drawn. Here the C.F.A.O is suing the Bank on the basis of negligence in tort.

The Court relied on *Chroeder v. Central bank of London Ltd*³⁶ and the judgment of Lord Macmillan in *Donoghue's case*.

Similarly, in the case of *Osemobor v. Niger Biscuit*³⁷ the plaintiff purchased at a supermarket a packet of biscuit manufactured and packed by the defendant. In the course of chewing she felt something hard in her mouth, which turned out to be a decayed tooth. As a result she became ill and required medical attention. The defendant was held liable, Kassim J. said.

“ A person who manufacturer goods which he intends to be used or consumed by others, is under a duty to take reasonable care in their manufacture, so that they can be used or consumed in the manner intended, without causing physical damage to the persons or property.”

36. (1876) 34 L T R 735

37. *Supra*.

The judge relied on Donoghue's case and the Australian case of *Grant v. Australian Kitting Mills*.³⁸ Where wears were exposed though they were packaged from the manufacturer; excessive Sulphur was used during manufacturing and the plaintiff contacted dermatitis. The manufacturer's defence was that the goods were sold to the plaintiff while packaged. The Privy Council however held that although they were exposed they nevertheless reached the plaintiff in the same condition as the manufacturer intended them to be.

By recognizing new duty - situations the Courts are constantly expanding the scope of the tort of negligence as emphasized by Lord Macmillan "The categories of negligence are never closed".³⁹ Thus, in 1964, in the leading case of *Hedley Byrne v. Heller and Partner Ltd.*⁴⁰ a new duty of care was recognized to avoid making careless misstatements which might cause financial loss to persons reasonably relying on them. This principle has been applied in *Imarsel Chemical v. NBN*⁴¹ here D, Pharmaceutical Company applied to the plaintiff for credit facilities,

38. (1936) A C 85

39. *Supra*.

40. (1964) A.C 465

41. (1974) 4 ECCLR 355

the plaintiff insisted upon a reference from D's banker, the Enugu branch of the bank stated that D company was a good customer of the bank and was credit worth to the amount of N3000. This statement turned out to be untrue and the plaintiff lost nearly N3000 in respect of the money lent. Okagbue J. held that "on the authority of Hedley Byrne I hold that, the plaintiff's claim succeeds"

In a very recent case of *Diamond Bank Ltd. v. Partnership Investment Co.*⁴² Ogbuagu JSC held that, "A bank has a duty to exercise reasonable care and skill in carrying out its customer's instructions. That this duty extends over the whole range of banking business within the contract with the customer".

In 1979, in *Ross v. Counters*⁴³ it was held that a Solicitor in drawing up a will for a client, owes a duty of care to a proposed beneficiary under the will, and is liable in negligence to that beneficiary if, by careless drafting, the latter loses the intended bequest.

By recognizing new duty situations the Courts are constantly expanding the scope of the tort of negligence, but at the same time it is accepted that public policy requires some limits to be set to the range of liability, and when, in particular case, the Court denies that a duty of care is owed, it is really coming to a decision that, on policy grounds, the defendant ought not to be made liable.

42. (2010) 13W R N 35 at 42.

43. (1979) 3 ALL E R 580

This was the decision in *Ashton v. Turner*⁴⁴ where it was held that a man, who had been seriously injured by the careless driving of his friend whilst they were fleeing from the scene of a burglary which they had committed, was owed no duty of care by the friend and could not therefore recover in negligence.

Ewbank J. in the same case stated-

The law..... may in certain circumstance not recognize the existence of a duty of care by one participant in a crime to another participant in the same crime, in relation to act done in connection with the commission of that crime. That law is based on public policy; the application of the law depends on a consideration of all the facts. Having regard to all the facts in this case, I have come to the conclusion that a duty of care did not exist between the defendant and the plaintiff during the cause of the burglary and during the cause of the subsequent flight in the get - away car.

Duty of care as one of the chief ingredient of the tort of negligence continued to be expanded further than what was contemplated in 1932 owing to advancement in science and technology. The only limitation to the tort of negligence still remains the public policy and those things which are not reasonably foreseeable by the defendants.

44. (1980) 3 ALL E R 870

2.4 THE CONCEPT OF A REASONABLE MAN, FORESEEABILITY RULE AND REMOTE POSSIBILITY

2.4.1 The Concept of a Reasonable Man

The general characteristics of the reasonable man have been described as an "Abstraction"⁴⁵. The standard of reference he provides can be applied to particular cases only by the intuition of the Court. The standard is objective and impersonal in the sense that it eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. In the circumstances of the particular case, the reasonable man would have in contemplation, and what; accordingly, the party sought to be liable ought to have fore-seen.

A reasonable man is a hypothetical creature whose imaginary characteristics and conduct by way of foresight, care, precautions against harm, susceptibility to harm, and the like are frequently referred to as the standard for judging the actual foresight and care of a particular defendant. Such a man is a man of ordinary prudence,⁴⁶ a man using ordinary care and skill. He is to guard against the obvious, the possible and the foreseeable.

45. Ibid p. 111.

46. Ibid p.111.

But not against the bare possibility, the highly unusual, and the completely unexpected. He will take at least the precautions customary and normal in the circumstances. The reasonable man has been described as the man in the street; the man on the clapham omnibus, or the man who takes the magazines at home and in the evening pushes the lawn mower in his shirt sleeves.⁴⁷

He is not infallible or perfect⁴⁸ in qualities of the head and heart he represents and does not excel the general average of the community. He foresees danger and uses his intelligence. He is presumed to be free both from over apprehension and from over confidence⁴⁹.

According to Fleming⁵⁰, "he is the embodiment of all the qualities which we demand of the good citizen and if not exactly a model of perfections, yet altogether a rather better man than probably any single one of us happens or perhaps even aspires to be".

Standard is a defined criterion by reference to which individual conduct may be judged. In other words a standard is a measure of quality, quantity or value established by law or general consent,

47. Ibid p. 111, 112

48. ibid p. 697

49. Ibid p. 697

50 Ibid p. 697

it is the general recognition and acceptance that makes a standard. Standard may be either fixed or indefinite. It is indefinite when it is fixed by a formula which permits individual judgment in the circumstances of the particular case e.g. reasonable care, due diligence, the care of the reasonable man. Indefinite standards are in their nature capable of development, but in each case it is for the Court to judge or decide whether in the particular circumstances what is under consideration satisfies the standard or not.

As Fleming observed⁵¹, it is for the Court to determine the existence of a duty relationship and to lay down, in general terms, the standard of care by which to measure the defendant's conduct. It is for the jury to translate the general into particular standard suitable for the case in hand and to decide whether that standard has been attained. However, it must be remembered that the law does not exact impossible or unreasonable standard⁵²

51. Ibid p. 697.

52. *Balley v. London Electricity Board* (1965) A.C 778

3.4.2 Foreseeability

All the above and standard led to reasonable foreseeability which has become one of the dominant concept of negligence. By it, a person can only be under a duty to take care if he can foresee or ought to foresee that his conduct may cause injury to someone if he does not exercise due care. Foreseeability is essentially a question of fact and can only be determined 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 foresee that the act in question; is the type that can cause damage.

The victim of the acts or omissions of the defendant must therefore be a foreseeable victim, in order to succeed in his case. This does not mean that he must be someone who is identifiable by the defendant. What it means is that he should be one who falls in one of the classes of circumstance that injury is foreseeable. Thus, in *Balby v. London Electricity Board*⁵³.

⁵³.(1965) A.C 778

The defendant with statutory authority excavated a trench in the street after taking precautions for the protection of passersby 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 defendant to have them in contemplation and to take precautions appropriate to their condition.

Similarly, in *Goldman v. Hargrave*⁵⁴ where, in dealing with liability of the defendant for failing to extinguish a fire started on his land by natural causes, the Privy Council held, that the standard was what, it was reasonable to expect of him in his individual circumstances. "Less must be accepted of the infirm than of the able - bodied - the defendant should not be liable unless it is clearly proved that he could and reasonably in his individual circumstances should, have done more; this however, was a case in which the defendant was making use of his land and had a risk thrust upon him. The test would be unsuitable for a case in which the danger arises from the defendant activity.

54.(1967) 1 AC 645

The above case of Goldman, have similar facts with the recent Nigerian case of UTB v. Ozoemena⁵⁵ where the Supreme Court held that; the general concept of reasonable foresight is the criterion of negligence. According to it, negligence is not established by proving that the loss sustained by the plaintiff might have possibly and with extra ordinary foresight and prudence been avoided by the defendant. It was held that it was not reasonably foreseeable that an unknown person would cause a fire outbreak on the appellant's plot of land.

The same principle in Goldman was used to decide the Nigerian case, in that the cause of the damage which is fire outbreak, were not as a result of the activities of the defendants. The former was caused by natural causes owing not to the activity of the defendant nor any fault that can be attributed to him, while the latter was caused by an unknown person. The test would have been different if the cause of the fire were as a result of the defendant's activities or through the fault of anyone acting for them or through them with their knowledge or authority.

55. U.T.B v. Ozoemena (2007) 3 N W L R (pt. 1022) 448.

According to Kodilinye⁵⁶, in order to establish that he has a good cause of action in negligence, it is not sufficient for the plaintiff to show the existence of circumstances which give rise to a notional duty of care to him and he can establish this only by showing that the harm suffered by him was the reasonably foreseeable consequences of the defendant's conduct. He went further to say that negligence "in the air" or toward some other person is not enough, the plaintiff cannot build on a wrong to someone else e.g. where a motor cyclist carelessly collides with a car, he will be liable to the owner of the car for any damage caused, since he owes a duty to all road users which are within "foreseeable range" of impact, and whom he could reasonably foresee would be harmed by his carelessness but he will not be liable for the shock and consequent miscarriage suffered by a pregnant woman standing 15 yards away who does not see the accident but merely hears the crash and see blood on the road afterwards, since a duty of care only arises towards those individuals of whom it may reasonably be anticipated that they will be affected by the act which constitutes the alleged breach⁵⁷.

56. *Opp. cit.* p. 42

57. *Bourhill v. Young* (1943) A.C. 92

3.4.3 Likelihood of Harm

According to Kodilinye⁵⁸ the greater the likelihood that the defendant's conduct will cause harm, the greater the amount of caution required of him.

Lord Wright has said⁵⁹, "the degree of care which the duty involves must be proportioned to the degree of risk involved if the duty of care should not be fulfilled". A good illustration is found in the case of *Bolton v. Stone*⁶⁰ the plaintiff was struck and injured by a cricket ball as he was walking along a public road adjacent to a cricket ground. The plaintiff contended that the defendant, who was in charge of the ground, had been negligent in failing to take precautions to ensure that cricket balls did not escape from the ground and injure passersby but the Court held that taking into account such factors as the distance of the pitch from the road, the presence of a seven - foot - high fence, and the frequency with which balls had escaped previously, the likelihood of harm to passerby was so light that the defendant had not been negligent in allowing cricket to be played without having taken further precautions such as raising the height of the fence.

57. Kodilinye Opp. cit p.43

58. *Northwestern Utilities Ltd. v. London Guarantee & Accident Co. Ltd.* (1936) A.C 108 at p. 126

59. (1951) A.C 850.

However, in *Hilder v. Associated Portland Cement manufacturer Ltd*⁶⁰ where the plaintiff, whilst riding his motor - cycle along the road, crashed and sustained injuries after being struck by a football kicked from the defendant's adjacent land where children are in the habit of playing, the defendant was held negligent in having failed to take precautions to prevent football from being kicked onto the road. In the circumstances, the likelihood of injury to passersby was considerable and he ought to have reasonably foreseen the consequences as a reasonable or ordinary prudent man would have foreseen. In any case where a reasonable man or ordinary prudent would not have foreseen then they will be no liability as this will fall under the remote possibility test.

In determining or assessing the magnitude of the risk. It is important to note that the duty of care is owed to the plaintiff himself and therefore that if he suffers from some disability which increases the magnitude of the risk to him that disability must be taken to account so long as it is or should be known to the defendant. The above was recognized by the House of Lords in *Paris v. Stepney Borough Council*⁶¹ after having been denied by

60. (1961) 1 WLR 1434

61. (1951) A.C. 367.

the Court of Appeal in the same case ⁶² the plaintiff, a one - eyed man employed by the defendants, was working in conditions involving some risk of eye injury, but the likelihood of injury was not sufficient to call upon the defendants to provide goggles to a normal two eyed workman. In the case of the plaintiff, however goggles should have been provided for, whereas the risk to a two - eyed man was of the loss of one eye, the plaintiff risked the much greater injury of total blindness.

In comparison, the determining ingredient for liability was in *Roe v. Minister of Health*⁶³ lack of knowledge was used to deny liability however in *Paris v. Stepney Borough council*⁶⁴ the defendants knew that the plaintiff stood a greater risk of total blindness being a one eyed man.

The risk must be balanced against the measures necessary to eliminate it and the practical measure which the defendant could have taken must be considered.

62. (1950) 1 K.B 320.

63. (1954) 2 Q.B 66.

64. *Supra*.

3.4.4 Limitation to the Concept of Reasonable foreseeability

The concept of the reasonable foreseeability is not applicable to all cases where there is foreseeability of injury e.g. if A noticing some damage to his crops on his farm, decided to set a trap at the place where the damage occurred 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 damages because entering into the farm is an act of trespass and he can ultimately not be allowed by the law to benefits from his wrong.

Also, in the case of *Ashton v. Turner*⁶⁵ where it was held that a man who had been seriously injured by the careless driving of his friend whilst they were fleeing from the scene of a burglary which they had committed was owed no duty of care by the friend and could not therefore recover in negligence.

The main thrust for this still remains public policy⁶⁶ i.e. the need to limit claims from any kind of actions. The law is fairly ready to modify the objective standard with regard to each circumstances and plaintiffs. In some cases, however, the question of the foreseeability of an event will depend upon whether or not a

65. *Supra*.

66. *Ewbank J, in Ashton v. Turner (Supra)*

particular item of knowledge is to be imputed to the reasonable man and in these cases it is of particular importance to remember that what is in questions is foreseeability, not probability. The probability of a consequence does not depend upon the knowledge or experience of anybody, but its reasonable foreseeability can only be discovered if it is first decided what knowledge and experience is to be attributed to the reasonable man in the circumstances.

In *Roe v. Minister of Health*⁶⁷ a patient in a hospital and Dr. G, an anesthetist; administered a spinal anesthetic to him in preparation for a minor operation. The anesthetic was contained in a glass ampoule which had been kept before use in a solution of phenol and unfortunately some of the phenol had made its way through an "invisible crack" into the ampoule. It thus contaminated the anesthetic with the result that R, became permanently paralyzed from the waist down. Dr. G. was aware of the consequences of injecting phenol, and he therefore subjected the ampoule to a visual examination before administering the anesthetic,

⁶⁷. *Supra*.

but he was not aware of the possibility, the danger to R. could have been eliminated by adding powerful colouring agent to the phenol so that contamination of the anesthetic could have been observed. It was held that he was not negligent in not causing the phenol to be coloured because the risk of invisible cracks had not been drawn to the attention of the profession until 1951 and care has to be exercised to ensure that conduct in 1947 is only judge in the light of knowledge which then was or ought reasonably to have been possessed.

In this connection the then existing state of medical literature must be had in mind. But the then - existing state of medical literature did not make R's injury any less probable than it would have been after 1951.

The excuses given in the above case in denying liability was that the invisible cracks were not known to science and the medical profession then. The idea was that "if it is unknown and could not reasonably have been known to the defendant then it is of course, irrelevant⁶⁸.

68. Ward v. L.C.C. (1938) 2 All E.R 341.

Nigerian Courts have followed these developments and have adopted and most often with speed, expanded these principles to the Nigerian situation and circumstances (i.e. decisions) in 1975 it was held in *Panalpina world Transport Nig Ltd v. Wariboko*⁶⁹ that whenever goods belonging to one person are unconditionally entrusted to the care of another person for safe keeping or for other purposes whether gratuitously or for reward, on the clear understanding that the goods in question shall ultimately be returned or delivered to the owner, that failure to return or deliver the said goods as agreed upon, raises a presumption of negligence against the default party. The view was taken that, in order to rebut the presumption the party concerned should show to the satisfaction of the Court that the loss occurred not through their fault, carelessness or recklessness, but in spite of all reasonable precautions taken by them in order to ensure the safety of the goods in question. To hold otherwise, will, in our view, work hardship on the owner of such goods.

69. (1975) 9 N.S.C.C 21.

We think that it is good sense that the Court should presume that the loss of goods and the circumstances surrounding it would be peculiarly within the knowledge of the party into whose custody they were entrusted.

The above decision is like the *Res Ipsa Loquitur* where the plaintiff would prove his case by merely stating that I gave the defendant the items or goods, in good conditions and the defendant's duty is to return them in the same good conditions the goods were; it is the failure to return the goods in the conditions they were given out or not returning the goods at all that the defendant is said to be negligent, careless or not to have taken reasonable or due care.

In 2010 (most recently one will say) in *Shell Petroleum Development Co. v. I Kontia*⁷⁰. It was held that damage to the plaintiff was reasonably foreseeable in the circumstances. In this case, it was clear that the plaintiff/respondent had pleaded facts and circumstances showing that the defendant/appellant had dug a cellar well on the land situate within plaintiff's community, which posed a danger to both human beings and animals without fencing it, keeping it guarded or secured against intrusion.

70. (2010) 45 W.R.N 137.

It is a common ground between the parties that the cellar or well was opened by the appellant in the vicinity of the respondent's village acquired by the appellant. It is also common ground that the said well was abandoned or suspended by the appellant and that, it was left uncovered and unfenced with no protective measures whatsoever against danger posed to the public.

It is the case of the respondent that the appellant knew or ought to have known that it should have provided safety measures to ward off the dangers posed to the members of the public by its acts or omissions regarding the cellar which was left open despite complaints. The appellant paid deaf ears to the complaints of the community. In the instant case, the components and the test of the tort of negligence have been sufficiently proved.

The nature of danger or injury to the community, which eventually occurred, was reasonably foreseeable. *And thus not remote* ⁷¹.

The Court of Appeal in arriving at the decision relied on, *clerk & lindsell*,⁷² *Okejiminor v. Gbakeji* ⁷³ *Anya v. Imo Concorde Hotel's Ltd* ⁷⁴, *Universal Trust Bank of Nigeria Plc v. Ozoemena*⁷⁵. Also, *N.B.C Plc v. Olarewaju* (2007) and *Dare v. Fagbamila* (2009)

71. Italics provided

72. On tort, 14th Ed. Paragraph 877: 502 – 505

73. 2008 Supra

74. (2002) 18 NWCR (pt 790) 3

75. Supra.

It is however noticed that there are many torts to which the neighbor principle can, in the nature of things, have no application, for instance defamation, inducement or breach of contract, and conspiracy. The interests of the individual are here protected in other ways, nobody has seriously suggested that the whole law of tort should be reduced to a question of what the defendant ought reasonably to have foreseen in the circumstances of the particular case. The foresight of a reasonable man or reasonable - foreseeability is not sufficient in all cases because even within the field of what is commonly thought of as negligence there are cases in which the defendant will escape liability although it is clear that he must have foreseen the likelihood of harm to the plaintiff.

2.5 BREACH OF DUTY

In the tort of negligence breach of duty is one of the chief ingredient of the tort,⁷⁶ in fact there is no other except damage to the plaintiff. Having decided that a duty of care was owed to the plaintiff in the circumstances the Court is next to determine whether the defendant was in breach of such duty. This is the question which in practice, occupies most of the Courts time. The defendant must not only owe the plaintiff a duty of care, he must be in breach of it. As observed by Salami JCA (as he then was)⁷⁷ in order to succeed in a claim of negligence, the plaintiff must proof evidence of the following:

- (a) That the defendant owed him a duty of care;
- (b) That the defendant was in breach of that duty; and
- (c) That damage has resulted as a result of the defendant's breach.

In deciding the question, the court considers whether or not a reasonable man placed in the defendants position would have acted as he did.

As we have seen, the test for deciding this was laid down in the often cited dictum of Alderson B⁷⁸.

76. *Opp. cit.* p. 72

77. In *Susainah (Trawling Vessel) v. Abogun* (2007) INWIR (part 1016) 456 at 463.

78. In *Blyth v. Birmingham Waterworks* (*Supra*).

It has been settled, that the general standard is objective and the question is, is he (ie the defendant) up to the standard of the reasonable man? The law cannot be understood unless we bear in mind that if judges by conducts in a particular circumstances in which the defendant finds himself and in some circumstances actually modifies the objective standard for example, where, in dealing with the liability of the defendant for failing to extinguish a fire started on his land by natural causes. The Privy Council held that the standard was what is reasonable to expect of him in his individual circumstances⁷⁹.

The defendant should not be liable unless it is clearly proved that he could and reasonably in his individual circumstances should, have done more. In *U.T.B v. Ozoemena*⁸⁰, the Supreme Court held that the general concept of reasonable foresight is the criterion of negligence. According to the court negligence is not established by proving that the loss sustained by the plaintiff might have possibly been avoided by the defendant. In that case, a person caused a fire outbreak on the appellant's plot of land, thus there was no breach of duty on the part of the appellant.

79. Goldman v. Hargrave (Supra).

80. Supra

Since the standard is that of the hypothetical reasonable man, in applying this standard, it is necessary to ask what in the circumstances, the reasonable man would have foreseen. So foreseeability is still the test and not probability. The probability for a consequence does not depend upon the knowledge or experience of anybody, but it reasonable foreseeability can only be discovered if it is first decided what knowledge and experience is to be attributed to the reasonable man in the circumstances.⁸¹

2.5.2 Magnitude of the Risk

The seriousness of the injury that is risked or the magnitude of the risk if an accident were to occur must also be taken into account in determining breach of such duty. A classical example is the case of Paris v. Stepney Borough Council.⁸² Where, as we have seen, a higher measure of care was owed by an employer towards a workman who, to the knowledge of the employer had only one good eye. The defendants were in breach of that duty.

However, it was pointed out in that case that the likelihood of injury would not have been sufficient to require the provision of goggles in the case of a two eyed workman. Also the defendant

81. Bolton v. Stone (Supra).

82. Supra.

will be held liable where he foresees and contemplates the consequence of his act and yet takes no precautions; he would be liable for breach of duty of care. However, where injury is not foreseeable by foresight of a reasonable man, there would be no liability, the reason is that in such cases the damage would be too remote.

Similar decision was reached in *A.N.T.S v. Atoloye*⁸³.

2.5.3 Proof of Breach

One interesting case worthy of mention here is the case of *Imo Concord Hotel Ltd v. Justice Kalu O. Anya*⁸⁴ because of the different decisions given by the trial Court and the Court of Appeal. This writer deemed it necessary to state the facts of the case before venturing into analysis of the decisions. Facts of the case; the respondents case at the trial was that on the 19th day of December, 1986, he arrived at Owerri from his abode at Amaekpu Ohafia to attend a book launching ceremony, that he drove to the Concorde Hotel in his Peugeot 505 SR A/C Saloon car with registration No. IM6583AF for the purpose of lodging in the said Hotel. Describing the security arrangement at the Hotel, the respondent gave evidence that the Hotel is of international standard and occupies a vast area of land which is completely fenced round with only one entrance into the premises,

83. (1993) 6 NWLR (part 298) 233. Also *Ngilari v. Mother cat Ltd.* (1999) 13 NWLR part 636, 621

And much earlier M.B.N Ltd v. P.A Abusomwan (1986) 2 NWLR (part 22) 270. And Seismographservice v. Mark (1993) 7 NWLR (part 304) 203. Koya v. UBA Ltd. (1997) 1 NWLR (part 481) 251. Agbenelo v. UBA Ltd (2000) 7 NWIR (Part 666) 535

84. (1992) 4 NWLR (Pt 234) 210

that at the entrance is an Iron barrier so fitted that it makes entry of vehicles impossible unless it is lifted and that the entrance was guarded by two security men on twenty four hours duty. The respondent further gave evidence that according to the routine no car was allowed into the hotel premises unless a number was given to the owner, who must surrender same to the security men before he is allowed to drive out from the premises.

It was the respondent's case that when on the 19th December, 1986 at between 10 and 11pm he arrived at the entrance of the Hotel, he saw two security men which was (sic) the 2nd and 3rd appellants on duty at the gate, that the 2nd and 3rd appellants registered the number of his car and issued him with a plastic disc number 102. That upon entrance into the hotel premises, he locked his car and kept the keys in his pocket and booked for an accommodation and was checked into room 322 after paying a deposit of N120; that the following morning he went for his car after settling his bills and was checked out of the Hotel but to his surprise, he did not find his car, that he reported the matter to the general manager of the hotel who subsequently provided a car to take him back to Ohafia.

The respondent alleged that his car which was only 9 months old cost N65, 000 at the time it was stolen due to the negligence of Appellants.

In their defence the appellants admitted that they had parking facilities in the hotel premises for the cars of visitors that they also posted security men in and around the hotel to look after the cars so parked, and in addition they secured the services of policemen in the Hotel at all times. The Appellants however contended that the facilities herein mentioned were gratuities as no fee were charged on visitors for parking their vehicles in the hotel premises, the appellant denied liability for the theft of the respondent's vehicle. Furthermore, the Appellants contended that the plastic disc issued to car owners was to enable them regulate the numbers of cars in the premises and that in a conspicuous place near the entrance to the hotel is mounted a board with a warning notice which read "Owners park at their own risk".

Explaining the circumstances surrounding the disappearance of the respondent's vehicle the appellants stated that it was when the iron barrier at the gate was raised for another vehicle that the

respondent's car suddenly emerged from the rear and drove off at great speed without stopping for the necessary formalities.

At the conclusion of oral evidence, the trial judge entered judgment for the respondent awarding him N65, 000 as special damages for the value of the vehicle and N30, 000 general damages with costs assessed at N1, 500. The respondent's claim of N840 for loss of use of the vehicle was refused. Being dissatisfied with the judgment of the Court, the Appellants appealed to the Court of Appeal. The Court of Appeal unanimously allowed the appeal.

To start with, this writer is in total agreement with the judgment of the trial Court, which held the Appellants liable in negligence. The trial Court held that the Appellants were in breach of duty of care, by allowing the respondent's car to be driven out of the premises of the hotel without the plastic disc being surrendered. If one may ask, what is the purpose of issuing plastic disc to every vehicle that entered the premises? What was the duty of the security men brought on the premises by the 1st Appellant? The Court of Appeal per Ndoma - Egba J.C.A (as he then was) has this to say;

Negligence as a tort consist of a duty to be careful owned to a person or group of persons a breach of which results in liability for compensation to the respondent by way of damages. There is no such duty on the part of the Appellant owed to the respondent in this case which was breached. There is no evidence either that the Appellants negligently allowed thieves to drive the respondent's car through the Hotel gate as to be answerable directly or vicariously through its agents.

With due respect, there is a duty on the Appellants to secure not only the respondent but his property which he brought to the premises (with the combine authority of *Donoghue v. Steveson*⁸⁵ and *Dorset Yacht v. Home office*⁸⁶).

The Appellants admitted that they have parking facilities in the premises of the hotel for the cars of visitors; they also post security men in and around the hotel to look after the cars so parked. Additionally, they secure the services of policemen in the hotel at all times.

This admission answers the questions posed earlier, the parking facilities of the premises of the hotel is for the cars of visitors (i.e. customers) of the Appellants, the duty of the security men is to first safeguard the cars at the parking lots which is the duty owed

85. *Supra*

86. (1970) A.C 1004

to not only the respondent but to every customer, which they have failed by allowing the respondent's car registered in his name and given a plastic disc which must be surrendered at the gate before leaving the premises.

There was a breach of duty by allowing another person or thieves to drive the respondent's car through the gate of the hotel without checking or surrendering of the plastic disc which was registered against the respondent's car. The argument or contention that the facilities are gratuitous as no fees are charged on customers or visitors for parking their vehicles in the premises of the hotel cannot hold waters. It is submitted that this contention is not only wrong but also untenable. It is the view of this writer from all the decided cases disused so far, that the money paid by the respondent to 1st Appellants is not only for the respondent to fly into his room and fly out immediately his time is out but covers all other services provided by the 1st Appellant.

The learned law lords went further to say that "The security arrangement at the hotel is merely an inducement to attract customers and cannot perse constitute a contract of bailment between customers or visitors and the owners of the hotel". The word "Inducement" is capable of so many meaning however it may be interpreted that once anybody induces anybody or the

public to come and lodge in his hotel, he owes a duty to that person who falls victim of his inducement when he suffer any damage as result thereof.⁸⁷

Secondly, it was the Court of Appeal that raised the issue of bailment for the first time in its judgment. It was not conversed by the appellant or the respondent and the Lower Court did not refer to it. This also, this writer submit is wrong⁸⁸. The issue of bailment is a breach of contract quite different from a breach of duty owed the respondent in this case. There is a notional duty owed independent of contract. The rule is that, you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour – persons who are closely and directly affected by my acts that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question, the respondent fall into this category but the Court of Appeal chooses to look the other way.

87. The dictum of Alderson B (supra). Also, *Hilder v. Associated Port Land Cement Manufactures Ltd* (1961) 1 WLR 1434

88. see *Agbonmangbe BankSupra*; Bailment is a contract where one gives his goods or article to another for keep for a certain time or transport it to a destination or surrender to another any breach that arises as a result, whether for a fee or gratuitously is a breach of contract not a breach of duty as in the tort of negligence.

(It is important to mention here that the respondent is fully aware of his rights).⁸⁹

The Court of Appeal gave the following reasons for its decision; the Appellants cannot be liable for negligence of the loss of the car because;

- (a) Security precautions taken by the hotel to ensure that vehicles parked in its premises were reasonably adequate and safe.
- (b) The respondent was in possession of the key of the car when the theft of the said car was being committed.
- (c) The hotel visibly displaced a permanent notice board in the premises disclaiming liability for theft of cars parked in its premises.
- (d) There was no contract of bailment between the hotel and the respondent.

A closer look at the *stare decisis* given above, one would notice that it is one thing to say that there is no relationship between the Appellants and the respondent (i.e. no duty is owed to the respondent) and another thing to hold that because the security precautions taken by the hotel to ensure that vehicles parked in its

89. He is a retired chief judge of Borno State and at the material time the pro-chancellor and chairman of the council university of Benin.

premises were safe were reasonably adequate. What this mean is that, the precautions taken were reasonably adequate to remove the notional duty owed the respondent. It would have been better for the Court of Appeal to have held that there was a duty owed the respondent but denied liability on the ground that adequate precaution was taken. (This is as we say in practice assuming without conceding) than to have held no contract or duty exist.

In addition, the fact that the respondent was in possession of the key of the car when the theft of the said car was being committed legally speaking goes to no issue in this case. The case of the respondent is purely on the tort of negligence and the Court is limited to the determination of negligent liability or not (i.e. whether the Appellants were liable or not). The Appellants neither allege any complicity or that the car was stolen because the respondent was with the key or that he refuses to deposit the key as require by them. Even the Court of Appeal did not expatiate on how this exculpated the Appellants from liability.

On the issue of the display of notice exempting liability, the issue is not whether or not the notice excluding liability was sufficient to absolve the Appellants from liability if a duty of care existed and a

breach occurred. It is whether or not such notice was in actual fact exhibited in the premises of the hotel. The respondent testified that there was no such notice at the material time. We are yet to fathom how this formed party of the decision of the Court of Appeal.

In this case, there is no issue as to bailment. *It was duty owed to a lodger and his property, which was, under the general criterion for liability in negligence, was within proximity, foreseeable and not remote*⁹⁰. That is why Lord Denning M.R. expressly stated:⁹¹

It is not necessary that the precise concatenation of circumstances should be envisaged. If the consequence was one which was within the general range which any reasonable person might foresee (and was not of an entirely different kind which no one would anticipate) then it is within the rule that a person who has been guilty of negligence is liable for the consequence.

This writer is of the view that the instant case was within the general range which any reasonable person ought to foresee and the rule that who has been guilty of negligence is liable for the consequences as held by the High Court should apply.

90. Italic provided

91. *Stewart v. West African Terminals Ltd* (1964) 2 Lloyds Report 371.

2.5.4 *Res- Ipsa Loquitor*

The burden of proving negligence that the defendant was in breach of the duty of care he owed to the Plaintiff always lies on the Plaintiff. In the tort of negligence it is for the person who suffers the injury to prove affirmatively that it was caused by the defendant's carelessness. In many cases where the Plaintiff is unable to show how a certain accident occurs his action is likely to fail, as he would not have adduced any evidence of negligence on the defendant's part, unless he successfully plead the doctrine of, "*Res Ipsa Loquitor*". It was applied in a case of *Scott v. London & St. Katherine Docks Co.*⁹² where a bag of sugar fell from upstairs window of a building on a passer-by. The defendant was held liable.

By application of this rule meaning that the "Act speak for itself". The condition necessary for the application of this rule was stated in the above case Per Earl C.J

That the thing which caused the damage was under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care.

It affords reasonable evidence, in the absence of explanation by the defendant that the accidents arose from want of care.

Adefarasin A.g. C.J.⁹³ observed.

The Maxim is no more than a rule of evidence affecting onus. It is based on common sense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the Plaintiff and are or ought to be within the knowledge of the defendant.

It was established in *Barkway v. South Wales Transport*⁹⁴ that when all the facts surrounding the accident are known, there is no room for the application of the maxim.

The majority of Nigerian cases in which the doctrine has been invoked concerned road accidents. For example in the case of *Ifeagwu v. Tabans Motors Ltd.*⁹⁵ the Plaintiff was sitting in his brother's roads side shop at a village on the Onitsha - Enuguroad when a petrol tanker, enroute to Enugu collided with a nearby electricity pole, over turned and burst into flames the plaintiff was badly burned in the inferno, and he subsequently sued the defendants as employers of the tanker driver,

93. *Akintola v. Guffant & Co Ltd* (1974) 5 CC ACJ. 673.

94. (1950), All E.R. 392.

95. (1972) 2 E.C.S.L 970.

for negligence relying on “*Res Ipsa Loquitor*: Aseme J. held “that the maxim applied in the circumstance I find that the defendant is liable to the Plaintiff for negligence”.

Where *Res Ipsa Loquitor* is successfully pleaded the effect is that it shifts the burden of proof to the defendant; to show either that the accident was due to a specific cause which did not involve negligence on his part, or that he had use reasonable care on the matter. For the plaintiff to rely on the doctrine he must establish two things.

- a. That the thing causing the damage was under the management or control of the defendant or his servants.
- b. That the accident was of such a kind as would not in the ordinary course of things have happened without negligence on the part of the defendant.

A good illustration is found in the case of *Ejisun v. Ajao*,⁹⁶ where the plaintiff was riding his motor cycle along a wide unobstructed highway near Funtua when he was knocked down from behind by a lorry driven by the 1st defendant a servant of the 2nd defendant Bello S.P.J. said; A motorist does not, in the ordinary course of

96. (1975) N.L.M.R 4.

things, drive his vehicle in this manner if he drives with proper care. The presumption, therefore, is that the accident could not have occurred without some sort of negligence on the part of the first defendant. I find a prima facie case has been made out against the first defendant and the burden is thrown upon him to prove that he was not negligent, he has failed to discharge the burden of proof. I find him liable .

Similarly in *Jibowu v. Kuti*⁹⁷ it was held that since the defendant had failed to discharge the onus of proof which lay upon him he was liable in negligence.

97. (1972) 2 U.I.L.R 367 Also: However in *N.B.C.v. Olarewaj* (Supra) it was held that the doctrine of *Re Ipsa Loquitur* does not apply in food poisoning cases.

2.6 Damage

The third ingredient of the tort of negligence is that, the Plaintiffs damage must have been caused by the defendant's breach of duty. Having established that the defendant owed a duty of care to him and that he was in breach of that duty, the Plaintiff must then proof that he has suffered damage for which the defendant is liable in law, entitling him the Plaintiff to the award of damages. There will be no award of damages to the Plaintiff if the defendant successful pleads any of the defences available in tort or no damage⁹⁸. The object of a civil inquiry into cause and consequence is to fix liability on some responsible person and to give reparation for damage done. The trial of an action for damage is not scientific inquest into a mixed sequence of phenomena, or an historical investigation of the chapter of events; it is a practical inquiry. It has been stated that theoretically the consequences of any conduct may be endless, but no defendant is responsible *ad infinitum* for all the consequences of his wrongful conduct, however remote in time and however indirect the process of causation, for otherwise human activity would be unreasonably hampered ⁹⁹.

98. Chukwu v. Uhegbu (1963). All NLR 642 held no liability in the absence of damage.

99. Opp. cit. p. 139.

Since 1850,¹⁰⁰ two competing views of the test of remoteness of consequences have been current in the law, first, consequences are too remote if a reasonable man would not have foreseen them. While the second was that, if a reasonable man would have foreseen any damage to the Plaintiff as likely to result from his act, then he is liable for all the direct consequences of its suffered by the Plaintiff whether a reasonable man would have foreseen them or not.

In 1921 and in *Re Polemis*¹⁰¹, the Court of Appeal apparently settled English law in favour of the second test. A chartered vessel was unloading in Casablanca when Stevedores, who were servants of the charterers, negligently let a plank drop into the hold. Part of the Cargo was a quantity of Benzine in tins, which leaked, and a rush of flames at once followed, totally destroying the ship. The charterer were held liable for the loss – nearly £200, 000 – the Court of Appeal holding that they were responsible for all the direct consequences of the negligence even though they could not reasonably have been anticipated.

Two aspects of this rule shall be discussed here i.e causation and remoteness of damage.

100. *Ibid* 139.

101. (1921) 3 K.B. 560

2.6.2 Causation

According to Kodilinye¹⁰²A useful test which is often employed is the “but-for” test that is to say, if the damage would not have happened but for the defendant’s negligence act, then, that act will have caused the damage- a good illustration is found in the case of Barnett v. Chelsea and Kensington Hospital management committee¹⁰³.The plaintiff’s husband, after drinking some tea, experience persistent vomiting for three hours together with two other men who had also drank the tea. Dr. B, who was himself tired and unwell sent a message to the men through the nurse that they should go home to bed and consult their own doctors the following morning some hours later the plaintiff’s husband died of arsenical poisoning and the coroner’s verdict was one of murder by a person or persons unknown; in an action against the hospital authority as employers of Dr. B. it was held that, in the failing to examine the deceased, Dr. B. was guilty of a breach of his duty of care, but this breach could not be said to have been a cause of the death because even if the deceased had been examined and treated with proper care, he would in all probability have died anyway.

102 opp.cit p. 54

103. (1968) 1 ALL ER 1068

It could not therefore be said that “but for the doctors negligence the deceased would have lived”

A more severe application of the but for test occurred in *Mc Williams v. Sir Williams Arrol Ltd.*¹⁰⁴ A steel erector was killed when he fell from a building on which he was working. Had he been wearing a safety harness, he would not have fallen. The defendants, his employers, were under a statutory duty to provide safety harnesses for all their employees working on high building and were in breach of that duty by failing to provide them. Nevertheless, they were held not liable since they proved on previous occasions when safety harnesses had been provided the plaintiff had never bothered to wear one. The inference therefore was that even if a harness had been provided on the day of the accident, the plaintiff would not have worn it. Thus it could not be said that the failure to provide a harness was a cause of the death¹⁰⁵.

104. (1962) 1 W L R 295

105. What happens to the power of the plaintiff’s employer to stop him from carrying out his duty without wearing the harness?

2.6.3 Remoteness of damage

The concept of remoteness of damage is one way in which the law sets limits to the extent of a person's liability for the consequences of his negligence, and the rule is that a defendant will be liable only for those consequences of his negligent act which are not too remote in law even though such act may be said, on an application of the "but - for" test to have caused the damage complained of. Consequences are too remote if a reasonable man would not have foreseen them¹⁰⁶. Thus, foreseeability is the criterion not only for the question whether a duty of care is owed, but also for the question whether damage is or is not too remote. The foreseeability test was applied by the judicial committee of Privy Council in the case of *Overseas Tankship (U.K) Ltd. v. Morts Dock & Engineering Ltd.*¹⁰⁷. The defendants negligently discharged oil from their ship in to Sydney Harbour, where the plaintiffs were carrying out welding operations, molten metal from the welding set fire to some Cotton waste floating on the oil beneath the wharf. The wharf was severely damaged.

The Court held that since, on the evidence, the defendants neither knew nor ought to have known that the oil was capable of catching fire when

106. *Overseas Tankship v. Morts Dock & Eng. Ltd.* (1961) A.C 388

107. *Supra.*

spread on water, they could not reasonably have foreseen that their act of discharging the oil would have resulted in the plaintiff's wharf being damaged. The damage was thus too remote, and they were not liable for it. But they were liable for the fouling of the slipways, since that was a foreseeable consequence of the discharge of the oil.

So many issues and questions have arisen after the above decision but it appears to have been settled by the Court of Appeal in the case of *Re Polemis*¹⁰⁸ where it was laid down, that provided some damage is foreseeable, the defendant is liable for all the direct consequences of his act, whether those consequences are foreseeable or not.

108. (1921) 3 K B 560

CHAPTER THREE

NATURE AND SCOPE OF CATEGORIES OF NEGLIGENCE

3.1

INTRODUCTION

In Nigeria, negligence has only comparatively recently begun to assume the prominence which it has long enjoyed in the industrial common law countries.¹ The increase in negligence litigation in Nigeria is directly linked with the dramatic growth of commercial activity and road traffic during the post-independence era. As it has been observed earlier², negligence is the most important and dynamic of all torts, from a practical point of view. Its emergence as a separate tort in early part of the 19th century was as a result of the industrial revolution in England and the advent of machinery, railways and motor vehicles, to this day it has retained its function as the principal means of compensating victims of accidents particularly those occurring in factories and on the roads.

As noted earlier, liability for negligence has been restricted or limited in various ways and forms before 1932³

It was Lord Atkin's decision in 1932⁴ that opens the gate for new fronts of the tort of negligence; it recognized new duty or plaintiffs. This decision has been used as the yard stick (for the ever expanding tort of negligence) for determining new duties and liabilities.

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1. Kodilinye,(1999) Nigerian Law of Torts, Spectrum Books Ltd. Ibadan p. 38.
 2. Chap. 2 ante.
 3. Heaven v. Pender (1883) 11 Q B D 503. Also, Derry v. Peek (1899) 14 A C 337.
 4. In Donoghue v. Stevenson (1932) A C 562.

As rightly said by Lord Macmillan “the categories of negligence are never closed”⁵- there are no closed list of duty-situations however there are a number of common situations in which it is well established that a duty of care exists. For instance a manufacturer of goods owes a duty of care to consumers to ensure that the goods are free from harmful defects.⁶

An employer of a workman in a factory owes a duty of care to provide adequate equipment and a safe system of working.⁷

A bailee of goods owes a duty to the bailor to take care of the goods entrusted to him.⁸

A driver of a vehicle on the road owes a duty of care to other road users, pedestrians and occupiers of premises abutting the highway to drive carefully.

An occupier of premises owes a duty of care to lawful visitors to ensure that the premises are reasonably safe.⁹

Recently, the Supreme Court held Airlines liable for injury of passengers on board of aircraft¹⁰.

By virtue of Article 17 of the Warsaw Convention, the carrier is liable for the damages sustained in the event of the death or wounding of a

5. In *Donoghue v. Stevenson* (Supra).

6. *Donoghue v. Stevenson* (Supra).

7. *Paris v. Stepney Borough Council* (1951) A C 367.

8. *Nigerian Ports Authority v. Ali Akar & Sons* (1965) 1 ALL N L R 259.

9. *Anns v. London Borough of Merton* (1977) 2 ALL E R 492.

10. *Harka Air services (Nig.) Ltd v. Emeka Keazor*. Thisday, Lawyer, Tuesday September 27, 2011, P IV

Passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

The Centre piece of this chapter is to discuss the far reaching and unending development of the categories of negligence, e.g. standard for acts requiring special skills, product liability, negligent misstatement, nervous shock, liability of bankers, solicitors and doctors and hospital management.

By recognizing new duty situations the Court are constantly expanding the scope of the tort of negligence but at the same time it is accepted that public policy requires some limits to be set to the range of liability.

3.2

STANDARD FOR ACTS

REQUIRING SPECIAL SKILL

In every field of human activity, the liability for negligence is fixed by the standard of reasonable foreseeability. A person who holds himself out as having a certain skill either in relation to the public generally (e.g a car driver) or in relation to a person for whom he is

performing a service (e.g Doctor) will be expected to show the average amount of competence normally possessed by persons doing that kind of work, he will be liable in negligence if he falls short of such standard. A surgeon performing an operation is expected to display the amount of care and skill, usually expected of a normal competent member of his profession. A Jeweller who pieces ears for earrings is only expected to show the skill of a normal Jeweller doing such work, and not that of a surgeon ¹¹.

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.¹²Professional knowledge in any field increases in size as time goes by, and the Court will endeavour to avoid hindsight in determining whether the defendant's state of knowledge was such as could reasonably have been expected of him prior to the accident.

11. Philips v. Whitely (1939) 1 ALL E.R. 566

12. Philips v. Whitely (Supra).

In *Roe v. Minister of Health*¹³.The plaintiffs were paralyzed after being injected, for minor operations, with an anesthetic solution which had been contaminated. The possibility of such contamination through an invisible cracks in the containers in which the solution had been kept, was not known to the medical profession before this tragic case brought it to light; the defendants were acquitted of

negligence but as Denning L.J. pointed "Nowadays it would be negligence not to realize the danger, but it was not then".

Magnitude of risk involved is also another factor to be considered in determining the standard of care or skill required. In *Paris v. Stepney Borough Council*¹⁴ it was held that the defendant had been negligent in not providing this particular workman with goggles, since they must have been aware of the gravity of the consequences if he were to suffer an injury to his one good eye; though it was pointed out that the likelihood of injury would not have been sufficient to require the provision of goggles in the case of a two eyed workman.

It was *McNair J.* who drew the distinction between acts requiring special skill and those not requiring special skill, where he said.

13. (1954) 2 Q B 66.

14. *Supra.*

"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".¹⁵

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. The standard is not reduced or affected by the simple reason that the driver is a learner he must comply with the same objective of an impersonal standard required of every driver.¹⁶ Thus, it is not a defence for him to say that is using such care and skill as he possessed. Similarly, it is not a defence to say that I used or acted to the best of my ability and judgment.

The standard that is required is dependent on the nature of each case, parties involved and the circumstances giving rise to the case.

Nowadays most standard required of professionals are laid down by statutes.¹⁷

15. Bolam v. Friern Hospital Management Committee (1968). 1 All E.R. 1068

16. Bolam v. Friern Hospital Management Committee (Supra).

17. Such as Highway Code, Legal Practitioner Acts etc.

There are laws guiding the practice of a Barrister and Solicitors, and Medical Practitioners, a violation of any of the law is deemed negligence per se.

This writer will attempt to give account of the development of standard requiring special skills in this chapter in the following areas. Careless misstatements, Solicitor's liability and Medical negligence etc.

3.3 PRODUCT LIABILITY

The cardinal principle of liability is that the party complained of should owe to the party complaining a duty to take care, and that the party complaining should be able to prove that he has suffered

damage in consequence of a breach of that duty.¹⁸ The view was that liability for negligence can only exist if the case is covered by a duty which has already been recognized.¹⁹ It has been stated against this view that in denying the existence of duty in some cases the judges have done so on the ostensible ground that no authority for such a duty exists. But they have not hesitated to produce a new duty when it has seemed right to them to do so. That is why Lord Macmillan has said “the categories of negligence are never closed” and the argument to the contrary has been rejected in terms²⁰.

18. *Susainah (Trawling Vessel) v. Abogun* (2007) 1 N W L R (part 1016) 456 at 463.

19. *In Landon's Case* (1899) 14 A C 337.

20. *Donoghue v. Stevenson* (Supra).

Before 1932 there was no liability for dangerous goods, products or chattels apart from contract²¹. The decision in *Donoghue's case*²² revolutionized the concept and expanded ambit of liability. It was the turning point which extended the liability to various classes of manufacturers, repairers, fitters, erectors and assemblers. Lord Macmillan had emphasized in the same case²³.

The question is, does he owe that duty to take care, and to whom does he owe that duty? Now I have no hesitation in affirming that a person who for gain engages in the business of manufacturing articles of food and drinks intended for consumption by members of the public in form in which he issues them is under a duty to take care, in the manufacture of these articles. He went further to say that; that duty, he owes to those whom he intends to consume his products, he intends and contemplates that they shall be consumed. By reason of that very fact he places himself in a relationship with all the potential consumers of his commodities and that relationship which

he assumes and desires for his own ends imposes upon him a duty to take care to avoid injuring them. Lord Atkins test in 1932, thus, became the turning point which overthrew the fallacy of privity of contract that has inhibited the growth of the law, and provided authority for the proposition that notional duty is owed independent of contract by a manufacturer to the ultimate consumer of his product. Following this, the word manufacturer has been given a

21. The most Famous and most important creative generalization of Lord Atkins in Donoghue's case.

22. Supra.

23. Supra.

broader meaning and it now includes assemblers, repairers, and even suppliers of drinking water. It applied to retailers who perform some work on the goods other than mere distribution. All of them are deemed to owe a duty of care to their final consumers.

The full rule that was developed was expressed as follows:

A manufacturer of a products which he sells in such a form to show that he intends to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumers life or property, owes a duty to the consumer to take that reasonable care.²⁴ Before this case was decided, it had been thought that the absence of any contractual relationship between manufacturer and consumer was fatal to a claim in negligence but Donoghue's case corrected this error.

In 1939, in Australia²⁵, A, bought underwear from a retailer which were exposed though they were packaged when they came from the manufacturer, excessive sulphur was used during manufacturing and the Plaintiff contacted dermatitis. The manufacturer's defence was that the goods were sold to the plaintiff while packaged. The Privy Council however held that although they were exposed they nevertheless reached the plaintiff in the same condition as the manufacturer intended them to be.

24. Lord Macmillan in *Donoghue v. Stevenson* (Supra).

25. *Grants v. Australian Kitting Mills* (1936) AC. 85

Similarly, where the defendant a garage owner negligently reassembled the flange on the wheel of X's lorry, later X when he was driving the lorry on the highway the flange came off the lorry mounted a pavement and injured the plaintiff a pedestrian. The defendant was held liable for his negligent repairs.²⁶

Nigerian Courts, like other areas of law have followed the most famous and most important creative generalization of Lord Atkin and have adopted it to our local situation` most times without modification.

One of the outstanding of the cases is *Osemobor v. Niger Biscuit*²⁷ the plaintiff purchased at a supermarket a packet of biscuit manufactured and packed by the defendants. In the course of chewing the biscuit she felt something hard in her mouth, which turned out to be decayed tooth. As a result she became ill and required medical attention. Holding the defendants liable in negligence *Kassim J.* in the Lagos High Court held.

I am satisfied that there was no probability of an intermediate examination of the biscuits before they

reached the plaintiff and I find myself unable to uphold the submission of the learned counsel for the defendants that she was bound to look at the biscuits before she put them in her mouth -- A person who manufactures goods, which he intends to be used or consumed by others, is under a duty to take reasonable care in the manufacture, so that they can be used or consumed in the manner intended, without causing physical damages to person or property.

In 1975, the case of Nigerian Bottling Company Ltd. v. Constance O. Ngonadi²⁸ came up.

One interesting thing about this case was that one of the issues formulated for determination by the Supreme Court *inter-alia* was, "Does the rule in Donoghue v. Stevenson, apply only to manufacturers of good and not retailers" (We will see whether the decision answers the above question or issue thoroughly) in that case, the respondent (plaintiff in the trial Court) who trades on beer and soft drinks on a retail basis, bought from the appellant a kerosene refrigerator known as Evercold Refrigerator. It was installed on the 12th February, 1975. On 14th February, 1975 it caught fire and was repaired. On the 29th August, 1975, the refrigerator exploded resulting in extensive personal injuries to the respondent. She was hospitalized and the injuries she sustained were found to have affected her breast feeding of her children, the colour of her hairs, and hands. The respondent then sued for negligence. The trial judge considered the evidence and held the appellant liable in negligence. He awarded of total £30,435.00 to the respondent. The Court of Appeal confirmed all the findings of the learned judge and affirmed

his decision. On appeal to the Supreme Court;unanimously dismissing the appeal it was held that “therule in Donoghue v. Stevenson also makes no distinction between manufacturer and distributor in cases of negligence but merely extended the limit of

liability to the manufacturer. The *ratio decidendi* for this decision was, the manager of the appellant company, that distributes the Evercoldrefrigerator not only informed her that the refrigerator was well suited for that purpose. He actively encouraged the respondent to purchase it. And it is shown that the plaintiff had no opportunity of examining the goods before they were sold and very shortly afterwards the defect manifest itself. These were the original concept in Donoghue’s case.

In 2007, in N.B.C Plc. v. Olarewaju²⁹,the High Court of Kwara State gave a remarkable judgment based on all the principles already enumerated but unfortunately the Court of Appeal reverse the decision of the Lower Court.

The respondent claimed that on 3/4/2000 he purchased two bottles of coca-cola, a product of the appellant, from one Mrs. Agnes Olaniyan, a retailer, he noticed visible particles in the liquid content of the bottle he drank, he saw similar particles in the unopened bottle. After about two hours, he felt unwell and consulted a doctor at the epidemiology unit of the Kwara State Ministry of Health. After recovery, his attempts to get in touch with the appellant to lay complaint yielded no fruit consequently, he instituted an action against the appellant and Mrs Agnes Olaniyan Claiming the sum of

₦11, 500.00 being amount the respondent expended on a medical treatment after consuming a bottle of contaminated coca-cola and

29.

(2007) 5 NWLR (part 1027) 255.

five million Naira as general damages for sundry inconveniences and discomfort the respondent suffered on the account of the appellant's negligence. At the end of the trial, the trial Court found in favour of the respondent and awarded him special and general damages.

The appellant was dissatisfied and appealed to Court of Appeal contending *inter-alia* that the trial court was wrong to have held that the averment that the respondent drank a contaminated bottle of coca-cola was not properly challenged by the appellant's pleadings.

That the trial Court was wrong in holding that there is a presumption that it is only the appellant that manufactures coca-cola in Nigeria and the bottle allegedly consumed by the respondent was the product of the appellant. Unanimously allowing the appeal per Ogunwumiju JCA stated.

"To make the standard of proof less might open a floodgate of litigation based on spurious and untrue assertions against-manufacturer. This will have the reverse effect of defeating a very mischief sought to be cured by placing a burden of care on manufacturer of consumables".

What the Court of Appeal is saying in essence is that we know and recognized that the appellant owes a duty to the respondent but the respondent must go beyond mere allegation and Proof to the satisfaction of the Court of Appeal that is the negligent act of the

appellant that has caused him injury or damage i.e to show by proofing either by scientific means or other means that is the very bottle he bought from Mrs. Agnes Olaniyan and drank that caused him pain or discomfort. It is the very failure to proof that made the Appeal Court to reverse the Lower Court's decision.

Another interesting pronouncement of the Court of Appeal in the same matter was that the doctrine of "*Res ipsa loquitur*" does not apply in food poisoning cases in fact this was the "*ratio decidendi*". The plaintiff must proof his case, he must show how the food was poisoned or contaminated and how its consumption affected him medically scientifically. This lead to the fact that negligence is a question of fact and not law ³⁰.

This writer submit that the decision of the Court of Appeal in the above case³¹ was based on technicality and not on the substance of the case. It was based on the rule of evidence and not whether there was negligence on the part of the Appellant, which the High Court held rightly liable in negligence adopting the same principle in *Donoghue & Osembor v. Niger Biscuits*. Just as in *Imo Concorde Hotel v. Kalu Anya*,³² this writer is in total agreement with the decision of the High Court and sees both decisions of the Court of Appeal in *Imo Concorde Hotel and N.B.C Plc v. Olarewaju* as miscarriage of justice.

30. *Shell PDC v. Ikontia*, (2010) 45 WRN 137

31. *N.B.C Plc. v. Olarewaju* (Supra).

32. (1992) 4 NWLR (part 234) 2010.

Another Nigerian case of *Okwejiminor v. Gbakeji*³³ came up in 2008. With similar facts and features. In that case, the appellant returned from his place of work on the 13th February, 1991 thirsty and hungry. He took a bottle of Fanta, which he bought from the 1st respondent earlier that day. While drinking, he felt some sediment passed through his throat. He stopped half way and took a closer look at the content of the bottle. The appellant felt much discomfort that he went to bed that night without dinner. At midnight of the same day, the appellant woke up with stomach pain and was taken to the hospital. The doctor who attended to him recommended a laboratory test of both the appellants stool and the remaining of the fanta orange. The laboratory result showed that the appellants stool and the fanta orange drink both had a common germ.

In its judgment, the trial Court found that the appellant's stomach ailment was caused by the fanta orange drink. Consequently, the trial Court held that the appellant proved his case and it awarded damages in his favour.

The 2nd respondent was dissatisfied with the judgment of the trial court and it appealed to the Court of Appeal.

The appellant, on the other hand, was dissatisfied with the quantum of damages awarded in his favour, and he appealed against that part of the judgment of the trial Court.

33. (2008) 5 NWLR Part 1079, 172

appeal and dismissed the cross-appeal.

The appellant was dissatisfied with the judgment of the Court of Appeal and he appealed to the Supreme Court which held *inter-alia*, per I.T Muhammad. J.S.C;

Basically, therefore, there existed a duty of care imposed by the law on the defendants to the plaintiff. And in the preparation, production and supply of their products, the defendants/respondents were required by the law to have reasonable foresight and have in contemplation the effect of their products on the ultimate consumer. Where the required care has not been taken as in this appeal, where foreign elements found their way into the product, the law can hardly exonerate the defendants as the law presumes them to foresee the kind of harm that occurred.

He quoted with approval the popular dictum of Lord Macmillan³⁴

A manufacturer of products, which he sells in such a form as to show that he intends the products to reach the ultimate consumer in form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care the manufacturing of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take reasonable care in manufacturing the product.

Secondly, the Supreme Court further held that the absence of privity of contract between a person who suffered injury from the use or consumption of a product and the person who made the product does not preclude an action in tort for the injury, provided the former

34. In *Donoghue v. Stevenson* (Supra)

can prove that he purchased the product made by the latter, and suffered the injury from use or consumption of the product.

The fundamental differences between this case and the earlier ones are; firstly, the plaintiff was able to prove his case; there was a

laboratory test which connected his stool and the fanta orange he drank. And the medical doctor who recommended the test and carried out further examination was called as a witness.

The general duties do not arise in all cases, but where on account of attendant circumstances if the owner was expected to carry out an inspection, it would arise. A defendant cannot be exempted merely because an intermediary was under a duty of inspection and was negligent in doing so or did it improperly³⁵. However if the plaintiff knows of the danger and disregards it, the defendant would not be liable.

The concept of product liability is intimately connected with warranty in a contract. It originated in a desire to protect the commercial buyer against financial loss. Its reach was extended to property damage and personal injuries. The movement to afford a better protection to consumers has moved in the direction to give the ultimate consumer injured by defective products a right of recourse against the manufacturer without proof of fault.

35. Grant v. Sun Shipping (1948) AC 549

Nowadays, legislation has taken over consumer protection. We have consumer protection laws for the federation and states laws – each state has law for warranty under contract and sale of Goods Acts have been adopted as state laws many of them without any modifications.³⁷ It must be pointed out here that despite these laws the Nigerian consumer including this writer and his supervisors are groaning under defective products and many discomfort and

injuries, unattended to. It is of a common knowledge in Nigeria that majority of cases never gets to the court. Three factors are responsible for this, which are; Religion illiteracy and delayed justices.

Religion, Nigerians are very religious people, who believe in one God, and anything that happens to them is believed to have come or has the sanction of God and it is the same God that will recompense them even better than the defendant. This belief makes most Nigerians to bear their losses silently as it is said popular parlance "I leave everything to God". This has greatly affected the development of law in general and particularly the tort of negligence in Nigeria.

Secondly, problem of illiteracy in Nigeria has greatly also, affected the development of law in general and particularly the law of torts in Nigeria. Many Nigerian victims don't know their legal right to pursue it to logical conclusion. Many cannot read and write, not to talk of knowing law which is a higher technical area for those who can even read and write.

36. Consumer protection Act LFN 2004

37. e.g. Kaduna State Sales of Goods Edit.

Recently we have witness within the FCT how firms constructing roads (kubwa expressway) have caused accident by blocking roads without warning and not giving proper signs. Many have lost their lives and property yet there were only twocases pending before the FCT High Court on negligence against the construction companying as at then³⁸.

Thirdly, another factor that has negatively affected the development of tort of negligence in Nigeria is delayed justice. It affirmed the

popular adage that says: "justice delay is justice denied". Those that are literate and want compensation from the defendant and not from God has issue of delayed justice to contend with. The case that readily come to mind is the case of *Okwejinor v. Gbakeji*³⁹ the case that commenced in 1991 was finally determined in 2008 by the supreme court a period of 17years. (The plaintiff was lucky to be alive to see the decision) no litigant will start an action that he knows will last 17years. Little or no justice at all can be given to any victims who have to wait long these years to have it. In *N.U.C & 2ors v. Registrar of Co-operatives Societies FCT & 3ors*^{40a} a case of an application to enforce the decision of the registrar of co-operatives Societies FCT commenced in July 2007 up till date the matter is yet to be decided after about 8years of commencement of action. This remains a cog in the wheel of justice delivery and a great source of discouragement to many litigants and has affected negatively the development of the tort of negligence in Nigeria.

38. Subject of discussion at NBA Abuja chapter held in June 2010

39. (2008) 5 NWLR (pt. 1079) 172

40. Unreported FHC/ABJ/471/07

3.4

NEGLIGENT MIS-STATEMENT

AND ECONOMIC LOSS

One other very important area where duty of care came to be recognized, applied and expounded is negligent misstatement. Originally⁴¹, there was no remedy for non-fraudulent misstatement on the basis that there were no common law duty of care and there was no contract. Prior to the decision in *Hedley Byrne v. Heller & Partners*

Ltd,⁴² the law of tort did not impose liability for careless words which had caused the plaintiff to suffer financial loss, unless there was a fiduciary relationship between the parties or unless fraud was proved. The general rule is that the common law duty to take care to avoid causing injury for others is restricted to physical injury either to person or his property. The plaintiff could not succeed in negligent misstatement that was the decision in *Derry v. Peek*⁴³. This does not mean that the law refuses to protect a man's financial or pecuniary interest. The existence of the whole law of contract and of such torts as; intimidation, deceit, injurious falsehood, inducement or breach of contract and conspiracy sufficiently demonstrates the wide degree of – protection afforded and a person can always protect those interests by making an express contract.

The view has been held, that; the reluctance to grant a remedy for the careless invasion of financial or pecuniary interests is long- standing, deep-rooted and not unreasonable.⁴⁴

41. i.e. before 1963 when the decision in *Hedley Byrne & Co.* was given.

42. (1964) A C 465

43. (1889) 14 APP. CAS. 337.

44. *Spartan Steel and Alloy Ltd. v Martin & Co.* (1973) 1 Q B 27

...therefore one who suffers pecuniary loss as the result of an inaccurate or false statement made either to himself (deceit) or to others (injurious falsehood) may have a remedy- but in each case the law requires that he should prove dis-honesty and not merely carelessness.

Although the tort of negligence has now been widened to bring economic loss within its scope, in the loss of that kind foreseeability is required. There comes a point where the logical extension of the

boundaries of duty and damage is halted by the barrier of commercial sense and practical convenience. As a result it is not enough for a plaintiff to prove that he has been prevented from doing something which previously he had done lawfully or that he has suffered loss in his trade or business as a foreseeable consequence of the defendant activities.

In 1951,⁴⁵ the Court of Appeal held that the law distinguished between the negligent circulation of chattels and the issue of negligent misrepresentations. There was liability in the former case but not in the latter, and the distinction had not been affected by Donoghue's case.

However in 1963 the House of Lords in *Hedley Byrne & Co. v. Heller and Partner Ltd.*⁴⁶ held that in principle there was no difference

45. Candler v. Crane, Christmas & Co. (1951) 2 KB 164.

46. Supra.

between physical loss and financial loss and that a duty to take care in making statement existed whenever there was a special relationship and there had not been a disclaimer of responsibility.

Although there has never been much difficulty in holding that there is liability for careless statements causing physical loss. It was novel to impose liability when such statement caused economic loss. In that case, the appellants, advertising agents, were anxious to discover the credit worthiness of Easipower Ltd. who had instructed the appellants to arrange substantial advertising contracts Hedley Byrne asked their

bank, the National Provincial to make inquiries. National Provincial on two separate occasions made these inquiries of Hellers, a firm of merchant bankers. The first inquiry was specifically stated by National Provincial to be “without responsibility” on the part of Hellers and the second inquiry, asking whether Easipower was “trustworthy” in the way of business, to the extent of £100,000 per annum” was answered by Hellers stating” without responsibility on their part or its officials” that Easipower was a “respectably constituted company, considered good for its ordinary business engagements. Your figures are larger than we are accustomed to see.

This reference was passed on to Hedley Byrne, who relied upon it, and suffered loss to the extent of £17, 000 when, as *del credere* agents, they had to pay the sum due on the advertising contracts when Easipower went into liquidation.

The Plaintiff action in negligence failed because the defendants had expressly disclaimed responsibility for their references, but the House of Lords held that, if it were not for this express disclaimer, the defendants would have owed a duty of care to the plaintiff not to cause financial loss by their statements. All five judges of the Court proceeded to expound their views as to the basis of liability for negligent misstatements, but unfortunately there was no uniformity of approach among their lordships.

However, the following points were sufficiently clear from the decision.

- (a) A duty of care will exist only where there is a “special relationship” between the parties. A majority of the judges in Hedley Byrne considered that a special relationship would arise whenever, in the circumstances.
 - (i) It was reasonable for the plaintiff to have relied upon the care or skill of the defendant who made the statement, and
 - (ii) The defendant knew or ought to have known that the plaintiff was relying on him. Thus professional advisers, such as accountants, bankers, commission agents and surveyors will owe a duty of care to their customers in respect of any professional advice given.
- (b) No duty of care will arise where advice is given on a purely social occasion, since it would be neither foreseeable by the defendant that the plaintiff would rely on the advice nor reasonable for the plaintiff to do so.
- (c) A non- professional person who gives information or advice on a business occasion (e.g one trader advising another as to the credit worthiness of a potential buyer) owes a duty of care at least if he has a financial interest in the transaction in question⁴⁷.

The principle in Hedley Byrne has been applied in a number of cases in Nigeria, first, in 1964. In the Lagos High Court by Adedipe J. in *Agbonmagbe Bank v. C.F.A.O*⁴⁸. The decision in this case marks a significant extension by the Nigerian Courts of the Hedley Byrne principle. The facts were that, during a period from August⁷th

to October 5th a trader, who had an account at the Shagamu branch of the defendant bank, gave the plaintiffs a number of cheques for goods supplied her. The plaintiffs handed each cheques, as soon as it was received, to their bankers, the Bank of West African, for collection and the latter duly sent each cheque to the defendant banks headquarters Ebute Meta, in Lagos. The cheques were returned to the Bank on October 10th in a bunch, all dishonoured.

47. *Anderson v. Rhodes* (1967) 2 ALL E.R 850.

48. (1966) All NLR 140; (1967) NMLR 173 It has been observed that the above decision goes further than the Hedley Byrne principle in that there was no positive mis-statement by the defendant bank made in return for any inquiry by the plaintiffs or their bankers.

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 mislead the plaintiffs into believing that the cheques had been paid. It was the plaintiff's contention that if the earlier cheques had been returned dishonoured within a reasonable time, the plaintiffs would have stopped delivery further goods to the trader, and thus would not have lost the amount represented by the subsequent cheques.

Adedipe J., took the view that cheques sent from Lagos to Shagamu should, if not paid, have been returned within a week and that the Agbonmagbe Bank had failed to fulfill its duty to return them in the ordinary course 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 breach of its duty of care owed the plaintiffs and was liable to the plaintiff in negligence.

The Supreme Court upheld the decision of Adedipe J., Bairamian JSC (As He then was) delivering the judgment of the Court, said.

Hedley Byrne & Co. v. Heller and Partners Ltd shows that Bankers normally owe a duty of care to persons whose bank is making an enquiry 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. 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 damage caused by its negligence.

Another classical application of the principle in Hedley Byrne in Nigeria was in 1974, in the case of Imarsel Chemical Co. Ltd v. National Bank of Nigeria Ltd.⁴⁹ here, D, a Pharmaceutical Company applied to the plaintiffs who were prepared to give credit, but insisted upon a reference from D Company banker D. Company produced a letter from the manager of the Enugu branch of the defendant Bank which stated that D 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 plaintiffs incurred a loss of nearly ₦3, 000 in respect of the money lent to D. Company and not repaid. Okagbue J. said, *inter-alia* "there can be no doubt that the defendant's manager knew that the plaintiff would place reliance on

his statement. I find as a fact that they did, and the statements were negligent. On the authority of Hedley Byrne I hold that the plaintiff's claim succeeds".

Negligent misstatement can take many different forms. The most obvious type of case is a careless response to a request for a specific piece of information, as in Hedely Byrne itself. But it also includes careless advice and evaluation in situations requiring special skills,

49.(1974) 4 E C S L R 355.

and extends to professional activities of a more positive nature such as the carrying out of an audit on a company or the preparation of maps and charts and the like. It might also be taken to include cases of negligent design, e.g of buildings, or of cranes and other complex pieces of machinery. Much of the controversy about the role of the duty of care in negligence has arisen in case which have involved the problem of "economic loss" the expression is liable to mislead; If a car is destroyed, that is "economic" in the sense that the owners assets are thereby diminished, but in legal term it is classified as damage to property and the owner is entitled to its value as damages. Even if the loss is unquestionably only financial in nature no difficulty is felt about allowing its recovery if it is plaintiff's property, e.g, the plaintiff in Donoghue could have recovered lost earnings and medical expenses and a company whose machinery was out of action. Where, however, this link of physical harm is absent, liability has generally been denied unless there is some further factor.

Good illustrations of this position are as follows; In the case of *Celanese v. A.H. Hurt (Capacitors) Ltd*⁵⁰ 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 production to grinding halt, as a result of the power failure. It was held that the defendants did indeed owe the plaintiffs a duty to take reasonable care to prevent the foil from escaping from the

50. (1980) 1 ALL ER 928

Plaintiff's factory premises in such a way as to foul the exposed conductors of their electricity supply.

The above decision was held to have been decided correctly in the case of *S.C.M (UK) Ltd v. W.J. Whittal and Son Ltd*⁵¹. 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 plaintiff's factory as well as many other factories. The plaintiffs have suffered severely especially from the power failure which lasted over seven hours, because they had molten metal in their machines which solidified owing to lack of heat. It was held that contractors were liable for the material damages 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.

The decision was also followed and applied in the case of *Spartan Steel and Alloys Ltd v. Martin and Co.*⁵² in that case, the defendant's

employees negligently damaged an underground electricity cable whilst digging up a road so that power supply to the plaintiff's factory was unexpectedly interrupted for more than half a day. During the time it took to restore the power, the plaintiffs had to pour molten metal out of their furnace to prevent the metal

51.(1971) 1 Q B 337

52.(1973) 1 Q B 27.

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 melt amounting to £400. Also 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 judgment in respect of £368 loss but denied liability in respect of the economic loss suffered that is the anticipated profits. 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 foreseeable financial loss immediately consequential on the foreseeable 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.

However in a recent decision of the Supreme Court in the case of Chief Patrick A. Abusomwanv. Merchantile Bank Nigeria Ltd ^{53a}

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.

Here, the appellant Chief (Patrick A. Abusomwan) entered into an agreement for the importation of cement from time international

53. (1986) 2 N W L R (part 22) 270.

corporation New York- through one Mr. Bassey and Mr. E.E. Tucker (i.e the 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 and invoices consequent upon the letter 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 mercantile Bank of Nigeria Ltd) directed that document be drawn in favour of Heilit Nigeria Ltd and endorsed to the back. As result of this non-compliance the defendant/respondent did not inform new Nigerian Bank Ltd.about the arrival of the cement but instead they informed Heilit Nig. Ltd, Mr. Tucker took delivery of the cement consignment before the appellant, Mr. P.A Abusomwan became aware of its arrival sold 45200 bags out of the total consignment of 84,000 bags shipped to him (Mr. P.A Abusomwan). The learned trial judge found defendant/respondent liable for negligent as sued.

The defendant/respondent appealed against the judgment of the High Court 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 appealed to the Supreme Court where it was held among others that the 19th century view that 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 thus allowed the appeal.

On this point, it has been observed that Hedley Byrne is the most striking decision in the field of negligence, perhaps in torts in general. In the years between Donoghue v. Stevenson and Anns v. Merton L.B.C, all have recognized the judicial valour shown in bringing economic loss caused by careless statements within the field of liability.

SHOCK

Negligent conduct produces harm and the harm may be in the form of external visible physical injuries or it may be in the form of mental injuries which may not so exhibit itself into visible injuries. However, with the aid of advanced scientific knowledge has made it possible to link between the defendant's conduct and the damage and thus to evaluate the same in terms of money and to ward off the simulative or fictitious claims. A shock for this purpose (or in the legal sense) is not merely a fright but identifiable physical and or mental lesion brought about, not by physical impact but through the mind, by what has been seen, heard or otherwise experienced.

The development of this aspect of negligence was gradual and it is not of recent origin like the tort of negligence⁵⁴. Previously no action lies for mere mental suffering, the view then was that the law only takes cognizance of physical injury resulting from actual impact. According to Buckley R.A⁵⁵ this crude view has been discarded. Now, it is salutary to note that nervous shock has developed interestingly that a cause of action may arise from a mere joke, a trifling matter, a matter which may seem to be quite less or unimportant to a lay man, but if it can be proved to have caused damage to the plaintiff it will entail an award of substantial damages.⁵⁶

54. Nervous shock was an issue for Court action even before 1888. Gandhi B.M. P 714.

55. *ibid* p714

In *Dulieu v. White*⁵⁷ it was held that shock was actionable only if it arose from the plaintiff's reasonably sustained fear for his own safety. This, it has been observed, would have kept liability within narrow bounds and provided a fairly simple rule but the majority of the Court of Appeal in *Hambrook v. Stokes Bros*⁵⁸ found it unsatisfying and decisively rejected it. That was a case in which a mother suffered shock from an apprehension of injury to her children from whom she had just parted and the Court rejected the *Dulieu v. White* limitation because it would favour a plaintiff who thought only of her own safety and deny a remedy to a mother who, like Mrs *Hambrook*, was courageous and devoted to her child.

The House of Lords decision in *Bourhill v. Young*⁵⁹, made it clear that liability would only arise if the shock resulted from what the victim saw or realized by her own unaided senses and not from what someone else told her. The above was what Gandhi B.M. called an arbitrary limitations⁶⁰ and the approach was to insist on arbitrary limitations, such that the shock must have resulted from fear of injury to oneself, or at least to near relatives or only from witnessing an accident with one's own unaided senses or that the plaintiff must have been within the zone of physical risk.

57. (1901) 2 KB 669.

58. (1967) 1 W L R 912.

59. (1943) A.C 92.

60. *Opp. cit.* p. 715.

Thus, the increasing popularity of the duty analysis left its mark also in this context bringing with its familiar emphasis on foreseeability. That is why Lord Denning L.J. said in *King v. Philip*⁶¹.

There can be no doubt since *Bourhill v. Young* that the test of liability for shock is foreseeability of injury by shock. Thus as observed we are only just emerging from this bondage to a point which liability appears to be predicted without artificial distortion simply on whether the defendant created an unreasonable (foreseeable) risk of nervous shock to someone in the plaintiffs position. The older tradition is now reflected only. If at all, in a rather more cautious judicial approach to foresight in words of Windyler J. "law (is) marching with medicine but in the rear and limping a little".

In *Owens v. Liverpool Corporation*⁶² mourners witnessed the upturning of the hearse when a tramcar driver collided with it and suffered severe mental shock. They succeeded on the strength alone of being within the collision- risk zone. It was held that the right to recover damages for shock is not confined to cases where there is apprehension as to human safety.

Nervous shock has been extended to cover one within the vicinity of the place where the accident or damage occurred, he need not be an eye witness before succeeding in his case. In *Boardman v. Sanderson*⁶³ where Y and his son Z were travelling in 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.

61. (1953) 1 Q B 429 at 441.

62. (1939) 2 K B 141

63. *Supra*.

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 argument that only eye witness to an accident can recover damages for injury by nervous shock.

Similarly, it has been 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*⁶⁴ where 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 hole 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 shock) if the rope broke and thus owe him a duty of care which have been violated.

In 1988⁶⁵ the Court of Appeal was faced with a novel claim for shock arising from the destruction of the plaintiff's home by the defendant's negligence.

64. (1951)1 Lloyd Rep.271

65. *Attia v. British Gas Plc* (1988) Q B 304

In refusing to uphold the dismissal of the plaintiff's claim on a preliminary issue of law and ordering the action to be tried, the Court necessarily rejected the proposition that liability for nervous shock could never arise in such circumstances whether because of a direct rule of law to that effect or because shock resulting from property damage was so unlikely as always to be beyond the contemplation of the reasonable man. However it is important to note that this case is not like other nervous shock decisions in that the shock was a consequence of a tort to the plaintiff which had already caused her actionable damage (i.e the destruction of her property).

One who suffered nervous shock as a result of a rescue operation can recover damages⁶⁶ 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 psycho-neurotic due to the horror of the whole experience. C. claimed damages for nervous shock from B. it was held that C must succeed because, it was foreseeable that somebody would suffer nervous shock as a result of B's negligence, a duty is owed to rescuers, liability for nervous shock is extensible to shock caused by fear for the safety of others.

The House of Lord in *MC Loughlin v. O' Brain*⁶⁷ settled all the issues by holding that there is no principles or policy or rule of law which prevents damages being awarded to plaintiff who has not seen or

66. *Chadwick v. B T C* (1967) 1 WLR 912

67. (1983) AC 410

heard the accident in question, but who has suffered reasonably foreseeable nervous shock by experiencing its immediate aftermath. Before the above decision, towards the end of the 1970s it was settled that an action lies if the injury apprehended or actually seen or heard is to any relative as well as spouse or a child or to a friend, or fellow-workman or even to any third party⁶⁸. However the court ruled against liability where the plaintiff suffered shock from seeing her pet cat killed in front of her eyes.

68. Bourhill v. Young (Supra) also Boardman v. Sanderson, (supra), Also Dooley v. Cammel Laird supra. Also, Chadwick B.T.C. Supra

3.6.1

LIABILITY OF

BANKERS

A bank as going concern undertakes numerous and highly professional service for its customers, it normally would act as agent for its customers, in executing its duties (i.e services) The law sets and expects from a banker a minimum standard of conduct, where there

is a short fall from this standard in the course of executing a service, the tort of negligence becomes relevant. It is established that a banker owes his customer a further duty to carry out its services with reasonable standard of professional care and skill. Where a banker is found careless in dealing with the affairs of its customer, it would be liable for breach of its duty. Thus liability of bankers evolves or emanate from the contractual relationship that arises; from the roles of the bankers. The banker is under specific obligations towards his customer, these obligations arise not much from the nature of their special contract but out of the customs of Bankers.

Ceteris paribus many duties of the banks are now codified⁶⁹ thus any breach of the duties entrenched therein will bring about actions based on the statutes governing Banks and customer's relationship. There is no dispute that a Bank owes a duty to its customer to;

1. Duty to honour customer's cheques
2. Duty to obey customer's mandate and countermand
3. Duty to keep customer's account accurate
4. Duty to advice on investment and reference⁷⁰
5. Obligation as to secrecy.

69. Banks and other Financial Institution Decree 1990. Bill of Exchange Act Cap 35 LFN 1990

70. This duty has been dealt with extensively in the previous chapter (Hedley Bynre is the locus classicus)

the following heads, mainly because liability of bankers in these areas arose out of the customs of bankers other than contractual relationship and law.

1. Negligence of a Banker as a collecting Bank
2. Negligence of a banker as paying Bank

3.6.2 NEGLIGENCE OF A BANKER AS COLLECTING BANK

According to P.J.M Fidler⁷¹ One of the principal function of a banker is to receive the proceeds and credit them to its customer's account, when acting in that capacity it is called a "collecting banker". As already noted, a Banker is under an obligation to act as collecting banker to its customer for cheques drawn on other banks in favour of the customer. Like any other agent the banker have to perform its duties diligently if it delay or does not exercise the ordinary skill required of it as a banker it will be liable to its customer if the latter suffer loss as a result. The more exacting responsibility of a collecting banker is perhaps its responsibility for conversion. For the customer may not have title or may have a defective title to the cheque paid in for collection. The crux of the matter is, if the banker collects a cheque for a customer who is not entitled to the proceeds thereof, it become liable in conversion to the true owner of the cheque. The fact that it acted honestly but mistakenly afford no defence.

71. sheldon and fidler:(1985) practice and law of banking, pitman publishing 128, long acre London

Sometimes, in modern times, customers used the term "Account payee only" crossing. This type of crossing is not mentioned in any part of the Act (i.e Bill of Exchange Act 1990) however account payee only crossing has been held valid. In *Akroker Mines v. Economic Bank*⁷². The Court held that though this type of crossing is not specifically mentioned by the law, it is merely done to make sure that "*Abondaticutela*" i.e abundant extra-caution is taken to observe the mandate and protect the payee. The view in this case is that account payee crossing is merely a memoranda to the collecting

bankers, to put the banker on inquiring with the purpose of protecting the instrument of the payee and failure to do so by the banker will be at the banks peril.

Where a cheque crossed “not negotiable account payee only” is paid into the account of another person other than the payee without the payee endorsing it, the bank will be liable for wrongly dealing with the instrument. In *Abimbolav. Bank of America*⁷³. A cheque for the sum of ₦17,700 drawn on the C.B.N and crossed account payee only in favour of a partnership firm. “HEWRLIETTA OSBORNE and company” was endorsed by one of the partners to a certain MR. NARSON and was collected for him by the defendant Banker. In a suit by the other for ₦8, 850.00 being half of the sum of cheque claimed by the plaintiff as his share of the partnership money, the defendant bank was held liability for collecting the said cheque crossed account payee only.

72. (1904) 2 K B 465.

73. (1977) 4 C C H C J 547

Similarly, in *United Nigeria Insurance v. Muslim Bank*⁷⁴ the plaintiff/appellant passed their cheque for £550 and endorsed not negotiable account payee only to the payee who did not receive it. A week later, a new customer opened a saving account with the respondent, the same name as the payee with a small cash deposit. Two days later the customer paid in the appellant’s cheque and the respondent credited the savings account with the amount after an interval of five days, he withdrew a small sum and two days after he withdrew £250 and absconded. The appellants brought this action to recover £550 as damages for the respondent’s

negligence in opening the absconded customer savings account, collecting the cheque and parting with the proceeds. In the particular of negligence, they pleaded *inter alia* that the respondent had failed to obtain the necessary references and did not follow banking practice in opening the savings account.

The High Court found that negligence had not been proved and held that the respondent were not liable to the appellants for the amount claimed on the ground of negligence but ordered the balance standing in the savings account should be refunded to the appellant. On further appeal the Supreme Court allowed the appeal and held that the respondent bank was negligent in not obtaining satisfactory reference while opening saving account for the absconding customer, that they had failed to observed the standard expected of diligent and reasonable banker.

74.(1972) ANLR 314.

The judgment of the Supreme Court in the above case was transmitted in the case of BEWAC v. African Continental Bank⁷⁵ where the Court held that a Banker who collects a cheque for a customer to which the customer has no title or a defective title is liable to the true owner for conversion or for money had and received to the value of the cheque, unless the Banker can claim the protection of Section 2 (2) of the 1964 Bill of Exchange Act. The Court considered that where a bank collects a cheque for a customer to which the customer has no title or a defective title, the bank has to show in opening the account and clearing the cheque for that new customer adequate references and making necessary inquiries about him or it

will be liable for failure to do so. In the case of *Bank of America v. Edward Alexander*⁷⁶ 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 defendant 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 passed judgment in favour of the plaintiff and awarded a substantial amount of £200 in damages in favour of the plaintiff.

75. (1973) N C L R 352.

76. (1969) 2 ALL NLR 2, also *Balogun v. National Bank of Nigeria* (1973) 3 SC 155

The defendant bank appealed, the appeal was dismissed.

Where a banker has a good reason for dishonouring a cheque, notice of such dishonor must immediately be communicated to the customer or to the collecting banker who will in turn notify the customer. Failure by either the paying banker or the collecting banker to discharge this responsibility will also expose it to liability. In *Agbonmagbe Bank Ltd. v. C.F.A O. Ltd.*⁷⁷ 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 BWA promptly sent the cheques to the appellant banker at shagamu. The cheques were however not cleared and the appellant bank as a result refused to honour the cheques, it however did not communicate the dishonor 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 they had remained silent for an unreasonably long time. The appellant was held guilty for negligence particularly in not notifying the respondent's bankers of the dishonour.

3.6.3 NEGLIGENCE OF A BANKER AS A PAYING BANK

When a cheque is presented for payment, the paying banker should check before paying it, that it is complete in form, that the date has arrived and that the cheque has been signed by the drawer or by his authority and that signature conforms with the signature in the mandate, that the sum to be paid is expressed in words, or in words and figures, which should agree and if the cheque requires endorsement.

77. Supra

He should also make sure that there is no material alteration apparent on the cheque and no sign that the cheque has been cancelled. If the paying bank has any reason to be suspicious on any of these scores, it should do what he consider to be in the best interest of his customer, which in practice means that he should return the cheque or obtain confirmation from the drawer that the cheque may be paid, by these it may avoid liability. Generally, there are no problems when all the above are observed by the banker in paying an ordinary cheque. However, difficulties arises when a crossed cheque is paid otherwise as directed by the drawer. The rule is stated thus,

that where the bank on whom a cheque is drawn which is so crossed, nevertheless pays the same, or pay a cheque crossed generally otherwise than to a bank or if crossed specially otherwise than to a bank whom it crossed, or his agent for collection being a banker, it will be liable to the true owner of the cheque for any loss he may sustain owing to the chequehaving been paid⁷⁸.

A banker is not justified in paying a cheque in a manner inconsistent with the direction contained in the crossing. If he does, and any loss ensues, he cannot debit the drawers account with the chequebecause of his negligence.

78. Sheldon and Fidler. Practice and law of Banking p. 169

A crossed cheque drawn by one customer in favour of another customer of the same bank should be passed through the payee's account (normal banking practice would be to insist that the cheque be presented through a bank or paid into the payees account).⁷⁹

In Ladipo's case⁸⁰ the plaintiff customer drew a crossed cheque on the defendant bank which paid it across the counter in cash. In an action by the plaintiff to recover the amount of the cheque so paid. It was held that a bank who paid cross cheque otherwise than as provided by the law, that is through another bank, shall be liable for any loss sustained by the true owner of the cheque. Any payment contrary to the crossing, is, a part from contravening statutory provision, negligence on the part of the bank and unauthorized, being contrary

to the customer's mandate. Hence the customer's account cannot be debited with such an authorized payment.

The banker's liability may also arise where payment is made when the authority to do so has been revoked or withdrawn by the customer or where the customer is dead and a notice to that effect has been given to the banker and or where payment is made on a cheque with unauthorized endorsement or forged signature.

In the case of *Nwandu v. Barclays Bank*⁸¹ the plaintiff who was a business man drew a post dated cheque for the sum of £660 in favour of X, a company engaged in a certain contract job for him.

79. *Ibid* p. 169

80. *Ladipo v. Standard Bank* (1968) 3 ALRC 287

81. (1962) 6 ENLR 191

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 later presented, the defendant in contravention of the plaintiff's instruction negligently paid the cheque and debited the plaintiff's account. The plaintiff then brought an action against the defendant seeking a declaration that the defendant bank has 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.

In a more recent case of *Union Bank v. Adeniran*⁸² the respondent was the people warden of the church of Bethel Kaduna and customer of the appellant. According to the mandate given to the appellant, the signatories to the account of the respondent were three, one of them

was, Brother F.A Onatola. He was later replaced by one Mr. J. Kolawole and the appellant was notified of such change on the 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 respondents account .

82. (1987) 1 NWLR (PT. 47) 52

was debited. The respondent then sued the appellant for wrongfully debiting the account of the church. The trial Court in held the defendant liable and entered judgment in favour of the plaintiff.

The defendant/Appellant then appealed against the judgment of the trial judge.

The Court of Appeal unanimously dismissed the appellants appeal and held *inter alia* that a banker who honours a document purporting to be a cheque but on which the customer 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.⁸³

All these illustrations, Statues and pronouncement of Courts and judges above 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 ahead and paid the cheque he will incur liability for his negligence unless the banker can adduce facts which

can create an estoppel against the customer in which case he can escape liability.

83. See- Section 24, Bills of Exchange ACT 1917

3.7 **LIABILITY OF SOLICITORS/ LAWYERS**

For many years a Barrister was held not liable to his client for negligence and the rule was regarded as resting on the ground that no contractual relation exists between a barrister and his client. This reason certainly became inadequate after Hedley Byrne and the whole matter has had to be re-examined in a series of decisions in the House of Lords and the Court Appeal. In *Rondel v. Worsley*⁸⁴. The House of Lords held that the immunity rests upon the demands of public policy in connection with the administration of justice. In order to fulfill his duty to the court, the advocate must be relieved of even the possibility that actions for negligence might be brought against him by disgruntled clients. The House of Lords stated further that, this is not based upon a desire to protect the advocate from the consequences of any negligence on his part but to ensure that he will not be deflected from his duty by fear of an action by a client who for example, take as incompetence a proper decision not to call a witness or not to press questioning of a witness to the limit.

It may be replied that such conduct on the advocate's part would not constitute professional negligence, but the fact that he may win the case brought against him by his client does not remove the "Nuisance" in litigation the expense and possible damage to reputation inherent even in a successfully defended action and so the possibility of his being deflected from his duty is still there.

84. (1969) 1AC 191.

A further reason advanced in *Rondel v. Worsley* for the immunity of the advocate is the undesirability of retrying the action against the advocate, the issue which arose in the original litigation out of which the action arose. The significance of public interest in due administration of justice extends a good deal further than the immunity of advocates.

Professional men of all descriptions have become increasingly exposed to negligence, it is clear that no special rule applied to a Solicitor engaged in pure paperwork or advice unconnected with litigation. A Solicitor who mishandles a conveyance or a company merger or the tax counsel who drafts an instrument which exposes the settler to fiscal liability is liable for negligence as anyone else, though it should not be assumed that merely because he turns out to be wrong he has been negligent. Many legal points are matter of opinion on which differing views may legitimately be held and no one can anticipate all the actions of the Courts, in developing the law. Where litigation is involved, there are policy factors which make the law more complicated.

For the many reasons and policy expressed above a lawyer engaged in litigation enjoys a degree of immunity from suit. In many cases it will be unnecessary to consider the precise scope of this because of a procedural rule whereby an action for negligence will be struck out as an abuse of the process of the Court if it involves an attack on the decision of a Court of competent jurisdiction.

In *Somasundaram v. M. Julius Melchior & Co.*⁸⁵ the plaintiff, who had been goaled for an assault upon his wife, sued his Solicitors, alleging that they were guilty of negligence in advising him to change his plea to guilty. The Court of Appeal upheld the striking out of the action and found it unnecessary to decide whether the Solicitor's immunity extended to the advice given.

Following the decisions in *Hedley Byrne* and many years after *Rondel v. Worsley*, one will say that the immunity of Barristers against litigation for negligence have been narrowed down to the actual conduct of the case in Court or matter closely related thereto such as the drafting of pleadings. Apart from that a barrister would henceforth definitely be held liable in negligence with respect to dealings unconnected with the conduct of cases in Courts. This was the views of their lordships (i.e Lord Reid, Lord Moris and Lord up John when 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.⁸⁵

84. (1989) ALL E.R 129.

85. In *Somasundaram v. M. Julius Melchior & Co.* (Supra).

The common law position has been retained in Nigeria via the Legal Practitioners Act 1975⁸⁶

The Act provides;

Section 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 given 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 of 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

86. Section 8 Legal Practitioner Act 1975 L F N 1990.

brief, the Court may, in addition to dismissing the appeal as stated in sub-rule (1) of this rules, award costs of the proceedings against such Legal Practitioner personally⁸⁷.

The combine effect of the above provisions is that in Nigeria a Legal Practitioner is fully liable in negligence unless he can bring himself within the immunity accorded to barristers and advocates in Courts proceedings or work closely connected therewith.

In *Lawson v. Siffre*⁸⁸ a Solicitor who advised his client to invest a sum of money on a mortgage but carelessly fail to investigate the mortgagor title as a result of which the client lost his money, was held liable in negligence.

Again, in *Raji v. X.*⁸⁹ a Legal Practitioner who failed to advise his client that in the opinion of senior Counsel the client proposed action had no chance of success as it was statute-barred, and pressed on with the fruitless claim, was held liable to the client for his gross negligence.

A Legal Practitioner will be liable only where he is guilty of gross negligence in *Cocottopoulos v. P.Z*⁹⁰ 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

86. Order 6 Rule 9 (2) Supreme Court Rule

87. (1932) NLR 133.

88. (1946) 18 NLR 74.

90. (1965) L L R 170.

salary in lieu of notice, which was paid to and receipted by the client.

The solicitor included other claim which from the correspondence available to the solicitor was not maintainable action against his

client's employer. The case was dismissed and the judge observed that a solicitor showing reasonable professional diligence and caution would advised his client against the prosecution of a claim such as the present one-claim which in my opinion is totally speculative and devoid of any merit. And the solicitor was consequently ordered to refund to his client the total Court fees, he paid for prosecuting the claim.

Thus, it can be deduced from the judicial authorities discussed here and statutory provisions that barristers in Nigeria fully owed duties of care to their clients in the practice of their profession and a breach of that duty will attract serious consequences in negligence. However, like their counterparts in other common law countries still enjoy some protection under law.

3.7 **LIABILITY OF DOCTORS/HOSPITAL MANAGEMENT**

It is settled that; if a person holds 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.⁹¹ 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 service be rendered for reward.⁹² where, anyone⁹³ practices a profession or is engaged in a transaction in which he holds out as having professional skill, the law expects him to show the amount of competence associated with the proper discharge of the duties of that profession, trade or calling, and if he falls short of that and injures someone in consequence he is not behaving reasonably. It is interesting to note, that (in case of Doctors) no contractual relation is necessary nor is it necessary that the service is rendered for reward. This clearly shows 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. Thus, 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 may institute an action against such a doctor to recover damages for the harm suffered.

91. R. v. Bateman (1925) 94 L.J. KB. 791

92. Supra.

93. Anyone, includes, Lawyers, Bankers, Doctors and others discussed earlier in this work.

negligence can only arise where there is a legal duty to take care either in contract or in tort. It therefore means that for the plaintiff to succeed, he must prove that the doctor was negligent and the onus stands discharged once he shows that (i) the doctor owed him a duty

to use reasonable care in treating him (ii) that the doctor had failed to exercise such care (iii) that the doctor was in breach of the duty owed him (iv) that he had suffered damage as a result of the breach.

A good example of the above principle was the decision of the Privy Council in a case that emanated from Malaysia⁹⁴ in that case, a doctor administered 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 a 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 inquiry or conduct the tests. On appeal to the Federal Court of Malaysia, the finding of negligence was rejected. On further appeal to the Privy Council the decision of the trial court was restored. The Privy Council while disagreeing with the Federal Court of Malaysia

94. *Chin Keow v. Government of Malaysia* (1967) 1 W L R 813.

viewed 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 distinguished medical men. The test is the standard of the ordinary competent practitioner exercising ordinary professional skill.

In *Roe v. Minister of Health*⁹⁵ it was held that he was not negligent in not causing the phenol to be coloured, because the risk of visible

cracks had not been drawn to the attention of the profession until 1951.

In the Nigerian case of *KanuOkorie A.v. Dr. E.S. Etuk*⁹⁶ the deceased was admitted into the Onitsha General Hospital on the 16th of August 1961 by the defendant doctor who diagnosed ruptured appendix. He treated the deceased with antibiotics to localize the infection and performed an operation on the 17th of August (i.e the next day). Only one incision was made but it had to be extended to expose the appendix 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 doctor's 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

95. *Supra.*

96. (1962) 6 ENCR 196

enema and air were discharged. The deceased later died on the 21st August. There was 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 Law of Eastern Nigeria, claiming damages for the death which the dependant attributed to the negligence of the defendant.

The particulars of negligence were that:-

- A. The particulars of 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.
- B. That defendant refused to attend to the deceased after the operation because he did not come into the hospital as the defendant's private patient.
- C. That the deceased was overdose 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 administration of the first enema was a negligent act it was not the doctor that ordered it and thus cannot be held liable for its consequences and that in any event the enema and Etuk were later discharged.

On the question of negligent raised in ground two, 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 far inadequate. It was finally decided that the plaintiff 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 of chloroform on the deceased but he escapes liability on the technical ground of lack of postmortem examination to ascertain the real cause of death.

Where it is shown that the negligence or incompetence of the doctor is beyond the mere issue of compensation and that there was disregard for life and safety of others then the doctor becomes criminally liable, it would amount to crime against the state which is punishable under the law⁹⁷.

The Hospital management is now liable for negligence for the following reasons.

The hospital management itself as an organization that undertakes the performance of function requiring skill: is under a duty to take care and it is 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.

97. Sections 196,220, of Penalcode

Secondly, there is a relationship of master and servant between the hospital management and the doctors/nurses working in the hospital, thus it become vicariously liable.

The position of the law at first was that the hospital management duty was that of ensuring that it gets qualified doctors to come and work in hospital and that once this duty is satisfactory discharged the management will not later be held liable for the negligence of any of its doctors. Presently this position has been discarded, as it was rightly held in the case of *Cassidy v. Ministry of Health*⁹⁸ 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 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 member of the nursing staff.

Another good example of liability of Hospital management found in the Nigerian case of DicksonEgbokwev. University Colleges Hospital Board of Management⁹⁹ the deceased was admitted into a fourth floor maternity ward of the defendant Hospital where she gave birth to a baby on the 23rd of December 1958. After the birth she

98. (1951) 2 KB. 574 at 583

99. (1961) WNLR 173

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 veranda 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 hospitals authority agreed under cross examination that if someone had been specially assigned to watch the deceased the incident would probably not have occurred. No medical expert was called to show that given the case history. All reasonable precautions had been

taken to prevent the occurrence. The Court held that the plaintiff case was successful since the hospital management had failed to rebut the inference of the 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 or other employees of the hospital.

It is now settled that hospital management are liable not only for negligence of their doctors or nurses but indeed all other employees of the hospital.

CHAPTER FOUR

DEFENCES TO THE TORT OF NEGLIGENCE

4.1. INTRODUCTION:

For a Plaintiff to succeed in an actionable negligence he must (as we have seen in the previous chapters) on his part proof that there was a duty owed to him by the defendant, that the defendant was in breach of the said duty and that breach or carelessness on the part of the defendant had caused him damage or injury. Where the plaintiff fails to proof any of the above elements or ingredients of tortious liability he will have no claim and the defendant must be set free of any blame or liability. In other words the defendant is said to have a complete defence. It is immaterial whether the defendant caused the damage or injury or not¹. In this chapter we shall consider other defences opened to the defendant mainly as follows; contributory negligence, inevitable accident, *volenti non fit injuria*, statutory defence and necessity.

1. This is more of a civil rule of litigation than tort of negligence.

According to J.G Fleming “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.”²Kodilinye defined contributory negligence as “basically negligence of the plaintiff himself which combines with the defendant’s negligence in bringing about the injury to the plaintiff”³ Coker J.S.C observed that contributory negligence means that the party charged is primarily liable but that the party changing him has contributed by his own negligence to what has eventually happened⁴.

All the above definitions 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 is that the plaintiff’s duty of care is not required to be exercised to anyone 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

2. Fleming J.G Law of Torts 4th edition P.215

3. Kodilinye G. (1990) The Nigerian Laws of Torts, Spectrum Law Publishing, Kaduna. p 85

4. Evans v. Bakare (1973) sc. P.800.

by law to be exercised towards him by any one. In the same veins the defendant who is required to exercise due care and diligence 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 does not owe the plaintiff the duty of care in the circumstances. Thus, the defendant will be held liable in negligence even though the plaintiff contributed also in the causing of the damage by his own negligence. However, in awarding damages, the role of the plaintiff will be taken into account so as to divide the amount to be paid by the parties proportionally with each one's blame worthiness and thereby reducing the claim of the plaintiff⁵.

5. Section 17 Kaduna State Torts Edict 1990. Also-Section 11 of Civil liabilities (miscellaneous provisions) Act No. 33 1961

4:2.1 CONTRIBUTORY NEGLIGENCE UNDER COMMON LAW.

The position at common law was that contributory negligence gives the defendant complete defence. The yardstick for determining liability was connected to the rule

of causation, which was to determine if the defendant's act was the sole cause of the accident or injury or damage or not. If it is, then he was held liable for the consequences but if there is an interfering cause, for instance the conduct of the plaintiff himself leading to ultimate results that follows then the defendant is not liable for the consequences.

The first case in which the principles of contributory negligence were evolved was *Butterfield v. Forrester*⁶ in this case the defendant wrongfully obstructed a highway by putting a pole across it. The plaintiff who was riding his horse violently in the twilight on the road collided against the pole and was thrown down and injured. Had he been careful he could have observed the obstruction from a distance of 100yards and could have thus avoided the accident. Lord Eallenborough, C,J. said, "one person being in fault will not dispense with another's using ordinary care for himself."

6. (1809) East 80

Two things must occur to support this action, an obstruction in the road by the fault of the defendant, and want of ordinary care to avoid it on the part of the plaintiff'

According to the above proposition the plaintiff's slight negligence deprived him of any relief as his negligence contributed to the damage complained off.

It should be noted that this judgment use contributory negligence as a means of defence. Before the enactment of statutory laws on contributory negligence in Nigeria the common law position was applied in the same way and magnitude as it was applied in England. In the case of Okoli v. Nwagu⁷. 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 injury. The trial judge dismissed the case. On appeal; it was held that, the respondent driver could not have averted the collision as there was not sufficient separation of time, place and space for him to do so. It was the deceased own negligence that caused the accident⁷

7. (1960) 5 FBC at P.16 (It was an accident which took place before the coming into force the Eastern regions Fatal Accident laws of 1956)

The rigid application of this doctrine resulted in injustice and harsh and unequal treatment to the plaintiff whose contribution to the wrong was less but whose suffering was substantial. As a result the doctrine was modified by introducing the doctrine of last opportunity in Davis v. Mann⁸. This was in order to lessen hardships of the plaintiff and its effect was that the plaintiff could recover in spite of his negligence if it could be found out that the

defendant had the last opportunity to avoid the accident. In that case, owner of a donkey fettered its fore feet and drove it into a narrow lane where it was run over by defendant's van going fast carelessly. The owner of the donkey was allowed to recover from the van-owner on the ground that the driver's carefulness would have avoided the mishap.

The last opportunity doctrine 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 allows the plaintiff to recover damages even though he too was guilty of contributory negligence, if at the time of the accident the defendant could have avoided it while the plaintiff could not.

8. (1842) 10 M & W 546.

However, the doctrine of last opportunity, instead of solving the problem (i.e. taking the plaintiff out of the absurd condition of losing his case for want of care on his part to himself) it created another problem to the Courts/Judges. There was confusion concerning the precise and appropriate rules to be applied in determining some-one's liability under the doctrine: whether to base it on the rule of causation or remoteness of damage⁹, or is to be based on some other considerations such as intention, foresight, negligence or the purpose of a particular statute¹⁰.

Because of the confusion created by the application of the doctrine of last opportunity, the rule was a gain modified in *British Columbia Electric Rly v. Luach*¹¹. The rule so modified was known as the constructive last opportunity rule which explained that if both, the plaintiff and the defendant were in default the liability should rest upon the party without whose negligence the mischief might not have happened. In that case, an action was instituted against Railway Company by the administrator of a man who, while being driven in a wagon across a level crossing, was run down and killed by electric car. The Judicial Committee of the Privy Council found the plaintiff guilty of negligence for failing to look out for the car before entering the line. The company was on the other hand found guilty of negligence on two counts one; the driver of the electric car was driving it at a very

9. Windfield and Jolowicz. *Opp. Cit.* p 157, 158

10. *Ibid* p 158

11. (1916) 1 AC 719

high speed. Two; that the car's brakes were defective. The railway company was held liable notwithstanding the negligence of the deceased. *The ratio decidendi*, of their Judgment was that even though the plaintiff was negligent in going onto 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 a enough distance for him to stop the car and thus avoided the accident if the brakes were in good condition.

The decision in the above case no doubt represents 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. The application of the rule is also not easy because the confusion which bedeviled the application of the doctrine of last opportunity rule also affected it. The rule have as rightly stated only served to compound the problem created by the doctrine of last opportunity instead of offering any useful solution to it¹². However, it is salutary to know that both doctrine and its hybrideof-constructive last opportunity were both abandoned after the coming into force of the contributory negligence Act ¹³ thereby saving the courts from the pains of the confusion created by them.

12. Westwood v. Post Office (1973) 3 All ER 184

13. Contributory Negligence Act 1945

In cases of maritime collisions this position was remedied in England by enacting Maritime Convention Act. 1911 whereby the liability to make good the loss depended upon and was fixed in proportion to the degree in which each vessel was in fault¹⁴. The law reform (Contributory Negligence) Act, 1945 remedied the injustice produced by the constructive last opportunity Rule, in regard to negligence on land and made the parties liable to bear the loss in proportion to their degree of fault. The detection of fault of each party and apportionment of damages now reflect the comparative importance of each party's fault¹⁵.

In Nigeria, statutory laws on contributory negligence appeared to be a verbatim reproduction of that of England¹⁶. This means that they are the same in all material respects. Thus, in the case of *Apah v. Costain*¹⁷ the plaintiffs who were passengers in a motor-car, claimed against the defendant for the personal injuries they have suffered as a result of the collision between the two vehicles on the Lagos-Ibadan Road. The plaintiffs claimed special and general damages.

14. Section 1.

15. Section 1 (supra)

16. Section 17 and 11 Kaduna State Torts Edict No.8 Civil liabilities Act 1961 respectively.

17. (1974) 3. S.C77

The accident occurred at an F. junction at Ogunmakin Road, where a side road from Abeokuta entered the Lagos-Ibadan Road. The tipper lorry turned into the side road

without warning and without being able to ascertain whether there was any oncoming traffic from the opposite direction. The learned trial judge decided that the plaintiff's driver was the only person who could have avoided the accident and that as he had failed to do so, the plaintiff's 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 (miscellaneous provisions) Act of 1961.

Similarly, in the case of *Oyalowo v. M. De Bank Transport Ltd.*¹⁸ 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 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.

18. (1973) 2 WSCA 35.

The western state Court of Appeal upheld the judgment of the trial judge that the defendant's driver had been negligent in pulling out suddenly and without warning from a stationary position onto the main road, but that the plaintiff's driver had been contributorily negligent since no reasonably diligent 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. Also, 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.

4:2:2 APPLICATION OF CONTRIBUTORY NEGLIGENCE TO CERTAIN CATEGORIES OF PERSONS AND SITUATIONS

Although no mention is made by the statute already considered¹⁹ about the standard of care required to be exercised by the plaintiff for his own safety, Courts decisions²⁰, have clearly shown that the standard is that of a reasonably prudent man. However, the standard is at times lowered with regard to certain categories of persons and situations in order to take care of the peculiarities of such persons and situations. For the purpose of this research we shall consider, children, workmen and the dilemma rule

19. Kaduna State Tort Edict. (Supra) Civil Liabilities (miscellaneous provisions) Act, (Supra) and the Law Reform Contributory Negligence Act ;(Supra)

20. E.g. Oyalowo v. M. De Bank Transport Ltd. (Supra)

4.2.2.1 CHILDREN

When a child is contributorily negligent to the occurrence of a damage or injury, he cannot just like an adult person recover full compensation but

would have his claim reduced in proportion to the degree of his own negligence²¹. The most important things to consider in determining whether or not a child is contributorily negligent in the occurrence of a damage or injury to himself are, the age, (even though it is not possible to specify an age below which, as a matter of law, a child cannot be guilty of contributory negligence)²²; intelligence, physical disabilities, experience, instruction and the things or act neglected²³. The standard is normally very low. In the case of *Lunch v. Nurdin*²⁴ 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 years 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 exercised ordinary care.

21. Charlesworth, (1977) on Negligence 6th Edition Sweet and Maxwell, London P.732

22. Ibid p 732

23. Ibid p 732

24. (1841) 1 Q.B. 29

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 a so young a child”.

The principle laid down in *Lunch v. Nurdin* was adopted in *Yachuck v. OliverBlais Ltd.*²⁵. A boy aged nine years, bought from the defendant company some gasoline (highly inflammable liquid), falsely stating that his mother wanted it for her car. In fact he used it to play with, and, in doing so, was badly burnt by it. It was held by the Judicial Committee that the company was negligent in supplying gasoline to so young a boy and that the plaintiff had not been guilty of contributory negligence for he neither knew nor could be expected to know the properties of gasoline. If the injury is due partly to the negligence of the child's parent or guardian in failing to look after or partly to the negligence of the defendant the child may still recover his whole loss against the defendant for he is not "Identified" with the negligence of his parents or guardian²⁶. According to *Muhammed Sale*²⁷. The above decision is over protective of children from their own negligence.

25. (1949) A.C 386

26. *Beasley v. Marshall* (1977) S.A.S.R 456.

27. *Tort of Negligence under the law*. LLM Thesis, faculty of Law (1996) p.217

He believed children nowadays are very intelligent and know what is dangerous and what is not, particularly nine years old boy as in the above case. This writer is tempted to agree with him.

4.2.2.2

WORKMEN.

It has been stated that in actions by workmen against their employers for injuries sustained at work the Courts are justified in taking a more lenient (or lower standard) view of careless conduct on the part of the plaintiff than would otherwise be justified, and that it is not for every risky thing which a workman in a factory may do that he is to be held to have been negligent²⁸.

Regard must be had to the dulling of the sense of danger through familiarity, repetition, noise, confusion, fatigue and preoccupation with work²⁹.

However, where the operation leading up to the accident is divorced from the bustle, noise and repetition that occurs in such places as factories these considerations cannot apply and, indeed, it may be that they are only relevant where the workman's cause of action is founded upon his employer breach of statutory duty³⁰.

28. Flower v. EBBW Vale Steel, Iron and Coal Ltd (1934) 2KB 132

29. Supra.

30. Per Lord Reid in Staveley Iron Chemical v. Jones (1956) AC 627, 642.

4.2.2.3

THE DILEMMA RULE.

Where the defendant's negligence has put the plaintiff in a dilemma, the defendant cannot escape liability if the plaintiff, in the agony of the moment, tries to save himself by choosing a course of conduct which proves to be the wrong one, provided the plaintiff acted in a reasonable apprehension of danger and the method by which he tried to avoid it was a reasonable one³¹. If

those conditions are satisfied he committed no contributory negligence. A famous illustration of the principle is *Jones v. Boyce*³². Where the plaintiff was a passenger on the top of the defendant's coach and, owing to the breaking of a defective coupling rein, the coach was in imminent peril of being overturned. The plaintiff, seeing this, jumped from it and broke his leg. In fact the coach was not upset. Lord Ellenborough C.J. directed the jury that if the plaintiff acted as a reasonable and prudent man would have done, he was entitled to recover, although he had selected the more perilous of the two alternatives with which he was confronted by the defendant's negligence; and the jury gave a verdict for the plaintiff.

31 *Jones v. Boyce* (1816) 17 E.R. 570.

32. *Supra*

In the case of *Sayers v. Harlow U.D.C.*³³ the plaintiff visited a public lavatory owned by the defendant, 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 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 she realized that she could not in fact get over the door, in trying to get down she fell and sustained 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 damages 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 the coming into operation of civil liability (miscellaneous provisions) Act and the Kaduna State Tort Edict) is that plaintiff will have the damages 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 is that of a reasonable prudent person.

33. (1958) 1 WLR 623.

However the standard of care with regard to certain categories of persons is lowered by the courts in order to take care of the peculiarities and the special situation in which they found themselves. Their actions even in those situations however, still have to be measured against that of a reasonable 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 concerned or the situation under which they found themselves and not to exempt them from the duty of taking care for their own safety.

4:3

VOLENTI NON FIT INJURIA

Volenti non fit injuria literally means, no injury is done to one who consents³⁴. In other words, no person can enforce a right which he has voluntarily waived or abandoned. If a defendant is successful in his plea of *volenti*, he will have complete defence, and the plaintiff will be unable to recover any damages. Voluntary assumption of risk (as it is also called) means, someone who agrees either expressly or impliedly to run the risk of injury, cannot recover damages for any of the risk he had agreed to run. The

position of the law here is based on the philosophy of individualism that no wrong is done to one who consents³⁵.

Before the enactment of the law reform (contributory negligence) Act the difference between contributory negligence and consent was merely academic because it serves no any practical purpose; as both afford complete defence to the defendant against the plaintiff's claim³⁶.

34. Nettleship v. Western (1971) 3 All ER 581 at p.588 per Lord Denning M.R

35. Gandhi B.M. (1990) Eastern Book Company LalbaghLucknow. P 732,733.

36.Ibid p 732

However with the coming into force of the Act, it became necessary to differentiate between the two; thus, whereas, the contributory negligence implies negligence on the part of the claimant, the concept of *volent non fit injuria* implies knowledge and express or implied agreement on his part. In the former though the defendants conduct the risk, the claimant himself is careless towards the same and regrets to avoid the harmful consequence to him; in the later the claimant knows the risk and volunteers to do the act in spite of his knowledge which may imply his consent. Proof of consent still

afford a complete defence to the defendant, contributory negligence does not. It only reduced the damages claimable by the plaintiff in proportion to his own degree of fault. For the purpose of this research we shall focus our attention on cases where the plaintiff could be taken to have assumed the risk by express or implied agreement, and its effect on third parties.

4:3:1. EXPRESS AGREEMENT.

A plaintiff who through an express agreement waives a duty of care owed to him by the defendant will not be allowed to turn around and make any claim against the defendant. In order to defeat an otherwise valid claim on the basis that the plaintiff

was volens the defendant must establish that the plaintiff at the material time knew the nature and extent of the risk and voluntarily agreed to absolve the defendant from the consequences of it by consenting to the lack of reasonable care that might produce the risk. It is common ground and long established that knowledge of the risk is not sufficient but there must also be consent to bear the consequences of it³⁷. That is why Lord Denning said³⁸.

Knowledge of the risk of injury is not enough nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree, expressly or impliedly, to waive any claim for any

injury that may befall him due to the lack of reasonable care by the defendant.

When there is this 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. In the case of *Buckpit v. Oars*³⁹ the plaintiff and the defendant, both of whom were seventeen years old, were in the habit of riding from time to time in each other's cars, neither of them had insurance cover against risk of injury to passengers. Evidence showed that the plaintiff knew that the defendant was not insured.

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37. *Nettleship v. Weston* (1971) 3 All ER 581 at 587
 38. In *Nettleship v. Weston* (Supra)
 39. (1968) 1 All ER 1145

A notice of warning was fixed on the car in the presence of the defendant that the car was not insured, that passengers are at their own risk. Two or three weeks later the car struck a wall as a result of the defendant's 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. On the question whether the defence of *volenti non fit injuria* was answer to the plaintiff's claim for damages, it was held.

- (A) On the facts, the plaintiff agreed to be carried at his own risk and to exempt the defendant from liability for the negligence which caused the accident;

the plaintiff though an infant in law could not enforce a contract which he had voluntarily waived or abandoned and;

- (B) There was no legal contract of carriage; the arrangement between the parties to the journey being one not intended to create legal relationship. However, this type of agreements are sometimes prohibited by statutes for instance, under the legal Practitioners Act⁴⁰, 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. Also under the unfair Contract Terms Acts⁴¹.

40. Section 9(1)

41. Section 2(1-)

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 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 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 an indication of his voluntary acceptance of risk.

4:3:2.

IMPLIED AGREEMENT.

This is where there is no express agreement by the parties but the agreement is inferred or drawn from the circumstances of the case and the conduct of the plaintiff. A good illustration is found in the case of *Woodridge v. Summer*⁴². The plaintiff sought to claim damages against the defendants because of injury he sustained when the first defendant horse which was taking part in a competition for heavy weight hunters organized by the second defendant in which horses were required to walk, trot, canter and gallop. 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.

42. (1862) 2 All E.R. 978

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 off 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 the tubs onto a course taking 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 defendant (organizers of the competition) but found the first defendant guilty of

negligence on the ground that the conduct and control of the horse by its rider (Mr Holladay) was unreasonable in the circumstance. The second defendant appealed against this judgment 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 follow;

A person attending a game or competition take 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 reckless disregard of the spectators safety.

This decision have been criticized in the sense that it tends to remove from the shoulders of the participant in a competition the duty of care towards his spectators which is a violation of an important ingredient of negligence⁴³. However, it has been observed⁴⁴, that if the duty of care to be exacted from participants in competition of the type in this case should be the same 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 someone.

Similarly, in the case of *wilks v. Children Home Guard Motor-cycle and light Car Club*⁴⁵ 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 man of the sporting world not have made and not (as was the case of *word ridge*) whether the participants conduct amounted to a reckless disregard of the spectators safety. This is no doubt a 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.

43. Charles worth opp. cit. p.755

44. Ibid p. 755

45 (1971)2 All E.R 369

4:3:3. THE EFFECTS OF THE AGREEMENT ON THIRD PARTIES.

Where an agreement to run a risk given by A to B on behalf of C but without C's authority cannot affect C. A good illustration is found in the case of *Kruger Ltd v. MoelTryfanship company limited*⁴⁶ a charter party contained a clause exempting the shipowner from liability for stranding and other accident of navigation, even when occasioned by the negligence of the master; the master to sign clean bill of lading without prejudice to the charter. By mistake the signed bill of lading presented by charterer 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 Lord that since the contract between the ship owner and the charterers was that the shipowner was not to be liable for the master's negligence but the charterers were bound to indemnify the shipowner against the claims of the holders of the bills of lading.

Again, where D gives E a contractual license for himself and his guest to come into F property but inserted an exemption clause in the contract, G. a guest of E who comes into the property under the contract is bound by the clause⁴⁷.

46. (1907) A.C 272

47. The judgment of Goddard J. in *Hobbs v. Air work Ltd.* (1937) 1 All E.R 108.

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 other persons: This is quite connected to the fact that whoever takes an assignment of a contract takes with it all conditions governing the performance of that contract⁴⁸.

It is important to note that an agreement to exempt an employer from liability for future negligence will not avail the servant who actually commits the act of negligence in *Cosgrove v. Horsfall*⁴⁹, 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 traveling the Country Court held the defendant liable and awarded damages to the plaintiff accordingly.

48. H.M.F Humphrey Ltd v. Baxter Hoare Ltd (1933) 149 L.T at 603

49. (1946) 175 L.T at 334.

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.

This writer wonders whether this case can succeed today as observed by Kodilinye⁵⁰. It is partly for this reason that *volenti* has declined in importance as a defence to negligence actions, and it rarely succeeds today; for, since the introduction of apportionment of loss in contributory negligence cases the Courts have tended to encourage reliance on contributory negligence and to discourage reliance on *volenti* on the ground that in most cases the fairer solution is that the plaintiff should have his damages reduced rather than that he should recover nothing at all.

Today, it appears that except in cases of express agreement Courts prefer to base their decisions on the provisions of the Civil liabilities Act and the various states laws on contributory negligence because the defence of *volenti non fit injuria* is still maintaining its common law posture; a successful plea of it will afford the defendant a complete defence against the claim of the plaintiff.

50. Kodilinye opp. cit. p.89,90

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 occurrence of the damage or injury will be taken into account so as to serve as a mitigating factor in awarding damages⁵¹. In this way the defendant is not allowed with his rash or negligent act or conduct, while the plaintiff is also made to pay for his own unreasonable conduct in the circumstance.

The attitude of the Courts may therefore be justified on the ground that from the fact that contributory negligence is a statutory law⁵² it is also fairer to both parties; the defendant is not allowed to escape liability by showing that the plaintiff too was negligent while at the same time the plaintiff is not allowed to succeed (in full) hundred percent for just proving that he has sustained 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.

There are views against 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 view that since cases which come 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 dropped⁵³.

51. Ibid p. 90

52. (By which it have more force than volenti non fit injuria)

53. Ibid p.89,90

However some are 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 voluntarily exposing himself to physical risk⁵⁴.

It is important to note that the defence of *volenti non fit injuria* does not apply to statutory duty. Thus where a person who fails to perform his statutory duty, thereby causing loss or damage to another cannot invoke it as a defence⁵⁵. 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 unless of course where there is a total disregard to his own safety which is unreasonable in the circumstances⁵⁶.

54, Ibid p.89, 90

55. Chadwick v. British Railway co. (1967) 1 W L R 912

56. Chadwick v. British Railway co.(Supra).

4:4. INEVITABLE ACCIDENT.

An accident is inevitable if it cannot be avoided by the use and operation of due human diligence, care and caution⁵⁷. An accident is inevitable if it is certain to happen and must happen, no matter the effort to evade it⁵⁸. Before a Court of law can accept a defence of inevitable accident there must be evidence of the inevitability of the accident. The Court must also be satisfied on the evidence before it that there was no previous or prior act of negligence on the part of the party raising the defence. In the case of A.N.T.S v. Atoloye⁵⁹.Mercedes Benz Luxury bus belonging to the 1st appellant and being driven by the 2nd appellant had collided with the rear of the respondent's Peugeot 504 saloon car and damaged it whilst the car was in a queue along the access road leading to Ikorodu road from the Lagos end of the Lagos-Ibadan Express Road. The defendants/appellants based their defence on brake failure and inevitable accident. The Court of Appellant held that:

In the instant case the appellant hinged his case on brake failure as the basis for the defence of inevitable accident, but there is no

evidence or proof that something happened over which he had no control and the effect of which could not have been avoided by the exercise of care and skill. Consequently, the appellant could not knock down the well settled principles of negligence on that ground.

57. A.N.T.S v. AToloye (1993) 6 NWLR (Part 298) 233 at 252

58. Supra.

59 supra

TOBI JCA (As He then was) went further to say;

I will very much hate to believe that it is every automobile accident arising from brake failure that will successfully erase the tort of negligence on the ground that the accident was inevitable. While an unanticipated and sudden brake failure may be a valid ground of defence of inevitable accident. I am not prepared to hold that lack of mechanical care or skillful professional control and management on the part of a driver will drown the well settled principles of negligence. If it were to be so then any driver can raise as a matter of routine, brake failure as legal basis for exculpating himself from tortious liability in automobile accidents. Our laws of tort never anticipate such a situation.

Also, in Okhai v. C&C construction company Ltd⁶⁰ some workers of the 1st respondent including the appellant and the 2nd respondent were servicing a crane belonging to the 1st respondent when the crane drum rolled and crushed the appellant left leg. The leg was

eventually amputated and replaced with an artificial limb. The Appellant's case was that the negligence of the 2nd respondent in pressing the starter without warning caused the drum to roll and crush his leg.

60. (1998) 3NWLR (pt.543) 584

The appellant also stated that if the 2nd respondent had switched off the main panel the accident could have been avoided. Appellant founded his case on the doctrine of *res ipsa loquitur*. The respondent raised the defence of inevitable accident, claiming that the motor of the crane energized itself. Although this defence was not specifically pleaded, the trial Court believed the respondent's evidence and dismissed the appellant's suit on the ground that the incident could not have been foreseen or forestalled. Dissatisfied with the judgment, the Appellant appealed, the Court of Appeal unanimously allowing the appeal, held. It is not in every accident that inevitable accident could be manifest even if it exists unless it can be clearly proved by evidence that the defendant has no control over what had happened and that no amount of care and skill could forestall it. Thus, there is no inevitable accident unless the defendant can prove that something happened over which he had no control and the effect of which could not be avoided by the exercise of care and skill. In the instant case, from the evidence and facts available, the unfortunate

accident could have been averted if due care and attention were taken. It would be ridiculous to hold that the accident was inevitable. The respondent was clearly negligent the defence of inevitable accident cannot therefore avail the respondents.

The above judgment relied on the case of A.N.T.S v. Atoloye⁶¹ which judgment was given by the same court 5years earlier from the above authorities therefore it can be deduced as follows.

Inevitable accident exculpates the defendant from liability completely if he succeeds. However,before a party can succeed the defence of inevitable accident he must proof: Inevitability of the accident or that the inevitable accident cannot be avoided-by the use and operation of due human diligence, care, skill or caution. Also that there was no previous or prior act of negligence on the part of the party raising the defence.That he had no control over what had happened and that the occurrence was such that in the ordinary course of things would not have happened if reasonable care has been used⁶². The defence of inevitable accident hardly succeeds the reason for that is connected with the fact that the question whether or not an accident is an inevitable one is one of facts taking into account the interplay of factors or circumstances that caused the accident.

61. *Supra*.

62. *N.B.C. v. Borgundu* (1999) 2 NWLR (pt591) 408 at 426, also, *Moghalu v. Ude* (2001) 1 NWLR (lt693) 1 at 13, also, *Owonikoko v. Arowosaiye* (1997) 10 NWLR (pt532) 61, and *Okonkwo v. Udo* (1997) 9 NWLR (pt519) 16

The tort of negligence depends squarely on the breach of a duty of care. Judges in deciding cases prefer to base their decision on whether or not the defendant has breached a duty of care which he owes to the plaintiff instead of basing it on the term inevitable accident. The reason for this argument is that if an injury occurs through inevitable accident, it means it is not as a result of any want of care, diligence or skill on the part of the defendant. It simply occur because it have to occur⁶³ Lord Green⁶⁴ 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 in negligence?”

Inevitable accident is still overshadow with the established or laid principle of the tort of negligence which must be established by plaintiff that the defendant owed him a duty which he has breached. Thus not much is therefore gained by the existence of the defence of inevitable accident. This writers suggest that instead of allowing it to stand as an independent

defence(which rarely succeeds) 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 victim of his acts or omission or not.

63. Charles worth opp. cit. p.764

64. In Browne v. De Luxe services (1941) KB549 at 552

4:5

STATUTORY DEFENCE.

Where a statute authorizes the doing of an act which would otherwise have amounted to a tort, the injured party would have no remedy. The ostensible explanation for this is that the act causing the injury complained of is lawful or has the backing of statute. For instance, if a policeman acting under the Police Act⁶⁵, Arrest a person on the reasonable suspicion of having committed a crime, if such a person is eventually discharged, he will not succeed in an action for false imprisonment or wrongful detention against the policeman, so long as the policeman in question does not exceed the powers conferred on him under the statute. The most common statutory defence in Nigeria *inter alia* are: Limitation of Action Act⁶⁶ and Public Officers Protection Act⁶⁷. The Black law dictionary⁶⁸ defined limitation of action as a certain time allowed by statute for bring litigation. This means that once the time allowed by law for the purpose of instituting an action in respect of a particular act expired 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.

65. Section 4.

66. No 88 Limitation of action Act 1966

67. Section 2 Public Officers Protection Act cap. 379. LFN 1990.

68. *opp. cit.* p. 835

In the case of *Letang v. Cooper*⁶⁹ the plaintiff instituted an action based on trespass to the person when the defendant car accidentally ran over her legs when she was sunbathing on the grass, it was held that her proper cause of action is in negligence and not trespass to the person and that since the case was brought outside the 3 years⁷⁰ period allowed under the Limitation of period Act for bringing such an action her action was statute barred. In *LCC v. Olutimehin*⁷¹, the plaintiff was owner of a premise comprising a church and a school. The said premises were close to a site used by the defendant for dumping human waste. The plaintiff brought an action praying, *inter alia*, for an injunction restraining the defendant from dumping the waste at the said location. At the trial, it was argued on behalf of the defendant that Section 40 of the Lagos Local Government Edict empowered them to collect waste material. The court however rejected the attempt to seek protection under the said statute and ruled that the statute merely empowered them to collect and not to dispose waste indiscriminately. Also in *Uwadiogwu v. Okoye*⁷²

69. (1964) 2 Q: B 53

70. Under the Kaduna State Limitation of Action Edict the limitation period for actions to recover damages for personal injury is five years. Section 19 (2) 3)

71. (1969) All N L R 43

72. (1986) 1 BN L R 684

the defendant lodged a case of theft with the police authorities in the course of investigations, the police searched the premises of the plaintiff and also arrested and detained him for a few hours.

He subsequently brought an action against the defendant claiming damages for false imprisonment. The Court held that in his case that the search conducted on the premises was supported by a search warrant issued by a judicial officer and that the act of the policeman in searching the premises and arresting him was lawful in the circumstance.

However, before an officer or authority is protected under the statute it must be shown, that his action falls within the purview of the law under which he was acting or carrying out his duty. His action must also be reasonable with the reasonable test and must be in the ordinary course of carrying out his duty and must be devoid of malice and carelessness.

That is why Ejiwumi J.C.A said⁷³; while a defendant acting under a statutory power is prima facie protected from an action in Negligence in the exercise of a statutory power, he may however be liable to another if it is established by that other, that the defendant was negligent in the manner in which he acted

under the statutory power given to him and that damage was caused to the other as a result.

73. N.E.P.A v. Akpata (1991) 2 NWLR (pt 175) 536 at 561

Similarly, where the defendant had acted in excess of his power or maliciously he will not be protected under the Act. In *Lagos City council v. Ogunbiyi S.A.J*⁷⁴. The evidence before the Court provided ample justification that the conductress had acted maliciously and her actions had debarred her from the protection of the Act. She was held liable.

In *Okechukwu v. Anigbugu* the defendants were rate collectors. They embarked on a rate collection exercise purportedly acting pursuant to the provision of an edict. In the course of their raid, the plaintiff was accosted and detained for his inability to show his tax receipt. He subsequently brought an action for false imprisonment. The defendants in turn sought the protection of the edict in question. The Court rejected the defence of statutory authority on ground that the edict empowered the defendants to collect rates and not to detain the citizens. It is important to observe that section 2 of the Public Officers Protection Act⁷⁵ has generated so much controversy and we have

observed that this law is long overdue for amendment. This law has not been amended since 1945⁷⁶.

74. (1969) AN L R 287.

75. Cap. 379 Laws of the federation 1990

76. There is a current Bill for Amendment before the NASS sponsored by Hon. Ukeje of the House of Rep.

In practice we have seen severally how lawyers especially those from the ministry of Justices and other agencies of government are quick to take cover under this law.

The Act⁷⁷ provides;

Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance of execution or intended neglect or default in the execution of any such act, law, duty or authority, the action, prosecution or proceeding shall not lie or be instituted unless it is commenced within three months next after the act, neglect, or default complained of, or in any case of continuance of damage or injury, within three months next after the ceasing thereof.

The above section is clear and unambiguous for an action to be maintained against a public officer, such must be brought within three months next from the accrual of the cause of action. This Law has denied many plaintiffs their entitlement as a result. The reason is not unconnected with the fact that we are in a country where illiteracy level is still high, larger number of the populace

are not aware of the existence of this law that they must commence action against a public officer within 3 months when the cause of action arose.

77. Section 2 Supra.

And to make matters worse for the plaintiff (who is probably not aware of this law) he immediately commence negotiation or writing letters of appeals without knowing that his right of action is limited to only 3 months and eating away. The woes of litigants in this area was compounded by the supreme Court⁷⁸ in 1998 in the case of Ibrahim v. Judicial Service Commission, where it held that a Public Officer includes, corporations and public bodies. It said “it is beyond dispute that the word ‘person’ when used in a legal parlance such as in a legislation or statute connotes both a natural ‘person’ that is to say a human being and an ‘artificial person’ such as a corporation, public bodies, corporate or in corporate”.

The Supreme Court has consistently held and indeed followed this position in other cases e.g. Forestry Research Institute of Nigeria v. Gold⁸⁰ it held that, where an action against a public officers falls outside the required three months window of opportunity for bringing such action the effect, Per OmogbenJSC is that “the said section 2(a) has removed the right of action,

the right of enforcement, the right of judicial relief against the respondent become unenforceable in law.

78. This was the position of the NBA Abuja chapter at a meeting held in June 2004.

79. (1998) 14 NWLR (pt. 584)1

80. (2007) 11 NWLR (pt.1044)1 at 24 Also Egbe v. Ade tarasun (1987) NWLR 1 at 20, A.G Lagos State v. Dosunmu (1989) 3NWLR R (pt111) 552, and Obiuweubi v. C.B.N (2011) 7 NWLR 465

For the reason given above and the enormous denial of fundamental rights that this law stand for, we suggest that this law should be reviewed as a matter of urgent National Importance, thus limiting the period of limitation as in contract to five or six years.

4:6

NECESSITY

This defence is readily available in the circumstance where a person is in imminent peril or danger and as a result of this, seeks to avert the approaching. In other words, the defence of necessity is put forward when damage has been intentionally caused in order to prevent a greater evil or catastrophe. It is not necessary for the person acting that he should be doing so only for his own interest. It is permissible for a person to act for the good of others. All that is required for the successful plea of necessity is that the act of the defendant should be reasonable, given the circumstance, for instance if a captain of a ship decides to throw over board some cargo in order to lighten

the ship hit by a storm, it would be a clear case that can be justified under the defence of necessity.

A Nigerian case on the point is *Uzoahia v. Atu*⁸¹ a cow belonging to the plaintiff broke away from the herds and went about terrorizing the villagers. In the process, one person was injured on account of this; a number of villagers formed a group to arrest the situation. The group led by the defendant apprehended the cow and killed it. The owner of the cow brought an action for damages. In dismissing his claim for damages the Court ruled that the defendants were actuated by necessity in killing the cow, and that they were accordingly absolved from responsibility.

81. (1975) 5 ECLR 139

CHAPTER FIVE

SUMMARY AND CONCLUSION

5:1.

Summary:

It has been established in the proceeding chapters that the development of the Tort of negligence has been gradual. The tort of negligence in its formative stages was treated merely as a mode of committing other torts and not as an independent tort itself¹. It was increase in population; increase in mechanization and industrialization of society and the consequent multiplication of personal injury caused by negligence; have all led to the idea of negligence as a separate tort. The first attempt to formulate a general principle was made in 1883 by Brett M.R in *Heaven v. pender*².

After the first attempt to formulate a general principle; there were a lot of uncertainties which slowed the growth of the Tort of negligence until 1932³. When Lord Atkins came out with the most famous and important creative generalization “the neighbor principle”. This principles thus over throw the privity of contract fallacy that has inhibited the growth of the law. In this connection and in addition, it is certain that Lord Atkins statement of principle has been largely responsible for the radical development of the tort of negligence since 1932.

1. Winfield and Jolowicz, On Law of Tort, Sweet Maxwell, London(1989) p. 73, 75,
2. (1883) 11 Q.B.D. 503
3. Donohue v. Stevenson,(1932)AC 562

The above decision did not influence liability for careless statement or negligent misstatement. Courts continued to hold that there was no liability for negligent until 1963⁴. The House of Lords after hearing eight days of argument came to a unanimous decision and held in principle, that there was difference between physical loss and financial loss, and thus a duty to take care in making statements existed whenever there was a special relationship and there had not been a disclaimer of responsibility. Hedley Byrne affirms and extends the principle that a duty to be careful (as distinct from being Honest) may exist in situations other than those in which there is a contract between the parties. It affirms that this duty may exist where there is fiduciary relationship. It extends that principle by stating that, duty covers all relationship where the inquirer was trusting the other to exercise a reasonable degree of care and when the other knew or ought to have known that the inquirer was relying on him. It required that the defendant should be a person whose profession or trade it is to make statement or give information. This is to show that – it is hardly desirable to impose liability on a bystander who carelessly misdirected one on his way to an important appointment. It is salutary to note that, the most striking decision in the field of negligence and perhaps in tort in general since Donoghue v. Stevenson is Hedley Byrne.

We surge on to deal with the grounds for liability in negligence based on duty of care, breach of duty of care and damage. Duty of care is the 'magna cater'; is the life wire and the Pivot on which the

establishment of liability revolves. It is the life wire in every case of negligence because in any claim for damages the plaintiff must establish or prove that there was a duty owed him by the defendant and the defendant has breached that duty which has caused injury or damage to the plaintiff. Where there is no duty owed by the defendant to the plaintiff it then means that he the plaintiff had no claim against the defendant. The plaintiff may perhaps look out somewhere else not negligence.

4. Hedley Byrne v. Hellers and partners,(1964) AC 46

The concepts of reasonable foresee ability and its limitation was extensively discussed under this head. Here, we were able based on the extension of the rule for determining the duty of care in Donoghue's case to show that to be a foreseeable victim of one's act, the affected party need not necessarily be very close to the defendant. It is enough if he can prove 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. This kind of proximity contemplated here is a legal proximity and not physical one⁵.

We also discussed the recognized categories of negligence including skilled or professional liability based on the expansion or extension of 'neighbour principles' over the years. There must be duty owed the plaintiff and the act of the defendant has breached that duty and caused the plaintiff damage. 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 purely 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 achieved⁶. And the

principal defences to liability in negligence. These are, contributory negligence, inevitable accident, *volenti non fit injuria*, statutory defence and 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 (Contribution negligence) ACT⁷.and Kaduna State of Torts Edict⁸. 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.

5. Ham Brooke v. stokes (1925) 1 K B 141

6. Spartan steel and Alloy ltd v. martin (1973) 1 QB 27

7. Supra.

8. Supra.

Similarly it has been shown that *volenti non fit injuria* is no longer important as a defence since the coming into force of statutory provisions on the contributory negligence 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 of the Courts we pointed out is connected with the fact that *volenti non fit injuria* unlike contributory negligence still maintain its common law position;a successful plea of it affords the defendant a complete defence against the plaintiffs claim. In addition we discussed inevitable accident; we were able to show in certain cases, the defendant will not be liable because the accident was due to something beyond his control even though due care and diligence was exercised. Also, while in discussing limitation of action as a defence efforts were made to show that it deals with a situation whereby eventhough the plaintiff may have a strong case

against the defendant yet his case is regarded as unmaintainable because it is not brought within the time limit within which the action should have been brought to court⁹.

5.2: Findings.

In the course of conducting this research the following findings were made:-

- (A) It has been observed that the “neighbour principle” has been taken as a rule of law instead of a rule of construction. When taken as a rule of law, it means that you must take reasonable care to avoid acts or omission which you can reasonably foresee would be likely to injure your neighbour and my neighbour is a person who is so closely and directly affected by my act that I ought reasonably to have him in contemplation.

9. Ibrahim v. Kaduna state Judicial Service Commission (1998) 14 N W L R (pt.584)1

- (B) Religion: majority of Nigerians are religious people who believe in one God, and anything that happens to them is believed to have come from God¹⁰. This believes makes most Nigerians to bear their losses silently as it is said in popular parlance ‘I leave everything to God. To make the matter worse many believe that is even God that will recompense them better than the defendant.
- (C) Education: Many Nigerian victims don’t know their legal rights to pursue it to logical conclusion. Recently¹¹ we have witness within the FCT how firms constructing roads have caused accident by blocking Roads without proper warnings and signs. Many have lost their lives and property yet there are only two cases pending before the FCT High Court on negligence against the constructions companies as at that time.

(D) Delayed Justice: The present state of the Nigerian Judicial system is burdened with delayed justice. This factor more than any other factor has affected the development of the tort of negligence in Nigeria negatively. It affirmed the popular adage that says: “Justice delayed is justice denied” those that are literate and want compensation from the defendant and not from God have the issue of delayed justice to contend with. The case that readily comes to mind is the case of Okwe Jiminor V. Gbakeji¹². It is a case that commenced in 1991 it was finally determined in 2008 by the Supreme Court a period of 17 years. (The plaintiff was lucky to be alive to see the decision) This remains a cog in the wheel of justice delivery and a great source of discouragement to many litigants.

10. Focus Group discussion held at ABU Kongo Campus on the 11th of July, 2014 (among 15 Muslims and 10 Christians). It was agreed that there is nothing in the Quran or Bible that prevents anyone from seeking redress. However, religious leaders or preachers have over the years enjoined their followers to seek peace with their neighbours.

11. In 2009/2010 during the construction of Kubwa Express way Abuja. It was the subject of discussion at the NBA Abuja chapter held in June 2010. Also group discussion held at Kongo Campus, ABU Zaria (Academic Environment) on the 11th of July, 2014, it was agreed that the tort of negligence is a technical area of the law that majority of the people are not aware of (including academicians).

(E) In chapter four of this research we have observed that there is argument on whether or not *volenti non fitinjuria* should continue to exist as a defence in view of the fact that even though the statutory laws on contributory negligence are not directly

applicable to it, it has made its relevant very insignificant. This writer is in support of respect for individual decision or consent.

In the same chapter we were attracted to the existence of inevitable accident as a defence. The argument against this defence is that liability in negligence is always the consequences of breach of duty of care by the defendant and no more. That Courts should determine liability based on whether there is breach of duty or not. However, there are argument in support of this defence which state that where the defendant has 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 because he was not negligent but that despite all measures the accident was bound to happened. Rarely do this defence succeed because the defendant's hands are mostly soiled with negligence prior to the accident one way or the other¹³.

5.3. Recommendation.

From the above findings, the following recommendations are hereby made:-

- a) The "neighbour principle" should not be taken as rule of law but as a rule of construction. The reason is obvious, if taken as a rule of law, it means that you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour and my neighbour is a person who is so closely and directly affected by my act that I ought reasonably to have him in contemplation. The implication of this rule is that the defendant may not be liable for any wanton or blatant breach of duty of care to a plaintiff who is not in his contemplation.

12. (2008) 5 NWLR (pt. 1079) 172, also NUC & 2Ors v. Registrar of Co-operative Society, FCT Unreported FHC/ABJ/471/07

13. A.N.T.S.v. Atoloye supra.

- b) Citizens should be educated or 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 negligence act. The religious believe that whatever happened to someone is a decree from God should be discouraged not because such beliefs is wrong but because of the fact that our religion does not prohibit someone from seeking redress for any wrong done to him.
- c) As we have observed, there have been debates about the continued existence of the defence of *volenti non fitinjuria* in view of the statutory provisions on contributory negligence¹³ which also takes care of cases that would have come under the defence of *volenti non fit injuria*. This writer is however in support of the view 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 occurred. Moreover, it is a fundamental principle of the law of contract that parties are free to; on whatever they want and on whatever terms provided such an agreement is not illegal and none of the parties to the agreement is suffering from any disability to enter such an agreement.
- d) There is an urgent need to amend section 2 of Public Officers Protection Acts. This law has caused greater harm and has denied many plaintiffs of their entitlement or claim¹⁴. It should be reviewed as a matter of National urgency. Litigants or claimants should be given up to 5years as limitation period within which to bring action against the current provision of 3months.
- e) Finally, the society is not static; it changes with time. The advancement in technological know- how is overwhelming. The law is expected to be abreast with such developments making law flexible and perpetual. In the light of that, Numbers of Court should be increased; modern technique should be applied in dispensation of justice to make it faster. Judge's security and welfare should be of paramount importance to the Government and policy makers.

14. See chapter 4
15. Ibrahim v. Kaduna State Judicial Service Commission (*supra*).